IN THE COMPETITION APPEAL TRIBUNAL

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

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Tuesday 17 May 2022

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

BETWEEN:

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

v

DAF Trucks Limited and Others **Defendants**

A P P E A R A N C E S

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

Tuesday, 17 May 2022

(10.30 am)

THE CHAIRMAN: Good morning. Good morning, everyone.

MR BEARD: Good morning.

MR LASK: Sir, good morning. I am going to be conducting the cross-examination of Mr Borsboom this morning.

THE CHAIRMAN: Okay.

MR LASK: I wanted to flag up at the outset that it will be necessary at some point to go into closed session as some of Mr Borsboom's evidence is marked as confidential. I have discussed it with Mr Beard and, subject to the tribunal's views, I think it may be appropriate to at least start the cross-examination in open because there is a chunk of it that I can do without going to closed material and then for me to indicate when the appropriate moment is that it is time to go into closed.

THE CHAIRMAN: All right, and that has all been explained to Mr Borsboom, has it?

MR LASK: I am not sure it has yet.

MR BEARD: No.

THE CHAIRMAN: All right. Shall we start then with Mr Borsboom?

MR LASK: Yes.

MR RONALDUS BORSBOOM (called)

THE CHAIRMAN: Good morning, Mr Borsboom.

A. Morning.

MR BEARD: As you will see, at the moment I am looking at you because I am looking straight at the camera in the tribunal, but I will turn towards the screen that is in the tribunal so I will not be directing my face towards you when I ask you questions or when Mr Ward is asking you questions. It is not discourtesy. It is just the way that the courtroom is laid out.

Now, Mr Borsboom, you may just heard Mr Lask indicate that he would like at some point to ask you some questions about material in your statement which is confidential. When he does that, what he is going to do is indicate that he is going to move to confidential material. We will then have a short pause because only people that are privy to DAF confidential material can be in the courtroom to hear that and see that and we have to stop the live transcript, so there will be a short pause there. If at any time during any other answers you want to refer to confidential material, please say so and we will make arrangements that you can give your answer in confidential session in due course.

THE CHAIRMAN: Mr Beard, we need to swear in --

MR BEARD: I was going to call him. I just thought it was appropriate to do that before swearing him in.

THE CHAIRMAN: Yes.

MR BEARD: So, Mr Borsboom, I will leave it now to the tribunal. I call you and they will swear you in.

MR RONALDUS BORSBOOM (affirmed)

THE CHAIRMAN: Thank you very much, Mr Borsboom. Mr Beard may have a couple of questions for you.

Examination-in-chief by MR BEARD

MR BEARD: Mr Borsboom, I will not ask you any questions save to confirm your witness statement, if I may. Do you have in front of you a copy of the statement which has a heading on the first page, "Witness statement of Ronald Borsboom" or it is your full name in fact?

A. Yes.

Q. If we turn to the next to last page, page 25 in that, {D/25/25}, is that your signature, Mr Borsboom?

A. That is indeed my signature.

Q. Thank you. Is this statement true to the best of your knowledge and belief?

A. It absolutely is.

MR BEARD: Thank you, Mr Borsboom. Mr Lask is going to have some questions for you on behalf of Royal Mail and BT. I do not have any questions for you at the moment. Thank you very much.

Cross-examination by MR LASK

MR LASK: Good morning, Mr Borsboom. As Mr Beard said, the camera through which you can see me and the screen through which I can see you are in different places so no discourtesy is intended if it appears that I am not looking at you when I am asking you questions.

I would like to start by asking you some questions about your role at DAF NV. You joined DAF in March 2000 as head of vehicle development; is that right?

A. That is correct.

Q. In that role you were in charge of all development projects other than those relating solely to engines; correct?

A. That is correct.

Q. How many people were in your department at that time?

A. Approximately 500, I would guess.

Q. So 500 people responsible for the development projects that you were overseeing?

A. Yes.

Q. In December 2002 you became director of product development, also known as chief engineer --

A. Correct.

Q. -- and this brought engine development within your remit; yes?

A. That is correct.

Q. Roughly how many additional people came under your

oversight at that stage?
A. Okay. I have to make a small correction. At that point it became 500. Before that it was probably more like -- something like 250 to 300.
Q. 250 to 300?
A. That is correct.
Q. In March 2020 you assumed your current role of executive director of product development; yes?
A. That is correct.
Q. Is it fair to say that all of these roles have concerned the engineering side of DAF's activities?
A. Absolutely, yes, correct.
Q. So you have not been involved in pricing, for example?
A. I have not, no.
Q. I would like to ask you now some questions about DAF's general approach to developing new products. Can I check? I see that you have two files in front of you and I understand at least one of them has your witness statement in it and the other --
A. Yes.
Q. -- has some documents. Do you also have access to a screen?
A. I do, yes, over here.
Q. When it comes to me to show you documents, would you prefer to view them on the screen or in the folder in

front of you?
A. The screen would probably be better.
Q. Okay. If at any time you want to look at a document in hard copy, assuming it is in the file, just ask me and I will give you the relevant tab reference.
A. Okay.
Q. So DAF's general approach to developing new products -- within DAF NV the development of new products is overseen by a project board and managed on a more regular basis by a project progress committee; yes?
A. That is correct.
Q. Both bodies meet on a monthly basis with each project being discussed at least quarterly; yes?
A. That is in general correct, yes.
Q. Is it fair -- I am sorry.
A. It depends a little bit on, let us say, phases of a project and whether or not issues are worth a more frequent review, but generally speaking it is indeed once a month.
Q. So, if anything, it may be more frequent but it is at least monthly meetings and at least quarterly reviews of each project?
A. Correct.
Q. Is it fair to say that papers would be produced for these meetings and minutes taken at these meetings?

A. Absolutely, yes, it is.
Q. Thank you. You were chair of both bodies, both the project board and the project progress committee; yes?
A. That is correct.
Q. Have you held that role as chair ever since you joined DAF in March 2000?
A. No, no. No, no. The role of chair comes with the position of chief engineer or director of product development.
Q. So you would have become chair in December 2002; is that right?
A. That is correct. That is correct.
Q. In that capacity you oversaw the project for DAF's Euro 4, Euro 5 and EEV vehicles; yes?
A. That is correct, yes.
Q. But Euro 3, the Euro3 project or projects, were already largely complete by the time you joined DAF; correct?
A. That is correct.
Q. You quite reasonably state in your witness statement that even in relation to Euro 4 and Euro 5, your recollection has faded to some extent given the significant passage of time; is that correct?
A. That is correct, yes.
Q. Is it fair to say these were complex projects, spanning a number of years?

A. These type of projects are very complex and indeed span a number of years, absolutely.
Q. An important consideration for DAF in a project of this kind is timing; is that right?
A. Timing is of course one of the key elements of any programme --
Q. When you are -- sorry, I spoke over you. Would you like to say that again?
A. Sure. One of the four key elements of the programme is timing. The other one is cost, performance and quality.
Q. When DAF is embarking on a project in order to comply with emission standard legislation, you have a legal deadline by which the new vehicles must be ready; yes?
A. That is correct, yes.
Q. Can I ask you to look, please, at paragraph 12 of your witness statement? That is at {D/25/4}. You refer to two legal deadlines here. You say:
"The Emissions Standards (apart from EEV) specified two legal deadlines. The earlier deadline was the latest date by which manufacturers could introduce new truck types that were compliant with the new emissions standard ..."
Just pausing there, is there a missing "not" before the word "compliant"?
A. No, it is not. It is the latest by which -- any date

after that you would be late literally. You can of course launch before that date if there is a reason for it.

Q. I see. Just focusing on the earlier deadline, my understanding is that, pursuant to that deadline, if a manufacturer wants to introduce a new model that is not compliant with the upcoming emissions standard, then this earlier deadline is the latest date on which it can obtain approval for that model from the national authority. Have I understood that correctly?

A. Well, it is -- all the legal deadline -- beyond the legal deadline you can only certify vehicles or put a licence plate on it if they complied to the new legislation. Before that, you can introduce a new model that does not comply to the new legislation but you would do that only for a very, very, very short time and it does not make a lot of sense.

Q. Yes, I see. You go on to say:

"... and the later deadline was the date by which all trucks sold by manufacturers had to comply with the relevant Emissions Standard."

Generally speaking in your statement, that is the deadline you are referring to; is that right?

A. That is correct. Manufacturers try to avoid introducing new types close to such a deadline because, like I said, basically (inaudible),the challenges with at least a year, and given the complexity and the challenges around new emissions standard, that usually is not a good idea.

Q. So they try not to leave it to the last minute?

A. Usually you try not to leave it to the last minute, but, yes, those are the reasons. There is registration. *Trucks*, remember, they leave our factory and in some cases they need to go to bodybuilders before they can be registered, so there is always a little bit of time that we need to be ready prior to the legal deadline to allow for that.

Q. Yes. When you talk here and in your statement about introducing a new truck, there is a distinction, is there not, between launching a new truck, taking customer orders for it and then the start of production; is that right?

A. That is correct. First of all, you would like the markets to know about your wonderful new product, prepare the markets for it and at a certain date you start taking orders, and you need a certain amount of orders in the order board to be able to start production on it.

Q. Yes, so you have very helpfully summarised the chronology. You have the launch first, secondly, at some point thereafter, DAF begins taking customer orders

and then, thirdly -- I think you say it is between six and 16 weeks later -- the new trucks go into production. This is what -- the date they go into production is what you refer to in your statement as the "SOP" or "JOB 1 date"; yes?
A. That is correct. "SOP" stands for "start of production" so that is a pretty accurate description, I would say.
Q. Thank you. Now, subject to the legal deadline, DAF has a degree of choice in respect of timing, in respect of when it introduces new models; is that right?
A. Sure. That is correct.
Q. I am sorry. I spoke over you again.
A. That is correct.
Q. There are a number of factors that will determine whether you can and want to introduce a new truck ahead of the legal deadline; yes?
A. That is correct.
Q. You identify some of the main ones in section E, but you also explain that, even if you want to introduce a new vehicle before the deadline, you are sometimes delayed by technical issues; yes?
A. That is correct.
Q. You make clear in your statement that DAF would never launch a product before it is ready; yes?
A. Yes, absolutely correct.

Q. I want to turn now to ask you some more specific questions about DAF's Euro 3 projects, recognising, as you say in your statement, that you have limited direct knowledge because they largely predate your time at DAF.

Can we go to paragraph 59 of your statement? This is {D/25/17}. You acknowledge here that the Commission, the European Commission, found an agreement between DAF and other manufacturers in April 1998 relating to the introduction of Euro 3 compliant trucks. Do you see that?

A. I have no personal knowledge, but this indeed was explained to me, yes, as one of the findings of the Commission, that is correct.

Q. Are you aware that DAF has admitted that agreement?

A. That is what was explained to me, yes.

Q. You have a table here between paragraphs 58 and 59, {D/25/16}. I am not sure if it is possible to display the whole table at the same time, but, if not, just the top bit of it will do for now. This table gives details of the relevant stages in the Euro 3 projects. Sorry, is that -- yes, that is Euro 3. In particular, you have, in the penultimate column, the actual JOB 1 dates for some of the trucks and, as we have heard, the JOB 1 date is the date the trucks go into production. You point out at paragraph 60 -- at paragraph 60, you

summarise the dates on which the trucks went into production and you point out that they went into -- some of them went into production ahead of the legal deadline.
A. That is correct.
Q. You contrast that with the agreement you refer to in paragraph 59, where you say that the -- you describe the agreement as being an agreement not to offer Euro 3 trucks before it was compulsory on 1 October 2001.
A. That is correct, yes. That is an agreement that again was outside my knowledge prior to this and something I had nothing to do with.
Q. But the suggestion in your statement, as I read it, is that you are saying even if there was an agreement, of which you know nothing -- even if there was an agreement not to offer Euro 3 trucks before the deadline, it was not in fact complied with, at least as far as DAF is concerned because DAF did introduce its Euro 3 trucks before the legal deadline. Is that the point you are making?
A. I think that is clear from the table, so yes.
THE CHAIRMAN: Can I just ask, the dates in those penultimate columns, are they dates?
MR LASK: Yes --
A. Those are dates, yes. It is in years.

THE CHAIRMAN: Can you just explain how they work?

A. Yes, it is years and week numbers.

THE CHAIRMAN: Week numbers, okay.

A. So the first two digits is the year 1998, 1999 and so forth and there is a dot and then the next two digits are week numbers, starting with week 1 in January.

THE CHAIRMAN: I thought so. Thank you for confirming.

MR LASK: One has to do a spot of mental arithmetic, but I will try to flag up the dates in real-time, if I can put it that way, as we go through.

I would like to show you some underlying documents, if I may, and the first one is at {I1/29}. These are the minutes of an ACEA meeting which took place on 6 April 1998. That date is at the bottom of this page. Do you see that? Have you seen this document before, Mr Borsboom?

A. I do not recognise it.

Q. All right. Well, I will ask you one or two questions but fully understood if you are not able to answer them. If we could scroll back up, please, you will see under the heading "Euro 3":

"All Members ..."

I take that to be members of ACEA.

"All Members agree not to push any anticipation of EURO 3 before it is compulsory."

So not to push any anticipation of Euro 3.
Then at the second bullet point there is a reference to:
"... only the Nederland has expressed the willingness to put incentives at the rate of 5000 Guilders/Vehicle, with a budget of 95 Millions Guilders, starting from February 1999 until EURO 3 Date, DAF has expressed its Willingness to respond to this incentive without pushing."
Do you know what that might mean?
A. I am sorry but I do not.
Q. Fair enough. Then you see the third [sic] bullet point:
"In case of incentive and anticipation, all Members will propose EURO 3 as on option, with an additional charge in the bracket of 4500 to 5000 guilders net price for trucks over 16 [tonnes] ..."
Then the final bullet point:
"Whatever the stage of development of their engines all Members will communicate on the cost of development and investment of the new technology for EURO 3 without stressing the consumption penalty incurred by EURO 3."
Do you know what that might mean?
A. Sorry, I do not.
Q. Can we go to the next document, please, at {I6/134T}? We understand this to be a record of a competitor

meeting but it is undated. Have you seen this document before?

A. No, I have not, sir.

Q. All right. Well, I will take it relatively swiftly then. Again, under the heading "EURO 3" we see:

"No significant strides for the promotion of EURO 3 (minimum or no identification of the vehicles, no identification of the engines)."

I appreciate you have not seen this document, but just reading it now and reading it alongside the previous document, this looks like an agreement not to promote the Euro 3 trucks before the legal deadline rather than an agreement to withhold them from sale. Do you agree?

A. Again, I do not know the document. First time I see it so I find it difficult to give it an interpretation.

Q. All right. It is right to say, is it not, that you have not given any evidence on the extent to which DAF in fact promoted its Euro 3 trucks before the legal deadline?

A. I could not comment, sir, I am sorry.

Q. You have not given any evidence on the extent to which other manufacturers promoted their Euro 3 trucks before the legal deadline?

A. No, because I have no knowledge about it and it is

20 years or more ago, so ... and in many cases, as the years show, it was before my job started at DAF so ...
Q. Yes, this agreement was before you joined DAF. Did you become aware of it when you joined DAF?
A. No, sir, not at all.
Q. All right. Could we go, please, to the Commission's decision at {I5/465/12}? If we scroll down, please, to Recital 50, this is the Commission's decision in which it found an infringement by DAF and a number of its competitors. Are you familiar with this document?
A. No, I am not, sir. I am sorry.
Q. All right. If you look at Recital 50 at the bottom:
"These collusive arrangements included agreements and/or concerted practices on pricing and gross price increases in order to align gross prices in the EEA and the timing and the passing on of costs for the introduction of emission technologies required by Euro 3 to 6 standards."
So that is referring not just to Euro 3 but also to Euros 4, 5 and 6. Were you aware of any agreements or information exchanges in relation to these matters?
A. Absolutely not, sir.
MR LASK: Sir, at this stage I do need to go to parts of Mr Borsboom's statement that are confidential so that might be an appropriate moment.

THE CHAIRMAN: Okay. So what does that mean in practical terms? Do we need to turn off the live screen? Have a five-minute break? All right. We will have a five-minute break and anyone who is not meant to be here will, I am afraid, have to leave. I assume everyone that is with Mr Borsboom is okay to stay; yes?

A. Yes.

THE CHAIRMAN: All right. We will have a five-minute break, Mr Borsboom, just to make practical arrangements.

(10.58 am)

(The session continued in private)

(12.10 pm)

(In public)

MR WARD: We now move on to the claimants' expert evidence and, as you will be aware from the timetable, what we now have is conventional cross-examination on the topic of plausibility or theories of harm, as it has been described.

THE CHAIRMAN: Yes.

MR WARD: We have Mr Harvey.

MR JAMES HARVEY (affirmed)

THE CHAIRMAN: Thank you. Make yourself comfortable.

Examination-in-chief by MR WARD

MR WARD: Mr Harvey, you have produced three reports relevant to theories of harm, dealing with theories of

harm, value of commerce, overcharge and loss of volume.
Do you have those before you?
A. Yes.
Q. Could I ask you to open your first report, please, which is E1, and could we go to page 13, {E/1/13}? Is that your signature?
A. It is.
Q. Can we now go to your second report, your reply report, which is at E/28. Could we go to page 7, {E/28/7}? Is that your signature?
A. Yes, it is.
Q. Can we now go to your supplemental report at {E/52} and again to page 7, {E/52/7}? Is that your signature?
A. Yes, it is.
Q. Do the contents of these reports represent your true and complete professional opinions on the matters to which they refer?
A. Yes, they do.
MR WARD: Please wait there. Mr Beard will have questions for you.

Cross-examination by MR BEARD

MR BEARD: Good morning, Mr Harvey. Mr Ward has just taken you to versions of your reports. They are in the non-confidential versions of the bundle. I will take you to confidential versions. Those will be what are in

I think the hard copy bundle next to you. If there is anything confidential that you want to refer to, say so and then we will make sure that it can be dealt with in confidential session. If I am hitting confidential material, I will try to avoid showing it on the screen to the world.

So what I want to do before lunch, if I can, is deal with a few preliminary points and some initial points on issues to do with certain evidence. Then I will later come on to some of the mechanisms that you have referred to in relation to theory of harm.

So could we just turn up your first statement at page 15, so I have got it at {E/IC1/15}, and this is not confidential.

THE CHAIRMAN: You are using the confidential?

MR BEARD: I am using the confidential so I will just keep giving those references, if that is okay. It is just there are some diagrams that do have confidential material and I do not want to be bouncing backwards and forwards between reports. So at 2.4, you say:

"In considering the Theory of Harm, I have examined the Settlement Decision ..."

So that is the Commission decision; correct?

A. Yes.

Q. "... and the Royal Mail's, BT's and DAF's pleadings [so that is the formal pleaded material], DAF's Pricing Statement [which is a particular document that was submitted as part of these proceedings] and the witness evidence [and you say] in full."

You say "in full". Do you mean you read all of the statements? Is that what you mean by --

A. Yes.

Q. Did you look at the documents that were exhibited to those statements in addition?

A. Which documents?

Q. Any of the documents exhibited to any of the witness statements, Mr Harvey.

A. Yes, I would have read them.

Q. All of the documents that were exhibited to witness statements?

A. I do not think I can say that.

Q. Are there any witness statements you remember focusing on the attached documents more than in others?

A. No.

Q. You have not looked at any other contemporaneous factual materials that have been disclosed in these proceedings other than those documents attached to witness statements?

A. Any material that I would have referred to would have been referenced in my report.

Q. So if it is not referenced in the report, we can take it you did not --
A. I may have read it but not relied on it.
Q. So you may have read some of the other material. So you have explored some of the other factual material that is in this case?
A. When I have referred to it in my report, yes.
Q. Sorry, I misunderstood your earlier answer. Were you saying the only factual material you have looked at in this case is the stuff you have referred to in your report or was there other material you have looked at but have not referred to?
A. Well, there may be material that I have read and did not rely on because it was not relevant to the theory of harm, but I do not recall what that is now.
Q. No, sorry, I am not asking you to provide a full catalogue. So there could be documents that are not referred to in your reports that you may well have seen and potentially considered?
A. Yes.
Q. I just want to start by looking at a little bit of the empirical evidence that we have on the relationship between list price changes and transaction price changes. If we could just go to your third report which is {E/IC52/24}, just picking it up at 2.44, this is in

the context of a debate about Professor Harrington's paper that we will come back to, but I just wanted to pick up the second sentence in 2.44(a). It says:

"In relation to [I am just reading through the paragraph, but you can read it to yourself] whether the prices that were shared were 'prices which may ultimately affect the prices that consumers pay but are not necessarily the final prices that will be put before consumers', I set out why I considered that it was plausible that collusion on list prices led to an increase in transaction prices in my First Overcharge Report and [you say] set out evidence of there being a strong relationship between DAF's changes in list prices and net prices in my Overcharge Reply Report."

Then we see a footnote 48 which takes us back to your first report, paragraphs 2.89 and 2.91. Do you see that?

A. Yes.

Q. So that is the evidence you are citing here of a strong relationship between changes in list prices and net prices in your overcharge reply report. So shall we go to that? I think it is in {E/IC28/38}. If we can just go to 2.89, you say:

"I have used DAF's database disclosure to examine whether there is a relationship between DAF's own list prices and its own net prices at an aggregate level."

So you are just looking at a relationship between list prices and net prices; correct?

A. That is right.

Q. So when you said in your third report that you were looking at changes in list prices and changes in net prices, that is not actually what this evidence is doing, is it? It is looking at just list prices and net prices. We can come on and see that if we just go over the page. You refer to them as "scatter plots"; I have been referring to them as the "kebab diagrams" but that may be unfair!

You see there you have got a scatter plot of total list price and net invoice prices in pounds and each dot is a truck transaction list price and invoice price -- that is correct? -- in this scatter plot?

A. That is correct.

Q. So this scatter plot is not looking at changes at all. It is just plotting a line through a relationship you say exists between list prices and invoice prices; correct?

A. That is right.

Q. So these scatter plots do not assist us in the analysis between changes in list prices and changes in transaction prices, and I will come back to these scatter plots in a moment. But you know that Professor Neven has looked at the relationship between changes in list prices and changes in transaction prices, do you not?

A. Yes.

Q. So let us just have a look at that. Could we go to Professor Neven's first report, section 5, which is in {E/IC10/32}. So this is section 5 of his report. I know you are familiar with this, Mr Harvey, because this is material you have engaged with. Just picking it up at 5.1, you will see:

"As discussed in Section 3, what is required for effective coordination is the development of a focal point on transaction prices. The exchange of pricing intentions on list prices would only be meaningful in this respect if these pricing intentions were passed through in transaction prices in a manner that was consistent over time."

Then Professor Neven says:

"The rest of the section is organised as follows. First, I present the methodology used to identify changes in list prices and the extent to which these changes are transferred to transaction prices. Second, I outline the results of the analysis of the evolution of pass-through rates and I test the robustness of my results in various dimensions."

You are familiar with what he is doing here.

So what Professor Neven is doing in section 5 is to try and understand whether there would be a possible focal point for -- evidence of a focal point sufficient to sustain coordination on transaction prices. That is what he is saying he is doing overall here. You understand that?

A. I do. I think Professor Neven is trying to establish whether it would be possible to reach an agreement on transaction prices --

Q. Absolutely.

A. -- and he says that a focal point is necessary to do that.

Q. Yes, absolutely. We will come back to this. But you say that is not your theory of harm and therefore that project is, in your view, broadly irrelevant I think overall. I paraphrase, but I think that is how you put it. Is that fair?

A. Yes.

Q. I do not want to focus on the project that he has engaged in at the moment. I just want to look at some of the data that he analysed. As you know, Professor Neven carries out his project, as we have seen in relation to 5.1 and 5.2, by looking at the data on gross list prices and changes in gross list prices and changes in transaction prices and he draws on two sets of data that you are familiar with, the AS400 data and the MI data. You understand that is what he is doing here?

A. Yes.

Q. So we will be coming back in due course, perhaps over the next couple of days, to talk about the robustness of the AS400 data, but for the purposes of this exercise Professor Neven thinks it can be useful. Just in relation to this exercise, you understand that Professor Neven is making no assumptions about what causes changes in gross list prices? You understand that, do you not?

A. Yes.

Q. So it could be that there is some terrible nefarious cartel creating changes in gross list prices or it could simply be that gross list prices were being flexed for commercial reasons?

A. Yes.

Q. So could we go to page 38, please, {E/IC10/38}? This is him, under the heading "Calculation of the pass-through rate", explaining what he is doing in order to carry out that analysis that he set out.

"As a first step, I calculate the average change in transaction prices before and after a list price change episode. As already mentioned in the previous subsection, in order to avoid composition errors induced by options, I focus here on the list prices (and the transaction prices) of the chassis component of each basic specification."

He says:

"I consider all basic specifications sold by DAF."

Then he says:

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

Then he explains:

"The average transaction price ... is therefore the change of the average transaction price before and after the list price changes. The change is expressed as percentage of the average transaction price in the previous period."

So you understand here what he is doing in terms of his analysis of transaction price changes, do you not?

A. Yes.

Q. If we then just go on to figure 8, just below 5.20 -- that is page 42, {E/IC10/42} -- here is a sort of summary of the results of the first step in Professor Neven's analysis. What we are seeing here is the dispersion of what he calls "the pass-through rate in the UK". When he says "pass-through rate", that is the extent to which a gross list price change is passed through to a transaction price. That is correct, is it not?

A. Yes.

Q. On this we see some blue bars with some circles in the blue bar, and we can see that explained at the bottom of the table, where it says that the blue bar is covering the 5th to 95th percentile range of the distribution and the circle dot is the weighted average. I just want to focus on the circle dot. So this is the weighted average pass-through of gross list price change into transaction price change. You understand that is what this is showing?

A. Yes.

Q. You will see a line, a horizontal dotted line, that by reference to the left-hand scale is dotting at 100%. So what that dotted line is showing is that, if you had a 3% gross list price increase, then if the weighted average transaction price in the relevant period went up by the same amount, the same percentage, then that would be 100% pass-through and the weighted average transaction price circle would be on that line. You understand that?

A. Yes.

Q. If, for example, we have a situation that Mr Ashworth talked about, where he gave evidence that he hoped that there would be a 50% pass-through on average, we would find the circles about halfway between 0 and 100; correct?

A. No, I do not think so.

Q. If Mr Ashworth was talking about the pass-through on average being 50% of any gross list price increase into a transaction price increase, that would be translated into a weighted average increase of 50%, would it not?

A. No, not under this method. The reason is that Mr Ashworth -- I think what you are saying is that Mr Ashworth said that when he spoke about, say, a 5% list price increase and the expectation that would give rise to a 2.5% increase in net prices, that is his expectation of what will happen. What that sort of has I think as an assumption is that nothing else will change, there is no other reason for the pass-through rates to -- sorry, the net price to change. What this chart is showing is what in fact happens after the event that takes account of both the impact of the list price change and potentially the impact of any other factors that led to a net price change.

Q. Let me just try again. Here you have a situation where

you are looking at list price changes and transaction price changes. That is what we are dealing with. Now, if Mr Ashworth was successful in moving 50% of the list price increase he saw into a 50% increase in transaction prices, you would see the relevant weighted average circle being at halfway between 100 and 0, all other things being equal; correct?
A. Yes, all other things being equal.
Q. All other things being equal. I just want to look at what is actually shown here. What we see is that -- we will see along the bottom -- it is quite hard to read. I do not know if we can slightly expand this table. That is brilliant. Thank you.
You see along the bottom dates, 1997, q1, q2, q3, q4, and you see that it is a date range going from 1997 to q3, 2010.
A. Yes.
Q. So if we could just focus back in slightly so we can see the full table. Thank you.
So the first bar we see is that in 1997 -- what is identified by the data is that the pass-through from gross list price increase that occurred in 1997, a gross list price increase event in 1997, actually did not translate or is not linked to any increase in weighted average transaction prices at all. In fact, what is

identified in the data is a fall in transaction prices, and you accept that is a correct representation of the data?

A. Yes.

Q. Then in 1998 we actually see that, in relation to the gross list price increase event, the transaction price is -- pass-through is actually negative, so that is showing that the transaction price is falling when the gross list price is increasing; correct?

A. Yes.

Q. The same is then true in relation to 1999 and 2000, and in fact we see negative changes or zero changes all the way through effectively to 2005, when we see a 50% weighted average pass-through; correct?

A. Yes, but none of these dots tell me where the dots should have been without the list price agreement.

Q. So your point is that, absent the agreement, you cannot tell anything from this material. But I think what I had been suggesting to you is that -- and I think you accepted -- that Professor Neven is working on the basis that he is analysing the extent of transaction price changes by reference to list price changes, even assuming that there is some kind of cartel operating and dealing with gross list prices; correct?

A. That is right, but I think there is a slightly different -- there is a different point, which is what we do not know from this chart is where those blue circles would have been with a different list price change. That is what you cannot tell from this chart.

Q. I see. So let us just be clear. Your hypothesis is there is unlawful information exchange or agreement in relation to gross list prices that means that gross list price changes are higher in the actual world than they would have been in the counterfactual world; correct?

A. Not necessarily. I think within my theory of harm all that you require is that one of the other competitors believed that your net prices would be higher as a consequence of the list price exchange.

Q. Well, let us just take a step back. So it is no part of your theory of harm that in fact DAF's gross list prices would be higher than in the counterfactual world; is that what you are saying?

A. No, I am not saying that, but it is not a requirement. All we need to believe is that, in exchanging the information, the competitors would think that DAF intends to price its trucks higher than they would have otherwise believed.

Q. But in relation to the pass-through analysis here, what we are seeing is that increases -- so changes in gross list prices do not result in changes in transaction

prices. That is correct, is it not?
A. In the factual, yes.
Q. In the factual, and what we are actually seeing is that, even though gross list prices were being increased -- and I can take you back to Professor Neven's selection of the points of increase which I think you are aware of -- that in relation to each of those increases, you are not seeing an increase in transaction prices in any part of this period; correct?
A. Well, I think we should look at the evidence that is referred to.
Q. Certainly. Let us go back to page 37, figure 5, {E/IC10/37}.
THE EPE OPERATOR: That figure is confidential.
MR BEARD: I think it is better if we just look at it in hard copy in those circumstances. We will need it off the screen. The only difficulty is the tribunal needs to see --
THE CHAIRMAN: I am looking at it.
MR BEARD: Are you able to click back on your screen? Sorry, you have it?
THE CHAIRMAN: I have it.
MR BEARD: What you should have is a headed figure 5, a table entitled, "Share of basic specifications affected by a change in list price over the total number

of specifications sold each quarter in the UK".

So what we see there in the coloured boxes at the bottom as a key are orange, "Generalized", light blue, "Partial", and dark blue, "Generic". If we go back to the preceding paragraph, 5.12, what you see there is an explanation of the different categories that are being defined by colour. Do you see that? Under 5.12(a), (i) through to (iii), {E/IC10/36}, you will see:

"Quarters in which ... prices have changed for all basic specifications [of trucks] ..."

So that is referred to as a "generalised catalogue price change", so that is a generalised list price increase. Do you see that?

A. Yes.

Q. Yes. So that is price list changes for all specifications. Then (ii):

"Quarters in which list prices have been systematically changed only for a subset of all basic specifications ..."

So these are partial changes in list prices. So not all basic specification trucks have been subject to a list price increase in the particular period where there is a light blue bar, but a substantial quantity have, which is what the representation across the plot -- the X axis on the graph shows proportion of changes.

So you can see orange is all basic specifications, light blue is substantial numbers and then other quarters are labelled "generic quarters".

So you know, Mr Harvey, that what was being done here by Professor Neven was taking these key general price changes, the partial changes and the generalised changes -- so this is when basic specifications of trucks were subject to list price changes -- and looking at the extent to which those changes passed through. You understand that?

A. Yes.

Q. So what we could actually do is correlate the light blues and oranges with the bars we saw on figure 8 with a couple of exceptions. You understand that?

A. Yes.

Q. Yes. So that is the way -- for the benefit of the tribunal, what is being done here is identifying periods where there was substantial changes in list price on basic specifications of trucks and then looking at how that had an impact on transaction prices.

THE CHAIRMAN: You are excluding the dark blue?

MR BEARD: Yes, because they are not dealing with basic specifications.

THE CHAIRMAN: Yes.

MR BEARD: That is why. I think that is understood by Mr Harvey. Mr Ward may of course cross-examine Professor Neven in relation to the modalities of this, but I am just -- I think there is not in fact, from Mr Harvey's answers, a dispute about the data that is being identified here.

If we now go back then to what is on the screen and figure 8, what we see are these weighted average transaction prices -- changes, I am sorry, the weighted average changes, and in the blue bar the dispersion of individual transactions. We see there is a wide dispersion and we will come back to that.

But you understand what Professor Neven was doing here was identifying the list price for the chassis for each basic specification; correct?

A. Yes.

Q. Then he was looking at the price for the chassis actually purchased; is that correct?

A. Well, my understanding is that Professor Neven has I think constructed the list price and the transaction price for the basic specification.

Q. You understand the way he has done that; is that what you said?

A. Yes.

Q. So what we are talking about in relation to basic specification are the core components common to each truck?
A. Yes, that is right, but they are not the trucks that customers necessarily bought or the price that they paid for them.
Q. For the truck as a whole?
A. Yes, because Professor Neven has stripped out some elements of the price, both the list price and the net price, so it is not what the customer actually paid.
Q. So just to run through a little bit more detail of how it is done, you understand that Professor Neven and his team calculated a chassis transaction price for each individual truck; correct?
A. Well, Professor Neven has defined what the chassis transaction price is and then calculated that.
Q. Do you understand how he assessed that chassis transaction price?
A. Broadly speaking, I think that he has removed the elements of the actual chassis that was purchased, the list price associated with those, to end up with a truck that is what was actually purchased minus some extra bits that was purchased at the time.
Q. Well, just to be clear, he is taking out effectively elements from the truck that would be options that would

mean you were not comparing apples and apples when you were carrying out this analysis. That is broadly what he is seeking to do, is it not?

A. Yes.

Q. You accept that trying to do an apples and apples analysis here is the relevant comparison you need to carry out?

A. It is, yes.

Q. Here what we are seeing is that -- using an apples and apples comparison of different trucks, what we are seeing is no pass-through in relation to the list price of the chassis, the basic specification, as compared with the transaction price on a weighted average basis; correct?

A. No, I do not think that is correct, and the reason it is not correct is what I went back to earlier, which was that what you actually need to know is what the net price would have done without that change or in a different change. That is not what these charts are showing.

Q. I am asking you about the factual situation here because what I am interested in assessing is whether, on the data available to us, what we see is a pass-through from gross list prices into transaction prices, whatever the cause of the gross list price change, and what this

evidence shows is that there is no basis for you saying that there is in the real world any pass-through from gross list prices into transaction prices when there are changes. That is correct, is it not?
A. No.
Q. But what we are dealing with here is the list price of the chassis component which is actually observed; correct?
A. Yes.
Q. We are talking about the transaction price of that chassis component which has been assessed and we are looking at situations where that list price of the chassis component has increased; correct?
A. Correct.
Q. The list price of the chassis component has increased but the transaction price of the chassis component has not increased in the real world. That is correct, is it not?
A. In the factual, yes.
Q. So in the factual world, in the real world where we observe list price increases, we do not observe a pass-through of those list price increases into transaction prices. That is correct, is it not?
A. On the basis of this analysis, yes. There are other analyses that suggest otherwise.

Q. You have done no analysis of pass-through of gross list prices into transaction prices, have you, Mr Harvey?
A. We -- I have examined the relationship between list prices and transaction prices as shown in the kebab diagram.
Q. No, Mr Harvey, that diagram, as we identified at the start, does not look at changes, does it --
A. That is correct.
Q. -- whereas what this does is it looks at changes in list prices and changes in transaction prices; correct?
A. Yes, it does.
Q. So when you said in your report that there was strong evidence of there being -- or that you set out evidence of there being a strong relationship between DAF's changes in list prices and net prices, the kebab reports do not show that -- the kebab diagrams do not show that, do they, because they do not deal with changes?
A. No, they deal with levels, that is correct.
Q. Instead we have clear evidence here that in fact there is not a strong relationship between DAF's actual changes in list prices and the transaction prices for DAF's trucks. That is correct too, is it not?
A. It shows in the factual that there is not a relationship. It does not tell us what that line or those dots would have looked like in the counterfactual.

Q. I understand you want to go to the counterfactual. I am just sticking with the real world. I am dealing with the statement you made. You say that you set out evidence of there being a strong relationship between DAF's changes -- and you mean their actual changes in list prices, do you not?
A. Yes.
Q. -- and its net prices -- by which you mean its actual transaction prices, do you not?
A. Yes.
Q. -- and that evidence does not exist, does it, Mr Harvey?
A. In terms of changes, no.
Q. No, and instead what we have is evidence to the contrary, that in the real world gross list price changes for DAF Trucks did not pass through into transaction price changes. That is the situation, is it not, Mr Harvey?
A. No, it is not.
Q. I will be coming back further to these issues in due course, but I put the points to you, Mr Harvey.
    Now, I want to just, before I go on to deal with some of the theories of harm, go back to the points that we touched on to begin with in relation to the nature of the theories of harm that you are dealing with.
    I think it is right, is it not, that you recognise

that Professor Neven's report analyses at least in part the plausibility of the theory that the infringement led to coordination on transaction prices?

A. Yes.

Q. So that is within an economic framework of coordination; correct?

A. Yes.

Q. Your theory of harm does not involve coordination in respect of transaction prices, does it?

A. No, it does involve coordination, yes, because that is what we are considering.

Q. It does involve coordination of transaction prices?

A. No, it involves coordination.

Q. So I will just put the question again. Your theory of harm does not involve coordination with respect to transaction prices, does it?

A. No.

Q. But let us just see if there is any common ground on these issues between you and Professor Neven on a couple of basic points.

You agree, I think, that the theory of harm being put forward by Professor Neven and explored in his report, that is a theory of harm based on coordination which is grounded in economic literature. You accept that, do you not?

A. Yes, it is a standard economic theory.
Q. Yes. You also agree that any theory of harm that is being developed requires consideration of two problems that Professor Neven referred to: the agreement problem and the implementation problem? You accept that?
A. Yes, provided that you are seeking to analyse a theory of harm that has at its heart agreeing over net prices.
Q. So if there is no element of agreement in theory of harm, you are saying there need not be any agreement problem; correct?
A. Yes.
Q. If your theory of harm does not involve any agreement, are you saying that the implementation problem also does not arise?
A. No, I am not saying that. It is of a different nature.
Q. So we accept that the implementation problem, which is the idea that even if on the face of it a particular change in strategy or pricing by a company might look like it could be beneficial to them, the problem is that other people might cheat and undermine the supposed benefits of that strategy or pricing; correct?
A. No, it is slightly different to that because, without an agreement, you do not have a cheating problem but you do need to evaluate whether the commercial behaviour that you are entering into, ie the exchange, is to your

benefit. So this is why I say it is a slightly different nature of problem.
Q. But when you are assessing on the basis that you put forward as to whether or not it is to your benefit, what you are concerned about is how other people might react to it and whether or not essentially a stable equilibrium position can be reached between you in the market; is that right?
A. Yes.
Q. We will come on to it but what we are actually looking for is what I think is referred to as a "Nash equilibrium"; is that fair?
A. Yes.
Q. A Nash equilibrium, as I understand it -- and I am not going to pretend anything other than I have looked this up -- but a Nash equilibrium is an equilibrium in a strategic game -- so you have a number of stages in a strategic game potentially; correct?
A. Correct.
Q. -- and a Nash equilibrium is reached where neither party can improve its position if the other party does not shift its stance; is that right?
A. That is correct.
Q. So in simple non-economist terms, it is a stable state in a multi-stage game. Is that a fair summary?

A. Yes.

Q. So what we are looking for in relation to any theory of harm, coordination or non-coordination, is a theory of harm using economic analysis that will establish a stable state because otherwise rational operators will shift their positions; is that correct?

A. Yes.

Q. So just for completeness on coordination issues, you are not putting forward an account that involves coordination in relation to transaction prices but as a general proposition I think you agree that coordination in relation to any matter requires firms to align on an objective for that coordination; correct?

A. No.

Q. Sorry, you can have coordination without an alignment of objective?

A. So if you are seeking to agree transaction prices through the coordination, then obviously you need to align. If, though, the coordination is changing your beliefs about what the other player will do, so you are still coordinating in the way that we have described but you are not seeking to reach an agreement, that does not require an alignment of objectives.

Q. So you are saying that all of the players could have completely different objectives but could still reach

a coordinated solution in those circumstances?
A. I am saying that they could reach a different decision on the prices that they had set in the market through the coordination.
Q. I am sorry, I am not sure I understand that. The question I asked you is whether or not the different players could have different objectives but could still reach a coordinated solution. Is that "Yes" or "No" to that question?
A. If you define a coordinated solution as agreeing on net prices, then they need to have common objectives.
Q. Yes.
A. If they are not seeking to agree net prices, then they need to have a common objective, which is to maximise their profits. They do not have to agree on what price they are setting.
Q. So you are saying that in relation to certain forms of coordination, an objective of obtaining higher profits is a sufficient objective for coordination?
A. For coordination to give rise to players making a different pricing decision compared to the one that they would have made, yes.
Q. We will come back to, possibly after the short adjournment -- when you talk about a different solution, you are talking there about the possibility of higher

prices or lower prices; correct?
A. Yes, in theory.
MR BEARD: Yes.
I am about to move on to another topic where I think there are a number of questions that will flow and, given two or three minutes, it is probably better just to pause there.
THE CHAIRMAN: All right. We will resume at 2 o'clock.
Mr Harvey, I am sure you are well aware that you are not meant to talk about your evidence.
A. Yes.
THE CHAIRMAN: You must not talk about your evidence over the lunch adjournment.
A. There are not many people queuing up!
THE CHAIRMAN: All right. We will resume at 2 o'clock.
(12.57 pm)
(The short adjournment)
(2.02 pm)
MR BEARD: Mr Harvey, good afternoon.
I am going to move on to an academic paper you refer to in your report -- in your first report, in fact. I think you refer to it again and a later version of it but I am just going to refer to the first one you have. Just so you have the reference, it is {E/IC1/38} -- just so you have the reference. That is paragraph 2.46.

This is a reference to Professor Harrington's report and it is a paper from 2020 by Professor Harrington that I just want to take you to. The paper itself is in the bundle at {I4/289} and you probably have it in that bundle. I think it is the second tab in your hard copy bundle. Do you have it, Mr Harvey?

A. Yes.

Q. Thank you. Sorry, I only paused because of course nods do not come out on the transcript.

As I say, you do cite a later version of that from 2021 by Professor Harrington but it is broadly the same approach being adopted in both papers; correct?

A. Yes.

Q. Can I just pick it up at the bottom of page 2, {I4/289/2}? It says:

"The EU is less tolerant than the US when it comes to ... sharing prices. The European Commission has taken the position that 'mere attendance at a meeting where an undertaking discloses its confidential pricing plans to its competitors is likely to be caught by Article 101(1)'. This view has been put into their guidelines which state: 'information exchange can constitute a concerted practice if it reduces strategic uncertainty ... because it reduces the independence of competitors' conduct and diminishes their incentives to compete'."

Then you will see at 6 you have got a reference to the European Commission "Guidelines on the Applicability of Article 101 of the Treaty [TFU] ... to Horizontal Co-operation Agreements". You are familiar with that document in the footnotes?

A. Yes.

Q. But you do not refer to it anywhere in your reports, do you?

A. No.

Q. Can we just go to those guidelines for a moment? I am just going to divert from -- I am coming back to Harrington, but just go to the guidelines. They are at {AU/2.17/13}. So this is within the document that is those guidelines, page 13, and it is under the heading "General Principles on the Competitive Assessment of Information Exchange".

If we go over the page to paragraph 61, {AU/2.17/14}, we will actually see the bit that Professor Harrington quoted at the bottom of 61. He misses out the "Hence" but:

"... information exchange can constitute a concerted practice if it reduces strategic uncertainty in the market ..."

The ellipsis was "thereby facilitating collusion".

He had missed that bit out.

"... that is to say, if the data exchanged is strategic."

So that is the bit he is quoting. You are aware of that?

A. Yes.

Q. If we go over the page again in these guidelines, {AU/2.17/15}, we see under 2.2, this is "Assessment under Article 101(1)", so this is all within that section on information exchange. You will see at 64 it says:

"Once it has been established that there is an agreement, concerted practice or decision by an association of undertakings ..."

I am not going to ask you questions about law but you know those are the basic criteria used in Article 101?

A. Yes.

Q. "... it is necessary to consider the main competition concerns pertaining to information exchanges."

Then it has two headings on this page. The first is "Collusive outcome" and then, if we scroll down, we are in the territory of "Anti-competitive foreclosure". I think we can leave aside anti-competitive foreclosure for today. That is not what we are talking about.

Agree, Mr Harvey?
A. I agree.
Q. So can we go back up to "Collusive outcome"? This is 65. It says:

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

So the concern that has been articulated here is that the exchange of strategic information can enable alignment of competitive behaviour. That is the principal concern that is being identified here; correct?
A. Yes.
Q. When it talks about competitive behaviour, it is there talking about the behaviour that actually companies are competing to win business. You understand that, do you not?
A. Yes.
Q. So what it is talking about is the alignment of competitive offerings by companies, is it not?
A. Yes.
Q. So what it is there talking about is coordination of

competitive offerings, is it not?

A. Yes, but I think the concern here is the collusive outcome that arises because of coordination.

Q. Well, we can deal with that in due course. I am just asking you about this particular phraseology. What it is is coordination of the companies' competitive behaviour, and I think you accept there that what we are talking about is their behaviour in winning customers being allied(?). If we translate that across to our current situation, the primary concern that this economic framework is talking about is a concern about what we would call coordination of transaction prices, is it not?

A. I think this can include coordination of transaction prices but not exclusively. It could include other forms of coordination including product development and so on.

Q. It could include product development, but the primary focus that is being articulated here is coordination of competitive behaviour and, in this context, we are talking about coordination of transaction prices being the pricing equivalent in the context of this market; correct?

A. Well, as I say, I think this is broader than just pricing behaviour. It is --

Q. It is broader than pricing behaviour, I accept --
A. Yes.
Q. -- but if we are talking about pricing behaviour and we are asking about what the main focus of this analysis is translated to the current market, we are talking about coordination of transaction prices, are we not?
A. In the context of pricing behaviour, yes.
Q. Let us go back to the Harrington paper, if I may. So just staying on the bottom of page 2, {I4/289/2}, it says:

"The lack of a well-accepted treatment of the sharing of prices is at least partly due to the absence of a well-established theory of harm. This missing theory of harm is exemplified by the EU's view that the exchange of prices is potentially harmful because it 'reduces strategic uncertainty'."

Now, the observation that Professor Harrington is making here is that actually the economic world lacks a well-established theory of harm dealing with the potential adverse effects of sharing prices. That is what he is saying here, is he not?
A. Yes, I think so.
Q. Then over the page, {I4/289/3}, he goes to, as he says, reducing strategic uncertainty. Then I think -- but I do not know whether you agree with this:

"... there is no theoretical or empirical bases upon which to conclude that less 'strategic uncertainty' among firms implies higher prices for consumers."

You accept that, I think, Mr Harvey?

A. In the broadest terms, yes, but I think what Professor Harrington is trying to explain here is that the intuition that people typically use to explain why this has an effect, that is if I exchange prices with you, that gives you essentially a heads-up as to what I am going to do next, that is the reduction of strategic uncertainty and that could lead to price increases. That intuition is well established in economic theory. The gap that Professor Harrington is trying to fill here is to put it into a formal economic modelled framework.

Q. Well, let us just unpick that slightly, shall we? He says:

"... there is no theoretical or empirical bases upon which to conclude that less 'strategic uncertainty' among firms implies higher prices for consumers."

What he is saying is that if you exchange information that reduces strategic uncertainty, that does not imply higher prices for consumers or, more exactly, there is no theoretical or empirical basis to infer that. That is what he is saying, is he not?

A. He is saying that it is not inevitable.
Q. No, that is not what he is saying, Mr Harvey. That is a misreading of that.
"... there is no theoretical or empirical bases upon which to conclude that less 'strategic uncertainty' among firms implies higher prices for consumers."
He is saying there are no bases for concluding that if an exchange of information results in less strategic uncertainty, there is any implication of higher prices for consumers. That is straightforwardly what he is saying here, is it not?
A. Yes.
Q. So the point he is making is that reducing strategic uncertainty amongst firms can have two effects. One is possibly it might result in higher prices, but, equally, they might take that information and use it against one another, might they not, Mr Harvey?
A. They might, but then you would question why they would carry on exchanging the information.
Q. Well, you may, Mr Harvey, and people may ask that question, but this is an analysis of the economic framework, and what the academic you have relied upon and referred to says is there is no theoretical or empirical basis for concluding that there is any implication of higher prices from a reduction in

strategic uncertainty, and you are not disagreeing with that, are you?

A. I think if we take a step back for a moment, what very basic economics says is that firms engage in behaviour when it is profitable to do so. That is what it says. In this case the firms exchange this information for a long period of time and in this case we do not have any other alternative explanation for why they did that. So I do not think it is a large analytical jump to conclude that in this case the exchange of information was profitable without pro-competitive rationale.

Q. I see. So your story is here that Professor Harrington is wrong in making his statement. There is a theoretical basis on which to conclude that a reduction of strategic uncertainty through this infringement does imply higher prices for consumers because it went on for a while. Is that your position?

A. No, not quite. My position is that economic theory says that firms will engage in behaviour when it is profitable to do so and what I am saying is that, without a story about why they are doing it, we do not have a pro-competitive story for why they did it.

Q. So let us just be clear here. If, for example, you saw that a truck manufacturer increased its market share over time so that there would be a benefit to it, then

you would see that as a pro-competitive basis, would you?
A. No, not necessarily. I think in this case the truck manufacturers exchanged commercially sensitive information. The question becomes, "What was the rationale for that in economic theory?", and the rationale would be: because it was profitable to do so. Now, I am not saying that there are no other possible explanations as to why they did it, but I do not think that conflicts with the fundamental economic theory.
Q. Well, let us just be clear on two points. Professor Harrington is not qualifying his statement by the longevity of any exchanges in relation to the reduction of strategic uncertainty, is he?
A. No.
Q. He is saying there is no theoretical or empirical basis for implying high prices by a reduction in strategic uncertainty, is he not?
A. In the broadest terms, yes.
Q. He is. When you talk about a rationale for entities doing things, are you saying that the rationale, the basis on which people do things, immediately translates into a theory of harm, Mr Harvey? They can be different, can they not?
A. They can, yes.

Q. Yes. So what he is talking about here is, aside from coordination, there is no well-established economic theory of harm about how sharing price information, which would reduce strategic uncertainty, actually results in higher prices for consumers, aside from coordination. That is what he is saying, is it not?
A. Yes.
Q. So what he is then going on -- if we go over the page, if we may, {I4/289/4}. Sorry, I have just lost my reference here. Give me one moment, Mr Harvey.
THE CHAIRMAN: Whilst you are doing that, can I just ask one question about that sentence?
MR BEARD: Of course.
THE CHAIRMAN: Mr Harvey, it says "strategic uncertainty", {I4/289/3}, in quotation marks. What do you understand he meant by using --
A. I think this is their beliefs about what their rivals will do in the future. That is how I interpreted it. So --
THE CHAIRMAN: Why is Professor Harrington using quotation marks around "strategic uncertainty"?
A. Oh, I see. I think this is a reference to the Commission guidelines that refer to strategic uncertainty but do not necessarily develop what that means. So I think sort of what he is trying to do here

is to give an economic meaning to the phrase "strategic uncertainty" and I think that is why it is in quotations. That was my interpretation.

MR BEARD: If we just move on to the next paragraph, {I4/289/3}, he says:

"The relevance of information exchanges regarding prices is [he says] exemplified by the recent trucks cartel case in the EU. It was documented that executives of truck manufacturers regularly met and shared gross list prices."

Then he describes gross list prices. So what he is saying here is that there is no economic theory of harm in relation to this sort of price sharing that is exemplified in the trucks cartel case. That is what he is setting out here. I know he is going on in a project to embark on exploring it, but that is what he is saying here, is it not?

A. Yes, in relation to the list prices, yes.

Q. Well, he is focusing in particular on list prices but actually he is talking about all the strategic uncertainty which you have just helpfully given your interpretation of to the tribunal; yes?

A. Well, he is saying here that this is specifically focusing on list prices.

Q. Yes, but obviously exemplified by the recent trucks cartel?

A. Yes. Later, when he develops the theoretical model, he is looking at list prices.

Q. Yes. I will come on to that.

I notice that he does not mention that he has actually been providing evidence in trucks cartel litigation in this paper or indeed in the later one. Do you find that surprising? I think normally economists, if they are citing a particular case like *Trucks*, as here, and they are advising on it, would disclose that. That would be the normal course, would it not, Mr Harvey?

A. I confess that I seem to remember him actually disclosing it.

Q. Ah okay. I will come back to it. We will double-check.

A. I cannot remember whether it was in this version or the later version.

THE CHAIRMAN: Do we know that for a fact, that he has been?

MR BEARD: We do, yes. We do not know precisely from when and I am not going to -- well, unless Mr Harvey knows the answer to whether he has been involved --

A. No.

Q. Anyway let us move on. That is another question I think I can take further with you.

If we just go down the page to "Motivated by these issues ...", so motivated by the issues of there being a lack of economic theory of harm in relation to why strategic uncertainty might imply higher prices.

"Motivated by these issues, this paper addresses two questions. First, is it harmful to consumers when firms privately share their prices? Second, if it is harmful, should the sharing of prices be subject to the per se rule (by object) or rule of reason (by effect)?"

This is because he is an American economist talking about American anti-trust language, where they use terms like "per se" and "rule of reason".

A. At this point he seems to be zooming in on the price elements of the motivation.

Q. So:

"This paper develops a theory of harm associated with the sharing of prices and delivers conditions when such an information exchange raises prices."

A. Yes.

Q. Yes, so I think that is what you are referring to.

If we go down the page, he looks or sets out or outlines the conditions that he puts in place or specifies certain of the conditions -- we will come back to some others later -- certain of the conditions that he applies in relation to his theory. You see that, bottom of the page, last two lines:

"The first feature is that firms (or, more specifically, their executives) are not sharing transaction prices."

So he is saying that this is not a transaction price sharing situation that he is trying to model. That is correct, is it not?

A. Yes.

Q. Then he says:

"They are sharing prices which may ultimately affect the prices that consumers pay but are not necessarily the final prices that will be put before consumers."

I will come back to this a little more in a bit, but he says, {I4/289/4}:

"In the Trucks case, manufacturers shared list prices, and list prices would be expected to affect dealer prices which would then affect the prices paid by final purchasers."

Now, we will come back to that, but he has clearly got a particular view about how pricing works in the trucks market. You understand that?

A. Yes, his view is that the list prices can affect the final prices.

Q. He is going a bit further than that, but we will come back to it, because he is talking about what the chain of causation in relation to pricing is here. That is

what he is saying in that sentence, is it not?
A. Yes, he is saying that there is a causal connection between the sharing of list prices and what final prices are paid.
Q. No, he is doing more than that, Mr Harvey. He is saying:
"... list prices would be expected to affect dealer prices which would then affect the prices paid by final purchasers."
So he is putting a causal route in, is he not?
A. Yes, I suppose he is, yes.
Q. If we go halfway down that paragraph, it says:
"The second feature is that the executives who are sharing prices may be able to influence transaction prices but do not have full control over them."
That is just part of the assumptions he is making in relation to the modelling. Again we will come back to it, but that is the second key condition, is it not?
A. Yes.
Q. If we go down to the next paragraph, just setting out how this modelling works a bit more, he says:
"The way those two features are encompassed in a formal model is stylised but [he says] the insight it yields is intuitive and robust (in the sense that it only relies on some general assumptions)."

Well, therein may lie some interesting questions for further on, but let us just go to the next bit:

"The sharing of prices by firms is captured with a two-stage structure. Firms first choose prices and then, after sharing those prices, can change the price at some cost."

So that is how he is looking at the first part of this process. Do you understand what he is suggesting here is a choice of list prices that are then shared and then they can be changed but only at some cost to the business that has put forward those prices? That is correct, is it not?

A. Yes, but what I think he is trying to capture here is this idea of incomplete control.

Q. So let us just see what he then says:

"To relate this structure to, for example, the *Trucks* case, suppose an executive chooses a list price. In the absence of sharing that list price with other manufacturers, that list price would lead to some final price for purchasers according to the firm's internal pricing process."

So that is his causal approach.

"When executives of truck manufacturers share their list prices, knowledge of other manufacturers' list prices may induce an executive to intervene in the internal process by which the list price affects the final purchaser price."

So he is talking about a list price and then an intervention to change that list price potentially, but it is a cost involved; correct?

A. Yes, but within the framework of his model I do not think that the cost has only to be to change the list price. An intervention could involve some other form of intervention that is costly that would lead to a change in the final purchaser price.

Q. He certainly conflates those two stages, you are right. What he does is that he talks about the possibility of change -- intervening to change the list price or somehow intervening to change the discounts that are part of the causal process leading to the final price, you are quite right.

A. Yes.

Q. But that is on the basis of his causal linkage that he has already described, is it not?

A. I think it is on the basis that other manufacturers would interpret list price changes as implying aspiration to change the net price, so in that sense we are going back to the conversation we had earlier about relationships.

Q. No, let us just pause there. You are going back to a suggestion that you made about interrelationships earlier that we will be coming back to, but Professor Harrington here is not talking about other manufacturers. What he is talking about is a process by which a manufacturer sets a list price, he shares that list price -- or it shares that list price with others --

A. And in that sense he is talking about other manufacturers.

Q. Yes, undoubtedly. But what he is talking about then is that there is a cost to him if he then wants to alter that list price in the light of the exchange of information he has had with others; correct?

A. Correct, yes.

Q. You are also correct that Professor Harrington talks about that cost either being a change of the list price or of the discounting structure for transaction prices, so he is saying that it can be either of those costs that are relevant; correct?

A. Yes.

Q. He does that because he links the list price directly to the transaction price through that causal mechanism we have outlined -- we have seen above; correct?

A. That is not how I interpret Professor Harrington's modelling.

Q. I see.

A. So with this type of model it is obviously necessary to make quite stylised assumptions, simplifications. What Professor Harrington is trying to capture is the idea that the list price contains information that is relevant to the other party to interpret what they might do with their net price. That is the first part.

The second part is cost, is around the idea that those that are exchanging information, that is giving commercially useful information to someone else, cannot immediately, after having done that, fiddle with either the list price or easily affect the transaction price. So although the mathematical model is organised in a way that says there is a connection between list prices and net prices, I do not think that is the causal route. The causal route is the belief that the list price contains useful information on net prices.

Q. But just to be clear -- I think you have just clarified actually a question I was going to come to, but the maths is essentially linking the list prices to the transaction prices, is it not?

A. Yes.

Q. So it is a direct causal linkage?

A. Within this mathematical formulation of the intuition that Professor Harrington is exploring, but what it is capturing there is the idea that the list price has information about net prices.

Q. Well, undoubtedly that is part of the motivation that Professor Harrington has in building this model. I do not think we are disagreeing about that. Whether or not he is adequately capturing these ideas or whether or not there is a problem in relation to his model and certainly its application here is something I am going to come on to.

If we just move down the page, "The main finding ..." -- do you see that?

A. Yes.

Q. "The main finding is that a private information exchange of prices by competitors is harmful to consumers when the cost of adjusting price is neither too small nor too large which can be interpreted as the colluding executives having some but not full control over the final price."

So just pausing there, what he is saying is that there can be circumstances where the private information exchange that we are talking about can give rise to a situation where the costs of altering the list price or interfering in the transaction price in this modelling gives rise to a situation where that can be harmful to consumers. That is correct, is it not?

A. Yes.

Q. When he says "neither too small nor too large", it is slightly redolent of Goldilocks. Those costs have got to be just right in order for the conditions applying in relation to his model to obtain. That is correct, is it not?

A. They do need to be, yes, in between too small or too large, obviously within a theoretical model. No number is put to that.

Q. Well, that is something else I am going to be coming back to.

Just staying on that section, it says:

"Contrary to EU guidelines, the harm from sharing prices is not tied to reducing strategic uncertainty. Indeed, the event of sharing prices is itself not harmful in that, at the equilibrium, the prices that consumers pay are the same whether or not firms shared those prices. The harm comes from the agreement to share prices in that it is the anticipation of sharing prices that causes firms to raise the prices that will be shared, and it is that which ultimately harms consumers."

So he is just refining his main finding here and saying, "Well, it is not actually the sharing of prices, it is the anticipation of sharing prices that gives rise to this specific window where, if the relevant costs obtain, then you could end up with harm to consumer prices"; correct?

A. Yes.

MR RIDYARD: Mr Beard, sorry to interrupt your flow but I just wanted to ask the witness about his notion of the costs of not following through or ... Can you expand on what you understand by this notion of costs? Can you make it a bit more concrete so we can understand what it is we are talking about here?

A. Yes. Within the model it is not actually specified, it is just a cost, but one interpretation of the cost is simply that it requires management time and effort to revisit the list prices or indeed influence the net prices that have been set. So it may be sort of shoe leather costs or it could be simply that those that are making the final pricing decisions are different from the people that are sharing the list prices and so the interaction between them could potentially be a costly or imperfect process. So I think that is sort of one interpretation of the cost.

The second is that -- I do not think is explicit in here, but I think it is possible -- is the fracturing of trust that might arise as a consequence of doing something different to what you said you would do in that initial exchange. Neither of those things are set out explicitly in Harrington but I think that is two plausible interpretations of what he is trying to get at.

MR RIDYARD: Thanks.

MR BEARD: I was going to move on to costs so perhaps it is worth just going to page 5, {I4/289/5}. So there are a couple of further assumptions that are being identified here:

"First, [that] colluding executives have a large influence on the prices that they will be sharing."

So this is the list prices. Then:

"Second, after sharing prices, those executives have limited influence when it comes to either changing prices that were shared or influencing the internal pricing process that translates those prices (such as list prices) into the prices faced by consumers ..."

We have touched on how the maths deals with that. Then this may well go to the point that you were just answering in relation to Mr Ridyard's question:

"In our model, this second assumption is modelled by assuming an executive can influence the subsequent prices but only at a cost. This cost captures having to go outside of standard protocol -- such as changing the list price which the firm had already decided upon -- or exerting pressure on other employees who have more authority over the subsequent pricing process -- such as sales managers who control discounts."

So he has actually here set out what he considers to be the likely costs that he is talking about. You understand that, Mr Harvey?

A. Yes, and I think this emphasises the departure from standard protocol, but it seems to me that even going through the standard protocol could be costly, and that is the shoe leather cost that I spoke about earlier.

Q. I will come back to that because I think we do not concur on that issue. But I am going to take the terrible risk as a lawyer of going to an equation now, if we could go to page 9 in this article, {I4/289/9}. Now, the tribunal may well be pleased that I am not going to try to work my way through all of these equations, but if I could just pick up equation --

THE CHAIRMAN: I was looking forward to that!

MR BEARD: Sir, obviously I did not want to spoil what would obviously be the entertainment for your spare time so I will just cut through.

So equation 4, if I may. You can see that?

A. Yes.

Q. Pi 1 (L, H) minus pi 1 (H, H) is less than or equal to k which is less than or equal to pi 1 (L, L) minus pi 1

(H, L). Yes?

A. Yes.

Q. You will be more familiar with the annotation than I am, but Pi 1 is effectively the profit of the firm in question when the list prices that are being specified are the two prices in the brackets?

A. That is right.

Q. This is annotation I can cope with, "L" is low and "H" is high in those brackets; correct?

A. Excellent, Mr Beard. Yes.

Q. Thank you. So we are looking at the profit of the firm in circumstances where there is a low price -- a low list price and a high list price put forward by the firms in question less the profit where they both put forward high prices; correct?

A. That is right.

Q. Then that sum is less than or equal to k, and "k" is this critical costs value that is being identified, is it not?

A. Yes.

Q. So when we were previously talking about the cost window, what I referred to as the "Goldilocks cost window", what you need to identify, that is what is critical to ending up in an equilibrium situation in relation to the list pricing that is offered by the two

firms. That is correct, is it not?
A. Yes.
Q. Actually, that is summarised at the bottom of the page, where it says that:
"... both firms choosing a low initial and final price is always a ..."
"Sub-game perfect equilibrium"; is that right?
A. Yes.
Q. "... outcome ..."
In other words, if both of the firms choose low initial and final list prices, then that is a stable situation; yes?
A. Yes.
Q. "If k is moderate in value, so that [equation] (4) is satisfied, then it is also a [sub-game perfect equilibrium] ... for both firms to choose a high initial and final price."
Correct?
A. Yes.
Q. So what is being suggested here is that actually you can have two equilibria even if you are within that cost window for k, where it is between the two profit calculations. That is what Professor Harrington is suggesting. You can have a high pricing equilibrium or a low pricing equilibrium. That is correct, is it not?

A. Yes.
Q. So on the face of it, even if you fell within that cost window, k, you still do not, even under Professor Harrington's model, have any basis for concluding that lower or higher prices would be implied in circumstances where there is an information exchange. That is correct, is it not?
A. No, and the reason for that is that, within this model, Professor Harrington then goes on to consider --
Q. Little z?
A. Little z.
Q. Let us go to little z.
A. Let us go to little z. But it then goes on to consider the circumstances under which you would agree to share the information in the first place.
Q. Well, that is what little z is talking about. Can we go to page 10, please, {I4/289/10}?
So at the moment what equation 4 is saying is that, if you manage to fall within that cost window k, even on this model with all sorts of assumptions in it, then you could still end up with a higher price equilibrium or a lower price equilibrium. Nothing, even on Professor Harrington's model, can be concluded.
But then, as you say, we have this additional element of little z, and if we go halfway down the page:

"When there are two equilibria, a slight modification of the game allows us to use forward induction and weak dominance to select the equilibrium with high prices. Append the two-stage game with a stage 0 ..."

So you change the game and you add an additional stage; that is correct?

A. Yes.

Q. "... in which firms simultaneously decide whether or not to propose sharing prices. If one or both firms ... do not share prices then the ensuing game is the one-stage game in which they choose prices and realise profits."

So if they do not share prices, then they choose prices and realise profits.

"If both choose share prices then the ensuing game is the two-stage game in which they choose initial prices and then, after having shared those prices, decide on their final prices."

Then it says:

"Assume each firm incurs a small cost z ... when both choose share prices, perhaps due to possible litigation."

So here what he is saying is, if there is a small cost of sharing prices, then that is the little z being greater than 0; is that correct?

A. Yes.

Q. What we see in the remainder is actually that, if little z is greater than 0 due to cost sharing -- cost of sharing the information, then that is what effectively says that if you are within that k costs window, you will end up with the higher price equilibrium rather than the lower price equilibrium. That is correct, is it not?

A. Yes.

Q. Now, I just want to go back to one or two points in relation to the assumptions made here.

To be clear, in your reports you say that your theory of harm does not depend on the specific economic models developed by Professor Harrington and you say it is only one example, but when we go back to the initial analysis and the nature of the project that Professor Harrington was setting out that I took you to, is not the point that Professor Harrington is making that it is only in rather particular circumstances which he has set out in his paper that you could make any assumption of adverse effects from list price sharing at all? Is that correct?

A. That is what Professor Harrington is saying, yes.

Q. He is saying more than that though, is he not, because he is saying that, outside that window, he does not consider that there is an economic theory of harm that implies higher customer prices from list price sharing, is he not?

A. Yes, from list price sharing.

Q. So the idea you can take from Professor Harrington's theory a central case and say, "Well, what we have got here is not quite that but it is similar", that does not work because, unless you fall within the parameters of Professor Harrington's case at least in relation to pricing information, in fact his modelling is saying you do not have a good theory of harm, is he not?

A. Sorry, can you ask me the question again?

Q. Yes, of course. I am sorry, I recognise it was a little long.

A. Yes.

Q. So the idea you can take from Professor Harrington's theory that it is a central case is not right because what he is identifying is that at least in relation to the exchange of pricing information, unless you fulfil the specific conditions that he has identified, you do not have an economic theory of harm that implies higher customer prices. That is correct, is it not?

A. Can you clarify what you mean by "central case"? Sorry.

THE CHAIRMAN: I was getting a bit lost in that question as well.

MR BEARD: Okay. So let me just ask the question without the central case element and then we can try again.

So Professor Harrington's theory is that at least in relation to the exchange of pricing information, unless you fulfil the specific conditions that he has identified, you do not have an economic theory of harm that implies higher customer prices. That is correct, is it not?

A. On his modelling, to find higher prices, you need to fall within these parameters. I do not know whether he meant that there is no other -- I think what he means is no other unilateral theory that has been developed mathematically within the literature. I do not think he is ruling out other coordinative theories and I do not think he is necessarily ruling out other models that capture what happened in this cartel that have not yet been developed.

Q. What I am asking -- what I have identified in Professor Harrington's report is he starts off by saying there are no theoretical or empirical bases upon which to conclude that less strategic uncertainty among firms implies higher prices for consumers. We agreed on that.

A. Yes.

Q. He then goes on to create a model where, in relation to the sharing of prices, he says, "I have created an economic theory of harm, a model, which shows [he says] that if you fulfil these conditions, then it may imply an adverse effect on consumer prices from the sharing of list prices". That is correct, is it not?

A. Yes.

Q. But what he is doing is saying, "I am not aware of any other theory of harm that deals with this in relation to reductions of strategic uncertainty and this is the exception". That is why he has engaged in this project, is it not?

A. Yes.

Q. The point is that he has therefore defined rather strict conditions which show when an exchange -- on his account, which show that when there is a gross list price exchange, you can infer an adverse effect on customers and therefore it is the exception to the general proposition he puts at the beginning of his paper, is it not?

A. So I think there is two parts to the question. There is two parts to the question you have asked me, two points. One part is the question of how restrictive Professor Harrington's conditions are, and I do not regard these conditions as terribly restrictive in the sense that saying firstly that the people sharing the information do not find it costless to change prices but equally do not find it terribly costly to change prices, they are in that middle zone and then the second condition that we have just been through, the z condition, is that there is a cost to sharing prices in the first place. I would accept, obviously, that there is no -- we cannot put any numbers to those parameters but I do not think I can accept that they are restrictive. They seem quite a general formulation to me and indeed that is what Professor Harrington says.

Q. Well, that is certainly what Professor Harrington says. I am going to come back to the nature of those assumptions in a moment. But what I am saying is that he has built a very specifically structured model with specific assumptions and it is only under those assumptions, fulfilling the criteria in his calculations, that he identifies on his account that there is implied some sort of adverse impact on consumer pricing from sharing gross list pricing. That is the position, is it not?

A. On -- yes. He has been able to drive out this conclusion on the basis of his mathematical modelling.

Q. So working back to the point I was making earlier, what you cannot say is that you have a theory a bit like Professor Harrington's and this somehow shows that there is an economic theory of harm because he has defined his very strictly and carefully and, if you vary those assumptions, the conclusions do not follow. That is correct, is it not?

A. I do not and have not used this type of literature in that way at all. It is quite normal in economic analysis to rely on mathematical models to understand the factors that would lead to different types of outcomes. They are an abstraction from reality and therein lies their limitation. So I do not think that the fact that this is a stylised model and depends on certain assumptions of itself means that it is -- I think, as you are suggesting -- a significant step to use it to inform the theory of harm in this case any more than one might refer to general economic theory in the context of a merger and try and understand what effect that would have on prices.

Q. General economic theory I can see but this is not a general economic theory. It is a very specific economic theory in order to define an exception to what he says is a lack of economic theories of harm in relation to reductions of strategic uncertainty.

So the point I am putting to you is that you cannot use it like general economic theory. You either fall within its scope or you do not. If you do not fall within its scope, it does not inform you that there is a theory of harm suggesting that there is an adverse effect on consumer pricing from sharing list pricing. That is correct, is it not?

A. No. He is seeking to define a general economic theory. That is what this paper is trying to do.

Q. Well, I think that is a matter of dispute and no doubt something that will be the subject of cross-examination of Professor Neven. I have put the point to you but now I want to go back and look at some of the assumptions that apply around the costs of changing prices and some of the assumptions that are otherwise used in the modelling in any event.

So just to be clear, and I think you have accepted it, rather than modelling -- seeking to model a hypothetical firm's internal pricing process, Professor Harrington's approach is to represent that process as a cost faced by the notional colluding executive. That is correct, is it not?

A. Yes.

Q. We have already dealt with the fact that that approach is predicated on the mathematical structure that the initial list price and final list price flows through into a transaction price; correct?

A. Yes, but your point about it being part of the mathematical structure is important because, as I said earlier, that is a modelling simplification to capture this idea of the list price containing information and it ultimately being costly to change those things. So, yes, that is the way it is modelled and I do not think it is what it is seeking to understand itself, if you see what I mean.

Q. Yes, I understand. Your position is that that is built into the maths and therefore one can see this as a more general proposition being developed. I have put to you that this is actually one of the fundamental assumptions that goes to his conclusion that has quite limited parameters attached to it and I think we see where the difference lies in relation to those issues.

A. Yes.

Q. Now, if we could go to page 5 again in relation to this paper, {I4/289/5}, we have touched on the idea that the second of his assumptions -- this was actually the passage I took you to after your response to Mr Ridyard's question -- that what is being referred to in the second of these particular assumptions is the idea that an executive has to go outside the standard protocol; is that correct? That is one of the basic assumptions here?

A. Yes, well, here it speaks about executives having limited influence.

Q. Yes.
A. Yes.
Q. Therefore having to go outside the standard protocol in order to change a list price that has been shared; correct?
A. Yes.
Q. Then if we go down to the bottom of that page, I will not read it out but if you pick it up:
"Authority over the list price may reside at a high level where the marketing division plays an important role, while discounts are apt to be controlled by the sales division."
This is reflecting, I think -- if we just go over the page, {I4/289/6} -- how he is understanding the price setting process that he is then effectively providing the simplified modelling in relation to; correct?
A. Yes, I think here he is providing some examples of the type of list price, net pricing process, that would fall within the realms of this modelling. I think they are examples rather than mechanical, if you see what I mean.
Q. But in all of these examples the reason Professor Harrington is talking about this potential cost is because the cost of changing the shared list price or intervening in the discount process is because,

otherwise -- is because that explains why an executive would not try to deviate from the announced price; is that correct?
A. It is explaining -- yes, but it is explaining why that list price would contain some information with regards to future net pricing.
Q. Sorry, just to be clear, what he is doing here is talking about the potential cost of changing that shared list price or the discounting process and, in doing so, what he is doing is explaining effectively why an executive would not try otherwise to deviate from the announced price; is that correct?
A. Sorry, can you take me to the piece that you are actually referring to?
Q. Well, I was just taking you to one of those examples, but let me try putting the point another way.
All else being equal, there would be an economic incentive for the executive and the company in question to undercut the rival with whom this price has been shared; correct?
A. Yes.
Q. But if there is a cost to undercutting because there is a cost to changing the list price or intervening in the discount process, the incentive to deviate is mitigated or eliminated. Is that broadly what is being said here

effectively?

A. Sort of. Sorry. What is going on here I think are two things. Firstly, the cost means that the list price that you have shared contains some information about what net prices you will be intending to charge in the future. If it was a very, very easy for you to nip off and then change them again, then the other firm would potentially reason that it is not -- not your intention. But the second role that this plays is in the context of the k parameter that we spoke about.

Q. So let us just transpose this across the internal organisation of DAF on pricing on which we have heard evidence. I think the idea that Mr Ward has put forward is that whoever was the executive engaged in sharing prices would want to set a high list price and then, after he had shared that price with other manufacturers, the idea is that that high list price would feed through into the transaction prices. That you understand is being put forward?

A. Yes.

Q. But the assumption is being made, then, that it would not be standard protocol for him to change the list price or intervene in the downstream pricing process in any way if we are applying the Harrington approach. That is correct, is it not?

A. Mr Beard, can I ask whether the words "standard protocol" have a particular meaning to you or is that just your shorthand? The reason I raise that is that I think what Professor Harrington is getting at here is that there is a cost to intervening and he has articulated that in terms of moving outside of the standard protocol, but what I am saying is I do not think that necessarily you would need to move outside of the standard protocol. It could just be that operating the protocol is costly.

Q. But that is not what he is saying, is it? He is saying that there is an incremental cost of pricing and that is why he talks about moving outside the standard protocol. That is part of his reasoning here, is it not?

A. That is part of his reasoning, yes.

Q. So you are then trying to extend his account by saying, "No, no, no, it is not just outside the standard protocol. If you were just incurring the normal costs of pricing, that could be problematic". Is that what you are saying?

A. Yes.

Q. You have no basis for saying that in relation to Professor Harrington's approach because, in those circumstances, it is not necessary to take into account the internal costs of pricing that are normally incurred in the course of pricing for transactions generally. That is correct, is it not?

A. No. No, it is not. It is using the phrase -- I agree that he is motivating the idea of the cost via a departure in the standard protocol, but some of the examples that he has included here, for example the one that starts, {I4/289/6}, "The managerial costs of price adjustment increase with the size of the adjustment because the decision and internal communication costs are higher for larger price changes", the costs occur because more people are involved. The increased costs occur because larger prices lead to more internal discussions. Those types of things strike me as -- they do not hinge on standard protocols being moved in or out of. They are simply costs of changing prices.

Q. Let us just pause there. He is talking about the change in the list price resulting in those changes in pricing and costs of pricing, is he not? That is what he is concerned about here. He is talking about an additional cost by reason of the change in the list pricing or the change in transaction pricing, is he not?

A. Yes.

SIR IAIN MCMILLAN: Mr Beard, could I ask a question --

MR BEARD: Of course. I am so sorry.

SIR IAIN MCMILLAN: -- about the increase in costs, and it is really to get clarity about is it an increase in overall costs or is it a redistribution of the same cost because executives are spending their time differently on internal discussions and so on. There may be an opportunity cost here because the executives are spending their time on that rather than other things, but does it mean that the actual overall cash cost to the business is greater? It does not seem to me but I may be wrong.

MR BEARD: Sorry, I am happy to make submissions on it. I do not know whether the question is directed to me or to Mr Harvey.

A. So my interpretation is that he is not referring to an increase in cash costs here. He is referring -- although that could arise. I think here he is referring to an incremental cost, but that could well be the diversion of management time. So I do not think he has ruled out the increase in cash costs but I do not think his argument hinges on it.

Q. Just to be clear in relation to the answer you have just given to Sir Iain, it is an incremental cost of some sort. It is not a re-allocation of costs within the business. That is correct, is it not?

A. The re-allocation of costs within a business could well be an opportunity cost for the purpose of making this price decision an incremental one, so I think either work.

Q. In theory but it has to be an incremental cost, does it not?

A. Yes.

Q. Just to be clear, what we are talking about here are the costs of changing the pricing in the light of the exchanges of information. If and insofar as the pricing undertaken by the company in question incurs costs in any event, those costs are not part of the analysis of cost being undertaken by Professor Harrington, are they?

A. Well, that is just the same as saying that if there are no additional costs of making a price change, then they will not get counted, no.

Q. So in circumstances where, for example, you would have a bilateral discussion between either DAF or a dealer and a customer in order to create the price that the customer buys at, you would in any event be incurring potentially quite significant pricing costs. That is correct, is it not?

A. Yes.

Q. It is only if there is an increase in those costs that you then would consider the increment as part of the analysis of Professor Harrington's case; is that correct?

A. You would consider an increment if they incur either a direct cost or an opportunity cost from involving yourself in a decision that you would not otherwise have involved yourself in, in this example.

Q. Just closing off that for a moment, in relation to the cost that we are talking about of engaging in pricing, it is not the case, is it, that DAF NV, for example, sets list prices and then delegates price setting to local subsidiaries in the ordinary course, is it?

A. No.

Q. So, in those circumstances, under normal processes, DAF NV always has the ability and role to intervene in pricing after list prices have been set. That is correct, is it not?

A. Yes.

THE CHAIRMAN: Can I just understand the timing of this and what seems to be underlying the questioning? When are these changes to list prices said to be taking place? After the exchange of information?

A. Yes.

THE CHAIRMAN: So list prices would have been published in some way prior to the exchange of information and then, after the exchange, they need to change the list price in some way?

A. I do not think here they are necessarily published. It is just that --

THE CHAIRMAN: Published internally?

A. Yes, exactly. They exist, they have been created and then they are shared, and it is the cost that would be incurred after that point.

THE CHAIRMAN: Do we know that that is the way it worked, that there were prices that were distributed internally which then had to be changed as a result of the exchange of information?

A. I do not think I do know that, no.

MR BEARD: It is the next round of questions I was coming to.

Mr Harvey, you have not sought to calculate or assess whether or not the costs you are referring to here fall within the window of k that is identified in the equation in Professor Harrington's model, have you?

A. No.

MR BEARD: We have the evidence from those involved in pricing on those matters.

I am conscious of the time. Now might be a good --

THE CHAIRMAN: Is that a convenient time?

MR BEARD: That is a convenient moment.

THE CHAIRMAN: All right. We will break for ten minutes.

(3.12 pm)

(A short break)

(3.25 pm)

MR BEARD: Before I finish with Professor Harrington's report, there are a couple more questions I wanted to go back to, if that is okay.

THE CHAIRMAN: Yes.

MR BEARD: Just going back to little z if we may, you can turn it up but you can probably answer these questions without reference to the paper. We have already established we are in essentially the non-coordination paradigm, you are looking at a different theory of harm in Professor Harrington's model and we have identified that z is the additional factor in addition to k that on the analysis you require to be greater than zero in order to end up with an equilibrium of high prices; correct?

A. Yes.

Q. Just to be clear, z is the cost of sharing information so it is an incremental cost above just a unilateral provision of information; is that correct?

A. What do you mean by "unilateral provision of information"? Sorry.

Q. Well, there is not any sort of sharing arrangement. It is giving out information unilaterally.

A. It is the cost of firm A giving firm B its, in this case, list price information.

Q. Is that -- and it is not the sharing of the information?
A. Sorry, that is sharing information.
Q. No, that would be unilateral -- what I am talking about is the reciprocal provision of information.
A. I think in this model the way that it is motivated is from the cost of getting found out, litigation or something like that, so I think the interpretation of it -- it could be a one-way cost in the sense to the firm that is giving information over, there is a cost, then that would be z. Sorry, I think I might have been misinterpreting your question.
Q. No, I do not think you are, but I think you are implying that there is a risk of litigation if you unilaterally provide information and I am not sure that that necessarily holds with the proposition, does it?
A. No, but I think here the cost is just a cost that arises once you share information, so the act of giving someone your list prices.
Q. But that is not right, is it, because, as you say, it is not the act that is the cost that is attributed, it is the threat of litigation, is it not?
A. Well, that is what Professor -- how Professor Harrington motivates z, but I think formally it can be a cost that arises once you enter into an act that is different from keeping the information to yourself.

Q. That is something we will perhaps come back to but I understand your position in relation to it.

I think you would also accept that there could potentially be cost savings from sharing information if, for instance, this was information that could be obtained through other mechanisms legitimately; correct?

A. Yes.

Q. So effectively you could have a saving of transaction costs in those circumstances?

A. Yes.

Q. You, I think it is very clear, have not carried out any analysis in relation to k or z here?

A. Within this, there is no analysis that can be done to estimate a k that you can compare to this model because it is a theoretical model.

Q. I see. But you have not attempted to look at either of those figures?

A. No.

Q. No. Just in relation to these -- I think we established in exchanges previously that the predicate of the model is a structure that involves list prices feeding through to transaction prices. I think we agreed that; correct?

A. Yes, I think we did.

Q. So just to be clear, I think you accept that Professor Harrington's model does not apply and it does not give rise to a theory of harm if there were evidence in fact that list price changes did not in fact translate into changes in transaction prices; correct?

A. No. Sorry. So I think this goes back to this distinction between the mechanical -- the maths that Professor Harrington uses, where he says that there is this relationship between list prices and net prices and what he is seeking to understand, which is that when I give you information, it informs the other person about what my list price will be, they will make an inference about what my net price will be.

Q. If the evidence we have were to be that in fact changes in list price did not translate into transaction prices, that would be a factual divergence from the assumption in the mathematical model that Professor Harrington is using, is it not?

A. It depends what that evidence is and what it shows.

Q. Understood. I want to move on to one or two other suggested mechanisms that you highlight or mention in your report. Can we go to -- we will take it in your second report, paragraph 2.23, which is {E/IC28/15}, I think.

THE CHAIRMAN: When you say "second report", is that the reply?

MR BEARD: Yes, I am sorry, it is the reply. I just have it as "JH2" in my notes. Sorry, that is lazy.

Do you have 2.23 in front of you on your screen?

A. Yes.

Q. So obviously you are more than familiar with this.

"For example, in my First Overcharge Report I set out some of the ways in which DAF may have sought to increase prices, based on information that it would not have had but for the Infringement. I noted that DAF's witness evidence provides details of some of the mechanisms [you say] by which management could have affected the final prices DAF charged, through the mandate structure and the involvement of senior management. This process involved both the setting of target margins and the use of a cost metric known as IKP, which DAF's witnesses explain, by 2003 was not reflective of costs incurred ..."

I think this is --

"... but 'an instrument by which DAF NV tried to steer local sales units to negotiate higher prices'."

You are there citing evidence from Mr Habets, who provided evidence in the tribunal. I do not know whether you were here during the period when Mr Habets and Mr van Veen gave evidence or have seen a transcript of that?

A. No.

Q. You have not, okay. I may need to take you back to one or two pieces in relation to it, but let us start with that for a moment.
So in that passage would it be fair to say you have identified three potential mechanisms? One is the IKP cost which is the surcharge on MLO -- that is the first one -- the second is using target margins and the third is by reference to the mandate structure. Is that fair that you are referring to those three here?
A. Yes.
Q. Yes, okay. Let us go to transcript {Day7/93:10}. This is Mr van Veen. I know you have read his witness statement, but this is Mr van Veen, page 93. If we pick it up at line 10 -- I think this is actually in response to a couple of questions from Mr Ridyard where he explains how the IKP works. Would you mind just reading through and shouting out when you want to move down? If you could read through to page 95, just line 2 -- line 3, I am sorry, on page 95, {Day7/95:3}. (Pause)
A. Can we move on to page...? (Pause)
Okay.
Q. Lovely, thank you very much.
So let me just start with the IKP surcharge, if I may. I want to make sure I have inferred correctly how you say this might work so let me set it out and

then you can -- I will ask you a couple of questions about it. I think the position is broadly -- your position is broadly that DAF might have made a different decision on the level of IKP cost in the light of the information on gross list prices or other information it obtained or shared. That is the starting point, is it not, in relation to IKP surcharge? Correct?

A. Yes.

Q. So specifically what you are saying is DAF might have increased the IKP surcharge, the amount added on to the MLO cost, to generate an IKP cost beyond the increase that would have been obtained in the -- that would have obtained in the counterfactual; correct?

A. Yes.

Q. Yes, and I think what you are then saying is that that artificial increase in IKP surcharge would have had the effect of essentially communicating to local sales units an IKP cost measure of increasing IKP beyond the counterfactual; correct?

A. Yes, that is one possible mechanism.

Q. That in turn, I think it is being suggested, would have resulted in that local sales unit negotiating higher prices than in the counterfactual; correct?

A. Yes.

Q. So let us just start with the first stage of that, the

setting of the IKP surcharge. I think there are a number of assumptions that are being made in there. I think the first is that the level of the IKP surcharge could be influenced by any individual at DAF NV who participated in the infringement. That is the assumption that you are making there; correct?
A. No, I do not think so. I think it could have been indirectly influenced by the -- so the person participating in information exchange does not necessarily need to be the person with the hand on the IKP data.
Q. No, I think I used the word "influenced".
A. Yes.
Q. Yes?
A. Yes.
Q. That individual would believe, I think is the predicate of your -- one of the predicates of your approach, that based on the information exchange, that DAF's competitors were going to offer higher transaction prices than they would have done absent the information exchange. That is also true, is it not?
A. Yes.
Q. Right. The individual involved who is seeking to influence would be seeking similarly to increase DAF's transaction prices because he believed that was a better

strategy for DAF than seeking to undercut the competitors and win volume; correct?

A. Can you say that -- sorry, can you repeat that?

Q. So the person that we are assuming could influence the IKP surcharge, you are also assuming that he believed that it was a better strategy for DAF to increase transaction prices rather than undercut the competitors and win volume?

A. Yes.

Q. So let us just start with the assumptions about trying to increase the transaction prices to a super-competitive level. I think you would accept that an economically rational course of action for DAF or indeed any of the other manufacturers in the face of price increases by their competitors would be to maintain their own prices or even decrease them to undercut competition on price and win volume; correct?

A. No, that depends on what they think the other competitor is going to do.

Q. But you would accept that it would be economically rational for them to undercut their competitors to seek to win business and win volume; correct?

A. No, that is not correct for the same reason that you do have -- obviously have -- you have markets where prices are above costs and you do not get that -- it is in their interests not to undercut.

Q. That it may be economically rational, I think is then what you are saying, depending on the circumstances, to undercut the competitors and win business?

A. In most models that deal with price competition, when you believe that your competitor is raising their prices, you will follow with a price increase of your own.

Q. When you say "follow", you do not actually mean at the same level; you mean lower than, do you not?

A. No.

Q. You do not mean lower than? You mean that you would forego the business in those circumstances?

A. If you believe that your rival is raising its price, then it would not be in your interest to cut your own price.

Q. That is not what I asked you, Mr Harvey.

A. Sorry.

Q. You said that, "In most models that deal with price competition, when you believe that your competitor is raising their prices, you will follow with a price increase of your own", and I said, "When you ... 'follow', you do not actually mean at the same level; you mean lower than, do you not?", and you said "No". But what I think you mean is that in those pricing

models you would have an incentive to increase your prices but not as much as your rival in order that you won the business but at a higher margin; correct?
A. No, not necessarily, because then that depends what the rival does next, so, no, that does not follow.
Q. So that depends on what the rival does next?
A. Yes.
Q. So if the rival were to know that you were going to undercut them to win the business, the rival would undercut you; is that correct?
A. No -- sorry, we have to be slightly careful with the sequence of who does what when. In these models essentially the firms are making decisions at the same time regarding their pricing and you are, I think, putting the scenario to me which is you believe that your rival is going to raise their price and you will raise your price too.
Q. Well, I am only responding to your answer to the question.
A. Sorry.
Q. I tested the question:if the rival raised their price, would you have an incentive to price below theirs in order to try to win the business?
A. You would have an incentive but you would not necessarily act on it.

Q. But it has to be profitable to undercut the competitors if you are expecting that you will still be able to charge a price above the competitive level, does it not?
A. I think that type of logic gets you back to why do we not have all markets pricing at cost and we do not, and the reason we do not is that the firms are always making the trade-off between the extra margin that they gain by raising their prices and the volume loss. So I do not think it does follow that you will just undercut them a touch. It depends on your beliefs about what they will do.
Q. I see. But if we are talking about a single tender situation, for example, in those circumstances -- let us just think about the single tender situation and we are talking about bespoke pricing -- I think we all agree on that in relation to customer deals -- I do not think you disagree with that proposition, do you?
A. No.
Q. No. So we are talking about bespoke tender pricing and in those circumstances, if the competitor was to offer a higher price than you did, that would mean that you would win the business and, if it is at a higher price than otherwise had been available to you, that would be beneficial, you would gain more profit; correct?
A. Yes, if you would have won at the lower price and not

the higher price.

Q. Yes. Let us just assume too for the moment because it makes it easier for these purposes.

But obviously your competitor is concerned that you could undercut them in those circumstances; correct?

A. Yes.

Q. Therefore there is the danger that you engage in a multi-stage game of thinking that drives your prices down. I am not saying that you need to have ten stages of actual negotiation where you each offer new prices.

A. Well, if I am participating in that bid, the price that I will offer will depend on what I think the rival will do, and so if I think the rival will charge a certain price X, I may not be concerned about cutting my price. If I am concerned that the rival will cut their price, then I might. I do not -- do you see what I mean?

Q. Yes, absolutely, I do see what you mean. It is right that essentially, in that tender process, the tender prices offered, at least in the first round, would not be available to the rivals competing. That is our understanding; correct?

A. Yes, although they might have a view on the relative price position, so they may not see the numbers that go into that bid, but they may have an understanding of broadly what those prices would be.

Q. But neither DAF nor the competitor would have any way of checking whether or not, in that tender process, DAF or the competitor had succeeded in increasing transaction prices, would it?
A. No.
Q. No. So you are not saying, I do not think, that DAF would have gone with a strategy of trying to raise transaction prices here. You are just saying it might have done?
A. Yes, it might have done on the basis of the information exchange.
Q. It might have done, but it might not have done?
A. It might not have done.
Q. Yes. Your report is essentially saying that you think it is plausible or possible that that could have happened; correct?
A. Yes.
Q. But, equally, I think perfectly fairly, you are saying it is plausible or possible that it did not happen?
A. I am saying it is possible that it did not happen. Can you explain to me the distinction you are making between "plausible" and "possible"?
Q. Absolutely not because it is language you use in your report interchangeably, so that was one for you, Mr Harvey.

A. So I think it is plausible, and the basis for that is that -- it goes back to what I was speaking about earlier -- is that when I reject -- if I reject a theory of harm, I find it hard to rationalise the thing that I am trying to develop a theory about, which is the information exchange, so it is on that basis that I think it is plausible.
Q. So it is plausible. You are not saying it is --
A. But I am not saying it is inevitable.
Q. You are not saying it is actually more likely than not. You are just saying it is plausible?
A. I am saying it is plausible.
Q. So you are perfectly capable of saying that two things are plausible here?
A. Yes, I think I am -- so that question about "more likely than not", I think that is where the fact that they continued with the infringement is relevant from an economics perspective because of the profit motive that I spoke about earlier, so I think I would lean towards "more likely than not".
Q. Well, you might lean towards it but that is not what you have said anywhere in any of your reports, is it? All you have said -- and I can take you through lots and lots of references -- is that your account is plausible or possible; correct?

A. That is what I write, yes.
Q. Yes, and that is not "more likely than not".
Let us just move on slightly from the questions about --
A. Sorry, can I just ... I think I am saying it is more likely than not.
Q. Well, that is not what you have said in any of your reports, is it, Mr Harvey?
A. I think perhaps the word "plausible" is my shorthand for that.
Q. Is it?
A. Yes.
Q. I see. So we should read every reference to "plausible" as being "more likely than not", should we, in your reports?
A. I do not think I would say that.
Q. No --
A. No.
Q. -- because that would be something of a perversion of language, would it not, to treat "plausible" as "more likely than not" when you have provided three reports and a joint statement, would it not, Mr Harvey?
A. I am not sure about that. I think you asked me the question whether I think, on this particular issue, it is more likely than not. I have said, on the basis of

the information exchange continuing and there being a profit -- I believe there is a profit motive for what they have done, that is what the economics would say, that allows me to sort between something that is more likely than not. So in this context I am trying to answer the question that you put to me.
Q. You know that "more likely than not" is a sort of critical legal threshold, do you not, Mr Harvey?
A. Yes, I do.
Q. Yes, you do. You have provided three reports where you do not use that phrase anywhere, Mr Harvey.
A. And that is partly why.
Q. Oh, is it? I see. So should I take your references to "possible" as meaning "more likely than not", then, as well?
A. I think it would depend on the reference.
Q. Right. Would it? So just to be clear, there are occasions when we read your report when we should take the word "possible" and say "When I say it is possible, I mean it is more likely than not that this happened"? Are you seriously telling the tribunal that that is how we should read your reports, Mr Harvey?
A. No.
Q. No, and that is true also of your use of the word "plausible" which you use almost interchangeably with

"possible", is it not, Mr Harvey?

A. Yes.

Q. Yes. Thank you, Mr Harvey.

I just want to go back to the IKP surcharge, if I may. I think you recognise from the evidence because you referred to Mr Habets' statement -- and I probably do not need to take you to the transcript on it, but let us go to his statement, {D/IC23/15}. I am just going to go to paragraphs 61 and 62, Mr Harvey. Now, I think you do not disagree with any of this. Indeed I think you have referred to Mr Habets' statement in your report. It says, 61:

"When I first joined DAF ... the purpose of IKP was to cover costs that were not included in MLO, such as SE&A and warranty costs."

I think there is no dispute there. He says "this soon changed", although "soon" is a somewhat relative term there because it is around 2003 or 2004. Now up until 2003/2004 I think you are accepting that the IKP surcharge was a costs metric that was derived from the MLO plus an additional cost element relating to other cost factors. You are not disputing any of that, are you?

A. No.

Q. So when we are talking about the alleged infringement, we are talking essentially about half the period where the IKP surcharge was clearly being set -- and quite fairly you do not contest this -- by reference to DAF's actual costs. That is correct, is it not?

A. Yes, with one caveat, which is that it refers to here the idea of a complete cost measure, which would include both manufacturing costs, MLO, and other overhead costs. So it depends what goes into those other overhead costs, the proper interpretation of this cost measure.

Q. Of course.

A. Specifically what I mean by that is another way of writing "other overhead costs" is margin.

Q. Margin, I see.

A. A truck-level margin that makes a contribution to overheads.

Q. I see. Right.

A. But that is the one caveat.

Q. But this is just pure speculation on your part?

A. Yes.

Q. Yes, and I am not going to go to i now but that was not a proposition that was put to Mr Habets as the meaning of "IKP surcharge". You are not aware of that?

A. No.

Q. No. But let us assume for these purposes that your speculation about some kind of margin element being

baked into it, that it is either a standard margin that is applied throughout or there is not a margin being baked into that costs figure, then you would accept that your theory in relation to manipulation of the IKP surcharge just does not apply up until 2003/2004 at all; correct?
A. If the margin is allocated to the -- that could have been allocated to the IKP surcharge was not affected by market conditions, then, yes, this would only apply up to 2003 or 2004 -- sorry, after 2003 or 2004.
Q. Now, I think you said you were not aware of the position post 2004 or, more exactly, the evidence provided by Mr Habets in relation to these matters, that he provided evidence that in fact the IKP surcharge was used to keep the IKP cost measure flat even if there were reductions in MLO costs. You are not aware of that?
A. This is his evidence recently?
Q. Yes.
A. No, you need to take me to it.
Q. I will take you to that but let us just deal with that in principle. I have various references, if that helps, but his evidence was that if the MLO cost rose, then the IKP surcharge -- the IKP surcharge would effectively mean that the IKP cost moved up. On the other hand, if the MLO cost fell, the IKP surcharge would be changed so

that cost measure remained the same. That is what I meant by "flat".
A. Right.
Q. I am summarising. I think probably this is not a very fair question to you given that you were not privy to the evidence, but there is no reason to think that DAF would have done anything different in relation to that particular arrangement in the counterfactual, is there?
A. I do not know. Sorry.
Q. No, fair enough. You know that, after 2004, the infringement arrangements were not among HQ exchanges, headquarters exchanges. It was to do with German subsidiaries? You know that?
A. Yes.
Q. So it is more remote from the supposed head office arrangements; you know that too?
A. Yes.
Q. Now, just staying with IKP costs for a moment, you know, I think, although you do not specifically set it out in your evidence, that the IKP cost is not seen by dealers. You are aware of that, are you not?
A. Yes.
Q. So when we are talking about this theory that I outlined at the outset of this line of questioning about IKP costs and IKP surcharges feeding through, that cannot

operate in relation to dealers, I think, on your account; is that right?
A. Yes, I think that is right because they are not responding to the IKP cost change.
Q. I think there are probably a couple of other brief points on IKP surcharges and the mechanism that would be applying just in relation to the fleet and direct sales. The mechanism I think would require, would it not, that DAF UK, who were the people actually doing the deals with direct and fleet -- they were more concerned about achieving a certain margin above IKP cost than securing volume; is that correct?
A. Sorry, can you repeat that?
Q. So in order for the story that we ran through in relation to the IKP surcharge mechanism that you remember I set out to you -- you have accepted that it does not apply in relation to dealers so I am just focusing on direct and fleet sales that were carried out through DAF UK.
A. Yes.
Q. Sorry. I probably should have just spelled that out.
In order for that mechanism to operate as you suggest, it would have to be the case that DAF UK was more concerned about achieving a certain level of margin above IKP cost rather than securing volume; is that

correct?
A. They would need to be concerned about securing a margin. I do not understand the second point about more concerned than volume.
Q. But you understood that for DAF UK there was significant incentive to get deals done and maximise volumes, do you not?
A. Well, I am sure that was one of their incentives, yes.
Q. So here you are speculating about what DAF UK could have done but not would have done in those circumstances; correct?
A. I do not necessarily see a tension with achieving a margin and achieving volume, so it was the ...
Q. Understood. Just in relation to these IKP costs and IKP surcharge measures, the data on IKP costs including the data on IKP surcharge has been disclosed to you, has it not, Mr Harvey?
A. Yes.
Q. So it would have been possible for you to consider changes in IKP surcharge over time and test this theory; correct?
A. I would not necessarily know the reasons why the surcharge had changed.
Q. But you did not do anything empirically to assess whether or not changes in IKP surcharge had, for

instance, affected transaction prices? You have not sought to do that, have you?
A. No, I have not.
Q. No. You, I do not think, have considered evidence about the relevance of IKP cost metric in the negotiations with these claimants, have you?
A. No.
Q. No. Okay. I am going to move on now, if I may, to IKP target margins. I think the transcript I took you to at Day 7 -- if we could just go back to that. It is page 95 on Day 7, {Day7/95}. So we stopped where Mr Ridyard said "I see", {Day7/95:4}. Then there was some questions from the chairman and some responses that related to the target margin percentage.
Would you mind just reading that page and through to line 20 on the following page, page 96, {Day7/96:20}.
A. Yes.
Q. If you let the Opus operator know when to turn. (Pause)
A. Okay, carry on.
Q. Thanks. (Pause)
A. Thank you.
Q. So we see there overall target margin would be set by the board on a series level and that would include the involvement of DAF NV and then there would be individual target margins set for hundreds of different models

across many countries, and then you saw how Mr van Veen gave a simplified example of the board setting one margin and then it being dispersed and --

THE CHAIRMAN: Is it Mr van Veen or Mr Habets?

MR BEARD: I am so sorry, did I misattribute this? This is Mr van Veen. Did I say "Mr Habets"? I am so sorry. If I said "Mr Habets", I am sorry to have confused you, Mr Harvey. It is Mr van Veen, I apologise.

Yes, it certainly is Mr van Veen. The aim was to come up with a set of target margins across different models, countries, customer types, that would meet the board's target and Mr van Veen was involved alongside the financial control department.

Now, you do not specifically, in your report, consider how target margins might be a route to increase transaction prices, but, again, I will run through a few propositions and see if I am understanding how you are thinking about this correctly.

So is it that, first of all, the level of IKP targets could be influenced by the individual at DAF NV who participated in the infringement? That is your starting point, is it?

A. It is rather that the infringement could influence the IKP margin. I do not think it requires the specific individual to pull the lever, as it were.

Q. No, "pull the lever" -- again I used the word "influenced". I think the point I am making is it does not necessarily have to be direct. That is not the point I am putting to you, Mr Harvey.
A. Okay.
Q. But I think it needs to be the individual or individuals who have been involved in the information exchanges have to influence, do they not?
A. Well, they need to be able to set about a chain of events that causes the margin to change, so yes --
Q. I will go with causation being influence.
A. -- if that is what you mean.
Q. Yes, I will stick with that.
The underlying proposition is that that person could have been incentivised to increase them beyond the level that he would otherwise have done in the counterfactual; is that broadly right?
A. Yes.
Q. I think the thinking is that that would have led to increases in the target margin seen by the local sales units; correct?
A. Yes.
Q. Your thinking is that that could in turn have resulted in local sales units negotiating higher transaction prices than would have been achieved in the

counterfactual; correct?
A. Yes.
Q. Now, I think -- again, you have given your answer in relation to IKP surcharge. I think you accept that this does not apply in relation to dealers because they do not see IKP costs or IKP target margins; correct?
A. Yes.
Q. We have already discussed, I think, to some extent the possibility of incentives to undercut, but let us just try it in relation to target margins. Let us just assume for the sake of argument that again we are dealing with a tender situation but there has been an incremental increase in the overall target margin for each of the relevant truck series, XF, CF, LF. Just make it simple. I am not going to change it between series. It is an increase on your account beyond that which would have occurred in the counterfactual; okay?
A. Yes.
Q. Obviously, if that was done at a general level by the board at DAF NV, the next stage, of course, would be to decide how the target margins changed for different models in different countries. You understand that from the evidence you have seen?
A. Yes.
Q. Yes, and so, in other words, bringing it back slightly

more parochially, it would matter how the board's general instruction translated into target margins for the UK; correct?

A. Yes, it would.

Q. Just to be clear, you have not actually considered any evidence in relation to those target margins, have you?

A. No.

Q. In relation to the target margins, the hypothesis is that DAF UK, in dealing in relation to direct or fleet matters, would have negotiated a price with the customer that was higher than would otherwise have been the case absent the change in target margins; correct?

A. Yes.

Q. In engaging in a tender process, what DAF UK would be doing is trying to win business as against competitors; correct?

A. Yes.

Q. In those circumstances I think, as we have already established, there would not be transparency as to the prices that were being tendered by the competing truck manufacturers; correct?

A. No.

Q. No. So in those circumstances, even if DAF UK had an ambitious target margin, that would be meaningless for DAF UK if it actually lost the business, would it not?

A. Yes.

Q. So in those circumstances DAF UK would have a significant incentive to ensure that it priced in such a way as to win the business; correct?

A. If we are going round the "You would have potentially set a lower price to win the business" argument again, I give you the same answer that I gave earlier, which is it depends on your expectations of what your rival would do.

Q. I see. So it does not matter that we are talking about internal target margins in these circumstances; you consider it has the same potential impact as an IKP cost?

A. Yes, I think it could do.

Q. Okay. We also know that in relation to target margins that often they were not hit by DAF UK. You know that, do you not?

A. Yes.

Q. If they were not going to be able to hit their target margins, you also know that in those circumstances they would have to get approval for the deal in question; correct?

A. Yes.

Q. That is engaging in the mandate structure; correct?

A. Yes.

Q. So does the theory then go, as we move into mandate structure, that DAF NV would have rejected more transactions that were passed to it from the local sales unit under the mandate structure?
A. Yes, I think that does follow.
Q. I see. So DAF NV would have rejected more transactions than it otherwise would have done and DAF UK would have lost out on some of those deals?
A. Well, I think in terms of the way that a mandate structure could work, that is one possible outcome, that there are in fact greater rejections. The other possible outcome is that there are not, but in anticipating that more rejections would take place, DAF UK tries harder to get a better price. So I think there is a distinction between what might happen in the end and how that influences DAF UK's behaviour.
Q. Right. So you are offering two alternatives. One is, because of the threat of refusal under the mandate structure, that actually DAF UK just competes harder so it does not have to engage so -- is that right?
A. Well, it tries to secure a better price so it does not trigger the mandate structure.
Q. I see. So it is trying to avoid the mandate structure by offering a price that would not be competitive against the other competitor?

A. Yes, but where their belief is that their competitor is not competing as hard as it was.
Q. I see. But they do not know what price the competitor is offering, do they?
A. No, they do not.
Q. We have seen in relation to -- we are only talking here about direct and fleet and we know that those are the sorts of deals which had to go up for approvals more than other deals, and you have not carried out any analysis of whether or not there was a greater refusal rate in relation to mandate approvals, have you?
A. No.
Q. So you do not actually know whether or not there was any impact in relation to IKP target margins on the levels of refusal through the mandate structure and you are speculating about DAF UK putting forward higher prices in circumstances where it would run a significant risk of losing the business in question; correct?
A. That is the theory of harm, yes.
Q. I see.
I am conscious of the time. I have a few more questions that I was going to go through but I can carry on tomorrow morning.
THE CHAIRMAN: How are you doing for time?
MR BEARD: In relation to mandate structure I am going to be

another good hour or two, I think, on the basis of the questions I have got here, so that is the only reason why I --

THE CHAIRMAN: Right. I think you were scheduled to go to probably lunchtime tomorrow.

MR BEARD: Yes, I will be done by lunch -- well in advance of lunchtime tomorrow, so that is the only reason why I am not trying to push on through.

THE CHAIRMAN: Yes. I think it will probably be good for us all to have a break now.

Mr Harvey, the same rules apply.

A. Same rules.

THE CHAIRMAN: So no discussion of the case overnight and we will resume at 10.30 tomorrow.

MR BEARD: I am most grateful.

(4.15 pm)

(The hearing adjourned until Wednesday, 18 May 2022 at 10.30 am)

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