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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 1st October – Tuesday 29th 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

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.

Friday, 4 October 2024

(10.00 am)

(Proceedings delayed)

(10.07 am)

THE CHAIRMAN: Some people are joining live stream on our website. An official recording is being made and an authorised transcript will be produced but it is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings and breach of that provision is punishable as contempt of court.

Ms Ford.

Opening submissions by MS FORD (continued)

MS FORD: Sir, the Tribunal should have received overnight a copy of two letters in hard copy that the Tribunal requested the other day.

THE CHAIRMAN: Yes, I did. I think I might have left them in the room, but ...

MS FORD: I can hand up additional copies, if that assists, but I was not planning to address them orally except to confirm that they made their way to the Tribunal.

THE CHAIRMAN: No, that is fine. Thank you very much indeed.

Yes, good.

MS FORD: So I am moving on to deal with the Claimants'

1 spillover effects case and I am going to take this
2 relatively briefly because Mr Scannell has already
3 addressed you on the attenuated causal mechanisms that
4 this would require in order to work. So I am going to
5 focus on it from essentially ZF's perspective.

6 The starting point is obviously that there would
7 have to have been a relevant contact in the context
8 either of OSS 1 or OSS 2 and for ZF it could only have
9 been in the context of OSS 2. I have shown the Tribunal
10 that in OSS 2 the Commission did not find that there had
11 been a continuous stream of communication, it was
12 recital 38 in that decision which said that the contacts
13 had a varying frequency in the course of the overall
14 duration of the conduct. So there can be no assumption
15 that any particular point in time there was a consistent
16 process of infringing information exchange in
17 the context of OSS 2.

18 There would then have to have been a mechanism
19 whereby information which had been obtained in
20 the context of OSS 2 was passed on to someone with
21 responsibility for the Claimants' accounts and that is
22 the relevance of the evidence from the ZF witnesses,
23 that there are generally separate sales teams for each
24 OEM customer and that a sales team in respect of one OEM
25 would not be involved in the RFQ and pricing process for

1 a different OEM.

2 Just to show the Tribunal one example of that
3 evidence {D/1/15}, please.

4 THE CHAIRMAN: D? D1, which tab?

5 MS FORD: Tab 1, page 15, please.

6 This is from Mr Drouin's evidence. At paragraph 62,
7 he explains:

8 "... each OEM customer had its own dedicated account
9 team at TRW, and a sales team from one customer account
10 would not be involved in the RFQ process or pricing
11 discussions for other customer accounts (which are, in
12 any event, very specific to each customer and each
13 product)."

14 There are statements to that effect in each of
15 the witnesses that deal with the different claimant
16 companies.

17 So, given the way that each customer had its own
18 dedicated teams and the teams were separated both in
19 terms of responsibility and also, in some cases,
20 geographically as well, we say that there would not have
21 been any established channel for information to flow
22 from one team to another.

23 THE CHAIRMAN: Yes, I mean, Mr West submits that that may or
24 may not be true at the salesperson level, but if you go
25 up the organisation, clearly there is people looking at

1 every aspect holistically and separately. So what is
2 your position on that?

3 MS FORD: We say that that is, in many respects,
4 unsurprising, because of course one would not expect
5 a company to operate with entirely separate
6 responsibilities for each customer all the way up
7 the chain, it would simply be inoperable, so it is
8 unsurprising.

9 THE CHAIRMAN: Of course not, but then where does that leave
10 us on siloing? Clearly, if you go high enough up
11 the organisation, it is common ground that there is no
12 silo operating. So how does that -- why is any of this
13 particularly assisting us when it gets to specifics?

14 MS FORD: It goes to the extent to which there are
15 established lines of communication, because in order to
16 make this case work on the scale that they are
17 advancing, one would have to have established channels
18 rather than, for example, chance meetings in corridors
19 or occasional oversight by senior personnel. In our
20 submission, the unremarkable fact that one would have,
21 for example, committees with responsibility for certain
22 things that might look at one customer account and
23 another customer account in the same meeting is simply
24 not going to provide that channel of communication to
25 the extent that would be necessary plausibly to give

1 rise to the sort of effects the Claimants are talking
2 about here.

3 THE CHAIRMAN: I understand that submission. You mention
4 "occasional oversight by personnel". Where is
5 the evidence on how occasional the oversight by senior
6 personnel is?

7 MS FORD: Well, I certainly anticipate that the Claimants
8 will be testing that proposition insofar as they want to
9 say that there was any relevant crossover, but one can
10 talk about, for example --

11 THE CHAIRMAN: But have you adduced any evidence on it?

12 MS FORD: -- Ms Bernadi -- yes, Professor Bailey is pointing
13 out the fact Mr Drouin's evidence, that we were just
14 looking at, goes on to say, for example {D/1/15}:

15 "Occasionally, we met salespeople from other account
16 teams at general TRW meetings -- for example, at yearly
17 Target Review meetings for the Passive Safety Division
18 and at yearly Customer Strategy Review meetings with
19 TRW's Management Board in the US ..."

20 Those are two examples of the sort of situations
21 where you might find that one customer account is
22 mentioned in the same meeting as another customer
23 account and he is addressing --

24 THE CHAIRMAN: Yes, but that was not really --

25 MS FORD: -- the likelihood of that.

1 THE CHAIRMAN: That was not the point I was on. It was
2 the -- assuming the more senior people straddle
3 the various accounts, various customers and so forth, as
4 we agree they must do, you said that they only have
5 occasional contact with the sales team -- sorry, I am
6 paraphrasing, Ms Ford, I apologise, the transcript has
7 gone, but you said something like that -- and is there
8 any evidence on the degree of contact between the senior
9 people and the various sales teams and the extent of
10 their interest and what the limits of their
11 responsibilities were? Is there anything on that in
12 the evidence at the moment?

13 MS FORD: Well, if we come on to read the next two
14 paragraphs, we can see that he is talking about how much
15 of that sort of cross-pollination there was in
16 the context of two examples: target review meetings and
17 customer strategy review meetings, and there are
18 equivalent paragraphs in other paragraphs of
19 the evidence from ZF, so I can -- I do not have
20 the relevant references to hand, but I can give
21 the Tribunal references at some point if it would be of
22 assistance.

23 THE CHAIRMAN: We will pick them up at some point, yes.

24 MS FORD: But let us just take up these examples.

25 THE CHAIRMAN: Yes.

1 MS FORD: There are such things as target review meetings
2 and he explains:

3 "The focus ... [is] on ... volumes and turnover, and
4 the purpose of these meetings was to show management
5 that the business in our customer account was developing
6 properly. At these meetings, we explained to management
7 what our targets were for the account and the upcoming
8 RFQs that we would have to manage. We discussed these
9 targets with management, who decided if they were
10 sufficient or if we needed to find other ways to grow
11 the business in the account."

12 Then he goes on to contrast that with strategy
13 review meetings, they:

14 "... were much larger, half-day meetings, which all
15 customer account sales teams were invited to attend
16 remotely and at which each sales team presented their
17 customer development strategy (for example, if
18 the customer wanted to move to a different location or
19 develop a new product and how the account team planned
20 to respond), the key financial figures for the account,
21 the technical performance ..."

22 If we could please go over the page {D/1/16}:

23 "... and the customer's views on ... (Quality, Cost,
24 Delivery, Development and Management) to TRW's Board,
25 using the same standard template. Each year ..."

1 So that gives the Tribunal an idea of the frequency
2 of that exercise:

3 "... our sales team attended these meetings,
4 although we generally did not stay for the full
5 presentations by the other teams. These meetings were
6 focused on customer strategy and setting targets
7 for ..." --

8 THE CHAIRMAN: Yes, I think this is not the point I was
9 asking you about, but, yes, I have read all of that,
10 yes.

11 MS FORD: Certainly the point we emphasise is that in order
12 to give rise to the sorts of effects that the Claimants
13 claim have occurred, one needs established channels of
14 communication rather than chance cross-pollination.

15 THE CHAIRMAN: Yes, I understand that submission, yes.

16 MS FORD: The ZF witnesses have also specifically commented
17 on the position with regard to the OEM account teams for
18 the VW and the BMW accounts, because of course they were
19 the subject of the OSS 2 decision. To show the Tribunal
20 one example of that, Ms Bernadi's evidence at {D/4/10},
21 please. So at paragraph 33 she says:

22 "I do not recall ever talking to the BMW or VW
23 account teams in relation to RFQ responses, price
24 reductions or any other price mechanisms and I was not
25 aware of how TRW's VW or BMW account teams responded to

1 any requests for price changes. Such specific points
2 were never part of discussions at the Account Director
3 meetings."

4 Then, for completeness, 35:

5 "We never had any member of the Fiat account for OSS
6 who moved over from the BMW or VW accounts."

7 And again there are equivalent paragraphs in
8 the other witness statements dealing with the other
9 customer accounts.

10 So it is not simply the generality of the fact that
11 these customer teams operated separately, it is
12 the specificity of the fact that they are saying that,
13 "We did not liaise with the BMW/VW teams and we did not
14 have a transfer of personnel from them".

15 There is then a timing point, which is that if,
16 notwithstanding the lack of established channels, there
17 was a transfer of information, that transfer of
18 information would then have to have coincided with
19 the response to a relevant RFQ either issued or about to
20 be issued by one of the claimant groups so that there
21 would have had to have been an extant RFQ process and
22 that process would have had to have concerned the same
23 type of OSS, because, as Mr Scannell pointed out
24 previously, it would be irrelevant if there was
25 information concerning seatbelts which are conveyed at

1 a time when there was an RFQ about airbags.

2 THE CHAIRMAN: Yes, so, I mean, sporadic communications may
3 not be sufficient.

4 MS FORD: Indeed.

5 There is then a question of the utility of
6 the information that goes over. So not only does it
7 have to transfer at the right time, it would have to
8 have utility for the purpose of responding to
9 the Claimants' RFQs, and, again, the Tribunal is
10 familiar with this theme, the evidence of ZF's witnesses
11 is that because these products were bespoke, information
12 in relation to one OEM is unlikely to have been of
13 utility in preparing to respond to an RFQ for
14 a different OEM. Just to show the Tribunal a single
15 example of that point being made, this is back in
16 Mr Drouin's evidence, {D/1/16}, paragraph 66. What he
17 is doing in the first half of this paragraph is
18 responding to a particular email that the Claimants have
19 relied on. We do not need to get into the details of
20 the email at this stage, but the point that he makes
21 starts about nine lines down in this paragraph, where he
22 says -- it begins "not only", about nine lines down:

23 "Not only are OSS products very specific to each
24 project, but each customer is very different, and each
25 customer account therefore has different pricing

1 targets. As explained above, pricing was specific to
2 each project, even for the same customer. It is quite
3 difficult to compare prices even for the same product,
4 as the price includes elements that vary from customer
5 to customer and from project to project, such as
6 the costs of validation and development (as some
7 customers will ask for much more validation work than
8 others) and amortisation. The price also varies
9 depending on the technical specifications for each
10 customer, as some customers like BMW have higher
11 specifications than PSA."

12 Again, this is just an example paragraph and there
13 are other paragraphs to the same effect, but the point
14 being made is, even if you had information about
15 the pricing to one OEM, it was not going to be of any
16 utility in the context of pricing to a different OEM or
17 even pricing for a different project to the same
18 customer.

19 The next question is, well, to what extent --

20 THE CHAIRMAN: How does that tie into the findings in OSS 1?

21 So, as I recall -- sorry, I have not got the right
22 paragraphs in mind, but as I recall, in OSS 2, there was
23 a suggestion it may be sporadic and ineffective, but of
24 course you are not involved in OSS 1, so, yes, okay, so
25 I do not have to ask you that question.

1 MS FORD: We are not. I do have a recollection that there
2 is an equivalent paragraph in OSS 1, but as
3 the Tribunal --

4 THE CHAIRMAN: Right. Okay, well, that will be a matter for
5 Mr Scannell in due course. We can pick that up later,
6 yes.

7 MS FORD: Indeed.

8 So we are moving on to the question: would ZF change
9 its conduct based on the information concerned?
10 The point being, even if the team pricing to
11 the Claimants had obtained some information from
12 the BMW/VW team and they considered it to be of
13 relevance in some way to what they were doing, which the
14 Tribunal appreciates our evidence is that is not likely,
15 the question then becomes: well, in the absence of any
16 explicit coordination about pricing to a different OEM,
17 because that is the premise on which this spillover case
18 is being run, if there is no explicit coordination,
19 could these people have had the confidence to act on it
20 in such a way as to increase their prices, because on
21 this scenario, they have no guarantee how their
22 competitors might respond and whether, if they do
23 anything about it, they might actually go and lose
24 the business? This is the point that is made by
25 Dr Majumdar in the joint expert statement. It is

1 {E1/13/10}, please.

2 The relevant proposition is proposition 11, which is
3 that:

4 "Spillover effects would be expected to be less
5 harmful to the Claimants than effects arising from
6 explicit collusion ..."

7 This is a point that Mr Hughes disagrees with.

8 THE CHAIRMAN: Sorry, just slow down a little bit for this.

9 I need to remind myself.

10 Yes, okay. Yes, I am with you now. Yes, sorry,
11 apologies.

12 MS FORD: Dr Majumdar agrees with that proposition.

13 THE CHAIRMAN: Yes.

14 MS FORD: If we look at why, he explains that:

15 "Explicit coordination allows a coordination
16 strategy to be tailored to the bespoke contract in
17 question. It also allows a punishment strategy to be
18 communicated to the coordination group ...

19 "In contrast, tacit coordination due to information
20 spillovers can arise only indirectly from coordination
21 with respect to other customers. This undermines
22 the scope for (i) alignment and (ii) internal stability
23 (ie two of the three cumulative criteria required for
24 coordination as set out in Proposition 3). This is
25 because each Defendant [would] need to infer (without

1 reassurance from the other Defendant or their
2 rivals) and without a punishment strategy being in
3 place) that were it to compete less aggressively than it
4 otherwise would have done, then so will the other
5 Defendant and so will their rivals."

6 His view is that that indicates to him tacit
7 coordination would either be unlikely to arise, or if it
8 did arise, would give rise to substantially weaker
9 effects than explicit coordination.

10 The key point is right at the end here, because:

11 "... each Defendant would be less confident that
12 the other would compete less aggressively than it
13 otherwise would have done ..."

14 In our submission it is one of the real oddities
15 about the analysis that Mr Hughes has put forward that
16 he maintains that there is no difference between
17 the effects which would arise if the Defendants had
18 explicitly coordinated and the effects which arise on
19 the indirect case when they have not had the opportunity
20 to assure themselves that they will not be undercut by
21 their competitors.

22 Finally, there is the question about how might
23 the Claimants respond in the event that there were any
24 attempted increase in price prompted by the transfer of
25 information? The Defendants' case is that the Claimants

1 have sufficient countervailing bargaining power to
2 defeat any such attempted increase in price.

3 THE CHAIRMAN: Yes, this is ... you are talking about
4 spillover now or just generally?

5 MS FORD: I am talking about spillover. However, it is
6 a very pertinent question because, if we look at what
7 the joint experts say about the relevance of
8 countervailing bargaining power, they perceive it as
9 relevant to both the likelihood that there was explicit
10 coordination and the likelihood of effective tacit
11 co-ordination, the spillover case, and that is quite
12 important because, in the Claimants' skeleton,
13 paragraph 99, they have noted that the Defendants'
14 evidence goes into all the ways in which these Claimants
15 exercised countervailing buyer power. We can pull it
16 up. It is skeleton, tab 1, page 32 {S/1/32}.

17 THE CHAIRMAN: Sorry, give me a paragraph number. 99, you
18 said?

19 MS FORD: Paragraph 99, yes.

20 THE CHAIRMAN: The page numbers are different because
21 I printed it out, so ...

22 MS FORD: They characterise the Defendants' evidence from
23 the procurement witnesses and they say:

24 "[It] is concerned to a substantial extent with
25 establishing that the Claimant OEMs were hard

1 negotiators when it came to the price of OSS supplies.
2 For example, that evidence explains that the Claimant
3 OEMs had demanding target prices; or that they would
4 require OSS suppliers to justify their prices by
5 reference to proof of their costs; or that they would
6 demand discounts."

7 They go on to say:

8 "The relevance of this material is not clear."

9 They maintain:

10 "None of this material shows that a cartel targeted
11 at the Claimant OEMs would not or could not have been
12 successful, or that there would have been no point
13 attempting to form one."

14 They go on to say that it is not relevant to
15 spillover either.

16 Now, the economics experts do not agree with that
17 proposition. If I can show the Tribunal {E1/13/4},
18 please, and we are looking at proposition 3, which,
19 slightly unhelpfully, is on this page and runs over to
20 the following page. Proposition 3 sets out
21 the conditions for coordination, so it says:

22 "Economic theory indicates that necessary conditions
23 for ..."

24 If we could go over the page, please {E1/13/5}:

25 "... coordination (whether explicit or tacit) ..."

1 So whether on the Claimants' primary case or on
2 their spillover case:

3 "... are: (i) 'alignment' (ie establishing
4 the cartel strategy for the coordinating group to
5 adopt); (ii) 'internal stability' (ie monitoring
6 adherence to the latter strategy and punishing those
7 that deviate from that strategy); and (iii) 'external
8 stability' (ie the absence of effective external
9 constraints on the coordinating group)."

10 Now, that, I interpolate, is referring to
11 countervailing bargaining power and we will see that
12 that is the way in which the experts understand it as
13 well.

14 But just going back to where we can see what
15 the experts say, on the previous page {E1/13/4},
16 Mr Hughes says:

17 "Agree: these are, according to the economic
18 literature, the three conditions that must be met for
19 tacit or explicit coordination to arise and be
20 sustainable."

21 Dr Majumdar agrees with that proposition as well.

22 If we look then on {E1/13/13} at proposition 16,
23 the experts address the characteristics of this
24 particular market and the proposition they are
25 considering is:

1 "The characteristics of the market for the Relevant
2 OSS products are such that coordination between
3 suppliers is plausible from an economics perspective."

4 Now, Mr Hughes agrees with that as a proposition,
5 and if we could look, please, at the final -- over
6 the page {E1/13/14}, the final point he makes in
7 explaining why he agrees, and it starts, "Finally ...",
8 he says:

9 "... another factor to consider when assessing
10 the internal stability of a cartel is countervailing
11 bargaining power, which refers to the ability of a buyer
12 to undermine the effectiveness of a cartel."

13 He goes on to express his view that actually these
14 Claimants have limited countervailing bargaining power.
15 That is very much contested. The Defendants' evidence
16 in that of their procurement witnesses is that
17 the Claimants are well able to exert countervailing
18 bargaining power. We can see that both experts consider
19 that to be relevant as to the likelihood of explicit
20 coordination and also the likelihood that any tacit
21 coordination is actually going to be effected. So we
22 strongly disagree with the suggestion in the Claimants'
23 skeleton that this is of unclear relevance; it is
24 actually of really quite important relevance.

25 THE CHAIRMAN: So where do we end up with all this? You say

1 that even if --

2 MS FORD: Our --

3 THE CHAIRMAN: You are talking about spillover at

4 the moment, but even if --

5 MS FORD: In the context of spillover, at the final level of

6 this extenuated causal chain, the question is: even if

7 there had been some relevant transfer of information

8 which is of some utility, happened at the right time,

9 and those pricing to these Claimants felt able to act on

10 it, none of which we say is even faintly clear, then

11 the last enquiry one makes is: well, what would

12 the Claimants' response to that have been? And there,

13 one asks: do the Claimants have countervailing

14 bargaining power; are they able to defeat any attempt by

15 the suppliers to increase prices? Our --

16 THE CHAIRMAN: You say to increase prices. You mean to

17 charge more than they otherwise would?

18 MS FORD: In the counterfactual, yes.

19 THE CHAIRMAN: But that -- right. But if -- sorry, I know

20 we are talking about spillover, but I am just trying to

21 get this. If, in the direct cartel activity, you are

22 able to increase the price -- I am using "increase"

23 there, I mean you charge a higher price than you

24 otherwise would with that level of cartel activity and

25 the countervailing bargaining power of the manufacturers

1 -- I get confused by the term "OEM", because they are
2 all OEMs, as far as I can see -- the car manufacturers
3 is insufficient to stop that effect entirely, it may be
4 it ameliorates it, why is that countervailing bargaining
5 power greater in the spillover case such that it can
6 extinguish the effects of the spillover, assuming there
7 is a spillover in the first place?

8 MS FORD: Well, two points. First, of course, the Tribunal
9 has well in mind that we do not accept that, in
10 the context of the direct coordination, there would have
11 been any effect on prices compared to
12 the counterfactual, so --

13 THE CHAIRMAN: Of course, yes, yes, yes --

14 MS FORD: But I engage with the question --

15 THE CHAIRMAN: But, I mean, if it can have an effect in
16 the direct, why would it then not have an effect --
17 necessarily not have an effect in the spillover?

18 MS FORD: Because we are dealing, first of all, with
19 different OEMs, and so one cannot simply assume that
20 because, for example, it may have been sufficient to
21 increase prices vis-à-vis the targets of the direct
22 conduct, it would equally have been sufficient to raise
23 prices vis-à-vis the --

24 THE CHAIRMAN: Yes, that is the whole: is there a ratchet,
25 is it the whole? But the whole basic mechanism of

1 the spillover you object to, I understand that. But
2 assuming there is a spillover effect, how does
3 the countervailing bargaining power extinguish that?

4 MS FORD: Sir, it is not quite the same point, because --

5 THE CHAIRMAN: Okay.

6 MS FORD: -- it is a question of whose countervailing buyer
7 power one is looking at, and it is conceivable that
8 these Claimants were able to exert countervailing
9 bargaining power even if the targets of the direct
10 collusion were not.

11 THE CHAIRMAN: Yes.

12 MS FORD: So it is a fact specific enquiry.

13 THE CHAIRMAN: Yes, sure, sure, sure. Yes, okay,
14 I understand.

15 MS FORD: So we say that the evidence -- and there really is
16 quite a significant body of evidence -- that these
17 Claimants were sophisticated negotiators, they were hard
18 bargainers --

19 THE CHAIRMAN: Yes.

20 MS FORD: -- they were able to resist pricing effects, and
21 we will see that in the evidence, and we say that that
22 is highly relevant to --

23 THE CHAIRMAN: So there is no evidence that they were
24 materially more effective than, say, BMW or these other
25 very sophisticated car -- Toyota, these very

1 sophisticated car manufacturers?

2 MS FORD: There is no comparative evidence.

3 THE CHAIRMAN: No.

4 MS FORD: But that would not be of utility because we do not
5 have a starting assumption that there was any pricing
6 effect vis-à-vis BMW or VW.

7 THE CHAIRMAN: I understand that. Yes, we discussed that
8 with Mr Scannell.

9 MS FORD: Just to round off that point, Mr West sought to
10 rely on the *Trucks* judgment to suggest that
11 countervailing bargaining power was not relevant and of
12 course there are two material distinctions in the *Trucks*
13 judgment. The first is that they had a binding finding
14 of infringement with respect to those Claimants, where
15 of course, here, we are at the stage of seeking to
16 establish whether or not there was any relevant
17 infringement at all and that is --

18 THE CHAIRMAN: It is a factual enquiry --

19 MS FORD: It is a factual enquiry -- (overspeaking) --

20 THE CHAIRMAN: -- (inaudible) -- approach it from *Trucks*, it
21 is not really very helpful, we have to decide on
22 the evidence in this case.

23 MS FORD: Sir, yes, and the same in the spillover context,
24 because *Trucks* was a market-wide cartel, whereas here,
25 we have this theory of harm whereby one has to follow

1 the very extenuated causal chain to get --

2 THE CHAIRMAN: But there is, as I understand, no spillover
3 case in *Trucks*; is that correct?

4 MS FORD: No, because, as I understand Mr West to have
5 conceded, this is something of a novel --

6 THE CHAIRMAN: Yes, exactly, yes.

7 MS FORD: -- theory. So *Trucks* was a much more conventional
8 case.

9 So I am moving on to deal with the question of
10 the allocation as between OSS 1 and OSS 2 --

11 THE CHAIRMAN: Can I put the expert report away?

12 MS FORD: Sir, yes.

13 This particular issue arises by virtue of the fact
14 that ZF is only the addressee of OSS 2 and not OSS 1.
15 In our submission, it is absolutely axiomatic and one of
16 the most basic principles of tort law that ZF will only
17 be liable for such damage as the Claimants can show was
18 caused by OSS 2. If authority is needed for that, we
19 rely on the Supreme Court in *Sienkiewicz*. This is
20 authorities bundle 2, tab 15 --

21 THE CHAIRMAN: Sorry, there are a lot of contingencies one
22 has to consider. So we are still on spillover?

23 MS FORD: We are on spillover.

24 THE CHAIRMAN: So far as spillover is concerned, you can
25 only be liable on OSS 2?

1 MS FORD: Yes.

2 THE CHAIRMAN: Right. I think that is common ground, is it
3 not?

4 MS FORD: No, unfortunately not.

5 THE CHAIRMAN: Oh, right.
6 Mr West is frowning.

7 MS FORD: The complexity arises because we say that for
8 the period during which there is an overlap in time
9 between the OSS 1 infringement and the OSS 2
10 infringement --

11 THE CHAIRMAN: Which is the larger part, yes.

12 MS FORD: -- they are both operating at the same time --

13 THE CHAIRMAN: Yes.

14 MS FORD: -- the Claimants' position is that they are not
15 obliged to demonstrate that any particular damage they
16 seek to claim was caused by OSS 2. They say we do not
17 have to apportion or allocate as between OSS 1 and OSS 2
18 during that overlap period. Our submission is --

19 THE CHAIRMAN: But is it that -- sorry, I think I know where
20 you are going, but is it as simple as looking at OSS 1
21 or OSS 2? Within each we have got different cartels,
22 have we not?

23 MS FORD: That is true, one could attempt to break it down
24 further. Certainly ZF was found to have participated in
25 the two infringements in OSS 2, and so we do not seek

1 to --

2 THE CHAIRMAN: You are in both of the cartels, are you?

3 MS FORD: We were found to have participated in both of
4 those.

5 THE CHAIRMAN: Sorry, my poor recollection. Yes, sorry.

6 MS FORD: So we say what the Claimants must do is establish
7 a causal link between the infringement in which my
8 client has been found to have participated, OSS 2, and
9 the damage that they are claiming. That is -- it is
10 absolutely fundamental.

11 I wonder if we can just see the statement of
12 principle I am trying to pull up. It is
13 the Supreme Court in *Sienkiewicz* and it is
14 {AUTH2/15/14}, please.

15 THE CHAIRMAN: Someone has very kindly rejigged my bundles,
16 thank you. So which tab?

17 MS FORD: Tab 15, page 14.

18 THE CHAIRMAN: So tab?

19 MS FORD: Tab 15.

20 THE CHAIRMAN: Somebody has put some tab numbers on these
21 bundles. Thank you very much, whoever did that. Thank
22 you. Yes.

23 MS FORD: Page 14, and this is in the judgment of
24 Lord Phillips --

25 THE CHAIRMAN: Just remind me what this case was about.

1 Sorry, I have not looked at this recently.

2 MS FORD: This was one of the industrial disease cases about
3 breathing in dust, and it is actually dealing with an
4 exception to the usual rule when one has multiple
5 successive exposures to the same agent, to the same
6 harmful dust, and the extent to which a claimant in that
7 context has to prove a causal link as between different
8 instances of inhaling of dust.

9 THE CHAIRMAN: So they were different Defendants for
10 different incidents, were they?

11 MS FORD: Well, or one instance which is related to
12 the defendant and other instances which are not, or that
13 sort of thing.

14 THE CHAIRMAN: Yes, I understand.

15 MS FORD: So we do not actually -- I am not seeking to
16 suggest that there is a parallel between
17 the circumstances of this case, I am going to it for
18 the basic statement of principle.

19 THE CHAIRMAN: Yes, so it is tort --

20 MS FORD: Tort.

21 THE CHAIRMAN: -- and multiple contributing causes,
22 potentially.

23 MS FORD: Yes, that is exactly what we are trying to get to,
24 although this is even more high level because we say
25 that this is a basic principle that the Claimants are

1 trying to sidestep and it is the proposition in
2 the first sentence of paragraph 16:

3 "It is a basic principle of the law of tort that
4 the claimant will only have a cause of action if he can
5 prove, on the balance of probabilities, that
6 the defendant's tortious conduct caused the damage in
7 respect of which compensation is claimed."

8 We say that the Claimants are attempting to sidestep
9 this basic proposition.

10 THE CHAIRMAN: Okay, but that is at a very -- without
11 wishing to be disrespectful to the Supreme Court,
12 because they go on to say other things, but that is
13 the sort of undergraduate position; we all know that.
14 The question is: how do you grapple with that when you
15 have got potentially multiple causes where you cannot
16 ... so where do they go on to deal with that?

17 MS FORD: It absolutely is the most basic position.

18 THE CHAIRMAN: Yes.

19 MS FORD: The only reason we go back to it is because we say
20 the Claimants' position in this case is not consistent
21 with that most basic proposition.

22 Now, what the Claimants have cited is Drake v
23 Harbour, which Mr West showed you an extract from during
24 his opening submissions. Now, that is authorities --

25 THE CHAIRMAN: So that is all we are getting out of this?

1 MS FORD: I have only gone to this for this, what we say is
2 the absolute headline proposition which the Claimants'
3 position in this case is not consistent with.

4 THE CHAIRMAN: Right, but where you have got multiple
5 causes, where do we get assistance from that?

6 MS FORD: I am going to come on to deal with that. I am
7 first going to address what the Claimants say is
8 the applicable authority and then I am going to come on
9 to say what we say is the applicable authority.

10 So the Claimants' authority is *Drake v Harbour*.

11 THE CHAIRMAN: Yes.

12 MS FORD: This is {AUTH2/13/1}, and the Tribunal will recall
13 there is an extract from this in Mr West's skeleton and
14 he showed the Tribunal.

15 THE CHAIRMAN: Yes, and, again, just remind me, this was
16 a fire case, was it not?

17 MS FORD: This was a case about the -- yes -- the negligence
18 of an electrician and whether it caused a fire to break
19 out in a loft, so not really in any way on a par with
20 the facts.

21 If we look, please, at {AUTH2/13/5}, we can see
22 paragraph 15 is essentially an absolute,
23 straightforward, conventional approach to causation. So
24 if we look part way down the paragraph, there is an
25 explanation of what the judge did. It says:

1 "He considered other possible causes of loss and
2 said ... that no operative cause of the loss had been
3 established which was 'at least as likely as that
4 the defendant[s] failed to check that the insulation was
5 not unacceptably damage, or that any existing damage was
6 not exacerbated by their activity in assembling
7 the light figures onto the cable'. By this he meant, as
8 I read his judgment, that it was more likely that
9 the fire was caused by the Defendants' negligence than
10 that it was not. That was a conclusion that was open to
11 him on the evidence and I am not persuaded that it
12 should be disturbed."

13 So I go to that because in many respects this is an
14 absolutely vanilla example of finding what is the most
15 likely cause of loss.

16 THE CHAIRMAN: Yes.

17 MS FORD: The passage that the Claimants like is at
18 paragraph 28, which is on {AUTH2/13/8}, please, and it
19 starts at the second sentence. They say:

20 "... where a claimant proves both that a defendant
21 was negligent and that loss ensued which was of a kind
22 likely to have resulted from such negligence, this will
23 ordinarily be enough to enable a court to infer that it
24 was probably so caused, even if the claimant is unable
25 to prove positively the precise mechanism."

1 We see from the next line that essentially this is
2 an appeal to common sense.

3 THE CHAIRMAN: Yes. So you say this does not assist us at
4 all --

5 MS FORD: Not even slightly -- (overspeaking) --

6 THE CHAIRMAN: -- (inaudible). I understand that.

7 MS FORD: If you have an electrician who has been found to
8 be negligent and you have a fire in the loft, it is not
9 difficult to see --

10 THE CHAIRMAN: It does not really matter which fuse got put
11 in back to front.

12 MS FORD: It is not difficult to see why the court might be
13 inclined to join the dots.

14 The reason it does not help in this case is because
15 we have the two competing potential causes. We say it
16 is conceivable that either infringement A or
17 infringement B could have been sufficient and it is for
18 the Claimants to prove which one it was, and this basic
19 presumption does not assist with that because this
20 presumption could give you contradictory outcomes. If
21 you apply the presumption in here, you can conclude that
22 infringement A was the sole cause of the entirety of
23 the loss and at the same time, applying the same
24 presumption, you can conclude that infringement B was
25 the sole cause of the entirety of the loss. It just

1 does not help.

2 THE CHAIRMAN: All right. You were going to go to some
3 other cases that help ...

4 MS FORD: Sir, yes, we say the more pertinent authority is
5 the *Wilsher* case, it is {AUTH2/4/1}.

6 THE CHAIRMAN: Just a second, one of my bundles has fallen
7 apart. Sorry, if somebody can at some point change that
8 bundle. It just seems to be beyond help.

9 Right, yes, okay.

10 MS FORD: So this was a case about whether a local health
11 authority was liable for negligently causing a premature
12 baby to be blinded after it was exposed to excess
13 oxygen.

14 THE CHAIRMAN: Yes, I have seen this case.

15 MS FORD: Yes, so, sir, you will recall that in
16 the circumstances of this case, the excess oxygen might
17 have been the cause, but also the baby suffered from
18 various other health conditions and they equally could
19 have contributed to the condition.

20 What the House of Lords found in this case was that
21 where there is a plurality of possible causes,
22 the burden remains on the claimant to prove that it was
23 the defendant's actions that proved -- that caused
24 the injury.

25 The relevant passage is in -- at page {AUTH2/4/17},

1 please. It is essentially the part that is opposite
2 letter H. What he is doing is he is quoting, with
3 approval, he is endorsing the analysis of
4 the Vice-Chancellor in the court below, and so that is
5 why it is in a quote, because he says at F:

6 "... I am quite unable to find any fault with
7 the following passage ..."

8 So he is endorsing it.

9 THE CHAIRMAN: Sorry, where are you?

10 MS FORD: I am about to read from the part opposite H, but
11 I am explaining that what is going on is that the --
12 Lord Bridge is endorsing the contents of this quote,
13 which was what was said in the court below, so that is
14 why it is a quote --

15 THE CHAIRMAN: This is the court below, right, okay, yes.

16 MS FORD: He is citing the court below but he is expressing
17 agreement with it and we can see, just above F:

18 "... I am quite unable to find any fault with
19 the following passage ..."

20 In the dissenting judgment of the Vice-Chancellor.

21 So the relevant passage is in H:

22 "In the present case the question is different.
23 There are a number of different agents which could have
24 caused RLF."

25 That is the condition that the baby had:

1 "Excess oxygen was one of them. The Defendants
2 failed to take reasonable precautions to prevent one of
3 the possible causative agents (eg excess oxygen) from
4 causing RLF."

5 So, here, you do have a finding that there was
6 relevant negligence. But then he says:

7 "But no one can tell in this case whether excess
8 oxygen did or did not cause or contribute to
9 the RLF suffered by the plaintiff. The plaintiff's
10 RLF may have been caused by some completely different
11 agent or agents, eg hypercarbia, intraventricular
12 haemorrhage, apnoea or ..."

13 Various other things I probably cannot pronounce:

14 "In addition to oxygen, each of those conditions has
15 been implicated as a possible cause of RLF. This baby
16 suffered from each of those conditions at various times
17 in the first two months of his life. There is no
18 satisfactory evidence that excess oxygen is more likely
19 than any of those other four candidates to have caused
20 RLF in this baby. To my mind, the occurrence of
21 RLF following a failure to take a necessary precaution
22 to prevent excess oxygen causing RLF provides no
23 evidence and raises no presumption that it was excess
24 oxygen rather than one or more of the four other
25 possible agents which caused or contributed to RLF in

1 this case."

2 So this is a case where there was a finding of
3 negligence, but there were nevertheless various possible
4 causes and there is no presumption or assumption that it
5 was the cause -- the negligent cause, rather than
6 the other causes, which caused the damage; the burden
7 remains on the claimant to prove the causal link between
8 the fault and the damage.

9 THE CHAIRMAN: (Inaudible). But here, let us assume -- and
10 I am sorry, I am making lots of assumptions against you
11 to get to this point. I mean, you -- say you are both
12 cartelists by reference to the OSS decision. Let us
13 assume I am against you or we are against you on
14 spillover, we are satisfied there has been some
15 spillover and as a result of that the Claimants have
16 suffered damage and they point out that there were two
17 sets of cartels operating and they say -- their experts
18 say, "Look, we cannot obviously say whether it is
19 the first cartel or the second cartel, probably there
20 are contributions from both, who knows". Are you
21 saying, in those circumstances, you just both --
22 although everyone is in court, you get to walk away
23 simply because we cannot establish which of the cartels
24 is the dominant one?

25 MS FORD: I say that the position of the House of Lords in

1 this case is, where you have a finding of liability --

2 THE CHAIRMAN: Yes, I know that, but --

3 MS FORD: Well, it is completely on all fours.

4 THE CHAIRMAN: So what is the consequence that you say that
5 you -- if, in the end, notwithstanding there is
6 a spillover and notwithstanding the Claimants have
7 suffered damage and notwithstanding that they were
8 cartels you were both involved in, the mere fact that we
9 cannot say which cartel caused the price increase or
10 which was the dominant one as a result of which you walk
11 away without paying damages, that is your position, as
12 I understand it.

13 MS FORD: The consequence is, the Claimants, who bear
14 the burden of proof, have failed to discharge their
15 burden to show --

16 THE CHAIRMAN: I know that is the reason, but that is your
17 position? That is your position.

18 MS FORD: That is our position, yes.

19 THE CHAIRMAN: Yes, I was just trying to clarify.

20 MS FORD: That is, in my submission, absolutely four-square
21 supported by this House of Lords decision.

22 THE CHAIRMAN: Yes, I know you make that submission, yes.

23 MS FORD: Professor Bailey reminds me, I have not shown
24 the Tribunal the last sentence in this passage, below D:
25 "A failure to take preventative measures against one

1 out of five possible causes is no evidence as to which
2 of those five caused the injury."

3 So a finding to the effect -- that this Tribunal is
4 assuming against my client, a finding to the effect that
5 there was spillover --

6 THE CHAIRMAN: It is slightly different. I mean, it would
7 be more analogous -- I mean, it is horrible to talk
8 about, because they are such troubling cases, but if one
9 physician increased the oxygen and then a second
10 physician also increased the oxygen, so you do not know
11 which physician has resulted in the RFL developing, they
12 both increased the oxygen, it is just not possible to
13 say, I am not sure what the House of Lords would have
14 done in those circumstances, which would seem
15 more analogous to the facts we are dealing with here.

16 MS FORD: Well, there, one is at least saying that both
17 the increases of oxygen -- we have seen from the early
18 part of that passage there is a finding that the oxygen
19 is capable of contributing to the -- is a possible cause
20 of the RLF and then you have two sources of that
21 possible cause. In my submission, here, we have
22 different causal agents. It is far too simplistic to
23 say they were both competition infringements and
24 therefore it is the same. These are different causal
25 agents, they are different infringements, they involve

1 different combinations of OSS components, they involve
2 different suppliers, they involve different OEMs, they
3 involve differences in conduct, they were over different
4 time periods and the Commission saw fit to address them
5 in different infringement decisions. These are
6 different causal agents and the burden is on
7 the Claimants to show that the infringement that my
8 client has been found to have participated in --

9 THE CHAIRMAN: Yes, I understand.

10 MS FORD: -- was a cause of the loss.

11 THE CHAIRMAN: You have made that submission, yes.

12 MS FORD: Now I am moving on to deal with the way in which
13 the Claimants grapple with this, and this is their
14 skeleton, paragraph 57 {S/1/19}.

15 THE CHAIRMAN: There are other cases in this area -- I mean,
16 I thought there were quite a few cases later than
17 *Wilsher* in this area.

18 MS FORD: For our part, we have not found any that are more
19 on point in terms of competing causes. I am going to
20 come on to deal with some of the cases on remoteness,
21 because that becomes relevant when we look at the way in
22 which the Claimants try and put the various machinations
23 that they seek to draw on to try and say why we are in
24 the frame, notwithstanding that we did not participate
25 in OSS 1. But for our part --

1 THE CHAIRMAN: Well, you have looked, anyway, yes.

2 MS FORD: -- this is where we have come out in terms of
3 the most immediate parallels.

4 So just looking at the way the Claimants put it
5 {S/1/19}, we are starting at paragraph 57.

6 THE CHAIRMAN: Of?

7 MS FORD: Of the Claimants' skeleton argument.

8 THE CHAIRMAN: Yes, sorry.

9 MS FORD: What they say is:

10 "... there are three logical possibilities ..."

11 Now, before we even get into the detail, what they
12 do not include in this list of possible permutations is
13 the fourth possibility, which is that OSS 2 has not been
14 shown to cause any loss, and we say that is the position
15 unless the Claimants can prove otherwise.

16 But addressing their three possibilities. The first
17 -- and this is in their paragraph 58 -- they say if
18 there had been no OSS 2 infringement then the prices
19 charged by ZF would have been lower, and then they say
20 in that case they would have purchased from ZF rather
21 than from the participants in OSS 1. So their argument
22 is: even though ZF did not itself participate in OSS 1,
23 it is to be treated as a "but for" cause of any loss
24 suffered as a consequence of OSS 1.

25 Now, in our submission, that very clearly falls foul

1 of the principle of remoteness.

2 THE CHAIRMAN: I did not -- when I read this, I did not
3 quite -- "if there had", so why are we considering
4 the possibility of there being no OSS 2 cartel?

5 MS FORD: Each of these three permutations, I think I am
6 right in saying, is taking away, is assuming that there
7 was no OSS 2 cartel to try and get at --

8 THE CHAIRMAN: But there is no impact. I mean, there is an
9 OSS 2 cartel. We cannot get away from that. So I was
10 a little unclear of the various contingencies.

11 Can I just ask ... sorry.

12 Mr West, I did not understand this paragraph and it
13 is probably my fault.

14 MR WEST: I think what we were trying to get at is
15 the effect of any one of the cartels, and so we run some
16 thought experiments which ask what would have happened
17 if there had only been one. That is how we tried to get
18 at the effect of any one of them.

19 THE CHAIRMAN: Right, so it is a thought experiment. Yes,
20 I see.

21 Okay, sorry.

22 MS FORD: So this particular thought experiment is
23 saying: let us assume there was no OSS 2 cartel, then
24 ZF's prices would have been lower, then we,
25 the Claimants, would have purchased from you, ZF, rather

1 than from the participants of the OSS 1 cartel and
2 therefore you, ZF, are a "but for" cause of our loss.

3 That is the proposition.

4 THE CHAIRMAN: Yes.

5 MS FORD: That, we say, is contrary to the principle of
6 remoteness.

7 THE CHAIRMAN: Yes, well, I think I understand that, yes.

8 MS FORD: I would like to just show the Tribunal a basic
9 statement of that principle. It is the *Kuwait Airways*
10 case, {AUTH2/5/208}, please.

11 THE CHAIRMAN: Bundle, tab 5?

12 MS FORD: Tab 5, page 208. It is starting at paragraph 69,
13 where Lord Nicholls poses the question:

14 "How, then, does one identify a plaintiff's 'true
15 loss' in cases of tort?"

16 What he explains is that one first asks whether
17 the wrongful conduct causally contributed to the loss.

18 THE CHAIRMAN: Sorry, I am catching up with you. Sorry,
19 which paragraph are you on?

20 MS FORD: I am sorry. I am on paragraph 69, in which
21 he starts with a rhetorical question.

22 THE CHAIRMAN: Yes.

23 MS FORD: He says:

24 "I take as my starting point the commonly accepted
25 approach that the extent of a defendant's liability for

1 the plaintiff's loss calls for a twofold inquiry ..."

2 The first one is:

3 "... whether the wrongful conduct causally
4 contributed to the loss and, if it did, what is the
5 extent of the loss for which the defendant ought to be
6 held liable."

7 Now, the first inquiry is the simple "but for" test.
8 Then one goes on to ask the second question: to what
9 extent ought the defendant to be liable.

10 If we go over the page, please, {AUTH2/5/209}, to
11 paragraph 70, and the relevant passage is essentially
12 opposite B, where Lord Nicholls says:

13 "The law has to set a limit to the causally
14 connected losses for which a defendant is to be held
15 responsible. In the ordinary language of lawyers,
16 losses outside the limit may bear one of several labels.
17 They may be described as too remote because the wrongful
18 conduct was not a substantial or proximate cause or
19 because the loss was the product of an intervening
20 cause."

21 So one has to ask: what is the substantial or
22 proximate cause of the loss?

23 We make the very basic submission that
24 the substantial or proximate cause of the loss in
25 the thought experiments --

1 THE CHAIRMAN: Well, that is remoteness rather than
2 causation, is it? I mean, does it not have to be
3 a substantial and proximate cause for the purposes of
4 causation also?

5 MS FORD: It does. So we can see, just above B, there is
6 a reference to "Unpacking Causation".

7 THE CHAIRMAN: Sorry, above?

8 MS FORD: Above B. He is quoting an article and he says the
9 law has to be set:
10 "The law has to set a limit to the causally
11 connected losses for which a defendant is to be held
12 responsible."
13 So one is not causally responsible for something
14 merely because one can say it is a "but for" cause.

15 THE CHAIRMAN: Yes, I mean, there are lots of cases on this.
16 I thought there were lots of later cases on this.

17 MS FORD: Certainly we --

18 THE CHAIRMAN: I have certainly had them cited against me.

19 MS FORD: We have gone to this because this is essentially
20 the statement of the point of principle.

21 THE CHAIRMAN: You are saying this is remoteness rather than
22 causation and that may not matter, but ...

23 MS FORD: Well, we are saying that it is not enough for
24 the Claimants to say that, "You, ZF, who are not party
25 to OSS 1, we would have bought from you and therefore

1 you are somehow responsible for the consequences of
2 OSS 1". It simply transparently falls foul of this
3 inquiry at the moment.

4 THE CHAIRMAN: Yes.

5 MS FORD: That is an inquiry which applies to competition
6 law infringements as it does any other claim, and
7 authority for that we get from the opinion of
8 Advocate General Kokott in the *Kone* case. This is
9 {AUTH3/7/7}.

10 THE CHAIRMAN: Authorities 3?

11 MS FORD: 3, so foreign authorities.

12 THE CHAIRMAN: Are we going back into authorities 2?

13 MS FORD: I will be, to deal with the *FCA v Arch* authority,
14 yes.

15 THE CHAIRMAN: It is quite a challenge. I am going to need
16 somebody to sort out that bundle at some point, if
17 I may. So bundle 3, yes. So which tab?

18 MS FORD: It is tab 7 at page 7. This is an
19 Advocate General's opinion in a case which considered
20 whether or not umbrella losses are recoverable as a --
21 or should be recoverable as a head of competition law
22 loss. Of course, we all know they are and the Tribunal
23 has well in mind that there is a distinction between
24 umbrella losses, which are fairly conventional at this
25 stage, and the type of loss which is now being claimed,

1 the spillover loss.

2 But what she does deal with is that remoteness is
3 a legitimate inquiry in the context of competition law
4 infringements.

5 So we are looking at paragraph 33, and she says:

6 "On the other hand, it is perfectly legitimate, for
7 the purpose of examining the existence of a causal
8 link ..."

9 Just pausing here, this is about causation in this
10 context:

11 "... to lay down criteria which ensure that cartel
12 members are not subject to unlimited liability to
13 provide compensation for any losses, however remote, for
14 which their anti-competitive behaviour may have been
15 the cause in the sense of a 'conditio sine qua non'
16 (also known as an equivalent causal link or a 'but for'
17 causal link)."

18 Then she goes on at paragraph 40, please, over
19 the page {AUTH3/7/8}:

20 "That said, the criterion of a sufficiently direct
21 causal link is in substance intended, on the one hand,
22 to ensure that a person who has acted unlawfully is
23 liable only for such loss as he could reasonably have
24 foreseen ..."

25 THE CHAIRMAN: I mean, is there only an AG's opinion on

1 this, has the court never said anything about this?

2 MS FORD: I do not think the court has said anything to
3 the contrary but it does not go into it, as is often
4 the case, it does not go into it in this degree of
5 detail.

6 THE CHAIRMAN: But in any other case, there is no learning
7 on causation and remoteness coming from the competition
8 authorities from the EU, no?

9 MS FORD: Well, the slight wrinkle is that what the court
10 normally says is, subject to the principles of
11 equivalence and effectiveness, these are matters for
12 the --

13 THE CHAIRMAN: Yes.

14 MS FORD: -- domestic rules of law essentially, the position
15 is a matter of national law, and so that brings one back
16 to what is the position as a matter of tort law.

17 THE CHAIRMAN: But you are not really getting anything out
18 of this. I mean, Mr West has not said the position on
19 competition law, he has referred to a tort case as well
20 so ...

21 MS FORD: Yes, it may be that it is a proposition I do not
22 need to establish, that one does not have a different
23 approach as a matter of competition law.

24 THE CHAIRMAN: I do not know how much weight we can attach
25 to an opinion of the AG which is not obviously supported

1 by another authority. I mean, these seem eminently
2 sensible statements, but I am not sure how much weight
3 they should carry of themselves.

4 MS FORD: Well, I do say it is persuasive authority and of
5 course we can see whether Mr West actually suggests that
6 one should not attach any weight to it.

7 THE CHAIRMAN: Yes, sure.

8 MS FORD: Just while we are in it and for completeness, can
9 we look at the contents of paragraph 42, and this is
10 where she is looking at the first point about reasonable
11 foreseeability, and the Tribunal will appreciate there
12 is very much an echo there with questions of reasonable
13 foreseeability as a matter of domestic law. Sorry,
14 paragraph 42.

15 THE CHAIRMAN: 42 or 52?

16 MS FORD: 42, please {AUTH3/7/8}. So:

17 "Any loss the incurrence of which the cartel members
18 ought reasonably to take into consideration on the basis
19 of practical experience is foreseeable (or ensues via an
20 adequate causal link) unlike loss which results from an
21 entirely extraordinary train of events and, therefore,
22 ensues via an atypical causal chain."

23 So there, again, we see that link between
24 foreseeability and causation.

25 If we were to assume in the Claimants' favour that

1 the OSS 1 infringements had somehow had a spillover
2 effect and indirectly impacted the prices of OSS
3 products to the Claimants, then, one asks, well, what is
4 the substantial and proximate cause of that loss? In
5 our submission, it must very clearly be the OSS 1 cartel
6 itself. We say it cannot sensibly be said that
7 the OSS 2 cartel was an immediate or proximate cause of
8 the losses which arise from that, and given that ZF not
9 only did not participate in the OSS 1 cartel, but was
10 not even aware of it, it cannot be suggested that any
11 consequences arising from OSS 1 are foreseeable by ZF
12 and therefore something that it ought to be held
13 responsible for.

14 So, in our submission, the first thought experiment,
15 the way in which the Claimants put it, is clearly too
16 remote to be recoverable from ZF.

17 So I am going back to the second way the Claimants
18 put it, and this is -- if we can go back, please, to
19 the Claimants' skeleton, paragraph 59 {S/1/20}. This is
20 their paragraph 59:

21 "The second [they say] is that prevailing prices in
22 the market ... would have been the same as in the real
23 world."

24 So, again, we are positing that one takes away
25 OSS 2, and they say: what might have been

1 the consequence? Then they say: okay, well, prices
2 might have been the same anyway, and they speculate that
3 that might happen if customers rushed to buy from
4 suppliers that were not in the OSS 1 cartel and that
5 pushed those innocent suppliers' prices up to the levels
6 of the cartel. So what they are positing there is that
7 there might have been umbrella pricing and that ZF, in
8 that scenario where it had not participated in OSS 2,
9 might nevertheless have engaged in umbrella pricing and
10 priced at the same levels.

11 THE CHAIRMAN: I have to say I am a little muddled as to how
12 these thought experiments really help, because we know
13 these cartels were both operating.

14 MS FORD: Well, I do not -- sir, I really do not disagree
15 with that, I am simply attempting to address the ways in
16 which the case is put against me. I think perhaps
17 the fact that one has to get into such convoluted
18 reasoning --

19 THE CHAIRMAN: We do not have to write a judgment on these
20 thought experiments, I hope. We know the -- there is
21 huge uncertainty in this case, but the one foundation we
22 do have is that there was an OSS 1 and an OSS 2 cartel
23 and we have got to analyse causation and remoteness on
24 the assumption there are both those -- on
25 the understanding there are both those cartels in

1 operation.

2 MS FORD: That is true, and there is a question of principle
3 that the Tribunal must decide.

4 THE CHAIRMAN: The simple point, as I understand it, is you
5 submit that we cannot tell what was attributable to each
6 cartel, and consequently you say the case against you is
7 not proven.

8 MS FORD: The burden is not made out.

9 THE CHAIRMAN: Yes.

10 MS FORD: There is a prior question of principle because
11 the Claimants say, "We do not have to show a causal link
12 between OSS 2 and the loss".

13 THE CHAIRMAN: Yes.

14 MS FORD: "It is enough that they were both operating at
15 the same time".

16 THE CHAIRMAN: But the consequence of that, you say, is that
17 notwithstanding that the Claimants have suffered -- this
18 is on the various hypotheses -- notwithstanding that
19 the spillover is a legitimate claim, notwithstanding
20 that a causal link of some sort, so spillover has
21 resulted in an increase in prices, you say because you
22 cannot separate out the consequences in your submissions
23 and because you cannot separate out OSS 1 from OSS 2,
24 the case against each is unproven and therefore that is
25 it.

1 MS FORD: Just to pick apart the proposition you, sir, have
2 just put to me. You said notwithstanding that a causal
3 link of some sort is proven in the sense that there has
4 been a spillover which causes an increase in prices.

5 THE CHAIRMAN: A spillover from a cartel.

6 MS FORD: Well, indeed.

7 THE CHAIRMAN: Then you do not know which one, yes. I mean,
8 as Professor Bailey just said, that is your point, you
9 do not know which one, so consequently neither of you is
10 responsible.

11 MS FORD: Well, and in that circumstance, one cannot say
12 a causal link of some sort is proven, because
13 the requisite causal link that is required is to -- for
14 the purposes of my client --

15 THE CHAIRMAN: Is there anything between you and Mr Scannell
16 on this? Do you say, if that is the position, if we
17 cannot attribute it to your clients, then it must be --
18 do you point and say, "It must be them"?

19 MS FORD: Well, we say it is for the Claimants to prove.

20 THE CHAIRMAN: Right.

21 MS FORD: We say it is an inherent and --

22 THE CHAIRMAN: Well, we know it is for the Claimants to
23 prove, but we are assuming that the Tribunal has got to
24 the stage -- as I say, there are lots of hoops to jump
25 through before we get to that -- that there has been

1 a spillover effect that as a result of the cartels
2 operating, as found by the Commission, we are satisfied
3 that prices were higher and also satisfied that a direct
4 cartel is not an explanation for that. Assuming we have
5 got there -- and we might never get there, I appreciate,
6 for all sorts of reasons, but assuming we have got
7 there, do you then say it is for Autoliv to pay up or do
8 you say, no, the consequence is that the Claimants
9 receive nothing?

10 MS FORD: I say that if the Claimants have discharged their
11 burden to show a causal link between the infringements
12 that Autoliv has participated in and the loss, then that
13 makes good their case against Autoliv. If they have not
14 discharged their burden to show a causal link between
15 the infringement that ZF was found to participate in and
16 their loss, they have not discharged their burden
17 vis-à-vis ZF.

18 So it really is in relation to each defendant, they
19 must discharge the burden to show the causal link
20 between the infringement which has been found and
21 the loss that they claim.

22 THE CHAIRMAN: Autoliv is in -- you are not making
23 the submission that Autoliv will be responsible --
24 I mean, if we ever arrived at this position, and
25 I think, when you talked about potential conflicts

1 within your position, Autoliv has its fingerprints on
2 all the OSS 2 cartels and on all the OSS 1 cartels bar
3 one. So one might say, if there is a spillover effect,
4 etc, etc, etc, it is pretty clear there is a causal link
5 with Autoliv, but the position against TRW is more
6 unclear because there are a lot of cartels operating
7 which TRW was not a part of.

8 MS FORD: Yes.

9 THE CHAIRMAN: Are you making that submission?

10 MS FORD: I am certainly making the submission that
11 the position vis-á-vis TRW is unclear. I do not have to
12 make any submission vis-á-vis the position regarding
13 Autoliv --

14 THE CHAIRMAN: Right, so you are being nice to Mr Scannell
15 and keeping your counsel on that point.

16 MS FORD: I say it is for the Claimants to prove the case.

17 THE CHAIRMAN: Yes, I understand, I understand that. It is
18 very helpful just to get the lay of the land, yes.

19 MS FORD: We were just trying to untangle the second way in
20 which the Claimants put this and this is the --

21 THE CHAIRMAN: I do not get a lot out of those passages at
22 the moment --

23 MS FORD: No.

24 THE CHAIRMAN: -- so, I mean, it may be you want to come
25 back to them in closing, if we ever get there. It is up

1 to you, take your course.

2 MS FORD: I wonder if I might, since we are dealing with it,
3 deal with the *FCA v Arch* authority, which is the one
4 that the Claimants try and deploy in this context.

5 THE CHAIRMAN: Yes, let us look at that, yes.

6 MS FORD: So this is {AUTH2/27/1}.

7 THE CHAIRMAN: Sorry, beg your pardon, tab?

8 MS FORD: 27.

9 This was a dispute about whether insurers were
10 liable for business losses which were caused by
11 the COVID-19 pandemic, and so we are not strictly in
12 the context of tortious liability, we are dealing with
13 contractual liability, but this is a discussion of
14 the concept of concurrent causes and that is the context
15 in which we originally cited it in our skeleton for
16 the PTR and it has now appeared in the Claimants'
17 skeleton.

18 So if we start, please, at paragraph 171, which is
19 {AUTH2/27/72}, the Tribunal will see
20 the heading "Concurrent causes". In 171, we see this
21 familiar language of "proximate cause" or "the real or
22 efficient cause of the loss". What the Supreme Court is
23 considering here is how that applies when there are two
24 concurrent causes. So, at 172 and 173, we see them
25 referring to authorities which recognise the possibility

1 that in certain factual scenarios you might have
2 cooperating and equally effective causes, or you might
3 have a combination of causes which were equal or at
4 least nearly equal in their efficiency. Those are
5 the scenarios that they are citing.

6 It goes on, at 175 {AUTH2/27/73}, to point out that
7 in those scenarios:

8 "In each case it was the combination of two causes
9 which together made the loss inevitable. Neither would
10 have caused the loss without the other."

11 Just pausing there, that is of course not something
12 which has been established as a question of fact in
13 relation to competition infringements, that we are in
14 a situation where neither could have caused the loss
15 without the other. Speaking at a level of generality,
16 it is entirely possible that loss was caused either by
17 infringement A or by infringement B, so we are not in
18 this scenario where neither would have caused the loss
19 without the other.

20 We go on to 176, what we see there is
21 the Supreme Court saying:

22 "There is ... no reason in principle why [that] ...
23 analysis cannot be applied to multiple causes which act
24 in combination to bring about a loss."

25 So its progression of reasoning is essentially from

1 two causes to multiple causes.

2 It goes on to deal with the facts of the case, and
3 it is saying:

4 "... it obviously could not be said that any
5 individual case of illness resulting from COVID-19, on
6 its own, caused the UK Government to introduce
7 restrictions which led ... to business interruption."

8 Then it says:

9 "... the Government measures were taken in response
10 to information about all the cases of COVID-19 in
11 the country as a whole ..."

12 Therefore it was:

13 "... realistic to analyse this situation as one in
14 which 'all the cases were equal causes of the imposition
15 of national measures."

16 So this is a case where you have got this
17 accumulation of causes all working to bring about
18 a consequence together when individual instances would
19 not have been enough. Again, we say there is no
20 parallel there with the circumstances of OSS 1 and
21 OSS 2, because it certainly has not been established
22 that they are working together in that way.

23 Now, what then happens is that the insurers have
24 a counter-argument and that is dealt with under the next
25 heading, "The 'but for' test".

1 THE CHAIRMAN: Sorry, just pausing for a second. All
2 the authorities being looked at by the Supreme Court,
3 are they all contractual insurance cases or are some of
4 them torts?

5 MS FORD: I think, certainly as we come on to the later
6 paragraphs, there are some references to tort as well.
7 I have not personally combed through each one that we
8 have just looked at to checked.

9 THE CHAIRMAN: I mean, if the Supreme Court had only
10 considered contractual insurance cases, I wonder why --

11 MS FORD: Yes. No, I do not --

12 THE CHAIRMAN: -- the principles are general.

13 MS FORD: So as we come on to paragraph 186 -- I will work
14 through it in order, but as we come on, we will see
15 *Kuwait Airways*, which is the one that I actually just
16 showed the Tribunal as the principle of remoteness --

17 THE CHAIRMAN: I see.

18 MS FORD: So we do see them cross-referring to tortious
19 principles as well.

20 So they have identified this factual scenario where
21 you have lots of individual causes which, together,
22 brought about a particular consequence. The insurers
23 then raised their counter-argument and their
24 counter-argument was: well, that fails the "but for"
25 test, because it cannot be said that but for any

1 individual case of illness resulting from COVID-19 you
2 would not have had the government measures. You cannot
3 take away one individual case because the same would
4 have happened because of all the other cases, so they
5 say that reasoning fails the "but for" test.

6 That is the context in which the Supreme Court then
7 goes on to consider the sorts of examples that
8 the Claimants try to latch on to. So 182 and 183 on
9 {AUTH2/27/75}, please, you see the Supreme Court saying
10 it has long been recognised that the 'but for' test is
11 potentially either over-inclusive or under-inclusive.
12 The examples they give are things like two fires started
13 independently of each other which combine to burn down
14 a property or two hunters who simultaneously shoot
15 a hiker and they say, okay, well in that scenario either
16 cause was sufficient to bring about the harm. Those are
17 the sorts of examples the Claimants have latched on to,
18 they cite 182 and 183, and I think what their thought
19 experiment is trying to get to is, well, if you take
20 away one of the cartel -- one of the infringements,
21 the other might still cause a loss if we speculate about
22 umbrella pricing for example, so they are trying to get
23 themselves within this, these types of examples of two
24 simultaneous fires or two hikers shooting people -- or
25 two people shooting a hiker.

1 What we say is that that really does not help them
2 at all because the Supreme Court is starting from
3 a situation where it is satisfied that there are
4 concurrent causes and it is dealing with
5 the counter-argument about why that does not fall foul
6 of the "but for" test. It is starting from
7 a presumption that you have events which are genuinely
8 concurrent causes of a loss in the way that no
9 individual instances of COVID would have been sufficient
10 by itself, and that is exactly what the Claimants have
11 not shown in the circumstances of this case. So simply
12 speculating that one might get the same effects from
13 umbrella pricing does not show that OSS 1 and OSS 2 are
14 properly concurrent causes of loss in the way that
15 the COVID instances would have been. We say that there
16 is just no parallel between this case and separate
17 infringements in OSS 1 and OSS 2 that happen to coincide
18 in time.

19 Certainly if one looks back at the -- the entire
20 premise of this is: oh, we might get the same effects
21 through umbrella pricing. But it cannot be right that
22 ZF is to be treated as jointly and severally liable for
23 OSS 1 merely because, in a counterfactual where it is
24 assumed it did not participate in OSS 2, it would have
25 been an innocent supplier who might have raised its

1 prices under the umbrella of the infringement. It makes
2 no sense to use that as a lever to say, "Well, you must
3 therefore be jointly and severally liable for this
4 cartel that you did not participate in". So, in our
5 submission, this second way in which the Claimants put
6 it simply does not work at all.

7 THE CHAIRMAN: So what do you say we get out of this
8 authority that you rely on?

9 MS FORD: I submit -- well, perhaps I can put it
10 differently. We cited it in our PTR skeleton because we
11 saw a pleaded case on the part of the Claimants in their
12 Re-Amended Reply claiming that these cartels are
13 concurrent causes. So we cited it to say: this is what
14 the Supreme Court means by "concurrent causes", these
15 cartels are not, they are clearly not, they do not fall
16 within the concept of concurrent causes, and we were, at
17 that point, essentially somewhat boxing in the dark
18 because we were trying to establish what was meant.
19 There was simply a fairly --

20 THE CHAIRMAN: Sorry, it is my fault, not yours. You say
21 they are not concurrent causes because?

22 MS FORD: Well, we have seen the example of what
23 the Supreme Court is talking about with concurrent
24 causes.

25 THE CHAIRMAN: Yes.

1 MS FORD: Simultaneous effective causes, so they are both --

2 THE CHAIRMAN: Shooting a deer at the same time or

3 something, was it not? Yes.

4 MS FORD: Well, no -- no, that is --

5 THE CHAIRMAN: Or a person, or something, at the same time.

6 MS FORD: Those examples have the prior assumption that both

7 fires combined together to burn down the house, or both

8 hunters both shoot at the same time and both impact

9 the hiker. We say that one cannot make that factual

10 assumption about the effects of two separate

11 infringements.

12 THE CHAIRMAN: I do not know how one gets to -- sorry,

13 I have not thought about this. But, I mean, with

14 the hikers, one might shoot the hiker in the leg,

15 the other might shoot them in the heart. I do not know,

16 is that concurrent, is that not concurrent? One would

17 presumably say, well ...

18 MS FORD: I think the purpose of that scenario is that they

19 both --

20 THE CHAIRMAN: Fire is a different example.

21 MS FORD: If we look back at 182.

22 THE CHAIRMAN: Yes.

23 MS FORD: They are assuming that:

24 "... two hunters simultaneously shoot a hiker who is

25 behind some bushes and medical evidence shows that

1 either bullet would have killed the hiker instantly even
2 if the other bullet had not been fired."

3 THE CHAIRMAN: Yes, sorry, I beg your pardon. Okay. But
4 there you have evidence that both are --

5 MS FORD: They are concurrent causes.

6 THE CHAIRMAN: -- concurrent, and the fire one, you would
7 say either fire would have burned down the house.

8 MS FORD: Exactly.

9 THE CHAIRMAN: Here, you say we do not -- we just do not
10 know. I mean, it is all so abstract, but you here say,
11 even if there are the potential for spillover damage,
12 you cannot say they are concurrent causes?

13 MS FORD: You cannot say they are concurrent in this way.
14 There are various possibilities: either infringement
15 A caused all the loss, or infringement B caused all
16 the loss, or indeed, conceivably, infringement A caused
17 some loss and infringement B caused different loss.

18 THE CHAIRMAN: Yes. No, but the trouble is they are binary
19 results in this case: the house burns down or the hiker
20 dies. It is a bit more difficult where you say you have
21 got separate cartels having a partial impact, because it
22 is not a -- you know, whether the claimant suffer loss
23 or not is not binary in the way a death is binary.

24 MS FORD: Well, the Claimants' case that is put against us
25 is, well, we have detected an overcharge using our

1 multiple and there is your loss. The Tribunal has well
2 in mind that we consider there are a lot of problems
3 with that as an approach, but ...

4 THE CHAIRMAN: Of course.

5 MS FORD: I am reminded that there might be a transcript
6 writer break required given that we started at 10.

7 THE CHAIRMAN: Yes. Oh, we started at 10, of course. Yes,
8 sorry. Time is flying! Is now a convenient moment?

9 MS FORD: It is.

10 (11.26 am)

11 (A short break)

12 (11.42 am)

13 MS FORD: There was a third thought experiment in
14 the Claimants' skeleton. This is skeleton, tab 1,
15 page 20, please {S/1/20}, and this is their
16 paragraph 60. Then they say that the third possibility
17 is that the OSS 2 cartel caused some, but not all of
18 the loss. So they say the possibility is that:

19 "... if there had been only an OSS2 cartel but not
20 an OSS1 cartel prices would have been somewhat higher
21 than in the counterfactual, but not as high as the
22 overcharge was in fact."

23 Then they go on to say, well, in that case it is
24 just a quantification of loss rather than whether ZF
25 caused loss at all and so the Tribunal should wield

1 the broad axe in their favour.

2 Now, in our submission, that is exactly what they
3 have to prove, because --

4 THE CHAIRMAN: Well, you have made that submission.

5 MS FORD: -- at present there is no basis to assume that
6 OSS 2 caused some loss. So the Tribunal has my
7 submission that ultimately this case fails at the most
8 basic level because they have not shown the causal link.

9 I am moving on to deal very briefly with
10 the experts' evidence on the existence or extent of any
11 overcharge and I will then hand back to Mr Scannell to
12 deal with pass-on and financing losses.

13 Much has been made of the fact that the Defendants
14 have not adduced their own overcharge model, but of
15 course we are under no obligation to put forward a rival
16 model; we are perfectly within our rights to point out
17 the respects in which we say that the Claimants have
18 done is neither robust, nor convincing.

19 Can we look please briefly at the joint expert
20 statement at {E1/13/15}, please, and proposition --

21 THE CHAIRMAN: Can you give me a second.

22 (Pause).

23 Yes, sorry.

24 MS FORD: Proposition 18 is that:

25 "Reasonable sensitivity checks are important and

1 constitute best practice when presenting an econometric
2 model, in particular where there is uncertainty over key
3 assumptions."

4 Mr Hughes agrees with that proposition.

5 Then if we look, please, at proposition 19
6 {E1/13/16}:

7 "If reasonable sensitivity tests show material
8 differences in overcharge estimates, then one cannot
9 rely on the results of a single preferred model for an
10 inference on the existence of an overcharge."

11 And Mr Hughes agrees with that proposition.

12 However, despite agreeing that reasonable
13 sensitivity checks are best practice, the model that
14 Mr Hughes put forward did not contain any sensitivity
15 checks in Hughes 1 and it has instead put forward
16 a single preferred model.

17 So what Dr Majumdar did was to look at the key areas
18 of uncertainty and to put forward sensitivity checks
19 which explored those.

20 So the first uncertainty was as to the timing of
21 the alleged infringement --

22 THE CHAIRMAN: Yes, I mean, we have been through this, yes.

23 Do we need to go through it again? We are going to hear
24 from the experts.

25 MS FORD: There are aspects -- there are elements in which

1 we do not agree with the way in which the matter has
2 been opened by the Claimants in defining the nature of
3 the dispute between the experts. It may be that I can
4 take this very --

5 THE CHAIRMAN: Yes, well, take it briefly. Yes.

6 MS FORD: So, as the Tribunal is aware, what Mr Hughes has
7 done is distinguish between an early period, a main
8 period and a wind-down period, but the periods he has
9 identified do not coincide with infringement periods as
10 defined in the OSS 1 and OSS 2 decisions. So there is
11 a very obvious area of uncertainty as to whether, if
12 there is indeed any infringement, the start and end
13 dates are in the right place for the purposes of
14 the model. It is equally common ground -- this is
15 paragraph -- joint expert statement, proposition 24
16 {E1/13/17}, that if you adopt the incorrect start or end
17 date, then that may bias the estimate of an overcharge.
18 So Dr Majumdar has applied sensitivity checks with
19 regard to the period of the infringement and they are
20 the ones identified in the joint expert statement, 33 to
21 35 {E1/13/23-24}, and what he sees, as set out in joint
22 expert statement 36 {E1/13/24}, is that there are
23 material changes in overcharge estimates and their
24 significance when you test for alternative
25 specifications of the infringement period and that leads

1 him to the conclusion that the overcharge estimates are
2 not robust.

3 There is then a further uncertainty which relates to
4 the RFQ dates and --

5 THE CHAIRMAN: Yes, I mean, we have got all these points.

6 We obviously read the expert reports carefully and we
7 have read the skeletons and we understand what the scope
8 of the dispute is.

9 MS FORD: Yes --

10 THE CHAIRMAN: Is there anything we can really usefully
11 discuss now, prior to actually hearing from the experts?

12 MS FORD: Well, it may be that I can simply point out
13 the areas of disagreement. I think probably the only
14 point to note in relation to the RFQs is that this is
15 something of an evolving debate between the experts
16 because of course they have been putting in notes and
17 counter-notes and so this is something which is
18 evolving.

19 THE CHAIRMAN: Yes.

20 MS FORD: On omitted variables, we do not agree with the way
21 in which it was put on Tuesday, that Mr Hughes has rerun
22 his models with a few tweaks, it made no difference and
23 therefore this is all sort of a damp squib in terms of
24 a dispute. We do not agree with that at all.

25 What Mr Hughes has done is controlled for a certain

1 subset of raw materials prices and what we say he has
2 not done is to control for all the other factors which
3 feed into the costs or production of OSS materials and
4 which can vary from contract to contract. What
5 Dr Majumdar found when he compared, on the one hand,
6 actual production costs and, on the other hand,
7 a composite of the raw material indices that Mr Hughes
8 has actually used, he found that the total cost,
9 the actual cost did not follow the direction of the raw
10 materials costs that Mr Hughes is using as a control for
11 prices.

12 In the case of airbags, most strikingly, the two
13 went in completely different directions.

14 THE CHAIRMAN: That was using Autoliv's costs?

15 MS FORD: It was using Autoliv's costs and a composite of
16 the raw material indices. So what that suggests is that
17 the raw material indices are unlikely to be controlling
18 adequately for movement of costs over time.

19 A point that is then made is that if the model has
20 omitted costs and those costs happen to be higher in
21 the infringement period than in -- than after
22 the infringement period, then the consequence is to
23 materially overstate the overcharge. So that does
24 remain an important concern with the model; it is not
25 right to suggest that that has just fallen away.

1 Then the Tribunal has heard that there is an
2 additional dispute as to the relevance of new contract
3 prices and that arises because the overcharge which is
4 identified relates only to RFQs for new contracts and so
5 it seems a self-evident sensitivity to take out the data
6 points which do not concern new contracts and see
7 whether or not the same result pertains. So that is
8 what Dr Majumdar did and the outcome was that
9 the results were not robust to that sensitivity check
10 either.

11 So the convenient nutshell summary of Dr Majumdar's
12 views is in the joint expert statement, proposition 27
13 {E1/13/19}, and this is the bottom right of the page:

14 "I consider that the MH1 model is likely to be
15 misspecified and hence that the estimated overcharge is
16 unreliable and cannot be attributed to the existence of
17 an infringement."

18 He gives a summary of his reasons and those are the
19 ones we have just worked through in terms of the key
20 disputes between the experts.

21 That is all I was proposing to say by way of opening
22 and Mr Scannell was going to then deal with pass-on.

23 Opening submissions by MR SCANNELL (continued)

24 MR SCANNELL: Good morning.

25 Mr Chairman, in the course of my submissions on

1 Wednesday, you asked me to respond to one of
2 the documents that Mr West took you to --

3 THE CHAIRMAN: Oh, yes.

4 MR SCANNELL: -- in the course of his opening submissions.

5 THE CHAIRMAN: Yes.

6 MR SCANNELL: The document is at {J1/41/1}.

7 THE CHAIRMAN: Yes.

8 MR SCANNELL: It is an internal Autoliv email dated
9 27 February 2003 from Torben Schönborn, who was
10 the director of Autoliv's GM business unit, to
11 Arthur Blanchford, who was then vice president of the GM
12 business unit.

13 The first point in relation to this document is
14 that, as my learned friend accepted in his opening
15 remarks, it was apparently annexed to one of
16 the leniency applications made to
17 the European Commission in the context of either
18 the OSS 1 or OSS 2 investigations, and it can be taken
19 from that that this document formed part of
20 the European Commission file and indeed that is how it
21 came to the Claimants, as my learned friend fairly
22 accepts.

23 THE CHAIRMAN: Right, so where it says "annex", it is fair
24 to assume that is an annex to a leniency application?

25 MR SCANNELL: An annex to a leniency application.

1 THE CHAIRMAN: Yes, okay.

2 MR SCANNELL: Mr West told the Tribunal on Tuesday that
3 the email provides evidence of Autoliv and ZF working
4 together to increase market prices up to profitable
5 levels.

6 The Commission obviously did not form that view. As
7 to why, I would suggest that the answer is tolerably
8 clear: properly read, this document does not support an
9 inference of wrongdoing.

10 Now, in the email, Mr Schönborn reports on
11 a discussion he has had with Klaus Fruck of TRW. Now,
12 pausing there, as we know, not all meetings and
13 discussions are illegal between OSS suppliers.
14 I explained that in the context of the {J1/71/1} email,
15 the internal Takata email from Mr Evangelista, which is
16 not either inculpatory in the way the Claimants allege,
17 and neither is this one.

18 Now, what did Messrs Schönborn and Fruck discuss?
19 The email makes that clear on its face. The subject
20 was, "Global Sourcing/Strategy ..." relating to
21 procurement that Opel was contemplating at this time.
22 Now, what did they agree? Well, they agreed that they
23 were not willing to support Opel's intention to pursue
24 that strategy. Now, that is clear from the first line
25 of the second paragraph.

1 In the second line of the three-line second
2 paragraph, Mr Schönborn says:

3 "When business is sourced we should give each other
4 the chance to recover the sourced price by engineering
5 changes!"

6 How should those words be read, in particular
7 the words "we should give each other the chance to
8 recover the sourced price by engineering changes"?
9 Well, in my submission, those words can only be read one
10 way. The line refers to what happens after business is
11 sourced; that is after Opel has selected its supplier
12 and after the sourced price has been agreed. So
13 the reference to "we" can only be a reference to Opel
14 and whomever it is that Opel selects to supply it.

15 Now, at that point in time, it makes no sense
16 whatever to say that Autoliv and TRW "should give each
17 other the chance to recover the sourced price by
18 engineering changes". So the line refers to the OEM and
19 the supplier having the opportunity to decrease, in
20 the case of the OEM, or increase, in the case of
21 the supplier, the agreed price as a result of
22 engineering changes. Now, the possibility of such
23 increases or decreases after the OEM selects its
24 supplier is actually common ground between
25 the Claimants' and the Defendants' witnesses.

1 The email continues:

2 "Furthermore I am very glad ..." --

3 THE CHAIRMAN: Sorry, referring to the subject, you said,
4 "Global Sourcing ...", but then it says " ... /Strategy
5 with our competitors". What is your interpretation of
6 that?

7 MR SCANNELL: This is the strategy with competitors to
8 respond to Opel's expressed intention to adopt
9 a particular global strategy and we will see how they
10 propose to do that in just a moment -- I am just about
11 to go there --

12 THE CHAIRMAN: All right.

13 MR SCANNELL: -- and one can see that there is actually
14 nothing untoward about it at all.

15 So Mr Schönborn goes on:

16 "Furthermore I am very glad he brought up some
17 points he is not willing to stand any more and we want
18 to make a clear common statement to GM-Fiat-WWP whenever
19 these points will come up."

20 There follow four bullet points.

21 THE CHAIRMAN: Sorry, you are going quite quickly,
22 Mr Scannell, I am just trying to catch up.

23 So the paragraph "In general" --

24 MR SCANNELL: Yes.

25 THE CHAIRMAN: -- leaving aside the parenthesis, "we should

1 give each other the chance to recover the sourced price
2 by engineering changes", there is still -- nevertheless
3 this is discussion of two competitors as to how they
4 should be approaching Opel's global sourcing strategy;
5 is that right?

6 MR SCANNELL: Yes.

7 THE CHAIRMAN: You say that is appropriate?

8 MR SCANNELL: I say that it is not inappropriate; correct.

9 The reason is that what is actually happening here is
10 that Opel has expressed its intention to adopt
11 a particular global sourcing strategy which will apply
12 to all RFQs going forward, there has been a discussion
13 between Autoliv and TRW in relation to that, and their
14 proposed response is, "Let us make a joint, clear,
15 common statement together to that OEM". Now, there is
16 nothing unlawful about making a common statement to an
17 OEM. There is nothing collusive about that, there is
18 nothing secretive about it. They are simply going to
19 express a joint view to the OEM that they are not happy
20 with that approach that Opel is proposing to take going
21 forward, and it is a perfectly open, transparent
22 response that they are proposing.

23 Now, it is clear from the colon at the end of
24 the second line of the fourth paragraph that the four
25 bullet points that follow relate to what should be

1 included in that joint common statement. So
2 the words, "Working together to increase market prices
3 up to a profitable level", is something that is
4 anticipated will happen between GM and the relevant
5 supplier. It is not something that is anticipated to
6 happen between TRW and Autoliv, and, with respect, it
7 would be nonsensical for Autoliv and TRW to make a clear
8 common statement to GM that they are about to work
9 together to drive up prices. They can only mean that
10 Autoliv and TRW want to work with GM/Fiat to increase
11 the prices that GM/Fiat imposes so that they cease being
12 unprofitable and become profitable.

13 That confirms the point that I made on Wednesday,
14 that it is the OEMs, not the suppliers, who determine
15 the prices they pay for the supplies, and we say that it
16 is an error to consider otherwise.

17 Then the last two lines, read in the context of
18 the rest of the email, refer to the fact that Autoliv
19 and TRW want to discuss further details, we say with
20 GM/Fiat, when they receive an RFQ, and there is
21 a proposal to discuss the same matters with Takata,
22 possibly because Takata might want to join in in this
23 common statement that they are proposing to make to
24 GM/Fiat. I would add that the fact that there is
25 a reference at all to building up a better relationship

1 with competitors for legitimate purposes refutes
2 the existence of any cartel in 2003, and of course this
3 is at a time before any infringement was found by
4 the European Commission.

5 So we do not accept that this email evidences a by
6 object infringement of competition law, or indeed any
7 infringement, and I would suggest that it is tolerably
8 clear that the European Commission did not either.

9 THE CHAIRMAN: Well, I think one area you may -- I mean,
10 obviously there is -- unfortunately we have not been
11 given any evidence as to the context of this email, or
12 you say there is nothing wrong with the industry making
13 joint representations to Opel. Do we have any evidence
14 that that ever happened, or that was the intention, or
15 is that your speculation? I mean, is it in evidence?

16 MR SCANNELL: We do, I believe, have some documents in
17 the file, and I can get the references for the Tribunal,
18 to joint statements being made to OEMs, or at least
19 joint representations being made to them. I can --

20 THE CHAIRMAN: Around this time, or in relation to this
21 issue, or ...?

22 MR SCANNELL: I am not immediately aware of the dates.

23 THE CHAIRMAN: Presumably you will have those materials to
24 hand because you provided this in the context of
25 a leniency application and it would have been --

1 the points you are making to me now would have been no
2 doubt addressed and fleshed out with the Commission for
3 precisely reasons you are pointing out, that it could
4 have been a -- it would have been explained to
5 the Commission that this was a legitimate matter and
6 so --

7 MR SCANNELL: Well, I say it is clear from the face of it
8 that it is legitimate.

9 THE CHAIRMAN: -- you will have -- no doubt have materials
10 to support that position?

11 MR SCANNELL: Well, my primary submission is that it is
12 clear from the face of this document that it is
13 a legitimate communication and that it does not evidence
14 a by object infringement. Now, what would have
15 happened --

16 THE CHAIRMAN: So why then would it have been part of
17 a leniency application?

18 MR SCANNELL: Because all relevant documents relating to
19 contacts with competitors would naturally go into
20 the Commission file. The Commission then considers
21 those and determines whether or not inferences should be
22 drawn.

23 THE CHAIRMAN: So obviously any relevant evidence will be --
24 you will in due course point us to.

25 But the other matter is -- and I am not suggesting

1 you are not right, Mr Scannell -- but is there authority
2 that it is okay for -- where a purchaser is pursuing
3 a certain strategy, you said the fact they want to get
4 together and discuss joint representations to divert
5 that strategy or ameliorate it, you say that is
6 necessarily not anti-competitive. Are you able to in
7 due course, not now, in closing, to identify authorities
8 to that effect?

9 MR SCANNELL: Yes, I will endeavour to do so, yes.

10 So could I turn then to pass-on. I am going to take
11 it that the Tribunal is familiar with the joint expert
12 statement and with the points of agreement and
13 disagreement between Mr Hughes and Dr Majumdar. Sir,
14 there is just one point that I want to address in
15 relation to pass-on at this stage and that is
16 the Claimants' --

17 THE CHAIRMAN: Well, we looked at some legal principles, did
18 we not? It seems a lifetime ago. We looked at some
19 legal principles in the first speech.

20 MR SCANNELL: There was a very brief and cursory reference
21 by my learned friend to *Trucks* --

22 THE CHAIRMAN: It was by Mr West, yes.

23 MR SCANNELL: -- in the context of pass-on.

24 I want to address just that point, actually,
25 the Claimants' suggestion that we fail the test of

1 causation that gets applied to pass-on and that there is
2 insufficient proximity between the overcharge that
3 the Claimants allege and the pass-on that we allege. As
4 I say, that was addressed by Mr West on Tuesday. So he
5 began by taking the Tribunal to paragraph 151 of
6 the Court of Appeal's judgment in *Trucks*. In case
7 the Tribunal wants to refresh its memory of that
8 particular paragraph, it is in authorities bundle 2 --
9 which may be volume 4 of the Chairman's --

10 THE CHAIRMAN: Give me the tab number.

11 MR SCANNELL: Tab 42 {AUTH2/42/1}.

12 THE CHAIRMAN: I have got the tab numbers written on
13 the bundles now so it is much easier to navigate. Thank
14 you.

15 MR SCANNELL: I am very relieved.

16 So that is the Court of Appeal's judgment and
17 the relevant page is 52 {AUTH2/42/52}, and the paragraph
18 that you were taken to, if you recall, was
19 paragraph 151. So:

20 "... DAF could only succeed in its argument on
21 SPO if it could establish ..."

22 And so on. And "SPO" is supply pass-on.

23 THE CHAIRMAN: Sorry, paragraph -- sorry 151?

24 MR SCANNELL: 151, and the Court of Appeal is there
25 addressing DAF's appeal on supply pass-on, SPO:

1 "... DAF could only succeed on its argument on
2 SPO if it could establish ..."

3 And so on.

4 THE CHAIRMAN: Sorry, I think I might be in the wrong.

5 MR SCANNELL: Sorry, are you in the wrong ...?

6 THE CHAIRMAN: Sorry, I have just turned over a tab by
7 mistake. Give me a second.

8 (Pause).

9 Sorry, yes, I am with you now. Yes.

10 MR SCANNELL: Paragraph 151.

11 THE CHAIRMAN: Yes, I have got that. We have looked at
12 that, yes.

13 MR SCANNELL: Mr West then said that the CAT had identified
14 four relevant criteria or indicia of causation and
15 submitted that the claimant satisfied none of them.

16 THE CHAIRMAN: Yes.

17 MR SCANNELL: So I want to address that submission.

18 Now, before I begin, it is important to take a step
19 back for a moment and ask what exactly the Tribunal is
20 considering when it is addressing proximity or causation
21 in the context of pass-on. The answer is that
22 the Tribunal needs to satisfy itself as to
23 the likelihood that any overcharge that the Claimants
24 manage to establish would have been passed on by OEMs in
25 the form of higher car prices. That is what we are

1 grappling with in relation to this and that is why
2 proximity has to be established to ground that enquiry.
3 By "proximity" we mean no more than how close
4 the relationship is between the allegedly cartelised
5 input and the output, so in this case cars. So it is
6 quite easy in the context of legal debate about
7 the requirements of proximity to lose sight of the wood
8 for the trees, but ultimately the proximity question
9 boils down to how close the relationship is between OSS
10 components and cars. Now, once that is appreciated,
11 the answer to the proximity question becomes tolerably
12 clear. Proximity is obviously satisfied, OSS components
13 are not just component parts of cars, they are legally
14 mandated component parts of cars.

15 Taking a step back -- forward again, there are two
16 points. The first is that, as a matter of law, there is
17 no particular necessity to consider proximity within
18 the framework of a four factor template. In *Trucks*
19 itself, that framework was only applied where it was not
20 already obvious that there was a proximate relationship
21 between the overcharge and the pass-on.

22 THE CHAIRMAN: Sorry, Mr Scannell, just so I am following.

23 So the test is a direct and causative link; is that
24 right?

25 MR SCANNELL: Yes. That gets refracted through an

1 enquiry: what is the proximate relationship between
2 the allegedly cartelised input and whatever it is that
3 it is alleged the overcharge gets passed into? I'll
4 explain that.

5 THE CHAIRMAN: But the test -- ultimately, the legal test is
6 direct and causative? That is the --

7 MR SCANNELL: Yes.

8 THE CHAIRMAN: Then the next question is what that means.

9 MR SCANNELL: Yes.

10 THE CHAIRMAN: Then we have got the four factors that were
11 set out in paragraph 152, or cross-referred to in
12 paragraph 152.

13 MR SCANNELL: Yes.

14 THE CHAIRMAN: Just before we dig into that, how direct is
15 direct? There are those cases where a price is
16 routinely passed on, and one might say the manufacturer
17 in that particular circumstance is nothing more than
18 a conduit for a price passing through --

19 MR SCANNELL: Yes.

20 THE CHAIRMAN: -- to a customer and one can think of
21 examples in very unrelated fields. Then there are other
22 things where costs go up and, as a result of that,
23 businesses have to make decisions and those decisions --
24 management decisions may involve putting up the price of
25 products.

1 MR SCANNELL: Yes.

2 THE CHAIRMAN: They seem to be -- at least in many cases, it
3 will be much less direct, they may have an indirect
4 effect on prices. Apart from looking at the relevant
5 factors, what should we be considering? Sorry, I know
6 you are getting to this, but I am just trying to
7 organise my mind. So what other assistance do we get,
8 apart from the four factors, in deciding whether
9 something is direct or indirect, from the authorities?

10 MR SCANNELL: Well, when it comes to satisfying yourself
11 that you can put a tick in the proximity box or
12 the causation box for pass-on --

13 THE CHAIRMAN: So proximity -- so how does proximity fit
14 into "direct and causative"?

15 MR SCANNELL: The proximity test is used as the test to
16 determine whether or not causation is satisfied, and
17 what I am going to explain to you is that you can either
18 be satisfied because it is plainly obvious that there is
19 a proximate relationship between cars and components, or
20 you can apply a four-step test, such as the Competition
21 Appeal Tribunal applied to supply pass-on, to get
22 comfortable with the idea that there is proximity
23 between those two and you can put a tick in the box on
24 that basis.

25 But what I am beginning with, the first

1 proposition --

2 THE CHAIRMAN: So -- sorry, again. So these principles,
3 they are not peculiar to -- I think it if one goes back
4 to the *Sainsbury's* case, they are not peculiar to
5 competition cases --

6 MR SCANNELL: No.

7 THE CHAIRMAN: -- these are general principles of showing
8 loss in any case.

9 MR SCANNELL: Yes.

10 THE CHAIRMAN: Yes.

11 MR SCANNELL: The second point I am going to make -- so just
12 to recap on the first point, it is that there is no
13 legal obligation to apply the four-step test where it is
14 not already -- you are certainly free to do so, but
15 there is no legal obligation to do so.

16 Second, even if one does apply the four-step test,
17 we submit that we amply satisfy each of the four
18 component parts of that test.

19 Now, as to the first of those points, it is
20 important to realise, before I go into *Trucks*, that in
21 *Trucks* the Defendants alleged three different forms of
22 pass-on. Sir Iain will be intimately familiar with what
23 I am about to say. So there was resale pass-on, what
24 were called "complements" and supply pass-on.

25 Now, resale pass-on addressed the question whether

1 the buyer of a new truck would pass on an overcharge to
2 buyers of used *Trucks*. Complements addressed
3 the question whether the claimant's losses could be
4 mitigated by savings they made by buying their truck
5 bodies from third-party manufacturers. Supply pass-on
6 addressed the question whether the buyer of a new truck
7 would pass on an overcharge to its customers in the form
8 of higher prices for the goods and services it supplied.
9 It was only in the context of supply pass-on that
10 the Tribunal applied the four factors that the Claimants
11 refer to and that was only because it was highly
12 sceptical about DAF's contention that *Royal Mail* would
13 pass on any overcharge on new *Trucks* it bought by
14 increasing the price of postage stamps, which was
15 a regulated industry, and it was equally sceptical that
16 *BT* might pass on an overcharge by increasing the prices
17 it charged to customers when it came to their house to
18 fix their landline or install a router, particularly
19 because the only reason DAF gave in support of saying
20 that that would happen was that the overcharge would
21 probably feed into the usual planning and budgetary
22 processes of *Royal Mail* and *BT* and prices might
23 subsequently increase. So that is the context.

24 THE CHAIRMAN: It was lacking that proximate cause.

25 MR SCANNELL: Yes.

1 But, importantly, the Tribunal had no such concerns
2 in relation to resale pass-on or complements and that
3 was because it was perfectly obvious that there was
4 a proximate relationship between the price of a new
5 truck and the price of a used truck and that savings
6 could be offset against an overcharge.

7 Now, with that in mind, could we turn up
8 the Tribunal's judgment in *Trucks*. It is at
9 {AUTH2/35/1}. Within that could we turn first to
10 {AUTH2/35/93}.

11 THE CHAIRMAN: Page 93?

12 MR SCANNELL: Page 93, please. I am taking to you this
13 paragraph to show you the judicial scepticism which had
14 immediately visited DAF's suggestion that there was this
15 thing called "supply pass-on".

16 THE CHAIRMAN: Right.

17 MR SCANNELL: "Before *Sainsbury's Supermarkets* ... previous
18 judges dealing with this case have shown considerable
19 scepticism as to whether it is possible to establish
20 sufficient causation in relation to SPO."

21 That is supply pass-on:

22 "At a CMC in December 2017, Rose J (as she then
23 was), referring to *Sainsbury's Supermarkets* ...
24 *v Mastercard* (which was then the latest case to consider
25 this) said:

1 "... if the Mastercard decision is correct ...
2 unless you're actually selling on the *Trucks* to somebody
3 you can't show pass-on because it's impossible to prove
4 a link between the price of a stamp and the price that
5 was paid for these *Trucks*'.

6 "At a further CMC in June 2018, Roth J commented as
7 follows.

8 "... It is not really classic pass-on at all. It is
9 a rather unusual pass-on, isn't it?"

10 He continued:

11 "If *Royal Mail* puts up the price of a postage stamp
12 once every six years by 2p, it would be very odd to
13 say ..." --

14 THE CHAIRMAN: We are familiar with that passage, yes.

15 MR SCANNELL: Yes. That debate continues.

16 Then moving down to {AUTH2/35/96}, at paragraph 216,
17 the Tribunal reiterated what was said in *Stellantis*:

18 "... the defendant must demonstrate 'a legal and
19 proximate, causal connection between the overcharge and
20 the act of mitigation'; or as the CAT said in *Royal Mail*
21 ... v ... *Trucks* ... there must be a 'direct causative
22 link' between the Overcharge and, in that category (iii)
23 case, the reduction in the costs of other supplies."

24 So that is the answer to your question, sir, in
25 relation to direct causative link: are we dealing with

1 the same thing when we are dealing with proximity? We
2 are.

3 THE CHAIRMAN: So "legal and proximate" means the same as
4 direct cause.

5 MR SCANNELL: Yes.

6 Incidentally, for your note, Mr Chairman, you may be
7 curious as to what a category 3 case is. Just for your
8 note, category 3 there refers to the Supreme Court's
9 judgment in *Sainsbury's Supermarkets v Mastercard*.

10 THE CHAIRMAN: Yes.

11 MR SCANNELL: So they envisaged different ways that
12 companies could respond to an overcharge and category 3
13 is category 3 --

14 THE CHAIRMAN: Yes, I have looked at *Sainsbury's*.

15 MR SCANNELL: -- taking its lead from the Tribunal.

16 Then at {AUTH2/35/97}, paragraph 223, the Tribunal
17 concluded:

18 "Accordingly, we consider that DAF must prove that
19 there was a direct and proximate causative link between
20 the Overcharge and any increase in prices by
21 the Claimants. That means that there must be something
22 more than reliance on the usual planning and budgetary
23 process ..."

24 So it is in the specific context of DAF's rather
25 ambitious supply pass-on argument that the Tribunal

1 called for a more concrete reassurance in respect of
2 proximity or proximate causal link.

3 But when it came to resale pass-on and complements
4 the analysis is far less anxious. So at paragraph 225,
5 further down the page, the Tribunal says:

6 "In our view, the example of Resale Pass-On shows
7 that the legal test for causation can be satisfied in
8 other ways, namely by the very close association between
9 the products in question -- new and used *Trucks* -- and
10 the Overcharge having a direct effect on the used *Trucks*
11 market. Furthermore, if that effect is proved on
12 the facts and expert evidence, there seems to us to be
13 no reason why the purchasers of those used *Trucks* should
14 not be able to claim against DAF in respect of
15 the impact that the *Trucks* overcharge had on their
16 selling prices."

17 THE CHAIRMAN: So just remind me, how did they deal with
18 the fact that the truck market was broader than these
19 particular customers? So the second-hand market would
20 have been much bigger, presumably, than those *Trucks*
21 sourced from these customers.

22 MR SCANNELL: They did not have to deal with that, they just
23 had to deal with the question of principle --

24 THE CHAIRMAN: Okay.

25 MR SCANNELL: -- about whether the buyer of a used truck

1 could potentially have a claim against the cartelists.

2 THE CHAIRMAN: Yes, okay.

3 MR SCANNELL: I can personally attest to that, because in
4 the collective action that is now on foot by the used
5 *Trucks* buyers, I am acting for the used *Trucks* buyers
6 against the cartelists.

7 So then, at paragraph 227, the Tribunal deals with
8 complements, which was the other form of pass-on, and
9 there it says:

10 "Rather, Complements, like Resale Pass-On, shows
11 that the legal test for causation can be satisfied by
12 reference to other factors, such as the very close
13 relationship between the *Trucks* and bodies, which have
14 to be bought together, and the direct effect of
15 the Overcharge."

16 So the Tribunal had no difficulty in simply
17 accepting that there was a close enough relationship
18 between new *Trucks* prices and used *Trucks* prices and
19 between savings and overcharges to conclude that there
20 was a causal link, and I would suggest that it is just
21 as obvious in this case that there is a sufficiently
22 proximate relationship between the price of components
23 that go into making a car and the car itself.

24 THE CHAIRMAN: It is not analogous, is it? If the price of
25 a truck -- a new truck is higher than one might expect

1 the resale price to be higher, that is straightforward
2 -- the thing is the same, but here, we are talking about
3 a component, so it is not the same.

4 MR SCANNELL: It is not the same input that is getting sold
5 by the first buyer. But likewise, in the case of
6 complements, one was dealing with, if you like, apples
7 and oranges, one simply had to determine whether or not
8 there was a relationship between different *Trucks* that
9 might be bought by the victim of an overcharge and
10 the cartelised *Trucks*.

11 Now, as to the four factors the Tribunal considered
12 it helpful to consider in the context of supply pass-on
13 they are set out at paragraph 228. I take it that
14 the Tribunal is familiar with the four factors.

15 THE CHAIRMAN: Yes.

16 MR SCANNELL: All of those factors are simply ways of
17 enquiring whether it is plausible to say that a claimant
18 might have passed on an increase in prices in the way
19 that is alleged by a defendant when that is not already
20 apparent.

21 Now, we do not need to turn up the relevant
22 paragraphs, but when the Tribunal ultimately came to
23 apply each of those four factors to DAF's supply pass-on
24 claim, it found unanimously that they were not present,
25 none of them were present. So it was for that reason

1 that it looked at DAF's expert evidence to see if that
2 could bridge the gap, if it could somehow establish
3 that, notwithstanding the answers to the questions,
4 there was a proximate relationship, and what the CAT
5 ultimately held was that DAF's expert evidence could not
6 bridge the gap.

7 Now, pausing there, DAF appealed to the Court of
8 Appeal, but that appeal related only to supply pass-on.
9 Just so that you can see that and satisfy yourself that
10 that is the case, if you would go to the Court of
11 Appeal's judgment at tab 42 of the bundle you are
12 looking at -- so this is {AUTH2/42/1} for the Opus
13 operator -- the relevant paragraph is 77, which sets out
14 the grounds of the appeal, on page 33 {AUTH2/42/33}, and
15 the relevant subparagraph is (2). So:

16 "In relation to [supply pass-on] ..."

17 The ground of appeal was that:

18 "... the majority of the CAT erred in law in
19 concluding that there was an insufficiently proximate
20 and direct causative link ..."

21 So there is no appeal against resale pass-on or
22 complements.

23 THE CHAIRMAN: Okay.

24 MR SCANNELL: The Court of Appeal unanimously dismissed

25 the appeal and endorsed everything the Tribunal had said

1 about establishing proximity. It endorsed the approach
2 the CAT had taken to that and it did not disagree with
3 anything the Tribunal had said about resale pass-on or
4 complements, because they simply did not arise.

5 THE CHAIRMAN: So the passages on resale and complement
6 pass-on in the CAT decision, have we looked at all of
7 those?

8 MR SCANNELL: We have not, they are very long, but each of
9 those failed for different reasons and I can come back
10 to that. But really that is not why I am taking you to
11 the authority; I want to address what was actually
12 controversial in that case, which was the supply pass-on
13 component, and that was also the subject of the appeal
14 to the Court of Appeal.

15 THE CHAIRMAN: Right, but you were praying in aid the other
16 -- the decision on the resale and the complement.

17 MR SCANNELL: Only to make a very limited point, and that
18 limited point was --

19 THE CHAIRMAN: Your limited point is just that you do not
20 have to be hidebound by the four.

21 MR SCANNELL: Yes, that is all.

22 THE CHAIRMAN: Yes.

23 MR SCANNELL: The analysis that got applied then to resale
24 pass-on and to complements did not relate to that part
25 of pass-on at all, and resale pass-on failed for a very

1 specific different reason -- in fact, there were two
2 reasons mainly relating to datasets that had been relied
3 on and also the fact that the evidence proved that *BT*,
4 and to a slightly lesser extent *Royal Mail*, when they
5 bought *Trucks*, they ran them into the ground, so there
6 was not much of a resale market anyway.

7 THE CHAIRMAN: I see.

8 MR SCANNELL: So we do say that the four factors are
9 something of a red herring in the context of a case
10 where it is obvious that there is a proximate
11 relationship between the allegedly passed on --
12 the allegedly cartelised input and what is sold.

13 But even if the Tribunal were to consider it helpful
14 to apply the factors that were applied to DAF's supply
15 pass-on case, I would suggest that it is clear that they
16 are satisfied, which is what one would expect given my
17 earlier submission, that it is clear that there is
18 a proximate relationship.

19 So looking at the first, the relevant question is --

20 THE CHAIRMAN: So that we have got them in front of us ...

21 MR SCANNELL: Yes, so if you want to see them in
22 the CAT's --

23 THE CHAIRMAN: Well, just somewhere.

24 MR SCANNELL: 228 on page 98 {AUTH2/35/98}, or you could
25 take it at 550 on page 167 {AUTH2/35/167}.

1 THE CHAIRMAN: Yes, that is fine. Thank you very much, yes.

2 MR SCANNELL: So looking at the first, the relevant question
3 is not whether the claimant knows that there is an
4 overcharge as such, it is whether the claimant would
5 have noticed if its input costs had increased to such an
6 extent that it would feel it necessary to react by
7 increasing the prices of its own products.

8 THE CHAIRMAN: It does not have to know there is a cartel or
9 anything like that, it just has to know the part is more
10 expensive.

11 MR SCANNELL: That is the point exactly, Mr Chairman, and
12 one can see that from paragraph 551 of the CAT's
13 judgment {AUTH2/35/167}.

14 Now, DAF failed the test in *Royal Mail* for multiple
15 reasons --

16 THE CHAIRMAN: Sorry, just pausing there, how does it know?
17 Increased compared to what? You are saying these are
18 all bespoke and you cannot extrapolate from one to
19 the other, so how are they going to know, in this case,
20 that the prices have increased?

21 MR SCANNELL: Well, it is more a question of whether or not
22 they are above the level that the buyer expects them to
23 be, or indeed that they are just at a particular level
24 and need to be passed on.

25 THE CHAIRMAN: Yes, at a level, because the buyer may go,

1 "Well, that seems very reasonable to me", but it does
2 not mean he is not victim to a cartel or an overcharge.

3 MR SCANNELL: I take that, yes.

4 Now, I was explaining that DAF failed that test in
5 *Royal Mail* and *BT* for multiple reasons, including
6 the fact that *Royal Mail* and *BT* did not even notice that
7 they had paid more for *Trucks*. But we say that the same
8 obviously cannot be said of any of the Claimants in this
9 case. It is actually difficult to conceive of a case in
10 which the claimant is more acutely aware of the prices
11 that it is paying for the allegedly cartelised
12 components and scrutinising them.

13 THE CHAIRMAN: Yes, so these are long negotiations; they
14 know exactly what they are paying and they know why they
15 are paying it --

16 MR SCANNELL: With target prices -- (overspeaking) --

17 THE CHAIRMAN: -- (inaudible) --

18 MR SCANNELL: -- to begin with --

19 THE CHAIRMAN: Yes.

20 MR SCANNELL: -- and benchmarked against the historic
21 prices, benchmarked, too, against all of the components
22 they have bought for vehicles on the same platform.

23 THE CHAIRMAN: But the benchmarking does not matter, because
24 the benchmarking would relate to whether they were being
25 overcharged, and you say that that does not matter, all

1 that they need to know is the cost of this component --

2 MR SCANNELL: Yes.

3 THE CHAIRMAN: -- so they can factor it into the --

4 MR SCANNELL: Yes.

5 THE CHAIRMAN: -- price.

6 PROFESSOR NEUBERGER: So is the point being that in

7 *Royal Mail* and *BT* they were less aware of the cost of

8 *Trucks?*

9 MR SCANNELL: That was actually found as a fact, Professor,

10 that they were less aware.

11 PROFESSOR NEUBERGER: That they were not aware of the cost

12 of *Trucks?*

13 MR SCANNELL: Yes.

14 PROFESSOR NEUBERGER: Thank you.

15 MR SCANNELL: The relevant paragraph for your perusal is

16 paragraph 551 at {AUTH2/35/167}.

17 THE CHAIRMAN: Sorry, could you just give me it?

18 MR SCANNELL: Tab 35.

19 THE CHAIRMAN: Paragraph 551.

20 MR SCANNELL: 551.

21 So then the second of the factors is the relative
22 size of the overcharge and the Claimants' overall costs
23 and revenue. Now, I would suggest that that has to be
24 seen in context. An overcharge is never going to be as
25 high, realistically, as the overall costs and revenues

1 of the claimant. It is never even going to match
2 the income of an individual who says that she was
3 overcharged when she used her credit card, for example.
4 It is always going to be a small fraction, a tiny
5 fraction, of overall costs and revenue.

6 Now, one of the relevant considerations in *Trucks*
7 was the fact that if the overcharge in that case had
8 been, as alleged, 10%, then that would have translated,
9 for *BT*, into approximately a hundredth of a penny on
10 the price of a stamp, for example, and even less on
11 the prices of *BT*'s services, and of course as it was
12 the overcharge was found not to be 10%, it was 5%, so it
13 was half of those amounts.

14 But, actually, in the present case, the relationship
15 is far, far closer than that. According to Dr Majumdar,
16 Fiat's data for 2007 to 2022 shows that OSS component
17 costs accounted for 5% of Fiat's total production costs
18 and 6% of its variable production costs. The joint
19 expert statement reference is row 64 of the joint expert
20 statement, which is at {E1/13/40}.

21 THE CHAIRMAN: Sorry, let me just look at that.

22 MR SCANNELL: So it is row 64, and one can see from
23 the third column Dr Majumdar observing that:

24 "... OSS products can also be served as part of
25 the paid option ..."

1 My apologies, I have lost my feed.

2 (Pause)

3 Here we are.

4 So he is making the point there that:

5 "In the case of paid options of vehicles, I estimate
6 that OSS features account for around 9% of variable
7 costs."

8 Further up at the beginning of this box, he says:

9 "I estimate that OSS costs account for around 5% of
10 total production costs and around 6% of variable
11 production costs ..."

12 So it is never going to be a huge proportion, but
13 I would suggest that in this case it is a lot bigger
14 than it was in *Royal Mail* and *BT*.

15 Then the third of the factors is whether there is
16 a relationship between the component and the goods or
17 services provided by the claimant, and in *Royal Mail*, as
18 we know, that failed, because there is no relationship
19 between a truck and a stamp, and there is no
20 relationship between a truck and repairing a phone line
21 either. But that is self-evidently not true in this
22 case. In this case I would propose that it could not be
23 clearer that there is a relationship between
24 the component that goes into a car and the car itself.

25 Then the final factor asks whether claims have been

1 brought by customers of the claimant alleging that
2 the overcharge was passed to them and that they have
3 suffered a loss. Now, that failed in *Royal Mail* too,
4 and it was in that context that the Tribunal memorably
5 said that size matters, and it said that because it was
6 vanishingly unlikely that the purchaser of a stamp
7 the price of which had fractionally increased would
8 associate that increase with the potential to bring
9 a claim against *Trucks* OEMs, and the same was true of
10 a consumer of *BT* services.

11 But I would suggest that that is not in fact true in
12 this case either. The buyer of a car who finds out that
13 the price of components has been cartelised might well
14 think that it had paid too much for the car and that
15 there might be a good claim against the undertakings
16 found to have cartelised. It is true that no claims, in
17 this case, were brought within the limitation period,
18 but I would suggest that nothing turns on that per se,
19 because of course this is not, as I said at
20 the beginning of my opening remarks, a follow-on damages
21 claim in the traditional sense by any means. The fact
22 that there has been no claim by downstream buyers may
23 well have more to do with the fact that there has never
24 been a regulatory decision saying that the price of
25 these Claimants' components were cartelised. In other

1 words, the absence of a claim simply points to how
2 speculative the Claimants' claim is in this case, it
3 does not suggest that there is no proximity.

4 So for all of those reasons we say that there is
5 a relationship --

6 THE CHAIRMAN: It is not whether -- I mean, it may well not
7 occur to people to make a claim in respect of a car,
8 with or without legal advice, because of an overcharge
9 for a component, but that is not quite what they are
10 saying here, is it? It is whether there is an
11 identifiable claim by an identifiable purchaser -- where
12 there is a potential for an identifiable claim.

13 MR SCANNELL: Yes.

14 THE CHAIRMAN: It is not whether there has in fact been
15 one --

16 MR SCANNELL: Yes.

17 THE CHAIRMAN: -- or whether in practice anyone would
18 actually do it, whether they would think it was worth
19 it, is not the point.

20 MR SCANNELL: Yes, and I accept and concede that there have
21 been no such claims. I do, however, make the submission
22 that one cannot draw from that a conclusion that there
23 is no proximity, because there are other ways of
24 explaining why there might not have been a claim,
25 the most obvious one of which is that there has never

1 been a regulatory decision saying that the Claimants'
2 components were cartelised.

3 THE CHAIRMAN: But in terms of the price, there was a slight
4 shimmy, was there not, because when you were talking
5 about the stamps you were talking about the overcharge
6 on the stamps; when you then went to this OSS cost, you
7 were looking at the total cost of the component. What
8 we are interested is the incremental cost --

9 MR SCANNELL: On each component, yes.

10 THE CHAIRMAN: On each, yes.

11 MR SCANNELL: I accept that the incremental cost on each
12 component is modest, depending on what the overcharge
13 found is, but it is certainly a lot higher than the sort
14 of incremental costs one was talking about in *Royal Mail*
15 and *BT*. I say that in the context of my overall --

16 THE CHAIRMAN: But it is sufficiently small -- well, what is
17 your submission? Is it sufficiently small that it is
18 not self-evident that it will be passed on to
19 the consumer?

20 MR SCANNELL: I say that it is not a reason to conclude that
21 there is no proximity. It must be remembered that
22 the four-step test, even as articulated by
23 the Competition Appeal Tribunal in the context of supply
24 pass-on, is a four-step test none of the component parts
25 of which is mandatory. So the Competition Appeal

1 Tribunal made it clear in the *Trucks* case that these are
2 four considerations that can be taken into account, and
3 the relative importance of steps within them, or indeed
4 whether they should be taken into account at all, is for
5 the Tribunal ultimately to decide. But I would suggest
6 that, overall, in this case we are dealing (a) with
7 a situation where proximity is clear, and (b) that there
8 is nothing in the four-step test to prevent a conclusion
9 that proximity is amply satisfied.

10 What that means is that this is not a case where one
11 needs to look at the expert evidence with a view to
12 asking oneself the question: does it bridge a gap?
13 Is it strong enough to establish proximity in
14 circumstances where the Tribunal is deeply sceptical
15 about whether or not proximity or a direct causal
16 relationship is made out?

17 So those are my submission in opening. As I said,
18 I will take the financing losses in closing, not in
19 opening.

20 Professor.

21 PROFESSOR NEUBERGER: Just while we are on pass-on, pass-on
22 occurs on the assumption -- I mean, the issue arises on
23 the assumption that we find there is an overcharge. One
24 of the things I was not clear about in reading
25 the skeleton was, is the basis for your pass-on argument

1 that there was an overcharge which applied to
2 the Claimants only, or that, if there was an overcharge,
3 it would have applied across the industry as a whole.

4 MR SCANNELL: It is predicated on the Claimants' overcharge
5 case being made out, which is not an allegation that
6 there was an overcharge on the industry as a whole,
7 although, on its primary case, the alleged cartel is
8 a cartel affecting OEMs other than the Claimants in
9 addition to the Claimants.

10 PROFESSOR NEUBERGER: I understand, but there must be --
11 I mean, in considering the question of whether there was
12 pass-on, the question must arise in
13 the counterfactual: pass-on compared with what? Are
14 prices higher compared with what? I am just wanting to
15 make sure I have got my counterfactual scenario right.
16 Is it one in which the prices of OSS to the Claimants
17 alone were somewhat lower, or is the counterfactual one
18 in which the price of OSS to the Claimants and all their
19 competitors were lower? I am not clear on what basis
20 you are making the pass-on case.

21 MR SCANNELL: Yes, thank you. Could I have a moment,
22 Professor, in relation to that?

23 PROFESSOR NEUBERGER: Of course.

24 (Pause).

25 MR SCANNELL: We framed the pass-on argument by reference to

1 the case as it is put against us. So the case that is
2 put against us is that there was an overcharge which
3 affected the Claimants, but on the primary case it is
4 broader than that, and the pass-on argument that is
5 advanced by Dr Majumdar is an argument that applies
6 however the Claimants put their case in relation to an
7 overcharge. So he is saying that these Claimants would
8 have passed on their costs whether what the Claimants
9 have established to establish an overcharge is their
10 primary case of a global cartel, or target cartels, or
11 for that matter spillover.

12 PROFESSOR NEUBERGER: I am not sure that completely answers
13 the point.

14 MR SCANNELL: Yes, I am not sure that I am --

15 PROFESSOR NEUBERGER: -- because, I mean, it is well
16 established, and I think it is in
17 the Commission Guidelines, for example, that there is
18 substantial potential difference between pass-on in
19 the case of an overcharge affecting one player in
20 a market and pass-on in the case of an overcharge which
21 affects the whole market, industry-wide or
22 company-specific overcharge. So, I mean, it seems to me
23 hard to go into any analysis of the expert evidence
24 unless it is crystal clear whether the overcharge we are
25 talking about is a claimant-specific overcharge or we

1 are talking about an industry-wide overcharge. I mean,
2 I am not quite sure what the industry-wide overcharge
3 hypothesis would be, it is rather complex, and so all
4 the evidence we have concerns a claimant-specific
5 overcharge, but it seems to me important at this stage
6 to clarify what we are talking about when we come to
7 look at the pass-on argument.

8 MR SCANNELL: Yes. Part of the difficulty -- part of
9 the confusion arises from the fact that, as the primary
10 case is put, it is not actually identified which OEMs
11 are said to have been affected by the cartel. So
12 the way the case is put in the 4APOC, paragraph 39
13 {A/2/17}, is that there was a cartel which affected
14 the Claimants and other OEMs, but what those other OEMs
15 were we are not told. It is probably the OEMs affected
16 by the OSS decisions, but are there others or not?

17 THE CHAIRMAN: It is not just the Claimants' problem. If
18 everyone in the industry has been overcharged 2% for
19 their car parts, then the whole industry can put up
20 costs by 2%, potentially. But if you are the only one
21 who has been overcharged by 2%, then your ability to
22 pass that cost on is complicated by the fact that no one
23 else is putting their price up by --

24 MR SCANNELL: I have the Professor's point in relation to
25 that well in mind.

1 I think that the safest response to you, Professor,
2 is to take this up with Dr Majumdar and to get back to
3 you, if I may.

4 PROFESSOR NEUBERGER: Fine. I think it is most important
5 that we clarify this well before we ask the experts to
6 give evidence, because it does not seem to me that it is
7 -- it is all to do with how the case is made and not to
8 do with an expert economic assessment of some economic
9 facts.

10 MR SCANNELL: I understand.

11 THE CHAIRMAN: So perhaps you could let us know your
12 position before we get to the week after next.

13 MR SCANNELL: Absolutely, we will.

14 Thank you, Professor.

15 THE CHAIRMAN: In the time we have got, can I just raise --
16 it is really the conduct of these hearings going
17 forward. At the moment, although you are both making
18 extremely helpful submissions, they do not seem to be as
19 well coordinated as they might be. In particular, we
20 have two separate skeletons from you and I am not sure
21 how cross-examination is going to be conducted and how
22 closings are going to be conducted. It seems to us that
23 you should be aligned, and if you are not aligned, that
24 is going to create problems for you, but you should be
25 aligned on everything save the narrow point that Ms Ford

1 addressed us on this morning where she was suitably --

2 MR SCANNELL: Yes, that's the joint and several liability.

3 THE CHAIRMAN: Joint and several liability. Clearly your
4 interests may depart -- although Ms Ford was being
5 tactful in the way she dealt with it, but your interests
6 may depart on that and so we will need separate
7 submissions from you on that. That is in relation, as
8 I understand it, only to spillover.

9 MR SCANNELL: Correct.

10 THE CHAIRMAN: So subject to that, should you not be putting
11 in joint submissions in closing -- or we would like you
12 to put in joint submissions in closing, and indeed there
13 should not be any duplication of cross-examination of
14 fact witnesses or expert witnesses, so if you could just
15 assist us on how you are proposing to manage that.

16 MR SCANNELL: Yes, well, I can certainly assist you on
17 the cross-examination question to begin with. So it is
18 not anticipated that there will be any duplication of
19 questions, or indeed, as matters presently stand,
20 possibly even any questions at all from the other party
21 than the party cross-examining.

22 THE CHAIRMAN: Yes, that is what I would expect.

23 MR SCANNELL: So this afternoon the Tribunal will hear from
24 two of the Claimants' witnesses, Mr Saternus and
25 Mr MacQueen. Those witnesses will be cross-examined by

1 ZF and as matters stand I am not proposing to ask any
2 questions at all.

3 The same goes for the remaining procurement witness.

4 We will then come to the pass-on witnesses. We,
5 Autoliv, will cross-examine those witnesses. We will
6 then come to the financing witnesses and we, Autoliv,
7 will cross-examine them.

8 Professor Bailey is taking one of the pass-on
9 witnesses.

10 THE CHAIRMAN: That is very helpful. Thank you.

11 MR SCANNELL: But, again, I am not going to jump in.

12 THE CHAIRMAN: Then we get to expert witnesses, and we will
13 fill you in a little bit more about at that 2 o'clock,
14 if we can, as to what our thinking is. But insofar as
15 there is cross-examination of expert witnesses, again,
16 I would -- a cross-examination section --

17 MR SCANNELL: Yes, we are not anticipating any --

18 THE CHAIRMAN: -- we expect one of you to do that, save
19 insofar -- that it is the particular issue that Ms Ford
20 has identified.

21 MR SCANNELL: It is not anticipated that we will just have
22 one cross-examiner, but it is anticipated that there
23 will be a division of subject matter which is very
24 clearly delineated. So Ms Ford will take
25 cross-examination on overcharge issues, for example, and

1 I will take cross-examination on finance and --

2 THE CHAIRMAN: Fine. That is just spreading the burden.

3 That is satisfactory.

4 Then in terms of closings, again, it is not --
5 you know, we hope there will be a single written closing
6 from you, subject to those areas where you depart, and
7 if you need to put in something separate, you will need
8 to explain to us why you do.

9 MR SCANNELL: I understand. Just so that the Tribunal is
10 aware, that is not something that we had apprehended
11 would happen, so we will need to consider
12 the ramifications of that. But we take on board
13 the indication.

14 THE CHAIRMAN: Thank you very much.

15 MR SCANNELL: Ms Ford may --

16 THE CHAIRMAN: We can obviously chat about this further in
17 due course.

18 MR SCANNELL: -- want to say a word on that.

19 MS FORD: Sir, we certainly anticipate that we will liaise
20 to avoid duplication.

21 THE CHAIRMAN: You have not liaised to avoid duplication for
22 your opening skeletons.

23 MS FORD: Well, but the concern I have is the limited time
24 available to ask us to put in one document which we have
25 fully approved as between two teams is slightly more

1 difficult than two documents which we would agree, for
2 example, ZF will deal with overcharge because that is
3 the area which we have had responsibility, I anticipate
4 that each party will have separate submissions on
5 overspill because the mechanisms for overspill within
6 the defendant groups, the factual position will be dealt
7 with --

8 THE CHAIRMAN: Well, insofar as your interests differ, of
9 course, absolutely that, but --

10 MS FORD: Sorry, sir, to be clear, it is not just
11 the differing interest, it is different factual
12 positions. The position within ZF and the way they run
13 their teams is anticipated to be different, and ZF knows
14 about that, than Autoliv --

15 THE CHAIRMAN: That is --

16 MS FORD: -- and how they run their team --

17 THE CHAIRMAN: -- that is -- that is fine --

18 MS FORD: -- so it is not a differing interest but --

19 THE CHAIRMAN: -- we will have a paragraph on how ZF
20 organises its teams and then you have a paragraph on how
21 Autoliv organises its teams and they will be separate
22 paragraphs, and who drafts them is of no concern to
23 the Tribunal as long as we have them in a single
24 document.

25 MS FORD: Well, the only point I make is that there

1 certainly could be separate paragraphs and it may be
2 that they are in two separate documents, but that does
3 not mean that there will be duplication as between them.

4 THE CHAIRMAN: We would like them in a single document.

5 I mean, that is not what we have had for the skeletons
6 in opening --

7 MS FORD: No.

8 THE CHAIRMAN: -- and it is twice the work and it is never
9 clear if you are saying -- you seem mostly to be saying
10 the same thing, but it is never -- are you saying
11 the same thing and we are going to have to write
12 separate judgments on your respective positions. It is
13 highly unsatisfactory. So you will have to do your best
14 in that, and obviously if you are running inconsistent
15 positions on things where you do not have inconsistent
16 interests, that is not going to help your case at all.

17 (12.51 pm)

18 (The short adjournment)

19 (2.05 pm)

20 PROFESSOR NEUBERGER: If I can just make a remark in
21 relation to the handling of expert evidence. We have
22 given some thought to how this would best be handled and
23 we have put around a note which gives our thinking on
24 it. If there is some response from -- some comments or
25 concerns from parties then they will let us know

1 shortly.

2 There are a couple of other matters that
3 concerned -- relatively minor matters about the expert
4 evidence that are mentioned in that note. That was all
5 I wanted to say.

6 MR WEST: Could I just check one point. So at point 3, it
7 says:

8 "The Tribunal does require ..." --

9 PROFESSOR NEUBERGER: Oh, "does not". That is a typo.

10 Thank you very much, Mr West. That is very kind.
11 Perhaps if I complain about typos later on ... the point
12 is well taken.

13 MR SCANNELL: Professor Neuberger, over the lunch
14 adjournment, I am sorry to report that we were unable to
15 reach Dr Majumdar, and in the circumstances, I am taking
16 it that you are familiar with the joint expert
17 statement, rows 60 and 66, which broach, to a degree,
18 the concern that you have expressed. But in
19 the circumstances, I would propose that it would be
20 sensible for Dr Majumdar to put in a one-page document
21 to you providing an answer directly to your question.
22 That could go in next week, well in advance of the hot
23 tub session.

24 THE CHAIRMAN: Yes, in case it raises any questions for
25 Mr West, so we need it -- if we can get it, I do not

1 know how long, maybe by close of business on Tuesday or
2 something, does that sound sensible?

3 MR SCANNELL: That would be fine, I am sure. I am sure that
4 Mr Hughes might want to put in a one-pager of his own.

5 MR WEST: Yes, we will have a look at what Dr Majumdar
6 produces and see if there is a need for a response.

7 MR SCANNELL: Is that satisfactory, Professor?

8 PROFESSOR NEUBERGER: Yes, yes. I mean, in a sense --
9 I mean, it will be helpful to get a note from
10 Dr Majumdar, but it is really understanding the basis on
11 which the Defendants are putting forward their pass-on,
12 and insofar as he is able to speak on behalf of the case
13 that you are putting forward, then that is fine.

14 MR SCANNELL: Yes. Thank you.

15 MR WEST: Well, I think it falls to me to call our first
16 witness, who is Mr Saternus. So I call
17 Wojciech Saternus, if he is here.

18 I understand that Mr Saternus has elected to swear
19 the oath.

20 MR WOJCIECH SATERNUS (sworn)

21 THE CHAIRMAN: Please take a seat, Mr Saternus.

22 A. Thank you.

23 Examination-in-chief by MR WEST

24 MR WEST: Could Mr Saternus be shown tab 12 of bundle B
25 {B/12/1}.

1 Mr Saturnus, is this your first witness statement?

2 A. Yes.

3 Q. If you could be shown then page 10 of that same tab --
4 sorry, {B/12/8} of the same tab.

5 THE CHAIRMAN: I think the documents will come up
6 automatically, so you will not need to touch the screen,
7 hopefully.

8 A. Thank you.

9 MR WEST: Are those your signatures --

10 A. Yes --

11 Q. -- on that page?

12 A. -- I confirm.

13 Q. If you then go forward to tab 15 {B/15/1} in the same
14 bundle, is that your second witness statement?

15 A. That is correct.

16 Q. Then going on to {B/15/6} of that tab, is that your
17 signature?

18 A. I do confirm it is my signature.

19 Q. Are the contents of those two statements true to
20 the best of your knowledge and belief?

21 A. Yes.

22 Q. Do they represent the evidence you wish to give to this
23 Tribunal?

24 A. That is correct.

25 MR WEST: Ms Ford may have some questions for you -- or

1 Mr Bailey, sorry.

2 Cross-examination by PROFESSOR BAILEY

3 PROFESSOR BAILEY: Good afternoon, Mr Saturnus. Thank you
4 for joining us today.

5 Just to explain at the outset, I will use the same
6 abbreviations that you use in your statements. So for
7 example, "OSS", not Occupant Safety Systems, and "ZF" to
8 refer both to ZF and its predecessor, TRW.

9 Earlier this week, on Monday, you should have
10 received a shortlist of documents. Were you provided
11 with a list of documents as ordered by the Tribunal?

12 A. Yes, I received.

13 Q. Have you had a chance to read them?

14 A. I have a chance to read.

15 Q. Can we go, please, to {B/12/3}. This is your first
16 witness statement. At paragraph 9, you explain that you
17 joined the purchasing department in General Motors in
18 2013. Do I take it you were not involved in GM's
19 purchase of OSS for either Opel or Vauxhall cars before
20 2013?

21 A. That is fully correct.

22 Q. If we can go over the page, please, {B/12/4}, you
23 explain in paragraph 15 of your first statement -- it is
24 the last sentence:

25 "Typically, at the time of GM, the suppliers

1 included in a bid list were ZF (formerly TRW), Autoliv
2 and Takata ..."

3 You say something similar in paragraph 11 of your
4 second statement {B/15/4}.

5 When you say there "at the time of GM" {B/12/4}, are
6 you referring to your time at GM from 2013?

7 A. That is correct.

8 Q. Could we go, please, to {J1/129/1}, please.

9 For the Chair's reference, we have prepared a hard
10 copy witness bundle that has all the documents I am
11 going to go to which, as I understand, has been handed
12 up, in case that makes life easier. So it is just a
13 sort of --

14 THE CHAIRMAN: Yes, thank you very much.

15 (Handed).

16 PROFESSOR BAILEY: They are in the order in which they are
17 found in Opus, sir. I am not actually going to go to
18 them in exactly that order.

19 THE CHAIRMAN: Thank you.

20 PROFESSOR BAILEY: Happily, though, it is the first tab in
21 your bundle.

22 So this is an email from the GM purchasing commodity
23 manager for safety systems in 2003. I appreciate this
24 is a document before your time, but it does relate to
25 GM's approach during the claim period, that is why I am

1 asking you about it.

2 We can see from the opening sentence of the email
3 that it relates to an invitation for bids relating to
4 the supply of steering wheels, driver airbags, passenger
5 airbags, for two Vauxhall car models, the Astra and
6 the Vectra.

7 If I could just ask you just to cast an eye over to
8 whom it was sent and who it was copied, what we can see
9 there is that it was sent at the same time to five
10 suppliers. We can see it was sent to KSS, Dalphi Metal,
11 as well as TRW, Autoliv and Takata. So I would like to
12 suggest that what we can see here, at least in 2003, GM
13 was proactively going beyond the three suppliers that
14 you identify in your statements, inviting them to bid
15 for these safety components in Vauxhall cars.

16 So the question I am putting to you is that whilst
17 in your experience from 2013 there were three players,
18 TRW, Autoliv, Takata, we can see from this email, which
19 I realise is before your time, but in 2003 would you
20 accept that GM, the buyer here, for the safety systems,
21 is going beyond those and actually inviting five
22 suppliers to bid to supply the safety components?

23 A. What I can say, sir, from my experience, I would not do
24 that. Nevertheless, I cannot comment what was done in
25 2003.

1 Q. So you would not do it, but clearly that was how it was
2 done in 2003.

3 The reason, of course, why GM would have done it
4 back then and invite five suppliers would be that it
5 would be in GM's interest, would it not, to maximise
6 the degree of competition for each RFQ package? Would
7 you agree with that?

8 A. I can just only assume what that guy, the author of this
9 email had in mind or what was the intention of the guy.
10 So this is only -- it can be only my speculation or
11 assumption.

12 Q. We will move on.

13 In paragraph 16 of your first statement {B/12/4} --
14 we do not need to turn it up -- you explain that after
15 you send out the RFQ, there would be a technical review
16 with each supplier and I would like to have a look at an
17 example of that.

18 Can we go, please, to {J3/24/1}, which is tab 8 of
19 the hard copy bundle. So this is a document disclosed
20 by the Claimants, it was a presentation by TRW to
21 General Motors in March of 2010, and we can see from
22 the opening slide it is extracted from the bill of
23 materials for various safety components for the Opel
24 Junior.

25 Can you help us, the Opel Junior, that was

1 the platform for the Opel Adam car, was it not?

2 A. If my memory serves me good, yes.

3 Q. I am grateful.

4 For the Tribunal's note, that is in the glossary at
5 {S/8/8}.

6 If we can go over the page, please, to slide 2
7 {J3/24/2}, in actual fact, from slides 2 to 6 we are
8 going to see a series of steering wheels and they become
9 ever more fancy, with enhanced trim and functions. This
10 is the most basic version. I just invite you to note
11 that what we see here is the steering wheel's
12 components, its materials, its density and its weight,
13 and you can see that in the table on the slide. I am
14 not going to go laboriously through each of the slides,
15 but if we just go through and if I could ask the Opus
16 operator just to turn through 3 {J3/24/3} through
17 {J3/24/4}, {J3/24/5} to slide 6 {J3/24/6}, please, we
18 can see the same level of detail on each.

19 Now, slide 6 shows the highest end steering wheel,
20 now made from leather, it has various functions,
21 heating, cruise control, answering the phone and so on.
22 Now, would you agree with me that here what TRW is
23 presenting are steering wheels that are bespoke to
24 the Opel Adam car?

25 A. I do agree.

1 Q. It is fair to say, is it not, that we can see here that
2 General Motors had detailed and very specific
3 requirements for its steering wheels, by which I mean in
4 terms of density, weight, functionality, design?

5 A. Yes, I would say not particularly for that one, but for
6 each and every steering wheel there are requirements
7 defined by -- by -- in this case by Stellantis or, at
8 that time, by GM.

9 Q. Is the kind of detailed information that we can see on
10 this slide consistent with your experience of bills and
11 materials that you will have seen during your time at
12 General Motors?

13 A. Yeah, it is quite consistent.

14 Q. I am grateful.

15 So if we can go now, please, to {J3/22/1}, and we
16 are just kind of moving forward in the procurement
17 process and we are now at a safety pre-RFQ, a target and
18 setting update in February of 2010. This is a GM
19 document and just to sort of explain for you and
20 the benefit of the Tribunal, if you look at the bottom
21 right-hand corner, you will see in the bottom there it
22 says "Global Purchasing and Supply Chain", so that is
23 it -- it has got a geographic scope. It is
24 February 2010. Then if I could ask you to look at
25 the top left-hand corner, you will see a wonderful array

1 of acronyms. I am just going to focus for today's
2 purposes on the fourth one, the "Junior Corsa". That
3 was a Vauxhall and Opel car model, was it not?

4 A. Sorry, again, if you could precise the question.

5 Q. Of course. So if you just look to the top left-hand
6 corner of the slide, they are in blue writing.

7 A. Mm-hm.

8 Q. If you can go down to the fourth line that begins
9 "Junior Corsa", and my question to you is, Junior Corsa,
10 that is a Vauxhall and Opel car model, is it not?

11 A. Right.

12 Q. I am grateful.

13 Now, if we can go forward, please, to slide 4
14 {J3/22/4}, we can see here GM setting out strategies for
15 its procurement of safety components. If we start,
16 please, with point 2, we can see it says:

17 "Targeted sourcing strategy supports execution of
18 vision BOT."

19 You can take it from me "BOT" means "business over
20 time" and we are going to see that, it is actually on
21 slide 21, I am going to come to that later.

22 Now, "targeted sourcing", that refers to where
23 a customer wants a particular supplier to supply it with
24 a particular product; that is right, is it not?

25 A. That is correct.

1 Q. We can see an example of that if we look at subparagraph
2 (c) beginning:

3 "Junior Corsa ..."

4 Then we have passenger airbags, roof rail airbags
5 and seatbelts for the Junior Corsa, that was targeted to
6 TRW. Would you agree with me that where GM was engaged
7 in targeted sourcing it is actively seeking to manage
8 the business as to going to which supplier?

9 A. Well, targeted, sir, means that we concentrate on -- on
10 the supplier that we think that it makes sense to put
11 the business on them, because most probably they have
12 the previous model which is very similar and will help
13 us to avoid additional cost in case of the completely
14 open RFQ sourcing.

15 Q. If we look on in the same subparagraph, we see it then
16 refers to "BOM", bill of materials, "reuse from S4400".
17 S4400, that is the platform code for the Opel Corsa D,
18 is it not?

19 A. Yes, correct.

20 Q. This is saying that GM will reuse the cost of the safety
21 components in the bill of materials for the previous
22 Corsa as a benchmark for what it will pay this time
23 round. That is what this is getting at?

24 A. Yes, it is stated, I confirm.

25 Q. I am grateful.

1 In point 3 we just really see the same point again,
2 now it is:

3 "Optimise BOM REUSE."

4 When you do this, because you describe this yourself
5 in paragraph 23 of your first statement {B/12/5}, when
6 you do this, you reuse those bills of materials, that is
7 the way in which GM's exercising buyer power to hold
8 cost down to previous levels, is it not?

9 A. Yes, reuse, it means that we -- or together with
10 the engineering of course, because that is the
11 cross-functional teamwork, but try to optimise the bill
12 of the material reuse means as much components that are
13 possible to be used from the previous platform of course
14 we -- we are going to use it.

15 Q. Thank you.

16 Then at point 4 {J3/22/4}, we move to a separate
17 strategy. We now see that GM is saying that it wants:

18 "Game changers [which] will drive competition & set
19 new benchmark."

20 Then we can see, in the subparagraphs, it sets out
21 three suppliers, KSS, DBI, S&T, and the reason why these
22 are described as "game changers" is because GM expects
23 these suppliers to increase competition for the supply
24 of safety components; that is right, is it not?

25 A. I cannot comment in this there what the author of

1 the presentation had in mind saying the "game changers".

2 Q. Well, put to one side "game changers" then. When it
3 says "will drive competition", the reason GM is
4 referring to these other suppliers is that it expects it
5 will drive competition and set new lower benchmark
6 prices; that is right, is it not?

7 A. I expect, yes.

8 Q. I am grateful.

9 THE CHAIRMAN: Sorry, just remind me who are these? KSS
10 I recognise. S&T is?

11 PROFESSOR BAILEY: S&T is a Korean supplier. KSS --

12 THE CHAIRMAN: Yes, I know about KSS.

13 PROFESSOR BAILEY: They are all suppliers of OSS products,
14 and if it would assist the Tribunal, I can provide
15 the full names broken down from acronyms after.

16 Can we go forward, please, to slide 21 {J3/22/21},
17 which is the one I mentioned.

18 So what we see here is the "Business Over Time".
19 The pie charts at the top deal with airbags and steering
20 wheels, the pie charts at the bottom deal with
21 seatbelts. What we can see is the pie chart in
22 the left-hand side is for 2009 business over time and
23 then it goes to 2013 and then it goes to "team vision".
24 Now, I am going only to ask you about 2009 because those
25 are the actual figures at the time of this presentation.

1 If I could ask you to look first, please, at the pie
2 chart for airbags and steering wheels in the left-hand
3 side, we can see that there are the players you
4 identify, so in other words Autoliv, TRW and Takata, but
5 would you agree with me we can see that a quarter of
6 GM's business for airbags and steering wheels is, at
7 this time, being provided by Delphi Automotive, KSS and
8 Daewoo?

9 A. Yes.

10 Q. I am grateful.

11 Then if I could ask you to look at the seatbelt
12 equivalent the one below, again a pie chart, we can see
13 that the three that you mention, Takata, TRW and I infer
14 that the big black must be Autoliv, but we can also see
15 that DBI had 15%, "Chris", I assume it is not an
16 individual, I think that is a Brazilian supplier,
17 Chris Cintos? Would that be right?

18 A. That can be right, yes.

19 Q. I am grateful. And "Samsung", if you add those
20 together, they accounted for 22% of GM's seatbelt
21 business at this time, based on these figures? I am
22 just adding up DBI 15%, Chris 5%, Delphi and Samsung.

23 A. Yes, and what was the question, excuse me?

24 Q. I am simply asking you to confirm that you agree that --

25 A. I confirm what I see on the slide, yes.

1 Q. I am grateful.

2 Well, if we can just go back, please, to
3 paragraph 11 of your -- this time if we go to
4 paragraph 11 of your second statement, this is at
5 {B/15/4}. So here, you say:

6 "I recall that at the time there were three
7 players: ZF/TRW, Autoliv and Takata which was later
8 acquired by Joyson Safety Systems."

9 Actually, to answer the Chair's question, that is
10 KSS as the supplier.

11 Now, you are recalling here, fairly, from 2013.
12 Would you accept, from what we have just seen, that in
13 2009 GM was procuring from Delphi Automotive, KSS, DBI,
14 Samsung as well as the three players that you mention?

15 A. Yes, when I follow the chart you put on a table, it is
16 consistent with what you are saying.

17 Q. I am grateful.

18 Can we go, please, to paragraph 32 of your first
19 statement. That is at {B/12/7}, please. Here, you are
20 describing the relationship with Autoliv and TRW. You
21 mention the three players; we have addressed that.

22 You then do go on to say, in the last sentence:

23 "We are trying to introduce new suppliers ..." --

24 I have just lost my feed.

25 A. Me too.

1 THE EPE OPERATOR: It should come on again in a moment.

2 THE CHAIRMAN: Back on.

3 PROFESSOR BAILEY: I will start again. In paragraph 32, in
4 the last sentence:

5 "We are trying to introduce new suppliers ... strong
6 requirement from our Leadership ... but it is not so
7 easy to introduce a new supplier, [there are] very
8 strict safety requirements."

9 Would you agree with me also that from what we
10 looked at in 2009, GM had managed to introduce new
11 suppliers other than the three that you mention?

12 A. Yes, they had managed, but I can imagine it was not from
13 one day to another because, as I mentioned, so
14 introducing suppliers in a safety, that means that
15 the supplier they have to fulfil very restricted
16 regulations, they have to comply with all these safety
17 requirements. So, as I -- as I put in my statement.
18 So, any time it is being fully coordinated by
19 engineering and if supplier is qualified, of course, we
20 put them into the supply base, but as I stated and
21 reiterate, it is not from one day to another.

22 Q. I am grateful.

23 I am going to move on now to GM's negotiations with
24 various OSS suppliers and I am going to show you
25 a series of emails. They are emails from TRW, emails

1 from Autoliv. The reason I am doing that is because
2 I want to show you discussions they had with GM at the
3 time, how they were reacting and I want to ask you about
4 whether that reflects your experience. That is just to
5 explain what we are doing.

6 Can we go, please, to {J3/20/1}. I am going to do
7 this in chronological order. That is in tab 5 of
8 the hard copy bundle, for the Chair's reference.

9 So this is a TRW email sent in November 2007, and it
10 is a long email. For the Chair's reference or
11 the Tribunal's reference, it's from Mr Heinrich. He was
12 the TRW account director for inflators on the sort of
13 the technical side, but he does refer to one or two
14 matters that are relevant.

15 If we pick it up in the opening line:

16 "Obviously due to a Takata offer for GM-Opel
17 S-4400 ..."

18 We established that is the Junior Corsa:

19 "... [passenger airbag], GM-Opel purchasing is
20 putting pressure towards TRW-DM to reduce the module
21 price again ..."

22 So just to pause there and break that down,
23 the reference to "GM-Opel S4400", that is the GM
24 platform for the Opel Corsa?

25 A. Right.

1 Q. Then "PAB", passenger airbags?

2 A. Correct.

3 Q. Then, when it is saying GM-Opel purchasing team is using
4 Takata's offer to put pressure, that is all designed to
5 get TRW to push its prices down; correct?

6 A. I cannot comment what it mean to put pressure, but our
7 purchasing job is any time to negotiate the better
8 price, which means that they are low price.

9 Q. Is this not an example of something that you describe in
10 paragraph 24 of your first statement, where what is
11 happening here is the GM-Opel purchaser is playing off
12 Takata and TRW, and it is exactly what you describe,
13 that a sensible, astute buyer will say, "Look, I have
14 got this great offer from Takata, if you are not going
15 to match it, then the business is going to go to
16 Takata"? So it is an example of GM playing one supplier
17 off against another, is it not?

18 A. From my experience, I cannot comment to that.

19 Q. Well, in your -- if we can just briefly turn up your
20 experience. So that is set out in paragraph 24, which
21 is in {B/12/6}. In the third sentence, you say:

22 "At this point, if there is a frontrunner, I tell
23 the other bidders that I have a supplier 'x' who is
24 offering me much better prices. I tell them that if
25 they really would like to get the business, they must

1 provide me with prices which are at a reasonable level."

2 So that is you doing the same thing, is it not? You
3 are saying, "Look, I have got another supplier, they
4 have put in a better offer than you; if you want my
5 business, you have got to match it", and this email is
6 a demonstration of the same thing, is it not?

7 A. Sir, I do not think so. For me, so this is a normal
8 negotiation way; supplier is asking where they are in
9 the sourcing process, so that is why my reply that
10 I have another frontrunner who is offering me better and
11 if you would like to get the business, you need to
12 improve prices, so I would name it as normal negotiation
13 approach.

14 Q. If we can go back to the email, please, at {J3/20/1},
15 I put it to you that GM-Opel is absolutely playing TRW
16 off against Takata in order to get a better price. That
17 is obvious, is it not?

18 A. Based on what, sorry?

19 Q. So it is obvious from the wording of the email that what
20 GM is doing is it is playing TRW off against Takata to
21 get a lower price?

22 A. I would name it that they tried to negotiate lower
23 price, that is it.

24 Q. Well, we are going to see some other examples.

25 Can we go over the page, please, {J3/20/2}. I am

1 going to miss out all the technical joy of inflators and
2 go to the second angled bracket. You will see here it
3 says:

4 "Unfortunately TRW-DM was not nominated as
5 the supplier for the GM-Opel S-4400 successor platform,
6 part of the GMW 'Gamma' (BASIC CAR, e.g. Opel Corsa ...
7 Daewoo/Chevrolet Kalos -- 700k/a -- development in Korea
8 and nominated to S&T tier-1 model manufacturer ..."

9 So this is another example, is it not, of GM
10 choosing to source airbags from a player other than
11 the three you mention, because it went to SCT, did it
12 not?

13 A. Yes, I fully believe it went to the supplier who
14 presented the best cost.

15 Q. On the best cost, if we go to the very end of the email,
16 we can see he is, in the last sentence:

17 "Based on this, we will consider all potential
18 VA/VE options ..."

19 Then he sets out various examples. "VA/VE", that
20 stands for value analysis, value engineering?

21 A. That is correct.

22 Q. What VA/VE options are are ways to make a product that
23 save costs that can then be passed on in lower prices
24 for customers; correct?

25 A. No, VA/VE, so those are the main engineering changes

1 that, together with the suppliers based on their
2 different proposal, experience, know how, those are
3 simply suppliers' proposals on how to optimise the cost
4 structure.

5 Q. Yes, and by "optimise the cost structure", what TRW is
6 trying to do is find lower costs so that it can offer
7 a lower price to GM; that is right, is it not?

8 A. I assume, yes.

9 Q. Can we go, please, to {J3/25/1}. We are now moving
10 closer in time, we are in April 2010. This is a GM
11 presentation, and could we go to slide 6 {J3/25/6},
12 please. This shows a -- can we try ... Can you go over
13 a page, please {J3/25/7}.

14 THE CHAIRMAN: Just on the date, it says there is a date at
15 the bottom and obviously a date in the title; it may not
16 matter at all, but it says "Revised 1-27-2010".

17 PROFESSOR BAILEY: Can we go back to the first slide
18 {J3/25/1}, please.

19 It is a GM document, sir, so I am not sure I can
20 necessarily assist very much because obviously GM is
21 part of the claimant so I do not have access to what it
22 might mean. I do not know if the witness is able to
23 help. Can we go back to slide 1, please, page 1.

24 THE CHAIRMAN: Bottom right-hand corner, it says "Revised
25 1-27-2010".

1 PROFESSOR BAILEY: Yes, I think that is true of nearly all
2 of -- we have a number of similar slide decks in Opus
3 and I think it is true that it is almost a standard
4 wording. I have taken the American date from the top as
5 this being a document from 13 April.

6 THE CHAIRMAN: Is it common ground what "src'g" stands for?
7 Sourcing?

8 PROFESSOR BAILEY: Sourcing. Well, I assume that is not
9 disputed.

10 So this is, again -- this is a presentation on
11 target sourcing, which we saw earlier, and I just wanted
12 to show an example of an outcome as opposed to
13 the strategy.

14 If we can go, please, to {J3/25/7}, so slide 6. We
15 can see here global purchasing supply, "GPS", "Quote
16 Comparison", and this is for seatbelts used in
17 the Opel/Vauxhall Junior car. We can see, at
18 the bottom, there is a recommendation to go with TRW and
19 I would just like to ask you about the first two
20 bullets.

21 The first is:

22 "Car-set price targets achieved."

23 So that shows, does it not, that GM got exactly what
24 it wanted in achieving its pricing targets?

25 A. That is correct.

1 Q. Then:

2 "3X3% LTA."

3 Just to unpack that. My understanding, but please
4 correct me if I am wrong, is that that refers to
5 a long-term agreement that consists of a 3% annual
6 reduction on the price charged by TRW over a three-year
7 period; correct?

8 A. Correct. One year after the production, over the next
9 three years.

10 Q. For the Tribunal's note, actually slides 4 to 8 of this
11 document show that GM achieved its pricing targets in
12 each and every occasion.

13 So I would suggest to you that this is another
14 example of GM exercising buyer power because it is
15 achieving what you describe in your statement as
16 the very low challenging target prices that it set for
17 its suppliers.

18 A. Yeah, but this is happening in every RFQ.

19 Q. Thank you.

20 If we can go, please, to {J3/21/1}. It is tab 6 of
21 the hard copy bundle. We are now going to look at an
22 Autoliv email from April 2010. The sender will be
23 familiar to the Tribunal, that is Mr Schönborn.

24 I apologise if I have mispronounced his name. So he was
25 the GM European programmes manager there, and it is sent

1 to various individuals within Autoliv.

2 Can we go to the bottom of the first page, please,
3 because we start with that as the original email, and we
4 can see that it is referring to Autoliv:

5 "... had a chat ..."

6 You can see:

7 "... with our GME Comm[ercial] Buyer on our Opel
8 Junior [steering wheel and driver airbag] sourcing
9 status."

10 Then he says:

11 "Information he gave to me of the record."

12 I am pretty sure that might be another typo as "off
13 the record". So it is information that the GM buyer
14 gave to Autoliv, and I would like to go through that
15 with you if I may.

16 We can see that, at the bottom, good news for
17 Autoliv, they have been recommended as the preferred
18 supplier.

19 Then if we go over the page, please, {J3/21/2}, we
20 can see that it says:

21 "We will get some further fine tuning requests ...
22 no concrete figures ... tooling might be 100,000 Euro
23 above their allowable cost ..."

24 Just pausing there. That is a reference for Autoliv
25 to have to bring down its price to achieve GM's

1 preferred costs level, is it not?

2 A. Yeah, referring to the tooling cost, right.

3 Q. Yes.

4 We can also see in this email that GM told Autoliv
5 that:

6 "TRW is the most competitive on pricing, basically
7 in line with us."

8 So I would suggest this is another example of GM
9 playing off, in this instance, Autoliv and TRW off
10 against one another?

11 A. I am not going to comment what somebody said, excuse me.

12 Q. Okay. But it is plain, is it not, that the GM buyer, it
13 may not be your practice, but this GM buyer had told
14 Autoliv that TRW is the most competitive on pricing in
15 line with it? You accept that other GM buyers,
16 according to this, would engage in that type of playing
17 off one supplier against another?

18 A. Well, from my perspective, I would -- I would not name
19 the -- purely the supplier name.

20 Q. I agree and that is what you say in your statement, sir,
21 at paragraph 24 {B/12/6}. But do you agree with me
22 about the practice. So if we just put to one side
23 the identifying, the name checking, it is common
24 practice for GM, is it not, for it to take one
25 supplier's offer and then, if it is lower than another,

1 to put that to the other supplier and say, "Look, if you
2 want my business, you are going to have to match or beat
3 that"? That is what you would do, is it not? It is
4 a commercially rational thing for a buyer to do?

5 A. I would say this is nothing sophisticated, that is
6 the normal business.

7 Q. Okay.

8 If we can go back, please, to page {J3/21/1}, just
9 to show you the reply and just to show you how ... We
10 can see, at the top, that the director of global
11 restraint sales and the GM business unit at Autoliv
12 says:

13 "We should see this program as a stepping stone for
14 the Corsa ... having a low cost design in development
15 with GM, we will have a much better chance to compete
16 for the Corsa than some prototypes and power point
17 slides."

18 So would you accept that what Autoliv is seeing this
19 as is a way of competing to get ahead of its rivals to
20 win business from GM?

21 A. I am not sure on which basis he mentioned that they will
22 be significantly lower, if they assumed a -- the current
23 overstrategy, then, yes.

24 Q. I am grateful.

25 I am going to go to a different document now. Can

1 we go, please, to {J3/1/1}. This is tab 2 in the hard
2 copy bundle, and this is -- for the Tribunal's
3 reference, this is a presentation by Mr Gutierrez and he
4 was at the time an account director for GM at TRW. We
5 are now in May 2011.

6 I just want to go to {J3/1/2}, please, and ask you
7 to look at the "Notes". You will see there are three
8 boxes and I just want to ask you a question having
9 identified a proposition from each of the boxes.

10 So we can start with point 1. TRW are saying:

11 "Significant WINS on D2XX have started TRW firmly
12 down the path of raising MS [market sales] to 30%
13 level."

14 Then you go to box 2, first bullet:

15 "TRW technical product offerings are approved by GM
16 in all areas ([airbags/seatbelts/steering wheels) and
17 therefore our growth strategy is able to move forward
18 across the board."

19 Then we go to point 3, first bullet:

20 "The relationship between TRW OSS and GM Safety
21 group has improved continually based on trust and
22 execution.

23 "TRW Quality performance has been a significant
24 factor towards new program wins and GM shows signs that
25 this will be a major priority."

1 So pausing there, this shows, does it not, that TRW
2 had worked hard to improve its relationship with GM
3 safety group and compete for its business?

4 A. I can conclude that, yes.

5 Q. Actually, I wonder if we just look at the third bullet
6 in box 3, we can see a reference to:

7 "ALV ..."

8 So that is Autoliv:

9 "... should emerge from NBH ..."

10 Which I take to be "new business hold":

11 "... by July 2011 and together with Takata will
12 represent the strongest competition on global programs.
13 KSS is a growing concern."

14 In your experience, would GM have used business
15 holds in a way to ensure that suppliers would not take
16 part in RFQs for new business if they were not meeting
17 GM's requirements?

18 A. Sir, business hold is any time being discussed on
19 the really very high level, so from my perspective,
20 I cannot -- I cannot even comment because if
21 the supplier is on a new business hold, as I mentioned,
22 so this is mainly being decided by directors.

23 Q. Thank you.

24 Final point on that bullet, though. Would you agree
25 with me that this shows that TRW regarded Autoliv,

1 Takata and KSS as competitive threats for GM's OSS
2 business?

3 A. Yes.

4 Q. Yes.

5 Would you also accept that competition between TRW,
6 Autoliv, Takata and KSS reflects your own experience of
7 negotiating with OSS suppliers?

8 A. If you could precise your question in a different way
9 for my better understanding.

10 Q. Yes, of course. Would you also accept, during your time
11 in procuring OSS parts, so from 2013 onwards, that there
12 has been strong competition between TRW, Autoliv, Takata
13 and KSS?

14 A. Yes, it has been always competition because, as
15 I mentioned, we did not have so many suppliers in our
16 supply base.

17 Q. Thank you.

18 Could we go, please, to {J3/3/1}. So this is a set
19 of TRW emails, again relating to a conversation with
20 GM's purchasing team. Just to orientate ourselves, we
21 are going to go to the bottom first, with Jorge Estevez.
22 He sends an email on 30 June 2011. He is the account
23 manager for GM at this time.

24 If we just start with the subject. It says it is
25 "GM S4500", that is a codename for a Vauxhall Opel

1 Corsa; is that not right?

2 A. Yes.

3 Q. We can see it is for "SWS", so steering wheels, and
4 "DAB", driver airbags; correct?

5 A. Correct.

6 Q. So we start:

7 "Team,

8 "I got initial feedback from GM, as expected our
9 [steering wheel+driver airbag] quotation is bad and far
10 away from their [GM's] targets. They expected more from
11 our side because we have been involved in Junior
12 quotation (KSS and [Toyoda Gosei] weren't) and they
13 recommend us to look into Junior comments (leather cost,
14 wire harness, bezels)."

15 Now, just pausing there. That shows that GM had
16 told TRW that TRW's quote for these components was way
17 off GM's target price; that is right, isn't it?

18 A. I can conclude, yes.

19 Q. Yes.

20 That is consistent with your own approach, which you
21 describe in paragraph 24 of your first statement
22 {B/12/6}, that you would tell suppliers that they really
23 needed to be at or very close to the target price during
24 an RFQ?

25 A. Correct.

1 Q. When you say you might tell suppliers they have to put
2 in prices at a reasonable level, in paragraph 24 of your
3 first statement, what you meant by that is you have got
4 to be at or very close to the target price?

5 A. That is correct, any time we are referring to
6 the targets.

7 Q. If we can go back a page, please, {J3/3/1}, I would like
8 to look at the reply, which is halfway down from
9 Mr Gutierrez, so he is the account director for GM at
10 TRW, and he is writing later in the same day, and he
11 says:

12 "I [have] just been on the phone with the lead
13 buyers in Europe for the Corsa sourcing. They ..."

14 In other words the buyers at GM:

15 "... are extremely concerned about our lack of
16 competitiveness on the quote we have submitted for
17 the Corsa [steering wheel and driver airbag], they were
18 expecting TRW to be competitive."

19 So this is another indication that GM was pushing
20 TRW towards a lower price; correct?

21 A. Sir, as somebody stated in the email that they were
22 expecting TRW to be competitive, not pushing.

23 Q. Well, if we go on to the next record of what was
24 discussed, they say:

25 "They [GM] will release targets tomorrow and told

1 [Mr Gutierrez] that they will shock us but they are
2 real."

3 So, according to this, GM wanted to achieve target
4 prices that would actually shock TRW by how low they
5 would be?

6 A. After target release, any time, you know, there is such
7 comment from the suppliers that targets are really very
8 challenging, targets are like shock for them, but it is
9 not TRW, it is -- it is common -- common comment from
10 suppliers.

11 Q. Well, if we could just go on to the next paragraph, we
12 can see why there may have been shock in fact in this
13 case. It goes on:

14 "The call we had this afternoon to review the cost
15 has been a complete disaster the TRW purchasing team is
16 providing cost info that is DOUBLE of what we [are]
17 paying today on the current program, this is not
18 acceptable and need to be fixed [as soon as possible]."

19 So what we can see here is that GM had used
20 the prices that it was already paying for TRW components
21 as a benchmark, a cross-check on its proposed costs, and
22 then what GM were saying is, "There is no way we are
23 going to pay double the costs"; that is right, is it
24 not? (Pause).

25 That is why it needs to be fixed, because GM had

1 said, "Your costs are way too high"?

2 A. Yeah, I guess they were referring to the targets they
3 have got. After submission the offer from ZF or TRW,
4 they simply concluded that they are far away from
5 the expectation, that is why somebody mentioned like
6 doubled.

7 Q. Well, if we see how he finishes, so, in other words what
8 does TRW decide to do? He says:

9 "We must get focus on this and I expect a detailed
10 review on Monday in order to face targets and win this
11 business. Please support this activity giving it top
12 priority."

13 So it is right, is it not that TRW responds to this
14 pretty much negative feedback from GM by saying it will
15 do all it can to reduce its costs and compete hard to
16 win the business?

17 A. Yeah, I can read it, yes.

18 Q. Then if we, just for completeness, see at the top, once
19 the target prices had been provided, the email on
20 4 July, we can see just how demanding they were, and it
21 says that they would have to do an "extensive and
22 intensive" review of the bill of material costs.

23 So, really what we see from these emails and GM's
24 feedback is a real life illustration of the point that
25 you make, sir, in paragraph 17 of your first statement

1 {B/12/4}, which is that GM would set very low, very
2 challenging target prices; that is right, is it not?

3 A. That is right.

4 Q. Then I just want to show -- go back to a document to see
5 how GM was successful in achieving those very low target
6 prices.

7 Can we go, please, to {J3/22/12}. So what we can
8 see here is "Benchmark Information". It is a GM
9 document we looked at earlier. "SIAB", so we are
10 looking at side impact airbags for the Junior Corsa,
11 which is a Vauxhall-Opel car. Do you agree with what
12 I have just said?

13 A. Yes.

14 Q. I just want to look at a few of the bar charts, if
15 I may, and go through them together.

16 If we start with the left-hand column in light blue
17 first. So we can see this is the "Corsa Junior AC". If
18 you go down to the key, it is not exactly clear, but
19 take it from me, it says it is the "Allowable Cost" and
20 that is €15.15. So just to check with you,
21 the allowable cost, that is the cost that GM thought
22 the side impact airbags should cost?

23 A. Yeah, exactly. I think allowable cost, at that time, it
24 was named "allowable cost"; right now, we name it
25 the "should cost".

1 Q. I am grateful.

2 Now, if we go along again to the next bar in the bar
3 chart, we can see there is a TRW price also of €15.15
4 and that has been used for the Opel Corsa, that is
5 the code that we discussed earlier. So this is showing,
6 as I understand it, currently contracted business
7 between GM and TRW and the price that GM is paying for
8 a TRW side impact airbag is €15.15; correct?

9 A. I assume, yes.

10 Q. What is happening here is that GM is using that as
11 a benchmark on future prices? Because what it is doing
12 is looking at cost, then it is looking at existing
13 prices and it is using that as a way of evaluating
14 whether the prices it is being offered are good value or
15 not good value?

16 A. Yeah, as I can see, I could conclude the same, that it
17 -- right now, it became a benchmark. Nevertheless, I am
18 not sure exactly if this was -- probably not exposed to
19 ... just only internally.

20 Q. If we could then go to the red column on the right-hand
21 side, we can see here the target price, the "Corsa
22 Junior Target" price in red and that is also, again,
23 confirmed by the key at the bottom. It is a very
24 obvious and simple point and I apologise, but just to
25 make it plain, GM's target price for the Corsa Junior,

1 at €13.52, is below both the allowable cost and the TRW
2 existing price; that is right, is it not?

3 A. Right.

4 Q. So would you agree with me this is just another
5 indication of just how challenging GM's target prices
6 were at this time?

7 A. Sir, I can -- I can assume, because normally we -- like,
8 a standard approach in each and every RFQ process, we
9 are referring to the targets given by the programme
10 team. Nevertheless also we have what is called here on
11 the slide "allowable cost", at the moment called "should
12 cost", this is the cost being calculated by our
13 engineering cost team, and we should be -- ideally we
14 should meet the target cost. If not, at least we should
15 be -- we should meet the allowable cost or should cost.

16 Q. Yes. Could we just actually --

17 THE CHAIRMAN: Sorry to interrupt you. Could you just say
18 that again. I just want to make sure I am understanding
19 it. Could you just run through what each of the labels
20 on the graph are?

21 PROFESSOR BAILEY: I apologise, sir, were you asking me
22 a question?

23 THE CHAIRMAN: Yes, I was. Yes, sorry. Well, I can ask
24 the witness, but --

25 PROFESSOR BAILEY: I apologise, yes, of course. Yes,

1 I apologise, sir. Yes, I can.

2 So yellow is the "Benchmark". So this is where GM
3 were using benchmark prices, and you can see the yellow
4 bar is "GSV" and that is the reference for a global
5 small vehicle which was manufactured on the Gamma
6 platform, and you can see that Autoliv's price there was
7 11.52.

8 Then the orange bit on top --

9 THE CHAIRMAN: Yes.

10 PROFESSOR BAILEY: -- as I understand it is content, and
11 I take that because, if you go to the key in the bottom
12 left-hand side, it says:

13 "Target prices/new programmes based on
14 benchmark ..."

15 Ie the yellow, then it says:

16 "... plus content."

17 Which I assume to mean various specific features of
18 the airbag and that is what the orange "2" means. Then
19 if you add 11.52 to 2 you get the target price of 13.52.

20 That is my reading, sir. I am not sure --

21 THE CHAIRMAN: (Off microphone - inaudible).

22 PROFESSOR BAILEY: I assume -- well, I should probably ask
23 the witness rather than me.

24 Could you help the Tribunal.

25 A. Yeah, content, exactly, so this may be some specific

1 design dedicated, because we have different programmes,
2 like you can see Corsa, Peugeot, Opel, whichever car it
3 is, the product may differ, of course differs between
4 one car line and the other car line. So content, which
5 means specific design for -- dedicated for the -- for
6 the concrete brand.

7 THE CHAIRMAN: I see. So the -- so for the Target
8 Corsa Junior there would need to be -- it is a different
9 product so that content represents the difference; is
10 that right?

11 A. Right.

12 THE CHAIRMAN: Sorry, Professor Bailey, I just wanted to
13 make sure I understood. Thank you.

14 PROFESSOR BAILEY: No, sir, not at all.

15 In fact, sir, those are the questions I wanted to
16 ask this witness.

17 THE CHAIRMAN: Any re-examination?

18 MR WEST: No re-examination.

19 THE CHAIRMAN: Thank you very much for giving evidence. You
20 are released from your oath. I am grateful.

21 A. Thank you.

22 (The witness withdrew)

23 MR WEST: Would it make sense to have a short break now?

24 THE CHAIRMAN: Yes, it might do. Yes.

25 (3.00 pm)

1 (A short break)

2 (3.10 pm)

3 MR WEST: I now call Mr MacQueen.

4 MR DAVID MACQUEEN (affirmed)

5 Examination-in-chief by MR WEST

6 THE CHAIRMAN: Please take a seat, Mr MacQueen.

7 MR WEST: Could Mr MacQueen be shown tab 10 of bundle B
8 {B/10/1}, at page 1.

9 Is this your first witness statement, Mr MacQueen?

10 A. Yes, it is my first witness statement.

11 Q. If you then go on to {B/10/11} of the same tab, at
12 the top, you will see a statement of truth. Is that
13 your signature?

14 A. This is my signature.

15 Q. Then if you go on to {B/13/1} of the bundle, is that
16 your second witness statement?

17 A. Yes, it is.

18 Q. Again, turning over to {B/13/12} of that tab, is that
19 your signature?

20 A. It is.

21 Q. Is the contents of those statements true to the best of
22 your knowledge and belief?

23 A. It is.

24 Q. Do they represent the evidence you wish to give to this
25 tribunal?

1 A. They do.

2 MR WEST: Ms Ford will have some questions for you.

3 Cross-examination by MS FORD

4 MS FORD: You should have a hard copy bundle for

5 Mr MacQueen.

6 THE CHAIRMAN: Thank you very much. That is very kind of

7 you. Yes, thank you.

8 MS FORD: Mr MacQueen, you were purchasing executive manager

9 of Occupant Safety Systems at PSA from 2007 to 2010,

10 yes?

11 A. That is true.

12 Q. Is it right that you were not involved in purchasing

13 Occupant Safety Systems during the period 2002 through

14 to 2006?

15 A. I was not.

16 Q. Can we look, please, at paragraph 14 of your second

17 statement, {B/13/5}, please.

18 I would like to ask you about the -- I think it is

19 the last sentence -- the last two sentences of your

20 paragraph 14. You say:

21 "The reality is that taking the risk of excluding
22 one of two suppliers (Autoliv or ZF/TRW) on a bid would
23 be huge as there were only a few suppliers of OSS
24 components ..."

25 Then you say:

1 "This was not something we could afford to do."

2 Is it your evidence that PSA never took steps to
3 exclude TRW from bidding?

4 A. I would say that, to the best of my recollection, our
5 intent was to promote competition, so our intent was not
6 to exclude the low number of bidders that we had.

7 Q. Can we look, please, at {J3/9/1}.

8 Can we start, please, Mr MacQueen, on the email that
9 is at the bottom of this page. You can see this is an
10 email from a Mr Engel at PSA and he is providing
11 the contact details of the PSA project T8. Can you see
12 that at the bottom there?

13 A. Yes, I can.

14 Q. Then if we look at the top email, it is from Mr Olivier
15 at TRW to Eric Claeysen of TRW. He is saying:

16 "Attached is Mr Engel's email.

17 "He warned me that this was for information
18 purposes, since we are in business hold.

19 "As long as the freescale case is not settled ..."

20 Then he says:

21 "They are still allowing us to work with their
22 teams ..."

23 "Business hold" would mean that PSA had excluded TRW
24 from participating in the RFQ, yes?

25 A. That is what I understand, though I do not know

1 the case.

2 Q. So this would be an example where PSA has taken steps to
3 exclude TRW from bidding?

4 A. Again, I don't know the case. It sounds like it. What
5 I also read is that under purchasing responsibility we
6 gave authorisation to have contacts to anticipate work
7 on the T8 and A51/A55. So I would say this probably
8 materialises what I was saying, which is that
9 the intention was not to exclude our -- our core
10 suppliers.

11 Q. Can we look at {J3/38/1}, please. In this document, can
12 we please start at {J3/38/3}.

13 What you should have there, Mr MacQueen, is an email
14 from Mr Deneuille of Bosch to Mr Reboud of PSA, dated
15 31 July 2008, headed, "Airbag [tender] for A9"; do you
16 see that?

17 A. Yes, I do.

18 Q. Bosch is a competing airbag supplier; is that right?

19 A. I do not have recognition that Bosch is competing on
20 airbag but rather airbag control units.

21 Q. Airbag control units. Understood, thank you.

22 If we look at the third paragraph of this document,
23 we can see that Mr Bosch has discovered -- sorry,
24 Mr Deneuille has discovered that Bosch is placed on
25 business hold, which is why they have not received

- 1 the tender and will not be able to submit a bid. So
2 this is another example of PSA putting a supplier on
3 business hold, yes?
- 4 A. That is what I -- that is what I read, and I read it is
5 linked to a litigation on the application of a technical
6 productivity on a product called G9.
- 7 Q. If we look on {J3/38/2}, you should be able to see, in
8 the middle there, this chain appears to have been copied
9 to you and you reply to Mr Deneuille. Do you have
10 a recollection of this at all?
- 11 A. I have no recollection, but I can read the -- I can read
12 the email.
- 13 Q. Then if we go up to {J3/38/1}, at the bottom of
14 the page, Mr Deneuille is sending an email of
15 4 August 2008. He is saying -- "[he] is following up on
16 [the] telephone conversation last Friday during which we
17 discussed the [deadlock] we are currently
18 experiencing... which results in [the] business hold on
19 the A9 project. So we can see that he is still in
20 business hold at that point, yes?
- 21 A. Yes.
- 22 Q. Then, if we go to the top of the page, please, this is
23 -- is Ms Baiget, is she internal to PSA? Florence, who
24 has sent this email?
- 25 A. Sorry, could you repeat?

1 Q. I was just asking the identity of the person who is
2 sending the email at the top, I am possibly
3 mispronouncing her name. Is it Ms "Baiget"? Is she
4 internal to PSA?

5 A. Florence Baiget, she was in my team, yes.

6 Q. She is emailing you and she says:

7 "I will make the electronic RFQ available to BOSCH
8 today for the A9 Airbag despite BOSCH's proposal below
9 our expectations.

10 "Our strategy paid off anyway since the blocking of
11 the A9 RFQ made it possible to go up to + 4% to - 5% on
12 the G9 boxes in 2009 ..."

13 Is it fair to say that what has happened here is
14 that PSA has used the strategy of putting its supplier
15 on business hold to extract improved terms from it?

16 A. I think that is probably the first part of the sentence,
17 but I think we skipped a paragraph where I took an
18 engagement towards Bosch company to apply their new
19 technology AB10 on the G9, which was the origin of
20 the dispute. So I think this commitment from Bosch goes
21 with my engagement to push the new, probably most --
22 more affordable technology from Bosch on this project
23 called G9.

24 Q. But where she is saying "our strategy paid off", what
25 she is saying is that as a consequence of having put

1 them on business hold, you managed to persuade them to
2 improve their terms, yes?

3 A. That is true, with my commitment to apply the new
4 technical solution from Bosch on G9.

5 Q. Can we look, please, at {J3/40/1}, please.

6 So you should have here an exchange of emails
7 between Mr Olivier of TRW and the same lady we just saw,
8 Ms Baiget, on 27 November 2008, and you will see that
9 you are copied in to this exchange; do you see that?

10 A. Yes, I do read.

11 Q. Then the email below, the email of 26 November, she
12 says:

13 "As indicated by phone, we will be initiating
14 updates to price taking into account the elements
15 contained in the file below to some purely
16 administrative reasons.

17 "This does not in any way constitute an agreement on
18 those material increases ..."

19 Then she goes on to say:

20 "... Required by your refusal to confirm your
21 commitment to process productivity from -- 4% as of
22 01/01/09."

23 Just pausing here. The reference to "material
24 increases", are we talking here about raw material price
25 increase requests?

1 A. That is my understanding from reading the very early
2 thread of this email too; I understand we are
3 referring to raw material increases.

4 Q. Where she says it:

5 "... does not in any way constitute an agreement on
6 the material increases ..."

7 Then she refers to the refusal to confirm your
8 commitment to process productivity and she goes on to
9 say:

10 "We will cancel these increases at the beginning of
11 January 2009."

12 Sorry, I should have read the previous line there:

13 "... if we do not reach an agreement on productivity
14 2009, we will cancel these increases at the beginning of
15 January 2009."

16 Is what is going on here that PSA is saying it is
17 not going to agree raw material price increases unless
18 it manages to extract improvements on productivity?

19 A. That is not my understanding. My understanding, if
20 I read properly, is that -- so this is addressed to TRW,
21 so TRW was de-committing on a prior process productivity
22 of 4% and because of this de-commitment, Florence Baiget
23 took a position to say, "I will only agree to the raw
24 material increases if you keep your commitment and
25 I will want to rediscuss if you do not keep your

1 commitment".

2 Q. Then if we go to {J3/44/1}, please, starting actually on
3 {J3/44/2} of this document, please.

4 Halfway down this page you have got an email from
5 you to Mr Lake of TRW and Mr Metais of TRW, and you say:

6 "... PSA has decided to award TRW the additional
7 business of A9 Thorax Airbag program for various
8 reasons:

9 "Improved TRW efforts on the commercial offer of
10 the product,

11 "Synergy strategy with A515 product,

12 "Additional business in a situation when TRW OSS
13 questions PSA business activity."

14 Just going on to the third paragraph there, you say:

15 "I ... wish to emphasise that PSA is very
16 disappointed that, to this stage, absolutely no updated
17 commitment has been made by TRW regarding the process
18 productivity program."

19 Is this a continuation of the exercise of trying to
20 extract further productivity discounts from TRW?

21 A. This is not my -- my reading. I think there are three
22 emails which are interconnected. I see this as
23 a following of the reopening of the discussions of
24 the TRW commitment on 4%, and it is likely that what
25 I am saying here is I am frustrated that the commitment

1 has not been applied and asking TRW to make
2 a complementary proposal to the original commitment.

3 Q. If we look at the top of the page, we have got an email
4 from you to Mr Lake and Mr Metais, and you are saying,
5 first of all:

6 "Given the fact that TRW has not wished at this
7 stage to come back to PSA to provide a solution
8 regarding 2009 process productivity and given the fact
9 that TRW position during my phone call to Thierry Metais
10 last week was that TRW did not intend in discussing
11 further OSS process productivity for 2009, we have no
12 other solution than express our strong disappointment."

13 So just pausing there. It appears you have not
14 managed to reach any resolution regarding productivity,
15 you are still looking for discounts and you have not
16 achieved them; is that fair?

17 A. I agree. It confirms that we did not come to an
18 agreement.

19 Q. Then the consequence is:

20 "As of this week:

21 "PSA quotation on M3/M4 program will not be sent to
22 TRW,

23 "PSA technical and commercial discussions with TRW
24 over the BVH2'/B78 program will be put on hold
25 immediately."

1 So your response is to exclude TRW from bidding on
2 these projects, yes?

3 A. Yes, with a proposal to review our position when TRW
4 comes back to suitable proposals.

5 Q. Then if we look at {J3/46/1}, please.

6 This is an internal email from you to
7 Thierry Reboud, dated 21 July 2009.

8 A. Yes.

9 Q. You can see it is headed:

10 "PSA/TRW collaboration ... green light."

11 You are saying:

12 "TRW negotiation finalised for OSS 2009 process
13 productivity:

14 "Based on the TRW February 2009 offer (-2.95%
15 instead of -3.99% contractual),

16 "With a slight delay in the application of certain
17 decreases ...

18 "It was high time to resume discussions on the RFQs
19 in progress ..."

20 So what has happened is that you have now managed to
21 secure further productivity discounts from TRW and so
22 you are now allowing them to resume discussions on
23 the RFQs; is that right?

24 A. No, I do not agree.

25 Q. Well, what appears to have happened is that you have

1 successfully used the threat of excluding TRW from
2 bidding to extract further discounts from them.

3 A. I disagree on "further discounts". In fact, if I read
4 properly, what we have secured is a lower commitment
5 than the original commitment of TRW, minus 2.95% instead
6 of 3.99% contractual. So this -- this is not actually
7 beyond, it is even lower than the original commitment of
8 TRW.

9 Q. But this is an improved commitment compared to when you
10 had TRW on hold, right?

11 A. Well, this is an improved commitment versus nothing, but
12 it is an improved -- it is a lower commitment than
13 the original commitment of TRW to apply 3.99% on
14 1 January 2009.

15 Q. Can we look at {J3/15/1}, please.

16 This is an internal TRW email, and if we look at
17 the very bottom of the page, you can see Mr Metais, this
18 is 3 November 2004, saying:

19 "I am pleased to confirm that TRW have been awarded
20 on T7 (replacement car for 307/T5) on OSS business:

21 "Side airbags

22 "Steering wheels."

23 T7 is a PSA model, yes?

24 A. It is.

25 Q. Then if we go back, please, to {J3/15/1}.

1 If you look, please, at the email that is in
2 the middle of the page from Mr Ribet, dated
3 4 November 2004, he is saying:

4 "James, for your information we have been coached by
5 PSA T7 Program Management to get this business, so
6 I think we could duplicate this tactic to get T7
7 Steering Gear."

8 Now, the reference to being "coached by PSA T7
9 Program Management", is it the case that PSA has decided
10 in advance that it would like to award this business to
11 TRW and so it is coaching them to ensure that they get
12 it?

13 A. I cannot -- yeah, I cannot conclude on this, because
14 I do not know what is behind the coaching. I may add
15 that I think in one another document TRW appeared red
16 from a technical standpoint on another programme, and as
17 I said at the beginning, given the low number of
18 suppliers in this commodity, of course, from
19 a purchasing standpoint, we would not be happy to have
20 a supplier quoted red, technically. So one explanation
21 -- but, again, I do not know what -- what is really
22 behind, but one explanation can be that we have ensured,
23 or the T7 program management has ensured that all of
24 the technical explanations were understood and that TRW
25 could provide an accurate technical solution.

1 Q. Well, we can come on to the document I think you are
2 referring to, the red --

3 A. Yeah.

4 Q. -- we can come on to look at that one.

5 But just focusing on this one, presumably PSA would
6 not have bothered coaching TRW if it had not reached
7 a prior view that it was minded to try and award this
8 business to TRW; is that fair?

9 A. I assume so, yeah.

10 Q. So the document I think you were probably talking about
11 just now is {J3/16/1}. It is another internal TRW
12 document, and they are saying here:

13 "... A5X ACU: not awarded to TRW due to redhibitory
14 comments from PSA engineering."

15 Is this the one you had in mind?

16 A. Yes, that is the one that I had in mind.

17 Q. Then they say:

18 "The 'positive' point is PSA Purchasing wanted and
19 wants still us, and they have dealt with PSA
20 engineering to 'coach' TRW for the next quote (starting
21 in 2 weeks). That means that PSA engineering will not
22 be able to pronounce a red flag."

23 So what seems to be happening here is that PSA
24 purchasing has taken a view that they would like to
25 award this to TRW and they are essentially arranging to

- 1 the engineering team to coach TRW so that it is in
2 a position to get the business; is that fair?
- 3 A. Not completely. I do not know if I could go as far as
4 this. Definitely our purpose was not to have red
5 suppliers. So the purpose was to have TRW not being
6 quoted red on the next RFQ. Then, at the end of
7 the day, I am -- I do not see or I do not read between
8 the lines the intention to have TRW awarded. At the end
9 of the day, that is a fair competition and so
10 the purpose is to have the various bidders competing and
11 reaching the target price.
- 12 Q. Right, but if your only concern was to avoid essentially
13 having TRW red flagged, you could have simply left it at
14 that. But what seems to have happened is that you are
15 arranging for the engineering team to coach TRW and that
16 must be because you are taking a prior view that you
17 would be interesting in giving them this business.
- 18 A. Again, I would not go as far as this, I would just say
19 that our interest was to make sure that TRW could
20 compete right until the end on the following RFQ and not
21 being blocked from an engineering standpoint, which is
22 obviously an immediate -- an immediate no-go.
- 23 Q. Can we look at point (b) on this email that says:
24 "A58 Side [airbag]: Autoliv have done a great bundle
25 on all OSS ... and despite certainly a TRW better price

1 on Side [airbag], Autoliv wins all A58 OSS."

2 What seems to be going on here is that Autoliv and
3 TRW are competing and, on this occasion, Autoliv was
4 successful by offering a bundled deal on all OSS; is
5 that fair?

6 A. Yeah, that is what I -- that is what I read.

7 Q. Then point (c), which I think should be "seatbelts", it
8 says:

9 "... we were not again in the last A58 round.

10 "Takata and Autoliv were far despite our 'poor' MP
11 BT.

12 "We are very anxious for our business: A51/A55 RT."

13 Then the next line:

14 "In spite of these bad news, we are continuing our
15 efforts for A51/A55 [steering wheel, airbag, seatbelt]
16 and T8 ACU."

17 So what that is recording is that ZF was competing
18 with Takata and Autoliv for PSA's business in relation
19 to the seatbelts for the A58 but it was, on that
20 occasion, unsuccessful, yes?

21 A. That is -- that is how I read it. I do not know if
22 there were more suppliers, but at least obviously Takata
23 and Autoliv.

24 Q. It is saying that it is keen to continue to compete for
25 the A51/A55 business, yes?

1 A. Yeah, it does.

2 Q. Just looking at the passage at the bottom,

3 the observation at the bottom of this email, they say:

4 "These decisions confirm one more time (and not only
5 for OSS):

6 "It's more and more difficult to enter in new
7 business (ACU) ..."

8 I presume that is airbag control unit?

9 A. Yeah.

10 Q. "... but we need to accept and to succeed."

11 Is it fair to say that what is being said here is
12 that ZF's experience is it is difficult for suppliers to
13 get onto the PSA panel and to win new business, in this
14 case in relation to airbag control units, but it is
15 continuing to make efforts to do so?

16 A. Yeah, that is a possibility. I also read that
17 the competition is getting fiercer and, yes, it is
18 difficult to enter onto the panel.

19 Q. Can we look, please, at {J3/33/1}. This is an internal
20 PSA presentation, I think, headed, "CPA - GM Airbag
21 Restraint and Electronics: G72/G73/G84".

22 Is this a document that you are familiar with?

23 A. Familiar when reading it, but of course that was a long
24 time ago. So familiar when reading it, yes.

25 By the way, I should add that when I look at

1 the people mentioned here, so that was before my time
2 because Philippe de Rosny is the person that I replaced.

3 Q. Well, perhaps you could assist insofar as you are able,
4 and if it is --

5 A. I will.

6 Q. -- something that you are unable to comment on --

7 A. I will.

8 Q. -- then feel free to say so.

9 {J3/33/8}, please, within this document. We have
10 got the heading here, "PSA Market and State of
11 Play - Belts", and if you look at the right-hand side
12 panel, "PSA - 2007", there is a comment that says:

13 "The PSA panel follows the Europe panel by strongly
14 increasing the share of AUTOLIV."

15 Is this PSA taking an active decision as to
16 the market share it wants to allocate to particular
17 suppliers?

18 A. I must say, I do not know. I do not know. It is --
19 I do not know. The sentence could be understood as
20 the panel of PSA is following the -- the one of Europe.

21 Q. Fair enough.

22 Let us look at {J3/33/12}.

23 (Pause).

24 I do not know -- am I the only person who has not
25 got a display or ...?

1 A. It is okay, I got it.

2 Q. You have got it. Right, well it may be that I can work
3 off a hard copy. Hang on.

4 Right, well, we will carry on with a hard copy in
5 the meantime. You should have there a table headed,
6 "3.1 Performance du panel PSA". Is that what you have
7 on your screen?

8 A. Yeah.

9 Q. I am assuming that across the top of this table are
10 the criteria by which PS --

11 THE CHAIRMAN: Sorry, I think we have lost our --

12 MS FORD: Oh, you have lost them as well?

13 A. Yeah, it --

14 MS FORD: Across the top of this table, are these
15 the criteria by which PSA evaluates its suppliers, so
16 "Competitiveness, Productivity, Ecotech, Quality" and
17 such like? Has your screen gone now?

18 A. Yeah.

19 THE CHAIRMAN: They are coming and going.

20 A. Yeah, it is blinking.

21 MS FORD: Ah, that is not ideal.

22 Do we have an extra hard copy?

23 Sir, we can pass up an unmarked copy, if that is
24 okay?

25 THE CHAIRMAN: Yes.

1 (Handed) .

2 MS FORD: So Mr MacQueen, the tabs are broadly in order. So
3 it is from J1 to J3 and then the numbers in order. So
4 we are in tab J3/33. Then within that it is page 8 --
5 I am sorry, we had moved on to page 12.

6 So I was just checking my understanding that
7 the headings across the top of this table are the
8 criteria that PSA uses to evaluate its suppliers?

9 A. Yes, this is what I -- what I understand.

10 Q. So we can see that if we look at TRW --

11 A. Mm-hm.

12 Q. -- PSA has rated TRW green with a happy face for
13 competitiveness and productivity, yes?

14 A. Yes, I agree.

15 Q. So presumably that means that PSA were satisfied that
16 TRW was performing well in terms of competitiveness and
17 productivity?

18 A. I also agree.

19 Q. Then if we go within this to page {J3/33/14}, please.
20 This presentation appears to be predicting an
21 anticipated drop in airbag prices between 2007 and 2011;
22 would you agree?

23 A. Yes, I -- I agree.

24 Q. The red text at the top, "Price drop effect on A7
25 (AUTOLIV competition) ...", is it saying there that

- 1 the price drop effect is due to competition from
2 Autoliv?
- 3 A. That would be my -- my understanding too.
- 4 Q. The next line:
- 5 "... [and] B0 (introduction TG)."
- 6 Is it saying there that the price drop has also been
7 affected by the introduction of competition from
8 Toyoda Gosei?
- 9 A. That would also be my understanding, yes.
- 10 Q. Then the red text on the right-hand side:
- 11 "Break [being] achieved through introduction ..."
- 12 I do not know if you can help with what is being
13 suggested here is contributing to additional downward
14 pressure on prices?
- 15 A. I am afraid I am -- I am -- I do not know. When
16 I read "Single-generator downside effect", I could
17 probably interpret that there would be a technical
18 change to single-generator versus I do not know what
19 before. That is what I could interpret, but I do not
20 know if that is right.
- 21 Q. Is "introduction", might that refer to the introduction
22 of another competitor?
- 23 A. That would not be my interpretation, because if it was
24 another competitor, we probably would have listed him,
25 as we did on the -- on the left side. So I think that

1 is more related to a technical -- technical evolution of
2 the component.

3 Q. If we go, please, within this document to page
4 {J3/33/23}, you can see, at the top right of this slide,
5 it is setting out PSA's "Purchasing strategy", yes?

6 A. Yes, I agree.

7 Q. Then bullet point 1, it appears that PSA's perception of
8 the European market is that there is a "dynamic of
9 expanded competition", yes?

10 A. Yes, I agree.

11 Q. PSA's strategy going forward is to:

12 "Maintain [that] dynamic of expanded competition to
13 lower prices and to prevent world leaders from locking
14 us into their 'product/cost' strategy."

15 Yes?

16 A. This is also what I read, yes.

17 Q. Then there is a further -- essentially, a purchasing
18 strategy in bullet 2 to:

19 "Maintain the division of markets into lots to
20 optimise technical and economic competition and
21 stimulate the interest of 'outsiders'."

22 Is that fair?

23 A. That is fair, and I would add that what I understand is
24 behind is separating for given vehicles the OSS RFQ into
25 packages. So, like, seatbelts, frontal airbags, rear

1 airbags, so this -- and steering wheels, so splitting
2 the lots and probably allowing some competitors which
3 may not be as technically competent across the board to
4 be able to quote some of the packages, even if they
5 would not be able to quote all of the packages.

6 Q. Then another tactic this is being floated here, bullet
7 point 3:

8 "Continue to award new contracts for a limited
9 period of time and take advantage of limited contract
10 commitments ..."

11 Presumably that is also to continue this dynamic of
12 competition, yes?

13 A. Yes. Yes, indeed, presumably. Though -- though
14 I believe that if I interpret this, this means limited
15 -- limited period of time on a given car and OSS
16 components are super, super technical to approve, so
17 I would read between the lines that this is to give an
18 extra push on competition, but the reality of being able
19 to award the business to another supplier than the one
20 who had the first period of time would probably be
21 limited.

22 Q. Is it fair to say that what we are seeing on this slide
23 is a selection of fairly sophisticated tactics on
24 the part of PSA to manage its suppliers?

25 A. Yes. I would add, a strategy to at the end of the day

- 1 reach the best affordability for our -- for our cars.
- 2 Q. Then if we can move on, please, to {J3/33/26}. So this
- 3 appears to be showing the planned evolution of PSA's
- 4 purchasing decisions in relation to airbags in the EU;
- 5 is that right?
- 6 A. Yes, I would agree to this.
- 7 Q. We can see PSA's intentions are shown in the bullet
- 8 points towards the bottom of the screen. So it is
- 9 planning to improve Autoliv's market share, yes?
- 10 A. Yes, given what I read is Autoliv 29% projected in 2011
- 11 and remaining to award, 23%, so I think it refers to
- 12 the fact that on the 23% -- out of the 23% that are
- 13 still to be awarded, we would be looking into increasing
- 14 Autoliv's market share.
- 15 Q. At the same time PSA's plan is to keep TRW high as well?
- 16 A. Yes.
- 17 Q. You are envisaging supporting the gradual rise of
- 18 Takata?
- 19 A. Yeah, this is what I read.
- 20 Q. You are also intending to:
- 21 "Support the upgrade of KSS ... to make it play
- 22 a challenger role."
- 23 A. Yes.
- 24 Q. So that is essentially an exercise in trying to
- 25 introduce a new supplier; is that right?

- 1 A. Yes, it is.
- 2 Q. Then if we look at {J3/33/46}, please. If we can
3 perhaps look at both 46 and {J3/33/47} together. I do
4 not know if it is possible to do some sort of split
5 screen or something. I gather there is a side-by-side
6 function. I hesitate to mess with the screen too much.
- 7 I think that these are two parts of the same chart,
8 and essentially what this is showing is PSA's planned
9 allocation of new contracts for up and coming business;
10 is that fair?
- 11 A. Yeah, that is fair, intentions.
- 12 Q. So the column on the right-hand side is setting out
13 PSA's strategy, forward-looking strategy as to how to
14 allocate these up and coming contracts as between
15 the various suppliers?
- 16 A. Yeah, that is -- that is right. That is how I would
17 interpret it. I would probably add that, per my
18 recollection, at the end of the day, what we play is
19 a competitive bid, so between the intention and
20 the final result, it may fit or it may not fit, as our
21 target was inevitably to reach the best cost matching
22 the programme targets.
- 23 Q. Certainly we are at the stage of intention for this
24 chart, as I understand it, but, for example, if we look
25 at W2, airbags and seatbelts, the plan is to:

1 "Assign at least 1 prize to AUTOLIV."

2 Yes?

3 A. Yes, that is what I read, and it is probably consistent,
4 W2 being a European programme, it is probably consistent
5 with the comment that was made on the -- on the previous
6 slide.

7 Q. Then, similarly, we have got this proposed intention in
8 relation to B7 airbags and belts:

9 "Assign at least 1 lot to TAKATA.

10 "Assign at least 1 prize to AUTOLIV."

11 So, again, the forward-looking intention is you have
12 sort of parcelled out who you would like to get what?

13 A. I agree.

14 Q. Can we go, please, to {J3/36/1}.

15 So what you should have here is an email exchange
16 dated 15 May 2008, with the subject line, "Consideration
17 of magnesium increase in PRF A9 Steering Wheel", and you
18 will see that you have been copied in at the top there;
19 do you see that?

20 A. Yes, I do.

21 Q. At the bottom of the page, Ms Baiget again is forwarding
22 an email, and the email has the heading, "Magnesium
23 increase (steering wheel family)."

24 She is saying:

25 "Our steering wheel suppliers AUTOLIV and TRW are

1 asking us for price increases for the drastic increase
2 in the price of magnesium ..."

3 If we could go over the page, please {J3/36/2}.

4 Then what we see follows is then a fairly detailed
5 explanation of the cause of the increased magnesium
6 prices. So we can see that she is explaining:

7 "The magnesium market, which in 2008 is controlled
8 76% by China, is characterised by low competition,
9 rising demand (substitute for aluminium), a reduction in
10 production capacity (China's environmental policy in
11 the run-up to the Olympic Games), and strong
12 speculation."

13 Then she then says:

14 "Obtaining the breakdown of the purchase cost of
15 magnesium allowed us to identify the following 3 factors
16 for the increase."

17 So is it fair to say that somebody, she or someone
18 else, has gone away and done the exercise of looking
19 into the causes of magnesium price increases?

20 A. Yes, that is my understanding too. Per my recollection,
21 we had a specific organisation which were taking care of
22 raw material trends.

23 Q. So a specific organisation that advises you as to what
24 the causes are, or ...?

25 A. Per my recollection, yes.

1 Q. So what that means is that when you are in receipt of
2 a request for a raw materials price increase, you are in
3 a position to take an informed view as to whether it is
4 reasonable to grant it or to resist it; is that fair?

5 A. That is fair.

6 Q. Can we look, please, at paragraph 41 of your first
7 statement. So this is {B/10/10}, please. I would like
8 to ask you about paragraph 41. You have put in
9 a recollection here. You say:

10 "I remember without being able to name the projects
11 that sometimes the pricing levels from suppliers were
12 a bit strange from project to project, almost as if they
13 were saying 'well, I'm giving you the quote because
14 you're asking me and there are not many people, but
15 I don't want this project. Therefore, my quote is not
16 competitive'."

17 Then further down this paragraph, line nine in
18 the paragraph, you say:

19 "As to why, without being completely able to
20 characterise it, it could be Autoliv and TRW were
21 splitting PSA's business."

22 Now, that is speculation on your part, is it not?
23 You do not have any factual basis to suggest that that
24 was what was going on?

25 A. That is true, I don't have any facts which go behind,

1 personally.

2 Q. You would accept, I think, that there might be other
3 reasons for suppliers putting in a quote which you took
4 the view was uncompetitive?

5 A. Yes, and I think this is what I also try to explain in
6 paragraph 42.

7 Q. Yes, to be fair, you have gone on to say:

8 "A more obvious reason might be the availability of
9 workforce to manage the programs."

10 You say:

11 "As I stated above, there were not many suppliers on
12 the panel, and so, depending on the number of businesses
13 that they had taken on from PSA and other OEMs, this was
14 probably a factor in providing a less competitive
15 pricing."

16 So you are accepting that there might be other
17 reasons for that?

18 A. I am accepting that there are other reasons, and
19 I probably should say that in the bundle that I was
20 provided I saw that there were some targeted battle
21 plans from our suppliers, so I suppose that they were
22 using these battle plans to select part of the packages
23 but not all the packages, which may also be an
24 explanation.

25 Q. Yes, and you also explain that if you, PSA, thought that

1 suppliers were cherry-picking their preferred projects,
2 then you might have taken countermeasures, such as
3 threatening to exclude them from the next RFQ
4 opportunity. You have made that point as well, have you
5 not?

6 A. Yes, I did.

7 Q. Knowing that, suppliers would put in an uncompetitive
8 bid rather than risk being penalised for cherry-picking,
9 would they not?

10 A. Yeah, that's a possibility, yes.

11 Q. Can we look, please, at {J3/34/1}. So you should there
12 have an internal presentation headed:

13 "Executive Business review:

14 "TRW/PSA Peugeot Citroën January 2008."

15 Is a document like this used for internal purposes,
16 or is it something that actually gets communicated back
17 to TRW?

18 A. I'm unclear about this. If you could flip pages, I will
19 tell you, but ...

20 Q. Sure. Fair enough.

21 Well, perhaps we could start by looking at
22 {J3/34/3}, and you have there, "PSA overview of TRW".
23 In relation to "Occupant safety" in this table,
24 the table shows that TRW was rated "G", colour green,
25 for commercial savings in 2006 and 2007, and so

1 presumably you, PSA, were satisfied that TRW had
2 performed well in relation to commercial savings in that
3 period?

4 A. Presumably, but what I read also is that this is
5 a template, so I'm not quite sure that it's a definitive
6 assessment. I think I read on the bottom, and I can see
7 "insérer une légende", which means "insert legend", so
8 I don't know if this is a definitive --

9 Q. You are not sure if this is the final version of
10 the document?

11 A. Well, I'm probably quite sure that this is not the final
12 version given the statements.

13 Q. Understood.

14 A. But I don't know if it's internal or external, so if you
15 can -- if you would continue to flip.

16 Q. Well, let's have a look at {J3/34/11} within this,
17 please. You have there a heading "Occupant safety",
18 then there is a heading of, "Positive points", and then
19 a heading of, "To be improved". Presumably what these
20 are positive points and scope for improvement in
21 relation to PSA's opinion about TRW?

22 A. Yes, I agree.

23 Q. One of the positive points that you have identified is
24 that you managed to achieve good commercial savings from
25 TRW in 2006 and 2007, so the same point comes up.

- 1 A. Yes, I agree.
- 2 Q. Then under the points of improvement there appears to be
3 a need to improve competitiveness on seatbelts. That
4 has been identified.
- 5 A. Yes, I agree.
- 6 Q. If we go to {J3/34/12}, please, we have here
7 the heading, "Occupant safety - Key Performance
8 indicators". Can I ask you to look, please, at
9 the table which is headed, "Productivity Savings". So
10 this is on the left-hand side, the middle table. What
11 we have here is the -- there is a column "2006 Results".
12 Presumably this is the productivity savings you managed
13 to achieve from TRW in 2006, so -4.4%?
- 14 A. Yes, I agree.
- 15 Q. When I say "minus", that is a reduction of --
- 16 A. Reduction.
- 17 Q. -- 4.4%.
- 18 Sorry, did you say -- did you respond?
- 19 A. No, no, it is a reduction, yes, I agree.
- 20 Q. I am grateful.
- 21 Then you have the next column "PSA target for 2007".
22 So your target for TRW in the next year is a further
23 reduction of -4.5%; is that right?
- 24 A. Yes, I agree.
- 25 Q. Then "2007 Commitment", is that what has actually been

- 1 achieved?
- 2 A. "Commitment" -- I read "commitment" as being the TRW
3 commitments, and the "year-to-date" as what is actually
4 achieved. So the year-to-date matches the commitment,
5 meaning TRW has actually executed its -- its commitment.
- 6 Q. Right. So it appears that both what TRW has committed
7 and what it has achieved is very close to PSA's
8 increased target for 2007?
- 9 A. Yes, I would agree.
- 10 Q. If we go, please, to {J3/48/1}, please. So this is
11 a PSA PowerPoint presentation, "PSA/TRW - Global
12 Overview". A similar question. Is this the sort of
13 thing that would be for internal purposes, or something
14 that would actually be presented to TRW?
- 15 A. I think that one would be presented to TRW, to
16 the contrary of the previous one which would have been
17 an executive preparation for internal Stellantis -- I'm
18 sorry, PSA.
- 19 Q. Then if we go, please, to {J3/48/3} within this and look
20 at the bullet "Occupant safety", it says:
21 "Globally satisfactory with stabilizing market share
22 up to 30%.
- 23 "We expect TRW to continue the challenge with
24 distinctive products at competitive prices (issue on
25 seatbelts especially)."

1 The reference to "continue the challenge" indicates
2 that PSA considers that TRW is broadly competing well,
3 subject to this issue on seatbelts; would you agree?

4 A. Yes, I would agree, and if I -- if I refer to the market
5 share that were in the previous purchasing strategy that
6 you were showing, I think global TRW was not at 30%, so
7 probably the implication here is that they have won more
8 business and they have stabilised to a global 30% market
9 share.

10 Q. Then page {J3/48/5} within this, please,
11 "Conclusion - PSA's main expectations", and in relation
12 to occupant safety:

13 "... TRW to propose distinctive and competitive
14 products to challenge the competition and continue to
15 grow in PSA."

16 So, again, the reference to "continue to grow"
17 suggests that PSA is already recognising TRW's efforts
18 to compete for PSA business; is that fair?

19 A. This is my understanding too.

20 Q. Then {J3/13/1}, please. This one is an internal TRW
21 presentation dated 10 April 2008, but I am asking you
22 about because it actually relates to PSA. If we look,
23 please, at {J3/13/2}, we have got the heading:

24 "PSA Global Overview - OSS."

25 Can we look, please, at the right-hand box entitled,

1 "Overall Account Highlights/Outlook/Strategy", and
2 within that, towards the bottom, do you see that there
3 is a heading, "Issues"?

4 A. Mm-hm.

5 Q. Then the first issue that is identified is:

6 "Strong attack from Takata on market prices to book
7 new B7 (Autoliv incumbent business). Price drop average
8 by 7%."

9 Would you agree that what ZF is encountering is
10 strong competition from Takata in competing for PSA's
11 business?

12 A. Yes, it is my understanding too.

13 Q. Then:

14 "Need low cost innovation products as safety is
15 becoming just a 'commodity'."

16 So what TRW is identifying is a strategy to compete
17 for PSA business by providing low cost innovation
18 products; would you agree?

19 A. Yes, I would.

20 Q. Then page {J3/13/3}, please:

21 "PSA: Competitive Assessment - OSS."

22 Then we have the heading in black there, "Strategic
23 Issues/Actions"?

24 A. Mm-hm.

25 Q. If we look, please, at the arrow that says "Airbags",

1 the second one down, it records:

2 "Competitors strongly reacted to last 3 TRW cars
3 award.

4 "Takata improved cost structures on their existing
5 product and destroyed the PSA market price in January,
6 less than 7%.

7 "Autoliv hardly resist, but lost his whole incumbent
8 business on B7.

9 "TRW to continue to work on inflator cost
10 improvement on to beat the competition."

11 So, again, we can see this is TRW encountering
12 strong competition on price in competing for PSA's
13 airbags business; is that fair?

14 A. Yeah, that's fair, and -- and therefore developing new
15 technologies to match the competition.

16 Q. Then the next area is "Steering wheels", and we see:

17 "Aggressive KSS price attack to get Wx."

18 Again, what TRW is experiencing is strong price
19 competition here, yes?

20 A. Yes, yes.

21 Q. Then "Seat Belts":

22 "Competitors strongly reacted to last 2 cars TRW
23 award.

24 "Takata improved cost structures on their existing
25 product.

1 "Autoliv improved their performances regarding
2 pretension and retractor noise.

3 "TRW to recover the gap improving pretention
4 length ... and improve the market price ..."

5 So it is fair to say that TRW is here encountering
6 competition both in pricing and in technical
7 performance, yes?

8 A. Yes, that is -- that is fair, to -- to interpret that
9 way.

10 Q. Its strategy to compete going forward, in the final
11 bullet, it is planning to compete for PSA business both
12 on the basis of technical performance and on price;
13 would you agree?

14 A. Yes, I agree.

15 Q. Can we go, please, to {J3/7/1}. This one may be a bit
16 difficult to read; I will try and indicate which area on
17 the page we are looking at.

18 So this is an internal TRW sales battle plan for
19 the A9 SWS, and if you look at the top right, it is
20 dated 6 May 2008 and modified at 19 August 2008, and
21 then under the customer details you can see the customer
22 is PSA; do you see that?

23 A. Yes, I do.

24 Q. Then there is a box:

25 "TRW Customer Relationship/Key Drivers."

1 It is a grey box on the left-hand side, in
2 the middle. Can you see that one?

3 A. Yes, I do.

4 Q. If we look at the text next to that, it says:

5 "Autoliv lost Steering Wheel to KSS and Takata ...
6 They will be eager to keep this 'only' incumbent
7 business.

8 "KSS could target a second Steering wheels business
9 using carry over from their first order."

10 What we are seeing here is vigorous competition
11 between Autoliv, KSS and Takata for the PSA business;
12 would you agree?

13 A. Yes, and I would add TRW.

14 Q. And TRW, yes.

15 Then TRW is actually then setting out what it is
16 planning to do in response, and its plan is:

17 "Beat competition by offering improved components
18 with:

19 "Weight decrease ...

20 "Smaller packaging ...

21 "Costs."

22 So its plan to compete is both to offer improved
23 components and reduced costs; would you agree?

24 A. Yes, I do agree.

25 Q. Then there is a box immediately underneath, "TRW

1 Strategy", and we can see:

2 "To be competitive with price. Low price and good
3 quality is target of PSA.

4 "Use Roumania TRW footprint to compete Takata and
5 Autoliv.

6 "However Autoliv has a factory nearby Shenzen (PSA
7 new factory)."

8 So it has identified low price and good quality but
9 it is also giving some thought to manufacturing location
10 as a means of competing, yes?

11 A. Yes, it does.

12 Q. In general, the impression that we get overall from this
13 document is that it is clear TRW is competing vigorously
14 for PSA's business, yes?

15 A. This is what I also interpret from the -- from
16 the document.

17 Q. Can we look, please, at {J3/18/1}. I believe that this
18 is part of an RFQ for a thorax head airbag; is that
19 right?

20 A. Yeah, this is what I read too.

21 Q. If we look at {J3/18/19} within this, please. So under
22 the heading, section 5, "Requirements", it says:

23 "General description.

24 "The acceptance of a pyrotechnic device is specific
25 to the vehicle and the silhouette for which it is

1 intended. Therefore its reuse on another vehicle
2 requires a new validation campaign."

3 So the pyrotechnic device that is referred to here,
4 is that the component that inflates the airbag?

5 A. Frankly, I -- I don't know if I'm in the position to
6 comment, because this is really a technical
7 specification, so.

8 Q. It is technical stuff. Understood.

9 A. Yeah.

10 Q. When it says that this pyrotechnic device is "specific
11 to the vehicle and the silhouette to which it is
12 destined", what it is saying there is that this is
13 a bespoke component; is that right?

14 A. Yeah, I don't know what is the scope of the pyrotechnic
15 device, if it includes the airbag, the airbag itself.
16 I'm definitely sure, even not being a technician, that
17 we can say it's bespoke, because the size of the airbag,
18 the sizing of the airbag would be adapted to our
19 vehicle.

20 Q. What seems to be said here is that if you were going to
21 reuse it on a different vehicle, it requires a new
22 campaign of validation, so it would have to go through
23 further testing, is that right, in order to actually be
24 used in a different vehicle?

25 A. That's what I read, yeah. But, again, I cannot comment

1 on the -- on the scope of the device itself. So if it
2 includes the -- the bag, probably, for sure, yes, it
3 would require a new -- a new validation.

4 Q. Can we look, please, at {J3/19/1}, please. This is
5 another of these battle plans. This is an internal TRW
6 document relating to PSA Seat Belts M3M4 and the date is
7 4 September 2009. If we can look, please, within this
8 at {J3/19/6}, about a third of the way down you have
9 a heading there "Competitor set", and then:

10 "What is the competitor's strategy & why are they
11 have a risk to TRW?"

12 Do you see that?

13 A. Yeah, I can -- I can see it.

14 Q. What we can see is a sort of a colour-coded threat
15 level. So Autoliv is identified as a high risk and it
16 is said it is:

17 "Eager to recover market shares at PSA after B7 and
18 T3 losses."

19 Then KSS is assessed as a medium risk, and Takata is
20 again assessed as a high risk:

21 "Needs to create international footprint at PSA and
22 needs to now award after A515 SOP."

23 So this is TRW evaluating the competition that it is
24 facing in trying to win this PSA business; would you
25 agree?

1 A. Yes, I would agree, and it sounds like TRW has a very
2 good knowledge of its competitors.

3 Q. Can we then look at the box, "Statement of winning
4 strategy", "Strengths" and "Weaknesses". One question
5 I have about this relates to the statement in
6 the weaknesses:

7 "Rear Retractor (without torsion bar) interface not
8 fitting with PSA standard."

9 Is this suggesting that the product which TRW has
10 made for a different OEM is not going to be immediately
11 compatible with PSA?

12 A. That would be my interpretation too.

13 Q. That would be because these products are generally
14 bespoke for each individual OEM?

15 A. In this case, on the rear retractor, yes. I cannot --

16 Q. The rear retractor is a part of a seatbelt; is that
17 fair?

18 A. Frankly, I -- that's -- you have reached my limits.

19 Q. I have well exceeded mine, I suspect.

20 Can we look, please, at {B/13/6}. This is your
21 second witness statement. I would like to ask you about
22 your paragraph 17. You are responding to something that
23 Mr Corbut has said in his witness statement where he:

24 "... describes the serial production phase and
25 explains that: '[s]uppliers are typically asked to

1 re-quote for a facelift [also known as a "mid-life"]
2 through an RFQ process, although it is very rare for
3 the OEM to switch suppliers at the mid-life ... in
4 the absence of quality issues with the existing
5 supply ..."

6 Etc.

7 Then you are commenting on his evidence and you say:

8 "In my opinion, OSS components are typically not
9 components that would be changed on a facelift, and
10 suppliers would typically not be asked to re-quote for
11 a facelift for OSS components. Facelifts or mid-life
12 cycle updates would instead be for external
13 (cosmetic) changes such as new branding when companies
14 change their logo. Maybe with the exception of
15 a steering wheel, which is a branded product, I think it
16 is rare and I have no real recollection of it happening
17 during the relevant period."

18 Just pausing there, I think the point that you are
19 making is that you would not normally expect OSS
20 components to be the subject of external cosmetic
21 changes; is that right?

22 A. Yes, that's right. That was, I'd say, my -- my
23 recollection, but, again, that was quite long ago,
24 so ...

25 Q. You would accept, presumably, that sometimes simple

1 modifications might be made to OSS components partway
2 through production?

3 A. Well, again, per my recollection, probably essentially
4 on the -- on the steering wheel, or parts which are
5 appearing to the driver, or making sense to
6 the occupants of the car.

7 Q. There might also, presumably, be some modifications that
8 are made for technical reasons, just to slightly tweak
9 the design or something during the course of production?

10 A. Technical or quality, but I'm not in capacity to -- to
11 qualify or to really recall specific cases.

12 Q. When that happens, if you have made a tweak to a part,
13 presumably that part would then be allocated a different
14 part number to enable it to be distinguished from
15 the original version before the change?

16 A. Presumably, but I cannot be -- again, I cannot be
17 certain. That would be for the technical team to -- to
18 answer to this.

19 Q. Then you go on in this --

20 THE CHAIRMAN: How are we doing for time?

21 MS FORD: I have perhaps three minutes left.

22 THE CHAIRMAN: Oh, right. Please carry on, yes.

23 MS FORD: I'm grateful.

24 THE CHAIRMAN: Yes. Of course, yes.

25 (Pause).

1 MS FORD: When there was a VA/VE change to an OSS component,
2 in that circumstance, would you then have a new part and
3 a new number?

4 A. Presumably, yes, to be able to identify the parts before
5 and after for after-sales, but, again, I'm only
6 presuming and it will be for our technicians to -- to
7 confirm.

8 Q. Understood.

9 So then just going back to the second half of your
10 paragraph, you say:

11 "Typically, seatbelts, sensors, engine control
12 units, or airbags would not fit in the usual scope of
13 renegotiation or a new RFQ at mid-life."

14 You make the point that if you had a supplier that
15 totally failed, then you would want to resource, but
16 normally, I think it is fair to say, you are saying that
17 you would not be looking to change a supplier partway
18 through the project because of the costs that are being
19 incurred. So is it fair to say that your point broadly
20 is that if you were to make a small modification to an
21 OSS product you would not normally bother to issue an
22 RFQ in respect of them?

23 A. That is what I -- what I am saying in my statement to
24 the best of my knowledge. Looking at the purchasing
25 policy that you were referring to earlier, it may have

1 been that there were some RFQs at mid-life, but I do not
2 have this -- this recollection, so this is why I made
3 this statement.

4 Q. Well, I can show you one instance where there was what
5 appears to be a mid-life RFQ. It is {J1/279/1}. This
6 is an internal Autoliv document and it is concerned with
7 T7 phase 3 for steering wheel, driver airbag, passenger
8 airbag, so OSS products, yes?

9 A. Yes. I see -- I read, "T7 [phase 3] is ... the Mid life
10 of T7", yes.

11 Q. Right, so this was, presumably, an example of where
12 there was a mid-life change to an OSS product?

13 A. Presumably, yes.

14 Q. This was a case where Autoliv was asked to retender for
15 this business; is that right?

16 A. Frankly, I -- I don't know. That's what I could
17 interpret when I look at "PSC2", and I understand PSC2
18 are, reading the statements from Autoliv, sessions --
19 internal sessions at Autoliv, to decide on -- on
20 answering to quotes, but that's only interpretation, so
21 whether it was a quote or whether it was, you know,
22 managed through change notice, I don't know.

23 Q. If an RFQ were to be sent out for a follow-on part like
24 this, it is likely that the incumbent would win, is it
25 not, because they have an in-built cost advantage

1 compared to their competitors because they are already
2 manufacturing the component?

3 A. It is likely that if the new product is a derivative of
4 the previous one, they would obviously have common
5 investments. If the product is significantly changed,
6 I would -- I would believe that the -- let's say
7 the chances of a competitive bid would be -- would be
8 real.

9 MS FORD: Sir, those are my questions.

10 THE CHAIRMAN: Mr West?

11 MR WEST: No questions.

12 THE CHAIRMAN: Thank you very much indeed. You are released
13 from your oath.

14 A. You're welcome. Thank you.

15 (The witness withdrew)

16 Housekeeping

17 THE CHAIRMAN: Is there anything else we need to consider?

18 Oh, just one thing. I think it might be helpful if
19 the witnesses -- I appreciate the advantage of
20 the electronic documents, but it would be quite sensible
21 if they had their statements at least in hard copy.
22 Particularly when we get to the experts and they are
23 more complicated, I think that would be helpful.

24 So what have we got on Monday?

25 MS FORD: We have a further -- the final procurement

1 witness, I believe, and then -- I'm trying to find my
2 timetable.

3 MR SCANNELL: Two further witnesses: Jérôme Gautier and
4 Francesca Biancheri.

5 THE CHAIRMAN: Right.

6 MR SCANNELL: They are both pass-on witnesses.

7 THE CHAIRMAN: You are doing pass-on, I understand,
8 Mr Scannell.

9 MR SCANNELL: Yes.

10 THE CHAIRMAN: How are we on timing for that?

11 MR SCANNELL: That should be fine. There is provision in
12 the timetable next week for a spillover, if I can use
13 that term.

14 THE CHAIRMAN: Yes. Well, we will try and avoid spillovers
15 wherever possible, but ...

16 MR SCANNELL: Yes. I am not currently anticipating that
17 there will be any spillover of Ms Biancheri into
18 the Tuesday and so we should be fine.

19 THE CHAIRMAN: Okay. Thank you very much. So we do not
20 need an early start?

21 MR SCANNELL: I do not believe so, no.

22 MS FORD: I should not think so.

23 MR WEST: Mr Carosso is on video, I think, so he is our
24 first video witness, I believe, on Monday.

25 THE CHAIRMAN: Right. So we are in the hands of

1 the technology. Right, okay.

2 (4.26 pm)

3 (The Court adjourned until 10.30 am on Monday,

4 7 October 2024)

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