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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)

13 Friday 15 October 2021

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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**

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

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

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Friday, 15th October 2021

(10.30 am)

(Proceedings delayed)

(10.43 am)

Closing submissions by MR WOOLFE

MR WOOLFE: Sir, I have a document to hand up. It is not an extensive written submission. It is nine pages in which it sets out the propositions which I ask the tribunal to agree with us on and then a series of references to the bundle. If I provide you with five copies of that. Right.

You don't have to write down everything I say. You have the references in front of you. Some references I may give you that aren't in the note.

That broadly follows the headings originally in my skeleton, the issues I said the tribunal had to decide. The only one that has been added is at the end, what is section I in this note which is about what modelling approach should be adopted generally. That's the only additional issue which I have added.

Under each there are a series of propositions which I ask the tribunal to agree with us on, and references.

Before I begin with that perhaps two big picture points first, if I may, sir.

First, this is a somewhat unusual market exclusion case, in that often one finds with companies that seek the court's help with exclusion from the market, seeking injunctive relief and so forth, you have companies that were in some difficulty anyway. They were in some sense failing commercially and then they have some negative experience with a large company and it pushes them over the edge and so forth.

Now, the present case could not be further from that. Achilles was a long established provider in the industry. It is common ground it has been for

1 20 years.

2 Mr Blackley I think accepted broadly speaking it had done a good job in that time,
3 albeit it on minor points of detail. It had a stable and profitable business. The
4 references for that I give in my skeleton. Miss Ferrier's fourth statement,
5 paragraphs 25-28.

6 It continues to operate the same business line successfully in other sectors and
7 geographies and so forth. That's the first big picture point.

8 The second one is there is, in fact, an ample pool of large buyers in the rail industry,
9 who have substantial supply chains requiring assurance, which can make
10 Achilles' business viable and profitable, even with a competing RISQS
11 scheme in the counterfactual.

12 My learned friend has made a great deal of paragraph 149 of the liability judgment, if
13 you will recall, in particular, the reference at 149 (1), that the market
14 opportunity available to Achilles would be limited. I think at 149 (5) as well,
15 that certain buyers are not available to Achilles.

16 It is a slightly strange and invidious position for Mr Went and I to stand before you
17 arguing what the tribunal might have meant by certain words in the judgment.
18 I don't propose to do that. I want to address you on the substantive question
19 of whether or not you are bound by those particular words to find that Achilles'
20 prospects in the market were poor, and I respectfully submit that you are not.

21 In context, paragraphs 149 and 150 were addressed to the binary question of
22 whether there was a sufficiently appreciable effect on competition was shown
23 to establish a breach of chapter 1 and chapter 2. Either there was or there
24 wasn't. A threshold question.

25 The tribunal was addressing that question as best it could on the evidence then
26 before it, which had been submitted in the context of a heavily expedited

1 procedure.

2 The tribunal has recently set out reasons why, notwithstanding the factors at 149,
3 factors that suggested it might well be that Achilles would be unable to
4 complete, nonetheless there was a sufficient effect.

5 I would submit that in the present context, where we are considering the extent of
6 Achilles' loss, you are not bound by anything in paragraph 149 to conclude
7 that Achilles' prospects were poor. You may independently reach that
8 conclusion on the evidence, but you are not bound to.

9 Indeed, we now have the benefit of evidence that we didn't have before us at the
10 liability trial. I am going to refer you in a moment to the confidential schedule
11 3 which we looked at partly yesterday. Before we go there, though, may
12 I take you to bundle G3, tab 90? This is an e-mail from Miss Ferrier in
13 September 2017. Before I read that, I will double check it is not ... no.
14 Reporting internally on a conversation in which she says her old friend Ian
15 Anderson, MD of Colas Rail.

16 I confess before I did this case I had never heard of Colas rail. I had no idea
17 whether they were a minor company or large one. She records his views in
18 that, paragraph 1, and some suggestion that there may be some sort of
19 backlash against this change to the new RISQS RSSB model I think.

20 Halfway through that paragraph 1:

21 "He does not think the change to split system of service providers is workable and
22 RSSB will struggle to manage the service. Indeed, he thinks we should really
23 publicise the fact that we are business as usual, same product codes offering
24 same approver assurance levels. He does not think people will want to spend
25 the time or money changes products codes sent to providers, as long as we
26 are not more expensive."

1 So you can see perhaps why Miss Ferrier, when she repeatedly referred to business
2 as usual in her evidence, why a message from the market she got that this
3 might be a good message to go with. It goes on to say:

4 "If, however, NR said our service did not meet their standard, they would be forced to
5 do so."

6 Identifies that explicitly.

7 Then sub-paragraph 2, she mentions the fact they recently won the Midland Metro
8 Project, which I think is outside Network Rail's scope.

9 Now, in a sense, that may be sort of a straw in the wind.

10 However, if we go to confidential -- it is Bundle E, tab 4. I am not going to read out
11 any numbers, because they are confidential. You may recall this document.

12 This sets out, as of 2020, the buyers who are on RISQS, categorises certain of them
13 as to whether they do things like train operating or infrastructure manager, but
14 in respect of others it is silent. Presumably they are all companies providing
15 services to Network Rail or companies active on the market.

16 Then we have a column with Network Rail procurement spend since 2015, and then
17 a series of comments. You recall yesterday I was pointing out that the
18 relatively small number are RISQS charter signatories.

19 Now, I think when I counted this up last night I counted 67 who had either Network
20 Rail procurement spend or, in the case of a few of them, it says registered on
21 BravoNR, where they have some interest in Network Rail. Of those I think
22 seven are regarded as being RISQS charter signatories, just for the tribunal's
23 note.

24 If I may just take you to the entry on there. I think there is no dispute it is a buyer for
25 Colas Rail. If you look across to NR procurements, you can see it is a very
26 substantial number. That's the only point I am going to make at this stage.

1 So this view being expressed by Miss Ferrier that they had concerns about the
2 RSSB and would not want to switch, and that there may be attraction of
3 business as a usual approach, this doesn't come from some very small
4 company. At the liability trial there was a very diverse supply chain. This is
5 quite small suppliers of niche services here and there. It is not one man in
6 an office, not wanting to have the fuff of changing. This is a big company.
7 That's my point. So that may be a serious issue.

8 Looking at this more widely, you can see the scale of procurement spend coming
9 from Network Rail, which comes into these buyers. As I would like to stress,
10 this is only Network Rail procurement spend.

11 I should acknowledge the numbers are large, because they are since 2015. That's
12 five years' worth of procurement spend. Imagine it is an annual. You would
13 have to divide it by five. But there are other companies putting money into the
14 rail market, TfL, HS2 and so forth, Transport For Wales I believe.

15 So this is the lower bound of the money that's coming into the rail market.

16 Obviously, some of it, these buyers themselves retain and spend on their own costs
17 and stuff internally, and their own profit, but I think it is common ground that
18 a great deal of this money and the other money in the supply chain flows
19 through into sub-contracting.

20 My second big picture is this. There is a great deal of money which suppliers further
21 down the supply chain are competing to try to obtain. These are big
22 companies, these buyers. If some of them choose to start mandating Achilles
23 for their own supplier assurance needs, then a lot of suppliers would follow.

24 We saw that in the example of First Great Western, which you see on here doesn't
25 have NR -- the nature of the company, it doesn't do services for Network Rail,
26 but has 1,400 suppliers. That's public.

1 In that context -- this is why I was stressing so much yesterday -- Mr Law's use of 37
2 suppliers per buyer is so problematic. This overlaps with the modelling point
3 I am raising in my aide-memoire. Although it is last in my aide-memoire, if
4 you close that file and turn to the last section of what I call aide-memoire,
5 paragraph 16.

6 My submission, sir, is before we get on to the question of how successful Achilles
7 would have been in the market, and that's the big counterfactual issue you
8 have to decide, there is an issue as to what modelling approach is appropriate
9 to use.

10 I would submit to you that Mr Parker's top-down modelling approach is a great deal
11 more appropriate in this case, because what Mr Parker does, in a sense yes,
12 he does take a view as to Achilles' likely success and bases it on JQS, but it is
13 quite a top-down approach. He translates that into revenues and so forth.

14 Mr Law's approach is bottom up. It is more detailed. It still, however, requires you to
15 take a view on Achilles' overall success. It doesn't get you out of having to
16 decide that difficult counterfactual issue. What it does, however, is require
17 you to form a view as to loads of other very small nitty-gritty issues to try to
18 build it up from the bottom. For instance, his point about the number of
19 suppliers per buyer.

20 What Mr Law said, and perhaps if we turn this up. This is Bundle F1, tab 6. It is at
21 page F213. He uses this ratio of 37 suppliers per buyer. Paragraph 6.45.

22 That is essentially a sort of 1:1 mapping of suppliers to buyer. Each supplier is
23 mapped to one buyer, and if you share them out they have got 37 each. That
24 would effectively be imagining a world -- you apply that 37 figure, you are
25 imagining a world with no multi-homing at all. Each buyer only takes with it its
26 suppliers and those suppliers supply no-one else. That's what the 37

1 assumes. That's why there is an inherent contradiction between that and
2 6.47. Perhaps I was not getting it across so well in cross-examination, but
3 I think Mr Law did agree with me in the end. 6.47 essentially says because
4 there is duplication, it says in the third line, between each buyer's suppliers
5 and other buyers' suppliers, the marginal gain from adding more buyers tails
6 off. That assumes duplication. That is in itself a reason, if there is
7 duplication, why 37 is too low.

8 My point is two-fold. First of all, this is a somewhat unfair assumption to make,
9 because it seems to be common ground that some degree of multi-homing is
10 likely. Beyond that, it is an arbitrary assumption that has to be made on
11 Mr Law's approach. His approach requires you to take a view on a per buyer
12 basis how many suppliers are there. It is that kind of nitty-gritty issue to build
13 bottom up that is somewhat tricky. Whereas, I submit Mr Parker's approach is
14 one where, yes, he does use the JQS experience to inform the likely ratio
15 between buyers and suppliers, but that's a real world data point. But broadly
16 speaking, with Mr Parker's approach the big issue you have to decide is
17 simply how successful would Achilles have been. If you consider not very
18 successful, you drive the percentages down, if you consider more successful,
19 you drive them up. It is a relatively simple approach, and I would submit more
20 appropriate to use in this case than the bottom up that Mr Law uses.

21 **THE CHAIRMAN:** Yes. I think Mr Parker makes the point that the 37 supplier per
22 buyer doesn't really work, if you are starting from scratch, and that's why
23 there seems to be a contradiction between the number of suppliers, looking at
24 6.45, the 1,400 suppliers, that are registered with the single buyer.

25 **MR WOOLFE:** Exactly. If you sign up one buyer, that number for one may be
26 higher or lower than 37. That's true.

1 **MR CUTTING:** The classic is if you sign up Network Rail, you get ten of thousands.
2 That's your paradigm example.

3 **MR WOOLFE:** Exactly. Precisely. We have Great Western. If you think how many
4 buyers would you have to sign up who do have one supplier only before you
5 would end up with the average being 37 having signed up for -- I think you
6 have to sign up half the market of buyers with only one supplier.

7 **MR CUTTING:** Clearly, the complexity comes once you are talking about changes
8 from a different point.

9 **MR WOOLFE:** Exactly. It is simply that point I wanted to try to get across, both that
10 that 37 figure is not the right one to use, but also that this is an inherent
11 problem with Mr Law's overall approach, leaving aside the specific way he
12 comes to it on the percentage figures.

13 With those sort of big picture points having been made, I was proposing to run
14 through the headings in turn. I am not going to take you to all the documents
15 in here. You have seen a lot of them already.

16 **MR CUTTING:** Can I ask a question about this? We may come on to this but it is
17 sort of related to the arguments about incumbency, because the issue of
18 whether there's a correlation between buyer numbers and supplier numbers
19 and whether that average is 37 is relevant in any way, rather depends on
20 what your starting point is, because if you start with an assumption of a base
21 of five buyers and 20,000 suppliers, or whatever, then your delta, as you lose
22 business or gain business, is different from if you start as a complete new
23 entrant with zero, and then it depends on which buyers you buy up. That in
24 a sense is a microcosm of the difference between the Defendant's model and
25 your model. But there comes a point when you have to think about what is
26 that correlation and whether the numbers vary at different points in the

1 spectrum.

2 **MR WOOLFE:** Yes, that is right. I think one would always expect you to get
3 a higher percentage of suppliers than of buyers, because if you sign up one
4 buyer, unless you pick a buyer who --

5 **MR CUTTING:** I suppose the question I get to is in either model that would be the
6 sensitivity in the growth in supplier numbers at different levels of penetration
7 in the buyer base.

8 **MR WOOLFE:** Perhaps I can --

9 **MR CUTTING:** Clearly Mr Parker's model is predicated on, in effect, a loss of share
10 and what happens with retention rates and different retention rates of buyers
11 and suppliers, and then a bunch of revenue associated with that. I suppose
12 my question is that at lower levels of market penetration to begin with, does
13 that have an impact on the sensitivity of the model to both the number of
14 suppliers and the revenue associated with them?

15 **MR WOOLFE:** Well, if I can give a two part answer to that. First of all, if you go to
16 Mr Parker's first report, Bundle F1, tab 3, and I think it is to around page F81,
17 and what you can see is that figure 4, retention of produce. What you can see
18 is there is a degree of modelling of the retention rates as between supplier
19 customers and buyer customers. Standing here, I am not entirely sure how
20 that is derived, but you see that has been done. So it is possible.

21 Clearly, if you were to think that Achilles would lose a lot of buyer customers, so you
22 are down to low levels, clearly (inaudible) much more volatile at lower levels.
23 If you're looking at 30% (inaudible) of the market, it might not make a huge
24 difference.

25 **MR CUTTING:** That might be relevant both in the actual and in the counterfactual.

26 **MR WOOLFE:** Yes, indeed, sir. I accept that. I am not sure it is possible to

1 construct either top-down using JQS experience, which is averaging over
2 large numbers, or indeed by adopting a sort of a priori assumption, as Mr law
3 does, to deal with the small number problem, because it very much depends
4 on the identity of who you are signing up. If it is First Great Western versus
5 UKPN was the other one they named, the small number in rail, they are very
6 different. If you look at say, two, three, four buyers, inherently it is more
7 volatile. It is a somewhat different proposition. I am not sure there is an easy
8 way around that, other than to look at what Achilles has done in the actual,
9 yes.

10 **MR CUTTING:** I just wanted to check my understanding of the limits of the model.

11 **MR WOOLFE:** I was thinking about it at some point this morning, hence why I was
12 staring at figure 4.

13 With that I was going to move to the various points which really go this question of in
14 a sense what percentage of the market would Achilles have ended up with,
15 whether on a market capture basis, as Mr Law says, or on a retention basis,
16 as Achilles says. The fundamental points as to how successful they would
17 have been.

18 The first point in my aide-memoire is Achilles' continuity in the market/delay in
19 Achilles reentering the market, that point. Now I addressed you on the correct
20 counterfactual in principle in opening. I set that out again at paragraph 1.
21 I am not going to go through that again. We simply say the correct approach
22 is the infringement that has been found is the RISQS-only rule. You remove it
23 and then you consider what a realistic counterfactual is.

24 At paragraph 1.3 I cite ECJ in Mastercard. That's not an authority in the bundle.
25 I can provide a copy later in the day. That doesn't say anything remotely
26 about the facts of this case. It simply says the counterfactual must be

1 a realistic one at that fairly high level, which I think shouldn't be a great
2 surprise. I give it to you as a reference.

3 On the facts, however, we think it can be assumed that if you don't have the
4 RISQS-only rule Network Rail realistically needed to have in place the
5 necessary standards, because that's what is done in the actual situation.

6 Network Rail's proposed counterfactual, as I understand, in Mr Blackley's third
7 statement at paragraph 15, is that it would have a note somewhere, where it
8 would say, essentially: "If you tell us you want to come into the market, we will
9 start creating the relevant standards". That's how I understand Mr Blackley's
10 evidence, because the work of producing the standards was too much work to
11 do in the absence of that suggestion.

12 The point I am making in paragraph 1.4, and this is a new point of legal argument, is
13 that counterfactual would be the appropriate counterfactual with a different
14 infringement. It would be an infringement where the infringement was having
15 a RISQS-only rule, without a note saying "We will change it if you want to
16 come into the market", but that wasn't the infringement the tribunal found. So
17 there is a mismatch there.

18 Anyway, having made those points as a matter of legal argument, the next two
19 points, point 2 and 3, are the references to the evidence, since there we
20 engage with Network Rail's case on the facts. Point 2 is the date when
21 Network Rail knew that Achilles was going to be entering the market, was
22 continuing in the market. We say that is September 2017.

23 There is reference to a earlier exchange between Mr Katzen and Miss Cooklin, but
24 we say it is clear from Mr Katzen's email to the market generally of
25 14th September 2017, and you recall that was very widely shared between
26 Network Rail staff. It was pinged around between various, and they were

1 discussing what to do about it. You can see the numerous tabs, 25 or so
2 different e-mails in the bundle.

3 I refer you also there to e-mails between Mr Blackley and the RSSB and internal
4 Network Rail e-mails in October.

5 Clearly, I put those in because they are relevant to the interpretation of what they
6 knew in September rather than being a fresh date of knowledge. That's fairly
7 clear.

8 The third point is we disagree with Network Rail that it would have taken a year for
9 Network Rail to implement the relevant standard, whether the starting date is
10 September 2017 or 21st March 2018, as Mr Blackley suggests. We don't
11 agree it would have taken a year to create the standard in API if Network Rail
12 had been acting reasonably.

13 You will recall I cross-examined Mr Blackley about this quite extensively by reference
14 to the actual implementation of the judgment.

15 You will see our submission there, that the reason it took so long, in fact, from 2019
16 to 2020 was not due to, as he tried to suggest, Achilles being unreasonable or
17 raising unjustified complaints but, in fact, due to Network Rail's own conduct in
18 a number of respects, which I set out at paragraph 3.

19 Now I am not going to take you to all of that, but I just want to focus in on one point
20 which is still maintained I think. Now Mr Blackley did accept on the transcript
21 yesterday -- on Wednesday -- you will see the transcript reference is just
22 above paragraph 4 of this note -- that it was not acceptable, his phrase, not
23 acceptable that the API specification should require Achilles' supplier
24 customers to register with the RISQS system. He accepted that. But there
25 was the suggestion somehow that it was agreed on 17th April that suppliers
26 did need to register with RISQS, and that Achilles could somehow get

1 numbers separately, and so forth, and that Achilles was being unreasonable
2 by persisting in this point after that date.

3 Now, actually, as we are going to see in a moment, this forms an express part of the
4 NR302 standard. If we can just go, to put it in context for a moment, to
5 an initial draft of the standard that Mr Blackley prepared. That's in
6 bundle G10, tab 527. What you will see there is Mr Blackley's e-mail in the
7 previous tab 526, where on 17th October he is forwarding this to Network
8 Rail. You will see a version of the NR302 standard. It still has an old date on
9 it. If you turn to page 4975, this is Mr Blackley's draft, dated September 2019.

10 "Comments. We should reflect new assurance framework and to allow assurance to
11 be provided by multiple supplier assurance providers."

12 My simple point here, if you go to page 6.7, which is on page 4996, you will see
13 under 6.7 "supplier requirements", various things:

14 "Audit qualification cannot be transferred."

15 And so forth:

16 "Each supplier organisation is a separate legal entity in terms of audit", and so forth.

17 "(c): Where an organisation requires registration, they need to register an element
18 and must provide a DUNS number. If the supplier organisation does not have
19 a Companies House number, they should provide the DUNS to define their
20 organisation."

21 Then point:

22 "(e). Suppliers understand if they wish to contract with Network Rail they must be
23 registered on RISQS" and so forth.

24 Then section 6 comes to an end over the page. That deals with in a sense the
25 numbering that each supplier needs to have. 6.7 comes to an end.

26 At some point in the consultation phase -- I don't know exactly when -- a point was

1 added to the standards. If you now put that away and go to G12, and it is
2 tab 628 and what we can see on page 5874 is now 6.9, supplier
3 requirements. 6.91 supplier identification. You see, broadly speaking, this
4 correlates with the text we were looking at, about not transferring audit
5 qualifications, what legal part of the body is defined as needed for an audit.
6 The need for different DUNS numbers, Companies House numbers and so
7 forth.

8 Then 6.9.1 (e):

9 "Suppliers shall obtain a unique ID from the Network Rail nominated supplier
10 assurance platform."

11 So that's RISQS:

12 "And provide that unique ID to their chosen supplier assurance provider to allow the
13 transfer of information by API to Network Rail."

14 So at some point, presumably, discussions about the API and so forth, this was
15 added to the standard and went through the consultation process, but it is
16 very clear that suppliers must obtain this from RISQS and provide it to their
17 chosen supplier assurance provider.

18 You can see why, if you recall the meeting note of 17th April, where there was
19 discussion about it, where Altius and someone from Network Rail were saying
20 suppliers will need to register with RISQS, and indeed suggest they pay a fee.

21 Mr Blackley, I think he said in oral evidence, he suggested on the day that shouldn't
22 be the case, but you can see why walking away from that meeting there was
23 no clarity, and Achilles could see in the standard a specific provision saying
24 that was what was supposed to happen, and indeed the API specification
25 assumed it as well. You can see until they got clear clarity that that was not
26 going to be required, why they were concerned.

1 We say there was not any --

2 **THE CHAIRMAN:** Sorry. What is the relevance of the earlier one, the document
3 you just took us to then?

4 **MR WOOLFE:** Simply as a way in a sense of stressing this point that Companies
5 House numbers or at least DUNS numbers can be unique identifiers. You
6 can see in a moment there can be a range of -- it leads on to a letter we
7 looked at before and we will see in a moment. There is a range of numbers
8 you can use as a unique identifier, and simply that this point must have been
9 consciously added at some point in the consultation process.

10 If I can take you to Mr Blackley's letter. Put bundle G12 away and go to bundle G11
11 for a few minutes. I would like to pause for a minute on the exchange of
12 correspondence in May 2020, because -- G11, tab 617 and 618. I think what
13 was being said was that Achilles was maintaining somehow an objection to
14 using an API to go into the RISQS database, and that this was why Network
15 Rail changed approach, and therefore Achilles is responsible for the additional
16 delay in producing this alternative API.

17 This is simply a covering e-mail from Mr Blackley to Ms Ferrier at 617. The letter is
18 at tab 618. If you turn over to 5809, it refers to the role of Altius and so forth.
19 Under "Alleged conflict of interest":

20 "I do not ... accept conflict of interests ... The primary concern of all parties is ... [to
21 ensure] a suitable system of intraoperability ... In turn, the integrity of such
22 a system requires the universal application of a unique identifier to any
23 audited supplier (so that we can ensure that one supplier does not have more
24 than one record in the master database and that we know which supplier
25 assurance provider is auditing that supplier)."

26 That's the essential technical problem they were grappling with. He says:

1 "We have (perhaps unhelpfully) referred to this process as 'registering on RISQS' as
2 this is where the master database will be held. However, what title process is
3 given, and whatever the theme of the unique identifier (RISQS ID or other) the
4 principle remains the same ..."

5 So there seems to be some acceptance that, in fact, other identifiers are possible,
6 albeit it is not a definitive response.

7 That's by way of context to Ms Ferrier's letter, which I want to spend a little bit longer
8 on, which is at tab 624. There are several points in this letter. We will just
9 deal straightaway with the one that follows on from what we just looked at,
10 which is the bottom of 5837 to 5838.

11 Miss Ferrier records her understanding that, based on Mr Blackley's letter, the need
12 for a RISQS ID was now no longer going to be applied. It is the question of
13 what other unique identifier is to be used. That's quite an optimistic
14 interpretation of Mr Blackley's letter. I would suggest that really Mr Blackley
15 had not clearly conceded that point at all, but she was in a sense trying to
16 move things forward.

17 In a sense, if Miss Ferrier is right, some resolution has been reached on this issue,
18 which is the point of main concern.

19 Stress was placed by my learned friend at one point on the previous part of
20 page 5837, where Miss Ferrier raised sort of above the first hole punch
21 whether it should be explained -- whether such an API is objectively justified
22 at all. She says, level with the first hole punch:

23 "Please set out for us the reason why an API is required in the form currently
24 stipulated ... and what objective safety risk is being managed ... Please also
25 explain how such supplier information will be stored and used by Network Rail
26 and Altius upon receipt - ie, how the data will be secured for use solely in

1 Network Rail's safety functions (and not, for example, for use by RSSB/Altius
2 for its commercial operation ...)"

3 I think Mr Blackley, in one of the transcript references I set out at the bottom of the
4 references under paragraph 3 -- I think it is -- I can't remember which one it is.

5 I think he accepted that was a justified concern. It was a legitimate concern
6 that Achilles should have that confidentiality of its data.

7 The point I would like to make to you now, sir, this is not a refusal to put the
8 information into the RISQS database. It is simply a request for information.

9 That's all Miss Ferrier is doing. If proper thought had been given to that
10 legitimate concern previously, in the process of designing the API
11 specification, then this should be capable of a response.

12 I am afraid I have to jump around in bundles again. Maybe we don't need to go
13 there.

14 Mr Blackley writes back on 23rd June, so about a month later. That's bundle G3,
15 tab 652. Sorry. G13 rather, 652A. We need not go to it because the point
16 is -- yes, there it is. That's where there is a change of direction and the new
17 API approach is introduced. I say you don't need to go there. It may be
18 useful to go there. There is something that's not in that letter from Mr Blackley
19 of 23rd June.

20 He deals with various points. At the bottom of 6538 he deals with this concern about
21 Achilles' data. He announces this creation of a Sentinel API aggregator.

22 **MR CUTTING:** Can I ask a question? Does the standard then change after this?

23 **MR WOOLFE:** No, the standard has not been --

24 **MR CUTTING:** In which case the standard is interpreted to mean that Network Rail's
25 approved supplier, whatever it is, can be Altius rather than RISQS.

26 **MR WOOLFE:** I am not sure. I think Network Rail can depart from limited parts of

1 the standards, if it wishes, in certain ways.

2 **MR CUTTING:** I think you are trying to make a thing of --

3 **MR WOOLFE:** Yes, I was.

4 **MR CUTTING:** -- of 302, but if 302 can be interpreted in an entirely compliant way,
5 because it embraces --

6 **MR WOOLFE:** (Overtalking).

7 **MR CUTTING:** -- rather than RISQS, then that has not really --

8 **MR WOOLFE:** -- in a sense.

9 **MR CUTTING:** Sorry to be pejorative. I had not really --

10 **MR WOOLFE:** The thing about 302, there is the identifier of the provider you are
11 dealing with, the approved supplier assurance platform, which is the point you
12 have raised, sir, but the other thing it says is suppliers must go and get the
13 details from it. That has changed as well.

14 In fact, Network Rail is doing something different to what it says in its standard. But
15 my point about the 17th April meeting was it was reasonable for Achilles to
16 walk away from that meeting, because somebody said to you suppliers will be
17 required to register on RISQS. The NR302 standard had not been sent to
18 them at this point. "We are doing something different." It was reasonable for
19 Achilles to walk away thinking what had been said at the meeting is what was
20 going to happen. That's the point I was trying to draw from it there.

21 I am not saying Network Rail can't depart from it, because, in fact, they have. I have
22 a feeling somebody said it sometimes departs slightly, and then change later,
23 for minor things that they can move away from. I am not suggesting there is
24 anything improper about what they have done, but nonetheless the standard
25 sets out the expectation.

26 Does that answer your question, sir.

1 **MR CUTTING:** Ish.

2 **MR WOOLFE:** I am not saying they were absolutely bound to do what was set out
3 in the standard, but it does set an expectation.

4 In terms of this letter, Achilles data, 6538 and so forth, it responds to the concern
5 and says they are going to create this new aggregator. It says it will be a strip
6 down section of the Exigo platform database and would not require any form
7 of registration with RISQS on the part of suppliers. There is a direct response
8 on that point.

9 What this letter doesn't, however, say is "It is going to take us six months to do this".

10 I simply note that. There is no reason to think that Mr Blackley thought at the
11 time it would take six months, but it is presented as a relatively simple
12 process.

13 Those are the points I wanted to focus on arising in this delay, because I think
14 Achilles was still being blamed somehow for having raised concerns about the
15 API, and somehow that they were responsible for the additional six months.

16 Our case is, in a sense, if the system had been designed -- a sensible system was,
17 in fact, designed, it had been designed from the outset with obvious and
18 legitimate concerns taken into account, these delays would not have been
19 encountered. That's our submission.

20 Returning to my aide-memoire for a moment, fourth and fifth points, we come to the
21 contracts which have taken on much more significance in this case than
22 I think anybody thought they would do when we started three years ago.

23 Point four, our case is Achilles could have retained its buyer and supplier customers
24 under its existing contractual arrangements, subject to minor amendments
25 being made in due course.

26 I am going to make that good by looking at the contracts themselves. These are the

1 contracts between Achilles and its customers, not the concession contract
2 between Achilles and RSSB.

3 If we go to bundle G2.

4 It is subject to a confidentiality agreement. It is hardly surprising. There was
5 an express confidentiality term in the contract, so I can't read bits out, with
6 Scot Rail. You will recall the form of this contract was a front end and then
7 a service schedule, which starts on page 1171.

8 You can tell from the date of signature of the main agreement -- it's 1st July 2015 --
9 that that continues on, but then if you look in the service schedule, page 1171,
10 under 5.1, you can see a subscription term. You can see it's a renewing
11 matter. So these get reissued.

12 In a sense, what I want to look at is the definitions again on page 1171. I think I put
13 to you in opening, sir, actually this is tied quite loosely to the RISQ scheme as
14 it exists as a structure of the RISQS Board and RISQS scheme documents
15 and so forth.

16 If you look at 1.5, the definition of RISQS scheme, there is no reference to the
17 RISQS Board in that, and no reference to the RSSB. The RISQS scheme
18 means:

19 "The database of suppliers compiled and maintained by Achilles and used in the
20 provision of services to buyers predominantly within the rail sector", and so
21 forth.

22 So when at Section 3 under "services" there is provision of various matters to the
23 buyer customer it is in that sense self-contained.

24 The only link in this document to people outside Achilles is in the definition of RISQS
25 Board. You can see the definition of the RISQS Board, however, and I submit
26 it is not tied really to the RISQS scheme, as it has come to be constituted, in

1 a sense owned by the RSSB.

2 There is a reference:

3 "It is committed to the governance of the Link-Up scheme and assisted activities."

4 Generalised reference to representative buyers, trade bodies, Railway Station
5 Standards Board and so forth.

6 There is a reference to the RSSB there. That is really the only -- that's the only link
7 in this service schedule to sort of the external mechanics of the RISQS
8 scheme as it is understood. That's not surprising. This was originally --
9 Achilles had been providing Link-Up for many years.

10 The other thing to understand, in terms of competition, is there are not that many
11 buyers, as we know. There are 111 or 112 buyers they were trying to get.
12 There would have been a process of trying to win them over. "Come with us",
13 and so forth.

14 Insofar as it is necessary to agree a slight amendment to the exact description of the
15 board for governing the scheme, you can no doubt do that, but otherwise this
16 contract can just carry on. Even if certain provisions that specifically relate to
17 the RISQS Board cannot fully be complied with, because the RSSB won't
18 cooperate, 2.1 and so forth, that doesn't necessarily mean that all the other
19 services under the contract have to cease. That's not to say a failure of the
20 entire purpose of the contract. It is not a frustration type situation. That's my
21 submission.

22 Now, on --

23 **THE CHAIRMAN:** But there would have had to have been some amendments to it.

24 It is quite confusing if you read this in the context of the new arrangements
25 after --

26 **MR WOOLFE:** Certainly it would have had to have been changed on the next

1 renewal date, without question. In terms of -- I mean, so if we actually look at
2 what was required to be done differently, if you look at 2.1, I mean, that's
3 where the RISQS Board itself comes on -- takes more prominence. It says:

4 "Will meet from time to time", and so forth:

5 "And shall be eligible to be nominate for RISQS Board membership."

6 That is somewhat confusing, but there is not urgent issues, and there is no
7 suggestion the whole contract cannot operate. Circumstances do change and
8 contracts happen in different circumstances, and sometimes people do their
9 best in the circumstances, but it is not an insuperable barrier to Achilles
10 continuing to provide services under this contract to buyers.

11 Can I move to the issue --

12 **THE CHAIRMAN:** We are going to have a five-minute break now.

13 **(Short break)**

14 **MR WOOLFE:** Thank you, sir. I was going to move on from the buyer contract to
15 the supplier contract. This is my final high level point about the buyer
16 contracts. Obviously that requires Achilles to provide a certain service. It
17 doesn't prevent them from providing another service, if I can put it that way.
18 You don't always have to have a signed contract to provide a service either. If
19 you just continue to provide access to a database, that may be without having
20 a signed contract in place, but it doesn't prevent any -- even if it is marginally
21 outside the terms of this contract, it doesn't prevent that happening.

22 I think the point being put against me by my learned friend is that the terms of the
23 supplier contracts prevent Achilles from making use of the supplier
24 information, and therefore that would prevent them from providing the service
25 to buyers. That's where the contract point bites a bit more.

26 There are two contracts. One is at G2, tab 28. The other is in the miscellaneous

1 documents bundle at tab 16. If you open the G2 one and place it to one side,
2 because we are going to come to it in a moment, and then take up the
3 miscellaneous documents file at tab 16.

4 It is tab 29 for the Achilles' RISQS one.

5 Just to remind you of the relationship between these two documents, as I understood
6 Miss Ferrier's evidence, miscellaneous bundle tab 16 is the generic standard
7 terms and conditions that every supplier had to sign up to, to register and
8 access the system. The RISQS audit terms, which are G2, tab 29, were
9 terms which those who had RISQS audits signed up to as well, in addition.
10 As it happens the RISQS audit terms to deal in some sense with registration
11 in the system as well, if there is an overlap, but I don't think any inconsistency.

12 If we start off with the miscellaneous bundle at tab 16, I fully accept that there is
13 a great deal more reference in these terms to the external framework of the
14 RISQS Board as it actually existed. The question is what the significance of
15 that is. You can perhaps see that. There is a definition of the RISQS Board,
16 which is explicitly defined by reference to the RISQS scheme document. It is
17 incorporated by reference, I suppose. The RISQS database means:

18 "The database of supplier and other information operated by Achilles on behalf of the
19 RISQS Board as defined in the rail industry."

20 Again, more reference there.

21 I think my learned friend is pushing the view that this connection to the RISQS Board
22 and the definition of this database was fundamental to the contract. So, in
23 effect, once Achilles was no longer operating that database on behalf of the
24 RISQS Board, either this contract was at an end or the consent to the use of
25 the data transferred under it came to an end. I am not sure exactly how it was
26 put, but I think that's the point that is being put.

1 I submit it is not clear that is right, for a number of reasons. Perhaps start with this
2 one. The key provision in terms of the services being provided is the
3 definition of the RISQS database. As you can see, that's in terms of general
4 terms:

5 "Achilles will provide to subscribers the information provided by suppliers through the
6 questionnaires into the RISQS database."

7 That's the fundamental point. That's where the consent to use of the data is, if you
8 like. So it is the definition of the RISQS database that matters.

9 Clearly, if you look at the term "RISQS database" and its definition, as being one
10 agreed by Achilles on behalf of the RISQS Board, that clearly identifies, we
11 submit, as at the date of the signing of the contract, when in the year the
12 supplier signed up to it, the database in question, which of Achilles' databases
13 it was.

14 There is then some sort of purposive connection. It is the one that Achilles operates
15 on behalf of the RISQS Board.

16 That is the same database that continues in existence from 30th April to
17 1st May 2018. I would submit, since that is the right way to interpret the
18 RISQS database, in this context, it is clearly an annual contract which -- is
19 that right? It is an ongoing contract anyway. You interpret the terms as they
20 exist at the time in question. It doesn't require to be interpreted as being all
21 consent to the information in that database comes to an end as soon as
22 Achilles ceases to operate it on behalf of the RISQS Board. Clearly, these
23 terms would need to be amended at the next renewal date.

24 That is actually consistent with Miss Ferrier's evidence -- I am afraid I don't have
25 a transcript reference for this but I will try to find it later on -- that Achilles,
26 when there was a change up from Link-Up to RISQS had simply issued new

1 service schedules as at the next renewal date. There was not a wholesale
2 exercise of amending terms, as at the time of changing from Link-Up to
3 RISQS, and that was their expectation at the time. That's the second point.

4 **THE CHAIRMAN:** It would be thoroughly confusing, wouldn't it, if you read this in
5 May '18 in the counterfactual scenario? References to the RISQS database
6 no longer make sense.

7 **MR WOOLFE:** If you read this then, yes, I can see on its own it does require a bit of
8 interpretation. However, the reason it is being raised is what would have
9 happened on the ground. Did, as a matter of law, Achilles' right to use the
10 data come to an end, so it had to shut off access to parts of the database.
11 I that's the point that's being made. Another question is what would happen
12 with subscribers, in fact?

13 I would submit the reason I have given does require some interpretation, but
14 understood in context of when it was signed, you can see that consent was
15 given to load the information into the database, and I submit that persists.
16 But, in practice, whenever a supplier wants to log in thereafter, they can be
17 presented with the requirement to sign up to new terms and conditions, and if
18 they fail to do it at that point, then matters are different.

19 Actually, that's rather what I think Ms Scott -- you see the last reference in my
20 paragraph 4.2. Where are we? So if you look at bundle G7, tab 389. I admit
21 this is moving away slightly from the point of law to the interpretation of the
22 contract. Behind 389, there is an e-mail exchange in early May 2018. What
23 you see, G7, 389, page 3507, there's a Colin Flack e-mail that has gone to
24 a Jed Yaqub at Mitie. An email shot has gone out to a large number of
25 people, and because somebody from Mitie is in Achilles' customer contacts,
26 as it were, it has gone to them, they forward it to Network Rail. You can see

1 the nature of the e-mail that is sent.

2 In terms of how that is dealt with, if you go back to page 3505, there seems to have
3 been some concern raised about -- it is not clear from the e-mail chain --
4 about customers suppliers updating information and so forth in the Achilles
5 database. You will see an e-mail from Ms Scott dated 3rd May 2018 to Jed
6 Yaqub:

7 "Once organisations accept this they are accepting T&Cs, which means Achilles can
8 keep their information into their new platform. Current contract is for it to be
9 kept in RISQS, not TransQ."

10 That was her belief at the time. She was alive to this point at the time through
11 someone in Network Rail.

12 I have given you submission as to why the issue should be read in that way. There
13 was clearly an understanding at the time that Achilles could get round this
14 problem simply by presenting new terms and conditions, when suppliers log
15 into the database for the first time.

16 Actually, in the situation where Achilles does manage to persuade customers to stay
17 with it, this contractual problem rather goes away, because if they are using
18 the database, they have to consent to the terms of it.

19 Can I move to a different contractual point, which is my learned friend's submission,
20 which I will elaborate on in due course, this point about a non-compete
21 provision, as he calls it, in the concession contract between Achilles and
22 RISQS.

23 I don't know if you still have bundle G2 amongst the many available. You can put
24 away everything else except G2 at the moment. It is G2, tab 30 is the
25 concession contract.

26 **MR CUTTING:** 13 or 30?

1 **MR WOOLFE:** 30, 3-0, sir. You will recall I took you to this in opening. Let me just
2 find my notes on this point. Yes. My learned friend suggests there is
3 a non-compete provision in this, which applied during the term of the contract.
4 I submit the situation is not that straightforward. There is no doubt there was
5 some constraint on Achilles, but it is not quite to the extent my learned friend
6 suggests.

7 The two relevant provisions are, I think, 4 5B on page 1101 and then clause 8.9 on
8 page 1104.

9 To take them in turn, it says:

10 "For the duration of the agreement, the service provider shall not undertake activity
11 outside the agreement that cause a conflict of interest in relation to the
12 services."

13 Now, a conflict of interest, and it is defined by reference to the services. The
14 services involve many things, in particular auditing and so forth, where
15 conflicts of interest are important.

16 Clearly, there's some sense of duty of loyalty, because at 4.5 (a), it is that Achilles is
17 the sole provider for the term of this. So there is some sort of mutuality of this
18 at this level. But I submit it is not clear at all that Achilles would not be able by
19 reason of 4.5 (b) simply to inform its customers that it will be operating
20 a service after 1st May, because that's not conflicting with the service it is
21 providing up to 1st May. It is simply saying: "Once this agreement is over, we
22 will be providing something else".

23 **THE CHAIRMAN:** What do you make of the fact that Achilles seem to have
24 interpreted that in a restrictive way, and presumably they would have done so
25 in the counterfactual?

26 **MR WOOLFE:** We will look in a moment at a couple of references about how they

1 did interpret it, sir. If I can answer that --

2 **THE CHAIRMAN:** I agree it doesn't seem to be saying anything -- doesn't seem to
3 me to restrict Achilles from saying "This is what we will be doing after this
4 agreement comes to an end."

5 **MR WOOLFE:** On the factual, there seems to be some differences of opinion within
6 Achilles as to how it should be interpreted and what people should do.
7 People take different views on legal risk. Some people get very nervous
8 when they read anything in a contract, but other people are more robust.

9 You also have Miss Ferrier's evidence that their marketing strategy was in fact
10 business as usual, in a sense to carry on and have trust in the fact that people
11 will let things roll over, to some extent. In a sense, it didn't require them to do
12 anything to conflict with this. You will also note her evidence that she was
13 having conversations with buyers, which you will have seen. They were
14 willing to carry on. We see from the facts and the evidence, even in relation
15 to Colas Rail is an example of Miss Ferrier talking to a big buyer in the
16 industry. There is not some sort of absence of communication about this.

17 What we can see is in a sense how RSSB, who is the counterparty to the contract,
18 interpret it as well.

19 I am going to show you 8.9 for a moment, which is relevant to the letter I am going to
20 show you in a second. 8.9 is the starting position Achilles can use its existing
21 IP rights, including the Link-Up name, outside the RISQS scheme, provided it
22 doesn't conflict with this agreement or communications policy in schedule 5.
23 For clarity the name Link-Up will not be used for the period of this agreement,
24 except by agreement and with the approval of the RISQS Board. It does
25 rather look like a term that has been put together in the process of drafting,
26 because the second part of it seems to override the first part, but there we go.

1 So there are some restrictions with regard to the use of the Link-Up name.
2 That's clear.
3 Then, schedule 5, which for your-note is at page 1131, the various provisions on the
4 communications policy, but they are really to do with communications in the
5 name of the schemes, but there are requirements for RISQS related to
6 communications to be approved.
7 You see at 1131, third paragraph:
8 "All RISQS relating to communications undertaken by the service provider shall be
9 subject to prior approval in writing."
10 If we look at a letter that RSSB wrote to Achilles, following Mr Katzen's e-mail in
11 September 2017, if you recall his e-mail to the entire market, which I gave you
12 reference for earlier, if you have bundle G4, tab 115, what you will see there is
13 both another version of that e-mail and the RSSB writing -- sorry. G3, 115.
14 I apologise. G3, 115. In that tab is a letter to the RSSB. On page 1780 is
15 a copy of the e-mail that Mr Katzen sent, if you recall it. That e-mail, if you
16 look at it, both referred to Link-Up in various ways and referred to the RISQS
17 service and so forth and that the RISQS service continued.
18 In a sense you can see both the users, the name Link-Up and RISQS related, and
19 then it announces that an event will take place.
20 The RSSB's response is interesting, because at 1778 they write to record concerns.
21 Under the event on 10th October 2017, they suggest that the holding of that event,
22 a drinks event, would cause a conflict of interest. That's what they put
23 forward.
24 We know that event took place, because that's the event that Mr Stephen -- if you
25 recall I cross-examined Mr Blackley about, his attempts to stop one of his
26 colleagues attending the event. That was the event, as I understood it.

1 Anyway, that point is raised.

2 Over the page, communications:

3 "We also considered the wider communications you sent out to third parties to be
4 contrary to the communications policy. As you are aware, the contract
5 requires all RISQS-related communications undertaken by Achilles to be
6 approved in writing by the scheme manager and requires use of Achilles' own
7 branding or identity in connection with the RISQS scheme to be formally
8 agreed and signed off."

9 So essentially you sent this out, talking about your continued provision to the RISQS
10 service to 1st May, and saying you are carrying on, and you used Link-Up in
11 it, and Achilles in it and because it is RISQS-related, we consider it is in
12 breach of 8.9. But they are not suggesting merely informing the market of
13 an intent to carry on providing the service would constitute a conflict under 4.5
14 (b), nor in itself, if correctly phrased, a breach of 8.9. That's my submission in
15 relation to that.

16 I am going to move along fairly briskly sir, now, if I may.

17 That's everything I had to say on my heading (a) about continuity in the market.

18 I have dealt with that in a sense a number of points.

19 Point (b), supplier multi-homing. We have a number of references on this. It seems
20 broadly common ground between a number of witnesses and the experts that
21 where important clients, important customers, require a supplier to register on
22 a different system, they will, in fact, do so.

23 You will recall Miss Bate's evidence that her Fusion people, although she didn't like
24 joining new supplier assurance schemes, she listed the supplier assurance
25 schemes that her firm is a member of, including several in the construction
26 sector. So there is evidence of multi-homing.

1 In this context I should deal with Miss Grant's evidence, that was not subject to
2 cross-examination if you recall. I think it has been common ground between
3 my learned friend and me, in a sense, I make submissions as to the weight to
4 be attached to it in the light of the fact it was not subject to cross-examination.

5 Miss Grant's evidence. You can put away bundle G that you had out and it is in
6 bundle D, tab 4. My cross-examination of Miss Grant, had I done it, would
7 have been quite short. For your note, paragraphs 10 through to 16 and
8 paragraph 21 of this statement, what Miss Grant essentially does is she likes
9 to be audited through RISQS and do things through RISQS because she
10 wants to have robust assurance of what she is doing. She wants to be on it
11 for reasons independent of her buyers. Even if buyers didn't require it, I think
12 she says at paragraph 21:

13 "Although our clients require us to be on this because of the safety critical nature of
14 our work and the implied quality standard we want to be on RISQS anyway for
15 the various reasons set out above."

16 I would not have taken issue with that. That's what Miss Grant says.

17 Where I would perhaps have taken issue is two points. First of all, at paragraphs 23
18 to 24, where there is criticism in some sense of the audits that Achilles had
19 been providing.

20 Mr Nelson's professional pride, in a sense of being engaged at this point, I would
21 have been challenging her on that. I would suggest that one view from one
22 market participant does not suggest some systemic problem with Achilles'
23 audits. You recall Mr Nelson -- various points about customer satisfaction.
24 They seem to relate to audit scheduling and that kind of thing, rather than
25 criticisms of Achilles' auditing itself. There we are. I would suggest little
26 weight can be placed on that.

1 The more critical point for you, sir, is paragraphs 29 and 32, where she says
2 "potential of switching to another scheme":

3 "We would not switch to an alternative offering because one of our clients did so or
4 asked us to move schemes. We would need substantive evidence as to why
5 this might be a requirement, and want to move away."

6 In a sense, with regard to switching, I would not take issue with that. But
7 multi-homing, she says:

8 "I cannot think of a scenario in which Fenix would want to be on another scheme
9 which provides the same assurance as RISQS. I cannot see there would be
10 any point in multi-homing, even if a client were to specify Achilles."

11 At that point I would have taken issue with Miss Grant, because it is considerably at
12 variance with all the other evidence of all the other witnesses. However much
13 she may like RISQS for giving her own assurance, in a sense, if an important
14 customer said "You must do this, you must join this scheme as well", it would
15 be a very idiosyncratic business decision to refuse to do so.

16 However, Miss Grant is not here. I would suggest, for present purposes, you should
17 place little weight on it. It is one person. I think the overall view we have of
18 the market is if customers require you to be on another scheme, you will join.

19 That's everything I wanted to say about Miss Grant's evidence.

20 On the issue of buyer multi-homing or single homing, I give you the references there.

21 I don't have anything to add. In a sense, it seems to be common ground
22 largely that buyers are much more likely than suppliers to single home to
23 a single scheme, albeit some buyers do multi-home in different industries, and
24 they would choose the one that best fits their needs.

25 Where I have a bit more to say is on the issue of those companies who are direct
26 suppliers to Network Rail who are acting as buyers. Now, again the point --

1 I have already shown you the schedule, which suggests that there are a large
2 number of these buyers with a lot of money at stake, and only a small number
3 signed up to the RISQS charter.

4 What I would like to do is show you perhaps what it means to sign up somebody who
5 is a supplier to Network Rail as a buyer.

6 I am going to show you some confidential material in bundle 1. I am not going to
7 read it out. I will just point it out to you on the page. It is bundle G13, 679.
8 This is an agreement between Achilles and MACE group. MACE -- this is not
9 confidential -- was not registered as a buyer on RISQS, so it doesn't appear in
10 that confidential schedule I showed you, but it is a supplier to Network Rail.
11 Hence Mr Blackley was speaking to people at it. I don't think that's disputed
12 by Network Rail.

13 If I can take you to page 6756, this is the front end of a contract. There are
14 definitions on page 6754. Page 6756, we have appendix 1, implementation
15 services. I ask you to read clause 4, and you can see what the expectations
16 are on Achilles and the customer, as regards implementing this.

17 I call your attention to 4 (b) and 4 (d), 4 (e) and so forth, 4 (f) and 4 (g). This is all
18 understood as to what will be done in this respect. That's an implementation
19 plan.

20 Then, on page 6760, we are now in something called appendix 2, "Subscription
21 service. Link-Up." You see what it is and what is being provided.

22 Then clause 4, the process of onboarding. Page 6760. Clause 4.1, there is
23 an obligation on the customer. That's important, because when you look at
24 page 6764, you will see fees set out. The reason, in a sense, why people are
25 willing to offer buyers good deals, if I can put it that way, to sign up, is
26 precisely because if they agree to something like clause 4.1, on page 6760,

1 you can see how that drives value to Achilles.

2 You can also see on page 6764 certain supplier fees. I just wanted to put that to you
3 as an example of a company that is a direct supplier to Network Rail choosing
4 to sign this contract, and the value it drives in terms of -- once it is
5 implemented, it takes time for these things to happen over a schedule of
6 time -- the value it is expected to drive.

7 **THE CHAIRMAN:** Those supplier fees are not discounted?

8 **MR WOOLFE:** I am not sure what they might be -- in a sense discounted by
9 reference to -- they are what's stated there. I don't think they have been
10 reached by any form of discounting or anything else. Even if they have, they
11 are what they are. You will see that how the different levels are worked out
12 depends how many content modules are answered. Okay.

13 Having dealt with sort of contractual matters at quite some length, I am just going to
14 turn to in a sense the flip side of Achilles' position, which is the suggestion by
15 my learned friend that Network Rail's entire case -- that RSSB RISQS was the
16 incumbent, was in existence before and continues uninterrupted.

17 I dealt with this at quite some length in opening. I am not going to go on at some
18 length now. Our point is essentially under heading (e). There were significant
19 discontinuities between Achilles' RISQS and RSSB's RISQS in various
20 respects. We set out those respects in paragraph 10, with the references to
21 the evidence.

22 There are some points of interpretation as to the extent to which Achilles' contracts
23 carried on and what it would have meant in practise. We have dealt with
24 those.

25 It is absolutely clear to provide a service RSSB RISQS had to sign up both buyers
26 and suppliers to full contract terms. In terms of the buyers, you have seen

1 what buyer contracts look like. These are not insignificant agreements.
2 Buyer contracts are not ones where you simply click and accept terms and
3 conditions. If you try to agree those from scratch, they are significant and
4 require negotiation, if there is competition around.

5 You need to consider how RSSB would have been performing in the counterfactual
6 where there were clear Network Rail standards, which recognised the
7 possibility of alternative schemes existing. All of the RISQS suppliers you
8 have seen in confidential schedule 3 -- there were more even at the time, but
9 that is a 2020 list -- would have known that there was a possibility of different
10 supplier assurance providers being available, and would have known they had
11 the option as to who to go with and may want to negotiate different deals. So
12 that process of onboarding and competition would have been entirely different
13 for the RSSB, in the counterfactual, where Network Rail had a proper
14 standard in place. The whole landscape would have been different.

15 You can similarly see, on the supplier side, RISQS had to persuade suppliers to log
16 in and sign up to new terms. As you can see, that's really driven by what
17 buyers are going to be on the platform.

18 It was having difficulty getting through all the suppliers, even in the actual situation.
19 You will recall the e-mails from Graham Cox and Miss Scott of 24th
20 April 2018. Just for your note, those are at G6, 343 and G6, 346. You will
21 see references under paragraph 10.2. They were quite a long way short still
22 on 24th April, a week before the scheme went live. I think they had about
23 58% of the suppliers on the new platform. Ms Scott's e-mail is the one where
24 she e-mails the principal contractors, and says: "Please can you get all your
25 suppliers to sign up, otherwise they will be invisible". Do you remember that?

26 The next one is 10.3. It is worth pausing on this. Customer data. As well as the

1 permission to use data, there is also the question of what data set you are
2 looking at and what you can provide to your buyers.

3 The letter from Achilles dated 21st March 2018, at bundle G5, tab 223, so the first
4 reference under paragraph 10.3, and what you can see is Achilles was
5 delivering information in tranches, quite naturally, because, as I say, it couldn't
6 on 21st March deliver the information that would be current as of 1st May.
7 That would be impossible. This was being provided in Excel and pdf format.
8 So the initial tranche goes across in phase one, but there is an important rider
9 to that under phase one:

10 "Where supplier data on RISQS is supplemented by third party information, none of
11 the third party information will be provided as part of the supplier data
12 transfer."

13 There is some provision about that in the supplier agreement we were looking at
14 earlier.

15 "... as this information is provided by Achilles to buyers under agreements between
16 Achilles and a third party provider."

17 So a buyer who is switching across will not -- if they stay with Achilles, they will see
18 the same thing they have always seen. If they go to RISQS, they are not
19 necessarily getting exactly the same thing. Albeit RISQS may enter into
20 a similar contract themselves, the integration would be different.

21 Then there is a transfer of health and safety certificates on 20th April. But if you note
22 at phase three:

23 "We will finally open the FTP service to RSSB on 11 May 2018, for 24 hours, to
24 enable RSSB to access audit reports published in the intervening period and
25 historic audit reports for large suppliers as of 29th March, 2018."

26 So, in fact, there's going to be a period of time, a couple of weeks, while this goes

1 across, the last month's worth of data. So RISQS for RSSB wouldn't have
2 had a completely live database as of 1st May 2018.

3 Under the concession contract, they are not entitled to just deliver a live database.
4 They are entitled to sight of, in a sense, all the data that their scheme
5 manager could have viewed up to then.

6 Still in bundle G5, I was going to move to under 10.4, the identity of the entity
7 providing the audit. This is quite a significant matter as well. I think it seems
8 clear that trusting the person auditing you is quite important, in terms of the
9 assurance that you get from it.

10 As a buyer trusting the entity who will be auditing your suppliers is important and
11 indeed the supplier having trust in their connection with the auditor as well.

12 If you look at tab 270 within bundle G5, you will recall -- the same document behind
13 271 as well, minutes of a meeting, so I think it was presented at that meeting,
14 but I showed you it in 270, so let's go with that. Pages 2531 to 2532. This is
15 a document over which Network Rail asserts confidentiality, so I will not read
16 matters out.

17 If I can call your attention to page 2531, the bottom row on that page, some concerns
18 are expressed. Some concerns are expressed for a particular reason to do
19 with the way a bid worked.

20 Then, over the page, 2532, risks is set out as well. You can see there is an overlap
21 between those two. They are set out separately. So this was obviously seen
22 as an important thing by the RSSB.

23 I am going to take you in a moment just to the other reference under 10.4, which is
24 the email from Darren Male of Quensh Consultancy. I also cite the same
25 presentation under 10.5, because if you look at 10.5, my rubric is "Risks to
26 service provision due to the RSSB RISQS commercial structure".

1 What I am really pointing you to is the two entries on page 2531. There is a change
2 of commercial structure. It is not simply the RSSB has re-tendered for
3 provision of the service. It was not structured as a contract for service
4 provision before. It was a concession contract and the commercial risks and
5 operational risks for people arising out of those commercial structures are
6 different following 1st May 2018, in particular, the bottom row on page 2531.

7 Having shown you that, internal RSSB concerns, I just remind you of bundle G7,
8 tab 400, that e-mail that I referred to there. That presentation is dated
9 March 2018, to fix it in your mind. So G7, tab 400. That having been
10 an internal RSSB concern in March. We are now G7, tab 400, page 3625,
11 an e-mail from Mr Darren Male of Quensh Consultancy Ltd, at the bottom of
12 the page, to Miss Gillian Scott of 8th May.

13 I infer, from the content of this e-mail, that he has a client base and he somehow
14 deals with managing audits or something of that sort. I am not sure exactly
15 what. There's concern about both RISQS and Achilles TransQ Global issuing
16 invoices. Second paragraph:

17 "There is a level of uncertainty in my client base on the ability of Altius and Capita to
18 deliver the RISQS scheme. Having hosted a Capita RISQS audit already, I
19 felt it didn't deliver the level of assurance and depth that Achilles provided.
20 Also as you are probably ..."

21 There is an "aware" missing or something.

22 "... the transfer of the data from Achilles to Altius platform was very poor. The tone
23 of Capita's e-mails are also causing concern.

24 I am aware that the scheme is run by RSSB, not Network Rail ..."

25 A number of points. Firstly, there is some concern -- the identity of the service
26 provider, the identity of who audits you is important. Probably why companies

1 tend to have the same financial auditors year on year. Some level of trust is
2 important.

3 There were concerns about this. Simply a straw in the wind. He expresses concern
4 about what Capita is doing. I appreciate we have other people expressing
5 concern about Achilles. My submission there is it is individual people saying
6 "I had this experience." It is not a great weight to the tribunal. You have one
7 going one way and one going the other way.

8 Then reference to the transfer data.

9 What I am suggesting to you is these transition issues were real at the time, even in
10 the actual situation, where everybody was moving across wholesale to the
11 RISQS portal.

12 Putting that away, that deals with the issue of discontinuity between Achilles' RISQS
13 and RSSB RISQS. There is then the question of incumbency raised. Our
14 position, in line with Mr Parker's evidence, is it is not really very helpful to seek
15 to label one party as the incumbent and one as the entrant. Each side has
16 some element where you could say this is a normal element of 'incumbency',
17 but they are rather distributed around in this case, and it is a more
18 complicated scenario, and it doesn't do anybody much good to refuse to
19 recognise that.

20 Mr Parker says that in his second report, paragraphs 19 to 25. We give the
21 reference.

22 Just to pull out some key features we have already seen. Both did have the
23 information submitted by suppliers. So this was a common set of information
24 there in that sense.

25 RSSB RISQS have the benefit of having the same brand name that has been used
26 for the last four years. That may be seen in one sense as incumbency. But it

1 is not the same scheme carrying along.

2 Achilles, by contrast, gets to use again if it wants the well-established Link-Up brand
3 name that it had been using between the late 90s and 2014. I think it was
4 accepted it was well-established.

5 Then, of course, potentially a couple of features where Achilles has more of the
6 features of an incumbent. It has the direct contractual and commercial
7 relationships with its buyers and suppliers. It has staff on the ground who
8 have been delivering the audit day in, day out for a number of years, and with
9 whom the supplier customers have experience.

10 Those are my submissions on that, sir.

11 Having set out various elements which all go to how well competition would have
12 happened, you are going to have to take a view as to how much in a sense of
13 the market Achilles would have retained. My learned friend submits it is very
14 small. We submit it is larger. We submit that's common ground, that that is a
15 question you have to --

16 **THE CHAIRMAN:** Before you move on to that point, what do you say to the point
17 raised by Network Rail that, in the counterfactual world, Achilles -- I don't
18 know what you say -- would have maintained that it was entitled to provide
19 a service to Network Rail's direct contractors, ie the case that it put forward at
20 the liability trial. Does that matter, I mean, or would that have happened in --

21 **MR WOOLFE:** I see. Well, in the counterfactual, we would have had a standard --
22 my case is like the NR302 standard, possibly subject to bits of tweaking or
23 whatever, but looking at something like that. That standard makes clear, as
24 I read it, that Achilles can provide services to Network Rail's direct suppliers,
25 in their capacity as buyers, but what it can't do is audit them as suppliers for
26 the purpose of Network Rail's own systems.

1 That's not to say that it couldn't have them registered as suppliers, because there
2 may be in a sense suppliers between these companies as well. So if say --
3 I am slightly hypothesising here -- say Skanska decides to register as a buyer
4 with Achilles, and chooses to sub-contract some element of something it is
5 doing to Colas Rail as being a more specialist rail outfit, in that scenario Colas
6 would be a supplier. It would be a supplier to Network Rail. It would have to
7 be on RISQS as a supplier for that. We are not saying we get anything to do
8 with that. That doesn't mean to say that it might not (inaudible) having
9 registered as a supplier on Achilles' system as well. In a sense the reason
10 this is why Achilles was never too worried about what Network Rail itself was
11 choosing to do, is the only thing it loses by Network Rail saying "We want
12 RISQS to audit our suppliers" is the direct revenue from auditing those
13 suppliers for the purposes of that. To the extent that any of them are
14 multi-home suppliers, you get them anyway. To the extent you get them as
15 buyers, you get them anyway. It is a multi level supply chain at which a lot of
16 things happen further down from Network Rail.

17 Although it was very important, in terms of the number of connections it has, it is only
18 one buyer amongst others.

19 **THE CHAIRMAN:** It probably wouldn't have mattered very much.

20 **MR WOOLFE:** It is important, no question, sir. Does that help with the question of
21 what would have happened. We wouldn't have been suggesting we were
22 entitled to insist that Network Rail takes audits from us for its suppliers.

23 **MR CUTTING:** Can I ask a question, which I think is related, which is in that
24 counterfactual what is the nature of Network Rail's position, vis-a-vis
25 facilitating or not competition. I mean, in light of its dominance, but in relation
26 to its own preference for RSSB -- how does that -- in your counterfactual, you

1 know, what is the nature of its facility, role or behaviour?

2 **MR WOOLFE:** In the counterfactual, we say it would still have the NR302 standard,
3 in which it says we recognise alternative schemes. As a dominant
4 undertaking, it is assumed, for the purpose of these proceedings, it would
5 have an obligation to not act in a discriminatory way, such as would cause
6 (inaudible) competition. Of course, it can make clear to the market "We use
7 this as our preferred scheme". I mean, there's no reason why they could not
8 do that. Also, if it wants to use a single qualification system, it has to pick
9 one. I don't think it could be attacked as being dominant for simply having
10 chosen RISQS rather than us. If at some stage it wants to put it up for tender,
11 it would just be a procurement problem.

12 As regards wider communications to the market of the type that you have seen in the
13 actual, I am not presenting those to you as a separate abuse of dominance,
14 because who cares? It is all part of the actual. But I would submit that some
15 of the activity and being very closely associated with RSSB, working with
16 them to try to put a message out to the market, that people shouldn't go with
17 Achilles, and so forth, I do submit that that would not really be consistent with
18 a duty not to discriminate.

19 **MR CUTTING:** I understand that's your submission. The next question then, and
20 maybe you will come on to it this afternoon -- the next question is clearly what
21 would the nature of communication, influence, steer, expression of its
22 preference that Network Rail would have -- what would that look like and what
23 influence would it have?

24 **MR WOOLFE:** Well, perhaps in a sense if we look at the -- looking at an example
25 may help. So if we -- in relation to that e-mail from Ms Scott and the
26 background to it, how it might have been different. In bundle G6, tab -- if we

1 start with tab 342, what we can see at the bottom of that page, 3284, there is
2 an e-mail from Mr Cox of the RSSB to a range of people, including you will
3 see a Capita e-mail address and so forth, and Mr Sharp and Don Clarke, also
4 going to Mr Lee Jones of AMEY and Gillian Scott you can see in the copy line.

5 This is raising the concern about the number of suppliers on the system.

6 "Available to buy on the market" and so forth "only have 2,200 on the system."

7 matter of urgency.

8 Network Rail had been very wrapped up in RSSB's launch of this to the market. This

9 is not simply an email from RSSB to Network Rail as a customer, saying

10 "A number of your suppliers aren't on yet. You need to give them a prod",

11 which in a sense would be fairly normal. It is a bit more tied up with

12 commercial success.

13 Then we can see what happens in Ms Scott's e-mail to buyers at 346, and just

14 perhaps sort of worth noting, for example, who t1 has gone to. Under the

15 BCC list, there is an e-mail from MACE group, for example. (Inaudible)

16 contractors anyway.

17 **MR CUTTING:** I suppose what I am asking you, this went in the actual --

18 **MR WOOLFE:** This went in the actual --

19 **MR CUTTING:** Against the context of something we have said was an abuse of the

20 words --

21 **MR WOOLFE:** Yes, and also --

22 **MR CUTTING:** Are you saying something similar could and would have gone in the

23 counterfactual?

24 **MR WOOLFE:** Something could not have gone in these exact terms. That is the

25 point. She e-mails all principal contractors. She is not simply herself emailing

26 her own suppliers and saying: "I have been given a list. You haven't signed

1 up. You are my supplier. Please sign up". That's normal and I showed you
2 a contractual provision earlier to the same effect. So it is normal to ask
3 a company to sign up their own suppliers. What Ms Scott does is go out on
4 behalf of Network Rail, on behalf of the RSSB, in effect, to her own supplier
5 base and saying: "Please, you reach out to your supplier base and insist that
6 everybody signs up." It is that reaching down another chain in the supplier
7 chain that is somewhat unusual.

8 Also, the content of the e-mail where she is saying they won't be searchable to any
9 buyers in the market, full stop, after 1st May, and so forth, and they will be
10 deleted. They will not be searchable to any buyers.

11 That was true in the actual, in a sense, the buyers all moved over. They could have
12 stayed and used Achilles log in, entirely true, but in the counterfactual of the
13 competing scheme, if buyers are being signed up by Achilles, that would be
14 factually inaccurate. I would suggest a dominant undertaking could not put
15 out misleading and incorrect communications that favour a certain one or two
16 commercial competitors. It shouldn't be assumed in the counterfactual
17 anyway.

18 **MR CUTTING:** Okay. Even if that's right, I mean, this is inherently difficult in
19 constructing the counterfactual. If this was not there by Network Rail, wouldn't
20 the RSSB have gone to the entire market and said: "You should all sign up.
21 We are Network Rail's preferred RISQ provider", and that would then provide
22 an anti-Achilles stimulus, using the imprimatur of Network Rail's choice.
23 Would that not have an impact on Achilles' position?

24 **MR WOOLFE:** That may have had some impact on Achilles' position. If you see the
25 way Achilles markets itself now, the website screenshot is provided at some
26 point in Mr Blackley's evidence, where Achilles has on its website the logos of

1 MACE Group, UKPN and First Great Western and so forth and saying "Put
2 yourself in front of buyers like". So any supplier assurance provider is going
3 to use the names of its buyers to some extent to try to sell itself to suppliers.
4 That is just how supplier assurance schemes market themselves. So there is
5 nothing unusual or abusive about that, and we don't dispute, of course, that
6 Network Rail is an important buyer who a lot of people would want to supply.
7 This is why we say EPIM is quite a good comparator. In that case a number
8 of operators decided to move, but in a sense a chunk of demand is a chunk of
9 demand. If they move across and say "We want you to join this new RSSB
10 scheme", then people would have done. Mr Parker's counterfactual assumes
11 that a large number of buyers would have followed and an even larger chunk
12 of suppliers, in a sense. The question is how many suppliers would have
13 stayed with Achilles.

14 **MR CUTTING:** Yes. Okay.

15 **MR WOOLFE:** With that, can I move to the use of the JQS as a comparator,
16 because Mr Parker doesn't pretend and we don't pretend that JQS is a perfect
17 comparison. You are never going to find the perfect comparison. The
18 question is whether or not it provides useful information that the tribunal can
19 use as an understanding of what may happen in this kind of market, where
20 you have new sponsored entry, because whether or not you say Achilles is
21 the incumbent (inaudible) may have had, you know, EPIM is an example of
22 sponsored entry, where you have a chunk of the largest buyers in the industry
23 collectively deciding they are going to sponsor a new supplier assurance
24 entrant, and in a sense that's what has happened with RSSB RISQS as well,
25 and Network Rail, amongst others, said they want to use it.

26 Mr Parker points out in his evidence yesterday that actually you can use the JQS

1 comparator a number of ways. You can draw the analogy with RSSB RISQ
2 as the entrant like EPIM and see what Achilles JQS lost, or you can use the
3 other way round and draw an analogy -- imagine Achilles as the entrant or
4 you can use it with some form of an adjustment, if you want. So it can be a
5 starting point rather than an endpoint and you could recalculate, if need be.

6 So the criticism that there are some differences doesn't advance Network Rail's
7 position. The question is whether or not they really matter.

8 The essential question, as I understand it, is not in dispute. In our case with, as we
9 would say, RISQS coming into the market on 1st May that RSSB RISQS
10 could win all of Achilles' customers. There is no part of Achilles' customer
11 base from the RISQS scheme who we are saying were off limits to RSSB
12 RISQS at that point. Now people have stayed with us on our other schemes
13 in UVDB and so forth, but the scope of the market is the same.

14 So the point that I understand is being put by my learned friend in a couple of ways
15 is if it were the case that Achilles JQS had some customers that EPIM could
16 not properly compete for, that would mean that Mr Parker's percentage
17 retention is not a good comparison, because it would include some customers
18 who EPIM couldn't compete for. I think that's essentially the point that was
19 being put in a couple of ways.

20 One of those is the geographic scope point. That is where that comes in. If Achilles
21 JQS has customers outside the geographic scope of EPIM's operations, in
22 a sense it gives them some sort of sealed off demand. Also this point about
23 contractors and operators and who can obtain audits. We will look at both in
24 a moment.

25 On the geographic scope point for a moment, this is dealt with at 12.4 of my
26 aide-memoire. This is the point that Mr Gjertsen's evidence really went to,

1 because Mr Law had raised the point about the fact that Achilles had some
2 buyers I think outside of Norway. Mr Gjertsen's evidence is clear, that 60 out
3 of Achilles JQS's 66 buyers are based in Norway, and the ones that aren't are
4 quite small. So that could be said on the geographic scope point. Yes, there
5 is a little bit of Achilles' buyer base that sits outside EPIM's reach, as it were,
6 but it is small. That does not render it a totally inappropriate comparison.

7 **MR CUTTING:** But its retention numbers embrace the Danish sector of the market
8 as well, do they?

9 **MR WOOLFE:** I believe that to be the case, yes. It may be there would be some --
10 one could try to do some adjustment for that, but I think Mr Gjertsen indicated
11 in his witness statement that they are small, the Danish operators, a low
12 activity level.

13 You will recall my learned friend's cross-examination, the reference to 3% in
14 Mr Gjertsen's evidence, which is bundle B, tab 11.

15 **MR CUTTING:** That doesn't matter if there is still a unit of 1 in the retention
16 numbers. It might be relevant to the turnover associated with that but it is not
17 relevant to the retention percentage.

18 **MR WOOLFE:** I think, to be fair, it might affect the number of suppliers they have. If
19 you have one that was very big, it might have a lot of suppliers associated
20 with it, and therefore you would get an artificially high retention ratio. If you
21 had quite small -- it wouldn't have such an impact. I think that's why the size
22 may matter.

23 There's a reference at paragraph 9. It is highlighted here, but I think it was said in
24 open court -- to a percentage of activities. I think my learned friend in
25 cross-examination -- that figure was something of an impressionistic
26 guesstimate, I think on Mr Gjertsen's part I would say, he admitted, rather

1 than being something quantified.

2 I have been reminded by those instructing me that Mr Parker's model retention ratio
3 translates very much into turnover. They are sort of two sides of the same
4 coin. I was (inaudible).

5 Anyway, that is the evidence that you actually have from Mr Gjertsen, who deals with
6 it day-to-day. The important part I would stress is at paragraph 16. He states
7 his belief and understanding has always been since its launch EPIM JQS had
8 been operating in the same market as Achilles' JQS.

9 You can see from paragraph 8 of his statement, he says -- my point there is simply
10 that both EPIM and Achilles have operator members, because EPIM
11 operators. He says:

12 "Although we lost most operators as customers of JQS, we fought hard to retain the
13 business of other buyers and suppliers."

14 I think some operators did stay with Achilles.

15 Then, in combination with this, I think we perhaps need to look at the e-mail from
16 Mr Thomassen, in the miscellaneous bundle, tab 15. This is the e-mail
17 provided by Network Rail. Mr Thomassen's e-mail, the way it seems to
18 operate is the paragraph starting:

19 "Operators on the NCS ..."

20 So the operators on the NCS, the Norwegian Continental Shelf:

21 "... are preparing and approving a budget paid for by the operators for a number of
22 audits to be performed, currently 200 per year."

23 So because EPIM, as an organisation, is a pay in and funds the audit capacity, as it
24 were. Then he says:

25 "The operators on the NCS are nominating registered suppliers to be audited by the
26 EPIM JQS/(inaudible) JQS service and it's the operators who make the list of

1 priority suppliers to be audited."

2 So the way the competition works in this market is not just -- the buyer decides who
3 wants to be audited. I think that's the same in every market. Same in ours as
4 well. The difference is that audit is also paid for by the buyer. That is
5 a difference that I think was referred to in cross-examination. Then:

6 "(Inaudible) execute the orders on behalf of the operators."

7 What I want to call your attention to is the next paragraph, two sentences:

8 "The audit report is available to all the operators in the EPIM solution. The audited
9 supplier can choose to mark the audit report available for everyone or only for
10 the operators."

11 So the supplier can choose whether its audit report will be visible to operators and I
12 think they were called contractors in my learned friend's submission, the
13 non-operator members or not. But the supplier in a sense gets to choose. So
14 for a supplier choosing to -- it does in a sense provide some visibility of audits
15 to non-operating members as well. That is the point I wanted to take from
16 that. So there we go.

17 As I say, we set out the fact that Mr Gjertsen's belief and understanding is although
18 there may be some differences in precisely how they operate, since its
19 launch, EPIM JQS has been operating in the same market, so not a perfect
20 comparator. Not to say that it operates in every single way the same in
21 a different market, but it does give you something to get hold of in relation to
22 what can happen upon this occasion as a sponsored entry.

23 I am conscious of the time because I want to make sure my learned friend can start
24 so I get some time in reply later.

25 I think the last point I will deal with fairly shortly. September 2020 I submit -- I don't
26 need to go to it at length.

1 **THE CHAIRMAN:** Before we move on.

2 **MS BURGESS:** It is just one point I wanted to raise with you. You talked right at the
3 beginning of your opening around before this happened Achilles, in its
4 concession, was a stable and profitable business. My experience in that
5 context and also in context of when a business might be open to threat is that
6 you would have some business planning in place, so perhaps over a five year
7 period or something like that, accepting that the fifth year will never turn out as
8 perhaps suggested. I am just interested as to why that sort of data is not
9 available, because it could have been quite useful in the context of the
10 counterfactuals.

11 **MR WOOLFE:** I am not sure I can help you as to why it is not available. One thing
12 I can assure you of is we have carried out thorough disclosure and tried to
13 find the material that is relevant, and if business plans of that type were being
14 made at that time or available, we would have provided them.

15 So we are not sitting on anybody cache of material that we are not providing on that
16 point.

17 As to why that material is not available, I am not in a position right now to assist the
18 tribunal further. Does that help answer the question to some extent.

19 **MS BURGESS:** Not really, but I understand what you are saying.

20 **MR WOOLFE:** I am afraid it is the best I can do.

21 The next point is Network Rail suggests that damage should be reduced on the basis
22 that Achilles should reasonably have reentered the market in
23 September 2020. On the facts, that is based on the submission that Achilles
24 should have got on with it more and joined in. You have my submission on
25 that already. I don't need to do that at any length.

26 Final point on future losses. It's a simple and common sense point, which is that

1 Achilles has been excluded from the market for three years. It is reasonable
2 to assume that will have affected Achilles over a longer term timescale than
3 Mr Law assumes in his report.

4 Mr Parker has modelled it forward into the future on a discounted basis and cut off of
5 five years. To be clear, the scope of the instruction, as Mr Parker made clear
6 in cross-examination, it is not that he has been instructed that he must find
7 loss for five years. It is he was instructed to cut off his estimate of loss at five
8 years, on the basis that we consider that was a reasonable approach, and the
9 tribunal was not going to want to award matters beyond them. Obviously, the
10 tribunal can form its own view on the period of continuing loss and
11 calculations can be cut off at the appropriate point.

12 Unless I can assist you further, those are my submissions in closing. I will obviously
13 address matters further in reply.

14 If I can give any more insight into madam's question, I will do so, once I have
15 a longer conversation with those instructing me.

16 **THE CHAIRMAN:** We are going to want some more data from Mr Parker, but I am
17 not in a position to make the request just at this moment, but we will come
18 back with a request for data from Mr Parker to be commented on by Mr Law.

19 **MR WOOLFE:** Thank you, sir.

20
21 **Closing submissions by MR WENT**

22 **MR WENT:** I think it is just worth making one point clear at the outset. It is just
23 following on from one of Mr Cutting's questions I think. These quantum
24 proceedings are proceeding on the basis of chapter 1 only. So the
25 dominance issue has not been decided and the chapter 2 issue is stayed.
26 I just want to make clear that that's how this case needs to be viewed. We

1 are not dealing with dominance.

2 I just wanted to start by setting out clearly the sequence of events between
3 May 2017 and May 2018, because I think it is crucial to understand the
4 counterfactual and the issues of causation properly.

5 Obviously, Achilles withdraw from the RISQS tender in May 2017. It had
6 a conversation with Network Rail shortly after that, before which Achilles'
7 optimism -- the conversation with Network Rail gave Achilles optimism that it
8 could obtain a recognition of equivalence from Network Rail in due course.

9 Then we say that Achilles continued to believe that it could gain recognition from
10 Network Rail right up until the penny dropped on 26th April 2018. That's at
11 bundle G6, tab 356, page 3332.

12 So Achilles also believed throughout this period that it could compete for all RISQS
13 members except for the auditing of principal contractors.

14 I think it is worth just going to one of the key documents. we looked at it yesterday.

15 Just showing Achilles' state of mind that this was the case until April 201. It is
16 a confidential document but I do want to be able to go through it properly.

17 I don't know whether we can go into confidential session for the last
18 ten minutes or so.

19 **THE CHAIRMAN:** Yes.

20 **MR WENT:** Thank you.

21
22 **[CONFIDENTIAL SESSION EXTRACTED**

23 **AND AVAILABLE AS SEPARATE TRANSCRIPT]**

24
25 **(1.12 pm)**

26 **(Lunch break)**

1 (2.00 pm)

2 **MR WENT:** Sir, like my learned friend I have prepared just a few brief written notes.

3 I am not going to be following them but you may find it helpful as you revisit
4 the issues.

5 **THE CHAIRMAN:** Thank you.

6 I was next going to deal with some legal points, fairly briefly I think, and then just
7 a couple of comments on the witness evidence before turning to the
8 substance of the case.

9 First on the legal points, I have said we are proceeding under chapter 1. Chapter 2
10 has been stayed. I don't think it affects anything in any event, but I just want
11 to be clear on the point.

12 **MR CUTTING:** I think all I have done before lunch is just discuss the point relevant
13 to the counterfactual. I think what I am saying is there are implications of
14 Network Rail's position relevant by virtue of their legal position in the actual
15 and the counterfactual world.

16 **MR WENT:** Yes, but I think one of the points my learned friend is making or
17 suggesting is, you know, there are certain statements, for example,
18 communications Network Rail put out that would have been different in the
19 counterfactual. It is almost as if suggesting -- because I think he also in his
20 opening was relying on the Enron case, which I will come to in a moment,
21 suggesting actually there is some sort of additional anti-competitive conduct
22 or behaviour at least to be purged in the counterfactual situation. I just want
23 to be clear, looking at that, it is not on the basis of chapter 2. It can only be on
24 the basis of chapter 1.

25 For example, there is evidence from Miss Ferrier where I think she talks about --
26 what does she say -- along the lines Network Rail should be an impartial

1 bystander when it comes to RISQS. Obviously there is the discrimination
2 point that was made as well. I think these are the types of considerations you
3 would normally apply in the chapter 2 context. I think what I am saying is
4 I just want to make sure we are squarely dealing with chapter 1 in these
5 proceedings.

6 **MR CUTTING:** I think I ought to engage with you on that, because it seems to me,
7 even if we are not talking about damages arising from chapter 2, it is relevant
8 in the actual -- the time, the behaviour has been adjudged to have been an
9 abuse of dominance, and it is relevant that as a dominant undertaking, in the
10 counterfactual, one would assume that Network Rail was behaving in
11 an entirely compliant way. So what we are doing is thinking about what
12 behaviour could we expect from Network Rail in the counterfactual. That
13 seemed to me the only question we were considering, just about defining
14 what behaviour would be expected in the counterfactual and what impact
15 would that have on buyers in the market place.

16 **MR WENT:** I think our primary position is that Network Rail wouldn't have done
17 anything different in the counterfactual. It is perfectly entitled to put out the
18 communications that it did. So that's the primary position.

19 **MR CUTTING:** Understood.

20 **MR WENT:** There is no other infringement that needs to be purged from the
21 counterfactual, if you like. Clearly RSSB would have been doing everything it
22 was doing to make sure RISQS was a success. We don't say there is
23 anything wrong in Network Rail equally wanting to make sure RISQS was
24 a success. Miss Ferrier accepted --

25 **MR CUTTING:** You are also accepting, aren't you, in the counterfactual, Network
26 Rail would be behaving in a way that was consistent with compliance with the

1 chapter 2 prohibition?

2 **MR WENT:** That assumes that they are dominant, and that question has not been
3 decided. I think that's the point I would make.

4 Briefly, just on the question of mitigation, from a legal perspective, obviously the
5 Supreme Court in Sainsbury, paragraphs 212 and 214 at authorities bundle 1,
6 page 907 I think, it is confirmed in competition damages actions that claimants
7 cannot claim for reasonably avoidable loss. Even persons against whom
8 wrongs have been committed are not entitled to sit back and suffer loss which
9 could have been avoided by reasonable effort.

10 Can I hand up a couple of sections from McGregor that I just wanted to hand up and
11 have in the authorities bundle. I am not going to spend any time going
12 through it now. You will see, for example, at section 9081, it said there:

13 "At the same time, when assessing reasonableness, while it is being said that the
14 Claimant is not bound to nurse interests in the Defendant, it has also long
15 been said that the Claimant must have the Defendant's as well as their own
16 interests in mind."

17 That was just the point on that. I think I probably do -- coming back briefly to the
18 Enron case, because my learned friend did rely on it in his opening. I think
19 I need to deal with it. It is at authorities bundle 2. We don't need to turn to it.

20 Obviously, as I say, he is using this for the proposition that the tribunal has to
21 construct a counterfactual by identifying lawful behaviour on the part of the
22 Defendant and cannot construct a counterfactual that bakes into it somewhat
23 infringing behaviour.

24 My learned friend says this case is fraught with the proposition that it can't be right to
25 assume that Network Rail would have operated Sentinel and OTPO for
26 a period of many months after 1st May, in a form which excluded Achilles

1 from the market.

2 In terms of legal precedence, obviously the facts in Enron are very different. It was
3 a follow-on decision from the Office of Rail and Road. The proposition found
4 at paras 88 to 90 that my learned friend wants to rely on is that, in effect,
5 when considering, as I said, the counterfactual it is not necessary just to
6 expunge from the counterfactual the infringing conduct found by the Office of
7 Rail and Road, but also any other infringing behaviour.

8 I would submit this principle has a very narrow application, and certainly does not, if
9 you like, give licence to the tribunal to start identifying other infringements
10 which have not been pleaded by the claimant, and within which the Defendant
11 has not had the chance to present its views in keeping with the principles of
12 natural justice.

13 An example of the application of that principle can be seen in the Albion Water case,
14 which is at tab 5 of the authorities bundle. Again, I don't think we need to turn
15 to it. I am not sure we have time.

16 At paragraph 61 of that judgment, the tribunal said that the tribunal in Enron had held
17 that the counterfactual is purged not only the abuse of conduct and its
18 consequences but also of any unlawful conduct on the Defendant's part.

19 Then you see the application of that principle in paragraph 62 of Albion Water, where
20 the tribunal said it was entitled to assume that in the counterfactual world it is
21 entitled to assume that the Defendant would comply with a reasonable
22 interpretation of Ofwat guidance.

23 I say that this principle has a pretty narrow application.

24 On the facts of this case in the counterfactual, the Sentinel and OTP schemes would
25 not have incorporated the original formulation of the RISQS-only rule but
26 a modified version. That would then have made sure that Network Rail was

1 not operating the scheme in an unlawful way. The question as to whether
2 there would have been a regime in place immediately to start allowing
3 a competitor to operate in competition with Network Rail is another matter,
4 and doesn't give rise to any form alternative infringing behaviour. We are
5 dealing with agreements, concerted practices, at least that's my submission,
6 and not chapter 2.

7 Given that Achilles had been the operator for over 20 years, it had benefited from the
8 Link-Up only rule, the predecessor, and subsequently the RISQS-only rule,
9 and nobody had previously come forward to request Network Rail to allow
10 a competing scheme to enter the market with Achilles, and given the
11 considerable costs of implementing that regime, we say it would seem
12 reasonable that Network Rail would have been given time to implement the
13 regime once the first supplier assurance provider came forward seeking to
14 compete.

15 So it is said in the counterfactual, with the modified RISQS-only rule there would not
16 have in any event been anything unlawful in Network Rail not having
17 established that detailed system, the modified RISQS-only order being
18 compliant with chapter 1 and also chapter 2, and then a regime could be put
19 in place.

20 Mr Blackley explained that the standards prior to those containing the RISQS-only
21 rule had been developed by Achilles, and dated back to 2003, I think, or
22 possibly 2006.

23 I just say it can't be expected at that point in time, when Achilles was the monopoly
24 provider of supplier assurances in GB Rail that Network Rail would have gone
25 to the trouble of developing that detailed regime.

26 I think my learned friend also queried in opening how it would be possible for

1 Network Rail not to have a system in place for approving a supplier assurance
2 provider, given that it would have been necessary to approve RISQS.

3 However, with respect, I say that misses the point, since the intraoperability regime
4 that would have needed to be put in place with a new provider entering the
5 market would have been a regime specifically catering for a multi scheme
6 environment. Obviously, when you have a single scheme operating, as with
7 Link-Up and subsequently RISQS, that can be reviewed and accepted
8 internally by Network Rail, in the normal course, as Network Rail did for
9 Link-Up and then RISQS.

10 The standards in the counterfactual, which in the first form would have dated back to
11 around 2003 I think, and that was I think Mr Blackley's evidence on
12 cross-examination, you know, could simply have said that approval for
13 Sentinel to be made via Link-Up or another approved provider, and it could
14 have been left at that.

15 Finally, just on the authorities, I don't know whether it assists or not, but I looked out
16 one Court of Appeal authority dealing with a witness not being present due to
17 ill health. I wasn't going to really make any submissions of it, but it might be of
18 assistance if you consider it actually.

19 There is not any disagreement on how you approach this in any event, but in case it
20 assists.

21 I think the only thing I would say is if the evidence given by Miss Grant in this case is
22 corroborated by other factual witnesses presented by Network Rail, and you
23 agree that their evidence in the face of cross-examination, this may mean you
24 are willing to attach more weight to it when having regard to the overall
25 inherent probabilities of the case, which I think is the language used in that
26 authority.

1 I just want to make a few general observations on the factual evidence of Achilles'
2 main witness.

3 First, we say Miss Ferrier's written and/oral evidence -- I already pointed to this -- is
4 in conflict with contemporaneous documentary evidence, in respect of certain
5 material points. At times, particularly in her oral evidence, it seemed to us
6 that Miss Ferrier was telling us what she wished with hindsight to have been
7 Achilles' internal view on matters and what she wished with hindsight Achilles
8 decided to do.

9 Now, I am sure with hindsight that Achilles had many regrets over entering into the
10 concession contract on the terms they did with RSSB. I am quite sure there
11 would have been a lot of soul-searching within Achilles since then, and I think
12 we can see the frustration bubbling over at times in the internal documents.

13 However, Achilles was stuck in the actual world and would have been stuck in the
14 counterfactual with, from their perspective, the bad deal of the concession
15 contract.

16 We say Network Rail certainly shouldn't now be penalised for that, and Achilles
17 shouldn't be entitled to recoup from Network Rail what it has lost out on
18 through striking a bad deal with RSSB.

19 We believe on a number of occasions in her oral evidence Miss Ferrier was
20 suggesting that the infringement was responsible for internal decisions of
21 Achilles when, in fact, as I said, there were other clear reasons for them
22 independent of the infringement, as disclosed in the documents.

23 I have said already, you know, the penny dropped only in April 2018. Until then
24 Achilles was working under the assumption they would be able to compete
25 and they would obtain recognition.

26 I would say when I questioned Miss Ferrier on the actual reasons for certain

1 decisions in internal documents, for example, Mr Flack saying that Achilles
2 was not engaging in communications to the market because of the terms of
3 the concession contract, Miss Ferrier took the line that it was due to the lack
4 of clarity as to whether Achilles could compete in the market. You can see
5 that, for example, in the transcript day one, around page 104. However,
6 I would submit that the internal documents at the time are very clear as to
7 what was actually going on and Miss Ferrier's explanations are simply not
8 recorded in contemporary documents.

9 When I put certain documents to Ms Ferrier prepared by Mr Flack, I think she also at
10 times took the line that she disagreed with his view, and said as much to him
11 at the time. For example, day one transcript, page 104 again. However,
12 there's no suggestion of this again in the internal documents.

13 I want to give just another important example of this. I have touched on it already.
14 Miss Ferrier suggested, in oral evidence, that the decision to have buyers and
15 suppliers renew terms and conditions, and the issue over the data not being
16 migrated to TransQ, that that was because Achilles could not offer the service
17 they had previously provided. The exchanges on that are at page 20 of Day 2
18 transcript.

19 I must admit I didn't see the point in pursuing that response very far with
20 Miss Ferrier, because it undoubtedly contradicts the documentary evidence
21 for the reasons I have already explained.

22 I had also taken Miss Ferrier to the relevant internal documents before asking my
23 questions about the transfer, for example, of the supplier data to the TransQ
24 data, so Miss Ferrier had an opportunity to refresh her memory to the extent
25 that was needed.

26 Ms Ferrier was intimately involved in preparing strategy for TransQ in the run up to

1 1st May, 2018, and was part of the discussions with Achilles' executive.

2 I think she may have said she was part of the executive.

3 Her views, just as the views of other senior business people at Achilles, are clearly
4 articulated in the internal documents.

5 That's the first point. Then two smaller points.

6 No criticism in this area, but we take her knowledge of Northern European oil and
7 gas industry wasn't particularly strong. It appears she discussed the case
8 with colleagues internally, presumably looked at internal documents, but none
9 of what was discussed with colleagues or the internal documents she
10 reviewed are covered in the witness evidence supporting her statements.
11 She was presented initially as the only factual witness on this linchpin for
12 Achilles' case, the comparator for used. The quantum assessment, it was
13 only because Network Rail's expert queried the respective geographic scope
14 of Achilles JQS and EPIM JQS that Mr Gjertsen provided a witness
15 statement. We are obviously pleased that he did and could be
16 cross-examined. It was only because of that that we could get to the bottom
17 of certain what we say are material issues, to the extent to which the Achilles
18 JQS situation can provide a reliable comparator for what would have
19 happened in GB Rail.

20 The third point is in her written evidence she often talks about in generalisations
21 about customer behaviour, about the dynamics in supplier assurance
22 markets. I suspect that's in part because we have from Miss Ferrier a range
23 of views from a number of different sectors in which supplier assurance plays
24 a role, and as Miss Ferrier I think admits in her witness evidence, they have
25 different histories. So in some like utilities there is a single supplier assurance
26 scheme. In others there's more than one supplier assurance scheme, with no

1 mutual recognition of audits, EPIM JQS, Achilles JQS. In others, like
2 construction, again you have something different going on.

3 I will submit, to the extent these generalisations don't hold true was clearly brought
4 out in cross-examination. For example, the idea that multi-homing works
5 effectively and that suppliers don't mind multi-homing.

6 We went to internal Achilles' documents which I took Miss Ferrier to in
7 cross-examination that made clear the suppliers' view, supplier assurances
8 and tax, frustrated the need to multi-home. Equally, Miss Ferrier presented a
9 picture that supplier assurance involves roll on contracts with suppliers and
10 buyers. I would say there was no suggestion in her written evidence that this
11 roll on subscription model wasn't the model that was in place on
12 1st May 2018, and, in fact, all her written evidence was geared up to
13 presenting it as if it was the roll on subscription model that was in place at
14 1st May 2018, and her presentation of this issue certainly wasn't on the basis
15 that whilst supplier assurance normally involves roll on contracts, the situation
16 at 1st May was different.

17 Then, when I put to her in cross-examination the reality of the contractual situation in
18 GB Rail and the fact that Achilles were determining the course they had to,
19 entering into new contracts with buyers and suppliers, Miss Ferrier had to
20 come up with a reason for the fact that it wasn't a roll on contract by situation.
21 As I said already, the reason was given I say is contradicted by the
22 contemporaneous documentary evidence, and also I would say makes no
23 logical sense.

24 Briefly, on Network Rail's witnesses, I know that one issue, a concern has been
25 raised about Mr Blackley having discussions with four of the five buyers on
26 Link-up. You will have seen there was an e-mail expressing concerns about

1 the need to obtains audits on both RISQS and Link-Up, and that prompted
2 internal discussions, etc.

3 We would say that particularly in the situation where there was complete information
4 asymmetry between the parties on policy -- on key points, it was acceptable
5 for Network Rail to try to arm itself with the facts of the case.

6 Moving to my main submissions, there seems to be agreement that supplier
7 assurance markets tend to be buyer led, unless there are buyers interested in
8 or willing to recognise supplier assurance schemes simply wouldn't be
9 successful. That means that unless Achilles -- that means that Achilles'
10 (inaudible) from 1st May onwards is squarely dependent on the amount of
11 buyer interest.

12 We would say there appears to have been an attempt by Achilles in the presentation
13 of its evidence to shift the focus to the decisions of individual suppliers, when
14 considering whether significant supplier multi-homing would occur in an
15 industry. It is as if we have been asked to assume that there has already
16 been a split of buyers across the supplier assurance schemes in an industry,
17 and so the decisions of suppliers then become all important to the analysis.

18 Then it is said it just costs a relatively small amount of money for each individual
19 supplier to be on two schemes and so it is natural for the suppliers to be
20 willing to pay the costs to have access to buyers they want.

21 We say that's putting the cart before the horse. It is first necessary to consider the
22 extent to which buyers, in deciding whether to move away from industry
23 scheme to a competing one would want to subject their supply chain to a
24 second set of supplier assurance costs.

25 We say that's, of course, important also particularly as the RSSB had moved buyers
26 and most suppliers over to the enhanced RISQS platform prior to 1 May 2018,

1 and before Achilles had put out any general marketing communications at all
2 to the market, general communications about TransQ, and given that Achilles
3 needed to negotiate new contracts with buyers from 1st May 2018, and
4 needed to have suppliers enter into new terms and conditions for a web site,
5 which was directing them to their competitor's offering.

6 Achilles knows that suppliers, in fact, don't want to be paying twice and dealing with
7 the administration of more than one scheme, if they can help it, as it's really
8 frustrating.

9 I went through some of those points with Miss Ferrier. It is Day 1 transcript,
10 pages 65 and 67.

11 Miss Ferrier also confirmed Mr Flack's view that supplier assurances' view doesn't
12 necessary (inaudible) tax. I think indeed on day one, page 70, line 9, she
13 says:

14 "Yes, I think that's quite common in supplier assurance."

15 Buyers also have in mind, when thinking about supplier assurance, they have in
16 mind how their suppliers would react to being forced to pay twice and having
17 a double or triple tax imposed on them.

18 Miss Ferrier accepted, on day one, at page 67 that buyers are wanting cost efficient
19 ways of achieving supplier assurance. Of course that makes sense.

20 Achilles also knows that smaller suppliers in particular might actually think twice
21 about being on two schemes, and indeed that was all set out in the marketing
22 communications for the launch of TransQ, which I explored with Miss Ferrier,
23 page 66 and following on day one transcript.

24 An important question to ask, if the evidence points to virtually the whole of the
25 GB Rail industry having already moved to (inaudible) on 1st May 2018, what
26 is the likelihood of buyers wanting to move to Achilles at that point in time or

1 afterwards, if it would have meant requiring their suppliers to be double
2 taxed? The importance of that question crystallises when you see the
3 potential overall increases in supplier assurance costs the Achilles' expert is
4 predicting would have occurred in the counterfactual.

5 Now, of course, we recognise that this is the potential overall increase in supplier
6 assurance costs and the actual amount depends on the level of supplier
7 multi-homing. We obviously recognise that. However, given that the majority
8 of the suppliers seem to serve Network Rail, and Miss Ferrier accepted that
9 was the case -- that's day one transcript, page 75, lines 4 to 13 -- this already
10 we say should give the tribunal a sense as to the level of supplier
11 multi-homing that would be involved in the situation.

12 This supplier multi-homing presumably is likely to increase when you add in
13 Transport for London and important other charter buyers who potentially have
14 large tier 1, 2, 3 supply chains that would add further suppliers who need to
15 multi-home across supplier assurance platforms. Remember, we have
16 charter buyers that are not necessarily in Network Rail. There are principal
17 contractors within this. So you are going right up the chain when you start
18 adding in those other contractors.

19 Now, where the history of an industry is that two or more schemes have been in
20 existence for some time, there is concern about supplier assurance costs can
21 lead to mutual recognition of audits.

22 However, where everyone in the industry is already on a single scheme, that's not
23 going to be a consideration.

24 That said, a buyer with a small GB Rail infrastructure supply chain might not be so
25 concerned about moving to a new scheme. That makes sense. It is
26 important to realise that I am talking here about a small number of rail

1 infrastructure suppliers, as opposed to all and sundry suppliers that might
2 supply all and sundry products to companies active in Rail, so a buyer with a
3 small GB Rail infrastructure chain (inaudible) safety critical might not be
4 concerned about or so concerned about switching as the overall supplier
5 assurance costs for their safety critical suppliers might not be so much.

6 I think I would include in that category, based on the evidence, a buyer like FGW.

7 That said, even in this instance, clearly a buyer may have concerns about
8 suppliers paying twice for audits, which is why we say FGW is presumably
9 taking such a position as to recognise RISQS audits.

10 Of course, that was also the proposal made by Achilles on 1 May 2018, which we
11 saw in the evidence.

12 Achilles often touts the costs savings it achieves in industries, UK utilities is one such
13 example. So Achilles certainly wouldn't want to tout the costs increases in
14 an industry arising through multiple supplier assurance platforms.

15 Indeed, we know it would prefer to try to shift the responsibility on that for any
16 increased supplier assurance costs to buyers. Again, we saw that during the
17 course of evidence. It tries to do that by seeking to offer sufficiently
18 differentiated offering in the market.

19 Irrespective of whether a differentiated offering can persuade buyers in an industry to
20 have the industry costs significantly increased, and so irrespective of whether
21 a differentiated product could, if you like trump a significant increase in costs,
22 the evidence is that Achilles didn't have any differentiated offering and, in fact,
23 an inferior offering, potentially, when it was planning to reenter, and a properly
24 differentiated offering was to wait until further product development as well as
25 the multi-million pound investment over several years under Project Titan.

26 Of course, even where, on its evidence, it now apparently has a differentiated

1 offering in Link-Up and MyAchilles, it has five buyers currently.

2 Returning to the main theme, given this all comes back to the question as to what
3 buyer interest Achilles might have had in TransQ from 1 May 2018, we say
4 that the documentary evidence we have seen squarely points to Achilles
5 having a low expectation as to the number of buyers it might sign up to
6 TransQ, and a handful number of buyers actually expressing any interest. On
7 Achilles' aspirations and the fact this was consistent between
8 September 2017 and March 2018, I would say it is worth considering the
9 transcript at day one, page 110.

10 I take Miss Ferrier, for example, to bundle G4, tab 208, page 2268, and page 2276 in
11 that document and asked her to read three bullets there at the top. I also
12 pointed her to the fact that it said that the target was ten buyers again. This is
13 in March 2018. I asked her if that aspiration was right. She said correct. She
14 agreed that in March 2019 that was still the aspiration.

15 We say there are very good grounds for this, and also for presuming this would be
16 no different in the counterfactual.

17 I want to look at these reasons in a little bit of detail, but I will try to be fairly brief.

18 I have ten points here I think.

19 First, Achilles had no detailed plan as to what it would do next when it withdrew from
20 the RISQS tender. That's admitted by Mr Flack. Achilles had a transport --
21 document bundle G4, tab 201, page 2203. He says that the detailed reasons
22 for this are not clear.

23 Miss Ferrier tried to suggest that because Mr Flack was not at Achilles at the time of
24 the withdrawal from the tender, he didn't know the reason for Achilles
25 withdrawing from the tender was, in fact, the much bigger financial prize
26 available to Achilles in competing against RSSB's RISQS.

1 We say that must beggar belief. The reasons for withdrawing from the tender would
2 not have been discussed with Mr Flack as head of transport, when he was
3 intimately involved in the strategy going forward, when he did join Achilles. It
4 just doesn't make any sense. Of course, the tribunal itself expressed the view
5 in the liability judgment -- paragraph 79 -- that the reasons for the withdrawal
6 were not altogether clear.

7 Second, Achilles was prevented from marketing its proposed competing offering
8 because of the contractual restrictions it perceived there to exist in the
9 concession contract. That's certainly not a trivial or minor point. Achilles was
10 witnessing RSSB, Network Rail and other buyers in the industry positively
11 marketing the enhanced RISQS scheme, and making it clear it would perform
12 better, and be more responsive to the needs of the whole industry, in contrast
13 with the RISQS scheme that Achilles was operating as the concession holder.

14 Achilles was also witnessing, presumably much to its frustration, that buyers and
15 suppliers moving over to the enhanced RISQS scheme well in advance of
16 1st May 2018, but Achilles was finding it difficult to get its ducks in a row. The
17 plane was taking off. They were missing the boat.

18 Miss Ferrier has tried to suggest in cross-examination on day one the key reason, as
19 I said already, was not being able to effectively market -- having no certainty
20 over whether they would be recognised by Network Rail.

21 However, earlier in her cross-examination, Miss Ferrier had said that Achilles were
22 confident they would receive Network Rail recognition until the penny dropped
23 in April 2018. I may have given the reference already. It is pages 83 to 88 of
24 the day one transcript where that is dealt with.

25 Given there is no mention of the contemporaneous internal documents of the reason
26 for the lack of marketing was to do with the uncertainty as to whether Achilles

1 might be recognised, but the internal documents make clear it was everything
2 to do with the concession contract and getting their marketing strategy in
3 order, I would suggest that Miss Ferrier's evidence on that shouldn't be
4 accepted.

5 Third, as I have already mentioned, the RSSB was marketing heavily, holding road
6 shows and demonstrating just how good the enhanced RISQS product would
7 be. People were enjoying the platform, how well it was performing. RSSB
8 was also making clear that audit performance would improve with the
9 enhanced RISQ offering.

10 There's information on that in day one transcript, page 88, lines 11 to 16.

11 RSSB also had the buy-in of major stakeholders in GB Rail, as we know, including
12 Network Rail and Transport for London.

13 Miss Ferrier accepted if Achilles had been in the RSSB's situation, Achilles would, of
14 course, have taken full advantage of the contractual provisions preventing
15 marketing, just as the RSSB did.

16 It makes eminent sense that RSSB would have done exactly the same as it did in the
17 actual.

18 Fourth, the RSSB was actually migrating buyers and suppliers to the enhanced
19 RISQS platform well in advance of 1st May 2018. We have seen the number
20 of suppliers who were already interacting with the enhanced platform before
21 1st May. We can see that RSSB in essence had virtually or most suppliers on
22 line before the end of May 2018, so slightly after the transition point.

23 Importantly, while concerns were expressed by RSSB in April 2018 about the
24 number of suppliers interacting with the system, there is absolutely no
25 suggestion at all that buyers weren't migrating to the new platform. The
26 relevant document is bundle G6, tab 342, page 3284. I did question

1 Miss Ferrier on that.

2 Fifth, Achilles seemed to recognise relatively late in the day it couldn't have extant
3 buyer and supplier contracts simply roll on and couldn't continue to use the
4 wealth of data Achilles had on suppliers.

5 We have already seen the plan that Miss Ferrier hatched with her chief operating
6 officer. So at 1 May 2018 the TransQ platform would have had no data until
7 suppliers started to sign up to TransQ and the data would have migrated to
8 the new platform.

9 While we know that some suppliers did take up TransQ subscriptions, it appears as
10 though it wasn't in significant numbers, probably more owing to confusion in
11 the market place than necessarily wanting to move to TransQ, but it certainly
12 wasn't a normal roll on subscription model, although Miss Ferrier had been
13 trying to persuade us it was. It was actually the complete opposite, I would
14 say. Suppliers had already migrated to the enhanced RISQS platform prior to
15 1st May 2018 while Achilles could not continue with its existing contracts with
16 its buyers and suppliers. RSSB had had a four month free run at the market,
17 in essence, before 1 May 2018.

18 Sixth, there is no evidence to suggest that buyers had not migrated. I made that
19 point. I won't make it again. I think the discussion on that is on day two of the
20 transcript, page 4, lines 7 to 23, just to give you a reference.

21 This is probably now my sixth point. Buyers would not likely have been willing to
22 move to TransQ on a single homing basis, as this would require them to move
23 their suppliers with them and this would have required any suppliers who were
24 required to be on RISQS by the buyers to pay for a second subscription and,
25 where necessary, a second set of audits.

26 We have Balfour Beatty's evidence for that and I would say that makes economic

1 sense in any event.

2 It is a very important consideration for buyers and can't simply be glossed over. It
3 wouldn't with been maybe the roll on decision by buyers but a decision that
4 could have a real impact on their supply chain. It is not a consideration which
5 recognised -- well, perhaps in passing Achilles' factual and expert witness
6 evidence at trial, but it clearly is a consideration which you can find in the
7 contemporaneous documents. There is even evidence that Achilles was
8 trying to shift the responsibility, as I say, of requiring suppliers to multi-home
9 to buyers, because Achilles didn't want to be responsible for imposing this
10 necessary evil or double tax on suppliers.

11 Miss Ferrier also agreed that if the large majority of the suppliers in an industry are
12 required to be on one supplier assurance scheme because of the choice of
13 buyers in the industry, that would be a relevant consideration for another
14 buyer thinking about moving to a different supplier assurance scheme, if that
15 meant requiring its suppliers to be charged twice.

16 So she accepted that. She thought the buyers might only do this if it was an offering
17 of additional value to meet their need. That's at page 75 of day one, lines 4 to
18 13.

19 Seventh, related to that, we say the vast majority of suppliers on RISQ need to be on
20 RISQS because they are direct suppliers to Network Rail or direct suppliers to
21 another RISQS charter signatory. In fact, Miss Ferrier accepted this at
22 lines 16 to 19 of page 75 on day one, that the majority of suppliers who were
23 available at the relevant time may have been servicing Network Rail, as
24 I have said.

25 I have already touched on Achilles' submission at the consequential hearing, that
26 Network Rail being able to require its direct suppliers to be audited on RISQS

1 would have had a chilling effect on those suppliers. We agree, although not
2 with any negative connotation from a competition law perspective. Suppliers
3 after all are not going to want to multi-home and to pay two sets of
4 subscriptions costs if they can avoid it.

5 Contrary to what Miss Ferrier would want us to believe, multi-homing does not
6 always work effectively. Suppliers become frustrated when they are required
7 to multi-home.

8 It is suggested the RISQS charter is not worth the paper it is written on. However, it
9 is clear that major buyers in the industry supported RISQS in 2017 and 2018,
10 and were throwing their weight behind it.

11 It is also clear that they continue to do so by re-signing the RISQ charter at the end
12 of 2019. While this might be a symbolic gesture and not legally binding, it is
13 clear that major stakeholders in the industry wanted to promote RISQS and
14 would not have been interested in Achilles' offering. Certainly Achilles has not
15 been able to persuade, as far as I am aware, a RISQS charter signatory to
16 sign up to Link-Up since its relaunch.

17 Moreover, while it is right that the RISQS charter would not have prevented
18 signatories from changing their mind subsequently, it is difficult to see why
19 buyers would have shown commitment to RISQS and then considered moving
20 to TransQ at 1 May 2018, when Achilles itself was acknowledging in its
21 internal documents that its TransQ offering provided no additional value.

22 Of course, we have looked in some detail when changes to TransQ would have
23 come into effect, we have Mark Chamberlain's evidence at the liability trial.
24 That's page 50 of Day 2. Obviously not his evidence, but pointing out that
25 evidence to Ms Ferrier.

26 Miss Ferrier has explained that MyAchilles was introduced in the first Achilles

1 community at the end of 2018, but only much more recently introduced on
2 BuildingConfidence and UVDB. That's at page 53 of Day 2.

3 Eighth, buyers who are required to be on RISQS because they are direct suppliers to
4 Network Rail or TfL would not likely have moved their buying activities to
5 TransQ. You know Balfour evidence on this point.

6 Achilles seeks to persuade you that Walker Construction's decision to sign up to
7 Link-Up shows that principal contractors to Network Rail might move over to
8 Link-Up, but we say it is not at all obvious that that contract is going to drive
9 any revenues.

10 It is worth noting that Balfour Beatty's position on this as the principal contractor is
11 not any sort of aberration, but there is evidence endorsed by another principal
12 contractor on RISQS in evidence. I do want to turn to this. It is at G6,
13 tab 327. If we can start at page 3231, please.

14 This is a 17th April 2018 e-mail from Achilles to Skanska, a principal contractor.
15 There is reference in this e-mail to frustrations regarding the RISQS transition.
16 We have seen some of this, although it is not said what these issues are. It is
17 worth noting again:

18 "Achilles confirms that it can't say anything relating to its future offering because of
19 contractual obligations."

20 That, of course, again confirms what was the reason that Achilles was not marketing
21 at this time. It is there in black and white. Obviously, why else would an
22 Achilles business person say this.

23 Moving on to page 322 -- moving backwards but onwards in the e-mail chain, if you
24 like, to 3229, this is an e-mail from Skanska to Achilles on 25th April 2018.
25 Skanska asks whether what Achilles is offering is acceptable as an alternative
26 to the Capita offering, from the client's perspective for tier one.

1 Given that Skanska is tier one and a client to Network Rail, this appears to be asking
2 whether Network Rail would accept Achilles' TransQ assurance.

3 This is no doubt the type of confusion in the market place that was pretty rampant at
4 the time, but nothing to do with anything unlawful.

5 If we move to page 3228, backwards again, Achilles responds to say that Skanska
6 are a principal contractor, presumably, but they are, contracting directly with
7 Network Rail, they will have to have RISQ membership and a Capita audit.

8 The Achilles' business person also says that suppliers below that, it is up to the tier
9 one to decide what system they want to put their suppliers through. They just
10 have to demonstrate they are managing their supplier chain.

11 On 25th April, an Achilles' business person still thought they had the opportunity for
12 capture.

13 If we move to 3227, and Skanska's response, you see there it says:

14 "Thanks. That solves the issue. We are required to contract directly with Network
15 Rail and insist that our tier ones maintain the standard, even when
16 sub-contracting the work. We won't have a need for Achilles' alternative."

17 So that's a very clear view. It supports what Balfour Beatty says in its evidence.

18 This is entirely consistent with Balfour Beatty's evidence and shows that
19 principal contractors to Network Rail would not be likely to be interested in
20 Achilles' alternative offering.

21 Just carrying on, at 3227, also Achilles says:

22 "Please see below from Skanska. No need for Achilles' alternative."

23 Then, if you go back one more page at 3226, Achilles' chief operating officer says:

24 "I can only assume they don't want to tell us a straight no as they have serious
25 doubts about the new service and want to keep their options open."

26 We would suggest that Miss Whittaker has misread the situation in terms of

1 Skanska's rejection, given we know from Balfour Beatty that there are
2 a number of other reasons why a principal contractor would not want to move
3 their buying activities to an alternative supplier scheme. Skanska's e-mail, we
4 would say, is pretty clear after all on this point.

5 That brings me to my ninth point on this and final. Even if buyers multi-homed
6 across RISQS and TransQ because Achilles had offered a free buyer
7 subscription, so if it had become a roll on decision, as it were, this would not
8 have driven traffic to TransQ. If buyers are giving their suppliers a choice as
9 to which supplier assurance platform to be on, and those same suppliers are
10 required to be by one or more buyers to be on RISQS, Network Rail obviously
11 being a significant consideration there, they are not going to choose to pay for
12 two subscriptions and pay for two sets of audits.

13 If I can turn to the undisclosed comparator in Northern Europe. In our submission,
14 given that Mr Parker is going outside GB Rail to find a comparator in another
15 product geographic market, it was incumbent upon him to satisfy himself that
16 the comparator was fit for purpose and could be used without any adaptation,
17 if he was not building any adaptation into the approach he was adopting. He
18 could of course have taken the view that there were differences and make
19 adaptations, but that he is not what he did. In our submission, the comparator
20 simply can't be used. There are far too many material differences between
21 the two situations. I would like to highlight the material differences that we
22 say exist on the evidence between the two situations, which one would expect
23 would have driven a considerably high number of buyers and suppliers to stay
24 with Achilles' JQS, as compared with the number of buyers and suppliers that
25 would have moved to TransQ and GB Rail.

26 Before I do so, I just want to address the question of incumbency, because it comes

1 up in the discussion. My friend already addressed you on T it. We say that
2 Achilles would have lost most if not all of its residual incumbency advantages
3 by 1st May 2018. Contractual relations, reputation and audit capability were
4 areas where Mr Parker thought that Achilles still had elements of incumbency
5 in 2018. As a starting matter, Achilles was not permitted to market to RISQS
6 members between October -- it thought it couldn't -- October 2017 and
7 May 18. Its proposed new offering, which was to be launched with a brand
8 name unrecognised in GB Rail. It is worth noting that Mr Parker recognised
9 that launching with a new brand name without marketing was an important
10 consideration. I think I have a reference to that in a second.

11 Achilles simply couldn't announce to the market what its new offering would be
12 ahead of 1st May 2018. That's a pretty striking feature.

13 Achilles was also required to negotiate new buyer contracts from 1st May 2018, and
14 we say it is important that proposed terms were sent by Achilles for a single
15 buyer from 1 May 2018, and obviously had to enter into new contracts with
16 a supplier.

17 So Achilles could not use its supply data until suppliers consented to new terms and
18 conditions on 1st May 2018. You have my reasons why that is the case,
19 nothing to do with infringement. We know it was likely to be difficult for
20 Achilles to have traction with suppliers to enter into TransQ terms at
21 1st May 2018, given that RSSB had itself had struggles having started the
22 process on 1st January 2018, and with a four months head start. It won't
23 have helped Achilles that it was felt that it was necessary due to the
24 concession contract to direct suppliers trying to access what had become the
25 ghost platform to the enhanced RISQS platform. Mr Parker thought that could
26 be significant. Again I will give you the reference in a second.

1 Achilles also had reputational issues during the concession contract because it was
2 felt it wasn't delivering on promises that had been made about product
3 development. On the other hand, RSSB RISQS Board had established
4 RISQS in 2014 as a scheme operated by the industry for the industry. We
5 know that.

6 RSSB had made the most of its free run it had until 1st May 2018 and was engaging
7 in a considerable positive marketing and showing how superior the new
8 platform was over RISQS.

9 RSSB, as we said already, migrating buyers and suppliers.

10 Indeed, Mr Parker accepted that if it assumed in the counterfactual that RISQS
11 would have managed to migrate suppliers and buyers a long time beforehand,
12 then this could make a difference to his assessment. I have the references
13 for that in a moment I think again.

14 RSSB as the industry body would also have had a strong reputation within the
15 industry. That makes good sense.

16 There is also evidence that buyers and suppliers in the industry identified supplier
17 assurance with RSSB and RISQS as opposed to with Achilles.

18 So we say any residual incumbency advantages would have disappeared or
19 certainly been reduced to a very small level by 1st May 2018, and that was
20 because of the way in which the concession contract had been established,
21 the terms of it. Sorry. How Achilles thought the implications of that.

22 So in terms of the differences between Achilles JQS and GB Rail, a few points.
23 First, while Achilles was clearly an incumbent in the Northern Europe oil and
24 gas sector, it was not in GB Rail, even if it had some residual incumbency
25 features. Even if it might have had some residual features of incumbency in
26 the run up to May 2018 in GB Rail, as I said, they had disappeared by 1st

1 May 2018.

2 Second, unlike in GB Rail, Achilles was not prevented from marketing its product in
3 the run-up to the transition in the Northern European oil and gas sector.

4 Achilles in GB Rail was simply prevented from doing so because of the interpretation
5 it put on concession contract, and it couldn't market its new TransQ product,
6 a brand that was simply unknown in GB Rail. That would have been
7 significant.

8 Third, Achilles couldn't simply let buyer and supplier contracts roll on -- sorry. They
9 could let the contracts roll on simply between December 2018 and
10 January 2019 in Northern European oil and gas sector, and didn't need to
11 enter into new contracts with buyers and suppliers. As I said, our view is that
12 was not the case in GB Rail because of the concession contract, nothing to do
13 with infringement.

14 Fourth, Achilles could continue to make use of supply data, obviously from
15 1st January 2019 onwards in the Achilles JQS situation in GB Rail. It couldn't
16 again because of the view Achilles took on the contractual position.

17 Fifth, Achilles wasn't forced to rebrand obviously an Achilles JQS offering in the
18 Northern European oil and gas sector with a brand not known there.

19 Sixth, EPIM JQS had not migrated most buyers and suppliers previously on Achilles
20 JQS to EPIM JQS.

21 Seventh, in GB Rail, it is not just a group of infrastructure owners deciding to
22 establish a competing scheme, but rather initiative driven by the RISQS Board
23 and the RSSB to establish an industry scheme.

24 Mr Parker, I think in cross-examination, suggested it might have been possible to
25 switch the comparator analysis so that one was looking at the position of the
26 EPIM buyers rather than Achilles JQS. We say it is far too late in the

1 proceedings to be suggesting that. We have extremely limited information on
2 the position in any event of buyers and suppliers on EPIM JQS, other than the
3 number of operators and suppliers on EPIM JQS in January 2018, in
4 Miss Ferrier's third witness statement. I will come on to some issues with the
5 data in a moment. There are no other numbers for EPIM JQS.

6 Miss Ferrier could not account for the missing 36 buyers, based on the numbers
7 presented in her third witness statement, compared with her fourth witness
8 statement. That's at day two transcript, page 40.

9 Eighth, EPIM provides the audit function for the Norwegian continental shelf
10 operators and not to other buyers. So if a contractor in Northern European oil
11 and gas sector wants its supply chain to be audited, it must be on Achilles'
12 JQS. I think you have that point.

13 EPIM JQS couldn't provide that function for contractors. This is really important, as it
14 means that buyers were not given a free choice between Achilles' JQS and
15 EPIM JQS at the transition moment.

16 It is important to note that Mr Parker accepted that if it is the case there is no choice
17 for contractor buyers on Achilles' JQS and moving to EPIM JQS because
18 contractors could not request to have their supplier chain audited on EPIM
19 JQS, that would probably affect his analysis. That's transcript Day 4,
20 pages 29 to 30.

21 Ninth, suppliers do not pay for audits in the Northern European oil and gas sector,
22 but they are paid for by buyers. We have heard this point already today.

23 Subscription costs also appear to be lower in Northern European oil and gas sector.
24 Obviously, this might increase the willingness of suppliers to multi-home and
25 the willingness of buyers to have their suppliers multi-homing. Indeed,
26 Mr Parker accepted that it could be relevant to the decision that in the

1 Achilles' JQS situation buyers pay for suppliers audit. He accepted that.
2 That's transcript day 4, pages 8 and 9, the confidential transcript.

3 I should note that the extent of supplier multi-homing in Northern European oil and
4 gas sector, the extent of it is not at all clear, as was shown by my exchanges
5 with Mr Parker yesterday.

6 Tenth, there is no buyer in the unique position of Network Rail in the Northern
7 European oil and gas sector.

8 Eleventh, in the Northern European oil and gas industry, Achilles appear to have
9 been predicting retaining 50% of buyers and roughly half the number of
10 suppliers, which also equated to roughly half its previous annual revenues.

11 In fact, a somewhat higher proportion of suppliers remained on Achilles than
12 expected. So it is actually not such a dramatic shift there, being a question
13 over the viability of Achilles JQS in that market to retaining the majority of its
14 suppliers and the majorities of its revenues, but by contrast, in GB Rail,
15 Achilles just had an aspiration -- it is only an aspiration, nothing more-to retain
16 ten buyers. That's less than 10 per cent of the buyers in GB Rail at the time.
17 It is not clear that any of them were particularly large buyers in the sense it is
18 not clear that any of them had a large number of suppliers providing safety
19 critical service in GB Rail infrastructure, and only actual interest from the few.
20 There's absolutely no reason why the internal documents wouldn't have really
21 talked up actual interest from buyers if there was considerably more interest.

22 Even if Achilles might have won a few more suppliers than it might have expected in
23 the run up to 1st May, it is very different from retaining 50% of buyers and
24 almost 80% of suppliers.

25 When I put these differences to Mr Parker in cross-examination, some important
26 points emerged. I have already commented on some of them. I will go

1 through quickly to make sure you have the references.

2 First, Mr Parker accepted that Achilles being required to use a brand name not
3 recognised on GB Rail could potentially have an impact on his assessment.
4 That's Day 4 transcript, page 23, non-confidential.

5 Second, Mr Parker accepted, as I said already, if the difference in the offerings
6 between Achilles JQS and EPIM JQS in terms of the audit function was right,
7 that could have a material impact on his analysis, he said. That's transcript
8 Day 4, page 23, non-confidential.

9 Mr Parker thought it would make a difference to his assessment if in the
10 counterfactual buyers and suppliers were being directed to Achilles' website.
11 We have seen that. That's transcript Day 4, page 26.

12 Mr Parker thought it would make a difference to his assessment if buyers and most
13 suppliers migrated in the counterfactual to the enhanced RISQS platform prior
14 to 1 May 2018. That's transcript Day 4, page 26.

15 Mr Parker said that while he hadn't given any thought to it, it was probably right that
16 he was assuming that buyers on Achilles' JQS had a choice as to whether to
17 move to EPIM JQS. That's transcript Day 4, page 28.

18 Mr Parker accepted -- I think that's the same point so it is probably the same
19 reference. Yes. It is the same auditing point. I have given a reference to
20 transcript Day 4, pages 29 to 30.

21 There was some discussion this morning about suppliers to Danish operators
22 needing to be removed from the calculation. We would say that Mr Gjertsen's
23 evidence on this was not particularly clear. I am not sure I really got to the
24 bottom of what metric he was using when he was talking about 3%. At one
25 point he did say it could be 3%, 5%, 7%.

26 It also doesn't take into account other buyers on Achilles' JQS outside Norway. That

1 simply hasn't been dealt with.

2 We have run some numbers on Mr Parker's assessment. Just to be clear, for
3 example, a 5% difference here makes a difference of £600,000 over the
4 whole of Mr Parker's calculation. A 10% difference -- so a 10% reduction in
5 number of suppliers remaining on Achilles' JQS, a 10% difference leads to a
6 1.2 million difference in the calculation. So those are significant points.

7 You can't have a broadbrush approach to this. As I said, we say for these types of
8 reasons you simply can't use the approach of Mr Parker. These are
9 significant amounts of money for relatively small percentages. So it's
10 an important issue we say on which there is no reliable data.

11 If contractors on Achilles' JQS had a choice to move to EPIM JQS, they might have
12 moved, but, of course, they didn't have a choice. They could not do so. So
13 this materially affects the choice in that comparator.

14 My learned friend suggested I think in his openings -- closings rather, that visibility of
15 audits on EPIM's JQS contractors was relevant but we say it isn't. The
16 important point is the contractors simply couldn't take their buying activities to
17 EPIM JQS, because they couldn't have their supply chain audited as the
18 contractor if they are on EPIM JQS. That's really, really important.

19 In essence, you ended up having a bifurcation of buyers, not because of any choice
20 at all in the market, but because of the product difference between the two
21 schemes.

22 It's entirely different what's happening in GB Rail, where you have two competing
23 providers and obviously buyers would have had a choice.

24 Finally, on this point, Mr Parker considered, in respect of the differentiating factors
25 overall, that if the tribunal were to come to a view that lots of these factors
26 meant that, for example, Achilles looked more like a pure entrant than

1 an incumbent, again it would be necessary to adjust his modelling. That's
2 transcript Day 4, page 24, lines 8 to 11 of the confidential.

3 Another reported issue that arose during the trial is the accuracy of the data relating
4 to the Achilles' JQS.

5 The data from the Achilles JQS scenario materially drives the damages calculation.

6 You have just seen with the 5% to 10% difference in the number of suppliers
7 being retained.

8 We therefore submit it is unacceptable that there are material discrepancies with the
9 data. I will make a few specific points about that.

10 First, Mr Parker had not explored whether it might be necessary to consider
11 onboarding suppliers on EPIM JQS prior to January 2019. He nevertheless
12 accepted that this might be necessary if it was the case that EPIM JQS had
13 started to onboard suppliers prior to January 2019. That's in the transcript
14 Day 4, page 33.

15 So he's accepting that it might be necessary to look at the number of suppliers
16 pre-January 2019 to work out then what the retention rate was post
17 January 2019.

18 Obviously, to the extent that more suppliers were lost previously, then that could
19 drive a lower retention rate. Again, really important point that hasn't been
20 explored at all.

21 Second, Mr Parker didn't understand the differences in the buyer figures on Achilles
22 JQS between Miss Ferrier's third and fourth witness statement. That's
23 transcript Day 4, pages 33 and 34.

24 Miss Ferrier herself has not been able to explain the missing 36 buyers. This is
25 really important, because, assuming that it was 112 buyers on Achilles JQS
26 pre-January 2019, we have no reason to disbelieve this, but in January 2019

1 the number of buyers was -- I think it is 59 in her third witness statement.
2 That means that the buyer capture of Achilles JQS at that point in time is
3 much lower than the percentages that Mr Parker had used.

4 Third. Mr Parker accepted he had not sought to ask his client how much supplier
5 multi-homing there is in the Achilles' JQS situation. That's the transcript for
6 Day 4, page 39.

7 Again, these are really important issues. We say it is not acceptable that these
8 issues weren't explored when putting forward this as a model for
9 a £12 million claim.

10 I then have just a few general points on Mr Parker's evidence. Mr Parker accepted it
11 was a fair point that it was not his position to decide on whether the principal
12 contractor revenues were sufficiently small to be excluded from the
13 calculation. That's transcript Day 4, pages 42 to 43.

14 Mr Parker was generally working on the assumption 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 until 14th May. That's transcript Day 4, page 50.

18 However, I have said already this is contradicted by the internal documentary
19 evidence which, as we have gone through already, shows clearly that Achilles
20 was confident it could compete for all RISQS members, except principal
21 contractors and they would obtain recognition of equivalence from Network
22 Rail, until the penny dropped. The game changer e-mail on 26th April 2018.

23 Mr Parker, we say -- obviously you will have to decide this point -- but Mr Parker we
24 say is wrong on this point is likely to have infiltrated a good deal of what he
25 says in his reports. It is a really important point. As I say, you will have to
26 decide if he is right on that particular point.

1 Mr Parker confirmed that he had not given independent consideration to the five year
2 loss period. He also confirmed that the 50% figure for future losses was
3 arbitrary. Again, Network Rail is really surprised at that, the 12 million claim
4 that he is making arbitrary assumptions about the nature of future losses. It is
5 simply not acceptable.

6 Mr Parker confirmed that he had not taken into account subsequent radical
7 improvements on legacy Link-Up and RISQ services. That's transcript Day 4,
8 confidential, at page 21.

9 Finally, we say Mr Parker is undoubtedly comparing apples and pears. He has taken
10 Achilles' revenues and GB Rail and predicted Achilles' counterfactual
11 revenues on that basis. However, the counterfactual revenues actually being
12 achieved don't relate just to rail, seemingly.

13 Take First Great Western, for example. The evidence shows that it has few
14 suppliers for safety critical works of the type required in audits for Sentinel and
15 OTP.

16 Rather, what First Great Western more generally seemingly wants is a service which
17 places their suppliers in one place, I suppose for procurement purposes.

18 A considerable number of suppliers, however, are not going to be driving much by
19 way of supply revenues for assurance, but it appears more likely that Achilles
20 will achieve some buyer subscription revenues for managing first groups
21 entire supplier chain in one place. That's why the buyer subscription
22 revenues are higher than they might normally be, although -- I will not say that
23 because it is confidential.

24 Achilles will tell us that the ability to service First Great Western has been unlocked
25 through being recognised by Network Rail for Sentinel OTP audit purposes.
26 However, Achilles appears to be accepting RISQS audits for FGW suppliers,

1 which need audits for Sentinel and OTP, and so I would suggest it is not
2 entirely clear what recognition has unlocked in relation to that customer and in
3 relation to other customers. I did explore this with Miss Ferrier. Again, I did
4 not feel there was any convincing answer provided.

5 Those are my points I think on Mr Parker.

6 Mr Law. We would submit that Mr Law's evidence is grounded in the facts of
7 GB Rail and gives appropriate regard to the tribunal's liability judgment, and
8 should certainly be preferred. We don't suggest it is possible to achieve
9 micro-precision when it comes to assessing damages in this type of case,
10 involving counterfactual analysis, and Network Rail's expert has been realistic
11 about that.

12 Mr Law expressly recognises that there is judgment the tribunal will need to apply,
13 based on the facts in GB Rail, and that would include, for example,
14 changing -- it is just simply one cell in his calculation to increase the average
15 number of suppliers from 37 to another number. Simply, you need to make
16 one change in a cell to put a different number of suppliers into that calculation.

17 Mr Law provides what his judgment tells him, but he leaves open the possibility the
18 tribunal might not agree precisely on every single percentage. That's very
19 different, we say, from the approach of Mr Parker, who has taken
20 a comparator from a different geographic market, a different product market,
21 that will have inherently different market differences built into the predictions.

22 While Mr Parker now says it would be possible, for example, to take the reverse
23 scenario than the Achilles' JQS scenario, as I say, it is far too late to be
24 making proposals of that kind which Network Rail can't properly assess and
25 challenge.

26 It was a disclosure request by Achilles, in terms of all Network Rail's direct suppliers,

1 etc. That actually came before the tribunal as an issue, sir, which you ruled
2 on. So they requested this vast amount of data from Network Rail, and it was
3 on the basis that this was going to be relevant to calculating damages.
4 Achilles then went on to entirely ignore all the information that came back,
5 completely ignored it, and went to the comparator elsewhere.

6 I was going to move on to unreasonableness of Achilles in delaying re-entry, if I may.

7 On the question of Achilles delayed re-entry in the actual, there is no obvious reason
8 as to why Achilles couldn't have accepted the API solution. I hear what my
9 learned friend is saying, that Achilles didn't actually say no to it. Let's think
10 about that for a moment.

11 My learned friend's questioning of Mr Blackley was on the basis that Achilles had not
12 rejected it. However, we say that's to miss the point. It should be clear from
13 a review of the communications between Achilles and Network Rail that
14 Achilles was challenging multiple aspects of the proposed API solution, to the
15 point of querying whether the API solution was compliant with the tribunal's
16 judgment, and indeed whether or not an API solution was even needed.

17 It was very, very difficult for Network Rail, given that level of questioning repeatedly
18 over numerous letters, to continue with the API solution, and certainly at no
19 point did Achilles actually agree to it, say "We're happy with this solution".
20 They were constantly putting issues in the way of it.

21 One point which seemed to come up even as late as May 2020 in the
22 correspondence was who would see Achilles supply data. We say
23 Mr Blackley very clearly had already dealt with that at the meeting in April,
24 that the data would only be viewed by Network rail. It is an issue that had
25 already been dealt with, but it was still being raised in May.

26 On the original API front point, my learned friend -- actually this was this opening, so

1 just briefly -- Achilles thought that it was unfair to have suppliers to go to
2 RISQS, register RISQS and get a unique number in order to use Achilles. He
3 also made in closing the point.

4 We have seen the minutes of the meetings which Mr Blackley, realising Achilles'
5 concerns, made clear that the proposal would not require suppliers to register
6 with Achilles, but rather supplier assurance providers could obtain a unique
7 number which could then be used by Achilles. It was also suggested that
8 competing supplier assurance providers could obtain a bank of numbers in
9 advance to use with their suppliers. Those were points put forward at the
10 meeting but, as I said, after the meeting, there was then a continuous
11 correspondence in which Achilles challenged fundamental aspects of the
12 whole API solution proposal.

13 My learned friend also said in opening that in contrast to the original API, which
14 would envisage supplier assurance providers feeding information directly into
15 RISQS, and then Network Rail and RISQS passing the information to Sentinel
16 and Network Rail could view it there, the original API aggregated sucks in
17 information from Achilles and Achilles passed it on to Sentinel.

18 It is worth noting that the API aggregator has been created by Altius, which provides
19 the RISQS platform on the same Exigo platform as RISQS. It was never
20 envisaged that Achilles' supplier information would sit on the RISQS
21 database, visible to other suppliers, but rather just that the information would
22 be seen only by Network Rail and passed to Mitie.

23 As matters stand now currently with the API aggregator solution, a competing
24 platform provider is still in receipt of information from Achilles but, as often
25 happens in this type of situation, to comply with competition law, apart from
26 anything else, there are Chinese walls in place within Altius to ensure that

1 Achilles supplier information is not passed to those with commercial
2 responsibility for RISQS. That would have been the case under the original
3 API solution as well.

4 I know, Mr Cutting, I think you raised some questions about this in terms of the
5 standard and how that could tie in with the solution now. I am instructed that,
6 in essence, Network Rail feels it is acceptable under the current standard. It
7 has not changed sufficiently for it to matter.

8 Then, in terms of the current position, while Achilles has been out of the market for
9 three years, we would submit that the relative level of its success, since it
10 started offering its Link-Up service, does have a bearing on matters.

11 As we have moved to the current position, I will just deal with a point my learned
12 friend made about the contractual position. You were taken to bundle G13,
13 tab 679. It is the current contract with MACE, obviously confidential. You
14 were taken to clauses within that looking at onboarding of suppliers.

15 I asked Miss Ferrier about these types of provisions in her cross-examination, on the
16 second day. I would certainly urge you to review her responses on that. It is
17 transcript Day 2, page 12, line 6 to 13. This is obviously the confidential
18 transcript. I will not make the points in open court, because I can't enlarge on
19 the thing. I definitely recommend reading this because it casts light on the
20 point my learned friend was trying to make.

21 **THE CHAIRMAN:** What are the points to make about this? Are they in your written
22 document?

23 **MR WENT:** I don't know they will be necessarily. It is a simple point. I don't think
24 I can make this in open proceedings.

25 **THE CHAIRMAN:** Unless you make the point I won't know what it is.

26 **MR WENT:** It will take a second. It is the problem of the -- it makes it very difficult.

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**[CONFIDENTIAL SESSION EXTRACTED
AND AVAILABLE AS A SEPARATE TRANSCRIPT]**

MR WOOLFE: The next point I wanted to address was the significance of dominance for construction of the counterfactual, to address the point Mr Cutting raised, and whether or not there needs to be an assumption -- what is to be done about this. The liability trial took place on an assumption of dominance, and that issue is stayed. It has not been resolved one way or the other.

In a sense, what I would suggest is that the nature of an abuse of dominance in itself is conduct which moves away from what is normal conduct in the market, and in itself exerts market power and so on to achieve an end. I would suggest assuming any of that in the counterfactual would be rather surprising.

More to the point, I think on the facts what we can see is, if an open standard is in place, then Network Rail does seem to feel the need to be more even-handed. Just on the facts, it is not dominance or not. If you remove the RISQS-only rule and have an open standard in place, they do seem to think they have to be more even-handed about matters.

You get that on the facts from bundle G10, tab 534, and this is an e-mail from Mr Blackley to a Matt Clements, RSSB, on 22nd November, 2019. It was being suggested to him that Network Rail should sign up again to the charter. He says in the first paragraph:

"Given the CAT judgment it is likely that Network Rail open up assurance to multiple supplier assurance providers. These providers will also undertake core assurance in addition to their specific module assurance, e.g Sentinel. As

1 such, I do not believe Network Rail can sign up to the current wording."

2 So there is certainly some sense of not everything that would have happened in the
3 counterfactual could have happened in the actual.

4 Similarly, if you recall the note of the options meeting, Mr Blackley's record of the
5 options meeting, for example, it was again recorded in that they thought the
6 RISQS scheme manager shouldn't audit the compliance of the group service
7 providers and so forth. Simply to submit that in a sense the presence of an
8 open standard does change everybody's expectations, as to how they should
9 act, and I would submit you wouldn't have seen an e-mail like that from
10 Ms Scott that I took you to in my main closing where she was e-mailing all
11 downstream buyers to ask them to put pressure further downstream, because
12 it wouldn't be in accordance with that standard.

13 Now my learned friend made repeated reference -- a major plank of his case now
14 seems to be that the concession contract made all the difference, and once
15 the RSSB wrote to my client on 9th October 2017 objecting to Mr Katzen's
16 e-mail of 17th September 2017 -- if you recall, that's RSSB letter -- suddenly
17 this made all the difference and my client lived in fear of being in breach of its
18 contractual obligations not to conflict with the RISQS contract.

19 I think it was suggested that Mr Flack was one who shared this view. Now I think
20 you have seen this, but in bundle G4, tab 201 -- we are going to go back see
21 to some other material in G4 as well -- headed "Transport sector strategy",
22 this is Mr Flack's presentation in March 2018. It sets out indeed, whether it is
23 right or wrong, or attributed to anybody else in the case, it certainly was his
24 understanding.

25 On page 2205 we can see the first bullet point:

26 "It is clear that any restrictions on Achilles end on the termination of the contract on

1 1st May 2018. Therefore any activity prior to that date in respect of RISQS
2 (as opposed to Enhanced RISQS, ie post 1 May 2018) must not conflict with
3 the final months of that scheme. However a product offering that will not
4 come into effect until after 1st May cannot possibly be a conflict of interest.
5 We need to be robust and confident about this."

6 That was his view. So that was the view that some people in Network Rail had.

7 Now it was suggested I think that although Miss Ferrier had said in evidence they
8 were making efforts to speak to buyers and so forth, this was not something
9 that was actually happening. I think in effect it was being suggested that
10 Miss Ferrier's statement was incorrect.

11 Now we can see examples of where this was happening and there is evidence in the
12 bundle of it. So within G4 if you go to tab 186 and see there an e-mail from
13 Ms Quarterman, Duty Manager Transport, saying:

14 "I have written up the business case for Colas Rail - please run through it and let me
15 know what you think."

16 That's the document that is attached. Perhaps just look at the nature of that for the
17 moment. You can see it at page 2090B. You see this is a presentation to be
18 given to Colas Rail, a business case. You can see what's set out.

19 The important point for this is the covering e-mail. Colin is asked:

20 "How did your meeting go with the MD of Colas ...?"

21 So Mr Flack is meeting Colas Rail at that point.

22 There is another one as well if you go over to tab 188. This actually is slightly odd,
23 but it is actually Miss Ferrier contacting Ms Scott. Amongst the things they
24 want to talk about is Achilles' transport offering post 1st May.

25 Then we can see some others in this bundle at tab 178 and you can see it's about
26 contacts with Volker. There is going to be a meeting with them, wanted to

1 update them with the rail offering.

2 Tab 154 as well, an e-mail from Colin Flack talking about discussions -- in the
3 middle -- by the second hole punch on that page -- with the CEO of RDG.
4 That's a rail delivery group.

5 Then in bundle G5 at tab 248 -- this is quite an important one -- you can see there's
6 an e-mail from Rebecca Bantoft to a variety of people within Achilles, subject
7 "Rail briefing for SAMS". You can see there's -- they have prepared a briefing
8 paper and gone through possible questions they may ask. Over the page you
9 can see the briefing on that.

10 So there is limited stuff in the bundle, but there is some there. To suggest there was
11 no contact at all is just not correct.

12 On JQS my learned friend was I think suggesting in his closing that in effect the
13 market is partitioned in JQS on the basis of the type of business that they are.
14 Operators have gone one way and contractors have stayed the other.

15 Now I don't think that's correct. I have put references indeed in my aide-memoire in
16 this point on JQS. The references are at paragraph 12.4 of my aide-memoire.
17 It is clear from Gjertsen, paragraph 8 that both EPIM and Achilles accept both
18 operator buyers and non-operator buyers, but more to the point by way of
19 reply, I don't think it was put to Mr Gjertsen. My learned friend did put to him
20 that non-operator customers couldn't obtain an audit from EPIM. They
21 couldn't request audits, but it wasn't put to Mr Gjertsen that operators had
22 gone one way in the market and contractors had stayed the other. That
23 simply wasn't put and it doesn't fit with Mr Gjertsen's evidence.

24 On the subject of the counterfactual, Mr Blackley's suggestion that they could simply
25 have noted that they would produce a standard in due course, if I may put it
26 that way, my learned friend said they wouldn't have needed a standard,

1 because a standard is only about interoperability and interoperability is
2 something you only need when further operators come into the market.

3 With respect, that's not right either, because the standard doesn't just given deal with
4 interoperability. It governs the actual substantive standards that a supplier
5 assurance provider to Network Rail -- provider of assurance Network Rail
6 standards must meet. So they must assure against the Sentinel and OTP
7 substantive rules, but they must also meet the ISO17021 auditing standards.

8 That now specifies who can provide central assurance. If you didn't have that in
9 place, you would need to have something in place saying who can do it. So
10 either you have a RISQS-only rule, or a rule that specifies the provider, or you
11 have a rule that says who can do it. I don't think it is really realistic to think
12 you can have a world where you don't have any sort of rule. So the standard
13 is not just about interoperability. It is about specifying who can actually carry
14 out that activity.

15 A point was raised about missing buyers, that Miss Ferrier had somehow failed to
16 account for missing buyers on the JQS figures. I think that was a point
17 I covered in re-examination with Mr Parker, that, in fact, my learned friend is
18 confusing two things. There is some figures about renewals in Miss Ferrier's
19 evidence and you have to see those as figures about renewals. If you treat
20 them as stock numbers, you get confused.

21 Another point in respect of Mr Blackley's contacting of various Achilles' customers. It
22 was pointed out that it was legitimate for Network Rail to seek to arm itself
23 with information to defend these proceedings. That is undoubtedly correct.
24 However, we say it is not necessary for Mr Blackley to be doing the
25 investigating and that's where the problem lies.

26 It was also said that -- repeatedly said by my learned friend that it was been only in

1 April 2018 that "the penny dropped with Achilles". He is trying to paint a
2 picture that we were blissfully unaware of the problem of the RISQS-only rule
3 in any way until April.

4 Now that's not what Miss Ferrier's evidence was. Miss Ferrier's evidence, as
5 I understood it, was that it was a concern and there was constant seeking to
6 try to get clarity on the point and it was only in April that the final clarity
7 arrived, but it wasn't that Achilles was entirely unaware of the possibility this
8 could be a problem, shall we say, beforehand. You get that from G5, 249.
9 I am not sure it is worth going there.

10 **MR CUTTING:** Sorry. Can you give that reference again?

11 **MR WOOLFE:** G5, 249. It is actually another version of this briefing paper that
12 I was just showing to you a moment ago. Do I have the right reference? Yes.
13 So there we are. On page 2453A you see the question and answer third up
14 from the bottom, how they are preparing to prepare their messaging:

15 "I need to book an audit. What should I do? Will an Achilles audit booked in May
16 still be compliant?"

17 The suggested answer is:

18 "We are booking audits into May, so as it stands, these audits will be compliant."

19 Comment from Dominic O'Malley:

20 "Can we not say 'and these audits will remain compliant'. I would immediately ask
21 what 'as it stands' means as it is ambiguous and sounds like it might be
22 subject to change."

23 I mean, that's exactly -- if you are a sales person, you don't want to be going
24 and saying, "Well, you know, we think as things stand". It is not the sort of
25 message you want to be delivering.

26 More to the -- in addition, of course, the RISQS-only rule didn't only affect what

1 Achilles was doing, as has repeatedly been stated, but also was affecting
2 what RSSB and Network Rail were able to do. Again I pointed out the e-mail
3 of Gillian Scott of 24th April.

4 I think I just have one more point, a final point. Much is made again of the cost
5 concern about multi-homing, that Achilles being in the market and driving
6 multi-homing would be adding cost.

7 Now again I think a lot of the time my learned friend is implicitly assuming his
8 counterfactual, in which we would have been out of the market for a year. If
9 you have that as your counterfactual, then everybody is already on RISQS
10 and you can see why that begins to have some more force. If you are
11 assuming more continuity, however, it just doesn't work in the same way,
12 because in May 2018, you know, Achilles would have been in the market.
13 People would have been signed up. They would be used to being Achilles'
14 customers. Network Rail is directing some people on to RISQS. It is not at all
15 clear that it would necessarily be seen as Achilles is foisting the extra cost on
16 the supply chain, if you see my point.

17 Finally, in response to your question, madam, about business forecasts, now there is
18 some material that is in the disclosure in the bundle. However, by and large
19 the experts on both sides found it wasn't very helpful.

20 Just to give a reference to that -- you may be aware of it -- that's Mr Parker's first
21 report at paragraphs I think 74 and following. I think that's F1, tab 3, page 78,
22 and in Mr Law's report at paragraphs 4.5 to 4.10. That's Bundle F1, tab 6 at
23 pages F186 to 188.

24 For what it is worth, however, if I could take you to one thing and refer you to
25 another. In bundle C, tab 5 this was an exhibit to Ms Ferrier's first witness
26 statement in these proceedings, so back I think at the time of -- I think it's

1 under (inaudible) recognition, in fact. This was setting out -- this was
2 a forecast that was contemporaneous in -- a contemporaneous forecast by
3 Achilles. I think it comes -- it is referred to in paragraph 17.1 of Miss Ferrier's
4 first statement. That may help give us the date of it. At 17.1 of her first
5 statement, which is bundle B, tab 1, page 5, she referred to:

6 "Achilles had originally forecast its revenue for renewals in the 2018-19 year to be ..."
7 and then a certain number. Anyway that was a forecast made there.

8 I think, however, both Mr Parker and Mr Law thought it was over-optimistic. Then
9 there is a later forecast Mr Parker refers to that he thinks is probably affected
10 by the anti-competitive conduct itself and therefore is not optimistic enough,
11 as it were. That's from that period.

12 The other thing is -- there is a bundle reference for it, but you will not find
13 a document there -- in bundle G2, tab 43 -- that's the bundle reference -- is
14 a large spreadsheet, which was a five-year forecast or business plan dating
15 from November 2016. It is in the electronic version of the bundle.

16 Now the question is, madam, do you want us to provide you with a soft copy of that
17 or a hard copy of it so you can see it? It is in the bundle. None of us have
18 referred to it. The experts have had access to it. If you would like to see it,
19 we can make sure we get it to you in a convenient form.

20 **MS BURGESS:** Yes, that would be helpful.

21 **MR WOOLFE:** Would you like it in A3 perhaps? Would that be -- it is not huge, but
22 the relevant tabs are somewhat large.

23 **MS BURGESS:** Thank you.

24 **MR WOOLFE:** I think that's everything I have, sir.

25 **THE CHAIRMAN:** Thank you, Mr Woolfe. I mentioned before that the tribunal with
26 like to have some additional data. The tribunal hasn't yet reached any

1 conclusions as to which is the appropriate model to use for the calculation of
2 Achilles' losses, but if I could ask you to look at paragraphs 77 and 78
3 in Mr Parker's first report, which is at F81.

4 **MR WOOLFE:** Yes.

5 **THE CHAIRMAN:** He has there taken certain assumed supplier and buyer retention
6 rates and applied those to Achilles' revenues in financial year 2018 and then
7 later on there's a discounting in relation to rates. That's at paragraph 79.

8 What would be useful for the tribunal is if that calculation can be redone with different
9 percentages, and I would suggest, again without any pre-judgment of what we
10 are going to finally decide, but if we start at 5% for each of the supplier and
11 buyer rates and then go upwards 5, 10, 15, up to the rates put forward by
12 Mr Parker.

13 **MR WOOLFE:** Can I just clarify, sir? I think the way Mr Parker's model works is you
14 have a buyer percentage and that will drive a supplier percentage. Is it to be
15 a buyer percentage of 5 and whatever the outturn for supplier is or is it to be
16 assuming a 5% buyer, if you see my point sir?

17 Sir, perhaps if I can make this suggestion to be pragmatic. If we give you the 5%
18 steps, as it were, for the buyer and we go away and speak to Mr Parker and
19 ask him -- we tell him what you just asked for, and if we can give you exactly
20 what you asked for, we give it, and if it is actually slightly different, we give
21 you something and explain a bit and then you can --

22 **THE CHAIRMAN:** Okay. Equally that should take into account costs as well.

23 **MR WOOLFE:** Yes, yes.

24 **THE CHAIRMAN:** Then if it can be done on an alternative basis with no discounting
25 for on rates and with a 50% discount. That's the first thing.

26 The second thing is if we could have the calculation of the revenue and costs

1 associated with the provision of services to prime contractors and other direct
2 suppliers. This was the element of the calculation that Mr Parker didn't take
3 into account, because he said it wasn't material I think.

4 **MR WOOLFE:** This is in relation to excluding certain firms from the JQS? No.

5 **THE CHAIRMAN:** Not from the JQS. It's from the --

6 **MR WOOLFE:** Sorry. I recall the point, sir. Absolutely, yes.

7 **THE CHAIRMAN:** Paragraph 34.

8 **MR WOOLFE:** It was the principal contractor revenue.

9 **THE CHAIRMAN:** Yes, and I think Mr Law says that should also apply to direct
10 suppliers to Network Rail as well, because that couldn't have been -- those
11 profits were not open to Achilles.

12 **MR WENT:** I think Network Rail does have some numbers around that that may be
13 useful for that part of the exercise.

14 **MR WOOLFE:** Yes. Why don't we do a direct answer to what we can do, and if
15 there comes a point where Mr Parker says, "I can't because we need some
16 data", then we can approach you to ask for that data.

17 **MR WENT:** Yes.

18 **MR WOOLFE:** Thank you.

19 **THE CHAIRMAN:** We don't want to encourage a vast amount of extra work by the
20 experts, but what I would suggest is if Mr Parker produces the figures and
21 then if Mr Law comments on them, that would be helpful. I don't know how
22 busy -- Mr Parker sound like he is a busy man. If I could suggest we have
23 that in 14 days, is that realistic?

24 **MR WOOLFE:** At this moment I would have thought it is realistic, because
25 I understand it to be relatively straightforward to run those, numbers but I am
26 obviously putting words into somebody's mouth who is not here. We will set

1 an expectation and we will let you know if there is any problem.

2 **THE CHAIRMAN:** Yes. I mean, if it turns out to be a very complicated calculation, it
3 suggests that we have not fully understood what we are asking for.

4 **MR WOOLFE:** I also have a feeling that it may be something that Mr Parker's team,
5 who is actually doing the work with the spreadsheet, (inaudible). So I imagine
6 it is workable, sir.

7 **MR CUTTING:** It is always easier for counsel to promise the economists (inaudible)
8 satisfied.

9 **THE CHAIRMAN:** Finally, if you could both e-mail your notes from today, if you
10 could e-mail them to the tribunal, then we would have electronic copies of
11 them.

12 Thank you both very much to you and to your teams.

13 **MR WOOLFE:** Thank you, sir.

14 **THE CHAIRMAN:** We are going to reserve judgment.

15 **MR WOOLFE:** I just thank the tribunal for its patience. It has been quite a long
16 week. So we are both grateful.

17 **(4.25 pm)**

18 **(Hearing concluded)**

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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?