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6 **IN THE COMPETITION**
7 **APPEAL TRIBUNAL**

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

8 Salisbury Square House
9 8 Salisbury Square
10 London EC4Y 8AP

11 Friday 20th October 2023

12
13 Before:

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15 Justin Turner KC
16 (Chair)
17 Sir Iain McMillan CBE FRSE DL
18 Professor Anthony Neuberger

19
20 (Sitting as a Tribunal in England and Wales)
21
22

23 BETWEEN:
24

25 **PSA Automobiles SA & Others**

Claimants

27 **V**

28
29 **Autoliv AB & Others**

Defendants

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31
32
33 **A P P E A R A N C E S**
34

35 Tristan Jones and Sean Butler (instructed by Hausfeld & Co. LLP) appeared on behalf of the
36 Claimants.

37 Robert O'Donoghue KC (instructed by White & Case LLP) appeared on behalf of the First to
38 Fifth Defendants (Autoliv).

39 Sarah Ford KC (instructed by Macfarlanes LLP) appeared on behalf of the Sixth to Tenth
40 Defendants (ZF).

41 Max Schaefer (instructed by Steptoe & Johnson UK LLP) appeared on behalf of the Eleventh
42 Defendant (Tokai Rika).
43

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(10.30 am)

Case management conference

THE CHAIR: As some of you are joining us via live stream on our website, I must start therefore with a customary warning. An official recording is being made and an authorised transcript will be produced. It's strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings and breach of that provision is punishable as contempt of court.

MR JONES: I appear with Mr Butler for the Claimants, Mr West will be back but he could not attend today.

You know Mr O'Donoghue, representing Autoliv, and Ms Ford, representing ZF, and Mr Schaefer is here representing Tokai Rika.

There has been a significant narrowing of the issues before you, although I'm afraid there are also a couple of new, hopefully short, points. Would it be acceptable for me to hand up another version of that composite draft which is in the bundle, which shows you a couple of amendments that are agreed between the parties?

There are four copies there.

(Handed)

THE CHAIR: Just before I forget, in future it would be very helpful to have a pleadings bundle at least of the key... there aren't any pleadings in the bundle, I don't think, and the draft amended pleading was buried in the exhibits, so ...

MR O'DONOGHUE: They are at the back of the core bundle.

THE CHAIR: Oh gosh they are, I am so sorry.

MR JONES: The reality is they shouldn't be there, they were added as updates, we're aware that that shouldn't have been done ...

THE CHAIR: I see.

1 MR JONES: That's right.
2 What I am proposing to do is just explain --
3 THE CHAIR: Sorry, just give me a second.
4 Sir Iain is remote. We will need an electronic copy so we can forward to him. This is
5 of the amended order. Could you email it straight into the Tribunal and --
6 MR JONES: We will do, absolutely. I do apologise.
7 What I'm proposing to do is just briefly to show you what's agreed and what the
8 disputes are and then to make a suggestion about how the day could proceed.
9 Broadly speaking, the main issue in dispute is now the expert issue, but there are
10 some other issues, mostly around timetabling, which I am going to suggest we leave
11 to at the end of the day. If I can just take you through the order and explain where we
12 are on things and make those suggestions.
13 If you turn in the order and, Sir Iain, I apologise that you don't have it, but I will do my
14 best to explain where the changes are. They are quite minor and the track changes
15 are reasonably minor.
16 At paragraphs 1 and 2 is the disclosure of price amendments internal communications
17 order, which my client --
18 THE CHAIR: We can do this after -- if we're doing experts first, why don't we start with
19 that and then Sir Iain will have a copy of this.
20 MR JONES: Very well, Sir. That's fine.
21 Shall I just explain in broad terms --
22 THE CHAIR: Yes, in broad terms.
23 MR JONES: -- the other issues for the day, which are these.
24 Those orders there are essentially agreed, subject to a caveat which is that my learned
25 friends say that there should be consequential amendments to the directions to trial
26 and particular witness statement timing. That is a point which we will need to come

1 back to.

2 That leaves us the main outstanding issue, the expert issue. That issue also could
3 potentially have consequences for the timetable, in the sense that if my learned friends
4 succeed in their application, I would want an amendment to the timetable for our expert
5 to respond. Those timetabling issues should sensibly be discussed together.

6 Then, Sir, there's a third issue, which is Tokai Rika's compliance with the disclosure
7 orders. Sir, I don't know if you will have their letter of this morning, 20 October, if not
8 we will make sure that that gets through to you.

9 THE CHAIR: I have seen it, but I haven't really had time to digest it.

10 MR JONES: In headline terms it's again making a suggestion of amendments to the
11 order because they've not been able to comply with the disclosure orders.

12 THE CHAIR: And a new date for disclosure?

13 MR JONES: All of those issues about timetabling clearly go together, they interact,
14 and we will need to look at them in the round. More than that, we, the counsel end,
15 should discuss them probably over the lunch break to see if we can agree them and
16 only come to you if there are disagreements.

17 The Tokai Rika issue does give rise to another point, we've only just received this letter
18 but, to be blunt, it is a shambles and we may very well be applying for an unless order,
19 in other words unless they disclose, their defence should be struck out. I have
20 mentioned this to my learned friend. We need to give it more thought this morning,
21 we may be making an application this afternoon. I simply mention that now for
22 completeness.

23 With all of that said, we can come back to the precise changes as you suggested to
24 the directions later on. It makes sense to start with the experts point and then to come
25 back to directions later.

26 THE CHAIR: Just on timetabling, just so you're aware, the timetable was set on the

1 assumption that there would be ... that the parties were working on that assumption,
2 and it was the Tribunal at the end, when we were just dotting the last I and crossing
3 the last T, then raised the question of a single joint expert. So it doesn't necessarily
4 follow that if there are independent experts for each of the Defendants that the
5 timetable gets revisited.

6 MR JONES: I am grateful for that indication and we will take that into account when
7 we look at the timetable.

8 Shall I hand over to my learned friend for their applications?

9 THE CHAIR: Yes, by all means. Is this just to explain what they are.

10 MR JONES: The experts application?

11 THE CHAIR: Right.

12 I think we would like to understand a little bit more about your case first. In particular,
13 how you envisage well, let's start first of all, you plead obviously the existence of
14 a cartel. As we understand it, your case is that there's a single cartel?

15 MR JONES: Yes.

16 THE CHAIR: How are you going to prove that at trial, the existence of that cartel? In
17 particular, are you going to be relying upon econometric analysis to prove the
18 existence of the cartel -- I'm not talking about the overcharge -- or are you going to be
19 proving it in other ways? In particular, obviously you have the reference to
20 correspondence in the pleadings and things.

21 MR JONES: Yes.

22 Firstly, can I say the pleadings are somewhat open textured on the nature of the cartel,
23 or possibly cartels. The reason I say "possibly cartels" is that, as you will know, the
24 Commission found separate cartels and the way in which the pleadings have been
25 drafted is to leave it open, subject to the --

26 THE CHAIR: Do not assume that's a point in your favour, you can't be open

1 indefinitely, you are going to have to --

2 MR JONES: I fully appreciate. Sir, I fully appreciate that. I was just making the point
3 that it has been left in an open textured way at the pleadings stage inevitably.

4 The intention is to rely principally on documents which have been disclosed to prove
5 the existence of the cartel or cartels. However, it is right to say that the pleadings have
6 also set out an allegation that the overcharge itself can be relied on as evidence of
7 a cartel. So it is a case in which the Claimants will also be relying on econometric
8 evidence to support the case that there was a cartel.

9 THE CHAIR: Your pleading is a little bit opaque, you put some figures in but how are
10 you going to demonstrate or what data are you going to rely upon as the basis for your
11 econometric analysis that there's an overcharge?

12 MR JONES: That is the data which has been disclosed, or from Tokai Rika is to be
13 disclosed, from the Defendants and the data which has already been disclosed by the
14 Claimants. Ideally what one does, this is explained within the Claimants' expert's letter
15 for today, is to pool that data and where you have different data sets which don't
16 include precisely the same variables, you find ways, if possible, to fill those gaps. You
17 might need to use proxies, you might need to clean the data in different ways.

18 If that can't be done, then it's right to say that one needs to do a different analysis,
19 most likely what the Defendants are suggesting, which is a Defendant-by-Defendant
20 analysis. The reason you would do that is because you know that each defendant's
21 data set can be looked at on its own --

22 THE CHAIR: My question was perhaps simpler than that.

23 First of all, you're going to be -- question: are you going to be comparing a period
24 during which you say there was a cartel with a period during which you say there
25 wasn't a cartel? What is being compared to what --

26 MR JONES: Yes, I understand.

1 THE CHAIR: -- in order to perform some sort of analysis?

2 MR JONES: I understand.

3 Can I caveat this by saying that my understanding is that the data is still currently being

4 looked at and that all of the experts are leaving open the question of exactly how they

5 are going to proceed with the analysis. I also might need to take instructions, because

6 I am not myself involved in that. In principle, yes.

7 THE CHAIR: In broad terms you don't have a clean period -- at least on your

8 case -- on which to draw comparisons?

9 MR JONES: We do, Sir, because the pleaded start of the alleged cartel is -- I would

10 need to look at the pleadings, but it's after the date on which we've got data from, if

11 you see what I mean. We do have a clean period on our pleaded case.

12 THE CHAIR: What is the clean period?

13 MR JONES: Could I just take instructions?

14 THE CHAIR: Yes, of course, yes.

15 MR JONES: The clean period is the after period. The cartel is alleged to have ended

16 in 2011 and the data has been disclosed to date or almost up to date, so there is a

17 long clean period after the alleged cartel.

18 THE CHAIR: Right. You'll be looking at -- so the clean period is supply to your clients,

19 your client group? Or are you looking beyond that?

20 MR JONES: Could I again take instructions? I don't want to give the wrong answer.

21 THE CHAIR: Yes, of course.

22 MR JONES: Sir, my solicitor would also need to check that.

23 In principle it could be either. I don't know from the top of my head whether the data

24 that was disclosed was Claimant-specific or market wide, we could maybe look back

25 at the order, but it could, in principle, be either.

26 We may also need to speak to the economist to see what his thinking is, if that would

1 | be of assistance. I am afraid I don't have the answer.

2 | THE CHAIR: I'm not asking you to commit yourself firmly, but are you saying a
3 | decision hasn't been made or are you saying you don't have instructions on what the
4 | decision is?

5 | MR JONES: At the moment I'm saying the latter. Let me take instructions.

6 | THE CHAIR: Take your time, please.

7 | It's also not fair to spring these questions on you. Then in terms of the
8 | econometric -- the overcharge, there's a calculation of overcharge at the end of the
9 | pleading, let's find it. How has that been arrived at? Again, in broad terms without
10 | asking you to -- obviously I am looking from paragraph 76 really, over to 80. Has that
11 | been arrived at by comparing data from post-2011 with data pre-2011?

12 | MR JONES: I need to take instructions, I'm grateful.

13 | THE CHAIR: Yes.

14 | MR JONES: Yes. I am told it was an econometric analysis based on the Claimants'
15 | data, which of course they had at the time of the pleadings, which was a during and
16 | after analysis.

17 | THE CHAIR: Using approximately those periods.

18 | MR JONES: Using approximately those periods, and it was done by the expert
19 | economist instructed by the Claimants.

20 | THE CHAIR: Obviously you're in the process of assembling further data sets?

21 | MR JONES: Yes.

22 | THE CHAIR: As I understand, it is broadly speaking going to be the same principle
23 | which is running both through your calculation of the overcharge and your allegation
24 | of the existence of a cartel, you're going to be in both cases relying on these before
25 | and after periods?

26 | MR JONES: Yes.

1 THE CHAIR: You're contending a single cartel, in the sense I am talking about we can
2 divide it between Defendants and we can divide it between products, but you're not
3 contending for different cartels on different products, as I understand it?

4 MR JONES: Well, that is right. Except, could I just for clarity make this point, which
5 is that when the Commission, for example, or the CMA decide whether there's one
6 cartel or multiple cartels, there's a large degree of discretion for how you characterise
7 these different facts. There are lots of cases where you could say there's ten different
8 cartels here or there is one so-called single continuous infringement and then they say
9 there is one cartel. So it is right to say that we're alleging that there was a cartel, but
10 it's also right to say that you can slice these things up in different ways.

11 THE CHAIR: Yes, of course.

12 I think I asked at the last hearing why the Commission had said they were independent
13 cartels, I think no one knew the answer to that?

14 MR JONES: That's right.

15 THE CHAIR: Right.

16 MR JONES: Sir, I should maybe just add this, just for complete clarity. This last point,
17 which you'll know there has been debate about, the alternative umbrella case.

18 THE CHAIR: I will come on to that next.

19 MR JONES: That is two cartels, I have to stick -- on that case we're stuck with the
20 Commission decisions, which say that there was OSS1 and OSS2, so those are the
21 cartels that the Commission found. The pure follow-on case which only builds on the
22 Commission decisions, is only built on Commission decisions, if I can put it that way.
23 We're not trying to reframe that as one cartel. If we're in that territory we follow what
24 the Commission has said.

25 THE CHAIR: What is going to be the basis of your econometric analysis of the
26 umbrella?

1 MR JONES: In broad terms, Sir, my understanding is that it's the same, in the sense
2 that one looks at whether prices in particular to the Claimants increased during the
3 period that you're looking at. One then has to piece that together with the factual
4 evidence.

5 THE CHAIR: Sorry, if the prices increased --

6 MR JONES: If there was an overcharge. Relatively counterfactual I meant,
7 I apologise.

8 THE CHAIR: The counterfactual comes later, so ...

9 MR JONES: Yes, although --

10 THE CHAIR: Well, there's a higher price. Sorry, I am not criticising your - I'm just
11 trying to make sure I understand what you're saying. You're saying so you look at
12 a higher price during the -- this umbrella case only arises if you fail in your principal
13 case, is that right?

14 MR JONES: Yes.

15 THE CHAIR: If you succeed on demonstrating there's a cartel in operation, you need
16 to rely on the umbrella case.

17 MR JONES: We don't need to. In principle the effects could arise anyway and they
18 could reinforce each other. But if there is a cartel that targets the Claimants, then one
19 would logically think that that is what causes any increase in price to the Claimants,
20 which may be shown by the econometric analysis.

21 THE CHAIR: For present purposes we will assume you've failed on your principal
22 case, you haven't shown a cartel operating --

23 MR JONES: Yes.

24 THE CHAIR: What we are calling, I am told inaccurately, the umbrella case?

25 MR JONES: Yes.

26 THE CHAIR: Then just explain what your analysis is going to be --

1 MR JONES: What I am trying to convey -- but not very elegantly -- is that in both
2 cases one would make use of the econometric analysis and one would also look to
3 the factual material. If the econometric analysis shows an overcharge and if the
4 factual material shows a cartel targeted at the Claimants.

5 THE CHAIR: I need to pin you back -- how is the econometric analysis going to show
6 an overcharge?

7 MR JONES: In the same way by looking at the during and after periods, so it would
8 be the same essential analysis, and if the analysis shows an overcharge the
9 Claimants' case would be that is either because there was a cartel targeted at the
10 claimants, or it's the consequence of the umbrella effect.

11 THE CHAIR: It's essentially the same case.

12 MR JONES: It's the same case, but the factual material comes in to decide between --

13 THE CHAIR: You're going to say effectively things were cheaper -- I appreciate they
14 may not have been cheaper because you're controlling for all sorts of factors, but
15 perhaps were cheaper post-2011, which shows something fishy was going on before
16 2011. That is potentially an aspect of your case, whether you're talking about umbrella
17 or whether you're talking about the operation of the cartel against your client?

18 MR JONES: Targeted, precisely. The relevance of this factual material is that you will
19 look at this, look at the econometric analysis, and if it shows a big overcharge for
20 example, then just as a matter of logic that would be more likely to have been caused
21 by unlawful activity targeted at the Claimant than by umbrella effect. If you look at the
22 facts and say there was nothing targeting the Claimants, then that will go into your
23 decision about the robustness of the econometric analysis. You'll have to decide
24 whether nonetheless it's plausible that these umbrella effects caused the overcharge.
25 You will look at it in the round --

26 THE CHAIR: What's your case going to be on umbrella still? How are you going to

1 determine -- how are you going to dissect out the different cartels or the different
2 parties to those cartels?

3 I understand your broad-brush, "Well, it was more expensive before 2011, the prices
4 we were charged were higher before 2011, relative control for other things, as opposed
5 to after 2011", but how does your umbrella case work if you then start asking more
6 precise questions as to whether that was a result of the first cartel or the second cartel,
7 or collusion between these two Defendants and not the other two Defendants? Is
8 there any way you can do that at all or is that not going to be part of your case at the
9 moment?

10 MR JONES: Just to go back to the starting point of this discussion, which is that in
11 that scenario the cartels as found by the Commission, so if the question then is: how
12 do you apportion between the two?

13 THE CHAIR: Not only between the two, because in some of those cartels it may not
14 have been all the Defendants.

15 MR JONES: Yes. That I don't have an exact answer to now. I accept that that's
16 an issue which the economists are going to have to grapple with and I accept that it
17 may well be an issue in respect of which the Tribunal would have to exercise a broad
18 axe -- I think this is how it's described in the authorities. That is not an easy issue,
19 I completely accept that. I don't right now have a precise answer to how the
20 economists will deal with it. It is an issue which they are going to have to deal with,
21 and it's a point which comes up, obviously --

22 THE CHAIR: Is it an issue that they can deal with?

23 MR JONES: It might be.

24 THE CHAIR: We don't know why the Commission dissected out these various cartels.
25 I mean I understand, at least in principle, how you can say the prices in 2011 can be
26 compared to the prices before 2011, other than that I don't understand at the moment

1 | what analysis could be done.

2 | MR JONES: I have been handed a note saying that we need to discuss this with our
3 | economists before I say anything definite on it.

4 | With that very firmly in mind, clearly one looks again in the round, so one looks at the
5 | disclosure, so there are these different cartels and you as a Tribunal wouldn't only be
6 | looking at the econometrics, but you'd be looking at the evidence as to how these
7 | cartels operated, so that will help you to decide --

8 | THE CHAIR: It doesn't help you on analysing umbrella effects, does it?

9 | MR JONES: It could do, it could do. I mean, it certainly would from the point of view
10 | of the Tribunal having to make a decision on the broad-axe basis as to which cartel
11 | caused which proportion of the overcharge, because you can look at how active these
12 | different cartels were, how close they were to the Claimants, even if they were not
13 | targeting the Claimants. So there will be a lot of factual material which will enable you
14 | to do that. Will it help with the econometrics, well --

15 | THE CHAIR: Sorry, my brain is not moving quickly enough.

16 | What factual material will there be?

17 | MR JONES: Factual material about the operation of the cartels found by the
18 | Commission.

19 | THE CHAIR: Right. How are you going to get that information?

20 | MR JONES: That's the disclosure which we've had from the Commission file and
21 | other related documents.

22 | THE CHAIR: Right. So far as you can piece anything together from those
23 | documents --

24 | MR JONES: Yes.

25 | THE CHAIR: Right. Okay.

26 | MR JONES: At an extreme level, just to bring it to life in a way which is

1 an exaggeration, just to illustrate the point, if one of those cartels was extremely active
2 and one was really not very active at all, and you have an econometric analysis
3 showing the umbrella effect caused by both together, then you as a Tribunal would be
4 able with the broad axe to apportion those as between the two different cartels. So,
5 your task will be very much helped by having that material.

6 There's a separate question, which is, Sir, where you started your question to me,
7 which was: will that help the economists in their task to try to look at maybe
8 an econometric model which distinguishes between them? I think all I can say is it
9 might; economists do often look at factual material and then make judgements about
10 their models based on that material, but without speaking to my economist I can't really
11 say anything more about that.

12 THE CHAIR: At what stage are you going to be saying -- I mean, just dealing with all
13 this in your expert report seems quite late in the day. At what stage are you going to
14 be saying what the analyses you're doing are? Not the details of them, but you've
15 explained to me today for the first time, no criticism, or at least the penny has dropped
16 for the first time, you're comparing post-2011 to pre-2011.

17 I now understand that you're doing that for the purposes of demonstrating there's a
18 cartel and also considering the overcharge. I understand your case on the umbrella
19 effect, the analysis is broadly similar. You say, well, whether or not you're going to be
20 considering the effects of individual cartels and so forth may be more difficult
21 questions. At what point are we going to know whether those are going to be part of
22 your positive case or not?

23 MR JONES: The straight answer to that is, at the moment, there is a sequential
24 exchange of expert reports. I think we had understood that the consequence of that
25 is that the answer to your question would be when we serve our expert report. If it
26 would be helpful to give indications before then, then I am sure that can be arranged.

1 THE CHAIR: It might be before we launch on huge expert reports, in case there are
2 matters that need refining. Do you want to take instructions -- maybe over lunch will
3 be the time -- as to when you can produce a further statement of case on how you will
4 be positioning your econometric analysis?

5 MR JONES: I will do that. It feeds into these other timetabling issues -- most obviously
6 disclosure. What is hampering us at the moment is we don't have, for example, Tokai
7 Rika's disclosure, but the other disclosure --

8 THE CHAIR: Financial disclosure you're getting quite quickly, aren't you?

9 MR JONES: Financial disclosure we do have, although not from Tokai Rika.

10 THE CHAIR: Sorry, we will look at that in due course --

11 MR JONES: If I can take a look over lunch, the point I was making was the point
12 I mentioned earlier, which is that the expert report, although it's focused on the data,
13 will take some account of the factual material and they do need to go hand in hand to
14 an extent. But we have a year until trial, there are a number of different conflicting
15 pressures on the timetable. I will take that into account and we should be able to factor
16 in, I think, some directions.

17 THE CHAIR: Right.

18 Sorry, who is going first?

19 PROFESSOR NEUBERGER: I have some questions about the umbrella effect. Am
20 I right in assuming that the umbrella comes down in 2011, there's no aftereffect of the
21 umbrella, is that correct?

22 MR JONES: Sir, can I take a moment to check on that, I don't know if that's correct.
23 I will read the pleading really carefully to answer that. My understanding on what
24 ordinarily is pleaded is that there was an effect during the operation of the cartel,
25 whether it's an umbrella effect or a straight effect, and that there may even be a period
26 of market adjustment afterwards. But it rather depends on the econometric analysis

1 whether one sees that period afterwards or not.

2 I think that that would be the position. Sir, I apologise for keep having to say that I
3 wasn't that close to the details of the pleadings but I think that will be what is pleaded
4 and I will check.

5 PROFESSOR NEUBERGER: I understand the point in general, that when a cartel
6 comes to an end because it's been exposed, then there may be a period where prices
7 take to adjust. I was more wondering about whether the theory of the umbrella effect
8 also stops at the point where the cartel -- sorry, the cartel itself stops at the point it
9 stops and I am just wondering whether the theory of the umbrella also stops at that
10 point. That was really the --

11 MR JONES: I think the answer to that is it doesn't necessarily, because the way the
12 umbrella case has now been pleaded out, you'll have seen, is about the Defendants
13 basically having knowledge of each other's approach to RFQs and to amendments.
14 When the cartel comes to an end, of course it's possible that they all start behaving in
15 different ways and the knowledge which they did have about their approach becomes
16 irrelevant. That does seem unlikely, because the sorts of information which we're
17 talking about is things like what they say about price increases, what they say about
18 raw material prices, how they resist requests from the Claimants, those sorts of things.
19 In principle, it is possible that those effects have a sort of ongoing overhang effect.

20 PROFESSOR NEUBERGER: I don't want to press you for an answer at this stage,
21 but my worry about it is that once you go down the route you're suggesting, then the
22 simple view that there's a clean period and a dirty period vanishes and that makes the
23 relevance of the econometric argument much less clear. That was why I was pressing.
24 The other question is the umbrella effect you're talking about, that concerns exclusively
25 supplies from the Defendants to yourselves? Does it cover other supplies?

26 MR JONES: Can I address both of those points, because on the first point, just to be

1 clear on the econometric analysis, the point which you've highlighted is valid. What
2 ordinarily is done is you leave a period after the potentially dirty period in case there
3 are umbrella effects, so your clean period starts a bit later, and you can make other
4 tweaks to the analysis to try and cover it.

5 I accept in principle, if the umbrella effects could have carried on forever then that's a
6 problem, I accept that. But one just has to look at the analysis to see how far those
7 points go.

8 On the second point, of course we're only concerned with sales to the Claimants.
9 That's the short answer. But in principle, the logic of the argument would apply to
10 others as well, that is true.

11 PROFESSOR NEUBERGER: This case is only concerned with --

12 MR JONES: Yes, absolutely.

13 PROFESSOR NEUBERGER: Thank you.

14 THE CHAIR: Who is going first?

15 Ms Ford.

16 MS FORD: Sir, it's been agreed that I will be leading on the expert issue.

17 We are applying to vary paragraph 17 of the Tribunal's order from the last CMC. It's
18 behind tab 24 of the core bundle at page 451.

19 THE CHAIR: I think it was a provisional order, I don't think the burden falls with you.

20 MS FORD: I am grateful for that indication.

21 In that case what we would suggest substituting for the provisional order is the wording
22 in green, if the Tribunal has the latest version of the composite order in green,
23 paragraph 8.

24 Which provides:

25 "The Claimants and Defendants shall have permission to rely on expert evidence in
26 the field of competition economics. Each Party shall each have permission to rely on

1 one expert in this field, and the Defendants shall endeavour to coordinate their use of
2 experts in this field."

3 So the distinction being, rather than one expert for the Claimants and one expert for
4 the Defendants, each party will be entitled to rely on their own expert.

5 The authorities that we rely on in support of our application fall into three categories.

6 The first concerns the rights of the defence, because we say that instructing an expert
7 economist is an important element of the rights of the defence in competition claims.

8 The second category that we rely on is authorities which offer guidance as to the
9 circumstances in which a single joint expert might be appropriate, both generally in
10 High Court claims and also in the specific circumstances of competition law claims.

11 Then, finally, we rely on authorities concerning conflicts of interest and how that
12 applies in particular in the context of instructing expert economists in competition
13 claims.

14 Starting with the rights of the defence, these are protected by the Charter of
15 Fundamental Rights of the European Union. If the Tribunal please takes up the
16 authorities bundle behind tab 4.

17 THE CHAIR: You're not suggesting there isn't a power to order a single -- you can
18 have a single court expert. You must have a power --

19 MS FORD: Sir, I am certainly not suggesting that there is a power --

20 THE CHAIR: Fundamental rights.

21 MS FORD: I am sorry, I am not suggesting there isn't a power, I am not suggesting
22 that it is obligatory that one must be permitted to instruct one's own expert in all
23 circumstances, but I do say that in the circumstances of this case, it would be a breach
24 of Article 48 and the rights of the defence if we were not permitted to instruct our own
25 expert in the circumstances of this case.

26 THE CHAIR: Right. Okay. What's the headline, why this case?

1 MS FORD: I will come on to address the Tribunal in detail about the circumstances.
2 But I would like to emphasise that this is a fundamental rights issue. It is of importance.
3 Article 48 is behind tab 4, it provides respect for the rights of the defence --
4 THE CHAIR: Give me a second. I'm trying to work out how this bundle works.
5 MS FORD: Sir, it's page 175.
6 THE CHAIR: Yes, that's not the issue.
7 MS FORD: Does the Tribunal have tabs on the right-hand side of the PDF that might
8 assist? Mr Schaefer tells me it's electronic page 179. I didn't realise I am afraid --
9 Normally there would be bookmarks on the PDF that one could then click on a tab, so
10 I don't know if that's the case.
11 It's Article 48 and it's headed "Presumption of innocence and right of defence". Then
12 paragraph 2 of that:
13 "Respect for the rights of the defence of anyone who has been charged shall be
14 guaranteed."
15 As to what is understood by rights of defence, we've cited Aalborg Portland, which is
16 behind tab 2 in the bundle. The relevant paragraph within that is starting at
17 paragraph 64.
18 THE CHAIR: How does the Charter fit into the post-Brexit, we're still --
19 MS FORD: It still applies in the sense that the Claimants are still pursuing claims in
20 reliance on EU law, because it relates to the period pre-Brexit and consequently the
21 protections that are essentially the other side --
22 THE CHAIR: What are the transitional provisions? If a crime is committed pre-Brexit
23 but the proceedings are post-Brexit, how do we know whether it applies or not?
24 MS FORD: It applies because the Claimants are seeking to rely on Article 101, and I
25 can show --
26 THE CHAIR: I understand that.

1 MS FORD: Insofar --

2 THE CHAIR: Does it necessarily follow? Because this is about legal process as
3 opposed to the cause of action.

4 MS FORD: I will show you the Court of Appeal authority which explains why this
5 applies in domestic proceedings.

6 The answer is because one is seeking to implement EU law so insofar as the
7 Claimants' claim relies on EU law, and they plead that they do, obviously they're relying
8 on 101 because it still applies in respect of the period.

9 THE CHAIR: Presumably the Charter doesn't apply to EU law; it applies to common
10 law murder, or assault --

11 MS FORD: It applies where member states are implementing EU law. I can show the
12 Tribunal the Court of Appeal authority which hopefully will answer this point.

13 THE CHAIR: Where did you want to me to go to on this case?

14 MS FORD: Within this case, starting at paragraph 64 -- this is just to show the Tribunal
15 what is to be understood by the contents of the rights of defence.

16 PROFESSOR NEUBERGER: Which page are we looking at?

17 MS FORD: It's my page 43. Electronic page 47, I'm grateful to Mr Schaefer for being
18 ready with these numbers.

19 PROFESSOR NEUBERGER: Thank you very much.

20 MS FORD: The Court of Justice explained the rights of the defence are fundamental
21 rights, forming an integral part of the general principles of law, whose observance the
22 court ensures. That's authority for that:

23 "Drawing inspiration for that purpose from the constitutional traditions common to the
24 Member States and from the guidelines supplied by international treaties for the
25 protection of human rights on which the Member States have collaborated or to which
26 they are signatories, such as the European Convention for the Protection of Human

1 Rights and Fundamental Freedoms."

2 Then if we go down to 66 on the same page, the court explains:

3 "respect for the rights of the defence requires that the undertaking concerned must
4 have been afforded the opportunity, during the administrative procedure, to make
5 known its views on the truth and relevance of the facts and circumstances alleged and
6 on the documents used by the Commission to support its claim that there has been an
7 infringement of the Treaty."

8 Obviously it's pitched at a very high level, but what it means in our submission is that
9 respect for the rights of the defence includes the opportunity for the undertaking to
10 present its case and have its case heard. We do say that that includes instructing
11 an expert economist in the context of competition claims.

12 This is obviously in the context of administrative proceedings before the Commission,
13 but the rights of the defence are respected in national courts, as I have said, insofar
14 as national courts are implementing EU law. We can see that from the Court of Appeal
15 in the *Emerald* case, which is behind tab 18 in the bundle. Within that tab it is starting
16 at paragraph 67, which is my page 632, possibly about four pages on in the Tribunal's
17 version.

18 THE CHAIR: Which paragraph again?

19 MS FORD: Paragraph 67. This is an appeal to the Court of Appeal from a decision
20 of the High Court in a competition damages claim.

21 THE CHAIR: What date is this?

22 MS FORD: This is reported 2016, so it is pre-Brexit.

23 It says:

24 "Article 48 of the Charter applies to national courts of member states when they are
25 implementing EU law."

26 Then:

1 "Article 48 thus applied to the proceedings before the judge, as those proceedings,
2 amongst other things, involve the implementation of EU law; namely, in particular,
3 claims for the breach of duties owed to the claimants under Article 101 FEU."

4 The Tribunal will appreciate that these Claimants are also claiming for breach of duties
5 they say are owed to the Claimants under Article 101 FEU. In that respect this Tribunal
6 is also implementing EU law and so we say Article 48 applies.

7 THE CHAIR: You're saying that this paragraph deals with the question of transition?

8 MS FORD: Obviously not expressly in the sense that this is a judgment which
9 pre-dates Brexit, but insofar as the Claimants have a claim under EU law at all, the
10 corollary must be that the protections that EU law ensures in respect of that claim also
11 apply.

12 THE CHAIR: All right. Okay.

13 MS FORD: I am turning to look at the guidance and authorities.

14 THE CHAIR: The Charter of Fundamental Rights before Brexit applied to all legal
15 issues, irrespective of whether EU law or not EU law?

16 (Overspeaking)

17 -- common law and then you're saying, post-Brexit, the Charter continues to apply to
18 where the cause of action arises under EU law?

19 MS FORD: No.

20 THE CHAIR: Tell me the principle, just on this transitional point, which may be
21 unimportant in the overall scheme of things, but ...

22 MS FORD: Certainly.

23 I don't seek to say that Article 48 of the Charter applies to everything. I am not in a
24 position to make a submission either way about that, it may or it may not. I make the
25 submission that Article 48 of the Charter applies to the national courts of members
26 states when they are implementing EU law, that is the broadest proposition that I need

1 to make. Insofar as we are now in a post-Brexit world, insofar as the Claimants are
2 relying on Article 101 and therefore this Tribunal is implementing EU law, then
3 Article 48 continues to apply.

4 THE CHAIR: All right okay.

5 MS FORD: I'm moving on to look at the guidance on authorities concerning the use
6 of single joint experts. I say from the outset that not all of these are concerned with
7 the very specific scenario that is before this Tribunal, namely one expert for the
8 claimants, one expert for the defendants. One of the cases I'm referring to is actually
9 concerned with whether one party may appoint two experts in the same discipline and
10 some of them are concerned with the question of whether you have a single joint
11 expert for both the claimants and the defendants.

12 I do say that the factors that the authorities indicate a court or a tribunal should be
13 taking into account, it's things like the centrality of the issue, the complexity of the
14 issue, the extent to which the propositions that the expert evidence goes to are
15 controversial, those sorts of issues apply with equal force when this Tribunal is
16 considering this particular question of whether a single joint expert as within
17 defendants is or is not appropriate.

18 So --

19 THE CHAIR: I mean you're disputing this as a case management decision?

20 MS FORD: This is partly why I have taken the Tribunal to these questions of Article 48;
21 we say it does go beyond a case management question, in the sense that it engages
22 fundamental rights, it engages the rights of the defence in these proceedings.

23 THE CHAIR: In other cases where it has turned on a case management decision, you
24 would say they were wrongly decided?

25 MS FORD: No, I don't make that submission. I don't seek to suggest that because
26 Article 48 is engaged there is an absolute right always to have one's own expert. It is

1 a fact-sensitive assessment and the factors that the court or tribunal will take into
2 account include the ones that I will show you are within --

3 THE CHAIR: Can you give us the factors first, before we get to the authorities.
4 Obviously we're only concerned with factors which apply in this case. But, what is the
5 approach the Tribunal should take?

6 MS FORD: The Tribunal will take into account first of all the extent to which the matter
7 is either controversial or an established area of knowledge. The more controversial it
8 is, the more it will be justified to have multiple experts.

9 It will take into account the centrality or otherwise of the issue, if it's a peripheral issue
10 one might think that it would be proportionate to have only a single expert. If it's
11 an absolutely central issue that would point towards permitting multiple experts.

12 One may take into account the importance of the issue, which is not necessarily the
13 same thing in terms of the value of the claim, in terms of the consequences for the
14 parties concerned. In this case we're dealing with quasi-criminal proceedings.

15 Fundamentally one also takes into account the extent to which the expert is going to
16 be asked to grapple with matters where there is a conflict of interest as between those
17 that will be instructing the expert. I will come on to deal with that under a particular
18 head, because we say that is a particularly important factor in this case.

19 THE CHAIR: You are pushing at an open door if you're trying to make good the
20 submission that conflict is a relevant consideration. Of course it is.

21 The others, I think, you may have a little bit of work to do. Obviously you have those
22 cases where you're just informing the Tribunal of something which is common ground,
23 the formula for salt or something, and whether one actually needs this expert evidence
24 at all, whether that evidence can be advanced by agreement is a separate issue.

25 In terms of when you say the extent to which a matter is controversial, is that what you
26 mean? Whether there's a dispute about it?

1 MS FORD: Yes. Broadly. Whether it's a matter that -- so, for example, the first
2 authority I was going to refer to is what is said in the White Book, and the White Book
3 says, if that issue falls within a substantially established area of knowledge, then that's
4 one example where a single expert might be ...

5 THE CHAIR: If it's not controversial why do you need evidence at all?

6 MS FORD: Because the court may nevertheless need to be assisted. These are
7 areas in relation to which this is a matter of expert opinion evidence. The Tribunal for
8 example, even if it's an economist, the economist has expertise which may not be
9 available to members of the Tribunal, depending of course on the wing members.
10 So --

11 THE CHAIR: If it's a technical question, let's say it's gene therapy and the court needs
12 to understand gene therapy, but it's not controversial what gene therapy is, it's just not
13 something one can take judicial notice of. Why would it not be just written in a
14 pleading, a statement of case or a primer for the court? Why would you need an expert
15 at all?

16 MS FORD: We are assuming a situation where it concerns knowledge that is not
17 available to the Tribunal or the judge as such. Therefore, it is necessary to have
18 an expert to inform the judge. One imagines that details of gene therapy are not
19 something that a judge can simply take judicial notice of. Not something that is
20 common knowledge, so one might need --

21 THE CHAIR: It's not an answer to my question. Why could it not just be in a statement
22 of case or in a primer? Why would you need an expert before the court?

23 MS FORD: Because it is a matter of expert opinion. It is not a matter of fact as such.
24 It might well be a matter on which there is a common established body of knowledge
25 such that the answer is not controversial, but nevertheless the court requires the
26 assistance of the expert in order to provide that insight, that matter of expert opinion.

1 THE CHAIR: Okay.

2 MS FORD: I was referring to the commentary in the White Book just for that particular
3 proposition, behind tab 39.

4 THE CHAIR: Do I get anything from the commentary really?

5 MS FORD: It makes good the proposition that I've just --

6 THE CHAIR: It doesn't make it good, it's just commentary.

7 MS FORD: I take the Tribunal's point. I seek to rely on it for the proposition that where
8 it's a substantially established area of knowledge, so essentially uncontroversial, that
9 would be something that points towards a single expert, but otherwise not.

10 Similarly, there's the Commercial Court Guide which says although "parties should be
11 prepared to consider the use of a single joint expert in appropriate cases ... the court
12 recognises that in many cases it will be appropriate for each party to be given
13 permission to call one expert in each field requiring expert evidence."

14 THE CHAIR: This is where -- this is a single joint expert for claimants and
15 defendants --

16 MS FORD: Sir, that is absolutely right.

17 THE CHAIR: I find these cases of very limited assistance.

18 MS FORD: Perhaps I can show the court a couple and if they are of less assistance,
19 I will move away from them. The first example is *ES v Chesterfield & North Derbyshire*
20 *Royal Hospital NHS Trust*, which is a clinical negligence case, it is in the authorities
21 bundle at tab 16.

22 This is an appeal, so it's a Court of Appeal authority in a clinical negligence action and
23 what it concerns is whether or not the claimant should be permitted to appoint two
24 experts in the same discipline. The Tribunal can see that from paragraph 1 of this
25 judgment, at the end of the paragraph, there's a comment from the Master:

26 "The application by the claimant to instruct two experts in obstetrics on the grounds

1 that the professional whose conduct was in question was always a practitioner in the
2 field... was common to every clinical negligence case."

3 That is the question that the Court of Appeal is considering.

4 If we go to paragraph 20 within this judgment, the Tribunal will see that this is a claim
5 which is valued at £1.5 million. I highlight that because we go on to see that the Court
6 of Appeal does authorise the appointment of two experts in the same discipline and it
7 places emphasis on the importance, the high value and the complexity of the case in
8 doing so. At 23, it says:

9 "Above all, however, for a case of this importance, high monetary value and complexity
10 the parties will not be on an equal footing if Master Ungley's order is to stand."

11 Similarly, paragraph 25, the Court of Appeal goes on to say:

12 "I do not moreover consider that the extra time and expense that would be introduced
13 into the trial by the calling of a second expert for the claimant would be
14 disproportionate in a case of this monetary value and importance."

15 Two points to draw out of that.

16 First, those are additional factors that I say come out of the authorities that one does
17 take into account in exercising this power. Is it a case of importance, is it a high-value
18 case, is it a complex case?

19 Secondly, the Tribunal have well in mind that the Court of Appeal is treating a
20 1.5 million claim as one which is sufficiently high value to justify two experts, and of
21 course we are many multiples beyond that in terms of the claimed value of this claim.

22 One further --

23 THE CHAIR: -- less importance to the parties involved though?

24 MS FORD: I will --

25 THE CHAIR: Looking at the subject matter, I am not sure that's really a --

26 MS FORD: I will come onto make submissions about the importance to the parties

1 involved in this case, in which they face quasi-criminal allegations of cartel conduct.
2 Very important. But these are the sorts of factors that the Court of Appeal has
3 indicated must be taken into account in this sort of judgment.

4 There's then *Yearsley v Mid Cheshire Hospitals NHS Trust*, this is the authority behind
5 tab 19. This is a first instance decision where Mrs Justice Whipple is rejecting a
6 request that the court appoint a single joint expert. At paragraph 4 we can see the
7 value of this claim. The schedule of loss puts the damages at roughly £500,000 and
8 the counter schedule puts the value of the case significantly lower.

9 Here the key factor that is being taken into account is the importance of the issue to
10 which the expert evidence goes in the case. If we look at paragraph 7, we can see
11 the judge records at the bottom of the paragraph:

12 "The point the claimant makes is that this issue about dementia may well turn out to
13 be at the heart of the case and of serious importance when it comes to assessing
14 damages."

15 THE CHAIR: That feeds into your conflict point, doesn't it, that the parties had
16 a different interest in what the experts said?

17 MS FORD: It feeds into that, but even if there were no conflict, and obviously we say
18 there is very clear conflict, but even if there were no conflict it still applies in this case
19 because questions of overcharge are absolutely at the heart of this case. Even if one
20 were to --

21 THE CHAIR: We will come on to conflict, I understand conflict is very important, I am
22 not in any way ... but beyond saying that there are cases where it's necessary for the
23 claimant and defendant to have separate experts, because their interests are not
24 aligned, which self-evidently is the case, I'm not quite sure what I am getting out of this
25 case.

26 MS FORD: I'm seeking to suggest that even putting aside questions of conflict, if you

1 have an issue which goes to the heart of the case in the way that overcharge does,
2 and we've just heard from Mr Jones for the Claimants that they seek to rely on the
3 expert evidence of an economist, both in terms of liability and in terms of fundamental
4 element of quantum, so it's absolutely at the heart of this.

5 THE CHAIR: Absolutely and no one is suggesting there should be a joint expert for
6 the Claimants and the Defendants.

7 MS FORD: In our submission the same considerations go to whether or not there
8 should be a joint expert as between the Defendants. I do say that these authorities
9 are of assistance in identifying the factors that go --

10 THE CHAIR: At the heart of the case, you'll be making submissions that at the heart
11 of the case is a dispute between the Defendants?

12 MS FORD: No, the issue to which the experts' evidence goes is at the heart of the
13 case. The question of overcharge. Which they rely on both for liability, they rely on it
14 to try and show that one or more Defendants were in a cartel in the first place, and,
15 secondly, what the consequences were and what the damages ought to be. That
16 issue, the issue to which evidence goes, is absolutely at the heart of this case.

17 The same sorts of factors that I have indicated should be taken into account are also
18 of relevance specifically in competition claims. We can see that in particular, I have
19 cited the practitioners' text, which is the Blue Book Competition Litigation UK Practice
20 and Procedure.

21 THE CHAIR: Which tab?

22 MS FORD: This is tab 38 of the authorities bundle.

23 THE CHAIR: Which paragraph?

24 MS FORD: Within that it's paragraph 13.31. It starts off by recalling that the tribunal
25 and the court do have the power to appoint a single joint --

26 THE CHAIR: Single for the claimant and defendant?

1 MS FORD: It is.

2 I do say that the same considerations apply.

3 THE CHAIR: I know you say that, but this doesn't help resolve that dilemma, does it?

4 MS FORD: We will come on --

5 THE CHAIR: Showing us lots of authorities for the fact that in some cases it's not
6 appropriate to have the same expert for claimants and defendants, it only gets us so
7 far.

8 MS FORD: Sir, I fully appreciate that, and I will come on to deal with the PSA case,
9 which is a case where this Tribunal decided as within defendants they should be
10 entitled to their own experts.

11 Just to draw attention particularly to what's said in the second half of this paragraph,
12 where the authors say:

13 "Given the complexity of many competition cases, it may be that this power is unlikely
14 to be of much use in the competition field."

15 In my submission that demonstrates that the same sorts of factors feed into
16 competition claims as any other. They say:

17 "However, there may be scope for its use in cases where the particular issue that is
18 proposed as the subject of expert evidence falls within a substantially established area
19 of knowledge, and where it is not necessary for the Court or CAT to sample a range
20 of opinion. An example might be a technical issue that is unlikely to be controversial
21 between the parties."

22 Again, consistent with what we see in the general authorities. It does go on to cite the
23 PSA case, which I am going to come on to address the Tribunal on.

24 Very briefly there is a transcript of a competition claim in the CAT behind tab 29, which
25 I mention in brief because it's again concerned with the possibility of a single joint
26 expert, but it does show the same considerations being taken into account by this

1 Tribunal.

2 THE CHAIR: For claimant and defendant?

3 MS FORD: For claimant and defendant, yes.

4 THE CHAIR: I understand that submission, I understand why in many, many cases,
5 across all fields of law, it's inappropriate to have a single joint expert. I understand
6 that.

7 MS FORD: In that case perhaps we can then focus on the concerns about conflict of
8 interest, which drive particularly concerns as between co-defendants. The Tribunal
9 will have seen that this is a matter that the Court of Appeal has grappled with very
10 recently in the UK Trucks claims. It's the Court of Appeal's judgment behind tab 27.

11 THE CHAIR: There's plainly a conflict in that case concerning the overcharge to resale
12 vehicles as I understand it, yes, and --

13 MS FORD: What is insightful in my submission is that the Court of Appeal considers
14 that the only way in which to resolve that conflict is to appoint separate experts.

15 THE CHAIR: I understand that. The question is if that was the position in this case, I
16 can't imagine this Tribunal would form a different view. But --

17 MS FORD: Sir, I will be coming on to say that there is a transparent conflict --

18 THE CHAIR: Okay. Clearly if there's a conflict then separate experts are appropriate.

19 MS FORD: Can I draw the Tribunal's attention to one paragraph in the reasoning in
20 the Court of Appeal; the reason I do so is because it's responsive to some points that
21 are taken against us by the Claimants. It's paragraph 96 within this judgment. For
22 context, the Tribunal will see from 95 --

23 THE CHAIR: Hold on, just give me a second, I am just trying to scroll through.
24 I'll get there eventually.

25 I'm there.

26 MS FORD: The Tribunal will see from paragraph 95 that the Court of Appeal is

1 disagreeing with the Tribunal in one particular respect. It says:

2 "It would be wrong to accept the suggestion that Dr Davis [who was the expert
3 economist in that case] could be the expert for both sides of the new/used divide. It
4 was wrong to suggest that the informed consent could resolve that problem."

5 THE CHAIR: Then they go on and look -- haven't set up Chinese walls for this.

6 MS FORD: Yes, they say Chinese walls, they say separate legal teams, they say
7 separate experts. The reason they say separate experts is, in my submission,
8 informative. It's at 96, they say:

9 "This approach [so the approach of the CAT] ignores the fact that any regression
10 analysis and determination will be highly sensitive to the assumptions made and data
11 input. There is an inevitable element of subjectivity, both in the selection of the data
12 and these assumptions. Without in any way being critical of or doubting the integrity
13 of Dr Davis, complete objectivity in expert economic evidence cannot really be
14 achieved."

15 Two points to emphasise about that paragraph.

16 The first is that the Court of Appeal is saying that the choices the expert economist
17 makes are inevitably to some degree subjective in nature, it cannot be said to be
18 a purely objective exercise. The reason I emphasise that is because the Claimants
19 say against us:

20 "Insofar as the Defendants find themselves in different positions, that can be resolved
21 by the expert essentially applying an objective judgement and making objectively the
22 correct choice about how to resolve it."

23 In my submission, the Court of Appeal here is saying that that is a fallacy, because
24 there is always going to be an element of subjectivity.

25 Second, the Court of Appeal is making all those points, it is emphasising that in
26 circumstances where it's saying without in any way being critical of or doubting the

1 integrity of the economic expert.

2 They are saying even if the economic expert fully complies with his duties to the
3 Tribunal to be independent, to be objective, that doesn't resolve problems of a conflict
4 of interest.

5 THE CHAIR: Absolutely. You're pushing at an open door again on that aspect.

6 MS FORD: I am grateful.

7 In that case, the last authority is the one that I said I would show the Tribunal, which
8 is the PSA case behind tab 30.

9 THE CHAIR: This is the one on the transcript, Mr Justice Green, yes?

10 MS FORD: That's right, yes. It involves the same claimant group, PSA, the same
11 instructing solicitors, Hausfeld.

12 THE CHAIR: You'll have to tell me which page you want to go to, it's quite a long
13 transcript.

14 MS FORD: It starts at internal page 10 of the transcript.

15 It is worth emphasising that unlike this case this is not a case concerned with multiple
16 different cartels. It was concerned with a single market-wide cartel in the sale of
17 bearings, and so one doesn't see the multiple cartels targeted at particular customers
18 that we're concerned with in the present case. In that respect, one might expect there
19 to be a greater degree of unity of interest as between the defendants than in the
20 circumstances of this case.

21 Starting at page 10, line 12 we can see the Chairman, Mr Justice Green as he then
22 was, now Lord Justice Green, articulating the question.

23 THE CHAIR: It starts quite a bit before that, doesn't it?

24 MS FORD: He is saying the question is whether or not the defendants have one expert
25 or one expert each.

26 THE CHAIR: Right, sorry.

1 MS FORD: The same issue that faces the Tribunal now.
2 He is putting to counsel for the claimants in that case why will there not be a conflict
3 or least a commercial conflict between the defendants' experts. In that context if we
4 go over to page 11, we can see that the claimants' counsel conceded that there was
5 at least a potential for conflict in relation to overcharge. This is starting at line 3:
6 "What is said to give rise to a potential for conflict is the position in relation to
7 overcharge. One can see perhaps the possibility, and it is at this stage largely
8 speculative, that, for instance, one contract may secure, for whatever reason,
9 significantly higher overcharges than another".
10 He is essentially acknowledging what he describes as at least the speculative
11 possibility of a conflict.
12 For the defendants it was submitted that there was a conflict, and you can see that
13 from page 16.
14 THE CHAIR: It evolves, doesn't it, because Mr de la Mare doesn't really push -- he
15 sort of suggests this sort of staged process, doesn't he? He doesn't really stick to his
16 guns?
17 MS FORD: In my submission, that is a sensible concession in circumstances where
18 he wasn't in a position to say that there was no relevant --
19 THE CHAIR: For sure -- I mean, yes --
20 MS FORD: That is in the circumstances of a single cartel. I will be going on to submit
21 the position applies a fortiori in our circumstances, where we have, at least
22 potentially --
23 THE CHAIR: We will come to that, but just in terms of what's going on here, this reads
24 as a rather pragmatic case management decision, in the light of the concession that
25 there was a conflict. You say, "No, it's not about case management, it's far more
26 fundamental than that"?

1 MS FORD: I do say that these issues of whether to permit defendants to instruct their
2 own expert or not engage fundamental rights under Article 48, and so it is a matter
3 which goes beyond a purely case management issue.

4 THE CHAIR: This authority doesn't help us on that point?

5 MS FORD: No, this authority is an example of the Tribunal accepting that in
6 circumstances where there is a conflict of interest it is not appropriate to require
7 defendants to instruct a joint expert.

8 THE CHAIR: Sorry, again if there's a conflict, I think our -- subject to what the
9 Claimants say -- view is if there is a conflict in this case, between the Defendants, then
10 there ought to be separate experts, at least dealing with matters relating to that conflict.
11 How wide that goes is perhaps a separate conversation.

12 MS FORD: I can certainly come on to address why we say there's a conflict. Before
13 I do that, two short points that I say come before logically.

14 The first is that the Tribunal has evidence before it that it is essentially the consistent
15 practice of this Tribunal and the High Court to permit defendants to rely on the
16 evidence of their own experts in relation to economic issues.

17 I show the Tribunal the evidence, it's Mr Firth on behalf of ZF and Mr Balmain on behalf
18 of Autoliv.

19 THE CHAIR: I mean -- I am not sure how much ... I mean we have read that, we
20 understand that's the position, you say that's not the normal practice, but that's not
21 an answer of itself.

22 What do you say to the point -- it's a forensic point nevertheless, but you are accepting
23 you've been operating a cartel, at least with respect to the matters identified by the
24 Commission. Why the reticence in those circumstances to share an expert, when you
25 are quite prepared to share other information and to co-operate in relation to these
26 matters?

1 MS FORD: This comes back to the rights of the defence. We have, of course,
2 accepted the findings of the Commission, but that doesn't preclude us exercising our
3 rights of defence, which we say includes, as a matter of common practice in this
4 Tribunal, the right to instruct one's own expert. It's driven not only by issues of conflict
5 of interest, but also the sorts of factors that we see being taken into account in the
6 case law. So, these proceedings are classic examples of high value, complex,
7 important claims, when we say it's legitimate, important and proportionate for each
8 Defendant to be permitted to defend themselves against those allegations in the way
9 which has become conventional.

10 THE CHAIR: You will also appreciate the concerns of the Tribunal, that it's not
11 satisfactory to arrive at a trial with each of the defendants putting in three different
12 economic models, treating data sets in different ways and then having to presumably
13 choose between one of those three models and one of those three data sets and then
14 having to apply that then to the other two Defendants. That is a reason why this is
15 unattractive. It may be necessary, but it is a reason why this is unattractive. Do you
16 have any submissions on that?

17 MS FORD: I do.

18 THE CHAIR: Do you want to do conflicts first and then get to that?

19 MS FORD: I can certainly do that, but I can give the Tribunal a flavour of what
20 I propose to say, hopefully by way of reassurance to the Tribunal. Because we
21 appreciate that the Tribunal's concern is that what is going to be offered would be three
22 potentially conflicting overall market analyses, one from each Defendant, that it would
23 be then obliged to reconcile.

24 In fact -- I can show the Tribunal the letter from E.CA which bears this out -- what's
25 being suggested is the appropriate approach would be three Defendant-specific
26 analyses, so each economist would be focusing on the particular circumstances of

1 | their Defendant, that means their Defendant's data, the specific circumstances of that
2 | Defendant.

3 | THE CHAIR: Of course that would make sense in many circumstances, but if you're
4 | operating as a cartel it's difficult to know why one should dissect you out and treat you
5 | separately.

6 | If you're not operating as a cartel that's a different matter, of course.

7 | If we could just break there, because the transcriber is keen to have five minutes if
8 | that's all right. Then perhaps we can get on specifically to deal with the conflicts that
9 | you're ... and obviously with a measure of precision, that would be very much
10 | appreciated.

11 | (11.50 am)

12 | (A short break)

13 | (11.57 am)

14 | THE CHAIR: Conflicts.

15 | MS FORD: I understand that the point the Tribunal is putting to me is: how can there
16 | be a conflict if you're all in the same cartel?

17 | THE CHAIR: I was teasing you a little bit about that, but of course there could be ...

18 | MS FORD: The risk of a conflict is particularly acute in these circumstances, because
19 | we are not just dealing with one single market-wide cartel. The Commission decisions
20 | on which the Claimants rely identify six different cartels, and they operate across
21 | different --

22 | THE CHAIR: That's the umbrella point.

23 | MS FORD: No, Sir, it's not limited to the umbrella point. These are the fundamental
24 | findings on liability.

25 | Can I ask the Tribunal to turn up the E.CA letter, it's core bundle, tab 17, page 116.
26 | The Tribunal will see a table.

1 THE CHAIR: It's in the pleading, isn't it, we don't need to go to the letter.

2 MS FORD: I go to the letter because I will then be taking the Tribunal to some of the
3 points on the methodology. This is a good illustration of the point here.

4 OSS1 is concerned with four different cartels.

5 OSS2 identifies two cartels.

6 We can see from the column "Supplies" that these are concerned with different
7 products, so they are seatbelts, air bags --

8 THE CHAIR: We are very familiar with this table, yes --

9 MS FORD: I belabour this point, Sir, because this is the answer to why there is a
10 conflict of interest. Because we are not in -- of course I should say even if there were
11 a single market-wide cartel, there is still a potential conflict of interest in relation to
12 apportionment of loss as between Defendants, in circumstances where there could
13 well be contribution claims.

14 THE CHAIR: Let's focus very much on where you say the conflict lies. I understand
15 that if we were apportioning loss between the Defendants, clearly you would need your
16 own experts involved in that. Are we concerned -- are we going to be concerned with
17 apportionment? The Claimant is not concerned with apportionment at all. The
18 Claimant says you're presumably jointly and severally liable for the loss --

19 MS FORD: That presumption is an important one, because the Claimants' ideal case
20 is that there is one cartel in which everyone is jointly and severally liable, of course
21 that's the allegation they make. We say there is no support for that allegation at all.
22 What they do have is findings of infringement in relation to multiple different cartels, in
23 which the participants are not jointly and severally liable.

24 THE CHAIR: This is not a follow-on claim.

25 MS FORD: No. That, in fact, makes it worse. Because the Claimants are now saying
26 they rely on this economic evidence to demonstrate liability.

1 THE CHAIR: Sorry, it's my fault, I took you off your path, can you just talk about what
2 the conflicts are if you could identify them and then we can look for support.

3 MS FORD: If one takes the very basic situation of a single cartel in which each
4 participant is jointly and severally liable, then there is a conflict between the
5 Defendants in respect of apportionment. It's quite correct that the Claimant is --

6 THE CHAIR: Sorry, slow down, are you talking generally or are you talking about this
7 case?

8 MS FORD: This case and generally.

9 THE CHAIR: Right, so if there's a single cartel, there's a potential conflict when it
10 comes to apportionment?

11 MS FORD: It is true that the Claimant is not concerned with issues of apportionment
12 because they simply say you are all jointly and severally liable to compensate me for
13 the loss I have suffered.

14 But the Defendants are concerned about apportionment, because there is a potential
15 for contribution proceedings as between Defendants. It is true that those have not
16 been brought yet, but they are not out of time and they would not be out of time unless
17 and until you either get a settlement or a judgment.

18 THE CHAIR: They're not pleaded at the moment?

19 MS FORD: No, they are not pleaded at the moment. But that is something -- in
20 circumstances where the Defendants are working to determine the extent of their
21 liability, it's something which cannot be disregarded.

22 THE CHAIR: Why (inaudible) hearing expert evidence on apportionment?

23 MS FORD: Sir, the Tribunal is not going to hear expert evidence on apportionment,
24 but it is something that a Defendant will very much have in mind in circumstances
25 where they're seeking to work with their expert to present their case on the extent of
26 their liability.

1 THE CHAIR: Why will the expert be addressing apportionment?

2 MS FORD: We will come up on to the E.CA letter. The expert will be addressing a
3 Defendant-specific analysis. One can't simply put apportionment to one side.

4 THE CHAIR: We will come to Defendant-specific, because I'm sure we will have some
5 questions about that. But in terms of conflict, I have a list of one so far, which is
6 apportionment. Are there any other conflicts?

7 MS FORD: That is the very basic situation where one has one cartel. We are not in
8 the basic situation. We're in a much more complex situation where there are multiple
9 different cartels, multiple different combinations of participants, multiple different
10 combinations of products, multiple different time periods over which those cartels
11 apply.

12 THE CHAIR: Hold on, we're not investigating those cartels, the Commission has made
13 decisions on that. We're dealing with the cartel that has been put in issue by the
14 Claimants.

15 MS FORD: No, we're not limited to that.

16 The first point is that the Claimants, in relation to an umbrella claim, are seeking to
17 determine the loss which they say has been caused by those many different cartels.
18 Obviously they rely on those in respect of the participants of each individual cartels,
19 so the participants vary, the time periods vary --

20 THE CHAIR: Park umbrella for the moment.

21 MS FORD: The Claimants' pleaded case adds additional permutations. They say
22 either it's one whole cartel in which everybody participated, or they say one or more of
23 the Defendants, I can show the Tribunal the relevant pleadings --

24 THE CHAIR: I did remind myself, but if you could show me --

25 MS FORD: It's core bundle tab 50, page 563.

26 THE CHAIR: Just give me the paragraph number in the pleading.

1 MS FORD: Starting at paragraph 39. Paragraph 39 is the pleading of what might be
2 described as the overall cartel. The pleading says:

3 "Over a period which extended from at least as early as 6 July 2004 until at least as
4 late as 30 March 2011, the Undertakings to which the Addressees of the Decisions
5 belonged, or any two or more of them in combination ..."

6 There we have the possibility either that everybody was in a cartel or that one or more
7 participants were in a cartel. We know that the Claimants have said today that they
8 propose to rely on economic analysis in order to seek to establish their case as to the
9 participants in the cartel.

10 Of course, the Tribunal will appreciate that insofar as economic analysis goes to
11 liability, there's an absolutely fundamental conflict between the defendant who wants
12 to say, "It wasn't me, it was my co-defendants", and any other defendant who equally
13 wants to say, "I wasn't involved, it was my co-defendants".

14 The conflict goes further because of course, even if one weren't relying on the
15 econometrics to establish liability, one is still looking to establish ... rely on any aspect
16 of any loss that is suffered by any particular combination of cartels which have been
17 found by the Commission, which have different participants, different time periods and
18 additional cartels then alleged by the claimants, which may have different periods,
19 different participants.

20 In each case, the --

21 THE CHAIR: How does this happen at trial? What the Claimant is not going to be
22 entitled to do is just throw a whole morass of information at the Tribunal and expect
23 us to sort out whether there's one cartel, two cartels, cartels for different products. At
24 the moment, all it has done is just flag, "Oh, by the way if I can't win on ground A, I will
25 try something lesser, a cartel between two out of the three".

26 I understand your point if that is the contention, that two out of the three are in a cartel.

1 That then creates a tension between the third and the two. But at some point the
2 Claimant is going to have to pin its colours to the mast, is it not, and say -- is it
3 contending, it's saying it's a cartel of two, what is it relying upon to support that?
4 Because once you start on the econometric analysis it becomes extremely difficult to
5 do. If on the other hand it's on the basis of the documents that have been produced
6 and just informs the view that it can't succeed against the third, that is a different point.
7 At some point the Tribunal has to understand what the case is. At the moment, I have
8 already indicated and this was the reason for indicating to the Claimant that he is going
9 to have to plead this out a little better at some point, explaining what analysis he is
10 doing. The point you're making really only arises if he is pressing his arguments on
11 a different cartel to the cartel between the three of you.

12 MS FORD: Sir, I fully endorse what the Tribunal says about the need for the Claimants
13 to better particularise their case, and the difficulty we face in trying to articulate the
14 problems, is that we don't know what case is ultimately going to be pursued against us.
15 In those circumstances, the Tribunal cannot possibly be satisfied now that it is
16 appropriate to require us to instruct one single expert in circumstances where --

17 THE CHAIR: That cuts both ways. We don't know.

18 If the case is that there's a cartel between the three of you, or it should be treated as
19 a single cartel in which the three of you are jointly and severally liable, and we're not
20 dealing with apportionment, where does the conflict arise?

21 MS FORD: In my submission that is not an appropriate proposition to put, in
22 circumstances where the pleaded case we face --

23 THE CHAIR: No, it is an appropriate proposition. I am putting it to you, so if you don't
24 want to answer it, it's up to you, but I do want to give you the opportunity.

25 MS FORD: Sir, you're asking me to assume that the Claimant only could choose a
26 case of a single cartel --

1 THE CHAIR: Plainly the primary case is there's a single cartel operated by the three
2 of you against his client, and that's led to an increase in prices. That's plainly his
3 primary case.

4 MS FORD: That is his ideal case that he would like to establish, but of course the
5 findings of liability that he seeks to rely on in part to support that don't establish
6 anything of the sort. They do establish multiple cartels, different participants over
7 different time periods and different products, it's very, very messy --

8 THE CHAIR: Not against his client, or are you saying they do? Sorry, you're not
9 making an admission I take it?

10 MS FORD: I'm certainly not making any admissions. We very much rely on the fact
11 that none of those findings actually do relate to his client. In those circumstances he
12 is advancing what we say is a very speculative case, that nevertheless there was
13 some overarching cartel --

14 THE CHAIR: It's going to be extremely complicated if he is contending that only two
15 of you are in a cartel, then the third member of the originally alleged cartel is not part
16 of that cartel and is in competition, but there may be umbrella effects from the two in
17 the cartel to the third. I really can't begin to imagine how we're going to unravel all that
18 at the moment. The idea that this gets pushed off for a few months and we then worry
19 about it at trial seems very unattractive, so --

20 MS FORD: Well, indeed, but that is exactly the point. As it presently stands all those
21 possibilities are open as against us, the Claimants will seek to continue to advance
22 those claims against us and I have shown you at 39; we see it again in 43,
23 an alternative case --

24 THE CHAIR: He's doing what any sensible pleader will do. He is saying there's a
25 cartel of three and if I don't get home on three, I will go for two. One can understand
26 why that is being pleaded. There are no particulars to support a cartel of two, as I

1 understand it, at the moment. Correct me if I'm wrong.

2 MS FORD: Again, I would very much endorse that there is no particular support of
3 this case --

4 THE CHAIR: I'm not -- we're going to have to resolve that. Mr Jones is going to have
5 to at some point, and I appreciate he is getting disclosure at the moment and he's not
6 in a position to answer all these questions today, but at some point, fairly soon, he is
7 going to have to explain what his case is. If indeed he is contending there's a case on
8 a cartel of two, he has a lot of downstream issues to worry about as to how he is going
9 to identify that cartel as distinct from the cartel as originally pleaded.

10 MS FORD: Sir, again I don't dissent from any of that. But I do say it can't be right that
11 the weakness of the case the Claimants are putting and the difficulties they have in
12 advancing their case should be used as reasons why we are not permitted our own
13 expert in order to respond to that case.

14 THE CHAIR: As of today, we may not be in a position to decide whether at trial there
15 will be a case of a cartel of two, and which two it will be and for what products. There's
16 no reason to assume that will be the case and therefore to make orders which
17 accommodate that case, if that's still not been determined.

18 Which is the reason for my question, which you haven't yet answered, assuming we
19 are down to the cartel of three, and he has to succeed or fail on that allegation, in
20 those circumstances, the only conflict I have at the moment written on my list is the
21 question of apportionment at the end of the day, should you plead further in relation to
22 this contribution or whatever.

23 On the assumption it's a cartel of three, should I have anything else on my list?

24 MS FORD: If the Tribunal narrows the issues down to an allegation of a cartel
25 involving all parties and excludes the possibility of any debate as to whether or not
26 multiple parties were involved in that cartel and also excludes the findings of liability

1 | which involve multiple cartels, then the issue that arises as between the Defendants
2 | is one of apportionment of liability for that single cartel.

3 | However --

4 | THE CHAIR: There is still the umbrella claim?

5 | MS FORD: There is still the umbrella claim. That then brings in questions of
6 | apportionment as between the umbrella claim and whatever cartel has been found to
7 | exist.

8 | THE CHAIR: I put the question to Mr Jones, which he was unable to answer: how are
9 | you going to be addressing the umbrella claim, with respect to, are you going to be
10 | putting -- how are you going to be addressing the fact that the umbrella may have been
11 | opened by different cartels?

12 | MS FORD: I can show the Tribunal what our economists say in their letter.

13 | THE CHAIR: Just tell me first in broad terms how that is going to be addressed.

14 | MS FORD: They say that they would have to --

15 | THE CHAIR: No, what do you say? You will be -- what is your case?

16 | MS FORD: I am reliant on what my economists say, because it's a methodological
17 | question. I understand that they say that what one would have to look at is the theory
18 | of harm, and the extent to which or how one could reason that the cartels which have
19 | been found by the Commission to exist, which relate to particular products and do not
20 | target the Claimants, how conceivably could those narrow cartels be concluded as the
21 | causal instrument/causal effect of some sort of increase in price in respect of other
22 | Claimants who are not targeted in any way?

23 | They envisaged that it would involve both an examination of the circumstances --

24 | THE CHAIR: You haven't pleaded at the moment that the umbrella effect is nothing
25 | to do with your client, it is to do with -- I will get the numbers confused -- the First to
26 | the Sixth Defendant, let's say. You say -- Defendant is responsible for the umbrella

1 effect, it is nothing to do with us. And therefore you've not pleaded out a separate
2 umbrella issue, have you?

3 MS FORD: In my submission -- to directly answer the question: no, we have not -- we
4 should not be criticised for that, because --

5 THE CHAIR: It's not a question of criticising, it is just trying to identify the pleaded
6 issues as of today.

7 MS FORD: Sir, it is important to understand that what we face is a myriad of
8 possibilities, all of which are maintained on behalf of the Claimant to ask us to identify
9 each possibility and say, "In that circumstance we say it was this Defendant that was
10 responsible for the overcharge, not that Defendant". In my submission that is simply
11 not practicable --

12 THE CHAIR: As of today you have no positive case on the umbrella, that certain
13 cartels only are responsible for the umbrella effect?

14 MS FORD: I think I am right in saying that we don't at this stage engage with it in that
15 level of detail, because we have not been told the case that we face in sufficient detail
16 to enable us to do so. But it's an obvious issue that arises in circumstances where we
17 are only an addressee of one of the two Commission decisions. Therefore, it
18 necessarily begs the question: any effect that is identified, is that attributable to a cartel
19 which we have been found to participate in or a cartel which we have not been found
20 to participate in? That's a fundamental conflict of interest as between us and the other
21 Defendants.

22 THE CHAIR: Right.

23 Where did you want to go next?

24 MS FORD: Sir, I think you have my submissions about the extent of the conflicts of
25 interest and the importance of not narrowing this down to what I would term the
26 Claimants' ideal case, because we, when we're defending ourselves, cannot afford to

1 simply focus on the ideal case. We have to be able to address all permutations of the
2 allegations that are being made against us.

3 We do say there is an obvious and concrete conflict of interest between us and the
4 other Defendants. That is all the more so when it goes to liability, as we've heard this
5 morning, not only at quantum but actually questions of whether or not we are said to
6 be in a cartel with our co-Defendants or not. How can our interests and the
7 co-Defendants' interests be aligned in circumstances where the Tribunal is asking
8 itself: are these people in a cartel? Are these two people in a cartel? Are these three
9 people in a cartel? The Defendants are very much -- there is no common interest as
10 between those parties.

11 I'm moving on to the second question, which I apprehend the Tribunal has concerns
12 about, which is the question of the possibility of three different and diverging
13 approaches --

14 THE CHAIR: Just before, we need to go back to the Defendant-by-Defendant
15 approach to analysis.

16 MS FORD: That is the point I am making.

17 THE CHAIR: Okay, fine.

18 MS FORD: E.CA having reviewed our data, the ZF Defendants' data, have reached
19 a provisional view that a Defendant-specific analysis is likely to be required in any
20 event. What is being suggested is not that each Defendant will produce a completely
21 different, completely conflicting market-wide analysis. What they are saying is we
22 think that there are specificities of the circumstances of particular Defendants such
23 that you need to look at each Defendant individually. They think that that is the case
24 even if there were a joint expert, and if we're right about that, then there is no efficiency
25 saving and no benefit in requiring it to be done by a joint expert. You're simply
26 requiring one person to do the same job otherwise done by three people.

1 THE CHAIR: With respect, that's not correct. Because you could have three experts
2 doing Defendant-by-Defendant analyses using different methodologies, or you could
3 have one expert doing a Defendant-by-Defendant analysis which is consistent, using
4 the same methodology and the same data inputs.

5 MS FORD: What they are envisaging is that the single expert will do their Defendant.
6 So they are not all going to do a Defendant-by-Defendant analysis for everybody, they
7 will do their own Defendant.

8 The second part of the point --

9 THE CHAIR: The Claimant will be faced with three different models and three different
10 ways of extracting data and three different ... not necessarily consistent conclusions
11 drawn from those models.

12 MS FORD: Two points about that.

13 The first is that the Claimants face that circumstance because they have sued multiple
14 Defendants. If the Claimants were confident that their ideal case, one cartel, were the
15 actual factual position, you sue one Defendant in that cartel and you say they are
16 jointly and severally liable for the entirety of the loss. It's a consequence of their
17 decision to sue three Defendant groups that they potentially face three analyses.

18 THE CHAIR: Again, you're not advancing a positive case that it's a subset of a cartel.
19 You're not saying, "I'm not part of the cartel", and pointing to the other two groups and
20 saying that they were the cartel and it's nothing to do with me?

21 MS FORD: We have to defend ourselves against any permutation of the case that is
22 put against us.

23 THE CHAIR: Right, I understand.

24 MS FORD: If I may just pick up the second element of your question. You were putting
25 to me that it might result in three different approaches, rather than using the same
26 essential approach to data. The answer to that is: if that's what's come out, it's

1 because the different circumstances of the data of the different Defendants
2 necessitated --

3 THE CHAIR: No, no, no, that's not necessarily the case at all, plainly. It could be -- you
4 could have ... of course there may be differences due to the data available, of course.
5 But you may have different approaches to analysing that data. One would assume
6 a single expert will at least attempt to produce consistent analyses, albeit with different
7 data sets.

8 MS FORD: It may assist to see what E.CA say about this. It's the core bundle, tab 17,
9 starting at page 115, please. This is their letter setting out their anticipated
10 methodology.

11 There's a headline point at paragraph 4. They make the point that in their experience
12 it is common practice for each Defendant to work with their own experts. They say:
13 "This is because of efficiencies related to data processing, methodological specificities
14 and potentially conflicting interests between the Defendants. Finally, and for the same
15 reason, we would expect Defendant-specific analyses to be required, even where a
16 single joint expert is instructed for all Defendants. This implies there is very limited to
17 no efficiency gain related to analyses on a single joint expert basis, but there is a risk
18 of a reduction in the quality of the analysis."

19 That's --

20 THE CHAIR: Why is it more efficient? Why is it more efficient for the purpose of data
21 processing and methodological specificities to have three different people do it rather
22 than one person do it? Could you just explain that to me?

23 MS FORD: Yes, it starts at paragraph 25 of this letter which is headed, "Difficulties
24 with carrying out adequate analysis on a single joint expert basis". You see this is
25 where they enlarge upon this point. They say:

26 "Efficiencies in relation to the data processing, methodological specificities and

1 potential conflicts."

2 26 is dealing specifically with data processing. They say:

3 "... the data collection process to date has been a substantial effort ..."

4 THE CHAIR: Slow down. With respect to data, you're reading 26, yes?

5 MS FORD: I am reading 26, yes.

6 THE CHAIR: Can you read it slowly?

7 MS FORD: "With respect to data processing, an overcharge analysis as well as the

8 analysis of the theory of harm require extensive data gathering and processing, such

9 as matching and cleaning."

10 They say:

11 "As explained above, the data collection process to date has been a substantial effort,

12 giving E.CA valuable knowledge specific to the databases of the ZF Defendants. This

13 relates, for example, to the interpretation of key variables such as prices and cost, how

14 to identify costs from margin measures to the extent they are not recorded separately,

15 and how to derive technical product features from product codes. This is specific to

16 the ZF Defendants" and the same would be true in relation to ...

17 THE CHAIR: Going back to 4, common practice, own expertise ... this is because of

18 efficiencies in relation to data processing and methodological specificities. So you're

19 saying you need to understand the data sets?

20 MS FORD: You need to understand the data sets.

21 That's the point that's made in 26 and the understanding is Defendant-specific. I mean

22 that's an important point to emphasise.

23 THE CHAIR: Yes, of course.

24 MS FORD: Then 27:

25 "Data further often has some limitations, like incomplete entries, incorrect entries,

26 outliers, such shortcomings must be adequately addressed to prepare the data for

1 further analyses and requires close cooperation with the data experts of each
2 respective Defendant, as they are Defendant-specific. Therefore, it is usually more
3 efficient for an expert to focus on one Defendant, unless the data situation is very
4 simple, which is not the case for the ZF Defendants."

5 These two paragraphs are what make good the point that there are efficiencies in
6 relation to data processing.

7 THE CHAIR: It's good to have somebody working with the data who understands the
8 product codes and the accounting systems.

9 MS FORD: It's good to have somebody focusing on the specific data of a specific
10 Defendant.

11 THE CHAIR: I mean, you are not seriously suggesting one expert doesn't have the
12 capacity to focus on three different -- with assistance, I mean, obviously.

13 MS FORD: I am not making a submission that it's not possible, that they are not
14 capable of doing it, but there are merits to having an expert who is particularly focused
15 on his in-depth knowledge of a particular Defendant. Then the Tribunal will be
16 assisted by three experts who each have that detailed specific understanding of their
17 Defendant's data, who can then convey that understanding to the Claimants' expert.

18 THE CHAIR: They may not be in a position to reconcile differences between the data
19 sets.

20 MS FORD: If that's the case, that is a factor which points in favour of a
21 Defendant-specific analysis. One can't simply paper over the inconsistencies by
22 saying, "We will give it to one expert and they can just come up with a less appropriate
23 model which seeks to pretend that they are all the same". That's exactly why
24 a Defendant-specific analysis is meritorious.

25 26 and 27 go to the first point, which is data efficiencies.

26 28 concerns methodological specificities and that follows on, they explain, from the

1 availability and interpretation of the available data, which is Defendant-specific:

2 "As explained above, the development of the methodology for analysis and the data
3 processing need to go hand in hand. Suppose, for example, that initial analyses for
4 the data for the pre-infringement period show that the quality of the data is too low
5 (e.g. due to missing characteristics), and the focus of the analysis needs to shift to
6 data covering the period during and after the infringement. Having a shorter period for
7 analysis, may affect further methodological choices, such as how to account for the
8 impact of demand."

9 They go on to say:

10 "We envisage to conduct the overcharge analysis principally based on data from the
11 ZF Defendants, complemented by public data where relevant. The advantage of
12 building the case based on ZF data covering prices, production costs and product
13 characteristics, is that it will be internally consistent and more comprehensive ..."

14 THE CHAIR: I understand this is an argument why you want to do it Defendant-by-
15 Defendant, which --

16 MS FORD: Yes.

17 THE CHAIR: That's different to whether or not you have the same expert, that's a sort
18 of parallel issue.

19 MS FORD: It is a related issue, because if one accepts what this goes to, which is
20 that the sensible way to address data in this case in the opinion of these economists
21 is to do a Defendant-specific analysis, then of course it's quite right that one could
22 bring in one expert and require them to try and do all of that, but one could equally
23 have experts who are focusing on each individual Defendant and the overall scale of
24 the task doesn't change.

25 THE CHAIR: At some point you need to reconcile these different analyses, don't you?

26 MS FORD: That is the point that they make in the second half of this paragraph. They

1 say:

2 "As a result, it would likely be necessary to account for the effects of costs separately
3 for each of the Defendants, even if a single joint expert were to conduct the analysis."

4 THE CHAIR: That's not the point I mean. At some point you need to
5 reconcile -- assuming the evidence shows, and I'm talking the documentary evidence,
6 shows that you were operating a cartel, let's assume we're trying to look at the impact
7 on the overcharge, and we're analysing Defendant data sets, and they are giving us
8 different answers. Someone has to reconcile those different answers.

9 How would that happen from the Defendants' perspective? Your data may be deeply
10 unattractive, whereas for Mr O'Donoghue's clients the data may be actually much
11 more favourable. How is the Tribunal going to decide which -- assuming you are
12 operating a cartel, how is the Tribunal going to decide what the overcharge is to the
13 Claimant, without trying to do some sort of reconciliation?

14 MS FORD: What the Tribunal would have is a measure of overcharge in respect of
15 those sales that were made by my clients and a measure of overcharge on those sales
16 made by Mr O'Donoghue's clients. You would also have the benefit of expert evidence
17 from the economist who was versed in the data on which those results were based,
18 who would be able to comment on the factors they've taken into account, the
19 judgement calls they've made and essentially the methodology that they think is most
20 appropriate, applied to the specific circumstances of that Defendant.

21 The Tribunal then itself will be in a position to determine whether or not it considers
22 that analysis is robust or not. It will have the benefit of the explanation from the
23 particular Defendant's expert as to what they have done and why.

24 Of course it's for the Tribunal then to decide. We're persuaded that in circumstances
25 where defendant X has no cost data for this period it is more appropriate to conduct a
26 before and after analysis in relation to the later period, because of the specificities of

1 that defendant's data. However, we consider that the same doesn't apply to defendant
2 B, because their data is strong in this period but not that period.

3 PROFESSOR NEUBERGER: I'm still slightly baffled how the Tribunal will handle this,
4 because if we hear from the Claimants that their expert economic evidence was that
5 there was an overcharge in the period compared with the clean period, and then we
6 get from the experts on the other side, looking separately at subsets of the same data
7 and coming to a variety of different conclusions, it's not going to be terribly helpful,
8 because what we would like to know, it seems to me, is on the basis of all the evidence,
9 was there evidence of an overcharge or not? Was there evidence of a cartel or not?

10 I can't quite see how the three Defendants' separate expert reports really help answer
11 it. They tell us a lot about the individual data sets, sub data sets, but they don't go to
12 the fundamental question that we're interested in.

13 MS FORD: Well, they will tell you the extent to which there is an overcharge on that
14 Defendant's case on the sales that they made. It's true that that's not a market-wide
15 analysis, that relates to their sales. But the Tribunal across the three reports will have
16 a report on the position of each of the Defendants who are essentially the subject of
17 these claims. Insofar as there are different answers across different Defendants, the
18 Tribunal would have to interrogate whether or not it considers those discrepancies to
19 be justified or not by reference to the underlying data and the particular circumstances
20 of that Defendant.

21 What's important to emphasise is that the Tribunal will not necessarily be in any better
22 position if there is a single joint expert. Because if these differences in the way in
23 which you approach different Defendants' positions are justified -- of course it's a
24 matter for the Tribunal to decide whether they are -- then the same will apply to the
25 approach of a single joint expert. They too would have to make those distinctions,
26 because it would be appropriate on the basis of the Defendants' circumstances.

1 What is the risk? The risk is that a single joint expert, who is attempting to reconcile
2 the positions of multiple Defendants, whose interests are not necessarily aligned, the
3 risk is that what you get is a superficial reconciliation, which is actually less robust
4 because that Defendant is trying to draw lines across multiple Defendants, when
5 actually that's not appropriate, when actually there are relevant differences that need
6 to be drawn.

7 There is a real risk in assuming that because one person does the exercise the
8 outcome will be more robust and more resilient than if you have individuals doing it.

9 PROFESSOR NEUBERGER: I am still slightly baffled. Suppose we have a case from
10 the expert for the Claimants that there is clear evidence from the entire spectrum of
11 data which is common to both sides that there is clear evidence of a cartel operating,
12 in the sense that charges in one period were higher than in the other period. It would
13 seem to me to be really helpful to the Tribunal for somebody who can confront this
14 across the board and say, "I have examined all the data. I understand the peculiarities
15 of each of the data sets and actually, here is a critical appraisal of what the Claimants'
16 expert has put forward".

17 It seems to me that's likely to be much more helpful and at that stage at least does not
18 involve any significant conflict between the Defendants, because the Defendants have
19 a joint interest in saying there was no cartel.

20 MS FORD: Sir, one can't necessarily assume that there is at that stage no conflict
21 between the Defendants, because if one puts forward an overall analysis, that will
22 necessarily involve judgement calls as to what is the appropriate methodology, what's
23 the appropriate period, what's the appropriate data, and the answer to those
24 judgement calls may differ as between Defendants.

25 Even in making those more micro judgement calls, the expert is put in a very difficult
26 position if the circumstances of different Defendants do differ. The evidence of my

1 | economist, or the opinion of my economist in this letter is that they, having looked at
2 | the ZF data, do anticipate that there will be specificities that require the expert to make
3 | those sorts of judgement calls. So it does put them in a very difficult position.

4 | In my submission, the circumstance that the Tribunal is worried about, that it will have
5 | three expert reports from three Defendants, is, first of all, a commonplace scenario,
6 | because that is essentially what normally happens and the way in which the Tribunal
7 | reconciles it is to test the robustness of the assumptions that have been made in
8 | relation to each particular Defendant.

9 | I fully accept the Tribunal's preference to only have to test the robustness of one report
10 | rather than three, but insofar as there are relevant differences between Defendants,
11 | in my submission, that's something of a false economy, because you still need to be
12 | satisfied that the differences in approach in relation to each Defendant are or are not
13 | justified.

14 | PROFESSOR NEUBERGER: My problem with what you're proposing is that I'm not
15 | getting three separate views on the same thing, I'm getting one view from the
16 | Claimants based on the totality of data, and three separate views from different experts
17 | based on subsets of the data. It doesn't seem to me particularly useful to get a view
18 | from an expert on the subset of data when it's clearly important relevant data which
19 | has been shared among the parties, which the other parties have access to, which
20 | they're excluding from their analysis.

21 | MS FORD: There is no artificiality, in my submission, in focusing on a subset of data
22 | in the sense that that data originates from a particular Defendant. One can then take
23 | the analyses of the Defendants' economists collectively and say that does cover the
24 | market as a whole.

25 | PROFESSOR NEUBERGER: With respect, no, it doesn't, because taking three
26 | evidence sets separately you may well be unable to reach a conclusion. Taking them

1 together they may well have information in them which does lead to a conclusion, but
2 it does not seem to me that three separate reports, each focusing on one subset of
3 the data, is the same as having a co-ordinated report, based on the totality of the data.
4 MS FORD: Sir, I think there is an assumption underlying that, which is that
5 a corroborated report based on the totality of the data is the correct way to go, and
6 that's something which is not at all evident.

7 If I can ask you to look, for example, at paragraphs 34 and 35, which is where E.CA
8 address this. They recognise a theoretical advantage. They say:

9 "The main potential advantage of combining data sets is the large number of
10 observations. However, the advantage may be largely lost when trying to account for
11 supplier specificities. For example, if a certain variable is not available for all
12 Defendants, the analysis cannot account for this dimension in a model that combines
13 data of all the Defendants. In such situations it is necessary to carefully consider
14 whether benefits related to bundling analyses or pooling Defendant-specific data
15 outweigh the costs."

16 They go on in 35:

17 "Thus, in general terms, it is possible to say that in a situation where the data
18 processing appears simple and not firm-specific and where the methodological
19 choices are likely to be common, a combined analysis may be considered right from
20 the beginning. However, in a situation where the data processing appears complex
21 and firm specific and the methodological choices likely need to consider data issues
22 and specificities related to the operations of the Defendants, this may not be
23 an effective choice. My current view, given my understanding of the industry and the
24 available data, is that the situation in these Proceedings corresponds to the latter."

25 If it transpires that there are benefits to taking a combined data set, then no doubt both
26 the Claimants and the Defendants can do so. So, if on analysis of the data, it

1 | transpires that that sort of market-wide approach that the Tribunal anticipates would
2 | be very helpful can be done, then no doubt the parties can do it.

3 | The concern is that that may not be the most viable approach on this case. If it's not
4 | the most viable approach from the Defendants' perspective, then the Claimants are
5 | not going to be offering this Tribunal an overall market-wide approach either, because
6 | they will be faced with the same issues.

7 | PROFESSOR NEUBERGER: Sorry, I should have been clearer, I think there's the
8 | distinction between trying to produce one mega model with data from very different
9 | sources, with very different problems in it, which I'm prepared to accept the judgement
10 | of your economist is not a sensible way forward in this case.

11 | An economist taking a view on the implications of three separate data sets, which they
12 | may want to model differently, and coming to an overall view on the basis of what that
13 | evidence shows, it seems to me that the expert economist can usefully say something
14 | about the data across the board, even if she is not modelling it as one big model.

15 | MS FORD: In my submission, insofar as this is true, that is something a Defendant
16 | economist could do, but it doesn't necessitate confining the analysis to a single expert
17 | economist in order to achieve that outcome.

18 | Of course the Tribunal has my submissions that there are very significant
19 | contraindications, there are very important reasons why one wouldn't want to be
20 | confined to one economist, which should not be overridden by the practicalities in the
21 | way that the Tribunal is concerned to do.

22 | The Tribunal has the points I make in relation to the Claimants' view of the
23 | practicalities. They've spent some time in their skeleton saying it would be easier for
24 | their expert to respond to a single expert rather than multiple experts. Of course that
25 | can't be overstated in circumstances where it looks like the data might well involve
26 | Defendant-specific analyses anyway.

1 We do say that those sorts of complaints ring a bit hollow in circumstances where, first
2 of all, they are the consequence of the number of Defendants the Claimants have
3 chosen to sue.

4 Secondly, in circumstances where they haven't seen fit to mention these supposed
5 problems until the Tribunal itself voiced them at the last CMC. Of course it was the
6 Claimants themselves who put forward for directions to trial, who envisaged that their
7 expert would be responding consecutively to the expert reports of the Defendants, on
8 the assumption, at that stage, that each of the Defendants, in the usual way, would be
9 supplying a separate report.

10 We do say those sorts of points that the Claimants now raise should be given limited
11 weight, in the sense that they are clearly somewhat opportunistic. Conversely, we do
12 say that there are very significant inefficiencies, costs and genuine unfairness in
13 requiring us, the Defendants, to instruct a joint expert at this stage. It means that at
14 least one Defendant, if not more, would have to cease instructing the expert that they
15 have chosen to instruct and that they've been working with and that they have invested
16 time and effort and understanding in working with them to understand the data and
17 systems of that specific Defendant. They are going to incur wasted costs in that
18 respect and incur further costs in instructing a separate expert and bringing them up
19 to speed.

20 We say of course the data availability issues have to ultimately be understood by all
21 experts so that they can engage with them, but that doesn't mean that it's
22 appropriate --

23 THE CHAIR: Do you have any figures --

24 MS FORD: I can -- we have evidence about the extent of their involvement, I don't
25 think it actually goes to the extent of figures.

26 MR O'DONOGHUE: We have given a figure of £200,000.

1 THE CHAIR: It may be more expensive, it may be less expensive, we're not in
2 a position ... we don't have figures to reconcile today.

3 MS FORD: It would certainly be more expensive, in the sense that those are sunk
4 costs and the requirement would then be to instruct a different expert.

5 THE CHAIR: It may be difficult -- we've only got three of you chipping in to one expert
6 at trial, swings and roundabouts. That's not the point, the point is we don't have the
7 figures, we don't have the predictions of costs with a single expert as against the
8 predictions of costs for independent experts.

9 MS FORD: We haven't put forward that analysis, we do say that these are wasted
10 costs, in the sense that we have already invested --

11 THE CHAIR: I understand that, I have that submission.
12 Is there anything else?

13 MS FORD: I simply say in response to a point that is taken against me by the
14 Claimants in their skeleton, it cannot be said that the Defendants are to blame for any
15 wasted costs in circumstances where we have raised or the Claimants raise no
16 objection --

17 THE CHAIR: I don't think we're suggesting that this is your fault. It's a point raised by
18 the Tribunal and it's a case management matter, subject to your submissions.

19 MS FORD: Sir, in those circumstances, those are my submissions.

20 THE CHAIR: I'm grateful.

21 Mr Jones, I think the issue that's of particular interest, we've read your skeleton
22 argument, but the point which is in the air a little bit about whether we are going at trial
23 to be dealing with an allegation that the cartel involves all three Defendant groups, or
24 whether you're contending that the cartel is narrower than that or whether there's more
25 than one cartel.

26 I understand from our previous conversations you're not in a position to answer that

1 today and indeed you're still receiving disclosure and yet to receive -- you have
2 applications for further disclosure. But you will also appreciate my comments in the
3 direction of Ms Ford earlier, which were really directed to you, that don't think you're
4 coming along to trial throwing up the possibility of every permutation and combination
5 without pinning your colours to the mast. If you have alternative cases they are going
6 to have to be fully pleaded, fully argued, there is going to have to be an entirely
7 independent analysis of those alternative cases.

8 I don't know if you're in a position to assist us at all in that respect today, but perhaps
9 you can let me know where you are on all this.

10 MR JONES: We will be thinking about that over the adjournment, in combination with
11 the directions points because it raises timetabling issues.

12 I'm not pushing back on what you've just put to me, it's also true that I'm not going to
13 be the person who has to do those amendments in the next few months, because I am
14 here today and then not, so I need to liaise with Mr West, or at least his clerks, to think
15 about the timing and how we can pull all of this together.

16 Sir, I will do that and I will come back after the break.

17 THE CHAIR: As we understand -- obviously those behind you understand the case
18 far better than we do at this stage -- you're relying on significant documentary
19 evidence --

20 MR JONES: Yes.

21 THE CHAIR: -- to articulate the fact that there was a cartel.

22 MR JONES: Yes.

23 THE CHAIR: In the final analysis you may say that cartel is good against these two, I
24 can show it on the documents for these two groups, the third one is looking a bit iffy, I
25 may pursue that, I may not pursue that. I understand that on the documents. We will
26 have to take a view and make a decision.

1 When it comes to the econometrics, I'm not quite sure how -- you can see the price
2 pressures, but I am not sure that's really going to assist you in being able to decide
3 how many of the Defendants were involved in the cartel. I may be wrong about that,
4 but --

5 MR JONES: I suspect that that is right, but I add the caveats I added earlier.

6 THE CHAIR: Of course, of course.

7 One way forward today potentially is that you are at some point going to have to pin
8 your colours to the mast as to whether or not your very briefly pleaded alternative case
9 is being pursued. That would need to be in advance of your submitting your expert
10 reports, sometime between now and Christmas at an appropriate date. Obviously you
11 need to get all the disclosure in first, I appreciate that.

12 MR JONES: That is the complication, which we need to put our heads together on,
13 but, yes, I see that. In broad terms I am not going to push back, I see the force of what
14 you're saying, Sir.

15 THE CHAIR: Are you not instructed on the case generally, are you just --

16 MR JONES: I'm here for the CMC. I fortunately was able to hear the questions earlier
17 and hopefully will be able to answer them.

18 THE CHAIR: I understand.

19 MR JONES: That's the position.

20 THE CHAIR: In terms of what else can we usefully deal with in the next -- some other
21 submissions.

22 MR JONES: I see that the expert issue could be short cut along the lines that, Sir, you
23 just put to me or at least deferred until the pleadings have been crystallised. So if
24 that's the direction, you're not going to want to hear from me on these submissions
25 that I have set out here.

26 Can I just say that I do, in the course of the submissions I was planning to go through,

1 address this point about different cartels, because even if there were different cartels
2 with different participants, when you actually drill down into it, it's quite hard to see
3 what the actual conflict there would be.

4 THE CHAIR: The potential conflict, as I understand it, was, "Look, if the cartel is being
5 pushed off to defendants A and B", so the expert is saying, "Look, I think there's
6 evidence the cartel is against A and B, it's a little bit more difficult with C", then the
7 potential liability is now being shared between two parties, not between three parties.
8 So there is -- sorry, do I have that wrong?

9 MS FORD: Sorry, I wouldn't want the Tribunal to proceed on the understanding that
10 it's solely a question of liability, because it's of course a question of quantification --

11 THE CHAIR: That's what I meant. Inaccurate in my question.

12 Obviously, the overcharge is now having to be divided between A and B, as opposed
13 to between A, B and C. That would potentially seem to be an area of conflict if the
14 expert was giving evidence that was irrelevant to that.

15 MR JONES: The difficulty.

16 THE CHAIR: Does that make sense?

17 If the overcharge is £1 million, which of course it's more than that --

18 MR JONES: I'm hesitating slightly because I don't know whether you want me to
19 respond to the application or whether there's a case management solution at this point
20 which it would be better to go down.

21 THE CHAIR: I think there is a principle underlying, the case that is being put is quite
22 broad, irrespective of whatever else happens they're entitled to their own expert,
23 because this is complex, this is important, and this is beyond just case management.
24 There are in cases of this type and of this magnitude, even with uncertainties, as
25 a matter of principle or as a matter of pragmatic case management, they run both, they
26 are entitled to their own Defendants -- their own experts, sorry.

1 That point of principle, I think, would need to be addressed today.

2 I think there's a secondary issue as to whether or not there's a specific conflict and
3 whether that conflict has arisen yet. You will have an enormous job persuading us
4 that if there is a conflict they are not entitled to their own experts, because that wouldn't
5 be consistent with the normal approach of this court.

6 We've read your skeleton on the broader points, but is there anything you would wish
7 to elaborate on the broader points?

8 MR JONES: Shall I make a start now before the adjournment?

9 THE CHAIR: Yes.

10 MR JONES: The starting point on the conflict question is that their commercial
11 interests in the case as pleaded by the Claimants are aligned, or at best indifferent.
12 What I mean by that is they all clearly, as a starting point, will be arguing and have
13 pleaded that there was no overcharge. They all have an interest in showing that if
14 there was an overcharge it was as low as possible. The primary case, and when the
15 case is finessed, will remain that there was a cartel with all three involved.

16 Sir, that takes me then to the point we were just discussing, which is what if there was
17 instead a fallback cartel? Let us take the example of a cartel which ZF wasn't in. Of
18 course, one of Ms Ford's points is well, the umbrella case necessarily raises this at
19 the moment, because ZF was not in one of the Commission decisions. If one then
20 asks what's the actual conflict there for ZF, it's hard to put your finger on it, because
21 ZF are not saying, "Yes, there was a cartel which other people were involved in, which
22 caused an overcharge". They haven't pleaded that, it would be an odd turn of events
23 if ZF were actually in conflict with any of the others, because they actually wanted to
24 plead that there was a cartel with an overcharge but that it wasn't in it.

25 In the course of her submissions my learned friend said in answer to one of your
26 questions, Sir, that one of the Defendants might want to say and, I quote, "It wasn't

1 me, it was my co-Defendant". None of them have pleaded to that --

2 THE CHAIR: No, I have that point.

3 MR JONES: That simply is not in issue at the moment.

4 They have all denied in terms that there was any overcharge, that is: Autoliv,
5 paragraph 62; ZF, paragraph 17; and Tokai Rika, in various places, but paragraph 3
6 among others.

7 At best they would be indifferent. More likely they would remain in their currently
8 pleaded position, which is there was no overcharge. In which case, they would be
9 aligned. It is hard to see how it would arise that they would be pointing the finger at
10 each other. Sir, I appreciate that of course goes back to your --

11 THE CHAIR: It comes back to the point, I mean if the expert is saying ... all three are
12 in a room with the expert and he is starting to say, "I think it looks like groups A and B
13 that are responsible for this", then now there's a conflict, because group C is smiling
14 and saying, "Right, suddenly I have lost this liability off my balance sheet". In the
15 meantime, A and B have potentially a larger liability on their balance sheet.

16 In those circumstances, there is a potential conflict and its starting to crystallise out.
17 That is, as I bring you back to the pleadings, dependent upon you saying I may perm
18 two out of three.

19 MR JONES: It is reliant on that and also, Sir, the question which you rightly put to me,
20 which is: is the expert analysis actually going to help decide who was in the cartel? I
21 said to you, "That sounds unlikely to me".

22 We clearly do need to come back.

23 THE CHAIR: On the umbrella claim, yes.

24 MR JONES: The same point. The same point would apply generally. Clearly we
25 need to come back on that and so I understand that there's a need for a procedure to
26 do that.

1 The point which I emphasised at the outset is not only are their principal interests
2 aligned, they haven't pleaded any different and the only way of them trying to identify
3 different interests is to come up with hypothetical scenarios, which haven't arisen, and
4 even when they do arise, none of them have said that their experts are taking different
5 approaches to any of these questions. None of them have given you any material on
6 which to base a conclusion that there might be conflict. Keeping in mind, of course,
7 that the experts anyway have to be independent.

8 I'm not going to labour that point, because I know my learned friends accept it, but it's
9 an important background point which is: they're not hired guns.

10 THE CHAIR: I also have sympathy to the view that, of course, the way they are
11 instructed the way, they live with the case means they're not --

12 MR JONES: I appreciate that.

13 THE CHAIR: They're not impervious to influences.

14 MR JONES: Sir, I appreciate that.

15 That also focuses attention on what is the Tribunal going to be deciding? The reason
16 why we have different experts on the Claimants and the Defendants is because they're
17 going to be disagreeing with each other. That is going to be a useful process for you,
18 the Tribunal, to decide between them.

19 When the Defendants hypothesise that they might have experts who take different
20 approaches, they're not even suggesting that they are going to be disagreeing with
21 each other and tell you what their different processes are. There isn't even a process
22 at the moment for any differences as might arise between experts to be looked at, and
23 it will be completely impractical.

24 Apportionment -- I see the time, perhaps I should pause there and come back at
25 2 o'clock.

26 THE CHAIR: Just deal with apportionment.

1 MR JONES: Apportionment is similar in these senses, it's not pleaded, you're not
2 going to have to decide it. The point again goes further, because what Ms Ford has
3 said is each Defendant's expert will look at their own overcharge.
4 We will come on later to talk about whether that is sensible and, if it is, what the scope
5 of it is. Just focusing back on apportionment, you have each Defendant expert looking
6 at overcharge for their client. None of them, as I understand it, are going to be looking
7 at the other Defendants' data and saying, "Actually, they charged a high overcharge".
8 ZF's expert isn't going to be saying, "Autoliv charged a high overcharge" and vice
9 versa.
10 Again, if you drill down into that, not only is it not actually an issue in the proceedings --
11 THE CHAIR: It may well be, one can envisage the experts -- after everything is
12 exchanged they will then start lashing out at the other experts.
13 MR JONES: It's extremely late in the day.
14 THE CHAIR: It is not pleaded at the moment.
15 MR JONES: It would be extremely late in the day to raise that as an issue later on.
16 It's not the normal course of these cases. For obvious reasons, which is the
17 Defendants don't want to be at each other's throats at the Tribunal.
18 THE CHAIR: How is apportionment normally dealt with in these cases?
19 MR JONES: Settlement or you issue proceedings ... there are cases, like one of the
20 ones in the bundle was a case where there was a part 20 brought in, so it does happen,
21 I am not saying it never happens.
22 THE CHAIR: Often in separate proceedings --
23 MR JONES: I think so. The reality is they will settle. I don't know of any cartel case
24 where -- yes, you would be left to have separate proceedings and then work it out
25 between yourselves.
26 The reason why you wouldn't, as Defendants, want to have that argument before the

1 Tribunal is apportionment is on the basis of what is fair in the circumstances. It
2 wouldn't actually just be looking at the numbers, you would be looking at who was
3 involved, who was the ring-leader, all of those sorts of things. When I say they don't
4 want to be at each other's throats, that's why they don't want to do it.
5 That isn't an issue and there's no hint that it would be. The point which I am making
6 is, you're therefore not going to have Defendants in conflict with each other because
7 of apportionment, because none of them are going to be pointing a finger at someone
8 else's overcharge and saying that it's higher than their expert says it is.
9 It's a spectre of some discussion which might happen between them in the future,
10 which is actually really difficult to tie back to anything that their experts might be doing.
11 So my next topic is Defendant-by-Defendant. It follows on from apportionment but I
12 have got a lot more to say about it. Shall I pick that up after the adjournment?
13 MR O'DONOGHUE: I understand Mr Jones wants to take instructions on what his
14 case is on certain cartels, but there is a pragmatic issue. We've heard about the sunk
15 costs already incurred with experts, £200,000. You'll see at tab 45 of the core bundle,
16 the Claimants have added 11 economists on 11 October to the ring, which I think gives
17 a total of 18. So the experts are gearing up as we speak. We need to know -- there
18 is a chicken and egg, I understand that, in terms of disclosure and what is the
19 alternative case if any. But we need to reach a terminus on this very, very soon,
20 because, if not, there may be prejudice to the Defendants.
21 THE CHAIR: I'm not putting pressure on Mr Jones to give me a final answer today --
22 MR O'DONOGHUE: These are pragmatic concerns.
23 THE CHAIR: The disclosure has not yet all been produced. You raise very fair points,
24 but this is about case management, we need to deal with it efficiently but we
25 can't -- because costs are running. I mean costs are going to be running if we order
26 three experts; costs are going to be running, it's not as if --

1 MR O'DONOGHUE: To be clear, it's not really a question of costs, it's a question of
2 fairness, which is --

3 THE CHAIR: Absolutely.

4 MR O'DONOGHUE: As things stand, we do not know if it's one expert or multiple. If
5 it's one expert, we need to get on with that ASAP. If it's three experts, likewise.

6 Of course, the expert evidence as it stands, the first round is due in February, it's not
7 that far away, we have a trial in one year.

8 THE CHAIR: It's sequential though, isn't it?

9 MR O'DONOGHUE: It is sequential, but there is not a huge amount of flex for kicking
10 the can down the road is the point.

11 **(1.05 pm)**

12 **(The lunch adjournment)**

13 **(2.00 pm)**

14 MR JONES: Sir, I was coming to the Defendant-by-Defendant analysis. There are
15 three points that I want to make in relation to that.

16 The first is really to pick up on Professor Neuberger's point about it being unhelpful to
17 have three separate reports, each focusing on a subset of data.

18 You will have seen, I hope, that in the letter from the Claimants' economist he expands
19 on this. He makes the point that ideally one would look at a pooled data set. That
20 proposition, that ideally one would look at a pooled data set is, I think, common ground.

21 Ms Ford read out from the E.CA letter which said that their current view is that wouldn't
22 be possible, but in the passage which she read out, acknowledged that if it is possible
23 then it may be preferable.

24 That's important because even at the starting point, you can see that it needs to be
25 investigated -- is it possible to do a pooled analysis needs to be investigated. So any
26 economist instructed on the case to answer that question, can it be done, would need

1 to look across the three data sets. That's the first point.

2 The second point is in any event, even if you do three separate analyses, you would
3 need to look at those analyses in the round to look at the question that you're
4 concerned with, which is the overcharge in the round. You cannot simply have three
5 separate Defendant-by-Defendant analyses. You need to stand back and ask what
6 the impact was on the Claimants in the round.

7 The third point, this is really the key point for my purposes, is this: If you have three
8 models from three separate economists, you will find that they make very different
9 methodological choices and that will create real difficulties in trying to reconcile them,
10 and in trying to decide on the overcharge.

11 THE CHAIR: That's not your problem. If the Defendants run three different cases that
12 you can't reconcile., you're smiling from ear to ear, aren't you?

13 MR JONES: No, I'm not, because it becomes an issue that the Tribunal has to grapple
14 with, and that the Claimants' expert also has to grapple with.

15 Because if you look, for example, to the *Royal Mail v DAF* case and the discussion
16 that you see in that case about the expert reports. The Tribunal there faced two reports
17 on overcharge and it was able to identify the main methodological differences between
18 them, by which the Tribunal meant the main things which were driving different results
19 from those two models.

20 I think there were four in fact, the Tribunal described it as three, but actually discusses
21 four different key drivers. The Tribunal also makes the point -- I won't take you to it
22 unless it would help, but it is the point quoted in my skeleton -- that beyond those four,
23 there were a series of other differences between the models that weren't even visible
24 to them, because there were all these specifications in the models which were not
25 transparent unless they are brought out clearly before the Tribunal.

26 What the Tribunal did there was to consider the merits of the conflicting approaches

1 on each of these four different variables which were driving differences in outcomes.
2 At the end of that they stood back and, in broad terms, said, "We agree with the
3 claimants on some of these and the defendants on some of these and doing the best
4 we can ..." broadly speaking, they cut it down the middle.
5 What you would have here -- let us take an example, demand. Regression models
6 often include a proxy for demand. In other words you are saying, well, prices move
7 because of various different factors, costs are one set of factors, demand is another
8 set of factors. Economists often, because of that, try to come up with some proxy for
9 demand. Economic growth might be a proxy for demand, if there's a lot of growth you
10 might say that sort of captures demand.
11 This is all entirely hypothetical I should say, because of course we don't know what
12 variables they are using. What you could find is one economist saying I am using
13 a data set on economic growth to proxy demand.
14 Another economist might say, I agree economic growth is the right proxy, but I have a
15 different data set.
16 A third might say, actually a better proxy is cars sales, for example, car sales would
17 be a good input here, because we're talking about the car industry.
18 The fourth might say, actually I think all of that doesn't make sense and we don't need
19 to proxy demand, I'm just going to be looking at costs.
20 You would then be faced with four different approaches on one topic, not two, and they
21 proliferate. That's one example. There's a huge number of judgement calls of that
22 nature. So, we would have to deal with it to decide to persuade you of the errors of
23 the three conflicting ones.
24 But it's worse than that, it's worse than that because you might think that's all right, we
25 can deal with that problem in the same way that the Tribunal did in *DAF*. Instead of
26 two different approaches, we will look at four different approaches and then we will

1 | decide which is the best.

2 | There are, in my submission, several flaws in that way of thinking.

3 | Firstly, I go back to the point about the sheer number of them. It's hard enough to

4 | work out the key differences when you have two economists.

5 | When you have four, there will be a large number of differences. They are not, to be

6 | clear, and just responding to something my learned friend said, they are not

7 | differences which are just because the data is different.

8 | THE CHAIR: No, I appreciate that.

9 | MR JONES: It is not that at all. There are a series of judgement calls. So you would

10 | have a very large number of differences.

11 | They would be difficult in the first instance even to identify, because even unpicking

12 | the reports to see what the differences are is a complex process.

13 | Then you would envisage a process of the Tribunal focusing not only on the difference

14 | between the Claimant and one Defendant, but the Claimants' expert and three

15 | Defendants' and the disagreements between them because they would all have their

16 | particular reasons for having chosen it.

17 | Sometimes they might be perfectly valid differences, so it may well be the point Ms

18 | Ford made is not completely wrong, it may well be this model only works if you use

19 | this particular data and another model only works if you use that data.

20 | That sometimes happens, so there may be all sorts of reasons but it's massively

21 | complicated --

22 | THE CHAIR: What do you say to the point that this is not how it is normally done --

23 | MR JONES: I do not know, I will come on to that.

24 | I do not know of a single case where four experts have given evidence on overcharge.

25 | I accept it has been envisaged that it might happen, but a trial going ahead, I am not

26 | aware of one. I will come back to that if I can in due course, but what it is envisaging

1 at the moment is this cross-cutting argument on all of these kinds of judgement calls.
2 The last point just to make is you can't, Sir, just tweak the models. This may be self-
3 evident, but just to be absolutely clear. It is not possible in the hearing for the Tribunal
4 to say, "I prefer this expert's approach on economic growth and that expert's approach
5 on some other variable and that expert's approach on whether to use a proxy, all those
6 sorts of things. Now please go away and build a super model that combines our
7 preferences."

8 You would end up having to make a judgement call which would be so vague, because
9 there would be so many different factors in each of the different reports, and so difficult
10 to reconcile, that it would be less accurate than having two. So the reason I'm
11 emphasising that -- and I emphasise it again now -- this is not about what is easiest
12 for the Claimants. I accept that the main question for you is what does justice require?
13 I totally accept that.

14 THE CHAIR: Quality of justice is obviously what we have to have regard to, whether
15 that is improved by the focus on --

16 MR JONES: That's exactly right.

17 THE CHAIR: On rival positions or whether it becomes justice is the casualty when
18 one starts having a number of different expert reports and different approaches being
19 thrown at the Tribunal.

20 MR JONES: That is precisely my point. My point is, to put it in colloquial terms, it
21 would be extremely finger in the air if you have four different reports addressing slightly
22 different things, not being reconciled between each other, the Defendants maybe or
23 maybe not actually saying why they disagree with each other. That's why I say having
24 multiple Defendant experts would make this less rather than more susceptible to a fair
25 resolution.

26 One can, of course, contrast that to what the position would be if there were a single

1 expert. I appreciate to an extent it is self-evident, I just make the point that we are not
2 closing the door on a Defendant-by-Defendant analysis.

3 THE CHAIR: We understand that point, yes.

4 MR JONES: Can I come to other cases. There was a comment in Mr O'Donoghue's
5 skeleton argument about something to the effect of there being a hundred private
6 damages claims in this jurisdiction and never an order to share experts. I wasn't
7 entirely sure what that meant. Obviously, there are lots of cases where claimants
8 share experts. There are cases where defendants share experts on particular points,
9 on pass-on, for example, in the other PSA case. That was the order there. Now, of
10 that 100, only a subset would have included multiple defendants anyway. I entirely
11 accept there isn't a case that I'm aware of where defendants have been required to
12 share an expert -- I accept that. I would also make the point that as far as I'm
13 aware -- my learned friends will say if this is wrong -- there hasn't been a case that's
14 gone to trial against three or more defendants. So, there are a couple of cases that
15 you have been shown where the Tribunal has contemplated having multiple experts
16 on overcharge. It hasn't been, as far as I am aware, tested as a practical suggestion.
17 There may be regulatory cases with four or more experts on a particular issue because
18 in a regulatory context the Tribunal has no choice because the appellants have to put
19 in their expert evidence with their notices of appeal. I'm actually not aware of that
20 happening but it's perfectly possible it would have happened there when you have a
21 big cartel and the CMA as the respondent and so on.

22 In the private damages context, I'm not aware of it happening. It therefore does, at
23 least to our minds, appear that this Tribunal is going to be breaking new ground
24 whichever way you go. You're either going to be testing what it's like to have four
25 experts, or you're going to be proceeding on a basis where the Defendants share an
26 expert on overcharge. As I have said, the question is what will work best for the

1 Tribunal.

2 The *Trucks* case I should address you on in the Court of Appeal. Could we look at
3 that. It is in the authorities bundle.

4 THE CHAIR: There was a very clear conflict in that case. Was that the point you were
5 going to make, or did you have another point?

6 MR JONES: Well, that's the first point. I just make this point. We maybe don't need
7 to look at it. Not only was there a conflict, but the context there was that the class
8 representative, the proposed class representative, was saying don't worry, we will
9 resolve this conflict by having a single expert and we will resolve it by taking his views,
10 by taking his advice essentially. What the Court of Appeal says in paragraph 76 is,
11 they describe it as a very vague promise. It is a vague promise to resolve it on the
12 basis of expert input. They go on to explain that it is a context where experts might
13 take different approaches. It is not only that there was a conflict, but it's that someone
14 who wanted to be the class representative was trying to resolve it just by relying on
15 what one expert might say in an area where it was all vague and open to argument. It
16 was because the class rep has to be able to represent the interests of the class
17 properly that it was necessary for them to have separate representations. Everything
18 that was said there needs to be seen in this context.

19 The other case I should just touch on is the *Emerald* case and these Article 48 points.
20 The first point I make, Sir, in a sense it's a point that doesn't go anywhere for this
21 reason: my learned friend opened with Article 48 talking about the rights of defence
22 which shouldn't show you any cases that say that the rights of defence under Article
23 48 require every party to have their own expert.

24 THE CHAIR: No.

25 MR JONES: It was put out as a background factor, but it doesn't actually link to the
26 arguments because the arguments are all fact-sensitive and you just need to look at

1 | what fairness requires. In that sense, it seems to be not really to add anything.
2 | Nonetheless, since it's a legal point, I should address it and just make our position
3 | clear: Article 48 is about the rights of defence of a person who has been charged. No
4 | one in this courtroom or their clients has been charged with anything by my clients.
5 | So, before you think about the transitional provisions, this would never have been a
6 | case engaging Article 48 of the Charter.

7 | THE CHAIR: You mean it doesn't apply to civil actions.

8 | MR JONES: It doesn't apply. I haven't seen -- and my learned friend hasn't cited any
9 | case to say that it would apply to civil actions apart from *Emerald*, which I am going to
10 | come on to. That is a completely different context and it comes up in a completely
11 | different way.

12 | The context in *Emerald* was this: The claimant --

13 | THE CHAIR: Was that tab 2?

14 | MR JONES: 18.

15 | THE CHAIR: Please carry on. We will look at it as we find it.

16 | MR JONES: *Emerald* is indeed private proceedings, but what was happening was the
17 | claimants were seeking a fully unredacted version of the Commission decision. The
18 | problem that that runs into is there is a principle of EU law which is a little strange to
19 | English ears, but the principle is this; if a decision in the course of its discussion, so
20 | the recitals to the decision as opposed to the operative part, says that a person was
21 | involved in unlawful conduct, but that finding is not reflected in the operative part of
22 | the decision, then it would infringe that person's rights, it would infringe the
23 | presumption of innocence for those passages of the decision to be published. The
24 | reason for that is it is obviously damaging to their reputation and opens them up to
25 | other courses of action and so on and so forth, in circumstances where they haven't
26 | had an opportunity to appeal against the Commission decision; that's the important

1 point because they're not an addressee of the decision. So that is the principle of EU
2 law. It's about having a decision which says that someone was involved in unlawful
3 conduct. It could be either this is what the *Pergan* case itself was about, the European
4 case, it could be either a situation where the decision says someone who is not an
5 addressee of the decision was involved so it names a third party as a participant, or,
6 in some cases, it could go further, so you've got an operative part saying a particular
7 party was involved in a particular cartel but then in the course of the discussion, the
8 decision goes much further than that and suggests that it was a much wider cartel and
9 more than in the operative part. That is the principle of EU law. What was being said
10 in these proceedings was because of that principle, the defendants were saying, we
11 can't give you a fully unredacted version of the decision. The claimants were saying,
12 these are private proceedings, don't worry about that principle.

13 What the Court of Appeal says is --

14 THE CHAIR: Can't give you it because of the interests of third parties or the concern
15 that third parties may have been --

16 MR JONES: Yes. You see the reason is, it's precisely the same reason, we can't give
17 it to you because what you are asking us to do is publish a Commission decision which
18 says you've been involved in a cartel, which EU law says can't be published because
19 you haven't had a right to appeal against it. That is the only thing that is being
20 discussed in this judgment. That is why I think Ms Ford took you to page 632. When
21 a court says Article 48 applied to proceedings before the judge, they weren't saying
22 the claimants were a prosecuting authority, or this is raising a criminal offence or
23 anything like that. They're saying they applied and, therefore, the presumption of
24 innocence applied in the sense that you can't get your hands on a Commission
25 decision saying you've been involved in wrong-doing when you haven't had a chance
26 to appeal it.

1 Sir, I struggle to see on that basis how Article 48 could possibly apply here. I would
2 say this; we, certainly on this side of the court have not approached it in that way. I
3 spend a lot of my time doing cases for the CMA in which it is repeatedly said you're
4 here as essentially a prosecutorial role, it's quasi-criminal et cetera. That is right. In
5 all the cases which talk about whether it is quasi-criminal -- in fact *Napp* in this Tribunal
6 -- are all the regulatory cases. The point is it is a regulator with powers to impose a
7 penalty on someone and that is criminal under human rights law and under Article 48
8 would enjoy those rights of defence. You as the CMA have to take everything into
9 account in the way you manage the case, your attitude towards disclosure,
10 cross-examination and all those sorts of things. We are not in that territory. This is a
11 commercial dispute in which they are not going to face a penalty imposed by this
12 Tribunal.

13 So, unless I can be of further assistance, those are my submissions. We've had some
14 discussions on timetabling, but I think, again, that's best picked up later on in the day.

15 THE CHAIR: Right. Anything you want to reply on?

16 MS FORD: Two very brief points in response. On the question of conflicts, in our
17 submission unless the Claimants can say now and categorically that the only case that
18 they are advancing against the Defendants is one of an overall global cartel involving
19 all the Defendants, then there is a very clear conflict of interest as between the
20 positions of the respective Defendants in these proceedings, and that must lead to an
21 entitlement to instruct their own experts.

22 THE CHAIR: If the expert is just dealing with the question of whether there was
23 evidence of a cartel at all, or evidence of overcharge, and the expert economists are
24 not getting into the detail of who is involved, so if they're seeing it as a bird's eye
25 economic issue, does that still apply?

26 MS FORD: Sir, it does, even if they're not getting into liability, and of course we have

1 indication that the Claimants might seek to rely on them for that purpose. What they
2 are being asked to do is identify the extent to which a cartel gives rise to an
3 overcharge. Unless the Claimants are only identifying a single cartel, one has an
4 immediate conflict of interests that is between different Defendants, parties to different
5 alleged or found cartels, as to whether any effects are attributable to those cartels or
6 one of which all of them are participants. Even if we confine it to a single cartel, there
7 are still conflicts, first of all, on the question of apportionment.

8 THE CHAIR: The expert won't, as I understand it, and maybe this is wrong, the expert
9 won't be saying is there a cartel involving three or two -- you can't have a cartel of one
10 I suppose -- or which two, the expert will just be saying is there evidence of a difference
11 in price between the period of the cartel and the period after and, if so, how much.
12 That will be the start and end of the expert evidence as I understand it. Am I wrong
13 about that, whether you arrive at that through individual analysis or global analysis as
14 a distinct question?

15 MS FORD: That is not right in the sense that there are questions to which the expert
16 evidence will go as to whether or not any effect that they identify is attributable to one
17 cartel or another cartel or an umbrella effect. I think the most concrete example of the
18 conflict arises where you have an effect which is identified by the expert and the expert,
19 well essentially, being part giving evidence on the question of whether that is an
20 umbrella effect caused to that Defendant's data by a cartel that it wasn't party to, or an
21 effect caused to that Defendant's data by cartel to which it was party. It comes in very,
22 very clearly at that point.

23 I have also made the submission that you also have potential conflicts at a more micro
24 level when the expert is making the various judgements. Mr Jones indicated that the
25 expert will be making judgement calls at multiple points in the process. Whenever
26 they are called to make a judgement call, that judgement may work in favour or against

1 any particular Defendant such that their interests are not aligned. There again, on a
2 more micro level, one has conflicts. At the very least, unless the Claimants can say
3 now that they are only alleging one global cartel, those questions of attribution arise,
4 and even if they were only to allege one global cartel, one still has conflicts arising
5 from questions of apportionment as between Defendants and from the umbrella
6 damages point which, as we understand it, they would run in any event, even if they
7 were to otherwise confine their case to an allegation of a single cartel.

8 In those circumstances, given that one cannot possibly exclude the existence of
9 conflicts, in our submission, that points to permitting the Defendants to instruct their
10 own experts. We would urge the Tribunal not to be tempted to try and push off the
11 determination on that point because we are very much prejudiced by not being able to
12 work with our experts over the period of time in the run up to trial than we otherwise
13 would be, pending some sort of decision on that point. We say given that there is a
14 clear conflict now, we must be permitted now to instruct our expert.

15 Sir, the second point concerns the question that you posed to Mr Jones about what
16 does he say about how this is done in other cases. Mr Jones's answer to that point
17 was quite carefully worded, because he said he was not aware of a trial which had
18 gone ahead on the basis of four experts. Of course, that is in large part because the
19 vast majority of competition damages claims do settle before trial. In fact, in recent
20 times there only have been two cases that have actually gone to trial and final
21 judgment. They are *BritNed* and the *Trucks* case. If one asks a slightly different
22 question, if one doesn't focus on the trial and one says: Are the Claimants able to
23 point to any instance in which either the High Court or the Tribunal has made an order
24 precluding co-defendants from relying on their own experts, no, there is no such order.
25 The practice is that co-defendants are permitted to rely on their own experts.

26 THE CHAIR: In terms of argument, the only argument that we've seen is really the

1 cases you've drawn to our attention.

2 MS FORD: Certainly we've drawn the Tribunal's attention to those areas of debate
3 that we've been able to identify. I rely on it as a point in my favour. These matters are
4 so self-evident that defendants should be permitted to instruct their own experts that
5 it simply has not been debated to a great degree.

6 THE CHAIR: Right. We're going to reserve judgment on this point. We appreciate
7 obviously we won't reserve it for too long for reasons which have been identified. We
8 won't give you a decision now. What do we move on to next?

9 MR JONES: Maybe I should take you through the order and explain the other points
10 that have been agreed, then come on to timetabling.

11 THE CHAIR: Where are we on disclosure by the way, your disclosure application?

12 MR JONES: Paragraphs 1 and 2 of the order.

13 THE CHAIR: Hold on -- let me check. Yes, I think this is the one I am working on.
14 Paragraphs 1 and 2, there were some amendments.

15 MR JONES: There are track changes, all of that is agreed subject to -- I think my
16 learned friends would want to say we've only agreed on it on the basis there are
17 changes to the directions which we are going to come on to. That is essentially
18 agreed, 1 and 2.

19 The amendments in paragraphs 3 and 4 are agreed, and Sir, we've discussed the fact
20 that there may need to be further amendments and indeed there will need -- I have
21 taken an indication of that and I will come to the timetable of those later but 3 and 4
22 are agreed.

23 5 and 6 are also agreed. There have been some amendments, because these
24 documents are documents originating from a third party, Takata. My solicitors had got
25 in touch with them -- I think you suggested at the last CMC to see if they had any
26 objection and it turned out yesterday that that email from my solicitors had been caught

1 in a junk email folder. So, we have agreed that with Takata -- and I don't think anyone
2 objects to this -- essentially, there is a backstop so the documents are going to be
3 designated as non-confidential in 21 days unless JAS, who is now Toccata, apply to
4 vary that within those 21 days. So it gives them a window, liberty to apply for a third
5 party essentially. So that is the suggestion there, Sir.

6 THE CHAIR: Yes. So, by applying you mean -- they're not party to these proceedings
7 -- what do they have to do in practice, just issue an application notice?

8 MR JONES: Write a letter to the Tribunal.

9 THE CHAIR: Okay, that's fine.

10 MR JONES: Then 7 is agreed. So 8 was the only outstanding point. That takes us
11 then to timetable. Well I've made a suggestion to my learned friends about the
12 timetable. I think perhaps the best thing to do is for me to go through that with you
13 and tell you what I propose the dates are. Actually my learned friends haven't heard
14 back the extent to which there's disagreement, so an alternative course would be to
15 pause now so we can huddle and identify if there are any disagreements. That may
16 be a better course.

17 THE CHAIR: What dates are we talking about?

18 MR JONES: There are several steps. Tokai Rika needs to give disclosure of its data
19 by 3 November which is two weeks from today.

20 THE CHAIR: Yes, okay.

21 MR JONES: The data is what they say in their letter they can provide in short order.
22 To the extent any of these points are agreed, let me just run through them: 3 November
23 for data, all other disclosure orders which are outstanding would be 24 November. So
24 that picks up --

25 THE CHAIR: So this is for all the parties, so your new class if I can put it that way.

26 MR JONES: Yes, and Tokai Rika. So it would all come at the same time. I think that

1 data is actually agreed. So, disclosure on 24 November. The Claimants would
2 re-plead to address the points you've put to me today, and at the same time, provide
3 a note on their expert approach. I don't have the precise wording of this direction in
4 mind, but it is intended to reflect the points which you were putting to me in the
5 discussion earlier, which is that we need to know broadly how the econometric
6 analysis would address the issues which arise on the pleadings, we have suggested
7 by 22 December. The amended defences by 12 January. Witness statements by
8 26 January.

9 THE CHAIR: Witness statements.

10 MR JONES: Reply witness statements would be 16 February. Claimants' expert
11 report on 1 March. Defendants' expert report on 26 April. Claimants' reply expert
12 report on 28 June. The joint memorandum on 19 July, and the PTR is listed for
13 29 July.

14 THE CHAIR: You want until the 22nd - sorry you get disclosure on the 24th, and so
15 on 22 December -- I mean, I don't see any particular issue with regards to the issues
16 the expert evidence will be addressing, subject, obviously, to what the others have to
17 say. If you're for the first time pleading a case that the cartel is between two of the
18 parties and not all three, that would seem to really put a spanner in the works. I'm not
19 quite sure how the directions would catch up. So it would be really quite a different
20 case wouldn't it in terms of the --

21 MR JONES: You mean if we abandoned the three-party cartel argument and instead
22 just run --

23 THE CHAIR: Or if you run, at the moment, it is just flagged as a possibility. If you're
24 saying there's a cartel between two parties because the involvement of the third is not
25 entirely neutral as I understand it, that's then a competitor in the field.

26 MR JONES: Yes.

1 THE CHAIR: So it is quite a different case. Am I right about that?

2 MR JONES: Yes, that is true. If there was a big change in the pleaded case, then
3 that would be problematic for the rest of the timetable, I accept that. I don't know quite
4 where that goes in this sense. For present purposes, we're not aware that we're about
5 to change our case significantly.

6 THE CHAIR: For the moment you've got what I understand to be a primary case, that
7 there was a cartel that all the Defendants were involved in.

8 MR JONES: Yes.

9 THE CHAIR: At the moment, on your pleading, you don't really seem to have an
10 alternative case.

11 MR JONES: No.

12 THE CHAIR: You've reserved your position.

13 MR JONES: That's right.

14 THE CHAIR: I am paraphrasing.

15 MR JONES: Doing the best we can on the timetable, of course we have been asking
16 for the disclosure that my learned friends have now agreed to since CMC 2. They
17 have only agreed to give it by 24 November. Tokai Rika is in an absolute mess.

18 THE CHAIR: Yes. I am not sure that resolves this particular --

19 MR JONES: What I am saying is I'm not sure this was an indication, but we could not
20 do that any earlier because we're going to have to go through the disclosure we will
21 get on 24 November.

22 THE CHAIR: You're getting the internal communications on 24 November.

23 MR JONES: Yes, and all the disclosure on RFQs that Tokai Rika hasn't yet given,
24 which will obviously, on the question of two or three, will be important to look at Tokai
25 Rika material.

26 THE CHAIR: I thought you were getting the Tokai Rika on 3 November?

1 MR JONES: No, data. Tokai Rika data on the 3rd. Then the rest of their disclosure
2 would be the 24th. They say they can't do before that. Of course, we're talking
3 thousands of documents. So one then has a process of the solicitors looking at it.
4 Then it has to go to counsel et cetera. That is I think the quickest that could possibly
5 be done. Indeed, that took quite a lot of arm twisting over lunch for that to be ...
6 I think the point I was trying to make was we do not at present anticipate there is going
7 to be a significant change to our case. We've seen a lot of documents. If I thought
8 there was going to be a big change, I would let you know now.

9 THE CHAIR: By not a change, you mean that your case is likely to be three parties
10 as a cartel and the case on a --

11 MR JONES: Precisely.

12 THE CHAIR: As far as you can tell.

13 MR JONES: If there is a big change, all I was trying to say was to agree with you if
14 there is a big change in the case --

15 THE CHAIR: We may have to look at the whole timetable, the trial date, all sorts of
16 things.

17 MR JONES: That's all I was trying to convey. We can't, in order to anticipate and
18 protect against that, I'm afraid, do anything better at that early stage.

19 THE CHAIR: Right.

20 MR JONES: What has been changed on this timetable to make clear, the gaps
21 between the experts are the same as they always were. So I've not changed any of
22 that.

23 THE CHAIR: I understand that.

24 MR JONES: There is one point I should make before I sit down, as I know my learned
25 friends will want to make some points about this. The PTR is on 29 July. The trial
26 doesn't start until 1 October. So, it did occur to all of us that if the PTR could happen

1 at the start of September, that would obviously make quite a change including the
2 points my learned friends are going to raise with you.

3 THE CHAIR: I'm busy in July anyway, so that would be sensible.

4 MR JONES: That may be the key then, I will sit down now, thank you.

5 MR O'DONOGHUE: Sir, you put your finger, if I may say so, on the immediate log
6 jam. If we obtain a revised pleading on 22 December, the suggestion that by
7 12 January we could, for example, plead an amended defence is, with respect, for the
8 birds, and, likewise, witness evidence on the 26th. The way through this is if the
9 Tribunal could accommodate a PTR in early September, then we could gain two or
10 three weeks from that perspective. We could shunt everything a bit forward. I haven't
11 spoken to my friends. What I would suggest is that we would produce an amended
12 defence on 26 January and then a week after that, we would have the witness
13 evidence and everything gets shunted forward.

14 THE CHAIR: Sorry, Mr O'Donoghue, can you just give me that date again, 26th?

15 MR O'DONOGHUE: For the amended defences, and then a week later, which I think
16 is 2 February, we would have the witness evidence and the rest of the directions would
17 be shunted forward.

18 THE CHAIR: Amended defence on 26 January.

19 MR O'DONOGHUE: Yes.

20 THE CHAIR: Witness evidence I've got as?

21 MR O'DONOGHUE: 2 February.

22 THE CHAIR: And at the moment it is 26th.

23 MR O'DONOGHUE: Yes.

24 THE CHAIR: And then when would the expert reports be coming in?

25 MR O'DONOGHUE: Everything will be shunted forward by two to three weeks.

26 THE CHAIR: Right.

1 MR O'DONOGHUE: It would depend practically on when the PTR would take place,
2 if it was early September. There's a reasonable amount of flex. If it was late July, I
3 think that's then quite problematic. Assuming an early September PTR date, we think
4 there are two to three weeks of flex in the timetable which would then arise. We could
5 move directions forward by I would say a couple of weeks.

6 THE CHAIR: All this moving forward will be unnecessary if the Claimant is not
7 changing its case. The change we're all concerned about is if the cartel is not all three
8 members. If that doesn't change, there's no need to adjust the timetable at all, let
9 alone adjust this adjustment.

10 MR O'DONOGHUE: Sir, we would insist on a change in any event because, of course,
11 the disclosure to come is not simply on whether there is one cartel or multiple. There
12 is disclosure that the Claimants have pleaded to at some length via amendments
13 already. The disclosure to be given on 3rd and 24th November will, in our submission,
14 should lead to other amendments because, frankly, we need to know prior to witness
15 evidence what is their case on liability. This is not a follow-on case. It is a stand-alone
16 case and, on numerous aspects, the particulars are thin. Once disclosure is
17 completed on the 24th, we then need to know this side of Christmas what is the totality
18 of your case on liability. So, to put it another way Sir, in my submission, it would be
19 quite wrong today to assume that the only amendment would be one cartel versus
20 multiple, because the approach the Claimants have taken consistently on the
21 amendments to date is that with each tranche of disclosure, further amendments have
22 been made.

23 THE CHAIR: I understand that. Mr Jones, what do you say to Mr O'Donoghue's
24 proposal?

25 MR JONES: If the PTR can be accommodated in September, then that all seems very
26 sensible. The only point which I would make is I understand, although we don't have

1 precise dates, that our expert is planning to be away for August if at all possible. Just
2 looking at the timetable, I think Mr O'Donoghue was saying that everything could be
3 shunted by a couple of weeks, which I think is right, but I would just say could we
4 please keep the joint memo, which is the last date within July. I think that is possible
5 on what's been suggested.

6 MR O'DONOGHUE: On 31 July. I think that should still work.

7 MR JONES: Yes, precisely. That in principle sounds fine.

8 MR O'DONOGHUE: I am not seeking an order for this. Of course, all this is being
9 done on the basis that the drip feed stops and the disclosure ends this side of
10 Christmas, otherwise the timetable is in serious --

11 THE CHAIR: It's a reasonably tight timetable in my view.

12 MR O'DONOGHUE: Yes.

13 THE CHAIR: So we need to make sure we keep to it.

14 MR O'DONOGHUE: Indeed.

15 THE CHAIR: Ms Ford?

16 MS FORD: I am content to adopt Mr O'Donoghue's submissions on the specifics of
17 dates. I just rise to express one slight concern about the discussion that has happened
18 in relation to the particularisation of the Claimants' case. The Tribunal has referred to
19 the fact that there's a reservation of position presently on the face of the pleadings and
20 various possible permutations. Mr Jones has indicated that he doesn't anticipate there
21 will be a major change in the Claimants' case. That raises the possibility that the
22 Claimants will further particularise, for example, their claim that there is an overall
23 cartel, but will leave on the face of the pleading these residual reservations.

24 THE CHAIR: We won't be leaving those on the face of the pleading, that needs to be
25 resolved. I am not shutting out the Claimants from saying there's a cartel of two, or a
26 cartel of two in the alternative, but if that's going to be part of their case, it has to be

1 fully pleaded. We've got to work out how to accommodate the economic evidence to
2 be consistent with that. That is going to be a fairly major overhaul I think of the case.
3 So, at the moment, I'm proceeding with my fingers crossed on the assumption we will
4 just have one case and Mr Jones will let us know in due course if we're wrong about
5 that. If the case is looking very different, then of course, we will need a further CMC
6 to thrash out -- are you content to proceed on that basis Mr Jones?

7 MR JONES: Yes.

8 MS FORD: I'm grateful.

9 THE CHAIR: Are we done? We have agreed disclosure.

10 MR JONES: We've agreed disclosure. I threatened an unless order application. I am
11 not going to make that application. I'm going to say though, just so it is clear on the
12 record, that if Tokai Rika does not comply with these orders, my clients are likely to
13 apply to strike their case out and debar them from participating in further proceedings.

14 THE CHAIR: And certainly last-minute suggestions that you cannot comply with
15 a timetable are not satisfactory. So, if there's anything unforeseen, any applications
16 have to be made in good time.

17 Obviously, the Claimants will have some sympathy if they have to be back here
18 complaining the directions have not been complied with.

19 MR JONES: I am grateful.

20 I think that's everything, Sir.

21 **(2.37 pm)**

22 **(The hearing concluded)**

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