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**IN THE COMPETITION**

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

**APPEAL**  
**TRIBUNAL**

Salisbury Square House  
8 Salisbury Square  
London EC4Y 8AP

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

Before:

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

(Sitting as a Tribunal in England and Wales)

BETWEEN:

**Claimants**

**Stellantis Auto SAS & Others**

**V**

**Defendants**

**Autoliv AB & Others**

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

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

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

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

Monday, 28 October 2024

(10.30 am)

THE CHAIRMAN: Just give me a couple of minutes.

(Pause).

Some of you are joining us live stream on our --

(Pause).

Some of you are joining us live stream on our website. 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 WEST: Good morning.

THE CHAIRMAN: Good morning.

MR WEST: Before I proceed with the oral closing submissions, the Tribunal received, last night, a letter from Autoliv's solicitors attaching a new note from Dr Majumdar. The Claimants object to that on admissibility grounds, but my friends told me, this morning, that he is not applying to admit that note. So I just put that on the record. On that basis --

THE CHAIRMAN: Hold on. Slow down. So this is -- we only just saw this, various documents, just quite recently. So this is the spillover damages and

1 method B sensitivities?

2 MR WEST: Yes.

3 THE CHAIRMAN: That is not going in?

4 MR SCANNELL: I told my learned friend that I was not  
5 proposing to make a proactive application to admit it,  
6 but of course we do want to refer to it and it is before  
7 the Tribunal. I will apply, if the Tribunal feels that  
8 an application needs to be made, but the -- that note is  
9 simply a response to a note that has been put in by  
10 Mr Hughes putting in a new methodology for calculating  
11 spillover. Dr Majumdar is responding to that, and he is  
12 confirming in writing a point which we said he confirmed  
13 in our written closing.

14 THE CHAIRMAN: Right. Okay, that is not as straightforward  
15 as I was hoping.

16 MR WEST: Was that the application? I am not sure if that  
17 was the application.

18 THE CHAIRMAN: Let us leave that for the moment. You put in  
19 some additional documents?

20 MR WEST: What happened is that, following the settlement  
21 with ZF, Mr Hughes had to recalculate the spillover  
22 damages because the spillover damages calculation that  
23 he had put before the Tribunal, whilst it separated  
24 the OSS 1 and OSS 2 periods, it did not split the OSS 2  
25 period between the two Defendants. So, in light of

1           the settlement with ZF, he has prepared a new  
2           calculation which excludes the ZF value of commerce.  
3           That is all it does.

4       THE CHAIRMAN: Subject to anything Mr Scannell has to say,  
5           on that narrow point, if it is just a mechanical  
6           exercise of stripping things out and coming up with  
7           the new figures, the provisional view will be that that  
8           is unobjectionable, that is just mechanical. However,  
9           I thought it had gone a little bit further than that.

10       MR WEST: This is Mr Hughes' note?

11       THE CHAIRMAN: The note -- this is the note on additional  
12           spillover damages.

13       MR WEST: Can I ask which note? Because there is one from  
14           Mr Hughes and one from Dr Majumdar.

15       THE CHAIRMAN: Yes, so this is Mr Hughes' note, yes  
16           (indicates)? What we have not had the opportunity to do  
17           is find out how much of this is new and how much of this  
18           is in the original expert report and how much is just an  
19           adjustment.

20       MR WEST: Can I just clarify one additional point. Whilst  
21           he strips out the ZF value of commerce, the figures that  
22           he is presenting are based on the Claimants' value of  
23           commerce figures.

24       THE CHAIRMAN: Yes.

25       MR WEST: Whereas his original calculation was based on

1 the Defendants' ones. That causes the figures to come  
2 down, and so it is conservative, but Mr Hughes thought  
3 it was better to present the Claimants' figures. That  
4 is the only other change in this note.

5 THE CHAIRMAN: Well, if they have gone down, then I do not  
6 suppose Mr Scannell is objecting, but ...

7 Are you objecting to this?

8 MR WEST: It is agreed that that is admissible.

9 MR SCANNELL: We have not objected to the admission of  
10 Mr Hughes' note.

11 THE CHAIRMAN: Right.

12 MR SCANNELL: We think that it would be helpful for  
13 the Tribunal and we are not objecting.

14 THE CHAIRMAN: Okay.

15 MR SCANNELL: We thought that the same approach would be  
16 taken to Dr Majumdar's note, but it seems not.

17 THE CHAIRMAN: Right, okay. Fine, well, let us -- so what  
18 are we going to do about Dr Majumdar's? I mean, it  
19 cannot have a sort of non-status if we can read it and  
20 consider it but it not be in evidence; it is either  
21 going to be in evidence or it is not.

22 MR SCANNELL: Yes, I am going to refer briefly to the points  
23 that are made in that note when I come to make my oral  
24 closings, but the points that I want to make are not  
25 dependent on this being admitted into evidence.

1 THE CHAIRMAN: But you say you can make the same submissions  
2 in any event.

3 MR SCANNELL: Absolutely, I would.

4 THE CHAIRMAN: Yes. Well, obviously if you want to make  
5 submissions, that is fine. So we will --

6 MR SCANNELL: I believe Dr Majumdar's note is in  
7 the correspondence bundle, of course. It is not in  
8 the E bundle, which is the expert bundle.

9 THE CHAIRMAN: Right, but the correspondence is not -- is  
10 not evidence. Insofar as you want to raise argument,  
11 there is no objection to that, as I understand it, if it  
12 is submissions --

13 MR SCANNELL: Yes, I am not suggesting that it has some sort  
14 of quasi-evidential status because it is in  
15 the correspondence bundle, I just mean that it is  
16 physically before the Tribunal, so there will not be any  
17 problem if you do want to take a look at it. But,  
18 frankly, Mr Chairman, I am not going to die in a ditch  
19 over whether or not this is formally admitted into  
20 evidence.

21 THE CHAIRMAN: Thank you. Right, so the current position is  
22 we will -- although we have read it de bene esse, we  
23 will not consider it when we write our judgment, we will  
24 consider any submissions you make. Let us leave it  
25 there for now and if we need to readdress that ...

1           So where is the -- the additional note is already in  
2           the bundles; is that right? Mr Hughes' additional note?

3 MR WEST: Mr Hughes' note is at the back of bundle E, at  
4           tab 20 -- sorry, tab 21 {E1/21/1}.

5 THE CHAIRMAN: Yes, I have already got it. Thank you very  
6           much.

7                           Closing submissions by MR WEST

8 MR WEST: So the Tribunal has the parties' lengthy written  
9           closing submissions and I do not propose to repeat  
10          the contents of those. What I would like to do in oral  
11          closing submissions is focus on a number of points  
12          around which the dispute between the parties appears to  
13          have coalesced the real focal points of the dispute.  
14          I have agreed between -- with my friend a split of  
15          timing, which is that I shall sit down by 12 tomorrow at  
16          the latest, leaving me an hour to reply at the end, but  
17          I do not expect I will actually need all of that time.  
18          We shall see how we get on.

19                 So can I start with the direct case of cartelisation  
20                 against the Claimants and in particular the documents on  
21                 which the Claimants rely for their direct case. Again,  
22                 I went through this in opening and I do not propose to  
23                 go through that all again. We handed up a chronology at  
24                 the time with those documents and there is now a fuller  
25                 chronology in closing.

1 THE CHAIRMAN: Can I just check -- sorry, you may be coming  
2 to it, but there is an annex to Autoliv's submissions  
3 where the documents are classified. I am not expecting  
4 you to agree with the commentary, but insofar as  
5 the classifications are identified, is there any dispute  
6 about those classifications, or if there is, can you let  
7 me know at some point?

8 MR WEST: Yes.

9 As the Chair mentioned, Autoliv addresses this in an  
10 annex to its submissions because it clearly wishes to  
11 stay as far away from these documents as possible, and  
12 we shall see what my friend says about them in his oral  
13 closings. I suspect the answer will be as little as  
14 possible. But its position in the annex is that there  
15 are innocent explanations for all of these documents.  
16 The Tribunal can read the documents for itself, but I do  
17 just wish to go to a handful of them again, if I may,  
18 just to test these explanations which are now put  
19 forward.

20 So can we start with tab --

21 THE CHAIRMAN: Yes, sorry for taking you off your course  
22 before you have even started, but there were just  
23 a couple of points. I raised in opening about  
24 the status of the documents and whether  
25 a Civil Evidence Act notice had been served and I think



1           you have commented on that in your closing somewhere.

2           I cannot remember.

3       MR WEST: I think my friend commented on that.

4       THE CHAIRMAN: Autoliv commented. But, of course, there is  
5           no provision in the rules, is there, of this Tribunal  
6           for Civil Evidence Act notices; is that right or ...?

7       MR WEST: That is right. So the position the parties have  
8           taken is that documents in the bundles are treated as  
9           evidence of their contents, and there was an earlier  
10          exchange at a CMC about providing schedules of documents  
11          upon which the Claimants rely, so that -- and it was  
12          agreed that Civil Evidence Act notices could be  
13          dispensed with to that extent. So we have considered  
14          this.

15       THE CHAIRMAN: But, sorry, do Civil Evidence Act notices  
16          exist for the purposes of this Tribunal?

17       MR WEST: I am aware of one case where the Tribunal has  
18          directed the service of Civil Evidence Act notices.  
19          There is no provision in the CAT rules about it.

20       THE CHAIRMAN: Yes.

21       MR WEST: Indeed, the CAT is not bound by formal rules of  
22          evidence in any event.

23       THE CHAIRMAN: No, no.

24       MR WEST: But I think the position, as agreed between  
25          the parties, is that documents in the bundles are

1 evidence of --

2 THE CHAIRMAN: Yes. No, I understand that. It was more  
3 just the structure of how we are approaching this than  
4 anything else, but thank you.

5 MR WEST: So effectively we are following the practice  
6 direction in the CPR, even though it is not strictly  
7 applicable.

8 THE CHAIRMAN: Yes.

9 MR WEST: So {J1/41/1}, which the Tribunal will recall.  
10 This is an internal Autoliv email sent by Mr Schönborn  
11 to Mr Blanchford and Mr Fischer, subject, "Global  
12 Sourcing/Strategy with our competitors", and  
13 Mr Schönborn says he:

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

16 Now, "Art", that is Mr Blanchford, was the head of  
17 Autoliv's GM business unit, General Motor's business  
18 unit, which included Opel and Fiat at the time, so  
19 Mr Fruck must be the head of TRW's GM business unit, and  
20 Mr Schönborn says:

21 "In general we agreed that we are not willing to  
22 support Opel's strategy regarding their intention with  
23 this global sourcing!"

24 So how are we to understand that sentence? In my  
25 submission, if one asks what is Opel's strategy with

1 the global sourcing, the strategy must be to put  
2 pressure on prices of OSS components by bundling  
3 together as a package a number of vehicles. That is  
4 a big prize and therefore the hope is that will  
5 encourage fierce competition between the OSS suppliers.

6 Here, we have Autoliv agreeing with TRW not to  
7 support that strategy.

8 He goes on:

9 "When business is sourced we should give each other  
10 the chance to recover the sourced price by engineering  
11 changes!"

12 Now, what does that mean? In my submission, it is  
13 referring to the practice, following the sourcing of  
14 the business, so the appointment of the supplier, that  
15 when there are engineering changes, as we have heard  
16 that there often are during the development phase,  
17 the supplier will quote an inflated price by reason of  
18 that amendment.

19 Now, what is meant by, "we should give each other  
20 the chance to recover the sourced price"? In my  
21 submission, what that refers to is cooperation between  
22 TRW and Autoliv if Opel seeks to use competition to put  
23 pressure on these inflated price amendments. So, for  
24 example, if -- let us say Autoliv was to be appointed as  
25 the supplier and it quotes an inflated price in response

1 to an engineering change, one of the things Opel could  
2 do is then approach TRW and see what its price would be  
3 for this specification, or what its view would be of  
4 the appropriate price amendment in those circumstances.  
5 What the parties are here agreeing to do is not to  
6 cooperate with Opel in the event that that should arise.

7 We then see Mr Schönborn says:

8 "He also has a lot of problems with Opel's pricing  
9 and want to take the opportunity to recover loss  
10 business."

11 So it is a discussion about pricing.

12 Then we have:

13 "... I am very glad he brought up some points he is  
14 not willing to stand any more and we want to make  
15 a clear common statement to GM-Fiat-[Worldwide  
16 Purchasing] whenever these ... come up."

17 The first is:

18 "Breakdowns for ... engineering changes ...

19 "Targets regarding VA/VE savings

20 "Tooling Breakdowns

21 "Working together to increase market prices up to  
22 a profitable level."

23 Now, so what is being said here is that Autoliv and  
24 TRW are agreeing that they are not going to cooperate  
25 with Opel's requests for detailed breakdowns of

1 engineering changes, or targets, or tooling breakdowns,  
2 and it is said that they are going to make a clear  
3 common statement whenever these points come up. What  
4 does that mean? In my submission, what it means is, if  
5 Opel goes to ZF with these demands, they will be  
6 declined, and if it goes to Autoliv with these demands,  
7 they will likewise be declined. What is not being  
8 suggested is that Autoliv and TRW should tell Opel that  
9 this is a common position between the two of them.

10 Now, if this were to happen, of course, Opel would  
11 also have the possibility of going to the third main  
12 supplier, which is Takata, but we see further down  
13 towards the end of the email, just above "Regards":

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

17 So they are also to be brought into the agreement.

18 Then the final bullet point which we see on  
19 the list:

20 "Working together to increase ... prices up to  
21 a profitable level."

22 That is clearly an agreement between Autoliv and TRW  
23 that the two of them will work together to increase  
24 prices of OSS supplies.

25 THE CHAIRMAN: Just remind me, what evidence do we have on

1           what the global sourcing strategy is that Opel are ...?

2           MR WEST: So the global sourcing was a single tender  
3           regarding a number of vehicles. Rather than putting out  
4           either a single vehicle to tender or separate packages  
5           for the different OSS components for a single vehicle,  
6           all of the OSS for a number of vehicles were being put  
7           out to tender together.

8           THE CHAIRMAN: So it is a single tender for a number of  
9           vehicles?

10          MR WEST: Yes, and we can see that -- I will just find  
11          the reference -- it is 129, tab 129 {J1/129/1}.

12          THE CHAIRMAN: Sorry, I know you addressed this before but  
13          I have just forgotten.

14          MR WEST: So this is the announcement of the tender.

15          THE CHAIRMAN: Sorry, 129?

16          MR WEST: Tab 129. So this is GM emailing the suppliers:

17                       "Dear Safety Suppliers ..." --

18          THE CHAIRMAN: Yes. Okay, yes, I have got that marked up.

19          MR WEST: So you can see a number of vehicles, Astra,  
20          Vectra, Saab 93, so a number of vehicles being put out  
21          to tender at the same time. In my submission, that  
22          final bullet point {J1/41/1} is a clear agreement  
23          between competitors to seek to increase prices. So what  
24          I say about this document is that it is a clear record  
25          of a cartel agreement, perhaps a rather unusual beast,

1 and it ticks all of the boxes in this case. It is an  
2 agreement between Autoliv and TRW and it is directed at  
3 a number of the Claimants, namely Opel and potentially  
4 also Fiat, which was part of the same WWP at the time.

5 If we see, apart from discussing this with Takata,  
6 what was going to happen next between Autoliv and TRW,  
7 that is in the line beginning:

8 "When we receive ..."

9 So Mr Schönborn says:

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

12 That is indeed exactly what happened. This email,  
13 as we see, is in February 2003, this tab 41 {J1/41/1},  
14 and the announcement of the tender that we just looked  
15 at at {J1/129/1} was in October -- 27 October of  
16 the same year, so a number of months later. So  
17 Mr Schönborn had said {J1/41/1}, when the RFQ is  
18 announced, we will come together to discuss more  
19 details, and that is what explains the timing of  
20 the dinner meeting in Ulm, which is recorded in tabs 42  
21 {J1/42/1} to 43 {J1/43/1}. So 42 in German and 43. So  
22 this is now 6 November, a few days after the RFQ is  
23 announced, and we see there the individuals who  
24 attended, Mr Fruck, that Mr Schönborn had been  
25 discussing with, and not Mr Schönborn this time but

1 Mr Aigner. Now Mr Aigner was the head of the EU sales  
2 for OSS for Autoliv, and we can see that in the  
3 organogram, if you want to look at it up, at tab 611  
4 {J1/611/1} --

5 THE CHAIRMAN: Yes, I have got that in mind, we do not need  
6 to turn it up.

7 MR WEST: Now, as it happens, Mr Aigner later moved to  
8 Autoliv's Volkswagen business unit and he was part of  
9 that business unit at the time of the Volkswagen cartel  
10 and he is listed in the Commission's RFI in connection  
11 with the Volkswagen cartel, and we can see that at  
12 {J1/695/7}, item 21. So that is a:

13 "Meeting ... in Gasthof Bammes (near [Nuremberg]  
14 ...) between TRW (Mr Aygun and Mr Krebs) ..."

15 Familiar names:

16 "... Takata ... and Autoliv (Mr Hundt and  
17 Mr Aigner)."

18 THE CHAIRMAN: So just -- these references are all in your  
19 closing, are they, written closing, these document  
20 references? If not, tell me --

21 MR WEST: I did take -- I took the Tribunal to this in my  
22 opening, so they should be in the transcript for  
23 the opening. I can provide a note of all these if  
24 that --

25 THE CHAIRMAN: Yes, it would be nice to have them in one



1 place otherwise it is ... So where are you in your  
2 closing at the moment in this document, just remind me  
3 where that is dealt with?

4 MR WEST: Well, in the closing I do not go through all of  
5 the documentary evidence.

6 THE CHAIRMAN: Okay, well, I will chop the documents next to  
7 them. If you tell me where it is in the closing that  
8 you deal with {J1/41/1}, which you do ...?

9 MR WEST: It is certainly dealt with in our opening, in our  
10 opening submissions. We do not deal with all of  
11 the evidence of cartelisation directly in the closing.  
12 I will ask my Junior to --

13 THE CHAIRMAN: But you run through quite a lot of  
14 the documents.

15 MR WEST: I am not sure this one is -- this one is certainly  
16 dealt with in the opening.

17 THE CHAIRMAN: In your written opening?

18 MR WEST: Yes.

19 I am told it is paragraph 63 of the closing  
20 {S/13/32}. In the opening, there is a section entitled,  
21 "Opel's 2003 global sourcing" {S/1/33}.

22 THE CHAIRMAN: 61, was it? Sorry, where are you in your  
23 opening?

24 MR WEST: 63, I am told, of the closing {S/13/32}, and  
25 the opening is 108 to 111 {S/1/33-35}.

1 THE CHAIRMAN: Okay. So let us have a look in the ... I am  
2 not sure you have all the references here -- starting  
3 with closing.

4 MR WEST: Then this RFI response is paragraph 28(a) of  
5 the opening {S/1/11}, which deals with the individuals  
6 listed in the RFI request, including Mr Aigner.

7 THE CHAIRMAN: Right, hold on a sec. You say go to the ...  
8 RFI response is 28(a). Yes, but all these are --  
9 all these points are scattered through the documents and  
10 they need to be --

11 MR WEST: We have tried to pull them together in  
12 the chronology.

13 THE CHAIRMAN: Right. Let us just take this a bit more  
14 slowly with documents that you are relying on. So let  
15 us go to the closing then. So you say {J1/41/1} has to  
16 be read in the light of tab 129 {J1/129/1} for  
17 the global strategy.

18 Then the dinner meeting, which I think you have got  
19 the references in for that, tabs 42 {J1/42/1} and 43  
20 {J1/43/1}.

21 Then you say that Mr Aigner was part of the -- on  
22 the list.

23 MR WEST: Yes. So he moved to the Volkswagen business unit  
24 and he is listed in the RFI at {J1/695/7} point 21.

25 THE CHAIRMAN: Then you said his -- and the -- we get what

1 his position was from your dramatis personae,  
2 presumably?

3 MR WEST: Yes, or the organogram which is {J1/611/1}, which  
4 again we looked at in opening but shows him as in charge  
5 of EU sales for GM.

6 THE CHAIRMAN: Yes, thank you.

7 MR WEST: Now, both of these documents, both {J1/41/1} and  
8 42/43 {J1/42/1} {J1/43/1}, which are translations of  
9 each other, you will see contain the annotation at  
10 the bottom, "Annex Opel 1". You can see that on 41 and  
11 it is also on 42. What does that annotation mean? It  
12 means that, as was confirmed by my friend in opening,  
13 these are documents which Autoliv gave to the Commission  
14 as annexes to its leniency statement, and the reason it  
15 did that is because it wished to comply with its  
16 obligation as a leniency applicant to put before  
17 the Commission all of the inculpatory evidence, and  
18 therefore we say what this shows is that it is not just  
19 my submission that this is a document evidencing  
20 cartelisation against my clients, that was Autoliv's own  
21 view. That is why it gave the document to  
22 the Commission.

23 THE CHAIRMAN: Well, they might have -- it might have given  
24 the document because of -- it afforded different  
25 interpretations. It might have -- I mean, I -- it is

1 not as if it formed an admission that that was a -- I am  
2 not sure how much one can read into that.

3 MR WEST: Well, I have made the point.

4 The other interesting aspect of this document  
5 {J1/41/1} is the date, back in February 2003, and that  
6 is before the start of any of the Commission cartels.  
7 So we rely on that in particular in relation to  
8 the claim concerning the early period as showing that  
9 there is in fact substantial documentary evidence of  
10 cartelisation prior to the period when the Commission  
11 found that the cartels operated.

12 THE CHAIRMAN: Yes, although this does not relate to a new  
13 contract, this particular document.

14 MR WEST: This does. This relates to a new RFQ, the global  
15 sourcing RFQ, Opel's global sourcing RFQ. That was  
16 a new contract.

17 THE CHAIRMAN: Is that right? Sorry, just help me with  
18 that. I thought this was -- if we go back to 41  
19 {J1/41/1}, I may have misunderstood that.

20 MR WEST: So this is about the upcoming RFQ --

21 THE CHAIRMAN: So what are the "engineering changes"? The  
22 "engineering changes" suggests that it is -- you have  
23 already got something and you are changing it.

24 MR WEST: Yes, so this is -- suggests -- this is concerning  
25 what should happen later on, but this particular global

1 sourcing RFQ, as we see -- I think, I gave you  
2 the reference to tab 129 {J1/129/1} -- it was not  
3 actually announced until October of 2003, so this is  
4 discussing an upcoming RFQ. But, yes, the parties are  
5 certainly agreeing, in relation to the negotiations for  
6 the RFQ, that they are not going to comply with various  
7 requests that Opel are likely to make for costs  
8 breakdowns and VA/VE savings and tooling breakdowns, and  
9 so on, once the RFQ has been announced.

10 THE CHAIRMAN: Okay.

11 MR WEST: So far as we can tell, what actually happened  
12 about this tender is -- this is referred to at tab  
13 {J1/46/1}. There is another email between TRW and  
14 Autoliv, and over the page {J1/46/2}, it talks about  
15 this in the second bullet point, this global sourcing,  
16 we saw that the Opel and Vectra were the two models,  
17 the two Vauxhall models at issue, and we see Mr Müller  
18 saying this "was probably ... won by the proud  
19 Spaniards". Now, that is a reference to Dalphi Metal.  
20 So what appears to have happened is that Dalphi Metal do  
21 not appear to have been involved in this attempted  
22 cartel and ended up winning the bid. As I explained in  
23 opening, that does not mean that no loss was suffered as  
24 a result of this. What it means is that there was  
25 a tender involving some bidders who were in a cartel and

1 at least one, Dalphi Metal, which was not, and  
2 the outcome was that the non-cartelist won the bid.  
3 Whether there is loss in that situation requires  
4 a comparison with what would have happened in  
5 a counterfactual of no cartel and in particular whether  
6 Dalphi Metal would still have won, or whether one would  
7 have had lower bids from Autoliv and TRW, and in that  
8 situation Opel still suffered a loss by reference to  
9 the counterfactual. This is just another way of  
10 describing the phenomenon of umbrella damages. So one  
11 has, in the event, a purchase from a non-cartelist but  
12 losses are still suffered by reason of the cartel even  
13 though the sourcing in the end was placed with  
14 a non-cartelist. So that is a traditional form of  
15 umbrella damages.

16 Now, Mr Spiess told us that something similar had  
17 happened around the same time with another GM global  
18 sourcing package, the Epsilon II, that is paragraph 20  
19 of Mr Spiess's statement {D/3/5}. He was asked some  
20 questions about this in cross-examination because it  
21 appears to be a very similar episode of a GM global  
22 tender being put out and -- with a view to putting  
23 pressure on OSS prices, and in the event what happens is  
24 that instead of the usual suspect winning, Dalphi Metal  
25 wins the tender, and we say that is all very similar to

1           what happened with the other global sourcing that we  
2           have been looking at. But in any case, in 2005, as we  
3           also know, shortly after these global sourcings, Dalphi  
4           were removed from the game when TRW purchased  
5           Dalphi Metal.

6           Now, we have the Commission merger decision for that  
7           merger transaction at {J2/91/1} and there is no need to  
8           turn it up but it is clear from that merger decision  
9           that when the Commission approved this merger, it had no  
10          inkling of the kinds of conduct between Autoliv and TRW  
11          and Takata as appear from the document we have just been  
12          looking at. Instead the Commission recorded that  
13          the market was characterised by fierce competition.

14          Now, we pleaded this document at tab 41 {J1/41/1} in  
15          our Re-Amended Particulars of Claim in October 2022,  
16          paragraph 40B(i) {A/2/18} of the Re-Amended --

17       THE CHAIRMAN: "This document" being?

18       MR WEST: Tab 41 {J1/41/1}. The reason is that this was on  
19          the Commission file, as we saw from the annotation, so  
20          we obtained this document at an early period, and  
21          Autoliv have therefore had a substantial period of time  
22          to prepare their answer but they have chosen to submit  
23          no evidence at all about this document. They have not  
24          produced Mr Schönborn, about what he meant in the email,  
25          or Mr Blanchford, concerning what he understood from it

1           when he received it or what steps he took in response to  
2           it, or Mr Aigner, about what was discussed in the dinner  
3           meeting with Mr Fruck, no minutes of that meeting have  
4           ever been produced or any other document reporting back  
5           on the discussions that took place. Indeed, no one from  
6           within the GM account in Autoliv at the time has been  
7           produced as a witness. Instead we had Mr Michalik, who  
8           candidly states in his statement, at paragraph 17  
9           {C/5/6}, that he has never held a commercial role at  
10          Autoliv. He was always a technical person and, as  
11          the Tribunal will recall, in the event his attendance  
12          was dispensed with entirely because his evidence was so  
13          peripheral.

14                 Neither have Autoliv submitted any evidence about  
15                 why none of these individuals have come along. We do  
16                 not have a statement from their solicitors saying they  
17                 have made extensive efforts to contact the individuals  
18                 but they have died, or they are ill, or they are  
19                 unwilling to assist for other good reasons. So turning  
20                 then to what Autoliv say in their annex about this.

21          THE CHAIRMAN: You could have called these people yourself,  
22                 subpoenaed them or ...

23          MR WEST: I suppose that is theoretically possible, but it  
24                 would be perhaps unexpected for the claimant in a cartel  
25                 case to be expected to call the cartel individuals.



1 THE CHAIRMAN: You say this document is sufficiently clear  
2 on its face that there would be no need to do that.

3 MR WEST: I do, yes.

4 So if we can look at what annex -- sorry, what  
5 Autoliv say about this in the annex, this is row 2 of  
6 their annex, which is at {S/16/1} and row 2 is on  
7 {S/16/2}. The first paragraph -- so this is in yellow,  
8 row 2.

9 THE CHAIRMAN: Sorry, row 2 of this document?

10 MR WEST: {S/16/2}, row number 2, yes.

11 THE CHAIRMAN: In yellow, yes.

12 MR WEST: So they say:

13 "[This] document does not involve the exchange of  
14 commercially sensitive information as contemplated by  
15 the recitals ... of the Guidelines on the applicability  
16 of ... Article 101 of the Treaty on the Functioning of  
17 the European Union to horizontal cooperation  
18 agreements ..."

19 Well, that rather misses the point, in my  
20 submission. My submission is this is a cartel  
21 agreement, not a legitimate horizontal cooperation  
22 agreement which happens to have some information  
23 sharing.

24 Then, at paragraph 2, they say:

25 "The internal Autoliv email refers to Opel's

1 proposed 'Global Sourcing' procurement process, in  
2 relation to which Autoliv and TRW intended to raise  
3 issues with the OEM on a common basis in a joint  
4 statement. The reference to making 'a clear common  
5 statement' to the OEM is inconsistent with allegations  
6 of covert collusion."

7 But, again, that assumes that Opel were going to be  
8 told that this common position being adopted by Autoliv  
9 and TRW had been reached on a common basis and was being  
10 put forward on a common basis, and if Opel were going to  
11 be told that, then no doubt Autoliv can produce  
12 the communication by which Opel were told that, and  
13 indeed when my friend was making submissions about this  
14 document on Day 3, the Chair asked him whether he was  
15 going to produce any evidence of this supposed joint  
16 statement, but needless to say, no such evidence has  
17 been produced.

18 THE CHAIRMAN: In terms of authority as to where  
19 the dividing line is between cartel activity and people  
20 with a trade interest coming together for a common  
21 statement, what is the relevant case law?

22 MR WEST: I am not specifically aware of any case law about  
23 making common statements. It is not something that  
24 commonly happens. But certainly there is case law  
25 about --

1 THE CHAIRMAN: When suppliers come together and complain  
2 that supermarkets are --

3 MR WEST: One would certainly --

4 THE CHAIRMAN: -- not paying them enough for their milk,  
5 which they regularly do, no one suggests that is  
6 a cartel; that is clearly a legitimate activity. But  
7 when is talking to your fellow suppliers legitimate and  
8 when is it illegitimate?

9 MR WEST: I am not sure coming together to say that  
10 supermarkets are not paying enough for milk, if it  
11 amounted to an agreement between the milk suppliers that  
12 they were not going to supply milk at that price, I am  
13 not sure that would be permissible. Certainly trade  
14 associations --

15 THE CHAIRMAN: Okay, there is no case law I should  
16 particularly have in mind on this?

17 MR WEST: Not that I am aware of, but undoubtedly, if there  
18 is to be any suggestion that this was above board, it  
19 should have been in the open; that is more of a factual  
20 point than a legal point.

21 THE CHAIRMAN: Yes. I understand that, yes.

22 MR WEST: Indeed, my friend's submission in this paragraph  
23 is rather contradicted by the next paragraph of  
24 the annex, where he says:  
25 "... the contents of the proposed common statement

1 as set out in the email includes the statement: 'working  
2 together to increase market prices up to a profitable  
3 level'. This does not refer to working with TRW; it  
4 would be nonsensical for Autoliv and TRW to make  
5 a common statement to GM that they were working together  
6 to increase their individual prices."

7 So the very thing that we are apparently told they  
8 were doing is now said to be nonsensical. In my  
9 submission, what was intended was that Autoliv and TRW  
10 would work together with each other to increase their  
11 prices without telling Opel what was going on.

12 This carries on:

13 "The email ... states: 'when business is sourced we  
14 should give each other the chance to recover the sourced  
15 price by engineering changes'. The reference to 'each  
16 other' is a reference to GM and the supplier having  
17 the opportunity to decrease (in the case of the OEM) or  
18 increase (in the case of the supplier) the 'sourced  
19 price' (i.e. the price after the RFQ and nomination  
20 process has concluded) arising from engineering  
21 changes."

22 So that seems to be a submission that this statement  
23 about recovering the source price means two directly  
24 opposite things at the same time: one, working to  
25 increase the price; and the second, working to decrease

1 the price. In fact, as we have seen, this document  
2 talks about working together to bring prices up to  
3 the profitable level and it cannot be sensibly  
4 suggested, as I think this document recognises, that  
5 the OEM would wish to be party to an agreement to bring  
6 prices up. As my friends submit in connection with  
7 their case about buyer power, the OEMs had at all times  
8 been seeking to use all levers at their disposal to  
9 bring prices down, not to push them up, and indeed that  
10 was the whole point of this global tender initiative, to  
11 bring prices down, and the whole point of the objection  
12 to it, we see here, was to stop that from happening.

13 They then say:

14 "The Claimants have sought to link this document  
15 with [{J1/41/1}], which indicates that a different  
16 Autoliv employee and a TRW employee [the same one] met  
17 for dinner some 8 months later November 2003 ..."

18 But I have explained the timing of that. It is that  
19 the RFQ was only announced in October and tab 41  
20 {J1/41/1} says that parties will meet after the RFQ is  
21 announced, so the gap of eight months is entirely  
22 consistent with my submissions.

23 They also say we seek to link it with another email  
24 concerning the award of airbags for the Vectra to  
25 Dalphi Metal. But that is because this was one of

1 the vehicles in the global tender, Vectra -- it was  
2 the Vectra and the Astra were the two Vauxhall vehicles  
3 in the tender.

4 Whilst the explanation in this annex refers to  
5 Autoliv employees, we know that they are not just any  
6 Autoliv employees or any TRW employees, they were  
7 respectively the head of Autoliv's GM Group in Europe  
8 and the overall head of TRW's GM Group, so we can be  
9 fairly confident of what it was they were meeting to  
10 discuss, namely GM business, particularly given that  
11 this tender was announced only a few days earlier at the  
12 end of October 2003.

13 So, in my submission, the explanations in row 2  
14 seeking to explain away the document at tab {J1/41/1}  
15 are not convincing at all and they are of course put  
16 forward entirely without any evidential basis or, as far  
17 as we are aware, a basis on instructions.

18 Now, at several points in its closing submissions,  
19 Autoliv goes so far as to say that there is not a single  
20 document which supports the Claimants' direct claim.  
21 That is at paragraph 10 of their closing submission, at  
22 line 2 {S/15/4}:

23 "... not a single document ..."

24 They say something similar about what their table  
25 shows, i.e. this annex, that is paragraph 123 of

1 the closing {S/15/30}, where they repeat that this table  
2 explains that there is not a single document in support  
3 of the direct cartel claim. It might be thought that is  
4 putting their case very high, given the documents that  
5 I spent most of the day going through in opening, and  
6 indeed it might be thought that that rather compromises  
7 the credibility of Autoliv's submissions, but they have  
8 to put their case that high and I will come back in  
9 a second to why it is that they have to do so, but just  
10 the two or three documents I have shown the Tribunal  
11 demonstrate that there are documents in support of  
12 the Claimants' direct cartel case and the submission  
13 that there is not a single one is wholly unsustainable.

14 I will come back in a second to the suggestion that  
15 it is a good answer to all of this that the Commission  
16 did not find a cartel despite having seen some of these  
17 documents.

18 Going back to the documentary evidence, I would like  
19 to look now at one or two documents concerning  
20 Mr Westerberg or Mr Carlson, or both, and the reason for  
21 that is that the involvement of the top management is  
22 extremely significant, in my submission. So  
23 the starting point for Mr Westerberg --

24 THE CHAIRMAN: Where is this in your closing?

25 MR WEST: We have the section on ...

1 THE CHAIRMAN: Is it 87?

2 MR WEST: 104, I am told, is --

3 THE CHAIRMAN: Paragraph 104 {S/13/44}? Meeting between  
4 Carlson and Lake?

5 MR WEST: Yes, so 104 deals with one of the documents I am  
6 going to look at in a second.

7 THE CHAIRMAN: Right.

8 MR WEST: We did address this in the skeleton argument for  
9 opening as well. My Junior is going to fish out  
10 the reference.

11 Just before we look at this, it might be worth  
12 explaining why it matters, because the nature of  
13 the defence being run in this case, insofar as there is  
14 one, is that Autoliv admit cartelising supplies to  
15 the named OEMs in the Commission decision, Toyota,  
16 Honda, Volkswagen, BMW, but it denies that that extended  
17 to the Claimants, so it says the Claimants have no claim  
18 because the cartel was limited to the named OEMs. So  
19 that is the nature of the case being run, certainly as  
20 I understand it, and one could characterise that as  
21 a sort of "a few bad apples" type of defence, there were  
22 a few bad apples in the company but it did not go any  
23 wider, it was limited to Volkswagen and BMW in Germany,  
24 Toyota and Honda in Japan and went no further. In my  
25 submission, that is a much more difficult defence to run



1 if it appears from the documents that participation in  
2 the wrongdoing went all the way to the top of  
3 the company.

4 So Mr Westerberg -- this was a point we made in  
5 opening, but he is made on the Commission list of  
6 contacts for the Volkswagen cartel, that is tab  
7 {J1/695/1}. {J1/695/6}, point 1. You see there  
8 Mr Westerberg.

9 THE CHAIRMAN: Yes.

10 MR WEST: There are several other documents confirming  
11 Mr Westerberg's involvement. Now, Mr Westerberg, just  
12 to remind the Tribunal, was the CEO of Autoliv from  
13 the beginning of the period we are concerned with until  
14 about late 2007 or 2008 when he was replaced by  
15 Mr Carlson.

16 Then we have {J1/66/1}, and we can see the subject  
17 line of this email, "Minutes [of] Sales Meeting [in]  
18 Paris - 13th Sept 04".

19 THE CHAIRMAN: Sorry, what page are we on? Sorry,  
20 apologies.

21 MR WEST: Tab 66. First page of tab 66. Subject line.

22 THE CHAIRMAN: Hold on, I am in the wrong tab. Apologies.  
23 Yes.

24 MR WEST: Sales meeting, and we see, a bit further down,  
25 this is in German, but we can see Mr Westerberg

1 was there.

2 Then, over the page {J1/66/2}, the meeting minutes  
3 {J1/66/2} are set out, and we looked at this, again in  
4 opening. Down at item 4:

5 "Talk to OEMs and bring this argumentation during  
6 price negotiations.

7 "Communicate/cooperate with TRW and Takata. More  
8 information will follow soon."

9 So Mr Westerberg was at least here when this was  
10 being discussed.

11 Then on the next page {J1/66/3} -- again, we looked  
12 at this before -- this is still discussing the sales  
13 meeting, this time from Franz X. Weiss, at the bottom of  
14 the page, and the fourth bullet point of his email:

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

18 The email at the top of this page is from  
19 Ms Veronica Eriksson to all of the account directors of  
20 the various business units within Autoliv, and we see,  
21 about halfway down in about the middle of the page, that  
22 Mr Westerberg was also copied in to this.

23 THE CHAIRMAN: But we do not know if this is -- this is not  
24 specific to any manufacturer -- car manufacturer.

25 MR WEST: Well, what then happened is that each of

1 the Autoliv business units fed back information about  
2 their own particular OEMs. There is one referring to  
3 Fiat -- sorry, to PSA and Renault. I did show you that  
4 in opening.

5 THE CHAIRMAN: So one of the things that seems to be  
6 the Tribunal is unaware of is, as I understood, you  
7 received the entire EU Commission file and we have no  
8 idea what sort of documents were flying around which the  
9 Commission relied on. So if you look at BMW or you look  
10 at Honda or you look at Volkswagen, we have got no feel  
11 for that documentary trail, so we are catapulted in,  
12 both sides, no doubt for their own reasons, have decided  
13 not to explore that, and we are catapulted in just to  
14 look at documents which are either neutral, in terms of  
15 manufacturer, or they are, in some cases, specific to  
16 the parties here. You say, well, you would not expect  
17 any documents, but presumably the Commission found  
18 a bunch of documents in relation to Volkswagen, BMW.

19 I am not sure --

20 MR WEST: The closest we have really is the RFIs, but those  
21 would have been based on --

22 THE CHAIRMAN: You have got all the emails, you know exactly  
23 who was involved in sending emails insofar as they  
24 related to BMW, let us say.

25 MR WEST: Yes, so we have chosen not to go into that because

1           that cartel has already been established.

2       THE CHAIRMAN:   Yes.

3       MR WEST:   These ones which refer to --

4       THE CHAIRMAN:   But at the moment -- sorry, correct me if  
5           I am wrong -- you are saying Mr Westerberg was senior in  
6           the company, so that means it is likely his influence  
7           applied to different manufacturers of cars, I understand  
8           that submission.  But was Mr Westerberg involved in  
9           the BMW/Volkswagen/Honda cartels directly personally,  
10          was he aware of it?  That seems the sort of bit that is  
11          missing at the moment.

12       MR WEST:   Well, all we can see is that he is listed as being  
13          party to one of the meetings that the Commission was  
14          asking about in its RFI.  Now, because it is  
15          a settlement decision, we do not have what you would  
16          have in a fully contested decision, which is a recital  
17          of all the evidence in the decision itself.  So the most  
18          -- the best substitute we have to go on is the RFI,  
19          where the Commission said, "Please give us all of  
20          the detail of what happened at these meetings and what  
21          was discussed".

22       THE CHAIRMAN:   So just -- so which RFI request, was it  
23          request 1, you said?  Can we just bring that up?  695?  
24          {J1/695/1}.

25       MR WEST:   Yes.

1 (Pause).

2 THE CHAIRMAN: Can we bring it up on the ...?

3 MR WEST: Oh, sorry. 695 at page 6, point 1 {J1/695/6},  
4 point 1.

5 THE CHAIRMAN: So this is September, not November.  
6 I am probably getting in a muddle.  
7 So there was a sales meeting on 13 September 2004,  
8 minutes circulated from Mr Weiss.

9 MR WEST: Yes.

10 THE CHAIRMAN: I thought -- sorry, how do we connect this to  
11 Mr Westerberg?

12 MR WEST: Point 1:  
13 "Meeting in November ... between Autoliv  
14 (Mr Westerberg and ... [Mr] Weiss) and TRW  
15 (Mr Kunze) ..."

16 THE CHAIRMAN: Sorry, I am being very slow. So which -- you  
17 are -- tab 66, which page are you reading from?

18 MR WEST: No, the RFI is tab 695 {J1/695/1}.

19 THE CHAIRMAN: No, no, I appreciate that. Yes, okay.

20 MR WEST: Tab 66 {J1/66/1} is --

21 THE CHAIRMAN: So the bit that I have got stuck on is  
22 point 1 on the RFI refers to a meeting in November and  
23 you are showing me minutes of a meeting in September and  
24 I am just trying to --

25 MR WEST: Well, these may or may not be correlated. I think

1           they probably are because they both concern RMPIS as it  
2           happens and they are close in time.

3       THE CHAIRMAN: That is fine. So all your submission  
4           is: look the Commission were interested in a meeting in  
5           November between Mr Westerberg and Mr Weiss --

6       MR WEST: In fact --

7       THE CHAIRMAN: -- and TRW, Mr Kunze.

8       MR WEST: -- they are connected. We can see they are  
9           connected because, if you look at {J1/55/1}, so we see  
10          this is the continuation of the email communications  
11          about seeking RMPI information from competitors and we  
12          see here Mr Franz Xaver Weiss:

13                 "Hi Veronica,

14                 "In November, Lars and myself met with Mr Kunze ..."

15                 So that seems to be the same meeting.

16       THE CHAIRMAN: Okay, so this is why it was of interest to  
17           the Commission -- or reflected, because it is a VW  
18           document.

19       MR WEST: Yes, we see it has got an "Annex VW" annotation at  
20           the bottom, this specific one.

21       THE CHAIRMAN: Right. So just summarise what you are  
22           getting out of this, Mr West.

23       MR WEST: At the moment I am trying to show that it appears  
24           that Mr Westerberg either knew about or participated in  
25           -- it looks like both -- the OSS cartels.

1 THE CHAIRMAN: For his -- he is copied in on some emails,  
2 but for participation you rely on what? Which document?  
3 MR WEST: Well, we see here Mr -- Lars -- that is  
4 Mr Westerberg:  
5 "... and myself met with Mr Kunze on a VW-Congress."  
6 THE CHAIRMAN: Oh, so "Lars" is Mr Westerberg.  
7 MR WEST: "Lars" is Mr Westerberg, yes.  
8 THE CHAIRMAN: All right. Sorry. So you say we have  
9 Mr Westerberg involved in this at least -- apparently at  
10 the very least in relation to VW?  
11 MR WEST: Yes, although the email at {J1/66/1} which we  
12 looked at before, {J1/66/3}, that was sent to all of  
13 the account directors for all of the different business  
14 units, and I showed you in opening that there were then  
15 responses from these various business units, including  
16 one relating to PSA, but I do not know the reference.  
17 THE CHAIRMAN: Yes.  
18 MR WEST: 123, I am told.  
19 THE CHAIRMAN: Sorry, 123?  
20 MR WEST: {J1/123/1} is the response relating to Renault and  
21 PSA. I showed you this in opening.  
22 THE CHAIRMAN: Yes, you did, yes.  
23 MR WEST: This was from Mr Kohl, because this was before  
24 Mr Rivière took over the account.  
25 THE CHAIRMAN: So, sorry, the relevant dates?

1 MR WEST: So this is 2005.

2 THE CHAIRMAN: Okay, so how does that relate? So we were  
3 looking at tab 66. We have now jumped to 123. What is  
4 the relationship?

5 MR WEST: Well --

6 THE CHAIRMAN: This was information about Renault and PSA  
7 price increases, but we do not know if this came from  
8 TRW or from another source.

9 MR WEST: Well, my submission is that this came from TRW,  
10 and we saw --

11 THE CHAIRMAN: We just cannot resolve that, can we? How can  
12 we resolve that?

13 MR WEST: Well, as a matter of overall probabilities. We  
14 saw where the Volkswagen information came from.

15 THE CHAIRMAN: So why is it saying, "the information about  
16 TRW is strictly confidential"?

17 MR WEST: Well, because of course Mr Kohl knows very well he  
18 should not be having these discussions.

19 THE CHAIRMAN: It could be it has come from a customer, and  
20 then he is saying, "Don't tell TRW I have told you".

21 MR WEST: But this is about TRW's own price increases.

22 THE CHAIRMAN: Yes, so the customer says, "Look, TRW's  
23 putting up its prices for its front seatbelt by 1.2%,  
24 that's typical what it's doing this year, but please  
25 treat this as confidential, don't go telling anyone I've



1           given you that information".

2           MR WEST:  It is also, in my submission, highly unlikely that  
3           any customer would tell Autoliv that the prices of its  
4           competitor were increasing, because that would encourage  
5           Autoliv to increase its prices.

6           THE CHAIRMAN:  Well, Autoliv might be trying to increase  
7           them by 3%, and says, "Look, TRW are just putting them  
8           up by 1.2%".  I mean, we do not -- taking this document  
9           in isolation, it is difficult to resolve any of these  
10          questions.

11          MR WEST:  Yes, I agree.  I do not suggest that this is  
12          the only document that we have in the case.

13          THE CHAIRMAN:  Right.  So we just jumped to that document  
14          from the document at {J1/66/1}, I think.

15          MR WEST:  But what you can see at {J1/55/1}, going back to  
16          55 --

17          THE CHAIRMAN:  Yes.

18          MR WEST:  -- at the bottom of the page, so this is now in  
19          February '05, Ms Eriksson, again, emails the -- so this  
20          is in a similar vein to the Paris sales meeting emails,  
21          but a few months later.  Again, I showed you this in  
22          opening:

23                 "We have realised ... it's not very easy to get our  
24          customers to the table and discuss  
25          our 'compensation' ...

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

5            So that is the email that Mr Franz Weiss responded  
6            to, as we saw at 55. It is also what Mr Kohl responds  
7            to at {J1/123/1}.

8            THE CHAIRMAN: Sorry, tab 123?

9            MR WEST: Yes. So that is the one about Renault and PSA.

10           So --

11           THE CHAIRMAN: Hold on. So you are going to have to take  
12           this more slowly, Mr West. I know we looked at these  
13           before, but that was a while ago. So how are you  
14           linking {J1/123/1} to {J1/55/1}?

15           MR WEST: They are both responses to the same email from  
16           Ms Eriksson.

17           THE CHAIRMAN: Right. So 2/3/2005, or maybe that is -- is  
18           that 3 February 2005 or 2 March?

19           MR WEST: Not clear. I do not think it matters.

20           THE CHAIRMAN: It says, "Re: Competitor survey", that is  
21           what you are --

22           MR WEST: Yes, so Ms Eriksson's email, "Subject: Competitor  
23           survey" and the response, "Re: Competitor survey".

24           THE CHAIRMAN: Right, I see.

25           MR WEST: I showed you in opening there were also responses

1 from the various other business units, but I do not  
2 propose to go through that again.

3 THE CHAIRMAN: But we know -- I am just trying to understand  
4 how this is taking things forward. I mean, a lot of  
5 this is evidence of cartel activity, but we know there  
6 are cartelists.

7 MR WEST: Yes, so --

8 THE CHAIRMAN: The question is, were they cartelists as  
9 against your clients?

10 MR WEST: Yes, so this point I am on at the moment is  
11 the involvement of the senior management and I hope  
12 I have established that they appear to have been  
13 involved in the OSS cartels.

14 THE CHAIRMAN: Yes. Yes.

15 MR WEST: So 38 {J1/38/1} was the next document I was going  
16 to go to.

17 THE CHAIRMAN: Have we found the reference for where this is  
18 in your closing yet?

19 MR WEST: I do not think this is dealt with specifically in  
20 my closing.

21 THE CHAIRMAN: The senior management point?

22 MR WEST: Well, Mr Carlson is dealt with in the closing,  
23 there is a separate section on him. This is --

24 THE CHAIRMAN: Okay, where --

25 MR WEST: I have not --

1 THE CHAIRMAN: -- where is Mr Carlson dealt with?

2 MR WEST: So the closing, it is 4(vii), 87 and 104.

3 THE CHAIRMAN: Sorry, give me a page number, Mr West,

4 please. Paragraph 87?

5 MR WEST: So the first reference was 4(iv) -- sorry, 4(vii),

6 that is on {S/13/6}.

7 THE CHAIRMAN: Right.

8 MR WEST: 87, {S/13/38} -- 87(i).

9 THE CHAIRMAN: Yes, that is the one I suggested it might be.

10 Yes.

11 MR WEST: Page {S/13/38}.

12 THE CHAIRMAN: Yes.

13 MR WEST: 104, page {S/13/44}.

14 THE CHAIRMAN: Right, thank you. So we are now going on to

15 tab 38 {J1/38/1}.

16 MR WEST: Yes. Again, we looked at this in opening. So

17 this is now Volkswagen, so this is outside

18 the Commission's -- sorry, this is Volvo, so this is

19 outside the Commission's decisions, and, again, you have

20 to read it backwards, but starting about halfway down,

21 there is an email from Mr Westerberg:

22 "We need to put a high priority on margins ..." --

23 THE CHAIRMAN: Sorry, hold on. Right, I have got it, yes.

24 MR WEST: "... try to avoid price wars!!!"

25 Then we have a response to that from Mr Celsing to

1 Mr Westerberg:  
2 "Situation of today  
3 Yesterday we had [a] very hard discussions in the  
4 morning with dave sharp and his team ..."  
5 Then:  
6 "Stefan [that is Mr Kroenung] opened contact with  
7 t sales man so we have matching prices ..."  
8 So that, we suggest, must be TRW, and here  
9 Mr Westerberg is effectively being told that Autoliv has  
10 made contact with T, so they have matching prices.  
11 THE CHAIRMAN: So how does that -- so matching prices for  
12 what?  
13 MR WEST: Well --  
14 THE CHAIRMAN: How do you operate a cartel when you both  
15 offer the same prices? Is that what was going on,  
16 or ...?  
17 MR WEST: Well, so --  
18 THE CHAIRMAN: I thought something was so you let someone --  
19 you offer a -- you back off and let someone else take  
20 the contract.  
21 MR WEST: Well, in this case, they are clearly fixing  
22 the price between them.  
23 THE CHAIRMAN: Well ...  
24 MR WEST: Then {J1/118/1}.  
25 THE CHAIRMAN: So it just seems to be -- so "t" is -- it is

1 common ground that is TRW, is it?

2 MR WEST: It is not, that is my submission, but ...

3 THE CHAIRMAN: I mean, it could be "their salesman". Maybe  
4 not. I do not know, it cannot be anything. I mean, it  
5 is not capital "T", is it?

6 MR WEST: Well, we can see the same thing again in the next  
7 document, in fact, which is {J1/118/1}. I do ask  
8 the Tribunal to bear in mind a point from  
9 the Aalborg Cement case that this is a cartel case that  
10 we are dealing with, and so one would not expect  
11 necessarily to be able to turn up a document and it have  
12 full details of the whole cartel laid out.

13 THE CHAIRMAN: I understand that, but one still needs to  
14 interpret fairly the documents that we do have. There  
15 may not be many of them, I appreciate that submission,  
16 but ...

17 MR WEST: Then 118, if we look, again, these emails go in  
18 reverse.

19 THE CHAIRMAN: 118?

20 MR WEST: Tab 118. There is an email at the bottom from  
21 Mr Westerberg:  
22 "Lars ... presently at ATC ..."

23 THE CHAIRMAN: Hold on, hold on. So 118, I think it is on  
24 the second page, is it not? Is this the evening dinner?

25 MR WEST: No.

1 THE CHAIRMAN: There are two pages at 118. Which page do  
2 you want me to look at?

3 MR WEST: There should only be one.

4 THE CHAIRMAN: 118, sorry.

5 MR WEST: {J1/118/1}.

6 THE CHAIRMAN: Yes, I have got two pages, one we looked at  
7 before.

8 MR WEST: We did look at this before, yes.

9 THE CHAIRMAN: But one page I do not have marked up, so I do  
10 not know.

11 MR WEST: Hopefully it begins:  
12 "Dear all ..."  
13 Then halfway down:  
14 "Lars is presently at ATC ..."

15 THE CHAIRMAN: Okay.

16 MR WEST: He asked:  
17 "Franz:  
18 "[Mr Westerberg] would like to have your  
19 calculations for the airbag for the new Golf and also  
20 the offer from our worst competitor who we think is TRW.  
21 "Christophe [that is Mr Rivière now]:  
22 "[Mr Westerberg] needs your calculations regarding  
23 Peugeot 207."  
24 So this email seems to be seeking information from  
25 Mr Weiss and Mr Rivière for an internal meeting with

1 Mr Ward, who was also of Autoliv. But, as we see from  
2 the top, Mr Franz Weiss appears to know better, because  
3 he says:

4 "Good evening, Lars,

5 "I don't know if the meeting with T .. is still  
6 ongoing. Maybe you could agree that we don't attack  
7 existing business. They try to take our Skoda oktavia  
8 [inflator cushion]!!!!"

9 THE CHAIRMAN: So this is Volkswagen again?

10 MR WEST: This is Volkswagen again. We see the same "T~.."   
11 and~--

12 THE CHAIRMAN: Right.

13 MR WEST: -- Mr Westerberg.

14 THE CHAIRMAN: Okay, but there is nothing surprising about  
15 this because we are back in the same -- we know they are  
16 cartelists as against VW, so we do not get --  
17 I understood your point on Volvo -- if the Volvo  
18 document was clear, I would understand your point that,  
19 look, you would say the Commission has not turned over  
20 -- looked under every stone or has not acted on  
21 everything it has found under each stone, but here, this  
22 is just VW again, so what is the point of looking at  
23 this?

24 MR WEST: Yes, but my point is that -- I am on the "bad  
25 apples" point really here, whether it is credible to say



1           that the cartel activity was limited to certain business  
2           units where one has -- apparently has the involvement of  
3           the top management of the company.

4       THE CHAIRMAN:   Okay, but it is the same point.   Yes, okay.

5       MR WEST:   We can see that Mr Westerberg also appears to have  
6           asked for Peugeot information for this meeting, that is:

7                 "Christophe:

8                 "LW needs your calculations regarding Peugeot 207."

9       THE CHAIRMAN:   Sorry.

10      MR WEST:   So Mr Westerberg -- so this appears to be  
11           a meeting with -- Mr Westerberg is having, according to  
12           Mr Weiss, with TRW.   He refers to the "Skoda oktavia"  
13           because of course he was in the Volkswagen business  
14           unit, but if one goes further down the document  
15           Mr Westerberg also asked Mr Rivière, that is  
16           Christophe --

17      THE CHAIRMAN:   So who is Mike Ward?

18      MR WEST:   I think he was the head of Autoliv US.

19           The meeting was said to be taking place at "ATC", we  
20           think that is the Autoliv Technical Centre which was on  
21           the outskirts of Detroit.

22                 (Pause).

23      THE CHAIRMAN:   Sorry, I am just -- it is very difficult to  
24           understand these emails.   So the first one, "I don't  
25           know if the meeting with" let us assume that is TRW, "is

1           still ongoing", and you say, well, why should there be  
2           a meeting, it is very odd.

3       MR WEST:   Indeed.

4       THE CHAIRMAN:  "... maybe you could agree."

5           Then I think it is sort of one sentence:

6           "... that we don't attack existing business, they  
7           try to take our Skoda oktavia ..."

8           So they are the incumbents on Skoda, or do we just  
9           not know?

10       MR WEST:  Yes, well, it is apparent from that, "they tried  
11       to take our Skoda", that the suggestion is not attacking  
12       incumbent VW business.

13       THE CHAIRMAN:  Okay, so they are going to try and persuade  
14       them not to compete with Skoda -- for the Skoda  
15       business.

16       MR WEST:  Yes.

17       THE CHAIRMAN:  Then the next email, I just was not quite  
18       sure why --

19       MR WEST:  The next one is earlier in time, the one further  
20       down the page, and that sets out what Mr Westerberg had  
21       asked for, what information he had asked for for this  
22       meeting and it includes, from Mr Rivière, Christophe,  
23       his calculations regarding Peugeot 207.

24       THE CHAIRMAN:  Right, but there is nothing -- taking that  
25       email in isolation, is there anything wrong with asking

1 for the calculations regarding Peugeot 207?

2 MR WEST: Only if one combines it with the fact that  
3 the meeting turns out, so it appears, to have been with  
4 TRW.

5 THE CHAIRMAN: Right, okay.

6 MR WEST: I am going to move on to Mr Carlson. Would that  
7 be an appropriate moment? Unless the clock is not ...

8 THE CHAIRMAN: Yes, hold on, just give me a second.

9 MR WEST: Maybe the clock has not been changed. Oh, it has.

10 THE CHAIRMAN: Yes, thank you.

11 (11.47 am)

12 (A short break)

13 (11.58 am)

14 MR WEST: So Mr Carlson is not named as such in  
15 the Commission's RFIs, although he does appear to have  
16 participated in one of the meetings listed in the RFIs,  
17 and the reference for that is {J1/27/1}. This is  
18 the calendar of a Mr Rauch, who was the head of  
19 Autoliv's BMW business unit, referring to "Lf", that is  
20 Mr Laurenz Fauser, who was the head of TRW's business  
21 unit at the time, and this is referred to in the RFI at  
22 tab 694 {J1/694/7}, page 7 of tab 694, point 13:

23 "Telephone calls on 9 and 16 February ...  
24 between ... (Mr Rauch) and ... (Mr Fauser)."

25 Going back to tab 27 of J1 {J1/27/1}, we can see

1 the telephone call is listed as "Lf", Mr Fauser,  
2 "Und JC". We suggest that must have been Mr Carlson,  
3 but I accept it goes no further than that.

4 Going forward to {J1/107/1}, starting as usual at  
5 the bottom, there is an email from Mr Carlson to  
6 Mr Leif Berntsson, where he says:

7 "... how is it going with Takata? I would like to  
8 have a meeting with them at the highest level."

9 So Mr Carlson wants to set up a meeting with Takata  
10 at the highest level via Mr Berntsson. As I explained  
11 in opening, this meeting eventually took place in  
12 September. That is {J1/111/1} of the bundle. You see  
13 the email from Mr Carlson in the middle:

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

16 THE CHAIRMAN: Sorry, which ...? It is 111, yes.

17 MR WEST: If we turn up my friend's annex to his closing  
18 submissions at {S/16/18}.

19 THE CHAIRMAN: Your closing or ...?

20 MR WEST: This is annex 1 to my friend's closing  
21 submissions, S1 [sic], tab 16, page 18, line 30.

22 So this is the document where Mr Carlson asks  
23 Mr Berntsson to arrangement a meeting with Takata at  
24 the highest level at tab 107, so this is line 30, and we  
25 see that this appears in white on the table, meaning

1           that this document was not sent to the Commission.

2       THE CHAIRMAN:   Right.

3       MR WEST:   The meeting in Frankfurt document at {J1/111/1} is  
4           line 30 --

5       THE CHAIRMAN:   30?

6       MR WEST:   -- sorry, line 28 {S/16/17}, and you will see this  
7           is also in white, so this document was also not sent to  
8           the Commission.

9           What they say about this in line 28, about this  
10          meeting with Takata:

11                "These internal Autoliv emails do not establish any  
12                contact between Autoliv and ZF, or between Autoliv and  
13                any other competitor, in relation to OSS supplies to ...  
14                the Claimants.

15                "The emails refer to Jan Carlson having a meeting  
16                with Takata ... in Frankfurt. This does not  
17                substantiate the Claimants' direct case. There is no  
18                reference to topics for discussion at the meeting.

19                "A meeting between Mr Carlson and Takata does not  
20                evidence anti-competitive conduct; there are multiple  
21                legitimate reasons for competitors to meet, particularly  
22                at the senior management level (e.g., collaboration on  
23                costs-savings initiatives, or with a view to potential  
24                M&A deals ...)"

25                We see they say that.

1           But in terms of the chronology here, this is  
2           September 2007, so the date is wrong, the date here is  
3           9/06, it should be 6/09, so it is September 2007. What  
4           we know is that between -- that at the date when  
5           Mr Carlson is suggesting and then having this meeting  
6           with Takata, the Commission had found that there were  
7           already a number of cartels on foot between Autoliv and  
8           Takata, including the OSS cartels for supplies of  
9           seatbelts to Toyota, airbags to Toyota and OSS  
10          components to Honda, as well as the OSS 2 cartel  
11          concerning supplies of OSS components to Volkswagen.

12          At row 28 my friends go on to refer to a document --  
13          it is actually at 29 {S/16/18}, they refer to a document  
14          with the reference {J2/97/1} as an example of legitimate  
15          collaboration. I am going to come to that in a second.

16          So that was a meeting with Takata. We also have  
17          evidence around this time of Mr Carlson meeting with TRW  
18          and that is tab {J1/128/1} the bundle. Just before  
19          leaving the meeting with Takata, we have never seen any  
20          minutes or other record of the contents of that meeting  
21          and no witness has given any evidence of any legitimate  
22          project between these parties which this meeting could  
23          have been about.

24          So then turning to {J1/128/1}, this email features  
25          both Mr Westerberg and Mr Carlson. So this is

1 July 2007, Mr Westerberg is still the CEO and  
2 Mr Carlson, as we will see in a second, was in charge of  
3 OSS sales in Europe for Autoliv. Mr Westerberg emails  
4 Mr Carlson, "Subject: PSA", so we know this is about one  
5 of the Claimants:

6 "Anything new re TRW?"

7 Again, the Tribunal has seen this before:

8 "Meeting Peter Lake this evening."

9 Mr Carlson says. He goes on to say:

10 "When it's regarding collaboration on components,  
11 Halvar works on it but it takes time. He is counting on  
12 having a first result available in August."

13 This, in my friends' schedule {S/16/1}, item 29  
14 {S/16/18}, page 18, the Tribunal will see this is also  
15 in white, so not provided to the Commission, and there  
16 appears to be something of a pattern emerging here with  
17 documents implicating Mr Carlson not being provided to  
18 the Commission.

19 Going back to the document at {J1/128/1} --

20 THE CHAIRMAN: Sorry, we were just moving to item 29? You  
21 were just showing it is in white, yes?

22 MR WEST: It is in white, yes.

23 THE CHAIRMAN: Yes, okay.

24 MR WEST: Who was Mr Lake? Mr Lake was the vice president  
25 of sales at TRW. As we saw during the trial, he was

1 second in seniority at TRW only to Mr Plant.

2 The Tribunal may recall that I put some documents to  
3 witnesses suggesting involvement in or knowledge on  
4 the part of Mr Lake and Mr Plant of cartel conduct.  
5 The references are {J1/691/1}, {J1/706/1}, {J1/708/1}  
6 and {J1/709/1} and those documents were all put either  
7 to Mr Gravell or to Mr Drouin.

8 Going back to line 29 of my friends' table  
9 {S/16/18}, they say:

10 "This email refers to a meeting between [Mr] Carlson  
11 ... and Peter Lake, TRW's Vice President and Head of  
12 Sales. The email does not indicate any topics for  
13 discussion ... There are a multitude of legitimate  
14 reasons for competitors to meet that are not in any way  
15 anti-competitive, particularly at the senior management  
16 level. Noting that this email goes on to refer  
17 to 'collaboration on components', it seems highly likely  
18 that the meeting referenced would have related to  
19 the possible cooperation between TRW and Autoliv in  
20 the areas of materials and components, discussed a few  
21 months prior, in March 2007 ..."

22 There is then a reference to a document at  
23 {J2/97/1}.

24 Just stopping there, this entry is phrased in terms  
25 of what "seems highly likely", but the Tribunal should



1 of course bear in mind that Mr Carlson remains  
2 the chairman of the board of Autoliv and Autoliv's  
3 lawyers therefore presumably take their instructions  
4 from him, amongst others.

5 Looking now at {J2/97/1}, this is not a document  
6 the Tribunal has seen before.

7 THE CHAIRMAN: Right, okay, (inaudible), yes.

8 MR WEST: It was added to the bundles after my opening  
9 submissions, apparently in reference to the document at  
10 tab 128 about the meeting with Peter Lake, and indeed in  
11 my friends' closing in the table I just showed you, they  
12 do refer to this document in that connection, so let us  
13 have a look at the document.

14 This is from February 2007, we see at the top, and  
15 we see, at the bottom, Mr Carlson's title at the time,  
16 "Jan Carlson, President, Autoliv Region Europe", so this  
17 is prior to him becoming the CEO. That was still Mr --

18 THE CHAIRMAN: Sorry, I have lost you. I have lost you.

19 MR WEST: At the very bottom, we see Mr Carlson's name and  
20 his title in the email signature.

21 THE CHAIRMAN: Bottom of the first page?

22 MR WEST: So this should be {J2/97/1}. Does the Tribunal  
23 have this?

24 THE CHAIRMAN: Yes. It starts circulation list, Carlson and  
25 Eriksson.

1 MR WEST: You may be looking at {J1/97/1}. This is  
2 {J2/97/1}, it is a document added by Autoliv.

3 THE CHAIRMAN: Sorry, hang on.

4 MR WEST: So the date is in the top left-hand corner,  
5 "2007-02-27", and Mr Carlson's title is at the bottom  
6 left, "Jan Carlson, President, Autoliv Region Europe".  
7 So this was immediately prior to Mr Carlson taking over  
8 from Mr Westerberg as CEO later in 2007 or in early  
9 2008. We see who he is writing to, Mr Brenner of TRW,  
10 again in the top left:

11 "Günter Brenner: Vice President

12 "Occupant Safety Systems - Europe"

13 For TRW. So we have the president of Autoliv Region  
14 Europe writing to the vice president for Europe of TRW.

15 The email says:

16 "... Mr Brenner.

17 "... very much looking forward to our meeting on  
18 March 6th and 7th to discuss the possibility to drive  
19 cost down by a cooperation in the areas of material and  
20 components."

21 He then lists some proposed subjects for discussion  
22 as:

23 "... areas where ... we could benefit from  
24 a cooperation.

25 "Your comments are appreciated."

1           Then he says:

2           "I will be accompanied by Mr Leif Berntsson, Senior  
3 Vice President Airbags Europe."

4           Now, as I mentioned in connection with the meeting  
5 with Takata, no witness from Autoliv or TRW has given  
6 any evidence in this case of there being legitimate  
7 business cooperation at this time between Autoliv and  
8 TRW concerning materials and components.

9 THE CHAIRMAN: But insofar as this is a legitimate document,  
10 it is not describing anything that is illegal, so what  
11 is your position on that?

12 MR WEST: My position is that this is not a legitimate  
13 meeting.

14 THE CHAIRMAN: In what sense? It is -- this is just  
15 a faux -- faux topics for discussion --

16 MR WEST: Yes.

17 THE CHAIRMAN: -- and really they were going to ...

18 MR WEST: Yes. Let me explain why. So the first point is  
19 that this refers to cooperation on material and  
20 components, but no witness from either Defendant gave  
21 any evidence at this time of any legitimate business  
22 cooperation between Autoliv and TRW concerning material  
23 and components and one might think that would have been  
24 a highly material point to mention if indeed such  
25 a thing had happened.

1           Mr Corbut was very careful to identify particular  
2 occasions when there had been collaboration between  
3 Autoliv and TRW. He referred to one occasion when TRW  
4 were asked to supply steering wheels to PSA and Autoliv  
5 had been awarded the driver airbags and so he said  
6 the technical teams had to work together to ensure  
7 the airbag would fit into the steering wheel. That is  
8 Mr Corbut at paragraph 47 {C/1/16}. So it was  
9 sufficiently unusual to be working together with TRW for  
10 Mr Corbut to remember a single occasion in 2004 when it  
11 had happened, but no one in this case has given evidence  
12 of a proposed joint venture at this time concerning  
13 supplies and components.

14           What we also see is that this letter was sent to  
15 TRW's individual, Mr Günter Brenner, and Mr Brenner was  
16 mentioned during the course of the trial in connection  
17 with a document at {J1/234/1}.

18 THE CHAIRMAN: Sorry to interrupt, Mr West. Where is this  
19 dealt with in your closing? 105, I see reference to ...

20 MR WEST: This is expressly dealt with {S/13/44}, 104 to  
21 108.

22 THE CHAIRMAN: It was very "simply a cloak for cartel  
23 meetings". When was this document disclosed?

24 MR WEST: I am told it was obtained from the DoJ file, so it  
25 would have been disclosed about two years ago. It was

1           added to the bundle for the first time after my opening  
2           submissions.

3       THE CHAIRMAN:   Why would anybody write a -- why would  
4           anybody -- what is the purpose of having a cloak for  
5           a cartel meeting?   Why not just not write anything?  
6           What is the sort of -- I mean, whose ...

7       MR WEST:   Well, it sets down a paper trail which can be  
8           relied on subsequently to say this was a perfectly  
9           legitimate meeting, which is what is being said.

10      THE CHAIRMAN:   Right, but there are -- it is the -- it is  
11           not really a paper trail, is it?   I mean, there are lots  
12           of matters you complain of and there do not seem to be  
13           paper trails, in a general sense, explaining why there  
14           was contact between Autoliv and TRW, just in this  
15           specific example.

16      MR WEST:   That is true, this is an unusual example from that  
17           perspective.

18                   But can I just come on to deal with  
19           the circumstances of it individually?

20      THE CHAIRMAN:   Okay, yes.

21      MR WEST:   So, firstly, Mr Brenner, who is the recipient of  
22           the email, he was mentioned during the trial in  
23           connection with an email at {J1/234/1}.   The Tribunal  
24           may remember this, to do with the A9, between Mr Rivière  
25           and Mr Carlson, and we see it has copied in

1           Günter Brenner.

2           Mr Corbut --

3           THE CHAIRMAN: Yes, I remember this. Yes.

4           MR WEST: Mr Corbut told us that Mr Brenner was  
5           the president of Autoliv Europe.

6           So what seems to have happened is that in {J2/97/1},  
7           February 2007, Mr Brenner was the vice president of TRW  
8           for OSS, but by March 2009, or some point prior to that,  
9           he was now the president of OSS for Autoliv. So  
10          the position is perhaps somewhat similar to what we  
11          heard about Mr Bastien, who had been at Autoliv and then  
12          moved to Takata, and what seems to have happened, just  
13          joining the dots, is that Mr Carlson, at one point in  
14          late '07 or early '08, replaces Mr Westerberg as CEO,  
15          that means there is an opening to be the president of  
16          Autoliv Europe, and it is then taken by Mr Brenner who  
17          had previously been president of TRW Europe for OSS.

18          All of those developments, including this letter,  
19          took place at a time when these two companies, as  
20          the Commission has found, were involved in multiple  
21          cartels with each other, including, at this point,  
22          the Volkswagen cartel between TRW and Autoliv, which  
23          commenced in January 2007, and we can see that from  
24          the OSS decision, OSS 2, {A/11/1}, page 32 {A/11/32}.  
25          Article 1 is the Volkswagen cartel, and we can see that

1 it is listed as starting on 4 January 2007.

2 If one goes back to {A/11/13} of this tab,  
3 recital~(35), so:

4 "Infringement I [that is the Volkswagen  
5 infringement] started on 4 January 2007 when the parties  
6 met in Nuremberg."

7 So this is a few weeks after Autoliv and TRW,  
8 together with Takata, started being in a cartel towards  
9 Volkswagen.

10 If we can go back to {J2/97/1} --

11 THE CHAIRMAN: Sorry, so the VW cartel started on  
12 4 January 2007, yes.

13 MR WEST: A few weeks before this letter.

14 We see Mr Berntsson, who is going to accompany  
15 Mr Carlson, is the same Mr Berntsson that we saw in  
16 the Takata email being asked to set up the meeting with  
17 Takata at the highest level. Autoliv's table annexed to  
18 its closing submissions does not have an entry for this  
19 document but I am told this document is also not on  
20 the Commission file.

21 THE CHAIRMAN: J2 --

22 MR WEST: {J2/97/1}. No minutes of the meeting have ever  
23 been produced.

24 THE CHAIRMAN: I mean, that does not really square with  
25 the -- with it being a cloak, does it, because it would

1           have been sent to the Commission?

2       MR WEST: Well, we have seen --

3       THE CHAIRMAN: There is no point having a cloak and keeping  
4           it in your filing cabinet at home and not taking it out  
5           when it is raining.

6       MR WEST: We have seen that documents implicating Mr Carlson  
7           appear not to have been sent to the Commission.

8       THE CHAIRMAN: Yes. I do not know what I get from that.

9       MR WEST: As we have seen, at the time of this meeting  
10          Autoliv was already in a cartel with TRW, as I have  
11          said. So what Autoliv --

12      THE CHAIRMAN: But you are not submitting this is not  
13          a contemporaneous document?

14      MR WEST: No.

15      THE CHAIRMAN: But you are saying it is a contemporaneous --  
16          or a genuine contemporaneous document, genuine in  
17          the sense it was sent between these parties at around  
18          that date, you are just saying that it was not in good  
19          faith describing what actually was going to happen at  
20          the meeting, that is the submission?

21      MR WEST: Exactly.

22          What Autoliv are apparently going to ask  
23          the Tribunal to believe is that, at one and the same  
24          time as they were in a cartel with TRW concerning OSS  
25          supplies in Europe, they were also negotiating an



1 entirely innocent purchasing joint venture concerning  
2 materials and components which no one has previously  
3 mentioned to this Tribunal, or, it appears,  
4 the Commission, and which has left no other imprint of  
5 any kind on the documentary record, and where, shortly  
6 after it happened, the relevant representative from TRW  
7 joined Autoliv, a recruitment which Autoliv has also  
8 never previously seen fit to mention, just as it did not  
9 mention that Mr Bastien had previously worked for  
10 Autoliv. These are the discussions which my friend says  
11 are referred to in the email at {J1/128/1}, which refers  
12 to "collaboration on components", where Mr Carlson is  
13 meeting Mr Lake specifically in connection with PSA. At  
14 around the same time, as the Tribunal will note, as he  
15 was seeking to set up his high-level meeting with Takata  
16 {J1/107/1}, also in July, and Autoliv, in its schedule,  
17 also relies on {J2/97/1} to explain away that meeting  
18 and say, well, that may also have been concerned with  
19 these legitimate forms of cooperation, which, as I say,  
20 do not leave any other record, so far as the Tribunal is  
21 aware.

22 I am going back to {J1/128/1}. Just as one has no  
23 meeting minutes for the earlier meeting with Mr Brenner,  
24 there are no meeting minutes for the meeting with  
25 Mr Lake, nor has any evidence ever been adduced as to

1           the subject matter of the meeting.

2       THE CHAIRMAN:  So just looking at -- sorry -- the one that

3           is on the screen now, I do not know what it is ...

4           {J1/128/1} -- sorry, I beg your pardon -- you say that

5           is PSA -- that meeting is about PSA?

6       MR WEST:  That meeting is about PSA.

7           (Pause).

8       THE CHAIRMAN:  So assuming this is -- so:

9           "Meeting with Peter Lake ... When it's regarding

10          collaboration on components ..."

11          Is that, on its face, consistent with {J2/97/1}?

12       MR WEST:  It is the same cover, I would say.

13       THE CHAIRMAN:  The same cover, yes, okay.

14          Then:

15          "... Halvar works on it but it takes time."

16          Is that ...?

17       MR WEST:  Halvar Jonzon I think possibly is another employee

18          of Autoliv, but I am not sure I can cast much more light

19          on that.

20       THE CHAIRMAN:  "He is counting on ... a first result

21          available in August."

22          You do not offer any explanation for that?

23       MR WEST:  I am not able to say, but we know who could

24          explain this:  Mr Carlson, who is still in post, chairman

25          of the board of Autoliv to this day.  I do submit that

1 if there really were an above-the-board project at this  
2 very time, mid-2007, between Autoliv, TRW and it seems  
3 also possibly Takata, concerning supplies of OSS to PSA,  
4 which is one of the Claimants in this case which is  
5 alleging there was a cartel at that very time, it  
6 strains credibility that no one has sought to mention it  
7 before.

8 THE CHAIRMAN: Well, yes, but, I mean, you have got a broad  
9 -- you make that as a broader point. You say it is  
10 really extraordinary that no one has been called to come  
11 and offer any explanation of the documents in general,  
12 but there is no -- once the Defendants have taken that  
13 approach, rightly or wrongly, I make no comment on it,  
14 but once they have taken that approach, it would be  
15 a bit odd if they have used this exception and said: all  
16 right, we will give -- we will have witnesses talking  
17 about this particular meeting. I mean, that is  
18 the approach they have taken, is that --

19 MR WEST: Yes.

20 THE CHAIRMAN: -- you know, the documents on themselves do  
21 not get you home and why should they be putting people  
22 in the witness box to --

23 MR WEST: That is the position they have taken, but as far  
24 as whether I can explain the contents --

25 THE CHAIRMAN: We will have to take a view on that, but I am

1           just trying to just understand. So these are written  
2           quite close to each other; is that right? Or, no,  
3           sorry, this is --

4           MR WEST: One is February and one is July.

5           THE CHAIRMAN: One is February, one is July. It is just why  
6           the other one is general and this is specific to PSA is  
7           that it ...

8           MR WEST: I am not able to assist.

9           THE CHAIRMAN: Sometimes -- well, I suppose if you look at  
10          the first one ... I mean, it may be there is  
11          a disjunction between the two. So the first email, he  
12          is asking, "Anything new re TRW", and the subject is  
13          "PSA", and then he comes back on collaboration on  
14          components. I do not know. Yes, all right.

15          MR WEST: There we are.

16          THE CHAIRMAN: But on its face, this is not -- I mean, you  
17          say it is deeply suspicious and so forth, but on its  
18          face, it is not disclosing cartel activity. You say --

19          MR WEST: Again, taken individually, if there were nothing  
20          else, but I say also the Tribunal must take all of  
21          the evidence in the round.

22          THE CHAIRMAN: Yes, of course, I understand that, but ...

23          MR WEST: Particularly in a cartel case and particularly  
24          when there is no evidence explaining it.

25                 We say it is not unreasonable in a case like this to

1 expect the Defendants to produce witnesses who can give  
2 positive evidence, if this is their case, that  
3 the cartel was limited to certain customers and not  
4 others. That is what happened in the BritNed case, as  
5 we explain in our closing submissions, where Mr Jönsson,  
6 an admitted carteliser, explained in his evidence that  
7 the cartel did not apply to the particular supplies in  
8 issue in that case, which was a single interconnector  
9 cable between the UK and the Netherlands, hence the name  
10 of the case, and so in my submission it is not  
11 unreasonable, and as has been done in other cases, to  
12 produce someone to say, "Yes, we did cartelise these  
13 supplies, but not the ones to you", and that has not  
14 been done in this case.

15 THE CHAIRMAN: So where do we end up? I mean, you said --  
16 and please do not read anything into this question, but  
17 where do we end up if there is evidence of cartel  
18 activity but we are not persuaded by the economic  
19 evidence showing there was an overcharge? Where would  
20 that ...

21 MR WEST: Well, in that case, the claim would fail for want  
22 of loss. There would be no -- the cause of action  
23 requires proof of loss, and so if the Tribunal holds  
24 that the economic evidence has not established any loss,  
25 the claim would fail on that basis.

1 THE CHAIRMAN: You said that in opening, yes.

2 MR WEST: We of course take the opposite position, that  
3 the Tribunal should accept Mr Hughes' evidence and  
4 Mr Hughes' model --

5 THE CHAIRMAN: Yes, of course, Mr West, that is a given,  
6 yes.

7 MR WEST: -- and that then corroborates our evidence --

8 THE CHAIRMAN: That is why I said --

9 MR WEST: -- on the facts.

10 THE CHAIRMAN: -- "Do not read anything into the question".

11 MR WEST: We say that it is unlikely in this case that  
12 the cartel conduct would be confined in the way that  
13 the Defendants' case suggests, that it was precisely  
14 because of the overlap between the people dealing with  
15 the different aspects of the business, so certainly  
16 the top management, who dealt with all of the business,  
17 in my submission, were implicated in the cartel:  
18 Mr Westerberg, Mr Carlson, and we have seen Ms Eriksson  
19 on some of the emails. In the trial, we discussed  
20 the position of Mr Malmhagen, who was the head of the VW  
21 unit but was also in charge of sales generally within  
22 the company, and we now also see Mr Brenner's name  
23 mentioned in connection with these emails, and he became  
24 the president of Autoliv in Europe. So, ultimately,  
25 the top management and the management overseeing

1 the individual business units, in my submission, set  
2 the policies and procedures for the business as a whole,  
3 and so that makes it very unlikely, in my submission,  
4 that any wrongdoing would be confined in that sort  
5 of "bad apples" way.

6 Just while I am on the document, could we look at  
7 a document at {J1/707/1}. Now, this is a TRW document  
8 in which Mr Markowsky refers to information he got "from  
9 different Autoliv individuals" about Autoliv's givebacks  
10 in 2004, so it is clear on this document that the writer  
11 is saying he got the information from Autoliv.

12 THE CHAIRMAN: Sorry?

13 MR WEST: That is -- so he says -- this is Mr Markowsky  
14 writing to various -- these are TRW people, including  
15 Mr Plant, you see, he was the head of the whole company:

16 "John, please give us a chance ..."

17 That is Mr Plant:

18 "... to reestablish our sense of honor.

19 The information I got from different Autoliv individuals  
20 are the following."

21 Then there is information about Autoliv's givebacks  
22 in 2004 to various OEMs. We see there:

23 "BMW ...

24 "[DaimlerChrysler]

25 "GM ..."

1           That is General Motors.

2           "... /Opel ..."

3           You can see the reference to them having lost

4           the Epsilon. Then:

5           "Ford ...

6           "PSA/Renault ...

7           "VOLVO ...

8           "VW ..."

9           THE CHAIRMAN: Where do you deal with this in your closings?

10          MR WEST: I think we dealt with this in opening at 121

11          {S/1/37}.

12          THE CHAIRMAN: Do you pick it up in your closing or not?

13          MR WEST: Not specifically.

14                 The Tribunal may recall that Mr Drouin, I think it

15                 was, gave some evidence about it, but he then accepted

16                 in the witness box he had actually never seen

17                 the document before being shown it for the purposes of

18                 these proceedings and so he could not actually really

19                 give any evidence about it.

20          THE CHAIRMAN: What did he say about it?

21          MR WEST: He made various arguments, saying, for example,

22                 that the givebacks referred just to VA/VE, where in fact

23                 what we see at the bottom is it says "VA/VE incl[uded]".

24          THE CHAIRMAN: Sorry ...

25          MR WEST: Anyway, he could not give any evidence about it,



1 as he accepted, because he had not seen it and he was  
2 not party to it.

3 Just to make three points about this document. One,  
4 we say it clearly, again, evidences collusive exchanges  
5 between Autoliv and TRW specifically.

6 The other important point is the date of this,  
7 which, again, is back in 2004, which is --

8 THE CHAIRMAN: Is this a document the Commission saw?

9 MR WEST: This is not a document the Commission saw. That  
10 was my next point. If you go to my friends' table, this  
11 is line 7 {S/16/5}, row 7. You will see it is in white,  
12 meaning not on the Commission file, and April 2004 was  
13 before the start date of any of the Commission cartels  
14 and long before the VW and BMW cartels which began,  
15 according to the Commission, in 2007 and 2008,  
16 respectively; this is back in 2004.

17 Again, in relation to this document, Autoliv is  
18 forced to take the position that, again, it does not  
19 amount to any evidence at all.

20 Now, I went through all of the contemporaneous  
21 documents we rely on in opening and they are set out in  
22 the chronology and I am not proposing to go back over  
23 all of them, unless the Tribunal would like me to do so.  
24 What we say is, firstly, it is no answer to this body of  
25 documents for Autoliv to say, "Well, it is only

1 intermittent or sporadic, and if there really had been  
2 a cartel, as you say, this would be only a fraction of  
3 the communications", because, as I say, that is  
4 precisely what one would expect in a cartel case, that  
5 the record of communications is partial and fragmentary  
6 and intermittent, and in this case, in fact, we say that  
7 the record is actually pretty strong as cartel cases go.

8 The authority for that proposition is  
9 the Aalborg Cement case, which we cite in our closing at  
10 paragraph --

11 THE CHAIRMAN: Yes, we have had a look at that and  
12 I understand the submission.

13 MR WEST: In addition to that, if one accepts -- if  
14 the Tribunal accepts that those documents amount to  
15 a case to answer of any kind, we would say the burden  
16 then shifts to the Defendants to answer it, but of  
17 course they cannot do so because they have adduced no  
18 evidence at all on this direct cartelisation case. Not  
19 only does that mean they have no evidence, in my  
20 submission, it also entitles the Tribunal to draw  
21 adverse inferences against them. That is the Wisniewski  
22 case {AUTH2/50/1}, starting at {AUTH2/50/14} internal.

23 THE CHAIRMAN: Oh, yes, I am familiar with this Wisniewski  
24 principle, yes. Where did you want to go, sorry?

25 MR WEST: It starts at the paragraph just after halfway,

1 beginning:

2 "The need for the party ..."

3 THE CHAIRMAN: Sorry, I have just lost the page number.

4 Is it 14?

5 MR WEST: 14, 337 of the report. Can I just ask

6 the Tribunal to read to the bottom of that page.

7 THE CHAIRMAN: Starting from?

8 MR WEST: "The need for the party ..."

9 (Pause)

10 THE CHAIRMAN: Okay.

11 MR WEST: Then over the page, please, to {AUTH2/50/15}. So  
12 the discussion continues, and we have the paragraph from  
13 Herrington, which was quoted in our closing submissions.  
14 These are really all authorities on the point that there  
15 needs to be a prima facie case.

16 If one then goes on to the next page, please  
17 {AUTH2/50/16}, these are further authorities, including  
18 common law authorities, on the same point.

19 Then over to page {AUTH2/50/17}, please. Here  
20 the Court of Appeal draws the threads together in four  
21 principles. So they say, first:

22 "(1) In certain circumstances a court may be  
23 entitled to draw adverse inferences from the absence or  
24 silence of a witness who may be expected to have  
25 material evidence to give on an issue in an action.

1           "(2) If a court is willing to draw such inferences,  
2 they may go to strengthen the evidence adduced on that  
3 issue by the other party or to weaken the evidence, if  
4 any, adduced by the party who might reasonably have been  
5 expected to call the witness."

6           We say those words "reasonably have expected to  
7 call" are relevant if one asks: well, which party is it  
8 who could reasonably have been expected to call people  
9 like Mr Aigner, for example?

10          Then (3):

11          "There must, however, have been some evidence,  
12 however weak, adduced by the former on the matter in  
13 question before the court is entitled to draw the  
14 desired inference: in other words, there must be a case  
15 to answer on that issue."

16          Then (4):

17          "If the reason for the witness's absence or silence  
18 satisfies the court, then no such adverse inference may  
19 be drawn. If, on the other hand, there is so much  
20 credible explanation given, even if it is not wholly  
21 satisfactory, the potentially detrimental effect of  
22 his/her absence or silence may be reduced or nullified."

23          So, in summary, if there is a prima facie case, that  
24 entitles the court to draw the inference, if it thinks  
25 it justified, against the party who could have been

1 expected to call the witness, but that is all subject to  
2 whether there is a credible explanation for  
3 the witness's absence, and as the Tribunal knows, in  
4 this case, no evidence has been tendered for the absence  
5 of any of the witnesses, and we say the grounds for an  
6 inference in this case are particularly strong in  
7 the case of individuals who still work for Autoliv,  
8 including in particular Mr Rivière and Mr Carlson.

9 So that, in my submission, is why it is that Autoliv  
10 is forced to adopt the rather extreme position in their  
11 closing submissions that there is not a single document  
12 in favour of the Claimants' case, because once they  
13 accept that in fact there is a body of documentation,  
14 even if they would describe it as intermittent, or  
15 sparse, or whatever other description they would use,  
16 then that is no answer for them, given the points in  
17 Aalborg Cement and given the Tribunal's entitlement  
18 under the law as set out in this case to draw adverse  
19 inferences from Autoliv's failure to produce  
20 the relevant witnesses.

21 Just before I leave this section on the documents,  
22 the Tribunal will recall the evidence about Mr Bastien  
23 moving from Autoliv to Takata. His CV is now in  
24 the bundle. It is still marked as confidential, so  
25 I will not ask you to read it out, but if we could look

1 at it at {J1-IR/5.1/1}.

2 (Pause)

3 THE CHAIRMAN: I am not sure it is in my ...

4 MR WEST: So a request has been made to de-designate it, but  
5 it has not been sorted out yet, so I will not read it  
6 out, but if you could just look at the first entry, or  
7 the most recent one, chronologically, and see what is  
8 written there about Mr Bastien's role.

9 THE CHAIRMAN: Sorry, starting November 2004?

10 MR WEST: Yes.

11 THE CHAIRMAN: Okay.

12 MR WEST: So the Tribunal sees what is written there.

13 THE CHAIRMAN: Is that picked up in your closing, that  
14 document?

15 MR WEST: It was not, because there was still a dispute  
16 about confidentiality, so I thought I would deal with it  
17 orally.

18 THE CHAIRMAN: So where do you deal with this witness in  
19 your closing?

20 MR WEST: I am told it is 77 {S/13/35}.

21 THE CHAIRMAN: I know it is in there somewhere; I can  
22 remember reading it. So Mr Bastien's CV is where?  
23 Sorry, it has gone from the screen.

24 MR WEST: So it is J1-IR, which is inner ring, so this is a  
25 confidential bundle, tab 5.1 {J1-IR/5.1/1}.

1 THE CHAIRMAN: Tab 5-point ...?

2 MR WEST: 5.1. I cannot see any reason why it is  
3 confidential, but it has not been sorted out yet.  
4 We also have the date when he moved over to Takata.  
5 That is tab 6.1 of the same bundle {J1-IR/6.1/1}.

6 THE CHAIRMAN: When did he move? Is that confidential,  
7 the date?

8 MR WEST: Sorry?

9 THE CHAIRMAN: The date is presumably not confidential when  
10 he moved. When is it?

11 MR WEST: I am not sure, but the Tribunal can see it anyway  
12 on the document.

13 THE CHAIRMAN: The date of the letter?

14 MR WEST: Yes.

15 THE CHAIRMAN: Oh, I see, just underneath, yes.

16 MR WEST: Can I therefore now say a little bit about  
17 incumbency. In its closing submissions, Autoliv makes  
18 the point which, in my submission, is a peculiar one  
19 that there is somehow nothing wrong with a cartel based  
20 on incumbency, as opposed to one based on price fixing.  
21 So at paragraph 18 they say, in relation to the OSS  
22 decisions {S/15/6}:  
23 "... the core of the infringements that were  
24 identified concerns the protection of OSS suppliers'  
25 incumbency, which is ..."

1 THE CHAIRMAN: Paragraph 18?

2 MR WEST: This is paragraph 18 of Autoliv's closing:

3 "... which is consistent with the absence of an  
4 overcharge and the reality of the OEMs' enjoyment and  
5 exercise of their countervailing buyer power."

6 Then at 36, paragraph 36 {S/15/9}, they say --  
7 sorry, I do not have the page reference.

8 THE CHAIRMAN: Yes.

9 MR WEST: 36 -- sorry, I do not have a page reference.

10 Page 9:

11 "There is no indication of ..."

12 So this is, sorry, tab 15 of bundle S, page 9  
13 {S/15/9}.

14 THE CHAIRMAN: Sorry, we are in their closing?

15 MR WEST: Yes.

16 THE CHAIRMAN: I was looking at paragraph 36.

17 MR WEST: Yes, 36. It just was not on the screen.

18 So they say:

19 "There is no indication of coordination on price,  
20 and no suggestion that coordination will generate more  
21 money for the incumbent per RFQ. Coordination to  
22 protect incumbency reflects an effort to resist  
23 the OEM's exercise of countervailing buyer power to  
24 force the incumbent suppliers to bid against themselves  
25 and to induce the non-incumbents to make very low bids



1 to oust the incumbents, which would make their business  
2 unprofitable."

3 This is why this is all fine, apparently.

4 Then paragraph 40 {S/15/10}:

5 "In short, the focus on incumbency, shows that  
6 the nature of the infringement was not price  
7 coordination. Concerted efforts to protect incumbency  
8 are consistent with the OEMs' exercise of countervailing  
9 buyer power: they essentially controlled the prices  
10 the OSS suppliers would be paid."

11 Now, those are quite surprising submissions in this  
12 tribunal and are wrong, in my submission, for an obvious  
13 reason. The whole point of having a tender, which is  
14 what an RFQ is, is to generate competition between  
15 the suppliers to drive down the prices and the mechanism  
16 is the very mechanism of a tender, to force them to bid  
17 against each other, which requires them to offer lower  
18 prices to avoid losing the business, and where one has  
19 a cartel operating under a principle of incumbency, that  
20 prevents competition from operating, because the bidders  
21 are not competing with each other, instead they have  
22 simply decided in advance who is going to win by  
23 agreement amongst themselves, an agreement in particular  
24 that the tender will be won by whoever supplied the OSS  
25 components to the predecessor vehicle or platform.

1 A cartel operating under principle of incumbency of  
2 the kind I have just described is thus a form of market  
3 sharing or customer allocation cartel. These are well  
4 known forms of hardcore cartel activity, they are  
5 plainly illegal, they are not justifiable in any way,  
6 and therefore it is surprising to find the submission  
7 apparently being made that this is all justified because  
8 it prevents the customer from exercising buyer power to  
9 drive down prices. That is precisely what is wrong  
10 with it.

11 This was also Mr Hughes' testimony at {Day10/16:13}  
12 where he said:

13 "... one way in which anti-competitive collusion can  
14 adversely affect things is if your ability to switch to  
15 truly independent alternatives is compromised."

16 That is lines 13 to 16.

17 THE CHAIRMAN: Sorry, they are not saying that that is  
18 legitimate, that the principle of incumbency is -- I do  
19 not understand -- sorry, maybe I am misunderstanding,  
20 but the Defendants are not saying, if the cartel  
21 activity was in relation to incumbency, that is not  
22 anti-competitive. They are not going that far, they are  
23 just -- that finding has knock-on effects when you get  
24 to the economic evidence. I think that is the ...

25 MR WEST: Well, they certainly seem to be saying it would

1 not have an effect on price, which, again, in my  
2 submission, is wrong, because it prevents competition  
3 from operating, which is what drives down the price.

4 THE CHAIRMAN: I see.

5 MR WEST: That was Mr Hughes' testimony, and Mr Hughes went  
6 on to say that the existence of buyer power does not  
7 negate this mechanism. This is lines 16 to 22  
8 {Day10/16:16-22}. Sorry, if I perhaps just read it out.  
9 I may have the wrong page reference, but he said --

10 THE CHAIRMAN: Are these references in your closing or not?

11 MR WEST: Possibly under the head of incumbency. We do have  
12 a section on incumbency.

13 THE CHAIRMAN: Okay, but anyway, Mr Hughes --

14 MR WEST: Can I perhaps just read this bit out, because I am  
15 not sure I have the right page reference, but Mr Hughes  
16 said {Day 10/16:17}:

17 "... recognising in a merger context that customers  
18 are powerful and sophisticated, a point with which  
19 I would agree and I've made that point in my first  
20 report, isn't a good answer as to why there ... couldn't  
21 be ... anti-competitive effects from collusion ..."

22 That was Mr Hughes, and that was the part of his  
23 evidence when he then went on to refer to  
24 the Commission's diagram showing all of the different  
25 cartels there had been in relation to car parts. In my

1 submission, it is therefore intuitive to say that if one  
2 has a market affected by a cartel based on incumbency,  
3 then prices are likely to have been higher over  
4 the period when that cartel operated and are likely to  
5 fall again when the cartel was abandoned, or when it was  
6 broken by the competition authorities and prices came to  
7 be determined again by competition, which is of course  
8 consistent with Mr Hughes' model.

9 My friends' closing submission also has a section  
10 where they refer to evidence of the OEMs playing  
11 the suppliers off against one another to push prices  
12 down, and on that, as Mr Saturnus said, that is an  
13 entirely normal business practice, and it has never been  
14 the Claimants' case that there is no negotiation in  
15 connection with these RFQs, but the evidence at  
16 the trial casts light on how the negotiation works. How  
17 it works is that Autoliv's sales team are given  
18 a walk-away price which they are not authorised to go  
19 below but they can bid above it, and therefore, after  
20 they make their opening bid, they have some wriggle room  
21 to offer lower and lower prices in negotiations with  
22 the OEM until they reach the walk-away price, but no  
23 matter how hard the OEM seeks to negotiate, the sales  
24 team cannot go below the walk-away price, which has been  
25 authorised by means of the central authorisation process



1 THE CHAIRMAN: Sorry, Day 10?

2 MR WEST: {Day10/16:22} to {Day10/17:11}.

3 THE CHAIRMAN: Okay, thanks.

4 MR WEST: I was moving on to the Commission decision, and  
5 this is the first point raised by Autoliv under  
6 the heading of "The direct case", but on analysis, in my  
7 submission, reliance on the Commission decision as  
8 showing that there was no direct cartel in this case is  
9 a thoroughly bad point, and in particular the fact that  
10 the Commission did not proceed to a decision in relation  
11 to whether there was a cartel concerning the claimant  
12 supplies is not in fact evidence of any kind which this  
13 Tribunal can take into account. I say that for three  
14 reasons.

15 The first is that the decisions are silent on  
16 the point.

17 THE CHAIRMAN: Sorry, where are you in your closing again?

18 MR WEST: So we are now addressing the relevance of  
19 the Commission decisions, 48 to 60, page 27 {S/13/27}.

20 So the Commission decisions simply say nothing about  
21 this issue, so this Tribunal has no expression of view  
22 from the Commission which it can take into account and  
23 its failure to express a view is not evidence. What  
24 Autoliv says is at paragraph 30, bullet point 3, that:  
25 "There is nothing to suggest that the Commission

1 considered that [the] documents were capable of  
2 sustaining the infringements ..." {S/15/8}

3 But the problem with that is that there is nothing  
4 to the contrary either; one simply has nothing either  
5 way.

6 Secondly, it is this Tribunal's role to decide cases  
7 on the basis of the evidence before it. The Tribunal  
8 cannot delegate its decision-making function to  
9 the Commission by holding that since the Commission did  
10 not find an infringement, therefore there could not have  
11 been one.

12 Relatedly, and thirdly, this Tribunal does not know  
13 why the Commission did not proceed to find an  
14 infringement. The Commission may have been influenced  
15 by the quality of the evidence, or by its desire to wrap  
16 up the investigations, or a mixture of both, and to  
17 the extent that the Commission's approach was influenced  
18 by, for example, its view of its enforcement priorities,  
19 that tells this Tribunal nothing about the decision that  
20 the Tribunal has to reach.

21 THE CHAIRMAN: But you rely on the Commission decisions  
22 insofar as they evidence cartel activity, and just  
23 explain how you put it. You then say, from that, one  
24 can infer that cartel activity was likely as against  
25 your clients. Do you go that far or not?

1 MR WEST: Well, we have a partial admission of cartelisation  
2 by the Defendants, although they say it is -- that  
3 the cartel was only against other buyers, and we say it  
4 is inherently unlikely that you would have a cartel  
5 against some buyers but not others, particularly where  
6 one has the same individuals involved in both sets of  
7 supplies.

8 SIR IAIN MCMILLAN: May I ask a question, if I may?

9 MR WEST: Sure.

10 SIR IAIN MCMILLAN: When you take the Commission's decision,  
11 you know, on the cartelisation, you know, with other  
12 companies, is it your case to the panel that when you  
13 take that and then you converge that with the evidence  
14 that you produced this morning, you think we have  
15 a finding that, you know, they were cartelising against  
16 the -- the other Defendants were cartelising against  
17 your clients?

18 MR WEST: Yes.

19 SIR IAIN MCMILLAN: Right, okay.

20 MR WEST: I am now seeking to answer the suggestion that  
21 because the Commission did not find that, that somehow  
22 should be taken into account by the Tribunal as counting  
23 against my case.

24 As I say, because the Tribunal does not know why  
25 the Commission decided not to proceed to a decision



1           either way concerning supplies to my client, my clients,  
2           even though it had some evidence of cartelisation of  
3           those supplies, all this Tribunal can do is to speculate  
4           as to the reasons for that, which is not appropriate, in  
5           my submission.

6           Even if the Commission had expressed a view on  
7           the evidence of cartelisation against the Claimants,  
8           which it did not, as we have already seen this morning,  
9           a number of the documents I have taken the Tribunal to  
10          were not on the Commission file and we do not know what  
11          the Commission would have done if it had also had those  
12          further documents.

13          There is some authority on this question in the case  
14          of *Courage v Crehan*. That is {AUTH2/8/1}.

15        THE CHAIRMAN: Sorry, authorities?

16        MR WEST: Now, this case was about the UK market for  
17          on-sales of beer and the particular issue was: is that  
18          market foreclosed by the existence of beer tying  
19          agreements. That issue arose in litigation between  
20          the tenant of a pub and the landlord of a pub, otherwise  
21          known as a pub owning company or pub co. Mr Crehan was  
22          the tenant, although this was in fact a test case, there  
23          were many other similar cases.

24          The Commission had held in a decision concerning  
25          a different brewer, Whitbread, that the UK beer market

1 was foreclosed. So that is at {AUTH2/8/15}. Just  
2 around about a third of the way down, when it refers to  
3 "The Whitbread Decision" and there is then a quotation:

4 "Conclusion on first Delimitis test."

5 So this is the Commission's conclusion in  
6 the Whitbread decision:

7 "It can be ... concluded that an examination of all  
8 tying agreements, including but not limited to  
9 beer-supply agreements entered into, and the other  
10 factors relevant to the economic and legal context of  
11 the UK on-trade market shows that the brewers' tying  
12 agreements had in 1990 and still have today, on  
13 the basis of the most recent available information,  
14 the cumulative effect of considerably hindering  
15 independent access to that market ..."

16 So that is what the Commission had said in a case  
17 involving a different brewer, Whitbread, rather than  
18 Courage, which was the brewer in this case.

19 The parties to these proceedings, so the Courage, or  
20 Inntrepreneur as it became known, had also asked  
21 the Commission to make a decision in relation to their  
22 leases, and can I ask you just to read paragraphs 27 to  
23 33 rather than me read those out {AUTH2/8/13-14}.

24 (Pause).

25 THE CHAIRMAN: Okay. Up to where?

1 MR WEST: To 33.

2 (Pause).

3 THE CHAIRMAN: Okay.

4 MR WEST: So where they refer to 81, that is now  
5 Article 101, which is the basis of this claim. In  
6 essence, what happened is Courage, or Intreprenuer,  
7 asked the Commission for a decision, but it then changed  
8 the form of lease to make the tie less strict, and  
9 the Commission issued a comfort letter for the less  
10 strict lease tie. That left the question of the old  
11 form of lease, which was Mr Crehan's form of lease, and  
12 the Commission said, well, the national court can deal  
13 with that, there is not sufficient community interest in  
14 that.

15 So, in a sense, this is a useful illustration of  
16 the fact that the Commission does not have to proceed to  
17 a decision in relation to any particular issue notified  
18 to it of competition law, and hence we see  
19 Lord Hoffmann's biblical language in paragraph 33.

20 Now, the parties' arguments about what the court  
21 should do are set out at 38 {AUTH2/8/16}, where  
22 Lord Hoffmann says:

23 "Although the parties came to court armed not only  
24 with witnesses of fact about the state of the market ...  
25 but also with economic and other experts ... counsel for

1 Mr Crehan submitted that the court should decide the  
2 Delimitis 1 issue ..."

3 That is the foreclosure issue:

4 "... simply on the basis of the commission's opinion  
5 expressed in the recitals to its decision in Whitbread.  
6 The judge should not try to 'second guess'  
7 the commission. The judge said that there were 'obvious  
8 attractions' in taking such a course but refused to do  
9 so. By that time he had heard lengthy and detailed  
10 evidence which satisfied him that, in respect of  
11 the period 1991-1993, the commission's opinion could not  
12 be sustained. He concluded ...

13 "'I am not prepared to find that the UK market was  
14 foreclosed to that extent simply because the Commission  
15 thought that it was and said so in its decision in  
16 Whitbread. I have made up my own mind on the basis of  
17 the extensive evidence ... placed before me. I do not  
18 suggest that the market was 100% open to all-comers.  
19 The tied estates, even after the Beer Orders, cannot be  
20 brushed aside as insignificant and they did to some  
21 extent seal off a part of the market. But the sealing  
22 off was not complete even within the tied estates. Much  
23 more importantly, leaving the tied estates aside, there  
24 were, in my view, amply sufficient fully contestable  
25 other outlets to mean that Delimitis condition I was not

1 satisfied."

2 So we see there the invitation, rather similar to  
3 the one to this Tribunal, not to second guess  
4 the Commission, but the judge's view that it was up to  
5 him to make his decision based on the evidence he has  
6 heard and not simply to defer to the Commission in  
7 another case.

8 What then happened is that the Court of Appeal  
9 overturned that decision, holding that the judge should  
10 have followed the Commission and that is paragraph 40 of  
11 the judgment, where they say:

12 "... the Court of Appeal said that he had been wrong  
13 not to follow the commission ... In making his own  
14 decision, he had not complied with what is generally  
15 called the 'duty of sincere co-operation' imposed upon  
16 the institutions of member states by article 10 ..."

17 The Commission -- the Court of Appeal's reasoning is  
18 then set out at paragraph 41. That Court of Appeal  
19 judgment was then itself appealed to the House of Lords  
20 as it then was.

21 What follows next is a discussion of the question of  
22 conflicts between judgments of national courts and  
23 the Commission, but in this case no question of conflict  
24 arose because the legal and factual situations were not  
25 identical. You can see that in 49 {AUTH2/8/19}, where

1 they are discussing an opinion about  
2 Advocate General Cosmas about the principle of avoiding  
3 conflict, where the Advocate General says:

4 "There could be no risk of conflict ... 'where the  
5 legal and factual context of the case being examined by  
6 the commission is not completely identical to that  
7 before the national courts'."

8 So no issue of conflict could arise in the Crehan  
9 case, not least because the parties were different.

10 Then we have the ruling of the House of Lords at  
11 paragraph 69 {AUTH2/8/24}:

12 "There was a good deal of discussion, both before  
13 the Court of Appeal and in argument before the House,  
14 about the degree of 'deference' which a national court  
15 should show to a decision of the commission. Mr Vaughan  
16 [for Mr Crehan] is recorded (in para 96 of the judgment  
17 of the Court of Appeal) as having constructed a scheme  
18 of three degrees of deference (absolute ... very great  
19 ... and deference) which might have to be paid to  
20 a decision of the commission. For my part, I do not  
21 find deference in this context a very helpful  
22 expression. It is commonly (if not altogether happily)  
23 used in administrative law when a court decides that  
24 the decision-making power on a particular question  
25 properly belongs to someone else and that the court

1           should not substitute its own view. But the  
2           decision-making power on whether article 81 ... applies  
3           plainly belonged to the English court, exercising  
4           concurrent jurisdiction, and I find it difficult to see  
5           how the exercise of this power can be combined with  
6           'deference' to the decision of someone else.

7           The correct position is that, when there is no question  
8           of a conflict of decisions in the sense that I have  
9           discussed, the decision of the commission is simply  
10          evidence properly admissible before the English court  
11          which, given the expertise of the commission, may well  
12          be regarded by that court as highly persuasive. As a  
13          matter of law, however, it is only part of the evidence  
14          which the court will take into account. If, upon an  
15          assessment of all the evidence, the judge comes to  
16          the conclusion that view of the commission was wrong,  
17          I do not see how, consistently with his judicial oath,  
18          he can say that as a matter of deference he proposes  
19          nevertheless to follow the commission. Only a rule of  
20          law, in the nature of an issue estoppel which obliges  
21          him to do so, could produce such a result and the Court  
22          of Appeal accepted that there was no such rule."

23          So one has two categories of case. This is all  
24          pre-Brexit, of course, but the current case is governed  
25          by the pre-Brexit rules. One is a case where

1 the decision is made binding on the national court.  
2 That will usually be so because that decision is  
3 addressed to one of the parties which is then before  
4 the court, or Tribunal in this case, and that -- that  
5 situation applies in the present case in relation to  
6 the follow-on aspect of this claim, where  
7 the Commission's decision is binding on Autoliv and this  
8 Tribunal must follow it, but that is not in dispute.

9 The second category of decision is where one has  
10 a Commission decision which is not binding because  
11 the situation has been considered by the Commission and  
12 by the national court, or this Tribunal, are not  
13 identical, for example, because the parties are  
14 different. Now, that was the case in Crehan, and where  
15 that is the case, the Commission decision is evidence  
16 which the Tribunal can take into account, but it is only  
17 evidence, it is not conclusive.

18 There is also that kind of material in the present  
19 case where, for example, Autoliv relies on certain  
20 Commission merger decisions which they say cast light on  
21 the nature of the particular markets at issue here and  
22 the Tribunal can indeed weigh those up as evidence,  
23 although we say they are not particularly strong  
24 evidence, for example in relation to the Takata merger  
25 decision, it postdates the relevant period and so on,



1 but it is admissible as evidence.

2 But if one asks in which of those categories  
3 the present case falls when one is thinking about  
4 the relevance of the Commission's OSS decisions to  
5 the Claimants' direct case of cartelisation against  
6 them, it does not actually fall into either of those  
7 categories, and the reason is, there is no Commission  
8 decision on the point, and so there is not anything  
9 which the Tribunal can attribute weight to one way or  
10 the other. That is why we say in our closing  
11 submissions that the submission by Autoliv in this case,  
12 about not second-guessing the Commission, is much more  
13 extreme as a submission than Mr Crehan's submission in  
14 *Crehan v Courage*, where at least he had a decision from  
15 the Commission which was on point about whether the UK  
16 on-trade beer market was foreclosed that he could point  
17 to. But in this case there is not any such decision.

18 Even in *Crehan*, the House of Lords said it would  
19 have been contrary to the judge's judicial oath to  
20 decide the case by not second-guessing the Commission  
21 if, on the evidence as a whole, he thought  
22 the Commission had got it wrong. So even if there is  
23 a decision, it is still not conclusive.

24 So we say, really, on analysis, the Commission  
25 decision does not assist Autoliv at all, and their

1 reliance on it really just recycles a point made by  
2 Tokai Rika back in 2023 when it sought to strike out  
3 the claims against it and as part of that strike-out  
4 application relied upon the absence of a Commission  
5 decision. The Tribunal, of course, dismissed that  
6 application and we set out the relevant part of  
7 the Tribunal's reasoning at paragraph 57 of our closing  
8 submission {S/13/30}, where this Tribunal in this very  
9 case rejected precisely this submission. So you will  
10 see there Tokai Rika's strike out was dismissed on  
11 the ground that the fact the Commission had not found  
12 a cartel by Tokai Rika against the Claimants was not  
13 a reason for striking out the claim. Autoliv's  
14 submission on this point is really just the same as that  
15 and one which the Tribunal has already dismissed.

16 But even if there were some requirement to show  
17 additional evidence the Commission did not see, as  
18 I have submitted already and as my friend's table shows  
19 annexed to his closing submissions, a number of  
20 the documents on which we rely were not in fact before  
21 the Commission for whatever reason.

22 Can I move on now to the Claimants' indirect case,  
23 so spillover case, damage resulting from the cartel  
24 against the named customers, or named OEMs.  
25 The principal point made on this issue by Autoliv is to

1 repeat its reference in its opening to the six alleged  
2 links in the causal chain and to say that the Claimants  
3 have failed to address those, or have addressed only one  
4 or a few of them, but there is no real authority cited  
5 for these six links in the chain, Autoliv appears to  
6 have made them up. We say that this submission is  
7 parallel to the one made in the Royal Mail v Trucks case  
8 to the effect that the claimant had to establish its  
9 case, as it were, from the bottom up, identifying  
10 precisely how the cartel had come to affect  
11 the particular truck contracts in that case. As  
12 I pointed out in opening, in that case this Tribunal  
13 held that the bottom-up approach was not the only way in  
14 which the claimant could seek to prove their case. They  
15 could do so instead on a top-down basis by reference to  
16 evidence of higher prevailing prices in the market in  
17 general and to infer that those were due to the cartel.

18 That was of course not concerned with indirect but  
19 direct effects, but we say the reasoning is equally  
20 applicable.

21 THE CHAIRMAN: Where are you in your closing, sorry?

22 MR WEST: It is not specifically in our closing, but it is  
23 in our opening case, paragraphs 37 to 45 {S/1/14-16},  
24 and 154 to 174 {S/1/46-52}.

25 THE CHAIRMAN: Sorry? 47 to 55, did you say?

1 MR WEST: 37 to 45.

2 THE CHAIRMAN: Okay, it is coming out on the [draft]  
3 transcript slightly different. Take it a bit more  
4 slowly, so 37 to 45 ...

5 MR WEST: 154 to 174. The Tribunal will probably recall  
6 the extract from Royal Mail that I went to previously.  
7 This is tab -- authorities 2, tab 35, page 56  
8 {AUTH2/35/56}. So here, at 82, the CAT sets out an  
9 earlier judgment that it gave in the same action on  
10 a disclosure application, and this is the approach which  
11 was ultimately followed. The particular point is over  
12 the page at {AUTH2/35/57}, paragraph 41 in the extract,  
13 where the Tribunal said:

14 "We would wish to hear submissions on this at  
15 the next CMC ..."

16 As I say, this was the approach eventually followed:

17 "... but our present view is that we doubt that  
18 the issues can be approached from the 'bottom up' on  
19 the traditional evidential basis of witness statements  
20 from the various key employees regarding the numerous  
21 contemporary emails, notes of meetings and telephone  
22 conversations, and so forth, on which they would then be  
23 cross-examined: see in that regard the observations of  
24 Rose J (as she then was) in the air freight cartel  
25 litigation: Emerald Supplies ... Instead, it seems to us

1           that the issues will probably have to be approached by  
2           the analysis of large amounts of pricing and market  
3           data, using established economic techniques to determine  
4           what, if any, was the effect of the infringement on  
5           prices and any pass-on through the relevant period.  
6           That is not to say that evidence of witnesses of fact  
7           would be irrelevant but we anticipate that it will be of  
8           a more general nature, for example explaining how  
9           the OEMs priced their trucks and the nature of the  
10          relationship between gross and net prices, the  
11          significance of configurators, and so forth. The same  
12          approach would apply to the prices charged by the  
13          claimants in the context of pass-on."

14                 So it is just wrong to submit, if this is  
15          the submission, that one can only prove one's case by  
16          means of establishing each and every link in the causal  
17          chain on a bottom up basis, even where one is dealing  
18          with a direct cartel, and in my submission, precisely  
19          the same applies to this indirect claim. It is open  
20          instead to the claimant to adduce econometric analysis  
21          showing that prices were higher during the cartel period  
22          after adjusting for confounding factors, i.e. regression  
23          analysis.

24          THE CHAIRMAN: Is it not being said you need a -- before you  
25          test your hypothesis with econometric evidence, you need

1 a hypothesis as to why the spillover will occur and that  
2 is independent of whether you choose to do bottom up or  
3 top down as ... --

4 MR WEST: Yes, so that is --

5 THE CHAIRMAN: So you need an evidentially based hypothesis,  
6 just as you say you have for the direct case. It is  
7 said you do not have that for the umbrella case --

8 MR WEST: That is the question of mechanism. I will come to  
9 that -- I will just finish this point -- it is on my  
10 next page.

11 So just to finish on this point. If the Tribunal is  
12 of the view that the prices were higher during  
13 the period to which the indirect claim applies but it is  
14 not convinced that there was a direct cartel, then in my  
15 submission it is entitled to infer, subject to  
16 the existence of a mechanism, that the higher prices  
17 were caused by the cartel found by the Commission. So  
18 instead of going through each of the six or however many  
19 individual hoops it is, the Tribunal can make that  
20 inference if it thinks the inference is justified. My  
21 primary case is of course that the Tribunal should find  
22 a direct cartel and so we are not in this world, but  
23 this is on the alternative spillover case.

24 PROFESSOR NEUBERGER: I have a slight problem with  
25 the weight you are putting on the econometric evidence.

1 I mean, supposing that the econometric evidence does  
2 show that during the relevant period prices seemed to be  
3 somewhat higher than during the rest of the period, then  
4 in principle there could be many explanations for this  
5 which have nothing to do with the cartel or any sort of  
6 cartel illegal activity. So how would one put enough  
7 weight on that econometric evidence to carry you over  
8 the line?

9 MR WEST: Well, I suppose the Tribunal has to weigh up  
10 everything in the balance together, including  
11 the evidence of direct cartelisation, of indirect  
12 cartelisation and of effects, as demonstrated through  
13 the econometrics, and decide in the round which theory  
14 it considers proven, either --

15 THE CHAIRMAN: Or on the assumption -- we are not taking it  
16 in the round because we are on the assumption you have  
17 failed on your direct case, so we then put that back in.

18 MR WEST: Yes. Yes, well, then the Tribunal will have to  
19 ask itself whether, based on the evidence concerning  
20 indirect effects and the strength of the finding, if it  
21 makes one, that there were overcharges, the appropriate  
22 conclusion is to say that that mechanism applied.  
23 I accept, of course, there can be other explanations why  
24 -- which could not be -- which were not captured for  
25 some reason in Mr Hughes' model. One can never rule

1           that out. But of course what Mr Hughes attempted to do  
2           was to adjust for any other factors which might have led  
3           to the overcharge other than the cartel and that is why  
4           there are various variables in his model. We will come  
5           on to the expert evidence later on, but in my  
6           submission, the various suggestions that were made to  
7           him as to what might be missing generally did not make  
8           any difference to the outcome of the model. So no one  
9           has really been able to identify what is it that is  
10          missing from the model that would lead to what would be  
11          a coincidence that the model finds prices are higher  
12          during the cartel compared with before or afterwards,  
13          and Mr Hughes' view certainly was that that explanation  
14          of a coincidence would seem to be much less likely to  
15          him.

16                 So if we then come on to the mechanism, in my  
17          submission, the Claimants have identified a number of  
18          such mechanisms. One is incumbency. We know that  
19          the OSS cartels, or some of them at least, were based on  
20          the principle of incumbency, because that is what  
21          the Commission held and we have looked at the Commission  
22          decisions, and if the facts were that the parties to  
23          the cartel agreed to extend that principle to  
24          the Claimants, then we would be in the world of  
25          the direct case, that would be a direct cartel case



1           against the Claimants.  If there were no explicit  
2           agreement to that effect but a sort of nod and a wink,  
3           if I can put it that way, then in my submission, we are  
4           still in the world of the direct case and that is what  
5           would be referred to in competition law as a concerted  
6           practice as opposed to an agreement.  So in order to be  
7           in the indirect case, we need to be in a world in which  
8           there is not even a nod and a wink, there is simply  
9           unilateral conduct by each cartel member, and  
10          the unilateral conduct would be that each cartel member,  
11          in relation to the Claimants' business, which on this  
12          theory is not cartelised, decides to extend  
13          the incumbency principle to that business as well, not  
14          because it has any assurance from the other suppliers  
15          that they will do so, but because it makes its own  
16          assessment that they are likely to do so, and that, in  
17          my submission, is a mechanism for indirect effects.

18        THE CHAIRMAN:  Okay, right, and that is indirect, is it?

19        MR WEST:  If there were no agreement or concerted practice  
20          between the cartelists to that effect but just the  
21          unilateral decision by each of them, or by those who  
22          were involved in any one RFQ, that would be an indirect  
23          effect, in my submission.

24        THE CHAIRMAN:  Right.  That is -- but that is a direct --  
25          that is direct in the sense that it is not a ratcheting

1 of price or anything, any of the type of mechanisms  
2 I thought you were talking about in opening, this seems  
3 to be a tacit agreement.

4 MR WEST: Well, the tacit agreement, again, it is quite  
5 difficult to draw the line between direct and indirect  
6 in this context, because if one has an agreement of any  
7 kind, that is a direct cartel. If one has no agreement  
8 of any kind but simply has the suppliers unilaterally,  
9 as it were, all happening to follow the same approach --

10 THE CHAIRMAN: So your spillover case is not that there is  
11 competition, ordinary competition, if I can use that  
12 rather imprecise term, that there is ordinary  
13 competition with respect to your clients but  
14 nevertheless they are impacted by the OSS decisions,  
15 that is no longer your case. Your case is that actually  
16 there is not ordinary competition in respect of  
17 behaviours as against your client.

18 MR WEST: On this mechanism, the incumbency principle would  
19 apply and that limits -- certainly limits the extent of  
20 competition as regards supplies to my clients. But that  
21 is not the only mechanism we have identified. Another  
22 mechanism we identify concerns pricing. We had a lot of  
23 evidence about how prices were constructed, and in my  
24 submission, ultimately where that came out is that  
25 prices were constructed by identifying costs and then

1 applying a margin, and we saw evidence both of  
2 contribution margins and EBIT margins.

3 Now, none of the witnesses were actually in  
4 a position to explain how the prices were arrived at for  
5 the RFQs in this case, because none of them were there  
6 at the time, but we say there is a clear mechanism there  
7 if the margins which were applied were in any way  
8 influenced by the margins that were being earned on  
9 the cartelised business. The evidence showed --

10 PROFESSOR NEUBERGER: Sorry, before I forget about  
11 the incumbency principle, is it inconceivable in  
12 a freely competitive market without cartels with --  
13 where there are long-term contracts that competitors  
14 competing freely would decide to price existing business  
15 -- would act more aggressively to retain existing  
16 business than to take business which would previously  
17 have been done by other people? Is that not likely to  
18 arise in any case in a freely competitive market?

19 MR WEST: It could conceivably arise, but if the existence  
20 of the cartel in any way influences the extent to which  
21 they aggressively compete for incumbent, as opposed to  
22 non-incumbent, business, then in my submission that is  
23 a mechanism by which an overcharge could arise on an  
24 indirect basis. Even Dr Majumdar said he could not rule  
25 out all together that this could have happened. I think

1           he thought it was quite unlikely, whereas Mr Hughes  
2           thought it was more likely than Dr Majumdar did.

3           PROFESSOR NEUBERGER: Thank you.

4           THE CHAIRMAN: So the mechanism that you are relying on is  
5           the one you set out in opening, is it, with  
6           the various ...? I just want to know where have you  
7           written down the submissions you are now making.

8           MR WEST: Paragraph 38 of the opening {S/1/14}.

9           THE CHAIRMAN: Paragraph 38.

10          MR WEST: "The evidence demonstrates that information  
11          concerning pricing to the named OEMs ... would have  
12          'spilled over' to individuals or bodies within ...  
13          (including the elements which went to make up such  
14          pricing ... margins, discounts, RMPs and so on) ..."

15          THE CHAIRMAN: Right. Well, that is conclusory. What is  
16          the mechanism that you rely on?

17          MR WEST: That is the mechanism.

18          THE CHAIRMAN: I thought you had some other paragraphs.  
19          This is just your summary, is it not? You have not  
20          dealt with in your closing, the mechanism. I think that  
21          is the case.

22                       (Pause).

23          MR WEST: In the written closing, I think we just deal with  
24          siloing and --

25          THE CHAIRMAN: Yes, so I just --

1 MR WEST: -- bespoke-ness.

2 THE CHAIRMAN: -- want to find it, the bits you rely on in  
3 your opening, because this is a criticism that is made  
4 quite -- is emphasised a lot by the defendant, that you  
5 have just failed to identify any --

6 MR WEST: Well, I think what they say is that it is in our  
7 expert report but ... and clearly this point about  
8 incumbency and spillover effects is addressed in detail  
9 by Mr Hughes, so --

10 THE CHAIRMAN: Well, I would like to see it in your  
11 submissions. I do not think you have shown us really.  
12 Where is it put in Mr Hughes then? Let us have  
13 a look at it, if it is not there, in Mr Hughes. We need  
14 to see it written down somewhere, because I confess,  
15 I am not entirely clear in my mind as to what your case  
16 is. So where was it in Mr Hughes?  
17 If you want to come back to it --

18 MR WEST: Yes.

19 THE CHAIRMAN: -- Mr West ...

20 MR WEST: I can certainly provide the references.  
21 So still on the indirect case, it was suggested by  
22 Autoliv, certainly in their evidence, that one of  
23 the reasons why the indirect case cannot work is because  
24 of the way the individual business units were siloed  
25 from one another. That was the evidence of Mr Corbut,

1           for example, at paragraph 13 {C/1/5}, where he referred  
2           to Autoliv's general policy of maintaining separation  
3           between different business units, and paragraph 17  
4           {C/1/7}:

5                     "... each Business Unit is managed individually, and  
6           is deliberately kept separate and distinct from other  
7           Business Units."

8           It is not entirely clear from Autoliv's closing  
9           submission whether this point is actually maintained.

10       THE CHAIRMAN: I mean, you made some progress in  
11       cross-examination on that. You went to a lot of  
12       documents that show --

13       MR WEST: Yes.

14       THE CHAIRMAN: -- that there is -- even if there is some  
15       measure of independence -- I am not going to use  
16       the term "siloiing", but some measure of independence of  
17       the sales forces, that all disappears once you move up  
18       the chain.

19       MR WEST: Indeed.

20       THE CHAIRMAN: Plus there are meetings and so forth --

21       MR WEST: Exactly.

22       THE CHAIRMAN: There seemed to be quite a bit of evidence on  
23       that so ...

24       MR WEST: There was, indeed.

25       THE CHAIRMAN: I have read your closing on that.

1 MR WEST: So my only point is it is not actually clear  
2 whether this is maintained based on paragraph 130 of  
3 Autoliv's closing {S/15/31}, but perhaps we can see what  
4 they say.

5 THE CHAIRMAN: Yes.

6 MR WEST: Can I move then on to overcharge, and  
7 a preliminary point but an important one, in my  
8 submission, is the limited nature of Dr Majumdar's  
9 evidence. The issue to which the expert economic  
10 evidence in this case goes is whether the Claimants were  
11 subject to overcharges because they paid higher prices  
12 for OSS products procured during the cartel period. But  
13 there is something of an oddity, in my submission, which  
14 is that only one of the experts actually opined on that  
15 issue. We know what Mr Hughes' opinion is. He  
16 said: yes, the Claimants were subject to overcharges.  
17 But Dr Majumdar did not actually express an opinion on  
18 that. Instead he limited himself to saying whether  
19 Mr Hughes' model was a reliable basis to conclude that  
20 there were overcharges.

21 So for all this Tribunal knows, if Dr Majumdar had  
22 actually been instructed to express an opinion on  
23 the question to which his evidence is supposed to go, he  
24 may well have said that there were overcharges, for all  
25 we know. Then the question of whether Mr Hughes' model

1 is a sufficiently reliable basis would have become  
2 something of a second-order issue. In my submission,  
3 this is a peculiar way of going about things in expert  
4 evidence. If one thinks of other areas of litigation  
5 where one can have disputes between experts, for example  
6 in a breach of warranty dispute, were the accounts of  
7 the company misstated at the closing date. One would  
8 ordinarily expect the Claimants' expert to come along  
9 and say the accounts were misstated --

10 THE CHAIRMAN: I doubt whether that is a helpful analogy,  
11 really.

12 MR WEST: Well, my point is --

13 THE CHAIRMAN: I mean, obviously the Defendants run their  
14 case as they see things fit, but, in principle, there is  
15 nothing -- you come forward with a model saying you have  
16 identified an overcharge which is attributable to cartel  
17 activity, in principle, there is nothing wrong with  
18 saying, look, it just does not, it is too fragile and it  
19 cannot be relied upon. I mean, that is ...

20 MR WEST: But it is --

21 THE CHAIRMAN: It does not necessarily necessitate producing  
22 a model producing the opposite or producing some  
23 different overcharge. I mean, the Defendants run  
24 the case as they see fit --

25 MR WEST: They do, and the Claimants are entitled to comment



1 on how they are running the case, and my comment is that  
2 it is a particularity of this case that Dr Majumdar does  
3 not actually express a view on the point his evidence is  
4 supposed to go to.

5 THE CHAIRMAN: I mean, we were going to have three models at  
6 one point. The Tribunal is enormously relieved we just  
7 have one to deal with. But, yes, I understand your  
8 submission.

9 MR WEST: But my main point under the heading overcharges is  
10 that in the Claimants' submission, Mr Hughes' model  
11 weathered the storm of criticism directed towards it.  
12 We have made this point in our closing, the various  
13 alternative data sources for omitted variable bias  
14 suggested by Dr Majumdar were incorporated by Mr Hughes  
15 in his reply report and they make no material  
16 difference. The same ultimately turned out to be  
17 the case in relation to the important sensitivities  
18 about the RFQ date.

19 Now, the RFQ date was a serious issue because  
20 the classification of the project as "clean" or "dirty"  
21 depends on the RFQ date. So the RFQ date was in a sense  
22 the fulcrum of the analysis. But in the PSA data, for  
23 the majority of projects, it was missing, which meant an  
24 assumption had to be applied. Mr Hughes assumption was  
25 the 30 months, but that was subject to an attack by

1 Dr Majumdar based on data showing that where the RFQ  
2 dates were known, they tended to be clustered at  
3 the start of the platform. In his report, Dr Majumdar  
4 said if you apply the start of platform date, there are  
5 no overcharges, and if that had been maintained,  
6 the Claimants might be on rather shakier ground now. In  
7 fact, in what turned out to be a significant mistake,  
8 Dr Majumdar later accepted that in fact, if you apply  
9 the by-platform sensitivity, you continue to find  
10 overcharges of the same magnitude, or a very similar  
11 magnitude as Mr Hughes found, at least for airbags and  
12 seatbelts.

13 So, in my submission, that is powerful evidence  
14 upholding Mr Hughes' model and showing that that model  
15 identifies overcharges because those overcharges are  
16 real. In relation to -- in my submission, that goes  
17 a long way to removing the need for the Tribunal to  
18 decide between the two experts, at least on this RFQ  
19 date point, and at least in relation to airbags and  
20 steering wheels -- sorry, airbags and seatbelts.

21 For steering wheels, the position is slightly  
22 different, because there were fewer observations for  
23 steering wheels and that meant the results were rather  
24 more susceptible to these changes, although in fact an  
25 overcharge was still found in the early period but not

1 in the main period using this particular sensitivity.  
2 But in my submission, that single negative result does  
3 not undermine the model either as a whole or even in  
4 relation to steering wheels, and as we will see in  
5 a second, the steering wheels result was in fact more  
6 robust under some of the other proposed sensitivities.

7 Could I then address some specific complaints about  
8 Mr Hughes' model in my friends' written closing  
9 submission.

10 The first is that Mr Hughes was wrong or  
11 inconsistent or circular in not maintaining an early  
12 period dummy for seatbelts. He explained that he had  
13 dropped the early period dummy and maintained only  
14 the main period dummy, and the Defendants say, well,  
15 that is inconsistent and what he should have done is  
16 kept the early period dummy and taken the early and main  
17 periods together, and if he had done that, he would not  
18 have found an overcharge. That is the thrust of  
19 the criticism. In my submission, this is an example of  
20 applying the econometrics as a substitute for critical  
21 thinking, which Mr Hughes explained was not what should  
22 be done.

23 But the situation Mr Hughes faced is one in which  
24 the start date of the cartel, and indeed the very  
25 existence of the cartel, because it is a follow-on case,

1 is unconfirmed and where therefore the model has to take  
2 that into account. That is why Mr Hughes explained that  
3 he modelled the early and main periods separately,  
4 because, for the main period, we at least know that  
5 the Commission cartels are operating and so modeling  
6 them separately enables the model to tell you whether  
7 there are different results in the two different  
8 periods. What he found for seatbelts was: no early  
9 period overcharge, only a main period overcharge. Or to  
10 put it another way, if one were plotting the prices on  
11 a graph over time, one sees them remaining at  
12 the competitive level in the early period and then  
13 rising to an elevated level over the main period, then  
14 falling back again at the start of the wind-down period.

15 Now, what conclusions should one draw from that sort  
16 of finding? Mr Hughes, in my submission, drew  
17 the natural conclusion that the cartel effect only  
18 applied during the main period and that, in my  
19 submission, is a very common sense conclusion to have  
20 reached. What do Autoliv say he should have done? What  
21 Autoliv say he should have done is stuck rigidly to  
22 the hypothesis that there was both an early and main  
23 period overcharge in relation to seatbelts, and then,  
24 having found an overcharge only over the main period,  
25 taken the average of the two, or taken the result one

1 gets if one mixes them together, which of course is no  
2 overcharge.

3 Now, in my submission, that approach would be  
4 lacking in common sense. It would effectively assume  
5 that there was a cartel, or a cartel effect, over  
6 the early period when the model tells you and the data  
7 tells you that there was not, and it would have assumed  
8 that if there was a cartel, it was equally responsible  
9 for prices -- the effect on prices when they remained at  
10 the competitive level over the early period as over  
11 the period when they remained above the competitive  
12 level, i.e. during the main period. In my submission,  
13 no thinking person would come to that conclusion based  
14 on those findings. Instead what they would do is look  
15 at the results and do what Mr Hughes did and say, well,  
16 it looks like, for seatbelts, there is only a main  
17 period overcharge. The reason he should draw that  
18 conclusion is because the results formed a pattern: no  
19 overcharge in the early period but overcharge in  
20 the main period. That --

21 THE CHAIRMAN: Sorry to interrupt, but just the way you are  
22 approaching this case generally, whether it is looking  
23 at the documents or whether it is looking at  
24 the econometrics, is you are very much -- and  
25 I appreciate you are only looking at the Peugeot data

1           for the econometrics -- sort of lumping everything  
2           together, and of course we have got three separate  
3           Claimant groups, and you may have -- when it comes to  
4           the documents, you may have some quite powerful  
5           submissions for one Claimant group and the documents may  
6           be more fragmentary for the next, and similarly, looking  
7           at the econometrics, obviously there is no econometric  
8           analysis for two of the groups, so how are you -- just  
9           explain to me what your overall case is on why we are  
10          lumping everything together, and should we be?

11         MR WEST: Well, for the econometrics, it is more  
12           straightforward, because one only has useable data for  
13           PSA, so there is no useable data for the other  
14           Claimants, for whatever reason.

15         THE CHAIRMAN: Right.

16         MR WEST: So the only possible approach --

17         THE CHAIRMAN: But if you were just representing  
18           Vauxhall/Opel and you came here and said -- let us  
19           assume you have not got PSA, you say, "Look, you know,  
20           we have got some evidence of cartel activity, look at  
21           it, but I am afraid we cannot help you on an overcharge,  
22           we have not got any documents".

23         MR WEST: Well --

24         THE CHAIRMAN: You would be struggling to make out your  
25           case, would you not? You would get round that by

1           the fact that Peugeot happened to be sitting alongside  
2           you, you, Vauxhall --

3       MR WEST:   What Mr Hughes would have done if it was  
4           a Vauxhall-only claim, I cannot tell you, but he has  
5           used the PSA data because he thinks that is the best  
6           available proxy here.  If it was only a Vauxhall/Opel  
7           claim, he would not have that proxy.  Whether he would  
8           be able to identify some other proxy which was not as  
9           good as that one but still was able to establish some  
10          findings on which the court could rely, I am not in  
11          a position to say.

12                But, fortunately -- and quite often in these cartel  
13                cases, the availability of data does turn out to be  
14                quite contingent in that way.  In BritNed, for example,  
15                a big problem for the claimants was that the defendant  
16                was ABB, which had not actually been in that many  
17                projects and so there was very limited project data.  
18                Whereas in claims against some of the other defendants,  
19                Prysmian and Nexans and companies like that, they had  
20                been in a very large number of projects, so if you have  
21                a case against one of those defendants there is just  
22                a lot rich -- there is rich -- the dataset is much  
23                richer and so one does have these contingent factors in  
24                cases like the present about the availability of data.

25       THE CHAIRMAN:  But if the cartel activity is as -- and I am

1 no doubt paraphrasing, perhaps unfairly, some of the OSS  
2 decision, but if the cartel activity is sporadic and  
3 sometimes ineffective, how can one use the Peugeot data  
4 as a proxy for the Vauxhall/Opel position?

5 MR WEST: Well, again, I think Mr Hughes' explanation was  
6 that there were some procurement practices, as we saw,  
7 and that, based on the data he had seen, the cartel  
8 conduct seemed to be of a broadly similar nature in each  
9 case and similar also to the cartel conduct in the OSS  
10 decision.

11 THE CHAIRMAN: We are looking at the -- just going back --  
12 sorry, I appreciate I am jumping around and I apologise  
13 for that, but when going back to the direct case, is it  
14 the position -- is your submission we should be looking  
15 at it globally, or should we be analysing the documents  
16 separately for each cartel? If it is the latter, can  
17 you explain why?

18 MR WEST: I think we say it is probably a bit of both.  
19 Certainly, if there were no documents at all for one of  
20 the particular Claimant OEMs, it might be said, well, we  
21 can forget about that one because there is not anything.  
22 But in my submission, there is evidence in relation to  
23 all of the OEMs. But one also looks at the evidence as  
24 a whole, both against the Claimant OEMs and the other  
25 OEMs, all of which goes to identify what is the conduct



1           that is likely to have happened in this case.

2           THE CHAIRMAN: Right, but ... yes. I mean, that is -- but  
3           there is no need to extrapolate from Vauxhall to --  
4           there is no need to take Vauxhall and extrapolate to  
5           Peugeot in that way, one can just go to the OSS  
6           decisions and extrapolate from those. When it comes to  
7           extrapolating behaviour, there is no need to start with  
8           Vauxhall, you can start with the OSS parties, can you  
9           not?

10          MR WEST: One could choose to start there, certainly.

11          THE CHAIRMAN: In that we -- you have findings there.

12          MR WEST: Yes. But as I say, in relation to the overcharge,  
13           the experts are agreed that the only useable dataset is  
14           PSA, and clearly one of the important issues for  
15           the Tribunal will be: can the Tribunal read over from  
16           PSA to the others? Mr Hughes' position is that he  
17           regarded that as a reasonable proxy. Ultimately, it is  
18           a question for the Tribunal. The Tribunal may wish to  
19           take the additional uncertainty into account in some way  
20           in the application of a broad axe or otherwise, but that  
21           is the situation we find ourselves in on the data.

22          PROFESSOR NEUBERGER: Can I just ask about the using of  
23           a different model for airbags and steering wheels on  
24           the one hand and seatbelts on the other. I think you  
25           said that what Mr Hughes found for seatbelts was no

1 early period overcharge, only a main period overcharge.

2 But if you use the same model for seatbelts as for  
3 the other two, do you not end up with a very large  
4 undercharge in the first period and a substantial  
5 undercharge in the main period? If that is true, is  
6 there not some onus on you to explain why the model  
7 produces that?

8 MR WEST: Well, I think Mr Hughes did try to explain that  
9 several times in his evidence. He said it was to do  
10 with the -- are we talking here about seatbelts  
11 specifically?

12 PROFESSOR NEUBERGER: Well, yes, if you use the same model  
13 for seatbelts as you do for the other two, you seem to  
14 get pictures which are dramatically different from  
15 the other two in the sense that you get undercharges  
16 rather than overcharges. It just seems that that  
17 requires more explanation, because if that is not  
18 the right interpretation of the model for seatbelts, why  
19 should I be confident it is the right explanation for  
20 airbags and steering wheels?

21 MR WEST: Well, I think Mr Hughes did attempt to explain.  
22 Clearly, if one has a combined period for seatbelts, one  
23 is not likely to find overcharges, because Mr Hughes has  
24 said there are not any overcharges in the early period,  
25 and the results of combining different periods, as

1           Mr Hughes explained, is not always in econometrics that  
2           you end up with an average of what you would have had.

3       PROFESSOR NEUBERGER: Sorry, that was not the point I was  
4           making.

5       MR WEST: Oh, sorry.

6       PROFESSOR NEUBERGER: I was making the point that you use an  
7           early period dummy and a main period dummy for airbags  
8           and steering wheels, but you do not for seatbelts, and  
9           you explain that by saying that, for seatbelts, he found  
10          there was no early period overcharge, only a main period  
11          overcharge. What I am saying is that, if you do use  
12          separate dummies for the early period and the main  
13          period, you do not find no early period overcharge and  
14          a positive main period overcharge, if you use separate  
15          dummies you get a large apparent undercharge in  
16          the early period and a substantial undercharge in  
17          the main period.

18       THE CHAIRMAN: Overcharge?

19       PROFESSOR NEUBERGER: No, an undercharge in the main period.

20                I am just saying if you use the same model and you  
21                want to say it is not relevant for seatbelts, then are  
22                there arguments to explain why it is relevant though for  
23                the other two?

24       MR WEST: Well, I think the difference is, on the other two,  
25           Mr Hughes finds positive overcharges in the early

1 period, which is why he maintained the dummy in respect  
2 of the early period for those two components. Whereas  
3 he does not do so for the early period on seatbelts, and  
4 as he explained, you do not necessarily get the result  
5 by combining periods as you would expect in perhaps  
6 other areas of simpler mathematics.

7 PROFESSOR NEUBERGER: That is another issue but I am just --  
8 maybe it is helpful to look at the figures. I mean,  
9 I have got it here in {E1/19/1}, which is Dr Majumdar's  
10 estimates, which I think were accepted as technically  
11 right even though the interpretation of them obviously  
12 varied between Dr Majumdar and Mr Hughes. So this is  
13 table 1 {E1/19/1}. I am looking at the second -- you  
14 have got the first panel is the MH1 model, the second  
15 panel is using a consistent model across all three OSS,  
16 and I mean, I am saying, given the figures for  
17 seatbelts, which seem to be highly difficult to  
18 understand and interpret, I accept that, why should  
19 I have confidence in the positive figures for airbags  
20 and steering wheels?

21 MR WEST: Well, I think the answer Mr Hughes would give is  
22 that the position in relation to seatbelts is different  
23 because there is not an early period overcharge.  
24 Whether prices might in fact have been lower in  
25 the early period for some reason, I am not quite sure,

1 but we are not -- that is not what we are pursuing.

2 That issue -- the issue concerning seatbelts does not  
3 apply, as this data shows, this particular issue in  
4 relation to the other two OSS components.

5 PROFESSOR NEUBERGER: But it is not merely a question of  
6 Mr Hughes finding no price effect in the early period  
7 and a substantial positive price effect in the main  
8 period, from this analysis, he is finding a large  
9 negative effect in the early period and a substantial  
10 negative effect in the main period. So ...

11 MR WEST: You mean if the periods are combined?

12 PROFESSOR NEUBERGER: No, I am just looking at the -- I am  
13 looking at the second panel, "MH1 Early + MH1 Main  
14 Period ...". I am just saying, if I use a consistent  
15 set of binoculars across all three OSS, you are asking  
16 me to take at face value two of them and to totally  
17 ignore the third, and I am saying that if I cannot trust  
18 my binoculars on one category of OSS, what reason do  
19 I have confidence to believe in the other two? That is  
20 my problem.

21 MR WEST: Well, I think the explanation is that this mixes  
22 up clean and dirty periods, which is what Mr Hughes was  
23 very keen to say that the Tribunal should not do, and  
24 when one does that, the results are, as he would say,  
25 unreliable and to be put to one side.

1 PROFESSOR NEUBERGER: Thank you.

2 MR WEST: The second point I would like to address from  
3 Autoliv's closing submissions concerns the indirect  
4 case, and the submission is that for the indirect case  
5 the model has to assume the only dirty period is  
6 the main period, because that is the only cartel we have  
7 if one assumes that there is no direct claim, and  
8 therefore, they say, the overcharges should be those  
9 which are found if one takes the main period only.

10 I was looking at this in Dr Majumdar's table at  
11 page 44 {E1/6/44}, which I think is a similar table. So  
12 one sees, this is I think the row, "MH1 Main Period".  
13 So this is the inverse of the point that I was  
14 discussing with Professor Neuberger a second ago. So  
15 this is now the indirect claim and it is said you should  
16 only take the main period as being dirty because you  
17 only have the Commission cartel. As I say, this is,  
18 I think, row 3, "MH1 Main Period".

19 Now, the first point to make about that is that this  
20 does find the result for seatbelts, and that, in my  
21 submission, is unsurprising, because one is not changing  
22 anything. Mr Hughes only took the main period for  
23 seatbelts; this only takes the main period, and hence  
24 one gets the same result as Mr Hughes gets. So this  
25 point about the indirect case, what the dirty period

1           should be for the indirect case, only applies to airbags  
2           and steering wheels, although in fact, if one looks at  
3           this row 3 under "Steering wheels", Dr Majumdar actually  
4           found an overcharge there on this approach as well. So  
5           on one view, this point is really an airbags point only.

6       THE CHAIRMAN: We have not got the data for the main period  
7           and a clean period post the main period? These figures  
8           are -- sorry, if I am recalling correctly -- have  
9           assumed or hypothesised that it is clean prior to the --

10       MR WEST: These figures assume it is clean prior to the main  
11           period in this role.

12       THE CHAIRMAN: But if you do it, nobody has actually  
13           said: right, well, what is the impact? If I put  
14           a question mark over that early period, I just do not  
15           know, I cannot say one way or the other whether it is  
16           clean or not, so I look at the OSS main period and then  
17           I look at a clean period after the Commission have done  
18           their dawn raids and after the wind-down, if you want  
19           a wind-down, nobody has looked at that.

20       MR WEST: I think Mr Hughes would say that is very similar  
21           to what he has actually done, because his findings of  
22           overcharge in the main period do not assume that  
23           the early period is clean, so they compare -- certainly  
24           the clean periods which are assumed in that model are  
25           post-cartel and I think there may be one or two, or

1 a small number of data points which are before even  
2 the beginning of the early period. So if one says,  
3 well, what results does one get if one does not assume  
4 that the early period is clean, one just assumes  
5 the only clean periods are pre-cartel and post-cartel,  
6 the results you get are Dr -- Mr Hughes' results, as  
7 I understand it.

8 But what the Defendants are saying, or seeking to  
9 say is, on at least some of these alternative proposed  
10 specifications, the Tribunal must treat the early period  
11 as clean and just take the main period as the only dirty  
12 period.

13 THE CHAIRMAN: Yes, so Mr Hughes has done that for OSS 1  
14 period, not for the OSS 2 period. I think that is  
15 the position.

16 MR WEST: He has done it for the Commission decision --  
17 the period covered by the Commission decisions.

18 THE CHAIRMAN: Both Commission decisions, it means he --  
19 yes, we know, we have got the diagrams of what his main  
20 period are.

21 MR WEST: Yes, and of course Autoliv was in both decisions,  
22 so --

23 THE CHAIRMAN: Yes.

24 MR WEST: -- the previous point about causation does not  
25 arise.



1 THE CHAIRMAN: Okay, understood. Sorry.

2 MR WEST: So this is really taking the main period only and  
3 assuming everything else is clean, and as I said, it is  
4 really an airbags point, as one sees that one figure in  
5 blue. But I think, again, we would say this is an  
6 example of not applying critical thinking properly to  
7 the results of the model, because what Mr Hughes has  
8 found is that, at the end of the main period, prices  
9 fall back down to the competitive level and remain there  
10 afterwards, and what this argument or attack on  
11 Mr Hughes is really saying is, one should assume that  
12 the early period prices, which Mr Hughes' model has  
13 shown to be inflated, are competitive prices and it is  
14 not enough for the model to show prices falling at the  
15 end during the wind-down period, the model must also  
16 show an overcharge in comparison with the early period.  
17 In my submission, that fails to attribute proper weight  
18 to the finding one finds of prices falling at the end of  
19 the main period and is not something which any thinking  
20 person would do in looking at the results of the model.  
21 As the Chair suggests, one might instead try and compare  
22 the main period to periods which are undoubtedly clean,  
23 which is in effect what Mr Hughes' model does.

24 The Tribunal should be particularly wary of this  
25 approach, in my submission, because of the evidence we

1           were looking at this morning. I have shown the Tribunal  
2           documents the Commission did not see which show,  
3           apparently, cartel conduct in the early period. In my  
4           submission, even if the Tribunal is not prepared to find  
5           a direct cartel over the whole of that period, it ought  
6           not to, as it were, ignore that evidence when it comes  
7           to make its decision on overcharge. The way in which  
8           you can take that into account, in my submission, is by  
9           saying, well, let us leave aside the early period  
10          because we are not prepared to say it is entirely clean,  
11          there is some evidence of cartelisation in that period,  
12          and how we should take that into account is by comparing  
13          the main period with undoubtedly clean periods, which,  
14          as I say, is what Mr Hughes' model does.

15       PROFESSOR NEUBERGER: So does that mean, do I understand  
16          this right, that the overspill or indirect effect story  
17          is not -- sorry, the cartel that is established --  
18          the cartels which are established are under OSS 1 and 2,  
19          that if we take the second alternative claim, you are  
20          still wanting us to take into account the possibility  
21          that there were cartels outside OSS 1 and 2?

22       MR WEST: Well, we know that Mr Hughes finds overcharges.  
23          But even if the Tribunal is not prepared to say that on  
24          the balance of probability there was a cartel then, at  
25          the very least we know there was some evidence, and so

1 the way for the Tribunal, in my submission, to take that  
2 into account is to say: we are not going to assume  
3 the early period is clean and we are going to adopt  
4 Mr Hughes' results accordingly, just -- but limited to  
5 the main period.

6 MR SCANNELL: Mr Chairman, I hesitate to interrupt, but just  
7 so that there is no uncertainty about this, the whole  
8 predicate of the second alternative case is that there  
9 is no cartel. That is the pleaded case.

10 MR WEST: But that is why -- if the Tribunal does not find  
11 a cartel in the early period, then we are in the realms  
12 of the indirect period, but the Tribunal still has to  
13 decide what is the appropriate way to calculate  
14 the overcharge in that case, and of course calculation  
15 of the size of the overcharge is a question of  
16 the broad axe, as we know, and the Tribunal has a broad  
17 discretion in coming to its conclusion.

18 THE CHAIRMAN: Is that a convenient moment?

19 MR WEST: Yes.

20 THE CHAIRMAN: Can you remind yourself of where your  
21 definitive explanation of the mechanism for the indirect  
22 case is in the submissions, or in the evidence, or  
23 whatever it is you are finally relying on, over  
24 the short adjournment. Thank you.

25 (3.13 pm)

1 (A short break)

2 (3.25 pm)

3 MR WEST: So I have a list of references to the indirect  
4 case and how it is put. Would you like me to read it  
5 out or --

6 THE CHAIRMAN: Just tell me where I can find them.

7 MR WEST: So in the fourth amended particulars of claim,  
8 paragraphs 44B(i) to (ii) {A/2/28}, and then carrying  
9 on --

10 THE CHAIRMAN: Sorry, hold on. Just slow down.

11 MR WEST: So this is {A/2/28}.

12 THE CHAIRMAN: Okay. All right, that is fine. Next?

13 MR WEST: So 44B to 44D, at {A/2/28}.

14 Then in the reply {A/6/12}. So this is paragraph 25  
15 we are on here, little (2), in the middle of the page.  
16 Then there are a series of examples that run on to  
17 {A/6/16}.

18 THE CHAIRMAN: Can we have that up, so I have that?

19 (Pause)

20 It is just sort of an assertion of spillover, is it  
21 not, looking at (2)?

22 MR WEST: There are various examples, I think, some drawn  
23 from the disclosure.

24 Then the opening skeleton {S/1/1}, bundle S, tab 1.

25 THE CHAIRMAN: The opening skeleton, you say?

1 MR WEST: Yes. The first one is paragraph 9 {S/1/5}.

2 I note that 9(a) is the incumbency, and 9(c) information

3 spillover.

4 THE CHAIRMAN: Right.

5 (Pause)

6 MR WEST: Also paragraph 38 of this skeleton {S/1/14}, which

7 is spillover again.

8 (Pause)

9 THE CHAIRMAN: Right.

10 MR WEST: Also 45 {S/1/16}, and 154 to 155 {S/1/46}.

11 THE CHAIRMAN: 145?

12 MR WEST: 154 to 155 {S/1/46}.

13 (Pause)

14 THE CHAIRMAN: Okay.

15 Nothing in your -- anything in your closing?

16 MR WEST: 114 to 115 {S/13/47}. Also paragraphs 7 to 9

17 {S/13/10}.

18 THE CHAIRMAN: Paragraphs 7 to 9.

19 (Pause)

20 Right, and it is those paragraphs you rely on for

21 the mechanism?

22 MR WEST: There is also a section on incumbency at 82 to 88

23 {S/13/37}.

24 THE CHAIRMAN: Closing?

25 MR WEST: Yes.

1 THE CHAIRMAN: 82?

2 MR WEST: 82 to 88. Although it is in a section of  
3 the skeleton dealing with the direct case, you will see  
4 at the end of 88 {S/13/39} it says:  
5 "This is also an example of the kind of case where,  
6 even absent explicit coordination, tacit collusion could  
7 arise."  
8 Which is a point I was making earlier.

9 THE CHAIRMAN: Thank you.

10 MR WEST: Then there are some references in the oral  
11 opening. Shall I list those as well?

12 THE CHAIRMAN: Yes, that would be helpful.

13 MR WEST: So page 74, line 14 {Day1/74:14} to 76, line 16  
14 {Day1/76:16}.

15 THE CHAIRMAN: 74 to 76, yes.

16 MR WEST: 92, line 2 {Day1/92:2} to 94, line 24  
17 {Day1/94:24}.

18 THE CHAIRMAN: Sorry, 92 to?

19 MR WEST: 94, line 24.

20 THE CHAIRMAN: Okay.

21 MR WEST: Page 97 {Day1/97} and page 100 {Day1/100}.

22 I cannot guarantee those are completely comprehensive,  
23 but those are the ones we have found.

24 So the third point I would like to address  
25 concerning the econometrics is the suggestion that

1 Mr Hughes should have had a single dummy across  
2 the early and main period. So this is on the direct  
3 case. If we look at Dr Majumdar's table of results at  
4 {E1/6/44}, this is the row 2, "MH1 combined periods".  
5 So I say this point really concerns airbags because, on  
6 seatbelts, one would not expect an overcharge for  
7 a combined period, for reasons I have explained, and for  
8 steering wheels, actually we see that Dr Majumdar here  
9 finds an overcharge on steering wheels under this  
10 alternative specification, so this is an example of  
11 where the steering wheel result is actually more robust  
12 than the others. So this is really a --

13 THE CHAIRMAN: More what?

14 MR WEST: Robust.

15 THE CHAIRMAN: Why is it more robust?

16 MR WEST: Because it is maintained -- the overcharge is  
17 maintained under this alternative specification.

18 THE CHAIRMAN: I see, more robust than seatbelts or airbags?

19 MR WEST: Well, seatbelts would not be expected to be robust  
20 to this, because this combines the early and main  
21 period. But airbags, yes, is the one I am going to  
22 address.

23 Mr Hughes' answer to it is in his second report, so  
24 {E1/4/24}. It is rather technical, I am afraid.

25 THE CHAIRMAN: E1/4?

1 MR WEST: Page 24. He says, at (b) on page 24, at  
2 the bottom:

3 "Dr Majumdar's approach, of using a single combined  
4 indicator for the entire Cartel Period, is flawed for  
5 two reasons. First, because Dr Majumdar's approach  
6 restricts the impact of the Cartels to be the same  
7 across the entire Cartel Period (i.e. ... the Early and  
8 Main Periods), whereas I wish to test whether there is  
9 evidence of Early Period effects and only include such  
10 effects in my models if prices are statistically  
11 significant ... in the Early Period."

12 So we have discussed that point:

13 "Second, my approach of considering the Early and  
14 Main Periods separately, where there is evidence of  
15 Early Period effects, enables the model to exploit  
16 the data more efficiently to capture different cartel  
17 effects between the Early and Main Periods as certain  
18 parts were not purchased consistently over time. Where  
19 certain OSS parts were not purchased consistently over  
20 time, Dr Majumdar's approach of defining a single longer  
21 Cartel Period means that data on such parts are likely  
22 to make less of a contribution to the estimation of  
23 the overcharge, compared to my method, when the Cartel  
24 impacts exist but differ between the Early and Main  
25 Periods. As a result, under Dr Majumdar's approach,



1 potentially valuable data is likely to be ignored or  
2 given less weight and the resulting estimate is likely  
3 not to fully capture the impact of the Cartels."

4 There is a footnote there, at 62, in which this  
5 point is further explained. He says:

6 "This issue arises because the model includes  
7 indicators to capture the variation in prices between  
8 different sub-classes of OSS parts (e.g. ....airbags  
9 based on airbag location, vehicle size, etc). If  
10 pricing data for an OSS sub-class only or primarily fall  
11 within the single Cartel Period and there are no or few  
12 data points outside this Period, then the single,  
13 combined cartel dummy approach used by Dr Majumdar will  
14 fail to capture and exploit any variation in the cartel  
15 dummy overcharge effects within that sub-class across  
16 the Early and Main Periods. This is because under  
17 Dr Majumdar's combined approach the cartel indicator  
18 will always be 'on' across the Early and Main Periods,  
19 and there may be few or no observations within certain  
20 sub-classes when it is 'off'. Consequently, such data  
21 points for any such sub-class are less likely to  
22 contribute to the overcharge estimate under his  
23 approach, since the overcharge estimation method is  
24 based on comparing prices during and outside the Cartel  
25 Period, which requires there to be sufficient pricing

1 data for the individual part sub-classes during and  
2 outside the Cartel Period."

3 Now, that is complicated, but in my submission what  
4 he is really saying is, if you are comparing only  
5 the whole cartel period and all of your -- or the vast  
6 majority of your data points are within that one cartel  
7 period, there is not enough to compare it to, whereas if  
8 it is split up, you may be able to make sensible  
9 comparisons between different sub-periods within  
10 the overall period. That is what Mr Hughes explained in  
11 the hot tub at {Day8/39:6-24}. So Mr Hughes said:

12 "... generally speaking -- your proposition is  
13 generally right ...

14 "The other thing that happens ... [when] you've got  
15 data over time ... the way the model works is, for  
16 individual car parts of a particular type ... we have  
17 what are called 'fixed effects' ..."

18 So this is what he was talking about in  
19 the footnote:

20 "... so the model works out, on average, an airbag  
21 of type 2 is somewhat more expensive, on average, than  
22 an airbag of type 1, okay? And then ... the model says,  
23 during the cartel period, controlling for that factor,  
24 do I observe that the price of the airbag is higher  
25 during the cartel period? Now, for that to work, you

1           need ... a distribution of data points during and  
2           outside the cartel period. So ... if you have too long  
3           a cartel period where you have a single period ...  
4           you'll lose granularity on your observations, it will be  
5           harder to make the in and out comparison that you'd like  
6           to make."

7           So Mr Hughes' explanation of Dr Majumdar at page 44  
8           of E1, tab 6 {E1/6/44}, "MH1 combined periods" row, is  
9           that why one is getting a zero percent figure is nothing  
10          to do with the lack of an overcharge, it is to do with  
11          the fact that you can no longer make sufficient use of  
12          the data points, whereas if you have an early and main  
13          period, you can compare not only with the known cartel  
14          period but also as between the early and main periods.

15       PROFESSOR NEUBERGER: Can I just understand that a bit  
16          better. It may be a bit technical, but if the problem  
17          with having a single combined period is lack of  
18          statistical power, would you not expect that to show up  
19          in the form of a higher standard error on your estimate,  
20          and yet the -- there seems to be no problem in the power  
21          of the model to detect the overcharge in the combined  
22          period, I mean the standard error is about 4.5%, which  
23          is pretty much the same as the standard error on  
24          the other two cartel dummies in Mr Hughes' original  
25          model?

1 MR WEST: Mr Hughes -- I am afraid I cannot -- Mr Hughes  
2 would have to answer that, I am afraid.

3 PROFESSOR NEUBERGER: Thank you.

4 MR WEST: I cannot answer that.

5 PROFESSOR NEUBERGER: Okay.

6 MR WEST: I am sorry.

7 I think Mr Hughes also mentioned this -- I hope this  
8 is the right reference, {Day8/33-35}. Can we go over  
9 the page {Day8/34}. Yes, I think this is a similar  
10 point, 33 to 35. I will not read it all out.

11 So, in my submission, the trouble with the attacks  
12 made in my friends' closing submissions on Mr Hughes'  
13 model is that, as I say, they involve substituting an  
14 econometric analysis for the use of common sense, and in  
15 fact Mr Hughes' evidence, in my submission, was  
16 extremely credible when he explained why he had adopted  
17 the approach that he had. I revert to the point I made  
18 at the outset, which is that the model weathered all  
19 the attacks which were made against it and it is  
20 a reliable model, in my submission, and the only model,  
21 of course, the Tribunal has before it.

22 Before leaving the expert evidence, can I say a word  
23 about the broad axe principle. In the context of  
24 overcharge, the broad axe principle operates in favour  
25 of the claimant and means the claimant does not need to

1           establish the precise amount of its loss on the balance  
2           of probabilities. If the Tribunal is satisfied on  
3           the balance of probabilities that the claimant suffered  
4           some loss, then in the event it does not accept  
5           the claimants' quantification entirely, it can award  
6           a different sum, doing the best it can.

7           THE CHAIRMAN: But the broad axe applies to quantum and  
8           essentially the size of the overcharge, not whether  
9           there is an overcharge?

10          MR WEST: Yes, and inevitably that means there will be some  
11          measure of over or under-compensation, but the broad axe  
12          is not a departure from the principle that damages  
13          should be compensatory, instead it represents -- it  
14          recognises the fact that in some contexts it is not  
15          possible to be entirely precise about the compensation.

16          THE CHAIRMAN: But that applies in damages enquiries  
17          generally, does it not?

18          MR WEST: It does.

19          THE CHAIRMAN: There is nothing special in this particular  
20          area; is that right?

21          MR WEST: I think that is right, yes.

22                 But that point -- if evidence be required for  
23                 the point I have just made, it is in BritNed,  
24                 authorities tab 22, at page 1084 of the report,  
25                 paragraph 30 {AUTH2/22/12}. What happened in that case

1 was that the judge had said he erred on the side of  
2 under-compensation, using the broad axe, and the Court  
3 of Appeal said that is not the point of the broad axe  
4 and the award should be based on the evidence, so far as  
5 possible, even where it is necessary to wield the broad  
6 axe. I accept that in the context of pass-on,  
7 the principle operates the other way round. So if  
8 the Tribunal were satisfied on pass-on that there had  
9 been some mitigation by reason of pass-on but did not  
10 accept the Defendants' evidence as to the precise level  
11 of that mitigation, again, the Tribunal is entitled to  
12 come to a figure as best it can using the broad axe.

13 That brings me to pass-on and I would like to start  
14 with the factual evidence. The factual mechanism  
15 advanced by Autoliv concerned the possibility that  
16 the dealer prices would be increased, or dealer  
17 discounts reduced, which is the same thing, in response  
18 to an unexpected increase in OSS costs during  
19 production. The first point to make about that theory  
20 is, it does not address the case where OSS costs are  
21 found to be higher prior to the vehicle entering into  
22 production.

23 The witnesses were clear that prices in this  
24 industry are set by means of benchmarking to competing  
25 vehicles, and that benchmarking process feeds both into

1 pricing and specifications, so the pricing has to be  
2 comparable and so do the specifications have to be  
3 comparable if the vehicles are to compete with one  
4 another. Mr Couturier put the point this way:

5 "... if you start to remove some item which has  
6 a customer perceived value, then you change  
7 the positioning of the car."

8 That is Day 5, page 73 {Day5/73}.

9 Subject to those points about benchmarking,  
10 profitability would be considered by the Claimants in  
11 deciding what equipment to include in the vehicle,  
12 including whether to include higher quality or more  
13 expensive components or not, and if it turned out that  
14 OSS components were costing more than had been budgeted,  
15 one choice the Claimants might do -- might adopt,  
16 depending on the size of the difference, would be to  
17 incorporate cheaper components in the car than they had  
18 otherwise planned to do, not necessarily cheaper OSS  
19 components, but any components, from the engine to  
20 the radio, in seeking to achieve the overall  
21 profitability for which they were aiming. That of  
22 course assumes that the difference in the OSS costs made  
23 a sufficient difference to make the Claimants decide to  
24 adopt a different specification. That would of course  
25 depend on the size of the overcharge.

1           There has not been any attempt in this case to  
2           allege pass-on by such means. There was such an attempt  
3           in a case called Stellantis v NTN, which is at tab 29 of  
4           the authorities {AUTH2/29/1}. I do not think we need to  
5           turn it up, but that was a procedural appeal in  
6           the Bearings case, that the Tribunal has heard about, in  
7           which the defendant attempted to plead pass-on by means  
8           of what it called "offsetting" or purchasing cheaper  
9           components from other suppliers. In that case,  
10          the Court of Appeal held, upholding the Competition  
11          Appeal Tribunal, that the pleaded case should not be  
12          allowed to be run because it did not meet the test for  
13          a pleading. In light of that, no doubt, there has been  
14          no attempt in this case to plead pass-on by means of  
15          offsetting. So if that is what the Claimants would have  
16          done in response to an increase in OSS costs prior to  
17          the production stage, then we do not need to worry  
18          about it because it is not pleaded as pass-on in this  
19          case.

20          That is no doubt why Autoliv focuses on an  
21          unexpected increase in costs during serial production,  
22          although that does mean there is something of a mismatch  
23          between the overcharges which are sued upon in this case  
24          and the pass-on, because Mr Hughes' overcharges are all  
25          new contract overcharges, that is to say the RFI prices



1 were higher and that includes price amendments over  
2 time, but Mr Hughes did not find a price amendment  
3 effect as such. In other words, he did not find that  
4 the rate at which prices decline was different during  
5 the cartel period as opposed to outside it. So all of  
6 the prices taken over the life of the contract were  
7 instead said to be relevant to the new contract  
8 overcharge, whereas this form of pass-on seems to be  
9 a form of pass-on arising by virtue of price amendments  
10 during the life of the contract.

11 Leaving that to one side, the witness evidence was  
12 clear, in my submission, that pricing would only be  
13 amended if the increase in cost made a sufficiently  
14 large difference to the overall cost of the vehicle, and  
15 that in turn meant that the profitability target could  
16 no longer be met. Mr Gautier said this {Day4/104:25}  
17 starting at line 25, at the bottom:

18 "Taking an example to try to, I would say, to  
19 put ..."

20 If we can go over to the next page {Day4/105:1}:

21 "... figures ... or flesh on the bone, let's imagine  
22 that the profitability target is ... €1,800. When we  
23 achieve, let's say, €1,750, we are certainly not going  
24 to revisit the target, we are going to work to try to  
25 maximise the volumes, but not change dramatically our

1 approach.

2 "If it will impact until, let's say, the level of  
3 being €1,500 instead of €1,800, that means a discrepancy  
4 over 15%, so in that case we will probably revisit and  
5 try to find another way."

6 That was Mr Gautier.

7 Ms Biancheri {Day4/152:2-10}. So the question was  
8 put:

9 "One way that it could do that is by reducing  
10 the discount that it gave to dealers?"

11 "Answer: It was not a common use because, in this  
12 case, the dealer would have not bought any more vehicles  
13 from FCA, so the business would have been reduced, in  
14 this case, if there was not a final customer ready to  
15 buy the vehicles of the FCA brands --"

16 Then, going on to {Day4/159:7-9} -- beginning at 5  
17 {Day4/159:5}, actually, so this is a question about  
18 increasing its prices in response to the increase in  
19 standard costs and Ms Biancheri said:

20 "In some cases, and depending from the amount that  
21 has been increased, if it was relevant versus  
22 the overall cost of the vehicle."

23 So it would have to be sufficiently large to be  
24 relevant to the overall costs.

25 Mr Couturier was {Day5/68:20}, and one saw his

1 answer there at line 20, where he said:

2 "We never reduced the dealer margin ... from my  
3 recollection ..."

4 He dealt with this point at {Day5/68-71} overall.  
5 It might be worth just going to the next page {Day5/70}.  
6 Yes, so for example then at page 70, 17 {Day5/70:17}:

7 "... I do not recall that we have received  
8 instruction from the top leadership to say, "You need to  
9 increase price because the cost is going up" ... I do  
10 not recall this, because what we were looking at is the  
11 competitiveness on the market. That was very important,  
12 and probably every department was running its own KPI.  
13 So if you have a cost issue, you should fix it within  
14 the cost department. If you have a price issue, you  
15 should fix it in your pricing department. That's  
16 the way we were operating it."

17 So in order for the suggestion of a change in dealer  
18 price to be credible we would have to be dealing with  
19 a sufficiently substantial increase in cost, but in fact  
20 the experts were clear that the overcharge in this case  
21 was small compared to the overall price of the vehicle.  
22 Mr Hughes said it was around €20 per vehicle, and in my  
23 submission, the effect of the evidence is therefore that  
24 it is overwhelmingly likely that in response to such an  
25 overcharge it would make no difference whatsoever. If

1 so, that is the end of the pass-on defence.

2 But even if the increase did make a difference to  
3 the Claimants' prices to its dealers, the Claimants  
4 would also have to consider volume effects, or, as  
5 the testimony I have just shown you put it,  
6 the competitive situation. In this case, the volume  
7 effects were difficult to predict, and in particular it  
8 is difficult to tell a priori whether a price increase  
9 would make things better or worse and so the Claimants  
10 would be reluctant to make such a change, as  
11 the evidence showed that they were.

12 The suggestion of pass-on raises a particular issue  
13 in this case, because the overcharge is limited to  
14 vehicles procured -- whose OSS was procured during  
15 the cartel period, but because of the long production  
16 runs of cars, as Mr Hughes explained, those cars would  
17 be competing on the forecourts with vehicles containing  
18 OSS procured before the cartel period for almost all of  
19 the cartel period. Likewise, after the end of  
20 the cartel period, vehicles with OSS procured during  
21 the cartel period would be competing with vehicles  
22 containing OSS procured after the cartel period. So if  
23 one sought just to increase the price of the affected  
24 vehicles, you would have the difficulty that consumers  
25 have the choice of buying other vehicles on the same

1 forecourts whose prices have not been increased. That  
2 was Hughes 2, paragraph 1.2.7(b) {Day9/26-27}.

3 It is not sufficient, for Autoliv on pass-on, if  
4 the Tribunal thinks the Claimants might occasionally  
5 have made such a change. The pass-on model put forward  
6 assumes the pass-on, as it were, across the board in  
7 the figure identified by Dr Majumdar and in my  
8 submission that is just -- that just is not supported by  
9 the evidence that we heard.

10 So that is the factual evidence. In a sense, legal  
11 causation is prior to factual causation, but if it helps  
12 to look at legal causation in the factual context of  
13 this case, in my submission, legal causation has also  
14 not been established, because the mechanism --  
15 the posited mechanism is simply not proximate. It is  
16 not a case of the claimant company buying a particular  
17 cartelised good then selling the same cartelised good,  
18 which was the case in Royal Mail of resale pass-on.  
19 Neither is it a case where the component in question  
20 accounts for most or a large part of the value of  
21 the finished product. Neither is it the case, I should  
22 say, where the cost of the finished product is arrived  
23 at on a cost-plus basis where one might say that  
24 the causal link is more or less automatic. Instead what  
25 the evidence showed is, at best, a very indirect and

1 contingent relationship between any overcharge on OSS  
2 products and any increase in the price of the vehicle  
3 with complex commercial decisions intervening of a kind  
4 that we say are likely to break the chain of proximate  
5 causation.

6 The four factors identified in the Royal Mail case,  
7 at paragraph 550 {AUTH2/35/167}, we say are a useful  
8 guide to whether legal causation is made out and we say  
9 that in this case none of those factors applies. It  
10 cannot be sufficient, in my submission, that OSS are  
11 a component in the vehicle, it must depend, surely,  
12 I submit, on the proportion of total vehicle costs for  
13 which they account, otherwise you would be in  
14 the situation posited in our closing submissions where  
15 you could have proximate -- legally proximate causation  
16 between purchase of a single plastic dowel costing  
17 3p and the on-sale of a jumbo jet in which it has been  
18 incorporated. There has to be something more than that,  
19 in my submission, and in this case there is not, or  
20 certainly not anything which is proximate.

21 One of the other factors, the fourth factor, is  
22 identifiable claims by downstream purchasers and Autoliv  
23 in their closing submissions try to explain away  
24 the lack of any such claims by saying, "Well, you,  
25 Claimants, were not identified as the victims in

1 the Commission decisions so it is not perhaps surprising  
2 there have not been my claims". The problem with that  
3 is there have not been any claims by purchasers of  
4 Toyota cars or BMW ones or Volkswagen ones either, at  
5 least not in Europe, so far as anyone has been able to  
6 identify.

7 Moving on now to the economic evidence on pass-on,  
8 Dr Majumdar in this case prepared the model and it is  
9 subject, in my submission, to significant uncertainties.  
10 The first is its use of variable costs as a proxy for  
11 OSS costs, whereas in fact it is doubtful whether it is  
12 a good proxy for OSS costs, firstly, because, as I have  
13 explained, OSS costs are a very small proportion of  
14 total costs, and secondly, because, as I have also said,  
15 in practice, any pass-on in this case would be  
16 vehicle-specific, for the reasons I have explained.

17 The second uncertainty in Dr Majumdar's model had to  
18 do with whether it sufficiently accounts for the effects  
19 of the different mix of options, what Mr Hughes called  
20 an endogeneity problem. In other words there may appear  
21 to be a correlation between cost and price, but what  
22 the model is measuring is in fact the correlation  
23 between a higher price and a higher specification car.

24 Mr Hughes put forward two alternative specifications  
25 to seek to model that more appropriately both of which

1           resulted in a significantly lower pass-on rate of about  
2           26%, rather than Dr Majumdar's 48%. Although the 26%  
3           figure assumes variable costs are the proxy, which  
4           Mr Hughes did not think they were.

5           Now, I do not propose to go back over the evidence  
6           on all that is which is admittedly complex, because in  
7           my submission, the pass-on defence fails for other  
8           reasons, but in any case, it is not clear that it would  
9           be necessary for the Tribunal to decide that because  
10          ultimately it goes to the size of pass-on, which is  
11          a question of the broad axe.

12          Then, finally, we get on to volume effects, which is  
13          the last point on pass-on, where it is apparent that  
14          Autoliv is in real difficulties in showing, on  
15          the balance of probabilities, that there would be any  
16          mitigation overall even if there were an increase in  
17          dealer costs. The experts ultimately agreed that there  
18          would be volume effects, and Dr Majumdar accepted in his  
19          examination-in-chief that his headline pass-on rate of  
20          48% was no longer maintainable, it was at most 35%, due  
21          to the evidence on price elasticities. But whether  
22          volume effects would mean that any increase in  
23          downstream prices actually did mitigate the loss to  
24          the Claimants depends on a number of other imponderable  
25          factors.



1           One is what has been called "dealer pass-on". To  
2           what extent would dealers pass the loss on, or  
3           the increase, instead of absorbing the increase  
4           themselves. Mr Hughes pointed out that dealers have  
5           very low margins and cannot therefore afford to absorb  
6           increases and that will tend to increase the level of  
7           volume effects, whereas Dr Majumdar took the -- applied  
8           the assumption that dealers would absorb 75% of  
9           the increase. That is what he said in the joint expert  
10          statement, line 83 {E1/13/47}. That is only in  
11          the joint expert statement because Dr Majumdar's report  
12          did not consider volume effects at all, instead they  
13          were simply dismissed in a single footnote, footnote 427  
14          {E1/6/93}. So Dr Majumdar did not engage in any proper  
15          analysis of this issue or identify any actual evidence  
16          about questions like dealer pass-on.

17          Another imponderable is, if a consumer did decide to  
18          switch to another model, would that be another model  
19          sold by the same Claimant, in which case the level of  
20          volume effects would be reduced? Mr Hughes made an  
21          assumption of 25% for what he called the "diversion  
22          rate", but, again, there is no real evidence about that,  
23          it is simply an assumption made for the purposes of  
24          preparing the model.

25          I do recall to the Tribunal, which no doubt recalls

1           it itself, the memorable exchange in response to  
2           Professor Neuberger's exam question, where the experts  
3           were asked to opine on whether a car manufacturer would  
4           be better off if it passed on some, none or all of  
5           a particular cost increase. That is {Day9/64}, starting  
6           at page 64. Ultimately, Dr Majumdar said, well, it is  
7           difficult to say who would come off better or worse  
8           {Day9/67:9-12}, and Mr Hughes basically agreed with that  
9           {Day9/71:23} to 72, line 10 {Day9/72:10}. He said it is  
10          a difficult question to answer without a lot of  
11          information which we are not going to have in any real  
12          world scenario. In my submission, that is really  
13          the end of the pass-on defence, because it means that  
14          Autoliv cannot establish on the balance of probabilities  
15          that even if the Claimants increased downstream prices  
16          to dealers in response to an overcharge on OSS costs,  
17          that would actually mitigate their losses in this case  
18          or not, or might make them worse. It is common ground  
19          the burden is on Autoliv on this occasion to establish  
20          pass-on, and in my submission it has failed to do so.

21                 Those were all my submissions.

22       THE CHAIRMAN: I am grateful. Thank you.

23                 Mr Scannell, how are you placed in terms of timing?

24       MR SCANNELL: Particularly given that I will be on my feet  
25                 tomorrow morning instead of tomorrow at 12, I am

