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5 record.

6 **IN THE COMPETITION**

Case No. : 1298/5/7/18

7 APPEAL TRIBUNAL

8 Victoria House,

9 Bloomsbury Place,

10 London WC1A 2EB

11 1 March 2019

12
13 Before:

14 **Andrew Lenon QC, Jane Burgess, Michael Cutting**

15 (Sitting as a Tribunal in England and Wales)

16 **BETWEEN:**

17 **Achilles Information Limited**

18 **v**

19 **Network Rail Infrastructure Limited**

20 _____
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29 **HEARING - Day 8**

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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 Friday, 1 March 2019

2 (12.00 pm)

3 (Proceedings delayed)

4 (12.18 pm)

5 MR. FLYNN: Sir, I apologise for keeping the Tribunal
6 waiting; I'm grateful for your patience.

7 THE CHAIRMAN: Not at all. Thank you very much for
8 both sets of closing submissions, which are very
9 helpful.

10 MR. WOOLFE: I was somewhat grateful, given the timing this
11 morning, to have a few minutes extra before starting, so
12 I have no complaint to make.

13 Closing submissions by MR. WOOLFE

14 MR. WOOLFE: Sir, if I begin at the outset by dealing with
15 the first point that is made in Network Rail's written
16 closings. They say, at paragraph 2 of their closings,
17 that Achilles' case has shifted considerably throughout
18 the course of the proceedings, and they refer to
19 the letter before action in particular, both as regards
20 its legal basis and the consequences. They complain
21 that it has made it difficult for them to defend
22 themselves in these proceedings and to deal with
23 the case against it. I will deal with that in a moment,
24 if I may.

25 But they go on to say in paragraph 2, as it goes

1 over the page, that during the course of Day 7 of
2 the preliminary issues trial -- so yesterday -- it
3 became apparent, as far as Network Rail understands,
4 that Achilles is seeking to have Network Rail recognise
5 Achilles' TransQ supplier assurance scheme only in
6 respect of auditing services of suppliers who do not
7 contract directly with Network Rail.

8 Now, with respect, I think we have made our position
9 clear previously, but in fact, this statement of our
10 position misstates it again. So if I can take you to
11 paragraphs 1 and 2 of our closing, sir.

12 What we put front and centre in this case, and what
13 we always have done, is that this is about the terms of
14 three authorisation schemes operated by the defendant,
15 the Sentinel scheme, the on-track plant scheme and
16 the principal contractor scheme. Those are schemes
17 which people who want to work in the rail sector have to
18 get authorisation under in order to be allowed access to
19 Network Rail's premises effectively: their land, their
20 track, their infrastructure. Network Rail has imposed
21 requirements in those that those undertakings are
22 registered with and audited by RISQS against certain
23 criteria, and we say certain anti-competitive
24 consequences flow from that; and I will take you to
25 those in due course.

1 What we are seeking is set out at paragraph 2, which
2 is that those schemes be amended so that
3 the requirements to obtain assurance are specified by
4 reference to objective criteria, rather than by
5 reference to the identity of the person who provides
6 the assurance. That is essentially what we are asking
7 for.

8 Now, that is not quite the same as what Network Rail
9 have stated at paragraph 2 of their closings. What they
10 are saying is:

11 "We seek to have our assurance recognised in respect
12 of auditing services of suppliers who do not contract
13 directly with Network Rail."

14 That is wrong, I think, in two respects. First of
15 all, because this formulation fails to draw
16 the distinction between recognition for the purpose of
17 the authorisation schemes as opposed to for procurement
18 purposes. We are not seeking that Network Rail does
19 anything with our assurance for procurement purposes.
20 That is one problem.

21 It is another problem because we are not asking that
22 the relief be limited to auditing services of suppliers
23 who do not contract directly with Network Rail. What we
24 are seek is that we be allowed to audit and provide
25 assurance under the authorisation schemes, if I can put

1 it that way.

2 THE CHAIRMAN: I understand that, but it is fair to say
3 the problem is most acute in the way that it has been
4 characterised by the defendant, although I accept that
5 that is not how your case is put.

6 MR. WOOLFE: Yes, I see the point, but actually it is most
7 acute I think in that it is something closely related but
8 slightly different. I think it is most acute in respect
9 of, they are looking at the suppliers, because they are
10 thinking -- if I may I speculate -- they are a buyer of
11 services and they see their supply chain. What they are
12 forget about in these proceedings is the other buyers.

13 The problem of what the defendant is doing is acute
14 both in respect of suppliers who do not contract
15 directly with it, so who may supply their tier 1
16 contractors, but also in respect of suppliers who
17 contract with other buyers entirely; but it also affects
18 other buyers as well, who in fact may not be seeking
19 authorisation under the Sentinel scheme at all
20 themselves -- they may be, they may not be.

21 THE CHAIRMAN: These are buyers in other sectors?

22 MR. WOOLFE: No, they are other buyers who may be wanting to
23 use RISQS as a buyer, sir.

24 THE CHAIRMAN: But they may be in other sectors.

25 MR. WOOLFE: They may be in other sectors as well, yes.

1 Precisely, yes.

2 So you are right in the sense that the effect of
3 the authorisation schemes is most unusual insofar as it
4 goes outside the relationship between Network Rail and
5 the person who directly contracts with it, because
6 obviously, normally speaking, an undertaking can choose
7 who it contracts with and who it picks, and it can
8 choose to set conditions on that person. But the nature
9 of the authorisation schemes, if it goes outside that,
10 yes, that is right, it does identify those suppliers who
11 do not contract directly, but also affects other buyers
12 as well.

13 MEMBER 3: Does that point apply for all three schemes?

14 I think you have been very clear how the impact of
15 the Sentinel rule affects things. I am not sure we have
16 had as much on --

17 MR. WOOLFE: The other two.

18 MEMBER 3: -- on the other two schemes.

19 MR. WOOLFE: Yes.

20 MEMBER 3: And certainly for a scheme with the name
21 "principal contractor scheme", I am wondering where the
22 scope is there for other -- because "principal
23 contractor" I think relates to principal contractor with
24 Network Rail. So I am just wondering -- can you help me
25 with that?

1 MR. WOOLFE: Yes, I can. I think you are absolutely right,
2 sir, and you identify the important point, which is
3 these are three separate schemes and they need to be
4 analysed separately; and I think there probably has been
5 a tendency for Network Rail to talk a lot about
6 "principal contractor scheme" and us to talk about --

7 MEMBER 3: About Sentinel.

8 MR. WOOLFE: -- Sentinel, yes. In a sense, Sentinel is, to
9 be frank, what we are most concerned about commercially,
10 So I make no bones about that --

11 MEMBER 3: Yes, we will come back to that.

12 MR. WOOLFE: So if we are talking about whether these
13 schemes have an effect not just between Network Rail and
14 its suppliers but more generally, the on-track plant
15 scheme definitely does. If I can take you to that.
16 That is in bundle G1 at -- it is either tab 5 or tab 6.
17 I think it is 6.

18 My understanding is, if you go to page 149, and
19 under the heading, "Scope", in the second paragraph:

20 "This document applies to organisations carrying out
21 OTP operations on NRMI ..."

22 That is Network-Rail-Managed Infrastructure:

23 "... and Network Rail projects."

24 My understanding -- I will be corrected by --

25 the same is true if you look at the top of page 150 as

1 well. I will be corrected if this is wrong, but my
2 understanding is Network Rail requires authorisation
3 under these rules if you are going to be supplying
4 on-track plant even if, as an on-track plant provider,
5 you are providing it to somebody else on the railway.

6 MEMBER 3: That happens, does it?

7 MR. WOOLFE: Well, indeed that happened -- a slightly
8 unfortunate example, but in the Tebay case, Carillion
9 was operating the line -- the infrastructure works on
10 that line up in that part of the world.

11 MEMBER 3: That pre-dates this scheme, does it not,
12 the Tebay? I mean, Tebay -- I mean, the concern there
13 is whether Tebay pre-dates the way Network Rail now lets
14 contracts for the maintenance and development of its
15 track. So it may be the case; I am not going to take
16 issue with you. But it is more relevant whether that is
17 how things work now.

18 MR. WOOLFE: My understanding, sir -- and I have nods from
19 behind, and the other side can correct me if I am
20 wrong -- is that there are situations where Network
21 Rail -- to take the simple subcontracting situation,
22 just that one for a moment: Network Rail contracts with
23 somebody to do certain works on the track, say Carillion
24 or whoever it may be, they require on-track plant which
25 is specialist equipment and they buy it in. So this one

1 does supply certainly down the supply chain. There are
2 situations where you might need on-track plant to do
3 work, say, on a station that is managed by a train
4 operating company --

5 MEMBER 3: But then, just to close off that leap -- okay, so
6 that is very helpful. Again, the next question, though,
7 is that this would always be on Network-Rail-managed
8 infrastructure.

9 MR. WOOLFE: Yes.

10 MEMBER 3: Whereas your point about Sentinel is that it
11 applies also to non-Network-Rail-managed infrastructure
12 because it applies on TfL.

13 MR. WOOLFE: That is a point about the Sentinel scheme, yes.

14 MEMBER 3: This one does not.

15 MR. WOOLFE: This one does not; this just applies to
16 Network Rail.

17 MEMBER 3: So just getting the scope different. The scope
18 on PCLS, Network Rail, Network Rail; this one, only
19 Network-Rail-managed infrastructure, but definitely
20 includes tier 2, tier 3, other contractors --

21 MR. WOOLFE: Yes, and may include other buyers --

22 MEMBER 3: -- Sentinel, the universe.

23 MR. WOOLFE: -- as well, in the sense that, if they are
24 buying services that require on-track plant on
25 Network-Rail-managed infrastructure, they interface

1 with it in certain ways.

2 Now we come on to the principal contractor scheme,
3 and that is where I think there is a difference
4 undoubtedly, because this is about -- this is at G1/5,
5 and it is fundamentally about people who are going to
6 contract with Network Rail.

7 The title is not (unclear) the reason why.
8 "Principal contractor" in this sense just means somebody
9 who has certain duties under the construction, design
10 and management regulations for control of a work site,
11 but in fact, the -- if you look in G1/5 on page 121,
12 down the bottom, the scope is different. So:

13 "This standard applies to all organisations
14 undertaking PC duties ..."

15 Which is a general matter. But:

16 "... where Network Rail is the client."

17 My understanding is -- so, for example, to take
18 a hypothetical example, if you have a train operating
19 company who owns a station and they require, for some
20 reason, to carry out some works on the -- which require
21 them -- in the area of Network-Rail-managed
22 infrastructure that interfaces with the station, that
23 would not necessarily require, as I understand it, PCLS.
24 I do not know what terms and conditions Network Rail may
25 otherwise impose on that, but this is not what does it.

1 So this, in a sense, only relates to the situation
2 between Network Rail and its potential suppliers, but it
3 is not simply a term in a contract between Network Rail
4 and somebody who is actually supplying it, because, for
5 instance, you heard the evidence of Mr. Matthews that he
6 is at the moment -- ReadyPower is applying to become
7 a principal contractor. But that is applying for
8 a certain licensing status that is given to you. I do
9 see, sir, and I entirely accept, that the principal
10 contractor licensing scheme is in a different category
11 from the other two, because it does more directly relate
12 to this.

13 However, it may still be the case that somebody is
14 interested in becoming a principal contractor: they want
15 to be audited to become a principal contractor and
16 authorised, but they are not yet. In fact, inevitably,
17 they will not yet be a supplier at the time they are
18 applying; they will not have any audits done. Because
19 if you look, I think, at section 8 of the same
20 document --

21 MEMBER 3: So that you are assessing -- that is making
22 a point about the impact of this on choice prior to
23 becoming a principal contractor.

24 MR. WOOLFE: Indeed, because it might be a situation where
25 you would think, "Well, I have aspirations of becoming

1 a principal contractor, therefore I will" --

2 MEMBER 3: "So I am going to jump onto RISQS now".

3 MR. WOOLFE: Exactly. Having said that, of course --

4 MEMBER 3: But the scopes are different.

5 MR. WOOLFE: Yes. If you were becoming a principal

6 contractor, you would be wanting to win work from

7 Network Rail eventually. So in that sense it is

8 different, and I would accept there is quite a strong

9 difference perhaps between Sentinel and the on-track

10 plant and the principal contractor. I do not think

11 there is a big difference really in terms of effect

12 between Sentinel and on-track plant: it is on-track

13 plant is quite specific to its context of plant.

14 MEMBER 3: I think, for me, it was just about trying to work

15 out how the Venn diagrams work and whether

16 your arguments or the analysis as a whole apply equally

17 to the three schemes. I do not think they do, but we

18 can come on to consider that. I just wanted to be clear

19 about that.

20 MR. WOOLFE: Yes, there is a more indirect relationship in

21 terms of the dissuasive effect, if I can put it that

22 way, of the RISQS-only rule in respect of the principal

23 contractor scheme. In the counterfactual, imagine

24 the case where Network Rail can choose which scheme it

25 is going with for its procurement purposes. Then one

1 can see that that will be a stronger factor in the mind
2 of people who want to be principal contractors than it
3 would be in respect of others, perhaps.

4 MEMBER 3: So I do not know the answer to this question, but
5 does the fact that the situation in relation to
6 the PCLS is different -- let's not make any value
7 judgment; it is different -- how does that bear upon
8 both the facts and the arguments in relation to RISQS as
9 a procurement tool? Because presumably it is in
10 the context of principal contractor that Network Rail is
11 using RISQS as its EU pre-qualifier, because by
12 definition those are going to be contracts between
13 Network Rail and the buyer?

14 MR. WOOLFE: In terms of that, it will not only be in
15 respect of the principal contractor scheme that
16 Network Rail is using RISQS as a procurement tool.
17 Because if you look at --

18 MEMBER 3: No, but if your arguments are different, or if
19 the effects are different in relation to PCLS --

20 MR. WOOLFE: Yes.

21 MEMBER 3: -- but the relationship between the arguments on
22 scheme as a procurement -- and the arguments between
23 scheme as a procurement tool are most closely correlated
24 to the analysis in relation to the PCLS --

25 MR. WOOLFE: In fact, sir, I think it is more the other way

1 around. The distinction between authorisation and
2 procurement is more important in respect of the generic
3 Sentinel, if I can call it that, and not so much in
4 respect of the PCLS. They are more closely aligned with
5 the PCLS and more different in respect of Sentinel and
6 the on-track plant.

7 MEMBER 3: Okay.

8 MR. WOOLFE: Just to focus on -- because I think it depends
9 partly on the number of people who are principal
10 contractors. If everybody fell under PCLS and very few
11 were under Sentinel not under PCLS, then things might be
12 different. But the numbers are such, as I understand
13 it, that the large bulk of people are ones who are
14 Sentinel and not PCLS.

15 The other point I wanted to -- I think came out of
16 that, sir, is: so "the principal contractor"
17 specifically -- has this very specific meaning which we
18 perhaps have not gone into, which it does -- if you go
19 to page 122 of G1, and if it was under the definition
20 of "principal contractor licence", that is one place we
21 can get it from:

22 "Principal Contractor Licence is a formal document
23 issued to indicate that a supplier has the management
24 systems required to discharge the duties of
25 a Network Rail Principal Contractor on CDM notifiable

1 projects."

2 If you look over a couple of pages to page 124, that
3 is where CDM is defined as:

4 "The Construction Design Management regulations."

5 I think it is "Construction (design and management
6 regulations)."

7 In fact. I am somewhat summarising, sir, but when
8 I looked at -- those regulations are the ones that
9 apply -- if you have a construction project that is of
10 a certain size and one undertaking has, in a sense,
11 a management responsibility for the project as a whole
12 and undertakes certain obligations in respect of safety
13 and so on, then the good management of the project in
14 respect of that.

15 So the principal contractor licensing scheme does
16 not relate to everybody who contracts directly with
17 Network Rail, because there will be many people who
18 contract with Network Rail for many things who are not
19 --

20 MEMBER 3: But it only applies to contracts that

21 Network Rail is a party to.

22 MR. WOOLFE: That is right, yes. It only applies to people
23 who --

24 MEMBER 3: Have a direct contract with Network Rail.

25 MR. WOOLFE: -- want to contract directly with Network Rail

1 in respect of those projects.

2 MEMBER 3: Just to help you maybe: is there any evidence
3 anywhere of other buyers adopting the PCLS as
4 a standard?

5 MR. WOOLFE: I am not aware of any in the bundle.

6 MEMBER 3: No, I did not see any either, but I just
7 thought --

8 MR. WOOLFE: I have, standing here now, no knowledge of
9 whether any other buyer has applied that.

10 Just to check your question, sir, you are asking
11 that they say, "Well, we just choose to adopt this"?

12 MEMBER 3: Yes.

13 MR. WOOLFE: Not that I am aware of.

14 MEMBER 3: Thanks.

15 MR. WOOLFE: Now, I was going to go back to our claim form
16 actually, both to deal with the suggestion that the case
17 has been changing, but also to perhaps pick up one point
18 as to how the anti-competitive effect arises. So if you
19 go to bundle A/1. As you will see, at paragraph 18 of
20 that claim form, on page 7, we say clearly there that:

21 "Network Rail operates a series of supplier schemes
22 which impose terms on persons wishing to supply
23 Network Rail or to have access to Network-Rail-managed
24 infrastructure."

25 So we are clear about that at the start.

1 Then we go through, and we have successfully:

2 "The Principal Contractor Licensing Scheme ..."

3 And I accept your point, sir, which is this does not
4 apply merely to people who want to have access to
5 Network-Rail-managed infrastructure, it applies, as we
6 said, to people who fall within a certain definition of
7 "principal contractor". That is at paragraph 19. But
8 then I think in fact the end of paragraph 19 is
9 incorrect, and it in fact applies to people who want to
10 fulfil that role in relation to Network-Rail-managed
11 projects.

12 Then we have Sentinel, and we set out the terms of
13 that at 24, and similarly the plant operator scheme.

14 Now, in terms of whether the case was misunderstood,
15 as you will see at paragraphs 26 and 27, this recounts
16 the initial correspondence, and it was raised by
17 Achilles at the start that it wanted to offer it
18 supplier assurance, and it offered to provide Sentinel
19 with any assurance it may need. Then you will see
20 the text -- we can go through it in the bundle, but
21 the text of it is here -- of Network Rail's response,
22 which is to say, very clearly, that RISQS is a mandatory
23 requirement of the schemes. So it is focusing on
24 the schemes not on its general procurement function.
25 Then it is interesting to note why they say they are

1 doing it, because they are not simply saying, "Because
2 we want to only contract with people who are assured to
3 certain standards". What they say is:

4 "No alternative pre-qualification scheme is
5 identified in the requirements for these schemes as
6 a key objectives [sic] of RISQS was to have a single
7 rail industry scheme ..."

8 So it is clearly in the mind of whoever wrote this
9 letter -- and I recall from Mr. Spence's evidence that
10 she is somebody who has now moved on from Network Rail.
11 You can go to it in bundle C1 if you want, but I do not
12 think that is really necessary. It is in the mind of
13 the person writing this letter that the purpose behind
14 having the mandatory requirements and the purpose behind
15 refusing Achilles' request in its letter was to have
16 a single rail industry scheme. So it is very clearly in
17 their mind that this is not just about Network Rail and
18 its suppliers, it is wider than that. So I find it
19 a bit hard to understand how it can be said that we
20 raised this point for the first time yesterday.

21 Now, if I can pick up the other points as to how --
22 why the supplier schemes are squarely at the centre of
23 our case from the beginning. In terms of how the abuse
24 is framed at paragraphs 32 and 33 -- I am going to come
25 back to dominance and make a point about that in

1 a moment but I will do it in a different context.

2 At paragraph 32.2 we explicitly identify
3 the supplier schemes as being the means by which
4 Network Rail is abusing its dominance, and the same at
5 32.3. Then in the Chapter I case at paragraph 38 we
6 similarly refer to the requirement in each of those
7 schemes that assurance be obtained solely through RISQS
8 and not through alternative supplier assurance schemes
9 restricts competition; and we refer at 38.1 and 38.2 to
10 the requirements in terms.

11 Well, first we say the requirements in terms prevent
12 supplier assurance being provided by schemes other than
13 RISQS. Secondly, we say it amounts to a requirement
14 that goes down through the supply chain.

15 For your note, the point was very squarely put in
16 the third witness statement of Ms. Ferrier at
17 paragraphs 35 and 36 in bundle B5. That was dated
18 1 February. So it has been in the proceedings, as
19 I say, clearly for quite some time.

20 The difference in views on the point was very clear
21 between the experts, if you will recall. It is at
22 point 4.4 of the joint statement, which is in bundle F5,
23 so that is page 46 of that tab, and it was dealt with by
24 Mr. Holt in his reply report effectively at paragraphs 6
25 to 13. We picked it up again -- our skeleton, again, is

1 all framed about the key schemes and we picked it up in
2 opening. With respect, I have been working at it with
3 the witnesses over quite some days, so I think I have
4 raised this before.

5 Having dealt with that, sir, I would like to briefly
6 deal with what we say one more time the case is actually
7 about, and start with this point about dominance and how
8 it flows through. It has been said at times that
9 the relevance of Network Rail's dominance is somehow
10 unclear. That was said in the defendant's skeleton in
11 footnote 4; or I think Mr. Holt as well at one point in
12 his report suggested that somehow there is not
13 a sufficient connection between the dominance and
14 the conduct we complain of.

15 So I want to start with how the dominance is
16 relevant and how the problem arises.

17 Now, if I can take you in our claim form again to
18 paragraph 30, which is where we set out our case on
19 dominance, and I appreciate that the whether or not
20 Network Rail is dominant is, in a sense, off the table,
21 but we are operating on the assumption that it is.

22 Now, we say at paragraph 30 that:

23 "Network Rail occupies a dominant position on
24 the market for the operation and provision of access to
25 national rail network infrastructure."

1 We point out that they own almost all the national
2 rail network infrastructure. It has been somewhat
3 instructive in the course of this case finding out about
4 the various bits of lines that they don't own, like
5 the Heathrow Express, HS1, and so forth. But in terms
6 of what they own, which is the vast majority, they own
7 it.

8 We point out at 30.2 that train operating companies
9 and freight operating companies have to get access to
10 Network Rail.

11 But then we come to an important point at 30.3,
12 which is:

13 "Further or alternatively, suppliers of trackside
14 services to the rail industry ..."

15 I stress, "the rail industry":

16 "... have no option but to deal directly with
17 Network Rail to obtain access to rail infrastructure."

18 So if I can put it this way, if I am a supplier of
19 on-track plant and I want to hire out my vehicles to
20 Carillion in order to operate -- or whoever it may be,
21 in order to operate in that on-track plant market,
22 I need to have permission from Network Rail. That is an
23 aspect of the provision of access to its rail
24 infrastructure, in the same way that provision of access
25 to train operating companies is. There are different

1 groups here but it is the same fundamental point.

2 It is sort of reiterated at 30.4, which is perhaps
3 a subtly different point, which is that if you supply
4 services related to rail infrastructure, because
5 Network Rail is very important, and they are an
6 important part of demand, which is a different point --
7 but to focus on 30.3, the fundamental point is
8 this: Network Rail owns the land in the sense it owns
9 the land on which this whole rail industry happens in
10 the UK; it is a sort of monopolist landowner, if you
11 like. The key schemes constitute the terms on which
12 Network Rail allows access to its land, and anyone who
13 wants to have access has to comply with those terms,
14 even if they are supplying services to the rail industry
15 more widely and not to Network Rail. That is the point
16 and the problem.

17 So having got to that point, our case is then, if
18 Network Rail is fundamentally concerned with ensuring
19 that authorised persons have been audited to a certain
20 required standard that they meet certain objective
21 standards, then they can specify in open and objective
22 terms what the requirements of those audits should be,
23 both in terms of scope, so the question set, and in
24 terms of the quality to which they are audited. But
25 they do not, they specify RISQS.

1 In opening, I explained that the implication of
2 mandating RISQS in that way arises because RISQS, like
3 Achilles' own scheme, consists in bringing together
4 three elements that then have to be managed and packaged
5 by the scheme provider. So one is the standards
6 themselves, the sort of the question set. That
7 specification makes (inaudible) to various levels. If
8 you will recall, in bundle G1 we have the Network Rail
9 scheme requirements, and in bundle G2 we have
10 the various audit protocols; and they sort of specify
11 the standards at different levels. You may have
12 different levels of detail.

13 It is perhaps instructive to look in this respect
14 at the on-track plant scheme -- so you can put away
15 bundle A now, if you want, sir. So it is bundle G1/5.
16 On page 150 of that tab, you can see set out there
17 the on-track plant scheme operation rules. What we have
18 in the third paragraph is:

19 "To gain approval, a POS provider shall demonstrate
20 to the POS Review Panel that they have ..."

21 MEMBER 3: Sorry, where is this?

22 MR. WOOLFE: G1/6/150.

23 MEMBER 3: Thanks.

24 MR. WOOLFE: What we have numbered from 1 to 10 is a series
25 of sort of high level substantive requirements. So

1 the first one is:

2 "A fully documented management system and framework
3 for the safe delivery of OTP operations."

4 Second is:

5 "A competence management system."

6 Thirdly is:

7 "Adequate processes to enable effective
8 communication ..."

9 And so forth.

10 You will recall, sir, that those are the kind of
11 top, high level requirements that then feed through into
12 the on-track plant audit protocol, which is called
13 the "plant operation scheme", which for your note is at
14 G2/18. I am not going to take you to it now, but that,
15 as you will recall, sets out a more detailed
16 specification in respect of these similar requirements;
17 they overlap.

18 So in a sense, Network Rail has an internal
19 specification of what it wants plant operators to be
20 able to do, but it is entrusted to a more detailed
21 standard that is controlled by somebody else: that is
22 RISQS and the audit protocol.

23 So that is the first element that Network Rail has
24 sort of mandated over to RISQS.

25 Now, the second element is of course the audit

1 against the standard, and they are saying that only one
2 person can do that. The third element of a scheme like
3 RISQS, or indeed TransQ, is the IT services which manage
4 the information concerned. In a sense, as we have
5 explored in the evidence, the IT services that would be
6 necessary for the purposes of the authorisation schemes
7 are different in functionality to those that would be
8 required for procurement. But in practice, RISQS
9 provides both, a full set of IT services.

10 Now, the context is, as you will recall, those
11 elements are provided separately. So there was
12 reference to the RISAS scheme, which is the Rail
13 Industry Supplier Assurance Scheme, which relates to
14 certain products, where the standards have been
15 specified and held centrally, but you have competition
16 between two accredited bodies at the moment, and there
17 could be provision for more.

18 You will also have recalled me exploring with
19 witnesses the PAS 91 standard in the construction
20 sector, which effectively is an open standard
21 specification of information that has to be collected
22 and audited, but that can be audited by multiple
23 scheme-providers who agree mutual recognition.

24 To take another example, which is in the witness
25 evidence of Ms. Ferrier, her third witness statement, so

1 bundle B/5, at paragraphs 19 to 22 -- and I think it
2 might be worth just turning that up.

3 Rather than me read it out or start speaking before
4 you recall, sir, perhaps if I could invite you in fact
5 to read from paragraph 19 through to 22.

6 (Pause)

7 The only point I make about this is this, which is
8 it is an example of a scheme where safety is undoubtedly
9 serious and is taken seriously and in a very
10 intrinsically dangerous environment, offshore oil and
11 gas; and it is possible to operate on the basis of an
12 open standard with multiple people assuring against it.
13 At this stage, all I am saying is that this shows that
14 these functions can be separated out.

15 The point is fundamentally that by specifying RISQS,
16 Network Rail is choosing to specify all three of those.
17 So it is choosing to mandate that it is RISQS standards,
18 the audit protocols, which are applied, and it is
19 choosing to mandate that the audit is carried out by
20 RISQS; and, indeed, it is choosing to mandate that
21 everybody registers with the IT portal as well.

22 There is nothing wrong with providing a combined
23 service, it is what my client does, but the problems
24 arise when that becomes a closed system and it is
25 mandated to the industry.

1 Just to highlight one more point. It has been said
2 by the defendant that they are simply deciding who they
3 want to purchase supplier assurance from. That is one
4 of the ways in which they put their case. But I think
5 it is important to recognise, the schemes themselves do
6 not represent a purchase by the defendant as such.
7 The choice of RISQS that they mandate may reflect the
8 fact that the defendant has access to the relevant
9 system, but these schemes are not a contract between
10 the defendant and the RSSB. The contract between the
11 defendant and the RSSB as regards RISQS services is
12 a standard form contract. It is at G2/28. That is for
13 access as a buyer. Nothing in that contract imposes
14 this requirement.

15 These schemes are effectively, we say, an agreement
16 or concerted practice for competition law purposes, even
17 if they are -- I suspect they are -- have contractual
18 force in some respects; this is English law. But in any
19 event, they are an agreement or concerted practice for
20 these purposes. They impose a requirement on those
21 seeking authorisation from Network Rail to go and
22 purchase assurance from RISQS. Network Rail is already
23 a buyer on RISQS irrespective of this, but by imposing
24 this requirement, any supplier who wants to be
25 Sentinel-assured, or indeed any buyer who wants to be

1 Sentinel-assured, is required to go and purchase
2 services from RISQS; they have to register and they have
3 to pay for the audit.

4 So it is not simply about Network Rail deciding who
5 they want to purchase from.

6 MEMBER 3: Sorry, can I ask you a question here. I do not
7 know whether you are going to come on it. I think that
8 is very clear. One of the questions that was just going
9 round in my mind is that the example you use in relation
10 to Norwegian oil and gas, I think you are saying two
11 things: one is that the component parts of RISQS could
12 actually be separable activities, and they could be
13 procured -- they could be organised to be procured
14 separately.

15 MR. WOOLFE: Yes, could be done in-house separately or
16 procured separately.

17 MEMBER 3: Then you say: look at Norwegian oil and gas; you
18 have two schemes sitting next to each other. That is
19 all fine. I am just trying to unpick two parts of this.
20 So you have a single scheme that does a bunch of
21 elements, and you also have -- you are also asking us to
22 look at situations in which there are multiple schemes
23 that may or may not do all of those things. I mean,
24 I do not know whether each of those two schemes does all
25 of those four things, which suggest they can be

1 separated but in practice people buy them on a bundled
2 basis. That is not clear.

3 The second thing is, when you say you have
4 the Norwegian oil and gas industry using multiple
5 schemes, you don't have a single infrastructure owner
6 there --

7 MR. WOOLFE: No.

8 MEMBER 3: -- or operator, because I suspect there might
9 well be a difference between owner and operator. But
10 there you have multiple operators of the networks as
11 well. Whereas here we have a single operator of
12 the managed infrastructure choosing one bundled scheme.

13 MR. WOOLFE: Yes.

14 MEMBER 3: So your Norwegian analogy is not perfect.

15 MR. WOOLFE: No, it is not perfect, and I think -- first of
16 all to pick on one point: it is different in that
17 Network Rail, as I say, owns land on which a lot of
18 people need to have access to do various things. In
19 that sense, it is a kind of a platform, or a network
20 owner, however you want to put it. Certainly, standing
21 here, it is far from clear to me that anybody in
22 the Norwegian oil and gas industry does anything like
23 that. I think that is part of the point you are making,
24 sir. That is right.

25 MEMBER 3: Yes. I think the point is there are different

1 pipeline networks going through the Norwegian oil and
2 gas industry and they are going to be operated by
3 different people.

4 MR. WOOLFE: Yes.

5 MEMBER 3: So obviously they might each individually be
6 making decisions about where they get their schemes, so
7 you can have a world in which two schemes exist; that's
8 fine. But, actually, if each of them says, "I am going
9 to have a scheme, but I am going to have one scheme
10 which does all of these things", then we have
11 a situation in which it becomes perhaps standard or
12 normal that people do actually bundle their schemes and
13 buyers look to bundle their schemes.

14 MR. WOOLFE: Perhaps to clarify two points. First of all,
15 my point in referring here to the Norwegian oil and gas
16 example -- there are two points I would take here: one
17 is the one I was trying to make here, which is that, in
18 principle, one can separate out the standard from whom
19 provides assurance against it. I think Norwegian oil
20 and gas is an example of it, but they are operating to
21 a standard which certainly -- they may have -- may be
22 implemented slightly differently, but they are operating
23 a common standard to some degree, at paragraph 21.

24 MEMBER 3: Yes, but what I am not getting is whether
25 the supplier assurance -- the SAS providers are

1 providing bundles.

2 MR. WOOLFE: Yes, that -- perhaps I can clarify that. It is
3 no part of our case that the sort of vertical
4 integration, if you like, is a problem. All I am saying
5 is, in a sense, they are -- our difficulty is
6 fundamentally that they are --

7 MEMBER 3: But it is, because you have just said that what
8 RISQS has done is a bundle of things that could be
9 separated.

10 MR. WOOLFE: Yes.

11 MEMBER 3: What I am saying -- and then you have pointed to
12 Norway. I am just asking the question: but in Norway
13 those schemes are also bundled.

14 MR. WOOLFE: They are bundled, as I understand it, as
15 the assurance and the IT -- or assume that they are for
16 the moment. But they can all compete on the basis of
17 a common standard.

18 MEMBER 3: Yes. I get that.

19 MR. WOOLFE: So the standard is inseparable. That is
20 important for these purposes, because we can have a
21 situation here in rail where if Network Rail -- if there
22 is a common standard against which we are working, or
23 a common specification and Network Rail says, "I am
24 willing to accept certain things as assuring against
25 this specification", then at that point you could have

1 people who do bundle provision of assurance and IT, if
2 you like, who can both compete against it. It is
3 the separating out of the standard perhaps that I am
4 most interested in.

5 But I think it is worth recalling that Network Rail
6 is mandating all of these things perhaps for a different
7 reason, which is admittedly it would not be enough, I do
8 not think, for us to say Network Rail can specify
9 the RISQS standards but allow somebody else to audit
10 against them, because in a sense they would put
11 the standards potentially beyond the control of
12 the people doing the auditing on Network Rail. That
13 might be problematic.

14 Now, in terms of the effects of the RISQS-only
15 rule -- and if I can refer you to our -- I will just do
16 this very briefly -- our closings at paragraph 23. Now,
17 the very direct effect of it is that there is demand
18 created in fact by the key schemes for certain
19 assurance, for assurance against the requirements of
20 the Sentinel module, the on-track plant module and
21 the safe system of work planning module and so forth.
22 That demand is reserved entirely to RISQS. That is
23 point one. It is an important point because that is
24 a large chunk of the market by value, as we are going to
25 come to. We would say that that in and of itself,

1 the point we make at paragraph 24.1, is enough to be
2 a restriction of competition. So that was, we say,
3 a good analogy with the situation in *Socrates*
4 in those paragraphs.

5 But the second point, which requires more evidence
6 to get to, is there is then an indirect effect, because
7 by, we say, making all of that RISQS -- all of that
8 audit work that is related to Sentinel and the on-track
9 plant, and indeed the principal contractor licensing
10 scheme, by arranging all of that non-contestable, it
11 effectively makes it non-viable -- and that is the point
12 we make at paragraph 25 -- for a second supplier
13 assurance scheme to operate in this industry, because
14 what is associated with that is not just all
15 the audit revenue, the day-rate for going and doing
16 the audits, but also all of the registration fees for
17 those people who are required to do it, and it is all
18 the registration fees for the buyers who are interested
19 in those suppliers as well. So that all that is left
20 over is those suppliers who do not require any of these
21 audits.

22 Just as a matter of fact, this is, from a supplier
23 assurance point of view, very low value stuff, because
24 by definition they are not doing anything that anybody
25 is that fussed about checking that hard. In practice

1 they pay, I believe, a relatively small fee, and they
2 get their answers of certain core information verified,
3 which is checked, on a desktop basis, but it is not
4 at all the same thing. So we say at paragraph 25.2 that
5 that is the bit that is left over at the moment, and it
6 is not economically viable to chase that.

7 The only other way in would be to sort of try on
8 a sort of freestanding basis to say: although we do not
9 have all that audit work, and although we do not have
10 all of the information that arises from that audit work,
11 we are nonetheless going to try and come in and just
12 create a supplier assurance service for buyers that is
13 so whizzy and amazing that even though none of
14 the actual qualified suppliers are on the scheme,
15 somehow we will generate work. However good we think
16 the things we can do are, it is just not big enough to
17 overcome this disadvantage, and in practice it means
18 that competition in the market is not viable once that
19 demand has been sucked up.

20 Sir, I recall that we were going to have a half-hour
21 lunch break, is that right? Would that be a convenient
22 moment to stop, or if you have more questions, I am
23 happy to carry on.

24 THE CHAIRMAN: I think we would prefer you to carry on until
25 1.30.

1 MR. WOOLFE: Okay.

2 Now, in terms of the -- I am going to come back to
3 the economic analysis in a bit, but I wanted to comment
4 briefly on the evidence that you heard, sir.

5 THE CHAIRMAN: Yes, I mean, one thing I would like you to
6 come back on is the point you make in paragraph 9 and
7 elsewhere, that it is relevant to take into account
8 effects in markets other than simply the rail industry,
9 but you do not need to do that now, but at some point I
10 would welcome that.

11 MR. WOOLFE: Well, actually, I can take that now, which is,
12 what is required under Chapter I and we turn to
13 Chapter II as well, what both section 2 and section 18
14 protect is the process of competition. Indeed, my
15 learned friend I think said that in opening. Our case
16 is based on the fact that there is a restriction of
17 competition in the supplier assurance market in the rail
18 industry.

19 Now, we are saying that there are benefits that flow
20 from that competition outside the market, and that is
21 different from saying competition is restricted outside
22 the market. In a sense, it is not clear that it is.
23 What Achilles can offer outside the market may be
24 restricted, but only really restricted as regards
25 the rail segment, if you see my point.

1 I think Professor Vickers, at the time he was
2 chairman of the Office of Fair Trading, said -- what he
3 called the "zero 1 fallacy" of, having done your market
4 definition, just looking in the market and refusing to
5 look outside it. A market definition is only ever
6 a tool to analyse competitive effects and effects on
7 welfare. So I think I would adopt that, if I may. So
8 the effect on competition we are looking at,
9 the restriction of the process of rivalry, is that
10 inside supplier assurance in the rail sector, but it may
11 have implications for welfare outside the market.
12 Indeed, that commonly happens in a sense because, in
13 a situation where you have a vertical chain of markets
14 with suppliers going down them, there can be
15 a restriction of competition upstream, prices get raised
16 and then the welfare effects get passed down because you
17 get pass-through. So it is not an uncommon situation to
18 have welfare effects arising in different markets from
19 the one where the restriction of competition occurs.

20 THE CHAIRMAN: No disrespect to Professor Vickers, do you
21 have any legal authorities to support that approach?

22 MR. WOOLFE: I may need to have a think. There were
23 definitely of number of authorities to the effect --
24 indeed, my learned friend may have cited them in his
25 skeleton that it is about protecting the process of

1 competition not specifically competitors, which is
2 a related point. But, in a sense, it is not a key part
3 of our case --

4 THE CHAIRMAN: No, I understand that, yes.

5 MR. WOOLFE: -- we are founded on the effect on competition
6 here, not on --

7 MEMBER 3: But it does have implications, actually, for
8 the broader analysis, because it is relevant -- it
9 seemed to me that the point you raised might still be
10 relevant if we come to spend some time on objective
11 justification.

12 MR. WOOLFE: Yes.

13 MEMBER 3: Because then you are weighing -- in non-legal
14 terms you are weighing costs and benefits. If you think
15 about it partly from the point of view of the DomCo or
16 the party to an agreement under 101, and you are
17 thinking what is his compliance burden, and what is his
18 duty in the 102 sense, he or she is then weighing up
19 the impact of their actions. This analysis suggests
20 they have to have sufficient foresight to think not just
21 about the impact of their actions and
22 the proportionality of their actions in relation to
23 markets they can foresee, and which have
24 a Tetra Pak-type nexus with their dominance, but they
25 have to look beyond that. That, for me, becomes quite

1 an interesting -- that is quite a high test.

2 MR. WOOLFE: It is quite a high test.

3 MEMBER 3: All I am saying is it is quite a high test if

4 a dominant company, when considering the objective

5 justification of what he does, has to think, "Okay, I am

6 Tetra Pak, I understand what I am doing in the market

7 for cartons and machinery, those are related, that is

8 fine, but now you are saying I have got to" -- and it is

9 not that Network Rail are in the supplier assurance

10 market, because your impact here is on supplier

11 assurance --

12 MR. WOOLFE: Yes.

13 MEMBER 3: -- or managed supply chain products.

14 MR. WOOLFE: Yes.

15 MEMBER 3: It is not really within the obvious purview --

16 MR. WOOLFE: No, in terms of --

17 MEMBER 3: Of Network Rail. Do you know what I mean?

18 MR. WOOLFE: In terms of the welfare benefits, yes, you are

19 right, sir.

20 MEMBER 3: Yes, so it is quite tricky if this is relevant to

21 --

22 MR. WOOLFE: Well, I think in that respect, there may be

23 a relevant difference between -- I will try to avoid

24 referring to the provisions, but Section 9 on the one

25 hand and objective justification under section 18. In

1 that, if -- you will see it in our closings at -- I need
2 to find this for the moment. In the end, in our case,
3 under Chapter II, if you made your way all the way to
4 the back of this, at paragraph 85, it dealt there with
5 the question of the basic definition of "abuse", and
6 suggests that there are in fact two components to
7 the basic definition, one of which is looking
8 at anti-competitive effect, but there is undoubtedly in
9 the case law an evaluative component that comes in in
10 various ways in different contexts.

11 Now, as regards objective justification, it is often
12 treated as though it is an entirely separate element,
13 and the authorities do show -- and italics Purple
14 Parking is the one that is in the authorities bundle --
15 that it is correct to separate it out as a stage of
16 analysis. But it is not a separate -- it is not a full,
17 freestanding defence, as it were. In a sense, it is
18 part of the same question: you cannot really be abusing
19 your dominant position unless what you are doing is not
20 objectively justified. I think that relates to
21 the burden of proof point that my learned friend makes,
22 and I think he makes a good point in his skeleton, which
23 is that what the Court of First Instance decided in
24 Microsoft is essentially that it is for the defendant on
25 objective justification to advance credible arguments in

1 evidence which support the objective justification, but
2 it is then abuse still has to be shown in the round. To
3 an extent, just as regards Section 18 -- some may say
4 this is a point against me -- but it deals, I think,
5 partly with your concern, sir, that in a sense they can
6 advance what is credible for them, and then if it
7 requires a wider consideration, so be it, but it is not
8 them who have to be coming up with the stuff.

9 Under Section 9, if I can put it that way, it is
10 slightly different, because the test is quite specific
11 there, which is they have to show certain improvements
12 in productive efficiency and technical and economic
13 efficiency and so on. Those have to be -- you have to
14 show that what you are doing is indispensable to them.
15 That is quite a specific and structured analysis, that
16 it is not -- it is sometimes described as "weighing" but
17 it is not actually in terms about weighing, it is
18 slightly different in nature.

19 Now, I think we started down that particular tangent
20 with a question. Did I answer your question, sir?

21 THE CHAIRMAN: Yes, I think you did for present purposes.

22 MR. WOOLFE: I do recall there is the point about authority
23 for the proposition that we are focusing on effect on
24 competition in this market but can consider effect
25 outside it. I will consider that point.

1 Now, in terms of the witness evidence, I should
2 comment on it briefly, sir, because I have not in
3 written closing.

4 You heard from three witnesses for the claimants:
5 Ms. Ferrier, Mr. Nelson and Mr. Chamberlain. I would
6 submit that all three of them are entirely honest and
7 reliable witnesses who sought to answer the questions
8 directly.

9 As regards the witnesses of fact for the defendant,
10 all of them are honest without question, (unclear)
11 there. About certain of them, we do make certain points
12 about the reliability of their evidence, just in the way
13 things go.

14 As regards Ms. Pearson, I would say entirely
15 reliable and answered the questions in a very
16 straightforward way, and I make no further comment
17 beyond that.

18 Mr. Matthews and Mr. Berwick, as regards their oral
19 evidence they answered the questions directly and were
20 entirely, I would say, reliable. Their written
21 evidence, with respect, was somewhat imprecise in its
22 terms, and thus has to be read very carefully by
23 reference to what they then said orally when it was
24 tested.

25 I would say to some extent the same is true of

1 Mr. Cooke as well.

2 Now, as regards -- if I may be so disrespectful as
3 to group witnesses together, for the sake of time --
4 Mr. Blackley and Ms. Scott, both of them were, I would
5 say, honest and reliable witnesses in terms of what --
6 they were trying to tell the truth as they saw it, but
7 they were both somewhat -- they were trying to make
8 points to a considerable extent, both in their written
9 evidence and in oral evidence, and we say that does
10 affect the reliance that can be placed on some of what
11 they were saying.

12 Now, the reason for going through this in this way
13 is to get to Mr. Spence and Mr. Prosser, where
14 the problem becomes a bit more of interest.

15 Now, Mr. Spence, both in writing and orally, I would
16 submit, sir, was effectively seeking to argue a case or
17 to give opinion evidence on safety issues. Now, I am
18 not going to argue that that is inadmissible, because
19 I think, given this process, it would seem somewhat
20 churlish. But it did become apparent that Mr. Spence
21 did not have close knowledge of the facts relating to
22 supplier assurance.

23 If you will recall in particular he was unaware that
24 the Health and Safety Management scheme did not record
25 what it was that RISQS actually did, and he was working

1 off the basis that what was said in the Health and
2 Safety Management scheme was correct. I think he used
3 the phrase it was "news to me" that is was not. So as
4 regards, he was somewhat quite removed from the actual
5 facts.

6 I would suggest that in terms of his opinions, in
7 the end they were reduced to making quite broad and
8 general points about safety, simply on the basis that
9 greater complexity led to greater risk at some level,
10 and if you could avoid risk, you should avoid risk,
11 therefore you should avoid complexity, therefore this
12 should not happen. That is essentially what Mr. Spence
13 said.

14 I would say there is limited reliance that one can
15 place on that from a witness who is employed by the
16 defendant and in a sense is in a slightly defensive
17 mindset in these proceedings.

18 As regards Mr. Prosser, actually no questions in
19 person: Mr. Prosser was of course honest and reliable
20 and direct and sought to answer the questions put.
21 I would submit two things. First of all, he suffered
22 from the same misapprehension as to what RISQS actually
23 did as Mr. Spence, and in no sense could that be said to
24 be his fault; he is a regulator who has a purview over
25 a vast array of things, and he does not deal with risk

1 day to day and therefore why would he know?

2 My comment I would make, sir, is about the very last
3 part of his statement, where he in one sentence says
4 something would be undesirable from the point of view of
5 the ORR. As you will recall, he did accept in
6 cross-examination that that is not a formed policy view
7 of the ORR, nor was it a decision about any specific
8 proposal on whether it should be allowed.

9 I would suggest that nor is it really opinion
10 evidence of a kind that the Tribunal can readily grapple
11 with. It just seemed to reflect he had heard Mr. Spence
12 reflect concerns, and therefore he had some concerns.
13 I would say it goes no further than that.

14 That is important in circumstances where, as he said
15 himself, and I believe it is paragraph 25 of
16 Mr. Prosser's statement, that if Network Rail wanted to
17 change its Health and Safety Management System, then
18 that can be reviewed by the ORR if it has a significant
19 impact on safety. I must apologise. It may be it was
20 "major", it may be it was "significant". I cannot
21 recall the precise term, but there we are.

22 Turning, if I may, to the economic evidence on
23 effect on competition, because in a sense we are zeroing
24 in on -- and I will deal with not the character of
25 the witnesses but the substance of it.

1 If you can turn to paragraph 32 of our closings,
2 we -- in a sense, that is where we set out our case as
3 regards the economic evidence, that the realistic
4 counterfactual by reference to which effect is to be
5 judged is one in which the RISQS-only rule is replaced
6 in each of the key schemes by provisions which specify
7 open and objective audit requirements, and when judged
8 by reference to that counterfactual, as we say
9 Mr. Parker did correctly, one can see how
10 the anti-competitive effect arises. It is what we have
11 at 32.1.3, that his view is if Network Rail had not
12 refused recognition, Achilles would have entered
13 the market, and you would either get a sustained period
14 of competition, where you do get two schemes in
15 the market on a sustainable basis, and there were plenty
16 of -- sorry, the *EPIM* case is perhaps an
17 example of that in North Sea Norwegian oil and gas, we
18 have sustained competition between schemes. Or, indeed,
19 you could have a period where somebody tries to enter
20 and ultimately it fails, either the entrant fails or
21 indeed the incumbent fails, but because you have
22 a process of competition, there are some benefits that
23 flow from that.

24 He, to be fair, was not able, I think, in his final
25 report to express any opinion as to which of those

1 counterfactuals is more likely, but he did consider that
2 those were the relevant counterfactuals. He considered
3 there was an effect on competition with a welfare effect
4 when judged by reference to either of them.

5 Then you have the likely consumer detriment which he
6 identified in those paragraphs in terms of prices, in
7 terms of incentives to quality and so forth.

8 Differentiation of portals in the market, that is
9 connected to things outside the market, and we do say
10 that is a -- it is a welfare effect. It is not
11 something I say we have to prove in order to succeed in
12 this case.

13 Now, Mr. Holt's analysis, as you will recall from
14 cross-examination yesterday and the day before, started
15 on an entirely different basis. He his analysis of
16 counterfactuals began on the premise that the defendant
17 would, for procurement purposes, have to multi-home and
18 have to be on both schemes. So he had two big sets of
19 counterfactuals, but both of those big sets of
20 counterfactuals assumed that same point and then he had
21 a variety of different permutations. He did accept
22 yesterday, sir, that the defendant's single-homing was
23 at least a potential counterfactual. He did accept
24 that. It is not in analysing his report at all, and we
25 say Mr. Parker's evidence is the one that says: no, in

1 fact that is the likely counterfactual; that is what
2 would happen. We say that is to be preferred.

3 Now, the other point which we flag, which I think is
4 an important one, is even within the confines of his
5 analysis, he assumed essentially that buyers would --
6 other buyers would stay on RISQS. He assumed that on
7 the basis that technically there is no requirement on
8 them at the moment not to use another portal. Because
9 they are not doing that at the moment, why would they
10 want to in the future? They would stay on RISQS. We
11 say that is fundamentally unsound, because what I have
12 taking you through, in terms of it is not realistic for
13 there to be another portal in the market at the moment
14 in terms of one that attracts suppliers and so forth.
15 So there is simply no benefit of buyers signing up to
16 another scheme at the moment.

17 If there was competition -- sorry, if there -- if
18 a second scheme could carry out assurance for
19 the purpose of the authorisation schemes, then they
20 could gain a sufficient critical mass of suppliers and
21 buyers to be viable, and then buyers may well choose to
22 use them.

23 Now, there are two points on the law which I wanted
24 to take you to. The first one -- actually, perhaps
25 I can deal with this without going to the case.

1 If you recall the *Dutch Cranes* decision,
2 the one I took you to in opening, sir, and -- perhaps it
3 is worth turning it up.

4 The general court decision on appeal -- this is in
5 volume 2 of the authorities bundle at tab 24. If we go
6 through, the relevant analysis of the court starts on
7 page 301 of the report at paragraph 132.

8 Just to remind you of the basic facts of the case,
9 the SCK was a certification body that had been set up
10 effectively by the crane industry in the Netherlands,
11 and there was a -- you had, in order to operate -- it
12 offered certification. It would not allow you to hire
13 in cranes that were certified by anyone else, if I sort
14 of summarise.

15 Then over the page, paragraph 133 continues:

16 "... the Commission took the view that
17 the anti-competitive nature of the prohibition on hiring
18 could be assessed only by reference to the nature of the
19 certification system with which that prohibition was
20 associated ... [and] laid down four criteria ...
21 openness, independence, transparency and acceptance of
22 equivalent guarantees ..."

23 It is fair to say that all four of those criteria
24 have made it through into the Commission's own
25 horizontal guidelines, but the court here only in fact

1 comments on two of them.

2 At 135 they refer to the lack of openness in
3 the certification system and the failure to -- sorry,
4 that is the two things they are going to talk about:
5 the lack of openness and the failure to accept
6 equivalent guarantees. The lack of openness is what
7 they mean at paragraph 136, where they are talking about
8 refusing to hire cranes from uncertified firms.

9 137, which I think is what I want to take you to:

10 "The second criterion, relating to the acceptance of
11 equivalent guarantees offered by other systems, is also
12 pertinent. The prohibition on hiring preventing
13 certified firms from calling on the services of
14 uncertified firms even if they provide guarantees
15 equivalent to those of the certification system cannot
16 be objectively justified by an interest in maintaining
17 the quality of the products and services ensured by
18 the certification system. On the contrary, the failure
19 to accept equivalent guarantees offered by other systems
20 protects certified firms from competition ..."

21 Now, the point I would make is this: effectively,
22 although it is framed in terms of objective
23 justification, it is also in a sense assessing
24 the counterfactual and identifying the counterfactual,
25 because you will recall at paragraph 133, this is

1 the Commission taking the view that the anti-competitive
2 nature of the prohibition on hiring can be assessed only
3 by reference to these factors. So it is intrinsically
4 comparing the situation where you have got this refusal
5 to accept other guarantees with a system where you did
6 allow them. So the simple point to take perhaps is that
7 the counterfactual to consider here is one where
8 Network Rail does allow other people to assure, and that
9 is the basic comparison which we are engaged in;
10 provided that they are equivalent to whatever standard
11 it wants to set.

12 Now, the other authority I wanted to take you to was
13 the italics Socrates case, which is in authorities
14 bundle 3. I think I can deal with that point swiftly.
15 This is at tab 55 of the bundle, so right at the back.

16 Now, the basic facts of this case were that the Law
17 Society was running an accreditation scheme in relation
18 to conveyancing, and people who joined the accreditation
19 scheme got a certain quality mark, and you had to do
20 various things like use certain forms and so on and
21 comply with certain standards. But another thing that
22 you had to do was take certain courses by way of
23 training, you or your staff did. Not only -- so having
24 in a sense created the demand for training by
25 establishing the scheme and saying, "If you want to be

1 a member, you have to have training", it also required
2 that that training was purchased from the Law Society
3 and no other training was allowed to be purchased.

4 Now, *italics* Socrates was a firm which had been
5 providing training of a similar type for a long period
6 of time, anti-money-laundering training. The claim was
7 effectively that this was restricted competition.

8 Now, the points I would like to take you to are
9 in -- there are two points effectively. One starts at
10 paragraph 155 of the judgment and the second one then
11 goes on at 161 to 164. I think I can deal with them
12 both now.

13 It is a point that, to be fair, I was making in
14 the case.

15 The court discussed an authority the Ordem dos
16 Técnicos, which I keep on referring to as "Spanish
17 accountants", I understand it is actually Portuguese
18 accountants, where something similar had happened:
19 the regulatory body had reserved -- sorry, it is
20 page 321, I should have said, of the bundle.

21 The regulatory body had reserved a certain part of
22 the training to itself. If I can pick it up at 158
23 where Mr Justice Roth is -- the Tribunal rather, is
24 discussing the Ordem dos Técnicos case, and it says
25 there:

1 "... the court noted ..."

2 The court in *Ordem dos Técnicos*:

3 "... that the effect of the regulation was
4 artificially to segment the market for the compulsory
5 training of chartered accountants. On a review of
6 the specified subject-matter of the two categories of
7 training, the Court considered that it appeared the two
8 categories of training 'could be regarded, at least in
9 part, as interchangeable'."

10 So this was training that could only be provided by
11 an approved provider and training that could be provided
12 by others and that a distinction between them was not
13 justified. Then the court found at paragraph 159 of
14 the italics *Socrates* judgment, reporting on the *Ordem*
15 *dos Técnicos* case, the court recorded that there was
16 a distortion of competition.

17 The point I want to take from this, sir, is what is
18 at 160 of the judgment:

19 "We think this demonstrates that the question of
20 effect is not to be assessed simply on the basis of
21 market share or complete foreclosure which can result in
22 a segmenting of the market and a distortion of the way
23 competition operates affecting one segment."

24 So if -- although there would, absent a certain
25 requirement, be a general market for certain services,

1 if a rule segments the market and reserves a chunk of
2 the market, one part of the demand, exclusively for one
3 provider, that in and of itself can be an appreciable
4 effect on competition. That's the simple proposition.

5 The second point I wanted to take you to on this was
6 the need to focus in on precisely what it is the
7 counterfactual is in quite a close way. So at
8 paragraph 161 the Tribunal make they preliminary
9 observations:

10 "First, assessment of effect requires comparison
11 with a notional counterfactual situation where
12 the challenge, practice or restriction did not exist.
13 In this case, that does not mean a CQS ..."

14 That was the quality scheme in question:

15 "... with no requirement for the relevant training
16 but a CQS where the relevant training did not have to be
17 obtained from the Law Society."

18 Then it makes two other points.

19 Then there is a discussion of the evidence and
20 the factors.

21 At paragraph 164, over on page 324:

22 "In the light of the above, once the CQS became
23 a must-have product to which close to 60% of firms
24 active in residential conveyancing subscribed, we are
25 satisfied that by reserving at least a significant part

1 of the demand from such firms for
2 [anti-money-laundering]/mortgage fraud training from at
3 least a significant number of those firms at any one
4 time, potential competition from other suppliers of such
5 training was actually or potentially impaired, and that
6 this could discourage entry by other suppliers into this
7 segment of the market."

8 Now, the anti-competitive effect that the Tribunal
9 is identifying there is, we say, precisely what the
10 anti-competitive effect is here, because what the rules
11 in the key schemes do is reserve a huge chunk of demand
12 in this market for the audit services for Sentinel and
13 so forth to RISQS, and render them non-contestable.
14 That in and of itself is a restriction of competition.
15 It may be justifiable for other reasons, and we will
16 come on to that. But simply of itself, it restricts
17 competition, because you are looking at a counterfactual
18 in which the schemes have a requirement for audit but do
19 not say it must be RISQS. That is the short point.

20 Now, sir, is that a convenient moment? Half an hour
21 and back at 2 o'clock.

22 THE CHAIRMAN: Yes.

23 (1.32 pm)

24 (The short adjournment)

25 (2.06 pm)

1 MR. WOOLFE: Sir, if I can begin by dealing with
2 the question about whether there is authority on
3 the proposition of taking into account the welfare
4 effects outside the market. One of the virtues of
5 having so many authorities is that when you find in
6 a textbook the authority you are looking for, it happens
7 to be in there.

8 So if I can take you to authorities bundle 3 at
9 tab 52, and behind that tab is the case of
10 *Mastercard v European Commission* and this is
11 a judgment of the Court of Justice, and in this case it
12 was an appeal that has gone from Commission decision to
13 the General Court to the Court of Justice regarding
14 the multilateral interchange fee in the payment card
15 system.

16 The nature of the restriction effectively in that
17 case -- in all these payment card cases is that by
18 setting the fee that sits between the two banks in
19 a payment card system it can effectively have
20 restrictive effects in particular by placing a floor
21 under the prices charged to shopkeepers and to card
22 users on the other. So that was where the restrictive
23 effects were arising.

24 Now, at page 77 of this judgment -- I will start on
25 page 76, actually, at paragraph 235. An argument had

1 been raised -- 234 -- that the General Court wrongly
2 ignored the two-sided nature of the system, and at 235
3 the court noted the point that the examination of
4 the first limb of exemption, so technical and economic
5 process, or improvements in production or distribution
6 must be undertaken in light of the factual arguments and
7 evidence. So hardly surprising.

8 Then at 276 it establishes --

9 MR. FLYNN: 276?

10 MR. WOOLFE: Sorry, 236. I do apologise:

11 Required the nature and specific features of
12 the sector concerned by the agreement -- so
13 the sector -- to be taken into account:

14 "Furthermore, under [Article] 81(3) EC [now 101(3)]
15 it is the beneficial nature of the effect on all
16 consumers in the relevant markets that must be taken
17 into consideration ..."

18 Obviously "relevant" will have a certain meaning and
19 I suggest it is not just the market on which
20 the agreement necessarily itself is made, it can be
21 other markets too:

22 "It follows from this that, in the case of a
23 two-sided system such as the MasterCard scheme, in order
24 to assess whether a measure which in principle infringes
25 the prohibition laid down in art 81(1)EC - insofar as it

1 creates restrictive effects in regard to one of the two
2 groups of consumers associated with that system - can
3 fulfil the first condition laid down in art 81(3) EC, it
4 is necessary to take into account the system of which
5 that measure forms part, including, where appropriate,
6 all the objective advantages flowing from that measure
7 not only on the market in respect of which
8 the restriction has been established, but also on
9 the market which includes the other group of consumers
10 associated with that system, in particular where, as in
11 this instance, it is undisputed that there is
12 interaction between the two sides of the system in
13 question. To that end, it is necessary to assess, where
14 appropriate, whether such advantages are of such
15 a character as to compensate for the disadvantages which
16 that measure entails for competition."

17 So here the court is saying, yes, you can look at
18 advantages in another related market for the purpose of
19 granting exemption. So these are benefits of
20 a restriction, you can look outside the market.

21 Now, they place a restriction on that at
22 paragraph 242, and you can read it, but essentially what
23 they go on to say is: if you have a restriction in one
24 market and all the benefits that are being put forward
25 arising in another market, that is not enough; at least

1 some of the benefits have to arise in a market by
2 the restriction --

3 MEMBER 3: But in these cases is the other market always
4 the other one of the two-sided markets, because your
5 case is slightly different, is it not?

6 MR. WOOLFE: It is different, I accept that, but I would
7 stress in paragraph 247 the words, four lines up in
8 the bottom of 237:

9 "In particular where there is an interaction between
10 the two sides of the system."

11 Now, there are a range of other authorities cited.
12 It is paragraph 3.027 of the current edition of Bellamy
13 & Child on this same point. This happens to be the one
14 that is in the bundle, therefore I have taken you to it.
15 If necessary, we could always put in a short written
16 submission on further points.

17 But in a sense, I have a separate point which in
18 a sense disposes of this, which is, what we are talking
19 about is not whether some additional benefits can be
20 taken into account but really whether restrictive
21 effects that flow through on to another market can be
22 taken into account, and that in fact is quite well
23 established. There are plenty of cases where, both in
24 the dominance context and in the agreements context,
25 anti-competitive conduct on one market has an effect on

1 another. So an example in particular I am thinking
2 of -- admittedly in the context of dominance -- was
3 the Google and Streetmap case, which I do not think we
4 have in the bundle -- I will be corrected if I am
5 wrong -- where Google was doing something in relation to
6 search that was then having an effect on the mapping
7 market, and it is quite trite that one can take into
8 account --

9 MEMBER 3: They were in mapping.

10 MR. WOOLFE: They were in mapping --

11 MEMBER 3: One of the issues in that case is that they were
12 doing something in search to facilitate their own --

13 MR. WOOLFE: Yes, I --

14 MEMBER 3: I still think what the problem here -- well, it
15 is not a problem, it is a difference --

16 MR. WOOLFE: It is a difference --

17 MEMBER 3: -- which is we are talking about effects in
18 a broader supplier assurance market, which is not
19 a market that Network Rail participates in.

20 MR. WOOLFE: Yes, we are talking about, we would say,
21 harmful welfare effects arising in a broader context,
22 that is right, but arising from a restriction in which
23 we would say Network Rail participates.

24 Now, it is true, and we fully accept, that
25 Network Rail does not itself participate as a supplier

1 in providing supplier assurance services to anybody, but
2 that does not tell you whether or not there is
3 a restrictive effect. It may go to motivation and so
4 forth, but that is not a necessary element of the claim.
5 Anyway, I hope that is of some assistance on that point.

6 I had, I think, two more points on effect on
7 competition before going on to justifications, if I may.
8 The first point is simply to reiterate that our -- what
9 is unusual about what Network Rail is doing is that it
10 is -- it in a sense goes back to the point that it is
11 not simply purchasing supplier assurance services,
12 because it is foreclosing the choices of other
13 participants in the market. It is not simply saying,
14 "We are going to buy from RISQS". By using these
15 schemes, it is imposing that same choice on other
16 buyers, both buyers who are part of its own supply chain
17 and buyers who are not part of its supply chain, and
18 that is, we say, a highly unusual feature. Network Rail
19 is only part of the ultimate demand for these services,
20 it is not the entirety, and the other buyers, and in
21 particular those buyers who do not form part of
22 Network Rail's supply chain, are very important.

23 To take, in a sense, a concrete -- "a concrete
24 example" perhaps is a bit of a funny term with
25 a construction firm, but if you think of one of the big

1 construction firms like Costain or Skanska, whose names
2 we saw in the OJEU notice, they provide a wide range of
3 services both to Network Rail, potentially to other
4 infrastructure providers elsewhere in the country, HS2
5 for example, HS1, Heathrow, whoever it may be, or
6 the train operating companies who operate sidings, and
7 railway stations and so forth. Now, if Network Rail
8 says, "We are being to allow other supplier assurance
9 schemes to come into the authorisation space", if I can
10 call it that, "But we, Network Rail, are going to stick
11 with using RISQS for our procurement", then as
12 a supplier, and as a supplier to Network Rail, say
13 Costain or Skanska would -- I'm sure it would want to
14 join RISQS as supplier, but it would not necessarily
15 require them to join as a buyer, and they are themselves
16 a buyer of services, of buying in on-track plant
17 supplies for example, or workforce who may come and work
18 for them through recruitment companies, and they will be
19 buying those both in other sectors entirely, but they
20 will also be buying them, you know, to provide services
21 potentially to other infrastructure managers, or train
22 operating companies or so forth. We say buying, in
23 a sense sucking up all the demand in this market,
24 ensuring that all -- everybody is audited by RISQS and
25 thus leaving no scope for a competing supplier to be

1 there, this effectively constrains the choice of Costain
2 or Skanska as a potential buyer.

3 So there is quite a complex web of supply chains
4 here. It is not simply a Network Rail sits at the top,
5 then tier 1 contractors, tier 2 contractors and so on.
6 That model of the world is not reality, and if it were
7 reality, then Achilles probably would not be here
8 wanting to get the relief that it is seeking.

9 Now, the other point on effect is contestability.
10 This is a point that was raised by the Tribunal either
11 yesterday or the day before. Now, this is a point that
12 is, I understand, picked up at paragraph 2 of
13 Network Rail's closing, and they seek to imply that
14 the size of the market opportunity that is available
15 to us is small, and I just need to address that,
16 I think, for a moment. Now, first of all, what really
17 matters in this case is not the number of subscribers
18 you are talking about, but there was some reference in
19 evidence to the raw numbers, and the raw numbers, if you
20 happen to want them, are in bundle H21 on page 5948, and
21 you can see large numbers of subscribers, I think
22 4,300-odd active subscribers and 2,488 who require an
23 audit. But the raw numbers are not what matters, what
24 matters is the value, because that is what a supplier
25 assurance provider like my client is interested in, it

1 is: what money can I earn from operating in this space?

2 If you look at the value of this market,
3 Network Rail is focusing, in paragraph 2 of their
4 closing, on simply the audit, and that is not in fact
5 the right measure, because what we are saying is that we
6 should be allowed to provide the assurance that is
7 required under the authorisation schemes, but if you
8 audit people, they also register with you and you also
9 seek to be there in the procurement space, so it is not
10 simply a matter of looking just at the audit revenue.
11 So the comparison they are doing here is not the right
12 one.

13 Now, in Ms. Ferrier's first witness statement, going
14 back quite some time now, back to October -- this is at
15 bundle B/1 -- she referred at paragraph 17.1 to an
16 estimate that Achilles had made, or a forecast of what
17 its revenue from renewals might be in 2018/19, and she
18 compares it to the actual, which is tiny. That is
19 the effect of foreclosure. That document is in
20 bundle C1/5, and there is a spreadsheet, effectively,
21 and this was a -- I am afraid I am not quite sure of
22 the date of this, but this is a contemporaneous forecast
23 by Achilles for that year, and what you can see at
24 the top are two rows labelled "Audit" and "CSMS".
25 I understand that is part of second stage audit. Then

1 we have, in a sense, the total, "FY19" -- full year
2 19 -- "grand total". You can read along to
3 the right-hand side. You are looking at 6,137,900, so
4 6.1 million being their sort of estimate of
5 the continuing size of the market, and then you have
6 a series of estimates applied to it assuming different
7 retention rates for different stages of the process.

8 MEMBER 3: Sorry, did you say what "CSMS" is?

9 MR. WOOLFE: So CSMS is what, I think, elsewhere has been
10 called "verification", so where information is provided
11 by a supplier, a fee is charged for verifying that it is
12 correct, that the company exists and so forth, whereas
13 audit is the actual activity of going out and going to
14 the offices and checking paper on site and so forth.
15 But nonetheless, the total that it comes to for
16 the market size is 6.13 million, yes?

17 Then, if you read down the right-hand column, they
18 are applying certain assumptions to how much business
19 they might retain, which in a sense does not concern us
20 because it is not what happened, and they estimate that
21 they could retain the 5.4 million, and that is
22 the 5.4 million-odd figure that appears in
23 paragraph 17.1 of Ms. Ferrier's statement, to explain
24 where it comes from.

25 The important point to note is that the value that

1 is associated with auditing is not simply just the fees
2 you get from being charged audit, it is all the revenue
3 you get from the people by virtue of having them on your
4 platform, and it is not just the suppliers, but also
5 the buyers who are associated with them. So we would
6 take issue with that calculation that is done in rough
7 form at paragraph 2.

8 MEMBER 3: But that number is not broken down as between
9 principal contractors, Network Rail as a contractor,
10 non-network Rail buyers?

11 MR. WOOLFE: No, and in that regard, if you look at, in our
12 closing, we deal with it -- there are two footnotes that
13 touch on similar points and I am not too sure that I
14 have the right one. So footnote 1 and footnote 5, and
15 I think footnote 5 is the first one I want to go to, for
16 which I apologise, which is -- so footnote 5 is to
17 paragraph 25.2. Here is the point where we are
18 complaining about, in the present situation, so
19 the actual, effectively all we can do is compete for
20 the relatively low value work of verifying basic
21 registration details, and it also makes the point that
22 the -- so this refers to the spreadsheet that my learned
23 friend put to Mr. Parker on Wednesday. So the basic fee
24 for simply registering for one product code is £365, and
25 a basic fee for registering for even up to 24 product

1 codes is not much more. By comparison, the rate for
2 auditing is quite substantially more.

3 But also, beyond that, the problem at the moment is
4 you can only compete for suppliers who do not need an
5 audit at all, and because of that you would only get
6 buyers who are only interested in suppliers who do not
7 need an audit, because as soon as a buyer needs some
8 suppliers who do need an audit, they will have to be on
9 RISQS, and so that actually pushes it down even further,
10 and at the next stage you ask, well, what suppliers
11 would be interested in buyers who are only interested in
12 suppliers who do not need an audit, and before you know
13 it, the whole thing collapses. This is one of the
14 reasons why, in a two-sided market, once you reserve
15 a large chunk of demand, effectively it becomes
16 unviable. So that is the actual situation.

17 In the counterfactual, the question of what would be
18 contestable, we deal with that at footnote 1.

19 MEMBER 3: Sorry, can we just go back. I just realised that
20 I am not understanding one of your submissions. I am
21 really sorry about that.

22 MR. WOOLFE: Okay.

23 MEMBER 3: You pointed us to Socrates.

24 MR. WOOLFE: Yes.

25 MEMBER 3: Any kind of reservation of a chunk of contestable

1 demand, you say competitive effect.

2 MR. WOOLFE: Yes -- well, sorry, perhaps I could just
3 qualify. What Socrates said is -- they did not put
4 a qualification on that what the -- in that case,
5 the accreditation the Law Society was providing had to
6 be a must have, and that, we say, would be satisfied
7 here, because people have to have access to the track,
8 so ...

9 MEMBER 3: So then, what I think you said is that once you
10 have got a reserved part of the market, then you have
11 the effect on competition for 101/102.

12 MR. WOOLFE: Yes, that is enough.

13 MEMBER 3: I get that.

14 Then you get to the question of the viability of
15 the rest --

16 MR. WOOLFE: Yes.

17 MEMBER 3: -- so that you then have -- that effect is either
18 there or compounded by the viability issue of
19 the remainder.

20 MR. WOOLFE: Yes.

21 MEMBER 3: You say that is part of what is going on here.

22 MR. WOOLFE: Yes.

23 MEMBER 3: What I realise I do not understand -- and
24 apologies for this -- is that that reservation that
25 kicks off the foreclosure, if you like, or represents

1 the foreclosure, how much difference, if any, does it
2 make to your submission when we think about that
3 reserved non-competed pool, when we look to the amount
4 that I think you have said they can close off, which is
5 the stuff that is a contract involving Network Rail?

6 Is your case that even though you accept that
7 Network Rail can stipulate RISQS for its contracts, that
8 still constitutes part of the Socrates effect, or are
9 they allowed to do that, but the Socrates effect then
10 applies to the rest of the tier 2, tier 3 and other
11 buyers? So what is your -- be really clear --

12 MR. WOOLFE: Be really clear. It is the latter.

13 MEMBER 3: So they are allowed to do --

14 MR. WOOLFE: So they are allowed to -- think this through.

15 They choose a supplier assurance scheme to run their
16 procurement stuff through, they specify it as
17 a qualification system, OJEU and so on. Now, that is
18 simply purchasing a service --

19 MEMBER 3: Yes, I get that.

20 MR. WOOLFE: -- and the thing is --

21 MEMBER 3: I just need to be clear, because these volumes
22 here -- the volumes -- the money numbers that you are
23 pointing to here include, as of now, the Network Rail
24 contract volumes?

25 MR. WOOLFE: That is correct. So if we take it in stages.

1 Network Rail are allowed, in their procurement function,
2 to -- it is not really specifying what supplier
3 assurance scheme anybody else must be registered with,
4 it is simply saying, "We offer our contracts through
5 this and if you want to come, you sign-up", so yes.

6 The second stage is what they are doing in
7 the authorisation schemes where they are then saying,
8 "In order to be authorised to have access to track,
9 Sentinel and on-track plant at least, you must register
10 and you must purchase RISQS even if you do not in fact
11 contract with us". That is the effect of it.

12 We say that that does fall within the Socrates
13 simply by virtue of saying that they are reserving
14 a portion of demand to the RSSB, which is certainly
15 a body they have quite a close association with. Then
16 we say there is then kick on effects of that in terms of
17 what the remaining part of the market, the non-reserved
18 market segment in respect of those who do not require
19 a Sentinel audit and so forth. So that is our analysis.

20 I think your point, sir, is about contestability, is
21 it not?

22 MEMBER 3: Well, and the related concept you have introduced
23 of viability in that context.

24 MR. WOOLFE: So I understand your question is: if, in
25 the counterfactual, Network Rail allows -- sets

1 objective criteria so that anybody can come in and do
2 things for authorisation schemes who meet quality
3 criteria, but continues to say, "We only advertise
4 contracts through RISQS", what does that world look like
5 and is in fact is there a second scheme in that world or
6 not? Is that your essential concern?

7 MEMBER 3: Yes.

8 MR. WOOLFE: Now, our position on that is summarised at
9 footnote 1 of the skeleton argument -- of the closing,
10 sorry, and this is where it is important to distinguish
11 between the size of the organisations you are talking
12 about on the one hand and the value of the supplies that
13 these people are making to Network Rail and their value
14 in terms of the supplier assurance market as suppliers,
15 because Network Rail itself has obviously huge volumes
16 of demand; they only pay £50,000 a year for supplier
17 assurance itself. So that itself is small.

18 MEMBER 3: But its principal contractors may be quite large.

19 MR. WOOLFE: Yes.

20 MEMBER 3: So they may drive a higher proportion of
21 the audit revenue.

22 MR. WOOLFE: Yes, so --

23 MEMBER 3: I get that it is a flat fee per day.

24 MR. WOOLFE: Sir, we have to take it in stages, because
25 then, yes, their suppliers/principal contractors have to

1 be on the system and they have to pay a registration fee
2 which tops out at £1,285, and that is not big, and then
3 you get into the audit -- that is what is set out in
4 that footnote -- costs, and obviously a big organisation
5 will cost more to audit than a small organisation
6 because they will have more things. However, you have
7 to remember the nature of the audit that is occurring.
8 So it is a management systems audit that is being done
9 effectively at central office base, it is not on sites
10 all over the country, so it does not necessarily scale
11 up entirely with the size of the organisation.

12 But then also you are only talking about these
13 undertakings necessarily being on RISQS as suppliers.

14 MEMBER 3: Yes.

15 MR. WOOLFE: They may choose, if there is another one in
16 the market, to be on something else as a buyer and so
17 the supply chains feeding them are not necessarily on
18 RISQS as well.

19 MEMBER 3: While we are here -- sorry, this is an indirect
20 question -- the numbers from H --

21 MR. WOOLFE: H30 --

22 MEMBER 3: -- the 200 and the 6 million.

23 MR. WOOLFE: Yes.

24 MEMBER 3: That is for the rail standard services; that does
25 not include the revenue from the added value --

1 MR. WOOLFE: So that is revenue that would have been earned
2 in this market --

3 MEMBER 3: Those are the rail specific numbers rather
4 than --

5 MR. WOOLFE: Yes, they were bid specifically in the rail
6 context.

7 The final point which I have been passed and I feel
8 is a good one to say is if we did not think it was
9 viable, we would not be here. I mean, it is costing my
10 clients a fair chunk of money to be here and a fair
11 amount of trouble and they have a belief that it is
12 viable.

13 MEMBER 3: Yes.

14 MR. WOOLFE: Now, that is everything I want to say on effect
15 on competition for a moment. I was going to turn to
16 safety and justification and costs, and I am going to
17 try and deal with this fairly swiftly because my learned
18 friend needs time.

19 Now, we deal with the safety evidence at
20 paragraph 33 of our closing, and I should clarify one
21 point. We said in opening that safety appears to be an
22 ex post facto justification. Now, I am not suggesting
23 any form of bad faith in that, it is just simply as you
24 look at the documents, it does not exist in
25 the contemporaneous documents, and I think Mr. Spence

1 essentially, when I put to him why he had not thought
2 about it before and he said it had not become an issue.
3 So it is necessarily ex post facto because they had not
4 thought about it before. It is not intended as
5 a criticism, but it does go to the weight that is then
6 put on it, because it has arisen in the context of
7 a dispute.

8 We suggest that actually, when you look at it, it is
9 not borne out on the evidence. So Mr. Spence's
10 evidence, as I said, was very general in nature and did
11 largely come back to the view that adding complexity was
12 something that was to be avoided and simply stopped
13 there without considering further, and it was founded
14 upon some misapprehension as to what RISQS actually did,
15 and he certainly was very frank that he is not somebody
16 who deals with auditing on a sort of day-to-day basis,
17 he was not expert in that area.

18 I also submit that the evidence of Mr. Prosser did
19 not advance matters much further either, because he
20 relied to a very large extent on what Mr. Spence said
21 and the fact Mr. Spence had concerns, but he accepted
22 that the ORR would assess a change at the time that it
23 was proposed, that any major change would be accompanied
24 by a formal risk assessment that would be independently
25 reviewed, and as I said, his view that something would

1 be undesirable was not an official policy view, it
2 simply reflected the concerns of Mr. Spence.

3 Now, as regards Professor Jack, I would say again
4 Professor Jack's evidence largely depended upon
5 Mr. Spence's. He did, sir, appear to begin from
6 the premise that you should trust the organisation who
7 is at the coalface, and if they are unhappy, you should
8 not be forcing them to do something else. But with
9 respect, he did not really, as I say, take matters much
10 further to address whether there was a real safety issue
11 or not with respect to whether having a single supplier
12 assurance scheme was necessary. It is common ground
13 between the parties that safety in the rail market is
14 important, and it is common ground that safety
15 management systems are important, and it is common
16 ground that supplier assurance audits, amongst other
17 things, safety management systems.

18 We say there is still a gap that the defendant that
19 has to convince of that it is necessary to have a single
20 supplier assurance scheme not just for Network Rail but
21 for the entire industry in order to deliver those safety
22 benefits, and we say that they have not discharged that
23 and shown that that does not go beyond what is necessary
24 to achieve any specific benefits. That is essentially
25 our position, sir.

1 Now, as regards cost justification -- and this
2 perhaps comes back to the point we have covered to some
3 extent already -- that is at paragraphs 37 and 38 of our
4 closings. There is considerable more detail that sits
5 behind them, but we set out at paragraph 37 certain
6 specific findings of fact that we invite you to make,
7 and then at 38 certain additional points that are made.

8 Now, we do accept that if you have two schemes in
9 the market, as in any market where you have more than
10 one supplier, then there will be some fixed costs and
11 there is some duplication of fixed costs. We have
12 two -- we have an IT system, RISQS have an IT system.
13 We have some management time, they will have some
14 management time. Those are fixed costs.

15 But that in and of itself, unless that is quantified
16 in some way, and it would be for the defendants,
17 certainly in the context of Section 9, to quantify it
18 and persuade you, but that cannot be assumed to outweigh
19 the benefits of competition. If it could be assumed to
20 outweigh the benefits of competition, then every
21 restrictive agreement that monopolised a market would
22 have a "get out of jail free" card.

23 To a large extent, we say Mr. Holt's analysis --
24 well, perhaps I can take you to the two -- you can see
25 the high level points that we deal with. If I can take

1 you to the specific costs evidence, that is
2 Mr. Blackley's evidence, which is at bundle D2,
3 paragraphs 121 to 123. For your note, we deal with
4 these points at paragraphs 55 to 59 of our closing. It
5 is on page 48.

6 Just at a high level, Mr. Blackley comes up with
7 some very big numbers and some very small numbers.
8 Essentially, what we say is that the big numbers are
9 very questionable and the small numbers do not need to
10 concern you.

11 So the first big number he comes up with is the time
12 spent by RISQS users within Network Rail, and
13 Mr. Blackley has assumed that every single RISQS user
14 within Network Rail -- and he is referring to those who
15 are engaged at expression of interest stage, therefore
16 procurement staff -- would require to be doing things
17 through RISQS. So this whole -- that £150,000 to
18 £300,000 depends entirely on assuming that Network Rail
19 would have to be tendering contracts through RISQS,
20 which we say is not a relevant cost. If it chose to do
21 so, it could incur the costs, but it is not being forced
22 to do by the relief we are seeking.

23 Then there are a series of -- one perhaps medium
24 sized and then some small items set out at
25 paragraph 122. "Systems Training". This, again,

1 assumes that all 389 Network Rail users required
2 training at £56 an hour and a figure is produced of
3 44,000, but that, again, depends upon everybody being
4 required to do this. So that, we say, goes.

5 Then we have a series of, with respect, smaller
6 items, and in the context of this kind of market: 5,400
7 in relation to mapping codes. Our position is that
8 the codes can be -- they already have been mapped to
9 the codes that my client uses, as part of what they have
10 done. But it might need to be checked admittedly, so
11 there might be some cost there.

12 Then we have a series of three costs which I think
13 we fully accept would be incurred. So the cost of
14 attending scheme board meetings, assuming that TransQ
15 had a scheme board and we invited Network Rail along to
16 come and engage with TransQ to make sure that it was
17 doing things right, in the same way it does with RISQS:
18 £3,600 a year. I do not think we would argue with that
19 kind of figure. Another £1,300 for attending liaison
20 meetings similarly. We do not say that is preposterous,
21 but these are small numbers.

22 Then the reconciliation activities within
23 Network Rail. This figure might be slightly wrong
24 because those reconciliation activities happen, as
25 Mr. Blackley said already, but instead of checking an

1 internal list against RISQS, it will be checking an
2 internal list against two sources. But in a sense, who
3 knows. This is the figure; it is not something that
4 should concern you.

5 Then we have a very substantial cost of £200,000 to
6 £250,000 per year, which is based upon the assumption
7 that Network Rail needs to undertake a large set of
8 work, involving three additional full-time employees, to
9 assure itself that the scheme met Network Rail's
10 requirements. He says that -- he notes that these
11 activities are currently undertaken by a team of five
12 full-time employees by the RSSB.

13 You may recall, sir, that when I put this to
14 Mr. Blackley, I said, "You have not got five full time
15 employees within Network Rail at the moment, are these
16 not internal activities being undertaken inside the RSSB
17 as a scheme proportionality, as indeed any scheme
18 provider would?" His answer was along the lines of, "Oh
19 yes, but we are all on the same side" with the RSSB. It
20 is just that that is not -- it cannot be a satisfactory
21 basis. Network Rail has non-delegable duties as an
22 infrastructure owner to ensure health and safety and so
23 forth under ROGS and the Health and Safety at Work Act
24 and various other matters, and this has been extensively
25 put by the defendant. It must in some sense be ensuring

1 itself now that what is provided by RISQS is enough.

2 Now, it may be that it is doing that by attending
3 board meetings. If it is doing that by attending board
4 meetings, then the checking -- the cost of checking is
5 very small. But the cost of checking that an external
6 provider is up to scratch is not three full-time
7 equivalent employees, because Achilles does not
8 understand that while it was the scheme provider for
9 many years, there were three full-time employees within
10 Network Rail checking on it. So I would suggest, sir,
11 that that can also be discarded.

12 So in terms of the factual evidence as to what the
13 costs would be, we are left with a small number of
14 thousands, in other words. I suggested that insofar as
15 Network Rail bears those costs and thinks, "Well, it is
16 not really for us to bear them", they could charge any
17 person who wants to apply to do audits a fee, which
18 would then ensure that the person who gains the benefit
19 of the work bears the cost. It sort of internalises
20 the externality, in economic jargon. That may be
21 a fair, reasonable condition for them to impose. It
22 would be a less restrictive alternative than what we
23 have at present.

24 Now, in terms of Mr. Holt, we deal with this at
25 paragraphs 65 to 69 of our closing. You will recall

1 I cross-examined him on paragraph 352 of his first
2 report, which is bundle F/2, and this, I think -- this
3 in a sense -- Mr. Holt accepted he had not done any
4 quantitative work. So the only quantitative work we have is
5 Mr. Blackley's evidence. His was a very general and
6 high-level approach. So 352 of his first report is on
7 page 123. We also have the point here that he has not
8 taken into account the restrictive effects on a further
9 market, and that was the point which we addressed a few
10 minutes ago.

11 Now, there is just one more point I wanted to raise,
12 which is I am not quite sure where it fits into the
13 legal analysis but it is what I call the "sidestepping
14 point". It is said that we are somehow sidestepping the
15 procurement that has been carried out by the RSSB.
16 The answer on that is quite short. The RSSB ran
17 a procurement for two lots: for IT services and audit
18 services; a contract to provide those services to
19 the RSSB. Network Rail never ran a tender for
20 the provision of supplier assurance services to it, even
21 as a procurement system. Still less did it run any kind
22 of tender for nominating schemes for the purposes of
23 the authorisation -- for Sentinel authorisation and so
24 forth.

25 Now, in a sense, the problem with this sidestepping

1 point as well, it is circular, because it can only be
2 said that we are sidestepping a procurement that has
3 been done if we do not have the opportunity to come into
4 the market anyway. So, in that sense, I am not sure how
5 much it takes matters forward, but since it is being put
6 against us, I felt I should comment on it.

7 MEMBER 3: So this is sort of -- I think this is sort of
8 related to the sidestepping point, and I think the point
9 that you have made, and I think which Mr. Parker made,
10 that where did Network Rail have competition for
11 the provision of an integrated scheme.

12 I wanted -- I think there are two areas I wanted to
13 ask for your submissions on in that context, and they
14 are these. I think you and Network Rail both refer to
15 the test of normal conditions of competition.

16 MR. WOOLFE: Yes.

17 MEMBER 3: And there may be claims or evidence that a normal
18 situation, or a normal process of competition, needs to
19 have one integrated scheme by either an infrastructure
20 owner or a rail infrastructure owner; see Network Rail
21 over the last 20 years, SNCF, Deutsche Bahn,
22 National Grid on the network, Thames, UK Power
23 Utilities. So is it consistent with normal competition
24 to have one scheme?

25 In thinking about competition as a process of

1 rivalry, and the question of whether your clients were
2 never given a chance to compete -- I mean, Network Rail
3 have 20 years experience over your clients operating
4 either as a concessionaire or as the operator of
5 the Achilles scheme. I think there is evidence that
6 your clients engaged with Network Rail as to whether it
7 should go with RISQS and whether it should tender or
8 whether it should stay with Achilles. So, in effect,
9 that process of rivalry -- Achilles had 20 years of
10 demonstrating its value, its worth, its quality; and at
11 some point at the end of that, Network Rail decided to
12 go with RISQS and RISQS decided to outsource
13 the component.

14 So is your case that competition requires there to
15 be a formalised tender process, or is the situation that
16 a process of rivalry and the opportunity for your
17 clients to demonstrate the quality and the value of
18 their system over a period of time -- I mean, why is
19 that not a process of competition?

20 MR. WOOLFE: If I can deal with the two points in turn.

21 The first one is about if one integrated scheme is
22 normal, effectively.

23 MEMBER 3: Yes.

24 MR. WOOLFE: What we would say is you have to distinguish
25 between the outcome of a competitive process on the one

1 hand, that is one thing, and on the other hand conduct
2 by a dominant undertaking.

3 Now, it may be a normal outcome of -- it may be
4 a natural, organic outcome of competition in some
5 markets, or indeed in many markets, to converge on one
6 system. There are some markets in which -- stepping
7 outside the context -- which have network effects and so
8 on, and they end up being the collapsed or the single
9 system. You have other markets where it does not.

10 I think the example Mr. Parker uses in his report is
11 food delivery companies, or indeed property portals,
12 where you have both.

13 MEMBER 3: Yes.

14 MR. WOOLFE: So you can have situations where, these two
15 separate markets, you have two platforms operating at
16 the same time. That is an entirely possible, viable
17 circumstance; it depends on the conditions of
18 competition that drive it.

19 So it may be normal to have a single scheme as an
20 outcome of competition, and if that is what happens as
21 an outcome of having restricted competition, we have
22 nothing to complain about.

23 In terms of the Hoffmann-La Roche test, what that
24 deals with is do you have recourse to methods different
25 to those that condition normal competition? We would

1 say that the ability of Network Rail as the dominant
2 infrastructure owner to be able to say who has access to
3 its infrastructure and who does not, even if they are
4 not people who are supplying it, and then uses that to
5 say who these people must be assured by and then with
6 the effect -- rather than the effects that I am talking
7 about -- impossibly into the market, that is recourse to
8 the methods that are different from usual, normal
9 competition. That is different from the question of, if
10 you remove the unusual feature, which we are talking
11 about -- so, say, we move to an open system where
12 anybody can do the assurance for the authorisation
13 schemes, Mr. Parker says one possible outcome is that
14 you get two schemes or more operating in perpetuity.
15 But another possible outcome is indeed you can get where
16 it collapses and you have only one scheme that is left,
17 that may be RISQS or it may be TransQ. That would be
18 the outcome of competition -- unrestricted competition
19 in the market.

20 Does that --

21 MEMBER 3: Yes, partly.

22 MR. WOOLFE: The second point I think was we were never
23 given a chance to compete. Now, I think the point that
24 Network Rail would say is that, in a sense, we,
25 Achilles, had the benefit of not competing for a period

1 of time. But I take the point that we demonstrated what
2 we could do for a period of time.

3 MEMBER 3: I did not put it on the basis of you had that
4 period of not being able to compete, because it seems to
5 me that the rivalry -- it was a very important contract,
6 so presumably Achilles were putting their best foot
7 forward while executing and developing that
8 relationship. It is clear from the internal documents
9 that there were strengths and weaknesses of Achilles'
10 conduct.

11 MR. WOOLFE: Yes.

12 MEMBER 3: But that is still a process in which it is
13 demonstrating its ability and its rivalry to any
14 alternative decision that Network Rail might take.

15 MR. WOOLFE: Well, it certainly is showing its abilities and
16 so forth. It is not necessarily a process of rivalry if
17 there is not another supplier in the market. But you
18 can have countervailing buyer power that constraints it.
19 You can have a -- in a sense Network Rail as a big,
20 important partner drives it --

21 MEMBER 3: I think what it gets to is, if your criticism is
22 of Network Rail's decision to go with somebody else,
23 the decision was clearly capable of being informed by
24 their experience of Achilles up to and beyond the date
25 on which they started thinking about choosing somebody

1 else.

2 Now, they still did not have experience of anybody
3 else and they did not ask a third or fourth person to
4 compete, but at least in relation to the Achilles
5 position, I am just wondering how much weight you really
6 want to -- or we should put on this -- I cannot remember
7 what you call it -- the going round it thing, but
8 the fact that you were there competing.

9 MR. WOOLFE: You have referred a number of times there, sir
10 -- I think you referred to "outsourcing" and "going with
11 Achilles" or "going with somebody else". This comes
12 back, as I said earlier on, to the outsourcing point.
13 Network Rail is not simply outsourcing a certain demand
14 that it has, because the effect of this is to drag all
15 other buyers and suppliers onto other buyers onto
16 the system. It never ran a tender on behalf of those
17 other buyers, if you see my point.

18 MEMBER 3: No, but if this can be characterised as
19 a question of competing for the market, that is still
20 a market it had experience of Achilles in for a number
21 of years.

22 MR. WOOLFE: In terms of competing for the market, what has
23 been tendered by the RSSB are two components.

24 MEMBER 3: No, but I am thinking of the scheme-to-scheme
25 competition. So you are still going back to

1 the Network Rail decision, that it only ever looked at
2 one scheme.

3 MR. WOOLFE: Yes.

4 MEMBER 3: Whereas Achilles were in that scheme, running
5 that scheme, developing that scheme, operating that
6 scheme for a long period, which is a process which gives
7 Network Rail experience to assess Achilles. So it is
8 not as if it makes -- that decision that goes away from
9 your client is not a point at which it is not able to
10 consider the value of the Achilles proposition.

11 MR. WOOLFE: So what you're saying, I think, sir, is that that
12 decision has not been made blind. The decision to
13 specify RISQS has been made in one sense in
14 the knowledge -- they may not have considered it in any
15 depth, that they could have thought about going with
16 TransQ.

17 On that, sir, I would say two things. First of all,
18 if they had specified TransQ, the same problems would
19 arise. In terms of effect on competition, my client
20 would be the beneficiary of it in that situation, but
21 the same problems would arise.

22 Secondly, if you recall the RISQS charter, and there
23 is a -- that is at bundle G2/1. Somewhere we have a web
24 shot of the RSSB website, saying that Network Rail has
25 signed this, but I think it is also in --

1 MEMBER 3: Sorry, G2?

2 MR. WOOLFE: G2/13, the first tab in the bundle.

3 I think Mr. Blackley acknowledges that Network Rail
4 has signed this and been advertised as such.

5 MEMBER 3: Yes.

6 MR. WOOLFE: We have here a statement of belief and then
7 a statement of commitment:

8 "We believe it is the responsibility of all buyers
9 to ensure quality."

10 Fine:

11 "This will be achieved most efficiently if there is
12 a central service and system providing the base level
13 assurance for all industry suppliers ..."

14 So this is a statement of belief on behalf of
15 Network Rail that there should be a central system for
16 all industry suppliers:

17 "... thereby allowing buyers to concentrate on such
18 further assurance as may be needed. We therefore commit
19 to maintaining our involvement with RISQS."

20 So forth. What this does not say in
21 the commitment -- this is a buyer commitment. This does
22 not say, because this is standard form, this does not
23 say, "We commit to stipulating this in our authorisation
24 schemes". But I would say, sir, there is a belief on
25 the part of Network Rail that there should be a single

1 industry system. So it is not simply a case of choosing
2 which one is better, they have been involved with RISQS,
3 with the RSSB process, they are bound into it, and they
4 have decided that they want a single industry system.

5 MEMBER 3: Yes.

6 MR. WOOLFE: It is that decision there is a single industry
7 system -- now, they may be right about the efficiency
8 benefits, they may be wrong, but they have undoubtedly
9 taken the decision that there should be a single
10 industry system, and they are going to use their
11 position in the supply chain in the market, as an
12 infrastructure owner, to make that happen.

13 So, fundamentally -- so what this case is about at
14 that level is, having decided to restrict competition in
15 that way, is there an efficiency justification in terms
16 of the cost efficiency for it? That is fundamentally
17 how Network Rail and the RSSB positioned this from
18 the start, including the 14 May letter. In a sense,
19 the argument that there was not really a restriction on
20 competition, or that the safety certification, are in
21 a sense distractions that have come up in the course of
22 litigation. Fundamentally, it is that question.

23 Because if you will recall, that RISQS charter -- do you
24 recall the internal RSSB RISQS matrix?

25 MEMBER 3: Yes.

1 MR. WOOLFE: That was specifically --

2 MEMBER 3: That's the --

3 MR. WOOLFE: -- proposed in order to address the perception
4 that there might be a market for an
5 alternative provider.

6 So that has anti-competitive intent behind it. Now,
7 it may be anti-competitive intent with a view to
8 a greater and brighter world, but it is undoubtedly
9 anti-competitive intent. It is efficiency. So when you
10 look at the efficiency justifications, in practice they
11 really have not proved their case on efficiency
12 justifications.

13 THE CHAIRMAN: Can I come back to safety, Mr. Woolfe? Can
14 you go to paragraph 72 of your submissions, just to make
15 sure I understand the point.

16 MR. WOOLFE: Yes, this is specifically in the context of
17 objective necessity.

18 THE CHAIRMAN: Yes, that is right. You say that
19 Network Rail has to establish that the main operation
20 would be impossible to carry out --

21 MR. WOOLFE: Yes.

22 THE CHAIRMAN: -- absent the restriction. Is this right,
23 you say that they cannot do that, because the main
24 operation of supplier assurance is possible, albeit that
25 there is some very small level of risk; is that the

1 point?

2 MR. WOOLFE: I think -- I realise this is not clear.

3 The main operation in this context would be the main
4 authorisation schemes, because what we are looking at is
5 a restrictive term in an authorisation scheme as
6 a whole. So your question would be: can you operate
7 the Sentinel scheme, can you operate the on-track plant
8 scheme to fulfil the definitely legitimate purposes that
9 those serve without this specific restrictive effect?

10 THE CHAIRMAN: With multiple schemes.

11 MR. WOOLFE: Yes, and you have to show that it is impossible
12 to do that.

13 Now, there may be costs in doing it. But the fact
14 that even if it cost you a lot, actually, it still would
15 not be impossible. If you are into the field of it
16 would cost you some money to do it, then you are in
17 the Section 9 exemption analysis; because objective
18 justification is not the last stage at which an
19 anti-competitive agreement can be saved, it can still be
20 saved at exemption. So there is this very high
21 threshold of impossible to implement under it.

22 THE CHAIRMAN: Presumably it would be a sufficient strategy.

23 It is impossible to do it with the requisite level of
24 safety.

25 MR. WOOLFE: Well, I think, to make it very concrete, sir,

1 if you look at the Sentinel scheme itself, which is at
2 G1/2, that refers to the purpose being:

3 "... to define the rules and mechanisms for
4 compliance with the Sentinel scheme, together with
5 the consequences for breach."

6 Undoubtedly, the purpose of the Sentinel scheme is
7 to ensure that only authorised people get access to
8 track, and people there know what they're doing, so it
9 has to be -- the scheme has to be possible to operate to
10 fulfil the purposes for which it is established.

11 I think that is even more clear if we look at
12 the on-track plant scheme, which is G1/6, and you can
13 see what the purpose is of that module.

14 There is a specific aim of controlling certain
15 risks, the risk of runaway, uncontrolled movements and
16 so forth, and scope. Then on point 3 there is a very
17 specific list of what the plant operator has to
18 demonstrate.

19 So what you would have to say is looking at that,
20 not just its overall purpose but how it actually works
21 in practice, do we need this restrictive term saying you
22 need a single assurance provider in order to do this?
23 This would be quite a nitty-gritty analysis; you have to
24 ensure it is impossible not to. We say they have not
25 even come close to doing that.

1 Their case, such as it is, on safety or efficiency
2 really comes down to an exemption analysis, because that
3 is the stage at which the necessary costs, such as they
4 are, have to be taken into account.

5 THE CHAIRMAN: Thank you.

6 MR. WOOLFE: I should let my learned friend say something.

7 Closing submissions by MR. FLYNN

8 MR. FLYNN: Sir, we are probably getting into diminishing
9 returns in that I have neither the time nor probably
10 the mental energy to respond to every point that has
11 been made today never mind in the case. You have our
12 skeleton, you have the oral opening, which I would, as
13 it were, reiterate today, because I think I stand by
14 what was said in that, and now you have a lengthy
15 written closing.

16 Can I start by making a few points and then see what
17 is of interest to the Tribunal at this stage.

18 On the shifting case point, I mean, I do not wish to
19 squabble in any way with Mr. Woolfe, but I think it is
20 right that some of our witnesses were taxed because they
21 were not addressing the counterfactual that Mr. Woolfe
22 thought was the right one that they should have been
23 looking at, and there has been an element of ships
24 passing in the night there.

25 We say there have been shifting parameters about

1 what is objected to in Network Rail's conduct, on
2 the legal basis to which that is objected to, and what
3 could or should be done about it. That is, in a casual
4 way, what Achilles ask here of the Tribunal.

5 That has, we say, moved around a bit, and it has made
6 the debate and the clarity I think suffer.

7 THE CHAIRMAN: My own view, I have not really discussed it
8 with the other members of the Tribunal, is that it has
9 not really shifted that much; it has really become
10 clearer what their case is, but I don't see there has
11 been a major shift, I must say.

12 MR. FLYNN: Well, it has become clearer. Some points we
13 understood to be putting to Mr. Holt yesterday that
14 narrowed it down are now said not to be the basis of
15 the case. Clearly, the focus of the attack has always
16 been, as it were, a competition law attack on
17 the requirement in the three schemes that people be
18 RISQS assured. Is it a Chapter II case, is it
19 a Chapter I case? It is both, but the emphasis has
20 changed. All I am saying is that there may be some lack
21 of clarity in the exchanges in the evidence that flow
22 from that. As best we can, we have been addressing
23 the case that we have to meet.

24 Now, some -- in a way it is a related point. Some
25 things have been said this morning about our witnesses.

1 Let me say immediately -- and you will have seen from
2 our closing -- that we have no complaint to make of
3 Achilles' witnesses, who gave evidence in a clear and
4 straightforward manner and answered questions
5 appropriately.

6 We do have an authority in relation to the fact
7 opinion point, which is in paragraph 11 of our closing
8 document. It is summarised there and I probably do not
9 need either to read the summary or to therefore take you
10 to the case. But, essentially, that is a case in
11 the TC-- I do not know if you have had time to
12 assimilate it. But, essentially, a case in the TCC,
13 where Mr Justice Jackson said, well, often in these
14 cases you get witnesses of fact who are experienced
15 professional people who speak to what they know, and
16 you know, sometimes, particularly if they write their
17 own statements, they go off in the deep end in one or
18 two places, some of it is comment, some of it is
19 argument, some of it is indeed strictly factual. We
20 would say at this stage you have heard the witnesses,
21 you have seen them, you are well able to make your own
22 assessments on that, and we do not need to get, as it
23 were, too technical about it.

24 Just briefly though, since some things have been
25 said. Ms. Pearson was, I think, the only one of our

1 witnesses who got a gold star from Mr. Woolfe, and
2 I would say her evidence is actually pretty important,
3 not only for the facts, the dates, the figures,
4 the information about the tender, but also for a key
5 insight, I think, into what is going on in this case,
6 where she said in effect it is not unusual in
7 procurement for you to advertise for bids for a contract
8 and the bidders come along and say, "What you should
9 have wanted is this". There is a bit of that going on
10 here. In fact, there is quite a lot of that going on
11 here.

12 Network Rail has its own reasons -- you have had
13 them explained at length -- for going down this
14 particular route. It is, as we have said, the ultimate
15 source of demand: it is the buyer who requires
16 the supplier assurance; supplier assurance is not, at
17 its heart, and should not be, distorted into being
18 a service for suppliers which buyers are bound to take.
19 So there is an element of: we want this, they say if we
20 were better advised or more generous in some way, we
21 might take what they have to offer. I think that is
22 a key insight which one gets from other witnesses but
23 including Ms. Pearson.

24 Now, I think then, in the "not too bad" category we
25 had Messrs Matthews, Berwick and Cooke. Some criticism,

1 but basically they're all right, particularly when you
2 get them in the box and can explore things with them.
3 No further comment to make on that.

4 Then the next ranking I think was Ms. Scott and
5 Mr. Blackley, where it is said that they are trying to
6 make points and that affects the reliance you should put
7 on their evidence.

8 I mean, I think it probably comes back to what
9 I said based on the judgment of Mr Justice Jackson, but
10 you are well able to determine whether they are just
11 being argumentative or trying to explain in their own
12 way, and that might apply particularly to Mr. Blackley
13 possibly, trying to explain in his own way why he finds
14 a particular proposition a difficult one to accept.
15 Perhaps I do not need to say more about that.

16 Then in our factual witnesses I think we get
17 Mr. Spence and Mr. Prosser, and particularly Mr. Spence,
18 on Mr. Woolfe's oral account of that today.

19 Now, the first thing I would say about that is --
20 and I think this applies actually to both of them,
21 Mr. Spence and Mr. Prosser -- it is unreasonable,
22 I suggest, or just inappropriate for Mr. Woolfe to
23 submit to you that you should basically discount their
24 evidence because in a way they had not followed
25 the paper trail through and did not know exactly how

1 the RISQS scheme matched up to some rather creaky
2 Network Rail high level standards. That does not really
3 matter. That does not really matter. What they were
4 there to talk about is their experience, and their, in
5 both cases, lengthy experience, of safety in which both
6 of them have been regulators or inspectors as well as
7 now Mr. Spence as a professional within the company.

8 So we say that is not an appropriate criticism.
9 Both are dealing with these issues at a higher level of
10 operation than just following the paperwork through.
11 When Mr. Spence said that was "news to me", I do not
12 think he was thinking, "Oh my goodness, I am here on
13 false pretences, I just do not know what I am talking
14 about", he thought, "Well, I did not know that is how we
15 go there", but it did not change, in my submission,
16 the force of what he had to say.

17 In relation to Mr. Prosser, I think it is fair to
18 say he said ultimately these were serious matters and
19 for technical reasons it is a matter that might -- if
20 there was to be a change in the system, it is a matter
21 that might have to come in front of the office for the
22 ORR; that would be first placed in the hand of
23 Network Rail and it would be evaluated on its terms if
24 it came to him, but he could understand the concerns.
25 I think that is effectively what he was saying.

1 Perhaps I will come back to it, but I certainly do
2 not think it is appropriate to suggest that the, in my
3 submission, forceful evidence of Professor Jack can be
4 discounted as simply adopting what Mr. Spence had to say
5 and basically saying, "Yes, I agree with that". I think
6 that is really an inappropriate way of looking at
7 things.

8 There has been a lot of talk today about the sort of
9 impact on the ground of the schemes, if you like,
10 the numbers. Perhaps I can just make a few -- just
11 point you to a few references in our closing
12 submissions.

13 Right at the beginning -- and I think you may have
14 already been taken to that -- of paragraph 2, we say
15 that Achilles seems to think there may be only 100
16 suppliers contracting directly with Network Rail, but
17 actually that is -- and even if that is principal
18 contractors they are thinking of, that number is on
19 the low side. But then we give some breakdown there of
20 actual companies with a current RISQS subscription who
21 both require an audit and are registered on the parallel
22 website, if you like, or parallel data system as
23 prospective tenderers to Network Rail. That is just
24 over 1,000. Based on those proportions and looking at
25 the number of 3 million that we quote just above, we

1 therefore take a view on what the market opportunity
2 might be, and footnote 6 contains a more detailed
3 breakdown of the Bravo numbers and the RISQS numbers,
4 suggesting that ultimately 60% of suppliers on RISQS who
5 require a RISQS audit do not contract directly with
6 Network Rail, and that is how we get to the market
7 opportunity point. That is one source of numbers.

8 The other is at paragraph 25, and I apologise this
9 document is not paginated, but there are some further
10 numbers at paragraph 25, where we essentially -- in
11 paragraph 25 and 26 -- make the point that while there
12 is an initially compelling thought that RISQS is
13 basically pervasive in the supply chain, and
14 particularly because of the Sentinel audit which applies
15 to every individual who goes trackside, the Network Rail
16 percentages or proportions within those categories are,
17 let's say, very far from a monopoly sort of position,
18 and --

19 THE CHAIRMAN: Can you explain the 29%? Sorry, I am sure it
20 is perfectly easy to understand, I just did not have
21 a chance to work it out in my own head.

22 MR. FLYNN: I will just do it again, I think. We will just
23 give you the calculation in a second.

24 THE CHAIRMAN: Well, you can come back to it.

25 MR. FLYNN: I will come back to you on the 29. The 42 is

1 60% of 70%, I think. I will come back to you on that.

2 Again, just moving on to a couple of other -- some
3 other points that have been made today then.

4 Our position is that -- it is 70% of half, I think,
5 so 70% times 50% gets you to the 29. But I think that
6 figure may require some more elaboration and I will
7 leave it there, I think, for the moment.

8 Partly picking up, I think, on the discussion that
9 was just being had, it is no part of our legal case that
10 there is some problem with Achilles sidestepping
11 the tender. I think that was Mr. Blackley's
12 characterisation from a procurement perspective. Having
13 run the tender, you then, in his view, have -- you have
14 the people who have succeeded and have the contract and
15 everybody else has had their chance, as it were. That
16 is what I think he referred to as "sidestepping". It is
17 certainly no part of our legal case that that is
18 a particular problem or obstacle for them, and we do not
19 need to go over the factual position as to why they did
20 not succeed in the tender, and indeed I think could not
21 have succeeded in the objective of securing both lots
22 because one of the bids was non-compliant. So it just,
23 you know, could not be done. You know, that is for them
24 to explain, as it were.

25 I fully also take the point that was debated with

1 Mr. Parker and others that that is not exactly the same
2 as tendering RISQS as such.

3 What that is about, in my submission, is, as I said
4 probably many times in these proceedings -- what that is
5 about is how Network Rail assesses the way it should
6 have supplier assurance in relation to these schemes.
7 It is not about telling everyone else who they have to
8 get a service from; this is about Network Rail
9 ultimately, as a buyer, as Mr. Holt explained, of
10 the supplier assurance. They are the party who could
11 have done it, used to do it in-house. It is an evolving
12 scheme. We have been over that many times. There is
13 nothing unusual, and I think that has already been said
14 in the debates earlier -- there is nothing unusual in
15 a network owner or operator stipulating that
16 its supplier should use a single scheme, particularly
17 for safety reasons. Probably our best example of that
18 is the National Grid utilities vendor database plus
19 the Verify proprietary compulsory audit. That is
20 probably our best -- that is the example which you have
21 probably heard most about.

22 It is also absolutely normal, and Mr. Woolfe fairly
23 said that is what Achilles does -- it is absolutely
24 normal to bundle together in a package the three
25 services which I think Mr. Parker characterised as

1 "verification, procurement and data analytics", the sort
2 of value-added whizzier bits.

3 I think what is not normal is the suggestions that
4 have been made by Mr. Parker, and to an extent in
5 cross-examination by Mr. Woolfe, about how you might
6 unpack or detach these bundled services and separate
7 them out or operate them differently. So if one is
8 talking about normal competition or some kind of test
9 for what is appropriate, we say the current situation
10 does not show any abnormal, surprising features.

11 What is completely unevidenced before you is
12 the issue of demand for the alternative version,
13 the transmodal or, you know, multi-industry version. It
14 may exist, but you have not heard from a single buyer or
15 supplier on the other side of the room who wants to do
16 that who is unhappy with the way things are in RISQS
17 and, you know, there just has not been any evidence of
18 that in front of you. In those circumstances, two
19 things, I think. One is Mr. Holt is entirely right to
20 say that the current situation is indicative of other
21 buyers' preferences, and you have absolutely no
22 assessment of the costs or benefits that might flow from
23 solutions better suited to other types of buyers, many,
24 you know, cross-industry-type buyers and particularly
25 suppliers; they just cannot be weighed in any analysis

1 here, even if -- and that goes back to a discussion
2 Mr. Cutting was having with Mr. Woolfe -- even if there
3 was any suggestion -- could be any suggestion that
4 Network Rail should have thought about these things
5 itself and needs to demonstrate those in an objective
6 justification argument.

7 Now, in relation to objective justification, we have
8 dealt with this at length. You will have seen
9 paragraph 52 of our closings. We do -- we continue to
10 place the emphasis on the safety aspects. It is plain
11 that the object of the Network Rail schemes, they are
12 all about safety on the railway. You do not have to get
13 very far into them before you see that that is what they
14 are about. That is why they are there.

15 That is why it is surprising -- the requirement for
16 those schemes to be thoroughly evaluated in a supplier
17 assurance programme is an inherent part of that. That
18 is why it is surprising to hear Mr. Woolfe again
19 referring to what they call the "contemporaneous
20 documents". Contemporaneous with what?

21 Contemporaneous -- this is very much from an Achilles
22 optic: contemporaneous with their announcement that
23 having not succeeded in the tender, they would like to
24 offer a competing service. That is what they are
25 contemporaneous with; they are not contemporaneous with

1 the rationale for the scheme or the rationale for
2 the single supplier assurance programme rule,
3 the RISQS-only rule, as we can call it now, but one that
4 has been in place for 20 plus years with
5 the predecessors to those schemes.

6 It is also no good for Mr. Woolfe to say, well,
7 Mr. Spence had not thought about. Firstly, he was not
8 asked. What he was then confronted with was not
9 a rationale for a single scheme but a proposition that
10 there might be more than one. That is what he was
11 thinking about. His views on what is good for safety
12 relate to the single scheme. That is why it is good for
13 safety. So he is not explaining in a contemporaneous
14 way the rationale for anything.

15 Same goes for Mr. Prosser. When you look at
16 Professor Jack, what he is largely talking about is:
17 well, what if, for some reason, we have to go to more
18 than one scheme? That is what he is talking about, and
19 Dr. Cox. We have analysed their evidence in some
20 detail. They have put it in different ways. But they,
21 as safety experts, essentially concurred with
22 the view -- let's call him a "factual witness" for
23 the sake of argument -- of Mr. Spence, that if you do
24 not have to introduce complexity, you do not do it, and
25 that is rule number 1. This would introduce complexity

1 with more schemes.

2 Everyone is agreed it is going to cost you more, you
3 are going to require effort, you are going to require
4 supervision, you are going to require databases talking
5 to each other, flows of data, everyone is agreed that
6 all of those things will have to happen. I think
7 everyone is agreed you could call that "complexity", and
8 everyone is agreed that that increases risks in
9 the system.

10 Now, against that, we are told: well, you have not
11 really thought about it and you have not really costed
12 it. Mr. Blackley -- Mr. Woolfe put it nicely: his big
13 numbers were questionable and his small numbers were
14 immaterial. He has made a conscientious effort against
15 one view, one understanding of the counterfactual, of
16 what Network Rail would have to incur.

17 Now, Mr. Woolfe may disagree with some of
18 the efforts and say: well, you would not have had to do
19 all of that, or if you did have to do that, it would not
20 cost very much. But this is not a case where there is
21 no effort been made before you to justify the -- or to
22 set out the inefficiencies and the risks of moving to
23 multiple schemes.

24 Now, the economic evidence I think will be very
25 fresh in your mind, and I am certainly not going to try

1 to summarise it or even rehearse it. I think it is
2 important to say -- and we do say this in our
3 closings -- that Mr. Parker's views, firstly, basically
4 do not tally with the claim form. He did not agree with
5 the claim form's market definition. He did not want,
6 I think, to accept that in all respects the bundled
7 service within the Achilles or RISQS-type scheme was
8 two-sided, because he thought there was a get-out of
9 either supplying it directly or the assurance provider
10 having to pass it across on contractual or licence or
11 standard terms. All rather imaginative stuff.

12 It was just said by Mr. Woolfe that our expert
13 Mr. Holt did not carry out any quantitative work and
14 neither did Mr. Parker. They both addressed this at
15 the level of economic theory, which is their expertise
16 after all.

17 There was a detailed discussion between Mr. Parker
18 and Mr. Cutting about what is missing, what competition
19 is not there that there could be. I think Mr. Woolfe
20 has already referred to the headlines there: competition
21 on price, competition on quality and differentiation.
22 So platforms doing things differently.

23 As regards price competition, we say you have
24 Mr. Holt's view -- explanation as to why merely having
25 lower prices was not necessarily a good thing and could

1 lead to competitive bottlenecks for Network Rail if what
2 is happening is that the two or more schemes are
3 essentially competing for the business of suppliers.
4 This is not a good thing, it is a problem, is
5 essentially what he was saying.

6 In relation to quality, Mr. Parker suggested that
7 there might be someone out there who was itching to
8 provide a gold standard quality assurance service. Now,
9 that could mean two things, and he may have meant either
10 or both of them, I am not sure. One is they would carry
11 out appraisals as to compliance with safety standards
12 that would be higher safety standards than those of
13 Network Rail. That seems implausible, but Network Rail
14 no doubt would like to hear if there were higher
15 standards that they should be attaining; that is what
16 they have been trying to do over the last 20 or more
17 years. Or it could mean quality of audits, and there
18 you, again, get into the bottleneck problem that, in my
19 submission, Mr. Holt explained very convincingly, which
20 is it is not in suppliers' interests to go for
21 the Rolls Royce service if the Honda service will give
22 them the same certificate at the end of the day.

23 There was some criticism this morning of Mr. Holt's
24 position, and I think there was an implication in some
25 of the cross-examination that, as it were, he had sort

1 of selected and picked out some of his many potential
2 permutations of the counterfactual, rather than made
3 a serious assessment as a professional economist as to
4 which was the appropriate one. I do not think that is
5 a fair criticism. I think it is important to realise
6 that when he was talking about Network Rail
7 multi-homing -- the term they all used -- what he was
8 talking about was the "must recognise" rule, and saying
9 that is what he meant by "multi-homing": having to
10 recognise other schemes.

11 When Mr. Woolfe said that Mr. Holt accepted that
12 single-homing for Network Rail was a possible
13 counterfactual, as if he had not picked up on that
14 before, this, I think, is an area where the sharpened
15 dialogue assisted, because what Mr. Holt was accepting
16 was that there might well be a Network Rail single home
17 for the procurement side of the data services, and that
18 could well be on RISQS.

19 So I do not think I will rehearse any more of
20 the economic evidence. Perhaps I could just make two or
21 three points on the law.

22 We have set out in detail in our written closings,
23 and it builds on matters that were in the skeleton, as
24 we saw these for the first time in Mr. Woolfe's skeleton
25 in relation to the entirely inapposite nature of relying

1 on the Commission's horizontal guidance in the vertical
2 context that they have pleaded, and the particular
3 inappropriateness or poor analogy, if I can put it that
4 way, of the Dutch Cranes cartel case.

5 He took you today to the general court judgment,
6 paragraph 137, saying that one of the problems that
7 the Commission found and was upheld by the General Court
8 was that the industry scheme did not recognise
9 equivalent approvals of other bodies.

10 Two things on that. Firstly -- and this is I think
11 the point I made in opening -- that was part of
12 the cartel, because this was an essentially bogus
13 certification scheme, the idea of which was to keep out
14 other suppliers of cranes for hire, and particularly
15 from outside the Dutch market; and what they did not
16 recognise were the statutory or quasi-statutory
17 recognition appraisal bodies that were already in
18 the Dutch market. So they made people -- they could not
19 operate on the market without the certification from
20 the foundation that was essentially part of the cartel.

21 Mr. Woolfe -- and I can see why: *Socrates*
22 was a great win for him. It is a case he no doubt
23 rightly wishes to rely on. But the problem in *Socrates*
24 and in the Portuguese accountants case was that there
25 the regulatory body was reserving part of the market to

1 itself. That is what they were talking about there.

2 That is a totally -- just plucking out words about

3 reservation of market and so forth, that is not

4 the point that the court in either of those cases was

5 addressing.

6 We say that a better analogy -- nothing is a perfect

7 fit here, but a better analogy is to be found in

8 the cases we relied on in our skeleton, including

9 the italics *Selex Sistemi Integrati* case in

10 the European Court; furthermore by a judgment, which we

11 will hand up and I do not need to go to in detail, of

12 Mr Justice Cranston dating from 2015 in a case called

13 italics *Speed Medical Examination Services Ltd v*

14 Secretary of State for Justice. There it was a judicial

15 review, and one of the arguments was based on

16 competition. What Mr Justice Cranston said was that

17 the impugned body, as it were, the -- this was in

18 a system for accrediting medical experts and a portal

19 for basically attributing the work, because there had

20 been a problem with solicitors going to their favourite

21 experts, and this was an attempt to make it more

22 neutral. The problem for a larger operator like

23 the claimant here, Speed Medical, was that meant it

24 would only get part of the market. It was more or less

25 fixed that it could only have a seventh of the market

1 and it could not push forward and secure more.

2 Mr Justice Cranston's conclusion at paragraph 65 on
3 that argument was that, like the case of
4 *Eurocontrol* in the *Sistemi*
5 *Integrati* case, Medco, the body set up by the Secretary
6 of State:

7 "... is a regulator acting in the public interest
8 and implementing a policy of the Secretary of State,
9 a regulator which is not itself active nor with any
10 financial or economic interest in the downstream market
11 which it is regulating."

12 I accept that is not a full analogy, but as we have
13 consistently said and laid importance on, Network Rail
14 has no activities in the supplier assurance market and
15 gains no benefit, no economic or commercial benefit,
16 from the impugned rule here. I do not need to summarise
17 the remainder of the argument that Mr Justice Cranston
18 makes.

19 I do not think I need to make a point on
20 the MasterCard case which was cited in front of you,
21 because I think Mr. Cutting, as it were, made it for me,
22 that what they were talking about were two sides of
23 the same market. I have to say, that passage was
24 dismissing an argument advanced by the Lloyds Banking
25 Group represented by yours truly, but I am afraid

1 I could not remember the full details of it, so I am
2 glad we do not have to go into that in any great detail.

3 I think, unless there are other points that people
4 behind me think I should make, I think that is probably,
5 again, a sufficient guide to what you will find in our
6 closing submissions, sir.

7 THE CHAIRMAN: Mr. Flynn, can you help me on the same
8 paragraph of Mr. Woolfe's skeleton, paragraph 72.

9 MR. FLYNN: The closing submissions?

10 THE CHAIRMAN: Yes.

11 MR. FLYNN: Yes. Let me just turn that up.

12 (Pause)

13 THE CHAIRMAN: Is it common ground that the application of
14 the doctrine of objective justification or ancillary
15 restraints requires it to be shown that the main
16 operation would be impossible to carry out absent the
17 restriction; and if so, is Network Rail's case that
18 the operation of running these licence schemes would be
19 impossible without the single supplier assurance scheme?

20 MR. WOOLFE: Sir, I rise hesitantly. I just realise
21 a qualification I should have put on that, which is
22 Mastercard I think is going up on appeal from the Court
23 of Appeal to the Supreme Court. I did not note that. I
24 am afraid I am not in that case, so I do not know what
25 the appeal is about, so I cannot help you with what it

1 is. But I should have noted that. I apologise, sir.
2 MR. FLYNN: Well, I think that is probably what it says,
3 that it has to be impossible to carry out without
4 the restriction. I think you then have to consider what
5 the main operation you are talking about here is, and
6 that, I do not think, can possibly mean that you can
7 just envisage another way of doing this, and therefore
8 it is not impossible to carry it out. You know
9 the constraints under which Network Rail is operating as
10 a matter of law, as a matter of its licence, as a matter
11 of its obligations under health and safety legislation,
12 and you have had, in my submission, powerful evidence
13 about the dangers and indeed unwisdom of, as it were,
14 rocking the boat from the safety perspective here.

15 So I think that is probably an extreme formulation.
16 In my view, like much of this case, it really would be
17 the tail wagging the dog to find that competition law is
18 such a pure and unthoughtful set of rules as to sweep
19 all of that aside and say, well, it is all about the
20 money and you have to demonstrate the efficiencies that
21 would be necessary to do that. That, of course, is
22 before we get on to our exemption arguments as well. We
23 say these matters have been hypothesised as to what the
24 alternative approach might be. I do not think, in
25 reality, although it has been mentioned very much --

1 I do not think you have had much detail of how you could
2 actually run this on a different approach: whether it be
3 a single scheme with other -- with various suppliers
4 feeding in, which I think was what Mr. Blackley said was
5 the only way he could see this running, or you had
6 parallel schemes, as apparently happens in the Norwegian
7 oil and gas field -- I should not say "field", sector.
8 I do not think you have had the detail to make
9 the conclusion that it would be impossible to carry out
10 without the restriction complained of.

11 There are a couple of points which we do make in our
12 closings, which I am asked to highlight in my client's
13 interest. One of them relates to the buyers' charter,
14 which we say is a simple statement by, insofar as it is
15 signed, and it unequivocally was signed by Network Rail,
16 it is a statement of a policy that it had had in place
17 for 20 years or more. It does not actually change
18 anything; it restates their commitment to the evolving
19 industry scheme.

20 The other point, which is possibly one which you can
21 balance against the point we were just on, is
22 the principle stated in many cases of the Court of
23 Justice and downwards about the importance of parties on
24 the market, even if they are dominant parties, being
25 able to choose their counterparties, if I can put it

1 that way. Again, I probably do not need to develop
2 that, but that is the headline point we have made
3 elsewhere.

4 MEMBER 3: Could we just think about that a bit further.

5 Mr. Woolfe took us through the three different
6 schemes and the universe of effects that those schemes
7 create, in the sense that arguably, in relation to
8 the principal contractor scheme, that is really about
9 Network Rail stipulating risk for the people it
10 contracts with. That chimes clearly with what I think
11 you started your opening remarks on by saying that in
12 this case it is about Network Rail as buyer stipulating
13 who it deals with.

14 But we get -- there is still the points that
15 Mr. Woolfe makes, that the on-track plant scheme, and
16 particularly the Sentinel scheme, then reflect
17 Network Rail not as buyer stipulating the scheme to be
18 used by people through the supply chain. There your
19 clients are not there as buyer, are they? I mean, they
20 may ultimately fund a chunk of the works, but still not
21 all of them, I think.

22 MR. FLYNN: No, I think that's probably fair. I have given
23 you some breakdown of the numbers, as it were.
24 The pervasiveness of the Sentinel scheme within RISQS is
25 not possibly what one might have thought, having heard

1 that it has basically ran down the supply chain. But
2 the purpose of Sentinel is to make sure that no one who
3 has not got the appropriate training and supervision is
4 allowed on the railway. That is what it is there for.

5 MEMBER 3: But to the extent it is then applying beyond the
6 universe with whom Network Rail has a contract, you are
7 not relying on Network Rail as a contracting party, you
8 are then relying on Network Rail as the person
9 ultimately responsible in tort or health and safety.

10 MR. FLYNN: Well, and it has a variety of legal obligations
11 itself, including, yes, to maintain safety on
12 the railway.

13 MEMBER 3: But then it is not about Network Rail as buyer,
14 is it?

15 MR. FLYNN: No, that is not about the buyer, but that is,
16 nevertheless, an important principle that we do rely on
17 to inform --

18 MEMBER 3: If that was the governing principle, you would
19 not need the contracting principle. Because if that was
20 the governing principle, it would apply both to those
21 people you contract with and those people you do not
22 contract with.

23 MR. FLYNN: Perhaps I could have my cake and eat it. Maybe
24 we can have both. They are not inconsistent, I think.

25 I can tell Mr. Cutting will be puzzling over that

1 one, and no doubt so will I.

2 I think I probably cannot develop the point much
3 further by reference to the possible contractual
4 structures, but I think you understand where we are
5 coming from on that.

6 THE CHAIRMAN: Thank you, Mr. Flynn.

7 MR. FLYNN: Thank you, sir.

8 THE CHAIRMAN: Did you want to come back on anything, Mr.
9 Woolfe?

10 Reply-submissions by MR. WOOLFE

11 MR. WOOLFE: There are six points, but they are short ones,
12 so I will deal with them swiftly.

13 First of all, as regards the *ITALICS* Multiplex
14 case and the admissibility of the evidence of
15 Mr. Spence, to be clear, we are not saying that things
16 expressed by Mr. Spence are otherwise inadmissible. In
17 a sort of technical sense, yes, but we are not
18 suggesting the tribunal ignores them.

19 What we were saying at paragraph 15.2 of our
20 statement is, in a sense, for the Tribunal's point of
21 view, it has to make findings of fact based on factual
22 evidence, it can weigh opinion evidence based on the
23 expertise and independence of the person who is giving
24 it. If things stray into argument, it becomes more
25 difficult for the Tribunal to grapple with. That was

1 essentially the point we were trying to make.

2 Simply on italics Multiplex, Multiplex was
3 premised on the engineer being intimately familiar with
4 the details of the project and what were the facts that
5 were at issue. That is paragraph 66 of
6 the italics Multiplex case. We would say that
7 Mr. Spence's evidence was materially altered by
8 reference to knowing -- his lack of knowledge of
9 the facts and what RISQS actually did. So that is
10 the first point.

11 The second point, I think Mr. Flynn took you to
12 paragraph 25 of his closing and to the footnote to that
13 paragraph, which deals with the number of suppliers. We
14 are on the -- this was the 29% point.

15 In a sense, it is just worth going to the document
16 which those come through to understand exactly what they
17 are, which is in bundle H/21/5948, and what these
18 calculations are.

19 These calculations, as we understand them, are based
20 upon just numbers of subscribers not on value; and
21 merely the fact that somebody is a Sentinel or not
22 a Sentinel subscriber does not necessarily tell you what
23 proportion of the value of the market they account for.
24 Non-sentinel will be low value, but even within Sentinel
25 you might have person A who is simply providing some

1 workforce on-track versus, say, Readypower -- an example
2 you saw before you -- who said they paid, I think,
3 £6,800 a year because they are both Sentinel-registered
4 and on-track plant and so on, so it stacks up.

5 Simply to note that these percentages that are being
6 talked about in paragraph 25 are based on supply and not
7 on value, and that is not a good way of doing it.

8 Simply for your note -- I am not going to make any
9 submissions about it, but the reference to the number of
10 principal contractors has kept on coming up. That is in
11 fact given at page 5955 of that bundle at that point in
12 time. That is "principal contractors" as defined, not
13 necessarily anybody who is contracted with Network Rail,
14 which is a point that my learned friend made. But
15 simply if you happen to want a figure for the number of
16 principal contractors, there you are. I think it comes
17 out at 133, but I may have got my maths slightly wrong.

18 Then the third point that was made was that we do
19 not have any evidence of an unhappy buyer or supplier
20 turning up and saying, "I want this other solution".

21 Well, in fact, we did have the evidence of
22 Mr. Berwick from Balfour Beatty. The reference I will
23 give the Tribunal is transcript, Day 5, page 61, line 19
24 through to page 63, line 5.

25 He accepted that he had had a choice in

1 the construction sector and had weighed up the different
2 schemes available, construction Line or
3 Building Confidence, but that in effect it had no choice
4 in the rail sector. I would say that it is hard for us
5 to find evidence of somebody saying what they would
6 choose if they had a choice but they do not. That is
7 hypothetical. Indeed, some of the problem is there has
8 been some hypothetical evidence.

9 The fourth point Mr. Flynn
10 raised: *italics* Socrates. He made the point that in
11 *italics* Socrates the Law Society was reserving part
12 of the market to itself.

13 I think I already said that in a sense, whether you
14 reserve it to yourself or reserve it to another body
15 with whom you are closely associated, as indeed
16 Network Rail is with the RSSB, does not determine
17 the anti-competitive effect. But simply an authority in
18 reply to the point that -- the case is called
19 *italics* Sel-Imperial. It is in bundle 3, tab 43.
20 Paragraph 66 deals with the point of whether there has
21 to be benefits to the undertaking in question.
22 Mr Justice Roth there was firmly of the view that it did
23 not. He was basing himself on an analysis of
24 the *italics* Selex case which my learned friend cites.

25 MEMBER 3: Could you give us the reference again?

1 MR. WOOLFE: It is bundle 3, tab 43, and the case is called
2 italics Sel-Imperial v The British Standards
3 Institute.

4 This case involved the Kitemarking of car parts.
5 Yes, I think that is right.

6 What Mr Justice Roth considers at 66 was
7 considering, admittedly, a hypothetical possibility in
8 that case but it was part of his reasoning:

9 "... where BSI decided that it would restrict the
10 number of repairers, whether generally or by region, to
11 which it would grant a Kitemark in respect of PAS 125."

12 So this is a public standard published by BSI:

13 "That could clearly result in a severe restriction
14 of competition. It is no answer to say that BSI as
15 a responsible body would never contemplate such action
16 ... I find it impossible to hold ... that as a matter of
17 law this could not constitute an abuse just because this
18 was not to the undertaking's economic advantage."

19 So the reservation of the market point is really
20 about the conditions of competition in the market, not
21 who benefits.

22 Then the fifth point, Speed Medical to which my
23 learned friend made reference. We say it is an entirely
24 different case, where the Government decided that a body
25 was to be set up. Indeed, it was -- if you look at

1 paragraph 27 of Speed Medical, which I had a copy of
2 a moment ago -- I do not think it is in the bundle.
3 I am not sure it has been handed up. The Medco, as it
4 was called, was written into the Civil Procedure Rules.
5 So its position was there by legislation and it was
6 a judicial review, and that is an entirely different
7 context to the present.

8 Finally, one more point in reply to the point
9 regarding the total benefit that is said to flow. Of
10 course, the benefits of competition flow not just to
11 the people who would purchase from the new entrant but
12 they apply across the market generally, and that is an
13 important point to bear in mind.

14 Unless I can assist you further, sir, those are my
15 submissions.

16 THE CHAIRMAN: Thank you very much, Mr. Woolfe.

17 Thank you for your submissions and thank you to your
18 respective teams for putting the bundles together.

19 The Tribunal will reserve its judgment.

20 MR. WOOLFE: Thank you, sir.

21 (4.00 pm)

22 (The hearing adjourned)

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