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**IN THE COMPETITION**

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

**APPEAL**  
**TRIBUNAL**

Salisbury Square House  
8 Salisbury Square  
London EC4Y 8AP

Tuesday 1<sup>st</sup> October – Tuesday 29<sup>th</sup> October 2024

Before:

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

(Sitting as a Tribunal in England and Wales)

BETWEEN:

**Claimants**

**Stellantis Auto SAS & Others**

**V**

**Defendants**

**Autoliv AB & Others**

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**A P P E A R A N C E S**

Colin West KC & Sean Butler (Instructed by Hausfeld) On Behalf of the Claimants.

Sarah Ford KC & Prof. David Bailey (Instructed by Macfarlanes) On Behalf of the Sixth to Tenth Defendants.

David Scannell KC & Derek Spitz (Instructed by White & Case) On Behalf of the First to Fifth Defendants.

Tuesday, 1 October 2024

(10.30 am)

THE CHAIRMAN: Good morning.

Some of you are joining us live stream on our website, so I am going to start with the warning. An official recording is being made, and also a transcript is being produced, but it is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings and breach of that provision is punishable as a contempt of court.

Mr West.

MR WEST: Good morning, gentlemen.

I propose to dispense with the introductions, the representation today is the same as at the PTR and in the skeletons.

This is a trial of this action for damages for breach of competition law and today has been set aside for the Claimants' opening speech.

Housekeeping

Before that there are one or two housekeeping points.

The parties have sought to agree, subject to the Tribunal, a protocol for the giving of concurrent evidence by the economic experts, just setting out in a bit more detail how, again, subject to the Tribunal,

1 we propose that that should proceed. I don't think  
2 the Tribunal has seen that yet, so can I perhaps hand up  
3 a copy of that. (Pause).

4 We may not have copies. I'll come back to that, but  
5 it explains, in outline, how we foresee that  
6 the concurrent evidence should proceed.

7 One other housekeeping point is that we have just  
8 received the list of documents for Mr MacQueen, who is  
9 one of Friday's witnesses in line with the timetable set  
10 out by the Tribunal three days' notice and we are  
11 concerned by one entry on that list, which is  
12 Dr Majumdar's report. Can I again -- I think we do have  
13 copies of that list. Could I just hand that up.

14 (Handed).

15 THE CHAIRMAN: Are these documents already in the bundles,  
16 or these are additional documents?

17 MR WEST: These are documents which the witness has been  
18 notified that he will be cross-examined about. I can  
19 see from the bundle references it looks like some of  
20 them are already in the bundle.

21 THE CHAIRMAN: So the other documents will be produced in  
22 the bundle, presumably?

23 MR WEST: Yes.

24 THE CHAIRMAN: Your point was ...

25 MR WEST: My point is we are a bit concerned about item

1 number 16, which is Dr Majumdar's report. Now, this is  
2 a list which has been provided for the cross-examination  
3 of a lay witness, Mr MacQueen, who addresses procurement  
4 issues, and we are a bit concerned that it seems that  
5 the lay witness is being asked to read and it is being  
6 proposed that he should be cross-examined about  
7 the expert report. What Mr MacQueen would make of that  
8 I do not know, he is not an economist clearly, and if he  
9 is to read Dr Majumdar's report, presumably he would  
10 also have to read Mr Hughes' report to understand  
11 the economics.

12 I do not know why he is being asked to do that but  
13 we are concerned about that.

14 THE CHAIRMAN: But it is paragraphs 1 to 94, I assume that  
15 means?

16 MR WEST: Yes, sorry, paragraphs 1 to 94.

17 THE CHAIRMAN: That seems to be -- presumably it is  
18 the factual information in that -- those passages which  
19 Dr Majumdar's relying on. I do not know, maybe that is  
20 not right.

21 MS FORD: Sir, it is not in fact all those pages. We can  
22 probably provide a more focused indication of exactly  
23 which paragraphs we envisage going to, but it is factual  
24 information which underlies Dr Majumdar's report and  
25 they are matters that we then wanted to explore with

1 the factual witness.

2 THE CHAIRMAN: If you could identify the relevant paragraphs  
3 that would be helpful.

4 MS FORD: Sir, we can certainly do that.

5 MR WEST: That would be very useful.

6 Just to update the Tribunal on one other witness  
7 matter, Mr Sven Michalik, who is Autoliv's witness,  
8 dealing with its relationship with  
9 Opel/Vauxhall/General Motors has been stood down by  
10 agreement. He was a technical employee and never held  
11 a commercial role, he says that himself in his evidence,  
12 so his evidence was all really at one remove from  
13 the commercial discussions that we are concerned with  
14 here, and the agreed basis of standing him down is that  
15 it remains open to the Claimants to make submissions as  
16 to weight and that no point will be taken that  
17 the claimant cannot advance any aspects of this case  
18 because it was not put to Mr Michalik specifically. So,  
19 on that basis, the parties thought it sensible to  
20 dispense with his attendance.

21 Another brief housekeeping point --

22 MR SCANNELL: Sorry -- I am sorry to interrupt, but just so  
23 that there is no misunderstanding, when Mr West says  
24 that Mr Michalik's evidence has been -- in inverted  
25 commas -- "stood down" that is not the same thing as

1 saying that his evidence has been withdrawn; his  
2 evidence-in-chief is still his evidence-in-chief, he is  
3 simply not going to be cross-examined.

4 MR WEST: I am grateful for that clarification.

5 One point about confidentiality is that the  
6 Defendants have asked to add some documents to  
7 the disclosure bundle for the trial, documents which are  
8 in the confidentiality ring, so these are recent  
9 documents. The result is that if the Defendants propose  
10 to take witnesses to those documents at the hearing and  
11 refer to the contents of the documents, we would need to  
12 go into closed session. Now, we have raised this point  
13 in correspondence and the position at the moment is that  
14 the Defendants have said they will tell us when the time  
15 comes to give notice of documents that they will refer  
16 to in cross-examination whether any of those  
17 confidential documents are going to be referred to, and  
18 so maybe the debate will crystallise at that point, but  
19 I just raise the possibility that we may have to go into  
20 closed session if that is going to happen.

21 Then finally on housekeeping, as far as I am aware,  
22 we, the Claimants, we have prepared, for the purposes of  
23 today's opening submissions, a short outline chronology  
24 -- I say "short", it is about 20 pages long. It is not  
25 intended to be comprehensive but it is intended to

1 outline the main developments, certainly the main  
2 pleaded developments, and to provide an overview of  
3 the case. I will be referring to it as I go through my  
4 opening submissions and so can I also hand that up.

5 THE CHAIRMAN: Is that an agreed chronology?

6 MR WEST: It is not an agreed chronology, I am afraid, as  
7 yet.

8 THE CHAIRMAN: Can it be agreed in due course, or ...?

9 MR WEST: Possibly. It was provided, I think, late  
10 yesterday to the Defendants. We have been preparing it  
11 as I have been preparing these opening remarks.

12 (Handed).

13 THE CHAIRMAN: Obviously it would be helpful if it can be  
14 agreed and perhaps an amended one can be produced in due  
15 course. No rush. No rush, but at some point.

16 MR WEST: So, gentlemen, with that by way of admin, this is  
17 the Claimant's claim for damages --

18 THE CHAIRMAN: Where is this going in the bundle?

19 MR WEST: It can perhaps go in with the skeleton arguments  
20 so bundle skeletons, list of issues and glossary, but it  
21 might make sense to have it to hand for the moment  
22 because I will be referring to it.

23 THE CHAIRMAN: Yes, okay.

24 Opening submission by MR WEST

25 MR WEST: So, gentlemen, this is the Claimants' claim for

1 damages for a breach of competition law. As  
2 the Tribunal knows, the Claimants are all companies in  
3 the Stellantis Group which manufacture cars under  
4 a number of well-known brands, Peugeot, Citroën, Fiat,  
5 Vauxhall and so on, but at the material time they were  
6 separate OEMs, PSA, FCA and OV. The Claimants'  
7 allegation, as the Tribunal knows, is that they paid  
8 increased prices for purchases of Occupant Safety System  
9 products, seatbelts, airbags and steering wheels which  
10 they purchased from the Defendants, and those  
11 overcharges arose, we say, because the Defendants were  
12 involved in one or more cartels concerning such products  
13 over a period of a number of years ending in 2011.

14 As the Tribunal knows, the Defendants confessed to  
15 being involved in cartels concerning OSS products over  
16 that period leading to two Commission decisions in which  
17 ZF or Autoliv, or both, were found to have cartelised  
18 OSS supplies in Europe. Those were settlement  
19 decisions, because, as I say, the Defendants admitted  
20 the charges against them, as did all of the other  
21 suppliers under investigation by the Commission which  
22 included some Japanese suppliers, Takata, Tokai Rika and  
23 Toyota Gosei, that the Tribunal will hear more about in  
24 the course of the trial.

25 The Defendants also entered confessions in



1 investigations concerning suspected cartel conduct in  
2 the OSS market in the United States leading to plea  
3 agreements there, and ZF/TRW settled investigations  
4 concerning the same subject matter in South Africa and  
5 Brazil, whereas those investigations remain on foot to  
6 this day against Autoliv.

7 Now, a notable aspect of this case, and so far as  
8 I am aware this is the first case to come to trial which  
9 has this feature, is that the Commission found cartel  
10 conduct only against particular customers of the  
11 Defendants but made no such finding in relation to the  
12 Claimants who are other customers of the Defendants.  
13 We have generally referred to the customers against whom  
14 cartelisation was found by the Commission as the named  
15 OEMs, which were VW, Volkswagen and BMW, in the case of  
16 second Commission decision, OSS 2, to which both  
17 defendant groups were party, and in the case of OSS 1,  
18 which only concerned Autoliv, the affected customers,  
19 customers affected by the cartel conduct in which  
20 Autoliv participated, were Toyota and Honda.

21 But the Claimants' primary case is, although  
22 the Commission limited its findings to those OEMs, in  
23 fact the cartel conduct was more broad and affected also  
24 supplies to the Claimants, and I'm going to come shortly  
25 to the evidence we point to about that, but that

1 evidence includes discussions concerning supplies to the  
2 Claimants between the Defendants which we say are  
3 effectively of the same or a very similar kind to those  
4 which the Commission found.

5 Now, the Commission decision was a finding based on  
6 an anti-competitive object, it held that the object of  
7 the conduct was anti-competitive, and findings of breach  
8 of competition law can be based either on object or  
9 effect, but, by contrast, the damages claim requires  
10 proof of loss, in other words proof of effect on  
11 the market, and in this case the Claimants have  
12 instructed their economic expert to analyse whether  
13 prices for OSS components were higher under contracts  
14 concluded during the cartel period than under contracts  
15 concluded outside that period after adjusting for other  
16 factors that could affect costs and prices.

17 Mr Hughes, the Claimants' expert, has carried out an  
18 analysis of the kind with which the Tribunal is  
19 familiar, namely a multivariate regression analysis, to  
20 seek to identify whether there was an overcharge.

21 Mr Hughes finds that after controlling for other  
22 variables, such as changes in raw materials costs and  
23 demand variables, prices for all three types of OSS  
24 component were higher over what he terms "the main  
25 period", which coincides with the cartels found by

1 the Commission. He also finds that prices were higher  
2 for two of the three components, airbags and steering  
3 wheels, but not seatbelts, during what he  
4 terms "the early period" which runs from the earliest  
5 date of cartelisation pleaded by the Claimants for each  
6 type of component to the start of the main period.

7 We rely on Mr Hughes' analysis not only in relation  
8 to the quantum, but also in relation to liability,  
9 because we say if the Tribunal accepts Mr Hughes'  
10 evidence that there was an overcharge we say that is  
11 powerful evidence that there was probably a cartel  
12 against the Claimants, or, in the alternative, that  
13 the prices they paid were affected by the other cartel  
14 conduct in the market, which the Defendants accept, and  
15 if so, the Defendants would be liable anyway, assuming  
16 the Tribunal finds the overcharge was caused by that  
17 cartel conduct.

18 Now, the Tribunal has the skeleton arguments --

19 THE CHAIRMAN: Sorry, Mr West, sorry.

20 (Pause).

21 Mr West, please carry on.

22 MR WEST: The Tribunal has the skeleton arguments in  
23 the case and I am certainly not proposing to outline  
24 materials we have already set out there in my opening  
25 remarks. What I was proposing to do is to take

1 the Tribunal to some of the key documents in the case.  
2 We have referred to a number of these documents in  
3 the skeleton but the Tribunal may not have had a chance  
4 to look at the documents themselves.

5 THE CHAIRMAN: You said the overspill, or the "umbrella", as  
6 you sometimes refer to it, you say there is no precedent  
7 for that?

8 MR WEST: I am not aware of another case to date which has  
9 come to trial where the Commission has found a cartel  
10 against some of the Defendants' customers where  
11 the claim is brought by different customers. As far as  
12 I am aware this is the first case with that particular  
13 feature.

14 The Commission adopted a number of decisions  
15 concerning car parts in some of them that found  
16 cartelisation in relation to the part and in others in  
17 relation to the part as supplied to certain customers,  
18 and there may have been litigation by other customers,  
19 but none of those cases has come to trial, either they  
20 have been settled or they have not come to trial yet.

21 So, as I was saying, we have referred to a number of  
22 the documents in the case in the skeleton but the  
23 Tribunal may not have had a chance to look at those  
24 documents themselves and there are various particular  
25 points on certain individual documents which would be

1 easier probably just to raise as we go through.

2 In addition to going through the documents,  
3 I propose to address in my opening remarks the issue of  
4 burden of proof, which the Defendants raise in their  
5 skeletons, just so the Tribunal's clear on the  
6 Claimants' position in relation to that at the outset.

7 The other topic which is not perhaps addressed in  
8 great detail in the skeletons is the scope of  
9 the dispute between the economic experts. Now,  
10 the Tribunal has the joint expert statement, but in my  
11 submission one can boil the dispute down even further to  
12 a limited number of points under each topic and  
13 I propose to go through that if that would assist  
14 the Tribunal.

15 One of the themes of our skeleton the Tribunal may  
16 have picked up is that the Defendants have not seen fit  
17 to produce any witness who can actually address from his  
18 or her own knowledge the operation of the cartel, either  
19 the cartel found by the Commission or the evidence of  
20 cartelisation which the Claimants rely on.

21 The witnesses who are produced are people who say,  
22 "I knew nothing about it, it had nothing to do with me",  
23 and they are not, for example, people who are referred  
24 to in the Commission investigation on the whole.

25 The result of that is that, certainly in relation to

1 the documents concerning the Claimants' direct case,  
2 i.e. there was a cartel against us, the Tribunal is not  
3 really going to be significantly better informed about  
4 that evidence at the end of the trial than it is going  
5 to be at the beginning, because the documents have  
6 really been left to speak for themselves rather than  
7 being addressed by any witness evidence, and in the case  
8 of most of the witnesses we cannot put the documents to  
9 them because the witnesses were not involved in those  
10 documents.

11 The position is slightly different in relation to  
12 the indirect case, the spillover case, because, as  
13 the Tribunal is aware, the Defendants say that there was  
14 a degree of siloing within their organisations by  
15 customers, so there were different business units,  
16 the BMW business unit was separate from the Peugeot  
17 business unit, for example, and that would have affected  
18 the likelihood of any overspill effect, and some of  
19 their witnesses are in a position to address that  
20 because they can address the structure of the  
21 Defendants' businesses. So in relation to the indirect  
22 case, there will be more putting documents to witnesses,  
23 because those witnesses can address the indirect case  
24 with documents.

25 So if I can start with the process of going through

1 the documents, the starting point is the Commission  
2 decisions, which I will not spend too long on because  
3 the Tribunal may have looked at those before. They are  
4 in bundle A of the trial bundles at tab 10 to 11. So if  
5 we start at bundle A, tab 10 {A/10/1}. This is the --  
6 (Pause).

7 THE CHAIRMAN: Just give me a second. I apologise.

8 MR WEST: So tab 10 is the OSS 1 decision, these decisions  
9 are in fact very similar in their structure and  
10 contents, but if we start with OSS 1. We can see at --  
11 so the paragraphs are usually referred to as "recital",  
12 so recital 3 {A/10/7} sets out the products which I have  
13 been referring to, seatbelts, airbags and steering  
14 wheels. The decision then goes on to deal with  
15 the procedure and makes clear that it is a settlement  
16 decision, that starts at recital 24 {A/10/10}, where  
17 the Commission refers to the proceedings taking place  
18 under the settlement notice, and indeed resulting in  
19 a settlement decision.

20 At recital 33 {A/10/12}, we see that this  
21 investigation was concerned with the supply of OSS to  
22 Japanese OEMs, so those are the car companies, and they  
23 are then listed out, so the first one, seatbelts to  
24 Toyota, airbags to Toyota, seatbelts to Suzuki,  
25 seatbelts, airbags and steering wheels to Honda in

1 the subparagraphs of 33, so those are the specific OEM  
2 customers.

3 Then the nature of the conduct is dealt with in  
4 recitals 34 to 38, and the Commission makes the point at  
5 34 that the essence of each of the cartels was the same  
6 and it concerned:

7 "... the maintenance of each competitor's incumbent  
8 'commercial rights' to supply a specific type of OSS for  
9 a particular passenger car model. When the OEM ...  
10 developed new models of certain existing passenger  
11 vehicles, the relevant competitors coordinated in an  
12 attempt to ensure that the supplier who had won the  
13 award for supplying the relevant OSS equipment for  
14 the previous model (that is to say the incumbent  
15 supplier) would also supply the OSS for the new model."

16 Then at 35, they:

17 "... also met when the OEM ... introduced certain  
18 completely new models. In the absence of ...  
19 'commercial rights', the Parties sought to find a common  
20 understanding as to which Party would supply ..."

21 Then 36:

22 "The overall aim of each of the ... cartels was to  
23 respect the incumbency principle and to coordinate on  
24 prices. [It] was pursued by coordination of responses  
25 to specific RFQs and exchanges of commercially sensitive



1 information on requests from OEMs which were not related  
2 to a specific procurement event, with a view to  
3 coordinating the relevant competitors' conduct. For  
4 example, OEMs generally requested annual price  
5 reductions ... These reviews related to particular OSS  
6 equipment currently being supplied to the OEM (for which  
7 production had already started) and took place during  
8 specific periods of the year. The relevant Parties  
9 coordinated their positions in an attempt to submit  
10 a common reaction to the OEM. Occasionally, some  
11 Parties also discussed the coordination of [potential]  
12 price increases to be passed on to the relevant OEMs due  
13 to increases in the cost of raw materials."

14 Then 37:

15 "Even though on some occasions the ... Parties may  
16 have been unable to reach an agreement or did not  
17 respect the arrangements reached, in most cases there  
18 was at least a discussion between the relevant  
19 competitors to try to find an agreed outcome."

20 So that's the broad nature of the cartel conduct.

21 We see at 39 {A/10/13}, the end of 39, the nature of  
22 the communications. In the last sentence of 39:

23 "The contacts took place via email exchanges,  
24 face-to-face meetings or phone meetings."

25 I remark there that of course in the case of

1 face-to-face meetings or phone meetings, that would not  
2 necessarily generate a record. It may do, but it would  
3 not necessarily do so.

4 The affected geography is set out in recital 51  
5 {A/10/16}, as "EEA-wide", because even though  
6 the contacts took place in Japan, the arrangements  
7 included the entire territory of the EEA and  
8 the decision is concerned with supplies of these types  
9 of products to the Japanese OEMs in the EEA.

10 Recital 54 concerns the difference between an  
11 agreement and a concerted practice, either of which is  
12 sufficient to constitute an infringement. So  
13 the Commission says:

14 "An agreement may be said to exist where the parties  
15 adhere to a common plan which limits or is likely to  
16 limit their individual commercial conduct by determining  
17 the lines of their mutual action or abstention from  
18 action in the market. Although Article 101 ... and  
19 Article 53 ... draw a distinction between the concept of  
20 concerted practice and that of ... agreement ...  
21 the objective is to bring within the prohibition of  
22 those Articles a form of coordination between  
23 undertakings by which, without having reached the stage  
24 where an agreement properly so-called has been  
25 concluded, they knowingly substitute practical

1 cooperation between them for the risks of competition.  
2 Conduct may fall under Article 101 ... and 53 ... as  
3 a concerted practice even where the parties have not  
4 explicitly subscribed to a common plan defining their  
5 action in the market but knowingly adopt or adhere to  
6 collusive devices which facilitate the coordination of  
7 their commercial behaviour. Article 101 ... and 53 ...  
8 preclude any direct or indirect contact between economic  
9 operators of such a kind as to either influence  
10 the conduct on the market of an actual or potential  
11 competitor or to reveal to such a competitor the conduct  
12 which an operator has decided to follow itself, or  
13 contemplates adopting, on the market, where the object  
14 or effect of those contacts is to restrict competition."

15 So we say it is a wide net that is cast where one is  
16 considering contacts between competitors. This  
17 decision, as I said, was based on a finding of an object  
18 infringement, that is recital 70 {A/10/21}, and  
19 the application of the law to the facts is in  
20 recital 72:

21 "Based on the submissions of the Parties and  
22 the other evidence obtained during the course of  
23 the Commission's investigation, in each of the four  
24 infringements, the relevant competitors coordinated  
25 their behaviour to reduce uncertainty between themselves

1 in relation to the supply of specific OSS components in  
2 the EEA. They did this by engaging, to varying degrees,  
3 in project allocation, price coordination and exchanges  
4 of commercially sensitive information."

5 So that is what the Commission found to have  
6 constituted the infringement and we will see that that  
7 has certain similarities with the expert analysis in  
8 this case, where Mr Hughes, for example, refers to  
9 information exchange reducing uncertainty in the market.

10 Conduct which is in breach of the first paragraph of  
11 Article 101 can be exempted under the third paragraph  
12 and the Commission addresses this in paragraph 80  
13 {A/10/23}. That depends -- an exemption depends on  
14 there being countervailing efficiencies or benefits, but  
15 the Commission says:

16 "There is no indication that the Parties' behaviour  
17 entailed any efficiency benefits or otherwise promoted  
18 technical or economic progress. Complex infringements  
19 amounting to secretly organised price coordination,  
20 market sharing and ... the exchange of commercially  
21 sensitive information between competitors are, by  
22 definition, among the most detrimental restrictions of  
23 competition."

24 I note there the reference to this price  
25 coordination and so on as having been "secretly

1           organised". The balance of the decision goes on to  
2           calculate the fines and so on, which we are not directly  
3           concerned with.

4           Turning then to OSS 2 {A/11/1}. As I said, it has  
5           a very similar structure and layout, so I will go  
6           through it briefly. Recital 2 {A/11/7} identifies  
7           the parties to this decision and we see it is Autoliv,  
8           TRW and Takata, and the Tribunal may have picked up that  
9           Takata is not a party to these proceedings having gone  
10          bankrupt following the issue of faulty airbags in  
11          the mid-2010s.

12          The procedure was, again, under the settlement  
13          notice, as recorded at paragraphs 19 and following  
14          {A/11/10}, and the nature of the conduct is at  
15          paragraphs 28 to 33, and we see it is rather similar to  
16          the present case at 28, page 11 {A/11/11}:

17          "... comprises two single and continuous  
18          infringements which concerned the supply of certain  
19          types of OSS (namely certain seatbelts, airbags and  
20          steering wheels) to [Volkswagen] and BMW. Those  
21          infringements consisted principally in exchanging  
22          sensitive information but, in some instances, also  
23          extended to more concrete forms of coordination between  
24          or among AUTOLIV, TAKATA and TRW concerning supplies of  
25          certain seatbelts, airbags and/or steering wheels to ...

1 [Volkswagen] ... and ... BMW ...

2 "The overall aim of Infringement I [that is  
3 Volkswagen] was to maintain the status quo for some of  
4 the parties' existing business within the VW Group and,  
5 at times, to resist the VW Group's requests to reduce  
6 prices, for example when ... asked for quotes for  
7 the re-sourcing of previously awarded business regarding  
8 specific OSS."

9 "The overall aim of Infringement II was to reduce  
10 uncertainty as to the parties' individual strategies in  
11 their negotiations with the BMW Group and, at times, to  
12 resist the BMW Group's requests to reduce prices, in  
13 particular during annual price negotiations.

14 "The aims of the infringements were mainly pursued  
15 by exchanging commercially sensitive information  
16 relating to pricing elements.

17 "On some occasions there was a discussion between or  
18 among the parties to try to find an agreed outcome.  
19 Although in many cases the parties were unable to reach  
20 a specific agreement or did not respect the arrangements  
21 reached, a common intention to restrict competition with  
22 respect to the relevant supplies of OSS to [Volkswagen]  
23 or BMW ... governed the discussions."

24 So we see it is rather similar to the discussions  
25 concerning which -- or which were issued in OSS 1,

1           although the phraseology of "maintaining the status quo"  
2           was used rather than the incumbency principle.

3           Recital 37 {A/11/13} makes the same point as  
4           in OSS 1 about the contacts including face-to-face  
5           meetings and phone conversations, and the balance of  
6           this decision, the legal assessment, the fines and so  
7           on, is, again, very similar to OSS 1.

8           Now, I mentioned already that this is a settlement  
9           decision, and the result of that is that it reads very  
10          differently to the decision one would expect to see if  
11          it was not a settlement decision and if it was instead  
12          a fully contested decision, because in that case  
13          the Commission would have to prove its case and set out  
14          the evidence which it would then rely on if there were  
15          an appeal, and as a result the decision would have been  
16          longer and would have set out in more detail  
17          the contacts, although in the usual way some would be  
18          redacted for confidentiality and privilege and so on,  
19          but the Commission did not have to do any of that, so as  
20          a result we find in the decision only the broad  
21          descriptions that I have taken you to.

22          However, we do have documents in which  
23          the Commission set out the details of the cartel  
24          contacts between the Defendants which it was  
25          investigating, and for each infringement, at that stage

1 an alleged infringement, the Commission sent a request  
2 for further information to the parties under  
3 investigation listing all of the contacts it was  
4 investigating and asking for full information from  
5 the parties about those contacts. As I say, because  
6 this is a settlement decision the best source for  
7 the cartel contacts between the parties that  
8 the Commission was investigating is not the decision  
9 itself but the RFIs, so can I go to those next.

10 The full list of them is in footnote 17 of my  
11 skeleton argument, but the first one I was proposing to  
12 go to is the RFI which was sent to ZF/TRW in relation to  
13 the Volkswagen infringement, which is tab 695 of  
14 the disclosure bundle, J1 {J1/695/1}. This is also in  
15 the hard copy core bundle.

16 THE CHAIRMAN: Sorry?

17 MR WEST: The hard copy core bundle, if the Tribunal has  
18 that. Bundle J, core, it is called. It is two volumes.

19 THE CHAIRMAN: Oh, yes, sorry, I have got it, yes. Which  
20 one do I want?

21 MR WEST: It is number 2. So the J-Core contains hard  
22 copies of essentially everything referred to in  
23 the skeletons and the evidence, so that is 695 --  
24 tab 695.

25 THE CHAIRMAN: 695?



1 MR WEST: 695. The tab numbers of this core bundle are  
2 the same as the tab numbers of the overall disclosure  
3 bundle, but because the core bundle only has some of  
4 the documents, you will see that the tabs are not in  
5 order.

6 THE CHAIRMAN: Yes, thank you.

7 MR WEST: They are in order, but they are not consecutive.

8 So 695, European Commission RFI. This was sent to  
9 TRW, as one sees at page {J1/695/3}, and it lists out,  
10 if one goes to {J/695/6}, "Contacts with competitors  
11 concerning the Volkswagen ... Group".

12 THE CHAIRMAN: Page 6 of the bundle?

13 MR WEST: Page 6 of this tab. Tab 695, internal page 6, and  
14 there are 23 contacts relied upon.

15 If one looks at the first one, entry number 1, one  
16 sees that that is a reference to a meeting between  
17 Autoliv and TRW, and the Autoliv individuals are  
18 Mr Westerberg and Mr Weiss. Mr Westerberg was the CEO  
19 of Autoliv and Mr Weiss was the head of  
20 its Volkswagen Group business unit.

21 THE CHAIRMAN: Mr Weiss was, sorry, head of?

22 MR WEST: The Volkswagen Group business unit, so  
23 the business unit within Autoliv which dealt with  
24 Volkswagen.

25 THE CHAIRMAN: So senior people.

1 MR WEST: Well, one is the most senior person of -- I can,  
2 show you this. We have a very useful organogram, in  
3 fact a number of organograms, which show the hierarchy  
4 within Autoliv. I do not think we have quite as good  
5 equivalence for TRW, but if one looks at tab 612 of this  
6 bundle {J1/612/1}, "Autoliv Account Organization", and  
7 I believe a document like this is called  
8 an "organogram". Actually, I will come to that in  
9 a second. It is the previous one, 611, to start with  
10 {J1/611/1}. We see that Lars Westerberg was the CEO and  
11 he appears as the most senior person on this chart.  
12 Volkswagen Group, one can see the next level down is  
13 the list of the various OEMs which have their own  
14 business units within Autoliv and the Volkswagen Group  
15 is headed up by Mr Weiss.

16 Can the Tribunal also note, just under Mr Westerberg  
17 is Ms Eriksson. Ms Eriksson is not given a title here,  
18 but we can see she is also a very senior person in  
19 the company. We think her title is something  
20 like "Group Controller", but as I say, it does not  
21 appear here.

22 This organogram is not dated, but we think it is  
23 around 2004 or thereabouts.

24 THE CHAIRMAN: How has this been prepared?

25 MR WEST: How has it been what?

1 THE CHAIRMAN: How has this document been prepared?

2 MR WEST: We do not know. This was a disclosure document,  
3 so --

4 THE CHAIRMAN: Oh, a disclosure document. Understood.

5 MR WEST: Yes. So this is a contemporaneous document  
6 prepared by Autoliv and disclosed.

7 One sees at the next tab, 612, {J1/612/1}, another  
8 one of these, but later in time, and one can see now  
9 that Mr Westerberg has been replaced as CEO by someone  
10 called Jan Carlson.

11 THE CHAIRMAN: Sorry, 66 ...? Apologies.

12 MR WEST: 612.

13 THE CHAIRMAN: 11 is 2004, and this is?

14 MR WEST: So this is later.

15 THE CHAIRMAN: Yes.

16 MR WEST: We think this is after 2006, and the reason we  
17 know that is the PSA account was headed up by  
18 Christophe Rivière, you can see on the chart, and he  
19 moved to that position in 2006, we believe, and Mr Weiss  
20 is still in charge of the Volkswagen Group.

21 So that is who some of these people are, and as I  
22 say, these are useful organograms to keep in mind who  
23 the various individuals are.

24 If we then go back to the Volkswagen RFI at tab 695  
25 {J1/695/1}, you will see at entry number 12 {J1/695/7}

1 a telephone call between Mr Aygun of TRW  
2 and Mr Malmhagen of Autoliv. I think he is on  
3 the organograms, but we have a job title for him at  
4 tab 321 of this J bundle {J1/321/1}. So his job title  
5 was "Vice President Global Business Unit Volkswagen  
6 Group" and "Vice President Europe Sales". So he was  
7 both a VP of the business unit which dealt with  
8 Volkswagen and had a general role as vice president of  
9 sales in Europe, and we say that is obviously relevant,  
10 that people have this kind of dual role, when one comes  
11 to consider questions like overlap effect.

12 THE CHAIRMAN: The reference for that was?

13 MR WEST: That is simply an email setting out his job title  
14 in his email signature at tab 321.

15 THE CHAIRMAN: Tab 321.

16 MR WEST: Still on the RFI, back in the RFI in tab 695  
17 {J1/695/7}, if one goes down to entry 21 you will see  
18 a reference to another meeting on 16 June 2010, and  
19 right at the end of the list of Autoliv participants is  
20 a Mr Aigner and he is someone else who will feature in  
21 some of the documents that we will be looking at.  
22 Mr Aigner, according to the organograms, was part of  
23 the GM business unit, so I am not entirely sure why he  
24 was involved in this contact, but GM, of course, at  
25 the time also included Fiat, which is one of the

1 Claimants.

2 If we then go to the BMW RFI, which is tab  
3 {J1/694/1}, the list of contacts begins at internal  
4 page 6 {J1/694/6} and there is a list of the contacts  
5 the Commission is investigating, and entry number 13 on  
6 this list {J1/694/7} appears as a telephone call between  
7 a Mr Rauch and a Mr Fauser, and we have the calendar  
8 entry for that, which is at tab 27 {J1/27/1}.

9 THE CHAIRMAN: 27?

10 MR WEST: 27, 2-7.

11 This is the calendar entry appointment, subject  
12 "Lf", so that is Mr Lawrence Fauser, who is listed in  
13 the RFI, "Und JC". I showed the Tribunal a minute ago  
14 that the CEO that took over from Mr Westerberg was  
15 Mr Jan Carlson and we suspect that is the "JC" being  
16 referred to. But there is other evidence which I will  
17 come to in a second about Mr Carlson's involvement, but  
18 if it is right that this refers to him, then we have  
19 both the CEO at the time and his successor involved in  
20 the cartel conduct, and as I will show you, it is clear  
21 that that was in fact the case anyway.

22 Then staying in the BMW RFI, entry number 1  
23 {J1/694/6} is a meeting between Mr Rauch of Autoliv and  
24 a Mr Bausch of TRW. That is a Mr Roland Bausch. He was  
25 the head of TRW's BMW business unit, but he was in

1 a rather similar position to Mr Malmhagen in that he was  
2 also the European sales lead for OSS products within  
3 TRW. I can show you the document for that. Why do I  
4 not I just give you the reference? It is tab  
5 {J1/914/1}. I do not think it is actually in the core  
6 bundle.

7 THE CHAIRMAN: Sorry, 91 ...?

8 MR WEST: 914, which refers to Mr Bausch and the European  
9 sales lead.

10 Just before we leave the RFIs and the organograms,  
11 going back to the 2006 organogram at tab 612 {J1/612/2}  
12 the Tribunal will note the CEO, Mr Carlson, the overall  
13 controller, whatever the precise job was, Ms Eriksson,  
14 and the head of the PSA business unit, Mr Rivière. All  
15 of those individuals still work for Autoliv now.

16 THE CHAIRMAN: Sorry?

17 MR WEST: Mr Carlson, the CEO -- I believe he is now  
18 Chairman -- Ms Eriksson, and Mr Rivière, and of course  
19 none of them have seen fit to come along and assist  
20 the Tribunal with the matters before it.

21 Now, while I am on the subject of involvement by  
22 the top management, could I show you a few documents  
23 concerning that.

24 Tab 127 was the next one I was going to go to  
25 {J1/127/1}. This is in Swedish, Autoliv is a Swedish

1           company, but we have a translation in the next tab  
2           {J1/128/1}. So as you know, one starts at the bottom.  
3           Mr Westerberg, in 2007, emailing Mr Carlson,  
4           subject "PSA", we say one of the Claimants, "Anything  
5           new re TRW?", which is one of the other cartelists, and  
6           Mr Carlson says, "Meeting Peter Lake this evening", and  
7           Mr Lake was the vice president and head of sales at TRW.

8           THE CHAIRMAN: Sorry, how do you know that? I suppose, if  
9           it is in dispute, I will no doubt be told. Okay.

10          MR WEST: I do not believe it is. Mr Lake, I think, was  
11          the second most senior person in the company, and there  
12          was someone called John Plant, who was, as it were,  
13          the Chairman or CEO above Mr Lake, but Mr Lake was  
14          the second most senior person, and here we have  
15          Mr Carlson meeting with him to discuss, according to  
16          the subject of the email, PSA.

17          THE CHAIRMAN: Mr Westerberg?

18          MR WEST: No, it was Mr Carlson.

19          THE CHAIRMAN: Sorry, Mr Carlson. I beg your pardon.

20          MR WEST: So Mr Westerberg emails Mr Carlson to ask him what  
21          is new about TRW and Mr Carlson says, "Meeting Peter  
22          Lake this evening".

23                 We then have the rest of this email:

24                 "When it's regarding collaboration on components,  
25                 Halvar works on it but it takes time. He is counting on

1 having a first result available in August. Janne."

2 We do not know what that relates to.

3 One of Autoliv's witnesses, Mr Corbut, says that in  
4 2004 and in 2005 there was a collaboration on components  
5 between TRW and Autoliv because one of the OEMs ordered  
6 seatbelts from one of them with airbags produced by  
7 the other and so the technical teams had to meet to  
8 ensure the component would fit together, but this is  
9 obviously not a meeting between the technical teams,  
10 this seems to be a meeting between the senior  
11 management, the top management of the companies.

12 Still on the subject of the top management, the next  
13 document is at tab 106 {J1/106/1}, which is again in  
14 Swedish, but one has the translation over the page.

15 THE CHAIRMAN: 106.

16 MR WEST: So the translation is 107 {J1/107/1}. This is  
17 Mr Carlson, the email at the bottom in 2007 again,  
18 emailing a Mr Berntsson, subject, "Takata", that is one  
19 of the other cartelists:

20 "Hi,

21 "Hope you managed to take a bit of a holiday ... One  
22 question: how is it going with Takata?"

23 We see that Mr Berntsson is an Autoliv person; you  
24 see that from his email address:

25 "I would like to have a meeting with them at



1 the highest level. You had received input that they  
2 wanted to; is there anything new? Janne."

3 So this appears to be another meeting at the highest  
4 level between Mr Carlson and this time Takata. This  
5 meeting, as far as we can tell from the documents, did  
6 then take place. Tab 110 {J1/110/1} is the Swedish  
7 document and 111 {J1/111/1} is the English translation,  
8 and one sees just above the hole punch, or just below  
9 halfway down if you do not have a hole punch, Mr Carlson  
10 emailing again in 2007. He says:

11 "Something has gone wrong here! I have a meeting  
12 with Takata at 11:30 am outside the exhibition area ..."

13 THE CHAIRMAN: That was?

14 MR WEST: It is translation, tab 111.

15 THE CHAIRMAN: Yes, and you're reading ...?

16 MR WEST: This is just slightly below halfway down the email  
17 from Mr Carlson:

18 "I have a meeting with Takata at 11:30 am outside  
19 the exhibition area ..."

20 The exhibition, we see from below, is  
21 the IAA exhibition in Frankfurt. So we have Mr Carlson  
22 meeting with Takata at the Frankfurt exhibition, as he  
23 had expressed a desire to do in the earlier email.

24 Now, we do not know what was discussed at these  
25 meetings beyond what the emails say. Apart from

1           the first email, there is no evidence that they included  
2           the Claimants specifically, but what we say is that this  
3           tends to suggest that the market here was affected by  
4           coordination, including at the highest level of these  
5           companies.

6           THE CHAIRMAN: Just remind me, what was the basis on which  
7           the disclosure -- you had disclosure from Commission  
8           documents. What were the criteria by which they were  
9           disclosable?

10          MR WEST: I think the Commission file in general was  
11          disclosed. The whole Commission file.

12          THE CHAIRMAN: Oh, the whole Commission file.

13          MR WEST: The next example, again, two tabs further on  
14          {J1/115/1} on the same subject. The email -- the second  
15          email in the list from Brad Murray to Mr Carlson:

16                 "Hello Jan."

17                 So this is about a forthcoming trip that Mr Carlson  
18                 is making to Japan:

19                 "I know you are reconsidering plans for Japan. In  
20                 order to help with your decision, here is  
21                 the itinerary~...

22                 "Wed Evening: Dinner w/ Takata."

23                 One of the other cartelists:

24                 "This will be with Shigehisa and Mr Wada. (Executive  
25                 Director and Senior Executive Officer). This is a guy

1           that met Lars and I before with Jim Takada."

2           So Mr Westerberg.

3           "He is a very senior guy and I believe he has the  
4           trust and confidence of Jim. Even though it is only  
5           dinner, I think this is the most important meeting of  
6           your itinerary."

7           So the meeting between Mr Carlson and his alleged  
8           competitor.

9           These are also, we say, informal meetings, dinners  
10          in this case, for which no record appears to have been  
11          generated, and of course we say it is important that  
12          the top management of the company appear to have been  
13          involved in these cartel contacts, because  
14          the fundamental defence being run in this case is: yes,  
15          we cartelised against BMW, Volkswagen and Toyota, but  
16          that was the extent of it. One would think that if you  
17          are running a case that there was a few bad apples in  
18          one business unit, it is highly relevant to whether that  
19          is likely to be correct that in fact you see involvement  
20          in the cartel at the highest level of the company.

21          THE CHAIRMAN: But we do not know why the Commission focused  
22          on the OEMs -- sorry, on the car manufacturers that it  
23          did?

24          MR WEST: We do not know.

25          THE CHAIRMAN: We do not know why -- well, do they say why

1           they are looking -- they say they are individualised  
2           cartels as opposed to a generalised cartel?

3       MR WEST: No, but the Commission has the right to prioritise  
4           its own business, so it has the right, if it wishes, to  
5           limit its investigation, particularly if the Defendants  
6           are willing to plead certain infringements and move on,  
7           but the Commission has lots of other pressing business  
8           and we do not know, because it does not tend to explain  
9           decisions of that kind, but we say that is likely to  
10          explain it. I will come in a second to show that  
11          the Commission did have evidence of cartelisation  
12          against others, so it was not that the Commission did  
13          not know about it.

14                So I now propose to look at the evidence of  
15           cartelisation against the Claimants, and starting at  
16           the beginning in the chronology, the first example is  
17           tab 71 in this bundle {J1/71/1}, which is concerned with  
18           the supply of seatbelts to General Motors Brazil, so at  
19           that time that would have included Vauxhall/Opel, and  
20           indeed I think Fiat as well, because they had  
21           a purchasing arrangement with Fiat. So we see that this  
22           is -- this refers to some seatbelts that GM Brazil is  
23           looking to source, and if we look over the page  
24           {J1/71/2}, the second paragraph from Mr Evangelista's  
25           email:

1           "One more subject that is in need to discuss is our  
2 relation with Autoliv ..."

3           So this is a Takata email:

4           "... as most of the above mentioned business are  
5 their ..."

6           I think that should probably say "theirs". This is  
7 a translation, incidentally:

8           "... and of course, if we get them, we may create  
9 difficulties in our relation with Autoliv. Only for  
10 your information, last Monday we received the  
11 Purchase Order from Autoliv to produce the non Airbag  
12 frame for Ford Amazon ...

13           "Only for your information attached you will find  
14 a chart with Autoliv's prices we got from them to Meriva  
15 and S10 project (our first strategy was cover Autoliv's  
16 price)."

17           Then we see the price list set out, and cover  
18 pricing, we say, is a process whereby a party which  
19 wishes to participate in a tender but does not wish to  
20 win it quotes at a level which is slightly higher.

21 THE CHAIRMAN: So Mr Evangelista is Takata?

22 MR WEST: So this is Takata saying, "We got these prices  
23 from Autoliv", so we say it also does implicate Autoliv.

24 THE CHAIRMAN: How does that help us on this case?

25 MR WEST: Well, Takata was one of the other cartelists, and

1           our allegation is that there was a cartel involved in at  
2           least Autoliv, TRW and potentially the other cartel  
3           participants in the OSS decisions.

4   THE CHAIRMAN:  But we are not being asked to make findings  
5           as to whether the cartel was a cartel.

6   MR WEST:  No, but in my submission, this evidence is  
7           relevant in looking at the cartel conduct of which there  
8           is evidence in the market, and obviously the Tribunal  
9           will have to decide whether, ultimately, on the balance  
10          of probabilities, it thinks that Autoliv and TRW were  
11          both involved in it.  We say this is evidence that  
12          Autoliv is exchanging its prices with its competitors.  
13          In this case it happens to be Takata.

14  THE CHAIRMAN:  Yes, but the Commission has already told us  
15          that --

16  MR WEST:  But this relates to the  
17          Claimants -- (overspeaking) --

18  THE CHAIRMAN:  -- which is binding on the Defendants, so why  
19          are we then shooting off to Brazil to prove the same  
20          thing?

21  MR WEST:  Well, because this evidence relates to supplies to  
22          the Claimants, so that is what I am currently  
23          considering, evidence of cartelisation of supplies to  
24          the Claimants specifically.

25  THE CHAIRMAN:  Okay.

1 MR WEST: So this is a GM tender, which included, as I say,  
2 Vauxhall/Opel; they were part of the GM.

3 THE CHAIRMAN: I understand, yes.

4 MR WEST: I also ask you to note that this business is  
5 "their" or "theirs", which appears to suggest or appears  
6 to be redolent of some sort of incumbency principle,  
7 so: we are not going for this business, this is  
8 Autoliv's business.

9 Then if we look next at tab 41 {J1/41/1}, which is  
10 the next incident that we rely on, this is another  
11 sourcing by Opel, this time in Europe, and this is  
12 Mr Schönborn sending this, of Autoliv:

13 "I had a longer discussion today with Klaus Fruck,  
14 counterpart to Art from TRW!"

15 So Art was the head of the GM business unit in  
16 Autoliv:

17 "In general we agreed that we are not willing to  
18 support ..." --

19 THE CHAIRMAN: Sorry, so Schönborn is who?

20 MR WEST: Mr Schönborn, I think, is an individual within  
21 the GM business unit at Autoliv.

22 THE CHAIRMAN: We do not know his seniority?

23 MR WEST: I think he is junior to Mr Blanchford, who he is  
24 emailing here. Mr Blanchford was the head of  
25 the business unit.

1 THE CHAIRMAN: The head of, sorry?

2 MR WEST: Of the GM business unit.

3 THE CHAIRMAN: Mr Blanchford is head of which unit?

4 MR WEST: The GM business within Autoliv.

5 THE CHAIRMAN: Is he in the organogram?

6 MR WEST: He is.

7 THE CHAIRMAN: Okay, that is fine. I do not need to turn it  
8 up.

9 MR WEST: So here we have a discussion between Mr Schönborn  
10 and Mr Fruck, who is the "counterpart to Art", so that  
11 appears to a head of the GM business unit at TRW:

12 "In general we agreed we are not willing to support  
13 Opel's strategy regarding their intention with this  
14 global sourcing!

15 "When business is sourced we should give each other  
16 the chance to recover the sourced price by engineering  
17 changes!

18 "He also has a lot of problems with Opel's pricing  
19 and want to take the opportunity to recover loss  
20 business. loss business.

21 "... I am ... glad he brought up some points he is  
22 not willing to stand any more and we want to make a  
23 clear common statement to GM-Fiat-WWP ..."

24 We think is worldwide purchasing:

25 "... whenever these points will come up.



1 "Breakdowns for ... engineering changes ...

2 "Targets regarding VA/VE ..."

3 That stands for "value analysis", "value  
4 engineering", so that is a process of seeking to reduce  
5 the cost of components by engineering changes:

6 "Tooling Breakdowns."

7 Then:

8 "Working together to increase market prices up to  
9 a profitable level.

10 "When we receive the RFQ for the sourcing we want to  
11 come together to discuss further details.

12 "Next step will be to discuss these items also with  
13 Takata and to build up a better relationship with our  
14 competitors."

15 So, again, specific discussions between in this case  
16 Autoliv and TRW, the two defendants, regarding an  
17 upcoming sourcing by one of the Claimants. In fact, it  
18 is two of the Claimants, because it is both Opel and  
19 Fiat at this time. That is what the worldwide  
20 purchasing arrangement was.

21 THE CHAIRMAN: So what do you say this evidences?

22 MR WEST: It is evidence of -- as we know, the cartels tend  
23 to leave relatively fragmentary evidence because  
24 the parties to the cartels are aware that they should  
25 not be doing it. But this is an example of evidence

1           which has nevertheless survived and come down to as  
2           evidencing discussions between Autoliv and TRW of an  
3           upcoming sourcing, and we say it is likely to be  
4           indicative of other discussions of the same kind which  
5           may have taken place but did not leave evidence.

6           Obviously I can only show you the evidence that has  
7           actually been generated and has survived.

8           THE CHAIRMAN: But you are saying this is evidence of cartel  
9           activity?

10          MR WEST: It is, yes. It is discussion between two of  
11          the companies who are being approached to source these  
12          supplies about adopting a common strategy and indeed,  
13          "Working together to increase market prices up to a  
14          profitable level", "discuss these items also with  
15          Takata".

16                 If the Tribunal notes on this document at the bottom  
17          it has an annotation "Annex Opel 1". Now, we think what  
18          that means is that as part of its leniency submission  
19          Autoliv supplied annexes containing inculpatory evidence  
20          relating to various OEMs, including in this case Opel.  
21          So it is said here is the contemporaneous material which  
22          is suggestive of cartel conduct against Opel and that is  
23          what the "Annex Opel 1" means, we think.

24          THE CHAIRMAN: Say that again? I did not quite understand  
25          the submission.

1 MR WEST: So this document obviously has the annotation  
2 "Annex Opel 1" and we think that is what it refers to.  
3 It is an annex. What is it an annex to? We think it is  
4 an annex to the leniency submission in which it sets  
5 out: here is the further evidence which we are making  
6 you aware of as part of our leniency process which  
7 suggests cartelisation against other OEMs, in this case  
8 Opel, one of the Claimants. That is why it is on  
9 the Commission file and that is why we have got it.

10 This discussion --

11 THE CHAIRMAN: So in terms of the Commission getting  
12 documents, the Commission had gone into the premises and  
13 seized documents, had they not?

14 MR WEST: Yes.

15 THE CHAIRMAN: So are there any other ways the Commission  
16 would have got documents apart from the leniency  
17 submission and the raids?

18 MR WEST: The responses to RFQs is another possibility.

19 THE CHAIRMAN: Okay. So they could have got documents lots  
20 of different ways and we are speculating to say this is  
21 -- I mean --

22 MR WEST: Yes, I mean, I suppose it could --

23 THE CHAIRMAN: -- the leniency submission.

24 MR WEST: Yes. We do not know.

25 THE CHAIRMAN: Right.

1 MR WEST: But it is relevant -- whether it is the leniency  
2 submission or the RFI may not matter specifically, but  
3 it is relevant to a point on German law, because  
4 the defendant's position on German law is  
5 the European Commission investigation at no point  
6 extended beyond the named OEMs and therefore it did not  
7 interrupt the running of time for the purposes of  
8 the calculation of limitation periods in Germany, and we  
9 say, well, what we have here is evidence that whether it  
10 is part of the leniency submission or an RFI or whatever  
11 it may be, Autoliv is actually submitting evidence to  
12 the Commission, which ends up on the Commission file,  
13 concerning other OEMs, not just the named OEMs in  
14 the decision but in this case one of the Claimants, and  
15 we say therefore it does not make sense to say this was  
16 never part of the investigation. It was made part of  
17 the investigation, and if this document is on the file,  
18 that is how we have it. Anyway, that is a different  
19 point under German law.

20 So this discussion referred to in this email is  
21 followed up by a dinner meeting, it appears, and that is  
22 tab 43 {J1/43/1}, between Mr Aigner of Autoliv and  
23 Mr Fruck, so not Mr Schönborn this time, it is  
24 Mr Aigner, and the Tribunal may recall Mr Aigner's name  
25 from the -- one of the RFIs I showed you. So they are

1           having a dinner meeting at this restaurant, which is  
2           named, in a place called Ulm in Germany, and this  
3           meeting --

4       THE CHAIRMAN:  Sorry, I just remind myself of the dates.

5           Why does that relate to the earlier ...?

6       MR WEST:  Well, this is --

7       THE CHAIRMAN:  Is it the same time, or ...?  No, this is --  
8           they are quite a while apart, are they not?

9       MR WEST:  One is February, and the next one is in I think  
10           November.  I think that is a November date.  But what  
11           happened is --

12       THE CHAIRMAN:  So we do not know which company that  
13           concerned, which customer?

14       MR WEST:  Well, what we know is that on 27 October -- this  
15           is {J1/129/1} of the bundle --

16       THE CHAIRMAN:  Tab?

17       MR WEST:  129.  The Opel global sourcing WWP -- so this is  
18           the purchaser -- represented here by Mr Layer, who  
19           writes this email, announces the upcoming sourcing --

20       THE CHAIRMAN:  Sorry, I have not read this email, so just  
21           take it slowly.--

22       MR WEST:  So one sees Mr Layer's job title.  So he is at the  
23           "GM-Fiat Worldwide Purchasing", that is the WWP, and he  
24           is emailing the OSS suppliers, "Dear Safety Suppliers",  
25           to announce:

1            "... the upcoming opportunity ... in the area of  
2            Steering Wheels, Driver Airbags, and Passenger Airbags.  
3            GME has recently decided to make an attempt at  
4            commonizing the designs the Astra ... Vectra ... and ...  
5            Saab ..."

6            That is why it was called a global sourcing, because  
7            they were trying to have the same design for multiple  
8            models.

9            In fact, he says:

10           "Because of this ... a Global Sourcing package will  
11           become available in the next days."

12           So he announces that the package is going to be  
13           available in the next days, 27 October, and then we have  
14           a meeting between Mr Aigner and Mr Fruck on 6 November.

15           THE CHAIRMAN: Okay, I am following you now, yes.

16           MR WEST: Just to finish on this global sourcing, there is  
17           one more document at tab {J1/46/1} and it is another  
18           email from Mr Aigner to someone at TRW, this time  
19           Mr Mueller and the contents is over the page in  
20           translation.

21           THE CHAIRMAN: Sorry, tab 46?

22           MR WEST: Tab 46, I'm sorry. 4-6:

23           "Hello Jochen.

24           "Brief feedback on two topics:

25           "First the important thing: We will be happy to come

1 to you next Saturday. We will come with the whole  
2 family; please let us know what time we should  
3 arrive~..."

4 So we have a social meeting between Mr Aigner of  
5 Autoliv and Mr Mueller. Then what they are going to  
6 discuss next is the global sourcing. So:

7 "Opel, Vectra, thorax module: award was probably  
8 actually won by the proud Spaniards ..."

9 That is a reference to a company called Dalphimetal,  
10 who was one of the companies who was asked to tender.

11 THE CHAIRMAN: Dal ...?

12 MR WEST: Dalphimetal. So if you look back at tab 129

13 {J1/129/1}, the announcement of this tender and the list  
14 of people the email was sent to you, you have, towards  
15 the bottom, a Mr Guillermo Barth of Dalphimetal. Here  
16 it is spelt "Dalphimetal", although the next entry "Theo  
17 Schmitz", is spelled "Delphi". I am not quite sure why  
18 the spelling changes, but Delphi or Dalphi. They were  
19 a Spanish OSS supplier until 2005 when they were  
20 purchased by TRW.

21 THE CHAIRMAN: Ah, right. Okay, sorry. Purchased by TRW  
22 in?

23 MR WEST: 2005.

24 THE CHAIRMAN: But as far as we are aware, there was no  
25 relationship with TRW at this time?

1 MR WEST: Not at this time.

2 Going back to the tab {J1/46/1}. So, "award was  
3 probably actually won by the proud Spaniards", so that,  
4 we think, is a reference to Dalphi or Delphi:

5 "Takata is ... putting up ... a fight ..."

6 So they were discussing -- they were making  
7 arrangements for a social meeting and then going on to  
8 discuss this global sourcing.

9 THE CHAIRMAN: The thorax module is?

10 MR WEST: Thorax is obviously a part of the body which is  
11 protected by a specific type of airbag, the thorax  
12 airbag.

13 THE CHAIRMAN: That suggests that -- taking it in the round,  
14 it suggests what you say is the collusion, the cartel  
15 activity, was unsuccessful at least in respect of  
16 airbags on that occasion.

17 MR WEST: Well, it depends what the cartel activity  
18 involved. If it was a decision not to cooperate with  
19 the global sourcing but to put in bids which were higher  
20 than they would otherwise have been so that the attempt  
21 to put pressure on prices through this global sourcing  
22 would not succeed, at least so far as TRW and Autoliv  
23 are concerned, because they got together and said, "We  
24 are not going to cooperate with this", and the result of  
25 that was they lost the business, but the result may also



1 have been that the claimant had to pay more.

2 We see again in this, it is another of these  
3 appendix documents with that writing the bottom of  
4 the second page "Appendix Opel 5".

5 The next document is tab {J1/692/1}, which is a long  
6 document, and it is page 35 internally {J1/692/35}.  
7 This is an email from Mr Alan Hylton, who formerly  
8 worked at Takata-Petri. He says, "Alan Hylton from  
9 Takata-Petri" --

10 THE CHAIRMAN: So this is from -- it says from -- I may be  
11 misreading this. I see, it is the forwarded, yes. So  
12 from Alan Hylton?

13 MR WEST: To Barth. This is, again, at Dalphimetal:

14 "Do you still remember me? Alan Hylton from  
15 Takata-Petri."

16 So Takata earlier merged with a company called  
17 Petri. At this stage it was still called Takata-Petri:

18 "We met on a few occasions to secure 'some kind of  
19 deal' that would safeguard ..." --

20 THE CHAIRMAN: Sorry, I am being slow. Just say again who  
21 Alan Hylton is.

22 MR WEST: So he was an employee of Takata-Petri, although by  
23 the time he sends this email he says he has actually  
24 retired, but he is referring to matters that happened  
25 while he was still there.

1 THE CHAIRMAN: Okay, so none of this is involving the  
2 Defendants.

3 MR WEST: Well, we shall see -- (overspeaking) --

4 THE CHAIRMAN: Yes, okay, but it is not from or to the  
5 Defendants. I understand.

6 MR WEST: Just to explain what he says. He says:

7 "We met on a few occasions to secure 'some kind of  
8 deal' that would safeguard our respective profit margins  
9 against the mighty Opel."

10 So this is suggestive of cartel conduct here between  
11 Dalphi and Opel. As I say, Dalphi was then purchased by  
12 TRW. We see that this email was sent, forwarded on by  
13 Mr Guillermo Barth, to various people including one  
14 Ramiro Gutierrez, then of Dalphimetal.

15 Now, after the merger between Dalphi and TRW,  
16 Mr Ramiro Gutierrez became the head of TRW's GM business  
17 unit, so he was in charge of TRW's relationship with GM  
18 and we have a witness statement from a different TRW  
19 witness who says actually the person that dealt with  
20 the commercial side of things was Mr Gutierrez. That is  
21 when he was at TRW.

22 Moving on then to {J1/707/1}, the next chronological  
23 document, and this is another TRW incident. We see this  
24 is an email from a Mr Peter Markowsky in 2004 to various  
25 people including Mr Plant, John Plant, who I think

1 I said earlier was the top -- most senior person in  
2 the company, in TRW, and he says:

3 "... please give us a chance to reestablish our ...  
4 honour. The information I got from different Autoliv  
5 individuals ..."

6 So this is a TRW email:

7 "... are the following."

8 He then lists Autoliv's givebacks -- those are  
9 discounts -- relating to various OEMs. They include  
10 Opel, you see GMCE, so that's General Motors  
11 Europe/Opel, and then also PSA/Renault. So here we have  
12 Mr Markowsky of TRW saying to the senior  
13 management: this is what Autoliv told me that their  
14 discounts -- the discounts that they are offering for  
15 2004 in relation to the following OEMs, including the  
16 Claimants. So we say, again, this is the same type of  
17 conduct one finds at issue in the OSS decisions:  
18 exchanging commercially sensitive information, in this  
19 case about discounts.

20 Mr Lake, who was the individual who was meeting with  
21 Mr Carlson in the email we saw earlier on, his name  
22 appears at the bottom, but I should say, it is not clear  
23 to me whether this was sent to him or not, because  
24 the date at the bottom of the email seems to be 26 April  
25 and the one at the top seems to be the 28th, so it is

1 not clear if Mr Lake saw this or not.

2 THE CHAIRMAN: Where are we going?

3 MR WEST: So there are two emails here.

4 THE CHAIRMAN: Oh, it is the next one.

5 MR WEST: The second one on the same page is cc'd to

6 Mr Lake, "For info", it says.

7 THE CHAIRMAN: Mr Lake works for?

8 MR WEST: He was the vice president and head of sales. So

9 he was the individual that we saw earlier, a reference

10 to a meeting that he was having with Mr Carlson of PSA.

11 THE CHAIRMAN: It would be quite useful to have this set out

12 on a single piece of paper who all the relevant

13 personnel are. I mean the ones you are referring to.

14 It does not have to be comprehensive beyond that, it

15 will just speed things up a little bit, because --

16 MR WEST: We will put together a dramatis.

17 THE CHAIRMAN: -- although you explained it to me, I then

18 forget them. It is like watching a complicated movie.

19 MR WEST: Well, I mean, I say it would have helped if these

20 people came along to explain any of this, but since they

21 have not, I have to try and piece it together with

22 the documents.

23 THE CHAIRMAN: I understand the submission.

24 MR WEST: Then tab 72 was where I was going next {J1/72/1}.

25 This is Mr Evangelista again, in Brazil. If you go

1 forward to the internal page 5 of this document  
2 {J1/72/5}, this is a sales report, and one sees at  
3 the top of internal page 5 a business opportunity for  
4 "Fiat LAAM". That probably means Latin America:

5 "Stilo/Doblo.

6 "An opportunity to present a quotation was given to  
7 TPSA."

8 That's Takata-Petri South America, we think:

9 "This business belongs to Autoliv."

10 So we see again that idea of incumbency:

11 "At the same time, an opportunity to present a  
12 quotation for Palio Restyling II was given to Autoliv,  
13 obviously aiming drop both prices."

14 So the client is asking Takata to quote for business  
15 currently held by Autoliv and giving Autoliv the right  
16 to quote for business currently held by Takata, and we  
17 see that the Palio Restyling is Takata business back on  
18 page 2 {J1/72/2} where they refer to "Palio Family"  
19 restyling and the fact that they are supplying that  
20 currently. They say that the programme should increase  
21 by 30%, under "Palio Family".

22 Going back to page 5 {J1/72/5}:

23 "An agreement was made between TPSA and Autoliv to  
24 not play on Fiat's game."

25 So the two suppliers get together and say, "We won't

1 quote on yours if you don't quote on ours".

2 That is then reported by Mr Evangelista as part of  
3 his weekly sales report, presumably to the management,  
4 and around the middle one sees a [redacted] emailing  
5 {J1/72/1}, and he says:

6 "Airton, I think it is the right decision not to be  
7 aggressive on Fiat Lamm but this discussion with Autoliv  
8 is not acceptable to have."

9 THE CHAIRMAN: Sorry, I have lost you.

10 MR WEST: So this is page 1 of tab 72 {J1/72/1}.

11 THE CHAIRMAN: Sorry, Mr West. I have got that now, yes.

12 MR WEST: So what one sees here -- and I may be corrected,  
13 but I think this is the only example of it in  
14 the papers of somebody being told, "We are having this  
15 discussion with our competitors", and saying, "Hold on,  
16 you should not be doing that":

17 "... this discussion with Autoliv is not acceptable  
18 to have."

19 That type of objection is notably missing from  
20 almost all of the other -- in fact all of the other  
21 examples, so far as I am aware.

22 THE CHAIRMAN: Sorry, and that sentence, page 1, where is  
23 that sentence?

24 MR WEST: It is the email from [redacted] in the middle:

25 "Airton I think it is the right decision ..."

1 Page 1:

2 "... not to be aggressive ..."

3 So he agrees with the outcome but he objects to  
4 the fact that this discussion happened.

5 THE CHAIRMAN: Mr West, probably the stenographer needs  
6 a break, if you have finished on that document?

7 MR WEST: Yes.

8 THE CHAIRMAN: Shall we take five minutes?

9 (11.54 am)

10 (A short break)

11 (12.17 pm)

12 THE CHAIRMAN: I understand we may have lost the transcript,  
13 but I think we need to press on.

14 MR WEST: I said I had finished with this document at  
15 tab 72, but it has been brought to my attention that we  
16 may not all have been looking at the same page. It is  
17 page 1 of this tab that I was looking at, and in  
18 particular [redacted]'s comment that the discussion is  
19 not acceptable.

20 THE CHAIRMAN: Sorry, hold on. If you could just speak up  
21 a little bit, Mr West; I have trouble hearing you  
22 occasionally.

23 So we were looking at page 1, yes, tab 72 {J1/72/1}.

24 MR WEST: Yes, it is the right one on the screen.

25 Then Mr Airton explains that:

1           "The intention is to cover Autoliv's price."

2           There is one more document relating to that, which  
3           is tab 67 {J1/67/1}, on page 2 of this document, as  
4           labelled at the bottom. It is a table and it actually  
5           includes the cover prices. So that is the column  
6           headed:

7           "According Airton TAKATA's price (target plus +/-  
8           10%."

9           THE CHAIRMAN: Sorry, page?

10          MR WEST: It is the second page, page 2 of tab 67.

11          THE CHAIRMAN: I have the wrong page numbers. Yes. So say  
12          that again?

13          MR WEST: The fifth column:

14          "According Airton TAKATA's price (target plus +/-  
15          10%)."

16          What one sees is that in fact these prices, which  
17          are the prices Takata is going to quote, are all 10%  
18          above the two columns to the left, "Autoliv current  
19          prices". So they know what Autoliv were quoting and  
20          they're saying, "Well, we will put in prices that are  
21          10% higher than them". That is what is known as "cover  
22          pricing".

23          Back to the chronology. We are now in May 2004,  
24          I think this is. The next development is that  
25          the Commission cartels, I think the earliest of



1 the Commission cartels start in July 2004 --

2 THE CHAIRMAN: Sorry, just going back to this. This  
3 document is in -- this is not -- you linked it to  
4 tab 72. I was just -- oh, I see, because it is  
5 Brazilian currency. Right, I've got it. Yes, okay,  
6 thanks.

7 MR WEST: Yes, these are the cover prices.

8 So everything that we have looked at so far  
9 ante-dates the first finding by the Commission of  
10 cartelisation, which is in mid-2004, just to see where  
11 we are broadly in the chronology.

12 The next document to look at is tab 66 {J1/66/1}.  
13 Now, this is in German, but I do not think we need to be  
14 able to understand German to see that it was a sales  
15 meeting with Lars Westerberg in Paris, at the first hole  
16 punch, or a third of the way down. So this is sending  
17 him the minutes of that meeting with Mr Westerberg, and  
18 the minutes themselves are overleaf {J1/66/2}. So we  
19 see this is an Autoliv sales meeting in Paris in  
20 September '04 and one of the matters discussed is, "Raw  
21 material price increases". The Tribunal will recall  
22 that that is - that's one of the points that was  
23 discussed between the cartelists and the Commission  
24 cartels and it is item 4 here, "Raw material price  
25 increase".

1 THE CHAIRMAN: Sorry, which page are you on?

2 MR WEST: This is page 2 of tab 66.

3 THE CHAIRMAN: Okay, "Raw material price ...", yes.

4 MR WEST: "Talk to OEMs ..."

5 So that is the customers:

6 "... and bring this argumentation during price

7 negotiations."

8 Then the next one:

9 "Communicate/cooperate with TRW and Takata. More

10 information will follow ..."

11 So here we have a suggestion of cooperation with

12 competitors in relation to RMPs.

13 Then the next document in this the same tab consists

14 of a couple of emails {J1/66/3}. If one starts with

15 the first one starting, "Dear Veronica ..."

16 So Veronica is Ms Eriksson --

17 THE CHAIRMAN: We do not know which customer it is for this

18 document?

19 MR WEST: We will see that in a second.

20 THE CHAIRMAN: Okay. All right.

21 MR WEST: So "Dear Veronica" was Ms Eriksson, who we saw in

22 the organogram was second top, and this email is from

23 "Franz X". That is Franz Xaver Weiss.

24 THE CHAIRMAN: Sorry, which tab are you at now?

25 MR WEST: Sorry. Tab 66.

1 THE CHAIRMAN: You are still at tab 66?

2 MR WEST: Yes, the next page.

3 THE CHAIRMAN: So it is the next page. Yes, I am with you.

4 MR WEST: So this email is someone who signs himself "Franz  
5 X". That is Mr Weiss. We can see that at the top,  
6 because his name was Franz Xaver Weiss. So he was the  
7 head of Autoliv's Volkswagen business unit and listed in  
8 the Commission RFI as party to cartel contacts, and he  
9 says:

10 "As already mentioned during the Sales Meeting in  
11 Paris we will try our best and use your and Halvar's  
12 argumentation to find more money for Autoliv.

13 "Some things to remember."

14 Then jumping to the fourth indent there:

15 "We have to team up with our competitors or at least  
16 use the same argument, (who is speaking to whom?)."

17 So he is suggesting teaming up with competitors in  
18 relation to raw material price increases.

19 We then see Veronica Eriksson sending an email, and  
20 the distribution list is at the top and those are all of  
21 the account managers for all of the OEMs. So we see,  
22 for example, Mr Blanchford on the list, who was for  
23 the General Motors account. Mr Rivière is listed.  
24 Well, this is 2004, so he was not yet on the PSA  
25 account, but these -- it is essentially being sent to

1 all of the account managers. We see also, about six  
2 lines down in the middle, Mr Westerberg, the CEO.

3 Ms Eriksson says:

4 "Further to the mail sent earlier regarding  
5 the reality of increasing raw material prices.  
6 Halvar Jonzon attached his comments to the numbers on  
7 the [overhead] slides shown by Lars at the sales-meeting  
8 in Paris. Please review and give us your feedback."

9 There are then two or three further emails I would  
10 like to take you to which continue this process  
11 of enquiring with competitors about raw material price.

12 THE CHAIRMAN: So what are you getting out of this document?

13 MR WEST: What happens is that the various account managers  
14 are then sent off to go off and find out what they can  
15 from their competitors about their position in relation  
16 to raw material price increases, as we will see in  
17 further emails. But this is the start of the process.

18 THE CHAIRMAN: Okay.

19 MR WEST: The next document in this series is at tab 123  
20 {J1/123/1}. Starting at the bottom of this, this is  
21 another email from Ms Eriksson to the account managers.

22 "Gentlemen,

23 "We have realised that it's not very easy to get our  
24 customers ..."

25 THE CHAIRMAN: Sorry.

1 MR WEST: It is at the bottom of page 1, tab 123.

2 "... discuss our 'compensation' for the increasing  
3 Steel-prices.

4 "To be able to discuss further actions from Autoliv  
5 it would be useful if you could share what you know  
6 regarding our competitors success in terms of getting  
7 compensated."

8 So they are sent off to find out -- these are  
9 the account managers for the various OEMs sent off to  
10 find out what the competitors have managed to achieve in  
11 relation to raw material price increases.

12 The first response here, further up on the same  
13 document, from Mr Kohl, Jean-Marc Kohl. He says:

14 "Veronica.

15 "We have the information that TRW would have  
16 required to Renault and PSA a price increase ..."

17 Then he sets out what TRW have been seeking in terms  
18 of price increases, and then says:

19 "On our side, we have started to give price  
20 breakdown for still price increase.

21 "That is under discussion with the customer.

22 "Best regards.

23 "Jean Marc.

24 "Note: the information about TRW is strictly  
25 confidential."

1           So this is an example of these exchanges being  
2           regarded as confidential, although no one appears to  
3           have thought them to be improper.

4       THE CHAIRMAN: But we do not know -- from this, we do not  
5           know if they are getting this information from TRW.

6       MR WEST: It does not -- this specific one does not say. We  
7           have seen that some of the other emails we looked at  
8           said, "We got the information from ...".

9       THE CHAIRMAN: I am certain some of the others do, yes,  
10          sure, but this one --

11       MR WEST: One wonders where else they could have got it  
12          from.

13       THE CHAIRMAN: Well, it could have come from the customer.

14       MR WEST: There are then responses from the various other  
15          account handlers. Just to go through those briefly,  
16          31 {J1/31/1} --

17       THE CHAIRMAN: Just give me a second.

18       MR WEST: -- is from Mr Rauch for BMW. He says:

19                 "Also TRW ..."

20       THE CHAIRMAN: Can you just give me a second.

21                 (Pause).

22                 I'm sorry, yes. Where next?

23       MR WEST: So this is tab 31. This is the response, again,  
24          to the same enquiry about competitors,  
25          "Subject: competitor survey". This one is to do with

1 BMW and about four lines down:  
2 "... TRW and Takata will get compensation ..."  
3 He refers to there.  
4 Volkswagen is tab 55 {J1/55/1}, and this is, again,  
5 Mr Franz X Weiss, and he starts by saying:  
6 "In November Lars and myself met with Mr Kunze from  
7 TRW on a VW-Congress."  
8 Not, perhaps, surprising, because we know that  
9 Autoliv was in a cartel against BMW.  
10 THE CHAIRMAN: Sorry, I think I am on the wrong bundle  
11 again. Which tab, did you say?  
12 MR WEST: This is tab 55.  
13 THE CHAIRMAN: Oh, sorry, I heard 35. Sorry.  
14 MR WEST: So here at least we know where they are getting it  
15 from. At the bottom, he says:  
16 "No news so far from Takata.  
17 "More details will follow."  
18 Then the Daimler one is at tab 32 {J1/32/1} from  
19 Mr Peter Koppe setting out:  
20 "Please find TRW's and Takata's position per region  
21 and competitor."  
22 One sees on this document, at the bottom, "Annex  
23 Daimler 2", so this is another one of those documents  
24 which appears to have been provided to the Commission by  
25 Autoliv as an annex to something, here concerning

1 actions towards Daimler, which is a different OEM.

2 Ford, finally, is 124.

3 THE CHAIRMAN: 124?

4 MR WEST: Tab 124 {J1/124/1}. This is again from Mr Koppe.

5 Second line down:

6 "With respect to Ford TRW got massive in the US and  
7 is addressing the issue in EU as well. In the US they  
8 ask for average 3% which is in line with our request for  
9 roughly 3-3.5% on [airbags] and ... [seatbelts]."

10 So what we say is that this episode shows that  
11 the suggestion of exchanging information with  
12 competitors about RMPIS is not limited to the named  
13 OEMs, in fact it is circulated to all of the account  
14 handlers and the major account handlers respond  
15 individually, again copying in each other and  
16 the chairman or the company, or the CEO, Mr Westerberg,  
17 and nobody appears to query whether this is something  
18 they should be doing, which is perhaps understandable  
19 given that it clearly had the buy-in of the senior  
20 management.

21 Moving on from that episode, the next document is  
22 tab {J1/44/1}, which is to do with a supplier called  
23 Kendrion, you may recall from our skeleton argument.

24 THE CHAIRMAN: Yes.

25 MR WEST: This is another email from Mr Schönborn. We can



1 see it is sent to Mr Aigner -- so these are familiar  
2 names -- and Mr Blanchford, and it concerns, as he says,  
3 a discussion with Kendrion, so that is a different  
4 supplier:

5 "They have to move production ..."

6 This is about the third paragraph down:

7 "... for their Height Adjuster ... Business from  
8 Spain to Germany.

9 "WWP ..."

10 So that is the Fiat General Motors worldwide  
11 purchasing alliance:

12 "... is giving them a very hard time regarding this  
13 relocation."

14 And so on.

15 "[They] asked Kendrion to present a business case to  
16 take over Autoliv's complete Height Adjuster business in  
17 Europe. Kendrion refused to do so furthermore they did  
18 not participate in the global GM Height Adjuster  
19 workshop."

20 So Kendrion was given the opportunity to quote for  
21 Autoliv business and refused. Then we see the quid pro  
22 quo later on, two paragraphs further down:

23 "Kendrion now want to relocate with Opel approval,  
24 increase the sales price up to Autoliv price level,  
25 claim 2 million Euro steel price increase.

1           "They wanted to check with our side if we would go  
2           for their business if they would put WWP under pressure.

3           "The indication I gave was NO!"

4           So this is another example of one of these  
5           agreements whereby each supplier agrees not to compete  
6           for business currently allocated to the other.

7           THE CHAIRMAN: Right, so what do we -- okay. I mean, it is  
8           just helpful to understand sometimes why you are relying  
9           on those documents. We understand there is no dispute  
10          between the parties that there has been cartel  
11          activity --

12          MR WEST: (Overspeaking) --

13          THE CHAIRMAN: -- and the question we are concerned with is  
14          whether there is cartel activity as against the  
15          Defendants -- sorry, as against the Claimants.

16          MR WEST: But this is Opel. This is against Opel, this  
17          example.

18          THE CHAIRMAN: Yes.

19          MR WEST: So all of the documents I have been showing you so  
20          far --

21          THE CHAIRMAN: But it is a discussion with Kendrion.

22          MR WEST: It is a discussion with Kendrion, yes, but we say  
23          it shows, again, the apparent willingness of -- in this  
24          case it is Autoliv to engage in cartel conduct against  
25          the Claimants, and it is very similar, we say, in

1 the contents, the nature of the agreement, to  
2 the Brazilian material we looked at before where  
3 the customer said they tried to play the suppliers off  
4 against each other and the suppliers get together and  
5 agree not to allow then them to do that.

6 THE CHAIRMAN: Yes.

7 MR WEST: We see again at the bottom the annotation of  
8 the Opel annex.

9 Then very briefly {J1/48/1}. This is an email about  
10 a telephone call and it is Mr Aigner and Mr Mueller  
11 again from Autoliv and TRW, and Mr Mueller says:

12 "I just received your message ...

13 "Have a good start to 2006 ... hope everyone is  
14 healthy and active ...

15 "We should talk again; let's talk on the phone in  
16 the evening ..."

17 Mr Aigner says:

18 "I'll call you this evening."

19 So, again, here we have the representatives of  
20 Autoliv and of TRW agreeing to have a telephone  
21 discussion without explaining what it is they are going  
22 to be discussing. Again, the annotation at the bottom.

23 The next document, I am afraid, is not in  
24 the core bundle yet. It is {J1/118/1}, so that will  
25 have to be -- we will have to look at that on

1           the screen. Again, it is multiple emails, but if one  
2           starts with the second one --

3           THE CHAIRMAN: You will update the bundles?

4           MR WEST: I will, yes.

5           So:

6           "Dear all.

7           "Lars is presently at ATC visiting Mike Ward ..."

8           He is another Autoliv person:

9           "... and today they will have discussions regarding  
10          low pricing."

11          "Franz ..."

12          So that's Mr Weiss:

13          "[Lars Westerberg] would like to have your  
14          calculations for the airbag for the new Golf and also  
15          the offer from our worst competitor who we think is  
16          TRW."

17          Apparently a request for what Mr Weiss knows about  
18          the competitor's offer for this particular sourcing.  
19          That is that's a Ford sourcing.

20          Then next we see Christophe -- that is Mr Rivière:

21          "[Lars Westerberg] needs your calculations regarding  
22          Peugeot 207."

23          So he also is seeking information on a Peugeot  
24          vehicle.

25          Then if one looks at Mr Weiss' response:

1 "Good evening Lars.

2 "I don't know if the meeting with T.. is still  
3 ongoing."

4 We think that "T .." is TRW:

5 "... maybe you could agree that we don't attack  
6 existing business. They try to take our Skoda Oktavia  
7 [inflator cushion]!!

8 "[Best regards] Franz."

9 So Mr Weiss seems to think that in fact this meeting  
10 for which this information is being sought is not  
11 a meeting with Mr Ward on his own and Mr Westerberg, it  
12 is a meeting with the competitor, and that is why he is  
13 suggesting that he say to the competitor that they  
14 should not attack existing business, and that is, again,  
15 the same theme of not attacking existing business that  
16 we have seen in several other documents.

17 We are now at, I believe, January 2006. So the next  
18 development in the chronology is that Autoliv's  
19 participation in the Commission cartels begins in  
20 MArch 2006, just to orient ourselves. In 2007, on  
21 the chronology, you will see the various meetings  
22 referred to with Mr Carlson, and we looked at those  
23 earlier out of chronological order, so I will not go  
24 back to those.

25 There is another document in 2007 which we rely on

1 on the question of secrecy and evidence. This is  
2 actually tab 1 of the bundle {J1/1/1}. The first email  
3 here is from Mr Junto Shirai of Autoliv, sent to various  
4 other Autoliv individuals, and he refers there to:

5 "I met with TK ..."

6 That is Takata:

7 "... [redacted] ..."

8 So he is reporting back on a discussion with Takata.  
9 I should say, this email is not concerned with the  
10 Claimants specifically, so we are relying on this more  
11 for the question of secrecy.

12 So he sets out here discussions he has had with  
13 Takata, but what we rely on is the response, over  
14 the page {J/1/2}, from Mr Matsunaga, also of Autoliv, to  
15 Mr Shirai. It is rather difficult to read, but he says:

16 "Mr Shirai,

17 "You must not type this kind of information. It  
18 will leave evidence. Please inform me verbally in  
19 the future."

20 So specific instructions within Autoliv: do not  
21 write things like this down.

22 Mr Shirai is duly chastened, as we see on page 4  
23 {J/1/4}:

24 "Mr Matsunaga,

25 "I understand and I will make sure this will never

1           happen again."

2           So we say evidence specifically of instructions  
3           being given: do not write things down when you have  
4           discussions with competitors. Unlike [redacted], that  
5           we saw earlier, he is not objecting to the discussions,  
6           he is objecting to them being written down.

7           Then the next incident concerns the tender to supply  
8           OSS products to what was called "phase 2" of  
9           the B0 Project. B0 referred to vehicles produced by  
10          a joint venture between Autoliv and Toyota, and phase 2  
11          -- the phase 2 tender originally started in early 2009,  
12          so within the cartel period, and we point to evidence  
13          that the parties sought to cartelise the supplies to  
14          phase 2, and because PSA was a party to that, that,  
15          again, shows the cartel conduct extending to PSA.

16          If we start at tab {J1/5/1}, there are a handful of  
17          documents relating to this. {J1/5/2} of tab 5. This is  
18          a Toyoda Gosei email, which the Tribunal I think looked  
19          at at an earlier CMC in this case, but one sees, from  
20          Mr Obara, subject, "Next term B0 seatbelt", and then  
21          about two lines down:

22                 "Confidential matters included/Forwarding  
23                 Prohibited: Please leave [save] the attachment as  
24                 necessary and delete this message after confirming this  
25                 email."

1           So more instructions to delete evidence in this case  
2           within Tokai Rika.

3           If one then goes down to the second last paragraph:

4           "Next B0 for all seats ..."

5           Which presumably means seatbelts:

6           "... will be the commercial right that we can never  
7           give away."

8           The Tribunal will recall that language of  
9           "commercial right" from the OSS 1 decision:

10          "Regarding B0, [we] have been discussing with  
11          competitors ..."

12          This is a translation, hence the square brackets, it  
13          was originally in Japanese:

14          "... since ... the time of Yaris compe[tition], and  
15          tentatively ... [we] are intending to move [to] the  
16          following allocations."

17          "AL" is presumably Autoliv:

18          "Next term Yaris: none ..."

19          Then one sees further on:

20          "Next term B0: All seats TR."

21          That is, we assume, Toka Rika.

22          So that here is an allocation of the OSS supplies to  
23          B0 in which PSA was a party.

24          THE CHAIRMAN: So -- okay.

25          MR WEST: A bit further on {J1/5/3}:



1            "... [I] heard something ..." --

2        THE CHAIRMAN: Just explain PSA's relationship to B0 again?

3        MR WEST: B0 was a -- referred to the vehicles produced by  
4            a joint venture which was a 50% joint venture, 50:50  
5            between PSA and Toyota.

6        THE CHAIRMAN: It was 50:50, okay.

7        MR WEST: Just finishing off this email:

8            "... [I] heard something that the person in charge  
9            of PSA and AL has an authority ..." --

10       THE CHAIRMAN: It had its own corporate identity?

11       MR WEST: I have to check the answer to that.

12       THE CHAIRMAN: Okay.

13       MR WEST: But the -- as I understand, the sales/purchases  
14            made by the joint venture were invoiced back-to-back to  
15            PSA in France, so effectively the price was paid by  
16            French claimants and entities.

17       THE CHAIRMAN: All of it, or 50% of it?

18       MR WEST: Well, the 50% share, presumably, for ...

19       THE CHAIRMAN: Yes.

20       MR WEST: Yes.

21            Okay, just finishing on this. The second last  
22            sentence on -- or paragraph on page {J1/5/3}:

23            "Nevertheless, [I] heard something that the person  
24            in charge of PSA in AL ..."

25            That is Autoliv:

1            "... has an authority of [final] decision on B0, so  
2 careful discussions will be held for several times  
3 behind the scene again."

4            So it looks like -- this is phase 2, it looks like  
5 it also applied to phase 1.

6            There are also documents relating to B0 which  
7 suggest that cartelised prices, in particular the prices  
8 of products sold to Toyota, which was one of the named  
9 OEMs, were used as a benchmark for the pricing to B0,  
10 which of course included PSA. We get that from tab  
11 {J1/15/1}. This is not terribly easy to read, but the  
12 email at the bottom:

13            "The three companies met today.

14            "TKP's price for [steering wheel driver airbag] ..."

15 THE CHAIRMAN: Sorry, I do not know where you are reading?

16 MR WEST: Sorry, it is not very easy to read.

17 THE CHAIRMAN: I can read it, but the third paragraph down?

18 MR WEST: So it is just below the line, so the second email  
19 on this page.

20 THE CHAIRMAN: Yes. (Inaudible). I have got it now, yes.

21 MR WEST: "The other companies said that ..."

22            Sorry:

23            "... [the] price for the [steering wheel driver  
24 airbag] for the next Yaris ..."

25            That is a Toyota model:

1           "The other companies said that the price would  
2           destroy the market price, and ... become the standard  
3           price for the next B0 and next Corolla."

4           So they seem to be saying that Takata's price to  
5           Toyota --

6           THE CHAIRMAN: Sorry, just assist me with who this is from  
7           and to.

8           MR WEST: Sorry, so this is -- it is clearly from one of  
9           the cartelists, Mr -- I am not sure we can identify  
10          which specific company that is.

11          I will have to see if I can answer that question.

12          But the point is that in this email it is suggested  
13          that the price for this particular component being sold  
14          by Takata for the Yaris, so that is a cartelised supply,  
15          would become the standard price for the next B0. So we  
16          say that is a mechanism as to how, even if one does not  
17          accept that the B0 prices were themselves cartelised,  
18          the cartel prices charged to Toyota in this case come to  
19          affect the prices of the B0 components because --

20          THE CHAIRMAN: I am sorry, you will have to take that more  
21          slowly. It is just it is difficult to read. Just take  
22          me through this more slowly.

23          MR WEST: So:

24          "[Takata-Petri]'s price for the [steering wheel  
25          driver airbags] for the next Yaris was discussed.

1           "The other companies said that the price would  
2           destroy the market price ..." --

3           THE CHAIRMAN: Just take it a bit more slowly, Mr West.

4           Where are you reading at the moment? Are you on page --

5           MR WEST: So this is under the line, the second email on  
6           the page.

7           THE CHAIRMAN: "The three companies met today."

8           MR WEST: Yes.

9           Then the next line:

10          "TKP ..."

11          This is Takata-Petri we assume:

12          "[Their] price for the STW (DAB) ..."

13          We think that must be steering wheel driver airbag:

14          "... for the next Yaris ..."

15          That is a Toyota model.

16          THE CHAIRMAN: Yes.

17          MR WEST: "The other companies said that the price would  
18               destroy the market price, and ... become the standard  
19               market price for the next B0 and next Corolla."

20               So they are saying the price offered by Takata for  
21               this Yaris, which is a Toyota supply, so cartelised,  
22               would become the standard price for the B0, which is  
23               the joint venture in which PSA was a party. So we say  
24               that is a mechanism by which the cartel prices would  
25               come to become a benchmark for prices charged to the

1 Claimants.

2 THE CHAIRMAN: Sorry, a benchmark ...?

3 MR WEST: For prices charged to the Claimants, so in this  
4 case the joint venture to which PSA was a party.

5 THE CHAIRMAN: Right, but they are both Toyota companies.

6 MR WEST: B0 is the joint venture.

7 THE CHAIRMAN: Yes, but with Toyota.

8 MR WEST: With Toyota, yes.

9 THE CHAIRMAN: So that is not evidence of a mechanism of  
10 customer to customer becoming -- at least not without  
11 further explanation. I think that is saying that  
12 a price charged to Toyota might set a benchmark for  
13 a price charged to Toyota in partnership with PSA. That  
14 is what you are saying.

15 MR WEST: Yes, that is the point, in short.

16 So as I said, the defence, in summary, is: yes,  
17 there was cartelisation but it was strictly limited to  
18 the named OEMs and went no further. That is what a lot  
19 of this evidence I am showing you is --

20 THE CHAIRMAN: Has that been said?

21 MR WEST: That is the pleaded defence, that the cartelised  
22 conduct in the OSS decisions is admitted, but it is  
23 denied that it went any further. That is the defence as  
24 I understand it, that we are now facing.

25 THE CHAIRMAN: Right, you need to remind me of at that some

1 point. I am not disagreeing, I just need to have that  
2 in mind.

3 MR WEST: So, here, we say, well, this shows it does go  
4 further.

5 There are various other documents referring to B0,  
6 but in light of the discussion we have had I don't need  
7 to take you to in my oral opening.

8 The next document is as {J1/6/39}. Sorry, that is  
9 another email -- that is another one on B0. Sorry,  
10 I will look at something else.

11 THE CHAIRMAN: So I am in tab 6?

12 MR WEST: Yes, sorry, I am going to move on from B0.

13 Could we look at {J1/689/1}.

14 THE CHAIRMAN: Sorry, tab?

15 MR WEST: 689.

16 THE CHAIRMAN: 689. It is the other bundle.

17 MR WEST: Now, we see here, because the document has this  
18 cover page, this shows that it was seized as part of  
19 the dawn raids at TRW and it looks like it was  
20 Aschaffenburg. The document itself, over the page  
21 {J1/689/2}, is a handwritten note. It may be in German.  
22 There is a translation on the next tab {J1/690/1}. It  
23 is obviously a short document, but the point is that  
24 these -- this document appears to be -- this is an  
25 internal handwritten note seized from TRW's offices

1           which appears to set out a list of Takata steering wheel  
2           prices, "Takata - SW", then there is a list of prices,  
3           Mini, Auris, Alfa, Mazda and Fiat, and of those Alfa and  
4           Fiat are claimant brands, Alfa Romeo and Fiat. There is  
5           also reference to Auto -- an Autoliv price in the top  
6           right --

7           THE CHAIRMAN: Can you just remind me, Alfa is GM as well,  
8           is it?

9           MR WEST: Alfa is part of Fiat, Alfa Romeo.

10                  So on its face this appears to suggest that Autoliv  
11           is in possession of Takata steering wheel prices.  
12           No one has come along to explain the document, so there  
13           is only so much one can say about it. As I say, also  
14           reference to an Autoliv price.

15           THE CHAIRMAN: This is a TRW document, is it not?

16           MR WEST: Yes.

17                  Then going back to Autoliv, tab {J1/50/1} concerns  
18           something called the A9 that we may be hearing more  
19           about. So the A9 was a specific Peugeot vehicle. It  
20           was the Peugeot 208 specifically.

21           THE CHAIRMAN: Sorry, tab 50?

22           MR WEST: Tab 50. So this is --

23           THE CHAIRMAN: Translation at {J1/51/1}?

24           MR WEST: Yes, translation at 51.

25                  We see this is from Ms Chassery to Mr Rivière and

1 others:

2 "A9 - from Takata's perspective."

3 So she says:

4 "I've spoken with [Mr] Bastien [of Takata] this  
5 afternoon ... and mentioned the A9 to him.

6 "He told me that Takata had not been overzealous  
7 this time, that they had responded but did not hit as  
8 hard as on B7 ..."

9 Which was the Citroën C4:

10 "He thinks that the A9 is for Autoliv."

11 THE CHAIRMAN: Sorry, B7 is?

12 MR WEST: That is the Citroën C4, as we can now see in  
13 the glossary which has been agreed.

14 THE CHAIRMAN: C4, okay. The A9 is?

15 MR WEST: The A9 is the Peugeot 208, and we see again at  
16 the bottom that this is an annex, but this time a PSA  
17 annex, so obviously there was a specific PSA annex as  
18 well.

19 THE CHAIRMAN: Sorry, this is -- I am just trying to work  
20 out who this is for. This is Autoliv --

21 MR WEST: So this appears to be Autoliv and Takata  
22 discussing an ongoing tender, the A9 tender, and Takata  
23 saying it had not been overzealous with the bidding.

24 THE CHAIRMAN: So it's an internal Autoliv?

25 MR WEST: Yes, but referring to discussions with Takata.



1 THE CHAIRMAN: Yes.

2 MR WEST: The question arises why Takata might not have been  
3 overzealous. Of course, we don't know, because none of  
4 these people have chosen to appear.

5 What we do know, because Mr Corbut, Autoliv's PSA  
6 witness, tells us, at paragraph 28 {C/1/9}, that Autoliv  
7 was the incumbent supplier on this platform. So the A9  
8 was replacing the preceding platform, the A7, on which  
9 Autoliv was the incumbent supplier, and so we say that  
10 appears to explain why Takata had not been overzealous  
11 with their bidding and is in accordance with  
12 the principle of status quo, or incumbency, whatever one  
13 might wish to call it. We see again Mr Rivière's  
14 name --

15 THE CHAIRMAN: Sorry, the evidence reference you just gave  
16 me for that, could you repeat it, please?

17 MR WEST: Mr Corbut, paragraph 28. Fabrice Corbut.

18 THE CHAIRMAN: Yes.

19 MR WEST: Again, Mr Rivière could well be able to assist  
20 with this, but he is sitting in Autoliv's offices and  
21 not in this room.

22 Then the next document is at {J1/799/1}. This is  
23 a translation of an email from a Mr Herzinger of Takata  
24 to Mr Fauser, TRW, and these were both individuals named  
25 in the Commission's RFI, as we saw, in relation to

1 the BMW cartel. But we see here that Mr Herzinger's set  
2 out a table he seems to be asking Mr Fauser to complete,  
3 "Who supplies what ...", and we have various types of  
4 OSS component across the top and then all of the OEMs  
5 down the side, including Fiat, Alfa, Opel, Peugeot, and  
6 the Commission's RFI on BMW refers to meetings between  
7 these individuals at around the date of this email and  
8 also with Mr Rauch from Autoliv, so tripartite meetings.

9 Another category of documents we rely on, again, in  
10 opposition to the suggestion that the cartel conduct was  
11 limited to the named OEMs, if indeed that is the case  
12 put, as I understand it to be, is we also have evidence  
13 of cartelisation against other OEMs who are not either  
14 named OEMs or claimants, and I will not take long on  
15 this, but if I can just show you a very small number of  
16 documents.

17 Tab {J1/36/1}. So this is an email, again, within  
18 Autoliv concerning Ford business. If one looks, again,  
19 just after halfway down, Mr Timo Rau to  
20 Mr Stefan Kroenung:

21 "Attached is the Autoliv vs competitor quotes.  
22 I added the latest TRW prices in blue ... KSS in my  
23 opinion is not a problem ...

24 "Do not send the file to Mark or Gustaf."

25 THE CHAIRMAN: Sorry, I am lost again. I am on the wrong

1 page. Which page?

2 MR WEST: 36, page 1, halfway down.

3 THE CHAIRMAN: Yes, okay.

4 MR WEST: So, not sure why Mark or Gustaf are being kept out  
5 of the loop.

6 But one sees then, over the page {J1/36/3}, page 3  
7 of the tab, one sees here a table of prices, and if you  
8 look down the left-hand side, there are various types of  
9 OSS, so "PAB", passenger air bag, "SAB", side airbag,  
10 "IC", inflator cushion, "Front Belts", driver air bag,  
11 "Steering Wheel", rear belts 2 and 3.

12 Then the next column is the brand. So we have  
13 "FoE", that is Ford of Europe. "PAG" was the Premier  
14 Auto Group. That was a division of Ford which owned  
15 Jaguar and Land Rover. Then "JAG" -- Jaguar -- "US".  
16 "VCC" is Volvo, Volvo Car Company US, and one has  
17 the same OEMs, or brands, continuing down the list for  
18 the various types of OSS.

19 One then has volumes in thousands of pieces.

20 Then at the top, "Autoliv", TRW, Takata, and "K" is  
21 KSS. One sees here the prices, obviously, for Autoliv,  
22 as this is an Autoliv document, but also to the nearest  
23 cent, so it appears, for various of these types of OSS  
24 for Takata and TRW and in some cases KSS as well.

25 THE CHAIRMAN: Right, okay, understood.

1 MR WEST: So Mr Rau appears to be in possession of  
2 the competitors' pricing in this level of detail for  
3 these various components.

4 And then we see again reference to confidentiality  
5 in the next tab. {J1/37/1}. So this refers to the same  
6 exchange, but at tab 37, just by the first hole punch:

7 "Do not spread out the competitor information, this  
8 is highly confidential."

9 One more example of this, this time concerning  
10 Volvo, is at {J1/38/1}. Starting again from the bottom,  
11 we have an email from a Gustaf Celsing referring to  
12 pricing:

13 "Previous price ..."

14 I am not sure what all of this means, but he says in  
15 the second line:

16 "... ref to trw price is as ref ..."

17 So he is referring there to TRW prices.

18 And then the next email up from Mr Lars Westerberg,  
19 who we are familiar with:

20 "We need to put a high priority on margins -- try to  
21 avoid price wars!!!"

22 And Mr Celsing's response to that, four lines down:

23 "Stefan ..."

24 That is Mr Kroenung:

25 "... opened contact with t sales man so we have

1 matching prices +1000 m€, we hope they're fair?????"

2 So here again "t", we have --

3 THE CHAIRMAN: Sorry, I have lost.

4 MR WEST: So just by the first hole punch, the line

5 beginning:

6 "Stefan opened contact with t sales man ..."

7 So that must be TRW. There is a reference, as

8 I showed you at the bottom, to "ref to TRW prices" and

9 TRW again being referred to as "t":

10 "Stefan opened contact with [their] sales man so we

11 have matching prices ..."

12 So this is for a Volvo RFQ, Volvo again not being

13 one of the named OEMs.

14 THE CHAIRMAN: Sorry, it is the matching prices ... oh, yes,

15 I have got it. Yes, sorry.

16 MR WEST: So they are matching prices with TRW. Again,

17 Mr Westerberg --

18 THE CHAIRMAN: This is Stefan from ...?

19 MR WEST: From Autoliv. So he was part of the Ford business

20 unit. Volvo was part of Ford at the time.

21 THE CHAIRMAN: What does:

22 "We need to put high priority on margins -- try to

23 avoid ..."

24 Are there two ...? I see.

25 MR WEST: We see how they avoid a price war by declaring

1 a truce.

2 THE CHAIRMAN: Yes, all right, understood.

3 MR WEST: Tab {J1/693/1} hopefully. Sorry, this one, again  
4 is not yet in the bundle, so we will add that. I am  
5 afraid we will have to look at that electronically, but  
6 it is only one page. This is about supplies to Daimler,  
7 another non-named OEM, and about three-quarters of  
8 the way --

9 THE CHAIRMAN: Who was Daimler owned by?

10 MR WEST: It has changed over time.

11 THE CHAIRMAN: It has.

12 MR WEST: I am told that they were Mercedes. I am told.

13 THE CHAIRMAN: Right.

14 MR WEST: If one goes down under the words "Situation  
15 Analysis", just under halfway. There is a number 1 and  
16 then, about ten lines down, one sees:

17 "This would then lead us ..."

18 So he is discussing this sourcing to Daimler:

19 "... with the products, currently being launched at  
20 Daimler ..."

21 There we get the reference to Daimler:

22 "... for M & S-Class ..."

23 That looks like it is Mercedes:

24 "... to a €55 level, which is in line with the  
25 combined high volume REMA pricing."

1           Again, the specifics do not necessarily matter:

2           "From recent customer discussion we know that  
3 Autoliv is quoting in the neighbourhood of €50,0 and  
4 further spec alignment discussions towards carry over of  
5 existing E & C-Class ..."

6           So this is a TRW email and he says recent customer  
7 discussions we know that Autoliv is quoting €50. We  
8 then have the response from Mr Hauser, who is a seatbelt  
9 guy, at TRW to Ruediger. He says:

10           "Autoliv is in range of 53-54 ..."

11           So not 50:

12           "... per unit -- the customer will never tell you  
13 the truth."

14           So do not believe what the customer told you about  
15 our rival's pricing.

16           Then goes on:

17           "We should stop to panic and talk to our  
18 competitor."

19           So again, the suggestion of how to solve the problem  
20 is by discussions with the competitor, this time in  
21 relation to Daimler.

22           And then something else slightly different, tab  
23 {J1/708/1}.

24 THE CHAIRMAN: I am looking at the time, Mr West,

25 I appreciate you lost a little period. How are you

1           doing generally? Do you need an extra few minutes now  
2           to ... or are you saying --

3           MR WEST: If I have five minutes now I can get to the end of  
4           my documents on the direct case.

5           THE CHAIRMAN: Yes.

6           MR WEST: Yes.

7                         So this {J1/708/1}, if we go over to the second page  
8           of 708 {J1/708/2}, you can see an email from someone  
9           called Thierry Metais -- I think that is how you  
10          pronounce that -- so this is a TRW email and it relates  
11          to prices of supplies to PSA. You will see he says:

12                        "We have obtained PSA Purchasing an approval for 50%  
13          of Metal Change index for Rare Earth increases."

14                        So they have asked for an increase because cost of  
15          rare earth metals has gone up. They have offered 50%:

16                        "We have refused, requesting 100%."

17                        You will see he then says they have used various  
18          arguments, they have asked for invoices, "We have  
19          refused." Then, about three-quarters of the way down,  
20          he says:

21                        "I try to manage other Steering suppliers to refuse  
22          50% on Rare Earth."

23                        So, they are refusing to accept 50% compensation for  
24          the increase in prices and he is going to speak to  
25          the other suppliers to get them to refuse 50% as well.



1           Now, we have been told by TRW, and it appears to be  
2           correct, that rare earth metals are components in  
3           magnets which are used in steering systems, not steering  
4           wheels, so it appears to be correct that this is not  
5           evidence of cartelisation concerning steering wheels  
6           specifically, but it appears instead to be cartelisation  
7           of other components, yet other components purchased by  
8           the Claimants from these defendants. We see Mr Metais'  
9           email goes to Mr Peter Lake, whose name we have seen  
10          before.

11          Then, finally, something similar at {J1/709/1},  
12          which, again, is not yet in the hard copy bundle.  
13          Tab 709. If one goes over the page {J1/709/2}, it is  
14          again Mr Lake, the email in the middle. Perhaps you  
15          have to start right at the bottom. So from Mr Laguette.  
16          He refers to discussing with Valeo today, and he talks  
17          about signing an agreement --

18          THE CHAIRMAN: Sorry, he is from where? Sorry.

19          MR WEST: So this is again TRW and this is about supplies to  
20          Renault-Nissan, so Renault had joined with Nissan by  
21          this date, and Mr Lake is requesting on -- making  
22          a request about Valeo's status on supplies to Renault:

23                 "... and what about Bosch, CT etc ..."

24          Now, just to explain, those were competitors of TRW  
25          in relation to electronic power steering components and

1 we get that from {J1/709/1} of this document, if we look  
2 at the top:

3 "Dear all,

4 "A few updates regarding or G24 negotiation with  
5 Renault.

6 "EPS warranty oncost calculation."

7 So this is about warranty costs for electronic  
8 steering components. But what one sees again is that  
9 Mr Gonzales, this is, sets out the "Situation at  
10 the competitors (feedback)" and he goes on to give  
11 details on the position at Delphi, Bosch, Siemens and  
12 then compares it with TRW. So again, this is not OSS  
13 components, this is EPS components, so it appears that  
14 this is yet another cartel against the Claimants in  
15 relation to a different car component supplied by these  
16 defendants.

17 That takes me to all I was going to say on  
18 the direct case, so I will move on to some documents on  
19 indirect after the break.

20 THE CHAIRMAN: How are we doing for timing?

21 MR WEST: I think I will finish certainly by the end of  
22 the day.

23 THE CHAIRMAN: Thank you, I am grateful.

24 (1.11 pm)

25 (The short adjournment)

1 (2.02)

2 THE CHAIRMAN: Mr West, we mentioned you were going to, at  
3 some point, do a note on who everyone is in all these  
4 emails, or the ones you feel we need to focus on.

5 MR WEST: Yes.

6 THE CHAIRMAN: If we could get that possibly overnight.

7 I do not know if that is too much of a chore to do  
8 overnight, but if possible, it would be very helpful.

9 MR WEST: So I was moving on now to the indirect effects  
10 case, and as the Tribunal knows, it is my case, based on  
11 the economic evidence, that the Claimants paid more for  
12 OSS components purchased on contracts concluded during  
13 the period to which the evidence we have been looking at  
14 relates, i.e. broadly 2002 to 2011, and if the Tribunal  
15 finds there was an overcharge, my primary case is that  
16 it is likely that it was caused by the cartel conduct  
17 against the Claimants that we have been looking at.

18 But if, for argument's sake, there were no cartel  
19 against the Claimants, we say the most likely  
20 explanation of there being higher prices in the market  
21 at the time is that that was caused by the cartel  
22 conduct which did take place against the named OEMs and  
23 the Commission decision, because these are, after all,  
24 the very same suppliers who are both supplying  
25 the named OEMs with occupant safety system components

1 and are also supplying the Claimants with the same  
2 components, and we say the likelihood is that the prices  
3 charged to the named OEMs fed into the prices charged to  
4 the Claimants. There are a number of mechanisms by  
5 which that could have happened, we have looked briefly  
6 at one, which is that cartel prices come back as  
7 a benchmark for prices to the Claimants. Another  
8 possibility is that if the Defendants were making  
9 inflated profits on cartelised business, it may have  
10 mattered less to them whether they won the Claimants'  
11 business and so they may have put less effort into  
12 the bids they submitted on the Claimants' business. Or  
13 elements of pricing on the sales to the named OEMs could  
14 have fed into pricing to the Claimants even though  
15 the products themselves were, to a greater or lesser  
16 extent --

17 THE CHAIRMAN: Are you going to go --

18 MR WEST: -- customised.

19 THE CHAIRMAN: -- go through these again? Is this an  
20 introduction or is that ...

21 MR WEST: I am going to show you a few documents which  
22 are --

23 THE CHAIRMAN: Could you just take those a bit more slowly  
24 and just go through them again, if you do not mind.

25 MR WEST: So the first suggested mechanism is that prices --

1 THE CHAIRMAN: Setting a benchmark was your first one.

2 MR WEST: -- benchmarking.

3 The second was that if the Defendants --

4 THE CHAIRMAN: You said we have seen that already. That was

5 the Toyota document.

6 MR WEST: That was a Toyota document.

7 THE CHAIRMAN: Just -- and so setting a benchmark means what

8 exactly?

9 MR WEST: Prices sold to the named OEMs, Toyota or BMW or

10 Volkswagen, are used as -- well, as a benchmark, as

11 setting the market price, which then feed into

12 the prices charged to the Claimants.

13 THE CHAIRMAN: But, I mean -- okay, well, that is at a very

14 high level of generality. These are, I think everyone

15 accepts, bespoke products, so how does the feeding in

16 work?

17 MR WEST: Well, they are bespoke to a greater or lesser

18 extent. We will see some documents later on, not as

19 part of the opening, which suggest that in some cases

20 the same products were reused. I think we cite them in

21 the skeleton argument, both in cartelised business and

22 in supplies to the Claimants.

23 THE CHAIRMAN: So the benchmark, is that a benchmark in

24 the customer's mind or the benchmark in the supplier's

25 mind?

1 MR WEST: I imagine the supplier's mind, largely.

2 THE CHAIRMAN: So if -- so just elaborate a little bit. If  
3 TRW have set a price due to cartel activity, set a price  
4 with Toyota which is higher than it might otherwise be  
5 because they have been given favourable circumstances in  
6 which to negotiate that contract, how then does that  
7 feed into another contract --

8 MR WEST: Well, if the price --

9 THE CHAIRMAN: -- supplied by somebody else?

10 MR WEST: Well, this would be supplied by the same people,  
11 so TRW also supply to the Claimants and the prices they  
12 use in one case are relied upon as a basis of the prices  
13 charged to the Claimants.

14 THE CHAIRMAN: So relied on in a sense internally? Are you  
15 saying they negotiate --

16 MR WEST: Internally -- it could be purely internally. On  
17 this theory we are saying there was not a cartel against  
18 the Claimants so we do not need to show that the process  
19 that led to this cartelised pricing being applied to the  
20 Claimants was part of the cartel. So it could be purely  
21 internally rather than by virtue of an agreement to that  
22 effect with the other defendants because that would be  
23 another cartel or the same cartel.

24 THE CHAIRMAN: Okay. That is the first one. Next one?

25 MR WEST: Or elements of pricing, for example, part of

1 the overall price may be the margin, the price may be  
2 determined by taking the costs and adding a margin, and  
3 if the same margins were applied to the cartelised,  
4 the non-cartelised business, that is another mechanism.

5 THE CHAIRMAN: That is still, on your first setting,  
6 a benchmark, that is another aspect of setting  
7 a benchmark, is it, or --

8 MR WEST: Well, I suppose that is the -- if the pricing --  
9 if the margin becomes a benchmark internally, so the --  
10 whichever supplier it is, Autoliv or TRW, is aware that  
11 it is making a margin on X on some sales, there may be  
12 an expectation it should be making a similar margin on  
13 sales to the Claimants.

14 THE CHAIRMAN: It seems to be another -- seems to be the --  
15 okay.

16 MR WEST: Similar.

17 THE CHAIRMAN: It seems to me all the same thing.

18 MR WEST: But it is not so affected by the bespoke nature of  
19 the products. If it is a percentage margin, it could  
20 apply irrespective of how bespoke the products are. Or  
21 discounts is another possibility. If a particular  
22 customer is getting a certain level of discounts.

23 THE CHAIRMAN: Another mechanism?

24 MR WEST: I think those are the main mechanisms we offer.

25 Of course, we do not know exactly. The question, we

1 think, is if -- or we submit: if the Tribunal finds an  
2 overcharge but is not prepared to find a direct cartel  
3 against the Claimants, is it likely that the overcharge  
4 resulted from an indirect mechanism? We say that is  
5 the only other logical possibility.

6 The Defendants' answer to this, insofar as they put  
7 forward one, is siloing. So they say that the pricing  
8 for any one OEM was siloed within the business unit  
9 dealing with sales to that OEM. So Volkswagen was  
10 separate from PSA, BMW was separate from Vauxhall, and  
11 so on.

12 THE CHAIRMAN: I mean, that is not their only point, is it?

13 They say you have not clearly articulated a mechanism.

14 MR WEST: That is a fair point, yes, but one of their  
15 points, should I say, is the siloing issue.

16 THE CHAIRMAN: Yes.

17 MR WEST: Unlike in the case of the direct cartel, we do  
18 have, as I mentioned earlier, some witnesses who will  
19 give evidence about siloing, so we will be looking at  
20 some of this material in cross-examination and that is  
21 why I propose to address it relatively briefly in  
22 opening.

23 THE CHAIRMAN: I mean, do we need to look at the documents  
24 in opening if they are going to be dealt with in cross  
25 or ...?



1 MR WEST: It is a matter for the Tribunal whether you would  
2 like to see any of these.

3 THE CHAIRMAN: I do not think we need to at the moment  
4 unless -- I do not want to take you out of your course,  
5 but I do not think we feel they are -- we can look at  
6 them during the cross-examination, unless they are  
7 particularly complicated and they need explaining at  
8 this stage.

9 MR WEST: Can I just show you one document and then move on?

10 THE CHAIRMAN: Certainly, yes.

11 MR WEST: Tab 234.

12 THE CHAIRMAN: We are in bundle J still?

13 MR WEST: Bundle J, yes. This may not be in  
14 the core bundle, I am sorry to say, yet.

15 THE CHAIRMAN: 2-3 -- yes, sorry.

16 MR WEST: Sorry, this is not in the core bundle yet  
17 {J1/234/1}.

18 We can see this is an email from Mr Rivière  
19 regarding "A9 update" and the A9 was the Peugeot 208  
20 which we saw earlier. So this is an update --

21 THE CHAIRMAN: Sorry, I have not got to it yet.

22 MR WEST: Under, "Subject: A9 update". So this is an update  
23 on Autoliv's negotiations with PSA in relation to  
24 the supply of OSS products for the A9 platform, and one  
25 sees Mr Rivière emailing Mr Carlson and Ms Eriksson, and

1 he says:

2 "You'll find below an updated status regarding A9  
3 RFQ.

4 "We have to send the 3rd round answer next Friday  
5 and I would like to discuss it with you before."

6 "I also copy the mail to Gunther ...", he says, and  
7 then he goes on to deal with the pricing in the previous  
8 offer for the "DAB+PAB", so driver airbag and passenger  
9 airbag, "SW", steering wheels, and then the front side  
10 airbag and inflator cushion and so on.

11 So he is discussing here the prices offered and  
12 the prices which are proposed to be offered in the next  
13 round of negotiations. Then he says, at the end  
14 {J1/234/2}:

15 "Thanks to let me know if and when we have a chance  
16 to discuss it tomorrow ..."

17 So what we see here is -- and this may be, perhaps,  
18 a slightly different mechanism again -- this is an  
19 overlap in personnel, so this is Mr Carlson again and  
20 Ms Eriksson, who we have seen before in earlier  
21 documents, discussing with Mr Rivière what Autoliv's  
22 position should be in the negotiations of this specific  
23 RFQ. Again, so this is a slightly different kind of  
24 overlap, this is overlap in personnel, and what we have  
25 here, in my submission, the Claimants' case is one which

1           has people who were involved in the cartel giving  
2           directions for the negotiations and the offers to be  
3           made by Autoliv to the Claimants for the Claimants' RFQs  
4           --

5           THE CHAIRMAN:  Sorry, can we go back to the previous page?  
6           {J1/234/1}.  Thank you.

7                     So just explain.  So "DAB" and "PAB" is?

8           MR WEST:  Driver airbag and passenger airbag.

9           THE CHAIRMAN:  I see.  Okay.  That is, yes, the proposal for  
10           round 3, so this -- presumably the last offer would have  
11           been round 2; is that what we see from that?

12           MR WEST:  I believe so, yes.

13           THE CHAIRMAN:  Then "SW" is ...?

14           MR WEST:  Steering wheel.

15           THE CHAIRMAN:  Steering wheel.  I should have guessed that,  
16           should I not?

17           PROFESSOR NEUBERGER:  Can we just clarify, the point is not  
18           anything about the content of this, it is simply to do  
19           with who is talking to whom?

20           MR WEST:  It is who is talking to whom and the content  
21           relates to the detail of the negotiations.

22           PROFESSOR NEUBERGER:  But there is nothing untoward about  
23           the detail of the negotiation?

24           MR WEST:  Not in this particular email.

25           PROFESSOR NEUBERGER:  No, fine.  No, I just wanted to

1 understand.

2 MR WEST: But what I say one has here, if one takes  
3 the position that Mr Carlson, for example, was himself  
4 involved in the cartel, one has an individual who was  
5 a cartelist in relation to the named claimants actually  
6 involving themselves in a decision about what prices to  
7 offer PSA in this negotiation.

8 THE CHAIRMAN: Sorry, he was a named ...?

9 MR WEST: Our allegation is that he was one of  
10 the individuals involved in the cartel against  
11 the named OEMs, and I showed you some documents earlier  
12 concerning Mr Carlson.

13 THE CHAIRMAN: You showed that there were some RFIs -- there  
14 were requests for information for him.

15 MR WEST: Well, I showed you some documents regarding his  
16 involvement in discussions with, for example, TRW.

17 THE CHAIRMAN: Yes, but there is no specific finding he was  
18 -- I mean, you may say it is self-evident, but there is  
19 no specific finding by the Commission --

20 MR WEST: There is no specific finding by the Commission in  
21 relation to any individual because it is a settlement  
22 decision --

23 THE CHAIRMAN: Yes, that was my understanding.

24 MR WEST: So we have to piece the position together as best  
25 we can.

1 THE CHAIRMAN: Yes, understood.

2 (Pause).

3 PROFESSOR NEUBERGER: Mr West, I think it is an issue of  
4 some considerable importance. I am still not very clear  
5 about the mechanism by which the indirect effect  
6 actually works.

7 MR WEST: Well, as I said, for example, if it becomes  
8 apparent to a particular supplier that it is making  
9 a certain margin on cartelised supplies, it may adopt as  
10 a policy that prices to other purchasers should be set  
11 in such a way as to achieve the same level of margin.

12 PROFESSOR NEUBERGER: Its competitors would also follow  
13 the same policy; is that right? Because otherwise, if  
14 they just try and keep up the same margin and there is  
15 proper competition operating, you would have thought  
16 the competitors might undercut them.

17 MR WEST: Yes, that is right, and the experts I think  
18 discuss this theory of harm and the likelihood of it  
19 happening. But I think that is right, we do say that  
20 the existence of the cartel in the market would tend to  
21 dampen competition in general.

22 PROFESSOR NEUBERGER: Thank you.

23 MR WEST: So I will not take you to any more documents on  
24 this, but we say that in terms of the liability of the  
25 Defendants, it does not actually matter whether

1 the Tribunal concludes that it was caused by direct or  
2 indirect effects, because the liability is the same.  
3 But it does affect the period over which they are liable  
4 because the indirect effects, there being a follow-on  
5 claim based on a Commission decision, must be limited to  
6 the period covered by the Commission decision.

7 THE CHAIRMAN: Yes.

8 MR WEST: So it does affect the period.

9 Before leaving this point, there are a couple of  
10 points about the indirect case the Defendants raise in  
11 their skeleton arguments. One is they say that it is  
12 the Claimants' case, an allegation, that every single  
13 euro of spend was affected over the cartel period by  
14 this indirect effect. Another point they make is that  
15 we should have come up with a different level of  
16 overcharge for our indirect effect case compared to our  
17 direct effect case.

18 If I could just explain what our position is in  
19 relation to those two points. What we say is the answer  
20 to both of those points is the nature of the regression  
21 model. What the regression model does is it identifies  
22 the relationship between the two variables, if there is  
23 one. Here the variables are, one, the price of OSS,  
24 and, two, whether it was procured during the cartel  
25 period or not. In this case Mr Hughes finds that there

1 is a positive relationship between the two, but that is  
2 expressed as an average across the period based on all  
3 of the data points that Mr Hughes has, and of course  
4 that does not preclude the possibility that some  
5 contracts had a higher overcharge and others had a low  
6 overcharge, but we say it does not actually matter  
7 because our claim is based on the average overcharge  
8 that Mr Hughes has found.

9 THE CHAIRMAN: But one of the issues you -- we have to  
10 grapple with is the fact that the Commission has not  
11 found a single cartel, it has found a number of  
12 individual cartels, and indeed different cartels, if  
13 spillover is a real phenomenon, presumably different  
14 cartels could be affecting the prices that --  
15 the overcharge that you are identifying in  
16 the econometric model. How does -- as a matter of law,  
17 where does that leave us on causation? I think it has  
18 been addressed in the Defendants' skeletons. What is  
19 your position on that?

20 MR WEST: Well, I hope we address it in our skeleton as  
21 well.

22 THE CHAIRMAN: You probably do. I am sorry --

23 MR WEST: On the causation --

24 THE CHAIRMAN: -- but could you just remind me of what you  
25 say on ...

1 MR WEST: In relation to Autoliv, we say the point does not  
2 assist Autoliv because it was in all of the cartels with  
3 the sole exception --

4 THE CHAIRMAN: It was not in all of the -- it was in both  
5 periods, but it was not in all of the cartels, was it?

6 MR WEST: It was in three of the four cartels in OSS 1 and  
7 both of the cartels in OSS 2.

8 THE CHAIRMAN: Right.

9 MR WEST: So it is true that it was not involved in  
10 the Suzuki cartel in OSS 1. So the Suzuki cartel was  
11 two other suppliers supplying Suzuki, whereas our case  
12 is based on purchases from Autoliv and TRW, and our case  
13 is that any overcharges on those supplies are much more  
14 likely to have been caused by cartels in which Autoliv  
15 and TRW were involved than some other cartel which  
16 Autoliv and TRW were not involved in against the third  
17 party OEM.

18 So we say the point about the Suzuki cartel really  
19 does not go anywhere and that means that Autoliv are  
20 really on the hook because they were in all of the other  
21 cartels in OSS 1 and OSS 2.

22 The position for TRW is slightly different because  
23 it was only in the OSS 2 cartels, and so we say that --

24 THE CHAIRMAN: Just remind me, how many of those cartels  
25 was it in?



1 MR WEST: There were two. Two.

2 THE CHAIRMAN: Two out of ...?

3 MR WEST: Two. Two out of two.

4 THE CHAIRMAN: Two out of two, right.

5 MR WEST: So the question there the Tribunal will have to  
6 decide as a matter of factual causation: what effect it  
7 thinks TRW's participation in those cartels had on any  
8 overcharge assuming an overcharge is found.

9 THE CHAIRMAN: But I thought we had this at the PTR,  
10 the questions which we were going to have to distinguish  
11 between the two defendant groups, and it was accepted  
12 that would have to be done for the period in which OSS 1  
13 was operational but OSS 2 was not because that would be  
14 an Autoliv only thing.

15 MR WEST: That is right. So --

16 THE CHAIRMAN: But as I understood, for a -- maybe I am  
17 wrong about this, but for OSS 2 during that period, we  
18 were not being invited to distinguish between the two  
19 defendant groups.

20 MR WEST: I think that is not the case. So TRW are  
21 certainly saying that you should distinguish.

22 THE CHAIRMAN: No, I am asking, what is your position on  
23 that?

24 MR WEST: What you may have in mind is at that, an earlier  
25 stage, the question arose whether the expert witnesses

1           would be able to distinguish between the two, would  
2           the expert analysis be able to say --

3       THE CHAIRMAN:  It is really what was in the skeletons for  
4           the PTR, but maybe --

5       MR WEST:  Well, that, I think, was the question of whether  
6           one had to distinguish between the effect of Autoliv's  
7           participation and TRW's participation and I think  
8           the position we got to is that it is being argued that  
9           you will have to do that.

10      THE CHAIRMAN:  So that is your position?

11      MR WEST:  That is my understanding.  This, of course, only  
12           arises on the indirect case --

13      THE CHAIRMAN:  You say your understanding.  Is that your  
14           position?  Is that your submission, that we will have to  
15           distinguish between losses --

16      MR WEST:  You will have to certainly decide --

17      THE CHAIRMAN:  -- (overspeaking) -- groups.

18      MR WEST:  You will have to decide upon TRW's arguments to  
19           this effect.  So it says that you cannot find that it  
20           caused any part of the overcharge, and since it is  
21           making that submission you will have to decide that.

22      THE CHAIRMAN:  Well, what is your position as to -- assuming  
23           -- what is your positive case in relation to --

24      MR WEST:  Again, this only affects the indirect effect, so  
25           if one puts the direct effect to one side, because one

1           has joint and several liability --

2       THE CHAIRMAN: Yes, I understand that. I understand that.

3       MR WEST: On the indirect effect, it is correct that one has  
4           two possible causes that OSS 1 cartel is in OSS 2. Let  
5           us assume there are two of them for simplicity, and it  
6           is true that the Tribunal will have to decide in order  
7           to decide the liability of TRW what the effect of  
8           the OSS 2 cartel was. Our position, in summary, is that  
9           there are really three possibilities and these are all  
10          questions of factual causation for the Tribunal which it  
11          has to decide on the basis of the general probabilities  
12          and likelihood of the matter.

13                So the first possibility is, in order to examine  
14          the effect of individual cartels it helps to think about  
15          what would have happened if there was only one. So let  
16          us imagine there had only been OSS 1, for example, and  
17          no OSS 2. Well, one possible outcome is that because  
18          TRW was not in any cartel, it was not in OSS 2 because  
19          it did not exist, we only had OSS 1, TRW's prices would  
20          have been lower. The basis of this whole argument is  
21          that these indirect effects arise.

22       THE CHAIRMAN: So TRW's prices would have been lower?

23       MR WEST: Because it is not in a cartel, on this hypothesis.

24       THE CHAIRMAN: But it is not benefiting from an umbrella  
25          effect and being able to get away with charging more

1           because everyone else is --

2       MR WEST: I am going to come to that in a second --

3       THE CHAIRMAN: -- charging extremely high prices.

4       MR WEST: That is the second possibility.

5       THE CHAIRMAN: Right.

6       MR WEST: So the first possibility is TRW charges less

7           because it is not in the cartel. We say if that is

8           the true position then the Claimants would have avoided

9           the loss by purchasing from TRW to a significant extent

10          in any event. That means that TRW's participation in

11          OSS 2 is a "but for" causation, a "but for" cause of

12          the loss, because but for that participation, the loss

13          would have been avoided. I anticipate it will be said,

14          "Well ..." --

15       THE CHAIRMAN: Just say that once more, Mr West, I am sorry,

16          I am just ... So if TRW charged less, they would have

17          obtained the business.

18       MR WEST: If they were not in the cartel and the loss would

19          have been avoided.

20       THE CHAIRMAN: Yes.

21       MR WEST: Therefore, TRW's participation in the OSS 2 cartel

22          is a "but for" cause of the loss, because if TRW had not

23          been in the OSS 2 cartel, because there had not been an

24          OSS 2 cartel, the loss would have been avoided.

25       THE CHAIRMAN: Yes, I am just not quite -- because we are

1           assuming they are not part of the cartel on this,  
2           because --

3       MR WEST:   Yes, because one -- one has to try and determine  
4           what is the effect of any individual cartel, so it helps  
5           to think: well, what if there had only been one, what  
6           would the result have been?  If the answer is --

7       THE CHAIRMAN:  You are saying if you see an overcharge it  
8           means that TRW must have been partaking in -- it must  
9           have been in the cartel.  You are inviting that  
10          inference.  You say if they charge less, there will be  
11          no overcharge, all the business would go to TRW.

12          I mean, there may be lots of subsidiary questions to  
13          that.  But assuming you are right about that, if you see  
14          an overcharge you say that is evidence of TRW's  
15          involvement in a cartel; is that what you are saying?

16       MR WEST:   That is certainly one of the points we make.

17                  I was just going through the different alternative  
18          outcomes that could arise if there was only one cartel.

19       THE CHAIRMAN:  Yes.

20       MR WEST:   As I say, that is one possibility: loss avoided.

21       THE CHAIRMAN:  Okay, loss avoided, yes.

22       MR WEST:   Therefore OSS 2 is a "but for" cause of the loss.

23                  As against that no doubt it will be said, "Well, you  
24          could not just have purchased all of your supplies from  
25          TRW, they did not have capacity to supply all of them,

1           and anyway, if everyone started trying to buy from TRW,  
2           their price would have gone up". Traditional umbrella  
3           effects. So, on this hypothesis, the loss is not  
4           avoided, because TRW charged the same, even though they  
5           are not in the cartel on this theory. The important  
6           thing about this theory is it means that either OSS 1 or  
7           OSS 2 would have caused all of the loss, because it  
8           would have generated traditional umbrella effects  
9           meaning the same loss would have been caused whether  
10          there was only one or it was both. Where you have two  
11          concurrent causes of the same loss, they are both  
12          liable.

13        THE CHAIRMAN: The authority you rely upon for that?

14        MR WEST: Well, we have the *Arch* case which cites  
15          the well-known principle to that effect. That is  
16          the most recent decision of the Supreme Court which  
17          considers this.

18        THE CHAIRMAN: This is the insurance case?

19        MR WEST: That is an insurance case but it considers  
20          the position in tort law.

21        THE CHAIRMAN: Right. So, I mean there used to be cases  
22          like *Galv* and things, it used to be the dominant and  
23          the effect, was it a dominant and effective cause used  
24          to be the test. That is no longer the law; is that  
25          right?

1 MR WEST: Well, we are talking here about concurrent  
2 sufficient causes. So if the position the Tribunal  
3 reaches is because of traditional umbrella effects  
4 either one of these cartels would have caused the prices  
5 to raise to the level --

6 THE CHAIRMAN: I understand that. I am just trying to  
7 identify the legal test while we are having this  
8 conversation and what you say the legal test is.

9 MR WEST: The legal principle is, where you have two causes  
10 which are concurrent and either one is sufficient to  
11 cause the damage, they are both regarded as causes.

12 THE CHAIRMAN: Okay. So either one has to be sufficient on  
13 its own?

14 MR WEST: Either one has to be --

15 THE CHAIRMAN: But if you combine them, they are both --

16 MR WEST: Here, because we are looking at what the effect  
17 would have been if there had only been one cartel, if  
18 the effect is prices would have been the same.

19 THE CHAIRMAN: Again, I just want to pull you back to  
20 the legal principle. So you are saying if there are two  
21 causes, the test is, is one of them on their own,  
22 effect -- or has the potential to cause the damage.

23 I was not aware that --

24 MR WEST: Yes.

25 THE CHAIRMAN: -- that was the legal test, but ...

1 MR WEST: The third possibility is that if there had only  
2 been one cartel and not two, the prices would have been  
3 a bit higher but not as high as they actually were. So  
4 some effects -- some umbrella effects, but not complete  
5 umbrella effects. On that basis, OSS 2 contributed to  
6 some extent to the loss suffered and ultimately  
7 the Tribunal will have to form a view, if that is what  
8 it thinks the most likely outcome is, that OSS 2  
9 contributed to some extent, it will simply have to take  
10 a common sense view of what that extent is likely to be,  
11 that is a question of the broad axe.

12 THE CHAIRMAN: It is not a matter of common sense, it is --  
13 well, at least not -- it probably is to  
14 Professor Neuberger. It is not a matter of common  
15 sense, it is a matter of evidence, is it not? It cannot  
16 be what was --

17 MR WEST: Well, the --

18 THE CHAIRMAN: -- how much the OSS 2 is involved is a matter  
19 of common sense. I do not know quite what your "common  
20 sense" --

21 MR WEST: Well, there is not any for --

22 THE CHAIRMAN: -- references would be.

23 MR WEST: Well, I suppose one -- it is a matter of common  
24 sense, I say, because one can also look at what the --  
25 what TRW says would have happened and consider as



1 a matter of common sense how likely that is, which as  
2 I understand it is whatever the Tribunal finds that  
3 the overcharge is, it was all caused by OSS 1 and none  
4 of it was caused by OSS 2.

5 THE CHAIRMAN: Right.

6 MR WEST: They have not really explained how they get there,  
7 but we say that seems the least likely of all. There is  
8 not any direct expert evidence on this because we went  
9 through this in connection with the question of conflict  
10 of interest. Because the cartels are simultaneous,  
11 the nature of regression analysis is such that it cannot  
12 distinguish between two simultaneous effects; all it can  
13 say is prices were higher during -- on contracts  
14 concluded during the cartel period or they were not. If  
15 there are two simultaneous cartels operating during  
16 the cartel period, it cannot attribute the effect to one  
17 or the other.

18 But these are ultimately, we say -- they are  
19 questions of factual causation for the Tribunal to  
20 decide based to a certain extent on -- we say, yes,  
21 based on common sense and the overall likelihood of  
22 different results in different scenarios. If there had  
23 only been one rather than two, for example.

24 THE CHAIRMAN: Well, we -- see where we get do, but I think  
25 you are going to have to assist us with that "common

1           sense" approach. It sounds a bit like putting a finger  
2           in the air and guessing at the moment.

3           MR WEST: It is the broad axe and frequently in, you know --

4           THE CHAIRMAN: It does not seem to be an axe at all, it just  
5           seems to be ...

6           MR WEST: Well, we say the Tribunal has to do the best it  
7           can --

8           THE CHAIRMAN: Okay.

9           MR WEST: -- based on the overall likelihood and probability  
10          of the matter. I am reminded that we do deal with this  
11          in our skeleton argument at paragraphs 52 to 62  
12          {S/1/18}, including, I think, identifying some of  
13          the relevant authorities.

14          THE CHAIRMAN: Yes, let us just have a look at that.

15                   (Pause).

16                  So you refer to two authorities, do you not,  
17                  *Financial Conduct Authority v Arch* and *Drake v Harbour*.

18                  I have not looked at *Drake v Harbour* yet, but I can't  
19                  immediately see the relevance to the point you are  
20                  making now.

21          MR WEST: I think it is just that causation is a question of  
22          fact and therefore probability.

23          THE CHAIRMAN: Can we just have a look at the bit you rely  
24          on in *Financial Conduct Authority*. So tab 27  
25          {AUTH2/27/1}.

1 MR WEST: Yes, it was paragraph 182 {AUTH2/27/75}, so  
2 these -- the reference is to the page numbers on  
3 paragraph 59 {S/1/20}.

4 THE CHAIRMAN: Sorry, say again?

5 MR WEST: Paragraph 182 {AUTH2/27/75}. So this is Lord --

6 THE CHAIRMAN: Yes, so it refers to some old authorities  
7 there, but in the field of tort there is a lot more that  
8 has happened since these cases.

9 MR WEST: Well, we can certainly look to see whether there  
10 are other authorities we should bring to your attention,  
11 but this is the principle which I rely on.

12 THE CHAIRMAN: Because I thought the bare "but for" test was  
13 not -- it had to be -- I cannot remember what the words  
14 were -- "dominant cause", I think, "dominant and  
15 effective cause", as I recall, which may be answered in  
16 this case, I do not know, but it just ... I think some  
17 further assistance on that would just help --

18 MR WEST: We can look into that.

19 THE CHAIRMAN: We can pick it up in closing, of course,  
20 if ...

21 MR WEST: Just going back to the criticisms of the indirect  
22 effect claim, I said the Defendants say that we should  
23 have identified a different overcharge under each head  
24 and the answer to that is the same: the regression model  
25 does not enable you to identify different overcharges,

1           it identifies a single overcharge depending whether  
2           the contract is concluded during the cartel or not.

3       THE CHAIRMAN: Can you just give me a moment.

4           (Pause).

5           Sorry, Mr West, please carry on. Could you just  
6           repeat that last sentence.

7       MR WEST: Yes, so the criticism that we have not advanced  
8           a different quantification depending on whether a claim  
9           is determined to be direct or indirect is that  
10          the regression model cannot distinguish in that way  
11          between different effects or different means.

12       THE CHAIRMAN: Yes, well, plainly, it cannot, yes.

13       MR WEST: Can I just --

14       THE CHAIRMAN: But that is not an answer to the point. If  
15          there is a point there, if indeed you do have to, as  
16          a matter of law, identify a causal link, then the fact  
17          that your regression model does not do it is not  
18          a perfect answer to that complaint.

19       MR WEST: I suppose it is possible, ultimately, if  
20          the Tribunal said, "We just cannot tell, it is  
21          impossible, we throw our hands up", but I think my  
22          submission would be that is the last alternative  
23          the Tribunal should reach if it really cannot do  
24          anything else apart from that.

25       THE CHAIRMAN: Yes.

1 MR WEST: Can I deal very briefly with the burden of proof  
2 because there is a lot about this in the Defendants'  
3 skeleton arguments. Now, the Claimants accept that we  
4 bear the burden of proof on the liability and quantum  
5 issues with the exception of pass-on, where the  
6 Defendants bear the burden of proof, and the test we say  
7 is the ordinary civil test of the balance of  
8 probabilities which the Tribunal should apply to  
9 the evidence in the case as a whole to decide whether  
10 the claim is made out. The Defendants put a number of  
11 glosses on this which we do not accept.

12 One is they say that there is a higher standard in  
13 this case of "strong and compelling evidence". That is  
14 Autoliv's skeleton, paragraph 34 {S/2/13}. We say that  
15 is an inappropriate gloss on the test. It is true that  
16 in applying the standard of proof the Tribunal, like any  
17 Tribunal, can have regard to the overall probabilities  
18 and if particular matters are highly improbable it may  
19 require stronger proof to hold that they have been  
20 established. The law on this point is explained in  
21 the classic case of *Re b*, which is tab 14 of  
22 authorities 2, at paragraph 15 {AUTH2/14/8}. This is  
23 where Lord Hoffmann reviews some of the cases on this  
24 point and says, beginning at the second line:

25 "There is only one rule of law, namely that

1 the occurrence of the fact in issue must be proved to  
2 have been more probable than not. Common sense, not  
3 law, requires that in deciding this question, regard  
4 should be had, to whatever extent appropriate, to  
5 inherent probabilities. If a child alleges sexual abuse  
6 by a parent, it is common sense to start with the  
7 assumption that most parents do not abuse their  
8 children. But this assumption may be swiftly dispelled  
9 by other compelling evidence of the relationship between  
10 parent and child or parent and other children. It would  
11 be absurd to suggest that the Tribunal must in all cases  
12 assume that serious conduct is unlikely to have  
13 occurred. In many cases, the other evidence will show  
14 that it was all too likely. If, for example, it is  
15 clear that a child was assaulted by one or other of two  
16 people, it would make no sense to start one's reasoning  
17 by saying assaulting children is a serious matter and  
18 therefore neither of them is likely to have done so.  
19 The fact is that one of them did and the question for  
20 the Tribunal is simply whether it is more probable that  
21 one rather than the other was the perpetrator."

22 So that, we say, is the law in relation to  
23 the question of whether there is a higher standard of  
24 proof for allegations of serious misconduct, namely that  
25 there is not, it is simply an element to be taken into

1 account in the overall circumstances.

2 The Defendants also say that there should be  
3 a higher standard because the proceedings are "quasi  
4 criminal", as they put it, and it has been said  
5 certainly that some competition proceedings are of  
6 a quasi-criminal nature, in particular investigations by  
7 competition regulators because they have jurisdiction to  
8 impose punitive remedies in the nature of, i.e., that is  
9 to say, fines. But even in those cases, the standard is  
10 still the balance of probabilities and the authority  
11 I was going to on this is the *BGL* case, tab 34 of  
12 the authorities {AUTH2/34/1}, paragraphs 56 to 58  
13 {AUTH2/34/32-33}. This is a Tribunal -- Competition  
14 Appeal Tribunal decision and they start by citing  
15 the case of *Durkan v Office of Fair Trading*, where  
16 the Tribunal summarised the position as follows:

17 "The question of the standard ..."

18 So this is in the Tribunal on appeals from  
19 the Competition Markets Authority:

20 "'The question of the standard of proof has been  
21 considered in a number of cases. In *Napp ...* and *JJB*  
22 *Sports ...* the Tribunal held that the standard of proof  
23 is the civil standard ... on the balance of  
24 probabilities. The seriousness of an infringement of  
25 the Chapter 1 prohibition involving (as here)

1 the imposition of penalties, is a factor to be taken  
2 into account in considering the probability of an  
3 infringement having occurred. We were referred ... to  
4 the well-known speech of Lord Hoffmann ... in *Rehman*...  
5 concerning the relative likelihood of coming across  
6 Alsatians and lions in Regent's Park and to a passage in  
7 the opinion of Lady Hale in *Re b* ... where she stressed  
8 the seriousness of an allegation of misconduct is not  
9 necessarily a factor which makes it less likely [to say]  
10 the allegation is true: context is everything ..."

11 The Tribunal went on to say:

12 "'... it is incumbent on the OFT to adduce precise  
13 and consistent evidence in order to establish the  
14 existence of an infringement. But it is sufficient,  
15 according to the case-law, if the body of evidence  
16 relied on by the OFT, viewed as a whole, meets that  
17 requirement ...'

18 "Compare *The Market*, whilst accepting the latter  
19 proposition, suggested that 'each element of the  
20 evidence relied upon must still be considered as to  
21 whether it contributes to proof as a whole'. If it is  
22 suggested that this is a requirement additional to  
23 the need to have regard to the totality of evidence when  
24 considering whether the CMA has discharged its burden of  
25 proof, then we disagree."



1           They then go on to deal with quasi-criminal. They  
2 say:

3           "Competition cases are quasi-criminal ... Given  
4 the nature and seriousness of the allegations ...  
5 the presumption of innocence applies. [That] was common  
6 ground."

7           Then:

8           "... Compare The Market went on to contend that:

9           "Where a finding of fact might be consistent both  
10 with a finding of non-infringing conduct or infringing  
11 conduct, the finding in question is not ... supportive  
12 of a finding of infringement. Compare The Market  
13 maintained that it was not sufficient for the CMA to  
14 refer to evidence 'in the round' as being probative of  
15 its case when key elements of the evidence were not  
16 themselves clearly supportive of a finding of  
17 infringement. Essentially, Compare The Market contended  
18 that a 'collection of ambiguous or ambivalent material  
19 does not amount to proof in the round'.

20           "It was insufficient for the CMA to contend that  
21 certain facts or analysis were 'consistent with'  
22 a finding of infringement. It was necessary for  
23 the CMA to establish that a particular finding was  
24 inconsistent with non-infringement. If the finding  
25 could reasonably be held to be consistent with

1 non-infringing conduct it is not probative of any  
2 infringement.

3 "These contentions were not common ground. In its  
4 Defence, the CMA did not accept these submissions.  
5 The CMA submitted that a particular finding might, when  
6 taken on its own, be consistent with both infringing and  
7 non-infringing conduct but, when taken together with all  
8 of the evidence, be supportive of an infringement. Its  
9 task was to consider the whole body of relevant evidence  
10 and determine whether, on the balance of probabilities,  
11 it established an infringement. The Tribunal's task was  
12 to determine whether the CMA committed any material  
13 error in its assessment. There was no justification,  
14 the CMA contended, at either stage for disregarding  
15 relevant evidence on the basis that, taken on its own or  
16 in another context it may not be 'inconsistent with  
17 non-infringement'.

18 "We consider ... there is significant danger in  
19 attempting to lay down, in the abstract, how evidence is  
20 to be weighed in the light of various factors (margin of  
21 appreciation; standard of review; burden and standard of  
22 proof; and presumption of innocence) already considered  
23 in this section. We reject the approach of Compare  
24 The Market as being altogether too prescriptive in how  
25 evidence is to be weighed and assessed, both by

1 the CMA when making its decision, and by this Tribunal  
2 on appeal. We consider ... the CMA must produce  
3 sufficiently precise and consistent evidence to support  
4 its decision that the alleged infringement took place.  
5 However, it is not necessary for every item of evidence  
6 produced by the CMA to be consistent only with  
7 infringement. It is sufficient if the body of evidence  
8 relied on by the CMA, viewed as a whole, meets that  
9 requirement. In other words, the fact that any  
10 particular element of conduct is consistent both with  
11 infringing and non-infringing conduct does not mean ...  
12 it is to be disregarded altogether. It is a factor to  
13 be taken into account, but above all else the evidence  
14 must be considered in toto material should not be  
15 jettisoned in advance of such consideration simply  
16 because it fails to meet some abstract requirement of  
17 admissibility."

18 So, again, we say no need to gloss the law on  
19 the burden of proof.

20 THE CHAIRMAN: What do you say about the authorities relied  
21 on by the Defendants?

22 MR WEST: For what, sorry?

23 THE CHAIRMAN: What do you say about the authorities relied  
24 on by the Defendants on this point?

25 MR WEST: In relation to the burden of proof?

1 THE CHAIRMAN: Yes, yes.

2 MR WEST: Well, we say that they are simply examples of  
3 the application of the rule I just stated, where  
4 the facts in question might have been regarded as  
5 particularly unlikely to have occurred, and that has to  
6 be taken into account and weighed in the balance. Of  
7 course, we say it is ridiculous, here, for the  
8 Defendants to rely on this at all because it is not at  
9 all unlikely that they were cartelists, we know that  
10 they were cartelists because they admitted it.

11 The Defendants also say that it is incumbent on the  
12 Claimants to prove precisely which infringing action  
13 affected which RFQs and precisely how those particular  
14 RFQs were affected, but in my submission there is no  
15 requirement to that effect either and competition law  
16 claims would not be workable if there were. A good  
17 example is the recent *Trucks* litigation. That concerned  
18 a cartel relating to sales of *Trucks* which ran for over  
19 a decade and, following the Commission decision, many  
20 claims were pursued by claimants who had purchased large  
21 volumes of *Trucks* in the course of their businesses.  
22 For some of these individual claimants, there were many  
23 thousands of *Trucks* involved just for that one claimant  
24 and it would clearly have been quite impossible for the  
25 Claimants to identify in the case of each one of those

1           *Trucks* precisely which infringing conduct had influenced  
2           the sale of that specific truck at what particular price  
3           and how.

4           It is useful to look at the judgment of the CAT in  
5           the *Trucks* litigation, which is tab 35 of authorities 2  
6           {AUTH2/35/1}. It is apparent from this judgment that  
7           there was a debate about this question and it was framed  
8           in terms of whether it is open to the claimant to prove  
9           its case on a top-down basis by economic evidence of  
10          overcharge affecting *Trucks* generally, or had to be done  
11          on, as it were, a bottom up basis by showing precisely  
12          how the cartel conduct caused the overcharge on any  
13          specific purchase of a truck. The CAT in that case held  
14          that the claimant could prove its case on a top-down  
15          basis.

16          There was an earlier judgment in the litigation,  
17          which is cited in the main judgment at {AUTH2/35/56},  
18          which was concerned primarily with disclosure, but goes  
19          on to consider the question of proof, and it is -- if we  
20          look at it actually, it is over on {AUTH2/35/57}, it is  
21          part of the quotation in paragraph 41 --

22          THE CHAIRMAN: Sorry, paragraph 41?

23          MR WEST: Page {AUTH2/35/57}.

24          THE CHAIRMAN: Yes. Oh, I see, paragraph 41 of

25          the citation, yes. Paragraph 82 of the judgment.

1 MR WEST: Yes, where they say:

2 "We ... wish to hear submissions on this ... but our  
3 present view is ... we doubt ... the issues can be  
4 approached from the 'bottom up' on the traditional  
5 evidential basis of witness statements from the various  
6 key employees regarding the numerous contemporary  
7 emails, notes of meetings and telephone conversations,  
8 and so forth, on which they would then be cross-examined  
9 ... Instead, it seems to us that the issues will  
10 probably have to be approached by the analysis of large  
11 amounts of pricing and market data, using established  
12 economic techniques to determine what, if any, was  
13 the effect of the infringement on prices and any pass-on  
14 through the relevant period. That is not to say that  
15 evidence of witnesses of fact would be irrelevant but we  
16 anticipate it will be of a more general nature, for  
17 example explaining how the OEMs priced their *Trucks* and  
18 the nature of the relationship between gross and net  
19 prices, the significance of configurators, and so forth.  
20 The same approach would apply to the prices charged by  
21 the Claimants in the context of pass-on."

22 That is what ultimately happened in the trial. We  
23 can see the Claimants' approach at paragraph 58  
24 {AUTH2/35/51}. Now, this is concerned with -- so the  
25 Claimants at paragraph 58:

1            "In relation to the procurement of *Trucks* from DAF,  
2            the Claimants called one witness each: [one] for Royal  
3            Mail; and Mr ... Peatey for BT. The Claimants  
4            approached this part of the case on the basis that the  
5            CAT had directed there should not be specific factual  
6            evidence ..." --

7            THE CHAIRMAN: Sorry, I have not got my eye on the right  
8            bit. Paragraph 51?

9            MR WEST: 58, page 51.

10          THE CHAIRMAN: 58, sorry. Page 51, sorry.

11          MR WEST: So, the Claimants considered, about five lines  
12          down:

13               "... the CAT required any Overcharge to be  
14               determined by expert econometric evidence as to an  
15               average Overcharge on all DAF's UK sales. In fairness  
16               to the Claimants, some of the *Trucks* affected ... were  
17               purchased ... 25 years ago and many of the individuals  
18               involved could not be traced and had long since left ...  
19               What they therefore sought to do was to put before us  
20               witnesses who could speak about the issues of truck  
21               procurement and Supply Pass-On in general terms because  
22               of their role within each of the Claimants, rather than  
23               dealing with specific contracts or negotiations that are  
24               the subject-matter of their claims."

25               We see, at 59, that the Defendants criticised that

1 approach:

2 "This ... was criticised by Mr Beard ... who said  
3 ... the Claimants had failed to engage with an important  
4 aspect of the case, namely the actual effect on the  
5 Claimants. He maintained that it was necessary to  
6 consider the factual evidence to see whether it informs  
7 or supports the econometric results as to the existence  
8 or level of any Overcharge paid by the Claimants."

9 So that was their position. In the event,  
10 the Tribunal based its overcharge judgment on  
11 the regression analysis, as we can see at paragraph 345  
12 {AUTH2/35/126}. They say:

13 "We ... see no reason why an Overcharge that is  
14 found at the general level of DAF's prices to UK truck  
15 customers would not apply to the specific sales to the  
16 two Claimants, and no convincing evidence was provided  
17 to support DAF's contrary view. The mechanism by which  
18 such a price increase might arise could be different for  
19 large customers, arising more through the bidding  
20 process rather than being linked to expectations or  
21 signals caused by list prices changes, but that does not  
22 affect our substantive conclusion. Hence, our  
23 conclusion is that any impact of the Infringement found  
24 at the level of DAF's UK prices as a whole can  
25 reasonably be applied to the Claimants' purchases."



1           Now, as is apparent from that quote, the data in  
2           that case concerning overcharge took DAF's sales as  
3           a whole and the question was: could that be used as  
4           a proxy for overcharge to the Claimants? That  
5           particular point does not arise in this case because  
6           the data in this case is -- concerns only purchases by  
7           the Claimants from the Defendants, so it is specific to  
8           the Claimants' purchases in any event.

9           While we are in this judgment, one of the points  
10          raised by the Defendants here is alleged buyer power,  
11          and we can see that this also arose in *Royal Mail*,  
12          paragraph 53 {AUTH2/35/50}, where they record:

13          "the Claimants entered into a series of contracts  
14          with DAF UK during the course of the Infringement. DAF  
15          says ... both Claimants were highly sophisticated  
16          purchasers ... with specialist procurement divisions  
17          that put them in a very good position to negotiate low  
18          prices with DAF. They were two of the largest  
19          purchasers of DAF *Trucks* in the UK. DAF says ... this  
20          is an important factor to be taken into account in  
21          assessing whether the Claimants have suffered any loss  
22          on their purchases of *Trucks*."

23          We see some similar points in the Defendants'  
24          skeleton arguments about the Claimants having buyer  
25          power in this case. But the Tribunal did not seem to

1 think that this evidence really went anywhere, that is  
2 paragraph 67 {AUTH2/35/53}, where they say:

3 "However, we would assume ..."

4 Page 53:

5 "... that *Royal Mail* would use everything within its  
6 means, leveraging its volumes and brands to obtain  
7 the cheapest possible truck prices and to lock those in  
8 through long-term fixed price contracts. It would have  
9 acted in the same way in the counterfactual if there was  
10 no infringement and no putative Overcharge. We do not  
11 think that much can be derived from this evidence that  
12 it was a hard negotiator but we do think that the prices  
13 that it agreed provide a sense-check, particularly to  
14 the experts, as to the likelihood of there being an  
15 Overcharge in those prices and ... the extent to which  
16 DAF would have been prepared to offer even lower prices  
17 in the counterfactual."

18 That is referring, I believe, to the previous  
19 paragraph, 66, and the evidence in particular from  
20 DAF that it was charging negative margins on truck sales  
21 to *Royal Mail*. Well, there is no evidence to that  
22 effect in this case.

23 THE CHAIRMAN: But these are just -- you are just comparing  
24 facts between cases, there is no principle to be applied  
25 here; is that right?

1 MR WEST: I will move on. There are similar points being  
2 said, we say, on the Defendants' side and we see how  
3 they landed in that case.

4 So we say the position is really much more  
5 straightforward than the Defendants suggest on  
6 the burden of proof. Essentially, the Tribunal has to  
7 weigh up all the evidence and come to a conclusion as to  
8 what is most likely to have happened. In particular,  
9 does the evidence as a whole show the Claimants paid  
10 more? If so, does the evidence suggest that that was  
11 due to a cartel against them? If the evidence does not  
12 show that, is there a mechanism by which the cartel  
13 against others could have come to affect the prices paid  
14 by the Claimants? Those are essentially, we say,  
15 the main questions the Tribunal has to address and it  
16 has to do so based on all of the evidence in the case.  
17 If it resolves those issues in my clients' favour, we  
18 say that is sufficient to lead to a judgment for  
19 substantial damages.

20 A related point concerning the burden of proof has  
21 to do with what we say is the negative position taken by  
22 the Defendants in these proceedings, which, as  
23 I explained earlier, is that they admit  
24 the infringements found by the Commission because they  
25 have no alternative but to admit that since those

1 findings are binding, but contend that the infringing  
2 conduct went no further. So that is the first element  
3 which is negative.

4 The second is they advance no positive case on their  
5 own to make that out. They do not advance any  
6 explanation by way of evidence, why it is they say that  
7 some OEMs' supplies were cartelised and others were not.  
8 They do not say, for example, that is because of  
9 particular features of the markets or the personnel  
10 involved or the particular features of those supplies,  
11 and as I said earlier, in fact, all of the Defendants'  
12 witnesses deny any involvement in the cartel and any  
13 knowledge of it.

14 So the Defendants' position is, in effect, to take  
15 no stand on the burden of proof. They say in effect: we  
16 deny the wrongdoing went any wider and it is up to you  
17 to prove otherwise. But as we have already seen going  
18 through the authorities on the burden of proof,  
19 the civil burden of proof is not a demanding one since  
20 it demands only that the Claimants' case is more likely  
21 than the Defendants', and in my submission it is  
22 difficult for a defendant to take its stand on  
23 the burden of proof while simultaneously choosing to put  
24 in little or nothing by way of a positive case against  
25 the Claimants' evidence. We say the position in

1 relation to the economic evidence is similar because, as  
2 we point out in our skeleton, Dr Majumdar does not  
3 himself seek to answer the question whether there was an  
4 overcharge on OSS supplies to the Claimants, instead he  
5 has taken a rather negative approach of seeking to  
6 identify whether Mr Hughes' analysis is a reasonable  
7 basis to conclude that there was an overcharge to the  
8 Claimants. So again, it is a negative criticism of the  
9 Claimants' expert evidence. It follows that there is  
10 not a rival analysis from Dr Majumdar saying, for  
11 example, that there was an overcharge but it was very  
12 small. There is nothing to that effect. So  
13 the Tribunal is being presented with an "all or  
14 nothing", in my submission.

15 PROFESSOR NEUBERGER: Can I ask one on that, Mr West. There  
16 seems to be -- you are drawing a parallel between the  
17 Defendants' unwillingness -- the Defendants not putting  
18 forward various sorts of evidence which were in their  
19 possession, and I can understand the point you are  
20 making, and you are drawing a parallel between that and  
21 their failure to put up an alternative economic model,  
22 where, on the face of it, they do not seem to have any  
23 particular information which is available to them and  
24 not available to the Tribunal. I am not sure that  
25 I quite follow the parallel.

1 MR WEST: I understand the point. The same information is  
2 available to both experts because the data, which is  
3 available to any of the parties, has all been disclosed,  
4 so either expert is in a position, should they wish to  
5 do so, to prepare their own regression model saying,  
6 "This is my best view on whether there was an  
7 overcharge, and if so, what it was".

8 So, yes, I take point it is not a case where they  
9 had particular factual witnesses available to them they  
10 have chosen not to call, but they could, if they wished,  
11 have prepared a positive case to that effect, which they  
12 have not.

13 PROFESSOR NEUBERGER: But to produce a positive case to  
14 the effect that there is no effect seems slightly --  
15 seems less useful than other things might be to  
16 the Tribunal.

17 MR WEST: Well, perhaps, although the Tribunal would then at  
18 least have two models to compare and decide which it  
19 thinks may be better. Whereas, in fact, you just have  
20 Mr Hughes' model and an attempt to break that model by  
21 making criticisms of it without attempting to say,  
22 "Actually, this is the way you should do it and this is  
23 the result it produces".

24 Although it is notable that when Dr Majumdar comes  
25 to pass-on he takes a rather different approach. He

1 does prepare his own model, because of course the  
2 Defendants have the burden of proof in relation to  
3 pass-on, and in relation to his pass-on model he is  
4 quite happy, for example, to use proxies where  
5 the relevant information is not available. I will come  
6 to this shortly, but one of the proxies he uses which is  
7 quite significant, in our submission, is that he says  
8 overall variable costs can be used as a proxy for OSS  
9 costs because they do not have OSS costs. So that sort  
10 of accommodating approach that he adopts to his own  
11 model is apparent when it comes to the criticisms he  
12 makes of Mr Hughes' model.

13 So can I then turn to the points of dispute between  
14 the economic experts because, as I say, the dispute is  
15 in fact quite narrow, it is limited to quite a small  
16 number of points on each of the main topics.

17 THE CHAIRMAN: We have read carefully the expert reports and  
18 got an appreciation of the areas of dispute which will  
19 be explored in cross-examination. Are we going to be  
20 assisted by your running through them now without going  
21 specifically --

22 MR WEST: I would hope so. I will not take too long over  
23 this. I do not have much else after I have addressed  
24 you on this, but I think it might be useful because  
25 I think it is possible to distill the debate to

1 a greater extent than it has been done in the joint  
2 expert statement which still contains a lot of  
3 propositions. In my submission there is really  
4 a handful of points between them on each of the topics,  
5 so it may just be useful to identify what those are.

6 Now, in relation to overcharge, as the Tribunal  
7 knows, Mr Hughes has prepared a regression analysis  
8 which identifies overcharges on all three kinds of OSS  
9 components and it is expressed as a complicated  
10 equation, but the debate between the experts is not  
11 really about any complicated mathematics underlying  
12 the equation, it is really about what information should  
13 go into the equation and what assumptions should be  
14 applied underlying the model. Mr Hughes' results,  
15 importantly, are all, as you know, statistically  
16 significant to the 1% level which we say shows that they  
17 are very strong and reliable results.

18 THE CHAIRMAN: Just as a matter of interest, how  
19 does "statistically significant" work with your  
20 submissions on balance of probability? Typically, it is  
21 a 99% certainty or 95% certainty. You have been telling  
22 me we just do it on balance of probability.

23 MR WEST: All we would need to show is that the overcharge  
24 is more likely than not to have happened, but in fact  
25 the level of statistical significance which attaches to



1 the model is much higher than that, so we would say it  
2 is a much higher standard than the balance of  
3 probability. It is a much higher standard, only 1%  
4 chance of it finding a relationship if there is not one,  
5 as I understand it, is what that statistical  
6 significance of the 1% means. Whereas, technically, on  
7 the burden of proof, anything more than 51% would, on  
8 one view, be sufficient.

9 So if one looks at the criticisms which Dr Majumdar  
10 makes, they fall, in my submission, into two categories,  
11 what he calls "omitted variable bias" and  
12 then "sensitivities", alternative sensitivities, and  
13 the sensitivities relate to the assumptions underlying  
14 the model, whereas omitted variable bias refers to  
15 the controls which are in the model to control for other  
16 changes that may have affected the price, and in some  
17 cases Dr Majumdar's position is not really that  
18 a variable has been wrongly omitted but that one has  
19 been wrongly included, but nevertheless that is  
20 the label.

21 He refers to three particular types of omitted  
22 variable. He refers to some additional raw material  
23 costs he would like to see included, that is  
24 paragraph 138 {E-IR/1/34}; he refers to the fact that  
25 the costs index used by Mr Hughes appears to diverge

1 from an index of the Defendants' costs; and, thirdly, he  
2 suggests an alternative demand control. So I say there  
3 are really three main points under "omitted variable  
4 bias", the alternative demand control point, which is  
5 paragraphs 155 to 157 {E-IR/1/40}, is that the demand  
6 control used by Mr Hughes is not specific to  
7 the automotive industry, he uses a GDP demand control.

8 But the important point about these three alleged  
9 omitted variables is that, in his reply report,  
10 Mr Hughes re-runs the model using all of these allegedly  
11 omitted variables and the results are not materially  
12 different. We say that is an important result because  
13 Dr Majumdar has had an opportunity to say, "This is  
14 the figures that I say should have been included by way  
15 of control", but when you run the model including those  
16 figures you get essentially the same results.  
17 The results are slightly different, to a very small  
18 degree, and Mr Hughes says, "Well, that is an acceptable  
19 range, in my view, but it makes a small difference". So  
20 in my submission the omitted variable bias points, if  
21 anything, support Mr Hughes' analysis, or at the most  
22 are something of a storm in a teacup.

23 Now, the position is different in relation to  
24 the underlying assumptions, and here again there are  
25 three main criticisms which Dr Majumdar makes. One is

1 he wishes to apply different assumptions about  
2 the duration of the infringing conduct; secondly, he  
3 wishes to apply different assumptions about the RFI  
4 date; and, thirdly, he runs a version of the model under  
5 which only the first price under any contract is  
6 included as a data point. So these contracts ran for  
7 a number of years, they would often run for five or  
8 six years, there would be a variety of prices as they  
9 changed over time, and Mr Hughes' model takes all of  
10 those price point throughout the life of the contract.  
11 This so-called "new contract sensitivity" takes one  
12 price point per contract at the start of production.

13 So those are the three sensitivities.

14 In the case of the RFQ date, there are two  
15 alternative approaches which Dr Majumdar advocates. One  
16 is that he simply moves the RFQ dates six months in  
17 either direction. So the RFQ date is a key date under  
18 Mr Hughes' analysis, because that is the date which  
19 defines whether a contract was within the cartel period  
20 or not, was the RFQ date, because that was when  
21 the prices were set. So it is important that that date  
22 is right, because otherwise, as Mr Hughes points out,  
23 you will end up allocating affected contracts to  
24 the unaffected period and vice versa. But the data does  
25 not include RFQ dates for all of the contracts and so

1 where it does not include an RFQ date, Mr Hughes takes  
2 the start of production date and subtracts 30 months  
3 because 30 months is the median gap between start of  
4 production and RFQ date where the data contains both of  
5 those dates. That is also consistent with the witness  
6 evidence about the gap between the two.

7 So one of Mr -- Dr Majumdar's approaches is, well,  
8 Mr Hughes, you have taken 30 months, what if you  
9 increase it or decrease it by six months? The other  
10 approach is to assume, where you do not have an RFQ  
11 date, that the RFQ was at the beginning of the platform.  
12 That is Dr Majumdar's "by platform sensitivity", and  
13 the basis of that is, Dr Majumdar says, where the RFQ  
14 date is missing, it is to be inferred that there was not  
15 an RFQ, in fact what happened is that there was  
16 a mid-platform refresh of that vehicle, but it did not  
17 involve another RFQ, so the only RFQ was at the start of  
18 the platform.

19 So as I say, those really are, in my submission,  
20 the three key points in relation to sensitivities or  
21 assumptions: duration of infringing conduct, RFQ date,  
22 and the new contract sensitivity, and these are all set  
23 out at table 8 of Dr Majumdar's report, page 44  
24 {E-IR/1/44}.

25 Just to identify Mr Hughes' answers to these points,

1           so far as concerns alternative assumptions about  
2           the duration of the infringement, Mr Hughes' answer is  
3           essentially that those assumptions contradict  
4           the results of the model. So Mr Hughes says: my model  
5           identifies overcharges in the main period, but those  
6           overcharges break down at the start of the wind down  
7           period in MArch 2010 and they identify overcharges for  
8           two of the three products in the early period, and if  
9           you assume -- if you make alternative assumptions about  
10          the duration of the infringing conduct, you are adopting  
11          assumptions which are contradicted by the data. So if,  
12          for example, you say, well, let us assume there was no  
13          early period effect and that the early period prices  
14          were set by competition, naturally that will tend to  
15          reduce the overcharge, including to zero. Or, if one  
16          takes the main period but includes within it the wind  
17          down period and you say, well, what was the overcharge  
18          including both of those periods, again, the result will  
19          be to reduce the overcharge because, Mr Hughes says,  
20          the data tells you that the overcharge vanished at  
21          the start of the wind down period, in broad terms. So  
22          he says, well, the problem with these assumptions is  
23          they are not consistent with the results of the data so  
24          they are not appropriate assumptions. That is at  
25          paragraphs 2.4.15-17 {E1/4/23-25}.

1           Then, in relation to the RFQ dates, the suggestion  
2           of moving it six months in either direction, Mr Hughes'  
3           essential objection is again that is contrary to  
4           the data. Where we have data for both RFQ date and  
5           start of production date, the median gap is 30 months,  
6           and if you increase it to 36, you are introducing  
7           a systematic inaccuracy in the model and the result of  
8           that is to allocate affected contracts to the unaffected  
9           period and so on because of the importance of the RFQ  
10          date.

11        THE CHAIRMAN: So we have the median figure. Do we have  
12          the range in evidence?

13        MR WEST: I am sure the experts will be able to tell you  
14          what that is --

15        THE CHAIRMAN: Professor Neuberger says we do, so ...

16        MR WEST: Then on the "by platform sensitivity", Mr Hughes  
17          has a number of objections to this. One is that it is  
18          contradicted by the evidence. As I explained a second  
19          ago, the theory is that where there is no RFQ date it is  
20          because there was not an RFQ, instead it was a mid-life  
21          facelift or refresh of the model. But the evidence says  
22          that these mid-life refreshes or face lifts of models  
23          are cosmetic in nature, you would not tend to change  
24          the OSS components of the car because they are not  
25          generally cosmetic components anyway. So you would not

1           tend to have a change in the OSS components in  
2           a mid-life refresh. But the possible exception to that  
3           is steering wheels because steering wheels can have  
4           a cosmetic element to them, but even there, there is  
5           very little evidence of any mid-life refresh of steering  
6           wheels. I think there is one example identified by  
7           Mr Corbut. But even then, if you look at what Mr Corbut  
8           says about it, he says there was an RFQ on that  
9           occasion, so that is not consistent with Dr Majumdar's  
10          approach either.

11           Then Mr Hughes also takes issue with the suggestion  
12          that if you apply the by platform sensitivity  
13          the overcharges disappear. That is what Dr Majumdar  
14          said in his report. But there have been two recent  
15          notes exchanged by the experts on this by platform  
16          sensitivity specifically. Those are in bundle E. I do  
17          not think we need to necessarily turn them up, but the  
18          Tribunal should be aware that these were exchanged. So  
19          Dr Majumdar identified what he said was a coding error  
20          and produced a new note and that is at tab 12 of  
21          bundle E {E/12/1}, and Mr Hughes responded to that by  
22          way of his own note, which is at {E/14/1}.

23          THE CHAIRMAN: Let me just find those.

24          MR WEST: Just on the specific point of the effect of the by  
25          platform sensitivity, as part of preparing this note,

1 Mr Hughes went back and looked at the detail of how  
2 Dr Majumdar had produced the results, namely that  
3 the overcharge disappears, and he found that  
4 Dr Majumdar, in running his model, had not only replaced  
5 estimated RFQ dates which were part way through the life  
6 of the platform, but had actually removed known RFQ  
7 dates as well. When those known RFQ dates are put back  
8 in, because the purpose of this sensitivity is to  
9 explain cases where you do not have a known RFQ date,  
10 most of the overcharges, I think with one exception,  
11 reappear, and that is explained at paragraph 4.4 of this  
12 note. I think the exception is one way of running  
13 the model in relation to the new contract main period  
14 effect for steering wheels.

15 But in relation to the balance, in fact, Mr Hughes  
16 finds that the overcharge effect is still there even if  
17 you apply the by platform sensitivity.

18 Then, finally, in relation to the new contract  
19 sensitivity, what Mr Hughes says is that the problem  
20 with that is that you massively reduce the number of  
21 data points to somewhere between 50 and 100 per OSS  
22 component, whereas previously it had been many hundreds,  
23 and the problem with that, Mr Hughes says, is that it  
24 reduces the statistical power of the model to such an  
25 extent that, even if there were an effect, the model



1 would not find it. He also says there was no need  
2 simply to disregard data points and no justification for  
3 disregarding data points.

4 So, in my submission, those are the three main  
5 sensitivities or alternative assumptions: the RFQ date,  
6 the alternative infringement period and the new contract  
7 sensitivity and that is what Mr Hughes says about them.  
8 So I think it is right that one can boil down  
9 the dispute between the experts to that quite small  
10 number of points in relation to overcharge, because  
11 I think those are really the key points of difference  
12 between them.

13 I was going on briefly then to address pass-on.

14 Would that be an appropriate moment for a break?

15 THE CHAIRMAN: You are going to address what, pass-on?

16 MR WEST: Pass-on.

17 THE CHAIRMAN: Yes, thank you.

18 (3.15 pm)

19 (A short break)

20 (3.27 pm)

21 MR WEST: Pass-on, gentlemen. There is a clear difference  
22 of view between the parties in relation to the law  
23 regarding pass-on and in particular what is required to  
24 demonstrate a causal link between an overcharge and  
25 pass-on. We rely on the recent guidance of the Court of

1           Appeal in the *Trucks* appeal. That is tab 42 of  
2           the authorities, page 52, paragraph 151 {AUTH2/42/52}.

3           THE CHAIRMAN: Hold on, give me a second. Sorry.

4                     Which tab of the authorities?

5           MR WEST: 42.

6                     Page 52, paragraph 151, the Court of Appeal says:

7                     "In terms of factual causation ..."

8                     This is pass-on:

9                     "... DAF could only succeed in its argument on  
10                    [supply pass-on] SPO if it could establish that  
11                    the prices charged by *Royal Mail* and BT to their  
12                    customers were higher because of the overcharge, in  
13                    other words if it could establish (and the burden of  
14                    proof is on DAF) that the overcharge had been passed on  
15                    to those customers. The CAT was unanimous as to this  
16                    requirement at [223] of its judgment where it said: 'we  
17                    consider that DAF must prove that there was a direct and  
18                    proximate causative link between the Overcharge and any  
19                    increase in prices by the Claimants. That means that  
20                    there must be something more than reliance on the usual  
21                    planning and budgetary process, into which  
22                    the Overcharge was input and ... some point prices  
23                    increased'. I agree with Mr Ward ... that the CAT was  
24                    applying the correct legal test, as recently restated by  
25                    this Court in *Stellantis* ..."

1           And of course the CAT had identified four indicia  
2           which could be relevant to establishing causation and we  
3           say none of them are made out here, and we say the  
4           Defendants have not shown that any of those indicia are  
5           made out or that there was any other basis for direct --

6           THE CHAIRMAN: Sorry, just remind me, the four indicia are  
7           set out in this judgment, are they?

8           MR WEST: The next paragraph goes on to address them:

9                     "... non-exhaustive potentially relevant  
10           factors ..."

11          THE CHAIRMAN: Yes, yes, yes. Okay, yes.

12          MR WEST: Before turning to the experts, the witness  
13          evidence is also key on this question because, in my  
14          submission, it demonstrates that the mechanism by which  
15          prices affect costs is very tenuous and far from  
16          proximate, because that evidence is that the Claimants  
17          set their prices by benchmarking against competing  
18          vehicles, but there seems to be a suggestion that if  
19          profitability is insufficient on that basis, the  
20          Claimants might look again at the specifications of  
21          the vehicle and perhaps reduce some components or  
22          include cheaper components so as to ensure that  
23          profitability is sufficient.

24                 Now, of course, we are talking here about OSS  
25          components and so most of those are not optional,

1 a vehicle has to have a steering wheel and seatbelts and  
2 at least some airbags nowadays, and so it is difficult  
3 to see how this really works in relation to OSS. But  
4 even if it is right to say that the Claimants' pricing  
5 staff would have revisited the specifications, that is  
6 not, in my submission, pass-on, because the allegation  
7 of pass-on as pleaded is pass-on in the form of higher  
8 prices, the allegation is the overcharge led the  
9 Claimants to charge higher prices, and buying and  
10 incorporating fewer or cheaper components is not pass-on  
11 in the form of higher prices. If anything, that seems  
12 to be a different form of mitigation, purchasing cheaper  
13 components to seek to mitigate an overcharge, but it is  
14 not a pleaded form of pass-on and the attempt to say  
15 that that is pass-on was rejected by this Tribunal and  
16 the CA -- the Court of Appeal in the *Bearings* case. So  
17 we say that pass-on is also impossible on the facts,  
18 because it is not pass-on of the kind which is pleaded.

19 Now going back then to the expert evidence on this  
20 point. In this case it was Dr Majumdar who is putting  
21 forward a model and it is an equation of a similar kind  
22 to Mr Hughes' model on overcharge and there is in fact  
23 a reasonable degree of common ground in relation to  
24 the pass-on model. For example, the experts both agree  
25 that the appropriate price for these purposes is the net

1 dealer price, so that is the relevant variable, they  
2 agree, under this model. In my submission, there are  
3 three main criticisms that Mr Hughes makes of the model,  
4 so this is really what, in my submission, the pass-on  
5 debate boils down to.

6 The first is one that I have already mentioned,  
7 namely that the costs information in the model is not  
8 OSS-specific costs, it is all variable costs. So what  
9 the model models is the relationship between price and  
10 variable costs in general, not the specific OSS costs,  
11 and Mr Hughes points out that not all variable costs  
12 will be pass-on to the same extent. To give an obvious  
13 example, a change in costs which is industry-wide will  
14 tend to be passed on to a greater extent than a change  
15 in variable costs which is firm-specific, and Mr Hughes  
16 points out that the cost increases in this case are  
17 actually more than firm-specific, they are  
18 model-specific, and that is because they only affect  
19 models which were manufactured under contracts concluded  
20 during cartel period, and because of the long term  
21 nature of automotive supply runs, that means that cars  
22 which were manufactured using OSS purchased before  
23 the beginning of the cartel would continue to be  
24 manufactured for a number of years into the cartel  
25 period. Those models would be competing with models

1 which incorporate the cartel overcharge and the result  
2 of that, Mr Hughes says, is that it would be very  
3 difficult to pass on any part of the overcharge, because  
4 the models affected by it are competing with other  
5 models that are not affected by it. That is his first  
6 complaint: using variable costs as a proxy for OSS  
7 costs.

8 The second is that he says that Dr Majumdar's model  
9 does not sufficiently account for the extent to which  
10 prices are driven by willingness on the customer's part  
11 to pay for higher specification vehicles reflected in  
12 the customer's willingness to buy optional extras.  
13 Dr Majumdar does include a variable to try to control  
14 for this, but that variable is limited to the number of  
15 options, and Mr Hughes says that is likely to understate  
16 the willingness to pay effect and to allocate an effect  
17 which is really driven by willingness to pay to an  
18 increase in costs. Mr Hughes puts forward two  
19 alternatives to seek to control for this. One is  
20 limiting the data points to vehicles within a certain  
21 tolerance of the median number of options, and  
22 the second is to base the option only on vehicle base  
23 prices and not on prices including the cost of options.  
24 He models both of those alternatives and he finds that  
25 the pass-on rate falls to about half of what Dr Majumdar

1 has found. So that is the second of the three  
2 issues: whether the model controls specifically for  
3 willingness to pay for optional features. Of course  
4 the increased price of OSS is not a feature for which  
5 customers will be willing to pay. It is not an increase  
6 in functionality at all.

7 The third difference between them, in my submission,  
8 is volume effects. Dr Majumdar did not really address  
9 this at all in his original report on pass-on, although  
10 I think he does now accept that it is an essential  
11 element of pass-on. Instead, he has a single footnote,  
12 footnote 427, saying that he thinks that volume effects  
13 are unlikely to be material. We say that the Defendants  
14 have to do a bit better than that because they have  
15 the burden of proof in relation to pass-on and that  
16 includes the burden of proving the effect of  
17 the increase in costs which they allege by way of  
18 pass-on on sales and the volume of sales, because, as  
19 I think Dr Majumdar accepts, unless prices are entirely  
20 inelastic, demand is entirely inelastic, there must be  
21 a volume effect of some kind. Mr Hughes has not  
22 prepared a full model of volume effects, not least  
23 because he says that is up to the Defendants, but he has  
24 prepared an indicative model, and the level of volume  
25 effects under that model depends mainly on

1 the elasticity of demand. Mr Hughes relies on a US  
2 study with a figure of elasticity between three and five  
3 meaning a 1% increase in costs leads to a 4 to 5%  
4 reduction in earnings through volume effects. In  
5 the joint statement Dr Majumdar takes issue with that  
6 level of elasticity and proposes a lower number. So  
7 there are two rival studies which the respective experts  
8 rely upon which the Tribunal may have to look at to see  
9 which figure for elasticity is likely to be more  
10 appropriate in this particular market.

11 Another point on volume effects raised in the joint  
12 expert statement is Dr Majumdar says that the level of  
13 volume effects assumes that dealers pass on themselves  
14 to customers, pass on at the level of the dealer, and so  
15 one has to take effect -- take into account the question  
16 of whether dealers would absorb any pass-on themselves  
17 in their own margins or would pass that on to buyers,  
18 because only in the latter case would there be volume  
19 effects and there is a dispute between the experts about  
20 that, Mr Hughes' position being that dealers generally  
21 have very low margins and so they are not in a position  
22 to absorb increases in cost without passing it on.

23 In my submission, those are really the key -- three  
24 or four key points between the experts which explain  
25 the differences between them in relation to pass-on and



1           the Tribunal will have to hear what the experts have to  
2           say on those points, amongst others.

3           Can I just mention German law very --

4           PROFESSOR NEUBERGER: Can I just interrupt, Mr West, for one  
5           moment. You said earlier on that you could boil down  
6           the differences between the experts and you have done so  
7           on the specific questions of overcharge and pass-on.  
8           What I was not clear is whether you are saying that  
9           the disagreements that are registered in the joint  
10          report on other topics are not ones of particular  
11          importance to explore, or whether you think there are  
12          other important differences between the experts which we  
13          will have to resolve in order to come to a decision on  
14          the case.

15          MR WEST: In my submission, these are the main differences  
16          between them in relation to overcharge and pass-on. On  
17          value of commerce, there is not a difference between  
18          them; they essentially agree. In relation to financing  
19          losses, Dr Majumdar has not been instructed to address  
20          that, so there is no difference between them.

21                 Then that just leaves the question of theory of  
22          harm --

23          PROFESSOR NEUBERGER: Yes.

24          MR WEST: -- and that may be considered partially a question  
25          for the experts and partially a factual question, but

1           that is not a matter I have addressed here.

2           PROFESSOR NEUBERGER: Okay, thank you.

3           MR WEST: Very briefly on German law -- the only reason  
4           I raise this is the Tribunal still has to decide whether  
5           it wishes to hear from the German law experts in  
6           cross-examination.

7           PROFESSOR NEUBERGER: Yes.

8           MR WEST: In my submission, the importance of this point  
9           continues to reduce. Since the PTR, one of  
10          the questions we have been considering is the split of  
11          commerce within Vauxhall/Opel as between C4, on the one  
12          hand, and C10 and 11 on the other hand. C4 is  
13          the German Opel Automobiles entity and it was joined as  
14          a claimant in December 2020, whereas C10 and 11,  
15          the Spanish and UK entities, were joined in  
16          October 2022, and that means that were the Tribunal to  
17          hold that the cessation point applies, so time under  
18          German law does not start running until the infringement  
19          came to an end, then C4's claim will be in time on that  
20          basis alone so long as time starts running at around  
21          the date when the Commission found that the infringement  
22          ended, which was in MArch 2011. So C4's claim was  
23          within ten years of the end of the Commission  
24          infringement, and that point, the cessation point, is  
25          the point where there is a judgment. There may be

1 a debate about whether it is formally a judgment,  
2 a pronouncement of some kind by the German court which  
3 holds that the cessation point does apply in German law.  
4 So we have calculated that 65% of the commerce within  
5 Vauxhall/Opel sits with C4 and only 35% with C10 and  
6 C11. We have explained that calculation to the  
7 Defendants in correspondence and they can check that.  
8 It has not, so far, been disputed. But if that is  
9 right, then we say that the other point of German law,  
10 the point on which there is no decision on point by  
11 the German court, actually only applies to about 35% of  
12 the trade within Vauxhall and Opel, and in fact it is  
13 less than that, because, on any view, losses suffered  
14 within ten years of those companies starting their  
15 claims in October 2022, so losses after October 2012,  
16 are in time on any view. So we say, actually,  
17 the suspension point, which has to do with the scope of  
18 the Commission investigation, and we saw some documents  
19 with "annex" written on them and so on which are  
20 relevant to that, actually only affects what we think is  
21 a small, or relatively small minority of the affected  
22 commerce on this point. So --

23 THE CHAIRMAN: But that just makes it less financially  
24 important. It does not mean it does not have to be  
25 resolved.

1 MR WEST: That is correct. It is less financially important  
2 but the question really is: does it justify bringing  
3 the experts here with the additional cost and time?

4 THE CHAIRMAN: Well, if you are making the points, I mean,  
5 if you are still resisting the points --

6 MR WEST: We are still resisting the points, but we are  
7 increasingly coming to the view that the additional cost  
8 and time of bringing the experts here probably is not  
9 worth the --

10 THE CHAIRMAN: How much are we talking about for this aspect  
11 of the claim -- back of an envelope -- if you are right?  
12 It is still a significant sum of money, is it not?

13 MR WEST: Well, of course, it depends on the level of  
14 overcharge and so on which is found by the Tribunal.

15 As I say, the Tribunal does have to decide this,  
16 because we have to decide whether to tell the German  
17 lawyers to come or not, but it does seem to us that  
18 the more we think about it, the less the key points  
19 matter.

20 THE CHAIRMAN: If you are saying it does not matter and we  
21 can just find against you on this point, then they may  
22 not need to come.

23 MR WEST: I am not saying that, I am afraid.

24 THE CHAIRMAN: I think Ms Ford was perhaps out of step with  
25 everyone else on this, on this German decision at

1           the last PTR. Sorry, you are looking at me as if I have  
2           got that wrong.

3           MS FORD: Sir, we were certainly identifying the difference  
4           of views between the German experts on the extent to  
5           which the German law decision is binding. It is not  
6           a decision, it is an indicative ruling, and so --

7           THE CHAIRMAN: Yes. The question is: should this Tribunal  
8           be going behind that indicative ruling, and, if so, on  
9           what basis, and is that assisted? Our provisional view  
10          is there will be some reluctance to do that, but if that  
11          is going to be assisted by cross-examining the experts,  
12          or putting them in a hot tub, or we can decide how we  
13          are going to do it, then they could come, but I mean,  
14          what is your -- have you thought about this further?

15          MS FORD: Sir, I am going to ask Professor Bailey to address  
16          you on this, because he deals with the German law point.

17          THE CHAIRMAN: Ah.

18                 Professor Bailey, you have drawn the short straw.

19          PROFESSOR BAILEY: May it please the Tribunal.

20                 Our position is that actually some questioning,  
21          whether it is from the Tribunal or from counsel to  
22          the experts, would be of assistance.

23          THE CHAIRMAN: Right.

24          PROFESSOR BAILEY: You are quite right that it is a Court of  
25          First Instance providing preliminary assessment, but of

1 course the Defendants' expert strongly disagrees with it  
2 and has set out his reasoning. To test whether or not  
3 that reasoning is persuasive, given that this order does  
4 not actually bind even the Regional Court in Dortmund or  
5 any other court in Germany --

6 THE CHAIRMAN: Right.

7 PROFESSOR BAILEY: -- we say that actually, for about an  
8 hour, some questioning would be useful.

9 THE CHAIRMAN: Okay. Well, if it was to be  
10 cross-examination, how long would the parties want? How  
11 long would you require, Professor Bailey?

12 PROFESSOR BAILEY: No more than an hour.

13 THE CHAIRMAN: You would require an hour.

14 PROFESSOR BAILEY: 45 minutes to an hour is what we would  
15 currently ...

16 THE CHAIRMAN: Mr West, we can pick this up tomorrow morning  
17 if that is easier. Sorry, I have sprung it on you  
18 a little bit.

19 MR WEST: I think that is -- we do need to reach a landing  
20 point at some point, but tomorrow morning should be  
21 fine.

22 THE CHAIRMAN: Yes. I mean, if both sides'  
23 cross-examination were limited to 45 minutes, it may be  
24 better done by cross-examination rather than a hot tub,  
25 I suspect, and then it is a question whether -- you may

1 not want to cross-examine, Mr West, I do not know,  
2 but~...

3 Then you have got your point that none of this is  
4 worth a candle anyway, so you can discuss that.

5 MR WEST: I do not think I would go quite that far.

6 THE CHAIRMAN: No, no. Very good.

7 MR WEST: That is all I was proposing to say by way of  
8 opening. I understand that the expert protocol  
9 I mentioned at the beginning should now have been  
10 provided to the Tribunal.

11 THE CHAIRMAN: Yes, we need to think about that. I would  
12 not assume that we are going to be agreeing with that,  
13 but we obviously will discuss it with you and ...

14 MR WEST: Shall we also address that tomorrow morning then?

15 THE CHAIRMAN: No, I think we need a -- probably -- we will  
16 discuss that next week. There is no particular urgency,  
17 is there, to decide the ...?

18 MR WEST: Well, I suppose only that --

19 THE CHAIRMAN: We have only just received it, and --

20 MR WEST: If it is intended that the experts should give  
21 some sort of teach-in or presentation, then they will  
22 have to prepare that.

23 THE CHAIRMAN: Yes, I think "unlikely" is our current view,  
24 so ... we are not sure we are going to be greatly  
25 assisted by that, because we have had obviously their

1 helpful reports, but we can discuss that further at  
2 the beginning of next week.

3 MR WEST: That is all I was proposing to say. I do not know  
4 if anyone else wishes to address you.

5 Housekeeping

6 MR SCANNELL: Sir, on a point of housekeeping, my  
7 instructing solicitors, White & Case, wrote to  
8 the Tribunal earlier this week to request --

9 THE CHAIRMAN: Some extra time.

10 MR SCANNELL: Yes.

11 THE CHAIRMAN: Yes, that is not possible this week for  
12 the time period you are suggesting. So, I mean, you  
13 have got half an hour now, if you want to. You do not  
14 have to.

15 MR SCANNELL: I suppose I was asking for that, was I not?

16 THE CHAIRMAN: I mean, Mr West's opening has been relatively  
17 short and obviously we have read your skeletons  
18 carefully and so forth so ...

19 MR SCANNELL: I am happy to take half an hour, if you will  
20 listen to me. But I am also conscious that  
21 the transcriber may be tired and spirits may be  
22 flagging.

23 THE CHAIRMAN: Spirits are definitely flagging, yes.

24 MR SCANNELL: In that case, I will not make a fresh call on  
25 your energy.



1 THE CHAIRMAN: I am sorry, in principle, we are more than  
2 happy to start early or sit late, it is just not  
3 possible today or tomorrow. So there we are.

4 MR SCANNELL: Yes.

5 THE CHAIRMAN: I think -- were you in agreement as to  
6 whether you needed more time? I do not think you were  
7 in agreement, were you, the Defendants?

8 MR SCANNELL: No. No, Ms Ford has indicated that she is  
9 content with the allotted time. My concern is that we  
10 will be sharing the load between us and we are very  
11 mindful that the Tribunal will not want duplication.  
12 Thursday is a non-sitting day and Friday afternoon is  
13 given over to the cross-examination of some witnesses  
14 and I am very keen not to squeeze those witnesses --

15 THE CHAIRMAN: I understand.

16 MR SCANNELL: -- and to make sure that we have enough time  
17 for them to be cross-examined.

18 THE CHAIRMAN: What is happening on Friday morning?

19 MR SCANNELL: Excuse me, sir?

20 THE CHAIRMAN: What is happening on Friday morning?

21 MR SCANNELL: Finishing closing.

22 THE CHAIRMAN: Finishing closing.

23 MR SCANNELL: So we have one and a half days, effectively --

24 THE CHAIRMAN: I see.

25 MR SCANNELL: -- for opening for ZF and Autoliv.

1 THE CHAIRMAN: Yes. But in the light of -- I mean, there is  
2 a huge amount of overlap --

3 MR SCANNELL: Yes.

4 THE CHAIRMAN: -- between you, plainly.

5 MR SCANNELL: Yes.

6 THE CHAIRMAN: So I would have thought a day and a half  
7 should be sufficient, just ... You have Thursday to  
8 focus on and to narrow those submissions.

9 MR SCANNELL: Yes. Very well, thank you.

10 THE CHAIRMAN: So if there is nothing else today ...  
11 (3.51 pm)

12 (The Court adjourned until 10.30 am on Tuesday,  
13 2 October 2024)

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