

1 This Transcript has not been proof read or corrected. It is a working tool for the Tribunal for use in preparing its judgment. It will be  
2 placed on the Tribunal Website for readers to see how matters were conducted at the public hearing of these proceedings and is not to  
3 be relied on or cited in the context of any other proceedings. The Tribunal's judgment in this matter will be the final and definitive  
4 record.

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

7  
8 Case Nos.:1304/7/7/19 1305/7/7/19,  
9 1425/7/7/21

10  
11  
12 Salisbury Square House  
13 8 Salisbury Square  
14 London EC4Y 8AP

Wednesday 22<sup>nd</sup> March 2023

15  
16  
17 Before:  
18 The Honourable Mr. Justice Roth  
19 Mr. Simon Holmes  
20 Professor Robin Mason  
21  
22 (Sitting as a Tribunal in England and Wales)

23  
24 **BETWEEN:**  
25 JUSTIN GUTMANN  
26 **Applicant/Proposed Class Representative**

27  
28 v

29  
30 GOVIA THAMESLINK RAILWAY LIMITED & OTHERS  
31 **Respondents/Proposed Defendants**

32  
33 SECRETARY OF STATE FOR TRANSPORT  
34 **Proposed Intervener**

35  
36  
37  
38  
39 **A P P E A R A N C E S**

40  
41 Mr. Philip Moser KC, Mr. Stefan Kuppen and Ms. Alexandra Littlewood (instructed by  
42 Charles Lyndon)

43  
44 Mr. Paul Harris KC, Ms. Anneliese Blackwood and Ms. Clodhna Kelleher (Instructed by  
45 Freshfields Bruckhaus Deringer LLP)

46  
47 Ms. Anneli Howard KC, Mr. Brendan McGurk and Ms. Khatija Hafesji (Instructed by  
48 Linklaters LLP)

49  
50 Mr. Tim Ward KC (Instructed by Slaughter and May)

1 Ms. Sarah Abram KC and Mr. Jonathan Scott (Instructed by Dentons UK and Middle East  
2 LLP)

3  
4  
5  
6 Digital Transcription by Epiq Europe Ltd  
7 Lower Ground 20 Furnival Street London EC4A 1JS  
8 Tel No: 020 7404 1400 Fax No: 020 7404 1424  
9 Email: [ukclient@epiqglobal.co.uk](mailto:ukclient@epiqglobal.co.uk)  
10

11 **Wednesday, 22 March 2023**

12 **(10.30 am)**

13 Case management conference

14 **MR JUSTICE ROTH:** Good morning. These proceedings, as all proceedings in this  
15 Tribunal, are being live streamed. I must start, therefore, with a warning: an official  
16 recording of the proceedings is being made. It is strictly prohibited for anyone to make  
17 any unauthorised recording of the proceedings or to take any visual image of the  
18 proceedings, and to do so constitutes a contempt of court.

19 We have an agenda, which I think the parties have had input into, and it seems to us  
20 that the first matter is the application for certification in the second lot of Gutmann  
21 proceedings -- if we can describe them that way -- regarding the TSGN cases, and we  
22 have the application. We see that it's not opposed, save on one particular matter  
23 regarding potentially further particulars of the survey.

24 But, of course, it's for the Tribunal to be satisfied that it is an appropriate case for  
25 certification, Mr Moser. So, if we start with the authorisation condition, as it has been  
26 described. As regards Mr Gutmann personally, well, we have considered that in our  
27 judgment in the first Gutmann proceedings, so I don't think you need say any more  
28 about that. But the other aspect of that is funding, and we did have some questions  
29 about the funding.

30 We have a litigation budget which I think is at tab 20, is it, of the core bundle?

1 **MR MOSER:** Yes.

2 **MR JUSTICE ROTH:** Can I ask -- we know there is a proposal later in our agenda to  
3 have this matter heard together with the first Gutmann proceedings. We haven't  
4 formally determined that yet, but everyone seems to agree that's a sensible  
5 suggestion. It seems to us a sensible suggestion. So I want to know: is this budget  
6 prepared on the basis that they will be tried together or is this prepared on the basis  
7 that it will be a freestanding separate trial?

8

9 Submissions by MR MOSER

10 **MR MOSER:** This budget is prepared on the basis of this case only. It may well be  
11 that following certification and an order that they be heard together it will be sensible  
12 to consolidate matters, but that is something we haven't done presumptuously in  
13 advance.

14 **MR JUSTICE ROTH:** So it's on the basis -- because there may be certain efficiencies  
15 in terms of your costs.

16 **MR MOSER:** Exactly.

17 **MR JUSTICE ROTH:** So this is on the basis of a separate self-standing.

18 **MR MOSER:** Yes.

19 **MR JUSTICE ROTH:** The other question -- which I think we had before -- we see the  
20 total, bottom right, the bit over 8 million, some of that's post-trial, therefore would be  
21 affected by a costs order. But taking it through to trial, it's about 8 million. The funding  
22 you have under the Litigation Funding Agreement is about 5 million, I think. So what's  
23 the position about how it's going to be funded?

24 **MR MOSER:** The position is the same as in the other Gutmann cases, Sir. You will  
25 recall what happens at a particular point, should it become necessary, is that there is  
26 a certain element of conditional fee arrangement.

1 **MR JUSTICE ROTH:** That covers both counsel and solicitors, does it?

2 **MR MOSER:** Yes.

3 **MR JUSTICE ROTH:** So once one allows for that element, this budget is done on the  
4 basis of what it will cost to bring the case through to a successful conclusion for  
5 Mr Gutmann and the class; if it were unsuccessful, you're saying that then the total will  
6 be less because the conditional element won't kick in; is that right?

7 **MR MOSER:** That is right.

8 **MR JUSTICE ROTH:** It will be within the funding, or you're satisfied that the funding  
9 will cover the budget.

10 **MR MOSER:** We are satisfied.

11 I am told, for the sake of completeness and so I don't mislead, that because some  
12 things have already been decided in the other case, there are certain efficiencies in  
13 that sense. It is less than the other one precisely because, well, for instance we don't  
14 intend to have a week of certification hearing.

15 **MR JUSTICE ROTH:** Yes. But that's already allowed for.

16 **MR MOSER:** That is allowed for.

17 **MR JUSTICE ROTH:** Then the other question is on the Litigation Funding Agreement.  
18 I think we sought to alert to you this in advance of the hearing.

19 **MR MOSER:** Yes, and it was very helpful.

20 **MR JUSTICE ROTH:** Because obviously that involves the funder.

21 **MR MOSER:** That letter is now at page 70 of bundle T.

22 **MR JUSTICE ROTH:** Sorry?

23 **MR MOSER:** If it assists, the letter has been put in the bundle.

24 **MR JUSTICE ROTH:** Yes, I think we have seen the letter. But the agreement itself  
25 is at tab 17, page 384.

26 **MR MOSER:** Yes.

1 **MR JUSTICE ROTH:** What do you want to say about that point?

2 **MR MOSER:** What I want to say about the point -- which was in relation to 24.3, at  
3 page 410 of the bundle -- is that we're grateful for the Tribunal's letter and we certainly  
4 don't want to give the impression, however unintended, that the Tribunal has identified.  
5 So Mr Gutmann, who is incidentally here today, two rows behind me, has asked the  
6 funder to insert the same clause, or the like clause, I should say, as in Merricks, which  
7 was the Tribunal's, I think, second suggestion.

8 **MR JUSTICE ROTH:** Yes.

9 **MR MOSER:** The funder has of course agreed. That will be done just as soon as that  
10 can be amended and changed.

11 **MR JUSTICE ROTH:** Well, I think, just to pause a moment -- yes, we don't need to  
12 ask anything else regarding authorisation.

13 Then we go to the second aspect, often described now as the eligibility condition. We  
14 did want to ask you about the Gatwick Express because we see that though it's not  
15 apparent in the claim form, I think, but certainly the notice, the draft notice to the public  
16 makes clear the Gatwick Express is included or intended to be included. But I had  
17 thought -- and I may be wrong -- that a TfL Travelcard is not valid on the Gatwick  
18 Express, rather like the Heathrow Express.

19 **MR MOSER:** I will just take instructions for a moment.

20 We're also of the view that it appears that the Gatwick Express is separate. However,  
21 it is part of Southern and, as such, until we have seen the disclosure in the case, we  
22 consider that it's not entirely clear whether this is an arrangement that falls within the  
23 complaint or not, in that perhaps it is an arrangement where there ought to be  
24 a boundary fare. So, for the moment, we include it.

25 **MR JUSTICE ROTH:** If a Travelcard is not valid on the service, then this abuse isn't  
26 engaged because it hasn't covered part of the travel. I don't think one needs

1 disclosure; it ought to be public record. Is it one of the Defendants? It's part of  
2 Southern, isn't it? The Southern Franchise.

3 Forgive me, I can't now remember who is representing Southern today; is it Mr Ward  
4 or Mr Harris? It's Mr Harris.

5 Mr Harris, can you enlighten us on this point?

6 **MR HARRIS:** I'm just trying to take instructions. I don't know off the top of my head,  
7 nor does my instructing solicitor, but we're urgently trying to find out.

8 **MR JUSTICE ROTH:** Mr Moser, it does seem to us that if it's like the Heathrow  
9 Express, in the sense the Travelcard is not valid for travel on that particular sort of  
10 niche service, then this abuse doesn't bite on it.

11 **MR MOSER:** No. Sir, what will happen is they will tell us, and it is not for to us exclude  
12 in advance until we can tell whether or not it has some validity on that route. If it  
13 doesn't, then the point will simply fall away.

14 **MR JUSTICE ROTH:** Yes, but I think it's something we need to know before settling  
15 the CPO and the notice to class members. Because if it doesn't apply, you certainly  
16 wouldn't be right to put out a notice saying, as I think the draft has that we have been  
17 provided with -- which I think is somewhere in this bundle -- which says -- it's at tab 8:  
18 "TfL Travelcard holders who travelled on Gatwick Express could benefit from the  
19 claim."

20 We don't want to send out a message like that if it's excluded.

21 **MR MOSER:** We don't know. We know that it's not like the Heathrow Express, which  
22 isn't part of the rail network. Gatwick Express is one of the routes of the Defendant  
23 company.

24 **MR JUSTICE ROTH:** Yes, it's in the franchise.

25 **MR MOSER:** Perhaps a pragmatic solution would be to expedite that part of the fact  
26 finding and get clarity from Southern as to what the situation is in relation to Gatwick

1 Express. I think anecdotally we understand where the Tribunal is coming from. We  
2 felt we couldn't simply presume that in the absence of knowledge.

3 **MR JUSTICE ROTH:** Well, it's something you could, I would have thought, clarify  
4 either over the break today, and if you can't, then by Monday. We can then settle the  
5 final form of the CPO --

6 **MR MOSER:** Yes.

7 **MR JUSTICE ROTH:** -- after that's been clarified. I don't think it should go ahead as  
8 it is while this is uncertain. I can understand that you don't want to make any  
9 concession today and --

10 **MR MOSER:** Certainly not on my feet.

11 **MR JUSTICE ROTH:** Yes. If it can be clarified over the lunch adjournment, all well  
12 and good; if not, then we will say we will give the parties until Monday to liaise and try  
13 to bring clarity to the position. I think it's largely a non-stop service. Whether that's  
14 relevant or not I don't know, but I think it goes, in my experience at least, straight from  
15 Victoria to Gatwick Airport. So it's quite different from, say, Thameslink to Luton  
16 Airport, where clearly the Travelcard is valid.

17 Right, that's that point.

18 The only other point raised is about the expert methodology, where it's said -- well,  
19 two alternatives, I think, are given. One that it should be as a condition of certification,  
20 and the other that subsequently more details might be sought. I know you've since  
21 written and have given some details, but that's a point raised by the Respondents.

22 **MR MOSER:** Save that they wrote yesterday and withdrew their application.

23 **MR JUSTICE ROTH:** I didn't see that. So that's not a live issue?

24 **MR MOSER:** Not as far as I know.

25 **MR WARD:** Strictly it's not withdrawn. We don't want to determine it today.

26 Mr Moser's clients have given us some provisional answers, and therefore we're not

1 asking for an order. But we await with interest the final answers.

2 **MR JUSTICE ROTH:** What we are minded to do now that the litigation funding point  
3 has been clarified, once the Gatwick Express point is clarified is to make a CPO, then  
4 one gets into pleadings, further information and so on, and of course, at that point, you  
5 can seek further information. As you know, under, I think, rule 85, at any time the  
6 Respondent, or indeed someone else, can apply to set aside a CPO, so that is there  
7 in the rules. Don't need to make any direction about that.

8 **MR MOSER:** Sir, yes.

9 **MR JUSTICE ROTH:** Excellent. That point is now not a live point. Is there any other  
10 basis of objection being raised to the grant of a CPO?

11 **NEW SPEAKER:** No, Sir.

12 **MR JUSTICE ROTH:** Thank you. Subject to those two points, we are then satisfied  
13 it should be granted. I think we should write a short ruling to that effect, just explaining  
14 the basis. It won't be as long as a judgment, but I think it's right that should be done.  
15 Because rulings should be unanimous, it's not satisfactory to do it ex tempore. But we  
16 can proceed on that basis.

17 The next point then is then to consider the details of the CPO. I think we need some  
18 dates. You have a draft CPO, tab 7, on page 59. No, that's not ...

19 **MR MOSER:** Is it the directions?

20 **MR JUSTICE ROTH:** Perhaps it's the direction. It's also the domicile date at  
21 paragraph 8, but it's also the directions. Which tab are they at?

22 **MR MOSER:** We have put forward some draft directions --

23 **MR JUSTICE ROTH:** Yes.

24 **MR MOSER:** -- which are in the IP bundle, the inter partes correspondence, at  
25 page 131.

26 **MR JUSTICE ROTH:** Is there one ...



1 **MR MOSER:** Is there another one ...

2 **MR JUSTICE ROTH:** No, that's the old one.

3 **(Pause)**

4 **MR MOSER:** At IP 131, we have our draft document, "Proposed timetable to trial"; is

5 it that?

6 **MR JUSTICE ROTH:** Well, it may be to the notice. But, in any event, the two dates

7 we need are the domicile date --

8 **MR MOSER:** Oh, I see.

9 **MR JUSTICE ROTH:** -- and the date by which the class member must opt out or

10 a non-resident class member must opt in.

11 **MR MOSER:** That is on page 62. Forgive me, that's a different thing.

12 **MR JUSTICE ROTH:** Yes, that's what I was ...

13 **PROFESSOR MASON:** Of the inter partes correspondence bundle?

14 **MR MOSER:** No, of the C bundle, the core bundle.

15 **MR JUSTICE ROTH:** Yes, that is the order, isn't it?

16 **MR MOSER:** Yes, so you were right. You were going to the right tab. I wasn't sure

17 what ...

18 **MR JUSTICE ROTH:** Yes, there are two dates. That's it. It's under paragraph 8 and

19 paragraph 9, and paragraph 10.

20 First, the domicile date; what would you suggest?

21 **MR MOSER:** In the other proceedings it was the date of certification of those

22 proceedings. My submission would be, since these are so closely linked, that it would

23 be convenient to have the same date across all these proceedings, therefore the date

24 of certification of Trains 1.

25 **MR JUSTICE ROTH:** Which was?

26 **MR MOSER:** Which was -- somebody is going to remind me.

1 I am told it's page 559 of bundle S.

2 **MR JUSTICE ROTH:** Of the core bundle?

3 **MR MOSER:** Of the supplementary bundle.

4 Yes, that's the CPO in the other proceedings, and the domicile date is  
5 19 October 2021.

6 **PROFESSOR MASON:** Which tab is that, please?

7 **MR MOSER:** Tab 17.

8 **MR JUSTICE ROTH:** Yes.

9 **MR MOSER:** As for the other two dates, I would suggest the same wording as in the  
10 other CPO, which is no later than 4.00 pm on the date three months after date of  
11 publication of the notice and three months after publication for the other one.

12 **MR JUSTICE ROTH:** The notice, then, that will be dependent on you and your clients.

13 **MR MOSER:** Yes.

14 **MR JUSTICE ROTH:** But it will be published obviously after we have resolved this  
15 question about the Gatwick Express, which, if it were to be excluded, will need some  
16 slight amendment of the class definition, I think.

17 **MR MOSER:** Yes.

18 **MR JUSTICE ROTH:** So it will be at some point later on. So 19 October 2021 for the  
19 domicile date.

20 Do any of the Respondents want to be heard on that?

21 **MR HARRIS:** I am acting for the Respondent on this issue and, no, we're neutral.  
22 (Inaudible) be a discretion of the Tribunal.

23 **MR JUSTICE ROTH:** Yes, we're content with that, Mr Moser. So the domicile date,  
24 19 October 2021, and then the three months for both paragraphs 9 and 10.

25 **MR MOSER:** I'm grateful.

26 **MR JUSTICE ROTH:** The next, logical, question, before we come to any question of

1 intervention, is about the case management of these proceedings. We see all parties,  
2 as I mentioned a moment ago, indicated it's sensible for them to be case managed  
3 together.

4 **MR MOSER:** Yes.

5 **MR JUSTICE ROTH:** We take the same view.

6 There is the further question of whether they should not just be case managed  
7 together, but tried together. I would have thought that would be sensible as well; is it  
8 not? The same substantive issues arise.

9 **MR MOSER:** We agree and, in fact, we ask for it.

10 **MR JUSTICE ROTH:** Yes. Is anyone objecting to that? No. So we shall say they  
11 are to be case managed together and tried together.

12 Then, as regards directions for trial, we will come to dates for defences and so on in  
13 a moment, but the question of a split trial that was raised, I think by the Defendants,  
14 we think there may be merit in a split trial. But it's premature to decide that before the  
15 defences are in. We need to see exactly what are the issues between the parties on  
16 the pleadings. I think clearly, in a case like this, there should then be a CMC after the  
17 pleadings have closed. Then one can look at the two actions -- or formally three  
18 actions I think, but two sets of proceedings -- and see whether a split trial is  
19 appropriate.

20 We just mention that it has worked quite well in a number of such cases to proceed to  
21 consider the question of abuse, if that appears to be the real contentious issue in the  
22 case; not that the Respondents are conceding dominance at all, but clearly there is  
23 a major battle on abuse and quantification that will no doubt fully occupy the Tribunal  
24 for several weeks, and to do that on the assumption of dominance. Of course, if the  
25 claim fails on abuse, you never get to dominance; if the claim succeeds on abuse,  
26 there is the potential for a further trial on dominance. But, in the nature of things, that

1 | may not actually arise.

2 | Certainly, that's what happened in *Purple Parking v Heathrow Airport*; that was a trial  
3 | on the assumption of dominance. Heathrow Airport lost the case then settled. They  
4 | never sought to have a further case on dominance, so it was quite an efficient way of  
5 | proceeding.

6 | So I just mention that without having taken a firm view. But you can reflect on that,  
7 | and we will revisit it once pleadings have closed.

8 | **MR MOSER:** Sir, I'm in your hands on that. I have put our case, which is -- at least  
9 | at present it seems to us -- that a split is not necessary. But I can only agree that it's  
10 | more sensible to wait until you have seen the defences and what the situation is.  
11 | The current timetable that we have set out for these cases doesn't proceed on the  
12 | basis of a split.

13 | **MR JUSTICE ROTH:** Yes, well, they don't need to be affected by whether there is  
14 | a split or not, really. But it certainly reduces the scope of the expert evidence and has  
15 | a lot of potential benefits. But we will see, we will come back to it.

16 | **MR MOSER:** Yes.

17 | **MR JUSTICE ROTH:** You will no doubt reflect on what I have said.

18 | So then, before dealing with actual timetable for defences, perhaps we should  
19 | consider the intervention application because there is some question of, if there is  
20 | an intervention, should the written statement come before or after defences?

21 | So I think we will proceed to that next.

22 | So, Ms Howard, you appear, I think, for the Secretary of State.

23 |

24 | Application by MS HOWARD

25 | **MS HOWARD:** Thank you, I'm grateful.

26 | My Lord and members of the panel, the Secretary of State made this application on

1 7 November and we have set out our arguments in some detail both in the application,  
2 which is at tab 25 of the core bundle, and then supplemented in its note of  
3 14 November 2022. That's at tab 26. Then we have also set out some more details  
4 on what I call --

5 **MR JUSTICE ROTH:** Sorry to interrupt you, I have them at tab 26 and 27, actually.

6 **MS HOWARD:** Okay, I'm sorry, my bundles weren't fully tabbed up, so it may be the  
7 wrong tab numbers. But I have the page numbers, if that helps.

8 We have also given your Lordships some more detail on what I call the "financial  
9 liabilities", potential financial liabilities, in our skeleton, which you should have at 4A of  
10 the core bundle.

11 The application has been supported by all the Defendants, but is opposed by the Class  
12 Representative, both in their skeleton, but also in their observations on our note of  
13 intervention, which is at page 604 of the bundle.

14 What I propose to -- I don't know how much detail you want me to go into today, so  
15 what I would plan to do is really just concentrate on why we say we have an interest  
16 in these proceedings, and why that interest is sufficient for the purposes of rule 16 of  
17 the Tribunal Rules. I was proposing to divide those into five main areas --

18 **MR JUSTICE ROTH:** There are two questions, aren't there? One, whether you've  
19 sufficient interest for the purpose of the rule and, secondly, the discretion of the  
20 Tribunal.

21 **MS HOWARD:** That's right.

22 **MR JUSTICE ROTH:** Then whether you should be permitted to --

23 **MS HOWARD:** And whether it's expedient and how we can manage the scope of our  
24 intervention to make sure it's not going to disrupt or delay or add --

25 **MR JUSTICE ROTH:** Well, whether you're allowed to intervene at all --

26 **MS HOWARD:** Exactly.

1 **MR JUSTICE ROTH:** -- that's the question, as a matter of discretion.

2 **MS HOWARD:** That's right.

3 **MR JUSTICE ROTH:** If you are, then one comes to look at how it's done.

4 **MS HOWARD:** So, where I think we take the starting point is, is rule 16 and whether  
5 we have a sufficient interest, and paragraph 4.92 of the Tribunal guide, which makes  
6 it clear that the Tribunal's proceedings and rulings may have far reaching  
7 consequences, not just for third parties and their private commercial interests, but also  
8 for the wider public interest.

9 It's really with respect to the latter that the Secretary of State has applied to intervene  
10 in these proceedings.

11 We submit that there are five main pillars, as we say, which go to support both why  
12 our interest is sufficient and why the Tribunal should exercise its discretion in our  
13 favour, and why that intervention should be allowed now rather than later.

14 The first one is the quasi-regulatory role that the Secretary of State has in  
15 administering the railways under the statutory framework, which is the Railways Act  
16 1993 layered with the Railways Regulation, which is now retained EU law, and the  
17 contractual arrangements that have been set up in the franchise agreements and their  
18 subsequent amendments through the pandemic, that's for shorthand the EMAs and  
19 the ERMAs and now, with the regulatory reforms that are ongoing, the new National  
20 Rail Contracts.

21 So throughout the period of the alleged infringement there's been a shifting regulatory  
22 framework through these agreements. It's a complex regulatory regime with multiple  
23 layers of statutory, regulatory and contractual provisions, which we have tried to set  
24 out in summary in our note. We would like to be able to assist the Tribunal in  
25 developing our statement of intervention because the Secretary of State has two main  
26 roles.

1 Firstly, it's responsible for setting the strategic direction for the railway industry in  
2 England and Wales and it has, in its role as the franchising authority, broad oversight  
3 of the fares policy, and has to balance the competing interests of passengers and  
4 taxpayers.

5 Just in summary, obviously the original franchise agreements were tendered, there  
6 was a competitive tender, and the train operators bid for those tenders by setting out  
7 their bid fares policy.

8 But, throughout the life of the franchise, there is a reckoning between what their  
9 projected revenues and costs would be in their bids against the actual costs and  
10 revenues that play out during the lifetime of the franchise, or the lifetime of the contract.

11 There is a complex regime in the franchise agreements for allocating the risk for any  
12 difference between the projections in the bids and the actual real life.

13 So because of the Secretary of State's oversight of fares and giving approvals for any  
14 changes to fares going forwards, we say that it's well placed as an amicus to help and  
15 assist the Tribunal to explain the regulatory framework and the public interest  
16 considerations that are taken into account when setting and overseeing fares policy.

17 **MR JUSTICE ROTH:** Just pausing there, when you say it is an amicus, usually there  
18 is an amicus when the court asks for one. But, here, it's an amicus coming forward to  
19 explain, as you say, the regulatory framework, how it works, how it's possibly changed  
20 over this period. That's something you could do in a written submission, I would think.

21 **MS HOWARD:** Yes. I think as I am coming to explain how these five different  
22 interests are, there are different levels of intervention and how we could manage this.

23 **MR JUSTICE ROTH:** I just want to clarify on that one.

24 **MS HOWARD:** Yes.

25 **MR JUSTICE ROTH:** I think you said in one of the documents you just referred to -- it's  
26 the application to intervene at paragraph 11, you say:

1 "To file written submissions regarding the regulatory framework and arrangements  
2 made thereunder [it says] to assist the understanding of the issues."

3 That's what you've been dealing with at the moment; is that right?

4 **MS HOWARD:** Yes. So laying out the regulatory regime and these multiple layers,  
5 we could easily just do in a statement of intervention. But I will develop -- because of  
6 the factual complexity in this case, there may also be a need for factual witness  
7 statements as to what considerations are taken into account in balancing the public  
8 interest.

9 **MR JUSTICE ROTH:** If it's relevant.

10 **MS HOWARD:** If it's relevant, yes.

11 **MR JUSTICE ROTH:** But a written statement in that form, by way of written  
12 intervention, explaining the framework, just so we see where we're going -- let me  
13 interrupt you for a moment.

14 Mr Moser, on that point alone, would that be opposed?

15 **MR MOSER:** With the caveat that I'm not sure where my learned friend is going  
16 because the five pillars are --

17 **MR JUSTICE ROTH:** She's going to ask for other grounds of intervention in other  
18 forms.

19 **MR MOSER:** Yes.

20 **MR JUSTICE ROTH:** But I'm just sticking to this one. I'm not asking you to address  
21 and reply to something that hasn't been raised yet.

22 **MR MOSER:** We have always said that there's nothing to stop the Secretary of State  
23 giving evidence in that sense. If they want to explain how the regime works, if that's  
24 something they feel the Defendants need assistance with in writing, that, and only that,  
25 is something that we wouldn't find objectionable.

26 **MR JUSTICE ROTH:** It's not giving evidence, because you only give evidence if one



1 party calls you to give evidence.

2 **MR MOSER:** Yes.

3 **MR JUSTICE ROTH:** This is volunteering and asking the Tribunal's permission to  
4 accept such a statement, explaining how the no-doubt complex regime works.

5 **MR MOSER:** If the Tribunal found it useful, we would be entirely in the Tribunal's  
6 hands in that regard.

7 **MR JUSTICE ROTH:** You wouldn't be objecting to that?

8 **MR MOSER:** No.

9 **MR JUSTICE ROTH:** Thank you.

10 **MS HOWARD:** Yes, in that respect, there is an analogy here with the right of the  
11 Competition Authority to intervene under paragraph 4.1 of the Competition  
12 Practice Direction. We are not the Competition Authority, the ORR is --

13 **MR JUSTICE ROTH:** The ORR is not --

14 **MS HOWARD:** -- who has not expressed any concerns about this fares policy, but  
15 we are in a quasi-regulatory role through our oversight of fares policy, which the ORR  
16 is not responsible for. So the first pillar is our oversight.

17 This morning's discussions about the Gatwick Express example is an example where  
18 we can assist and, in fact, my instructing solicitors --

19 **MR JUSTICE ROTH:** I think that --

20 **MS HOWARD:** -- could easily answer those questions for you --

21 **MR JUSTICE ROTH:** I would have thought --

22 **MS HOWARD:** -- if that would assist you.

23 **MR JUSTICE ROTH:** -- the relevant Respondent can answer that question when they  
24 have looked into it, but we don't need an intervener for that.

25 Yes. But, anyway, it's not opposed. I can see there may be some merit in it. How  
26 helpful it will be at the end of the day, I don't know.

1 **MS HOWARD:** Yes.

2 **MR JUSTICE ROTH:** You can take it that there is no strong pushback against that.

3 **MS HOWARD:** I think also, just on the timing point, which we may come to later, in  
4 the draft directions it's envisaged that if we were allowed to intervene and put written  
5 submissions in, they would come right at the end of the process after expert evidence.  
6 We submit that's too late. It would make sense to have it much earlier, at the time of  
7 the defences, so they can actually add some value.

8 **MR JUSTICE ROTH:** The submission we have just talked about, that could come  
9 fairly soon. But we will look at timing later.

10 **MS HOWARD:** Yes, okay. Shall I then move on to my other pillars?

11 **MR JUSTICE ROTH:** Yes.

12 **MS HOWARD:** Because we say that we're not just in the position of an interested  
13 observer in the same way as a regulator or a kind of Sports Direct equivalent in the  
14 competition proceedings, because there are real impacts on the Secretary of State  
15 and the Department of Transport going forwards, both in terms of policy, but also  
16 operational responsibility. Those are my second and third pillars.

17 If I can just explain my second pillar first. There are policy implications for the  
18 Department going forward because of its role administering the railways under the  
19 Railways Act 1993. Obviously, the railway reforms are currently ongoing. So if the  
20 boundary fare practices are found to constitute an infringement, there are quite  
21 wide-ranging ramifications in terms of running the railways in future.

22 I have four points here.

23 Firstly, there will need to be changes to advertising and retail practices in order to  
24 increase the transparency and availability of boundary fares; that's on the  
25 counterfactual that the Class Representative put forward.

26 That's going to entail significant additional costs in terms of staff training, development

1 of new technology for web -- for retail --

2 **MR JUSTICE ROTH:** When you say "new technology", what's -- the basic complaint  
3 is a lot of fares are bought online, you have various Travelcards you can refer to when  
4 booking online, but the TfL Travelcard is not one, so you need to modify this  
5 online -- that's not, in this day and age, a vast expense.

6 **MS HOWARD:** It will need to be developed because obviously the Department of  
7 Transport -- as part of the forthcoming reforms of the railways, this is all going to be  
8 centralised --

9 **MR JUSTICE ROTH:** Well, whatever. But it's not a vast -- you have online booking  
10 frequently used, you have the ability --

11 **MS HOWARD:** This is a matter --

12 **MR JUSTICE ROTH:** -- to specify your Travelcard.

13 **MS HOWARD:** This will be a matter for evidence, obviously, going forward.

14 **MR JUSTICE ROTH:** Yes, but then just certain common sense about this.

15 **MS HOWARD:** But there are costs entailed in doing that, development costs and  
16 rollout costs.

17 **MR JUSTICE ROTH:** There are always costs, but it's not a vast cost.

18 Secondly, you should be able to buy it over the phone. Yes, you have to train your  
19 staff to understand what the fare is, but you're not looking at massive expenditure here.

20 **MS HOWARD:** There will be additional cost. But those costs do not just relate to  
21 these particular routes that are subject to these proceedings, but also potentially other  
22 routes across London, and also where there are regional zonal fares in other parts of  
23 the country. We've set that out in our application.

24 **MR JUSTICE ROTH:** I couldn't see it in the application. Where is there anything  
25 equivalent to a Travelcard for urban transport that can be used also on an overground  
26 main line train.

1 **MS HOWARD:** Okay, obviously, this will be a matter for evidence, but there are other  
2 zonal fares, I think in Birmingham and in other parts of the country.

3 **MR JUSTICE ROTH:** We would like a bit of information from you, please.

4 **MS HOWARD:** That's because -- yes, I am assuming that would be for evidence in  
5 due course.

6 **MR JUSTICE ROTH:** Well, only if you intervene, but this is should you be allowed to  
7 intervene.

8 So you say in Birmingham, the Travelcard for Birmingham urban metropolitan  
9 transport is valid on the overground main-line train.

10 **MS HOWARD:** I understand that there are zonal fares.

11 **MR JUSTICE ROTH:** There are zonal fares all over the place, but the point is that the  
12 Travelcard is valid. It's the unusual situation here, that you have a TfL Travelcard  
13 which is not, as one might first think, valid only for use on TfL services, but is also valid  
14 on independent services run by the independent train operating companies.

15 Now, that may be because London is such a vast area, so that you have main line  
16 trains making intermediate stops. But you're saying there is an equivalent in  
17 Birmingham; is that right?

18 **MS HOWARD:** That's what my instructions are as to Birmingham, and I think that's  
19 the only one at the moment that we have found.

20 **MR JUSTICE ROTH:** There is just one other, which is Birmingham; is that right?

21 **MS HOWARD:** We may need to just discuss this and come back.

22 **MR JUSTICE ROTH:** I do want to know. If you say it has these wide-ranging  
23 implications --

24 **MS HOWARD:** Obviously, there are other implications potentially with the rollout of  
25 the Oyster network and pay as you go, particularly outside London into other regions.  
26 There will be similar overlap there. There are a number of other different routes that

1 | come in and out of London, which also cross across the zones of 1 to 6.

2 | **MR JUSTICE ROTH:** The relevance is that you've covered the cost of travel on  
3 | another operator. So lots of services cross zones, but it's only where that arises, that  
4 | situation, that this is relevant.

5 | **MS HOWARD:** Exactly. But if you think of London as the kind of central hub for most  
6 | InterCity services. Any InterCity service coming in and out of London will cover those  
7 | Travelcard zones of 1 to 6.

8 | **MR JUSTICE ROTH:** Yes, the services into London. These three sets of proceedings  
9 | cover quite a number, and no doubt there will be some other operators who are not  
10 | subject to the proceedings. I can see that.

11 | **MS HOWARD:** That's why I'm saying that our interest is not just a sort of academic  
12 | interest of the regulatory regime; there are factual issues here which we need to  
13 | present factual evidence on.

14 | **MR JUSTICE ROTH:** What's the evidence you want to present on that?

15 | **MS HOWARD:** We want to explain what the wider ramifications are for zonal fares  
16 | nationwide and how, if there is a change in the revenue forecasts or the costs  
17 | implications across these networks, that is then going to play out into the costs of  
18 | running the railways as a whole, not just on these routes that are the subject of  
19 | proceedings. But also into those risk elevation provisions between the train operators  
20 | and the Secretary of State in the franchise agreements.

21 | **MR JUSTICE ROTH:** So it's about cost?

22 | **MS HOWARD:** It's about revenues and it's about costs.

23 | Because it goes without saying, as we have said in our note, if boundary fares are to  
24 | be made available in all instances, where historically and customarily that hasn't been  
25 | the practice, that will obviously alter the revenue, the actual revenues on the affected  
26 | routes and will increase the costs. Therefore, the reckoning on which these

1 | agreements were entered into will change quite significantly.

2 | **MR JUSTICE ROTH:** Most abusive practices increase costs because people make  
3 | money from them.

4 | **MS HOWARD:** Yes. But this is where -- these are slightly different because these  
5 | services are not economically viable services, and this is where the services of general  
6 | economic interest come in because these services are propped up by the taxpayer  
7 | and by public subsidy.

8 | **MR JUSTICE ROTH:** How far does that go? Suppose you have, God forbid, a terrible  
9 | train crash and a lot of people on the train are injured, and some even killed. But it's  
10 | usually the injuries that generate huge claims. So one of the train operating companies  
11 | faces multimillion pound claims from a lot of injured passengers. There are big  
12 | arguments about quantum, as there often are, and if the quantum is high that will affect  
13 | the revenue of the train operating company; are you saying the Secretary of State  
14 | could intervene to say: well, we want to be concerned about the way the court  
15 | quantifies the damages?

16 | **MS HOWARD:** Normally, that's one isolated incident that doesn't necessarily --

17 | **MR JUSTICE ROTH:** It could be a vast sum.

18 | **MS HOWARD:** Take the pandemic, for example, or take industrial action, that's  
19 | something that affects all the railways, not just one isolated incident on one train, on  
20 | one route. So this is of a different scale to one accident that affects a certain number  
21 | of passengers.

22 | **MR JUSTICE ROTH:** It would affect the revenue over several years quite  
23 | substantially.

24 | **MS HOWARD:** The accident in that situation wouldn't affect the revenue. It would  
25 | affect, obviously, the costs of any damages. But it wouldn't affect the revenues,  
26 | whereas this would affect the revenues, as well as the costs liabilities.

1 So we say that adjusting the availability of boundary fares will have important effects  
2 on the pricing and availability of other types of tickets, not just boundary fares, because  
3 of the holistic way in which the railways are administered. Because fare pricing and  
4 policy -- and this is what the department wants to give evidence on -- uses incentives  
5 to drive consumer behaviour.

6 So you can't look at this in a purely private law lens of: was this an excessive price?  
7 Or was there an economic efficiency to justify this behaviour?

8 You do need to take account of the wider public interest and the Secretary of State's  
9 statutory duties under the Railways Act and under the Railways Regulation, which  
10 introduce other socioeconomic and environmental considerations. So, for example,  
11 fares policy is used to try to drive and promote rail transport over other forms of  
12 transport --

13 **MR JUSTICE ROTH:** There isn't a fares policy against boundary fares, is there?  
14 I thought --

15 **MS HOWARD:** No. The fares policy is dealt into the contractual requirements in the  
16 tender, which the TOCs then bid to in their bids for the franchise --

17 **MR JUSTICE ROTH:** Is there a fares policy that says the TOCs should not offer  
18 boundary fares?

19 **MS HOWARD:** It's not a policy as in a kind of written statute, but obviously the  
20 Department has an internal assessment of the public interest in determining how fares  
21 should be organised. It's a very complex -- we're aware of a number of fares.

22 **MR JUSTICE ROTH:** We're just concerned with boundary fares. Is there  
23 any -- because they are offering boundary fares quite a lot.

24 **MS HOWARD:** They are, yes.

25 **MR JUSTICE ROTH:** You're not saying that's contrary to the Secretary of State's  
26 policy, are you?

1 **MS HOWARD:** No, but it has to be assessed in the kind of context of the other  
2 obligations, both on the Secretary of State, but also on the train operators.

3 **MR JUSTICE ROTH:** No doubt it has been, and it's not found to be against their  
4 policy.

5 **MS HOWARD:** There are conflicting -- for example, the train operators are required  
6 to maximise revenues in their franchise agreements. When they set their fares, they  
7 are meant to maximise revenues with the aim of reducing the amount of public subsidy.  
8 So there is a reckoning between their obligations to act as an efficient operator and  
9 maximising revenues available to reduce the tax burden, but also to further  
10 passengers' interests and make the best fares available to them. So there is a tension  
11 between those.

12 Another example, for example, you may prioritise certain types of passengers against  
13 other types of passengers. So commuters, for example, may end up paying more for  
14 peak periods, whereas students or elderly passengers may benefit from concessions  
15 through their railcards that offer them a lower fare. But this is all assessed as a whole,  
16 in the round.

17 Now, if boundary fares, for example, are made more available, then that may, as  
18 a knock-on effect, mean that some of these concessions have to be withdrawn  
19 because there is only a finite pot of money at the end of the day. There is no money  
20 tree, as has repeatedly been said, and we can see that in the current economic  
21 climate, with ongoing tensions. Expecting the taxpayer to shoulder a blank cheque for  
22 running the railways is not realistic, and these railways have to be managed by the  
23 train operators. If there are going to be cuts in revenue in one area, that is then going  
24 to have to be supplemented by either higher prices across the board, withdrawal of  
25 concessions or even withdrawal of some services.

26 So we say you cannot just look at this through a private lens of private competition



1 law, looking at efficiencies in a narrow frame. It has to take account of the public  
2 interest.

3 **MR JUSTICE ROTH:** I don't think we are looking at efficiencies. I think here it's  
4 an exploitative abuse that's alleged.

5 It is not about efficiencies. It's about passengers who have already paid for part of the  
6 journey being made to pay again. No doubt if you get everybody to pay twice you will  
7 get more revenue, and then you can maintain other concessions.

8 If you can't get everybody to pay twice, you may have to cut some other things. If the  
9 various train operating companies who have competing services, to some extent,  
10 engage in a cartel to put up their prices, then that will increase their revenue and  
11 enable them to give more concessions.

12 But the notion that somehow gives an interest to the ultimate funder --

13 **MS HOWARD:** I think --

14 **MR JUSTICE ROTH:** -- I find a bit difficult.

15 **MS HOWARD:** This is what we refer to as the service of general economic interest  
16 regime, which applies and we say modifies the competition law assessment. So, in  
17 terms of assessing whether this is an abuse, there are multiple strands to that  
18 assessment.

19 So the first strand is -- well, paragraph 4 of schedule 3 provides an exemption for  
20 services of general economic interest. It's well accepted that railways --

21 **MR JUSTICE ROTH:** It's not an exemption. It says it will only disapply insofar as --

22 **MS HOWARD:** That is right.

23 **MR JUSTICE ROTH:** -- it's very qualified.

24 **MS HOWARD:** That's right. You're pre-empting my argument.

25 So there is a debate as to the extent to which that exemption applies. Whether it  
26 applies in absolute, gives 100 per cent exemption. We have said in our note we don't

1 think that applies in this case.

2 **MR JUSTICE ROTH:** That's pretty well-established.

3 **MS HOWARD:** But there will still be an argument that depends highly on the factual  
4 evidence and the economic, probably, assessment of the counterfactual of whether  
5 there is a balancing that needs to be reconciled between the abuse and the benefits  
6 of the restriction and the benefits it provides for operating the railways.

7 We say that is where the Secretary of State -- this is actually my fourth pillar -- needs  
8 to intervene to assist the Tribunal in understanding the very careful expert judgment  
9 and considerations that the Secretary of State takes into account in balancing all these  
10 competing interests. Because it's not a straight, plain, vanilla competition private law  
11 assessment of, is there a restriction? Is there some efficiency to justify it?

12 You have to take account of the wider public interest of running the railways.

13 **MR JUSTICE ROTH:** You have to say that if the boundary fares that are available  
14 were more generally known, that would be a reason to say that the service of the train  
15 operating companies -- that that is incompatible with them carrying out their service.

16 **MS HOWARD:** Or it would compromise the performance of their public service duties,  
17 because obviously they bid on a certain basis, on certain assumptions that were going  
18 to remain constant. If there is now going to be clarification of the legal position of these  
19 customary practices, then that's obviously an intervening event that changes the  
20 assumptions on which they originally bid for the franchise agreements.

21 **PROFESSOR MASON:** Can I ask a question on that?

22 So let's suppose, perhaps by dint of these proceedings, it becomes generally known  
23 that you can buy boundary fare tickets; would the Secretary of State then rule that type  
24 of fare out for the general, broader reasons that you have just given?

25 **MS HOWARD:** I don't think I could speculate on that. Obviously, the  
26 Secretary of State would need to take account of the Tribunal's ruling and then

1 determine how to change and adapt its processes going forward. That's the policy  
2 implications that I was trying to explain as part of my second pillar -- that we're not just  
3 an interested observer. We do actually have an operational role and a policy role  
4 here, as the administrator of the railways.

5 Just to be clear on that -- I'm sorry, I am muddling all my pillars -- it's not just a sort of  
6 oversight, overseer role. The Secretary of State does have a potential direct  
7 responsibility as the operator of last resort, which we have also explained in our note,  
8 at paragraph 13.

9 So, in certain instances where there is no franchise agreement or a train operator has  
10 gone into administration, there has to be continuity of the rail services, so the  
11 Secretary of State has to step in and appoint an operator of last resort.

12 So there is a whole rigmarole in actually setting up an operator of last resort, but also  
13 the cost of implementing any reforms, as you say, or making decisions about whether  
14 boundary fares continue, and the way in which they're sold will fall to the  
15 Secretary of State as operator of last resort.

16 There is also a potential liability under the operator of last resort should a TOC fail in  
17 future and go into administration because the Secretary of State would have to step  
18 in.

19 **MR HOLMES:** Can I ask another question? How is that different to a  
20 situation -- I understand how it has implications for the basis upon which somebody  
21 has bid for a franchise, they bid on certain understandings of the law and so forth; why  
22 is that different to a situation where you've, say, bought a company in an acquisition  
23 or something, and it's subsequently found that the company in question can't charge  
24 the prices that it does because they were found to be excessive or they were cartelised  
25 prices and so forth? That is then a matter for settlement according to the contractual  
26 provisions or in this instance at the next bidding round.

1 It seems to me that the only potential difference that you're referring to is indeed under  
2 the SGEI regime, and I think you're coming to develop that. That has to be the focus  
3 of the arguments that you're making. Because absent that, I struggle to see how it is  
4 different to the other situations, like excessive pricing cartels and so forth.

5 There is nothing different about this, or it may be seen as an unusual form of abuse.  
6 But, in substance, it is, if found, would be a competition infringement like any other  
7 excessive price fixing, whatever.

8 **MS HOWARD:** I think the difference is, as you've rightly identified, these are services  
9 that are not economically viable in a normal constant market and, therefore, they have  
10 to be supported by public subsidy. The train operators contract on a certain basis to  
11 run them, knowing that at the end of the day they are supported by subsidy.

12 Train operating companies are thinly capitalised, there is a limited amount of parent  
13 guarantee that's set up, and any shortfall is then borne by the state.

14 **MR HOLMES:** Until you get to the point where you introduce the concept of the  
15 SGEI -- and I appreciate you're going to develop that -- I struggle to see how that is  
16 different to the argument that cartels have tried in the past and failed, where they say,  
17 "We had to have these prices because this product is simply not viable at the market  
18 price, and some of us would have gone out of business". That is an argument that  
19 failed probably 50 years ago.

20 **MS HOWARD:** I think it's wrong, maybe, to draw an analogy with a cartel because  
21 that's a completely different type of contumelious conduct. Whereas here it's a novel  
22 abuse. It's a situation that's not really been considered before. Therefore --

23 **MR JUSTICE ROTH:** I appreciate that. But the point only arises if the abuse is found.  
24 If the abuse isn't found, then of course it all falls away.

25 **MS HOWARD:** We say that the SGEI analysis comes in at various steps of the  
26 competition law assessment. So, you know, we reel off the bit. Is there an exception?

1 Is there an infringement, or is there a rule of reason? Is there an objective  
2 justification? Have there been anti-competitive effects which would cause harm?

3 The SGEI analysis feeds into each of those.

4 **MR HOLMES:** That I understand and I appreciate. But just giving an indication, it  
5 seems to me that is the heart of your basis for your request to intervene. It is how the  
6 SGEI regime does or does not change the competition analysis of this abuse.

7 **MS HOWARD:** You will notice as we have gone through our original application and  
8 our notes and our skeleton, the SGEI framework has been a central part of that, but  
9 we have been trying to explain how that has a role, has practical implications for the  
10 Secretary of State, both in relation to these routes that are the subject of the  
11 proceedings, but also for future policy -- as a precedent for future policy reforms. But  
12 also because of the liabilities that the Secretary of State bares under the franchise  
13 agreement, which relate not just to the historic situation, but also going forwards.  
14 Does that answer your question? I just --

15 **MR HOLMES:** Well, I won't repeat what I said. But I think as you've acknowledged,  
16 it is how the SGEI regime affects the competition analysis and you've run through  
17 a number of ways in which it might do that, which I'm sure you're going to develop.

18 **MS HOWARD:** Yes. So I have covered three pillars so far.

19 So, firstly, I have covered the quasi-regulatory role. Secondly, the future policy  
20 implications. Thirdly, the operational responsibility as OLR. The fourth pillar was the  
21 SGEI regime, and it might help if I just try to develop that a bit further.

22 I don't want to overstate its importance in terms of it being a complete and utter  
23 exemption because it's not. It's more nuanced than that and it will be very fact specific  
24 on the context. But it is relevant and it is intimately connected to the factual evidence  
25 that will be given and the economic analysis.

26 So it's our submission that because the Secretary of State is the guardian of the public

1 interest in the administration of the railways, its interests go well beyond that of just  
2 a mere interested bystander. It has the statutory and legal duties to best represent,  
3 as it sees fit, the competing interests of taxpayers and the travelling public. That's not  
4 to ignore the fact that a large proportion of the class members in this case will also be  
5 taxpayers. So if they receive any money with one hand, in their capacity as claimants,  
6 they may also be paying for it in the other hand as taxpayers.

7 Now, the other parties who are more on nationwide routes, obviously, and other  
8 passengers who bought other types of fares on these routes also have an interest and  
9 obviously are not represented before this Tribunal. So the Secretary of State  
10 considers that it needs to present the wider public interest and make arguments on  
11 their behalf.

12 Let me just deal you into how we see the SGEI regime working in overview. I can't  
13 delve down into the specifics of this case because we don't know where the factual  
14 evidence is going to lie.

15 But, obviously, there is the exemption in paragraph 4 of schedule 3 of the  
16 Competition Act, and you may want to have that wording in front of you. I think we set  
17 it out in our note, at paragraph 4, which is at page 597 of the bundle.

18 **PROFESSOR MASON:** Which tab?

19 **MS HOWARD:** I have it down as tab 26, but it may be 27 in your bundle. It's  
20 page 597.

21 **PROFESSOR MASON:** Paragraph 4C?

22 **MR JUSTICE ROTH:** I'm not sure it does set it out, does it?

23 I think it's page 600, Ms Howard.

24 **MS HOWARD:** I'm sorry -- yes, at the top of page 6, thank you, I'm grateful.

25 **MR JUSTICE ROTH:** It's page 600.

26 **MS HOWARD:** It's paragraph 9.

1 **MR JUSTICE ROTH:** Page 600.

2 **MS HOWARD:** That just sets out the wording of paragraph 4, which states:

3 "Neither [in this case] the chapter II prohibition will apply to undertakings entrusted  
4 with the services of general economic interest insofar as the prohibition would obstruct  
5 the performance in law or in fact of the particular public interest tasks that have been  
6 assigned to that undertaking."

7 **MR JUSTICE ROTH:** Yes.

8 **MS HOWARD:** Now, as in many other regulated sectors, take health for example,  
9 that provision, there is a respect for activities that are not purely economic, but have  
10 other public interest considerations. So competition law does not apply tooth and claw  
11 because that would entail a race to the bottom, where price is considered at the  
12 expense of other important considerations, like choice or quality of service.

13 So competition, we submit, has to be modified in order to take account of the public  
14 interest considerations.

15 I'm not just using modification, the word "modified", as a bandied term, it is actually  
16 referred to in the Railways Regulation, which is EU retained law.

17 So we say that --

18 **MR JUSTICE ROTH:** When you say "the railways", are you relying on -- you're not  
19 relying on anything other than paragraph 4?

20 **MS HOWARD:** Paragraph 4 takes the exemption, but the Railways Regulation is the  
21 specific EU coordinating regulation for the administration of the railways.

22 **MR JUSTICE ROTH:** Yes.

23 **MS HOWARD:** Which has been continued in UK law as retained law.

24 **MR JUSTICE ROTH:** Does that create any additional exemption?

25 **MS HOWARD:** It recognises that railway services are services of general economic  
26 interest.

1 **MR JUSTICE ROTH:** Yes, but it doesn't create any further exemption?

2 **MS HOWARD:** No, because there is a discretion for member states or former  
3 member EU states to administer the railways how they see fit. Obviously, there is  
4 a broad range of approaches that have been taken.

5 **MR JUSTICE ROTH:** Yes, but does it create any additional qualification of the  
6 application of the Competition Act?

7 **MS HOWARD:** No, but I think it does recognise that there are competing  
8 considerations in running the railways that are not just -- there is a sort of exemption  
9 from competition law because of competing regulations.

10 **MR JUSTICE ROTH:** It doesn't as such. The only path to qualification in competition  
11 law is paragraph 4 of schedule 3; is that right?

12 That's what I am trying to clarify. Or are you saying there is something else?

13 **MS HOWARD:** The Railways Regulation -- and we have some copies here if it would  
14 help to turn it up, because I don't think they're in the bundle -- it was adopted under  
15 what was Article 106 and 102 of the Treaty, which is virtually identical wording to the  
16 exemption in paragraph 4 of schedule 3.

17 **MR JUSTICE ROTH:** So it doesn't go wider?

18 **MS HOWARD:** I don't think it goes wider, no.

19 **MR JUSTICE ROTH:** That's all I was trying to establish.

20 Now, I think you can take it that it can be assumed for your purposes that the railway  
21 operation is a service of general economic interest, so that bit is fulfilled.

22 **MS HOWARD:** So what will be an issue in these proceedings, we submit, is that in  
23 determining the extent to which competition law applies, there will have to be some  
24 assessment of the way in which competing interests, whether they're economic,  
25 environmental or social considerations, feed into the fare setting policy, and what the  
26 implications of the counterfactual that the Class Representative puts forward means



1 in terms of running the railways, either these routes on a financially stable basis and  
2 what it means.

3 Because they posit a very simple counterfactual, for example, that these boundary  
4 fares will be widely available and you will be able to buy them on any route going out  
5 of London which overlaps with the Travelcard.

6 But that's not necessarily how the counterfactual would work in the real world, so you  
7 have to look at it not just in abstract theory, but also in practical reality to reflect the  
8 fact that these services have to be run at minimal expense to the taxpayer. So if  
9 revenues are taken away from one type of ticket those lost revenues will have to be  
10 made up elsewhere and that means that either --

11 **MR JUSTICE ROTH:** Another possibility is that the negotiation with TfL over the share  
12 of revenue from TfL, which the train operating companies derive for the use of the TfL  
13 card, that would be renegotiated.

14 **MS HOWARD:** Yes, but then we get into debates of what's a realistic counterfactual  
15 and how do you speculate what it might be.

16 **MR JUSTICE ROTH:** We couldn't possibly know. Are TfL going to be allowed to  
17 intervene to show the effect it will have on them?

18 **MS HOWARD:** There is no application before you on that.

19 **MR JUSTICE ROTH:** Is that the logic of your submission?

20 **MS HOWARD:** I don't know the intricacies. I would have to take instructions on the  
21 intricacies of the TfL arrangements. But, obviously, they are separately represented.

22 **MR JUSTICE ROTH:** They're certainly not represented in these proceedings, but we  
23 have heard some indications which were looked at in the previous Gutmann hearing  
24 of how, because they're using the TfL card, there is an agreement between TfL and  
25 the companies of what contribution they make.

26 Well, if there is wider use of boundary fares no doubt that might be renegotiated, so

1 that's going to affect TfL directly. TfL is no doubt a service of -- will have its interests  
2 and revenue implications. So isn't the logic of your argument they, too, should be  
3 allowed to intervene?

4 **MS HOWARD:** They may be allowed to intervene on a purely commercial basis, if  
5 they have commercial interests affected. But we say the Secretary of State is in  
6 a different position because it is the regulator and --

7 **MR JUSTICE ROTH:** It's not the regulator, is it?

8 **MS HOWARD:** It's not the competition regulator, but it is the Department that's  
9 responsible for administering the railways and overseeing fares policy generally.

10 **MR JUSTICE ROTH:** It's not a regulator, is it?

11 **MS HOWARD:** It plays a quasi-regulatory role in overseeing fares. Because if there  
12 are changes to the fares in future, they have to have the approval of the  
13 Secretary of State because it's a departure from the agreements that have been  
14 entered into.

15 **MR JUSTICE ROTH:** You say changes to fares have to have the approval?

16 **MS HOWARD:** If there is a departure from -- because of the tender process under  
17 the original agreements. I mean, there is a shifting arrangement because of the  
18 National Rail Contracts, but if there is a change to the basis on which these contracts  
19 were bid, obviously under procurement law it's difficult to change the contract after the  
20 event, so you have to have the Secretary of State's approval for any changes.

21 **MR JUSTICE ROTH:** The introduction of boundary fares; was that something that  
22 was approved?

23 **MS HOWARD:** I think I would have to take instructions about that, but there are  
24 approvals that have to be in place. I think there were, yes.

25 **MR JUSTICE ROTH:** So they were approved?

26 **MS HOWARD:** Yes. For example, the expansion of Oyster which has been ongoing

1 is because there is an approval process for that.

2 **PROFESSOR MASON:** If I may, just so I understand the nature of the point you're  
3 making at this stage. So, again, looking at that paragraph at the top of page 600 that  
4 we have just been discussing, paragraph 9 and the quotation; is it your argument that  
5 performance would be obstructed as a matter of law?

6 **MS HOWARD:** I can't say that as a matter of law because it does depend on the facts  
7 and I don't know how the factual evidence is going to play out.

8 Obviously, the Secretary of State doesn't have intimate oversight of the train operating  
9 companies' budgets and strategy and how they -- so it would be a matter for factual  
10 evidence, I think.

11 **PROFESSOR MASON:** I see. Therefore, my second question was: as a matter of  
12 fact, again, you're not at this stage going to be able to provide any detail?

13 **MS HOWARD:** We can't speculate, no.

14 But, obviously, we're very keen not to kind of duplicate what the Defendants will say,  
15 and we would obviously make sure that there is no duplication. But the  
16 Secretary of State does envisage it will have its own witness statements that they want  
17 to submit to explain these wider considerations and how it exercises its judgment and  
18 discretion in approving or overseeing fares that have been set, other considerations  
19 that have been taken into account.

20 **PROFESSOR MASON:** Do you anticipate at any stage being able to provide  
21 evidence, were this to proceed, of particular concessions or particular services that  
22 would no longer be viable as a result of the revenue rebalancing that you're saying  
23 might have to happen if these changes went ahead?

24 **MS HOWARD:** I think, again, we would have to look at the evidence to see what the  
25 kind of impact of these changes would be for not just these routes, but for other routes.  
26 Given that the TOCs are -- it's well-known that they are thinly capitalised and there is

1 a limit to the amount of parental guarantee.

2 So the addition of the SGEI regime, we say you can't just apply a private law  
3 competition law assessment. You do have to have a public law lens when you're  
4 looking at the lawfulness, to take account of the economic judgment that's been  
5 exercised by the department.

6 **MR JUSTICE ROTH:** What are the tasks that the TOCs carry out that you say would  
7 be obstructed if they had to make -- if more people bought boundary fares?

8 **MS HOWARD:** They are under, for example -- like, we haven't put in the whole  
9 provisions of the franchise agreements here, but obviously there are service level  
10 qualities and there are obligations about making fares available, making services  
11 available at different times of the day, making sure that, you know, disadvantaged  
12 groups, for example, of passengers are able to travel and have access to mobility  
13 measures for persons of restricted movement, for example, or students or children, to  
14 promote use of trains. But also making sure, conversely, that where there are peak  
15 trains that demand is managed, so you don't have overcrowding.

16 So there are implications. If boundary fares are made available on all services across  
17 the board, that means that peak tickets would be, probably, cheaper and then you  
18 have a situation of some trains running on an overcrowded basis, but other train  
19 services being left empty and running ghost trains, which are not economically viable.

20 **MR JUSTICE ROTH:** Yes, they are available, I thought, on most services. There is  
21 a thing about it. Apart from the advanced purchase, boundary fares are available on  
22 virtually all services, I thought.

23 **MS HOWARD:** Yes, but there are implications for advanced tickets. Those versions  
24 of fares don't become economically viable, it may lead to a situation where certain  
25 types of tickets end up being withdrawn.

26 **MR JUSTICE ROTH:** It's quite a small proportion of the (inaudible), speaking from

1 memory.

2 **MS HOWARD:** Yes, I'm not sure whether that's been effective.

3 **MR JUSTICE ROTH:** We heard evidence about that last time. It's not that you're  
4 making boundary fares available, there are some routes where that's true. It's really  
5 that people know about them and can buy them.

6 **MS HOWARD:** Yes. But if they are available on every route, then that obviously will  
7 affect the revenue and cost --

8 **MR JUSTICE ROTH:** It will clearly affect. We can see it will affect the revenue  
9 because people start taking advantage of a lower price that was always there, but they  
10 didn't know about.

11 **MS HOWARD:** Yes --

12 **MR JUSTICE ROTH:** Of which the Secretary of State -- a kind of fare which, as  
13 I understood you just said, that the Secretary of State approved of, that there should  
14 be boundary fares.

15 **MS HOWARD:** Approved. But, again -- and this is where it feeds into the  
16 counterfactual -- it may not just be a case of these fares in isolation going down; there  
17 will be wider ramifications, which could mean that all fares generally have to go up to  
18 make up for the difference.

19 **MR JUSTICE ROTH:** Like any enterprise, if you --

20 **MS HOWARD:** Or taxpayers have to pay more.

21 **MR JUSTICE ROTH:** Yes.

22 **MS HOWARD:** So there is a balancing of those competing interests.

23 **MR JUSTICE ROTH:** Yes. We need to take a break, as you know, at some point in  
24 the morning for the benefit of the transcribers; would that be a sensible --

25 **MS HOWARD:** I think that probably would. I have to deal with the financial interests  
26 under the franchise agreements. That was my fifth pillar, and that can become quite

1 complicated, so I think now is a convenient moment.

2 **MR JUSTICE ROTH:** We will take a 10-minute break now and return at 12 o'clock.

3 **(11.49 am)**

4 **(A short break)**

5 **(12.05 pm)**

6 **MR JUSTICE ROTH:** Ms Howard, you made a reference to -- was it the Railways Act  
7 or Railways Regulation that you referred to in connection with paragraph 4 of schedule  
8 3? Can you just give me the reference to that?

9 **MS HOWARD:** Yes, we have some copies, if it would assist. So the Railways  
10 Regulation is Regulation 1370 of 2007. I can hand some copies up, if that would assist  
11 you.

12 **MR JUSTICE ROTH:** Is that the bit that you were referring to? It's not in the bundle,  
13 is it?

14 **MS HOWARD:** It's not in the bundles, but I have multiple copies here.

15 **MR JUSTICE ROTH:** Yes, would you like to hand that up.

16 **MS HOWARD: (Handed)**

17 This has been retained throughout the Brexit process, amended.

18 This version just has Article 4. The original regulation -- which we can provide you  
19 copies of -- also sets out all the recitals, but the recitals are not in this version that we  
20 have handed to you.

21 **MR JUSTICE ROTH:** We have two documents, I think; which one is it? We have  
22 volume 1 of 1, volume --

23 **MS HOWARD:** There is version 1 of 1, which I think is the full copy.

24 **MR JUSTICE ROTH:** Volume 1 of 1, at the top; that's the one, is it?

25 **MS HOWARD:** Yes. What we have given you is the recitals, which you will see says  
26 version 1 of 1, which sets out the recitals. Then there is version 3 of 3,

1 | which -- I'm afraid sorry these are not numbered. It has Articles 1 to 4 in the following  
2 | sections --

3 | **MR HOLMES:** One more specific question: you referred to -- you said you weren't  
4 | using the word "modified" loosely. You said it modified competition law. Where does  
5 | that expression appear in these regulations?

6 | **MS HOWARD:** I will just find it in the recitals for you and come back.

7 | **MR JUSTICE ROTH:** Which Article, sorry, is it?

8 | **PROFESSOR MASON:** You've given us preamble, purpose and scope, public service  
9 | contracts and mandatory content.

10 | **MS HOWARD:** Yes.

11 | **PROFESSOR MASON:** How do all of these relate to each other?

12 | **MS HOWARD:** This should be the blueprint for the instructions that the Commission  
13 | gives to the national competent authorities. So akin with other European regulatory  
14 | frameworks, you have a harmonised regime at the EU level, and then each  
15 | member state appoints their competent authority, and it's the Department of Transport  
16 | that's the competent authority under this regulation.

17 | So the recitals set out the purpose of the regulation, and the main objectives of the  
18 | European transport policy you will see in recital 4. They talk there about the main  
19 | objectives of guaranteeing safe, efficient and high-quality passenger transport  
20 | services through what's called regulated competition, guaranteeing transparency of  
21 | performance of the services, having regard to social, environmental and regional  
22 | development factors.

23 | Also to offer specific tariff conditions to certain categories of travellers, such as  
24 | pensioners, and to eliminate the disparities between transport undertakings in different  
25 | states; that is the EU objective.

26 | But you can see there, there are EU level objectives that are meant to be achieved

1 through the regime. This is a sort of *lex specialis*, it's called in recital 3, in relation to  
2 Article 86.2. Obviously, Article 86.2 doesn't exist anymore. The equivalent now is  
3 1062 of the TFEU, but that is implementing what we say is the services of general  
4 economic interest regime in Article 1062, which in our domestic regime picks up in  
5 paragraph 4 of schedule 3, which I have cited on page 600.

6 So the whole concept of this regulation, as you will see from Articles 1 to 3, is the  
7 services of general economic interest which overlays the administration and regulation  
8 of the railways.

9 For your question about modified --

10 **MR JUSTICE ROTH:** Sorry, Article 73 of the treaty constitutes a *lex specialis*, not this  
11 regulation?

12 **MS HOWARD:** But this regulation is adopted under -- because Article 73 is the  
13 provision on transport which allows member states to have some discretion of how  
14 they administer their transport regimes. Because there are wide disparities  
15 between -- some regimes are 100 per cent subsidised by certain member states  
16 against others that are verging towards more commercial or private finance, and there  
17 is a spectrum between different member states.

18 So this regulation was adopted to try to move member states towards a more  
19 harmonised regime, and you can see that in recital 5.

20 They talk there:

21 "Many transport services that are required in the general economic interests cannot  
22 be operated on a commercial basis, so the competent authorities must be able to  
23 ensure that such services are provided."

24 So that's ensuring continuity of service. There are different mechanisms in which they  
25 might do that, whether that's through awarding exclusive rights, granting financial  
26 compensation. That is reference to basic public subsidy.



1 **MR JUSTICE ROTH:** Yes, then in the substantive regulation; which Article should we  
2 look at?

3 **MS HOWARD:** So these recitals are enacted through Articles 1 -- which, again, give  
4 the permission to grant exclusive rights in return for the discharge of public service  
5 obligations. That's the end of Article 1. And lays down the conditions under which  
6 competent authorities may do that.

7 I'm sorry, I think it's in ...

8 Article 3.1, for example, talks about where the competent authority decides to grant  
9 an exclusive right and public compensation --

10 **MR JUSTICE ROTH:** Just a minute, Article 3.1, yes. Yes?

11 **MS HOWARD:** That talks about to do so within the framework of a public service  
12 contract. So this is how the franchise agreements, which have now been replaced  
13 with the EMAs and then the ERMAs and then the NRCs, fit into this regulatory  
14 framework because they are the implementation or the mandate of the public service  
15 obligations as part of the general service of economic interest.

16 Then Article 4 contains more information about the details that are required to be in  
17 the contract.

18 **MR JUSTICE ROTH:** Article 4?

19 **MS HOWARD:** That's in version 3 of 3.

20 **MR JUSTICE ROTH:** I didn't get an Article 4.

21 Yes, it's just been given to me. Yes.

22 **MS HOWARD:** So there is certain mandatory content that has to be, as with any  
23 contract dealing with a service of general economic interest, you have to set out the  
24 public service obligations.

25 **MR JUSTICE ROTH:** Yes.

26 **MS HOWARD:** That's specifically those obligations and objectives that I took you to

1 in the opening recitals. Then to determine the arrangements, I am looking at (c) for  
2 the allocation of costs, connected with the services.

3 Then, in Article 2, arrangement for the allocation of revenue from the sale of tickets.  
4 What may be kept by the public service operator, what revenues may be paid to the  
5 competent authority or shared between the two.

6 **MR JUSTICE ROTH:** Yes.

7 **MS HOWARD:** So I think that just allows for this risk allocation, or revenue sharing  
8 mechanisms to be set out in the contract, and that's all part of the balancing of the  
9 interests --

10 **MR JUSTICE ROTH:** Yes, and that then defines -- leads to the obligations placed on  
11 the TOCs.

12 **MS HOWARD:** I think the last provision I would like to take your Lordships to is  
13 Article 4.6, which recognises that the competent authorities have the right to require  
14 public service operators to comply with certain quality and social standards or to  
15 establish social and qualitative criteria.

16 Again, those criteria and standards are set out in the tender documents, and then also  
17 have to be set out in public service contracts.

18 We say that those link back into those regulatory objectives that I took you to in recital  
19 4 of making sure that social, environment and regional development factors are taken  
20 into account or that the mobility of certain categories of travellers is promoted.

21 **MR HOLMES:** Were you still coming to a reference to modifying competition?

22 **MS HOWARD:** Modified competition, part of that pick up is in recital 4, that regulated  
23 competition. There is one more reference, which I will try to find --

24 **MR JUSTICE ROTH:** Recital 4 through -- but this is competition between the service  
25 providers, isn't it, that they're talking about?

26 **MS HOWARD:** I don't think necessarily. I think it links into the previous recitals which

1 are dealing with the service of general interest which talks about where the competition  
2 law applies and the extent to which it applies.

3 **MR JUSTICE ROTH:** It's to be read, isn't it, with recital 5?

4 **MS HOWARD:** Or recital 2, which sets out the exemption.

5 **MR JUSTICE ROTH:** Recital 2 is just paraphrasing or quoting the law; it's not doing  
6 anything, is it? It just says what Article 86.2 says.

7 **MS HOWARD:** There is a reference in the recitals to modified competition. I'm sorry,  
8 I'm just going to try to locate that. I don't want to take ...

9 **(Pause)**

10 I will find that and come back to you after lunch, if that's all right? But there is  
11 a reference in the recitals to modified competition.

12 **MR JUSTICE ROTH:** Yes, if you rely on it.

13 **MS HOWARD:** Yes.

14 **MR JUSTICE ROTH:** What recital 7 makes clear is it's -- and that's why I said  
15 "regulated competition". It talks about regulated competition between operators.

16 Well, you will come back. If there is a reference, you will bring it to our attention.

17 **MS HOWARD:** We do have some copies of the Railways Act if that would assist you  
18 as well, just setting out the Secretary of State's obligations and particularly its  
19 responsibility as an operator of last resort, if you want those provisions?

20 **MR JUSTICE ROTH:** No, I think you've summarised that in your skeleton argument.  
21 We can understand if the railway company goes under --

22 **MS HOWARD:** There would --

23 **MR JUSTICE ROTH:** -- they have to step in. Just like if a bank goes under, as we  
24 have seen recently, central banks may have to step in.

25 **MS HOWARD:** Yes. There were a couple of factual questions that your Lordship was  
26 pressing me on, and I have taken some instructions over the break. It might just help

1 to come back on those before I move on to financial liabilities.

2 **PROFESSOR MASON:** Sorry, just before you do: will you be moving on from this  
3 now?

4 **MS HOWARD:** I was going to move on to the kind of financial provisions. So if you  
5 have questions on that, please, if I can help you --

6 **PROFESSOR MASON:** Just one more, if I may. I am looking at recital 9. I'm just  
7 wondering if you could comment on that and guide us as to how we should interpret  
8 that in this context.

9 **MS HOWARD:** So this is cutting and pasting part of the SGEI regime, part of which  
10 has been set out in Court of Justice case law. So it is a sort of hidden reference to the  
11 Altmark criteria. I don't know if you're familiar with the Altmark case law, but normally  
12 there has to be a written mandate. When you award a public service contract, it can't  
13 just be done on a minister's say so, there needs to be a written mandate or a written  
14 agreement which stipulates the public service obligations and the kind of the service  
15 criteria -- the performance criteria that are expected in the delivery of those obligations.  
16 Normally, that's done through an SLA, a Service Level Agreement. But, also, as part  
17 of the Altmark criteria you have to make sure that any compensation from public  
18 resources, any subsidy is not excessive and so --

19 **PROFESSOR MASON:** And transparent?

20 **MS HOWARD:** And transparent, which is partly why it has to be put into a proper  
21 written -- normally, they're published in the Official Journal at the EU level, or they're  
22 published on the website here. There is a transparent contract that's published on the  
23 website, in the same way as the franchise agreements. The EMAs, the ERMAs and  
24 the NRCs are all published and available on the website.

25 But the part of it about it's essential at the end, essential that the contract sets out the  
26 nature of the obligations and the agreed reward is, again, picking up the Altmark

1 criteria that any amount of money that's paid to the operator has to be cost derived. It  
2 has to reflect cost with a reasonable profit margin, and there mustn't be excessive  
3 remuneration and there must be some clawback, if there was excessive remuneration.  
4 You're looking perplexed; is there anything I can help you with?  
5 Just to deal with -- I have sort of three factual points because I was getting  
6 heat-seeking missiles on various factual points and, obviously, we haven't prepared  
7 our factual evidence yet because that would be very presumptive.  
8 But, firstly, on the OLR point, my instructing solicitors have reminded me that this is  
9 not just a kind of hypothetical, potential liability if a TOC defaults, but the  
10 Secretary of State is already acting as an OLR because there is no franchise  
11 agreement in relation to Southeastern.  
12 So in respect of the Southeastern route, the Secretary of State is actually in the shoes  
13 of a TOC because it has had to set up an (inaudible) to act as operator of last resort.  
14 So obviously Southeastern is not within the scope of these proceedings.  
15 **MR JUSTICE ROTH:** Yes, I think we say that in our judgment, don't we?  
16 **MS HOWARD:** Yes. But, obviously, any ruling from the Tribunal on these practices  
17 will have implications for the administration of Southeastern and, in that situation, the  
18 Secretary of State --  
19 **MR JUSTICE ROTH:** The Secretary of State, if they're operating the Southeastern,  
20 are they not -- how is then the -- Southeastern is a respondent to the existing  
21 proceedings.  
22 **MS HOWARD:** Southeastern isn't, I don't think.  
23 **MR JUSTICE ROTH:** Yes, it is, on the other collective proceedings Mr Gutmann has  
24 brought against London & Southeastern.  
25 **MR MOSER:** If you recall, Sir, we ended the claim period for that one when the --  
26 **MR JUSTICE ROTH:** When the franchise fell.

1 **MR MOSER:** Yes, when the Government took over.

2 **MR JUSTICE ROTH:** So it's not continuing?

3 **MR MOSER:** No. We didn't issue a new claim against the Secretary of State, partly

4 because we thought it would be better to not trouble the Secretary of State with having

5 to turn up. Of course, if the Secretary of State wants to turn up, that may change.

6 **MR JUSTICE ROTH:** Yes.

7 **MR HARRIS:** Sir, if I can assist as well?

8 **MR JUSTICE ROTH:** Yes.

9 **MR HARRIS:** Insofar as the outcome of the substantive case is that future behaviour

10 has to change with regard to making things available and advertising training, as

11 regards LSER, who I represent, that will of course fall upon the Secretary of State.

12 So the Secretary of State does have that direct interest and this behaviour, which is

13 ongoing, is said to be illegal and that's the DfT's responsibility for LSER.

14 **MR JUSTICE ROTH:** That's a very specific interest --

15 **MR HARRIS:** Precisely, Sir.

16 **MR JUSTICE ROTH:** -- in that there is no franchise now.

17 **MR HARRIS:** A specific interest, but of precisely the variety that Ms Howard was just

18 addressing the Tribunal on, an OLR specific responsibility.

19 **MS HOWARD:** That was my first point.

20 My second point is you were pressing me on the implications for different types of

21 tickets and advance fares. I'm instructed that actually the larger harm arises in relation

22 to season tickets and advance fares where there is no boundary fare at present.

23 Obviously, those have now been added to the claim. But that situation, where there

24 isn't currently a boundary fare available, then that would have to have quite wide scale

25 changes if found to be in breach.

26 **MR JUSTICE ROTH:** Yes.

1 **MS HOWARD:** Thirdly, on other zonal fares nationwide, we don't have the full facts  
2 on this yet because we obviously haven't prepared our factual witness evidence.  
3 We understand there are zonal fares in a number of cities around the UK, including  
4 not just Birmingham, but Manchester, Leeds and Liverpool, which do have zones  
5 across their travel networks and they do have some schemes for travelling within those  
6 zones, but we need to explore --

7 **MR JUSTICE ROTH:** Travelling on the overground train operators within those --

8 **MS HOWARD:** Yes.

9 **MR JUSTICE ROTH:** Using your Metropolitan bus card?

10 **MS HOWARD:** I think there is a Walrus scheme or something in Liverpool. It may not  
11 be identical to the scheme in London, but there may be ramifications for those zonal  
12 ticketing schemes in other cities.

13 **MR JUSTICE ROTH:** Yes, it isn't the zonal nature of the scheme that's relevant; it's  
14 the fact that you can use your --

15 **MS HOWARD:** There is a duplication.

16 **MR JUSTICE ROTH:** You can use your Travelcard for free on the train operating  
17 company's service. It could be a one zone ticket, the point would still arise.

18 **MS HOWARD:** I think we will need to explore exactly how those tickets work. There  
19 are other zones -- there are -- the department thinks there may be implications for  
20 other cities that have similar networks.

21 **MR JUSTICE ROTH:** Bit surprised it hasn't considered what the implications are  
22 before launching this application, I must say.

23 **MS HOWARD:** It is exploring that, but I don't think we were expecting a situation  
24 where we needed to have the entirety of the evidence ready for the intervention.

25 **MR JUSTICE ROTH:** Not the entirety, but --

26 **MS HOWARD:** The next point was the Travelcard scheme. Again, this will be a matter

1 for evidence in due course. But there is an agreement between Travelcards and the  
2 train operators, which is an important source of revenue as part of their fare box.  
3 Obviously, if there is increased use of Travelcards, then that will reduce the revenues  
4 for the train operators in future.

5 **MR JUSTICE ROTH:** Sorry, will reduce revenues?

6 **MS HOWARD:** If people are using their Travelcards more -- sorry, are using the  
7 combination of the Travelcard and the boundary fare --

8 **MR JUSTICE ROTH:** The agreement is that TfL pays the train operating companies  
9 to compensate them. So if there is increased use of Travelcards, the point I was  
10 making is: you might expect that agreement to be renegotiated, so TfL pays more to  
11 the train operating companies.

12 That was the point I was making to you.

13 **MS HOWARD:** I think there are complications, and it is not that straightforward  
14 because there are mechanisms within the agreement. It depends whether it falls  
15 within the mechanisms of the agreement.

16 **MR JUSTICE ROTH:** We had evidence on it at the previous hearing about this  
17 agreement. I'm sure one of the respondents will correct me if my memory is at fault.  
18 No doubt it's a complex agreement with various formulas in it, but it is about TfL  
19 compensating the TOCs for the fact that people buy the TfL Travelcard from TfL, so  
20 they get the revenue. But some of the card holders may use the card to travel on the  
21 train.

22 **MS HOWARD:** On their trains, yes.

23 **MR JUSTICE ROTH:** The point I am saying is: if there is increased use, one might  
24 expect it might be renegotiated, is all I'm saying.

25 **MS HOWARD:** I don't think we can -- we will look on that for evidence, but I don't  
26 think you can speculate whether it would work or whether it will just work prospectively



1 or whether it will cover retrospective damages as well.

2 **MR JUSTICE ROTH:** But your concern is prospective, as I understand it.

3 **MS HOWARD:** It's not. That's the next point I am coming to.

4 Because of the risk and the revenue and costs risks that have been assumed by the  
5 Secretary of State under the franchise agreements. So I was asked: "you know, why  
6 is the Secretary of State in no different a situation to a commercial operator, who  
7 makes an acquisition, finds out there is some problem down the line?"

8 It's very, very different to an ordinary commercial operator because it has assumed  
9 the risks under the franchise agreements. So let me just deal with those situations.

10 The historic provision, just for your note, is for Stagecoach there's been no risk  
11 allocation at all, so for Stagecoach fares, both the revenue and the cost risk.

12 For GTR --

13 **MR JUSTICE ROTH:** Just a second.

14 Yes, GTR.

15 **MS HOWARD:** The Secretary of State has always assumed the revenue risk under  
16 the old franchise agreement. So, if there was a shortfall in revenues, the  
17 Secretary of State would step in and cover that shortfall, subject to certain caveats  
18 and mechanisms.

19 But with the advent of the pandemic, in March 2020, there was then a transfer of not  
20 just the revenue risk, but also cost risks from GTR to the Secretary of State under the  
21 terms of the EMA, which had, to all intents and purposes, been replicated in the  
22 ERMA and the NRCs.

23 **MR JUSTICE ROTH:** NRCs and --

24 **MS HOWARD:** National Rail Contracts, which were introduced from March 2021.

25 So there's different time periods, where the franchise agreements were in force up  
26 until March 2020 and then the EMAs came into force, and then the ERMA replaced

1 them. Then the National Rail Contracts replaced them. We have set that out in our  
2 skeleton and in the annex to our skeleton, with the dates and times.

3 So that covers Stagecoach and GTR.

4 For South Western, both revenues and cost risks were covered up until March 2020,  
5 then have continued since then.

6 The Secretary of State bears them, sorry, from March 2020.

7 **MR JUSTICE ROTH:** Both revenue and cost risk covered from March 2020?

8 **MS HOWARD:** Yes. So, before March 2020 it was South Western that bore it, both  
9 of them; after March 2020, the Secretary of State has assumed revenue and cost risk.

10 **MR JUSTICE ROTH:** Yes.

11 **MS HOWARD:** The terms of the franchise agreements are very similar for South  
12 Western and GTR, apart from that slight difference on revenue. In our skeleton and  
13 the annex, we have used South Western as the template to explain how they work.

14 But, in broad terms, how this falls potentially -- and this is another matter for why the  
15 factual and the implications will have a bearing on this -- the Secretary of State is at  
16 risk of bearing any shortfall in revenues settled by the train operating companies as  
17 a result of any changes made in the light of the Tribunal's ruling. That's not just  
18 prospective, that goes back to the relevant parts of the claim period that relates to the  
19 assumption of the risks under the franchise agreements or their successors.

20 Secondly, it also bears the cost risk. As we have set out in our skeleton, at  
21 paragraphs 7 to 9, there are three main heads of potential costs liability. I'm going to  
22 deal with the first two and then the third one separately.

23 So the costs, we say, are the historic -- any liability in these proceedings --

24 **MR JUSTICE ROTH:** You were going through the different agreements. You said  
25 Stagecoach, no risk allocation. Stagecoach bears all costs and revenue risk. GTR,  
26 Secretary of State always assumes the revenue risk --

1 **MS HOWARD:** Fare box revenue risk, yes.

2 **MR JUSTICE ROTH:** -- throughout and, with the pandemic, there was transfer of the  
3 cost risk to the Secretary of State.

4 **MS HOWARD:** Yes.

5 **MR JUSTICE ROTH:** I think going forward; is that right?

6 **MS HOWARD:** From March 2020 going forwards.

7 **MR JUSTICE ROTH:** Yes, going forward from March 2020. South Western is fairly  
8 similar.

9 **MS HOWARD:** Apart from --

10 **MR JUSTICE ROTH:** Except the revenue risk was also on South Western  
11 before March 2020.

12 What about, then, the others continuing? What's the position with Govia Thameslink?

13 **MS HOWARD:** The only other one is LSER, which, obviously, the Government has  
14 then stepped in as operator of last resort.

15 **MR JUSTICE ROTH:** What about the new proceedings before it?

16 **MS HOWARD:** That's GTR. So it's covered under the GTR franchise agreement.

17 **MR JUSTICE ROTH:** I see, that's all.

18 **MS HOWARD:** And LSER is obviously -- now it's formed by the Government as  
19 operator of last resort.

20 **MR JUSTICE ROTH:** Previously LSER was going back. Are there any continuing  
21 obligations for the period when LSER held a franchise?

22 **MS HOWARD:** I will just have a look.

23 I understand that LSER had an EMA from March 2020 on the same terms as GTR.

24 **MR JUSTICE ROTH:** Before that.

25 **MS HOWARD:** I'm instructed that LSER was on risk for both revenue and costs prior  
26 to March 2020, so that's equivalent to the South Western agreement. Then they

1 transferred both revenue and cost risks to the Secretary of State under the EMA  
2 in March 2020.

3 **MR JUSTICE ROTH:** Yes, thank you.

4 **MS HOWARD:** From October 2021, that is when the Secretary of State stepped in as  
5 Operator of Last Resort.

6 So coming back to the increased costs aspect, as we have set out in our skeleton at  
7 paragraphs 7 to 9, the first potential head of damages liability is any liability for  
8 damages in these proceedings from the relevant periods of the claim period where the  
9 Secretary of State has assumed the risk, because that would be a cost, a head of cost.

10 **MR JUSTICE ROTH:** So the Secretary of State might have to pay?

11 **MS HOWARD:** Might have to pay. I'm saying it's -- there are caveats and I'm going  
12 to explain the caveats in a minute. But I am trying to -- I will deal you in, in layers.

13 So damages liability. The second head of costs is the costs of the litigation. That can  
14 play out in two scenarios, where essentially the Secretary of State ends up being  
15 damned if you do and damned if you don't. Because if the Class Representative wins  
16 then obviously the Secretary of State and the taxpayer could be liable not just for the  
17 Defendants' costs in defending, but also the Claimant's through any adverse costs  
18 ruling. So could end up paying everybody's costs subject to certain caveats.

19 But, if the Defendants win, then obviously their costs should be picked up by the Class  
20 Representative, but they're only going to pay their reasonable costs which are normally  
21 60 to 70 per cent. So, even in the event after successful defence of these  
22 proceedings, the Secretary of State could still have to pick up costs of 30 to  
23 40 per cent for multiple Defendants.

24 So I said that this is potential liability and there are quite complicated provisions in the  
25 risk elevation provisions in the EMAs and the ERMAs, which will depend on whether  
26 those damages and costs are disallowable costs or not.

1 So, in broad summary -- I can take to you the provisions if you want to, but I'm trying  
2 to keep this at high level -- the liability of the Secretary of State will depend on whether  
3 these damages and costs are disallowable costs, i.e. whether the train operating  
4 companies are culpable in some way for the infringements and have not acted as what  
5 is termed as a "good and efficient" operator. Those are defined terms in the franchise  
6 agreement. So if --

7 **MR JUSTICE ROTH:** You're saying if under the agreement they did not act as a good  
8 and efficient operator, then the costs are disallowable?

9 **MS HOWARD:** That is right, and they bear the costs.

10 If, however, they did act as a good and efficient operator, then they're entitled to -- or,  
11 presumably entitled to transfer that liability to the Secretary of State, on the basis that  
12 they are allowed costs.

13 So this is where the SGEI regime feeds in because obviously if their conduct is exempt  
14 under the SGEI regime or it's otherwise objectively justified in the public interest, that  
15 will then feed into that good and efficient operator assessment.

16 **MR JUSTICE ROTH:** Yes, then they won't have a liability for damages.

17 **MS HOWARD:** They won't have a liability for damages, but the Secretary of State --

18 **MR JUSTICE ROTH:** They won't because --

19 **MS HOWARD:** Yes, sorry, they will have a liability for damages. Yes, that is right.

20 But, in any event, the Secretary of State could still have to pay any shortfall in  
21 recovered costs, at the end of the day.

22 **MR JUSTICE ROTH:** Unreasonably incurred costs, yes.

23 **MS HOWARD:** Yes. You know, you never do get 100 per cent of your costs.

24 So there is a potential liability there of a quite considerable sum, but it's all going to  
25 depend on the factual and expert evidence at trial as to how that plays out.

26 So those are the first two heads of cost liability.

1 But there is a further third head of potential cost liability, which is prospective in that  
2 the Secretary of State will also bear responsibility for any costs of implementing  
3 reforms that are necessary in the light of the Tribunal's ruling. We have set that out in  
4 paragraph 9(C) of the skeleton.

5 Of course, that's not just as regards these particular routes that are the subject of these  
6 proceedings, but there could be wider reforms that are necessary to -- InterCity routes  
7 coming into London, but in other regions as well.

8 **MR JUSTICE ROTH:** The first two heads of costs are like an insurance company  
9 that's insured someone, has a claim against them.

10 **MS HOWARD:** That's a remark that Mr Justice Smith made in relation to the parallel  
11 proceedings in Boyle, which perplexes a little bit because I think it is -- I can see from  
12 a commercial aspect you may think: oh well, the Secretary of State is just an insurer --

13 **MR JUSTICE ROTH:** I'm not saying he's just an insurer; I'm saying it's the same  
14 interest that an insurer has.

15 **MS HOWARD:** But there is an added interest because of the public interest and the  
16 taxpayer's interest in this. If you're an insurer, then you have an extensive team of  
17 actuaries who will assess the risk and decide the premium. So, therefore, you've  
18 assumed the risk of something like this happening.

19 For the public interest and the taxpayer, there is no risk assessment there; it's just  
20 a blank cheque, effectively.

21 **MR JUSTICE ROTH:** You're more exposed. But the insurer has a direct financial  
22 exposure to damages and costs, doesn't it? When insured.

23 **MS HOWARD:** Yes.

24 **MR JUSTICE ROTH:** And that's clear financial interest.

25 **MS HOWARD:** They do. But then they often have a right to take over and conduct  
26 the litigation themselves.

1 **MR JUSTICE ROTH:** They can be -- if the defendant doesn't appear, then they can  
2 run or feed into the defence, but they wouldn't have a right separately to intervene,  
3 would they? So we have a separate interest.

4 **MS HOWARD:** I think it's because we have a different -- the Secretary of State has  
5 a slightly different perspective to the Defendants.

6 Obviously, the Defendants have their commercial perspective and their private  
7 interests. But, as I explained earlier, the Secretary of State is effectively representing  
8 the position of taxpayers, the Treasury and other passengers.

9 **MR JUSTICE ROTH:** I'm just talking about these two heads of increased costs that  
10 it's concerned about. Yes, I mean, an insurer has the interests of all its shareholders,  
11 but the actual separate interest of the costs and the liability is essentially an insurance  
12 interest, isn't it?

13 **MS HOWARD:** Yes. Well, again, it's the money tree point of costs being borne by  
14 the public purse.

15 **MR JUSTICE ROTH:** As you say, the money tree point. Yes.  
16 Yes, so those are your three heads of cost.

17 **MS HOWARD:** Those are the three heads of cost and we anticipate that the changes  
18 that might be necessary in terms of advertising, rolling out new selling procedures at  
19 kiosks, new ticket machines, online sales technology will have a profound impact on  
20 cost and there will also be profound impact on revenues if, you know, potentially from  
21 the Tribunal's ruling and ultimately that risk will be borne by the taxpayer through  
22 increased subsidies or by other rail passengers through increased fares because the  
23 money has to come from somewhere. It's for that reason that the Secretary of State is  
24 requested to intervene, because it needs to present a slightly different perspective to  
25 the strict commercial perspectives of the Defendants and to speak for those parties  
26 who are not represented.

1 I have detailed submissions on how we would envisage our intervention, but I think  
2 that's probably premature to deal with it because you need to understand first and be  
3 happy and comfortable with exercising your discretion before we leave the heads to  
4 how we will manage that.

5 But we submit we can manage our intervention, as we are doing in the Boyle litigation,  
6 very carefully. We would obviously coordinate with the Defendants to avoid  
7 duplication. We would be putting in limited submissions to assist the Tribunal where  
8 we can and, for example, at the recent Boyle CMC we didn't put in a skeleton because  
9 a lot of the issues raised didn't directly impact on the Secretary of State, and we had  
10 just representations and made oral submissions. So we're convinced we can flex this  
11 to make sure we don't overburden the Tribunal or affect the timetable and avoid any  
12 unnecessary duplication.

13 Sir, unless you have any further questions, those are the end of my submissions on  
14 the interest to intervene and --

15 **MR JUSTICE ROTH:** We do.

16 You clarified in answer to a question from Mr Holmes that really it turns on the SGEI  
17 derogation. That's your interest and that's the aspect you wish to address, because  
18 that's the only basis on which what would otherwise be an abuse would not be  
19 an abuse.

20 The question is whether assuming it's, as I say, in your favour, assuming it's highly  
21 likely that it's a service of general economic interest, how it would obstruct the  
22 Respondents in perfecting the tasks that have been assigned to them. That's the  
23 question.

24 Now, why is it that that's not an argument the Respondents are capable of making;  
25 what value do you add that cannot be addressed by the Respondents?

26 **MS HOWARD:** Because I think it's -- this comes back into the Secretary of State's



1 oversight of the fare policies as a whole on a holistic basis. It's not just on these lines,  
2 but what implication it will also have for other passengers, not just these fares in  
3 isolation from the wider fares on these routes or on other services, for example.

4 **MR JUSTICE ROTH:** Leave aside other services. The derogation, as I understand  
5 it, only applies if the particular tasks assigned to these Respondents would be  
6 obstructed, wouldn't be able to carry them out effectively, in the same way.

7 **MS HOWARD:** In law or fact, yes.

8 **MR JUSTICE ROTH:** Why is that not now -- if they succeed in making that argument,  
9 the whole point falls away. If they fail in making that argument, the idea that some  
10 other train company can make some different argument, well, they can if they want,  
11 but one would have thought the position is similar.

12 I still don't quite understand what value the Secretary of State is going to add to what  
13 the Respondents cannot themselves say or, indeed, you can provide them with some  
14 information if they need it, because they know what their obligations are under their  
15 agreements, this complicated change of agreements pre/post-March 2020 and so on.  
16 They know what they have to do, they know what the consequence -- or they will  
17 say -- will be of greater availability of boundary fares. Why can they not address that  
18 effectively?

19 **MS HOWARD:** Because the Secretary of State has a different perspective, because  
20 it is responsible for weighing up these competing interests and the question that you're  
21 posing, my Lord, is very similar to the one that Mr Marcus Smith -- Mr Justice Smith  
22 posed at the beginning of the Boyle -- when we applied to intervene in the Boyle  
23 proceedings and he said: no, we won't let you in yet. You can just feed into the  
24 Defendants.

25 And then when we reapplied to intervene once certification had been given he  
26 accepted that we did have a different perspective and we needed to be able to make

1 our own arguments in the public interest.

2 **MR JUSTICE ROTH:** I can see that, because of course --

3 **MS HOWARD:** -- and be given aggressive rights of intervention.

4 **MR JUSTICE ROTH:** It's a very different case because the Boyle case, as  
5 I understand it, the defence is partly: we were required to do this by the  
6 Secretary of State; we had no choice. So of course you may have a different  
7 perspective and your perspective, when that sort of -- it's almost like saying could be  
8 a third party, as I think Mr Justice Marcus Smith observed at one point, but that's not  
9 this case at all. The Respondents are not saying: we couldn't make our boundary  
10 fares available online because the Secretary of State required us not to.

11 **MS HOWARD:** No, but there is also an SGEI argument in Boyle, as well.

12 **MR JUSTICE ROTH:** Yes.

13 **MS HOWARD:** So there is a parallel between the two proceedings.

14 **MR JUSTICE ROTH:** Well, I still don't understand at the moment what it is that --

15 **MS HOWARD:** I think --

16 **MR JUSTICE ROTH:** -- you'll be saying that they can't say.

17 **MS HOWARD:** I think this feeds into -- where it really feeds into is the counterfactual  
18 in determining whether there is an abuse and whether it's objectively justified and  
19 whether that has caused loss, because the train operators will obviously have their  
20 own private commercial perspective on how they have made these charges and what  
21 the situation would be, but they can't speak to the wider public interest considerations  
22 that the department balances very carefully in setting its fares policy, and so it's not  
23 just as a matter of commercial profitability and delivering money; it also brings in those  
24 social, environmental and regional development policies that are referred to in the  
25 regulation which the department, as the competent authority, is responsible for  
26 balancing, and that feeds directly into the SGEI regime.

1 What we are trying to avoid is a similar situation in the Boyle litigation where, you  
2 know, things have arisen which -- I think if we come in at a late date, we feed in, it's  
3 not clear enough, there is a risk of complications whereas if we can come in and set  
4 out the framework very, very clearly at the outset then it would assist everybody,  
5 the Tribunal and the parties.

6 **MR JUSTICE ROTH:** Setting out the framework, which was your first point, I think  
7 we're with you on that, that you can put in a written submission explaining the  
8 framework. We're quite happy with that.

9 We haven't heard from -- well, the Respondents are not opposing it. Mr Moser said  
10 he's not going to resist it. He didn't necessarily think it's relevant, but he's not going  
11 to resist it, so we're with you on that point.

12 It's going beyond that and looking at these rather wide-ranging matters that weren't  
13 introduced or you say it will affect their ability to do certain things and the question is  
14 why they can't tell us that themselves.

15 **MS HOWARD:** Because it's these factors, these public interest considerations, that  
16 feed into their ability to deliver the public services as a whole under their franchise  
17 agreements, not just the narrow question of: well, is this price differential? What's the  
18 price differential? What's the (inaudible) for this price differential, but how would any  
19 loss of revenue or increased cost then impact on their ability to deliver other objectives  
20 that are set out in the service level agreements which would reflect the social and  
21 environmental --

22 **MR JUSTICE ROTH:** If it's a question of how would it impact on their ability to do  
23 certain things, surely they're able to tell us that? If you're saying that this company, if  
24 it lost this revenue it wouldn't be able to do certain other things, you would expect the  
25 company to be able to tell us that, wouldn't you?

26 **MS HOWARD:** They might be --

1 **MR JUSTICE ROTH:** Some might think they would be better able to tell us what they  
2 can do with a certain reduction in revenue than the Secretary of State because they  
3 know where their costs and revenues and how they allocate things --

4 **MS HOWARD:** But the Secretary of State will be able to help and assist you by  
5 explaining how do these competing priorities-- how does it determine which ones have  
6 to be balanced in which way, and which ones take priority, in its expert judgment.

7 **PROFESSOR MASON:** And yet the parties could speak to their contractual  
8 obligations and how they would fulfil those or not given any change and presumably  
9 all of that balancing is expressed in the contractual obligations.

10 **MS HOWARD:** It's expressed in the sort of black letter but it's probably not got the  
11 flesh under the policy behind it, if you see what I mean, that the Defendant is  
12 approaching it from, so they might be able to say -- talk about, well, this is  
13 an obstruction in legal terms because we won't be able to deliver clause A or clause  
14 B -- but actually the department is going to be able to explain more why these are the  
15 competing priorities or these competing categories of passengers' or taxpayers'  
16 interests have to carry weight and how to weigh their interests against --

17 **PROFESSOR MASON:** Is that strictly necessary; is it not sufficient to hear arguments  
18 about which contractual obligations could not be met?

19 **MS HOWARD:** Well, I think that would help -- the contractual analysis might help you  
20 in talking about whether there is an obstruction in law, but I think you also have --

21 **PROFESSOR MASON:** But also of fact.

22 **MS HOWARD:** But it's a narrow factual basis rather than the wider aspect of  
23 delivering these public services as a whole or the entirety of the public service  
24 objectives that are set out in the franchise agreements in relation to these services.

25 It's not just about price, obviously. They have to make sure that there is a variety of  
26 tickets, a variety of different services to maximise customers' willingness to pay and to

1 try and promote travel on the rail and to make it economic by maximising economies  
2 of scale because you can't just have -- you have to get the trains from A to B and have  
3 different trains running at different times in order to create a network and if you've  
4 got -- all passengers develop it going on certain times of day but not in other times of  
5 the day you will either, as I said, be running ghost trains which are uneconomical or  
6 you won't be able to physically move trains around the network to get them where they  
7 need to be to pick passengers up for --

8 **PROFESSOR MASON:** Again, all of that will be expressed in the contracts, won't it?

9 **MS HOWARD:** I'm not sure it goes into that level of detail. It will be wrapped up  
10 neutrally in running efficient services, or something like that.

11 **MR JUSTICE ROTH:** The respondents would know that, wouldn't they, about what  
12 the effect will be on, you say, running this shift of passengers, what the degree will be.  
13 They have been running this business for several years.

14 **MS HOWARD:** They will be able to talk about their narrow -- their commercial  
15 interests, their shareholders and their passengers but not necessarily the perspective  
16 of taxpayers, who --

17 **MR JUSTICE ROTH:** These are factual questions as to what extent will it prove  
18 difficult to perform this or what the effect will be.

19 **MS HOWARD:** But at the end of the day, I mean, I know I was asked, "is the SGEI  
20 your only regime?" It's not our only argument because of the financial responsibilities  
21 as well, and the SGEI will feed into the financial implications for the Secretary of State  
22 and as to whether these are disallowable costs or not.

23 **MR JUSTICE ROTH:** Your SGEI is one point. I take that. Your second ground is that  
24 there might be financial implications for the Secretary of State.

25 **MS HOWARD:** Yes, and then the third ground is we're an Operator of Last Resort so  
26 there we're in an equivalent position to the Defendants.

1 **MR JUSTICE ROTH:** Well, that's the financial implications, I suppose.

2 **MS HOWARD:** I think that's separate to the -- the financial repercussions under the  
3 franchise agreements, it's a separate --

4 **MR JUSTICE ROTH:** But you only become Operator of Last Resort on this analysis  
5 if the financial implication for the company are so bad that they go into administration  
6 or liquidation.

7 **MS HOWARD:** That's a different aspect to the Southeastern situation where we  
8 already actually are an Operator of Last Resort.

9 **MR JUSTICE ROTH:** In Southeastern there is a particular aspect.

10 Yes, right. Well, I think that's the right point at which then to break for the lunch  
11 adjournment and then we will hear from the Respondents after lunch.

12 Is that you, Mr Harris, who is addressing us on that or Mr Ward?

13 **MR HARRIS:** Yes. Very brief indeed.

14 **MR JUSTICE ROTH:** And then from Mr Moser. Thank you.

15 **(1.01 pm)**

16 **(The luncheon adjournment)**

17 **(2.00 pm)**

18

19 Submissions by MR HARRIS

20 **MR HARRIS:** Members of the Tribunal, I have four short points on the intervention.

21 But just before I turn to them there is a question of fact that you invited my client to

22 look into over the short adjournment, namely whether you can use a Travelcard on the

23 Gatwick Express. The answer is: you can use certain Travelcards on the Gatwick

24 Express, in particular the most obvious kind, being what's called an "any permitted"

25 Travelcard, which, as the name suggests, means you can use any particular type of

26 TOC service.

1 But I'm afraid it's more complex than that because there is a profusion of other types  
2 of Travelcard. For instance, at the other end of the spectrum, you can get a  
3 Thameslink only Travelcard, which allows you to travel only on Thameslink trains, but  
4 then other TfL services, including all manner of buses, et cetera, et cetera.  
5 Then you can get intermediate ones. So, believe it or not, you can get a "not Gatwick  
6 Express" Travelcard, which, as the name again suggests, means you can't travel  
7 on -- anyway, the point about that is that we, having made that factual enquiry, see  
8 a potential methodological problem facing the Class Representative. Namely, there's  
9 already a profound difficulty, in our submission, with them identifying who has  
10 a Travelcard for an in-scope journey and it's all the more difficult to identify which  
11 particular variety of potentially relevant Travelcard for the Gatwick Express they had  
12 at a given time.

13 **MR JUSTICE ROTH:** The case is only about TfL Travelcards, isn't it?

14 **MR HARRIS:** Yes, and my understanding is these are TfL Travelcards. But you can  
15 combine them with Thameslink only or any permitted or, say, not Gatwick Express.

16 **MR JUSTICE ROTH:** Is that right?

17 **MR HARRIS:** That is right. Yes.

18 **MR JUSTICE ROTH:** Because the impression we had from the other case is that the  
19 TfL Travelcard is just either for -- it's just done by zones. You can have a zone 1 and  
20 2, or a zone 1 to 6, and that's it.

21 **MR HARRIS:** My instructions are they can be combined, but with different TOCs in  
22 the manner I have just identified. So, yes, it could be anything by way of bus or Tube  
23 or I think it covers some types of ferry, et cetera, and trams and what have you within,  
24 say, zones 1 to 6, but then it could only be combined -- you pay more. Let's say you  
25 buy an "any permitted" Travelcard zone 6, you pay more if you buy a Thameslink only  
26 Travelcard zone 6.

1 **MR JUSTICE ROTH:** Right. I don't think we got into that at all, and I don't think it was  
2 presented to us --

3 **MR HARRIS:** No.

4 **MR JUSTICE ROTH:** -- that way last time, by anyone.

5 **MR HARRIS:** I'm not sure the issue arose. But what I can say is that in the LSER first  
6 Gutmann case, it was drawn to the Tribunal's attention that there were certain other  
7 services -- not Gatwick Express, but certain other services with which you cannot use  
8 a Travelcard, a TfL Travelcard. So, for example, the LSER high speed service.

9 **MR JUSTICE ROTH:** Yes, that is right.

10 **MR HARRIS:** But, be that as it may, for present purposes on this factual issue, all  
11 I really want to say is it presents, for the purposes of certification now, a potential  
12 methodological problem. Namely, how do you identify who would have a relevant  
13 Travelcard for travel on the Gatwick Express, as opposed to somebody who had  
14 a Travelcard but it wasn't relevant, it was an invalid Travelcard?

15 Our respectful suggestion is simply that the way to deal with that now would be a little  
16 like what happened with season tickets. Namely, don't specify it with the inclusion of  
17 Gatwick Express for now, but that if my learned friend wishes to come up with  
18 a methodology and then seek to persuade the Tribunal in due course that it should be  
19 added -- and indeed season tickets were added -- when a methodology was  
20 presented, then that would be the way forward, given this factual complication.

21 That's all I have to say about that.

22 **MR JUSTICE ROTH:** Thank you very much.

23 **MR HARRIS:** As to my four short points on the statement of intervention. The first is  
24 the longest and the three others are extremely short.

25 The first is this: it's an important part of this case what would happen in the  
26 counterfactual, or what would have happened in the counterfactual. It's common



1 ground, or at least it seems to be, that if this behaviour with which we're accused is  
2 indeed abusive and we have to change it going forward, then there would be  
3 implications both in terms of revenues received -- obviously they will go down -- and  
4 expenditure expended. Obviously, that will go up.

5 As Ms Howard was explaining, that could give rise to a number of different factual  
6 outcomes in this counterfactual.

7 Just to give a few, it could mean that other fares have to go up because there is not  
8 an unlimited pot of money. It could mean that other types of discount have to go down  
9 or be removed; or it could be a combination of those things or indeed it could be  
10 something else. It could be, for example, a whole category of discounts is removed,  
11 just to name some possibilities for this counterfactual world.

12 The reason that's my first point -- and it's, in our respectful submission, the most  
13 relevant -- is we do not get to decide, as the TOCs, what that factual outcome would  
14 be in the counterfactual world. In each of those examples that I have given we have  
15 to get the approval of the DfT, so any variation to what is called the "bid fares" policy  
16 that was enshrined with and endorsed by the successful franchise bidding, the  
17 outcome of that bidding franchise agreement, we have to turn to the DfT and say:  
18 actually, we think this is a good idea, from our commercial perspective on this set of  
19 routes. For example, we might want to scrap, just for the sake of argument, young  
20 persons railcards on certain of our routes because we have to make up this shortfall  
21 in revenue.

22 But the DfT can easily say: no, you're not doing that, we don't approve it.

23 Likewise, they could say: you can't change your fare structures in other respects.

24 Therein lies the rub. That's why we say the DfT is so valuable. In this counterfactual  
25 world, we can only posit suggestions as to what we might have liked to try to achieve,  
26 but we certainly cannot present to the Tribunal evidence or submissions about what

1 would most likely have been achieved. Only the DfT can do that.

2 As Ms Howard was explaining, it's not only that they're the only person that can do  
3 that, but they're the only person that can do it by reference to what she was describing  
4 as the "wider perspective" and the wider policy imperatives that are incumbent upon  
5 them, leaving aside the fact that it has wider ramifications. We agree with that point  
6 as well. It may apply to different regions and what have you.

7 So my first and principal point is that we can't tell you enough to be the greatest  
8 assistance about the counterfactual.

9 **MR HOLMES:** Two points or questions on that. One is that surely the TOCs will be  
10 the first people who would think about what might be the consequences and that the  
11 Secretary of State, to the extent that they have to approve them, is always going to be  
12 sort of second in line because they are more remote.

13 Second observation is: what might be the consequences or the counterfactual would  
14 surely depend upon the magnitude -- if there was a ruling finding something was  
15 an abuse, what the commercial implications of that were, which would in turn depend  
16 on what was found to be abusive and what was not found to be abusive, which seems  
17 to make the whole exercise very speculative.

18 I am just wondering how one might circumscribe the speculation as to what might or  
19 might not happen in the future in those circumstances.

20 There are two levels of that. One is: what might be the consequences which the TOCs  
21 will first be considering?

22 Secondly, the Secretary of State being one further down the line.

23 **MR HARRIS:** Thank you, Mr Holmes. Can I take them in reverse order?

24 **MR HOLMES:** I think I put them in both orders, so you take them as you like.

25 **MR HARRIS:** Thank you. We know what the Class Representative in both cases  
26 says is the magnitude of this case. It runs into, off the top of my head, hundreds of

1 millions. It's ongoing, and so in broad terms we know that these are truly substantial  
2 revenue losses. Although it hasn't been worked out what the expenditure would be in  
3 order to increase advertising and training and what have you -- and this will tie into my  
4 fourth point, my much shorter fourth point. That is, in our provisional thinking,  
5 substantial as well.

6 So, as regards magnitude, these are not small fry; these are material. I accept, of  
7 course, that if they were immaterial this would be far less of a concern, but they are  
8 material on the Class Representative's own case.

9 **MR HOLMES:** But they might be successful on some aspects, but not others. So at  
10 the moment it is subject to speculation as to --

11 **MR HARRIS:** I completely accept that. But, of course, it's the -- depending on what  
12 side of the fence one is on -- beauty of a class regime, that the figures are not likely to  
13 be small. Because if you seed generically as regards a type of abuse, then it  
14 applies -- by definition, it's the same, similar related issue for all of the members of the  
15 class.

16 We know here that the class is a large class and it extends for a multiyear period.

17 So, even if some bits of it didn't succeed, other bits of it are still material, in my  
18 respectful submission. At least that's the basis upon which we have to proceed for  
19 today.

20 So that's the first question.

21 On the second question, there is a difficulty there. You suggest to me -- and I don't  
22 know because the factual evidence isn't before us -- is the DfT really only second in  
23 line? Is it for us, as a TOC, to come forward and say: "this is what we think, therefore  
24 that's the only option?"

25 My understanding, from what I know about the background -- and I obviously can't  
26 give evidence from the bar -- is it doesn't really work like that. The DfT is very

1 concerned, for the reasons Ms Howard gave, about the bigger picture and the wider  
2 ramifications and the sorts of imperatives that don't, with respect, occur. They are not  
3 of interest to a purely commercial operator, like my client. Or they're not anywhere  
4 near as much of interest.

5 So, for example, there may be -- you know, it's vitally important for us for some policy  
6 reasons to have young people or old people or disabled people on this particular route  
7 or at this particular moment and that must take priority.

8 So, therefore, although you come to us and you make a suggestion about, I don't  
9 know, increasing a fare to try to make up, actually that's all very interesting, but frankly  
10 we're not interested -- you know, we're not concerned because our policy imperatives  
11 as a department, as a quasi-regulator, are different and you haven't even thought of  
12 them.

13 So I would be very hesitant to suggest that it's a simple question of we come along  
14 with a smorgasbord of A through E, these are the options, and then we get (inaudible)  
15 through E. It may well be that there is a G, H, I, J, K that we have never even thought  
16 of.

17 Then it feeds into another point that the chairman raised earlier on, which is it could  
18 even go so far, in terms of the distinctions between this case and Boyle, as being  
19 a direction. It could even be: actually, we disagree with how you're proposing. This is  
20 all wrong. Our policy imperatives allow us and tell us that we're going to dictate to  
21 you, we're going to direct to you that you will do the following.

22 So that is the principal reason that we say that the DfT's perspective is of profound  
23 relevance. I have just been given a note that says another way in which it might work,  
24 Mr Holmes, is: we present some options and the DfT says actually none of them is  
25 acceptable. We're not going to tell you, but go off and come up with some more, come  
26 back to us.

1 That I am told, just by way of instructions rather than evidence from the bar, is  
2 something that does happen.

3 So that's the key point. Of the four, that's the key point.

4 Now, it might be that were you not with Ms Howard and the support of TOCs as to the  
5 intervention that for the reasons I have given we feel compelled to try to obtain at least  
6 some of this by way of witnesses from the DfT. We would have to call witnesses from  
7 the DfT. This is not an option that's been explored yet in detail, but we feel so strongly  
8 that their input is required that would be the back-up.

9 But we say that's far less satisfactory, not least of all because then you wouldn't be  
10 assisted by somebody like Ms Howard. You would only have evidence. You would  
11 then only have cross-examination. But there will be a limit to the degree to which  
12 a factual witness can provide assistance on matters such as the policy imperatives.

13 There would be to some degree, but there would be a limit.

14 We respectfully contend that since that would be our -- subject to case management  
15 from the Tribunal and relevance and proportionality and all the rest of it, nevertheless  
16 it would be at least prima facie our right to try to call some evidence from the  
17 department in support of our own case.

18 The better course would be to have a managed and proportionate intervention along  
19 the lines Ms Howard suggested.

20 So that's my first point. That's the principal point. The other three are much quicker.

21 **MR JUSTICE ROTH:** Just on that point, presumably from the way you've explained  
22 it, which I entirely appreciate, there would be discussions between the TOCs and the  
23 DfT of what concession might go, how it might be adjusted. There would be  
24 exchanges and meetings and so on, to see where can the revenue shortfall that results  
25 be met. That would be quite a complicated process, and we would be in no position,  
26 nor would you or the DfT, to actually know how that might come out.

1 **MR HARRIS:** That may be that one wouldn't be drawing hard edged, factual  
2 conclusions about precise outcomes. But, nevertheless, you will be a lot further  
3 advanced in your thinking about what a likely counterfactual would be with their  
4 assistance than without it.

5 Because all we could do is we could say, "Well, we think we probably would have gone  
6 and offered these options". But, as I have just explained, the options we might think  
7 of and that might seem presentable to us are irrelevant and not acceptable from the  
8 DFT's perspective. If you don't have that at all, it's going to be a much more nebulous  
9 inquiry.

10 As you know, all throughout this case the counterfactual has been an important  
11 consideration.

12 Let me give you another example. Let's say, just for the sake of argument, that we  
13 say, we think, what the Tribunal has directed in order to remedy this ex hypothesi  
14 abusive behaviour is going to cost -- I don't know -- £10 million a year for each TOC  
15 for the next five years, and then maybe a little bit less. It's a made up number, but you  
16 see my point.

17 The Department would say: no way. No way can you afford, given the imperatives  
18 that are upon us and upon you in the franchise agreement, to be spending anywhere  
19 near that amount of money on this, notwithstanding what the Tribunal has said.

20 That obviously has a difference. It obviously makes a difference to what would happen  
21 in the counterfactual world.

22 So that's the principal point. As I say the second, third and fourth points are much,  
23 much shorter.

24 We iterate what my learned friend Ms Howard has already said; that the DfT is already  
25 in the same position. It's not just an intervener with an interest in what we're saying in  
26 our defence; they are already in the same position as the TOCs because they're

1 already an operator of last resort. So, in respect of what used to be my client's  
2 franchise, the LSER franchise that then went back to the DfT. Insofar as we have  
3 things, properly, as a named Defendant, to say about what should happen in the future  
4 if we're found to have committed any abusive behaviour, they have the same interest.  
5 The only difference is that they wouldn't, in that regard, be a named  
6 defendant -- a named defendant -- but they are still for the reasons that she gave on  
7 the financial risk, even though they're not a named defendant.

8 **MR JUSTICE ROTH:** What's the difference from their interest to yours?

9 **MR HARRIS:** They may have a slight difference, as there may be differences between  
10 Ms Abram's and Mr Ward's clients and my clients as regards what they say could be  
11 done in the counterfactual on their particular network.

12 You may recall that, for example, the evidence from Mr Backway in my case, in the  
13 first case in the first set of Gutmann proceedings, is we have a large number of  
14 unmanned train stations in outlying parts. Then infrastructure, TVMs and what have  
15 you, that is different for my company as compared to, say, Mr Ward's client.

16 **MR JUSTICE ROTH:** I understand that. What's the difference between the  
17 Secretary of State and you as regards trains on London South Eastern?

18 **MR HARRIS:** Because --

19 **MR JUSTICE ROTH:** They're running it now. You were running it before, but the  
20 station is the same.

21 **MR HARRIS:** Maybe. But I don't know that because the transfer across of the  
22 particular franchise took place already, what, 12 or 18 months ago?

23 On top of that, we now no longer have an interest for that particular franchise in the  
24 amount of expenditure to change infrastructure going forward. We might have had  
25 a view that, for example --

26 **MR JUSTICE ROTH:** Your interest is that it's either a defence or it isn't. If it's

1 a defence you will say: because it would cost so much this should not be required,  
2 therefore it's not an abuse.

3 That's your interest.

4 **MR HARRIS:** As the person who operates and directly holds the purse strings, we  
5 would say that the DfT for that particular franchise has an obvious role to play.

6 If, for example, we were to speculate not knowing any longer that it's perfectly  
7 reasonable and could cost X to install gates and TVMs and barriers and extra people  
8 at certain stations with historic knowledge the current operator, the DfT, may say, "No,  
9 that's not right", and, again, it feeds very much into the counterfactual.

10 So that's the second point.

11 The third point is very, very brief. You mentioned to Ms Howard before as regards the  
12 Boyle case, and I represented the defendants in the Boyle case, where Ms Howard's  
13 client was given permission to intervene.

14 You're perfectly right, there was a difference there, in the sense that the DfT did give  
15 some actual directions as regards the nature of the fare structure in that case, but it  
16 wasn't limited to that.

17 Mr Justice Marcus Smith's judgment -- it's not spelt out in the judgment, it's a very  
18 short period. But the argument in the case proceeded on the dual premise, so the  
19 exact same one that Ms Howard has advanced today about including SGEIs. Then,  
20 on top of that, there was, if you like, another layer, which was the direction.

21 Certainly my understanding -- I have looked in the judgment, it doesn't say this in terms  
22 because it's such a short judgment, at tab 12 of the authorities bundle, paragraph 3,  
23 but nevertheless it was because of these points about SGEI and counterfactual that  
24 the Tribunal in that case was persuaded, indeed actively barely took any persuasion  
25 because it said it was so obvious.

26 **MR JUSTICE ROTH:** Was it opposed?



1 **MR HARRIS:** Can we check that?

2 **MR JUSTICE ROTH:** My understanding from reading the judgment is that it wasn't,  
3 but I may be wrong.

4 **MR HARRIS:** That's odd that I can't remember off the top of my head. I think it wasn't.

5 **MS HOWARD:** I thought it was opposed because I had to make quite extensive  
6 arguments explaining the SGEI regime.

7 **MR JUSTICE ROTH:** Obviously it wasn't opposed very effectively.

8 **MS HOWARD:** We applied pre-certification, and so we had to make extensive  
9 arguments at that point. Then the Tribunal said wait --

10 **MR JUSTICE ROTH:** They said it's too early.

11 **MS HOWARD:** They said it's too early and come back again.  
12 So then we reapplied after certification. I think at that point, maybe perhaps it was  
13 after we put in our written application, it was then accepted.

14 **MR JUSTICE ROTH:** I am being told it wasn't opposed.

15 **MS HOWARD:** Yes, I think after certification it wasn't opposed because we had  
16 a chance to put in further writing --

17 **MR JUSTICE ROTH:** No, I think the Tribunal said you can't intervene. You can only  
18 object to certification which was not appropriate at that point.

19 **MS HOWARD:** Yes. Then there was a debate about how to manage the scope of the  
20 intervention.

21 **MR MOSER:** If I can put those who were in the case out of their misery -- I wasn't in  
22 the case, but it is at paragraph 3 of the judgment, "There is no dispute amongst the  
23 parties", et cetera.

24 **MR HARRIS:** Yes, thank you, Mr Moser. I'm not sure that's quite -- necessarily means  
25 no opposition to the intervention because Ms Howard is quite right, that there certainly  
26 was opposition at one point.

1 **MR JUSTICE ROTH:** Yes, I think the Tribunal also said at the outset: there's  
2 a difference between intervention and objection, and that before certification it's  
3 a question of objection, and no locus to object at that point. You should come back.

4 **MR HARRIS:** Be that as it may -- and I will get back to you -- the point is that it  
5 proceeded on the dual basis. It wasn't just the fact that -- then the last point, the fourth  
6 point, and the final point, is shorter and it's slightly distinct.

7 Just for the record, the Tribunal, in interchange with Ms Howard, suggested  
8 again -- and this happened during the CPO hearing and to some extent in the  
9 Court of Appeal -- that it might be relatively easy and of little cost to make any required  
10 changes to the manner of sale of boundary fares. I obviously don't want to get into it.  
11 I recognise the CPO has already been granted.

12 But, for the record, we don't accept that and we will be leading evidence that it is not  
13 a simple matter. There are distinct differences between things like online sales and  
14 actual sales, TVMs at stations, ticket counters, and what have you. I don't want to  
15 develop that, but my clients feel very strongly about it and given that it arose,  
16 I just wanted to make our position clear.

17 Unless I can assist further, that's what I have to say about the factual matters and the  
18 SOI.

19 **MR JUSTICE ROTH:** Just a moment.

20 **(Pause)**

21 Just to be clear as to what you can deal with and can't deal with. Presumably the  
22 revenue effect, or estimated revenue effect, of making boundary fares -- well, take it  
23 in stages, you rewind, you just covered the question of the cost of making changes;  
24 that's something you will give evidence of? That wouldn't be for the Secretary of State,  
25 that would be -- you will know that.

26 **MR HARRIS:** Save as regards LSER, possibly.

1 **MR JUSTICE ROTH:** Currently.

2 **MR HARRIS:** Yes.

3 **MR JUSTICE ROTH:** As regards the estimated loss of revenue, well, that's  
4 something -- again, you would know that rather than the Secretary of State; that's  
5 right, isn't it?

6 **MR HARRIS:** Yes, and it's the consequences of those two things --

7 **MR JUSTICE ROTH:** It's the implications of -- yes, that's how I understood it.

8 **MR HARRIS:** Yes.

9 **MR JUSTICE ROTH:** Thank you very much.

10 **MR HARRIS:** If it assists, those instructing me have diligently looked up the position  
11 as regards to Class Representative's stance on intervention in Boyle that I had  
12 forgotten. It was as follows: they had opposed originally. By the time we reached this  
13 hearing in October, the CPO hearing, their position was that they did not oppose the  
14 then prospective intervener making submissions, but they said, in their skeleton, and  
15 I quote:  
16 "It is not clear how it assists to go beyond that."  
17 And they were opposed to what Mr Justice Marcus Smith and his colleagues set down  
18 in their ruling at 3, namely "what we have termed an aggressive role of intervention".

19 **MR JUSTICE ROTH:** It said they didn't want to take an aggressive role or they --

20 **MR HARRIS:** Their position was: we don't accept that they should have an aggressive  
21 role of intervention --

22 **MR JUSTICE ROTH:** Yes.

23 **MR HARRIS:** -- or, at any rate, we can't see how it would assist to do that, in the  
24 sense of going above and beyond submission.  
25 So, in other words, the breakdown was: should Ms Howard and her client be allowed  
26 in to make some relatively light touch submissions and nothing else?

1 Her stance was: "no, I'm going to need to have some factual witness evidence, and  
2 I'm going to need to have a fairly fulsome role as an intervener. I would, for instance,  
3 like to comment on the expert evidence and make a proper full set of submissions".  
4 The Tribunal was persuaded, in the face of her submissions, that she should have  
5 what they termed the "aggressive role of intervention", and that wasn't a stance that  
6 was accepted by the then prospective Class Representative.

7 **MR JUSTICE ROTH:** Yes.

8 I'm not sure, from Ms Howard's submissions here, she is seeking aggressive  
9 intervention in this case.

10 **MR HARRIS:** No. To be fair, I think that was a word from the Tribunal.

11 **MS HOWARD:** It was --

12 **MR HARRIS:** I don't think that was Ms Howard's. It was just kind of a sobriquet for  
13 the fact that she wanted to have evidence as well as submissions, and comment on  
14 expert evidence and -- et cetera, et cetera.

15 **MS HOWARD:** We have said that our intervention wouldn't be as extensive as in  
16 Boyle in our application and our note. Although I think we have reserved the right to  
17 comment on -- we don't want to instruct separate experts, obviously, but we reserve  
18 the right to comment on the expert evidence. To wait and see, and see how the case  
19 develops before any definitive position is taken.

20 **MR JUSTICE ROTH:** The expert evidence here is all about the quantification of the  
21 loss, the extent to which Travelcards would be --

22 **MS HOWARD:** Obviously, counterfactual will feed into it.

23 **MR JUSTICE ROTH:** But that's what it's looking at. Is that something you're  
24 concerned with? I thought you're concerned with the implications of the final amount  
25 on --

26 **MS HOWARD:** We are obviously financially concerned about the final amount, but

1 obviously the counterfactual, which will be relevant for the effects of the infringement,  
2 causation will then feed into the quantum analysis.

3 **MR JUSTICE ROTH:** Yes, but that's something the respondents will be fighting.

4 **MS HOWARD:** That is, yes. So --

5 **MR JUSTICE ROTH:** I don't follow how you give a different perspective on that.

6 **MS HOWARD:** We may not. It's not going to be separate economic arguments per  
7 se. It's just if there are any observations that we want to feed in, we reserve the  
8 right -- and you will see it's in a footnote in our skeleton -- just to say: look, seeing at  
9 the moment we don't think we need to, but if the case develops and it would assist,  
10 we reserve that right.

11 But it can be reviewed at a later time.

12 **MR JUSTICE ROTH:** We can determine the scope of your intervention. So we can  
13 exclude that or include it, and at the moment --

14 **MS HOWARD:** Or wait and see.

15 **MR JUSTICE ROTH:** -- well --

16 **MS HOWARD:** See when pleadings have closed or factual evidence is closed to see  
17 how --

18 **MR JUSTICE ROTH:** It (inaudible) be after expert evidence, won't it?

19 At the moment, the expert evidence hasn't dealt with the implication. If there is  
20 separate expert evidence on what might be the implications, this second stage of the  
21 TOCs providing other services, I can see you would want to comment on that. Yes.

22 **MS HOWARD:** I would take it in stages, see what the defences say first, and then  
23 see how the evidence is going to play out.

24 **MR JUSTICE ROTH:** Yes.

25 Mr Moser.

26

1 Further submissions by MR MOSER

2 **MR MOSER:** Sir, may I, as Mr Harris did, first make some remarks about the Gatwick  
3 Express?

4 **MR JUSTICE ROTH:** Yes.

5 **MR MOSER:** Mr Harris mentioned for the first time some other kinds of Travelcards.  
6 We believe that what he's talking about are out-boundary Travelcards for inbound  
7 travel only. For instance, that's Gatwick to zones 1 to 6. Those are cards that combine  
8 TfL and rail tickets. They're not within the scope of either of our claims. Then, so far  
9 as we can see, entirely irrelevant.

10 It comes, of course, as a surprise, possibly to him as it does to us, that they're raised  
11 as part of what you, Sir, raised this morning.

12 They could have put in a response, of course, if there was something in this. They  
13 didn't do that. I say that's a red herring.

14 We have looked into this Gatwick Express point a little bit further to excavate our own  
15 reasoning as to why we included it at this stage prior to defences. The Gatwick  
16 Express used to be its own franchise. It merged into Southern in 2008, which merged  
17 into TSGN in 2015.

18 First of all, it is a normal route in the franchise. The only special aspect is that it's  
19 non-stop, but there may be other non-stop services, whether to Luton or elsewhere.

20 The Travelcard Agreement 1995, which, as, Sir, you pointed out governs this area,  
21 says that TfL Travelcards are valid on rail services. That's all. It's a long agreement,  
22 but we haven't found an exclusion for Gatwick Express.

23 Indeed, I heard Mr Harris mention that Travelcards -- he qualified it as "some  
24 Travelcards" -- are valid on the Gatwick Express. So we weren't barking up the wrong  
25 tree after all.

26 There is some publicity around Travelcards not being accepted on Gatwick Express,

1 but that, we say, looks like one of those rules that may just be abusive because it looks  
2 like something that may have been put out by the TOCs.

3 It's no different from the rest of the alleged abuse in kind. So it's really a matter, we  
4 say, for the defence to plead why Gatwick Express should be excluded.

5 Lastly, again, the Heathrow Express that was mentioned is different. It's not a  
6 franchise; it's a licence. It's not part of the Travelcard Agreement. Crucial difference  
7 that Gatwick Express is part of the Travelcard Agreement, and the Heathrow Express  
8 is not part of the Ticketing Settlement Agreement. The Gatwick Express is part of the  
9 Ticketing Settlement Agreement.

10 **MR JUSTICE ROTH:** Ticketing Settlement Agreement. Can you remind me: which  
11 agreement is that?

12 **MR MOSER:** That's the one which determines how -- I'm just going to cross-check  
13 with Mr Kuppen, so I don't mislead you.

14 That's how the TOCs share revenue amongst each other.

15 I think it suffices, for your purposes, that the Travelcard Agreement applies.

16 So I submit -- and I'm sorry if I wasn't, Sir, sufficiently insistent about it this  
17 morning -- that the CPO notice should not be the hurdle. Some claims fail, of course,  
18 even in part of a certified claim. But, at this stage, it does seem to us -- and I repeat:  
19 I heard the representative for the Defendant say that Travelcards apply to the Gatwick  
20 Express. Therefore, at this juncture, I would ask for the certification of the notice to  
21 stand.

22 They can bring a defence, and we will see what it says.

23 **MR JUSTICE ROTH:** Yes.

24 **MR MOSER:** So that's all I had to say about Gatwick Express. Then about this  
25 intervention. I come first to Ms Howard's points and then say something about  
26 Mr Harris's points.

1 The first point is there's been some discussion of Boyle -- and I don't want to spend  
2 time on it because I sense the Tribunal has this point, but this is not Boyle. Boyle is  
3 effectively a case where it is said the Secretary of State set this fare, and the  
4 Secretary of State is going to have to come along and justify the fare setting. It's  
5 a case about fare setting.

6 This is not a case about fare setting. The boundary fare exists. It's constantly being  
7 suggested today that somehow people should not be allowed to take it up, but it exists,  
8 as we heard, the Secretary of State told us, that it is part of the franchise as it was  
9 originally let to these Defendants.

10 So this is not Boyle, opposed or unopposed. The question is whether there's  
11 a sufficient interest under Ms Howard's five pillars.

12 The first pillar was essentially the role of amicus. I have given my submissions on  
13 that. The Tribunal may or may not be assisted by the Secretary of State's  
14 interpretation of its own rules, and it had some explanation this morning.

15 I said this morning that I wouldn't oppose it. I wouldn't be particularly encouraging of  
16 it either because it seems to me that the parties are quite capable of explaining matters  
17 to the Tribunal without it somehow having to go through the prism of the  
18 Secretary of State. But there we are. I have already said it's a matter for the Tribunal  
19 as to whether they want a statement about the regulatory regime.

20 The second pillar was the real impact as far as policy is concerned. As far as I can  
21 see, the third pillar was rather tied into it in relation to what was going to happen  
22 afterwards.

23 One has to leave aside in all this the somewhat, in my submission, astonishing  
24 situation into which the Secretary of State wishes to put himself, where it is suggested  
25 that this case is going to be bad for revenue and, therefore, this may affect the public  
26 interest.



1 Well, to accept that point, one has to understand that what the Secretary of State is  
2 saying is that it is right or somehow systemically planned that the travelling public are  
3 to be hoodwinked into not buying a boundary fare, paying twice for their travel, in order  
4 to protect the revenue of the train operating companies and ultimately the  
5 Secretary of State's claims any potential cost he might have to meet.

6 So there's a public interest in misleading the public in anti-competitive practices being  
7 carried on by the train operating companies. That, it seems, is the Secretary of State's  
8 astonishing case.

9 One has to get past that, of course, in order to consider the validity of this astonishing  
10 case.

11 There are some aspects to this that Ms Howard has complained of, for instance that  
12 the Secretary of State would have to spend time and money training staff to sell the  
13 tickets lawfully. Again, it is perhaps astonishing, if one steps away from it for the  
14 moment, that the Secretary of State shouldn't consider it sensible to train staff lawfully  
15 anyway.

16 Mr Gutmann has, in a sense, done the Secretary of State's work for him. We have the  
17 Yonder report, that shows what the problem is. You go to the counter, you say,  
18 "I would like a ticket to Reading", you're not asked about a Travelcard. If you are  
19 asked about a Travelcard, 50 per cent of the time, in one of the examples, you're still  
20 told, "No, it won't make a difference".

21 You just have to say to the people on the counter, "Sell the boundary fares". That  
22 shouldn't cost anything.

23 **MR JUSTICE ROTH:** I don't think it was said that the Secretary of State would have  
24 to train the staff. The TOCs would have to --

25 **MR MOSER:** The TOCs would have to train the staff.

26 **MR JUSTICE ROTH:** The cost might fall on the Secretary of State, but not if it's

1 disallowable.

2 **MR MOSER:** Exactly.

3 **MR JUSTICE ROTH:** It would be disallowable if they were not acting as a good and  
4 efficient operator.

5 **MR MOSER:** Exactly.

6 **MR JUSTICE ROTH:** So they would have to say the failure to train the staff was part  
7 of being a good and efficient operator, therefore it's an allowable expense. Therefore  
8 the Secretary of State meets it up. That's how I understood it feeds through.

9 **MR MOSER:** Yes, that's where --

10 **MR JUSTICE ROTH:** Unless the cost of training causes the TOC to become insolvent,  
11 in which case the Secretary of State takes over.

12 **MR MOSER:** Even then, Sir -- and this is where I was going to end up in Ms Howard's  
13 pillar 5, because that's where it all ends up, in pillar 5, with the Secretary of State  
14 picking up the bill -- even if the TOC becomes insolvent, Sir, we have sued the parent  
15 companies, they're parties to this case. So that's not going to happen.

16 If they have to take over as the operator of last resort, that's not going to be a financial  
17 threat to the Secretary of State, even in my learned friend's worst case scenario.

18 So, yes, you're absolutely right, Sir, for any of this to work one has to step into the  
19 alternative universe where somehow the Secretary of State is going to be responsible  
20 for all of this.

21 Here, the Secretary of State has put himself in another peculiar position, where it  
22 seems he wishes to intervene in this case in order to argue vociferously that the TOCs  
23 have been good and efficient operators only for the situation presumably to be  
24 reversed in the later stage, if there's a dispute between them about this, where the  
25 Secretary of State would want to say that they weren't.

26 This point that the Secretary of State raises is really something that arises down the

1 line. It's really a matter between the Secretary of State and the train operating  
2 companies if and when it should ever come to pass that they are arguing about who  
3 is to bear the costs of all this.

4 That will happen after this case. That will happen after the law has been clarified, and  
5 if it is found that competition law has been broken.

6 My client, Mr Gutmann, and the class members, ought not to be vexed with that private  
7 argument between the Secretary of State and the TOCs that will happen both  
8 procedurally and timeously removed from these proceedings. They don't have to  
9 come and take up time and cost in our case in order to argue -- pre-argue, as it  
10 were -- a case that may never happen down the line if there is by some chance  
11 an element of cost to be picked up by the Secretary of State.

12 When I come back to Ms Howard's fifth pillar, I will ask you briefly to look at the  
13 franchise agreements and the National Rail contracts, which of course have provisions  
14 in them that the TOCs must obey the law. If the law is breached, the costs become  
15 disallowable costs, and if the law is breached they're not good and efficient operators.  
16 So we will see that in the end.

17 So Ms Howard didn't take you to any of that, but the prospect of this coming to pass  
18 is so remote it is not wrong to say that it is never going to happen, as far as anyone  
19 can tell.

20 So much for the second and third pillars. As I say, I will come back to the unlikelihood  
21 of revenue and cost risk.

22 The fourth pillar was the SGEI regime, and it was Ms Howard's point that it will have  
23 to be a matter where the careful balancing of competing interests has to be taken into  
24 account by the Tribunal.

25 The core of SGEI is of course paragraph 4 of schedule 3 of the Competition Act 1998.  
26 We have seen that on page 600 of bundle C. That is subject to the proviso insofar as

1 the prohibition will obstruct the performance in law or in fact of the particular tasks  
2 assigned to that undertaking.

3 This is a matter that was already subject to exchange between the Tribunal and  
4 Ms Howard, and I don't want to add too much to the Tribunal's points on this, which,  
5 in my respectful submission, were all well taken.

6 The fact that boundary fares have to be made properly available as such can hardly  
7 be said to be something that is going to obstruct the performance of the particular task  
8 assigned to that undertaking. Indeed, the availability of boundary fares -- and this is  
9 rather glossed over by Ms Howard and the Defendants sometimes in their  
10 submissions -- the availability of boundary fares is a given; it's just a question of  
11 whether or not there is abuse in hiding the existence of the boundary fares, the  
12 availability, from the travelling public.

13 **MR JUSTICE ROTH:** There is the other aspect, which is where boundary fares don't  
14 exist. The season tickets and the advance tickets. Indeed, I think Ms Howard said at  
15 one point that's a very significant part of the loss.

16 **MR MOSER:** It's not, of course. Because as we have seen in the evidence of Mr Holt  
17 advance fares are between 6.5 and 7 per cent of the overall ticket.

18 As far as season tickets are concerned, we have excluded inbound travel from the  
19 scope, as I have already mentioned this afternoon. That is most of the season tickets  
20 - there is a small share of more season tickets that are outbound - but they're not part  
21 of the claim. So there is no evidence at all that this is some enormous part of the case.

22 The evidence that exists as to advance fares is somewhere between 6 and 7 per cent  
23 overall. Not something, I say, that seems likely to obstruct the performance in law, in  
24 fact, of the particular tasks assigned to that undertaking, which is to run a rail service.

25 **MR JUSTICE ROTH:** Beyond that, it's to run a rail service with certain kinds of  
26 concessionary fares as spelled out and so on. No one is suggesting it prevents them

1 running a rail service; it's saying it would prevent them carrying out certain other tasks  
2 which flow from the regulation that certain categories of passengers should get  
3 concessions and so on. Whether it actually says how much the concession has to be,  
4 I don't know. It seems unlikely.

5 **MR MOSER:** It seems unlikely, Sir. Indeed, at least thus far the train operating  
6 companies haven't argued that and they've covered almost every point.

7 The key provision in this regard, on which Ms Howard hung her hat, was said to be  
8 the provision in the Railway Regulation that allowed for a moderated competition in  
9 this field.

10 Now, we haven't heard back yet from Ms Howard, but I will happily take a wager that  
11 there is no such thing as moderated competition in the Railway Regulation -- sorry,  
12 modified competition in the railway regulation. It doesn't exist.

13 So the Secretary of State's key point on this is non-existent.

14 **MR JUSTICE ROTH:** There is provision about modified competition as between  
15 operators, hence the giving of an exclusive franchise. That's allowed, and that's where  
16 you get modified competition. The expression is regulated --

17 **MR MOSER:** Not modified. That's recital 4. There is regulated competition between  
18 operators. That has, with respect, nothing to do with the Secretary of State.

19 So there is nothing out of the ordinary here so far as competition law is concerned.

20 The Railway Regulation may give a pointer that this is an SGEI regime, and I think  
21 everybody here thinks that's an unsurprising proposition. But the Railway Regulation  
22 certainly does not provide for a special modified, or even moderated or other version  
23 of competition law. So we are dealing with SGEI in the way that we commonly  
24 understand it. I submit that there is nothing here that takes it particularly into a region  
25 where the Secretary of State can say this is so important it is going to engage the  
26 regime.

1 Importantly for procedural purposes, for case management purposes, it is obvious that  
2 Mr Harris is going to run all of these points. He doesn't, with respect, need Ms Howard  
3 to make these points. He says, "Well, I might have to call evidence". Then he might  
4 have to call evidence. That is a matter for them. There is no need for an intervention  
5 on that basis.

6 Indeed, we know that these points have been run already, in that many of the points  
7 that Mr Harris made about the various reasons, if you recall, Sir, as to why advance  
8 fares, different fares (inaudible) subject to boundary fares were about objective  
9 justification based on the cost that would create. That's classically a matter for the  
10 operator and not the Secretary of State.

11 The Secretary of State isn't going to know what the difference in revenue is.

12 As I think the Tribunal has indicated, any adjustment that happens afterwards might  
13 be a matter for discussion between the TOCs and the Secretary of State. But, again,  
14 that's not something with which my clients ought to be vexed in the context of this  
15 competition law collective action.

16 It's an oversimplification, with respect, to imagine that this is entirely a zero-sum gain,  
17 so that somehow if more boundary fares are purchased and there is a lower revenue  
18 stream because of it, other fares will immediately have to be put up by an exactly  
19 equivalent amount. There are other efficiencies that can be found and there are other  
20 ways that can be negotiated. It is not by any stretch as simple as that.

21 Sir, that brings me back and I have really more or less dealt with it by way of  
22 pre-advertising, but it brings me back to this issue of Ms Howard's fifth pillar and the  
23 cost risk and it is important to note that as far as we can see there is no cost risk at all  
24 before March 2020 that has been identified. I think that was even clarified by  
25 Ms Howard in response to a question from the Tribunal.

26 There is a revenue risk in some cases, it is said, we are told, but revenue

1 before March 2020, is historic. This isn't a consumer refund-type case. Competition  
2 law damages will be in the future. They will be cost, they will not be revenue  
3 pre-March 2020. So I don't accept that there is any revenue risk at all, actually, looking  
4 back.

5 The question then is: well, what is the cost risk that Ms Howard advertised as being  
6 potentially a matter for the Secretary of State?

7 Well, we have in the bundle different agreements, excerpts from a franchise  
8 agreement, an emergency management agreement -- sorry, an emergency measures  
9 agreement, an emergency recovery measures agreement -- that's the EMA and the  
10 ERMA and the National Rail contract, the NRC.

11 Up to March 2020, we're talking about the franchise agreements. The terms of the  
12 franchise agreements are set out in paragraphs 3 and 4 of the annex to the  
13 Secretary of State's skeleton argument, with the exception of GTR, which bore no  
14 revenue fare box risk from 2014. The TOCs, in general, bore both revenue and cost  
15 risks until March 2020, and there is no identified mechanism by which the  
16 Secretary of State or the taxpayer would be liable retrospectively under the franchise  
17 agreements.

18 Then comes the COVID regime, the EMA, the ERMA and the NRC on 31 March 2020,  
19 when first emergency contracts and ultimately the new NRCs came into force.

20 The regime under the EMA, the ERMAs and the NRCs is essentially the same. The  
21 taxpayer bears revenue and cost risk, save for disallowable costs. This is the point  
22 that was already mentioned in argument.

23 What are the disallowable costs? There is set out -- in the Secretary of State's annex,  
24 that is in bundle C, tab 4A, page 1538 -- what disallowable costs means, and  
25 the Tribunal will have seen this.

26 It includes any costs that were incurred otherwise than in accordance with those

1 expected to be incurred by a good and efficient operator, any costs incurred as a result  
2 of failing to comply with obligations under the franchise agreement.

3 Over the page, at 15.39, this is tab 4a, by the way:

4 "Failure to comply with obligations under or in connection with any agreements  
5 ancillary."

6 And (iii):

7 "Failing to comply with any applicable laws to the extent that this gives rise to a criminal  
8 liability."

9 But then it goes on to say:

10 "Paragraph (a) above shall apply in respect of any other consequence of a failure by  
11 the franchisee to apply with any applicable laws."

12 **MR JUSTICE ROTH:** Just one sec.

13 **(Pause)**

14 Yes, I see.

15 **MR MOSER:** In summary, if you've broken the law the costs are disallowable and the  
16 Secretary of State won't have to stump up for them.

17 There is within this a slightly circular definition that includes the good and efficient  
18 operator. The good and efficient operator is defined in the agreements in a way that  
19 we see in the authorities bundle. If we turn to tab 4 of this authorities bundle, we will  
20 see the emergency measures agreement. It happens to be First MTR's, but they're  
21 all the same.

22 **MR JUSTICE ROTH:** Just a moment.

23 This is tab 4 of authorities?

24 **MR MOSER:** Yes.

25 **MR JUSTICE ROTH:** Yes, emergency measures agreement.

26 **MR MOSER:** Then, at page 12.1, which should have been inserted somewhere.



1 **MR JUSTICE ROTH:** Sorry?

2 **MR MOSER:** 12.1. Do you have a page 12.1?

3 **MR JUSTICE ROTH:** Page 12.1?

4 **MR MOSER:** Yes.

5 **MR JUSTICE ROTH:** This is not ...

6 **MR MOSER:** It's a bottom right-hand corner number, "auth 12".

7 **MR JUSTICE ROTH:** Yes, I'm sorry. Yes, I have it, "Good and efficient operator".

8 **MR MOSER:** Well, I will let you read it.

9 **MR JUSTICE ROTH:** Perhaps we should read it, yes.

10 **(Pause)**

11 Yes.

12 **MR MOSER:** A similar definition is to be found in the new National Rail contract from

13 19 May 2021 onwards; that's behind tab 6 of the authorities bundle.

14 At page 41.2 is the equivalent definition of good and efficient operator in reasonably

15 similar terms, from the bottom of 41.2 over to the top of 41.3.

16 **MR JUSTICE ROTH:** Yes.

17 **MR MOSER:** Always baked into the definition of the GEO, the good and efficient

18 operator, is the obligation to comply with the other obligations in the agreement.

19 If we turn back to 41.1 in this document, the terms of the agreement, term 3.1 under

20 the heading "Compliance with laws", 3.1 "General":

21 "The operator shall at all times perform the rail services and all its other obligations

22 under the National Rail contract in accordance with applicable laws."

23 That mirrors the term as was in the old franchise agreements. The example, again, is

24 back in tab 3 of this authorities bundle and at page 7.1 of tab 3:

25 "Compliance with laws. The franchisee shall at all times perform the franchise services

26 and all its other obligations under the franchise agreement in accordance with all

1 applicable laws."

2 Unsurprisingly.

3 So the point is a lucidly clear and simple one, which is that if the laws are broken, for  
4 instance by a competition law abuse, the costs that result will be disallowable. Another  
5 way of looking at it is that the TOCs will not have acted as a GEO and, really, if I were  
6 acting for the Secretary of State -- which I'm absolutely not -- then I would rather take  
7 the line that I would wait and see whether the laws have been broken, and rather than  
8 seeking to pre-argue that they might have been good and efficient operators, to see in  
9 the public interest whether laws have been broken and then take a view on costs.

10 In my submission, if we succeed there is no realistic chance that those costs will be  
11 allowable and the Secretary of State should be quite relaxed and reassured about that.

12 By the way, the EMAs and the ERMAs don't contain the same requirements expressly,  
13 but they didn't replace the franchise agreements; they were just amendments to the  
14 franchise agreements. So the obligations in the franchise agreements in this regard  
15 continued to apply until being replaced by the one in the NRC.

16 So any damages payment is clearly disallowable; any costs as a result would be  
17 disallowable as resulting from breach of law. It's adverse costs.

18 So the Secretary of State can be relaxed.

19 The risk of having to step in as an operator of last resort, again, Sir, one can be quite  
20 relaxed because we are suing the parent companies as well.

21 It leaves the possible argument about unreasonably incurred costs if the Defendants,  
22 against all expectation, should win.

23 Well, again, one ought to be careful before suggesting that is going to be an allowable  
24 cost. But if there is some residual risk in that regard, that somehow this won't be  
25 covered or the parental guarantee won't apply or whatever, in the first place this is now  
26 somewhat in the scheme of things a small amount of risk.

1 In the second place, what difference is this going to make if the Secretary of State has  
2 intervened or has not intervened?

3 If, as we're told, the Secretary of State is not intent on making an aggressive  
4 intervention -- although the way it's described it appears to have all the same features  
5 as the intervention in Boyle, whatever you want to label it -- if the Secretary of State  
6 wishes to assist the Tribunal in how the regulations work, for instance, how is the  
7 Secretary of State's intervention going to help manage costs in this case?

8 That's a case management matter that we haven't even come to. Because the  
9 Secretary of State's intervention is certainly going to increase costs.

10 We have already spent a day today that we would not otherwise have spent talking  
11 about the Secretary of State. The Secretary of State has instructed not one but two  
12 City firms, Linklaters and Eversheds. The Secretary of State has asked for 24 lawyers  
13 to be put into the confidentiality ring --

14 **MR JUSTICE ROTH:** How many?

15 **MR MOSER:** 24. More than any other single party in this case. The  
16 Secretary of State is clearly going to take time and cost, apparently even in relation to  
17 expert evidence, from what Ms Howard has most recently said. These are all costs  
18 for which there is no allowance in the budget, of course.

19 From a case management point of view, the Secretary of State's intervention  
20 threatens completely to unbalance this case, apparently for the residual risk that  
21 unreasonably incurred costs might be successfully claimed at some point down the  
22 road. That's entirely disproportionate as a reason to exercise the discretion that  
23 resides within the Tribunal.

24 That is quite apart from the fact that, as I have said, it is unlikely that the  
25 Secretary of State will be able to assist in any matter of substance in a way that the  
26 other parties could not.

1 Again, that brings me back to Mr Harris's submissions. Mr Harris's forceful and  
2 effective intervention demonstrated, in my respectful submission, how the Defendants  
3 are more than capable of arguing their corner in all of this, including on what the law  
4 means, without the need for the Secretary of State to have a separate voice in that  
5 matter, other than perhaps by way of a piece of written amicus documentation to assist  
6 the Tribunal.

7 The argument that, well, the Secretary of State will have to deal with the  
8 consequences, it is ever thus, I'm afraid, in relation to matters that come before the  
9 CAT. Once a breach of competition law has been established, what is the CAT  
10 supposed to do?

11 So when we found this competition law, we have listened to you, Ms Howard, it will  
12 have an adverse effect on the Secretary of State, we have decided not to do anything  
13 about it. Well, that's obviously wrong, with respect. The consequences of the CAT's  
14 rulings are supposed to ensure that competition law is observed.

15 It is not to be looking over its shoulder to say: well, how is this going to affect the  
16 decision-making of the Secretary of State?

17 Competition law findings are made according to the law *ruat caelum* and if the heavens  
18 fall.

19 So the intervention of the Secretary of State makes no difference as far as the likely  
20 consequence is concerned. It does make a difference as far as the likely costs are  
21 concerned, and a troubling one as far as the Class Representative is concerned.

22 So, Sir, unless there is anything else I can assist you with.

23 **MR JUSTICE ROTH:** Thank you.

24 **MR WARD:** Can I just make one very brief point about Mr Moser's submissions?

25 **MR JUSTICE ROTH:** Mr Ward, for the transcript, can you say who you're acting for?

26

1 Submissions by MR WARD

2 **MR WARD:** First MTR, thank you.

3 It's just this: Mr Moser made submissions in really quite absolute terms about what the  
4 Secretary of State might ultimately be liable for were his clients to prevail.  
5 The Tribunal hasn't heard full argument on that. This is a matter on which my client,  
6 obviously, would have a keen interest, although we do reserve our position.

7 Ms Howard's skeleton argument put matters in quite qualified terms. Should  
8 the Tribunal find it of assistance to hear full argument about that today or another day,  
9 of course we will be happy to assist. But, with respect, that has not been the case  
10 thus far today.

11 **MR JUSTICE ROTH:** Yes.

12 Ms Howard, bearing in mind that we need to take a break, how long will you be in  
13 reply?

14

15 Submissions in reply by MS HOWARD

16 **MS HOWARD:** I just want to deal with a couple of short points. I think we have  
17 canvassed a lot of the argument already. So I have a couple of points, then --

18 **MR JUSTICE ROTH:** We will hear you now then.

19 **MS HOWARD:** Then Mr McGurk may want to reply on some of the details of the EMA  
20 and ERMA provisions and the liability.

21 **MR JUSTICE ROTH:** Right.

22 **MS HOWARD:** I just had a couple of short points. I regret I didn't come back on the  
23 modified competition provision after the break. I think the reason you have to look at  
24 regulation 1370 -- I don't know whether you have it in front of your Lordships? The  
25 version we gave up this morning.

26 **MR JUSTICE ROTH:** Yes.

1 **MS HOWARD:** Now, as I explained this morning, this regulation was an EU  
2 harmonisation mechanism which intended to open up the rail market to increase  
3 competition, because there was a wide spectrum of different mechanisms that  
4 member states were using in administering their railway services, from complete  
5 systems of nationalisation on the one hand, through to probably the UK being the most  
6 advanced in terms of privatisation at that time.

7 The aim of the regulation was to introduce a transitional period where rail services  
8 would be opened up to competition. I think you could see that initiative particularly at  
9 recital 32, which actually starts at the top of page 6.

10 You will see -- I don't know whether you have that in front of you -- it refers to the  
11 transitional period during which the application of the provisions of this regulation may  
12 take place at different times by different states, and it is therefore that public service  
13 operators from markets that are not yet affected by the provisions of the regulation.

14 That is introducing services of general economic interest, where they're given and  
15 awarded public service contracts in markets that have been open to control  
16 competition more rapidly.

17 So the transition period is intended to allow and arrange a transitional regime for  
18 operators to be opened up to controlled competition. That's where we took the  
19 reference from modified competition.

20 Because if you look at all of these recitals -- and I took your Lordships to some of them  
21 earlier -- Articles 1 to 4 set up the process for the award of public service tasks through  
22 the mechanism of a contract through the award of services of general economic  
23 interest, and there is the ability for the member states to take account of other criteria  
24 other than just cost. So if your Lordships could, say, look at recital 17, that is another  
25 provision that refers to the ability of the competent authorities, in this case the DfT, the  
26 Secretary of State, to establish social and qualitative criteria in order to maintain and

1 raise quality standards for public service obligations. Then, again, it lists some of  
2 those criteria, whether that's employment, working conditions, passenger rights,  
3 reduced mobility, environmental protection, security and safety of passengers, as well  
4 as employees' employment rights and social protection.

5 So, again, there is a list of criteria that the competent authorities can take into account  
6 in awarding these contracts. It's precisely because of those wide range of public  
7 interests that these types of services are not run on a fully commercial basis.

8 I took your Lordships earlier to recital 5, that says right from the outset that these sorts  
9 of transport services cannot be operated on a commercial basis and, therefore, the  
10 competent authorities have to enact to ensure the continuity of those services. That's  
11 why the Altmark criteria come in because they are not run on pure profit making  
12 principles.

13 And just to complete that point --

14 **MR JUSTICE ROTH:** I'm not sure, Ms Howard, this is really a reply.

15 **MS HOWARD:** Because I was --

16 **MR JUSTICE ROTH:** I don't think there was any part of Mr Moser's submissions --

17 **MS HOWARD:** No, I just wanted --

18 **MR JUSTICE ROTH:** -- to say that the TOCs have to operate on entirely commercial  
19 bases and that the Secretary of State cannot set out various public service obligations  
20 for them.

21 **MS HOWARD:** No, it was because -- it was in answer to Mr Holmes' point about:  
22 where do you find modified competition?

23 Then my learned friend said, quite rightly, that we hadn't come back to explain where  
24 the term "modified competition" came from. I wanted to make sure that I had fulfilled  
25 that obligation, and I apologise I didn't do it immediately after the recess.

26 **MR JUSTICE ROTH:** By "modified competition" you're referring to recital 32, are you?

1 **MS HOWARD:** It's controlled competition. We thought "modified" was probably -- in  
2 the context of the SGEI it's modified to take account of the need to deliver these  
3 services. It links in to those Altmark criteria, that the train operator is not allowed just  
4 to maximise profits as a normal commercial operator would be. Instead, they are  
5 allowed a level of compensation -- and you can see this in recitals 27 and 28 -- that  
6 really reflects costs. You will see at the end --

7 **MR JUSTICE ROTH:** Yes. I think we have the point.

8 **MS HOWARD:** -- appropriate (inaudible) and efficiency and quality of service. It's not  
9 just being run on pure price considerations, you also have to look at a wide range of  
10 other public interest criteria, where -- and they are allowed to recover their net cost  
11 with a reasonable profit margin, but no more.

12 So that was the reference to modified competition.

13 In response to the amicus role that my learned friend was explaining we could be  
14 confined to, we do think it's important that we are allowed to present the public law  
15 dimension because the Secretary of State is involved in balancing these competing  
16 interests and, as Mr Harris made out very, very clearly, when they have to apply for  
17 permission or approval to modify the (inaudible) fares policy, it is the department that  
18 has to give approval for that, exercising its regulatory judgment and balancing all the  
19 competing priorities.

20 There may be many different ways of doing that. It may be not just that prices go up  
21 across the board, but there may be other cost savings that have to be made elsewhere.  
22 But, obviously, that's a hugely political exercise, especially in the current climate, that  
23 the Department for Transport has to have oversight.

24 **MR JUSTICE ROTH:** Yes, what I was referring to is your request in paragraph 11 of  
25 the application, which is at page 591. Your request being:

26 "To file written submissions regarding the regulatory framework and arrangements



1 made thereunder as would assist."

2 That's how you put it, and that's what I was referring to.

3 **MS HOWARD:** Yes, but I think we then supplemented that in our note, as we set out  
4 at the end of our note, just to say --

5 **MR JUSTICE ROTH:** That's --

6 **MS HOWARD:** But it may be that it's premature now and, at the moment, we put in  
7 something in writing and submissions, and when pleadings are closed we then see --

8 **MR JUSTICE ROTH:** Well, it's a question of what we allow you to do. It's not about  
9 whether it's premature.

10 What I was proposing at the outset was to say, as regards that request -- I thought  
11 that was maintained, if you tell me that's no longer --

12 **MS HOWARD:** No, it is maintained.

13 **MR JUSTICE ROTH:** If you don't wish to do that --

14 **MS HOWARD:** No, it is maintained.

15 **MR JUSTICE ROTH:** That's what I was asking about, and that's what I asked  
16 Mr Moser, if he would object to it. I think he has made clear, and again in his response,  
17 he doesn't object. He thinks it's irrelevant, but he's not going to push against you. So  
18 that's one point.

19 You then go on to say, in paragraph 11.2, written and oral submissions at any stage  
20 to protect the wider interests. That's a separate point, as you've correctly separated  
21 them.

22 **MS HOWARD:** So we have 11 and we have also explained it in our note, at  
23 paragraph 19, how we think that could play out as the claim progresses. But you may  
24 decide, at this stage, it's premature to decide on all those points. So, at paragraph 19,  
25 of the note, we have put forward that we think it's helpful to put in a statement of  
26 intervention. We will respond to the claim form and defences at that point. We have

1 also flagged that it may assist to give the Secretary of State's evidence of fact, if that  
2 would assist on these public interest considerations.

3 Then we go on to -- at the end of paragraph 2, that we don't propose to adduce  
4 separate expert evidence. We will reserve the right because we obviously haven't  
5 seen all the defence or the expert evidence, whether we comment on that. But that's  
6 very tentative at this stage, and I think we have to see how the case progresses.

7 **MR JUSTICE ROTH:** Yes.

8 **MS HOWARD:** Mr Moser tried to blow up our case as if to say that, you know, we  
9 were in favour of hoodwinking the public and misleading the public, which is obviously  
10 not the case. We're just trying to explain what the implications are for the  
11 Secretary of State as the competent authority in this sector, and also for its financial  
12 exposure as a result of the provisions in the agreements.

13 We would want to make one factual point, and I obviously can't go into detail here  
14 because it's probably very highly commercially and confidentially sensitive.

15 But, as I explained in opening, the TOCs themselves are thinly capitalised. They are  
16 supported by a parental guarantee, but it's a limited amount, a fixed amount. Above  
17 that parental guarantee, there is no parental support. So that is where the OLR  
18 provisions would kick in, if the costs of the damages or the legal costs exceeded the  
19 amount of the parental guarantee.

20 Lastly, I think, just before I pass to Mr McGurk, I would say that the cost -- Mr Moser  
21 seeks to paint us into the position of an equivalent of a part 20 claimant, where there  
22 is a claim in indemnity or contribution, and this should all be relegated until after the  
23 main hearing has been heard and determined and then we can sort out the financial  
24 implications with the Defendants. But that ignores the fact about how the public  
25 interest is weaved into the factual assessments here, which are relevant in determining  
26 the abuse, determining the counterfactual and, most importantly, whether there has

1 | been a breach of law or a breach of the agreements and whether these are  
2 | disallowable costs.

3 | It also ignores the point that I made earlier, that the Secretary of State is damned if it  
4 | does or damned if it doesn't. Because regardless of who wins this litigation the  
5 | Secretary of State faces the risk of having to pay and support the legal costs because  
6 | it's unlikely that the entirety of any costs is going to be recoverable and the  
7 | Secretary of State will have to make up the shortfall.

8 | At that point, I am now going to pass on to Mr McGurk, who is going to explain how  
9 | the agreements work.

10 | **MR JUSTICE ROTH:** We will take a usual mid-afternoon break of ten minutes.

11 | **(3.26 pm)**

12 | **(A short break)**

13 | **MS HOWARD:** Thank you. So I'm going to have two just brief points to conclude.

14 | **MR JUSTICE ROTH:** Yes.

15 | **MS HOWARD:** One of them is just to come back on the number of lawyers in the  
16 | confidentiality ring. My learned friend said there were 24 lawyers on behalf of the  
17 | department. That's not the case. It's because the department originally instructed  
18 | Eversheds, who were involved in the franchise agreements, but as it became more  
19 | litigious, they have moved to Linklaters. So there is, at the moment, a situation where  
20 | it looks like there are 24 lawyers, but actually the Eversheds lawyers are no longer  
21 | involved. There are actually only ten lawyers involved. Many of those are junior  
22 | lawyers, but they are also members of the DfT and, as you will be very familiar with  
23 | the way central departments work, there is not always continuity in personnel over the  
24 | relevant period and there are different teams within --

25 | **MR JUSTICE ROTH:** It's not that you're using two solicitors?

26 | **MS HOWARD:** No.

1 **MR JUSTICE ROTH:** You've moved from Eversheds to Linklaters?

2 **MS HOWARD:** That is right.

3 **MR JUSTICE ROTH:** There are how many Linklaters lawyers?

4 **MS HOWARD:** I think eight. So there are eight Linklaters lawyers and two Eversheds

5 lawyers that have continued because of their expertise in -- the franchising

6 arrangements.

7 **MR JUSTICE ROTH:** I thought you just said they're departmental lawyers?

8 **MS HOWARD:** So, yes, it's eight from Linklaters, there are two from Eversheds, who

9 have the franchise expertise. Then there is counsel, and then there are three within

10 the department.

11 **MR JUSTICE ROTH:** Three lawyers in the department?

12 **MS HOWARD:** Yes.

13 **MR HOLMES:** That's 15.

14 **MS HOWARD:** 15, but not 24.

15 **MR JUSTICE ROTH:** Yes, thank you.

16 **MS HOWARD:** On the financial liability provisions, as Mr Ward explains, the costs

17 position is not as simplistic as Mr Moser has portrayed. That's obviously the Class

18 Representative's world view, that their case is definitely going to win. But, as I have

19 tried to explain this morning, the position is much more nuanced than that and there

20 are more considerations in assessing whether this conduct is abusive or whether it's

21 objectively justified. And that --

22 **MR JUSTICE ROTH:** I think his position was if they win. He accepted if they don't

23 win, you will have the point about recoverable costs. He accepted that. If they win,

24 that means there has been a breach of competition law; if there's a breach of

25 competition law, then it was unlawful.

26 **MS HOWARD:** Yes, but the provisions -- when you read the provisions of the EMAs

1 and the ERMA's and the NRC it's not as black and white as that. As I said, there are  
2 variables and assumptions that are played into the provisions.

3 **MR JUSTICE ROTH:** Can you just help me on that? If we go to the clauses --

4 **MS HOWARD:** If you look at the definition of -- disallowable costs are set out in  
5 appendix 1 to schedule 8A. That's at tab 4, authorities 16, it starts.

6 So there is --

7 **MR HOLMES:** Which paragraph?

8 **MS HOWARD:** It's tab 4 and authority 16. It's sort of halfway through the agreement.

9 The agreement starts at page 10. There is an appendix to the agreement in the  
10 schedule, which then sets out the definitions for the disallowable costs.

11 Obviously, there's the chapter at the opening which introduces the types of costs that  
12 might be covered.

13 Then there are, in (a), obviously an exclusion for costs that occurred otherwise than  
14 those incurred to be via a good and efficient operator.

15 Now, the definition of good and efficient operator is, I think, at 12.1, within the same  
16 tab. I think you have been taken to this by Mr Moser. But the important point to make  
17 about this is that the -- if you look at about six lines up from the bottom it talks about:  
18 the efficient and economical manner, the degree of skill, diligence and foresight which  
19 can be expected from an experienced train operator, where, in this context, costs and  
20 revenues are optimised in combination to the greatest extent reasonably practicable,  
21 adopting a reasonable balance in respect of the short, medium and longer term  
22 consequences for the relevant franchise.

23 Now, this picks up the obligation in the franchise agreement that I referred to earlier  
24 this morning, that train operators are under a duty in their franchise agreement to  
25 maximise revenues. Obviously, that has to be balanced against -- we're not saying  
26 that, you know, by making boundary fares available or being transparent that's going

1 to -- you know, that's not endorsed by the department. But there is a balancing  
2 exercise here of how that sits and the tension with the obligation that is also upon them  
3 to maximise revenues.

4 So you can foresee that the outcome of the litigation will have some assessment on  
5 how these conflicting obligations interrelate and how they should be reconciled.

6 **MR JUSTICE ROTH:** The obligation under the franchise agreement is to operate  
7 lawfully, isn't it?

8 **MS HOWARD:** There are obligations to --

9 **MR JUSTICE ROTH:** Is that right?

10 **MS HOWARD:** There are obligations to comply with the law.

11 **MR JUSTICE ROTH:** Yes.

12 **MS HOWARD:** But then you will see how that feeds into the disallowable costs as  
13 well. Because, again, it's not quite as straightforward as Mr Moser has portrayed.  
14 So if you look at (e), for example, at page 17, it does talk there about a failure to comply  
15 with applicable laws, as Mr Moser pointed out, but that's only to the extent that this  
16 gives rise to a criminal liability. So we're obviously not here in a criminal capacity.

17 **MR JUSTICE ROTH:** No, it's:

18 "Paragraph (a) above shall apply in respect of any other consequence of a failure to  
19 comply with any applicable law."

20 That's what (e)(iii) says. Paragraph (a) above is the costs incurred in general, the  
21 disallowable costs. So as regards paragraph (a) --

22 **MS HOWARD:** That's whether you're a good and efficient operator.

23 **MR JUSTICE ROTH:** It's not about criminal liability --

24 **MS HOWARD:** It's a civil liability. You come back to a debate about whether you're  
25 a good and efficient operator. So it's not necessarily clear-cut that an infringement of  
26 this type in a novel case would necessarily feed through to say that you were in some

1 way not a good and efficient operator. That's a matter that's going to be of debate,  
2 I would imagine.

3 I don't profess to be able to speculate as to how that will land at the moment. But,  
4 obviously, the facts and the evidence and the economic assessment and  
5 the Tribunal's ruling will feed into that assessment.

6 **MR MOSER:** I wonder also if Ms Howard would take you to (e)(i) on that page, please.

7 **MS HOWARD:** So (e)(i) refers to failing to comply with the franchise agreement.  
8 Again, save in respect of any failures which result from the franchisee acting as a good  
9 and efficient operator.

10 **MR JUSTICE ROTH:** I can see there might be some scope for argument.

11 **MS HOWARD:** Exactly. So there is going to be, at some point, a dispute about --

12 **MR JUSTICE ROTH:** I suspect your client will be taking quite a strong line that if you  
13 commit an abuse, they should not be liable to pick up the costs.

14 **MS HOWARD:** Yes. I'm not professing -- and I certainly don't have authority to  
15 profess either one way or the other, and I would not be wanting to take any position  
16 on this because it is highly fact specific.

17 I'm just foreseeing that there will be arguments over this, and the Tribunal's ruling will  
18 play into this.

19 **MR JUSTICE ROTH:** Yes, we're not going to be able to resolve those arguments in  
20 this case, are we?

21 **MS HOWARD:** Well, no. But they will be highly instructive for future discussions. If  
22 it was so straightforward as Mr Moser has portrayed, then obviously we wouldn't be  
23 applying to intervene. This has been a very considered decision to apply to intervene.  
24 We didn't apply to intervene at the outset, pre-certification, but we feel that relegating  
25 us to the equivalent of a part 20 defendant, where we sit in the side lines and watch  
26 what's going on without any say at all would be incredibly unfair.

1 You know, in a part 20 procedure, the part 20 defendants have the opportunity to open  
2 up, reopen the debate, whether there has been a ruling or a settlement, to say: this is  
3 unfair and that the allocation should be different.

4 I don't think that necessarily applies here. There is going to be an argument here and  
5 the department, the Secretary of State, will be fixed with the Tribunal's ruling. If it's  
6 not allowed any say or involvement in that process, we say that procedurally that will  
7 be unfair and unjust. So we can talk about how to scope the intervention, how to make  
8 sure that it's manageable and doesn't add complexity or duplication or additional cost.  
9 We're very willing to accommodate any flexibility, but we do consider that we must  
10 have the right to present the best interests of taxpayers because the Defendant TOCs,  
11 with all respect, will not have their eye on that wider aspect. They will be thinking  
12 about their bottom line, their duties to their shareholders, and their private commercial  
13 interests. But will not be thinking about the wider interests of other passengers,  
14 employees or taxpayers.

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

16 **PROFESSOR MASON:** Just before you sit down, help me to understand how that  
17 relates to what I understand to be the derogation for competition law for obstructing  
18 performance for this specific task, so that last point that you made; how does it attach  
19 to that?

20 **MS HOWARD:** The point about representing their interests or financial -- the good  
21 and efficient operator argument?

22 **PROFESSOR MASON:** Representing the interests to start off with.

23 **MS HOWARD:** I think it is common ground that these are services of general  
24 economic interest.

25 **PROFESSOR MASON:** That's fine.

26 **MS HOWARD:** There are a range of different public interest considerations that the



1 department has to take into account, which are not just the private, commercial, profit  
2 maximising considerations that a normal commercial operator would take into  
3 account. The department, the Secretary of State, has to look at the wider public  
4 interest. Therefore, that may then feed into whether there is any abuse at all, i.e. is  
5 there a total exemption, or if it's not a complete exemption whether there are public  
6 interest considerations which have to be fed into the objective justification analysis.

7 So you're not applying a standard -- what I call a pure vanilla, private law analysis;  
8 you're introducing public interest socioeconomic arguments as well, as part of the  
9 SGEI regime, which is the modified competition analysis that I referred to.

10 **PROFESSOR MASON:** Understood.

11 **MS HOWARD:** That will then feed into: did the TOCs operate as a good and efficient  
12 operators?

13 **PROFESSOR MASON:** Then the second point, financial implications for the  
14 Secretary of State, for example.

15 **MS HOWARD:** Because the financial implications under the -- well, the OLR position  
16 is different because we are in the position as a TOC. But, under the franchise  
17 agreements, there is a debate there about whether these costs -- whether that's the  
18 costs of the litigation, the damages or the costs of reforms are allowable or not.

19 So that assessment of the SGEI will feed into the objective justification, will feed into  
20 the counterfactual, and then will feed into whether it can be said that the TOCs have  
21 operated as good and efficient operators.

22 **PROFESSOR MASON:** Thank you.

23 **MS HOWARD:** Thank you.

24 **MR JUSTICE ROTH:** Yes, Mr McGurk.

25 **MR MCGURK:** In the event, Sir, I have nothing in the following, but I am grateful.

26 **MR JUSTICE ROTH:** We should take ten minutes and return.

1 (3.52 pm)

2 (A short break)

3 (4.02 pm)

4

5 Ruling (see separate transcript)

6

7 Timetabling

8 **MR JUSTICE ROTH:** I think we then turn to the timetable and we thought it would be  
9 helpful to have the written intervention that we have just given permission for to come  
10 before defences. To avoid any duplication everyone can take account of it, or not if  
11 they think it irrelevant, or at least have regard to it in the defence. Then you can reflect  
12 that in any reply.

13 So it's a question of how soon, Ms Howard, that could be done; would three weeks be  
14 sufficient now we know you have 15 lawyers working on it?

15 (Pause)

16 **MS HOWARD:** The Department would struggle with three weeks, mainly because I'm  
17 in court in front of you all next week. Then I have very heavy submissions, which  
18 I can't front load next week because I'm in court on another case.

19 **MR JUSTICE ROTH:** I don't know how much it will involve you, given the nature of  
20 the document.

21 **MS HOWARD:** Then we're right up against Easter because obviously Good Friday is  
22 on 7 April.

23 **MR JUSTICE ROTH:** Would you like to do it after Easter?

24 **MS HOWARD:** I think that would be survivable.

25 **MR JUSTICE ROTH:** Right. So we're looking at -- what would you suggest?

26 **MS HOWARD:** Would the 26th work? I am conscious that we're going to lose people

1 over the Easter period.

2 **MR JUSTICE ROTH:** Some work can be done on it. Obviously, there are a couple of  
3 weeks to go where it can be worked on before. People can look at it when they return  
4 from Easter holiday. I imagine it can mostly be done by the lawyers in the department,  
5 with some help from -- you say Eversheds are very familiar with this. It does seem  
6 quite a long period of time.

7 14 April?

8 **MS HOWARD:** Obviously, the department has a lot going on at the moment because  
9 they're heavily implicated in the reforms to the railway regime, which is occupying a lot  
10 of space. There are other political events going on, which I probably don't need to  
11 draw attention to. They think even the 14th is going to be difficult.

12 **MR JUSTICE ROTH:** If we were to say it affects defences and, therefore, Mr Moser,  
13 the process of everything; if we were to say 21 April would that cause you problems?

14 **MR MOSER:** I suppose it depends on what the knock on --

15 **MR JUSTICE ROTH:** Effect on the defence is.

16 **MR MOSER:** -- effect on the defence is. If the defence could still be in, in about  
17 six weeks' time, that wouldn't cause us a problem.

18 **MR JUSTICE ROTH:** Let's then hear from the various Defendants.

19 So it would be -- I haven't counted my weeks, but if that was 21 April and you were to  
20 have until --

21 **MS ABRAM:** 3 May, Sir. That would give us only an extra 12 days.

22 **MR JUSTICE ROTH:** It would be 5 May, say, an extra two weeks from then.

23 But this is only dealing with one little bit of -- your defence is mostly on other things,  
24 isn't it?

25 **MS ABRAM:** Yes, Sir. We were going to propose there should be four weeks after  
26 the Secretary of State's statement of intervention, which would have taken us to

1 19 May. We're confident -- we don't know, of course, how long a document we're  
2 going to be facing and how much we will have to absorb.

3 The difficulty may be particularly acute for Stagecoach, of course, because we have  
4 been out of this market for a few years, so we have no one in-house to help us with  
5 what the regulatory regime was.

6 It's difficult to see that a date of 19 May for defences, with respect, would cause  
7 material knock-on delay to later stages of these proceedings.

8 **MR JUSTICE ROTH:** Are you suggesting -- what was it, the 19th?

9 **MS ABRAM:** 19 May. On the basis that the statements of intervention were to come  
10 on 21 April, so that would be four weeks down.

11 **MR JUSTICE ROTH:** I think that's the latest it can come. Thank you.

12 Mr Harris.

13 **MR HARRIS:** The same submission.

14 **MR JUSTICE ROTH:** And Mr Ward, same?

15 So, Mr Moser, that's what's being offered, 19 May.

16 **MR MOSER:** What can I say? Of course, they were meant to file their defences three  
17 weeks after they received this, back in December, then that was all put off.

18 It can't be news to them -- without wishing any disrespect to whatever it is the  
19 Secretary of State is going to put in, it can't be news to them what the law is. We do  
20 think six weeks or thereabouts from now would still be plenty of time.

21 Having said that, it's going to be a similar situation for us, of course, as to six weeks.  
22 We were hoping to get into disclosure by July in this matter.

23 **MR JUSTICE ROTH:** Yes.

24 **MR MOSER:** Which would be about four weeks after when we were hoping to file our  
25 reply.

26 **MR JUSTICE ROTH:** How long do you think you want for reply after defences?

1 **MR MOSER:** I think since we're dealing with three of them we would need six weeks  
2 after filing of the defences.

3 **MR JUSTICE ROTH:** Yes.

4 We were going to have a CMC after close of pleadings.

5 **MR MOSER:** Yes. Sir, you said that, and I accept it. Our proposed timetable was  
6 one where the CMC would come a bit later, but we already had that exchange this  
7 morning.

8 **MR JUSTICE ROTH:** (Overspeaking) that split trial for a start, and that will affect  
9 disclosure.

10 **MR MOSER:** So I accept that it's going to be: defence, reply, CMC.

11 **MR JUSTICE ROTH:** Yes, just give us a moment.

12 **(Pause)**

13 Yes, our struggle is to try to think when one can have a CMC before the summer,  
14 because of even obligations of the Tribunal members, let alone canvassing the  
15 position of counsel. But I think this is not going to hugely affect that challenge.

16 What we are minded to order is statement of intervention by 21 April, defences by  
17 12 May, and reply on 23 June.

18 We think given that the statement of intervention is only dealing with one narrow part  
19 of all this, that should be possible for Secretary of State and for the Defendants. Then  
20 you get your six weeks, which we understand.

21 Whether it will be possible to have a CMC, probably on a Friday in the first half of July,  
22 we will have to see, because it will depend on rearranging some other sitting. Potential  
23 date is 7 July, but we can't offer that firmly at the moment.

24 **MR MOSER:** That's very helpful. We can but try.

25 **MR JUSTICE ROTH:** Yes, well, I think that's what we will then do. So a statement of  
26 intervention, 21 April; defences in all the actions, but they may be consolidated

1 defences across the three sets of proceedings, 5 May; and reply, again, can be  
2 consolidated.

3 **MR WARD:** You did say 12 May.

4 **MR JUSTICE ROTH:** Yes, 12 May. I misspoke. 12 May and then 23 June.

5 **MR MOSER:** It was worth my learned friend turning up for that.

6 **MS ABRAM:** Sorry, just to raise one point of clarification. You referred to consolidated  
7 defences and, of course, consolidated reply. I think on the defence side what you  
8 have in mind is the possibility of LSER and GTR producing a consolidated document.

9 **MR JUSTICE ROTH:** Yes.

10 **MS ABRAM:** I'm grateful.

11 **MR JUSTICE ROTH:** That's exactly what I had in mind.

12 Are there any other matters and other directions?

13 **MR MOSER:** Only if the Tribunal were boldly minded to fix a trial date before anything  
14 else, which we have estimated to be in April 2025. But I suspect given that we're  
15 having another CMC, that's not going to be on today's list.

16 **MR JUSTICE ROTH:** I think the scope of the trial and whether it's split will affect that.  
17 We will think about trial length, but what we would like, then, for that CMC, in the usual  
18 way, is for the parties to consider directions for trial and to liaise. You might want to  
19 consider directions, whether on the alternative basis of whether dominance is included  
20 or dominance is -- the trial goes, as I think the Defendants have prepared, is on the  
21 assumption of dominance and dealing with liability, causation, quantum. Clearly,  
22 I think it must include quantum because that's a major issue in this case.

23 **MR MOSER:** Yes.

24 **MR JUSTICE ROTH:** So I don't think deferring quantum is so attractive here.

25 **MR MOSER:** We are not planning to split anything.

26 **MR JUSTICE ROTH:** Yes, I know. So I don't think anyone is suggesting that.

1 Yes, Mr Harris?

2 **MR HARRIS:** Just one other relatively sort of formality almost. In the GTR  
3 proceedings, the second Gutmann proceedings that were certified today, there needs  
4 to be some just consequential amendments to the claim form. It's currently a CPO  
5 claim form and now it needs to be turned into an actual claim form.

6 We had suggested two weeks from today, but we're not really wedded. As long as it's  
7 done in good time before the defence because strictly we will be pleading the defence  
8 to the amended claim form.

9 **MR JUSTICE ROTH:** I imagine you don't need two weeks for that.

10 **MR MOSER:** I wouldn't mind having two weeks for that. It shouldn't take that. They  
11 can start preparing because it's not going to do anything other than make formal  
12 changes, proposed, becoming and so on.

13 **MR JUSTICE ROTH:** Two weeks from today is what?

14 **MR MOSER:** 5 April, Sir, Ms Howard says.

15 **MR JUSTICE ROTH:** Yes, 5 April. Very good. Nobody seems unhappy with that.

16 **MR MOSER:** The matter of -- forgive me, the matter of the Gatwick Express; are we  
17 proceeding as pleaded or is that something that will come in, in your short judgment?

18 **MR JUSTICE ROTH:** So, no, I think from what we have heard, as pleaded.

19 **MR MOSER:** I'm grateful.

20 **MR JUSTICE ROTH:** You have dealt with that. The amendment to the litigation  
21 funding agreement, we have your undertaking, as I understand it, that will be  
22 amended --

23 **MR MOSER:** It will be.

24 **MR JUSTICE ROTH:** -- as per the Merricks addition, and it will be on your -- a CPO  
25 is granted on the basis of that undertaking.

26 **MR MOSER:** I'm grateful. I'm happy for that to be recorded in the order.

1 My learned friend.

2 **MS HOWARD:** I just wanted to raise a thing about the confidentiality ring, which we  
3 flagged at the end of our skeleton. Obviously, we are parties already, I think, to the  
4 GTR confidentiality ring, but there are separate rings for the other claims which we're  
5 not party to and it may make sense for us to be admitted to all the rings if they're going  
6 to remain distinct, so that if there are --

7 **MR JUSTICE ROTH:** Why --

8 **MS HOWARD:** Because we may want to -- and I am also thinking along the line. If  
9 we do want to put in a factual witness statement under the cover of one of the  
10 Defendants, we may need to have access to pleadings, so that we can see the scope  
11 of the case at the time we're preparing any witness statements. So it might make  
12 sense for us now to be admitted to the ring, just as a precaution, to make sure there  
13 are no concerns about confidentiality.

14 **MR JUSTICE ROTH:** I think the sensible thing is: when the need arises, you should  
15 write saying whom you want to have admitted and for what purpose, and if everyone  
16 agrees, then they will be admitted --

17 **MS HOWARD:** I was just trying to save the hassle of another application before  
18 the Tribunal.

19 **MR JUSTICE ROTH:** -- I think rather than a general -- for a particular disclosure,  
20 rather than a general submission to the rings.

21 **MS HOWARD:** I'm obliged, thank you.

22 **MS ABRAM:** May I just float one further point on confidentiality? Not to seek  
23 a resolution today, but just to bring it to the Class Representative's attention.

24 In the South Western proceedings, we have an interim confidentiality ring that only  
25 covers the funding documents that you made, Sir, in 2019, so there will clearly be  
26 a need for a further confidentiality arrangement in those proceedings. It may be that



1 | it makes sense for there to be a single confidentiality ring covering both sets of  
2 | proceedings, so as to enable documents to be cross-served without concerns about  
3 | confidentiality between the two.

4 | I'm not seeking a resolution, but just flagging it as something that will need to be  
5 | considered in due course.

6 | **MR JUSTICE ROTH:** You will need to think about that. I think it's really a concern for  
7 | the various Defendants -- obviously, the claimant is the same in all of them -- whether  
8 | you may have certain documents or that even though you're on different networks you  
9 | may be competitors for tendering for other franchises in the future. So I can envisage  
10 | it may be possible that there are certain documents that you don't want another TOC  
11 | to see. So you will have to just give that some thought and tailor the confidentiality  
12 | order accordingly.

13 | If it can be done with one ring, that's a lot easier for everyone, but it may need some  
14 | different sort of inner rings or separate sub-rings or whatever it turns out to be. I really  
15 | don't know. But I just can see there might be some concerns, and no doubt those  
16 | behind you will give this some thought.

17 | **MS ABRAM:** I'm very grateful.

18 | **MR JUSTICE ROTH:** Is there anything else?  
19 |

20 | Application for costs by MR MOSER

21 | **MR MOSER:** Sir, since this is the last time, perhaps, that the Secretary of State is  
22 | going to appear represented, I would make an order for our costs of the application to  
23 | intervene on the basis that it was almost entirely unsuccessful. It succeeded only in  
24 | parts that were not opposed and that they could have had cheaply. It's cost us  
25 | a significant amount of time today and it would be right for the Class Representative's  
26 | costs to be borne by the Secretary of State, at least those that are occasioned by the

1 application.

2 **MR JUSTICE ROTH:** Yes. What do you say about that, Ms Howard?

3 **MS HOWARD:** I would respectfully submit that my learned friend, they opposed the  
4 intervention outright all the way through, even in their skeleton. I should have said it's  
5 only this morning, after hearing from the Tribunal and its provisional view, that they  
6 made the concession that we should be allowed to submit a statement of intervention.  
7 Even then it was very reluctant, in that he didn't object, but he wasn't encouraging it  
8 either. So that was a very last-minute concession. I think it would be unfair to visit the  
9 costs of the application on the Secretary of State. I think the ordinary rules should  
10 apply, that obviously we're responsible for our own costs, we should not be responsible  
11 for the Class Representative's costs.

12 **MR JUSTICE ROTH:** Yes. Thank you.

13 **(Pause)**

14

15 Ruling on costs

16 **MR JUSTICE ROTH:** We think that this was a limited application. Although largely  
17 unsuccessful, it had a measure of success. The Secretary of State appeared out of  
18 concerns for the public interest, and we think in those circumstances there should be  
19 no order for the costs of the application to intervene.

20 **MR MOSER:** Thank you, Sir. We have nothing further.

21 **MR JUSTICE ROTH:** That concludes this hearing.

22 If the claimants could draw up a proposed form of order, we can amend, I think, the  
23 CPO order with the dates we have, if we have that in Word format. We will produce  
24 our reasons for the ruling in due course.

25 **MR MOSER:** We are grateful.

26 **(4.33 pm)**