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IN THE COMPETITION

Case No. : 1298/5/7/18

APPEAL TRIBUNAL

Victoria House,

Bloomsbury Place,

London WC1A 2EB

27 February 2019

Before:

Andrew Lenon QC, Jane Burgess, Michael Cutting

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Achilles Information Limited

v

Network Rail Infrastructure Limited

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HEARING - Day 6 - Open Court

APPEARANCES

Mr Philip Woolfe and Mr Stefan Kuppen (appeared on behalf of Achilles)

Mr James Flynn QC, Mr David Went (appeared on behalf of Network Rail)

1 Wednesday, 27 February 2019

2 (10.30 am)

3 (Proceedings delayed)

4 (10.34 am)

5 PROFESSOR ANSON JACK (continued)

6 Cross-examination by MR. WOOLFE (continued)

7 MR. WOOLFE: Good morning, Professor Jack.

8 A. Good morning.

9 Q. Now, if I could ask you to have your report handed to
10 you again at bundle F. We are at tab 4 of that, are we
11 not? Yesterday I had run through with you paragraph 93
12 of your report, the various subparagraphs, where you set
13 out the benefits as you see them of a single supplier
14 assurance scheme.

15 Then we come to a section starting at paragraph 95
16 where you said it was relevant to benchmark
17 Network Rail's practices against the practices adopted
18 by rail infrastructure operators in other European
19 countries and then some other supplier assurance schemes
20 in other contexts.

21 A. Yeah.

22 Q. I am aware of benchmarking -- you are a professor of
23 international rail benchmarking; is that --

24 A. That's correct.

25 Q. So benchmarking is what you do, as it were?

1 By "benchmarking", you essentially mean
2 comparison --

3 A. Yes.

4 Q. -- simplified to its utmost. I am sure there are more
5 complex ways of doing it, but there you are.

6 The first one you have is the SNCF, the French
7 railway structure operator. You say at paragraph 96
8 that:

9 "SNCF has its own procurement division which runs
10 a single supplier assurance process."

11 Is it fair to say from what you present at
12 paragraph 97 that this is essentially about supplier
13 assurance in the sense of conducting checks on its
14 suppliers; yes?

15 A. The nature of the research that I did was I went into
16 SNCF's and Deutsche Bahn's websites and made enquiries
17 as if I was the supplier. So what I put before
18 the Tribunal is the evidence I found from basically
19 their websites and the supplier arrangements.

20 Q. Essentially what it appears is that SNCF runs its
21 supplier assurance operation in-house?

22 A. Yes.

23 Q. So it is not actually comparable to the situation here,
24 where Network Rail is joining an external supplier
25 assurance scheme for the purpose of qualification like

1 it is with RISQS. I mean it is different structurally;
2 that is right?

3 A. Yes, I mean, each of the railways in Europe is
4 structured in different ways that -- what I was looking
5 at was the mechanism by which SNCF undertake their
6 supplier assurance.

7 Q. Okay.

8 A. The conclusion I reached, albeit from a fairly
9 superficial review, is that they do it in-house.

10 Q. But it is not comparable to the situation here, where
11 Network Rail has outsourced to RISQS the function of
12 auditing suppliers for the purposes of the Sentinel
13 authorisation scheme; it is just a different kind of
14 situation, is it not?

15 A. Well, I acknowledge it's different, but I don't think
16 that it's non-comparable in the sense that both SNCF and
17 Network Rail need to assure themselves of the quality
18 and safety of their suppliers and SNCF has got one
19 mechanism of doing it and Network Rail another.

20 Q. So they have chosen to assure the quality of their
21 suppliers in-house and that is what it shows
22 effectively?

23 A. Yes, but it also shows that they have chosen not to use
24 multiple parties to do so.

25 Q. Yes, well, they have not chose any parties to do so,

1 they have chosen just to do it themselves. That is
2 the same with Deutsche Bahn as well?

3 A. It appears to be the case.

4 Q. There is nothing in that material which deals with the
5 reasons why they have chosen to do that, is there?

6 A. No.

7 Q. Okay. Then we come to the Gas Safe Register, which is
8 obviously in a different sector. I think you have two
9 comparisons in the UK gas sector. First of all you have
10 the Gas Safe Register for gas engineers who do many
11 things, including domestic stuff.

12 A. Yes.

13 Q. Then separately offshore oil(?) and gas at a much higher
14 upstream level.

15 As regards the UK gas -- the Gas Safe Register, as
16 I understand it, this is basically a register to ensure
17 that gas engineers have the relevant qualifications, is
18 it not? Is that right?

19 A. That's my understanding, yes.

20 Q. It says over the page -- actually, I am not sure it does
21 say here. It is the bit you quote:

22 "The Gas Safe Register is the only official gas
23 registration body."

24 Then at point (c):

25 "A gas engineer can only be aligned to a registered

1 business and be issued with a licence to undertake gas
2 work on behalf of a registered business if they hold
3 a valid and current qualification. This evidence of
4 competency is obtained by every engineer through a
5 recognised route of training and assessment ..."

6 Do you know anything about what the routes of
7 training and assessment are for the purposes of this
8 register?

9 A. No, I don't.

10 Q. They are set out on the Gas Safe Register website. Can
11 I hand you up something. (Handed)

12 A. Thank you.

13 Q. You have two documents, Professor Jack. The first one
14 is from the Gas Safe Register website and it is
15 a document issued -- "How to become registered with
16 the Gas Safe Register, easy and fast".

17 If I could ask you to turn over the page on that,
18 you will see in the bottom of the first column --
19 perhaps in the middle of that column:

20 "Evidence of competence is awarded through
21 the process of proving to a recognised awarding body
22 that there is the necessary experience to take the
23 assessment of gas safety competence. Once the engineer
24 has the required evidence, this information will be
25 passed to the Gas Safe Register."

1 Then the bottom:

2 "Gas Safe Register only accepts evidence of
3 competence in gas safety such as ..."

4 Then we have three examples that are set out into
5 more detail. So a national accredited certification
6 scheme, ACS, ACS-aligned NVQs and a qualification credit
7 framework.

8 So there are, in fact, multiple routes of
9 qualification as a gas engineer, are there not?

10 A. Yes, I understand that.

11 Q. So this is -- in a sense the Gas Safe Register is an
12 example of an authorisation scheme which accepts
13 evidence of capability from multiple sources, is it not?

14 A. That's correct, but there is one -- only one point at
15 which it can be registered.

16 Q. But in a sense, is that not comparable then to Sentinel?
17 There is only one Sentinel register saying who is
18 allowed to go on track, but it could accept evidence
19 from multiple sources --

20 A. Yes, I think it is comparable with Sentinel --

21 Q. Okay, and I would suggest that it is not --

22 A. -- and it is comparable with the IT aspect of the RISQS
23 scheme.

24 Q. But from an audit aspect, it is not comparable to RISQS,
25 is it?

1 A. Not directly, no.

2 Q. Okay. Thank you.

3 Can I take you to the other document that I handed
4 up as well. This is from the website of SSIP, Safety
5 Schemes In Procurement, and it relates to the PAS 91
6 standard. I apologise for the very small text. Are you
7 familiar at all with the PAS 91 standard as a possible
8 comparison?

9 A. I think I indicated yesterday I was aware of it, but not
10 familiar with it.

11 Q. Perhaps I can take you down to -- this is the view from
12 the Health and Safety Executive, and under the first
13 section:

14 "A supporter ..."

15 It says in the middle of that paragraph:

16 "HSE supports the work of SSIP to simplify
17 pre-qualification and to encourage straightforward
18 mutual recognition between its member schemes."

19 It goes on to say:

20 "SSIP assessments are all judged on core criteria
21 approved by the HSE."

22 Then:

23 "Message to clients."

24 In the second sentence:

25 "HSE encourages clients to accept a valid

1 certification based upon an assessment by any of the
2 SSIP member schemes as having met the core criteria ..."

3 It is worth perhaps just noting that there is
4 a footnote -- there is a star there, and the star goes
5 over the page to say:

6 "... with the exception of Construction Line, which
7 does not carry out health and safety assessments to
8 the core criteria."

9 So that is a qualification to that. Then
10 "Significance of mutual recognition":

11 "The terms of membership of the SSIP forum means
12 that all the members of the SSIP forum are committed to
13 mutually recognise each other's standards of
14 assessment."

15 So that is an example, is it not, from a sector
16 where safety is important, of different supplier
17 assurance schemes agreeing to mutually recognise each
18 other's standards of assessment?

19 A. Yes.

20 Q. So it can be made to work, can it not?

21 A. Yes, it can. The -- let me explain the basis on which
22 I've put forward those four. They were just the four --
23 the first four that I came to when I was doing some
24 research in support of this. You may say it's
25 a coincidence that those four -- I mean, two of them

1 were (inaudible) directly from the rail industry and
2 I thought were more comparable, but in looking at
3 the gas industry, I found two further examples where
4 there was a single source of the truth. But I do
5 acknowledge that there are other industries where there
6 are multiple acceptance schemes.

7 Q. Yes, you could not go on researching assurance schemes
8 indefinitely in all industries; you would be there
9 forever essentially, so that is understandable.

10 A. That's a fair assumption.

11 Q. If I could then take you to the UK offshore oil and gas
12 sector element. This is at paragraph 101 of your
13 statement.

14 THE CHAIRMAN: Sorry, where shall we put these?

15 MR. WOOLFE: Sorry, sir. Put these at the back at G4 as
16 well, if there is still room there.

17 At paragraph 34(d) [sic] of your statement you do
18 deal with offshore oil and gas and you refer to the FPAL
19 scheme. I think you are saying that it is an example of
20 a single supplier assurance scheme --

21 A. Sorry, could you give me the reference again?

22 Q. I do apologise. Paragraph 101 -- sorry -- of your
23 report.

24 A. Yes.

25 Q. You are putting it forward on the basis that this is an

1 example of a single supplier assurance scheme operating
2 in an industry?

3 A. Yes.

4 Q. Now, just to test that, can I ask you to take up
5 volume B, please, the claimant's witness statement
6 bundle. First of all, if you turn to tab 3, you'll see
7 the witness statement of Mr. Chamberlain. If I could
8 ask you to turn to paragraph 34, where he is
9 setting out -- in his statement he is setting out
10 the fact that the portal operated by Achilles, the
11 TransQ Global portal, is similar in purpose, structure
12 and functionality to other services, but in doing so he
13 sets out in relation to those schemes who their
14 competitors are. If you see at (d):

15 "FPAL and oil and gas sector supplier
16 pre-qualification service operate in the UK.
17 Competitors include Helios, Altius and DeepStream."

18 If I could ask you to turn to another page as well.
19 In Ms. Ferrier's third witness statement -- that is B,
20 tab 5 at paragraph 14 -- I am not sure if you will have
21 seen this. This was evidence that Ms. Ferrier put in,
22 having seen your statement.

23 A. I have seen this.

24 Q. You have read this.

25 So having read that, do you still stand by FPAL as

1 an example of a single supplier assurance scheme?

2 A. The feature of FPAL that I was quite struck by when
3 I was looking at this was the -- I think it's called
4 the "code of practice" that is operated in the UK oil
5 and gas environment, and the language that is used
6 with -- within the sector says that those that sign up
7 to the code of practice must use FPAL. So that was
8 the feature that I was struck by.

9 Q. Right, but that is, in a sense, a voluntary decision by
10 those who choose to sign up, is it not? They are
11 signing up to the code of practice and using FPAL at the
12 same time?

13 A. Yes, it is, as I think it is effectively a decision by
14 Network Rail and the other parties to sign up to RISQS.

15 Q. That, with respect, is where we differ from you because
16 Network Rail has chosen to sign up to RISQS, yes, but by
17 virtue of the terms of the Sentinel scheme in
18 particular, any other supplier or buyer who wants to put
19 employees onto track has to sign up to RISQS. That is
20 a key difference, is it not, Professor Jack?

21 A. I think that Network Rail deciding to enter into
22 a scheme where there is one source of the truth and one
23 set of suppliers is comparable. I don't think --
24 I don't see a key difference there.

25 Q. Okay.

1 Now, if I can take you within Ms. Ferrier's
2 statement to paragraph 18, she says that FPAL is not
3 a mandated single provider of supplier assurance in
4 the same way as the RISQS scheme now is.

5 "There is no infrastructure owner in the sector akin
6 to Network Rail. The large operators own their
7 infrastructure and choose to manage their supplier
8 assurance in a collective way."

9 Then she goes on to say -- she gives it another
10 comparator, which is the Norwegian oil and gas market,
11 and there she refers to "Achilles long-standing
12 JQS service" and the members of the -- I think the
13 membership organisation EPIM, "... have historically
14 been serviced by the ... JQS offering", but now they
15 have set up their own EPIM JQS and there is
16 competition -- if I summarise -- between Achilles'
17 JQS offering and the EPIM JQS offering, and they both
18 operate on the basis of an international oil and gas
19 protocol. So that is an example, is it not, of how you
20 can have multiple supplier assurance schemes competing
21 on the basis of common standards?

22 A. It appears to be an example of competition in supplier
23 assurance schemes, yes.

24 Q. And the offshore --

25 A. Yes, it is.

1 Q. There can be accidents in offshore oil and gas that are
2 just as horrific in the consequences as rail accidents?

3 A. Indeed -- more so sometimes.

4 Q. I think beyond a certain point it is safety-critical
5 enough, is it not?

6 Then if I can take you to -- you can put
7 bundle B away now -- paragraph 105. If you will recall,
8 this is where you set out the safety implications of
9 recognising multiple supplier assurance schemes. If you
10 recall, yesterday I said I would run through 93 with you
11 and then pick up 105 so far as anything different
12 happened.

13 Now, you have -- if we just deal with them briefly.
14 I think 105(a) referred to the likely divergence and you
15 refer to the possibility of encouraging suppliers to
16 seek accreditation and audit by the least thorough
17 qualification scheme. That is essentially the "race to
18 the bottom" argument; is that right?

19 A. Yes.

20 Q. I think we dealt with that yesterday.

21 A. Well, I think you -- you highlighted that in your theory
22 it is possible to deal with it by having similar
23 standards and people auditing to the same standards, but
24 I don't think you dealt with the fact that we all
25 recognise that if you've got multiple players in any

1 marketplace, you will find both good -- or you will tend
2 to find both good practices and less good practices.

3 I don't think you dealt with that.

4 Q. Well, what I am wanting to do is test the various points
5 you put forward and some I'm testing with you,
6 Professor Jack, and some I'm testing -- there's the
7 economic incentives with the economists. To deal with
8 that briefly, if Network Rail is required to recognise
9 different providers of assurance for the purpose of
10 its -- of Sentinel and the on-track plant scheme and
11 the principal contractor scheme, it can set what
12 standards it wants things to be audited to, can it not?

13 A. Yes, it can.

14 Q. It can ensure that whatever standards it wants to be met
15 are met?

16 A. Yes.

17 Q. It can set a very high standard for that, can it not, if
18 it wants to?

19 A. Yes, it can.

20 Q. So even if there were a very minor variation at a
21 very high standard, it is sufficient for the purposes of
22 assuring that people are authorised correctly under
23 those schemes, yes?

24 A. Yes, I think the -- you're back to saying that you can
25 deal with everything by setting standards and I just

1 keep coming back to the suggestion that setting
2 standards is one thing, but it's the total system that
3 matters.

4 Q. Well, I am trying to explore it in stages with you,
5 Professor Jack. So at the stage of those authorisation
6 schemes, certain standards can be set and applied. In
7 one sense people have no choice but to go to a scheme
8 that is authorised by Network Rail for those purposes;
9 that is right.

10 Now, if we were turning to joining supplier
11 assurance schemes for the purposes of qualification for
12 contracts, now Network Rail can choose whichever scheme
13 it wants, can it not, as a qualification scheme?

14 A. I'm not sure what the point you're making --

15 Q. Well, if -- Network Rail can pick which scheme it wants
16 to offer its contracts through and any supplier who
17 wants to come and supply Network Rail has to go to that
18 scheme. In that situation the incentives are just
19 the same as they are at the moment, are they not?

20 A. I agree with the first half, but I think the -- as soon
21 as you have more than one scheme that is recognised, you
22 have the potential for differences opening up between
23 them.

24 Q. In terms of the safety aspect, I think you accepted that
25 Network Rail can decide what it wants to accept for the

1 authorisation scheme or what standard it wants to set,
2 and that should deal with the safety concerns, should it
3 not?

4 A. Well, it -- we talked yesterday, and I think you --
5 you -- in Dr. Cox's cross-examination, the point
6 about -- where he and I agreed is that you could in
7 theory put in place mechanisms to address any concerns.
8 Where we did not agree is about the degree of
9 complexity, the -- and indeed whether those would
10 introduce risks. But I think my point is that, even if
11 Dr. Cox feels that it's appropriate to put in place
12 additional mechanisms, the fact that it's appropriate to
13 put in place additional mechanisms must mean that
14 there's -- there is a concern, there is a risk that
15 needs to be addressed. So even if it is quite minor, it
16 is nevertheless there. In my view it is significant and
17 requires -- and would require very significant checks
18 and balances to enable them to protect themselves.

19 Q. But I just want to understand -- with respect, I want to
20 understand the factual basis for that view. Now,
21 the differences -- it seems to me your view is based
22 upon how competition in the market would work between
23 multiple schemes; is that right?

24 A. No, I'm not -- I'm not particularly taking a view on
25 competition. I'm -- I appreciate we're in a Tribunal

- 1 that is focused on competition, but --
- 2 Q. You are the one who refers to an economic incentive at
3 paragraph 105(a) so it does appear to be a point about
4 economics.
- 5 A. The incentive of any supplier in any market is to get
6 business, I guess. So to that extent I acknowledge I'm
7 commenting on competition, but I'm not trying to make
8 a point about competition.
- 9 Q. You see, your point is that you say a supplier of audit
10 services would have an incentive to be less thorough to
11 gain supplier business. Is that your point?
- 12 A. Yes, that --
- 13 Q. I put the suggestion to you that a supplier of assurance
14 services, they need to be accepted by Network Rail for
15 the purpose of, say, the Sentinel scheme, but they also
16 need to have buyers, do they not, Professor Jack? Yes?
- 17 A. Yes.
- 18 Q. If they do not have buyers, they will not have any
19 business?
- 20 A. Well, the largest buyer we're talking about here is
21 Network Rail, I presume you mean --
- 22 Q. Yes, but there is a distinction -- and I do not think
23 you perhaps have appreciated it, Professor Jack --
24 between Network Rail having to use -- having to accept
25 Achilles as giving an audit for the purpose of the

1 authorisation schemes and, on the other hand,
2 Network Rail being required to use Achilles as
3 a qualification service for the purpose of letting its
4 contracts. Those are two different things. Our case
5 does not involve Network Rail having to let its contract
6 through Achilles.

7 A. No, I think I understand that.

8 Q. Yes, so if, in fact, the supplier assurance schemes have
9 to compete for buyers, including compete for
10 Network Rail's business, they do not just have an
11 economic incentive to knock down standards to attract
12 suppliers, they have an economic incentive to do what
13 buyers want, and your point here does not take account
14 of that, does it?

15 A. I think the -- we're back into the territory of
16 recognising that some people will be more assiduous in
17 checking things up than others. I mean, I'm speculating
18 here, I have got no direct knowledge of the market, but
19 I guess that there are some that may get -- some
20 auditors that may get a reputation for being somewhat
21 easier to get the relevant accreditation through than
22 others, and obviously the employer of that auditor would
23 have to be careful -- I suppose sail close to the wind,
24 to use an analogy -- to make sure that they were meeting
25 the buyer's requirements as well as setting whatever

1 tone they set in the market for suppliers. But I'm
2 speculating here.

3 Q. If I can take you to point (b) of your paragraph 105,
4 you refer to variations in the audit service provided.
5 I think this is a related point:

6 "If there is variation, it will be impossible for
7 Network Rail to determine on the face of the different
8 schemes which it could and which it could not rely
9 upon."

10 It would not just be a matter of looking on the face
11 of the different schemes, would it? They could require
12 compliance with certain audit standards, could they not?

13 A. Yes, and I think the -- I mean, the point that I would
14 make in addition to what's there is it effectively
15 depends on what level of additional supervision is put
16 in place, the degree to which Network Rail could rely
17 upon it.

18 Q. Then at (c) you say:

19 "There is no uniform development of supplier
20 assurance across schemes."

21 You refer to this being a rail industry scheme
22 owned -- run by the industry for the industry. But
23 there are plenty of examples, are there not, of
24 competitive industries collaborating on improvements to
25 quality and safety standards -- are there not?

1 A. Yes, I would expect so.

2 Q. Just in that regard, can I take you to bundle H1,
3 please, a report that starts at 197. I think we were
4 looking at this for some slightly different purposes
5 yesterday. This is the Arthur D Little report where
6 they consider cost efficiencies. If I can take you to
7 page 267 of the bundle. I apologise. Sorry. It starts
8 with page 263. We have a series of slides then
9 setting out comparators with other industries and indeed
10 we have a comparator with the rail industry.

11 A. In Belgium.

12 Q. In Belgium, yes, that is right.

13 A. Yes.

14 Q. We have one page showing, again, a diagram, looking at
15 from low-level qualification to the highest level of
16 qualification.

17 Over the page -- that is about the infrastructure
18 manager, Infrabel.

19 Over the page we have the main operator, SNCB, so
20 slightly different; we are talking about a train
21 operator rather than infrastructure.

22 You will see here on the right-hand side, for
23 the highest level of assurance -- on the left-hand side,
24 the UK sector, we have RISAS, which, as we have seen, is
25 a scheme which accepts multiple accreditation bodies.

1 Then on the right-hand side:

2 "It depends on nature and product of service. They
3 recognise ISO and other country assurance schemes."

4 So even at the highest level of assurance they are
5 choosing to operate a mutual recognition approach in
6 the interests of efficiency, but also accepting it is
7 safe; yes?

8 A. Yes, I can see --

9 Q. And then --

10 A. I can see these triangles. I can see a variety of ways
11 in which assurance is delivered.

12 Q. Then over the page we have, at 265, the automotive
13 industry, a risk-based assurance framework. Again
14 the same triangle with the same highest level of
15 assurance.

16 You will see, perhaps, in the middle of that on
17 the level that says "Link-Up (Proof)", which I think is
18 the audited Link-Up service. We have an example of
19 a quality management system called "TS 16949". So,
20 again, that is another example of -- that's --
21 the automotive industry is a competitive industry where
22 they have collaborated to produce a standard. That is
23 right, is it not?

24 A. Yes, I think -- I am not sure where you're going here.

25 Q. Well, I'm just -- I'm just -- you are putting forward

1 that it is a benefit that RISQS is developed by
2 the industry for the industry and that this leads to
3 uniform development. What I am suggesting to you is you
4 can have situations where schemes can be developed on
5 a more competitive basis and they can still aim at
6 uniformity or an appropriate degree of harmonisation.

7 A. Well, I think the -- we're in danger of going round
8 the cycle we went round yesterday afternoon and a little
9 bit earlier this morning. I think they can, but, as
10 we've identified, to do so would involve the
11 introduction of risks that Network Rail certainly see as
12 real and they would require Network Rail to put in place
13 complex mechanisms which, while they may mitigate
14 the risks that are introduced, would not eradicate them.

15 Q. Just on that, Professor Jack, were you in court on
16 I think Monday for Mr. Blackley's evidence?

17 A. No, I wasn't.

18 Q. In Mr. Blackley's evidence -- indeed, it is in his
19 statement -- he accepted that Network Rail does not at
20 the moment have staff who are dedicated to auditing what
21 RISQS does. So Network Rail does not seem to have any
22 job -- comprehensive job in-house of assuring itself as
23 to the quality of what it is that RISQS is doing. He
24 just said, "Well, we're on the same side". So if they
25 had a real concern that this thing that they outsource

1 needs to be done in a particular way, they would
2 supervise it, would they not?

3 A. Well, I think, in a way, you're -- the language that
4 you're using about "outsourcing" is -- I mean, I think
5 it's probably strictly valid, but I tried to explain
6 yesterday some of the nature of how the industry is
7 structured and the existence of RSSB as an
8 industry-owned body, and the fact that RISQS has been
9 developed through a collaborative process involving all
10 the parties in the industry that have been involved in
11 supplier assurance, particularly Network Rail, makes it
12 a sort of organic thing. So what they are doing today
13 is the product of a process that the industry set about,
14 what, at least going back to 2008, when this report was
15 produced, that highlighted there were many different
16 schemes causing confusion, and one of the central
17 recommendations that came through at that time,
18 I believe, is that it was desirable to have a single
19 scheme that all players in the industry recognised.

20 Now, there's no mandation of players in the industry
21 recognising it, but there is a trend towards the players
22 in the industry recognising that, no doubt led by the
23 fact that the largest player in the industry,
24 Network Rail, has itself recognised it. So I see this
25 as something that has developed out of an understanding

1 of good practice, considerable experience of people that
2 have worked in this -- in this function for many years
3 and that has evolved into a shape where the words don't
4 come from me, they describe it as "of the industry and
5 by the industry".

6 Q. You say it doesn't come from you, but you were at
7 the RSSB at the time that this scheme was first
8 produced.

9 A. That's purely a coincidence.

10 Q. I know you are focusing on the nature of RSSB as an
11 industry-owned body, but Achilles under the Link-Up
12 label did this work from 1997 --

13 A. Yeah.

14 Q. -- through to 2018; yes?

15 A. It did.

16 Q. Now, it was -- from 2014 to 2018 it did so under
17 a concession contract by the RSSB, but during the whole
18 of that period of time this work was being undertaken by
19 a body which is not an industry-owned body and was not,
20 so far as they were aware, being audited by
21 Network Rail. So they did it for four years at the end
22 under a RISQS label, under a concession contract, but it
23 is only recently in 2018 it was moved to this --
24 the RSSB doing it and, so far as we are aware, no
25 further audit has been imposed by Network Rail on that.

1 Now clearly they are involved through the RISQS
2 board -- clearly. They have some involvement in what is
3 said and supervising it and I would not suggest
4 otherwise. But to suggest that there is a very large
5 job of auditing to be done in those circumstances does
6 not really reflect reality, does it?

7 A. I don't think I've been suggesting that, and I hear what
8 you said about the evidence that was given on Monday
9 about Network Rail effectively trusting the scheme as it
10 is. I think the point that we -- both myself and
11 Dr. Cox have made is that, were there to be multiple
12 schemes, Network Rail would have to put in place
13 additional controls.

14 Q. Yes, and there is some difference between you. He says
15 additional non-zero; you may have a different view on
16 the degree?

17 A. Yes, I think we both agreed the word "significant"
18 though --

19 Q. I think --

20 A. -- and I think he acknowledged that yesterday.

21 Q. I will take you to that paragraph in a bit so we can
22 look at exactly what was said.

23 Just to finish -- I am just trying to keep things in
24 order, if I may -- on bundle H1, if you can turn to
25 page 267, you will see there is, in the UK aeronautical

1 industry -- I think it is actually wider than that --
2 there is an industry-specific AS standard, which --
3 suppliers comply with the AS 9100, so it is a quality
4 standard applicable in that industry.

5 Again aviation is a safety-critical industry, is it
6 not?

7 A. It is.

8 Q. So, again, something has been produced by the industry
9 for the industry, but without requiring a single
10 assurance scheme in the same way?

11 A. It's not clear what the assurance scheme is here, it
12 just talks about a standard --

13 Q. Well, it is not an assurance scheme. It is a standard.

14 A. It just talks about a standard, so we don't know how it
15 is assured.

16 Q. If we can put that one away. If I can take you to -- on
17 points (d) and (e) on page 191 of your report, so 191 of
18 the bundle, I think we have dealt with confusion and
19 divergence of interest sufficiently already. (f) down
20 to -- (f) (h) and (i) you do not comment on and I think
21 (g) is just a confusion issue again.

22 So if I can now take you to 106, where you refer to
23 there being a continuous incentive on RSSB to improve
24 without there being a concern that the contract would be
25 lost. With respect, to be accurate, I think your point

1 is not so much about them having an incentive to improve
2 so much as them being free from external -- it's not in
3 which they have a positive incentive as they do not have
4 a negative incentive. Is that a fair summary?

5 A. I'm not sure why you're suggesting that.

6 Q. Well, you see you say:

7 "As RISQS is owned and operated by RSSB, they have
8 a continuous incentive to improve the scheme without
9 concern that any contract would be lost."

10 What I would suggest to you is that actually fearing
11 losing one's contract is -- fearing losing one's
12 business is an incentive to improve in most
13 circumstances. Being free from the pressure of fearing
14 losing one's business is not an incentive to improve.

15 A. It goes back to the nature of RSSB, and here I can
16 speak, if I may, as -- with my experience as a director
17 of RSSB. The incentive that you have as RSSB is to meet
18 the needs of your members.

19 Q. Well, that is your purpose.

20 A. Yes, and because the members sit around the board, sit
21 around the board of RISQS, etc, if RSSB is not
22 continuously improving, then it gets pressure from its
23 most immediate stakeholders and that becomes
24 uncomfortable for people delivering the service and/or
25 the directors. So they've got an incentive for that as,

1 if you like, the price of being the custodians of that
2 scheme for the industry.

3 Q. Two points with you. Firstly I think -- you say RISQS
4 would not have concern that the contract would be lost,
5 but --

6 A. And indeed I don't think there is a contract.

7 Q. So you do not think there is a contract ...?

8 A. The relationship between RSSB and Network Rail is not
9 a contractual one --

10 Q. Well --

11 A. -- with respect to RISQS.

12 Q. I believe it is, Professor Jack.

13 A. Is it?

14 Q. If you can turn to bundle G2 and if I could ask you to
15 turn to tab 29.

16 A. Sorry, 29?

17 Q. 29, yes, that is right. Now, this is a set of terms and
18 conditions for buyer membership of RISQS.

19 A. Mm.

20 Q. So insofar as Network Rail is a buyer member, our
21 understanding is they would have to sign up to these
22 terms. Do you have any reason to believe that is not
23 the case?

24 A. No, no, I don't.

25 Q. Okay. So in that case there is a contract between

1 Network Rail and RISQS, is there not?

2 A. You could probably -- you could probably describe this
3 as a "contract", but what I meant was -- is that
4 Network Rail make a decision that they wish to use
5 the RISQS service. They sign up -- I think you
6 highlighted yesterday that they had signed the --

7 Q. RISQS charter?

8 A. -- RISQS charter.

9 Q. Yes.

10 A. So they go through the process of saying, "We'll do it
11 this way", and signing this would be that.

12 Q. Yes.

13 A. What it's not is a contract of the nature of, "We want
14 you to operate this service for five years and we'll pay
15 you so much".

16 Q. Well, in fact, they pay £50,000 a year, so I understand
17 there must be some form of contractual commitment to do
18 that -- whether it is written or not, there is an
19 agreement to do that. But what you are saying is there
20 is no long-term exclusivity contract between
21 Network Rail and RSSB?

22 A. Yeah.

23 Q. Is that your point? Thank you.

24 Finally, I think you are saying that RSSB acts in
25 the interests of its members. You can put G2 away,

1 thank you. Am I right in thinking RSSB has about 80-odd
2 members?

3 A. It's a while since I left and I heard you say
4 83 yesterday.

5 Q. Does that sound about right?

6 A. It sounds about the right sort of number.

7 Q. So there are far fewer members of the RSSB than there
8 are suppliers and buyers on RISQS?

9 A. Yes.

10 Q. So the interests of the RSSB members are not necessarily
11 the same as the interests of the suppliers and buyers?

12 A. That's correct, and I think I'm right in saying -- I may
13 be out of date -- that London Underground, who are
14 a significant partner in RISQS, are not a member of
15 RSSB.

16 Q. Right, thank you.

17 If I could just find 109, you refer to there being
18 a -- if you see the last sentence of that, where you
19 say:

20 "On the contrary, it is clear to me that the safety
21 implications of any confusion and/or ..."

22 And this is what you go on to focus on.

23 "... delay in reporting serious incidents could have
24 grave consequences."

25 Now, just to clarify, incident-reporting does not go

- 1 through RISQS, does it?
- 2 A. Incident-reporting as such doesn't.
- 3 Q. No.
- 4 A. The -- I think the word "incident" is slightly
5 ambiguous --
- 6 Q. Yes, that is what I wanted to clarify.
- 7 A. -- and the "incident" that one is referring to here is
8 a -- I don't know -- if there is a difficulty with
9 a product or a service that generates the need for
10 a reporting up and down this chain.
- 11 Q. Well, as I understand it, under RISQS people are audited
12 annually or when certain conditions are met and audit
13 failure notices would have to be passed around. So
14 there is that. But this is not in a sense the scheme
15 through which information about incidents or safety is
16 passed up and down the chain, is it?
- 17 A. It's not the one -- there are other systems. I think
18 there's something called "National incident reporting
19 system".
- 20 Q. And SMIS, is that another?
- 21 A. Well, SMIS is a routine inward-reporting to RSSB.
- 22 Q. Right.
- 23 A. I'm well familiar with SMIS as I used to be responsible
24 for it.
- 25 Q. Yes.

1 A. That is a thing where RSSB just collates data about what
2 has happened --

3 Q. So that is high-level monitoring of data?

4 A. High level and low level, but it collates data and it
5 adds it all up and it reports.

6 There are other systems, such as national incident
7 reporting, which are -- where things like an email --
8 I think in my day it was probably even a fax -- would be
9 sent around the industry saying, "There's a fault with
10 such and such a piece of equipment. Have a look at it
11 if you've got one", sort of thing.

12 Q. Okay.

13 A. But I'm not talking about those sorts of incidents. I'm
14 talking about someone discovering an emerging defect of
15 some sort that could and should be passed up and down
16 the supply chain to people that are involved in
17 a particular type of service or product.

18 Q. If I can just take you through a few points on the joint
19 statement, please.

20 A. Sure.

21 Q. If you could turn to tab 6 in the bundle.

22 A. Okay.

23 Q. If I could take you to paragraph 2.3 at the start of
24 this. It is on page 289 of the bundle.

25 A. Okay.

1 Q. There is reference to "a significant additional set of
2 supervisory activities" and introducing "additional
3 complexity", but there is no -- "significant" seems to
4 only apply, insofar as it is agreed, to the additional
5 set of supervisory activities, not to the complexity.

6 I think yesterday --

7 A. I think the whole of that paragraph was agreed.

8 Q. Yes, it is agreed --

9 A. The variations in the paragraph are in 2.4 and 2.5.

10 Q. Yes, I want to ask you a question about 2.3.

11 A. Okay.

12 Q. Okay?

13 You heard Dr. Cox say yesterday that by "significant
14 additional set of supervisory activities", he was
15 meaning functionally important, rather than being simply
16 onerous or being a large set of activities. Would you
17 agree with that characterisation?

18 A. I would agree with that as a characterisation of what
19 Dr. Cox said.

20 Q. Would you agree that that is right?

21 A. No, because if we go to paragraph 2.4, you can see what
22 I was referring to as "complexity".

23 Q. No, I am moving on to the -- can we take what --

24 "additional set of supervisory activities" and

25 the "complexity", can we deal with them -- I know they

1 are connected, but can we deal with them separately? If
2 you would like to deal with complexity first, we can do,
3 but please can we keep them separately rather than jump
4 around from point to point?

5 A. Apologies.

6 Q. So on the "significant additional set of supervisory
7 activities", would you agree with Dr. Cox that
8 "significant" in that sense means functionally
9 significant, rather than necessarily importing a view as
10 to how big the set of supervision would have to be?

11 A. I'm not sure I completely follow the distinction that
12 you're making.

13 Q. Okay. Something can be important without being onerous,
14 can it not?

15 A. It can be, yes.

16 Q. What I am just checking is -- because what you say at
17 2.4 is about the additional complexity. The only thing
18 you say about additional supervisory activities is you
19 say you are not clear what the additional supervisory
20 activities would be, and I just wanted to check that
21 when you agreed to say "significant additional set of
22 supervisory activities" in 2.3, you were not meaning to
23 give any opinion as to how big and onerous the set of
24 activities would have to be?

25 A. I'm just trying to think about how appropriate it is to

- 1 talk about the discussion that Dr. Cox and I had.
- 2 Q. Well, I am not really asking about the discussion. I am
3 asking for your view. What do you think,
4 Professor Jack?
- 5 A. My view is that -- given that what you have seen in my
6 expert report and what I have answered to you today --
7 is that the recognition of two or more suppliers would
8 place significant burdens on Network Rail. Elsewhere
9 I've written that I'm not sure how they would do it. So
10 I can imagine the opening up of big challenges and big
11 tasks, but I haven't quantified that, I think -- but
12 I was content because Dr. Cox and I both agreed to use
13 the word "significant".
- 14 Q. Just in terms of exploring what that would be, as
15 regards the actual substantive -- if I can put it that
16 way -- the substantive standards that people would have
17 to be checked against, like the Sentinel audit protocol
18 and so forth -- now, Network Rail is already running
19 the Sentinel on-track plant and principal contractor
20 licensing schemes, is it not, and so it already has
21 internal standards governing the running of those
22 schemes; yes?
- 23 A. At the -- at the level at which they're undertaking that
24 activity, yes.
- 25 Q. Yes, and Network Rail must already be undertaking

- 1 a view, must it not, as to whether what RISQS is
2 providing meets its requirements?
- 3 A. Yes, and as you commented to me earlier, I think you
4 told me that they said that they feel that they can rely
5 upon RISQS and what it is delivering.
- 6 Q. But it is not just to do with the feeling they can rely
7 upon, but that they must feel that it covers in scope
8 what it is that needs to be checked?
- 9 A. Yes, I think that would be reasonable.
- 10 Q. So they must already have a view about the scope of
11 the assurance they require, so it would not --
12 recognising another scheme would not require them to do
13 all that work again from scratch, would it? They
14 already have a view as to what the scope of
15 the assurance they require is?
- 16 A. Yes, I think the -- I mean, my reading of the various
17 documents that I've seen about this case I think makes
18 it clear to me that they hadn't contemplated at all the
19 possibility of having more than one supplier and that,
20 by virtue of this case, they are obviously beginning to
21 have to think about that --
- 22 Q. Yes.
- 23 A. -- to respond to questions such as you're putting to me.
- 24 Q. Yes.
- 25 A. What I think there is no doubt about is that they have

1 got a sincerely held and experientially detailed
2 understanding of the risks that they face and they see
3 that these will increase their risks. As a result,
4 they've got their health and safety -- their duties
5 under the Health and Safety At Work Act, or would have,
6 to understand those further and take appropriate steps.
7 What they are and how extensive they would be, I don't
8 know.

9 Q. Okay, in which case just one more point. In terms of
10 checking the audit quality of any other supplier
11 assurance scheme -- we have already gone through
12 the point this Network Rail does not appear to be
13 auditing risks at the moment. Now, obviously
14 Network Rail could choose to rely upon the fact that
15 Achilles is certified at ISO 9001 quality management if
16 it wanted to do that, but if it wanted additional
17 assurance, it could require that Achilles be certified
18 against some other auditing standard, could it not? It
19 could specify that, yes?

20 A. Well, it could do, but the significant things -- those
21 that are within my understanding -- and I stress that
22 I haven't tried to articulate all of the things that
23 they would need to do because I'm not close enough to
24 their systems -- but those that are within my
25 understanding go beyond the specification of standards

1 and audit requirements. It's back to how they would
2 deal with the arrangements for the industry governance
3 in the round and things like that.

4 Q. To some extent, is that not things they need to deal
5 with for the purpose of running a qualification system,
6 as in the system through which they let contracts? Some
7 of it is related to that, is it not? It may be you are
8 not close enough to the detail.

9 A. I don't think I'm close enough to comment on that.

10 Q. At paragraph 2.6 you deal with the example of -- this is
11 complexity and some additional complexity comes in and
12 Dr. Cox says what he says about it. At 2.6 you raise
13 Network Rail and London Underground having at one stage
14 different track access systems. Is that a fair way of
15 putting it?

16 A. Mm.

17 Q. You are using that as an example of complexity. I just
18 want to suggest to you that that example of how it used
19 to be is in a sense entirely different because that was
20 where you had two schemes operating in silos, not
21 talking to each other, and hence there was a gap between
22 them.

23 A. Mm.

24 Q. That is what the problem there was.

25 What we are talking about here is whether another

1 scheme would be enabled to provide information to
2 Network Rail. So it is kind of the reverse situation,
3 is it not? It is not moving to a situation where
4 schemes do not talk to each other; it is moving to
5 a situation where schemes do talk to each other?

6 A. I think it is an example of -- maybe this is by
7 analogy -- that if you highlight that there are two
8 schemes that may or may not talk to each other well,
9 then it is possible for people to either gain or
10 inadvertently slip between cracks.

11 Q. Okay.

12 Finally, Professor Jack, yesterday, if you recall,
13 I started by asking about the source of your expertise
14 and the nature of it. Would it be fair to -- and please
15 do correct me if I have this wrong -- would it be fair
16 to say that your relevant expertise would be in
17 the field of management systems, strategic safety and
18 rail policy? Would that be a fair summary? You can add
19 to the list if you --

20 A. Yes, I think you could add things like risk assessment,
21 system safety.

22 Q. Right, system safety, thank you.

23 You developed that expertise essentially in
24 the course of a 25-year career with British Rail,
25 Railtrack and Network Rail. Roughly 25 years, is that

- 1 ...?
- 2 A. Yes.
- 3 Q. Then 12 years with the RSSB. Would you think it is fair
4 to say that, having developed your expertise in that
5 context, your view will necessarily be influenced by
6 the context in which you developed that?
- 7 A. Yes, I think that is fair.
- 8 Q. You rely to a very significant extent in your report, as
9 we have seen, on the evidence of Mr. Spence, and you
10 referred a few minutes ago to Network Rail's sincerely
11 held and experientially detailed view. Would you say
12 that, acting in the utmost good faith, because of your
13 long association with the RSSB and Network Rail in its
14 previous guises, you do have some degree of inclination
15 to accept and trust somewhat uncritically what it is
16 that Network Rail are saying to you?
- 17 A. Well, I could give examples. I don't think I included
18 in my description of my career the fact that I led
19 a review of Network Rail's reporting against safety
20 incidents called "RIDDOR" -- under RIDDOR --
- 21 Q. "R-I-D-O-R", is it?
- 22 A. R-I-D-D-O-R. I'm not sure I know what the acronyms
23 stand for --
- 24 Q. No, it just helps the transcript.
- 25 A. -- but it's about statutory reporting of injury at work.

1 Q. Yes.

2 A. It was found that Network Rail were not reporting
3 sufficiently -- they had created a regime in which their
4 reporting was grossly understated and, as RSSB, we were
5 asked to lead a review of Network Rail and how that had
6 come about. I led that review, which we published, and
7 that highlighted -- that was somewhat critical of people
8 from the executive level downwards, and I think --
9 I think I would say without fear of contradiction that
10 that established my independence of thought from
11 Network Rail.

12 But going back to the more general question you ask
13 about my willingness to -- my general experience.
14 Mr. Prosser, who gave evidence on I think Friday morning
15 for the safety regulator, he was an attendee at the RSSB
16 board. The whole of the time he was on the board I was
17 there, until 2015. He, of course, comes from the
18 chemical industry, so the influence that he brought to
19 bear on the safety thinking and the evolution of how
20 best to undertake safety systems and processes was
21 heavily influenced by his experience outside the rail
22 industry before he joined it.

23 MR. WOOLFE: Thank you. I have no further questions, sir.

24 MR. FLYNN: Neither do I, sir. Thank you.

25 Questions from THE TRIBUNAL

1 THE CHAIRMAN: Professor Jack, yesterday I raised with
2 Dr. Cox a point that was made by Mr. Spence in his
3 evidence that in the health and safety field elimination
4 of risk is the optimum and controlling risk is
5 sub-optimal. One point that Dr. Cox made in dealing
6 with that was to say that elimination of risk is very
7 rarely possible and that usually there is a trade-off
8 between elimination of risk and other desirables and
9 that is permissible in modern safety management
10 thinking. Do you have anything to add to what Dr. Cox
11 said on that subject?

12 A. Well, I agree with what he -- what he said about it
13 being permissible to trade off, but what I would say
14 about this particular case -- I think where you went to
15 with your questioning of Mr. Spence is that it's very
16 unusual for a duty-holder to be doing something
17 willingly that will increase risk, and if they are doing
18 so, they're usually doing it for very good reasons that
19 involve those trade-offs that Dr. Cox was talking about.

20 So I would say that in this case I think it would be
21 quite extraordinary for Network Rail to be willingly
22 going to a situation where they perceive that they are
23 going to increase their risk and -- you just don't do
24 that in health and safety. You do -- you don't pile
25 on -- pile mitigation on mitigation because you're going

1 to increase the risk. If you don't have to increase
2 the risk, you don't.

3 THE CHAIRMAN: Thank you.

4 MR. FLYNN: Thank you, Professor Jack.

5 MR. WOOLFE: The next order of business was going to be for
6 me to call Mr. Parker to give economic evidence. Would
7 it be convenient to break now and pick him up after that
8 break?

9 THE CHAIRMAN: Yes. Thank you very much, Professor Jack.

10 MR. FLYNN: Sir, perhaps I could just point out that
11 I discussed with my friend earlier -- we can do it in
12 whatever order suits my friend or the Tribunal -- but
13 one possibility canvassed was that this would now be an
14 opportunity for Mr. Woolfe to put any questions that he
15 has to Ms. Scott on her third witness statement.

16 MR. WOOLFE: Yes, I had forgotten that and actually it will
17 be very short.

18 MR. FLYNN: I thought you had.

19 MR. WOOLFE: So we could deal with that very briefly and
20 then break immediately thereafter. Would that be ...

21 THE CHAIRMAN: Yes, let's do that. The Tribunal has not
22 really had a chance to look at that statement, so we
23 will just read it.

24 MR. FLYNN: Would it perhaps be better to do it after the
25 break, if you had a couple of minutes to run your eyes

1 over it during the break?

2 THE CHAIRMAN: Yes, that would be better.

3 MR. WOOLFE: It is about three pages, sir.

4 (11.36 am)

5 (A short break)

6 (11.52 am)

7 MR. FLYNN: Sir, in that event we will recall Ms. Scott.

8 MS. GILLIAN SCOTT (recalled)

9 MR. FLYNN: Sir, Ms. Scott swore an oath the other day.

10 I do not know if you would prefer to have it
11 re-administered or a reminder of the oath you took
12 the other day, Ms. Scott.

13 A. Yes.

14 Examination-in-chief by MR. FLYNN (continued)

15 MR. FLYNN: I wonder if you could be given bundle B. If you
16 turn to the back, tab 11, you should see there
17 a document called "Third witness statement of
18 Gillian Scott".

19 A. Yes.

20 Q. At the back there is a signature, the very last page in
21 the bundle. Is that your signature?

22 A. It is, yes.

23 Q. If we could just look at paragraph 4 of the statement,
24 please, on the first page, it refers to an exhibit and
25 a bundle of documents. I think it is correct, is it

1 not, that although no doubt you were shown documents,
2 actually there is not an exhibit and the documents are
3 referred to by reference to their place in the trial
4 bundles?

5 A. Yes.

6 Q. We see an example of that, for example, at 5(c), over
7 the page.

8 A. Yes.

9 MR. FLYNN: Thank you.

10 If that is clear for the Tribunal, then Mr. Woolfe
11 may have some questions.

12 Cross-examination by MR. WOOLFE (continued)

13 MR. WOOLFE: Thank you, Ms Scott, we will be fairly swift.
14 At paragraphs 8 through to 11 of your statement you
15 refer to "a RISQS review of inter-relationships" and you
16 refer to the need for suppliers to interface with each
17 other up and down the supply chain. You say:

18 "It provides a buyer with the knowledge that its
19 suppliers are being audited on a consistent basis."

20 You say:

21 "It involves consideration of the management of
22 inter-relationships."

23 You refer to the IMR protocol. Can I just check
24 that the way this audit is undertaken, RISQS will audit
25 the management systems at a point in time of an

1 undertaking to check that they have processes for
2 communication to take place; RISQS does not audit and
3 observe how communications are taking place on
4 particular projects?

5 A. They don't go and observe it on a particular project and
6 it is a point in time. If anything changes, that's
7 fundamental to their management systems, they're
8 supposed to inform RISQS and go through another audit.
9 But what they do do is check that there's documents been
10 signed and briefings and things like that handed over
11 and been carried out. So there's a level of check or
12 verification.

13 Q. That the management system is being applied?

14 A. Yes.

15 Q. Then can I take you to paragraph 17 of your statement,
16 the very last sentence of paragraph 17. You say:

17 "The RISQS portal is always up to date as it
18 provides Mitie with information on audit failures ..."

19 I see what you say about that.

20 Then you go on to say:

21 "... or other matters affecting the status of a
22 sponsoring organisation, such as if a suspension or
23 take-down was required or following the outcome of an
24 investigation carried out by Network Rail."

25 I just want to confirm with you, if Network Rail

1 carries out an investigation under section 5 of
2 the Sentinel scheme rules -- if you can be shown
3 bundle G1, tab 2. That is the Sentinel scheme rules,
4 which I think you are aware of.

5 A. It is, yes.

6 Q. If you can turn to page -- section 5 starts at 58 and
7 then at page 59, it is provision for -- "Investigations
8 by Primary Sponsors", "Other Investigations", and then
9 "Sentinel Formal Review Panel", which involves people
10 from Network Rail.

11 Then over the page, "Outcomes to Primary Sponsor
12 Investigations". If you can see the fourth paragraph
13 down, starting, "If during the Formal Review ...", and
14 there is a role there for Network Rail Corporate
15 Investigations, "who will appoint an independent lead
16 investigator".

17 If I can take you finally to page 71 of the bundle,
18 which is a table showing "Breach outcome guidelines" for
19 sponsors, and this shows that in certain circumstances
20 a sponsor can be suspended, for example, point 1, if
21 there was a failure by the primary sponsor to
22 investigate an alleged breach or if they put individuals
23 to work while knowing they were not sponsored or if they
24 failed to provide PPE and so forth, and you can see why
25 that would be the case.

1 So, as I understand it, Network Rail investigate
2 these kind of breaches by sponsors?

3 A. They do, yes.

4 Q. If Network Rail found one, they would inform Sentinel
5 directly, would they not?

6 A. Not always. They would need to tell RISQS as well so we
7 take it down in the portal because as I mentioned --
8 sorry -- in the earlier paragraph, not many people
9 within Network Rail or other organisations have access
10 to the Sentinel.

11 Q. I am sure they do tell you as well. I would imagine
12 that they do. But what you say at 17 is:

13 "The RISQS portal provides Mitie with information on
14 other matters ..."

15 I am missing out bits, but the implication of what
16 you are saying is that somehow the RISQS portal is
17 the source for Mitie of information regarding
18 investigations. What I am just checking with you is
19 that Network Rail, following an investigation, they may
20 well inform RISQS, but they would inform Mitie directly,
21 would they not?

22 A. Well, it doesn't say in here that they inform Mitie
23 directly, does it?

24 Q. No, that is why I am checking that they would inform --

25 A. So my understanding is they inform RISQS and we inform

- 1 Mitie to take any Sentinel accreditation down.
- 2 Q. So you are saying that RISQS is the channel of
3 communication between Network Rail and Mitie? That's
4 wrong, Ms. Scott.
- 5 A. Right.
- 6 Q. It never has been the case, so far as we are aware.
7 I am asking you to comment. I am suggesting to you it
8 is wrong. Do you have any comment to make?
- 9 A. Do I have any point to make?
- 10 Q. Do you have any comment to make about me suggesting to
11 you that that is just wrong?
- 12 A. Do you want -- sorry, I don't know what comment you want
13 me to make. We inform Sentinel to take people down when
14 they've failed audits and things like that. At this
15 moment in time, that's my understanding. I've never had
16 to ring following an investigation because there hasn't
17 been any investigations while I've been scheme manager
18 to actually ask them to take Sentinel down, but I know
19 with everything else we ring Sentinel -- or we email
20 Sentinel and confirm when an organisation has to be
21 taken down.
- 22 Q. I would suggest to you that Network Rail, if --
23 following an investigation, if they suspended a sponsor,
24 they could and would inform Mitie directly.
- 25 A. If that's what you know.

1 Q. You have not seen it in the six months that you have
2 been there?

3 A. I haven't been there six months. Sorry. I've only been
4 there since October.

5 MR. WOOLFE: Thank you. Those are all the questions.

6 MR. FLYNN: No re-examination, sir. Thank you.

7 THE CHAIRMAN: Thank you, Ms. Scott.

8 A. Thank you.

9 (The witness withdrew)

10 MR. WOOLFE: With that, I will call Mr. Parker.

11 MR. DAVID WILLIAM GEORGE PARKER (affirmed)

12 Examination-in-chief by MR. WOOLFE

13 MR. WOOLFE: Could Mr. Parker be given bundle F, please. If
14 I could ask you to turn behind tab 1 of that bundle, you
15 should see a report there. Is that your report?

16 A. Yes.

17 Q. There is a signature page on page 31.

18 A. Yes.

19 Q. Under the heading "Statement of truth", it says you
20 understand your duty to the Tribunal. Is that your
21 signature?

22 A. Yes.

23 Q. Do you understand yourself to have complied with that
24 duty in preparing this evidence?

25 A. Yes.

1 Q. Thank you.

2 Then at tab 5 you should see a joint expert
3 statement that you prepared with Mr. Holt.

4 A. Yes.

5 Q. On page 202 you see two signatures. Is that your
6 signature on the left?

7 A. Yes.

8 Q. In preparing that joint statement, did you comply with
9 the duties stated above?

10 A. Yes.

11 Q. Then finally at tab 7, you see a supplementary note that
12 you prepared, and on the last page of that tab, 14, you
13 should see a signature. Is that your signature?

14 A. Yes.

15 Q. In preparing that note, did you understand yourself to
16 be complying with the duty to the Tribunal?

17 A. Yes.

18 Q. Is there anything you want to clarify or amend in any
19 way in that evidence?

20 A. No.

21 MR. WOOLFE: In that case, thank you, Mr. Parker.

22 Cross-examination by MR. FLYNN

23 MR. FLYNN: Good afternoon, Mr. Parker.

24 Can I take you first of all to paragraph 100 of your
25 principal report, so the one behind tab 1. Just to

1 close something off there, you say:

2 "It is beyond my expertise to assess whether there
3 are legitimate safety reasons for the conduct in
4 question."

5 A. Yes.

6 Q. So safety is outside the scope of your expertise and not
7 addressed in your report?

8 A. It's not addressed in this report. I respond in the
9 joint statement to some points that Mr. Holt makes about
10 economic incentives --

11 Q. Indeed.

12 A. -- but otherwise I do not deal with it.

13 Q. So largely, then, subject to those points, safety is off
14 the table, as it were, in the discussion that you and
15 I are about to have?

16 A. Yes, it's beyond my expertise.

17 Q. You note in the footnote to that sentence -- you make
18 a reference to the Article 82 guidance of
19 the European Commission.

20 A. Yes.

21 Q. You cite part of a paragraph there. The guidance is in
22 the purple book. I do not know if there is a copy for
23 the witness, but, if not, I can probably hand up mine.
24 Inside that substantial book, the guidance starts at
25 section 4. You are familiar with the layout of that

1 book, I imagine. It is section 4.121 on page 1780.

2 A. 4.121.

3 Q. Yes. If you look at -- the page numbers are on the sort
4 of inside of -- the top of the pages and the inside of
5 the spine.

6 A. Yeah.

7 Q. If you look for 1780.

8 A. Yes.

9 Q. You see at the bottom of that page, that's what you have
10 called the "Article 82 guidance", the guidance on
11 the Commission's enforcement priorities --

12 A. Yes.

13 Q. -- in applying Article 82 of the Treaty.

14 The paragraph you quote is paragraph 29, so that is
15 on page 1785, section 4.124 in the top right.

16 A. Yes.

17 Q. So the whole paragraph -- perhaps I do not need to
18 read it onto the record, but it says:

19 "The question of whether conduct is objectively
20 necessary and proportionate ..."

21 In fact, I should correct myself. I think I have
22 been asked to read things onto the record:

23 "The question of whether conduct is objectively
24 necessary and proportionate must be determined on the
25 basis of factors external to the dominant undertaking.

1 Exclusionary conduct may, for example, be considered
2 objectively necessary for health or safety reasons
3 related to the nature of the product in question.
4 However, proof of whether conduct of this kind is
5 objectively necessary must take into account that it is
6 normally the task of public authorities to set and
7 enforce public health and safety standards. It is not
8 the task of a dominant undertaking to take steps on its
9 own initiative to exclude products which it regards
10 rightly or wrongly as dangerous or inferior to its own
11 product."

12 It is just the last sentence of that that you quote,
13 is it not?

14 A. It's the last sentence I quote, but I note in the
15 earlier part of that footnote that the Article 82
16 guidance recognises safety considerations as a relevant
17 category of potential efficiency, which is the remaining
18 part of that paragraph.

19 Q. Fair enough.

20 When this paragraph and elsewhere refers
21 to "product", it could also be referring to a service,
22 could it not? It is not just -- this is not just
23 applying to physical goods?

24 A. Yes, I think that's right.

25 Excuse me, would it be possible to take my jacket

- 1 off?
- 2 Q. So the question I was going to ask you about this is: in
3 extracting that particular sentence from the general
4 proposition which you fairly recognise in the footnote,
5 are you suggesting there is some relevance of that
6 particular sentence to the matters at hand?
- 7 A. Well, I think the whole paragraph is relevant.
8 I brought out this point, but I also brought out that
9 safety considerations are a relevant category of
10 potential efficiencies, so safety considerations are
11 relevant. Subject to that caveat, then that's the case.
- 12 Q. Are you suggesting, then, that Network Rail is trying to
13 exclude any particular products or services and that is
14 why that particular quotation is relevant?
- 15 A. Well, the RISQS-only rule does exclude our suppliers of
16 supplier assurance schemes.
- 17 Q. But Network Rail is not active in supplier assurance,
18 is it?
- 19 A. No.
- 20 Q. So it is not excluding a product or a service that is
21 competing with its own product or service or that might
22 be regarded as dangerous or inferior to its own product or
23 service?
- 24 A. No, Network Rail does not itself operate a supplier
25 assurance scheme.

1 Q. Thank you. We may come back to the purple book. I am
2 not certain.

3 Could we look at your supplementary report, please.

4 A. Yes.

5 Q. That is the one I think in tab 7. In the unnumbered
6 paragraph at the top there, you say that the note arises
7 out of your review of Mr. Holt's report and supplements
8 your views set out in the joint expert statement. You
9 say that you agree with Mr. Holt that there are elements
10 of this case which give rise to two-sided market issues
11 and on which you do not focus in your initial report,
12 and you have extended your analysis accordingly.

13 You say you did not focus on two-sided issues in
14 your first report, your initial report, but they are not
15 in there at all, are they?

16 A. No, that's correct. That was the purpose of writing
17 the supplementary note. Having reviewed Mr. Holt's
18 report, I recognised there were some areas of
19 the supplier assurance schemes which did give rise to
20 two-sided market issues and I therefore extended my
21 thinking on the basis of my updated understanding of
22 the facts and these views are set out in my
23 supplementary note.

24 Q. That is a similar point you are making in numbered
25 paragraph 2 of this --

- 1 A. Yes, that's correct.
- 2 Q. -- note, that it was following your review of Mr. Holt's
3 report you recognised that there are some elements of
4 this market that can be regarded as having two-sided
5 features?
- 6 A. That's correct.
- 7 Q. Those issues were not raised for the first time by
8 Mr. Holt, were they, in these proceedings?
- 9 A. No, I don't think so.
- 10 Q. If we look at paragraph 24 of your first statement, your
11 initial report --
- 12 A. Paragraph 24?
- 13 Q. 24 -- there you set out the materials on which you
14 relied in setting out the initial report --
- 15 A. Yes.
- 16 Q. -- as matters stood at the time. You have certainly
17 reviewed other things since, but you had the claim form,
18 the defence and some evidence from Ms. Ferrier,
19 Mr. Chamberlain, Mr. Nelson, the tender materials and so
20 forth.
- 21 Now, if we go to the claim form, which is in
22 bundle A -- bundle A for Mr. Parker, please. In
23 the first tab is the claim form.
- 24 A. Yes.
- 25 Q. If we turn to page 11 in that bundle, you will see

1 a heading, "D. Relevant markets".

2 A. Yes.

3 Q. Paragraph 28:

4 "There are a number of relevant markets for
5 the purpose of this claim."

6 We will no doubt come back to the first two, but
7 28.3:

8 "There is a relevant market for the provision of
9 supplier assurance services in the rail industry in
10 Great Britain. Further or alternatively, this market is
11 a two-sided market, although the demand for assurance
12 ultimately derives from the buyers of trackside and
13 non-trackside services. Assurance services are
14 purchased and paid for by the suppliers of those
15 services."

16 So --

17 A. Yes.

18 Q. -- the claim form clearly sets out a contention on
19 the part of Achilles that this is a two-sided market.
20 It is part of their case.

21 A. So I agree with that, but as I read that and I realised
22 that this is not the full set of services that are
23 being -- sort of being sold to buyers, the way that's
24 described is buyers want to know that their suppliers
25 are assured, suppliers need to get assured. For me,

1 that process of qualifying through supplier assurance
2 and the supplier then informing the buyer that they have
3 passed the relevant qualification is not -- does not
4 give rise to two-sided market issues. I believe that
5 the -- so as a result, I didn't focus on two-sided
6 market issues in my report.

7 It then became clear to me through subsequent review
8 that the services around procurement in particular and
9 the access to a large -- a large number of -- a large
10 number of suppliers on a database all at once do give
11 rise to interesting two-sided market issues and that's
12 what I focused on then in expanding my analysis in
13 the supplementary note.

14 Q. So do you disagree with the contention in the claim form
15 that the market as described there is a two-sided
16 market?

17 A. I don't disagree that it's a two-sided market. I think,
18 as described there, it wasn't clear to me that that gave
19 rise to interesting two-sided market issues because lots
20 of markets have a supplier and a buyer, but they're not
21 necessarily two-sided. So, as I say, having now further
22 understood, I updated my thoughts and I wrote them down
23 in my supplementary note.

24 Q. So I think you may be drawing some distinction between
25 a two-sided market and interesting two-sided market

- 1 issues; is that correct?
- 2 A. Well, in principle, the way that you could operate
3 a verification service would be that supply --
- 4 Q. Sorry, just to explain the question: I just mean at
5 a more general level, do you see a distinction between
6 two-sided markets -- and you are saying possibly what is
7 said in paragraph 28.3 describes a two-sided market you
8 do not disagree with that, but you did not think it
9 raised interesting two-sided market issues?
- 10 A. Well, strictly speaking I didn't really think it raised
11 two-sided market issues as I would see them from an
12 economics perspective purely on the verification
13 service, which is what I had originally understood
14 the service to be. I had subsequently understood that
15 there were broader aspects of the service which I had
16 missed in my original reading and understanding and
17 therefore I updated my thoughts and thinking in my
18 supplementary note.
- 19 Q. If we look at your CV which is appended or annexed to
20 your first report -- it is page 32 of your first report,
21 the one in tab 1. Starting at page 32, there is a large
22 list of UK competition inquiries. A few of those
23 concern two-sided markets, do they not?
- 24 A. Yes, they do.
- 25 Q. You tell me, but I imagine possibly the Zoopla cases?

1 A. That's correct.

2 Q. Just Eat and Hungryhouse?

3 A. Also correct.

4 Q. That would be a two-sided market. There may be others?

5 A. There are others. Would you like me to go through them?

6 Q. If there are any that you think are particularly
7 relevant to today's discussion, you can point them out,
8 but otherwise I think I am content with the observation
9 that there are a few in there.

10 A. Yes.

11 Q. So you know a two-sided market when you see one?

12 A. So my understanding of the service originally was there
13 was this verification service for suppliers and that
14 that -- the results of that were then passed on to --
15 passed on to the buyers. But that passing on of that
16 information could in principle happen either by the
17 supplier or by the platform -- it's purely, in
18 principle, a matter of convenience -- and therefore
19 I didn't feel that really lent itself to being
20 a two-sided market.

21 But having further understood and reflected on
22 the materials, particularly as set out in Mr. Holt's
23 report, I realised that there are some important
24 two-sided market issues and therefore I updated my
25 thinking and some of my conclusions and set those out in

- 1 my supplementary note.
- 2 Q. So there you are talking about important two-sided
3 issues. I am just trying to get a handle.
4 "Interesting" or "important", that is where you get
5 engaged with the two-sided market issues, as an
6 economist?
- 7 A. Well, I think when they lead to differences in
8 the analysis, then you would want to take them into
9 account.
- 10 Q. Now, you still have with you, I think, the claim form.
- 11 A. Yes.
- 12 Q. Paragraph 28.
- 13 A. Mm-hm.
- 14 Q. There Achilles -- their case is that there are a number
15 of relevant markets for the purposes of this claim.
- 16 A. Yes.
- 17 Q. They are set out in the four subparagraphs.
18 "There is a relevant market for the operation of
19 provision of access to national rail network
20 infrastructure in Great Britain."
21 Number 1.
- 22 A. Yes.
- 23 Q. These proceedings are on the basis of an assumption that
24 Network Rail is dominant in that market.
- 25 A. Yes.

1 Q. You understand that.

2 Then:

3 "There are relevant markets for the provision of
4 trackside and non-trackside services related to the rail
5 industry in Great Britain ... the precise boundaries of
6 [which] ... are not material for the purposes of
7 the present claim."

8 A. Yes.

9 Q. Then:

10 "There is a ... market for the provision of supplier
11 assurance services ..." --

12 A. Mm-hm.

13 Q. -- which may be two-sided.

14 A. Yes.

15 Q. "In the alternative ..."

16 Paragraph 28.4:

17 "... there is a relevant market for the provision of
18 supplier assurance in safety-critical industries in
19 Great Britain, of which the rail industry forms
20 a significant and distinct market segment."

21 But potentially a wider market than the one in 28.3
22 of supplier assurances for the rail industry?

23 A. Yes.

24 Q. Supplier assurance services.

25 In your first report, figure 1, page 5, you

1 summarise -- perhaps we should look at paragraph 6. In
2 relation to relevant markets, you find there are
3 relevant markets for:

4 "The supply of key-scheme-compliant supplier
5 assurance services.

6 "(b) The provision [of] recognition for
7 key-scheme-compliant supplier assurance services in
8 the rail industry."

9 Then you break down the supplier assurance schemes
10 into supply of IT services and audit services --

11 A. Yes.

12 Q. -- mapping on to the way that the RISQS tender has done.

13 A. Yes.

14 Q. Then:

15 "The supply of mainline rail infrastructure
16 development and maintenance services, who are customers
17 of key-scheme-compliant supplier assurance services.

18 "Rail infrastructure operation and access
19 provision."

20 Then you put those in a table.

21 A. Yes.

22 Q. The first two of those, the market for
23 key-scheme-compliant supplier assurance services in
24 the rail industry, there is one operator, RSSB, you say?

25 A. Yes.

1 Q. In the second of those markets, the market for providing
2 recognition for key-scheme-compliant supplier assurance
3 services, providing recognition for those services,
4 there is again one operator, and that is Network Rail?

5 A. Yes.

6 Q. Those markets, as you find, are much narrower and quite
7 different from those set out in the claim form, are they
8 not?

9 A. Yes, that's correct. I mean, I was asked to review
10 the evidence and give my expert opinion on the relevant
11 markets for assessing the conduct in question in this
12 case, and I can -- I will talk you through my logic for
13 why the markets are more narrow than you -- than
14 Achilles had set out in the claim form. So in that
15 sense I don't necessarily agree with the views that
16 Achilles had set out there. I think the markets are
17 narrower. I think there could be a hypothetical
18 monopolist of key-scheme-compliant supplier assurance
19 services because if you -- as a customer and you want to
20 satisfy the key schemes, you have to get your supplier
21 assurance from RISQS and you can't go elsewhere; and if
22 you're an alternative supplier of supplier assurance
23 services outside the key-scheme-compliant supplier
24 assurance services, then you would not be able to supply
25 such services because Network Rail doesn't recognise

1 anyone else. Therefore the market, as I see it, is
2 narrower than as set out in Achilles' claim form and
3 I think it's this key-scheme-compliant supplier
4 assurance services market because that's what the
5 hypothetical monopolist could profitably monopolise.

6 Q. And, likewise, presumably then the market for providing
7 recognition; would that be profitably monopolised?

8 A. Yes, I think so because there's only one person who can
9 provide recognition for the key schemes. A key
10 recognition is a key input into those -- into being able
11 to provide a key scheme and in principle the
12 hypothetical monopolist -- and we're talking about
13 a hypothetical monopolist here -- could raise the price
14 of that recognition above the competitive level.

15 Q. That's the hypothesis? We will --

16 A. That's the test.

17 Q. That's the test.

18 A. The hypothetical monopolist test is the test for market
19 admission.

20 Q. Indeed, HMT, a well-known test for it, and that is done
21 on a hypothetical basis, as you say, and we will come on
22 to looking at the reality of this market in due course.

23 Could I take you to paragraph 32 of your first
24 report, which is I think open in front of you. This is
25 under a heading "Structure of the industry".

1 A. Yes.

2 Q. You say there:

3 "The demand for supplier assurance services in
4 the rail industry arises from the fact that suppliers in
5 the rail industry need to demonstrate that they can
6 operate safely on or near the rail network."

7 A. Yes.

8 Q. That is the starting point, you would say? It is a need
9 on the part of suppliers to demonstrate their ability to
10 operate safely?

11 A. Well, there is a need for suppliers to demonstrate they
12 can operate safely. Suppliers are trying to sell
13 their -- sell their services to buyers, so you could
14 imagine a world where I'm a supplier, I'm selling to
15 a buyer, I need to get an input in order to be
16 a credible supplier to a particular buyer, which is
17 I need to get myself verified, I need to have a certain
18 qualification, I get that qualification, I inform
19 the buyer about that -- about the fact that I have that
20 qualification. Suppliers ultimately want to work on
21 the network so that could be -- happen. Alternatively,
22 the supplier of the verification services could sit in
23 between the supplier and the buyer and the supplier then
24 gets verified by -- gets audited by the key scheme --
25 the supplier assurance provider, and then it's actually

1 the supplier assurance provider that passes on that
2 verification to the buyer.

3 But those two things are economically equivalent and
4 that's why I say it doesn't -- the two-sided nature of
5 that bit of the market I don't think is very interesting
6 because it just depends where you put -- whether you
7 think of the supplier assurance as an input or whether
8 you think of it as an intermediary, it doesn't, in my
9 view, change the economics.

10 Q. Could we look again at paragraph 28.3 of the claim form.
11 I think that may still be on your desk.

12 A. Yes.

13 Q. Page 11 in tab A, the second sentence again:

14 "Further or alternatively this market is a two-sided
15 market."

16 There Achilles' view is the demand for assurance
17 ultimately derives from the buyers of trackside and
18 non-trackside services. In describing the two-sided
19 market, they say demand ultimately derives from buyers.
20 It is buyers who want their suppliers to be assured.

21 A. Well --

22 Q. You are putting --

23 A. -- and suppliers want to be assured in order to provide
24 services to buyers. I'm not really quite sure --

25 Q. They want to be assured because the buyers want them to

1 be assured. That is why it starts with the buyers, is
2 it not?

3 A. Yes, I mean, I agree with that. That's correct.

4 Q. So it is right, is it not, that buyers are the ultimate
5 source of demand? That is why there is this market
6 because it is something that buyers want?

7 A. Well, that's true for any market.

8 Q. You might say that, but you are saying here that the
9 demand for supplier assurance services arises from the
10 fact that suppliers in the rail industry need to
11 demonstrate they can operate safely on or near the rail
12 network.

13 A. They do, and the reason that suppliers need to
14 demonstrate that is because buyers demand it of them or
15 because Network Rail requires that anyone operating on
16 the rail network passes those tests.

17 Q. Achilles' case -- and this is not one we would, I think,
18 disagree with -- is that the demand starts at the buyer
19 end, as it were -- buyers want it for -- so that they
20 know that their suppliers are safe and reliable and so
21 forth. That is why there is this product or service
22 called "Supplier assurance".

23 A. Yes, so buyers want to know that their suppliers are
24 safe and reliable, and suppliers -- then that generates
25 a demand amongst suppliers to ensure that they can

1 demonstrate that they are safe and reliable.

2 Q. On a similar point, can we look at the joint expert
3 statement. That is in tab 5. I think you can probably
4 close the claim form bundle. We will get it out again
5 if we need it again. If we look in this joint expert
6 statement, which is in the sort of tabular form -- but
7 if you can find page 14 of that, it is statement 210.

8 A. Yes.

9 Q. The statement -- and I must say, my eyes do not tell me
10 whether that is in blue or black, but anyway --
11 the statement is:

12 "The ultimate customers of supplier assurance
13 services in the rail industry are buyers of these
14 suppliers' goods and services."

15 I think the comment in the middle is your comment.

16 A. That's correct.

17 Q. You say:

18 "The direct customers of supplier assurance
19 services are suppliers requiring supplier assurance and
20 buyers ..."

21 Should that be "buyers are seeking to assure"?

22 A. Well, "The direct customers are buyers ..." -- if you
23 continue the statement:

24 "The direct customers are buyers seeking to ensure
25 that suppliers they are working with have met

1 the appropriate standards."

2 Q. So you are saying there that buyers are direct customers
3 of supplier assurance as well as the suppliers?

4 A. Yes.

5 Q. Yes.

6 A. Indeed I recognise that also in my supplementary note,
7 which was -- had been written in parallel but expanded
8 on because I was only able to submit it after the
9 production of this joint statement, but, as I say,
10 I recognise that.

11 Q. We understand you were operating under considerable time
12 pressure.

13 Still within the joint statement, if you turn on to
14 page 46, this is a point on the counterfactual. So if
15 the RISQS-only rule goes and -- to assess the effect of
16 the RISQS-only rule.

17 "The counterfactual market situation requires
18 Network Rail to purchase supplier assurance services
19 from Achilles and perhaps other supplier assurance
20 schemes, in addition to RISQS."

21 You disagree with that as the counterfactual. You
22 say:

23 "The relevant counterfactual requires Network Rail
24 to recognise any provider of supplier assurance for
25 the key schemes that met appropriate minimum standards."

1 Then you say:

2 "That does not require Network Rail as a buyer of
3 supplier assurance services to have to purchase from any
4 and all supplier assurance schemes that meet
5 the appropriate minimum standards. This statement
6 reflects the confusion between Network Rail's role in
7 recognising an alternative supplier assurance scheme and
8 Network Rail's role as a buyer of supplier assurance
9 services."

10 So this is a point I think we will just have to keep
11 coming back to. You say in the counterfactual that
12 Network Rail would not be required to purchase anything
13 from a supplier assurance scheme, it would not have to
14 subscribe to it, it would not have to pay any money to
15 it.

16 A. So I think the key distinction here is between the role
17 of the supplier assurance scheme in providing
18 verification and the role of the supplier assurance in
19 providing other services, such as a list of --
20 a procurement assistance service, a list of suppliers
21 who pass a certain scheme and so on.

22 So in principle, if all you were interested in is
23 verification, so I want to know a particular supplier
24 has met a -- the right level of supplier assurance, what
25 I could do is I could ask that supplier for confirmation

1 that they have in fact passed that level of assurance.
2 So, as I understand it, you do the audit, the supplier
3 gets told "Yes, you've passed" and they get
4 a certificate and it gets put up on the portal as well.
5 For convenience, Network Rail or another buyer might
6 look up on the portal, but in principle they could just
7 ask the supplier, "Have you passed the relevant audit?",
8 and the audit -- the supplier would have every incentive
9 to pass on the relevant certificate or whatever it is,
10 saying, "I have passed the audit".

11 So for the purposes of recognition, if there's
12 another scheme out there that Network Rail recognises as
13 provider supplier assurance of a sufficient quality,
14 then you could get -- whichever supplier was being
15 audited, you could get them to verify it or you could
16 get it from the platform, but it seems to me if
17 the supplier would be prepared to do it for free, then
18 it is unlikely the platform could charge anything for
19 that service alone. Therefore I don't think it --
20 recognising another scheme requires Network Rail to
21 purchase supplier assurance services from that scheme.
22 I think the two things are separate. It might then
23 choose to access the other scheme and buy the other
24 services, but I don't think there's any requirement on
25 it to do so.

- 1 Q. We will come to look at this in a little more detail.
2 So suppliers might provide it off their own bat or
3 possibly Network Rail, you say, could look at the portal
4 of the particular scheme to which that supplier was
5 affiliated. They would have to be a subscriber for
6 that, presumably. These are proprietary portals. They
7 are not --
- 8 A. Well, if that was the only service that you wanted, then
9 you could subscribe or you could ask the suppliers to
10 provide the verification directly. So if someone wanted
11 to know whether I had met a certain qualification and
12 say, "Well, I am not going to recognise you unless you
13 have met that qualification", I would have every
14 incentive as a supplier to pass that qualification over
15 directly and say, "Look, I have achieved such and such
16 a qualification". That doesn't require my buyer to go
17 back, for example, to my university and say, "Well, this
18 is the only way I can find it out". That's a piece of
19 information that can be found out through multiple
20 routes.
- 21 Q. You could supply your degree certificate and they would
22 not have to check it with your university. That is
23 the sort of thing you are saying, is it?
- 24 A. For example.
- 25 Q. We will come back and look at some of these elements in

1 a little more detail.

2 Just focusing on this recognition point, if you look
3 at paragraph 35 in your first report, tab 1 in the file,
4 this is building on the structure of the industry point
5 that we looked at a moment ago, and you show a supply
6 chain, which I think you have updated in your
7 supplementary note.

8 A. Yes.

9 Q. There is a graphic which illustrates the point you are
10 making in paragraph 35.

11 A. Yes.

12 Q. So just sticking with that for the moment --

13 A. Okay.

14 Q. -- you say:

15 "Rail engineering suppliers wish to provide services
16 to a rail infrastructure provider."

17 Looking at it from that end of the optic, as it
18 were.

19 "To do so, they need to demonstrate to the rail
20 infrastructure provider they meet the necessary safety
21 and other compliance standards. They do that by
22 purchasing supplier assurance services. The supplier
23 assurance provider carries out the necessary audit and
24 compliance checks and communicates the result to
25 the rail infrastructure provider."

1 A. Yes.

2 Q. Yes?

3 "This supplier assurance uses audit and IT services.
4 The supplier assurance provider also requires that its
5 services are recognised by the rail infrastructure
6 provider."

7 A. Yes.

8 Q. Is this not just simply back to front? I mean, does it
9 not start with the rail infrastructure provider
10 thinking -- knowing, "I need works on my network, I need
11 maintenance, I need all sorts of engineering
12 supplies" -- let's use your term -- but obviously those
13 people have got to be qualified and in particular they
14 have got to be able to operate safely on the railway.
15 That is where it starts, is it not? It is not a rail
16 engineering supplier's wish to provide services and ends
17 up with the rail infrastructure provider; it starts with
18 the infrastructure provider, surely?

19 A. So, I agree with that. I don't think there's any
20 substantive difference in looking at it that way or in
21 the way that I've set out. There's a demand for these
22 services and -- that arises from the rail infrastructure
23 provider or other users of the rail network and that
24 generates suppliers' demand for supplier assurance
25 services.

1 Q. It is those buyers, if we call them that, infrastructure
2 providers and other people on the network -- those are
3 the ones who specify the requirements that their
4 suppliers are going to have to meet. They are the ones
5 who specify that, are they not?

6 A. Well, it depends which buyer we're talking about.

7 Q. Particularly -- let's talk about Network Rail --

8 A. Well, yes, Network Rail specifies certain requirements,
9 for example that suppliers have to meet the key schemes,
10 and they specify requirements as to how they need to
11 demonstrate at least the initial part of that.

12 Q. Precisely, and in order to do that they could do those
13 checks in-house or they can outsource it to qualified
14 third parties?

15 A. I mean, I think in principle that's right, but my
16 understanding is you have to get your supplier assurance
17 from RISQS.

18 Q. Yes, indeed, but in principle you could do it in-house.
19 It is something that the infrastructure provider needs
20 and it could do it in-house, and I think the evidence
21 suggests that originally, if you go back a long way,
22 this was done in-house at British Rail or Railtrack and
23 it has gradually moved to -- it is an evolving
24 process -- gradually moved to the scheme that we have
25 today.

- 1 A. So when you say "it", can you just clarify what you
2 mean"? You do it in-house".
- 3 Q. "It in-house", the supplier assurance. You could carry
4 out -- the infrastructure provider, the manager, like
5 Network Rail --
- 6 A. Yes.
- 7 Q. -- could do these evaluations in-house.
- 8 A. Yes.
- 9 Q. I think --
- 10 A. Yes, sorry.
- 11 Q. -- we have already agreed that.
- 12 A. I just was not fully clear.
- 13 Q. No, I may not have been clear.
- 14 Putting it round this way, as you do in 35, I think
15 you say there is no substantive difference, but does not
16 this description sort of build into it -- has it not got
17 a kind of self-fulfilling function? This is Achilles'
18 story, as it were, that suppliers are free to choose
19 their supplier assurance provider and buyers should be
20 obliged to recognise them, provided they meet particular
21 standards.
- 22 A. So I think it's correct to say that if there were
23 multiple providers of supplier assurance, then suppliers
24 would have a choice, as if they were recognised --
25 equally recognised by Network Rail in its role as

1 the key schemes owner and provider of recognition
2 services or the only person that can verify -- allow
3 a certain scheme to operate, then suppliers would then
4 have a choice, but equally buyers would also have
5 a choice once they -- if, having looked at the two-sided
6 market -- we might be better to look at page 10 of tab 7
7 where I've extended the graph appropriately -- buyers
8 and suppliers are both purchasing from supplier
9 assurance services and currently they have a choice of
10 RISQS, and if there were multiple schemes, they would
11 have a choice of multiple schemes.

12 Q. All subject to this input, as you call it, of
13 recognition --

14 A. Yes.

15 Q. -- which is the top-right box in your figure 1 in
16 Parker 2 and figure 2 in Parker 1, if I can put it that
17 way?

18 A. Yes.

19 Q. It is the same box. It is subject to this recognition
20 by the infrastructure provider.

21 A. Yes.

22 Q. But if you look at it as a market where the demand comes
23 from the infrastructure manager -- it is the
24 infrastructure manager that wants supplier assurance.
25 For suppliers, this can be a welcome or less welcome

1 process, but it is the infrastructure, the buyer that
2 wants it -- if the buyer makes a choice of a particular
3 service, it would not need to recognise anyone else,
4 would it? It is not obliged to say, "I've chosen this
5 particular service but, you know, no doubt there are
6 others out there that are just as good". It has made
7 a choice.

8 A. Well, I think we need to separate the twin roles of
9 Network Rail as a setter of industry standards and then
10 as a purchaser of services. There's a distinction to be
11 made between the standards that Network Rail sets as its
12 sort of role as custodian or owner of the key schemes,
13 and then you could set standards and say multiple people
14 could meet those standards, and then, as a buyer of
15 supplier assurance services, it could then purchase from
16 suppliers that met similar standards.

17 Q. Is that a role or is that a model that you are putting
18 forward? I mean, they have the key schemes and they
19 have made their choice of supplier assurance provider.
20 They can --

21 A. Well, they have, but in principle you could make an
22 alternative choice, which is there are a set of --
23 "I set some standards because I am the industry scheme
24 owner and I'm the only person who sets those standards
25 and I will allow people to operate as long as they meet

1 those standards". I mean, indeed, it's not that they,
2 for example, choose one principal contractor, they say,
3 "Principal contractors, you need to meet certain
4 standards and you need to get those assured", and --
5 "but I don't choose one principal contractor, I allow
6 people to be principal contractors for me subject to
7 them meeting the same -- the minimum standard", and
8 equally a buyer of principal contractor services -- but
9 there's absolutely a separation in Network Rail's role
10 as the setter of standards, the setter of the rules and
11 then as its purchaser of services.

12 Q. But when it is purchasing services from principal
13 contractors and others in the supply chain, those are
14 pursuant to competitively tendered projects, are they
15 not?

16 A. I would expect so.

17 Q. So the work that it lets will be tendered for, won by
18 particular people, and they will be divided into lots
19 which reflect its needs and best practices in
20 the procurement world --

21 A. Yes, that's correct.

22 Q. -- and it would be very surprising and probably unlawful
23 for Network Rail to say, "Whatever the outcome of this
24 procurement, I am only going to award the contract to
25 Balfour Beatty", for example.

1 A. I would expect that to be the case.

2 Q. You would expect that to be the case.

3 A. But I'm not quite sure of the relevance of that
4 observation.

5 Q. Well, you are saying it did not only have one principal
6 contractor, it has lots of principal contractors. There
7 is a good reason for that, I suggest: that it requires
8 them all to have RISQS accreditation and a licence or
9 whatever the correct term is under the principal
10 contractor scheme.

11 A. Yes.

12 Q. For the building blocks for those purposes, it has
13 chosen RISQS as its provider of supplier assurance
14 service.

15 A. But it hasn't competitively tendered RISQS.

16 Q. Well, that is simply incorrect, is it not?

17 A. No, no, it has competitively tendered the inputs into
18 RISQS, so it has competitively tendered the IT bit, it
19 has competitively tendered the audit bit, but it hasn't
20 competitively tendered RISQS. RISQS is the scheme;
21 RISQS gets the outputs. The RSSB is the owner of RISQS.
22 It sets the prices that RISQS charges. It has
23 competitively tendered for the inputs into RISQS, but it
24 hasn't -- no one has competitively tendered for RISQS.
25 RISQS is owned by the RSSB even, which is -- that's the

- 1 rule.
- 2 Q. What is the role in that model -- in that understanding
3 of it, what is the role of RISQS? It has the audit
4 services, it has the IT services. What is the bit of
5 RISQS you are saying that has not been competitively
6 tendered for?
- 7 A. RISQS sets the prices for the services that it charges.
- 8 Q. That it does through the service providers that it has
9 contracted with?
- 10 A. Well, it takes the -- the service providers are inputs
11 and RISQS then charges suppliers or buyers for the RISQS
12 service. But it has then outsourced, if you like,
13 the audit part of that and the IT part of that, but then
14 RISQS is the body in the middle that is the key scheme.
15 It's not -- the inputs are not --
- 16 Q. The key schemes are Network Rail's, I think.
- 17 A. Sorry, that is the key-scheme-compliant supplier
18 assurance service, you're quite right. But there's only
19 one of those. There's only allowed to be one of those
20 and it's not competitively tendered. The inputs into it
21 are competitively tendered; the scheme itself is not.
- 22 Q. So what, other than some administration, you say -- you
23 acknowledge it has competitively tendered the inputs.
- 24 A. Yes.
- 25 Q. RISQS could not operate without the IT services and

1 the audit services, presumably?

2 A. No, that's right.

3 Q. So what is left for RISQS to do other than a certain

4 amount of possibly --

5 A. Setting the prices.

6 Q. -- back-office administration?

7 A. Setting the prices. The prices of the audit services

8 that it passes on to suppliers and the verification

9 services and the procurement services that it sells to

10 buyers.

11 Q. Those services were bid for. The prices for the audit

12 services were bid for.

13 A. The prices for the audit services that RISQS pays to

14 Capita and Altius were bid for. The prices that

15 the suppliers and the buyers -- were not.

16 Q. Then you are suggesting there should be a competitive

17 tender for the RISQS service; is that in your report?

18 Is that a new point?

19 A. Well, the conduct at issue is that Network Rail only

20 recognises one supplier of key-scheme-compliant supplier

21 assurance services, and there's RISQS, and the conduct

22 at issue is that Network Rail will not recognise another

23 supplier to compete. So you don't have competition in

24 the market because no one else is allowed to offer

25 a rival supplier assurance scheme and you don't have

1 competition for the market because RISQS itself has not
2 been competitively tendered.

3 Q. We may need to come back to your understanding of how
4 RISQS operates. In fact, we can possibly do that now,
5 although it is ...

6 Let's just have a look at that. In the joint
7 report, paragraph 14(b), I think, which is on page 3.

8 A. Sorry, could you give me the reference again?

9 Q. It is in tab 5 -- the joint expert statement, I should
10 say.

11 A. Yes, I have that.

12 Q. Page 3.

13 A. Page 3. Yes.

14 Q. 14(b):

15 "The experts disagree on the following issues:

16 "(b) Whether RISQS is operated on a not-for-profit
17 basis."

18 A. Yes.

19 Q. You consider this to be unclear since you have not seen
20 "... a direct reference to this status or the existence
21 of an automatic mechanism to keep RISQS prices just in
22 line to cover costs".

23 A. Yes.

24 Q. Is this the same point, a similar point to the one we
25 were just discussing?

1 A. It's a slightly separate point. So the point we were
2 just discussing is whether RISQS itself was
3 competitively tendered and whether -- what service RISQS
4 provides over and above the service that the IT and
5 audit bits do, and the IT and audit bits feed into RISQS
6 and RISQS then sets the prices to suppliers and buyers
7 as it wants to.

8 Q. If you turn to page 13 of the joint statement --

9 A. 13?

10 Q. 13 -- in relation to statement 2.9, "RISQS is
11 a not-for-profit scheme"; a proposition by Mr. Holt,
12 I think.

13 A. Yes.

14 Q. You say, middle column:

15 "This is unclear to me."

16 A. Yes.

17 Q. Mr. Holt argues it is the case, but the references he
18 quotes do not obviously support this."

19 You refer to Mr. Blackley's witness statement and
20 you are drawing a distinction between whether the RSSB
21 is a not-for-profit organisation or whether RISQS is
22 a not-for-profit scheme, I think.

23 A. Yes.

24 Q. You are saying Mr. Blackley does not get home on
25 the point that RISQS is a not-for-profit scheme.

1 A. Well, he states that RSSB is not for profit and I think
2 he then infers from that that RISQS itself is not for
3 profit, but it didn't seem to me to follow from his
4 statements. It might be helpful to turn to those.

5 Q. I do not think we need to do that. I think we could
6 look at the next point. I mean, I take what you say, he
7 makes an inference and it does not necessarily follow.

8 You then quote GP1, by which I think you mean
9 the first witness statement of Ms. Pearson; is that
10 correct?

11 A. Yes.

12 Q. Shall we have a quick look at that? That is in
13 bundle D. You are referring there to paragraph 34 of
14 this statement. Did you read anything else in
15 the statement or did you just focus on --

16 A. Sorry, which tab? Apologies.

17 Q. If I could just ask the question first. You refer to
18 her paragraph 34 which Mr. Holt refers to. Did you look
19 at anything else in her witness statement?

20 A. Yes.

21 Q. So let's have look at it. It is in tab 8. Were you
22 here for her evidence the other day?

23 A. No, I was not.

24 Q. Have you read the transcripts? Probably, but you have
25 forgotten.

1 A. Quite lengthy.

2 Q. Yes.

3 Let's look. Paragraph 34, which is the one you
4 comment on:

5 "When RISQS was operating under a concession,
6 Achilles was in control of pricing and would retain all
7 profits. The new arrangements mean there is a mechanism
8 through which RSSB can adjust the costs of RISQS to
9 suppliers ..."

10 Interpolate "and buyers" because that was part of
11 Ms. Pearson's evidence the other day.

12 A. Yes.

13 Q. Suppliers and buyers, so including Network Rail.

14 "... if profit levels permit. Any change in price
15 would be an RSSB board decision, however RSSB has given
16 a guarantee to the industry that it would not increase
17 the fees in the first year following Altius and Capita's
18 contracts taking effect from 1 May 2018."

19 That is what you comment on.

20 A. Yes.

21 Q. You say:

22 "Maintaining prices at the Achilles level implies
23 that they ought to be profitable."

24 A. Well --

25 Q. I am only trying to summarise what you say in your

1 comment.

2 A. Yes -- no, you're right. I mean, I'm saying that
3 Achilles was previously the only provider of the scheme,
4 it operated under concession prices and I would expect
5 it to make a profit, and therefore, having moved into
6 RSSB's operation -- and just to confirm the view,
7 the discussion we had earlier, this is saying RSSB sets
8 the prices to buyers and suppliers. So RSSB has given
9 a guarantee that it hasn't -- it's not going to reduce
10 the prices, but if the prices were already at levels
11 which one might expect to be healthily profitable given
12 that Achilles was a private sector operator, it doesn't
13 seem to me that that tells you that the prices now are
14 not for profit; it tells you that the prices haven't
15 gone up or at least they have been guaranteed that
16 they're not going up in the first year.

17 Q. Then you say:

18 "Similarly, the observation by Ms. Pearson that any
19 price changes need to be decided by the RSSB board does
20 not suggest there is an automatic mechanism to keep
21 RISQS prices just sufficient to cover costs."

22 A. Yes.

23 Q. So those are your comments on her paragraph 34.

24 Given the time, and it is a lengthy paragraph,
25 perhaps I could suggest, sir, if that is a convenient

1 moment -- perhaps I could suggest that Mr. Parker has
2 a look at paragraph 35 over the lunch break, if you
3 would not mind, since you will not be allowed to talk to
4 anybody else.

5 A. No.

6 MR. FLYNN: Perhaps you could do that over lunch.

7 (1.01 pm)

8 (The short adjournment)

9 (2.06 pm)

10 MR. FLYNN: Mr. Parker, just before lunch we were looking or
11 about to look at paragraph 35 of Ms. Pearson's witness
12 statement.

13 A. Yes.

14 Q. You may now have done so.

15 A. I have.

16 Q. You have.

17 I am not going to read all that out, it is a lengthy
18 paragraph, but it explains in (a) how the mechanisms
19 within the RSSB should or may lead to fees charged to
20 suppliers being reduced, depending on the scheme
21 revenues, after the initial period of maintaining them
22 at the pre-tender level.

23 A. Yes.

24 Q. It notes that RSSB says the price will not increase in
25 the first year and it suggests that once the costs of

1 administering the scheme are known, it is expected
2 the costs of the scheme will reduce and that will be
3 passed on to suppliers in the form of lower membership
4 prices.

5 A. Yes, I see that.

6 Q. You see also that if the contracts with Altius and
7 Capita are extended beyond the initial period of three
8 years, there is a possibility for further reduction
9 because those contractors are required to recoup their
10 implementation costs in the first three years of
11 the contract.

12 A. Yes.

13 Q. You see what she says over the page about the impact of
14 there being more or fewer members in the scheme.

15 A. Yes.

16 Q. Now, all this was in the context of you suggesting that
17 RISQS is not itself a not-for-profit scheme, but it sits
18 within the RSSB, which is a not-for-profit organisation,
19 and therefore has to run itself according to the
20 limitations placed on it.

21 A. Well, I think it's unambiguous that RSSB is
22 a not-for-profit organisation. That seems to come up
23 very clearly. What I've said in the joint statement is
24 that it's unclear to me whether RISQS itself is
25 a not-for-profit scheme, and I think it's still unclear

1 to me from this paragraph -- there are parts of it that
2 suggest that it is a not-for-profit scheme and parts it
3 that suggest that it isn't and therefore it's not that
4 clear. For example, it says there:

5 "To the extent that RSSB generates revenues, should
6 it exceed the overall cost of running the scheme, RSSB
7 will be able to re-invest any surplus back into
8 the scheme ..."

9 Then the bit in brackets:

10 "... (as a not-for-profit entity will be obliged
11 to)."

12 Well I don't think that follows. RSSB is
13 a not-for-profit entity, but in principle that statement
14 by itself doesn't tell you that RISQS is
15 a not-for-profit scheme, merely that if in principle
16 there are parts of the operations of RSSB which might
17 make a profit, that could be used to re-invest in other
18 aspects of the RSSB which are outside of that element
19 and that would remain not for profit.

20 But then there are other parts of this which seems
21 to suggest that there is -- you know:

22 "The lower costs of the scheme will be passed on to
23 RISQS customers in the form of lower prices."

24 Okay, well, that follows various -- various "mights"
25 and "possiblys". So I'm left a bit unclear as to

- 1 whether RISQS is not for profit or not.
- 2 Q. You are saying ultimately that you have not seen
3 anything that says definitely, "If the scheme continues
4 to be a profitable scheme" -- let's say it was
5 a profitable scheme under Achilles, it is currently
6 charged at the Achilles rates -- you are saying, "I do
7 not know they will go down and, if they do, I still do
8 not know that then they will not make a profit at the
9 end"?
- 10 A. Well, what I'm saying is that I would expect that
11 Achilles, as a private sector monopoly operator, would
12 make a profit. It's no longer doing that. It does not
13 say that prices have come down following --
- 14 Q. No, it says that prices were kept at the Achilles level
15 for the first year --
- 16 A. At the Achilles level.
- 17 Q. -- so we are in a transitional period --
- 18 A. Well --
- 19 Q. -- and I can accept from you that you are saying maybe
20 there is no guarantee to transition --
- 21 A. It's --
- 22 Q. I can accept from you that in the first period the
23 prices are the Achilles prices so, you know, they are
24 based on a profit-seeking model. I entirely see what
25 you are saying there, but the intention is clearly

1 announced.

2 Perhaps I could take you to one of the tender
3 documents. Now, you say in your report that you have
4 read the tender documents. It is quite possible that
5 you would not have read all of it because there are an
6 awful lot of them and also some of them were delivered
7 electronically.

8 Sir, we are going to hand up what is actually
9 a print-out of something that is in the bundles but has
10 only been delivered electronically. The bundle
11 reference, I believe, is H30, page 820, but you will not
12 have a physical document in there. (Handed)

13 These are instructions and further notes to
14 the tenderers.

15 A. Mm-hm.

16 Q. You will see paragraph 3 there:

17 "The current buyer and supplier membership fee and
18 volumes at different levels are given below.
19 The audit-related volumes and fees are also highlighted.
20 Please note that the fees paid by the members will not
21 change at least for the first year of the contract,
22 after which the prices will be reviewed, with a view
23 to reduce them to ensure the industry is receiving value
24 for money and benefiting from the scheme in line with
25 the change control procedure. Tenderers are expected to

1 submit their pricing with this in mind."

2 There are some additional conditions attached to
3 that.

4 I can see again you are going to say at least
5 the first year they will be reviewed with a view to
6 reducing them to ensure the industry -- so there is no
7 guarantee, you might say, that the scheme is not going
8 to make a profit, but the intention is clear, is it not,
9 and that has been communicated to the tenderers and is
10 available to all RSSB members?

11 A. Well, I -- you have taken the words out of my mouth.

12 I see -- I see that prices will be reviewed with a view
13 to reduce them -- okay, there's a possibility that they
14 may be --

15 Q. They might be increased. They might be increased. I am
16 in agreement with you.

17 A. -- reduced in the future, that they have value for
18 money. What it doesn't say is, "RISQS is a
19 not-for-profit scheme and we are just going to pass
20 these costs on with an appropriate mark-up for our own
21 costs". You know, that would be a helpful and
22 unambiguous statement to clarify whether it's
23 a not-for-profit scheme or not. This doesn't seem to
24 me to clarify my confusion. It may be that it's clear
25 to others, but I'm struggling.

1 Q. Well, you are looking for something absolutely
2 definitive, I think, and this is more indicative and,
3 you would say, non-binding. Can I take those words out
4 of your mouth?

5 A. I think it -- to me it doesn't get me to the certainty
6 of a statement that says, "RISQS is a not-for-profit
7 scheme". There are lots of statements out there which
8 says that RSSB is a not-for-profit organisation, but
9 there isn't a -- you know, maybe there's some scheme
10 rules we haven't seen that say that RISQS is
11 a not-for-profit scheme or is operated on
12 a not-for-profit basis. That would be potentially
13 more -- you know, less ambiguous.

14 Q. Until those come out, then you are where you are, as it
15 were?

16 A. Yes.

17 Q. Is not the reality that RSSB has tendered for the inputs
18 to the RISQS service? It has.

19 It has, through the tender, put in place controls
20 over the pricing of those inputs?

21 A. Yes.

22 Q. It is an industry body formed of suppliers and buyers.
23 It is a not-for-profit body.

24 A. Yes.

25 Q. It cannot pay a dividend. We saw that in evidence

1 earlier. So ultimately this pricing is in the hands of
2 the not-for-profit body and its intention has been
3 clearly signalled?

4 A. Well, the pricing is in the hands of a not-for-profit
5 body, I accept that. I see there are some words about
6 intentions, I accept that. I don't think that tells me
7 that this is a not-for-profit scheme. In principle, you
8 could make profits on this scheme and use it to fund
9 other elements of what the RSSB does.

10 As I understand it from the discussion this morning,
11 which I heard some of, there are a number of RSSB
12 members, about 80 of them, I think, and there are
13 several thousand suppliers and 100-plus buyers. So
14 the people who are, if you like, paying the fees of
15 RISQS are not the same people as the members of RSSB.

16 Q. Well, perhaps we can come at this another way. We can
17 put Ms. Pearson's evidence away. That is the D bundle.
18 You can clear your desk of that.

19 THE CHAIRMAN: Have we finished with this, Mr. Flynn?

20 (Indicates)

21 MR. FLYNN: Yes, I think, we have, sir.

22 THE CHAIRMAN: Do you want us to put it somewhere?

23 MR. FLYNN: Notionally it has a place in the bundle. Maybe
24 it should go where -- which is H30, page 8200. Maybe it
25 should go there.

1 If we look in your first report -- I will just wait
2 for people to file the document.

3 I am looking at your first report then in tab 1 of
4 the F bundle at paragraph 45. You say --

5 MEMBER 3: Could you repeat where we are going?

6 MR. FLYNN: It is the experts' bundle, sir, at tab 1 --
7 bundle F, tab 1, Mr. Parker's first report. I am
8 looking at paragraph 45, where you say that:

9 "A hypothetical monopolist of key-scheme-compliant
10 supplier assurance services to the rail industry would
11 be able to raise prices by a SSNIP ..."

12 "Small but significant non-transitory increase in
13 price", if I remember correctly.

14 A. Yes.

15 Q. "... without fear that this would be made unprofitable
16 by customers switching to other supplier assurance
17 services."

18 Now, this statement was made, I think, before you
19 delved into the two-sided nature of the market; right?
20 This was in your first report.

21 A. Yes.

22 Q. So by "customers" here, you mean suppliers, so
23 the people who --

24 A. Yes.

25 Q. -- have assurance services applied to them, as it were?

1 A. Yes, exactly, and in my second report I say this is an
2 area that needed updating -- in my supplementary note --
3 that you need to look at the supplier side and the buyer
4 side of that two-sided market. But the same logic
5 applies. If you want key-scheme-compliant supplier
6 assurance services, this is -- if you want something
7 that was relevant to the key schemes, then RISQS is your
8 only option or the key-scheme-compliant supplier
9 assurance service is your only option. You can't go to
10 other supplier assurance services because they don't
11 provide the same requirements.

12 Q. So is the logic of your position that whenever a buyer
13 mandates to suppliers the use of a particular supplier
14 assurance scheme, that you have a standalone product
15 market for supplier assurance and therefore a monopoly
16 position held by that particular buyer?

17 A. No. It's a -- it goes back to the discussion we were
18 having earlier as between the standard-setting
19 organisation, the owner of the scheme, who is mandating
20 in this case that there's only one supplier assurance
21 scheme that can be provided, then an individual buyer,
22 of whom there are 112, I believe, can then choose
23 between multiple supplier assurance schemes all meeting
24 that standard, and it may choose to multi-home across
25 multiple schemes or it may choose to single-home and

1 only choose one scheme, and potentially it would -- may
2 competitively tender as between the schemes to choose
3 which one it single-homes on.

4 But, no, I'm not saying that every single buyer
5 decision is a separate market. I'm saying that
6 the separate market really arises from the fact that
7 the key schemes can only be -- the supplier assurance to
8 key schemes can only be provided by RISQS because that's
9 what's mandated by the scheme owner.

10 Q. So if we look at figure 1, which is at the top of page 5
11 in your report. It is the table showing the --

12 A. Yes.

13 Q. -- summary of your market definitions. The first one
14 is:

15 "The market for key-scheme-compliant supplier
16 assurance services in the rail industry."

17 One provider being the RSSB.

18 A. Yes.

19 Q. Are you suggesting in any way that the RSSB is in
20 a dominant position in that market?

21 A. I haven't been asked to look at dominance, but there is
22 only one provider of key-scheme-compliant supplier
23 assurance services in the rail industry and that's just
24 by way of identifying who that person is and it's
25 the RSSB.

1 Q. You have looked at the claim form and we have looked at
2 it together a bit this morning. Any suggestion in
3 the claim form that the RSSB is in a dominant position?

4 A. No. They look at a different market. I was asked to
5 give an independent view on the relevant markets for
6 the conduct and my view is the relevant markets are
7 different to those set out in the claim form in some
8 respects and I have identified this market for
9 key-scheme-compliant supplier assurance services in
10 the rail industry and it follows from that that there's
11 only one provider of those services. But since that
12 wasn't something that Achilles set out in its claim
13 form, unsurprisingly I guess they didn't then make that
14 separate argument.

15 Q. Looking back at your paragraph 45 and the hypothetical
16 monopolist --

17 A. 45?

18 Q. Yes, 45.

19 A. Yes, thank you.

20 Q. -- the hypothetical monopolist of key-scheme-compliant
21 supplier assurance services to the rail industry,
22 the concern you raise there, that such a hypothetical
23 monopolist would be able to raise prices without fear
24 that this it would be made unprofitable by suppliers
25 switching to other supplier assurance services, that is

1 a hypothetical concern, and, you know -- that is
2 a theoretical concern, is it not, as opposed to one that
3 is borne out on the facts in relation to the RSSB and
4 the RISQS scheme; the evidence we have just been
5 discussing in relation to the, I would say, direction of
6 travel in relation to the prices charged to members.

7 You say there is no absolute guarantee, you have not
8 seen anything in the rules, all well understood, but all
9 the indications are, are they not, that the pricing is
10 under strict control and review by the RSSB and it is
11 not likely to rise to monopolist levels without fears of
12 people switching to other services? That is just
13 a hypothetical theoretical concern, is it not?

14 A. We need to distinguish between the actuality and how you
15 do a market definition exercise to identify the relevant
16 markets. You do a market definition exercise by
17 abstracting somewhat from reality and asking the
18 question, "Would a hypothetical monopolist of this
19 particular service be able to raise prices?", and you
20 look at whether demand-side substitution is possible, so
21 could anyone else -- any customer, buyer or supplier
22 wanting key-scheme-compliant supplier assurance services
23 switch to another supplier of supplier assurance
24 services, and the answer is "no" because Network Rail
25 does not recognise anyone else as supplying relevant

1 supplier assurance services for the purposes of the key
2 schemes; could any supplier operating another supplier
3 assurance scheme come in and offer

4 a key-scheme-compliant supplier assurance service?

5 Answer: no, because Network Rail does not recognise
6 anyone -- there's no way that anyone -- there would be
7 any demand for that alternative supplier so no supplier
8 would do it. That's what tells you that this is
9 a market.

10 Then, having set your markets, then you need to look
11 at what is going on in practice, and that's where the
12 discussion we were just having about whether RISQS is
13 a not-for-profit scheme is relevant, but it's not
14 relevant to market definition.

15 Q. So not relevant to market definition but you have just
16 done -- in the box, as it were, you have just done
17 the analysis that you would need to do if Achilles had
18 made a different claim. Is that where we are at on this
19 one?

20 A. I'm not sure I understand the question.

21 Q. Well, I think a moment ago you said that you had not
22 investigated whether your market 1 in your figure 5 --
23 figure 1 -- I am sorry -- on page 5 -- market for
24 key-scheme-compliant supplier assurance services in
25 the rail industry was a relevant market because it was

1 not in Achilles' claim. Now I think you have just been
2 extemporising, no doubt absolutely technically
3 correctly, to suggest that that is a market and one that
4 could be monopolised. Is that what you were just doing?

5 A. In my view, as I think I set out in figure 1, there is
6 a market for key-scheme-compliant supplier assurance
7 services in the rail industry. You have put it to me
8 that that's not a market that appears in the claim form
9 and I agree with you. I was asked to look at what the
10 relevant markets were from my independent expert
11 perspective and these are my views. I think there is
12 a market for key-scheme-compliant supplier assurance
13 services.

14 Q. Then you express a hypothetical concern which, as
15 I said, is no doubt theoretically the correct way of
16 going about that exercise, but when we look at the facts
17 here -- and maybe you will say that is not a matter for
18 you -- that is not a concern that should be borne out
19 insofar as one is concerned with the impact of
20 price-setting by the provider of the -- sorry, I have
21 now forgotten your market definition, but the market for
22 the -- the occupant of the market for
23 key-scheme-compliant supplier assurance services?

24 A. So I think it's helpful to distinguish between two
25 things: there's the process of market definition, which

1 is about trying to understand the competitive
2 constraints that act on economic actors in the market,
3 and then there's -- having worked out what your market
4 definitions are, then you can look at conduct within
5 those markets. The question of what the markets are
6 is -- as the OFT guidance and all the guidance from all
7 the competition authorities around the world basically
8 says, you do a hypothetical monopolist test, which is
9 a hypothetical exercise but it's designed to illustrate
10 these competitive constraints. Having defined
11 the markets, you can then look at conduct within those
12 markets. You know, it's at that second stage that the
13 question of whether RISQS is not for profit becomes
14 relevant. So we need to distinguish between the two
15 stages.

16 Q. Very good.

17 If we look back to paragraph 35 of your first
18 statement, just to remind ourselves of how you present
19 the way that things work in this sector, you -- we can
20 perhaps pick it up again in the middle because we have
21 been over there once:

22 "The supplier assurance provider ..."

23 Sorry, paragraph 35 in your first report.

24 A. Yes.

25 Q. In the middle:

1 "The supplier assurance provider carries out the
2 necessary audit and compliance checks and communicates
3 the results to the rail infrastructure provider and uses
4 IT and audit services to deliver that service."

5 A. Yes.

6 Q. So that is your understanding, is it, of how things
7 operate here? The supplier assurance provider carries
8 out the necessary audit and compliance checks and
9 communicates the results to the rail infrastructure
10 provider?

11 A. So I think I should update that because my understanding
12 has moved on a little bit. My understanding is the
13 supplier assurance provider carries out the necessary
14 audit and compliance checks and then it informs the
15 supplier as to whether they've passed or not, and if
16 they've passed it, they will give them a certificate.
17 They will also upload it on the portal, the IT portal,
18 which is then available for any buyer of services to
19 use, and they may -- I believe they also communicate it
20 to Network Rail, but I am not -- I'm not entirely sure
21 about that, but I think there's a range of communication
22 of this information that goes on.

23 Q. Yes. The message gets through possibly by use of
24 a portal rather than direct communication, I think you
25 are saying.

1 A. That's my understanding.

2 Q. Now, against that understanding, amongst others, I would
3 like to look at one of the important topics in this,
4 which is the race to the bottom that concerns
5 Network Rail if there should be a further -- if the
6 RISQS-only rule evaporates, shall we say.

7 If you look at paragraph 120 of that report, that is
8 where you address that. So you say in paragraphs 120
9 and 121 that whether there is anything in the race to
10 the bottom argument depends on whether supplier
11 assurance schemes need to meet certain minimum standards
12 to operate and are monitored on whether they need to do
13 so. You say you understand that all supplier assurance
14 schemes in the rail industry need to meet RIS 2750.
15 Whether they do or do not I do not think is a matter we
16 need to discuss between us, but you recognise, I think,
17 that the correctness of the argument about race
18 to the bottom depends on minimum standards and
19 monitoring -- monitoring against --

20 A. If you go on to 123 as well, I say:

21 "Equally, if consumers found there to be
22 a competitive benefit from meeting a slightly higher
23 standard, this argument would not apply."

24 So if buyers place value on having their suppliers
25 audited to a greater standard, to a higher standard,

1 then supplier assurance schemes, needing to balance off
2 the requirements of buyers who want the supplier
3 assurance schemes to be of a very high standard,
4 suppliers who ideally would want them to be no more
5 costly and onerous than they need to achieve whatever
6 standards are required -- that would be a balancing
7 exercise. But if buyers ultimately -- and we talked
8 about buyers, you know, providing the source of
9 demand -- if buyers want something done to a certain
10 standard or they give you more credit as a supplier in
11 a procurement exercise if you've assured yourself to
12 a higher standard, then there's no reason why a race to
13 the bottom should necessarily apply; in fact there might
14 be a race to have higher standards.

15 Q. So in 123, what do you mean by "consumers"?

16 A. In that case buyers, but I go on -- I cover this issue
17 also in my supplementary note at point 55, tab 7.

18 Q. There I think 55 -- it is on page 13 --

19 A. It's on page 13, yes, 56.

20 Q. -- you make the point I think that you have just made.

21 A. Yes.

22 Q. Just going back to 121 -- and you can tell me whether
23 this is something you also felt the need to update -- so
24 that is page 28 of your first report, who do you
25 envisage doing the monitoring?

1 A. Well, I think ultimately the monitoring responsibility
2 would have to lie with Network Rail because they are
3 the key scheme owner, if you like. Potentially that
4 then could -- they could then outsource that monitoring
5 if they wanted to, but ultimately the demand for that
6 monitoring is the key scheme owner to make sure that
7 the supplier assurance is -- all the relevant schemes
8 are meeting whatever the appropriate standards are that
9 they've set --

10 Q. Yes, ultimately --

11 A. How they achieve that is up to them.

12 Q. -- they are the ones who want their suppliers to be
13 assured so the burden would be on them to do this --

14 A. Yes, I think that's right.

15 Q. -- carry out this monitoring effort.

16 Would you accept that the more schemes there were in
17 place, the more intensive that monitoring might need to
18 be?

19 A. Yes, I would. I think whatever monitoring is done for
20 RISQS, for example, would need to be done for other
21 schemes as well and that would increase costs for
22 Network Rail.

23 Q. Yes.

24 We were just looking at your further report and
25 you --

- 1 A. Mm-hm.
- 2 Q. -- rightly have taken us there, paragraph 55 on page 13.
- 3 The point you had already made:
- 4 "... if buyers placed a value on quality of supplier
- 5 assurance, this would provide an incentive for supplier
- 6 assurance schemes to improve standards rather than
- 7 engage in a race to the bottom."
- 8 In 56 you say that this is strengthened by the
- 9 two-sided market observation. It sort of balances,
- 10 I think you are saying.
- 11 "A scheme that reduces standards to attract
- 12 suppliers will find that it becomes less attractive to
- 13 buyers."
- 14 A. I wouldn't necessarily say it balances, but these are
- 15 two offsetting effects and --
- 16 Q. Offsetting effects, I am sorry. They do not necessarily
- 17 level out, but --
- 18 A. -- the scheme -- you know, any two-sided market, you
- 19 need to balance the interests of one side and the other,
- 20 and exactly where that comes out is a bit unclear, but
- 21 it's --
- 22 Q. Exactly. It may not be level but it is things in
- 23 different sides -- different pans of the scale, as it
- 24 were.
- 25 A. Yes.

1 Q. What if, Mr. Parker, buyers do not actually have
2 a choice between the schemes? What if they are not free
3 to withhold recognition from schemes above a certain
4 standard, for example, RIS 2750 or accredited or
5 something of that sort? What if they no longer have
6 the ability to say "Actually we just -- we don't like
7 that scheme" for whatever reason?

8 A. Well, we need to distinguish again between Network Rail
9 in particular in its role as the setter of the scheme
10 standards and then Network Rail and other buyers in
11 their role as purchasers of supplier assurance services.
12 If Network Rail wanted all schemes to meet a certain
13 minimum standard and it felt maybe that the minimum
14 standard that's currently there is too low, it could
15 change the rules of the scheme so that any scheme that
16 met a higher minimum standard could meet that.

17 Q. When you talk about "the schemes" there, are you talking
18 about what in these proceedings have been called
19 "the Network Rail schemes"?

20 A. Ah, no, I apologise. What I mean is the supplier
21 assurance scheme that is -- the standards for the
22 supplier assurance schemes that then verify suppliers --
23 audit suppliers to make sure that they have
24 sufficient -- sufficiently good systems, and in
25 principle you could set that standard wherever you liked

1 as Network Rail, as long as it was open and available to
2 anyone who met that standard. Then, if you've got
3 multiple people all having met whatever the appropriate
4 standard is, no buyer at that point is required to
5 purchase from all schemes or any individual scheme --

6 Q. It is all --

7 A. They are currently, of course, required --

8 Q. It is all to do with the level of standard basically?

9 A. Well, they're currently required to purchase from RISQS.

10 If another scheme came in that was alternative and had
11 met whatever the level of the standard was that had been
12 set, then they could choose to use one scheme or another
13 or both.

14 Q. They could choose? That is your hypothesis.

15 What if they cannot choose? What if they can
16 only -- you mean they can -- again, it comes down to
17 meeting this standard, does it not?

18 A. Well, if the supplier assurance schemes all meet
19 a certain standard -- and let's suppose there's two of
20 them in the market -- and I'm a buyer then of supplier
21 assurance services for key schemes, then I now have
22 a choice of two schemes that I could buy, both of which
23 I know will be ultimately accepted by Network Rail
24 because my demand is from Network Rail for services to
25 infrastructure or from Network Rail's customers, whether

1 they're TOCs or ultimately, you know, us in this room as
2 UK taxpayers or passengers -- but all those buyers then
3 have a choice to use this scheme which has these
4 characteristics or this scheme which has these
5 characteristics, both of which are recognised by
6 Network Rail and therefore they have a choice.

7 I can see that there's -- there isn't a choice in
8 a situation where there's only one scheme. I'm
9 struggling to understand why there isn't a choice for
10 buyers when there are multiple schemes.

11 Q. So you are suggesting -- let's say there were just two
12 schemes, there was RISQS and there was another scheme --
13 let's call it "Achilles" -- that was just as good.

14 A. Yes.

15 Q. Are you suggesting then in those circumstances
16 Network Rail could say, "Well, I will stick with RISQS,
17 thanks very much"?

18 A. As a buyer, yes, I think that's potentially right. As
19 a -- as a setter of standards, no, I think its
20 responsibility as a setter of standards is to set
21 a standard and allow people to meet it. But then, as
22 a buyer of the schemes, it can then choose, "Well, do
23 I want to go with this scheme or that scheme?"
24 Presumably as we're asked to assume for the purposes of
25 these proceedings that Network Rail is dominant, it may

- 1 have some responsibility as to how it makes those
2 procurement decisions as between RISQS and AN Other
3 scheme, but subject to that, it would have a choice.
- 4 Q. That is probably a legal question rather than an
5 economic one, is it not? But Network Rail does not
6 actually set these standards, does it? Network Rail has
7 its schemes, but it is not Network Rail that sets the
8 standard as things are?
- 9 A. Well, Network Rail sets the schemes and it says that
10 RISQS must be used. Is it RSSB that sets the standards
11 for RISQS?
- 12 Q. RSSB administers it, yes, and the protocols.
- 13 A. But in principle, if Network Rail operates
14 the schemes --
- 15 MR. WOOLFE: It might help if we were to try and use more
16 consistent terminology because I think it's going to be
17 quite hard to follow this. If we say "schemes" --
18 "schemes" can mean two things. I do not mean to
19 interrupt, but that might help clarify the discussion.
- 20 A. I apologise.
- 21 MR. FLYNN: Let's move on if I am causing confusion.
- 22 Can we look at page 39 of the joint expert report,
23 Mr. Parker.
- 24 A. Yes.
- 25 Q. I apologise if I have caused confusion.

1 3.19, the proposition:

2 "Suppliers of services would likely prefer supplier
3 assurance schemes with less thorough audit procedures
4 (provided accreditation by the scheme is accepted by
5 buyers and that buyers do not discriminate between
6 suppliers based on which scheme they choose)."

7 There you say --

8 A. Yes.

9 Q. -- you agree in principle and that you do not consider
10 it likely that buyers would not discriminate between
11 suppliers based on which scheme they choose if there
12 were material differences between the thoroughness of
13 the procedure and that they would basically choose
14 the better ones; I think might be a fair summary of what
15 you are saying there.

16 A. Yes, my understanding is that buyers want to ensure
17 their suppliers meet high standards, and if they felt
18 that one scheme was not providing high standards, they
19 would have a preference for the other suppliers who have
20 been -- who have put themselves through a higher
21 standard because then they could be more confident of
22 their -- you know, of their safety and their procedures.

23 Q. But even if they are equivalent, small differences
24 between the way audits are carried out as understood by
25 the supplier assurance providers could lead to different

1 outcomes for audits and therefore add to imprecision or
2 uncertainty of outcome as between two or more schemes?

3 A. Yes, I think that's correct.

4 Q. We have discussed differing views on choice that
5 the buyer might or might not have.

6 Could we look at your supplementary report, please.
7 That is tab 7. Paragraph 5 on page 2. There you say
8 you:

9 "... understand supplier assurance schemes provide
10 multiple services to buyers."

11 Which you describe. There are basically three:
12 verification of supplier information; access to an IT
13 database of the audit status, etc; and data analytics
14 and other value added services.

15 A. Yes.

16 Q. Then at 6 you say in relation to those three services
17 that the first of those, verification of supplier
18 information, does not give rise to two-sided market
19 issues.

20 A. Yes.

21 Q. You say:

22 "I think that is because, while currently
23 buyers purchase verification from supplier assurance
24 schemes ..."

25 They could cut out the supplier assurance scheme

1 effectively and ask suppliers to provide verification
2 directly.

3 A. Yes, so in principle you could have a supplier assurance
4 scheme providing services to the supplier and saying
5 "You have passed a particular standard" and the supplier
6 could pass that information onto the buyer or you could
7 have the supplier getting the supplier assurance scheme
8 to audit it, keeping the information and getting
9 the platform to pass that on. Those two situations
10 I think are economically equivalent. They're not really
11 two-sided because one is just a chain -- you know,
12 a standard supply chain.

13 Q. A standard supply chain as between the person being
14 audited, the person carrying on the audit and
15 the recipient of the audit? That's the standard supply
16 chain? Sorry, just to understand what you were just
17 saying.

18 A. What I mean is you could think of it that the supplier
19 audit is an input into the supplier because it then goes
20 to providing them with some quality certification, which
21 then goes to -- then the supplier passes that on in any
22 tender to the buyer. So in a world where I have
23 a certain qualification from a university, they give me
24 a certificate, if I need at some point to prove that
25 I've passed that qualification, I pass that on. So it's

1 just input/input/input. So that of itself doesn't
2 provide, I think, any two-sided market issues, even if
3 I asked my university to pass on that certification to
4 whatever employer.

5 I think there are two-sided markets used which go to
6 the other two services -- that's the services that
7 I identify -- because that's about the number of people
8 on a database that have passed a certain standard and
9 the services that go to access to large numbers rather
10 than individuals.

11 Q. Just focusing on verification for the moment. Is this
12 an adequate alternative, in the context in which
13 supplier assurance arises, for the suppliers simply to
14 provide their certificate, shall we say, to the
15 infrastructure provider or other buyer? Is that an
16 adequate alternative?

17 A. It's not really for me to say, but it seems to me that
18 if there -- a supplier assurance provider could provide
19 or be required to provide some form of formal
20 certification or certificate in a manner that could then
21 be passed on.

22 Q. So, for example, a certificate that they have passed
23 a particular audit?

24 A. Yes.

25 Q. What if they previously, with different suppliers,

1 failed three and now they have got -- they have got one
2 good one and three ones they have failed? No incentive
3 on them then to pass that information onto the buyer, is
4 there? They would say, "You are looking for
5 a certificate. Here is a certificate".

6 A. So I suspect -- but this feels to me like a detail that
7 could be hammered out -- that it would be a requirement
8 of the key schemes that anyone seeking to get
9 verification needs to keep people updated on all events
10 or audit failures as and when they happen and then it
11 would be --

12 Q. So that would be a requirement on suppliers, you are
13 suggesting?

14 A. Yes, that could be a requirement on suppliers or it
15 could be a requirement on the supplier assurance schemes
16 to pass that on at no cost. You could write that into
17 the rules of the scheme. You could say that anyone who
18 passes -- you know, the minimum standards for supplier
19 assurance are that this -- "You have to audit people to
20 this set of minimum standards and pass on to the
21 infrastructure owner the outcomes of the audits".

22 Q. The infrastructure owner would then have to maintain its
23 own record of all this information.

24 A. Well, I think that's what happens already, isn't it,
25 because that would then go to the Sentinel scheme people

1 or the principal contractor licensing scheme people as
2 to whether they are then -- because --

3 Q. That is where --

4 A. -- the RISQS audit feeds into those other schemes is my
5 understanding.

6 Q. That is where it might end up. There is a lot of data
7 held on the database about the audits that have been
8 carried out, is there not?

9 A. Sorry, which database?

10 Q. The -- sorry, yes, indeed. The supplier assurance
11 providers' database.

12 A. Yes --

13 Q. They collect --

14 A. What I think I'm hypothesising is you write the rules of
15 the key schemes that say that whenever someone comes to
16 you for an audit, you get the results of that audit and
17 that result has to be passed to the infrastructure
18 owner, and it's just that result for that supplier at
19 the point that it happens.

20 Q. So there would be a rule that suppliers had to have an
21 open book and be completely honest about their audit
22 report --

23 A. No, this is not a requirement on the supplier in my
24 thinking.

25 Q. But the supplier is providing the information --

- 1 A. It is a requirement on the supplier assurance scheme.
- 2 Q. The supplier in this -- the hypothesis we are on is that
3 the suppliers could provide verification directly. That
4 is what you are suggesting?
- 5 A. So the suppliers could supply verification directly and
6 you could write a requirement on the supplier that they
7 do so or you could write into the rules of the key
8 scheme that says, "A minimum standard for a supplier
9 assurance scheme is that they pass us the verification
10 service, essentially, for free; that they give us
11 the results of all the audits as and when they happen",
12 and pass them onto the relevant teams within
13 Network Rail who then need to use the result of that
14 risks audit in the further analysis that they do for
15 the principal contractor licensing scheme, for
16 the Sentinel scheme and so on.
- 17 Q. That would be a relationship solely in relation to
18 the verification aspect, and you are saying that
19 the other two aspects in 5, those are the two-sided
20 market, those are things that people might value when
21 you have got lots of buyers and lots of suppliers on
22 the same sort of --
- 23 A. Yes.
- 24 Q. -- database, so those are the schemes which -- the
25 supplier assurance schemes -- those are the supplier

1 assurance schemes which a buyer might wish to belong to.

2 So this fix of allowing the suppliers to pass
3 the relevant information on or supplier assurance scheme
4 providers handing it over for nothing still leads to
5 a separation, does it not, between the other two aspects
6 of the supplier assurance schemes that we know which are
7 of value to buyers?

8 A. Yes, so it provides a separation between the
9 verification service and the other two services, and it
10 would mean that the verification element, which is
11 the element that needs to go into the further work to
12 establish the principal contractor licensing scheme,
13 Sentinel scheme requirements and so on -- then there are
14 other services that supplier assurance schemes provide,
15 which, if you had multiple schemes, there would then be
16 a choice for buyers, and Network Rail at that point
17 would become a buyer of these additional services and it
18 would be able to choose whether it used RISQS or
19 AN Other supplier assurance scheme or both.

20 Q. So on the verification, your hypothesis, as you say,
21 is it could either be provided directly by suppliers or,
22 possibly better, it could be a requirement of
23 a recognition of a supplier assurance scheme that they
24 simply cough up this information for free in relation to
25 audits?

- 1 A. Yes.
- 2 Q. The database services would be separate?
- 3 A. The database and IT -- which one is -- the procurement
4 type services would be separate because that's a --
5 that's a separate -- it's a separate service. It's:
6 right, now you can go and get a list of people for
7 procurement purposes, you can push tenders out in
8 addition to OJEU through these different schemes. You
9 could have competition then between supplier assurance
10 schemes for buyers -- not just Network Rail but
11 others -- for those services across multiple schemes.
- 12 Q. Do you think in those circumstances they would need any
13 kind of contract? Would Network Rail need any contract
14 with the supplier assurance schemes that met the
15 approved standard?
- 16 A. I think that's probably a legal question and not for me.
- 17 Q. Well, I think you were suggesting a minute ago that it
18 could be done with the suppliers simply providing their
19 information; you know, coughing it up, as it were.
- 20 A. Well, I'm suggesting that you could write the rules of
21 the scheme -- sorry, you could write the rules of
22 the key schemes in relation to which supplier assurance
23 schemes would be accepted and you could write your --
- 24 Q. By reference to a standard to that?
- 25 A. -- minimum standards for a supplier assurance scheme.

1 If you were worried about this must-buy concern, you
2 could write into that that the scheme has to provide
3 the verification service for free or it just has to pass
4 the information on. That's a condition of being
5 a supplier assurance -- a key-scheme-compliant supplier
6 assurance scheme and that would just be in part of
7 the scheme rules. I don't know whether that's a -- is
8 that a contractual issue? I don't know.

9 Q. So you think it could possibly be located all in
10 the scheme rules so the standard would include that sort
11 of requirement?

12 A. Potentially.

13 Q. Shall we just have another look at Ms. Pearson's witness
14 statement? That is volume D, tab 8. At paragraph 29,
15 under the heading "More stringent performance measures
16 under the new contract" -- in paragraph 29 Ms. Pearson
17 says:

18 "The RSSB took a more stringent approach to ensuring
19 it had the appropriate contractual tools in the service
20 contracts through which it could monitor performance and
21 drive improvements agreed with the incoming suppliers.
22 Contractual KPIs are a fundamental part of this."

23 In paragraph 30 she describes the respective KPIs
24 applied to each of the two lots in the tender, which we
25 do not have to go through.

- 1 A. Mm-hm.
- 2 Q. But Mr. Chamberlain from Achilles the other day accepted
3 that there was nothing surprising about that the
4 requirement for such stringent KPIs is what buyers might
5 be looking for. The suggestion is really that without
6 a contract and some form of enforcement that goes beyond
7 monitoring of compliance by a standard, the buyers would
8 be in a fix, would they not, under your proposal that it
9 could all be in the standard?
- 10 A. Could you maybe unpack that for me? I'm not totally
11 sure I understand the question.
- 12 Q. Well, without a direct contractual relationship with
13 the -- let's say the approved or meeting the standard
14 supplier assurance scheme -- a buyer is just simply not
15 going to have control over the way in which its needs
16 are met by any particular supplier assurance scheme,
17 is it?
- 18 A. Do you mean for the purposes of a verification service
19 or for the purposes of a procurement or data analytics
20 service?
- 21 Q. I'm focusing particularly on audits, which is what
22 I think your verification service relates to.
- 23 A. Yes, so the audit is the supply bit and the verification
24 is the passing of the audit information to the buyer.
- 25 Q. Yes.

1 A. So if the minimum standard that is set for any supplier
2 assurance scheme -- all supplier assurance schemes,
3 key-scheme-compliant service supplier assurance schemes
4 must meet that standard -- if a particular buyer did not
5 feel that the auditing standards, whilst they met
6 the minimum standards as set out the scheme rules --
7 the key scheme rules -- if it didn't feel that was
8 sufficient for its needs, then it could choose
9 a different supplier assurance scheme that would
10 presumably be advertising to buyers, "Join our scheme
11 because we've got really stringent standards so you can
12 be absolutely guaranteed that our suppliers are audited
13 to the nines", and buyers would then choose to use --
14 would place a greater weight on suppliers who had passed
15 that scheme's rules, so -- and then when -- that would
16 encourage them to buy procurement services from that
17 scheme, rather than from another scheme which had lower
18 standards. It goes back to the discussion we were
19 having about race to bottom and balancing the needs of
20 suppliers and buyers.

21 Q. So all that magnificent stuff about, you know, being
22 audited to the nines and so forth, that is something
23 that nevertheless I think you are accepting Network Rail
24 would have to monitor. Ultimately, however good the
25 contending supplier assurance providers' schemes are,

1 Network Rail is going to have to -- in your construct is
2 going to have to review that?

3 A. I think Network Rail would have to monitor all supplier
4 assurance schemes to ensure that they met whatever
5 the minimum standards were that were set out into -- in
6 the key scheme rules. I agree with that.

7 Q. So the current model for provision of supplier assurance
8 as described in your paragraph 5 and the three elements
9 which you identify there, verification, database, for
10 example, for procurement purposes and data analytics --

11 A. Yes.

12 Q. -- these are currently all linked matters, are they not?
13 This is part of the package you get when you --

14 A. Yes.

15 Q. -- as a buyer when you take service from one of these
16 schemes?

17 A. That's my understanding.

18 Q. RISQS and Achilles are to an extent similar models in
19 which you put the supplier assurance provider at
20 the centre of a kind of web of contacts, is it not?

21 A. Yes, that's the two-sided market element.

22 Q. That's --

23 A. Yes.

24 Q. -- graphically illustrated in many of the documents we
25 have looked at. You are suggesting that you could have

1 a partial separation of that. The verification side
2 could go one-sided, or not interestingly two-sided
3 possibly, but the fact they are all linked is of
4 enormous importance, is it not, to buyers of supplier
5 assurance services? The very fact that these things are
6 included in the package is valued by buyers, is it not?

7 A. Well, I think we need to perhaps distinguish again
8 between the purpose of market definition and whether
9 something is one-sided or two-sided and so on and then
10 the conduct that happens within those markets. So what
11 is -- I think it's right to say that buyers want
12 suppliers to pass the relevant audits, suppliers want to
13 pass the audits so that they can sell to the buyers,
14 they get the audits from the supplier assurance scheme
15 and the result of that is a piece of information which
16 is "You have or haven't passed the audit", and that
17 individual piece alone is what would then go to
18 Network Rail in terms of verification.

19 Then that piece of information is held by the
20 supplier assurance scheme. Putting that together with
21 a whole range of other supplier audit information then
22 provides you with a different service that you can sell
23 to buyers, which is lists of suppliers who have passed
24 or are interested in and/or have passed certain modules
25 for the purposes of then helping in, you know, more

1 efficient procurement exercises.

2 So I'm not sure that the distinction between whether
3 verification is one-sided or two-sided from a market
4 definition perspective -- it doesn't say anything about
5 whether you -- I'm not making any separation in
6 the actual products. I'm just saying I don't think
7 the verification service, if that was the only thing
8 that was going on, would necessarily be very interesting
9 to look at from a two-sided market perspective.

10 Q. Yes, indeed, but what I am suggesting to you is that now
11 and typically it is not the only thing that is going on.
12 What is going on is all three in a single package that
13 is of value to buyers because it is useful to have it
14 all in the same place, is it not?

15 A. That would continue to be the case if there was a choice
16 of supplier assurance schemes because each one of
17 them --

18 Q. If you could mandate -- I think you suggested that
19 Network Rail could require as a condition of the scheme
20 that any information on the database relating to
21 verification anyway would be available for free, but the
22 other matters --

23 A. To Network Rail, yes.

24 Q. To Network Rail, yes. Not to everyone, no doubt.

25 A. But that information is non-rival, so passing

1 the information to Network Rail doesn't mean that
2 the information has disappeared from the portal, it's
3 still there, and that's what the information that forms
4 the other service is.

5 Q. But without access to the portal, if it contains useful
6 information in services B and C, database and data
7 analytics, would not arise in that situation, would it?
8 You are not suggesting that would be free to
9 Network Rail as well?

10 A. No, those are the additional buyer services which -- you
11 could have a choice because it's a procurement issue: do
12 I want to choose supplier assurance scheme A or supplier
13 assurance scheme B for getting a list of suppliers to
14 procure from? There's no requirement on any buyer of
15 those services to choose one or the other or they could
16 choose both for that purpose.

17 Q. Have you read in any of the papers about the industry
18 feedback loop? Is that a phrase that has come up in
19 your --

20 A. I think I've seen the phrase. I can't say I'm terribly
21 familiar with it.

22 Q. The suggestion is that in a supplier assurance community
23 valuable information is circulated as between the buyers
24 and the suppliers in that -- let's call it
25 "community" -- which lead to improvements in

1 performance, in safety, in a large number of ways, and
2 that is an important feature of the RISQS model and also
3 the Achilles model.

4 A. So I understand the point you're making. It's a safety
5 issue which is beyond my expertise to comment on.

6 Q. But you can see that if all that resides, let's say, in
7 a single scheme at the moment, that if it moves to
8 a fragmented world with several supplier assurance
9 schemes all contending for the business of the suppliers
10 to the infrastructure manager, that that -- some of
11 the benefit of that feedback loop is lost? That is not
12 a safety issue. That is almost a matter of common
13 sense, is it not?

14 A. Well, I think I would say it's a safety issue as to how
15 that -- how that works. Presumably it depends on
16 interoperability and communication between schemes and
17 how the information is passed around --

18 Q. Passed around, extracted, monitored --

19 A. It's beyond my expertise to really give a view on any of
20 that.

21 Q. Yes.

22 I think we have probably had this discussion
23 already, but you say, I think, that the key disagreement
24 between you and Mr. Holt is what you consider his
25 conflation of the two roles of Network Rail that you

1 have described as "the body" -- you say:

2 "... as a buyer of supplier assurance services and
3 as the body responsible for prescribing which supplier
4 assurance schemes may be used by others."

5 A. Yes.

6 Q. So given that -- can I just put it to you? Supplier
7 assurance is at its heart and at its origin based on
8 needs of buyers. That is where it came from. Buyers
9 needed to be assured about their suppliers.

10 A. Yes.

11 Q. So deciding the standard by which you wish your supplier
12 to be assured and where you are going to get the
13 supplier assurance from is naturally the same sort of
14 role, is it not? It is not a conflation.

15 A. So deciding what the standard should be seems to me to
16 be a role up for the key scheme owner. Deciding where
17 you can get that -- you know, which suppliers are of
18 appropriate -- which key scheme -- sorry, which supplier
19 assurance scheme providers are of an appropriate quality
20 to meet that standard I think is something for the key
21 scheme owner. Deciding which of the appropriate
22 suppliers meeting whatever the right standards are --
23 the appropriate supplier assurance scheme providers --
24 is a matter for buyers and buyers then should be able to
25 choose between the various schemes that meet

1 the appropriate standards.

2 If you like, Network Rail has two hats. It has
3 a hat of setting the standards, setting the rules,
4 because it's the infrastructure owner, but it also has
5 a hat of buying services. That's the -- that's
6 the distinction that I think we need to make.

7 Q. I am suggesting to you it is all part of the same hat.

8 It is all part of the same hat. It is deciding how your
9 supplier assurance needs are most appropriately met.

10 A. Well, I don't agree with that.

11 Q. That is what I thought you might say.

12 Paragraph 3.18 of the joint statement. That is on
13 page 38.

14 A. Yes.

15 Q. "Competitive bottlenecks"; an important issue, I think,
16 in two-sided markets?

17 A. Yes.

18 Q. The proposition is:

19 "Competitive bottlenecks whereby competition focuses
20 mainly on the single homing side of the market can arise
21 in two-sided markets. These bottlenecks could arise on
22 either side of the market for supplier assurance
23 services, depending on the homing pattern."

24 You say you agree in principle; not clear whether it
25 would arise in practice. But if Network Rail is no

1 longer free to decide for itself how best to meet its
2 needs for supplier assurances, why would not those
3 bottleneck issues arise?

4 A. Well -- but I think it would be free because it could
5 set the standards as it wanted and then it potentially
6 has multiple people who can meet those standards, and
7 then what it needs from the verification part of
8 the supplier assurance service is assurance that
9 a supplier has met the appropriate standard, and if two
10 schemes can meet the appropriate standard, then --
11 you know, Network Rail, in the role as key scheme
12 operator just wants to know they've met the appropriate
13 standard. Network Rail in that instance is not really
14 a buyer of services. It just needs to know they have
15 met the standards so that it feeds into the rest of the
16 principal contractor licensing scheme, the Sentinel
17 scheme and the on-track plant scheme.

18 Other buyers or Network Rail in its role as a buyer
19 of other services would have a choice then for those
20 other services as to whether to choose one or the other,
21 which is different to the situation today, where no one
22 has a choice about anything.

23 Q. No.

24 I think we have already discussed -- you said this
25 would imply some monitoring by Network Rail --

1 A. Yes.

2 Q. -- of the schemes that were out there. There would be
3 a standard and how well they were meeting the standard
4 and how good their audits were, that is something that
5 Network Rail would have to deal with?

6 A. Yes.

7 Q. You have already said that.

8 Could we look at paragraph 90 of your report.

9 A. First report?

10 Q. The first report, page 23. There is a quotation there
11 from the Article 82 guidance.

12 A. Yes.

13 Q. I think you make the same quotation, only it is possibly
14 slightly fuller, in paragraph 102(d) on page 25.

15 A. Yes.

16 Q. "Rivalry between undertakings is an essential driver of
17 economic efficiency, including dynamic efficiencies in
18 the form of innovation. In its absence, the dominant
19 undertaking will lack adequate incentives to continue to
20 create and pass on efficiency gains. Where there is no
21 residual competition and no foreseeable threat of entry,
22 the protection of rivalry and the competitive process
23 outweighs possible efficiency gains. In
24 the Commission's view, exclusionary conduct which
25 maintains, creates or strengthens a market position

1 approaching that of a monopoly can normally not be
2 justified on the ground that it creates efficiency
3 gains."

4 Now, that is talking about rivalry between
5 undertakings in competition, is it not?

6 A. Yes.

7 Q. So rivalry and, in its absence -- absence of such
8 rivalry -- the dominant undertaking will lack adequate
9 incentives and so forth.

10 We are not looking here, are we, at rivalry between
11 Network Rail and other infrastructure owners, managers,
12 operators?

13 A. No, we're looking at rivalry between RISQS and other
14 potential supplier assurance schemes operating
15 key-scheme-compliant supplier assurance schemes.

16 Q. The third sentence talks about "no foreseeable threat of
17 entry". So no foreseeable threat of entry, nothing for
18 supplier assurance companies to do in the relevant
19 market. Is that how you understand that?

20 A. Yes. So if I'm a dominant firm or a monopoly and I face
21 little or no competition within the market, in principle
22 a competitive constraint could arise if there are
23 alternative suppliers in other related markets that
24 could immediately come in and compete for that business.
25 That's not the situation here for the reasons we've

- 1 discussed earlier.
- 2 Q. Network Rail is not in a dominant position in the
3 supplier assurance market, is it?
- 4 A. No, RISQS is in a -- is the only supplier in
5 the supplier assurance market, but it's essentially
6 granted that position by Network Rail as a result of
7 the rules in the key schemes.
- 8 Q. Insofar as we are talking about foreseeable threat of
9 entry, the RSSB tendered the essential inputs for
10 the RISQS scheme, did it not?
- 11 A. Yes.
- 12 Q. It competitively tendered and will do so again.
- 13 A. But that's not entry into the supply of supplier
14 assurance services. That's entry into the inputs into
15 supplier assurance services, so the IT service and
16 the audit service. The RISQS scheme has not been
17 tendered is my understanding. It's always been
18 the RISQS scheme. There's only one scheme. There is --
19 the requirement is you have to use RISQS and there is no
20 threat of entry because no one else can use RISQS.
21 No one else can be recognised by Network Rail.
- 22 Q. Achilles tendered in the RSSB tender, did they not?
- 23 A. For operation of the inputs, yes, that's correct.
- 24 Q. They would have been satisfied with that, probably, if
25 they had secured it?

- 1 A. I don't know. Maybe.
- 2 Q. The RSSB -- we have already discussed the RSSB's control
3 in pricing and you have not seen anything that brings
4 you to a final view on that, but I have explained as
5 best I can how we put it, that there is a clear
6 direction of travel inside a not-for-profit industry
7 body where prices for supplier assurance services will
8 be contained.
- 9 A. I understand the point you're making. My experience
10 when I've tried to run arguments of self-restraint,
11 shall we say, in front of competition authorities is
12 I've generally got quite short shrift.
- 13 Q. Even if there are effectively legally mandated?
- 14 A. Well --
- 15 Q. That might be a different context.
- 16 A. If one was legally mandated for the specific service in
17 question to be not for profit, that's one issue. Even
18 when a service is not for profit, in principle one could
19 float up the costs of providing that service in
20 the spirit of a monopoly profit as a quiet life. So
21 even not-for-profit services could give rise to prices
22 above the competitive level because if they don't face
23 competitive constraints, they have no incentive to
24 reduce the costs of their operation to an efficient
25 level.

1 Q. Even when what is being run is something on a two-sided
2 market, you have got buyers and suppliers represented
3 within RISQS and the RSSB, that dynamic is improbable,
4 isn't it?

5 A. Well, some buyers and some suppliers I guess are
6 represented --

7 Q. It cannot be everyone, but ...

8 A. -- within the RSSB and there's a lot of suppliers at
9 least that presumably are not represented because
10 there's several thousand of those and there's only
11 80 members of the RSSB.

12 MR. FLYNN: That may be one of the problems of democracy.

13 Thank you very much, Mr. Parker.

14 MR. WOOLFE: Sir, I am conscious of the time and the fact
15 that the shorthand writers need a break. I have only
16 three questions by way of re-examination, so if
17 I promise to speak slowly, shall we take those first?

18 Re-examination by MR. WOOLFE

19 MR. WOOLFE: First of all, Mr. Parker, you were taken in
20 your first report to a -- I think it is figure 2 in your
21 first report and figure 1 in your second. This is at
22 bundle F/1/13 and it is a diagram headed "Supply chain".
23 I think the point that was put to you was that you
24 should instead have started with the demand from
25 the infrastructure provider. If you were going to try

1 and reflect demand on this diagram, what would it look
2 like? If I were to ask you to draw it, what would you
3 do to it?

4 A. It would look like this because generally the ultimate
5 customer is at the bottom and it's -- the demand,
6 basically the arrows go the other way, I want this
7 demand from the people further up the chain, but the
8 diagram itself doesn't change.

9 Q. Then there was talk for quite some time about whether
10 RISQS is a not-for-profit scheme or not. From an
11 economic perspective in this scenario, why are you
12 interested in whether or not RISQS is a profit-making
13 scheme?

14 A. I think if it was clear that RISQS was a not-for-profit
15 scheme and there was some incentive on it to maintain
16 efficient costs -- although as just discussed, it's not
17 clear where that incentive would come from and,
18 you know, maybe economic regulation is a way of
19 achieving efficient costs -- but if that was the case,
20 then potentially you would not get consumer detriment
21 from having only one scheme because the prices would be
22 forced down to competitive levels. Essentially you
23 could get -- potentially get them to mimic competitive
24 levels if you did your regulation very effectively and
25 that might remove any type of consumer detriment.

1 But if that doesn't hold, then there is
2 the potential for consumer detriment, buyers or
3 suppliers in this case, arising from the operation of
4 there being only one scheme if that not-for-profit
5 element is not sufficient because -- if it's not
6 absolutely watertight.

7 Q. Okay, thank you.

8 Then in the course of discussion over how it could
9 work with passing information to the key schemes,
10 I think you said that the information could be either
11 passed by suppliers or it could be passed by the
12 supplier assurance scheme, and you were talking about
13 the supplier assurance scheme could simply pass on the
14 fact that an audit has been passed.

15 Now, I think it is fair to say that the Network Rail
16 witnesses who (unclear) said they would want to see what
17 the audit said rather than simply to note the fact of
18 whether it had been passed or not. If that is the case,
19 does that make any difference to your analysis?

20 A. No, I think you could -- as Network Rail in its role as
21 key scheme owner, you could mandate that supplier
22 assurance schemes need to pass on not just the result of
23 the audit, but all the material aspects of that audit
24 that Network Rail wanted to know about for the purposes
25 of then verifying whether the supplier in question had

1 passed the initial foundations of the Sentinel scheme
2 and principal contractor scheme and so on.

3 MR. WOOLFE: Those are all the questions I have by way of
4 re-examination, sir.

5 Questions from THE TRIBUNAL

6 MEMBER 3: I am always nervous about asking questions
7 in case they reveal a level of ignorance that you will
8 be alarmed by, but let us go.

9 I just wonder if you could help me with some
10 questions about the market effects. Have you seen
11 anywhere anything about the size of the market for
12 supplier assurance services in any of these putative
13 relevant markets?

14 A. I think I've seen a figure of £5 million for revenues
15 for supplier assurance services in the last year.

16 I think that's correct.

17 MEMBER 3: Does that then include services that would not
18 necessarily be contestable in the case, to the extent
19 that some of those revenues are revenues that
20 Network Rail pays or is responsible for in its role, to
21 use your dichotomy, as purchaser? I mean, does that
22 reduce the 5 million to a different number?

23 A. I think that's possible. I must admit, I'm not
24 completely familiar with this either, but there may be
25 some services that are not, if you like, key scheme

1 compliance required, that might be, I don't know, more
2 foundational or separate services, and in principle
3 those would be out of my -- out of my market --

4 MEMBER 3: Yes.

5 A. -- out of my key-scheme-compliant supplier assurance
6 schemes market and one would need to reduce the overall
7 size of the market appropriately.

8 MEMBER 3: Would that then have implications for either your
9 analysis or (unclear) analysis or our analysis of
10 the effects of either the conduct or the agreements in
11 question?

12 A. So I'm not sure it would have any implications for
13 the effect of them, but the effects presumably shrink as
14 the size of the pie of which you're worried about
15 shrinks. But there's a bit which is insulated from
16 competition at the moment and that's the bit I'm
17 focusing on. I don't know the precise size of that, but
18 if that is smaller than 5 million, we should look at
19 whatever that smaller number is, and if there's other
20 bits that are competitive, those are competitive and we
21 can take those off the table.

22 MEMBER 3: But I just wonder whether you want to help us
23 with -- I think three -- I do not know -- some unrelated
24 points arise, which is, to the extent that it is almost
25 agreed that Network Rail would face additional

1 supervisory responsibilities, that will have costs?

2 A. Yes.

3 MEMBER 3: So the question of the relative effects needs to
4 be weighed in relation to the costs for the purposes of
5 the proportionality of objective justification?

6 A. I agree with that.

7 MEMBER 3: It would also presumably have an effect on
8 the size of the contestable market, which would then
9 have implications for the debates between you and
10 Mr. Holt about contestability, entry and the number of
11 players that might survive in that market?

12 A. Yes, potentially. I mean, I would imagine a small
13 market would be unlikely to see large numbers of
14 suppliers in it. I mean, the counterfactual market
15 structures that I've envisaged are either there's
16 competition between multiple schemes, maybe two, maybe
17 more, over a period of time, or there's competition for
18 a while before it all resolves back to one scheme.

19 If the market size is small, I think the chances of
20 there being a large fragmentation in supplier assurance
21 schemes probably doesn't seem very plausible because
22 the supplier assurance schemes themselves wouldn't be
23 sufficient to -- sufficiently large to cover their fixed
24 costs, but I haven't done an analysis as to whether that
25 inevitably means there would only be one.

1 MEMBER 3: Yes.

2 A. What I observe is that Achilles was planning to enter
3 knowing that RISQS was continuing to be operated by
4 RSSB, so that makes it look like there's at least one
5 entrant who would have been operating in the market for
6 a period of time. So, as I say, I reached in my second
7 report the conclusion that I don't -- it's hard to tell.
8 It's not -- I couldn't give a view as to whether there's
9 definitely enough space for two or not, but there will
10 be competition for a time.

11 MEMBER 3: But then if we just think about this relative
12 question of the size of the contestable opportunity and
13 the type of competition there might be in the
14 counterfactual, I think Mr. Holt has raised the question
15 that total industry costs might increase with
16 the multiplicity and that that would then affect
17 the attractiveness of market, because you would have an
18 increase in fixed costs, and I think Achilles has raised
19 the question of whether costs would need to be incurred
20 for people to demonstrate that they meet the relevant
21 ISO standards, which would be, I think, new incremental
22 costs.

23 So I just wondered whether there are implications
24 for contestability at a higher level of costs that
25 either have been or could be considered in the context

1 of the economic analysis.

2 A. Yes, I mean, I haven't -- I haven't gone into detail.

3 If there are additional industry costs and they're of

4 a fixed nature, then that would place a limit on

5 the number of suppliers that could survive in that

6 market. If they're of a fixed nature, it doesn't

7 obviously place that much of a constraint on the prices

8 that those people will charge; ie, just because --

9 just -- if everyone -- there's a monopolist who has

10 a relatively low cost base and two competing firms that

11 have slightly higher cost bases, that doesn't

12 necessarily mean that the monopolist won't charge higher

13 than two competing firms because the competitive effect

14 is about reducing margins, rather than -- you know,

15 there is an element to which a monopolist with higher

16 costs versus a monopolist with slightly lower costs

17 would have somewhat lower prices, but if you're looking

18 at monopolist with lower costs versus competitive firms

19 with higher costs, I don't think you can draw

20 a conclusion one way or the other, other than in the --

21 the Article 82 guidance really is -- gives you a sort of

22 presumption, if you like, that those higher costs don't

23 outweigh the detriment that arises from the higher

24 margins and therefore the higher prices.

25 MEMBER 3: Leaving contestability aside, can I ask you

1 a question that just is going round in my head about the
2 nature of competition that we are thinking about here?
3 You have said that the tender of the IT component and
4 the audit component is not a replication of competition;
5 a scheme's a scheme.

6 A. Yes.

7 MEMBER 3: The third element of the composition of a scheme
8 other than the platform and the audit seems to me -- but
9 maybe I am wrong -- is the heart of the rules and
10 the relevant audit standards -- you know, the substance
11 of what the scheme is. Is that --

12 A. That's not quite what I either had in mind or
13 understand --

14 MEMBER 3: Okay.

15 A. -- but it may well be the case that it's the -- if it's
16 the scheme that sets the -- decides on what quality
17 standard it wants to meet subject to whatever
18 the minimum is, then, yes, the scheme is setting
19 the audit standards and it's setting the prices for
20 whatever the audits are. It will -- it could tender for
21 the audit services or it could do them itself -- but it
22 could tender for them, but then the tendering would give
23 it an input cost. Its choice of how it prices --

24 MEMBER 3: I understand that.

25 A. -- is a separate thing.

1 MEMBER 3: I think what I am struggling for is a slightly
2 different question and maybe I am just way off base
3 here, which is: I get the impression from what has been
4 said in the Tribunal over the last few days that it is
5 accepted that Network Rail can specify the standards
6 that need to be met and that it has specified a bunch of
7 standards and a bunch of rules that Achilles may have
8 helped develop in the past through its participation in
9 the RISQS scheme in relation to the standards and
10 the audit protocols and that that is the heart of
11 the scheme. That being so, there is not a great deal of
12 room for competition in relation to that heart of
13 the scheme because you accept that Network Rail can set
14 the standards, it tendered or RSSB tendered on the basis
15 of the rules, the audit protocols, they are laid down
16 inside and whoever wins that is just going to
17 the standards, following those audit protocols, getting
18 the auditors to ask questions that meet those relevant
19 protocols.

20 A. Yes.

21 MEMBER 3: So the scope for competition and the debate
22 about -- that you have raised about the competition that
23 you say has not happened is about something that -- I am
24 struggling for what -- that competition that you say we
25 have lost, what is it?

1 A. There's competition on price because you have the --
2 you've set the standards for the scheme and the scheme
3 sets the standards for its IT and audit inputs, but then
4 it can charge whatever price it likes, within reason,
5 subject to the debatable RISQS not-for-profit point --
6 but it can set the price. So there's potential for
7 price competition.

8 There's potential, I think, for competition around
9 higher standards than whatever the minimum is. So let's
10 suppose it was -- I wanted to introduce gold standard
11 supplier assurance and I had set my standards much
12 higher than even the RISQS standards -- at the moment
13 that's excluded because I'm not called "RISQS", I'm
14 not RISQS -- but you could in principle envisage
15 competition on higher standards and then I think you
16 could envisage competition on other value added services
17 around data analytics or training or know-how or
18 whatever comes out of -- you have got this database of
19 suppliers, this is the item 3, which I have to say I'm
20 not completely familiar with, of the list of products,
21 data analytics, know-how, training -- for a variety of
22 other services, there could be competition amongst those
23 other services.

24 So it seemed to me there are dimensions of
25 competition and Network Rail setting a particular set of

1 A. That is, yes.

2 Q. At tab 5 of the bundle there is a joint expert statement
3 by David Parker and Derek Holt. Do you see that?

4 A. Yes.

5 Q. At page 2 of that document, again is that your
6 signature --

7 A. Yes, it is.

8 Q. -- in the bottom right-hand corner.

9 Lastly, tab 8.

10 A. Yes.

11 Q. A document, "Response to David Parker supplementary note
12 by Derek Holt"; you have that?

13 A. Yes.

14 Q. Right at the back of that again, is that your signature?

15 A. That is, yes.

16 Q. You have told me you have a couple of corrections to
17 make.

18 A. I do.

19 Q. Perhaps you could just let the Tribunal know what they
20 are.

21 A. Sure, I have a piece of paper just to remind me of
22 the paragraph references to comment on this for and they
23 have no impact on my findings in any way, but just for
24 the sake of accuracy.

25 So in DH1, my first report, which is bundle 2,

1 paragraph 236 --

2 Q. Page 56.

3 A. Page 56, thank you. About mid-way through the paragraph
4 there's a reference to "NRIL SD SD". I explained
5 earlier in the report what that refers to. Essentially
6 it's that "NRIL" is, in my counterfactual, the body that
7 needs to recognise other schemes. The first
8 "SD" relates to the position of other buyers, which
9 means that they would be single-homing on different
10 schemes. That's what the "S" and the "D" relate to.
11 The "SD" would normally be referring to what
12 the suppliers are doing, so "SD" again meaning
13 single-homing but on different schemes. However, in
14 that particular context I was referring to other
15 suppliers all being on one scheme, so what I had
16 intended to say was "NRIL SD SS". It's a different
17 market configuration, but it doesn't have any
18 significant consequence for my findings.

19 Next is paragraph 320 of the same report. That will
20 be page --

21 Q. 73.

22 A. -- 73, thank you. It's actually over on the next page,
23 74. I think it's the penultimate sentence, beginning:
24 "It follows that schemes would be required to be
25 acceptable to suppliers ..."

1 I intended to say "buyers", not "suppliers" at that
2 point. I was talking about the context of schemes
3 making offers that would be attractive to buyers.
4 Again, that's what I intended to say and it has no
5 impact on my findings.

6 Then very briefly two more in relation to the joint
7 expert statement, which is tab 5. Statement 4.8 -- I'll
8 get a page in a second. It's 247. So in relation to my
9 response, the last statement is not accurate:

10 "Further, the requirement to be RISQS-accredited
11 does not extend to subcontractors."

12 I meant to say "to all subcontractors". Of course
13 I do recognise elsewhere that subcontractors using
14 the key schemes do need to be RISQS-accredited.

15 Then finally 6.22 of the same document which is
16 towards the end of page 86, about a third of the way
17 through I say:

18 "Even if it was, Achilles is a buyer in this
19 two-sided market."

20 Of course I did not mean to say "Achilles". I meant
21 to say "NRIL" is a buyer. Thank you.

22 Q. Subject to those corrections, Mr. Holt, do those reports
23 represent your complete expert opinion --

24 A. Yes, they do.

25 Q. -- in the matters that the Tribunal is dealing with?

1 A. Yes.

2 MR. FLYNN: Thank you.

3 Cross-examination by MR. WOOLFE

4 MR. WOOLFE: Good afternoon, Mr. Holt. The first topic
5 I would like to explore with you is the distinction
6 which Mr. Parker draws and you do not between, on
7 the one hand, Network Rail recognising assurance
8 provided by a supplier assurance scheme and, on the
9 other hand, Network Rail joining a scheme as a buyer.

10 A. Yes.

11 Q. It is a pretty central disagreement between the two of
12 you. I think it is in particular set out at point 4.4
13 of the joint statement, but we need not go there.

14 If I can just take you to some documents to explore
15 this distinction. Could you be handed bundle G1,
16 please, and if you can turn in that to tab 2, a document
17 headed "Sentinel scheme rules", which --

18 A. Yeah.

19 Q. -- I think most people here are becoming ever-more bored
20 by.

21 Are you familiar with this document?

22 A. I think I have seen it, but I wouldn't claim to be
23 familiar with all aspects of it.

24 Q. If I could take you to where it says "Purpose and
25 scope" --

1 A. Yes.

2 Q. -- you can see it says:

3 "The purpose is to define the rules and mechanisms
4 for compliance with the Sentinel scheme together with
5 the consequences of breach."

6 You can see the next paragraph:

7 "The custodians are Network Rail, safety, technical
8 and engineering."

9 A. Yeah.

10 Q. Also in the same paragraph you can see it is in relation
11 to putting people to work safely on Network Rail, but
12 also on Transport for London's managed infrastructure as
13 well, so it does not just relate to Network Rail.

14 Then we can see what the scheme does over the page,
15 page 45 of the bundle. 1.1:

16 "Individuals must have a primary sponsor to be able
17 to use their Sentinel card to access the managed
18 infrastructure (MI)."

19 So you can see it is about getting access to track;
20 yes?

21 A. Yes.

22 Q. That is point 1.1.

23 Point 1.2:

24 "All sponsors must be approved and shall continue to
25 maintain approval through the Sentinel scheme assurance

1 arrangements set out in section 6."

2 A. Yes.

3 Q. So you would agree that this scheme is about access to
4 infrastructure --

5 A. Yes.

6 Q. -- and being approved as a sponsor to be able to put
7 people to work on managed infrastructure?

8 A. Yes, that's right.

9 Q. Not only Network Rail's infrastructure, but also TfL's
10 infrastructure?

11 A. Yes, I understand TfL uses this(?), yeah.

12 Q. If you go to page 61 -- I am always using the bundle
13 numbering in the bottom right-hand corner --

14 A. Okay.

15 Q. -- you will see a section 6.1.

16 A. Yes.

17 Q. "Registration of a sponsor", and first of all
18 a requirement that everybody -- it is to do with the
19 role of primary and sub-sponsors and percentage of
20 workforce.

21 The next paragraph:

22 "For an organisation to be approved by Network Rail
23 as a sponsor, they must initially register with the Rail
24 Industry Supplier Qualification Scheme (RISQS) ..."

25 A. I see that, yeah.

1 Q. So it is a registration requirement.

2 You will also see down the page, 6.2, "Sentinel
3 audit process":

4 "An organisation registered with RISQS as
5 a trackside sponsor shall be subject to an annual
6 assurance process."

7 So taking a step back, you would agree, I hope, that
8 this document is imposing a requirement to be registered
9 with RISQS and to have certain audits done as
10 a condition of approval as a sponsor to gain access to
11 Network Rail's infrastructure and TfL's infrastructure?

12 A. Yes, I think I agree with that, yeah.

13 Q. So there is a distinct function here, is there not, of
14 approving?

15 A. Yes, I think that's correct.

16 Q. You should be handed bundle G4, please. Hopefully you
17 should have a tab 42B in there.

18 A. Sorry, 42B? Yes, I do have that.

19 Q. Right towards the back of that tab there is a series of
20 documents which unfortunately has been handed up that do
21 not have bundle numbering, but approximately half
22 a dozen pages before the end of the tab you should find
23 a document that looks like that (Indicates). So if
24 you --

25 A. From the end?

1 Q. If you go to the end, you will see a web page --

2 A. I do have some numbers and there are some documents with

3 page numbers on it.

4 Q. No, right at the very back of the tab.

5 A. The very back, yeah, HSE's view.

6 Q. A web page --

7 A. Yes.

8 Q. -- and something saying, "Becoming registered with

9 Gas Safe". So the last one is a web page, "SSIP, HSE's

10 view".

11 A. I see that, yes.

12 Q. Discard that one.

13 The next one back is "Becoming registered with

14 Gas Safe", the grey document.

15 A. "Qualification requirements" --

16 Q. The grey document.

17 A. Yes, "Gas Safe Register", I see that.

18 Q. Do not worry about that.

19 A. Okay.

20 Q. Then the document immediately preceding that is

21 a six-page document. Do you have that?

22 A. I have, I think, yes.

23 Q. If you turn to the start of that, you should have

24 a document headed "Services, qualification system with

25 call for competition".

1 No?

2 A. I'm afraid the document I have has "Glossary of terms
3 and acronyms", about six pages prior to the one you're
4 referring to. It's the ORR April 2017 -- fine. I'm
5 happy to look at this instead.

6 MR. WOOLFE: Does the Tribunal have a copy of this one? It
7 is one we explored with an earlier witness.

8 Now, are you familiar with that kind of notice
9 at all, Mr. Holt?

10 A. Is this an OJEU notice?

11 Q. It is indeed an OJEU notice.

12 A. Right, I'm aware of their existence.

13 Q. It is always published in I think technically an annex
14 to the OJEU, but they are called "OJEU".

15 A. Yes.

16 Q. You note this is headed "Qualification system
17 utilities", and it says:

18 "United Kingdom London repair and maintenance
19 services 2018/ ..."

20 A number.

21 "... qualification systems utilities."

22 The name of the contracting entity is the RSSB.

23 Over the page on page 2 we have, about halfway down
24 the page II.2.4, "Description of the procurement", and
25 you will see it announces the existence of

1 a qualification system, "... pursuant to which
2 the utilities and other buyers [listed in a certain
3 section below] can purchase services which fall within
4 the CPV codes above".

5 A. Right.

6 Q. Yes?

7 A. Yes.

8 Q. Then if you look over the face to the next page on
9 page 3, you will see a section 3, "Legal, economic,
10 financial and technical information".

11 A. Yeah.

12 Q. Third heading down, III.1.9, "Qualification for
13 the system", you will see:

14 "RISQS has been established as an industry-based
15 service to assist the UK rail companies and their
16 associated transport activities by providing through
17 the administration of a single qualification scheme and
18 database. For all the product and service categories
19 listed, RISQS will provide a register of suppliers and
20 contractors to the subscribers listed in a section below
21 and for some of the categories a second-stage
22 qualification will be applied. Registered and qualified
23 suppliers may be considered by subscribers for contract
24 opportunities without further notification
25 of requirements in the supplement to the official

1 journal ...", and so forth.

2 "Suppliers wishing to register on RISQS should apply
3 to the list ..."

4 At the very bottom of that page it says:

5 "The organisations that subscribe to RISQS as
6 clients and therefore have the ability to source
7 suppliers using the information within are ..."

8 Then you will see over the page a very large
9 number --

10 A. Yeah.

11 Q. -- of people listed.

12 Perhaps worth noting on the list -- it's
13 alphabetical -- there's Network Rail, but we also have
14 other infrastructure managers on here as well, so
15 Heathrow Airport Limited, for example the
16 Heathrow Express link.

17 We have some construction firms like Kier and
18 Carillion, familiar names, and we also have
19 train-operating companies, such as East Midlands Trains
20 and so forth.

21 A. Yes.

22 Q. I hope you will agree that this qualification notice is
23 about announcing the use of this system for
24 organisations that subscribe to source suppliers through
25 it. That is that it says at IV.3; yes?

1 A. VI.3, yes. I agree this is an OJEU notice. It's
2 referring to the use of RISQS for the procurement
3 services that this long list of companies use. If
4 that's what you're asking, I agree with that, yeah.

5 Q. So what I want to suggest to you is we have two quite
6 different functions of RISQS set out in these two
7 documents. In the first one we have RISQS being
8 nominated by Network Rail and an audit RISQS
9 registration has to be done and an audit has to be done
10 as a condition of granting somebody approval to be
11 allowed to go on-track, to hold a Sentinel card.

12 A. Yes.

13 Q. In this we have the announcement that RISQS is being
14 used as a qualification system for procurement purposes
15 and that means both buyers can advertise their contracts
16 in it, but also suppliers can apply to it to try to get
17 onto those contracts?

18 A. Yeah.

19 Q. Those are two quite different functions, are they not?

20 A. I agree. So in this case it is a supplier system that
21 is obviously providing a number of functionalities.
22 Obviously the underlying focus is that buyers need to
23 ensure that -- when they procure work, they ensure that
24 the suppliers are qualified to the right standards.
25 RISQS is -- has been identified in the first document

1 you showed me as the scheme to use for Sentinel and it's
2 been identified in the second document to be essentially
3 a qualification tool as well --

4 Q. Yes.

5 A. -- so yes.

6 Q. In terms of who needs to see audit results, that will be
7 different between the two as well, will it not, because
8 for Sentinel the people who need to see the audit
9 results are the team who are running Sentinel and doing
10 the approvals within Sentinel. That is right, is it
11 not?

12 A. Well, I think -- I'm sure you're right that they would
13 need to have visibility of all that information and I'm
14 not an expert on the flows of communication within
15 Sentinel. I think the one critical point I would note
16 in relation to the use of RISQS for Sentinel is that
17 that is a service that Network Rail, who obviously needs
18 to ensure that the people working on the railway are
19 properly accredited, has chosen to outsource. It could
20 do that in-house. It has chosen to outsource it and it
21 has chosen to use RISQS.

22 Q. Yes.

23 In terms of who would have to have access to audit
24 results within the use of it as a qualification system,
25 that would be presumably people doing the procurement

1 within Network Rail or any other buyer, would it not?

2 A. Yes, that's right. I think any buyers who are part of
3 the scheme and using it for their procurement tools
4 would no doubt be able to gain value through looking at
5 what suppliers are to the right standard.

6 Q. So for those purposes it would have to be available to
7 the procurement teams in every single one of these
8 suppliers who are listed in the procurement notice,
9 would it not, the information?

10 A. I presume that those buyers are members in the sense of
11 paying customers to RISQS and therefore able to access
12 the procurement tool, that's right.

13 Q. In terms of the functionality and features that would be
14 required to fulfil these two different functions, for
15 the approval scheme what is needed is that somebody
16 carries out an audit and that the information arising
17 from that audit, a report or whatever it may be, is
18 passed to the relevant person, but for the qualification
19 system you would need a much richer range of
20 functionality, would you not? You would need to have
21 the ability for buyers to publish contract notices
22 through the system setting out their requirements and
23 you would be able to have a system of notifying
24 suppliers that those have arisen and you have a
25 (inaudible) to sort suppliers by product code or buyers

1 by product code, and you might want things like linking
2 to e-tendering systems and the like?

3 A. Yeah.

4 Q. So you need a much richer range of functionality in that
5 use of the system?

6 A. I think that would make sense -- that we say would make
7 sense. There's some additional functionality that would
8 be helpful for the procurement focus. That would be
9 over and above what you're doing in terms of an audit
10 rule, that is right.

11 Q. So there is a very substantial difference, is there not,
12 between Network Rail recognising audits provided by an
13 assurance scheme for the purpose of granting approvals
14 on the one hand and Network Rail joining a supplier
15 assurance scheme as a buyer on the other?

16 A. Well -- so I agree with the proposition that they are
17 two different activities. What I don't agree with is
18 the suggestion that in this case, looking at the
19 counterfactual which the claimant is wishing to put
20 forward, that that is a relevant economic distinction --

21 Q. Well --

22 A. -- in other words that you could essentially avoid
23 the competitive bottleneck that I've identified by using
24 the mechanisms that Achilles and Mr. Parker have
25 proposed.

1 Q. Well, I would suggest to you that you can in this way,
2 which is: imagine for a moment that Network Rail allows
3 more than one supplier assurance scheme to carry out
4 the audits that are necessary for approval under
5 the Network Rail key schemes --

6 A. Sure.

7 Q. -- and Network Rail ceases to require people to be
8 registered with one particular supplier assurance
9 scheme as a condition of being Sentinel-approved, so
10 that goes --

11 A. Yes, so both, let's say, RISQS and Achilles could
12 potentially do the Sentinel-related audits.

13 Q. However that is done?

14 A. Yeah.

15 Q. That would still leave it open, would it not, for any
16 organisation who wanted to use one of those supplier
17 assurance schemes as a buyer to decide which of those
18 schemes it wanted to use as a buyer, whether -- this
19 could apply to, say, Kier as a buyer or it could apply
20 to Network Rail as a buyer. They would have a choice as
21 to which they used at that point?

22 A. Well, I agree they have a choice, but I think there's
23 a fundamental impact of the counterfactual in relation
24 to the nature of that choice. So I agree with you, in
25 a world where there is full buyer choice, then you would

1 have a competitive model potentially between multiple
2 schemes in which those additional services would be made
3 at competitive prices and the buyers would choose which
4 procurement system to use and they would probably try
5 and negotiate with other schemes who may be operating to
6 acquire the IT portal to ensure that that is built in to
7 the procurement system as well.

8 The consideration here, however, is very different.
9 We're in a counterfactual world where you must recognise
10 any scheme meeting a minimum standard and therefore that
11 changes entirely the competitive dynamics as to what
12 position a buyer would be in when it is coming to
13 negotiate in terms of access to those different sources.

14 Q. Can I pick you up on this "must recognise" because
15 I think this is really fundamental to everything in your
16 report because what we are in a sense attacking is
17 the very specific terms in the supplier assurance
18 scheme -- not the supplier assurance scheme --
19 the Network Rail schemes.

20 A. Yeah.

21 Q. So we are saying that the Sentinel scheme is a form of
22 contract or a concerted practice between Network Rail
23 and people who want to be Sentinel-assured, and
24 the offending terms in it are the ones that say, "You
25 must register with RISQS; you must be audited by RISQS".

1 We are proposing in a sense they be replaced by more
2 objective requirements; yes?

3 Now, if they are replaced with more objective
4 requirements, that would require Network Rail to
5 recognise another scheme --

6 A. Yes.

7 Q. -- for the purpose of Sentinel.

8 A. Yes.

9 Q. It would not require any other buyer to recognise any
10 scheme for any purpose, would it?

11 A. Sorry, you're not talking about whether Network Rail
12 would be required to take the procurement-related
13 services of the schemes, which I think was your previous
14 point; now you are talking about other buyers, as
15 I understand it.

16 Q. I think --

17 A. I think other buyers have never been required to use
18 RISQS for any particular purposes.

19 Q. We'll focus on your assumptions to the counterfactual
20 because there are various points in your report. You
21 focus on an element of the counterfactual of assuming --

22 A. Yeah.

23 Q. -- the whole set of your counterfactuals are
24 the all-buying multi-homing counterfactuals; yes?

25 A. Sorry, that's not what I was talking about just a moment

1 ago. I was talking about just Network Rail being
2 required to, let's say, accept multiple schemes for
3 the purpose of the Sentinel audit, and what I was saying
4 is that, although you're making a distinction between
5 the audit service that those two schemes might provide
6 in relation to Sentinel or the POS or any other element
7 of what RISQS does, that would entirely change
8 the position of Network Rail in the market for these
9 so-called additional value-added services because it
10 would no longer have the ability commercially to say,
11 "Actually, no, I'm just not accepting your scheme.
12 You're not proposing competitive terms".

13 Q. What we are suggesting is that Network Rail would still
14 have a competitive choice at that point because they
15 would be required to recognise it for the purpose of
16 the Sentinel scheme, but the procurement department
17 within Network Rail could decide -- they would have to
18 publish an OJEU notice like this and they could -- in
19 terms of naming their qualification system, they could
20 either name RISQS or they could name TransQ, and
21 Network Rail would have a choice that they could
22 exercise, you know, differently over the course of time.
23 They could choose to tender some services through RISQS
24 and some through TransQ, if they wanted. But they would
25 have a choice, would they not? Merely changing

1 the Sentinel scheme would not force them to do anything
2 else?

3 A. No, I think that's incorrect. It would be a choice, but
4 it would be -- I think there's a movie called
5 "Sophie's Choice" where you're choosing between worse
6 outcomes than you might otherwise have had, and I think
7 that's the situation that you would have here.

8 It goes back to the fact that once, let's say,
9 Achilles is recognised -- and it must be recognised --
10 for the purpose of carrying out the Sentinel audit, so
11 in addition to RISQS, of course it will then have
12 incentives to win suppliers. I think that's not
13 particularly contentious. Now, once it has a whole
14 bunch of suppliers that it is auditing, that provides it
15 in a very powerful position in relation to the provision
16 of that information to the buyer, in this case,
17 Network Rail.

18 So although your hypothesis is that somehow
19 Network Rail would not be in a position of needing to
20 acquire any procurement-related services from Achilles
21 in that context, it could instead procure those from
22 RISQS, that doesn't actually remove the competitive
23 bottleneck that I speak of because that information is
24 in the hands of Achilles.

25 Now, even the idea that you would then ensure

1 through the standards that that information flows
2 through individually as each -- as each audit is passed
3 one by one through to Network Rail, again that doesn't
4 actually resolve the competitive bottleneck because what
5 you would then be doing is forcing Network Rail to
6 effectively re-insource a key function of the supplier
7 assurance scheme, which is the IT portal, the fact that
8 having done a whole range of suppliers they're able to
9 bottle all that together into a coherent IT portal, and
10 then -- and if you're suggesting that Network Rail
11 wouldn't take that, you have to ask yourself
12 the question of what would it do instead. If it would
13 have to reconstruct all of that data and put that into
14 a database, well, that would be very costly and
15 inefficient relative to the current market-based
16 approach, which is that the supplier assurance scheme is
17 doing that, you know, in an economic way.

18 Q. I am just conscious of time.

19 I am going to come back to the competitive
20 bottleneck point in due course, but I think you have
21 accepted there is a distinction -- you may argue about
22 the significance or relevance of it to the analysis, but
23 I think you agree that there is a distinction between
24 these two uses of the scheme, one being for providing
25 assurance for approvals, the other being as

1 a qualification system for contracts?

2 A. Yeah, I think our area of disagreement, if you want to
3 put it that way, is the consequences of that in
4 the counterfactual.

5 MR. WOOLFE: Well, in that case I will sort of deal with
6 that as we flow through. Now, I wanted to put some
7 points to you about the benefits of competition and
8 there is a single confidential document I want to take
9 the witness to. He is in the confidentiality ring, but
10 I am conscious that it might be a convenient time to
11 deal with it now at the end of the day.

12 Would it be possible to -- it is in bundle I4, so it
13 is quite a recent document. Would it be possible to
14 move into closed session for that purpose?

15 THE CHAIRMAN: Do you have any observation, Mr. Flynn?

16 MR. FLYNN: Well, I would not have any observation without
17 knowing exactly what the document is, but, sir, we have
18 done it before. I think my clients will be happy to do
19 as we have done before, so ...

20 THE CHAIRMAN: Yes. Very well. We will go into closed
21 session then.

22 MR. WOOLFE: The document I am going to ask you about is in
23 bundle I4 at page 1198, and indeed it is a document that
24 Mr. Flynn took --

25 NEW SPEAKER: Sorry, would it be possible to wait until we

1 leave?

2 MR. WOOLFE: Oh yes, of course, sorry.

3 NEW SPEAKER: Sorry to interrupt.

4 (4.20 pm)

5 (The hearing continued in closed session)

6 (4.34 pm)

7 MR. WOOLFE: Thank you, sir, we will stop there. Thank you.

8 MR. FLYNN: May I assume we are in open session in
9 the morning?

10 MR. WOOLFE: Oh yes, indeed. Sorry, as soon as I put
11 the confidential document away, we are no longer in
12 confidential mode. I should have said. Thanks.

13 (4.36 pm)

14 (Court adjourned until 10.30 am on Thursday,
15 28 February 2019)

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22

23

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25

INDEX

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

PROFESSOR ANSON JACK (continued)1

 Cross-examination by MR. WOOLFE1

 (continued)

 Questions from THE TRIBUNAL41

 MS. GILLIAN SCOTT (recalled)44

 Examination-in-chief by MR. FLYNN44

 (continued)

 Cross-examination by MR. WOOLFE45

 (continued)

 MR. DAVID WILLIAM GEORGE PARKER50

 (affirmed)

 Examination-in-chief by MR. WOOLFE50

 Cross-examination by MR. FLYNN51

 Re-examination by MR. WOOLFE139

 Questions from THE TRIBUNAL142

MR. DEREK JAMES HOLT (affirmed)150

 Examination-in-chief by MR. FLYNN150

 Cross-examination by MR. WOOLFE154