

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

Wednesday 29 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**

APPEARANCES

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)

Wednesday, 29 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)

MR BEARD: Good morning, sir.

THE CHAIRMAN: Good morning.

Closing submissions by MR BEARD (continued)

MR BEARD: Good morning, members of the tribunal.

The menu for this morning, I am going to deal with the last of the points on the econometric analysis before and during and I will then move on to theory of harm issues and then on to claimant-specific evidence. But before I do, there are just a couple of points I wanted to pick up from yesterday. They were not sort of formally homework, but I just thought it was perhaps best to pick them up while they were live.

I am going to start with the last of them, which was where we left off yesterday, Mr Ridyard's concern about the inexorable rise in margins, where I understand the concern, but I think it is worth just bearing in mind the facts.

If we could go to {E/IC1/100}, just to be clear, the information we have is not of an inexorable rise in margins. That is not the information that we have here. Now, the question then that arises -- sorry, I also should say that we have also got information I will come back to about market shares and DAF's market share

1 improving, which would also be consistent with it
2 improving its models and so on.

3 I think the point that was being made yesterday,
4 "Well, if you are identifying premia in relation to the
5 emissions standards fixed effects, does that not
6 inexorably suggest higher margins?". The data says not
7 and I think the reason for that is that what you are
8 doing with the emissions standards fixed effects is that
9 you are looking at a difference between a Euro 3
10 standard truck and a Euro 4/Euro 5, et cetera, truck and
11 you are controlling for a range of factors including,
12 for instance, demand, and that, in practice, what may be
13 happening is that those factors may mean that you are
14 not overall able to increase margins. So although you
15 are identifying a difference in the econometrics as
16 a premium, that is not feeding through, then, into an
17 inexorable rise in margins. As I say, that is just not
18 the case. There is not an inexorable rise in margins.

19 So that is the first point I thought I should come
20 back to, which was the last of the questions.

21 I said I would go away and check on the issue to do
22 with Professor Neven's test about removing year dummies
23 from Mr Harvey's during/after regression. So that is
24 {E/35/26}. This related to the questions Mr Ridyard
25 raised about the shift in the DAF UK sales volume number

1 here if you remove the global financial crisis dummies.

2 Now, the first point is that the answer I gave
3 yesterday about the fact that it is those dummies
4 preventing the model from properly estimating demand and
5 considering variability is going to be the key here.
6 You would get the same effect if you took out all boom
7 years. So if you took out 2005/2006/2007, for example,
8 you would expect that you would have had a distortion in
9 relation to the demand coefficients as well. Indeed the
10 expectation, as I understand it, would be that that
11 would bias it downwards.

12 The second point, which I think I also referred to,
13 albeit perhaps insufficiently clearly, yesterday, is
14 that, even if there is something going on here in
15 relation to the detection of demand, it is not
16 suggesting that there is anything special going on in
17 relation to demand. We know the GFC was a significant
18 demand shock, but this material cannot tell you whether
19 there is something above and beyond a significant drop
20 in demand in relation to the GFC. If you were really
21 concerned about atypical effects, my understanding is
22 that you could use different sorts of tests in order to
23 try and identify those. So you cannot read from this
24 change in numbers anything significant about there being
25 an atypical, beyond demand effect in relation to this

1 plot, is what we say.

2 Red and blue dots, very briefly. I did check on red
3 and blue dots. So this is Professor Neven's check in
4 relation to GFC, global financial crisis, where he is
5 essentially carrying out the non-linear regression
6 analysis. It is {E/35/30}. So it is this plot. You
7 will recall that.

8 Now, I did have my homework corrected last night
9 because apparently on the transcript I referred to
10 non-linear regression variables and those are not --
11 that is a misnomer. They are variables used in the
12 non-linear regression. But the substance of what I said
13 yesterday is correct, that because of the way that these
14 dummies work, they do have the 1/0 value attached to
15 them, but because they span the period before and after
16 the infringement, in the regression model, when they are
17 at 1, they can be -- the variability in those can be
18 compared.

19 So there is something more going on in relation to
20 blue dots and red dots in this analysis than occurs in
21 relation to Mr Harvey's analysis where he applies those
22 dummies for the three years. Because they are all in
23 the during period, there is nothing to compare them with
24 afterwards so you cannot test the variability. So there
25 is a material difference there.

1 Then I think the last issue that was on my list of
2 homework was just in relation to the other variable bias
3 issue where we were picking up the questions related to
4 Professor Neven's table 23 or -- I will pick it up in
5 relation to table 23, {E/35/95}. So one of the things
6 that was being raised, I think, by Mr Harvey and being
7 tested by Mr Ridyard was this idea that Professor Neven,
8 by removing the emissions standards fixed effects from
9 Mr Harvey's during/after model, shows that there is no
10 increase at all in the infringement variable. He says
11 that that suggests that it is not the infringement
12 variable that -- it suggests that the way in which
13 Mr Harvey is treating the emissions standards fixed
14 effects as all being attributable to the infringement is
15 plainly wrong because you are getting nothing going
16 there at all. We stand by that because the idea that
17 you can maintain Mr Harvey's position of it all being
18 related to the infringement is not consistent with that.

19 The question that is then raised by Mr Harvey and
20 tested by Mr Ridyard, "Well, is not the issue that you
21 have got an infringement variable that is steady over
22 time whereas in relation to other variables you have got
23 more variation and therefore it might well move there?",
24 and we discussed the costs issue. I dealt with the
25 truck series issue. There is not a reason to think

1 about that. But actually the cost variable itself has
2 an effect which is stable over time. The model is
3 estimating an average cost pass-through that does not
4 differ between the infringement and post-infringement
5 period. Therefore, in those circumstances, the
6 assertion that you would therefore necessarily expect,
7 even though it is a cost measure, for it to be any
8 identification of infringement effect to be skewed
9 towards the cost variable is not right, which means that
10 the fact that the premium that you have identified,
11 where you switch off the emissions standards fixed
12 effects, goes to cost and the series variable is
13 actually an indication that there is not an infringement
14 effect being identified there.

15 So although costs are varying and although there is
16 sense in the reason why the emissions standards fixed
17 effects premium would be treated as part of the
18 explanation of the prices by reference to the cost
19 variable, it is not in fact that the cost variable is
20 fluctuating over time in the way that has been
21 previously suggested and insofar as I said that
22 yesterday, that is clearly wrong.

23 So I think that deals with the various outstanding
24 questions. I hope that is of some assistance on those.

25 MR RIDYARD: Thank you very much.

1 MR BEARD: So before and during. I am going to deal with
2 Mr Harvey's before/during model and then I will deal, at
3 the end, with Professor Neven's before/during/after
4 model. There are broadly two simple points. The
5 before/during model is just unfit to identify an effect
6 of infringement because the nature of the data in it is
7 so substantially inferior that you cannot use it as
8 a robust analysis. Professor Neven's
9 before/during/after model is far more reliable and it is
10 not, as Mr Ward has suggested, simply the sum of its
11 parts. You are not just sort of cutting and shutting
12 two regressions together. That is not what is going on
13 in relation to it. Obviously you are not getting more
14 data points, we understand that, but the way the model
15 works is much more sophisticated. I will come back to
16 that.

17 But let us just deal with the before/during model.
18 We have already highlighted one very broad issue in
19 relation to it, that the overcharge calculation that
20 Mr Harvey gets in relation to the before/during model is
21 far, far larger at 11.6% than the one he gets in
22 relation to his during/after model. That in and of
23 itself would ring an alarm bell because you know in
24 relation to the during/after material you have much,
25 much more sophisticated data that enables you to control

1 for what is going on.

2 Now, there is also an issue here that in fact, when
3 you look at the decision, what the decision says is that
4 the exchanges, the information exchanges, the things
5 that are the infringement, became more formalised and
6 effectively more sophisticated later in the period of
7 the infringement. You see that at Recital 56.

8 The point I am making is that the idea that somehow
9 there is a justification for this huge difference does
10 not exist and actually what it does is it signals that
11 you have a real concern here about the basic approach
12 that has been adopted.

13 THE CHAIRMAN: I thought it was your case that the collusion
14 became less pervasive over time because it was confined
15 to the German subsidiaries.

16 MR BEARD: No. The collusion -- we are not going behind the
17 decision because the decision says it is more
18 formalised. It was involving the German subsidiaries.
19 The point we make is different. It is about the
20 potential impact on the UK, even when there are more
21 sophisticated exchanges.

22 MR RIDYARD: But that is what we are measuring with these
23 data.

24 MR BEARD: Yes, but what we are saying is we do not have
25 any -- we say that that issue in relation to the UK

1 applies throughout but we do not have any reason to
2 think that, in circumstances where the findings in the
3 decision are that the scheme of exchanges became more
4 formalised, it meant that actually you should be
5 expecting to see a much lower overcharge in relation to
6 the UK. That is the only point I am making here. So we
7 are saying an alarm bell in relation to this, but it is
8 only an alarm bell. What I am going to come on to is
9 why actually the 11.6 is highly problematic.

10 MR RIDYARD: Sorry, I do not understand that because

11 I thought you were saying that, in the later period,
12 because it was operating through Germany, it was -- as
13 regards the UK price effects, it would have been less
14 effective in the UK. So if that was true, that would
15 suggest that you might expect to see a lesser cartel
16 effect in the later period than in the earlier period,
17 when it was being properly managed by head office.

18 MR BEARD: Well, I think the issue is that when you say

19 "properly managed by head office", actually what we see
20 in relation to that earlier period is actually a very
21 much less formalised approach and we see quite a lot of
22 autonomy in relation to the way the UK operates and
23 a lack of involvement of DAF NV in the UK pricing. So
24 you have a situation where, yes, it was HQ in relation
25 to the earlier period but you do not have an indication

1 that that is having an effect on the UK. Then in
2 relation to the later period where it becomes more
3 formalised, it is more formalised through the German
4 subsidiaries, and we say, well, actually you are not
5 getting essentially the effects being communicated in
6 any material way --

7 MR WARD: I am sorry, I must rise at that because there has
8 been no evidence whatsoever about what role whatever
9 happened in Germany may or may not have had on what
10 happened in the UK. I am terribly sorry but this really
11 is giving evidence from the Bar.

12 MR BEARD: No, I am not giving evidence at all. I am
13 dealing with what is in the decision. That is all I am
14 talking about.

15 THE CHAIRMAN: When the decision says -- I cannot remember
16 the phrase that has been used --

17 MR BEARD: "More formalised".

18 THE CHAIRMAN: -- "more formalised", what does that mean?

19 MR BEARD: Well, we see in the documents that you actually
20 get these spreadsheets -- I am going to come back to
21 a couple of them later -- that were being exchanged,
22 where the OEMs were -- the manufacturers were filling in
23 spreadsheets. I took you to a couple in opening.

24 THE CHAIRMAN: Right.

25 MR BEARD: So in the later --

1 THE CHAIRMAN: So the actual -- the way they exchanged
2 information and --

3 MR BEARD: Yes, exactly.

4 THE CHAIRMAN: -- they became more formalised, structured
5 maybe, but it does not really tell you much about how
6 that translated within any particular organisation.

7 MR BEARD: No, I understand that. There is a limit to how
8 far I can take the point. All I am saying is you have
9 an alarm bell here, and what I am then going to come on
10 to is saying you have an alarm bell in relation to this
11 differentiation and then actually what you look at is
12 the quality of the data and the robustness of the
13 analysis.

14 MR RIDYARD: But it is only an alarm bell if you believe
15 that the effect of the cartel is symmetric. So if you
16 believe that, you know, the --

17 MR BEARD: You are obviously right, sir.

18 MR RIDYARD: But if you believe it is symmetric, so the
19 cartel was off before 1997, it was on during the cartel
20 period and then it was off from 2011/2012 onwards, then
21 it would be alarm -- it would be a matter of concern if
22 you found a different estimate in the before/during
23 compared to the during/after. But if there was some
24 reason to believe that maybe the cartel was more
25 effective in the first period and there was, you know,

1 a run-off period or some other -- or less effective
2 because it was only operating through Germany or
3 whatever the theory would be, then you would not be
4 basing it on a symmetric pattern and therefore it is
5 quite possible you could have these different effects.

6 MR BEARD: Yes, I am not going to demur. That must be
7 right, and if you had two regressions that were both
8 robust and provided that sort of -- that comparison in
9 those circumstances -- obviously, I am not demurring --
10 that must be correct. But it is worth bearing in mind
11 that Mr Harvey's position is that he does not have any
12 reason to think that the way in which the cartel
13 operated was different over time, and that is part of
14 the reason why it should ring an alarm bell because, if
15 you are saying that and then coming out with these
16 differences, it is an alarm bell to him as much as to
17 anyone else about this.

18 So I do not want to -- I am not trying to go behind
19 the decision; I am not trying to give evidence about how
20 these things operated. What I am saying is, if you are
21 taking the symmetric proposition, which is what
22 Mr Harvey does, and then you get these differences, that
23 is sending you a signal that you have got a real concern
24 about what that first regression does. That is what
25 I am just turning to deal with.

1 So I am going to deal with four points in relation
2 to it. The first is that the AS/400 data, which is the
3 data that is used for the before/during analysis --
4 AS/400; the later data is MI data, management
5 information data -- so the first point is it is only
6 average cost data and it means that the experts simply
7 cannot control properly for costs. That is obviously
8 fundamental to any pricing regression.

9 The second point is -- I will pick up what is called
10 the "truck mix issue", which is the variation in the
11 different types of truck and how that is problematic in
12 relation to this data.

13 Thirdly, I will briefly deal with the fact that the
14 low quality data issue actually aggravates the exchange
15 rate point.

16 Now, I am obviously conscious that the points I made
17 in relation to exchange rate mean that, if you are with
18 me on the exchange rate points, then to some extent all
19 of these arguments about the before/during period fall
20 away because, as I have indicated, if you control
21 properly for the exchange rate, you do not actually get
22 anything in relation to the before/during period as an
23 overcharge.

24 MR RIDYARD: But if the data are fundamentally unreliable in
25 that period, you would not trust anything that was

1 happening in the early period.

2 MR BEARD: Well, if you do not trust anything, then I will
3 take that. I will just, very briefly at the end, deal
4 with the scope of data in the before period because, of
5 course, one of the things with the before/during
6 analysis is you are comparing the position in relation
7 to sales of trucks before with sales of trucks during
8 but you are not considering any of the sales of trucks
9 afterwards. It slightly goes with the terminology but
10 it is due to the numbers and volume of trucks. It is
11 another data issue essentially.

12 Let us just deal with the first of the points on the
13 AS/400 data, that it contains only average cost data.
14 The reason this is so important is because we know that
15 trucks are effectively custom-built and they are
16 heterogeneous. So the costs can vary hugely between
17 individual trucks. Now, the MI data that we use for the
18 during/after period is able to pick that up because it
19 has within the relevant data fields -- I mean, these are
20 massive spreadsheets -- but within the relevant data
21 fields it has the costs attributable to particular
22 trucks. The AS/400 has nothing like that at all.

23 If we just pick up our closings, {S/10/51}, picking
24 it up at 133 just for your reference. This is
25 Professor Neven:

1 "... the main issue with the AS/400 data is the fact
2 that it does not have granular cost, I mean, it only has
3 average cost from different sources than the source that
4 we have for the prices. ... Now, I would just like to
5 emphasise the fact that having detailed cost data is
6 actually very important for identification. As I have
7 explained in my report, the cross-section in the cost
8 data, the fact that, I mean, you have cost that varies
9 across trucks with different specifications at any given
10 point in time is something that is essential for the
11 identification."

12 That is the largest problem with the before/during
13 data because --

14 THE CHAIRMAN: Professor Neven agreed and I think your side
15 has agreed that you do need to test the before/during
16 period.

17 MR BEARD: Well, let us take it in stages. We say you can
18 get a robust analysis from the during/after
19 econometrics. We say that the before/during/after
20 enables you to have confidence in relation to the
21 analysis of the entirety of the period but we recognise
22 that the quality of the information you have in relation
23 to the early period is less strong than in relation to
24 the later period. So in circumstances where it is for
25 the claimants obviously to prove causation but then also

1 to come forward with a story as to how the analysis
2 should suggest any material positive overcharge, even if
3 we are in the territory of broad axes, we say that they
4 have just not done enough in relation to this because it
5 put forward an analysis that is fundamentally weak in
6 relation to both causation and quantum.

7 THE CHAIRMAN: Professor Neven's before/during/after does
8 not improve the data of the AS/400, does it?

9 MR BEARD: No, no.

10 THE CHAIRMAN: He is still using that and he has to.

11 MR BEARD: Yes, it is using the data, but this is -- sorry,
12 I can skip ahead to this. The reason why
13 before/during/after is different is because, yes, it
14 uses the same data that is used in before/during, but
15 what it does is it combines it with all of the data that
16 you have across the whole period, and because you are
17 able to do that, what you are able to do is actually run
18 modelling that is looking at patterns within the data
19 overall, including at relevant aggregated levels.
20 Therefore you are able to generate a much more robust
21 analysis of the overall period because you are putting
22 together much more granular data with less granular
23 data, you are also having two periods that you are
24 comparing with, both the before and the after, and in
25 those circumstances, that was why I said it is not just

1 a cut and shut, putting these two sets of data together.
2 Because the data interact in the model, you get more
3 information overall about the operation of the alleged
4 infringement effect.

5 One of the signals you have is that the cost
6 coefficient that you identify in the before/during/after
7 analysis is much, much higher than it is during the
8 before/during analysis. So the explanatory force of
9 costs to prices, so that bit of the right-hand equation,
10 in before/during/after is much, much higher than in
11 before/during.

12 In during/after, it is around sort of 1 to 1. So
13 when you have got the most granular data, what you are
14 seeing is costs are significantly explanatory in
15 relation to prices. When you do before/during/after,
16 the coefficient is saying that costs are significantly
17 explanatory in relation to prices. When you do
18 before/during, they are saying that, well, it is
19 a little bit explanatory.

20 Now, there is no reason why you would expect costs
21 and their explanatory variable, the coefficient on
22 costs, to be somehow markedly different during the
23 before/during period and therefore that is indicative of
24 the problem you are generating. But that is also
25 illustrative of why it is that, when you put all this

1 material together, you get different answers because the
2 model is clever enough to work with the interactions
3 between the different types of data. That is why
4 Mr Ward in particular is wrong in relation to his,
5 "Well, it does not add anything. You are just putting
6 two things together in before/during/after". That is
7 just not right.

8 I will come back to that briefly at the end, but
9 that is the essence of the point in relation to
10 before/during/after. It is not just the sum of its
11 parts.

12 If we could go back to the problems with the
13 granularity. I was actually going to pick up the fact,
14 which we have referred to in paragraph 135 in our
15 closings which is just on the screen, {S/10/51}, that in
16 Mr Harvey's own during/after model, he has a cost
17 coefficient that is equal to 1, so that is a 1% increase
18 in cost would equal a 1% increase in price. That is how
19 closely correlated they are. But in his before/during
20 model, it is right down at 0.34; in other words, it is
21 only a third of the value of the during/after. Now,
22 that, as Professor Neven has explained, is a serious
23 indicator of the poor quality of the aggregate cost data
24 compared to truck-level cost data because what it is
25 saying is the average cost is not really playing a very

1 significant role in explaining prices in the
2 before/during model, and that is a very, very
3 significant contra-indication as to the robustness of
4 this before/during modelling.

5 Now, it is worth just going to the claimants'
6 written closings on this, if we may, {S/9/149}, at
7 paragraph 387. It says:

8 "First, the reason why ..."

9 So this is the claimants' explanation of this vast
10 disparity.

11 "... the reason why the cost coefficient is lower
12 when using annual costs data than when using truck level
13 costs data is that the different data is measuring
14 different things. When using annual costs data, the
15 cost coefficient is measuring the impact of changes in
16 average costs on prices at the truck level. When using
17 truck level costs data, the cost coefficient is
18 measuring the impact of truck costs changes on
19 individual trucks."

20 Now, in some ways, that is profoundly true in the
21 sense that that is all that is going on, except that the
22 cost coefficient is trying to identify how costs
23 influence prices. So it is the same cost coefficient
24 that you want to be assessing because the question you
25 are asking is, "How much do costs influence prices?".

1 Saying, "Oh, well, we have only put in average costs so
2 that is all we are testing for", is no answer because
3 what you really want to know is the extent to which the
4 variation in costs in relation to particular trucks
5 actually impacts the particular truck prices because it
6 is particular truck prices that we care about. So it is
7 descriptive, it is accounting for why this exists, but
8 all it is doing is illustrating the problem that you
9 have here.

10 THE CHAIRMAN: So the cost coefficient is the same for the
11 whole period?

12 MR BEARD: I will double-check, but I think Mr Harvey's cost
13 coefficient is not varied because what you are asking is
14 to what extent the costs have an impact on the prices of
15 trucks. If you have got much more granular data, then
16 when you identify that coefficient, you are doing it in
17 a much, much more sophisticated way. When you use
18 average data, you are doing it in a vastly less
19 sophisticated way, as is indicated by the difference
20 between Mr Harvey's cost coefficient being 1 to 1 in the
21 during/after period and it being 0.34 in the --

22 THE CHAIRMAN: So you are assuming that for the during/after
23 period, the cost coefficient would effectively be the
24 same as for the before/during period?

25 MR BEARD: Yes, you have got no reason to think --

1 THE CHAIRMAN: Is that the logic of what you have done, what
2 Professor Neven has done?

3 MR BEARD: Well, it is not so much the logic of what
4 Professor Neven has done. What he is doing is
5 identifying the concern. There is no reason to think
6 that the level of cost influence on prices is somehow
7 systematically different once you move from AS/400 data
8 to MI data because that is what defines these periods.
9 There is no sort of great other reason for categorising
10 them in this way.

11 MR RIDYARD: Yes, I think that was the proposition the
12 chairman was making. So it is -- it seems perfectly
13 reasonable that the assumption is that it would be the
14 same for that --

15 MR BEARD: Yes, I am so sorry. I am not answering clearly
16 enough, but "Yes" is the answer. Yes, it is, and there
17 is no reason to consider it is different just because
18 you happen to be using different data sources because
19 that is all that is going on here.

20 THE CHAIRMAN: Right.

21 MR BEARD: To be fair, no account has been given that you
22 should expect a sort of different cost pass-through.
23 That is not part of Mr Harvey's or Mr Ward's case.

24 So we say that you have this obvious problem that is
25 fundamental to identification and you have indicators

1 which are showing that this difficulty arises. Now,
2 Mr Harvey says, "Well, I do see that there is a problem
3 here so I add in some other controls", which he says --
4 he thinks helps explain the variation in costs between
5 trucks. These are what he refers to as the "truck
6 characteristic controls".

7 Now, I will come back in a moment to why there are
8 flaws in the actual truck characteristic controls that
9 he uses in a moment because that is a further point, but
10 just looking first at the tests he has done as to
11 whether or not they really achieve what he is wanting to
12 achieve, the first of the problems he has with his truck
13 characteristic control is that the tests that have been
14 carried out have found that they are not a good
15 substitute for truck-level MLO costs. So just picking
16 out truck characteristics, feeding that into the
17 right-hand side of the equation as your explanatory
18 variable, is not a substitute for actually providing
19 granular costs to test for the effect of costs on
20 prices.

21 If we could just go back to our written submissions
22 at {S/10/52}, paragraph 136, you will see there that
23 this is what Mr Harvey has done. He said, "Look, I put
24 in truck characteristic controls to explain the
25 variation in costs between trucks".

1 "Professor Neven explained that his tests showed
2 that Truck characteristics are not a good substitute ...
3 the only way to test the impact of the additional Truck
4 characteristic controls ... was to add or remove the
5 relevant Truck characteristics in the different models,
6 leaving everything else unchanged."

7 He says:

8 "There is only one acid test for this and that is to
9 introduce the same information in the regression and see
10 whether it affects the coefficient. So the only acid
11 test to see whether the truck characteristics really are
12 substituting for truck cost level is to use the
13 during/after model with[out] truck characteristics and
14 then introduce [them]. If you see that the
15 characteristics are picking up the same thing as the
16 truck level cost, then you should see a big change in
17 the coefficient of the costs in the regression."

18 So what Professor Neven is doing is saying, "Look,
19 Mr Harvey, if you are right that sticking these truck
20 characteristics into your before/during model would
21 capture the same thing as truck costs, granular truck
22 costs, we can test that by doing it in the during/after
23 model, because if you stick those variables in the
24 during/after model, you would expect significant
25 changes". That is what he is saying.

1 We can see the results of this acid test if we go to
2 {E/62/29}. The critical column is actually the second
3 one, "Truck-level", under the heading "During-after
4 (MI period)". You see "No technical characteristics"
5 included -- so this is the normal use of costs in the
6 during/after model -- 1.006. With technical
7 characteristics it is almost the same. It is 0.976. It
8 is very close. So you are not seeing any material shift
9 here.

10 Now, that is the central concern that is being --

11 THE CHAIRMAN: What is that figure?

12 MR BEARD: Sorry, these are the cost coefficients that you
13 are identifying here. So, if you recall, what
14 Professor Neven was saying, that if you take Mr Harvey's
15 model, which is -- this is what it is concerned with --
16 and you -- Mr Harvey's model on the during/after period,
17 which does not include the technical characteristics
18 additional sensitivities, you get this cost coefficient
19 of 1.006. That was why I was referring to Mr Harvey
20 coming out with a 1 to 1 cost coefficient. That is what
21 that number is.

22 Then, if you recall, what Professor Neven said was,
23 if you then stick the technical characteristics into
24 that during/after model, what you would expect is, if
25 those technical characteristics are picking up the same

1 things as granular truck costs, the costs coefficient
2 would significantly change. But it does not because it
3 just moves from just over 1 to just below 1.

4 MR RIDYARD: So your conclusion from this is that, you know,
5 it is not Mr Harvey's fault that the early data are
6 poor, but his attempts to shore up that problem do not
7 have much effect in improving the --

8 MR BEARD: No, that is what is being identified here. I
9 mean this is just part of the scientific method. It is
10 testing the theories that have been put forward and the
11 sensitivities being put forward, are they robust, and
12 this is an indicator that they are not robust.

13 There is further to and fro. We deal with it in
14 paragraphs 138, 141 in our closing, so that is at
15 {S/10/53}.

16 MR RIDYARD: So if Mr Harvey had -- if he abandoned this
17 attempt to shore up the truck characteristics data, can
18 you remind us or do you know what his cartel effect
19 would be if he did not have those in his model at all?
20 Is that something that has been done?

21 MR BEARD: I think it would be zero. I will double-check
22 though.

23 MR RIDYARD: It is something for afterwards.

24 MR BEARD: Yes, I am concerned about -- I do have some
25 numbers somewhere in my notes but I am just going to

1 double-check that.

2 THE CHAIRMAN: Sorry. I am still just a bit confused about

3 that. So that is looking at the during/after --

4 MR BEARD: Yes.

5 THE CHAIRMAN: -- Mr Harvey's during/after, and --

6 MR BEARD: Yes.

7 THE CHAIRMAN: -- he has a cost coefficient of about 1 in

8 the during/after period, so that is with the granular

9 detail.

10 MR BEARD: Yes.

11 THE CHAIRMAN: But then you are adding in to that --

12 MR BEARD: These truck characteristics.

13 THE CHAIRMAN: -- the further granular detail.

14 MR BEARD: Well, you are adding in these truck

15 characteristics variables, and the way the model

16 works -- it is what I have referred to as

17 "Professor Neven's acid test". If you add in the truck

18 characteristics and they would be capturing the same

19 thing as the granular costs, then you would expect the

20 cost coefficient to shift. That is what Professor Neven

21 is saying in relation to his test. That was what we set

22 out at 136. So he does that and it does not. So what

23 you have got is, in relation to the during/after, you

24 have got evidence that these additional truck

25 characteristics are not capturing the more refined

1 costs.

2 THE CHAIRMAN: So these are additional truck characteristics
3 that are not picked up by the MI data?

4 MR BEARD: Well, they are not used in the same way in the
5 regression. I mean, the MI data picks up all sorts of
6 truck characteristics because it is dealing on a truck
7 level.

8 THE CHAIRMAN: Yes.

9 MR BEARD: The test you are doing here is adding a specified
10 type of variable because what has happened is you have
11 got that differentiation between the cost coefficients
12 in the during/after period at 1 to 1 -- this is all in
13 Mr Harvey's world -- and in before/during at 0.3.
14 Professor Neven comes along and says, "You know, that is
15 just -- that is an indication of just how bad your
16 granularity problem is in relation to before/during".
17 Mr Harvey responds, "Aha, I cannot solve for granularity
18 in relation to before/during, but I have got a surrogate
19 variable I can use, which is the truck characteristics
20 variable". Professor Neven says, "No, I do not think
21 that is going to work but let us test it". The way you
22 test it is by taking the variables that Mr Harvey
23 suggested for adding to before/during and seeing whether
24 they are actually capturing the same things as granular
25 costs in the during/after, where you have got the

1 granular costs material. This table is saying they are
2 not capturing the same thing; in other words, they are
3 not solving the problem.

4 MR RIDYARD: I am just wondering whether that is an acid
5 test because in the -- in Harvey's during/after model he
6 has got the granular data so you are there testing
7 whether this truck characteristic is adding something to
8 the already good granular data, whereas Mr Harvey's
9 proposition is that adding the truck characteristics is
10 the best available -- in an imperfect world, the best
11 available fix for the really poor-quality old data.

12 MR BEARD: Yes, but I think that the reason -- I understand
13 what Mr Harvey is saying he is doing, but I think this
14 is a product of the way in which feeding those
15 characteristics into the regression model, the
16 during/after regression model, you would expect -- and
17 I do not think -- no one has challenged Professor Neven,
18 I think, on this -- you would expect them to detect --
19 or you would expect the cost coefficient to change if
20 you had added those additional characteristics in, if
21 they were capturing the costs --

22 MR RIDYARD: If they were capturing something over and above
23 the granular data that you have in the second period,
24 but that is not the same question as does Harvey's fix,
25 which obviously is imperfect and everyone realises

1 that -- does it help to fix the much more severe
2 problems with the earlier period data, so I am --

3 MR BEARD: I will take that away. I think the answer is
4 "No". I think that -- well, certainly my understanding
5 of Professor Neven's test is that it is not simply
6 adding something. What it is doing is identifying
7 whether or not those characteristics are essentially
8 operating as surrogates for cost data, which is the
9 critical thing that we need to improve the before/during
10 and make it robust and what Mr Harvey is trying to do.
11 That is what he has said. On that, I do not think there
12 was any further cross-examination in relation to whether
13 or not in fact it was not an acid test, but I will go
14 away and check that, given the question, sir, that you
15 are now raising.

16 THE CHAIRMAN: I think what Mr Ridyard was raising was what
17 I was trying to express as well, so I am not really sure
18 where that goes. But there was also something else
19 confusing about what you said and maybe I am confused.
20 You said in Mr Harvey's world he had a cost coefficient
21 of 1 in the during/after period and 0.3 in the
22 before/during.

23 MR BEARD: 0.34.

24 THE CHAIRMAN: I thought it was the other way round, but ...

25 MR BEARD: No. It is 1 to 1 in the during/after period and

1 it is 0.34 in the before/during period.

2 THE CHAIRMAN: Okay.

3 MR RIDYARD: Which reflects the fact that the cost data in
4 the earlier period is not that good.

5 MR BEARD: Is massively aggregated, yes.

6 Sorry. If I have misspoken on the transcript,
7 I apologise.

8 THE CHAIRMAN: No, no, that is what you said and that is --
9 I thought it was ...

10 MR BEARD: No, because what the more granular data is
11 showing is that costs do have -- they are heavily
12 correlated with prices, so changes in costs changed
13 prices. That is what 1 to 1 is telling you. So that is
14 why it is a real concern, because you have got this
15 fluctuation -- we go back to the point that we have got
16 no reason to think across the period that the impact of
17 cost on prices is systematically different. When you
18 have got the detailed data, it is saying they are
19 closely correlated. When you look at Mr Harvey's model,
20 they are not closely correlated and that is illustrative
21 of just the fundamental problem he has.

22 We are then into Mr Harvey's attempts to patch the
23 problem in his before/during, and that is what this test
24 is assessing. Mr Ridyard is saying, "Well, hang on
25 a second. Is this really a test in relation to that

1 issue? Is it really testing whether the patch works?",
2 I think is where we have got to.

3 So we have put our case in relation to it. We say
4 this test is testing whether the patch works, but I take
5 Mr Ridyard's additional point and I will come back to
6 it.

7 Let me pick up a different point in relation to the
8 choice of the AS/400 data, which is its inability to
9 catch the truck mix. So we know that trucks are
10 heterogeneous and their costs differ significantly. If
11 we could just pick it up in our written closings at
12 page 54. If we could just turn over, paragraph 142,
13 {S/10/54}:

14 "The models need to control for individual Truck
15 prices because Trucks are heterogeneous and their costs
16 differ significantly ... The Truck-level cost data
17 contained in the MI dataset enables the model [that is
18 the regression model, not the truck model -- the
19 regression model] to identify changes in price
20 attributable to differences in technical characteristics
21 [it says] (particularly those not observed) ..."

22 Now, when I read that, I thought, "Hang on a minute,
23 what does that mean, hidden characteristics?", and it
24 does not mean that. What it is saying is that you can
25 identify in relation to the right-hand side of the

1 equation certain categories of truck characteristics,
2 like horsepower, whether or not it is a sleeper cab.
3 You could specify those sorts of things. But there were
4 all sorts of other more refined characteristics, the
5 quality of the cab, what other options and developments
6 the particular truck has, that will not be captured in
7 those specific variables in the regression.

8 But in the granular costs material, of course the
9 cost of the particular truck is the cost for all of
10 those variations, and that is why the cost material is
11 picking up these sort of so-called non-observed
12 variations and it is also picking up the impact of
13 exchange rates.

14 "... [it] therefore ensures that differences in
15 price between Trucks that are driven by these factors,
16 but correlated with the Infringement variable, are not
17 incorrectly attributed to the effect of the
18 Infringement."

19 In other words, you could have a truck that has many
20 more bells and whistles, it would therefore have
21 a higher cost. If you are not specifically picking up
22 that higher cost because of the bells and whistles on
23 the truck in your regression analysis, the danger is you
24 just apply some sort of average cost. You say, "This
25 truck is terribly expensive", and then you attribute the

1 expense of that truck effectively to the infringement,
2 which is obviously wrong.

3 So what we say is, well, that is highly problematic
4 because we know that there are all these truck mixes and
5 we are trying to identify changes in relation to
6 individualised truck prices and therefore this AS/400
7 data just cannot deal with this because it is aggregated
8 and it does not pick up these differences. There was
9 a suggestion that this does not matter because, broadly
10 speaking, the bells and whistles on trucks were sort of
11 steady over time, but that is just not true on the
12 evidence.

13 If we could just go to {S/10/56}, just a couple of
14 pages over, this is the chart that was referred to,
15 I think, by Professor Neven in the course of the
16 cross-examination or the concurrent evidence session,
17 which actually shows that the share of options, as part
18 of the overall price of the truck or more exactly as
19 a share of the chassis price, actually increased
20 steadily over time.

21 "DLP" is dealer list price options. So what it is
22 taking is just benchmarks here. It is not trying to
23 look at absolute prices. It is looking at sort of broad
24 shares. The point is therefore that, if the level of
25 options which would increase costs are systematically

1 changing over time, you cannot make an assumption that
2 it kind of all comes out in the wash in relation to
3 average costs.

4 There is also the issue here that, although there
5 are only a limited number of trucks sold with bodies, in
6 fact what this cannot do is identify -- Mr Harvey's
7 AS/400 data cannot actually identify the cost of bodies
8 separately in this data, and obviously those can be
9 a significant part of the cost of an outturn truck. So
10 those mixed difficulties are very fundamental too and it
11 would mean that increases in the price associated with
12 increased options would be attributed to the
13 infringement in Mr Harvey's before/during model.

14 Then the third point I can deal with very briefly,
15 is that the problems with the cost data in the
16 before/during model seriously aggravate the exchange
17 rate issues that I identified in the first part of my
18 submissions. We pick this up just further down the page
19 in our submissions. I will just refer you -- given
20 time, I will just refer you to 147 to 153, {S/10/56}.

21 But the real issue here is that you lose the
22 cross-sectional variation in the cost data across
23 different trucks with different specifications, which is
24 really important for disentangling the effect of the
25 infringement from the exchange rate. You obviously also

1 lose a significant degree of variability, which I think,
2 as all the experts have agreed, is very important for
3 the robustness of the regression model.

4 Then the final point on the data that I said I would
5 pick up was just on the before period because the
6 before/during analysis is only looking at the data from
7 1995 to 1996, and so actually what is happening is you
8 are comparing the truck sales from 1995/1996, just two
9 years of data, with all of the sales from 1997 onwards
10 through to the end of the AS/400 period in around 2004.
11 So there is a big issue there, particularly since there
12 were only 5,000 Euro 2 trucks that are actually used in
13 the analysis from the before period.

14 If we just go to {E/35/54}, you will see there --
15 this is Professor Neven's second report -- he is just
16 illustrating the point that the entirety of the before
17 period is constituted by those blue dots, and they are
18 then used essentially in the regression to seek to
19 establish this high overcharge in relation to all of the
20 yellow dots, which amounts to around 75,000/80,000
21 trucks.

22 MR RIDYARD: Is the relevant issue the ratio of the blue to
23 the yellow dots or is it just whether there are enough
24 blue dots?

25 MR BEARD: I think it is the enough blue dots. It is not

1 the ratio. It is another problem that exacerbates the
2 granularity and other data issues and truck mix issues
3 that I have been identifying.

4 Finally on this, I am just going to pick up on the
5 advantages of Professor Neven's before/during/after
6 model. As I say, Mr Ward's central criticism is you
7 combine the two but you do not get anything new, which
8 is a lovely rhyming couplet but it is unfortunately not
9 true.

10 The basic proposition, that you are not adding new
11 data points, that is of course correct, but just going
12 back to that cost coefficient issue, using that as
13 a benchmark of the problems you get with before/during
14 as compared with during/after, the before/during/after
15 model, so Professor Neven's model, it does not have
16 a cost coefficient of 0.34, it has a cost coefficient of
17 0.586. Now, that is much closer to Professor Neven's
18 own cost coefficient of 0.8 for the during/after model.
19 In other words, because you are combining the two sets
20 of data, what you are able to do is get a much more
21 robust overall regression analysis. It means the model
22 is better able to explain truck-level differences in
23 prices and improves the precision by which the
24 infringement variable is estimated.

25 This was explained by Professor Neven in the

1 concurrent evidence session in answer to a question from
2 Mr Ridyard. I will just give you the reference so you
3 have it. It is {Day12/3:53} and it is around lines 5
4 to 11.

5 So the combining of the MI data set with the earlier
6 data set is not just a simple form of aggregation or cut
7 and shut, as I have put it. The wider, more detailed
8 total data set is of assistance. Also, you do get two
9 periods of comparison. You do not just get the 5,000
10 Euro 2 trucks. You are also, using the model, comparing
11 the 5,000 Euro 2 trucks but also the Euro 5, EEV, Euro 6
12 trucks at the end, so you have a much richer set of
13 comparators outside the infringement period when you are
14 running this model.

15 MR RIDYARD: Just a point of clarification. When you are
16 talking about the coefficients, you have mentioned the
17 0.586 cost coefficient. Sorry, that related to what
18 precisely?

19 MR BEARD: So that is the cost coefficient in
20 Professor Neven's before/during/after model and it is
21 close to his before/during model [sic]. If we go to
22 {E/11/43} --

23 THE CHAIRMAN: I thought he only had a during/after model.

24 MR BEARD: Did I not say "during/after"? I did, I think.

25 He has got before/during/after and during/after.

1 THE CHAIRMAN: Yes. I think you said "close to his
2 before/during model".

3 MR BEARD: I am so sorry. I just misspoke. Apologies. No,
4 no, absolutely, he does not have a before/during model.
5 Sorry, sir.

6 Mr Ridyard, this is table 4, the results in relation
7 to the MI period.

8 THE CHAIRMAN: So his during/after is 0.3, you say --

9 MR BEARD: No, no, no, his during/after is 0.8, is the cost
10 coefficient, 0.803.

11 THE CHAIRMAN: His before/during/after is 0.586?

12 MR BEARD: Exactly.

13 THE CHAIRMAN: Mr Harvey's during/after is ...?

14 MR BEARD: Is 1 effectively -- it was the 1.006 that we
15 saw -- and his before/during was 0.34.

16 So Professor Neven is not saying that, look, you get
17 a sort of result out of the before/during/after model
18 that is as robust as you get from his during/after
19 model. He is not saying that. But he is saying that
20 your overall robustness of regression materially
21 improves because of the way that the model can digest
22 the greater quantity of data and the clean periods.

23 MR RIDYARD: In very broad terms, the average of 0.3 and 0.8
24 is about 0.5 or 0.6 and that is what he gets, so could
25 it not just be that he has also just got, you know, not

1 very good information in the first period and very good
2 information in the second period and if you just lump it
3 together you get something which is in between?

4 MR BEARD: No -- well, I think you need to be quite careful
5 with that arithmetic --

6 MR RIDYARD: Yes, it was quite sloppy. I accept that.

7 MR BEARD: No, I would not dream of suggesting anything like
8 that, but you are doing apples and pears there because
9 0.34 is Mr Harvey's before/during, not Professor Neven's
10 before/during in relation to that. What Professor Neven
11 is doing is just comparing his during/after cost
12 coefficient with the before/during/after cost
13 coefficient and observing they are much closer. But,
14 no, I think Professor Neven would -- as he I think in
15 response to questions from you, sir, in the witness
16 process, said, "No, no, no, it is not just an
17 arithmetical average".

18 MR RIDYARD: I will go back to that, yes. Thank you.

19 THE CHAIRMAN: Did Professor Neven comment on Mr Harvey's
20 cost coefficient for the before/during period --

21 MR BEARD: Yes.

22 THE CHAIRMAN: -- apart from saying it is unreliable?

23 MR BEARD: We certainly put that in the comment category,
24 sir. Yes, he was --

25 MR RIDYARD: I think he did.

1 MR BEARD: He was saying there are a whole range of problems
2 with the 0.34, yes. So, yes, in all of these issues to
3 do with granularity, truck mix and so on, exchange rate,
4 all of these were observations that Professor Neven
5 made.

6 The other issue I think it is important to raise
7 here is, of course, that the further advantage of the
8 before/during/after model is that it is actually better
9 able to control for the exchange rate, which, as we
10 discussed yesterday, is a key parameter that we need to
11 be considering here.

12 I think in his submissions -- just one final point
13 on this -- Mr Ward said, "Ah, yes, but if you use the
14 after period, the before/during/after may be tainted by
15 the fact that it is possible that Euro 5 or Euro 6
16 trucks were impacted by the infringement". But, of
17 course, Mr Harvey has always proceeded on the basis of
18 Euro 5 and Euro 6 essentially for his modelling,
19 particularly his during/after modelling, of course, not
20 being affected. But we also saw yesterday, when we were
21 looking at the emissions materials, how Professor Neven
22 had actually tested for any indications of an overhang
23 effect as well, and I will not go back to that given the
24 time. So we say those criticisms are misplaced in
25 relation to the before/during/after matter.

1 Just for your notes, in relation to
2 Professor Neven's critique of the 0.34 coefficient, that
3 is {E/35/58}. So that is in his second report. It just
4 comes after those tables in fact, the table I showed you
5 with the 1.006 and the 0.976. So he sets those -- just
6 for your notes.

7 I am now going to move on, if I may, having dealt
8 with those four very significant issues in relation to
9 the regression analysis, to look at matters concerned
10 with the theory of harm debate that has gone on.

11 Obviously this is a separate exercise from the
12 econometrics and we say the weaknesses in the
13 econometric analysis that we have identified are
14 fundamental. The exchange rate approach is simply not
15 tenable, neither is the global financial crisis. We
16 recognise some of the complications in relation to
17 emissions but say Mr Harvey has not justified this idea
18 that you put all the premia as an infringement effect,
19 and I have dealt with the problems with his
20 before/during analysis this morning.

21 Now, of course, dealing with the theory of harm, we
22 are still in the territory of considering UK market-wide
23 effects. I think the first question we need to ask
24 ourselves is: does the material seen in relation to the
25 theory of harm somehow undermine or qualify the analysis

1 that we have seen in relation to the econometrics?

2 Now, we say the answer to that is plainly not, and
3 there are actually two reasons for this. The first, as
4 we have set out in our closings, which is even if you
5 were completely to buy into the claimants' approach to
6 the theory of harm, it is saying no more than an effect
7 is possible, but, equally, no effect is possible.
8 Therefore, when you are asking yourself what does the
9 theory of harm tell you about the econometrics, we would
10 say, even taking Mr Harvey's analysis at its very
11 highest, you are not getting close to a suggestion that
12 there is a problem with the analysis of the econometrics
13 that we have carried out -- Professor Neven has carried
14 out, the scientific method approach that he has applied,
15 robustly scrutinising the econometrics, because actually
16 Mr Harvey is simply saying, "Well, it is possible there
17 could be effect. It is equally possible there may be no
18 effect".

19 You will recall the cross-examination in relation to
20 it. If we could just pick it up in our closings at
21 paragraph 174, so that is {S/10/66}. We deal with this
22 at paragraphs 174 through to 182. Just picking it up at
23 175:

24 "Mr Harvey's conclusion that it is plausible that
25 the Infringement led to higher transaction prices for

1 customers in the UK is therefore merely a conclusion
2 that such effects were possible. That conclusion is not
3 in dispute. But it does not advance the Claimants'
4 position. Quite apart from the fact that it is not
5 based on any scientific testing or consideration of
6 empirical data, it does not suggest, or even purport to
7 suggest, that a zero or minimal overcharge is unlikely."

8 So I think it is important to bear that in mind.

9 I am going to come on and explain why Mr Harvey's
10 account of theory of harm is flawed, fundamentally
11 flawed, we say, but that starting point is important,
12 that he was not saying it was more likely than not there
13 was an effect. He backed off that. It is not in any
14 part of his report and he was very cautious to make
15 clear that that was not his position in relation to it.

16 So his theory of harm is suggesting it is possible
17 there was an effect, possible there was not an effect,
18 but that is not a particularly radical conclusion in
19 relation to an infringement that involves information
20 exchange because we know from lots of material that
21 actually there are debates about the extent to which
22 information exchange in particular can have adverse
23 effects. So it is not radical, but it is -- more
24 importantly, the theory of harm position adopted by
25 Mr Harvey is not casting doubt over the analysis that

1 Professor Neven has put forward in relation to the
2 econometrics.

3 THE CHAIRMAN: So it is not for Mr Harvey to sort of satisfy
4 the burden of proof on this at all?

5 MR BEARD: No.

6 THE CHAIRMAN: He is looking at it -- I mean, it was clever
7 cross-examination, but he is looking at it from an
8 economic point of view and just saying that these are
9 possible theories.

10 MR BEARD: Yes. Okay. I am going to come on to how
11 possible and plausible those theories are in a moment,
12 but the point I am making is what we have as a primary
13 piece of analysis and evidence is the econometric
14 analysis of whether or not there is an overcharge. The
15 question you are asking yourself in relation to theory
16 of harm is does this discussion of the theory of harm
17 somehow impugn or alter the way that you look at the
18 econometrics, and I am just putting Mr Harvey's case at
19 its highest here, where he is saying it is possible, and
20 I am saying, "Okay, let us just take that". It does not
21 tell you that in any way the analysis of exchange rates
22 or global financial crisis that we have been through is
23 in any way wrong, problematic, contradictory or
24 affected. That is --

25 MR RIDYARD: I think in the interests -- in the sort of

1 principles of scientific discovery, you would want your
2 researcher to go into an econometric exercise with an
3 open mind, being perfectly prepared to accept that when
4 you look at the data it comes up with a zero answer or
5 a positive answer. That is actually quite an important
6 precursor to going into an exercise of this kind. So
7 this -- and Mr Harvey I think was pretty clear in saying
8 that at the start of his first report -- saying he is
9 open-minded about what the data show. That is why he is
10 looking at the data.

11 MR BEARD: I understand that. We will come back to
12 Mr Harvey's position in relation to various matters in
13 a moment, but the point I am making here is -- let us
14 just situate where this theory of harm analysis comes.
15 We are saying you do the econometrics, and Mr Harvey's
16 econometrics which give you positive and materially
17 significant overcharge are flawed for the reasons I have
18 been working through and actually Professor Neven's
19 analysis is much to be preferred. But actually it is
20 the flaws in Mr Harvey's analysis that I am focusing on
21 here. All I am saying is, look, even if you accept
22 everything that Mr Harvey says about theory of harm,
23 that does not alter the way in which you carry out the
24 analysis of the econometrics, which is the critical
25 thing that we are dealing with here.

1 I am going to come on and say that actually his
2 theory of harm story does not work, I am going to
3 explain that, that is what I am next going to come on
4 to, but I am just letting it be, at its absolute
5 highest, reject everything Professor Neven said, accept
6 everything Mr Harvey said about the theory of harm, does
7 it change the way in which you approach the analysis of
8 the overcharge, the key question that this tribunal is
9 faced with. We say, even if you accept everything
10 Mr Harvey says, because of the way he puts it, we say
11 no, it does not.

12 THE CHAIRMAN: I am also interested in how it affected the
13 way Professor Neven approached his econometrics.

14 MR BEARD: The way that Professor Neven -- well, I think we
15 heard about Professor Neven. I will come back to the
16 quote, if I can find it, Professor Neven's X factor
17 journey, where he explained that he was sceptical that
18 there would be no effect from an infringement of this
19 sort, but he went away and tested it and looked at the
20 data in relation to it.

21 What we see actually in relation to the econometric
22 analysis is that Professor Neven -- indeed it is one of
23 the odder criticisms that is levelled at him -- did do
24 a lot of testing and a lot of assessment in relation to
25 the econometrics -- his own econometrics and Mr Harvey's

1 econometrics. That is entirely proper and entirely
2 consistent with what Professor Neven explained was the
3 scientific method. You have a theory; you test it to
4 falsify it.

5 Now, on occasion, Mr Ward seemed to be holding that
6 against Professor Neven, that he was trying to falsify
7 theories. No, no, that is entirely the way that you
8 should do it. You are testing things to see whether or
9 not they are wrong. If you spend your time testing
10 things to see whether you are right, you fall into the
11 confirmation bias trap, which Professor Neven was very
12 clear he recognised is always a risk, but that he had
13 taken specific steps, not only in this case but more
14 generally, given all of his academic work, to ensure
15 that he does not suffer from confirmation bias in
16 relation to these things.

17 So I will come on to those issues, but we saw how he
18 explained he was sceptical, he looked at the material
19 and he ended up concluding you did not have good
20 evidence for an overcharge and that Mr Harvey's approach
21 was wrong.

22 So I am going to then work through the various
23 issues in relation to theory of harm, including trying
24 to identify exactly what it is that is being put as the
25 theory of harm now by Mr Ward and Mr Harvey, but I am

1 just conscious of the time.

2 THE CHAIRMAN: A break?

3 MR BEARD: Yes.

4 (11.41 am)

5 (A short break)

6 (11.52 am)

7 MR BEARD: A couple of points to pick up from that session
8 before I move on. The first was just in relation to,
9 sir, your points. It was in fact Mr Ridyard who
10 specifically asked Professor Neven had he approached the
11 econometrics with a sort of preordained view of zero.
12 That is {Day12/15}, around line 13. His answer was,
13 {Day12/16:2}:

14 "I think I did everything ... to avoid that bias."

15 That referred back to his answer given on page 13 of
16 the same day, Day 12, where he explained the sorts of
17 issues that he took into account to avoid confirmation
18 bias. In particular, when you are doing the
19 econometrics, making sure you are going back to first
20 principles; making sure any number you get, you are
21 asking yourself why do you get those numbers; actually,
22 in process terms, operating different teams analysing
23 and assisting in relation to these things; consulting
24 other independent people in relation to the conduct of
25 it. There was a long screed but I think --

1 THE CHAIRMAN: It felt like a very prepared answer,
2 I thought.

3 MR BEARD: Well, I do not think there is any basis for that,
4 sir, with respect, but obviously it is a matter for the
5 tribunal.

6 The other matter that I wanted to come back to was
7 actually Mr Ridyard's earlier points about the acid
8 test, so if we could just go back to that at {E/62/29}.
9 I was not sharp enough but I am grateful to those behind
10 me. The answer I think probably lies, Mr Ridyard, in
11 the first column because what Professor Neven does there
12 is, rather than using the granular data, he just uses
13 the aggregated data and tests the issue. The first
14 thing you see is that the cost coefficient falls
15 markedly and the second thing is with and without the
16 truck characteristics you do not get materially
17 different answers.

18 MR RIDYARD: So he deliberately used the poor data from the
19 second period?

20 MR BEARD: Sorry -- yes.

21 MR RIDYARD: He used the earlier data from the second
22 period, yes.

23 MR BEARD: No, he takes the during/after material and --

24 MR RIDYARD: I have got it.

25 MR BEARD: -- aggregates it so that it has become as clunky

1 as the AS/400 data effectively or at least it is
2 annualised.

3 MR RIDYARD: Understood.

4 MR BEARD: Yes. Therefore I think that controls for the
5 concern that you had.

6 Let me move on now to the theory of harm beyond the
7 point that I have already raised about whether or not it
8 impacts the econometrics because, as I say, the
9 econometrics carried out by Professor Neven and the
10 testing of Mr Harvey, it is an independent consideration
11 testing those various different propositions. Each of
12 the criticisms and pieces of analysis that Mr Harvey
13 puts forward and then is critiqued by Professor Neven or
14 what Professor Neven puts forward -- each of those can
15 be tested autonomously.

16 Let us look at the theories of harm that Mr Harvey
17 has put forward. I have to say, there is a degree of
18 confusion here so I think I need to pick it up from the
19 transcript in various places. So can we go to
20 {Day21/42}? You will recall that Mr Ward started
21 saying -- this is part of a top-down analysis of the
22 cartel. He said, picking it up at line 10,
23 {Day21/42:10}:

24 "What we have learned is the general proposition
25 that the list prices influence the transaction prices

1 [I will come back to that]. That is good enough in
2 a case where we are proving our case ultimately with the
3 econometrics. I am not trying to prove a case that on
4 1 June 2003 that contract went up 3% because of
5 something that was said in the Netherlands a month
6 earlier. I am not trying to and I do not need to. That
7 is the essence of the top-down approach that we have
8 taken."

9 So this was him articulating a matter. This was in
10 connection in particular with bottom-up versus top-down
11 that we will be coming back to.

12 Mr Ridyard then asked whether a theory of harm was
13 needed. Mr Ward essentially said, "Well, for sure".
14 Picking this up at the bottom, {Day21/42:21}:

15 "Theory of harm is part of this, for sure, but
16 I would respectfully submit, though, if we have got
17 plausible routes for causation, which we do, which are
18 indeed the foundation of the theory of harm, and we have
19 an overcharge, if you accept Mr Harvey's evidence that
20 there is one, that is sufficient. That is sufficient.
21 I do not rely on the overcharge on its own -- the
22 econometrics on its own and I do not rely on these
23 factors on their own because I am doing it top-down."

24 Then when he actually came on later to try and
25 explain Mr Harvey's evidence, we see this at page 89 --

1 sorry, it is probably worth picking it up at 88 if you
2 would not mind, {Day21/88:22}:

3 "Now, one thing that DAF say in their closing is
4 that Mr Harvey's theory is no more than a theory of
5 difference, in other words that there would have been
6 different decisions. But Mr Harvey did explain why he
7 thought the result could at least plausibly lead to an
8 increase in prices. There was quite a big debate about
9 the nature of his theory of harm and at page 106 [of
10 their closings] {S/9/106}, we have set out some key
11 extracts, but really there are just two things. One is
12 he explained it was essentially unilateral, albeit
13 founded in the collusion that was the basis of the
14 decision, and it was just far less demanding an approach
15 than Professor Neven's."

16 Then Mr Ward was asked about his position as he
17 developed the submissions and then it stopped sounding
18 like a unilateral theory, the essentially unilateral,
19 and more like a coordinated theory.

20 If we go to page 93, {Day21/93}, there have been
21 various points -- we can see reference to 14 years
22 already twice on that page. Then Mr Ridyard intervened
23 and said, {Day21/93:14}:

24 "So this sounds like -- excuse me for trying to
25 pigeon-hole these things, but I would like to be clear

1 what the theory of harm is. This sounds like you are
2 supporting a theory of coordination, saying that there
3 would be coordination. Even though you could not check
4 on transaction prices, you can check on outcomes of
5 competition, like market shares and maybe some actual
6 prices, and that is good enough to give you enough
7 information to check on whether your co-conspirators are
8 playing ball or not. So this would be you saying that
9 the theory of coordination could work, where you
10 coordinate on list [prices] ... and you check not on
11 actual transaction prices, because that is virtually
12 impossible, but on the consequences of sticking to or
13 not sticking to that agreement to raise prices by an
14 agreed amount?

15 "Mr Ward: yes, plus the fact that we just do
16 not know what kind of feedback was going on in the
17 market.... "

18 So we are left with a degree of ambiguity about what
19 the theory of harm is. It is essentially unilateral,
20 was the way that it was put first by Mr Ward, but then
21 he appeared to accept some coordination and he also
22 refers to relationships between list prices and
23 transaction prices.

24 Now, there is undoubtedly a degree -- I think we
25 could put it at the lowest -- of looseness about the way

1 in which this is being approached. If we go to our
2 closings, {S/10/69}, at 183 we describe what I think is
3 economically not exciting, that there are two types of
4 theory of harm, coordinative and unilateral.

5 Coordinative, as the name suggests, involved multiple
6 parties coordinating in particular on prices they sell
7 at and unilateral theories of harm are substantially
8 different. They involve an above-competitive
9 transaction price being set by a market participant
10 without their coordinating with others on those prices;
11 in other words, the company in question does not know
12 and does not need to know or monitor what its rivals'
13 transaction prices are, but in a unilateral theory case
14 it will still set its own transaction prices above the
15 competitive level.

16 So those are the two broad economic categories. You
17 will recall from the Commission's own guidance -- I will
18 just give you the note. It is actually covered in our
19 closings at paragraph 207. Sorry, no, that is a wrong
20 reference. I take that back. The Commission's own
21 guidance talks about information exchange either
22 facilitating coordination or a foreclosure theory. Now,
23 foreclosure theories we are not interested in here. The
24 Commission guidance on horizontal cooperation does not
25 talk about unilateral theories explicitly at all.

1 If we go down to paragraph 185 in our closing,
2 {S/10/69} -- I am not going to go to the paper but there
3 is a paper by Professors Harrington and Ye about what
4 are referred to as the canonical forms of collusion,
5 collusion on prices charged or market allocation. Those
6 are seen as the standard approaches. Then they go on to
7 explain that coordination can be indirect as well direct
8 if certain conditions obtain. You will see in that
9 quote:

10 "In contrast to those canonical forms of collusion
11 [so collusion on prices actually charged or market
12 allocation], there are some recent collusive practices
13 for which coordinated conduct does not directly
14 [constrain] competition, in which it is not apparent
15 that compliance is sufficient to produce
16 supra-competitive outcomes [pricing above the
17 competitive level] ... some cartels coordinated on list
18 prices but not on discounts, which meant firms did not
19 coordinate on transaction prices."

20 So that is just the phenomenon that, if you
21 coordinate on list prices but you do not coordinate on
22 discounts, then you are not going to have an impact --
23 you cannot assume that there is any coordination in
24 relation to transaction prices.

25 "While it is easy to monitor and ensure that all

1 firms set the agreed-upon list price, collusion could
2 prove ineffective due to firms' competing in discounts
3 off list prices. In fact, discounts were common in some
4 of the cases involving coordination on list prices."

5 So they are immediately identifying the sort of
6 problem that arises when you are asking yourself about
7 transaction price impacts but you are talking about list
8 price issues.

9 Now, I want to work through the various sort of
10 possible theories that could be being put forward here
11 by Mr Ward and Mr Harvey. I think there is one thing
12 that is worth bearing in mind: the idea that you can
13 both have a unilateral theory of harm applying and
14 a coordinative theory of harm simultaneously in relation
15 to the same prices just does not make sense. It is one
16 or the other that is influencing the prices.

17 MR RIDYARD: Let us accept that they are -- that Mr Harvey
18 and/or the claimants are vague, as you suggest, does
19 that matter?

20 MR BEARD: Well, we say it does matter because, in these
21 circumstances, where you have got a decision that is
22 talking about the collusion, the coordination being in
23 relation to list prices and information exchange
24 predominantly, that in those circumstances, if Mr Harvey
25 is not able to put forward a theory of harm that is

1 coherent, then that does cast doubt over his outturn
2 econometric analysis which is suggesting that there is
3 a very significant overcharge because that does create
4 a concern in relation to these issues.

5 THE CHAIRMAN: So there is only doubt about which is the
6 applicable theory of harm because we do not know what
7 happened in reality and that is the odd world that we
8 are operating in, that we are trying to use economic
9 theory to work out what might have happened in reality,
10 whereas surely we should start from what actually
11 happened in reality and then test it economically as to
12 whether it had an effect on prices.

13 MR BEARD: Let us just take this in stages. We have the
14 decision which has set out what constitutes the
15 infringement. It does not say that there was any
16 coordination in relation to specifically transaction
17 prices. So what is being asked by the economists
18 is: does it make sense to say that there could be higher
19 levels of transaction prices given the decision -- given
20 what has been identified in the decision? Now, it is
21 undoubtedly appropriate to test that because the
22 decision is not trying to identify --

23 THE CHAIRMAN: No, but a lot more happened in reality than
24 is set out in the decision. Of course it is.

25 MR BEARD: I think you have to be slightly careful here,

1 sir. I know Mr Ward has said, "Oh, well, there is lots
2 and lots of things going on". You have got thousands
3 and thousands of documents that were produced for the
4 Commission, leniency applications by four players in the
5 market. They have resulted in the decision being given
6 by the Commission. That decision does not deal with
7 transaction prices and what this case is about is the
8 transaction prices. Obviously, the evidence that has
9 been given and the evidence that was anticipated by
10 Mr Justice Roth at the disclosure hearing is about how
11 the pricing worked in relation to all of this. That is
12 what is critical here.

13 What the economists are looking at is, given what we
14 know about how the pricing worked and given the evidence
15 we have in relation to that and given the data we have
16 in relation to it and given the economic principles we
17 can apply here, do we have good reason to think that
18 actually there is a theory of harm that says it is
19 likely that actually those transaction prices would have
20 been higher, given all the information we know? So it
21 is not ignoring the evidence but it is applying the
22 economic framework to the evidence that we have and to
23 the decision, because none of this is questioning in any
24 way the terms of the decision and the infringement that
25 is found in relation to that.

1 So there just is not -- we are taking the decision
2 at face value, we are not challenging that, but it is
3 right to look at, you know, how does a theory of
4 coordination fit with what we know about what went on
5 here, how does a unilateral theory fit with what we know
6 about what was going on here, because there is a grave
7 danger that we all start this going, "Oh, yes, well,
8 there was a cartel, as Mr Ward may have mentioned, that
9 went on for some years, and there was, as he puts it,
10 a softening of competition". But what we are asking
11 ourselves is: is whatever happened there sufficient to
12 mean that you actually got transaction prices that were
13 higher? And they have to be stable higher. That is the
14 other thing. They cannot just be -- you have got to
15 have a theory that essentially says, well, you would
16 have held the price at a supra-competitive level and
17 other people would not have come in and taken it away
18 from you as a matter of theory in relation to any
19 tendering.

20 That is what is important here because, as we will
21 come on to see, if you are thinking about this being
22 a coordination theory, either direct or indirect, you do
23 not have the basis for saying that actually the parties
24 that were competing for business from customers could
25 actually coordinate their transaction prices even on

1 a soft basis, and I will come back to the attenuated
2 form that Mr Ridyard put to Mr Ward.

3 Then when we come on to the unilateral theory, we
4 end up with a situation where the unilateral theory is
5 undoubtedly an exception -- we see that from
6 Professor Harrington's approach -- and the criteria for
7 applying the Harrington unilateral theory just are not
8 shown to be met here.

9 Then we get into a much more general discussion
10 about, well, there are sort of mechanisms by which
11 prices could be influenced, like IKP targets and
12 mandates and so on. But of course those are the means
13 by which you either get some form of coordination or you
14 get a unilateral effect. They are the mechanisms. They
15 are not theories as to how you have stable theories of
16 harm.

17 Then the last variant that we have had, the last
18 variant we have had, is this notion of a rigged market.
19 But, as I will come on to explain, the notion of the
20 rigged market, if what he is saying is that each bid is
21 effectively rigged, Mr Ward has a number of fundamental
22 problems with that approach. I will leave aside the
23 fact that rigging of arrangements was not part of the
24 pleaded case -- leave that to one side. Let us assume
25 that we can suggest that it is broad enough to cover

1 it -- what he is assuming is that you as a tribunal can
2 conclude that DAF charged higher prices because you can
3 assume that other people charged higher prices.

4 Now, that is not remotely possible to do unless you
5 have got a coherent economic theory of harm because you
6 cannot identify evidence in relation to the other OEMs
7 because you do not have it. You do not have them here.
8 I mean, it is long in the past, but in the case
9 management approach we said, you know, it should all be
10 all the OEMs together, but that is long done.

11 You do not have evidence from the OEMs. What you
12 are testing today is whether or not DAF was charging
13 higher prices. You cannot have a predicate for that
14 analysis, saying, "Well, we are going to presume that
15 the other OEMs charged higher prices in a tendering
16 process". You cannot assume this. So Mr Ward
17 constantly talks about a rigged market, but what he is
18 conflating is what was found in the decision and what
19 goes on in relation to negotiating and bidding
20 processes, the actual pricing, and he cannot sustain
21 that rigged market story.

22 MR RIDYARD: Well, when you say "sustain", the question is
23 maybe how far does he have to nail down the theory,
24 I mean, given that all the facts are not available to
25 us.

1 MR BEARD: Well, he has at least got to have a coherent
2 theory and we say neither the coordination nor
3 unilateral theories work.

4 MR RIDYARD: So are you saying that -- do you have to
5 show they cannot work or that they probably do not work
6 or ...?

7 MR BEARD: Well, this is where we get into questions of what
8 the threshold is in relation to causation. For the
9 moment --

10 MR RIDYARD: That is why I am asking these questions.

11 MR BEARD: Yes. So what we are looking at there is
12 obviously Mr Ward's case is, "Well, I can take a number
13 of things and say cumulatively I have got causation".
14 We say, look, it is regression analysis, which is the
15 primary plank he relies on for saying there is an
16 overcharge and we say for the reasons we have been
17 articulating is not sound. In particular, those issues
18 in relation to exchange rates and global financial
19 crisis mean you cannot rely on that as indicative of
20 a correlation.

21 Of course, we know from *BritNed* that we are dealing
22 with a correlation and all you can do is draw an
23 inference for causal purposes. So he places a lot of
24 weight on that. We say you cannot draw that inference
25 and you particularly cannot draw that inference when you

1 are so wrong about the way that you have done your
2 economic regression analysis.

3 Then he is saying, "Yes, but, look, I have got
4 theories of harm, there is softening of competition
5 here", and we say, "No, no, no, you have not got that
6 theory of harm. It is not robust. There is an awful
7 lot of generalised hand-waving and, in relation to the
8 rigged market, it is actually a bootstraps argument.
9 You are assuming that other people priced higher and
10 then that means that DAF would cement(?) prices". You
11 cannot do that. If you have got a coherent economic
12 theory as to how higher prices could be sustained, that
13 is one thing, but he does not have coordination and he
14 does not have unilateral effect and, absent that, you do
15 not have separate evidence in relation to it.

16 So when you take each of the elements that he is
17 heavily relying on here and saying, "Look, look, look,
18 this is enough for causation", they do not stack up,
19 which is why we go through the theory of harm material.
20 Then he ends up with, "It is 14 years and it is in the
21 decision". Well, we have heard that but we also know
22 that the decision does not mean that there is any effect
23 and you cannot draw that presumption. That is precisely
24 what is not needed in relation to -- it is the reason
25 why we are here, is to test that. So in those

1 circumstances, when we look at the limbs of his
2 causation story, we say they do not stack up.

3 THE CHAIRMAN: I do not think that Professor Neven was able
4 to come up with a coherent explanation for why they
5 would have participated in this cartel for 14 years.

6 MR BEARD: He does not have to come up with a coherent
7 reason.

8 THE CHAIRMAN: Well, does he not -- from his own economic
9 credibility point of view, does he not have to have
10 thought about that?

11 MR BEARD: He has taken a decision at face value and he
12 actually says in some of his evidence, "Well, I think
13 that the likely approach that you think about here would
14 be -- transaction price coordination would be what the
15 Commission was thinking about could have resulted from
16 this". He actually says that in relation to his
17 evidence.

18 MR RIDYARD: But then he rejects it.

19 MR BEARD: Then he tests it and rejects it. But there is
20 nothing wrong with that. That is perfectly sensible.
21 He is essentially saying --

22 THE CHAIRMAN: So if that is not the explanation, what is?

23 MR BEARD: Well, we do not know what the explanation is in
24 relation to it, but you were asking has Professor Neven
25 tested -- looked at an explanation. He has assumed

1 essentially that the people involved in the cartel,
2 profit-maximising entities, do want to achieve
3 something. What is going on here? Is it a form of
4 coordination that could result in coordination in
5 transaction prices? Because that is the orthodox normal
6 way that you would analyse this in economic terms. That
7 is why he has started off, as he is saying, sceptical
8 about the idea of no effect because that is what you
9 would be assuming would be the mechanism of effect here.
10 He says --

11 THE CHAIRMAN: That is what he concluded, then, no effect at
12 all -- no profit-maximising result from this collusion
13 over 14 years?

14 MR BEARD: Well, no, because you could still end up with
15 a profit-maximising effect in relation to these matters
16 without it necessarily resulting in overcharges to
17 people. You can get all sorts of benefit from taking
18 the information that you have got, and that may be
19 perfectly rational as a profit-maximising entity, but it
20 does not necessarily --

21 MR RIDYARD: I do not think that Professor Neven thought --
22 when I quizzed him on that, he did not think that was
23 the explanation.

24 MR BEARD: No, he is not saying that. I completely
25 understand that that is not how he is putting it. What

1 he is saying is, "Look, I look at the decision. There
2 is collusion in relation to list prices. How would this
3 likely cash out as an effect? I take the orthodox
4 approach to analysing that, which is looking at the
5 species of coordination".

6 Then, when he is faced with the unilateral story, he
7 also looks at that, but he tests it and he concludes
8 that these are not robust. But that is not -- his
9 credibility is not somehow damaged because he then does
10 not say, "Well, I have to come up with another theory as
11 to how the cartel worked". He is standing there going,
12 "Look, I am looking at the data, I am looking at the
13 theory, how does it all fit together?".

14 MR RIDYARD: But if you reject the collusion story and you
15 reject the unilateral effect story but you still have
16 this conduct that we know exists, you have not really
17 closed off the theory, have you, because you have some
18 unexplained facts that the firms that -- as you say,
19 they were profit-maximising, they engaged in this
20 cartel-like activity for a long period of time with lots
21 of organisation behind it and regular meetings, and yet
22 all of the places that Professor Neven went to to
23 explain it, he said, "No, it cannot be that, it cannot
24 be that", so we are still left with what was motivating
25 their conduct.

1 MR BEARD: Well, there is a danger that we are trying to
2 solve all the problems of a European-wide cartel, and
3 although there were regular meetings, actually when we
4 focus back on the UK, actually, in relation to the UK,
5 contact was relatively limited. Then, of course, in the
6 later period things were being done through Germany, so
7 you might well find yourself saying, "Well, look, we are
8 dealing with the UK here. We have to test what has
9 happened in relation to the UK". It is possible (a)
10 that people were trying to do things to undermine
11 competition -- it was a cartel. That is understood.
12 That is how it is put by the Commission -- and they
13 failed, because that is the other thing that can be
14 going on here. People were intending to do these things
15 and failing. Second of all -- and I know Mr Ward will
16 say, "Yes, but it went on for 14 years", and that this
17 is very Samuel Beckett, try fail, try again, fail
18 further -- but that is still potentially possible in
19 relation to a situation where you are dealing with
20 a pan-European cartel, where, if there were interests,
21 you might well be seeing other benefits elsewhere across
22 the EU.

23 You, as a tribunal, cannot then assume that there is
24 an impact in the UK because all we are ending up doing
25 is literally relying on Mr Ward's cri de coeur that

1 there is an object infringement and it went on for
2 14 years, and there is not a proper theoretical --
3 economic theoretical framework to deal with this and
4 there also is not data that indicates this. As I will
5 come on to this afternoon, I hope, when we actually look
6 at some of the dealings for these particular claimants
7 as well, which is a further layer that we have to deal
8 with, you are not seeing any of these soft mechanisms
9 working their way through. You do not have actual
10 factual evidence in relation to that.

11 So I think it was the court in Oviedo that had done
12 an awful lot of consideration of the economic
13 material -- and I will find the reference for you --
14 that looked at all of this and said, "Look, we do not
15 identify an effect, having carried out all this
16 analysis. We recognise that we cannot fully answer why
17 it is that in relation to this truck -- this cartel it
18 carried on for this long, given that we have identified
19 that there is not a good basis for identifying an
20 effect, but that is not the question we are faced with".

21 We say the same is true here. We use the economic
22 framework and the fact that we cannot solve all of the
23 problems as to why this cartel was maintained for
24 14 years does not mean that we undermine our
25 dispassionate data analysis, nor that we step away from

1 the frameworks of economic theory that are to test
2 theories of harm here.

3 So I think it is important to actually look at what
4 these theories of harm mean and how they potentially
5 work because if you do not have a situation where you
6 can say, "Well, you do not have a good basis for saying
7 that there was actually coordination, even soft
8 coordination, in relation to transaction prices", and
9 you do not have a good story in relation to unilateral
10 effects and you end up with this sort of general
11 softening of competition reference to IKP target margins
12 and mandate structures, you do not actually have
13 a robust story that tells you how it is
14 supra-competitive prices could have been maintained,
15 which is critical for Mr Harvey's approach.

16 So let me deal with the forms of coordination that
17 may or may not be being put forward by Mr Ward. The
18 first one -- if we could pick it up in our closings at
19 paragraph 189, so this is {S/10/70}. Now, we have given
20 this a name. The name is not critical. We have called
21 it "The tide that lifts all boats". The idea is that
22 what you have got is a theory -- it sort of is what we
23 think Mr Ward may have been talking about when he talked
24 about relationships between list prices and transaction
25 prices, although he did not say that there was some sort

1 of mechanistic relationship.

2 "The tide that lifts all boats" is coordination in
3 relation to list prices that then feeds through into
4 transaction prices. So we are taking the form of
5 information exchange that is most price-related and
6 looking at it and saying, "Look, you coordinate on list
7 prices", and "the tide that lifts all boats" is, if you
8 lift the list prices, this brings the transaction prices
9 up with it. So it is the list price tide lifting the
10 transaction price boats.

11 But this only works if you have essentially got some
12 sort of mechanical relationship where the list prices
13 are bringing the transaction prices up. Now, Mr Ward
14 may say, "Well, it does not have to be 100%, it could be
15 50%". No doubt he will say that that was what
16 Mr Ashworth aimed at. We understand that. We
17 understand that. But the problem that Mr Ward
18 encounters when he tells this sort of story and
19 something he has not really grappled with, so far as we
20 can see in his closings, is that there is no empirical
21 basis for it.

22 If we could just go to paragraph 193 in our -- so
23 just over the page, I think. It is set out here,
24 {S/10/71}:

25 "Professor Neven carried out empirical analysis to

1 see what the extent of pass through of changes in list
2 prices into transaction prices was. His analysis shows
3 that, in fact, this did not happen. His analysis
4 demonstrates the extent to which there were increases in
5 transaction prices in the UK following general or
6 relatively wide-ranging list price increases."

7 If we just go over the page, {S/10/72}, we have
8 included the picture. You will recall this. Now, to
9 some extent you can ignore the big blue bars because
10 that is for a more sophisticated discussion of
11 coordination issues. It is just the round dots that
12 matter here because what the round dots are is the
13 extent to which, when there was a significant list price
14 change by DAF, was there a concomitant increase in
15 transaction prices. It is average transaction prices,
16 which obviously makes sense because you are talking
17 about these generalised list price increases, and the
18 data tells us that did not happen because there is only
19 one dot, which is in 2005, Q2, which suggests that there
20 is anything like a 50% increase in transaction prices at
21 the time there was a significant list price increase,
22 but the rest of the time you are just not seeing it.

23 So this idea that Mr Ward has maintained, which is,
24 "Well, look, we know that list prices affected
25 transaction prices, so if you are coordinating in

1 relation to those, I do not have to say it is 100% but
2 I am going to say that they moved the transaction prices
3 up", the data shows that is not the case. We have
4 tested it.

5 The answer, so far as we can see, from the claimants
6 is to say, "Ah, well, look, this is all during the
7 cartel period, so what can you get from that because it
8 could have been different?".

9 MR RIDYARD: I do not think that is a very fair

10 representation of what the claimants say on this.

11 I think they had some technical questions and criticisms
12 of this particular piece of analysis, did they not?

13 MR BEARD: They do have some technical criticisms, but in
14 terms of the analysis, looking at it in terms of the
15 tide that lifts all boats, none of those criticisms that
16 are levelled at the technical analysis actually tell us
17 that there is any problem here with the level of
18 pass-through or the average level of pass-through. This
19 is not the dispersion point because that is where they
20 do level some criticisms particularly. But in relation
21 to the extent of pass-through, we just say that you are
22 not seeing it. It is the same when you look after the
23 infringement period; in other words, list prices moving
24 up is not moving transaction prices for DAF during the
25 period or after the period.

1 MR RIDYARD: If changing list prices has no effect on
2 transaction prices, then I can see why you would say
3 there is not much point -- there is no effect in
4 a cartel that focuses on list prices, but I do not think
5 that is a proposition that is universally held within
6 this room.

7 MR BEARD: I got that sense, sir, reading the tribunal. But
8 the problem is we all approach it on that basis, but,
9 when we look at the data, that is not what the data is
10 telling us here. That is not what the data is telling
11 us. We all make these assumptions because the
12 infringement finding was in relation to sharing list
13 prices, because we think of these entities as being
14 profit-maximising, because we think, well, list prices
15 must be linked to transaction prices, so when they are
16 shifted upwards, that must be having an impact on
17 transaction prices, but that is not what the data shows.

18 Look, the intuition is pretty powerful because, if
19 you recall, that was what Mr Ashworth was saying. He
20 said, "Look, I would hope on average to get 50%
21 pass-through in relation to these things" --

22 MR WARD: He did not say "I hope", he said "I did". Sorry.
23 I have heard this so many times, I have finally cracked
24 and intervened.

25 MR BEARD: Yes. He did say he hoped to do it and he did do

1 it and the data says he did not.

2 Look, if you have someone within the DAF
3 organisation, a sales manager, saying, "This is what was
4 happening", and actually it was not, that is
5 significant. The two things just are not consistent.
6 We understand that Mr Ashworth said these things, but
7 when we look at the material, it just is not correct.

8 If we go on to paragraph 198, {S/10/73}, it was not
9 just Mr Ashworth, it was also Mr van Veen who tried to
10 use list prices as part of the negotiation. Indeed we
11 had said this in DAF's pricing statement, so this is
12 material that was put in. Mr Ward made a great play
13 about how Mr Ashworth had made some sort of, you know,
14 useful concession to him. We have quoted here our
15 pricing statement that was submitted ages ago.

16 "List prices ... were also referred to in the course
17 of negotiations by DAF UK and dealers, who may have
18 tried to use list price increases as one of the means to
19 negotiate higher sales prices ..."

20 But it does not mean that that tactic was
21 successful.

22 SIR IAIN MCMILLAN: Mr Beard, the obvious question to me is
23 that if the data is not consistent with the evidence
24 that Mr Ashworth gave to the court, then why did he say
25 what he did?

1 MR BEARD: Well, he must have thought that that was the
2 case. That is obviously the evidence he gave, but he
3 just does not have the data in relation to it. I mean,
4 it may well be that he does not -- that there were cases
5 where he thought he was doing very well in negotiations
6 and getting good prices and in fact it turns out that,
7 when you actually look at the numbers, he was not
8 getting such good prices as he thought, because one can
9 understand that when you are involved in individualised
10 negotiations, you think, "I have done terribly well,
11 I have used the reference to list prices, I have pushed
12 things up", but actually, when you crunch all the data,
13 you just do not get that outcome from it. So we accept
14 that that is what Mr Ashworth said. We are not denying
15 it.

16 THE CHAIRMAN: He is your witness.

17 MR BEARD: Of course he is our witness. That is not the
18 issue. We are not decrying his evidence in relation to
19 it, but it is not consistent with the data that we are
20 seeing.

21 SIR IAIN MCMILLAN: Thank you.

22 MR BEARD: Now, I will come back to the issue about
23 obviously this being a market-wide number because some
24 of the things that have been said about Mr Ashworth's
25 evidence by the claimants is wrong, but we are not

1 running away from the fact that Mr Ashworth did talk
2 about moving transaction prices up in negotiations. We
3 understand that. But then we have to test it and that
4 is what we are doing here.

5 So we say that when you are looking at this notion
6 of the tide that lifts all boats, in other words there
7 is coordination that is identified in the Commission
8 decision in relation to list prices and that actually
9 what that was doing was shifting transaction prices up,
10 you just do not have the evidential support for it. We
11 recognise what Mr Ashworth says; we recognise that that
12 is what he thought. It was clearly an honestly held
13 belief. We are not denying that in the slightest.

14 SIR IAIN MCMILLAN: So is your position there, if I may ask,
15 Mr Beard, that Mr Ashworth made an innocent mistake when
16 he gave his evidence to the court?

17 MR BEARD: He clearly thought that was the case. I am not
18 suggesting otherwise. But, you know, there is no point
19 in us cross-examining or going back to our own witness,
20 saying, "But the data says something different".
21 I mean, the data just says what it says. He does not
22 have that material. He has not crunched through it. He
23 gave his evidence honestly and that is what he thought.
24 But, yes, it is -- I think we have to say that it is not
25 borne out by the data so to that extent it is an honest

1 mistake.

2 SIR IAIN MCMILLAN: Thank you.

3 MR BEARD: There is no more that can be said about it
4 because how one moves -- when one is faced with
5 a proposition like that, how do you test it? Well, let
6 us look at what the numbers actually say.

7 THE CHAIRMAN: If he was not doing as well as he thought he
8 was doing, surely that would have become apparent quite
9 soon from his superiors or whatever, not meeting targets
10 or ...

11 MR BEARD: Well, it depends what the targets were. He might
12 have been doing perfectly well enough to hit targets and
13 so on. I am not suggesting Mr Ashworth was a bad
14 salesman. I am not suggesting anything of the sort.
15 I do not know what the targets were that he was being
16 required to hit so I do not think one can assume that.
17 I do not think that was the -- I do not think that is
18 the issue. I mean, there were clearly periods where DAF
19 was doing extremely well, Mr Ashworth and his sales team
20 were clearly doing extremely well, and they were clearly
21 making good revenues for DAF, not throughout the period,
22 but there were obviously periods where they were
23 successful.

24 But that is not the question we are asking
25 ourselves. The question we are asking ourselves was: he

1 may well have been able to achieve good prices through
2 a negotiation but was he achieving good prices through
3 negotiation by reference to the increased list price?
4 That is what we are really testing here because that is
5 what is coordinated on. Mr Ashworth may have been an
6 excellent negotiator and getting good prices lots of the
7 time, quite aside from what the list prices were or list
8 price increases. I am not casting aspersions on
9 Mr Ashworth and his sales ability in the slightest.

10 What we are testing is whether or not what he said he
11 thought happened is actually borne out by the numbers.

12 It is perhaps worth just going to {Day8/61} of the
13 transcript. So there was a discussion -- this is re-X.
14 So I was asking about these issues about, {Day8/61:18}:

15 "... you have referred to, on a number of occasions,
16 the hope, the expectation [indeed, as Mr Ward said],
17 that on average you would get half the transaction price
18 increase -- list price increase in transaction prices.

19 "Answer: That is correct.

20 "Question: How successful were you in achieving
21 that aim, particularly in relation to large or direct
22 customers?

23 "Answer: I think a very simple answer to that is,
24 on average, we knew that from history that was generally
25 what we could get, and if you take the balance of -- if

1 you say 50/50 and we put Royal Mail in the 50% of big
2 customers and BT in the 50% of retail customers, then we
3 would expect to get a substantial amount from retail
4 customers and less from BT, so the balance comes out
5 that way. So it is sometimes zero on fleet customers
6 and sometimes full amount on retail customers because
7 you would expect a customer buying one truck, you would
8 achieve a full percentage increase with that customer.
9 On the balance it is 50/50. It was a very rough -- but
10 it was very similar in terms of models as well.

11 "Question: Did that vary across the period ...

12 "Answer: [he said] ... very little."

13 So he definitely thought he was getting higher
14 prices on average when list prices went up.

15 THE CHAIRMAN: This was in re-examination.

16 MR BEARD: Yes. No, I am not running away from it. We have
17 always said that they used these list prices in
18 negotiations. The reason I am going to this is Mr Ward
19 says, "Look, look, look, this is really important, this
20 is a great concession, this is what has gone on". We
21 have said we recognise that we have mentioned these
22 matters in relation to the pricing statement previously,
23 we recognise what was going on, but we also have the
24 data.

25 MR RIDYARD: So when you say you are not running away from

1 it, you are recognising he said it but you just think he
2 is wrong?

3 MR BEARD: Yes. It is just not borne out by the numbers.
4 That is as much as we can do in relation to it. As
5 Sir Iain put it, it is his honest belief. There is no
6 doubt about it.

7 I have been focusing there on the idea of the list
8 price moving through, so this is the idea that the OEMs
9 were agreeing list prices and essentially that pulled
10 all the transaction prices up.

11 THE CHAIRMAN: That was underlying the recital in the
12 decision, was it not, about going from gross list prices
13 down to transaction prices?

14 MR BEARD: Yes, this is this idea of top-down --

15 THE CHAIRMAN: It is a question of generally.

16 MR BEARD: Yes -- well, we have got the evidence in relation
17 to how -- well, from Mr Ashworth about how he did
18 pricing and how he did not refer to -- when he was
19 setting prices in negotiation, he was not taking a list
20 price and discounting off it. It was actually,
21 particularly with these claimants, for example, taking
22 what previously he had sold at and developing that. But
23 I will come back to those points. I think that is true,
24 but this is not the way that he priced. This is
25 a different issue. This is the extent to which, if you

1 got a list price increase, you can use it to push
2 through.

3 Of course the important thing about this tide that
4 lifts all boats is, of course, because it is a sort of
5 coordination theory, what is being said is you
6 coordinate and you have this direct mechanism so you can
7 have confidence that the OEM, the other rivals, are
8 doing the same thing because, if you do not have
9 confidence they are doing the same thing, then actually
10 you will just get competition downwards in a tendering
11 situation.

12 MR RIDYARD: Well, in any coordination story you need to
13 have some way of monitoring what your competitors do.

14 MR BEARD: Yes. That is what I am going to come back to in
15 relation to soft competition. Well, I will deal with
16 orthodox coordination and then the soft coordination
17 story, but in none of those do you have the tools for
18 monitoring. That is part of the problem with all of
19 these situations.

20 So let us just deal with the more orthodox canonical
21 form of coordination. You take the decision at face
22 value. We assume that manufacturers were trying to
23 inflate transaction prices. We pick it up in our
24 closings at -- sorry. In the claimants' closings, they
25 say, "Well, using this sort of orthodox test for

1 coordination, it is somehow setting a theory of harm,
2 establishing a test that could not possibly be passed".
3 But, with respect, that is just not the case. I mean,
4 the question you have got is can coordination be
5 sustained in a particular market, and we have seen that
6 the orthodox coordination approach is what has been
7 developed by the Commission and indeed myriad other
8 regulators around the world in thinking about these
9 issues.

10 MR RIDYARD: Given that we do not know everything about the
11 way the cartel worked, is not the test can we -- on what
12 we do know, can we eliminate the possibility that
13 coordination worked?

14 MR BEARD: Can we eliminate?

15 MR RIDYARD: Because otherwise there is -- there are facts
16 about how the cartel worked in the decision, but that is
17 not the whole story and, you know, for whatever reason,
18 the whole factual story is not available to us in the
19 court, so what do we do with the bits that we do not
20 know about?

21 MR BEARD: Yes, well, what we do is we look at whether or
22 not the conditions exist for coordination to be
23 maintained which are in relation to transaction prices,
24 and that is what Professor Neven is testing by reference
25 to the normal parameters of our market conditions, such

1 as to enable the relevant forms of monitoring and so on,
2 to avoid the agreement problem and the implementation
3 problem which are seen as most significant.

4 MR RIDYARD: Would you -- yes. So one way of monitoring
5 would be to get information about your competitors'
6 transaction prices, and I think we can all see why that
7 would be a pretty difficult task.

8 MR BEARD: It does not work.

9 MR RIDYARD: But there are other ways of assessing whether
10 your competitors have adhered to some coordinated
11 understanding. One would be -- you know, one that was
12 mentioned I think at some point earlier, the possibility
13 of looking at market shares to see whether your
14 competitors had pinched market share off you in an
15 unexpected way and taking a view through that indirect
16 mechanism as to whether they had adhered to ...

17 MR BEARD: Yes, I can see --

18 MR RIDYARD: Have we got the hard information that
19 eliminates that as a possibility?

20 MR BEARD: I think -- let us just go to the market share
21 information that we have because we do have detailed
22 market share information. If we could pick it up in
23 Professor Neven's report, {E/10/28}. So the theory we
24 are discussing now is a somewhat -- it is not the normal
25 orthodox coordination theory where you are monitoring

1 transaction prices directly. What you are doing is
2 looking at market shares and asking, "Are people
3 complying with whatever coordination deal has been
4 done?". If they are, then one would expect that their
5 market share would not be varying because you had all
6 done a deal in relation to how these things were
7 operating, but you --

8 MR RIDYARD: So your proposition is that there are some --
9 so at some point there is a sufficient movement in
10 market shares that you can therefore eliminate the
11 possibility there was collusion?

12 MR BEARD: To be fair to Mr Ward and Mr Harvey, market-share
13 monitoring is not the way that I think the case has been
14 put. I think there was a proposition perfectly sensibly
15 put by you, sir, to them. What we see -- and therefore
16 we have the data that we have here, but you see the
17 volatility in relation to market shares and actually, if
18 we just scroll down, this is basing the market shares at
19 zero in 1994 and then looking at the six major
20 manufacturers, and you just see a vast amount of
21 volatility there.

22 MR RIDYARD: So you are inviting us to say, because of this
23 volatility, we can rule out the possibility that there
24 was collusion where the monitoring was based on checking
25 market shares?

1 MR BEARD: Well, more particularly, Mr Harvey and Mr Ward do
2 not have a basis for saying there was sufficient
3 stability in relation to market share information that
4 enabled this theory to be sustainable. But, yes, that
5 is broadly what we are saying here. You can see it. It
6 is exemplified with Iveco. They essentially plummet
7 downwards in terms of their market share. But it is not
8 just the overall trends, it is also the volatility,
9 because even DAF, who overall, in trend terms, does very
10 well in terms of market share, so it is increasing its
11 market share very substantially over the period, you
12 also see, however, that there are significant
13 fluctuations in DAF's market share. So the idea that
14 you could be looking at this and saying, "Oh, yes, they
15 are playing ball or not", it just is not plausible on
16 the face of it. You just do not have that --

17 THE CHAIRMAN: It is one piece of information that might
18 help you in terms of monitoring if it worked like that.
19 I mean --

20 MR BEARD: Sorry, yes, but what we are testing is whether or
21 not you have got enough -- what we are asking ourselves
22 here is: is there enough information here to make it
23 plausible that people were pushing their prices higher
24 in particular tender processes? Are they pushing their
25 prices higher and holding them higher over time in

1 multiple tenders in circumstances where the rational
2 reaction for any manufacturer competing in a tender,
3 where they think that there is a higher bid being put
4 in, is to undercut that bid -- a supra-competitive bid
5 being put in -- is to undercut that bid. That is always
6 rational.

7 MR RIDYARD: That is always the rational immediate response,
8 but the whole point about coordination is do you then
9 lay that off against the possibility of a reward down
10 the line.

11 MR BEARD: No, no, that is the trade-off in the economics of
12 cartels, I completely understand that. But for the
13 immediate transaction, you are asking -- for the
14 immediate transaction, there is always going to be
15 a rational incentive to undercut the supra-competitive
16 price. The reason why the implementation problem is so
17 problematic is because, unless you can actually see what
18 prices are being put in by others, you do not know
19 whether or not they are complying with whatever deal is
20 done because you do not know what the criteria were that
21 were precisely applied in order for you to lose the bid
22 because you are predicating it on the idea that you have
23 lost the bid here, and then you will think, "Hang on
24 a minute, someone is not playing ball because I have
25 lost that bid". But unless you can see the pricing,

1 there is no way you can go back and say, "But you were
2 not playing ball. These were the rules we were playing
3 by". This is why the monitoring issue is so important.

4 Now, in orthodox coordination I suppose most of the
5 time what you are doing is talking about whether or not
6 you can actually see the transaction prices, and I think
7 it is accepted you cannot here. We are then asking,
8 well, could you work out, from the fact that market
9 shares were changing, that people were consistently
10 cheating in such a way, undercutting, that you could
11 then discipline them.

12 The point we are making is market shares are pretty
13 indirect mechanisms for monitoring at the best of times
14 in these circumstances, if you are not involved in
15 a market allocation cartel, which I think we recognise
16 we are not -- that in those circumstances what you are
17 asking yourself is is that giving you enough information
18 in relation to the particular tendering processes or
19 do you think you are going to get undercut, in which
20 case you may go below the rival because you still want
21 to win the business, because as long as the business is
22 above your -- above the competitive margin, you will
23 still want to win it.

24 So why would you hold a supra-competitive price if
25 you are going to lose in circumstances where you cannot

1 see what is going on with your rivals? Market
2 information of this sort is just too generalised. But
3 Mr Harvey does not have a story that says you have
4 sufficiently granular market information to be able to
5 monitor this in order to be able to sustain
6 supra-competitive prices in relation to transaction
7 prices over time. That is the essence, which is
8 presumably why this was not put forward, because you do
9 not have that sort of level of information.

10 But it is because we have got this dispersion here,
11 this material -- it is all part of Professor Neven
12 looking at the orthodox criteria for assessing
13 coordination and saying, look -- if we scroll back
14 a couple of pages in this, what he is doing is he is
15 working his way through the various considerations that
16 apply when you are deciding whether or not there are
17 likely to be market conditions that will facilitate
18 coordination in relation to the transaction prices.

19 That is when we go back to page -- I think it is
20 page 13. It starts at {E/10/13}. Sorry, maybe if you
21 can go two pages on, I think {E/10/15}. Yes, so this is
22 all in the section, "The characteristics of the trucks
23 market are not conducive to coordination". Then the
24 last thing he considers is market shares. What is being
25 said now is, "Well, would market shares be enough to

1 monitor?". We say, well, this information that we have
2 got just is not -- it is clearly not granular enough and
3 it is showing actually volatility, which suggests that
4 there was not -- it is not consistent with the
5 hypothesis.

6 MR RIDYARD: Sorry, "suggests" and "is not consistent with"
7 are not the same things.

8 MR BEARD: No.

9 MR RIDYARD: Which does it do?

10 MR BEARD: Well, the overall position -- I do not want to
11 lose what Professor Neven is saying here -- is that you
12 have got overall market conditions that are not
13 conducive to coordination, and that is because, as he
14 identifies, there is the lack of transparency in the
15 market, you have got significant numbers of competitors,
16 you have got the complexity of the trucks which make
17 coordination much harder and then you have also got the
18 asymmetry which, as a matter of accepted theory, means
19 that it is going to be harder to coordinate in the
20 market, and it is in that context that he says, "Well,
21 that is not -- all of the evidence I am seeing there,
22 when I just use the orthodox approach to whether or not
23 there is coordination, suggests this market is not
24 conducive to coordination".

25 Now, sir, you are then saying, "Well, look, let us

1 assume we are just talking about a much softer story
2 here, where you cannot coordinate on transaction prices
3 directly and those conditions do not suggest that you
4 can coordinate on transaction prices directly, but you
5 can sort of coordinate on those transaction prices just
6 by reference to that market data". The point I am
7 making is that the market data that is being set out
8 there is not supportive of that mechanism being a way in
9 which coordination can be sustained in relation to
10 transaction prices because it is not sufficiently
11 granular, it is highly volatile and, indeed, of course
12 that was not the case that has been put here in
13 relation --

14 MR RIDYARD: I suppose what I am looking for in all of this
15 is is there some test where we say -- we look at the
16 variation in market shares and we say, "Well, that is so
17 great, that variation, that we can therefore eliminate
18 the possibility of any collusion". I mean, it is one
19 thing to say -- obviously we can all paint a picture of
20 a kind of caricature of perfect collusion, but also we
21 know that, having looked at a number of cartels over
22 time, you know, lots of them are imperfect and have all
23 sorts of wrinkles and breakdowns and everything else.

24 MR BEARD: Yes.

25 MR RIDYARD: So what I think one might be looking for would

1 be some sort of test to say, "This is too much variation
2 and therefore, because of that, I am going to reject the
3 notion that collusion could be happening".

4 MR BEARD: We do not have evidence on what the specific
5 threshold test for market share data alone would be,
6 I think in part because the case has not been put on
7 that basis. The emphasis has been much more on
8 essentially a unilateral approach and, obviously,
9 Professor Neven, in this report, is taking the orthodox
10 approach to coordination, which is taking the decision
11 and thinking about it creating coordination in relation
12 to transaction prices.

13 At the moment, I think that I cannot go further than
14 that because I cannot create some sort of threshold test
15 for you, sir. All I can do is look at the position that
16 has been articulated and say, "Well, when we are talking
17 about transaction prices in relation to particular
18 tenders, is that sort of information sufficient to allow
19 monitoring and enforcement of cartel arrangements just
20 by reference to that market share data?". Now,
21 Professor Neven has deployed it in circumstances where
22 he is saying, "Yes, but it is showing vast amounts of
23 change and indeed asymmetry which is contrary to the
24 conditions conducive to coordination" --

25 MR RIDYARD: But that is the thing. Is it truly contrary?

1 Are there --

2 MR BEARD: I say contrary to it being conducive to
3 coordination.

4 MR RIDYARD: Yes, okay. Fine.

5 MR BEARD: Am I able to stand here and say, "No, that cannot
6 mean there was any coordination"? No, I cannot and
7 Professor Neven did not. He said that it is very
8 unlikely. He did not at any point say it was
9 impossible. So I do not imagine -- I will obviously
10 consult because the market shares are now taking on
11 a much more significant role than they have done
12 previously in the discussion, but I do not think that
13 there will be a bright line. One would have to analyse
14 what the market share fluctuations were and what that
15 information was telling you about the position of the
16 rival OEMs.

17 So I imagine that you would actually have to carry
18 out quite a sophisticated analysis in order to think
19 about the fluctuations and what mattered and what
20 information you could be drawing from that. So I am
21 guessing that it is not entirely straightforward, but
22 all I can do is look at the volatility and the changes
23 and say that, well, on the face of that, it is not
24 obvious that that is going to be sufficient to sustain
25 the softened form of coordination that I think you were

1 putting to Mr Ward.

2 I think the other reference you made in passing to
3 Mr Ward, sir, was about the idea of occasionally knowing
4 particular transaction prices, the possibility that the
5 combination of market shares with occasional transaction
6 price knowledge would be --

7 MR RIDYARD: Well, there were some references to net prices
8 in the decision, were there not?

9 MR BEARD: Yes, well, it is to do with particularly
10 predicting net prices, and I have gone back to the
11 binding findings crystallisation, what the decision
12 means on that. But let us here we do actually have
13 a situation where there is no evidence that you have got
14 prices of rivals when you lost in a bid, and that is
15 what you actually need because we have got situations,
16 occasional situations, where, for instance, Royal Mail
17 would say to us during a bidding process, "Yes, okay,
18 you have got to do better because someone else has come
19 in with a tender at a lower price and we need you to
20 drop down to a certain level". But what we do not have
21 is information, then, if we lose a deal, what the rival
22 won at.

23 It is that sort of information I think, sir, that
24 you were hypothesising might be relevant in these
25 circumstances. I may be wrong. I may be presuming

1 wrongly as to what you were raising.

2 THE CHAIRMAN: I think should we be assuming one way or
3 another, whatever its purpose, that the cartel worked
4 for its participants. I mean, whatever they were trying
5 to do with it, it did carry on for 14 years.

6 MR BEARD: It did.

7 THE CHAIRMAN: One would assume that, if there was the sort
8 of cheating that Professor Neven is postulating if there
9 is no effect of enforcement, that that would have
10 emerged at some point during that 14 years.

11 MR BEARD: Well, they are a big bunch of assumptions there
12 against which we are testing --

13 THE CHAIRMAN: Yes, because we do not know the facts so --

14 MR BEARD: Well, we do know a lot of the facts about the
15 pricing and we have an awful lot of the data here. That
16 is the point I am making. We have an awful lot of the
17 data about what the impacts are and this case is about
18 the impact of it. We are not quarreling with the cartel
19 position.

20 THE CHAIRMAN: Right, and what Professor Neven does is he
21 sets up how a collusion -- he postulates a form of
22 coordination and then knocks it down by saying, "But you
23 could not monitor it and it could not properly be
24 implemented". But do we not assume or are we not
25 entitled to assume that, however it worked, it did work

1 and there was no effective cheating and there was some
2 form of monitoring that enabled it to carry on for
3 14 years?

4 MR BEARD: No, you are not, sir, for two reasons. First of
5 all, just a correction, it is not Professor Neven's
6 theory of coordination. This is the canonical approach
7 to coordination. He is not plucking this stuff out of
8 the air. He is taking it from guidelines, economic
9 literature --

10 THE CHAIRMAN: Yes, but we do not know whether there was
11 coordination over transaction prices, so he is
12 postulating that and saying, "but it could not work".

13 MR BEARD: Yes, the key thing is "work" because the finding
14 of infringement is not in relation to coordination of
15 transaction prices, so whatever you are inferring from
16 the Commission decision, you cannot just infer that
17 there was in fact an impact on transaction prices. That
18 is precisely what we are here testing.

19 THE CHAIRMAN: That is not what I am saying.

20 MR BEARD: I am so sorry.

21 THE CHAIRMAN: I am saying that it worked and it was
22 effective for whatever its purpose was and there must
23 have been, therefore, effective monitoring because,
24 otherwise, why would these rational economic enterprises
25 stay in it for 14 years?

1 MR BEARD: Well, I think there may be just a jump that, sir,
2 you may well be making, that, yes, we are going to
3 assume that the liaison that operated at headquarters
4 and then through the German subsidiaries that exchanged
5 this information that is identified in the decision,
6 that worked in that it kept going and that information
7 was shared. Did it work in the sense of having an
8 impact on transaction prices? Now, that is not what is
9 dealt with in the decision. That is not the
10 infringement and that is precisely what we are testing
11 here, whether this decision did or could work here.

12 The "did work" in the sense that you are using,
13 which is work in having an impact on transaction prices,
14 we are testing through the econometrics and we are
15 saying it did not work in that sense. Whatever was
16 going on, conjure the most nefarious arrangements, it
17 did not work. That is what the econometrics tells us.

18 Then, in relation to theory of harm, we are looking
19 at it and saying, "Well, given what is actually found in
20 this infringement, the binding findings of infringement,
21 does that fit with a theory of harm that is saying,
22 well, it could work here?". What is being said is --
23 Mr Harvey has said, well, it is possible it could work
24 here and Professor Neven is criticising the basis on
25 which Mr Harvey does that, but he is also saying,

1 "Actually, I think, when you look at what we know and
2 how you have to be able to coordinate in order to
3 sustain the prices or fulfil the criteria for unilateral
4 effect or think about the rising tide that lifts all
5 boats, any which way you go in relation to this, I think
6 it is very unlikely it is having an effect". So he is
7 saying it is very unlikely it is working in the sense
8 that, sir, you are taking it.

9 Of course it is very important to maintain two
10 things. One is the way in which he carries out the
11 econometric analysis, he is using the orthodox
12 principles of econometrics and just carrying out the
13 scientific analysis of that data and that analysis.
14 Secondly, when he is looking at the theory of harm
15 issues, he is of course recognising that there can be
16 a situation where, although he thinks it is unlikely,
17 there is something that has not been envisaged that does
18 not fit with his approach that means it does in fact
19 occur. But is it right for him to test all of these
20 things separately using the different tools that you
21 have? Obviously, yes, and that is exactly what he is
22 doing here.

23 So I think the problem is you can make presumptions
24 about the cartel or the infringement working in terms of
25 what actually went on. What you cannot make

1 a presumption about is that it worked in terms of
2 impacting transaction prices because that is precisely
3 what we are here testing.

4 THE CHAIRMAN: Okay. Shall we break there?

5 MR BEARD: Please.

6 (1.03 pm)

7 (The short adjournment)

8 (2.00 pm)

9 THE CHAIRMAN: Mr Beard.

10 MR BEARD: Thank you, sir. I am conscious I am going to
11 have to move things along slightly more quickly.

12 THE CHAIRMAN: Yes. We will let you do so.

13 MR BEARD: No, the questions are very helpful so it is
14 useful to understand what the concerns you have are, so
15 please, questions are very welcome, but I will just try
16 to move things along a little bit more quickly because
17 I have a reasonable amount to get through by tomorrow
18 lunchtime and maybe to take stock when we pause at the
19 end of the day.

20 Just a couple of further points on the issues to do
21 with monitoring which go to general coordination, theory
22 of harm and also the sort of softened theory of harm.
23 I have made the point about how DAF does not know about
24 the outturn prices it loses to. I think it is also
25 worth just mentioning in passing that of course when

1 this question about the extent of monitoring is to be
2 considered, it is to be considered in the context of two
3 further factors.

4 The first is that of course we have
5 Professor Neven's mystery shopping exercise that he
6 carried out, which is obviously an idealised mystery
7 shopping exercise. He is assuming you can get perfect
8 information about actual prices and what would that tell
9 you in terms of monitoring. So, obviously, in real
10 mystery shopping, you do not necessarily get anything
11 like the precise prices, particularly when you are
12 talking about trucks which would involve all sorts of
13 negotiation, but nonetheless he provides the relevant
14 evidence about that in his second report and I will just
15 give you the references: paragraph 2.13 and then
16 annex A. You will recall that Mr Harvey made some
17 points about, "Well, actually, you can see some broad
18 scale as to where the prices were going", and he
19 explained how -- Professor Neven explained how that
20 point really did not take Mr Harvey anywhere because
21 what you are talking about is a dispersion, an
22 uncertainty in the mystery shopping, which is around the
23 same scale as these sort of list price increases.

24 It is just worth bearing in mind, we talk about list
25 price increases. We must not fall into the trap of

1 thinking that list price increases are somehow sinful in
2 and of themselves. What we are talking about is list
3 price increases being higher by reason of the
4 infringement. That is the case that is being put.
5 There is no criticism of list price increases being made
6 and that point about Mr Harvey's criticism is dealt with
7 in the joint expert statement at {E/77/19}.

8 The other point which I will be coming back to is
9 one of Mr Ward's other *cris de coeur*, which is that
10 there is a terrible information asymmetry, and I am
11 going to want to put that in a good deal of perspective
12 because we have tens of thousands of documents here,
13 both from disclosure and from the file, so there has
14 been a huge disclosure exercise in addition to the
15 material that was before the Commission. So when we are
16 talking about these things, it is obviously true that
17 not everything will always have been written down, but
18 it is instructive, when you have had such a full
19 disclosure exercise, whether or not documents exist that
20 support what Mr Ward is suggesting to the tribunal.

21 Now, I have been focusing on the coordination story.
22 I am going to very briefly deal with essentially
23 unilateral. We are back in the territory of
24 Professor Harrington's theory. There are two massive
25 problems with the reliance on this. The first is, as

1 far as we are aware, there is only really one unilateral
2 transaction price elevation theory out there, which is
3 from Professor Harrington, and the key thing is that he
4 puts in place a series of very strict conditions
5 effectively that need to be met in order for that to
6 apply.

7 So the two problems are, first of all, the saying
8 "essentially unilateral" is actually misreading what
9 that project is engaged in. It is saying it is an
10 exceptional thing for there to be a unilateral theory of
11 elevation of transaction prices. You cannot just take
12 it as some kind of central example and extrapolate
13 outwards because there are key conditions that have to
14 be met.

15 The second point is there is no good reason to think
16 that those conditions were in fact met here. To be fair
17 to Mr Harvey, he does not suggest that. He recognises
18 there are not other unilateral theories but he does not
19 suggest that this one actually applies.

20 I just want to very briefly go back to the paper,
21 which is at {I4/289}. If we can just pick it up on
22 page 2, {I4/289/2}, going down to the bottom of the
23 page, you will see there at the bottom:

24 "The lack of a well-accepted treatment of the
25 sharing of prices is at least partly due to the absence

1 of a well-established theory of harm."

2 In other words, this is a problem that economists
3 are beginning to -- are grappling with and that
4 Professor Harrington's approach is him trying to put
5 together what he refers to as a "missing theory of
6 harm". If we just go over the page, {I4/289/3}, he
7 says, {I4/289/2}:

8 "This missing theory of harm exemplified by the EU's
9 view that the exchange of prices is potentially harmful
10 because it 'reduces strategic uncertainty'. However,
11 there is no theoretical or empirical bases upon which to
12 conclude that less 'strategic uncertainty' among firms
13 implies higher prices for consumers."

14 This is all part of the idea that you can reduce
15 strategic uncertainty but that does not necessarily feed
16 through to higher prices.

17 Now, the European rules and our UK rules on
18 competition say, "Reduction of strategic uncertainty,
19 you are done, there is an infringement here", which is
20 essentially what is found in the infringement that we
21 are dealing with. But what he is saying as an economist
22 is, actually, that sort of approach is not justified.
23 Indeed he says that there is no theoretical or empirical
24 basis for this. Now, a different policy choice has been
25 made in Europe but he is saying actually you need to be

1 cautious about this.

2 This is actually all part of a whole longer-term
3 story about the uncertainty as to whether information
4 exchange is a good or a bad thing, whether or not it
5 should be infringing or not. There was an infringement
6 in relation to construction companies a little while
7 ago, it was albeit in relation to bid-rigging, but it
8 turned out that various of the textbooks that were
9 available to construction lawyers suggested that this
10 sort of conduct was exactly what you should engage in
11 efficiently in relation to a market. Whilst there are
12 not textbooks suggesting such things in relation to
13 trucks, in relation to information exchange there is
14 undoubtedly a much longer-term uncertainty as to when
15 information exchange is or is not problematic. So
16 sometimes when we are thinking about, well, one should
17 always assume that everyone knew that there were ground
18 litigation risks in relation to information exchanges,
19 that is not a proposition that one wants to accept too
20 readily.

21 Now, if we carry on down -- I picked up on
22 paragraph 2 and the strategic uncertainty. I can
23 probably then go to the annex to our submission, which
24 is at {S/13}. There we see in S/13 just a summary of
25 the four key problems with the Harrington model that

1 have been identified. As we know, the Harrington model
2 requires strict conditions, what came to be referred to
3 as the "Goldilocks window", for costs of changing prices
4 had to be met. You will recall that Professor Neven
5 gave evidence about how the range of that might be
6 expected to be quite small.

7 Now, Mr Harvey, as I say, to be fair to him, has not
8 said that those conditions were actually met and there
9 was a point put by Mr Ward in cross-examination, which
10 we deal with at 6, where it was suggested that there
11 would be a material cost, but it appeared that there
12 might well be a misunderstanding on the part of Mr Ward
13 in relation to how those costs would be dealt with and
14 assessed in relation to these issues because, of course,
15 what the concerns are are related to particular
16 incremental costs in relation to the calculation of k ,
17 the Goldilocks cost condition.

18 Then the second issue was in relation to z , which
19 was another cost issue. There, undoubtedly, there was
20 some confusion because Professor Harrington's costs,
21 which concerned the cost of the risk of litigation, that
22 cost is concerned with, as is put there, the cost above
23 and beyond the cost of unilateral provision of
24 information. The irony there is that the situation in
25 the EU is that unilaterally providing the information

1 would give rise to the risk of litigation and therefore
2 the incremental cost of reciprocal exchange does not
3 actually fit with Professor Harrington's model.

4 The third point, if you remember,
5 Professor Harrington's model essentially comes out with
6 a story initially that there are potentially two stable
7 equilibria, high price equilibria, low price equilibria,
8 that is why z is so important to move
9 Professor Harrington's model to the high-priced
10 equilibrium, but in considering those issues -- and
11 Professor Neven pointed out there is no discussion about
12 how you would actually identify those levels, and that
13 was an inherent problem with Professor Harrington's
14 report.

15 Then the fourth point was, as Mr Harvey accepted,
16 that effectively there is a -- within the maths of
17 Professor Harrington's model there is a mechanical
18 relationship between list prices and transaction prices.
19 So it is a bit like a tide that lifts all boats
20 condition but a very tight one that is required, and for
21 the reasons we have been exploring, that is not met
22 here.

23 Then the final point, to pick up at paragraph 14,
24 over the page, {S/13/4}, illustrating this is the fact
25 that list price increases did not match what was

1 actually implemented in the UK. We are going to come
2 back to that when I look at some of the
3 claimant-specific material.

4 So essentially unilateral does not work conceptually
5 and unilateral does not work in fact given the tight
6 parameters of the model.

7 There are a couple of other issues I should just
8 pick up. I said earlier that one of the ways in which
9 Mr Ward tries to put these things forward is by talking
10 about mechanisms and he talks about the IKP surcharge
11 and target margins and mandate structure and says,
12 "Well, look, there could be effects through the
13 infringement conduct that would mean that those
14 parameters that are used in the pricing process would be
15 affected". But it is worth remembering, as I mentioned
16 at the outset, these are mechanisms; mechanisms either
17 to fit within the Harrington model or to fit within
18 a coordination model. They were ways in which prices
19 would be influenced, so they do not sidestep any of the
20 discussion about theory of harm.

21 We have however dealt with these matters in our
22 closing, if we could just pick it up at {S/10/85}. This
23 is under the heading -- under the section on mechanisms,
24 picking it up from 235. As I say from 236:

25 "The key problem with all of these 'mechanisms' is

1 that ... they are simply potential means by which either
2 coordination or unilateral effects arise."

3 So you are essentially recycling background
4 considerations into your coordination mechanisms or your
5 unilateral effect mechanisms.

6 It is pointed out in 237 that, notwithstanding the
7 extensive data, Mr Harvey has not carried out any
8 empirical analysis in relation to how these mechanisms
9 would work.

10 But let us just flip over the page, if we may, and
11 go to 241, {S/10/86}. You will see there that there is
12 a cross-reference to our third annex to these closing
13 submissions which set out the key points about the
14 pricing mechanisms. Then if we go to 242, we deal with
15 the IKP surcharge:

16 "The suggestion appears to be that DAF NV might have
17 increased the IKP surcharge ..."

18 So that is the amount added to the MLO cost.

19 "... to generate an artificially higher IKP cost
20 than that which would have been obtained in
21 the counterfactual. That would have had the ...
22 effect of communicating to DAF UK that IKP cost had
23 increased ..."

24 Now, it is not clear how that fits through the
25 unilateral mechanism of Professor Harrington and, of

1 course, if you are saying, "Well, this is the way that
2 DAF NV was trying to secure a coordination of
3 transaction prices", it is very unclear how that solves
4 any of the monitoring and implementation problems that
5 we were discussing before the short adjournment. But
6 there are some more points here that are important.

7 First of all:

8 "The IKP surcharge was a measure of actual costs
9 until 2003 or 2004 ..."

10 So the idea of it being used as a mechanism for any
11 sort of manipulation up till 2004 just does not make
12 sense.

13 MR RIDYARD: Mr Beard, does that mean that IKP was exactly
14 the same as MLO up until 2004?

15 MR BEARD: No, it was not the same, but it was a set
16 surcharge, I believe, in relation to the IKP surcharge.
17 I will double-check that because we have the reference
18 there.

19 THE CHAIRMAN: Set by the M&S director?

20 MR BEARD: No, I think the target margin was there.

21 MR WARD: Yes.

22 MR BEARD: I will check that and revert in relation to it.

23 In relation to (b), {S/10/87}:

24 "Mr Habets explained that, after 2004, the decision
25 at Board level was that the IKP surcharge should be

1 changed in order to disguise falls [as he put it] in MLO
2 costs from DAF's local sales units."

3 So it was not actually increasing the surcharge in
4 these circumstances.

5 MR RIDYARD: Sorry, is that right? If costs were going down
6 and the IKP was used to disguise the fall in costs, then
7 it was raising the surcharge.

8 MR BEARD: Sorry, it is an arithmetical increase. What it
9 is not doing is moving the total IKP cost higher than
10 the previous IKP cost with the surcharge. You are quite
11 right to correct me, sir. Sorry. That is absolutely
12 right.

13 So just for your notes, in relation to the IKP
14 surcharge being an actual cost measure, the reference is
15 to Mr Habets' evidence, which is {D/IC23/15},
16 paragraph 6. So that goes back to the point today --
17 paragraph 61. I am so sorry. I misread. Thank you to
18 Ms Mackersie.

19 Then picking up (c), you have obviously got this
20 issue in relation to IKP cost. The dealers were not
21 seeing that. So -- I think we picked this up
22 previously -- at the most it could affect negotiations
23 between DAF UK and customers, direct customers, or
24 DAF UK and dealers, but it did not -- the dealers
25 themselves did not see these costs and they were the

1 ones engaged in discussions with customers directly for
2 50% of the sales.

3 The final point to just bear in mind is that it
4 assumes that DAF UK understood changes in IKP to be
5 signals of cost increases, but Mr Ashworth, in this
6 regard, considered the IKP numbers did not actually tell
7 him very much and he did not treat them as signals on
8 the basis of his evidence. So that is in relation to
9 IKP.

10 So just taking it in layers, mechanisms are not
11 theories of harm themselves and, in relation to that,
12 not having been tested. Then, in fact, when we come to
13 the IKP surcharge, there are significant reasons why
14 suggesting that that is somehow a mechanism does not
15 itself make sense.

16 Then if we move to target margins:

17 "It was suggested by Mr Harvey that DAF NV might
18 have increased the target margins above the level that
19 would have been obtained ..."

20 This would then have "increased the target margins
21 seen by DAF UK" and then "might have resulted in DAF UK
22 negotiating higher transaction prices". I think it is
23 worth bearing in mind the evidence of Mr van Veen which
24 is highlighted at 243(a), which is that the board level
25 would be setting an overall target margin, but then

1 there was a much more complicated breakdown by model and
2 country of target margins, and:

3 "Any theory of effects in the UK market would
4 therefore depend on how the Board's general instruction
5 was translated into target margins in the UK."

6 Such that you could end up with a situation where,
7 even if the board, which is supposedly being influenced,
8 moved the target margin upwards, you have not got any
9 necessary impact on the actual target margins applied in
10 the UK and, of course, as with IKP costs, dealers do not
11 see those target margins at all.

12 If we move to mandate structure, {S/10/88}, the
13 suggestion there was that:

14 "... DAF NV might have rejected more transactions
15 that were passed to it from DAF UK under the mandate
16 structure. This might have led DAF UK to anticipate
17 that more [deals] [sorry, there is a typo there, it
18 should be 'deals' rejected] would be rejected, which
19 might in turn have led them to try harder to get better
20 prices from customers ..."

21 So the idea is essentially DAF NV is manipulating
22 the mandate structure and sending signals back down to
23 DAF UK by refusing to approve deals otherwise.

24 MR WARD: Would it help if I explain that is not the case?

25 Well, I will do it in reply. It is fine.

1 MR BEARD: What we say is that that is the way in which the
2 mandate structure would potentially have this impact.

3 Mr Ward, I am sure, will explain his case on this in due
4 course, but in order for that to operate -- as I say, it
5 is only a mechanism, it does not solve any of the
6 implementation problems, in any event, but there are
7 a couple of points to be made here.

8 Picking up points we have made previously, the
9 mandate structure itself was not introduced until
10 October 1998, so seeing that as the mechanism seems
11 rather odd when it did not exist at the start of the
12 infringement period and, of course, between 1998 and
13 2003 we know that DAF NV had rather limited oversight of
14 whether deals were being sent to it and Mr Harvey
15 himself accepted that that would attenuate the force of
16 any putative effect of this mechanism.

17 The other important plank here is the unchallenged
18 evidence of Mr van Veen that only a couple of
19 transactions a week were actually rejected at the level
20 of DAF NV between 2003 and 2007, the idea being that, if
21 you are trying to put pressure on DAF UK, refusing to
22 approve them would be sending that signal. I think the
23 other way that Mr Ward seeks to put his case is, "Well,
24 people would negotiate differently in order to avoid the
25 mandate structure", but, again, that does not assist in

1 relation to showing how you have a mechanism for higher
2 prices nor how it could be monitored or enforced. So we
3 end up with the implementation problem again.

4 So we say casting these matters as mechanisms does
5 not solve your theory of harm analysis and indeed it is
6 a theme running through Mr Ward's submissions that he
7 tries to drift away from the economic theory that
8 a theory of harm analysis would embark upon and tries to
9 refer to these sort of mechanisms without grappling with
10 how you would maintain higher prices by using them.

11 That takes us back, as I say, to that implementation
12 problem, that it is all very well saying, "Well, DAF NV
13 might have tried to manipulate prices", but if you are
14 being undercut by someone else whose pricing cannot be
15 monitored, then none of these mechanisms are enabling
16 the sort of coordination or indeed unilateral effect
17 that the theories of harm are canvassing.

18 I touched earlier on a sort of variant on Mr Ward's
19 themes on theories of harm, which was the rigged market
20 approach. I think just a couple of additional points
21 I want to pick up here. The first is the idea of the
22 rigged market in relation to transaction prices and
23 tenders.

24 As I said earlier, it is not pleaded in those terms
25 at all and indeed, as I said previously, in case

1 management process it was said DAF had previously said,
2 "You know, we think this should all be dealt with, but
3 with all of the manufacturers together in a trial".
4 Now, that was not ordered and we understand that. But
5 I think if the contention had been, "Well, DAF's prices
6 were higher because everybody else's prices were
7 higher", and that that was how the case was being put in
8 relation to the particular tenders and deals done by the
9 claimants, it is easy to see how that might have been
10 thought about rather differently because otherwise you
11 are left in the position, as I said earlier, that
12 Mr Ward is sort of inviting you to assume price
13 increases on the part of other manufacturers which
14 I should say, in other proceedings, they are all
15 denying.

16 They are all denying any overcharge because --
17 obviously we have other trials coming up in the future,
18 we know what the pleadings are there, and so one needs
19 to be extremely cautious about Mr Ward's assumptions in
20 relation to other manufacturers here, which is why you
21 end up thinking about theories of harm rather than being
22 able to make presumptions about other individual
23 entities, because you simply cannot do that, otherwise
24 you would be in very much a bootstraps argument dealing
25 with these things.

1 MR RIDYARD: Most cartel theories do proceed on the basis
2 that there is more than one firm involved and they are
3 horizontal competitors and they are all raising prices.

4 MR BEARD: Let us take it in stages. Obviously the solo
5 tango does not exist and you need more than one person
6 to be part of a cartel. Obviously true. It is also
7 obviously true that when we are thinking about cartel
8 infringements, there are concerns about the impacts on
9 prices. That is entirely true. But when you are
10 dealing with damages claims where the argument is that
11 the transaction prices were higher and that is what is
12 being tested -- and that is what we are here dealing
13 with in relation to DAF -- you cannot possibly say,
14 "Well, we are going to spend eight and a half/nine weeks
15 discussing whether or not DAF increased its prices by
16 actually doing some econometrics and looking at data and
17 looking at evidence and so on, but for the purposes of
18 assessing whether or not there was a sustainable theory
19 of harm, we are just going to assume that what you are
20 testing here has been proved in relation to all of the
21 other manufacturers". You just cannot do that. That
22 cannot be the basis on which you proceed. That is why
23 this rigged market story that Mr Ward conjures is
24 problematic. Yes, collusion in relation to the
25 infringement decision; no, you cannot assume that in

1 relation to the particular tenders.

2 Before moving on, I think I need to deal very
3 briefly with just emissions. There are two points here.
4 One is to do with emissions pricing, where we set out in
5 our submissions, in particular at paragraph 216 onwards,
6 {S/10/80}, the problems that arise in relation to any
7 sort of coordination in relation to emissions pricing,
8 you know, agreements, monitoring and so on, and how
9 that -- equally we see no reason why the unilateral
10 theory of harm could apply there. I am not going to go
11 back and repeat those points.

12 There is also another aspect to the theory of harm
13 in relation to emissions, which is about timing of the
14 introduction of emissions. There I think we have little
15 more to say than two things. One is we do not
16 understand how this actually impacts or is said to
17 impact pricing in relation to any of these matters and
18 the second is that the dates for the actual introduction
19 of the various emissions standards were not right at the
20 end of the relevant period at which they were required.
21 We see that and I just give you the
22 reference: Professor Neven's report, the theory of harm
23 report, table 1, {E/34/20}.

24 There is one matter on this that I do need to just
25 pick up, which is that in the claimants' submissions

1 there is an assertion at paragraph 127 that Mr Borsboom
2 could not assist on how collusion on timing was
3 implemented within DAF. Now, what the evidence given by
4 Mr Borsboom on this topic did was explain very clearly
5 how it was engineering-driven, the whole process for
6 setting the timetable for the implementation of the new
7 models compliant with the relevant emissions standards,
8 and in relation to those matters, clearly he set out
9 very full evidence about how these matters were dealt
10 with.

11 There is a plea at some point in the claimants'
12 submissions that there is an evidential gap in relation
13 to these materials, but to reiterate a point that was
14 made at the time: there was never a request for further
15 disclosure in relation to those matters, notwithstanding
16 the vast amounts of disclosure that have been provided
17 in this case.

18 So, with that, I am going to pause on theory of harm
19 and move to claimant-specific evidence, but I see
20 Mr Ridyard --

21 MR RIDYARD: I do not want to take you off-flow but I have
22 a couple of questions that I just wanted to sweep up.
23 One was you mentioned that this was an information
24 exchange case, the implication being it was not as
25 self-evidently serious as a proper cartel -- a bit of

1 a paraphrase but you have made the point about
2 information exchange. I remember in your openings you
3 made a point, "Well, this is not as bad as some other
4 cartels", and I think you gave a reference to the *Dole*
5 case.

6 I just wondered, in your closing arguments have you
7 positioned this cartel offence against other ones for us
8 to see where it falls in the spectrum of cartel cases?

9 MR BEARD: No, we have not tried to set out a hierarchy of
10 sin. That does not feel to us -- it is not going to
11 help here.

12 MR RIDYARD: I thought that was the argument you were
13 making, that this is somehow less serious than other
14 infringements.

15 MR BEARD: No, we were just talking about the
16 characterisation of what there is in the decision.
17 I will come back to it when I refer to the binding
18 findings judgment, but what we see is an awful lot of
19 material about information exchange in relation to gross
20 list price increases and there are some elements that
21 amount to agreements. But the point I was making was
22 that, in relation to what is characterised in the
23 decision, there is a lot of emphasis in relation to
24 information exchange and therefore, when we are thinking
25 about how does it work, it is obviously relevant to be

1 thinking about how we consider information exchange
2 infringements in relation to the characterisation of
3 this decision.

4 It is not doing more than that. *Dole* was different
5 because that was specific future price changes being
6 provided on a weekly basis by the two rivals and an
7 agreement being reached in relation to it. That was the
8 only point I was making so I am not trying to --

9 MR RIDYARD: Position this against other ones?

10 MR BEARD: No, it is not really a valuable exercise to
11 try --

12 MR RIDYARD: That is fine. I just wanted to understand
13 where you were on that.

14 MR BEARD: I am only dealing with what is in the decision
15 and the only point I was making was a lot of what is
16 focused on in the decision is about information exchange
17 and therefore it is material to think about the economic
18 and factual considerations that pertain to information
19 exchange.

20 MR RIDYARD: Fine. The other point is a very specific one
21 which I read when I was going through your closing
22 submissions, and it was to do with that Oxera report and
23 the 7% -- 7.5% of cases showing no effect and the 93%.
24 I cannot find it now, but you made a comment in there
25 saying that that 93/7 ratio was misleading because there

1 was a sort of sample selection problem.

2 MR BEARD: Yes.

3 MR RIDYARD: Do you -- you do not have to answer it now but
4 do you give any kind of reasoning, any kind of evidence,
5 beyond that --

6 MR BEARD: I will have to go and check the source for that.

7 I think I know where it comes from, but I will come back
8 to that.

9 MR RIDYARD: I have often heard that sort of said and it has
10 always struck me as an interesting proposition, but
11 I have never seen it bottomed out anywhere.

12 MR BEARD: Honestly I cannot remember. I think there is
13 a separate source for that and so perhaps that is one we
14 will check overnight and revert on.

15 MR RIDYARD: Perfect.

16 MR BEARD: Thank you.

17 With that, I am going to move to some of the
18 claimant-specific evidence, if I may. So this is
19 contemporaneous evidence about the circumstances of
20 truck purchases by these claimants and, obviously, we
21 have set out our case on this in section 3 of our
22 closings.

23 I will cover it broadly in three areas. First of
24 all, given Mr Lask' objections -- he was focused on
25 timelines, but I think his objections apply whether or

1 not we put the references to evidence diagrammatically
2 or not. So the first area I will deal with is why the
3 tribunal can and indeed must have in mind this evidence.
4 Then I will look at what the evidence shows, including
5 picking up one or two of the points about Mr Ward's
6 mechanisms and how they are supposed to be influential.
7 Then I will also pick up -- in doing that, I will look
8 at the timelines. I will look at the timelines there.
9 Then I am also going to pick up some of the other points
10 that Mr Ward argued for on how the infringement might
11 have affected his clients, with the allegations focusing
12 on conduct in the UK. I want to go to one or two of the
13 documents here.

14 So why the tribunal can and should have regard to
15 the evidence. It feels like a slightly odd submission
16 to be making about claimants, saying that you should not
17 consider this material and it should bear no weight
18 because normally contemporaneous documentary evidence is
19 seen as highly relevant. Indeed documents are often
20 cited as not having faded memories and so on. Mr Lask
21 protests, "Oh, well, there are all sorts of gaps in
22 relation to this", but actually this is a case in which
23 we have a vast amount of documentary material. I am not
24 going to say every possible document that existed during
25 the time period is there. That is obviously not true.

1 Some of it could well have been lost or destroyed. But
2 there is a huge amount of material in relation to both
3 the Commission file and the disclosure that subsequently
4 occurred in relation to this and therefore the
5 protestations of gaps are really not fairly made in
6 relation to these matters.

7 Now, Mr Ward in his submissions was asked by
8 Mr Ridyard was it his case that it was impossible for
9 the tribunal to conclude that any average market-wide
10 overcharge did not apply to Royal Mail and BT based on
11 evidence about their transactions. Mr Ward was keen to
12 avoid the word "impossible" but he came as close to
13 impossible as he felt able to do so without necessarily
14 agreeing with Mr Ridyard. So he did not say it was
15 formally irrelevant, this material, but he was coming
16 pretty close. We say that is plainly wrong.

17 Now, I am going to just deal with the lines that, in
18 particular, Mr Lask set out in support of those
19 propositions, and they are broadly four. He said,
20 "Well, we have got evidence from the experts, there is
21 a disclosure ruling, we have got information asymmetry
22 and then there was reference to the principle of
23 effectiveness". In passing there was reference to
24 *BritNed*, but I will probably come back to *BritNed* in due
25 course. But let us deal with those four first.

1 So Mr Lask's first line was an extremely odd
2 proposition as a basis for excluding reference to
3 relevant contemporaneous documentary material. He says,
4 "Well, the economists had agreed that effective analysis
5 of the level of overcharge could only be carried out at
6 a market-wide basis and controlling for different
7 factors". We recognise that that is true for the
8 econometric analysis. There was something of a flavour
9 in some of Mr Lask's submissions that we were trying to
10 avoid the econometric analysis, but I do hope, if I have
11 achieved nothing else over the last day and a half,
12 I have at least indicated that we are very much
13 committed to the importance of the econometric analysis
14 and therefore it is in addition to that, not as
15 a substitute for it, that we refer to the relevant
16 contemporaneous material.

17 We consider an economic regression is the right
18 approach to analysing data. It must control for the
19 relevant factors. Indeed the submissions I have set out
20 indicate why we say that Mr Harvey has actually failed
21 to do that.

22 But none of this suggests that we should ignore
23 contemporaneous material or that we are somehow bound to
24 say, "Okay, the economists could only analyse this on
25 a market-wide basis because of the data, but then we

1 must treat these claimants as subject to the market-wide
2 overcharge". That just does not follow at all. There
3 is no basis for that constraint. The economists both
4 recognised that what they are generating is an average
5 market-wide overcharge, but it is an average, if nothing
6 else.

7 DAF also says that, you know, even if the tribunal
8 is with Mr Harvey to any extent in relation to his
9 regression analysis, you do then need to consider
10 whether or not the average that he has calculated is
11 relevant and applicable to these particular claimants
12 because it is these claimants, not the market, which is
13 bringing the claims before you.

14 To that extent, we say, looking at the
15 contemporaneous material is relevant and indeed, as we
16 also say, acts as a sense-check on a number of the
17 submissions that have been made in somewhat general
18 terms by the claimants in relation to the position.

19 I am just going to take you very briefly to one
20 authority. It is the *Peugeot* case, authorities
21 bundle {AU/6.2.1} at page 11. This is only a disclosure
22 ruling. We are not saying this is some sort of binding
23 conclusion. It is Lord Justice Green, as he now is,
24 picking it up at paragraph 21. So there is an argument
25 going on about what should be disclosed. I am not going

1 to indulge further in the delights of that. But just
2 picking it up at paragraph 21, {AU/6.2.1/11}:

3 "In principle I start from the proposition that it
4 is desirable for econometric analysis to be capable of
5 being benchmarked, or capable of being placed into
6 context, by internal disclosure. Many econometric
7 analyses involve the making of assumptions about how
8 markets work. If those assumptions turn out to be
9 incorrect, wholly or partially, then the resultant
10 statistical analysis may be materially flawed. It is
11 also commonplace that the very best experts, and those
12 most versed in market knowledge, are the middle and
13 senior managers employed [by] the ... companies who on
14 a daily basis live with the intricacies of their
15 markets. If, to take a hypothetical situation, an
16 expert generated an econometric model which then turned
17 out in court to collide with the inferences properly to
18 be drawn from internal disclosure then it would have
19 been far better for the expert to have grappled with
20 that inconsistency and attempted a reconciliation at the
21 earliest possible stage in preparation for litigation."

22 He is saying much better than to be challenged in
23 cross-examination. Now, we completely accept this is in
24 the context of him saying, "Look, let us get this
25 disclosure out there, then the experts can think about

1 it". But the basic proposition which is being referred
2 to there, which is econometrics, it is not the be-all
3 and end-all if you have got contemporaneous material.
4 You do not exclude the consideration of contemporaneous
5 material seems to us to be an obvious and unimpeachable
6 statement.

7 Indeed, of course, it is what drove the fact that in
8 this case -- and this takes me to my second point --
9 disclosure has been ordered in relation to lots of the
10 negotiation and what was called "communications data",
11 the contractual materials in this case.

12 We have disclosure -- I am not going to take you
13 through all the disclosure orders, but we had disclosure
14 of contractual documents in March 2018, we had
15 disclosure of what has been referred to as
16 "communications and negotiations material"
17 in April 2019, and those documents included material on
18 pricing to the claimants, both internal communications
19 within DAF about proposed pricing to Royal Mail and
20 approvals and communications between DAF and Royal Mail.
21 I mean, there are several thousand of these documents
22 that have been disclosed.

23 Now, those are not irrelevant. They do not simply
24 have to be considered by the economists only in the form
25 of being part of an econometric analysis. They can be

1 considered alongside that material.

2 The claimants refer to Mr Justice Roth's disclosure
3 ruling, and this is in their closings annex, which is
4 {S/9/444}. That does not look like the right reference.
5 I want to go back to paragraph 13. I think two pages
6 perhaps might do it, if we go back, {S/9/438}. So this
7 is the disclosure judgment that Mr Lask put a great deal
8 of weight on. What the disclosure judgment -- these
9 quotes set it out -- was considering was making sure
10 that the economists were not ships passing in the night;
11 in other words, they were not developing completely
12 different models on the basis of completely different
13 data. He says:

14 "... [determining] the issues of causation and
15 quantum so that disclosure can be tailored accordingly."

16 If we go down the page, there was an emphasis on --
17 sorry, if we could go over again, thank you, 13.4,
18 {S/9/439} -- no, let us leave it at 13.3. That is
19 great. The highlighted paragraph -- sorry, I am dancing
20 around.

21 "It is unlikely to be realistic in these cases for
22 the issues to be approached by examining each price
23 charged for each transaction subject to the claim and
24 seeking to ascertain how any antecedent exchange of
25 information or coordination between the OEMs may have

1 influenced that price (whether directly or by reference
2 to a gross price)."

3 Well, no issue there. This is the sort of pure
4 bottom-up approach that was adopted in *BritNed*, where
5 you look at the particular negotiations related to
6 a particular contract and identify those particular
7 exchanges to try and come up with a counterfactual price
8 by looking at those detailed exchanges. Everyone has
9 accepted that is not what we are doing here. We are
10 doing an econometric analysis. But the fact that you
11 say, well, you do an econometric analysis overall, does
12 not mean then that you ignore anything else.

13 THE CHAIRMAN: I think you said earlier on that you do the
14 econometric analysis and then the claimants have to show
15 that it is applicable to them.

16 MR BEARD: Yes. They certainly do have to show it is
17 applicable to them.

18 THE CHAIRMAN: But the basis for doing the econometric
19 analysis is that it is applicable to the claimants.

20 MR BEARD: Sorry, let us just take it in stages. The
21 econometric analysis is on a market-wide basis. These
22 people are part of the market so to that extent that is
23 accepted. The question is whether or not there is
24 a good basis for saying that that average is actually
25 the average -- the number that this tribunal should be

1 attaching to these claimants.

2 THE CHAIRMAN: But how do you actually do that? How do you
3 prove that it is specifically applicable to these
4 claimants?

5 MR BEARD: Well, there are two or three things that you are
6 doing here. First of all I am going to come on to
7 evidence that shows -- in particular some of Mr Ward's
8 favourite evidence from Mr Ashworth about how he had
9 expectations that in fact you would have lower prices in
10 relation to larger customers. I am also going to show
11 you material that is contemporaneous, so that is in
12 relation to the averaging issue. But I am also going to
13 show you contemporaneous evidence which is relevant to
14 the question of whether or not Mr Harvey's approach both
15 to theory of harm and indeed to the econometric analysis
16 is really borne out when we look at the situation in
17 relation to these claimants. Those are matters which
18 are obviously germane.

19 THE CHAIRMAN: You mean -- do you mean that, that
20 Mr Harvey's analysis is borne out or is disproved?

21 MR BEARD: A question of whether or not, I think I said,
22 Mr Harvey's --

23 THE CHAIRMAN: Whether or not.

24 MR BEARD: I am going to be on the "not" side of that, as
25 you can probably guess, sir.

1 THE CHAIRMAN: I thought you might.

2 MR BEARD: Yes, is borne out. So we are doing two things
3 with looking at the contemporaneous material.

4 THE CHAIRMAN: Mr Ashworth was obviously called by you, but
5 he was not -- I do not remember him actually giving
6 evidence in relation to the specific contracts in
7 question because he was not actively involved in the
8 negotiations.

9 MR BEARD: Well, that, I think, is one of those issues that
10 is not a fair characterisation of the position. We put
11 forward Mr Ashworth as someone who was not necessarily
12 dealing with the day-to-day negotiation but what he was
13 doing was he was the person responsible within DAF for
14 the DAF UK contracts with Royal Mail and BT, and he
15 spoke to how he understood those processes to work and
16 what feedback he got from the individuals that were
17 making specific contact. So I think that Mr Ward has,
18 on occasions, tried to suggest that Mr Ashworth was not
19 involved in the negotiations and therefore it is sort of
20 the same as the position in relation to Mr Giles and
21 Mr Peatey. No. Mr Ashworth was the responsible person
22 within DAF dealing with the settling of these contracts
23 and the sales department that was doing the negotiation.
24 The difference is that Mr Giles and Mr Peatey are put
25 forward in a position where it turns out, albeit that in

1 some of their exhibits they referred to contracts -- it
2 turned out they could not speak to any of these matters.

3 So it is not right to say there is some sort of
4 equivalence here. Mr Ashworth was the responsible
5 individual within DAF in relation to all of these
6 contracts. I will come back to that in a moment, but
7 that is something of an aside because what we are
8 dealing with at the moment is should you just ignore all
9 the factual evidence and all I am saying is, look, the
10 fact that you have got these disclosure rulings that are
11 saying, "Well, look, from an econometric point of view,
12 I want to make sure as a court that we are not having
13 ships passing in the night in the econometrics" -- he is
14 not saying at that point, "You are precluded from or
15 should attach no weight to any further contemporaneous
16 material in relation to these matters", and I am just
17 explaining how that material may be relevant to the
18 issues that we are dealing with here.

19 MR RIDYARD: But you are making the point that, even if we
20 were to find completely in favour of Mr Harvey and
21 against Professor Neven on the econometrics, so there is
22 a 9% price effect or whatever the number is, you still
23 want a second bite at the cherry to say the 9% applies
24 to the UK in general but not to Royal Mail?

25 MR BEARD: Unashamedly, yes.

1 THE CHAIRMAN: Because of the prices that we see in the
2 contract?

3 MR BEARD: In part because of the prices we see in the
4 contract, the way in which the negotiations were carried
5 out, the margins that we see in relation to these
6 matters. Those -- and indeed Mr Ashworth's appraisal of
7 the position in relation to others -- in relation to
8 these negotiations. So, yes, but I am also -- I am not
9 just relying on the factual material for that reason.
10 I completely recognise that role for it, but I am also
11 looking at it because, when we come to look at the
12 material, what it shows is a number of things.

13 One is that when we were talking earlier about tides
14 that lift all boats, the impact of list price changes on
15 transaction prices, we do not actually see that in
16 relation to these claimants, and that is material here,
17 given the debate we have been having about mechanisms
18 and how these things worked and how impact occurred.

19 I am also going to pick up the fact that even though
20 we have huge amounts of disclosure, what Mr Ward has
21 identified is just one or two particular examples of
22 what he says constitute evidence of coordination in
23 relation to the UK. I am going to go to one or two of
24 those and explain how actually he is just hugely
25 overselling these points and that he does not have the

1 basis for the story, notwithstanding the thousands and
2 thousands of pages of material he has to work with.

3 So I can probably move through this relatively
4 swiftly. We are not doing what Mr Ward and Mr Lask have
5 referred to as a bottom-up calculation of
6 a counterfactual. We are using econometric analyses.
7 The contemporaneous evidence is to go beyond that
8 material and to assist in the ways that I am talking
9 about.

10 If we just go down to 13.4 whilst we are passing,
11 {S/9/439}. This is where the term "bottom-up" was
12 referred to.

13 "... we doubt that the issues can be approached from
14 the 'bottom up' on the traditional evidential basis of
15 witness statements from the various key employees ...",
16 et cetera.

17 "Instead, it seems to us that the issues will
18 probably have to be approached by the analysis of large
19 amounts of pricing and market data ..."

20 Yes, that is what we are doing with the
21 econometrics.

22 "... using established economic techniques to
23 determine what, if any, was the effect of the
24 infringement on prices and any pass-on through the
25 relevant period. That is not to say that evidence of

1 witnesses of fact would be irrelevant but we anticipate
2 it will be of a more general nature, for example
3 explaining how the OEMs priced their trucks and the
4 nature of the relationship between gross and net prices,
5 the significance of configurators and so forth. The
6 same approach would apply to the prices charged by the
7 claimants in the context of pass-on."

8 Then you see at 13.5, {S/9/440}, there is this
9 concern about different methods being used and requiring
10 vast amounts of data. That is different methods of the
11 economists. But the point I am making here is that that
12 expectation of what would be done and what evidence
13 would be provided is essentially precisely what DAF has
14 done here. It has provided econometric analysis. It
15 has provided swathes of data to enable that econometric
16 analysis to be carried out. If we just go back up the
17 page again, it has also provided the witnesses of fact,
18 right from Mr Ashworth dealing at a UK level,
19 responsible for the sales, responsible for those
20 contracts that are actually entered into by the
21 claimants, all the way through up to the board of
22 DAF NV, explaining how the OEMs -- how the manufacturers
23 priced their trucks and the nature of the relationship
24 between gross and net prices and what they were doing in
25 relation to these matters. It is that pricing evidence

1 that has been provided.

2 But I am just mentioning that in passing. The key
3 point is that, just as there is a recognition that
4 witnesses of fact will be relevant, so are the
5 contemporaneous materials, and I need say, I think,
6 perhaps no more than that in relation to this material.
7 As I say, we have the extensive disclosure that was
8 carried out and I do not think I need to go to it, but
9 it has throughout been DAF's position -- and I will just
10 give you the reference. There was a CMC in
11 October 2020, reference {J3/55/3}, where at that CMC DAF
12 specifically said that if the tribunal were to find
13 a positive DAF UK overcharge, then for particular
14 claimants, depending on their factual circumstances,
15 there may be further individual issues to be resolved
16 such as whether the relevant claimant actually suffered
17 the average overcharge. So this is not a shock. This
18 is not new. This has been part of the position
19 throughout the process from DAF.

20 So we say the fact of the econometrics being done
21 and being done on a market-wide basis does not preclude
22 reference to contemporaneous documents, nor does the CMC
23 process or those disclosure orders.

24 The third reason that was given by Mr Lask was,
25 "Well, there is just a lack of sufficient information".

1 I mean, this is quite a strange submission. They are
2 referring to asymmetry of information, but it just does
3 bear repeating that DAF has disclosed in the region,
4 I think, of 40,000 contemporaneous documents from the
5 Commission file. Therefore to suggest that there is
6 a very significant asymmetry of information about even
7 what was considered by the Commission is not correct.

8 The claimants have access to all the relevant
9 material. There were some documents on the Commission
10 file that were not relevant, but they have all of that
11 material. But more than that, we have had very
12 extensive disclosure in these proceedings, the data
13 being one part of it; all of that communications
14 material, negotiations and procurement material being
15 another part of it.

16 Of course what we have got -- although Mr Lask says,
17 "Oh, well we do not have the full contractual record",
18 actually we do have a very full contractual record that
19 we are referring to here. They have got it set out in
20 their annex A to their particulars of claim, just for
21 your notes at {B/1/50}, and we have our list, which is,
22 in particular, found at {S/5/1}.

23 If we can just call that up because what we have got
24 here is the annex to our skeleton which refers to the
25 relevant Royal Mail and BT contracts under which the

1 claimed trucks were purchased. Not only do we have the
2 contracts and their details, but we have actually set
3 out a lot of references as to where we have sourced this
4 material.

5 Now, it is true, as Mr Lask says, that there are
6 moments where we miss particular amendments, for
7 example, we do not have all of them, but do we have
8 a great deal of information about this contractual
9 process and the prices being paid for under these
10 contracts, the prices being set under these contracts
11 and how they were arranged? Yes, we do. We have an
12 awful lot of material in relation to it.

13 For Mr Lask to be saying, "Well, there are gaps here
14 and therefore we cannot rely on it", is simply
15 a submission we do not understand. It may well be he
16 can come along and say, "Well, there is a gap here and
17 therefore you cannot draw the sort of inferences you are
18 seeking to draw from this material". Fine. We do that
19 all the time in all sorts of litigation because no
20 documentary record is complete. But to suggest that
21 "There are vast gaps and we do not understand what is
22 going on here" is just simply not consistent with the
23 material we have.

24 The fact that we know that there are individuals
25 within both BT and Royal Mail who were around and were

1 involved in negotiations means that praying in aid the
2 fact that Mr Peatey and Mr Giles could not speak to any
3 of these matters assists him not one iota.

4 THE CHAIRMAN: The communications between the parties in
5 negotiating the contracts, those were all disclosed?

6 MR BEARD: Yes, that is what --

7 THE CHAIRMAN: The emails, et cetera?

8 MR BEARD: Yes, all of that stuff has been disclosed.

9 THE CHAIRMAN: What about the internal approvals process
10 within DAF?

11 MR BEARD: Yes, that has all gone. Yes, all gone. That is
12 what I mean. So this story that you are missing
13 stuff -- I mean, obviously we could do a sort of
14 performative arrival of many thousands of documents,
15 I am not sure the tribunal would thank us for it, but
16 there has been a vast amount of material provided.

17 THE CHAIRMAN: The timelines and the contractual
18 negotiation, that is pleaded by you?

19 MR BEARD: The timelines and ...?

20 THE CHAIRMAN: Well, I mean how the contracts were
21 negotiated is part of your pleaded defence, is it?

22 MR BEARD: No, we are not pleading to the --

23 MR WARD: This was all new when it was opened with the
24 timelines.

25 MR BEARD: Yes, you do not plead timelines, sir. Timelines

1 are diagrams setting out what the evidence is.

2 Similarly we do not --

3 THE CHAIRMAN: Well, you plead the primary facts that are
4 founding your defence.

5 MR BEARD: Yes, we have pleaded the primary facts in answer
6 to the case that is pleaded against us. We can go
7 through and have a look at what is pleaded in relation
8 to these matters, but we have --

9 MR WARD: There was no pleading of any of this bottom-up
10 detail of who said what on what day or the timelines or
11 anything.

12 THE CHAIRMAN: It does amount to a further defence, as
13 Mr Ridyard put to you, that even if the econometrics
14 show that there was an overcharge, you are, as
15 a separate plea, saying that it did not apply to these
16 claimants.

17 MR BEARD: No, because that is not -- I think that is not
18 correct because the way the pleadings are structured,
19 the pleading does not plead on behalf of Royal Mail that
20 there was an average market-wide overcharge that applied
21 to them. They just claim an overcharge and we then deny
22 and object to the terms of that overcharge. The
23 econometrics are then put forward setting out why it is
24 this is the overcharge that is relied upon.

25 THE CHAIRMAN: I think it must be a bit more complicated

1 than that because there are about 120 pages of
2 particulars of claim.

3 MR WARD: Yes, so the defence is just kind of relentless
4 denial of everything; "We deny there is an overcharge,
5 we deny there is causation, we deny there is interest",
6 and so forth.

7 THE CHAIRMAN: But it does not put forward a positive case
8 in relation to the contractual documentation?

9 MR WARD: No, not at all. I will be corrected if I am
10 wrong, but I do not think it even says, "And anyway you
11 would have paid less". It just says that there is no
12 overcharge. Deny, deny, deny, deny.

13 MR BEARD: I will come back with pleading references but
14 actually that is not correct. What is pleaded against
15 us is that there was an overcharge and one of the things
16 we plead saying there was not an overcharge was in fact
17 that these trucks were individually negotiated for; you
18 know, there was individual negotiation in relation to
19 them. So what we are doing is essentially setting out
20 why, in the pleading, there is concern in relation to
21 the assertion of overcharge in relation to all of these
22 trucks.

23 So I will come back with the pleading references,
24 but there is no -- amongst the myriad grounds that have
25 been raised by Mr Lask and Mr Ward in relation to the

1 objections for reliance on contemporaneous evidence, the
2 pleadings was not one of them, so I will come back to
3 it. That does not prevent --

4 THE CHAIRMAN: It is a particularly Chancery point.

5 MR BEARD: I will see that as -- yes. It may well be true,
6 but, I mean, I am not sure that tells either way in
7 relation to it, as they say.

8 It is perhaps worth just turning up some of
9 Mr Ashworth's evidence because it is clear from his
10 evidence what was being said about various of these
11 matters. If we can just go to {D/22/9} and down to
12 paragraph 34 if we could, please. What was being set
13 out in the witness evidence was the particular
14 circumstances and concerns about the power of Royal Mail
15 and BT to be able to specifically negotiate and
16 therefore a description of the dynamics of the
17 interactions that we are going to see referenced in the
18 contracts and the materials I refer to on the timelines.

19 "... they were amongst the most sophisticated
20 customers and negotiators that DAF UK dealt with, and
21 required a huge amount of information and data from
22 DAF UK that they then used to negotiate with us in a way
23 that many other truck purchasers did not."

24 We have summarised quite a lot of this material in
25 paragraph 279 of our closing submissions, but if we just

1 go down to paragraph 80 of Mr Ashworth's statement,
2 which is at -- I am very sorry, I have lost my page
3 reference, but I think it will be about page 15. I may
4 be wrong. {D/22/23}.

5 "Royal Mail used its volumes to its advantage to
6 drive prices down, presumably in the knowledge that if
7 DAF UK did not lower its prices to the right level, it
8 could threaten to take its business elsewhere, which
9 would have had a significant negative impact on
10 DAF's UK's revenue (as I have already explained ...) and
11 could have undermined DAF UK's position as a market
12 leader in the UK."

13 If we can just go over the page to 83, {D/22/24}:

14 "Our ... objective was to secure as much of
15 Royal Mail's business as possible."

16 It talks here about the mechanisms for negotiation
17 and how Royal Mail would refrain from offering
18 a completely exclusive contract in order to provide
19 a benchmark.

20 Then if we just go down to 84, there is discussion
21 about how these sorts of tender process worked. So,
22 again, we have extensive evidence that we are putting in
23 in relation to these matters. The fact that -- I am not
24 going to go back through the cross-examination, but
25 whether or not it is cross-examined on makes no

1 difference. We have always been setting out our case in
2 relation to the dynamics of this negotiation. That was
3 what Mr Ashworth was in a position to speak to because
4 he was the head of the department dealing with these
5 matters.

6 We also have extensive examples of this in
7 a documentary record and we -- in our closings we set
8 that out at paragraph 228. So of the four reasons that
9 Mr Lask adduced, I have dealt with the econometrics,
10 I have dealt with the disclosure statements, I have
11 dealt with the information asymmetry.

12 The last one he prayed in aid was the principle of
13 effectiveness. I mean, I am not suggesting that
14 Lord Justice Green's development of the principle of
15 effectiveness in British common law is not a great and
16 interesting thing, but it really makes no difference to
17 this analysis at all. In circumstances where you have
18 extensive disclosure and in circumstances where this
19 material is relevant, the idea that it cannot be relied
20 upon because somehow it is rendering it impossible for
21 you to make a claim is just an untenable submission.

22 When I come back to *BritNed*, probably early
23 tomorrow, I will pick up the fact that actually
24 references to the principle of effectiveness in that
25 case were rejected as any basis for the way in which

1 matters should proceed. It is an utterly unmeritorious
2 contention.

3 So we are in the slightly remarkable situation that
4 the claimants do not want you to look at a group of the
5 contemporaneous materials. They do want you to look at
6 some of them and obviously I will come back and deal
7 with those, but the ones that we want to rely upon,
8 apparently we cannot. We say not true.

9 So I am going to move on to deal with some of that
10 material, including, if I may, some of the timelines,
11 but I am conscious of the time. Now might be a good
12 point for a break --

13 THE CHAIRMAN: Okay.

14 MR BEARD: -- before we get the big timelines out.

15 (3.09 pm)

16 (A short break)

17 (3.23 pm)

18 MR BEARD: Sir, I am about to go to timelines, but before
19 I do, I do just want to pick up a pleading point that
20 I sort of fumbled my way around. I think the answer was
21 correct but I think it is worth spelling this out. If
22 we could just pick up the claimants' re-re-re-amended
23 particulars of claim, {B/1/43}. So the "The Defendants'
24 liability for damages", and if we can just scroll down,
25 "Causation and loss".

1 "The Defendants' breaches have caused the Claimant
2 loss and damage. In particular, the effect of the said
3 breaches is that the purchase prices and lease payments
4 made by the Claimant were higher [sorry, I am in
5 Royal Mail. It is pretty much identical to BT] than
6 they would have been absent the Cartelists' collusion.
7 The measure of the Claimant's damage is the difference
8 between the purchase prices and lease payments which the
9 Claimant paid under the [Royal Mail Group] contracts and
10 such lawful prices and payments as the Claimant would
11 have paid had there been no such infringements ..."

12 So that is the claim. Up until then, in the
13 pleading I think there is nothing to do with contractual
14 negotiation pleaded and then we have this loss pleading.

15 Then at 26(a), {B/1/44}:

16 "Without prejudice to the generality of the
17 foregoing, during the Relevant Period the First and/or
18 Second Defendant calculated the net price they charged
19 the Claimant for a Truck by reference to the ... gross
20 list price ... The calculation of the net price ...
21 typically consisted of expressly applying specified
22 discounts, often including a standard discount of 15%,
23 ... The best particulars that the Claimant can currently
24 provide of the First and/or Second Defendant adopting
25 this approach in calculating the net price to be charged

1 to the Claimant are set out in Appendix G to these
2 Re-Re-Amended Particulars of Claim. Accordingly, the
3 net prices paid by the Claimant were derived from the
4 gross list price. The Defendants' collusion over gross
5 prices caused the net prices paid by the Claimant to be
6 higher than would otherwise have been the case."

7 Appendix G is in fact just a huge long list of
8 occasions when trucks were purchased of various sorts,
9 and they just say, "Oh, well, there was gross list
10 prices and then there was a reduction of 15% from the
11 gross list price". Now, as we know, that is not the way
12 in which this pricing happened at all and we have seen
13 evidence in relation to it. But I will leave that to
14 one side for a moment.

15 It is just worth going to our response to it and
16 Mr Ward's contention that we had not pleaded out and it
17 was all just bare denials. If we could go to {B/2/58},
18 please, you see at the bottom there, it says 30A:

19 "As to paragraph 26(a) ..."

20 Then there is a long passage which then goes into
21 how we actually did the pricing in response to that
22 pleading that I have just taken you to.

23 If we go actually over the page to (d), {B/2/59},
24 you see it says there:

25 "The Claimant purchased Trucks directly from DAF in

1 the UK ... as opposed to from a dealer. The normal
2 basis for establishing the Transaction Prices charged to
3 the Claimant in those circumstances was as follows. The
4 Transaction Price for a given Truck would be established
5 pursuant to a purchase agreement. The prices in that
6 agreement would be the subject of individual
7 negotiations between DAF and the Claimant, often over
8 a period of months. The Transaction Prices so agreed
9 would be derived individually in the particular
10 circumstances of the relevant transaction using
11 commercial judgment."

12 Then (e):

13 "When developing an initial proposal as to price,
14 DAF would take into account some or all of the
15 following."

16 (i) is previous purchases, specification, range of
17 commercial considerations.

18 If we go over the page to (f), {B/2/60}:

19 "For its part, the Claimant was a sophisticated
20 customer which purchased substantial volumes of Trucks
21 directly from DAF. It exercised bargaining power and
22 was an effective negotiator. The process of negotiation
23 thus led in the vast majority of cases to changes to the
24 terms of the transaction proposed, whether in terms of
25 the proposed price and/or to the specification for the

1 Truck."

2 I am not going to go through all of it. It keeps
3 going right down to (n).

4 Now, the idea that this is a bare denial is just not
5 tenable, but the idea that we did not set out what we
6 were doing in our pleadings is also not tenable. We had
7 the most terse claim in relation to causation and loss
8 of overcharge and actually we have pleaded very fully to
9 it.

10 With that, I am just going to move back to the
11 contemporaneous evidence, if I may.

12 THE CHAIRMAN: Okay.

13 MR BEARD: Now we are looking at this evidence and
14 particularly looking at it doing two things. One is
15 that the claimants actually obtained very low prices
16 from DAF and the idea that somehow they would have been
17 much lower absent the infringement, indeed much lower to
18 the tune of the 9% or 10% that Mr Harvey is suggesting,
19 is just not plausible in the light of this evidence.
20 But it also goes to the various ways in which the
21 claimants say that their prices were likely to have been
22 affected by the infringement and is evidence of why that
23 does not stack up. So I want to start with some of
24 those timelines that I have produced or those in our
25 team produced and I passed up in opening.

1 Just to be clear, we are not saying that these
2 timelines disprove effects on Royal Mail and BT. That
3 is not what we are here seeking to do. We do not say
4 the burden is on us to do that, but that is not what
5 these are here to do. We are also not saying they are
6 exhaustive. So we are not saying that they include
7 every possible occasion of contact between manufacturers
8 on the top lines of these timelines. The irony being,
9 of course, that if you put more on the top line and show
10 that actually there is less change on the bottom line,
11 it does not assist the claimants.

12 But leave that to one side. They are not exhaustive
13 and they do not include the whole time period. You can
14 generate these things -- they are vast if you generate
15 them for all the contracts for the whole time period.
16 But what we put them forward for was to do an apples and
17 apples comparison, to look at, as examples, how these
18 matters were dealt with with these claimants. We did
19 not try and select odd situations.

20 The two Royal Mail timelines that were just in
21 relation to two types of trucks, LF 45s and CFs --
22 LF 45.150s, I should say, and CF 85.380s, for those
23 periods, that represented 30% of Royal Mail's trucks in
24 the claim, just those two timelines.

25 In relation to BT, we gave you a timeline and that

1 covered 25% of the trucks in BT's claim. So it was not
2 that we were trying to select out. We were trying to
3 simplify. We hold our hands up to that because there
4 are lots of contracts or contracts involving purchases
5 of small numbers of trucks at particular varieties and
6 we think we could make the same point in relation to all
7 of them, but we are doing this on an illustrative basis.

8 Now, we also recognise that we have identified
9 chassis prices here. We are not demurring that we have
10 identified chassis prices, but the reason why we did
11 that was to carry out the apples and apples comparison,
12 because if you were finding that list price changes were
13 feeding through into transaction price changes, you
14 would expect the chassis price to be affected, not just
15 options. There is no reason to think that options only
16 would be, particularly when the most valuable options
17 were bodies. As we will come on to, of course, we have
18 separate manufacturers for the most part producing
19 bodies.

20 So we have tried to do something that actually helps
21 us understand whether or not any of these mechanisms
22 that they are talking about actually work in relation to
23 the contractual arrangements that we see for the
24 purchase of these actual trucks that are in the claim.

25 MR RIDYARD: Mr Beard, when it comes to the options, though,

1 are you saying that it would not be possible to -- let
2 us say the same option was purchased with a particular
3 truck at the beginning and end of the timeline, are you
4 saying that it would not be possible to effect a price
5 rise through raising the option price whilst keeping the
6 chassis price the same?

7 MR BEARD: No, I am not saying it would not be possible to,
8 but the idea that, if you are talking about a list price
9 change, you would have only put it in relation to the
10 option -- because most of the options are very low
11 value. The only really big option values are bodies and
12 trailers.

13 I think that in relation to those, for reasons that
14 we will get on to when we talk about value of commerce
15 and so on, that actually the idea that the list price
16 change would be attached to those is not borne out by
17 any material because we see in various of the contracts
18 and so on the actual -- we see what -- for instance, DAF
19 is purchasing bodies from others and putting a very
20 small mark-up on, so I think that would be very
21 difficult in relation to the main options. Then if you
22 are talking about translating an overall list price on
23 to the options, I think then it would probably get very,
24 very hard because you are talking about such
25 comparatively small sums.

1 Is it impossible? No, we cannot say it is
2 impossible. Is there any reason to think that they were
3 being loaded on to options? No, we do not have any
4 reason to believe that. Has any reason been put forward
5 that you would not shift the chassis price if you are
6 shifting transaction prices but you would shift all the
7 option prices? No, there is no reason for that.

8 So I cannot say impossible, but there is no reason
9 to think that this is in any way unreflective, and
10 actually, if you include the options, you do create the
11 problem that most valuable options are the ones that are
12 trailers, tail-lifts and bodies, manufactured by third
13 parties.

14 MR RIDYARD: Thanks.

15 MR BEARD: Let us start, if I may, with the Royal Mail LF 45
16 timeline which is at {S/6}. Now, you may still have
17 hard copies. I do have some --

18 THE CHAIRMAN: Still got them, the big ones.

19 MR BEARD: Yes, so LF 45 is -- I think it is a medium-size
20 one. I had it that size. (Indicates). If you still
21 have that ... I am going to pass up a slightly revised
22 version of it in a minute, but let us just deal with
23 this one because this is the one I handed up at the
24 start.

25 So just to pick up on this, it is common ground that

1 there were about 1,400 LF 45 trucks purchased under
2 these contracts in this period, so actually covered by
3 this timeline. That is in fact, just on this timeline,
4 about 20% of the entirety of the trucks which are
5 subject to the Royal Mail claim.

6 Now, we did this a little bit in opening and I will
7 not dwell on it too long because you know the point, but
8 if we look at the top here, what you see is, in green,
9 a list price of 4% that DAF is introducing. You also
10 see reference around the same time, just beforehand, to
11 a headquarters meeting in Gothenburg.

12 Now, this was a longer-term contract and one of the
13 things Mr Ward has said in the course of submissions is
14 that it does not matter that these were long-term
15 contracts because there were periodic opportunities to
16 renegotiate, the idea being that you could move prices
17 up. He actually quotes Mr Ashworth, making the point
18 that if there was an opportunity at the end of the
19 contract to improve the price, then he would want to do
20 so. That is a fair case using Mr Ashworth's evidence.

21 But the question is: even if Mr Ashworth would have
22 wanted to take such an opportunity, was he able to do so
23 with these claimants? What we see here is that,
24 although there was a contract renewal in 2003, in fact
25 the price fell by 13.6%. It did not go up. The

1 transaction price did not move following the list price
2 at all. In fact we know -- and we have referred to this
3 in our submissions, paragraph 286. Just for your notes
4 this is at {S/10/102} -- we know actually there was
5 vigorous competition from Iveco around that time.

6 THE CHAIRMAN: Vigorous competition?

7 MR BEARD: Yes, we do say vigorous competition. We will go
8 to it if we can. {S/10/102}, paragraph 286 -- would you
9 mind just going back up slightly so I can give context?

10 "... as this contract demonstrates [this is the
11 contract we are dealing with], [Royal Mail] had
12 a strategy of placing some orders for Trucks with
13 manufacturers in addition to DAF [in order] to signal
14 that it was willing to move ..."

15 There is evidence for this strategy paying off.

16 "For example, both DAF and Iveco were appointed to
17 the framework agreement for VEH300021 (LF45s), which ran
18 from October 2000 until 2003."

19 That should be "2002", in fact, should it? Anyway:

20 "Under a 'mini-competition' between them for the
21 supply of 75 trucks in around September 2003, Iveco
22 offered a price £4,400 lower than that offered by DAF;
23 and in response, DAF had to reduce its own price to win
24 the business. This is reflected in the price decrease
25 of 13.6% shown on the LF45.130s Timeline ..."

1 So, yes, sir, vigorous competition. That is what is
2 going on here and that is what is resulting in these
3 very significant price drops. We have footnoted the
4 documents that deal with these issues.

5 We then see in April 2004 that there is a 3%
6 increase, list price increase. Of course, on the
7 claimants' case, using those --

8 THE CHAIRMAN: Sorry. So the vigorous competition from
9 Iveco following the meeting in April 2003, so presumably
10 DAF would have known that Iveco were competing with
11 them?

12 MR BEARD: No -- do you mean from the meeting in Gothenburg?

13 THE CHAIRMAN: No, no, from the negotiations with
14 Royal Mail.

15 MR BEARD: I would have to go back and check the document,
16 whether or not Royal Mail told DAF that Iveco was the
17 best counter-bidder. It may well be -- I will check the
18 document, but it may --

19 THE CHAIRMAN: Well, somebody was obviously undercutting
20 them.

21 MR BEARD: Yes, someone was -- you asked whether or not they
22 knew it was Iveco and I just would have to check the
23 documents. But they knew -- they clearly knew that
24 someone was undercutting them because they were told it
25 and had to drop their prices.

1 THE CHAIRMAN: Interesting that that is an example, perhaps,
2 of seeing what other members of the cartel are doing.

3 MR BEARD: I am not sure I understand that, sir. I mean,
4 you have got a situation where you have put in a bid,
5 Royal Mail come back and say, "Your bid is too high.
6 You need to drop it because someone is a lot lower than
7 you". You do drop your bid in those circumstances. You
8 do not actually know whether or not Royal Mail went back
9 to the other party, which we now know is Iveco, and
10 said, "You should drop further". We do not know what is
11 going on, but we do not know what is happening.

12 This is -- Iveco -- I mean, we do not have the
13 documentation, but, for instance, Iveco would be
14 unlikely to know, if they were in the same position as
15 DAF, what we were actually ending up winning the bid for
16 because we do not know what -- when we lost deals, we do
17 not know what the winning bid was. So saying, well,
18 that this is, you know, information about what other
19 cartelists were doing is not information that can talk
20 about how any putative coordination could occur, if that
21 is the way you are thinking about this, sir.

22 THE CHAIRMAN: Well, it was not really explored in the
23 evidence.

24 MR BEARD: No, sure. Understood. But, no, what you have is
25 a massive drop. But the point I am making is we are

1 here dealing with a situation where Mr Ward is saying,
2 "Look, if we are in the world of gross list prices
3 moving up and that is bringing transaction prices with
4 it, there are two things to bear in mind". First of
5 all, as I said earlier, list prices moving upwards is
6 not in and of itself problematic. The question is: were
7 those list prices higher than they would otherwise have
8 been?

9 There is actually something of a gap in relation to
10 that story here. But even if the list price that DAF
11 would have put in place in April 2003 would have been
12 marginally lower, so let us just for the sake of
13 argument -- and I am not saying this is correct -- but
14 let us say, on Mr Ward's case, they would have put in
15 place a 3% list price increase rather than a 4% one at
16 that point -- okay? -- and so you have got this -- on
17 Mr Ward's case, well, there has been this sort of
18 coordination in relation to list prices, that has moved
19 them up, it has given DAF confidence to move them up --
20 and I am just speculating at this point. I am just
21 putting forward the hypothesis of how it works. He is
22 then saying, "Well, what we have got here is the list
23 price increase that is pushed up by the coordination
24 feeding through into transaction prices". That is what
25 he has been talking about.

1 But even if we take the whole of the list price
2 increase, never mind the bit that is supposed to be
3 incrementally increased by the operation of the
4 infringement, we just do not see that pass through into
5 the transaction price. We see completely the opposite.
6 If, just going back to my hypothetical, the list price
7 increase is 1% more than it would have been because of
8 this infringement, I mean, the idea that that 1%
9 increment is somehow being reflected in the price change
10 here, it is just untenable. You are not seeing that
11 mechanism at work.

12 If we then move on, we have then got the 3% list
13 price increase, so we have had 4%, then we have got
14 another 3% in April. Then we have got the contract from
15 the beginning of 2004, where we see the two variants of
16 this truck, a difference of between plus 7 [sic] and
17 minus 1.8.

18 I should say Ms Mackersie has noted that the point
19 that, sir, you were raising about the Iveco involvement,
20 that was actually explored in Mr Ashworth's evidence at
21 paragraph 83 --

22 THE CHAIRMAN: I saw the reference in the footnote.

23 MR BEARD: Yes. That was one of the paragraphs I think

24 I took you to about half an hour or so ago, but if it
25 was not, it was around there. But I do not think he was

1 asked any questions about that.

2 But, anyway, let us just go back to the timeline if
3 we may. So we have 3%, then we have a new contract
4 where there are some very small increases but not -- 3%
5 transaction price increase, 0.7 and actually, in
6 relation to some of the trucks, a minus 1.8. It
7 depended whether or not there was a buy-back waiver.
8 But, again, you are not seeing that list price increase
9 as a whole come through and the idea that an increment
10 in relation to the list price was coming through is also
11 not tenable.

12 Now, obviously --

13 THE CHAIRMAN: But if we take Mr Ashworth's evidence that he
14 would expect 50% of the list price increase, then you
15 would assume a 1.5% rise in the contract price?

16 MR BEARD: Yes. You see, this is the issue. We are going
17 back. This is obviously a small part of the data that
18 was analysed by Professor Neven that we saw in the dots
19 diagrams. But this is actually bringing it home, that
20 you are not getting what Mr Ashworth said he believed
21 happened. You are just not getting it and we are
22 looking at these big contracts.

23 I will be coming back to the fact that what
24 Mr Ashworth says is he was -- it was half overall, and
25 I think, as I have already touched upon, not in relation

1 to big customers. I think he distinguishes between the
2 two. So to that extent one might say, well, this is
3 consistent with Mr Ashworth's evidence, but --

4 MR RIDYARD: I think he was also asked whether the gap
5 between big and small customers changed over time and
6 I think he said he thought it did not, had not changed.

7 MR BEARD: The gap between ...?

8 MR RIDYARD: The prices to big customers and small
9 customers.

10 MR BEARD: I will have to check that. Your memory may be
11 better than mine, sir. I am not for a moment doubting
12 you but it ...

13 In any event, what we are seeing is that the
14 mechanism that we are talking about is not actually
15 being evidenced in here because you have then got
16 another 3% price increase in February 2005, but, again,
17 you have then got a fall in the transaction prices.
18 Then they stay flat even though you have got further
19 list price increases. So even if you assumed that all
20 of these list price increases would not have happened
21 absent the coordination, you are just not seeing the
22 mechanism here.

23 Of course, what Mr Ward and Mr Lask say is, "But you
24 cannot tell what the price would have been in the
25 counterfactual". I mean, we understand that, but I am

1 trying to deal with some of the mechanism stuff here
2 first.

3 MR RIDYARD: Yes.

4 MR BEARD: The mechanism is just not tenable in the face of
5 this material, but then, you know, even this story about
6 what would have happened in the counterfactual -- I am
7 going to call up -- I will not read it out because it is
8 confidential, but I think we can have it on the
9 screen -- {D/IC23/18}. If we could just scroll down so
10 we can see the whole table. Here you have -- this is
11 from Mr Habets' witness statement, the table of margins
12 between 2004 and 2010. We recognise, of course, that in
13 the period of the financial crisis the margins were
14 lower, particularly in 2009, but what is interesting is
15 just looking, for instance, at the row that deals with
16 these LF trucks for Royal Mail, which is five rows from
17 the bottom.

18 So what we are seeing here are negative margins, and
19 I am not going to get into the detail of them, and
20 actually overall negative margins, and you are being
21 asked to assume that, even though there are these list
22 price increases, even though we know that the MLO
23 margins on these trucks are negative on the aggregate
24 annual MLO margin set out by Mr Habets, nonetheless, on
25 Mr Harvey's account, these trucks would have been 9% or

1 10% cheaper. I mean, it is just not a plausible story.
2 The mechanism does not work and just the assumption is
3 not properly founded here. Bear in mind, of course,
4 Mr Harvey's account, that would be minus 10% even on
5 those margins during the global financial crisis as
6 well.

7 THE CHAIRMAN: I think you put that to Mr Harvey.

8 MR BEARD: Yes, I did.

9 THE CHAIRMAN: Well, I do not think you put to Mr Harvey the
10 timelines, did you?

11 MR BEARD: No, because he had not looked at any evidential
12 material.

13 THE CHAIRMAN: No, but as to whether it should provide some
14 sort of sense-check on his econometrics?

15 MR BEARD: I think I did put the proposition -- I am pretty
16 sure I did because strangely it was in anticipation of
17 a question like that that I was doing so, saying, you
18 know, was there any point in looking at evidential
19 materials as a sense-check. I will go back and check.
20 It may be self-delusion or hopeful notes --

21 THE CHAIRMAN: Well, I hope you were not doing everything
22 for fear of a question from us.

23 MR BEARD: It is not always fear. It is anticipation and
24 excitement!

25 The point we make overall in relation to this is you

1 are seeing these prices remaining the same and then
2 there was one renegotiation that we saw in the evidence
3 in opening. That was around August 2005 and there was
4 a discussion. In fact there was a point -- and we
5 picked this out in our submissions. If we can just go
6 to {S/10/108}, please. It is paragraph -- that is
7 exactly it, thank you. It is 298(b):

8 "In August 2005, a year after [this contract] was
9 concluded [the one we are looking at on the bottom of
10 that timeline], DAF sought a price increase of £200 for
11 LF45s. That ... was rejected and [then] the contract
12 was extended [through] until December 2006 ..."

13 So you are seeing these cumulative list price
14 increases. Even when DAF comes along and says, "Can we
15 have £200 more per truck?", "No" says Royal Mail. We
16 have got various other examples of this in the
17 contemporaneous documents, and of course this was some
18 of the material that I tried to put to Mr Giles in
19 relation to these matters. In a nutshell, highly
20 sophisticated purchasers, buying big volumes of trucks
21 through rigorous tender processes, bringing lots of
22 pressure to bear in negotiations, succeeding in getting
23 very low margins [sic], and obviously we are not seeing
24 a pass-through of list prices into transaction prices --

25 THE CHAIRMAN: You mean getting very low prices?

1 MR BEARD: Did I not say "low prices"? I am so sorry.

2 I meant to.

3 THE CHAIRMAN: You said "low margins".

4 MR BEARD: I did mean low prices, absolutely.

5 This assumption that, well, you would be willing to
6 sell for a negative margin so you will always be willing
7 to sell for a more negative margin, it is just an
8 assumption that is not founded in these circumstances.

9 MR RIDYARD: It would be nice to know at what point DAF
10 would walk away from these margins as being too negative
11 because, I mean, it may be that it all depends on
12 exactly what these margins are and to what extent they
13 are still making some contribution to overheads, it
14 might be worthwhile doing, so there is still a -- it
15 does not discount what you are saying. Just it is
16 complicated.

17 MR BEARD: Yes, I am not demurring in relation to that.

18 I cannot say, "No, no, no, it would always be the case
19 with negative margin X that DAF would walk away",
20 because I anticipate that, in practical terms, in
21 commercial reality, the walk-away point would vary
22 depending on the other circumstances.

23 MR RIDYARD: Yes.

24 MR BEARD: So I am not demurring in relation to that. But
25 the question that I am asking is, given we have all this

1 econometric evidence, given that we have the other
2 material, given that we are able to look at these
3 pass-throughs, is it really realistic to be standing
4 here saying, "No, no, no. Actually they have gone 9%
5 lower"? We say, no, it is not in those circumstances.
6 But we cannot set, you know, walk-away thresholds for
7 year on year in relation to negative margins. That just
8 does not exist.

9 THE CHAIRMAN: But those negative margins were presumably
10 approved at the highest level.

11 MR BEARD: Yes, I mean these would be PACCAR approvals for
12 these because -- yes, no issue about that. Those are
13 low margins and, yes, they would have gone up to PACCAR
14 because these deals did because they were big deals.

15 THE CHAIRMAN: Sure.

16 MR BEARD: If I have overstated it in relation to any one of
17 these particular contracts, I am sorry, but that is
18 broadly -- you are absolutely right, sir.

19 Now, I wanted to move on to another timeline, but
20 I think I should deal with a couple of specific
21 criticisms made by Mr Lask. He says -- one of them was
22 the options point which I have dealt with, on an apples
23 and apples basis. I can take you to it but I will not
24 given time because I have already alluded to the fact
25 that one of the problems with Mr Lask's criticism is

1 that he would end up bringing bodies back into the
2 calculation, which of course are, except for a small
3 number, manufactured by third parties, which would
4 complicate matters. I have dealt with that I think.

5 Then the other one was he had concerns about what
6 happened next in a sort of Question of Sport moment.
7 The answer is that we stopped the timeline that you have
8 because it moved to -- he said because it moved to
9 Euro 4, but, as I explained in opening, it was not
10 actually that. It was because the model changed from
11 a 45 to a 45.140, so there was a danger that we would be
12 not doing apples and apples.

13 I should say we have been very clear about these
14 Euro 4 price changes for trucks. We set this out in
15 paragraph 144 in our skeleton for the trial so we were
16 not in any way trying to hide anything that happened in
17 relation to Euro 4. Indeed I also took Mr Giles to
18 negotiations in relation to Euro 4 because you may
19 recall it was at the point of Euro 4 where DAF ended up
20 investing half a million pounds in the AdBlue
21 infrastructure as part of securing the Euro 4 contract.

22 I do not know if you remember that, but you had to
23 have this additive in relation to the new engines to get
24 below the relevant emissions threshold and that involved
25 a whole sort of -- almost like a petrol pump

1 infrastructure being put in place so that you could put
2 stuff into your trucks. So essentially there was
3 a negotiation where half a million pounds was
4 contributed in relation to that.

5 If it assists in any way, we actually have --
6 because of Mr Lask's criticism, we have actually
7 extended this timeline.

8 MR WARD: Sir, what on earth are we supposed to respond to
9 this point? It is unreal.

10 MR BEARD: I am happy to leave it if Mr Ward is objecting.
11 I am only responding to what Mr Lask says. He is
12 criticising our timelines and saying they are selective.
13 I can bring them further and longer.

14 THE CHAIRMAN: Well, I am getting a bit concerned about time
15 anyway because we are still on overcharge.

16 MR BEARD: Yes, yes. That is fine.

17 THE CHAIRMAN: There is quite a lot of other things. Maybe
18 you do not want to deal with them as fully.

19 MR BEARD: No, I definitely do, but I will obviously deal
20 with that by reference to my written closings more
21 closely. But, yes, I am conscious of time. I will
22 happily leave it. But the point we would make is that
23 actually we have all the data that indicates that there
24 was a step up in relation to the costs in relation to
25 Euro 4 as occurred, but then it actually -- the Euro 4

1 trucks of this type remained constant for the remainder
2 of the whole playing period.

3 MR WARD: Now we are just giving evidence, rather than
4 having it here. I mean, come on. Come on.

5 MR BEARD: Well, this is all in the documentary material.

6 MR WARD: I do not think we are going to --

7 THE CHAIRMAN: It is not particularly helpful just to say it
8 is all in the documentary material if our attention has
9 not been --

10 MR BEARD: I understand, sir, but I am not actually
11 giving -- the evidence is there. This is not actually
12 controversial in the sense that --

13 MR WARD: I am sorry, it is controversial --

14 THE CHAIRMAN: Is it dealt with in any witness statements?

15 MR BEARD: I will confirm that, but I do not think we
16 specifically put this sort of detailed numbers --

17 MR WARD: Or even in the closing submission is it in?

18 MR BEARD: Actually I will come back to that, but I think,
19 in relation to this material, we were simply trying to
20 respond to Mr Lask. Mr Ward does not want me to deal
21 with Mr Lask's point. I will leave it. The
22 illustration remains good in relation to the timeline
23 that we served long ago.

24 MR WARD: We do not mind you dealing with it, just not in
25 this way. That is the problem.

1 MR BEARD: I can understand that it is always awkward when
2 someone does not deal with the point in the way you want
3 them to, but I will carry on.

4 On the CF 85 timeline -- we will just look at that
5 briefly. That is {S/7} on Opus. Here we have
6 consistency in relation to pricing over a much longer
7 period of time, so we can see the pattern for
8 approaching ten of the much-mentioned 14 years. There
9 were a couple of changes of contract in relation to
10 these arrangements. The first contract runs
11 from July 1997 until 2001 and there were two list price
12 increases in 1998 and 2000.

13 But if you look in I think what is technically
14 called the orangey box under October 2000, so if we can
15 just scroll down, you can see there is actually a tender
16 there for the next contract. Actually DAF tendered at
17 the same prices for the current supply both for Euro 2
18 and Euro 3 trucks, so no step up there for Euro 3.

19 Of course you can see, scattered along the top of
20 this, all of these various list price increases that we
21 have been referring to. In the course of negotiation in
22 fact the tender prices were not held on to and
23 Royal Mail actually got Euro 3 trucks for less than
24 Euro 2.

25 Then we move on here and we see various of the list

1 price increases. Mr Lask was concerned about the
2 reference to a new Euro standard in 2001, but, as I say,
3 what we were dealing with was a situation dealing with
4 Euro 3 trucks. Actually, we did not see any increase in
5 price there and that then continues with falls in prices
6 in 2002, 2003 and then a very tiny increment in 2004,
7 notwithstanding the various price increases we see along
8 the top line.

9 So essentially we see around 10.5% of list price
10 increases over the next two and a half years, various
11 points at which there were renegotiations, which are
12 represented by the black lines, and we are not seeing
13 any increase in price. Actually we are seeing falls in
14 transaction prices here.

15 We did actually test one of these renegotiations
16 with Mr Giles in cross-examination, where DAF asked for
17 a 2% price rise and that was rejected. That is covered
18 at paragraph 298(a) in our closing submissions.

19 So we dealt with these issues.

20 Now, Mr Lask raised a criticism that we were
21 cherry-picking by looking at these trucks. I have
22 already indicated we were not doing anything of the sort
23 because they were very large percentages of the trucks.
24 He said, "Oh, well, you can see ..." -- he picked out
25 some LF 55s and said, "Well, you saw a price increase of

1 2.5% at one point in the negotiation and 1.5 at another
2 time". Well, there are two things to emphasise here.
3 We are not saying that trucks increasing in price is
4 somehow problematic, nor is that the case that it can be
5 problematic. Transaction prices can rise. What we are
6 interested in is whether or not the mechanisms that
7 Mr Ward and Mr Lask are relying upon are being evidenced
8 here.

9 So the fact of the price changes for the LF 55s is
10 not significant. We actually did not choose LF 55s,
11 only because there were a comparatively small number of
12 them across the whole period and, in fact, what we saw
13 in relation to LF 55s was not some sort of substantial
14 change in pricing. In fact, although I am not going to
15 go to it, I will give you the document reference,
16 {I1/312.31/9}. This is in the next contract that
17 Mr Lask did not go to. Those prices for LF 55s actually
18 fell very substantially by 9% and then 17.3%.

19 THE CHAIRMAN: What period is that?

20 MR BEARD: That was in 2003. Mr Lask selected a very short
21 period for these LF 55 trucks, a different set of
22 trucks, smaller. He said, "Look, look, look, we have
23 got some price increases here". We are not denying that
24 there were from time to time price increases, that is
25 not the issue, but it is really striking that Mr Lask

1 did those two price increases and then completely
2 ignored the fact that the next time there was any sort
3 of renewal in relation to those trucks, there was a vast
4 price drop.

5 THE CHAIRMAN: Is it possible that the strength of the pound
6 could have fed into the fact that UK prices did not need
7 to rise in the early period?

8 MR BEARD: Well, yes, I am not suggesting that there are not
9 possibilities that exchange rate could not have fed
10 through and we are not trying to control for that.

11 THE CHAIRMAN: Then there is another -- yes, well, exactly.
12 There are quite a number of things that could have gone
13 into the --

14 MR BEARD: Yes. We are not fighting shy of that. We are
15 not trying to do a regression here because there is
16 exchange rates, there is costs, there is demand. You
17 know, all of that is true, but that is in the
18 regression. We are not fighting shy of that. We
19 cannot. What we are looking at are issues to do with
20 mechanisms and what we are actually seeing in relation
21 to these claimants, given that we do not have regression
22 that goes to this claimant-specific that is in any way
23 reliable.

24 MR RIDYARD: I mean, that is the most -- there are two
25 things going on here. One is what this information

1 tells you about the mechanism and, you know -- which is
2 about following through the list price increases and
3 transaction prices. But the second thing that is going
4 on here and in a way the reason we are looking at that
5 is this second bite of the cherry point. In a scenario
6 where, you know, hypothetically, we do find a price
7 increase on econometrics, you know, you said you want to
8 refer to this evidence to say, "Well, that may be true
9 for the UK as a whole but it is not true for these
10 customers", and there the fact that these timelines do
11 not control for cost changes and again exchange rate
12 movements is a bit of a problem because that is -- the
13 whole point of doing the econometric exercise was to
14 hold other things constant.

15 MR BEARD: We understand that.

16 MR RIDYARD: But does that not -- I take what you say about
17 the mechanism, put that to one side, but about using
18 this evidence to trump a bad econometric result for your
19 side would need to address all things that econometrics
20 addresses.

21 MR BEARD: Well, we say, look, you cannot do that. We
22 accept that you cannot do the econometric analysis and
23 we are just saying, "Should you just stop there?", and
24 we are saying, "No, you should not just stop there".
25 The reason we are saying that is because we have all the

1 evidence about the sophisticated procurement mechanisms,
2 we have the incidence of attempts to move prices by £200
3 that were just being rejected out of hand, the fact that
4 Royal Mail could hold us to repeated flat rate contracts
5 and so on; we are saying, "Look, if you have an average,
6 then we will be at the bottom of that average". That is
7 essentially where we are dealing with this.

8 Now, I accept entirely that in terms of controlling
9 for various factors, this does not do it. That is what
10 the regression does. But in the absence of that, what
11 other evidence do we have? We have this evidence about
12 the interaction overall in terms of procurement and how
13 that panned out in relation to pricing. We say that is
14 material and relevant for that issue as well as the
15 mechanisms issue.

16 But, no, I am obviously not saying it controls for
17 any of that. That is the predicate of the fact that we
18 are here on this material.

19 I am not going to -- we have covered the BT timeline
20 in our submissions, paragraph 299, {S/10/108}. What you
21 see there, if we could just ... you see very -- well,
22 I will just make the submission. You get -- in relation
23 to the BT timeline, you get this pattern of references
24 to price increases but you just do not get any sense of
25 the price increases at list price level being passed

1 through into transaction prices in very much the same
2 way as we have seen in relation to Royal Mail.

3 What we see is some limited price increases. There
4 is at one point, for instance, in 1998, where there was
5 a 2.5% price increase. But on the basis of Mr Harvey's
6 numbers from the before/during analysis, of course
7 that -- we would have to be hypothesising that, rather
8 than getting a 2.5% increase, somehow DAF would have
9 agreed to a 9% drop in prices in that period and, again,
10 that is just not feasible.

11 Very briefly, if I may, I am going to just try and
12 pick up some of the other points that Mr Ward has made
13 about specific effects. Obviously, he has made these
14 points about the influence of DAF NV on pricing, both in
15 relation to list prices, IKP and mandates. I think the
16 one thing I need to just touch on here is obviously he
17 has made those points generally, I have responded to
18 those generally, but in relation to the claimants
19 I should pick that up and then briefly pick up some of
20 the points where he refers to UK material and says,
21 "Well, actually, we have got information in relation to
22 the UK". What is striking about that is just how
23 limited the material is that he relies on from these
24 thousands and thousands of documents that we have got in
25 relation to the UK.

1 So let me just deal with the DAF NV influence
2 specific to these claimants. He says that the use of
3 list price increases and the means to exert pressure on
4 DAF UK by DAF NV affected both Royal Mail and BT and
5 that DAF's list prices were an important factor in
6 DAF UK's negotiations with the claimants. Just for your
7 notes, that is paragraph 141 and 147 of his statement.
8 There is just no basis for the latter proposition
9 whatsoever in the evidence. Indeed, we saw back in the
10 pricing statement that, although these list prices were
11 referred to in negotiations, the list price changes that
12 he is referring to do not assist him in relation to the
13 way in which prices were negotiated.

14 In relation to the question that we have already
15 seen pleaded as to the idea that there was discounting
16 of list prices, the position was -- and Mr Ashworth
17 explained this in some detail -- that that was not how
18 prices were negotiated with these claimants at all.
19 That was not the process that was gone through.

20 But in addition to Mr Ashworth, of course, we have
21 the material from Mr Giles and Mr Peatey -- we have
22 given the references in our closings at paragraphs 315
23 and 343 -- that they themselves said level of discount
24 off list prices was just not relevant to them when
25 negotiating prices. That was just not a relevant factor

1 in relation to this.

2 So the evidence that we have in relation to these
3 particular claimants and the significance of list prices
4 and list price increases, actually the evidence shows it
5 was not relevant to these negotiations. So the idea
6 that DAF NV was using list price as a means to exert
7 pressure on DAF UK and thereby push up prices for
8 Royal Mail and BT just does not stack up in relation to
9 the evidence.

10 Mr Ashworth, as I say, has always said, "Well, we
11 tried to use list price increases to try and move things
12 up". I have dealt with that issue already today and
13 I have just touched on the position in relation to
14 Mr Giles and Mr Peatey.

15 Then we come to IKP and margin targets. Again, we
16 have seen how Mr Ward wants to say IKP and margin
17 targets played a price in people's thinking about
18 prices, but there is just no evidence that that is the
19 case. In fact Mr Ashworth's evidence was that it did
20 not, and that is paragraph 104 of Mr Ashworth's
21 statement, {D/22/29}. Now, Mr Ward did cross-examine on
22 that and the obvious proposition that people knew about
23 them was accepted, but that is not taking matters
24 further forward.

25 Just taking a step back, one might be able to see,

1 if you are in a DAF UK dealer to and fro, there might be
2 some story about, "Well, if you do not get a better
3 price, then this deal will have to go up to DAF NV for
4 scrutiny and you do not want that to happen", and that
5 can be used as some sort of pricing lever. But, of
6 course, in the deals we are talking about here with
7 Royal Mail and BT, these are the big deals that were
8 going to go up on approval anyway and therefore how this
9 works as a mechanism is just wholly unclear.

10 We have dealt with the idea that somehow the IKP and
11 target margins would operate as some sort of channeling
12 mechanism to enable the prices charged by DAF to be
13 increased and the timelines actually illustrate how
14 those sorts of mechanisms by reference to list prices
15 just do not operate in the circumstances.

16 Just on the mandate structure, finally, we have got
17 obviously thousands of documents relating to the pricing
18 to these claimants and we are not aware of any documents
19 at all, nor have the claimants identified one, to
20 support any idea that anyone within DAF or indeed the
21 marketing and sales directors, who Mr Ward seems to see
22 as the spider at the centre of the web in all of this,
23 somehow rejected proposed prices for these claimants,
24 and that is precisely the sort of thing you would expect
25 to see if that were the mechanism that the mandate

1 structure were operating so as potentially to deal with
2 these matters.

3 Indeed, I will just refer you briefly to {I2/200},
4 which is an email chain, which is actually an email
5 chain which includes a Mr Bonsen, who was a managing and
6 sales director at the relevant time, so this is in 2009.
7 The critical question is asked here not what Mr Bonsen
8 thinks about any prices, but what Mr Schippers, the
9 overall senior individual in the business, thinks.

10 What this suggests is that these statements that are
11 being made about the extent of influence of the
12 marketing and sales directors on these pricing decisions
13 is just hugely overstated and the evidence we are
14 seeing, the actual documentary evidence we are seeing --
15 because we disclosed all of this internal material --
16 does not illustrate that at all.

17 Now, with that, I was going to move on briefly to
18 look at one or two of the particular documents that
19 Mr Ward referred to, but I am also -- in relation to UK
20 exchanges, in particular, for instance, the
21 Castle Coombe document which he placed great weight on.
22 I am happy to do that for a couple of minutes or I do
23 not know whether or not it would be better to pause and
24 start tomorrow morning. But I wonder whether, in the
25 circumstances, it might be a good idea to start -- if it

1 were possible for the tribunal to start slightly earlier
2 tomorrow.

3 THE CHAIRMAN: Well, why do we not carry on until 4.30 now?

4 MR BEARD: I am happy to now, thanks.

5 Now, DAF accepts there are a very small handful of
6 examples of pricing information being exchanged amongst
7 the UK subsidiaries. Of course, the Commission in its
8 decision did not actually find -- make a positive
9 finding that the UK subsidiaries participated in the
10 agreement, nor does any of the evidence suggest that
11 there was anything like the sort of regular exchange in
12 the UK that might have been said to lead to an effect on
13 prices. It is not even clear, to be fair to the
14 claimants, that they actually advance that case.

15 But in the claimants' submissions, just for your
16 notes, at paragraph 177, five examples are picked up by
17 the claimants, where they say, "Ah, actually, this is
18 examples of UK exchanges". Now, the first example they
19 pick up is perhaps Mr Ward's favourite document, which
20 is {I6/127}, which is a note of a meeting at
21 Castle Coombe, as it is known. You will see this is
22 2003 and this is a meeting where Stuart Hunt of DAF
23 attended.

24 It is accepted, of course, that during the course of
25 what is minuted here, DAF, as you can see from the first

1 paragraph, indicated a price increase prior to the
2 upcoming show of 3% and there was a general consensus
3 that prices would rise on average between 5% and 6%.

4 Now, as we have already seen effectively from some
5 of the timelines, even if this were the case because
6 those timelines covered this period, that did not affect
7 prices to Royal Mail and BT. But it is actually worth
8 just pausing and thinking what this note says. As
9 I say, it is 2003, so it is seven years into the
10 infringement. I am halfway through Mr Ward's 14 years.
11 But if you just look at the second paragraph, it says:

12 "Horror stories were indicated. Jurgen Knorpp
13 accused Iveco of selling 7.5 tonners for £15,000 ...
14 Equally the meeting discovered that ... Volvo and
15 Mercedes had recently been selling ... tractor units for
16 £32,000 ...

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

21 It is just worth pausing here. I am not seeking to
22 justify what went on at Castle Coombe. I completely
23 understand that this sort of exchange of information
24 about price rises should not have been undertaken. But
25 just take the context of what is being said here. What

1 is being said is, effectively, prices in the UK have
2 been falling for the last six years and that actually
3 what they are seeing are incidences of very, very
4 intense competition. This, as I say, is seven years
5 into the period of the infringement. This is six years
6 of falling prices where, according to Mr Ward, it was
7 inconceivable that the infringement did not have effect
8 on the UK market. But here are the representatives of
9 manufacturers saying they are falling and giving
10 examples of serious undercutting and they are very
11 concerned about what has happened here; in other words,
12 there has been -- whatever has been going on in the
13 background, that has not been working in the way that
14 anyone thought or hoped it might have been.

15 THE CHAIRMAN: Well, it is an example, perhaps, of cheating,
16 is it not?

17 MR BEARD: Well, that may well be right, but I think one has
18 to be slightly careful about this term "cheating" in the
19 sense that what "cheating" means is just people, because
20 they could not be monitored, are competing for business
21 and what is being said here is actually prices have
22 fallen over the last six years.

23 Now, as I say, I am not saying what is seen here in
24 terms of exchange of information, exchange of pricing,
25 is in any way good, exemplary, appropriate, but when we

1 are asking ourselves about the situation in the UK and
2 whether or not coordination and collusion that had
3 happened that is identified in the decision had
4 occurred, there are actually parts of this where this is
5 an apparent reaction to the effect of, for want of
6 a better word, competition occurring between people
7 which had driven prices lower.

8 Now, the question then arises: these exchanges
9 occurred. Did the prices move up in the UK, reacting to
10 these exchanges? Now, what we see in the regression
11 analysis is not and what we saw in the timelines was
12 not. But I leave that to one side. I just think it is
13 important, given that we have this vast swathe of
14 documentary material -- and actually this is an outlier
15 of a document in relation to the UK and still what is
16 being said by people that are doing something that is,
17 in competition terms, inappropriate, they are saying --
18 and writing it down -- they are saying, "Well, actually
19 prices have been falling".

20 The second example that is relied on by Mr Ward is
21 some information from MAN about Euro 4 pricing, but we
22 are not sure where Mr Ward is going with that one
23 because it is a document dated October 2005. I think it
24 is common ground that the Euro 4 and indeed 5 pricing
25 was set by DAF NV and it was set in June 2005, so it was

1 a different entity earlier than the date on which that
2 document was shared. Now, again, I am not saying that
3 that sort of material should have been shared. We
4 recognise that Mr Ashworth talked about using it
5 discretely. We understand all of that, but what does it
6 tell us about any sort of effect?

7 Third example he highlights is at paragraph 185.
8 This is an example -- can we just turn up {S/9/72}?

9 "... Mr Ashworth attended [an] SMMT meeting with
10 various representatives of DAF's competitors. A MAN
11 note of the meeting ... recorded: '... all received
12 price increases for forward production [DAF 6% and then
13 the others] Ian Jones said that we will not find the new
14 transaction price until all stocks are washed through --
15 he estimated between 4,000 and 5,000 ...'. Mr Ashworth
16 accepted that this was sensitive information and, in
17 particular, that an increase in DAF's list price would
18 be relevant to the ultimate transaction price ..."

19 That is just repeating the submissions that Mr Ward
20 has made previously. But DAF's 6% -- I mean,
21 Mr Ashworth could have been forgiven for not recalling
22 it, but actually, in February 2009, so a month before
23 this, in fact that 6% price had been announced publicly.
24 So if we could just go to {I2/125} -- I think I have the
25 wrong reference. I will have to come back to this one.

1 What I do want to note, though, is there was a list
2 price -- although there was a discussion in that note
3 that we have just seen of 6% in the meeting note, in
4 fact there was a list price increase of 7% in
5 February 2009. We will just go to that document,
6 {I6/108}.

7 So this is the price increase, January 2009. There
8 was a 7% increase from February 2009. I do just want to
9 dwell on this for a second. I will find the reference
10 to the publicity and provide it probably tomorrow
11 morning. But Mr Ashworth was referring at a meeting to
12 a price rise that was actually being announced -- that
13 had been announced publicly in any event. Then this
14 price notification was promulgated.

15 Now, you may not recall this from opening, but this
16 was in the context of a situation where we are in 2009,
17 there is more of a formalisation of the process of
18 exchange of information at the European level through
19 the German subsidiaries, and we saw in opening emails --
20 and I will just provide you with the reference. It is
21 {I2/118.3T} and {I2/122.1T} -- that Ms Rothacker of
22 Daimler, who sent round the spreadsheets, if you can
23 remember, had asked the other manufacturers for
24 information about list prices.

25 Interestingly at that time, so this was

1 January 2009, DAF Germany had provided the information
2 there would be no list prices planned for spring 2009.
3 But obviously we are seeing here in the UK a 7%
4 increase, so we are seeing a very significant difference
5 in the list price increases in the UK as compared to
6 what was being communicated in the material subject to
7 the infringement decision. That goes back to the point
8 I was making earlier about even the question of whether
9 or not the list prices were being elevated by the
10 infringement in the UK is something that is not being
11 born out by this evidence.

12 Indeed, what we also saw in opening was the next
13 general list price change here was in 2010, and that was
14 actually a list price decrease of 25%. Again, if you
15 recall, I went to some of the German spreadsheet
16 information and at the time that that 25% decrease was
17 occurring in the UK, DAF's feedback in the German
18 formalised spreadsheet was that there would be a 2%
19 price increase from October 2010, so again a significant
20 mismatch.

21 I do not think I went to it in opening, but if we
22 just go to {I2/IC343.1/12}, this was in relation to this
23 price decrease in 2010. The last bullet, internal DAF
24 presentation:

25 "DAF is the first to lower list prices drastically,

1 competition will be confused and have to react."

2 So the idea that this was being communicated -- this
3 sort of UK information was being communicated just is
4 not evidenced by any of the material and what we see of
5 the formalised exchanges that are referred to in the
6 Commission decision is material that was communicating
7 very different list price changes from that seen in the
8 UK.

9 Just very briefly on the last couple of examples
10 that the claimants have referred to. The fourth
11 example, the claimants' closing, paragraph 186 -- we
12 have addressed this at paragraph 378 of our closing --
13 the short point is that the information in question was
14 obtained from a dealer. Well, obtaining information
15 from a dealer is not problematic for these purposes, not
16 relevant.

17 Example 5, which is at the claimants' closing 187,
18 refers to SMMT meetings. I have addressed one of them.
19 The other meeting in question took place in July 2009.
20 There was no discussion of pricing. The wording of
21 sentence 187 in the closings is something I think
22 I ought to just go back to, {S/10/131}. No, I have got
23 the wrong reference. I think it is {S/9},
24 paragraph 187. Sorry, I do not have the page reference.
25 I will see if I can find something close to it.

1 {S/9/73}:

2 "Example 5: at two SMMT meetings ... attended by
3 Mr Ashworth and Mr Pain, the Cartelists discussed
4 stocks, market forecasts ... It is to be noted that,
5 according to Mr Ashworth's evidence, granular
6 information on registrations and transaction prices was
7 provided on a daily basis via the SMMT."

8 Now, I am sure that the impression that that leaves,
9 that actually the SMMT was providing daily updates live
10 of this information, was not what is intended to be said
11 here, but it is very clear from Mr Ashworth's evidence
12 that the SMMT did not provide that sort of material.
13 What happened was people submitted their material to the
14 SMMT, which is a trade body, which would then aggregate
15 it and make it available to members some time later.
16 But I am sure that is just a lack of clarity in relation
17 to drafting. Just to be clear, they did not provide any
18 transaction price data to SMMT.

19 THE CHAIRMAN: Right. I think we need to call a halt for
20 today.

21 MR BEARD: I have now got through those five matters and
22 therefore I can move on.

23 THE CHAIRMAN: So what is on the menu for tomorrow?

24 MR BEARD: So I need to deal with one or two of the points
25 on causation and quantum that I have not already picked

1 up in interactions with the tribunal already, I want to
2 deal with one or two of the points in relation to the
3 allegations about Professor Neven's independence and
4 then I want to move on to all of the volume 2 material.
5 If it were possible to start half an hour early
6 tomorrow, I think that would mean I would be able to
7 make sure that I was dealing with volume 2 by 10.30, but
8 if that is not feasible for the tribunal, I will simply
9 compress --

10 THE CHAIRMAN: I just want to be fair to both sides, so if
11 you are getting an extra half an hour, I think Mr Ward
12 should have an extra half an hour.

13 MR WARD: Well, I have plenty to talk about after the last
14 two days, unfortunately.

15 THE CHAIRMAN: Yes. Okay. Well, should we say -- it will
16 probably be easier if we have quarter of an hour, so we
17 start at 10.15 and then we can go on for another quarter
18 of an hour late at the end. I think if it is half
19 an hour, then it is getting quite late.

20 MR BEARD: No, no, understood. I do not want to push it.
21 Obviously I am trying to move things quickly and there
22 have been one or two questions along the way which
23 obviously --

24 THE CHAIRMAN: No. We are grateful to you for answering
25 them. All right. So we will start at 10.15 tomorrow.

1 MR BEARD: I am grateful.

2 (4.35 pm)

3 (The hearing adjourned until
4 Thursday, 30 June 2022 at 10.15 am)

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

INDEX

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

Closing submissions by MR BEARD1
(continued)

1

2