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5 **IN THE COMPETITION**  
6 **APPEAL TRIBUNAL**

Case No: 1298/5/7/18

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8  
9 Salisbury Square House  
10 8 Salisbury Square  
11 London EC4Y 8AP  
12 (Remote Hearing)

Thursday 14 October 2021

15 Before:  
16 Andrew Lenon QC  
17 Jane Burgess  
18 Michael Cutting  
19 (Sitting as a Tribunal in England and Wales)

20  
21  
22 **BETWEEN:**

23  
24 Achilles Information Limited **Claimant**  
25 v  
26 Network Rail Infrastructure Limited **Defendant**

27  
28  
29  
30 **A P P E A R A N C E S**

31  
32 Phillip Woolfe (On behalf of Achilles)  
33 David Went (On behalf of Network Rail)

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1 **Thursday, 14th October 2021**

2 **(10.30 am)**

3 **MR WOOLFE:** Sir, we are moving on to expert evidence this morning and it is  
4 Mr Parker who is giving evidence for the claimants this morning.

5

6 **MR DAVID PARKER (affirmed)**

7

8 **Examination-in-chief by MR WOOLFE**

9 **MR WOOLFE:** Could Mr Parker be handed Bundle F1, please? Mr Parker, could  
10 you look behind the tab numbers 1 and 2? Do you recognise those as your  
11 experts reports from the liability proceedings?

12 **A.** Sorry. Tab?

13 **Q.** Tab 1 and 2.

14 **A.** Tab 1 and 2 are the reports in the liability proceedings, yes.

15 **Q.** Now can you turn to tab 3, please. Is that your report?

16 **A.** Yes, it is.

17 **Q.** Can you turn to page F90, using the bundle numbering in the bottom right-hand  
18 corner.

19 **A.** Yes.

20 **Q.** Do you see a statement of truth and a statement you understand your duty to the  
21 tribunal, and underneath it your signature, and is that your signature?

22 **A.** Yes.

23 **Q.** Do you understand yourself to have complied with that duty in preparing this  
24 report for the tribunal?

25 **A.** Yes.

26 **Q.** Is there anything you want to correct or add to this report?

1 **A.** No, I don't think so.

2 **Q.** Thank you. Then could the witness be handed Bundle F2. In that could you turn  
3 to tab number 26, please? Turn to page F512. First of all, is that your second  
4 report in this matter?

5 **A.** Yes, it is.

6 **Q.** At page F512 you will see a statement of truth and a statement of understanding  
7 of your duty to the tribunal. Is that your signature underneath it?

8 **A.** Yes, it is.

9 **Q.** Do you understand yourself to have complied with that duty in preparing that  
10 report?

11 **A.** Yes.

12 **Q.** Is there anything you would like to add or correct to this report at all?

13 **A.** I think there was a mis-reference I believe in paragraph 40, a misdating.

14 **Q.** Paragraph 40, you say. That's on page F496?

15 **A.** That's correct.

16 **Q.** What would you like to say about that?

17 **A.** I think the analysis prepared by Deloitte that are referred to in the first sentence  
18 was, in fact, May 2018 rather than October 2019.

19 **Q.** Thank you. In fact, it may help. Could the witness be handed bundle G8. If you  
20 turn to tab 428 within it?

21 **A.** Yes.

22 **Q.** Behind tab A, that is dated May 2018. Is that the document you were thinking  
23 of?

24 **A.** Yes, that's right.

25 **Q.** Finally, if you put that one away and turn to tab 29 within Bundle F2, you will see  
26 a joint expert statement. Is that your joint expert statement together with

1 Mr Law?

2 A. Yes, it is.

3 Q. On page F559 you will see a signature page and a declaration. Is that your  
4 signature on page F559?

5 A. Yes, it is.

6 Q. And do you understand yourself to have complied with the duties set out in that  
7 declaration when preparing your parts of that joint statement?

8 A. Yes.

9 Q. Thank you.

10

11 **Cross-examination by MR WENT**

12 **MR WENT:** Good morning, Mr Parker.

13 A. Good morning.

14 Q. When preparing your evidence you thought that the Achilles JQS and JQS  
15 situation was the best proxy for the GB Rail situation?

16 A. That's correct.

17 Q. There were no material difference in your mind that would not have entered it  
18 a good comparator?

19 A. I think the issue with looking for a comparator is that you need to look at the  
20 comparators that are available, and then I think there are two issues perhaps  
21 with thinking about whether JQS is a good comparator. The first is whether  
22 it's a sufficiently good comparator to be useful for the purposes of a potential  
23 comparison, and then the second is whether the factual situations applying to  
24 each comparator and the counterfactual in this case were sufficiently the  
25 same as to be able to use numbers from one situation without any  
26 adjustment, or whether one should, in fact, adjust those numbers to take

1 account of factual differences where they are relevant to the aspects that you  
2 are drawing for comparison.

3 **Q.** But in this case you didn't think it was necessary to adjust the results, obviously  
4 from the Achilles JQS situation, to take into account any features in GB Rail  
5 that might not have been present in Achilles JQS or vice versa?

6 **A.** At this stage I had not reported any adjustments. I understand that there are  
7 significant factual disagreements between the parties.

8 **Q.** Sure.

9 **A.** Which ultimately it is not my position to opine on, so I didn't adjust for my  
10 interpretation of those factual differences at the time.

11 **Q.** We will come on to those in a moment and see what your action is, obviously  
12 subject to ultimately the tribunal's findings of fact. But obviously it will be  
13 interesting to explore how that might affect your analysis, but we will come on  
14 to that.

15 I think you are suggesting that it would be quite normal for competition economists,  
16 when using comparators, to conduct analysis and adjust for differences  
17 between the comparator and the situation being examined. That's quite  
18 normal practice, obviously?

19 **A.** Yes, that's right.

20 **Q.** Okay. Then I don't think we need to turn to it, but I am just going to quote what  
21 you said at paragraph 2 (m), I think it is, of the joint report. You say:

22 "Nor am I aware of any other differences between Achilles Link-Up RISQS and  
23 Achilles JQS, EPIM JQS that provide grounds for thinking that I had  
24 overestimated Achilles' loss of profits."

25 I am just quoting you directly there. Can we just turn to the tribunal's judgment for  
26 a moment. It is at Bundle A, tab 1, paragraph 149 within that. I am sure you

1 are aware of this paragraph. I think you commented on it in your reports in  
2 any event. This is obviously setting out a number of features of the GB Rail  
3 market. So just a simple question. You know the features are listed. Did you  
4 take any of those features into account when preparing your damages  
5 estimate?

6 **A.** Let me just remind myself of the paragraph and the features. So obviously the  
7 interpretation of the judgment is a matter for the tribunal.

8 **Q.** Of course.

9 **A.** In this part of the judgment, as I understand it, subject to -- obviously it is all  
10 a matter for the tribunal -- the tribunal was considering whether there was --

11 **Q.** Can I interrupt you? I am not asking you at the moment for your interpretation of  
12 this paragraph. I am just asking a simple question, whether you took into  
13 account these features. If the tribunal decides that actually these features  
14 were a relevant part of GB Rail, I am asking whether you took these features  
15 into account in your damages estimate?

16 **A.** So perhaps I should take them in turn.

17 **Q.** Yes, absolutely.

18 **A.** So the first of these features is that -- and all of these, if you like, might well be  
19 features, and they are somewhat contradicted in 150 and 151.

20 **Q.** All I am asking is assuming these features are found to exist in the market by the  
21 tribunal, I am just asking whether you took them into account. The first one is:

22 "The market opportunity available to Achilles would be limited."

23 So did you take that into account?

24 **A.** Well, I took into account that there would be a reduction in Achilles' suppliers and  
25 buyers as a result of competition, because there would be a new RISQS  
26 scheme and an Achilles scheme. To that extent I am taking into account the

1 fact that, you know, those buyers and suppliers would not be available or  
2 would not be likely to be won by the new Achilles scheme.

3 **Q.** Do you think assuming that -- I think it is 58% of buyers would have moved to  
4 TransQ, and 80% of suppliers in May 2018, do you think that reflects an idea  
5 that the market opportunity for Achilles would be limited?

6 **A.** Well, it is limited up to the point of at that point 42%, in that case, of people  
7 choosing to go to someone else.

8 **Q.** Okay.

9 **A.** So yes.

10 **Q.** So the second factor is Balfour Beatty's evidence that they wouldn't want to use a  
11 different supplier assurance scheme for their own supply chain. Have you  
12 taken that into account in your damages estimate?

13 **A.** Well, not in the sense that I build up from every individual supplier or buyer and  
14 say this one may or may not choose, but in the sense that overall there are  
15 40% of buyers and 30% of suppliers are choosing, in my analysis -- sorry --  
16 circa 30% -- choosing not to use Achilles, then whilst I am not making any  
17 specific link to individuals, Balfour Beatty -- the views of Mr Berwick in his  
18 witness statement are clear, and Balfour Beatty you could consider one of  
19 those suppliers, you know, that are not going to Achilles as being Balfour  
20 Beatty, but, as I say, I am not building this up from individual choices of  
21 individual suppliers.

22 **Q.** The third matter is that it would have been difficult for Achilles to compete on  
23 price without significant product differentiation. I suppose in a sense you do  
24 take that into account, because you are assuming that there is product  
25 differentiation that would have attracted buyers to TransQ?

26 **A.** And I assume a reduction in price for buyers.

1 **Q.** The fourth was the thought that a pool of clients available for the broader Achilles  
2 offering might not be as large as Achilles suggested. Is that anything that you  
3 thought about when preparing the damages estimate?

4 **A.** Well, again it goes back to the overall level of retention that comes out of JQS  
5 which, if applied here, some people will fall into that category.

6 **Q.** Okay, and then the fifth is:

7 "The tribunal wasn't convinced that RISQS would make all the difference between  
8 a non-viable and viable business, because of the increase in demand from  
9 buyers other than Network Rail."

10 Is that something you took into account?

11 **A.** Well, again I looked for a comparator. I mean, this is, you know, the tribunal  
12 saying it is open to doubt. I have looked for a comparator of a situation where  
13 the world is moving from one supplier assurance scheme to two supplier  
14 assurance schemes and seeing what happened.

15 **Q.** But it is heavily dependent on the factual situation between the two being pretty  
16 similar?

17 **A.** For the purposes of what I am drawing from it, yes, that's correct.

18 **Q.** And the sixth point, the conditions for tipping may exist. I appreciate it says  
19 "may"?

20 **A.** Yes. Well, this says the conditions for tipping may exist and the differentiation  
21 that would be offered might not be sufficient to offset that. I think one thing  
22 that has definitely become clearer in my mind in this proceeding, as opposed  
23 to the liability trial, is the extent to which essentially buyers make decisions  
24 and suppliers follow them. So the market tipping point which was discussed  
25 at the liability trial was I think predicated on the idea that buyers choose a  
26 supplier assurance scheme on the basis of the number of suppliers that are



1 on that scheme, and suppliers choose a supplier assurance scheme on the  
2 basis of the number or nature of buyers that are on that scheme. I think it had  
3 not been explored at that point, that actually, as I think the factual position is  
4 much clearer, that if buyers move, suppliers will follow them.

5 **Q.** Yes.

6 **A.** What that means is buyers can make decision on which supplier assurance  
7 scheme to chose for their own purposes.

8 **Q.** Yes.

9 **A.** And then suppliers will follow, and they do not have to make that decision based  
10 on the number of suppliers that are already there.

11 **Q.** Yes.

12 **A.** All I am saying is where we talk about tipping, where the judgment talks about  
13 chicken and egg, certainly my factual understanding of the position has  
14 moved on, and therefore, whilst I haven't taken into account the possibility of  
15 tipping, I think that's because my factual understanding has changed.

16 **Q.** Okay. If we can turn to your reply report and just turn to paragraph 35B, please.

17 **A.** That's F2.

18 **Q.** That's F2. Exactly. F495, over the page. It is worth keeping both reports open.  
19 We will refer to them as you might imagine. If you go to page F495. This is in  
20 paragraph 39B. At the bottom of that, can you see where it says:

21 "The inference I draw."

22 At the top of the page, first full paragraph:

23 "The inference I draw from this is that the judgment held there to be fact."

24 So this is talking about paragraph 149 we just looked at:

25 "The inference I draw from this is that the judgment held there to be factors that  
26 would have placed Achilles at a disadvantage in competing with RISQS for

1 business in the counterfactual, but that Achilles also had countervailing  
2 competitive advantages that would have provided it with a clear incentive to  
3 compete."

4 So you accept the judgment held there to be factors that would place Achilles at  
5 a disadvantage, but you didn't take them into account in your damages  
6 estimate. Right? You have not built that in into the comparator analysis?

7 **A.** I think we have gone through all those and I think by and large they are  
8 incorporated into the analysis in the sense I am not assuming Achilles would  
9 have retained every buyer and supplier. Then there are other specific factors  
10 that we have discussed. I am looking at an overall picture. I also think that  
11 certainly my understanding of the factual position has evolved over time, and  
12 I would also suggest that if you like the exam question has somewhat  
13 changed, and the question now is quantum.

14 Previously the question particularly in that part judgment, as I understood it, was  
15 essentially was there a sufficient prospect that Achilles would have been  
16 successful, that it was likely that it would have entered, and therefore there  
17 was the prospect of an appreciable effect on competition. It seems to me that  
18 the tribunal was assessing whether that was the case at that point, and then  
19 I think a quantum question is a much more precise and exact question, and  
20 the factual position that underpins a lot of these things I think has evolved and  
21 more facts, you know, have been provided.

22 **Q.** Okay. I think you thought that paragraphs 150 to 154 of the judgment, which  
23 starts the correct counterfactual, I think you thought that overrode the points in  
24 paragraphs 149. If you turn back to it, it is paragraph 150. It starts:

25 "Notwithstanding these factors, the tribunal considers for the reasons summarised  
26 below the correct counterfactual is one in which Achilles would compete with

1 RISQS."

2 So you accept this is definitely the correct counterfactual in your mind. Yes?

3 **A.** Well, I accept that that's what the tribunal considered, yes.

4 **Q.** If we look at paragraph 154, please, of the judgment? You see there at the  
5 beginning:

6 "Although the scope for price competition in the absence of loss leading or  
7 cross-subsidisation on a long term basis and product differentiation would be  
8 limited".

9 So there the tribunal appears to be accepting the correct counterfactual that the  
10 scope for product differential would be limited. Have you taken that into  
11 account in your damages estimate?

12 **A.** Not explicitly, because I don't build a model of product differentiation. I think it is  
13 clear there is some product differentiation and the factual position reflects  
14 that. To the extent I am modelling, if you like, a retention rate across the  
15 board, some of those people may well be being retained as a result of being  
16 attracted to the product differentiation that Achilles offers, but I don't try to  
17 measure the extent of that, so I don't really take a view.

18 **Q.** Okay. Do you have any reason to believe that these features that we have  
19 looked at in paragraph 149, paragraph 1.4 of the judgment, exist in the  
20 Achilles JQS comparator situation? Have you thought about this question  
21 previously, Mr Parker?

22 **A.** I haven't particularly thought about that, but I have looked for a comparator where  
23 there is a situation where there was one scheme moving to two schemes.

24 **Q.** But if there are material differences in GB Rail that don't exist in the comparator  
25 situation, presumably any damages calculation based on the comparator and  
26 ignoring those features cannot be accurate?

1 **A.** If the tribunal reaches the conclusion that the factual position is such that one  
2 should adjust the relevant parameters that I draw from the JQS experience,  
3 you know, in principle in either direction, but I think you are putting to me  
4 I could draw the inference that Achilles would have retained a lower  
5 proportion or achieved a lower proportion of the market, then yes, that would  
6 require some adjustment to those parameters and that would give a different  
7 estimate of damages.

8 **Q.** For example, if the evidence showed there was material product differentiation  
9 between Achilles JQS and JQS in Northern Europe, in the sense that Achilles  
10 JQS is much superior than EPIM JQS, but there was limited product  
11 differentiation in GB Rail, that was something that could potentially influence  
12 your damages estimate?

13 **A.** I think we need to distinguish there between two different types of product  
14 differentiation. I think the product differentiation that's being described in the  
15 judgment is essentially what economists would call horizontal product  
16 differentiation, but it is basically different features, so that at the same price  
17 some customers would like a product with some features and some  
18 customers would like a product with other features, and then there's  
19 an alternative type of product differentiation called vertical product  
20 differentiation, which is essentially a quality difference, such that at the same  
21 price every customer would prefer one approach, you know, one provider to  
22 another.

23 The discussion in the judgment, as I understand it, because I think I raised probably  
24 the point about product differentiation in my supplementary note in those  
25 proceedings, and I think that's probably where the language came from, but,  
26 as ever, it is a matter for the tribunal, related to horizontal differentiation.

1 Just purely by way of illustration, Sainsbury and Tesco might be considered to be  
2 horizontally differently differentiated, because some people prefer the Tesco  
3 offer, some people prefer the Sainsbury's offer, but you couldn't draw from  
4 that that Tesco is higher quality than Sainsbury's, or vice versa, and then, of  
5 course, they are also differentiated horizontally because the stores  
6 themselves are physically located in different places.

7 So that's the type of differentiation that I think is being talked about -- that I was  
8 talking about at that point, and I believe is being talked about in the judgment.  
9 There is then a separate issue I think around quality differences.

10 **Q.** Okay. Can we turn to paragraph 51 of your reply report. That's at page 501. So  
11 here you are saying you don't consider it likely that the widespread use of  
12 RISQS would have prevented supplier multi-homing. Then you examine the  
13 chicken and egg phenomenon you have just mentioned.

14 Then, at paragraph 51A, you say:

15 "The CAT concluded that Achilles would likely have remained in the market to  
16 compete with RISQS in the counterfactual scenario."

17 That is what you say there.

18 **A.** Yes.

19 **Q.** Okay. Can we just turn back to paragraph 150 in the judgment, please? Do you  
20 have that?

21 **A.** Yes.

22 **Q.** "The correct counterfactual is one in which Achilles would compete with RISQS  
23 at least for a time and that its competition would lead to some benefits in  
24 terms of lower prices and product differentiation."

25 Now, presumably, you see the really important difference between what you said in  
26 51A and what the tribunal has said in the judgment. Yes?

1 **A.** Is it the phrase "at least for a time"?

2 **Q.** Yes.

3 **A.** Yes, I do see that.

4 **Q.** Good. Just going back to the liability trial for a moment, your report, at Bundle

5 F1, tab 2.

6 **A.** Yes.

7 **Q.** Paragraph 45, please, which is at page F50.

8 **A.** Yes.

9 **Q.** Briefly, to set the context, in your first report you had not recognised that GB Rail

10 (inaudible) the two side market, and so in your reply report you are revising

11 your conclusions to take into account the two-sided nature of the market.

12 In your first report you set out three counterfactuals and those are listed at

13 paragraph 45, if you can see that there?

14 **A.** Yes, that's right.

15 **Q.** The first was ongoing competition between Achilles and RISQS, ongoing. The

16 second was competition between RISQS and TransQ for a period before one

17 scheme exited, and then the third was multiple scheme entry. Yes?

18 **A.** Yes.

19 **Q.** I think the first time round in your first report, without taking into account the

20 two-sided features of the market, you say the first counterfactual is most

21 likely?

22 **A.** Uh-huh.

23 **Q.** Then, having appreciated the two-sided nature of the market, you revised your

24 conclusion -- that's at paragraph 46 to say it is not possible to determine to

25 say ex ante which of the situations is most likely to arise? Correct?

26 **A.** That was based on my factual understanding at the time.

1 **Q.** Multiple scheme entry was obviously ruled out by the tribunal in the judgment.  
2 Very quickly on that, you are now predicting a massive increase in the size of  
3 the GB supplier assurance market. Is that more likely to encourage more  
4 entry?  
5 **A.** I think you may have somewhat misinterpreted or over interpreted the figures  
6 there, because --  
7 **Q.** Maybe we will come back to that. I am happy to leave that point for a minute,  
8 because I want to explore that in a bit more detail, so leave that for  
9 the minute.  
10 **A.** Of course, yes.  
11 **Q.** Now we have two counterfactual possibilities, either ongoing competition and  
12 competition for a time. Yes?  
13 **A.** Yes.  
14 **Q.** Then, at paragraph 48G of this report, if you turn to that, just over the page,  
15 where it says "Finally", you say:  
16 "Finally, even if Achilles was unsuccessful in attracting buyers and suppliers, I would  
17 still expect there to be competitive benefits during the period in which it was in  
18 existence. This is because buyers and suppliers using RISQS could credibly  
19 threaten to switch to Achilles and so to initiate better terms of RISQS, even if  
20 none of them were actually to switch to use Achilles."  
21 So you thought there could be benefits to competition even if Achilles didn't win  
22 buyers and suppliers, but was offering them a competing service for a time, at  
23 least in the report there. That's right?  
24 **A.** So that's right. I think an important point here -- as you can see, I am using the  
25 language of threatening to switch to Achilles and so on. I think, having  
26 thought harder about the counterfactual, absent the RISQS-only rule, and

1 listened to the factual evidence, I think it is clear that Achilles had, as I say in  
2 the reply report and in the joint statement, had elements of incumbency as  
3 well, whereas I think the point that had been pressed quite hard by Network  
4 Rail in the liability trial was that RISQS was the incumbent and Achilles was  
5 purely the entrant. At that point all this analysis was on that basis because we  
6 had not gone into a lot of detail on those situations.

7 So I think that was in a world where, firstly, we were thinking that Achilles would  
8 essentially have had to re-enter as of 1st May 2018, and without the benefit of  
9 this further understanding that buyers can choose and suppliers follow, and  
10 with both of those now present I think it seems more plausible that there could  
11 be ongoing competition, because as soon as you attract some buyers, the  
12 suppliers will follow, and therefore the whole chicken and egg point, which is  
13 "can I possibly get enough of both sides of the market to make this viable",  
14 you know, the position is changed, because as long as you get enough  
15 buyers, essentially you can persist.

16 So I think my views have evolved from that report, because my understanding of the  
17 facts has changed.

18 **Q.** Okay. But in your damages estimate you are not hedging at all as to whether  
19 there might be ongoing competition for a time or competition for a limited  
20 amount of time, and one of the schemes exit. You are just assuming that  
21 Achilles -- there would be on going competition, and actually Achilles would  
22 have successfully had a significant number of buyers from day one?

23 **A.** And drawing from the experience of JQS --

24 **Q.** Yes.

25 **A.** Which is that --

26 **Q.** Absolutely. That's an important part of your considerations here. Yes?



1 **A.** Yes, that's right, yes. Also the fact that my understanding of the facts has  
2 changed. The facts themselves may not have changed, but I don't think they  
3 all came out in the form that they now have in the liability trial.

4 **Q.** Right, okay. But, as you say, the Achilles JQS is an important part of your  
5 thinking on this. I think this is uncontroversial. I think you are (inaudible) isn't  
6 going to be successful?

7 **A.** Say again?

8 **Q.** Without buyers support, a supplier assurance scheme isn't going to be  
9 successful?

10 **A.** Yes. My understanding is it is the decisions of buyers that are critically important  
11 and that suppliers tend to follow buyers you know, in order to get access to  
12 commercial opportunities.

13 **Q.** (inaudible). Give me a moment. Let's carry on for a moment. Paragraph 26 of  
14 your first report, please, in these proceedings?

15 **A.** 26.

16 **Q.** 26?

17 **A.** Thank you.

18 **Q.** Here you are setting out the key features of the market for supplier assurance  
19 schemes in GB Rail that you consider relevant for assessing Achilles' loss of  
20 profits. Yes?

21 **A.** Yes.

22 **Q.** In the third paragraph you say:  
23 "The two-sided markets with multiple providers can exhibit single homing or  
24 multi-homing or both."

25 **A.** That is correct.

26 **Q.** This is speaking more generally and not necessarily specifically about GB Rail.

1 Yes?

2 **A.** Yes, that's right. You will see in the previous bullet we have the comment on  
3 decisions of buyers are more likely to influence those of suppliers, which is  
4 the point we have just discussed, and then in this bullet, the end of this bullet  
5 is:

6 "As a result of that, I would expect more multi-homing by suppliers than buyers",  
7 because suppliers may well want to supplier different buyers who have  
8 chosen for their own purposes, given the existence of horizontal differentiation  
9 to be on one scheme or another.

10 **Q.** Yes. Okay, understood. Is it reasonable to assume when buyers are thinking  
11 about moving the schemes -- let's assume they are on one scheme and a new  
12 supplier assurance provider comes into the market and they are thinking of  
13 moving. Is it fair to assume they would have an interest in keeping an eye on  
14 the cost of supplier assurance in their supply chain? Is that likely to be  
15 a consideration? They wouldn't want to impose unnecessary costs in the  
16 supply chain if their suppliers also serve other buyers in the first scheme,  
17 when they are thinking about moving to the second scheme. Is that likely to  
18 be a consideration?

19 **A.** Well, I think their primary consideration would be for their own purposes what is  
20 the best supplier assurance scheme for me, as a buyer, because they're the  
21 buyers and that's their kind of profit maximising, you know, decision. Would  
22 they be likely to take some account of what the suppliers might what?  
23 Possibly. That's an empirical question. I think we see some examples of --  
24 I think the First Great Western example is one where suppliers will be asked,  
25 as I understand it, to move across. So I think, you know, it is not clear to me  
26 how important that factor is. I am not saying it is not important, but it perhaps

1 might be of secondary importance.

2 **Q.** Is it an important consideration or not? It may be? It is?

3 **A.** Difficult for me to say. I have seen examples where it has not been sufficient to  
4 make a difference apparently to people's decisions. But if it was a really  
5 important consideration, such that buyers would base their decisions on  
6 whether suppliers were already on another scheme, then, you know, that  
7 would be a different matter.

8 **Q.** If Achilles thought it was an important consideration, would you take that into  
9 account?

10 **A.** Well, it is what buyers think is the important consideration, isn't it?

11 **Q.** Okay. If we can look at your second report. That's back in tab 26. F2,  
12 paragraphs 61 to 63. I think this is the multi-homing point that you were about  
13 to talk about earlier. You say in 61 that Mr Law argues that your calculations  
14 would have undergone a significant increase in size.

15 Then, at paragraph 62, you say that you do not consider these implications of  
16 multi-homing for the size of GB Rail's supplier assurance market to be  
17 implausible. Yes?

18 **A.** Yes.

19 **Q.** Then, at 63, you say the suppliers and buyers' multi-homing could have the effect  
20 of increasing total spend on supplier assurance services. Just to be clear,  
21 Mr Law was pointing out to you when you were replying to this that your  
22 calculation could imply that the size of GB Rail assurance marked increased  
23 from 6.5 million to 4. -- with an increase of 4.6 million. So you are relying to  
24 Mr Law's specific points there. Yes?

25 **A.** I think that would not be correct, those numbers. The reason that those numbers  
26 are not correct is while I am assuming or I am modelling a value of what

1 Achilles would likely have achieved, 4.6 million, some of that, because not all  
2 suppliers will multi-home, is suppliers that will be single homing on Achilles  
3 and not on RISQS. So there's also, which I haven't modelled, a consequent  
4 reduction in the size of RISQS. So I haven't modelled that, because --

5 **Q.** You don't have that information?

6 **A.** Well, we are in the counterfactual, so no-one has the information. I hadn't  
7 modelled it because the issue was what is the quantum for Achilles, and the  
8 relevant question there is what Achilles will pick up. But to the extent that,  
9 you know, some of Achilles' sales are actually taken from RISQS, because  
10 suppliers are moving -- they are not direct suppliers to Network Rail, they are  
11 not direct suppliers to buyers that choose to be on RISQS. That will be  
12 a reduction in the revenue on RISQS. So the overall increase in the market,  
13 which I think there will be some, because there will be supplier multi-homing,  
14 but it is not the full amount of the size of Achilles' -- of my modelled size of  
15 Achilles' future revenues.

16 **Q.** Okay. Can we just go back to product differentiation for just one moment? Can  
17 we turn to paragraph 35 in your first report?

18 **A.** First report. Sorry.

19 **Q.** Yes, first report. That's at tab 4, page 111?

20 **A.** Yes.

21 **Q.** I think you say here you understand that Achilles considers the TransQ, now  
22 Link-Up, will have material differences to RISQS, which Achilles believes will  
23 be attractive to buyers?

24 **A.** Yes.

25 **Q.** This differentiation would be likely to increase the level of multi-homing relative to  
26 a situation where TransQ Link-Up and RISQS were offering

1 an undifferentiated service.

2 So I think because -- well, that is what you say. Yes?

3 **A.** Yes.

4 **Q.** And that's because buyers would have moved to RISQS and suppliers would  
5 have followed them, in essence?

6 **A.** Yes, in essence. I think it seems pretty plausible, and I think the factual evidence  
7 is very consistent with this, that suppliers follow buyers, and also that  
8 suppliers may well want to serve multiple buyers in the industry, because  
9 there are lots of people doing quite similar things.

10 **Q.** Yes.

11 **A.** Therefore, if some buyers are on RISQ, some buyers are on Achilles, that would  
12 lead to multi-homing for at least some suppliers.

13 **Q.** Go back to paragraph 49 of your reply report. I think it is much the same point.

14 **A.** 49?

15 **Q.** Paragraph 49, yes. The second sentence. So supplier single homing would be  
16 more likely in that case of product differentiation. Yes?

17 **A.** Sorry. Are you taking about paragraph 49.

18 **Q.** Let me just check:

19 "I accept supplier's single homing on RISQS would be more likely to have not had  
20 any attractive features relative to RISQS, such that Achilles would have been  
21 incapable of attracting or retaining buyers."

22 Yes?

23 **A.** Yes, absolutely. I should perhaps clarify there that I am primarily thinking about  
24 a horizontal differentiation scenario. So attractive features could be different  
25 features that are attractive to some buyers, even if those features are not  
26 particularly attractive to other buyers. So it is not a quality difference that

1 Achilles is better than RISQS for all buyers. It is that there are some features  
2 that are sufficiently attractive to some buyers to make some buyers choose  
3 Achilles over RISQS.

4 **Q.** Okay. Can we just turn to bundle G6, tab 300, please.

5 **A.** G6, yes.

6 **Q.** This is a confidential document. Sir, I literally have a couple of questions on this  
7 but I would like to be able to refer to it. Can we just very briefly go into closed  
8 session. I think it is only Mr Blackley on our side and the reporters.

9 **THE CHAIRMAN:** Very well.

10  
11 **[CONFIDENTIAL SESSION EXTRACTED**

12 **AND AVAILABLE AS SEPARATE TRANSCRIPT]**

13  
14 **MR WENT:** I am going to continue. I just want to consider whether any of the  
15 following facts, if proved to be correct ultimately, depending on the tribunal's  
16 view, would affect your analysis that Achilles JQS can stand as a perfect  
17 comparator without any adjustment.

18 **A.** Uh-huh.

19 **Q.** I will go through them. I think it is just five minutes. If any you think "Oh, yes,  
20 that definitely would have been an issue for me", in terms of how you model at  
21 the moment, you can say as we go through. Otherwise I will ask questions at  
22 the end.

23 In GB Rail, if Achilles thought it was contractually prevented from using its preferred  
24 Link-Up brand from 1st May 2018, and ended up using the brand TransQ,  
25 which was not recognised in GB Rail, and Achilles did not engage in any sort  
26 of marketing of TransQ between mid-October 2017 and 1st May 2018 -- so

1           that's the first point?

2 **A.** Uh-huh.

3 **Q.** The second --

4 **A.** Sorry. I think the chance of me being able to remember all these in my head to  
5           the end of five minutes is quite unlikely. So can I take them one at a time?

6 **Q.** Yes. Did you think that might have an impact?

7 **A.** Yes, the question of brand name I think is potentially -- brand is wider than brand  
8           name, isn't it? It is all of the relationships that you have with people, the  
9           reputation of the company involved and so on. So I do accept that if the  
10          brand name was very important, then that could have had an effect, yes.

11 **Q.** Okay. The second point. So Achilles needed -- this is assuming this fact is  
12          correct -- Achilles needed to enter into new TransQ contract with buyers and  
13          suppliers from 1st May, 2018, and that includes requiring individual  
14          negotiators with buyers, and couldn't use supplier data in TransQ until  
15          suppliers agreed to TransQ terms and conditions, again, assuming that's  
16          factually correct?

17 **A.** So on the suppliers point -- I have just forgotten the buyers point. On the  
18          suppliers point, yes, I think, depending on how difficult it is to get someone to  
19          sign up to new terms and conditions, so if it is very difficult to do so and to get  
20          them to do that, then that could have a material effect, but if it is quite  
21          straightforward to do so, then it probably wouldn't have much of an effect.

22 **Q.** The first point is there would need to be buyer negotiations to have buyers enter  
23          into new TransQ terms and conditions. Is that likely to have an impact on the  
24          current situation?

25 **A.** Yes, again, I think if that's an important barrier, if you like, to getting people to use  
26          a counterfactual Achilles, then yes, that would be one that would need to be

1 taken into account, yes.

2 **Q.** Obviously, in the comparator situation, I think it is pretty clear that Achilles JQS  
3 was just continuing its existing service. The contracts were holding on. I am  
4 suggesting to you it could have been quite different in GB Rail, that Achilles  
5 would have needed to enter into new contracts with buyers and suppliers. So  
6 I am asking you whether it is likely the Achilles JQS comparator may not be  
7 that reliable on that basis?

8 **A.** I am sure we will come to the other points in a moment. I think, were the tribunal  
9 to come to a view that lots of these factors meant that, for example, Achilles  
10 looked more like a pure entrant than, you know, was the incumbent, as per  
11 JQS, then I think it would be necessary to adjust the modelling. I think one  
12 can still use JQS as a comparator, but rather than using the numbers for  
13 Achilles' JQS, you could use the numbers for EPIM. So assuming no buyer  
14 multi-homing, because I think it is buyers that would be the right approach,  
15 then you would use not 58% buyer acquisition or retention in the first year.  
16 You would use the 42 that EPIM seems to have achieved. Rather than 54 in  
17 the second year, you would use 46. Then you would end up in a slightly  
18 different -- rather than taking this into decline, you take that as an increase.  
19 Or you might take the view, or the tribunal might take the view, that the  
20 situation was somewhat balanced as between Achilles and RISQS, given the  
21 factual position, in which case it may be that the right thing to draw, given the  
22 evidence from the JQS situation, is that the market essentially split, and  
23 therefore 50/50/50 across the board, and if it would assist the tribunal, I could  
24 adjust the modelling to show those scenarios. But ultimately this is going to  
25 depend on factual positions, which I know are being heavily debated as  
26 between the parties.



1 Q. Understood.

2 A. Sorry --

3 Q. I will come on to some other points as well. Third point, Achilles had stopped its  
4 normal annual subscription renewals from around three months prior to  
5 1st May 2018.

6 A. Well, that's less clear to me, because I think the question is would that have  
7 happened in the counterfactual?

8 Q. Okay, sorry. Assuming that would have happened in the counterfactual, we are  
9 assuming this is not impacted by the infringement. That again is just my  
10 assumption for the moment?

11 A. It is not so obvious to me why that would not be impacted by the infringement,  
12 because obviously in the factual Achilles knew that it wasn't going to be --  
13 may well not have been running a scheme as of 1st May, whereas, assuming  
14 for some reason in the counterfactual Achilles decided to stop making  
15 renewals in that period, yes, that would make a difference, yes.

16 Q. Assuming Achilles thought "I am currently offering under contract RISQS  
17 services", and so actually contracts are normally entered into three months in  
18 advance, and therefore I don't want to be entering into a contract now for  
19 1st May, when actually I am not offering RISQS services, and Achilles may --  
20 that's a factual point?

21 A. That seems to me a factual point. I can't really comment on that.

22 Q. On its TransQ website, from 1st May, 2018, Achilles was pointing buyers and  
23 suppliers to the enhanced RISQS platform?

24 A. I mean, that strikes me as a point that would not have occurred in the  
25 counterfactual.

26 Q. Well, assuming that it would, because of contractual obligations, so nothing to do

1 with infringement, assuming it is to do with contractual obligations, could that  
2 have an impact?

3 **A.** Well, yes, if the contractual obligations were in the counterfactual, despite  
4 offering a separate scheme at that point, people on the website had to be  
5 pointed to a competitor, then yes, I do think that would make a difference.  
6 I am not really sure I understand the facts on that one.

7 **Q.** Okay. That's fine. Then the fifth point is RSSB had started sending out invoices  
8 to suppliers from January 2018, and having buyers and suppliers migrate to  
9 the enhanced RISQS platform, and buyers and most suppliers had moved  
10 over to the enhanced RISQS platform by the end of April, 2018?

11 **A.** Well, I think EPIM was also migrating in the JQS situation, prior to official launch.  
12 So I am not sure that's a particular difference as between --

13 **Q.** I am saying that all buyers had migrated or most buyers. I am not talking about  
14 a breakaway group of 27 operators in the comparator situation. I am saying  
15 that all buyers had basically migrated to the enhanced RISQS scheme prior to  
16 1st May, and most suppliers had migrated to it. So I am not talking about 27  
17 operators breaking away and suppliers following them. I am taking about  
18 most or all buyers had migrated to the enhanced RISQS platform?

19 **A.** I don't really understand why that would have happened in the counterfactual.

20 **Q.** I am asking you to assume that is the case.

21 **A.** Assuming that's the case, then yes, it would have made a difference, yes.

22 **Q.** Okay. I was moving on to a connected point. I am just conscious of the time. Is  
23 now a good point just to have five minutes?

24 **THE CHAIRMAN:** Yes.

25 **(Short break)**

26 **MR WENT:** So, Mr Parker, thinking for a minute about the differences on the

1 Achilles JQS side, again it will be a question for the tribunal in its judgment --  
2 sorry. Starting point. I think you are aware there is a distinction between the  
3 Norwegian continental shelf operators who moved to EPIM JQS and so-called  
4 contractors on Achilles JQS? Yes? You are aware broadly of that  
5 distinction?

6 **A.** Could you just explain that to me?

7 **Q.** I think you are aware that EPIM JQS was set up by a breakaway group of 27  
8 Norwegian continental shelf operators?

9 **A.** Yes.

10 **Q.** So the operators within the oil and gas industry?

11 **A.** Uh-huh.

12 **Q.** In that part of Europe. Yes?

13 **A.** Yes.

14 **Q.** That makes sense?

15 **A.** Yes.

16 **Q.** So they moved over. I think the suggestion is some of those operators may have  
17 stayed on Achilles JQS, but then the notion is that there are so-called  
18 contractors who definitely did stay on Achilles JQS?

19 **A.** Right. Okay.

20 **Q.** They are presumably contractors to the operators, for example?

21 **A.** Yes, and may well be buyers in their own right.

22 **Q.** Absolutely. Buyers in their own right. I think that's the important point.

23 I assume you were working under the assumption that buyers -- so, for example the  
24 contractor buyers who stayed on Achilles JQS, had a choice whether to move  
25 to EPIM JQS or not, as buyers?

26 **A.** I haven't particularly turned my mind to it, but yes, I think --

1 **Q.** You have an overall set of buyers on Achilles JQS -- I think it is 112 is the figure  
2 that has been given?

3 **A.** Yes.

4 **Q.** You have 27 EPIM operators moving over, so that is 27 buyers?

5 **A.** Yes.

6 **Q.** You assume the proportion of buyers remained on Achilles JQS?

7 **A.** Yes, that's correct.

8 **Q.** So you are saying those buyers would have had a choice as to whether to move  
9 to EPIM JQS?

10 **A.** I hadn't particularly thought about that, one way or the other, but I think that's  
11 probably right.

12 **Q.** Let's carry on for a moment. Certainly the factual evidence that has been set up  
13 is that in that situation of the EPIM operators breaking away, that buyers had  
14 a choice as to whether to remain on Achilles JQS or move to EPIM JQS.  
15 That's your client's factual position?

16 **A.** I understand that. I think I understand that, yes.

17 **Q.** Did you take that into account in your report as to whether there was a choice as  
18 to whether buyers could move over or not?

19 **A.** Sorry. I am struggling slightly to understand the distinction here.

20 **Q.** Let me explain the point I am getting at here. We understand that only  
21 Norwegian continental shelf operators can on EPIM JQS request audits for  
22 their supply chain, just the operators, no-one else. So if there are other  
23 buyers on EPIM JQS, they can't request audits for their supply chain?

24 **A.** Right. I see.

25 **Q.** So if there are buyers on Achilles JQS who want their supply chain audited, but  
26 they aren't the operators, they would have to be on Achilles JQS. Do you see

1 the point I am getting at?

2 **A.** Yes, I think I do, yes.

3 **Q.** That's not something you took into account when you were thinking about the

4 comparison between GB Rail and --

5 **A.** No, I hadn't taken that into account. That's news to me. I note that -- as well as

6 the operators a large number of other buyers also appear to have moved to --

7 **Q.** We will come on to the numbers in a moment. It is important. You are basing

8 this £12 million claim on this comparator. It is the numbers in the Northern

9 European oil and gas industry that drive that figure?

10 **A.** Yes.

11 **Q.** So I assume you accept that it is really important to be right on the numbers.

12 Yes?

13 **A.** To the extent that they would affect the tension rates or -- in the counterfactual in

14 this situation, yes, I agree with that.

15 **Q.** In GB Rail, obviously, the idea is that in the counterfactual suppliers could have

16 been audited on either TransQ or RISQS. Yes?

17 **A.** Yes.

18 **Q.** But what I am suggesting to you is that actually in the comparator --

19 **A.** Yes.

20 **Q.** -- buyers on Achilles JQS, other than -- the operators moved -- the buyers could

21 not move to EPIM JQS to have their supply chain audited?

22 **A.** Right, I understand.

23 **Q.** If you accept that factual situation, so, in fact, there is no choice for contractor

24 buyers on Achilles JQS, if you accept that proposition, does that impact your

25 analysis?

26 **A.** Yes, I think it probably would. It would point more towards there being a balance

1 of factors that would mean, rather than just purely using the Achilles numbers,  
2 one might in a sense use the EPIM numbers or some rates in between, as  
3 I previously identified, yes.

4 **Q.** We will come on to numbers a moment.

5 **A.** Yes.

6 **Q.** A different point. Again, this is assuming the facts as will ultimately be  
7 determined by the tribunal. Assuming that Achilles had an aspiration to sign  
8 up ten buyers on TransQ for 1st May 2018, and that assumption wasn't  
9 affected by the infringement, so assuming that, would you change your  
10 calculation which assumes that there would have been 64 buyers on TransQ  
11 at 1st May 2018?

12 **A.** My calculation is not for 1st May 2018. It is for the year. So I am not completely  
13 sure that even if I agree with the factual position as of 1st May, that doesn't  
14 necessarily I think tell you where they would have got to over the course of  
15 the year.

16 **Q.** But assuming they had an aspiration of ten buyers and that wasn't affected by --  
17 did have ten buyers signed up to TransQ, assuming that wasn't affected by  
18 the counterfactual, would that have an impact on your view that there would  
19 have been 64 buyers on TransQ during that year?

20 **A.** Well, I am not sure about when the buyers would have come across, because my  
21 number is a whole year number. So if your proposition is that they would  
22 have signed up only ten on 1st May 2018, and that is the only ten that they  
23 would have got through that period --

24 **Q.** No, that's not my proposition. My proposition is that Achilles had an aspiration to  
25 have ten buyers on TransQ?

26 **A.** In the factual?

- 1 **Q.** In May, in the counterfactual, so assuming no infringement --
- 2 **A.** Right.
- 3 **Q.** So in the counterfactual, assuming that Achilles had an aspiration to have ten
- 4 buyers on TransQ --
- 5 **A.** Yes.
- 6 **Q.** -- are you saying that if you -- I assume that hadn't been presented to you as
- 7 a possibility, that factual piece of information. That wasn't presented to you by
- 8 your client. You weren't told we had an aspiration to have ten buyers on
- 9 TransQ?
- 10 **A.** I don't recall whether that was mentioned to me before or not, but I understand
- 11 that's a factual issue. It certainly hasn't been presented to me in the
- 12 counterfactual.
- 13 **Q.** Assuming it is correct in the counterfactual, they had an aspiration to have ten
- 14 buyers on TransQ, would you still be thinking about them having 64 buyers
- 15 during that first year?
- 16 **A.** Well, it goes back to my point of are you saying -- I am not sure what to draw
- 17 from ten on 1st May 2018 says about aspirations for getting buyers across the
- 18 whole of the year. I have a whole year figure in mind. If you are saying there
- 19 was an aspiration to get ten on 1st May 2018, and the ten would have been
- 20 the number for the whole of that year, and that is what they were trying to
- 21 do -- would have been trying to do in the counterfactual, then the number
- 22 should be ten. I would support that proposition.
- 23 **Q.** And Achilles JQS, it is quite clear there that the buyers just continued
- 24 immediately from 1st January 2019. There was no gradual build-up. I think
- 25 the buyers started decreasing over time. Is that right?
- 26 **A.** Yes, they were gradually decreasing over time.

1 Q. So the idea there is the buyers stayed on Achilles JQS, whatever the percentage  
2 is, 58% I guess. It wasn't that they gradually build up buyers over time?  
3 A. Yes, that's correct, yes.  
4 Q. I was going to take you to a document but it sounds as though you may have the  
5 point already. This was accepted I think as facts, that EPIM JQS started  
6 onboarding suppliers prior to 1st January 2018. Are you aware of that?  
7 A. Yes. I understood it was --  
8 Q. That was --  
9 A. -- prior to 1st January 2019, I think, some point in September maybe. I had  
10 understood it was a few months earlier that they were onboarding on the  
11 basis that they would then be providing the service from 1st January.  
12 Q. Can we turn to paragraph 41 or 42 in your first report. I just want to turn to the  
13 table actually. It is over the page.  
14 A. Yes.  
15 Q. So you reference here --  
16 A. Sorry. What page is this?  
17 Q. This is on page 114?  
18 A. I have F69. Am I looking in the wrong place?  
19 Q. Sounds like it. You should be at F114 in the first F bundle?  
20 **MR CUTTING:** The difference might be the confidential and non-confidential. It is  
21 F69 in there.  
22 A. I have the same table in both. I am afraid I don't see the distinction.  
23 **MR WENT:** If you turn to the table, Figure 1, that's what we want to look at. You  
24 reference here that Achilles JQS had 3,474 suppliers at January 2019.  
25 A. Yes.  
26 Q. And 2,859 suppliers at January 2020.



1 **A.** Yes.

2 **Q.** That's a drop of 615. I have done the maths. Maybe you can do that quickly  
3 anyway. So you obviously know that EPIM JQS was onboarding suppliers  
4 from January 2018?

5 **A.** I do now, yes. I don't think I did at the time.

6 **Q.** In light of that, it might be necessary to explore the number of suppliers on the  
7 Achilles JQS prior to January 2019. Yes?

8 **A.** If they had already left Achilles at the time. So it's a question about whether  
9 onboarding also meant that they had left their Achilles subscription, I think,  
10 which could have been left to --

11 **Q.** But you have not explored that?

12 **A.** I have not explored it.

13 **Q.** If we can turn then to Katie Ferrier's third witness statement, so that's in  
14 bundle B, tab 3. If we turn to page 42, paragraph 20.

15 **A.** Yes.

16 **Q.** It says here -- I don't think you reviewed this statement, did you, for preparing this  
17 report?

18 **A.** No, I think I looked at number 4.

19 **Q.** If you look at the list of things you have looked at, it is not included in the list.  
20 Here is says that EPIM JQS had 800 suppliers in January 2019. Yes?

21 **A.** Yes.

22 **Q.** So it is possible, just merely based on these figures in your Figure 1, looking at  
23 this, it is possible that Achilles JQS lost around 615 suppliers. We know that.  
24 So a relatively small percentage of suppliers on Achilles' JQS were  
25 multi-homing, just based on the figures.

26 **A.** There is clearly some differences between these figures, which I don't fully

1 understand. For example, we have 1,100 suppliers to the end of January.  
2 That's at the end of paragraph 20 in the third statement. Then we have  
3 a figure of 3,474 in my witness statement.

4 **Q.** Assuming they lost 650 suppliers, we see 800 cropping up on EPIM JQS, that  
5 could suggest there is very limited supplier multi-homing?

6 **A.** I am not sure that's right. I don't think we should try to compare across these  
7 paragraphs, since they have very different numbers in. But I think you can  
8 work out the level of multi-homing from this paragraph, on the basis of this  
9 figure of 85% of suppliers are retained by subscription renewals. If we do  
10 that, that says we have retained 1,100, which is 85%. That would get me to  
11 a total number of suppliers of about 1,300. This is very round, back of the  
12 envelope numbers. If there are 1,300 total suppliers, and Achilles has  
13 retained 1,100, that means that there are 200 that have switched to EPIM,  
14 and, therefore, given that they understand that EPIM has 800 suppliers, that's  
15 suggesting that 600 of those are multi-homing. So about 75% then of the  
16 800.

17 **Q.** But you don't know that, do you? You are just making assumptions about which  
18 suppliers are serving which buyers. Let's assume, for example, there are  
19 a certain class of suppliers that serve the Norwegian continental shelf  
20 operators, and there is no overlap between the suppliers serving them and the  
21 suppliers serving the buyers that remained on Achilles JQS. That's  
22 a possibility. Yes?

23 **A.** No, I am not sure that's right, because if we take from the last sentence that we  
24 are retaining about 85% of suppliers by way of subscription renewals,  
25 therefore the total market for suppliers, which is because Achilles was the  
26 only provider prior to that, there must have been 1,300 suppliers. Yes? That

1 must follow from those two numbers. Therefore it must be the case that 200  
2 of them have switched to EPIM, and therefore that the remaining 600 are  
3 multi-homing, because they are on EPIM and on JQS.

4 What you are putting to me is that there's another group of suppliers that have  
5 emerged in January 2019 that were not previously on Achilles, which I don't  
6 see where that comes from. So I am looking only at these numbers and the  
7 internal consistency of these numbers.

8 **Q.** I am saying that Achilles JQS in January 2019 had 3,474 suppliers. It had gone  
9 down by 600-odd by January 2020?

10 **A.** But you are comparing two completely different sets of numbers here, completely  
11 different, because this says 3,474 and this one says 1,100.

12 **Q.** No, no, no. Ignoring the 1,100, because I don't think Miss Ferrier was able to  
13 explain that properly in her evidence. So ignore that 1,100. Assuming that's  
14 irrelevant, all I am saying is you have 600 suppliers being lost, we are  
15 assuming to EPIM JQS. So that's the drop in the numbers from Achilles JQS.  
16 Yes? It is the 600 loss. Is that right?

17 **A.** Well, I think you are comparing two completely different sets of numbers here.  
18 I am not sure why you would pick and choose some numbers to compare and  
19 not others.

20 **Q.** I am just asking you, we are assuming a drop of 600 suppliers from Achilles JQS  
21 because of EPIM JQS entering. Yes?

22 **A.** Well, on the numbers in this paragraph --

23 **Q.** In Figure 1. In Figure 1?

24 **A.** On the numbers here, yes, we are assuming a 600 loss, that's correct.

25 **Q.** Assuming 600 loss --

26 **A.** Yes.

1 **Q.** Now, is it possible that all of those suppliers don't serve buyers remaining on  
2 Achilles JQS? Is that possible? Is that feasible? Is that a logical possibility?

3 **A.** Of the 600?

4 **Q.** The 600. Is it possible that none of those suppliers served buyers remaining on  
5 Achilles JQS? Is that a logical possibility?

6 **A.** Well, it would be very surprising to me, the reason being that what we see is  
7 Achilles' retention of buyers, just looking at the internal consistency within  
8 Figure 1, retention of buyers is 58%, but retention of suppliers is 82%. So the  
9 fact that there are more suppliers being retained than buyers is demonstrative  
10 of multi-homing. You see exactly the same in the January '21 figures as well.  
11 So 54% of buyers are retained. 74% of suppliers. So that is what tells you  
12 that there is supplier multi-homing going on, which I think is not very  
13 surprising, given what we have heard about the desire of suppliers to  
14 multi-home for access to buyers.

15 **Q.** That will be a question for the tribunal to decide. Just going back to Miss  
16 Ferrier's third statement, you can see she talks about Achilles JQS had 49  
17 buyers in January 2019. 49 buyers. Yes?

18 **A.** Yes.

19 **Q.** She says 27 operators moved to EPIM JQS?

20 **A.** Yes.

21 **Q.** In cross-examination, Miss Ferrier could not explain where the rest of the buyers  
22 had gone -- they seem to have disappeared -- making it up to 112. Yes?

23 **A.** If you look at the numbers purely within 20, then we have 49 buyers on Achilles,  
24 27 on EPIM and therefore the retention rate for Achilles is around about  
25 two-thirds, so it is 49 out of 76, which is slightly less than two-thirds, maybe  
26 64% or something.

1 **Q.** Miss Ferrier could not explain where those other buyers had gone but --

2 **A.** You are asking me to compare numbers from Figure 1 in this report with some of  
3 the numbers in paragraph 20, which you say can't be explained. So I am a bit  
4 puzzled as to quite what calculations you are asking me to undertake here.

5 **Q.** In effect, none of this adds up, though, does it? There's inconsistency in the  
6 evidence, isn't there?

7 **A.** The key issues seem to be what is the buyer retention rate, what is the supplier  
8 retention rate and what is the level of multi-homing?

9 **Q.** There is inconsistency on the numbers on this. Yes?

10 **A.** Not particularly great inconsistency. If you look within paragraph 20, the buyer  
11 retention rate for Achilles was about 64%, and within Figure 1 it's 58%. So --

12 **Q.** But they are different numbers?

13 **A.** But not particularly dramatically different.

14 **Q.** What, 112 buyers reducing -- overall number of buyers reducing to 74 buyers?  
15 That's not dramatic? Just remember you are bringing a claim for £12 million  
16 on the basis of these numbers?

17 **A.** Well, all I am commenting on here is the relevant issues are what is the buyer  
18 retention rate, what is the supplier retention rate, what does that say about  
19 multi-homing. Buyer retention rate on this set of data, and I agree that there  
20 are different overall buyer numbers and supplier numbers in this set of data,  
21 but on this Figure 1 set of data in my first report, we have 58% buyer  
22 retention. On paragraph 20 of Katie Ferrier's third report we have what looks  
23 to me like 64, maybe 65%, 49 out of 76. On supplier retentions we have 82%  
24 in Figure 1 and we have 85% in paragraph 20 of Katie Ferrier's report. Both  
25 of those seem to be, you know, broadly consistent and in a similar ball-park,  
26 and also the implications for multi-homing don't seem to me to be that

1 different either, in that the level of supplier retention is larger than the level of  
2 buyer retention, and that's what tells you that there is multi-homing going on.

3 **Q.** It is not very satisfactory, is it, that there is evidence before the tribunal that's  
4 inconsistent on the numbers that drive the £12 million claim that's being  
5 brought here? That's not very satisfactory, is it?

6 **A.** I think there are two different parts of that statement. One is, is it satisfactory that  
7 there are inconsistencies in the evidence. It is always unsatisfactory when  
8 there are inconsistencies in the evidence. The question then is do those  
9 inconsistencies make a big difference to where one ends up on the overall  
10 numbers. It seems to me that, you know, if you use different numbers, there  
11 would be different outcomes. But key numbers which are the buyer retention,  
12 for my approach at least, which are the buyer retention rate and supplier  
13 retention rate, are not particularly different between these two sets of data.  
14 So it could be that both are drawn on a slightly different basis of how things  
15 are defined. But in terms of the implications for where I end up, they are not  
16 that different. But, you know, we are in a data sparse world here.

17 **Q.** Okay. Can we turn to Mr Gjertsen's evidence, please? That's bundle B, tab 12.  
18 Just go to paragraph 17 of that, please. Have you got that, paragraph 17?

19 **A.** Yes.

20 **Q.** If anyone is going to know anything about Achilles JQS situation, it is going to be

21 Mr Gjertsen. Yes? He says:

22 "One impact of this competition has been that some suppliers are members of both  
23 EPIM JQS and Achilles JQS."

24 He does not tell us how many, does he? He says there may be some suppliers that  
25 are members of both. Yes?

26 **A.** Sorry. Which paragraph?

1 Q. 17?

2 A. Yes.

3 Q. So he doesn't say how much. He says some. That could be indicative of not  
4 very much multi-homing. He says some?

5 A. It suggest that there has been some multi-homing. I am not sure what you can  
6 draw, other than that.

7 Q. But you have not tried to get to the bottom of how much supplier multi-homing  
8 actually goes on?

9 A. I have used these figures, which give rise to an estimate of the level of  
10 multi-homing.

11 Q. But you haven't sought to ask Mr Gjertsen and your client how much supplier  
12 multi-homing there is?

13 A. No, I have not.

14 Q. But it is an important question. Yes?

15 A. Well, I had an estimate of it from the data that I had already --

16 Q. But if you go to the source of the information and ask how much there is rather  
17 than estimating it, surely that's better. I am suggesting that Mr Gjertsen is  
18 likely to know or have a good sense of that. Surely it is better to ask that, isn't  
19 it?

20 A. As I understood it, these were the numbers and they give rise to a level of  
21 multi-homing, but at the time I was not aware of the existence of Mr Gjertsen,  
22 and I did not subsequently confirm those with him. So I accept that.

23 Q. You read his statement when you were preparing your supplementary report.  
24 Yes?

25 A. Yes.

26 Q. And you saw him say that there was some supplier multi-homing. You didn't

1 think to ask "Can I clarify what you mean by some?"

2 **A.** It is not inconsistent that there is some multi-homing that he is saying, and I find  
3 in my first report that there is some multi-homing, or at least that the evidence  
4 is consistent -- the supplier retention rate being higher than the buyer  
5 retention rate is consistent with there being some multi-homing, and therefore  
6 it didn't -- when I read that statement, it did not jump out at me as a point that  
7 needed clarification.

8 **Q.** Okay. Thank you. Just a quick question.

9 Do you think that Network Rail's requiring its suppliers to be on RISQS and requiring  
10 those needing audits to be audited through RISQS could have a chilling effect  
11 on those suppliers, in terms of their not wanting to be on TransQ?

12 **A.** Sorry. Could you give me --

13 **Q.** It is just a question. We know I think that Network Rail requires its suppliers to  
14 be on RISQS. Yes?

15 **A.** Yes. That's right, yes.

16 **Q.** And they have to be audited through RISQS?

17 **A.** Yes.

18 **Q.** Do you think possibly that could have a chilling effect on those suppliers, in terms  
19 of them not wanting to be on TransQ, for example, because of the cost of  
20 multi-homing, a chilling effect?

21 **A.** Well, I think two separate issues. If they are seeking to be a supplier to Network  
22 Rail, then they will need to list on RISQS, because that's the buyer  
23 requirement there.

24 **Q.** Yes.

25 **A.** If there are other buyers on TransQ that those suppliers seek to serve, and those  
26 buyers are sufficiently important to the suppliers in question, and that those



1 buyers require an alternative audit, then I would have expected, and I think  
2 the evidence from pretty much everyone is clear, that people may well  
3 multi-home on that basis, even if they had to register on another scheme and  
4 get audited by another scheme.

5 **Q.** Okay. Can we turn to paragraphs 36 (a) I think it is of your first report, but let me  
6 check. No, it doesn't look like it is. Hold on. Give me a moment. No. Sorry.

7 It is your first report, 36 (a). You say:

8 "Where there are multiple supplier assurance schemes, multi-homing especially by  
9 suppliers is common."

10 You then cite the construction industry. Yes?

11 **A.** Yes, that's correct.

12 **Q.** The construction industry is different from GB Rail, isn't it, inasmuch as suppliers  
13 can choose which scheme to be assured on. Yes?

14 **A.** That's correct, yes.

15 **Q.** And buyers don't mandate a particular audit provider. The suppliers can choose  
16 which one they use?

17 **A.** So I understand.

18 **Q.** And there is no suggestion that's the case in GB Rail, is there?

19 **A.** That's also correct, yes.

20 **Q.** So you can see that that would drive more -- well, it's a different circumstance  
21 from GB Rail, so it doesn't really provide much of an example for you?

22 **A.** No, that's right, but I have point (a). I have points (b), (c) and (d) which I think are  
23 also relevant to the existence of multi-homing, and I think we have discussed  
24 at length the JQS extent.

25 **Q.** Indeed.

26 **A.** Plus there is factual evidence that would support that proposition as well.

1 **Q.** If it was the case that buyers on RISQS required their suppliers to subscribe to  
2 and be assured through RISQS, but buyers on TransQ required their  
3 suppliers to subscribe to TransQ but didn't insist on RISQS audits --

4 **A.** Do you mean TransQ audits?

5 **Q.** TransQ, yes, I do indeed. Do you accept that that would have a material impact  
6 on the likely revenues Achilles would have achieved in the counterfactual?

7 **A.** It could do, yes.

8 **Q.** Okay. Thank you. Could we go to paragraph --

9 **A.** It could do if that's what Achilles or TransQ had sought to do in the  
10 counterfactual.

11 **Q.** Yes, understood. Paragraph 54, please. Let's see if it is your first report. It may  
12 be your reply report. No, it is this report. Paragraph 54. I think you say you  
13 have not been able to exclude contractor revenues from your assessment, but  
14 you don't believe excluding them -- you believe that excluding them would  
15 unlikely materially affect your estimates. Yes?

16 **A.** Yes.

17 **Q.** In the first bullet point you say you have been instructed that the revenues are  
18 likely to be small?

19 **A.** Yes.

20 **Q.** Since that scheme involved only one standalone audit module. Yes?

21 **A.** Yes.

22 **Q.** Do you know what those instructing you mean by "small"?

23 **A.** No.

24 **Q.** Have you asked them?

25 **A.** No.

26 **Q.** Is it for you to determine what is small in this context, as opposed to the tribunal?

1 **A.** I think it is a fair point actually. I should have tried to estimate the revenues  
2 associated with the principal contractor licensing scheme. My understanding  
3 is that the data is not specifically available, but I think it would be possible to  
4 look at the number of principal contractors and assume an audit revenue for  
5 those principal contractors and then remove that from my (inaudible) estimate.  
6 I have not done that at this stage but I will very happily do that if it would be  
7 helpful to the tribunal. I think it would be -- I suspect the answer would be that  
8 it would be small, but I am not sure it would be immaterial, and therefore I do  
9 think it is worth including.

10 **Q.** Can you turn to paragraph 72 (a) (i), the same report, just going on slightly.

11 **A.** Yes.

12 **Q.** So 72 (a) and (i). Then just looking at the second bullet there -- have you got  
13 that?

14 **A.** Sorry. 72 (a) (i). Yes.

15 **Q.** Then the second sub bullet within that?

16 **A.** Yes.

17 **Q.** So you say there:

18 "If a supplier were to switch to a new scheme they would need to set up and pay for  
19 the new subscription and export its data."

20 **A.** Sorry. I have the wrong one. 72 (a) (i).

21 **Q.** (i) and then the second bullet:

22 "Once a supplier has inserted their data in the system it is straightforward for them to  
23 renew. By contrast, if a supplier were to switch to a new scheme, it would  
24 have to set up and pay for a new subscription and export its data on to the  
25 new scheme."

26 **A.** Yes.

1 **Q.** Just to be clear, if the evidence is that Achilles had provided supplier data  
2 (inaudible) suppliers already set up on the enhanced RISQ platform before  
3 1st May 2018, it wouldn't have been a situation in which suppliers were in any  
4 sense deterred from remaining on the enhanced RISQ platform, would it,  
5 because they wouldn't need to enter data --

6 **A.** In the counterfactual?

7 **Q.** Yes.

8 **A.** So if that's right in the counterfactual, then I agree that that would have been  
9 an advantage yes.

10 **Q.** In second sub bullet you say:

11 "Buyers would face some more limited challenges in switching to a new assurance  
12 scheme, given that this would entail moving their suppliers one by one."

13 Again, just to be clear as to what was happening in respect of the enhanced RISQ  
14 service prior to 1st May 2018, our evidence is suppliers had already moved  
15 over, so presumably these challenges facing buyers wouldn't have been  
16 present for buyers starting on the enhanced RISQS product. Yes?

17 **A.** I mean, that must be true in the actual, and the question is what would have  
18 happened in the counterfactual.

19 **Q.** Then paragraph 72 (a) (ii). I think you are saying here that Achilles was the first  
20 and only provider of RISQS following its launch in 2014, and this means that  
21 suppliers and buyers alike were familiar with Achilles' services. Yes?

22 **A.** Yes.

23 **Q.** Were you aware that RSSB RISQS were doing road trips in the run-up to  
24 1st May 2018, and showing lots of suppliers and buyers the new services?  
25 I think it was over 1,000 we have seen. Were you aware of that?

26 **A.** I wasn't. But I don't think it's -- I think it's a general question of how much people

1 knew about RISQS, RSSB and the importance of that relationship versus the  
2 importance of the relationship that they had with Achilles as an existing  
3 supplier, and the person they had the contract with. So it seems to me it is  
4 part of that broader discussion about who was the incumbent, I think is the  
5 way it has been expressed in the discussions. So whilst I was not aware of  
6 that specific piece of factual information, it seems to me something that's part  
7 of that broader debate.

8 **Q.** Moving on to incumbency for a second --

9 **A.** Yes.

10 **Q.** If you turn to paragraph 21 of your reply report, you are saying here you don't  
11 think either party could be considered to be the sole incumbents on  
12 1st May 2018?

13 **A.** Yes, that is correct.

14 **Q.** In terms of Achilles, you talk about relationships between staff and market  
15 reputation. Yes?

16 **A.** Yes, that's right.

17 **Q.** You also say they had a copy of the database, supply questionnaire, response  
18 data and the audit report information built up over the previous 20 years?

19 **A.** I understand that is correct, yes.

20 **Q.** Now, if it is right that Achilles couldn't utilise any of that supply data without  
21 individual suppliers choosing to enter into new TransQ contracts and  
22 consenting to the use of the data, and so the new TransQ platform would not  
23 have had any data until suppliers started to enter into those contracts, that  
24 would affect your conclusions here. Yes?

25 **A.** Yes. Obviously it depends on exactly how difficult it was for suppliers, given they  
26 had an existing relationship with Achilles, for that data to be, you know, ported

1 across or whatever they needed to do, but I agree with you that if it was  
2 materially difficult, then that would make a difference, yes.

3 **Q.** At the same time, RSSB had been migrating -- it is correct, in the counterfactual  
4 their buyers/suppliers to the enhanced RISQS platform in advance of  
5 1st May 2018, that would affect your conclusions here as well?

6 **A.** That's right, although I think my understanding of the factual position was that not  
7 everyone did migrate to the RISQS platform prior to 1st May 2018, and there  
8 was some concern by the RSSB that not everyone had done so and they  
9 would lose quite a few suppliers in that initial period, and that's in the actual  
10 where there was not an alternative scheme. So I accept your point that if we  
11 assume in the counterfactual that RISQS would have managed to migrate  
12 everyone a long time beforehand, then yes, that would potentially make  
13 a difference. But it seems to me that in the counterfactual really both  
14 schemes might have had to do an element of this, and then it is an issue of  
15 fact as to how much that would have been more or less an issue for RISQS  
16 RSSB versus TransQ.

17 **Q.** Reputation is one of the issues you mention as well?

18 **A.** Yes.

19 **Q.** So to the extent there is evidence that Achilles was having reputational difficulties  
20 at the time, that could affect your analysis?

21 **A.** Well, I think it's a question as to how systematic those reputational issues were  
22 and then, to the extent that I am assuming that Achilles will lose a set of  
23 buyers and a set of suppliers, I am not making judgments in this instance as  
24 to exactly why they would have chosen one over the other, and some of them  
25 that I assume will be lost to Achilles may well do so because they were the  
26 ones that felt that Achilles was not performing satisfactorily for them.

1 Q. If there is a group of suppliers that thought they were not satisfactorily working for  
2 them, if there are a group of buyers that were thinking that, you are saying  
3 they would not likely have moved to TransQ, I think, if they recognised the  
4 reputation?

5 A. It would then be part of their consideration, wouldn't it.

6 Q. You are saying reputation is important?

7 A. Yes, I am saying reputation is important, so it would be part of their  
8 consideration.

9 Q. But you have not taken this into account in the comparator. So assuming that  
10 Achilles was having reputational issues, that suppliers and buyers might not  
11 have switched to TransQ because of those reputational issues, you have  
12 simply ignored that for the comparator purposes?

13 A. Well, I think the question would be do we see the same or different level of  
14 quality issue in JQS. I am using JQS as a comparator. If you are saying  
15 there is some issues for Achilles, you are putting to me there is issues for  
16 Achilles in GB Rail, the question is would there have been more, less, the  
17 same quality issues as far as Achilles JQS goes.

18 Q. You have looked at that, have you?

19 A. No, I have not looked at that, but I am just saying that's the relevant  
20 consideration.

21 Q. Assuming this is an issue, it is not something you have looked at --

22 A. That's correct.

23 Q. If we go to paragraph 24 of your reply report, please --

24 A. Yes.

25 Q. You say that the witness evidence you have seen indicates that there would have  
26 been a number of factors that would have been expected to make a service

1 run by Achilles an attractive option for buyers and suppliers. Yes?

2 **A.** Uh-huh.

3 **Q.** Presumably, you can't yourself take a view on whether these are attractive  
4 features. That's not part of your role I guess?

5 **A.** No. I think those are factual matters which have been put to the factual  
6 witnesses and on which the tribunal will ultimately have to take a view. These  
7 are features -- you put to me a set of features that suggest that Achilles would  
8 not have been particularly attractive and there are other features in the  
9 evidence that suggest Achilles might have been attractive, and I am reporting  
10 these here.

11 **Q.** So point A there, the fact that Achilles had direct contractual relationships with  
12 a wide range of suppliers and buyers. That's your first point?

13 **A.** Yes.

14 **Q.** If in the counterfactual suppliers and buyers needed to enter into new contracts  
15 for TransQ, this point couldn't stand, could it?

16 **A.** Well, I think it depends how difficult it is to enter into those new contracts. Clearly  
17 having the existing contract and the existing ability to contact those people,  
18 presumably is helpful in transferring people on to new -- potentially new  
19 contractual relationships. It seems to me it is an empirical question as to how  
20 important that would be.

21 **Q.** The second point is that Achilles had members' data, yes?

22 **A.** Yes.

23 **Q.** However, if it is right on the counterfactual the supplier data couldn't be used  
24 unless suppliers signed up to TransQ data, that would affect this point?

25 **A.** Yes, that would make it a less powerful advantage. Then again, it is an empirical  
26 question as to how easy it is for people to do that, how much they would have



1 done so.

2 **Q.** Then point (c), the fact that Achilles had longstanding existing relationships with  
3 buyer and suppliers --

4 **A.** Yes.

5 **Q.** That's the third point. However, unless buyers choose to move to TransQ,  
6 suppliers wouldn't have done so. You have already said this is buyer led.

7 Yes?

8 **A.** Yes, I think that's right.

9 **Q.** So if there is evidence of few buyers being interested in moving to TransQ, in the  
10 counterfactual, this would have an impact on this part of your analysis as well,  
11 wouldn't it?

12 **A.** To the extent that it was so widespread as to mean that the numbers that we see  
13 from the JQS experience, which I am using as my comparator, would not  
14 appear correct, but if there are isolated examples, you know, Achilles lost  
15 50-odd buyers in the JQS experience, at least on the data in my first report --

16 **Q.** It depends which data you use?

17 **A.** Take that just as a number, you know. If there were many of those people who  
18 switched because they were not particularly satisfied and it could that be the  
19 EPIM operators switched because they were not particularly satisfied, and the  
20 people who switched were the ones that were not particularly satisfied, the  
21 question is, I am assuming, you know, a similar level of reduction, you know,  
22 a similar level of reduction here, and the question is how many people actually  
23 felt that Achilles was not providing as good a service as it wanted, and then  
24 how much those people would have thought those quality differences  
25 overcome any potential issues that I have with moving to a new RISQS  
26 scheme run by Altius and Capita, with whom they are not familiar, and that's

1 the balance.

2 **Q.** Can we turn to paragraph 4 in your reply report.

3 **A.** Yes.

4 **Q.** It is a confidential document, the new TransQ pricing document?

5 **A.** Is it the same e-mail we have seen before?

6 **Q.** I think it is. Anyway we will see in a moment. You say:

7 "It is likely that the pricing strategy referenced in that e-mail could have been  
8 influenced by Network Rail's anti-competitive conduct", don't you?

9 **A.** Yes, given that was at a time of material uncertainty about whether Achilles was,  
10 in fact, going to be recognised by Network Rail.

11 **Q.** It is just unclear. If the infringement meant that Achilles simply couldn't offer  
12 a product at all, couldn't offer it -- that was the risk -- why would it lead to  
13 a strategy of offering lower prices?

14 **A.** I think my understanding of the factual position was that it was very unclear to  
15 Achilles at the time as to whether they were going to be allowed to operate or  
16 not, because Network Rail had not confirmed one way or the other and did not  
17 do so, I believe, until 14 May. Is that right? That was the kind of final e-mail.

18 **Q.** I believe that's the date, yes.

19 **A.** Therefore, if that had been made clearer to Achilles prior to that, then presumably  
20 this discussion would not have happened, because it would have been  
21 abundantly clear to them that they were not allowed to operate under the  
22 RISQS-only rule.

23 **Q.** Can we turn to paragraph 86, please.

24 **A.** Which report? Sorry.

25 **Q.** The same report. You are citing I think Miss Ferrier's fourth witness statement in  
26 support of your view that while buyers would have been offered discounts on

1 the counterfactual, suppliers would not. Yes?

2 **A.** Yes.

3 **Q.** Can we go to paragraph 154 from Miss Ferrier that you are citing. Sorry. Let's  
4 not go there. Sorry. I can tell you that in paragraph 154 that Miss Ferrier is  
5 citing references in her exhibit and let's turn to that, please. So it is bundle C,  
6 page 643. This is in tab 10.

7 **A.** Tab 10. Yes.

8 **Q.** I think Miss Ferrier is citing generally from pages 164 to 174 here. If you can go  
9 to page 643, please.

10 **A.** Yes.

11 **Q.** Sorry, give me a moment. I am just checking a reference. Give me a moment.

12 **A.** Uh-huh.

13 **Q.** I will come back to that because my referencing has gone awry. I will come back  
14 to that point in a moment, if I may. Can we go to paragraph 35 (c), please, in  
15 your second report. I will say if we move away from this report.

16 **A.** 35 (c), yes.

17 **Q.** Right at the bottom I think of the page there you mention that FGW would bring  
18 1,400 suppliers with it, and that is many times higher than the average  
19 number of suppliers by buyers on the scheme. Yes?

20 **A.** Yes.

21 **Q.** Could we just briefly go into the confidential session again. It makes it difficult  
22 having to refer to confidential documents but obviously I don't want to not put  
23 points to Mr Parker.

24 **THE CHAIRMAN:** Yes.

25 **MR WENT:** Thank you.

26

1 [CONFIDENTIAL SESSION EXTRACTED AND  
2 AVAILABLE AS SEPARATE TRANSCRIPT]

3

4 **MR WENT:** Can I call Mr Law, please? If he can be sworn in.

5

6 **MR STEVEN LAW (sworn)**

7

8 **Examination-in-chief by MR WENT**

9 **MR WENT:** If Mr Law can be passed Bundle F, please, and tab 6. So tab 6 within

10 that. Do you recognise that report?

11 **A.** Yes. It is my first report.

12 **Q.** If you go right to the end, is that your signature at the end?

13 **A.** Yes, that's my signature.

14 **Q.** And you understand your duty to the court as an expert?

15 **A.** I do.

16 **Q.** Do you have any clarifications to make on that report?

17 **A.** No.

18 **Q.** If you can be passed Bundle F2 please. It is worth keeping that out because you

19 will have some questions on it, I imagine. So tab 31, please. Do you

20 recognise that report?

21 **A.** Yes, my second report.

22 **Q.** If you go to the end again, your signature?

23 **A.** Yes.

24 **Q.** When preparing it, again your understood your duty as an expert to the court?

25 **A.** Yes.

26 **Q.** Do you have any clarifications or revisions on --

1 **A.** One clarification point on this report, I believe it's in paragraph 4.43. I refer to a  
2 37 supplier to buyer ratio used by Mr Parker in his calculations, which is  
3 actually inaccurate. He just referred to that number in his report. He doesn't  
4 use the 37 in his calculations.

5 **Q.** Are there any other clarifications or corrections?

6 **A.** Also I understand Miss Ferrier has submitted a witness statement subsequent to  
7 the date of this report. In that there is updated budget figures which I have  
8 not yet included in my calculations, but I can.

9 **Q.** Anything else on that report?

10 **A.** No.

11 **Q.** Can you turn then back to tab 29 in the same bundle? This is the joint expert  
12 report I think you can see. Yes?

13 **A.** Yes.

14 **Q.** If you just turn over the page, you can see is that your signature there?

15 **A.** Yes, it is.

16 **Q.** Again you understood your duty to the court in preparing this joint expert report?

17 **A.** I do.

18 **Q.** Thank you.

19

20 **Cross-examination by MR WOOLFE**

21 **MR WOOLFE:** Good afternoon, Mr Law.

22 **A.** Good afternoon.

23 **Q.** Do you have the two bundle Fs, F1 and F2 on the table?

24 **A.** Uh-huh.

25 **Q.** We will mainly be working in those, occasionally going to others, but keep those  
26 to hand.

1 To give you and the tribunal an idea of where we are going I was going to start off by  
2 looking first at some of the specific factual assumptions you have adopted in  
3 your report as the businesses of your analysis. Then I was going to look with  
4 you at the way your calculation works, your buyer analysis and how many  
5 buyers you think Achilles will be able to win and so forth, and then we are  
6 going to look at the JQS. Then, after that, there's a more miscellaneous  
7 selection of points, but just so you know where we are going.

8 In terms of your assumptions, can you go to your first report, so that's Bundle F1,  
9 tab 6, at paragraph 6.2, which is on page 202 -- that's right -- you set out  
10 a series of instructions that you have received. If I could begin with your point  
11 (d), you have been instructed that even if Network Rail had agreed to modify  
12 the RISQS-only rule at the end of March 2018, it would not have been in a  
13 position to accept supplier assurance from another provider for at least  
14 a further 12 months, ie at the earliest end of March 2019.

15 Just to confirm, you have not independently considered when Network Rail should  
16 have started making alternative arrangements, have you?

17 **A.** No, I have not.

18 **Q.** And you haven't assessed the evidence as to how long Network Rail would have  
19 taken to make any arrangements if it had been asked to? You have not  
20 conducted any analysis of that?

21 **A.** On my own, I wouldn't be able to do that. I would rely on other evidence.

22 **Q.** It is just a point on instruction. That's fine. I want to see how that plays through  
23 in your analysis. If you go over the page to 6.7 and 6.8. At 6.7 you record  
24 that same point as to the counterfactual you have been instructed --

25 **A.** Yes.

26 **Q.** Last sentence of 6.7:

1 "My instructions are that the correct counterfactual should reflect Achilles'  
2 performance following its re-entry to the market after an absence of 11  
3 months."

4 Then, in 6.8, this is essentially the basis on which you say that it is okay to use  
5 FY22. So its performance I think in 2021 to 2022 has a proxy for how it would  
6 have done in its first year in the market under the counterfactual?

7 **A.** Yes, that's available evidence to me.

8 **Q.** What you say is in each case Achilles is a new entrant in the market where there  
9 is a single incumbent after a period of absence from the market.

10 So that assumption as to that period of absence is fundamental to your analysis, isn't  
11 it?

12 **A.** Yes.

13 **Q.** Now, at 6.9, you refer to -- at this stage you say Achilles would likely attract three  
14 buyers, and you name them. That is because at the time you wrote this report  
15 those were the three who were in the public domain. You updated it  
16 subsequently?

17 **A.** Yes.

18 **Q.** The way your analysis works is there is initial stock of buyers Achilles has in its  
19 first year, it gets fairly quickly. Then your model looks at how many additional  
20 buyers may subscribe to Link-Up in future years thereafter, so who would be  
21 added as time goes on. Yes?

22 **A.** Yes.

23 **Q.** Just to be clear, 6.10 to 6.12, where you raise that question, additional buyers  
24 that may subscribe to Link-Up after the first year, you are considering how  
25 many buyers Achilles would add in subsequent years, in the context of having  
26 been out of the market for 11 months, aren't you?

1 **A.** Yes.

2 **Q.** Having re-entered when RISQS is the sole incumbent.

3 Let's see how this gets picked up at page 211 of your same report, 6.36 and 6.37. At

4 6.9 you said three buyers in the first year. 6.7, at this stage, you have

5 identified 17 further buyers may present a viable target market. Obviously, in

6 your second report you update that and say there may be a larger viable

7 target market. We will come to that in a moment.

8 You say:

9 "The portion of these that would likely elect to move to Link-Up will be determined by

10 a number of matters, such as ..."

11 Then you set out a series of factors. What I want to go through with you is the extent

12 to which each of the factors you name is determined by the fact that Achilles

13 has been out of the market for 11 months.

14 RISQS incumbency, point (a), that is entirely bound up with your assumption that

15 Achilles was out of the market for 11 months, isn't it?

16 **A.** Yes.

17 **Q.** Point (b):

18 "Whether those buyers would consider Link-Up to provide them with access to

19 additional suppliers."

20 Again I would suggest that that is very tied up to Achilles' absence from the market in

21 your assumed counterfactual?

22 **A.** To a certain degree. It is also tied up to you multi-homing as well, the benefits of

23 multi-homing.

24 **Q.** But in the context where Achilles was re-entering after 11 months in March

25 2019 --

26 **A.** Uh-huh.



1 **Q.** -- obviously all the suppliers and buyers in the meantime in your assumed  
2 counterfactual would have to be on RISQS, or at least the vast majority of  
3 them. So inevitably, at that stage, subscribing to RISQS as a buyer  
4 wouldn't -- subscribing to Achilles as a buyer in March 2019 wouldn't give you  
5 access to many more suppliers, would it, in your assumed counterfactual?

6 **A.** Well, I mean, you can see in paragraph 6.40 that I do attempt to identify the  
7 available buyer market.

8 **Q.** Yes, but this is focused on this question of access to additional suppliers. What  
9 I am suggesting to you is in your assumed counterfactual, which you have  
10 been instructed to accept, that Achilles would be out of the market for 11  
11 months, there wouldn't be many additional suppliers that you could get from  
12 Link-Up that you couldn't get from RISQS in that counterfactual?

13 **A.** Yes.

14 **Q.** That's tied up with it as well.

15 Then point (c) is about whether buyers would be happy to move their supply chains  
16 to Link-up. Again, the fact you are talking about moving suggests this is  
17 talking about the fact everybody is already established on RISQS. Yes?

18 **A.** Yes.

19 **Q.** Then we have product service, quality and price. I am not suggesting to you that  
20 those are particularly tied up with re-entry.

21 So those factors essentially you are talking about, I think they feed through into your  
22 table 6, which is on the following page?

23 **A.** Yes.

24 **Q.** In the sense that you have a column -- do I mean table 6? Sorry. That's right.  
25 This sets out the number of additional buyers subscribing to Link-Up after the  
26 first year. Yes? I know your calculations are illustrative, but in a sense you

1 have chosen relatively low percentages in part, haven't you, based on the  
2 factors set out in 6.37. Yes?

3 **A.** The reason I have chosen the ranges of 10 to 30% is more consistent with  
4 Achilles' view. I believe Miss Ferrier put into evidence that they were targeting  
5 up to 10 buyers to compete against RISQS.

6 **Q.** Okay. That suggestion was about what they were targeting in May 2018,  
7 whereas you are talking here about subsequent years. So you are talking in  
8 your counterfactual in re-entry, this is after March 2019 to 2020 being your  
9 first year. This is 2020 and beyond. Yes?

10 **A.** I understand it might have been earlier where the discussions were within  
11 Achilles.

12 **Q.** Would you agree in a sense on your model what percentage of market capture  
13 the tribunal should choose is tied up with how well you assume Achilles will be  
14 doing in the counterfactual, which is tied up with the factors you are setting  
15 out in 6.37.

16 **A.** To clarify, you are asking which I would recommend, 10, 20 or 30?

17 **Q.** No. I am saying -- I think you set out that the tribunal should choose which  
18 percentage it should be going for. What I am checking is that what you are  
19 suggesting at 6.37 is that the tribunal's choice of percentage should be  
20 affected by the factors that you have set out there?

21 **A.** To a certain degree, yes. Yes.

22 **Q.** This then feeds through table 9, which is on page F217. I think we can see --  
23 I find it a very helpful summary of your methodology. I think we can see how  
24 the number of buyers feeds through into all the other stages of the analysis.  
25 You have revenue from the first three buyers in the first row on that page.  
26 Then row (b), additional buyers in the subsequent years. You have the three

1 assumptions that you can adopt, depending on potential market capture.  
2 Obviously (b) determines the next row down, doesn't it, revenue from  
3 additional buyers?

4 **A.** Yes.

5 **Q.** That was an input into that. Then the next row down is additional suppliers, but,  
6 as we are going to see, I think it is set out in table 7 on page 214. Perhaps  
7 the tribunal and you could both turn to that. Your calculations of the number  
8 of additional suppliers are all calculated based on assumed numbers of  
9 additional buyers, aren't they?

10 **A.** Yes. My model is buyer-driven.

11 **Q.** That's right. So effectively, going back to table 9 on page 217, row (d) is always  
12 going to be 37 times row (b). Yes?

13 **A.** Yes.

14 **Q.** You said your table is buyer-driven. Then number of suppliers drives all the  
15 remaining rows of the table. Yes?

16 **A.** Yes, after you calculate the number of suppliers based on the number of buyers,  
17 it then drives the additional supplier revenue and audit revenue.

18 **Q.** So all your calculations are driven by your view as to the number of additional  
19 buyers that Achilles can attain. Yes?

20 **A.** Yes.

21 **Q.** And that's based on your view that it will be tough for Achilles to re-enter the  
22 market -- it would have been tough for Achilles to re-enter the market in  
23 March 2019, isn't it?

24 **A.** Well, tough might be -- I don't say it is tough. What I am looking at is -- I guess  
25 you have these principal contractors, etc, the charter signatories, and TfL and  
26 Transport For Wales and Network Rail all indicating they will use RISQS for

1 their suppliers in that case. So that obviously takes out a portion of the  
2 available buyers, from my perspective, in my model, regardless of the starting  
3 point.

4 **Q.** Essentially, if the tribunal were to adopt your model, they would be using table 9,  
5 effectively?

6 **A.** Uh-huh.

7 **Q.** And they would be making a choice as to the percentage of market capture?

8 **A.** Yes.

9 **Q.** All of that would be assuming --

10 **A.** Yes.

11 **Q.** -- entry in March 2019, wouldn't it?

12 **A.** Yes, under that instruction, but in my view it wouldn't be any different, should it  
13 have been earlier.

14 **Q.** I am going to come to that. Can we go to section 7 of your report on F, 222? In  
15 a sense that's what I have been trying to come to. You set out there what you  
16 call a sensitivity analysis?

17 **A.** Yes.

18 **Q.** There are two sensitivity analyses. One you say is called May 2018  
19 counterfactual scenario launch. Over the page, April '21, actual scenario  
20 launch.

21 Focusing on the first one for a moment, I think what you are saying is this. If you go  
22 to 7.5 down to 7.7, you say. 7.2, you cite the same instruction we have been  
23 talking about.

24 7.5:

25 "Notwithstanding my instructions and the potentially limited functionality of the  
26 Achilles' scheme as at 1st May 2018, I have prepared a calculation of Achilles'

1 loss on the assumption that it would have been able to launch Link-Up on that  
2 date."

3 So that is now proceeding on the assumption of a 2018 December -- potentially  
4 active, shall we say, on 2018, to use a neutral term.

5 7.6, you set out your assumption that:

6 "... Achilles' FY22 revenue provided a reasonable basis for modelling counterfactual  
7 revenue in a scenario where it was re-entering the market after an absence of  
8 11 months.

9 You acknowledge at 7.7 that:

10 "In a May 2018 launch scenario this assumption ceases to apply ..."

11 I think you are saying -- you say this assumption ceases to apply. You are saying it  
12 can't be assumed that FY22 revenue provides a good proxy for what would  
13 have happened in May 2018. Yes?

14 **A.** No, that's not what I am saying. I am just saying obviously the assumption that  
15 there's --

16 **Q.** I will tell you what you said:

17 "... I set out my assumption", 7.6, "that Achilles' FY22 revenue provided a reasonable  
18 basis for modelling counterfactual revenue ..."

19 You say:

20 "In a May 2018 launch this assumption ceases to apply ..."

21 Yes?

22 **A.** Yes, but yet I still use the FY22 figure, the 136,000.

23 **Q.** If you go --

24 **A.** At that time that's the one issue that I was grappling with, and I think Mr Parker  
25 grappled with it as well, is the lack of forecasts, contemporaneous forecasts,  
26 budgets, business plans for Achilles to compete in the market on a May 18th

1 launch date. The best available information to me was what was actually  
2 happening. They attracted those three buyers and budgeted revenue of  
3 136,000, which now has been updated.

4 **Q.** What you say there is:

5 "Accordingly, in the sensitivity analysis I assume that Achilles would have earned the  
6 same revenue in the year of launch as in subsequent years according to my  
7 three buyer market capture scenarios set out in table 10."

8 I am afraid can we jump back to table 10 to understand what that means. Go back to  
9 220, the previous page. What we can see there, you have three  
10 tables stacked one above the other. You have a 10%, 20% and 30% table.  
11 What I am concerned about is going across the rows. Let's take the 10%  
12 table. That represents your primary analysis of loss, and therefore you  
13 assume a certain counterfactual revenue in the first year. It is in red there but  
14 you can see under 2020, 10% market capture, a certain figure.

15 Just to be clear, that is assuming that that's Achilles getting the three buyers that it  
16 actually got in 2021. Yes?

17 **A.** Yes.

18 **Q.** And then we have a series of figures for 2021, 2022 and 2023, which are all the  
19 same. It's flat. That essentially just adds on to it a certain number of buyers  
20 that you have derived by applying your 10% capture assumption. Yes?

21 **A.** On the available buyer market.

22 **Q.** Okay. So you have taken the three that you got in 2021, and you have added  
23 another chunk to it, based on an assumption, and I think what you are  
24 saying -- am I right -- at paragraph 7.7 is that instead of having a lower figure  
25 in the first year, you simply apply the same figure you have in table 10 for later  
26 years. You apply that figure also to 2020. Yes?

1 **A.** Yes.

2 **Q.** What I am going to suggest to you is all the figures in that row are already  
3 infected by the assumption of Achilles' absence in the market?

4 **A.** As I mentioned, because of the approach I have taken and doing the bottom-up  
5 approach -- normally you would have budgets for forecast that I could rely on  
6 to make adjustments or make changes for different periods of time.  
7 Unfortunately, the best available information available to me was the 136,000  
8 relating to those three buyers.

9 **Q.** I can understand, and this is why you took it as your 2021.

10 **A.** Uh-huh.

11 **Q.** I want to suggest to you, although it is labelled as a sensitivity analysis, it is not  
12 really a sensitivity analysis at all. It doesn't really affect a change of  
13 assumption of how Achilles would have done when starting up?

14 **A.** Well, it is a sensitivity analysis in the sense that if you look at Table 11 on F223, it  
15 is a longer -- I have a longer loss period.

16 **Q.** But you have extended the loss period. You have not made any difference of  
17 assumption as to how successful Achilles would have been from when it  
18 started operating?

19 **A.** Again, I would just be speculating there. You know, I would expect Achilles to  
20 have prepared business plans or forecasts that gave me an indicator where  
21 they thought they could go in the market.

22 **Q.** I just wanted to check the limitations of this analysis.

23 What I want to say to you is that this approach effectively gives zero weight to  
24 incumbency. It assumes Achilles' ultimate level of success is the same,  
25 whether it had always stayed in the market or whether it was kicked out of the  
26 market for a year?

1 **A.** Well, yes. I think it is clear in my report, my views on incumbency, and based on  
2 the tribunal's ruling I viewed RISQS as the incumbent and Achilles was not  
3 the incumbent. It re-entered the market, so to speak.

4 **Q.** The final point, if you were setting out to model Achilles staying continuously in  
5 the market, you would have needed to apply higher -- you call them market  
6 capture ratios. Mr Parker calls his retention ratios. You would need to supply  
7 a higher starting point and a higher retention capture ratio than you do in  
8 a situation where Achilles has been excluded from the market for a period of  
9 time. That's right, isn't it?

10 **A.** Can you say that again?

11 **Q.** What I am saying is if you are setting out to model the situation where Achilles  
12 stayed in the market continuously --

13 **A.** Uh-huh.

14 **Q.** -- you would have needed to adopt a higher starting point and a higher  
15 percentage of market capture, in your terminology, than you have done where  
16 you have been modelling Achilles having been excluded from the market for  
17 a year?

18 **A.** Not necessarily. I think there's other factors to consider. Again, as I mentioned,  
19 the buyer capture percentages are illustrative in this case, but they are driven  
20 mainly by what Achilles based on comments from Ferrier in her witness  
21 statements, that what they really thought they could capture, absent, you  
22 know not -- being in the market without any absence, yes.

23 **Q.** Okay. We went over that a moment ago. I have just been asked to give you  
24 remainder not to read out any confidential information. I think you may have  
25 said something at some point or read out something. I just remind you to be  
26 careful.



1 **A.** Oh, sorry.

2 **Q.** We can move to the next topic and go back to 6.2 again, which is page F202.

3 I think sub-paragraph (e), again you were instructed that because Achilles  
4 could have launched, as is your instruction, Link-Up 12 months after the  
5 tribunal's order dated 12th September 2019, that Network Rail is not liable for  
6 any delay beyond September 2020. Again, that's just a matter of instruction,  
7 isn't it?

8 **A.** That's instruction.

9 **Q.** Do you accept that if Achilles couldn't launch in September 2020, then loss would  
10 need to be estimated over a longer period. Do you accept that?

11 **A.** I don't understand your point here, because I have got my two --

12 **Q.** Sometimes, Mr Law -- I want to make sure you understand where I am coming  
13 from. The tribunal understands. I want to lead into it a bit. If you go to  
14 Section 7. Page 223. That's your sensitivity analysis, table 12, on 224, isn't  
15 it? That's effectively adding -- where you assume -- instead of your  
16 assumption that Achilles would have launched in September 2020, you reflect  
17 the fact that Achilles actually launched in April 2021?

18 **A.** Yes.

19 **Q.** All your scenarios add 32% to your figures?

20 **A.** Yes.

21 **Q.** That's fine. Thank you. On a related point, if we go over to page F193, 4.31,  
22 there essentially you decline to provide any estimate whatsoever of future  
23 losses, don't you?

24 **A.** I don't necessarily decline to provide any estimate of future losses. It's more of  
25 what -- again it goes to the availability or lack of availability of  
26 contemporaneous evidence, as to how Achilles viewed the market and how

1 much it could actually grow or how much it would capture from  
2 a revenue/profit perspective. I felt with this lack of evidence and bottom-up  
3 approach, I didn't want to speculate too much as to how long -- if any future  
4 losses would exist.

5 **Q.** You have not formed any view that you positively believe, that Achilles would be  
6 no worse off in future than it would have been had it not been excluded from  
7 the market?

8 **A.** Yes, from the perspective of -- again, Achilles has other barriers in place, so to  
9 speak, not relating to the infringement, about how it could compete in the  
10 market against RISQS.

11 **Q.** I am not sure that quite answered my question. My question is whether you have  
12 formed any positive view that -- I am suggesting you have not formed or  
13 expressed a positive view that Achilles would be no worse off in future than it  
14 would have been but for the infringement?

15 **A.** I do believe I go to the end of April '23 and then, after that, yes, I believe just  
16 a loss.

17 **Q.** You have not modelled any loss beyond April -- at 4.31, I understood you were  
18 saying you declined to provide any quantification of future loss. Yes?

19 **A.** I say that for the reason I believe it can't be reasonable quantified. I would be  
20 speculating.

21 **Q.** Thank you. So essentially your loss calculation only runs between -- your  
22 primary loss calculation only runs between April 2019 and September 2020,  
23 doesn't it?

24 **A.** No, I think if I could get access to my exhibits. Do we have the schedules for ...

25 **Q.** Again, I am not sure which schedule you are looking for.

26 **A.** The detailed schedule of my calculations on a yearly basis.

1 **Q.** Can you get it from table 10 on page F220 or do you need the detailed schedule?

2 **A.** I need the detailed schedule. Is it in that part of the bundles?

3 **Q.** It may be in Bundle F2.

4 **MR WENT:** Tab 24.

5 **A.** Thank you. You can see in tab 24 on these schedules it runs in the first -- in the

6 instructed scenario it runs to March 2023.

7 **THE CHAIRMAN:** Can you tell us what you are looking at?

8 **A.** Appendix 3.2, F458.

9 **MR WOOLFE:** Okay. I am looking at your table 10. In table 10, page F220, there

10 was no loss showing at all for FY 23. I understood that's because --

11 **A.** Table 10 does not include the amount of detail you would find in appendix 3.2.

12 **Q.** It does set out the loss that you say is due.

13 Perhaps we can go on to your buyer analysis, if that's all right, Mr Law.

14 **A.** Sure.

15 **Q.** In your first report, if you go to page F182, your starting point at 3.34 was you

16 thought it was reasonable in principle that a buyer may wish to use a different

17 supplier assurance scheme for his own supply chain, ie when acting as

18 a buyer, to that which it uses when acting as a supplier. Yes? That is what

19 you said?

20 **A.** Yes.

21 **Q.** In fact, I suggest to you the JQS example rather shows that is right, as a matter

22 of principle, doesn't it? The operators at the top of the industry use EPIM.

23 Many suppliers lower down in the industry choose to use Achilles JQS in their

24 supply chains, don't they. So that rather supports your starting point in

25 principle?

26 **A.** Yes.

1 **Q.** Okay. You then refer to certain matters in the judgment. You refer to  
2 Mr Matthews and the statement of Mr Blackley in particular. If we go forward  
3 to 613 what you actually did was accept more or less entirely I think -- correct  
4 me if I am wrong -- Mr Blackley's analysis. If you go to paragraph 6.13 on  
5 page F204, you say there that you used Mr Blackley's analysis?

6 **A.** I refer to his evidence because he sets it out by categories.

7 **Q.** Exactly, but Mr Blackley adopted a quite extreme assumption, didn't he? He  
8 excluded any buyer who had any direct procurement spend or any interest in  
9 contracting with Network Rail, didn't he?

10 **A.** He excluded -- I wouldn't call it extreme but he made that exclusion, yes.

11 **Q.** I suggest to you it is an extreme assumption. You commented on it. That's fine.  
12 I think then you added in a small number of buyers back on top who had  
13 some existing relationship?

14 **A.** Yes. There was a group of nine that I cross-referenced.

15 **Q.** Yes.

16 **A.** They had spent on BuildingConfidence and UVDB and I felt it would be  
17 appropriate to include them in my buyer capture.

18 **Q.** It was quite a small number?

19 **A.** I adjusted it to seven, because one of them was a charter signatory. I can't  
20 remember exactly but it is in the table here. One was Balfour Beatty and one  
21 was J Murphy & Sons. So it went from nine to seven.

22 **Q.** In your supplemental report you changed your mind on the scope of the buyers  
23 to whom Achilles could potentially compete, didn't you? If we go to your  
24 second report, which is in Bundle F2, at tab 31.

25 **A.** Yes. I made that change based on new evidence that came out after I issued my  
26 first report.

1 **Q.** Yes, absolutely. It was presented as a facts change. You changed your mind.  
2 Change of assumption. You wanted to look at how it worked.

3 **A.** The model I developed allows me to make changes based on changes in  
4 evidence.

5 **Q.** Sure. If you go to pages F622 and F623, the first example of Walker  
6 Construction. Table 2 on page F623, this is your revised calculation on  
7 buyers. Starting off with a total buyer population of 88. Then you take out  
8 Network Rail, as I understand it, on the basis that Network Rail doesn't want  
9 to use Achilles --

10 **A.** At the time I wrote my report.

11 **Q.** Then take out nine RISQS charter signatories. Transport For Wales, which has  
12 made some indication of a similar nature, that it is going to use RISQS?

13 **A.** Yes.

14 **Q.** First Great Western you have taken out because it has already indicated --

15 **A.** It would be a double count.

16 **Q.** It is going to use Achilles. Walker Construction on a similar basis.  
17 That is why you now say -- anybody employed by Network Rail will similarly use  
18 RISQS downstream as well. Having abandoned that, you now say available  
19 buyers 75?

20 **A.** Out of abundance of caution, I decided to include it, because with the information  
21 I learned about Walker Construction -- again I don't know if it is confidential or  
22 not.

23 **Q.** It may be. Actually, we are going to come to the percentage figures. I want to  
24 understand the potential population of buyers that you are now using.

25 **A.** Obviously I have increased it from 24 to 75.

26 **MR WENT:** Can I just interject. I think this is important that Mr Law is given

1 a chance to answer the questions properly and not be restricted just because  
2 information is confidence.

3 **MR WOOLFE:** Apologies, Mr Went. We will come to the subject of anything he  
4 wants to say about the likelihood of this budding market in due course. I have  
5 got that. I will come to it. If it is confidential, we will come to it. I want to stick  
6 to the topic I am on.

7 **MR WENT:** If you remind him he was going to -- he obviously has some points he  
8 wants to make there.

9 **MR WOOLFE:** Okay. What I suggest to you -- well, perhaps I can pick up one  
10 point, first of all. The total buyer population of 88, we will see it I think in due  
11 course, but that's a population from 2020, isn't it?

12 **A.** Yes.

13 **Q.** That's Mr Blackley's evidence (inaudible) in 2020. That's not from 2019 or 2018,  
14 is it?

15 **A.** No. I am aware there was information from 2018 for 111.

16 **Q.** Yes.

17 **A.** But we didn't have -- as far as I know, there was not a breakdown to allow me to  
18 actually break the group and figure out what actual available buyer market  
19 was available. So that was the next best available information.

20 **Q.** If you are looking to break it down into categories of buyers that were available --

21 **A.** Yes.

22 **Q.** But in terms of buyers who were available to compete for back in May 2018, it  
23 was a fair bit higher, wasn't it?

24 **A.** According to the 111 figure, but again I don't know if Achilles could actually  
25 compete for the numbers that are different, the difference between 88 and  
26 111. I just didn't have that detail.

1 Now, on the flip side, the information from 2020 shows that actually buyers have left  
2 the market as well. So, you know, it's fair for me to take that into  
3 consideration.

4 **Q.** What I suggest to you is there is that difference as to total buyer population, but  
5 the difference now really between you and Mr Parker comes down partly to  
6 the few exclusions you still make here?

7 **A.** Uh-huh.

8 **Q.** And partly as to -- the largest of the percentage you then apply to this population.  
9 Yes?

10 **A.** Mr Parker doesn't directly calculate the amount of available buyers. What he  
11 does, as he discussed earlier on, he takes a percentage of the numbers that  
12 Achilles JQS experienced with the EPIM JQS split and applied that to the 111.

13 **Q.** Yes, but to a significant extent the difference --

14 **A.** But he doesn't further reduce it. Where I say: Well, that's the total available  
15 market, now what can Achilles realistically get?

16 **Q.** As I understand, he is applying a percentage assumption to a certain size of  
17 market. He is applying I think it comes down to 56% of buyers at one point.

18 **A.** Yes.

19 **Q.** Whereas you are applying an assumption of 10% of buyers. That's a difference  
20 between you. Yes?

21 **A.** Well, I give a range of 10, 20 and 30.

22 **Q.** You give a range of 10, 20 and 30 for a certain chunk of the market and then  
23 10%?

24 **A.** 10.

25 **Q.** For all the rest?

26 **A.** Yes.

1 **Q.** We are going to look in a moment at the reasons for that percentage. Again, if  
2 there is anything you want to refer to, by all means do. If there is something  
3 that may be confidential, I advise caution. I am not saying don't give  
4 evidence.

5 Can I just take you to the point about the exclusion of the RISQS charter signatories  
6 for the moment? If I can just understand that point.

7 I think in first report RISQ charter was not very significant because it had already  
8 been excluded for other reasons mainly, but here nine are excluded for that  
9 reason. Now, the RISQS charter is essentially just a declaration by the  
10 companies involved --

11 **A.** As far as I know. I wasn't a party --

12 **Q.** But they can change their minds?

13 **A.** Anyone can change their minds.

14 **Q.** In fact, some have done?

15 **A.** Can you give specifics?

16 **Q.** Okay. If we go to bundle G10. Keep that table open. Go to bundle G10, 534.

17 The front page is an e-mail from somebody called Matt Clements to  
18 Mr Ken Blackley on 22nd November 2019. Can you go over to the next page,  
19 which is the earlier e-mail. It is replying to page 5168, and there is  
20 Mr Clements at the RSSB, dated 21st November 2019:

21 "Hi, Ken

22 In spring 2018 we launched a RISQS buyers' charter, which provided a way for  
23 buyer members to show their commitment to the scheme. 13 of the biggest  
24 buyers in the scheme signed up to the charter. This included Network Rail."

25 Pausing there for a moment, Mr Clements is saying that 13 people were signatories  
26 to the charter in 2018. Yet we can see on your figures, which are for mid



1           2020, there are only nine RISQS charter signatories, aren't there?

2   **A.** Yes.

3   **Q.** Do you know, is Network Rail still a signatory to the RISQS charter?

4   **A.** I don't know.

5   **Q.** In the previous page, 5167, Mr Blackley is expressing some concerns about  
6           signing up again. I was not sure if your Table 2 reflected you knowing that  
7           Network Rail was not a RISQS charter signatory or if it was somehow splitting  
8           them out separately. I was not sure.

9   Anyway, the point is the number of RISQS charter signatories has gone down over  
10           a two year period from 13 of the biggest to 9. In fact, some have left the  
11           RISQS charter.

12   **A.** They are no longer RISQS charter signatory, they can no longer -- I don't know  
13           why they are not a charter signatory.

14   **Q.** To treat them as being entirely excluded from Achilles being able to compete for  
15           them is wrong, isn't it? They can change their minds?

16   **A.** On what basis would Achilles want to compete for them as --

17   **Q.** As a buyer?

18   **A.** Buyer assurance? I mean, obviously I understand that obviously a charter  
19           signatory could join the Achilles scheme as a supplier if they wanted to.

20   **Q.** But a charter signatory could decide to leave the RISQS charter and sign to  
21           Achilles as a buyer?

22   **A.** In theory, yes.

23   **Q.** It could happen. Yes? They could change their minds. They are not legally  
24           bound by the RISQS charter?

25   **A.** Again, I can't speak for the legal -- whether that document is legally binding and  
26           its terms. I am not a lawyer, unfortunately.

1 Q. I know you wish you were, Mr Law.

2 A. No. My last name may indicate it, but no.

3 Q. Can I take you to Bundle E. You can put that bundle away. This was the  
4 confidential material. Don't read anything. If you need to respond, by all  
5 means do, but you need to be careful. This is Bundle E, tab 4. There is only  
6 one document behind. This is a confidential schedule to Mr Blackley's third  
7 witness statement, I believe Am I okay mentioning the general nature of what  
8 this document is without mentioning any information within this?

9 This document, as I understand it, is a list of buyers in RISQS and they are listed by  
10 name on the left. I am not (inaudible) their names, buyers on RISQS, or  
11 whatever.

12 Then there is a categorisation in the next column over in respect of some of them,  
13 what they do. Train operating companies, infrastructure manager and so  
14 forth. Again, I am not sure it is terribly confidential that some of these people  
15 do what they do.

16 In the next column NR procurement spend for 2015, which I understand is  
17 confidential. There we are. Then there are some comments. The comments  
18 set out in respect of certain of them that they are RISQS charter signatories.  
19 I can see eight listed charter signatories on the first page. If you go over, one  
20 is listed on the next page. Do you recall seeing this document before?

21 A. I have seen this document before.

22 Q. This is where you got your figure of nine RISQS charter signatories from?

23 A. Yes.

24 Q. I want to understand as well -- if you can help, this document only measures  
25 Network Rail procurement spend. It doesn't record any other spend that  
26 these companies may have received from companies other than Network

1 Rail, does it?

2 **A.** Yes, because it was prepared by Blackley, who is Network Rail.

3 **Q.** There are some quite big numbers in here, but that does not represent all the  
4 revenue in the rail market, does it? There will be more, for instance, coming  
5 from Transport for London, Transport for Wales. These kind of bodies will  
6 also be putting money?

7 **A.** I think Transport For Wales is on this list.

8 **Q.** This is to do with how much procurement spend it has received from Network  
9 Rail, but Transport For Wales would also be putting its own money into the  
10 market, as it were?

11 **A.** Yes.

12 **Q.** Okay. Just looking at the Network Rail procurement spend impressionistically,  
13 there are a lot of very big buyers with a lot of spend going through them, who  
14 are not signed up to the RISQS charter, aren't there?

15 **A.** Yes.

16 **Q.** In fact, just in the top half of the first page, if you just look at those with, shall we  
17 say a ten digit spend, if you ignore decimals points, over a billion pounds, you  
18 can see there are quite a number of those that are not RISQS charter  
19 signatories, can't you?

20 **A.** Yes.

21 **Q.** So, in fact, most buyers --

22 **A.** Balfour Beatty is one of them.

23 **Q.** Again, I want you to be cautious. If you want to have a conversation by all  
24 means do. There we are. I am very cautious to avoid any of the actual  
25 figures on here.

26 **A.** No, I am not going to ...

1 Q. Thank you. There we are. Just one point. There is plenty of people there with  
2 a lot of money with whom suppliers will want to do business who are not  
3 charter signatories, aren't there?

4 A. Yes.

5 Q. So plenty of market for which Achilles can be a viable competitor. Yes?

6 A. Yes.

7 Q. If we can put that one away now, in terms of the percentage figures that you use,  
8 back in your first statement -- you needn't go to it -- you said at 6.39 that the  
9 matters that will determine the number of buyers that might register with  
10 Link-Up are largely matters of fact and judgment, and you have created what  
11 you call I think illustrative calculations, quantifications. Is that the word you  
12 use?

13 A. Yes, from the buyer market capture percentage.

14 Q. I think you suggest that a low percentage would fit with paragraph 149 of the  
15 tribunal's judgment. Yes? You say at the end of 6.39:

16 "The 10, 20 and 30%, these percentages reflect the tribunal findings in  
17 paragraph 149 of the judgment that ..."?

18 A. Here what I was doing was trying to make sure I was consistent with  
19 paragraph 149 of the judgment when I was putting my model together.

20 Q. Okay.

21 **MR WENT:** Can I just interrupt. (inaudible) on the basis of confidential information.

22 **MR WOOLFE:** At the moment we are on the 10, 20 and 30% which is applied to  
23 one chunk of the market. We are going to come to the 10% in a moment. If I  
24 may, I did not interrupt you. Please can you not interrupt me unless it is  
25 essential. Thank you.

26 Okay. Now you take that from paragraph 149 of the tribunal's judgment. Could we

1 perhaps take that up. Can you take Bundle A, please. 149 starts on page 52.  
2 Consistency with the judgment. 149 (1) the tribunal, it was put to Mr Parker  
3 this morning, found that the market opportunity available would be limited, but  
4 the RISQS-only rule would only affect demand from buyers other than  
5 Network Rail participating in Sentinel, and so forth.

6 I think we have seen from what we were just looking at a few moments ago, there's  
7 a lot of demand in the rail market that is not direct from Network Rail, isn't  
8 there? An awful lot. From the confidential statement from Mr Blackley's  
9 witness statement, there is a lot of money there, if I can put it simply?

10 **A.** Yes, there appears to be a lot of money, yes.

11 **Q.** Of those, only nine had signed up definitively to say they were going to use  
12 RISQS in 2020?

13 **A.** Uh-huh.

14 **Q.** There were an awful lot of buyers left over who could just use Achilles, weren't  
15 there?

16 **A.** In theory, yes.

17 **Q.** Yes, in theory. Although, obviously, the market opportunity is limited in one  
18 sense, there is no reason to think from the tribunal's judgment that this needs  
19 to be as low as 10, 20 or 30%, is there?

20 **A.** I think you have to look at 149 as a whole. The other thing you have to look at is  
21 the reason why or the reasons why a buyer would switch, so to speak, or  
22 even multi-home from RISQS to Achilles. I mean, there is obviously the  
23 familiarity with RISQS. Although Achilles operated it up until the end of 2018,  
24 you know, they viewed it as RISQS, right, as RSSB that owned it.

25 **Q.** I think that point is disputed, Mr Law. If that's your instruction, that is one thing  
26 about it --

- 1 **A.** That is my instruction in that sense. So I was looking at it from that perspective  
2 to see what realistically is available, even though you mention there is a large  
3 number and large amount of money, what realistically is available to Achilles  
4 in the counterfactual.
- 5 **Q.** Okay. Taking that first point about the market opportunity being limited, can you  
6 keep that judgment open and look back in your first report at page F212.  
7 Table 6 is at the bottom of that page. In terms of the section of the market to  
8 whom you are applying these illustrative 10, 20 and 30% percentages, you  
9 are applying these to quite a small number of buyers, aren't you, because you  
10 have already excluded at this point the vast majority of buyers who have any  
11 direct procurement spend with Network Rail, haven't you?
- 12 **A.** Based on, yes, the instructions I received, this is the group that I felt was  
13 available to --
- 14 **Q.** So the point the tribunal is making at 149 (1), is that it is limited. You have  
15 already taken out the parts of the market which Achilles can't address. That's  
16 not a reason in itself to apply a low percentage to the remainder, is it?
- 17 **A.** Are you suggesting I am doing a double count?
- 18 **Q.** Not you. In a sense -- to the extent you try and take 149 (1) into account as a  
19 reason to apply a low percentage, that would be double counting.
- 20 **A.** On its own it is not a reason to apply the low percentages. There were 24 buyers  
21 available at this stage in my view. Would 100 per cent of the 24 go to  
22 Achilles? No. Again, these are illustrative examples, and the percentage  
23 could be changed in my model to whatever the tribunal feels is appropriate.
- 24 **Q.** Okay. I think 149 (2) is the same point. Balfour Beatty is just an example.  
25 If we go over to 149(5), which is over on page 53 at the bottom, there is a point  
26 about viability. The tribunal expressed some doubt about viability and said

1 the sentence starting "However" on page 54:

2 "However, the business demanded TfL, Amy and Babcock has also been committed  
3 to RISQS, meaning that Achilles needs to find viability and demand from the  
4 rest of the non-Network Rail market."

5 Obviously, the tribunal had a concern about that at that stage, on limited information,  
6 but I would suggest to you, on the back of what we saw in the confidential  
7 schedules to Mr~Blackley's witness statement that in fact there is plenty of  
8 demand in the rest of the market from which we could find viability. That's  
9 right, isn't it?

10 **A.** Again, I didn't have a great view into Achilles' view of its viability to complete,  
11 because they did not put together a business plan or forecast or anything like  
12 that, that allowed me to take that, break it down and assess it and apply it to  
13 the facts.

14 **Q.** Okay. Then, if you go back to the previous page, 53, 149(3) and (4), those two  
15 points the tribunal -- 149(3) it says that Achilles may find it difficult to undercut  
16 RISQS on price, to go lower than RISQS on price.

17 149(4) suggests they may be concerned about how far Achilles could differentiate  
18 itself, but again those points in themselves don't suggest that Achilles would  
19 be at a disadvantage to RISQS, do they?

20 **A.** I am not suggesting they would be at a disadvantage. What I am trying to do is  
21 figure out how successful they will be at competing on all these factors, not  
22 just one in isolation.

23 **Q.** What I am suggesting is none of these factors in themselves provide any reason  
24 for applying 10, 20 or 30%. They are not a reason for applying a percentage  
25 as low as that. Yes?

26 **A.** Again, these are illustrative percentages.

1 Q. Okay. Thank you. Then in your second report you apply a 10% assumption. If  
2 you go back to page F623 within Bundle F2, tab 31, F623, now you are  
3 carrying out a different calculation I think on a larger population?

4 A. Yes. I think this is the stage where I would want to refer to confidential  
5 information.

6 Q. Okay. Just check, because I am trying to check whether we need anything  
7 confidential. Right. Okay. So this is fine. If you want to go into a confidential  
8 session, we absolutely can do.

9 Sir, I was looking in terms of a break whether you want to deal with this now or after  
10 the short break.

11 **THE CHAIRMAN:** Let's deal with it now.

12 **MR WOOLFE:** Can I deal with the question I want to put to you, and if you want to  
13 cite confidential information we will go to it at that stage.

14 As I understand it, you apply a 10% assumption to this larger market. It is  
15 paragraph 4.30 on page F626. That 10% number is just a number you have  
16 come up with, isn't it?

17 A. It is a number I apply on the basis of if you look here in 429, I look at the amount  
18 of capture rate out of the available buyers in that group that had spend, and  
19 one buyer represents 2%. So I felt an illustrative percentage to use on that  
20 particular group is 10%.

21 I included that group out of an abundance of caution, as I mentioned earlier, based  
22 on information about Walker and the amount they are paying and their  
23 intentions.

24 Q. Yes, but this is all on the assumption. This is again your counterfactual that  
25 Achilles would have been re-entering the market in 2019, and therefore using  
26 today's performance as a proxy. What I am suggesting to you is that there's



1 no basis for assuming 10% if Achilles was going to be staying in the market  
2 continuously?

3 **A.** Other than it was the closest number to 2%, yes. It's a number that I have not  
4 scientifically --

5 **Q.** You are talking it from the example of Walker Construction now, but that's in the  
6 actual situation in which Achilles is reentering after being out of the market for  
7 three years. There is no good basis for applying a 10% market capture  
8 across the board if you assumed Achilles was going to be staying in the  
9 market?

10 **A.** Again, as I mentioned in my report, I am using that as an illustrative percentage.  
11 My model, as you probably know, is subject -- I can make changes to these  
12 percentages.

13 **Q.** Is there anything you wanted to say in further response to the questions about  
14 the 10% share?

15 **A.** No.

16 **Q.** Thank you. Sir, that might be a convenient moment for a break. Thank you.

17 **THE CHAIRMAN:** Five minutes.

18 **(Short break)**

19 **MR WOOLFE:** Thank you. Mr Law, if you could have your first report in front of you  
20 again. So it is Bundle F1, tab 6. Can you go to page F213? We are moving  
21 to a different topic now, which is number of suppliers per buyer assumed in  
22 your model. We have already touched upon where you have come to, which  
23 is 37.

24 **A.** Before we proceed in that line of question, could I ask a clarification to the  
25 response I provided to you on the last question, when you asked that there  
26 was no basis.

1 **Q.** I think for the sake of the transcript perhaps clarify a bit more what you  
2 understand the question is and then give the answer, because it may be a bit  
3 confusing otherwise.

4 **A.** He asked the selection of the 10% and asked me if there was no basis for it.

5 Now, there were a number of things I had to consider when I was putting my  
6 numbers and models together and all that. It was the lack of  
7 contemporaneous evidence from Achilles. I didn't have a view as to what they  
8 thought they could realistically do when they were competing in the market on  
9 a counterfactual basis. But I do believe, and hopefully I am correct with this,  
10 that there was a view that they could compete and potentially get up to 10  
11 buyers in the market.

12 If you look at the numbers in my model, if you take the 30% version of that model in  
13 the supplemental report that I prepared, the number of buyers would be 15 in  
14 total. So you can see that even though the number appears to be small,  
15 because it is 10%, the actual number of buyers I have said that Achilles has  
16 captured is 15, on the 30% rate.

17 **Q.** That's not a point you made in your report, is it?

18 **A.** No, I have not made that point in my report directly, but I am giving it as  
19 an illustration as to what's driving the decision-making process.

20 **Q.** And that is based on your recollection that Achilles thought overall in the market  
21 they could get ten buyers?

22 **A.** Yes.

23 **Q.** That's based on that respect. I suggest to you, first of all, that the evidence you  
24 are dimly recalling is evidence of the actual situation where Achilles didn't  
25 know what was happening in early 2018?

26 **A.** I believe this evidence was actually before -- so it would be relevant to a

1 counterfactual --

2 **Q.** Secondly, it was an aspiration for what they could get in May 2018, rather than  
3 longer term. Yes? Whereas what you are doing is calculating what they get  
4 longer term, because you are calculating additional buyers in subsequent  
5 years, aren't you?

6 **A.** Well, I am trying to calculate the counterfactual --

7 **Q.** Specifically, the 10% is calculating additional buyers in subsequent years, isn't it,  
8 in your model?

9 **A.** In subsequent years to --

10 **Q.** Yes. You are assuming that the first year that Achilles reenters the market in  
11 your counterfactual of March 2019 is as the real 2021. Yes?

12 **A.** Yes.

13 **Q.** And then when you're talking about your 10%, 20%, 30% or your 10% figure, that  
14 is to do with modelling how many additional buyers they will get in future  
15 years. Yes?

16 **A.** Yes, as a proxy for the counterfactual, because that's the best available  
17 information. Again, with the lack of budgets and forecasts from Achilles, it has  
18 made this difficult for both experts, not just me, to actually come up with  
19 a counterfactual.

20 **Q.** Can I take you back to paragraph 6.45 of your first report.

21 **A.** Sorry. Which one?

22 **Q.** 6.45 on F213, your estimate of 37?

23 **A.** Yes.

24 **Q.** I just want to understand. 6.45, you take Mr Parker's calculation that there were  
25 37 suppliers registered on RISQS for each buyer. I think you clarified at the  
26 start of your evidence that you were not saying he used that figure. It is just

1 he calculated that?

2 **A.** Yes, he calculated it and I agreed with him.

3 **Q.** You go on to say that you think it may be a useful guide to the number of RISQS  
4 suppliers that would register.

5 You have subparagraphs (a) and (b) and 6.4 -- we are going to come to in due  
6 course. I think in the rest of 6.45, 6.46 and 6.47 you are dealing with the point  
7 that each buyer may differ greatly as to the number of suppliers that they may  
8 have. Yes? That's what you are directing this at?

9 **A.** I am using the 37 as a proxy or average for the whole buyer group. Now, there  
10 could be obviously a big difference in numbers.

11 **Q.** The issue of variation --

12 **A.** Yes.

13 **Q.** Before we come on to the issue of variation, which we will come on to in  
14 a moment, I want to understand what this ratio represents. In particular,  
15 I want to explore the difference between, on the one hand, the overall ratio of  
16 the number of suppliers to number of buyers. That's one thing. On the other  
17 hand, the average number of suppliers that each buyer has. I want to explore  
18 that difference with you, if that's okay.

19 **A.** Fine.

20 **Q.** So, Mr Law, imagine you have a market with three buyers and six suppliers.  
21 Yes? That's quite easy to imagine. Smaller numbers helps. Let's imagine,  
22 for my first hypothetical, and I accept this is truly hypothetical, each of those  
23 buyers contracts with all six suppliers. Yes? In that market, I am right in  
24 thinking that the ratio of suppliers to buyers is two suppliers to buyers?

25 **A.** From that perspective, yes. Mathematically, yes.

26 **Q.** But the number of suppliers that each buyer has is six?

1 **A.** Access to six.

2 **Q.** If you were to persuade one of those buyers to join your new community, you  
3 would get six suppliers, wouldn't you?

4 **A.** Yes.

5 **Q.** I am interested in --

6 **A.** Here I am not looking at the overall suppliers. I am trying to come up with the  
7 suppliers who actually generate revenue.

8 **Q.** We will have to understand what 37 means and so on. We are going to come to  
9 it. If I am looking at a set of buyers and a set of suppliers, thinking about  
10 supplier assurance, I am not just interested in the size of those two sets, am  
11 I? I am interested in the connection between the two sets?

12 **A.** Well, there is not a lot of information about the connection between the two sets.

13 **Q.** That's what I am interested in, the connection --

14 **A.** Ideally, if you could get to that, but that's information is not available.

15 **Q.** Take our same imaginary market, three buyers and six suppliers, but let's forget  
16 about the assumption that all the buyers contract with all the suppliers for the  
17 moment. So we have three buyers and six suppliers. What I put to you is  
18 this. It's impossible to imagine that example without assuming that on  
19 average each buyer contracts with at least two suppliers, isn't it? So you have  
20 buyer A, buyer B, buyer C. Buyer A contracts with two suppliers. Buyer B  
21 contracts with two suppliers. At this point, if we want to get the average  
22 number of connections, average number of suppliers with whom each buyer  
23 contracts to be below 2, buyer C is only allowed to contract with one supplier.  
24 At this point there are only five suppliers being contracted with. So if you want  
25 any one of your buyers to contract with less than two suppliers, you have to  
26 assume the other one contracts with more, don't you?

1 **A.** Yes.

2 **Q.** So the overall ratio of suppliers to buyers is, in fact, the absolute lower bound of  
3 the average number of suppliers that each buyer has, isn't it, the average?

4 **A.** Well, I don't know if it's the lower bound, but --

5 **Q.** I am suggesting to you, mathematically, it is impossible to imagine an example  
6 where the ratio of suppliers to buyers -- your ratio of suppliers to buyers, you  
7 can't imagine an average number of suppliers per buyer that is lower than the  
8 ratio. It is mathematically impossible.

9 **A.** Right.

10 **Q.** Okay. But that is, in fact, what you have used, isn't it? You have used the  
11 average number of suppliers per buyer. So you used the absolute lower  
12 bound.

13 **A.** I used that number on the basis of -- I mean, obviously it came from what was  
14 going on in RISQS at the time. I felt without the budgets and forecasts and  
15 business plan put in place by Achilles, to me it was the best available  
16 information at the time. Again, it is difficult to see how many suppliers on  
17 a per buyer basis would spend on each buyer.

18 **Q.** Spend is a different issue. We are going to come to your variation at 6.45 and  
19 following. As I understand it, at 6.45 (a) and (b), on the one hand you are  
20 saying some buyers will have -- what we are talking about to date is the  
21 average numbers in the market. Obviously, you don't win the whole market.  
22 You win some smaller number. What you say is some buyers will have many  
23 more suppliers, and you give some examples at (a) and (b).

24 Then, at 6.46, you say:

25 "However, it is not clear to me that all buyers do have such significant supply  
26 chains."

1 Then, at 6.47, I think you are giving a further reason why in a sense -- 6.45 (a) and  
2 (b), you have much higher numbers. 6.46 and 6.47 you are giving reasons  
3 why the number may be lower. Yes.

4 **A.** This information indicates why the number could go either way. If you look at  
5 6.45 (b), for example, where Miss Ferrier refers to a buyer that has 1,400  
6 suppliers, if I compare that to the actual budget that they have in place, it  
7 would indicate that the buyer spend is extremely low, if you spread it across  
8 1,400. So that means the number of suppliers is extremely low. So that  
9 would suggest to me that the actual number of suppliers that are generating  
10 revenue is very low and not the 1,400.

11 **Q.** Okay. Now, at 6.45 (a) and (b), you give examples where there are quite large  
12 numbers of suppliers. 6.46 you give an example where it is lower, but without  
13 reading out the confidential information and who it relates to, if you read the  
14 highlighted text in 6.46 and so forth, and the footnote, those numbers are not  
15 lower. They are not significantly lower than 37, are they?

16 **A.** It is lower but not significantly, yes.

17 **Q.** And, in fact, there is not a lot of room to go below 37, where there is a lot of room  
18 to go above 37, isn't there?

19 **A.** Again, I would need Achilles' budgets and forecasts on all that to get a view of  
20 what they think they realistically can do from the buyers they hope to attract.

21 **Q.** My point is this. If you have an example of a buyer with 1,400 suppliers, that's  
22 a long way above 37. You can't get that far below 37?

23 **A.** With the 1,400 suppliers, what we don't know is the breakdown of those 1,400. If  
24 you take, for example, Network Rail has 14,000 -- I can't remember the exact  
25 number of suppliers on their list, but suppliers like that, you know, supply  
26 pencils and paper, stuff like that. To go from 1,400 to suggest the number 37

1 is wrong, I think you are comparing apples and oranges here. I would need  
2 a lot of detail beyond those 1,400 suppliers.

3 **Q.** I think what you have set yourself up to do is look like -- I say this advisedly --  
4 look like you are doing it on the one hand, and on the other hand, but  
5 I suggest you are not doing it fairly, because on the one hand you have 1,400.  
6 On the other hand you have a number that's not very far below 37. Then if  
7 I deal with the point at 6.47. In 6.47, you are dealing with the situation where,  
8 as the number of buyers increases, you say, the number of additional  
9 suppliers you get drops off, doesn't it? I think this is a point Mr Parker makes  
10 as well.

11 **A.** Yes. When a buyer adds, it doesn't mean they bring a whole new set of  
12 suppliers. They might bring some but not a complete --

13 **Q.** On your market of 88 buyers, if you already have 87 buyers, adding 88 is not  
14 going to bring -- even if the one you add has a thousand suppliers you are not  
15 adding a thousand additional suppliers to the market. That's your point?

16 **A.** Mr Parker and I agree on that.

17 **Q.** What I suggest to you is you have switched here, haven't you, because here you  
18 suddenly switch from looking at the total number of suppliers that each buyer  
19 has to considering how the marginal number of additional suppliers changes  
20 as you begin to get big. Yes? You say I think -- in the middle sentence of that  
21 paragraph:

22 "Accordingly, when considering the pool of buyers, as that pool increases, the  
23 number of suppliers associated with that pool of buyers will tend to the  
24 average."

25 Yes? In the example I have just given, where you have a lot of the buyers in the  
26 market and you are adding one more, the number won't be tending up to the



1 average, will it? It will be tending down towards the average?

2 **A.** It would be tending -- yes, it will go towards the average. The way my model  
3 works is that additional buyer, whether additional suppliers are added or not,  
4 I am using that number for that additional buyer to drive the suppliers' fee  
5 revenue and/or audit revenue.

6 **Q.** But if you are looking at a scheme which is not starting at the top, having lots of  
7 buyers and seeing what difference the last one makes, but is at the bottom,  
8 adding small numbers of buyers, then using an average number can be very  
9 misleading, can't it?

10 **A.** I wouldn't say it would be very misleading. Ideally a model -- you know,  
11 a projection on the counterfactual, if you had the information could be done on  
12 a buyer by buyer basis.

13 **Q.** Okay.

14 **A.** But yes, that information is not available.

15 **Q.** Looking at 6.47, say I have 87 buyers, I add one more and I have 88. Yes?

16 **A.** Yes.

17 **Q.** When I have 88, the average is 37?

18 **A.** Uh-huh.

19 **Q.** I think what you say is --

20 **A.** I don't change the 37 when I change the buyers.

21 **Q.** Imagine in the example you have 88 buyers -- you have 87 buyers and then you  
22 add one more and 88?

23 **A.** That's not how my model works.

24 **Q.** Your first sentence:

25 "As the number of buyers registered on the scheme increases, the number of  
26 additional suppliers it would attract to the scheme would decrease."

1 What I am suggesting to you is that the average number of suppliers tends down  
2 towards 37. So when you have fewer buyers in your scheme and you are  
3 adding, it is likely the number of additional buyers you will add will be above  
4 37, not below 37. Yes?

5 **A.** Mathematically you wouldn't work out that way --

6 **Q.** Exactly. So 6.47 is not a reason why the number should be lower than 37, is it?

7 It is a reason why the number should be higher than 37?

8 **A.** Again, I am not looking to change to 37. I just don't think there is enough  
9 information available for me to do it.

10 **Q.** What I am suggesting to you, Mr Law, is that by choosing 37, the average  
11 number -- the ratio of suppliers to buyers, your modelling is systematically  
12 biased to underestimate the number of suppliers that each buyer will add?

13 **A.** I don't think it is systematically -- again, the choice of 37, which we discussed,  
14 and what the number really should be depends on a lot of other facts that are  
15 unfortunately just not available, or it might be a decision for the tribunal.

16 **Q.** Okay. Just to finish off one point, in your second report, which is Bundle F2,  
17 tab 31, page F, 637, looking at paragraphs 4.32, and following, can I just take  
18 you through that again, because I think what you do is -- at 4.36, over the  
19 page:

20 Since you have expanded the available buyer market to include 51 new buyers, you  
21 want to revisit your assumptions to the number of suppliers per buyer as to  
22 the ratio of 37 of Mr Parker. You actually come out at the 37 again, don't you?

23 **A.** I decided not to change it, because the information that was available, the lack of  
24 clarity on it and some of it is even a little bit contradictory.

25 **Q.** If you go to 4.43 in particular, the first sentence of paragraph 4.34:

26 "The ratio of 37 suppliers provided used by Mr Parker in his calculations."

1 You clarify that he doesn't use it, he just refers to it. "And by me in my calculations",  
2 so you do use, "is based on actual supplier revenue in 2018 divided by the  
3 number of registered suppliers in 2018, in a market without competition."

4 I suggest to you that's incorrect. It is just based on dividing number of suppliers by  
5 number of buyers, isn't it?

6 **A.** Obviously you are suggesting there should be a full stop after in 2018.

7 **Q.** No, it is actually more than that. It is based on actual supplier revenue in 2018  
8 divided by the number of registered suppliers in 2018. That sentence there  
9 suggests it is somehow a measure of revenue, and it is a measure affected by  
10 competition, whereas it is simply a ratio of number of suppliers and buyers --

11 **A.** Revenue shouldn't be in there. I should have clarified that as well.

12 **Q.** I think it is more than that. You can see what Mr Parker actually does.  
13 Mr Parker's report, back in Bundle F1, tab 3, page F68, and this calculation is  
14 at paragraph 39 on that page. He says:

15 "On average, there are approximately 37 supplier subscriptions for each buyer  
16 subscription."

17 So that's his ratio. In footnote 37, he just divides two numbers by each other. Those  
18 two numbers come from paragraphs 38 (a) and (b). They are just the number  
19 of supplier registrations and number of buyer registrations. Do you see  
20 footnote 37?

21 **A.** Yes. He divides 4109 divided by 111.

22 **Q.** Turning to 4.43 of your second report, that's incorrect, that first sentence, isn't?

23 **A.** Yes.

24 **Q.** It doesn't in any way depend on revenue?

25 **A.** It is worded poorly, yes. Apologies.

26 **Q.** It is not affected by the degree of competition in the market either. It is a more

1 substantive point than that.

2 **A.** Yes.

3 **Q.** The competition is irrelevant. It is just the numbers.

4 Okay. Then you go on to say, though -- you seem to take this competition point  
5 seriously, because you say in the next sentence:

6 "The number of suppliers to which Achilles' website refers at 54 suppliers per buyer  
7 is high compared with the calculation performed by Mr Parker."

8 Then you seem to say that competition is relevant:

9 "Given the increased level of competition in the market with two providers of the  
10 service and the requirement for Network Rail to specify the use of RISQS for  
11 its directors, and all other factors being equal, I would consider the true ratio  
12 of suppliers to buyers to be lower than in 2018."

13 Now I would suggest to you there is no reason why competition would affect the ratio  
14 of suppliers to buyers. There's no reason why competition between supplier  
15 assurance providers would affect the ratio of suppliers to buyers in the market  
16 for provision of services in rail?

17 **A.** When I'm referring to competition, I am not referring to competition per se. I am  
18 referring to a kind of counterfactual scenario where there is competition  
19 between Achilles and --

20 **Q.** What I am suggesting to you is that this entire paragraph is misconceived. There  
21 is no possible way that competition between supplier assurance providers  
22 could impact on the ratio of suppliers to buyers in the market for rail services?

23 **A.** Here what I was trying to determine, because I looked at Achilles' website, and  
24 you can see the ratio, but then it is like I don't have enough information to  
25 know if I should change my 37, because I am really interested in who is going  
26 to actually pay on a per buyer basis.

1 **Q.** Fine. Just to (inaudible) all of that, I suggest that by assuming 37 buyers per  
2 supplier you have not adopted a fair and reasonable approach, Mr Law?

3 **A.** I disagree, but that's fine.

4 **Q.** Thank you. Can we go on to the JQS? I think go to your first report now, so in  
5 bundle F1, tab 6, and page 189, F189. You deal with the use of Achilles' JQS  
6 as a comparator.

7 **A.** Yes.

8 **Q.** You give three reasons. So they are, at the top of page F190, assumptions  
9 regarding incumbency; bottom of page F190, a thing about EPIM being  
10 formed by an industry group; and the third one over the page is the extent to  
11 which the EPIM and Achilles' JQS operate in the same market. Yes?

12 Now can we deal with them in turn? I understand your first objection. You reject the  
13 use of JQS as a comparator because in the JQS case Achilles was the  
14 incumbent in the JQS -- when I say, JSQ, I mean the market -- Achilles was  
15 the incumbent in that case whereas in your view in the present case Achilles  
16 would have been the entrant to the market. That's essentially your first  
17 reason, isn't it? Yes?

18 **A.** Yes.

19 **Q.** We have already addressed the point about whether or not Achilles would have  
20 had to be out of the market for a year. In a sense you reject this. One reason  
21 you give is your instructions, that the fact you are instructed to assume it  
22 would have been out of the market for a year, but then you also say in that --  
23 paragraph 4.18 you say:

24 "The tribunal has previously found that RISQS was the incumbent",

25 and you refer to two paragraphs of the judgment and then you refer to Mr Parker's  
26 previous evidence. I just want to deal with those quickly if I may.

1 So can you be given bundle A, please, which is the tribunal judgment. As you will  
2 see from footnote 102, we are looking at paragraphs 75 and 147 which you  
3 have referred to.

4 **A.** Sorry?

5 **Q.** In Bundle A, tab 1, we go to paragraph 75 first, which is the first of the  
6 paragraphs you have referred to. Paragraph 75 starts:

7 "Mr Blackley's evidence was that Network Rail were supportive of the decision to run  
8 an open and comparative tender. Network Rail would be happy for Achilles to  
9 have been appointed."

10 In the middle of that:

11 "Although, Mr Blackley felt that Achilles as the longstanding incumbent had become  
12 somewhat complacent in investment and improving their platform was taking  
13 a long time."

14 So just referring back to your report, you said the tribunal had previously found  
15 RISQS was the incumbent.

16 With regards to this paragraph, it is not a finding of the tribunal, is it? It is the tribunal  
17 reciting evidence?

18 **A.** Yes.

19 **Q.** And it doesn't represent a finding that RISQS was the incumbent, does it? It is  
20 actually Mr Blackley's evidence that Achilles was the incumbent.

21 **A.** Yes.

22 **Q.** Thank you. Let's in a sense strike that one through. Can you go to  
23 paragraph 147 of the judgment. This is in a section entitled "The tribunal's  
24 analysis". I should set it in context. Look at paragraph 141. I think the  
25 tribunal have been considering the possibility of whether there would be just  
26 Achilles coming in or multiple new entrants. The tribunal says:

1 "The least likely possibility is multiple new entrants."

2 Partly in response to that, at 145, the tribunal was reciting Achilles' argument about  
3 the size of the market.

4 The tribunal found, at 146, that even allowing for some additional revenue from both  
5 sides of the market, "we consider the market will not sustain multiple new  
6 entrants."

7 147 is in that context. It was to do with the level of interest shown during the tender  
8 process. Yes? It recited the evidence of Miss Pearson. The last sentence of  
9 that paragraph 147 says:

10 "Since that tendering was on the basis of a chance to supply all of RISQS supplier  
11 assurance requirements, it is unlikely that a greater number or even the same  
12 number would invest to enter, in scale of the prize, in light of RISQS  
13 incumbency and Achilles' re-entry was significantly lower."

14 Do you understand that's where you have taken -- you say the reference in  
15 parentheses to RISQS incumbency and Achilles re-entry is a finding of the  
16 tribunal that RISQS is the incumbent, and to be treated as such for the  
17 purpose of this?

18 **A.** Under instruction, yes.

19 **Q.** I suggest to you you are rather over-interpreting the tribunal's language at this  
20 point.

21 **A.** I am not interpreting it myself. It is more under instruction from my instructing  
22 lawyer.

23 **Q.** So this had been pointed out to you, had it?

24 **A.** Yes.

25 **Q.** Then if I can deal with Mr Parker's evidence. You refer in paragraph 4.18 to the  
26 end of that from 103 to paragraphs 76 to 79 of Mr Parker's first report. You

1 can put Bundle A away now. His first report is in the same bundle you are in  
2 now, Bundle F1, tab 1. We are looking at paragraphs -- ware going to be  
3 coming back to this page. If you can put something convenient in it.  
4 Pages F20 to F21. Paragraphs 76 to 79. I think what you are referring to is in  
5 76A and 77A, the phrase:

6 "Achilles proposed to enter into competition."

7 Is that what you were meaning to refer to when you said that Mr Parker suggested  
8 that Achilles would be the market entrant and not the incumbent?

9 **A.** Yes.

10 **Q.** Okay. Again, what I suggest to you is you are taking -- at this point in his report  
11 Mr Parker is not focused on the issue of doing a sort of serious analysis of  
12 incumbency, is he, as between RISQS and Achilles? He is addressing the  
13 issue of whether or not supplier assurance is a natural monopoly. That's right,  
14 isn't it? 76A?

15 **A.** Yes, he is addressing that at 76, Yes.

16 **Q.** And 77A he is addressing a slightly more complicated issue, or more complicated  
17 terms, but again he is not addressing the issue of incumbency and weighing it  
18 up, is he?

19 **A.** Obviously, Parker and I -- my understanding is obviously incumbency is in  
20 dispute between the parties.

21 **Q.** What you are doing is taking isolated words out of context and placing a lot of  
22 weight on them in your analysis?

23 **A.** Not necessarily placing a lot of weight. I am quoting where he is saying they are  
24 entering into competition with RSSB.

25 **Q.** I see. What you have not done is conduct any economic analysis of your own,  
26 have you, as to whether or not Achilles or RISQS is properly to be regarded



1 "the incumbent"?

2 **A.** I have not conducted my own independent analysis because it was under  
3 instruction.

4 **Q.** Broadly speaking, this first objection is one that arises on instruction?

5 **A.** Yes.

6 **Q.** If I can take you to your second objection, that EPIM JQS is formed by  
7 an industry group.

8 **A.** I can also point out that Achilles is not a buyer or a supplier in this market as well.

9 **Q.** I think that's the next point we are coming to. I was coming down to the next  
10 heading "EPIM JQS was formed by a group of industry buyers". That point is  
11 mentioned at 4.22. We are coming straight on to that. You say that Achilles  
12 is not a buyer in GB Rail. I think that is not in dispute.

13 "As a result, unlike with EPIM JQS, there would have been no ready-made pool of  
14 buyers or suppliers available to Link-Up when Achilles sought to reenter the  
15 market."

16 Typically, when Mr Parker is using the JQS analogy the analogy he is drawing is  
17 between saying Achilles Link-Up is like Achilles JQS and RSSB RISQS is like  
18 EPIM JQS, isn't it? He is using Achilles as the incumbent --

19 **A.** And I disagree with that.

20 **Q.** And you disagree with that, but in this disagreement you are also assuming it is  
21 the other way round, aren't you? You are assuming that Achilles would have  
22 been the entrant and therefore it's an objection -- what you are doing is in  
23 a sense rejecting an analogy between Achilles' Link-Up and EPIM JQS, aren't  
24 you?

25 **A.** No, I am not necessarily doing that directly like that. What I am saying is EPIM  
26 JQS was formed by a breakaway group of buyers. If you look at what

1 happened in the GB Rail market, it is not a breakaway group of buyers  
2 forming anything. Achilles was the operator of RISQS, but RISQS was  
3 RSSB's, and so RISQS is actually the incumbent, from that perspective, which  
4 again is in dispute, and I am under instruction on that basis. But I don't see  
5 the similarity between a breakaway group of 27 distinct actually operators --  
6 they are not contractors -- they are actually operating oil and gas wells --  
7 broke away to do their own assurance programme. To me that's not similar to  
8 what is happening in the GB Rail market.

9 **Q.** What I suggest to you, Mr Law, is what you are raising is not an objection to the  
10 analogy that Mr Parker is making. You are objecting to a different analogy.  
11 He is drawing an analogy between Achilles' Link-Up and Achilles JQS and  
12 between RSSB RISQS and EPIM. What you are doing is objecting to what  
13 would be an analogy between Achilles' Link-Up and EPIM. Yes? That is  
14 based upon your assumption as to incumbency?

15 **A.** I don't see where I'm doing that, but ...

16 **Q.** I have put the point.

17 The last point is the geographical scope, 4.25 to 4.27 below. Tell me if I am  
18 oversimplifying, but I think what you are saying here is that EPIM JQS is  
19 Norway and Achilles JQS has customers outside Norway. So there's  
20 a mismatch of geographical scope. Is that your point on the facts?

21 **A.** With respect to the GB market, yes.

22 **Q.** Is the logic that essentially if there are some customers that Achilles JQS had,  
23 who just would never be interested in moving to EPIM JQS because of the  
24 different geographical scope, that somehow would skew the analysis? That's  
25 your point, essentially?

26 **A.** And also keeping in mind that EPIM JQS was set up for operators.

1 Q. Yes, but contractors can be --

2 A. Yes, they can be, but it was primarily set up for operators.

3 Q. My point, Mr law, it is a question of degree. It doesn't depend on the extent of

4 the overlap. If Achilles JQS hypothetically had one member who couldn't be

5 a member of EPIM, that wouldn't be a very big objection, would it, to the

6 analogy?

7 A. Yes, (inaudible) but also I don't have the information again available about how

8 Achilles operated in the JQS market. Achilles has that information. Of

9 course, EPIM has that information as well.

10 Q. I suggest to you --

11 A. So I don't know the exact degree of overlap in all that.

12 Q. I suggest Mr Gjertsen's evidence is very clear, that very little of Achilles' JQS

13 business comes from outside Norway.

14 A. I understand that Mr Gjertsen has done that, but that still does not change my

15 view, because there are sources of revenue from elsewhere as well, and they

16 appear --

17 Q. You discuss that in your second report. We can look at the detail of what you

18 say. If you go to Bundle F2, tab 31, your second report, page F615. It is

19 paragraphs 2.3 to 3.11 where you deal with Mr Gjertsen's evidence. The

20 tribunal has heard from Mr Gjertsen as well.

21 I think what you do, you look at 2.6 and following. You look at the suggestion that

22 EPIM may have customers outside of Norway. There's some evidence about

23 that?

24 A. Uh-huh.

25 Q. A company called Equinor, and then the suggestion that EPIM has

26 representation in 49 countries. You say this reinforces your view that Achilles

1 JQS and EPIM JQS are different. Yes?

2 **A.** Yes. Here Gjertsen is referring to the size of the companies where it is really the  
3 numbers, yes.

4 **Q.** Okay, but even if EPIM JQS has certain customers for whom Achilles JQS can't  
5 compete, that doesn't really matter for the purposes of Mr Parker's analogy,  
6 does it, because he is looking at the amount of revenue that Achilles can  
7 retain, and that won't be affected by whether or not EPIM is capable of  
8 winning other business for which Achilles can't compete, will it?

9 **A.** Can you repeat that? Sorry.

10 **Q.** So Mr Parker is looking at the amount of revenue that Achilles JQS was able to  
11 retain and Achilles JQS's ability to retain buyers and suppliers won't be  
12 affected by whether or not EPIM is able to access some wholly different set of  
13 buyers or suppliers that Achilles JQS can't access?

14 **A.** The amount that Achilles retained again, as I have stated in my report, I believe  
15 the comparator breaks down at the incumbency point first and foremost.

16 **Q.** So you come back to the incumbency?

17 **A.** Yes.

18 **Q.** Just on that what I am suggesting to you is that paragraphs 2.6 to 2.9, they don't  
19 in any way suggest that JQS are not a good analogy, because they don't go to  
20 Achilles JQS's ability to retain its business, which is the key point?

21 **A.** Again on the EPIM JQS the buyers in there are using it as a pre-qualification  
22 system, so ...

23 **Q.** If we can turn to paragraphs 2.12 to 2.14, this deals with a different point. This is  
24 more -- this is the point where you actually had raised an objection to  
25 Mr Parker's use of JQS and it was on this point that Mr Gjertsen replied to  
26 you. This is actually more on point.

1 Mr Gjertsen had said that of 66 buyers listed as using Achilles' JQS, all but six have  
2 a location in Norway. So the overwhelming majority of the market is in  
3 Norway. Now you do accept the comments as regards the other six, but you  
4 have no reason to doubt Mr Gjertsen's evidence that 60 out of 66 are in  
5 Norway, do you?

6 **A.** I have no idea. Pardon?

7 **Q.** You have no reason to doubt Mr Gjertsen's evidence that 60 out of Achilles  
8 JQS's 66 buyers have a location in Norway?

9 **A.** I have no reason to doubt it, because he has submitted it into evidence, yes.

10 **Q.** So there is a very substantial geographic overlap between Achilles' JQS and  
11 EPIM's JQS, isn't there?

12 **A.** To a certain degree there is some overlap, yes.

13 **Q.** I suggest there is very great overlap. 60 out of Achilles' 66 buyers are based in  
14 Norway. Your objection was that Achilles' JQS has certain buyers who aren't  
15 in Norway, but there are only six of those. There are not very many of them,  
16 are there?

17 **A.** But again here this is where I talked about -- the objection isn't -- my objection is  
18 based on the numbers, not the value of the commerce.

19 **Q.** Okay. Well, I suggest to you that, although this is a minor difference, it is not  
20 a big difference. It is a question of degree and this doesn't -- the question is  
21 not whether JQS is a perfect analogy, but whether it provides useful  
22 information. That's right, isn't it?

23 **A.** Again that's -- yes. I mean, I can see where you are coming from with that  
24 comment. Again I think it's a matter for the tribunal to consider how  
25 comparable JQS really is to be used to actually calculate the losses -- the  
26 figures from JQS comparator.

1 Q. Can I just have one moment, sir? There is one last point, which will be fairly  
2 swift, I think the one technical point of accountancy in the entire case, which is  
3 the issue about the treatment of certain management costs as overheads.

4 A. Yes.

5 Q. Now as I understand -- if I can pick it up in Mr Parker's report, which is -- his reply  
6 report, which is at F2, tab 26, and I think it is paragraph 40 within that. This is  
7 F496. You had adopted an assumption you say at paragraph 30 -- he's at  
8 paragraph 38 -- that the cost of employing management staff was a central  
9 overhead and not a direct cost. That was your assumption, and his response  
10 was that he had relied upon an analysis of Achilles' cost structure prepared  
11 by Deloitte. I think he was referring to -- he made a mistake about the date of  
12 the document. He corrected it to a date of May 2018. I took him to it. We'll  
13 see it in a moment. Then he also referred to -- it says:

14 "In its analysis Deloitte also treated the management costs as being variable and not  
15 fixed overheads."

16 Can I just take you briefly to bundle G8, tab 44? So G8, tab 444? If I can just give  
17 you the title of this document from the index. This is confidential. We don't  
18 need to see any of the exact information. This document is titled "Confidential  
19 Q of E Project Athena" and a further title. It is dated 20th June 2018. There's  
20 confidential and non-confidential versions behind tabs A and B.

21 If I can take you to page 4023, which is just one page back. Yes? It is an operating  
22 EBITDA. The first five lines are various types of revenue and then we have  
23 under "total revenue" it says three types of costs: cost of sales, staffing costs  
24 and overhead costs.

25 First of all, I suggest to you this is Deloitte conducting an analysis of Achilles'  
26 business and they are not treating staffing costs as overheads. We might

1 need to dive down into the detail of that, but that point of -- that's correct?

2 **A.** Yes, I understand Deloitte's did this and this might have been prepared for -- it  
3 wasn't prepared for litigation purposes.

4 **Q.** Then can we take you to -- same point for a moment, but it's a separate line.  
5 Then if you go to G8, tab 428, and again behind 428 there's a confidential and  
6 non-confidential version. It doesn't really matter so much which you look at.  
7 Again if you have to refer to different lines in this, I don't think the actual  
8 numbers in it matter in terms of people's salaries, which is what's in it, but if  
9 you want to refer to something, we need to go into confidential session.

10 So just to understand this, this is the document dated May 2018 which Mr Parker  
11 I think had in mind, and this is titled in the index "Athena RISQS Direct Cost  
12 Estimate FY19". It is dated May 2018. So we see it is in three sections. We  
13 have a list of a whole lot of auditors and we can see their names and you read  
14 across and you can see their salaries. Obviously that's the bit we don't want  
15 to read out in public.

16 If you keep reading across, the columns which are third and fourth on the right-hand  
17 side, there is a percentage allocation against FY18 and FY19. So these have  
18 been fully -- as I say, these are treated as full allocated as being full direct  
19 costs of the RISQS business. They are named individuals, so each is 100%  
20 allocated.

21 Then the next section down is of what seems to be types of administrative staff, audit  
22 schedulers, data validation and then some acronyms which I don't  
23 understand. You can see where I am reading from in the middle of --

24 **A.** Yes.

25 **Q.** In fact, they are not named and they have allocations that are multiples of 100%.  
26 So presumably, for example, there is 200% allocation of audit schedulers.

1 That is the equivalent of two full time equivalent audit schedulers, but not  
2 necessarily two specific individuals. Is that a fair reading?

3 **A.** That would be my understanding, yes.

4 **Q.** Fine. Then I think we come down to the category of management costs down  
5 the bottom, and again let's keep the names and salaries confidential, but we  
6 can seek the job titles: Sector Lead, PM RISQS, PM Lead RISQS, Transport  
7 Manager, Community Manager. If we read across, what we can see under  
8 "Percentage allocated FY18", we can see that there are allocations of those  
9 staff to FY18. So they are being treated as a direct cost. Yes?

10 **A.** Uh-huh.

11 **Q.** But also they are -- if you look at FY19, the allocations change, don't they?

12 **A.** Yes and that's when -- you know, when I look at this, I look at, you know, the  
13 nature of the work they are doing and their management roles. Now  
14 allocating them on a spreadsheet is one thing but they were obviously  
15 reassigned. So I didn't view them as a direct cost. I used them as a fixed  
16 cost, and therefore technically, you know, from calculating the profits, this  
17 comes -- you know, this comes after the contribution.

18 **Q.** But if you look at, say, the Transport Manager, she has a 90% allocation in FY18  
19 and a 30% allocation in FY19.

20 **A.** Yes.

21 **Q.** So that suggests that her allocation varies by reference to the amount of activity.  
22 Yes?

23 **A.** Well, I think in this case they were reallocated, because Achilles in FY19 were no  
24 longer providing the assurance services in the rail market. So it's a matter of  
25 do you lay them off or are they actually a fixed cost and you reassign them?  
26 I viewed it as the latter.



1 Q. Okay. I think we have taken the point as far as we can. I am all done.

2

3 **Re-examination by MR WENT**

4 **MR WENT:** I just have one very quick point on re-examination.

5 Mr Law, I think you lost the percentages you used in the by market capture in your  
6 first report. Actually also -- no, in your first report. We don't need to go back  
7 to it, and I think you said in terms of the 10% and 30% and I think you said  
8 that in part this was based on Miss Ferrier's evidence. I believe my learned  
9 friend said that this is Miss Ferrier's view at 1st May 2018, but you thought it  
10 might have been earlier.

11 Can I just take you to bundle B, tab 4, please? If you can turn within that to  
12 paragraph 91.

13 **A.** Yes.

14 **Q.** Have you read that?

15 **A.** Yes, I have.

16 **Q.** Is that what you had in mind?

17 **A.** Yes.

18 **Q.** And do you want to comment on any further on that?

19 **A.** My understanding and it says here it is confirmation that ten buyers are given  
20 verbal commitment to stay with Achilles, but I believe it's been even corrected  
21 further where they were anticipating on getting commitments from up to ten  
22 buyers.

23 **Q.** You've read just after that, because I think your recollection was this pre-dated  
24 May 2018 and you can see what is said?

25 **A.** Yes. It say.

26 "Kick-off meeting in early September 2017."

1 Q. I don't have anything further. Thank you.

2 A. So I am using that as insight and again with the limited information that Achilles  
3 has prepared with regards to (inaudible) with no budgets, no forecasts, it  
4 made it very difficult, but this is one thing that I noticed during my course of  
5 work that gave me some insights into where they think they are going to go on  
6 the buyer market.

7 Q. Thank you.

8 **THE CHAIRMAN:** Thank you very much.

9 A. Thank you.

10 **(Witness withdrew)**

11 **MR WOOLFE:** That obviously concludes the evidence. I am simply standing in  
12 case there were any matters you wanted to raise at this stage. If not, we will  
13 endeavour to enlighten you further tomorrow morning, sir.

14 **THE CHAIRMAN:** Thank you very much. 10.30.

15 **(4.30 pm)**

16 **(Court adjourned until 10.30 am**  
17 **on Friday, 15th October 2021)**

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### Key to punctuation used in transcript

--	Double dashes are used at the end of a line to indicate that the person's speech was cut off by someone else speaking
...	Ellipsis is used at the end of a line to indicate that the person tailed off their speech and did not finish the sentence.
- xx xx xx -	A pair of single dashes is used to separate strong interruptions from the rest of the sentence e.g. An honest politician - if such a creature exists - would never agree to such a plan. These are unlike commas, which only separate off a weak interruption.
-	Single dashes are used when the strong interruption comes at the end of the sentence, e.g. There was no other way - or was there?