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6 **IN THE COMPETITION**

Case No. : 1298/5/7/18

7 APPEAL TRIBUNAL

8 Victoria House,

9 Bloomsbury Place,

10 London WC1A 2EB

11 28 February 2019

12 Before:

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

14 (Sitting as a Tribunal in England and Wales)

15 **BETWEEN:**

16 **Achilles Information Limited**

17 **v**

18 **Network Rail Infrastructure Limited**

19 _____
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23 ***5 New Street Square, London EC4A 3BF***

24 ***Tel: 020 7831 5627 Fax: 020 7831 7737***

25 ***civil@opus2.digital***

26 _____
27 **HEARING – Day 7**

28

APPEARANCES

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

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

1 Thursday, 28 February 2019

2 (10.30 am)

3 (Proceedings delayed)

4 (10.35 am)

5 MR. DEREK HOLT (continued)

6 Cross-examination by MR. WOOLFE (continued)

7 MR. WOOLFE: Good morning, Mr. Holt.

8 A. Good morning.

9 Q. We were discussing yesterday, were we not, the
10 difference between the provision of audit for the
11 purposes of the authorisation schemes on the one hand
12 and the provision of a pre-qualification service on
13 the other?

14 A. Yes.

15 Q. I think you agree there is a basic distinction there on
16 the facts, but I think your point is that they are
17 linked in a way which we are going to explore, which
18 means that in fact Network Rail has to extricate
19 the two, has to do the two together.

20 A. Yeah, just to clarify, it is that in the counterfactual
21 being proposed by the claimant, Network Rail would still
22 be in a position of facing a competitive bottleneck.
23 It's not necessarily that they would have to take both
24 services, but economically they would be in a position
25 of facing a competitive bottleneck.

1 Q. I think you set out your reasons for this as point 4.4
2 of the joint statement, so if I can turn to you that.
3 That is at tab 5 of bundle F and it is on page 246 of
4 that bundle.

5 A. Yes, 4.4?

6 Q. 4.4, yes.

7 A. Yeah.

8 Q. The proposition is:

9 "The counterfactual market situation requires
10 [Network Rail] to purchase supplier assurance services
11 from Achilles and perhaps other supplier assurance
12 schemes, in addition to RISQS."

13 So the proposition that you are actually addressing
14 is both that Network Rail would have to purchase, which
15 means it would have to pay for, but also that it would
16 actually have to purchase from Achilles as well as from
17 RISQS.

18 A. Yes, that's right, and just to clarify, the point I was
19 making here is that, if Network Rail must recognise
20 Achilles and it gains a whole bunch of suppliers as
21 a result of the audit rule that Achilles is taking out,
22 then that data would be very valuable and that would
23 leave a number of options open to Network Rail. Simply
24 not taking any service or not paying any money to
25 Achilles was not one that I thought was reasonable.

1 Q. Now, we are going to focus in on the reasons you give
2 for that --

3 A. Yeah.

4 Q. -- in the right-hand column.

5 A. Okay.

6 Q. Does the Tribunal just want to take a moment to read
7 down that column? It might help before we talk through
8 it. (Pause)

9 Mr. Holt, you say that there is not a distinction
10 because, "... Network Rail does not have
11 the ability to exercise choice in relation to scheme
12 recognition ..." -- sorry, "... if Network Rail does not
13 have the ability to recognise choice ..." -- sorry,
14 I will start that again.

15 "... if Network Rail does not have the ability to
16 exercise choice in relation to scheme recognition, then
17 Network Rail will face a competitive bottleneck in
18 relation to that scheme."

19 That is the point you were just making.

20 A. Yes.

21 Q. You give two reasons for that here.

22 A. Yeah.

23 Q. You say:

24 "This is because the accreditation information that
25 the scheme will hold in relation to that scheme will be

1 highly valuable since without it Network Rail
2 Infrastructure Limited would be unable to be sure about
3 the accreditation status of suppliers using that scheme.
4 Also, to the extent that any free services would not
5 include an ability efficiently to include the suppliers
6 using that scheme in its tender processes, Network Rail
7 would in practice have to subscribe to the additional
8 services."

9 So there seem to be two points.

10 A. Yes.

11 Q. One is the value of information --

12 A. Yes.

13 Q. -- and the other is an efficiency point including about
14 the suppliers; yes?

15 A. Yes. The only brief qualification I make in relation to
16 the latter point is that it applies both to
17 the IT portal as well as the qualification system. So,
18 in other words, the information would be valuable to
19 Network Rail in the sense that if it doesn't get that
20 information, it would have to replicate to some extent
21 the services that currently the scheme is doing.

22 Q. Okay. So it is these two reasons; I am going to explore
23 them with you.

24 So looking at the first one, that is:

25 "The scheme will hold information ..."

1 So in the hypothetical scenario we are talking
2 about, imagine for ease that we have just two supplier
3 assurance schemes --

4 A. Okay.

5 Q. I accept that a case could be made that there would be
6 more than two, but imagine two --

7 A. Understood.

8 Q. -- for ease of expedition.

9 Now, Network Rail would allow both of those to audit
10 for the purpose of the key schemes and let's say both
11 RISQS and TransQ do some audits --

12 A. Sure.

13 Q. -- and then say that Network Rail would like to use
14 RISQS as a qualification scheme for a particular
15 contract and let's take the example of a repair and
16 maintenance in the London area because we have seen that
17 in the bundle. That is something we know --

18 A. Sure.

19 Q. -- does exist.

20 A. Yeah.

21 Q. Now, our position, our -- what we think -- is that
22 Network Rail would advertise in RISQS that it wants to
23 use that as a qualification system for that type of
24 contract -- it would advertise that in the official
25 journal and then it could do that.

1 Now, as I understand what you are saying here, you
2 are saying that Network Rail would be prevented from
3 doing that because there is some accreditation
4 information held by TransQ in respect of suppliers using
5 TransQ which Network Rail would need for the purpose of
6 placing a notice through RISQS; is that what you are
7 saying?

8 A. No, that's not quite what I'm saying. I'm not saying it
9 would need -- it would be prevented from using RISQS for
10 the purposes of the qualification system. What I'm
11 saying is that, in order to effectively reach all of
12 the accredited suppliers, obviously those suppliers
13 would need to be a member of RISQS, if that's the system
14 that's being used for qualification, and, furthermore,
15 in order to ensure that those bodies are all effectively
16 assured to the right standard, that information would be
17 held by the other scheme, Achilles, and therefore you
18 need to have some transmission mechanism for that
19 information to make its way across. My key point is
20 that that information in a "must recognise" world is
21 highly valuable and would affect the bargaining
22 positions of the parties.

23 Q. Okay. So if I could just take, I think, the starting
24 point of that. There is a bit of a chain of reasoning
25 there. The starting point, I think you said, is that in

1 order to reach all the suppliers -- yes?

2 A. Yeah.

3 Q. I think you said that.

4 Now, in a sense, just to use RISQS as
5 a qualification system -- Network Rail would be using it
6 as a qualification system, it would be trying to reach
7 the suppliers who are on RISQS --

8 A. Yes.

9 Q. -- and in order to place a contract through that, it
10 only needs to be assured about the information relating
11 to those suppliers who are on RISQS, does it not?

12 A. Yes, although obviously, if it's not aware of the
13 assurance situation in relation to other potential
14 suppliers, then there's a risk of excluding those from
15 the qualification --

16 Q. Right, I see --

17 A. I'm not sure if I understand your question.

18 Q. So it is important to your argument, is it not, that
19 Network Rail could not or would not want to exclude
20 suppliers who are not on RISQS?

21 A. Yes, yes, I think that is one element of it, but I think
22 it's not the only element.

23 Q. Because if that is not the case, then your argument is
24 circular, is it not, because you are saying -- you are
25 assuming that Network Rail needs access to the

1 information about suppliers who are on TransQ in order
2 to tender through RISQS. Unless it needs that
3 information for some reason, it does not need to have
4 access to it, if you see my point?

5 A. Well, I think what I'm saying is that the information
6 associated with the audit process that Achilles is
7 carrying out obviously needs to be transmitted in some
8 way to the scheme being used for -- well, I would say
9 Network Rail so it can satisfy itself of the assurance
10 status of all those suppliers and, furthermore, those
11 suppliers have to be able to access the qualification
12 system.

13 Q. Okay, but Network Rail only needs the information about
14 those suppliers if in fact it is going to think about
15 awarding a contract to those suppliers, does it not?

16 A. Yes, I think that's right. If it's not planning on
17 awarding any contracts to a supplier under any
18 circumstances, then there would be no need for it to be
19 aware of its assurance status. I think that's fair.

20 Q. So in a sense, the first point I think rather collapses
21 into the second one, does it not, which is, "... to
22 the extent that any free services would not include an
23 ability to efficiently include the suppliers using that
24 scheme [so here TransQ] in its tender processes,
25 Network Rail would in practice have to subscribe to

1 the additional services". So is that fundamentally your
2 point?

3 A. No, I think the fundamental point is that once, let's
4 say, Achilles has audited, you know, however many
5 hundreds -- call it 500 suppliers having been recognised
6 under this new rule, obviously that information has to
7 be developed into an IT portal and those suppliers, to
8 the extent that they are interested in supplying
9 Network Rail, which I presume is the case because why
10 else would they go through the assurance process, need
11 to be able to access the qualification as well. The key
12 point is that Network Rail's position in terms of
13 wanting to access that information or to be satisfied of
14 the assurance process in relation to those 500 suppliers
15 is valuable information.

16 Q. Okay, so just quickly on the 500 suppliers --

17 A. Yeah.

18 Q. -- as I understand it, Network Rail does not directly
19 contract -- it contracts with a much smaller number than
20 that. I think it is 100 or so or principal
21 contractors --

22 A. Sure. I'm happy to accept that. Sure.

23 Q. -- but that is a minor point. I mean, more --

24 A. Sorry, but I think there are many more suppliers who are
25 assured under RISQS than the direct ones that are

1 supplying Network Rail, and it may well be that
2 Network Rail needs to be aware of the assurance status
3 of the -- some of the other providers' subcontractors.

4 Q. I think that -- so the competitive bottleneck point is,
5 yes, we can see that TransQ would have a set of
6 information --

7 A. Yeah.

8 Q. -- but then it leads to -- a further question is: who
9 needs that information and how much do they need it? Is
10 that a fair point?

11 A. Yes, I think so. I mean, obviously the buyer and/or
12 the scheme that is running the qualification needs to be
13 aware of the assurance status of the suppliers who
14 are --

15 Q. You keep on repeating that, Mr Holt, that they need to
16 be aware of the assurance status of the suppliers, but
17 in a sense that is the issue, is it not, because what
18 I am putting to you is, from Network Rail's point of
19 view, if it is letting a contract or a contract in
20 a particular area and it says, "I am going to do this
21 through RISQS" --

22 A. Sure.

23 Q. -- then it is only considering suppliers who are on
24 RISQS. In order to think about those suppliers, be sure
25 about whether they are any good or not, it only needs

1 the information that is on RISQS.

2 A. Okay. So, yes, in respect of the set of suppliers who
3 are on RISQS. I think there is the risk that suppliers
4 who are not on RISQS would then not be participating in
5 that tender.

6 Q. Yes --

7 A. That's a separate point -- perhaps a separate point.

8 Q. I can see that from --

9 A. Sorry, can I just make one further point which I think
10 is relevant? I think, just because a supplier has been
11 assured by Achilles would not mean, of course, that it
12 would not want to participate in the tender that
13 Network Rail might be carrying out. I think that we
14 would agree on.

15 Q. That, though, would be a competitive bottleneck in
16 respect of the supplier, would it not?

17 A. No, because I have to say it is also the information
18 that -- sorry. So Achilles would have this information.
19 In my view, that information would be valuable because
20 it would be information that it would have access to
21 that it would otherwise not have access to if it weren't
22 carrying out these audits. The information, I think,
23 flow would then need to go into an IT portal for an
24 overview of all of the suppliers as to their
25 accreditation status. I think that's one of

1 the value-added services.

2 Q. Yes.

3 A. Now, if is not selling that IT portal to Network Rail,
4 then there needs to be some other means by which
5 the information that it holds on the accreditation
6 status of all the individual suppliers, let's say,
7 you know, 100 direct tier ones plus another few
8 hundred tier 2 and other, how is that information going
9 to be put into, you know, a coherent database?

10 Q. So I suggest to you that you are essentially treating
11 that information -- the information that TransQ would be
12 holding, in a sense it would be holding information
13 about suppliers that might be of value to buyers and
14 information about opportunities that might be valuable
15 to suppliers. Is that, roughly speaking, what we are
16 talking about?

17 A. I think that's fair.

18 Q. The point you are trying to make is one specifically
19 about Network Rail at 4.4. You are saying:

20 "Network Rail must purchase supplier assurance
21 services from Achilles in addition to RISQS."

22 You are saying Network Rail must multi-home, and
23 that is --

24 A. So I --

25 Q. -- important to your analysis because we then see later

1 on, do we not, that all your counterfactuals involve
2 Network Rail multi-homing?

3 A. Yes, but there is a qualification in that it does not
4 necessarily mean that Network Rail would use the TransQ
5 qualification system. Rather, what it means is that in
6 order to pay for access to the accreditation
7 information, it would be in a position where it has to
8 pay for that.

9 Q. So you are working on the basis that the information
10 about suppliers in TransQ would be valuable to
11 Network Rail --

12 A. Yes.

13 Q. -- in issuing contract notices through RISQS?

14 A. Well, not necessarily only in relation to contract
15 references. I mean, I presume here also that the
16 IT portal has some additional value in addition to
17 the qualification portal. There's --

18 Q. You are saying it might have other uses?

19 A. Yeah, I think there are multiple -- I think there's
20 a role in essentially processing the data arising from
21 the audit outcomes into a coherent database. That's my
22 understanding of the IT portal.

23 Q. Sure, but that is a point about the value that is added,
24 is it not, rather than about the value of the data
25 necessarily to Network Rail?

1 Can I then take you to the next one because I think
2 we have covered in a sense the value to Network Rail and
3 I have suggested to you --

4 A. Yes.

5 Q. -- you know what I am saying, that Network Rail would
6 not need this information about TransQ suppliers when
7 letting a contract through RISQS as such, and I think
8 what you -- there might be some reasons why Network Rail
9 would want information on lots of suppliers, and I think
10 that's the point perhaps that you are making in your
11 next point. Is that a fair summary?

12 A. Yes, I think if those are suppliers that are potentially
13 relevant suppliers for the type of work that
14 Network Rail is contracting, then it would want to have
15 access to potentially procure those services, but
16 obviously only to the extent that it's satisfied as to
17 their accreditation status as well. So that's the
18 information that it needs.

19 Q. Because what you say here is:

20 "Also, to the extent that any free services would
21 not include an ability to efficiently include
22 the suppliers using that scheme ..."

23 So in our hypothesis TransQ.

24 "... in its tender processes ..."

25 So it would be about tendering.

1 A. Yeah.

2 Q. "... Network Rail would in practice have to subscribe to
3 the additional services."

4 Now, I think -- am I right that from an economic
5 perspective the point you are making is an efficiency
6 one, which is that if Network Rail is going to include
7 all suppliers, in practice subscribing to multiple
8 schemes would be the only efficient means of achieving
9 that?

10 A. Well, it may be that having a single qualification
11 scheme is more efficient, but if it has a single
12 qualification scheme but multiple auditors, then there
13 needs to be a mechanism by which the single
14 qualification scheme is getting all of that data. And
15 so even if you're not procuring the qualification scheme
16 from Achilles, you still need the mechanism to get the
17 accreditation information in a coherent database format
18 in order to include those suppliers.

19 Q. But you are operating on the assumption, are you not,
20 that Network Rail has to include all suppliers?

21 A. No, I'm not assuming that they have to include all
22 suppliers. I'm saying that if they want to include all
23 suppliers, including those audited by Achilles, then
24 it's going to be in a position of either having to
25 replicate the database itself using the mechanism

1 I think that was described by Mr. Parker yesterday, ie
2 a series of emails from those suppliers saying, "Here's
3 our certificate from Achilles", or alternatively
4 a contractual requirement for Achilles itself to say,
5 "By the way, we've assured these hundred suppliers and
6 here's the information". But, of course, that basic
7 data is not everything that a scheme does.

8 The analysis, co-ordination, putting all that into
9 a database is a further value-added service. If
10 Achilles is not efficiently selling that, it's --
11 because the whole prospect that we're talking about here
12 is a situation where Achilles is not selling
13 qualification and IT services, but rather is merely
14 passing on some verification information then
15 somebody -- Network Rail, RISQS, I'm not quite sure
16 who -- then has a significant amount of work to do to
17 rebuild from that raw data what is going on. That
18 obviously puts an upper band on what Network Rail would
19 be willing to pay, but that would be a much higher
20 level, I would presume, than the competitive market
21 level for that information service.

22 Q. Right, but just to check, have you -- I think we are
23 still exploring what Network Rail's underlying need for
24 the information is, and whatever TransQ may do with this
25 data, it is still fundamentally data in respect of

1 particular suppliers who have chosen to go with TransQ?

2 A. Agreed, but presumably for the purpose of acquiring
3 contracts with Network Rail potentially and/or to meet
4 the other requirements that Network Rail has made in
5 relation to Sentinel or the POS.

6 Q. Would it not be a bit of an odd thing for a supplier to
7 do, if they want to win a contract with Network Rail and
8 if Network Rail has advertised its qualification system
9 being through RISQS, for them to go and -- for
10 the supplier to then go to TransQ for its audits? If
11 a supplier has chosen to do that, it would be a bit
12 strange, would it not?

13 A. That may well be the case. I think -- I think that
14 would be a sort of a risk of duplication in this respect.
15 If Network Rail has specified the use of RISQS for
16 the qualification and is not able to access the
17 information from the other auditors -- I think there's
18 the distinction between our views. I'm assuming that
19 there would further be a process by which the audit
20 information from TransQ is incorporated into the
21 qualification process somehow.

22 Q. Okay. If I can just push that with you a little bit
23 further because, if these are duplicated, so
24 the suppliers are in both systems --

25 A. Yeah.

1 Q. -- there is no problem for Network Rail as such in
2 having access to the information? There's no
3 competitive bottleneck?

4 A. Well, no, I don't think I agree because we're not
5 talking about duplication of the audit. So it's not
6 that Network Rail would already have the audit
7 information from RISQS and therefore would not face
8 a competitive bottleneck for that same information from
9 Achilles. So that's not the duplication we're talking
10 about.

11 Network Rail would still face that bottleneck
12 because Achilles alone would have the information in
13 relation to certain suppliers that it has won in this --
14 in the market audit competition and, furthermore,
15 Network Rail, if it is using RISQS as per your
16 proposition, would obviously want to try and include as
17 many suppliers as possible. So the duplication from the
18 supplier perspective would be that they're potentially
19 involved with TransQ for the audit, but RISQS for
20 the qualification.

21 Q. Your point is really about a competitive bottleneck that
22 Network Rail would be suffering from. That is what this
23 point really relates to; yes?

24 A. It is, yes. I agree with that.

25 Q. Your point does seem to be premised on Network Rail

1 having some form of need to include all suppliers or at
2 least so many suppliers that it would have to purchase
3 the information from TransQ. That is --

4 A. Yeah, I think the -- yes, I think I agree that an
5 assumption on which my statement relies is that if,
6 having gained recognition status in relation to the key
7 schemes, TransQ is able to market itself to suppliers,
8 saying, "Come be audited by us, that will qualify you to
9 be accredited for the purpose of the key schemes", then
10 it will have that information. Those suppliers I am
11 presuming would still potentially want to access
12 Network Rail.

13 Q. I suggest to you that in respect of access to those
14 suppliers, Network Rail would only be under
15 a competitive bottleneck in respect of those suppliers
16 who are only available on TransQ and who have chosen
17 also not to take assurance through RISQS as well.

18 A. Well, I agree with that and I also agree with your
19 previous point, that it would be very irrational,
20 I think, for a supplier to do the assurance, ie
21 the audit process, on both schemes. So it would
22 presumably choose one or the other, be audited by that
23 one scheme and then the question is how that information
24 is transmitted through to the qualification.

25 Q. I think I was putting a slightly different point to you,

1 which is: if a supplier only wants to supply to
2 Network Rail, then it would be irrational to have the
3 duplication because it would only go with the scheme --

4 A. Sure.

5 Q. -- that Network Rail wanted?

6 A. Agreed.

7 Q. If the supplier saw some value in homing on both schemes
8 because maybe it was supplying other buyers, not
9 Network Rail, then it might choose to go on both or --

10 A. Yes, that's a different situation. You know, thinking
11 about the overall market, thinking about also other
12 buyers, if they were to have different schemes that they
13 require for their assurance purposes, then I agree with
14 you that suppliers would be in a position of wanting to
15 join multiple schemes. I'm not sure I'd call that an
16 advantage of in-the-market competition because that's
17 obviously leaving them to be assured multiple times.

18 Q. We are going to explore the cost efficiency implications
19 of this in a moment, but I think we are focusing on the
20 competitive bottleneck point here.

21 A. Okay.

22 Q. So in respect of those suppliers who only supply
23 Network Rail, there would be no competitive bottleneck
24 because they are just going to go on the scheme that
25 Network Rail says it is going to use; yes?

1 A. No, that's not what I'm saying. I'm saying if
2 Network Rail is in a position of being required to
3 accept, for the purpose of recognition, multiple
4 schemes -- call it two for the sake of argument -- then
5 it needs that information to understand the
6 accreditation status of suppliers on each of those
7 schemes.

8 Q. I appreciate that is what you are saying, Mr. Holt, but
9 I am asking you to answer a question about what you are
10 not saying.

11 In respect of those suppliers who only supply
12 Network Rail --

13 A. Yes.

14 Q. -- there would be no competitive bottleneck for
15 Network Rail, would there, because those suppliers would
16 only go on the supplier assurance scheme which
17 Network Rail chooses to use for its qualification
18 purposes?

19 A. So those -- well, that's an interesting statement
20 because what that's saying is that actually, if
21 Network Rail were to specify a particular scheme for
22 qualification and would have free choice in doing so,
23 even under the claimant's sort of counterfactual --

24 Q. It is not even -- not precisely under, Mr Holt, but yes
25 --

1 A. That is indeed what it is saying -- then it seems to me
2 that -- then I think if Network Rail does that and says,
3 "Yes, we have a preference for RISQS and we are using
4 it", and makes a statement to that effect, then I agree
5 with you, all Network Rail specific suppliers would use
6 RISQS, certainly for the qualification. I think there's
7 still a bit of a question as to what they would do for
8 the audit role. They would -- I agree with you -- only
9 be audited by RISQS in that world if that is the only
10 way in order to participate in the qualification and
11 they want to supply Network Rail. So I agree with you
12 there.

13 If, on the other hand, there was the prospect that
14 the fact that recognition of TransQ should imply that
15 that means that you should be able to participate in
16 Network Rail contracts -- and the mechanism by which
17 that would happen is that TransQ audit information would
18 somehow be transmitted through into the qualification
19 system, even if it's a single one run by RISQS -- then
20 a supplier would still have the option to use TransQ in
21 that case for auditing purposes.

22 Q. Just towards the middle of that you hypothesised
23 precisely what it is that we are -- you were
24 hypothesising an assumption precisely that we are in
25 a sense arguing about, which is that you assumed that it

1 would be a condition of participating in the tender,
2 the pre-qualification through RISQS, that
3 the information regarding TransQ is available.

4 A. Yeah, okay, so --

5 Q. You are building into your assumption --

6 A. Yes. So if it is not -- let's assess each of those
7 situations. So either there is a requirement for the
8 audit information to be transmitted into RISQS so that
9 all the suppliers who are using any of the recognised
10 schemes are able to access -- are on RISQS and able to
11 access the qualification -- therein lies the bottleneck
12 and also a risk of duplication for a supplier -- or
13 alternatively, which I think you are now putting to me,
14 there would be no need for Network Rail to take any
15 consideration of anybody who has been assured by TransQ
16 at all in the procurement process because it would just
17 say, "The procurement process is being run by RISQS.
18 That's the qualification scheme. You need to be part of
19 RISQS, including the full assurance services that it
20 offers, including audit, and if you're not, then you're
21 not going to be participating in the scheme" -- if that
22 is the proposition, then I think actually that's a quite
23 different counterfactual because what that would suggest
24 is that Network Rail could in a sense continue to choose
25 and effectively mandate RISQS irrespective of this whole

1 recognition on audit point.

2 Q. Well, what I am going to suggest to you is several
3 things about that. First of all, it would only be
4 mandating it for its own supply, would it not?

5 A. Yeah, so for the qualification aspect, I agree with you.
6 That debate focuses on its own suppliers. I don't know,
7 but obviously, if it were to extend the nature of its
8 specifications in relation to its procurement, ie to
9 say, "Not only do we want our direct tier 1 suppliers to
10 be RISQS-accredited, we will work primarily or perhaps
11 even uniquely with principal contractors who also use
12 RISQS", then that would also be an issue which would
13 lead in the end to RISQS being the single model.

14 Q. Okay. Now, the other point is -- so that is pursuing
15 there the assumption that Network Rail would require
16 people who supply it to do everything through RISQS.

17 Let's go back to your alternative counterfactual,
18 you said --

19 A. Yeah.

20 Q. -- where the information is to be shared.

21 A. Yeah.

22 Q. At heart what this case is about for us is that there is
23 a competitive bottleneck in the authorisation schemes
24 that Network Rail runs because it says, "You shall only
25 use RISQS to be assured for Sentinel purposes", and

1 Sentinel, you need to get on to track and that is a form
2 of bottleneck and we say there is a bottleneck there.
3 Now, at the moment Network Rail is using that bottleneck
4 to exclude all potential other supplier assurance. It
5 is saying, "No, it shall be only RISQS", so it is an
6 absolute bottleneck in that sense. But it could use its
7 power arising from that bottleneck in a less restrictive
8 way, could it not? It could say, for example, "We will
9 allow other schemes to provide the assurance required
10 for Sentinel authorisation on certain conditions", and
11 those conditions could include that the information
12 regarding the authorisation status, audit status, be
13 available for Network Rail for its use, you know --

14 A. Yeah.

15 Q. -- for other purposes.

16 There is no -- so as regards Network Rail,
17 Network Rail really has potential providers of supplier
18 assurance over a barrel. It is not the other way round,
19 is it?

20 A. Well, I disagree entirely with that because Network Rail
21 is making a decision to outsource something that it
22 could do itself; in other words, by definition, it is
23 the consumer, the buyer in this relationship. It's not
24 the provider. So the selection of RISQS, I think, which
25 is agreed, is the outcome of that choice being

1 exercised.

2 Now, in terms of this bottleneck point, I would
3 agree that maybe suppliers therefore have to use RISQS
4 if they want to supply Network Rail --

5 Q. No. No, Mr. Holt, they have to use RISQS if they want
6 to be Sentinel-accredited and allowed onto Network Rail
7 infrastructure --

8 A. Yes.

9 Q. -- in order to do anything for anybody in this industry.

10 A. Yeah, sorry, my point was perhaps put too generally.
11 Obviously if they want to participate in the key
12 schemes, I agree with you.

13 Q. Yes.

14 A. But if you go down this alternative route of saying,
15 "Well, actually, the structure of the requirements can
16 be put such that, once you meet these requirements and
17 you are granted recognition by Network Rail, then you
18 can use a different assurance scheme than RISQS, let's
19 say TransQ, and that information will then be provided
20 in a sense into the system so that those suppliers can
21 still participate in the key schemes" -- I think that's
22 your proposition and --

23 Q. It was to do with providing the information so that it
24 can be used for other purposes.

25 But if we can go back to the fundamental question,

1 which is to what extent Network Rail would actually need
2 the information relating to suppliers who are on TransQ
3 if it wanted to let a contract -- now, I just want to
4 check whether something is in your thinking or not.

5 A. Yeah.

6 Q. Could the witness be handed bundle D, please, and taken
7 to the witness statement of Mr. Blackley, which is at
8 tab 2.

9 A. Yeah.

10 Q. If I can take you to paragraph 112 of that statement,
11 which is on page 44, and ask you to read paragraphs 112
12 and 113. Just skim them for a moment. (Pause)

13 A. Yeah, I've skimmed that.

14 Q. These aspects of Mr. Blackley's thinking, did they
15 inform in any way your thinking about this bottleneck
16 point?

17 A. No.

18 Q. In which case I will not ask you anything further about
19 them then.

20 A. No, it's a separate point.

21 Q. This is another point which -- so from an economic
22 perspective then, if we -- forgetting about a legal
23 constraint on Network Rail to advertise to all suppliers
24 irrespective of which system they are on --

25 A. Yeah.

1 Q. -- the only reason that Network Rail would be forced to
2 purchase the information about suppliers on TransQ is
3 if, from a commercial or economic perspective, it needed
4 to deal with those suppliers for the purpose of
5 the contract that it was going to let; is that fair?

6 A. Yeah, I mean, I'm not quite so sure it's so specific in
7 relation to a single contract. I mean, obviously it may
8 also wish to have oversight of all of the suppliers'
9 accreditation status, you know, across a range of
10 activities in which it might be procuring. So I'm not
11 sure it's so specific to, "For this one contract we need
12 the information". There's obviously an IT portal that
13 allows it to observe and monitor what's going on.

14 Q. What I am going to suggest to you, in respect of --
15 I think I put to you yesterday that Network Rail is
16 a very, very major buyer of services and goods indeed --

17 A. Yes.

18 Q. -- across the industry and I think you suggested
19 billions of pounds --

20 A. Yes, I'm sure that's right.

21 Q. -- and where Network Rail's budget is in the order of
22 billions of pounds. So a lot of money anyway is flowing
23 through this each year.

24 In practice it seems likely, does it not, that if
25 Network Rail is using a certain system to let its

1 contracts, that it will have access to a very wide range
2 of suppliers through the system that it says it chooses
3 to use?

4 A. That may well be.

5 Q. But in a sense it would be an empirical question, would
6 it not, whether that happened or not?

7 A. Yeah, I mean, I think the point is that if it is using,
8 let's say, RISQS for qualification and if that meant
9 that you had to be assured by RISQS in order to be part
10 of the process for Network Rail's procurement, then
11 I agree, that would attract suppliers to RISQS for
12 assurance.

13 Q. Under that hypothesis. But even, in fact, if it did
14 not, if it just said, "We are letting these contracts
15 through RISQS and either you need to have your audits
16 done by RISQS ..." or let's say they specify that the
17 information about the audits should be supplied to
18 Network Rail in an easily manipulable form or something
19 of that nature --

20 A. Yeah.

21 Q. -- Network Rail -- it would have access to a good range
22 of suppliers, would it not, and it would not need to
23 purchase any form of access as a qualification system
24 through TransQ, would it?

25 A. No, I haven't said that it would need to purchase the

1 qualification system from TransQ. What I'm saying is
2 that either it's the situation that if Network Rail is
3 specifying the use of RISQS as the qualification system
4 and that further implies that you need to be part of
5 the RISQS assurance framework, including use of RISQS
6 for audit, then that alone would make it quite
7 difficult, I think, for Achilles to attract suppliers
8 who want to supply Network Rail.

9 Q. So to sum up on this point then, essentially your
10 competitive bottleneck point that Network Rail would
11 need to multi-home because it needed information from
12 TransQ is based upon an assessment that the information
13 that TransQ would hold is of such value to Network Rail
14 that it could not afford not to purchase it?

15 A. Yes, it is essentially an economic point, saying that
16 if, having been recognised as a provider of assurance
17 services, including carrying out audits of suppliers for
18 the purpose of the key schemes, that is the basis on
19 which Achilles is then able to go into the market and
20 win suppliers, then to the extent that Network Rail
21 would want to include those suppliers in its procurement
22 or even understand the accreditation status of suppliers
23 across the base, not just on RISQS but also on TransQ,
24 then that information would be held by TransQ and would
25 be highly valuable.

1 Q. You keep on repeating it is valuable --

2 A. Yeah.

3 Q. -- but I am suggesting whether or not it is valuable to
4 Network Rail would be an empirical question.

5 A. So I agree that --

6 Q. "Yes" or "No", is it an empirical question?

7 A. It is, but the qualification is that if suppliers cannot
8 access Network Rail via TransQ, ie they would have to go
9 through RISQS for the procurement part irrespective of
10 this whole recognition debate, then we are in an
11 entirely different proposition because then Network Rail
12 would be able to specify the procurement issue. That's
13 the debate we had earlier.

14 So I think in that case it would be an empirical
15 question because actually that would lessen
16 the attractiveness of TransQ itself and that would
17 reduce the bottleneck, but it would also reduce
18 the ability of TransQ to -- you know, to compete for
19 audits.

20 Q. But they may still be able to compete for other buyers
21 in that scenario, might they not?

22 A. They may do. They currently obviously can do as well,
23 yes.

24 Q. Well, they cannot insofar as those buyers and the
25 suppliers of those buyers need to be Sentinel-registered

- 1 for the purposes of getting onto Network Rail
2 infrastructure. That is the key point.
- 3 A. That is a point about suppliers, yes.
- 4 Q. What I am saying is, first of all, whether or not this
5 information is of such value that Network Rail has to
6 purchase it is first -- and I think you agreed --
7 fundamentally an empirical question, but it is also an
8 hypothesis or assumption you are making. You are
9 assuming it would be so valuable; yes?
- 10 A. Sorry, can you repeat the question? I'm saying that it
11 would be valuable because if Achilles has won many audit
12 roles as a result of being granted this recognition
13 status, then that would be valuable information.
- 14 Q. I am suggesting to you that it is an assumption, you are
15 assuming that it is valuable, and in fact there are at
16 least two different possibilities: one that it is so
17 valuable that Network Rail chooses to purchase access --
- 18 A. Yeah.
- 19 Q. -- or that, in fact, because of the way things turn out,
20 Network Rail's suppliers tend to go on to where
21 Network Rail is, it's not so valuable. That is also --
- 22 A. Okay, so I agree with you. If Network Rail can apply
23 the procurement rules in the way you've described, ie
24 essentially can require all of its suppliers and,
25 possibly in relation to the key schemes more generally,

1 people that use RISQS for the procurement process, then
2 that would actually lessen the ability of TransQ to win
3 suppliers and would further therefore lessen the value
4 of that information they would hold.

5 Q. Okay. Now if I could then turn on to the analysis of
6 the counterfactuals --

7 A. Yeah.

8 Q. -- because at the start of section 4 of the joint
9 statement -- have you still got that open in front of
10 you?

11 A. I do.

12 Q. Thank you.

13 At paragraph 20 on page 240 --

14 A. Yeah.

15 Q. -- "The experts disagree on the following issues."

16 Then (b):

17 "The interpretation of the 'appropriate minimum
18 standards' ..."

19 This is actually recording a point of agreement that
20 Network Rail could not be described in any sort of
21 meaningful sense as foreclosing an assurance scheme that
22 did not meet appropriate minimum standards.

23 A. Yes.

24 Q. "[Mr. Parker] considers that this could be done for
25 other schemes in the same way as currently applies for

1 RISQS ..."

2 Then your point:

3 "... while DH considers that the ability of

4 Network Rail to ensure schemes maintain these standards

5 in practice cannot be assumed, but should itself form

6 part of the competitive effects analysis ..."

7 A. Yeah, that's right.

8 Q. I think at paragraph 199 of your main report, so at

9 tab 2 of that bundle, is where you I think explain the

10 basis of this.

11 A. Sorry, which paragraph did you say?

12 Q. Sorry, 198 and 199 on page 89 of the bundle.

13 A. Yeah.

14 Q. Because what you are doing here, as I understand it, is

15 defining the conduct in question --

16 A. Yes.

17 Q. -- because then -- that is for the purpose then of

18 identifying the counterfactual; is that a fair ...?

19 A. That's right.

20 Q. What you are making explicit in your definition, you say

21 in the last sentence, is that the buyer, Network Rail,

22 should determine whether a scheme is adequate.

23 A. Yes, that's right -- sorry, that's one point I am

24 making. I'm also making the point that the setting of

25 that adequacy standard still needs to be considered in

1 the effects analysis as to whether these incentives
2 would operate in that direction or not.

3 Q. At paragraph 201 --

4 A. Yes.

5 Q. -- you refer to -- you set out I think then two
6 counterfactuals, do you not?

7 A. Yes.

8 Q. The first one is called the "NRIL multi-homing
9 counterfactual" --

10 A. Yeah.

11 Q. -- and the second one is the "All-buyer multi-homing
12 counterfactual".

13 A. Yeah.

14 Q. As I understand it, your logic for the NRIL
15 counterfactual is:

16 "If the refusal to accept other schemes constitutes
17 an abuse of a dominant position ..."

18 You are sort of mentally removing what the abuse is
19 and saying, "Right, well, Network Rail has to act
20 differently", and you get to there to say that
21 Network Rail would have to use multiple assurance
22 schemes. The point as to whether that is in fact
23 the counterfactual is what we have already been
24 exploring, is it not?

25 A. Yes, agreed, that this counterfactual applies whether --

1 it stems from the need to recognise schemes that meet
2 the adequacy standard. It does not rely on whether you
3 would in fact end up using the qualification service
4 directly or not from all those schemes.

5 Q. Just to check what you mean by "NRIL multi-homing" --

6 A. Yeah.

7 Q. -- obviously it is part of our case that Network Rail
8 should be required to accept for the purpose of
9 the authorisation scheme the audits that we are doing,
10 but I think you are going beyond that in your assumption
11 of Network Rail multi-homing, are you not, that they
12 also have to go and purchase access to the
13 TransQ portal, the full-featured TransQ portal, as it
14 were; that's your assumption?

15 A. That was the way I described it -- I think, as
16 the debate on the distinction of the different services
17 developed, I described in the -- in a joint memo and
18 I think in my second report that it doesn't actually
19 matter for the purposes of the specific competitive
20 bottleneck argument whether or not in fact you take the
21 portal; it's rather that you still need to pay for
22 the information irrespective.

23 Q. So this here, this Network Rail multi-homing
24 counterfactual, that covers the case where
25 the information is so valuable to Network Rail that it

- 1 has to purchase it; yes?
- 2 A. Yes, whereby if Achilles wins a significant number of
3 audits, then that would be valuable information, that's
4 right.
- 5 Q. Okay. Then your second counterfactual --
- 6 A. Yes.
- 7 Q. -- is one you call the "All-buyer multi-homing
8 counterfactual".
- 9 A. Yes.
- 10 Q. As I understand it, you say here that:
- 11 "If the prescription of a specific scheme in
12 agreement with suppliers is a breach of Chapter I, then
13 potentially it might be argued that other buyers who
14 engage in such a practice and act anti-competitively,
15 although this would need to be proved, consequently
16 the conduct of all buyers in the rail industry who
17 require the use of a single supplier assurance scheme,
18 could potentially be argued to constitute an
19 anti-competitive agreement so that all buyers would need
20 to accept any adequate supplier assurance scheme."
- 21 A. Yes.
- 22 Q. I just want to check this with you -- because our case
23 is that specifically the terms in Network Rail's
24 authorisation schemes --
- 25 A. Yeah.

1 Q. -- are both an abuse of dominance and infringe

2 Chapter I.

3 A. I agree.

4 Q. If those are stripped out so that Network Rail has to
5 recognise multiple schemes for those purposes, that
6 would not lead to a situation where any buyer was
7 required to -- would be acting unlawfully if they did
8 not recognise multiple schemes, would it?

9 A. I agree that this counterfactual does not stem directly
10 from the claim form or the points put. The reason
11 I developed that set of analysis was to assess, given
12 that supplier assurance market in rail involves multiple
13 suppliers and multiple buyers -- to understand what the
14 implications of the choices of the other buyers would
15 be.

16 Now, in order to understand the choices and
17 the implications of those other buyers' choices, you
18 need to form a view as to what those preferences are.
19 I've described how I see what those preferences are as
20 being at the moment a preference for RISQS. That has
21 some implications. It leads to at least one plausible
22 scenario in which, even if the key schemes' recognition
23 was changed, it would have very little, if any, impact
24 in the market, because if the preferences of the other
25 buyers were to specify RISQS as well, then suppliers,

1 for the reasons we described earlier, would be
2 irrational to join another scheme. So that's one --
3 that's one important counterfactual analysis that
4 I wanted to look at.

5 This scenario with other buyers also having
6 a similar requirement to recognise any reasonable scheme
7 has different consequences. I'm not saying that the
8 claim form requires that necessarily to be the case, but
9 I felt it was useful to analyse what would happen in
10 that world.

11 Q. I would suggest to you that in no way is that
12 counterfactual a logical implication of the argument
13 that we are running in these proceedings.

14 A. Well, I think the logical extension would be that if --
15 if a buyer of supplier assurance, someone who is making
16 an outsourcing decision to say, "Rather than doing it
17 myself, I want to use a scheme", is put in the position,
18 as Network Rail would be in this world, to say, "Well,
19 actually, you can't specify a preferred scheme. What
20 you have to do is set a set of standards and then let
21 any of the schemes who meet those standards compete",
22 then I don't see necessarily why it wouldn't be similar
23 for any other buyer.

24 But just to be clear, none of my actual findings
25 rely on that. The analysis I've carried out in relation

1 to, I think, the counterfactual that you're putting more
2 weight on, you know, obviously stands alone as its own
3 analysis and that's what my findings are based on.

4 Q. Yes, I think it's fair to say that the existence or
5 non-existence of this all-buyer counterfactual does not
6 have any implications for your analysis of the other.
7 That is fine.

8 I suggest to you that the reason why our argument in
9 no way could require another buyer to multi-home is
10 because what is distinct about Network Rail is it
11 controls access to the rail infrastructure. That is
12 the key feature here. Network Rail controls that access
13 and, as part of that, it runs the authorisation schemes.
14 That makes it completely different to other buyers of
15 services who may want to use supplier assurance.

16 A. Well, not necessarily completely different from all.
17 There are other providers who control access to things,
18 like HS1 and so on --

19 Q. Yes.

20 A. -- but yeah.

21 Q. So there may be other infrastructure managers --

22 A. There might be, I cannot.

23 Q. -- who might run similar authorisation schemes and
24 similar issues might arise in respect of those?

25 A. Yeah.

- 1 Q. But that's not the same as all buyers, is it?
- 2 A. No, that's not the same as all buyers, but again the
3 point here in specifying the use of RISQS, what --
4 the whole point of that is to achieve better outcomes in
5 relation to its purchasing and commissioning of services
6 as well as the safety, of course, of other bodies that
7 it's not directly purchasing from.
- 8 Q. Now we were exploring a while ago that the -- (unclear)
9 the Network Rail multi-homing counterfactual -- that
10 this depended upon an assessment of the value to
11 Network Rail of the information that was held by
12 the second portal TransQ, and it is only if that
13 information is in fact, as it turns out, so valuable
14 that Network Rail needs to purchase access to it
15 separately that Network Rail is in fact required to
16 multi-home. There is a chain of --
- 17 A. Yeah, I think that's right. I mean, what I'm saying is
18 that, having been required to grant this recognition
19 status to any scheme that meets the adequacy
20 requirements, once you're in that world, then of course
21 those schemes will be competing as hard as they can, no
22 doubt, to win suppliers. I describe the process by
23 which that would likely happen and certain schemes would
24 be likely to make themselves attractive to suppliers by
25 saying, you know, "Come and be audited by our scheme."

1 We offer low prices, you know, the management time might
2 be somewhat less than you might have to spend with other
3 people and we also don't seem to have as high an audit
4 failure rate as some of the other schemes", and that
5 "would have attractions". So it's relevant to your
6 question because I think the whole process by which
7 competition would work in that world would be that the
8 scheme would be competing to win suppliers who want to
9 supply Network Rail and therefore would have a material
10 amount of audit information that would be of value.

11 Q. What I am trying to get to is the counterfactual which
12 does not appear here. That is where we are going. Just
13 picking up on what you are saying, I think in there you
14 assumed that the scheme, by which I think you mean
15 TransQ, would be competing to attract suppliers who want
16 to supply Network Rail?

17 A. Yeah.

18 Q. We have already covered if Network Rail is saying, "Our
19 procurement does not run through TransQ, it is runs
20 elsewhere", it is not clear that suppliers who are so
21 keen to supply Network Rail are going to be on TransQ
22 and not on RISQS. That is a big assumption, is it not?

23 A. Well, I think we had that discussion before. I agree
24 that if those suppliers would have no prospect of
25 gaining Network Rail contracts because the qualification

1 system uses RISQS, then they themselves would go with
2 RISQS. But other suppliers who perhaps are indirect
3 also need to be assured, of course, and they would have
4 options to use TransQ or RISQS because the qualification
5 system would not be a determinant. But what I am saying
6 is that even in that world, the information on the
7 assurance status would be relevant because you would
8 want to have an IT portal and all that information to
9 understand accreditation status.

10 Q. So we are not considering tier 1 suppliers to directly
11 supply Network Rail --

12 A. Yeah.

13 Q. -- but are considering tier 2 or tier 3 suppliers who
14 supply people who supply Network Rail --

15 A. Right.

16 Q. -- or we might be considering, might we not, suppliers
17 who are not part of Network Rail's supply chain at all?

18 A. Yeah.

19 Q. They are supplying other buyers?

20 A. Other buyers such as TOCs, who are on the railway and
21 therefore need to have the same sort of degree of
22 assurance --

23 Q. Indeed.

24 A. Exactly.

25 Q. For the benefit of the transcript writers and perhaps

1 the tribunal, "TOCs" -- you presumably mean "TOCs,
2 "train operating companies"?

3 A. Yes, I do.

4 Q. People like East Midlands Trains and so forth.

5 A. Yes, I do.

6 Q. So if we are looking at those buyers -- because in
7 this -- if we focus on the counterfactual that is
8 missing here, there is a counterfactual where in fact
9 being on both portals, both RISQS and TransQ, is not
10 especially valuable to Network Rail because its direct
11 suppliers are on RISQS --

12 A. Yes, okay.

13 Q. -- and so it does not -- that is not a counterfactual
14 that you analyse here, is it?

15 A. No, that's not, no.

16 Q. Okay.

17 In that scenario suppliers might still go to TransQ
18 if they were to -- if, for example, other buyers were to
19 decide to use TransQ for some reason?

20 A. At the moment, excepting the key schemes, other buyers
21 can use any scheme that they wish.

22 Q. Well --

23 A. For the key schemes I agree they would need to be
24 sponsored, for example, and use RISQS for certain
25 aspects of that.

- 1 Q. In theory they can use TransQ at the moment?
- 2 A. Yeah.
- 3 Q. But in practice everybody has to be assured, the audits
4 have to be done by RISQS at the moment. So the
5 information that is actually necessary at the moment to
6 know that your suppliers are allowed onto the rail
7 network is held and is only held by RISQS?
- 8 A. That's only in relation to the specific requirements
9 under the key schemes. Obviously buyers have other
10 roles. Some buyers aren't members of the key schemes,
11 perhaps, at all.
- 12 Q. Some buyers may not be members, but if you are looking
13 at works that require access to track --
- 14 A. Okay.
- 15 Q. -- at the moment --
- 16 A. Yeah.
- 17 Q. -- a buyer can say, "Well, there's RISQS, I need to buy
18 services that require access to track", every
19 single supplier who is authorised to do those works is
20 on RISQS --
- 21 A. Yes. That's right, that's --
- 22 Q. That is the current situation.
- 23 A. Yes, the Sentinel scheme, that's right, or the on-track
24 POS.
- 25 Q. -- so everybody who is deemed to be authorised by

1 Network Rail is on RISQS at the moment --

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

3 Q. -- so there is no -- if a buyer now were to say, "I want
4 to use some other system", they would be forcing all
5 these suppliers to duplicate, would they not?

6 A. No, I'm not suggesting that they would be forcing
7 suppliers to duplicate, I don't think, because
8 presumably the idea would be that for the modules which
9 are currently specified for the use of RISQS in order to
10 comply with Sentinel -- presumably the requirement that
11 would be made would be that Network Rail would have to
12 allow, let's say, Achilles or someone else to do that
13 role --

14 Q. I think I was making the point --

15 A. -- and the supplier would obviously only do one audit in
16 that world if --

17 Q. I was not making a point about the counterfactual,
18 Mr. Holt. I was making a point about the fact
19 situation.

20 At the moment if a buyer, say
21 East Midlands Trains --

22 A. Yeah.

23 Q. -- it needs to procure some services of an engineering
24 nature that require to be delivered by somebody who is
25 authorised to have access to track, it knows that

1 everybody who is authorised is on RISQS -- yes?

2 A. Yeah.

3 Q. -- and it is not allowed to -- if it were to say, "Oh,

4 I want to use some other portal at the moment", no

5 portal is going to have a list of people who are

6 authorised at the moment, are they?

7 A. I think that's correct, yeah.

8 Q. Okay, so I think we have dealt with the Network Rail

9 multi-homing counterfactual and we have dealt with the

10 all-buyer multi-homing counterfactual and I have put to

11 you that there is a counterfactual that is missing, and

12 I think you accepted in principle that it is there. You

13 may have a view about the likelihood of it --

14 A. Well, sorry, I think --

15 Q. There may be a Network Rail single-homing counterfactual

16 as well.

17 A. Yeah, where Network Rail would still single-home on

18 RISQS.

19 Q. Yes.

20 A. Yeah, but I think in that situation, that would --

21 I think you're suggesting that's in relation to

22 the qualification --

23 Q. Yes.

24 A. -- and therefore the qualification drives the audit

25 decision being made by suppliers. I think we agree in

1 that regard that if that's indeed what the procurement
2 requirement is, you have to be assured by RISQS for
3 the procurement to access the qualification, then you
4 would only have any incentive to be assured by RISQS.

5 I think the question you're posing is moving away
6 from tier 1 and thinking about tier 2, what will happen
7 if you allow sponsors to use TransQ instead of RISQS for
8 that role, so not a tier 1 role, but rather a principal
9 contractor role or, you know, as part of the Sentinel
10 process. What I'm saying is that if that is the case
11 and the "must recognise" status applies, then Achilles
12 would be expected to compete and win a lot of mandates
13 in relation to those audits and that information would
14 be valuable and generate the sort of bottlenecks that
15 I was describing earlier.

16 Q. I am going to perhaps move on in just a moment, but as
17 regards the information being valuable and the
18 bottlenecks, in the Network Rail single-homing scenario
19 the information by definition would not be sufficiently
20 valuable to Network Rail, but you are suggesting that,
21 because it generates the information in respect of
22 suppliers, that might be valuable -- so valuable to
23 other buyers; is that what you are hypothesising?

24 A. What I'm hypothesising is that somebody needs to know
25 the outcome of all those audit results; that information

1 needs to be collated in an integrated way. That is
2 obviously a service that an assurance scheme does, and
3 under the proposition that Achilles could compete to
4 provide those services, it would have that information.

5 Now, of course it could try and sell that
6 information as part of an IT portal or just sell the
7 information in a sufficiently processed way so that
8 whoever is doing the IT portal is able to process it,
9 but it would be in a strong bargaining position in
10 relation to the transmission of that information.

11 Q. Okay, I do not want to go round the houses again.

12 If you go to paragraph 205 --

13 A. Yeah.

14 Q. -- I think you set out there certain implications of
15 the multi-homing counterfactual.

16 A. Yes.

17 Q. So this is assuming that Network Rail has to multi-home,
18 but I think, to be fair to you, some of these
19 implications would apply even if Network Rail was only
20 accepting TransQ as an -- for the purposes of
21 authorisation --

22 A. Yes --

23 Q. -- and some might apply only if it was a requirement of
24 pre-qualification.

25 A. Yes.

1 Q. If you go to points 205(a) and (b), you refer to
2 monitoring RIS 2750 compliance, that is compliance
3 with it as a supplier assurance service, that it follows
4 sort of an appropriate - does it give appropriate outputs
5 and so forth.

6 Then I think at (b):

7 "... assess and monitor as to whether
8 the accreditation procedures are adequate to assure
9 Network Rail that safety standards are upheld."

10 The auditing the auditor point.

11 A. Yeah.

12 Q. I think it is fair to say that both of those, I am sure
13 you would say, apply -- both if it wants to accept it
14 for the authorisation schemes and if it wants to use it
15 for pre-qualification?

16 A. Yes. Yes, if anything, the focus is obviously in terms
17 of the audit standards. The process is that the
18 assurance scheme is applied in relation to carrying on
19 the accreditation of suppliers. That would clearly
20 apply, I think, for the audit role, yeah.

21 Q. That essentially is a matter of whether the assurance is
22 adequate for -- is fit for purpose?

23 A. Yeah.

24 Q. In a sense, as an economist, you just note that that is
25 a requirement. You are not expressing any opinion over

1 how that can be achieved to an adequate standard?

2 A. No I think all I'm saying in that respect is that you
3 would expect the buyer to be the one in the position --

4 Q. To decide.

5 A. -- to decide, rather than the supplier.

6 Q. I think we would add on fair, reasonable and
7 non-discriminatory terms --

8 A. Yeah.

9 Q. -- but it's (unclear) the buyer's choice and so forth.

10 A. Yes.

11 Q. At point (c) there was the assumption that they would
12 have to subscribe to all schemes unless it could show
13 that they were not adequate. I suggest to you that that
14 is what we have been talking about all day.

15 A. Exactly, yes. Yeah, exactly. This is about the
16 competitive bottleneck rather than whether you in the
17 end actually subscribe to the qualification.

18 Q. Then (d) is:

19 "... treat suppliers who are registered for
20 different supplier assurance schemes on an equivalent
21 basis."

22 So this would be treating people who supply
23 Network Rail equivalently whether they are registered
24 with RISQS or with TransQ. That is what you are
25 hypothesising?

1 A. Yes. The reason for that extra statement was to avoid
2 a situation in which -- actually quite close to what we
3 were discussing earlier -- which was that, if on the one
4 hand you were saying, "Achilles has passed the test for
5 minimum standards, therefore can go and start auditing
6 suppliers", that Network Rail could then say, "Well,
7 that's all very well and good, but actually, in our
8 purchasing role, we're mandating RISQS anyway", in which
9 case obviously that would affect Achilles' ability to
10 compete for those suppliers.

11 Q. So if they are allowed to say which system they choose
12 to purchase through, that rather falls away, does it
13 not?

14 A. That would fall away, but I think the concern
15 potentially that would arise is that you then get to
16 a situation where you have exactly the same outcome as
17 now, but just through a different route.

18 Q. What I think I said to you before, but just for clarity,
19 it would not be the same situation as now, would it,
20 because TransQ would have the ability to try and compete
21 for the business of other buyers?

22 A. Yeah, so that might be a distinguishing point. So
23 obviously this is in relation to Network Rail's choices
24 in relation to the key schemes.

25 Q. If I can take you forward to paragraph 215 of your

1 statement. There you are still, I think, explaining,
2 generally speaking, your competitive effects analysis in
3 relation to different counterfactuals.

4 A. Yeah.

5 Q. As we will see later on, you consider lots of different
6 variants of the Network Rail multi-homing
7 counterfactual --

8 A. Yes I do.

9 Q. -- and lots of different variants of the all-buyer
10 multi-homing counterfactual --

11 A. I do.

12 Q. -- but not the one I am putting to you, which is
13 the Network Rail single-homing counterfactual. But we
14 can park that for the moment.

15 A. Okay.

16 Q. Within the broad counterfactuals that you do consider,
17 you consider a wide range of different counterfactuals
18 which are set out at a table on page 96 -- or at least
19 that is half of them -- and you consider -- so that
20 is -- on page 96 you have a large range of different
21 scenarios for the Network Rail multi-homing
22 counterfactual.

23 A. Yeah.

24 Q. Then you have another table on page 103, which is,
25 "Possible market configurations under the all-buyer

- 1 multi-homing counterfactual".
- 2 A. Yeah.
- 3 Q. Then on page 106 you have a combined table of
- 4 counterfactuals, but I am right in thinking that what
- 5 you have done in this table is pick out some of
- 6 the Network Rail multi-homing counterfactuals that you
- 7 consider to be more likely for reasons that you give and
- 8 some of the all-buyer multi-homing counterfactuals and
- 9 you have put them together and you have essentially said
- 10 that this is the set of what you think are plausible
- 11 counterfactuals to consider?
- 12 A. Yes.
- 13 Q. The way your analysis works is you arrive at that set of
- 14 plausible counterfactuals and you consider the effects
- 15 in relation to those, having discarded others. That is
- 16 how your structure works?
- 17 A. Yeah, yeah, that's right, yeah.
- 18 Q. Am I right in thinking that if you go back to page 215,
- 19 ultimately what you do is to pull out three different
- 20 configurations which you have commented on in
- 21 particular?
- 22 A. Yeah.
- 23 Q. You say at 214 that you cannot entirely discount some of
- 24 the configurations that arise, but you think certain are
- 25 most likely.

- 1 A. Yeah, that's right.
- 2 Q. By "configurations", you essentially mean
3 counterfactuals, just a bit more specific?
- 4 A. Exactly. What I mean precisely is what are the outcomes
5 in terms of the marketplace. So how many schemes are
6 there, how many -- you know, what schemes do buyers
7 choose, what schemes do suppliers choose, exactly.
- 8 Q. The first counterfactual you pull out at 215 is one in
9 which other buyers -- although there are now two schemes
10 available --
- 11 A. Yeah.
- 12 Q. -- for assurance authorisation purposes, nonetheless
13 other buyers choose just to put their business through
14 RISQS; yes?
- 15 A. Yes.
- 16 Q. Now, that is clearly a possible counterfactual.
17 A second portal may fail in that sense. Now --
- 18 A. Sorry, I didn't quite hear your comment. It is
19 a counter -- possible counterfactual and then I didn't
20 hear the question.
- 21 Q. Sorry, I was -- that is a possible counterfactual.
- 22 A. Yeah.
- 23 Q. Then you -- at 216 you refer to a particular variant of
24 that --
- 25 A. Yeah.

1 Q. -- which is that RISQS is exclusively used by all buyers
2 other than Network Rail, but that one or more additional
3 schemes attract some suppliers who only wish to supply
4 services to Network Rail.

5 So that is on the assumption, is it not, that we
6 have explored that Network Rail has to be on both
7 portals and is letting services -- that I think must
8 assume that Network Rail is putting out contracts
9 through both portals and so some suppliers can sit on
10 TransQ and get work through TransQ; yes?

11 A. No, I think this is the same issue we were describing
12 before. While it might be that you read it in that way
13 that it's multi-homing in -- precisely in relation to
14 the qualification, what I mean is that this is
15 a counterfactual in which it is recognising multiple
16 schemes and, furthermore, that suppliers -- and those
17 schemes are competing for doing audit in relation to
18 the key schemes for -- in relation to the key schemes,
19 exactly.

20 So what I'm saying here is that, because for those
21 suppliers -- and indeed it could also be for the other
22 elements of the key schemes -- those parties are not
23 influenced by the decisions of other buyers because
24 they're not involved with the other buyers at all, in
25 which case the fact that those other buyers might

1 specify RISQS has no influence, what that does is create
2 an incentive and ability for schemes to compete for that
3 set of sub-suppliers and that then follows to my effects
4 analysis as to what competition would look like in that
5 scenario.

6 Q. Okay. So the first counterfactual is fundamentally one
7 in which other buyers choose only to accept RISQS; they
8 do not see any value in this other portal?

9 A. That's right.

10 Q. That covers both the scenario at 215 and the scenario at
11 216; right?

12 A. Yes, but within 216 there is a set of competition going
13 on amongst schemes primarily for suppliers using the key
14 schemes.

15 Q. I see.

16 A. Yeah.

17 Q. That assumes the competitive bottleneck point --

18 A. Yes, that leads to the competitive bottleneck.

19 Q. -- relies upon on the competitive bottleneck point?

20 A. Well, my effects assess whether a bottleneck would arise
21 and conclude that they do, yeah.

22 Q. Then at paragraph 217 you pick out the other main
23 counterfactual that you choose to highlight --

24 A. Yeah.

25 Q. -- which is that:

1 "All buyers must accept any scheme."

2 Then you say:

3 "The market dynamics would be very different because
4 schemes would not have to compete to be attractive to
5 buyers."

6 So this is the true all-buyer multi-homing
7 counterfactual, where not just some buyers find it
8 attractive to be on two schemes or some buyers choose to
9 be on one scheme rather than the other, but because all
10 buyers have to be on both schemes, competition becomes
11 entirely based on the supplier side of the --

12 A. Yes, that's correct, yes.

13 Q. That is in the all-buyer multi-homing counterfactual?

14 A. Yes, that's right.

15 Q. So those are the counterfactuals on which you then base
16 your assessment as to what the likely outcomes are --

17 A. Yeah.

18 Q. -- at 218 and 219.

19 You say in your conclusions that there are two
20 likely outcomes. In the first case, essentially because
21 everybody just wants to be on RISQS, only RISQS remains
22 in the market?

23 A. Yeah, and so that's just simply driven by the fact that
24 RISQS has been developed as an industry-led model, it's
25 not just a Network Rail consideration, there are many

1 other -- I think 100-odd other buyers involved -- and
2 obviously suppliers want to supply those other buyers as
3 well and therefore suppliers' decisions will be
4 influenced by those preferences.

5 Q. In relation to that, I suggest to you that you cannot
6 infer from the fact that all the buyers are on RISQS at
7 the moment that they would all stay on RISQS in the
8 counterfactual because once it is the case that not
9 everybody is required to be RISQS-assured to get
10 Sentinel authorisation, some buyers might choose to go
11 elsewhere.

12 A. I agree that you can't be definitive in this respect and
13 that's why I've qualified the various commentary about
14 the counterfactuals. I think I would note, however,
15 that the other buyers do appear in the witness evidence
16 to agree with the benefits that RISQS as a common
17 industry-wide scheme have provided.

18 Q. I explored that with them in cross-examination. I will
19 not ask you to comment because I think you were not here
20 when --

21 A. I wasn't here.

22 Q. Then moving to the second main likely outcome, which is
23 I think based upon your all-buyer multi-homing
24 counterfactual, which is that:

25 "In-the-market competition could arise. This might

1 be focused only on suppliers who exclusively wish to
2 obtain Network Rail contracts."

3 A. Yeah.

4 Q. I think you are not necessarily assuming within that --
5 necessarily all buyers, but you say:

6 "It might be focused only on suppliers or, if all
7 buyers must accept all schemes, would apply to suppliers
8 more generally."

9 A. Yeah.

10 Q. So looking at the first half of that sentence, I think
11 you are assuming that Network Rail is putting contracts
12 through TransQ, and because TransQ -- TransQ then would
13 just compete for suppliers; is that essentially it?

14 A. So again I think we come back to the point that this
15 analysis is not predicated on whether Network Rail is
16 putting the contracts through TransQ. That could have
17 been one scenario, but even if it is not, even if it is
18 using RISQS for the contracts, the same sort of
19 considerations apply for the reasons we've discussed
20 earlier.

21 So just to be briefly -- just to briefly comment on
22 what's going on here: this second scenario is in
23 the case where the role of the other buyers, if they
24 have preferences for the use of RISQS, would not be
25 sufficient to prevent viable entry by a rival scheme

1 such as Achilles. So this is the set of scenarios where
2 I'm looking at in-the-market competition and what the
3 effects of that would be.

4 Q. I see and there are two variants of this. One is that
5 Network Rail must accept all schemes --

6 A. Yeah.

7 Q. -- and the other is that buyers must accept all schemes.

8 A. Yeah.

9 Q. But you are, I think, again doing it on the assumption
10 that Network Rail would require access to the
11 information held by TransQ; yes?

12 A. Yeah, that -- what I'm saying is that once TransQ is
13 able to compete for doing the audits and wins suppliers
14 who say, "Fine, I'll go with you, you give me a good
15 deal" and the other considerations I've described
16 earlier about the degree of thoroughness and
17 the management time and the audit fail rate, which
18 I think would all be considerations by suppliers, it
19 might be Achilles, it might be a different scheme, would
20 no doubt win a bunch of suppliers for one or more of
21 the key scheme RISQS modules. Once it's done that, it
22 would have that information and obviously that
23 information needs then to be put into a package and
24 disseminated in the market for the further purposes that
25 supplier assurance are used for.

1 Q. We are going to come back to pick up some of those
2 points in relation to the "race to the bottom" argument
3 and the sort of cost efficiency points.

4 A. Okay.

5 MR. WOOLFE: That might be a convenient moment, sir, to
6 break.

7 (11.52 am)

8 (A short break)

9 (12.11 pm)

10 MR. WOOLFE: Sir, there is just one point I should raise for
11 the Tribunal before returning to cross-examine Mr. Holt.
12 As you will recall, on the first day we said that at the
13 end of the expert evidence we could make both economic
14 experts available together if the Tribunal wanted to ask
15 any further questions in a sort of combined environment.
16 Mr. Parker is not here at the moment, but we can get him
17 here if you would like him to be here.

18 THE CHAIRMAN: As things stand, we are not going to propose
19 a hot tub.

20 MR. WOOLFE: Thank you, sir.

21 In that case, Mr. Holt, I'm going to pick up just
22 a few more points with you about your -- one more point
23 about your counterfactual analysis and then onto your
24 effects analysis which is the logical conclusion of it
25 and then we are going to come to the objective

1 justification and cost efficiency section, so you
2 understand where we are heading.

3 At page 96 of your report you have your table of
4 configurations under the Network Rail multi-homing
5 counterfactual, so this assumes that Network Rail
6 multi-homes. As I understand the way this works, if we
7 ignore the column headed "Configuration" for a moment
8 because there is a series of sort of codes which --
9 I understand why you were using them, but for me I found
10 it quite a (unclear) amount of work.

11 Then Network Rail you are considering in all these
12 configurations is multi-homing and then you are
13 considering a number of different possibilities for
14 buyers. You have, assuming that other buyers
15 single-home on RISQS -- so "single-home RISQS" is "SR";
16 is that right?

17 A. Yes.

18 Q. "Single-home same" --

19 A. Yeah.

20 Q. -- and "single-home different" --

21 A. Yeah.

22 Q. -- and then "multi-homing"; yes?

23 A. So "single-home same" means all of that group
24 single-home and on a non-RISQS scheme, for example
25 TransQ.

- 1 Q. Okay.
- 2 A. Yes.
- 3 Sorry can I just clarify? Again the multi-homing is
4 actually in relation to the requirement to accept or
5 recognise multiple schemes --
- 6 Q. You are referring there to the Network Rail
7 multi-homing?
- 8 A. That's right, for Network Rail, yes.
- 9 Q. If I can just pick out one of them, which is the third
10 one that is in bold, so "NRIL SD M", which is about
11 two-thirds/three-quarters of the way down the table.
- 12 A. Okay.
- 13 Q. In this scenario, as I understand it, Network Rail is
14 multi-homing because that is the basic assumption on
15 which you are operating?
- 16 A. Yeah.
- 17 Q. Suppliers -- sorry, buyers -- other buyers, so you are
18 talking about the -- either train-operating companies or
19 tier 1 contractors to Network Rail --
- 20 A. Yeah.
- 21 Q. -- or whatever it may be -- so people who are maybe part
22 of Network Rail's supply chain or may be part of an
23 entirely different supply chain, but other buyers, you
24 are assuming that there is variation between them as to
25 which portal they home on; yes?

1 A. Yes, that's right, yeah.

2 Q. Suppliers multi-home because some buyers are on one
3 portal and some on the other?

4 A. Agreed, yeah.

5 Q. Just to check, the multi-home there, that is taking an
6 across-the-market view, is it not, because in fact you
7 may find that some suppliers are only on RISQS because
8 they are only supplying buyers who are on RISQS, some
9 suppliers are only on TransQ because they are only
10 supplying buyers who are on TransQ and some suppliers
11 may truly multi-home; yes?

12 A. Yeah, I think that sort of example is captured in the
13 one further down, below "NRIL mixed", where you have
14 that sort of variation in the choices made by individual
15 buyers and suppliers.

16 Q. Okay, I see.

17 A. Yeah.

18 Q. But looking at the scenario where buyers are
19 single-homing but on different schemes --

20 A. Yeah.

21 Q. -- you pick this up I think at paragraphs 247 to 249.

22 A. Yeah.

23 Q. I am not going to take you through your discussion of
24 every single one of these configurations because --
25 I think everybody will be relieved to know.

1 A. I'm sure they will.

2 Q. It is the only one that I did want to pick up in
3 particular.

4 A. Okay.

5 Q. You describe it in 247 and then you say:

6 "This configuration appears irrelevant and can be
7 discarded because there is no causal link between
8 Network Rail's conduct and the emergence of this
9 configuration."

10 A. Yeah.

11 Q. I think you explain that point at 249. You say:

12 "There is no causal link between their ability to
13 prescribe schemes and NRIL's conduct. This outcome
14 would depend entirely on the conduct of buyers other
15 than Network Rail. Buyers with market power could
16 already, but do not require accreditation for schemes
17 other than RISQS in addition to RISQS, even if
18 Network Rail does not accept these schemes, therefore
19 this specific counterfactual can be discarded."

20 So in a sense you are ignoring the possibility --
21 you are considering and then choosing to ignore the
22 possibility that you could have two portals in the
23 market who are competing for buyers because you are
24 assuming that, because they are on RISQS at the moment,
25 they would want to be on RISQS in the future?

1 A. Yeah, that's right, that -- to the extent that they
2 had -- these buyers had specific preferences for other
3 schemes and desired to use those, they would have had
4 such opportunity already.

5 Q. Yes, but the competitive choice for buyers would be very
6 different in the counterfactual we are considering,
7 would it not, because at the moment, as we have covered,
8 all bodies who want to be able to put people on-track --
9 in the broad sense of "on-track" -- in the rail industry
10 hence need to be Sentinel-registered; all people who want to
11 supply on-track plant hence need to be RISQS-assured and
12 all people who supply on-track plant need to be
13 RISQS-assured as well (sic). At the moment that is a
14 rule imposed by Network Rail. It would be a different
15 choice, would it not, for buyers if that requirement in
16 the key schemes were lifted?

17 A. Well, perhaps you can't entirely rule it out and maybe
18 the language here was a bit --

19 Q. Well --

20 A. -- forceful. I do later and perhaps I prior to this
21 recognise that the counterfactual analysis is inherently
22 subject to some uncertainty. But I think the key point
23 here is that, for those other buyers who are not
24 purchasing in relation to the key schemes, they have
25 the option and they have expressed the use of RISQS and

1 therefore there's nothing to suggest, at least for those
2 buyers, that anything in that respect would change in
3 the counterfactual.

4 Q. That is where I am going to conclude on the
5 counterfactual analysis, but to sum up, what I would put
6 to you is your counterfactual analysis excludes the
7 counterfactual where the information, as you put it, on
8 TransQ or another portal is not sufficiently valuable to
9 require Network Rail to purchase from it, so it excludes
10 the counterfactual where Network Rail can choose to
11 single-home just on the RISQS portal; yes?

12 A. So all of these counterfactuals include Network Rail
13 being required to recognise multiple schemes, so there
14 is no single-homing in the sense of contracting out of
15 assurance services, including audit, in relation to
16 the key schemes. In all of these counterfactuals
17 Network Rail is required to accept multiple schemes in
18 that regard. I agree with you, for the reasons we've
19 discussed before, that it still may end up using one
20 scheme if it wishes for the qualification service.

21 Q. Okay.

22 Now, let us move forward to how your choice of
23 counterfactual then affects your effects analysis.

24 A. Yeah.

25 Q. If you could jump to page 106 very briefly. We have

- 1 seen this before. This sets out the counterfactuals
2 that you consider to be -- or configurations you
3 consider to be more likely.
- 4 A. Yes.
- 5 Q. You then characterise the likelihood of them in your
6 view, albeit including some that are very low, and you
7 then characterise the type of competition, including
8 competition being industry-regulated monopolist provider
9 and then the scheme focus where you look at where
10 the focus of competition will be for Network Rail.
- 11 A. Yeah.
- 12 Q. So you are only analysing effects on competition by
13 reference to the configurations which you have chosen;
14 yes?
- 15 A. Yeah, I think that's fair. I think some of the
16 propositions might hold in respect of other
17 configurations as well, but I haven't independently gone
18 through -- obviously there are 40-odd possible
19 configurations.
- 20 Q. Each of those is, in effect, only a simplification of
21 reality in any event?
- 22 A. Yeah, I think -- well, some of them might very well
23 describe what would happen in reality. Obviously one
24 can't be entirely sure which of them will happen, but
25 I think I've tried to cover virtually every possible

1 scenario. If you can think of any, I will be happy to
2 add them in.

3 Q. Then if we jump forward to the outcome of the effects
4 analysis. It starts on page 111, where you do "Effects
5 analysis outcome for consumers". The first issue you
6 look at is "incentives for high-quality assurance", and
7 that is what has tended to be referred to in this room
8 over the last week and a half as the "race to
9 the bottom" argument.

10 A. Understood.

11 Q. You have a section describing the factual situation at
12 301 to 303 and then the counterfactual then follows.

13 At paragraph 305 you say, I think, that where there
14 is an obligation to compete for suppliers, where
15 providers shift some or in some cases all of their
16 competitive energy towards the supplier side of
17 the market to remain competitive, that may have
18 implications for the quality of assurance. Is that
19 broadly speaking what you --

20 A. Yes, yes, that the nature of the counterfactual where
21 Network Rail, if not others, must recognise schemes
22 affects the nature of competition.

23 Q. So I am going to explore with you in a minute what you
24 then say below about what kind of service one might have
25 to offer to attract suppliers insofar as one is

- 1 competing at all for suppliers.
- 2 A. Yeah.
- 3 Q. But what you do not address at all here are the
4 incentives that a scheme would have to attract other
5 buyers.
- 6 A. Yes, I do actually address, I think, that point in
7 the joint statement or it might have been in the second
8 supplementary note. I have to admit, I can't remember
9 exactly where I address it, but essentially --
- 10 Q. Yes, I think you do. We will come to it at
11 paragraphs 20 and 21 of your supplementary note.
- 12 A. Right.
- 13 Q. We will come to that in a moment.
- 14 A. Yeah.
- 15 Q. Here you do not directly address that.
- 16 A. No.
- 17 Q. What I want to put to you is the high-level point that
18 if the schemes are still competing for buyers to some
19 extent, that would be a significant constraint on
20 the extent to which any race to the bottom, as you call
21 it, arises, even if everything else you say is true.
- 22 A. Not in relation to the audit modules that are carried
23 out for the purpose of the key schemes and not for other
24 purposes.
- 25 Q. Oh, so in this respect you are distinguishing and

1 looking at the (unclear) authorisation schemes?

2 A. Yeah.

3 Q. But beyond that, if suppliers are looking to which
4 scheme to join for the purpose of assuring themselves
5 more generally for buyers -- there may still be a buyer
6 side constraint -- a scheme which has -- you know,
7 offers a better service to buyers, shall we say, a more
8 up-to-speed service, a more flexible service or
9 something of that sort would still have a competitive
10 edge in this market, would they not?

11 A. Again I go back to the previous point that other buyers
12 are not currently constrained and therefore, if they
13 felt better options could have been achieved by not
14 joining or not accepting only the RISQS scheme, then
15 that would have been available to them.

16 I think the other point is that, irrespective of
17 that driver, so even if you allow that schemes would
18 obviously be trying to attract other buyers who would in
19 this world have choice, that would not protect
20 Network Rail in relation to this so-called "race to
21 the bottom" argument for the reasons I described in this
22 report and also further commented on in relation to
23 the impact that the other buyers might have on that.

24 Q. The second point is that a race to the bottom can be
25 constrained, can it not?

1 A. I don't say it's some sort of absolute race to
2 the bottom ground zero. What I say is that there are
3 some inherent incentives in the way that, having been
4 given "must recognition" status, a core competitive
5 strategy of a scheme will be to make itself attractive
6 to suppliers to do audits. One way it can do that and
7 one way it would be particularly attractive to suppliers
8 would be to offer lower fees, to offer less intensive
9 management time on the part of those suppliers and also
10 potentially differences in audit fail rates would be
11 a factor that suppliers would take into account.

12 So the underlying pressure to try and win those
13 suppliers would drive competition in that direction.
14 I agree that there might be some mitigating factors that
15 you could overlay on the scheme, and obviously the idea
16 of having a scheme adequacy set of rules would be one
17 way to try and achieve that, but I don't think that
18 would be a perfect solution.

19 Q. Okay. So your point is fundamentally only one about
20 incentives, not one about outcomes -- yes? -- because
21 there is a range of things that could be done, even if
22 these incentives do exist as you say, to nonetheless
23 ensure that outcomes are adequate?

24 A. No, I don't agree with that. I agree that the main
25 driver here is through the incentives that are created

1 in the competitive dynamics. One, you have a "must
2 recognise rule". On the other hand, I do recognise that
3 there are some potential ways that you could mitigate
4 and try and lessen the effect of those, but I don't go
5 so far as to say that all you have to do is put in place
6 those mitigation issues and the problem goes away. And
7 I think -- I mean, one way that this was put,
8 I understand, on Day 4 by Mr. Blackley was it's far
9 better to avoid the incentive misalignment in the first
10 place than to try and overlay an auditing regime to try
11 and prevent those misalignments to achieve bad outcomes.

12 Q. That was Mr. Spence speaking as somebody who does safety
13 on a day-to-day basis in Network Rail.

14 A. Sorry, I'm not sure -- it was on Day 4. I can't
15 remember who said it --

16 Q. I think it was Mr. Spence. What I am putting to you is
17 that as an economist you can talk about the incentive
18 properties in the system, but you cannot really, can
19 you, give an expert opinion on whether those incentives
20 would actually lead to a reduction in audit quality
21 because that would depend upon the sufficiency of any
22 arrangements put in place to supervise that, and that is
23 not really your area of expertise, is it?

24 A. I absolutely agree that my area of expertise is as an
25 economist, not as an audit supervisory specialist.

1 I make two points: one is that the competitive
2 distortion that I've identified would lead to those
3 incentives.

4 I make a further point which I think is relevant,
5 relevant also from an economic standpoint, which is that
6 while you can try and overlay mitigation strategies, in
7 a world of imperfect information, in a world where
8 the standards are not directly perfectly correlated with
9 an outcome, but, rather, you need to have a whole bunch
10 of other things in place in terms of effort, investment,
11 the way in which the insurance scheme is conducting
12 itself, all of those things are, you know, matters of
13 degree, not binary. So the mere setting of a standard
14 and the attempt to audit in my view would not
15 necessarily achieve the outcomes that are being
16 described.

17 Q. I think we can move on, but you essentially assume, do
18 you not, that suppliers do not have any incentives
19 towards having a higher audit quality but -- they might
20 do might they not?

21 A. I think the context for that is that those suppliers
22 know that these two schemes, let's say -- there could be
23 obviously many schemes in the market -- have been
24 granted recognition status for the purpose of having
25 audits done. Now, once you're in that world -- in other

1 words they would presume non-discrimination in relation
2 to which of these recognised schemes they go with.

3 So if they have three options -- or just two to make
4 it simpler -- my view is that they would be more likely
5 to choose the one with the lower fees, less
6 time-intensive degree of participation, on the basis
7 that that obviously saves them costs. Obviously it's
8 also helpful to have a lower fail rate. And if they
9 don't do it, then their rivals may well do and they'll
10 suffer a competitive disadvantage against those rival
11 suppliers. So there would be an underlying pressure
12 towards going with the scheme that offers those types of
13 considerations.

14 Q. If you go to your supplementary note, where I think you
15 do deal with this. That is in tab 8 of the bundle in
16 front of you. Here is where the sort of point of
17 economic incentives is dealt with. On page 4,
18 paragraphs 19 to 21, you are dealing with Mr. Parker's
19 suggestion that schemes would still have an incentive to
20 increase audit quality because they need to compete for
21 other buyers and you disagree this would suffice to
22 offset the risk of reduced assurance quality, which
23 I think is the point you have just been putting.

24 Then you say:

25 "Other buyers are not the custodians of the key

1 schemes and do not face the same legal obligations as
2 Network Rail and are not affected by all work that is
3 undertaken on Network Rail infrastructure."

4 A. Yeah.

5 Q. But I think you would accept, would you not, that other
6 buyers do have incentives towards having high audit
7 quality?

8 A. Yeah, well, they may all have a particular degree of
9 preference. It may well differ from Network Rail. I think
10 the other key point is that, even if they do and
11 therefore even if -- in relation to particular assurance
12 requirements that they require, that would not
13 necessarily protect Network Rail in relation to things
14 that suppliers are doing for the purpose of accessing
15 the key schemes. That's the bit where this incentive
16 effect would still materialise, even if -- even if
17 buyers, unlike the current situation, don't have
18 a preference for RISQS and then sort of choose to go
19 with high-value-added other schemes.

20 Q. But other buyers and in fact other suppliers as well
21 would have legal responsibilities towards, for example,
22 health and safety and environmental management and so
23 forth, would they not?

24 A. Sure. I'm sure that's right.

25 Q. If they have control over workplaces, which is quite

1 a broad definition, they have duties under the Health
2 and Safety at Work Act and that kind of thing. I am not
3 asking you to comment on the legal specifics, but you
4 would accept that generally speaking they have those
5 obligations?

6 A. Yeah, I think that seems right.

7 Q. They can be fined large amounts of money if they fail to
8 meet those kind of health and safety obligations, can
9 they not?

10 A. Again I presume you're right.

11 Q. If things are unsafe and they have to pay compensation
12 for injuries, that can cost them a large amount of
13 money, can it not?

14 A. That may well be the case. All of this goes to suggest
15 that they will have interests in achieving safe
16 outcomes, like everybody working on, obviously, any
17 safety-critical industry, but that doesn't necessarily
18 mean they would have the same degree of trade-offs
19 between, you know, imposing costs on supplier base
20 versus, you know, more thorough audit requirements.

21 Q. But they would have an incentive, would they not, to
22 have their management systems audited to a good
23 standard?

24 A. Yes.

25 Q. So it is not the case that simply because they are

1 suppliers, all they would be interested in is cheap,
2 cheap, cheap, cheap, but not a regard to audit quality?
3 That is not an assumption we can make, is it?

4 A. No. What I make is that if the schemes are all
5 recognised and therefore they're broadly going to be
6 able to access the contracts from Network Rail, then
7 they will have a choice to make, and given that both
8 the schemes are recognised, they might as well go for
9 the lowest-cost option.

10 Q. Also in terms of examining the incentives, you looked at
11 the incentives of suppliers and I think you accepted
12 that some suppliers might place a higher value on audit
13 quality and some might place a lower value, but from
14 the point of view of what a scheme-provider is going to
15 do, a scheme-provider's incentive is presumably to be
16 profit-maximising, is it not?

17 A. Yes -- well, sorry, obviously that is in the case of
18 a commercial operator --

19 Q. Yes, sorry, I am not sure I can put words into your
20 mouth.

21 A. It might not be in the case of a not-for-profit scheme.

22 Q. We will come to that in a moment.

23 A. Okay.

24 Q. But assuming that a hypothetical TransQ comes in, their
25 incentive is to be profit-maximising, a standard

1 economic assumption, they will they'll take a view in
2 setting their own systems and audit quality on what will
3 earn them the most money across the market as a whole,
4 will they not?

5 A. Yeah, that sound sensible.

6 Q. So, in fact, if you have a large number of suppliers who
7 do want high audit quality, even if there were some --
8 a small number of rogue suppliers who want low audit
9 quality, it would not be in the interests of a scheme
10 like TransQ to lower its standards to the lowest common
11 denominator to win the business of a few -- I'm being
12 a bit hyperbolic here -- a few rogue operators if in so
13 doing it lost all the revenue from the much larger
14 number of suppliers who do care about quality?

15 A. Well, actually, I don't think I agree with this
16 proposition. I think originally we were talking about
17 the interests of the other buyers in relation to audit
18 thoroughness. We are now obviously on the topic of
19 the interests of suppliers. My view in this respect is
20 that the main reason to go through the assurance process
21 for a supplier is to get itself assured for winning
22 contracts with one or more buyers.

23 Once it's done that, there is no other additional
24 value. I mean, obviously there might be some
25 value-added services -- I'm not saying that there

1 aren't -- but in relation to the degree of cost and
2 effort that goes into purely the audit component,
3 the key thing is getting the certification; it is not
4 having a more intense, more beneficial audit that costs
5 more time and money.

6 They don't get any additional reward for spending
7 more time and effort and more cost and risking a higher
8 audit failure rate, assuming that both schemes have been
9 recognised, which is obviously the predicate of this
10 entire debate.

11 Q. Well, I suggest to you that it has been put by
12 Network Rail that this supplier assurance activity and
13 the quality of it is very important to safety.

14 A. Yeah.

15 Q. If that is the case, then a supplier may well have an
16 incentive to check that its management systems are up to
17 a certain standard, might it not? So they may be
18 interested in audit outcome, not just -- they are doing
19 it because they want to win work; yes?

20 A. Yes.

21 Q. They may be interested in feeling confident that they
22 had been checked to a good standard, might they not?

23 A. That now is sort of getting into the territory, which
24 I'm not sure I'm able to comment on, on their other
25 objectives in relation to getting approved. It seems

1 clear that the main objective in having a scheme come in
2 and assure you is to get the -- is to get the
3 certification so they can supply the buyer in question.

4 Q. Then finally paragraph 21, you say -- this is where you
5 make the point that these audit modules -- I am going
6 back to the buyers now so we are flitting between
7 suppliers and buyers -- these audit modules -- Sentinel
8 and plant operations -- these audit modules are of no
9 relevance for buyers other than Network Rail?

10 A. Yeah.

11 Q. But if a buyer is putting people to work, so say I am
12 a -- take a tier 1 contractor who is in the Network Rail
13 supply chain, construction supplier, I may want to buy
14 in a subcontractor to do some road-rail vehicle stuff.

15 A. Yeah.

16 Q. I need to get them and they need to be
17 Sentinel-authorised; they need to be
18 on-track-plant-authorised.

19 A. Yeah.

20 Q. They will be coming on to a work site which I control
21 and have duties over.

22 A. Yeah.

23 Q. They will be working alongside my workforce. They will
24 be working alongside other people. I would have an
25 interest, would I not, in ensuring that they are audited

1 to the right standard?

2 A. I think you would have an interest. Obviously nobody
3 wants to cause accidents or anything like that. That's
4 certainly not what I'm suggesting. But in a competitive
5 environment, if both schemes are being put forward as
6 valid recognised schemes to achieve the outcome which
7 you need, which is to ensure that you're complying with
8 the key scheme rules, then I think avoiding cost,
9 management time and so on would be an important
10 consideration in that respect because at the end of
11 the day, you've -- obviously you will have your own view
12 as to exactly how you conduct your own affairs and try
13 and have good processes, but we're not talking
14 necessarily about that alone; we're talking about the
15 actual process of going through the certification and
16 the audit process.

17 That is costly -- you know, significantly costly
18 according to, I think, some of the factual witness
19 evidence -- and so there is a financial incentive to try
20 and mitigate that cost because obviously your rivals
21 will be trying to mitigate their costs.

22 Q. If I could just pick up, I think, two more points on
23 the competitive effects. The first is a short point
24 I have on competitive bottleneck. For that, can you
25 turn to the joint statement, please, so tab 5 of

- 1 bundle F --
- 2 A. Yeah.
- 3 Q. -- at point 5.7, which is on page 261 of the bundle.
- 4 A. 5.7, right. Okay.
- 5 Q. Perhaps if everybody just reads that. This is again
- 6 the point -- the competitive bottleneck point.
- 7 A. Yeah.
- 8 Q. But I think that the focus is on -- the focus I want
- 9 deal with is the specific suggestion that was made that
- 10 you were dealing with. It was said for Achilles that it
- 11 had offered this service to Network Rail for free --
- 12 A. Yeah.
- 13 Q. -- and you say, "Well, that is irrelevant ..." --
- 14 A. Yeah.
- 15 Q. "... because this offer relates to a different situation
- 16 than the counterfactual", that it is one in which all
- 17 buyers, including Network Rail, have a choice.
- 18 A. That's right.
- 19 Q. Now, just focusing on -- obviously we have made a bit of
- 20 progress on the distinction between assurance and
- 21 qualification system -- sorry, authorisation and
- 22 qualification system.
- 23 Now, in terms of provision of assurance information
- 24 for the key schemes, Network Rail could simply
- 25 stipulate, could it not, as a condition of recognising

1 TransQ for the purpose of the key schemes, that
2 the audit information is provided to it for free, could
3 it not?

4 A. So this, as I understand, was a point that was described
5 by Mr. Parker yesterday. So -- yes, so I agree that one
6 could in a sense add further requirements to the
7 adequacy standard, which I was obviously focusing on in
8 terms of the assurance quality standards, while
9 recognising that that would obviously have costs, audit
10 compliance issues and so on. But now I think what is
11 being proposed is that further requirements would be
12 made in relation to the data transmission of the scheme
13 that is now recognised to whoever needs to get it,
14 whether it be Network Rail or RISQS or whoever.

15 So that's my understanding, that there would now be
16 some contractual requirements such that anyone -- any
17 scheme that did win some supplier audit business would
18 then have requirements to submit that information for
19 free. That, I think, is what's being suggested.

20 Q. So to take, for example, that -- if, say, the principal
21 contractor licensing team within Network Rail need for
22 that licensing function to have live access to the audit
23 information that's held in the TransQ portal --

24 A. Yeah.

25 Q. -- they could stipulate, "Well, because we need that,

1 that is a condition of us recognising you to do that
2 audit that you have to provide six, ten, however many,
3 free user licences to that team". That could be
4 stipulated, could it not?

5 A. I'm presuming you could potentially theoretically
6 stipulate any degree of -- you know, of transmission
7 that you would wish to. I think there are some
8 consequences of that which no doubt we'll come on to.

9 Q. In terms of whether or not it costs -- we are going to
10 come to the costs in a moment, but on the same point for
11 a moment, if Network Rail incurred some costs in respect
12 of monitoring that scheme or taking the information from
13 it, some additional IT costs and compatibility, they
14 could stipulate that they would only recognise somebody
15 if they paid them a fee to cover those costs, could they
16 not?

17 A. Yes, that sounds like something they could do. So
18 the costs would obviously still be incurred. They would
19 be paid by a different party than Network Rail.

20 Q. Yes.

21 A. Obviously the other concerns around whether that would
22 be sufficient to avoid -- the incentive concerns we
23 described earlier, that would still stand. But in terms
24 of who would end up paying for that, it's obviously
25 a cost to the industry that goes in there and then

1 the question is exactly who bears it.

2 Q. Just to focus on -- I can see that it becomes a cost to
3 the industry, it may get passed through to somebody or
4 not depending on competitive conditions and it does not
5 deal with everything, but in terms of the sort of
6 the externalities, put it that way, I mean, incentives
7 here, if Network Rail were to take that approach, it
8 would mean that the party who was responsible for these
9 additional audit costs being incurred would bear them
10 and would take them into account in deciding whether to
11 enter the market, would they not?

12 A. Yes, I think that would be right. I think there's an
13 important precondition for this because I think we're
14 trying -- we're discussing a scenario where somehow
15 the competitive bottleneck is avoided. What I think
16 needs to be clear in that regard is that the degree of
17 information that would need to be provided would
18 entirely, in a sense, protect the user of that
19 information from having to incur its own costs to
20 replicate the database.

21 I think that does have quite strong consequences
22 because what it means is that, in order to enter as
23 a provider of audit services, you're now committing as
24 a new entrant scheme to actually conducting
25 a significant amount of information processing as well,

1 over and beyond the audit service alone. So that's
2 obviously an additional cost that you will bear.

3 Q. Yes.

4 A. That would be a necessary cost for that party to bear in
5 order to avoid the competitive bottleneck. So between
6 that additional cost, ie the information-processing
7 mechanism which now is contractually required for free
8 and, furthermore, the cost of bearing the costs of all
9 this additional auditing, those are two additional costs
10 which I think would potentially have implications for
11 the pricing of those audit services.

12 Q. In a sense, of course, the important point is that an
13 entrant is only going to come in if, knowing that they
14 have to bear those costs, they still think they are
15 going to make a profit, and that would imply that they
16 still think they can provide services to suppliers and
17 buyers in the market that is of sufficient value that
18 they are going to win some business.

19 A. I think that's obviously a general statement that any
20 entrant would only enter if it thinks it could make
21 money.

22 Q. Absolutely.

23 A. I think what I'm identifying is that, in order to get to
24 a stage where you're avoiding the competitive
25 bottleneck, you are starting to actually have to impose

1 a lot of other costs, some of which would presumably be
2 borne by Network Rail because it's the one obviously
3 that has to create all of these rules and enforce
4 the application of that information transmission.

5 Now -- and that I think could be potentially --
6 obviously I'm not a data transmission expert -- but
7 there would be an important economic consideration here,
8 because what you would be saying is that the information
9 would be transmitted possibly between rivals, ie if you
10 are saying that you have a qualification scheme or an
11 audit IT -- sorry, an IT portal that RISQS is running,
12 but Achilles has won a bunch of supplier audits for
13 the reasons I've described earlier and has to
14 contractually guarantee the transmission of that
15 information for free in a sufficient status that it's
16 basically going right into an IT portal, then there are
17 some further monitoring arrangements that you would have
18 to put in place in that regard because you would have
19 sharing of information between rivals or transmission of
20 information between rivals and you would then have to
21 have a mechanism to deal with any disruption, delays,
22 errors and so on. So you would have to have some sort
23 of dispute or resolution mechanism set up as well.

24 Q. We do have to get on a bit, Mr. Holt.

25 A. Okay.

1 Q. But you are suggesting there, I think, a situation where
2 the information is being shared between TransQ and
3 RISQS, not just simply sent to Network Rail?

4 A. Yeah, so the nature of the issues would differ as
5 between whether the provision was that the information
6 has to get into RISQS so that you can have a full IT
7 portal covering all of the supplier base, which would
8 have one set of implications in terms of the fact that
9 you'd have problematic incentives where you have rival
10 players, one providing an input to another, because
11 obviously the quality of that input would affect its
12 rival, so you would have to police that.

13 Q. Just the last point before we get to the cost efficiency
14 which we are already trespassing into. The status of
15 RISQS as a not-for-profit scheme, that is a theme that
16 comes up -- you rely on to a significant extent in your
17 report.

18 What I was going to -- perhaps I will take it in
19 stages. In economic terms, I mean, RSSB is not allowed
20 to make distributions to its members because it is
21 a company limited by guarantee and it is in their
22 constitution that they cannot make distributions to
23 members and so, in economic terms, it is not
24 a profit-distributing enterprise; yes?

25 A. Okay, but do you mean to distinguish it from

1 a not-for-profit entity or ...

2 Q. I want to explore exactly what is meant by "not for
3 profit".

4 A. Okay.

5 Q. So it does not exist to generate a profit and then
6 distribute it to its members --

7 A. Okay, right.

8 Q. -- but it may still want to earn income from some of its
9 activities and use that to fund other of its activities,
10 might it not?

11 A. That's possible, yes.

12 Q. That is quite a common type of set-up for an
13 organisation, is it not?

14 A. It may well be.

15 Q. Oxfam, for example, it does all sorts of things to
16 generate income?

17 A. Sure.

18 Q. It might sell mugs, for example, and uses it to, you
19 know, do charitable activities, so it is a fairly common
20 kind of set-up to want to have some income-generating
21 activities and some activities that are costs and to
22 work in that way?

23 A. Obviously that's a somewhat different scenario, where
24 you have effectively a commercial operation, ie
25 the selling of branded shirts and mugs, in order to help

1 raise funds for the core services which are -- yeah,
2 which are being provided.

3 Q. What I am putting to you is that merely because a body
4 is not, as a whole, intended to be profit-making does
5 not mean to say that it will not seek to make a profit
6 in respect of some aspects of its activities --

7 A. That may well be the case, yes.

8 Q. -- or it may want to accumulate a -- over time run
9 a scheme at a profit for a period of time in order to
10 build up its reserves or pursue any number of financial
11 aims; yes?

12 A. It's possible.

13 Q. Okay. So the fact that the RSSB is not a profit-making
14 body in a sense does not mean to say that RISQS is not
15 a profit-making scheme, does it?

16 A. Well, I agree in that it doesn't guarantee in and of
17 itself that RISQS will be operated effectively on
18 a not-for-profit basis and I have -- I can't remember
19 where that statement comes up in the joint expert memo,
20 but I have sort of qualified the basis on which I say
21 the scheme is being run as if -- effectively on
22 a not-for-profit basis, by which I mean the incentives
23 and ability for RISQS to exercise market power are
24 significantly constrained.

25 Q. I am afraid I have lost where it is in the joint report,

- 1 but in the interests of time I think you rely upon
2 the evidence of Ms. Pearson. Does that ring a bell?
- 3 A. Yes.
- 4 Q. You refer to the evidence of Ms. Pearson, where she says
5 that they have an aim to adjust prices as profit levels
6 permit.
- 7 A. Yes.
- 8 Q. Is that what you recall relying upon?
- 9 A. I think it's a general -- there's a number of aspects to
10 my point, one of which is the nature of RSSB as an
11 entity in itself. Another is the clear intention that
12 the operators of the scheme have expressed in terms of
13 the desirability of passing on price reductions and
14 quality improvements, investment in new services and so
15 on to their users, and then furthermore the fact that
16 being an industry-wide scheme, which has clearly had
17 the full benefit of the buyers and the suppliers in fact
18 in the design of the scheme, they will be exercising
19 their own, you know, diligence in terms of ensuring that
20 they're getting the benefits, I think.
- 21 Q. So if I can take you on to -- in your main report, we
22 are going on to objective justification, exemption and
23 cost efficiencies now --
- 24 A. Okay.
- 25 Q. -- which is the last topic I want to explore with you.

1 On page 51 of the bundle --

2 A. Yeah.

3 Q. -- set out your views on this. This is your summary

4 views --

5 A. Sorry, I'm on the wrong page, 51 --

6 Q. 51 of the bundle, page 9 of your report.

7 A. Ah, yeah, sorry. Yeah.

8 Q. You say you have examined objective necessity and

9 efficiencies. You have objective necessity at

10 paragraph 34 and then quality and cost efficiencies at

11 paragraph 35.

12 A. Yeah.

13 Q. Briefly in relation to 34, your first statement is that:

14 "A scheme that is co-ordinated at an industry level

15 will be likely to be more effective at enabling safety

16 best practice to be achieved, sustained and developed."

17 I suggest to you that that is outside your

18 expertise, Mr. Holt.

19 A. Yeah, I mean, I rely on the factual witnesses in

20 relation to the precise degree in which that

21 co-ordination will facilitate improvement. I think

22 there is an obvious economic factor in terms of

23 the feedback loop and how information is transmitted,

24 which is consistent with that factual evidence, and

25 that's all I'm saying here.

1 Q. I think you go on, to be fair, to make then the economic
2 point at paragraph 34(b), which is essentially you are
3 putting the "race to the bottom" argument in relation to
4 incentives.

5 A. Yes.

6 Q. Okay. Now, we have already dealt with that, I am not
7 going to cover that again.

8 A. Okay.

9 Q. Now, at 34(c), you say:

10 "The risk of scheme proliferation may lead to
11 reduced average revenues per ... scheme, in which case
12 schemes may have a reduced ability to invest ..."

13 And so forth. Now, I just want to check what you
14 mean by this. When you say "average revenue", you are
15 not meaning average prices, are you, because reducing
16 average prices would, all other things being equal,
17 a good thing? I think you must be talking about
18 reducing average total revenues; is that right?

19 A. Yeah, so this is -- this is saying that there is
20 a current market -- I think we described the value as
21 being 5 million, albeit I think that's what Achilles, in
22 the concession period, was earning across all -- both
23 the buyer and the supplier community -- I might be wrong
24 in that regard, but it's basically something around that
25 order of magnitude, and what I'm saying here is that if

1 you have multiple schemes entering, unless of course
2 the competitive bottleneck drives up prices, which is
3 one risk I have identified on the buyer side, at least
4 for Network Rail, then the revenue per scheme would go
5 down, and what that does is limit the amount of
6 cash flow that would be available for further investment
7 and/or affect the incentives to carry out further
8 investment, because the potential benefits and,
9 you know, recovery of those investments would be under
10 more pressure.

11 Q. Is this not, in a sense, an argument in favour of any
12 monopoly, because in any monopoly, the average revenue
13 that is available to the monopoly, who only has to incur
14 its fixed costs once, is going to be higher than if you
15 have two competitors? So it is a quite -- if that is an
16 objective justification, it is one of quite
17 extraordinarily wide application.

18 A. Well, obviously I agree with you that in a general
19 market there would be trade-offs, and I, like most
20 economists, would identify that there would be benefits
21 of in-the-market competition under many scenarios.
22 Obviously what we're talking about here is
23 a counterfactual where you're removing buyer choice, so
24 I think obviously you have to take that into
25 consideration in terms of the nature of the single

1 scheme, you need to take into account the actual
2 corporate governance and the fact that the core inputs
3 are competitively tendered and so on.

4 So while I take your point that a monopoly that is
5 unconstrained would have higher revenue and therefore
6 that may lead to better incentives, that's not what I'm
7 saying. What I'm saying is that if you effectively, in
8 my view, distort the market by taking away buyer choice
9 and that leads to scheme entry --

10 Q. Sorry, just to be clear. When you say "buyer choice",
11 you mean the choice of Network Rail --

12 A. Yes, yes to be precise --

13 Q. -- to choose which scheme --

14 A. Exactly.

15 Q. -- it takes for the authorisation purposes?

16 A. That's right. So if that change induces entry, then
17 these are some of the consequences that I would expect.

18 Q. But just in terms of reduced average revenues versus
19 ability to invest, the effect of this would depend,
20 would it not, on the balance between the fixed costs and
21 the variable costs that the scheme-providers face, in
22 that if it is a 100% variable cost industry, which
23 I know is unlikely, but if it is a 100% variable cost
24 industry, the fact that you split it in two and half
25 the revenue goes over here to fund those variable

1 costs and half the revenue goes over here to fund -- it
2 makes no difference to incentives, does it? It's only
3 if you have some fixed costs that this becomes --

4 A. I think that's correct. Obviously if all the costs were
5 entirely variable and there were therefore no fixed
6 costs, no economies of scale, then you could have a --
7 you know, in theoretically any number of schemes, then
8 it would have no impact on costs. I'm not sure that is
9 consistent with the factual evidence in relation to
10 the cost structure.

11 Q. But you have not done any empirical analysis to work
12 out, based on the balance between fixed and variable
13 costs, what the effect on the need to invest would be or
14 anything of that sort?

15 A. That is entirely true. I was not instructed to examine
16 the cost structure of the industry. All I would note is
17 that the contracts that have been awarded by RISQS do
18 have volume-related price differentials in them which is
19 consistent with there being some economies of scale in
20 this sector.

21 Q. If I could just move on to the next section you have,
22 which is quality and cost efficiencies.

23 A. Yeah.

24 Q. We will in fact need to, I am afraid, be back to discuss
25 the depth of this in the report. We will not be too

1 long after lunch, sir, but we will be some time.

2 Am I right in thinking that at paragraph 35(a) --

3 A. Yeah.

4 Q. -- you refer to -- in (a) you refer to industry cost
5 savings and then in (b) -- so that is cost savings for
6 the industry if there is only one scheme.

7 A. Yeah.

8 Q. Then in (b) you refer to the industry-wide cost
9 increases, which I think would be what you have been
10 saying, that because you have more schemes in the market
11 there is an increase in costs, but again you are
12 focusing on the industry, are you not?

13 Then (c) --

14 A. Sorry, can I just clarify? (b) is basically saying,
15 given (a), ie that there are some general cost increases
16 as a result of the entering of new schemes, the question
17 is whether having in-the-market competition would likely
18 outweigh that, and so (b) is all about that assessment
19 of the factual and the counterfactual. My point is
20 that, given the factual, ie the advantages of the RISQS
21 scheme, competitive tendering and so on, that it's
22 unlikely that those competitive benefits would outweigh
23 the costs of entry.

24 Q. So (a) and (b) you take together --

25 A. Yeah.

1 Q. -- and they are all about the costs of this assurance
2 for the rail industry essentially and how the increase
3 in costs might be weighed up against competition?

4 A. Agreed.

5 Q. Then you have the competitive bottleneck problem for
6 Network Rail -- specific for Network Rail.

7 A. Yeah.

8 Q. Then you consider in a sense the other elements of
9 the section 9 analysis (unclear) and so on.

10 A. Correct.

11 Q. But you have only considered cost efficiencies from
12 the perspective of the rail industry, have you not?

13 A. That's correct.

14 Q. That is (a) and (b).

15 A. Yes.

16 Q. So you have not, for example, considered at all how cost
17 efficiencies might apply to providers -- to buyers, for
18 example, who sit both in the rail industry and outside
19 the rail industry?

20 A. I have not considered that, no.

21 Q. Indeed, there might be a range of such efficiencies, so
22 there would be a potential for a reduced duplication in
23 their internal procedures, would there not, if they used
24 TransQ or other Achilles platforms outside this market
25 and they would want to use Achilles inside this market,

1 would they not?

2 A. I don't have any information to rule that out or in.
3 Again, I just go back to the point that to the extent
4 that other buyers had those sort of interests, they
5 could already have engaged in that type of procurement
6 of a supplier assurance scheme.

7 Q. Well, we have our different points we have on that.

8 But also, if, as we explored yesterday -- and it is
9 in the confidential session, but I think I can say this
10 much -- if Achilles were to offer -- want to offer
11 a complete supply chain management solution to a big,
12 big buyer, for instance somebody like Skanska or a big
13 construction firm, somebody who sends their supplier
14 assurance work outside the rail industry to Achilles but
15 cannot do it in the rail industry at the moment because
16 we say they have to use RISQS -- yes?

17 A. Yes.

18 Q. -- now, not being able to give that client complete
19 visibility of their supply chain may have efficiency
20 complications, might it not, because if it were not for
21 this restriction, Achilles or indeed somebody else could
22 offer that kind of customer complete supply chain
23 visibility and be able to offer them a whole range of
24 value-added services about managing a very complex and
25 very large --

1 A. Yeah.

2 Q. -- you know, multi -- tens or hundreds of millions of
3 pounds supply chain, so there could be substantial
4 efficiency benefits in that kind of scenario which are
5 not factored into the very limited analysis you have
6 done here; is that right?

7 A. That is agreed in terms of it not being factored in.
8 Again, I don't have any factual evidence one way or
9 the other as to the materiality of that point, other
10 than to note the previous comment that other buyers are
11 not required to use RISQS for their supplier assurance
12 purposes.

13 MR. WOOLFE: Sir, I have some more I need to deal with with
14 Mr. Holt. It will take a sufficient time after lunch
15 that I do not think it is feasible to carry on with it
16 now, but I should not be too long. I should think in
17 the course of about 40/45 minutes or so.

18 THE CHAIRMAN: Very well.

19 (1.03 pm)

20 (The short adjournment)

21 (2.09 pm)

22 MR. WOOLFE: Now, Mr. Holt, we were going to be turning to
23 the cost efficiency point, and I think the two parts of
24 your statement we are going to need to look at in sort
25 of parallel are first of all 35 on pages -- starting on

1 page 51 of the bundle and going on to page 52 and we
2 explored that a little bit before the break.

3 A. Sorry, of my report?

4 Q. Of your report, that is right. I'm sorry. I always
5 refer to the bundle numbers if that is okay.

6 A. Yeah.

7 Q. So you will see the larger numbers in the corner of
8 the page.

9 A. Yes, got that.

10 Q. At 35(b) you say that your findings, your conclusions in
11 respect of ... (Pause)

12 For the benefit of the transcript, we are going to
13 be looking at paragraph 35 and paragraph 352 of your
14 report.

15 A. Thank you.

16 Q. So if you could maybe find a way of keeping hold of
17 both.

18 A. I've got them, thank you.

19 Q. As regards paragraph 35, I think you said earlier that
20 subparagraphs (a) and (b) in a sense have to be taken
21 together as a whole because, in one sense,
22 paragraph 35(a) simply says that, because there are some
23 fixed costs in this industry, if there is more than one
24 provider, there will be some more fixed costs, and thus,
25 by having only one provider, you eliminate some fixed

1 costs, and that would be true in sort of any market
2 generally speaking?

3 A. Yeah.

4 Q. But I think you said that you have to tie that together
5 with 35(b); is that fair?

6 A. Yeah, I think I did say that. I think really all I'm
7 saying here is that you need to look at both the
8 comparison of the factual situation and
9 the counterfactual situation in order to make an
10 assessment.

11 Q. Okay.

12 A. Yeah.

13 Q. What you are essentially doing, are you not, is trying
14 to look at the -- at 35(a) you are putting forward one
15 efficiency saving from having only one scheme --

16 A. Yes.

17 Q. -- so sort of the -- and then you are weighing that
18 up --

19 A. Yeah.

20 Q. -- against what you gain by having competition in
21 the market, what cost efficiency do you come out with;
22 yes?

23 A. That's right.

24 Q. We covered the fact that you are looking at it just in
25 the rail market in your analysis.

1 A. Yeah.

2 Q. If we then turn to paragraph 352, perhaps an important
3 point to note, the second sentence of that paragraph,
4 you said you have not been instructed to carry out
5 a detailed cost assessment of the operation of supplier
6 assurance schemes, and so this is a kind of qualitative
7 type of analysis that you are carrying out; is that fair
8 to say?

9 A. It is.

10 Q. So you are not doing any kind of quantitative comparison
11 of the cost efficiencies that are derived by having only
12 one scheme versus the losses from benefits of
13 competition that you might see?

14 A. No, it's a qualitative assessment.

15 Q. Thank you.

16 Now, at paragraphs 352(a) and (b) you identify two
17 sources of, you say, duplication if there are multiple
18 supplier assurance schemes. The first one is simply the
19 fixed costs of the operation of supplier assurance
20 schemes and the second one is the cost to customers from
21 having to pay more than one fee; yes?

22 A. Yes.

23 Q. So if we can just take the first one, the fixed costs.
24 Now, as you say, you have not done any analysis of what
25 the cost base of this kind of industry is, have you?

- 1 A. No, I've seen that the revenue base is about 5 million
2 and I've seen that there are some economies of scale
3 recognised in the two contracts with Altius and with --
4 it says "RSSB", but obviously that's with Capita.
- 5 Q. In terms of what this kind of work comprises, there is
6 the need to have an IT system, which would be a chunk of
7 fixed costs because it is -- in the way IT systems work,
8 it does not really matter the number of users; you have
9 a set-up cost of an IT system; yes?
- 10 A. Yes, I presume that is the case. I haven't specifically
11 analysed the extent to which that is the case, but yeah,
12 it would be an example.
- 13 Q. But then the audit activity, going out and checking what
14 people -- the management systems people have in their
15 office, that would -- it is likely to be a variable
16 cost, is it not?
- 17 A. Well, not necessarily. If you have multiple
18 scheme-providers with audit services, then the extent to
19 which you can maintain utilisation on a, you know,
20 national-level basis might be affected by the size of
21 your client base.
- 22 Q. True, but over time you can size the number of auditors
23 that you have to cover the client base that you are
24 serving, can you not?
- 25 A. Yes, but you might need a sort of a minimum number to

1 have full geographic coverage.

2 Q. Okay, so there is an element of that.

3 But, also, in respect of the basic information that
4 is provided, there is, as I understand it -- there is
5 a questionnaire that people fill out, sort of the IMR,
6 and then that has to be verified, the information in
7 that, and that is done by checking -- somebody sits
8 there and checks manually that the information is
9 correct?

10 A. Yeah.

11 Q. Then at the higher levels you can get the audit.

12 So just stepping back, there is quite a lot of
13 activity which is driven by the number of people who are
14 on the system, is there not?

15 A. Yeah, I think that's probably fair. The checking
16 process I think would be to some extent variable.

17 I think there would be some fixed costs. You obviously
18 have the IT and the minimum sort of audit capacity that
19 you need to maintain. Obviously there's sort of the
20 development of the scheme rules and interaction between
21 parties that might be partly fixed, but, yeah, I think
22 there are probably -- if you're suggesting a combination
23 of fixed and variable costs, I would probably agree with
24 you.

25 Q. But it does not look like a market where fixed costs

- 1 dominate, does it?
- 2 A. I don't have enough information to comment on
3 the proportion. I think there are some fixed costs.
4 I can't comment really on the exact proportion.
- 5 Q. You would not say it looks like a natural monopoly?
- 6 A. I wouldn't necessary say it looks like a natural
7 monopoly. Obviously the size of the market is not
8 large, but that does not necessarily mean it's a market
9 where only one efficient producer would necessarily be
10 able to survive, but that would indicate possibly
11 a smaller number of feasible suppliers.
- 12 Q. If you look at 352(b), which is the duplication of fees,
13 you are proceeding on an assumption here, are you not,
14 that buyers and suppliers are required to participate in
15 multiple schemes; is that right?
- 16 A. So I guess the word "required" probably needs some
17 explanation. By "required", I mean end up multi-homing.
18 So I don't actually mean that there's a legal
19 requirement on them to participate in multiple schemes.
20 I mean commercially that, as a result of how
21 the industry would develop, they would see the need to
22 participate in multiple schemes in order to properly
23 access the -- you know, the participants on the other
24 side that they're trying to participate with.
- 25 Q. Okay, but in terms of -- suppliers or buyers only pay

1 more fees if they choose to be registered on multiple
2 sites; that is right, is it not?

3 A. Yes. Obviously they'll only pay fees if they -- you're
4 right, if they choose to be on multiple schemes. But
5 the question here is whether, in the counterfactual,
6 with the prospect of in-market competition, is that
7 likely to lead to a scenario where people do in a sense
8 face that commercial decision that they do have to
9 either be audited by multiple schemes because different
10 buyers have adopted different schemes or participate in
11 multiple schemes for any other reason.

12 Q. But also, if these fees are being set on a competitive
13 basis by the scheme-providers, so we are not looking at
14 a competitive bottleneck situation --

15 A. Yeah.

16 Q. -- but if -- on this -- we only get into this exemption
17 analysis if we are right that there is a restriction of
18 competition here. So on the assumption that we are not
19 in a bottleneck scenario, these fees will be set on
20 a competitive basis and they will, well, be competed
21 down to in a sense marginal costs, will they not?

22 A. Okay, so obviously if you've put to one side the
23 competitive bottleneck, I think we can agree that
24 pricing would become competitive. I wouldn't agree that
25 that would necessarily drive prices to marginal cost.

1 That's obviously a theoretical proposition and in
2 practice schemes would not be sustainable if they only
3 recovered their marginal costs and not their ongoing
4 fixed costs.

5 Q. So they would have to have a long run --

6 A. Yeah, there's a long run sort of aspect to it.

7 Then, furthermore, even if the pricing of an
8 individual scheme were competitive, if it led to
9 a situation where, for example, a supplier had to
10 participate in two schemes because two different buyers
11 were on two different schemes, even if those two prices
12 were themselves not anti-competitive, that would still
13 lead to a duplication.

14 Q. There is a link, is there not, between I think 352(a)
15 and 352(b) in that the actual increase in
16 the industry-fixed costs that you postulate would only
17 end up being borne by the industry insofar as it feeds
18 through into fees that are paid by the industry, would
19 it not?

20 A. No, I think that was actually what my previous statement
21 was trying to explain. They're two separate things.
22 Multiple schemes can lead to higher industry costs due
23 to the presence of some fixed costs. In addition to
24 that, over and beyond that, individual suppliers might
25 end up paying two sets of fees where they need to join

- 1 up with two schemes.
- 2 Q. Yes.
- 3 A. So the first point is a point about, even if everybody
4 stayed on one scheme, costs would go up.
- 5 Q. Okay.
- 6 A. The second point is about, if people start having to
7 join multiple schemes, they then face further additional
8 costs.
- 9 Q. I can see that. That is a fair point, Mr. Holt.
- 10 A. Yeah.
- 11 Q. But the same point still applies, does it not, that if
12 they -- say somebody single-homes, a supplier or a buyer
13 single-homes, so there is no duplication of fees for
14 them, they will only bear an increase in industry costs
15 insofar as it is passed through to them in their fees,
16 will they not?
- 17 A. So if a supplier is single-homing -- I think is the
18 proposition; is that right?
- 19 Q. Yes.
- 20 A. -- so that means all the buyers they want to supply to
21 are on the same scheme, then the question as to whether
22 they might face higher costs in this world would still
23 depend on whether fixed costs, essentially industry
24 costs, have gone up, because although they wouldn't
25 directly be paying for the costs of the other scheme, if

1 the efficiency of the scheme that they stay on is
2 reduced due to the multi-scheme nature of this version
3 of competition, then they would be paying part of that.

4 Q. But another possibility in respect of fixed costs, if
5 you take a provider like Achilles who is active not just
6 in rail but in construction, in the utilities sector and
7 so forth, if they are spreading their fixed costs over
8 all of those industries, allowing somebody like that
9 into the rail industry may mean that the level of fixed
10 costs they are having to bear to provide that service is
11 lower than would be borne by a single industry provider
12 such as RISQS.

13 A. So that is possible. I agree with your previous
14 statement that there could be some economies of scope.
15 That's effectively what that would be.

16 A couple of brief points in that regard. I don't
17 have any facts, as I said before, to support
18 the magnitude of that, but obviously what you currently
19 have is all of these rail industry participants on one
20 scheme. So to the extent that you have duplication for
21 a lot of those players, it's not clear to me at all that
22 that set of costs would be outweighed by some
23 multi-sector multi-transport scheme operators choosing
24 to use TransQ.

25 Q. In a sense, it is not just if you have multi-industry

1 operators who choose to use TransQ, but if you have
2 a situation where RISQS is a pure industry scheme and it
3 incurs the fixed cost that it incurs to provide this
4 scheme, but TransQ -- in a sense it will bear a lower
5 share of fixed costs, will it not, because it is able to
6 enjoy the economies of scope and thus it can come in and
7 bring quite an effective and competitive price, can it
8 not?

9 A. So I think the first point is that if there were to be
10 an entry by TransQ in the way that you suggest, that
11 obviously would not reduce the fixed costs that RISQS is
12 bearing. So to the extent that RISQS is continuing to
13 service a set of suppliers and buyers, then it will have
14 to recoup those fixed costs on a smaller set. So that
15 particular point holds in a sense irrespective of the
16 particular nature of entry by a rival scheme.

17 Q. In terms of the duplication of fees and costs for buyers
18 and sellers, have you considered at all the possibility
19 of mutual recognition between schemes, how that can
20 reduce --

21 A. No, I have not considered that point.

22 Q. Have you seen reference in the papers to a scheme in
23 the construction industry called "PAS 91"?

24 A. I can't recall that particular reference. I'm aware
25 that there's been debate about schemes in other sectors.

- 1 Q. Sure. So in that case the construction industry has
2 agreed on a common core questionnaire --
- 3 A. Yeah.
- 4 Q. -- PAS 91, and under a scheme called "SSIP", safety
5 schemes in procurement, the different schemes that
6 operate have agreed to mutually recognise part of,
7 I believe, the audits that are done against that
8 questionnaire. Now, a measure like that would be an
9 effective tool to reduce duplication costs, would it
10 not?
- 11 A. It might be. Again, I don't know enough about that
12 particular circumstance to comment on how easily it can
13 be applied in this case.
- 14 Q. Thank you.
- 15 Now, I am going to come on to what you say at
16 352(c). You refer to the relative benefits of
17 competition in the market as against competition for
18 the market.
- 19 Before we get there, if I could just put one part of
20 Mr. Parker's report to you. If you go to tab 1, at
21 paragraph 88, which is on page 22 --
- 22 A. Yeah, 88?
- 23 Q. 88, yes -- I'd like to draw your attention in particular
24 to 88(c), "The value of differentiated products".
- 25 A. Yeah.

1 Q. I would suggest to you that in your analysis in your
2 report you have not really considered the value of
3 horizontal differentiation between schemes, that they
4 may set themselves up to better fit the requirement of
5 particular groups of suppliers or buyers?

6 A. Well, I did take into account a range of factors,
7 including one element of horizontal differentiation,
8 which is that different schemes might be of particular
9 interest to buyers or suppliers on one side because of
10 the nature of who they're trying to procure from or to,
11 so I did take into account various aspects along those
12 lines.

13 In respect of this particular point, I addressed
14 a number of sort of mechanisms by which there would be
15 multiple schemes operating. Obviously several of my
16 counterfactual configurations did have multiple schemes
17 and, by definition, those would be horizontally
18 differentiated schemes with different offerings
19 targeting different sets of suppliers and buyers.

20 I think one key focus of horizontal differentiation
21 in the counterfactual that I highlighted was of
22 particular concern was the way in which horizontal
23 differentiation might lead schemes to target suppliers
24 through the incentive mechanisms I described earlier.
25 So I don't suggest that we need to go through that

- 1 again, but that was a context where I was describing
2 horizontal differentiation.
- 3 Q. In a sense they may choose to offer a higher price,
4 higher quality service and quality perhaps not just in
5 audit quality --
- 6 A. Yeah.
- 7 Q. -- but in service -- customer service, for example.
8 That is one choice that people make in some markets.
- 9 A. Yes, so I recognise that that could be a strategy, but
10 again, given the recognition point, once you have
11 recognition and that it's sort of mandated, then
12 the competitive strategy of a scheme will be tailored
13 towards suppliers rather than buyers.
- 14 Q. Well, we have been through that. I do not want to go
15 over too much of that again --
- 16 A. Okay.
- 17 Q. -- but you have made that point again in that context.
- 18 A. Yeah.
- 19 Q. Another strategy that somebody might follow, as I have
20 already put to you, is to target those buyers who
21 operate not only in the rail industry, but also in other
22 industries, and that is another possible strategy.
- 23 A. It's possible as well.
- 24 Q. They may differentiate themselves to suit that buyer
25 group?

1 A. Yeah, again, I'm not sure that would have any effect on
2 the consequences of this for Network Rail.

3 Q. No, not for Network Rail, but in terms of overall
4 efficiency for the industry -- I mean, efficiency in
5 economic terms, welfare terms, is broader. It is not
6 just lowest cost; it is about what produces the greatest
7 value, is it not?

8 A. Yes, I agree. I explicitly referred to both price,
9 quality, standard of assurance and so on. So I agree all
10 of those are relevant.

11 Q. If I could take you to -- go back to your report and to
12 paragraph 352(c), which is on page 124.

13 A. Yeah.

14 Q. This is the point where -- you start off by
15 acknowledging that you would often expect that
16 competition in the market would generate incentives to
17 reduce industry costs.

18 A. Yes.

19 Q. I put to you that in the most general terms competition
20 in the market is preferable to competition for the
21 market, is it not?

22 A. That actually depends. There are trade-offs. There can
23 be situations where one is more effective than
24 the other.

25 Q. Okay, but there are some downsides, are there not, to

- 1 setting something up as competition for the market as
2 a tendering situation?
- 3 A. Again, as part of the trade-offs, you would want to take
4 into account, you know, the efficient structure of
5 the market, how competitive you expect that tender to
6 be, what sort of incentive mechanisms you can put on
7 the party that wins the tender to improve services over
8 time. So I agree with you to the extent that there's
9 a wide range of factors that you would take into account
10 in determining what's the most optimal scenario for
11 a given context. Obviously, in this case, Network Rail
12 and in fact the industry have obviously weighed up those
13 considerations and chosen to go down one route.
- 14 Q. Well, yes, and we will come to some of these
15 considerations in a moment, but it is key, is it not,
16 that the RSSB carried out a competitive tender for two
17 lots, for the IT lot and the audit services lot?
18 Network Rail has not tendered for the provision of
19 supplier assurance services to itself. It has just said
20 in its scheme rules that it wants RISQS.
- 21 A. That's right.
- 22 Q. In terms of it being a decision of the industry, not
23 everybody in the industry was centrally involved in this
24 decision to tender it, were they?
- 25 A. Do you mean the decision to tender it or the decision to

1 establish RISQS as an industry-led model?

2 Q. Well, so the only body which decided to specify RISQS in
3 its rules was Network Rail; that is right, is it not?

4 A. I don't know whether other buyers similarly specify
5 RISQS or merely accept RISQS.

6 Q. But in a sense it was Network Rail that has decided to
7 include RISQS as a condition of its authorisation
8 schemes?

9 A. That's right, yes.

10 Q. The RSSB has decided that the RISQS board, which I think
11 is the RSSB under the aegis of the RSSB, but is a group
12 of individuals from various companies and so on, have
13 decided that they want to put RISQS out to tender in
14 this way, but each individual supplier or buyer in this
15 industry have not collectively taken the decision to put
16 this out to tender, have they?

17 A. No, no, I agree with you there, yeah. It's an
18 industry-wide sort of decision, not a collective of
19 individual decisions.

20 Q. Putting it out to tender in this way, tendering of those
21 lots, the IT services and the audit lots, makes the
22 results very dependent upon the decisions that are made
23 at the time of tendering, does it not?

24 So to give you a bit more flesh on that, the RSSB
25 has put certain KPIs into the contract, key performance

1 indicators. They ran those through the procurement
2 process. Those KPIs presumably reflect a view on the
3 part of the RSSB as to what the industry wants?

4 A. I believe that's the case, yeah.

5 Q. But it does not necessarily reflect what the industry in
6 fact needs over the entire lifetime of the contract,
7 does it, because there --

8 A. Obviously at the point of the tender, the best
9 information will be used to get the best configuration
10 and contractual structure. Is your point that over time
11 things might change and therefore the scheme might
12 become out of kilter with what the industry wants?

13 Q. Two points really, Mr. Holt.

14 A. Okay.

15 Q. Please comment on both. One is that the RSSB's
16 information as to what people want is necessarily
17 imperfect.

18 A. I can't comment on the RSSB's information set. I mean,
19 my understanding is that this was sort of an
20 industry-led consultative exercise leading to this
21 outcome. Might it be that some views didn't get heard?
22 Perhaps, I don't know.

23 Q. But the RSSB is not necessarily -- if you have
24 competition in the market, then people make decisions
25 reflecting their own commercial needs and their own

1 commercial assessments of value as time rolls on, and so
2 this year/next year a supplier will -- as their business
3 evolves they will decide which supplier assurance scheme
4 best fits their need, what functionality it offers, how
5 that works for them; whereas if you have a tender
6 process, and, yes, you use it to drive costs and so on
7 at the time of the tender, but you fix your needs at
8 a point in time, do you not, and you fix your needs by
9 reference to the RSSB's assessment of what the market as
10 may need -- that is necessarily -- one is necessarily an
11 approximation to the other, is it not?

12 A. Well, I think that might be oversimplifying because it
13 sort of suggests that the scheme becomes locked in place
14 at the point of the tender. But I don't believe that's
15 the case because obviously, if you have various
16 performance incentives, then that will induce further
17 improvements over and beyond those that have already
18 come into being through the competitive tender, so it is
19 actually more of a dynamic process than I think your
20 description suggests.

21 Q. But still, you may get, might you not, a rather
22 one-size-fits-all approach, where the RSSB has decided
23 what KPIs it wants to go with; whereas, for example, you
24 may have subgroups within the market who would value
25 different KPIs differently, and if competition is

1 allowed to evolve, provider solutions can evolve to meet
2 those requirements more effectively.

3 A. Again, I agree that that might be possible. The other
4 buyers obviously, however, have expressed their
5 decision-making, their preferences, by joining along
6 with this industry-led scheme, so it's not clear to me
7 that the nature of what you describe suggests that
8 there's any material differentiation insofar as what
9 other buyers might want and what the RISQS scheme is
10 offering.

11 Q. Also there is a necessity -- if one moves to having
12 competition for the market rather than competition in
13 the market, there is a certain element of risk around
14 the execution of the tender, is there not, because if
15 the tender process is not as effective as it might be in
16 terms of driving price, you then lock those problems in
17 over a period of time.

18 A. Well, you -- I agree with you that the tender
19 effectiveness will be a driver of the outcome of
20 the process. That certainly sounds sensible. Again,
21 though, it's a bit more dynamic than that because of
22 the nature of the performance incentive regime that you
23 put in as well.

24 Q. But in terms of tendering, I am right, am I not, that by
25 the time you got to best and final offer stage, because

1 Achilles -- I think there were three who went forward to
2 tender. I do not know what happened to one, but
3 Achilles withdrew -- and the effect, as Ms. Pearson says
4 in her evidence, is that at best and final offer stage
5 there was only one provider left on the audit side.

6 A. Right.

7 Q. So there may be some problems, might there not, about
8 the extent to which the tendering process drives --

9 A. Well, I'm sure they would have preferred more people
10 being in play at that time, sure.

11 Q. It is quite hard to drive competition with only one
12 person in play, is it not?

13 A. Obviously, by the time you got to that point, there will
14 have been some competitive tension all the way along as
15 well.

16 Q. Yes, that is true, as the process moves on. You are
17 right.

18 Now, to take your reasons in turn quickly at 352(c),
19 I think 352(c)(i), that is the "race to the bottom"
20 argument again, is it not?

21 A. Yeah, sorry, can I just make one very brief comment on
22 the previous point?

23 Q. Of course. By all means.

24 A. There is obviously an issue about what information is
25 available in the market, so if the remaining bidders did

1 not have perfect information as to the contractual --
2 you know, the status of the other players in the market
3 or that they now have dropped out, then the competitive
4 tension on them would remain, even if they were actually
5 only one remaining person at the best and final offer
6 stage. 352(c)(i) ...?

7 Q. Yes, I just really want to check that that is the "race
8 to the bottom" argument again --

9 A. Yes.

10 Q. -- because, if it is, I will just say we have exchanged
11 our points on that --

12 A. Yes.

13 Q. -- and then move on.

14 A. That is right. That is right.

15 Q. Okay.

16 Now, 352(c)(ii), that is the competitive tendering
17 point, which we have covered, but there is one
18 additional point that you -- well, just to note, you
19 refer to there having been material supply-side
20 substitutability as to the number of firms that can bid,
21 so that is an assumption you are making, is it not, as
22 regards whether or not competitive tendering has driven
23 efficiency; yes?

24 A. Yeah, IT and audit services were the core inputs being
25 tendered. There were obviously a large number of

1 potential providers at the outset of that process,
2 that's right.

3 Q. But as we heard at the end, it was not --

4 A. Yeah.

5 Q. -- the case. But again, you have not done any -- when
6 you say that it is material, you have not done any sort
7 of quantitative assessment as to whether or not the
8 numbers who were bidding is material and sufficient to
9 drive --

10 A. No, I haven't done any quantification.

11 Q. Now, your (c) (iii), is this also the "race to
12 the bottom" argument again, because it seems to be a --
13 certainly a race to the lowest cost argument, but I am
14 not sure --

15 A. It is, yeah.

16 Q. Okay, so that is essentially the same as (c) (i) then?

17 A. The point I'm making is that, even if there were some
18 lower costs, that would not necessarily reflect
19 efficiency if the reason for the lower costs is
20 the point that we have been discussing on quality.

21 Q. The (c) (iv) you say:

22 "... the incentive for a scheme to reduce costs to attract
23 suppliers will be reduced given that schemes would have
24 scope to cross-subsidise their costs through high fees
25 to buyers."

1 A. Yeah.

2 Q. So this assumes, does it not, that there is
3 a competitive bottleneck as regards buyers?

4 A. It does.

5 MR. WOOLFE: It does. Okay. Thank you.

6 I said I would take about 40 minutes, sir, and
7 I think that takes me to the end of what I did. I do
8 not normally time it as well as that, so that is why
9 I am done. Thank you, Mr. Holt.

10 A. Thank you.

11 MR. FLYNN: I have no additional questions for Mr. Holt,
12 sir.

13 THE CHAIRMAN: Thank you, Mr. Holt.

14 A. Thank you.

15 (The witness withdrew)

16 MR. FLYNN: That concludes our evidence, I think, sir.

17 MR. WOOLFE: Yes, so I understand you want the closings at
18 9.00 am tomorrow morning -- written closings, and we
19 start at -- is it noon tomorrow?

20 THE CHAIRMAN: Yes, that is the plan, and it would be
21 helpful from the Tribunal's point of view if you could,
22 in your closing submissions, suggest to the Tribunal
23 what findings of fact you invite the Tribunal to make
24 and to support those points with any references to
25 the transcript that you would like us to focus on.

1 MR. WOOLFE: Yes, we will, sir. Thank you.

2 MR. FLYNN: Very well. Thank you, sir.

3 (2.42 pm)

4 (Court adjourned until 12.00 pm on Friday, 1 March 2018)

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INDEX

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
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MR. DEREK HOLT (continued)1
Cross-examination by MR. WOOLFE1
(continued)