Neutral citation [2025] CAT 59

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1518/5/7/22

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

10 October 2025

Before:

THE HONOURABLE MR JUSTICE RICHARDS
(Chair)
ANDREW LENON KC
PROFESSOR ANTHONY NEUBERGER

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) LONDON ARRAY LIMITED
(2) RWE RENEWABLES UK LONDON ARRAY LIMITED
(formerly known as E.ON CLIMATE & RENEWABLES UK LONDON ARRAY LIMITED)
(3) ORSTED LONDON ARRAY LIMITED
(formerly known as DONG ENERGY LONDON ARRAY LIMITED)
~~**(4) GREENCOAT LONDON ARRAY LIMITED (formerly known as ORSTED LONDON ARRAY II LIMITED (formerly and prior to that known as DONG ENERGY LONDON ARRAY II LIMITED)**~~
(5) MASDAR ENERGY UK LIMITED

Claimants

- v -

(1) NEXANS FRANCE SAS
(2) NEXANS SA

Defendants

Heard between 2 and 19 May 2025

JUDGMENT

APPEARANCES

Colin West KC (instructed by Hausfeld & Co. LLP) appeared on behalf of the Claimants.

Tony Singla KC and Paul Luckhurst (instructed by White & Case LLP) appeared on behalf of the Defendants.

Note: Excisions in this Judgment (marked "[✂]") relate to commercially confidential information: Schedule 4, paragraph 1 to the Enterprise Act 2002

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A. INTRODUCTION

1. The Claimants bring a claim for follow-on damages against the Defendants arising out of the Commission's Decision dated 2 April 2014 in Case AT.39610, Power Cables (the **Commission Decision**). In the Commission Decision, the European Commission (the **Commission**) found that the Defendants (to whom we will also refer to as **Nexans France**) and others participated in a cartel (the **Cartel**) concerning high-voltage (**HV**) submarine and underground power cables. The Cartel operated between 1999 and 2009 although the membership of the Cartel fluctuated with members leaving, and new members joining, from time to time. We use the term "**Infringement**" in the same sense that Nexans does in its pleaded defence to refer to the Commission's findings of infringement of EU law by those participating in the Cartel.

2. The Claimants are participants in a joint venture that included the construction of a windfarm in the Thames Estuary (**London Array**). The precise structure of the London Array joint venture, and the transactions that give the various Claimants individual title to sue are not material to this judgment. It is common ground that all of the Claimants have standing to bring this claim against the Defendants. Therefore, except where absolute precision matters, we will tend to refer to the joint venture simply as "London Array" with that expression including both the individual participants in the joint venture, the windfarm itself, the business that the joint venture conducted and the Claimants in this case.

3. Construction of London Array involved the laying of two kinds of high voltage (**HV**) submarine cables. "**Inter-array cables**" were 33kV submarine cables that connected individual wind turbines to the two offshore substations and ran to a total of some 202 km in length. Inter-array cables carried power generated by individual wind turbines. "**Export cables**", so called because they exported power from the windfarm to the onshore grid, were 150kV submarine cables that connected the two offshore substations to the onshore substation. There were four export cables each of a length of 53 to 54 km, plus two spare cables of length 4 km each. The export cables carried power generated by the entire windfarm. It is common ground that both the London Array export cables and

inter-array cables were the kind of HV submarine cables that were affected by the Cartel.

4. Between 2008 and 2009, London Array ran two separate tender processes for the purchase of export cables and inter-array cables. Nexans Norway A.S (**Nexans Norway**), which was a member of the same group as the Defendants, but was not an addressee of the Commission Decision, won the tender to supply export cables and duly did so. We note that some of the arguments in this case are to the effect that Nexans Norway enjoyed a degree of independence from Nexans France. When we are addressing arguments such as these we will distinguish between Nexans Norway and Nexans France. However, where it does not matter which precise entity is being referred to, we use the generic term "**Nexans**".

5. The tender for the supply of inter-array cables was won by a company called **JDR** which duly supplied those cables (although in the event it had to sub-contract some of the work to the second-placed bidder, Parker Scanrope). JDR was neither a member of the Cartel nor an addressee of the Commission Decision.

6. The Claimants bring their claim for follow-on damages alleging that the price that London Array paid for both export cables and inter-array cables was inflated by reason of the Cartel (the **Overcharge**). In relation to export cables, the Claimants allege that the Overcharge was the direct effect of the Defendants' infringing behaviour. By contrast, the Claimants allege that the Overcharge in relation to inter-array cables arose because of an "umbrella effect" whereby the Cartel caused the prices of cables supplied by JDR, a non-cartelist, to rise above the competitive level.

7. The claim in relation to export cables accounts for around 90% of the claim, with the claim in relation to inter-array cables accounting for the remaining 10%.

8. After construction of the London Array windfarm was completed, London Array's transmission assets, which included export cables, but not inter-array

cables, were transferred to Blue Transmission London Array Limited which was the applicable "Offshore Transmission Owner" (**OFTO**) pursuant to a scheme imposed by The Electricity (Competitive Tenders for Offshore Transmission Licences) Regulations 2015. Under a complicated statutory mechanism, the OFTO recovered the cost of purchasing those assets by means of certain charges paid by London Array known as "Transmission Network Use of System" (**TNUoS**) charges. In addition to recovering the capital costs the OFTO was also entitled to receive further amounts calculated by reference to the transfer value of those transmission assets. Happily, the parties were agreed on the effect of these transactions on the value of London Array's claim if there was an Overcharge. Therefore, we do not need to make any further findings on the nature of the transactions with the OFTO or their effect.

9. We must decide the following three issues in relation to the claims relating to both inter-array cables and export cables:

   (1) Whether there was an Overcharge at all: i.e. whether the price that London Array paid for the cables was higher than it would have been if there had been no Cartel.

   (2) If so, what is the amount of loss that London Array has suffered by reason of the Overcharge?

   (3) What interest should the Tribunal award on past losses?

10. The question set out in paragraph 9(1) involves a comparison with the price charged (in the "actual" world) and a price that would hypothetically be charged in a "counterfactual" world. Both sides approached this issue on the footing that the "counterfactual" was a world in which there was no Cartel at all (rather than, for example, a world in which there was a Cartel but Nexans did not participate in it).

B. THE EVIDENCE

11. Both sides relied on evidence from witnesses of fact and also on opinion evidence from economic experts. Much of both sides' factual evidence was accepted without challenge. We need say little about the witnesses who gave that evidence and will simply refer to their unchallenged evidence where necessary.

12. Mr Øystein Jacobsen provided a witness statement for the Defendants, but did not attend the trial for cross-examination as he no longer works for the Defendants and was travelling. We have admitted his statement as hearsay evidence and have taken into account the fact that it could not be challenged by cross-examination when considering its weight.

(1) Witnesses of fact who were cross-examined

13. The factual witnesses whose evidence was tested in cross-examination were (i) Mr Dirk Döring on behalf of the Claimants and (ii) Ms Anne-Lise Aukner, Mr Anders Granlie and Mr Rune-Andre Støten on behalf of the Defendants. No-one suggested that these witnesses were doing anything other than giving their evidence honestly and seeking to assist the Tribunal.

(2) The absence of witness evidence on the operation of the Cartel

14. We had no witness evidence as to how Nexans France participated in the Cartel. Nexans's position was that evidence as to how the Cartel operated in general was of limited value, but to the extent we needed to make findings on that issue, both sides referred us to recitals in the Commission Decision. A recurring theme of Nexans's submissions was that (i) the Commission Decision referred to London Array only in Recital (444)[1] which refers to conversations between Nexans France and ABB between 5 and 7 November 2008, (ii) Nexans Norway priced its bids independently and therefore (iii) there was no evidence that the

[1] Recital (444) reads as follows: "Between 5 and 7 November 2008 Mr Romand (Nexans) also contacted Mr Jönsson (ABB) twice by phone in order to discuss the price level that the companies should apply to their bids for the London Array project".

Cartel had any effect on prices for export cables sold to London Array specifically.

15. We will consider this point later in this judgment in the light of the Commission's full findings. However, at this stage we note only that Nexans has chosen to show only part of the picture. It advances witness evidence that it says shows the "independence" of Nexans Norway. It puts forward evidence of selected employees at Nexans Norway involved in the pricing of the bid for export cables who explain that they were unaware of the Cartel. It invites us to conclude that Recital (444) says little of interest. However, it puts forward no evidence as to how Nexans France operated the Cartel to enable the Tribunal to assess whether the asserted "independence" of Nexans Norway is as forceful a factor as Nexans submits it to be.

16. On a related note, on 22 August 2025, well after the trial had concluded, the Tribunal received a letter from solicitors to ABB and NKT referring to the judgment of the Court of Appeal in *Vogon International Ltd v Serious Fraud Office* [2004] EWCA Civ 104 and similar authorities. ABB and NKT requested that the Tribunal refrain from making factual findings of serious misconduct, such as fraud, dishonesty or conspiracy, against ABB or NKT on the grounds that neither had been represented at the trial. The Commission has already made findings adverse to ABB and NKT, and indeed all members of the Cartel, by concluding that they were participating in activity that infringed EU competition law. We will, in this judgment, consider carefully what the Commission Decision, including its recitals, determined. That will, on occasion, involve a degree of interpretation of the Commission Decision in the light of the evidence that is before this Tribunal. However, we have not made any additional findings of serious misconduct that go beyond those trailed in the Commission Decision.

(3) Expert evidence

17. We had expert evidence on economic matters from Mr Joseph Bell on behalf of the Claimants and from Dr Peter Davis on behalf of the Defendants. They provided lengthy expert reports and gave oral evidence in two ways. First, they gave evidence concurrently, with Professor Neuberger taking the lead in asking

them questions on topics that the Tribunal had identified in advance, although no advance notice was given of the precise questions. Second, they each were cross-examined in the usual way after they had given concurrent evidence.

18. The Defendants suggested in closing arguments that Mr Bell had, on occasions, shown an undue tendency to speculate and to decline to give concise answers to questions in cross-examination, preferring instead to give lengthy statements in support of London Array's broader arguments or to pre-empt the direction of travel of the cross-examination. We do not accept that criticism. This was Mr Bell's first time giving expert evidence before the Tribunal or the High Court in England & Wales. Some of his answers to questions were, on occasions, a little long. However, we have concluded that both he and Dr Davis were giving their evidence in a fair and scholarly way and seeking to assist the Tribunal.

19. We considered that the volume of expert evidence before the Tribunal was excessive. In total, the expert reports and joint expert statements ran to nearly 1,200 pages. Both experts' reports contained extensive references to econometric theory that would not be out of place in an academic paper. Dr Davis frequently explained his approach by reference to algebraic analysis. London Array did, sensibly, direct the Tribunal to relevant parts of the reports in suggesting pre-reading. However, even that material was lengthy and, in the event, only a small fraction of it could be explored with the experts in the two days available for their oral evidence.

20. We note that the President of the Tribunal is currently consulting on the terms of a Practice Direction relating to expert economic evidence. We will not seek to pre-empt the outcome of that consultation and limit ourselves to the following observations in relation to this case specifically:

    (1) We acknowledge that the process by which the parties shared lengthy expert reports between themselves enabled the respective experts to formulate the areas of agreement and disagreement between them. However, the fact that this material was helpful to the parties or the experts does not necessarily mean that it was all helpful to the Tribunal.

(2) By far the most helpful aspect of the expert evidence was the introduction to a Joint Expert Statement, prepared just a few days before the trial started, in which the experts set out some 12 areas of disagreement between them with an indication of the materiality of the issue to the magnitude of the asserted Overcharge. Those few pages enabled the Tribunal to decide an agenda for the concurrent evidence session and prepare some questions.

(3) With hindsight, the Tribunal would have been more assisted if the parties had been directed to prepare that brief statement of areas of agreement or disagreement (with a page limit of around 10-15 pages) a few weeks before the trial and the experts had then prepared separate position papers (also with a page limit). Those position papers, rather than the predecessor expert reports, could then have been the focus of both concurrent evidence and cross-examination.

(4) On that approach, the lengthy expert reports exchanged prior to the preparation of the position papers would not be discarded and could be put in evidence. However, both experts would need to submit to the discipline of setting out their positions in a concise and accessible manner in the position papers with the length of those position papers being determined by the amount of time available for oral evidence.

21. In making these observations, we are not criticising the parties or the experts. Both parties complied with the Tribunal's case-management directions.

C. OVERVIEW OF THE LONDON ARRAY PROJECT

(1) HV submarine cables generally

22. This judgment is concerned with the market for, and supply of, HV submarine cables namely submarine cables, that are capable of transmitting an electricity load of 33kV or more.

23. HV submarine cables are purchased by, among others, wind-farms and national electricity distributors. They contain an inner core (or multiple cores), made from copper, that conducts electricity. Around the inner core there is insulating material and the whole cable is then cased in a durable outer sheath, made largely from steel, to protect it both against the process of being laid onto the sea bed and then from the rigours of that environment.

24. HV submarine cables can be very long. The main export cables that London Array purchased were, as noted, all over 50 km in length. Cables of that length are not manufactured as a single unit. Rather, shorter cables are produced with factory joints being added at intervals to join these shorter cables to produce a cable of the required length. However, the addition of factory joints risks adding a source of faults to the cable and the process of creating factory joints is both complex and expensive. It follows that both suppliers and purchasers of cables tend to have a preference for a HV submarine cable to contain as few factory joints as reasonably practicable.

25. HV submarine cables could be manufactured to carry either an alternating current or a direct current (**AC** and **DC** respectively). DC cables comprise two separate cables, each of which has its own sheath. AC cables consist of three core cables which are then assembled together into one cable using a "laying-up" machine, which is not used for DC cables. Only the inner core metallic conductor of the AC and DC cables is the same whereas all the other components, such as the insulation and outer sheath, are different.

26. All HV submarine cables suffer from transmission loss since energy "leaks out", mainly in the form of heat. The longer the cable, the greater the transmission loss that results. DC cables suffer from significantly lower transmission loss than AC cables. However, many domestic electricity grids, including those in the UK, supply electricity in AC rather than DC format. If electricity for use in such a grid is transmitted through a DC cable, a "converter station" is needed to convert the DC current into usable AC current. There is, therefore, a trade off: using a DC cable might save money by reducing the applicable power loss. However, with that saving can come a countervailing expense, namely a need for one or more converter stations. As a very broad rule of thumb, at the time of

London Array's purchase of HV submarine cables in 2009, the tipping point came at around 100 km of cable length since at that point a DC cable will save sufficient power loss to justify the expense of the additional converter stations.

27. The insulating material in a HV submarine cable will take one of the following forms:

(1) a mixture of oil and paper (**oil-filled**);

(2) mass-impregnated paper (**MI**); or

(3) extruded plastic consisting of cross-linked polyethylene (**XLPE**).

28. The manufacture of AC and DC cables, viewed in isolation, involves the use of similar equipment. However, different methods of insulation require the application of a significantly different manufacturing process. Therefore, an AC cable that is XLPE-insulated will be manufactured following a significantly different process from a DC cable that is MI-insulated, with the differences being driven by the type of insulation rather than the type of current that those cables carry.

29. Given the different characteristics described above, and the complexity of the manufacturing process, HV submarine cables are made to order following a highly bespoke process. It would not be possible for a purchaser of HV submarine cables at the relevant times to purchase such a cable from a manufacturer's existing stock. Moreover, a high degree of trust is reposed in the quality of HV submarine cables since, if those cables fail, large populations could be left without power.

30. Those features mean that a prospective purchaser of a HV submarine cable will almost invariably be selective about who they purchase from. Before a supplier is even invited to tender for a project, a purchaser will typically perform extensive due diligence both on the rigour and quality of that supplier's manufacturing process and product and on its financial soundness (**pre-qualification**). Having established a pool of suppliers who are considered to

have the technical capability to supply HV submarine cables of the kind required, a typical purchaser will invite selected suppliers to participate in a tender process. Such processes are rigorous and time-consuming. Typically a purchaser will set out in precise detail all of the relevant features of the cable it requires and the conditions under which it is to be manufactured.

31. A prospective purchaser of HV submarine cables might invite tenders for the supply of a cable alone, as was the case with London Array. Alternatively, it might invite tenders both for the provision of the cable and its installation (a **turnkey project**). As is to be expected, the process of laying a HV submarine cable on the sea bed is a technically demanding and difficult process that requires both expertise and the use of special cable-laying vessels.

32. The matters discussed in paragraphs 22 to 31 above apply broadly to both the export cables and the inter-array cables. However, we accept Mr Granlie's unchallenged evidence that the inter-array cables were less sophisticated products than the export cables. That is partly because inter-array cables carry power generated only by an individual wind turbine or group of turbines rather than the power generated by the whole windfarm and so transmit lower voltages of electricity. In consequence, the technology involved and the insulation requirements of inter-array cables are simpler and the conductors smaller in size. Inter-array cables also tend to be shorter than export cables. Overall, inter-array cables are easier and cheaper to produce than export cables with the result that a company contemplating entering the inter-array cable market would face fewer barriers to entry than if it wished to enter the export cables market.

(2) The Cartel and its members

33. Recital 1012 of the Commission Decision sets out a table that lists each member of the Cartel, together with the date on which it started its participation and the date on which participation ended. We accept that table as an accurate summary as no party suggested it was inaccurate. Some salient conclusions from that table are as follows:

(1) ABB participated in the Cartel from 1 April 2000 to 17 October 2008, the date on which it applied for "leniency" as discussed in more detail in Section D(2)(a) below.

(2) Nexans France participated in the Cartel from 13 November 2000 until 28 January 2009, the date of the Commission's dawn raids (the **Dawn Raids**) at offices of Nexans France and others suspected of involvement in the Cartel.

(3) Prysmian participated in the Cartel from 29 July 2005 until 28 January 2009.

34. There was a dispute as to the nature of the Cartel's activities and the extent to which the London Array bidding process was itself affected by Cartel behaviour which we will address in Section D below. For the time being, we introduce only some key individuals to put in context some of our findings on the tender process and Nexans's internal approvals process:

(1) Two senior individuals within Nexans France, Mr Romand and Mr Barth, were aware of the Cartel and involved in its activities. The actions of Mr Romand and Mr Barth feature prominently in the Commission Decision. Annex II to the Commission Decision describes Mr Romand as "Deputy Managing Director HV & Accessories" and Mr Barth as "Managing Director HV & Accessories" at the time of Nexans's first round bids in the London Array project. As will be seen, both individuals were in a position to influence the terms of Nexans Norway's bid for the London Array export cables.

(2) For ABB, a Mr Jönsson was aware of the Cartel and played a part in its activities. The Commission Decision described him as "Systems Group Manager System Group Cables, BU [business unit] Grid Systems (global)" at ABB at the time of first round bids for the London Array export cables.

(3) A Mr Acquaotta of Prysmian was involved in the Cartel. The Commission Decision described him as working in Prysmian's "HV & Submarine Business Unit, HV & Submarine Marketing and sales" until January 2008.

(3) The procurement process followed by London Array and its outcome – export cables

35. It is common ground that London Array did not know of the existence of the Cartel at the time they entered into contracts for the purchase of export cables or inter-array cables. In opening, Nexans argued that London Array had some knowledge at the time of the Dawn Raids. London Array did not accept that. However, this debate rather fizzled out with Nexans saying in closing that it "matters little to causation issues" whether the Tribunal infers from contemporaneous press commentary that London Array was aware of the Dawn Raids. We therefore see no need to make findings on this issue.

36. The members of the London Array consortium were, in the words of Mr Granlie "very experienced professional procurers". Mr Støten described London Array's representatives who visited Nexans's factory as asking "lots of technical questions". Nexans considered London Array to be a "sophisticated purchaser".

37. We accept that evidence and conclude that London Array were both sophisticated purchasers and knowledgeable about the products they were seeking to purchase. As will be seen, that sophistication and knowledge manifested itself in a tender process that was designed both (i) to set out in minute detail the characteristics of the HV submarine cables that they wished to purchase and the process by which they were manufactured and (ii) introduce competitive tension among bidders with a view to securing the best price possible for those cables.

38. That finding is as to London Array's absolute levels of sophistication and knowledgeability. The evidence that we saw demonstrated that any purchaser of a HV submarine cable was buying a very expensive, and bespoke product.

Such a purchaser would necessarily have a good degree of sophistication and knowledge of HV submarine cables generally. We are not in any position to make findings as to whether London Array was more (or less) sophisticated and knowledgeable than other purchasers of HV submarine cables for use in a wind-farm. Nor do we make any findings as to whether the tender process that London Array followed was more (or less) exacting than tender processes followed by other windfarm operators seeking to purchase HV submarine cables.

39. London Array needed four export cables, each with a continuous length of between 53 and 54 km. Its process of pre-qualification initially established four viable potential suppliers to whom we will refer as ABB, Nexans, Prysmian and Mitsubishi/JPS without at this stage distinguishing between legal entities within those various groups.

(a) Round 1 bids

40. On 27 February 2008, London Array sent an invitation to tender (**ITT**) to all four potential bidders who had been identified by that point in time. However, at around that time, Shell withdrew from the London Array consortium and the tender process was put on hold. The tender process resumed in September 2008, by which time London Array had decided to add NKT to the list of potential bidders. An ITT was sent to ABB, Nexans, Prysmian, Mitsubishi/JPS and NKT in September 2008.

41. Among other relevant matters, the ITT stipulated that bidders should quote a price for the supply of four main cables (each with a length of between 53 km and 54 km), together with a length of spare cable having the following characteristics:

(1) The cables were to be AC and have XLPE insulation.

(2) The cables should each contain three cores.

(3) The four main cables should each have no more than 18 planned factory joints. Since each main cable contained three cores, that meant that only

six planned factory joints were permitted in each core cable and so each core cable would need to be manufactured in unbroken lengths of around 9 km.

(4) Since factory joints were areas of risk, tenderers were required to meet other requirements relating to them. For example, they had to provide London Array with their design drawings for those joints, joints had to be installed in an enclosure with filtered air, London Array had to be provided with the names of the individuals installing the joints and their training records and those employees had to wear particular clothing that would not release fibres throughout the jointing process.

42. London Array received three compliant bids, from Nexans, ABB and Prysmian in early November 2008. Mitsubishi/JPS and NKT submitted non-compliant bids.

43. On receipt of the bids, London Array went through a process of "evaluation" that involved each bid being expressed as a sterling price to make them comparable based on the qualifications they contained, the currencies on which they were based and similar factors. The outcome of that evaluation is as summarised in the following table:

	Export Cable Round 1 – December 2008		
Bidder	**Compliant?**	**Conditioned tender price (GBP)**	**Participant in Infringement at the time of November 2008 bid?**
NKT	No	149,973,740	No: ceased on 17 February 2006
Mitsubishi / JPS	No	118,731,472	See paragraph 46 below
Prysmian	Yes	109,181,233	Yes
ABB	Yes	85,848,269	No: ceased on 17 October 2008, but see Section D(2) below
Nexans Norway	Yes	82,279,464	Yes

44. In the table above, we refer to Nexans Norway as being a member of the Cartel given the finding in Recital (955) of the Commission Decision that Nexans France participated in the Cartel on behalf of other companies within the Nexans group, including Nexans Norway. In using this description in the table, we are not prejudging issues relating to Nexans Norway's independence which will be considered later in this judgment.

45. The status of Prysmian and NKT as participant and non-participant in the Cartel respectively was not controversial. ABB's position was more controversial and is the subject of specific factual findings in Section D(2).

46. The bid by "Mitsubishi/JPS" was made in partnership between Mitsubishi and J-Power Systems Corporation (**JPS**), two Asian manufacturers. At the time of first round bids, Mitsubishi was a member of the Cartel, in which it participated via a joint venture with Hitachi known as "EXSYM", and continued that participation until the Dawn Raids. JPS was itself a joint venture between Hitachi and Sumitomo. Hitachi, JPS and Sumitomo had ceased to be a member of the Cartel in April 2008. The bid by Mitsubishi/JPS was non-compliant because it tendered only for one of the four export cables that London Array was seeking.

(b) Round 2 bids

47. Following the submission of the Round 1 bids in November 2008, Nexans Norway was perceived as offering the best price, closely followed by ABB. London Array sent technical clarifications to bidders and held bilateral meetings with ABB, Nexans Norway and Prysmian (who had submitted compliant bids) in early February 2009.

48. Following that process, London Array revisited the commercial evaluation of the various bids it had received. London Array formed the view that ABB was offering the best price, a conditioned price of £80,349,181 as compared with Nexans Norway's conditioned price of £85,181,839. The switch in ABB's and Nexans Norway's respective rankings was driven to a significant extent by exchange rate movements.

49. In mid-June 2009, ABB was London Array's preferred tenderer. However, London Array decided to invite both ABB and Nexans Norway to submit their "lowest and final" prices by 3 July 2009, while emphasising that no tenderer would be eliminated at this stage and London Array reserved the right to award the contract to any tenderer if contract negotiations were not concluded successfully.

50. In response to that invitation, both Nexans and ABB reduced their prices. We discuss Nexans's price reduction further in paragraphs 80 to 82 below.

51. Following receipt of the "Round 2" bids, London Array concluded on 6 July 2009 that Nexans Norway was offering the best price (a conditioned price of £73,602,078) as compared with ABB's conditioned price of £79,664,240. In light of this, London Array's procurement team recommended that the contract for export cables be awarded to Nexans Norway.

52. Nexans's winning bid specified that it would, subject to contract, meet various "load-out" dates in relation to the four main cables and the spare: 4 June 2011 for Cable 1 and the spare, 8 August 2011 for Cable 3, 17 March 2012 for Cable 2 and 21 May 2012 for Cable 4.

(c) The Capacity Reservation Agreement and the argument about load-out dates

53. To ensure that Nexans Norway would be held to the load-out dates referred to in paragraph 52 when the contract was finally signed, London Array entered into a "Production Capacity Reservation Agreement" on 22 July 2009. Pursuant to the Capacity Reservation Agreement, London Array paid Nexans Norway some NOK 36 million (approximately £3.6 million) on terms that (i) if Nexans Norway and London Array entered into a contract for the supply of the export cables by 31 August 2009, that sum would be treated as an instalment of the contract price payable and Nexans Norway would meet the load-out dates specified in paragraph 52; but (ii) if Nexans Norway and London Array did not enter into such a contract by 31 August 2009, Nexans Norway could keep the sum paid.

54. Also on 22 July 2009, London Array varied the technical specifications for the export cables. Nexans Norway submitted a revised bid by reference to those revised technical specifications.

55. The contract was not signed by 31 August 2009, but on that date, Nexans Norway and London Array entered into an agreement extending the Capacity Reservation Agreement until 4 September 2009.

56. As part of the negotiations for the extension to the Capacity Reservation Agreement, both sides sought to vary the load-out dates that had been specified in tender documents and incorporated into the Capacity Reservation Agreement. On or around 28 August 2009, London Array requested that Nexans agree to accelerate the load-out dates for Cables 2, 3 and 4 (offering, in return, a few days' extension of the load-out date for Cable 1). Nexans responded to this request in an email of 28 August 2009 suggesting that all the load-out dates be extended by one month for each of Cables 1 and 3 and longer for Cables 2 and 4.

57. Nexans's attempt to renegotiate the load-out dates was poorly received. London Array threatened to award the contract for the export cables to someone else if Nexans did not adhere to the load-out dates that had originally been agreed and Nexans duly did so.

58. Nexans points to this disagreement as an instance of London Array exerting competitive pressure on Nexans, suggesting that the threat to award the contract to ABB instead was a real one. For its part, London Array suggests that the disagreement was insignificant because it simply resulted in Nexans adhering to the load-out dates to which it had already agreed. In our judgment, the true position lies somewhat between these two extremes. Nexans had agreed, by the Capacity Reservation Agreement, to adhere to the original load-out dates. However, that agreement expired on 31 August 2009. On 28 August 2009, London Array was in the difficult position of seeking to agree an extension to the Capacity Reservation Agreement that expired in just a few days' time and also to obtain accelerated load-out dates. At least in theory, Nexans could have declined to extend the Capacity Reservation Agreement, waited until it expired

and retained the NOK 36 million that it had received from London Array. Alternatively, it could have insisted on a delay to the load-out dates as its price for extending the Capacity Reservation Agreement and saving London Array from wasting NOK 36 million. However, that would have been an aggressive negotiating stance which would doubtless have had repercussions. We do not consider that Nexans was succumbing to strong commercial pressure from London Array when it agreed to adhere to the load-out dates which had formed the basis of its winning bid. Rather, we conclude that continued adherence to those dates, and an extension to the Capacity Reservation Agreement, represented a pragmatic compromise that ensured that Nexans would retain the benefit of the export cables contract that it clearly wanted on the terms on which it had bid.

59. The contract had still not been concluded by 4 September 2009 and on 7 September 2009, London Array and Nexans Norway entered into a "Letter of Intent". Pursuant to that Letter of Intent, Nexans Norway was paid NOK 48 million (approximately £4.8 million) and agreed to start work and adhere to the load-out dates set out in paragraph 52 pending conclusion of the formal contract. If London Array did not notify Nexans Norway by 18 September 2009 that it would enter into a contract, then Nexans Norway would be entitled to cease work and keep the payment made.

60. That deadline for execution of the contract was extended and on 30 September 2009, Nexans Norway and London Array entered into a contract for the supply of the export cables.

(d) Adjustments to specification and price between Round 2 and contract

61. Although Nexans's Round 2 bid (see paragraph 51 above) secured it the status of preferred bidder, that was not the final word on either price or contract specification. In late July 2009 London Array altered its technical specifications. In addition, the cost of metals, particularly copper and lead, had increased since Nexans submitted its Round 2 bid. Nexans accordingly submitted a revised bid on 24 July 2009 for a price that had increased by some 22% compared with its Round 2 bid.

62. Nexans submitted a further bid on 7 September 2009 in response to further changes in London Array's technical specification. That was for a price some 3.1% lower than the bid price referred to in paragraph 61.

(4) The procurement process – inter-array cables

63. London Array decided to follow a procurement process for inter-array cables separate from the export cables process. As we have noted in paragraph 32, the inter-array cables were less complex to manufacture and there were, accordingly, more available suppliers. A separate tender process for inter-array cables was intended to enable London Array to access that wider supplier base and attract more bidders.

64. Following a process of pre-qualification described in paragraph 30, London Array identified 10 potential suppliers of the inter-array cables. London Array considered that to be "probably too many" bidders and we conclude that London Array could, therefore, reasonably have concluded that fewer bidders would still produce a competitive tender process.

65. The following table shows the bids that London Array received following a first round of bidding in November 2008 (**Inter-array Round 1**) together with London Array's evaluation of each bid's conditioned tender price:

Bidder	**Conditioned tender price (GBP)**	**Participant in Infringement at the time of Inter-array Round 1 bids?**
JDR	30,233,390	No
Parker Scanrope	34,273,583	No
ABB	45,569,502	No: ceased on 17 October 2008 but see Section D(2) (although the subsequent discussions identified in that section do not affect inter-array cables)
Prysmian	47,647,435	Yes
Draka	48,560,786	No

NKT	49,095,566	No: ceased on 17 February 2006
Nexans Norway	51,164,466	Yes (see paragraph 44 above)
NSW	52,983,501	No
Mitsubishi / JPS	105,592,049	See paragraph 46 above

66. It can be seen that the majority of the bidders for inter-array cables were not members of the Cartel. The two lowest price bids, from JDR and Parker Scanrope, came from bidders who had never been participants in the Cartel.

67. That said, even though Nexans and Prysmian were just two bidders out of nine, they were at the time major players in the market for lower-voltage cables like the inter-array cables that London Array sought. In Table 4 of the Commission's Decision in Case M.8770 approving a merger between Prysmian and General Cable in 2018, the Commission concluded that between them, Nexans and Prysmian controlled somewhere between 50% and 90% of the market for cables below 33/45 kV (into which category the inter-array cables fell) between 2012 and 2017. Nexans does not suggest that the position was materially different at the time of the London Array tender and we conclude that it was not.

68. London Array concluded that only six of the bids which were received were technically compliant. It also made some changes to the parameters of the cable design and re-issued the tender for inter-array cables to those six bidders in July 2009 (**Inter-array Round 2**). London Array's evaluation of the six bids received is set out in the following table:

Bidder	**Conditioned tender price (GBP)**	**Percentage difference from winning bid**
JDR	29,058,597	N/A
Parker Scanrope	29,893,178	3%
Prysmian	37,200,295	28%
ABB	41,099,717	41%
Nexans Norway	46,673,342	61%
Draka	51,931,498	79%

69. London Array's evaluation was that all bidders, except Draka, reduced their bids as compared with those submitted in Inter-array Round 1. JDR and Parker Scanrope remained significantly cheaper than other bidders. However, London Array had some concerns about JDR's "capacity readiness and financial strength" and about Parker Scanrope's selection of materials. It therefore considered mitigating those risks by inviting Prysmian, notwithstanding its status as third-place bidder, to do some of the work on inter-array cables. That idea was, however, ruled out on grounds of expense. Prysmian's factory was located in Naples and it was considered that (i) the additional costs of shipping materials to JDR's factory (in Hartlepool) and (ii) the additional costs of sending London Array personnel to Naples during the manufacture would be too much.

70. Ultimately, London Array found some means of addressing what they saw as the risks associated with JDR and, in November 2009, the contract for the supply of inter-array cables was awarded to JDR alone.

71. As events transpired, JDR did experience some difficulties during the manufacturing process and a proportion of batch 3 of the inter-array cables had to be subcontracted to Parker Scanrope, the second placed bidder. However, London Array does not assert any Overcharge in relation to this "batch 3" and therefore we say nothing more about it in this judgment.

(5) Nexans's approach to the export cables bid and its internal approvals process

72. Unsurprisingly given the magnitude of both the risk and benefit involved, the decision whether or not to bid for the supply of export cables and the amount of any bid submitted involved both a lot of work by Nexans, and a good degree of internal review.

(a) Nexans's approvals process generally

73. In overview, Nexans followed the general process summarised below in deciding how to respond to the ITT:

(1) Olivier Angoulevant, an employee of Nexans Norway, was the sales manager who led on Nexans's response to the ITT. He performed an initial assessment, concluding that the project was one in which Nexans Norway could be sensibly competitive. Having reached that conclusion, he was responsible for "project managing" Nexans Norway's response to the ITT. He assembled a project team consisting of individuals with various expertise drawn from Nexans Norway's technical team, legal team, purchasing department, quality control and production and scheduling departments.

(2) The project team set about determining a bid price. It did so on a "cost plus" basis by estimating all costs associated with the tender and adding Nexans Norway's commercially desired margin which would typically be somewhere between [✂]. Nexans France had issued standing guidelines as to the kinds of terms and conditions that would be acceptable in a contract (for example terms imposing liquidated damages for late delivery). However, Nexans France's standing guidelines did not specify the precise margin that Nexans Norway should target in its bid.

(3) Nexans Norway staff prepared a PowerPoint presentation explaining, in high level terms, the nature of the tender. Included within that PowerPoint presentation was a "Draft Profit & Loss" statement. That set out a proposed tender price (expressed in NOK), an estimate of direct variable costs that Nexans Norway would incur and a calculation of the margin that Nexans Norway would expect to obtain if it won the contract. The PowerPoint presentation would tend to include some analysis of who Nexans thought it was bidding against.

(4) That PowerPoint presentation was initially reviewed by a group of individuals within Nexans with the necessary expertise. Until early 2009 that group was called the High Voltage Business Group (HVBG). After early 2009, the HVBG was split into two divisions, one dealing with cables on land and the other (the SUHVBG) dealing with submarine

cables. The HVBG or the SUHVBG had the power to require the proposed bid to be amended or even abandoned.

(5) Once the comments of the HVBG or SUHVBG had been reflected, the proposed bid was subject to the approval of a Tender Review Committee that comprised representatives of Nexans France and Nexans Norway. The Tender Review Committee met in Paris, although some Norwegian attendees could participate remotely.

(b) Approval of Round 1 bids

74. This process was followed in April 2008. Nexans Norway proposed to bid for the export cables at a price that would provide it with a margin of 39.9%. The PowerPoint presentation for the HVBG speculated that Nexans's competitors were "ABB, Prysmian, NSW? Japaneese?" At that time Mr Barth headed the HVBG with Mr Romand being the HVBG's second most senior member. If there had been any disagreement about Nexans Norway's proposed bid, Mr Barth had the authority to make the final decision. However, in practice there was no such disagreement and the HVBG approved Nexans Norway's proposed bid without amendment.

75. Mr Granlie was closely involved in the formulation of Nexans Norway's bids in response to the ITT. His evidence, and that of his boss at the time, Ms Aukner, was that neither knew of the existence of the Cartel when doing their work on the ITT. That evidence was not challenged and we accept it. That said, the terms of Nexans Norway's proposed bid for export cables were being reviewed by individuals at Nexans France (notably Mr Barth and Mr Romand) who were actively involved in the Cartel.

76. There was a meeting of the Tender Review Committee on 23 April 2008 to consider the proposed bid for export cables. At that time, Mr Barth and Mr Romand were the two most senior members of the Tender Review Committee and they were present at that meeting. Among others, Mr Granlie and Ms Aukner also attended. Mr Barth and Mr Romand could, in principle, have brought their seniority to bear and required the terms of Nexans Norway's bid

to be amended. However, they did not do so and the Tender Review Committee approved Nexans Norway's then proposed bid, priced by reference to a margin of 39.9%, without amendment.

77. Because the ITT was put on hold following Shell's departure from the London Array project, Nexans Norway did not submit the bid for which it had obtained the approval of the Tender Review Committee in 2008. However, on 14 October 2008, with first round bids due a few weeks later, Nexans Norway referred its proposed bid back to the HVBG, which was still headed by Mr Barth and Mr Romand. The presentation before the HVBG on this date showed that Nexans Norway was targeting a margin of 36.8%, lower than the margin that had been referred to as part of the April 2008 approval process. The presentation also speculated as to the identity of Nexans's competitors in the same terms as set out in paragraph 74. The HVBG made no change to the proposed bid.

78. The bid was not referred back to the Tender Review Committee in October 2008, even though the targeted margin of 36.8% was less than the margin of 39.9% in the presentation that had been before the Tender Review Committee in April 2008. We had no first-hand evidence as to why that was the case, although we were shown an email of 5 November 2008 from Mr Angoulevant to Mr Romand and Mr Gerace of Nexans France referring to a "P&L limit at 37%". We infer that the Tender Review Committee had given Nexans Norway authority to submit a bid that targeted a margin of 37%.

79. In the event, Nexans Norway calculated in an "Approval Form" of 7 November 2008 that the first round bid it submitted in November 2008 would produce a margin of 36.9%. We infer that this was sufficiently close to the "P&L limit" of 37% to require no further approval from the HVBG or the Tender Review Committee.

(c) Approval of Round 2 bids

80. By June/July 2009, when London Array was inviting Nexans and ABB to submit their "lowest and final" bids (see paragraph 49 above), Nexans's system of internal approvals had changed. An amended bid for the export cables

required the approval first of the SUHVBG (as distinct from the HVBG which had been split into two). Mr Granlie of Nexans Norway was the head of the SUHVBG reporting to Mr Raak of Nexans France and therefore Mr Barth and Mr Romand no longer had any role in the approval of the bid for export cables.

81. Mr Granlie formed the view that, in order to win the project, Nexans Norway would have to offer a price reduction. He prepared a presentation outlining the reasons for that belief on or around 1 July 2009. In that presentation, Mr Granlie assumed, wrongly, that Nexans's rival bidder was Prysmian, although he acknowledged that it "could easily be ABB". Mr Granlie recommended dropping Nexans Norway's price so as to target a margin of 31.9%, rather than the 36.9% that was implicit in its first round bid.

82. On 1 July 2009, Mr Granlie, Mr Angoulevant, and two of Mr Granlie's other senior colleagues at Nexans Norway, Mr Graff and Mr Gerace, discussed the proposal to reduce the price. They agreed with Mr Granlie. The matter was referred to Yvon Raak, Mr Granlie's boss, who was based in France and he too agreed. No further approval was needed, whether from the Tender Review Committee or elsewhere and Nexans Norway duly submitted its reduced bid the same day.

(d) The Cell Formula Mistake

83. On 1 July 2009, as a matter of arithmetic, the reduction in Nexans Norway's contract price implicit in their Round 2 bid was around 4.4% (that figure derived by comparing the contract price implicit in the bid submitted in November 2008 with that of the bid submitted in July 2009). However, that risks being a misleading figure since certain of Nexans's costs had increased between November 2008 and July 2009. In July 2009, Nexans thought its Round 2 bid reduced its margin from 36.9% to 31.9%. That corresponds to a reduction in price of around 7.4% allowing for the cost increases. Mr Granlie and others within Nexans Norway considered the reduction in price and margin to be a substantial reduction.

84. In fact, the reduction in margin arising as a result of the Round 2 bid was more substantial than Nexans Norway realised because of the presence of an error in calculations performed at the time (the **Cell Formula Mistake**).

85. As its name suggests, the Cell Formula Mistake was a methodological error in a spreadsheet prepared in June 2009. The spreadsheet as a whole recorded a cost referable to the steel necessary to provide armouring for export cables. However, the formula for capturing necessary costs did not interrogate the relevant cells of the spreadsheet that contained those steel costs. As a result, the June 2009 spreadsheet, failed to take some NOK 48 million (approximately £4.8 million) of steel costs into account as an expense. Had these costs properly been taken into account, Nexans Norway's Round 2 bid would have been considered in July 2009 to produce a margin of 25.3% rather than 31.9%.

86. The Cell Formula Mistake was not present in spreadsheets produced in connection with Nexans's first round bid in October 2008. Moreover, the Cell Formula Mistake was not the product of Cartel behaviour, it was a mistake of arithmetic and logic in the construction of the relevant spreadsheet. We conclude that, even if Nexans had not been a member of the Cartel, it would have made the same Cell Formula Mistake when pricing its bid.

87. Nexans did not discover the Cell Formula mistake until around 6 October 2009, after they had signed the contract for the export cables. They contemplated asking London Array for a price increase but ultimately decided not to.

(e) Revised bids in July and September 2009

88. As we have noted, before signing the final contract for export cables, Nexans provided updated bids in July 2009 and September 2009 as a response both to changes of specification by London Array and increasing metals costs. Neither of these updated bids were referred to either the Tender Review Committee or the SUHVBG. Moreover, since the Cell Formula Mistake was not discovered until 6 October 2009, neither of these revised bids were affected by any knowledge of that mistake.

89. In one email, Nexans estimated that the margin it would earn on the contract as signed (without knowledge of the Cell Formula Mistake) would be 34.5% although the experts appear agreed that Nexans's expectations at the time were higher at around 35.8%. Dr Davis has performed his own calculations of margin, based on estimates of Nexans's costs as at the date the contract was signed, but excluding the effect of the Cell Formula Mistake. On that basis, he concludes that Nexans could have expected a margin of 36.9% based on what they knew at the date of the contract. London Array places some emphasis on the fact that this was slightly higher than the margin that Nexans was targeting in its original bid in November 2008 (see paragraphs 77 and 78 above). We do not regard this to be a particularly relevant point. As we will explain later in this judgment, we consider that expectations of margin are of most assistance in determining the effect, if any, of the Cartel on the price of export cables. Nexans estimated that it would achieve a margin of 34.5% (or perhaps 35.8%) at the time it signed the contract and that is the figure that we consider to be the relevant one. Dr Davis's calculation may, or may not, be better than that performed by Nexans at the time but even if it is, we consider that it is Nexans's expectation, of a margin of either 34.5% or 35.8%, which tells us more than Dr Davis's calculation after the event.

(6) Post-contract matters including liquidated damages

90. The contract between London Array and Nexans Norway for the supply of export cables was executed on 30 September 2009. Nexans Norway failed to meet the load-out dates specified in that contract. As a result, it was obliged to pay, and did pay, liquidated damages pursuant to the terms of approximately NOK 74 million.

91. It is common ground that Nexans Norway would not have been able to deliver the cables by the dates specified in paragraph 52 whether or not it was a member of the Cartel although the parties had different perceptions on whether the stipulation of those dates in the final contract was the result of competitive pressure that London Array brought to bear on Nexans Norway which are the subject of our findings in paragraphs 57 to 59 above.

D. DISPUTED MATTERS OF PRIMARY FACT

(1) General features of the Cartel

92. As will be seen, Nexans places significant reliance in its defence to this claim on the proposition that London Array must show that the price it paid for both export cables and inter-array cables was inflated because of the presence of the Cartel. It stresses that it is not sufficient for London Array to show any general effect of the Cartel on the "market" and that London Array must establish loss and causation by reference to the London Array project specifically. We will address that argument later in this judgment. In making findings in this and later sections on the "general" features of the Cartel and its "general" effects, we should not be taken as prejudging that argument. In our judgment, such general features form relevant context for our assessment of the effect of the Cartel on the London Array project specifically.

93. Neither side invites the Tribunal to make findings as to how the Cartel operated, whether generally or in the case of the London Array project specifically, by reference to witness evidence. Rather, we are invited to make findings in this regard by reference to recitals set out in the Commission Decision. In its closing submissions, Nexans submitted that the following principles of law determine the status of those recitals. Since London Array did not dispute those principles, we take them to be common ground:

(1) The operative part of the Commission Decision is binding on this Tribunal (see [67(4)] of the judgment of Marcus Smith J in *BritNed Development Limited v ABB AB & Another* [2019] Bus LR 718 (***BritNed HC***)).

(2) The recitals that constitute the essential basis for the Commission Decision are binding (see [67(6)(b)] of *BritNed HC*). However, that proposition is of theoretical interest only since London Array has not pleaded that any particular recitals are binding on the Tribunal, although we were referred to a number of those recitals in the course of written and oral submissions.

(3) Recitals that do not constitute part of the essential basis for the Commission Decision are not binding (see [67(6)(c)] of *BritNed HC*). However, they are admissible evidence. In this case, neither side has advanced a case to the effect that a particular non-binding recital is wrong.

94. The Cartel operated in relation to, among others, HV submarine cables like the export cables and the inter-array cables. The Cartel as a whole was long-lasting, continuing from 1999 or 2000 until the Dawn Raids brought it to an end in 2009. As noted, membership of the Cartel fluctuated. That said, Nexans France, Prysmian and ABB, who were all significant producers of HV submarine cables, and who submitted compliant bids in the London Array bidding process were members of the Cartel for significant periods of time (see paragraph 33 above).

95. The Cartel had what the Commission described as two main "configurations":

(1) There was the "**A/R cartel configuration**" pursuant to which European, Japanese and Korean producers allocated territories and customers. Very broadly, Japanese and Korean producers refrained from competing for projects in Europe while European producers agreed to stay out of Japan and Korea.

(2) There was the "**European cartel configuration**" under which European members of the cartel allocated territories and customers within Europe among themselves.

96. Nexans characterises the Commission Decision as concluding that the Cartel was an "allocation-based" cartel, implicitly contrasting that with a "price-fixing" cartel. However, in our judgment that risks overlooking important aspects of the Commission Decision. Certainly, the Commission makes it clear that a function of the European cartel configuration was to allocate relevant projects to a particular allottee. However, the means by which that allocation was achieved in particular cases could well involve effects on the prices members of the Cartel offered in auctions. As the Commission put it in Recital (234):

> … the parties exchanged information and prices for allocated projects within the European cartel configuration. The parties could then prepare their cover bids and ensure that they would not bid higher than the allottee. Alternatively, the allottee would give instructions ('guidance') to the other parties to ensure that his bid remained the best…

97. Of course, only Cartel members would be sharing information on prices in this way, and only Cartel members would submit "cover bids" (i.e. bids that appeared to be genuine attempts to win a tender but were in fact engineered to be less attractive than the bid of the allottee). However, in an extreme case, if a number of Cartel members were ostensibly participating in a tender, but had all agreed between themselves that "cover bids" would be submitted to ensure that a particular allottee won the tender, there would be less competition than the purchaser of cables thought there was. In effect there would be only one genuine bid from all the Cartel members that could be measured against non-Cartel bids. In our judgment, a process such as this could well result in upwards pressure on prices.

98. The possibility of Cartel behaviour having an effect on prices for HV submarine cables is recognised in other recitals to the Commission Decision:

    (1) Recital (404) refers to communications between Nexans and Prysmian in 2006 in which Prysmian complained that Nexans's proposed increase of capacity to manufacture MI cables at its Halden factory in Norway was "not in line with our understanding". From this it follows that, on occasions at least, the Cartel sought to regulate capacity. Elementary economic theory suggests that, as a general matter, capacity restrictions are likely to lead to increased prices.

    (2) Recital (493) notes that "several parties agreed on the prices to be offered for SM and UG power cable projects by the establishment of a floor price or the co-ordination of price levels".

99. We will consider later how Cartel behaviour manifested itself in the London Array tender process specifically. However, as a purely general matter, we do not accept that there is a clear dividing line between an "allocation-based" cartel and a "price-fixing" cartel of the kind for which Nexans argues. Without making

any presumption as to how the Cartel affected London Array specifically, we agree with London Array that an agreement by members of a cartel not to compete in certain markets, to restrict capacity, and to maintain floor prices are, as a purely general matter, capable of having an impact on the prices paid by individual customers even in the absence of actions by the cartel directed specifically at their specific projects.

100. Nexans submits that the dividing line between an "allocation-based" cartel and a "price-fixing" cartel is borne out by paragraph [131] of the judgment of Henderson LJ in *BritNed Development Limited v ABB AB & Another* [2020] Bus LR 1073 ("***BritNed C/A***"). That judgment concerned the very same cartel as that relevant to this dispute. However, Henderson LJ's statement that Marcus Smith J at first instance had been "right to point out that the effect of an allocation-based cartel need not always be that a tender is made at an uncompetitive price" does not support the weight that Nexans seeks to place on it. Henderson LJ was simply endorsing a conclusion of fact that Marcus Smith J had reached to the effect that an allocation-based cartel "need not" have any particular result on prices. He was not making any statement of law to the effect that, in connection with London Array specifically, the Cartel operated purely as an "allocation-based" cartel (and indeed, as will be seen from the discussion below, Recital (444) of the Commission Decision indicates otherwise since it refers to collusion on price in the context of the London Array tender). In any event, Henderson LJ's statement envisages that an "allocation-based cartel" can indeed have an effect on prices.

(2) The extent of collusion between members of the Cartel in relation to export cables at London Array

(a) Preliminary point – ABB's successful application for leniency

101. In Article 1 of the Commission Decision, the Commission found that ABB participated:

> in a single and continuous infringement in the (extra) high voltage underground and/or submarine power cables sector … from 1 April 2000 to 17 October 2008

102. 17 October 2008, the date on which ABB applied for leniency as discussed in paragraph 112, was before London Array received first round bids for export cables. Nexans argues that, applying the principles summarised in paragraph 93, this conclusion precludes any finding that Mr Romand, of Nexans, and Mr Jönsson, of ABB, agreed to collude in respect of the London Array tender or that Mr Jönsson divulged competitively sensitive information to Mr Romand after 17 October 2008.

103. However, as London Array points out, the Commission Decision contains findings as to ostensibly collusive behaviour involving ABB after 17 October 2008. Recital (444) of the Commission Decision states that:

> Between 5 and 7 November 2008, Mr Romand (Nexans) also contacted Mr Jönsson (ABB) twice by phone in order to discuss the price level that the companies should apply to their bids for the London Array project.

104. Moreover, paragraph 422 of Annex 1 to the Commission Decision records that Mr Jönsson and Mr Romand actually exchanged price information relating to the London Array bid. Recital (116) of the Commission Decision states that Annex I "forms an integral part of [the Commission Decision]".

105. Recital 493(b) of the Commission Decision refers to the actions set out in Recital (444) as being instances on which both ABB and Nexans "participated in the European cartel configuration; an agreement or concerted practice through which they allocated territories and customers within the EEA". Recital 493(d) refers to the actions set out in Recital (444) as an example of a situation in which both Nexans and ABB "agreed on the prices to be offered for SM and UG power cable projects by either the establishment of a floor price or the coordination of price levels".

106. We take a "floor price" to refer to a minimum price below which members of the Cartel would not bid (see Recital (86)). Recital (90) acknowledges that setting a "floor price" would not necessarily result in a contract being allocated to any specific member of the Cartel and might be set if there were "too many 'outsiders' in the running for a project". In our judgment, a floor price would not be inconsistent with a degree of competition between members of the Cartel

since one Cartel member might still propose a better price (above the floor price) than other Cartel members.

107. Therefore, the Commission Decision (read together with Annex 1) includes determinations that (i) Mr Jönsson and Mr Romand actually exchanged price information relating to the London Array bid between 5 and 7 November 2008, (ii) by doing so, both were participating in the European cartel configuration and (iii) the exchange involved either the establishment of a floor price or the coordination of price levels.

108. Nexans argues that the Commission cannot have reached this conclusion because "the [Commission Decision] relies on no other evidence that these contacts occurred or as to what was allegedly discussed (despite voluminous materials being seized by, and provided to, the Commission during its investigation". We reject that argument. The Commission recorded in Recital (116) the volume of the evidence that it had received and the difficulties it had in drawing conclusions from that evidence which was often, intentionally, worded cryptically. We have explained why we consider the Commission's findings set out in paragraph 107 arise from the combination of the various recitals. If Nexans had wished to explain why the recitals in the Commission Decision do not give a full picture of the nature of the discussions between Nexans and ABB in November 2008 it should have produced evidence on these matters which were within Nexans's knowledge and not within that of London Array.

109. We agree with London Array that the solution to the apparent inconsistency between Recital (444) and Article 1 of the Commission Decision, to which Nexans refers, is to be found in the Commission's policy in relation to leniency applications. That policy is set out in a Commission Notice on Immunity from fines and reduction of fines in cartel cases (2006/C 298/11) (the **Leniency Notice**). We were also shown a version of the Commission's "Frequently Asked Questions (FAQs) on Leniency" published in October 2022 with neither side suggesting that the policy in 2008 was any different. Those documents demonstrate that, as its name suggests, "leniency" is a process by which the Commission either eliminates, or reduces, a fine that would otherwise be

imposed to undertakings that self-report and hand over evidence in relation to secret cartels. An undertaking that benefits from leniency may well have participated in culpable cartel behaviour but is not punished, or is punished less, for that behaviour as a reward for self-reporting. Leniency consisting of a complete immunity from fines (of the kind that ABB obtained) is available only to the first undertaking that provides information and evidence which enables the Commission either to carry out a targeted inspection (i.e. a "dawn raid") or to make a finding of infringement in relation to the cartel.

110. In this case, the Commission considered that it needed to perform "targeted inspections". In those circumstances, paragraph 12 of the Leniency Notice provides that an undertaking will be eligible for leniency only if:

> The undertaking ended its involvement in the alleged cartel immediately following its application, except for what would, in the Commission's view, be reasonably necessary to preserve the integrity of the inspections

111. Accordingly, if the Commission considered that it wanted ABB to continue to "play along" with the Cartel in order to preserve the integrity of future dawn raids, ABB would not lose its entitlement to leniency if it did so.

112. Finally, we observe that in Article 1 the Commission found that ABB participated in a "single and continuous infringement" from 1 April 2000 to 17 October 2008. ABB's leniency application on 17 October 2008 meant that, if it wished to preserve the possibility of immunity from fines, it could no longer carry on its previous "single and continuous" infringement. Rather, any future potentially infringing activity would need to be justified by the Commission's wish to preserve the integrity of proposed dawn raids.

113. Once that is appreciated, in our judgment the alleged "inconsistency" between the Commission's findings in its Recitals and Article 1 disappears. The finding that ABB committed a "single and continuous" infringement between 1 April 2000 and 17 October 2008 is not inconsistent with a conclusion that ABB performed later isolated and separate acts of infringement when it discussed London Array pricing with Nexans between 5 and 7 November 2008 so as to preserve the integrity of the Commission's proposed dawn raids. Evidently the

Commission accepted that those subsequent separate and isolated acts of infringement were justified since it granted ABB full immunity from fines. As a result, neither ABB's "single and continuous" infringement, nor its subsequent isolated and separate acts of infringement were punished with a fine.

(b) Was there collusion between Nexans and ABB in relation to export cables?

114. Recital (444) refers to discussions relating to the pricing of London Array bids between Mr Romand of Nexans and Mr Jönsson of ABB between 5 and 7 November 2008. There is a good reason why we have no evidence from Mr Romand: he has sadly passed away.

115. In the absence of evidence from Nexans as to what exactly was discussed between Nexans and ABB between 5 and 7 November 2008, we have only the recitals to the Commission Decision to guide us. In our judgment, Recital (444) of the Commission Decision, when read together with paragraph 422 of Annex 1 to that Decision, demonstrates that there was some collusion between Nexans and ABB in relation to first round bids for export cables that were submitted on or around 11 November 2008 of the kind summarised in paragraph 107. Nexans and ABB either set a "floor price" in relation to their first round bids or coordinated price levels.

116. London Array invites us to conclude from Recitals (442) and (443) that Nexans and ABB agreed what each other would bid for the London Array project as part of a wider set of collusion taking place in October 2008. In Recital (442), the Commission finds that, on 17 or 18 October 2008, Mr Romand of Nexans told Mr Jönsson of ABB that Nexans would "bid high" for a wind-farm contract in Belgium. Recital (443) records a finding that on 25 October 2008, Prysmian communicated its prices for a contract in Sicily which Prysmian eventually won. London Array therefore suggests that an agreement was struck in October 2008 to the effect that ABB would take the Belgian windfarm contract after Nexans "bid high", Prysmian would take the contract in Sicily and Nexans would take the London Array contract.

117. We are unable to reach that conclusion on the basis of the brief findings in the Commission Decision. The premise behind it is undermined by the fact that paragraph 420 of Annex 1 to the Commission Decision suggests that the windfarm in Belgium that Mr Romand and Mr Jönsson were discussing was Belwind, a contract for a windfarm in Belgium that a third-party database of windfarm projects (the **4C Database)** records that Nexans won despite, apparently, "bidding high" for it.

118. Of the two possibilities summarised in paragraph 107, we have concluded that it is more likely than not that Nexans and ABB colluded in setting a floor price for their first round bids for the London Array export cables. In the light of the detailed evidence we have as to the pricing of their first round bids, we do not consider that they co-ordinated price levels more generally in the sense of agreeing what each other would bid in the first round. As we have found in paragraphs 47 to 48 above, Nexans's and ABB's first round bids were extremely close. Only a process of "conditioning" enabled London Array to choose between them and during the course of London Array's evaluation of their bids, Nexans and ABB switched places. The sheer closeness of those bids, and their susceptibility to outside influences such as exchange rate movements militates against a conclusion that Nexans and ABB were seeking to ensure that one or other of them would offer the best price in the first round.

119. By agreeing a floor price for their first round bids, ABB and Nexans were not excluding the possibility of competing on price in relation to those bids (see paragraph 106 above). However, any such competition would necessarily involve both ABB and Nexans making bids above the agreed floor.

120. We do not, however, consider that there was any collusion between ABB and Nexans in relation to bids after the first round. The Commission Decision does not suggest any such collusion and we did not see sufficient evidence in the material before us to support a conclusion that collusion between ABB and Nexans continued after the first round. London Array itself commented in a contemporaneous document that "ABB has demonstrated throughout the tendering and evaluation process that they are keen to be awarded this work". While of course London Array did not know about the Cartel, and so it was

missing a core piece of information when making this evaluation, we still consider that it counts for something. London Array was experienced in procurement processes and could be expected to notice if ABB was not trying hard to win.

(c) Did Nexans France know that Prysmian was submitting a high first round bid?

121. On 24 April 2008, Mr Acquaotta of Prysmian sent Mr Romand of Nexans an email that contained the following paragraphs. Mr Acquaotta was interpolating his response to earlier questions from Mr Romand and in the interests of readability, we show Mr Acquaotta's response in italics and Mr Romand's initial questions in normal typeface. :

> need elements to day What about intermill *We are not ready and have asked one month extension* Qatar sub. We are ask 5 years guarantie or we are disqualified *Please do it* Need to talk eon *yes but not ready yet*.

122. On 14 May 2008, Mr Acquaotta sent Mr Romand an email, copied to Mr Gerace, making arrangements for a meeting to be held "next Friday", which we infer was 23 May 2008. The Tribunal has no evidence as to whether that meeting took place or, if it did, what was discussed at that meeting. However, London Array submits that the reference to "eon" can be interpreted as a reference, perhaps intentionally abstruse, to London Array given that E.ON was one of the participants in the London Array joint venture. It notes that Prysmian's eventual bid, submitted in November 2008 was significantly higher than that of either Nexans or ABB and invites us to infer that in or around April and May 2008, Prysmian and Nexans were discussing, and would ultimately agree, that Prysmian would make a cover bid for the London Array export cables.

123. We accept the possibility, which Nexans points out, that the references to "eon" in the email of 24 April 2008 could have been to any number of projects involving E.ON. We are less persuaded by Nexans's point that it would be "surprising" for Prysmian and Nexans to refer to the London Array project by reference to E.ON since much of the contact between possible tenderers and the joint venture participants in London Array had been with Shell rather than

E.ON. If Prysmian and Nexans were indeed discussing Cartel issues in the email of 24 April 2008, it is entirely possible that they would have used opaque references to cover up that fact.

124. Nor are we persuaded by Nexans's argument that, if Nexans and Prysmian were discussing a cover bid it would have been more natural to do so before the meeting of Nexans's Tender Review Committee on 23 April 2008 (see paragraph 76 above). The parties' Agreed Chronology shows that the tender process for export cables was put on hold on 28 April 2008 as a consequence of Shell's decision to sell its interest in the London Array joint venture. A meeting about a "cover bid" in May 2008 would still have utility since the export cables tender process could be expected to resume once Shell had transferred its share in the London Array consortium to someone else.

125. We acknowledge Nexans's point that, at the time of the email of 24 April 2008, Nexans and Prysmian were bidding together, as a consortium, for a project in Qatar. The reference to the "Qatar sub" therefore strikes us as, more likely than not, being related to that project. However, that does not mean that all other matters mentioned in the email were similarly benign: the email reads as a very short-form reference to a number of issues not necessarily united by a common theme. Mr Romand could have been referring to both Cartel business and non-Cartel matters.

126. Ultimately, we conclude that Mr Romand's email cannot readily be understood simply by reading it. To understand it, some assistance would be needed from the parties to the email exchange, yet we have not had that assistance. However, the email exchange is not the only evidence on this matter. At the time only ABB, Prysmian and Nexans were winning bids for export cables at wind-farms (see paragraph 171) and Prysmian's bid was some 25% higher than that of ABB and Nexans. We consider it unlikely that Prysmian would have had the track record of success in this area if it consistently bid so much higher than its competition. Therefore, there is a live question as to why Prysmian bid so high for this particular project if it was genuinely hoping to win it.

127. Nexans points out that Prysmian's bid was lower than the bids of both NKT and Mitsubishi/JPS and argues that it was not, therefore, unrealistically high. We consider that to be a false comparison. The only manufacturers winning tenders for export cables at wind-farms at this time were Nexans, Prysmian and ABB. There is little to be gained by comparing Prysmian's bid with those of others who were unlikely to win.

128. The Commission Decision refers to the "talk eon" email of 24 April 2008 in Recital (439). Nexans rightly points out that the Commission Decision does not include that email as an example of a cover bid in a list of cover bids in Recital 493(e). However, Recital 439(b) refers to that email as being an instance on which both Nexans and Prysmian "participated in the European cartel configuration through which they allocated territories and customers within the EEA". That is not binding on us. However, Nexans has not satisfactorily explained why the Commission's conclusion was wrong and has not sought to adduce evidence from anyone within Nexans France who knew what Mr Romand and Mr Acquaotta were discussing in April and May 2008. In a similar vein, we attach little weight to Nexans's argument that Prysmian's bid was "too high" to be a cover bid: apparently on the basis that a cover bid would need to be more subtly excessive so as not to attract attention. Nexans has given us no evidence with which to assess how cover bids were formulated from people who knew how the Cartel worked to enable us to evaluate that submission.

129. Nexans invites us to conclude that references in the contemporaneous documentation to Nexans Norway's belief that it was competing against Prysmian when making Round 2 bids are inconsistent with any knowledge by Nexans Norway that Prysmian was not seriously seeking to win the export cables contract. We disagree. Some employees of Nexans Norway such as Mr Granlie and Ms Aukner did not know about the Cartel. Therefore, even if Prysmian was not seeking to win, employees such as these could still believe that Prysmian might be a genuine competitor. If there were other Nexans Norway employees who did know about the Cartel, they could be expected to keep that knowledge secret and not share any knowledge they had about Prysmian's bid with employees unaware of the Cartel.

130. Overall, we have concluded that (i) Prysmian was not seriously seeking to win the contract for London Array export cables and (ii) employees of Nexans France who were involved in the Cartel were aware of that fact before Nexans Norway submitted its own first round bid. We have explained above our reasons for conclusion (i). Conclusion (ii) follows either from the discussions between Mr Romand and Mr Acquaotta or from the fact that since the London Array project was such a large one, and Nexans, ABB and Prysmian, all members of the Cartel in April and May 2008, were the only bidders who could realistically expect to win it, it would be surprising indeed if Prysmian's lack of interest in winning that tender was not discussed.

(3) "Independence" of Nexans Norway

(a) Are findings as to Nexans Norway's "independence" necessarily precluded by the Commission Decision?

131. The Defendants are addressees of the Commission Decision. Nexans Norway is not. A central plank of the Defendants' defence to the claim is the proposition that Nexans Norway was in an important sense independent of Nexans France with the result that the price Nexans Norway charged for export cables was not affected by activities of the Cartel, which were conducted within Nexans France.

132. In Recitals (723) to (727) of the Commission Decision, the Commission made some findings as to the position of Nexans subsidiaries, including Nexans Norway among others. In Recitals (723) to (724), it noted that reporting lines within Nexans meant that senior employees in Nexans Norway reported directly to senior managers within Nexans France. It was noted that the Vice President of Nexans Norway's energy division reported directly to Mr Barth.

133. In Recitals (725) and (726), the Commission found that Nexans France was responsible for the involvement of Nexans Norway in the Cartel. It concluded that, whereas Nexans France had argued that subsidiaries such as Nexans Norway independently competed for contracts, in fact Nexans France had allocated projects on behalf of those subsidiaries.

134. London Array suggested in opening that these findings of the Commission preclude the Tribunal from making findings as to Nexans Norway's "independence". For reasons that follow, we do not accept that.

135. The Commission's finding was, in effect, that Nexans France had, on occasions, allocated projects involving Nexans Norway. The Commission clearly had some reservations about assertions as to Nexans Norway's "independence" given the reporting lines that were in place. However, the Commission was considering whether Nexans France was participating in the Cartel only in its own name, or whether its participation also affected projects undertaken by other Nexans subsidiaries. The Commission's conclusion, set out in Recital (728) was that even though only the two Nexans France entities were addressees of the Commission Decision, Nexans France operated in the Cartel on behalf of other subsidiaries.

136. This Tribunal is considering a different question. We are not concerned with general questions as to whether Nexans France was operating on behalf of others or not. Rather, we must decide whether the price that London Array paid for its cables was higher than it would have been but for the Infringement. That is therefore, a specific, rather than a general question and, moreover a question that invites a focus on price.

137. The degree of independence that Nexans Norway had when setting the price it offered in the tender process in London Array is a relevant consideration. The Commission Decision makes no findings on that specific issue and we consider that it is open to us to do so.

(b) The significance of the absence of evidence on the operation of the Cartel

138. Nexans has put forward some evidence as to how senior level decision making operated in relation to its bid for export cables. However, it has not put forward any evidence from personnel involved in the pricing of Nexans Norway's bid at a more junior level. Nor has it put forward any evidence as to how Nexans

operated the Cartel, for example how it ensured that it "lost" tenders that had been allocated to other Cartel members.

139. While there is a good reason why Mr Romand was not called to give evidence we saw no sufficiently good reason, grounded in evidence, as to why other individuals were not called:

(1) Mr Angoulevant "project managed" the pricing of Nexans Norway's bid. Precisely how he did so, and what if any input and suggestions he received from others outside Nexans Norway would have been of real relevance. We do not accept Nexans's argument that evidence from Mr Angoulevant was unnecessary because "Mr Granlie … made the operative decision in relation to the margin". Mr Angoulevant could have given evidence about how Nexans Norway came to target a particular margin on export cables before Mr Granlie exercised his senior decision making function. Mr Singla KC said, on instructions and without waiving privilege, that attempts had been made to ask Mr Angoulevant to give evidence, but he had refused and, since he was resident in France, he could not be summonsed. However, there was no evidence on this matter that enabled us to gauge the quality or otherwise of the reasons for not calling Mr Angoulevant.

(2) Employees of Nexans France other than Mr Romand were named in the Commission Decision as being involved in the Cartel, for example, Mr Jay and Mr Barth. It is common ground that neither individual is still employed by Nexans. However, we were not shown any evidence as to Nexans's attempts, or otherwise, to secure their attendance as witnesses and therefore we have nothing with which to assess the quality of Nexans's reasons for not calling them.

(3) We saw an email dated 5 November 2008 showing that Mr Angoulevant was at that time discussing pricing for Nexans Norway's export cables bid with Mr Romand and also a Mr Gerace. The date is significant since it was at this time that Recital (444) indicates that Mr Jönsson of ABB was having discussions on bid pricing for London Array export cables

with Mr Romand. In closing submissions, Nexans describes Mr Gerace as a "peripheral figure". However, the Tribunal has no evidence with which to consider whether that is accurate. It appears quite possible that Mr Gerace was having discussions with Mr Romand or might be able to explain what discussions Mr Romand was having with Mr Angoulevant on the pricing of Nexans Norway's bid. It is apparent from paragraph 29 of London Array's Claim Form that London Array alleges that the meetings between 5 and 7 November had a direct effect on the bid that Nexans Norway submitted. Mr Gerace is currently an employee of Nexans Norway and could apparently have shed some light on that issue. We are not satisfied that there was a good reason not to call him as a witness.

(4) As noted in paragraph 122 above, Mr Gerace was also copied in on emails fixing up a meeting between Nexans and Prysmian in May 2008 to discuss what London Array submits to be Cartel business that led Prysmian to submit a "cover bid" for export cables. London Array had pleaded well in advance of the trial an allegation that Prysmian's bid was a cover bid. Given that Mr Romand has passed away, Mr Gerace might have had useful evidence to give on what Nexans and Prysmian were discussing. However, in closing submissions, London Array did not contradict Nexans's argument that London Array referred to the emails involving Mr Gerace as supporting its pleaded case for the first time in its opening skeleton argument. We are prepared to accept that Nexans could not have foreseen the potential relevance of Mr Gerace to the "cover bid" issue specifically.

140. In summary, we consider that there is other evidence, within Nexans's knowledge and outside the knowledge of London Array, that Nexans could have advanced to shed light on (i) Nexans Norway's asserted "independence" and (ii) the extent, if any, to which any such independence made Nexans Norway's bid for export cables immune from being increased by virtue of Nexans France's participation in the Cartel.

(c) Our conclusions on the asserted "independence" of Nexans Norway

141. Given the points we make in section D(3)(b) above, we will make only the following limited findings going to Nexans Norway's "independence":

(1) We find that all those Nexans witnesses (such as Mr Granlie, Ms Aukner, Mr Jacobsen and Mr Støten) who have given witness statements denying awareness of the Cartel were telling the truth in that regard as London Array does not suggest otherwise.

(2) We accept the evidence of Ms Aukner and Mr Granlie that a team within Nexans Norway prepared the bid for export cables. We have also found, see Section C(5)(b) above, that when they submitted proposed bids to the HVBG and the Tender Review Committee, neither body required any amendments to the terms of those bids even though they had power to do so. So, for example, when Nexans Norway proposed a reduction in targeted margin in October 2008, the HVBG did not oppose this.

(3) Mr Granlie proposed a reduction to Nexans Norway's bid in July 2009 because he genuinely thought that Nexans Norway was engaged in closely fought competition to secure what he regarded as a valuable opportunity.

142. Nexans invites us to go beyond those specific findings and draw an inferential conclusion that "there is no evidence that the Infringement influenced the persons actually responsible for pricing Nexans Norway's bids for the export cables". We will not go as far as that. Certainly, we will not conclude, on the evidence that has been placed before us, that the pricing of Nexans Norway's bid was expressly affected by the knowledge of any named Nexans Norway employee that the Cartel existed. However, as we have noted in section D(3)(b) above, we are concerned that we have not been shown the full picture. We do not, therefore, consider we have a secure basis for concluding that the Infringement had no influence on the persons actually responsible for formulating Nexans Norway's bid. Nexans stresses the fact that neither the HVBG (or the SUHVBG) or the Tender Review Committee altered any of the

bids that Nexans Norway proposed to make. However, Nexans has chosen not to put forward evidence as to how Nexans France operated the Cartel that addresses the possibility of Nexans Norway's bid being affected at an earlier stage.

143. We are reinforced in that conclusion by the fact that Nexans Norway was the only member of the Nexans group which manufactured HV submarine cables while the Cartel was in existence. As the Commission found, Nexans France had some mechanism for allocating projects involving Nexans Norway in accordance with the wishes of the Cartel. Therefore, even if Nexans Norway enjoyed a good degree of independence in pricing bids, Nexans France must have had some way of ensuring that Nexans Norway did not win contracts that had been allocated to others in the Cartel. Since Nexans has not put forward evidence of how the Cartel actually operated in this regard, we do not consider that we have the material available to consider critically the possibility that individuals within Nexans France who were involved in the Cartel were in contact with relevant individuals within Nexans Norway and influenced the pricing of the export cables bid. Indeed, Ms Aukner was asked in cross-examination whether there were any relevant differences between Nexans France's ability to influence pricing for the London Array bid and its ability to influence the pricing of projects that were affected by Cartel activity. She did not point to any relevant differences.

144. We have been shown evidence as to how senior levels of Nexans's approvals process worked in the form of the HVBG (and subsequently the SUHVBG) together with the Tender Review Committee. However, we have had no evidence from Mr Angoulevant as to how he and his team at a more junior level prepared the bid and the estimates that supported it. That is significant given our conclusion that Nexans France and ABB agreed a "floor price" for their respective bids for London Array export cables. In those circumstances, a single conversation between a Nexans Norway employee involved in pricing the bid, and a Nexans France employee with knowledge of the Cartel suggesting, for example, that an estimate for particular costs should be increased, or that Nexans Norway could be more ambitious in its pricing, could assume real significance. Yet, even though we know that Mr Angoulevant had at least one email

discussion with Mr Romand about the London Array bid, Nexans has not provided evidence from those actually involved in the detailed process by which Nexans Norway produced its bid. We have, therefore, not been shown a key part of the picture addressing the susceptibility or otherwise of that process to input from Nexans France. That gap is not filled by the evidence we have been shown on the ultimate outcome of that process and the review of Nexans Norway's work product by the senior HVBG and Tender Review Committee. Nexans would have needed to give a fuller account of the process to satisfy us that the process was immune from interference by those with knowledge of the Cartel at an earlier stage.

145. We apply the following approach set out by the Supreme Court at [41] of *Royal Mail Group Ltd v Efobi* [2021] UKSC 33:

> 41… So far as possible, tribunals should be free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense without the need to consult law books when doing so. Whether any positive significance should be attached to the fact that a person has not given evidence depends entirely on the context and particular circumstances. Relevant considerations will naturally include such matters as whether the witness was available to give evidence, what relevant evidence it is reasonable to expect that the witness would have been able to give, what other relevant evidence there was bearing on the point(s) on which the witness could potentially have given relevant evidence, and the significance of those points in the context of the case as a whole. All these matters are inter-related and how these and any other relevant considerations should be assessed cannot be encapsulated in a set of legal rules.

146. We conclude that there were witnesses available to give evidence on both how the Cartel worked and whether or not Mr Angoulevant and others in the Nexans Norway team preparing the detailed bid interacted with Mr Romand, Mr Barth, or others with knowledge of the Cartel on the pricing of their bids. We accept, of course, that there is a good reason for the absence of evidence from Mr Romand. However, we are not satisfied that there is a good reason for the more general absence of evidence on these two issues. As we have noted, those at Nexans France who had knowledge of the Cartel had senior roles within the Nexans group. They must have had some means of ensuring that Nexans Norway complied with decisions that Nexans France had made on bidding for HV submarine cable contracts. We infer that relevant individuals at Nexans France with knowledge of the Cartel interacted with the Nexans Norway team

led by Mr Angoulevant (i) to ensure that Nexans Norway employees complied with the floor price that Nexans France and ABB had agreed would apply and (ii) brought to bear Nexans France's knowledge that Prysmian was not genuinely seeking to win the contract for London Array export cables.

(4) Were there particular reasons that make an Overcharge on the London Array project unlikely?

147. Nexans argues that there were particular "a priori" reasons why an Overcharge on the London Array project was unlikely. In later sections we consider the magnitude of any Overcharge. This section is concerned only with findings as to the facts underpinning Nexans's argument.

148. London Array was a "marquee" project that would involve Nexans Norway supplying export cables to one of the largest windfarms in Europe. If the project went well, Nexans thought it would be able to leverage its experience to win further projects and that benefit was worth the sacrifice of a few percentage points of margin.

149. That is demonstrated by Nexans Norway's response to the request for "lowest and final" bids (see paragraph 81 above). Even though Nexans Norway had, at the time, limited capacity (as shown by the fact that London Array had to pay significant sums pursuant to the Capacity Reservation Agreement in order to reserve capacity at Nexans's Halden factory), it was prepared to offer a significant reduction in margin to give it a prospect of securing the contract for export cables.

150. It was suggested that London Array's sophisticated negotiation techniques provided a further reason to expect Nexans Norway's margin on the export cables to be atypically low. We do not accept that as we are not satisfied that London Array's approach in this regard was materially different from the approach followed by other purchasers of HV submarine cables (see paragraph 38 above).

151. In related arguments, Nexans argued that there was a natural "cap" on the amount of any Overcharge on export cables because it could not realistically have been expected to supply export cables to London Array at an "operating loss". By "operating loss", Nexans was referring to a loss after allocation to the London Array project of a notional allocation of Nexans's total overheads, as well as the direct costs of providing the export cables.

152. We do not accept that argument. There are a number of reasons why rational economic actors might decide to sell HV submarine cables at what might appear to be an operating loss. For example, Nexans could rationally form the view that even if a successful bid for export cables did not produce a profit on that measure, the lustre added to Nexans's credentials by the London Array project would mean that it could win future projects at healthy margins that would compensate for any short-term "loss". Moreover, Mr Bell's analysis suggests that some 6 out of 19 HV submarine cable projects that Nexans entered into in the post-Infringement period were expected to produce an operating loss (when considered on the basis of "expected margin").

153. We accept, of course, that if the estimate of Overcharge on export cables would result in Nexans selling export cables at a significant operating loss, that might call into question whether that estimate is correct. However, we do not accept Nexans's principled argument that **any** operating loss was necessarily impossible.

(5) Would there have been additional bidders for the London Array export cables in the absence of the Cartel?

154. In paragraph 136 of its written closing submissions, Nexans argues that:

> To establish causation, the Claimants would need to show: (i) there would have been an additional bidder in the counterfactual; and (ii) the additional bidder would have won the tender with a lower price than Nexans Norway or brought to bear sufficient competitive pressure that Nexans Norway would have been forced to lower its own price still further to secure the project. In this regard, the additional bid would have needed to be both technically compliant and competitive from a technical perspective.

155. As we will explain later in this judgment, we do not accept that proposition. However, since Nexans placed this argument at the forefront of its submissions, it is appropriate to express some conclusions on whether there would have been additional bidders for export cables but for the existence of the Cartel.

156. Paragraphs 139 to 168 of Nexans's written and oral closing submissions went carefully through what it submitted to be the universe of all possible additional bidders for export cables in the counterfactual. Nexans explained, in relation to each supplier either (i) why the Tribunal could not be satisfied on a balance of probabilities that the supplier would have bid at all in the counterfactual and/or (ii) why the Tribunal could not be satisfied on a balance of probabilities that any bid that was submitted in the counterfactual would either undercut Nexans's winning bid or exert sufficient competitive pressure to force Nexans to reduce its winning bid.

157. We are not able to conclude, on a balance of probabilities, that any particular supplier of HV submarine cables (other than Nexans itself) would have provided a bid, or a different bid, for export cables in the counterfactual. Indeed, we find it difficult to conceive how the Tribunal could be satisfied on such questions. We explain our reasons by reference to one potential supplier only: LS Cable, which was an addressee of the Commission Decision.

158. LS Cable was an Asian manufacturer. It participated in the Cartel until 26 August 2005. Therefore, until that date, LS Cable was not a large scale competitor for European contracts, although there is some indication in Recitals (223) and (660) of the Commission Decision that it did not always play by the rules of the Cartel and occasionally took orders in Europe. LS Cable was not, at the time it was a member of the Cartel, a manufacturer of submarine cables as it manufactured underground cables only. The Commission concluded in Recital (615) of the Commission Decision that there is no evidence that it was aware that the Cartel operated in relation to submarine cables.

159. After it left the Cartel, LS Cable decided that it would enter the market for submarine cables. It started building a factory (in Korea) that could manufacture submarine cables in April 2008. LS Cable first won a contract for the provision

of HV submarine cables in Europe in 2013. It did not win a contract to supply HV submarine cables of a length comparable to the London Array export cables until 2020.

160. To conclude, even on a balance of probabilities, that LS Cable would have bid for export cables had the Cartel not existed would require the Tribunal to consider a number of counterfactual questions. For example, it would be necessary to consider (a) whether, but for the Cartel, LS Cable would have decided to enter the HV submarine cable market earlier than it did, (b) when it would have built its new factory to enable it to do so and (c) when it would have acquired sufficient credibility as a manufacturer of HV submarine cables to get through London Array's process of "pre-qualification" so as even to be invited to bid for export cables.

161. Still further obstacles lie in the way of a conclusion that any bid that LS Cable submitted for export cables in the counterfactual would be competitive. Because it would be manufacturing cables in Korea it would face higher transport costs than would European bidders. HV submarine cables that it supplied might be subject to import tariffs that would not be a cost for other bidders. However, against that other costs that LS Cable faced, such as labour costs, might be lower than those of its European competitors. The Tribunal would need a detailed understanding of all costs that LS Cable faced, together with the costs of others assumed to be submitting bids, before it could reach any conclusions on the competitiveness or otherwise of a hypothetical bid from LS Cable.

162. The Tribunal has before it some evidence on the costs that Nexans faced both on the London Array project and other projects. However, it has almost no information on other suppliers' costs, still less the costs that those other suppliers could be assumed to face if there was no Cartel. That absence makes it impossible for the Tribunal to express any conclusions on the matters referred to in paragraphs 160 and 161.

163. That reasoning is obviously specific to LS Cable. However, it illustrates the general point as to what we see as the impossibility of making any finding, on a balance of probabilities, to the effect that any particular manufacturer (other

than Nexans itself) would have made a bid, or a different bid, absent the Cartel, that would either have won or driven down Nexans's bid. Simply put, there are too many imponderables, and insufficient information on other potential bidders' costs and motivations to enable us to make such findings.

164. However, the fact that we are unable to conclude that any **particular** bidder, other than Nexans, would have submitted an additional or different bid had there been no Cartel does not mean that it was impossible, or even unlikely, that there would have been **some** such additional or different bids. Nexans placed much emphasis on such asserted impossibility or unlikelihood in its closing submissions arguing, for example, that:

(1) Mitsubishi/JPS "could not have provided an additional bid in the counterfactual" because they had provided a bid in the auction process for export cables which was non-compliant and they would not have produced a "better" bid in the absence of the Cartel.

(2) NKT's first round bid for export cables was much higher than anyone else's and they would not, therefore, have submitted a more competitive bid even if there had been no Cartel.

(3) LS Cable could not have been a realistic bidder because its new factory would not have been built in time (see paragraph 159 above).

165. We do not need to set out in full the submissions that Nexans made in support of the proposition that particular manufacturers, whether addressees of the Commission Decision or not, would not have submitted a bid, or a realistic bid, in the absence of the Cartel since the above examples give a flavour of Nexans's argument and the flaws with it.

166. The difficulty with Nexans's approach is that it focuses unduly on the actual situation in which prospective bidders found themselves without considering the very different circumstances that would have been present had there been no Cartel, involving many of the leading manufacturers of HV submarine cables, in existence for some ten years.

167. Mitsubishi/JPS evidently had some interest in the European market for HV submarine cables in November 2008 because it actually submitted a bid for the London Array export cables, albeit a bid that London Array characterised as non-compliant. We do not accept the proposition that this non-compliant bid necessarily means that it could have made no better bid in the counterfactual. JPS participated in the Cartel since October 2001. It won a contract for the provision of a HV submarine cable in Europe in December 2012. If there had been no Cartel, its interest in the European market could have started much earlier and it would have had more time to develop credibility and expertise in that market with a view to submitting a realistic bid in November 2008.

168. Nexans objects that the contract that JPS won in 2012 (Nordsee One) was for a cable length of just 7 km, much less than the length of the London Array export cables. It stresses the technical difficulty of the jointing process and submits that JPS could not have complied with London Array's exacting demands in 2008. However, just as the Tribunal has no means of evaluating the matters set out in paragraphs 161 and 162 above, it has no means of evaluating how JPS's expertise in cable jointing might have developed in the absence of the Cartel.

169. Similar points can be made in relation to NKT, a manufacturer based in Denmark. While it was a member of the Cartel, until 2006, it supplied only underground cables and not submarine cables. However, after leaving the Cartel it decided to enter the market for submarine cables. We are quite prepared to accept that, in November 2008, NKT had not yet built up sufficient expertise in submarine cables to make a realistic bid in the London Array tender process as demonstrated by the fact that its bid was both non-compliant and expensive. However, NKT did win a bid to supply an 85 km cable to the Gwynt y Mor windfarm in 2010. If it had been unconstrained by the Cartel, we regard it as entirely possible that it might have started the process of entering the submarine cable market earlier and might have achieved credibility and success in that market earlier so as to be in a position to make a realistic bid for London Array's export cables.

170. Those points apply also to LS Cable: it is quite conceivable that, unconstrained by the Cartel, it might have built its submarine cable manufacturing facility

earlier so as to be in a position to submit a realistic bid for London Array's export cables.

171. In this regard, we note that, in the period until the Cartel ended, the "4C Database" that we were shown indicated that one of ABB, Nexans and Prysmian won every single contract relating to the provision of cables for windfarm projects in Europe. That position started to change relatively soon after the Cartel ended, making due allowance for the long lead time for projects of this kind, with a number of other different bidders starting to win contracts from around September 2010 onwards. We do not accept that this was entirely coincidental but rather conclude that the end of the Cartel paved the way for other bidders to enter the market for HV submarine cables competitively.

172. We also note that members of the Cartel must have concluded that there was something to be gained by excluding Asian manufacturers from the European market. Cartel members can scarcely be expected to take all of the risk associated with membership of the Cartel if the Asian manufacturers were simply incapable of competing with them for contracts in Europe.

173. In conclusion, while we cannot find that any **particular** manufacturer would have come forward with a realistic bid for export cables in the counterfactual, we consider it entirely likely that **some** manufacturer would have done. We consider that conclusion to be supported by Recitals (657), (658) and (660) to (662) of the Commission Decision. We will not, as Nexans asks us, rule out the possibility of either (i) any additional bidders for London Array export cables in the counterfactual or (ii) those bids being competitive. We return once more to the absence of evidence on how the Cartel operated beyond the findings in the Commission Decision. It is not possible to determine how Asian bidders in particular would have acted if there had been no Cartel. They could, for example, have sought to access the European market singly or via joint ventures. Nexans would have needed to give a fuller account of Cartel operation to succeed in obtaining the findings they sought. More generally, we agree with London Array's submission at [115] of its written closing arguments. Nexans's arguments relating to Asian bidders do, in our judgment, include an attempt to re-argue points on which they lost before the Commission. If Asian bidders had

been able to compete in the London Array tender, and were perceived as having a realistic chance of winning, that would, in our judgment have led to a downward movement in prices in the counterfactual.

E. FINDINGS ARISING OUT OF THE EXPERT EVIDENCE IN RELATION TO EXPORT CABLES

(1) Introduction – the benefits and limitations of the expert evidence

174. We have already commented on the volume of the expert statistical and econometric evidence before us. In very broad overview, the experts have been given access to financial and other data that Nexans has disclosed on both (i) the London Array project and (ii) 107 other HV submarine cable projects that Nexans concluded both before and after the Cartel terminated (**During Cartel Projects** and **After Cartel Projects** respectively). The experts have not had access to any detailed information on HV submarine cable projects delivered by suppliers other than Nexans with the exception of information on JDR's successful tender for the inter-array cables.

175. Both experts apply statistical and econometric methods subjecting that data to minute analysis in a wide variety of ways, as demonstrated by the sheer length of their reports. However, both experts agree that the correct approach is to perform a "during-after" comparison that considers (i) margins that Nexans earned, or expected to earn, on export cables supplied to London Array, (ii) margins that Nexans earned, or expected to earn, on During Cartel Projects and (iii) margins that Nexans earned, or expected to earn, on After Cartel Projects. For these purposes "margin" means (i) the difference between the revenue arising (or expected to arise) from a particular project and the direct operating costs incurred (or expected to be incurred) as shown in Nexans's own records which is then (ii) expressed as a percentage of the revenues.

176. While they agree that, in principle, a margin comparison exercise is appropriate, they disagree on details of the appropriate margin comparison. They also disagree on conclusions to be drawn once the comparison has been prepared:

(1) Mr Bell concludes that his preferred approach to the "during-after" comparison indicates that there was an Overcharge of some 16.8% on the London Array Project. Mr Bell's estimate is produced by analysis of the difference in average margin between During Cartel Projects and After Cartel Projects (a "group to group" or "**G2G**" comparison).

(2) Dr Davis argues that Mr Bell's approach presupposes that the London Array project was a During Cartel Project that was affected by the Infringement. He considers that a better approach is to compare the margin that Nexans earned on Export Cables with the average margin on After Cartel Projects (an "individual to group" or "**I2G**") comparison. That comparison, he argues, produces no statistically significant evidence of an Overcharge.

177. Both Mr Bell and Dr Davis agree that, by comparing margins, rather than prices, they are implicitly assuming that the Cartel had no effect on Nexans's costs. As a matter of pure economic theory, that assumption is open to doubt. It might be supposed that members of a cartel who are insulated from the effects of ordinary competition in their chosen industry will have less economic incentive than they might otherwise have to reduce costs in their business. However, since both Mr Bell and Dr Davis have grounded their analysis in margins, we have little evidence as to whether participation in the Cartel affected Nexans's costs and we will accordingly proceed on the basis that it had no such effect.

178. It is important to place the expert evidence in context. Given the quantity of expert evidence deployed, there is a temptation to conclude that the Tribunal's role is to determine a large number of matters of professional disagreement between the experts. However, that would be to misunderstand the role of the expert evidence which is being deployed to help the Tribunal decide the issues summarised in paragraphs 9(1) and 9(2) above. Differences between the experts need to be resolved, therefore, only to the extent that doing so will assist with the determination of those issues. Moreover, as will be seen, a good proportion of the disagreements between the parties involved not difficult points of econometric theory but rather questions about what data to use.

179. Both experts fairly acknowledged the difficulty in establishing causation simply from differences between measurements of different margins. Statisticians regard it as trite to say that "correlation does not imply causation". That caution is particularly relevant in this case. At a high level of generality, the data shows wide divergences between margins that Nexans expected to, or did, achieve both in the period of the Infringement and afterwards. Econometrics (or perhaps more accurately the arithmetic involved in computing mean averages) can show whether the average margin on projects in the Infringement period is higher than the average margin subsequently. Econometrics can provide some insight into the statistical significance, or otherwise, of any observed differences. However, the question of causation cannot be determined by econometric evidence alone but by considering that evidence in conjunction with other relevant parts of the factual matrix.

(2) The role of regression analysis

180. We presume that any reader of this judgment will be aware of the role of regression analysis as an evidential tool to assist the Tribunal to understand whether cartel behaviour has resulted in a claimant overpaying for goods and services purchased. We do not, therefore, consider it necessary to explain how regression analysis works, particularly given the conclusions that we express below. Marcus Smith J provides an overview of the statistical techniques involved at [293] to [302] of his judgment in *BritNed HC* and we also draw gratefully on the summary of how regression models work set out at [328] to [332] of the Competition Appeal Tribunal's judgment in *Royal Mail Group Limited v Trucks Limited and others* [2023] CAT 6 (***Trucks CAT***).

181. As will be seen from the section that follows, Mr Bell's primary means of estimating the Overcharge involved a comparison between the margins on a group of contracts initiated while the Cartel was in existence and margins on a group of contracts initiated after the Cartel had come to an end. The mechanics of that comparison are relatively straightforward to understand. However, as Mr Bell recognises, a potential weakness of such a comparison is that the difference in margins might be driven by factors other than the existence of the Cartel. To give an example, higher voltage cables tend to produce higher margins than

lower voltage cables. If During Cartel Projects happened to involve higher voltage cables than After Cartel Projects, then a pure comparison of margins might highlight an effect that has nothing to do with the Cartel.

182. To control for such effects, it is standard practice to perform a regression with variables that reference the type of project as well as a variable that seeks to capture the effect of the Cartel. Both experts have performed a number of such regressions controlling for a variety of variables that might affect margins including the level of costs, the voltage of the cable, whether it is a turnkey project or a "cable-only" project and whether the cable in question is for an interconnector. Both experts conclude that the estimate of the Overcharge after controlling for these variables is not substantially different from the result of a simple margin comparison. (As a point of detail, the experts' analyses were performed by reference not to margins, but to logs of the price-cost ratio which means that some transformation was necessary in order to convert those regression analyses into estimates of an Overcharge. However, while the experts disagreed on the best estimate of the Overcharge, they agreed on the nature of the necessary transformation and therefore we say no more about this issue.)

183. A comparison of margins on During Cartel Projects with margins on After Cartel Projects can be understood as a simple form of regression analysis, albeit one performed by reference to a single variable, as distinct from the multiple variable regression analysis described in paragraph 182 above.

184. Although Dr Davis does not agree with Mr Bell that the analysis of margins should be performed by reference to two groups consisting of During Cartel Projects and After Cartel Projects (considering instead that the analysis should be on the I2G basis), he has performed his own regression analyses that apply Mr Bell's preferred approach.

185. In principle, we agree with both experts that, in appropriate cases, regression analysis can be of utility in determining whether an apparent overcharge on goods or services has been caused by the presence of a cartel. However, we understood the experts to agree that multi-variable regression analysis is likely to be of relatively low utility in this case for the following reasons:

(1) There is wide variation in both expected and realised margins. Neither Mr Bell's nor Dr Davis's regression analyses explain much of that variation despite trying many different combinations of explanatory variables.

(2) As Dr Davis put it at [468] of his First Expert Report "the coefficients of the regression equations do not generally sit very comfortably with the witness evidence on the 'drivers' of prices and margins". So, for example, certain regression analyses indicated that there was a negative correlation between a project being a turnkey project and margin. Yet the unchallenged evidence of Mr Granlie was the installation component of a turnkey project was both technically demanding and risky, so that Nexans Norway would require a higher margin on turnkey projects.

(3) Given the difficulty in identifying the correct control variables that have a substantial effect on margin, there is a danger in following a regression-based approach. If incorrect control variables are introduced into the regression equation, they will reduce the reliability of the overcharge estimate.

186. That agreement between the experts was brought out in the concurrent evidence session in which we understood the experts broadly to agree with Professor Neuberger's summary that it was "appropriate for [the Tribunal] to concentrate on the margin comparisons" and that the fact that multivariable regression analysis does "such a bad job at explaining the considerable variation in margins should [be borne] in mind when drawing conclusions from those margin comparisons". We note that Mr Bell's agreement with this proposition was tempered by his opinion that there remained a role for regression analysis when considering the I2G comparison considered below and on certain conclusions arising out of consideration of small numbers of projects (such as the Transition Projects) considered in Section E(6)(b). Given that broad agreement, we will, therefore, focus on conclusions that can be drawn from a margin comparison rather than multivariable regression analysis in the remainder of this judgment.

(3) G2G and I2G

187. As noted in paragraph 176, the experts had different views on the appropriate type of "during-after" analysis that should be performed with Mr Bell preferring a G2G analysis and Dr Davis preferring an I2G analysis.

188. The experts agree that, once the G2G and I2G comparisons have been made, those comparisons can be used, mathematically, to derive an estimate of the Overcharge applicable to the London Array export cables. We stress the word "mathematically" since the experts were not agreed that such estimates were reliable, only that such estimates could be derived. However, given the mathematical agreement between the parties, we will use the expressions "G2G" and "I2G", where relevant, to refer both to the margin comparisons that they embody and also the estimate of Overcharge that they produce.

189. The Tribunal was invited to "choose" between the G2G and I2G approaches. However, in our judgment, no straight choice is required. As we have noted, the statistical and econometric evidence cannot on its own determine either (i) whether there was an Overcharge or (ii) the amount of any Overcharge. Therefore, both the I2G figure and the G2G figure contain evidence relevant to the determination of these matters. The task for the Tribunal is not to "choose" between the two figures but rather to recognise what the two figures reveal and assess the resulting conclusions together with those that flow from other, non-statistical, evidence.

190. Nexans is correct to observe that the G2G figure cannot on its own substantiate either the existence of the Overcharge or its amount for at least the following reasons:

(1) The G2G figure is simply a number. It cannot, on its own demonstrate that the price that London Array paid for export cables would be lower in the counterfactual.

(2) The G2G figure involves a comparison between two mean average figures. It is not, therefore, testing specifically for an Overcharge on the

London Array Project. There might be reasons specific to London Array why, even if the Cartel caused average margins on During Cartel Projects to increase, there was no such effect on the London Array margin specifically.

191. However, the G2G figure is a useful piece of evidence even if it does not demonstrate the existence or amount of an Overcharge on its own. As will be seen, the G2G comparison shows that margins on an appropriate selection of During Cartel Projects were higher than margins on an appropriate selection of After Cartel Projects. Provided that the limitations in the G2G figure and the assumptions implicit in its calculation are kept in mind, that figure says at least something about the environment surrounding the London Array project.

192. Against that, London Array is correct to point out some difficulties in the I2G measure that make it difficult to draw firm conclusions on either the existence or magnitude of any Overcharge from it alone:

(1) The "I" component of the I2G comparison is the margin that Nexans achieved on a single project, namely London Array itself. There may well be idiosyncratic reasons, entirely unconnected with the Cartel, why the London Array margin was low. London Array points, by way of example, to the Cell Formula Mistake and London Array's status as a "marquee project". Since the "I" component involves the margin on a single project being compared with a "G" component consisting of a group of After Cartel Projects, an I2G comparison risks giving undue prominence to downward pressures on margin unconnected with the Cartel. Accordingly, if used as a basis for estimating the amount of any Overcharge, it risks understating that estimate.

(2) A use of the I2G measure alone risks placing an unrealistically high onus on London Array since it ostensibly requires them to show that the margin on their export cables is outside the range of margins typically observed in After Cartel Projects. That is unrealistic because (i) margins on After Cartel Projects vary so widely without the experts having been able to explain that variation and (ii) it risks overlooking the evidence

from the G2G comparison that suggests that margins on During Cartel projects were, on average at least, higher than margins on After Cartel projects.

193. However, again in our judgment, that does not make the I2G figure devoid of all utility. This case concerns the question whether there was an Overcharge in relation to the export cables supplied to London Array specifically. The I2G compares the margin on export cables supplied to London Array with the margin on cables supplied on various After Cartel Projects. In principle that comparison can shed a light on the questions that we must ultimately determine that relate to London Array export cables specifically. Put another way, the G2G analysis provides some evidence as to what was going on with margins in a population generally. The I2G analysis, notwithstanding its limitations, provides some evidence on how margins on London Array export cables compared with margins on After Cartel Projects generally.

(4) Statistical significance: I2G versus G2G

194. As we have noted, margins on both During Cartel Projects and After Cartel Projects varied widely. To the extent that the G2G comparison observes a difference in average margin between those two groups, in principle that could be pure chance: for example by coincidence there could have been higher margin projects in the sample of Nexans's During Cartel Projects than in the sample of After Cartel Projects. The concept of "statistical significance" captures the likelihood of coincidence explaining any such difference. Very broadly, it is possible to estimate the probability that, by pure chance, the observed difference in margin could be seen even if there was no difference between the economic conditions applicable to During Cartel Projects and those applicable to After Cartel Projects.

195. There is a widely accepted convention among statisticians that once the probability of pure chance explaining a particular result falls below 5%, then the result becomes "statistically significant" in the sense that pure chance is unlikely to be the explanation.

196. The experts agreed that the results of the G2G comparison were at least capable of producing statistically significant conclusions, although whether they actually do so will depend on the number of During Cartel Projects and After Cartel Projects selected for comparison and how wide the difference in average margins of the two samples. They were also agreed that the I2G comparison was unlikely to produce statistically significant results unless it produced an estimate of Overcharge far larger than the Overcharge actually asserted by London Array. That is because the "I" component of the I2G comparison is a single data point arising out of the London Array project alone.

(5) Our overall approach to the G2G and I2G analysis

197. Our conclusions on the relative utility of the G2G and I2G analyses represent something of a middle ground between the opinions of the two experts.

198. As we have explained, we do not agree with Mr Bell that an estimate of the I2G figure is of little use at all. At the heart of this case is a simple question namely whether the price of London Array's export cables was increased as a consequence of the Cartel. The I2G analysis prepared on the basis that we favour (as summarised in the table in paragraph 257 below) shows that the margin on London Array's export cables was slightly higher than the average of During Cartel Projects and substantially higher than the average margin on After Cartel Projects. That is clearly a relevant piece of evidence and its weight must be evaluated together with the other evidence.

199. However, we do agree with Mr Bell that Dr Davis's approach accords the I2G analysis too great a weight. That approach proceeds on the basis that (i) the G2G approach is not appropriate in the context of this case since it presumes London Array is a During Cartel project like any other (ii) the I2G analysis does not produce a statistically significant result, and should therefore be given no weight and therefore (iii) the Tribunal should conclude that there was no Overcharge.

200. We have reservations about all stages of that analysis:

(1) As we have explained, the G2G analysis shines an important light on the question. That is particularly the case when it is considered together with other non-statistical evidence. As we have noted in paragraph 99 above, while there is no presumption that the Cartel resulted in an overcharge on the specific cables supplied to London Array, it is not unreasonable to expect that the Cartel might have caused prices for HV submarine cables generally to be increased. The existence of a statistically significant difference in margins between During Cartel Projects and After Cartel Projects provides support for that proposition.

(2) As London Array correctly pointed out in their closing submissions, on Dr Davis's approach to the issue of statistical significance, the I2G analysis could support the existence of an Overcharge only if it estimated an Overcharge significantly higher than that for which London Array is arguing. (By way of illustration, on one formulation of the sample selected for comparison, only an I2G comparison that estimated a 31.9% Overcharge would be statistically significant although that figure would obviously vary depending on the sample). That conclusion risks being at odds with common sense since it suggests that in this case the Overcharge can only be either zero or very large. Put another way, at a most basic level, the I2G analysis shows that the margin on London Array export cables was higher than the average margin of After Cartel Projects. There is clearly room for debate on the weight to be accorded to that piece of evidence. However, we do not agree that it should be accorded no weight at all simply because it fails to reach a threshold of statistical significance.

(3) Nexans's approach would put a significant obstacle in the way of claims for damages for cartel behaviour in a case such as this. A customer might be able to establish (via a G2G comparison) that there is an overcharge in the population as a whole. However, on Nexans's approach unless the overcharge was so egregious as to enable an I2G comparison to produce statistically significant results, no individual customer would be able to establish loss.

201. As will be seen in this case, we consider that an estimate of an Overcharge based on the G2G analysis produces strong evidence that there was an overcharge in the population generally. Because of the lack of statistical significance, the I2G measure provides relatively weak evidence of an Overcharge in the case of London Array specifically. However, despite its shortcomings, the I2G comparison also points in favour of there being an Overcharge on export cables. As we have noted, both estimates need to be approached with appropriate caution and weighed together with other evidence.

(6) Measure and comparability disputes relevant to G2G

202. The analysis set out in Section E(3) above leads us to conclude that estimates of an Overcharge that flow from the G2G comparison need to be assessed critically. Provided that they are assessed critically, those estimates are potentially useful and relevant evidence.

203. Both experts were agreed that the sample size with which they were performing their comparison was relatively small. Nexans provided financial information on around 60 projects that the experts considered they could work with. Much of the disagreement between the experts related to questions regarding data selection, for example which projects to include in the comparison and which information on those projects to measure and compare.

204. Dr Davis performed his (I2G) margin comparison separately for what he described as three comparator groups of After Cartel Projects "each successively less restrictive":

(1) Comparator Group 1 consisted of After Cartel Projects involving HV submarine cables to offshore windfarms which carried an AC current and had XLPE insulations.

(2) Comparator Group 2 consisted of After Cartel Projects that were, like the London Array project, for the supply of cables only as distinct from turnkey projects.

(3) Comparator Group 3 consisted of all After Cartel Projects on which Dr Davis considered there was reliable and usable data.

205. That approach exemplifies some of the data selection difficulties. Dr Davis's "Comparator Group 1" shares many features with the London Array project. London Array, after all, was a windfarm that bought XLPE AC cables. Moreover, London Array was buying cables only and so was not a turnkey project and so it has undoubted similarities with Comparator Group 2.

206. We can see how, at a high degree of abstraction, it might be considered desirable to select for comparison After Cartel Projects that are "most like" London Array since there is an intuitive preference for any comparison to be performed on a "like for like" basis. However, for the following reasons, we consider that we should not restrict the G2G comparison to Dr Davis's Comparator Group 1 or Comparator Group 2.

207. First, we did not understand Dr Davis to be arguing strongly that, in his professional opinion, the comparison should be made by reference only to Comparator Group 1 or Comparator Group 2. Dr Davis acknowledged in his comments at EO31 of the Joint Expert Statement that, since he is not an expert in HV submarine cables "… it is not clear from the documentary and witness evidence available to me which dimensions of project heterogeneity are sufficiently more important than others so that data from those projects should necessarily be dropped from the sample".

208. Second, when deciding whether to exclude a group of projects from the analysis, we do not consider that we should simply ask an impressionistic question whether there are some differences between that group and other projects that are to be included. That risks performing an unfocused and unprincipled comparison. Rather, we should consider whether, even if the group does have some differences with other projects, those projects would be affected differently by the Cartel. Moreover, as we have noted, the margin data are "noisy" with wide variations between projects that have not been explained. In such a heterogeneous sample it is almost inevitable that the exclusion of certain groups will have a substantial impact on the results of the analysis. In many

cases it will be possible for a party that hopes to gain from the exclusion of any particular group of projects to advance a superficially plausible reason for that group's exclusion.

209. Accordingly, when we perform the G2G analysis our starting point is that it should be performed by reference to all projects for which there is reliable data. We will, however, consider in specific cases whether there is a good reason for excluding particular categories of project from the comparison. A "good reason" for these purposes will need to explain why the particular project or projects in question could be expected to be affected differently by the Cartel so that including those projects among those selected for comparison would fail to compare like with like.

(a) "Expected" margin or "realised" margin

210. Nexans's margin, or anticipated margin, on a project could conceptually be calculated at any point from the date on which it received an invitation to tender to the date on which the project has been completed with no further benefits or liability from the project expected. However, for the purposes of this dispute, the difference between the experts as to the date on which margin should be tested reduced to the following two candidate approaches:

(1) *An "expected margin" approach*: Under this approach, Nexans's margin, in both constituents of the G2G analysis, is calculated by reference to the margin it **expected** to receive at the time it signed the relevant contract by reference to the price specified in the relevant contract. The parties also referred to this as a "contract margin approach" and we are content to use that terminology as well while emphasising that any contract that Nexans signed would not, of course, specify a margin (which would be a figure that Nexans would regard as highly confidential) but it would contain a price from which Nexans's expectations of margin could be deduced from materials that show Nexans's forecasts of associated costs.

(2) A "*realised margin approach*": Under this approach, the total revenues that Nexans **actually** receives after it has completed the contract are compared with the total costs that Nexans actually incurred in doing so. Since this measure of margin depends on how events turn out, the parties referred to this also as an "outturn margin approach".

211. Mr Bell's opinion was that the realised margin approach was more reliable. He supported that opinion on the following grounds:

(1) The purpose of the G2G analysis is to assist in identifying how much more London Array actually paid for export cables than it would have paid in the counterfactual. Since that is the G2G comparison's function, it is more natural to focus on data that identifies the margins that Nexans actually achieved on During Cartel Projects and compare them with the margins actually achieved on After Cartel Projects.

(2) Contracts for the provision of HV submarine cables take a long time to be performed. Much can change between the date a contract is signed and the date on which it is finally performed. For example, "variation orders" can be made, changing the specification of what is to be delivered pursuant to the contract or adding options. Any such variation orders are likely to lead to changes in price which could be affected by the Cartel. A contract margin approach would not capture the effect of variations such as these.

(3) Pragmatically, the experts had slightly more "outturn" data to work with than they had data on "expected margins". There were advantages in having a larger data set to work with.

212. Dr Davis preferred an estimate that focused on expected margins. He considered that it was supported by considerations of economic theory. The purpose of the G2G estimate is to assist in determining how much more Nexans could obtain by way of margin, on average, as a consequence of being a member of the Cartel. Since contracts for the provision of HV submarine cables tend to be awarded following a competitive tender process, the price that Nexans could be

expected to receive will depend on the bids that it, and competitor bidders, make in that tender process. A winning bidder's bid is expected to be impacted by costs that they anticipate incurring at the time they make that bid. By extension, the decision whether to enter into a contract at a particular price will be influenced by costs that the bidder expects to incur at the date of the contract since there can be no certainty on costs that will actually be incurred.

213. Ultimately, neither expert argued strongly that their approach was significantly better than that proposed by the other. Mr Bell and Dr Davis both provided calculations on the basis of both expected margins and realised margins. Nevertheless, we consider that it is appropriate for us to express a preference as to which basis to use.

214. On balance, we prefer the opinion of Dr Davis. We are not persuaded by Mr Bell's argument summarised in paragraph 211(1). Given what we have said about the need to approach both the G2G and I2G estimates critically, it does not, in our judgment, matter greatly whether one starts with measures based on expected or realised margins. An estimate on either basis will still need to be considered carefully in the light of all of the other evidence when deciding whether there is an Overcharge and, if so, how much it is.

215. Mr Bell's argument summarised in paragraph 211(2) has some force in principle. If the Cartel allowed suppliers to negotiate better contractual terms that would enable them to achieve greater margins on additions and changes to a project after contract signature, then one would expect that to be reflected in realised but not in expected margins. However, as will be seen the numbers are actually quite similar in this case (see paragraph 253 below).

216. We also consider that the force of Mr Bell's point is outweighed by countervailing considerations. Calculating the G2G figure by reference to realised margins adds considerable "noise" to data that already reveals large variations in margins between different projects. The experience with the London Array contract shows that realised margins can be affected by matters that are at least arguably unrelated to the Cartel (such as late delivery triggering payments under the liquidated damages clause). We will deal later with the

question whether contracts concluded after 2018 should be included within the samples on which G2G numbers are based. However, no great statistical insight is involved in the proposition that realised margins on those contracts might well have been affected by the COVID-19 pandemic, whereas anticipated margins might well have been less affected.

217. We also consider that Mr Bell overestimates the significance of the greater amount of data on realised margins (see paragraph 211(3) above). In the first place, there is not that much more data available if margins are considered on a "realised" basis. Using Mr Bell's favoured data set, there would be 34 data points available if realised margins are compared, as against 28 if the comparison uses expected margins. If we work with Dr Davis's "Comparator Group 3" (see paragraph 204 above), the figures are 60 and 53 respectively.

218. Moreover, in his "Margin Comparison Workpaper" annexed to his First Expert Report, Dr Davis estimated 95% confidence intervals for expected and realised margins. We accept his conclusion that the confidence intervals for "expected" margins are materially tighter than those for "realised" margins (by reference to the full data set – i.e. Dr Davis's Comparator Group 3). That suggests to us that conclusions expressed by reference to expected margins will be more reliable, because they are less noisy, than conclusions expressed by reference to realised margins even acknowledging that there are fewer data points available.

219. Neither using expected margins nor realised margins produces a perfect solution. On balance we conclude, particularly given the length of time between execution of a contract and its final performance, that using realised margins risks adding undue additional "noise" to the data that is unrelated to any effect that the Cartel might have. We will, therefore, focus on the G2G comparison based on expected margins.

(b) The definition of During Cartel Projects and After Cartel Projects

220. The Commission Decision concludes that Nexans's participation in the Cartel ended on 28 January 2009, the day of the Dawn Raids. On that date, Nexans had submitted bids on four HV submarine cable projects (but the contract for those

projects had not been awarded (**Transition Projects**). One Transition Project was London Array itself. The others were known as "Lincs", "Belwind" and "Attica Evia". The question arises as to whether Transition Projects should be treated as During Cartel Projects, on the basis that Nexans submitted its bid while it was participating in the Cartel, or After Cartel Projects on the basis that it entered into the relevant contract after its participation in the Cartel had ceased. Neither party argued that the Transition Projects should be treated as neither During Cartel Projects nor After Cartel Projects.

221. London Array argued in its closing submissions that since Nexans submitted some of its bids on Transition Projects while it was involved in the Cartel those bids would be affected by the existence of the Cartel. Some effect at least would, London Array argued, persist even if the contract was signed after the Cartel came to an end since inevitably final prices will be conditioned by earlier bids. Nexans did not address the question of Transition Projects in its written or oral submissions.

222. On balance, we agree with London Array on this issue. Given that both parties agree that Transition Projects should be included somewhere in the G2G analysis, we consider that they fall more naturally to be treated as During Cartel Projects. The contrary approach, of treating them as After Cartel Projects, in our judgment would involve an unwarranted conclusion that bids submitted when the Cartel was in existence ceased to have any effect at all on contract price as soon as the Cartel came to an end. In our judgment, that "cliff-edge" effect is unlikely.

(c) Whether to exclude MI/DC cables

223. London Array argues that DC cables supplied with MI insulation should be excluded from the G2G comparison. The attribute of having MI insulation and the attribute of carrying a DC current are independent. It does not follow, for example, that because a cable carried a DC current it necessarily had to have MI insulation. However, both sides proceeded on the basis that all potentially relevant comparator projects that had MI insulation happened to carry a DC

current. We therefore refer to this aspect of the debate being whether to include "MI/DC" cables in the G2G comparison.

224. London Array supports the exclusion of MI/DC cables from the G2G comparison for the following reasons:

(1) The manufacturing processes for XLPE/AC cables and MI/DC cables are different (see paragraphs 23 to 28 above).

(2) DC cables tend to be used for longer cable lengths.

(3) Paragraph 33 of Mr Döring's witness statement suggests that XLPE cables tend to be cheaper to purchase than MI cables.

(4) Therefore, there is a lack of both supply-side and demand-side substitutability as indicated by paragraphs 22 to 26 of the Commission's decision to approve a merger between NKT and ABB in 2017 (Case M.8239 – NKT Holdings A/S / ABB High Voltage Cable business).

225. The difficulty with London Array's position is that it focuses on alleged differences between MI/DC cables and XLPE/AC cables resulting from manufacturing processes without considering matters that they have in common. For the purposes of the present dispute, both MI/DC and XLPE/AC cables have been subject to Cartel arrangements. Therefore, even if they are manufactured differently, and even if different constituencies of buyers need different types of cable for different purposes, London Array's analysis does not set out a principled basis for concluding that the margin on MI/DC cables would be more or less affected by the Cartel than the margin on XLPE/AC cables.

226. In paragraph 5.54 of his First Expert Report, Mr Bell considered the possibility that "certain aspects of the Cartel conduct would have had different effects on each cable type". He referred to passages of the Commission Decision that suggests that, because of the Cartel, certain Japanese producers might have focused on AC/XLPE power cables "designed for short lengths and shallow waters". Mr Bell concludes that it was "possible" that when the Cartel ended,

such Asian manufacturers were better positioned to compete in Europe in relation to such AC/XLPE rather than MI/DC cables. However, while the possibility is noted, we are not satisfied on the evidence before us that it provides a sufficiently good reason for excluding MI/DC cables to overcome the issues that we have identified in paragraphs 206 to 209 that militate against excluding ostensibly good data from the G2G comparison.

227. We will, therefore, proceed on the basis that, if there was an overcharge on cables as a result of the Cartel, that overcharge would manifest itself in the same way in relation to both MI/DC and XLPE/AC cables. Including data in relation to both MI/DC and XLPE/AC cables in the G2G comparison has the advantage of producing an increased sample size. That in turn means that, even if the markets for MI/DC and XLPE/AC cables are affected by different factors that are unrelated to the Cartel, information generated from a G2G comparison using that larger sample could be expected to be less influenced by factors unrelated to the Cartel that affect just one market.

228. For essentially similar reasons, we will not exclude from the G2G comparison projects that involved the supply of cables with oil-filled insulation.

(d) Whether to exclude post-2018 projects

229. Nexans argues that projects from 2018 onwards should be excluded from the G2G comparison. Its essential argument is that, since the Cartel came to an end on 28 January 2009, any differences in margin observed after 2018 must necessarily be explained by something other than the end of the Cartel.

230. Nexans supports that submission by what it submits to be the unusually low margins on post-2018 projects. However, we agree with London Array that excluding data simply because the margins can be characterised, as a matter of impression, as "too low" risks introducing biases into the comparison. We therefore consider that some principled reason for excluding post-2018 projects from the G2G comparison is necessary.

231. We acknowledge that, in the 9 years after the Cartel ended, unrelated factors could have emerged that imposed downward pressure on margins for HV submarine cables. However, against that, it is possible that any "overhang" effect of the Cartel caused by, for example, the time required for other competitors to enter the market might have come to an end before 2018, so that margins observed after 2018 truly are unaffected by the Cartel. Accordingly, if the benefits of obtaining "Cartel-free" data on margins outweigh the risks of factors other than the end of the Cartel influencing those margins, there would still be value in data from 2018 onwards.

232. Overall, we considered that much of the debate in this area took place in something of an evidential vacuum. Nexans had an obvious interest in excluding lower-margin post-Cartel projects from the comparison since including such projects would tend to increase the estimated Overcharge produced from G2G data. While Nexans could certainly point to intuitive and impressionistic reasons why 9 years was "too late", it did not, in our judgment, satisfactorily ground that analysis in evidence as to why that was the case.

233. In order to address that point, Nexans sought to rely on Dr Davis's summary of an email that he was sent by White & Case, Nexans's legal advisers, that contained some explanation of why margins on two post-2018 projects (Moray West and Dieppe Le Treport) might have been low. However, we accept London Array's point that it would be wrong to accord that email much weight in circumstances where (i) it was not clear who had provided that explanation, and (ii) in any event, that person had not set out the conclusions in a witness statement that could be tested by contrary evidence or cross-examination. A further reason for giving little evidential weight to White & Case's email is the fact that it provides a commentary on why realised margins on these projects were low, whereas, as we have noted our preference is to perform the G2G comparison by reference to expected margins.

234. Nexans also mentioned the COVID-19 pandemic as a factor that was unconnected with the Cartel that might have led margins to fall after 2018. Again, we understand that submission at an intuitive level. However, while of course we are aware that the COVID-19 pandemic occurred, we were not shown

evidence that explained precisely why it would cause margins on HV submarine cables to fall. Moreover, given our preference for performing the G2G comparison by reference to expected margins, rather than realised margins, COVID-19 would have an effect only in relation to those contracts that were contracted during the pandemic. Therefore, even if COVID-19 did have a downward effect on realised margins (because it imposed costs that were not anticipated at the time a contract was signed before COVID), that effect will largely not be observed in the analysis of expected margins that we prefer.

235. On balance we have concluded that we should not exclude any post-2018 data from the G2G comparison.

(e) Liquidated Damages

236. The parties were not agreed on whether the G2G comparison should include the effect of the liquidated damages that Nexans had to pay as discussed in paragraphs 90 to 91 above. The question arises only if the G2G analysis is conducted using realised margins. Inclusion of liquidated damages in the computation tends to reduce the estimated Overcharge.

237. That was duly reflected in the parties' respective positions. London Array's position was that the liquidated damages would have been payable whether or not there was a Cartel. Accordingly, including their effect within the G2G estimate simply added "noise" that had nothing to do with the Cartel. Mr Bell's opinion was that the effect of the liquidated damages should be removed.

238. Dr Davis's opinion was that liquidated damages were payable because London Array was exerting competitive pressure over Nexans during the bidding process. Accordingly, the effect of that competitive pressure was not "noise" but tended to show that, in the case of London Array specifically, the exercise of competitive pressure militated against there being any Overcharge. That feature of the process should be captured in the G2G comparison.

239. Given our preference for the G2G comparison to be performed by reference to expected margins rather than realised margins, it is not necessary for us to

resolve this disagreement. That is because, since Nexans could not have known at the time it signed the contract for delivery of export cables, that it would have to pay liquidated damages, the incidence of liquidated damages cannot have informed its expectations as to margin.

240. Had it been necessary to do so, we would have preferred the opinion of Dr Davis and performed the G2G comparison, on the basis of realised margins, in a way that takes into account the effect of the liquidated damages. That is because, in our judgment, while one can debate the magnitude of the effect, London Array was exerting at least some competitive pressure when it extracted Nexans's agreement to adhere to the original load-out dates (see paragraphs 53 to 60 above). Moreover, Nexans's agreement to meet those load-out dates, and to pay liquidated damages if it failed to do so, was just as much a term of the contract as were stipulations as to price and the nature of the export cables that Nexans would supply. In our judgment, an analysis of realised margins that failed to reflect the impact of liquidated damages would ignore a material effect on Nexans's margin that was produced by the detailed operation of the contract that the parties agreed.

(f) The Cell Formula Mistake

241. There was an apparent disagreement between the parties as to whether the G2G comparison should "include" or "exclude" the effects of the Cell Formula Mistake. Given our determination that the G2G comparison should be performed by reference to expected margins, rather than realised margins, we do not need to consider whether the Cell Formula Mistake should affect any determination of what Nexans actually received on the London Array Project.

242. During the concurrent evidence session it at first appeared that, even if the G2G analysis was to be performed by reference to expected margins, there remained some disagreement in relation to the Cell Formula Mistake. Prior to the concurrent evidence session, the parties evidently considered that Mr Bell was arguing that the effect of the Cell Formula Mistake should be "excluded" when computing expected margins. We did not understand that. "Expected margin" is the margin that Nexans expected to earn on the basis of the price specified in

the contract (see paragraph 210(1) above). At the time Nexans signed the contract, it did not know about the Cell Formula Mistake. Therefore, it appeared to us that there was nothing to "exclude": Nexans's lack of awareness of the Cell Formula Mistake at the time it signed the contract necessarily meant that omitted steel costs would not be "included" in any event when determining Nexans's expectations of margin at the date of the contract.

243. Indeed, in our judgment, that would be the right result. The very reason for our preference for a G2G analysis that is performed by reference to expected margins, rather than realised margins, is that such an analysis excludes "noise" that is unrelated to the presence of the Cartel. The Cell Formula Mistake is a prime example of such "noise": it arose because of human error and was unrelated to the activities of the Cartel.

244. Happily, during the concurrent evidence session, Mr Bell clarified what he meant by his suggestion that the effect of the Cell Formula Mistake should be "excluded" when calculating expected margins. He had been working with data on expected margins that was prepared after Nexans had become aware of the Cell Formula Mistake. Therefore, Mr Bell understood that the data he had reflected the Cell Formula Mistake as a component of Nexans's expectations of margin even though Nexans did not know about that mistake at the time it signed the export cables contract. Therefore, when Mr Bell said that the effect of the Cell Formula Mistake should be "excluded" he was saying simply that the effect of the Cell Formula Mistake should be stripped out of the data that he had so as to result in Nexans's expected margin, as at the date of the export cables contract, being determined without reference to the effect of that mistake on margin.

245. As we have noted, we consider that to be the correct outcome and indeed precisely what an analysis by reference to expected margins was intended to achieve. We do not consider any disagreement remained between the parties on this issue but, to the extent it did, we resolve it in favour of Mr Bell's approach as summarised in paragraph 244.

(g) Whether to exclude other categories of cable or project

246. During the trial, we asked the parties to provide us with (i) a complete list of matters of data selection on which a determination of the Tribunal is sought and (ii) a means of enabling the Tribunal to determine the effect that this had on the I2G and G2G margin comparisons. We are grateful to the parties for providing us with a spreadsheet (the **Overcharge Spreadsheet**) in response to this request. The Overcharge Spreadsheet proceeds on the basis that the following additional matters of data selection and measurement need to be determined in addition to those set out in sections E(6)(a) to E(6)(f) above. Those additional matters can be summarised as follows:

(1) Mr Bell considers that supplies of cables in connection with a small number of oil and gas electrification projects should be excluded from the comparison.

(2) The expert reports and Overcharge Spreadsheet canvassed the question whether the comparison should include only cables supplied to windfarms or also include cables supplied as part of "interconnector" projects (i.e. cables that link the national grid of one country to that of a neighbour) or cables supplied to a national grid.

(3) Mr Bell considers that a small number of projects that involve cables with a weighted average voltage below 66kV should be excluded.

(4) The Overcharge Spreadsheet canvasses the possibility that certain "turnkey" projects should be excluded from the comparison so that only contracts for the provision of cables only are within the scope of the comparison.

(5) There was a debate about whether certain "early post-cartel/Infringement comparator projects" should be included in the comparison or not.

247. Very little was said in closing submissions about the oil and gas electrification projects described in paragraph 246(1). We have no secure basis on which to conclude that these projects would have been affected by the Cartel to any materially different extent from other projects. We will not, therefore, exclude these projects from the comparison.

248. We did not understand either party to be arguing strongly that "interconnector" cables and cables supplied to domestic national grids referred to in paragraph 246(2) should be excluded from the comparison. The possibility was acknowledged in Dr Davis's use of "Comparator Group 1" which focused on supplies of XLPE/AC cables to offshore windfarms only (see paragraph 204 above) but we have already explained why we will not limit the comparison to that narrow group. Mr Bell noted the possibility in, for example, his comments in paragraph EO33 of the Joint Expert Statement. However, he noted that a disadvantage of excluding interconnector and grid cables would be the small sample size that would remain available. Neither side suggested in closing submissions that the comparison should be by reference to windfarm cables only. We will not, therefore, exclude grid and interconnector cables from the comparison.

249. The same applies in relation to the "early post-cartel/infringement projects" described in paragraph 246(5). At a highly general level, we can understand the point that a particular After Cartel Project might be so soon after the Cartel that it came to an end so as not to provide good evidence of what a margin would be in an entirely Cartel-free environment. That argument is to an extent the mirror image of that relating to post-2018 projects considered in Section E(6)(d) above. However, we consider that we lack a secure basis in the evidence to determine when (i) there is a point at which an After Cartel Project "becomes" a good comparator and (ii) if so, how much time must have elapsed after the end of the Cartel for that to be the case. In those circumstances, while accepting that the point has a logical foundation, we consider that the preferable course is not to exclude "early" After Cartel Projects.

250. As we have explained in paragraphs 204 to 208 above, Dr Davis alluded to the possibility of excluding turnkey projects (see paragraph 246(4)) in his expert

reports but did not advocate strongly for this course. Mr Bell's analysis proceeded on the basis that turnkey projects were appropriate comparators. We will not, therefore, exclude turnkey projects.

251. The position with the lower voltage cables set out in paragraph 246(3) is more complicated. In his First Expert Report, Mr Bell suggested that the projects in question should be excluded from the comparison. Moreover, in doing so, he referred to factual evidence that suggested that these lower-voltage cables could be affected differently by the Cartel since, being more straightforward to manufacture, there was more competition in the market for lower voltage cables. Consistent with his position that matters going to data selection and comparability were not within the scope of his expertise (see paragraph 207 above), Dr Davis expressed no firm opinion on the matter, although he did include the projects in question in his Comparator Group 3.

252. In paragraph 3 of its closing submissions, London Array set out what it considered to be the three critical points of difference between the experts on the G2G model. The inclusion or otherwise of lower voltage cables was not one of the three and nor were lower voltage cables addressed in Section D of London Array's written closing submissions dealing with the competing models of the Overcharge. We can see something in the point that greater competition for lower voltage cables might cause the price of those cables to be affected differently by the Cartel. However, with neither side advancing a strong case in their closing submissions arguing for the exclusion of data on lower voltage cables, the point has not been tested by adversarial argument. In the absence of that adversarial argument, we do not consider it would be right for us to perform our own, unguided, review of the factual evidence to see if a case can be made to support the exclusion of the lower voltage cables. On balance, therefore, we will not exclude these cables from the comparison.

(h) The G2G estimate of an overcharge

253. The estimates of Overcharge that the G2G estimate produces, based on the parties' Overcharge Spreadsheet and in the light of the determinations that we have made above can be summarised in the following table:

G2G	Using realised margins	Using expected margins
Mr Bell's data	10.0%	9.9%
Dr Davis's data	10.6%	11.8%

254. As we have explained, our preference is to use data based on expected margins. However, we have also included the estimate that would be produced using realised margins, given the determinations that we have made above.

255. Unfortunately, the parties were not able to agree an Overcharge Spreadsheet that produced a single calculation. There evidently remained some differences between the data set that Mr Bell and Dr Davis were using. The nature of those differences was not fully explored in closing submissions and we have done the best we can to resolve data selection issues between the parties. There is not a material difference between the results based on either expert's data set. On balance, we have decided to use Mr Bell's figures simply because those are the ones that the Claimants, with the burden of proof, are putting forward and they produce slightly lower estimates than Dr Davis's estimate of the Overcharge based on G2G data. We consider that to be preferable to adopting Dr Davis's higher estimate for which London Array is not itself arguing.

(7) Measure and comparability disputes relating to I2G

256. Some of the disputes set out in the section above do not arise at all in connection with the I2G measure, or arise in a more limited manner, because the I2G comparison involves only a single During Cartel Project, namely London Array itself. To the extent that those disputes do arise, we will resolve them in the same way.

257. The estimates of the Overcharge produced by the use of I2G approach can be summarised in the following table:

I2G	Using realised margins	Using expected margins
Mr Bell's data	5.5%	12.2%

Dr Davis's data	6.1%	12.3%

258. As with the estimate based on the G2G approach, we will adopt Mr Bell's figures. We observe that the difference between the estimate based on realised margins and that based on expected margins is driven largely by the liquidated damages that Nexans had to pay. These significantly affected Nexans's realised margin on the London Array project (which is the only constituent of the "I" component of the comparison) but would be excluded from a calculation based on expected margins.

F. APPLICABLE LEGAL PRINCIPLES

259. In Section B of its written closing submissions, Nexans made some submissions as to propositions of law that apply when determining London Array's claim. London Array did not contradict these propositions and we therefore take the following to be common ground:

(1) London Array's claim is in tort. It bears the burden of establishing, on a balance of probabilities that (a) Nexans breached competition law and (b) London Array suffered actionable harm or damage that was caused by that breach.

(2) The Commission Decision means that London Array has discharged its burden of proving the breach of competition law.

(3) To establish the actionable harm or damage, London Array must show, on a balance of probabilities, that the Infringement caused it to pay a higher price for export cables and/or inter-array cables.

(4) That, therefore, requires London Array to show a causal link between the Infringement and an increased price for export cables and/or inter-array cables. That causal link is addressed by means of a "but for" test, namely whether in the counterfactual, the price that London Array paid for export cables or inter-array cables would have been lower.

(5) If London Array establishes that it has suffered actionable harm or damage that is caused by a breach of competition law, damages should be awarded so as to compensate for the harm or damage suffered.

260. We have mentioned, in paragraph 10 above, the parties' common approach to the effect that examining the price payable in the counterfactual involves asking what price would have been payable in the absence of the Cartel. The correctness of that common approach is confirmed by the analysis of Henderson LJ at [36] to [38] of *BritNed C/A* which, in particular, confirms that:

> … the correct measure of damage is in principle the difference between the price actually paid and the price which would have prevailed in the absence of a cartel…

261. Nexans submits that, in addressing the question whether London Array suffered actionable harm, the Tribunal should not proceed on the basis of any presumption that the Infringement caused prices for export cables or inter-array cables to be higher while it was in existence. If by that Nexans means that there is no legally operative presumption, we agree. London Array must prove its case without the benefit of any legal presumption in its favour.

262. However, if Nexans means that the Tribunal is somehow disqualified from considering whether the very fact that it participated in an unlawful and secret Cartel for such a long period is suggestive that it was obtaining a financial benefit in the form of an increased price for HV submarine cables, we do not agree (see, by analogy paragraphs [140] and [141] of the judgment of Flaux C in *Royal Mail Group Limited v DAF Trucks Limited and others* [2024] EWCA Civ 181 (***Trucks C/A***)). In circumstances where Nexans has called no evidence as to how it acted in relation to the Cartel, or the benefits that it perceived would accrue from doing so, the Tribunal is entitled to consider matters such as these when considering, in the light of all available evidence, whether London Array has proved its case.

263. Having set out the matters that we consider London Array must prove, we reject Nexans's submission summarised in paragraph 154 above. There are many ways in which London Array could establish the presence of an Overcharge

even without establishing those matters. Even if London Array does place emphasis on the possibility of additional bidders emerging absent the Cartel, we do not consider that London Array must establish either (i) who those bidders would have been, or (ii) what price they would have bid.

264. Neither party made detailed submissions on legal principles applicable to the quantification of damages should London Array succeed in proving the matters set out in paragraph 259 above. However, from paragraphs [145] and [104] to [106] of *Trucks C/A*, and the other authorities referred to in those passages, we derive the following principles in summary:

(1) If London Array can establish the matters set out in paragraph 259 it has a right to compensation for the resulting loss and the Tribunal should do its best to quantify that compensation on the available evidence.

(2) That task is difficult in this case because the amount of damage or harm that London Array has suffered would depend on a hypothetical or counterfactual state of affairs: namely how much it would have paid for export cables and inter-array cables had there been no Cartel. However, the difficulty of estimation should not cause the Tribunal to impose artificial demands for precision or require comprehensive evidence on all issues going to quantum. Rather, the CAT should use its forensic skills to do the best it can with the material in front of it in order to achieve practical justice. That has memorably been described as involving the exercise of a "sound imagination" and the practise of a "broad axe" (or sometimes a "broad brush").

(3) However, the application of a "broad axe" does not confer licence for a measure of compensation to be "plucked from the air" (see [12(9)] of *BritNed HC*). The Tribunal should not permit the "broad axe" to become a mallet (see [231] of the judgment of the Competition Appeal Tribunal in *Stellantis Auto SAS v Autoliv AB* [2025] CAT 9).

(4) London Array does not need to establish, on a balance of probabilities, that its loss is of any particular figure in order to be entitled to damages

although, of course, it does need to establish the matters set out in paragraph 259 and so needs to prove, on a balance of probabilities, that it has suffered some actionable harm or damage.

G. WAS THERE AN OVERCHARGE ON EXPORT CABLES?

(1) Existence of an Overcharge on export cables - conclusions

265. Nexans's closing submissions criticised London Array for advancing what Nexans considered to be no fewer than seven "theories of harm" in support of the argument that there was at least some Overcharge. In the interests of readability, rather than dealing with all of London Array's points, and all of Nexans's objections, we will start by summarising the reasons that have led us to conclude that there was indeed some Overcharge. We will then consider, under various thematic headings, objections that Nexans raised to our analysis and explain why those objections have not led us to a different conclusion.

266. In summary, we have concluded that the combination of the following matters demonstrates the existence of an Overcharge:

(1) The auction process for the London Array export cables had been affected by Cartel behaviour. Prysmian was not seriously seeking to win the tender and Nexans France knew as much before Nexans Norway submitted its first round bid (see paragraph 130 above). Nexans France and ABB had agreed that they would apply a "floor price" to their first round bids (see paragraph 118 above).

(2) The G2G comparison set out in the Overcharge Spreadsheet using the parameters that we favour shows that, on average, During Cartel Projects produced a margin some 7% higher than After Cartel Projects. (The mathematical relationship between the difference in margins and the G2G estimate of Overcharge was common ground between the experts. The margin difference of 7% is consistent with the G2G Overcharge estimate of 9.9% in the table in paragraph 253). Since that difference in margin manifested itself in the During Cartel Projects

viewed as a group, and since the auction process for London Array export cables was affected by Cartel behaviour, we consider it more likely than not that the margin on the London Array export cables was inflated by reason of the Infringement.

(3) Dr Davis accepted that the G2G comparison had the potential to produce statistically significant results. Our decision on the question of which projects to include in the G2G comparison means that Dr Davis may have expressed that conclusion by reference to a slightly different constituency of projects than we have adopted in this judgment. However, we do not consider that our preferred data set varies so significantly from those that Dr Davis was considering to call into question his conclusions on statistical significance. We conclude that the data set that we favour produces a difference in margin between During Cartel Projects and After Cartel Projects that is statistically significant, or at least close to being statistically significant.

(4) We are reinforced in that conclusion by our conclusion in paragraph 173 above to the effect that it is entirely likely that there would have been some additional bidders for export cables absent the Infringement. As a matter of economic theory, greater competition can be expected to drive down prices, as Dr Davis accepted in cross-examination. We consider the presence of greater competition for After Cartel Projects to be one of the reasons why the G2G comparison shows a difference in margin as compared to During Cartel Projects. Since more competition for London Array export cables could be expected in the counterfactual, we consider that the price that London Array would have to pay in the counterfactual would have been lower. That is particularly the case given the fact that there were only two bidders for export cables seeking to win the export cables tender and those two bidders were participating in an auction whose first round was rigged because of the agreement of a floor price and Nexans's knowledge that Prysmian was not seriously competing.

(5) We are also reinforced in that conclusion by the I2G comparison summarised in the table in paragraph 257 above. While we acknowledge the lack of statistical significance, we consider this to be evidence pointing in favour of the existence of an Overcharge on export cables.

(2) Nexans's counter-arguments considered

267. We do not repeat our analysis of our factual conclusions on, for example, the effect of the Cartel on the London Array auction process, or the magnitude of the G2G estimate of overcharge in the light of the various measurement and categorisation disputes. That analysis already takes into account Nexans's counter-arguments.

(a) The absence of a "presumption"

268. Nexans argues that it would be wrong to "presume" that a Cartel that was focused on allocating projects between members necessarily has any effect on prices. We have explained in paragraph 99 above why we do not consider there to be a bright line between an "allocation-based" cartel and a "price-fixing" cartel. Nor do we consider that our analysis proceeds from any "presumption". Rather, we consider that the existence of the Overcharge is demonstrated by factors specific to London Array as well as factors relevant to the market for HV submarine cables generally.

(b) "Independence" of Nexans Norway

269. Nexans argues that, because Nexans Norway employees priced the bid for export cables independently, without any awareness of the Cartel, whatever effect the Cartel might have had on other projects, or on average prices generally, there could be no effect on the price of the London Array export cables specifically.

270. Marcus Smith J accepted a somewhat similar analysis in *BritNed HC*. However, we have explained in paragraph 141 the limited findings we are prepared to make in relation to Nexans Norway's asserted "independence". We have also

explained why those findings do not satisfy us that Nexans Norway's pricing of its first round bid took place in a sealed environment that was immune from the Cartel. We do not accept Nexans's arguments based on the asserted "independence" of Nexans Norway. Indeed, contrary to Nexans's submissions, on "independence", we have made the inference set out in paragraph 146 above.

(c) Competition between Nexans and ABB

271. Nexans relies on what it submits to be genuine competition between Nexans and ABB in relation to the export cables contract. It notes that this competition was the product of London Array's sophisticated procurement process, arguing that the closeness of the respective bids of Nexans Norway and ABB "demonstrates competition and is inconsistent with collusion".

272. We agree that there was some competition between them on price. However, that competition took place within a tender process that was rigged by the actions of the Cartel since (i) only ABB's and Nexans's bids were competitive and (ii) ABB and Nexans had agreed to operate a floor price for their first round bids. ABB and Nexans were, therefore, in their first round bids "competing" but, because of the floor price were doing so on terms of their choosing. We do not, therefore, agree that the observed competition between Nexans Norway and ABB is "inconsistent with collusion".

273. We acknowledge that both ABB and Nexans dropped their prices when submitting their Round 2 bids (see paragraphs 49 and 50 above). Moreover, we accept that, by the time Round 2 bids were submitted, ABB was no longer engaged in any conduct that was referable to its former participation in the Cartel. However, the reduction in prices was necessarily by reference to first round bids that ABB and Nexans had already submitted as part of a rigged tender process. We are prepared to accept that the competition between ABB and Nexans in Round 2 might well have caused the Overcharge to be less than any average implicit in the G2G estimate. However, the G2G analysis has satisfied us that the Cartel caused margins as a whole to be higher prior to the Infringement ceasing. Even if Round 2 bids were made in a competitive environment, Round 1 bids served as a reference point for those Round 2 bids

and were tainted by precisely the same kind of Cartel effect that caused margins to be higher during the Infringement period. We are not prepared to accept that this competition meant that there was no Overcharge at all.

(d) The alleged unreliability of the G2G estimate and its inability to show causation

274. Nexans argues that the G2G approach is fundamentally flawed because, in placing weight on a difference in margin between a group of During Cartel Projects and a group of After Cartel Projects, that approach assumes what it is seeking to prove: namely that London Array was a During Cartel Project whose margin was inflated by the Cartel.

275. We do not accept that. We have explained why, in our judgment, the Cartel infected the tender process applicable to London Array specifically. That means that London Array shared relevant characteristics with other During Cartel Projects. The G2G estimate, accordingly, is relevant evidence as to the level of the Overcharge that London Array suffered, although it is not conclusive as to the level of that Overcharge as we discuss in Section H below.

276. Nor do we accept Nexans's argument that London Array's case to the effect that the Cartel caused the Overcharge is dependent on Mr Bell's econometric evidence and so must fail because that evidence is incapable of proving causation (see paragraph 179 above). The G2G analysis shows that margins on During Cartel Projects were, on average, higher than margins on After Cartel Projects. That is a statement about a population, rather than a statement about London Array's export cables specifically. Moreover, econometric evidence cannot on its own prove that the margin difference observed in the population is caused by the Cartel. However, even acknowledging those points, we consider the G2G analysis to produce cogent evidence in favour of an Overcharge. First, we consider that the Cartel was the cause of an observed increase in margin in the population. Causation can be established from other non-statistical evidence including the important fact that the Cartel operated to restrict competition. Second, we consider that other evidence, including the existence of a margin difference, caused by the Cartel, in the population as a

whole supports the conclusion that there was an overcharge for London Array's export cables, also caused by the Cartel. That follows once the totality of the evidence is considered together including (i) the fact that Cartel behaviour infected the first round bidding process and (ii) that Cartel behaviour affected competition in relation to the London Array tender.

277. Nexans argues that in principle, the I2G measure is a better means of estimating any Overcharge but, in this case, because it does not produce statistically significant results does not actually establish that there was an Overcharge. We have already explained, in paragraphs 199 to 200 why we do not accept that argument.

278. We give similar reasons for rejecting Nexans's related argument that London Array's reliance on the G2G comparison suffers from a fatal flaw in that, even if Nexans Norway's margin on the London Array project was nil, the G2G estimate would still estimate an Overcharge. The flaw in that argument is that it assumes the G2G comparison is the only relevant evidence of an Overcharge when there is also evidence consisting of the Cartel effect on the first round bidding process and the reduction of competition. The G2G analysis seeks to draw conclusions by reference to a sample of projects and not just London Array. Therefore, it remains possible that even if the population generally was "overcharged" by the Cartel, London Array was not. If Nexans's margin on London Array was indeed nil, that would be evidence of some weight to the effect that London Array was not itself overcharged. Nexans's argument in this regard simply emphasises the importance of considering the G2G analysis in the light of all of the evidence.

279. The same can be said of Nexans's objection that the data reveals that some After Cartel Projects gave Nexans a higher margin than did London Array. That is true. The G2G analysis necessarily proceeds by reference to average figures. It remains necessary to consider the average figures in context, including the contra-indication coming from higher margin After Cartel Projects to which Nexans refers.

(e) Capex figures provided to Government

280. On 3 February 2009, Mr Dave Farrier of E.ON provided the UK Government with some information on London Array's anticipated capex figures to assist the Government in assessing what level of subsidy should be given to the windfarm industry by way of Renewable Energy Certificates (**ROCs**). That information quoted an estimate for export cables of £136 million, much higher than the price that London Array ultimately paid of some £85 million. Nexans argues that this expectation that it would have to pay more demonstrates that London Array could not have been overcharged for the export cables.

281. We do not, however, consider that this piece of evidence weighs greatly in the balance when considered against the other evidence that we have seen. In December 2008, London Array had received two bids, from ABB and Nexans, that it considered to involve it paying some £82 million to £85 million for export cables (see paragraph 43 above). For the figure of £136 million to have any great evidential significance, we would need to be able to consider why Mr Farrier was telling the Government that the cost was estimated at £136 million when London Array had, just two months earlier, received bids suggesting the cost would be £85 million. Perhaps the answer is, as London Array argued in closing submissions, that the £136m figure was prepared by reference to earlier (purely internal) estimates of cost that did not take into account bids received. Perhaps metals costs had risen significantly between December 2008 and February 2009. Without understanding why Mr Farrier's estimate was at the level it was, it is difficult to draw any conclusions from the figure he provided.

(f) Undue reliance on previous pricing decisions

282. Nexans submits that London Array's approach to the Overcharge assumes that Nexans was pricing its bid for export cables by reference to some (unspecified) historic pricing decision. It argues that this overlooks a "core lesson from economics" namely that Nexans could not have been doing so, because what is relevant in the such of the market for export cables is the need to set a price that will apply in the future.

283. We reject that argument. Our conclusion that there was an Overcharge does not depend on any assumption that Nexans Norway priced its bid by reference to prices that it had charged in the past. Rather, as we have concluded, Nexans Norway applied a "cost plus" approach by estimating its costs and adding what it considered to be an appropriate margin. Our conclusion is that its expectations as to that appropriate margin were higher than they would have been in the absence of the Cartel and that this had an effect on the price that it ultimately charged.

H. WHAT WAS THE MAGNITUDE OF THE OVERCHARGE ON EXPORT CABLES?

284. Thus far in this judgment, we have concluded that (i) London Array was charged more for the export cables than it would have been charged if there had been no Cartel and (ii) the G2G comparison suggests that, on average, margins on During Cartel Projects were some 7% higher than margins on After Cartel Projects. From that, it is possible to conclude that, if the Overcharge on London Array's export cables was in line with those average figures, that Overcharge would be 9.9%.

(1) Factors that suggest a lower Cartel effect in this case

285. The G2G estimate is based on a comparison of populations. It accordingly produces an estimate of an "average" Overcharge on export cables. In our judgment, the fact that Round 2 bids for London Array export cables were the product of genuine competition between ABB and Nexans with that genuine competition taking place after the Cartel had come to an end demonstrates that the Overcharge on London Array export cables would be lower than that average.

286. We do not consider that there are any other factors that suggest that the Overcharge on the London Array export cables would be lower than the "average" Overcharge. In particular:

(1) We have, in Section D(4), concluded that Nexans was prepared to sacrifice a few percentage points of margin to secure the "marquee" London Array project. However, that means only that it was prepared to accept a lower margin than it would require for a "non-marquee" project. We do not consider that says anything about the magnitude of the Overcharge. In the counterfactual, London Array would remain just as much a marquee project as it was in the actual circumstances, in which the Cartel was operative. In short, the "marquee" nature of the project affected the amount of absolute margin that Nexans was prepared to accept but we are not satisfied that it has any material bearing on the scale of the Overcharge.

(2) We note that Nexans's bid in the actual circumstances in which the Cartel was operative was depressed by the Cell Formula Mistake. We have considered whether the possibility of a similar mistake in the counterfactual has an effect on the magnitude of the Overcharge. We have concluded that there is no such effect. First, we have concluded that Nexans would have made the same mistake if it were bidding in the counterfactual scenario in which there was no Cartel (see paragraph 86 above). We acknowledge the possibility that other bidders would have emerged in that counterfactual scenario, and Nexans's bid in the counterfactual might not have been the winning one. However, we have no reliable data on which to base a conclusion as to other hypothetical bidders' propensity or otherwise to make errors like the Cell Formula Mistake.

(2) Adjusting the average Cartel Overcharge to take into account the circumstances of this case

287. We have explained above why we do not consider that the I2G measure alone can form a secure basis for estimating the Overcharge even though it has some utility as a piece of evidence. We note that, in the event, the I2G comparison produced on the basis we favour results in an estimate of Overcharge that is higher than that produced by the G2G comparison. However, no party asked us to take the I2G figure as producing the correct estimate of Overcharge: Mr

Bell's position was that the estimate of Overcharge should be based on the G2G measure and Dr Davis's position was that the G2G measure was inappropriate and the I2G approach could not estimate the Overcharge properly because it did not yield statistically significant results. Therefore, we propose to estimate the Overcharge by starting with the G2G estimate and adjusting it to reflect the (single) factor that suggests that the Overcharge in London Array's specific case would be lower than that produced by the G2G estimate.

288. We consider that the significant competition between Nexans and ABB in Round 2 of the bidding process and subsequently justifies a significant adjustment to the G2G estimate of Overcharge. We do not conclude, as Nexans has invited us, that the Round 2 process completely cured the Cartel effects that so infected the Round 1 process (see paragraph 273 above). However, we do not consider that a competitive Round 2 would have been a feature of many other projects included in the G2G estimate. We therefore consider that there was significant downward pressure on the Cartel effect in the case of London Array that would not be reflected by the adoption of the G2G estimate of an average Overcharge.

289. It is simply not possible to adopt a purely scientific basis that enables us to quantify the appropriate reduction. We will avoid any temptation to do so. The matter has to be considered in the round and by reference to our overall impression of the evidence. This is a case for the application of the "broad axe".

290. In our judgment the presence of proper competition in Round 2 justifies an adjustment to Overcharge implicit in the G2G estimate when determining the Overcharge on export cables. We conclude that the Overcharge on export cables was 5%, a reduction from the G2G estimate of 9.9%. Since we cannot explain that figure precisely, we reason simply that the Overcharge on export cables cannot have been nil even given the presence of Round 2 bidding that was not affected by the Cartel (see paragraph 273 above). Nor can the Overcharge have been the full 9.9% that emerges from the G2G estimate since Round 2 bids that were not affected by the Cartel clearly had an effect on the level of the Overcharge. That therefore suggests that the Overcharge on export cables was somewhere between nil and 9.9%. We have no secure basis grounded in the

evidence for concluding that the Overcharge was more likely to be at the lower end of this range or at the upper end of the range and on that basis, conclude that it was in the middle of the range.

291. By way of further sense check, we observe that an Overcharge of 5% would not cause the London Array project to be loss-making, at least by reference to Nexans's expectations of likely costs at the time it priced its bids. The successful bidder in the counterfactual need not have been Nexans, but it is still instructive to sense check our conclusion by reference to Nexans's expectations of costs. Overall, in our judgment, an Overcharge of 5% would not produce a price that would be at odds with commercial reality if one were to assume that the export cables were supplied in a Cartel-free environment.

I. INTER-ARRAY CABLES

(1) London Array's case on the "umbrella overcharge"

292. London Array spent some 3 pages of its written closing submissions seeking to make good its case on inter-array cables. Nexans spent nearly 20 pages defending London Array's claim. London Array also spent little time on the inter-array claim in oral closing submissions.

293. By contrast with its case on export cables, London Array does not argue that the bidding process for inter-array cables was directly affected by Cartel behaviour. It is not suggested, for example, that there was any "floor price" in operation in relation to bids submitted by Cartel members. It is not suggested that there was any arrangement to allocate the contract for the inter-array cables to a member of the Cartel as JDR, which ultimately won the tender, was not a member of the Cartel.

294. London Array's case is nevertheless that the Cartel had an "umbrella effect" on the prices that non-Cartel members could charge for inter-array cables. It argues that the price JDR charged for inter-array cables was affected by this "umbrella effect" for the following reasons:

(1) Mr Bell gave evidence that an umbrella effect was supported by economic theory. Persons outside of the Cartel could be expected to set prices for cables based on their perceptions of market price derived from their previous experience of winning and losing bids. The Cartel, having been in place for such a long time, had distorted pricing in the market and therefore the perceptions of suppliers outside of the Cartel as to the market price were inflated by the Cartel. Moreover, Cartel members could be expected to submit bids for cables that were higher than they might otherwise be. That left room for relatively inefficient non-Cartel members to win tenders that they would not otherwise have won, with this reward for relative inefficiency also tending to inflate prices.

(2) In opening, London Array submitted that since a number of the bidders for inter-array cables were members of the Cartel, they would "therefore likely have bid lower absent the cartel".

(3) Also in opening, London Array submitted that Asian bidders might have entered the tender process but for the Cartel.

295. London Array notes that the data available to quantify the amount of an Overcharge on inter-array cables is much more limited than that available in connection with the export cables claim. That is largely because JDR, rather than Nexans, was the successful bidder and so there has been no order requiring JDR to give disclosure on comparable projects that it won or lost. While JDR's margin on the inter-array cables is known, for similar reasons, there is no evidence before the Tribunal as to how JDR went about pricing its bid for the inter-array cables.

296. In closing, London Array made some reference to what it submitted to be a lack of disclosure by Nexans in relation to projects comparable to the inter-array cables. However, Mr West KC clarified that he was not suggesting a failure by Nexans to comply with disclosure orders made. Rather, he was noting that it was unfortunate that Nexans did not appear to have retained documents on projects comparable to the inter-array cables.

297. Given the lack of data, London Array argues that the Tribunal should quantify the Overcharge on inter-array cables by adopting a market structure model that Mr Bell considered appropriate. (In his expert report, Mr Bell considered alternative approaches such as a margin comparison analysis and a unit price analysis. However, in closing submissions London Array pressed only the market structure model). Broadly that model is a theoretical model of a commodity market in which the quantity of goods that a market participant can sell depends both on its prices and prices set by competitors. Absent the Cartel, each participant in that market could be expected to set prices with a view to maximising its own profit. However, members of the Cartel would also be taking into account the profits of other Cartel members when setting their prices. This reduces their incentive to price keenly: if they raise prices, they will lose business to other suppliers, but some of that will be to other members of the Cartel. That upwards pressure on prices bid by Cartel members can be understood as the "Cartel overcharge".

298. Under Mr Bell's model, this Cartel overcharge is assumed to encourage suppliers outside the Cartel to raise their prices as well (the "umbrella overcharge" that the model seeks to measure). By making a number of simplifying assumptions, the model seeks to predict the size of the umbrella overcharge relative to the Cartel overcharge from the respective market shares of Cartel members and non-Cartel members. That produces a relative figure: i.e. the umbrella overcharge is expressed as a proportion (which Mr Bell evaluates at one third) of the Cartel overcharge.

299. Mr Bell was proceeding on the basis that the Overcharge applicable to export cables was 16.8%, the figure produced by his preferred G2G analysis. Using that as an estimate of the Cartel overcharge generally, he concludes that the Overcharge on inter-array cables was 5.6%. Given that we have concluded that the G2G estimate of the overcharge in the population generally was 9.9%, the logic of Mr Bell's approach is that the Overcharge on inter-array cables was 3.3%.

(2) Consideration of London Array's case

300. Before we can turn to the robustness or otherwise of Mr Bell's market structure model, we need to consider whether, on a balance of probabilities, London Array has shown that there was some Overcharge on inter-array cables.

301. We have mentioned London Array's reference to the lack of disclosure on margins on comparable projects, whether of JDR or Nexans. However, that lack of disclosure cannot excuse London Array from the obligation to prove its case on a balance of probabilities. If London Array had wanted further disclosure from JDR (or others) it could have applied for further third-party disclosure prior to the trial. It has not suggested whether before or during the trial that Nexans had failed to comply with its own disclosure obligations. London Array must, therefore, prove its case by reference to the evidence that is before the Tribunal even if London Array considers it to be unfortunate that there is not more.

302. The evidence before the Tribunal does not include anything like the detail on margins for inter-array cables that we had for export cables. Once we focus on the evidence that is before the Tribunal, we have reached the clear conclusion that London Array has failed to prove its case on the inter-array Overcharge.

303. Central to London Array's case is the proposition that an Overcharge on inter-array cables can be deduced by applying a "scaling factor" (of one third) to the G2G estimate of the Overcharge on export cables. That proposition therefore assumes that the Overcharge on inter-array cables is affected by the same Cartel factors as affect the Overcharge on export cables, albeit with the scaling factor meaning that the effects are less pronounced in the case of inter-array cables. We acknowledge that we declined to remove lower voltage cables from the G2G comparison applied in relation to export cables (see paragraphs 251 and 252 above). However, that was because, given the absence of adversarial argument on the issue, we were not satisfied that the Cartel had a different effect on the market for lower voltage cables as distinct from the market for higher voltage cables. That should not be taken as a finding that the market for lower voltage cables generally was affected in the same way as the market for higher voltage

cables. As we have noted in paragraph 32 above, lower voltage inter-array cables are more straightforward to manufacture. We also conclude that, as a result of this, there were more competitive suppliers of such cables than there were of export cables given the greater number of bidders who provided bids for London Array's inter-array cables. In those circumstances, we would have needed much more evidence to substantiate the proposition that an Overcharge on inter-array cables can be deduced simply by applying a scaling factor to the G2G estimate of an Overcharge for export cables.

304. In any event, even if the general market for lower voltage cables was affected by the Cartel in a similar way as the market for higher voltage export cables, all that London Array has produced to support its assertion of an umbrella Overcharge on inter-array cables is the economic theory described in paragraph 294(1). That economic theory, on closer inspection, is an explanation of why an umbrella Overcharge might exist. The theory is certainly plausible and rational in a hypothetical market. However, that alone cannot mean that it is correct on a balance of probabilities in the particular market for inter-array cables. For example, the model assumes that suppliers are adopting strategies designed purely to maximise their profits. However, other motivations are possible: for example, it might be considered that a non-Cartel member bidding in a market whose prices were inflated by the Cartel might choose to "buy" market share by submitting lower bids that did not maximise short-term profits. We have little material in the evidence to enable us to address the applicability of Mr Bell's general economic theory in the specific market with which we are concerned.

305. Moreover, London Array cannot discharge its burden of proof on the inter-array cable aspects of its case by showing that there was a general overcharge, caused by the Cartel, in the market for lower-voltage inter-array cables. It must show that the price it paid for its own inter-array cables was inflated by the Cartel.

306. There is weighty evidence, coming from the actual bidding process as distinct from Mr Bell's theoretical construct that points against that conclusion. Significantly:

(1) There were many more bidders for the inter-array cable tender than for the export cables tender with non-Cartel members dominating the bidding. The two front-runners in the inter-array tender, JDR and Parker Scanrope were not implicated in the Cartel at all and submitted bids that were significantly more competitive than the rest of the field. As London Array noted in an email sent at the time of the tender process: "JDR and [Parker Scanrope] are so far in front we would be paying a massive premium going to 3rd or 4th place bidders".

(2) Although we acknowledge the possibility that some Asian bidders might have been qualified to bid in the counterfactual, we see little evidence that this would have translated into more, or more competitive bids. London Array thought that inviting 10 bidders to join the first round was "probably too many" (see paragraph 64 above). Even if there had been more Asian bidders available, we consider that it is more likely than not that London Array would have limited the number of bidders to 10 in the counterfactual.

307. The contrast with the export cables claim is instructive. In that context, London Array was able to show both (i) that the first round bidding process had been tainted by the Cartel and (ii) that potential bidders had been excluded from that bidding process by the Cartel. Those factors, specific to the export cables tender, helped it to "bridge the gap" between the evidence of the G2G comparison, which was of a possible overcharge in populations as a whole, and London Array's specific tender process. However, the factors we have set out in paragraph 306 mean that there is much less material with which to "bridge the gap" between Mr Bell's theoretical model and the inter-array tender process.

308. We do not consider that Mr Bell's market structure model can be relied upon to overcome the difficulties in its case on the presence of an overcharge for inter-array cables. That model proceeds on the basis that, if there was an Overcharge on export cables, there necessarily had to be some Overcharge on inter-array cables. It does not even envisage the possibility that there might be no Overcharge on inter-array cables even if there was an Overcharge on export cables. Since it does not even acknowledge the possibility, Mr Bell's market

structure model cannot answer the factual difficulties associated with London Array's case that we have highlighted.

309. Overall, we do not consider that London Array has shown, on a balance of probabilities that there was an Overcharge in relation to the inter-array cables. The task of quantifying any Overcharge does not, therefore, arise.

J. INTEREST RATE

310. London Array claims simple interest only on its past losses. The parties therefore ask the Tribunal to decide a single rate of interest that is to be applied to that part of the claim relating to export cables that consists of London Array's payment of inflated TNUoS in the past. London Array was also seeking simple interest on damages awarded in connection with its purchase of inter-array cables although in the event we have decided that no such damages should be awarded.

311. London Array asks for interest at the rate of 3% over the Bank of England base rate. Nexans submits that interest should be at the rate of 2% over the Bank of England base rate.

312. Nexans relies on *Trucks CAT*, in which the Tribunal said, at [829] and [830]:

> 829. The conventional approach [under s.35A of the Senior Courts Act 1981] is to fix an interest rate by reference to the Bank of England base rate at the time of the loss and adding a fixed percentage. Depending on the particular characteristics of the claimant, the fixed percentage is normally 1 or 2%...
>
> 830. We consider that the conventional approach of the CAT is to award base rate plus 2% to commercial claimants and we will do so in this case.

313. London Array relies on *Tate & Lyle Food Distribution Ltd v GLC* [1982] 1 WLR 149 on the court's discretionary power to award interest on damages. It submits that the correct approach is that, in the words of Forbes J in that case:

> the proper rate of interest was that which reflected the rate of interest which a plaintiff with the general attributes of the actual plaintiff (although not one in any special position) would usually expect to be charged on borrowed money.

314. London Array puts forward evidence of the actual borrowing costs of the shareholders in London Array. It says that those shareholders were essentially special purpose vehicles and presents a graph from Mr Bell's expert evidence that, London Array suggests, demonstrates that the shareholders' borrowing costs were closer to 3% over base rate than 2% over base rate.

315. The difficulty with London Array's reliance on the *Tate & Lyle* case is that it relies on a single passage of Forbes J's judgment that does not give the wider context. As well as the passage quoted in paragraph 313 above, Forbes J observed that:

> I feel satisfied that in commercial cases the interest is intended to reflect the rate at which the plaintiff would have had to borrow money to supply the place of what is withheld. I am also satisfied that one should not look at any special position in which the plaintiff may have been; one should disregard, for instance, the fact that a particular plaintiff, because of his personal situation, could only borrow money at a very high rate or, on the other hand, was able to borrow at specially favourable rates. The correct thing to do is to take the rate at which plaintiffs in general could borrow money. This does not, however, to my mind mean that you exclude entirely all attributes of the plaintiff other than that he is a plaintiff. There is evidence here that large public companies of the size and prestige of these plaintiffs could expect to borrow at 1 per cent. over the minimum lending rate, while for smaller and less prestigious concerns, the rate might be as high as 3 per cent. over the minimum lending rate…

316. We suspect that lending practices may have moved on since Forbes J gave his judgment. We doubt that it is meaningful to speak any more of a "rate at which plaintiffs in general could borrow money". Moreover, the rate at which even commercial borrowers such as the London Array shareholders can borrow money will be linked to their "personal situation" in the sense that a weaker credit will have to pay more, though not necessarily a "very high rate" and a stronger credit will be able to pay less even if it cannot borrow at "specially favourable rates".

317. That said, both the *Tate & Lyle* case and *Trucks CAT* stress that the appropriate interest rate is not determined conclusively by a claimant's actual borrowing costs. Yet London Array's approach is grounded firmly in the assumed actual borrowing costs of its shareholders. In our judgment, that ignores the possibility that commercial borrowers which are special purpose vehicles might be able to borrow more cheaply with the benefit of a parent company guarantee.

318. Overall, we do not consider that London Array has done sufficient to displace the approach of *Trucks CAT*. The London Array shareholders are clearly "commercial claimants". The approach in *Trucks CAT* suggests that the applicable rate of interest should be Bank of England base rate plus 2%. A margin of 3%, in our judgment, overlooks the fact that the London Array shareholders are each members of larger groups of the kind that, if a parent company guarantee was given, could be expected to borrow reasonably cheaply.

319. We consider Bank of England base rate plus 2% to be appropriate.

K. DISPOSITION

320. The claim based on export cables succeeds. The Overcharge on those cables was 5%. The claim based on inter-array cables fails. The applicable interest rate is Bank of England base rate plus 2%.

321. The parties informed us during the hearing that a determination on the three matters set out in paragraph 320 will enable them to agree a form of order that gives effect to this judgment. Please could they agree a form of order and send it to the Tribunal for approval within 7 days of the hand down of this judgment. If that is not possible, the parties must contact the CAT which will make directions for the determination of the proper form of order.

The Honourable Mr Justice Richards Chair	Andrew Lenon KC	Professor Anthony Neuberger

Charles Dhanowa, CBE, KC (Hon)
Registrar

Date: 10 October 2025