

1 This Transcript has not been proof read or corrected. It is a working tool for the Tribunal for use in preparing its judgment. It will be
2 placed on the Tribunal Website for readers to see how matters were conducted at the public hearing of these proceedings and is not to
3 be relied on or cited in the context of any other proceedings. The Tribunal's judgment in this matter will be the final and definitive
4 record.

5 **IN THE COMPETITION**

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

6 **APPEAL**

7 **TRIBUNAL**

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

12 Monday 1st July 2024

13
14 Before:

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

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

21
22 BETWEEN:

23
24
25 **Claimants**

26 **PSA Automobiles SA & Others**

27 **V**

28 **Defendants**

29
30 **Autoliv AB & Others**

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

34
35 Collin West KC & Sean Butler (Instructed by Hausfeld & Co. LLP) on behalf of the
36 Claimants.

37
38 Sarah Ford KC & Prof. David Bailey (Instructed by Macfarlanes LLP) on behalf of the
39 Sixth to Tenth Defendants.

40
41 Hugo Leith (Instructed by White & Case LLP) on behalf of the First to Fifth
42 Defendants.

43
44
45
46
47 Digital Transcription by Epiq Europe Ltd
48 Lower Ground 46 Chancery Lane WC2A 1JE
49 Tel No: 020 7404 1400

Monday, 1 July 2024

(10.30 am)

(Proceedings delayed)

(10.42 am)

Housekeeping

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

My apologies for keeping you waiting. There have been some IT issues. It is a little unclear whether Sir Iain will be able to -- he is on, is he? He has currently managed to join us. If we lose him, we don't think there is anything today that requires a full Tribunal, so, if you disagree, please let us know.

I appreciate we have got -- the most substantive thing seems to be the disclosure application. We also just wanted to discuss generally preparations for trial and how the trial is going to be managed, and so forth. I don't know where you wanted to start?

MR WEST: I was going to start briefly with the agenda. As we have identified, there is the DoJ documents application, which is undoubtedly the most substantial piece. There are two other formal applications by my clients: one relates to redesignating certain documents as nonconfidential -- that is now a very narrow application, there are only, I think, four references remaining in the scope of that application; then there is the application for the costs of the French and Italian law foreign law expert evidence on limitation. There is then the Defendants' application for the cost of their application for an extension of time for service of their economic expert evidence.

1 If I can briefly mention two points which no longer appear to be live. One is the list of
2 issues. The parties have agreed that – it's at core bundle, tab 1, it may be appropriate
3 for the Tribunal to approve that document, if it is minded to do so. But, as far as the
4 parties are concerned, there is no dispute about that.

5 **THE CHAIR:** Yes. I mean, it is quite high level. I am not sure if we want to formally
6 approve it at this stage. Let's see where we get to. We have some questions, I think,
7 in mind.

8 **MR WEST:** Yes. Another agenda item just to mention, which is no longer live, is the
9 costs of the Defendants' application, second application, asking the Tribunal to revisit
10 its order in relation to a single expert between the Defendants, which was heard
11 in April. That has been dealt with and the order has now been issued.

12 **THE CHAIR:** Issued, yes.

13 **MR WEST:** There are, as you mentioned, a number of case management points
14 which are important points. There are not any formal applications before the Tribunal
15 in relation to those. It would probably make sense to come back to those after the
16 applications. So, subject to the Tribunal, I would propose dealing with the applications
17 and the disclosure application first.

18 **THE CHAIR:** Let's deal with the disclosure application and then see where we are.
19 Yes.

20 **MR WEST:** Just to say, the Tribunal should have had skeleton arguments from all
21 three of us and a chronology from myself. If I am going too slowly, please do tell me
22 and I will try to speed up.

23

24 DoJ Application by the Claimants

25 **MR WEST:** The background to this application is, as the Tribunal is aware, both ZF
26 and Autoliv were subject to investigations by various competition regulators, including

1 the DoJ, and when the Claimants came to seek disclosure in this action on the factual
2 issues, we didn't ask them to start again and go and identify all the repositories, we
3 limited ourselves to the known existing repositories of documents relating to those
4 investigations. The Tribunal ordered that disclosure be given of those caches of
5 documents, including the DoJ documents and the other regulators', including the
6 Commission's, but the Defendants were given the right to withhold documents on
7 certain grounds: privilege, leniency/settlement or that the documents were irrelevant.
8 This application is limited to the DoJ documents and it is limited exclusively to Autoliv's
9 DoJ documents. My clients are happy with the disclosure by ZF. Both Autoliv and ZF
10 had document caches of about the same size, relating to the DoJ investigation, about
11 50,000 documents in total, and the way the mechanism worked is that, after the order
12 for disclosure was made, the parties went off and tried to agree some key words for
13 the initial searches, and documents responsive to those key words were then subject
14 to a manual review.
15 For both ZF and Autoliv, the result of applying the agreed key words was to reduce
16 the number of documents for manual review to about 20,000. Mr Bolster gives the
17 precise numbers, but that's it in broad terms. Then, on 23 June last year, both Autoliv
18 and ZF provided disclosure and inspection of the documents they said were relevant
19 and which they were not withholding on settlement or privilege grounds, but the
20 numbers were strikingly different. ZF disclosed about 19,000 documents, Autoliv
21 disclosed 580 documents, and withheld 45,000.
22 Now, 580 is less than 2 per cent of the total cache of documents Autoliv had relating
23 to the DoJ investigation and, on its face, we say that is somewhat surprising. That
24 does seem a very low figure considering that these are the documents which were
25 subpoenaed by the DoJ in relation to Autoliv's participation in this specific cartel.
26 By contrast, ZF's hit rate, 19,000, disclosed, and 35,000, withheld is more like a 35

1 per cent disclosure rate. Now, one can only take this so far but, on its face, it is
2 surprising and appears to call for some explanation.

3 The only explanation forthcoming, if one can call it that, is that these are different
4 document sets, which is obviously true because one set is ZF's documents and the
5 other is Autoliv's, but, nevertheless, they are the same kinds of caches of documents.

6 The Claimants' particular concern on this application is whether, in that review, Autoliv
7 identified and disclosed all documents relevant to the Claimants' umbrella damages
8 case. So that is what we are concerned may have been missed.

9 Now, what types of documents would be relevant to the umbrella damages case? That
10 depends on the mechanism by which umbrella damages are said to have arisen. In
11 other words, how the cartelisation found by the Commission against BMW and
12 Volkswagen and so on, would have affected the prices charged to my clients? The
13 mechanism on that has been clarified and further particularised by amendments to the
14 pleadings since the disclosure review occurred. It is convenient to look at the Fourth
15 Amended Particulars of Claim which is tab 7 of the core bundle.

16 **THE CHAIR:** Paragraph?

17 **MR WEST:** It is paragraph 44.

18 **THE CHAIR:** A through to G, yes?

19 **MR WEST:** Yes. This should be a multicoloured document and, just to explain, the
20 lilac or purple and yellow amendments were made in October and December last year.
21 So they post-date the disclosure of the DoJ documents. The Tribunal will see, under
22 paragraph 44, I think, all of the further particulars are lilac or yellow in relation to the
23 umbrella case.

24 One sees the mechanism which is essentially that there was common decision making
25 or common information sharing within Autoliv in relation to pricing and strategic
26 decisions concerning both the named OEMs and other OEMs, including the Claimants.

1 So, if the Tribunal looks, for example, at paragraph 44G at sub-paragraph (i) on
2 page 45, these are not confidential, but I will avoid reading them out if that is okay.

3 **THE CHAIR:** Paragraph 44G(i), did you say?

4 **MR WEST:** Yes. Or (ii)(a). The yellow, over the page.

5 Another example, (iii)(e). So it is a (iii) and then a little ordinary (e), so that is on
6 page 49. Also (f) and (g).

7 **THE CHAIR:** Okay. Right. Yes.

8 **MR WEST:** So that is the pleaded mechanism and all of that, as I say, post-dates this
9 disclosure review. It is then addressed in Autoliv's witness evidence, in particular, the
10 statement of Mr Corbut, I think it is pronounced, which is in the supplemental bundle,
11 tab 17.

12 **THE CHAIR:** Will you give me a page number? I don't seem to have any tabs. I am
13 not quite sure where I get the page numbers, to put the page numbers in.

14 **MR WEST:** And the first reference --

15 **THE CHAIR:** Hang on, I am not there yet.

16 **MR WEST:** Sorry.

17 **THE CHAIR:** It's all right. I can't seem to get an index up at the moment. All right.
18 Give me a tab again, sorry?

19 **MR WEST:** Tab 17.

20 **THE CHAIR:** Okay. Yes. I am with you now.

21 **MR WEST:** The first reference is paragraphs 11 to 14, if I could ask you to read those
22 briefly. **(Pause).**

23 **THE CHAIR:** Yes.

24 **MR WEST:** So he is here discussing a particular type of meeting called a market
25 coordination meeting and he makes a number of points. One is, just before we get to
26 the points he makes, one of the -- part of the evidence he gives at this particular

1 location within Autoliv where he works, served three OEMs, one of which was PSA,
2 another one of which was Toyota, which was, of course, one of the named OEMs in
3 the Commission decision. But what Mr Corbut says here in outline is, firstly, he says
4 there was a general policy of siloing decision making for each OEM, and he says,
5 whilst different business directors for different OEMs might attend the same meeting,
6 they would only attend so long as their OEM was being discussed and then they would
7 leave. Thirdly, he says they did not discuss pricing anyway at these meetings because
8 pricing was a matter for the sales team.

9 As far as pricing is concerned, the relevant paragraphs are at 16 to 24, which, again,
10 could I ask you to read rather than me reading it out. **(Pause)**.

11 **THE CHAIR:** Okay.

12 **MR WEST:** So, again, that addresses his evidence about siloing in relation to prices,
13 and the final reference in here concerns obtaining authorisation within Autoliv for the
14 terms of a particular quote or response to an RFQ. It is apparent, from what Mr Corbut
15 says, that it was not the sales team themselves that had authority to issue the quotes
16 or approve the final quotes. So, the relevant paragraphs here are 33 to 35. **(Pause)**.

17 **THE CHAIR:** Okay.

18 **MR WEST:** So I need to be a bit careful because this is all marked yellow, which
19 means confidential, but the Tribunal will note that the acronym in the heading, the
20 three-letter acronym in the heading, that refers to the relevant committee which gave
21 the -- okay, I am told it is not confidential and I can say it is the project steering
22 committee which gave authorisation for the quotes. One can see from this evidence
23 a slightly different – in fact, a rather different approach to siloing appears to have
24 applied. That is the body which is ultimately deciding on the quote which Autoliv is
25 going to issue.

26 Finally on the evidence, this was then considered by the 'Claimants' expert,

1 Mr Hughes. Now, Mr Hughes gives evidence, amongst other things, about the
2 overcharge and, as part of his evidence on overcharge, he considers, from
3 an economic point of view, whether it is likely that the practices in this case could have
4 led to an overcharge to the Claimants, including under the head of umbrella damages.
5 His evidence, just to look at it, is again in the supplemental bundle. It is page 440.
6 Paragraph 2.3.1.

7 **THE CHAIR:** Sorry, which page did you say?

8 **MR WEST:** Page 440 of the bundle, the supplemental bundle.

9 **THE CHAIR:** Yes. If I put in page 440, I seem to end up in a completely different
10 place for some reason.

11 **MR WEST:** Sorry.

12 **THE CHAIR:** No, it is not your fault.

13 **MR WEST:** There should be a heading "The operation of the cartels."

14 **THE CHAIR:** Page 426?

15 **MR WEST:** Page 426 of the PDF with 440 written on it.

16 **THE CHAIR:** Which paragraph number?

17 **MR WEST:** Paragraph 2.3.1 down to 2.3.9. **(Pause).**

18 **THE CHAIR:** Okay.

19 **MR WEST:** So, although, factually, these matters are issues for the Tribunal,
20 Mr Hughes says, looking at this evidence, that there appears to have been a potential
21 mechanism for spillover between the named OEMs and the non-named OEMs, such
22 as the Claimants.

23 Obviously, these are all matters for trial, but the upshot, for today's purposes, is there
24 will be an important issue at the trial as to whether there was a mechanism whereby
25 higher prices charged to the OEMs named in the Commission decision due to the
26 cartel could have had a cross-contaminating effect on the prices quoted by the same

1 suppliers to the Claimants. That depends on whether the pricing decisions really were
2 siloed, as Mr Corbut seems to suggest, at least to the level of the sales teams, or
3 whether, in fact there was information spillover relating to the different OEMs within
4 Autoliv.

5 It follows, for the purposes of disclosure, that internal Autoliv documents which bear
6 on those issues are relevant and fall to be disclosed. Those documents will include,
7 for example, documents showing how Autoliv was structured, how its strategic and
8 pricing decisions were made, the extent to which reports or updates with information
9 on such matters were emailed not only within the individual sales teams, but across to
10 different sales teams and, indeed, to the more senior levels of management which do
11 not appear to have been siloed in the same way.

12 Now, at the time it gave disclosure of the DoJ documents in June of 2023 as part of
13 its disclosure statement, Autoliv provided a list of withheld documents referred to as
14 annex B -- annex B of the disclosure statement, I assume -- and there were about
15 45,000 withheld documents. So it's a very, very long document. But Mr Bolster has
16 annexed part of it to Bolster 13 and that is at tab 29 of the core bundle.

17 **THE CHAIR:** Of the core bundle?

18 **MR WEST:** The document itself is in tab 30, starting at page 2006.

19 **THE CHAIR:** Sorry, which bundle?

20 **MR WEST:** This is the core bundle. It is volume 4 in the paper version --

21 **THE CHAIR:** Sorry, I have one paper bundle. You have a luxury I have not been
22 afforded. I have one bundle which goes up to tab 30. Tab 30 has nothing in it.

23 **MR WEST:** Goes up to, sorry?

24 **THE CHAIR:** Tab 30, but it has nothing in it. So, it goes up to tab 29, in other words.

25 **MR WEST:** Do you have the electronic version?

26 **THE CHAIR:** Yes. **(Pause).**

1 **MR WEST:** As I say, the printed page number is 2006. Hopefully, that is the same
2 as the pagination in the PDF, but I can't guarantee it.

3 **THE CHAIR:** So it is the witness statement of Mr Bolster, the 13th witness statement.
4 I have that. Anyway, where do I find -- that is not what you are after, are you? You
5 are after the annex.

6 **MR WEST:** Yes. Annex B. I am told it is page 2017 of the PDF pagination. Page
7 2070.

8 **THE CHAIR:** Sorry. Page 2070?

9 **MR WEST:** Page 2070 of the PDF pagination, printed page 2006. It should look like
10 this without the highlighting that I have added.

11 **THE CHAIR:** Yes. So I thought the key word search produced 20,000 documents
12 from the DoJ.

13 **MR WEST:** Yes.

14 **THE CHAIR:** And then 590 or something were disclosed.

15 **MR WEST:** Yes.

16 **THE CHAIR:** This is a list, or a part of a list, of the documents that weren't disclosed?

17 **MR WEST:** Yes.

18 **THE CHAIR:** Okay. Fine. So you have an idea of what is there, at least in very
19 general terms.

20 **MR WEST:** We know what is there. Many of these documents have file names listed
21 under the heading "Attachment names". That is what those instructing me have
22 particularly focused on.

23 **THE CHAIR:** I am following that, yes.

24 **MR WEST:** It is a very long document. We don't need to go through it all. Mr Bolster
25 has analysed it and I'll take you to what he says, but just so you know what the
26 document looks like. For example, under the heading "Attachment name", if you go

1 to the second document with a name, one sees there "PSC review agenda".

2 **THE CHAIR:** Yes.

3 **MR WEST:** "PSC", that is the project steering committee, which we heard about
4 a second ago. The next named document is also "PSC review agenda". Skipping
5 down three more, one is something called "Monthly sales reports". We say those are
6 also likely to bear upon this same issue of siloing.

7 **THE CHAIR:** Why would the monthly sales reports?--

8 **MR WEST:** I will show you one in a second to make that point good. So monthly
9 sales reports, PSC agendas. Then, if one looks at the next page, just above the hole
10 punch in the same column --

11 **THE CHAIR:** I don't have hole punches.

12 **MR WEST:** I am sorry. It's about a quarter of the way down.

13 **THE CHAIR:** The second page?

14 **MR WEST:** The second page.

15 **THE CHAIR:** Two benchmarking studies?

16 **MR WEST:** Yes, benchmarking is clearly something we are particularly interested in
17 because if, for any reason, supplies to the named OEMs were used as a benchmark
18 for pricing or technical characteristics or anything else to sell to the Claimants, that is
19 another clear mechanism, as I think Mr Hughes himself addresses.

20 So Mr Bolster has analysed this list and he deals with it in a number of places. If we
21 can look at Bolster 13, paragraph 13, that is tab 29. This is addressing a specific point
22 made by Mr Balmain for Autoliv, where he says, "Actually, we have disclosed some
23 documents with these file names", but Mr Bolster analyses them, and we can see in
24 this table the particular document titles which the Claimants have alighted upon as
25 being likely to be relevant to the umbrella point. One has there the numbers. If you
26 look at the column on the right, these are the numbers in annex B. So there are 898

1 documents with "project steering committee" in the name, of which it appears -- well,
2 Mr Balmain says 41 documents with that name have been disclosed, although those
3 can't be the same documents because none of the annex B documents have been
4 disclosed.

5 **THE CHAIR:** Okay. So you have 41 project steering committee PSC documents.

6 **MR WEST:** Yes. But there is another 898 documents in annex B.

7 **THE CHAIR:** You are trying to show, if you can make it good for one case, that would
8 seem to drive a hole through the evidence. You don't have to prove that every –

9 **MR WEST:** Well, the extent is also likely to be relevant, if this was pervasive. They
10 always considered the OEMs together rather than separately.

11 **THE CHAIR:** Right.

12 **MR WEST:** Similarly –

13 **THE CHAIR:** Have you got – have you produced one of these documents to show
14 how it assists your case?

15 **MR WEST:** We have some monthly reports and monthly management meeting
16 reports, which have been exhibited, which I can show you in a second.

17 **THE CHAIR:** Okay.

18 **MR WEST:** Just to finish this point.

19 **THE CHAIR:** You have not produced for today – not a criticism, just a question – any
20 PSC documents?

21 **MR WEST:** Yes. There is a document I am going to show you which may fall within
22 this category. Before I take you to the documents, since we are here, just to make
23 good the point on the numbers, the total over the page, in the right-hand column, of
24 documents with the –

25 **THE CHAIR:** Yes, I have that.

26 **MR WEST:** It is about 2,200 of them.

1 In relation to the documents themselves, the document I was going to show you is
2 exhibited to Balmain 9. Tab 24, page 1736.

3 **THE CHAIR:** Page 1736?

4 **MR WEST:** Yes.

5 **THE CHAIR:** Sales report dated November 2010; is that right?

6 **MR WEST:** This is not the PSC document, but I will be giving the reference for that.

7 **THE CHAIR:** It is a sales report. I can see that. Yes.

8 **MR WEST:** Just on this page -- 1733.

9 **THE CHAIR:** Page 1733.

10 **MR WEST:** Page 1733.

11 **THE CHAIR:** Hold on.

12 **MR WEST:** One has the distribution list. So this is an email attaching this report from
13 Mr Matsunaga. He was the Autoliv internal business director, I believe, for Toyota,
14 which was one of the named OEMs in the commission decision. The distribution list
15 includes, if one looks under "CC" on the second line at the end, there is an individual,
16 Christophe Riviere.

17 **THE CHAIR:** Mm-hm.

18 **MR WEST:** Now, he was the Autoliv representative for PSA. So, he sent this. A bit
19 further down, four lines further down, in the middle, there is someone called
20 Fulvio Podio. Mr Bolster's evidence is that he was the representative within Autoliv for
21 FCA or Fiat, as it was at that time.

22 **THE CHAIR:** Sorry, Mr ...?

23 **MR WEST:** Fulvio Podio.

24 So those are the CCs. If you look at who the email is addressed to, Mr Bolster explains
25 who these people are, but these are senior people within Autoliv, including the head
26 of Autoliv in America, the head of Autoliv in Japan and so on. They are being sent this

1 global Toyota business unit November report and Toyota was, of course, a cartelised
2 OEM. This goes into great detail about the relationship between Autoliv and Toyota,
3 including costs and amendments and, in some cases, also pricing, on page 1736. One
4 sees under "Update" --

5 **THE CHAIR:** Sorry, just take that a bit more slowly. So I'm looking at Toyota. I just
6 have not picked up where the pricing --

7 **MR WEST:** Well, as I say, it focuses on a number of matters, but page 1736 under
8 "Update". This is not our document, but it looks like a pricing reference, second bullet
9 point, "to provide our improved local offer". Then one has what looks like a price and
10 a reference to EBIT, which would be a profitability reference. So this is information
11 about pricing and profitability relating to a cartelised OEM being sent to the
12 representatives of all of the OEMs, so it appears, including my clients and the senior
13 management.

14 **THE CHAIR:** Is this one of the documents you pleaded?

15 **MR WEST:** This is one of the documents which has been disclosed, I need to check
16 whether we --

17 **THE CHAIR:** I can come back to it. Thank you. Okay. I have the point.

18 **MR WEST:** There are other examples of, certainly, information of this kind being
19 supplied for multiple OEMs outside the so-called siloed, sales teams. If we can just
20 very briefly look at one other example on page 1868. These, again, concern Toyota.
21 I am told, or Mr Bolster gives evidence as to the circulation list at the top, and
22 Mr Murray was the president of Autoliv America. Sorry, that may be Mr Ward.
23 Mr Murray, president of Autoliv Japan. Mr Brenner, vice president of operations for
24 occupant safety systems in North America. So OEM-related information being
25 provided to the senior management, and another example of a document referencing
26 multiple OEMs is at page 1880. This appears to reference all of the Japanese OEMs:

1 Toyota; Mazda; Honda; Nissan, Daihatsu; Mitsubishi; Suzuki. A number of those were
2 cartelised. One can see pricing information there, again, page 1883, which is
3 referenced to the price of a rollover sensor.

4 **THE CHAIR:** Sorry. I am on page 1883.

5 **MR WEST:** The PSC document we have is a request for approval, but I have already
6 explained the request for approval process. And that is, the PSC appears to have
7 dealt with requests for approval from all the OEMs, there was no separate siloing at
8 the level of granting authorisation.

9 So, what we draw from this is that, when Autoliv's lawyers and disclosure providers
10 were carrying out the disclosure exercise, they don't appear to have been doing so
11 with a focus on these issues which are relevant to the umbrella claim. That is,
12 perhaps, not surprising because both parties' cases on this point have developed, I
13 think it is fair to say, since this time last year.

14 We have seen the further particulars of the mechanism which have been provided,
15 Mr Corbut's evidence, and the way it is addressed in Mr Hughes' expert report.

16 I should also say it was Autoliv's own position at the time it carried out this review that
17 the Claimants' umbrella case was unclear and that that caused problems in the
18 disclosure review exercise. We can see that at page 745 of the core bundle, which is
19 tab 20.

20 This is a letter from Autoliv's solicitors in connection with the disclosure review in
21 July 2023 under the heading "2. Approach to Relevance" --

22 **THE CHAIR:** Hold on. "Approach to Relevance". I have it now. Yes.

23 **MR WEST:** So, the PDF numbering is 809.

24 **THE CHAIR:** Sorry. What do I get out of this?

25 **MR WEST:** This is paragraph 6. So, when the documents were disclosed, Hausfeld
26 queried why the numbers were so low and what approach had been taken to

1 relevance. You'll see the answer here:

2 "Pursuant to para 5(c) of the Second CMC Order, the Autoliv Defendants may only
3 withhold documents from inspection to the extent that they are "irrelevant". As you will
4 be aware, it is the Autoliv Defendants' position that in certain respects the Claimants'
5 pleaded case is presently opaque and/or inadequately particularised, such that it is
6 difficult to determine with precision the applicability of the exception contained in
7 paragraph 5(c) of the Second CMC Order."

8 So, we have had to carry out this review --

9 **THE CHAIR:** They say they were required to adopt an inclusive approach.

10 **MR WEST:** Yes.

11 **THE CHAIR:** Does that not mean they have resolved it in your favour?

12 **MR WEST:** It is difficult to see how they could decide what was --

13 **THE CHAIR:** I understand that point, but you were taking one paragraph without the
14 other. That was all. I was just trying to --

15 **MR WEST:** I'm sorry, I should have read paragraph 7 as well. No doubt, my friend
16 would --

17 **THE CHAIR:** Right. But you didn't do it. I mean, you had this disclosure back
18 in July 2023; is that right?

19 **MR WEST:** In June. End of June 2023.

20 **THE CHAIR:** June 2023, and you were aware Autoliv had produced a very small
21 number of documents as compared to ZF. So that is information you have been
22 carrying for a year. You have known about the siloing since at least 6 February this
23 year, which is still some time off.

24 **MR WEST:** Yes. I am going to come to timing. My short answer to that is, following
25 those developments, we have been seeking disclosure and we sought a new review
26 from Autoliv. I can take you to it, at the beginning of February 2024.

1 **THE CHAIR:** Yes. I have seen that.

2 **MR WEST:** That was refused in March 2024. We have since then been continuing
3 and, ultimately, we have issued this application --

4 **THE CHAIR:** When was the last hearing in these proceedings? You had April 2024,
5 so you were aware there was an issue in March 2024. It had crystallised and you
6 didn't make an application in April 2024.

7 **MR WEST:** We were seeking to continue to resolve this, and we were hopeful, at one
8 point, we would manage to resolve it by reference to the 2,200 documents, but, in the
9 end, that has not proved to be possible.

10 **THE CHAIR:** This issue, have you had -- this siloing point is not being taken by ZF at
11 all; is that right?

12 **MR WEST:** They do take a similar point, I believe.

13 **THE CHAIR:** You are happy with their disclosure? I see.

14 **MR WEST:** I should also -- to be fair, my friend says this has always been pleaded.
15 That is his Defence at paragraph 41C, which is tab 9 of the core bundle, pages 165 to
16 166. Paragraph 41C. The last sentence in particular:
17 "OSS suppliers typically also had separate sales teams for each OEM customer."
18 It is true that has always been their case --

19 **THE CHAIR:** Sorry. Give me that reference again?

20 **MR WEST:** Paragraph 41C of the defence. Core bundle, tab 9. Bottom of page 164
21 to 166. That is the printed pagination:
22 "OSS suppliers also typically had separate sales teams for each OEM customer."

23 **THE CHAIR:** I must be in the wrong document.

24 **MR WEST:** Tab 9.

25 **THE CHAIR:** Paragraph 41C.

26 **MR WEST:** Printed page 165 of the core bundle.

1 **THE CHAIR:** There are two 41Cs. Yes. It is 41(c).

2 **MR WEST:** Yes.

3 **THE CHAIR:** Yes. It is there.

4 **MR WEST:** That was then, but we say matters have nevertheless somewhat
5 developed, in that the point is now being taken that information was siloed within each
6 of those and not shared as between different sales team. It is not just that there were
7 different people who dealt with each of the OEMs.

8 **THE CHAIR:** Yes.

9 **MR WEST:** In terms --

10 **THE CHAIR:** So, you say, yes, the sales team does not carry with it the information
11 that those sales teams had siloed?

12 **MR WEST:** Indeed. It was siloing personnel, but not necessarily information.
13 As far as concerns around the test to be applied, I don't think there is anything between
14 us. My friend has cited the Atos Consulting and West Ham Holdings cases, which are
15 well-known and say, effectively, if one wants to go behind a statement on a disclosure
16 statement saying the documents are withheld on the ground of relevance, one needs
17 to have a sufficient evidential basis to do so. My submission is the documents and
18 other submissions I have made and the documents I have shown you amount to
19 a sufficient evidential basis to cast doubt on the assertion that none of these are
20 relevant. Particularly because that statement, when made, pre-dated the further
21 particularisation of the pleadings and the further development in both parties' cases
22 which have happened since then.

23 So, in my submission, there is a sufficient ground to revisit the exercise and the
24 question arises, what should be done if the Tribunal agrees with that? We have put
25 forward two alternative proposals, both of which do not involve Autoliv reviewing all of
26 the documents again for relevance.

1 The first is that they simply disclose into the confidentiality ring all of the DoJ
2 documents responsive to the original agreed key words and we know there are about
3 20,000 of those.

4 **THE CHAIR:** So they just give you 20,000 documents?

5 **MR WEST:** Yes, which is essentially what ZF did.

6 **THE CHAIR:** It will come as no surprise this does not seem an attractive option so
7 close to trial, given these issues have been around for some considerable period.

8 **MR WEST:** I hear what you say, so I therefore move on to my alternative submission,
9 which is they hand over the documents, the 2,200 documents, which is the number
10 you saw in Mr Bolster's most recent statement. Those are the documents which are
11 relevant to the key words we have picked up in the file names: "benchmarking",
12 "project steering committee report", "monthly sales reports", and so on.

13 **THE CHAIR:** How often do the project steering committee meet?

14 **MR WEST:** I assume they meet when there is an RFQ quotation to approve.

15 **THE CHAIR:** We have 898 documents here.

16 **MR WEST:** There are a lot of these --

17 **THE CHAIR:** I have not heard from Mr Leith yet. Don't assume I am in your favour.
18 But if we were going to reduce -- why do you need them for the whole period? Could
19 it not be limited to a period of time, say, over two years?

20 **MR WEST:** Well, that would certainly be better, from my client's perspective, than not
21 receiving any of the documents.

22 **THE CHAIR:** That would cut them. What is the period? This is for what period? This
23 is from ...?

24 **MR WEST:** So, these were the documents which were subpoenaed by the DoJ so
25 they effectively cover the cartel period.

26 **THE CHAIR:** So they don't include the earlier period? Or they do include -- the cartel

1 period in the US might have been different, presumably?

2 **MR WEST:** I will check that. I am sorry. I don't know the answer to that off the top of
3 my head. We can certainly find, in the plea agreement, the cartel period that Autoliv
4 admitted in the US. The plea agreement --

5 **THE CHAIR:** Just perhaps look that up, not while you are on your feet. Fine. Was
6 there anything else on the substantive matters?

7 **MR WEST:** No. But just to clarify what our proposal is, so these documents are to be
8 disclosed into the confidentiality ring, but the only review to be carried out would be
9 a review for -- by Autoliv, would be a review for privilege --

10 **THE CHAIR:** Why? Why should they not -- I understand your point. Say this siloing
11 hadn't crystallised, at least in your mind, why should they not be entitled to screen for
12 relevance?

13 **MR WEST:** Well, we are attempting to put forward a pragmatic proposal which will
14 avoid them having to do that. They object to the time and cost which they say would
15 be involved in doing that. If they simply hand over the documents to us, irrespective
16 of relevance, and the Tribunal undoubtedly has the power to order that, it would be an
17 order for specific disclosure and is often done when the court or Tribunal concludes,
18 for whatever reason, that the initial review has not captured all relevant documents.
19 The documents would be disclosed into the confidentiality ring, so, if they are
20 ultimately not relied on by my clients, they will never see the light of day. The only
21 review which would then remain to be carried out by Autoliv will be for lenience and
22 privilege, because we can't override that.

23 **THE CHAIR:** All right. I will hear Mr Leith on the matter. Okay.

24 Mr Leith, I had a couple of questions, before you get going. Can I ask you a couple of
25 questions so I can understand some of the background?

26 **MR LEITH:** Yes.

1 **THE CHAIR:** When the documents were reviewed for relevance, that is your original
2 disclosure of documents, was this siloing, if I can put it like that -- not just of separate
3 sales teams, but the fact those sales teams were siloed, siloing of information. Was
4 that understood to be a relevant issue when the documents were reviewed for
5 relevance?

6 **MR LEITH:** So maybe most of the team behind me has heard that question, but what
7 I can say on the filed evidence is that there was an issue, as you have seen, on the
8 pleadings as to whether there were separate sales teams. The Claimants drew issue
9 in their reply with that averment.

10 **THE CHAIR:** It is not quite the same. The fact there are separate sales teams does
11 not mean they are not discussing things.

12 **MR LEITH:** It is a very closely related point, I would submit.

13 **THE CHAIR:** Still, it is not the same point. I am not asking whether there are separate
14 sales teams, I don't think it is disputed that there are separate sales teams. The
15 question is, between those sales teams, was information passing from one sales team
16 to another, at whatever level? It may be above the level of the sales team.

17 **MR LEITH:** I think I would have to just ask --

18 **THE CHAIR:** I would like to -- could you take instructions on that? I would like to see
19 where the evidence on this is, if it is in your evidence.

20 **MR LEITH:** Well, Mr Balmain does address the way the disclosure review was done.

21 **THE CHAIR:** Just show me.

22 **MR LEITH:** That is in tab 23 of the core bundle, which I -- I have it in volume 2, but I
23 think that probably won't be helpful.

24 **THE CHAIR:** Sorry. In which?

25 **MR LEITH:** This is the core bundle, tab 23.

26 **THE CHAIR:** I have got that. Yes. Just remind me where --

1 **MR LEITH:** Sorry to turn my back, sir.

2 **THE CHAIR:** That is quite all right.

3 **MR LEITH:** It starts at paragraph 12 of Mr Balmain's statement at page 1186 of the
4 core bundle.

5 **THE CHAIR:** Yes.

6 **MR LEITH:** So the process is key word searches are applied.

7 **THE CHAIR:** Yes. I have that.

8 **MR LEITH:** That knocks out about half the set straightaway. Then there is a manual
9 review of documents which are not susceptible to easy key word searching because
10 of their illegibility and so on. Then we have the 580 documents that are produced, as
11 is explained in paragraph 13. Then there is an explanation, which maybe we can
12 come back to, as to how the DoJ document sets were produced in the first place. I
13 think the Tribunal has the point that they are produced by subpoenas, sent by the DoJ,
14 to each undertaking that is under investigation.

15 **THE CHAIR:** What I was looking for was evidence of whether these documents have
16 been reviewed for this siloing point.

17 **MR LEITH:** Okay. Well, sir, what we have, in paragraph 15, is Mr Balmain's evidence
18 as to how the exercise was done in the first half of last year.

19 **THE CHAIR:** Right. So he says:
20 "Reviewers were instructed to take an inclusive approach to relevance, with the
21 Claimants' alternative "umbrella" case in mind."
22 That is quite, sort of, loose.

23 **MR LEITH:** Well, then he says -- later on, to be fair to Mr Balmain, in brackets, six
24 lines from the bottom, he says:
25 "(i.e., taking an over-inclusive approach to disclosure)", and "having erred on the side
26 of caution."

1 So, erring in the Claimants' favour.

2 **THE CHAIR:** But have you disclosed documents that support your case there was
3 siloing?

4 **MR LEITH:** I am not in a position to --

5 **THE CHAIR:** This is fairly fundamental. Without wishing in any way to cast blame at
6 this stage, the fact is this is an issue in the case, and have you given disclosure in
7 relation to it? The issue is the issue of siloing and there will be documents that may
8 support your case, which you may rely on, and there are documents which may
9 undermine your case, may show communication between the relevant sales teams or
10 their superiors. If documents relating to that issue have not been disclosed, plainly,
11 that is unsatisfactory.

12 Now, that is not to say that this was -- it is not a pleaded issue, and it may be rather
13 unfortunate the way it has turned out. As a pragmatic matter, we need to determine
14 whether disclosure has been given in relation to this issue.

15 **MR LEITH:** Sir, I am taking instructions.

16 **THE CHAIR:** We can -- shall we rise for five minutes and let you take instructions?

17 **MR LEITH:** That would be easier, rather than --

18 **THE CHAIR:** No. I appreciate I am springing these things on you.

19 **(11.35 am)**

20 **(A short adjournment)**

21 **(11.43 am)**

22

23 **Submissions by MR LEITH**

24 **MR LEITH:** Members of the Tribunal, you were asking me if I could give more detail
25 about the disclosure review, the exercise that was done.

26 **THE CHAIR:** Not really. It was a more precise question than that: whether, when the

1 review of documents took place, they were reviewed for the purpose of a siloing case?

2 **MR LEITH:** What I can say on instruction, sir, is the instructions on how to approach
3 a review to the umbrella case included, if the pricing of OSS to the Claimants was
4 being discussed by reference to the pricing of OSS to any of the manufacturers, in
5 respect of which there are --

6 **THE CHAIR:** Sorry, just say that more slowly. Start again. Okay.

7 **MR LEITH:** The instructions that we were given for the disclosure review on the
8 umbrella case were that, if a document referred to the pricing of products supplied to
9 the Claimants being determined by reference to the pricing of OSS products supplied
10 to the other OEMs in respect of which there are regulatory competition decisions, that
11 kind of document would be relevant.

12 **THE CHAIR:** Okay. That does not go far enough, does it?

13 **MR LEITH:** I think, sir, if I can just go back to Mr Corbut's evidence because there is
14 a risk that we are looking at his evidence as going beyond where it actually has --
15 where he has actually landed, sir. If I can take you, please, this is in the supplementary
16 bundle. So, this is in -- I have it in tab 17.

17 **THE CHAIR:** Give me a page number.

18 **MR LEITH:** Page 249 of the supplementary bundle.

19 **THE CHAIR:** Sorry. That comes up at page 263.

20 **MR LEITH:** Sorry, page 263, sir?

21 **THE CHAIR:** It comes up -- **(Pause)**.

22 **MR LEITH:** The witness statement starts, in my version, at page 249 of the
23 supplementary bundle.

24 **THE CHAIR:** Page 249. Must be page 238. Our page numbering is completely
25 different. I look enviously that you all have hard copies of everything. Right. Okay,
26 so I have the witness statement.

1 **MR LEITH:** It is internal page 5 of the witness statement. This is the passage that my
2 learned friend, Mr West, took the Tribunal to. So, at paragraph 11, Mr Corbut says
3 there are discussions between --

4 **THE CHAIR:** Sorry, paragraph 11, to coordinate the activities?

5 **MR LEITH:** Yes. Yes, sir. So there is some discussion between different parts of the
6 business and there is obviously, as you would entirely expect, upward reporting of
7 prices that have been achieved and some sharing of information. Mr Corbut's
8 evidence is not saying that --

9 **THE CHAIR:** The internal -- "The sufficient exchange of information ..." (Reads to
10 self). Okay. **(Pause)**.

11 Okay. Right. So, what is all this stuff about people leaving meetings when other
12 projects are discussed?

13 **MR LEITH:** Further on in the statement? Well, that is a specific point that is being
14 made about meetings, sir. Whereas the points on the documents my learned friend
15 was taking you to were about the distribution of emails, and so on.

16 So I think there is a risk of seeing what Mr Corbut's evidence is and what our case is
17 as being a kind of caricature that there is a rigid information barrier between different
18 parts of the business. That is not what he has been saying. There is a -- there is
19 a level of --

20 **THE CHAIR:** What is your case then? At the moment -- this is one thing I would like
21 to get out of today, that you plead this point, if there is a point. What is your point on
22 siloing? I thought, at least the Claimants understood, and I had understood the same,
23 that there was a point that information will not be -- the mechanism breaks down
24 because the umbrella mechanism breaks down, because information would not have
25 passed, relevant information would not have passed, from one OEM team into the
26 dealings with the Claimants.

1 So what is your case on that?

2 **MR LEITH:** Sir, I mean, the evidence that's being put forward is that there is a level
3 of discussion between different parts of the business, but then the actual setting of
4 prices and quotations, that is dealt with in a different way.

5 **THE CHAIR:** Okay. I understand the evidence and we can discuss its precision in
6 due course. But what is your point on mechanism? There is a point underlying on
7 this, whether the umbrella mechanism that has been pleaded against you withstands
8 scrutiny. Certainly, the Claimants were under the impression that you are saying that
9 that mechanistic explanation is not sufficient, or not plausible, because of some form
10 of siloing. If you are not running that point, then I can see the need for disclosure
11 might evaporate. But if you are attacking the umbrella claim on a mechanistic basis,
12 we need to understand what your case is. That is my question. It is not just what the
13 witnesses are saying, it is what you are going to be submitting at trial.

14 **MR LEITH:** Well, sir, we have a number of points on the mechanism by which we say
15 the umbrella is important, the starting point being that --

16 **THE CHAIR:** Show them to me in your pleading.

17 **MR LEITH:** I can give you the headline points and then take you to the pleading as
18 well, sir, because some of them are developments of the way the case put forward by
19 the Claimants has, or has not, been actually advanced.

20 **THE CHAIR:** Right.

21 **MR LEITH:** This is, if we go to paragraph -- if we go to our Defence, which I think is
22 in tab 8 of the core bundle.

23 **THE CHAIR:** Defence tab 9.

24 **MR LEITH:** Tab 9, sorry.

25 **THE CHAIR:** Yes.

26 **MR LEITH:** Actually, just if we can turn back in that bundle, please, to tab 7, which is

1 the Fourth Amended Particulars of Claim. There are some points I would like to take
2 the Tribunal to that respond to this.

3 **THE CHAIR:** Would you mind if we do it in tab 8? The yellow I find extremely difficult
4 to read.

5 **MR LEITH:** Of course. If we are in tab 8, this is the Claimants' own pleading. Pick it
6 up at -- I have it at page 479, so it is paragraph 9. The heading is, "The Claim in
7 Summary".

8 **THE CHAIR:** Yes.

9 **MR LEITH:** So, "In summary, the Claimants' claim", and so on. Then you see, in
10 paragraph 10:

11 "The price of OSS components is, and was, typically negotiated and determined as
12 follows."

13 This is the Claimants' case:

14 "OSS Components are typically bespoke, customer-specific products. In order to
15 select their suppliers, the Claimants would typically issue a request for quotation", and
16 so on.

17 The point I would really emphasise, and this is the first of the building blocks on -- the
18 first of the -- this goes to the first part of the Claimants' case on their umbrella claim,
19 that the components themselves are bespoke and they're customer-specific. So, there
20 is an inherent difficulty in --

21 **THE CHAIR:** That's an entirely different point.

22 **MR LEITH:** Yes, sir.

23 **THE CHAIR:** Obviously, they are --

24 **MR LEITH:** I was trying to address the Tribunal's question, which is, what is our case
25 on the umbrella?

26 **THE CHAIR:** On this aspect of the umbrella mechanism.

1 **MR LEITH:** Well, we have our pleaded case, which adopts and avers that the products
2 are bespoke. There is also no evidence put forward by the Claimants, having served
3 their expert report, that there was actually any overcharge to the Japanese
4 manufacturers, and so on, there is just an assumption that that is where you start, with
5 some kind of --

6 **THE CHAIR:** I understand that, yes. But this is not the point we are on, is it? The
7 point we are on is the extent to which you are relying on siloing as attacking the
8 umbrella mechanism. I appreciate you may have all sorts of other attacks, and is that
9 pleaded, and what is it?

10 **MR LEITH:** If we go to paragraph 34, in the next tab, sir, at page 165, paragraph 41
11 of our pleading, which is where Mr West took us before.

12 **THE CHAIR:** I have that.

13 **MR LEITH:** So we then have made the general points I have just been making, that
14 there is no finding of any effect on prices of the other infringements. Then there is the
15 point about OSS not being commodity products, and being custom made and highly
16 specific, then the point you have already seen, sir, which is that pricing tends to be
17 OEM specific.

18 Then, in the paragraphs that follow, we do set out detailed responses to the Claimants'
19 allegations as to the causal mechanism. We do so document by document, because
20 that is the nature of the case that is being pleaded against us.

21 **THE CHAIR:** Right. So where do you deal with siloing?

22 **MR LEITH:** Well, we don't use the word "siloing", sir.

23 **THE CHAIR:** I appreciate that. I appreciate you don't use it. Do you have a case that
24 information, relevant information, does not pass from -- I am reluctant to use the word
25 "sales team" because these may be people sitting above the sales team, but I will use
26 that as a shorthand? Do you have a positive case that information does not pass from

1 one sales team to another? Whether it is relevant, ultimately, is a separate question.
2 That is what I understand Mr West means by "siloing". He infers that is part of your
3 case.

4 **MR LEITH:** The way it has been pleaded at the moment, sir, taken from
5 paragraph 41G, as an example --

6 **THE CHAIR:** Paragraph 41G, yes.

7 **MR LEITH:** Paragraph 41G.

8 **THE CHAIR:** Yes.

9 **MR LEITH:** This is responding to a pleading of a particular document, but about ten
10 lines down, where it starts "It is denied that any of those factors establish ..."

11 **THE CHAIR:** Yes. I have it now. **(Pause).**
12 Right. It is not quite the same point though, is it?

13 **MR LEITH:** It is getting into the causal mechanism as to whether these kinds of
14 discussions --

15 **THE CHAIR:** Let me read this from the beginning. **(Pause).**
16 Right. Sorry. I have gone over to the next page. I don't see any of this going to siloing
17 at the moment.

18 **MR LEITH:** So there are perhaps two separate questions: one of them is a factual
19 question as to what information passed between whom; and the sort of economic
20 analysis is that -- or the factual analysis, what possible difference could that make?
21 Perhaps depending on the answer to the first question.

22 **THE CHAIR:** I think the first question is not just what information passed, but what
23 information could have passed?

24 **MR LEITH:** Yes.

25 **THE CHAIR:** If you have a system whereby sales teams are isolated and have
26 separate meetings and don't talk to each other, then the information is not capable of

1 passing from one sales team to another sales team. Now, that is how -- on a very
2 superficial read, that is how I understood your case from the evidence. That is also
3 how Mr West had understood your case from the evidence.

4 Now, if that is not your case, then that can be disposed of. But, if that is an aspect of
5 the case, that information cannot pass from one sales team to another, then we need
6 to address -- we need to get the pleadings in shape and have disclosure on that issue.

7 **MR LEITH:** I think there is a risk in the term "information", for example. Obviously, it
8 has very different meanings, different levels of specificity. So perhaps there is a risk
9 of confusion, it would not be -- I can see the merit in that being clarified. Yes.

10 **THE CHAIR:** So it is part of your case? Siloing is part of your case, as I understand
11 it, or not?

12 **MR LEITH:** Well, there is some degree to which our evidence and our case do say
13 that information of certain types is not passing between different particular individuals.
14 But I don't want to -- there is a very general proposition, sir.

15 **THE CHAIR:** Okay. You agree that is not pleaded at the moment?

16 **MR LEITH:** It is -- what I have just said is not pleaded, no.

17 **THE CHAIR:** Okay. When disclosure was done, you didn't have that issue in mind,
18 and you explained to me the review you did, but you didn't have that specific issue in
19 mind when documents were disclosed?

20 **MR LEITH:** Well, it was -- the point that was being considered was whether -- if
21 a document showed or indicated, one way or another, that prices were being set by
22 reference to the prices of another firm -- the prices being charged to another firm, and
23 that would be relevant and an overly inclusive approach would be taken.

24 **THE CHAIR:** Well, you say "overly inclusive", that approach was taken, I understand
25 that.

26 **MR LEITH:** Yes, and the question the Tribunal had for me before the break was

1 whether we had disclosed documents that go to this, and there are instances, or there
2 is at least one instance that Mr Bolster mentions, where they have relied on one of the
3 documents we have cited as part of their umbrella pleading. They say ZF disclosed
4 many more, but it is not the case that we have disclosed none that they regard as
5 being relevant to their umbrella case.

6 **THE CHAIR:** My question was, have you disclosed documents you are relying on to
7 support siloing? I think that was my question.

8 **MR LEITH:** The disclosure we have given -- I have discussed this with my
9 solicitors -- is disclosure that would illustrate the general process that is used for the
10 setting of prices and the process that is used. I mean, it is a negative point, I suppose,
11 so that is why the disclosure is a more general one.

12 **THE CHAIR:** All right. Okay.

13 Sorry, I have taken you out of your course. I don't know whether we have covered
14 most of your points or you still have more.

15 **MR LEITH:** I had a lot of points. I think probably -- I think where the Tribunal had
16 ended up with Mr West -- I hope I am not putting words in anyone's mouth -- is perhaps
17 the wider-ranging disclosure request, the 20,000 documents.

18 **THE CHAIR:** There seem to be practical problems with that, given where we are, and
19 you will appreciate that Mr West may take some of the -- "blame" is too strong a word,
20 but his clients may be responsible for some of the reasons we are doing this so late in
21 the day and that it could have been done much earlier, an application could have been
22 made much earlier. So we are where we are.

23 **MR LEITH:** Yes.

24 **THE CHAIR:** So where do we get to on the narrow disclosure?

25 **MR LEITH:** I do have a few points about the narrow disclosure.

26 **THE CHAIR:** Yes.

1 **MR LEITH:** Actually, to go and look at some of the documents that might --

2 **THE CHAIR:** That would be helpful. Yes.

3 **MR LEITH:** I will just find where I was in my notes. **(Pause).**

4 If we could please go back to the core bundle. These are some of the documents that

5 my solicitors included in the evidence as examples of the kind of disclosure we have

6 given. So if I could take the Tribunal, please, to page 1741 of the core bundle.

7 Just mindful of the, perhaps, mismatch between different page numbers. So this is

8 an email from 2010 from Takayoshi --

9 **THE CHAIR:** Are we the only people with electronic documents? Does nobody else

10 have the system we are operating with?

11 **MR LEITH:** I think my solicitors have it.

12 **THE CHAIR:** Perhaps you could speak to your solicitors and find out what page

13 number we are meant to be on?

14 **MR LEITH:** Apologies. It is core bundle, page 1741.

15 **THE CHAIR:** We have to put in page 1805.

16 **MR LEITH:** I am sorry, sir.

17 **THE CHAIR:** Thank you. Okay. Yes.

18 **MR LEITH:** So this is one of the documents we have disclosed taking the

19 overinclusive approach.

20 **THE CHAIR:** Sorry, what am I -- sorry. I seem to have -- **(Pause).**

21 **MR LEITH:** I hope the document, when we get there, lives up to expectations. It is

22 quite a short point. I can actually probably hand up this one page, if that would be

23 easier.

24 **PROFESSOR NEUBERGER:** It is PSC1.

25 **MR LEITH:** So, Chairman, you were asking my learned friend where were the PSC

26 documents. This one has the subject "PSC". So on the narrow approach, one of the

1 key words that would be -- this is on the claimants' alternative approach, one of the
2 key words that would be used would be "PSC". If it's in the file name or the title, then
3 it would catch that document, and this has "PSC" in the subject.

4 I mean, what is this document going to do to advance the umbrella case? I think I can
5 say that rhetorically because we have repeatedly put this document to our opponents
6 to say these are the kinds of materials taking the overinclusive approach that we have
7 found.

8 **THE CHAIR:** So this is exhibited? Was it disclosed?

9 **MR LEITH:** It was disclosed a year ago.

10 **THE CHAIR:** Why was it disclosed?

11 **MR LEITH:** Because we took this overinclusive approach, sir.

12 **THE CHAIR:** You must have thought it was relevant on an overinclusive approach.
13 What was it relevant to?

14 **MR LEITH:** I think that's very peripheral relevance, sir. That is my point.

15 **THE CHAIR:** Peripheral, I understand, but relevant to what, peripherally?

16 **MR LEITH:** (Away from microphone) If I can make the point this way. The assumption
17 underlying the alternative case, their alternative approach to 2,000 documents, is that
18 the term "PSC" is going to return documents that are likely to be relevant. This has
19 the term "PSC" in the subject. It is very difficult to see how that could be helpful to
20 anyone.

21 If I can just give another example of this, a bit later in the bundle.

22 **THE CHAIR:** Right. I mean, it may be -- so you have disclosed, your point, so far, is
23 you have disclosed some documents that are relevant out of your 590 documents?
24 Peripheral relevance?

25 **MR LEITH:** Yes. I would put it that way. This is really the --

26 **THE CHAIR:** One appreciates that, of the 800-odd PSC documents, some of them,

1 taken individually, may not be of assistance. One appreciates that.

2 **MR LEITH:** There are others. There are other PSC documents which, if the Tribunal
3 was interested in PSC documents, there are quite a few others. I maybe won't take
4 you to all of them which, again, the fact that PSC is mentioned in the subject, in the
5 title, throughout the document is no indication that it is actually useful at all. So if there
6 were to be any kind of disclosure ordered on the alternative approach, we would
7 submit that a relevance review would be appropriate, since we will be reviewing for
8 privilege and leniency anyway.

9 May I just take instructions on one thing? **(Pause)**.

10 Apologies, sir. The other point I would make about the alternative formulation of the
11 relief being sought, the 2,000-odd documents -- sir, you mentioned the possibility of
12 applying a date range, that is certainly one possibility to make it more proportionate.
13 Another approach, which I would invite the Tribunal to consider, is to apply not only
14 the key word search terms that are in the second list of search terms put forward by
15 the Claimants, but also look at the first set of search terms. Maybe I can put some
16 flesh on the bones of that point by looking at the search terms themselves, which are
17 in the core bundle at tab 19. It is Mr Bolster's 11th witness statement.

18 What he has done is helpfully set out the search terms, the key words that would be
19 applied under the primary approach with the 20,000 and then the alternative approach,
20 which is where we now are. That is right at the back of the statement, so at core
21 bundle, pages 615 and 616.

22 **THE CHAIR:** Right. So, sorry, just talk me through this.

23 **MR LEITH:** It should be a table with annex 1. So that is the primary relief sought that
24 would lead to the 20,000-odd documents.

25 **THE CHAIR:** Sorry. These were used to produce the 20,000-odd documents?

26 **MR LEITH:** These were agreed --

1 **THE CHAIR:** Yes. Yes.

2 **MR LEITH:** Then they were used, and then White & Case reviewed them and that is
3 how you get the 580, but they are now saying again --

4 **THE CHAIR:** Just these search terms produced 20,000. I get that. Then you whittle
5 them down?

6 **MR LEITH:** Yes.

7 **THE CHAIR:** Yes.

8 **MR LEITH:** You will see they referred to the brands of the Claimants, so Fiat, Citroen,
9 Peugeot and so on. So what those search terms seem to be intending to do is find
10 documents from the DoJ set that do refer to the Claimants. That is the first point.
11 Now, if I could ask the Tribunal to look at the second list.

12 **THE CHAIR:** But they would not include Toyota or BMW?

13 **MR LEITH:** (Away from microphone) Well, they don't. No. They have not asked for
14 that. Indeed, given that the DoJ investigation led to a plea agreement about Japanese
15 manufacturers, I think including Toyota, would lead to one hundred per cent hit rate
16 or you would get something very close to it, you wouldn't be able to eliminate
17 documents . Leaving that to one side. If we can then, please, look at annex 2. This
18 is the search terms that, under the alternative approach, the Claimants would apply to
19 the file names, and this would lead to the 2,000-odd documents.

20 What we would submit is that a document, even if it has, for example, "PSC" in the
21 title, the point we have just -- I have just been exploring with the Tribunal, and as I
22 referenced in that document from 2010, just having "PSC" in the title is not very
23 informative. It might lead to something of peripheral or marginal relevance. What we
24 propose is, in addition to applying those annex 2 search terms to the file names, the
25 annex 1 search terms should also be applied to the body of the material, so as to
26 ensure that, if a document is caught by one of the annex 2 search terms, it does at

1 | least reference, for example, one of the brands of the Claimants. That would be a way
2 | of making --

3 | **THE CHAIR:** Then how many documents does that end up with?

4 | **MR LEITH:** That, I am told, is about half. About 1,000.

5 | **PROFESSOR NEUBERGER:** Just to clarify, that would mean that, effectively, you
6 | were applying the annex 2 cross-references to the 20,000 you have already selected?

7 | **MR LEITH:** Yes. That would be a way of keeping the size manageable. I think the
8 | Tribunal has my more general points about the timing and, indeed, there were points
9 | I didn't need to make, perhaps, about where we are and so on. There is very limited
10 | time before the trial and my instructing solicitors are very hard-pressed preparing for
11 | the trial. So we do say either iteration of this application should have been made much
12 | earlier.

13 | **THE CHAIR:** So if we apply that so it cuts it down to 1,000 documents or so, why do
14 | you need to review -- given where we are, of course, normally, you would be entitled
15 | to review them but, given the cross-references that we have, why would you object to
16 | just disclosing those documents?

17 | **MR LEITH:** Well, we would wish to review them for privilege and leniency.

18 | **THE CHAIR:** I understand that.

19 | **MR LEITH:** And, since we will be looking at each document anyway --

20 | **THE CHAIR:** There has been some uncertainty with regards to relevance, the
21 | conversation we have been having and the fact it has not been pleaded, at least
22 | particularised. Would you object to, obviously, you need to review them for the other
23 | purposes, I understand that. Would you have any -- on what basis would you be
24 | reviewing them for relevance if you started tomorrow?

25 | **MR LEITH:** Sir, perhaps one way an issue like this could be taken forward is, if there
26 | were obviously relevant materials, they could be filtered out. That is --

1 **THE CHAIR:** What would be the basis of an objection? Given where we are and the
2 short time available and the fact you have not particularised your pleading yet. What
3 would your objection be to not screening for relevance?

4 **MR LEITH:** (Away from microphone) Well, the objection is the limit. The narrower
5 principle is that irrelevant material is not disclosed. I do take the point about some
6 particularisation, the question over information barriers and siloing (inaudible), but
7 there would be a way of screening for obviously irrelevant material, I think, sir. I think
8 the Tribunal has my position on that.

9 Can I just take instructions? **(Pause).**

10 Can I just add to that last point I was making? I am told that, for example, some of the
11 DoJ documents refer to non-OSS products, so that would be an example of something
12 that is obviously irrelevant and it would not be of any help to the Claimants, providing
13 it to them.

14 I think, sir, that takes me -- on the premise that we are really looking at the alternative
15 application, and having made those particular points about it, that is all I would wish to
16 say about that. Unless the Tribunal has any further questions.

17 **THE CHAIR:** We are very grateful. Thank you.

18 Mr West.

19

20 **Reply submissions by MR WEST**

21 **MR WEST:** We agree that it would be very sensible for Autoliv to plead their case in
22 relation to this point because it is apparent that their pleading does not currently
23 dovetail exactly with their evidential case, and they ought to give disclosure of
24 documents relevant to their pleaded case.

25 If I can address the PSC case you were taken to.

26 **THE CHAIR:** Can I just ask a question first? If we were to order disclosure using

1 these two lines, so the annex 1 and the annex 2 terms, and to -- there would not be
2 a review for relevance, save that documents which do not relate to OSS products
3 would not have to be disclosed. That is plainly relevant documents. What would your
4 position on that be?

5 **MR WEST:** Well, this is relevant, this document, because we wouldn't have gotten
6 this document under the review.

7 **THE CHAIR:** Take me to the document. You will have to remind me where it is again.

8 **MR WEST:** Page 1741 of the core bundle. Tab 24.

9 **THE CHAIR:** Yes.

10 **MR WEST:** In a sense, there are two ways of looking at this. One could say, well,
11 this document actually supports Autoliv's case because it is limited to a single OEM, so
12 that demonstrates the type of communication they say they had, it was just about
13 Toyota. However, it does seem to contain pricing information. If one goes on to
14 page 1750, there are all the prices set out in a table. I don't know exactly what those
15 are, but some kind of pricing information about Toyota is being supplied by this email
16 to the people on the distribution list. Some of the names you may recognise, like
17 Mr Ward, who was also on the earlier email I took you to and who, it appears, would
18 also be receiving pricing information about quotes to other OEMs such as the
19 Claimants.

20 It may be said, and perhaps when we get the pleaded case from Autoliv it will say,
21 "We don't allege there was any siloing at the level of the PSC", in which case there is
22 not a dispute about it. But they will not then be able to say at the trial that the decision
23 making was siloed to the extent that it took place at the PSC level. But this document
24 does not contain any of the annex 1 key words so it would not have been responsive
25 to that search.

26 **MR LEITH:** I am sorry to interrupt, but it actually does. One of the terms on page

1 1741 --

2 **THE CHAIR:** Hang on. Page? 1741?

3 **MR LEITH:** 1741. The 2010 email.

4 **THE CHAIR:** Yes.

5 **MR LEITH:** It is that long line:

6 "This is all TG/TR share so it will be a big chance to gain our market share, especially
7 frontal AB."

8 "AB" is one of the annex 1 search terms.

9 **MR WEST:** That's a pure coincidence. "AB" refers to "Abarth", which is one of the
10 brands. "AB" here is an airbag.

11 **MR LEITH:** This is the first time the Claimants have engaged on any of this material.

12 **THE CHAIR:** Sorry. I am just trying to understand. So the relevance of this is
13 because of who is on the distribution list?

14 **MR WEST:** Yes. To the extent there is any argument that siloing --

15 **THE CHAIR:** So this is a Toyota document. Who is it on the distribution list? Sorry,
16 catching up a bit.

17 **MR WEST:** These are the senior executives, such as Mr Ward, who is the head
18 of -- I will be corrected -- either America or Japan within Autoliv.

19 **THE CHAIR:** Right.

20 **MR WEST:** So those are, I assume, the senior executives who make up the body
21 which grants authority, and that is why authority has been requested on this email. If
22 they are the same individuals who are being asked to give authority for responses to
23 quotations, to be issued to my clients, then, at that level, there is no siloing of
24 information.

25 **THE CHAIR:** I understand that as a point, but I'm not sure you need to -- yes, I am
26 not sure you really need a document to show that particularly. Once we get a pleading,

1 | you can interrogate as to who was on the steering committee and things like that.

2 | Things can come out in other ways.

3 | **MR WEST:** I entirely accept, logically, the pleading comes first but I am concerned
4 | about the time it is going to take to do that.

5 | **THE CHAIR:** Did you have any other submissions?

6 | **MR WEST:** Just to underline that if the scope, as per the original request of annex 2,
7 | but not annex 1, is still only 2,000 documents, which is a manageable number, in my
8 | submission, especially given the large legal teams we have here and the size of these
9 | claims and the importance of this point.

10 | **THE CHAIR:** We will rise for five minutes.

11 | **(12.23 pm)**

12 | (A short adjournment)

13 | **(12.30 pm)**

14 | **THE CHAIR:** So I think the first point is to get this point clarified and pleaded, that
15 | siloing point. How long would you need for that, Mr Leith?

16 | **MR LEITH:** It is proposed that some other amendments are made to the Defence and
17 | the Particulars.

18 | **THE CHAIR:** Let's just focus on this point. We will come on to other amendments in
19 | due course. But to do this?

20 | **MR LEITH:** I would suggest, sir, four weeks.

21 | **THE CHAIR:** Four weeks? Why do you need so long? You have served your
22 | evidence. This is for your silo point?

23 | **MR LEITH:** Yes, sir. I think two weeks.

24 | **THE CHAIR:** Two weeks. And then, when minded to order the disclosure, we will
25 | order the disclosure as indicated before, which is the searching with the annex 1, and
26 | with the annex 2 file name searches on top, which we understand will produce -- that

1 | should catch all of your 2,000 -- a subset of your 2,200, would it not, Mr West? The
2 | indication is it is going to be in the region of about a half. There will be no screening
3 | for relevance, save that documents which don't relate to OSS need not be disclosed.
4 | How long are you going to need for that disclosure?

5 | **MR LEITH:** Two weeks.

6 | **THE CHAIR:** Two weeks. Yes, very good.

7 | So, does that conclude that issue?

8 | **MR WEST:** It does. Clearly, I have to reserve my position until I have seen the
9 | pleading as to whether there are any other disclosure issues arising out of that.

10 | **THE CHAIR:** I appreciate that. There may be requests for further information as to
11 | the better way forward.

12 | **MR LEITH:** Nothing further.

13 | **THE CHAIR:** Then we have -- where do you want to go next?

14 | **MR WEST:** The next application is for the costs of the French and Italian law expert
15 | evidence.

16 | **THE CHAIR:** Why do we need to decide that today?

17 | **MR WEST:** Well, we do feel quite strongly about this on our side of the case, because
18 | we had to put a lot of time and money into producing expert evidence, only for the
19 | points to be abandoned. So, we feel we ought to be entitled to the costs of that, since
20 | the points have been abandoned, and so we have necessarily won on those. If the
21 | Tribunal is with us on that issue, then there ought to be a payment on account. The
22 | court, the Tribunal at the trial of this case, is not going to be in any better position
23 | because it is not going to look at any of these issues of French and Italian law precisely
24 | because they have been abandoned. So, we do feel strongly that this ought to have
25 | been conceded earlier before we were put to the extensive cost and time --

26 | **THE CHAIR:** There is always a tension. If you make it too punitive for people to

1 narrow their case, then cases never get narrowed and they are fought tooth and nail
2 until the end. So, we are appreciative of the narrowing. The question is, does the
3 narrowing come too late? We understand, of course, you have a potentially strong
4 case for the costs of that. But we are quite close to trial and we would prefer to deal
5 with the matter of costs --

6 **MR WEST:** Is that the Tribunal's ruling?

7 **THE CHAIR:** That is the Tribunal's ruling. Yes.

8 **MR WEST:** Then, in that case, we move on to the confidentiality issues. I understand
9 my friend, Ms Ford, would like the Tribunal to sit in private for this.

10 **THE CHAIR:** Yes. Of course.

11 **MR WEST:** I am grateful.

12 **(12.35 pm)**

13 **(In closed session)**

14 **(12.46pm)**

15 **(In open session)**

16 **THE CHAIR:** Are we back on? Where to next?

17 **MR WEST:** Well, next is the Defendants' application for the costs of their extension
18 of time for expert witnesses. So that is for one of my friends to open that.

19 **MR LEITH:** I am happy not to pursue that today, sir, given the indications to the other
20 application.

21 **THE CHAIR:** Very well.

22 **MR LEITH:** No doubt it can be dealt with at some other stage, maybe through some
23 other mechanism. For the Tribunal to adjourn that.

24 **THE CHAIR:** Reserved to the trial.

25

26 **Housekeeping**

1 **MR WEST:** Well, that leads us to the other case management matters which are not
2 the subject of an application, but have been the subject of some correspondence.
3 First, there are a couple of pleading points, and one is whether the Claimants have
4 a pleaded case in relation to the non-overlapping period. The Tribunal may recall that
5 under the OSS decisions there is a period of about nine months when --
6 **THE CHAIR:** We queried in a ruling whether that was pleaded.
7 **MR WEST:** We did query that.
8 **THE CHAIR:** Is it pleaded?
9 **MR WEST:** Well, I say it is pleaded at paragraph 44 of the Fourth Amended
10 Particulars of Claim. Sorry, paragraph 46. Core bundle; tab 8 of the more easily
11 legible version, page 107:
12 "The cartel or cartels pleaded above constituted breaches of Article 101 TFEU and
13 resulted in loss to the Claimants for which the Claimants are entitled to and do hereby
14 claim damages."
15 Then, here is the relevant sentence:
16 "Each Defendant which was a party to the cartel (or if there was more than one cartel
17 ,each such cartel) is jointly and severally liable with all other parties to that cartel (or
18 those cartels), at least for the period during which it was a party, on the ground that a
19 cartel by its very nature is a joint tortious enterprise."
20 So, for the non-overlapping period, we have Autoliv as a party, but ZF is not and
21 therefore --
22 **THE CHAIR:** What was the ruling? What waspish comment did I make in the ruling?
23 **MR WEST:** This is authorities bundle, tab 5, paragraphs 21 to 24.
24 **THE CHAIR:** Sorry. Which page number again, please?
25 **MR WEST:** I am sorry. It is authorities bundle, tab 5. I have that electronically.
26 Page 91, I am told.

1 **THE CHAIR:** It is not page 91 on this.

2 **MS FORD:** Page 94.

3 **THE CHAIR:** Thank you. Sorry, which paragraph, Mr West?

4 **MR WEST:** Paragraphs 21 to 24 of the ruling.

5 **THE CHAIR:** I think I am not in the right place. Sorry. Give me the page number
6 again. 94. Yes.

7 **MR WEST:** It is paragraphs 21 to 24. **(Pause).**

8 **THE CHAIR:** Right. Yes. Paragraph 69?

9 **MR WEST:** It should be paragraph 21 to 24.

10 **THE CHAIR:** Right.

11 **MR WEST:** The Tribunal had in mind a different paragraph: paragraph 44.

12 **THE CHAIR:** Okay. So you say this is pleaded. I mean, it is a matter for you whether
13 it is pleaded or not. I'm not going to give you a ruling on whether it is pleaded. I mean,
14 if you need to clarify it, clarify it. If it is plainly there, then --

15 **MR WEST:** You will know the point I was going to make is that if you look at the list
16 of issues, the Defendants also --

17 **THE CHAIR:** Yes. But just as a general point, in a case of this complexity, I would
18 like to keep the pleadings accurate, and I don't want parallel issues in correspondence
19 and not in the pleadings and so forth.

20 So insofar as the pleadings need to be kept up to date, we are anxious that that should
21 be done so at trial we know the pleading is accurate and can be relied upon.

22 **MR WEST:** Well, as the Tribunal has directed, there will be another round of pleading
23 amendments. Another question on the pleadings is whether the Defendants should
24 update their pleadings to reflect the current position in relation to foreign law.

25 **THE CHAIR:** I think that would, again, just be helpful if that was taken out.

26 **MR WEST:** In their most recent correspondence, the Defendants appear to suggest

1 they will also be amending their pleading in relation to financing losses which brings
2 us to the point about that. The Claimants have a claim for compound interest.

3 **THE CHAIR:** Is there any evidence on this point?

4 **MR WEST:** The Claimants have, the Defendants have not adduced any evidence.
5 So if they are intending to try and rectify the position with the pleading, I am not quite
6 sure how they could. But we would certainly wish to see the draft pleading first, rather
7 than there being permission for that now.

8 We also have a wider point, which is we don't understand quite what they are going to
9 put to our witnesses at trial about this, because we have quite specific --

10 **THE CHAIR:** I understand that. You have tried to clarify this in correspondence.

11 **MR WEST:** We have, and we have been told that the Defendants wish those
12 witnesses who only address financing losses to attend and be cross-examined, even
13 though there was no positive case to put to them.

14 **THE CHAIR:** You want to know what case is going to be put to those witnesses?

15 **MR WEST:** And if it is a purely negative case, is that something the Tribunal is willing
16 to entertain?

17 **THE CHAIR:** I don't know what a negative case is.

18 **MR WEST:** It would be: "You don't really remember that, do you?" Something like
19 that, like you would find in a criminal trial.

20 **THE CHAIR:** That would still need -- Mr Leith, I think it would be --

21 **MR LEITH:** Ms Ford is dealing with this.

22 **THE CHAIR:** Sorry. I do apologise.

23 Is there any reason why your position cannot be explained rather than just having the
24 witnesses come into the witness box for a, sort of, general pushing them about?

25 **MS FORD:** Well, sir, I think there are a lot of things to unpick about what has just been
26 said. The first is that we don't accept that there is anything to rectify on the face of the

1 pleadings. Perhaps I can show the Tribunal what is on the face of the pleadings. If
2 we start with the Claimants' pleaded case which is a single paragraph: core bundle,
3 page 63, paragraph 77, under the heading "H: Causation, Loss and Interest":

4 The Claimants' case is had the Claimant groups "not made such losses, they would
5 have been able to invest equivalent sums in their respective businesses so as to
6 generate returns, alternatively, would have avoided the costs of raising equivalent
7 sums by means of equity or debt at rates equivalent to their cost of capital."

8 So what we have is essentially a pleading of the two possible alternatives but not
9 specifying which one actually in fact occurred. That is essentially the entire spectrum
10 of possibility.

11 We pleaded back to that pleading in our Defence, so it is tab 10, page 229,
12 paragraph 52.

13 **THE CHAIR:** Yes.

14 **MS FORD:** You have at "a" the denial of any loss. But then "b" we make the point
15 that the Claimants' case is wholly unparticularised. We say:

16 "The relevant investments that it is alleged the Claimants were prevented from making
17 and/or the relevant costs of raising sums equivalent to their alleged losses are wholly
18 unparticularised and ZF reserves the right to plead further to those issues as
19 appropriate."

20 But then at "c", we then put them to strict proof as to how they would have used the
21 sums equivalent to their alleged losses in the counterfactual. The position is that the
22 Claimants' pleaded case remains unparticularised, but what they have then done is
23 adduced witness evidence as to what they say they would have done and then
24 Mr Hughes has done the exercise of quantifying what they say are their financing
25 losses based on their evidence.

26 In our submission, we have quite rightly put the Claimants to proof on the face of the

1 pleadings. We have put this in issue and so we are entitled to cross-examine, first of
2 all, the Claimants' factual witnesses as to what they say they would in the
3 counterfactual have done and then, depending on the outcome of that exercise, that
4 then feeds into the exercise of quantification that Mr Hughes has done.

5 In our submission, it is not in any way unusual for us to challenge the evidence that is
6 relied on in support of this head of loss and it certainly seems unusual, in our
7 submission, for the Claimants to be suggesting that we should be in some way, shut
8 out from doing that, merely because we have not put in our expert evidence.

9 **THE CHAIR:** Yes. I think it is a question of what you are going to be putting to the
10 witnesses. To have them come into the witness box without any indication of what it
11 is you are going to be asking them about, because you have not put forward a positive
12 case yourselves, it can be unsatisfactory. Particularly if they need to check other
13 information or --

14 **MS FORD:** But, sir, essentially, we will be exploring with them the basis on which they
15 are giving their evidence. So the universe of the evidence that they can be asked
16 about is essentially what they are coming along and saying to the Tribunal about what
17 they would have done.

18 I do hesitate to purport to set out what it is that we will be cross-examining on. One
19 would not normally be expected to disclose one's cross-examination in advance.

20 **THE CHAIR:** Well, I do think the topics that are going to be explored. So perhaps
21 you could keep that in mind and that could be a matter that could be -- I appreciate it
22 is early days to be doing that -- but at the PTR, I think there should be an indication of
23 what areas you wish to cross-examine witnesses about where you have not put
24 forward a positive case in your evidence.

25 I am not saying you are not entitled to push them about and probe them, but I think
26 the areas, it would be appropriate to give an indication. So perhaps we can discuss

1 that further at the PTR.

2 **MR WEST:** Can I just make two points about that? In my submission, what is unusual
3 in this situation is for the Defendants' economic and quantum expert to have to say
4 nothing about it. Usually, one would find a rival analysis in that report.

5 **THE CHAIR:** Well, I think Ms Ford says what she wants to test at this stage is not
6 what happens when you plug the numbers into the economic model. The question is
7 whether they are soundly based in fact. Is that right?

8 **MS FORD:** Sir, that is absolutely right, subject to one caveat which is, of course, to
9 the extent that one makes progress with the witnesses, that would then have to feed
10 into the exercise that Mr Hughes has done.

11 **THE CHAIR:** Of course.

12 **MS FORD:** So we would not want to be shut out from then exploring what are the
13 consequences of what has been discussed in the factual evidence.

14 **MR WEST:** Well, I still struggle to see what will be put. So if one has a witness saying
15 "we had a loan facility which had an interest rate of 8 per cent" they can't say "no, it
16 was 6 per cent" or "you had a different rate of interest."

17 **THE CHAIR:** It may be this is of narrow compass or disappears altogether. I thought
18 what you were after, you were after an indication. I mean, Ms Ford is right, I can't shut
19 her out at this stage from cross-examining your witnesses. Is that what you are
20 inviting?

21 **MR WEST:** Well, this Tribunal is not of course subject to strict rules of evidence. If it
22 is a purely negative case, the Tribunal has the right to say it is not something it is going
23 to entertain.

24 **THE CHAIR:** Well, we will explore this further at the PTR when Ms Ford has got her
25 more detailed thoughts together by then.

26 **MR WEST:** The other point I was going to make, I went slightly too quickly when I

1 said the Defendants were going to amend their case on this. I got that from
2 Macfarlanes' letter at tab 45 of the correspondence bundle at page 134 where this is
3 the letter of Friday, 28 June:

4 "For the avoidance of doubt, the Defendants intend to address their position on
5 limitation under German law and financing losses to the extent necessary in their Re-
6 Re-Amended Defences."

7 They told us on Friday that they are going to amend in relation to financing losses, but
8 they have not given us a draft and we don't know what these amendments are. So
9 we are certainly not agreeing that they should have the right to make amendments
10 whose content is unfamiliar to us.

11 **MS FORD:** Sir, what that is referring to is the passage of our Defence which indicated
12 that we reserved the right to respond to the extent that the Claimants particularised
13 their own case. I have made the point to the Tribunal, the extraordinarily high level
14 way in which it is pleaded on behalf of the Claimants at the moment.

15 It may be that it is appropriate for the Claimants to essentially follow through the
16 position, as they now claim it is on the face of their evidence, into their particulars.
17 Insofar as they do so, we would then amend as necessary to engage with it. But we
18 are not indicating any --

19 **THE CHAIR:** I have not asked them to amend. I mean, they will take their own view
20 on that, at this stage.

21 **MS FORD:** Indeed. What we are essentially indicating is that insofar as they were
22 minded to do so, to the extent necessary we would respond.

23 **THE CHAIR:** I see.

24 **MR WEST:** That is not what it says, but anyway. We are certainly opposing. If there
25 is a request, which I am not sure there is, for advance permission to make these
26 amendments that we have not seen then we do not agree to it.

1 | What else is left? There is then a question about pre-trial directions. So, the Tribunal
2 | has granted an extension --

3 | **THE CHAIR:** I am just looking at the time. We have a few other matters we require
4 | some assistance with. I think we are probably going to be longer than ten minutes or
5 | so. Shall we return at 2 o'clock?

6 | **(1.01 pm)**

7 | **(The short adjournment)**

8 | **(2.02 pm)**

9 | **MR WEST:** (Microphone on mute) -- the hearsay evidence, the trial and pre-trial
10 | timetable, a question of video evidence and then the repleading deadlines. So if I
11 | could just address those briefly.

12 | The point about hearsay evidence concerns how we address, at the trial, disclosure
13 | documents which none of the witnesses can speak to. In reality, this is really the
14 | Defendants' witnesses. How this has been addressed in practice --

15 | **THE CHAIR:** Sorry, this is the Defendants' witnesses?

16 | **MR WEST:** So, if these are Defendants' documents which their witnesses --

17 | **THE CHAIR:** Defendants' documents you are relying on.

18 | **MR WEST:** Yes. So how do we address that? How it has been addressed in practice
19 | is that the Claimants' solicitors have provided schedules with lists of documents that
20 | they may wish to rely on and sought confirmation that they can be relied on for the
21 | truth of their contents. So, admissible for the truth of their contents without the need
22 | to serve hearsay notices, although, in practice, that is effectively equivalent to serving
23 | a hearsay notice.

24 | The Defendants have so far agreed that we can rely on those schedules. If I can just
25 | show you that. So it was the 30 May letter, tab 19 of the correspondence bundle.
26 | Page 49, it is paragraph 10 of the letter.

1 **THE CHAIR:** You say page 49, optimistically. Yes, it works this time. Sorry, which
2 paragraph?

3 **MR WEST:** Paragraph 10.

4 **THE CHAIR:** Okay. So there was no order. The order did not cover hearsay notices
5 or --

6 **MR WEST:** No. In effect, there was no rule concerning hearsay notices specifically
7 in the Tribunal, so we had to develop this ad-hoc procedure.

8 **THE CHAIR:** That seems satisfactory.

9 **MR WEST:** Both of the Defendants have given that confirmation, that the most
10 recent --

11 **THE CHAIR:** There is not the High Court rule about documents being -- documents
12 in bundles being -- if you wanted to challenge the truth of a document in a bundle or
13 you -- the authenticity of a document in a bundle, you used to have to give notice.
14 There is not that equivalent either.

15 **MR WEST:** I don't believe there is actually an equivalent rule. Otherwise, the practice
16 is the same.

17 **THE CHAIR:** Okay.

18 **MR WEST:** But in the letter of last Friday, this is tab 45, which you looked at just
19 before the short adjournment.

20 **THE CHAIR:** Sorry. Page number?

21 **MR WEST:** This is tab 45, page 136 of the correspondence bundle, paragraph 13. It
22 refers to the fact that ZF had already given that confirmation on 7 June. The
23 Defendants -- this is now both of them -- agree hearsay notices don't need to be filed
24 in exchange in respect of the scheduled documents.

25 So far so good. The only slight fly in the ointment is if one goes back to paragraph 3.

26 **THE CHAIR:** Paragraph 3 of the same letter?

1 **MR WEST:** Of the same letter. In relation to pleading amendments, the Claimants
2 say:

3 "If the Claimants intend to rely on additional contemporaneous documents in support
4 of their stand-alone claim, those documents should be addressed in the updated
5 Particulars of Claim."

6 So, they seem to be saying that we can rely on contemporaneous documents, which
7 we have provided a list of, as evidence as their contents, but, if they relate to the
8 stand-alone claim, we can only rely on them if we have pleaded them.

9 **THE CHAIR:** Right.

10 **MR WEST:** So, my point now is -- really, just to put a marker down -- that we don't
11 accept we need to plead all documents in order to rely on them.

12 **THE CHAIR:** The documents you have pleaded are by way of example?

13 **MR WEST:** They are by way of example, yes. So that is really a case of putting
14 a marker down on that. I don't know if my friends are going to disagree with any of
15 that, but that is our position.

16 **THE CHAIR:** It looks like a trial timetable in here as well.

17 **MR WEST:** Yes, indeed. That is the next point. Trial timetable and pre-trial timetable.
18 Before we get to the trial itself --

19 **THE CHAIR:** I thought we were on a four-week estimate for this.

20 **MR WEST:** I believe it is six.

21 **THE CHAIR:** No. It was originally six, and then, when we scythed through the number
22 of experts, there was a discussion that you would not need the full six weeks, if that
23 was the case. There was a discussion, I recall it. I don't know where it ended up. I
24 think maybe it was the hearing you were not present at, Mr West, possibly. We don't
25 see that you will need six weeks for this trial.

26 **MR WEST:** That is our position, sir. We will require six weeks. I think it is the

1 Defendants' position as well, based on this timetable, unless it has changed.

2 **THE CHAIR:** We will need to discuss this timetable. Don't just assume we will agree
3 with the timetable you put forward.

4 **MR WEST:** As regards the timetable, there is also -- there are some pre-trial steps.
5 Because of the extension which was granted for expert evidence, there has been
6 some delay in the directions for expert meetings and the joint memo. The parties have
7 now agreed some dates for those which it may or may not be worth putting in the
8 order --

9 **THE CHAIR:** Yes.

10 **MR WEST:** The experts' meeting is now to be held by 3 September, the joint memo
11 is to be produced by the 13th September.

12 **THE CHAIR:** When is the reply evidence?

13 **MR WEST:** 31 July. The PTR, I believe, is the 17th or thereabouts. The parties have
14 not quite agreed the date for the skeleton. I think the most recent suggestion from the
15 Defendants is the 27th September and, from the Claimants, the 24th September.

16 **THE CHAIR:** Who says we are starting on the 9th October? Where has that come
17 from?

18 **MR WEST:** That is the suggestion of the Defendants. Our suggestion is that we start
19 on the 1st October.

20 **THE CHAIR:** Yes, we want to start on the 1st October.

21 **MS FORD:** I wonder if I can just explain that the reason we were suggesting pushing
22 back, it is the dates that Mr West has just gone through, we don't get the
23 agree/disagree statement from the Defendants until 13 September. Obviously, the
24 position --

25 **THE CHAIR:** Sorry. What don't you get until 13 September?

26 **MR WEST:** The final agree/disagree statement between the expert economists.

1 **THE CHAIR:** Obviously, we don't know what is going to happen in reply, but one can
2 see the areas of dispute pretty clearly as they are.

3 **MS FORD:** It may be that is the case, but, essentially, the dispute will be usefully
4 crystallised by the agreeing/disagreeing exercise. In our submission, it makes sense
5 to have a suitable period after 13 September to address in the skeletons the extent of
6 the disagreement. At the moment, the PTR is on the 17th September and so that
7 gives us, on the Claimants' original suggestion of 20 September, we would only have
8 seven days, including the period of the PTR, in order to reflect in the skeleton
9 arguments for the Tribunal, the position on the face of the --

10 **THE CHAIR:** You have the expert reports. This is not a -- yes. I mean, you have the
11 expert reports. I think that is -- you will be able to draft the skeletons.

12 **MS FORD:** It is a question of the utility of the skeletons. In our submission, potentially,
13 they can be of greater assistance to the Tribunal if they are able to be drafted in light
14 of where the expert evidence has come out on the agree/disagree rather than --

15 **THE CHAIR:** Right.

16 **MS FORD:** That was the basis of the proposal. So, what was suggested was that the
17 trial could be accommodated if we were to start on the 9th October, with skeletons on
18 the 27th September.

19 **THE CHAIR:** The trial is going to start on 1 October. What adjustments need to be
20 made to the timetable for that, we can come back to. How long are the skeleton
21 arguments going to be? Is there going to be a page limit?

22 **MS FORD:** At the moment, I don't think it has been discussed. There is
23 a Practice Direction which suggests, in my submission, somewhat unrealistically, that
24 the page limit would be 25 pages for a hearing, but, obviously, with a trial that is likely
25 to take between four to six weeks, 25 pages is simply not going to cut it. In our
26 submission, the Tribunal might well be assisted by more detailed written submissions

1 rather than constraining the page limits.

2 **THE CHAIR:** I think we will want -- the trouble is one gets, you know, everything
3 repeated so many times. You get it in one expert report, and then you get it in
4 the skeleton, and it is the same material. So I think some sensible cap on page
5 numbers would be appropriate. Maybe we can discuss that in a little bit more detail at
6 the PTR. You will already be -- your drafting will be well underway by then,
7 presumably.

8 **MS FORD:** Indeed, subject to this point about the experts agree/disagree. I think the
9 concern on that particular point is it is not simply a list of "yes" and "no" in columns, it
10 tends to involve additional substantive input from the respective experts as to how
11 their views relate to their counterparts. It does seem, in our submission, it is preferable
12 that the skeletons be drafted with a good opportunity to take into account where that
13 comes out.

14 **THE CHAIR:** Right. I am not sure I fully understand that.

15 **MR LEITH:** (Away from microphone) May I just add one point on what the joint experts
16 say. Professor Neuberger, you might recall from Euronet, there was a very detailed
17 document, perhaps, in that case, much too detailed. It is not simply, do we agree on,
18 you know, the plausibility analysis set out here; "yes" or "no"? It is a document where
19 the experts tend to expand, engage with each other, because they have had the
20 meeting, and go through in some depth, actually, the opposing views and where they
21 ultimately come out. So, it is not simply a consolidation of the reports that have already
22 been filed, it is rarely that simple.

23 **THE CHAIR:** I am not finding this attractive. I mean, are you suggesting it is going to
24 be different to the expert reports?

25 **MR LEITH:** Well, it is an elaboration of -- it is a further --

26 **THE CHAIR:** I thought it was meant to be a reduction of the amount of material,

1 identifying areas of common ground and reducing issues, not expanding them.

2 **MR LEITH:** It does have the effect of reducing and identifying areas of common
3 ground, so reducing the number of issues in dispute. Certainly, it has that function.
4 But if there are points where, for example, on the economic modelling, the experts
5 have had a discussion, they can then set that out when they have come out on that in
6 writing, so the Tribunal has it in advance. So, it is not actually, very often, the most
7 useful distillation of where the experts have got to, available at the trial. That is why it
8 is -- in my experience, I submit that it would be useful to have a little bit more time with
9 that document before the skeleton goes in.

10 **THE CHAIR:** Right. I am not pushing back the trial date just because of this
11 document. That is the position. I don't know what you are proposing. We have not
12 settled on a date for skeletons yet. Maybe that document needs to come forward.

13 **MR LEITH:** I think the difficulty is on Mr West's expert's side, he is not available
14 in August. We are just running into this period where you have the joint experts, the
15 skeletons and the trial, it's all taking place in under four weeks. That is why we
16 suggested pushing back the trial. We can still easily finish within the end date,
17 especially if the Tribunal (break in connection).

18 **THE CHAIR:** Anyway, we are starting on 1 October. So we will need to accommodate
19 the skeletons and the expert report around that.

20 **MR LEITH:** (Away from microphone) Yes, sir. I think (inaudible).

21 **MR WEST:** So, my suggestion, our proposal, was the 24th September for the
22 skeletons.

23 **THE CHAIR:** 24 September?

24 **MR WEST:** I suggest this is a case in which the joint memo is likely to be relatively
25 predictable in its contents, not least because, as the Tribunal will be aware,
26 Dr Majumdar for the Defendants does not, in fact, present his own econometric model.

1 **THE CHAIR:** Yes. We are very conscious of that.

2 **MR WEST:** So, what one has is one model and criticisms of it. Then one will have
3 Mr Hughes' criticisms to that at the end of this month. So, my proposal is the 13th
4 September for the joint memo and the 24th September for the skeleton. In my
5 submission, it would be useful if the Tribunal were to indicate at this stage, rather than
6 just at the PTR, what sort of length of skeleton it would be assisted by, because we
7 will have to get drafting before the PTR.

8 **THE CHAIR:** Yes.

9 **MR WEST:** In my submission, perhaps somewhere between 50 and 70 pages might
10 be --

11 **THE CHAIR:** Let's say 50 pages.

12 **MR WEST:** The other relevant question, in that respect --

13 **THE CHAIR:** You can revisit that at the PTR, if that is not practical, but that is what
14 we should be aiming at.

15 **MR WEST:** -- is whether the case has now been docketed to this Tribunal, because,
16 if it has, then one does not need to go into the background quite as much.

17 **THE CHAIR:** Yes, it has.

18 **MR WEST:** Those are my submissions on the pre-trial timetable. I don't know if --

19 **THE CHAIR:** I mean, if there is a joint expert document, for example, the skeleton
20 should not be just typing out paragraphs from that joint document. The Tribunal is
21 going to read that joint document. So, if adjustments need to be made to the skeleton
22 because there is a sudden narrowing of issues, all well and good.

23 **MS FORD:** It may be that is the answer; simply cross-refer rather than -- particularly,
24 I think, if there is a page limit which is relatively concise.

25 **THE CHAIR:** Yes.

26 **MS FORD:** There is, I think, a direction which sets out what it is envisaged the joint

1 expert report will cover.

2 **THE CHAIR:** Shall we have a look at that?

3 **MS FORD:** It is within the bundle, I suspect probably the core bundle. **(Pause).**

4 I am told it is the second CMC order, but I don't know whether it is actually in the
5 bundle. I am grateful to Mr Leith. Core bundle, tab 12, page 286.9. So, this is the
6 Tribunal's order from the second CMC and, in particular, paragraph 21 is setting out
7 what is envisaged to be covered by the joint memo. So sub-paragraph (a), the areas
8 in dispute between them; sub-paragraph (b), whether each area in dispute is material
9 to the outcome of the case. Then, in relation to each material area: the extent to which
10 it is material and why; and the assumptions underpinning each expert's views;
11 a summary of each expert's criticism of the other expert's position; all key documents
12 and pieces of evidence which are relevant to the particular areas of dispute between
13 them and --

14 **THE CHAIR:** That seems quite --

15 **MS FORD:** Well, it is intended to constructively crystallise the extent of the dispute
16 between them.

17 **THE CHAIR:** It is identifying all pieces of evidence which are relevant, which could be
18 taken to be -- then someone has to decide something is not relevant in order to leave
19 it out of the document. It seems a recipe for a rather --

20 **MS FORD:** I don't think the intention is to suggest that anyone is in any way shut out
21 in the event this document does not identify a piece of information. It is not supposed
22 to be an exclusionary exercise, but the product of the exercise is intended to be that
23 one has, for example, an identified issue --

24 **THE CHAIR:** Why don't we get rid of "all" and just amend that to "key documents and
25 key pieces of evidence which are relevant to the particular areas of dispute between
26 them".

1 **MS FORD:** Yes. That is probably what it is getting at.

2 **THE CHAIR:** Probably what it is meant to be. Yes.

3 **MS FORD:** The idea being one then has an identified dispute together with a signpost
4 to those elements of the evidence --

5 **THE CHAIR:** I understand. I understand. Then the opinions on what the Tribunal -- it
6 is for the Tribunal to decide what it has to decide, isn't it? Anyway, all right. We ought
7 to have a page limit for this. How long are the expert reports?

8 **MS FORD:** They are fairly lengthy and we are waiting for the reply. There is a risk of
9 constraining the utility of the document if one requires the economists to work to
10 a page limit.

11 **THE CHAIR:** Right. I just worry a little bit about the utility of reading 200 pages of
12 evidence-in-chief, another 100 pages of evidence in reply and then another lengthy
13 document, all effectively saying the same thing in different ways. It is not particularly
14 complicated, unless -- yes. I mean --

15 **MS FORD:** Mr Leith is making the point that the difficulty of a page limit, in particular
16 when they are being asked to agree and when they are on opposite sides, is that it
17 becomes somewhat awkward for them and possibly a source of satellite dispute as to
18 what gets included and what doesn't.

19 **THE CHAIR:** Well, what size of document are you envisaging?

20 **MS FORD:** One normally leaves the economists to come up with a constructive
21 approach and there is some tribunal case law that rather suggests the lawyers,
22 essentially, should leave them a degree of latitude so as not to constrain them in their
23 discussions.

24 **THE CHAIR:** That is no different to expert reports generally.

25 **MS FORD:** Indeed.

26 **THE CHAIR:** Mr West. Do you have any views on how long this document should

1 be?

2 **MR WEST:** I don't see why it should be longer than 50 pages.

3 **THE CHAIR:** Well, we will say no more than 50 pages.

4 **MS FORD:** Might we have liberty to apply?

5 **THE CHAIR:** Liberty to apply on everything. It is a question of how concisely -- one
6 does not need ten pages of flack at the beginning and all that stuff, introductions, and
7 you know, "These are the issues"; "This is where we disagree", bang, bang, bang. We
8 have already seen their expert reports. And 50 pages is a limit, not an invitation.

9 **MS FORD:** Yes, indeed.

10 **MR WEST:** That, I think, brings us to the trial timetable itself. Now, it may be the final
11 trial timetable, day by day, is something the Tribunal would finally wish to determine
12 at the PTR, but it would be useful to have at least an indication at this stage of, for
13 example, which week the factual witnesses will be appearing.

14 **THE CHAIR:** Are you both making speeches in opening?

15 **MR WEST:** That is what is currently proposed.

16 **THE CHAIR:** Then we will have three speeches in closing; is that the idea?

17 **MR WEST:** Yes. The Defendants would ensure they would not duplicate what they
18 say.

19 **THE CHAIR:** Do you need -- again, this is provisional only -- do you envisage you're
20 going to need -- what is going to happen between the two Defendant groups? Are you
21 coordinating your submissions?

22 **MS FORD:** So we will certainly ensure there is no unnecessary duplication between
23 us. It is important to appreciate the Defendant groups are not -- they have, for
24 example, different witnesses that deal with different aspects of the procurement
25 process so there is not a 100 per cent overlap. So one should not proceed on the
26 basis that it is necessarily one of those situations where there is a claimant case and

1 a defendant case. But, certainly, as between those elements of the case which are
2 common, we will certainly ensure that there is not duplication as between us.

3 **THE CHAIR:** Yes. I mean, we are just trying to identify the areas. Will you really
4 need more than two days for opening? A day each, more or less?

5 **MS FORD:** Our suggestion was three for opening and five for closing, as to which the
6 three for opening will be a day each per party and then the five for closing will --

7 **THE CHAIR:** We don't need to hear the Defendants for a day each, surely? If the
8 Claimants are only for a day, are we even going to need to hear you on the area of
9 differences?

10 **MS FORD:** It is not so much differences, as the fact that this case turns on the way in
11 which each individual Defendant interacted with the Claimant groups, and that is
12 obviously different. Different witnesses, different procurements.

13 **THE CHAIR:** Those are the evidential things that will be important in closing rather
14 than opening, won't they?

15 **MS FORD:** Certainly, in both, in our submission, because, of course, in opening, one
16 would seek to identify those key areas of dispute that will then have a bearing on the
17 evidence the Tribunal then hears, so the Tribunal understands what is going to which
18 issues, and suchlike.

19 **THE CHAIR:** Let's say two and a half days opening at the moment. I am not
20 persuaded you will need three.

21 So that is a day for the Claimants, a day and a half for the Defendants. Then factual
22 witnesses. Seven days seems a lot for the factual evidence. I appreciate there is a lot
23 of witness statements but they are all saying similar things repeatedly. I am not sure
24 quite how cross-examination -- obviously, you are cross-examining on your silo point,
25 I appreciate that.

26 The emails that you are relying upon, your pleaded example emails, are the

1 addressees of the correspondence on those emails giving evidence?

2 **MR WEST:** In the main, they are not. I think it is fair to say that --

3 **THE CHAIR:** Yes, one or two references. So there is not going to be, I imagine, much
4 cross-examination on that. There may be some, but you are relying on the documents
5 for the truth of their contents, as I understand it.

6 **MR WEST:** Yes. There will be cross-examination and there are quite a lot of
7 witnesses.

8 **THE CHAIR:** Right. So, all right, we will need to look at that in more detail at the PTR.
9 But seven days looks a bit -- we were anticipating a week should be enough for the
10 factual witnesses.

11 **MR WEST:** Do you have the version with the rival positions before you? That is the
12 one which is attached to the letter of Friday we were looking at.

13 **THE CHAIR:** No. Remind me where that is.

14 **MR WEST:** It is correspondence bundle, tab 45, pages 138 and 139.

15 **THE CHAIR:** It is the same letter.

16 **MR WEST:** So this has the Claimants' suggestion at the top and the Defendants'
17 suggestion at the bottom of each box.

18 **THE CHAIR:** Right. This is just saying things like "Defendants' witness". It does not
19 say which witness, how long you need to cross-examine them, on what topics.

20 **MR WEST:** We had anticipated some of this would be addressed at the PTR. But,
21 for present purposes, what is important for us, most certainly, is which week the factual
22 witnesses will be appearing so they can make arrangements.

23 **THE CHAIR:** Indeed. I was suggesting that we will need some persuasion that you
24 need more than a week on the factual witnesses, which you may well do, but, at the
25 moment --

26 **MR WEST:** At the moment, I think we had proposed four days for the Claimants'

1 witnesses and one week for the Defendants' witnesses.

2 **THE CHAIR:** Four days for the ...?

3 **MR WEST:** So, Days 6, 7, 8 and 9, the Claimants' witnesses. Week two, that's at the
4 top of the page. Then our proposal was, week three, Defendants' witnesses. Then
5 we go on to the experts. But that was the Claimants' --

6 **THE CHAIR:** So you have a reading day, reading day, reading day. So, we want you
7 to start on the 1st October; yes? That will be the opening.

8 **MR WEST:** So the reading days will now be before we get to the trial?

9 **THE CHAIR:** Yes.

10 **MR WEST:** Ah.

11 **THE CHAIR:** So the trial to start on 1 October. Then why am I being told that is
12 a German public holiday; is that significant?

13 **MR WEST:** Only if one has factual witnesses coming from Germany.

14 **THE CHAIR:** Does that mean they are free or they are not free?

15 **MR WEST:** It means they are not free. We have the German law expert, but he is
16 coming much later.

17 **THE CHAIR:** So, you have the 1st October and the 2nd October, and we'd start the
18 witnesses on the afternoon of the 3rd October. Then how many days of factual
19 witnesses? You have at the moment --

20 **MR WEST:** We have four for the Claimants and five for the Defendants.

21 **THE CHAIR:** Yes. So I would like some serious consideration whether that can be
22 reduced. That seems a great deal of cross-examination. Just looking at -- having read
23 the witness statements, the areas of dispute seem of relatively narrow compass. If
24 you need more than five days, you will need to explain, at the PTR, why.

25 **MR WEST:** Is that in total?

26 **THE CHAIR:** In total, yes. How many witnesses are there altogether? Just tell me.

1 **MR WEST:** I have more than one statement so it is not immediately --

2 **THE CHAIR:** Just the number of witnesses. Okay.

3 **MR WEST:** 17.

4 **THE CHAIR:** 17. You are relying on them for -- why is the factual evidence relevant

5 for your case? Sorry, just remind me.

6 **MR WEST:** Well, again, this is helpfully set out in the index to the supplemental

7 bundle. But the main areas are procurement, financing losses --

8 **THE CHAIR:** Slow down. A bit more specificity than that. So, procurement, just

9 explain to me how that arises.

10 **MR WEST:** This is essentially to do with the relationship between the Claimants and

11 the Defendants and how the requests for quotation were dealt with. It feeds into the

12 case for the umbrella losses, for example.

13 **THE CHAIR:** So I understand you need to cross-examine on siloing. What else do

14 you need to cross-examine on?

15 **MR WEST:** I have not actually drafted my cross-examination --

16 **THE CHAIR:** Just in broad terms. I am not going to hold you to it, Mr West, but just

17 in broad terms.

18 While you are looking at that, Ms Ford, what do you anticipate? What facts are you

19 trying to ascertain for your case?

20 **MS FORD:** Well, the Claimants' witnesses fall into three groups. They are the

21 procurement witnesses that Mr West has just been addressing: the witnesses that

22 address the downstream pass-on case; and then the witnesses that address financing

23 loss. We have canvassed with the Tribunal that we would wish to test the factual case

24 on financing loss.

25 **THE CHAIR:** Yes. Okay. So the finance -- okay, right. Financing, work back from

26 that.

1 **MS FORD:** Up the list. It comes to pass-on. The Claimants have put in witnesses
2 addressing the question -- the extent to which, if they did --

3 **THE CHAIR:** I have that.

4 **MS FORD:** -- suffer a loss, they passed it on, which our expert says, yes, they did.
5 So, there will be material to put to them in support of that. Then, the top of the list will
6 be the procurement witnesses.

7 **THE CHAIR:** What are you trying to establish, procurement witnesses?

8 **MS FORD:** To some extent there is a limited amount to which we need to challenge
9 the procurement witnesses. There are certain statements that they make about their
10 perception of the nature of the competitive relationship, and that sort of thing, that we
11 would need to explore with them. I suspect we would wish to put our positive case
12 that our sales teams were competing for their business, essentially.

13 **THE CHAIR:** Just say that again. I am not sure I understood.

14 **MS FORD:** The case we are facing is that, contrary to the position under the
15 Commission decisions, there was a broader cartel which directly targeted the
16 Claimants' brands. We obviously vehemently dispute that and, to some extent, there
17 will be a necessity to explore with those witnesses that our -- that we were engaging
18 with, that we were essentially negotiating business to the extent that -- to the effect
19 that we were competing for their business. That there was not a cartel.

20 **THE CHAIR:** Right.

21 **MS FORD:** That's a relatively limited exercise in the sense that --

22 **THE CHAIR:** So you are not calling witnesses to say -- as I understand it, and this
23 may be wrong, you are not calling any witnesses to say, "Yes, okay, fair dos, we were
24 cartelists with respect to BMW, but we weren't with Peugeot and this is why it is
25 different". You are not calling that sort of evidence?

26 **MS FORD:** We have put forward five witnesses who can speak to either our

1 procurement process generally, or three of those witnesses were people in a position
2 to talk about ZF's account management vis-a-vis the Claimants group specifically. So
3 there is one witness that deals with PSA, one witness that deals with FCA and one
4 witness that deals with Opel, the other third Claimant group. In each case, we have
5 tried to find the person who is best placed to speak to the relationship between ZF and
6 the Claimant groups. They do say, specifically, their evidence is there was no cartel
7 vis-a-vis the Claimants. So they do give that evidence.

8 In that context, there will be scope to explore exactly how ZF competed for the
9 Claimants' business.

10 **THE CHAIR:** It is correct you are not calling witnesses to explain the emails that have
11 been relied on? That will be subject to submissions; is that right?

12 **MS FORD:** It is correct because the limited number of emails that actually identify ZF
13 personnel, I think there are only five personnel that appear on the face of the very
14 limited emails that have been cited, and none of those remain available to ZF. What
15 we have done is identify those witnesses who are best placed to speak to the
16 relationship as between ZF and each of the Claimant groups, so we have brought that
17 person forward.

18 **THE CHAIR:** Okay. So in response to your question, Mr West -- thank you very much.
19 In response to your question, Mr West, we will start factual evidence on the afternoon
20 of 3 October. This is all subject to review at the PTR. We will run through to
21 10 October. We will leave 11 October as a possibility. Then, that will take us into
22 week three, where we will start on the economic evidence. So, you have -- your
23 estimate on economic evidence was five days; is that right?

24 **MR WEST:** That was our estimate.

25 **THE CHAIR:** That is a hot tub?

26 **MR WEST:** That is another question for the Tribunal: whether it wishes to have any

1 concurrent evidence or hot tub, as it is known. Our proposal, to be clear, was a split.
2 So some hot tubbing at the outset and then some cross-examination.

3 **THE CHAIR:** Right. We will think about it. But five days at the moment, we will leave
4 that -- you have five days in total; yes? We will leave that at five days.

5 **MR WEST:** No, we have ten days in total.

6 **THE CHAIR:** Ten days in total? So the -- we are limiting that to five days. We only
7 have one -- economic evidence is not that complicated. I mean, it may be complicated
8 in detail, but not in number of issues. Okay. So that takes us, where have we got to
9 then? If we left the 11th October free and then we had five days. We need a day for
10 the legal experts, do we get anything out of cross-examining legal experts?

11 **MS FORD:** There was a relatively narrow compass point between them about the
12 operation of the objective limitation period under German law.

13 **THE CHAIR:** How does cross-examination possibly fit into that? I am not interested
14 in their opinions, I am interested in their pointing out what the German case law said
15 and, if it is not decided under German case law, I am not going to make up German
16 case law as a Tribunal. Surely, you are not inviting us to do that?

17 **MS FORD:** It may be the Tribunal is not particularly assisted by cross-examination at
18 all and one will simply distil the areas of dispute from the expert reports.

19 **THE CHAIR:** Yes. I imagine so. Let's say half a day, at the moment, for any
20 cross-examination of legal experts, which will be of a very narrow compass.
21 Then closing, we seem to have quite long closings. What do we have at the moment?

22 **MR WEST:** Our suggestion was two days in total.

23 **THE CHAIR:** Two days in total?

24 **MS FORD:** We were longer on that. We were suggesting five days of which two days
25 would be for the Claimants and 1.5 days each for the Defendants. Given four weeks
26 of evidence, it did seem to us --

1 **THE CHAIR:** You are not going to both be addressing the economic evidence, are
2 you?

3 **MS FORD:** I intend that we will split the issues up between us.

4 **THE CHAIR:** Yes. So you --

5 **MS FORD:** We won't duplicate. But the issue arises not necessarily with the
6 economic evidence, but with the factual evidence. For example, on the Claimants'
7 overspill umbrella case, that depends, to a considerable degree, on the witnesses'
8 evidence as to the extent to which the pricing of tenders to the Claimants would, or
9 would not, have been influenced by pricing factors from other OEMs. That is the
10 matters the Tribunal has been canvassing to a certain extent this morning. Those are
11 fact-heavy matters that do potentially differ as between the Defendant groups
12 because, of course, they may have different internal practices and they will have
13 different witnesses coming to address that.

14 **THE CHAIR:** Well, let's consider that further. Let's consider that further at the PTR.
15 Time of writing closings. It may be that -- yes, anyway, we will see where we get to.
16 If a timetable could be drawn up and perhaps you could send that in to the Tribunal,
17 based on those -- this is a provisional timetable, subject to adjustments at the PTR.
18 But if that could be put in writing, so that we -- for those dates we discussed, we would
19 be very grateful. Just drawn up in a document and sent in. We will leave five days for
20 closing at the moment. We will leave two days for writing closing submissions, subject
21 to the other amendments.

22 **MS FORD:** That is the point I was rising on.

23 **THE CHAIR:** Leave that.

24 **MR WEST:** Is that including the two-day break?

25 **THE CHAIR:** No. As you have it here. You have two days off writing closing
26 submissions, and then it depends whether it falls on a weekend, doesn't it? Then you

1 have five days total for closing the case. It may be we will review that at the PTR, but
2 leave that in the pro tem provisional timetable.

3 **MR WEST:** One other point on the trial. No one has so far applied to give any of their
4 evidence on video. But the Defendants have recently suggested in a letter -- I think
5 this may, again, be the letter of Friday -- that they may wish to give at least some of
6 their evidence -- this is ZF -- via video link. Again, that has not been raised. In my
7 submission, if they were going to seek that, that should have been raised by now.
8 There is not an application in relation to that. So I can't do any more than say certainly
9 we will be opposing it if we get to the PTR and it is then said some Defendants'
10 witnesses can't attend because they didn't make arrangements sooner to do so.

11 **THE CHAIR:** You will face an uphill struggle. I mean, given the indication that a lot
12 of this fact evidence seems to be of a relatively narrow compass, it would seem
13 eminently sensible to have some witnesses giving evidence by video link.

14 **MR WEST:** Well, would there at least be some merit in proposing a timetable in which
15 any application be made by certain date so we can see the basis on which --

16 **THE CHAIR:** Of course. Yes. That would be reasonable.

17 We have the PTR on the 17th September. Can you get it all sorted out in
18 correspondence by the beginning of September?

19 **MS FORD:** Sir, I am sure we can do that. That was certainly what we envisaged
20 doing. This is a matter that has been raised in the correspondence relatively late. The
21 Claimants' potential objection to this was raised on Saturday --

22 **THE CHAIR:** It doesn't matter. I consider it early days on this topic. Obviously, if it is
23 an important witness and you feel it necessary to have them here, you can make those
24 submissions and we can decide. We can't compel them to come, but we can make
25 an indication.

26 **MR WEST:** There is always the option of putting their statement in under hearsay

1 orders.

2 Finally, I think there is pleading deadlines. My friends have got two weeks, I think, for
3 the amendment of their defence in relation to foreign law and in the case of Autoliv's
4 siloing. We would propose another two weeks for any consequentially amended reply.

5 **MR LEITH:** The two weeks discussed earlier was just on the siloing.

6 **THE CHAIR:** You just have to take it out: you can do it this afternoon. You are just
7 crossing it out, aren't you?

8 **MR LEITH:** I should just check that.

9 **THE CHAIR:** Right. Okay. **(Pause).**

10 You are not going to have to respond to the Italian law, which is going.

11 **MR WEST:** But I understand that the German law plea is also being amended so we
12 may have to respond to that. We may also wish to clarify the point about the
13 non-overlapping period, which we would propose to do in the reply, if any.

14 **THE CHAIR:** Very good. So, you want a further two weeks. Any objection to that,
15 a further two weeks? Good.

16 I had a couple of other things. We have already covered some of these. We will
17 require addressing on the relevance of the OSS decisions: what the parties are relying
18 on them for and the legal framework for that. Alternative calculations. So Mr Hughes
19 has put forward a financial model which has been criticised by Mr Majumdar but, as
20 you pointed out, he has not come back and produced his own model. He is just taking
21 pot shots at it, which he is entitled to do, and says it is not sufficient.

22 If you are, particularly when it comes to -- I mean, the size of the damages, if you are
23 putting forward an alternative case -- or, I mean, on liability as well -- if you are putting
24 forward an alternative case taking on board some of Mr Majumdar's criticisms, how is
25 that going to be dealt with? It does not seem attractive to say to the Tribunal: well, we
26 took that approach, if we are wrong about that, you do the maths.

1 If you have alternative cases, or cascading cases, we really do need to know what
2 they are at some point. Are you dealing with that in reply or is it going to be all or
3 nothing on your model? You could say: no, we have enough confidence in our model.
4 But, equally, we could say we are not happy with it. What happens then?

5 **MR WEST:** I anticipate there will be some alternatives put forward. For example,
6 some of Dr Majumdar's complaints are to say: if you make slightly different inputs into
7 the model, you get radically different outputs. I suspect Mr Hughes will be saying
8 actually the outputs are not that different. So one can have different sensitivities and
9 this is the result that one gets. So he will be running those through.

10 But I have certainly heard what you have said about that and what the Tribunal's view
11 is on that, and we will seek to build that into the report, as far as possible.

12 **THE CHAIR:** Yes. You may have three other cases or something like that. But I don't
13 think you can just throw stuff at the Tribunal and expect the Tribunal to sort it out, if
14 that makes sense.

15 **MS FORD:** Sir, I wonder if I might raise one more timing issue.

16 **THE CHAIR:** Yes. Of course.

17 **MS FORD:** The date of the opening of the trial. The only reason I raise this is having
18 done the exercise of working out in approximate terms how long it would take, the
19 timetable the Tribunal has outlined would finish by the end of October which does
20 mean there is space at the end of the window if one were minded to start the trial
21 slightly later. That would then have the advantage of giving the parties time to --

22 **THE CHAIR:** Well, I think the object is to have this trial heard in October. When the
23 six-week time estimate was coming up, we were faced with alternative models based
24 on the Defendants' data. We had up to three expert witnesses on the Defendants'
25 side giving evidence and there was a discussion when it was narrowed down to single
26 experts, subject to what the Court of Appeal was going, whether we would need more

1 | than a month. So there was discussion about that at some point, if you recall.

2 | **MS FORD:** Sir, absolutely. In the event, that the outcome -- and it certainly appears
3 | that the outcome is that we don't need more than a month -- but then that raises the
4 | possibility that that month could be towards the end of the window.

5 | **THE CHAIR:** But it is very inefficient to lose time at the start of term. So we are going
6 | to press ahead with 1 October.

7 | Yes. So bundles. Presumably the bundles for the PTR can be the trial bundles. There
8 | may be other things to slot in, so that we can have paper bundles. So that is absolutely
9 | fine if there need to be extra tabs added at various places.

10 | We will need electronic and hard copy versions. If there are some bundles that are
11 | barely going to be turned up, it may be they are not necessary to have them as hard
12 | copies. But work on the assumption -- we can discuss that at the PTR -- work on the
13 | assumption that we will need hard copies. I don't know if everybody will, we will liaise
14 | with you about that. I will need them anyway. We will need some numbering system
15 | on the electronic so that we can efficiently navigate. I appreciate these things are
16 | done in a hurry for these sorts of applications, but we will need to make sure that all
17 | the PDF numbers correspond to the bundle numbers on here, the page numbers on
18 | here.

19 | One other thing. Obviously, if I can paraphrase your direct evidence of, dependent on
20 | your emails, that there has been a cartel, so direct factual evidence of a cartel and
21 | then you have your umbrella case. Are we going to be assuming the economic
22 | evidence shows a relevant price difference during the alleged period of the cartel or
23 | the umbrella period, the Tribunal is not going to be invited to distinguish between the
24 | two? We are not going to be able to say: well, this was actually caused by the umbrella
25 | effects, or this was actually direct cartel activity. We don't have to distinguish
26 | between the two or attribute losses to one or the other, or do we?

1 **MR WEST:** From the Claimants' perspective, we would certainly be saying you don't
2 have to do that. The Defendants may disagree.

3 The only other point I should just mention is that according to the Defendants' German
4 law expert, the applicable limitation period may differ under German law depending on
5 whether it is a standalone or follow on claim. So if you were to agree with Dr Ohlhoff
6 about that, then there may be a difference. But certainly, as far as the Claimants are
7 concerned, the Tribunal could not say: well, we find there is an overcharge, it may
8 have been caused by a direct cartel or by umbrella effects, but as far as we are
9 concerned it does not actually matter.

10 **THE CHAIR:** Right. Okay. If you could just give that some thought. If it does matter.

11 **MS FORD:** So from our perspective it very much does matter in the sense that we
12 strongly take the position that there was no direct cartel. So we would invite the
13 Tribunal to find on the facts that there was no direct cartel, in which case the conclusion
14 must be to the extent there is any overcharge -- which of course is also in dispute -- that
15 it cannot be attributable to direct cartel effects.

16 **THE CHAIR:** But if the evidence is supportive of a direct cartel and looking at
17 Mr West's emails if we say that is evidence of a cartel operating with respect to the
18 Claimants, do we then have to distinguish between the relative effects, relative
19 umbrella effects, and the direct cartel effects?

20 **MS FORD:** We would say yes as well. The Tribunal of course has well in mind that
21 one has to do a little bit more than point to a few emails in order to establish a cartel.

22 **THE CHAIR:** Yes. Quite.

23 **MS FORD:** I would not want it being said that I have accepted the proposition that
24 those emails in and of themselves are sufficient to establish that case as against us.
25 But the first inquiry is to what extent is there sufficient case to suggest there was
26 a direct cartel. We would say there is not.

1 In which case, one then proceeds to what extent is there a credible case that the way
2 in which the pricing operated was such as to give rise to the claimed effects. These
3 matters are all interrelated because, of course, insofar as the factual case suggests
4 that actually there is no strong case either for a direct cartel, or for overspill pricing
5 effects, that very much reinforces the question marks the Defendants raise as to the
6 reliability of a model that finds such an overcharge. So they are all very much
7 interlinked.

8 **THE CHAIR:** Right. But in the event that both were operating, it won't be necessary
9 to distinguish the relative impact of each. I don't even know if it would be possible.

10 **MS FORD:** Well, even on that narrow assumption, yes, it would be necessary because
11 the legal basis for recovering as against the Defendants in respect of the primary case,
12 the cartel, would be joint and several liability for both parties, whereas the legal basis --

13 **THE CHAIR:** That is for the nine-month period.

14 **MS FORD:** Well, on the Claimants' primary case, they claim a cartel from 2002 to
15 2011. It is their pleaded case that both Autoliv and ZF were at all times involved in
16 that cartel. If they were to get home on that case, which is an important factual
17 question, then Autoliv and ZF would be jointly and severally liable for the period of
18 their participation in the cartel. The joint and several liability position is different in
19 relation to the umbrella case because ZF -- and this is the matter that was partly
20 canvassed with the Tribunal in the context of the expert evidence -- has only been
21 found to have participated in an infringement in relation to OSS 2, whereas Autoliv has
22 been found to have participated in relation to OSS 1 and OSS 2, and so it is not correct
23 to say that one does not need to distinguish because the liability position is different
24 as between those two Defendants.

25 **THE CHAIR:** Right.

26 **MS FORD:** And as between the two levels of the case.

1 **THE CHAIR:** But that is just for that nine-month period, isn't it?

2 **MS FORD:** It is not. As a matter of law, we are only liable for those effects which can
3 be established to have flowed from that infringement for which they have been found
4 to be liable. It is not right -- for the entirety of the period of our participation, we can
5 only be held liable for the effects of OSS 2 and not OSS 1. And for the Claimants --

6 **THE CHAIR:** So for the PTR we need a more detailed list of issues, I think, on this.
7 This is quite important to have this in mind, I think, at the start. So your rival positions
8 will need to just -- just what you have said will need to be put down in a helpful way, if
9 possible. Thank you very much.

10 **MS FORD:** Yes.

11 **THE CHAIR:** You didn't have anything else? Costs in the case. Thank you very
12 much.

13 **(2.57 pm)**

14 **(The hearing adjourned)**

15

16

17

18

19

20

21

22

23

24

25

26