IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1435/5/7/22 (T)

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Wednesday 29th March 2023

Before:

Justin Turner KC
(Chair)
Sir Iain McMillan CBE FRSE DL
Professor Anthony Neuberger

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Claimants

PSA Automobiles SA & Others

v

Defendants

Autoliv AB & Others

A P P E A R AN C E S

Collin West KC & Sean Butler (Instructed by Hausfeld & Co. LLP) on behalf of the Claimants.
Robert O'Donoghue KC & Hugo Leith (Instructed by White & Case LLP) on behalf of the First to Fifth Defendants (Autoliv).
Sarah Ford KC & David Bailey (Instructed by Macfarlanes LLP) on behalf of the Sixth to Tenth Defendants (ZF).
Daniel Piccinin KC (Instructed by Steptoe & Johnson UK LLP) on behalf of the Eleventh Defendant (Tokai Rika).

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Wednesday, 29 March 2023

(10.30 am)

Housekeeping

THE CHAIR: I just need to read the live transcript.

Some of you are joining us live stream on our website, so I must start, therefore, with the customary warning: an official recording is being made and an authorised transcript will be produced, but it is strictly prohibited for anyone else to make an authorised recording, whether audio or visual, of the proceedings. Breach of that provision is punishable as contempt of court.

I notice you stood up, Ms Ford; did you want to say anything at the outset?

MS FORD: Sir, no. I was only going to address the Tribunal's letter that the Tribunal kindly sent yesterday, but I'm happy to wait until you've had the opportunity to say whatever --

THE CHAIR: Last night, yes. We'll come to that in a moment.

First of all, I want to deal with the strike out application from yesterday.

Mr Piccinin, notwithstanding your able submissions I'm afraid we're not going to grant, either in whole or in part, your application.

We do see some force in your criticism of aspects of the pleadings, which are not particularised sufficiently or sufficiently focused at the moment. I anticipate Mr West -- and we'll discuss this in due course -- will say: because he's still trying to get hold of disclosure documents in order that he can define his case.

I think we'd like a discussion about how to manage that going forward, perhaps later in these proceedings today.

MR PICCININ: Sorry, Sir, you say a discussion later today about how to manage the rest of these proceedings?

THE CHAIR: In general terms, yes. A discussion today in general terms about when

we're going to have disclosure and when pleadings will be refined, that sort of thing. Indeed, there may need to be a further case management conference, I think, to deal with such matters.

I was then going to return to the question of the disclosure from the other jurisdictions. Mr West, it's probably my fault, but I'm a little unclear, and I think all of us are a little --

MR PICCININ: I'm very sorry, just before, if you're going to move on; is the plan to provide reasons later?

THE CHAIR: I do beg your pardon. Of course, yes. I should have said, we're going to hand down reasons in writing.

MR PICCININ: So any application for permission to appeal to be made on the papers.

THE CHAIR: Once you've seen the reasons, you can make the application at that stage, rather than now, I think.

MR WEST: And the question of costs likewise?

THE CHAIR: Well, I'm in your hands on costs. We can either deal with it today. I wouldn't deal with it now. At the end of the day, or we can deal with it in due course, whatever course you prefer.

MR WEST: It may be easier to deal with once we've seen the term of the judgment and the consequential matter upon hand down.

THE CHAIR: Of course we can do it that way. Hopefully it can be resolved on paper. So I was then going to return to the disclosure application. Before we move on to Brazil, or back to Brazil, I want just to -- Mr West, perhaps it's best that we ask you the question. We're a little unclear as to the background to the Department of Justice investigations. It may be it's in part of the papers that I don't have in mind at the moment. Where's the best description of it?

I mean, it's quite briefly described both in your skeleton and in your pleading, and relatively concisely in the evidence I looked at as well. It may be you can just fill me

in as to -- we're interested as to when it started, that Department of Justice investigation, its scope, the extent to which you consider that it may be a repository of useful information relating to the Claimants. Are you able to assist me beyond --

MR WEST: I think it's Mr Bolster's fourth witness statement in support of that application.

THE CHAIR: Can you stick your microphone a little bit closer?

MR WEST: Thank you. Paragraph 27A refers to the DoJ.

THE CHAIR: 27B.

MR WEST: Yes.

THE CHAIR: I'm not sure it says when it started.

MR WEST: The other place this is addressed is in the pleadings relating to limitation because the Defendants rely, of course, on the DoJ investigation of their case --

THE CHAIR: So could you just summarise for me as best you're able, on instructions if necessary, what the DoJ proceedings involved. When they started, who the parties were, and why you believed that would be a useful source of documents.

MR WEST: Well, we know there were plea agreements with a number of parties in around 2012. Certainly with TRW and, I believe, with Autoliv as well.

THE CHAIR: Do we know the other parties?

MR WEST: I think also Takata. Plea agreements are public documents, so we can get hold of the plea agreements. They refer to cartelisation in relation to OSS components against -- in one case I think it's to a German manufacturer, as mentioned yesterday, and in one of the other cases a Japanese car makers. One of the plea agreements, from recollection, doesn't identify the target of the cartel.

The best thing may be to get hold of the plea agreements from the Tribunal.

THE CHAIR: I don't particularly want to delay things if that's not necessary.

Just explain to me -- the point is made against you that you had the Commission

documents and I understand you say you want a search done of the Department of Justice documents; is there any reason to believe there's going to be more in the Department of Justice documents?

MR WEST: Well, there are far more documents to begin with.

THE CHAIR: I have that point.

MR WEST: We know that when searches were undertaken in relation to PSA, incriminating documents were found, although in the event they were the same as the Commission ones. We haven't had the equivalent searches run in relation to FCA or in relation to the documents held by anyone apart from Tokai Rika. So the exercise so far has only been done on Tokai Rika's DoJ documents.

THE CHAIR: So I'm right in understanding your evidence; you're not pointing to anything specific to say, "My clients were mentioned in these DoJ documents"? You've not put in any evidence on that? I couldn't find it last night.

MR WEST: I think the only information regarding that is, as we discussed yesterday, the reference to my clients in the documents disclosed by Tokai Rika from the DoJ file that we already have. But, obviously, apart from that, we don't know what's in the documents.

THE CHAIR: No, I understand that.

MR WEST: But my submission is there's at least a reasonable basis to think that there will be relevant documents in there.

THE CHAIR: Yes, I understand that point. I just want to make sure I wasn't missing any important evidence on that.

Ms Ford, did you want to deal with the letter? You said you wanted to the mention the letter, I think.

Submissions by MS FORD

MS FORD: Sir, yes, we're grateful to the Tribunal for drawing the parties' attention to paragraph 28 of schedule 8A to the Competition Act. As the Tribunal has appreciated, although a lot of the discussion we had yesterday went to the question of contemporaneous documents provided to the Brazilian Competition Authority, which were the same as those that were then provided to the European Commission, the documents held by Tozzini on behalf of ZF also include settlement submissions and documents produced by the Competition Authority, the Brazilian Competition Authority, based on leniency and settlement submissions. That is the point that is explained in Ms Fraga's statement, in paragraph 10.

THE CHAIR: Yes.

MS FORD: We've put paragraph 28 of schedule 8A into the supplemental bundle, to enable the Tribunal to be addressed on it. It's in the supplemental bundle --

THE CHAIR: I have it in front of me.

MS FORD: I'm grateful.

So, obviously, as the Tribunal has identified, what it says is:

"A court or tribunal must not make a disclosure order in respect of a settlement submission which has not been withdrawn or a cartel leniency statement."

That is a paragraph which is transposing article 6(6) of the damages directive, so it's a policy which is also present at EU level.

We would also draw the Tribunal's attention to paragraph 29, which provides:

"A court or tribunal must not make a disclosure order in respect of the competition authority's investigation materials before the day on which the competition authority closes the investigation."

The concepts of "settlement submission" and "cartel leniency statement" are defined terms in the context of schedule 8A. There is a specific definition of them.

So "settlement submission" is defined at paragraph 5(1). It is essentially defined to

mean:

"A voluntary statement made orally or in writing to a competition authority which states that the undertaking accepts that it has infringed competition law provided for the sole purpose of allowing the competition authority to follow a simplified or expedited procedure in connection with the infringement."

Then the definition of "cartel leniency statement" is paragraph 4(4), and it's:

"A set of information provided voluntarily, orally, or in writing to a competition authority which consists of information about a cartel and a person's role in the cartel provided specifically for the purposes of the competition authority's cartel leniency programme and excluding any pre-existing information."

Now, the common thread through both those definitions is that it refers to a "competition authority". The concept of a competition authority is also defined in schedule 8A, at paragraph 3(1), and it's essentially defined to be either the CMA or a sectoral regulator. So the definition of "competition authority" for these purposes doesn't include the Brazilian Competition Authority.

But, in our submission, these provisions are nevertheless important because what they show is that there is an established principle that a Court or Tribunal will not undermine leniency and settlement procedures by directing disclosure of documents. We would suggest that --

THE CHAIR: Sorry, presumably the policy behind that, I assume, is that you don't want people to be guarded in what they're putting in their leniency documents because then, if they're looking over their shoulder, worrying about whether they're going to be sued in a private action when it goes in -- is that the policy reason or --

MS FORD: Sir, yes. It's that people will be discouraged from participating in leniency proceedings. They won't want to come forward and provide inculpatory documents if the consequence of that is that what they have said then gets disclosed and facilitates

claims against them.

THE CHAIR: So, presumably, your submission would be the same general principle should apply I think to Brazil that we've been talking about?

MS FORD: That's exactly my submission. Additionally, in our submission, this entirely accords with what Ms Fraga has said, in paragraphs 21 and 22 of her statement, because she's made the point that she has actually investigated applications that were made by third parties to have access to confidential information and documents from CADE's investigations. She points out that the authority has consistently refused those requests. This is application bundle-tab 3, page 43.

So she dealt at paragraph 20 with the specific application that was made by the Claimants in these proceedings.

But, 21, she says:

"I enclose a table listing the CADE proceedings in which third parties requested access to confidential documents and information from CADE's investigations."

She says she's that identified at least eight instances:

"In all of them CADE denied the access sought by third parties."

She says:

"In the context of the first claimant's request for access to confidential documents, the President of CADE's Tribunal was very emphatic in the Tribunal's decision in marking CADE's stance regarding third party requests for accessing confidential documents and information relating to concluded investigations.

"The President stressed the importance of protecting the leniency and settlement programmes which preserve confidentiality of documents and information stemming submissions made by the leniency applicant and/or settling programmes and/or settling party, noting that to do otherwise would result in negative effects for the future of the settlement programme and Brazilian society."

Then she says:

"The President's sentiment has been mirrored by CADE in other requests ever since, as an indication of CADE's willingness to balance public and private enforcement without jeopardising its leniency and settlement programmes, tools of paramount importance in detecting and fighting against cartels and other anti-competitive practices which are at the core of Brazil's Competition policy."

So the policy which underlies the domestic provisions in this jurisdiction is very much echoed in the approach that's taken by the Brazilian Competition Authority, as set out by Ms Fraga.

So, we say, given that there is such a consistent policy, that should be taken into account in conducting the weighing exercise.

THE CHAIR: I understand. I'm grateful. Thank you.

Mr West, if there's -- just on -- so I'm dealing with -- I think you've addressed me on the US. You haven't really had a chance to address me on the Brazil legality point. All we really needed to hear from you on was any submissions on Article 153, paragraph 11. If you remember, yesterday, Ms Ford said that it was a -- your expert had sort of picked up the wrong end of the stick on that. Are there any submissions you want to make on that and indeed on the paragraph we've just been looking at, paragraph 28 of schedule 8A of the Competition Act? Hear you on that. I think we've read your skeleton. I don't think we need to hear you on anything else, but if there's something you want to elaborate on, please do let us know.

MS FORD: Sir, just by way of correction, it's paragraph 53, rather than 153. I wonder if that --

THE CHAIR: Sorry, that's probably why he's looking so bemused.

Sorry, Mr West. You know the point I mean. It's the point in -- I'll see if I can find it. Mr Künzli -- I'm not sure if I'm pronouncing his name correctly -- paragraph 11, he

draws attention to Article 153.

MS FORD: 53, subparagraph 2(g), I think, Sir, you may be referring to.

THE CHAIR: It says 153 here. Do I have that wrong?

Sorry, I'm at the wrong one. It's Article 53, (3)(g). But I think he relies on paragraphs 11 and 12, perhaps I can put it that way.

Submissions by MR WEST

MR WEST: Yes. So he says that's the exception for publishing or disclosing information due to legal or regulatory requirements, which he says is an exception to confidentiality generally under Brazilian law. He also says that's consistent with regulation 21, which we were also looking at yesterday, which is, I think, at page 645.

THE CHAIR: Hold on. My computer hasn't woken up yet.

MR WEST: Of the exhibits-bundle.

PROFESSOR NEUBERGER: Oh right. Thanks.

So there my friend took you to Article 2, which are exceptions to public access.

THE CHAIR: Sorry. So page 605 --

MR WEST: 645.

THE CHAIR: 645. Right.

MR WEST: This is resolution 21, which we looked at yesterday.

THE CHAIR: Hold on. Just get there first. Page 645.

MR WEST: Do you have resolution 21?

THE CHAIR: Yes. It wasn't that I was talking about. It was Article -- no, it was Article 100 and -- I'll look at your skeleton. I apologise, I'm in a muddle about the different provisions.

Yes, it's paragraph 49 and 50 of your skeleton. I wasn't sure what page 645 had to do with that.

MR WEST: What I was just going to show you is how Mr Künzli explains these provisions are consistent with one another and how it supports his interpretation of Article 53. I can show you. It's very, very quick.

THE CHAIR: Yes.

MR WEST: In regulation 21 -- we were looking at this yesterday -- you can see the exception in --

MS FORD: Which one now?

MR WEST: 645.

THE CHAIR: Yes.

MR WEST: The exception in Article 2 which maintains confidentiality over the list of documents. But there is then, in turn, an exception to the exception in Article 3 in the case of express legal determination or specific judicial decision.

THE CHAIR: Yes, that's not the point you're making at 49 and 50. But, yes, I understand those.

So there's a dispute as to whether legal determination and judicial decision includes legal determination and judicial decision in another jurisdiction.

MR WEST: Yes. But what we haven't looked at yet, and Mr Künzli mentions, is Article 5.

THE CHAIR: Right.

MR WEST: So:

"The signatories of the leniency agreement and the committees of TCC shall inform CADE of the existence of any judicial or ex-judicial measures that are known to them in the Brazil or abroad, regarding access to documents and information arising from the scene ..."

Et cetera, et cetera.

So where there are proceedings abroad in which any question may arising concerning

documents which are protected in Brazil, the signatories are supposed to inform CADE of those. No doubt that is so CADE can come along and make appropriate representations.

What Mr Künzli says is that makes it clear that where Article 2 refers to the legal determinations or judicial decisions, it must include foreign --

THE CHAIR: There's a dispute on that between the experts, which I can't resolve.

MR WEST: Well, Ms Fraga doesn't actually address what Mr Künzli says about this. Mr Künzli makes this point in his first statement.

THE CHAIR: I think she does come back and --

MR WEST: What she says in her second statement is: Mr Künzli has failed to address regulation 21.

THE CHAIR: Right. But she's not changed her view, has she?

We're faced with a dispute between the experts as to what these terms mean. I don't know how you can invite me to resolve that in your favour absent cross-examination, a much more in depth look at Brazilian law. I mean, I can't just sit here and just say: well, one expert's right and the other's wrong.

I'm not -- there's no basis on which the Tribunal can do this. What I was asking you to address me on was Article 53(iii)(g).

MR WEST: My submission is: if you look at regulation 21 and Article 53 together, they're consistent, in that both refer to foreign legal determinations. That supports what Mr Künzli says that Article 53, the exception in article 53 --

THE CHAIR: Shall we have a look at Article 53?

MR WEST: Yes.

THE CHAIR: Where do I find that?

MR WEST: Page 601.

So the exception there for the information companies are required to publish or

disclose, which expressly refers to "in Brazil" or another jurisdiction is, in Mr Künzli's view, a general exception to confidentiality.

THE CHAIR: Yes. Ms Ford addressed what this subsection is doing, request for restricted access, at some length yesterday.

MR WEST: Yes, although Ms Fraga's evidence about this is extremely brief in her second statement.

THE CHAIR: But, just looking at the words, leaving the experts to one side for a second, just looking at the words, subsection (3) starts off -- so:

"On a case-by-case basis as far as the investigation and inquiries are concerned to comply with measures to ensure rights to confidentiality granted by law or protect information on the business activity of individuals or legal persons under private law, which, if disclosed, could give competitive advantage to other economic agents.

"The competition authority may on its own motion or upon application by an interested party restrict access to records, documents or data and information pertaining to those matters."

So how do you -- one just has to be a little bit cautious at just jumping into Article 53(3) without looking at what the entire section is doing, I think that's the point that is being made against you.

MR WEST: But, in this case, we are concerned, are we not, with CADE granting confidentiality to documents in its investigation?

Insofar as it's suggested that this is a subcategory which has different legal treatment, Ms Fraga's express evidence and whole case is:

"One cannot distinguish between different documents on CADE's file. There are no different categories of documents on the file."

That's paragraph 10(4) of her first statement. All the documents are in the same category as far as confidentiality is concerned.

THE CHAIR: But it's saying:

"Upon application by an interested party, it can restrict access to records, documents and objects."

I understood the submission to be that it can't restrict access to those information and companies that are to be published or disclosed due to legal or regulatory requirements.

You don't have any further submissions on that?

MR WEST: In my submission, we are talking about documents which have been submitted to CADE and which CADE has restricted access to, on its own motion or upon the request of the applicant, in this case the Defendant.

The only other interpretation would be that there are no exceptions. If one says there's a different rule somehow under Article 51, to which there are no exceptions at all, then one enters the realm of absurdity that we were discussing yesterday, where any documents submitted to CADE are then protected for all time against everyone.

THE CHAIR: I'm grateful, Mr West. Did you want to add anything on section 28?

MR WEST: Yes, as my friend has pointed out, it doesn't apply on its terms because it's only concerned with applications for leniency to the CMA and, pre-Brexit, also applied to the Commission as well.

But in so far it's now suggested, a completely different argument, that this should somehow be applied in parallel to leniency applications under Brazilian law, I think the devil would be in the detail, because the submission has been made to you: as a matter of Brazilian law everything is subject to leniency.

THE CHAIR: So I think the point is whether it's a matter of -- whether it's a strict legal requirement, but bearing in mind that in the EU it would be appropriate to disclose a settlement submission or a leniency statement just as a matter of comity or common sense, or whatever you might say, one shouldn't apply or shouldn't seek these

documents from other jurisdictions, because the same policy considerations arise. I think that would be the submission.

MR WEST: Yes.

THE CHAIR: Do you have any comment on that?

MR WEST: Yes, I would also draw your attention to paragraph 4, the definitions paragraph in this regulation. Subparagraph 4, in particular to the closing words of that definition, which says the cartel leniency statement excludes any pre-existing information, if the Tribunal could look at that.

Whereas in Brazil it's being said that -- and the policy could apply to either. One could say that in order not to discourage leniency applications, even contemporaneous documents which are brought to light for the purpose of leniency application should be protected from disclosure, because otherwise it would be discouraged.

That isn't the position in England or in Europe, because pre-existing information is not protected and so, in my submission, certainly, if there's to be any carve out of this kind it should be very clear that it's only new material specifically brought into being for the purposes of the leniency application and not anything else.

Whether it's possible in the case of a Brazilian file to identify any such information, I simply don't know. Because what we do know is the contents of file is very different. One has documents like the history of conduct and the technical note, which have no equivalent that I'm aware of in a Commission file document, a Commission file or a CNA file.

Certainly, if there's to be any such carve out, we must be provided with explanations of any redactions that are applied on this ground to enable us to understand them and, if necessary, to challenge them.

MR O'DONOGHUE: Sir, I don't really -- are we dealing just with Brazil?

THE CHAIR: No, sorry, you haven't had a chance to say anything, have you? I do

apologise.

Submissions by MR O'DONOGHUE

MR O'DONOGHUE: Sir, a couple of short points. I'm conscious we've spent more on Brazil than we have on strike out, which seems to me surprising.

In my submission, these issues, fascinating though they are, do not need to be grappled with today, for two reasons.

In my respectful submission, what Mr West needs to do is to give the Tribunal some basis for believing that there is likely to be material in the Brazilian file that is not in the Commission file. Now, the Tribunal has seen the evidence --

THE CHAIR: Can I just interrupt you to ask a question?

MR O'DONOGHUE: Yes.

THE CHAIR: As I understand -- I think we're getting a little bit back to front on this. As I understand -- and this case is going to trial -- Mr West is entitled to disclosure. We're concerned with the practicalities of how we search for documents. One way of going about it is you all go back to your respective companies and you get out every last document you have and you every bit of storage, and you go through it manually and find everything that Mr West says is relevant to the pleaded case, which is clearly unsatisfactory.

So what we're concerned with here is efficient ways of doing disclosure by integrating repositories of documents, where someone has already done the work before.

We've done that with respect to the Commission, and I need now to decide whether that should be done for the US documents and whether it should be done for the Brazilian documents. But that's what we're talking about, searching.

I'm not sure to say that -- if you're saying there's just no point in searching because there's evidence there's nothing there, I would understand that submission. But then

I need you to follow it up with what other searching you're going to do instead.

MR O'DONOGHUE: Well, Sir, the point I wanted to make -- the only specificity put on this point at all is a couple of references to Mr Riviere, who is the ultimate person responsible for the PSA account.

Now, they said in a CADE Technical Note he was mentioned, but his documents were searched before the Commission. They've had that disclosure and, again, they have not come back and said: well, on the basis of his disclosure, we think there is potentially a gap.

So the only thing concrete to put before the Tribunal as to why it might amount to a row of beans to look at Brazil is Mr Riviere.

THE CHAIR: I understand that, but how you proposing that disclosure should go forward from here? Are you saying there should be no disclosure?

MR O'DONOGHUE: They've had the Commission materials. In most cases, indeed, that's all one gets. If Mr West wants --

THE CHAIR: I understand. But the Commission didn't deal with the cartel activity as against the Claimants. We simply do not know whether they looked at it at all or -- we just don't know.

MR O'DONOGHUE: Indeed.

THE CHAIR: So it's not an answer. In another case, it could easily be an answer to say: the Commission has looked at this and documents have been produced for it.

But, in this case, we don't know if the Commission has looked at the issues in this case and no one can tell me, one way or the other, whether they have. So it's not a perfect answer to say: just look at the Commission documents.

MR O'DONOGHUE: Sir, they have had the case file. They've come up with a small handful of examples concerning PSA. So what is crystal clear is all that material was before the Commission and we can see the decision that were rendered.

But what Mr West is effectively seeking now is further specific disclosure. The burden is on him. It's not some free-for-all that he can go to any regulator around the world and fish. There has to be some tangible basis for apprehending that he's likely to get something of utility.

THE CHAIR: But the term "fishing", it's a wonderful term to use as if it's a bad thing. The term "fishing" applies when you don't have a case and you're fishing around for a case. That's how I use the term "fishing" and how it is sometimes used.

In this case, we have a case, a pleaded case, which you've not applied to strike out, which is going to trial, and there needs to be disclosure. Mr West isn't in a position to say what documents you have, his clients aren't in a position to say what documents you have. So you can call it "fishing" if you like, but it's no more fishing than any other case where you have to give disclosure, generalised disclosure relating to pleaded issues. Am I misunderstanding that or --

MR O'DONOGHUE: So if one is seeking further disclosure, there has to be a basis for that. Because one starts from the basis that he has the Commission file and he has interrogated that.

Now, in relation to CADE specifically, the only thing he has said is this one individual was mentioned in a Technical Note, but they've had that disclosure.

THE CHAIR: I understand that.

MR O'DONOGHUE: And that's it. There has to be some tangible or concrete basis for disclosure being granted because otherwise one has a sort of whack-a-mole approach that, "Let's look here, let's look there", and that's simply not how specific disclosure should function. We're not dealing with this in a vacuum. In competition cases -- it's set out in Ms Ford's skeleton. Standard disclosure is unheard of. It has to be specific disclosure. They've had the Commission file. In most cases --

THE CHAIR: We're not arguing at the moment about the scope of the search terms,

assuming it's electronic. We're not arguing about that. We're arguing about what gets searched.

MR O'DONOGHUE: Yes. Well, Sir, my basic point is: there is no material before the Tribunal today that gives any basis to believe that anything in Brazil is likely to move the dial one bit, and it is simply pointless. It's duplicative of the Commission --

THE CHAIR: Let's say I'm with you on that, Mr West says: right, we need disclosure relating to the cartel activity.

You say there shouldn't be generalised disclosure. He says, "Fine. I'd like any document that concerns -- references my client", and you have to go off and search for these documents; on what basis would you be objecting to that?

MR O'DONOGHUE: Well, we've done that for the Commission and it has effectively drawn a blank.

THE CHAIR: It hasn't drawn -- you, of course, will be saying it's not worth a candle, I'm sure. But it hasn't drawn a blank, in the sense that some things have been produced.

MR O'DONOGHUE: Well, there are four things which are pleaded. I'm not going to go down the rabbit hole of Ms Ford saying it doesn't amount to much.

In my submission, the antonym of strike out is not a winning case. There has to be some appreciation of -- what has the Commission process thrown up? In my respectful submission, very little.

Then, if the response to that is, "Let's look at Brazil and South Africa", there has to be a proper basis apprehending that is likely to be useful and proportionate. At the moment, beyond a wing and a prayer, there is nothing.

On the approach to disclosure in these cases -- it's gone in the skeleton, let me just give you the reference. It's in authorities 24, the Ryder case.

THE CHAIR: Authorities 24.

MR O'DONOGHUE: Sir, yes, and it's at page 731.

THE CHAIR: Yes, which did you want to --

MR O'DONOGHUE: So it's paragraph 34 and 35. So, 34, usually no standard disclosure. 35.1, same point. Two relevant documents, strong justification about the train of inquiry. Documentation for settlement and leniency, which we've covered, and the same as 5. 6 and 7 are important, that it has to be reasonably necessary and proportionate, and by reference to specific pleaded issues and specific categories of documents. We say that is the problem with Mr West's application. His is essentially a catch all. It is completely divorced from the specific disclosure approach which is applied in these cases. What he's effectively saying is: we want standard disclosure in relation to Brazil, South Africa and in the Department of Justice it's even worse. It's a disclosure in relation to material that everyone accepts is irrelevant in material respects.

THE CHAIR: Just remind me: what is this case about?

MR O'DONOGHUE: This is the Trucks cartel. Mr Justice Roth – is the leading judgment on disclosure in follow on cases, from this Tribunal.

THE CHAIR: Yes.

I'm just going to give a judgment on the US documents and the Brazilian documents, and then we can go on to discuss South Africa.

(11.12 am)

Ruling

(For Ruling, see [2023] CAT 26)

(11.40 am)

THE CHAIR: I don't know how clear that is in terms of the categories. But, essentially,

what it will amount to is any documents disclosed by the parties to the Brazilian Competition Authority or by Takata to the Brazilian Competition Authority will be potentially disclosable.

Forgive me if I've misunderstood, but I don't think I've been addressed on how that searching will take place. I've been addressed on electronic searching for the Department of Justice.

Mr West, are you able to help me insofar as there are documents, those categories of documents that have benefit sent to the Brazilian authorities? Are you asking for anything, and has this been discussed?

MR WEST: I don't believe it has. I don't think they have any information about it.

THE CHAIR: Ms Ford, is that something we can grapple with today or is that something that needs further discussion?

MS FORD: So two of the parties whose documents are engaged by 10.2.1 are of course already represented, so the parties -- what we would suggest is that the parties, insofar as they party to these proceedings, can provide their own documents.

THE CHAIR: Yes, that seems very sensible.

MS FORD: So that just leaves the rump of documents and parties that are not party to these proceedings. We envisage we would be able to provide a search of those and provide relevant documents. That shouldn't be a problem.

THE CHAIR: I will leave you to sort out how those searches take place and everyone's happy with them.

That's a reference to 2017. The same would apply to 2015, insofar as you have any of those documents.

MS FORD: So we weren't a party to that. So my understanding is we don't hold any documents in respect of that.

THE CHAIR: But I think Autoliv were a party to that, unless I'm getting in a muddle.

So 2015 documents supplied to the Brazilian Competition Authority, the same principle would apply to any documents you provided, any Takata documents you hold. I can't remember if Takata were a part of that, and I'm not sure it concerns you, does it?

MR PICCININ: No, it doesn't. Going back to your earlier point about the US documents --

THE CHAIR: Yes.

MR PICCININ: -- rather than getting into the nitty gritty of search terms, perhaps I could just suggest we that we conduct a reasonable search for documents that mention supplies to the Claimants or TPCA in the EEA?

THE CHAIR: I don't want to do it off the top of my head. I will assume -- there seems to be a lot of co-operation in this litigation, which I'm delighted to see. So I hope that the terms of searching can be agreed between the parties and, if it can't, obviously I'll determine any disputes.

MR PICCININ: I'm grateful.

THE CHAIR: It's quite complicated. I don't know if that's sufficiently clear for someone to draw up an order as to what it is the Tribunal's ordering?

MR WEST: We can do that.

THE CHAIR: Now, given those broad principles have been set out with regards to the US and Brazil, I wasn't sure of the extent to which it would be necessary to hear argument on South Africa or whether similar principles could apply.

MS FORD: Sir, I fear the position in relation to South Africa is somewhat different. Because the basis on which we resist inspection and disclosure there is that TRW Automotive Inc is the leniency applicant in South Africa.

THE CHAIR: Yes.

MS FORD: It's been granted conditional immunity, and the evidence of Mr Lötter, who is the witness we rely on for those purposes, is that compliance with the disclosure

order would put the conditional immunity at risk, so it's a different point than --

THE CHAIR: I understand it's a different point. But you've heard our scepticism that you're somehow prevented from disclosing emails that have been generated by yourself.

I understand about submissions, I understand about leniency statements. None of that is being ordered. This is just documents.

I imagine, on your case, most of the documents will have been disclosed already in the EU and to Brazil and, therefore, you won't have any additional disclosure anyway. But I just don't see why you shouldn't search for them.

MS FORD: Well, Sir, I don't think Mr Lötter is able to go so far as to say that they're -- as Ms Fraga was able to do, that there is a commonality in respect of those documents. I don't think he addresses specifically that point in his evidence.

We do say there is a material difference here because there is an express direction from the South African Competition Authority in respect of these proceedings.

THE CHAIR: I have seen it. But could you remind me where --

MS FORD: Yes, there are two relevant documents, there is the request and then the response. The request is exhibited at exhibit 5D, 1122.157.

THE CHAIR: Sorry, 11 --

MS FORD: So it's exhibit-bundle, and then page 1122.157. Sorry, 159, I'm afraid.

THE CHAIR: Sorry, start again.

MS FORD: It's tab 5D.

THE CHAIR: Just give me a page number, please.

MS FORD: 1122.159.

THE CHAIR: I do apologise. I have 112.159.

MS FORD: 1122.159. That may make a difference.

THE CHAIR: Right. I have that. Thank you.

MS FORD: So, Sir, you should have an email dated 12 October 2021.

THE CHAIR: Yes.

MS FORD: This is to the representative of the South African Competition Authority. It explains:

"As you're aware, we act for TRW Automotive Inc."

It draws attention to the fact:

"A number of ZF entities are defendants to an action for damages brought by companies within the PSA Automobile Group before the English courts. PSA's claim refers inter alia to the investigation undertaken by the Competition Commission in respect of occupant safety systems. ZF is in the process of preparing its defence and the defence refers to the Commission's original complaint and amended initiation statement of 2016."

THE CHAIR: I've read it. It seems to be talking about the amended initiation statement.

MS FORD: It is. It's specifically referring to those documents and the possibility that it might be required. You see paragraph 3, it's referring to:

"... required to provide copies of both documents." "In the circumstances we would be grateful for your confirmation that the Commission is conformable that these documents be made available to PSA, if requested."

So it's a fair point that what is in contemplation here is two particular documents. The response that then comes back --

THE CHAIR: Those documents wouldn't be caught by the order that's just been made in respect of Brazil, would it?

MS FORD: Not those documents, no. But the response that comes back is in very broad terms.

THE CHAIR: Right.

MS FORD: It is then at exhibit bundle, tab 4, page 881.

THE CHAIR: 881.

MS FORD: The Tribunal should have there a letter dated 26 October 2021:

"We refer to the above matter in your correspondence to the Competition Commission of 12 October. It is our instruction from the Commission that we object to the use of the initiation statements or any other document which forms part of its record of litigation proceedings in South Africa or anywhere in the world by yourself, TRW, or any other person as there is ongoing investigation and litigation by the Commission in South Africa."

And they go on to give their reason:

"The use of initiation statements or any other information or documents will be detrimental to the ongoing Commission and Tribunal proceedings initiated by the Commission."

THE CHAIR: So have your clients now adopted a policy of not using any documents that have been submitted to the -- I mean, it's going to be -- I'm thinking of other litigation cases. I now know if I don't want to disclose something, all I have to do is post it to the South African Competition Authority and, in a FRAND case, they can say, "Can I see your licence?"

"I would love to show you, but I'm afraid I've sent it the South African Competition Authority. Not disclosable anymore."

I mean, this is just unrealistic, isn't it?

MS FORD: I see the point that the Chair is putting to me. But, from my client's perspective, they have been granted conditional immunity. Their immunity is expressly conditional on them complying with the requirements for immunity. They have received an express direction from those that act on behalf of the Competition Commission in South Africa, saying, "You may not use these documents", and in those

circumstances they are very concerned that if, contrary to that express direction, they do proceed to use those documents, their immunity will be vulnerable and that could then result in a fine or -- a fine which could be up to 10 per cent of their turnover within South Africa and exports from South Africa. So you would have seen the evidence to effect that could potentially be substantial.

THE CHAIR: You're putting a lot on just a clause, when really the focus of this correspondence was the documents identified. They say "any other document", I think a reasonable interpretation of that is that it means: any other document particularly focused on the inquiry they're concerned with, as opposed to documents you have in your ordinary course of business.

MS FORD: Well, the other factor to draw the Tribunal's attention to is: in paragraph 2, what they're referring to is an ongoing investigation litigation by the Commission.

THE CHAIR: Yes, I understand that. But that would be that you can't have two authorities in the world investigating the same competition matters. I mean, that just seems extraordinary.

So the Department of Justice and the EU couldn't look at antitrust in breach of Article 101 at the same time, because they're -- if everyone had these rules, it seems -- on the basis just of a clause in a letter, it just seems to lead to extraordinary consequences.

MS FORD: Sir, this direction is given specifically in relation to -- in contemplation of these proceedings. So it doesn't in fact have that breadth of consequence in these circumstances, because what they're saying is you've asked us about providing documents in this litigation, and their response is: no, because the use of these statements, or other information or documents, will be detrimental to the ongoing Commission and Tribunal proceedings initiated by the Commission.

THE CHAIR: What I'm going to suggest, Ms Ford -- because I rather suspect there is

going to be considerable overlap with the Department of Justice and Brazil -- I'm going to order that you search the South African documents along the lines of the Brazilian documents, and you disclose them on a lawyer's only basis pro tem. If there are documents that Mr West needs to rely upon or thinks he may need to rely upon, we can grapple further with this issue.

But just to put a warning shot across your bow, you're going to have to come up with much better evidence than this to show that there's a risk.

Mr West, is that satisfactory?

So you would get your disclosure. It would just be lawyers only for now. Then, if you think you would need to deploy it at all, we can deal with the question a little more fully. Obviously, I don't want to cause unnecessary concern.

MR O'DONOGHUE: Sorry, Sir, before we leave South Africa, I have one very short point.

THE CHAIR: Yes, of course.

MR O'DONOGHUE: Maybe you need to alter this. So it's in the application bundle, tab 6, page 70.

THE CHAIR: So these are the witness statements?

MR O'DONOGHUE: Yes.

THE CHAIR: Tab 6.

MR O'DONOGHUE: Page 70, paragraph 38 of my solicitor's statement.

Does the Tribunal have that?

He makes one point on duplication, I'm not going to readdress you on that. We give him those over.

But the last sentence:

"Autoliv was not provided with access to file by the South African Competition Commission."

So, in our case, we have nothing further to give. It may be a case of nil return, but it seems to me pointless to ask us to search for things that we've already given.

THE CHAIR: You're not suggesting it's particularly burdensome to search?

MR O'DONOGHUE: Well, it may be a question of managing expectations. It will be nil returns.

THE CHAIR: I understand that. If you could -- I'm going to make the order against you, just as I do against the other Defendants. Then we'll see -- if it's a nil return, it's a nil return. I understand that.

MR O'DONOGHUE: Sir, I'm just reminded, because you used the words "lawyer's eyes only", the inner ring in this case is not lawyers only. I believe it includes external experts as well.

THE CHAIR: Initially, I'm going to do it lawyers only. It's in anticipation of the fact that actually there are no documents that are of any interest to you, because you have them all from the Department of Justice and from Brazil and from the Commission.

MR WEST: So will we need a new confidentiality order to govern --

THE CHAIR: Well, it will be disclosed on "lawyers only". I mean, presumably, it doesn't need to be -- and I am talking about external legal advisers, not internal legal advisers initially. Yes, you would need a confidentiality ring for that. But, hopefully, that's fairly straightforward. It would be, you know, pro tem until this matter is sorted. Obviously, it's liberty to apply under it as well. So I would hope we don't need anything particularly complicated.

Can I just ask you to address third party documents? So there would be no order for disclosure of anything specific to the inquiry, but there may be third party documents picked up. So searching for your client's name could be "Takata", it would be mentioned, and it may be it comes up that it's somebody else, another OSS manufacturer or something. In those circumstances, how are we going to deal with

the confidentiality of those documents?

I'm envisaging that on the searches, relevant documents emerge which belong to a party that's not in court today.

MS FORD: Sir, we were going to ask, in any event, that the documents that are produced from the foreign regulator documents go into the confidentiality ring in order to address that particular point.

THE CHAIR: You have an inner and outer confidentiality ring, have you?

MS FORD: Yes.

THE CHAIR: Are we content for them -- that seems sensible to me, Mr West; are you content with that?

MR WEST: Well, the disclosing party always has the option, in the first instance, to designate them within the inner ring.

THE CHAIR: I see, yes. So that will be ...

Ms Ford, is that an opportunity to have a five minute break for the shorthand writer, then you can take instructions?

MS FORD: Sir, yes.

THE CHAIR: Okay.

(11.56 am)

(A short break)

(12.05 pm)

THE CHAIR: Right. How are we getting on?

MS FORD: So the Tribunal was asking about the position of third party documents in relation to the South Africa.

THE CHAIR: Yes.

MS FORD: On that, the position for us is quite straightforward because we were not given access to the South African Competition Commission's files, so we didn't receive

any documents belonging to other parties. That's paragraph 14 of Mr Lötter's statement, so, for us, that doesn't arise.

THE CHAIR: It's not just South Africa; it's also Department of Justice, it's also Brazil.

MS FORD: Yes. So, in relation to Brazil, the only relevant party that we understand is not here present is Takata.

In relation to that, the established practice in relation to giving access to the Commission file is that one, out of courtesy, notifies the party whose documents they are, to give them the opportunity to come and make representations to the Tribunal should they feel the need to do so.

THE CHAIR: That would seem sensible. But, as a first step, they get put it the inner confidentiality ring. Then maybe they need deploying, maybe they don't. If they need deploying, a third party should get the opportunity to say so, yes. That seems a sensible way of going about things.

But I'm not sure we need to draw that up at this stage, do we? They'll go into the inner confidentiality ring and, if any need to be deployed, if they're third party documents, I think we would need an application to --

MS FORD: With liberty to apply.

THE CHAIR: Yes. So they won't be deployed until they have the permission of the Court, or the Tribunal, rather.

MS FORD: Sir, yes.

THE CHAIR: Does that make sense?

MS FORD: We're content with that as an outline means of approaching it.

There's one final point which is the question of date by which this is to be done.

THE CHAIR: Yes.

MS FORD: The Claimants have suggested 28 April. Given that what the Tribunal is envisaging is not simply a process of handing over the documents, it's a fairly detailed

review --

THE CHAIR: Yes, they'll need longer than that.

MS FORD: What we've asked for is 9 June.

THE CHAIR: Yes. Does that cause any problems, Mr West?

MR O'DONOGHUE: Sir, that seems fine, but in some ways we'll have to see how we go with the liberty to apply.

MR WEST: We can live with that date.

THE CHAIR: I'm grateful. So where do we go now?

MR WEST: Gentlemen, there is an updated composite draft order --

THE CHAIR: Yes. That will be helpful.

MR WEST: -- which was produced overnight. So that's in the supplemental bundle, at tab 14.

THE CHAIR: Updated overnight?

MR WEST: It should have been.

THE CHAIR: How do I know it's the updated one?

MR WEST: There should be a tab 14.

THE CHAIR: Okay, so there wasn't --

MR WEST: There wasn't previously.

THE CHAIR: So it was just an empty tab before, was it?

MR WEST: Yes. I'm happy to say the that the parties are inching closer together. The remaining points of substance are disclosure in relation to limitation, which is paragraph 9. --

THE CHAIR: Shall we deal with that one next?

MR WEST: But, just to summarise what else there is, there's disclosure in relation to pass-on, which is right at the end. Then I think we're into more minor disputes concerning the precise scope of searches.

THE CHAIR: Yes. So let's --

MR WEST: Both limitation and pass-on disclosure are actually my friend's applications rather than mine.

THE CHAIR: Right. So, as I understood -- I may have this wrong -- the position was there are fiendishly complicated limitation pleadings, which I can only barely grasp. It's agreed there should be disclosure in relation to limitation, and the dispute is whether it should be board minutes or whether it needs to go broader than that; is that the scope of the dispute?

MR WEST: Yes.

MS FORD: So that's the core point, and there's an issue of additional, very small points, about searches for communications between the Claimants and a regulator and publicly available documents. But those are the three --

THE CHAIR: So if we start with -- you'll remind me, for corporate -- so you have constructive knowledge, the suggestion, I think, was the first Commission decision would be the relevant date for constructive knowledge. Somebody said that.

MS FORD: That is a suggestion made by the Claimants on the basis of the Trucks judgment. What I was proposing to submit in relation to that, Sir, is that essentially it raises issues that this Tribunal can't decide now because, first of all, it's a submission made on the basis of an assumption as to applicable law --

THE CHAIR: We'll come back to that. I want to just -- there's a dispute about that?

MS FORD: There is a dispute about it.

THE CHAIR: That's fine. Then we're concerned with, also -- constructive knowledge is in issue and actual knowledge is in issue.

MS FORD: Actual knowledge is definitely in issue.

THE CHAIR: For actual knowledge -- and I imagine it doesn't apply to constructive knowledge -- whose knowledge are we concerned with in a company? Where has the

law come to on that? It presumably doesn't have to be board knowledge, or does it have to be board knowledge?

MS FORD: It doesn't have to be board knowledge. The parties have reached agreement as to which of the companies should be --

THE CHAIR: Yes, I saw that. Which of the companies -- but if the legal department have knowledge, that's good enough, even if the board are completely ignorant of it; that would be good enough for your case?

MS FORD: That would be our submission, yes.

THE CHAIR: At least that's arguable, whether or not it's accepted.

So, on what basis, Mr West -- I'm just trying to narrow the issues. On what possible basis can we say that knowledge is any knowledge of the board, if that's not the law?

MR WEST: I'm not aware of any actual authority having been identified to that effect. Of course, ordinarily, in English law, under the limitation rules, one doesn't distinguish under section 32 between actual and constructive knowledge because either is sufficient. So one is thrown back, in relation to actual knowledge, on the general law of attribution of knowledge to companies.

THE CHAIR: Sure.

MR WEST: Which is what I've cited.

THE CHAIR: But you're not saying the law is clear that the only relevant knowledge is the knowledge of the board?

MR WEST: No.

THE CHAIR: I think it would be a very challenging submission to make that it's clear that the only knowledge that matters for the purposes of the Limitation Act is the knowledge of board.

MR WEST: No, I can see, in theory for example, if the business of the company was delegated to someone else, that might be different.

THE CHAIR: It might be the legal department. The legal department are aware of the --

MR WEST: Ordinarily, if the legal department --

THE CHAIR: They have meetings, they minuted it. It's just below the radar of the board. In those circumstances, the limitation of defence on knowledge may well be engaged.

So where I'm leading is: I don't see the justification beyond proportionality and it's easier, I don't see the justification for limiting disclosure to the board; am I misunderstanding that?

MR WEST: No, you're not misunderstanding my submission. Obviously, what the Chair is saying about that, in my submission it might be a bit surprising for the board not to take instructions on matters which it's discussing from, as it were, the business side of the company, especially if what is under consideration is pursuing proceedings.

THE CHAIR: Yes, but it may -- I don't want to end up in a discussion about this too much. But they might know six months later.

You know, one could imagine -- it's not incomprehensible to me that this will arrive at the legal department's door first. It may be another department's door first. But I don't see why all matters can be resolved by reference to the board minutes, I just don't understand that.

MR WEST: Well, then we perhaps have to take instructions. This is a new proposal not mounted by my friend. So it will be the board plus the legal department.

THE CHAIR: No, I'm just -- no, I'm not saying that, I was using that as an example. I'm not suggesting that.

MR WEST: If it's further than that, obviously we'll need to address why the company's knowledge could be treated as that. If it's said, for example, the PR department, I don't accept that's treated as the knowledge of the company. In terms of actual

knowledge --

THE CHAIR: I can't rule on any of those matters today. We are just dealing with disclosure, and we can have the legal arguments at trial.

MR WEST: But in order to make a case for disclosure, there needs to be at least some ground for saying this individual or this department's knowledge is treated as that of the company for these purposes.

THE CHAIR: Right. So, sorry, Mr West, can I go back to -- as a practical matter, what search has to be done?

MS FORD: We have proposed that the communications should be limited to the board, senior leadership teams or heads of relevant divisions. So we have sought to address this point by narrowing the scope of the potential custodians.

THE CHAIR: Well, will this be -- okay. Sorry, I was just going to ask you: you have a list of custodians or you will negotiate a list of custodians?

MS FORD: It's not a matter within our knowledge which custodians within the Claimants satisfy those requirements. But what we've sought to do is to say: we're not asking to you look for emails from the person who is in charge of cleaning the floor, for example. We have said the board, senior leadership teams or heads of relevant divisions in terms of the personnel. Then we've also defined the scope of the documents that we say are relevant because this comes up, because the suggestion being made is: only board minutes are relevant.

We strongly --

THE CHAIR: We're with you on that so far, so --

MS FORD: Mr West seems to be contemplating that we are making an argument now, or we're in a position to make an argument now, as to whether any particular individual is or is not the mind of the company for the purposes of attribution. Clearly, we can't possibly get into that at this stage.

THE CHAIR: Mr West, I can hear on further argument as to why it should be the board. But you've heard our initial view, that if it's not the board that's the critical institution to be fixed with knowledge, there seems to be a good case to go broader. I don't know whether you want to persist with your application to limit it to the board or whether you want to take instructions. We're in your hands.

MR WEST: I may perhaps come back and see if I have an alternative submission in view of the observations that have followed from the Tribunal.

MS FORD: Sir, we do say that the Court of Appeal in Gemalto is a very pertinent authority on this. It was suggested by Mr West that we haven't identified authority. The Court of Appeal in Gemalto has given a judgment in which it found that claims are to be time barred.

What's informative is the nature of the information it referred to in that context. It's tab 33 of the authorities bundle.

So there's a heading:

"Essential background of facts."

Which starts at internal -- sorry, bundle page 1225, paragraph 17, where the Court of Appeal is summarising the material that was available to the judge below. So, in many respects, what it says is a very compressed version of the matters that were actually relied upon by the judge.

But, in any event, what one can see is that material that the Court of Appeal is referring to goes very much broader than simply board minutes.

So, for example, you have a reference to the publication of a press release in 18. Then, in 19, it records the announcement was picked up by major news outlets and came to the attention of Gemalto. Internal emails were sent on 7 January 2009, including to and from Gemalto's chief executive officer, executive general counsel and deputy general counsel.

They forward the Commission's press release or news articles reporting on the announcement, including some that named Infineon as confirmed as being among the companies that had been raided. One email asked senior staff to use your key account buyer network and fish for serious information on this --

THE CHAIR: Your point is if they just had board minutes they wouldn't have had any of that.

MS FORD: They wouldn't have had any of that. We do see that there was one reference to board minutes, to which the Court of Appeal refers in paragraph 24, after having referred to other internal emails. What the board meeting recorded was, we had to explain -- we, Gemalto had to explain to third parties that Gemalto was not manufacturing chips and consequently was not involved in the investigation recently launched by the European Commission against chip manufacturers, we could only be victims of unlawful activities, if any.

So the actual pre-occupation of the board, in that circumstance, the sole mention in board minutes was not actually to do with potential claims as such. It was the concern that there was a misunderstanding and they were being accused of having been party to the cartel and they were seeking to dispel it.

THE CHAIR: I understand. Mr West, is it worth your taking instructions about this over lunch or do you think we should press ahead and argue it?

MR WEST: I would like to be able to take some instructions over lunch and come up with an alternative proposal, if I may.

THE CHAIR: I'm grateful for that. Shall we move onto the next topic?

MS FORD: So there were very small additional issues in dispute on limitation.

THE CHAIR: Let's have a look at those.

MS FORD: The first was the extent to which --

THE CHAIR: Sorry, just give me a second. Could you give me a paragraph number?

MS FORD: On the order, it is ...

So our limitation paragraph starts at paragraph 9. But then paragraph 10 defines the documents for which searches should be made.

THE CHAIR: And just remind me: green is whose wording?

MS FORD: That means our proposals, ZF's proposal.

THE CHAIR: Yes. Okay. I'm looking at paragraph 10.

MS FORD: So 10A is seeking communications between the Claimants and the European Commission and Department of Justice, and the South African Competition Commission and the Brazilian Competition Commission. That is relevant, in the sense that in Gemalto, for example, there had been requests for further information provided by the Competition Commission and sent to the claimant's company. So one can see that it's relevant and it does put the company on notice as far as they --

THE CHAIR: I'm struggling a bit to fit this into what we were arguing about a few minutes ago, that you're not allowed any South African documents because you're going to get fined and the world is going to cease turning on its axis. But you're now saying there can be disclosure of South African documents?

MS FORD: No, these are the communications between the Competition Commission and the Claimants, the Claimant companies, for example asking for further information. That is what actually happened between the European Commission and the claimant company in Gemalto.

So if we just go back to the Gemalto --

THE CHAIR: I'm just trying to reconcile your -- I don't have a problem with it as a proposition otherwise. But you're saying that because the Claimant wasn't a party to South African -- there are no obligations on it and it's free to --

MS FORD: Yes, this is not a document that would fall within the confidentiality obligations.

THE CHAIR: They haven't put in a leniency statement, they haven't done --

MS FORD: They are not being investigated at all. What may be going on, if such documents existed, would be that the Competition Commission is asking --

THE CHAIR: Well, I think Mr West hasn't taken that point, has he?

MS FORD: Well, it was in dispute. But if it he doesn't wish to pursue it, then --

THE CHAIR: No, I'm not trying to put words in his mouth.

MR WEST: My point on that is simply that there isn't any evidence that there ever were such communications. One would think if there were, the Defendants would know about it, because they're party to the investigations. Based on such investigations as were made to date, we haven't found any evidence that there were any.

I suppose the other --

THE CHAIR: If you're coming up -- and I appreciate this is still for argument -- with a list of custodians and you're going to search their documents, I would have thought these would properly get caught anyway, but there's certainly no harm in having this as a category, if that's how we're approaching this; is that fair, Mr West?

MR WEST: I hear that. I suppose the other point just to mention is: it's not completely clear at the moment what the relationship is between A and B, and then C and D for that matter. Whether A and B fall to be disclosed if they also fall within C and D.

THE CHAIR: Ms Ford?

MS FORD: I was simply going to confirm that our application is for self-standing categories of documents A, B, C and D, not that one is to be confined by reference to the other.

MR WEST: So it's not limited to the custodians, in other words? That's the application, as I understand it.

THE CHAIR: Why publicly available documents?

MS FORD: That's the other point that's in dispute. What's being said against us is: that would only be relevant to constructive knowledge.

But we disagree with that because insofar as it's shown that the Claimants had possession of documents which are in the public domain at the relevant time, that is indicative of what actual knowledge they had, and, again --

THE CHAIR: We're envisaging a custodian, say head of legal, and on her computer she has, or he has, an announcement --

MS FORD: Sir, exactly. Again, if we go back to Gemalto, we see that what actually sparked all the communications internally was receipt of the Commission's press release and --

THE CHAIR: They wouldn't get caught by constructive knowledge anyway.

MS FORD: They're relevant to actual knowledge. This is the point. Because this is the way we sidestep the somewhat complicated argument that's being advanced against us in relation to Trucks and what's meant on constructive knowledge. On any view, it's accepted that actual knowledge is relevant if --

THE CHAIR: Okay. I understand, I understand. Yes.

MR WEST: Yes, but actual knowledge of who? My friend just said this isn't limited by custodians on her application.

THE CHAIR: It will be limited by custodians.

MR WEST: Ah.

MS FORD: Yes. I can confirm that the paragraph we're debating is the definition of documents. We have made a proposal in respect of the custodians and that will apply to all the different documents.

THE CHAIR: All the different documents. I'm mainly clarifying the order, Mr West, but I think that's the intention.

MR WEST: Yes. Our concern is: if it is simply a question of who read a newspaper

article one day in the canteen, then one really is in the realms of constructive knowledge only, and it makes a difference.

THE CHAIR: Maybe, but I can see the point. If the head of the legal department has on his or her computer an announcement stored in their important files on the desktop, then that could be relevant to actual knowledge, plainly.

MS FORD: Sir, I think that is the scope of the dispute between us on limitation.

THE CHAIR: Right. So I'll leave you to just discuss that further, see if there's any common ground in the light of that discussion.

I'm sorry, I keep forgetting Mr O'Donoghue. I'm not sure the extent to which you're aligned. I do apologise.

MR O'DONOGHUE: You'll be relieved to hear I have nothing to say on this. I thought we were moving on to the pass-on disclosure, but if we're not, I'll sit down.

THE CHAIR: Let's move on to the pass-on disclosure.

Application by MR O'DONOGHUE

MR O'DONOGHUE: I'm grateful. Sir, this is a short but important application. This is a claim for compensatory damages and on the heroic assumption that liability and overcharge are established, it will a complete or a substantial defence in law for my clients to show that some or all of that overcharge was passed on by the Claimants to their customers.

THE CHAIR: At least arguably.

MR O'DONOGHUE: Yes. Well, Sir, indeed, and there's no strike out in relation to the pleaded defence.

Sir, can we just look at the order to see where the battle lines are drawn? It's paragraph 7 to 11 of annex 2 of the composite order.

THE CHAIR: 7 to --

MR O'DONOGHUE: 7 to 11 of the composite order.

THE CHAIR: Yes.

MR O'DONOGHUE: So the first point -- this is page 24, if the Tribunal has that. The heading is in the wrong place; the heading should start at 7, but that's a minor point.

THE CHAIR: So the heading is what, technical specifications?

MR O'DONOGHUE: Pass-on, Sir. It's at the bottom of the page. It should be at the top of 7.

THE CHAIR: Oh, I see. I'm with you.

MR O'DONOGHUE: So you'll see in green what we seek. You'll see in red what is offered on the other side. You will see that what is in red is similar, but not identical to what is in green, in 9.

So that's the menu before the Tribunal today.

Now, the starting point is that given that this is an arguable defence, complete or substantial defence, as a matter of law the Claimants are obliged to give relevant and proportionate disclosure on the way they've dealt with costs within the business. We have Supreme Court authority for that in Sainsbury's, authorities 26, volume 2, and it's at page 843.

THE CHAIR: I'll just have a quick look at that, sorry.

MR O'DONOGHUE: It's just one paragraph, but short.

Page 843, Sir.

THE CHAIR: Thank you.

MR O'DONOGHUE: Tab 26. It's paragraph 216:

"Once the defendant's raise issue of mitigation in the form of pass-on, there is a heavy evidential burden on the merchants to provide evidence as to how they have dealt with the recovery of their costs in their business. Most of the relevant information about

what a merchant has actually done to cover its costs will be exclusively in the hands of merchant itself. The merchant must therefore produce that evidence in order to forestall adverse inferences being taken against it by the court which seeks to apply the compensatory principle."

So if there's an arguable defence, there is a heavier evidential burden on the Claimants. There is asymmetry of information because the information on recovery costs lies exclusively within the sphere of the Claimants.

So that is the legal position established at the highest levels of judicial authority.

Now, our expert has said, in his provisional report and letter, that he needs the data in 7 to 11 to perform the regression analysis in relation to pass-on.

THE CHAIR: Can you just show us that, Mr O'Donoghue?

MR O'DONOGHUE: It's in the second volume of exhibits. So it's the second exhibit volume. It's at page 13 --

THE CHAIR: Oh, isn't it also in the bundle? It's also in the core bundle, isn't it?

MR O'DONOGHUE: It may also be in the core bundle.

THE CHAIR: This is the letter from --

MR O'DONOGHUE: From ABC.

THE CHAIR: Yes, I think it's tab 32 in the core bundle.

MR O'DONOGHUE: Thank you, Sir. That's probably more convenient.

So it's at paragraph 27, towards the back end.

THE CHAIR: Yes.

MR O'DONOGHUE: So he essentially lists, in shorter form, the information in paragraphs 7 to 11, which we saw.

We are somewhat surprised that the Claimants are resisting this because a virtually identical order was made in two ball bearings cases in which these Claimants were also involved. Now, can I just show that to the Tribunal, in the supplemental bundle,

tab 10?

It might be supplemental 52. Hopefully the Tribunal received that overnight.

THE CHAIR: Yes, I have that, thank you.

MR O'DONOGHUE: So we see, at page 1, it's a series of FCA claimants. So, as we can see from the 10th Defendant, this is the NTN case, so another automotive case involving ball bearings, virtually the same claimants. There is a virtually identical order on pass-on in relation to a claim brought by PSA in the same cartel. The part of relevance on pass-on is towards the back end. It's on the supplemental 66, and it's paragraphs 5, 6 and 7. What you will see is that some of this is verbatim, or at least very, very similar to what is set out in green in the order we see.

THE CHAIR: Was this agreed or was this argued?

MR O'DONOGHUE: I think it was partly agreed.

So that's in the NTN case. In the PSA case, the order in fact is identical.

THE CHAIR: Tab 11, is it? Sorry, where is the PSA?

MR O'DONOGHUE: Tab 38, Sir.

THE CHAIR: Tab 38 of ...?

MR O'DONOGHUE: In the authorities bundle, forgive me.

THE CHAIR: In the authorities bundle.

Yes. I ought to make a note of this. So --

MR O'DONOGHUE: So you will see a couple of pages --

THE CHAIR: Can you just give me a second? Apologies.

MR O'DONOGHUE: Forgive me.

THE CHAIR: Yes, I'm grateful. Thank you, Mr O'Donoghue.

MR O'DONOGHUE: Cover page, PSA. So this is the second bearings case. Then, on page 1667, 9, 10 and 11 -- and of course this is the order that is suggested as being a template for disclosure in this case generally. I can give you a reference for that.

We don't need to turn it up. It's at tab 14 of the correspondence bundle.

THE CHAIR: I'll take it as read.

MR O'DONOGHUE: So the letter from Hausfeld, the Claimants' solicitors, 21 December 2022, tab 40 of the correspondence. They say, and I quote:

"We note that our list is closely modelled on the types of documents ordered to be disclosed by the Tribunal in PSA v NSK."

Which is the order we've just seen.

So we were very surprised -- given that this was ordered in two previous cases, and they hold this up as a model of standard practice in these kind of cases -- that we've met with the resistance that we've met with. But be that as it may ...

Now, the only real point made by Mr West is there was a judgment of this Tribunal a couple of months ago in one of the Trucks cases, Royal Mail, and he says, and I paraphrase, that following a full trial the pass-on defence in that case was rejected. Again, I paraphrase, he says: well, that has made things more difficult for defendants raising pass-on defences.

But my short answer to that is twofold. In the absence of a strike out, the assertion that on causation in relation to pass-on that we would fail is not an argument open to Mr West at this stage. That might be a good point at trial, when the absence of a strike out is neither here nor there, with respect. Indeed, Royal Mail from that perspective is a point firmly against him, because the findings on which he relies arose following a 12-week trial, in which all this was heard following disclosure and hearing from the experts. So we say, if anything, that is a point against them.

THE CHAIR: Is there a settled law in this area?

MR O'DONOGHUE: Well, it is settled in the sense that the Supreme Court in Sainsbury's says: if there is no strike out on the defence, the burden shifts --

THE CHAIR: It depends on when pass-on will succeed.

MR O'DONOGHUE: Well, this is a developing area of law, which, in my submission, is another reason why one should be cautious of getting out the scythe.

The final point in Royal Mail, of course, was that it was fundamentally different because, of course, Royal Mail and British Telecom, who were the claimants in that case, they had regulated businesses, so how costs are dealt with in the context of regulated business really is a very different thing to what we have in this case, which is a market facing entity selling automobiles on the open market in the UK and in the EU.

The final point, before I hand over to Mr West, there is a further particular feature in this case, which is important, and we can pick this up in our defence. It's in the core bundle, page 69. So it's tab 13 --

THE CHAIR: Sorry, give me the tab again.

MR O'DONOGHUE: Yes, it's tab 13, Sir. So this is our amended defence.

So it's at 14B(ii).

THE CHAIR: Yes.

MR O'DONOGHUE: So we say, second sentence:

"The bidding process for RFQs was sophisticated and competitive. OEMs such as the Claimants had (and continue to have) a significant degree of buyer power."

Then we cite the European Commission:

"OEMs usually have an excellent knowledge of prices and costs for components on a worldwide basis."

We cite some merger decision. We give examples of ways they can force a haircut of the cost, sponsoring entry, expansion and so on.

So, in this sector in particular, because of the concentration on the OEM side, because of the sophistication of the organisation of procurement, we say these entities, these Claimants in particular, are extremely well geared up for dealing with the pass through

of costs through their businesses. So we say our case, if anything, on pass through is an a fortiori one.

So those are my submissions. We say this is a matter for trial. We're plainly entitled to the disclosure.

One final point: if we were left with what is -- if we go back to the composite order.

THE CHAIR: Yes.

MR O'DONOGHUE: If we were left with what is simply set out in red -- it's worth looking at that. So we would get general policies and guidelines --

THE CHAIR: Which doesn't necessarily equate to what was done.

MR O'DONOGHUE: It's effectively a proxy strike out because before we get at these guidelines we have no hope in hell of running a pass-on defence.

THE CHAIR: I see.

MR O'DONOGHUE: It is plainly inadequate because this is about how, in specific terms, granular terms, one deals with costs. The guidelines is effectively intended to shut us out from the word go.

MR WEST: I rather feel the tables are turned, now, because it's my friend who is saying he needs disclosure out of fairness and I am saying his case is not properly particularised.

The important point to come out of the recent Royal Mail judgment, and some other recent judgments in pass-on -- but it's all summarised there -- is the need to demonstrate causation as a matter of law. In other words, if the costs are passed on, as a matter of law, that amounts to mitigation. That's emphasised throughout the judgment, if I can look at it briefly in a second.

But I'm not seeking, at this stage, to say my friend can never have any more pass-on disclosure, neither am I seeking to strike him out. I'm saying that the Defendants ought to plead a mechanism of legal pass-on. So a mechanism to demonstrate that these

costs have been passed on as a matter of legal causation.

Now, as things stand, he hasn't had any information about how my client set its costs and that's why we are proposing to give them our pricing policies. So my submission is they should have that material, and they should then consider whether they're in a position to plead that the costs were passed on in a way that would satisfy the test for legal causation, which the recent authorities demonstrate --

THE CHAIR: Mr O'Donoghue says the internal guidelines are really going to be very difficult for him to build and prove his case on guidelines.

MR WEST: Well, it may be difficult to prove his case on pass-on on the basis of the guidelines, but it shouldn't be difficult for him to plead a case on legal causation on the basis of the guidelines, which demonstrate how the prices were set within the business.

My concern here is not so much the pass-on. As my friend says, we've actually given some of the disclosure before. It's that by ordering that disclosure the Tribunal is effectively giving a green light for a further regression analysis in this case. So not only a regression analysis on the price of OSS components, which my client bought, but another regression analysis of all my client's sales, to attempt to see whether there was some relationship between the price at which we sold our cars and the price at which we purchased seatbelts.

THE CHAIR: Doesn't that just have to be done? As Mr O'Donoghue rightly says, you've not applied to strike this out. Pass-on is going to go to trial, and in what circumstances do we not grapple with that?

It may be when Mr O'Donoghue gets documents he shrugs and says: well, pass-on is not going to work.

But, in a similar way -- I mean, as you say, it is the other way round, we've sort of, you know -- I think -- I hope properly afforded you the opportunity to plead your case

in the light of the documents, and don't we need to afford Mr O'Donoghue an opportunity to plead his pass-on case?

You could have come in today and applied to strike it out, and said: he hasn't enough to get it off the ground.

MR WEST: I couldn't strike him out for failing to plead a case on legal causation between my client's purchasing prices and selling prices because he doesn't have the information to do it.

THE CHAIR: No.

MR WEST: So I'm proposing to give them the documents which are relevant to that and see whether he can plead a pleadable case on causation.

THE CHAIR: It's whether the policies and internal guidelines are really worth a candle.

MR WEST: It's important to note that although my friend says this exercise was gone through in the Royal Mail case, and he's right about that, it isn't a point against me, because if you read the judgment of the Tribunal -- and I'll take you to it if I have an opportunity to do so -- the pass-on defence failed for two reasons. It failed for no legal causation and no factual causation. In the event, the regression analysis was a complete waste of time.

THE CHAIR: It might be in this case or it might not.

MR WEST: In my submission, what that Tribunal judgment indicates is guidance for the Tribunal in future as to how these approaches should be approached, which is not how it's been done in the past, simply to have a free-for-all on pass-on and further regression analysis, which in the event the Tribunal says: don't assist it because there hasn't been a mechanism of legal causation demonstrated.

So, in the first instance, it's for the Defendants to prove that. At the moment, what they say is: well, businesses like yours try to recover their costs through their selling prices.

That's precisely what the Royal Mail judgment says does not amount to legal causation, because that could be said of any business.

THE CHAIR: I understand that, but ...

MR WEST: In particular, one is dealing here with OSS components, the total price of which is about €250 per vehicle. So the total overcharge is perhaps €25 on a car that sells for €10,000 or €20,000.

THE CHAIR: You're asking us to make the sort of determinations that would be made at trial in the light of a great deal of evidence and argument and economic evidence as well. You're asking us to sort of attach weight to that now when we're making a disclosure application, which I don't think is really easy for us to do --

MR WEST: I'm asking the court to consider whether it's appropriate to give the Defendants the go-ahead to do this regression analysis, to attempt to create a model --

THE CHAIR: No, I understand your point.

MR WEST: -- to identify changes in price of 0.1 per cent when they haven't yet explained how it is. But, even if there were such changes, it satisfies the test --

THE CHAIR: You haven't come along today and said these are our guidelines, our guidelines are if the costs don't change by more than €500, we won't do anything. If you'd come along with a guideline like that today, I can see --

MR WEST: We have, my Lord.

THE CHAIR: Have you? Well, sorry. I beg your pardon.

MR WEST: Mr Bolster has exhibited the guidelines.

THE CHAIR: All right. What was the bit in the guidelines you were relying on?

MR WEST: The bit in the guidelines that we rely upon determine how the prices are set in the business and I can show you. It's in the --

THE CHAIR: Yes. Sorry. I do apologise. I haven't picked that up.

MR WEST: It's Bolster 6, paragraph --

THE CHAIR: Can I see the guidelines rather than the interpretation of the guidelines?

MR WEST: Yes. Those are in the confidential bundle, which I'm afraid I have electronically.

THE CHAIR: Yes.

MR WEST: So I just need to find that.

THE CHAIR: Which page?

MR WEST: I believe it's 98. So, sorry, 58, PSA.

THE CHAIR: 58?

MR WEST: Yes. So here --

THE CHAIR: So we have to be careful not to read this out, yes.

MR WEST: We have to be careful not to read out any of the names. What you see on the far left, that is the A9. So that the Peugeot model whose pricing has been considered here.

THE CHAIR: Hold on. I haven't got there yet. I'm just having a little bit of bundle trouble.

MR WEST: Sorry, do you have that?

THE CHAIR: 58.

MR WEST: Page 58 of the confidential bundle.

THE CHAIR: Yes, got it. Yes.

MR WEST: And the pricing is set by reference to these comparator models that you see.

THE CHAIR: Hm-mm.

MR WEST: So that is the evidence on how the price of this particular model is set and the reason there are several levels is because one has options when buying the cars, alloyed wheels and sports version and so on, and each of the models is, as you can see, compared to the benchmark.

THE CHAIR: Okay. So where does it deal with component costs?

MR WEST: It doesn't. That's the point.

THE CHAIR: Right.

MR WEST: So that isn't how the prices were set.

But these are quite lengthy and these are only examples. The FSA example is at 98, as I said, which is in words rather than a diagram. Price strategy. I don't believe this is confidential, but you'll see the pricing is defined by reference to a basket of competitor models.

THE CHAIR: Yes. So you're looking at, if I can read out the title, Selection of Basket. Is that the title?

MR WEST: Yes.

THE CHAIR: Under that.

MR WEST: "Strategy expressed in terms of average visual and equipment adjusted position against..."

THE CHAIR: Sorry, I'm trying to work out where you're reading from, Mr West.

MR WEST: Under pricing strategy.

THE CHAIR: Right. Oh, all right. At the top. Sorry, introduction.

MR WEST: Yes. Well, any part of the page really.

THE CHAIR: So I don't suppose it will come as a surprise to anyone that competitive price comparisons are an absolutely important aspect of pricing probably in any market, and certainly in motor vehicles. But that doesn't answer the question of pass-through in itself, does it?

MR WEST: It may preclude there being a mechanism for pass-through either as a matter of law or fact.

THE CHAIR: I accept it may. But you've given disclosure of these documents.

MR WEST: Not yet. We have exhibited them to Mr Bolster's statement as examples

of the type of material we are willing to give.

THE CHAIR: Right.

MR WEST: Obviously we will give comprehensive disclosure.

THE CHAIR: Going back to my initial question, which I might have phrased badly, there's nothing that you've provided which suggests that component parts are not taken into account. Cost of component parts are not taken into account.

MR WEST: That is precisely what this guidance says does not happen.

THE CHAIR: But it doesn't say not. You're inferring it from the document, is that right?

MR WEST: The document explains how the price is set and isn't by reference -- it's not a cost plus model.

THE CHAIR: Right.

MR WEST: I don't want to take too long, but can I just show you one or two paragraphs from the judgment, obviously Sir Iain McMillan will be familiar with it in the Trucks case, which is -- is that tab 6. Which tab is Trucks?

Let me just find it. Sorry, it's missing a reference. Tab 36. So authorities 2.

So just a couple of paragraphs to give you a flavour of this. The first is 229.

PROFESSOR NEUBERGER: What's the reference? I missed it.

MR WEST: It's tab 26 of the second authorities bundle.

THE CHAIR: Yes.

MR WEST: Actually it's 228. I'm sorry.

So by way of summary of the legal test for causation, in relation to a pass-on form of mitigation defence:

"We respectively conclude that this part was unanimous. The DAF [that's the defendant] must prove a direct and proximate causative link between the overcharge and any increase in prices by the claimants. It's not enough for DAF to say that all costs, including increases in costs, are fed into the claimants' or their regulators' [no

regulators in this case] business planning and budgetary processes. There must be something more specific than that and there are number of potentially relevant factors it can rely on, including (1) knowledge of the overcharge…"

THE CHAIR: Yes. I don't think Mr O'Donoghue would disagree that's precisely why he says he needs the disclosure, because he can't just wave his hands and say that's economic theory --

MR WEST: That's why I'm proposing to give him the pricing policies to enable him to seek to plead their relationship such as to come within one of these heads.

THE CHAIR: But there is some force in his submission, is there not, that you're giving the pricing policy, you're going to say, "hey, look, it doesn't say anything about component prices, you've got to drop your defence", if defence is the right term.

MR WEST: Unless he can come up with some other pleadable mechanism and, if he cannot, then, according to this judgment, there's no point spending the time and money on the regression analysis because there isn't any legal causation in the first place.

THE CHAIR: But at some level component prices -- it's not an unreasonable inference at this stage to say at some point component prices will be taken into account when pricing the cost of a motor car, because otherwise motor vehicle prices would just stay round the same, just competing with each other, and material costs was increased and every motor car manufacturer would go out of business. So at some point component prices have to be a factor.

MR WEST: One possibility, for example, is that it operates in reverse. So one starts from the prices and then determines based on that what specifications of equipment are going to be in the car. That isn't relevant to seat belts or airbags, of course, because you have to put them in the car anyway. But it certainly means that, if the price of seat belts goes up by 10 per cent, it doesn't have any effect on the price and in any case simply saying you're a business, you've got to recover your costs, through

your prices, is not enough. That's what this judgment says in terms.

THE CHAIR: Yes. I understand. It's not enough to say that. You've got to go to the documents and you've got to show that it's happened in that particular case.

MR WEST: Even that's not enough. That would be causation in fact.

THE CHAIR: Fine. All right. Yes.

MR WEST: But you also need to establish causation in law.

THE CHAIR: Yes. Okay.

MR WEST: And I won't take too long but if I can just give you a couple of other references where this is strongly emphasised. 572 is one of them.

THE CHAIR: Say again?

MR WEST: Paragraph 572.

"As we've said in relation to the four factors identified above, [those are the same four in paragraph 228], none of them are present in this case. The absence of knowledge [and of course no knowledge of the cartel in the present case], together with the tiny size of the overcharge, [same here], means there was obviously no specific decision by the claimants to increase prices in response to the increase in costs. Nor is there any direct association between truck costs and the products sold by the claimants, even though an element is properly attributable to each product. And even if it can be shown that there was an increase in prices because of an increase in costs, it will be impossible to identify which prices in relation to which specific products actually increased because of the overcharge.

Therefore we find it difficult to see how there can be sufficiently identifiable purchasers from the claimants who could make a claim in respect of the overcharge or to whom it could be said the loss suffered by the claimants has been transferred. In the circumstances, we don't think that the DAF can satisfy the legal test for causation which requires the overcharge to be a direct and proximate cause of the increase in

specific prices. Even if as a matter of forensic accountancy DAF is able to show the minuscule overcharge can be traced through the series of internal steps, judgments and regulatory intervention resulting in higher price-setting ... [as the exercise my friend wishes to do] the absence of the four factors means the overcharge is too remote from downstream prices."

So the exercise was a waste of time in that case, and finally 754 --

THE CHAIR: Well, I mean, you say it was a waste of time. It didn't succeed.

MR WEST: It didn't succeed and --

THE CHAIR: It doesn't mean giving disclosure was an inappropriate step in the litigation.

MR WEST: Well, in my submission the approach which should be taken in future cases to disclosure in relation to pass-on should take this judgment into account because it adopts, as I say, a very stringent position in relation to that.

THE CHAIR: It does, but, sorry, Mr West, I'm just struggling -- you say these are very hurdles to overcome in the light of the Trucks judgment, which I understand your submission on that. Mr O'Donoghue says yes, there are hurdles to overcome and just waving his hands at some guidelines, or some economic theory, isn't good enough, at least on the law as it seems to be in Trucks. So both of you are agreeing this needs to be looked at a much more granular level of causation and Mr O'Donoghue says he just hasn't got the documents to be able to do that and I'm not -- you both seem to be making very, very similar points but leading to opposite conclusions and I'm just not sure why your reasoning inexorably leads to the idea that there shouldn't be disclosure so that Mr O'Donoghue can't explore any of these things.

MR WEST: No, no. My submission is there shouldn't be disclosure at this stage until he's pleaded a case on legal causation, which is a proper pleadable case on legal causation. In other words, one that says --

THE CHAIR: Well, he will plead a case, and doing the best he can, that ticks the boxes in Trucks. He's going to say we infer or we --

MR WEST: If he can do that, then he will be entitled to the pass-on disclosure he requests. But at the moment he hasn't. We can look at the pleadings, but at the moment the pleadings say "you have sought to recover your costs in your business" and, to be fair, that was pleaded before this judgment. That's what this judgment says is not enough. So we haven't yet got to the stage on the pleadings --

THE CHAIR: So if he repleads his case, you're saying you may apply to strike it out.

MR WEST: If he repleads his case on legal causation in a way that doesn't meet the test --

THE CHAIR: If you give him the guidance and your guidance is silent as to how you deal with component costs, let's assume, and he pleads in light of that document and cannot point to anything in that document in relation to component costs, you'll apply to strike him out. Is that where this is heading? I'm not quite sure why we're having staged disclosure if it's not heading to some sort of --

MR WEST: Yes, that is the logical conclusion. If the case he pleads is one which doesn't meet the legal test, then we would say that pass-on defences should go. Either they shouldn't be proceeded with or they should be struck out and, again, in the Stellantis v NTN case, that happened. I think my friend was in that case, when they tried to plead pass-on by reducing the cost you paid to other suppliers. It was struck out or rather --

THE CHAIR: I understand that but your difficulty is you didn't apply to strike it out.

MR WEST: Well, I accept I cannot apply to strike out until he's had disclosure about how we set our prices, because he would say, well, we haven't had that -- how can we plead legal causation in relation to how you set your prices when we had no disclosure about that.

THE CHAIR: Well, you put in the guidance document in evidence.

MR WEST: Yes.

THE CHAIR: Why didn't you say, now, here it is? Why didn't you apply to strike him out on the basis of that?

MR WEST: Well, he's only had that since we put in that evidence for this hearing. So those are my submissions.

THE CHAIR: I'm grateful. Mr O'Donoghue was there anything you wanted to come back to? The guidance, perhaps.

MR O'DONOGHUE: Two minutes, Sir.

THE CHAIR: Yes.

Submissions in reply by MR O'DONOGHUE

MR O'DONOGHUE: I don't have much to say.

Well, the cat is out of the bag. What Mr West wants is to give me his guidance, which we can see is full of a series of truisms, which is that firms look at what competitors are doing in the market. It tells me nothing about costs and then he would apply to strike me out. So that's all been laid bare.

THE CHAIR: Yes.

MR O'DONOGHUE: A couple of points. The confidential annex they've put in in a way makes my case for me. Just to give you a -- even on a basis of a quick synopsis, it is replete with references to profit margin and therefore costs are, as you would expect, fundamental to their business and indeed there is an air of unreality because why on earth have these RFQs, this incredibly sophisticated procurement, if cost is neither here nor there, but it's simply all about benchmark pricing in any sense.

So just so you have references Sir, so the confidential bundle, 66. You see reference to induced profit margin.

THE CHAIR: I've got 66.

MR O'DONOGHUE: Yes. 78, again.

THE CHAIR: Sorry, I didn't --

MR O'DONOGHUE: Sorry. Forgive me Sir.

THE CHAIR: Induced profit margin.

MR O'DONOGHUE: Yes. You see the middle of the page and bottom of the page. Page 66 of the confidential bundle.

THE CHAIR: Sorry, I've got two page numbers. I'm looking at the wrong one, I guess. Yes. Sorry, say that again. What was it? On 66.

MR O'DONOGHUE: Yes, bottom of the page, reference to induced profit margin.

THE CHAIR: Yes.

MR O'DONOGHUE: Then at 78, a few pages on, you see a more detailed analysis of induced profit margin. Then on 96 --

PROFESSOR NEUBERGER: Can you go a bit slower?

MR O'DONOGHUE: Forgive me, Sir. Yes, so 66, 78 --

THE CHAIR: So on 78 there's a reference to induced, yes, in the top left.

MR O'DONOGHUE: Top left. Yes. Same on the next page.

Then 95, there's a rather detailed analysis of the actual margins, which can only mean the look at costs, as you would expect, and over the page, 96, again, look at these targets, discussions of margin and then 97 you'll see -- I won't read out the figures -- it's a sentence starting two thirds of the way down, the margin is well understood.

So in my submission, this makes my case in spades for me and, as one would expect, they're looking at costs in minute detail. Of course, they're looking at the competition, who doesn't, and this shows that this is inherently a granular exercise and of course what is interesting is what Mr West doesn't say. There's been no evidence on

proportionality that this would cost a seven figure sum or the sky would fall. Nothing. It's taken at a very, very high level and what amounts to, frankly, Sir, is a game of legal snap. If he can give me the guidelines, then he has me and that, with respect, will not do.

Now, one final point, Sir. There's been a lot of reference to pleading. We received a request for further information in relation to pass-on, which we answered. It's in the core bundle in tab 9. It's at 10.4 and it's response 5. So it starts "in addition". Does the Tribunal have that? 10.4 under response 5.

So it's request 3, the response in paragraph 5.

THE CHAIR: Yes.

MR O'DONOGHUE: And, Sir, see the last sentence:

"In addition, as to the claimant's case..."

THE CHAIR: Sorry, I'm just trying to -- so this is --

MR O'DONOGHUE: This is our response to request for information.

THE CHAIR: From the claimants, yes. Okay.

MR O'DONOGHUE: "In addition, as to the claimants' case that pricing was based on comparisons with comparable cars, insofar as the infringement affected prices in the market in general, if and to the extent that the prices of other OEMs were increased, it follows this would have affected the claimants' pricing."

So we have directly responded to a pleading to his sole point that they based -- they decide prices solely based on benchmarking and, again, he has not applied to strike out that further information, which is part of our pleading. So we say with respect these objections go nowhere.

THE CHAIR: And, sorry, just remind me where was it pleaded in your original defence. You did show me. I apologise.

MR O'DONOGHUE: Yes, it's core, tab 13, paragraph 67. So we plead the Sainsbury's

point: heavy evidential burden.

THE CHAIR: Sorry. Just hold on.

MR O'DONOGHUE: 67, Sir, and we've given further information as you saw. And no attempt to strike out either of these parts of the pleading.

THE CHAIR: Yes. Okay. Thank you.

I'm grateful. How much more have we got to do? I know you're taking instructions on one thing, which may be short or may be longer depending on the instructions. In terms of what else --

MR WEST: There are various miscellaneous points on the CDO, for example in relation to the scope of disclosure. But no other points of principle.

THE CHAIR: So that's another hour, are we talking? Is that the sort of thing we're talking about?

MS FORD: I rise only to the extent that the time period over which disclosure should be given is defined as a point of principle. I should just make clear that that is in dispute, but it may be that it's a debate over nomenclature rather than substance.

THE CHAIR: And you're going to take instructions. Do you want longer than -- shall we say back at five past two or do you need a little longer to --

MR WEST: Five past two.

THE CHAIR: Five past two. I'm grateful.

(1.08 pm)

(The luncheon adjournment)

(2.05 pm)

Ruling

THE CHAIR: The next issue is disclosure in relation to pass-on. In the Amended Defence, at paragraph 67, it's pleaded:

"In the alternative, and without prejudice to the Autoliv Defendants' case set out above, in the event that any of the Claimants did incur any overcharge(s), the Claimants (or one or more of them) passed those overcharges on to their customers or counterparties in the form of higher prices, and must give credit for this pass-on. The Claimants bear a heavy evidential burden to provide evidence as to how they dealt with recovery of costs in their business. In this paragraph, references to the Claimants passing on or mitigating any overcharge include references to passing on or mitigation by predecessor entities and/or entities that have (purportedly) assigned their claims to the Claimants (and it is averred that the heavy evidential burden arises in respect of passing on or mitigation by those entities also)."

And there's a further allegation in response to a request for further information at tab 9, request 3, which was:

"Save insofar as already answered as part of Response to Request 2 above, please state whether, and if so on what grounds, the Defendants dispute the pricing mechanism pleaded at paragraph 13(1) of the Reply (given the burden of pleading and proof in relation to the mechanism of causation of downstream pass-on lies on the Defendant)."

The response to that inter alia is:

"In addition, as to the Claimants' case that pricing was based on comparisons with comparable cars, insofar as the infringement affected prices in the market in general, if and to the extent that the prices of other OEMs were increased, it follows that this would have affected the Claimants' pricing."

Mr O'Donoghue for Autoliv relies on Sainsbury's v Visa, which is in the authorities bundle at tab 26. So this is Sainsbury's v Visa [2020] UK Supreme Court 24.

At paragraph 216, it says:

"The legal burden lies on the operators of the schemes to establish that the merchants

have recovered the costs incurred in the MSC. But once the defendants have raised issue of mitigation, in the form of pass-on, there is a heavy evidential burden on the merchants to provide evidence as to how they have dealt with the recovery of their costs in their business. Most of the relevant information about what the merchant actually has done to cover its costs, including the cost of the MSC, will be exclusively in the hands of the merchant itself. The merchant must therefore produce that evidence in order to forestall adverse inferences being taken against it by the court which seeks to apply the compensatory principle."

Mr O'Donoghue also made reference to two orders that have been made by this court, one or both of them concerning the claimants in this action. One is at tab 38, that's the order in Peugeot and Others v NSK, and it ordered disclosure in relation to pass-on in terms similar to that sought in this case, which I will come to in a moment. He also referred to Fiat Chrysler and others, FCA v JTEKT Europe Bearings. In that case, again, similar scope of disclosure relating to pass-on pricing data, costs and so forth, was ordered in that case.

The disclosure sought today is set out in the draft order, page 25,

"7. Technical specifications and descriptions of vehicles produced by PSA over the Relevant Period including: (a) brand; (b) platform; (c) car line; (d) model; (e) trim levels; (f) options; (g) technical characteristics of car model (such as horsepower, weight, size, miles per litre, air conditioning, type of engine: electric, hybrid, diesel or petrol); (h) list price; (i) date of start of Production (SoP); and (j) date of end of Production (EoP).

8. Documents, data or information for the Relevant Period for each allegedly affected car model manufactured by the Claimants, including all options, for each country where it was sold, by month and, if applicable, by dealer type (independent and Claimant-owned dealers), as to: (a) the price books setting out the recommended retail

price (RRP); (b) invoicing/actual sales data on vehicles sold to dealers, including the actual prices paid; (c) information on discounts; (d) financial information on profit and loss, volume, gross revenue and target margins on vehicles; and (e) characteristics of each car model, to the extent not covered above, that affect pricing.

9. Policies and/or internal guidelines used to build pricing architecture between brands, between models, and across countries.

10. For base (standard) vehicle and options, full information on key costs broken down by plant and car model, on a monthly basis during the Relevant Period, including without limitation total average cost, labour costs, input costs, manufacturing or administrative costs.

11. For the cost category that encompasses costs related to OSS products (e.g. input costs), a full breakdown of the cost subcategories that make up that more aggregate cost category, and the cost values for all subcategories that include costs related to OSS products."

Mr West, on behalf of the Claimants, is offering to disclose policies and/or internal guidelines used to build pricing architecture for the period 1 January 2004 to 31 December 2012 and in relation to France, Germany, Italy and Spain and the UK.

Mr West, or his clients, have exhibited examples of those guidelines and he points out that those guidelines do not refer to manufacturing costs as being a relevant consideration in the pricing of motor vehicles, but instead referred to the cost of competitive products.

He points to the Trucks case, Royal Mail Group Limited v DAF Trucks Limited [2023] CAT 6, at the authorities bundle at tab 36 and makes reference to paragraph 572, where Tribunal identified four factors that were relevant to establishing pass-on, none of which were present in that particular case:

"As we have already said, in relation to the four factors identified in [550] above, none

of them are present in this case. The absence of knowledge, together with the tiny size of the Overcharge, means that there was obviously no specific decision by the Claimants to increase prices in response to the increase in costs. Nor is there any direct association between truck costs and the products sold by the Claimants, even though an element is properly attributable to each product. And even if it can be shown that there was an increase in prices because of an increase in costs, it will be impossible to identify which prices in relation to which specific products actually increased because of the Overcharge. Therefore, we find it difficult to see how there can be sufficiently identifiable purchasers from the Claimants who could make a claim in respect of the Overcharge or to whom it could be said that the loss suffered by the Claimants had been transferred."

Mr West may be correct that it's going to be necessary to plead causation in much more detail than it has been done at the moment. He may also be correct that the Defendants face an uphill task on that. But he has not applied to strike out the allegations in relation to pass-on. He has suggested that there should be staged disclosure, so disclosure of more guidelines for the time being and then, if that doesn't produce a pleading which satisfies him, he may apply to strike out the defence of pass-on.

We think that is unattractive procedurally. We also consider it unfair on the Defendants because there is an information asymmetry, and given that this pass-on is clearly pleaded, appropriate disclosure should be given at this stage in order to enable the Defendants to consider their case further and plead it more fully, if so advised. So I therefore make the order sought by the Defendants.

THE CHAIR: We just had some other questions in relation actually to how pass-on is going to develop.

PROFESSOR NEUBERGER: Yes. I mean, it just occurs to me that there's been a

tradition in these cases of producing massive econometric analyses of pass-on, and there's a question in my mind about whether that is the most effective way of making the case that some of the overcharge has been passed on. I just caution against rushing into a form of analysis simply because it's been hallowed by tradition if there are other more effective ways of making the argument available.

THE CHAIR: So, again, something to perhaps come back to in a moment. I think we want to have some discussion about where we go from here and possibly schedule another case management conference in order to make sure things are developing. But I think we may have some other issues to deal with on the order first.

MR WEST: Just before leaving pass-on, as you mentioned in your judgment, my clients have given pass-on disclosure in relation to their costs in the bearings case, both FCA and PSA. That wasn't specific to bearings, so that applied to all their costs going into their cars, and it covered a period between 2004 and 2012 in the case of FCA, or 2016 in the case of PSA. It involved an enormous amount of work and produced a huge amount of documentation. In the first instance, we would seek to provide that material as responsive to this order, which, as my friend said, is actually in the same terms as was sought in the FCA and PSA cases.

I just thought I better put that on the record in case anyone wants to pop up --

THE CHAIR: What are the dates you say --

MR WEST: 2004 to 2012 in the case of FCA; 2004 to 2016 in the case of PSA. There isn't a Vauxhall Opel equivalent, so we would have to re-do that in the case of Vauxhall and Opel, insofar as we have the documents available.

THE CHAIR: Has there been correspondence in relation to this between the parties? Or are you springing this on everyone for the first time?

MR WEST: There has been correspondence, I think, in relation to the dates. So you'll see in the order we have the dates for our pass-on disclosure that we proposed as

being those dates. So the pass-on dates we proposed for disclosure.

THE CHAIR: That was in relation to the guidelines, wasn't it?

MR WEST: Yes, but I think it has to be explained that those dates have come from the previous disclosure that was given and indeed those jurisdictions. It does seem to make sense not to require us to do it all again.

THE CHAIR: No, I understand the point. There aren't any dates in the Defendants' order at the moment; is that right?

MR WEST: There aren't.

MR O'DONOGHUE: (inaudible).

THE CHAIR: The cartel period or --

MR O'DONOGHUE: Well, Sir, that is the problem, of course. In the amended particulars, that they say "at least", they have not told us --

THE CHAIR: Without going back to all that; what period are you -- sorry, I didn't understand what your submission was.

MR O'DONOGHUE: So you'll see at 8 is the Relevant Period, capitalised term.

THE CHAIR: 8, so where is that defined?

MR O'DONOGHUE: Paragraph 1.

THE CHAIR: Sorry, where is it defined?

MR O'DONOGHUE: Paragraph 1 of annex 2.

THE CHAIR: Sorry, I can't --

MR O'DONOGHUE: Paragraph 1 of annex 2.

THE CHAIR: Paragraph 2.

MR O'DONOGHUE: Page 20.

THE CHAIR: Yes, paragraph 1 -- so 1 January 2000 to 31 December 2022.

MR O'DONOGHUE: Is what they're seeking from us. So the first we have heard of this proposal is now.

THE CHAIR: Yes.

MR O'DONOGHUE: There are a lot of assumptions and assertions built into what Mr West is saying. I'm in no position to respond to those on the hoof.

THE CHAIR: Yes, I can understand that.

MR O'DONOGHUE: It's very unsatisfactory. Of course, the other Defendants are in an even worse position.

MR WEST: But the relevant period here goes up to 2020, because there needs to be a post-cartel period of data, a clean period of data to compare to prices during the cartel in order to see whether there was an overcharge; that's why it runs up to, effectively, the present day.

Whereas when one is dealing with pass-on, one looks at whether any overcharge during the cartel period was passed on. So, in my submission, it does serve a different purpose.

THE CHAIR: You'll remind me of your letter on this, ABC's letter; did they specify dates or ...

I think paragraph 18.

MR O'DONOGHUE: 27, Sir.

THE CHAIR: Yes, but I think paragraph 18 is reference to some dates.

MR O'DONOGHUE: Also, from memory, I think he was simply endorsing the relevant period.

THE CHAIR: "Because ideally I would have information for Stellantis purchases from all suppliers in the period from 1 January 2000 to 31 December 2022."

Which is the date you have in your ...

MR O'DONOGHUE: That's for the overcharge. Then on pass-on, 27, he's --

THE CHAIR: That's on the overcharge, I beg your pardon.

MR O'DONOGHUE: -- simply cross-referring to what we have seen in 7, 8, 9, 10, 11.

THE CHAIR: Yes.

MR O'DONOGHUE: We are rather surprised. This relevant period has been in the order for some time now and if a proposal of this kind was to be made, it should be properly ventilated. The other Defendants have been completely blindsided on this. I'm in no position to respond today. It's bad enough having multiple composite orders over the weekend and overnight, but for this to be launched at the last minute is really quite unfair.

THE CHAIR: No, I understand that.

MR WEST: But there was an attempt to assist all parties providing these composite draft orders.

MR O'DONOGHUE: It doesn't assist me in any way, I'm afraid.

THE CHAIR: In terms of -- obviously, we don't know, ultimately -- I'm sure you're both confident you're going to win this action, but we don't know ultimately who the cost of this exercise is going to fall on, and may depend on whether it's a successful defence or not.

So it may be in the interests of the parties to talk further about whether there are economic ways of organising this disclosure. But, at the moment, I'm going to order the relevant period and, obviously, you can talk further about it and there's always, you know, if -- I'm reluctant to give liberty to apply, but obviously you're always entitled to come back to the Court if particularly important proportionality issues emerge. So that's the order that would be made.

What else do we need to deal with? And how far have we come on the agreement --

MS FORD: So there's a related dispute about what should be the relevant period, in particular in relation to my clients' disclosure, because the Claimants are seeking disclosure from us for the period 1 January 2000 to 31 December 2022.

THE CHAIR: Just remind me where that is in the order, sorry?

MS FORD: I suspect it is the first paragraph of annex 1, internal page 12.

THE CHAIR: Yes, it's in there. All right.

MS FORD: Our position, and the Tribunal can see, from the green wording, is that it should be from 1 January 2007. That is when the Commission decision found that the 6th to 8th Defendants' infringing conduct began.

The issue we have is a practical one. It is not a straightforward process to ascertain where and how data and documents are held going so far back in time. For that reason, our enquiries are ongoing, but we have explained in correspondence already that we consider there are likely to be material difficulties in providing the sort of granular value of commerce and overcharge disclosure that the Claimants are seeking.

We have set out the position on the basis of our inquiries so far. In particular, we have found that there are likely to be centrally held financial records for the period going back to 2012, for ZF plants in both Europe and North America.

Prior to 2012, it becomes necessary to look for non-centralised records on a plant by plant basis.

Of the 29 European and North American plants which were involved in the supply of OSS products during the period 2000 to 2022, our present understanding is that only eight of those may hold financial records relating to the period which pre-dates 2012.

Essentially, it's work in progress to try to say what financial information we have for the period prior to 2012 and how it might be extracted. But that is the background to the proposal that we've made.

What is to be emphasised is essentially, as Mr West has just explained, what we're now talking about is quantum disclosure, rather than liability disclosure. That is necessarily, as a matter of practicality, going to be driven by the actual availability of data.

THE CHAIR: But there's the available, "if available" qualification, isn't there, in the start of the annex? Hasn't that created these problems?

MS FORD: There absolutely is. Nevertheless, in our submission, it will be sufficient for the Claimants to conduct a during and after analysis for them to have the data that goes from 2007. There is a principled reason why we suggested 2007, which is: that is the period of infringement found by the Commission in its OSS2 decision.

Our inquiries to date suggest that the data available prior to 2007 is likely to have very material gaps in it.

THE CHAIR: So this is just for -- this is just for your clients, not --

MS FORD: Sir, yes, because we find ourselves -- this derives out of the practical position in terms of the data on the basis of our inquiries we think is going to be available. That necessarily has to drive the nature of the analysis that the experts conduct.

THE CHAIR: I thought the 2007 came from the Commission?

MS FORD: Sir, yes, I'm sorry. We may be at cross-purposes, as to the basis of your question.

It's our client, as opposed to, for example, Autoliv, because they haven't taken an issue with this period. The reason we do is because of the way in which the data is held, so far as we can tell, and the limitations on the data in the earlier period.

THE CHAIR: Right.

MS FORD: In our submission, quantum disclosure and the methodologies that the experts wish to adopt to try to quantify the consequences, if any, of an infringement necessarily have to be driven by the availability of the data. As I've indicated --

THE CHAIR: What evidence do I have before me that there's nothing before 2007 that's available?

MS FORD: We have dealt with it in correspondence. It hasn't been put into a witness

statement.

THE CHAIR: Hm-mm.

MS FORD: The position is that the data becomes increasingly -- it appears to us increasingly unlikely to be available. There are likely to be increasing gaps in the period prior to 2007. So we have proposed a --

THE CHAIR: It's not easy for me to rule on 2007 at the moment with no evidence and no rational reason as to why one gets to 2007. I absolutely understand the problems of gathering older data. I absolutely understand that. These are quite historic events we're investigating, so that's going to be a problem throughout this exercise, and it seems at the moment to be catered for by the first paragraph of the annex, which is specifically contemplating that it has to be available and on the basis of reasonable and proportionate searches. No doubt you'll be corresponding with the Claimants as to what is reasonable and proportionate. But I don't see at the moment a reason for imposing a date. But, Mr West, what's your position on this?

MR WEST: Precisely as, Mr Chair, you just said. We seek an order back to 2000 and, if there are problems about the availability of data, that's an issue not to be dealt with in the date and the order, but in the data which is eventually produced in response to the order.

THE CHAIR: Mr O'Donoghue, you're keeping quiet on this. You don't have a position?

MR O'DONOGHUE: We're content to do our best and go back as far as we can.

THE CHAIR: Yes.

MS FORD: So there is a relevant distinction in this regard: in going back to 2000, as opposed to 2004, for example. Because we just heard Mr West has offered 2004 in relation to his initial disclosure in relation to costs. 2004 is the earliest period at which even arguably infringing conduct has been pleaded, that's one single instance, a single pleaded instance of what is claimed to be infringing conduct prior to 2007 and that is

in 2004.

In our submission, there's simply no basis to try to go back earlier than 2004 at the very least.

THE CHAIR: Yes. I don't really feel I'm -- I mean, clearly there's going to be a problem with availability of data inside/outside cartel periods. That's going to be a challenge for all the parties on all aspects of the case, and more data is better than less data.

So, at the moment, I don't understand -- we've gone 2007, 2004, if the other parties -- if the other Defendants are going back to 2000 at the moment, I don't see a reason for not having that in the order. If it's not reasonable and proportionate, you will no doubt be communicating that to the Claimants and the first paragraph of the annex to fall back on.

MS FORD: In those circumstances, we've heard what the Tribunal says about that.

THE CHAIR: Mr Piccinin, I haven't heard from you for a while. It's my fault because I told you to stop addressing me.

MR PICCININ: Yes, I took to heart what you said yesterday. I don't have anything to add on these topics, but if there's something --

THE CHAIR: No, it's clear which paragraphs will apply to you and which won't?

MR PICCININ: I think it is, yes.

THE CHAIR: As I understand you, nothing bites on you on the overseas regulators; is that correct?

MR PICCININ: Well, other than information to the DoJ as discussed. But, as I said, I have no dog in those fights, if I can put it that way.

THE CHAIR: Very good. As long as the parties are clear. Where next?

MR WEST: We have limitation.

THE CHAIR: Yes.

MR WEST: Which we've been wrestling with.

THE CHAIR: Yes.

MR WEST: We think the other relevant custodians are likely to be the general counsel of the three companies.

THE CHAIR: You say "we"; that's on your side of the court?

MR WEST: On the Claimants', yes. Who it appears was a member of the board anyway, and the other relevant individual or office holder is likely to be the head of procurement. There may also have been a head of competition whose documents may be relevant and we're certainly happy for those to be included in the scope of searches.

But it is just important, in my submission, to distinguish between the two different roles this paragraph -- this is 10C of the order -- could be playing and to be quite clear about what exactly it means.

THE CHAIR: Sorry, which page?

MR WEST: I have it loose, I'm afraid. But it's in the supplemental.

THE CHAIR: Page 7. Okay.

MR WEST: So, ordinarily in the case of an order for disclosure, it's for the disclosing party to go off and identify who the relevant custodians are, by means of appropriate inquiries and relevant searches and so on and so forth. If that is how this is understood, there may not be a problem with it.

THE CHAIR: Hm-mm.

MR WEST: It may be otherwise, if this is understood as dictating not only who the custodians are, so all these people are to be treated as custodians, but what types of searches have to be undertaken in relation to all of them. In my submission, it should be for my clients, in the first instance, to identify the relevant custodians and, of course, this will all be explained --

THE CHAIR: The issue is -- just help me: where are the custodians identified in this?

MR WEST: Well, in paragraph 10C it refers to --

THE CHAIR: Leadership team, heads of relevant divisions --

MR WEST: -- the members of the board, leadership teams and heads of relevant divisions. This is saying those are all relevant custodians, and some form of search, perhaps even email searches, have to be carried out. We certainly don't agree to any such an order.

The other possibility is this is simply identifying the level of seniority within the company at which communications of this kind are relevant and responsive to this order.

If understood in that sense, there may be no problem with it. We think the relevant individuals are the general counsel, the head of procurement and possibly the head of competition. But we will, in the usual way, undertake appropriate inquiries to identify relevant custodians and to identify relevant documents that they hold.

So if it's understood in that sense, as I say, there may be no problem with it.

THE CHAIR: I mean, Ms Ford, this seems reasonable. I don't think you're intending to identify the custodians by reference to the head of the car washing department or something.

MS FORD: Sir, indeed. We're not in a position to comment on who the relevant custodians are.

The reason this arises is because we were facing a position where we were being told we were only going to get board minutes.

THE CHAIR: I entirely understand. What should the order that we make today -- what should it --

MS FORD: What we have sought to achieve with 10C is to identify the level at which --

THE CHAIR: I understand that --

MS FORD: -- and so that is the level of the relevant custodians. We're, of course, not trying to second guess if the Claimants were to say there is a head of a division that

is not a relevant division because the division is in charge of something completely unrelated.

THE CHAIR: How do we draft the order today? I understand what you're seeking to do and it makes perfect sense, but -- because I can't make an order --

MS FORD: I'm going to try to make a suggestion, if I may very briefly ...

In a way, there has been an attempt to try to achieve this outcome by using the word "relevant", in the sense that it is then for the Claimants to say that which they consider -- the custodians they consider to be relevant. Perhaps if we were to move the relevance in order to make clear that it is for the Claimants to tell us who are the relevant personnel. This is essentially sought to identify a particular level below which we are not suggesting the Claimants have to search, but we do --

THE CHAIR: -- ventilated here. Isn't the order that the Claimants give disclosure of these categories and then searching will be done by reference to the custodians; that doesn't need to go into the order.

Mr West, I'm looking at you to see if that's ...

MR WEST: I'm sorry, could you just repeat that?

THE CHAIR: So the concern is, and I understand it's your concern that you don't want senior leadership teams and heads of relevant divisions to necessarily be custodians because some of the divisions may be areas we're not concerned with. So we're interested in how we can draft this order, so it can be made today, or promptly, without getting into that tussle.

I was just suggesting the ordinary order -- not have been external/internal communications, memos, et cetera. Full stop. Then the question of custodians, that debate takes place outside the order, or within the shadow of the order, rather than gets written into the order; is that the usual way?

MR WEST: Yes, that would be acceptable.

I do note at the moment there isn't any reference, in 9 and 10, to these being documents that can be extracted following a reasonable proportionate search. Maybe that's implicit, but perhaps that should be made explicit.

THE CHAIR: That certainly should be, yes.

MS FORD: Sir, that's normally read in.

Given that this issue has been ventilated and all parties understand what is sought to be achieved, I think we will be content with that.

THE CHAIR: I'm grateful.

Anything else?

Do we know where we are on South Africa?

MS FORD: So far as I'm aware, South Africa has been dealt with. I think we may be moving on to -- to the extent there are debates about the particular categories of quantum disclosure sought by the Claimants, but I think there are only limited disputes between us.

Mr West wants to --

THE CHAIR: Mr West, do you want to explain that to me?

MR WEST: Yes, I'm just turning through the pages of the draft order. The first dispute seems to concern paragraph 8, the numbering has gone wrong -- sorry, paragraph 8 of annex 1.

MR O'DONOGHUE: Paragraph 11.

THE CHAIR: Anyone have anything before --

MR WEST: 11 of the main order.

MR O'DONOGHUE: Sir, it will take one moment.

THE CHAIR: Please.

MR O'DONOGHUE: A mercifully short point.

You can see from the order the Claimants have pleaded in the amend particulars.

There's a reference to Opel's "global sourcing" strategy. It's their pleading, and we have reasonably asked them for information on this global strategy.

Now, they've agreed to give that, to their credit, but they also want to us do the same and we say: well, they're the Claimants, it's their report, their strategy, and they should do it and we should not.

THE CHAIR: I'm sorry, which -- just --

MR O'DONOGHUE: So 11A of the main order, the main body of the order, page 8. It's head of the Claimants' specific allegations of anti-competitive behaviour.

THE CHAIR: I see. Right. Sorry.

MR O'DONOGHUE: It's 11A.

THE CHAIR: It's each of the parties. I was looking at the Claimants. It's each of the parties. You should say that should be limited to --

MR O'DONOGHUE: It's their strategy. We don't know the full contours of their "global sourcing" strategy, so it's really for them, we say.

MR WEST: It is a short point. Just to make sense of it, we need to look at paragraph 40B, tab 11 of the core bundle. So this is the particular specific allegation of anti-competitive conduct. Tab 11, page 27.

THE CHAIR: Yes.

MR WEST: Paragraph 40B(i):

"On 27 February 2003, employees of Autoliv and TRW reported they had discussed Opel's "global sourcing" ..."

THE CHAIR: Wrong paragraph. Start again.

MR WEST: 40B(i):

"On that date employees of Autoliv and TRW reported they had discussed Opel's "global sourcing" strategy and concluded that "when business is sourced we should give each other the chance to recover the sourced price by engineering changes!

[TRW] also has a lot of problems with Opel's pricing and want to take the opportunity to recover lost business. When we receive an RFQ for the sourcing we want to come together to discuss further details. Next step will be to discuss these items also with Takata and build up a better relationship with our competitors."

So we are asked to provide disclosure in relation to the global sourcing strategy. This was an attempted response to that on the part of the Defendants, or some of them. Our point is simply that the Defendants may also have documents relating to this, not least, for example, was there contact with Takata, as indicated here?

THE CHAIR: Contact with?

MR WEST: Takata.

THE CHAIR: Right.

MR WEST: So, if they have such documents, further documents relating to this particular incident, they should give us them.

THE CHAIR: This is within the -- this isn't from the depository materials at the DoJ? This is --

MR WEST: No, this would be a new search in relation to a specific anti-competitive incident which has been pleaded.

MR O'DONOGHUE: I'm at a loss. This is a specific disclosure request by us of them. It simply relates to "global sourcing" by Opel. There is no specific disclosure request in the other direction, in relation to Takata. So this another example of something being done.

THE CHAIR: But it's something we can probably deal with today, because it's just a question of whether it's relevant, isn't it?

MR WEST: We're saying we're happy to provide it, but it should be reciprocal, that's all.

MR PICCININ: Just, on this point, since this is a tit-for-tat application, it seems to be

coming back in my direction as well without me having made the application.

THE CHAIR: Welcome back.

MR PICCININ: Thank you. Just I'm glad that Mr West has taken us to paragraph 40B. This was one of the sections that I dealt with yesterday, where I said that all this green text is stuff about people other than my clients. This document isn't one of ours. This document doesn't say anything about my clients. There is no allegation that's pleaded about any of this against my clients, and there's no basis for a disclosure order to be made against my clients in relation to this.

THE CHAIR: I understand. It's not your client.

So how would this search happen in practice? This is the only -- there are going to be -- sorry. I'm just trying to get a structure to this. But, on the cartel, there's going to be searching of custodians; is that right? By electronic searching of --

MR WEST: Yes.

THE CHAIR: So this is separate to the DoJ documents. Which paragraphs are relevant for that?

So they're searching for 11B; that's agreed. Any other searching for documents generally, on liability as opposed to quantum?

MR WEST: Yes. Well, we have the sample RFQs that we haven't come to so far. But this doesn't seem to be a specific RFQ, this is instead a "global sourcing" strategy, so it isn't caught up by that, I don't think.

THE CHAIR: Yes. Well, I mean --

MR WEST: So my clients are going to have to search for this specifically.

THE CHAIR: Yes. Your clients will have to search?

MR WEST: Yes.

THE CHAIR: You're anticipating that the Defendants will have to do some searches, and the manner in which that searching is going to be done; has that been discussed

for 11A and B?

MR WEST: It hasn't. But, clearly, we have dates here of the particular documents and the individuals involved ought to be apparent from the documents. Likewise, one can think of relevant key word searches, such as "Opel" and "global sourcing".

THE CHAIR: I understand. I'm inclined to order this not against the 11th Defendant.

MR O'DONOGHUE: Sir, so be it. But, again, this is a very narrow, specific disclosure application on global sourcing and nothing else. There was no application in the other direction, and it has transmogrified on Mr West's feet into --

THE CHAIR: It has. But, nevertheless, it's a pleaded allegation at 40B(i) that you've been discussing Opel's global sourcing strategy.

MR O'DONOGHUE: And nothing else. But, Sir, I mean --

THE CHAIR: And seeking -- I don't see why disclosure shouldn't be sought around that. I understand your point, it's on the hoof and all that, but why shouldn't disclosure be given in relation to paragraph 40B(i)?

MR O'DONOGHUE: If it's simply on the question of Opel's global strategy, that’s one thing; if it's a range of other issues going beyond that, that's a different thing. It's the latter which concerns me, which is what Mr West has picked up on. We don't have standard disclosure in this case.

THE CHAIR: No, I understand that. These are communications that refer to or discuss the implementation of Opel's global sourcing strategy.

MR O'DONOGHUE: Yes, and there will be multiple other categories, and we will be addressing those in various ways.

THE CHAIR: We are not on other categories at the moment, are we?

MR O'DONOGHUE: If they're covered by other disclosure, then there's no basis for a specific disclosure on that.

My application was an incredibly narrow point, which is -- in a sense, this shouldn't

even arise, because they've had this pleading for months, they can simply tell us: has Opel's, or did Opel's, global sourcing strategy -- was it in fact applied or not? That's really the question.

This was pleaded in December. We're now almost four months later, and the binary question should have been answered by now. If it did, that's the end of the point.

The only issue from my perspective, for the application -- and it's the only application before the court -- was: did this global sourcing strategy in fact apply at any stage? That's the only point on which further information was sought and nothing else.

THE CHAIR: Yes. Well, I'm going order disclosure of that category as requested by the Claimants.

Anything else, Mr West, on this?

MR WEST: Not on this, no.

THE CHAIR: Are we on the annex now?

MR WEST: Yes. I mean, there are some dates which are still not agreed, but that probably can be addressed at the end. You'll see, at 28, a further one day CMC has been proposed, again, probably deal with that at the end. 28, I'm sorry, of the most recent --

THE CHAIR: Page 28?

MR WEST: Paragraph 28.

THE CHAIR: The paragraphs are coming and going. On page 11; yes?

MR WEST: 11. We can probably deal with that at the end.

THE CHAIR: Sorry, I can't find the pleading; what are you pointing to? You said paragraph 28.

MR WEST: We have proposed a further CMC.

THE CHAIR: Sorry, I'm probably looking at the wrong version, I expect.

MR WEST: Yes, this is the version in the supplemental bundle, tab 14 of the

supplemental bundle.

THE CHAIR: Apologies.

MS FORD: For what it's worth, there is a debate to be had about the dates of the various stages and this may fit in better with that, because --

THE CHAIR: I think it might.

MR WEST: Then, on to annex 1, we've dealt with the date at paragraph 1. There's just a comment on paragraph 1 of annex 1, which is: we, the Claimants, have agreed that the Defendants' disclosure, this quantum disclosure, this and the succeeding paragraphs, can be limited to material in electronic database form. We seek the same order in relation to our disclosure. That isn't agreed, as far as I'm aware, as things stand. Although perhaps we shall see what happens about that. Oh, it is agreed. Then that point also goes. There is then a point on paragraph (vii).

It's agreed that the Defendants, in connection with the sampled RFQs, should provide communications between them and any competitors; that's (vi), which I believe we've looked at before. It occurred to us, on this side, that might miss out something, which is internal reports of discussions of that kind, which don't themselves constitute communications between the competitors.

A good example of that, the Tribunal will recall Mr Obara's email reporting internally of cartel discussions. So we have asked that those also be included. That hasn't yet been agreed, unless I'm told otherwise.

MS FORD: No, this has not been agreed. The turn of phrase that Mr West used is informative. He said it "occurred to us" and this is not something that was sought in the Claimants' application. It appeared for the first time in a draft order that was circulated at the weekend. That in itself is somewhat unsatisfactory.

We resist this category of documents for two reasons. Firstly, the Claimants have already had the access to the file documents, and in so far as this material is likely to

exist, it is likely to have been included in access to file documents.

Secondly, it is an extraordinarily onerous exercise because what it's contemplating is a two-stage search.

First, one must search for communications which are responsive to paragraph 6. Then, once one has identified communications, one must then do a further search for the use to which such communications might be put. In our submission, in the context of an exercise which is supposed to be going to quantum rather than liability as such, this is really taking matters too far. So we resist this category of documents.

MR O'DONOGHUE: Sir, we respectfully concur.

One further point, of course, the disclosure is not in relation to Brazil, South Africa. DoJ has a significant bearing on this point well.

THE CHAIR: Yes. Mr West, that does seem a fair point. You have already had quite a lot of liability disclosure. This seems to be getting some more sneaked into the quantum issue, and it's come rather at the last minute.

MR WEST: I accept it has come rather late in the day. I don't accept, however, that this is all just quantum disclosure. The purpose of the communications disclosure has always been -- and this is explained in our evidence -- that it goes to liability.

THE CHAIR: I mean, it is in the annex "Effects and quantum disclosure".

MR WEST: It is. But, as I say, it's explained in the evidence this is primarily sought because it indicates how the cartel operated, which goes to the liability. The point we were discussing earlier, what further evidence of liability might come out which is relevant to the position of the --

THE CHAIR: But it's limited to our -- I can see why you want internal communications generally, but this is just in RFQs and --

MR WEST: Yes. Well, the communications data we're seeking is all limited to the sample RFQs in order to try to make it manageable.

THE CHAIR: Yes. Well, I'm not going to order this at this stage, principally because it's last minute and, obviously, depending on what you get, if it's not beyond satisfactory, but it may be that we have to contemplate further disclosure. Hopefully not, but you're not shut out from reapplying if you can show you need it in due course.

MR WEST: The next point is paragraph 8. So the Defendants have agreed to provide us with information relating to purchases and sales, and we, the Claimants, are providing the same information. That's for the purposes of preparing the main are regression model. That will mainly be built based on sales between the Claimants and the Defendants. But, in addition to that, the Claimants' experts have asked that we be provided with sales information relating to sales between the Defendants and the specific OEMs, who are recorded as having been targeted in the Commission decision.

The purpose of this is to carry out an analysis of how prices differed as between sales to the Claimants and sales to the OEMs that we know to have been targeted. The idea behind this is that if it's shown that those prices moved in lockstep, well, that's some evidence that the cartel effect applied not only to the targeted OEMs, but also to the Claimants.

THE CHAIR: So is that -- sorry, if they're made anonymous --

MR WEST: Yes.

THE CHAIR: -- how do you know if they've been cartelised or not.

MR WEST: Well, because the documents to be disclosed will only be the sales to those OEMs. Although the specific identity can then be removed from the documents we're given.

This is agreed by ZF. So it appears in black for them. But not by the other parties.

But I should just compare this, in the case of Autoliv, with what they're seeking from us. If one goes on to annex 2(i), this is the Claimants' disclosure. They're asking that

we provide transaction level data of global purchases of OSS products. So they're asking that we provide data on purchases we made --

THE CHAIR: You're not agreeing to that?

MR WEST: Which we're not agreeing to.

THE CHAIR: I'm not hugely attracted by (inaudible) tainting. Let's just deal with whether they should be disclosed. Any submissions? Who's making submissions on this paragraph?

MR O'DONOGHUE: Sir, yes, so this is a complementary category of disclosure sought to put forward a second type of economic methodology in context of overcharge. If we can just quickly look at what the Claimants' expert says about this. It's in the exhibits volume. Volume 1, tab 2. So this is a letter of Mr Hughes from AlixPartners, and so it starts --

THE CHAIR: What page number?

MR O'DONOGHUE: So it's exhibits bundle page 8.

So this is the Claimants' expert setting out these methodologies.

So, at 3.5, he explains the typical analysis, which is a regression, seeks to isolate the effect of the cartel, so he says the before and answer approach. He says this is a standard and well accepted method, and we agree with that, as far as it goes.

If you then go on to page 11, it's page 317. So this is the RFQ disclosure.

That's fine, as far as it goes.

But if we then go to 3.17, he says, "In addition", so there's a second complementary methodology we put forward.

He says:

"In addition the claimants seek disclosure of the above information from the defendants, but in relation to automobile manufacturers other than Stellantis."

And that's what we saw in the order.

So it's something separate, and it's not the typical analysis.

Then, in 3.19, he explains what he's trying to achieve here. If I can ask the Tribunal to quickly read that paragraph, please.

(Pause)

THE CHAIR: Hm-mm.

MR O'DONOGHUE: What Mr Hughes is suggesting is that the object of the exercise is to compare the developments and the prices paid by the Claimants for OSS products with the developments in prices paid by Volkswagen, BMW, Toyota or Honda. It is common ground that is a complementary analysis, but the fundamental question of principle -- it's not a question of proportionality, it's a question of principle -- where does this complementary analysis lead?

Because if one goes back to 3.19, the penultimate line, the bit in the brackets is absolutely fundamental. So he says:

"The defendants increased their prices towards Stellantis in a similar way as they have increased their prices during the cartel period towards the OEMs named in the Decisions (assuming they did so)."

The assumption does all the work in what he says. So what he's doing, he's saying: well, I will assume that there was an overcharge in relation to BMW and BMQ Honda, and I will then use that to assume there was a similar overcharge price development in relation to Stellantis.

But the issue is that the comparison of these other OEMs' prices, simply in terms of their development, tells one absolutely nothing as to what was causing those prices to change. So what he is simply doing is observing a change in prices for one group of buyers and saying: "I assume that was caused by the cartel and, therefore, I can map that on to these particular claimants."

We say that analysis is wrong in principle, and the assumption is doing all the work.

The brackets are telling. He says "(assuming they did so)". But that is the whole point of an overcharge analysis; it can't be done on the basis of an assumption, which is what he is trying to do here.

Now, we've said in evidence in our skeleton: well, what is the purpose in principle of this analysis, given that it depends entirely on an unproven assumption of an overcharge?

And we've never had an answer. Given that it is a complementary analysis, and we say there is a flawed principle at its core, to order very significant disclosure in relation to four other OEMs on the basis of simply an unproven assumption, we say is really a step too far, particularly given that it's a secondary analysis.

If it was Mr Hughes' sole or primary analysis, that might be one thing. But given that, as he admits himself, his primary analysis is standard regression and this is complementary, we say the defect of principle at the core of this then becomes a fundamental objection to this disclosure taking place. I'm just going to give you one authority on that --

THE CHAIR: Is there any evidence as to how burdensome this is?

MR O'DONOGHUE: It's four other OEMs. So, on one view, it's four times the work we're already doing.

THE CHAIR: Sorry, what are you actually having to give? Sorry, what are the documents?

MR O'DONOGHUE: Well, if we go back to --

THE CHAIR: The order, yes. Paragraphs 1 to 5.

MR O'DONOGHUE: Sorry, it's paragraph 8, on page 70.

THE CHAIR: It reads back on to 1 to 5 above.

MR O'DONOGHUE: It is essentially the entire quantity of the disclosure replicated times four, all based on an assumption that whatever movements you see in these

other OEMs' prices must have been caused by the cartel.

But, of course, the Commission decision is an object infringement. It finds that there was an object of restricting competition. It doesn't find, and deliberately so, there's any effect on pricing.

What Mr Hughes is doing is saying: "well, where I see an object infringement, I will assume that any change in prices is caused by an overcharge. I will then map that on to this case, and I will use these parallel developments to make a point on the basis of overcharge." We say that is simply wrong in principle.

To require, effectively, a quadrupling of the disclosure exercise based on this tendentious assumption, which he does not seem to want to verify in any way is extraordinary.

THE CHAIR: So you would say there would need to be an evidential after inquiry as to what was happening with all these other --

MR O'DONOGHUE: Indeed, it would become a claim within a claim within a claim within a claim.

So we say it is built on a house of cards. Given it's a complementary analysis and that his primary analysis is sound and is the typical one, we say the Tribunal would need very compelling justification. He may have a point if, having started his standard regression, he says: "there's bit of a problem, there is a bit of a gap, in fact this complementary analysis suddenly is imperative."

He's not saying that. At this stage, it's purely complementary and we're being asked to engage in this extraordinary level of disclosure, which has effectively quadrupled the work on the basis of assumption and nothing else.

PROFESSOR NEUBERGER: Can I just understand something rather better?

Supposing this analysis were done and you could see among the people who were the object of the cartel that prices were high during the infringement period and then

dropped, and that prices for the Claimants didn't have that drop; wouldn't that be fairly convincing evidence that the Claimants were not being cartelised? Isn't that useful information?

MR O'DONOGHUE: Sir, we say no. Ultimately, on his own evidence, the most it can show is that two series of prices moved in a way which was somewhat similar.

What it doesn't get to is to isolate in any way what is the reason, what is the cause, for that effect.

PROFESSOR NEUBERGER: I'm trying to make the opposite point.

I'm trying to say that it's normal in cartel cases to assume that the cartel was effective and stopped, then the prices would exhibit a drop following the end of the cartel period.

MR O'DONOGHUE: Yes.

PROFESSOR NEUBERGER: If that was clear, for example if the evidence showed this, that drop was clear in the case of the people we know were the victims of the cartel, and is not apparent in the prices paid by the Claimants; wouldn't that be fairly powerful evidence that the Claimants were not being damaged by the cartel?

MR O'DONOGHUE: It may be. But, of course, they're the ones seeking this disclosure. We are not.

PROFESSOR NEUBERGER: No, I understand that.

MR O'DONOGHUE: You're entirely right.

PROFESSOR NEUBERGER: But, conversely, if the two price series showed a similar drop, that might well be confirmatory evidence that the Claimants were in fact damaged by the cartel.

So I'm just trying to argue that this sort of analysis might actually be quite helpful in determining whether the Claimants were victims of cartel or not.

MR O'DONOGHUE: Well, Sir, we say what it conflates is correlation and causation. Ultimately, one can't avoid isolating causes of mechanism and observing parallelism

and subsequential drops. It does not answer the question of causation. At best it is correlation. So we say it is weak evidence, which is why it is said to be complementary.

PROFESSOR NEUBERGER: But the same objection would apply to looking simply in the normal case where the Claimants are clearly cartel victims about correlating the drop in prices following the end of the cartel period and identifying that as the effect of the cartel.

I mean, this is inevitable using statistical evidence. It's not completely compelling, but it is quite useful.

MR O'DONOGHUE: Indeed, Sir. It's an inherent problem. But, of course, if this was their primary ground, it might be one thing, harsh indeed, to shut someone out from primary methodology, but to have this complementary methodology, that is, in my respectful submission, a poor second best at the expense of this disclosure. We say it's extraordinary, certainly at this stage.

If he came back and said: "my primary methodology because of a lack of quality data issues is not working out, I want to adopt a different mode", that might be one thing. So perhaps the answer to this is we deal with this in stages.

Sir, finally, on proportionality, in the --

THE CHAIR: We don't have any evidence on proportionality, do we?

MR O'DONOGHUE: We do, Sir. I want to show you that.

THE CHAIR: Right.

MR O'DONOGHUE: So it's in the witness bundle, the application bundle, tab 6, page 73. It's Mr Balmain. It's paragraph 52. What he says is, essentially, within Autoliv, each of these OEMs is a different business unit within the undertaking. So it's effectively a completely different set of people, which is why I make the point that this effectively quadruples the already staggering amount of work that we're doing in relation to these particular Claimants. And --

THE CHAIR: I mean --

MR O'DONOGHUE: -- we're looking at a 23-year period.

THE CHAIR: I don't know if it's common in this Tribunal to have such approximate evidence on proportionality. It's going to cost -- there must be estimates, and this is your data, what it's going to cost to produce this and how long it's going to take. It's very difficult for us to know – are we talking about an extra £30,000? Are we talking about a £300,000? Are we talking an extra 3 million? That is the sort of proportionality evidence that would weigh on the Tribunal's mind.

But it's very difficult -- of course it's more work. Yes, of course it is. It's four times as much work.

MR O'DONOGHUE: It's quadruple and already --

THE CHAIR: But quadruple what?

MR O'DONOGHUE: We have estimates, of course, of the EDQ and one could times those by 4. So we have a figure of up to £200,000, this is at core 235.

THE CHAIR: Core ...? Sorry, which bundle are you calling the core?

MR O'DONOGHUE: The core bundle, tab 21, 235.

THE CHAIR: Sorry, I'm in the wrong bundle. I do apologise.

I'm sorry, can I ask you to give me those references again? I picked up the wrong bundle. Core?

MR WEST: Tab 21, page 235.

THE CHAIR: Yes. What am I meant to be looking at?

MR O'DONOGHUE: So, at the top you will see, an estimate for standard disclosure of £250/300,000.

THE CHAIR: This is in relation to which?

MR O'DONOGHUE: Just in relation to these Claimants.

THE CHAIR: No, but which paragraphs are the disclosure; the whole thing?

MR O'DONOGHUE: Yes.

THE CHAIR: Right.

MR O'DONOGHUE: Then, at 3, there's no standard. There's a slightly lower range given. Of course, it's indicative because we haven't yet completed the exercise.

Can I just give you one final authority? Because this has come up before this Tribunal. It's yet again the Trucks cartel. This time it's in the supplemental bundle. It's the one nil case. It's in my --

THE CHAIR: Tab 9.

MR O'DONOGHUE: So supplemental bundle. It's in tab 1. It's the Royal Mail judgment.

THE CHAIR: Yes.

MR O'DONOGHUE: It's at paragraph 15.

THE CHAIR: Hm-mm.

MR O'DONOGHUE: So you'll see, Sir, at 16, the defendants in that case were proposing to put forward what was called a second methodology regression. They say it was not being proposed to fill any gaps in Mr Balmain's approach method. It was duplicative in his object. It was a different method, using a very substantial quantity of different data.

At 17, at the end, you will see the application to introduce that second complementary econometric analysis, also rejected as being disproportionate. We say, in a case where effectively it's been quadrupled, it's a fortiori.

THE CHAIR: Yes. So going back to the order -- yes, we are going to make the --

MR PICCININ: Sorry, I was proposing to address you briefly on this, if I may?

THE CHAIR: Yes.

MR PICCININ: Not at all.

I have two very short points. One is this is the whole area of the case that we spent

quite a bit of time on yesterday, talking about market wide harm, where this Tribunal has said in the FOREX case that we need to tread very carefully, so we don't end up with untriable trials. I understand that you rejected my strike out application. I'm not attempting to reargue that by any means. But you'll recall that this difference in difference analysis doesn't relate to any pleaded proposition. So it's not been pleaded or alleged, or even suggested by the expert in his letter that it is the case that Toyota and Suzuki are particularly similar to any of the Claimants' brands, such that you would expect the prices for seatbelts for them to have moved in concert over the relevant period. There's no allegation of fact of that sort to which this disclosure application relates.

My concern is not so much a proportionality one in terms of how much it costs to go and get the documents, and I don't have any evidence for you on that. But it's a different one, which is: if you start granting these disclosure applications, what you end up doing is sending us all off down the garden path towards a trial of issues concerning Toyota and Suzuki; why are we doing that? Are they a large part of the market?

THE CHAIR: We understand this needs to be actively case managed, but we are inclined -- well, we are ordering --

MR PICCININ: I had one other point, just before you do order it. Just so you have it before you reject it.

So this relates to the difference between Professor Neuberger and my learned friend, Mr O'Donoghue, a moment ago. I wonder if we can turn up the authority, so we're on the same page the Professor was talking about. In the authorities bundle, at page 1875, so it's right towards the back end. It's the practical guide, it's the European Commission's practical guide at tab 45.

THE CHAIR: Sorry, it's getting later now. I'm losing focus on tab numbers.

MR PICCININ: Tab 45.

THE CHAIR: Tab 45.

MR PICCININ: Yes.

THE CHAIR: Yes.

MR PICCININ: Then it's from paragraph 56, rather.

What the Commission is doing here is explaining what Professor Neuberger said before about the way the difference and differences analysis is usually used in competition cases. So it says you can make comparison over time and comparisons across markets. That's the difference in differences approach, because you look at development of the relevant economic variable, the price for the cartel product in the infringement market during a certain period, and you compare that to the development of the same variable, so the price of the cartel product, during the same time period on an unaffected market, that is the market on which there was no infringement.

The comparison shows the difference between those two differences over time. That gives an estimate of the change in the variable, so the price, produced by infringement and excludes the factors that affected both the infringement and the non-infringement market. That allows you to isolate the effects.

The example in the next paragraph is helpful, just to make it even simpler. They talk about the flour cartel, and they say: suppose that when you look at the affected market over time, what you see is that there's an increase in price of €40 in the member state where the cartel occurred.

But then you look at another member state, where there was no cartel, and what you find is that the price of flour increased in that market as well, but by the lesser amount of €10. So what you do is you say: aha, the difference between those two differences is €30, so that's the impact of the cartel.

So that's the point that I think Professor Neuberger was putting to my learned friend

before.

But the point that I want to make about that is that's the opposite of what the Claimants say --

THE CHAIR: It is the opposite.

MR PICCININ: -- are proposing to do. That's a problem for their application for disclosure because this only works one way.

As the professor said, it's true that if the analysis comes up in the way that the European Commission just described in the guidance we were looking at --

THE CHAIR: Absurdly elementary example.

MR PICCININ: Sure.

THE CHAIR: If only it were that easy.

MR PICCININ: If it comes up qualitatively like that, then what you would actually find is these Claimants are not entitled to damages, because you're actually using these Claimants as a benchmark for people who have suffered no loss.

But the analysis that the Commission is describing there is an analysis that assumes these Claimants have suffered no loss. What you're measuring is the effect of cartel on Toyota and Suzuki, not on the Claimants.

The Claimants are treated in the Commission's example as a benchmark of someone who hasn't suffered harm. If what you find is the opposite, which is what the Claimants are hoping. Not expecting, but hoping. And you find they all move together, the normal inference, just like for the €10 increase in the example we looked at, the normal inference is that the cartel was ineffective for Toyota and Suzuki, not that it was effective for someone else who was outside the influence of the market.

So this just isn't a methodology that's been pleaded, and it's not a methodology that is, on its own, capable of supporting the inference that the Claimants are seeking to draw from it.

So I do urge on the Tribunal that this is exactly the kind of garden path that one can be seduced to start hopping along, but it's going to be a lot of work that leads to nothing of value.

PROFESSOR NEUBERGER: It just seems to me that, in this case, one of the problems is that this is an unusual case, in the sense that we have people who are not victims of the cartel as found by the Commission. Therefore, if one's trying to find a cartel-free period -- sorry, trying to find a period where you know whether the cartel was operating or not, your one basis for doing that is to look at a group of customers for whom the cartel was operating and it at least gives you a firm basis of comparison. That was my point.

Clearly, in the normal case, the difference and differences, you're looking at people who are unaffected by the cartel.

But, in a case like this, where you don't know whether the Claimants were affected by the cartel, at least you have the benefit of comparing them with people who you know were affected by the cartel and that might be informative. That's my point.

MR PICCININ: I understand, Professor, how this analysis might exonerate us or might lead to a damages award of zero. What I'm not understanding is how it could lead to the opposite result.

All it could do is, at best, say: well, they all move together, therefore it's possible that either there was no cartel effect on anyone, or there was a cartel effect of some unknown size on everyone.

If that's the case, there's not much point us going down it, because it's head I win, and tails no one wins, but the proof is on my learned friend.

THE CHAIR: So why would you possibly resist this?

MR PICCININ: Because what's the point of the exercise in a six-week trial?

THE CHAIR: We're going to rise and -- just for a short while.

(3.22 pm)

(A short break)

(3.28 pm)

Ruling

THE CHAIR: We've decided not to order disclosure in relation to these other manufacturers. The reason is we are concerned that it is going to lead to a number of satellite issues for the reasons that have been suggested, and that needs to be weighed against the value of the disclosure.

We did contemplate doing it in two stages, having disclosure and then seeing where we are, but we are of the view that's not going to be effective, that we'll just end up at that stage having lot of question marks. So we're going to decline to order paragraphs 8A and C.

MS FORD: Sir, we obviously had previously conceded that we would provide that disclosure, notwithstanding --

THE CHAIR: You don't have to, now.

MS FORD: I'm grateful.

THE CHAIR: Unless you're very anxious to do so.

MS FORD: I don't understand we are.

MR WEST: The next question concerns the identification of the sample RFQs.

THE CHAIR: Yes.

MR WEST: Our proposal is set out in the schedule to annex 1.

THE CHAIR: On page 18?

MR WEST: Yes. However we don't have any concrete counter proposals to date, so I'm not entirely sure how to take this forward.

THE CHAIR: What's the issue here?

MS FORD: Sir, we have been liaising by correspondence on this. The issue is we accept that, in principle, an approach of sampling is appropriate, but the volume of RFQs that have been proposed is, in our submission, going to give rise to excessive work and really is going to undermine the exercising of proposing sampling. So there is --

THE CHAIR: About half the RFQs, I was told yesterday, I think.

MS FORD: It's certainly a large volume. There is a distinction between identifying RFQs and, I'm told, identifying projects. So one might identify a project, but that project might then entail many RFQs under the headline of the project.

So what we suggest is that we will continue to liaise to come up with an appropriate sampling methodology.

I understand perhaps Mr O'Donoghue had a proposal to make about each of the parties suggesting or nominating certain RFQs, and that in principle would be fine by us. But we do say one has to bear in mind there is a relevant distinction between an RFQ and a project which hides multiple RFQs.

THE CHAIR: Right. Why is it difficult -- let's assume a project has 10 RFQs; why is that particularly burdensome?

MS FORD: Well, it's not simply here as an RFQ; it's a large number of consequential searches and data of documents that then spin off from every individual RFQ. So it is of material relevance if one has essentially said: it's this project, but that then involves many RFQs under the headline of that project.

MR WEST: I mean, ideally we would like to have had this nailed down today, because disclosure can't really get started until it is.

But, in the time honoured phrase, we are where we are.

So, given where we are, I suggest there be an order that the parties seek to agree within a short period of time, and in default there be brief written submissions and a

resolution on paper.

MS FORD: We're content to proceed on that basis, yes.

THE CHAIR: Let's have a time period for -- 14 days? I don't know where that takes us with -- sorry, you want to say something?

MR O'DONOGHUE: I suggested four weeks because there has been a lot of co-operation on this. One of the problems is the problem Ms Ford mentioned, which is an RFQ and project aren't the same thing. There's a risk with that, that what is meant to be a sample ends up being the whole thing, which defeats the purpose. One of the other issues, which is again no criticism of anyone, as you see in the annex, the Claimants have sent us product part numbers and some of those have digits missing, some of them, as yet, have not been capable of --

THE CHAIR: So we're not making an order today, as I understand it --

MR O'DONOGHUE: Indeed, Sir. This goes to timing. There's quite a lot of things to unpack and it's not a matter of --

THE CHAIR: How long do you want?

MR O'DONOGHUE: We would say four weeks.

MS FORD: I'm afraid we need to push for even longer than that. The reason is, first of all, the four weeks includes the Easter period. We need the co-operation of our clients in order to do this exercise and we anticipate they won't be available. The other point is I'm told that what this entails is one need to match up the relevant parts with the relevant RFQs, and that is not a straightforward process, I understand, and for that reason --

THE CHAIR: Are we agreeing the order or disclosure at the moment?

MS FORD: We're talking about the process of agreeing the relevant sample.

THE CHAIR: Yes. Right.

MS FORD: It's not as straightforward as one might hope, simply because one has to

match up records. So I'm told we only received this information on 15 March. We've done the best that we can in the light of that timing, but there is still a fair amount of work to do. So, in terms of the period of time, we ask for six weeks.

THE CHAIR: Is there any reason why it's going to cause a problem?

MR WEST: Well, as I said --

THE CHAIR: Six weeks to do this? I'm sure you're anxious to get it quicker --

MR WEST: We are anxious to get it done. We don't really understand the delay; it's simply a question of agreeing a sample. I don't want to cast any aspersions, but the Defendants, of course, know rather more what is in these documents. We would be concerned if there was any suggestion they were selecting the sample accordingly.

THE CHAIR: That I'm in agreement with. I don't see why the Defendants should be selecting them. But I'm inclined to give the Defendants a longer period, to make sure that it's done properly. If there's a problem, I'll get proper evidence as to what the problem is, if you return.

MR WEST: My submission was 14 days.

THE CHAIR: Well, I'm going to order all the six weeks, but I don't think it needs to go in the order. But insofar as there's further discussion, I don't think the appropriate approach would be for the Defendants to be selecting the part numbers.

MR O'DONOGHUE: Sir, on that the -- in the ball bearing case that I mentioned, what happened was that each set of parties selected RFQs, so there was parity. I can show you the order, if you want, Sir. But that's what happened.

THE CHAIR: But why are you selecting them at all?

MR O'DONOGHUE: Well, Sir, of course the issue is that, if one person gets to make the selection, they sort of choose the ones that are particularly favourable to them and vice versa, so there has to be parity.

THE CHAIR: Right. I see.

MR O'DONOGHUE: It's a sample, it has to be representative.

THE CHAIR: But you get to select, having seen the documents. The Claimants don't get to select.

MR O'DONOGHUE: It's their RFQs. Mr West says we know all about this. With respect, so do they.

THE CHAIR: All right. Well, I'll leave you to see if you can make progress.

The application. That six week period, I would expect the application to be made to the court by the end of that six week period. It won't necessarily be heard, but if agreement hasn't been reached. So if you're -- that's the back stop; yes?

MR WEST: The next point --

THE CHAIR: Who is going to be making the application, if the agreement hasn't been reached?

MR WEST: The Claimants are happy to make it.

THE CHAIR: Right. So if that could be incorporated into an order.

MR WEST: The next point, we're now on the annex 2, which is the Claimants' disclosure. Very few points arise in relation to this. As far as I'm aware, the points I mentioned a while ago were by Autoliv seeking disclosure from the Claimants for purchase data concerning all suppliers worldwide. This is paragraph 1 of the order. This is replicated in a number of the succeeding orders. It's thought to be a little surprising in light of Mr O'Donoghue's submissions about them being obliged to disclose documents concerning supplies to other OEMs. But, as far as I'm aware, that is maintained, so that is his application.

THE CHAIR: Can you just give me a bit of context to this, Mr O'Donoghue? I'm not really focused on it.

MR O'DONOGHUE: If one looks at annex 2, so the battle line between the Claimants and my client on this is as follows: they propose that on -- so this applies to

paragraph 1, paragraph 2, 4 and 5. So it's a common point across these paragraphs. So the issue is whether the disclosure provided to the experts on these particular paragraphs should include disclosure in respect of OSSs, purchases made by the Claimants from all OSS suppliers or from the Defendants in the EEA.

Now, just to unpack this, it's not an application made lightly. But the basic concern driving this is a pragmatic one, which is that there may be insufficient data points for the regression analysis to function, if a narrow approach is taken.

Now, there's two points on that. One is general and the other is a specific point.

The general point we've picked up in our skeleton -- I'm not proposing to go through that again, but it's a basic statistical point, which is: you need a certain minimum number of observations for the economic methodology of the regression analysis to work effectively, because if the sample size is too small, the model may have an inherent defect through lack of observations.

So that's the general point.

Now, the particular concern in this case, we can pick this up, actually, from Mr West's expert's own report. It's in the core bundle, tab 31.

THE CHAIR: Yes.

MR O'DONOGHUE: It's paragraph 3.14. So you'll see -- so Sir, it's on page 440.

So the first issue in this particular case -- we've touched on this already -- there are a few RFQs issued. Then, over the page, amendments are often infrequent. So there may be, as a starting point, limited data points. Then there's a further particular problem on the Claimants' side -- again, no criticism -- that in relation to Vauxhall and Opel it seems that before 2017 those documents, because of corporate changes, remained in the control of General Motors and are not said to be within the Claimants' control. So that is paragraph 30 of Bolster 6. So we have a genuine concern that because of the need for a certain statistical sample size, and because of the particular

problems that seem to have surfaced already on data coverage, if we cut this too fine from the word go, there may be a fundamental defect in the regression methodology. So, happily, we would suggest that as a way forward you do the following: it is common ground that the EDQs and disclosure reports will have to be amended, I think, by the end of April. In the EDQs and disclosure reports, the Claimants can tell us with much greater specificity what they have and haven't got per Claimant group. We can then see, then having identified what data they do and don't have, work out at that stage whether there are likely to be sufficient data points for the regression to function effectively.

THE CHAIR: Sorry, I'm being very slow. Just remind me why -- this regression analysis is trying to identify what?

MR O'DONOGHUE: A range of things, primarily the overcharge. It's only overcharge.

THE CHAIR: So doesn't one get into the same problem of setting hares running with regards to charges as against other Defendants from other worldwide -- I mean, do you end up having to have a mini-inquiry as to why that price was --

MR O'DONOGHUE: Perhaps, Sir. But one has to take this in stages. If we're in the happy position that the statistical basis from the Claimants' side is sufficient in terms of data points, limited to the EEA, so be it. If there's a data deficiency, there's simply not enough observations for this to function at all, then we may need to do something which is less optimal. So all I'm saying is: we take it in stages.

It may well be this is not a problem at all. What I wanted to avoid was the problem whereby we're boxed in from the word go to a limitation that is Defendants to the EEA and transpires in one month's time is not enough observations for the econometric model to work. That's the pragmatic concern I'm seeking to avoid. It may not arise.

THE CHAIR: You say you might be applying for this at a later stage or applying today?

MR O'DONOGHUE: At a later stage.

THE CHAIR: So there's -- well, obviously you can reserve your position --

MR O'DONOGHUE: Yes.

THE CHAIR: -- to apply for further disclosure in due course, as one appreciates this is a -- just as Mr West has applied for further disclosure as the case has gone on and ...

MR O'DONOGHUE: Sir, that's right, but we do specifically apply that the EDQs would be amended in April address this point specifically, because otherwise we're left to guess.

THE CHAIR: So what order are you asking for us to make today?

MR O'DONOGHUE: That the EDQ disclosure reports, which are due 28 April, they would set out by Claimant group what data the Claimants have and don't have in relation to those four provisions of that exchange.

THE CHAIR: Mr West, do you have any objection to that?

MR WEST: The position is that the Defendants are not in the dark about this. The parties already started corresponding about it and there's a letter in the bundle, at 82D of the correspondence bundle, which sets out the number of data points contained in the Claimants' documents. I'm told it's page 1.6.

Does the Tribunal have that letter?

THE CHAIR: Not yet. It's coming up. Right.

MR WEST: So it's a letter of 25 March, which was regrettably last Saturday. Paragraph 5, this concerns this specific point in the order:

"The claimants maintain that the quantum and effects disclosure should be limited to purchases in the EEA from the defendants in the relevant period as demonstrated by the following table produced by the claimants' expert economists. There are over 1.4 million individual observations ..."

That's then been broken down between ZF and Autoliv and between B0, PSA and

FCA.

So we have provided information on the quantity of data we already have. That, of course, is just our own data. So, in a sense, the ball is in the Defendants' court and their expert's court as to whether it's sufficient or not. So, in my submission, there isn't any need in those circumstances to make any particular order about what should or should not be in the disclosure report.

MR O'DONOGHUE: Sir, we have responded to that and that is precisely the issue. So what we need to understand -- I mean, it's not useful to say we've 1.4 million data points generally. We need to understand the distribution of those data points, in particular that they're mapped on to the clauses in annex 2. It's in supplemental 48, Sir.

THE CHAIR: Sorry, what is in supplemental 48?

MR O'DONOGHUE: Our response to the letter Mr West --

THE CHAIR: Not in the correspondence bundle?

MR O'DONOGHUE: Yes -- sorry, supplemental.

THE CHAIR: Supplemental. Hold on.

MR O'DONOGHUE: So 28 March --

THE CHAIR: I haven't anything labelled "supplemental"; you mean the witness statements bundle?

MR O'DONOGHUE: No, there should be a supplemental bundle that was handed in yesterday.

THE CHAIR: Oh, I see. Right. Yes, hold on. Okay.

I beg your pardon. Sorry.

I'm with you. What page?

MR O'DONOGHUE: Page 48, Sir.

So direct response to the letter we've just seen, at bottom:

"Unfortunately, the data as currently provided does not address concerns as to whether the necessary data points for the expert analysis will be available if disclosure is limited to the EEA and defendant suppliers. As presented, the data is largely uninformative as to that question because the observations are not linked to (1) product categories; (2) specific RFQs. If that information is provided by return, the Autoliv defendants will consider further whether the scope of the claimants' disclosure can be narrowed accordingly."

There has been a lot of co-operation on this. We need a terminus and we need a commitment from the Claimants. We get this disaggregation and it can be mapped onto the full provisions in annex 2 that we have just seen.

It may be that a formal order is not needed, but we need to get to the end of this soon, so that any final applications can be made, if necessary.

THE CHAIR: So you need to get this data and find out if it's sufficient for your purposes?

MR O'DONOGHUE: Yes, we need a breakdown.

THE CHAIR: Break down of?

MR O'DONOGHUE: According to paragraphs 1, 2, 4 and 5, which set out what each Claimant has.

THE CHAIR: We think you're just going to have carry on talking about this at the moment. We don't think we have sufficient information really to make an order. So we are not making any order that hasn't been agreed between the parties on this subject. But of course you are free to come back and I appreciate you've put your marker down on this, Mr O'Donoghue.

Discussion regarding further dates

MR WEST: I believe that just leaves the questions of dates.

THE CHAIR: Yes.

MR WEST: The Tribunal's already ruled about the regulator documents, at paragraph 4 of the main body of the order. I think the next question is effects and quantum disclosure.

THE CHAIR: Sorry, I need to make sure I go to the right order. It's tab 2, isn't it? So which page are you on?

MR WEST: Page 99 of the supplemental bundle, internal page 5, paragraph 7 of the body of the order.

THE CHAIR: Page 5.

MR WEST: Paragraph 7, so we simply need a date by which the quantum and effects disclosure should be given and we would be happy in the circumstances with the end of July.

MS FORD: Sir, we have asked for 6 October 2023 for this date. For what it's worth, this is the date that then drives all the following suggestions about dates because, in our submission, it is necessary to leave more time to complete disclosure and that then pushes back the subsequent steps.

THE CHAIR: What's Mr O'Donoghue's position on this?

MS FORD: I understand he's falling in behind us on this one.

MR PICCININ: Likewise, nothing to add to what Ms Ford says.

THE CHAIR: Just explain to me what has to be done and why it needs until 6 October, in broad terms.

MS FORD: Well, we had the debate with this Tribunal about the period over which disclosure must now be given. The outcome is that we must give disclosure for a period of 22 years, starting in 2000 and going on to 2022, in relation to all the categories of documents that have been debated in terms of quantum before the Tribunal.

I've also addressed the Tribunal on the nature of the way in which the information is laid out. Prior to 2012 in particular, we will need to extract and process and review data stored on local servers at individual plants, at multiple geographic locations. So the exercise that we are being asked to undertake is a substantial one and, in our submission, it is just not going to be possible to do it even by the end of July, so we are asking for 6 October.

THE CHAIR: August is a dead month, I suppose, people are on holidays and so forth.

MS FORD: Well, certainly in the sense that we are being asked -- we need to go to individual factories, and I'm told that the factories will be closed during August and so there is that personnel difficulty.

THE CHAIR: So if we went to 6 October, I mean, are there going to be satellite disputes once this disclosure is produced or ...

MS FORD: One would hope not. There is, I think, a provision for a CMC to go into the diary in order to resolve any subsequent disputes. But the timetable that we have subsequently proposed which follows on from that brings us out at broadly the same place in terms of when the joint experts meeting can take place, which is the last date that I think is in issue between the parties.

THE CHAIR: When is the joint experts meeting and your recommendation?

MS FORD: So we've recommended 14 June. I think this is paragraphs 20 to 21 in the draft order.

THE CHAIR: So expert reports are -- so the meeting is before expert reports?

MS FORD: No, the meeting is the culmination of the exercise. So --

THE CHAIR: When are the experts reports going to be?

MS FORD: Expert reports, paragraph 17. Their proposal is 15 December and our proposal is 9 February.

Sorry, that's the Claimants' expert. Am I looking at the right thing?

Yes, that's right. So what happens is that we obviously need to push back the disclosure deadline, but as --

THE CHAIR: Just take your dates for the moment. So 9 February, 5 April, and then 31 May. Then the experts meet in June. Do we have the pre-trial review July? And the trial is November, is it? Is that right?

MR WEST: It's listed in October 2024.

THE CHAIR: Yes. It's not --

MS FORD: But the Tribunal will note that the actual difference between us in terms of the dates by the time we get to that point is really very minimal. So paragraph 20, for example, the Claimants are suggesting by 17 May and we're saying 14 June. So the difference narrows as we go through the dates.

The key significance is that it gives us the time to do the work that we need to do at the front end. Then we just gradually compress the dates, so we broadly come out at the same place.

THE CHAIR: Mr West, this is a substantial exercise, I'm sure you will agree, and I'm sure you want it done properly and thoroughly. I'm inclined to give the Defendants until 6 October; do you see that causing any practical problems?

So that would be taking through -- I'm quite happy to -- you're having to go first on the expert evidence, so you get it on 6 October. Your expert evidence has to go in on 15 December.

MR WEST: That may be the crunch point.

THE CHAIR: Yes. On 9 February. It's 9 February on the -- sorry.

MS FORD: If it assists while Mr West is taking instruction, the Claimants' suggestion is a period of 23 weeks between quantum disclosure in December and their expert reports.

THE CHAIR: Yes, which ought to be sufficient.

MS FORD: Well, our proposal compresses it somewhat, but they still get 18 weeks, which in our submission should still be perfectly adequate.

THE CHAIR: Yes. (Pause).

MR WEST: So I understand that the crunch point we are concerned about is actually the reply report stage. Because we'll be responding to three expert reports, so that's the stage between paragraphs 18 and 19.

THE CHAIR: Why three reports?

MR WEST: Assuming the Defendants instruct different experts in relation to the quantum.

MS FORD: Yes. We have permission to do that. I think it's on the face of one of the orders.

Well, Sir, it's usually the case that defendants do, because their interests don't necessarily entirely align.

THE CHAIR: Right. Well, don't they rely on these aspects?

MS FORD: Well, defendants are jointly and severally liable, and there are potential issues as between them as to --

THE CHAIR: We'll be dealing with joint and several liability.

MS FORD: Yes, so those beside me are pointing out that obviously the volumes of commerce for which each Defendant is responsible are different, and they will be in the position to address different elements of it. But, certainly, the usual practice is that defendants are permitted to have different experts because they're not actually aligned.

THE CHAIR: Yes. Courts take a very different view in cases involving generic pharmaceutical companies who are fierce competitors of one another and they're required to have a single expert.

MS FORD: I think permission has been given for separate experts in these

proceedings.

THE CHAIR: (Microphone switched off). Maybe it can't work, but I'm just trying to identify those issues where there is a potential conflict and those issues which are common to the parties.

MR PICCININ: Can I help on this? Just to expand on this point about the commerce. So my clients, for example, as you know, supplied the seatbelts for the project B0, phase 1. So assuming that there has been found an infringement in relation to project B0, phase 1, my clients will be very interested in the question of what was the size of the overcharge on those seatbelts.

THE CHAIR: Yes.

MR PICCININ: Whereas it may be that none of the other parties have any interest in that at all.

THE CHAIR: That's not a conflict. That's not a conflict.

MR PICCININ: It might be, because, of course, the different ways in which you run the regression analyses that try to estimate these overcharges can produce different results on --

THE CHAIR: I agree there might be. I'm just trying to understand -- maybe the prospect of having -- sorry, if I've been slow at arriving at this position, the prospect of having three separate, different approaches to how you are measuring essentially the same issue --

MR PICCININ: It's not --

THE CHAIR: I appreciate -- but as to what the appropriate methodology is, there are three different methodologies. Forget this application to the particular facts, but three different approaches. We could be having -- significantly increased the length of the trial.

MR PICCININ: To my knowledge, Sir, this has been the approach taken in every cartel

damages case in this Tribunal, certainly every one that I've ever been --

THE CHAIR: That's not a perfect answer to my question as to what the areas of --

MR PICCININ: No, but the reason is the one that I have given, is that it follows almost as night follows day, that differences in methodologies will produce different results that are more favourable to one defendant or to another, and so they don't have an interest in advancing -- it's not like in a patent case, for example, where everyone wants to show that -- everyone on the defendant's side wants to show that the patent is invalid, say.

THE CHAIR: It's a little bit more complicated than that --

MR PICCININ: Sure, I didn't mean to --

THE CHAIR: But don't -- it seems unattractive, at least there can't be some common methodologies being applied.

MR PICCININ: There certainly can be, and there is commonly in these cases direction for co-operation between the parties to avoid duplication. You can have procedures for experts to meet to discuss methodologies to minimise the extent --

THE CHAIR: We could be faced -- as I understand it, I appreciate you're assessing different products in periods, and I understand that. But we could be faced with four different methodologies which are -- you're all saying your is the best.

MR PICCININ: Yes, and we may disagree with each other about that. My clients, it may be in their interest to say Ms Ford's economist is wrong in some aspect --

THE CHAIR: It might just be the economists all disagreeing as to what the best method is, rather than assuming a partisan position.

MR PICCININ: Of course they wouldn't be assuming a partisan position. But I may want to argue that Ms Ford's economist is wrong. I, representing my client, may want to do that and in circumstances where I'm forced to instruct her economist, that seems unfair to my client's rights of defence.

THE CHAIR: If it makes --

MS FORD: If I might interject on that point. That is particularly pertinent in the exceptional circumstances of this case, where there is an allegation being made on the basis of Commission decisions, two Commission decisions, my client isn't even an addressee of the first decision; we are an addressee of the --

THE CHAIR: I understand that. There are potential conflicts. But, at the moment, it doesn't seem to me you have to pay £10 for an overcharge in seatbelts, one other of the other Defendants only has to pay £5 and vice versa.

MS FORD: It's entirely conceivable that I may wish to say, for example, that any damage that was identified was caused by the first cartel, to which my client was not a party, and not the second cartel, to which it was, or variants on that. It's entirely conceivable that there might be differences --

THE CHAIR: It's not quite the same. Can you just remind us where permission was given for three separate experts?

MR WEST: It's actually in the order for today. It's in the draft -- it hasn't been given before.

THE CHAIR: It hasn't been made yet.

MS FORD: I apologise. Certainly paragraph 16 presently -- and it's not disagreed -- says that we shall have permission to rely on expert evidence, each of us, and it says:

"Each party shall have permission to rely on one expert in this field and the defendants shall endeavour to coordinate their use of experts."

We have agreed that problem.

THE CHAIR: Maybe it's the coordination we need to focus on.

MS FORD: Of course, there are provisions for expert joint statements, which will be the point at which the parties can seek to narrow down the extent of the dispute

between them, and try to make something more streamlined for the purposes of trial.

There is indeed a progress report, at paragraph 21:

"A party's expert shall file with the Tribunal a short progress report, stating whether good progress has been made on the progress of the joint memorandum and giving the Tribunal the opportunity to assist and case manage at that stage."

So we have sought to build in --

THE CHAIR: Has it been argued before?

MR O'DONOGHUE: Yes, it has. There was an application in the Trucks cartel by the claimants and the defendants should (inaudible) was rejected purely on the grounds of fairness as between the parties. They shouldn't be saddled with somebody else's expert. We'll give you the reference, but this has been contested before.

MS FORD: I would say this is really rather a serious point. Since it's only come up in exchanges with the Tribunal, rather than on an application, in the event that it were to be suggested that we should be constrained in respect of instructing an expert would request the opportunity to deal with that.

THE CHAIR: I understand. I'm not going to make an order today. But I'm interested in understanding how we can not have -- arriving at the position where there are four entirely rival and inconsistent algorithms being used or regression analyses being used, I'm not talking about the -- and disputed as to what is the appropriate approach. It seems very unattractive. Whether it has happened before or not, it just seems very unattractive. Anything that can be done, sensibly, to manage that and ensure the areas of differences are limited to the fact, as opposed to the broader question, would be attractive.

MS FORD: Well, Sir, the Claimants have proposed consecutive as opposed to simultaneous reports potentially for that reason. They have agreed to their proposal that they will go first --

THE CHAIR: You have an easy job, you are faced with one report. Poor Mr West doesn't know which way to turn, and this is how it's come about.

MS FORD: The difference between us at the moment on the dates, it's paragraph 19, they've sought 13 weeks for their reply reports and we have suggested a period of eight weeks. That's the difference between us and it's in circumstances where --

THE CHAIR: So, sorry, we're between --

MS FORD: We're in paragraph 19, the different between 3 May and 31 May. You're looking at the --

THE CHAIR: Yes, 31 May. Right.

MS FORD: So they have sought 13 weeks, we've suggested eight weeks. The other factor to bear in mind is that the period that they have suggested the Defendants' experts have to respond to the Claimants' expert reports on their dates is a period of seven weeks.

So they've suggested that we can respond to their report in a period of seven weeks. This is obviously reply reports, it's not the primary reports. So we've suggested, in those circumstances, a period of eight weeks is sufficient for them to then provide a reply report.

THE CHAIR: Right. So, Ms Ford, do you think you'll be able to do your disclosure by 14 September? Any reason you can't do it? I'm just concerned that -- if you do suggest there's likely to be three expert reports that the Claimants need to respond to, the Claimants need more time.

MS FORD: Sir, I've been given very clear instructions from those behind me that it will not be possible to do it in that time frame. So perhaps space can be found elsewhere in the timetable? But we would request that one doesn't approach it by compressing the time we get for disclosure.

THE CHAIR: So what about your time for evidence in answer, or reports in answer,

paragraph 18?

MS FORD: Yes. At the moment, there's not a lot between us. So they've suggest a seven-week period and we have had asked for an eight-week period. So there's not a great deal between us on those.

THE CHAIR: Yes, just concentrate on your figures for the moment. So we're starting off on the -- if you're not giving the disclosure until October, then the -- Mr West, you don't want to bring -- I'm just concerned about your reply evidence. Do you want to bring your -- assuming we're stuck with 6 October; do you want to bring your 9 February forward?

MR WEST: I think for disclosure in October, it's not realistic to bring that February date forward. If disclosure were in September, I think we could live with the January date, but we're told that isn't possible.

THE CHAIR: Well, Ms Ford says that's not sufficient time and I have some sympathy with that.

MR WEST: So on that basis --

THE CHAIR: You want to stick with 9 February?

MR WEST: Yes.

THE CHAIR: Okay. But we'll leave the dates as they are then in green at the moment.

MR WEST: The green dates are of course the Defendants' dates, so that has that --

THE CHAIR: Well, they're -- is there any amendment you propose, assuming we're stuck with the 6th?

MR O'DONOGHUE: Sir, given that the joint report isn't on our proposal due until 28 June, that could be pushed out a bit to gain, certainly, a couple of weeks.

MR WEST: Sorry, I was taking instructions. So if it was 9 February for the Claimants' expert, I'm told we could then live with the middle of March for Defendants' expert report, and the end of May for --

THE CHAIR: It only has eight weeks or thereabouts, so I don't want to compress that. So if we say, for your evidence in reply, if we move that back a week for now, to -- so I'm taking the green numbers. So 9 February, 5 April, and then 7 June or somewhere around there, if that's a week day, and then we'll move the expert reports meeting. I think we'll move that back seven days, and then move the joint memorandum back seven days, and I think that then comes to the importance of having another case management conference.

When are we going to have the case management conference, approximately? We may need to go away to settle on a date, but --

MS FORD: Presumably, it will make sense to have that after the disclosure, in the sense that it can then resolve any outstanding issues on disclosure. So that would suggest at some point in the Michaelmas term of this year.

THE CHAIR: Right. I think the topics we'll want discussed include the approaches that are going to be taken by each of the Defendants' experts and the extent to which any methodology is common or is different, an understanding of where the areas of conflict specifically arise and, also, we want to understand the approaches that have been considered to the pass through, calculating the pass through.

MR WEST: For a CMC in the Michaelmas term of this year?

THE CHAIR: Yes, you don't have to see any of the data on this. You just have to have a feel for what the data is.

MR WEST: Obviously, the Tribunal has ruled on the dates, but can I say there's great concern behind me about having one week to deal with three experts' reports compared to what the Defendants have, to deal with one. So if that does turn out to be in issue --

THE CHAIR: We can revisit that at the case management conference when we understand how different those three expert reports are going to be. If they are going

to be essentially the same thing, just dealing with different data in different periods, that shouldn't be a major concern. But if we have three very different approaches ... The other thing we need to discuss is when the pleadings are going to be in order. Mr West, your pleadings are still, in certain respects, very general. That's not a criticism, but when are you going to be able to --

MR WEST: That, again, is dependent on the disclosure, which we're not going to have until October.

THE CHAIR: That's disclosure on quantum.

MR WEST: But also the communications disclosure, as I understand it, we're not going to have until then.

MS FORD: But the vast body of disclosure that is likely to go to liability is the foreign regulatory material that's been directed for 9 June. So one might expect that, to the extent that a case on liability is capable of being enlarged upon, it can be done on the basis of that.

MR WEST: Well, certainly, as we did the Commission file, we're happy to revise the pleading, to the extent that there is material that we can sensibly rely upon in the foreign regulator files and, indeed, we positively wish to do so.

THE CHAIR: It's also paragraph 43, isn't it? When can that be looked at? 44, sorry. This is what we are calling the "umbrella claim". When are you going to be able to plead what you're relying upon in respect of the umbrella claim?

MR WEST: Shall we do that at the same time?

THE CHAIR: What time is that?

MR WEST: Following disclosure of the other regulator files.

THE CHAIR: Which is in the -- that's coming on 6 June.

MS FORD: 9 June.

THE CHAIR: Right. So, anyway, perhaps we'll schedule another case management

conference for shortly after the disclosure, so within two weeks of disclosure having been given, within three weeks of disclosure having been given, that sort of time, subject to further discussion on diaries.

It would be helpful if you could agree between you an agenda as to what needs to be discussed. I've given, sorry, rather loosely an indication of some of the areas. It would include any outstanding amendments to pleadings, how the experts are going to co-operate in terms of methodology. I'm not talking about specific areas of conflict. I can't remember what else I mentioned.

MR WEST: I'm told --

THE CHAIR: Perhaps we can agree some provisional issues at this stage and no doubt they'll be refined closer to the case management conference.

MS FORD: Perhaps we could finalise that in the minute of the order from today.

THE CHAIR: Well, I think --

MS FORD: If the Tribunal is envisaging agreeing --

THE CHAIR: I'm not sure it needs to be in the order. I just think if you could copy the Tribunal in with some suggestions as to what shape the next case -- you may have some ideas I've not thought of, or some of my ideas may be bad for particular reasons. So if that could be dealt with by -- but if there can be recorded in the order that there will be a case management conference as soon as practicable 14 days after disclosure.

Is there anything else we need to discuss today?

MR WEST: Sorry, there are some consequential knock-on amendments, potentially, to dates. So, at the moment, paragraph 9, limitation disclosure, it still has a May date.

THE CHAIR: Paragraph 9 of which section?

MR WEST: Of the main body.

MS FORD: Sir, that date was agreed because it was a date the Claimants asked for.

MR WEST: It seems unnecessary to have lots of different dates for disclosure of different things. Our agreement was in relation to board minutes only.

MS FORD: I'm told we would be prepared to offer 9 June on the basis that there's parity with our regulatory disclosure.

THE CHAIR: I don't see why there should be difficulty with 9 June. This is the limitation disclosure.

MR WEST: Limitation disclosure. The point being made to me is that this actually more similar to the sample RFQ process than it is to the regulator file process.

THE CHAIR: I thought you submitted to me that you'd listed four or five custodians and they're just going to do some searches on there and you're being given -- I suppose there's eight weeks. So do you want a date in July? I'm reluctant to send it right off to the other side of the -- another month? How about 9 July?

MR WEST: I'm told the end of July would be doable.

THE CHAIR: Okay. Very well. 31 July.

One other thing -- sorry, one other thing to discuss at the CMC -- Mr West, sorry, just before I forget one other thing -- it's unclear to me whether the limitation defence, the extent to which it's a perfect or considerable defence to the entire claim and whether in those circumstances it ought to be heard as a preliminary issue.

MS FORD: Sir, the problem we envisage with it being a preliminary issue is that there is a dispute about applicable law and that turns on the Claimants' case as to the way in which their geographical manufacturing activities are dispersed. They've pleaded quite a complex case as to what they say is the applicable law which is in issue between us and that is essentially a matter that needs to be dealt with by reference to witness evidence and however the Claimants envisage proving their case as to their own manufacturing activities.

THE CHAIR: That doesn't mean it couldn't be a preliminary issue.

MS FORD: Well, it would be a quite substantial one if it were to be a preliminary issue of both applicable law and --

THE CHAIR: But it would be a substantial issue at trial as well. It may be a bad issue but just if the parties can address their mind to it.

MS FORD: Perhaps we can put it as a matter to be discussed at the CMC.

THE CHAIR: A matter to be discussed, yes.

MR WEST: Sorry, I'm told there are two other dates for disclosure, which also still perhaps should be updated, which are paragraphs 11 and 12.

THE CHAIR: 11 -- right. What's wrong with 7 July there?

MR O'DONOGHUE: This is their date.

MR WEST: Yes, 11B in particular. It's a similar type of exercise to the sample RFQs at 11A as well, as we discussed earlier.

THE CHAIR: You want that at the end of July?

MR WEST: We suggest that should go with the quantum disclosure date.

THE CHAIR: When? Remind me --

MR WEST: Which is 6 October.

THE CHAIR: I don't see any reason why it has to go off that long.

MR O'DONOGHUE: This is one code-named project.

THE CHAIR: Yes.

MR WEST: It's more potential email searching which is very time consuming and it's a similar exercise to the quantum disclosure exercise.

THE CHAIR: No, I'm not putting it off to October, Mr West. 31 July and that's what we said the others -- and we did order paragraph 11A and that will apply to 11A as well 31 July.

MR WEST: And paragraph 12, the same point again.

THE CHAIR: Right. You want 31 July for that? Very good.

MR PICCININ: Sorry, I don't know if this is the right time to rise and say this, but you said earlier -- because I don't know the basis on which you've rejected my strike out application. But you did say earlier that you agree that there are some deficiencies in the Claimants' pleadings and --

THE CHAIR: Yes, which I've just been discussing with Mr West. He needs to sort that out.

MR PICCININ: It may be I missed particular directions that were given --

THE CHAIR: So he's getting further disclosure and he's getting some disclosure in June, I think, and he's going to look at his pleadings and, if they're not in a decent state by the time of the next CMC, you will no doubt be making appropriate applications.

MR PICCININ: I see, and the respects in which he'll be looking at them to see what the deficiencies are will become clear when he sees the reasons in your judgment.

THE CHAIR: I don't think so beyond the general observations I've already made that I have sympathy with your views beyond paragraph 44 that it's very vague but I think --

MR PICCININ: And I guess we'll see what he gets on B0 as well.

THE CHAIR: We'll see what he gets on B0 and all those sorts of things. Indeed.

MR PICCININ: Okay. I'm very grateful.

THE CHAIR: If it will lead to a narrowing or an expanding of the issues we don't know.

MR PICCININ: Indeed.

THE CHAIR: Right. Can we stop?

Thank you very much.

(4.30 pm)

(Hearing concluded)