

This Transcript has not been proof read or corrected. It is a working tool for the Tribunal for use in preparing its judgment. It will be placed on the Tribunal Website for readers to see how matters were conducted at the public hearing of these proceedings and is not to be relied on or cited in the context of any other proceedings. The Tribunal's judgment in this matter will be the final and definitive record.

**IN THE COMPETITION**

Case No. : 1340/5/7/20 – 1341/5/7/20 (T)

**APPEAL**  
**TRIBUNAL**

Salisbury Square House  
8 Salisbury Square  
London EC4Y 8AP  
(Remote Hearing)

Wednesday 29 July 2020

Before:  
The Honourable Mr Justice Trower  
Dr William Bishop  
Simon Holmes  
(Sitting as a Tribunal in England and Wales)

**BETWEEN:**

1340/5/7/20 (T)

(1) National Grid Electricity Transmission PLC

-v-

- (1) ABB LTD
- (2) ABB Power T&D Limited
- (3) ABB Limited
- (4) ABB Holdings Limited
- (5) ABB AB
- (6) ABB ASEA Brown Boveri LTD
- (7) ABB Norden Holding AB
- (8) ABB AG
- (9) ABB Beteiligungsund Verwaltungsgesellschaft MBH
  - (10) NKT Holding A/S
  - (11) NKT Cables Limited
  - (12) NKT Cables A/S
  - (13) NKT Cables Group A/S
  - (14) NKT Cables GMBH
  - (15) Prysmian S.P.A
- (16) Prysmian Construction Company Limited
- (17) Prysmian Cables (2000) Limited
- (18) Prysmian Cables & Systems Limited

(19) Prysmian Cavi E Sistems Limited  
(20) Safran SA

Defendants

AND

1341/5/7/320 (T)

(1) SP Power Systems limited  
(2) Scottish Power UK PLC  
(3) Scottish Power Energy Networks Holdings Limited  
(4) SP Manweb PLC  
(5) SP Transmission PLC

Scottish Power Claimants

-v-

(1) Prysmian S.P.A  
(2) Prysmian Construction Company Limited  
(3) Prysmian Cables & Systems Limited  
(4) Prysmian Cavi E Sistemi SRL  
(5) Prysmian Cables (2000) Limited

Defendants

---

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

Ms Marie Demetriou QC and Michael Armtiage (On behalf of NKT)  
Ms Helen Davies QC and Ms Fiona Banks (On behalf of Prysmian)  
Mr Jon Turner QC, Ms Laura Elizabeth John and Julianne Morrison (On behalf of NGET)  
Mr Tristan Jones (On behalf of Safran)  
Mr Mark Hoskins QC and Ms Sarah Ford QC (On behalf of ABB)

Transcription by: Opus 2  
Tel No: 020 3008 5900  
Email: production@opus2.com

Wednesday, 29 July 2020

(10.32 am)

Pre-Trial Review

THE CHAIRMAN: Thank you very much. Good morning, everybody. We are going to start this morning just by introducing the members of the tribunal. I hope that those of you who are participating in this hearing can hear me. I am Mr. Justice Trower, I am chairing this hearing. There are two other members of the tribunal, and I am going to ask them to introduce themselves. Apart from anything else, when they do, I hope that tiles have not come up on your screens yet; they will when they speak.

So to my left in the hearing room is Dr. Bishop and he will introduce himself now.

DR. BISHOP: Hello, I am William Bishop, Bill in normal circumstances, and I am the economist member on this panel.

THE CHAIRMAN: To my right is Mr. Holmes.

MR. HOLMES: Hi, I am Simon Holmes. I am a member of the tribunal and I am a competition lawyer by background.

THE CHAIRMAN: Thank you very much. I am now, slightly unconventionally, going to ask each member of the Bar who is speaking at this hearing introduce themselves as well. Apart from anything else, it is important for us

1 to make sure that the connections are working properly.  
2 So if we could start with Mr. Turner and then the other  
3 advocates in the order in which they appear.

4 MR. TURNER: Yes, I am Jon Turner. I appear  
5 for National Grid, the claimant, together with Ms. John  
6 and Ms. Morrison.

7 THE CHAIRMAN: Thank you.

8 MR. HOSKINS: Then for ABB, you have got Mark Hoskins  
9 and ...

10 MS. FORD: Sarah Ford, also appearing for ABB.

11 THE CHAIRMAN: Thank you. NKT next, I think.

12 MS. DEMETRIOU: Yes. Hello, I am Marie Demetriou appearing  
13 for NKT and my junior is Mr. Michael Armitage.

14 THE CHAIRMAN: Yes, thank you.  
15 Prysmian.

16 MS. DAVIES: Hello, yes, this is Helen Davies appearing for  
17 Prysmian together with my junior Fiona Banks.

18 MR. JONES: Tristan Jones here, good morning, appearing for  
19 Safran SA

20 Housekeeping

21 THE CHAIRMAN: Thank you very much. Good. Right, well,  
22 just before we start, one or two introductory comments  
23 in relation to the technology. I would be grateful if  
24 all counsel could keep their videos on, because it is  
25 helpful for the tribunal to see who is effectively

1 sitting in counsel's row, but please turn your  
2 microphone off unless you are actually speaking. That  
3 will inevitably, during the course of the hearing, mean  
4 that from time to time, someone will try to say  
5 something and forget that they have turned their  
6 microphone off, but that is a -- it is much more  
7 important that you should keep them off, because  
8 otherwise we get feedback if there are too many people  
9 with microphones on.

10 I would ask, please, for any other attendees at the  
11 hearing to turn their videos and microphones off for the  
12 entirety of the hearing. That assists with bandwidth  
13 issues. If there are any technology problems during the  
14 course of the hearing, which we very much hope there  
15 will not be, we will do our best to solve them as soon  
16 as possible. It may be necessary to stop in order to  
17 sort them out. I hope not but if it is, it is.

18 Because hearings of this sort can be quite tiring,  
19 as I am sure those of you who have done a certain number  
20 of remote hearings will know, we will break once during  
21 the morning and once during the afternoon. I suggest  
22 about 11.45 and 3.15 respectively; but, please, whoever  
23 is addressing the tribunal at the time, we do not want  
24 to interrupt your flow to be too precise, but kindly  
25 keep it as close to those two times as possible. We

1 will sit from 10.30 am till 1.00 pm and then from  
2 2.00 pm to 4.30 pm.

3 Good, all right. Now, there has been circularised  
4 an agenda for today's hearing which the parties have  
5 helpfully commented on and added to, and we, I think,  
6 will use the form of the agenda for the purposes of  
7 discussing the matters that need to be discussed. But  
8 so far as we are concerned, we would like to hear from  
9 you on the points that you wish to address us on in the  
10 order in which they appear on the agenda, although, and  
11 I think for most of these points we will deal with them  
12 as we go along, but I think, as is apparent, from your  
13 respective skeletons, some of the points can be dealt  
14 with together and slightly out of order, so particularly  
15 13 and 14 which came into the agenda a little later on.

16 So, Mr. Turner, I am going to hand over to you  
17 for -- to begin with to say what you want to say and  
18 crack on with the agenda items as soon as you are able  
19 to do so.

20 Submissions by MR. TURNER

21 MR. TURNER: Thank you. I have not got any specific  
22 introductory remarks, so if it pleases the tribunal,  
23 I will crack on straight with the agenda items.

24 THE CHAIRMAN: Thank you.

25 MR. TURNER: But I think it is understood between everybody

1 on all sides at the Bar, and you will have seen from the  
2 skeletons, that the two most important issues to cover,  
3 which will occupy the most airtime, are going to be  
4 whether the expert evidence should be heard concurrently  
5 or individually through traditional cross-examination,  
6 and any issue of whether there should be further reports  
7 or any other remedy as a result of what transpired in  
8 the expert process.

9 THE CHAIRMAN: Yes.

10 MR. TURNER: Those are the two main points.

11 THE CHAIRMAN: Yes.

12 MR. TURNER: Turning then to the agenda items, issue 1,  
13 COVID-19 and what to do.

14 THE CHAIRMAN: Yes.

15 MR. TURNER: The first question is the issue of whether  
16 a fully remote trial should be ruled out. At this  
17 point, we do not think that a fully remote trial should  
18 be ruled out, for the reasons we have given in the  
19 skeleton, and we suggest that the tribunal take stock  
20 and sees the shape of the case overall and where we are  
21 in relation to COVID-19 at a second PTR in October.  
22 There is broad agreement, as we understand it, about  
23 that. There is an issue about when such a second PTR  
24 should be heard.

25 THE CHAIRMAN: Yes.

1 MR. TURNER: The defendants or some of them, Safran is more  
2 ambivalent, tend to say it should be at the very  
3 beginning of October. We say it should be towards the  
4 end of that month --

5 THE CHAIRMAN: Yes.

6 MR. TURNER: -- and I will come back to that.

7 So those are the issues concerning a fully remote  
8 trial. Everybody agrees at the Bar that  
9 a part-physical, part-remote trial in this matter is  
10 doable.

11 THE CHAIRMAN: Yes.

12 MR. TURNER: There has been an issue about whether the --  
13 such a trial should be heard at a large courtroom, such  
14 as court 30 in the Rolls Building, where you have the  
15 stairs and it is more open and accessible, or in the  
16 tribunal's building where there is a concern raised on  
17 the other side about the lifts --

18 THE CHAIRMAN: Yes.

19 MR. TURNER: -- and issues to do with social distancing.  
20 For our part we have no objection to the tribunal  
21 investigating whether one of the large courtrooms in the  
22 Rolls Building can be reserved, which would need to be  
23 for the months through November, December and January,  
24 Hilary term next year but we do not share the view that  
25 this is a necessity on account of the tribunal lifts.

1 THE CHAIRMAN: Yes.

2 MR. TURNER: On this matter of mechanics, I believe that we  
3 are all rather in the hands of the tribunal.

4 THE CHAIRMAN: Yes. Well, I think I can deal with the Rolls  
5 Building point straightaway, because the tribunal has  
6 made enquiries. The 'super courts' are booked for the  
7 relevant period in the Rolls Building and they are  
8 simply not available, so while we understand why it was  
9 thought appropriate to investigate that, it is  
10 a non-starter as matters presently stand. Of course  
11 cases settle, and we certainly do not rule out entirely  
12 the possibility that availability may arise by the time  
13 of the next PTR, but I think we have to proceed on the  
14 basis that it is going to be here.

15 Can I say as well, we have discussed at some length,  
16 as members of the tribunal and with the registrar and  
17 his staff here, the feasibility and practicality of  
18 holding a hearing here, and we will certainly want to  
19 discuss with all of you some of those issues, but we  
20 do -- we share your view and we will all -- will of  
21 course hear what people have to say about lifts and so  
22 on, but we share your view that it should be possible to  
23 organise a hybrid hearing, based in these premises, and  
24 so I think you can proceed in addressing us on the basis  
25 that what we really need to focus on is the

1 practicalities of how we go about doing that,  
2 recognising all the while that the pandemic is changing  
3 and the Government guidance in relation to the pandemic  
4 is changing, and we will inevitably have to review the  
5 situation come October.

6 MR. TURNER: Yes.

7 THE CHAIRMAN: So that is in very broad terms -- I hope that  
8 is a helpful indication. I mean, we have got some more  
9 specific points that we can raise. I do not know  
10 whether you would find it helpful, Mr. Turner, for me to  
11 run through the specific points at this stage?

12 MR. TURNER: Yes, yes, my Lord, I think all counsel would be  
13 grateful for that.

14 THE CHAIRMAN: Yes, okay. Well, let me tell you where we  
15 got to on it. There is quite a sizeable courtroom, as  
16 I am sure you all know here. It is not ideally  
17 configured in the sense that it is not wide like the  
18 'super courts' in the Rolls Building are, but it is  
19 quite deep.

20 We think that on the basis of the existing social  
21 distancing rules, it should be possible to get 20 people  
22 on to the benches, and -- which means that four  
23 people -- up to four people from each party could be in  
24 the courtroom. What we would have in mind would be that  
25 would be leading counsel, one junior or solicitor, plus

1 another solicitor plus one client. But it is really up  
2 to the parties as to how they would wish to organise  
3 themselves.

4 There are also remote connections to conference  
5 rooms which are available, which is actually one of the  
6 advantages of this building over and above the Rolls  
7 Building, because it is possible to have a feed into  
8 a conference room for each of the parties, and that  
9 conference room will then be available for the parties,  
10 both for watching the hearing for surplus members of  
11 their team, if that is what they wish to do, and for  
12 consulting together after the hearing or during the  
13 breaks.

14 So that is the position so far as the actual hearing  
15 itself. The tribunal would obviously intend to be in  
16 the courtroom in person, and there is room, observing  
17 existing social distancing rules, for the members of the  
18 tribunal plus the registrar and any referendaire and so  
19 on, to be present in court observing those rules.

20 So far as evidence is concerned, it will be possible  
21 to conduct cross-examination of witnesses in person in  
22 the court building, we think at the moment. We see no  
23 reason why that should not be done. It may well be the  
24 case that the parties wish, if there is a hybrid  
25 hearing, for some of the cross-examination to be done in

1 any event remotely. I think members of the Bar are  
2 getting more accustomed to doing that now than they were  
3 before lockdown started. There are obvious  
4 disadvantages of doing it remotely, but in the same way  
5 that, as we understand it, some of the witnesses in any  
6 event wish -- the parties wish them to give their  
7 evidence by video link, that is something that can be  
8 done and achieved satisfactorily, so long as one has in  
9 place the right arrangements.

10 Those arrangements will have to include arrangements  
11 which ensure that the witness, wherever they happen to  
12 be remotely, is given proper facilities, both electronic  
13 and in hard copy, if that is what they wish for, and  
14 proper assistance in wherever they happen to be to  
15 ensure they get to the right documents and so on and so  
16 forth in the usual way, but that is something that we  
17 anticipate the parties should be able to discuss between  
18 themselves.

19 The obvious solution may well be for witnesses to go  
20 to solicitors' offices and the like in order to be  
21 cross-examined from there, if that is required.

22 So those kind of situations we can envisage can be  
23 sorted out with goodwill.

24 So far as experts are concerned, I think it is  
25 probably better to leave the discussion of what we do

1 about them until we have decided what to do in relation  
2 to concurrent evidence and that particularly contentious  
3 issue.

4 So far as moving around the building here is  
5 concerned, it may be necessary for there to be staggered  
6 arrival in the building in order to ensure that too many  
7 people do not have to get into the lift at the same  
8 time, but there are a number of lifts in the building  
9 and, as matters presently stand, I think you can get two  
10 people in a lift at any one time. So people will just,  
11 I think, have to stagger their arrivals to respond to  
12 what is available.

13 Now, I think that was where we got to. I think we  
14 accept as well -- we agree with the parties as well that  
15 a remote hearing will be difficult but we do not see any  
16 need or reason to rule it out for certain at this stage.  
17 We do not see any reason why that should be done, and  
18 the reason I think it is slightly unfortunate if we do  
19 is that we all have an idea of what a hybrid hearing  
20 involves at the moment; most members of the Bar have  
21 either heard of how they work or actually been involved  
22 in them themselves, and so have members of the tribunal.  
23 But hybrid hearings are an inherently flexible concept,  
24 and I think by an entirely remote hearing, what you  
25 probably all have in mind is the idea that nobody

1 attends before the tribunal. The tribunal itself is  
2 almost certain to wish to get together in any event, to  
3 sit together in a socially distanced way, even --  
4 whatever form the hybrid hearing might take, and whoever  
5 actually attends on behalf of the parties at the hybrid  
6 hearing.

7 But in any event we -- we would be reluctant to rule  
8 out a remote hearing at the moment, but we can see that  
9 there may be considerable difficulties.

10 I hope that is helpful, Mr. Turner.

11 MR. TURNER: That is very helpful. I, for one, take on  
12 board all of those observations on the practicalities.  
13 Nothing in what your Lordships said sounded wrong, and  
14 we will work with the witnesses on all sides and with  
15 the other parties on the basis of those provisional  
16 indications as we go forwards in the case.

17 THE CHAIRMAN: Thank you.

18 MR. TURNER: The associated matter, I do not know if it is  
19 convenient to deal with it now, is the programming of  
20 a second pre-trial review --

21 THE CHAIRMAN: Well, just before we do that, I think I ought  
22 properly to check to find out whether any of the  
23 other parties have got any observations that they want  
24 to make in relation to the hybrid hearing issue.  
25 Perhaps you could just say yea or nay in order,

1 Mr. Hoskins.

2 You need to turn your microphone on.

3 MR. HOSKINS: We have agreed sort of a running order amongst  
4 ourselves. On this point Ms. Davies was going to go  
5 first. I think there is -- a discussion to be had  
6 probably about confidentiality, but I am sure Ms. Davies  
7 is probably going to introduce that discussion.

8 THE CHAIRMAN: Thank you very much. Ms. Davies?

9 Submissions by MS. DAVIES

10 MS. DAVIES: I am grateful. As regards your Lordship's  
11 comments, we entirely agree with my learned friend  
12 Mr. Turner. We are grateful to the tribunal for making  
13 the enquiries in relation to the Rolls Building, and  
14 grateful for the indication that that can be kept under  
15 review because there are -- there are going to be issues  
16 arising out of staggering arrivals with 20 people coming  
17 in the building together with witnesses. So if a 'super  
18 court' did become available in the Rolls Building and it  
19 could be used for this hearing, that would be our  
20 preference if possible, but of course we understand that  
21 is all subject to availability.

22 The preference of all parties, as my learned friend  
23 Mr. Turner indicated, is indeed for a hybrid hearing, if  
24 that is possible. We are not inviting the tribunal to  
25 rule out a remote hearing today, but that obviously --

1 if by the time we get to the next PTR, a hybrid hearing  
2 becomes impossible, then of course we are going to have  
3 to have a discussion about whether a fully remote  
4 hearing is possible, because there are considerable  
5 difficulties in a trial of this magnitude involving this  
6 number of witnesses and this complexity of expert  
7 evidence in dealing with that.

8 So that is just to put down that marker.

9 THE CHAIRMAN: Thank you.

10 MS. DAVIES: The point that my learned friend Mr. Hoskins  
11 adverted to, which arises whether or not we are having  
12 a hybrid hearing or a fully remote hearing, relates to  
13 confidentiality. There is through the evidence, both  
14 factual and expert, scattered confidential material.

15 Now, that arises at the moment essentially in  
16 relation to three categories. There is confidential  
17 material that is contained within The Commission  
18 decision itself. There is confidential material that is  
19 contained within the documents that were on  
20 The Commission file, but there is also significant  
21 confidential material contained in the documentation  
22 that has been disclosed, in particular by the  
23 defendants, they of course being competitors; and  
24 because for the purposes of the expert analysis, the  
25 experts have not only looked at the historic position

1 during the alleged cartel period, but also in the  
2 post-cartel period for the purposes of their  
3 comparators. So there is confidential material there.

4 Now, we are all conscious that the tribunal's  
5 guidance suggests that in order to deal with  
6 confidential material in these times of remote hearing  
7 and pandemic hearings, the parties should endeavour to  
8 leave the confidential material to the end of a day, so  
9 that essentially the feed can be turned off. But with  
10 the best will in the world, it just appears to us that  
11 that is unlikely to be practicable in this case, given  
12 the extent of the confidential material and the way in  
13 which it is scattered through the documentation.

14 Of course all counsel, as they do in any case where  
15 there is confidential material, would make every effort  
16 to ensure that where possible, if they are referring to  
17 confidential material, it is simply referred to on the  
18 page, rather than actually read out. But that is  
19 complicated in the context in particular of  
20 cross-examination, as the tribunal will of course  
21 understand.

22 So one of the things we just wanted to flag with the  
23 tribunal is that we do understand in other instances,  
24 the way this is being managed is, as it were, to have  
25 two feeds, one of which is a feed which anyone who is in

1 the confidentiality club can sign into, and the other is  
2 a feed in which those outside the confidentiality club  
3 can also sign into the hearing. That makes policing  
4 much easier because the feed which involves those  
5 outside the confidentiality club can just be turned off  
6 and turned on when need be.

7 We are not raising this, expecting an immediate  
8 answer from the tribunal, I should add, but simply to  
9 flag that this is a real issue. It is not going to be  
10 totally solved by a hybrid hearing, because on the  
11 numbers that my Lord has given, which is precisely what  
12 we anticipated for a hybrid hearing, we will not be able  
13 to have, either within the hearing room or indeed any  
14 overflow conference rooms, all those who are members of  
15 the confidentiality -- in a confidentiality club because  
16 that exceeds 20, because it is not only counsel,  
17 solicitors but also experts.

18 So we are going to have to have a mechanism in place  
19 to deal with this issue, and we simply just wanted to  
20 flag that with the tribunal, and it may be that the way  
21 of dealing with it is for there to be further  
22 discussions between the parties and the registry, so  
23 that when we come back at the PTR, whenever that is  
24 going to be, in early October or late October, we can  
25 discuss with the tribunal, if necessary, precisely how

1           those arrangements might work.

2           THE CHAIRMAN: Well, Ms. Davies, I am glad you put it like  
3           that, because that was exactly where we got to, and  
4           I have had had a brief word with the registrar about the  
5           practicalities of ensuring that we do get streaming  
6           properly in place for the purposes of the hearing. He  
7           has indicated that he is very open to discussion with  
8           the parties as to how best to set this up. So I think  
9           the way that the tribunal would like to leave this is  
10          simply that we will expect perhaps one -- perhaps you  
11          could each nominate a solicitor from each team who can  
12          be responsible, if you like, for the IT issues, and the  
13          registry will discuss with them what practical  
14          matters -- what practical arrangements can be put in  
15          place. But we are conscious of the confidentiality  
16          issue.

17          MS. DAVIES: My Lord, I am grateful. I should have just  
18          said, I identified three categories of confidential  
19          material. So far as the documents on The Commission  
20          file is concerned, the defendants are each reviewing  
21          those to release, insofar as they can, documents from  
22          the confidentiality ring, and a number of the defendants  
23          have confirmed they are going to be able to, and my  
24          clients have confirmed that we can do that in relation  
25          to our own documents this morning.

1           So that category may get smaller, but that is not  
2           going to solve the problem, because there are other  
3           categories of confidential material, some of which  
4           the -- there is absolutely no -- they are documents that  
5           do not emanate from any of the defendants, so we cannot  
6           release them.

7           THE CHAIRMAN: Yes, I see.

8           MS. DAVIES: I am grateful.

9           THE CHAIRMAN: So far as The Commission papers are  
10          concerned, as I understood it from the skeletons, ABB  
11          have agreed -- or had agreed already to de-designate.  
12          You say you now have --

13          MS. DAVIES: Yes, we confirmed that this morning.

14          THE CHAIRMAN: Yes, thank you. I am not sure about NKT and  
15          Safran; what is their position on this issue?

16          MS. DEMETRIOU: So we have -- there are very few NKT  
17          documents, and we are in the process of reviewing, and  
18          we should after the hearing be able to deal with that  
19          satisfactorily by way of correspondence, but we just  
20          need to take instructions. There are very few NKT  
21          documents.

22          THE CHAIRMAN: But you do not anticipate there being a point  
23          of principle that is of concern there?

24          MS. DEMETRIOU: Well, no point of principle has been flagged  
25          to me, but I think that the position is that

1 instructions are being taken from clients --

2 THE CHAIRMAN: Thank you.

3 MS. DEMETRIOU: -- and so we will revert by way of  
4 correspondence.

5 THE CHAIRMAN: Safran's position?

6 MR. JONES: My Lord, from Safran's point of view we did in  
7 fact de-designate all of our documents a couple of years  
8 ago.

9 THE CHAIRMAN: I see.

10 MR. JONES: So there are no designated documents. There is,  
11 I should mention, a potential wrinkle but I will not  
12 trouble my Lord with that just now, because I am not  
13 sure whether it really is a wrinkle that we need to  
14 raise with you or not, but it has been raised in  
15 correspondence with the claimants, and if we need to  
16 raise it later on the agenda, we will do so.

17 THE CHAIRMAN: All right, thank you.

18 Mr. Turner, did you want to contribute to this point  
19 on confidentiality?

20 Submissions by MR. TURNER

21 MR. TURNER: Thank you. We agree with what Ms. Davies has  
22 said. She was right to raise that, and we will approach  
23 matters in the spirit that she has indicated. I can say  
24 that my expectation is that this should not end up being  
25 a significant problem at trial. There will be

1 significant cross-examination of the factual witnesses  
2 about cartel documents. That seems likely. But those  
3 are unlikely to continue to be designated as  
4 confidential, and we therefore think that that problem  
5 will evaporate.

6 So far as concerns the more recent documents, there  
7 too, we doubt that there will be a significant need to  
8 look at underlying factual material, save perhaps in one  
9 or two instances which we will discuss as a team with  
10 the other parties, because those are apparent and  
11 indeed, one of them I expect to be touched on in the  
12 course of this very hearing.

13 THE CHAIRMAN: Right.

14 MR. TURNER: Leaving that aside, I do not expect there to be  
15 something that will prove to be a real problem.

16 My Lord, we have essentially strayed on to item 5 on  
17 the agenda.

18 THE CHAIRMAN: Yes.

19 MR. TURNER: The remaining item is whether to establish  
20 a confidentiality ring in the tribunal itself, and the  
21 only point that I would wish to add there is that it  
22 makes sense to do so, so that the parties owe duties of  
23 confidentiality and the individuals who sign up to  
24 undertakings directly to this tribunal, which will be  
25 managing the proceedings, rather than merely the

1 existing order which relates to confidentiality duties  
2 owed to the High Court, from which this matter has been  
3 transferred.

4 THE CHAIRMAN: Yes. I mean, on that particular point, we  
5 obviously do not want to get into an interesting  
6 discussion of what the effect of the transfer order was,  
7 and I can see that it may be that the  
8 confidentiality ring transferred in some way. I have no  
9 idea whether that is the case or not. But I would have  
10 thought, for my part, that it is sensible to clarify it  
11 by ensuring that the confidentiality ring is  
12 re-established for the avoidance of doubt for the  
13 purposes of the proceedings in front of the -- in front  
14 of this tribunal, unless anyone has got any good reason  
15 why that should not happen. I hear a deafening silence,  
16 so I think you should proceed on that basis.

17 Good. Okay. Before we go on to the PTR, which,  
18 Mr. Turner, I think is certainly the next thing on the  
19 agenda, subject to -- subject, I think, to item 2, which  
20 has been clarified in the sense that our understanding  
21 is, is that we -- there will be a decision from the  
22 Court of Justice on -- towards the end of September.

23 Now, the only point that I think needed just to be  
24 raised in relation to that was, without wanting to set  
25 any hares running, I have no idea how reliable that --

1 the indication that we have been given actually is.

2 I think some of the parties have said in their skeleton  
3 that if the indication proves to be misplaced, the trial  
4 cannot go ahead. Is that the position of all parties?

5 MR. TURNER: I think, my Lord, I will speak first on this.

6 I had an exchange with Ms. Davies last night about one  
7 issue. Our skeleton wrongly assumed, paragraph 43,  
8 I believe, that Prysmian was not applying to annul  
9 The Commission decision in full insofar as it relates to  
10 them.

11 THE CHAIRMAN: Yes.

12 MR. TURNER: Ms. Davies has corrected me on that. Prysmian  
13 is doing so, as well as applying for narrower relief.  
14 If it got the narrower relief, then as we indicated in  
15 our skeleton, that would affect only the early portion  
16 of the claim and, of course, it is speculative whether  
17 Prysmian would achieve any success at all on this  
18 appeal.

19 But we do accept that there is a possibility, at  
20 least a technical possibility, that they may succeed to  
21 the full extent of their appeal. If that is the case,  
22 we would then have to assess the consequences. At its  
23 highest, it would not affect this damages claim  
24 continuing against the other defendants, who are jointly  
25 and severally liable for their role in the cartel, and

1           for any damage that was caused by it from the date when  
2           they began their own participations.

3       THE CHAIRMAN:   Yes.

4       MR. TURNER:   In the case of ABB, for example, that was  
5       April 2000.

6           Nonetheless, if Prysmian were to succeed fully in  
7           its appeal, there would need to be a reassessment of the  
8           details of the case at the very least.  Therefore, we  
9           see that there is a prospect that there may need to be  
10          a pause to assess the outcome of such an appeal  
11          succeeding in full.  At this stage, however, we think  
12          the right course for the tribunal to take is to treat it  
13          as a speculative possibility and something that should  
14          be reassessed at a second or resumed PTR in October.

15       THE CHAIRMAN:  Yes, thank you.  Does anyone else want to  
16       contribute to that?

17           Yes, Ms. Davies.

18       MS. DAVIES:  My Lord, I am grateful.  Just to answer the  
19       question that my Lord asked, the possibility that the  
20       date that we have currently been given by the registry  
21       of the Court of Justice proves to be incorrect, I am  
22       afraid to say is a real one.  Experience in other cases  
23       suggest that things can slip in the Court of Justice.  
24       They had originally told us a week earlier, and then the  
25       next day it went back by a week, and obviously they are

1 now on vacation in Luxembourg and so we will not  
2 actually hear if there is going to be any further delay  
3 in all probability until September.

4 Our position certainly will be that the trial cannot  
5 go ahead prior to the final determination of my clients'  
6 appeal, and that is essentially the legal position that  
7 was set out by the Chancellor in a case called --  
8 an earlier case involving National Grid, the insulated  
9 switchgear cartels. My learned friend Ms. Demetriou in  
10 fact refers to the relevant decision in paragraph 11 of  
11 her skeleton.

12 THE CHAIRMAN: Yes.

13 MS. DAVIES: I do not understand there to be a dispute about  
14 that. I do not understand my learned friend Mr. Turner  
15 to be suggesting that the trial could commence on  
16 2 November, if in fact there has been slippage in the  
17 Court of Justice and we do not yet have the judgment.

18 But the reason just simply for flagging that is it  
19 does also impact on the PTR.

20 THE CHAIRMAN: Yes.

21 MS. DAVIES: Because again, obviously by -- by late  
22 September, beginning of October we will know where we  
23 are. We know either whether we have got the judgment or  
24 we will have a revised date for it.

25 THE CHAIRMAN: Yes.

1 MS. DAVIES: So we are not asking the tribunal to make any  
2 ruling about this at the moment, but it is another  
3 reason why it is sensible for there to be a resumed PTR,  
4 and it is in fact going to be a reason why we suggest it  
5 should be at an earlier date rather than a later date.

6 THE CHAIRMAN: Yes. Thank you very much. All right, well,  
7 I think that takes us on then to the further PTR point,  
8 and I think this boils down to when, rather than  
9 whether. All parties, for perfectly understandable  
10 reasons, think that it is a good idea and the tribunal  
11 thinks that it is a good idea too so we can proceed on  
12 that basis. As I understand it, the competition is  
13 between the 21, 22, 23 October period on the one hand  
14 and a late September, early October period on the other  
15 hand. So I think if I could just understand,  
16 Mr. Turner, your position, that would be helpful first,  
17 and then I will hear from the defendants -- we will hear  
18 from the defendants.

19 MR. TURNER: Certainly. As a preliminary remark, it is not  
20 in principle the case that the trial cannot go ahead.  
21 The law is that you must not reach a decision which  
22 conflicts with a decision of the European Court.  
23 Therefore, were the claimant in particular prepared to  
24 accept the costs risk, or a costs risk, this trial could  
25 certainly proceed.

1           The point, however, is one of practicality. As  
2 a matter of practicality, we do see that it is sensible  
3 to take stock of the Prysmian judgment when it emerges  
4 because the shape of the trial may be altered in ways  
5 that we cannot yet fully anticipate.

6           Turning then to the question of when the second PTR  
7 should take place, we are proceeding at the moment on  
8 the footing that the trial can and should commence on  
9 2 November. On that basis, it is most sensible to  
10 programme a second PTR hearing in late October, and  
11 there are four real advantages to that. Number 1 is  
12 that we can take account of the up-to-date position on  
13 COVID-19, which is fast-moving.

14           Number 2, the tribunal will be able to take account  
15 of any late settlements, which cannot be ruled out in  
16 a case of this nature, and which would also affect the  
17 shape of the case.

18           The third point, you will then be able to take  
19 account of the parties' responses to the  
20 Court of Justice judgment in Prysmian, if any responses  
21 are needed at all, and there is at least a significant  
22 possibility that none will be needed.

23           The fourth point is that a hearing around 22 or  
24 23 October would avoid interfering with the orderly  
25 programming of skeleton arguments for trial. The reason

1 I say that is because I am looking at things from the  
2 point of view particularly of the claimant and orderly  
3 preparations that are needed. The parties agree on  
4 sequential service of skeleton arguments, with the  
5 claimant going first and the defendants following  
6 afterwards. There are four defendants. This is a case  
7 where, subject to the question of this tribunal imposing  
8 a page limit, which we will return to, there is the  
9 prospect of very large and dense submissions arriving  
10 only shortly before the hearing. For that reason, the  
11 claimants think it is sensible for there to be at least  
12 a two-week gap between the delivery of the defendants'  
13 skeletons and the beginning of the hearing.

14 For that reason we envisage our skeleton going in on  
15 or around Friday, 9 October, and the responsive  
16 skeletons coming in on or around 16 October.

17 That then leaves a clear space for the second PTR.  
18 The problem with an earlier date is that those four  
19 advantages that I have now outlined are all undercut  
20 without the need to go through them, and this is a point  
21 too that Safran essentially mentions in their skeleton  
22 argument, concerning the advantages of a later scheduled  
23 date for a second PTR.

24 THE CHAIRMAN: Yes. Thank you.

25 Have you split this up between you as defendants

1           or --

2           MS. DAVIES: Yes, my Lord, I think the understanding is I am  
3           going to go first again on this one, if I may.

4           THE CHAIRMAN: Very good.

5           MS. DAVIES: As my Lord -- as the tribunal knows, we suggest  
6           that the PTR should be earlier, so late September or  
7           early October, and essentially the reason for that is  
8           that actually what we are doing at this hearing is  
9           leaving for determination at that PTR potentially some  
10          serious issues of principle, in particular can the trial  
11          go ahead completely remotely, and what happens if the  
12          Court of Justice judgment does not arrive on  
13          24 September as we have currently been suggested -- it  
14          has currently been suggested to us it should do?

15          In relation to that, it appears from what Mr. Turner  
16          just -- that latter point, it appears from what  
17          Mr. Turner just said that there may well be  
18          a significant issue of principle between us as to  
19          whether the trial can go ahead or not if the -- my  
20          clients' appeals to the Court of Justice have not been  
21          finally concluded. I am not going to take time taking  
22          the tribunal to the relevant authority now, but our  
23          submission certainly will be that the trial should not  
24          commence -- it should not come on, to use the  
25          Chancellor's language, in the National Grid case before

1           that.

2           Now, the real disadvantage of leaving the PTR until  
3           effectively the week before the tribunal commences its  
4           reading, which is what my learned friend is suggesting,  
5           is that it creates the obvious risk of serious  
6           disruption to all parties in the event, for example, it  
7           has to be decided at that PTR either that the trial  
8           cannot go ahead at all or that it has to be delayed, and  
9           the prospects of arranging for example -- rearranging,  
10          for example, witnesses' availability for attending  
11          hearings and so on and so forth becomes so much more  
12          difficult the later the decision is left.

13          Now, by the end of September, early October, we will  
14          know either whether we have received the  
15          Court of Justice judgment on 24 September, and what its  
16          outcome is, and the parties will have had enough time  
17          between 24 September and the last week of September or  
18          early October to consider whether the position is  
19          indeed, as my learned friend suggests might be possible,  
20          no implications for this case at all, or significant  
21          implications for this case.

22          The pandemic situation is, of course, as we all  
23          know, fast-moving, but again, we are only then a month  
24          before the commencement of the trial, effectively, and  
25          so the tribunal will be able to take stock, in

1 particular as regards any updated guidance or so on by  
2 that stage.

3 Having it at that stage, and this is the really  
4 important point from our perspective, will enable the  
5 parties effectively to make any arrangements that are  
6 necessary in light of any updated position from the  
7 tribunal at that stage. Whereas if we leave it until  
8 late October, there is, as we see it, a very -- a very  
9 real risk that that makes things difficult because it is  
10 so late, and that in itself creates disruption to the  
11 conduct of the hearing. It is obviously a case  
12 management decision for the tribunal, but that in  
13 essence is why we would submit the better date is late  
14 September, early October.

15 THE CHAIRMAN: Yes, thank you very much. Does anyone else  
16 on the defendants' side want to add to anything  
17 Ms. Davies said?

18 MR. JONES: Sir, I do on behalf of Safran. I could perhaps  
19 say, of course, I am agreeing with Mr. Turner, so your  
20 question may have been rather directed at my colleagues,  
21 so perhaps I should not have jumped in in case anyone  
22 else wanted to come in behind what Ms. Davies has just  
23 said.

24 THE CHAIRMAN: No, I think you paused for long enough,  
25 Mr. Jones, so that is all right.

1 MR. JONES: My Lord, I am grateful. My Lord, very briefly,  
2 I agree, for the reasons that Mr. Turner has given, that  
3 the later date would be preferable. There is obviously,  
4 though, a trade-off, and Ms. Davies has identified the  
5 downsides with the later date.

6 I had suggested in my skeleton what I called  
7 a compromise but which is essentially this, which that  
8 if it turns out that by late September there have indeed  
9 been very dramatic developments, which is essentially  
10 what Ms. Davies' concerns boil down to, very dramatic  
11 developments, including if by then it is clear that it  
12 cannot proceed as a hybrid trial, or if by then, for  
13 example, Prysmian completely succeeds in its appeal to  
14 the CJEU, then there would be nothing to stop the  
15 parties, indeed they should, raise it at that point with  
16 the tribunal, and so that, it seems to us, is a way of  
17 balancing the concerns at a later date, but with the  
18 option of raising things earlier if there are very  
19 dramatic developments earlier on.

20 My Lord, finally, I simply wanted to mention a point  
21 about dates, which is, as we understand it, the two  
22 candidates, as my Lord said, are -- the early one is  
23 late September or early October, but to be clear, what  
24 we understand that to mean is the week of 28 September,  
25 and I mention this only because I have difficulties the

1 following week, and I understand that some of my learned  
2 friends also do.

3 THE CHAIRMAN: Yes.

4 MR. JONES: So our understanding is it is that week or, as  
5 my Lord said, 20, 21, 22 October.

6 THE CHAIRMAN: Yes. All right.

7 Submissions by MR. HOSKINS

8 MR. HOSKINS: My Lord, can I just explain ABB's position  
9 briefly.

10 THE CHAIRMAN: Yes, thank you, Mr. Hoskins.

11 MR. HOSKINS: Simply to say we support the Prysman position  
12 for the reasons Ms. Davies gave. We do not support the  
13 "compromise" that Mr. Jones has just suggested, because  
14 having a late date and the possibility to raise  
15 something earlier seems just not practical, given the  
16 cast in this case, both on the bench, the Bar and the  
17 solicitors. The idea we can all ad hoc pop up and  
18 arrange a meeting when everyone is available just does  
19 not seem to us to be practical, so we prefer the  
20 Prysman position.

21 THE CHAIRMAN: Thank you.

22 Ms. Demetriou, do you want to add anything?

23 MS. DEMETRIOU: No, we support the Prysman position but  
24 I do not have anything to add to the submissions that  
25 you have heard already.

1 THE CHAIRMAN: Yes. All right, I think -- it will not -- as  
2 you will anticipate, we have discussed this and although  
3 what has been said has been said very elegantly orally,  
4 it had also been anticipated in writing mostly.

5 We prefer as a tribunal the solution of the later  
6 date for a number of reasons, largely those that were  
7 advanced by Mr. Turner. We do not underestimate the  
8 significance of the point that was made by Ms. Davies.  
9 It is plainly relevant that the parties need to have  
10 sufficient time, from any determination that is made at  
11 a later PTR that is going to affect the conduct of the  
12 trial, to make adequate arrangements, but we think in  
13 some part that will be mitigated by the fact that the  
14 issues that will have to be determined at the PTR in the  
15 circumstances envisaged by Ms. Davies are issues that  
16 will in any event have been highlighted at a slightly  
17 earlier stage. While they will not have been resolved,  
18 the parties will have had an opportunity to consider how  
19 to deal with necessary arrangements in the light of the  
20 questions that might arise as to the conduct of the  
21 trial, depending on what happens in Europe, amongst  
22 other things.

23 We also wish to emphasise that while Mr. Hoskins is,  
24 of course, correct in what he says about the logistics  
25 of getting a lot of people together, the tribunal does

1 intend to be available to deal with things of this sort  
2 during the course of October insofar as it is practical  
3 to do so.

4 Now, of course, all members of the tribunal do have  
5 some other commitments, but this is not a case in which  
6 any of us will simply be coming to this for the first  
7 time at the time we start our reading in the week before  
8 the hearing, and we do envisage the possibility of being  
9 able to give written directions, should it prove  
10 necessary do so, and the possibility, albeit we  
11 understand the logistical difficulties, of having short  
12 ad hoc hearings to give steering -- steer the case in  
13 the right direction, should that be necessary to do so.

14 My colleagues on the tribunal have emphasised the  
15 fact that they are fee-paid members of the tribunal and  
16 they are committed to this case for this period. Of  
17 course, they have other things on, but this is not like  
18 a judge who moves from one case to another without very  
19 much time between them. So I think you may feel assured  
20 in this sense, that we do anticipate that we will be  
21 able to give time to this case during the course of  
22 October, should the need arise.

23 So I hope that gives a little bit of comfort to the  
24 defendants' concerns about the practicalities of dealing  
25 with some of these points but largely -- as I say,

1 largely for the reasons given by Mr. Turner, as  
2 fortified by what Mr. Jones has said, we think that the  
3 later date is appropriate, and the day we would propose  
4 to fix for it is 23 October because that happens to suit  
5 us best within that window of the 21st to the 23rd.

6 Now, so far as skeletons are concerned, and  
7 I think -- I am not sure I have heard -- we have heard  
8 from the defendants on the skeleton aspect of this as  
9 between -- that is the 9th as opposed to the 16th for  
10 the claimant's skeleton and the 16th as opposed to the  
11 23rd for the defendants' skeleton. Does anyone -- can  
12 I say -- perhaps I can cut through it in this way, we do  
13 have a preference, partly for the reasons that I have  
14 just indicated, which is that some members of the  
15 tribunal will be starting to read into this case on --  
16 from time to time during the course of October. We have  
17 a preference to get the skeletons as early as possible.

18 MS. DAVIES: My Lord, I have a particular point to make  
19 about the dates that my learned friend Mr. Turner has  
20 suggested, which I have indicated to him. It is agreed  
21 that there should be sequential exchange of skeletons,  
22 and the broad timing of one week from the claimants and  
23 a week after from the defendants is also agreed, but we  
24 would request that the dates not be Friday the 9th and  
25 Friday the 16th, but instead be Monday the 12th and

1 Monday the 19th, which would still get the full suite of  
2 skeletons to the tribunal two weeks before the start of  
3 the reading period.

4 The reason for that is that there is in fact  
5 a hearing floating in another claim arising out of the  
6 same alleged cartel between 12 and 14 October, which my  
7 clients -- both my clients, Prysmian and hence myself  
8 and NKT and hence, as I understand it, Ms. Demetriou  
9 will be appearing. So receiving my learned friend's  
10 opening on Friday the 9th, with only seven days to  
11 consider before serving ours, will directly coincide  
12 with the time in which I certainly am preparing for and  
13 engaged in that other hearing. Whereas if the dates  
14 were moved to the Monday and the Monday, we would hope  
15 to get the other hearing listed on the Monday, and  
16 effectively therefore either remain -- retain the seven  
17 days or at most be reduced to six.

18 THE CHAIRMAN: Yes.

19 MS. DAVIES: I mean, I hesitate in raising some availability  
20 issues, but it is one that affects a number of parties,  
21 and I am conscious that the purpose of sequential  
22 exchange is to seek to enable defendants, so far as  
23 possible (a) to remove unnecessary duplication from that  
24 which has been put in the claimant's document where we  
25 do not need to add, and secondly where we do need to

1           respond actually to respond. So there is a real  
2           practical problem of having the dates that my learned  
3           friend Mr. Turner suggests from our perspective.

4       THE CHAIRMAN: How did you understand Mr. Turner to respond  
5           to that suggestion, or perhaps I should hear from him?

6       MS. DAVIES: Yes, he did not respond directly to me, I am  
7           afraid.

8       THE CHAIRMAN: Right.

9       MR. TURNER: I had not had explained the detail of  
10           Ms. Davies' personal difficulties until now. We are  
11           happy with that. I would not worry about this going  
12           over the weekend.

13       THE CHAIRMAN: No. I think the tribunal will be content  
14           with that. Does anyone else want to try and persuade us  
15           that we should go for a later date rather than an  
16           earlier date? So the proposal now which would be  
17           the 12th and the 19th for the exchange? No? Okay,  
18           well, that is what we will order.

19           There is the subsidiary position in relation --  
20           while we are on this subject, in relation to  
21           chronologies and the dramatis personae. As I understand  
22           it, the parties do not think the tribunal will be  
23           assisted by a chronology, and we are in your hands on  
24           that.

25           So far as a dramatis personae is concerned, I find

1 in cases of this sort, where there are an awful lot of  
2 people involved, that it is quite helpful to have a DP  
3 of some sort. So I think what we would like is for that  
4 document to be made available in agreed form by the time  
5 of service of the first skeleton. I am not going to  
6 direct who does it. We will leave that up to you, but  
7 obviously, the claimants will have to take it in hand if  
8 no one else is going to do it.

9 MR. TURNER: I am grateful.

10 MR. HOSKINS: My Lord, we have raised one other possibility  
11 for a pre-trial direction, which was that all the  
12 parties should confirm the witnesses -- the factual  
13 witnesses that they wish to cross-examine by Friday,  
14 11 September 2020. It just seemed to us that was  
15 sensible, particularly in terms of organising which  
16 witnesses would have to attend and how they would  
17 attend, et cetera. Nobody has commented on that, so  
18 I do not know if it has generally been seen as a good  
19 thing or a bad thing by the other parties, but we would  
20 like that direction, please.

21 THE CHAIRMAN: Yes. Thank you, Mr. Hoskins. Yes, I had  
22 noticed that. Does anyone else want to comment on that?  
23 Perhaps from the defendants' side first, and then I will  
24 hear Mr. Turner. No, Mr. Turner.

25 MR. TURNER: No, it is a good suggestion.

1 THE CHAIRMAN: Thank you. I will direct that -- we will  
2 direct that then.

3 Thank you, I think while we are on -- and this is  
4 taking matters slightly out of order, but it is  
5 amongst -- no, in fact we will do -- I think let us move  
6 on to pleadings next, thinking about it.

7 I think that is the next item on the agenda, is it  
8 not, Mr. Turner?

9 MR. TURNER: Well, the overhanging question is whether for  
10 skeletons, there should be a limit on the page length.

11 THE CHAIRMAN: Oh yes, you are quite right. Well, now, the  
12 reason we just wish to explore this with you is -- has  
13 nothing to do, from the tribunal's point of view, about  
14 restricting in any way the -- what is necessary for the  
15 parties to say to the tribunal in order to advance their  
16 case. Nor are we particularly interested, to be frank,  
17 with a pure equality of arms argument, although we do  
18 appreciate that mass of language per se can have its  
19 advantages, but it can also, to be fair, have its  
20 disadvantages because the tribunal, if faced with  
21 more -- and I am sure no one on this call is going to be  
22 verbose, but if the tribunal is faced with more language  
23 than is necessary, will actually -- it may well be  
24 counterproductive.

25 What we are keen to ensure, though, is that we are

1 not faced with a vast mass of paper that is unnecessary,  
2 and sometimes it is necessary to give directions. In  
3 the Commercial Court, as I am sure you all know, it is  
4 commonplace, and I think in fact it is even in the  
5 Commercial Court Guide in relation to a number of types  
6 of hearings, that there are limits on the lengths of  
7 skeletons.

8 For my part, I can think of very few cases, however  
9 complex, in which a skeleton that runs to more than 75  
10 pages is going to help anyone at all. Now, it is  
11 against that background that the tribunal has approached  
12 this suggestion, and I am -- I think it does help  
13 concentrate minds if people know that they have got  
14 a word limit.

15 Now, if you are going to tell us that limitations  
16 simply are not practical in this case, I think you will  
17 just have to explain to us why.

18 So who wants to go first on this?

19 MR. TURNER: My Lord, perhaps I will say my piece. We are  
20 familiar with very long and complex cases in this area,  
21 competition law claims, and my own experience accords  
22 with your Lordship's, that there is no real need for  
23 extremely long documents. My particular concern, which  
24 I indicated earlier, is not so much pure equality of  
25 arms, but the burden placed on our team on the

1 claimant's side if many hundreds of pages of material  
2 arrive in the short period in the run-up to the hearing.

3 For that reason, we think a page limit is  
4 appropriate. We have set out our proposal in our  
5 skeleton, which was essentially that we should have up  
6 to 100 pages, bearing in mind the number of parties on  
7 the other side, and that the defendants collectively,  
8 and they will be liaising to avoid duplication, should  
9 have 200 pages. So that, for example, you do not have  
10 three or four skeletons all dealing with the law on the  
11 incidence of tax on damages, or on the passing on of  
12 loss, but that they parcel these things up between  
13 themselves.

14 As I say, it is more for our point of view the  
15 principle that matters, because we are aligned with what  
16 your Lordship has said in terms of the thinking, and our  
17 object is to ensure that we are not deluged in the  
18 run-up to the trial.

19 THE CHAIRMAN: Yes.

20 Who is going to deal with this for the defendants?

21 MR. HOSKINS: For ABB's part I would be happy to live with  
22 the 75-page limit. We have all promised, and we will  
23 seek to avoid duplication, but I think to say in advance  
24 if we are only just allowed 50, it is just too tight.  
25 We agree with the tribunal's assessment that a maximum

1 of 75 is likely to be appropriate, but 50 just feels too  
2 light, to be perfectly frank, even if we are  
3 co-operating, as we will.

4 I just simply say that, obviously, I think any  
5 party, if they are struggling, should be able to write  
6 to the tribunal and beg a few extra pages, but I hope  
7 that will not be necessary, and certainly we will be  
8 trying to avoid that. But we are happy to sign up to  
9 75.

10 THE CHAIRMAN: Anyone else want to say anything?

11 MS. DAVIES: Yes, if I may, my Lord. Simply to say from our  
12 perspective, we would urge the tribunal not -- not to  
13 impose a limit in this sense: we have obviously just  
14 heard what the tribunal has said. You have very, very  
15 experienced counsel appearing in front of you on all  
16 sides in relation to this. We all understand that  
17 lengthy openings are not actually of benefit to anyone  
18 because they become unreadable.

19 We do -- we have on the defendants' side all agreed  
20 to do what we can to seek to avoid duplication, and the  
21 only reason not -- the reason I am just suggesting do  
22 not impose a specific limit is what that does do is it  
23 involves last-minute applications to the tribunal, for  
24 example, if you are going to be 77 rather than 75 for  
25 some important reason, and we do not at the moment know

1           what the position is going to be as regards settlement,  
2           for example. So I would simply just ask the tribunal if  
3           possible, rather than imposing a strict limit, we have  
4           heard what the tribunal has said, and we will of course  
5           take that into account and seek to comply with it, but  
6           to avoid the practical issue of specific requests where  
7           there is an issue, that should be sufficient.

8           THE CHAIRMAN: Yes. Anyone else want to say anything?

9           MS. DEMETRIOU: Just to confirm that that is also our  
10          position. So we have listened carefully to what the  
11          tribunal said. We will do everything we can to keep the  
12          skeleton argument as lean as possible, but we do not  
13          think that there is a need to impose a rigid page limit  
14          in this case, for the reasons Ms. Davies just gave.

15          THE CHAIRMAN: Yes.

16                 Mr. Turner, do you want to say anything in response  
17          to what has just been said? Your microphone is off,  
18          I am afraid.

19          MR. TURNER: Apologies. Am I audible now?

20          THE CHAIRMAN: Yes, you are now, yes.

21          MR. TURNER: It is a very short point in response to  
22          Ms. Davies. It is not a complete reassurance that one  
23          says we have very experienced counsel in the field and  
24          everyone understands what to do. I have déjà vu because  
25          in one of the recent cases that we have mentioned, this

1 is the case colloquially called *Paroxetine* in this  
2 tribunal a couple of years ago, at the PTR, the parties  
3 equally gave assurances and then respected leading  
4 counsel on one side put in a skeleton which was, from  
5 memory, around 280 pages. Ms. Demetriou will remember  
6 that, as we worked together on the case, and that was  
7 the subject of acid comment by the tribunal during the  
8 proceedings.

9 But for that reason, it seems to us that it will  
10 focus minds desirably if a page limit is imposed. We  
11 take on board what Mr. Hoskins has said, and we would  
12 not object to the defendants having a 75-page limit for  
13 our part.

14 THE CHAIRMAN: Yes.

15 Ms. Davies, I am against you on this, I am afraid.  
16 It is always open to a party to come and explain to the  
17 court, and it can easily be done in writing, as to why  
18 it is they cannot fit it within 75, but many judges'  
19 experience is, with the best will in the world and  
20 casting absolutely no aspersions on counsel at all,  
21 there are pressures that arise in relation to the  
22 preparation of skeleton arguments where if there is not  
23 a direction of this sort or a practice direction in  
24 place, it is very difficult to resist the temptation to  
25 go much longer than one really should. But can I stress

1           that we will be open to a short written application if  
2           people find at the last minute that they cannot comply,  
3           but I do think it is appropriate for a 75-page limit for  
4           each skeleton.

5           Good. Mr. Turner, what is next?

6           MR. TURNER: My Lord, the next topic -- just before leaving  
7           that topic, my Lord, in the claimant's case, I have  
8           suggested 100 pages because we have multiple opponents  
9           who all say they have a different individual case to  
10          put, and I do not know whether in view of that,  
11          your Lordship would be prepared to direct, or the  
12          defendants' counsel oppose, the claimants having 100  
13          pages as the upper limit for their skeleton argument?

14          THE CHAIRMAN: What, you are suggesting 100 pages you have  
15          and they have 75 pages each? Is that what that boils  
16          down to?

17          MR. TURNER: Yes, it does.

18          THE CHAIRMAN: Yes, is our response on that, but it may be  
19          held against you when Ms. Davies writes and says she  
20          cannot get it in in 75.

21          MR. TURNER: I know, I understand. We will be efficient.  
22          It is only that we have a particularly difficult task in  
23          dealing at the moment with four opponents.

24          THE CHAIRMAN: No. The tribunal does understand that.

25          MR. TURNER: The next issues, which in the tribunal's letter

1 to the parties were going to be organised together,  
2 dealt with together, were issues 3, 4 and 13,  
3 essentially the amendment issues --

4 THE CHAIRMAN: Yes.

5 MR. TURNER: -- and the application by National Grid in  
6 particular for orders for further information.

7 THE CHAIRMAN: Yes.

8 MR. TURNER: Before I develop that, if it is convenient, my  
9 Lord, I have noticed the time and what you said at the  
10 outset about a break. I do not know whether now is  
11 convenient or whether I should crack on.

12 THE CHAIRMAN: I would have thought it probably is if we are  
13 moving on to a completely different topic, although can  
14 I ask this before we do break. Quite a lot of these  
15 points seem to still be subject to discussion between  
16 the parties at the time the skeletons went in. Has  
17 there been any progress?

18 MR. TURNER: There has --

19 THE CHAIRMAN: Good.

20 MR. TURNER: -- particularly on the subject of the draft  
21 amendments that we indicated some time ago.

22 THE CHAIRMAN: Excellent. All right. Well, we will break  
23 for -- I think we will break -- it is now just after 20  
24 to, we will break until 11.50 am, so just under  
25 ten minutes.

1 MR. TURNER: I am obliged.  
2 (11.42 am)  
3 (A short break)  
4 (11.53 am)  
5 THE CHAIRMAN: Right. I hope ...  
6 I hope we are all back. Can you hear me,  
7 Mr. Turner?  
8 MR. TURNER: Yes, I can.  
9 THE CHAIRMAN: Good. We are just waiting for Dr. Bishop to  
10 reappear.  
11 (Pause).  
12 Right, I think -- have you got all members of the  
13 tribunal on your screen?  
14 MS. DAVIES: Yes -- sorry, I have you, my Lord, but not  
15 Dr. Bishop or Mr. Holmes.  
16 MS. DEMETRIOU: I have got everyone.  
17 MR. TURNER: I have only your Lordship. Mr. Holmes, I do  
18 not have on video.  
19 MR. HOLMES: That is strange, can you hear me, Mr. Turner?  
20 MR. TURNER: I can.  
21 MR. HOLMES: My camera is on and I can see myself.  
22 THE CHAIRMAN: I think so long as everyone is participating  
23 in the sense that they can hear and see others, that is  
24 probably sufficient, even if you cannot see us. I hope  
25 you will forgive Mr. Holmes for hiding. He is not doing

1           it deliberately, he is present.

2       MR. HOLMES:  It is on that screen as well.

3       THE CHAIRMAN:  Ah well, one of the mysteries of Teams.

4           Good, all right.  Shall we continue?  We were going to

5           move on to pleadings and RFI, I think.

6       MR. TURNER:  Yes, there are three issues essentially.  There

7           is the ABB amendments, which they have put forward.

8           There is the National Grid amendments on the claimant's

9           side.  Thirdly, there is the question of a timetable for

10          further amendments --

11       THE CHAIRMAN:  Yes.

12       MR. TURNER:  -- including a reply by the claimant.  After

13          those there is the issue of further information.

14       THE CHAIRMAN:  Yes.

15       MR. TURNER:  So I will begin with the amendments to the

16          pleadings.  All the parties agree that it is appropriate

17          to put the pleadings in order ahead of the trial.  There

18          have been a lot of developments over the months and

19          years of this litigation which have not yet found their

20          way on to the pleadings, and most recently and perhaps

21          importantly, there has been an intense expert engagement

22          which has led to movement.  Everybody appreciates that

23          their respective cases should now be clear going

24          forward.

25                 We and ABB were in correspondence about this since

1 mid-June. ABB moved first by proposing significant  
2 amendments of its particulars which we have been  
3 considering, and as of yesterday, I am pleased to report  
4 it is fully agreed that there is no opposition to ABB's  
5 draft amendments. ABB are going to make certain changes  
6 to their proposed pleading in an agreed form before it  
7 is finalised.

8 THE CHAIRMAN: Yes.

9 MR. TURNER: So, so far as ABB is concerned, that is  
10 a non-issue for today. The other defendants have not as  
11 yet --

12 MR. HOSKINS: Sorry, there is one small practical issue  
13 I need to raise, but I can do it after (inaudible)  
14 I will come back to that.

15 MR. TURNER: Thank you.

16 The other defendants have not as yet proposed making  
17 any specific amendments to their own defence pleadings.  
18 In the case of Prysmian, they say that they want to wait  
19 for the Prysmian Court of Justice judgment for reasons  
20 of efficiency. Safran has not indicated it intends to  
21 amend at all. Perhaps it feels no need.

22 In the case of NKT, they have pointed to some  
23 amendments required as a result of the Court of Justice  
24 judgment recently in their own case, and we have also  
25 drawn to their attention the need for at least one

1 change following the recent Supreme Court judgment in  
2 *Sainsbury's v Mastercard*.

3 Then we turn to the claimant. National Grid  
4 signalled to the defendants that we aimed to put up  
5 pleadings -- the main pleadings in order as soon as  
6 possible. We circulated draft amendments to our main  
7 particulars a week ago, and we sought consent. I think  
8 the position is this: consent has been given by ABB,  
9 subject to certain confirmation that we will make minor  
10 changes, and we agree to that.

11 Consent has also been given to our proposed  
12 amendments by Safran. NKT appears also in its skeleton  
13 to have consented. If we can try using the document  
14 technology for the first time and bring up on screen  
15 {A/4/6}, if this works.

16 It does work. So you will see the first sentence in  
17 paragraph 14 of Prysmian's skeleton:

18 "The NKT Defendants consent to the proposed  
19 amendments in the [re-amended particulars of claim]."

20 Prysmian in its skeleton says that it needs more  
21 time. I do not believe that I have had an update on  
22 that from Ms. Davies.

23 A copy of our proposed amendments is in the bundle 24  
24 at {A/92/1}.

25 THE CHAIRMAN: That was the version of your particulars of

1 claim you asked us to read.

2 MR. TURNER: Yes.

3 THE CHAIRMAN: Yes.

4 MR. TURNER: Well, I hope it was. It should have been on  
5 the reading list. This is the draft that gives the  
6 up-to-date position.

7 THE CHAIRMAN: Yes.

8 MR. TURNER: What you should have on screen is the first  
9 page of that draft. Now, these were not intended --  
10 they are not intended to introduce any new points. The  
11 amendments are there to deal with three main  
12 developments. The first is that very recently ABB has  
13 substituted, as your Lordship knows, a new fifth  
14 defendant.

15 THE CHAIRMAN: Yes.

16 MR. TURNER: That new fifth defendant was not an addressee  
17 of The Commission decision, whereas the old fifth  
18 defendant was, and so there are some amendments made  
19 throughout to reflect the substitution.

20 Second, there is the outcome of the recent Court of  
21 Justice judgments in the appeals by ABB and NKT in  
22 recent months.

23 Third, the outcome of the expert engagement process,  
24 our particulars of claim now include up-to-date numbers.

25 As things stand, we have got no reason to think that

1           there is any problem with our draft amendments which  
2           should lead to Prysmian needing longer to confirm  
3           whether they are content or whether, in the same way as  
4           ABB, that they have spotted something which is a problem  
5           that they would draw to our attention.

6           It does not seem to us that Prysmian needs more time  
7           than the others, and for that reason we seek permission  
8           for the amendments in this draft in the form of our  
9           order, and if we bring that up, that is {A/9/3}, where  
10          we seek --

11         THE CHAIRMAN: Have you got the hard copy reference as well?  
12           Because I can mark them up.

13         MR. TURNER: I apologise, I have not marked up my notes with  
14           the hard copy references.

15         THE CHAIRMAN: No, do not worry.

16         MR. TURNER: Yes, I thought --

17         MS. DAVIES: They should be the same.

18         MR. TURNER: Yes, I thought they were the same.

19         THE CHAIRMAN: Oh right, good.

20         MR. TURNER: If they are the same, you should have it at  
21           tab 9.

22         THE CHAIRMAN: Yes.

23         MR. TURNER: The draft order is in tab 9, and if you turn  
24           the page to page 3, at the moment I have on screen  
25           {A/9/1}, if you turn to page 3 {A/9/3} and move forward

1 on the electronic page as well.

2 THE EPE OPERATOR: Hang on. It is Matthew, the EPE officer.

3 We have two pages.

4 MR. TURNER: Right, if you turn to the next page, please.

5 THE EPE OPERATOR: Sure.

6 MR. TURNER: It could be I have put the wrong reference in.

7 Yes, there you are, I am sorry, it is paragraph 3, not  
8 page 3 {A/9/2}. We were just asking for permission to  
9 re-amend in accordance with the draft which we had up on  
10 screen a little while earlier.

11 In the following paragraphs, we had the proposed  
12 sequential timetable. If the tribunal is prepared to  
13 order that we have permission to make those amendments,  
14 the dispute between us moves to the timetable for  
15 further amendments by all the parties, and in accordance  
16 with the draft order that you should have on screen,  
17 those would be amendments after we have served on  
18 7 August to the defendants' defences, and we said after  
19 the month of August, 4 September would be fine. The  
20 claimant may amend its reply, if so advised, by  
21 18 September.

22 THE CHAIRMAN: Yes.

23 MR. TURNER: There are two objections to the timetable here  
24 articulated in the skeletons. The first was from NKT  
25 principally. NKT say that National Grid should serve

1 the reply amendments first on 7 August, before the  
2 defences. If that is right, if we have understood that  
3 correctly, we do not agree, it is back to front because  
4 we should have NKT's up-to-date case on what amount of  
5 the overcharge has been passed on by National Grid to  
6 its customers before we set out our response to that  
7 issue in the reply.

8 THE CHAIRMAN: Is this the burden of proof point that arose  
9 in *Sainsbury's*?

10 MR. TURNER: It is connected to that, yes. Both NKT and  
11 Prysmian at the moment plead in their current defences  
12 explicitly that a claimant has got the burden of  
13 disproving that it has passed on an overcharge to its  
14 customers. The Supreme Court has definitively ruled  
15 that they are wrong about that. We do not perhaps need  
16 to turn that up, and I have given the reference in our  
17 skeleton, but essentially it is not for a claimant to  
18 plead and prove it has not passed on an overcharge. The  
19 starting point is that the defendant pleads and proves  
20 that there has been a pass-on.

21 THE CHAIRMAN: Although there was something that I was not  
22 sure I quite understood, but I did not spend a lot of  
23 looking at it, which was there is apparently a strong  
24 evidential burden on you. What is the difference  
25 between the legal burden and the evidential burden in

1           this context?

2           MR. TURNER: Here the practical implications are these: that  
3           where a defendant says that an overcharge has been  
4           passed on, it needs to set out its case. However, the  
5           point made by the Supreme Court as Mr. Hoskins, who was  
6           also there will recall, it was principally his point,  
7           was that the information required to assess whether  
8           a claimant, such as here National Grid, has passed on  
9           a loss in its prices, is likely to be held by that  
10          claimant and not by the supplier of the cartel goods or  
11          services.

12                     That is why a party in the position of my client,  
13          the claimant, has an evidential burden because it will  
14          be called on to provide the necessary material to enable  
15          the matter to be properly adjudicated.

16          THE CHAIRMAN: So what the defendant has to do is raise  
17          a case, and then fairly rapidly the evidential burden  
18          shifts back to you, is that the way it works?

19          MR. TURNER: That is right.

20          THE CHAIRMAN: Yes.

21          MR. TURNER: What has happened now is that there has been  
22          both the exchange of the expert reports, all the  
23          disclosure and finally the expert engagement which has  
24          led to their joint statement. All the experts have had  
25          something to say about it. Our expert has in certain

1 respects adjusted their position. In a couple of  
2 respects, the defendants appear also to have produced  
3 new material. It is our position, it is plain that the  
4 defendants should now say what they consider to be the  
5 outcome for their pleaded case on what has been passed  
6 on, and we respond to that in our reply afterwards with  
7 our own case.

8 What I have done in the skeleton argument, I do not  
9 have the paragraph reference immediately to hand, is to  
10 indicate where, if there has been pass-on, we see the  
11 numbers coming out on different bases.

12 THE CHAIRMAN: This is paragraph 40 {A/2/13} of your  
13 skeleton, I think.

14 MR. TURNER: Thank you, that is right. Can you turn it up.  
15 Yes, thank you. That is it. Where we have summarised  
16 what we now see as what is going to feature, we think,  
17 in our reply after the defences have been served as what  
18 has been passed on based on these different scenarios.  
19 Our primary case, as the tribunal may have gathered, is  
20 that we are entitled in these proceedings to receive the  
21 full amount of the overcharge for the reason that this  
22 is a very peculiar situation where the regulator has the  
23 ability, through adjustment of National Grid's prices to  
24 its electricity customers, to pass back, through lower  
25 prices allowed to National Grid, losses that were

1           suffered to consumers to them through the price  
2           mechanism.

3           So that is our primary case and our defence -- our  
4           reply case assumes that if you do follow through, that  
5           there has been some degree of passing on of the  
6           overcharge to customers, this is the way in which it  
7           should be approached.

8           So we have indicated the position, as your Lordship  
9           says, in paragraph 40. After the expert engagement, we  
10          think that it is the right approach for the defendants  
11          now to set out their defence case first, and we propose  
12          4 September for that, and we will follow on the 18th  
13          with our reply.

14         THE CHAIRMAN: I mean, can I just understand this,  
15         Mr. Turner. So these points in large respect flow  
16         either from a clarification of the law or from the  
17         consequences of the discussions that have been held  
18         between the experts. Now, so far as the second aspect  
19         is concerned, the discussion between the experts, the  
20         purpose of the amendments to these pleadings is to  
21         ensure that the pleadings reflect what the parties'  
22         cases now are in the light of the advice and views that  
23         have been expressed by the experts on the issues that  
24         arise.

25                 It is not, as I understand it, intended by any party

1           that they are going to reformulate their case in a way  
2           which is not discernible from the expert evidence that  
3           has now reached the stage of the statement that we have  
4           all looked at.

5       MR. TURNER:   That is right.

6       THE CHAIRMAN:   So there is an element of -- and do not get  
7           me wrong, I think it is important, there is an element  
8           of formalising the parties' positions together with  
9           ensuring that their positions are clearly articulated  
10          for the purposes of -- so everyone knows where they are  
11          going to trial about this.   This is not a case in which  
12          the amendments are being prepared in circumstances in  
13          which there may be a case that people do not know about  
14          which is suddenly going to emerge in the pleadings.   Is  
15          that right?

16      MR. TURNER:   That is absolutely right.

17      THE CHAIRMAN:   Yes.   So I think one has to be -- I mean, one  
18          of the questions -- one of the consequences of that,  
19          which the tribunal did discuss amongst itself, was  
20          actually why it was that we all needed so long to  
21          finalise this, because surely the changes to the  
22          pleadings that now are going to be introduced by the  
23          parties should be readily apparent to them as a result  
24          of the expert engagement, or is that not right?

25      MR. TURNER:   We would hope so, yes, and it is for that

1 reason that we were able to produce the amendments to  
2 our main case which was circulated a week ago, and how  
3 I was able in this skeleton to indicate what we are  
4 likely to say in our reply to the defences. We do not  
5 think that substantial time is needed. The main reason  
6 for the proposal that the defendants should have until  
7 4 September to put this in order was that I was paying  
8 regard to the August holiday, more than anything.

9 THE CHAIRMAN: Yes.

10 MR. TURNER: I had nothing more sophisticated in mind.

11 THE CHAIRMAN: Yes. All right. Well, I think -- the main  
12 protagonist on this, I think is Ms. Davies, I think,  
13 probably; is that right, because, Ms. Davies, I have not  
14 heard yet what your attitude is in relation to the  
15 amendments as a matter of principle, I do not think,  
16 quite apart from the timetable?

17 MS. DAVIES: My Lord, so far as the amendments as a matter  
18 of principle, I have instructions as of this morning  
19 that we do not oppose those. So we do not oppose  
20 paragraph 3 of my learned friend's order.

21 THE CHAIRMAN: Thank you.

22 MS. DAVIES: The two issues that arise from our perspective  
23 are, firstly, the question of whether Prysmian should be  
24 required to amend its defence to respond to these  
25 amendments at this stage, as my learned friend suggests

1 in paragraph 5, I believe it is, of his order. It has  
2 gone from the screen. It is tab {A/9/2} from  
3 recollection.

4 UNIDENTIFIED SPEAKER: Could we have the order back on  
5 screen, please? Thank you.

6 MS. DAVIES: Yes, it is paragraph 5. Our position as  
7 regards that is that we should not be required to amend  
8 our defence until after we have received the CJEU  
9 judgment in my clients' appeal, and I will explain why  
10 that is. It is an efficiency point, as my learned  
11 friend points out, but I will explain why there is no  
12 need for us to make the amendments to deal with the  
13 issues he has amended at this stage.

14 Secondly, we also support Ms. Demetriou's position  
15 that the date proposed for my learned friend to produce  
16 his draft amendments to his reply of 18 September is too  
17 late, and that should happen in August. Now, I am in my  
18 Lord's hands as to whether I deal with the Prysmian date  
19 now, and then Ms. Demetriou deals with the reply point,  
20 and I do not think I need to in relation to that.

21 THE CHAIRMAN: Well, as you are speaking, why do not you  
22 deal with the Prysmian point first.

23 MS. DAVIES: Now -- so -- yes, thank you, my Lord. So far  
24 as that is concerned, as we all know, as matters  
25 presently stand, we are expecting a judgment from the

1 Court of Justice, subject to any delay, on 24 September.

2 The likelihood is that that judgment is going to  
3 lead to the need for amendments, in fact both by the  
4 claimants and also by Prysmian, and my learned friend in  
5 fact accepted that in his email to the tribunal on  
6 22 July.

7 Now, that being so, the question -- there is  
8 a practical question of whether Prysmian should be  
9 required, as it were, effectively to amend its pleadings  
10 twice immediately in the run-up to the hearing, and in  
11 that respect, my Lord, I entirely agree with the point  
12 that my learned friend Mr. Turner made a moment ago,  
13 which is part of the important backdrop to this, that  
14 what we are talking about here is formalising  
15 amendments, not indicating a new case on the part of  
16 anyone.

17 Now, specifically as regards the amendments that my  
18 learned friend is proposing to make to his re-amended  
19 particulars of claim, as he indicated, those broadly  
20 fall into three categories. The first is amendments to  
21 deal with the position of the fifth defendant, the ABB  
22 entity. There is absolutely no need for Prysmian to  
23 amend its defence in relation to that. It is not  
24 a matter that concerns it.

25 The second is amendments reflecting the findings of

1 the Court of Justice in its judgments in the ABB and NKT  
2 appeals. Those are matters that are directed to ABB and  
3 NKT, and again, there is no need for Prysmian to amend  
4 its defence at this stage in response to those. By far  
5 the more efficient course is for any amendments that  
6 arise -- that my learned friend wishes to make arising  
7 out of the Prysmian appeal to his claim against my  
8 client to be made, and for us to deal with any points  
9 that arise out of that in relation to -- at the time  
10 that we amend our defence.

11 The third is amendments to set out National Grid's  
12 revised case in relation to the value of commerce  
13 affected and the level of the alleged overcharge, and  
14 those are the amendments which are set out in  
15 paragraphs 62 to 73 of my learned friends' amended  
16 document at A -- starting at {A/92/19}.

17 THE CHAIRMAN: Just a moment while that comes up. So it is  
18 paragraph 63 --

19 MS. DAVIES: It starts at paragraph 63 and it goes through  
20 to paragraph 73, because of the various ways in which my  
21 learned friend builds up his claim. But what all these  
22 are doing are setting out their revised case as to the  
23 value of commerce and their revised case as to the level  
24 of overcharge. As my learned friend Mr. Turner  
25 explained, they are not at this stage setting out any

1 case in relation to pass-on because their primary  
2 position, as we understand it, is going to be that the  
3 tribunal should be awarding damages in this case, simply  
4 by reference to the value of commerce and overcharge,  
5 and should not be taking any account of the fact that  
6 a very significant amount of that overcharge, if it is  
7 proven, would have been passed on through the regulatory  
8 system.

9 THE CHAIRMAN: Yes.

10 MS. DAVIES: So in their particulars of claim, all they are  
11 doing is amending to set out their case, which is  
12 consistent with the case as set out in the expert  
13 evidence that has now been exchanged, as to the value of  
14 commerce and the revised percentage of overcharge that  
15 now -- that is now found in Dr. Jenkins' annex to the  
16 joint experts' statement.

17 Now, of course we understand it makes sense for the  
18 claimants to tidy their pleadings up in this way, but  
19 there is no need generally to require Prysmian  
20 specifically to respond immediately, because my learned  
21 friend is well aware, as a result of the expert process,  
22 what the Prysmian case is on the value of commerce and  
23 the level of any overcharge, and there is no specific  
24 benefit in requiring Prysmian to incur costs in amending  
25 its defence to deal with that, in circumstances where we

1 are going to have to engage in another round of  
2 amendments very shortly after the dates proposed by my  
3 learned friend.

4 The one caveat to that I would express is that the  
5 amendments that are being proposed by my learned friend  
6 also include amendments to appendix 2 to the particulars  
7 of claim. Now, appendix 2, the tribunal may have seen,  
8 is the appendix in which the claimant set out the full  
9 details of the various 108 supplies which are the  
10 projects in suit in these proceedings.

11 THE CHAIRMAN: Yes.

12 MS. DAVIES: What they do by the most recent round of  
13 amendments is update their overcharge figures in  
14 relation -- their claimed overcharge figures in relation  
15 to each of those projects.

16 Now, that appendix has in fact gone through various  
17 iterations since it was first produced, and has been  
18 amended extensively as a result, and the most recent  
19 version before the one that is attached to this  
20 re-amended version was served in, I believe, May last  
21 year, formally, although it was circulated slightly  
22 earlier than that, and the defendants have not actually  
23 responded formally -- have never been required to  
24 respond formally to that amended version.

25 What we were proposing to do as part of our

1 preparation for trial, in fact we have been doing as  
2 part of our preparation for trial, is working through  
3 that amended version with a view to narrowing any areas  
4 of dispute where we could do so, and we will be in  
5 a position to circulate the amended version of our  
6 response to appendix 2 within the next two weeks.

7 THE CHAIRMAN: Right.

8 MS. DAVIES: So that aspect of the pleading, which is not  
9 going -- in any way be affected by the Prysmian appeal,  
10 we can see the sense of advancing in the interim and are  
11 happy to do that.

12 But so far as the other amendments are concerned,  
13 that have been made by my learned friend, to his  
14 pleading, which is the body of the pleading and the  
15 amendments to appendix 4, given that those are all  
16 matters that do not in fact at this stage require  
17 responses by Prysmian, and it is therefore not necessary  
18 or efficient, in our submission, to require Prysmian to  
19 incur costs of amending its defence effectively twice,  
20 our position is that we should wait till we get our  
21 Court of Justice judgment.

22 If my learned friend then wishes to make further  
23 amendments to his particulars of claim in light of that,  
24 as he has done, for example, in relation to the NKT and  
25 the ABB judgments, he can do so and we will produce

1 a composite amended defence dealing with any -- any  
2 small points that remain -- that relate to Prysmian as  
3 a result of that. Obviously we are not going to deal  
4 with the ABB points or the NKT points at that stage.

5 That is broadly what I wanted to say in relation to  
6 the timing, and so far as that timing is concerned, our  
7 submission is that the sensible thing is -- to do is to  
8 leave that for discussion between the parties once we  
9 get the Court of Justice judgment, and if there is any  
10 dispute about it, of course we can come back to the  
11 tribunal in accordance with the indication that the  
12 tribunal gave us earlier about that. But in particular,  
13 if my learned friend is going to amend his particulars  
14 of claim in light of the Court of Justice judgment, that  
15 needs to happen first before we amend our defence.

16 Now, my learned friend Mr. Turner has also made the  
17 point that we need to amend our defence to set out our  
18 case on pass-on in light of the *Sainsbury's v Mastercard*  
19 judgment, and my Lord of course had the debate with my  
20 learned friend about the difference between a legal and  
21 evidential burden. But all I would say in relation to  
22 that, my Lord, is that our case on pass-on is actually  
23 already set out in our defence. There is a paragraph --  
24 perhaps we could turn it up. It is in {B/8/23}.

25 Actually if we could go back to page 22 {B/8/22}.

1           The tribunal will see the heading, "Pass on Defence",  
2           and then at paragraph 48, there is a paragraph which I  
3           understand my learned friend now to be criticising as  
4           suggesting that the legal burden is on the claimants to  
5           prove pass-on, which of course I accept, in light of the  
6           Supreme Court judgment, is not the position, but of  
7           course, as per the discussion shortly a moment ago  
8           between my Lord and Mr. Turner, there is an issue about  
9           evidential burden which -- and we respectfully accept  
10          and adopt what my learned friend Mr. Turner said in  
11          relation to that, it does readily and rapidly move to  
12          the claimants.

13         THE CHAIRMAN: Yes.

14         MS. DAVIES: But in any event, the law in relation to that  
15          is clear, and if there is a tidying-up amendment that  
16          needs to be made to this, it is not one that is actually  
17          going to take anyone by surprise.

18                 But the key point is that then in paragraph 49 of  
19          our defence, without prejudice to the legal point, we in  
20          fact set out what our case on pass-on was. In  
21          particular, if my Lord and the tribunal -- if we turn on  
22          to -- the next page, page 23 {B/8/23} and at  
23          paragraph 49.2.3 we have set out a positive case in  
24          relation to pass-on.

25                 So this is not a situation where our pleading simply

1           took the legal point and we had not pleaded a positive  
2           case in relation to pass-on. We had in fact, without  
3           prejudice to the legal point, already done that which  
4           the Supreme Court now says a defendant in our position  
5           needs to do, which is to positively plead a case in  
6           relation to pass-on. We have done that, and insofar as  
7           an amendment needs to be made to paragraph 48, it really  
8           is a small tidying-up one, and there is absolutely no  
9           need to require us to do that now, in advance of the  
10          amendments that we are going to have to make, once we  
11          have all seen the judgment of the Court of Justice in my  
12          clients' appeal.

13        THE CHAIRMAN: But is it -- do I take from that, Ms. Davies,  
14          that your position is that you do not have any further  
15          case to put in relation to pass-on? I mean, is your  
16          case on pass-on now fully pleaded?

17        MS. DAVIES: Yes, my Lord, that is our position. I accept  
18          that there needs to be a tidying amendment up to  
19          paragraph 48 to make it clear we are talking about  
20          evidential burden, not legal burden.

21        THE CHAIRMAN: Yes.

22        MS. DAVIES: But our case on pass-on as set -- as then  
23          evidenced through the expert evidence of Mr. Davies is,  
24          in our submission, sufficiently summarised in  
25          paragraphs -- in paragraph 49.

1 THE CHAIRMAN: I see. Before Mr. Turner responds on that  
2 point, and I am conscious that I am also going to hear  
3 Ms. Demetriou on the order of play in reply, can I just  
4 understand this. Leaving that on one side, there are  
5 three aspects, I think, to the pleading which you said  
6 did or did not have to be responded to. When I say "the  
7 pleading", I mean Mr. Turner's particulars of claim.

8 The first are those categories of plea where you do  
9 not have a case to advance. That is, for example, the  
10 ABB allegations and the substitution of the new fifth  
11 defendant and so on. That is fine, you are not going to  
12 plead to them, and you cannot be made to plead to them  
13 and why should you, end of story in a sense.

14 The second category are what you described as the  
15 value of commerce and overcharge amendments, and so far  
16 as I understood it, you say that your case is apparent  
17 from the experts' reports, but is not yet specifically  
18 identified in a pleading form, but it is identifiable  
19 from the expert evidence, as I understand it. Is that  
20 right or have I got that wrong?

21 MS. DAVIES: Not quite, my Lord. So there is an appendix --  
22 so there is a response that my clients have produced to  
23 appendix 2, which is the list of projects in which we  
24 have set out our case on --

25 THE CHAIRMAN: No, I am not dealing with the projects, I am

1           dealing with the -- or maybe this is the same point.

2           MS. DAVIES: That is precisely right, my Lord, it is the  
3           same point.

4           THE CHAIRMAN: I see.

5           MS. DAVIES: So what we have done in our response to  
6           appendix 2 is we have set out our case as to the value  
7           of commerce because there are disputes between the  
8           parties on some projects as to what the correct value of  
9           commerce is. So there are different figures. So we  
10          have set all that out in our -- we describe it as  
11          a Scott schedule, but what we have set out in our Scott  
12          schedule, and that is the document which, as I  
13          indicated, we have been in the process of reviewing in  
14          any event and are happy to serve within the next two  
15          weeks.

16          THE CHAIRMAN: So that covers everything apart from those  
17          parts of the pleading you do not wish to respond to  
18          anyway?

19          MS. DAVIES: Effectively, in our submission.

20          THE CHAIRMAN: Okay. Because I am slightly wondering what  
21          the problem then is, because you have either got  
22          allegations which are not -- you are not going to plead  
23          to or you are going to produce, albeit not -- and  
24          I quite understand why you may not want to go through  
25          the formality of serving another document and so on, but

1           you are going to, in some form or other, produce  
2           a document that constitutes a schedule to -- an updated  
3           schedule to a pleading that deals with the outstanding  
4           points. So where is the issue?

5           MS. DAVIES: The issue is there are various tidying-up  
6           amendments in my learned friend's re-amended particulars  
7           of claim, various small changes here and there, and it  
8           just would take time and effort to work through it, to  
9           produce a document which is going to be supplemented in  
10          a matter of weeks by another document, and there is no  
11          real utility, and it is certainly not an efficient way  
12          of dealing with it, particularly in circumstances where  
13          it is apparent, in our submission, that the likelihood  
14          is the claimants are going to be wanting to amend  
15          following the Court of Justice judgment.

16                 Of course, if my -- it all depends on what happens.  
17                 If my clients' appeals are dismissed in their entirety,  
18                 then there may be a short amendment to simply plead  
19                 that, and say, "You are bound by it". If, however,  
20                 things change as regards period, for example, which is  
21                 one outcome, then we will need to see what their  
22                 position is going to be in relation to that.

23                 For NKT and ABB, they have in fact amended their  
24                 particulars of claim to reflect the findings of the  
25                 Court of Justice in its judgment where changes have been

1 made as to scope of liability, but this claim is being  
2 pursued as a stand-alone claim against some of the  
3 Prysmian entities, not a follow-on claim. We need to  
4 see exactly what the claimants' response is going to be,  
5 and similarly, of course, if we succeed in annulling  
6 The Commission decision entirely, because it is being  
7 pursued as a stand-alone claim against some, it may --  
8 we are going to need to see what the claimants' position  
9 is going to be. Are they going to abandon the case  
10 against Prysmian altogether? We simply do not know.

11 So those are all the points where the claimants are  
12 going to have to clarify their position in amended  
13 particulars of claim against us, and we can then respond  
14 and make such a -- as undoubtedly there will have to be  
15 amendments to our defence because there are various  
16 points where we have said, subject to the appeals or so  
17 on and so forth. So we are going to have to do that  
18 exercise too, and it really is an efficiency argument  
19 where there is no pressing need at all for my learned  
20 friend to have Prysmian amend its defence in two stages.  
21 The most efficient course is, in our submission, the one  
22 we are proposing.

23 THE CHAIRMAN: Okay. Thank you.

24 Ms. Demetriou, the reply point and whether it is to  
25 be served on 7 August.

1 MS. DEMETRIOU: Yes. So we are concerned that -- we are  
2 concerned that the reply on pass-on, the proposed date,  
3 which is 18 September, is far too late, and the reason  
4 that we are concerned about that is that the claimant's  
5 case on pass-on has changed very recently and very  
6 significantly at the stage of the joint expert  
7 discussions, and the tribunal will have seen in relation  
8 to other agenda items that come a bit later on, that we  
9 are seeking -- we are -- all on the defendants' side are  
10 seeking more time to analyse with our experts the new  
11 analysis that is been undertaken, in particular by  
12 Mr. Noble in relation to pass-on at this very late  
13 stage.

14 So the key point really is that we need to see how  
15 it is relevant to their pleaded case, particularly in  
16 circumstances where the Supreme Court has underlined, as  
17 you have heard and Mr. Turner accepts, that there is  
18 a very heavy evidential burden on the claimants in  
19 respect of pass-on.

20 Now, Mr. Turner very helpfully accepted that the  
21 purpose of the repleading or the amendment process at  
22 this stage is not to advance some kind of new case, but  
23 to reflect the work that the experts have done, and it  
24 is correct that the pleadings on all sides, and we  
25 accept on our side too, are very bare on the question of

1 pass-on, and in a sense the pleadings have been  
2 overtaken by what has gone on in the expert reports.

3 But the difficulty for us is that we need to see  
4 their case first on pass-on, because it is so new, and  
5 if we could just -- if I could just take you to the  
6 letter that Mr. Turner's solicitors wrote -- so this is  
7 at bundle A/91, it is a two-page letter and this is the  
8 letter of 22 July where BCLP, the claimants' solicitors,  
9 address the question of amendments to pleadings.

10 If you could turn to the second page and to item 3  
11 {A/91/2}, you will see there that it is suggested, it is  
12 proposed National Grid amend its reply by 18 September:

13 "We confirm that [National Grid] will be amending  
14 its Reply inter alia following the Supreme Court's  
15 decision in *Sainsbury's v MasterCard*, and to reflect the  
16 'Option 2' approach to calculating the appropriate  
17 damages award that is contained in Mr. Noble's expert  
18 reports and his annex to the Joint Expert Statement."

19 Now pausing there and I am going to come to it, the  
20 annex is completely new. So that is analysis which is  
21 completely new.

22 "We consider it efficient to wait the Defendants'  
23 updated Defences ..."

24 Now, if the tribunal could now please just turn  
25 on -- turn to the joint expert statement and in

1 particular to -- to bundle E, tab 18, page 102  
2 {E/18/102}, and in fact perhaps we can start at page 101  
3 because this will contextualise the point {E/18/101}.  
4 So this is Mr. Noble's annex to the joint experts'  
5 statement, and in it he discusses three issues, he says,  
6 related to taxation.

7 THE CHAIRMAN: Hang on, wait a minute, I am looking at the  
8 hard copy which is no good.

9 MS. DEMETRIOU: Sorry.

10 THE CHAIRMAN: No, it is all right, I will look at it on the  
11 screen.

12 MS. DEMETRIOU: So it is {E/18/101}.

13 THE CHAIRMAN: Yes, it has been brought up for us, thank  
14 you.

15 MS. DEMETRIOU: So this is the introduction to Mr. Noble's  
16 annex to the joint expert statement, and he says that he  
17 discusses three issues related to taxation. So:

18 "First, I provide further details on the approach to  
19 taxation taken in my two reports -- see section 3B.  
20 This seeks to address the comments made by the  
21 Defendants' experts that my approach was included in my  
22 model but was not adequately explained in my reports."

23 So just pausing there, you will have seen -- so  
24 what -- in summary, what Mr. Noble did in his first two  
25 reports was to take into account the natural tax

1 consequences of the loss that the claimants are seeking.

2 So he took into account, we think, the tax  
3 consequences of the overcharge, and so in a very  
4 broad -- so broadly, just to explain that, he factored  
5 in the fact that had an overcharge been suffered or been  
6 incurred, as the claimants contend is the case, then  
7 that would have led to lower profits, and there would  
8 have been a tax saving. So that was something which  
9 apparently Mr. Noble took into account in his  
10 calculations, but he did it in a way which was not  
11 obvious. So he did not set out any of his assumptions,  
12 and it was unclear that he was in fact doing that.

13 He also took into account the natural tax  
14 consequences of the interest element in a similar way.  
15 Now, you will have seen from ABB's skeleton argument,  
16 and I apprehend that this is a point that Ms. Ford will  
17 deal with in more detail in relation to the RFI matter  
18 on the agenda, but you will have seen that ABB served  
19 a request for further information, essentially  
20 interrogating the assumptions which Mr. Noble used in  
21 order to carry out that analysis, and they received  
22 a response, and indeed have received a new factual  
23 witness statement from Mr. Simpson. That has all been  
24 received extremely recently, so after the joint expert  
25 meetings and the joint expert statement.

1           Now, moving on to the third point which is now on  
2 page 102, the third thing that Mr. Noble does. So he  
3 says here:

4           "Third, I received further instruction from BCLP  
5 during the course of the agree-disagree process,  
6 requesting that I consider amending my approach such  
7 that the principal damages are not adjusted for tax."

8 THE CHAIRMAN: I am sorry, we have not got it -- which page  
9 are you on? 103 or 102?

10 MS. DEMETRIOU: This is the third point, so it is  
11 paragraph 3.4 on page 102 {E/18/102}.

12 THE CHAIRMAN: Oh yes, I have got it right at the top, thank  
13 you.

14 MS. DEMETRIOU: So this is the third thing that Mr. Noble  
15 does in the annex to the joint expert statement. So  
16 what he says there is that he:

17           "... received further instruction from BCLP during  
18 the course of the agree-disagree process, requesting  
19 that I consider amending my approach such that the  
20 principal damages are not adjusted for tax. I explain  
21 the new calculations undertaken in response to this  
22 instruction in section 3D."

23           Now, again, that is extremely new, and our experts  
24 are still working through it and we are going to come on  
25 in relation to a later agenda item to ask the tribunal

1           for a period of time in which to consider whether or not  
2           a short response is necessary to this new work.

3           But the point for these purposes is that this is all  
4           new analysis that is relevant to the pass-on case, and  
5           we want to see how it is put in terms of their pleaded  
6           case, because we need to take that into account when  
7           deciding whether or not it is necessary to reply to it,  
8           should the tribunal give us permission, which we say we  
9           should have because it is new, and we will come on to  
10          that and debate that later.

11        THE CHAIRMAN: To what extent does Mr. Turner's explanation  
12          in paragraph 40 of his skeleton assist on your  
13          understanding of this point?

14        MS. DEMETRIOU: Well, not very much is the answer, because  
15          what that does is it attempts to put figures on the  
16          different scenarios, but we do not really have any  
17          understanding or any real understanding at the moment of  
18          why, for example, this -- they say that this entire new  
19          approach follows from *Sainsbury's v Mastercard* but we  
20          are not clear why it does. What is said in the skeleton  
21          argument is: well, *Sainsbury's v Mastercard* says that  
22          you do not need to frame your claim as a claim for  
23          financial profits; but we simply do not understand why  
24          that should mean that you do not take account of the  
25          natural tax consequences of an overcharge and so it

1 is --

2 THE CHAIRMAN: Is this not all -- but is this not all sort  
3 of about arguing the pros and cons of the point rather  
4 than articulating and pleading the point, so that it is  
5 then capable of being run at trial?

6 MS. DEMETRIOU: Well, so we say that it is difficult to  
7 disentangle the two, and in a sense what has happened is  
8 that we have been -- this has been served very, very  
9 late and so we have not only -- and there is two points  
10 that I have sought to explain.

11 So the first point, Ms. Ford will explain further,  
12 but relates to the work that was already done in  
13 Mr. Noble's first two statements, but which had not been  
14 adequately explained, and so none of the assumptions  
15 have been provided, and that has resulted in the  
16 response to the RFI that you have seen and to indeed  
17 a new witness statement. But then there is also this  
18 further stream of new work which has apparently resulted  
19 from an instruction that BCLP has given the experts, and  
20 so we need -- we need properly to be able to consider  
21 that, and as part of the consideration of that, we want  
22 to see how it is relevant -- how they put it in terms of  
23 their pleaded case.

24 So --

25 THE CHAIRMAN: Yes.

1 MS. DEMETRIOU: -- if there is going to be any utility at  
2 all in amending the pleading so as to reflect the expert  
3 work in an orderly way, well, then that -- what that  
4 requires, we say, is that we see it at least in draft  
5 form, given that has been sprung on us so late --

6 THE CHAIRMAN: Yes.

7 MS. DEMETRIOU: -- so we can then properly consider it. So  
8 it is a timing point and it is also a sequence point --  
9 a sequencing point, and we say because it is so  
10 substantial and so late, it is simply not good enough to  
11 say, well, it is -- you have got to amend your defence  
12 first and we are going to -- we are going to tell you  
13 what we make of this on 18 September. We say that is  
14 much too late.

15 THE CHAIRMAN: Yes.

16 I mean, because at this stage of the case, the  
17 important things are really twofold. The first is that  
18 the parties are appropriately tied down to the case that  
19 they wish to advance, and the second is that other  
20 parties have an appropriate opportunity to obtain the  
21 information that they need for the purpose of testing  
22 the case.

23 What I am a little bit troubled by at the moment is  
24 that this all sits on the back of a pleading point,  
25 because we all know that pleadings, while important to

1           confine the issues, are not what a case is fought on at  
2           this stage. What I am wondering is whether we need to  
3           look at this particular issue in the context of the  
4           discussion about the request for further information as  
5           well, that arises, I think, in relation to the Simpson  
6           evidence, so that we can see the totality of the problem  
7           here and try and craft a solution which gives everyone  
8           what they need in order to prepare for trial.

9           MS. DEMETRIOU: So we would be happy with that. We think it  
10           feeds into both the RFI issue but also the issue later  
11           on in the agenda which relates to an opportunity, if  
12           necessary, to reply to new points that have emerged at  
13           the joint expert stage.

14          THE CHAIRMAN: Yes.

15          MS. DEMETRIOU: May I just -- I am not going to make  
16           submissions on that now, but just to foreshadow what we  
17           say, there is a distinction between things like  
18           sensitivity analyses which are conducted at that stage  
19           in response to points that have been made by other  
20           experts which are simply responsive, and points which  
21           constitute new pieces of analysis which have not been  
22           seen hitherto in any of the reports.

23          THE CHAIRMAN: Yes.

24          MS. DEMETRIOU: It is that which is concerning us, and we  
25           say that there are a number of instances, not least this

1 one that I have been talking about, which -- of evidence  
2 which is completely new but, sir, I accept what you say,  
3 that it is an issue -- we are concerned -- we are  
4 concerned for our part not with the -- not with -- not  
5 with the formalities of it, but with substantively being  
6 given a proper opportunity to see how it is put in terms  
7 of how they are going to put their case on this new  
8 material, and having a proper opportunity to consider it  
9 and respond if necessary.

10 So I entirely agree with what you have said, which  
11 is that it is tied in to those two other issues, and  
12 I am content for my part for you to defer consideration  
13 of this point and construct a solution at that stage  
14 which works for everyone, taking these points into  
15 account.

16 THE CHAIRMAN: Yes. I mean, I think -- I certainly think we  
17 will not decide exactly what we think ought to happen in  
18 relation to the pleadings until we have heard the debate  
19 about the RFIs as well, so that we can look at the  
20 totality of the question of how we formalise the  
21 information that the parties need.

22 So thank you very much, Ms. Demetriou, for that. Do  
23 you want to -- did you want to say anything else at this  
24 stage because I am going to ask, I think Mr. Turner just  
25 to explain to us the position in relation to the RFIs

1 first, and then you can come back on that if you need  
2 to?

3 MS. DEMETRIOU: No. Just to say that we equally have  
4 a paragraph in our defence which is -- which is the  
5 point on the legal burden, which we of course accept,  
6 like Ms. Davies, we would have to amend.

7 THE CHAIRMAN: Yes. Thank you.

8 MR. TURNER: My Lord, very briefly in response to that,  
9 I agree, given what Ms. Demetriou has said, that it is  
10 probably a good idea for the tribunal to look at the  
11 wider picture before you take a final view on the  
12 amendments, so I will not say much about that. What  
13 I will say is this in relation to Ms. Davies' points:  
14 the idea that they need to wait until after the Court of  
15 Justice judgment is somewhat misguided. I am not  
16 conscious of having said that it is likely that it will  
17 lead to any amendments being needed at all. On the  
18 contrary, we think it is likely that there will be  
19 a rejection of the appeal.

20 At all events, though, it will be speculative, and  
21 the reason for wanting amendments now, litigation need  
22 arises because the parties need to crystallise, leaving  
23 aside that possibility, what are their cases and how  
24 they put them on material issues, one way or another.

25 In that regard, the experts have now had a very full

1 engagement, and on issues such as what goods are  
2 affected, the value of commerce as it is called, or the  
3 overcharge, or indeed on the question of the passing on  
4 of loss, the current pleading is outdated. It is  
5 outdated in a number of ways. I do not know if -- I do  
6 not have the reference immediately for the Prysmian  
7 pleading, paragraph 49 that was on screen before, but  
8 the point can be made without needing to go back to it.

9 It expresses a defence in very general terms  
10 {B/8/22}. It is out of date because since then, the  
11 parties' experts have explained the nuts and bolts of  
12 how the regulatory system works. They have talked about  
13 whether forecasts by National Grid provided to its  
14 regulator were then factored in to allow charges or  
15 revenues that they could make to their customers and  
16 what the implications are. They have talked about what  
17 Ofgem proposes to do and how that affects things, and on  
18 all sides what has happened, which led to my numbers in  
19 my paragraph 40, is that there has been both  
20 a principles debate and the articulation, the  
21 crystallisation of numerical outcomes, how it affects  
22 the quantum.

23 On all sides, what the experts have done is largely,  
24 or in some cases at any rate, to produce scenarios  
25 restating what they say are the implications, and

1 Prysman's expert has done just the same. If you go to  
2 E/18 and I am not sure if I will get this right, to  
3 page 121 on the electronic bundle {E/18/121}, we will  
4 try to get that up, you have, for example, here  
5 Prysman's expert's restatement for his part, and we can  
6 flick through the further pages, of how he says the  
7 debate has affected the numbers.

8 So he has given various illustrations like the other  
9 experts have also done. What we want really, and what  
10 will advance things, is for the defendants to say after  
11 the expert engagement, and with all of the nitty-gritty  
12 discussion they have had about how the system of  
13 regulation works, what is the parties' case now about  
14 the passing on of loss? It is quite a simple point, but  
15 it is something that all of the defendants, including  
16 Prysman, ought to be able to say.

17 Now, our expert too has come up with scenarios.  
18 Ms. Davies pointed this out to me in discussions before  
19 this hearing, and what I am seeking to do is to say:  
20 well, we will say that our case is this and we can  
21 explain how we get there.

22 But the first step should be for Prysman and the  
23 others to take stock after the expert debate, and rather  
24 than having this smorgasbord of scenarios or  
25 sensitivities, to say what it is now that is their case

1 on how the regulatory system led to the passing on of  
2 an overcharge.

3 Ms. Davies says that she can update another part of  
4 the case which is the value of the cartel goods  
5 affected, and the overcharge, I think within two weeks.  
6 It should not be a different or more difficult exercise  
7 for them to say what their case is on the passing on of  
8 loss. We can then clarify what our position is after  
9 the expert debate too, and that is -- that is quite  
10 aside from any discussions between the experts and  
11 whether new points were introduced, which I will come to  
12 and which we will all turn to shortly.

13 THE CHAIRMAN: Yes. Mr. Turner, sometimes, and everyone  
14 knows this is the way pleadings sometimes go, a claimant  
15 decides to pre-empt what is strictly speaking a reply  
16 point in their particulars of claim, just simply because  
17 they know what is going to be said against them, and  
18 they want to make sure that they get it in early.  
19 I mean, is there any reason why you could not do that in  
20 this case, which is effectively what Ms. Demetriou is  
21 asking you to do. She is saying: well, it may  
22 technically be a reply point but it ought to be pleaded  
23 at this stage in the particulars of claim, points of  
24 claim. I am not saying that is necessarily a good idea,  
25 but I am just raising that as a possibility. I have

1           lost you, I am afraid.

2       MR. TURNER: I think when I banged the table for theatrical  
3       effect, it caused the microphone to mute. Apologies for  
4       that.

5           Your Lordship is absolutely right to raise it. Yes,  
6       as a result of the expert debate, we have a fair idea of  
7       what we say our case will be on the passing on of loss,  
8       but for an orderly process, and precisely because it is  
9       not or should not be a lengthy or difficult task, it  
10      will be better if they say what they see the outcome to  
11      be and what the defendants' position now is, their legal  
12      position on how the loss has been passed on, before we  
13      formulate our reply, and then perhaps have to go back  
14      and take account of what they have just said. It is  
15      really a matter of only a few weeks when we wait for  
16      them to do that. It seems to be the more orderly  
17      approach to take.

18      THE CHAIRMAN: Yes.

19      MR. TURNER: That is why we prefer to do it.

20      THE CHAIRMAN: All right.

21           Well, as I indicated, I think we want to deal with  
22      the RFI points before we decide what to do about the  
23      pleadings.

24      MR. HOSKINS: My Lord, I have got about two minor

25      housekeeping points on pleadings, if I just get them

1 in --

2 THE CHAIRMAN: Yes, Mr. Hoskins, thank you.

3 MR. HOSKINS: Just simply two points, which is if an order  
4 is made, as Mr. Turner seeks, that National Grid is  
5 allowed to make the amendments which are in the draft  
6 that he took you to, that draft will have to be updated  
7 to reflect the correspondence that Mr. Turner referred  
8 to between ABB and National Grid. There is just some  
9 little tidying-up points. So that is just simply  
10 a housekeeping point. Its not quite the version that is  
11 in the Opus bundle, it will have to be slightly amended.

12 THE CHAIRMAN: Yes.

13 MR. HOSKINS: The second point relates to the ABB  
14 amendments, because you made an order, as I am sure you  
15 remember in relation to the substitution of the fifth  
16 defendant, and you set down a timetable there to make  
17 those amendments.

18 Now, we are going to have to make -- again, it is  
19 an efficiency point like Ms. Davies made, we are going  
20 to have to make amendments, in light of the  
21 National Grid's amendments to the particulars of claim,  
22 and it is better that we do it all at the same time.

23 So we would ask you, if you would not mind varying  
24 your order that you made on 17 July, and we will do all  
25 our amendments by -- Mr. Turner is suggesting

1           4 September, and we will scoop everything up and do it  
2           by 4 September. Those are the exciting points I had.

3       THE CHAIRMAN: Yes. That certainly seems sensible, although  
4           I would remind you, Mr. Hoskins, that it was your  
5           clients who wanted that order made very quickly before  
6           the PTR, rather than dealing with it at the PTR. But  
7           I am sure we can -- we can all ensure that there is not  
8           time wasted on dealing with those out of order.

9       MR. HOSKINS: Thank you.

10       THE CHAIRMAN: All right, thank you.

11           Mr. Jones, did you want to add anything or not?

12       MR. JONES: No, my Lord, no.

13       THE CHAIRMAN: Right. Shall we just get the outline of the  
14           RFI, and then we will break for the short adjournment?

15           It is -- perhaps you can tell us, first, Mr. Turner,  
16           what the position is in relation to your request for  
17           further information? I know it is not quite so directly  
18           linked to what we have just been discussing as the  
19           Simpson point, but your request for further information  
20           in relation to the individuals involved in the cartel.

21       MR. TURNER: We have asked the three defendants in this  
22           claim who supplied the cartel goods to us to provide  
23           what we see is essential missing information about their  
24           participation in the cartel, for which they do not need  
25           to conduct further enquiries.

1 THE CHAIRMAN: Yes.

2 MR. TURNER: I have seen that in their skeletons, they all  
3 say they will provide a response, and Prysmian says that  
4 the application was therefore inappropriate.

5 What I would seek to ascertain before the short  
6 adjournment is this: when they say they will provide  
7 a response, do they mean to say that they will give the  
8 information sought or not? Because if so, I can take  
9 this very quickly, and if not, we will need to deal with  
10 it.

11 THE CHAIRMAN: Yes. Well, I think it is sensible to at  
12 least understand what everyone's position is.

13 Ms. Davies, perhaps you first and then Mr. Hoskins.

14 MS. DAVIES: Our position is we are -- we are still  
15 taking -- I do not have a formulated response, we are  
16 still taking instructions in it, in relation to it, but  
17 we are seeking to provide the response that my learned  
18 friend is asking for.

19 THE CHAIRMAN: Thank you.

20 Mr. Hoskins?

21 You are mute, I am afraid.

22 MR. HOSKINS: Sorry. Quoting from paragraph 12 of our  
23 skeleton argument {A/3/5}, ABB will respond in the terms  
24 of the draft order attached to the application by  
25 7 August 2020.

1 THE CHAIRMAN: Thank you.

2 Ms. Demetriou?

3 MS. DEMETRIOU: We are in the same position as Ms. Davies,  
4 so we are currently taking instructions but we are  
5 endeavouring to provide a response to the information  
6 sought.

7 THE CHAIRMAN: When you say "provide a response",  
8 I understand both you and Ms. Davies say that will not  
9 be a response simply saying we are not going to give you  
10 the information. It will be a response which has more  
11 to it than that; is that right?

12 MS. DEMETRIOU: That is correct. I cannot say now what  
13 exactly it will have to it, because we are in the  
14 process of taking instructions, but yes, that is correct

15 THE CHAIRMAN: Okay. Does that give you what you need --

16 MS. DAVIES: It is also correct for us, my Lord.

17 THE CHAIRMAN: Thank you very much, Ms. Davies. Does that  
18 give you what you need, Mr. Turner?

19 MR. TURNER: Not entirely, my Lord. So far as ABB is  
20 concerned, I am not clear -- I do not know if the  
21 tribunal is -- whether they are saying that they will  
22 give the information sought.

23 MR. HOSKINS: We will give a substantive response, rather  
24 than a response that says we are not giving you  
25 a substantive response.

1 MR. TURNER: You see, what that may mean, of course, is: you  
2 are not entitled for the following reasons; and if --

3 MR. HOSKINS: No, we will give you a substantive response.  
4 We will not say you are not entitled to a substantive  
5 response.

6 THE CHAIRMAN: I mean, as I understand it, what this means,  
7 and I think the three of you must respond to the  
8 contrary if I have got this wrong, is that you will  
9 provide substantive information in response to it. It  
10 may be the case that Mr. Turner looks at the information  
11 that you provide and says: that is not comprehensive for  
12 X, Y, Z reasons; and challenges the validity of the  
13 response; but what none of you are going to say is that  
14 you are not entitled to an answer to this question.

15 MR. HOSKINS: That is correct on ABB's part.

16 MS. DEMETRIOU: That is correct on NKT's part.

17 MS. DAVIES: Also correct from Prysmian.

18 THE CHAIRMAN: Does that help, Mr. Turner?

19 MR. TURNER: That does help a great deal. What I wish to  
20 avoid is a situation where this is not dealt with in any  
21 way at this hearing, and then we receive answers that  
22 tell us nothing, because we will need to trouble the  
23 tribunal again.

24 THE CHAIRMAN: Yes.

25 MR. TURNER: I am anxious to avoid that. I note the time.

1           It may be that I should just take instructions over the  
2           short adjournment.

3       THE CHAIRMAN:   Yes.

4       MR. TURNER:    But it may be if I deal with this now, it only  
5           needs to be very brief.

6       THE CHAIRMAN:   Yes.   Well --

7       MR. HOSKINS:   Can I just make clear that a substantive  
8           response could be: we have no further names to add; but  
9           that is anticipated by National Grid themselves as being  
10          a possible response; but we will not take a point not  
11          entitled, we will give you a substantive response, but  
12          the substantive response may be there are no further  
13          names that we can add.   I hope that is clear.

14      THE CHAIRMAN:   Yes.   No, I had understood that to be the  
15          case.

16                Good.   Thank you very much indeed.   If it -- it goes  
17                without saying that if over the short adjournment, in  
18                the light of the discussion we have had on pleadings,  
19                anyone has moved their position, we would of course be  
20                grateful to hear that at 2 o'clock.   But I think we will  
21                at 2.00 pm hear what you have got to say about the  
22                request for information in relation to Mr. Simpson.

23                But just in broad terms can you just give me two  
24                minutes about what the parameters of the dispute in  
25                relation to that now are.   Because as I understand it,

1           you, Mr. Turner, have said that by serving Mr. Simpson,  
2           you have complied with the request for further  
3           information; is that right?

4       MR. TURNER: Yes, we think that that was the best way of  
5           answering the request.

6       THE CHAIRMAN: Is that -- I mean, I think, as I understand  
7           it, there may be some debate about whether or not any of  
8           the other defendants wish to apply to put in a response  
9           to Mr. Simpson, but is there any argument about whether  
10          or not Mr. Simpson is an adequate response to the  
11          request for further information?

12       MS. FORD: My Lord, I am dealing with this point on behalf  
13          of ABB. I do need to go into it in a degree of detail  
14          to explain how we got to where we are, but in  
15          a nutshell, our position is we are still considering the  
16          response, given the lateness with which it was provided,  
17          but we do envisage first of all, that there may be  
18          certain further clarificatory enquiries that we need to  
19          raise in the light of what has now been said by  
20          Mr. Simpson; and, secondly, that we would probably wish  
21          to adduce a responsive expert report in order to take  
22          into account both the information that has now been  
23          provided, the response to any further clarification and  
24          also the changed position that Mr. Noble has taken in  
25          the joint experts' statement.

1 THE CHAIRMAN: Yes, I see. Thank you. That is very  
2 helpful. Ms. Ford, can I just say that we do not have  
3 the pleasure of being able to see you, we can hear you,  
4 but perhaps over the short adjournment, someone could  
5 look into whether or not we can see you, because I think  
6 you qualify as somebody who should be seen for these  
7 purposes.

8 MS. FORD: I am grateful, my Lord, yes. We will try and  
9 sort that out.

10 THE CHAIRMAN: Thank you very much.

11 UNIDENTIFIED SPEAKER: I can see you.

12 THE CHAIRMAN: Oh, can you?

13 MS. DAVIES: My Lord, before we break, can I just mention  
14 one thing.

15 THE CHAIRMAN: Yes.

16 MS. DAVIES: I understand that the consent order in relation  
17 to the Scottish Power matter has now been signed and is  
18 being sent to the tribunal. I just wanted to mention  
19 that to enable the tribunal to look out for it over the  
20 short adjournment, so that that can then be dealt with  
21 publicly.

22 THE CHAIRMAN: Thank you very much indeed, Ms. Davies. Do  
23 not -- yes, thank you.

24 MS. FORD: My Lord, just further to your Lordship's point  
25 about whether you can see me or not, it has been

1 a phenomenon that we have noticed over the course of the  
2 hearing, that different people can see different  
3 speakers, so I am told that some people can see me and  
4 others cannot, and it is -- it appears to have happened  
5 with others as well. I think it is possibly one of the  
6 difficulties that we face with the remote hearing.

7 THE CHAIRMAN: Yes. Yes, I can see that. Well, we will  
8 endeavour to investigate that and see what we can come  
9 back with.

10 Good. Okay. Well, we will -- it is now five past  
11 but -- well, I think we will give ourselves until  
12 1.05 pm. We have made quite good progress this morning.

13 MR. HOSKINS: 2.05 pm.

14 THE CHAIRMAN: Yes, 2.05 pm. Thank you. 2.05 pm.

15 (1.05 pm)

16 (The luncheon adjournment)

17 (2.07 pm)

18 THE CHAIRMAN: Right. Good afternoon, everybody.

19 I think we were going to move on, were we not, to  
20 deal next with points in relation to the requests for  
21 further information that is outstanding.

22 So Mr. Turner, you were about to address us,

23 I think. You are on mute.

24 MR. TURNER: Can you hear me now?

25 THE CHAIRMAN: Yes, we can, yes.

1 MR. TURNER: In view of the discussion just before the short  
2 adjournment, I am happy to confirm we do not need to  
3 proceed with an application for an order against any of  
4 the defendants. I have heard what they say about the  
5 intention to provide substantive responses. In each of  
6 their skeletons, they say that they will do that by  
7 7 August, and if that date is the target, that is  
8 satisfactory to us. But I wish it to be recorded that  
9 that is the date that they have committed to providing  
10 those answers by.

11 THE CHAIRMAN: Thank you. There was just one aspect of this  
12 that we just wanted to clarify, the tribunal did, before  
13 we move on. Can we anticipate that there are then going  
14 to be any other procedural developments as a result of  
15 the provision of this information? In other words, put  
16 another way, what are you going to do with it once you  
17 have got it?

18 MR. TURNER: The -- well, that takes us into the reason for  
19 wanting it in the first place.

20 THE CHAIRMAN: Yes.

21 MR. TURNER: Very briefly, the position is that some of the  
22 entities in the defendant groups were not addressees of  
23 The Commission's decision of infringement of the  
24 competition rules.

25 THE CHAIRMAN: Quite.

1 MR. TURNER: There were other subsidiaries in the groups.

2 THE CHAIRMAN: Yes.

3 MR. TURNER: They were generally involved in the supply of  
4 the power cables to our client in one way or another.  
5 For example, the ABB UK selling operation is such  
6 a local subsidiary.

7 THE CHAIRMAN: Yes.

8 MR. TURNER: Each of them takes a point in its pleading,  
9 most recently clarified by ABB, that they will say that  
10 these entities had nothing to do with the cartel and  
11 should not be liable. This is something that is very  
12 difficult for a claimant to trace, even with the  
13 assistance of documents, because by its nature, in  
14 a secret cartel, they do not produce these documents.  
15 We therefore wanted this information to see if it would  
16 help us to enable us to establish linkages between the  
17 cartel entities, accepted to have been involved in the  
18 cartel, and the selling operations, which provided the  
19 cartel goods to the claimant.

20 THE CHAIRMAN: Yes. I think we understood that, but are we  
21 going to be faced with a further round of evidence on  
22 this point then?

23 MR. TURNER: I would doubt it. We may be able, using the  
24 available material, to create linkages. There may be  
25 points that will be raised in the cross-examination of

1 witnesses of fact, but at this point, I do not  
2 anticipate that there will be a further round of  
3 information that is sparked off because of this.

4 THE CHAIRMAN: Good. Good. I mean, we ask for fairly  
5 obvious reasons that we want to make sure that we  
6 understand what the procedural and substantive  
7 consequences are of the answers being given.

8 MR. TURNER: Yes.

9 THE CHAIRMAN: All right. That is very helpful, Mr. Turner.  
10 Thank you.

11 So shall we move on then to the RFI in relation to  
12 Mr. Simpson.

13 MS. FORD: My Lord, yes. Ms. Demetriou has already touched  
14 on how this point has arisen.

15 THE CHAIRMAN: Yes.

16 MS. FORD: The claimant's claim is for the amount of any  
17 overcharge they may have suffered on the purchase of  
18 their cables and for the cost of funding of any such  
19 overcharge, and insofar as the claimants paid more than  
20 they otherwise would have done for their cables, then  
21 they may well have received a corresponding benefit, in  
22 that they had lower profits and so they would have paid  
23 less tax than they otherwise would have done.

24 If the claimants receive an award of damages, then  
25 that damages award might also be subject to tax, and

1           there may then be a discrepancy between the tax  
2           treatment of the cables and the tax treatment of any  
3           award of damages that is intended to compensate the  
4           claimant for such loss as they may have suffered. That  
5           sort of discrepancy might mean that the award of damages  
6           would be adjusted upwards, or it might mean that the  
7           award of damages would be adjusted downwards.

8           So it would mean that the award of damages might be  
9           adjusted upwards if the claimants have to pay more tax  
10          on any award of damages they receive, than they have  
11          avoided by reason of any overcharge, and so they are  
12          left out of pocket. But equally, it might have to be  
13          adjusted downwards if the tax that the claimants pay on  
14          any award of damages is less than the benefit -- the tax  
15          benefit they have received by reason of having suffered  
16          the overcharge, and so in that circumstance, the  
17          claimants would get a windfall.

18          There was not any pleaded claim on the part of the  
19          claimants that the award of damages they were seeking  
20          should be adjusted upwards to reflect the incidence of  
21          taxation, and indeed it had not ever been mentioned, but  
22          in the data pack which accompanied the claimant's  
23          expert, Mr. Noble's first report, the claimant's damages  
24          had been inflated by 12.5 million on one of the  
25          Mr. Noble's scenarios and 4.5 million on one of the

1 other scenarios for tax reasons. There was no  
2 accompanying explanation in the body of Mr. Noble's  
3 report pointing out that uplift or explaining the basis  
4 on which it had been applied.

5 So in those circumstances, ABB served an RFI on  
6 4 June 2020, and what we asked for was clarification as  
7 to the assumptions on which the adjustment had been  
8 applied, and for explanation as to what was the factual  
9 basis for those assumptions. At the claimant's request,  
10 we then amended that RFI to take into account the fact  
11 that in Mr. Noble's reply report, he had then provided  
12 certain explanations as to the basis -- as to the  
13 assumptions that he had applied, and so we amended our  
14 RFI to take that into account, and we served the amended  
15 RFI on 12 June 2020. The tribunal can see that in  
16 bundle {A/39/1} if we can bring that up on the screen.

17 THE CHAIRMAN: Oh --

18 MS. FORD: So this is the cover page. If we then go over  
19 the page to see the substantive questions {A/39/2}, the  
20 tribunal will see that in broad terms, questions 1 and 2  
21 are asking about the tax treatment of the claimant's  
22 purchase of cables in the past. So what we are asking  
23 about there was at what rate did they receive tax relief  
24 and over what period did they receive that tax relief.

25 Then if we go on to questions 3 and 4, those

1 questions in broad terms are asking about the tax  
2 treatment of any future award of damages, and so they  
3 are asking about the factual basis for the assumptions  
4 that have been made about how any award of damages to  
5 National Grid would be taxed, and we also specifically  
6 asked about the tax treatment of the previous settlement  
7 received in a previous case, and we asked whether or not  
8 National Grid would be taxed on the amount of any -- of  
9 the award of damages which Ofgem then might require it  
10 to be shared with consumers. We said: if you are, by  
11 reason of the sharing factors, sharing these recoveries  
12 with consumers, are you being taxed on that amount that  
13 then gets passed on?

14 We served that on 12 June 2020. In the meantime,  
15 the experts' joint statement was served on 20 July 2020  
16 and in that, as Ms. Demetriou has already explained,  
17 Mr. Noble appeared to change his approach to tax, and  
18 what he did was he referred to new instructions which  
19 had informed him that recent case law had clarified that  
20 the claim for the principal overcharge is not a loss of  
21 profits claim. We understand he is there referring to  
22 the *Sainsbury's* judgment, and he said that this  
23 indicated that it was wrong to regard compensation due  
24 to National Grid in respect of the principal overcharge  
25 as if this were a case about lost business profits. He

1 explained that his interpretation of the consequence of  
2 his new instructions was that he should no longer apply  
3 any tax adjustment at all to the principal amount of the  
4 claim, but he continued to apply a tax adjustment to the  
5 interest element of the claim.

6 I should say that we, like NKT, are still  
7 considering this approach, because it is not clear to us  
8 either why what is said in *Sainsbury's* means that there  
9 should be no tax adjustment at all to the principal  
10 amount of the claim. But we had asked for a response to  
11 our RFI by 2 July, and that was not least so the  
12 information could potentially be taken into account in  
13 the experts' joint statement insofar as was necessary.  
14 We were told by the claimants that that was not going to  
15 be possible, but they said we would receive a response  
16 in any event no later than 16 July 2020. In fact, we  
17 did not receive the response until the evening of  
18 Wednesday, 22 July 2020, so that was after the experts'  
19 joint statement.

20 What we received is really quite a substantial  
21 volume of material. We received the response itself.  
22 We received the witness statement of Mr. Simpson, which  
23 has now been put into the inner confidentiality ring,  
24 and we also received certain documents by way of further  
25 disclosure.

1           We have, since its receipt, been carefully  
2           considering the material we have been given, but because  
3           of the late stage at which it has been received, we have  
4           not yet been in a position to take further steps in  
5           response.

6           As I indicated to the tribunal before the short  
7           adjournment, we do envisage that we may have some  
8           further requests for clarification, and those we  
9           presently envisage will cover broadly two areas. The  
10          first is certain matters concerning the likely future  
11          treatment of any damages award. These are matters that  
12          were addressed for the first time in Mr. Simpson's  
13          statement, and we envisage that we might have to go back  
14          and ask for clarification in respect of those.

15          I am hesitating to go into those in any further  
16          detail for two reasons. One is because we are still in  
17          the course of considering what has been said, but also  
18          because Mr. Simpson's statement is in the  
19          confidentiality ring, and so I am in some difficulty  
20          making submissions as to the substance. But broadly, it  
21          concerns the likely future treatment of any damages  
22          award.

23          The second point on which we envisage we may wish to  
24          seek clarification is the distinction that Mr. Noble has  
25          now drawn in the joint experts' statement between the

1 treatment of the principal amount of the damages and the  
2 treatment of the interest, and in particular, we  
3 envisage that we will want to know where he has drawn  
4 the line between matters that constitute the principal  
5 and matters that constitute the interest.

6 We --

7 THE CHAIRMAN: Is that the point that distinguishes between  
8 what you get by way of overcharge damages and what you  
9 get by way of cost of funding damages?

10 MS. FORD: I think we understand broadly that is the  
11 intention of the -- of the distinction that is being  
12 drawn. We -- there is a question of principle as to  
13 whether that is the correct --

14 THE CHAIRMAN: Yes.

15 MS. FORD: -- that is a valid distinction to be drawn, and  
16 there is also a more granular enquiry as to whether or  
17 not the actual heads of damage that Mr. Noble has  
18 identified as being the principal and those which he has  
19 identified as being the interest are correctly so  
20 identified. I understand that there may be a difference  
21 between the experts as to which elements belong to which  
22 heads.

23 THE CHAIRMAN: I see.

24 MS. FORD: So we will endeavour to formulate our further  
25 requests as soon as possible. We would hope to be in

1 the position to do it by the end of next week, but by  
2 14 August at the latest, and that reflects the fact,  
3 first of all, that this is a holiday period and various  
4 members of the team may not be there. Also, because we  
5 have just made a request for certain individuals to be  
6 added into the confidentiality ring in order that they  
7 can see Mr. Simpson's evidence and be able to assist us  
8 with that. So that is a written request we have made  
9 very recently, but we envisage that time will be taken  
10 in order to address that request.

11 We are also conscious that we have undertaken to  
12 address in parallel the cartel knowledge RFI by 7 August  
13 and so that is another workstream that is ongoing. So  
14 in those circumstances, we are very much seeking to  
15 formulate these requests as soon as possible, and we  
16 envisage hopefully by the end of next week, but by  
17 14 August at the latest.

18 THE CHAIRMAN: Yes.

19 Can you just help us get this in context. How much  
20 turns on this point in (inaudible due to overspeaking)

21 MS. FORD: Well, the adjustment that Mr. Noble originally  
22 made upwards was some 12 million or so on his option 1.  
23 He has since taken the position that no adjustment  
24 should be made on the principal, and so the adjustment  
25 is only made on the interest, but of course, one of the

1 points that we are now exploring is whether or not the  
2 adjustment should be upwards or downwards at all, in the  
3 light of the information that we have now been provided,  
4 and so it may be that in the light -- once the parties  
5 have the opportunity to scrutinise this new information  
6 further, it may be that the matter tilts in the other  
7 direction.

8 THE CHAIRMAN: I see. So this is a sort of point where you  
9 may even be saying that Mr. Noble has shot himself in  
10 the foot.

11 MS. FORD: Sir, we are in the course of formulating our  
12 thoughts on it, but as a matter of principle, these tax  
13 issues could operate either way. He has at the moment  
14 said this necessitates an uplift. By parity of  
15 reasoning, if the discrepancy goes the other way, it  
16 would justify a reduction.

17 THE CHAIRMAN: Yes. Okay. So what is it that we are being  
18 asked to do in relation to this request for further  
19 information?

20 MS. FORD: My Lord, to a certain degree, I am simply  
21 updating the tribunal as to where we are.

22 THE CHAIRMAN: Yes.

23 MS. FORD: We do envisage that it will be necessary -- we  
24 certainly presently envisage it will be necessary to put  
25 in a responsive expert report, and in this respect, this

1 dovetails with the question that is on the tribunal's  
2 agenda about whether or not there should be permission  
3 for the experts to adduce responsive evidence generally.

4 THE CHAIRMAN: Yes. So that goes really with the point  
5 about the concerns that I think you have as to what it  
6 is that Dr. Jenkins said more generally in her report  
7 that constituted new evidence; is that right? Have  
8 I got that right?

9 MS. FORD: Well, I am presently concerned with Mr. Noble has  
10 said. Insofar as we are dealing with Dr. Jenkins, I  
11 would let Mr. Hoskins make submissions on those matters.

12 THE CHAIRMAN: Right, right.

13 MS. FORD: But certainly the point that is specifically  
14 arising from tax is what we are envisaging is both that  
15 we would wish to respond to the new case now advanced by  
16 Mr. Noble, where he says we would not make a tax  
17 adjustment at all on the principal element of the award  
18 and we would only do so on the interest. We would also  
19 want to have the opportunity now to deal with and  
20 address the further information that we have received  
21 from Mr. Simpson, and indeed any further information we  
22 get from him in response to the subsequent  
23 clarifications, because this information was only  
24 received after the experts' joint statement, and so we  
25 have not had the opportunity to take it into account at

1 all in what we have said.

2 THE CHAIRMAN: Yes. All right. Thank you very much,  
3 indeed, Ms. Ford. Was there anything else you wanted to  
4 say about that?

5 MS. FORD: Simply in terms of timing, obviously, again, we  
6 would undertake to produce our reply report as soon as  
7 possible. It would necessitate factoring in time for  
8 National Grid to respond to our further enquiries, and  
9 then we would envisage -- assuming, say, two weeks for  
10 National Grid to respond, we would envisage by the end  
11 of September, we would produce our reply report.

12 THE CHAIRMAN: By the end of September?

13 MS. FORD: Yes. What we envisage is it is going to take us  
14 approximately four weeks to produce a responsive report,  
15 but that needs to factor in the time for us to formulate  
16 our request for further information and for a reply to  
17 be given to it.

18 THE CHAIRMAN: This report is -- and when you say your reply  
19 report, you are just focusing here on the single issue  
20 of tax?

21 MS. FORD: In -- that is what -- that is the subject of  
22 these submissions. We obviously have the separate  
23 agenda item about the possibility of further responsive  
24 evidence, but for this purpose, yes, I am envisaging  
25 responding to the tax information.

1 THE CHAIRMAN: Okay. All right.

2 Mr. Turner, what is your position on this? I am  
3 afraid you are still mute.

4 MR. TURNER: Oh, can you hear me now?

5 THE CHAIRMAN: Yes, I can now, yes.

6 MR. TURNER: Thank you. Having heard Ms. Ford, I think it  
7 boils down to this. They anticipate serving a further  
8 request for information. We will wait to see what that  
9 says. She has said the end of next week or 14 August at  
10 the latest, but she has also said that there are grounds  
11 for producing a reply report, and she asks for that to  
12 be permitted by the end of September.

13 THE CHAIRMAN: Yes.

14 MR. TURNER: So on that, I ought to clarify our position.  
15 We do not think that there is a need for any reply  
16 report. However, if the tribunal were to permit them to  
17 give one, we would not object strenuously, but the end  
18 of September is quite out of the question when you  
19 appreciate just how limited this dispute really is. If  
20 I may briefly try to show you why, I think the first  
21 point is that the tax position is fully pleaded now.

22 If you put up on the screen, please, {A/92/43} you  
23 have the new pleadings that we have produced, and you  
24 will see there, this is an appendix to the particulars  
25 of claim, if you look at the third paragraph, it says:

1           "The following adjustments are made for the effect  
2 of taxation, as set out in Appendix A2 to the Joint  
3 Expert Statement ..."

4           So that is then incorporated and the changes are  
5 referred to.

6           Perhaps if we can go on to that document, which  
7 I understand is currently treated as confidential, so  
8 I will not read it out but show it to the tribunal. It  
9 is at {E/18/100}. This is when it comes up -- here we  
10 are -- Mr. Noble's annex showing what he did. If you  
11 would kindly turn the pages in this, turn over to the  
12 next page {E/18/101} you will see a heading, "[Tax]", at  
13 the bottom and in the following paragraphs, after that  
14 introduction, he fully explains what he has done in  
15 relation to tax. If you turn over again {E/18/102}, we  
16 will not walk through it fully now but please keep it on  
17 the screen for the moment, so you have a full  
18 explanation of what is there.

19           Now, what occurred so far as the instructions are  
20 concerned that Ms. Ford referred to was a point --  
21 another point that arose in *Sainsbury's v Mastercard*.  
22 It was argued there that a claim of this nature, in  
23 a cartel case, essentially, a competition case, is  
24 really for loss of profits, and the Supreme Court said  
25 that was not right, and you do not regard the money of

1 which you have been deprived essentially as a loss of  
2 profits that is subject to taxation, as such.

3 Our instructions are in the bundle, and you can see  
4 those if you look at {A/103/2}. Following -- so this is  
5 after the *Mastercard* judgment which had come out in  
6 June. We simply drew to his attention this point, that  
7 the Supreme Court had said this is not a loss of profits  
8 claim, and in paragraph 4, it was noted that the  
9 approach taken in some of the expert evidence, including  
10 his report, appeared to assume, we thought, that the  
11 claim for the principal overcharge, the amount by which  
12 they were overcharged, did:

13 "... refer to a loss of profit, which would have  
14 been taxable in the hands of the Claimants."

15 To give you an illustration that we are not only  
16 talking about Mr. Noble here at all, if you would please  
17 get up on the screen {E/6/39} you have the expert  
18 report, for example, of the NKT person. He is called  
19 Mr. Warren. This is his main report. If you look at  
20 the bottom of that page, 4.31, he is talking there about  
21 tax issues that affected his analysis.

22 THE CHAIRMAN: Yes.

23 MR. TURNER: You will see in sub-paragraph (1) he said to  
24 the effect that any -- he calls it "Net Funding  
25 Shortfall" reflected higher costs, for example,

1 an Overcharge, those would reduce the taxable profits  
2 and reduce taxes payable. So he had gone off on that  
3 footing.

4 I should say that he then also changed his approach  
5 when it came to the reply report, but our instructions  
6 were designed to deal with this degree of confusion  
7 amongst the experts. So what then happened was that we  
8 told the experts that they needed to take that into  
9 account.

10 Meanwhile, it was not the only tax issue being  
11 debated between the experts. To cut to the chase, our  
12 expert, Mr. Noble, had originally assumed a particular  
13 form of tax treatment for the capital allowance, and he  
14 approached it on the basis of a 5% straight-line  
15 depreciation. The NKT person, Mr. Warren, came back and  
16 said "No, you have got that wrong", as well as having  
17 got wrong one or two other tax assumptions.

18 So Mr. Noble adjusted this. He only got the chance  
19 to do it because of the nature of the expert debate  
20 after he saw Mr. Warren's reply report, and it was done  
21 in the joint expert statement engagement process. If  
22 you could go back, please, on the screen to {E/18/106},  
23 we will -- we are now back in Mr. Noble's annex and you  
24 will see if you look at 3.21 on that page, he says that  
25 he has updated his tax calculation, that was his

1 original approach, to reflect certain things.

2 If we turn over the page, please, to 107 {E/18/107}  
3 you see clearly from paragraph 3.23, he says: I failed  
4 to take into account certain things that the other  
5 experts have drawn to my attention.

6 He refers to Mr. Biro, who is the ABB expert, and  
7 Mr. Warren and he says:

8 "I now [do] take these into account ..."

9 He proceeds to present the impact of taking into  
10 account what the defendant experts had said.

11 All he does at the end of that, if you go forward to  
12 3.26, please, on page 108 {E/18/108} is having done that  
13 and recorded just above section 3D how it reconciles, he  
14 refers to the instructions and he says that he  
15 interprets the effect of this as meaning that you simply  
16 forget about the impact of the tax treatment for the  
17 principal overcharge. That is as opposed to, as  
18 your Lordship surmised, the interest costs on which the  
19 company may also have received certain tax relief.

20 So if you then turn over the page and go to  
21 {E/18/110}, that is two pages on, all he is done is take  
22 out the effect of tax on the principal overcharge. This  
23 is above that new heading at the bottom "Revised  
24 factoring-in assumptions" that you can forget and with  
25 that very simple adjustment he has given his new

1 figures.

2 There is nothing more to it than this. So it is  
3 quite true, as Ms. Ford says, that he has moved. He has  
4 moved both because he took account of certain points  
5 made by the other experts and he took account of the  
6 point that had emerged from the instructions.

7 But it is not a long or difficult job for them to  
8 understand those numbers, and equally it is fully  
9 pleaded.

10 For these reasons, no particular objection if they  
11 want to look at these and say, well, we want some time  
12 to verify that he has achieved what he said he has done  
13 in this annex but the idea that they should have to the  
14 end of September to do it is extravagant and it is also  
15 not conducive to the orderly conduct of the proceedings,  
16 because it is something that can be done very quickly  
17 and should, if it is going to be done, be done in the  
18 next couple of weeks.

19 So I think I have covered everything that Ms. Ford  
20 had to say. There was one mistake in what she said,  
21 which was that she claimed that in his original report  
22 Mr. Noble had actually inflated the damages claim by  
23 reason of a tax effect. That is not correct. The total  
24 tax adjustment after including the tax effect on  
25 interest in fact reduced the total value of the claim.

1 THE CHAIRMAN: Yes.

2 MR. TURNER: But that is not a point that needs trouble the  
3 tribunal.

4 THE CHAIRMAN: All right. Thank you very much. Does anyone  
5 else want to say anything on this?

6 MS. FORD: My Lord, I would respond briefly to what  
7 Mr. Turner has just said, if I may.

8 THE CHAIRMAN: Yes.

9 MS. FORD: Mr. Turner has said that because the case on tax  
10 is now fully pleaded, that means that we do not need  
11 very long to respond to it. It hardly need be  
12 emphasised that the fact that the pleading now  
13 cross-refers to the expert annex and so formally  
14 incorporates it does not really tell you anything about  
15 the time it might take us in order to respond to it.

16 Secondly, there is a fundamental difference in the  
17 approach between Mr. Noble and Mr. Biro, and you can see  
18 that, for example, from page {E/18/82} of the experts'  
19 joint report. Mr. Noble in the first column notes in  
20 the paragraph which begins "Mr. Biro":

21 "Mr. Biro criticises my non-tax adjusted approach on  
22 the basis that he considers any tax shield benefits ..."

23 I am sorry, it is the following paragraph:

24 "Mr. Biro also states that I have provided  
25 inadequate supporting evidence for my tax treatment, and

1 states that if factual information on NGET's historic  
2 tax treatment cannot be identified, losses should be  
3 calculated on a pre-tax basis."

4 He goes on to point out that he disagrees and he  
5 thinks it is legitimate to make certain assumptions  
6 and -- rather than to have the factual basis for the  
7 taxing approach, and Mr. Biro fundamentally disagrees  
8 with that as an approach. You can see his comments in  
9 the next column.

10 He says:

11 "It is appropriate to do so ..."

12 He is there referring to the issue 48, is it  
13 appropriate to account for the impact of tax:

14 "... only to the extent that this can be done in  
15 a manner that ... captures reliably the actual tax  
16 treatment of any loss over the relevant period due to  
17 the existence of an overcharge; and ... reflects  
18 adequately the tax treatment of a damages award made to  
19 [National Grid] ..."

20 He goes on to say that he does not think there is  
21 sufficient factual basis presently to make  
22 an adjustment. That was precisely the reason why we  
23 served our request for further information, trying to  
24 establish what factual basis there was for the  
25 assumptions that Mr. Noble has made. Mr. Noble's

1 position is that he can do all of this on the basis of  
2 assumptions and not have any regard to the factual  
3 basis, and we fundamentally disagree with that, and we  
4 have now, as a consequence of the request for further  
5 information and potentially as a consequence of the  
6 further enquiries, actual factual material that tells us  
7 how were these cables treated historically and what is  
8 the likely actual tax treatment of National Grid's  
9 future award of damages? So there is now factual  
10 information that can be taken into account.

11 So in my submission, it is fundamentally wrong to  
12 say that all that is required in responding to  
13 Mr. Noble's position is to understand what he has now  
14 done. In our submission, because there is such a  
15 fundamental difference between the experts, what also  
16 needs to be explored is whether there is -- what  
17 material difference does it make if you base your tax  
18 adjustment on the actual historic position, and you base  
19 it on the actual likely treatment of National Grid's  
20 damages award, rather than making the assumptions that  
21 Mr. Noble has. In my submission, that means that there  
22 is a more fundamental exercise to be done, and it is  
23 going to take a certain amount of time.

24 THE CHAIRMAN: But the -- so the substance of your position  
25 is that you want the period of time you have asked for



1 Good. Right.

2 Decision

3 THE CHAIRMAN: What we have decided is the claimant's -- so  
4 far as the pleadings are concerned, the claimant's  
5 amended pleading, which is to include a prospective  
6 pleading in relation to passing on, should be served and  
7 filed by 7 August.

8 Just by way of explanation of that, we appreciate  
9 that that is unconventional in the sense that it is not  
10 intended to pre-empt any argument in relation to the  
11 legal burden of proof, but it is in recognition of the  
12 fact that the Supreme Court made clear about the  
13 evidential -- what the evidential burden was, and it is  
14 also in recognition of the fact that we are at a fairly  
15 advanced stage in these proceedings, where it seems to  
16 us that for good case management reasons, it is  
17 appropriate to get a party's position in relation to  
18 passing on put down as rapidly as possible, and we do  
19 not think it is appropriate to wait for the conventional  
20 provision of a reply in relation to that.

21 We would -- we think it is appropriate to do it that  
22 way, and on the same date, this is not an order, as  
23 Mr. Turner made clear that an order was not required, we  
24 are expecting the defendants to have produced a response  
25 to the request for further information in relation to

1 the individuals involved in the non-addressee entities.

2 The defendants are all to put in a defence, or their  
3 amended defences by 4 September. We understand and  
4 appreciate Ms. Davies' submissions in relation to the  
5 possibility that that may mean that there will have to  
6 be further substantial amendments to her clients'  
7 defence in the light of the decision that may be made by  
8 the European Court, but we think it is important at this  
9 stage of the proceedings to get everything short of that  
10 formalised into -- into pleadings, and we are not  
11 satisfied that the extra work that may have to be done  
12 for a further amendment is one that is sufficiently  
13 onerous in this context to mean that that is not the  
14 right way forward.

15 We also consider that on that -- the same date of  
16 4 September, it is appropriate for permission to be  
17 given to the defendants to respond on the tax issue with  
18 a new report. We do not think it is appropriate to have  
19 to wait till the end of September for that. We are  
20 satisfied that this is an issue that has been raised in  
21 principle, albeit not in the detail with which Ms. Ford  
22 has explained to us that it has now been raised, or in  
23 the way that it has been explained to us it has now been  
24 raised, and we think 4 September is the right date for  
25 that to be included -- or for that to be served and

1 filed.

2 We also give permission -- but we should emphasise  
3 that that report is to be limited, as we made quite  
4 clear during the discussions, to the tax issue that has  
5 been raised.

6 We also give permission to the claimants, should  
7 they be so advised, to put in an amended reply. We  
8 emphasise that that does not mean, and we are sure  
9 Mr. Turner understands this, that he should not plead  
10 out in a prospective way his case on passing on in the  
11 particulars of claim. He should, but we also appreciate  
12 that it may be the case that there are things said in  
13 the defendants' defences on this point which can  
14 properly be dealt by way of reply and which were not  
15 previously anticipated.

16 So those are the directions that we propose to give  
17 in relation to items 3 and 4.

18 There was just one point that is connected, but  
19 unrelated, and we are agnostic about it, but we raise it  
20 for the parties' consideration. We think this is a case  
21 where there may be some benefit in a list of issues  
22 being prepared at some stage.

23 Now, we do not think it is appropriate to give  
24 a direction here and now in relation to this, and it may  
25 be that the case has gone sufficiently far on pleadings,

1 and indeed on exchange of expert evidence, and that is  
2 why we are a little bit -- we are agnostic about it. We  
3 are not saying you must do it. But we would invite  
4 leading counsel to consider that as to whether or not  
5 they think that would be a helpful way forward.

6 Your microphone is off.

7 MS. DEMETRIOU: Sir, may I just ask for a point of  
8 clarification. First of all, we are grateful for that  
9 ruling. Could I just ask you to clarify, I think it  
10 follows from the debate that we were having, that in  
11 providing for the claimants to plead their position on  
12 pass-through by 7 August, that you have in mind the tax  
13 point which they say is affected by  
14 *Sainsbury's v Mastercard*? Because that was the issue  
15 that -- I think it does follow because that was the  
16 issue that I was making submissions on, but I just --  
17 I think it would just be helpful if the tribunal could  
18 clarify that.

19 THE CHAIRMAN: When you say "the tax point" that was dealt  
20 with on *Sainsbury's v Mastercard*, sorry, can you just  
21 explain what you mean by that?

22 MS. DEMETRIOU: Yes, so -- so the new analysis that  
23 Mr. Noble has carried out which he says follows from  
24 *Sainsbury's v Mastercard*, or rather from an instruction  
25 that he received in light of *Sainsbury's v Mastercard*,

1           which has caused him to change his tax analysis, and we  
2           saw that.

3       THE CHAIRMAN: Oh, I see. Well, I mean, we had  
4           concentrated -- we were focusing on the passing-on  
5           point, rather than the tax point, to be frank. The  
6           point that -- but, I mean, the point in relation to tax  
7           was a point that was dealt with by way of the request  
8           for further information and the issue that we were  
9           discussing on whether or not there should be a reply  
10          report.

11                 I have to say, I am not sure we have applied our  
12           mind as to whether or not there needs to be a specific  
13           plea in relation to the tax point. I am sorry if we  
14           missed that, Ms. Demetriou.

15       MS. DEMETRIOU: No, that is all right. It is just that  
16           Mr. Turner did indicate that they know already what  
17           their position is on this point, and why they say -- so  
18           the point that I was concerned with, or one of the  
19           points I was concerned with, is why they -- the basis on  
20           which they say -- they allege that it follows from  
21           *Sainsbury's* that it is appropriate not to consider the  
22           natural tax consequences of the overcharge element of  
23           loss.

24                 So it would be helpful if that could be clarified  
25           whilst Mr. Turner is making the other amendments. That

1           would assist us in understanding the new analysis that  
2           Mr. Noble has carried out.

3           THE CHAIRMAN: Well, I think I am not -- I do not think we  
4           are going to make a direction in relation to that. We  
5           have all heard what you said. Mr. Turner has got to  
6           make his case sufficiently clear on this tax point, but  
7           whether it is actually something that needs to be  
8           pleaded, I am not sure it is appropriate for us to  
9           direct at the moment.

10          MR. TURNER: My Lord, may I just come in on that, just to  
11          remind Ms. Demetriou that, leaving aside this matter  
12          which is essentially an argument rather than a pleading  
13          case point, we have pleaded our case on tax fully, and  
14          that is the pleading that I directly took the tribunal  
15          to a little earlier, which cross-refers to the very full  
16          explanation in the annex. So it is all there.

17          THE CHAIRMAN: All right. Well, anyway, I think our view is  
18          that we will not direct it. Mr. Turner will doubtless  
19          reconsider whether his pleading is good enough in the  
20          light of that, of what you said, Ms. Demetriou, and  
21          I think we will leave it there for the moment.

22          MR. HOSKINS: My Lord, can I just raise one point more on  
23          the ruling, please, which is I think you gave permission  
24          to the claimants to put in an amended reply if so  
25          advised, but I do not think you gave a date by which

1           that should happen.

2           THE CHAIRMAN: I am so sorry, I noted it down, I think it  
3           was two weeks later. Wait a moment.

4           MR. HOSKINS: 18 September.

5           MR. HOLMES: 18 September, yes.

6           THE CHAIRMAN: Yes, the 18th, thank you.

7           MR. HOSKINS: Thank you.

8           MR. TURNER: My Lord, there was also one more clarification.

9           On the RFI, our RFI does not just relate to individuals  
10          in the non-addressees, it is to any individuals acting  
11          for the defendants because of the concern that they may  
12          have links that we will then show to the addressees.

13          THE CHAIRMAN: Yes. All right.

14                 The next item on the agenda is experts and the  
15          question of concurrent evidence and further supplemental  
16          questions, which we have in part touched on already. So  
17          shall we concentrate, please, for these purposes on the  
18          concurrent evidence and, please, if you could also  
19          address us on -- insofar as you want to, on teach-in as  
20          well.

21          MR. HOSKINS: Yes.

22          THE CHAIRMAN: Can I say this at the outset, because I think  
23          it will help everyone, that -- and the expert Dr. Bishop  
24          has made this perfectly plain in his discussions with  
25          us, that the tribunal itself does not regard itself as

1           overburdened by the possibility of a hot tub and  
2           concurrent evidence. I am not going to say any more at  
3           the moment and there are plenty of other arguments that  
4           need to be advanced by both sides in relation to this,  
5           but Dr. Bishop intends to work from time to time over  
6           the run-up to the trial in any event in relation to  
7           this. We would like to hear you on the other points,  
8           which are serious and substantial points, but we do not  
9           really need to hear you on that.

10       MR. TURNER: My Lord, would it be helpful if I begin?

11       THE CHAIRMAN: Yes, please.

12                               Submissions by MR. TURNER

13       MR. TURNER: To set the scene, the tribunal sees that there  
14           is disagreement between the two sides.

15       THE CHAIRMAN: Yes.

16       MR. TURNER: The defendants all say that there should be  
17           individual cross-examination by counsel of each of what  
18           amount to eight experts, one after the other. First,  
19           the three on our side, then the five on their side.

20           If we call up, please, on Magnum {A/5/26}, you have  
21           there the defendants' or Prysmian's trial timetable,  
22           draft trial timetable, which I believe the others agree  
23           with, and you see that the expert evidence on this  
24           approach occupies weeks 5, 6 and 7, ending in the week  
25           ending 18 December, and then if you have it on screen

1 still, you will see that the written closing submissions  
2 they programme in apparently for the following day,  
3 immediately after the hearing of the expert evidence.

4 That may be --

5 MS. DAVIES: Sorry to interrupt. That is  
6 a misunderstanding. That is to simply indicate those  
7 two days are set aside for writing. We are proposing  
8 written closings come in in January.

9 MR. TURNER: Right. There is no indication of that on the  
10 timetable, but thank you for clarifying.

11 The total estimate is that on their approach, the  
12 expert examination will take up to 12 days of court  
13 time, in addition to four days of pre-reading for the  
14 tribunal; and if you have it still on screen, you will  
15 see that the 12 days are split, eight to nine days for  
16 me to cross-examine each of their five experts, and  
17 four days for all four of them to put their various  
18 individual cases to our three experts. I will return to  
19 that disparity in a moment.

20 As against this, our suggestion is at {A/2/27}. You  
21 see here that we envisage two concurrent evidence  
22 sessions which follow the shape of the two  
23 joint expert statements. Those would occur in week 5  
24 and week 6. In the first there is a hot tub on  
25 overcharge, with spill-over time for supplemental

1 questions from counsel, and then the following week  
2 would be the expert evidence on cost of funding and the  
3 regulation issues and quantum, again with  
4 cross-examination afterwards by counsel.

5 That is the map. In assessing the two sides'  
6 different positions, you have to bear in mind that there  
7 are three main topic areas for expert evidence. The  
8 first is estimating the size of the cartel overcharge.  
9 The second is estimating the costs of financing the  
10 overcharge. The third is assessing whether the  
11 regulatory system means that all or some of this  
12 overcharge has been passed on to National Grid's  
13 customers in the form of higher prices, and ultimately  
14 quantifying the damages claim.

15 The choice between concurrent evidence and  
16 cross-examination is not an all-or-nothing choice. Each  
17 of these three topic areas can in principle be  
18 considered separately in terms of the merits that you  
19 see for concurrent evidence or for sequential  
20 cross-examination. But on the claimant's side, we  
21 firmly consider that the concurrent evidence approach is  
22 the right one for investigating the expert issues for  
23 all three areas, and it is combined with supplemental  
24 questions from counsel.

25 On the defendants' side, they oppose any concurrent

1 evidence on anything to the point that they have not  
2 been willing to countenance co-operation on possible hot  
3 tub agendas to illustrate how it might look if you rule  
4 against them. The starting point for the tribunal is to  
5 appreciate that these two approaches to examining  
6 experts are completely different. Individual  
7 cross-examination by the barrister for an opposing party  
8 takes place in the fully adversarial session. It  
9 obviously is time-consuming to deliver, because counsel  
10 needs to systematically drill into and unpick the  
11 details of a particular expert witness's evidence  
12 through developing a series of questions, and the aim of  
13 it is to expose weaknesses or errors: "I put it to you  
14 that you have overlooked X", or "I put it to you that  
15 your emphasis on Y is unjustified", and so on.

16 In this particular litigation, Prysmian's skeleton  
17 helps us by illustrating just how complicated individual  
18 cross-examination would be.

19 We will go to it in a moment, but you recall that  
20 they suggest that there is a very great deal (inaudible)  
21 expert to be cross-examined on in their own report, at  
22 least on the issues of estimating the size of the cartel  
23 overcharge and the regulatory issues. They say nothing  
24 about any complications of the cost of financing issues  
25 at all.

1           On overcharge, they say that each expert has come up  
2           with their own analytical approach, as well as  
3           alternatives, that they have performed multiple and  
4           varying sensitivities, and they use different samples  
5           and they have different data choices, all of which  
6           Prysmian seems to suggest should be the subject of  
7           individual questioning.

8           If you do hold individual cross-examinations on  
9           a multiple of what Prysmian describes as issues and  
10          permutations, it is inherent that that will proceed  
11          slowly and it will take considerable hearing time. But  
12          it also involves friction because of the adversarial  
13          setting, because it slows the process of questioning  
14          further. We indicated that in the skeleton.

15          That is why I have estimated that the individual  
16          cross-examination of each of the five defendant expert  
17          witnesses would likely take one to two days apiece and  
18          it would total to eight or nine days. That is not  
19          a generous estimate, it is a tight estimate.

20          Perhaps surprisingly, given the emphasis by the  
21          defendants on there being a multitude of issues to be  
22          explored by each expert at the trial, based on their own  
23          individual approaches, you will see that they allocate  
24          in their draft timetable that all four of them, every  
25          defendant together, would fully cross-examine our three

1 experts and would put all of their respective experts'  
2 idiosyncratic points, which they say they need to do, in  
3 a total of four days.

4 It is true they subdivide that. They allow, it  
5 seems, two days for all of them with Dr. Jenkins, and  
6 then one day apiece for Mr. Noble and then  
7 Professor Jenkinson.

8 Working on the basis of an ordinary court day, that  
9 breaks down to an average of 2 hours 15 minutes each on  
10 average, cross-examining Dr. Jenkins and all putting  
11 their individual cases to her, and an average of just  
12 over 1 hour 5 minutes each cross-examining Mr. Noble and  
13 Professor Jenkinson on the basis of an even split.

14 If that collective time estimate of four days is  
15 their considered approach, the idea that you have  
16 a multitude of issues and permutations which all  
17 unavoidably has to be the subject of cross-examination  
18 in court seems rather difficult.

19 It follows that we think that their  
20 cross-examination approach is likely to take  
21 a considerable time in court.

22 Now, ABB in particular has referred to a precedent,  
23 which is that there was a previous cartel damages case,  
24 just between themselves and one claimant, a party called  
25 Britned, which was heard in February 2018. In that case

1 Dr. Jenkins was also the expert witness for the  
2 claimant, focusing on the estimation of the cartel  
3 overcharge. In that case she was on the stand  
4 cross-examined by one barrister for almost  
5 two-and-a-half days, and it followed in that case  
6 an initial day set aside for what has been termed  
7 a teach-in, when each of the experts under oath gave  
8 a presentation of their modelling work. It was a form  
9 of evidence-in-chief.

10 But the bottom line is that however long individual  
11 cross-examination is going to take in this case,  
12 concurrent evidence in the ordinary hot tub scenario is  
13 a great deal faster. That has been the consistent  
14 experience of this tribunal. We have always had  
15 satisfied customers.

16 Why is that the case? It is the result of the  
17 tribunal being able to cut straight to the heart of the  
18 issue, and they do that in the setting where the answers  
19 given to them by the experts are typically more  
20 forthcoming and more constructive than under traditional  
21 adversarial cross-examination. Equally importantly,  
22 concurrent evidence has got a huge advantage that  
23 individual cross-examination lacks. On every key issue,  
24 the tribunal can not only hear every expert say their  
25 piece in turn. They can hear the experts comment

1 directly when invited on the others' views where that is  
2 needed.

3 What that avoids is the disjointed nature of  
4 individual cross-examination where you have no  
5 interaction, and where the tribunal might hear the  
6 claimant's experts speak to an issue on one day, and  
7 then not hear from a relevant defendant expert's view --  
8 on the same issue for another week, or if you look at  
9 the defendants' draft timetable, even two weeks later.  
10 Ships pass in the night.

11 It is for those reasons that in general, this  
12 tribunal has embraced the practice of concurrent  
13 evidence to the point where the tribunal in the *BCMR*  
14 case, which we have quoted in our skeleton at 52(c)  
15 {A/2/19}, even described it as its normal approach, and  
16 that is why ABB is wrong in its skeleton to submit that  
17 in this field, individual cross-examination should be  
18 treated as the normal way of doing things. It is not.

19 I should make clear that in the previous recent  
20 cases, concurrent evidence has not been confined to  
21 basic or conceptual questions only, with all the applied  
22 questions and matters of detail being hived off to  
23 individual questioning. The defendants are wrong in  
24 suggesting that. I will give you two examples only.

25 The case about abuse of dominance by the Royal Mail

1 was heard in June last year. We have included a copy of  
2 the tribunal's hot tub agenda attached to our skeleton.  
3 If you get that on the screen, it is at {A/2/31}.

4 If you -- this was the tribunal's document. If you  
5 go ahead now two pages to page 33 {A/2/33}, you have the  
6 agenda. What you see there -- by the way, there were  
7 three economists instructed by the parties in this  
8 session. The tribunal started with conceptual and  
9 definitional issues about what was called an as  
10 efficient competitor test, but then from about  
11 paragraph 2.5, towards the bottom of that page, the  
12 questions became very specific and very granular. You  
13 can see that for yourself, and if you go over the page  
14 to 2.7 {A/2/34} and all of issue 3 and issue 4.1 over  
15 the page {A/2/35}, you will see that it was a very  
16 detailed exercise. There was an opportunity afterwards  
17 for individual questioning. It was very limited.  
18 I asked almost nothing for one of the parties, and  
19 Ofcom's counsel asked nothing.

20 The second example is the *GlaxoSmithKline* case which  
21 was heard in this tribunal over a number of weeks in  
22 2017. I and others among the counsel at this hearing  
23 attended. We had two hot tubs. The first extended over  
24 three days and it involved four economists. One was for  
25 the competition authority and there were three opposing

1 economists for the industry parties. Conceptual issues  
2 were dealt with at the start, over one-and-a-half days,  
3 and the remaining one-and-a-half days were on applied  
4 questions specific to the facts of the case, which  
5 concerned whether certain agreements had restricted  
6 effects or not.

7 If we turn up briefly {AU/11/34}, the President of  
8 the tribunal, Mr. Justice Roth, presided in this case,  
9 and you will see from line 23 onwards that he introduced  
10 the hot tub and if we could please turn over to page 35  
11 {AU/11/35} and read from line 5, you will see that he  
12 explained the process that he would follow. You will  
13 see that there the tribunal simply used the joint  
14 experts statement itself as the framework or agenda for  
15 the questioning. Go down to line 19.

16 You will see from lines 20 onwards that the first  
17 day was concerned with conceptual issues. That was the  
18 point 1 that Mr. Justice Roth referred to, and then it  
19 moved, for one-and-a-half days roughly, to the detailed  
20 applied issues. You see that development indicated if  
21 you go in this document to page 86 {AU/11/86} and look  
22 at the President's concluding remarks that day from  
23 line 15, where at the end of the day he said that  
24 counsel could ask questions on the following day because  
25 there was a break until the Thursday morning, and then

1 he said:

2 "... we [are going to] move on ... to the next part,  
3 which may prove the critical part for deciding this  
4 case ..."

5 Which was the detailed applied issues.

6 So --

7 THE CHAIRMAN: I enjoy the way he finishes his little  
8 lecture.

9 MR. TURNER: Oh, yes.

10 THE CHAIRMAN: They were obviously all going to have a good  
11 time in London. I am not sure that is possible these  
12 days in the pandemic world we live.

13 MR. TURNER: Yes. Two of the economists were from the  
14 United States in that case.

15 So that is the practice in relation to hot tubs. It  
16 is efficient, it is powerful and it can relate to  
17 applied matters and it can encompass a number of  
18 economists together. But finally there is a vital third  
19 advantage to the advantages of concurrent evidence. It  
20 is far easier for the tribunal itself, when you can  
21 allow the experts to interact, to boil down the issues,  
22 to resolve them and ultimately for you to write  
23 a judgment.

24 It is far more difficult if you have to piece  
25 together the disjointed cross-examination narrative over

1 12 days. That is what takes me to the circumstances of  
2 this particular case. Our position is that the subject  
3 matter here in all three topic areas is inherently  
4 better suited to a debate between the experts on the  
5 rival points directly, not sequential cross-examination  
6 of a series of different approaches.

7 Let me begin with the issue of the overcharge and  
8 what is called in the trade, value of commerce, which  
9 only means the value of the goods and services that were  
10 supplied to the claimant and which were affected by the  
11 cartel.

12 Prysmian says in its skeleton argument that our case  
13 is unsuitable for concurrent evidence on this area  
14 because the tribunal will have to consider separately  
15 all the five experts' separate models and all the  
16 alternative analyses and their sensitivities and their  
17 choices of data.

18 NKT in its skeleton at paragraph 24 adds to that.  
19 It says the joint experts' statement reveals there are  
20 46 material issues which will have to be covered  
21 implicitly at the hearing, and NKT says it has to be  
22 able in fairness to put its own expert case properly to  
23 National Grid's expert on these 46 issues.

24 To put these arguments in context, I remind the  
25 tribunal of the defendants' draft timetable in which if

1 they want to put their respective expert cases to  
2 Dr. Jenkins in cross-examination, they are allowing  
3 an average of just two-and-a-half hours at the trial to  
4 do that.

5 The reality is that these overcharge issues are well  
6 suited for concurrent evidence, allowing for  
7 a spill-over for supplementary evidence -- questions by  
8 counsel. The joint experts' statement which you were  
9 asked to read ahead of this hearing helps appreciate  
10 this, not the reverse. It is not a case of 46 separate  
11 unrelated issues all needing to be covered in the court.  
12 These issues, as you will have seen, are grouped under  
13 a small number of major themes. Those themes are in  
14 each instance relevant to all the experts or to at least  
15 a number of them. Essentially the claimants' expert and  
16 one or more of the others.

17 These provide the framework for a fruitful  
18 concurrent evidence session. It is far better to  
19 address these topics in a combined way in a hot tub and  
20 not separately at five different times spread days  
21 apart. To put it another way, if you have one of these  
22 joint expert statements in front of you, perhaps you  
23 have hard copies as well as the electronic Magnum  
24 versions, the defendants' proposal for cross-examination  
25 is somewhat akin to having to go through with each of

1 the experts in each of these individual columns all  
2 these issues in turn, working down through one of them  
3 laboriously to the bottom with every expert, and then  
4 starting again at the top with the next expert.

5 THE CHAIRMAN: Mr. Turner, on this point I think we ought to  
6 say this straightaway about this statement. I do not  
7 think any member of the tribunal thought that these two  
8 volumes, and we have got them in two-volume form, were  
9 a -- either of them was a reflection of what  
10 Mrs. Justice Rose thought was going to be produced when  
11 she directed a joint experts' statement. What seems to  
12 have happened is that some issues were identified and it  
13 is not clear to us how it was that they were identified,  
14 and then we have in one document each party's case in  
15 relation to that issue, where from time to time there  
16 has been a reference to agreement, but actually when you  
17 look at what is said, everyone is reiterating what they  
18 had already said in their reports.

19 MR. TURNER: Yes.

20 THE CHAIRMAN: Now, the statements do fulfil a function. We  
21 were not entirely sure that they did when we first saw  
22 them, but they do because they collect together in one  
23 place in quite a convenient way how it is that each  
24 party is proposing to argue its case in relation to each  
25 issue. But we have difficulty in seeing how they in any

1 sense constitute an agreed statement by the experts as  
2 to what they agree on, and an agreed statement by the  
3 experts as to what they disagree on, in a form that is  
4 remotely digestible.

5 MR. TURNER: Yes.

6 THE CHAIRMAN: We think that that has caused a little bit of  
7 a problem in the way in which people have approached the  
8 question of whether or not concurrent evidence in this  
9 case is appropriate, because it is somewhat distracting  
10 from the question of what the issues that need to be  
11 determined actually are.

12 I make that comment to you now because it sort of  
13 resonates a little bit with the point that you are on  
14 about how it is that the hot tub is going to work in the  
15 context of, on the one hand, a large number of different  
16 arguments and sub-issues, and on the other hand,  
17 a question of how one best collates and collects  
18 together the substantive issues on which the court -- on  
19 which the tribunal is going to have to determine.

20 Now, I just wanted to -- now, the consequence of  
21 that is that one of the things that we have been  
22 considering is whether the experts should be requested  
23 to do something else in -- and we have not formed a view  
24 on this at all, can I hasten to add, whether they should  
25 be requested to do something else, which is to produce

1 a document that does not run to more than about a dozen  
2 pages, but which actually identifies what issues are  
3 agreed and what issues are not agreed, and that being  
4 a document, they all agree on every word that is  
5 expressed within it.

6 Now, in a sense that may take you towards the annex  
7 to the protocol that is annexed to your skeleton  
8 argument, but we felt we needed to tell you all at  
9 a relatively early stage in this debate about whether  
10 there should be concurrent evidence or not, what our  
11 view was about this joint statement, and the form that  
12 it actually took.

13 MR. TURNER: My Lord, I am grateful. We agree with you, and  
14 I suspect that on the other side, the other parties also  
15 agree. The joint statement was not what was envisaged.  
16 The parties had asked the experts to produce brief  
17 reasons for disagreement and had sought to make this  
18 a confined exercise.

19 No one is at fault for this, but the process did get  
20 out of hand, and it has led to, in some cases,  
21 repetition of entire tracts of material and to  
22 developments of the existing reports.

23 THE CHAIRMAN: Yes.

24 MR. TURNER: I should say in fairness to everybody that it  
25 has been explained to me, and I now see it, that to some

1 extent this was an artefact of the process that was  
2 adopted with simultaneous exchange of main reports and  
3 reply reports.

4 THE CHAIRMAN: Yes.

5 MR. TURNER: Because everybody produced main reports at the  
6 same time, and they only got to see the criticisms by  
7 the others of their main reports in reply reports, which  
8 emerged, I think on 4 June, the main reports which had  
9 come at the beginning of March. They then jumped into,  
10 very rapidly, an expert engagement process in which they  
11 sought to take account of what the others had said. You  
12 have already seen one way in which at least one of the  
13 experts, Mr. Noble, but there were others, had to update  
14 what they had done to take into account criticisms that  
15 they accepted, and this partly explains why the process  
16 mushroomed in this way.

17 THE CHAIRMAN: Yes.

18 MR. TURNER: That is by way of explanation. As to whether  
19 it would be of assistance to ask the experts to produce  
20 something like a 12-pager now, I think that it would be  
21 something that we would wish to consider overnight. My  
22 own immediate response is that that may not be a useful  
23 exercise. It may not accomplish what your Lordship  
24 hopes.

25 THE CHAIRMAN: Yes.

1 MR. TURNER: So far as concerns our draft agenda, if I may  
2 bring this up. It is at {A/2/39}. What we have sought  
3 to do here is to distil ourselves the main topics and  
4 themes from the expert evidence. We have divided it  
5 into the three areas, starting with overcharge, for  
6 which we found 16 topic areas, 16 paragraphs, then ten  
7 for cost of funding and then nine for the Ofgem  
8 regulation issues.

9 THE CHAIRMAN: Yes.

10 MR. TURNER: Now, please, if you turn up the overcharge  
11 joint experts' statement, I will see to show you why  
12 this should not be a deterrent from approaching the  
13 taking of expert evidence concurrently at all, and how,  
14 although it is a large and indigestible document, it can  
15 be utilised.

16 So if we pick that up at {E/17/10} and go to  
17 page 10, please. {E/17/10}. Here we have the overcharge  
18 document, and I would invite you to look at the bottom  
19 row, which is row 6, item 6. This gives you a sense of  
20 the magnitudes. You will see in the first column that  
21 the claimant's expert, Dr. Jenkins, says what the final  
22 output is of her work after the expert discussions. She  
23 says:

24 "I estimate that ..."

25 The prices paid by the claimants were increased by

1 20.3%.

2 Then if you read across the rows, the others say it  
3 was either nothing or very small.

4 The last of them, Ms. Jackson, who is Safran, on the  
5 right-hand side, if you just go to the next page  
6 {E/17/11} you will see that she says she cannot rule out  
7 there may have been an overcharge in the range 0 to 5%.

8 So this is very helpful as a starting point because  
9 it shows you the magnitude of the difference between the  
10 two sides, 20% on one side, essentially nothing or  
11 nothing to 5% on the other.

12 Now, the experts all agree on what are the main  
13 motivators for the differences between their respective  
14 positions. If you go in the same document, please, to  
15 page 6 {E/17/6}, and look at the bottom of the page, the  
16 question at 4(a) was:

17 "What do you consider to be the main two drivers of  
18 the difference between [you] ...?"

19 The claimant's expert, Dr. Jenkins, says there is  
20 basically two key drivers. The first is "my finding"  
21 that the cartel had an effect on the defendants' costs  
22 of supply. It reduced the competitive discipline. It  
23 meant that their costs were inflated, and this got  
24 passed on. That accounts on its own for a full 10% of  
25 the whole difference. So that would take you down from

1 your 20% to 10 by itself.

2 The second issue that she talks of is the assessment  
3 of one of the two kinds of power cables, called the  
4 fluid-filled power cable projects. There are  
5 essentially two varieties. There was these cables  
6 filled with oil or fluid as insulation, and what have  
7 been referred to as cross-linked polyethylene or XLPE  
8 cables.

9 The argument turned on how you regard what happened  
10 with the fluid-filled cables, and the difference between  
11 the experts on that accounts for about another 4 to 5%  
12 by itself. So add those two up, you already see that  
13 you have almost obliterated most of the difference.  
14 These two issues of substance pretty well overshadow the  
15 others, and it is not contentious, if you have read  
16 across the rows.

17 Again, if you look at the last row, Diana Jackson  
18 who is Safran, we have to go over the page but she talks  
19 about the two most important differences {E/17/7} and it  
20 is essentially in line with the others.

21 Now, these two main issues crop up across many of  
22 these indigestible joint expert statement questions, and  
23 where that happens, wherever it happens, what you have  
24 got is a constructive engagement and a debate between  
25 some or usually all of the opposing sides' experts on

1 the relevant theme.

2 Now, with that, if you go back to our draft agenda  
3 at {A/2/39}, you will see this is overcharge. We began  
4 with, under section A, the conceptual or methodological  
5 points, and I will come back to that, and then at B, we  
6 have the first of these two main substantive points  
7 under that bold heading, the fluid-filled projects.

8 If you go over the page to section C, that is  
9 page 40 {A/2/40}, you have the other, the cartel costs  
10 and inefficiency. You will see that we have listed, and  
11 it did not take long, the joint experts' statement  
12 issues provisionally that bear on these topics which are  
13 listed.

14 To take one example, to show you the typical manner  
15 of engagement between the experts, if we go back -- if  
16 you look first at 6(b) on that page, perhaps, the top of  
17 the page, the question is: when you are considering what  
18 the prices would have been apart from the cartel for the  
19 fluid-filled projects to give you a sort of benchmark,  
20 what do you conclude from there being a recent  
21 procurement exercise for fluid-filled projects?

22 Now, if you go on that point to -- back to the joint  
23 statement and turn to {E/17/69}, E/17 at page 69, you  
24 have there this issue 35. You have the reference to  
25 this recent procurement exercise for fluid-filled

1 projects. It is after the end of the cartel, and so the  
2 claimants say this could be a very good benchmark of  
3 competitive price levels for this sort of cable.

4 There was one by a Korean supplier called Taihan  
5 which is one of the groups that was kept out of Europe  
6 by the cartel. Now, the issue is that Dr. Jenkins says  
7 it is informative to help show you what the competitive  
8 price level would have looked like, and with the  
9 exception of Mr. Coombs for NKT, who you will see on the  
10 screen, that is the fourth column, says: I did not  
11 consider there is issue; all the others have engaged  
12 with that contention.

13 If you go over to the next page, page 70 {E/17/70},  
14 you will see from the very top that the Prysmian expert,  
15 who is a man called Mr. John Davies, he has done new  
16 analysis on this in the expert process. He has carried  
17 out a new analysis, and you will see from the bottom  
18 paragraph under "Dr. Helen Jenkins" at the left, she  
19 then refers to his new analysis and she talks about it.  
20 This helps explain some of the length of this document,  
21 as I was saying. You will see at the bottom she says in  
22 her column:

23 "Mr. Davies also presents some further analysis when  
24 he compares the Taihan prices ..."

25 So on.

1           Now, if you turn over the page again to 71  
2           {E/17/71}, and you look at the penultimate column which  
3           is still Mr. John Davies, you will see from the very top  
4           he says:

5           "Dr. Jenkins has raised three criticisms of my  
6           analysis."

7           So this is a sort of live debate online:

8           "I find her arguments unconvincing ..."

9           Here are my reasons.

10          Then he develops a series of reasons.

11          That is why this document is so long, but more  
12          importantly, what you see is a lively debate between  
13          these experts about this issue, and this issue of how to  
14          deal with an overcharge on this sort of project,  
15          fluid-filled, is debated in a very animated way in  
16          numerous other parts of the statement too which we have  
17          drawn attention to. I take it purely and simply as  
18          illustrative. This is all very well suited to being  
19          addressed at trial in a combined session where these  
20          experts can present their point of view and they can  
21          comment on the opposing point of view.

22          THE CHAIRMAN: So is it really the point that this is a sort  
23          of written hot tub that we have got in front of us?

24          MR. TURNER: Yes, essentially what has happened. I am using  
25          this to illustrate that far from it telling you that

1           this calls for individual sequential cross-examination,  
2           they are all speaking with each other, and the hot tub  
3           is the occasion for you to crystallise this.

4           If you then go back to the threshold question of the  
5           methodologies that they have and their approaches, you  
6           will recall that the defendants' arguments in their  
7           skeleton is that these are somehow separate silos. It  
8           is fundamentally incompatible approaches. They do not  
9           interrelate, and this is why they have to be  
10          investigated through sequential cross-examination.

11          That is, with respect, misguided. If you turn up in  
12          this joint experts' statement, if you go to {E/17/17},  
13          you have a question to them at item 8, asking all the  
14          experts:

15                 "Do you agree that a form of regression analysis  
16                 [econometric approach] should be the preferred  
17                 analytical tool for undertaking the comparison ..."

18          This is between cartel prices and what is sometimes  
19          called clean prices, competitive, post-cartel prices.  
20          There is broad agreement on the framework for analysis  
21          here, and you will see that there is common ground in  
22          the approaches that they have used. Just cast an eye,  
23          for example, over what the claimant's expert Jenkins  
24          says and what Mr. Biro says, and he is the -- in a way,  
25          the greatest outlier in this area, and he says these are

1 complementary approaches. They can all provide valuable  
2 insights. No reason to prefer one over the other and  
3 best used in combination. Also Ms. Jackson agreeing  
4 with this in the last column.

5 THE CHAIRMAN: Yes.

6 MR. TURNER: Then if you go forward to question 10 at  
7 page 20 of this document, you have some methodological  
8 discussion {E/17/20}. Go, please, to page 20. If you  
9 look at question 10 at the foot of the page, you have  
10 got a discussion on the importance of a model's ability  
11 to predict the individual prices for these projects,  
12 which rather recalls the old saying, all models are  
13 wrong but some are useful.

14 What you get in response to that question is  
15 an animated discussion on the importance of a model's  
16 ability to predict individual prices, and the debate of  
17 principle is picked up between Dr. Jenkins on the one  
18 side and the defendant four experts on the other side,  
19 and we have put that in our agenda too at item 2.

20 One more, if you go forward to page 57 in this same  
21 document, question 30 {E/17/57}, here is a question to  
22 pick up on something from Prysmian's skeleton about just  
23 how important the sample that you use for your economic  
24 model is, and how material it is to the differences that  
25 I spoke about at the outset between where they all end

1 up.

2 If you look at this question, you will see that  
3 there is a general agreement that but for a few fairly  
4 tractable points, this is just less material. If you  
5 have a look at -- again, Ms. Jackson, who is Safran at  
6 the end on the right, she says, for example:

7 "I obtain similar estimates of overcharge ... [if  
8 I use] my baseline specification regardless of which  
9 expert's data I use ... While there are differences in  
10 data, differences in specification ..."

11 Whether you take into account that is the -- if you  
12 base it on the actual reported costs of supply or you  
13 say that those costs might be inflated so I have to use  
14 proxies, the so-called price technical model, or whether  
15 fluid-filled cables are considered comparable to the  
16 other kind, that is the primary factor behind the  
17 different estimates, but:

18 "... data differences may be more material in some  
19 specifications than others."

20 I say that just to give a sense of context. There  
21 are essentially a small number of tractable points, and  
22 those two we have sought to cover in our proposed  
23 provisional draft agenda, for example how to deal with  
24 particular outlier cable projects where you have got  
25 them in the data.

1           So just to conclude, having taken a very brief  
2           thumbnail tour of this statement, what you have is  
3           a field where a concurrent evidence session would be  
4           obviously extremely useful in achieving justice, in  
5           helping you, the tribunal, get to the right answer,  
6           doing so efficiently and doing so quickly. It is a far  
7           better way to go about things than having a minimum of  
8           12 solid hearing days of disconnected individual  
9           cross-examinations over and over again on the same  
10          topics, like fluid-filled cables.

11          That is the large joint experts' statement and what  
12          I have to say about the overcharge.

13          The same is equally true, if not even more  
14          compelling, for the expert debates on the other two  
15          issues, cost of the financing and the regulation issues.

16          On cost of funding, you have a small number of key  
17          issues dividing the claimant's expert,  
18          Professor Jenkinson, not Jenkins, and the four defendant  
19          experts. If you go, please, to {A/2/42}, this is our  
20          draft agenda again, when it comes up. Yes, under "Cost  
21          of Funding".

22          It is very simple but we think it works. We begin  
23          with the principles and nature of the financing costs.  
24          This is a case where there was not a specific finance  
25          instrument that was issued directly to finance the

1 overcharge on payments for these cable projects. That  
2 sort of dedicated financing is not how this company runs  
3 its business. Against that background, you then have  
4 an expert debate about how one goes about assessing the  
5 costs of financing for an overcharge in a case which has  
6 that feature.

7 So the experts argue, for instance, over the  
8 question whether it is relevant to consider the size of  
9 the additional funding requirement that National Grid  
10 had to bear because it was overcharged. If we go,  
11 please, to {E/18/11} you have the second joint  
12 statement. This one deals with cost of financing and on  
13 this, you have -- this is 3(b), the question:

14 "What is the effect of the size of [the cartel] ...  
15 Overcharge on your analysis of the source of funding?"

16 What you will see, without reading across in any  
17 detail, is a range of views, if you look across these  
18 rows, from Jenkinson to Biro, who is in the third  
19 column.

20 There is also a critical debate about the nature of  
21 equity financing and whether, when you raise equity  
22 capital, it is right to think of that, leaving aside the  
23 legal characterisation, as involving a cost to the  
24 claimant as a matter of economics, and we have that too  
25 in our draft agenda, questions 19 to 21. It is an issue

1           that they address.

2           My Lord, I am aware of the time.

3       THE CHAIRMAN: Well --

4       MR. TURNER: We ought to have a break around now, but I can  
5           continue or --

6       THE CHAIRMAN: I think I originally anticipated  
7           a 3.15 break, but as we broke anyway, let us -- I think  
8           let us just keep going, to be honest with you. We have  
9           only got 40 minutes more to go. I am sorry, but we have  
10          already had one break this afternoon. I think to have  
11          two would be a bit extravagant.

12       MR. TURNER: Yes.

13                So what I am doing here is again merely illustrating  
14           that you have topics or themes where a hot tub is, we  
15           say, frankly, obviously the right way to address the  
16           expert issues.

17                They next consider the cost of our debt financing,  
18           National Grid's debt financing, and how to assess that.  
19           If you go back to our draft agenda at {A/2/42}, this is  
20           where we have set out how we propose it should be  
21           addressed. I am sorry, we have to turn over one page  
22           {A/2/43} to see this. Yes, there you are.

23                Finally we consider, as the experts have covered,  
24           what is the role for financing this using cash reserves,  
25           paragraphs 24 and 25.

1 THE CHAIRMAN: Yes.

2 MR. TURNER: Now, like overcharge, these cost of funding  
3 issues are extremely well suited to being addressed by  
4 the experts concurrently. They disagree on these  
5 issues, but the nature of their disagreement can well be  
6 explored in concurrent evidence.

7 The final subject area is the impact of Ofgem's  
8 regulation and that is about National Grid's ability to  
9 pass on the cartel overcharge in the form of higher  
10 prices to its own customers, which depends on what Ofgem  
11 allows it to do.

12 THE CHAIRMAN: Can I just ask one thing about the way this  
13 is presented. You have called it regulation and  
14 quantum. We had thought of it more as passing on, and  
15 we wondered why you have put it after cost of funding  
16 rather than after overcharge, because it struck us as  
17 being more closely related to that. Is there a point of  
18 substance here that arises as a result of the way you  
19 are looking at it, or is it just something that you  
20 happen to have presented in this particular way?

21 MR. TURNER: Yes, the point of substance is this. The  
22 quantum refers to putting it all together and arriving  
23 at the final result. So in our case it is Dr. Jenkins  
24 who estimates the amount by which the company was  
25 overcharged. Professor Jenkinson -- that is on the

1 principal amounts of the supply of these products, these  
2 cable projects.

3 Professor Jenkinson estimates what goes on top of  
4 that as the additional cost of financing by way of  
5 special damages. What Mr. Noble does is then address  
6 the question of how much of all of that extra cost Ofgem  
7 has allowed to be passed through to customers in the  
8 form of higher prices, and what the final result is for  
9 the claim, and that is why we refer to it as quantum.

10 THE CHAIRMAN: So is the consequence of that that whenever  
11 you have a cost of funding issue that arises in relation  
12 to a claim of this sort, you need to be -- and, sorry,  
13 and when you have it with a regulated entity, you have  
14 to think about quantum at the end of the process of  
15 looking at the overcharge and the cost of funding  
16 together? Whereas, if you were dealing with something  
17 other than a regulated entity, it would be more natural  
18 to think about passing on as something that followed  
19 straight on from overcharge.

20 MR. TURNER: Yes. Without the comparison with  
21 a non-regulated company, it certainly is the case here  
22 because what Ofgem does in its regulation is to allow  
23 the company to recover its efficiently incurred business  
24 costs, such as procuring these cable projects, and its  
25 efficiently incurred costs of financing it all. That is

1 the theory of it.

2 THE CHAIRMAN: Yes.

3 MR. TURNER: Because of that, it allows for what the company  
4 can recover in its charges to customers, taking account  
5 both of those features.

6 THE CHAIRMAN: Yes. Okay.

7 MR. TURNER: So it is after you have added those up that you  
8 then come to the work of Mr. Noble. An associated  
9 aspect of that, which you will probably hear tomorrow,  
10 appears to have caused a minor amount of confusion, is  
11 that Ofgem also in its process allows the company to  
12 recover in its charges the money it is going to need to  
13 pay its tax bill.

14 THE CHAIRMAN: Yes.

15 MR. TURNER: Therefore to some extent, that tax effect is  
16 accounted for in the charges that Ofgem allows the  
17 company to levy on its customers.

18 THE CHAIRMAN: Yes.

19 Okay. Sorry, I interrupted you. You were  
20 explaining to us why this particular bit of the analysis  
21 is also suited to concurrent evidence.

22 MR. TURNER: Yes. So I will just make that good. We have  
23 to look at these areas separately, so I have done two.

24 THE CHAIRMAN: Yes.

25 MR. TURNER: On this one, contrary to the impression which

1 we received from Prysmian's skeleton, the experts in  
2 their discussions on the regulation side too have boiled  
3 down the areas of disagreement very markedly, and again,  
4 you have an entirely tractable number of issues which  
5 remain in dispute between them.

6 If you turn up this second joint experts' statement  
7 again, please, and go to {E/18/42}, you have one of  
8 these questions that brings everything together. The  
9 question for all of them is:

10 "What do you understand to be the key issues  
11 relating to the regulatory, pass-on and quantum stage of  
12 the analysis that result in differences between ... [you  
13 and the other experts]?"

14 So they are all asked to say what are the key issues  
15 dividing them, and if you look at the claimant expert,  
16 "RN" means Mr. Noble in the second column, you will see  
17 that he refers to seven key issues, and if you read his  
18 narrative in his box, he says that he has tried to  
19 narrow the differences on two of them by coming closer  
20 to the opposing viewpoint. One of those was the  
21 factoring-in point, which I can explain, and the other  
22 was the tax point that we have now already had a look  
23 at. Mr. Noble picks up the big ticket items in  
24 descending order of impact, and you will see his bullets  
25 there:

1            "... Whether my Option 1 provides a suitable  
2 approach analysing pass-on and quantum ..."

3            To recall, that option 1 is the approach of saying  
4 that Ofgem will deal in its future regulation with the  
5 passing on of prices to customers because it can look  
6 both forward and it can look back as to what has been  
7 charged, and it can adjust the process of regulation to  
8 ensure customers are left no worse off, and that because  
9 of that, this tribunal can safely award the full amount  
10 of the overpayment and costs of financing made by --  
11 made on the claimant's side.

12            The second issue, whether you should assume that  
13 an overcharge to National Grid, which has been added to  
14 what is called its regulatory asset value, the basis on  
15 which Ofgem decides how much to allow it to recover in  
16 its revenues, any overcharge which has been added to  
17 that already in technical terms, but which is still  
18 sitting as a loss at the date of trial with the victim,  
19 with National Grid, and it has not, at the date of  
20 trial, been passed on in any charges to customers via  
21 National Grid's prices, whether that should be conceived  
22 of as inevitably destined to be passed on in the future,  
23 and for that reason, to be left out of account.

24            If that is the position, and it is a mixed question  
25 of law as well as expertise, there is then a question of

1           how much money that accounts for. What is the impact  
2           financially on the size of the claim? All the experts  
3           have gone into that, and I have already indicated,  
4           I think I showed you earlier, parts of one of the  
5           experts, Mr. Davies of Prysmian, looking at various  
6           scenarios in relation to this.

7           The third area there is a technical term. They have  
8           called it the RIIO sharing factor, and all that means is  
9           whether you should take account of the fact that Ofgem,  
10          in response to a question that actually then was  
11          Mrs. Justice Rose, asked National Grid to ascertain with  
12          Ofgem, how they were going to deal with an award of  
13          damages, because she could see that this could be  
14          relevant to the court or tribunal's approach.

15          Ofgem responded as a result of Mrs. Justice Rose's  
16          prompting, and they said: we are going to apply what  
17          they call a sharing factor to an award of damages that  
18          National Grid gets to make National Grid pass back some  
19          of that damages award to its customers by depressing the  
20          charges that it is allowed to impose in future.

21          Then there is an issue between these experts about  
22          that, what it means and how much it accounts for.

23          THE CHAIRMAN: Just on that particular point, we have seen  
24          that letter. We saw reference to it in your skeleton,  
25          and it is in the bundle.

1 MR. TURNER: Yes.

2 THE CHAIRMAN: Is that the sum total of the evidence we are  
3 going to be faced with from Ofgem in relation to what it  
4 will in fact do?

5 MR. TURNER: That is all which currently we have.

6 THE CHAIRMAN: Yes.

7 MR. TURNER: We interpret that letter, as we read it,  
8 naturally as meaning that they envisage in the way it is  
9 written that the court would award the full amount of  
10 the overpayment, and that they would essentially slice  
11 that in two to avoid a complex calculation, as they put  
12 it, and through their adjustment of National Grid's  
13 future prices, pass money back to customers in that way.

14 THE CHAIRMAN: Because there is a sort of everlasting circle  
15 problem on one view on this issue, is there not, about  
16 how you go -- how you go about taking into account the  
17 potential future attitude of the -- of Ofgem in relation  
18 to a recovery?

19 MR. TURNER: My Lord, you are absolutely right, and I think  
20 all parties appreciate this. On the one hand, it is  
21 said -- and it is said on both sides in different  
22 ways -- the court must have regard to what Ofgem does or  
23 will do.

24 THE CHAIRMAN: Yes.

25 MR. TURNER: So we say you should take into account that

1           they have said this is what they will do. The  
2           defendants say you should take into account -- leave  
3           that out -- leave that to one side, you should take into  
4           account their pre-existing general form of regulation,  
5           which would allow National Grid to continue to pass  
6           through overcharge to its customers in the future.

7           THE CHAIRMAN: This gives rise to -- I mean, I quite see  
8           that there is an economic question here for economists,  
9           but there is also a legal question too, presumably, to  
10          do with ultimately proximity and causation of loss in  
11          the context of a claim like this. Is that the right way  
12          of starting to think about it?

13          MR. TURNER: Absolutely, absolutely, yes. All the parties,  
14          I think, are agreed on that too, and as regards the  
15          everlasting circle, my Lord, you are right. The court  
16          is being asked to say in this pass-on debate between all  
17          of the experts and the parties what they think Ofgem is  
18          going to do. That is the very essence of answering the  
19          question of what you should assume has been -- or will  
20          be passed on.

21                 So everybody is seeming to say you must ask yourself  
22          what Ofgem will do. In the letter that we have referred  
23          to, Ofgem says, and I will try to use a wry smile, we  
24          will take account of what the court does, which does  
25          create something of an everlasting circle.

1           So there is -- there will be an interesting issue of  
2           law here. It is not one which we apprehend has cropped  
3           up before, certainly in this fashion and --

4       THE CHAIRMAN: Can I ask you this on this point, with this  
5           multitude of talent before us, I am sure one of you --  
6           if it has happened, one of you will know about it. Has  
7           there been a follow-on claim of this sort in relation to  
8           a regulated entity before?

9       MR. TURNER: To my knowledge, no, and so this issue that is  
10          now before the tribunal will be a new one. In fact, we  
11          have only just sorted out in the Supreme Court, in  
12          *Sainsbury's v Mastercard*, some very basic questions of  
13          passing on of loss.

14       THE CHAIRMAN: Yes. Thank you.

15       MR. TURNER: I hope this is helpful, because what you see --  
16          and I do not need, I think, to explain these seven areas  
17          in detail, is that there are a tractable number of  
18          issues in the regulation sphere too on which these  
19          experts are engaging. Mr. Noble also goes on to cover  
20          the modelling framework used, the payment profiles and  
21          timing of the overcharge and taxation, and I think if  
22          you turn the page to page 43 {E/18/43} the last of them  
23          should be the factoring-in point, which means, as he  
24          explains, the extent to which any overcharges were  
25          already factored into the allowances that Ofgem gave to

1 National Grid in a particular price control period.

2 On this one, as you will see, if you merely look at  
3 Mr. Noble's text, what he says there on that page in  
4 that column is that he has come closer to the others.  
5 He says about four lines down:

6 "The changes I have made to my analysis mean my  
7 pass-on rates -- when assuming Group 2 is passed-on ..."

8 By the way, that is jargon which means the amount of  
9 the overcharge which under the pre-existing Ofgem  
10 regulation is still sitting with the victim, but would  
11 otherwise be passed on in future to customers by way of  
12 a depreciation allowance:

13 "... now appear to be higher than those of  
14 Mr. Biro ..."

15 So he points out that at least on this view, he sees  
16 that he is imagining that the claimant is saying here  
17 that this part of it is even a higher degree of pass-on  
18 than that claimant expert.

19 At all events, though, it is an issue between them  
20 that remains which they can debate fruitfully  
21 concurrently, and this one, because this is the last of  
22 the points in descending order, accounts for, on our  
23 assessment, not much.

24 What we have done in our provisional agenda again  
25 here is to try to cover the significant themes and

1 issues. It is not definitive, we would not suggest that  
2 you should make an order in that form. What we have  
3 sought to do unilaterally is show that there is quite  
4 obviously no serious point in objecting to concurrent  
5 evidence.

6 Now, Prysmian raises in its skeleton points which,  
7 in our view, do not have substance. So take the issue  
8 of the methodologies for analysing the impact of  
9 regulation on National Grid's prices; that is the gist  
10 of one of Prysmian's points.

11 If you go back a page from what is on screen to  
12 page 42 {E/18/42}, so this is this question 27, you will  
13 see from the first column, the fourth bullet, Mr. Noble  
14 on the modelling framework, and then reading across,  
15 that with one exception, which is NKT, the experts all  
16 use the same basic approach. It is quite true that  
17 there are differences between the experts on how they  
18 implement that basic approach and that is discussed in  
19 question 38 in this large document, as Prysmian  
20 correctly indicates, but all of it is perfectly suitable  
21 for debate in a concurrent evidence session.

22 Another objection that Prysmian raises in their  
23 skeleton to try to show that concurrent evidence should  
24 not be entertained in this area concerns timing of  
25 payments of any cartel overcharges that were made by the

1 victim, and that in its skeleton, I do not need to go  
2 back to it, is at {A/5/17} at sub-paragraph 34(c).

3 Timing of payments of any cartel overcharges is  
4 a minor issue and it is one on which the experts have  
5 fruitfully engaged. If you please look on in this  
6 document to {E/18/77} and look at question 44 when it  
7 comes up, here it is, "Timing of Overcharge payments".  
8 Look at the third column which is Mr. Biro, he is the  
9 ABB expert:

10 "I do not consider the differences between Mr. Noble  
11 and myself in relation to how we have each approximated  
12 ... payment profiles [for these projects] ..."

13 Appendix 2 is just where they are described:

14 "... to have a material impact on the estimated rate  
15 of pass-on."

16 Then look at what Mr. Coombs says in the next  
17 column. He is NKT. That is in the middle. He answers  
18 very crisply:

19 "No ... Mr. Coombs has assumed that expenditure is  
20 incurred on Power Cable projects, and projects are  
21 capitalised for inclusion in the [regulated asset  
22 value], 12 months after ..."

23 Does not assume that this is a significant issue.  
24 Then go to the next column, Mr. Davies, Prysmian:

25 "I have tested the effect of assuming that the

1 overcharge was capitalised according to the payment  
2 schedule, both as calculated by Mr. Noble and as I have  
3 done so in my first report, and find that this has  
4 a small effect on my estimates of the pass-on  
5 percentage ..."

6 Also the final column, Jackson:

7 "No. Evidence on payment timings is limited ..."  
8 and so on.

9 So although the skeleton puts up a fighting approach  
10 and says, here are these difficult issues have to be  
11 tested through individual cross-examination, on  
12 inspection this is not right. The reality is that there  
13 remain a handful of clear and important disagreements,  
14 and in particular on the debate we have already had, the  
15 importance of a declared intention by Ofgem effectively  
16 to slice the damages award by this tribunal in half, so  
17 that a share of money which is recovered is returned to  
18 customers, and how to deal with tax in arriving at any  
19 award, something we have already discussed.

20 All of these areas are covered in our provisional  
21 agenda, even if the tribunal concludes, as it may do, if  
22 the defendants finally choose to engage with this, that  
23 there is scope for refinement. I can go back to  
24 {A/3/44} and you will see that we think we have done  
25 a pretty fair job of -- have I got the right reference

1           there? No, I have not, I am sorry.

2           I meant -- yes, I meant the hot tub agenda, but  
3 I leave that to one side. I think we have done a fairly  
4 good job of covering the issues.

5           So I conclude very shortly, it was necessary for me  
6 to show you this in some detail and I hope clearly in  
7 order to explain how the parties divide, but this is  
8 perfectly obviously litigation where the basic model for  
9 dealing with the expert evidence ought to be concurrent.  
10 The timetable that I have proposed in draft gives ample  
11 time, including for supplemental questions from the  
12 defendants' counsel, particularly given they say they  
13 only need a short time anyway to do a full  
14 cross-examination of all our expert witnesses in any  
15 case.

16           They argue, all of them, that the tribunal would  
17 need three weeks to prepare for a hot tub. That is not  
18 a point that we can accept as a serious one. So, my  
19 Lord, for those reasons, we say that the answer to this  
20 agenda item is clear.

21 THE CHAIRMAN: Thank you, Mr. Turner. So which of the  
22 defendants is taking the lead on this one?

23 MR. HOSKINS: It is me, my Lord, Mr. Hoskins.

24 THE CHAIRMAN: Yes, thank you, Mr. Hoskins.

25

## 1 Submissions by MR. HOSKINS

2 MR. HOSKINS: I am not sure I can convey appropriately how  
3 strongly we disagree with Mr. Turner, but I will do my  
4 best. The fact that hot-tubbing has been used in some  
5 competition cases before does not, of course, mean that  
6 it should be used in all competition cases, and you will  
7 have seen that the three cases referred to by  
8 National Grid in its skeleton were very different from  
9 the present case, abuse of dominance cases, et cetera.  
10 But of course hot tubs can be very useful. Of course  
11 they can, but the question we have is whether a hot tub  
12 is appropriate in the circumstances of this particular  
13 case, and I have to say again, I disagree with  
14 Mr. Turner's suggestion that the tribunal has suggested  
15 that hot tubs are now the normal approach to dealing  
16 with expert economic evidence. I simply think that is  
17 not correct and you can actually see from the quotation  
18 that Mr. Turner purports to rely on that that is not the  
19 case.

20 If we can have, please, {A/2/19}, this is the  
21 claimant's skeleton, paragraph 52(c), you see the  
22 reference to *BCMR 2019*, this is the quote that is  
23 referred to, and it is supposed to tell us that the  
24 tribunal is now saying its normal practice is  
25 hot-tubbing for any economic expert evidence:

1           "The Tribunal recorded in its judgment ... '[It]  
2 conducted a contemporaneous examination of the two main  
3 expert witnesses (referred to as a 'hot tub session') in  
4 which Professor Cubbin led the Tribunal's questioning of  
5 the two experts. A list of relevant topics was provided  
6 in advance to the parties, as was a protocol of  
7 procedure in the normal form ..."

8           So the protocol was in the normal form when you have  
9 a hot tub:

10           "... the Tribunal took its normal approach to  
11 seeking common ground between the respective experts."

12           Now, seeking common ground could be, well, they do  
13 that in all cases, it could be they do it in hot tub  
14 cases, but what this quotation quite clearly does not  
15 say is having a hot tub is the normal approach in all  
16 these cases. It is simply not borne out by the quote  
17 they rely upon.

18           If you excuse my personal experience, I am not aware  
19 of a hot tub ever being used in a cartel damages case.  
20 Now, I can think of three that have gone to trial, I was  
21 involved in all three of them, although one of them  
22 settled before the trial finished. There was the rubber  
23 cartel, there was the *Sainsbury's v Mastercard* and there  
24 was *Britned v ABB*. None of them used a hot tub, and  
25 National Grid has not been able to point to a single

1 example of a cartel damages case in which a hot tub was  
2 used.

3 Now, a claim in relation to exactly the same cartel,  
4 raising the same issues, of course, has already been  
5 tried by the High Court in *Britned v ABB*. It was a case  
6 involving two parties, Britned and ABB. The economic  
7 experts were Dr. Jenkins for Britned, as you know, she  
8 appears for National Grid here, and Mr. Biro for ABB.  
9 We have him again. The trial judge you will all be  
10 familiar with, Mr. Justice Marcus Smith, who is the  
11 long-standing chairman of the  
12 Competition Appeal Tribunal. The evidence was given by  
13 way of cross-examination, and it is quite clear from the  
14 judgment that that process of cross-examination allowed  
15 the judge to form very clear views on the expert  
16 evidence.

17 If we can go please, to authorities, tab 1, page 139  
18 {AU/1/139} you see the heading, "Which approach is  
19 preferable?", "The reliability of Mr. Biro's model".  
20 Then at paragraph 416 at the bottom of the page:

21 "... Mr. Biro's margin analysis represents a  
22 reliable tool for assessing the overcharge."

23 Over the page, at 140 {AU/1/140}, "The reliability  
24 of Dr. Jenkins' model".

25 "... Dr. Jenkins' regression analysis is

1           insufficiently reliable to be used in any way at all."

2           Then the judge goes on to rely on a number of  
3           detailed technical points, all of which were explored in  
4           cross-examination to support his conclusions. You will  
5           see at paragraph 418(2), it is at the bottom of the  
6           page, and if we can turn over, please, to {AU/1/141}, he  
7           expressly cites from some of the cross-examination. So  
8           it cannot have been too bad.

9           So I am not showing you this to say if you hear  
10          cross-examination you will come to the same conclusion.  
11          Of course not. You will hear the evidence and you will  
12          form your own view. You can see why National Grid might  
13          not be keen to have cross-examination, given the result  
14          in *Britned*, but I do not show it to you because I am  
15          trying to say it will go one way or the other. The only  
16          reason I show you this is that in circumstances where  
17          cross-examination has been used effectively by a judge  
18          dealing with the same issues, the same economic issues,  
19          in relation to the same cartel, there would have to be  
20          an exceptional reason to depart from an approach that  
21          had been tested and shown to be effective.

22          There is no such exceptional reason here.

23          THE CHAIRMAN: Does it make any difference, Mr. Hoskins,  
24          that I have the very good fortune of sitting with  
25          Dr. Bishop and Mr. Holmes, rather than as a judge alone?

1 MR. HOSKINS: Does it make any difference? Of course it  
2 does, because you have the benefit of their experience,  
3 but in our submission, does that suggest that you should  
4 move to a hot tub rather than cross-examination? The  
5 answer is not, and I will develop some of the other  
6 reasons why we say, despite the experience of your two  
7 wingmen, you should not be taking upon the burden of  
8 yourself of a hot tub, and if you will allow me, I will  
9 develop those points. But of course we recognise you  
10 have that ability, but of course the experience of your  
11 wingmen will mean that you are better placed then to  
12 evaluate the answers in cross-examination and indeed for  
13 the tribunal to formulate its own questions in  
14 cross-examination. So it is not as if you go down the  
15 cross-examination route, the benefits of wingmen in the  
16 tribunal is lost. Absolutely not. They are just  
17 brought to bear in the context of cross-examination  
18 rather than a hot tub.

19 In the present case, there are five parties and  
20 therefore five experts to be heard on each topic, as  
21 experts total that you will hear five on each of the  
22 three main topics. In our submission that strongly  
23 militates in favour of cross-examination. The reason we  
24 say that is this. In cross-examination, there is a very  
25 sharp focus on each expert's views and they are tested

1 in detail. It is an individualised approach. Now, that  
2 is its strength. The problem with a hot tub with five  
3 experts is that the testing of the individual experts  
4 will inevitably be diluted and of a more general nature.

5 That issue, that problem of dilution, of course,  
6 would be less of a case if you had, say, two experts.  
7 But when you have five experts, one can immediately see  
8 that actually getting to grips with the detail through  
9 a process which is primarily discussion led by the  
10 experts prompted by questions, is going to be much more  
11 difficult.

12 It is also going to be far more difficult, if one of  
13 the benefits generally of a hot tub is to allow the  
14 experts to comment on each other, it is much harder  
15 where there is five of them because you have got  
16 an exponential problem. It is not simply: Ms. A, what  
17 do you say about Mr. B's approach? You have got five of  
18 them. So actually it is really difficult to see how the  
19 benefits of a hot tub, and there are undoubted benefits,  
20 are actually going to be brought to bear in this  
21 particular case.

22 Mr. Turner made the point about cross-examination  
23 being -- the fact that it is time-consuming, but with  
24 respect, this is not an issue about time. It is  
25 a question about forensic efficiency and effectiveness.

1 We have a very long trial window. You have seen some of  
2 the suggested timetables for the hearing. The idea one  
3 should have a hot tub because it might save a few days  
4 in a case of this scale is a non-point, with all due  
5 respect.

6 Mr. Turner made the point, well, how are the  
7 defendants going to cross-examine effectively if they  
8 are all going to take a turn with each of the -- with  
9 each of our experts, but of course one of us is going to  
10 take the lead in relation to Dr. Jenkins and so on with  
11 the other two witnesses. That is part of the discussion  
12 we are having to avoid duplication. It is not going to  
13 be all four of us all having a shot at each of the  
14 experts. There will, of course, be some follow-up  
15 questions from the ones who do not lead on a particular  
16 topic, but we are well aware of the need that one of us  
17 will need to focus on that.

18 So these sorts of timing issues, with respect,  
19 really should carry no weight whatsoever.

20 Now, one of the advantages of cross-examination is  
21 that experienced counsel draft the questions, and if we  
22 do our job properly, then that will allow and assist the  
23 tribunal in getting to grips with the issues in the  
24 case. That is our function. That is what we are paid  
25 for. That is why our clients have instructed us. That

1 is why they want us to ask these questions, and if we do  
2 our job properly, the tribunal will be hugely assisted,  
3 and it is not simply a case, with respect, of ploughing  
4 through every row and column in the joint experts'  
5 statements.

6 One of the reasons, again, why we are instructed is  
7 to exercise our judgment as to what matters and to  
8 assist the tribunal in seeing what matters. That is our  
9 job. That is the job of counsel and, with respect to  
10 National Grid, it seems hugely unfair in a case of this  
11 size and complexity to try and pass that burden on to  
12 the tribunal. I am not saying obviously you are not  
13 capable of doing it, but it is a very considerable  
14 burden, as you will all no doubt be aware. It is also  
15 not the case that -- there is sometimes a sort of  
16 suggestion coming through Mr. Turner's submissions that,  
17 look, there is these main issues, so we can focus on  
18 them in a hot tub. But with all due respect, you cannot  
19 skip issues. Whether one adopts cross-examination or  
20 a hot tub, the issues that have to be addressed are the  
21 same in both if you are going to get to the bottom of  
22 the matter.

23 So there is not somehow an advantage in hot-tubbing  
24 not having to go to as many issues as you would in  
25 cross-examination. That aspect is the same for both of

1           them.

2           Let us look at the nature of the issues in this  
3 case, and let me give you some quotes from Dr. Jenkins,  
4 so ABB's -- one of ABB's own experts. First Jenkins,  
5 paragraph 1.15 {E/1/13}, I can simply read it out. She  
6 says:

7           "Assessing the extent of any overcharge in this case  
8 is a complex exercise, involving detailed factual and  
9 economic analysis."

10          Now, that is something we can all absolutely agree  
11 upon in the context of this case.

12          Now, you have seen the joint experts' statements and  
13 you have made the points about how difficult they  
14 grapple with, but they do identify 127 issues, and many  
15 of those issues are described as material or arguably  
16 material. As I said before, one is doing  
17 cross-examination or hot-tubbing you will have to  
18 grapple with all those material or arguably material  
19 issues. Hot-tubbing is not a magic way to ignore  
20 certain issues.

21          The detailed issues are not simply binary, in  
22 a sense of a choice between the claimant on the one hand  
23 and the defendants' experts on the other. Again, if we  
24 can go to bundle {E/9/9}, this is Dr. Jenkins' second  
25 report. At paragraph 1.6 you will see that she

1 describes the non-binary nature of the issues in this  
2 case:

3 "This difference in our results is not driven by any  
4 one particular area of disagreement between the experts,  
5 or as between the other experts and me. Whilst there  
6 are some areas in relation to which my position differs  
7 from those of all the other experts, there are a number  
8 of topics or issues over which the other experts  
9 disagree amongst themselves as to the correct approach,  
10 and/or I agree with the position adopted by some of  
11 them."

12 Now, the number of issues, the detailed nature of  
13 the issues, the non-binary nature of the issues, all  
14 emphasise the need for individualised testing of each  
15 expert's views. It is because of that landscape of  
16 economic issues that saying, "Let us put them all in  
17 a hot tub and let them all have a discussion" is not  
18 going to get to the heart of the matter.

19 THE CHAIRMAN: With that ringing statement, Mr. Hoskins,  
20 I see it is 4.30 pm. Is it a convenient moment? I do  
21 not want to interrupt you in full flow on a point,  
22 but --

23 MR. HOSKINS: I am about to move on to a new point, my Lord,  
24 so that is a convenient moment.

25 THE CHAIRMAN: Yes, good. How much longer -- I am not going

1 to hold you precisely to this, but how much longer do  
2 you think you are going to be on this? I mean, you have  
3 only just started and it is obviously the most important  
4 point at this PTR but can you give us --

5 MR. HOSKINS: Well, I am only going to be another five or  
6 10 minutes, because I am dealing with this at the level  
7 of detail. I am going to make a submission that simply  
8 pulling out particular issues out of the joint experts'  
9 statements and saying, "There is an issue here" and  
10 "some people agree here" does not help you. So I am  
11 going to keep my submissions to matters of principle and  
12 I will be short and I will be about another ten minutes,  
13 I think.

14 THE CHAIRMAN: Right. Well, if it was not for the fact that  
15 I have something else to do, I am afraid, we perhaps  
16 could have gone and finished you, but I am sorry I have  
17 to rise -- we have to rise promptly today. Good.

18 Well, we will all assemble -- I mean, it is clear we  
19 are going to finish well in time tomorrow, so we will  
20 all assemble at 10.30 am tomorrow morning, and thank you  
21 very much for your assistance today.

22 MR. HOSKINS: Thank you.

23 (4.31 pm)

24 (The tribunal adjourned until 10.30 am  
25 on Thursday, 30 July 2020)

INDEX

PAGE

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

Pre-Trial Review..... 1

Housekeeping..... 2

Submissions by MR. TURNER .....4

Submissions by MS. DAVIES .....13

Submissions by MR. TURNER .....19

Submissions by MR. HOSKINS..... 32

Decision..... 120

Submissions by MR. TURNER..... 127

Submissions by MR. HOSKINS..... 170

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10