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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.

Wednesday, 16 October 2024

(10.30 am)

THE CHAIRMAN: Good morning, Mr Hughes.

You are still under oath. I do not think we need to re-swear you.

MS FORD: Sir, you better do the warning.

THE CHAIRMAN: Oh, yes. Thank you very much. Sorry.

I must start with a warning. 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 a contempt of court.

MR MAT HUGHES (continued)

Cross-examination by MS FORD

MS FORD: Mr Hughes, can we start, please, by looking at {E1/2/32}. It should have come up on your screen, I think.

A. Thank you.

Q. You should have there section 2.4 of your first report, and you have the heading, "Evidence of explicit coordination and information exchange in relation to the Claimants". You would accept, I think, that you do not have any personal factual knowledge of the matters you have set out in this section of your report?

1 A. That is correct.

2 Q. We can see you have expressed the view at 2.4.1 that:

3 "There is a body of evidence that indicates that
4 there was explicit communication between the Cartelists
5 with an intent to coordination on responses to RFQs from
6 the Claimants, and commercially sensitive information
7 was exchanged to facilitate this."

8 You were there expressing a concluded view about
9 matters on which you have no personal factual knowledge,
10 yes?

11 A. Yes, subject to the caveat that I'm quite clear that it
12 is the role of the Tribunal to interpret the documents
13 and, in the course of preparing all of this, I'm very
14 mindful that I'm not an expert on documents, as Ms Ford
15 has just said, and that what I'm using this is for
16 the purpose of understanding was there a mechanism by
17 which the cartel may have caused harm.

18 THE CHAIRMAN: Ms Ford, I think we raised this at the PTR.

19 It is not necessary for you to cross-examine on any of
20 the conclusions drawn from the documents.

21 MS FORD: Sir, I am grateful for that indication. I am not
22 cross-examining on the factual conclusions, but I am
23 proposing to make a submission in closing about
24 the content of this section, and so --

25 THE CHAIRMAN: Unless someone persuades me otherwise, we are

1 not proposing to attach any significance to what
2 the expert says about these documents and periods. That
3 will be a matter for the Tribunal. Sorry, I do not want
4 to take you out of your course, but it will not be
5 necessary to go to the documents, and so is that a fair
6 conclusion that will not be --

7 MS FORD: I am grateful. I am certainly not proposing to go
8 to the documents themselves. I do think there is
9 a matter to explore with Mr Hughes as to the basis on
10 which he is expressing conclusions in his reports.

11 THE CHAIRMAN: Okay, very well. We will see how we get on.

12 MS FORD: Mr Hughes, your answer just then said that it was
13 subject to a particular caveat, but the language you
14 have used in 2.4.1 is not caveated language, is it? You
15 have not said, "If the Tribunal were to find that there
16 was collusion", or even "There may have been collusion",
17 what you have done is expressed a view that the evidence
18 indicates that there was collusion.

19 A. I think Ms Ford is correct and this paragraph doesn't
20 attach caveats in the way that I've just attached
21 caveats, but the caveats I made that the interpretation
22 of documents is a matter for conclusion is a point that
23 I made in my executive summary.

24 Q. If we look at the final sentence in this paragraph, you
25 have said:

1 "However, as highlighted in OSS 1 and OSS 2, it is
2 clear that confidential information was exchanged.
3 The examples below demonstrate exactly that."

4 You are not here offering the neutral summary of
5 the documents, you are advocating for the existence of
6 coordination and information exchange in relation to
7 these Claimants.

8 A. I think my response to that is, as Ms Ford said at
9 the beginning of her cross-examination, I have no
10 personal knowledge of the documents and I think
11 the interpretation of the documents is a matter entirely
12 for the Tribunal, and that, I think, is my answer to
13 this issue.

14 The only purpose for exploring these documents,
15 again, as I say in my report, is to understand if
16 there's a credible mechanism for harm and to provide
17 some colour as to how that mechanism might have worked
18 depending on the interpretation of the documents.

19 Q. Can we look at paragraph 2.4.3 on {E1/2/36}, please.

20 You say here:

21 "In the rest of my report, when I refer to and
22 assess the effects of the Cartels (including
23 overcharges), I consider that these arise due to a range
24 of conduct (all of which has been described above)
25 including: (i) explicit coordination and information

1 exchange involving the Claimants not described in
2 the EC Decisions but as set out above ..."

3 Now, I bear in mind that you have commented at
4 the bottom of this paragraph, this is one where you have
5 indicated that ultimately these are factual matters for
6 the Tribunal. But what you have set out -- the approach
7 that you have set out here is that, in assessing
8 the effects of the cartels, including any overcharge,
9 you have proceeded on the factual basis that there was
10 explicit coordination and information exchange involving
11 the Claimants. Do you agree with that?

12 A. I think what I've said is -- is that I think there is
13 a body of material and that body of material provides
14 some information about, if those documents were to be
15 interpreted in the way that I think they could be
16 interpreted, what mechanism for the particular theory of
17 harm is. I'm only interpreting those documents in my
18 capacity as an economist, I'm not commenting on their
19 legal or factual or other basis. And, again, as I say
20 in my final sentence, all of this matters are -- all of
21 these matters are ultimately factual matters for
22 the Tribunal.

23 Q. Can we go, please, to {E1/2/40} in this document. If we
24 look, please, at section 2.6, you have a heading,
25 "The Claimants are likely to have been affected by

1 explicit and tacit coordination by the Cartelists."

2 Is it fair to say that you have felt able to express
3 the conclusion that the Claimants are likely to have
4 been affected, at least in part, because you have
5 proceeded on the factual basis that there was explicit
6 coordination with regard to the Claimants?

7 A. I don't think my title or my heading was intended to
8 communicate any particular conclusions on my part as to
9 the overall nature of the cartels, precisely the details
10 of how they operated, not least because that's not in
11 the public domain, but, again, these are all factual
12 matters for the Tribunal.

13 Q. Well, perhaps I can show you a couple of paragraphs on
14 which I base that question. If we look, please, at
15 {E1/2/41}, in your paragraph 2.6.4, you are saying:

16 "There is also evidence as set out above that there
17 was explicit communication about the intent to
18 coordinate RFQ responses to the Claimants as well as
19 information exchange specifically in relation to
20 the Claimants' RFQs. This included (but was not limited
21 to) exchanging information regarding current project
22 status which is likely to have facilitated maintenance
23 of status quo with respect to RFQs ... There is also
24 evidence of exchange of information on prices for
25 products to be incorporated in the Claimants'

1 vehicles ..."

2 This paragraph is not leaving factual matters to
3 the Tribunal, is it, it is arguing the Claimants' case
4 for there having been evidence of relevant
5 communications?

6 A. Again, the purpose of this paragraph is not to argue any
7 particular case, but simply that I think, if you're
8 going to think about whether there's a plausible theory
9 of harm in this case, it's appropriate to read those
10 documents, and if you don't read those documents,
11 I think it's very hard to give a balanced view as to
12 what the mechanism for harm was in this case. Something
13 that Dr Majumdar has raised in his comments on -- in
14 the joint expert statement is that there's a need for
15 clarity on what the mechanism of theory of harm is, and
16 the entire purpose of this section is to indicate what
17 a plausible mechanism for harm might be. But, again,
18 the entirety of the interpretation of the documents on
19 matters like this are matters for the Tribunal; I'm not
20 an expert on the underlying documents, as Ms Ford has
21 indicated and I've agreed with her.

22 Q. If we look, please, at 2.6.6 on the next page {E1/2/42},
23 you say here:

24 "I have also seen evidence of explicit coordination
25 and information exchange on [price amendments]

1 specifically related to the Claimants ... In a number of
2 examples, the exchange of information was specifically
3 at the request of another Cartelist ... and there was
4 clear discussion of future strategies and intent to
5 coordinate ..."

6 This is not giving a balanced view of the documents
7 or indicating a possible mechanism or plausible
8 mechanism for cause of harm, is it, this is expressing
9 a view on the evidence?

10 A. Again, to be quite clear, I'm not an expert on
11 the documents. My -- the purpose of this -- this text
12 -- and I've been clear, I think, (inaudible), perhaps
13 I should have added more caveats, to be clear --
14 the interpretation of the documents is entirely a matter
15 for the Tribunal, but I think it's important that I set
16 out the way in which, subject to the Tribunal's findings
17 of fact, which is entirely a matter for the Tribunal,
18 not for me, what the mechanism of harm would have been.
19 And in particular, Dr Majumdar has indicated, and
20 something we've agreed on, is that we need to think
21 about anti-competitive collusion in terms of various
22 headings of how anti-competitive conclusion may lead to
23 anti-competitive effects and there's various criteria
24 you need -- you need to talk through, and as I set out
25 in the joint expert statement, all I'm trying to do here

1 is mirror how, depending on the interpretation of
2 the documents, again, a matter for the Tribunal, is
3 mirror how those matters will be relevant to
4 the Tribunal's assessment of whether there is a credible
5 theory of harm or not.

6 Q. I am going to be making the submission to the Tribunal
7 that you have in your report sought to advocate in
8 favour of your client's factual case that there was
9 a cartel directed at them. So this is your opportunity
10 to address that submission.

11 A. I've been very mindful throughout this entire project
12 that I have duties to the Tribunal to act as
13 an independent expert witness and the only purpose of
14 having these materials is not to reach any conclusions
15 in relation to them, but indicate, if you wish to follow
16 a mechanism for theories of harm, which I think is an
17 important part of the case and something which I --
18 Dr Majumdar and I agree, you do need to actually think
19 -- think about how facts, even if they are in dispute,
20 may have influenced the theory of harm. What Ms Ford
21 has not done, she's not gone through all the documents
22 and highlighted where I've expressed caveats or noted
23 the points in dispute. All of these documents are in
24 dispute, and I understand that, and that the --
25 the Defendants -- my understanding of their position is

1 there was no anti-competitive conduct whatsoever.

2 However, I think, if I want to understand my job as --
3 with an economist hat on, if I want to understand if
4 there's a plausible mechanism for harm, I do need to
5 read the underlying documents and materials. Again,
6 these are entire matters for the Tribunal.

7 Something else that Dr Majumdar and I agree on is
8 that factual records and materials are relevant to
9 the assessment of the existing theory of harm and that's
10 one of the propositions in the joint statement on which
11 we agree.

12 Q. Can we look at the joint expert statement, at
13 proposition 16 {E1/13/13}, please.

14 You will recall that in this proposition you have
15 highlighted some of the characteristics of the OSS
16 market which you say make coordination likely, and
17 the first factor you mentioned is the number of firms in
18 the market; do you see that? It starts just before
19 the bottom of this page.

20 A. Yes.

21 Q. Can we look, please, at {J2/95/1}, please.

22 So you should have here the European Commission's
23 merger clearance decision of 21 February 2018 by which
24 it cleared a merger between KSS and Takata. You should
25 hopefully have had an opportunity to familiarise

1 yourself with this?

2 A. I have read it, but I think I'd be grateful for an
3 opportunity, if counsel wishes to draw my attention to
4 particular paragraphs, if I could re-read those
5 paragraphs before responding to her questions.

6 Q. Certainly.

7 So just to position this in the timeline, the OSS 1
8 decision was 22 November 2017, so this Commission
9 decision postdates the OSS 1 decision, you would agree?

10 A. Yes, yes.

11 Q. The OSS 2 investigation began when Takata applied for
12 immunity on 24 March 2011 and so the OSS 2 investigation
13 was also well advanced by the stage of this decision as
14 well, yes?

15 A. As a matter of logic, it would have been well advanced
16 by this stage, but as far as I'm aware, and Ms Ford will
17 no doubt correct me, I'm unaware of any statements in
18 the public domain that indicated that that case ...

19 Q. Well, I have in mind that the commission adopted
20 preliminary decisions on 7 July 2017 and settlement
21 meetings took place in November 2017 which are matters
22 that are recorded on the -- on the face of the OSS 2
23 decision, but it may be that we can -- we can leave it
24 there.

25 THE CHAIRMAN: I am not sure this is something the witness

1 can really --

2 MS FORD: No, that is entirely fair.

3 Can we look, please, at {J2/95/12} within this
4 document, and the relevant recitals that I was going to
5 draw your attention to, Mr Hughes, are (62) and (63).

6 (Pause).

7 A. Thank you.

8 Q. So we have got the heading, "Competitive pressure
9 remains post-Transaction", and the Commission says:

10 "... the results of the market investigation
11 indicated that large global companies such as Autoliv
12 and ZF are strongly competing with the Parties."

13 Then in 63:

14 "In addition, other alternative suppliers are
15 present and could expand their activity should
16 the merged entity attempt any price increase
17 post-Transaction."

18 So it is fair to say that the Commission is not
19 concerned about the competitive impact of the merger
20 between KSS and Takata because it is satisfied that
21 there are sufficient firms in the market to maintain
22 competitive pressure; that is right, is it not?

23 A. I have read this decision and there's a couple of other
24 paragraphs that I think are highly relevant in the sense
25 that what the Commission is looking at in these cases is

1 whether the merger would lead to a significant
2 impediment to effective competition. That's what it's
3 looking at. And therefore a key question when it
4 approaches these issues with my perspective of working
5 with the European Commission and other competition
6 authorities on merger cases is: what does the merger
7 change? And when you look at market shares in this
8 case, there's -- there's a number of things that are
9 worth bearing in mind in terms of what the merger
10 changes. The first of those is that the company that
11 was buying this business, there's -- I've -- I've got
12 three points to make. The company who was buying this
13 business was a company called KSS and their market share
14 in airbags was relatively modest at 5/10% and their
15 market shares in the other categories was 0 to 5%, so
16 it's a relatively small competitor.

17 The other thing which happens early on in this
18 Commission decision is that they reference that Takata
19 -- and forgive me for any mispronunciation -- had had
20 serious financial issues because it had been required to
21 repay substantial sums of money in compensation to
22 the OEMs and there were concerns that the management of
23 -- relating to airbag -- airbag faults, and -- and there
24 was concerns -- and I -- I -- I think it's paragraph 5,
25 but Ms Ford will no doubt be very familiar with it,

1 there were concerns expressed that the management knew
2 all about the faulty airbags so there was a whole
3 context to this case and one of the Commission's -- so
4 -- and so the second -- my second point is that Takata
5 was seen -- whilst it was still going to remain in
6 the market, would have been a much weaker competitor in
7 the absence of a merger.

8 I also -- I'm obviously not a European -- my third
9 point is I'm obviously not at the European Commission,
10 but one of the other things that matters a lot in merger
11 control decisions is whether or not there are customer
12 complaints and there weren't any customer complaints in
13 this case. I can't -- I have no role in advising any of
14 the OEMs in relation to this case, so I don't know what
15 their thinking was, but it may -- they may well have not
16 known about the further BMW and Volkswagen cartel and
17 that might have tempered their complaint, and that might
18 explain why the Commission didn't over-dwell on this
19 merger which involved two -- a relatively minor player,
20 a player which was having financial difficulties, and
21 why the -- why the OEMs weren't concerned.

22 Q. You mention customer complaints and one of
23 the additional factors that you identified in the joint
24 expert statement as being relevant was countervailing
25 buyer power. Do you recall that, or do we need to go

1 back and see it?

2 A. I think if you could pull up the paragraph.

3 Q. So it is {E1/13/14}. This is the same proposition,
4 proposition 16, and at the bottom, you mention
5 countervailing bargaining power; do you see that?

6 A. Sorry, just give me a moment.

7 Q. Sure.

8 (Pause).

9 A. Yes, thank you, I have read that.

10 Q. So if we go back, please, to the Commission decision
11 {J2/95/13}, and I am now looking, Mr Hughes, at recital
12 (69).

13 (Pause).

14 There is the heading there, "Strong automotive OEMs
15 as customers", and the Commission finds that:

16 "The automotive OEMs purchasing passive safety
17 products are large, well-established buyers that have
18 a high level of expertise. The results of market
19 investigation indicate that OEMs are confident that, for
20 the products concerned, they would be able to counter
21 any prices increases brought about by the Transaction."

22 So what we can see from this is that both
23 the Commission, based on its market investigation, and
24 the automotive OEMs themselves are satisfied that they
25 have sufficient countervailing buyer power to counter

1 any price increases caused by the merger, yes?

2 A. I think this paragraph, as it's stated, clearly --
3 clearly indicates that the Commission was satisfied that
4 in the context of its overall assessment of the merger,
5 a factor that it took into account is that OEMs are
6 large and sophisticated purchasers. But I don't think
7 you can stop there if you want to assess the competitive
8 effects of anti-competitive coordination and in
9 particular the main way in which you exercise buyer
10 power is by your -- your ability to switch to
11 alternatives. That's an important thing that -- that
12 you can have.

13 And therefore one way in which -- one way in which
14 anti-competitive collusion can adversely affect things
15 is if your ability to switch to truly independent
16 alternatives is compromised. And therefore I think
17 recognising in a merger context that customers are
18 powerful and sophisticated, a point with which I would
19 agree and I've made that point in my first report, isn't
20 a good answer as to why there wouldn't be any anti --
21 there couldn't be any anti-competitive effects from
22 collusion, and indeed these statements about the OEMs
23 being powerful and sophisticated customers is -- is --
24 must be judged in the context that one of the other
25 things I have in my first report is a diagram of all

1 the other parts of the car that have been cartelised in
2 a whole series of cases.

3 So I don't -- so I think -- I think the -- the buyer
4 power of the OEMs is a very relevant consideration to
5 understand whether there's a risk of anti-competitive
6 coordination, but I think it -- you need to understand
7 how, if there were to be coordination, which is entirely
8 a matter for the Tribunal, I'm not an expert on
9 the underlying facts, but if there were to be such
10 coordination, then that is something that could have had
11 adverse effects on prices.

12 Q. You were, there, Mr Hughes, I think, drawing
13 a distinction between mergers and coordination
14 generally; is that fair?

15 A. I think -- I think that's fair to a point. I think what
16 I'm saying in this particular context, though, is that
17 paragraph 69 isn't the Commission's first point. The --
18 in terms of assessing whether this merger leads to
19 a significant impediment of competition -- and I'm going
20 to attach a large caveat to my -- what I've just said in
21 a second, but I think their first point is actually an
22 earlier paragraph which is currently being on -- shared
23 on the screen, which is paragraph 66, which is -- so
24 I think the whole context of this merger and -- and how
25 things have been assessed is the context of this merger

1 is -- is as I emphasised at the beginning, is that
2 Takata's position as a third supplier has been greatly
3 impaired and that is the reason because of the --
4 the issues they'd had with the airbag recall which had
5 severely damaged their reputation and the concern is
6 the management involved in that.

7 The secondhand -- the second part of that, and I --
8 I emphasise the market shares, is that KSS is a much
9 smaller supplier and the increment of market shares is
10 small and therefore the key ingredient is the conclusion
11 that:

12 "Therefore, the combination of the declining Takata
13 [and] the rather small KSS is unlikely to have
14 a negative impact on the affected markets."

15 And -- and therefore -- my caveat is coming in
16 a second, and therefore I think that structural feature
17 of what the merger changed would, in my opinion, if
18 I was at the European Commission, and the absence of OEM
19 complaints, would have been major factors that weighed
20 -- weighed upon my decision-making.

21 The caveat that I need to attach is all I have in
22 front of me is a short European Commission decision;
23 I don't have any further detailed thinking, I wasn't at
24 the European Commission and I wasn't -- I wasn't
25 advising any of the OEMs in terms of their submissions

1 or the parties in relation to this matter.

2 Q. Mr Hughes, a further factor that you mentioned in your
3 joint expert statement in this proposition was
4 transparency in the OSS market. Do you recall that or
5 would you like to go back and have a look at that?

6 A. If I could go back, please.

7 Q. It is {E1/13/14}, and you see in the middle of the page
8 you mention transparency.

9 (Pause).

10 A. Thank you.

11 Q. Can we go back, please, to {J2/95/15}, please.

12 I am looking at, Mr Hughes, under
13 the heading "Coordinated effects" at recital 78, we can
14 see you have drawn a distinction between mergers and
15 coordination but the Commission has taken coordination
16 into account.

17 (Pause).

18 We can see, in 78, that the Commission has found
19 that:

20 "... the market for passive safety systems in
21 the EEA is not transparent."

22 It says:

23 "In this industry, prices are discussed bilaterally
24 with customers and generally in the context of tenders,
25 and RFQs are negotiated in confidentiality. Also, not

1 all suppliers receive every RFQ, so ... there is
2 asymmetrical information between suppliers."

3 We have seen those points reflected in the factual
4 evidence in these proceedings and so I would suggest it
5 is right, is it not, for the Commission to say -- or
6 the Commission is right to say that the risk of
7 coordination is low because this is not a transparent
8 market?

9 A. Would you mind going back to my proposition which
10 Ms Ford was quoting from a moment ago, the -- the one
11 that I was talking to about transparency, please?

12 Q. {E1/13/14}.

13 A. So what I'm talking about here, which is what
14 the Commission is not talking about, is -- is when I say
15 it's "relatively transparent" -- so I'm going to make
16 three points. When I say it's "relatively transparent",
17 what I'm talking about is at least in relation to RFQs
18 where the cartelists tracked information about who won an
19 RFQ and therefore who was the incumbent supplier of that
20 vehicle. And then I go on to say, "the cartelists may
21 have been able to maintain the status quo", which was
22 a feature of OSS 1 and to some extent OSS 2, not for
23 BMW, the incumbency principle, and the --:

24 "... as long as they had a common understanding of
25 their objectives [and that] may be facilitated by

1 explicit collusion and information spillovers."

2 So my first point is the coordination that
3 the Commission is talking about here is a lack of
4 transparency on prices, whereas what I'm discussing in
5 -- in the quote that Ms Ford is reading out relates to
6 the incumbency principle and RFQs, so the Commission
7 doesn't address my point specifically.

8 I also -- so that's my first point.

9 My -- my second point in terms of confidentiality
10 between RFQs, I think this is where it's very important
11 to understand the documents, and those documents -- when
12 I say "understand", I'll caveat my understanding in
13 a second, but it's important to look at those documents
14 and think about what communication -- what -- if -- if
15 there was a cartel, a factual matter, how
16 information-sharing as described in OSS 1 and OSS 2 and
17 potentially outside those periods, how information
18 sharing could be valuable to the cartelists, if there
19 was a cartel, in terms of helping them inform how they
20 set prices and compete. And in a market which is
21 otherwise opaque because you don't know the prices and
22 you don't know those things like that, that
23 information-sharing could be valuable to the cartelists
24 and that reduction in competitive uncertainty leads --
25 may lead to anti-competitive effects.

1 I think my -- my third point -- is it possible to go
2 back to the Commission decision again, just for
3 a second, please?

4 {J2/9/15}.

5 Thank you very much. My third point is really to
6 pick on something that Ms Ford said earlier which was,
7 Ms Ford observed that Takata had gone in for immunity in
8 relation to -- this is not for me to talk to, but since
9 it's on the screen -- they'd gone in for immunity
10 I believe in March 2011 -- Ms Ford will no doubt
11 remember the exact dates -- they'd gone in for immunity
12 and they'd gone in for immunity in relation to both
13 OSS 1 and OSS 2, however there's no reference here in
14 the Commission's decision to OSS 2 at all in this
15 particular where they're describing things and my
16 recollection of this case is there's no reference to
17 OSS 2 at all in this decision.

18 Q. Can we go over the page, please, to recital 84
19 {J2/95/16}. Just for completeness, in terms of
20 the Commission's perception of the likelihood of
21 coordinated effects, we see at 84:

22 "... automotive OEMs would likely be able to counter
23 attempts of airbags, steering wheels and seat belts
24 manufacturers to increase prices through coordinated
25 behaviour."

1 I would suggest to you that the Commission is right
2 to find that.

3 A. My -- my -- sorry, I'm -- I didn't quite catch
4 the question then. Is that a ...

5 Q. I am suggesting to you that the Commission is right to
6 find that "automotive OEMs would likely be able to
7 counter attempts of airbags, steering wheels and seat
8 belts manufacturers to increase prices through
9 coordinated behaviour".

10 A. I agree, obviously, that's what the text of
11 the paragraph says. So I -- I agree with that. I think
12 the question I have in my mind is, I -- which, again,
13 I -- I wasn't party to writing this decision, is when
14 they talk about coordination in this context, are they
15 talking about tacit coordination, where there's no
16 information exchange, no meeting, no -- no -- no -- no
17 exchange of any nature, or are they talking about
18 explicit coordination? I can't comment on that, because
19 I wasn't party to writing this decision. But -- but in
20 any event, I think what's very important, and building
21 together all the elements that Ms Ford has emphasised,
22 is that I fully accept that the OEMs are powerful and
23 sophisticated customers, there are some caveats to that
24 in the sense that they're smaller -- their share of
25 purchasing is much smaller than the share of the -- of

1 the cartel -- of the Defendants, as set out in
2 the Commission decision. My -- my fundamental point is,
3 understanding how -- how in -- in an environment which
4 is naturally competitive because OEMs are sophisticated
5 procurement, they know what they're doing, how, if there
6 were to be a cartel, how anti-competitive conduct could
7 compromise their ability to actually secure competitive
8 prices, and in particular how -- how information
9 sharing, how the incumbency principle could achieve
10 those outcomes.

11 Q. If we go back, please, to the factors you have mentioned
12 in the joint expert statement {E1/13/14}, towards
13 the top the page, you have mentioned the frequency of
14 interactions as being a relevant factor; do you see
15 that?

16 A. Sorry, just a second, please.

17 Q. Sure.

18 (Pause).

19 A. Yes.

20 Q. If we can look at how you address that in your report,
21 it is {E1/2/47}, please.

22 I am looking at 2.6.22, in the middle of the page,
23 and you state, first of all:

24 "More frequent interactions tend to facilitate
25 collusion ..."

1 You then refer to the findings in the Commission
2 decisions that the cartel contacts in relation to
3 the named OEMs:

4 "... generally intensified when specific RFQs and/or
5 requests for price reductions were launched ..."

6 You then refer to the Claimants' data, about
7 the frequency of RFQs. Then you say, in the last
8 sentence of your paragraph:

9 "Assuming that coordination in relation to
10 the Claimants also intensified during the launch of RFQs
11 (similar to the named OEMs), this suggests that
12 the Cartelists would likely have had relatively frequent
13 interactions which would have given them more
14 opportunities to observe and punish any deviation from
15 the collusive outcome, thereby strengthening any
16 collusive understanding."

17 So there are two assumptions underpinning this
18 sentence. The first is an assumption that there was
19 coordination in relation to the Claimants, yes?

20 A. Yes, but purely for the purpose of establishing, subject
21 to the Tribunal's findings of fact, is there a plausible
22 mechanism. This is the entire context of all of this
23 material.

24 Q. Then the second assumption is that coordination would
25 have occurred with the same frequency as the Claimants

- 1 issued their RFQs, yes?
- 2 A. I think the context of this point -- so, yes -- yes, to
3 a point. The context of this point is that -- I just
4 want to be clear on the economics of the point that I'm
5 making rather than the specific words on the page.
6 The economics of the point is that if you have frequent
7 interactions and you then observe that the other party
8 isn't adhering to the terms of coordination, you then
9 have an opportunity to react to that -- to that
10 departure from the terms of coordination and that -- and
11 that gives you an opportunity to discipline third
12 parties and that -- or discipline, should there be
13 a cartel -- again, I'm not going to say again what I've
14 said several times -- should there be a cartel, that
15 frequency of interaction may -- may enable the parties
16 to coordinate by providing a mechanism that you can --
17 if the terms of coordination aren't agreed to, then in
18 the subsequent competitive interaction, the firms can
19 respond competitively.
- 20 Q. These are significant assumptions for you to make, are
21 they not, because it has not been established that there
22 even was any coordination in relation to the Claimants,
23 let alone that one can assume that it occurred with
24 the same frequency as the Claimants issuing their RFQs?
- 25 A. I think the short answer to -- in terms of are they

1 significant assumptions, I think what I'm looking for is
2 -- so -- so I am not the finder of fact as to whether
3 there was any anti-competitive coordination in relation
4 to any of the matters here, so I'm not the finder of
5 fact. What I'm trying to establish here is that there
6 are frequent interactions between the firms and that is
7 what I think the evidence shows. I think that is
8 the context of this and I'm raising this in the context
9 of discussing, in terms of the various requirements for
10 there to be effective anti-competitive coordination,
11 whether those requirements are satisfied. The precise
12 determination of fact is a matter for the Tribunal.

13 Q. Just to address the last factor that you identified in
14 proposition 16 {E1/13/14}, you also mentioned the extent
15 to which OSS products are bespoke as a relevant factor.
16 The penultimate factor that you mention there; do you
17 see that?

18 A. Sorry, I'm -- yes, sorry.

19 Q. The penultimate paragraph, you say -- you are talking
20 about the review of technical specifications and,
21 the final line, you say:

22 "I address more fully the bespoke nature of
23 the products in Propositions 10 and 11."

24 You would accept, presumably, that whether OSS
25 products are bespoke or not is ultimately a factual

1 matter for the Tribunal?

2 A. Yes, I accept that's a factual matter.

3 Q. If the Tribunal is satisfied on the evidence that OSS
4 products are bespoke, then that militates against
5 the likelihood of collusion?

6 A. I think the context of this case -- just -- just to
7 respond fully to that question. It's, yes, with three
8 caveats.

9 The first caveat is I don't think bespoke is
10 like pregnancy, you either are or you're not; I think
11 bespoke is a matter of degree, and therefore I think
12 -- again, I'm not an expert on the facts, but my reading
13 of some of the witness statements is that there are
14 common cost drivers across individual categories and
15 that there are common features across categories. So
16 it's not a zero and 1 issue of bespoke.

17 The second feature of this is -- is bespoke is
18 important in terms of pricing information and therefore
19 if -- and therefore if you can -- if there's -- if there
20 were to be information exchange relating to -- again,
21 a matter for the Tribunal -- I might just get a piece of
22 paper and hold that up --

23 THE CHAIRMAN: We can take that as given.

24 A. I won't say it again.

25 THE CHAIRMAN: No need to.

1 A. I won't say it again.

2 THE CHAIRMAN: Thank you.

3 A. But I think the second feature -- the second feature is,
4 where products are bespoke, this is where information
5 exchange can be particularly valuable because it reduces
6 competitive uncertainty, and if you can share
7 information, I'm not saying that factually this
8 happened, but if there were to be evidence that
9 information had been shared that informs you on cost
10 drivers, such as the price of various materials are
11 going up and going down and that information is shared,
12 that will both be helpful for price amendments, in terms
13 of agreeing coordinating around these features across
14 products, which are common -- common -- you could have
15 a price amendments common across parts, but they might
16 also help you build up prices for new contracts.

17 And my third feature of this case is -- and, again,
18 a yellow card for a standard, repeated point -- my third
19 feature of this case is that in terms of the mechanism
20 for harm, I think the mechanism for harm in this case is
21 not purely relating to the exchange of confidential
22 information on prices or agreements relating to prices,
23 it's also relating to the incumbency principle, and as
24 per my reports, the concern I have there is -- again,
25 a matter for the Tribunal -- forgive me, sorry --

1 the concern I have there is if there's anti-competitive
2 coordination relating to the incumbency principle
3 relating to certain OEMs, I would expect that to have an
4 impact in relation to other OEMs and one of the quotes
5 that I read out yesterday was an -- which I won't read
6 out again, from my first report, was an Autoliv document
7 which said that there was commentary mostly -- all or
8 mostly, we respect the resourcing decisions of -- of
9 other competitors, ie we don't compete for their
10 incumbency business, and the reason -- the reason we
11 don't do that is because they might then attack us on
12 those. I'm paraphrasing the quote, but it will be fully
13 on the transcript yesterday. And the key feature of
14 that is customer allocation, which is how we economists
15 call that form of coordination, is something that
16 doesn't require any exchange of information on prices
17 and that may make it a viable form of coordination, and
18 I would -- I would -- I think if there were to be
19 explicit coordination, I think there would be a real
20 risk of that extending into tacit coordination or
21 the incumbency principle as well.

22 Q. Mr Hughes, can we talk very briefly about Dr Majumdar's
23 sensitivity checks on your model. Now, we have
24 obviously spent a lot of time in the hot tub discussing
25 that so I do not propose to go over all of the detail

1 that has already been discussed, but I do want to talk
2 about what the sensitivity checks, taken together, might
3 suggest about your model.

4 Can we look, please, at table 9 in Dr Majumdar's
5 report. This is {E1/6/47}. We did look at this table,
6 I think, on Monday.

7 Would you agree that what one might expect to see in
8 a robust model is that when one makes adjustments to
9 the model, the cartel coefficient would remain broadly
10 in the same ballpark and the statistical significance
11 might vary a bit?

12 A. I agree that if you make small or reasonable changes to
13 a model I would -- I would expect a robust model to be
14 -- to not be materially affected by small or reasonable
15 changes.

16 Q. Looking, for example, at airbags in this table, we can
17 see that if you use your main period dummy, you get
18 a cartel coefficient of minus 0.07, roughly, a negative
19 overcharge, but if we add in your early period dummy,
20 then it switches to positive 0.11; that is a fairly
21 enormous swing, is it not?

22 A. I think the question that's being raised here is
23 a factual one. So there is a factual answer to that
24 question, which is, if you assume that prices were
25 unaffected in the early period, either due to a cartel

1 or because of factors that I missed out of my model, if
2 -- if you -- if you -- so mathematically I agree with
3 these results, but if you assume there's no early period
4 effects and then a change -- but I think that is not
5 a small change, I think that's a substantial change, and
6 therefore I think the question for the Tribunal is to
7 weigh out whether that is a small and reasonable change
8 to the model. In my view, it is not, but that is
9 a matter I think for the Tribunal's judgment.

10 Q. If we look at seatbelts, the sensitivity that gave you
11 a positive cartel coefficient in relation to airbags, so
12 the "MH1 Early + MH1 Main ..." gives you a cartel
13 coefficient of minus 0.145, but if you put back in --
14 sorry, if you include just the main period dummy, you
15 then find a cartel coefficient of plus 0.16, so, again,
16 you see this massive swing depending on the assumption
17 but going in the opposite direction.

18 A. I won't repeat the first part of my -- so, yes -- yes,
19 I agree that if you change the specification as
20 indicated by Dr Majumdar you get a change in
21 the results. I think the relevant question is -- is --
22 as -- as I've discussed, is that the purpose of
23 including an early period dummy was to test whether
24 prices were lower in that early period. For seatbelts,
25 I don't find the prices lower in that early period and

1 therefore I don't include that in my preferred
2 specification. But I think, again, the question for
3 the Tribunal is -- is whether that's -- in your
4 judgment, whether that's a -- this change that's being
5 shown on the screen is a reasonable change in terms of
6 how to assess the merits of the results.

7 Q. Is not the thing that is particularly striking about
8 these sensitivities that there is no model specification
9 that actually yields consistent results across each of
10 airbags, seatbelts and steering wheels and so that
11 really must raise doubts about reliability, does it not?

12 A. What Dr Majumdar -- so I disagree with that proposition.
13 I think, if you change the specification model, either
14 in the sense that you disregard relevant information
15 that you know, so if you know prices are lower in
16 the earlier period or higher in the earlier period,
17 I think that's something which should inform your model.
18 In the same way, I think if you believe -- if you find
19 that prices are lower in the wind-down period, these are
20 things which should inform your modelling. So I don't
21 think these are small or reasonable changes.

22 Dr Majumdar did propose three alternatives or three
23 alternative things I should think about, which I haven't
24 talked about, but I think they -- and it's perhaps worth
25 emphasising those or noting those. One of those was

1 Dr Majumdar suggested I should -- and I'll explain why
2 I'm raising this in a second -- Dr -- Dr Majumdar has
3 proposed a by-platform sensitivity, we discussed that at
4 some length yesterday, I won't repeat that. Dr Majumdar
5 has also proposed what would happen if you include
6 Autoliv or the other Defendants' costs in the model on
7 the basis to allow for -- that information is imperfect,
8 but it does allow you to look at whether prices --
9 whether -- whether I'm missing -- in all the other
10 variables I have modelled, miss out certain, that
11 doesn't affect my results. Dr Majumdar also said, well,
12 perhaps some -- certain costs should be added to my
13 model and left out of my model. That doesn't affect my
14 results.

15 So what -- what Dr Majumdar's highlighted in his
16 report is -- and I believe he's done this on a good
17 faith basis, what he's highlighted in his report are
18 sensitivities that affect the overcharge. What he's
19 done less of highlighting in the report is
20 the alternative sensitivities that don't affect
21 the overcharge. But, again, I think the key question
22 for the Tribunal is whether these sensitivities are
23 small and reasonable.

24 Q. The other thing that Dr Majumdar has done in relation to
25 this table is to include a thick blue border around

1 the box which represents the model you presented in MH1.

2 Do you see those borders?

3 A. Yes, I do.

4 Q. So starting in the column for "Airbags", the model that
5 you presented was the early and main period model using
6 a different cartel variable for the early and main
7 periods, and if we look down all of the results for
8 the airbags column, we can see that that is the variant
9 that gives rise to the highest overcharge, yes?

10 A. Yes, that is correct.

11 Q. If we look across to the far right, to "Steering
12 wheels", you adopted the same model for steering wheels
13 and that gave you the second highest overcharge, did it
14 not?

15 A. Yes, that is correct.

16 Q. You can see that you could have obtained a higher
17 overcharge if you had used the bottom approach, "MH1
18 combined periods", but that would have then pointed to
19 a zero overcharge for airbags and seatbelts and so it
20 would not have been a favourable approach for
21 the Claimants, would it?

22 A. The premise of that question assumes that the objective
23 I had in this exercise was not to act as an independent
24 witness but to choose numbers that were favourable to my
25 client. I have not done that. I have not chosen

1 specifications to maximise overcharges, I have chosen
2 specifications to arrive at my professional view as
3 the right way of taking account of the data and
4 materials to assess the overcharge.

5 Q. Well, if we look at seatbelts, you took an inconsistent
6 approach in relation to seatbelts and looked at the main
7 period only, and I have heard your evidence yesterday
8 that you were allowing the data to guide you, but it is
9 right, is it not, that the data has guided you to
10 the approach which happens to give you the largest
11 overcharge?

12 A. One -- one of the things -- so the answer to that
13 question is, yes and no. One of the things that we --
14 sorry, I'm -- I will -- I'll probably answer
15 the question. One of the things that we've discussed at
16 some length is that, in a cartel case, what you want to
17 do is you want to have a clearest possible separation
18 between what we have referred to as "clean" and "dirty"
19 prices, okay? And therefore I think it's important when
20 you're doing these exercises, particularly in cases
21 where there's uncertainty about whether there were early
22 period effects or not, or whether prices were higher for
23 other reasons, I think it's important in those
24 circumstances to let the data reveal the answer.

25 It is the case that it makes a difference to

1 the results, but I haven't chosen that methodology
2 because it's favourable in some way to my client; I've
3 chosen that methodology because, where I find prices to
4 be higher in the early period, I think that's important
5 to take into account in making sure I'm not treating
6 those prices as being -- inappropriately treating those
7 prices as being clean when they're not clean. And
8 I don't do that systematically because I don't find any
9 econometric evidence that prices were higher for
10 seatbelts in the early period.

11 Q. The implication of your model is that you are assuming
12 a very specific fact pattern, because you are assuming
13 an infringement in the early period and the main period
14 for airbags and steering wheels and an infringement in
15 the main period only for seatbelts. Now, if
16 the Tribunal finds on the facts that there was no
17 infringement in the early period but there was an
18 infringement for the main period, it is right, is it
19 not, that your model actually cannot assist in relation
20 to the overcharge for that period for airbags and
21 steering wheels?

22 A. Would you mind repeating the question, please?

23 Q. I am sorry, there are two parts to the question.

24 First is the fact pattern which you have assumed
25 which underpins your question. You have assumed an

1 infringement in the early period and the main period for
2 airbags and steering wheels and an infringement only in
3 the main period for seatbelts; is that right?

4 A. So, in response to this question, I haven't -- I haven't
5 assumed there was an infringement in the early period
6 for any of these product categories. That has not been
7 my starting point. My starting point is to test, using
8 established econometric methods, whether there is
9 evidence that prices were higher in the early period.
10 Where I find that they're higher in the early period,
11 I take that into account. Where I don't find that
12 they're higher in the early period for seatbelts,
13 I adopt a different approach in line with what
14 the data's telling me.

15 Q. If the Tribunal finds on the facts something which is
16 not in line with what the data has told you, so, for
17 example, that there was no infringement in the early
18 period for airbags and steering wheels, your model
19 cannot assist in relation to the overcharge for airbags
20 and steering wheels at all, can it?

21 A. I -- I disagree with that. As -- as we've discussed,
22 I think if I observe -- what you're trying to do is
23 you're trying to isolate out the effects of the main
24 period cartel. If I observe prices are higher before
25 the cartel started and there wasn't a cartel, I -- I --

1 I would attribute that to factors in my model I haven't
2 taken account of and that's how I've explained matters
3 in my first report. So I disagree with the proposition
4 that's being put to me.

5 Q. Why did you not put forward a model that sought to
6 quantify an overcharge for other possible factual
7 findings that the Tribunal might reach?

8 A. I wonder if the question could be a bit more specific,
9 please?

10 Q. We have established that you have -- I am trying to
11 avoid using the word "assumed", because you took
12 exception to it, but the premise which underpins your
13 model which you say is derived from the data is that
14 there is an infringement in the early period and main
15 period for airbags and steering wheels and an
16 infringement in the early period only for seatbelts.

17 So I am asking you why did you not put forward
18 a model that could qualify an overcharge for other
19 possible factual permutations?

20 A. Sorry, I'm not quite clear what other factual
21 permutations Ms Ford has in mind.

22 Q. Assume that, contrary to the evidence that you have
23 carefully summarised in your report, the Tribunal
24 decides that there was no infringement in the early
25 period. You have not put forward a model that seeks to

1 quantify an overcharge in relation to that factual
2 assumption.

3 A. What I've specifically tested for is whether there were
4 evidence of higher prices during what I've defined as
5 the early period. If I find that there are higher
6 prices in the early period and they're not caused by the
7 cartel, I think the logical possibility that I need to
8 think about is that there's other factors that I've
9 omitted from my model that may be the driver of those
10 higher prices.

11 Q. Therefore your model cannot be used to derive an
12 overcharge in that scenario, can it?

13 A. I disagree, for the reason I've just given.

14 Q. Can we discuss very briefly the question of
15 the overspill case, overspill effects. So you have
16 conducted a single overcharge model and you say that
17 that model applies whether or not the Tribunal finds
18 that the Defendants have engaged in direct collusion
19 against the Claimants; that is right, is it not?

20 A. Yes, I have.

21 Q. Can I ask you to assume that you have suppliers A and
22 B and that suppliers A and B are engaged in express
23 collusion regarding the business of customer X, and they
24 agree to allocate RFQ 1 to supplier A and RFQ 2 to
25 supplier B, and RFQ 1 will happen before RFQ 2. Let us

1 assume that they agree that supplier A will bid 10 for
2 RFQ 1 and supplier B will bid 12 to ensure that
3 supplier A gets the business.

4 When supplier A puts in its bid for RFQ 1, it can be
5 reasonably confident, assuming that supplier B does not
6 cheat on their agreement, that it will not lose
7 the business to supplier B; that is right, is it not?

8 A. Sorry, would you mind repeating the question? I've lost
9 the As and Bs here.

10 Q. I'm assuming two suppliers, A and B. They are expressly
11 colluding in regard to the business of customer X and so
12 they agree to allocate the RFQs between them, they agree
13 to allocate RFQ 1 to supplier A and RFQ 2 to supplier B,
14 and they agree that A will bid 10 for RFQ 1 and supplier
15 B will bid 12.

16 What I am suggesting is that, by virtue of their
17 agreement, when supplier A puts in its bid for RFQ 1, it
18 can be reasonably confident, assuming that supplier
19 B does not cheat on their agreement, that it will not
20 lose the business to supplier B?

21 A. Sorry, could this question just be put more simply,
22 please? Sorry, I'm able to agree, if there's collusion,
23 and -- and the collusion is adhered to, I'm losing track
24 of the A, Bs and 1s and 2s and Xs, I'm afraid. I'm
25 sorry.

1 Q. If two suppliers agree cover pricing, provided they
2 stick to their agreements, then the supplier to whom
3 the RFQ has been allocated can be reasonably confident
4 it will not lose the business to the supplier with whom
5 it is colluding?

6 A. So I -- I agree, if cover prices are entered into, then
7 there is an agreement in that circumstances as to what
8 someone's going to do. You can never be certain,
9 though -- the caveat I would attach to that is you can
10 never be certain what the -- that people will do what
11 they agree to do in life, and that will be true in
12 cartels or in other situations. Sorry -- but in -- in
13 principle, I think that the nature of the collusion that
14 Ms Ford is describing to me I now understand in terms of
15 cover pricing and I think the purpose of what they're
16 trying to achieve is clear, but I don't think you can be
17 absolutely certain, in even a cartel context, that
18 people will do what they say, because cartel agreements
19 are obviously not enforceable.

20 Q. If supplier B does cheat on the agreement, then supplier
21 A can punish supplier B by bidding competitively for
22 RFQ 2, can they not?

23 A. Yes, that sounds reasonable.

24 Q. Because supplier B can anticipate that potential
25 punishment, it is more likely to comply with

1 the agreement in respect of the first RFQ, is it not?

2 A. Yes, that sounds reasonable.

3 Q. So I would like to change the assumption. Assume that
4 suppliers A and B did not engage in express collusion
5 and we are now talking about the business with
6 a different customer, we are talking about customer
7 Y rather than customer X. So customer Y also has
8 successive RFQs, 1 and 2, but there is no prior express
9 agreement between supplier A and supplier B as to how
10 they are going to allocate that business between them,
11 or what rates they will bid.

12 Now, in that case, you have already emphasised that
13 there is always a degree of uncertainty, but in that
14 case, supplier A can have no certainty that supplier
15 B will refrain from bidding competitively for RFQ 1, can
16 it?

17 A. Yes, they can have no uncertainty, but what's being
18 framed here is -- is a cartel is either perfect or --
19 and -- or it's imperfect or doesn't happen at all, so
20 it's a zero and 1, and I think collusion is a matter of
21 degree and reducing competitive uncertainty is a matter
22 of degree. So anything that reduces competitive
23 uncertainty reduces the risk in a bidding negotiation
24 market of you losing the contract, and if the risk of
25 you losing the contract has gone down, then your ability

1 to charge higher prices will have gone up because you
2 weigh that up. That's traditional price volume
3 analysis. So that's the first point.

4 The second point is that Ms Ford is envisaging
5 purely a -- and this is a -- this is an incumbency
6 principle customer allocation type argument -- she's
7 envisaging purely an explicit situation where there's
8 been an explicit agreement. However, we economists also
9 worry about tacit agreements whereby people, without any
10 communication but observing patterns of repeated
11 behaviour over time, and again I'm going to repeat --
12 I won't repeat the quote from Autoliv, but if -- if --
13 if we don't attack their business because the concern
14 that we have is that they will attack ours and that
15 particular tacit -- that particular understanding
16 doesn't necessarily require a formal agreement, but if
17 you've definitely reached or you may have
18 reached -- again, factors for the Tribunal -- but if
19 you've reached agreements to that effect in other
20 contexts in relation to other OEMs, there must be a real
21 risk of that spilling over -- spilling over and
22 affecting non-targeted OEMs.

23 THE CHAIRMAN: Are we at cross-purposes, Ms Ford?

24 MS FORD: Very slightly.

25 THE CHAIRMAN: So you are assuming here A and B, no cartel

1 and that includes no tacit agreement; is that right?

2 MS FORD: Well, it includes no explicit collusion and what
3 I am hoping to explore with Mr Hughes is the likelihood
4 or otherwise of tacit collusion arising where there is
5 no explicit collusion.

6 THE CHAIRMAN: I see, sorry. Perhaps we can just tackle it
7 again. Sorry.

8 MS FORD: Well, I just had a small point of clarification.
9 You started your response, Mr Hughes, by saying:

10 "Yes, they can have no uncertainty ..."

11 I think, in the context, you meant: yes, they can
12 have no certainty; is that right?

13 A. Yes, quite right. Thank you.

14 Q. Right, so we have got to the point that supplier A has
15 no certainty that supplier B will not bid competitively,
16 and supplier A knows in that scenario that if supplier
17 B does bid competitively and undercuts supplier A's bid,
18 then supplier A is running the risk of losing customer
19 Y's business, is it not?

20 A. Yes, that's right.

21 Q. So in the absence of express collusion between supplier
22 A and supplier B, supplier A is more likely to bid
23 competitively for RFQ 1 in order to maximise its chances
24 of winning that business?

25 A. In the -- sorry, the answer to that -- there's

1 a proposition being put there, which is: in the absence
2 of express collusion -- express -- explicit collusion,
3 it is more likely that they would -- they would bid
4 competitively. I think you also need to consider
5 the possibility of tacit coordination, because if you --
6 if you just look at explicit versus tacit, I think
7 you're missing something, and also I don't have
8 a particular reason for believing that tacit will be any
9 less effective than explicit.

10 Q. Right. So even if supplier A had some prior reason to
11 think that supplier B might not be interested in winning
12 this customer's business, so, for example, because they
13 had previously colluded in relation to customer X, even
14 in that scenario, supplier A cannot be confident that
15 the same arrangement will apply to customer Y, can they?

16 A. I think -- I think what -- I think what's missing from
17 this question is the -- is -- is what cartels do if --
18 if there was a cartel in this case, what cartels do, and
19 most cartels, in my experience, are imperfect, is what
20 they would do is they'd reduce competitive certainty.
21 So I don't think this is a matter of zero or 1, this is
22 all a matter of degree. So I don't -- I don't think --
23 so I don't think you can make these binary questions.

24 The second thing that's important in these cases --
25 and this is, again, emphasised in the economics

1 literature -- is, what we're discussing when we're
2 discussing both tacit and explicit coordination, what we
3 economists call "repeated gains". And the key feature
4 of repeated gains, as opposed to one -- the one shop
5 scenario that Ms Ford is discussing, the distinction
6 between those is, at the next stage of the game, you can
7 observe what's happened in the previous one. So if you
8 observe good things and good things happening over time
9 and then -- and by "good things" I mean in this context
10 anti-competitive behaviour or tacit coordination, that
11 learning of tacit coordination is something that can
12 build into models -- sorry, build into people's price
13 setting decisions and therefore lead to higher prices
14 over time.

15 So I don't think you can frame these things as
16 individual one shop -- and forgive me for getting
17 confused over the A, B, C, X and Y and so on, but
18 I don't think you can entirely summarise collusive and
19 the risk of tacit collusion to one shop gains,
20 particularly in markets where there are frequent
21 contracts between -- you know, they're bidding for
22 the same thing repeatedly over time.

23 Q. Let us assume that supplier B does bid competitively for
24 customer Y's RFQ. In that scenario, supplier A has no
25 credible means of punishing supplier B, because if it

1 were to compete competitively for RFQ 2, that might be
2 what supplier B always expected it to do and it would
3 not identify it as a punishment, would it?

4 A. If I give a general answer and worry a little bit less
5 as to whether I'm mixing the letters up. What
6 a credible punishment mechanism is is not an agreement
7 in -- an agreement or anything of that nature. What
8 a credible punishment mechanism is is if I observe
9 a competitive coordination, if I observe hard
10 competition, I'm -- in my subsequent -- in my subsequent
11 dealings, I may expect future hard competition. If
12 I don't observe that, then I may well expect more muted
13 competition. And the more that you have an expectation
14 and you reduce the competitive uncertainty about what
15 scenario you're in, the more that you're able to take
16 that into account in your price setting decisions.

17 And I think it's important -- it's important to bear
18 in mind that the context of the market that we're
19 discussing is -- is one in which the OEMs, as Ms Ford
20 has emphasised rightly today, are sophisticated
21 customers, they are trying very hard to buy these parts
22 on competitive terms, and -- and the suppliers, in
23 the normal competitive market, face very substantial
24 competitive uncertainty. And this is the environment
25 where, if there's a reduction in that competitive

1 uncertainty and it spreads, particularly where there is
2 evidence of information spillovers across OEMs, I would
3 expect that reduction in competitive certainty to
4 influence the prices at which people are willing to put
5 in as bids because they think the risk of them losing
6 the contract has gone down, they can afford to bid a bit
7 more in the hope that they'll get those higher margins
8 rather than losing that contract.

9 Q. I think, Mr Hughes, that the import of what you have
10 said is that you would accept that it is more difficult,
11 in relative terms, to achieve that sort of understanding
12 when there has been no express collusion?

13 A. What -- what explicit coordination -- so to give
14 a complete answer to the question, so the short answer
15 would just simply be yes, but I want to give a complete
16 answer. What explicit coordination particularly helps
17 you do, it helps you arrive at a focal point as to what
18 you're going to coordinate on, whether it's prices,
19 customer allocation, quantities, capacity or something
20 else. So that is a feature of explicit coordination
21 that is -- that does help. And where you have markets
22 where there is some explicit coordination, once you've
23 founded that, then that can help you with tacit
24 coordination. So one of the things I say in my first
25 report is that failed explicit coordination can help

1 with tacit coordination. So I think a full answer to
2 this question is that explicit coordination helps. I --
3 helps.

4 And the second answer to this question is that, even
5 absent explicit coordination, we economists also worry
6 about tacit coordination and there's no -- and there's
7 no particular reason why tacit coordination cannot be
8 effective at raising prices. And as effective at
9 raising prices as explicit coordination.

10 Q. Can we look at {E1/20/1}, please.

11 This is the table that you have produced which shows
12 the quantum of the spillover effects claim, yes?

13 A. Yes, it is.

14 Q. As I understand what you have done, you have used your
15 existing model but you have taken the period within that
16 model that corresponds to the OSS 1 and OSS 2 periods;
17 is that right?

18 A. Yes, I have.

19 Q. You presumably agree that for the spillover claim the
20 relevant period of the cartel must be the period of
21 the OSS 1 or OSS 2 infringements?

22 A. Assuming that there was no earlier anti-competitive
23 effects, if that's -- if that -- if I've understood
24 the question correctly.

25 Q. Right, so we saw on Monday that spillover effects is

1 the third way in which the Claimants put their claim,
2 and so if the Tribunal gets to the point of considering
3 the spillover effects claim, it will be because it has
4 reached a conclusion as a question of fact that there
5 was no infringement other than OSS 1 and OSS 2, yes?

6 A. Yes.

7 Q. In those circumstances, it would make sense to define
8 the relevant cartel periods to equate with those found
9 by the European Commission rather than stick to your
10 model, which defines the cartel period as being much
11 wider, would it not?

12 A. The earlier question I had from Ms Ford on this subject
13 related to -- and Ms Ford will correct me if I go wrong,
14 it related to whether there should be early period
15 effects -- sorry, forgive me. There's some mental
16 gymnastics on my part required. The question -- one of
17 the questions Ms Ford asked me earlier was that if there
18 are -- sorry, I think it's -- I understand
19 the conceptual point that Ms Ford is making and -- and
20 the premise behind her question, but it would probably
21 be easier for me to -- if you indulge me.

22 The -- the purpose of the early period effects is to
23 test whether there is anti-competitive effects earlier
24 -- earlier than in the main period. If I find them,
25 I include them; if I don't, I leave them out, okay?

1 The premise behind Ms Ford's question here is -- is
2 that should I somehow abandon the modelling approach
3 that I've taken, so it seems to be a rephrasing of that
4 question, and I think my answer to that is the same one
5 that I gave earlier, which is I don't think I should
6 abandon the approach that I -- I -- I have taken in
7 terms of looking at -- if I find -- even if there was no
8 cartel in the early period, if I find that prices are
9 systematically higher prior to the cartel, I think
10 I should take that into account in calculating
11 overcharge, as I've said in my first report.

12 Q. So that is not the premise which underlies the question.
13 The premise is that the Tribunal has reached a finding
14 of fact that there was no cartel in the early period and
15 it is seeking to ascertain what, if any, was the effect
16 of any overspill effect. Now, in those circumstances,
17 it would make sense to define the infringement period in
18 the model to cover solely the period of OSS 1 and OSS 2
19 and not any other period, would it not?

20 A. I disagree with that for the reason I've just given.

21 Q. Even if you wanted to ascertain whether there were any
22 higher prices in the early period, that would not entail
23 extending the period of the cartel, would it, you could
24 have a separate dummy to identify unrelated higher
25 prices, but it does not justify maintaining a definition

1 of the cartel period that is too long?

2 A. What the early period dummy does is only applies in
3 the early period and, I think this might be a labelling
4 point, if -- if -- if the Tribunal were to find no
5 evidence of any cartel harm in the early period, then
6 I think the interpretation of the -- that dummy is not
7 that it's a cartel effect. I have not extended
8 the period of OSS 1 or OSS 2, that's not what's going on
9 in the modelling.

10 Q. But in that scenario the correct approach would be one
11 of Dr Majumdar's sensitivities where he defines
12 the relevant cartel period as covering OSS 1 and OSS 2,
13 would it not?

14 A. No.

15 MS FORD: Sir, I am mindful of the time. I do not know if
16 that is a convenient moment to have a break.

17 THE CHAIRMAN: Yes. How are you getting on?

18 MS FORD: I am very close to finishing. I do need to have
19 a quick word with Mr Scannell as to timing.

20 THE CHAIRMAN: So it looks like we are going to need
21 a break.

22 (11.48 am)

23 (A short break)

24 (11.58 am)

25 MS FORD: Sir, I have some very brief questions on costs and

1 then I am going to hand over to Mr Scannell.

2 Can we look, please, at {E1/6/34} and looking at
3 figure 2 at the top of the page.

4 Mr Hughes, I will perhaps quickly summarise what
5 I understand this to be showing and you can tell me if
6 that accords with your understanding. It is in
7 Dr Majumdar's report and what it is showing is
8 a breakdown of the Defendants' contract-specific
9 incremental costs for the sales of OSS products to PSA.
10 So the colour orange is essentially the cost of
11 materials, 68% for Autoliv and 70% for ZF; pale blue is
12 "Contract-specific overheads" which includes things like
13 investments in production facilities, so that is 18% for
14 Autoliv, 16% for ZF; labour costs are dark blue, 13% for
15 Autoliv, 10% for ZF; and then there are other costs in
16 grey.

17 Mr Hughes, does that accord with your understanding?

18 A. Yes, that accords with my understanding of this graphic.

19 Q. I do not understand you to have taken issue with
20 the accuracy of these figures?

21 A. The caveat that I've attached is that where it refers to
22 "contract-specific overheads", Dr Majumdar hasn't
23 explained exactly how he has calculated that they are
24 contract-specific and in particular I note that they
25 seem to be allocated on the basis of cost drivers to

1 various product lines, which in my mind raises questions
2 as to whether they are in fact contract-specific or not.

3 Q. In your model you have controlled for certain raw
4 material prices and so what your model is doing is
5 controlling for some but not all of the factors in
6 the orange category; is that fair?

7 A. Yes, my model is controlling for some but not all of
8 the factors in the orange category. In particular, it
9 does not include freight, which is a small element of
10 cost, and ... thank you.

11 Q. Did you have the opportunity to review the transcript of
12 the cross-examination of Mr Carosso?

13 A. No, I have not.

14 Q. Well, I took Mr Carosso through an example RFQ and
15 discussed with him the various heads of costs which
16 could be expected to vary from contract to contract, and
17 what I just wanted to check with you is that you would
18 accept that costs such as development costs, tooling
19 costs and engineering costs are costs which would change
20 from contract to contract but which are not controlled
21 for in your model?

22 A. Yes.

23 Q. You have also controlled for certain technical
24 characteristics for each product. If we can just look
25 at your report where you set that out. It is {E1/2/86}.

1 So, for seatbelts -- sorry, for steering wheels, for
2 example, the four characteristics that you have
3 controlled for are material, heating, electronic
4 switches and wheel sizes?

5 A. Yes, that's correct.

6 Q. Can we have a look at what Mr Carosso said about this.
7 It's transcript {Day4/33:25}. You see the first line
8 that I wanted to show you is at the bottom of this page,
9 where I say -- I ask him to assume you have two RFQs.

10 Then if we go over the page, and there are two RFQs
11 for steering wheels, and what I asked him to assume was
12 that they have, at a high level, the same technical
13 characteristics, so that they are the same size, they
14 are finished in leather, they have electronic switches
15 on them and they are not heated. So that corresponds,
16 broadly, to the technical characteristics that you have
17 controlled for in your model, would you agree: size,
18 material, electronic switches, heating?

19 A. Yes, that is correct.

20 Q. We can see his evidence in relation to this from line 6
21 onwards. I asked him:

22 "... it is right ... that the pricing of those two
23 steering wheels could be very different depending on all
24 the different factors we have just discussed, so
25 depending on volumes, locations, technical

1 specifications, manufacturing locations, development,
2 tooling, engineering and how those costs might be
3 recovered; would you agree?"

4 He said:

5 "Yes, I do agree."

6 Then I said to him:

7 "One cannot assume that because two steering wheels
8 have the same high level technical characteristics, they
9 will be priced the same ..."

10 He agreed with that proposition.

11 So based on that evidence, controlling for high
12 level technical characteristics is not going to allow
13 you to control adequately for factors that affect price,
14 is it?

15 A. I think the answer to this question is a complicated one
16 in the sense that I cannot perfectly control for all
17 aspects of the parts and specifics that I have included
18 in the variables because I simply don't have any
19 further, more granular information. However, I will be
20 controlling for -- I will be controlling for key things
21 that are drivers of the prices. And it's important that
22 when we're discussing the risk of omitted variable bias,
23 which is some of the context that Dr Majumdar and I were
24 discussing on these points, that this shouldn't be
25 interpreted as a counsel of perfection. So it's not

1 a case that I'm trying to perfectly capture every single
2 element of cost difference that may be driving, what I'm
3 trying to capture is the core ones. So -- so, to put it
4 differently, I'm not trying to establish that I've --
5 the prices of every single -- I've -- I understand
6 exactly why every single price is different but I've
7 captured the core ones, and I believe I have captured
8 the core ones.

9 MS FORD: Sir, I am handing over to Mr Scannell.

10 Cross-examination by MR SCANNELL

11 MR SCANNELL: Good afternoon, Mr Hughes.

12 A. Good afternoon.

13 Q. Could we begin with the joint expert statement. That is
14 at {E1/13/1} again and turn to {E1/13/3}, please. So
15 I am looking under the heading of "Pass-on", if that
16 could perhaps be enlarged.

17 You and Dr Majumdar state that you agree that:

18 "Were an overcharge to exist, both experts agree
19 that a key issue is whether higher OSS prices were
20 passed-on into higher net dealer prices. They agree
21 that the available data does not allow this to be
22 measured directly but rather proxied by the pass-on of
23 variable costs in general. However, they disagree on
24 whether the latter is a reliable proxy ... and, if it
25 is, the magnitude of such pass-on ..."

1 Just for completeness, you go on:

2 "The experts agree that the rate of any relevant
3 pass-on of any overcharge that FCA may have suffered is
4 likely to be similar for PSA and VO. They also agree
5 that were pass-on to arise, offsetting volume effects
6 should be considered ... However, they disagree as to
7 the likely magnitude of such offsetting effects ... This
8 is a material issue."

9 Then if we could turn forward from there to
10 {E1/13/38} of your joint report, please, and I want to
11 look at what you agree at row 59. So you agree with
12 the proposition that:

13 "The relevant price for a pass-on assessment in this
14 case is the price paid by dealers to the Claimants ..."

15 That is the net dealer price:

16 "... not retail prices paid by end consumers."

17 Now, I want there to be no doubt in the mind of
18 the Tribunal as to what you and Dr Majumdar mean by
19 that.

20 First, as to why the price that dealers paid to
21 Claimants is the relevant price and not the price that
22 end consumers paid when they bought cars, the reason is
23 that the Claimants, for the most part, sold their cars
24 to independent dealers and not to end consumers. You
25 presumably agree with that?

1 A. Yes.

2 Q. As to what the net dealer price is, second, it is not
3 the same thing, is it, as the price that consumers pay
4 when they buy their car from a showroom, is it?

5 A. No.

6 Q. It is not either the price that one sees advertised from
7 time to time as the price of a particular car? It is
8 not the list price or the recommended retail price,
9 is it?

10 A. No.

11 Q. Okay.

12 So the net dealer price is the list price minus
13 a base discount that the Claimants give to their dealers
14 and minus also any other discounts or rebates that they
15 give to dealers; that is correct, is it not?

16 A. Yes, that's correct.

17 Q. That price, the net dealer price, could be increased
18 without changing the recommended retail price or
19 the list price by reducing discounts and rebates given
20 to dealers; that is also correct, is it not?

21 A. Yes, that is correct.

22 Q. Now, at row 60 of the joint expert statement, looking at
23 the final column, in the second paragraph, Dr Majumdar
24 opines that:

25 "Pass-on via net dealer prices is not the same

1 [thing] as pass-on via [recommended retail prices]. Net
2 dealer prices may fluctuate even if RRP's do not. This
3 is because the Claimants may continually adjust discount
4 support to dealers (ie, dealer rebates and additional
5 marketing support such as volume discounts and campaign
6 discounts) while list prices may remain unchanged. Put
7 another way, there is greater scope for the net dealer
8 price to vary than the [recommended retail price] -- it
9 can vary because the [recommended retail price] varies
10 or because discounts to dealers vary."

11 Now, you do not say whether you agree or disagree
12 with that proposition, but could you do so now, please?

13 A. This is not a matter I've looked into, factually, but
14 I agree, just as a matter of logic, that if the -- that
15 the -- that the price to the consumer might vary either
16 because of a reduction in discounts or because of a --
17 or a change in the list price, if that -- if I've
18 properly answered the question.

19 Q. We are not so much concerned, are we, with the price to
20 the consumer, we are interested in the price that
21 dealers pay when they buy cars from the claimant OEMs,
22 that is right, is it not, when we are considering
23 pass-on?

24 A. Yes, that's correct.

25 Q. Thank you.

1 Now, did you listen to the evidence given by
2 the Claimants' pass-on witnesses in this case?

3 A. No, I have not.

4 Q. Have you reviewed the transcripts of their evidence?

5 A. No, I have not.

6 Q. Okay.

7 Well, it is important for the question I am going to
8 ask in a moment to have some understanding of where we
9 have actually come out on the evidence. So I am going
10 to attempt to show you where we have come out on
11 the evidence and then I will ask the question. Do you
12 understand?

13 A. Yes, thank you.

14 Q. Okay.

15 So in the interests of time, I am going to focus on
16 the two witnesses that I cross-examined. That was
17 Mr Gautier of PSA and Ms Biancheri of FCA, but we can
18 refer to Mr Couturier, if time allows.

19 So Mr Gautier's evidence begins on Day 4 of
20 the transcript, at page 58, lines 18 to 19
21 {Day4/58:18-19}. Just at the beginning I am just going
22 to ask if you can see that. So I am just looking at
23 lines 18 to 19, Mr Hughes, and I am just asking if you
24 can see this is where we begin the cross-examination of
25 Mr Gautier.

1 A. Yes, I can see that.

2 Q. If we could turn, first, to {Day4/63:25}, I put it to
3 Mr Gautier that the base discount from the list price is
4 important because, I said, "for the most part, PSA sold
5 its cars to ..."

6 If we could turn over the page {Day4/64}:

7 "... independent car dealers, did it not?"

8 Mr Gautier said, "Yes".

9 I went on:

10 "It is also important for the Tribunal to understand
11 because the gross dealer price minus the additional
12 deductions PSA applied to the list price resulted in
13 the net dealer price, did it not?"

14 To which the answer was, "Sure":

15 "Question: That is the price that the experts are
16 interested in for the purposes of their pass-on
17 analysis; do you understand that?"

18 He said he did.

19 Then if we could turn over the page to {Day4/102},
20 please.

21 So at this point of the cross-examination,
22 Mr Gautier was addressing how PSA priced its cars and
23 thereafter how it implemented those prices, okay? He
24 had earlier explained that profitability targets were
25 set for each of the cars that Peugeot built; the cars

1 were benchmarked to competitors' cars to ensure that
2 they would compete with comparable vehicles on
3 the market; he said that recommended retail prices were
4 set in Paris approximately three years into the project,
5 and I had a discussion with him about that and he said
6 that it was at some time between the project maturity
7 date and the time when a pre-series of the car was
8 produced for testing.

9 He explained that implementing the prices PSA set
10 was something that fell to PSA's national teams, so they
11 had to achieve the profitability target when they sold
12 the cars to independent dealers in different countries
13 by adjusting the level of discounts from the recommended
14 retail price.

15 So we can take it from line 1. So Mr Gautier is
16 asked about the importance of profitability for PSA when
17 it is setting the price:

18 "I am going to ask you again, when PSA was pricing
19 its motor vehicles, profitability was one of
20 the considerations ..."

21 He said, "Yes":

22 "Question: So you have explained in the 2017
23 witness statements ..."

24 That is his *Bearings* witness statement:

25 "... that profitability forecasts were used to set

1 profitability targets for each car?

2 "Answer: Yes [he said]."

3 I then ask:

4 "PSA's national teams were then required to achieve
5 those profitability targets when they were implementing
6 the price strategy set in Paris; is that fair?"

7 Mr Gautier said:

8 "That's correct".

9 I then asked:

10 "One of the tools that was available to them to
11 achieve PSA's profitability targets was to offer more or
12 less MCV?"

13 Now, MCV was one of the discounts that PSA offered
14 to its dealers when it was setting the net dealer price,
15 and he said, "Yes":

16 "Question: In other words [I asked], they could
17 change the net dealer price; correct?"

18 Mr Gautier said, "Correct".

19 I then asked him whether:

20 "... another way of increasing profitability would
21 be to incentivise dealers to sell cars with more
22 optional extras ..."

23 And asked him if he would agree with that. He said
24 that he would agree, but he went on to explain that that
25 was less likely as a way of increasing profitability

1 than changing the discounts that were made available.

2 So Mr Gautier accepted that PSA could reach its
3 profitability targets by adjusting discounts to dealers
4 and thereby changing the net dealer price.

5 Then if we could turn over to {Day4/105}, please.

6 Here, the debate centred around the timing of
7 the setting of profitability targets, and you can see,
8 at line 11, I hope, that I put it to Mr Gautier that:

9 "The profitability target is set at the same time as
10 the price of the car is fixed, is it not?"

11 Mr Gautier disagreed with that, and he said:

12 "The profitability target is set at the beginning of
13 the project -- I am speaking globally at the level of
14 the project -- and then, when I was the head of pricing,
15 I was setting profitability targets country by country
16 trying to break down the overall profitability target
17 into, let's say, local targets that would build
18 the overall profitability."

19 So Mr Gautier was quite firm that PSA set
20 the profitability target for each of its cars before it
21 had even attempted to procure any components for
22 the car, and that target remained in place all the way
23 through to the point of sale to the dealers.

24 Then in the next line, line 20, he addresses what
25 PSA could do if, at the point of sale, it had become

1 clear that the costs of building the car were higher
2 than expected. So the question I put to Mr Gautier
3 about that was:

4 "If PSA knew at the time that it was implementing
5 prices what the OSS component cost was, for example, it
6 could deal with those costs through the rebates that we
7 have looked at, could it not?"

8 Mr Gautier answered, "It could".

9 So Mr Gautier seemed to accept then that a margin
10 above cost was decided before any costs were known or
11 incurred, at the beginning of the project, then a list
12 price for the car was set, and when that car was sold by
13 PSA to independent dealers, PSA could ensure that it
14 achieved the original profitability target irrespective
15 of the actual level of costs, which were by then, of
16 course, known, by adjusting the level of discount given
17 to dealers who bought the cars, in other words
18 increasing the net dealer price.

19 Now, if we can turn to Ms Biancheri, her evidence
20 begins at transcript {Day4/124:2-3}, if we could see
21 that, please.

22 So that is at the top of the page on the screen,
23 Mr Hughes. Do you see that? It is just the beginning
24 of the cross-examination.

25 A. Yes, I do, thank you.

1 Q. Thank you.

2 We can take this up at {Day4/147:9}. So at this
3 point Ms Biancheri has confirmed that Fiat offered three
4 types of discount to independent dealers when it sold
5 cars to them. There was a base discount, she said, to
6 arrive at the gross dealer price, then there were
7 campaign discounts and there were discretionary
8 discounts. Nothing turns on this -- on those names.

9 Then at line 1 -- excuse me, at line 9, I asked:

10 "Now, taking all of those discounts that we have
11 seen together, the price that FCA was ultimately paid
12 for the vehicle that it made was the list price minus
13 the base discount and minus any campaign discounts and
14 discretionary discounts that were rebated to the dealer;
15 you would presumably agree with that?"

16 Ms Biancheri said:

17 "I think we are missing the condition at
18 the discount, maybe, in your phrase? There were three
19 family of discounts: the base on the invoice ..."

20 I interrupted at that point and said:

21 "You refer to the base discount, the campaign
22 discount and the discretionary discount?"

23 She interjected and said:

24 "... discretionary, okay, yeah.

25 "Question: Okay?"

1 "Answer: Okay, yeah.

2 "Question: All right. So do I take it then that
3 you agree ...

4 "... with that."

5 Then over the page {Day4/148}:

6 "Answer: Yes."

7 So Ms Biancheri accepted that the price Fiat was
8 paid for its cars was the net dealer price, not the list
9 price or the price paid by consumers, and that the net
10 dealer price was the list price minus the various
11 discounts and rebates Fiat gave to its independent
12 dealers.

13 Then at page {Day4/152:11}, Ms Biancheri addressed
14 the adjustments FCA could and did make to the net dealer
15 price to maintain its margins. So I asked her:

16 "FCA was continually adjusting its net dealer
17 prices, was it not?"

18 She said:

19 "That is correct.

20 "Question: Yes, and it was doing that in part by
21 adjusting margins, was it not, and discounts?"

22 She answered:

23 "Discounts, yes.

24 "Question: Okay, so one way to increase the net
25 dealer price was to reduce the discounts given to

1 dealers, was it not?"

2 She answered:

3 "This was one of the ways, I agree."

4 Then, beginning at page {Day4/153}, Ms Biancheri
5 addressed the fact that the standard costs of building
6 Fiat's cars were included in a document which she called
7 the V99 document, and those costs were a list of known
8 costs over the past six months and unknown costs over
9 the next six months, and she explained that where
10 the relevant component was separately available as an
11 option, it had a separate entry in that document,
12 the V99, but otherwise the component costs were
13 reflected in the V99 as an entry for the model version
14 series of the car. Either way, the V99 was updated once
15 a year, so the actual costs of all of the components of
16 the car, including OSS components, were ultimately
17 recorded there.

18 Then, at -- I am coming to an end in just a moment.

19 So at {Day4/159:12}, I asked Ms Biancheri:

20 "Would you accept that insofar as cost increases
21 were reflected in the V99 document as actual costs of
22 the business FCA would generally aim to recover those
23 costs over the lifetime of the vehicle to which
24 the costs relate? Is that fair?"

25 To which she responded:

1 "It is fair to say that once per year there was
2 a re-thinking of the pricing strategy of the model to
3 adjust in case the costs were increasing too much and
4 the profitability was going ... down, depending on
5 the cost ..."

6 Now, the -- so I reminded Ms Biancheri, at
7 the bottom of the page, that we are talking about
8 the overall lifetime of the vehicle.

9 Now, I think we can stop there.

10 So I am going to suggest to you that where we have
11 come out on the factual evidence in this case is that
12 the Claimants' witnesses have accepted that increased
13 costs of production of their cars could be, first,
14 noticed, and, second, addressed at the point of sale to
15 dealers by increasing the price payable by
16 the independent dealers to whom the cars were sold, and
17 the way that that could be achieved was by reducing
18 the discounts those dealers were given from
19 the recommended retail price of the relevant cars.

20 The question I want to put to you is that, on
21 the basis of that evidence, where does this leave your
22 resistance to the notion that pass-on almost certainly
23 would have occurred in this case had there been an
24 overcharge?

25 A. So what -- what I've heard the witness evidence has --

1 if I do a precis and then respond to make sure I'm
2 responding to the right points, because there was a lot
3 of material there.

4 First -- one of the first points was that there were
5 profitability targets. That was one of the first
6 points. And one of the other points I heard was that
7 there would be an aim to achieve -- to meet those
8 profitability targets over the lifetime of the car, and
9 that prices -- net dealer prices could have varied over
10 time if costs were higher. So I think --

11 I wonder, if I pause there. Have I -- have
12 I highlighted the key elements that you would like me to
13 highlight, sir?

14 Q. I want you to be aware of the fact that the Claimants
15 have accepted that if there was a cost increase, that
16 could have been noticed, number one; and number two,
17 that it could have been taken account of when
18 the Claimants sold their cars to dealers by increasing
19 the net dealer price.

20 A. Okay, thank you for making sure I've understood
21 the point.

22 So -- so -- so the -- the first bit -- so -- so no
23 -- so -- so what is -- what is the reason for my
24 resistance to there being a good causal link between an
25 overcharge in relation to occupancy safety systems

1 products leading to higher car prices given that I agree
2 that the prices of cars can be adjusted over time?

3 I think the first point is -- is that there are two
4 scenarios to think about. I agree that the witness
5 evidence talks about the profitability -- this
6 particular witness's evidence talks about
7 the profitability targets. So I think the first thing
8 to explore, in terms of the question of pass-on, is, if
9 those profitability targets are being met, what then?
10 And the answer to, "What then", is you don't -- my
11 understanding of the evidence, including the evidence
12 that has just been read to me, my understanding of
13 the evidence is the key driver of car prices is
14 benchmarking, and if you -- if you are meeting
15 the profitability targets, there will be no response to
16 prices. That's my understanding of the position.

17 Again, matters of fact for the Tribunal, okay?

18 So the second scenario is: what if those
19 profitability targets are not being met, okay? And then
20 I think you have to ask yourself the question of -- so
21 they're not being met: are they not being met as
22 a consequence of occupancy safety systems? Well, that,
23 to me, seems like a very remote possibility because, as
24 Dr Majumdar's carefully worked out, the price of OSS
25 accounts for only 5% of the price of the actual cost of

1 the car, and as I have emphasised in my calculations,
2 the cartel damages, if there was a cartel, amount to
3 only 0.4% of the price per car. So these are very small
4 cost changes. So whether you're meeting the target or
5 not I think is neither here, nor there.

6 So -- and I think lots of other factors will be
7 affecting your pricing costing decisions in these
8 circumstances rather than purely this. So I think --
9 I think I understand the framing of the -- framing of
10 the question, but I think that's the first part of my
11 answer, that the -- in other words, it matters whether
12 you're at the profitability target or not, and I don't
13 think occupancy safety systems make any difference to
14 that.

15 The next question is: if you're not meeting
16 the profitability target, okay, as the gentleman has
17 kindly -- has rightly emphasised, there are things that
18 you can do, but those things that you can do have some
19 consequences, and if you move your prices outside
20 the line of benchmarked areas, you're going to -- you're
21 going to lose volumes. So those sort of consequences,
22 and my recollection of the witness statements from which
23 he is citing is that they are also concerned about
24 volumes, they're not just concerned about prices, and
25 I think you are -- you are left with the question -- and

1 then he -- the gentleman rightly emphasised about
2 noticing things. You do notice things, but your ability
3 to notice an increase in the price of occupancy safety
4 systems is neither here nor there, what you'll notice is
5 whether your total costs have gone up or gone down and
6 you won't be pulling out particularly -- my
7 understanding of the evidence we have is that the key
8 driver -- the key driver of -- is the overall
9 profitability, not the profit, so if another cost has
10 gone down, this will all be muted.

11 So I think -- I think my hesitation on all of this
12 also comes to the third point which has been emphasised,
13 is, there's an aim to -- to recover prices over time and
14 profits. That doesn't necessarily ascribe what firms
15 are doing in practice in terms of their day-to-day price
16 setting and competition.

17 Q. Okay. So just to pick up on two of the points that you
18 made in that response. First, you continue to cleave to
19 the view that benchmarking constitutes some sort of
20 breakwater preventing pass-on to dealers; is that right?

21 A. It's not so much it's an absolute hard and fast thing,
22 but I think the benchmarking is a key driver of how
23 prices are set. I'm not saying it's absolutely
24 determinative and I'm not saying profitability is of no
25 relevance, but it's -- it is a key driver of how prices

1 are set.

2 Q. Is it your view that if benchmarking plays a role in
3 the setting of prices and if a profitability target is
4 set, so that is a margin above cost, and if the evidence
5 shows that that profitability target can be hit by
6 increasing the net dealer price, that the benchmark
7 process somehow remains relevant?

8 A. That is my understanding of the witness statements that
9 I've read, and -- and I -- and my understanding is that
10 that wasn't contradicted by the material that
11 the gentleman has kindly read to me.

12 Q. Okay.

13 To pick up one other point that you highlighted in
14 your response. You said that OSS components constitute
15 a small proportion of the overall cost of producing
16 a car; correct?

17 A. Yes, that is correct.

18 Q. Are you saying to the Tribunal that that is preventing
19 pass-on of any overcharge on those components to dealers
20 in the form of increased net dealer prices?

21 A. I'm not saying -- I'm not saying that in an abstract on
22 its own, what I'm saying is -- is, when I was describing
23 the various fact -- the scenarios in which -- where
24 profits were insufficient, I think the inadequacies or
25 insufficiency of those profits, that won't be driven by

1 -- I think it's unlikely to be driven by a small cost
2 component whether that is the case or not.

3 Q. Do you take any account at all in expressing that
4 opinion of evidence showing that the claimant
5 manufacturers would notice increases in the costs of
6 the components that they put into their cars?

7 A. I think the -- the point I made a moment ago was that --
8 was that you would observe that after a lag, but I would
9 -- but I think I'm not suggesting that costs were
10 entirely opaque to the -- to the Claimants.

11 Q. So you say that there might be a lag. Do you accept
12 that there would be pass-on after the lag?

13 A. I think I go back to the answer I gave a moment ago,
14 which is, I think, the key driver of ... So I'm
15 hesitating because -- I'm going to hold up my yellow
16 piece of paper -- these are matters for the Tribunal,
17 but my understanding of the witness evidence is that if
18 prices -- so if -- if -- if profitability is sufficient,
19 then my understanding is that, because of the evidence
20 that you read out, that you try and achieve
21 the profitability target over the life of the car. So
22 what I'm taking from that is, providing you achieve
23 the profitability over the lifetime of the car, you're
24 -- you're not going to change your pricing decisions,
25 unless benchmarking has changed and therefore you can

1 afford to raise the price of the car.

2 If profitability is inadequate, then I think -- then
3 I think that costs -- costs are a factor that you will
4 look at in that context, and I agree with your
5 proposition that -- or I understand the points that you
6 read out, namely that there are mechanisms by which
7 prices can be varied. I think the question of fact for
8 the Tribunal is whether prices would have been varied in
9 the scenario that Occupancy Safety Systems are a small
10 part of the cost of the cartel, and -- and I realise
11 this entire point is -- my next point is entirely in
12 dispute, but if there -- if there were to be a new
13 contract overcharge, that will be very small in
14 percentage terms, only 0.4% of the price of the car.

15 Q. Okay, so summarising that, I think that what you are
16 saying -- you can disagree if this is wrong -- is that
17 you do not in fact disagree with Dr Majumdar as to
18 the mechanism by which pass-on would have occurred, but
19 you say that it is for the Tribunal to assess
20 the factual evidence and to form conclusions as to
21 whether what the witnesses said about how they would
22 adjust net dealer prices actually happened, or would
23 happen in the real world; is that right?

24 A. Yes.

25 Q. Thank you.

1 You will recall, yesterday, that Professor Neuberger
2 asked you a question which he characterised as akin to
3 an exam question. Now, I am not going to step into
4 the Professor's shoes and ask you to answer that exam
5 question, I just want to pick up on some of the language
6 in which that question was couched.

7 So could we take a look at the question. It is in
8 the transcript at {Day9/64}. The question crops up at
9 line 24; do you see that?:

10 "I have ... one more question on pass-through ..."

11 A. Sorry -- sorry, just ...

12 Excuse me, sir, am I starting from the 36% number,
13 or am I starting somewhere else, sir?

14 Q. You are starting from line 24, at the bottom of
15 the page.

16 A. Yes, I've got you. Thank you.

17 Q. If we go over the page you can see that the question was
18 characterised as "a bit like an exam question". You see
19 that, Mr Hughes?

20 A. Yes, sorry, I'm just making a note. Do I need any of
21 these details, or ...?

22 Q. No. No, you do not. As I say, I hope this will be
23 uncontroversial. I just want to pick up on some of
24 the language in this question so that the Tribunal is
25 absolutely clear about what prices we should --

1 the Tribunal should look at when it is considering
2 pass-on.

3 So I would like you to read to yourself page
4 {Day9/65}, the page we are on, at lines 11 to 12, and
5 the reference there to increasing prices of cars by €20;
6 do you see that?

7 A. Yes, I'm just reading, sir.

8 (Pause)

9 Yes, thank you.

10 Q. Then the language at line 14 and the reference there to
11 average price of cars going up.

12 A. (Pause). Yes, thank you.

13 Q. Finally, to the language at lines 15 to 16 with
14 reference to B following A and increasing prices; do you
15 see that?

16 A. Sorry, just a second.

17 (Pause)

18 Yes, sir.

19 Q. Okay.

20 Now, I hope we will agree here, but I think you
21 would agree that, insofar as that question envisages car
22 companies dealing with increased costs by increasing
23 the recommended retail price of cars, or the price that
24 final consumers pay when they buy cars from dealers, it
25 is not addressing the relevant price for pass-on

1 purposes, namely the price that dealers pay when they
2 buy the cars from the OEM Claimants; would you agree?

3 A. The -- sorry, now I see the question on screen, I may --
4 I read this question, or listened to this question
5 yesterday as being referring to an increase in net
6 dealer prices. That was how I interpreted the question.
7 So I may have misinterpreted the question yesterday, and
8 if so, I apologise.

9 Q. No, no, no, there is no need to apologise, Mr Hughes.
10 I am simply asking you a question which relates to
11 the language that was used to describe the relevant
12 price, and I think we can actually leave aside what
13 the question was actually asking and perhaps you could
14 just address my question purely at the level of
15 the nomenclature that were used to describe the relevant
16 prices for pass-on purposes.

17 It is not the recommended retail price, you have
18 agreed that; is that not right?

19 A. Yes, sir.

20 Q. It is not the price that final consumers pay either,
21 is it?

22 A. Yes, sir.

23 Q. It is not any publicly-known price, like list prices or
24 recommended retail prices that you might see in a glossy
25 magazine?

1 A. I'm hesitating slightly with the last piece in the sense
2 that my understanding is that the car companies do
3 mystery shopping exercises and do have some good ideas
4 about what the net dealer price is of discounts --
5 including discounts, so that's subject to that caveat,
6 sir.

7 Q. Okay, well, we can take that caveat.

8 Would you agree with this, that it is difficult to
9 envisage a situation in which B follows A when A adjusts
10 its net dealer price, because the discounts from
11 the recommended retail price that A offers its dealers
12 will not necessarily be known to B?

13 A. I think this is outside of my strict area of expertise.
14 However, I did make a comment a minute ago, which was,
15 if the Tribunal indulges me to go slightly outside of my
16 area of expertise, my understanding is the automotive
17 car companies do do mystery shopping exercises to try
18 and to understand the discounts that dealers are
19 actually giving and use that to inform their assessment
20 of what's going on in terms of under the -- under --
21 discounts off the -- off the recommended retail price
22 that are being funded by the dealers.

23 Q. Okay.

24 A. But that's not strictly in my area of expertise, sir.

25 Q. Very well.

1 You are not relying on anything you have seen in
2 the evidence in relation to that either, are you?

3 A. No, I'm not, sir.

4 Q. So remaining on the subject of questions that you were
5 asked yesterday, you were also asked a series of
6 questions by the Chairman. Again, I am not so much
7 interested in the substance of what he was asking and
8 going over that, I just want to pick up on some of
9 the language again so that everybody is clear about what
10 is a relevant price for pass-on purposes and what is
11 not.

12 So the reference is transcript {Day9/75:11}. So
13 this is the Chairman of the Tribunal speaking, and
14 perhaps you could read that to yourself. He is asking
15 Dr Majumdar a question, I should clarify.

16 A. Sorry, I'm -- sorry, sir, I'm reading Dr Majumdar's --
17 the question to Dr Majumdar?

18 Q. At line 11, we see the Chairman --

19 A. Sorry. Thank you. Sorry.

20 Q. -- asking a question to Dr Majumdar.

21 (Pause)

22 Again, I am not asking you the same question, I am
23 just asking you to notice the reference there to an
24 increase in costs of 20 being passed directly through to
25 the consumer; you see that?

1 A. Yes, sir. Again, I must confess that I interpreted this
2 question as a net dealer price question yesterday in my
3 answer, and apologies again if I've mis -- if I've not
4 correctly understood the question yesterday.

5 Q. No, we can clarify that now. That is part of
6 the purpose of me asking.

7 Then going forward to {Day9/77:11-13}, please,
8 lines 11 to 13, the Chairman remarked that he did not
9 recall ever being offered €20 off a car by a dealer, but
10 that may just be a personal experience; you see that?

11 A. Yes, sir.

12 Q. So would you agree with me -- I hoped that this would be
13 uncontroversial -- that unless the Chairman's question
14 and observation relates to volume effects, the question
15 whether a discount has or has not been offered to
16 a final consumer when they are buying cars from dealers
17 is not the relevant question when we are dealing with
18 the question of pass-on?

19 A. I think there's two parts to this question. I think
20 the relevant question -- so the first part is a "yes",
21 the relevant question is: is there pass-on at the net
22 dealer level? I fully agree with that. However, how
23 that -- since we are discussing pass-on, what we are
24 discussing is changes in retail prices following that --
25 sorry, let me work backwards.

1 When we're trying to understand what's going on
2 here, if we're discussing pass-on and then retail prices
3 go up -- sorry, let's -- I'll start -- forgive me -- if
4 you indulge me, I'll start again.

5 The scenario that I was being asked to comment on
6 originally, in the whole framing of this question and my
7 interpretation of the question, is there were three
8 different scenarios being considered by the -- yesterday
9 by -- when we were discussing this, and the first
10 scenario was companies responding in different ways to
11 price increases, okay? And -- and the question that was
12 being posed that I was trying to answer was that: were
13 those companies likely to be adversely affected in
14 similar ways despite different -- different responses.
15 So -- so the - the three companies, one raised prices
16 for the full amount, one raised prices partially, one
17 kept prices the same, and the proposition that was being
18 put was that they were all equally adversely affected.

19 And the difficulty I had in agreeing completely with
20 that proposition, although I understood -- understood
21 its logic, was that there may well be volume effects
22 associated with those things, and those volume effects
23 will be very much affected by the -- how much
24 the consumer price goes up by, and that -- and
25 the context of all of the discussion here about pass-on

1 is that the -- whilst the focus of the discussion is all
2 about -- the focus of the discussion is all about what
3 happens to the net dealer price, underlying all of this
4 -- and, again, from the witness statements -- is
5 that clients are very much concerned about selling cars
6 and car volumes. So if they're -- so if a dealer price
7 leads to higher consumer -- a dealer price increase
8 leads to higher consumer prices, then that is a factor
9 that will affect companies' incentives to vary those --
10 vary those net dealer prices.

11 MR SCANNELL: Okay. I was hoping to keep the volume effects
12 separate from the pass-on --

13 THE CHAIRMAN: Mr Scannell --

14 MR SCANNELL: -- but that is all right.

15 THE CHAIRMAN: -- it may be we can cut this short.

16 MR SCANNELL: Yes.

17 THE CHAIRMAN: I obviously put the wrong question, because
18 I put it on the basis of the consumer price rather than
19 the dealer price, which is your --

20 MR SCANNELL: Yes, as long as --

21 THE CHAIRMAN: -- point.

22 MR SCANNELL: -- there is no --

23 THE CHAIRMAN: I am not sure whether it is --

24 MR SCANNELL: -- misunderstanding.

25 THE CHAIRMAN: -- fair to explore this, or helpful to

1 explore this with the witness.

2 MR SCANNELL: I am grateful.

3 THE CHAIRMAN: It was probably my fault.

4 MR SCANNELL: So finally on pass-on, Mr Hughes, I would like
5 to ask you a question about volume effects now.

6 So, first, do you agree that when it comes to volume
7 effects one is grappling with the question of what
8 happens after the OEM has passed on any overcharge to
9 dealers in the form of net dealer prices?

10 A. Yes, that's exactly correct.

11 Q. Okay.

12 So it is asking whether dealers might in turn try to
13 pass the additional costs they have had to bear onto
14 consumers by increasing the prices final consumers pay,
15 and it is dealing with the question of whether consumers
16 are likely to say in response, "I am sorry, that price
17 is too high, I will buy a different brand of car"; do
18 you agree?

19 A. So -- so I agree that the overall effects on volumes
20 will depend upon the two things that you've just
21 mentioned and something I omitted to mention.

22 The first thing you mentioned was that -- whether
23 dealer prices -- so the price the dealer goes up and
24 then the price goes up to consumer and that will affect
25 by how the dealer ...

1 The thing I omitted to mention in these calculations
2 is VAT, for which I apologise, because cars in Europe
3 are subject to VAT, and what that means, so in the UK
4 it's 20%, as we all know, it's 19% in Germany, it's 20%
5 in France, 20% in Italy, and what that VAT does, it also
6 attenuates or increases the extent to which higher
7 dealer prices are -- are passed on to consumers in high
8 prices and that's something I omitted from
9 the illustrative calculation I did in my second report,
10 for which I apologise.

11 Q. So it is not actually in your evidence?

12 A. It's not in my evidence, sir. I'm just highlighting --
13 you asked me to comment on two points and I think I --
14 I just wanted to highlight that I made a mistake, which
15 I only thought about last night, for which I apologise.

16 Q. I think that you and Dr Majumdar agree, do you not, that
17 the question whether a consumer is willing to pay a bit
18 more, or says, "No, thanks, I will go elsewhere",
19 depends on what economists call "elasticities"?

20 A. Yes.

21 Q. In other words, how willing the prospective buyer of one
22 car is to switch to another brand of car?

23 A. It's not necessarily another brand -- so, yes, another
24 brand, another model, etc, yes, sir.

25 Q. If I understand the position correctly, you rely on an

1 American paper to say that elasticity is high and
2 Dr Majumdar relies on a European paper to say that
3 elasticity is low. Now, the Tribunal may have to
4 decide, ultimately, which of these two positions to
5 prefer. I am going to be as fair as I can to you. Can
6 you suggest an answer for the Tribunal as to which of
7 the two positions it should prefer?

8 A. I -- I wonder if we could pull up the paper that
9 Dr Majumdar wishes to rely on, which is -- and I'm going
10 to mispronounce her name -- Laura Grigolon, and there's
11 a table 5 in that paper, because this is the basis on
12 which Dr Majumdar compares elasticities reported in
13 Germany with elasticities reported in America.

14 Q. That paper is now on the screen for you {E2/17/1}.

15 A. That's very kind. Could you -- could we please go to
16 table 5 in this paper?

17 Q. Certainly. Could we try {E2/17/34}, please. Is that
18 the table you have in mind?

19 A. Yes. Thank you very much.

20 So what -- what Dr Majumdar says in his response to
21 the -- the proposition is he wishes to -- he -- he's
22 using the -- the column that's labelled "Outside", and
23 he's using -- he -- the word that he uses, he says this
24 is an industry-wide elasticity, and these industry-wide
25 elasticities, in Germany, are much lower than the 0.5

1 that's referred to in the US, and on the basis of this
2 he is saying that the elasticity of demand is much lower
3 -- the industry-wide elasticity of demand is much lower
4 in Germany than it is in America. So that's the column
5 that's labelled the "Outside". Okay, so that's --
6 that's why he's taking the number. And I agree that
7 not -- taking the first "Sub-compact" [sic] and
8 "Outside", that the "Outside" is 0.01.

9 What I wanted to highlight, though, is two things,
10 is this is not a known price elasticity. What
11 the footnote to the table says is it reports
12 segment-wide elasticities, which are the negative
13 numbers that you can see in the columns, and it produces
14 cross-price elasticities, which is -- which is when they
15 were pricing. So the outside numbers that he's citing
16 here are not industry-wide elasticities, so relying on
17 this to say --

18 THE CHAIRMAN: So, sorry, I am not following you. So what
19 are they then?

20 A. So they're cross-price elasticities, sir, by which
21 I mean, if you raise the price for example of
22 a sub-compact vehicle, the sales of the outside option,
23 which is not buying a car, I believe, will go up by --
24 by a very small percentage. There's a very diluted
25 effect, okay? But these are simply not industry-wide

1 elasticities. So that's the first thing I would say.

2 The second thing I would say is, fortunately, you
3 can work them out. If you -- if you add the row, so if
4 you add up the sub-compact rows, all the compact rows,
5 and then weight those elasticities by the purchasing
6 share of the various segments, you can work out an
7 industry-wide elasticity. And the preferred model of
8 the lady in question, which I believe is order --
9 "Nested Logit 1", I believe that's her preferred model,
10 but if you actually work out the industry-wide
11 elasticities, you actually get to an elasticity of about
12 minus 1, which is a lot higher than the industry-wide
13 elasticity that are arrived in the US.

14 So I think -- I think there's been a misinterpret --
15 there's been an accidental misinterpretation by
16 Dr Majumdar of what are the industry-wide elasticities
17 in the table. As a general premise -- so I think that's
18 the first thing, and --

19 THE CHAIRMAN: Sorry, just remind me what does industry-wide
20 elasticity mean?

21 A. My apologies, sir.

22 THE CHAIRMAN: No, it is fine.

23 A. If -- what the industry-wide elasticity measures is if
24 the price of all cars goes up by 1%, how much does
25 demand go down by. So the US paper calculates an

1 industry-wide elasticity of minus 0.5. So if the price
2 of the estimates -- so if the price of the car goes up
3 by 1%, the volume will go down by half a per cent. And
4 Dr Majumdar was saying, "A-ha, look at these numbers,
5 because they show a very different pattern", and I think
6 he has accidentally -- I'm sure he's not done it
7 deliberately -- he's accidentally made a mistake in
8 interpreting these outside numbers as industry-wide own
9 price elasticities, whereas they are clearly -- in my
10 opinion, they're clearly not. And if you work out
11 the number correctly, you'll get to a number of minus 1.
12 So it looks like, on the basis of European research,
13 the European research is suggesting a higher, more price
14 sensitivity than the US research.

15 So when I be relying on -- I use the US numbers,
16 I use the US numbers. Dr Majumdar said, "Well look at
17 these European numbers", and what I would say -- is that
18 the European elasticities actually seem to be higher
19 than the numbers that I'm using in the US.

20 In an ideal world, obviously I would have used
21 European numbers, but I was unable to find any European
22 numbers at a level of the individual car or vehicle, so
23 I couldn't find any -- I couldn't find any numbers of
24 that nature.

25 MR SCANNELL: Mr Chairman, I was keen to ask that question

1 so that this particular point that you may have to
2 decide upon, you get some assistance from. Could
3 I respectfully suggest that when Dr Majumdar takes
4 the stand again, he be asked the same question when he
5 is cross-examined.

6 THE CHAIRMAN: Yes. That would seem sensible, yes.

7 MR SCANNELL: I think the Tribunal might find it useful.

8 Mr Chairman, I have some brief questions, much
9 shorter than the section I have gone through, on
10 financing losses. I have spoken to Mr West and
11 I understand that there is no time pressure this
12 afternoon, so in those circumstances, could I suggest
13 that I continue after lunch?

14 THE CHAIRMAN: Very good.

15 So to get Dr Majumdar's answer on this paper, do you
16 want to just take that in-chief? Is that appropriate?

17 Mr West, do you have any objection to that, when we
18 get to Dr Majumdar?

19 MR WEST: No.

20 THE CHAIRMAN: No.

21 Okay?

22 MR SCANNELL: Yes, that is fine.

23 THE CHAIRMAN: Just because -- I will raise it now because
24 we have got five minutes and I may forget. It would be
25 helpful to have certain documents in Word sent through

1 to me. So particularly, I think, the skeletons,
2 certainly, and closing skeletons, when we get to that,
3 and clean versions of the pleadings in Word would be
4 very helpful, and expert reports.

5 MR SCANNELL: Yes.

6 THE CHAIRMAN: Yes, at least. Thank you very much.

7 MR SCANNELL: Thank you, sir.

8 (12.57 pm)

9 (The short adjournment)

10 (2.04 pm)

11 MR SCANNELL: Mr Hughes, I would like to ask you some brief
12 questions now on financing losses, all right?

13 Now, to contextualise the questions I am about to
14 ask, could you turn up your first report at
15 paragraph 6.4.16, please. That is in the bundle at
16 {E1/2/105} and I would like to take a look at 6.4.16
17 there. So looking at the first two lines, you say:

18 "I consider that the Claimants would have used
19 the extra cash absent the Cartels to reimburse (or not
20 issue), either fully or partially, the most expensive
21 debt (in the case of PSA and FCA) or borrowings (in
22 the case of VO)."

23 So the approach you have taken is that each of
24 the Claimants would have used all of the money that you
25 say they have been overcharged to reduce debt; is that

1 fair?

2 A. Yes, that is correct.

3 Q. Okay.

4 Could you imagine a time when the evidence shows
5 that a relevant claimant would not, on the balance of
6 probabilities, have applied cost savings either to
7 reduce debt or to avoid debt, so one knows that
8 the savings would simply have been spent on investments
9 or dividends, for example. Do you agree that it would
10 be wrong to claim compound interest as if the claimant
11 would have used the money to avoid debt?

12 A. I agree with that proposition.

13 Q. If we consider a time when a claimant says it does not
14 know, on the balance of probabilities, what proportion
15 of any cost saving would have been used to avoid debt
16 and what proportion would have been used for other
17 purposes, do you think it is fair to apply a single rate
18 on the basis that all of the money would have been used
19 to avoid debt?

20 A. I think, in that factual scenario, it would be
21 appropriate to consider what they might have done
22 instead with the money, and in particular whether
23 the cost of debt may have been too low a number to use,
24 or whether it would have been possibly too high
25 a number. It might have been too low a number to use,

1 for example, if they might have otherwise invested in
2 that -- invested in something.

3 Q. Thank you.

4 So can I take it from that answer then that you
5 would consider this to be another of those issues that
6 it is for the Tribunal to decide on the facts what it is
7 likely the relevant claimant would have done?

8 A. Yes. Yes, exactly, sir.

9 Q. Now, thinking specifically about Fiat/FCA, its debt was
10 primarily denominated in bonds; is that your
11 understanding also?

12 A. Yes, it is, sir.

13 Q. So can I ask you before I ask my next question, this
14 morning, I asked you whether you had had an opportunity
15 to consider the cross-examination of the pass-on
16 witnesses and whether you had had an opportunity to
17 review the transcripts of the evidence they gave under
18 cross-examination. Have you had an opportunity to see
19 live the cross-examination of Mr Laxenaire,
20 Ms Teusen-Krapp or Mr Bertino?

21 A. No, I have not.

22 Q. Have you reviewed any of the transcripts of their
23 cross-examination?

24 A. No, I have not.

25 Q. Okay.

1 In the interests of time, I am not going to take you
2 through everything that they said, but in the context of
3 Fiat, Mr Bertino agreed that compound interest was not
4 payable on debt denominated in bonds. He said that
5 coupon payments had to be made pursuant to the terms of
6 the bond and those coupons were proportions of
7 the underlying value of the bond. Are you with me so
8 far?

9 A. I -- I understand what you've said, sir. What's not
10 clear to me is whether those coupons are calculated on
11 a compound basis or a simple basis. That's a factual
12 proposition I don't know, I'm afraid.

13 Q. Well, did you not consider that question in the context
14 of what rate to apply to Fiat?

15 A. My understanding is that -- if I give a general answer
16 and bearing in mind I haven't read the underlying
17 transcripts, my understanding is that when you borrow
18 money on the bonds, that the interest that you
19 effectively pay over time is calculated on a compound
20 basis. That's my understanding of the general
21 proposition, but I haven't seen the specific transcript
22 references to which the gentleman is referring to, or
23 indeed whether it covered this point in detail.

24 Q. Are you aware of Mr Bertino saying any of that in
25 the witness statement that he has filed in these

- 1 proceedings?
- 2 A. I think so. I would need to look at the underlying
3 witness statement.
- 4 Q. Well, let me see if I can get to the bottom of
5 the approach that you took when you drafted your report.
6 So, in your first report, you say that you applied
7 the coupon rate to all of Fiat's debt from 2003 to 2020;
8 do you recall saying that? We can go to your report, if
9 you wish?
- 10 A. I think it would be helpful to go to my report, please,
11 sir.
- 12 Q. Okay, so it is {E1/2/105}, the same page as we were in,
13 and it is just above where we were looking, and I am
14 looking at the third bullet point, so perhaps you could
15 refresh your memory there.
- 16 A. Sir, is the third bullet point the one that's
17 labelled "VO"?
- 18 Q. Sorry, I do apologise. That's entirely my own mistake.
19 For Fiat, yes, the second --
- 20 A. I've got you, sir, thank you.
- 21 Q. -- it is the second bullet point. So it is the coupon
22 rates is what I want to focus on.
- 23 A. Could you please repeat your question, sir?
- 24 Q. As I understand it, you -- in your report, you applied
25 the coupon rate as the interest rate for Fiat's debt; is

1 that right?

2 A. Yes, that's my understanding.

3 Q. Okay.

4 Does that mean that you have treated the bond as if
5 it were a loan under which the rate of interest that was
6 payable is the value of the coupon expressed as
7 a percentage of the value of the bond?

8 A. I believe that's correct, but I haven't got
9 the underlying maths in front of me, in terms of how
10 exactly it was done.

11 Q. Are you comfortable recalling whether you compounded
12 the amounts that were payable by Fiat on its bonds?

13 A. I believe, sir, they were compounded.

14 Q. So, again, thinking about FCA/Fiat, even if its
15 underlying debt is predominantly denominated in bonds,
16 if additional cost savings would not have been used to
17 change the bond position, issuing a new one or redeeming
18 a bond early, for example, but would instead have been
19 used to reduce different forms of underlying debt, would
20 you agree that it would be more appropriate to apply
21 the interest rates applicable to those other debt
22 instruments rather than an interest rate referable to
23 bonds.

24 A. I think the relevant answer to this question is whether
25 the amount of the bond might have been different in

1 the circumstances where there were additional profits
2 available and the financing needs were therefore
3 reduced.

4 Q. Okay. Perhaps I could ask that question again. I am
5 not asking about a situation where the amount of
6 the bond changes at all. I am simply asking about
7 the approach that you think is the right approach to
8 take where predominantly Fiat's debt is denominated in
9 bonds, and they might be very large bonds, and cost
10 savings in the business might make no difference at all
11 to those bonds in the sense that they are not used to
12 redeem bonds early, they are not used to avoid issuing
13 further bonds, but they might be used or applied to
14 different forms of Fiat debt. Do you think that it
15 remains appropriate to apply some rate that is referable
16 to the bonds rather than a rate that is applicable to
17 a different form of underlying debt?

18 A. I think the factual premise to your question is worth
19 pausing on briefly. The question -- the question is
20 whether they would have borrowed that -- the bond would
21 have been in the same size, not that they wouldn't have
22 had the bond but that it would have been the same size
23 in the -- in the counterfactual in which there was no
24 OSS overcharge.

25 But turning to your very specific question, I think

1 if the factual position is that the amount of the bond
2 wouldn't have been changed at all but instead it would
3 have been used to repay other debts, then I think
4 the rate of interest on those other debts would be more
5 appropriate.

6 Q. I am grateful. Thank you.

7 Just to follow up on that question. If the Tribunal
8 were to conclude that additional cost savings on OSS
9 components is unlikely to have resulted in a decision
10 either to avoid issuing a €500 million bond, for
11 example, or redeem an existing bond of that size any
12 earlier, is it appropriate to apply any compound
13 interest rate applicable to bonds?

14 A. I think the -- the nature of my understanding is that
15 the overall price of the bond is calculated on
16 a compound basis and therefore I think it would be --
17 generally be appropriate to apply compound interest on
18 debts. I think the factual question you've raised is,
19 if I take as a given that the amount, quantum, etc, of
20 the debt and there's no repayment of the debt, if I take
21 all of those factual propositions as given, then I think
22 your proposition was -- sorry, I'm a bit puzzled by your
23 proposition, because it seems to me, if the money is
24 used to repay debts, then you pay compound interest on
25 those debts. So I think -- I think it's a -- it is

1 a factual question for the Tribunal, but I think it's
2 a question of whether it is -- and correct me if I'm not
3 expressing this correctly -- but it's a question, on
4 the balance of probabilities, what would the money have
5 been used for? Would it have been used for a purpose of
6 debt -- of avoiding debts or repaying debts and
7 therefore avoiding the compound interest of the debt?
8 I think that would be the relevant factual question,
9 sir.

10 Q. That is helpful, thank you.

11 So, I think we are actually agreeing that
12 the relevant question is: would the money, on
13 the balance of probabilities, have been used to avoid
14 debt? The question that I was asking was, which of
15 possibly many available interest rates does one select
16 for the compounding purpose? If the evidence suggests
17 that the money would not have been used to change
18 the bond position but might have been used to change
19 the debt position under some other instrument, I think
20 you would agree that the appropriate interest rate to
21 apply would be the interest rate under that instrument;
22 is that correct?

23 A. I'm going to say yes, but just to make sure that
24 my "yes" is treated as a complete answer, I think
25 the factual question is avoid and reduce debt and what

1 debt you would have avoided and reduced in those factual
2 circumstances. But subject to my correctly answering
3 your question, I think that -- the answer is, yes, with
4 those additional words.

5 Q. Thank you.

6 Now, you will recall that Ms Teusen-Krapp's evidence
7 in her witness statement on behalf of VO is that VO used
8 a cash pool; do you remember that?

9 A. I do remember that, but I think it might be helpful to
10 pull up the underlying witness statement, if that's --
11 if that's possible, if you want me to refer to it or
12 understand it, sir.

13 Q. Well, perhaps we could take a reference from
14 the transcript of her evidence in relation to this so we
15 can see what she said in answer to some questions that
16 were asked to her about the use of cash pools. We will
17 get that reference for you, Mr Hughes.

18 A. Thank you.

19 (Pause).

20 Q. Could we try {B/21/6}, please.

21 So perhaps you can just read what she said in her
22 witness statement to refresh your memory.

23 A. Sir, am I -- am I reading the right paragraphs, 16 and
24 17, sir?

25 Q. Yes, 16, I think --

1 A. Thank you.

2 Q. -- covers the point.

3 (Pause).

4 Okay, and you may also recall page 9 of this witness
5 statement, paragraph 27, if we could turn to that
6 {B/21/9}.

7 (Pause).

8 A. Sir, am I reading paragraph 27?

9 Q. 27, yes.

10 A. Thank you, sir.

11 (Pause).

12 Thank you, sir.

13 Q. Okay. So VO used a cash pool.

14 Then perhaps we could just see one brief reference
15 to her cross-examination where she described how that
16 pool worked. So {Day5/106}, please, and perhaps we
17 could begin at line 15 and the question she was asked
18 there:

19 "The interest rates earned on positive balances [in
20 the cash pool] were lower than the interest rates
21 charged on negative balances?"

22 Is the question she was asked. Do you see that?

23 A. Yes, sir.

24 Q. She answered:

25 "Yes, based on market rates."

1 She was then asked:

2 "Now, it is right, is it not, that you have not
3 explained anywhere in your witness statement whether VO
4 had a positive or negative balance in the global cash
5 pool of its shareholders from one year to another?"

6 Ms Teusen-Krapp responded:

7 "This is correct. I mean, a balance could change
8 every day and this is no information I have any more or
9 I have seen."

10 Do you see that?

11 A. Yes, sir.

12 Q. So can we then turn up what you say in your report in
13 relation to VO. So that is {E1/2/105} again, and it is
14 the third bullet this time, the one I mistakenly took
15 you to earlier. So this is VO, the third bullet.

16 A. Yes, sir.

17 Q. So you seem to be saying there that you applied the cash
18 pool rate to 100% of the amounts that you say VO was
19 overcharged; is that fair?

20 A. Yes, that's correct, sir.

21 Q. Okay. Can you confirm if that is the cash pool rate for
22 negative balances or the cash pool rate for positive
23 balances?

24 A. I believe, sir, I have a single rate that I've applied,
25 and I can't recollect off the top of my head whether

1 that -- what that single rate is, but my recollection is
2 I applied a single rate, sir.

3 Q. What would that single rate have been?

4 A. Sorry, sir, I just don't remember the underlying
5 spreadsheet.

6 Q. Okay.

7 A. I -- I believe -- sorry, my -- my recollection is that
8 it was a rate from borrowing, but that's -- that's my
9 recollection, which might be flawed, sir.

10 Q. Okay. So you think that the rate that you applied might
11 have been the cash pool rate for negative balances; is
12 that right?

13 A. Yes, sir. I only have a single interest rate. That is
14 my recollection.

15 Q. Okay.

16 Would you accept that if the cash pool was in
17 a negative position at one time and then, later in time,
18 it was in a credit position that it would not make sense
19 to continue compounding the negative figure as if
20 the balance had remained negative?

21 A. Yes, sir, on that factual position, the compounding
22 should be on the right interest rate that is being
23 applied at that -- for the cash pool at that level.

24 Q. Would you accept that in order to calculate the true
25 measure of financial loss, if any, one would have to

1 know the balance standing to the cash pool account from
2 time to time?

3 A. I think, sir, one would need to know whether it was
4 negative or positive, which I believe is the proposition
5 you're putting to me, unless I've misunderstood you,
6 sir.

7 Q. No, you have understood me correctly.

8 What have you done to ascertain what the balance
9 standing in the cash pool was from time to time?

10 A. This is not a question I've specifically looked at, sir,
11 and what I've simply used is the single interest rate
12 figure that I have.

13 Q. Does that single figure that you have applied represent
14 the only step that you have taken to smooth out
15 the fluctuating status of cash pool balances?

16 A. Sir, I don't think -- the answer to your question is
17 yes, but I don't think I've -- to give a full answer,
18 I don't think I've looked at the question as you have
19 posed it to me in terms of positive or negative
20 balances, I think I've just taken the interest rate that
21 I had.

22 MR SCANNELL: Thank you, Mr Hughes.

23 THE CHAIRMAN: Thank you very much, Mr Hughes. You are
24 released from your oath.

25 MR WEST: Sorry --

1 THE CHAIRMAN: Oh, sorry, I beg your pardon, Mr West. I do
2 apologise.

3 Re-examination by MR WEST

4 MR WEST: Just a very few questions going right back really
5 to the earliest answers you were giving in your
6 testimony earlier on today, Mr Hughes.

7 Some questions were put to you at the outset of your
8 testimony this morning to the effect that you were
9 expressing opinions on the facts and documents in
10 the case and you said you had made it clear elsewhere in
11 your report that these were matters for the Tribunal,
12 including in your executive summary. So can I just ask
13 you -- show you some paragraphs to ask you whether that
14 is what you had in mind.

15 Now, the first one is -- so this is in your first
16 report {E1/2/1}, paragraph 1.5.1 {E1/2/14}.

17 THE CHAIRMAN: Is this necessary really? I mean --

18 MR WEST: I am happy simply to provide --

19 THE CHAIRMAN: -- the references are there, I have read
20 them. I am not sure that it is necessary to get
21 the witness to point them out.

22 MR WEST: You were shown a decision of the Commission
23 relating to the merger between KSS and Takata. Could
24 you look at that at {J2/95/11}. You will see there are
25 a number of tables which may assist you with this

1 question. Do you know what period of time this report
2 relates to?

3 A. From the table, sir, it relates to 2015/16 and 17, sir.

4 Q. You also referred to a diagram. Just so we can be clear
5 what you are referring to there in your testimony, could
6 you look at {E1/4/22}. Is that the diagram you had in
7 mind?

8 A. Yes, sir, that is the diagram I had in mind.

9 Q. What point do you draw from this diagram in relation to
10 the question of buyer power that was being put to you?

11 A. I think the concept that I was trying to express was
12 some scepticism as to whether the buyer power of large,
13 sophisticated OEM companies meant that it was not viable
14 for there to be any effective coordination in relation
15 to car parts, and the point I was making is that there's
16 been a large number of findings of such car parts by
17 the European Commission, and there are various -- I know
18 that there are various live investigations of additional
19 car parts on top of these that one can see on
20 the screen.

21 MR WEST: Thank you very much. Those were all of my
22 questions.

23 THE CHAIRMAN: Thank you, Mr Hughes. You are released from
24 your oath.

25 A. Thank you.

1 (The witness withdrew)

2 DR ADRIAN MAJUMDAR (continued)

3 THE CHAIRMAN: Dr Majumdar, just to remind you, you are
4 still under oath.

5 A. Yes, sir, thank you.

6 THE CHAIRMAN: I think we are going to start with
7 the exciting topic of elasticity; is that right?

8 MR SCANNELL: It will not take long.

9 THE CHAIRMAN: Good.

10 Examination-in-chief by MR SCANNELL

11 MR SCANNELL: Good afternoon, Dr Majumdar.

12 A. Good afternoon.

13 Q. If I understand the position correctly, when it comes to
14 elasticities for the purposes of volume effects
15 analysis --

16 A. Yes.

17 Q. -- Mr Hughes relies on an American paper to say that
18 elasticity is high and you rely on a European paper to
19 say that elasticity was low?

20 A. Yes.

21 Q. The Tribunal may ultimately have to decide which of
22 the two positions to prefer. Can you suggest how
23 the Tribunal might go about that task?

24 A. Yes, sir. So I -- well, I'm aware of the --
25 the challenge that Mr Hughes made to just -- just before

1 lunchtime, and I've gone away and had a look at
2 the paper and I think that -- I'm grateful for Mr Hughes
3 for checking and I think he's correct, I think actually
4 I may have misreported a figure. I can see what has
5 happened and why it has happened and for that reason
6 I would prefer Mr Hughes' estimate of elasticity.

7 Just to explain what that means. When we looked at
8 the -- I caveat, ideally I'd have more time to look over
9 it, but just to assist the Tribunal, I think it's best
10 to go this way. What does that mean? It means that
11 when I calculated the volume effect, there were three
12 parameters where Mr Hughes and I disagreed, and there
13 are now only two because we're going to use his for
14 the elasticity. In terms of what that means, I, in
15 the joint expert statement, had estimated a volume
16 effect of 38-42%. Just to explain what that means is we
17 have pass-on of 48%, then we net off a certain amount,
18 because if the Claimants pass-on, they lose some volume,
19 they lose some margin and then we just need to net that
20 off the figure. And so I had reported 48 net of
21 a volume effect would be 38 to 42. If I replace my
22 assumed elasticity of 2 to 3 with Mr Hughes', which is
23 4, in absolute terms I get 35. So in the grand scheme
24 of things, the difference is small, we move from 38 to
25 42 to 35, sir.

1 THE CHAIRMAN: Thank you.

2 MR SCANNELL: Just before I sit down, Dr Majumdar,
3 the question of elasticities is addressed, is it not, in
4 row 83 of the joint expert statement at {E1/13/47}.

5 A. Sorry, which -- which tab number was that, please?

6 Q. 13.

7 A. 13, thank you. And did you say 40 --

8 Q. Page 47.

9 THE CHAIRMAN: It will come up on the screen --

10 A. Oh, thank you, sir. I should know by now, you're
11 absolutely right. I have it, yes, thank you.

12 MR SCANNELL: Okay.

13 You see your position set out in the third column
14 there.

15 A. Yes.

16 Q. Does anything that you have just clarified change what
17 you say in that box?

18 A. I just need to change a small number as -- as I just
19 explained to the Tribunal. I think if we go over to
20 the next page {E1/13/48}, yes, so right down at
21 the bottom, you see I mention 38 -- well, 38.4 to 41.6.
22 I think that will now become 35 instead, as a result
23 of --

24 THE CHAIRMAN: Right at the bottom, yes.

25 A. Yes, so the very bottom line, we can see 38.4 to 41.6.

1 I believe that will become 35 as a result of using
2 Mr Hughes' elasticity of 4 instead of mine of 2 to 3.
3 I would ideally have a little bit more time to check
4 this, but I -- I believe that that's where we end up,
5 sir.

6 MR SCANNELL: Well, I dare say the Tribunal will find that
7 helpful. Thank you, Dr Majumdar.

8 Cross-examination by MR WEST

9 MR WEST: Good afternoon, Dr Majumdar.

10 A. Good afternoon.

11 Q. In the hot tub yesterday, we were discussing the outcome
12 of the by-platform sensitivity --

13 A. Yes.

14 Q. -- as you will recall. So this assumes that Mr Hughes'
15 model is otherwise correctly specified and is focusing
16 on the question of the RFQ date and what assumption one
17 makes to find that. We looked at the results of that
18 sensitivity in {E1/18/1}.

19 A. Yes.

20 Q. But in fact Mr Hughes had prepared an even more high
21 level summary of these results in {E1/16/3}. Do you see
22 that?

23 A. I -- I can see that. Thank you, you've blown it up,
24 thank you.

25 Q. Just to explain the colour-coding here: green means

1 statistically significant to either 1 or 5%; yellow is
2 between 5 and 10%; orange is over 10%; and red is no
3 overcharge found. Just to explain that colour-coding.

4 Now, what this does not set out are the results of
5 Mr Hughes' original model with the 30-month assumption
6 to identify the RFQ date. But there is a table in
7 the bundles which adds that back in and that should be
8 at {E1/16.4/1}. Do you see that? So the two columns on
9 the right are exactly the same as the ones we just
10 looked at, but now we add back in the Hughes 1 results;
11 do you see that?

12 A. I see that, yes.

13 Q. The colour-coding, again, remains the same.

14 A. Yes. May I just check, please, how you described
15 the orange and the red, please?

16 Q. The orange was a positive overcharge but statistically
17 significant only above 10%.

18 A. Yes, okay, thank you.

19 Q. Mr Hughes' original model was based on, as I said,
20 the 30-month assumption between the start of production
21 and the RFQ date; that is right, is it not?

22 A. Yes, Mr Hughes' original model, where the article date
23 was unknown, would take the start of production date and
24 subtract 30 months to estimate the RFQ date, yes.

25 Q. You referred to that as a reasonable starting point in

1 your report, did you not, at paragraph 95?

2 A. I did, yes.

3 Q. So the Tribunal will be justified -- given we do not
4 know the RFQ date, the Tribunal would be justified in
5 attributing some weight to that as a reasonable starting
6 point?

7 A. Well, I think the position has -- I think the position
8 has moved on since then, since both Mr Hughes and I have
9 had what I certainly found to be very helpful exchanges
10 on this point. And while I think I have no problem with
11 the fact that Mr Hughes adopted the approach that he did
12 in his report, I understood why he did it, I think we've
13 both learnt a lot more now about known RFQ dates and how
14 they're distributed, which I think informs how we would
15 then estimate unknown RFQ dates, and we had a discussion
16 yesterday, where I think that, on the balance, what
17 we're calling method B is a better version than -- than
18 Hughes 1.

19 Q. What we see here, just focusing on Hughes 1 in this
20 diagram, is that it produces positive overcharges which
21 are statistically significant to either 1 or 5% for all
22 categories with the exception of the early period for
23 seatbelts, so this is the original model results, and in
24 relation to the early period for seatbelts,
25 the Claimants are not claiming; do you see that?

1 A. I -- I do see that. I would say that we -- we do need
2 to put in the coefficients here. So the colours are
3 very helpful in terms of identifying statistical
4 significance, as you mentioned earlier. I think,
5 really, to draw maximum information from this table, we
6 do need to add in the magnitude of the coefficient. So
7 we had a discussion yesterday, when we were talking
8 through inferences one would draw about sensitivity
9 analysis, and it's not only the statistical significance
10 that we need to look at, we also need to look at
11 the extent to which the coefficients jump around as
12 well, and so I think it would be very helpful to have
13 those added in to this table too -- before we can really
14 make an assessment of them.

15 Q. Well, we can certainly prepare that, but we do not have
16 that in this. The coefficients are, I think, in
17 the document we were looking at, at tab 18 {E1/18/1}.
18 But just focusing on this document {E1/16.4/1}, what we
19 then see, if you look at the "By-platform
20 sensitivity (b)", for airbags and seatbelts, one finds
21 essentially the same results, does one not, positive and
22 statistically significant overcharges on all periods
23 the Claimants are claiming for?

24 A. Right, so let's start with airbags. So we went through
25 this yesterday. So airbags, the early period and -- so

1 I'm looking at Hughes 1, so I'm looking at the first
2 column on the left, the early period, positive
3 statistically significant overcharge, and I think
4 the coefficient there, I'm just reminding myself, is
5 0.29.

6 THE CHAIRMAN: Sorry, can you just remind me where we find
7 the coefficients?

8 Mr West, you just said so --

9 MR WEST: Yesterday we were looking in tab 18 {E1/18/1}.

10 THE CHAIRMAN: Tab 18?

11 MR WEST: Yes.

12 THE CHAIRMAN: Do you mean tab 18? Oh, I see, at tab 18,
13 yes, okay.

14 MR WEST: Known platform B is the column on the right-hand
15 side.

16 THE CHAIRMAN: Thank you. Sorry.

17 A. Over to me? Yes, okay, so ... thank you.

18 I -- so I was just talking through the coefficients
19 and I am looking, first of all, at airbags {E1/16.4/1},
20 so I'm reading across from Hughes 1 to sensitivity A or
21 method A and I'm just trying to remind myself now of
22 the sensitivity A figures, which I need to do, so please
23 just bear with me.

24 MR WEST: Well, I was looking at sensitivity B for
25 the moment.

1 A. Oh, sorry, for sensitivity B. Okay, fine, we can do
2 that.

3 Right, so -- yeah, okay, so the coefficient for
4 the early period then is 0.269 for sensitivity B or
5 method B, and for the main period it is 0.09. So this
6 is -- we discussed this yesterday, and so I agreed
7 yesterday that if one looks at Hughes 1, early period
8 and main period, and compared those coefficients to
9 sensitivity B, the coefficients were similar and they
10 were both similar in terms of statistical significance.

11 Q. That is for airbags?

12 A. That's for airbags.

13 I also made the point that they -- one had to ask
14 the question intuitively whether those magnitudes made
15 -- made sense, but I won't go through that --

16 Q. I will come back to that.

17 A. -- I won't go through those points again. Yes, that
18 was --

19 Q. The same applies for seatbelts, does it not?

20 A. For seatbelts, so Mr Hughes' model for the Hughes 1 is
21 I think a coefficient of 0.163, and I think it's 0.221
22 for -- for seatbelts in method B, so they are
23 sufficiently similar and they are both positive and
24 statistically significant, I would agree with that, as
25 I said yesterday.

1 Q. So if one assumes the Tribunal is asking itself
2 the question whether, on the balance of probabilities,
3 these overcharges existed, then just based on
4 the by-platform sensitivity, what this table suggests
5 for both airbags and seatbelts is that they did?

6 A. What I -- I wouldn't agree with that, because I don't
7 think one can simply just look at these two results and
8 put to one side the other analyses that I have
9 presented. So what I said yesterday was, because
10 the Hughes 1 and sensitivity B results look similar,
11 the sensitivities that I applied to the Hughes 1 model
12 will probably carry over to the sensitivity B model for
13 airbags and also for seatbelts. So I was very keen to
14 emphasise that one shouldn't only look at Hughes 1 and
15 sensitivity B by themselves, as in this particular
16 chart, but one should also be very mindful of
17 the sensitivities that showed those results to be
18 non-robust. For example, if one puts a single dummy for
19 the cartel period for the early period and the main
20 period, ie not separating between the two, then one will
21 see the airbags results actually disappears and turns to
22 zero, and I strongly suspect that will be the same for
23 sensitivity B.

24 Q. Looking at steering wheels, in relation to steering
25 wheels, there are fewer contracts, are there not, than

1 in relation to either seatbelts or airbags?

2 A. There are fewer. There are something like 63 versus 100
3 or so, something in the order of that magnitude, if
4 I remember correctly.

5 Q. Indeed.

6 Here, what one finds is that I accept a negative
7 overcharge in the main period for steering wheels, so
8 one negative result, but then on both sensitivity B and
9 A, the other results for both the early and main periods
10 is a positive overcharge, which is significant, at
11 between 5 and 10, and in fact it is either 5.2 or 6 for
12 those results. We see that, do we not?

13 A. I can see it, but just bear with me one second while
14 I remind myself of the coefficients, because as I -- as
15 I said before, I do think it's important to be mindful
16 of -- of what they are.

17 So we're looking at steering wheels, sensitivity A.
18 Right, so, I mean, I guess there are a couple of points
19 to make, which is, it puzzles -- it puzzles me as to why
20 we would suddenly introduce sensitivity A now, not
21 having discussed them before. I mean, if we're going to
22 consider a sensitivity, we need to be consistent and
23 consider it all the way through. So if we're going to
24 consider sensitivity A, we should consider it for
25 airbags and we should consider it for seatbelts as well,

1 in which case the results start to look less robust.
2 For example, in the main period, for airbags, or
3 the seatbelts, if we look at what happens to
4 the coefficient, we may well find that it differs quite
5 a lot. So for seatbelts in sensitivity A, it drops to
6 0.016, so that's essentially a zero overcharge, which
7 suggests non-robustness of that result. Let's have
8 a look for airbags. And for airbags, the main period is
9 0.08, so it's not statistically significant. So, again,
10 not -- not a robust result.

11 So I think as soon as we introduce sensitivity A, if
12 we're going to have a consistent treatment of these --
13 of these models, then -- then the conclusion is that
14 they start looking a lot less robust. So I don't think
15 we can be selective and say we'll have sensitivity A for
16 steering wheels because that looks -- because that looks
17 better than sensitivity B, but we'll ignore sensitivity
18 A for the other two because we prefer sensitivity B. We
19 can't do that, that's selective, we need to look at them
20 all in the round consistently.

21 Q. What I would suggest to you, looking at this table as
22 a whole, is, with the exception of that one red box, if
23 the Tribunal is asking itself are these overcharges made
24 out on the balance of probabilities, this table as
25 a whole strongly suggests that they are.

1 A. So I would -- I would absolutely disagree with that.
2 I don't think we can make that inference from this
3 table. To my -- as I said before, firstly, if we're
4 looking at the table as a whole, then we need to look at
5 all of the coefficients and think about statistical
6 significance and we will see sufficient -- sufficient
7 jumping around there for that to suggest that, even on
8 its own terms, this is not suggesting a strong, robust
9 result.

10 Secondly, you'd already made the caveat at
11 the beginning, and I'm grateful for it but I think we
12 should remind ourselves again, this assumes
13 a well-specified model. It's a bit of a repeated point,
14 but I -- I would just like to -- to remind the Tribunal
15 of that.

16 Third, I would very much emphasise, as we discussed
17 on Monday, the importance of those sensitivities and
18 hence not simply looking at this -- this table by
19 itself.

20 Q. Another sensitivity you applied to the RFQ date to
21 Mr Hughes' 30-month assumption was to see what happened
22 if you moved it six months either way. I do not think
23 we discussed this in the hot tub, but we see that at
24 {E1/6/51}. There is a table there at the top.

25 A. Yeah.

1 Q. So Mr Hughes is the gap of 30 months. That is his
2 assumption, and the results of that are set out. Then
3 we have a gap of 36 months and a gap of 24 months and
4 the results of those are set out.

5 A. Yes.

6 Q. We see that in the case of two of the components,
7 airbags and steering wheels, so the first and the third
8 in this table, we see that there are overcharges which
9 are statistically significant to 1% under two of those
10 sensitivities; do you see that?

11 A. I do see that, yes.

12 Q. Whereas in the case of seatbelts, we have overcharges
13 which are statistically significant to at least 5% in
14 all three of them?

15 A. I see that, yes.

16 Q. In relation to the 36-month sensitivity, under steering
17 wheels, there is an overcharge but it is not
18 statistically significant; do you see that?

19 A. I see that.

20 Q. Again, looking at this table overall, I would suggest
21 that if the Tribunal was asking itself, on the balance
22 of probabilities, are these overcharges made out,
23 the only conclusion one can draw based on this is that
24 they are.

25 A. So, again, I think we need to step back and remind

1 ourselves why this sensitivity was running in the first
2 place. So this was run in my first report because I was
3 concerned that adopting an estimate for the RFQ date of
4 start of production date less 30 months was something
5 that we should sensitivity test because those dates are
6 unknown. We have moved on quite some distance since
7 then to move on to method B, as discussed.

8 So the reasons that these tests are here are to
9 understand the sensitivity around what is an important
10 issue, namely the RFQ date, and to my mind what this
11 shows is that there is -- there is material sensitivity.
12 So for airbags, it's true that there are two positive
13 and statistically significant coefficients, but there's
14 also one that's negative, minus 0.07. So to say that
15 two out of three are positive, I mean, sure, two out of
16 three, you can call that a majority, but the fact --
17 the fact you have one which is negative to such a great
18 degree would not give me confidence at all in concluding
19 that there's an overcharge. I would say, well, there's
20 something fragile in -- in this air -- airbags
21 regression.

22 A similar point for -- for steering wheels. I would
23 accept that you have a better case on -- on seatbelts on
24 the basis of that chart alone, but we have other
25 sensitivities bearing in mind that Mr Hughes here is

1 assuming a period that's broader than OSS 2, it's
2 broader than OSS 2 plus the Autoliv part of OSS 1, and
3 so one needs to think about alternative sensitivities
4 that perhaps make a little bit more -- well, that are
5 certainly worth considering as opposed to going beyond
6 the Defendants' participation in OSS cartels.

7 Q. If we now look at the overcharges Mr Hughes' model
8 found, let us just focus on the main period for a moment
9 that starts on {E1/2/92}. Page 92 is the steering wheel
10 regression.

11 A. Yeah.

12 Q. If we look at the column "Excluding Outliers", I think
13 we are agreed that is preferable, and the main period is
14 actually at the beginning of the next page {E1/2/93}:

15 "New Contract (Main Period): 22.3%", so that is
16 the overcharge found there?

17 A. Right, sorry, I'm just catching up with you. Just one
18 point. I mean, I don't think we agreed that looking at
19 the version "Excluding Outliers" was preferable, I think
20 we agreed it made a lot of sense only to focus on that
21 column on Monday to save jumping between lots of
22 different regressions. I -- I made the point that one
23 might just be mindful of -- of the full sample as well.

24 But, sorry, your precise question?

25 Q. I am just seeking to identify the overcharges he finds

1 in the main periods. So for steering wheels it is 22.3;
2 do you see that?

3 A. I've got seatbelts in front of me, here, so ...

4 Q. It is actually the top of the page is the end of
5 the previous table.

6 A. Oh, yes, I do apologise, thank you. I can see it there.

7 Right, so that's 22.3 for the main period.

8 Q. Yes, and on the same page, further down, of course for
9 seatbelts we only have the main period and that is 15?

10 A. I -- I see that, yes.

11 Q. Then over the page {E1/2/94}, this is actually airbags,
12 there is a typo at the top. Oh, no, the typo has been
13 fixed, I am glad to see. At the bottom, the main period
14 overcharge, 10.5%; do you see that?

15 A. I see that, yes.

16 Q. I think possibly the figures have been appearing in
17 the wrong place, so that should be the "Excluding
18 Outliers" figure, I think.

19 There are some figures appearing to the left-hand
20 side on the same row that look like they are in
21 the wrong place.

22 A. Oh, I see, so the full sample figure should be 20.9 and
23 the excluding outliers should be 25. I think that's
24 actually my point about being --

25 Q. That is the early period.

1 So if we look at the main period.

2 A. Right, okay -- okay, understood. So 8.8 versus 10.5.

3 Yeah, I think my point remains, though, that sometimes
4 these figures do differ depending on the sample one
5 looks at.

6 Q. Just for simplicity, if we look at the main period
7 figures, "Excluding Outliers", to summarise, we have
8 steering wheels, 22; seatbelts, 15; and airbags, 10.5,
9 broadly.

10 A. Yeah, understood. Just to check that I heard you
11 correctly, sir. You were saying, just to summarise, on
12 the main period for "Excluding Outliers", you're saying
13 steering wheel 22.3; seatbelt, 15; airbags 10.5; is
14 that ...? Yeah, understood.

15 Q. Yes, I am just seeking to identify the figures we are
16 talking about here.

17 A. Yeah.

18 Q. So, in fact, none of the main period overcharges is as
19 high as 25%?

20 A. No.

21 Q. No.

22 In fact, airbags is only just over 10%?

23 A. On the basis of that specification, yes.

24 Q. Mr Hughes said that the concern economists have about
25 cartels is not just that they can increase the margin of

- 1 the participants, but that they can reflect
2 inefficiencies amongst the cartel participants; would
3 you agree?
- 4 A. Well, as a very -- as a very general, high level
5 proposition, one can argue that cartels, if they are
6 operating effectively, bearing in mind that some don't
7 operate effectively, for a long period of time they can
8 lead to lower degrees of innovation, or efficiency.
9 However, I think, as I mentioned yesterday or the day
10 before, it's not obvious to me that that applies in this
11 case.
- 12 Q. Are you familiar with the *Britned* decision? I was not
13 going to show you it because it was not on your list,
14 but are you familiar with it?
- 15 A. I can't say I've read the whole thing but I am familiar
16 at a very high level with the *Britned* decision.
- 17 Q. For example, the only award of damages ultimately made
18 reflected so-called "baked-in inefficiencies"; do you
19 recall that?
- 20 A. I don't recall the --
- 21 Q. Okay.
- 22 A. -- award well enough to -- but as I say, I mean, cases
23 -- this is a different case, and I've -- my
24 understanding of the evidence is that there's a lot of
25 pressure on suppliers to reduce their cost of production

1 because they know year after year they will be requested
2 to discount in each price amendment. So, to my mind,
3 that puts a lot of pressure for cost efficiency as
4 opposed to inefficiency.

5 Q. We were looking yesterday at the EBIT to be earned by
6 Autoliv on the A9 quotation. That is {J2/234/1}.

7 A. I've got a blank screen at the moment.

8 THE EPE OPERATOR: Sorry, could I have the reference again,
9 please.

10 MR WEST: {J2/234/1}. Oh, sorry, it is J -- I am sorry,
11 I am told it is actually J1. It is {J1/234/1}.

12 For example, under driver airbag and passenger
13 airbag, the next proposal corresponds to 5.7% EBIT for
14 example.

15 A. Sorry, just let me catch up. I'm looking at the driver
16 airbag and passenger airbag, so that's the first one,
17 is it, "DAB+PAB"?

18 Q. Yes.

19 A. Okay, yes, and then, sorry, could you just direct me to
20 where I should look next, please?

21 Q. Well, steering wheels -- "SW" is steering wheels --

22 A. Yes.

23 Q. -- and about five lines down, we have the EBIT

24 corresponding to the next proposed quote there, 4.4.

25 Then third is front side airbag and inflator curtain or

1 cushion and it says there, greater than 8% EBIT and so
2 on; do you see that in the third bullet point there?

3 A. Yes, just two seconds just to read that.

4 (Pause).

5 Yes, I see that, yeah.

6 Q. Now, we do not have an analysis of Autoliv's costs and
7 margins underlying these figures. I do not know if you
8 were here or saw the transcript, Mr Corbut exhibited
9 what he said was the PSC presentation but it did not
10 have the figures in it, but we do have some calculations
11 for other proposed quotes, so can I just ask you to look
12 at those.

13 The first one is {J1/465/1} and it is {J1/465/9} of
14 this tab. So these are the calculations underlying
15 the proposed bid for two particular seatbelt quotes for
16 Toyota, as it turns out, and we see here the underlying
17 financial calculations. I am not going to ask you to
18 take this all in, but if you just look at the punchline,
19 down at the bottom right-hand side, EBIT, 12.3%; do you
20 see that?

21 A. So this is the first time I've seen this document. So
22 12.3, so this is, what, the bottom right corner I'm
23 looking at?

24 Q. Yes.

25 A. Yeah.

1 Q. I am sorry, I think we may be straying beyond your list,
2 but this was a point that arose yesterday in the hot
3 tub, so I am sorry about that.

4 A. Okay, understood.

5 Q. But --

6 THE CHAIRMAN: Just take this a little bit more slowly,
7 Mr West. Just -- what are we looking at here in this
8 table?

9 MR WEST: So we looked at this with Mr Corbut. This is an
10 example PSC presentation --

11 THE CHAIRMAN: Yes.

12 MR WEST: -- seeking approval for Autoliv to bid for some
13 seatbelt contracts for Toyota.

14 THE CHAIRMAN: It is just seatbelts?

15 MR WEST: They are just seatbelts.

16 THE CHAIRMAN: Yes, okay. Understood, yes, thank you.

17 MR WEST: This particular one is for China and over the page
18 is the Japanese equivalent {J1/465/10}. So one sees
19 there the EBIT figure, at the bottom right, which the
20 proposed quote would generate. Do you see that has been
21 calculated?

22 THE CHAIRMAN: Yes, I have caught up now, yes. Thank you.

23 MR WEST: But what one also sees above that is
24 the contribution margin.

25 MS FORD: I hesitate to interrupt, but there was this

1 protocol that insofar as witnesses were going to be
2 taken to documents that were not referenced in their
3 report, they would give notice of it and I draw
4 the Tribunal's attention to the fact that this does not
5 appear to be on --

6 THE CHAIRMAN: Well, I think this --

7 MR WEST: No, it was not.

8 THE CHAIRMAN: -- may be that because it arose out of
9 the hot tub. Let us see how we get on.

10 MR WEST: Do take your time. I do not want to be unfair by
11 going too quickly. As I say, this was a point that
12 arose in the hot tub yesterday.

13 My point is simply that as well as the EBIT, there
14 is a contribution margin; do you see that?

15 A. I see it on the slide, yes.

16 Q. Assuming that the fixed costs are all incurred, a firm
17 is better off --

18 A. I apologise, I missed that. Assuming ...?

19 Q. Sorry. Assuming the fixed costs of a firm are already
20 incurred, it is better off making a sale which
21 contributes to the bottom line, is it not, even if there
22 is not a clear profit margin on the sale after
23 allocating a proportion of fixed costs?

24 A. I think there's an issue with that assumption in
25 the sense that my understanding is that when a -- when

1 bidding for a contract, there are fixed costs that are
2 incurred necessarily in terms of R&D, tooling, other
3 production capabilities for a specific part and
4 therefore it's not clear to me that one can assume fixed
5 costs are already incurred for the purpose of bidding
6 for a contract. Some -- some will be, but there --
7 I would understand that there will be contract-specific
8 fixed costs, such as R&D, tooling and the like. But if
9 -- if -- if there were not, then, yes, the contribution
10 margin would be -- a positive contribution margin would
11 make a contribution to fixed costs.

12 Q. My point to you is that if one compares the contribution
13 margin to the figures for overcharge that Mr Hughes
14 produced which we were looking at, 10, 15 and 22, it is
15 much more realistic to think that they can be
16 accommodated within this business?

17 A. I'm not sure I can make that inference, because we -- we
18 looked at China, and this is Japan, and so I just don't
19 really have a sense of whether these are comparable
20 documents and whether one can just take those figures
21 and carry them over.

22 For example -- and as I say, I've not seen these
23 documents before -- for example, let's suppose volumes
24 were small in China and Japan, then you would need, all
25 else being equal, a much higher contribution margin to

1 cover your -- your fixed costs.

2 So I'm afraid I can't draw an inference from these
3 China and Japan documents for Europe, I'm afraid.

4 Q. Okay, let me just show you one Europe one and then
5 I will try not to show you anything else that is not on
6 your list. That is {J1/1108/1}. This one has to be
7 downloaded because it is an Excel spreadsheet. Could we
8 scroll down on this document. Stop there. Sorry, could
9 you scroll a bit further. Sorry about this; I do not
10 have it on paper. Sorry, could you scroll up.

11 (Pause).

12 Sorry about this. I cannot print this document out,
13 unfortunately, so it is a bit difficult to ...

14 THE CHAIRMAN: Find "contribution"? Is that what you were
15 looking for?

16 MR WEST: I am helpfully told it is 55M, so row 55 and
17 column M.

18 So this is a TRW quote for PSA business, and you see
19 there the contribution margins. I hope you can now see
20 that.

21 A. The highlighted column I can see, yes.

22 Q. They vary between 8.3 and 26.1?

23 A. I can see that.

24 THE CHAIRMAN: Have we got the EBIT on this?

25 Just while Mr West is doing that, can you just

1 explain to me what the contribution margin is, please?

2 Sorry.

3 A. So I don't know how it's been precisely calculated by --
4 I think this is a ZF/TRW document, but I would
5 understand the contribution margin as typically it would
6 be revenue less variable costs, the idea being that your
7 contribution margin makes a contribution to fixed costs.
8 So if you imagine you've incurred a lump of fixed costs
9 and --

10 THE CHAIRMAN: So what is the difference between that and
11 gross profit then?

12 A. Well, sometimes a gross margin is defined the same way,
13 but it will --

14 THE CHAIRMAN: Gross margin and gross profit.

15 A. -- it will -- but what I want to be careful about is,
16 because I don't know how ZF sets up its accounts, some
17 firms internally use gross margin or contribution margin
18 but define it in specific ways that suit their business,
19 so I'm just speaking at a very high level in terms of
20 how I would understand the concept.

21 THE CHAIRMAN: Right. The point being fixed costs are not
22 in there?

23 A. Yes, that would be my understanding, exactly, sir.

24 THE CHAIRMAN: Although we have got contribution margin and
25 gross margin in the left column here.

- 1 A. Yes --
- 2 THE CHAIRMAN: The figures are not hugely different.
- 3 A. Yes, which would imply that there's something -- an
4 additional cost in gross margin, because it's slightly
5 lower, but I -- but I've no idea what that would be.
6 Yes, because gross margin is materially lower for one of
7 those steering wheels.
- 8 THE CHAIRMAN: Yes.
- 9 A. And then "PBT" is negative for one; return on sales,
10 negative for one. So I'm afraid I don't really --
11 without knowing the definitions of -- of these financial
12 ratios, I'm afraid I -- I don't fully understand them.
- 13 MR WEST: I do not think we have something called EBIT, but
14 it seems to be the same thing but with a different
15 label, which is return on sales, and that is line 148.
- 16 A. Okay, so return on sales is -- as I understand it, it's
17 a measure of profit divided by turnover, but what
18 I don't know is what goes in the top of the fraction
19 here or the bottom of the fraction, because I don't know
20 how ZF/TRW do their accounts. So, again, other than at
21 a high level, I can't really -- I'm sorry, I can't sort
22 of delve further into this ratio.
- 23 Q. But I think is it fair to say that none of the experts
24 have really previously considered the question of
25 whether an overcharge at the level Mr Hughes suggests

1 could be accommodated within the profits and margins of
2 the business? That is not something that the experts
3 have considered?

4 A. I personally did not make that -- did not make that
5 assessment, no.

6 Q. Now, you said yesterday that a business, like these,
7 might rationally follow an incumbency strategy
8 unilaterally, as it were, even if there were no cartel;
9 is that a fair summary of the point you made?

10 A. I was -- if I remember correctly, I was responding to
11 a point made by Mr Hughes in respect of the incumbency
12 principle. And, again if I remember correctly, I was
13 saying that in a situation where a firm -- a supplier
14 has already won a contract and then, say, three years
15 later, there is a request for a new part on the same
16 platform, the incumbent firm, as I understand it, would
17 have a substantial advantage in terms of its ability to
18 produce that part. As a result -- and this would happen
19 irrespective of whether there was collusion or not, it
20 would happen because it had already made the investment
21 in the platform. And then what I said is, as a result,
22 if there were competition to supply that particular
23 modified part on the platform where there was already an
24 incumbent, the constraining force on the incumbent could
25 -- I didn't say necessarily was, I said could be

1 the fact that because prices would have already declined
2 over the three years and because the part was a modified
3 part similar to the existing part, the constraining
4 factor might actually be the current price as -- as
5 opposed to a price that someone else coming into
6 the market, making all the new investments and the like,
7 would be able to -- would be able to offer.

8 I just want to check that I've explained that --
9 that point clearly. Yes, thank you.

10 Q. But the two situations, I want to suggest, are not
11 the same, incumbency without a cartel, agreement to that
12 effect, and incumbency with a cartel to that effect,
13 because without a cartel, the incumbent does not know
14 whether, when bidding for incumbent business,
15 the competitors will be trying to win that business.

16 A. So there are two -- there are different -- there are
17 different points here, I think. So in the event that
18 you have explicit collusion with respect to a new
19 platform coming up for the first time, then I would
20 agree that explicit collusion, where supplier A says to
21 supplier B, "I'm going to bid 12, you bid 10; you win
22 the platform", then I would agree, in that scenario,
23 the price at the start of the platform is -- is impacted
24 by explicit collusion.

25 The point I was discussing is in relation to

1 a follow-on part further down -- down the line. I would
2 accept that the starting price could be affected by
3 collusion. I don't dispute that point.

4 Q. Could I just show you a document on that. This one is
5 referred to by Mr Hughes in his report,
6 paragraph 241(c), so you will have seen the text of this
7 one before; whether you have seen the document itself,
8 I do not know. It is {J1/40/1}. So this is an internal
9 Autoliv email. Mr Hughes referred to it today.

10 A. Sorry, could you make it big? I have the sun shining,
11 which actually makes it very ... I appreciate you don't
12 need to give me three -- three days' warning of the sun
13 shining, especially in the UK, but it just makes it
14 slightly harder to ...

15 Q. So it is the paragraph beginning, "So far". This is
16 Mr Timo Rau, and just to explain, these are individuals
17 within the Ford business unit at Autoliv.

18 THE CHAIRMAN: Mr West, shall we just wait until the blinds
19 are closed and try and get all senses firing again.

20 A. I'm grateful for the blinds going down. Thank you.

21 (Pause).

22 THE CHAIRMAN: That should be fine, I think.

23 A. I can see now. Thank you. Thank you very much.

24 MR WEST: So Mr Rau says:

25 "So far I always (mostly) respected a sourcing

1 decision."

2 THE CHAIRMAN: Hold on, Mr West.

3 (Pause).

4 Okay, start again.

5 MR WEST: So Mr Rau says:

6 "So far I always (mostly) respected a sourcing
7 decision. When business was sourced to TRW, I did not
8 attack them on existing programs as I believe that they
9 would fight back where it hurts us. I spoke with Stefan
10 Kroenung ..."

11 He is also an Autoliv person in the Ford business
12 unit:

13 "... about this and asked him to talk to his
14 counterpart in TRW to agree on the principles."

15 So what I suggest to you is what one has here is
16 a sort of non-aggression pact: we will not attack your
17 business if you do not attack ours; do you see that?

18 A. I understand the principle that you're -- that you're
19 raising, yes.

20 Q. Where one has an agreement like this, incumbency
21 operates in quite a different way, does it not, because
22 the firm with the incumbent business knows that
23 the competitor is not going to attack it on that
24 business?

25 A. Right, so that, of course, requires understanding who

1 the incumbent is. So when a new platform comes out, as
2 I understand it, then there's not an obvious incumbent
3 because by definition there is a -- a new platform, so
4 in that scenario, it's not clear to me how you apply
5 the principle without some further communication, some
6 further agreement as to who's going to get the new
7 platform. So I think that's an important point.

8 But I would accept the principle that if there is an
9 obvious incumbent, then by definition the incumbency
10 principle means that you bid less aggressively for
11 the pre -- you know, the pre-determined incumbent --
12 sorry, for the incumbent.

13 MR WEST: Could we then look briefly at your new contract
14 sensitivity and I just want to focus on one specific
15 point, which is the effect of that sensitivity on
16 the number of data points. The original number of data
17 points is set out by Mr Hughes at paragraph 3.3.19, so
18 that is {E1/4/52}.

19 THE CHAIRMAN: A request, before we start on that: is this
20 a convenient moment for five minutes?

21 MR WEST: Certainly, yes.

22 THE CHAIRMAN: How are you doing on time?

23 MR WEST: I think we should certainly finish within time.

24 THE CHAIRMAN: Thank you.

25 (3.19 pm)

1 (A short break)

2 (3.29 pm)

3 MR WEST: So Dr Majumdar, we were talking about the new
4 contract sensitivity and its effect on the number of
5 data points.

6 A. Yes.

7 Q. So the original number of data points underlying
8 the overcharge analysis in Hughes 1 is at
9 paragraph 5.5.3, that is {E1/2/85}.

10 Paragraph 5.5.3:

11 "For steering wheels, this results in 761 average
12 monthly price observations ..."

13 We know that steering wheels has the fewest:

14 "... across 67 parts. For seatbelts and airbags,
15 the sample size is larger with 1,557 and 1,351 monthly
16 price observations respectively ... both covering 106
17 parts."

18 Then the reduction -- in fact it is implicit in this
19 paragraph, but if we look at Hughes 2, para 3.3.19, that
20 is {E1/4/52}, so he is now talking about the new
21 contract sensitivity, 3.3.19:

22 "This approach uses the full time series of each
23 part, in contrast to Dr Majumdar's approach, which
24 relies solely on the price of each part at the SOP date,
25 reducing the sample size to between 55-103 observations

1 and resulting in fewer degrees of freedom."

2 So we see that the number of observations has fallen
3 from between 760 and 1,500 to between 55 and 103; would
4 you agree with that?

5 A. I agree that there is a reduction in observations,
6 although not necessarily information, which is
7 the discussion that Professor Neuberger and I had on
8 Monday.

9 Q. So that is between 5 and 10% one is left with of
10 the number of original observations; is that right?

11 A. Yes, but, again, the key point is the contracts are not
12 being dropped, it's the price amendments. So we had
13 this discussion on Monday, and Professor Neuberger,
14 I thought, made the correct remark, which is, is this
15 dropping -- are these observations being dropped but
16 information not, or are we actually losing information?
17 The point being that if the -- if the information is in
18 the first price, the price at the RFQ date, then we're
19 not losing information by dropping these values, we're
20 just applying a sensitivity test of the coefficient
21 magnitudes, and that's -- that's the key point, we're
22 not necessarily losing information.

23 Q. Now, yesterday, when you were discussing a part of your
24 pass-on analysis, particularly to do with how one
25 adjusts for the number of options, you said this at

1 {Day9/34-35} -- you probably remember:

2 "Imagine there's a Fiat Punto 3 with 20 options ...
3 it would in practice be fewer than that, but just to
4 make the maths easier, imagine there were 20 ... what
5 Mr Hughes says, 20, on average, I'll only look at
6 vehicles with 15% ... of that, so [between] 17 [and] 23
7 ... I'll only look at vehicles with 17 to 23 options,
8 and so we lose 50% of the data just like that, and also
9 we make the panel have holes in it."

10 So what we see there is you objecting in fairly
11 strong terms to losing 50% of the data and my suggestion
12 to you is that if that is objectionable then the new
13 contract sensitivity is all the more so.

14 A. Well, we're -- we're addressing different questions. So
15 in -- in the first scenario, we have a -- we have
16 the overcharge model and we have a situation where
17 the hypothesis, if you like, is that all or most of
18 the action's in the first price determined at
19 the contract stage, and then after that there are gentle
20 price amendments over time, which, if removed from
21 the sample, don't necessarily remove information and
22 allow a sensitivity test to be conducted of
23 the magnitude of the coefficient. So that's -- that's
24 the new contract overcharge.

25 When we're talking about the -- the pass-on model,

1 my concern was not only that there was being data
2 dropped by -- so here we're not -- we're creating holes
3 in the panel, it was not only that, but it was also that
4 the choice of the 15% turned out to be essentially
5 something close to a global minimum in terms of what
6 happens to the estimated pass-on coefficients. So
7 without a flip chart it's quite hard to show, but if you
8 imagine the estimated price and coefficient, it sort of
9 does that (indicates), then drops down here at 15% and
10 it goes back up again. So my -- my challenge to
11 Mr Hughes was, why 15%, that seems to be the global
12 minimum estimate of pass-on. So these are two very
13 different situations.

14 Q. If we turn then to the results of the new contract
15 sensitivity, on Monday, transcript page 125, lines 13 to
16 {Day8/125:13-16}, you said you were less concerned
17 with the statistical significance of this model
18 precisely due to the lack of data points. You said:

19 "... what I'm interested in is not so much
20 statistical significance, because we're removing data
21 which means we have a bit less power ... in
22 the test ..."

23 Do you recall that?

24 A. Yes.

25 Q. So if we then turn up the results at {E1/6/53}, and

1 stick for the moment with airbags and seatbelts, what we
2 see is that you have positive overcharge results for all
3 of these sensitivities with the sole exception of what
4 is called the "New Contract including Early Period
5 dummy" in relation to the early period where you have
6 a negative figure, but all the others are positive; do
7 you see that?

8 A. Just -- if you just give me a second to look at
9 the table, please. So just remind myself of the table.

10 Right, so for airbags, what I'm seeing is the first
11 row, we lose statistical significance on the first row,
12 but I take the point that statistical significance in
13 this particular test is not of great importance, so
14 that's ...

15 The second -- the second row, of course,
16 the magnitude of the coefficients changes substantially
17 from 0.18 to 0.03, which I think is my point about
18 the lack of robustness and the possibility of something
19 fragile in the airbags model, so that's what I'm seeing
20 in the first two rows.

21 The third row, of course, is a sensitivity where we
22 drop the early period and again we see a -- no evidence
23 of a -- of an overcharge.

24 So then moving to seatbelts, I see a lower number
25 than Mr Hughes' model; second row, a lower number than

1 Mr Hughes' model; third row, something close to zero.

2 Then steering wheels, I see a number similar to
3 Mr Hughes' model in the early period, lower in the main;
4 similar in the early, lower, essentially zero, in
5 the main; and then something negative.

6 So that's not -- not telling me that I have a robust
7 -- that Mr Hughes' model is -- is robust to this test.

8 Q. Well, although these coefficients are smaller than
9 Mr Hughes has found, they are still substantial in
10 the sense that overcharges at this level would generate
11 very substantial damages in this case.

12 A. Well, I think -- which numbers, really, because some of
13 these are negative, so that wouldn't generate any
14 overcharge, some of them are very close to zero?
15 The substantial overcharges would only arise with the --
16 everyone has a different definition of "substantial",
17 but I think we have a broad range of numbers from minus
18 0.18 to plus 0.309, if I'm reading the minimum and
19 the maximum correctly. So there's a broad range there,
20 which, again, to my mind is a sign of non-robustness of
21 the -- of these models.

22 Q. My point to you is simply that despite the admitted loss
23 of statistical power of this model, it still finds
24 overcharge in relation to most of the categories and
25 most of the periods.

1 A. So I -- I wouldn't read it that way. I -- I would
2 read it as the -- the coefficients being unstable, and
3 it's true that there are more positive numbers than
4 negative numbers, but most -- well, I haven't done
5 the maths precisely, but many of these numbers, possibly
6 most, are pretty close to zero, 0.035, 0.5, 0.033, 0.05,
7 0.05, 0.02, 0.03, minus 0.02. So there are only four,
8 sort of, to use a non-technical term, chunky numbers, so
9 I'm not sure I would -- would agree with that
10 proposition.

11 Q. Could we turn now to an element of your pass-on
12 analysis. This case is of course concerned with OSS
13 components, is it not?

14 A. I do apologise, I missed the question.

15 Q. This case is concerned with OSS components?

16 A. Yes.

17 Q. The Tribunal is concerned under the head of pass-on to
18 identify the pass-on rate --

19 A. Yes.

20 Q. -- in relation to costs of OSS components?

21 A. Yes.

22 Q. The extent to which an increase in OSS costs would be
23 passed on by the Claimants to their customers?

24 A. Yes.

25 Q. But for the purposes of your pass-on analysis, OSS costs

1 specifically are not available to you, are they?

2 A. That's correct. I have to use a proxy, which is
3 the variable cost of production, yes.

4 Q. That is paragraph 291 of your first report {E1/6/71}.
5 So, as you say, you have instead modelled the pass-on
6 rate using overall variable costs?

7 A. Yes, it's a fairly standard approach. It's mentioned,
8 for example, in the Commission guidelines, when you
9 don't have variable -- a precise measure of the variable
10 you're interested in because it's a variable cost, then
11 it's an acceptable approach to say you model how
12 variable cost is passed on as opposed to a specific
13 component of variable cost, so essentially that's what
14 I'm doing.

15 Q. But if we look now at something you said about
16 Mr Hughes' model {Day8/21:19}, you say:
17 "... we know there is not granular cost data that
18 allows us to work out cost for any particular contract,
19 so I would think that that is an important piece of
20 information a good econometrics model would have. Now,
21 it's no fault of anyone that we don't have it, it's just
22 the data aren't there. But, to my mind, that at least
23 informs us as to how much weight one can put on results
24 when there is ultimately an important variable missing."
25 Do you see that?

1 A. I do, yes.

2 Q. My suggestion to you, Dr Majumdar, is that these two
3 approaches are inconsistent.

4 A. Oh, I totally disagree. So, actually quite -- really
5 I think it's quite the opposite. So the beauty about
6 the panel that we have is, for the overcharge assessment
7 is we have just what we want in terms of granularity.
8 So we have -- for every single vehicle, we have
9 the variable cost of the base model, this is before you
10 add the radio, the leather steering wheel and so on, we
11 have the variable cost of the option, we have the total
12 cost, we have the price of the base vehicle, we have
13 the price of the options and we have some granular
14 information on how many options are -- are taken. So in
15 terms of the quality of the data, it's a world away from
16 the quality of the data that we have for the overcharge
17 model.

18 So the -- the issue with the overcharge model is
19 that we use variable cost changes to proxy OSS cost
20 changes. That's the issue. It's got nothing to do --
21 I mean, the quality of the data is -- is fantastic. If
22 anything, it shows you how -- how much is missing from
23 the overcharge model, because the equivalent of -- if
24 you think about the equivalent, you have granular
25 information per vehicle, per vehicle. The equivalent in

1 the overcharge model would be having granular
2 information per contract, we would know the precise
3 contract costs, we would know some details about each
4 contract, how the costs change over time. We have
5 the sort of equivalent in the overcharge model but we
6 don't have that in the overcharge -- sorry, we have
7 the equivalent in the pass-on model but not in
8 the overcharge.

9 So I -- I absolutely disagree with that.

10 Q. Well, it is just the same, is it not? In your pass-on
11 model, you do not have OSS-specific information so you
12 use the nearest available proxy, overall variable
13 costs -- and just let me finish the point.

14 A. Sure.

15 Q. Likewise, Mr Hughes does not have contract-specific
16 costs information for his overcharge regression, so he
17 uses various indices of the main raw material costs, it
18 is the next best thing; there is nothing wrong with
19 that, is there?

20 A. But that's a different point, though, you see, because
21 the assumption that we're making with the pass-on model
22 is that the variable cost pass-on that we measure is
23 a good proxy for OSS pass-on, but what we're saying is
24 we're actually measuring variable cost pass-on into
25 the net dealer price very well, because we have a very

1 good panel of data to do that. That is fundamentally
2 different from saying we have some high level cost
3 indices that do not match contract-specific cost data.
4 That -- that -- that -- that's not a comparable, in my
5 view, situation.

6 Q. Still on pass-on, you told us yesterday the position may
7 differ between FCA and the other OEMs because of
8 differences in the way they set prices. That is
9 {Day9/76:24}. You say:

10 "So I won't opine on the facts, but my reading was
11 [that] there was some sort of slightly different nuances
12 [as] to how each OEM was setting price ..."

13 Do you recall that?

14 A. Yeah, let me just -- sorry, I'm just going to read
15 the ...

16 (Pause).

17 Yes, yes, I remember that, yes.

18 Q. But it is also your position that the results of your
19 pass-on analysis, which is of course based on FCA data
20 exclusively, can equally be applied to PSA and VO: that
21 is your position, is it not?

22 A. That's -- yes, the position stated in the JES -- joint
23 expert statement was that it can be. I also said that
24 should -- something to the effect of should information
25 arise such that the factual information indicates that

1 one should take a lower or higher estimate for VO or --
2 or PSA, I would be open to that. So if the facts
3 suggest that, actually, for PSA, it should be whatever
4 higher but for VO it should be lower, I'm -- I'm
5 certainly open to that adjustment.

6 Q. But in the absence of data specific to PSA or OV which
7 is useable for pass-on, you say it is reasonable to use
8 FCA data as the nearest available proxy?

9 A. On the basis that my reading of the witness statements
10 at the time was that pass-on was likely to be similar
11 because, firstly, OSS costs are a variable cost, my
12 understanding of the way net dealer prices were set was
13 similar, ie at list price less the dealer margin, less
14 the various discounts, so on that basis, without
15 additional information, it seemed to me a reasonable
16 position to take to presume that an estimate for FCA
17 would be broadly -- well, would be a reasonable starting
18 point for VO and PSA, yes.

19 Q. Again, Mr Hughes does the same, does he not, because he
20 only has PSA data for overcharge so he says that is
21 the best available proxy for the overcharges suffered by
22 FCA and OV? But you object to that, do you not?

23 A. Yeah, well, again, I think this is a -- this is
24 a different point. So the point I'm making there is
25 that I would be uncomfortable inferring from a finding

1 of a -- an overcharge with respect to PSA that that
2 implies that there was an infringement in respect of FCA
3 or VO. So I think this is a fundamentally different
4 point. So why do I say that? My understanding of
5 the OSS decisions is that they were claimant-specific
6 and product-specific, so it wasn't systematically always
7 coordination with respect to airbags, seatbelts and
8 steering wheels, sometimes it would be one product only;
9 it wasn't always coordination with respect to all
10 the named buyers, sometimes it was with respect to one.
11 And so, therefore, were the Tribunal to find that there
12 was an infringement with respect to suppliers of OSS
13 products to PSA in the main period, for the sake of
14 argument, that would not, to my mind, imply that
15 the Tribunal would also find that there was an
16 infringement with respect to VO or with respect to FCA;
17 it would absolutely depend on the facts that
18 the Tribunal considered.

19 So that was my point. I see those as actually quite
20 different situations.

21 Q. My suggestion is that you are applying a different
22 higher standard when it comes to Mr Hughes' model than
23 you are prepared to accept when it comes to your own.

24 A. I would disagree with that.

25 Q. Now, Mr Hughes' model splits the overall cartel period

1 into three, does it not: early, main and the wind-down
2 period?

3 A. Yes.

4 Q. In each case I would suggest to you that there is an
5 objective basis for thinking that things may have been
6 different during each of those periods. Just to be
7 specific, the main period corresponds to when
8 the Commission held that the OSS cartels were in
9 operation.

10 A. Yes.

11 Q. The early period corresponds to the period prior to
12 the Commission decisions, or to the period covered by
13 the Commission decisions, when there is evidence of
14 cartelisation in the disclosure against the Claimants.

15 A. Well --

16 Q. I do not ask you to comment on the facts.

17 A. That is a factual question. That is, as I understand,
18 how Mr Hughes has proceeded.

19 Q. Then the wind-down period, I suggest there are two
20 significant developments in March 2010, one is the dawn
21 raids. Are you familiar with the fact that dawn raids
22 began in relation to the other car parts cartels?

23 A. I read that in Mr Hughes' report.

24 Q. The second is that some undertakings began leaving
25 the Commission -- the cartels found by the Commission

1 around March 2010. Are you aware of that?

2 A. I understand that it wasn't necessarily around
3 March 2010, I think sometimes it was later than that,
4 from memory.

5 Q. Could we just look then at {A/10/37}.

6 So this is the OSS 1 decision and this is
7 the operative part so-called, and we see under Article 1
8 that Tokai Rika left on 11 Feb; Takata, 25 March 2010;
9 Autoliv, 20 March 2010; Marutaka, 15 April 2009. So it
10 left significantly earlier; do you see that?

11 A. Okay, so I'm not going to debate -- debate the dates,
12 they are what they are.

13 Q. So I suggest to you this is not a case of circularity
14 where, whenever Mr Hughes finds an overcharge, he says,
15 "Well, that's the dirty period"; his definition of these
16 various periods is based on objective facts outside of
17 his analysis.

18 A. So in respect of the wind-down period, I think that's
19 fair, but I don't think -- well, I don't agree with you
20 with respect to the early period. So, as I say in my
21 joint expert statement, the inclusion by Mr Hughes of
22 the wind-down dummy, I have no issue with because
23 Mr Hughes has provided a factual basis for a potential
24 break in behaviour and an expectation as to what
25 the impact of that break would be. So as an economist,

1 I say, here's a potential break in behaviour and my
2 ex ante expectation is that the impact of the break in
3 behaviour would be that prices would be lower,
4 the wind-down dummy seeks to test that, and in two or
5 three cases it appears to be statistically significant
6 at conventional levels. So in terms of Mr Hughes' use
7 of the wind-down dummy, I -- as I say, I have no issue
8 with it, I presented a sensitivity test because the --
9 this relates to a different infringement and so I made
10 the point that therefore it is possible that were there
11 infringement with respect to the Claimants, it's not
12 necessarily the case that it would stop immediately and
13 so one needs to be open-minded to a sensitivity test
14 that removes the wind-down dummy and we spoke about that
15 on Monday.

16 Now, I would contrast that with the early period,
17 where I am not aware of a good economic reason to
18 distinguish between the main and the early period, and
19 to my knowledge Mr Hughes does not provide one in his --
20 either of his reports, and neither is a -- an
21 expectation provided as to what the magnitude of the --
22 you know, what -- what was the break in behaviour that
23 I should be looking for; there's no evidence of one, and
24 what would be my expectation. Would I suspect
25 a potentially greater impact in the early period? If

1 so, why? Would I expect a weaker impact in the early
2 period? If so, why?

3 With that factual information and that ex-ante
4 expectation, then I'm open to using dummy variables to
5 break up periods, but I can't just arbitrarily sort of
6 pop one in and see what happens. So that's, for me,
7 the difference between the wind-down period and the rest
8 of the alleged infringement period.

9 Q. Just on the wind-down period, assuming the Tribunal
10 agrees with Mr Hughes that prices returned to
11 the competitive level in March 2010 having previously
12 been higher, that is a very peculiar development to have
13 happened unless there was a cartel, is it not?

14 A. Well, no, not necessarily, because we have a one -- we
15 have a one-year dummy, and there could be an omitted
16 influence that is -- that this one-year dummy is picking
17 up. So I don't think one necessarily can infer from
18 the statistically significant wind-down dummy that there
19 was -- there was a cartel. So -- so, no, I would
20 disagree with that as a -- as a proposition.

21 Q. Then, in relation to the early period, given that
22 Mr Hughes finds that prices were higher than
23 the competitive level over that period for airbags and
24 steering wheels, any specification of the model which
25 treats those as the competitive price is likely to find

1 no or no material overcharge in the main period, is it
2 not?

3 A. Okay, we need to be careful with this one. So I think
4 your -- I think your question -- and you will tell me if
5 I get this wrong -- is, if we proceed on the basis that
6 the early period is a clean period, then, given that
7 Mr Hughes has found his early period dummy to be
8 positive and statistically significant, are we bound to
9 find a zero effect? I think that's the question.

10 Q. Or a very low effect.

11 A. Or a very low effect.

12 So two points. First, no, I don't think we
13 necessarily are. We would expect to find an average
14 effect of the two periods, were there truly a cartel.
15 So if the average -- if what we find is zero, when
16 the average of the two you might expect to be different,
17 then that suggests there's a certain fragility in
18 the model.

19 The second point is that if the period -- the early
20 period truly is clean and then we're finding
21 a statistically significant early period dummy, what
22 that's telling us is that there's something missing in
23 the model. And this is important, because if there's
24 something missing in the model, then it's not just
25 missing in the early period, it's probably missing in

1 the main period and in the clean period after the main
2 period as well. So, for example, if we proceed on
3 the basis that, say, under claim 3 there's only an
4 effect around the -- the OSS cartels, if you, say,
5 proceed on that basis, for the sake of argument, and we
6 treat the early period as clean, I think Mr Hughes'
7 argument is: oh, I still need my early period dummy to
8 control for things that are going on, non-cartel things
9 that are going on in the early period. And my concern
10 with that approach is, if you're finding things going on
11 in the early period that are not the cartel, that are
12 not explained by your model, the model is missing
13 something, and because it's missing in the early period,
14 it's missing in the late -- in the main period. So if
15 there's a factor pushing prices up that's not the cartel
16 in the early period, that factor is still potentially
17 there pushing prices up in the main period, the model is
18 therefore misspecified and therefore we cannot place
19 weight on that main period estimated effect, and I think
20 that's a -- I think that's an important point.

21 Q. But this point also does not apply to seatbelts,
22 does it, because Mr Hughes does not find an early period
23 overcharge in relation to seatbelts?

24 A. He does -- he does not -- he does not present that test
25 in his -- in his first or second report, that he does

1 not find a -- he says he does not find an overcharge in
2 relation to seatbelts in the early period, that is
3 correct.

4 Q. Can we go back to pass-on, briefly. Now, the mechanism
5 of pass-on which is positive is that in the event of an
6 increase in OSS component costs, the OEMs would reduce
7 the level of the dealer discounts that they offer; that
8 is right, is it not? Let us assume that is right.

9 A. Sorry, I am just reading the transcript.

10 So -- okay, so "the mechanism pass-on which is
11 positive is that in the event of an increase in OSS
12 component costs, the OEMs would reduce the level of
13 dealer discounts that they offer ..."

14 Yes, that is one mechanism for -- for pass-on, OSS
15 costs go up, the net dealer price goes up, which can
16 occur either via the list price going up, the dealer
17 margin going down or the various discretionary discounts
18 going down, that's right.

19 Q. If the level of dealer discounts go down, there are two
20 possibilities as to what happens next. One is
21 the dealer absorbs that price increase or reduction in
22 discounts, whatever you want to call it, and the other
23 is the dealer passes it on in the form of increased
24 prices to its own customers. Those are the two
25 possibilities?

- 1 A. Or a combination of both, yes. So the dealer could
2 absorb some of the -- some of the amount and pass on
3 some of the amount as well, yes.
- 4 Q. But in each -- let us assume it is the first, that
5 the dealer absorbs the overcharge.
- 6 A. Yes.
- 7 Q. That would, would it the not, reduce the dealer's
8 willingness to promote vehicles on which those discounts
9 have been reduced?
- 10 A. If the -- okay, so if the dealer absorbs the overcharge
11 entirely, then your proposition is that there may be
12 some sort of knock-on long-term effect that it does not
13 promote that particular vehicle as much as it otherwise
14 would have done. It's possible.
- 15 Q. Well, it was Ms Biancheri's evidence at {Day4/152:2-9}.
16 But the alternative is that the dealer increases
17 prices to its own customers and that is also likely to
18 lead to a reduction in sales, is it not?
- 19 A. Yes, all else being equal, I would expect that if
20 a dealer increased prices to its customers, then that
21 would have some impact on volumes sold.
- 22 Q. In the case of any individual lost sale, it is not just
23 the ability to increase the price by the level of
24 the overcharge that is lost, but the whole margin on
25 that sale?

1 A. Well, it depends who we're -- we're talking about. But,
2 yes, from an OEM perspective, were the OEM to pass on
3 a cost to a dealer, and were the dealer then to pass on
4 some of that to a consumer, and were the consumer --
5 were volumes sold to result -- fall as a result, then
6 there would be a lost margin on the volumes that were
7 lost, yes.

8 Q. So we are talking here, broadly, about an overcharge of
9 €20 per vehicle. If the OEM manages to increase
10 the price by that amount, for every successful sale, it
11 recovers an additional €20, but if it loses an
12 additional sale, it loses all of the margin on that
13 sale, which might be €2,000?

14 A. Right, so just take a step back. I don't -- for
15 the sake of having this discussion, I'm happy to assume
16 a €20 vehicle overcharge, just to be -- just to be
17 clear. And I think your proposition is: taking as given
18 that there's €20 overcharge per vehicle, then to
19 the extent that that causes a reduction in volumes,
20 where there is a lost volume, there will be a material
21 margin loss. Yes, I would -- I would agree with that,
22 and that -- that is taken into account in the very
23 helpful volume effect calculations that Mr Hughes
24 prepares in his second report and I adopt in the joint
25 expert statement. So -- so I agree, and we have

1 a mechanism for dealing with that, yes.

2 Q. If it is right that the overcharge is at €20 but
3 the margin on the vehicle is 2,000, then the OEM has to
4 sell another 100 vehicles with that €20 price increase
5 to make up for a single lost sale?

6 A. Yes, but -- but we have to think about the probabilities
7 of -- of losing a sale, so -- and as I say, all of this
8 is taken into account in the volume effect framework.
9 So there might be -- there might be only a tiny
10 probability of losing a sale as a result of that, so you
11 need to weight the loss of the margin by the probability
12 of losing the sale. So when you present it that way, it
13 sounds like there's going to be a huge loss, but
14 actually, if you think about it in -- in the -- if you
15 like, in the appropriate way of measuring volume
16 effects, you need to think about the probability of
17 there being a lost sale, which is very low.

18 Q. Still thinking about the ability of the firm to put its
19 prices up, economic theory suggests that pass-on is
20 likely to be lower for firm-specific cost increases,
21 does it not?

22 A. All else being equal, yes.

23 Q. All else being equal.

24 But in this case, because of the long production
25 runs of cars, during most of the cartel period you will

1 have cars which were procured before the start of
2 the period competing with ones which were procured
3 during the cartel period, will you not?

4 A. Oh, I think that is possible. So just to be clear on
5 what I'm agreeing to, I think what you're saying is that
6 it is possible for a vehicle model to have -- to use
7 inflated parts and be competing with another vehicle
8 model using parts that were made earlier in time which
9 were not inflated, I think that's what you're saying,
10 and I'd agree, that's possible.

11 MR WEST: I do not think I need to ask you about elasticity
12 because of the answers you gave at the beginning, so
13 thank you very much, Dr Majumdar.

14 A. Thank you.

15 Re-examination by MR SCANNELL

16 MR SCANNELL: Just one question for you, Dr Majumdar.

17 Could we turn up the LiveNote [draft] transcript
18 please at page 145. So Dr Majumdar, at the bottom of
19 the page, at line 23, you were dealing with
20 the comparative usefulness of the pass-on dataset and
21 the overcharge dataset used by Mr Hughes. Could I just
22 ask you to read page 145, line 25, to page 146, line 3.

23 (Pause)

24 Is there anything you wish to clarify?

25 A. Oh, I've misspoken. I've misspoken:

1 "So the beauty about the panel that we have ... for
2 the [pass-on] assessment ..."

3 I do -- I misspoke. I do apologise.

4 So what I'm trying to say here is that the -- is
5 the data that we have for the pass-on assessment is
6 a very nice dataset in contrast to the overcharge
7 dataset. So that should say "for the pass-on
8 assessment".

9 MR SCANNELL: Thank you, Dr Majumdar.

10 THE CHAIRMAN: Thank you very much --

11 A. Thank you.

12 THE CHAIRMAN: -- Dr Majumdar. Thank you. You are released
13 from your oath.

14 A. Thank you.

15 (The witness withdrew)

16 Housekeeping

17 THE CHAIRMAN: So we have now nothing until German law
18 experts on Monday, I think, and that --

19 MR WEST: Yes, and we have received, I think,
20 the Defendants' German law note. Ours is ready to go.
21 I am not sure if it has been sent yet.

22 THE CHAIRMAN: Sorry, German law note?

23 MR WEST: Yes, the Tribunal asked for short written notes
24 from the parties about German law in advance of
25 cross-examination, rather than Professor Bailey

1 addressing you orally on it.

2 THE CHAIRMAN: Yes, okay, I am grateful. So we have up to
3 45 minutes, I think we said, of cross and then half an
4 hour each of submissions; is that right?

5 MR WEST: Yes.

6 There is one other important development I should
7 bring to the Tribunal's attention, which is that in
8 the course of this afternoon the Claimants have settled
9 this claim with ZF. I have only just been informed that
10 that settlement agreement has been signed, so I can now
11 inform the Tribunal of that fact, but the case continues
12 against Autoliv.

13 THE CHAIRMAN: I see. Okay.

14 MR WEST: There may be implications, for example, there will
15 have to be amended pleadings and so on filed, but --

16 THE CHAIRMAN: Yes.

17 MR WEST: -- we will have to consider that.

18 THE CHAIRMAN: Fine. So the ball passes to you,
19 Mr Scannell, to cross-examine on German experts,
20 presumably?

21 MR SCANNELL: It would seem so.

22 THE CHAIRMAN: Yes.

23 MR SCANNELL: This is all news to me as well.

24 THE CHAIRMAN: Right, okay.

25 So I was going to suggest starting at 10 o'clock on

1 Monday, just to make sure we can get through that by
2 lunchtime.

3 MR SCANNELL: Yes.

4 THE CHAIRMAN: Then written -- just looking ahead to when we
5 can expect written closings. I do not think we had set
6 a date or time when we had received the written
7 closings, had we?

8 MR WEST: Thursday morning, I recollect.

9 THE CHAIRMAN: Thursday morning, yes, excellent, that is
10 what I was going to say. So if we could have them at
11 9.30 on Thursday, then we can have two days to read them
12 and that would seem to leave plenty of time, given where
13 we are.

14 MR WEST: Just in relation to the implication of
15 the settlement, one potential implication is clearly on
16 the causation issue because of the potential difference
17 in position between Autoliv and ZF, ZF having only been
18 party to OSS 2.

19 THE CHAIRMAN: Yes, well, that falls away, does it not?

20 MR WEST: I understand that it falls away, but my friend may
21 wish to consider that briefly and confirm his position
22 -- Mr Scannell, I mean -- in relation to that.

23 Likewise, whether Autoliv wishes to proceed with
24 the German law point, again, which I understand was
25 really ZF taking the lead on that, is something they

1 could usefully confirm.

2 THE CHAIRMAN: Yes, well, I do not expect Mr Scannell to do
3 that now.

4 MR SCANNELL: Yes, I am not going to confirm that now.

5 THE CHAIRMAN: Obviously if you could let us know by Friday
6 whether or not you are continuing with that.

7 MR SCANNELL: Certainly.

8 THE CHAIRMAN: Obviously it will save us all coming up to
9 London to hear the cross-examination and so forth.

10 MR WEST: Nothing further.

11 (Pause).

12 MR SCANNELL: Mr Chairman, just in relation to the timing of
13 the filing of the written closings, it was originally
14 envisaged by the Tribunal that a joint written closing
15 would be filed and, as I am sure the Tribunal can
16 appreciate, the hypothesis was that we would deal with
17 some of the issues arising and ZF would deal with
18 others.

19 Given the revelation of this settlement, could I ask
20 that the written closings be filed on Friday rather than
21 Thursday?

22 THE CHAIRMAN: Well, given where we are, I do not think that
23 is necessary, is it? I mean, we are more than a week
24 away. To suggest that you need an extra day seems
25 unlikely from here, so I think the Tribunal would

1 welcome two days to read the closing submissions so that
2 we can -- we are well prepared for Monday. I do not
3 think the issues are that complicated that it will take
4 more than a week to prepare closing submissions --

5 MR SCANNELL: Very well.

6 THE CHAIRMAN: -- so I am not going to consent to that.

7 Obviously, if there are any -- I appreciate this has
8 -- it may have caught you by surprise as well, Mr West,
9 but this settlement may -- if it raises any issues that
10 you wish to bring to our attention, you can obviously
11 write to us in the next day or so and we can give
12 thought to it.

13 (4.10 pm)

14 (The Court adjourned until 10.00 am on Monday,
15 21 October 2024)

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