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IN THE COMPETITION

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

APPEAL
TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Tuesday 1st October – Tuesday 29th October 2024

Before:

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

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Claimants

Stellantis Auto SAS & Others

V

Defendants

Autoliv AB & Others

A P P E A R A N C E S

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

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

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

Tuesday, 29 October 2024

(10.30 am)

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

Mr Scannell just give me one minute, sorry.

(Pause).

Yes, Mr Scannell. Thank you.

MR SCANNELL: Good morning.

Closing submissions by MR SCANNELL

Now, when I opened this case, I described it as "unfounded". That is obviously not a word that commends itself to the Claimants, but in my submission, this trial has shown just that and we invite the Tribunal to dismiss the case.

Beyond pointing to documents and noting to whom they were sent and by whom they were received and insinuating that senior Autoliv and ZF officers may have been involved in wrongdoing, often on no better basis than that they attended meetings with employees of their own companies or happened to have had meetings with senior

1 officers of other companies, the Claimants have not
2 presented anything to the Tribunal beyond a smattering
3 of documents which, properly construed, we say, are not
4 incriminating in the way that they suggest.

5 We say it is obviously important that, for the most
6 part, these are the same documents which were reviewed
7 by the Commission over an eight-year period as part of
8 the OSS investigation. The extravagant inferences that
9 the Tribunal is now being invited to draw from those
10 documents are not inferences that
11 the European Commission drew and there is no mystery, in
12 our submission, as to why it did not; it is because
13 those documents cannot sustain those inferences.

14 Beyond the documents, the Claimants present
15 Mr Hughes' evidence, and in my submission, that evidence
16 has been exposed as unreliable. It does not add to
17 the case that the Claimants have to prove and it cannot
18 stand in place of proof in a standalone case.

19 I want to address three broad issues in closing.
20 The first is the primary and first alternative case;
21 the second is the spillover case; and the third are
22 the expert issues split into overcharge and pass-on.

23 So turning first to the primary and first
24 alternative cases, this was addressed in our skeleton
25 argument for trial at paragraphs 51 to 82. The bundle

1 reference to that is {S/2/16-26}.

2 THE CHAIRMAN: Your opening skeleton?

3 MR SCANNELL: Yes.

4 THE CHAIRMAN: Yes.

5 MR SCANNELL: The transcript reference for my opening
6 remarks on the primary and first alternative cases is
7 {Day2/12-104}, and finally, the primary and first
8 alternative cases are addressed in our written closing
9 submission at paragraphs 13 {S/15/5} to 131 {S/15/32}.

10 I mentioned in opening and I have mentioned it
11 a number of times in the context of this case that
12 the primary case and the first alternative case is
13 a standalone claim, it is not a follow-on damages claim,
14 although the submissions that the Claimants make
15 repeatedly suggest that it is some sort of follow-on
16 claim.

17 Now, as to where the Claimants come out on this
18 standalone claim, I would suggest that it is tolerably
19 clear from the written closing that they have filed that
20 they have not discharged the burden of proof upon them.

21 In opening, I explained the implausibility of
22 the Claimants' primary and first alternative cases by
23 reference to four factors. The first of those is that
24 it is predicated on the involvement in the alleged
25 cartels of scores of individuals in the Autoliv and ZF

1 business units responsible for sales to each of
2 the claimant companies across an uninterrupted nine-year
3 period. Now, it is one thing to find, as the Commission
4 did, that individuals within business units, such as
5 those in Japan dealing with Toyota and Honda, and those
6 in Europe dealing with Volkswagen and BMW, committed
7 isolated and infrequent infringements of competition law
8 which did not always result in an agreement and those
9 agreements were not always complied with, but it is
10 quite another to say that each of the business units
11 responsible for Peugeot, Fiat and Vauxhall/Opel, within
12 both of ZF and Autoliv, and of course we have to say
13 also possibly others, but these have never been defined
14 by the Claimants, engaged in a single and continuous
15 infringement, invariably effective, targeting 100% of
16 the Claimants' volume of commerce over that period.
17 That is highly improbable, indeed, we would say,
18 practically impossible.

19 THE CHAIRMAN: So how do you square that with
20 the Commission's findings of a single and continuous
21 infringement for the various cartels that they found?

22 MR SCANNELL: Well, the --

23 THE CHAIRMAN: It does not mean it has happened in this
24 case --

25 MR SCANNELL: No.

1 THE CHAIRMAN: -- but saying it is inherently unlikely, or
2 inherently improbable, how are you squaring that with
3 the Commission findings?

4 MR SCANNELL: We are relying on the express findings, and
5 the Tribunal was taken to this, in the context of OSS 2,
6 but there are --

7 THE CHAIRMAN: They are sporadic and --

8 MR SCANNELL: Exactly.

9 THE CHAIRMAN: Yes, yes, yes.

10 MR SCANNELL: Exactly. So that is what we are saying, that
11 these were sporadic infringements that were found by
12 the European Commission and it is inherently improbable
13 that, in relation to the three claimant groups of
14 companies, that there was an infringement which operated
15 to affect 100% of the RFQs and that those infringements
16 were invariably affected.

17 THE CHAIRMAN: But if it is the case that then -- that we
18 are of the view that there is evidence -- I mean, if one
19 starts off, putting the case against you, as
20 I understand it, it starts off that you are engaged in
21 cartel -- you have been engaged in cartel activity in
22 accordance with the findings of the Commission. There
23 is no -- that is not a single car manufacturer, that was
24 various car manufacturers. So there is no -- one does
25 not start from an expectation that that cartel activity

1 would be limited. If your companies had engaged in
2 cartel activity against some manufacturers, why would
3 you not engage in cartel activity against all
4 manufacturers, if that is your way of doing business.
5 I understand the siloing arguments, just parking
6 the siloing arguments. So that is the starting point.

7 Then let us assume -- and, again, this is an
8 assumption, please do not read anything into it -- there
9 is evidence of cartel activity, albeit limited evidence,
10 but evidence of cartel activity against one or more of
11 the claimant manufacturers. At some point, does not
12 the burden shift back to you to show why those are
13 isolated incidents and why it is not continuous over
14 the period? At what point do you have to come clean and
15 say, "Well, look, this is why you would not expect it to
16 be continuous"?

17 MR SCANNELL: Well, there are a number of points that you
18 have made in that, Chairman, that need to be unpacked.

19 THE CHAIRMAN: Yes.

20 MR SCANNELL: So the first is that various OSS suppliers
21 have been found guilty by the European Commission of
22 engaging in certain infringements, and we have never run
23 away from that, so why would we not engage in other
24 forms of infringement and is that not the way that we do
25 business? We do not accept that proposition at all.

1 THE CHAIRMAN: No, of course.

2 MR SCANNELL: We say that that does not --

3 THE CHAIRMAN: But you have not chosen to explore the limits
4 of your activity in evidence. We know nothing about it.

5 MR SCANNELL: Well --

6 THE CHAIRMAN: You have not put forward a witness saying,
7 "Look, okay, we were bad boys when it came to BMW, but
8 you have to appreciate we took -- our whole approach to
9 Vauxhall was difference". I mean, you have left us --
10 and you are fully entitled to, but you have left
11 the Tribunal in the dark in that respect.

12 MR SCANNELL: I accept that, subject of course to
13 the evidence of geographical sequestration and
14 sequestration within the business across business units
15 as well, and I will come to my learned friend's device
16 of up to a higher level and then down across the break
17 waters.

18 THE CHAIRMAN: Sure.

19 MR SCANNELL: But we do not accept at all that it is good
20 enough for a claimant to come along and say, "You have
21 been found guilty of one infringement of competition
22 law, therefore I can simply shift the burden on to you
23 to disprove that you have been involved in other
24 infringements of competition law". That is simply not
25 the way these cases --

1 THE CHAIRMAN: No, but rightly or wrongly, that is
2 the claimant's starting point.

3 MR SCANNELL: That is their starting point.

4 THE CHAIRMAN: Rightly or wrongly.

5 Then what I was probing you with a little bit, if we
6 then find sporadic -- if that is the starting point, one
7 can argue whether it is a good -- a proper or improper
8 starting point, then find sporadic instances of apparent
9 cartel activity --

10 MR SCANNELL: Yes, I am --

11 THE CHAIRMAN: -- and you are going to say there are not
12 any, I am sure, but at some point, the burden might
13 shift back to you to say whether it is continuous or
14 whether it is sporadic.

15 MR SCANNELL: Yes, I want to be absolutely fair and not
16 overstate our position. If the Tribunal were to find
17 that there were isolated examples of inappropriate
18 information exchange, for example, then, yes, the burden
19 would logically shift at that point. As a matter of
20 law, that would not be an error. However, what
21 the Tribunal would then be dealing with is a case in
22 relation to the effects of that infringement, not a case
23 which somehow magically leaps from that to saying that
24 there was a single and continuous infringement over an
25 uninterrupted period affecting 100% of the RFQs across

1 that period.

2 Frankly, had the Claimants not been -- not grossly
3 overstated this case right from the very beginning and
4 tailored it to that sort of case, it would be a very
5 different, a far more conventional and not quite so
6 absurd set of allegations that they were bringing.

7 THE CHAIRMAN: Can I just -- sorry, while I am rudely taking
8 you off your course, Mr Scannell, can I just ask you one
9 other question which I also put to Mr West, which is,
10 you have not -- we have got no flavour of what
11 the documents relating to BMW and Volkswagen looked
12 like, so I would just be interested in your comment.
13 Either party could have said, "Look, this is what
14 a cartel looks like in terms of documentary evidence",
15 it might be very scant, it might be much fuller, but
16 I am slightly perplexed why neither party has given that
17 sort of context to what they now say are or are not
18 additional infringements.

19 MR SCANNELL: Yes. In relation to that, I will answer you,
20 of course, but I will be coming on to what to draw from
21 the European Commission files and the scope of
22 the investigation that was undertaken.

23 The important point that I would put down at this
24 point is that we do have the documents relating to BMW
25 and Volkswagen. They are the documents that were in

1 the European Commission file.

2 THE CHAIRMAN: Yes.

3 MR SCANNELL: So that is what --

4 THE CHAIRMAN: They have been disclosed, yes.

5 MR SCANNELL: They have been disclosed.

6 THE CHAIRMAN: Yes. No, I understand that.

7 MR SCANNELL: That is very important.

8 It is also important to say that the Commission,
9 looking at those documents, did not find, in relation
10 to, for example, BMW, that all of the RFQs that BMW ever
11 issued for each one of its OSS components was
12 cartelised. So that is a --

13 THE CHAIRMAN: Well, we do not know what caught
14 the Commission's eye in the first place. Focusing
15 purely on BMW and Volkswagen, presumably it started with
16 some information, because there was then a dawn raid and
17 the documents came -- I have no idea, came after they
18 had been tipped off in some way.

19 MR SCANNELL: Yes, I will get to that.

20 THE CHAIRMAN: Yes, we do not know what the documents they
21 have looked like. You know and Mr West knows, but we
22 have no idea.

23 MR SCANNELL: Yes.

24 THE CHAIRMAN: Yes.

25 MR SCANNELL: Yes.

1 The second factor -- so I was talking about factors
2 which go to the inherent improbability of the primary
3 and first alternative cases. So the second factor is
4 bespokeness, that the components are bespoke with
5 bespoke prices and that is common ground. The relevance
6 of that point is that it would not have been possible to
7 coordinate on price in a way that accommodated all of
8 the variations simultaneously and certainly not without
9 regular, uninterrupted coordination with competitors on
10 a scale that simply is not credible, we say, and
11 certainly is not reflected in the evidence.

12 There has been --

13 THE CHAIRMAN: But that would have applied as much to BMW
14 and Volkswagen. If they were here in court, which they
15 are not, you would be saying exactly the same thing,
16 that they are bespoke products and how could we do this
17 and ...

18 MR SCANNELL: Well, again ...

19 THE CHAIRMAN: Again, it is a difference between single,
20 continuous and sporadic --

21 MR SCANNELL: Yes, it is --

22 THE CHAIRMAN: Yes, I understand that.

23 MR SCANNELL: It is very important. It is one thing to say
24 -- bespokeness will not get you off the hook if what is
25 alleged against you is that you exchanged information

1 relating to a particular RFQ.

2 THE CHAIRMAN: Yes.

3 MR SCANNELL: It will only bite on the sort of claim that
4 the Claimants make.

5 THE CHAIRMAN: I understand that.

6 MR SCANNELL: We only make the point in that context.

7 PROFESSOR NEUBERGER: So just to make sure I have
8 understood, are you saying that the bespoke argument
9 suggests that any illegal exchange to be effective would
10 be RFQ by RFQ or amendment by amendment, but not
11 a general exchange of information?

12 MR SCANNELL: Yes.

13 PROFESSOR NEUBERGER: Right, thank you.

14 MR SCANNELL: Now, there has been no serious challenge to
15 the bespoke nature of OSS components in the course of
16 the proceedings. Mr West did ask a couple of questions
17 to witnesses like Mr Arango; they went nowhere. That is
18 not surprising, because the OEMs themselves have
19 repeatedly represented to the European Commission that
20 OSS components are bespoke and the Commission has
21 acknowledged that in a series of merger decisions,
22 including the Dalphi Metals decision that I took
23 the Tribunal to in opening.

24 The third factor that goes to the inherent
25 improbability of the primary and first alternative case

1 is that there were many-fold considerations which went
2 into the mix in deciding whether to bid for -- to supply
3 OSS components to a particular OEM, and if so, what to
4 bid, and there is no way that all of those variations
5 and permutations could be anticipated years in advance.

6 The fourth factor is that each one of the Claimants,
7 Peugeot, Fiat and Vauxhall/Opel, enjoyed very
8 substantial countervailing buyer power, and that goes to
9 causation, however the Claimants wish to put it, so that
10 also applies to the spillover case. So it goes to
11 the improbability that any attempt to concert had any
12 effect on prices.

13 Now, in opening, I took the Tribunal to a succession
14 of Commission decisions finding on the basis of market
15 investigations that OEMs have buyer power over their
16 suppliers and testifying to how that was used and abused
17 by OEMs. The references to those decisions are in our
18 written closing at paragraphs 46 to 50, that is
19 {S/15/11-13}, along with an account of the status of
20 those decisions before this Tribunal.

21 THE CHAIRMAN: Yes. Your four matters, are they set out in
22 your closing, the four points you just took us all
23 through, or are they in the opening, just so I can keep
24 track?

25 MR SCANNELL: Yes, they are at pages 11 to 13 {S/15/11-13},

1 and they include the Commission's decision in KSS and
2 Takata, which was decided after OSS 1, where
3 the Commission expressly found that automotive OEMs are
4 likely to be able to counter any attempt by OSS
5 suppliers to increase prices through concertation.

6 Now, the Claimants attempt to deny that they had
7 countervailing power, despite, presumably, having
8 participated in all of the market investigations that
9 resulted in the Commission finding that they did have
10 market power. That was somewhat confusing. Mr West's
11 questions to individual witnesses asking them to opine
12 as to whether they would agree that the Claimants did
13 not have countervailing buyer power were,
14 unsurprisingly, I would say, ineffectual. One can see
15 an example of that in the cross-examination of
16 Mr Squilloni, if we could turn that up, please. That is
17 at {Day7/91:20} of the transcript. So at line 20,
18 Mr West observes that there was a limited number of
19 suppliers that could supply Fiat, and he says:

20 "I [put it] to you that that would limit Fiat's
21 bargaining power in relation to OSS products; is that
22 right?"

23 THE CHAIRMAN: Sorry ...

24 MR SCANNELL: Sorry, we are on the wrong page.

25 THE CHAIRMAN: 92? Which line are you on, apologies?

1 MR SCANNELL: 91, line 20.

2 THE CHAIRMAN: Yes, I have got it now. I beg your pardon.

3 MR SCANNELL: So 20 to 23 are the lines that I have just
4 read out.

5 THE CHAIRMAN: Yes.

6 MR SCANNELL: Mr Squilloni asked for that question to be
7 repeated, but then over the page {Day7/92}, he said:
8 "I can only express my opinion, and from my
9 perspective, having never worked for purchasing in [an]
10 OEM but always in a supplier, I do not consider that
11 having a limited panel of three suppliers is a strong
12 limitation of the bargaining capability of an OEM."
13 Mr Squilloni's answer was impeccable, I would
14 suggest, on two counts, first, because he is quite right
15 that all he could do was offer an opinion as to
16 the correctness of Mr West's proposition. No witness
17 could provide an answer to the question whether the OEMs
18 have countervailing purchasing power. That requires
19 a market-wide investigation to be carried out and only
20 the European Commission can do that. It has done that
21 and it has determined definitively that OEMs do have
22 countervailing purchasing power.

23 Second, Mr Squilloni was quite right to say that
24 having a limited number of suppliers should not affect
25 that assessment, and indeed, in some of

1 the European Commission decisions that I have drawn to
2 the Tribunal's attention, the Commission has actually
3 factored in that very consideration and put it down to
4 the fact that there has been consolidation amongst
5 the OEMs themselves.

6 THE CHAIRMAN: But I think Professor Neuberger put this
7 question to somebody, or put the point: why -- just
8 because the OEMs have countervailing bargaining power,
9 strong bargaining power, why does that mean there is not
10 a cartel, or that the cartel is not having an effect?
11 There just seems to be a jump there. Just help us --

12 MR SCANNELL: There is a jump. There is a jump there,
13 Mr Chairman, because there is an intervening step, which
14 is how they used their countervailing buyer power. So,
15 in opening, I took the Tribunal to all of the evidence
16 that relates to the manner in which that countervailing
17 buyer power was exercised and, in particular,
18 the evidence showing that the OEMs pre-selected who
19 their suppliers would be, often independent of any
20 tendering process, they just decided who they wanted to
21 be their supplier, and, second, that they effectively
22 determined what prices they would pay for the OEM
23 components that they bought. That all goes to
24 the question of how probable it is that any concertation
25 would actually have an effect on price.

1 Now, Professor Neuberger might ask: well, if that is
2 right, then why, in OSS 1, for example, do we see
3 the European Commission saying that they tried that?
4 But the answer to that question, as we have set out in
5 our written closing, is that they did not try that.

6 THE CHAIRMAN: Sorry, where are you in your written closing?
7 Can you just give me that reference, sorry?

8 MR SCANNELL: We have set out the nature of the findings
9 that were made in OSS 1 at paragraphs 32 to 41 of our
10 written closing, so that is at pages 7 to 9 {S/15/8-10}.

11 THE CHAIRMAN: Right.

12 MR SCANNELL: I will be returning to OSS 1 shortly.

13 PROFESSOR NEUBERGER: Sorry, I had a slightly different
14 question from the one that you were putting in my mouth,
15 which was --

16 THE CHAIRMAN: Sorry, it is my fault.

17 PROFESSOR NEUBERGER: No, it was -- I can understand --

18 MR SCANNELL: No, I think Professor Neuberger was saying
19 that I put the question in his mouth. I apologise.

20 PROFESSOR NEUBERGER: Forget that, that was an unhelpful
21 aside!

22 I guess I can understand the argument that there was
23 huge countervailing buyer power in a world in which
24 the three or four potential suppliers are in competition
25 with each other. But if they are in a cartel together,

1 does that argument still work, that therefore they would
2 have been unable to engineer a significant increase in
3 the price that the OEMs had to pay for their OSS?

4 MR SCANNELL: It is not a binary question, Professor. So it
5 is not a question of whether they could or could not, it
6 is a question of probability. So how probable is it
7 that they could have affected things?

8 Now, I accept that an individual OEM might --
9 certainly will not have any effect on these OEMs, they
10 effectively determined what prices they would pay, which
11 is really quite extraordinary, but that is the extent of
12 the power that they wielded. As to whether they would
13 have, if two of them got together and said, "Well, let's
14 decide that we are going to bid €10 for this airbag",
15 that is going to very quickly boil down to a situation
16 where one of them is on the spot with one of these OEMs,
17 and then the bilateral negotiations continue and then
18 the price gets hammered by the OEM.

19 So I am not saying that it is impossible. Maybe if
20 you start at a higher level that is going to have some
21 effect. But it goes to the probability that the OEMs
22 decided that that was something that they would do.

23 PROFESSOR NEUBERGER: But if --

24 MR SCANNELL: Really, all of this debate is a debate about
25 the probability of the primary and the first alternative

1 case, the inherent probabilities, which is something
2 that the Tribunal needs to grapple with when they are
3 ascertaining -- interpreting documents, for example, and
4 deciding how likely it is that a global cartel or
5 targeted cartels actually were entered into.

6 PROFESSOR NEUBERGER: But if I am a supplier of OSS and
7 I know that my competitors are not going to undercut me,
8 then, first, I am likely to be successful in the RFQ,
9 and, secondly, I am in quite a strong position to resist
10 pressure from the car manufacturer to reduce my price,
11 because the car manufacturer has no alternative.

12 MR SCANNELL: Sorry, is the predicate of your question that
13 you are the only --

14 PROFESSOR NEUBERGER: No, my predicate is I have an
15 agreement with my competitors that they will not
16 compete, and on that premise it seems to me that I am
17 likely to be able to get a much better price, indeed it
18 provides a powerful incentive to form a cartel, and if
19 I am forming a cartel, I would have -- it sounds
20 plausible I would manage to succeed in extracting
21 a substantially higher price than I would if I indulged
22 in fair competition.

23 MR SCANNELL: Again, the relevance of countervailing buyer
24 power is not to dismiss the fairness of that
25 observation.

1 PROFESSOR NEUBERGER: Right.

2 MR SCANNELL: Certainly, in an ordinary market, where
3 the buyer does not have countervailing buyer power, that
4 is a powerful observation. But in circumstances where
5 the buyer has overwhelming countervailing buyer power
6 and is determining these things, and one can see that
7 being played out, including in the Claimants' own
8 evidence, it goes to the probability that there will be
9 an effect on prices too, and that is really as far as
10 this point goes, but we say it is an important point.

11 So I have recapped on the four points that
12 I mentioned in opening as going to the probability of
13 the primary and the first alternative cases, but it is
14 very important to remember that to those four factors
15 must be added also the structural problems with
16 the Claimants' case, some of which I adverted to in
17 opening. In a claim where the allegation is that there
18 was a -- it is a standalone claim making the serious
19 allegation that there was a global cartel or cartels
20 targeted at the Claimants and there is no regulatory
21 decision saying that such a cartel existed,
22 the expectation of courts and tribunals is that
23 a clearly pleaded set of allegations will be made.
24 I took the Tribunal to Phones 4U in opening in that
25 respect. At the very least, the defendant has a right

1 to know the case that they will have to meet.

2 But the present case is very different from that,
3 I would suggest, and it really has been quite
4 infuriating for the Defendants to deal with. Even in
5 closing this case, on the penultimate day of a one-month
6 trial, Mr West has still not provided a route map that
7 the Tribunal might possibly apply to get from a document
8 to the conclusion that he asks the Tribunal to reach.

9 Mr Chairman, your question yesterday is pertinent.
10 Clearly it is pertinent. There are claims by Fiat,
11 there are claims by Vauxhall/Opel and there are claims
12 by Peugeot; one cannot simply lump them together just
13 because Stellantis now owns all three of them. This
14 relates to the time when they are three entirely
15 separate companies. We still have not had from
16 the Claimants a clear indication, "Here is what I am
17 relying on to establish the existence of a cartel that
18 affected Fiat; here is what I am relying on for
19 Vauxhall; here is what I am relying on for Peugeot",
20 which is the bare minimum that one would expect
21 ordinarily to be presented.

22 The whole nature of the primary and first
23 alternative case has shifted too. The pleaded case, for
24 instance, gave no hint until amendments at
25 the Re-Amended Reply stage, long after the service of

1 evidence in the case, that the Claimants would
2 ultimately present a case which is directed at Autoliv's
3 most senior directors, and Autoliv's only, incidentally,
4 no reference to anybody else's directors now that
5 the Claimants have managed to settle with them, only
6 Autoliv's senior directors. Yet, Mr West complained
7 yesterday, without a hint of irony in relation to this,
8 that Autoliv is to be deprecated for not calling, for
9 example, Mr Carlson to give evidence, or Mr Westerberg,
10 or Ms Eriksson. That is a thoroughly unfounded
11 criticism, in my submission, and it is one I will return
12 to.

13 The fundamental omissions from the Claimants' case
14 that are referred to in opening, they remain.
15 The Claimants still do not say whom they say was a party
16 to the cartels. They do not say what the scope of
17 the cartels were. We still do not know on what basis
18 the Claimants purport to rely on documents which go to
19 price amendments and RMPs when apparently no claims are
20 made in respect of them, and Mr West took the Tribunal
21 to multiple of those documents yesterday. We still do
22 not know how the Claimants say that any of the cartels
23 they allege were implemented, how they were enforced, or
24 whether they operated effectively in 100% of cases.
25 None of those questions are answered. Indeed, I would

1 suggest that some of them have become even less clear
2 since the Defendants chose to discontinue these
3 proceedings against ZF and proceed against Autoliv
4 alone. That has resulted in the faintly absurd position
5 where the Claimants allege that Autoliv participated in
6 a cartel with ZF and others over an uninterrupted
7 nine-year period, yet barely mention any documents
8 pertaining to ZF in closing their case. All of that,
9 I would suggest, makes it extremely difficult for
10 the Tribunal, and the Tribunal has my sympathy in this
11 regard, that it is very difficult to see how you could
12 possibly write a judgment which finally provides all of
13 these route maps and explains how it is that there was
14 a cartel.

15 I want to deal next with the documents before
16 the Tribunal. Mr West said yesterday, "We will see what
17 my friend says in relation to them in his oral closings.
18 I suspect the answer will be as little as possible".
19 That is a curious submission for the Claimants to make
20 when they have referred to a handful of the documents in
21 support of their claim. We are content to deal with
22 the documents in this case, and I include in those all
23 of those that the Claimants have relied on and all of
24 those that Mr Hughes has sought to press into service
25 also, and we have done so in the table of documents

1 annexed to our written closing at {S/16/1}.

2 THE CHAIRMAN: Yes, we have looked at that. It is obviously
3 quite a full explanation of your position.

4 MR SCANNELL: I am grateful. I should add in that respect,
5 Mr Chairman, that the Claimants have pivoted somewhat
6 between opening and closing as to the documents they say
7 are most important, so many of those that were said to
8 be critically important at the beginning are now said to
9 be peripheral and some have been mentioned for the first
10 time. That has meant that there are nine further
11 documents which need to be added to the table. We are
12 very concerned that, to be useful to the Tribunal, you
13 want to be able to pick up that document and say that is
14 all of the documents, so we have added nine rows.
15 Nothing else has changed, we have added nine rows to
16 make it complete for the Tribunal --

17 THE CHAIRMAN: That is very helpful, thank you.

18 MR SCANNELL: -- and I can hand those up to the Tribunal.

19 THE CHAIRMAN: Has Mr West seen this yet?

20 MR SCANNELL: I am told not.

21 (Handed).

22 I am not going to go to the table straight away, so
23 I propose to press on.

24 So before I turn to the documents, I would like to
25 say a further word about witness selection, because this

1 is obviously relevant to the documentary story, and then
2 there are four more preliminary points to make as well
3 before I turn up some of the documents. So as to
4 the witnesses, we have addressed the Tribunal on
5 a number of times throughout the trial on this subject,
6 but given the reliance that is placed on the absence of
7 witnesses, certainly points do bear repetition.

8 The first point is that while I do not for a moment
9 seek to understate the importance of live testimony in
10 an appropriate case. There is more than a hint of
11 contrivance about certain of the objections
12 the Claimants make in relation to calling witnesses.
13 Quite apart from the fact that many of the particularly
14 senior individuals the Claimants say ought to have been
15 called were mentioned by the Claimants for the first
16 time in the Re-Amended Reply, that is well after
17 the service of evidence in this case, so that is
18 Lars Westerberg, Mr Carlson, Veronica Eriksson and
19 Pelle Malmhagen, they fit into that category, none of
20 the documents on which any of those individuals appear
21 are, I would suggest, inculpatory in the manner that
22 they are said to be inculpatory by the Claimants and
23 each of them is addressed in the annex before
24 the Tribunal.

25 THE CHAIRMAN: But Mr West said -- these documents were

1 pleaded, at least a number of them were pleaded, and
2 insofar as documents -- I mean, if documents are
3 produced at the last minute, one can understand why you
4 would not call relevant witnesses, but a number of
5 the documents were pleaded and obviously you were in
6 a position to make a decision as to whether or not you
7 would call anyone who was an author or recipient of that
8 particular document. There is no -- nothing wrong with
9 Mr West's submissions in that respect, and of course you
10 can answer it by saying, "Well, there is no case to
11 answer on that particular document", but I am not quite
12 sure ...

13 MR SCANNELL: Well, I think there are two answers to
14 the question. One is that, but the other is that it is
15 simply not true that the Claimants were placing reliance
16 on their senior executives argument until the Re-Amended
17 Reply came in. We do not accept that that was the case
18 that they pleaded before that time, and by that stage
19 all of the witnesses had been selected.

20 THE CHAIRMAN: Yes, I mean, the senior executive point
21 arises in response to your siloing case, to a degree,
22 not entirely --

23 MR SCANNELL: To a degree, yes, I think --

24 THE CHAIRMAN: -- but nevertheless, insofar as the senior
25 people are on the email chains, or for that matter

1 junior people on email chains, you had the option of
2 deciding whether to call them, particularly those that
3 are still employed and indeed those who are no longer
4 employed, you had that option, so I am not sure how far
5 that takes us, but there we go.

6 MR SCANNELL: Yes. I was dealing initially with the named
7 senior --

8 THE CHAIRMAN: Yes.

9 MR SCANNELL: -- executives.

10 THE CHAIRMAN: Yes. But it -- yes.

11 MR SCANNELL: There is a further important point in relation
12 to the senior executives, and that is this, that it is
13 one thing for a claimant to come along to a court and
14 say, "Here is a document, it is plainly incriminatory,
15 it calls for explanation and it is likely to be recalled
16 by its author".

17 THE CHAIRMAN: Mm.

18 MR SCANNELL: But it is quite another to point to
19 a document, like {J1/128/1}, for example, that is
20 the one and a half-line email that was written by
21 Jan Carlson 17 years ago, saying, "I have got a meeting
22 coming up with Peter Lake where we are going to discuss
23 collaboration on components".

24 THE CHAIRMAN: Yes.

25 MR SCANNELL: To rely on that for little more than the fact

1 that he was the sender of that message, and then to seek
2 to construct a case out of an adverse inference arising
3 from the fact that the Defendants have not called
4 Mr Carlson. To a large extent, that is what
5 the Claimants are seeking to do. They are bandying
6 about the names of senior personnel in Autoliv's
7 business, apparently in a misguided attempt to cause
8 embarrassment, insinuating that they were up to no good
9 but without substantiating it, and then criticising
10 Autoliv for not calling those witnesses and we do not
11 accept that that is appropriate.

12 THE CHAIRMAN: I cannot remember if this is a pleaded email
13 or not. But if it was, I mean, you could have called --
14 I mean, this is what is said against you, you could
15 have -- you know, Mr Carlson is a senior employee, so
16 this was obviously a matter of importance, he could have
17 said, "Look, Peter Lake and I were chums, we went to
18 school together, I cannot remember what this meeting was
19 about", or he could say, "Look, we were -- I cannot
20 remember specifically, but around this time we were
21 discussing strategies for reducing the costs of
22 components, so do not read anything into this". You
23 could be putting forward evidence saying that these
24 people were not involved in the BMW cartel activities.
25 I mean, there is lots one could do without necessarily

1 any specific recollection of that particular meeting.

2 MR SCANNELL: Yes, it is -- of course --

3 THE CHAIRMAN: That is the point that is being made against
4 you, as I understand.

5 MR SCANNELL: It is, in a sense, the point that is made
6 against me, but it is an unfair sense, because at its
7 heart is, "Do not look at that document, we are not
8 saying you should call him for that document". There
9 might be something else that Mr Carlson is copied in on
10 and there might be some other document that he should be
11 called for, but we do not accept that the documents do
12 call for evidence. That document, for example, what
13 would Mr Carlson say if he were called to this Tribunal
14 to give evidence in relation to it? He would clearly
15 say that in that email it means exactly what it says,
16 I have a meeting coming up with Peter Lake to
17 discuss "collaboration on components". He is not going
18 to say anything else, and it is precisely for that
19 reason that, in the commercial context, it has long been
20 established that the better approach in cases like this,
21 particularly where the evidence is old and given the new
22 rules where, in their evidence-in-chief, witnesses are
23 not even supposed to give a running commentary on chains
24 of emails --

25 THE CHAIRMAN: Sorry, do those rules apply in

1 the Competition Appeal Tribunal?

2 MR SCANNELL: They can apply in the Competition Appeal
3 Tribunal. They do not have to apply in the Competition
4 Appeal Tribunal.

5 THE CHAIRMAN: I mean, they have not -- they do not apply in
6 this because there is no order that they should apply in
7 this case; is that right?

8 MR SCANNELL: There is no order either way.

9 THE CHAIRMAN: Okay, sorry, I was just --

10 MR SCANNELL: Yes, so I was --

11 THE CHAIRMAN: I do not think anything turns on it, I was
12 just asking.

13 MR SCANNELL: Yes. Well, I was -- I was talking --

14 THE CHAIRMAN: I mean, you say, look, this email does not
15 amount -- you know, it may be -- at the highest, you say
16 it is consistent with cartel activity, it certainly does
17 not show cartel activity.

18 MR SCANNELL: Absolutely not. It does not, no.

19 THE CHAIRMAN: I understand that submission why you would
20 say, "Well, I do not need -- you know, because it does
21 not get over the line, there is no obligation on us to
22 call anyone". I understand that submission.

23 MR SCANNELL: Yes.

24 THE CHAIRMAN: But if it did go over the line, or was
25 evidence, then that does raise the question as to

1 whether or not you should be calling the relevant
2 witness to --

3 MR SCANNELL: Yes.

4 THE CHAIRMAN: -- explain context. I think that is where we
5 are.

6 MR SCANNELL: The third point in relation to this and I will
7 leave it at this, so I was going to mention Gestmin
8 again and Mr Justice Roth's judgment in Phones 4U,
9 because of course that is the last --

10 THE CHAIRMAN: We have got that in mind.

11 MR SCANNELL: Yes. It is a useful vade mecum for you,
12 Mr Chairman, because you are in the unenviable position
13 that Mr Justice Roth was in in Phones 4U, where you are
14 being asked to find on a standalone basis a cartel,
15 which is no easy task for any judge. But it is
16 instructive, for example, that Mr Justice Roth did apply
17 Gestmin in that case expressly and he said that is
18 clearly the preferable approach to take to
19 the documents.

20 THE CHAIRMAN: Sorry? Oh, yes, okay, sorry.

21 MR SCANNELL: So the final point I was going to make and
22 then I will move on is that we say -- and of course
23 I expect you to interrupt me at that point, Mr Chairman,
24 and say, "But they disagree with all of that", we say
25 that the meaning of the documents is clear. Take

1 {J1/41/1}, about which there has been some controversy
2 in the case. So that was the document that I addressed
3 the Tribunal at length on at Day 3 of the trial.

4 THE CHAIRMAN: Yes, I remember that, yes.

5 MR SCANNELL: Yes. So I was not -- I am not proposing to
6 repeat and rehear all of the submissions that I made on
7 that, but we do say that the meaning of that document is
8 clear, and we say that it is just unrealistic for
9 Mr West to say that it does not refer to a single common
10 statement. That is what the document says. It is
11 equally unrealistic to say that when four bullet points
12 follow a colon which is describing a common statement,
13 only three of those bullet points are describing
14 the contents of the statement and the fourth is an
15 anti-competitive cartel agreement, it is just not
16 realistic. We say it is patently wrong.

17 Now, Mr Chairman, you asked Mr West, yesterday,
18 whether they had sought to subpoena any of these
19 witnesses that they say should have been called. They
20 have not. In fact, they have never even sought to add
21 them as disclosure custodians, which tells its own
22 story. But you reasonably surmised that the Claimants
23 did not -- would say that they did not need to do that
24 because they would say that the meaning of the documents
25 is clear and all I say is we say the same thing.

1 Now, as to the other individuals that the Claimants
2 say should have been called, Torben Schönborn,
3 Arthur Blanchford and Joaquim Aigner, they ceased to be
4 employed by Autoliv in 2018. I know that is not
5 a complete answer, but that is the position.
6 Christophe Rivière did not hold roles in relation to
7 the supply of OSS to any of the claimant OEMs before
8 2006 when he became a business unit director for PSA.
9 Between 2002 and 2011, he held no roles in relation to
10 supplies in OSS 1 and OSS 2.

11 THE CHAIRMAN: All this is in the document --

12 MR SCANNELL: Yes.

13 THE CHAIRMAN: -- that has been included here?

14 MR SCANNELL: Yes.

15 THE CHAIRMAN: That is the one annexed -- the current
16 version is the one annexed, I think to, Mr West's, is
17 that right, skeleton? I did not print it out.

18 MR SCANNELL: Oh, apologies --

19 THE CHAIRMAN: I just want to make sure I have got the right
20 document.

21 MR SCANNELL: I thought -- apologies, Mr Chairman, I thought
22 that you were referring to our written closing where we
23 do address --

24 THE CHAIRMAN: Oh, right, okay. But there is a summary
25 document of all the personalities in the --

1 MR SCANNELL: Oh, a *dramatis personae*.

2 THE CHAIRMAN: A *dramatis personae*, yes.

3 MR SCANNELL: Yes, there is, in the S bundle.

4 THE CHAIRMAN: In the -- and there is no dispute about that?

5 Okay.

6 MR SCANNELL: No.

7 Okay, so that is what we say about the witnesses.

8 Then I said that there were four preliminary points
9 to make before we start turning up some of
10 the documents, and the first of these is that a large
11 proportion of the documents in the case were in
12 the European Commission file, so they are the documents
13 that are highlighted in yellow in the table that
14 the Tribunal has, and that is important because, as
15 I will explain, Mr West's submission to the Tribunal
16 yesterday, that the Commission decisions are, in his
17 words, "not in fact evidence of any kind which this
18 Tribunal can take into account" is wrong. Now, to
19 understand why it is wrong, it is important to
20 understand how the European Commission gathered and
21 reviewed the evidence it did in the OSS investigations
22 and what the scope of that evidence actually was.

23 Now, the Tribunal was taken to OSS 2 by counsel for
24 ZF.

25 THE CHAIRMAN: Yes.

1 MR SCANNELL: So we can do this by reference to OSS 1, and
2 that is in {A/10/1}, if that could be turned up, please.
3 That is the OSS 1 decision with which we are familiar.
4 Beginning at {A/10/9}, recital (19) --

5 THE CHAIRMAN: Page 9, the big numbers? Recital (19), yes,
6 I have got it, yes.

7 MR SCANNELL: The Tribunal can see that the timeline leading
8 to the decision began on 9 February 2011. That was when
9 Tokai Rika made an application for immunity to
10 the Commission.

11 The next recital shows that Takata applied for
12 immunity on 24 March 2011.

13 At recital (21) on the next page {A/10/10},
14 the Commission records that it carried out what we call
15 dawn raids --

16 THE CHAIRMAN: Yes.

17 MR SCANNELL: -- between 7 and 9 June 2011. Now, pausing
18 there. There was an overlap in the OSS 1 and OSS 2
19 investigations, so a single set of dawn raids was
20 carried out for both, and the decision whereby
21 the Commission resolved to carry out those unannounced
22 inspections, as they euphemistically call them, is in
23 the bundles at {J1/672.1/1}, if we could go to that,
24 please. So this is a translation of
25 the European Commission's resolution to carry out the

1 inspections we have seen referred to. At page 4 of this
2 decision {J1/672.1/4} --

3 THE CHAIRMAN: Hang on, give me a second.

4 MR SCANNELL: Sorry, could we go back to page 1
5 {J1/672.1/1}, please.

6 (Pause).

7 THE CHAIRMAN: Okay, I think it is not in the bundle.

8 MR SCANNELL: I think that is the J2 bundle, Mr Chairman.

9 THE CHAIRMAN: No, that is J1.

10 MR SCANNELL: Apologies.

11 THE CHAIRMAN: This is in J1, you said?

12 MR SCANNELL: It is in J1.

13 THE CHAIRMAN: Yes, okay, I think it has not been printed,
14 that is fine.

15 MR SCANNELL: Sorry, I thought that your J1 bundle was white
16 for some reason.

17 At {J1/672.1/4} of this decision, the Tribunal can
18 see the single article of the resolution. So it says:

19 "Autoliv, Inc, referred to in Article 3 and all
20 companies directly or indirectly controlled by it are
21 obliged to carry out a review concerning condone their
22 alleged participation in anti-competitive agreements
23 and/or concerted practices in breach of Article 101 of
24 the Treaty in connection with the supply of seat belts,
25 airbags and steering wheels, in particular to BMW and

1 the [Volkswagen] Group."

2 So the scope of the Commission's investigation was
3 not confined to BMW and the Volkswagen Group, nor to any
4 OEM, it applied to airbags and steering wheels
5 generally, and that is in fact common ground. To make
6 that good, could we turn to the K bundle, tab 707
7 {K/707/1}, please. So this is a letter from Hausfeld to
8 White & Case, dated 23 August this year, and if we could
9 scroll down to paragraph 3, we can see what
10 the Claimants had to say about the scope of
11 the Commission's investigations. Beginning in
12 the second sentence of paragraph 3, they said:

13 "It is in fact now clear from the Autoliv OSS
14 Inspection Decision that the Commission's investigation
15 at the time of the dawn raids was wider than BMW and
16 VW ..."

17 THE CHAIRMAN: Has Mr West submitted to the contrary? I do
18 not think he has, has he?

19 MR SCANNELL: I do not think there has been a positive
20 submission --

21 THE CHAIRMAN: No, okay, that is fine. Fine. You say --

22 MR SCANNELL: -- but in any event, it is very important --

23 THE CHAIRMAN: -- that is clear, yes.

24 MR SCANNELL: -- to understand. I am not disagreeing
25 expressly with anything that Mr West said in this

1 regard:

2 "... and encompassed the supply of OSS components
3 generally."

4 They go through the article that we have just looked
5 at and say that:

6 "The language used by the Commission demonstrates
7 that while supplies to BMW and [Volkswagen] was
8 the focus, it was not the entire scope or remit of
9 the inspection authorisation."

10 In other words, Autoliv would have been required to
11 permit the Commission's inspection over any relevant
12 materials regardless of the supplier.

13 Then returning to OSS 1 at {A/10/10}, following
14 the dawn raids on 7 and 9 June 2011, the next step in
15 the chronology is that on 4 July 2011, Autoliv applied
16 for immunity. One sees that from recital (22) at
17 the top of the page, and then at recital (23) one sees
18 that Toyoda Gosei applied for immunity on
19 12 November 2013.

20 Now, as to the applications for immunity,
21 the Tribunal already has my submissions in opening that
22 all of those applications were made under the EU's
23 leniency regime, their Leniency Notice, that is in
24 the authorities bundle at AB3, tab 4 {AUTH3/4/1}. We do
25 not need to turn that up. Those applications would have

1 followed full internal audits, as required indeed by
2 the dawn raid decision that we have seen, to ascertain
3 whether there was anything indicating an infringement
4 involving supplies to any OEM.

5 THE CHAIRMAN: We do not have any evidence in relation to
6 the audits?

7 MR SCANNELL: No. No, we do not. No leniency applicant has
8 sight of other leniency applications and a prisoner's
9 dilemma that I referred to in opening therefore pertains
10 with the risk that failing to disclose something and --
11 genuine and -- something material could result in
12 the removal of leniency with enormous economic
13 consequences for the relevant undertaking.

14 If I could just pause at that point to make two
15 points. First, I said it is important -- I said this in
16 opening -- for the Tribunal to appreciate that
17 the Claimants' allegation that Autoliv and ZF were
18 parties to a global cartel targeting every supply of OSS
19 components to every OEM, or that they were parties to
20 a cartel targeting the Claimants necessarily entails,
21 I would suggest, the serious allegation that they, along
22 with all of the other respondents and leniency
23 applicants, lied to the Commission about the scope of
24 the infringement and the subject matter of
25 the infringements that they had committed.

1 The further concomitant is that either all of those
2 undertakings somehow concealed their wrongdoing from
3 their own legal advisers and their external advisers, or
4 that they did not, and that those advisers collaborated
5 in or aided and abetted that deception. That is
6 a wholly inappropriate suggestion to make in the absence
7 of credible evidence.

8 Second, the second point I want to make is that
9 the Claimants in their written closing and Mr West on
10 his feet yesterday, submitted that the obligation to
11 submit all relevant information and evidence extends
12 only to admittedly incriminating evidence. In other
13 words, because Autoliv submitted a document, that
14 amounts to an admission that it is incriminating. Now,
15 that is nonsense. It is just a fundamental
16 misconception of how the EU's leniency regime works.
17 All relevant information and evidence must be submitted
18 to the European Commission and it is not tantamount to
19 an admission to submit it.

20 The next development along the timeline is not fully
21 recorded in the decision but it was extensively
22 canvassed by the Claimants in opening their case, and
23 that is that the European Commission issued requests for
24 information, or RFIs, to the investigated undertakings
25 between 2012 and 2015. Then, at recital (24), we can

1 see that the Commission spent three years reviewing all
2 of the information that it had harvested from the dawn
3 raids and from the RFIs, and then on 4 April 2016, it
4 simultaneously adopted an initiation decision and
5 the decision concluding that the investigated
6 undertakings had met the requirements of the leniency
7 notice, clearing the way for a possible settlement.

8 Just pausing there. Is the Tribunal sufficiently
9 familiar and comfortable with the significance of an
10 initiation decision?

11 THE CHAIRMAN: I was until you asked that question!

12 MR SCANNELL: Okay.

13 THE CHAIRMAN: Do you want to elaborate?

14 MR SCANNELL: Well, I have always thought that it is quite
15 curious that the initiation decision comes so late in
16 the day, years after dawn raids and so on.

17 THE CHAIRMAN: Right.

18 MR SCANNELL: There is a clear explanation for it. An
19 initiation decision is a term of art really and it is
20 something that the Commission does just at the point
21 where it is contemplating actually adopting a decision
22 saying that there has been an infringement. The legal
23 significance of it is that, once the initiation decision
24 is adopted, all national competition regulators then are
25 excluded from continuing any investigations that they

1 might have on foot in respect of the same matter.

2 THE CHAIRMAN: I see.

3 MR SCANNELL: At all times up to the initiation decision
4 there can be simultaneous investigations by national and
5 EU regulators.

6 Recital (26) is important:

7 "In the course of the settlement procedure,
8 the Commission informed the Parties of the potential
9 objections it envisaged raising against them and
10 disclosed to them the key evidence in the Commission
11 file relied upon to establish those potential
12 objections. The Parties had access to the relevant
13 documentary evidence on file, a list of all documents in
14 the case ... and, at the premises of the Commission,
15 the oral statements submitted under the Leniency Notice.
16 The Commission also provided the Parties with an
17 estimate of the range of fines likely to be imposed by
18 the Commission."

19 (27):

20 "Each Party expressed its view on the objections
21 which the Commission envisaged raising against it.
22 The comments of the Parties were carefully considered by
23 the Commission and taken into account where justified."

24 So the Commission reviewed all of the documents in
25 the file, it considered oral submissions from

1 the investigated parties, then it informed them of
2 the objections that they felt all of that evidence was
3 capable of sustaining.

4 So the submission that the Tribunal would be
5 speculating if it found that the Commission was
6 unimpressed by documentary evidence on which
7 the Claimants now rely to establish the existence of
8 further cartels is not right. It would not be
9 speculating; it would, quite properly, be taking account
10 of the incentives and the structure of the leniency
11 regime and taking into account also the procedural
12 history of the OSS decisions, set out in the decisions
13 themselves, which Mr West, quite strikingly, has never
14 even turned up. They show, at least on the balance of
15 probabilities, that the Commission had the evidence,
16 that they considered that it was insufficient to sustain
17 exactly the inferences that the Claimants invite
18 the Tribunal to draw.

19 Just finally on that point, *Courage v Crehan* is not
20 relevant to the point that I have just made. That was
21 a case about second-guessing the European Commission.
22 Now, we do not seek to second guess
23 the European Commission and neither do we say that
24 the Tribunal could not second guess
25 the European Commission if it was minded to do so. Our

1 point is a different point. It is simply that
2 the European Commission, which is an expert regulator in
3 this field, had essentially all of the relevant
4 documents the Claimants now rely on in support of their
5 primary and first alternative cases; it reviewed that
6 evidence specifically with a mind to ascertaining
7 whether there were OSS cartels on foot; it drew
8 inferences from those documents and those inferences did
9 not include the inferences that the Claimants now invite
10 the Tribunal to draw. Of course, we say, that is
11 relevant evidence.

12 In my submission, the Tribunal should look with
13 concern and some degree of scepticism at what
14 the Claimants are inviting this tribunal to do. It
15 would be a striking conclusion for the Tribunal to reach
16 that the Commission had somehow got it wrong, given its
17 unparalleled experience and resources and the time it
18 took to review all of the documents in its files.

19 THE CHAIRMAN: It is still very difficult for us to resolve
20 the -- on the one hand, Mr West's submission that
21 the Commission will, very sensibly, be pragmatic and
22 pick what he described as the "low-hanging fruit", and
23 the fact is the initial -- it certainly seems that BMW
24 and Volkswagen were the -- at least the focus of
25 the initial dawn raids. I take your submission that

1 documents were limited to that. But you, on the other
2 hand, are saying there is an expectation they had access
3 to lots of information -- by the way, lots of
4 information we do not have access to -- and
5 the presumption is they would have done a very competent
6 job and we are in no position to second guess them.

7 I mean, those are both cogent submissions and we
8 cannot reconcile them, because we have no evidence,
9 Mr West is saying one thing; you are saying the other.
10 You are both making some -- it sounds like common sense,
11 or sounds reasonable, but you cannot agree between you,
12 so we cannot really --

13 MR SCANNELL: With respect, I think there is a distinction
14 between the submission that Mr West makes and
15 the submission that I make. The submission that I make
16 is based solely on the structure of
17 the European Commission process. Mr West's submission
18 is based on a completely unevicenced assertion that
19 the Commission would fail to do its job correctly. That
20 is a positive submission, and it is actually quite
21 unlikely. While it is true that the European Commission
22 can order its own administrative priorities, there is --
23 there are European Commission decisions which govern
24 exactly that, requiring the European Commission to adopt
25 a decision saying that they are abandoning an

1 investigation if that is what they are ultimately
2 planning to do. That was never done here. So I think
3 -- what I think is irrelevant. My submission is that
4 there is a difference between these two competing
5 decisions. I am not seeking to second guess
6 the decision or guess what it was up to.

7 THE CHAIRMAN: Do the Commission formally do things on
8 the balance of probabilities, by the way? Is that their
9 formal threshold?

10 MR SCANNELL: That is a tricky question, Mr Chairman,
11 because the reality is that the standard of proof that
12 the European Commission applies is a different, shifting
13 concept. They tend not to pin it down. They often put
14 it extremely high, as beyond doubt, but they are clearly
15 not doing that. I do not want to overstate --

16 THE CHAIRMAN: But for these quasi-criminal proceedings --

17 MR SCANNELL: Yes.

18 THE CHAIRMAN: -- they could be applying a more stringent
19 test than necessary -- I do not want to get back into
20 the argument about what the balance of probability means
21 in this context, but they could, that is one
22 possibility, they are applying a more stringent test
23 than this Tribunal would.

24 MR SCANNELL: They are applying their own home-grown EU
25 standard, which is not the standard that must apply

1 across every Member State, because each Member State,
2 pending the adoption of harmonising rules, is free to
3 determine the standard of proof applicable to its own
4 civil proceedings, even in the scope of EU law, and
5 competition is within the scope of EU law. That is
6 the definitive position in relation to standards of
7 proof. It is sometimes wrongly thought that standards
8 of proof do not lie within the scope of EU law at all.
9 That is wrong, they do. That is clear from
10 regulation 1/2003 --

11 THE CHAIRMAN: This is just -- we are concerned with
12 initiating proceedings, we are not concerned with final
13 decisions, so that is another thing, you know, whether
14 investigating potential breaches of competition law,
15 I mean, the question of burdens may not even really
16 arise as a practical matter.

17 MR SCANNELL: Correct.

18 Would that be a convenient point?

19 THE CHAIRMAN: Yes, yes, of course. How are you doing? Are
20 you making -- are we holding you up more than you
21 anticipated or ...?

22 MR SCANNELL: I think it is all right.

23 (11.40 am)

24 (A short break)

25 (11.50 am)

1 MR SCANNELL: The second of the four preliminary points,
2 before we get to some documents, arises from the first,
3 that a proportion of the documents that the Tribunal has
4 been directed to by the Claimants in their written
5 submissions and in cross-examination and orally relate
6 to supplies to Toyota, Honda, BMW, Volkswagen, so they
7 have to be viewed with some care insofar as it is
8 suggested that they are capable of sustaining inferences
9 extending beyond those drawn by the Commission.

10 The third point is that many of the documents relied
11 on by the Claimants do not relate to RFQs at all, they
12 pertain to price amendments and to requests for raw
13 material price increases negotiated bilaterally by OEMs
14 and their existing suppliers. So we saw that yesterday,
15 for example, when you were taken to {J1/123/1} and
16 {J1/707/1}. Both of those documents are RMPI documents.
17 I should say that in the table attached, there is
18 a clear indication when a document relates to RMPIS and
19 when it relates to --

20 THE CHAIRMAN: In your table, yes.

21 MR SCANNELL: Yes.

22 THE CHAIRMAN: Yes, that is helpful. Thank you, yes.

23 MR SCANNELL: Finally, the fourth preliminary point is that
24 while we have well in mind the Tribunal's indication
25 that it is unimpressed with scatter charts and

1 arithmetical exercises identifying how many documents
2 the Claimants have relied on per year, the Tribunal will
3 of course be concerned at the overall strength of
4 the evidence base. Now, as it happens, we agree with
5 the Tribunal that it can be dangerous to apply a purely
6 arithmetical exercise, because it is well established,
7 in cases like Argos and BAGS, that even a single
8 document or fragments of evidence may suffice depending
9 on the circumstances and what that document actually
10 says.

11 But the point we make is that, not only that
12 the sort of cartels that the Claimants are alleging in
13 their primary case and their first alternative case
14 would require frequent and intense concertation of
15 the sort that is not evidenced in the evidence, it is
16 that when one actually looks at the documents, they are
17 not incriminating in the way that the Claimants suggest.
18 Now, I will be going to some documents, but I just want
19 to make some slightly higher level points before I get
20 there.

21 So taking Peugeot, for example. Now, this is an
22 exercise that the Claimants have not done but we have.
23 It is not simply the case that the Claimants have not
24 produced a single document between 2002 and 2007 and
25 that that accounts for more than half of their claim, or

1 even that when you split those documents that they do
2 rely on between different OSS components the Tribunal is
3 dealing with one or two documents over the entire
4 period. It is not just that. That is the arithmetical
5 exercise. It is that those documents are not actually
6 incriminating in the way that the Claimants have
7 suggested.

8 So two of the three documents said by them to
9 support Peugeot's steering wheel case, so this is
10 the case that Peugeot is taking, saying all of my
11 steering wheels were cartelised over the entire period
12 of the claim, if one focuses on the documents that are
13 before the Tribunal in relation to that, there are only
14 three of them. One of them is an internal Takata
15 document that relates to phase 2 of the B0 project, from
16 which the Claimants say it is to be inferred that
17 Tokai Rika gave Takata its prices and that those two
18 companies were coordinating. The second is a TRW email
19 to Takata in which it is -- to which is attached
20 a completely unpopulated table. The third is an Autoliv
21 email, dating after the bidding was complete on
22 the A9 Project, referencing how Takata had bid,
23 containing no reference to OSS components, no pricing
24 information and no reference to TRW, and I will be
25 turning to that document.

1 Looking next at Fiat. Again, it is not just that
2 the Claimants cite four documents for the entirety of
3 its claim, one mentioning airbags, one mentioning
4 seatbelts, it is that none of those documents are
5 smoking guns in the true competition sense of a document
6 which evidences the entirety of the scope of the alleged
7 cartel. If one takes all of the OSS components together
8 and takes the two documents the Claimants have cited
9 dating to 2010 as an example, one is the same TRW/Takata
10 email I mentioned a moment ago, the one that attaches
11 the unpopulated table, and the other is an internal
12 Autoliv document containing a SWOT analysis of its
13 competitors that shows vigorous competition between
14 them, not collusion.

15 Finally, looking at the overall strength of
16 the evidence presented against -- or by Vauxhall/Opel,
17 what the Tribunal has to consider there is a total of
18 three documents across the nine-year period even
19 mentioning seatbelts, three mentioning airbags, two
20 mentioning steering wheels, and again, they are not
21 incriminating in the way that the Claimants suggest. So
22 two of -- excuse me, one of them is an internal Takata
23 email sent by Mr Evangelista on 6 November 2002, and
24 I will be taking the Tribunal to that in a moment to
25 show that it is not incriminating. The next

1 chronologically comes seven years later in 2009, that is
2 an internal handwritten Autoliv note of a sales meeting
3 apparently recording that Opel did not send an RFQ for
4 seatbelts or passenger airbags to TRW and it did not
5 send an RFQ for side airbags to Takata for the Adam
6 model. That information could just as easily have come
7 from Opel. The third and final document Opel relies on
8 is, yet again, the 2010 email from Takata to TRW
9 attaching the empty spreadsheet.

10 So our overarching point in relation to the strength
11 of the evidence base is not simply that it requires --
12 the case requires intensity of concertation in order to
13 be credible at all, it is that when one zones in on
14 the dots and looks at those documents, they are just not
15 incriminating in the way the Claimants suggest.

16 Now, with all of that introduction in mind, could we
17 turn up some of the documents that have featured
18 prominently in the Claimants' case throughout --

19 PROFESSOR NEUBERGER: Mr Scannell, just one question which
20 was in my mind about the difference between those
21 documents which were on the Commission's file and those
22 which are not. I understand that the ones which are on
23 the Commission's file the Commission certainly saw.
24 The ones which are not in the Commission's file, I am
25 right to assume that the Commission was not aware of at

1 the time it took its decision, or is that a false ...?

2 MR SCANNELL: No, that is not false, Professor, that is
3 a fair conclusion to draw.

4 PROFESSOR NEUBERGER: Is it possible to say any more about
5 the documents which were not on the Commission file but
6 which are being used in this case? I am sorry, I am
7 taking you out of sequence, but it would be helpful.

8 MR SCANNELL: No, it is important to set your mind at rest
9 in relation to that.

10 There was an internal review, including a review by
11 external lawyers for Autoliv to provide all of
12 the evidence that was material. It would seem that
13 there were some documents that were not captured, but
14 there has been more extensive disclosure than simply
15 the Commission file in this case, there has been RFQ
16 level disclosure in this case as well, and one or two --
17 it is more than one or two, again, I do not want to
18 exaggerate -- again, there are a few documents, they are
19 the white documents on your table, have been unearthed
20 by that process. I am not suggesting to you, Professor,
21 that the Commission had those documents.

22 But I would suggest that, to round out that
23 submission, that in order to make anything of that point
24 the Claimants would have to establish that those
25 documents change things, that they move the dial away

1 from what I have said on to a credible basis for finding
2 the cartelisation that they allege.

3 SIR IAIN MCMILLAN: Just a clarification, if I may. I think
4 what you are telling the panel is that the external
5 counsel, these were the internal auditors that they
6 referred to earlier in the proceedings?

7 MR SCANNELL: Yes.

8 SIR IAIN MCMILLAN: So they saw documents that
9 the Commission had not seen, was not in the Commission's
10 file, but still gave a clean bill of health to
11 the disclosure aspect of the Defendants?

12 MR SCANNELL: Yes, they conducted their review, they
13 gathered together all of the information that related to
14 supplies to OEMs. That was all sent to the Commission.
15 Of course, judgments would have been exercised by those
16 external lawyers, logically. They would have asked
17 themselves what is relevant, what is material. That is
18 the test under the Leniency Notice. The view may have
19 been taken that some documents were not material, but
20 that view could not be taken in the context of
21 a disclosure exercise and they have all been disclosed
22 to the Claimants. It is common ground, I should say,
23 that the disclosure in this case is full.

24 SIR IAIN MCMILLAN: I see, thank you.

25 MR SCANNELL: Can we begin with {J1/71/1}, please.

1 Mr West took the Tribunal to this email in opening,
2 but he did not deal with the first page of it, which
3 sets its essential context. It is dated
4 6 November 2002, and that date is very important for
5 the Claimants and Mr Hughes, because when they say in
6 their pleaded case that Autoliv and TRW were involved in
7 a cartel from 6 November 2002, this is the email that
8 they are relying on to make that statement and it is one
9 of the documents Mr Hughes relies on to find his
10 so-called early period. It is an internal Takata email,
11 it was not sent to or received by anyone in Autoliv or
12 ZF. The subject of the email is, "GMB T3300". "GM"
13 refers to General Motors, which owned Vauxhall/Opel,
14 and "B" refers to Brazil. So this is an email that does
15 not pertain to business in Europe, it pertains to
16 business in Brazil.

17 It reads:

18 "Yesterday our engineers took part in one
19 GMB technical review and by the end of this meeting,
20 Ms Siomara (responsible buyer) called me to say that
21 GMB are having problems with the Seat Belts current
22 suppliers in Brazil. She told me that GMB really would
23 like to work with Takata as a supplier like Takata Petri
24 is very difficult to be found, due to our high level of
25 quality, attendance, engineering and other qualities she

1 listed we have.

2 "For all this, GMB is really, very interested in
3 working with us and NOW is our big [chance] to get
4 GMB Seat Belts business. They intent to give us one
5 package as described below."

6 Mr Evangelista then sets out the incumbency
7 information he has apparently been given by
8 General Motors Brazil and he says:

9 "As you could check below, GMB current situation of
10 [seat belt] suppliers is very difficult, therefore we
11 can understand the reason why, so suddenly, we got so
12 important to GMB."

13 He sets out the reasons that General Motors has
14 apparently told him -- some of the issues that
15 General Motors has apparently told him it is having with
16 its current suppliers. So under "TRW":

17 "It seems like they are no more interested to get
18 [seat belt] business not only for GMB but also for all
19 the other customers, high price (according to GMB)."

20 Under the "Autoliv" heading:

21 "Enormous pressure to increase price, they also
22 count on their Stockholm Headquarter support."

23 So Mr Evangelista is reporting on a conversation he
24 has had with Ms Siomara. She works for General Motors
25 Brazil and is interested in working with Takata.

1 Mr Evangelista sees that -- sees all of this as a big
2 chance to get GM seatbelts business in Brazil. Some of
3 that business, the T3300, the Meriva and the S10, is
4 currently being supplied by Autoliv, and some of it is
5 being supplied by TRW. So this email very obviously
6 does not support a claim that Autoliv or ZF or anyone
7 else is colluding with Takata, or with each other in
8 respect of supplies to GM Brazil, let alone
9 participating in a cartel affecting every car
10 manufacturer on earth, including each one of
11 the Claimants.

12 What this actually shows is Takata trying to steal
13 business away from Autoliv and ZF in an adversarial way.
14 Why on earth would Autoliv collude with them to achieve
15 that end?

16 It is clear from the language of this email that
17 Mr Evangelista has not liaised with TRW or Autoliv.
18 The information as to volumes of cars per year and whose
19 contract it is has obviously come from Ms Siomara of
20 General Motors and not from the current suppliers.

21 The email continues at the bottom of the page:

22 "We know that the GMB price, historically, is very
23 miserable (we have made phase out of Corsa, Vectra and
24 Celta this year due to price) and that our current price
25 is also higher than Autoliv and TRW, based on this, we

1 won't see possibility to make money with this business.
2 According to the above situation we could define one
3 strategy to 'seat and talk' with GMB and try to reach
4 a good business for both sides."

5 So even if Takata were to win this business, it
6 could not make any money out of it, it would have to
7 negotiate a wider deal with GM Brazil to turn a profit,
8 and again one sees the OEMs using their countervailing
9 buyer power to squeeze their suppliers on price.

10 Then if we turn over the page {J1/71/2},
11 Mr Evangelista says this:

12 "Ms Siomara told me that she would be asking
13 Mr John Chermside to contact you, Bob ..."

14 That is Bob Kittle, the addressee of this email at
15 Takata:

16 "... to discuss this 'good business opportunity' to
17 Takata Petri SA.

18 "One more subject that is in need to discuss is our
19 relation with Autoliv, as most of the above mentioned
20 business are their and of course, if we get them, we may
21 create difficulties in our relation to with Autoliv.

22 Only for your information, last Monday we received
23 the Purchase Order from Autoliv to produce
24 the non Airbag frame for Ford Amazon (we will be sending
25 complete information to you by today)."

1 Then:

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

6 Of course it is that bit that is zoned in on by
7 the Claimants.

8 Before I get to that, the second paragraph that we
9 have seen there is another example of two suppliers
10 working together in a legitimate way to produce goods
11 for OEMs. Not every meeting between OSS suppliers is an
12 illegitimate meeting. In fact, one of the Commission
13 decisions before the Tribunal, the U-Shin/Valeo CAM
14 Commission decision, at paragraph 45 {J2/93/10},
15 expressly states that the market investigation that
16 the Commission had undertaken, and I quote:

17 "... has indeed revealed such a situation where
18 cross-licensing was a prerequisite for two competing car
19 component suppliers to be awarded a supply agreement
20 with a specific OEM."

21 So occasionally it was the OEM forcing them to do
22 it.

23 THE CHAIRMAN: Sorry, that decision?

24 MR SCANNELL: {J2/93/1}.

25 THE CHAIRMAN: That decision, is it referred to in your

1 closing?

2 MR SCANNELL: Yes, it is amongst the Commission decisions
3 that are referred to.

4 THE CHAIRMAN: Okay. Okay, fine, thank you.

5 MR SCANNELL: The Claimants highlight the words "we got from
6 them" --

7 THE CHAIRMAN: Sorry, so cross-licensing. I do not quite
8 understand what cross-licensing has got to do with
9 anything.

10 MR SCANNELL: Sorry, perhaps we should just turn up J2 --

11 THE CHAIRMAN: Well, more in the context of this document
12 {J1/71/2}.

13 MR SCANNELL: Sorry, the limited point that I am making in
14 relation to this document is that the second paragraph
15 on the page that is currently on the screen is an
16 example of collaboration between OSS suppliers which is
17 not illegitimate.

18 THE CHAIRMAN: Why do you say it is not -- I mean, as you
19 rightly point out, it is Brazil, it is Ford, so there
20 are lots of ways one could say this is not -- the case
21 is not going to turn on this document, but out of
22 curiosity, why do you say this is legitimate?

23 MR SCANNELL: Well, this is recording the fact that, last
24 Monday, Takata received a purchase order from Autoliv,
25 so Autoliv wants to buy something from -- or supply

1 something to Takata:

2 "... to produce the non Airbag frame for the Ford
3 Amazon ..."

4 THE CHAIRMAN: Oh, I see, so you are saying --

5 MR SCANNELL: So they are working together.

6 THE CHAIRMAN: Okay, that is what you mean by
7 "cross-licensing". So you say that it is just Autoliv
8 buying some stuff from Takata?

9 MR SCANNELL: Yes, or vice versa. I am not entirely sure,
10 but it could be vice versa.

11 But that is not the paragraph, of course, that
12 the Claimants rely on. They rely on the third
13 paragraph, in particular the words "we got from them".
14 So they are suggesting that Autoliv handed over its
15 prices to Takata and they say that that demonstrates
16 concertation between Autoliv and Takata.

17 Now, we do not accept that. Mr Evangelista has not
18 referred at any point in this email to a conversation or
19 a contact with anyone at Autoliv, and as I have said, it
20 is implausible that anyone at Autoliv would have been
21 interested in having a conversation with them when
22 Takata was trying to steal Autoliv's business in Brazil.
23 Just two lines above the line "we got from them",
24 Mr Evangelista is fretting about what Autoliv's reaction
25 is likely to be when they find that it has been

1 displaced by Takata and the effect that that could have
2 on this legitimate joint venture work. Plainly none of
3 that has been discussed with Autoliv.

4 Of course, just a couple of lines above that again,
5 Mr Evangelista is still talking about what Ms Siomara at
6 General Motors has told him, including that GM will
7 be --

8 THE CHAIRMAN: Sorry, what is your submission on this
9 sentence then?:

10 "Only for your information attached you will find
11 a chart with Autoliv's prices we got from them to ..."

12 MR SCANNELL: "To Meriva and S10 ..."

13 THE CHAIRMAN: Meriva and S10 are ...?

14 MR SCANNELL: They are the two GM projects for GM Brazil
15 that are being supplied by Autoliv, and we saw that on
16 {J1/71/1}, if we could turn back.

17 THE CHAIRMAN: So you are saying the "from them" could be
18 they got them from GM?

19 MR SCANNELL: Yes.

20 THE CHAIRMAN: Yes, there is ambiguity in the language
21 there.

22 MR SCANNELL: Yes, they have given all of the information on
23 page 1, all of the volumes and who is supplying what,
24 and I am suggesting that it is highly plausible that
25 the further information that is being referred to on

1 page 2 {J1/71/2} was also given to them by GM.

2 THE CHAIRMAN: But I mean, again, there is no dispute that
3 you are engaged in cartel activity with Takata, or were
4 engaged in cartel activity with Takata. This is Brazil.
5 Even if it was evidence of cartel activity, well, so
6 what? We know you have got a history of cartelism, so
7 at least that is the basis on which the case is
8 proceeding, so does this add anything, even if you are
9 wrong about the interpretation?

10 MR SCANNELL: Well, we would say that it does not add
11 anything -- the relevance of it being Brazil is that it
12 is not Europe --

13 THE CHAIRMAN: Yes, exactly.

14 MR SCANNELL: -- and -- yes, but I do not at all accept --

15 THE CHAIRMAN: You do not accept the interpretation in any
16 event, yes.

17 MR SCANNELL: Not just the interpretation. I do not either
18 accept that Autoliv is engaged in cartel behaviour, so
19 of course they are doing it every time we see
20 a document.

21 THE CHAIRMAN: No, I understand.

22 MR SCANNELL: Now, two aspects of that document deserve
23 a little closer attention. The first is just how common
24 it was for information about rival bids to be given to
25 bidding suppliers by the OEMs themselves and the OEMs

1 did that to drive down prices.

2 The second is that none of the documents Mr Hughes
3 relied on to define his early period for steering
4 wheels, airbags and seatbelts actually justify the start
5 dates he has selected.

6 THE CHAIRMAN: We have got no evidence that there was trade
7 at least between Autoliv and TRW, have we? You are
8 saying that this is showing that they were purchasing
9 material from Autoliv, Takata were, or vice versa, in
10 relation to this airbag frame, non-airbag frame, but we
11 have got no evidence that meetings could be explained in
12 relation to TRW and Autoliv because you were trading
13 with each other.

14 MR SCANNELL: No, we do.

15 THE CHAIRMAN: We do?

16 MR SCANNELL: {J1/128/1}, one of the documents that
17 the Tribunal was taken to yesterday, where Mr Carlson
18 said that he was --

19 THE CHAIRMAN: If you could remind us of that at some point,
20 yes.

21 MR SCANNELL: Yes, I will go to that document.

22 So there are various documents in the bundles
23 showing OEMs giving their OSS suppliers bidding
24 information in order to drive supply prices down.
25 I need to take this at speed, so --

1 THE CHAIRMAN: Yes, of course.

2 MR SCANNELL: -- can we see a further example of that
3 behaviour. It is {J2/29/1}, please.

4 THE CHAIRMAN: J2 ...?

5 MR SCANNELL: Tab 29, please.

6 So the email at the bottom of the page is the one
7 I would like to show you. This is an internal Autoliv
8 email, dated 22 May 2007. It is not very legible, but
9 it is from Mr Peter Koppe. Mr Koppe was then
10 vice president of the business unit responsible for
11 supplies to what was then a merged entity comprising
12 DaimlerChrysler and Mitsubishi. What he says in his
13 email is:

14 "Yesterday we learnt from Mercedes, that TRW has
15 offered a second generation of pretensioners (no low
16 cost version) from 2010 on for a sales price starting
17 with 3 ... euros (... means 39 euros or less). This
18 means that we can ask ourselves as mentioned yesterday
19 by Stefan Kroenung, if we need a low cost RevAS or if
20 the market price for a 'fully loaded RevAS' will go down
21 to 35 euros shortly after 2010.

22 "Furthermore we are told, that some people are also
23 already asking Mercedes purchase, why they don't
24 desource Autoliv because Autoliv's pricing does not move
25 remarkably down until 2010. So far purchase is fair and

1 respect our investment, but you can of course question
2 yourselves, how long they are allowed to have this
3 attitude."

4 So there we see an OEM, Mercedes, divulging a TRW
5 seatbelt bid to Autoliv as well as the risk Autoliv
6 faces that Mercedes will deselect it as supplier because
7 its prices are not declining fast enough.

8 What that kind of document demonstrates is that when
9 the Tribunal sees an email in which Autoliv or ZF or any
10 other supplier has information relating to their
11 competitors' bids, it does not necessarily mean, as
12 the Claimants invariably suggest, that the supplier has
13 obtained the information from its competitors.

14 THE CHAIRMAN: I think we understand that submission, yes.

15 MR SCANNELL: In that case I will just go to one more
16 document and only because it has been mentioned a number
17 of times {J1/36/1}, if that could be turned up, please.

18 So we refer to this document at paragraph 92 of our
19 written closing {S/15/22} and it is addressed also at
20 row 26 of the table of documents the Claimants rely on.
21 So, again, it is a document that formed part of
22 the Commission file. One sees that from, "Annex Ford
23 1a", at the bottom left.

24 It is a chain of internal Autoliv emails dating to
25 January 2007 and it begins at the very bottom of

1 the page with an email from Gustaf Celsing on
2 30 January 2007, timed at 22.42. He was the head of
3 Autoliv's Volvo business unit. He has been given
4 the bids Autoliv's competitors made for side airbags,
5 inflatable curtains and driver airbags in an RFQ for
6 components supplied to Ford, Jaguar and Volvo, all of
7 which were owned by Ford. So the document has nothing
8 to do with supplies to the claimant companies, that is
9 the first point.

10 The information he has been given is set out on
11 {J1/36/3}, if that could be turned up, and this may be
12 familiar the Tribunal. So the Claimants have suggested
13 that this information must have come from competitors
14 for the RFQ, namely Takata, TRW and KSS, because
15 the spreadsheet is detailed. We do not accept that.
16 The level of detail in the spreadsheet and the fact that
17 precisely the same data appears for every bidder in
18 the RFQ process in fact indicates that it is far more
19 likely to have come from Ford. The tin hat, as it were,
20 is put on that by the fact that one of the bidding
21 entities is KSS, and KSS was looked at by the Commission
22 and the Commission made no findings against KSS that it
23 was ever involved in any cartel behaviour.

24 THE CHAIRMAN: Well, I mean, the fact is we just do not know
25 where they get this --

1 MR SCANNELL: No, we do not know.

2 THE CHAIRMAN: We cannot --

3 MR SCANNELL: I am not putting this higher than saying one
4 cannot assume that information like this has come from
5 competitors.

6 THE CHAIRMAN: No. No, no, I accept that, yes.

7 What about the -- just while we have got it open,
8 the words on the second page {J1/36/2}:

9 "Trw did not keep words so they redused the price
10 yesterday."

11 MR SCANNELL: Yes, at an earlier stage in the proceedings,
12 and possibly still, those words have been highlighted by
13 the Claimants. I cannot speak for the meaning of
14 the words, but in a sense they are not relevant anyway,
15 because what this is acknowledging is that TRW "reduced
16 the price yesterday", so it is bidding independently and
17 it is not taking anybody else into account when it is
18 actually bidding. One can see the effect of all of that
19 at the bottom of the page. This is the demotic language
20 that we have referred to I believe in our closing
21 {S/15/22}, where we can see that the effect that that
22 has on Autoliv and the margins it will make on this and
23 how difficult it is for them to continue the fight.

24 THE CHAIRMAN: Yes, so this could be an example where
25 the Commission says sometimes they did not stick to

1 their agreements, but it does say {J1/36/1}:

2 "Trw did not keep words ..."

3 Which seems to be some agreement they welched on.

4 MR SCANNELL: That is loading those words quite a bit.

5 THE CHAIRMAN: Well, this is -- this is --

6 MR SCANNELL: I have taken that as far as I can.

7 THE CHAIRMAN: Sorry, you said this is not the claimant.

8 Just remind us again, which contracts do these concern?

9 I mean, we have got TRW --

10 MR SCANNELL: These are supplies to Volvo -- sorry, these
11 are supplies to Ford.

12 THE CHAIRMAN: It is supplied to Ford, yes, okay.

13 MR SCANNELL: So not supplies to the Claimants.

14 Could we next turn up {J1/51/1}, please. So this
15 email, too, will be familiar to the Tribunal. It was
16 taken up by the Claimants in opening. It is an internal
17 Autoliv email from Ms Bénédicte Chassery to Mr Rivière
18 and Mr Goba Ble, dated 9 April 2009. It relates to
19 the Peugeot A9 Project, which, by now, the Tribunal will
20 know was the Peugeot 208. That is in the agreed
21 glossary at {S/8/8}.

22 THE CHAIRMAN: Yes, we have that.

23 MR SCANNELL: So two preliminary points. The first is that
24 the document {J1/51/1} formed part of the Commission
25 file. The second is that the document does not mention

1 TRW/ZF, and of course the primary and alternative cases
2 are premised on the joint involvement of TRW and Autoliv
3 at all times.

4 As to the content of the email, Ms Chassery says
5 that she has spoken to Mr Bastien. Mr Bastien was
6 formerly an employee of Autoliv. He subsequently went
7 to work for Takata.

8 THE CHAIRMAN: Yes, I remember that.

9 MR SCANNELL: Autoliv, incidentally, disclosed that fact to
10 the Claimants at the very beginning of these
11 proceedings, and they also disclosed Mr Bastien's CV and
12 his job offer from Takata. So the Tribunal might bear
13 that in mind in considering whether there is anything
14 behind the Claimants' florid remarks in their written
15 closing about plots thickening.

16 The subject of the conversation was the A9 Project
17 and it is important to appreciate that by this time --

18 THE CHAIRMAN: Sorry, when you said that it was disclosed to
19 the Claimants, how? This is that Mr Bastien went to --

20 MR SCANNELL: Takata.

21 THE CHAIRMAN: -- Takata?

22 MR SCANNELL: Yes, that was disclosed --

23 THE CHAIRMAN: Because Mr West says that only sort of came
24 out as a result of a question from us.

25 MR SCANNELL: It was in our disclosure, both the CV and

1 the job offer.

2 THE CHAIRMAN: Okay. It would be helpful just to have
3 a reference for that I think at some point. It does not
4 have to be now.

5 MR SCANNELL: Yes.

6 It is important to understand that by this time,
7 9 April 2009, the bids for the A9 Project had already
8 been submitted, but Peugeot had not yet chosen
9 the winner. So Ms Chassery's conversation with
10 Mr Bastien was in the nature of a post mortem, as we
11 used to call them after exams, to gauge Mr Bastien's
12 impressions of the A9 bidding process. According to
13 Ms Chassery, Mr Bastien said that:

14 "... Takata had not been overzealous this time, that
15 they had responded but did not hit as hard as on B7,
16 that times were hard ...

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

18 The reference to "B7" is a reference to the C4
19 platform.

20 THE CHAIRMAN: Sorry to interrupt. Where do we get that
21 the date -- you say the bids had already been submitted.
22 Where do we get that information from?

23 MR SCANNELL: Can I come back to you on that?

24 THE CHAIRMAN: Yes, of course.

25 MR SCANNELL: But we can show that the bids were already in

1 on the A9 Project.

2 There was not much mystery as to why Takata might
3 not have been as zealous bidding on the A9 Project as it
4 was on the B7 Project, and that is largely down to
5 the fact that the A9 platform was the successor to
6 Peugeot's A7 platform and Autoliv was the incumbent
7 supplier on the A7 platform. Just so that we can see
8 that in the evidence {C/1/9}. So this is Mr Corbut's
9 witness statement, and at paragraph 28, at the bottom of
10 the page, four lines from the end, we can see:

11 "Autoliv was the incumbent supplier for all passive
12 safety systems (save for the side airbag) for the A7
13 platform which was being superseded by the A9."

14 So Autoliv was the incumbent supplier and that may
15 explain why Takata would not have bid for the A9 Project
16 with the same zeal as it had bid for the C4 project.

17 It is obvious, I would suggest, that a non-incumbent
18 will not bid as enthusiastically as an incumbent.

19 THE CHAIRMAN: So, sorry, you said the incumbent. What was
20 the A7? That was ...

21 MR SCANNELL: The B7 is the --

22 THE CHAIRMAN: No, the A7.

23 MR SCANNELL: Sorry, the Peugeot 207, I believe. We can get
24 this from the agreed glossary.

25 THE CHAIRMAN: Yes, a different car. But I mean that is --

1 so incumbency can go across different car types? Sorry,
2 basic question. When everyone is talking about
3 incumbency, I was assuming it was the same car, but it
4 also is between cars, is it?

5 MR SCANNELL: When it comes to incumbency, it makes sense to
6 think of platforms --

7 THE CHAIRMAN: Yes.

8 MR SCANNELL: -- rather than individual models on
9 the platforms.

10 THE CHAIRMAN: So 207 and 208 are the same platform?

11 MR SCANNELL: That is my understanding. Over lunch, I will
12 run that by everybody to make sure that I am not
13 misleading you, but that is my understanding, yes.

14 THE CHAIRMAN: It says here the A7 platform was being
15 superseded by the A9, that is all, so if we could
16 just ...

17 MR SCANNELL: Yes.

18 THE CHAIRMAN: So I do not know if this is an example of
19 incumbency as being used by the parties or not, so just
20 clarify that, it would be helpful.

21 MR SCANNELL: Yes. Can I make a submission for now,
22 Mr Chairman --

23 THE CHAIRMAN: Yes, of course.

24 MR SCANNELL: -- based on the supposition it is an
25 incumbency situation.

1 The incumbent will not always -- sorry,
2 the incumbent will always ordinarily be able to make
3 lower bids than a non-incumbent because it already has
4 made the investment necessary to supply the relevant
5 parts, so it has configured its factory to manufacture
6 those parts, it has employed --

7 THE CHAIRMAN: If it is the same -- yes, if it is the same
8 seatbelt.

9 MR SCANNELL: Yes.

10 THE CHAIRMAN: It probably does not matter whether the car
11 changes. If the seatbelt is materially the same, then
12 one can see all the investment and the tooling and so
13 forth, the design, has been done.

14 MR SCANNELL: Yes.

15 THE CHAIRMAN: But if it was the same car -- sorry, it is
16 rather late in the day to be asking such basic
17 questions, but if it is the same car and it is having
18 a facelift which included a whole new seatbelt, not that
19 one can really imagine that, then that would obviously
20 not -- or a different steering wheel --

21 MR SCANNELL: Then that would not apply.

22 THE CHAIRMAN: -- that would not apply.

23 MR SCANNELL: True.

24 THE CHAIRMAN: So ... yes.

25 MR SCANNELL: I warn you, Mr Chairman, that you are now

1 venturing into the realm of part numbers and RFQs.

2 THE CHAIRMAN: Yes, sure.

3 MR SCANNELL: So on a more general level, if we could just
4 return, please, to the email that we were looking at,
5 which is {J1/51/1}. We say that that email does not
6 support the Claimants' allegation that TRW and
7 Autoliv --

8 THE CHAIRMAN: No, it is Takata --

9 MR SCANNELL: -- were in a cartel. So, again, we would say
10 that that is not incriminating in the way that
11 the Claimants assert.

12 There is a follow-up document which actually
13 pre-dates this document but the Claimants insist that we
14 must look at both of these together and so I will do so.
15 That is {J1/232/1}. So this is an internal Autoliv
16 email from Mr Rivière to Mr Carlson. It is copied to
17 Ms Eriksson. It is dated 13 July [sic] 2009 and it
18 relates to the bid Autoliv is about to make to Peugeot
19 to supply the A9 Project. So this email pre-dates
20 the one that we have just been looking at and it also
21 pre-dates the initial bid to supply the A9 Project.

22 In the second main paragraph, beside the double
23 arrow, at the end of the line, Mr Rivière predicts:

24 "I think it's not sure competition will maintain
25 such aggressive prices as they did for B7, therefore

1 it's worthwhile trying to get some PSA feedback before
2 considering being more aggressive."

3 So he feels that bidding for the A9 Project might
4 not be as aggressive as bidding for the C4, but he
5 suggests reaching out to Peugeot, not to a competitor
6 but to Peugeot, to get a clearer indication of that.

7 Now, in their written closing, the Claimants assert
8 that Mr Rivière must have formed that view because he
9 was told how Takata would bid by Mr Bastien. In fact,
10 the Claimants say that that is overwhelmingly likely ...

11 I may have said that this is dated July. If I did,
12 that was a mistake. It is dated 13 January, of course.

13 We say that it is not overwhelmingly likely at all,
14 quite the contrary, in fact. If Mr Rivière had had any
15 contact with Mr Bastien, then there would be no need to
16 suggest reaching out to Peugeot to get a clearer
17 indication of how keen the bidding was likely to be.
18 Nor would there have been any need for Ms Chassery to
19 ask Mr Bastien, four months later, how Takata had bid,
20 because that would also be known. Obviously nothing in
21 the email Ms Chassery sent could have informed the view
22 Mr Rivière is expressing here, because Mr Chassery's
23 email post-dates this email.

24 Could we next go to {J1/40/1}, please. So this is
25 Mr Rau's internal Autoliv email of 18 March 2008,

1 concerning supplies of seatbelts to Ford in
2 Latin America. You may wonder why I am going to it.
3 The reason is that it was relied on by Mr Hughes in his
4 first report at paragraph 2.4.1(c) {E1/2/33}, and it was
5 mentioned in the Claimants' skeleton argument at
6 paragraph 152 {S/1/46}, and curiously, Mr Hughes
7 referred to it repeatedly, both in the hot tub and in
8 cross-examination, and it is mentioned again by
9 the Claimants in their written closing {S/13/37}.

10 Two preliminary points {J1/40/1}. First, Mr Rau was
11 in the Autoliv Ford business unit. His boss was
12 Stefan Kroenung. As the Claimants say in their written
13 closing, Ford is neither a claimant, nor one of the OEMs
14 named in the Commission decision.

15 The second point is that this was in the Commission
16 file and did not result in the inferences the Claimants
17 invite the Tribunal to draw and it is not difficult to
18 see why, I would suggest.

19 From the third paragraph we can see why Mr Rau wants
20 to write to Mr Lodemann. He is concerned at
21 the intensity of TRW's efforts to:

22 "... steal business from us. We have seen this in
23 Europe, this is their approach to get Ford business in
24 South America."

25 So immediately one can see that the document

1 contradicts the existence of a global cartel, or
2 a cartel of the sort the Claimants allege.
3 The allegation is premised on both TRW and Autoliv being
4 parties to a cartel throughout this period, but this
5 email obviously refutes that.

6 Mr Rau continues:

7 "So far I always (mostly) respected a sourcing
8 decision. When business was sourced to TRW, I did not
9 attack them on existing programs as I believe that they
10 would fight back where it hurts us. I spoke with
11 Stefan Kroenung about this and asked him to talk to his
12 counterpart in TRW to agree on the principles. Either
13 we respect the ABF lifetime sourcing, or we also
14 identify TRW's weaknesses and fight them with their own
15 weapons. They are weak in Asia where they do not have
16 local inflators, [nor] have they localized as many
17 seat belt components as we have.

18 "Basically the feedback that I got was to look for
19 opportunities to also steal business from them."

20 So what Mr Rau was saying is that when TRW was
21 the existing supplier, he did not attack them, and
22 the reason he identifies for not doing that is actually
23 inconsistent with the existence of a cartel. He says
24 that "they would fight back where it hurts us", so he
25 anticipates retribution. The proposal Mr Rau made to

1 Mr Kroenung, that may well, if acted upon, have resulted
2 in unlawfulness, I do not hide from that. But of course
3 it was not acted upon because what Stefan Kroenung said
4 was equally inconsistent with the existence of a cartel.
5 He told Mr Rau to look for opportunities to steal
6 business from them. So, again, reliance on this email
7 as evidence of an ongoing cartel is, I would suggest,
8 misplaced on multiple counts.

9 Can we go next to {J1/128/1} which is the --

10 THE CHAIRMAN: Sorry, this concerns South America, does it?

11 MR SCANNELL: Yes.

12 THE CHAIRMAN: Yes.

13 MR SCANNELL: I would not have taken the Tribunal to it had
14 it not been for the fact that it was referred to by
15 Mr Hughes so often in cross-examination and in the hot
16 tub.

17 Can we next go to the document that you asked me
18 about a moment ago, Mr Chairman, which is {J1/128/1},
19 and of course you will be familiar with it now that it
20 is up on the screen.

21 THE CHAIRMAN: Yes.

22 MR SCANNELL: It is Carlson's email to Mr Westerberg and it
23 replies to an email from Westerberg earlier the same day
24 with the subject, "PSA":

25 "Anything new re TRW?"

1 This document was not cited in the claim, but the
2 Claimants came to place greater and greater reliance on
3 it as --

4 THE CHAIRMAN: It is not pleaded?

5 MR SCANNELL: No, this document was not pleaded initially
6 and I am not sure that it is even now. We can check
7 that. Grumbles to the left of me, so it may be pleaded
8 now.

9 THE CHAIRMAN: All right. It would be useful to know where
10 it is in this case.

11 MR SCANNELL: In any event, greater reliance has been placed
12 on it as the emphasis has shifted away from conventional
13 proof to reliance on the involvement of senior officers.
14 So it was referred to by the Claimants for the first
15 time in their Re-Amended Reply. That is my own note of
16 how it came up in pleading. That is paragraph 25.5(c)
17 at A6 --

18 THE CHAIRMAN: The re-amended?

19 MR SCANNELL: The Re-Amended Reply of the Claimants, and
20 the reference for your note is {A/6/13-14},
21 paragraph 25(5)(c). It was mentioned in opening, it was
22 mentioned in the skeleton argument and again, yesterday,
23 it featured prominently in the submissions that were
24 made.

25 I would suggest that the reality of this document is

1 far more prosaic, and importantly, it is clear on its
2 face, so there is no need for a witness to be called to
3 speak to it. Mr Carlson says that he has a meeting with
4 Peter Lake that evening, he says what the meeting will
5 concern. It will concern "collaboration on components",
6 that is it. There is nothing more to it. It is not
7 a conspiracy, it is not a cartel, it is a meeting
8 between two senior businesspeople to discuss
9 collaboration on components.

10 THE CHAIRMAN: "Collaboration on components", you say, can
11 be things like purchasing components from each other and
12 so forth?

13 MR SCANNELL: Yes, and in the specific --

14 THE CHAIRMAN: You have shown me a document that that goes
15 on?

16 MR SCANNELL: Yes, it is {J2/97/1}, which is the --

17 THE CHAIRMAN: J2, tab -- sorry, are we going to that later,
18 or is now a good time --

19 MR SCANNELL: Now is a good time to go to it, {J2/97/1}. So
20 that is the document that the Tribunal was shown
21 yesterday, a letter written by Mr Carlson.

22 THE CHAIRMAN: Hold on, sorry, I am in the wrong ... J2 ...
23 I am sorry, I am in J1.

24 My J2 goes up to 96.

25 MR SCANNELL: You have no 97?

1 THE CHAIRMAN: No. Now, I do, I think it is just
2 the labels. That is fine, yes, I have looked at this
3 before. I remember this one, yes.

4 MR SCANNELL: I dare say this document will be familiar.

5 THE CHAIRMAN: This is the one that is said to be a cloak,
6 yes.

7 MR SCANNELL: Yes, said to be a cloak, exactly. I am not
8 proposing to make any additional submissions on it, it
9 is perfectly clear what it says on its face.

10 THE CHAIRMAN: But it does not say anything about purchasing
11 components from each other.

12 MR SCANNELL: No, this one is talking about collaboration on
13 such things as:
14 "... tooling and common sourcing of parts.
15 "Common Supplier development.
16 "Develop good tool makers for use in LCC ...
17 "... surface and heat treatment sub-suppliers ...
18 "Collaboration of component areas."

19 THE CHAIRMAN: Yes.
20 Did you say there was something on purchasing
21 material from each other, a document, or was it just --

22 MR SCANNELL: Sorry, this was the material --

23 THE CHAIRMAN: This was the document.

24 MR SCANNELL: -- I was proposing to take you to in that
25 respect.

1 So they are the documents that I wanted to take you
2 to. As I said, the table that is annexed to our written
3 closing includes a commentary on every document.

4 THE CHAIRMAN: Yes, we will look at it conscientiously.

5 MR SCANNELL: We, of course, trust that the Tribunal will do
6 so.

7 Overall, when it comes to the documentary evidence,
8 we say that it is clear that it is incapable of bearing
9 the load that the Claimants put upon it.

10 I was going to turn now to the spillover case, but
11 I am perfectly happy to take an early lunch, given that
12 it is a completely discrete section.

13 THE CHAIRMAN: Let us make a start.

14 MR SCANNELL: Are you happy to press on?

15 THE CHAIRMAN: Yes.

16 MR SCANNELL: So in relation to spillover, I had, I confess,
17 expected to have to deal with something of substance,
18 something of greater substance at least at this point,
19 but given what the Claimants have put forward in their
20 written closing on spillover, we did wonder whether what
21 we would actually be responding to is a concession in
22 relation to the spillover case.

23 In opening, I addressed --

24 THE CHAIRMAN: Is it right -- I mean, the Claimants'

25 submissions do not seem to have moved on a lot on

1 mechanism from opening, as far as we can see.

2 MR SCANNELL: No.

3 THE CHAIRMAN: So if you addressed quite fully --

4 MR SCANNELL: What they have done is zoned in on one aspect
5 of proving causation, which is that in order for
6 the spillover case to work, there must be some mechanism
7 for information to move from one business unit to
8 another over the bulkheads, as it were, to get to
9 different business units, and that is the aspect of
10 causation, the only aspect of causation that my learned
11 friend has addressed.

12 I was proposing in closing to deal with that,
13 the one aspect that has been focused upon --

14 THE CHAIRMAN: Do you not mean the -- meeting the defence to
15 your siloing case?

16 MR SCANNELL: Yes. Yes. Although we have never called it
17 a siloing case.

18 THE CHAIRMAN: No, I think ... yes.

19 MR SCANNELL: Yes. That is what the Claimants call it, and
20 we have always been reasonable, I would suggest, in
21 relation to what we have said about siloing. We have
22 never said that it is impossible for information to move
23 from one part of the business to another. That would be
24 a slightly remarkable submission for any counsel to
25 make, or any legal team. We have said that of course it

1 is possible, but it is improbable. That is as far as we
2 have put that.

3 That is the part of the case that the Claimants have
4 zoned in on and it is the part that they cross-examined
5 Mr Corbut and Mr Squilloni on, and I was proposing to
6 deal with it and to ask, rhetorically, whether
7 the Claimants have established even that part of
8 causation. We say they plainly have not established --

9 THE CHAIRMAN: But you accept -- we are not quite sure what
10 one is arguing about. You accept that information can
11 pass between -- around the company in relation to
12 different OEMs and different products, at a higher level
13 if not at the level of the sales force. There is no
14 suggestion that a cartel could not operate, would not
15 involve people at a higher level. I am not, I have to
16 say, I am losing sight a little bit of what we are
17 arguing about in this aspect of the case. I understand
18 your other mechanistic arguments, but on whether or not
19 there is any practical impediment to operating a -- for
20 information passing between departments ...

21 MR SCANNELL: Yes, we --

22 THE CHAIRMAN: Could you just summarise where we are and why
23 we are talking about this?

24 MR SCANNELL: We are talking about it because

25 the possibility has been put before the Tribunal that

1 one way that this spillover might have worked and
2 the way that information might have passed from one
3 business unit to another is that information might have
4 been dropped into business units from on high within ZF
5 and within Autoliv so that the cartel could be
6 implemented in that way. That is the --

7 THE CHAIRMAN: Or could spillover --

8 MR SCANNELL: Or could spill over, if one likes, and that is
9 where the Claimants are coming from in relation to this.
10 But it has never gone beyond pointing to that as
11 a possibility.

12 THE CHAIRMAN: Yes, I understand that.

13 MR SCANNELL: Which is no proof at all. There is
14 a possibility within any undertaking to commit an
15 infringement of competition law. That is something of
16 which this Tribunal can simply take notice. That is
17 always possible. But the question that has to be
18 answered in any case is: did that happen? They have
19 never come close to establishing that, and what I was
20 going to focus in on --

21 THE CHAIRMAN: Or, it is not just, "Did that happen", did
22 what happen?

23 MR SCANNELL: Did the senior personnel of ZF and Autoliv,
24 and possibly other undertakings as well, did they
25 transplant information into different business units?

1 THE CHAIRMAN: And what information would have given rise to
2 the spillover.

3 MR SCANNELL: And what information would have given rise to
4 it, and was it useable, was it capable of changing their
5 behaviour? All of those things.

6 So the aspect that was explored in cross-examination
7 was elements -- not all of it, but elements relating to
8 what we have just discussed, and I was going to focus in
9 on that and show the Tribunal what actually came out of
10 that cross-examination. My conclusion in relation to
11 all of that is that, even in relation to this one
12 element of a causal chain, that element has not actually
13 been established.

14 THE CHAIRMAN: Sorry, which element has not been
15 established?

16 MR SCANNELL: The element of establishing that there was
17 some way that information might have spilled over into
18 individual business units that were dealing with
19 the Claimants as opposed to Honda, or Toyota, or
20 Volkswagen or BMW.

21 THE CHAIRMAN: Right.

22 MR SCANNELL: Of course, none of this has ever been properly
23 explained by the Claimants. I am doing my best to
24 assist in articulating what the spillover case actually
25 comprises.

1 THE CHAIRMAN: Yes, let us take this fairly speedily,
2 I think.

3 MR SCANNELL: Pardon me?

4 THE CHAIRMAN: Let us take this reasonably speedily, if
5 I can rush you on this.

6 MR SCANNELL: Yes.

7 So the three broad themes then that Mr West explored
8 in cross-examination were apparently designed to show
9 that Autoliv's senior management had a bird's eye view
10 of every RFQ process and could have influenced any one
11 of them by directing a business unit how to bid and what
12 to bid, and of course the Claimants' case is that that
13 happened in 100% of cases between 2006 and 2011.
14 The three themes were: first, that before business units
15 submitted their RFQ responses, authorisation to submit
16 that bid had to come from Autoliv's project steering
17 committee, the membership of which included senior
18 personnel; the second was that Autoliv's management was
19 provided with information about how particular business
20 units were performing, including how profitable they
21 were and what their sales volumes were; and the third
22 was that meetings within Autoliv were occasionally
23 attended by personnel from more than one business unit.
24 So I will take each of those in turn and I will take it
25 as fast as I can.

1 So the first is, again, the so-called PSC2 meeting,
2 the Project Steering Committee 2 meeting, at which,
3 before an RFQ bid was submitted, the director of
4 the relevant business unit would present the proposed
5 bid to an executive leadership team. As to
6 the structure of those meetings, that can be seen from
7 Mr Corbut's cross-examination at transcript
8 {Day7/16:21}, where Mr Corbut says:

9 "The PSC2 meeting is organised with a time schedule,
10 and every business unit, they have a time slot to show
11 up in this meeting and to present their business --
12 their business case."

13 Now, as to what Mr West hoped to get out of that, it
14 would seem that it was twofold. First, he wanted to
15 highlight that senior Autoliv personnel like Mr Carlson
16 occasionally participated in those PSC2 meetings.
17 The Claimants might think that that is somehow
18 inappropriate. Of course, we say that it is not
19 inappropriate; it is perfectly appropriate for him and
20 other senior people to attend internal Autoliv business
21 meetings at which technical presentations are made by
22 Autoliv personnel.

23 Second, the Claimants wanted to suggest that it
24 would have been possible to manipulate that process in
25 a way that could contaminate the bids that Autoliv was

1 making with information of some sort that came from
2 elsewhere. Now, as I have said, we cannot and do not
3 deny the possibility, that always exists, but apart from
4 the fact that the possibility exists in any
5 organisation, the second problem with the submission
6 that it is merely possible is that it ignores the nature
7 of the PSC2 meetings themselves. Mr Corbut explained
8 that the process of putting together an Autoliv bid was
9 a highly technical, cost-driven exercise, and
10 the purpose of the PSC2 meeting was confined to
11 verifying that the bid that the relevant business unit
12 wanted to make would be profitable in light of
13 underlying costs.

14 The third is that the inference the Claimants want
15 to draw is one based on assumed facts, not proven facts.
16 So they have had full disclosure in the case, but they
17 cannot point to a single instruction ever having been
18 given by a senior person to a business unit directing
19 that business unit to behave any differently than
20 the business unit was proposing to act in the first
21 place. The only instance of any mandate or
22 authorisation from a senior Autoliv officer related to
23 the A9 Project, and the Tribunal may recall that the PSC
24 approved a 6% EBIT scenario proposed by the Peugeot
25 business unit itself, and then later, when Autoliv was

1 selected by Peugeot and the bilateral negotiations began
2 with Peugeot, Peugeot -- not anyone else but Peugeot --
3 as we have seen again and again, demanded that Autoliv
4 reduce that price, the bid price, not once, or even
5 twice, but three times, and when it came to the third
6 demand to lower the bid price, the bid was so low that,
7 if it was agreed to, it would have gone through the EBIT
8 floor approved by the PSC. So that caused Mr Corbut --
9 excuse me, that caused the business unit to approach
10 Mr Carlson and Mr Brenner to ask whether it was
11 acceptable to lower the price through the floor. They
12 duly agreed and the negotiations continued. But there
13 is obviously a very big difference, I would suggest,
14 between senior management giving permission to
15 a business unit to conduct negotiations with Peugeot
16 the way that business unit is proposing to anyway and
17 the senior director of the company directing
18 the business unit to negotiate and do something
19 different than it was proposing to do.

20 The second theme Mr West explored with Mr Corbut was
21 that Autoliv's management was provided with information
22 about how particular business units were performing,
23 including how profitable they were and what their sales
24 volumes were. We say in relation to that it is hardly
25 surprising, it is absolutely as one would expect within

1 any commercial organisation that performance reports
2 have to be given to senior officers. Nor is it
3 surprising that any resulting comparison would be shared
4 among business units.

5 When Mr West cross-examined Mr Corbut in relation to
6 those matters it was unclear what the cross-examination
7 was pointing out. He focused in particular on the fact
8 that the September 2009 monthly report was sent to
9 Ms Eriksson and Mr Carlson, amongst others. One sees
10 that from transcript {Day7/38}, if we could just put it
11 on the screen. I am not going to quote from it, but
12 that is what is going on at that point in
13 the cross-examination. He then highlighted that
14 the September 2009 monthly report was sent to various
15 business unit directors, that is at the top of
16 {Day7/40}. But really that line of questioning did not
17 go anywhere. We can see how Mr Corbut explained
18 the monthly reports on page 40, at line 18:

19 "Looking at this email, yes. Now I would like to --
20 to comment that even if this is sent to -- to all
21 business unit, except to get a kind of general
22 understanding ... of the business, when you are
23 responsible for one specific business unit, it does not
24 really help you in your ... business with your -- your
25 customer."

1 We can see, directly below that at line 25, that
2 there is no follow-up question, it is just left sitting
3 there, and of course what Mr Corbut said was absolutely
4 right, Autoliv's monthly reports were created just to
5 provide an understanding of how the business was
6 performing. It is untenable to suggest that they
7 support the Claimants' case.

8 Then, finally, the third point of Mr West's themes
9 was that meetings within Autoliv were occasionally
10 attended by personnel from more than one business unit,
11 but there, apart from a series of questions relating to
12 RMPIs -- and of course we still do not know what
13 the status of RMPI documents are -- that did not lead
14 anywhere. Mr Corbut was taken by Mr West to the minutes
15 of an internal Autoliv sales meeting that was held on
16 5 March 2009 and that did not seem to go anywhere
17 either.

18 I propose, before we rise for lunch, just to show
19 you that document and then that would be a convenient
20 moment. So the sales meeting is {J1/113/1}. So to
21 contextualise this for the Tribunal's note,
22 the transcript references to the cross-examination on
23 this document are pages 45 to 48 of Day 7 {Day7/45-48},
24 where Mr West is asking questions to Mr Corbut on this
25 document, and I have already made the submission that

1 those questions led nowhere. This document is pleaded
2 to at paragraph 40J of the 4APOC, and Mr Hughes referred
3 to it twice in his report at 2.3.7(a) {E1/2/29} and
4 2.6.7 {E1/2/42}, and the point that is made in both of
5 those places is that the Defendants adopted the same
6 approach to requesting raw material price increases in
7 every jurisdiction they operated in. That is the point
8 that they seek to rely on this document to establish.

9 If we could just begin with that contention, could
10 we turn to {J1/113/4} of this document. So
11 the cherry-picked part of these minutes that
12 the Claimants focus on appears under the name
13 "Stefan K", near the top, beside the two asterisks:

14 "ALL immediately go into customers to show how much
15 price increase we need due to lower volume with
16 the facts. And ask for price increase. Use
17 Christophe's sheet."

18 Then it goes on:

19 "Christophe to distribute [the] volume effect sheet
20 and ALL to educate [business units] complete and
21 start 'every' customer meeting with this chart! - DONE!"

22 Now, the volume effect sheet that is being referred
23 to there is not in the bundles but it apparently is
24 a well-known fact that around the time of these minutes,
25 2009, the entire automotive industry was experiencing

1 something of a crisis following the global financial
2 crisis. That had a dramatic effect on car manufacturers
3 and, in turn, a dramatic effect on OSS suppliers. One
4 can see that all that is being said here is that Autoliv
5 should ask for material price increases because
6 the volumes that they had originally forecast they would
7 be supplying the car manufacturers would never
8 materialise. That obviously does not show that Autoliv
9 will be negotiating RMPs in exactly the same way in
10 every jurisdiction they operate in, let alone that they
11 would be asking for the same level of increase in every
12 jurisdiction.

13 But if we could scroll up to the first page of this
14 document {J1/113/1}, which Mr West did not at any point
15 refer to, we can see Autoliv's reaction to
16 the market-wide difficulties that arose during
17 the global financial crisis. Now, on this page, about
18 a third of the way down, we can see that Mr Jan Carlson
19 is summarising Autoliv's overall position in the market,
20 and four bullet points from the end of his account, he
21 says:

22 "CASH! Strong at year end, and we are burning cash.
23 If sales continue to decline, cash will continue to flow
24 out, which would not be good! Buffer declined by 12% in
25 January and credit rating dropped to 2 points to BBB-

1 with negative outlook. TRW to Junk B+."

2 It goes on to discuss Takata's position in
3 the market, TRW's and so on.

4 He then describes, "2009 Priorities for [Autoliv]",
5 and he describes the priority as:

6 "'Survival' -> Manage action program and cash.

7 "Strengthen customer relationship to be the winner
8 in the recovery.

9 "Gain [market share] from distressed competition.

10 "Secure continued product leadership."

11 So Autoliv's proposed response to the difficulties
12 it faced in 2009 was not to collude or concert, it was
13 to win more business from its distressed competitors and
14 to gain market share. Now, according to the Claimants,
15 Autoliv and TRW are at this very time engaged in
16 a global cartel on 100% of the RFQs that they are
17 supplying, and we say that that is demonstrably not
18 the case and documents like this show that that
19 submission is a sound one.

20 So they were the themes explored with Mr Corbut.

21 I would suggest that they did not lead anywhere, and
22 overall, therefore, it remains my submission that
23 the spillover case is unproven and should be dismissed.

24 THE CHAIRMAN: Thank you. Is that a good place to ...?

25 MR SCANNELL: Yes.

1 THE CHAIRMAN: How are we getting on? All right?

2 MR SCANNELL: Yes, comfortable.

3 (1.01 pm)

4 (The short adjournment)

5 (2.00 pm)

6 MR SCANNELL: Could I begin with three very brief

7 housekeeping points and then I will get to

8 the terra incognita of the economic evidence.

9 First, when were Mr Bastien's CV and job offer
10 disclosed? The answer is October 2023. In terms of
11 what was happening in the case management of the case at
12 that time, that was when the quantum and effects
13 disclosure was due, so it formed part of that, and that
14 is therefore pre-4APOC and pre the Re-Amended Reply.

15 The second housekeeping point I have on my note
16 is: when was the final round offer for the A9 Project?

17 THE CHAIRMAN: Yes.

18 MR SCANNELL: The answer to that question is: 27 March 2009.

19 In terms of a document which states that clearly, we
20 will add that to the trial bundle and give a reference
21 to the --

22 THE CHAIRMAN: Well, if it is not in dispute, then we do not
23 need to trouble with the document.

24 MR WEST: We will just check.

25 THE CHAIRMAN: Okay.

1 MR SCANNELL: The final point related to incumbency and when
2 incumbency arises.

3 THE CHAIRMAN: Yes.

4 MR SCANNELL: I think a useful paragraph to go to in that
5 connection is second Corbut, paragraph 13. That is in
6 the bundle at {C/7/5} and it is paragraph 13, if that
7 could be enlarged. Thank you.

8 THE CHAIRMAN: Oh, yes.

9 MR SCANNELL: So if I could just ask the Tribunal to read
10 that.

11 THE CHAIRMAN: The successor platform.

12 MR SCANNELL: Yes.

13 THE CHAIRMAN: I see, yes. Okay, now that makes sense.
14 Thank you.

15 MR SCANNELL: So now, with glistening palms, I will turn to
16 the economic evidence.

17 So overcharge is addressed at pages 38 to 72 of
18 Autoliv's written closing at paragraphs 162 to 271.
19 The bundle reference there is {S/15/39-73}. There is
20 obviously a great deal of detail there reflecting
21 a vigorous debate that took place between Dr Majumdar
22 and Mr Hughes, and a succession of notes and
23 counter-notes that have passed between them. There is
24 a risk, if the Tribunal descends too readily into
25 the rabbit hole of that detail, that it will lose sight

1 of the true economic landscape of this case, and within
2 that landscape I would suggest that there are two
3 prominent features.

4 The first is that the Tribunal will need to make
5 a finding in respect of the overall approach that
6 the Claimants have made to constructing their case.
7 That seems to have involved, as I alluded to in opening,
8 the Claimants identifying the two OSS decisions and then
9 leveraging those decisions to bring claims and extract
10 settlements from as many suppliers of OSS components
11 around the world as possible, even though they do not
12 relate to their clients.

13 Mr Hughes has obviously worked with Hausfeld in
14 pursuit of that strategy, in the course of which, in our
15 submission, he and the Claimants have lost sight of
16 the primary obligation of any expert who appears before
17 this Tribunal, that being to assist it by furnishing
18 impartial, reliable testimony, even if that does not
19 assist the party instructing him.

20 At paragraphs 165 to 176 {S/15/40-44} of Autoliv's
21 written closing we have set out the relevant authorities
22 relating to the role of an expert before this Tribunal.
23 The Tribunal will recall the cross-examination of
24 Mr Hughes on non-financing loss issues -- I did not
25 conduct that cross-examination, if you recall -- when it

1 was put to him that he had engaged in advocacy on behalf
2 of the Claimants. It will also have in mind that his
3 overcharge analysis is predicated, particularly in
4 relation to the early period, on his own interpretation
5 of documents in this case which Mr Hughes considers to
6 be inculpatory. We have set out our refutation of that
7 particular argument at paragraph 217 of our written
8 closing {S/15/56}.

9 The Tribunal will have to form its own view as to
10 whether Mr Hughes has overstepped the mark and our
11 submission is that he has.

12 The second feature of the expert landscape is that,
13 as Dr Majumdar said in his first report, the Hughes
14 model is obviously misspecified, it is unreliable and it
15 is biased and therefore cannot be used to quantify loss,
16 and that is really the single most important point for
17 the Tribunal to take away on the overcharge issue, that
18 the Hughes model simply does not work. The primary
19 cause of that misspecification would appear to be
20 control variables. It is axiomatic that to isolate an
21 overcharge effect, any multivariate econometric model
22 must control for factors that might be influencing
23 the price other than control cartel effects. If that is
24 not done, then an increase in price detected by
25 the model might be ascribed to a cartel when actually it

1 has been caused by something else. That is what
2 the experts are referring to when they refer to omitted
3 variable bias, and the most obvious candidates for
4 omitted variables are contract-specific costs of
5 producing OSS components and increases in demand for
6 those components. Mr Hughes has not controlled for
7 either of those possible effects on prices. He does not
8 account for them in his alternative cost and demand
9 controls either. The Claimants come close to accepting
10 that at paragraph 13 of their written closing {S/13/14},
11 where they say, in the absence of the contract-specific
12 costs information in question, there is no telling what
13 the overcharge might be.

14 So Mr Hughes' conclusion that there was an
15 overcharge that was caused by an infringement of
16 competition law cannot be relied upon, we say.

17 Now, analogies are always dangerous in legal
18 proceedings, they are probably more dangerous in
19 the present context, but if an analogy were to be drawn,
20 it might be to a market analyst who observes a fall in
21 the share price of a company on a Monday and seeks to
22 ascertain why that happened. If this market analyst
23 fails to take account of the company's financial
24 statements, its earnings forecast, consumer confidence
25 levels, macro-economic and global trading factors and

1 other potential influences, he might conclude that
2 the only reason this share price declined was because it
3 was a Monday. That is a worthless conclusion and that
4 is the problem that we are grappling with with
5 the Hughes model.

6 As the Tribunal has seen, the experts have toed and
7 froed throughout these proceedings exchanging notes and
8 discussing individual aspects of Mr Hughes' model,
9 mainly because, out of a sense of duty to the Tribunal,
10 Dr Majumdar has indulged that analysis and suggested
11 that its robustness can be tested in various ways. But
12 the fundamental problem of omitted variable bias has
13 persisted, it has not gone away, and we, for that
14 reason, do not accept Mr West's submission, yesterday,
15 that the Hughes report has weathered the storm. We do
16 not accept that.

17 It is therefore important, in my submission, that
18 when the Tribunal is considering questions such as who
19 is right and who is wrong on single dummies versus
20 separate dummies, and who is right and who is wrong on
21 RFQ dates, that it does not lose sight of the wood for
22 the trees. They are debates that are happening between
23 experts who are trying to make a silk purse out of
24 a sow's ear. They are trying to make the contraption of
25 the Hughes model work when it is broken.

1 Now, a fair measure of that debate took place in
2 the context of "sensitivities". They are the health
3 checks that Dr Majumdar has prescribed to ascertain
4 whether the Hughes model is robust in spite of
5 the underlying problem of omitted variable bias. They
6 are set out in Dr Majumdar's table of standard errors at
7 {E1/19/1} of the bundle, and the Tribunal will recall
8 that they -- that that table was discussed at length in
9 the hot tub and on cross-examination. Ordinarily,
10 sensitivities should be, I would suggest,
11 uncontroversial. Economists generally embrace them
12 enthusiastically, because they want to know if their
13 answers are reliable. That does not seem to have been
14 Mr Hughes' reaction. His reaction seems to have been to
15 cherry-pick sensitivities that do not materially change
16 results and they are the ones set out in tables 3 to 5
17 of the Claimants' written closing {S/13/50-53}, and then
18 to say in respect of other sensitivities, well, they are
19 changing the Hughes model, and that is what they say at
20 paragraph 138 of their written closing {S/13/54}.

21 So when it comes to other sensitivities, these are
22 the ones that create outlandish vacillations of
23 overcharge from high values to zero and statistically
24 significant undercharges. The Claimants characterised
25 those as changes that do not allow the data to speak to

1 Mr Hughes. I am sorry, I have given you an incorrect
2 reference. The reference to that is paragraph 157 of
3 the written closing {S/13/59}. We say that that is
4 unhelpful, ultimately, to the Tribunal; it is not
5 the approach of economic experts when they give evidence
6 in this place.

7 Now, the Tribunal may recall that on Day 10 of
8 the trial, Mr West asked Dr Majumdar to assume that
9 the Hughes model was well specified and he put it to
10 Dr Majumdar that if one took a table of the results of
11 the by-platform sensitivity and ignored one red box of
12 results that that produced, one could assume that
13 the overcharges were made out on the balance of
14 probabilities, and Dr Majumdar's response to that was,
15 "I would absolutely disagree with that", and that is
16 touching upon the submission that I am making, that,
17 fundamentally, Dr Majumdar is making/suggesting
18 sensitivities, suggesting tests that can be run to see
19 how robust the Hughes model is, but fundamentally where
20 he is coming from is that the Hughes model is
21 unreliable.

22 As to why it is unreliable, I have already
23 identified omitted variable bias. There is also this
24 contrived split between the early period and the main
25 period and I will return to that.

1 Ultimately, we say that it is not all that
2 surprising that the Hughes model struggled, because
3 the task that Mr Hughes is endeavouring to perform is to
4 detect what, in our submission, is undetectable. One of
5 the core planks of our case on liability is that even if
6 there were an infringement of competition law, it is
7 highly unlikely that that would translate into an
8 across-the-board effect on prices of the sort that is
9 alleged.

10 Now, the Tribunal may say, and it has touched on
11 this already, that Dr Majumdar has not advanced a model
12 and so what is the Tribunal to do to quantify loss if it
13 finds that there was an infringement? I would like to
14 address that.

15 PROFESSOR NEUBERGER: Can I just interrupt you before I lose
16 my ... I mean, you are making two major points, as
17 I understand it, which are largely separate. One is
18 the omitted variables problem and the other is the lack
19 of robustness to sensitivities.

20 If I can just focus on the omitted variables
21 problem, do I understand right that you are saying that
22 even if the model stood up to the sensitivity analysis
23 and showed that there was an overcharge -- that prices
24 were somewhat raised in a cartel period relative to
25 another period, are you saying that that in itself would

1 be irrelevant because there could be other factors which
2 would explain the increase in price apart from a cartel?
3 I mean, is the omitted variables bias enough to cause us
4 to disregard the econometric analysis?

5 MR SCANNELL: Well, I --

6 PROFESSOR NEUBERGER: Is this your contention?

7 MR SCANNELL: Yes. Well, I understand Dr Majumdar's
8 position to be that the omitted variables bias is
9 a foundational problem with the Hughes model. If it
10 were not a fundamental problem, then all of
11 the sensitivities, once conducted, might suggest that
12 the model is actually working, but the sensitivities
13 tell Dr Majumdar that the model is not working and
14 therefore his initial assumption that this model will
15 not work because of omitted variables is confirmed, he
16 would say. So that is the way he thinks about it.

17 PROFESSOR NEUBERGER: Okay, thank you. That is very
18 helpful.

19 MR SCANNELL: So in relation to the question I have
20 hypothesised as to what the Tribunal would do given that
21 Dr Majumdar has not put forward his own model, I would
22 suggest that there are four points.

23 The first is that the reason Dr Majumdar has not put
24 forward a model of his own is that the datasets that are
25 available are incapable of being shaped into a model

1 that identifies an overcharge. Of course we do not
2 accept that there is a credible basis for the Tribunal
3 to find the sort of cartels that the Claimants allege,
4 and I do not propose to repeat the points that we make
5 in that connection, and, of course, I will not repeat
6 also all of the points that we make about
7 the unlikelihood of an overcharge. But if the Tribunal
8 were against me on all of those points, then
9 the position would remain that Dr Majumdar has engaged
10 as best he can with the Hughes model; he has, to an
11 extent, put the omitted variables bias problem to one
12 side when he is identifying all of the problems --
13 the remaining problems within the model; and of course
14 he has not been able to prevail on Mr Hughes to discard
15 his model entirely, but he has at least persuaded him
16 that there are fundamental defects with it and that he
17 should remedy those.

18 Now, as I have indicated, what Mr Hughes has done is
19 to remedy some of them, but not all of them. It is
20 usually the case that he remedies the ones that do not
21 result in his overcharge diminishing and rejected those
22 that do not. But if the Tribunal were to feel that they
23 must use the Hughes model, then logically it would have
24 to be the Hughes model with all of those defects
25 remedied. But what one then finds is that

1 the overcharge is zero, so one comes full circle,
2 because one of the fundamental defects is that the whole
3 splitting out of the cartel period into an early period
4 and a main period does not work. There needs to be
5 a single dummy for the entire period, that is one of
6 Dr Majumdar's main points, and if one does use a single
7 dummy for the cartel period, one finds a zero overcharge
8 for seatbelts and a zero overcharge for airbags, and as
9 long as one makes one pretty uncontroversial -- accepts
10 one pretty uncontroversial proposition, which is
11 the removal of a separate wind-down dummy for steering
12 wheels, because there is no obvious reason to have one
13 for steering wheels, then there is a zero overcharge for
14 steering wheels also.

15 Now, I am going to take the balance of the points in
16 dispute between the experts at a very high level.

17 PROFESSOR NEUBERGER: Sorry to stop you. Just on that last
18 point, is there actually data for what happens if you
19 have a single -- sorry, the last case you talked about
20 was seatbelts, was it?

21 MR SCANNELL: It was steering wheels.

22 PROFESSOR NEUBERGER: Steering wheels, sorry, and you are
23 saying that if you remove the wind-down dummy --

24 MR SCANNELL: For the wind -- yes, the wind-down dummy.

25 PROFESSOR NEUBERGER: -- and you have a single variable for

1 the early and late --

2 MR SCANNELL: Yes.

3 PROFESSOR NEUBERGER: -- single dummy. That sensitivity is

4 available to us, is it?

5 MR SCANNELL: That, as I understand it, is page 2 of

6 the standard errors table {E1/19/2}.

7 PROFESSOR NEUBERGER: Fine.

8 MR SCANNELL: That is at E1/19/23 [sic].

9 THE CHAIRMAN: Can we just bring that up.

10 MR SCANNELL: That is the first row of the page.

11 PROFESSOR NEUBERGER: Fine. Thank you, I just wanted

12 the reference to it. It has now gone.

13 THE EPE OPERATOR: Can I check the reference, please,

14 E1/19 ...?

15 MR SCANNELL: Yes, this looks right. It is E1, 19, page 2.

16 Sorry. Yes, this is the right page.

17 PROFESSOR NEUBERGER: That lacks the wind-down dummy?

18 MR SCANNELL: So this has --

19 PROFESSOR NEUBERGER: Sorry, it is a point of detail.

20 MR SCANNELL: This one does have the wind-down dummy, I am

21 told, Professor. To get Dr Majumdar's confirmation that

22 what I have submitted is his position, one needs to go

23 to his note, the last of the notes that he put in, which

24 is at E1/777.1.

25 PROFESSOR NEUBERGER: Fine.

1 MR SCANNELL: It is paragraph 22 of that note. Sorry, K
2 {K/777.1}.

3 MR WEST: I must object. This is the document which my
4 friend did not admit in evidence yesterday. That is why
5 he is going to the correspondence bundle.

6 THE CHAIRMAN: Yes, we do not want to introduce new evidence
7 at this stage.

8 MR SCANNELL: Well, we can take it from the written closing.

9 MR WEST: We certainly cannot.

10 THE CHAIRMAN: We need the evidence.

11 (Pause).

12 MR SCANNELL: This is not -- I do not want to be unfair to
13 Mr West. The point is made at paragraph 230 of our
14 written closing {S/15/61} and there is a reference to
15 Dr Majumdar preparing the note, but if the Tribunal is
16 not minded to admit the note, then I am not going to
17 force that issue.

18 THE CHAIRMAN: Okay.

19 MR SCANNELL: So I was about to say that so far as
20 the balance of the points in issue are concerned, I am
21 going to take those at a high level, as Mr West did,
22 because, ultimately, we say that none of them detract
23 from the core point, which is all about the reliability
24 of the Hughes model and Dr Majumdar's position that it
25 is misspecified and unreliable. So in our written

1 closing we have split out the discrete disputes between
2 the experts into disputes that are common to all of
3 the OSS components and disputes that are specific to
4 particular OSS components. That is paragraph 185 at
5 page 47 {S/15/47}. It may be 46 of the document you are
6 looking at, if it is in hard copy.

7 The first of the issues that affect every OSS
8 component is the omitted variable bias issue and I have
9 mentioned that already.

10 The next is unknown RFQ dates and part numbers, and
11 before any members of the Tribunal consider
12 defenestrating themselves at this point, I will be brief
13 on this issue. The issue arises because the experts
14 need RFQ dates to determine which of them fall within
15 the alleged infringement period and which fall outside
16 it, but in the majority of cases they do not have RFQ
17 dates. In his first report, Mr Hughes said that
18 the dates could be supplied for any OSS component by
19 simply subtracting 30 months from the start of
20 production date for the component. Dr Majumdar
21 explained that that was more likely to result in error
22 than accuracy, and he proposed a superior method. He
23 had observed that, in almost every case, the RFQ dates
24 of an OSS component of a car are the same as the start
25 date of the relevant platform and so Dr Majumdar

1 suggested that the solution is to use the start date of
2 the platform as a proxy for the RFQ date. That is
3 paragraph 200 of our written closing {S/15/51}. That
4 also removes the distraction of the debate that took
5 place between Ms Ford and Mr West as to whether
6 modifications to a part results in new part numbers, and
7 whether new part numbers result in new RFQs being
8 issued.

9 A disagreement then broke out between the experts as
10 to how the by-platform process would work. One option
11 is to replace all known RFQ dates with the earliest
12 estimated RFQ date on that platform using Mr Hughes
13 start of production minus 30 months to supply that date
14 and when the dates of particular RFQs on the platform
15 were known, to use them. The experts called
16 that "method A", and that is a bit of a mess, because it
17 mixes apples and pears, it gives estimates primacy over
18 known RFQ dates.

19 The other option is to align unknown RFQ dates with
20 the dates of known RFQs on the same platform. That is
21 method B, and it is more rational and sensible.
22 Mr Hughes seems to agree with that, but not when it
23 might reduce the overcharge that he establishes, so he
24 would like to apply method B to airbags and to seatbelts
25 but he would like to stick to method A when it comes to

1 steering wheels.

2 I would suggest that the way through all of that is
3 to apply method B of the platform -- of the by-platform
4 approach to that problem of unknown RFQ dates.

5 Finally, in relation to method B, we have mentioned
6 in our written closing that Dr Majumdar has confirmed
7 the expectation he expressed in the hot tub that if
8 method B were applied to resolve the unknown RFQ issue,
9 the other sensitivities he had proposed would remain
10 valid and would continue to confirm that Mr Hughes'
11 model is not robust. Dr Majumdar has now provided that
12 same confirmation, but it is in the same note and you
13 have my submissions on that.

14 The next issue common to all of the components is
15 whether one should model based on the price of an OSS
16 component, at the start of production, or over
17 the entire life span of the contract, taking account of
18 price amendments along the way, and that is
19 the so-called "new contract model" issue. Now,
20 Mr Hughes takes the latter approach, considering
21 the price of the component net of all of these price
22 amendments, but he finds no effects in respect of
23 the amendments -- the price amendments themselves, or at
24 least no statistically significant ones.

25 Dr Majumdar therefore says, quite sensibly, it might

1 be thought, well, if the price amendments are not
2 actually doing anything, it is obviously sensible to see
3 what happens when you split the price amendments out and
4 just look at the new contract price alone as
5 a sensitivity check. When he does that, what he finds
6 is yet further evidence that the Hughes model is flawed.
7 The coefficients wobble all over the place and
8 Mr Hughes' overcharges essentially vanish.

9 Mr Hughes does not seem to challenge that, but he
10 clearly does not like it. He resists it by repining
11 that he does not like to discard data points. That,
12 I would suggest, is a rather self-serving point when all
13 Dr Majumdar was seeking to do was to run a sensitivity
14 check on the analysis that Mr Hughes had carried out
15 using all of the data points. In any event,
16 Professor Neuberger, you may recall that in the hot tub
17 you suggested that Dr Majumdar might not be throwing
18 away data points, he was keeping all of the prices of
19 the contracts, but he just was not reintroducing
20 the prices of the same components at different points in
21 time.

22 The next point between in issue between the experts
23 relating to all OSS components is the splitting out
24 analysis between the early period and the main period,
25 and the detail of our submissions in that respect are at

1 paragraphs 213 to 223 of our written closing and
2 I commend those paragraphs {S/15/55-59}. For present
3 purposes, I am simply just going to get to the point in
4 relation to that. So, ordinarily, the approach
5 economists take to determining the existence of an
6 overcharge is to look at a period before the time when
7 they say that there was a cartel and to undertake
8 a before, during and after analysis of prices. But what
9 Mr Hughes has done is rather different. He has looked
10 at prices during what he calls the "main period" and he
11 has found that they were at a particular level. He has
12 then looked at the period before that period of time and
13 he has found that the prices were actually higher before
14 the main period than they were in the main period
15 itself.

16 Now, what one might expect an economist to do in
17 that position is to say to the Claimants, "Well, there
18 is a problem here, because either there was no cartel in
19 the main period or, if there was a cartel in the main
20 period, it was ineffective because there seems to be no
21 overcharge", but instead, what Mr Hughes chooses to do
22 is to say that there is a further cartel in operation in
23 the early period. Even more troubling than that,
24 Mr Hughes says that he can discern the existence of
25 the early period cartel by interpreting the documents.

1 Now, we do not accept that that is appropriate for him
2 to do. He does not have expertise in the interpretation
3 of documents and it is not his role to interpret them.
4 In any event, as the Tribunal will see from
5 paragraph 217 of our written closing {S/15/56}, we do
6 not agree with Mr Hughes' interpretation of
7 the documents.

8 Beyond that criticism, Mr Hughes, having decided
9 that the cartel period began as early as 2002 -- and we
10 have seen Mr Evangelista's email in 2002 to stress test
11 whether that is a fair conclusion for him to have drawn
12 -- he then analyses the data as if there were two
13 cartels. So he cherry-picks between the two periods to
14 avoid results suggesting that there was either a lower
15 overcharge or no overcharge on particular categories of
16 component in one or other of his periods. That is what
17 he seems to be doing with seatbelts, for example, and we
18 address that at 218 of our written closing {S/15/57}.
19 He disregards the early period all together to get his
20 overcharge for the main period when it comes to
21 seatbelts and we say that that is an inconsistent
22 approach. Of course he gets even larger overcharges
23 than the main period in the early period for airbags and
24 steering wheels.

25 Now, Dr Majumdar is, quite understandably, puzzled

1 by that approach of splitting out things into an early
2 period and a main period. Being as fair as he can to
3 Mr Hughes, he suggested that even if one allows for
4 the possibility of infringements in an early period
5 before the main period, at the very least, a single
6 cartel dummy should be applied throughout
7 the infringement period. But when that is done, as
8 I have said, for airbags, the overcharge disappears
9 completely, not just in the early period but in both
10 periods, and Dr Majumdar takes that as yet further
11 evidence that the model cannot be relied upon.

12 Finally on the issues that span all of the OSS
13 components simultaneously, there is a further problem
14 with Mr Hughes' report and that is that even if his
15 analysis were to be accepted, it would only apply to
16 Peugeot, it would not apply to VO or FCA, which were at
17 all material times completely separate and distinct
18 companies from Peugeot. It is not safe simply to assume
19 that because one company has suffered an overcharge at
20 a particular level that others have also. That might be
21 a fair conclusion to reach in a follow-on damages case,
22 but it is not a fair conclusion to reach in a standalone
23 case like this, and that is not something that
24 Dr Majumdar feels able to agree with. It is not what
25 the Commission seemed to suggest was appropriate either,

1 given that they considered each of the OEMs that they
2 investigated separately and not together. It also does
3 not take account, of course, of bespokeness, of
4 Autoliv's relationship with Peugeot, Fiat and Vauxhall,
5 and the fact that they were mediated through different
6 business units. It does not take account either of
7 Autoliv's market share for each of the claimant OEMs'
8 businesses.

9 The serious concern that we have in relation to that
10 is that -- well, it is the same, in fact, as -- let me
11 put it this way. One of the serious concerns that we
12 have in relation to all of that is that we have
13 identified certain flaws and defects in the Hughes model
14 even when it gets applied to Peugeot. When it gets
15 applied to other OEMs, like Fiat and Vauxhall, then
16 the concerns become even greater, because we are now
17 dealing with separate companies whose data has not even
18 been examined and is not plugged into the model at all.

19 As to the specific issues, so the issues that are
20 specific to particular OSS components, they are
21 addressed at paragraphs 224 to 246 of Autoliv's written
22 closing {S/15/59-65}. I do not propose to deal with
23 those individually.

24 I do want to say a word about Mr Hughes' analysis on
25 his spillover claim, and the point that I want to make

1 here goes all the way back to the first point I made to
2 the Tribunal in this case, which is that the real
3 difficulty with the Claimants' case on spillover and
4 the reason that we insist that it just does not work and
5 is trying to contrive claims out of the OSS decisions is
6 that, according to Mr Hughes, it does not make any
7 difference at all whether there were cartels targeting
8 the Claimants' supplies or not. According to Mr Hughes,
9 with or without a cartel, the effect is identical.
10 Consistent with that starting point, he applies exactly
11 the same methodology to the primary and first
12 alternative cases as he applies to the spillover case.
13 We do not accept that that is a valid approach. At
14 the very least, we would say, spillover effects are
15 going to be less intense than the effect of
16 a fully-blown cartel. That is simply obvious.
17 Dr Majumdar has made that point and we have set out his
18 quotation at paragraph 251 of our written closing at
19 {S/15/67}.

20 Last week, Mr Hughes submitted a new note to
21 the Tribunal purporting to calculate spillover damages,
22 but all that has done -- and this was confirmed by my
23 learned friend yesterday -- is to remove ZF from his
24 calculations and correct an error he made in his second
25 report, where he purported to apply his overcharge to

1 the Claimants' volume of sales, but in fact applied it
2 to Autoliv's and ZF's VOC data. He now applies his
3 overcharge to the Claimants' volume of purchases from
4 Autoliv.

5 Now, Dr Majumdar has responded to that in a note.
6 (Pause). That is the same note. I am not going to say
7 any more about that.

8 So the position that we are in with the Claimants'
9 spillover case is really now rather striking. We say
10 that there is no legal analysis underpinning it, and we
11 can see that from the Claimants' skeleton argument for
12 trial and from their written closing, where the issue is
13 not addressed in full, and we would say that there is no
14 econometric analysis underpinning it either. So that is
15 all I want to say about overcharge.

16 I would like to deal, finally, with pass-on, and
17 I am not going to take this at great length either,
18 again on the basis that it is -- particularly when it
19 comes to the economics, I am not going to traverse
20 the economic debates. The relevant references, for
21 the Tribunal's notes, are paragraphs 132 to 139 of our
22 skeleton argument for trial, that is {S/2/37} to
23 {S/2/50}; paragraphs 272 to 381 of our written closing
24 submissions at pages 73 to 97 of S/15 {S/15/73-97}; and
25 in particular Day 3 of the transcript at {Day 3/77-106},

1 and you may recall I addressed the Tribunal on
2 the Trucks case, which is the proximity test for
3 pass-on.

4 The Tribunal also has the cross-examination of
5 Mr Gautier of PSA at transcript Day 4 {Day4/57}, of
6 Ms Biancheri of FCA, again on Day 4, beginning on
7 page 124 {Day4/124}, and of Mr Couturier of
8 Vauxhall/Opel at transcript Day 5 beginning on page 38
9 {Day5/38}, and of course of Mr Hughes at transcript
10 {Day10/58}, beginning on page 58.

11 Just pausing at that point. The Tribunal, if it
12 wants a swift way into a precis of the factual
13 cross-examination and where we have come out on that,
14 will find that in the cross-examination of Mr Hughes at
15 transcript Day 10, because if you recall, I took
16 Mr Hughes to the evidence that came out in
17 cross-examination from Ms Biancheri and Mr Gautier.

18 Now, the thrust of the evidence focused on the way
19 that an overcharge would be passed on not to consumers
20 -- and we underline this a number of times -- but to
21 independent dealers through the net dealer price. That
22 was the mechanism through which the Claimants were able
23 to manage and protect their profitability targets by
24 adjusting discounts and rebates available to their
25 independent dealers. The experts agreed that this was

1 the correct point in the supply chain at which to
2 consider pass-on and that the net dealer price was
3 the price to look at and not the price that was paid by
4 end consumers, so not the list price, for example.

5 I would like to address two points in closing, one
6 of which I am going to deal with very briefly, and that
7 is the non-applicability of the four-factor approach
8 that we saw in the Trucks case when we considered that
9 together, and the second concerns the Claimants'
10 misreading of the evidence on cross-examination as to
11 the pass-on mechanism through the net dealer price.

12 So as to the first of those points, the Claimants,
13 and in turn Mr Hughes, placed quite heavy reliance on
14 Trucks as the lynchpin of the argument, which we have
15 always said is an improbable one, that Autoliv would not
16 be able to establish pass-on. Very little is now said
17 about it in their closing arguments. Paragraph 184 of
18 their written closing {S/13/67} reruns the legal test
19 for causation in the context of pass-on, which has
20 actually never been in dispute, and then paragraph 185
21 quotes the four factors that were considered in Trucks
22 in the context of supply pass-on. But as to
23 the submission they make, it does not amount to a great
24 deal. They say, at paragraph 187 {S/13/68}:

25 "The Claimants do not repeat what they said in

1 opening about [the four] factors: the short point is
2 that none of them militates in favour of a proximate
3 causal link in this case."

4 That comes close to a concession in relation to
5 the debate that we had. I have shown the Tribunal
6 the Trucks case, I have shown what the Competition
7 Appeal Tribunal said in the Trucks case in relation to
8 pass-on, both in the context of resale and in
9 the context of supply. Our twofold submission in
10 relation to that is, first, that one does not have to
11 apply a four-step test, one can simply take it that
12 there is a relationship between a component and the good
13 that the component gets incorporated into, and, second,
14 that if one applies the four-step test anyway, we
15 satisfy it.

16 As to where the factual evidence --

17 PROFESSOR NEUBERGER: Before you go on, can I just clarify.

18 I mean, so -- I guess there is a legal problem about --
19 a legal interpretation about pass-on. I mean, supposing
20 that the Tribunal were convinced that Peugeot, for
21 example, set its car prices entirely in relationship to
22 the competitor prices -- when I am talking about car
23 prices, I am talking about net dealer prices -- and it
24 sets it entirely in relation to the competition, and
25 that costs happen to have had no influence on Peugeot's

1 decisions, but the Tribunal also is persuaded that,
2 ultimately, one way or another, maybe through
3 competitors' actions, costs do get -- the costs of
4 excess prices on OSS ultimately get passed on in some
5 form to prices of cars. But the -- so Peugeot has done
6 nothing specific in response to the costs increase.
7 Under those circumstances, is there a pass-on defence or
8 not?

9 MR SCANNELL: I would say that there is a pass-on defence
10 there. If the other car manufacturers -- taking
11 a global cartel, where it is said that all OSS
12 components to all OEMs are affected, if other car
13 manufacturers are taking the approach that they are
14 passing on and if Peugeot is linking its prices always
15 to the prices that they are actually charging at the net
16 dealer level, I would say that effectively they are
17 passing on.

18 PROFESSOR NEUBERGER: There does not have to be any
19 connection between any specific decision of Peugeot and
20 the overcharge for the pass-on argument to work; is that
21 right?

22 MR SCANNELL: Well, there never has to be any conscious
23 passing on, of course.

24 PROFESSOR NEUBERGER: No.

25 MR SCANNELL: So it is always a question of whether or not

1 increased costs are going to get picked up somewhere in
2 the business. What the evidence in relation to that was
3 from Peugeot was that in some cases, but not in all
4 cases, they will know what the costs of their components
5 are when they -- before they ever fix the price, and
6 where that is the case, they may very well be taken into
7 account in setting the list price of the car. But where
8 they do not know that, which Mr Gautier accepted might
9 also sometimes be the case, then you are into the realm
10 of saying, well, what could you do about it if it
11 manifested itself later in the piece, after you have set
12 the list price of your car and you are now at the stage
13 of implementing your prices? By implementing prices,
14 I mean what do the national managers employed by Peugeot
15 do when they are actually selling the cars to
16 the independent dealers. There, his evidence was
17 tolerably clear, I would suggest. It was that they
18 could do --

19 PROFESSOR NEUBERGER: They could.

20 MR SCANNELL: -- that they could pass on via the mechanism.

21 So that is the context.

22 Then, again, I do not want to dodge your question.
23 I think, Professor, if I understand you correctly, you
24 are asking: but what if you know that they are not going
25 to do that?

1 PROFESSOR NEUBERGER: Yes.

2 MR SCANNELL: If you know that they are not going to -- so
3 they have noticed the price increase, they are not going
4 to pass it on because they are concerned about
5 competitive conditions in the market and so on. To that
6 I can only revert to what I said initially, which is
7 that if everyone else in the market is passing on and
8 they are linking their prices to those other car
9 manufacturers, there is a measure of pass-on that is
10 happening organically within what they are doing. But
11 if it were to be established on the facts that they are
12 never passing on through the net dealer price, then
13 I would have to accept that that is the finding that has
14 been made, that they are never passing on and that there
15 is no pass-on.

16 PROFESSOR NEUBERGER: So if they do not -- you are saying if
17 they do not take any specific response to the price
18 increase, then there would be no pass-on, or are you
19 saying that if the -- if prices generally are inflated
20 because of the cost increase because of actions of
21 others, is there -- but they are not doing anything?

22 MR SCANNELL: So now we know that no one in the market is
23 doing anything about the cost increases?

24 PROFESSOR NEUBERGER: I have no idea what -- I have no
25 evidence on what the other people are doing, but --

1 MR SCANNELL: Yes, yes.

2 PROFESSOR NEUBERGER: So, I mean, it may well be that
3 the prices of cars are inflated by the overcharge on
4 OSS, but it is nothing to do with Peugeot. Peugeot has
5 Peugeot's policies. Peugeot's prices have been
6 unaffected by the cost increase, then do I find pass-on?

7 MR SCANNELL: The point I made initially, that if the OSS
8 cost becomes known to Peugeot during the manufacturing
9 process, if you recall, just pausing for a moment,
10 I will return to this. But if you recall, I took
11 Mr Gautier to that huge annex of his --

12 PROFESSOR NEUBERGER: Yes.

13 MR SCANNELL: -- where he spoke about how they built up
14 a price all the way to the list price.

15 PROFESSOR NEUBERGER: Yes.

16 MR SCANNELL: There was a question as to a big fat black
17 arrow, and when you are actually working out -- when you
18 are fixing the price, do you know what your costs are at
19 that point or does that all happen afterwards? Where we
20 came out in relation to that was: sometimes is probably
21 the one-word summary. Sometimes we will actually have
22 bought our OSS components by that time and sometimes we
23 will not. If they had, so if they knew what the prices
24 were, there is no reason at all to imagine that that
25 would not feature in the list price of the car, and if

1 100% of it were included in the list price of the car,
2 then, irrespective of benchmarking and so on, there
3 would be an element of pass-on. That element of pass-on
4 would actually be direct to consumers in the form of
5 a list price.

6 Then his evidence was, if we do not know when we
7 select the list price what the costs of the components
8 are, then we have the mechanism and we will always try
9 to preserve the profitability margin that we have set,
10 so that is the margin above all of our costs. So now we
11 know what all of our costs are, we are always going to
12 preserve the profitability margin above the costs and we
13 can use the net dealer price to ensure that we get that
14 margin.

15 So I would say that, in those circumstances, it is
16 tolerably clear what the evidence actually shows, which
17 is that Peugeot would pass on all the time. They would
18 never actually not pass on. Now, I accept that is not
19 dealing with your hypothesis, Professor. Your
20 hypothesis is: what if you know that they are not doing
21 that? It is tricky to matriculate into that mindset
22 when the evidence does not seem to be saying that,
23 I would suggest.

24 PROFESSOR NEUBERGER: Right.

25 MR SCANNELL: But I cannot take it any further than I have

1 in relation to what would happen on that hypothetical.

2 PROFESSOR NEUBERGER: Thank you.

3 MR SCANNELL: I am sorry I cannot be of greater assistance
4 on that.

5 There is a further point. I do not think that this
6 is actually necessarily going to move on our discussion
7 a great deal, unfortunately, but just to remind you,
8 Professor, of the evidence in relation to this. When it
9 comes to benchmarking, one is always talking about
10 setting the list price, so it is important to be clear
11 about that. One is never really benchmarking to the net
12 dealer price. If you recall, I explored that with
13 Mr Gautier as well. So I asked him, "What of your
14 competitors' prices do you actually know"? Where we
15 came out in relation to that is: well, we know their
16 list prices, that is the price that gets advertised in
17 glossy magazines, and we know their promotions prices,
18 so they are the prices that will occasionally also
19 appear in glossy magazines and publications saying, "10%
20 off the list price of, you know, whatever car it might
21 be", but they do not know the net dealer prices of their
22 competitors, because that is commercially confidential
23 information and it is information that cannot be
24 aggregated and bought either. So we had a discussion in
25 relation to all of that and he fairly accepted that

1 obviously they can only benchmark to prices they know,
2 and so the benchmarking will only ever get you as far as
3 the list price. But what we are really grappling with,
4 or what the experts have been grappling with is, if one
5 accepts that the net dealer price is the price to focus
6 in on, is the pass-on happening via that outlet.

7 I am not sure that that is necessarily taking things
8 further forward.

9 PROFESSOR NEUBERGER: Thank you.

10 MR SCANNELL: Now, I was actually going to recap or
11 summarise what Mr Gautier said in evidence, but in fact
12 that -- the discussion that we have just had rather
13 encapsulates it and I think that it would be duplicative
14 and wasteful of the Tribunal's time to go over that
15 again.

16 So if I could just very briefly mention the evidence
17 of the other witnesses, which is Ms Biancheri and
18 Mr Couturier. So in relation to FCA, it is said by
19 the Claimants that Ms Biancheri's evidence was that Fiat
20 would not increase its prices through the net dealer
21 price unless the cost was such as to materially increase
22 the overall cost of the vehicle, and the evidence that
23 the Claimants rely on in that regard is a reference at
24 page 159 of the Day 4 transcript {Day4/159}, where
25 Ms Biancheri said that the amount that any given cost

1 has been increased, if it was relevant versus
2 the overall costs of the vehicle. But, again, this is
3 mixing up the question of whether they are going to
4 change the list price of the vehicle or whether they are
5 going to adjust the net dealer price, and Ms Biancheri
6 was quite clear in her evidence that they were -- that
7 they regularly did and would adjust the net dealer price
8 even if increases in costs did not translate into
9 changes to the list price.

10 So the short point in relation to Fiat is that when
11 adjusting -- when addressing adjustments through the net
12 dealer price in order to respond to an increase in
13 standard costs Ms Biancheri agreed that FCA would aim to
14 do precisely that.

15 As to Vauxhall/Opel, finally, Mr Couturier's
16 evidence in his witness statement was that GM was
17 looking at the profit and we needed to reach the target
18 when we were deciding on VO vehicle pricing. That was
19 in his first witness statement at paragraph 26 {B/16/7},
20 and he also accepted that if GM were facing an increase
21 in costs, it had to find a way to offset that cost so
22 that the overall costs remained within the budget.
23 Mr Couturier agreed during cross-examination by ZF that
24 the amount of commercial support GM gives to dealers is
25 discretionary and that it can decide on the level of

1 support to give to its dealers. He agreed that GM can
2 decide to give or not to give large amounts of
3 commercial support to dealers, so {Day5/61:12-23}, for
4 example, he said:

5 "That's correct, yes, according to the tactics."

6 So this evidence, I would suggest, does recognise
7 a mechanism available through which to make adjustments
8 to the level of the dealer support and that would be
9 sufficient to achieve pass-on. But the evidence does go
10 beyond that to say that the mechanism would have been
11 used, because Mr Couturier said that the mechanism would
12 have been used "according to the tactics".

13 As I have said, I do not propose to ventilate
14 the expert issues in relation to pass-on, but where
15 Autoliv came out on pass-on, taking account of volume
16 effects, and just so that the Tribunal has that clear in
17 its mind, is that 35% of any established overcharge
18 would have been passed on to dealers through the net
19 dealer price. Dr Majumdar's final position on the rate
20 of pass-on, net of volume effects, was explained in
21 direct examination on {Day10/111} and following. In his
22 report, he had estimated that 48% of the overcharge
23 would have been passed on. That is his first report at
24 paragraph 14 {E1/6/5}. That initial estimate of
25 the impact -- sorry, his initial estimate of the impact

1 of a volume effect on that pass-on rate was based on an
2 assumed elasticity of 2 to 3. Elasticities are
3 addressed in the JES at row 83 {E1/13/47}. Applying his
4 elasticities led him to conclude that netting off from
5 the 48% figure a certain amount for lost volume resulted
6 in an estimate of pass-on net of the volume effects of
7 between 38 and 42%, and that is reflected in the last
8 paragraph of his comments on row 83 {E1/13/48} of
9 the joint expert statement.

10 But Dr Majumdar did make a concession, if
11 the Tribunal recalls, during direct examination. He
12 identified an error in his use of a European paper on
13 elasticities and correcting that error meant that he
14 agreed with Mr Hughes that the correct figure for
15 elasticity was in fact 4. So applying that elasticity
16 of 4 meant that Dr Majumdar's revised pass-on figure net
17 of the revised volume effect, based on applying the same
18 elasticity as Mr Hughes, is 35%.

19 Finally, before I sit down, just one very final
20 point in relation to pass-on and burdens of proof. We
21 accept, of course, that we bear the burden of proof in
22 relation to establishing pass-on. When it comes to
23 volume effects, however, the position is the reverse.

24 I am grateful.

25 THE CHAIRMAN: Thank you.

1 Mr West.

2 MR WEST: I am happy to proceed with my reply and I think we
3 will finish today if I do, but should we have our short
4 break now?

5 THE CHAIRMAN: Is that convenient for you? You would prefer
6 five minutes now?

7 MR WEST: Yes, as long as the Tribunal does not mind this
8 being perhaps less polished than it might otherwise be.

9 THE CHAIRMAN: No.

10 (3.02 pm)

11 (A short break)

12 (3.14 pm)

13 Reply submissions by MR WEST

14 MR WEST: So my friend made some points this morning about
15 overall plausibility, the plausibility of the Claimants'
16 case and why he said it was an implausible case, but as
17 the Chair and the Tribunal have raised themselves, many
18 of those points about plausibility apply just as much to
19 the named OEMs in relation to whom we know, of course,
20 that Autoliv was involved in cartels, and it is not
21 implausible to think that it would also be involved in
22 cartels against the Claimants, we would say very much
23 the contrary, and neither is it implausible, I would say
24 -- I would submit, that the involvement it had in
25 the five cartels identified in the Commission decisions

1 to which Autoliv was party would have wider effects on
2 its customer base and the market more generally.

3 My friend then had a point about how the pleaded
4 case against Mr Carlson had only been raised very late,
5 but my main response to that is that, irrespective of
6 when the claimant pleaded anything against Mr Carlson,
7 it is not unreasonable in a case like this to expect
8 a senior person to appear to explain the allegedly
9 limited scope of the wrongdoing. It is of course up to
10 Autoliv to decide who it wishes to call, if it wishes to
11 give such evidence, and Mr Carlson is the obvious
12 candidate, because he has the advantage that he was
13 there at the time and he is still there now.

14 As to when specific pleaded allegations were made
15 against the relevant individuals, an allegation was made
16 against Mr Rivière for the first time in the Amended
17 Particulars when it was pleaded that he was under
18 investigation in the CADE investigation in Brazil and
19 then, in the re-Amended Particulars, the document about
20 Takata's lack of zeal on the A9 was pleaded and that
21 plea named Mr Rivière specifically. Those developments
22 both happened in 2022, long before the witness
23 statements were exchanged in early 2024.

24 Now, Mr Scannell explained, this morning, that
25 Autoliv did not call Mr Rivière because he had not held

1 a role within the PSA business unit prior to 2006, but
2 in my submission, that is no explanation of any kind
3 because, from 2006 onward covers most of the cartel
4 period, including almost all of the Commission cartel
5 period, and of course Mr Rivière is still there now. We
6 had the peculiar scenario of looking at Mr Rivière's
7 email about the A9 and my friend making submissions
8 about where it is that Mr Rivière likely got his
9 information when of course Mr Rivière could just have
10 been asked.

11 For Ms Eriksson, she was first named in connection
12 with the emails concerning RMPs in the Re-Re-Amended
13 Particulars, which was in October 2023, also prior to
14 the exchange of witness evidence, and those emails were
15 either sent or copied, as we saw, to Mr Rivière and to
16 Mr Westerberg, although we did not plead either of them
17 in that connection at the time, but their involvement
18 was plain on the face of the documents.

19 The email concerning the meeting between Mr Carlson
20 and Mr Lake at {J1/128/1} was first pleaded in
21 the Re-Amended Reply, so that is in July 2024. Whilst
22 that was after the exchange of witness statements,
23 Autoliv could of course have said, "Well, it is not fair
24 for you to be allowed to amend in this way without us
25 being allowed to answer the allegation", but of course

1 they did not. Likewise the various other documents
2 I have taken the Tribunal to as inculpatory documents,
3 like Mr Schönborn's email, have been in the pleadings
4 since an early stage in this case.

5 My friend mentioned the Phones 4U case as authority
6 for the proposition that the court will generally prefer
7 the contemporaneous emails rather than any witness
8 evidence. Now, my friend has the advantage of me here,
9 because he was in that case and I was not, but it is
10 interesting to look at who was called as witnesses in
11 that case. There is a list at paragraph 40
12 {AUTH2/39/16}, from which it is apparent that
13 the relevant senior management individuals from all of
14 the relevant parties were all produced as witnesses.

15 Next, on the scope of the Commission investigation,
16 my friend showed you a letter from my instructing
17 solicitors in which they asserted that the Commission
18 investigation went beyond BMW and Volkswagen and he said
19 therefore we accept that that is the case. I could play
20 the opposite trick on him. If you were to look at
21 a letter at {K/701/1}, you will find a letter on behalf
22 of the Defendants asserting that in fact the Commission
23 investigations were at all times limited to
24 the named OEMs. Now, how have we ended up this back to
25 front position? The answer is that it was relevant to

1 the application of German law how wide
2 the investigations were. In that connection, it was in
3 the Defendants' interests to say that the investigations
4 were very narrow so that they would not have resulted in
5 the interruption of the running of the time limits under
6 German law. So if I am stuck with what I said, he is
7 stuck with what he said, and the Tribunal is no further
8 forward.

9 The submission in relation to
10 the Commission decision appeared to boil down to saying
11 that that decision contains a decision by the Commission
12 that the evidence against the Claimants was insufficient
13 to proceed to an infringement finding, and my friend
14 said I had not taken you to the Commission decision on
15 this point. But the reason I did not take the Tribunal
16 to the Commission decision on this point is because it
17 simply does not say anything about the evidence against
18 the Claimants. We looked at recitals (24) to (28), and
19 if you go through those recitals with a fine-tooth comb
20 you will find no reference at all to any evidence of
21 cartelisation against the Claimants, or indeed anyone,
22 apart from the named OEMs, and that is why we say that
23 there is no decision from the Commission one way or
24 the other which this Tribunal can follow. So
25 the Tribunal is really in the position -- or that

1 decision is comparable, we would say, to the decision in
2 the Crehan case by the Commission simply not to proceed
3 any further in relation to the old leases where one had
4 no decision and the national court was left to decide
5 the issue.

6 We now know from my friend's annex, the updated
7 annex of today, that it is not right to say that
8 the Commission was given and shown all of the relevant
9 documents. I am told that of the 66 entries on this
10 table, 25 of them are white documents, so documents
11 which it is admitted were not provided to
12 the Commission, and that includes the important
13 documents concerning Mr Carlson's meeting with Mr Lake
14 and the other document concerning Mr Carlson's meeting
15 with Mr Brenner.

16 It was suggested, or it may have been suggested,
17 that the external auditors had -- possibly had seen
18 these documents and may have advised in relation to
19 whether they should be supplied to the Commission. If
20 that is suggested, there is simply no evidence about
21 that at all. We have not been given any evidence about
22 the audit process or what may have been advised or what
23 the auditors may have seen or may not have seen.

24 My friend then made some submissions about
25 the quantum of inculpatory documents, saying that

1 the number of such documents was very low, but as we
2 have seen in this case, there is direct evidence of
3 document destruction or -- that is asking for emails to
4 be deleted, or asking for emails never to be created in
5 the first place, Mr Matsunaga's email {J1/1/2}: don't
6 type such information, "it will leave evidence". We
7 have evidence of meetings taking place with no minutes
8 or other record being generated, including Mr Carlson's
9 important meetings with both TRW and Takata. So one
10 plausible reason why there are not more documents which
11 I am in a position to show the Tribunal is that Autoliv
12 were careful not to generate any such documents.

13 Then if we look at the documents which have been
14 generated one way or another, could we just briefly look
15 again at {J1/71/1}. I may have misheard, but it might
16 have been suggested by the Chair, or otherwise, that
17 this concerned Ford. This is a GM document, GM Brazil,
18 so at that time it would have included Vauxhall/Opel and
19 also Fiat, I believe, which was --

20 THE CHAIRMAN: The point was it is Ford -- the paragraph
21 towards the end is about Ford.

22 MR WEST: Sorry, which paragraph is that?

23 THE CHAIRMAN: So if you turn the page --

24 MR WEST: Oh.

25 THE CHAIRMAN: -- and go to {J1/71/2}, there is a reference

1 to Ford.

2 MR WEST: Oh, I understand. So this is --

3 THE CHAIRMAN: Well, we can see where it refers to

4 General Motors and where it refers to Ford.

5 MR WEST: Yes, I am sorry. I see that.

6 So, yes, there seemed to be a supply relationship
7 between Autoliv and Takata in relation to Ford, and on
8 that it was suggested that there was a similar supply
9 relationship between Autoliv and TRW, but I think,
10 ultimately, there is not any evidence that there was any
11 such supply relationship in this case.

12 THE CHAIRMAN: No. There is the letter you do not like,
13 the "cloak", as you refer to it, I think.

14 MR WEST: The cloak letter.

15 THE CHAIRMAN: Yes, the cloak.

16 MR WEST: But even that does not refer to a supply
17 relationship.

18 THE CHAIRMAN: It does not refer to supply, no.

19 MR WEST: But just on this {J1/71/1}, the important part of
20 this email, I say, is are the line that says:

21 "... for your information attached you will find
22 a chart with Autoliv's prices we got from them ..."

23 Which I say must be Autoliv:

24 "... to Meriva and S10 ..."

25 Those were two models or projects:

1 "... (our first strategy was cover Autoliv's
2 price)."

3 So my friend sought to give the impression that this
4 was --

5 THE CHAIRMAN: I mean, there is something of an ambiguity
6 there, whether the "them" is from Autoliv. It is not
7 a very grammatical sentence.

8 MR WEST: No, as always with these documents.

9 THE CHAIRMAN: The "them" could be from Ford, it could be
10 from whoever, or General Motors. Meriva and S10 are
11 General Motors.

12 MR WEST: But my point is, "first strategy was cover
13 Autoliv's price", what that means is that Takata was
14 going to submit cover prices. Those are prices which
15 are higher than Autoliv's prices with the aim of not
16 winning the business, which is contrary to
17 the suggestion that in fact this is all about
18 competition with Autoliv. We saw another example of
19 that where it was another column in the table that
20 actually set out the prices which were going to be
21 charged which were 10% higher than Autoliv's prices.

22 Now, I accept that that document at tab 71 is
23 circumstantial evidence in the sense that it relates to
24 Brazil, but in my submission it is legitimate in
25 a cartel case for the claimant to rely on circumstantial

1 evidence, by which I mean evidence that may not relate
2 directly to the particular RFQs in issue, because that
3 casts light, in my submission, on the wider conduct
4 which went on in the market on which it is relevant for
5 the Claimants to rely and on which they are entitled to
6 rely, although obviously --

7 THE CHAIRMAN: But you do not need that, because you have
8 got the OSS decision, you would say. I mean, you have
9 established that there is some degree of cartel
10 activity, so showing that there was some degree of
11 cartel activity in Brazil, I do not understand how that
12 boosts your case particularly.

13 MR WEST: Well, only in that that particular example is
14 directed at one of the Claimants and so it goes to
15 answer --

16 THE CHAIRMAN: In Brazil, so ...

17 MR WEST: It goes to answer the point that this went no
18 wider. I accept that it is circumstantial, but as
19 the Court of Justice said in the Alborg Cement case, in
20 cases like this one sometimes has to piece together
21 the truth from fragments.

22 {J1/36/1}, if we can briefly go back to that.

23 Again, the key point here is {J1/36/2}, at the top:

24 "Trw did not keep words so they [reduced]
25 the price ..."

1 In my submission, what that clearly records is
2 unhappiness at TRW cheating on the cartel.

3 I will not go back to Mr Schönborn's email at
4 {J1/41/1} save to say that I stand by my position that
5 the explanation that was proffered for that is not
6 remotely credible.

7 Then on the A9 contract, my friend explained away
8 Takata's lack of zeal in bidding for the A9 on the basis
9 that it was an incumbent project for Autoliv, and in my
10 submission that is double-edged at the very least,
11 because if any part of Autoliv's understanding that
12 Takata was less likely to apply zeal in bidding for
13 a non-incumbent RFQ was based on its knowledge of
14 the cartel, then in my submission, that is a mechanism
15 of loss caused to the Claimants by the cartel, either
16 directly or indirectly. Again, that is -- or could be
17 said to be a piece of circumstantial evidence because it
18 concerns Takata, but in my submission, again, it casts
19 light on the type of conduct which was going on in
20 the market.

21 Then going back briefly to {J1/113/1}, my friend
22 took you to Mr Carlson's presentation and suggested that
23 this showed that the market was characterised by
24 vigorous competition, but of course one should bear in
25 mind the date, again, of this meeting in March 2009, at

1 which time it is accepted that Autoliv was in four or
2 possibly five cartels with Takata and/or TRW, so
3 the Tribunal can draw its own conclusions about how hard
4 it was competing.

5 Back, briefly, to the A9. The third round bids, my
6 friend said, were on 27 March and I think we agree with
7 that. Ms Chassery's email at {J1/51/1} has one of these
8 ambiguous dates on it: "4/9/2009". We would say that
9 must be 9 April, which ties in with the date of
10 the third round bids, which had been shortly beforehand,
11 27 March, rather than being many months later in
12 September. The supplier choice memo was then issued on
13 24 April 2009, that is {J3/30/1}.

14 Moving on to the expert evidence. My friend's
15 submissions on this focused a lot on omitted variable
16 bias and the principal omitted variable -- allegedly
17 omitted variable identified by Dr Majumdar were
18 the contract-specific costs, but Dr Majumdar accepted
19 that that information was simply not available and so he
20 also accepted that it was not -- or in any event
21 I submit it is not possible to call that bias, because
22 one cannot tell whether it would lead the results to be
23 higher or indeed lower. The submission seems to be that
24 because that particular category of costs information is
25 not available even though lots of other costs

1 information is available, including information on
2 indices of raw material costs, Mr Hughes should simply
3 have thrown up his hands and said, "Well, nothing can be
4 done". But it is notable that that is not what
5 Dr Majumdar did, in relation to pass-on, when he found
6 that OSS-specific costs were not available; he
7 identified the next most appropriate form of information
8 and used that for his model instead.

9 My friend said that Mr Hughes was rather mixing and
10 matching in that he preferred sensitivity A of
11 the by-platform sensitivity when it came to steering
12 wheels, but in my submission that is not quite what he
13 said. He preferred sensitivity B in general, but he did
14 rely on sensitivity A also as a further data point.

15 My friend then said that under the new contract
16 sensitivity the overcharges are not there, but that is
17 not right. In fact, the overcharges are still there,
18 although in most cases they are not statistically
19 significant. However, as Dr Majumdar accepted in
20 the hot tub, he would not expect these results to be
21 statistically significant because of the very low number
22 of data points. It is true the coefficients are
23 smaller, but the results nevertheless correspond to what
24 would be very substantial damages if the Tribunal were
25 to find the overcharges which the new contract

1 sensitivity finds.

2 Mr Hughes was criticised for looking at documents
3 and commenting on them. Can I just remind the Tribunal
4 of what Mr Justice Green, as he then was, said. This is
5 quoted in our closing at paragraph 29 {S/13/21}, where
6 he said:

7 "In principle I start from the proposition ..." --

8 THE CHAIRMAN: Sorry, I am looking at the wrong document.

9 Your closing at 29, you say?

10 MR WEST: Paragraph 29, page 21.

11 THE CHAIRMAN: Yes.

12 MR WEST: "In principle I start from the proposition that it
13 is desirable for econometric analysis to be capable of
14 being benchmarked, or capable of being placed into
15 context, by internal disclosure. Many econometric
16 analyses involve the making of assumptions about how
17 markets work. If those assumptions turn out to be
18 incorrect, wholly or partially, then the resultant
19 statistical analysis may be materially flawed ... If, to
20 take a hypothetical situation, an expert generated an
21 econometric model which then turned out in court to
22 collide with the inferences properly to be drawn from
23 internal disclosure then it would have been far better
24 for the expert to have grappled with that inconsistency
25 and attempted a reconciliation at the earliest possible

1 stage in preparation for litigation. This, in my view,
2 is preferable to the expert being subsequently
3 challenged in cross-examination at trial upon the basis
4 that the econometric modelling was theoretical,
5 artificial and divorced from reality. Early engagement
6 with the underlying facts including disclosed material
7 will, in my view, generate a more robust and defensible
8 final analysis."

9 So Mr Hughes' engagement with the detail of
10 the documents comes with the imprimatur of
11 Mr Justice Green, no less, as he then was.

12 Just in general in relation to the attack on
13 Mr Hughes' objectivity, I propose to rise above that
14 rather than say anything more about it, but just in
15 the interests of Mr Hughes himself, personally, can
16 I put it on the record that we reject that entirely.

17 The next submission is that Mr Hughes' model wrongly
18 assumes that it makes no difference whether there was
19 a direct cartel or not because it gets the same results
20 and it is suggested that a different methodology should
21 have been adopted. Well, in the first place, it is not
22 right to say that Mr Hughes gets the same results,
23 because of course different dates apply under
24 the indirect case and so different damages are found, as
25 Mr Hughes' recent note demonstrates. But more

1 fundamentally, an econometric analysis cannot tell you
2 whether an overcharge is caused by direct effects or
3 spillover effects, it can only tell you whether there is
4 an overcharge, and if so, how large it is. So what
5 appears to be suggested is something which, in my
6 submission, is not possible using the tools that we have
7 at hand.

8 Neither is it right to say that Mr Hughes finds
9 the same loss whether the loss was caused by a direct
10 cartel or by spillover effects, because the case is put
11 forward in the alternative, so whatever losses are
12 identified by his model are either caused by one or
13 the other, but we do not suggest that they were caused
14 by both somehow. So when one says Mr Hughes' model
15 finds the same results, what is one comparing it with?
16 He only has one set of results and he only ever could
17 have one set of results for the level of overcharge.

18 Then, finally, on pass-on, Professor Neuberger asked
19 the question: what if there is not a decision by PSA, or
20 in this case FCA, but it somehow comes out in the wash
21 that prices have been increased? In my submission, in
22 that situation we would be in the world identified in
23 the Royal Mail v DAF Trucks case addressed at
24 paragraph 184 of the Claimants' closing submissions
25 {S/13/67}. This is the first quotation -- the first

1 paragraph of the quotation:

2 "... it cannot be enough for a defendant to plead
3 that a Claimants' business input costs as a whole were
4 not increased, or that as part of the Claimants'
5 businesses ordinary financial operations and budgetary
6 control processes its overall expenses were balanced
7 against sales so that profits were not reduced. There
8 must be something more to create a proximate causative
9 link between the overcharge and a reduction in other
10 input costs, so as to constitute mitigation."

11 So, in my submission, if I have understood it
12 correctly, the scenario being posited by
13 Professor Neuberger would be one in which there is not
14 anything more than those ordinary budgetary processes
15 and therefore any defence of pass-on would fail.

16 Just before we leave pass-on and volume effects, my
17 friend says that the Claimants bear the burden of proof
18 on volume effects, but we do not agree with that.
19 The Defendants bear the burden of proof on pass-on and
20 part of pass-on is whether there have been volume
21 effects, because if there have been there may have been
22 no mitigation. But since the Defendants bear the burden
23 of proof in showing mitigation, then we say they also
24 bear the burden of proof in relation to volume effects,
25 although in my submission, who bears the burden of proof

1 on volume effects is very unlikely to be determinative
2 of any part of the outcome in this case.

3 (Pause)

4 Just two further points I have been asked to
5 communicate.

6 Firstly, as to whether disclosure in this case was
7 exhaustive, in fact what happened is the Tribunal may
8 recall that, on liability, the Claimants restricted
9 themselves to disclosure of the various regulator files.
10 This is not a case where there was a standard disclosure
11 exercise and that is why it has happened many times in
12 the course of the trial that I have had to say, or
13 submit or say to a witness, "Well, we do not have this
14 document or that document", because there was not
15 a standard disclosure exercise which might have been
16 expected to produce all relevant documents.
17 The Tribunal may also recall that, when it came to
18 disclosure of the Department of Justice file, in
19 the first instance there were many more documents
20 disclosed by ZF than there were by Autoliv and we had to
21 come back to the Tribunal to seek a further order for
22 disclosure of the DoJ document file.

23 The other final point is, we agree with my friend's
24 analysis of the burden of proof before the Commission
25 and that it is not necessarily the same as the burden of

1 proof which applies in this case of the balance of
2 probabilities. To the extent that it is higher, which
3 in my submission it is, that is another reason why
4 the fact that the Commission did not proceed to
5 a finding in relation to these allegations or
6 the corresponding evidence does not necessarily indicate
7 that the Tribunal should conclude on the balance of
8 probabilities, which is the burden of proof applicable
9 in these proceedings, that those allegations are not
10 established.

11 So unless I can assist further, those were my
12 submissions.

13 PROFESSOR NEUBERGER: Can I just -- sorry, it seems rather
14 late in the trial to raise this, but one thing I was
15 just reflecting on was, we have talked a lot about
16 the direct and indirect case, but the direct case has
17 got two versions and I am not sure I am clear in my own
18 mind about the distinction between the two versions as
19 far as evidence or as far as consequences are concerned.

20 MR WEST: I think the answer is that there are either none
21 or very few. It is effectively two different ways of
22 putting the same thing, it just depends whether one
23 characterises it as one big cartel or a series of small
24 cartels.

25 PROFESSOR NEUBERGER: Fine. So there is nothing of -- and

1 the evidence for both is similar then.

2 MR WEST: Exactly the same, yes.

3 PROFESSOR NEUBERGER: Fine, and the consequences. Okay,
4 thank you very much. I am glad I was not raising
5 something fundamental.

6 THE CHAIRMAN: Thank you very much, and thank you to
7 the solicitors for the efficient preparation of
8 the trial and particularly those who did my bundles.

9 Thanks to Opus as well.

10 (3.44 pm)

11 (The hearing concluded)

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