Neutral citation [2019] CAT 20

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1298/5/7/18

Victoria House
Bloomsbury Place
London WC1A 2EB

19 July 2019

Before:

ANDREW LENON Q.C.
(Chairman)
MICHAEL CUTTING
JANE BURGESS

Sitting as a Tribunal in England and Wales

BETWEEN:

ACHILLES INFORMATION LIMITED

Claimant

- v -

NETWORK RAIL INFRASTRUCTURE LIMITED

Defendant

Heard at Victoria House on 20-22, 25-28 February and 1 March 2019

JUDGMENT

APPEARANCES

Mr Philip Woolfe and Mr Stefan Kuppen (instructed by Fieldfisher LLP) appeared on behalf of the Claimant.

Mr James Flynn Q.C. and Mr David Went (instructed by Addleshaw Goddard LLP) appeared on behalf of the Defendant.

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A. INTRODUCTION

1. The Defendant ("Network Rail") is the owner and operator of most of the mainline rail infrastructure in Great Britain ("GB"). In that capacity it operates three schemes, referred to in this judgment as the "Key Schemes", which impose terms on companies or individuals wishing to work on Network Rail's managed infrastructure.

2. Under the terms of the Key Schemes, a supplier of services relating to Network Rail's managed infrastructure must be vetted by a process of "supplier assurance". Supplier assurance is the term used to refer to arrangements implemented by a customer organisation to establish that a supplier is suitably competent and adequately resourced and can consistently deliver its products to the customer's specification. The Key Schemes mandate that suppliers must be approved by the supplier assurance scheme run by the Rail Safety and Standards Board ("RSSB"). This service is known as "RISQS", an acronym standing for the Railway Industry Supplier Qualification Scheme.

3. The Claimant ("Achilles") provides supplier assurance services in a number of industries in the United Kingdom ("UK") and overseas. Between 1997 and 2014 it was the sole operator of a rail industry qualification scheme known as Achilles Link-Up, which was a precursor to RISQS. Between 2014 and 2018 it was the sole operator of RISQS for the RSSB. In 2016 the RSSB decided to split RISQS into two services, IT and audit. Following a procurement exercise for those services, in which Achilles took part, the RSSB awarded the contracts for those services to two other companies, Altius and Capita, who began providing services under the RISQS name on 1 May 2018.

4. Achilles now wishes to continue to provide a supplier assurance scheme to the rail industry in GB but contends that it is in practice prevented from doing so because of the exclusive status conferred on RISQS by the Key Schemes and because of Network Rail's refusal to recognise supplier assurance schemes provided by any other undertaking.

5. Achilles' pleaded case in these proceedings is that Network Rail is in breach of the Chapter I and Chapter II prohibitions in the Competition Act 1998 ("the 1998 Act") in the following respects:

   (1) By including in the terms of the Key Schemes applicable to its suppliers and persons seeking access to its infrastructure a requirement to obtain supplier assurance only through RISQS and not through alternative schemes ("the RISQS-only rule"), Network Rail is said to be entering into agreements or concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition within the UK;

   (2) By adopting a strategy of excluding competition in respect of supplier assurance schemes in the rail industry and requiring supplier assurance to be provided only through the RISQS scheme, Network Rail is said to be abusing its dominant position.

6. In the course of the trial, it became clear that Achilles is not seeking to prevent Network Rail from using RISQS to vet those suppliers of services with whom it wishes to contract directly as buyer. Achilles recognises that Network Rail should be free to choose its provider of supplier assurance for the purpose of vetting suppliers with whom it is itself contracting as buyer. Our judgment is therefore given on the basis that Network Rail's requirement that its direct suppliers should be vetted by RISQS and by no other supplier assurance scheme is not contrary to the Chapter I and Chapter II prohibitions.

7. Achilles' objection is to the way in which Network Rail, through the Key Schemes and as owner of and gatekeeper to the infrastructure, mandates the use of RISQS by other buyers who need access to that infrastructure such as contractors who need to buy in plant for use on the infrastructure, contractors who subcontract tasks requiring trackside access, or buyers who are not in a supply chain with Network Rail at all, such as train operating companies ("TOCs").

8. Network Rail's response to Achilles' case is, in summary, as follows:

(1) the Key Schemes are not agreements or concerted practices between undertakings;

(2) the RISQS-only rule does not have as its object or effect the prevention restriction or distortion of competition within the UK;

(3) the RISQS-only rule is objectively justified by the need to ensure safety on the railway network;

(4) the RISQS-only rule is exempted from the prohibition in section 2 of the 1998 Act pursuant to section 9 of the same Act;

(5) Network Rail's conduct in including the RISQS-only rule in the Key Schemes is not an abuse of a dominant position.

B. THE TRIAL

9. This judgment follows the expedited trial of the preliminary issue as to whether the RISQS-only rule constitutes a breach of Chapter I and/or Chapter II of the 1998 Act. The trial proceeded on the assumption that Network Rail holds a dominant position in the market for the operation and provision of access to national rail infrastructure in GB, leaving over any dispute as to the issue of dominance and loss and damage to be the subject of a separate trial in due course.

10. The Tribunal heard evidence from the following witnesses of fact:

(1) Ms Katie Ferrier who is currently Global Director of Customer Engagement for Achilles and worked previously for 12 years at Network Rail in a variety of capacities including Head of Supplier Engagement and Senior Procurement Manager.

(2) Mr William Nelson who is the Global Audit Programme Director for Achilles.

(3) Mr Mark Chamberlain who is the Head of Solutions for Achilles and in that role is responsible for delivering supplier assurance solutions for customers across the different industries served by Achilles.

(4) Ms Gillian Scott who has most recently been the RISQS Scheme Manager for the RSSB since October 2018 and worked previously at Network Rail in a variety of capacities including Assurance Manager (Principal Contractor Licensing).

(5) Mr Ian Prosser CBE who is the Chief Inspector of Railways and Director, Rail Safety, at the Office of Rail and Regulation ("ORR").

(6) Mr Allan Spence who is Head of Passenger and Public Safety for Network Rail and worked previously at the ORR and the Health and Safety Executive.

(7) Mr Bill Cooke who is Head of Corporate Workforce Safety, Technical and Engineering for Network Rail.

(8) Mr Kenneth Blackley who is Head of Commercial, Process and Governance within the Contracts and Procurement team within the Route Services function for Network Rail.

(9) Ms Gemma Pearson who is the Principal Procurement Business Partner for the RSSB.

(10) Mr Darren Matthews who is Group Compliance Director for Readypower Rail Services Group Limited ("Readypower").

(11) Mr Adam Berwick who is Head of Procurement Rail & Utilities at Balfour Beatty plc ("Balfour Beatty").

11. In addition, the Tribunal received the following expert evidence:

(1) On safety issues, from Dr Tony Cox MBE for Achilles and Professor Anson Jack for Network Rail.

(2) On economic issues, from Mr David Parker for Achilles and Mr Derek Holt for Network Rail.

12. Dr Cox is a consulting engineer. He has provided safety management advisory services to a range of companies in different sectors and presented evidence on safety management in the railways to the Ladbroke Grove Rail Inquiry. He has undertaken investigations or other legal expert assignments relating to matters including industrial accidents in construction and the railway.

13. Professor Jack is currently Professor of International Railway Benchmarking at the University of Birmingham having spent his career working in a variety of capacities for British Rail, Railtrack and Network Rail before holding the position of Executive Director of the RSSB and Deputy Chief Executive of the RSSB with responsibility for *inter alia* accident investigations, the development and management of standards and safety risk and strategy.

14. Mr Parker and Mr Holt are both professional economists. Mr Parker is a director in the competition practice of Frontier Economics Limited. Mr Holt is a director at AlixPartners LLP.

15. All the witnesses struck the Tribunal as honest and seeking to be of assistance to the Tribunal. A number of factual witnesses on both sides expressed opinions on safety issues. While such opinion evidence does not have the same standing as independent expert evidence, to the extent that the witnesses' opinions were based on their own professional experience, their evidence was of value to the Tribunal.

C. THE FACTUAL BACKGROUND

(1) Parties

16. Achilles is a company registered in Scotland which offers supplier assurance services in a number of industries both in the UK and overseas, including in particular the GB rail industry.

17. Network Rail is a public sector company registered in England and Wales. It owns and operates most of the GB railway structure, selling services to train operators in return for charges. It operates the railway network pursuant to a licence granted by the Secretary of State for Transport. Network Rail is regulated by the ORR, an independent statutory authority.

18. The RSSB is a not-for-profit company limited by guarantee and established in 2003. The RSSB oversees rail safety and standards on the rail network. It is governed by a Board comprising an executive committee the members of which are RSSB employees and three non-executive committees which include representatives from various industry bodies including infrastructure owners, contractors, TOCs and rail trade associations. The RSSB provides a range of products and services to its members in return for a membership levy and charges for specific services.

(2) Network Rail's Key Schemes

19. Pursuant to its powers as operator of the railway network, Network Rail has developed the Key Schemes which impose terms on persons wishing to supply Network Rail or to have access to Network Rail managed infrastructure.

(a) Sentinel Scheme

20. The Sentinel Scheme is a passporting system governing access by individuals to Network Rail's managed infrastructure. An individual's competence and fitness to work data is recorded in a database and can be accessed in an operational environment through various means including a smartcard ID or mobile devices. The Sentinel Scheme is administered by Mitie Group plc ("Mitie"), a facilities management company.

21. Under the Sentinel Scheme Rules, individuals must be sponsored by an organisation approved by Network Rail. Sponsors are required to have in place a process for undertaking pre-sponsorship checks for all individuals. These include *inter alia* checking the individual's eligibility to work in the UK,

understanding of English, whether any suspensions are in place, and drug and alcohol screening.

22. Through governing the access of personnel to infrastructure managed by Network Rail, the Sentinel Scheme has a very far reach in the GB rail industry, applying to about 1,500 potential suppliers and approximately 175,000 sponsored individuals.

23. The Sentinel Scheme, which is owned by Network Rail, has also been adopted by London Underground (Transport for London) ("TfL") to manage access to its infrastructure.

(b) On-Track Plant Operations Scheme

24. The On-Track Plant Operations Scheme ("the OTPO Scheme") sets out processes to support safe planning, control and use of on-track plant. Any supplier wishing to operate on-track plant on Network Rail's infrastructure is required to be approved under the OTPO Scheme. The OTPO Scheme is of narrower application than the Sentinel Scheme, applying to about 150 potential suppliers.

(c) Principal Contractor Licensing Scheme

25. The Principal Contractor Licensing Scheme ("PCLS") applies to suppliers who want to operate as a Principal Contractor, as defined by the Construction (Design and Management) Regulations 2015 (S.I. No. 51 of 2015) ("the CDMR"), on Network Rail's managed infrastructure. A Principal Contractor in this sense is a contractor with control over the construction phase of a project involving (or likely to involve) more than one contractor. The PCLS applies to all suppliers undertaking Principal Contractor duties on behalf of Network Rail, which amounts to about 164 potential organisations.

(3) Mandating of RISQS in the Key Schemes

26. The rules of each of the three Key Schemes require a supplier seeking to qualify under the relevant scheme to be assured by RISQS and make no allowance for an alternative supplier assurance service:

(1) Sentinel Scheme: section 6.1 of the Sentinel Scheme Rules dated June 2018 entitled 'Registration of a Sponsor' states that "*For an organisation to be approved by Network Rail as a Sponsor, they must initially register with the Railway Industry Supplier Qualification Scheme (RISQS)*".

(2) OTPO Scheme: clause 3.8 of module P521 of the Infrastructure Plant Manual dated June 2017 entitled 'On-track plant operations scheme' states that "*Suppliers used to provide [on track plant] shall be Network Rail approved through the Railway Industry Safety Qualification Supplier* [sic] *(RISQS)*".

(3) PCLS: clause 8.2 of the PCLS dated June 2017 states that "*The Organisation shall have … audited and verified compliance to RISQS IMR Module*". Clause 6.1.1 explains that "*The assessment is carried out by the RISQS Board's nominated auditor to confirm compliance.*"

27. Network Rail does not dispute that the RISQS scheme is currently the only viable means of achieving compliance with the requirements of the Key Schemes. The effect of the Sentinel Scheme and the OTPO Scheme is that any supplier carrying out trackside work or operating on-track plant on Network Rail's infrastructure is required to be accredited by RISQS irrespective of whether they are carrying out works pursuant to a contract with Network Rail.

28. As noted at paragraph 6 above, Achilles conceded in the course of the hearing that Network Rail was entitled to choose freely which pre-qualification system it uses in its role as buyer and therefore by implication that the RISQS-only rule in the PCLS does not constitute a breach of the Chapter I or Chapter II prohibitions in the 1998 Act.

(4) Supplier Assurance in the Rail Industry

29. Supplier assurance addresses the needs of buyers of products and services to verify that their suppliers comply with defined sets of requirements which may be general in nature or specific to the products or services provided and serve the general purpose of ensuring that the relevant supplier has in place the appropriate systems and procedures to support the delivery of the product or service offered.

30. A buyer can either satisfy itself that a supplier fulfils the relevant requirements or rely on a third party such as Achilles to provide the relevant assurance. Such third party supplier assurance is not unique to the rail sector but exists in many safety-critical or infrastructure-heavy industries including construction, utilities, oil and gas or health services.

31. In the context of the GB rail industry, demand for supplier assurance comes from infrastructure operators, contractors and TOCs who wish to establish that suppliers with whom they contract are suitably competent and adequately resourced, and can and do consistently deliver their products and services to the customer's specification. Assurance may be necessary to provide the buyer of products and services with confidence that the supplier will be able to fulfil obligations under the legislation applicable to the GB rail sector.

32. Rail Industry Standard on Supplier Assurance RIS-2750-RST dated December 2017 ("RIS-2750") is a rail industry standard published by the RSSB which defines a standard to be met by providers of supplier assurance in the GB rail industry. Section 1.1.1 of RIS-2750 describes its purpose as follows:

> "This document is a standard for the generation of supplier assurance that can assist duty holders and those that supply to them, discharge their responsibilities and legal duties to ensure the control of risks associated with the procuring and supply of products and services for use in the Great Britain (GB) rail industry."

33. RIS-2750 sets out the principles to be followed in the carrying out of supplier assurance together with details of the information required from suppliers.

Section G3.2.3.3 specifically envisages that buyers may rely on supplier assurance provided by third party schemes such as RISQS:

> "Within the context of this document, use of a scheme refers to either:
>
> a) Third party scheme – an external approval such as ISO 9001:2015, IRIS, RISAS, RISQS provided by recognised international or GB rail industry arrangements, typically using independent, accredited certification bodies.
>
> b) Second party scheme – a set of corporate supplier assurance arrangements whereby the buyer is relying on a scheme run by its parent or a sister company (which may be international and/or non-rail specific)."

34. RIS standards are not mandatory and RIS-2750 is not designed to ensure that compliance with these requirements alone are sufficient to meet Network Rail's requirements in relation to supplier assurance. Section 1.3.1 of RIS-2750 states:

> "Users of documents published by RSSB are reminded of the need to consider their own responsibilities to ensure health and safety at work and their own duties under health and safety legislation. RSSB does not warrant that compliance with all or any documents published by RSSB is sufficient in itself to ensure safe systems of work or operation or to satisfy such responsibilities or duties."

35. Ms Scott's evidence was that Network Rail has to satisfy itself that the supplier assurance arrangements that it adopts are sufficient for it to discharge its health and safety obligations as a duty holder under health and safety legislation and it does not simply rely on any scheme's compliance with RIS-2750 for this purpose.

(5) RISQS

36. RISQS is the main supplier assurance service used by buyers of products and services throughout the rail industry in the UK. It is operated by the RSSB and used by Network Rail, TfL, passenger, light rail and freight operators, rolling stock organisations, main infrastructure contractors and other buyers and suppliers of rail products and services in the UK.

37. The RISQS scheme is not governed or owned by Network Rail and Network Rail derives no commercial benefit or competitive advantage through its use of RISQS. There is a contractual relationship between Network Rail and the RSSB governed by RISQS-SD-005 (Terms and Conditions for Buyer Membership of

RISQS) ("the RISQS Terms and Conditions"), which is a set of standard terms and conditions the RSSB enters into with each buyer member in RISQS. The agreement is terminable by either party on at least one month's notice in advance of the annual renewal date.

38. In return for the scheme fee of £50,000 per annum the RSSB provides Network Rail with access to the buyer section of the RISQS portal, relevant training and the right to attend and propose a delegate for the RISQS Advisory Council.

39. The RSSB is obliged under section 4 of the RISQS Terms and Conditions to administer and verify supplier members' responses and report events such as the lapsing of a supplier member's membership of RISQS to Network Rail. Under section 5 of the RISQS Terms and Conditions, Network Rail is required to cooperate with the RSSB and notify the RSSB if any information received through the utilisation of RISQS gives rise to concerns about the suitability of a supplier member to provide particular services or goods.

40. Governance of the RISQS scheme is provided through the RSSB by the RISQS Committee (formerly the RISQS Board), comprising representatives from across the rail industry, including Network Rail. The RISQS Committee reports to the RSSB Board and provides the oversight, coordination and day-to-day management of the RISQS scheme. A team of dedicated RSSB specialists provide the necessary industry interfaces, service provider delivery and coordination, and the ongoing system improvements. The processes and policies for the RISQS scheme are then published in the RISQS scheme documents.

41. As described by Achilles, there are three main elements to the RISQS scheme. The first element is a performance standard or specification setting out what is to be checked by a RISQS audit. The second element is the process of checking or verifying the information provided or activities against that standard. This involves examining the documents provided by the company. The third element of RISQS is one of information management: the provision of an IT portal and the presentation of a specified set of information to users, in particular in a form that can be used for qualification of suppliers for procurement purposes.

42. Once a supplier has been approved, the RISQS audit is valid for 12 months from the date of pass and the audit is then repeated on an annual basis.

(6) Network Rail's Uses of RISQS

43. Network Rail uses the RISQS scheme in two main ways. First, Network Rail's licensing and authorisation teams use RISQS to ensure that undertakings wishing to obtain a licence under one of the Key Schemes satisfy the requirements laid down by the relevant level of assurance.

44. Second, Network Rail's procurement department uses RISQS as a pre-qualification system for suppliers wishing to provide infrastructure, maintenance or construction services to Network Rail. As noted at paragraphs 6 and 28 above, this aspect of RISQS is no longer challenged by Achilles. RISQS is an efficient way for Network Rail to approach the market to establish suppliers' expression of interest against the specified product coding structure, known as the Railway Industry Commodity Classification List ("RICCL"). Once they have qualified, suppliers can register an "expression of interest" through RISQS in supplying particular products or services. This means that Network Rail can use RISQS to identify registered suppliers who have selected the relevant product and/or service codes which meet Network Rail's contract needs without having to ask the supplier for this information for each and every tender that it issues in the Official Journal of the European Union ("OJEU"). For example, if a buyer in the GB rail industry (such as Network Rail) wishes to procure abseiling services, it can type the code into the RISQS system and find all suppliers who had expressed an interest in the relevant RICCL code.

(7) Qualifying Under RISQS

45. There are two levels of qualification and accreditation under RISQS. The first level involves potential suppliers completing a questionnaire in the RISQS portal about their company. The information provided in the questionnaire is then verified in light of the products and services which the supplier intends to offer. Certain RICCL codes require verification of a supplier's RISQS profile

answers before publication of the applicable status but do not require an audit for a supplier to pass before it can become fully RISQS qualified and accredited.

46. The second level involves an audit, which is carried out if the RICCL codes are deemed to be high risk, or when the location of the service delivery is deemed to be high risk. For example, if the activity itself may not of its nature necessarily be safety-critical but it becomes safety-critical by virtue of the fact that it will be undertaken on or near the line (i.e. "trackside" works).

47. Of the 3,865 active suppliers currently registered on RISQS (as confirmed by Altius, the IT manager of the RISQS scheme, on 21 January 2019), 1,889 (49%) have no auditable RICCL codes (and therefore do not require an audit) and 1,976 (51%) have one or more auditable RICCL codes (and therefore are subject to audit requirements).

48. The RISQS scheme assures high-level information to a total pool of around 4,500 suppliers. The assurance process is then distilled, with additional RISQS scheme modules for completion by particular suppliers, most importantly Principal Contractors and plant operators.

49. The RISQS audit assesses a supplier's management systems and processes to provide buyers with assurance that the supplier has the systems and resources in place to deliver the products and services they have identified as delivering through the RICCL codes. RISQS undertakes this assessment with the specific needs of the GB rail industry in mind (and the modules and audit methodology are designed to ensure that the supplier can deliver against the relevant product code safely).

50. In respect of the OTPO Scheme and PCLS, the RISQS audit provides baseline assurance on management systems and processes in accordance with applicable standards. Higher level safety-critical assurance, in particular the assessment of practical compliance with documented management systems, is carried out by Network Rail itself. Network Rail remains responsible for auditing the application of these management systems, for example through visits to operational sites which are outside the scope of the assurance provided by the

RISQS audit. The detailed safety requirements that are applicable to a particular activity (e.g. what kind of personal protective equipment should be worn or whether electricity needs to be switched off on the track) are not what supplier assurance addresses.

(8) RISQS Modules

51. The RISQS audit itself is built around the products and services the supplier offers and is split into modules referred to as Audit Protocols. The modules cover different risk elements imported by a supplier based on the risk that the service or location of the work poses. There are six core RISQS modules: Industry Minimum Requirements ("IMR"), Sentinel, Plant Operations Scheme ("POS"), Safe Work Planning ("SWP"), Alcohol and Drugs, and Medical Screening.

52. The RISQS IMR module is a set of minimum requirements for infrastructure suppliers, which combine rail-specific requirements with more general elements of quality assurance and legal compliance. All suppliers undergoing audit must pass this audit module to supply against the products and services that they provide.

53. The RISQS Sentinel module is the pre-qualification requirement for an organisation (i.e. a supplier) to sponsor individuals who hold a Sentinel competency in order to work on Network Rail or TfL managed infrastructure. The RISQS Sentinel module delivers assurance against certain aspects of the Sentinel Scheme Rules (which are set by Network Rail), in particular, the Sentinel Scheme requirements in terms of management systems.

54. In accordance with section 6 of the Sentinel Scheme Rules, an organisation must register with RISQS, have a management system in place to demonstrate their ability to be a Sponsor and be subject to either of the following audits, carried out by RISQS, to become a Primary Sponsor for Network Rail:

    (1) a Trackside Sponsor is subject to an annual assurance process which includes a management system audit to demonstrate that the

organisation has documented processes for the key management system requirements required to be a Trackside Sponsor; or

(2) a Non-Trackside Sponsor is subject to a random management system audit to demonstrate that the organisation has documented processes for the key management system requirements required to be a Non-Trackside Sponsor.

55. The management system audited by RISQS must comply with section 3 of the Sentinel Scheme Rules and the RISQS Sentinel module ensuring that the Sponsor has processes in place to ensure the safety of its workforce in the safety-critical environment of a live railway, including:

(1) processes for undertaking pre-sponsorship checks for all individuals prior to engaging in a contract of sponsorship;

(2) processes in place to complete an induction briefing with each individual sponsored;

(3) a competence management system;

(4) a fatigue risk management system; and

(5) arrangements in place for checking that all workers do not access Network Rail or TfL managed infrastructure or carry out safety-critical tasks while under the influence of alcohol or drugs.

56. If an organisation fails the RISQS audit, it is frozen out of the Sentinel system and unable to post workers trackside until it has passed a RISQS audit. Section 6.3 of the Sentinel Scheme Rules states: "*If one part of the organisation under the same company ID fails a RISQS audit then this would lead to all the companies in that group losing their Sentinel access until such time as that part of the company passes its audit.*"

57. The RISQS SWP module is a mandatory requirement for suppliers wishing to act as Principal Contractors.

58. The RISQS POS module is undertaken by all organisations that wish to hire out or operate their own on-track plant on the Network Rail managed infrastructure under the OTPO Scheme Rules (which are set by Network Rail).

59. The RISQS POS module provides assurance against a standard set by Network Rail but completion of the module does not authorise the supplier for the purposes of the OTPO Scheme. As indicated above, a further OTPO Scheme audit is undertaken by Network Rail, which includes physical inspections including at least a maintenance depot visit and a live operational site visit. This audit will assess operations on the ground including vehicle and plant checks on the site visit. Only after Network Rail has completed and approved this audit can the operator apply to the OTPO Scheme review panel for authorisation under the OTPO Scheme Rules.

60. The OTPO Scheme is administered through Network Rail. Network Rail's Central Licensing team governs and assures on-track plant operators. Ongoing assurance is carried out by Network Rail's Route, Project Assurance or Compliance teams. Operators assessed under the OTPO Scheme provide the relevant data directly to Network Rail.

(9) Achilles' Involvement in the GB Rail Industry

61. Achilles became involved in the rail industry in January 1997 when it took over an internal database of suppliers called Link-Up, which had been established by British Rail before being privatised in 1997. At that time, Link-Up was a register of supplier details which could be used by British Rail and industry buyers and it also provided technical assurance of products such as wheelsets or bogies.

62. Achilles developed the Link-Up database into a supplier assurance scheme of the sort offered by Achilles in other industries. Link-Up became a two-sided product with buyer agreements between Achilles and the rail operators, who

paid a subscription fee to Achilles, and supplier subscriptions for registration with Link-Up to ensure their details would be available to the industry's buyers and centrally registered. Achilles would also undertake on-site audits to verify information in the questionnaires completed by suppliers by way of validation and quality assurance.

63. One of Lord Cullen's recommendations in Part 2 of his report published in 2001, following his inquiry into the Ladbroke Grove rail crash, was for "*a system for the accreditation of companies which supply products and services for use on, or in regard to, the railways, at least where they are safety-critical*" (see Part 2 Report paragraph 1.21). Lord Cullen also recommended the creation of a rail industry safety body to govern and be held responsible for supplier assurance amongst its other roles.

64. Following the publication of these recommendations, the RSSB was established in 2003. The RSSB created the Rail Industry Supplier Assurance Scheme ("RISAS") which focussed on the supplier assurance of rolling stock components. At the same time, the Link-Up scheme continued to be developed by Achilles.

65. According to the evidence of Mr Nelson, the Link-Up supplier assurance service including the auditing process was developed by Achilles in conjunction with major rail operators. The audit protocols and processes were typically drafted by Achilles in the first instance but then discussed and refined with input from the relevant customers and industry stakeholders.

66. Product codes were established in order to properly define categories of work. The product codes enabled suppliers to categorise their scope of services offered to the GB rail industry. The questionnaires and modules were refined over time to meet the expectations of the industry as well as developments in legislation or regulation.

67. Over time, technological developments allowed more of the service to move online and for data to be stored and shared in different ways. Achilles invested

in its IT functions so that it could provide those services alongside its audit function.

68. The Link-Up service was overseen by a Steering Group which acted as an oversight body for the service with representation from all parts of the rail industry. The Link-Up Steering Group would meet to discuss the service and grounds for improvement, which Achilles was able to deploy in the development of the product.

69. Mr Spence's evidence was that by 2013 there was a feeling amongst the railway buying community that Link-Up was not developing for their needs and was too heavily focused on Network Rail's own requirements. It was decided to develop RISQS as an industry-wide scheme in order to avoid duplication and save costs. Before RISQS was launched, individual buyers often undertook their own capability assessments leading to duplication of audit of suppliers' businesses. RISQS has improved efficiency by removing duplication and facilitating the sharing of information between buyers through the introduction of a standard assessment process.

70. In 2013 members of the Link-Up Steering Group (which had acted as a representative oversight body for Achilles' Link-Up scheme) voted to change its structure and to establish a new oversight board for the scheme, the RISQS Board. The RISQS Board then decided to re-brand the scheme as RISQS.

71. The RSSB approached Achilles in around December 2013 with a proposal that Achilles would continue as exclusive provider of the Link-Up service under the RISQS name. Achilles and the RSSB subsequently agreed a three-year contract to operate the RISQS scheme commencing on 6 January 2014 with an expiry date of 30 April 2017 later extended to 30 April 2018 ("the 2014 Agreement").

72. The 2014 Agreement was a concession arrangement for Achilles to supply to the RSSB and the RISQS Board website/IT portal operation and hosting for supplier and buyer organisations in the RISQS scheme, audit services for supplier and buyer organisations, agreeing audit rules with the RISQS Board and other associated Achilles services in conjunction with the RISQS scheme

(such as EU procurement-related services and application programming interface ("API") integration). Achilles was required to pay a fixed annual fee to the RSSB (£150,000) and existing Link-Up customers were transferred into the RISQS scheme. RISQS was essentially a rebranded version of Link-Up.

73. The terms of the 2014 Agreement precluded Achilles from using the Link-Up trade name during the contract term, except with the prior approval of the RISQS Board but did not preclude Achilles from using the Link-Up trade name, or offering supplier assurance services or schemes, following termination of the contract.

(10) The Tender

74. In December 2015, the RSSB decided to put out to tender the provision of IT and audit services for the RISQS scheme after the RSSB's contract with Achilles had come to an end. The decision to split the tender into two lots was consistent with the applicable public procurement regulations, including Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC.

75. Mr Blackley's evidence was that Network Rail was supportive of the RSSB's decision to run an open and transparent competitive tender and that Network Rail would have been happy for Achilles to have been appointed as the provider under the new RISQS scheme although he felt that Achilles (as the long-standing incumbent) had become somewhat complacent and investment in improving their platform was taking a long time. A competitive tender offered an opportunity for a level playing field and to identify the best providers.

76. The tender process commenced in December 2016. There were two lots: Lot 1 for IT solutions and Lot 2 for audit services. The RSSB received six tender responses for each of Lot 1 and Lot 2. These were reduced to three for each lot, who were then invited to negotiate.

77. Following evaluation of the responses to this invitation, two tenderers from each lot were taken forward to negotiation for the Best and Final Offer stage. The

eventual successful bidders for Lot 1 and Lot 2 were Altius and Capita respectively.

78. Achilles tendered for both lots. Its tender for Lot 1 was disqualified as it submitted a dependent price offering to deliver Lot 2 for a very low cost provided it was successful in both lots. This contingent pricing was against the rules of the tender. Achilles was successful in progressing to the Best and Final Offer stage of Lot 2 but it subsequently withdrew after its Lot 1 tender was disqualified.

79. The reasons for its withdrawal are not altogether clear. According to Achilles' letter dated 17 May 2017 to the RSSB, Achilles was withdrawing from Lot 2 because:

(1) the timelines for the completion of the system planning and service transformation by the successful bidder(s) were "*unrealistic and the level of complexity and risk involved in standing up* [sic] *a new service did not appear to be fully understood by the RSSB program managers*";

(2) the documentation provided by the RSSB provided no acceptable detail as to how the "marriage of convenience" between the Lot 1 and Lot 2 providers was to operate in practice; and

(3) the implementation of the new model would increase the cost of supplier assurance for the GB rail industry.

80. In her witness statement, Ms Ferrier, who joined Achilles from Network Rail in January 2017, gave a somewhat different explanation for the withdrawal, namely concern on Achilles' part at a restrictive covenant in the key terms of Lot 2 which prevented Achilles from competing against the new RISQS IT service in the rail industry and which might have required Achilles to give up part of its existing IT business in rail. In her oral evidence, she said that Achilles withdrew from the RSSB tender process as it felt that the proposed approach "*did not meet the evolving needs of the rail industry*" with regard to the splitting

of the tender into two lots and because Achilles had a more compelling offering to make to global buyers.

81. Achilles' Counsel put to Ms Pearson of the RSSB in cross-examination that the reason for Achilles' withdrawal was that it wanted to provide a unified service rather than a service split into lots, to which Ms Pearson's reaction was as follows:

> "… it's not really for the market to tell you, you know, "We've already got this product. I know you're tendering for something else, but here, have this instead", and we did -- we were very clear in the OJEU notice and through the tender documents that we weren't accepting variant bids."

82. Altius and Capita began providing services under the RISQS name from 1 May 2018. The contracts between the RSSB and Altius and the RSSB and Capita are designed to be in place for three to five years.

83. In early 2018 the RSSB approached a number of organisations including Network Rail to ask whether they would be willing to sign a document known as the RISQS Charter:

> "We believe that:
>
> - it is the responsibility of all buyers of services and goods in the rail industry to ensure the quality of our suppliers, through enhanced health, safety & environmental management, performance improvement, and supply chain reliability.
>
> - this will be achieved most efficiently if there is a central service and system providing the base level assurance for all industry suppliers thereby allowing buyers to concentrate on such further assurance as may be needed for our specific supplier requirements.
>
> - the RISQS system, managed through RSSB provides such a service and we are committed to working with RSSB to further develop and improve RISQS for the benefit of our industry.
>
> We therefore commit to maintaining our involvement with RISQS and where we use a supplier assurance scheme for auditable categories, we will utilise RISQS to provide baseline assurance for suppliers for our rail work. Further we will contribute to the oversight and development of RISQS working with RSSB - which is owned by our industry, for our industry - by participating in the associated RISQS Consultation and Working Groups, and other forums."

84. The RISQS Charter has been signed by Network Rail and by a number of other buying organisations including TfL, Babcock and Amey.

(11) TransQ

85. Achilles wishes to compete for business from parties wanting supplier assurance for the purposes of the Sentinel Scheme, OTPO Scheme and PCLS by offering a rival service, TransQ. Achilles describes TransQ as an evolution of the model adopted by Achilles under the Link-Up and RISQS names. TransQ follows the same basic risk model and product code structure as RISQS and is designed to deliver compliance with all of Network Rail and industry standards. It has a web portal which is almost unchanged from when it was operated as RISQS. TransQ aims to provide additional business support through features such as Insights Reports, Training, enhanced Audit across a wider set of remits such as Corporate Social Responsibility and Labour Practice.

86. In addition, Achilles intends that in due course buyers in TransQ will be offered wider access to other industries, in particular construction. Suppliers would be given the opportunity to register once across communities. For example, a buyer in the construction community may also operate in the rail community, or a supplier in oil and gas may also be present in the utilities community. Such suppliers would ordinarily be required to input their data for validation twice and pay a fee twice (separately for each community). The idea is that TransQ will avoid duplication and internal administration and save costs.

87. Achilles believes that TransQ could offer a service of a quality equivalent to or better than the RISQS scheme.

88. On 10 April 2018, Achilles wrote to Network Rail stating:

    (1) That with effect from 1 May 2018, Achilles would continue to offer to the rail industry a supplier pre-qualification management registration scheme under the brand name Link-Up TransQ;

    (2) Link-Up TransQ would fully comply with all requirements of RIS-2750. Achilles provided copies of certificates that would be issued to customers demonstrating compliance with RIS-2750 and as appropriate with the PCLS standard;

(3) Achilles would provide Sentinel with any assurances it requires in relation to the operation of Link-Up TransQ and provide any information to Sentinel which might be required to demonstrate compliance with RIS-2750 and the PCLS standard.

89. By letter dated 14 May 2018, Network Rail responded in the following terms:

> "As you are aware in 2014 RISQS was introduced as a mandatory requirement for the Sentinel scheme and Network Rail's Principal Contractor Licensing and Plant Operator schemes. No alternative pre-qualification scheme is identified in the requirements for these schemes as a key objectives [sic] of RISQS was to have a single rail industry scheme allowing overheads to be kept to a minimum, to reduce duplication and reduce audit burden throughout the supply chain.
>
> In 2017 the RSSB competitively tendered for the provision of RISQS, thus ensuring value for money on behalf of the UK taxpayer. Network Rail support RISQS as provided through the successful tender and its management through RSSB such that the scheme is provided by the UK rail industry, for the industry."

90. Achilles responded to Network Rail's letter on 26 July 2018 alleging that Network Rail had infringed competition law. These proceedings were then issued on 2 October 2018.

91. Achilles says that, as a result of the RISQS-only rule, it has so far lost 101 buyers and 4,314 suppliers. Most suppliers in the rail industry have some trackside requirement and so need to have access to approval for Sentinel as a Sponsor. The lost customers include Principal Contractors and plant operators who need to comply with the Key Schemes.

D. CHAPTER I

(1) Legal Framework

92. Section 2 of the 1998 Act provides as follows:

> "(1) Subject to section 3, agreements between undertakings, decisions by associations of undertakings or concerted practices which –
>
> (a) may affect trade within the United Kingdom, and

(b) have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom,

are prohibited unless they are exempt in accordance with the provisions of this Part.

(2) Subsection (1) applies, in particular, to agreements, decisions or practices which –

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

(3) Subsection (1) applies only if the agreement, decision or practice is, or is intended to be, implemented in the United Kingdom

(4) Any agreement or decision which is prohibited by subsection (1) is void."

93. Section 9 of the 1998 Act provides as follows:

"(1) An agreement is exempt from the Chapter I prohibition if it –

(a) contributes to –

(i) improving production or distribution, or

(ii) promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit; and

(b) does not –

(i) impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives; or

(ii) afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.

(2) In any proceedings in which it is alleged that the Chapter I prohibition is being or has been infringed by an agreement, any undertaking or association of undertakings claiming the benefit of subsection (1) shall bear the burden of proving that the conditions of that subsection are satisfied."

94. A significant number of the cases relied on by the parties were from the Court of Justice and the General Court in Luxembourg (the "EU Courts"). Those cases

are equally relevant to the assessment of the alleged infringement under the 1998 Act as under Articles 101 and 102 of the Treaty on the Functioning of the European Union ("TFEU"). This is because section 60 of the 1998 Act provides that in determining questions arising under the Chapter I and II prohibitions, the Tribunal is required to ensure so far as possible that questions arising under those prohibitions in relation to competition within the UK are dealt with in a manner which is consistent with the treatment of corresponding questions arising under EU law. That of course includes ensuring consistency with the jurisprudence of the EU Courts.

(2) The Issues

95. The main issues between the parties under Chapter I were as follows:

(1) Do the Sentinel Scheme and OTPO Scheme amount to agreements or concerted practices between undertakings affecting trade in the UK?

(2) Does the RISQS-only rule have the object of preventing, restricting or distorting competition in the UK?

(3) Does the RISQS-only rule have the effect of preventing, restricting or distorting competition in the UK?

(4) If the RISQS-only rule has that object or effect, is it nevertheless objectively justified?

(5) If not, is the restriction exempted from the Chapter I prohibition pursuant to section 9 of the 1998 Act?

(3) Issue 1: Do the Sentinel Scheme and OTPO Scheme amount to agreements or concerted practices between undertakings affecting trade in the UK?

(a) The Parties' Contentions

96. In order to make good its claim under section 2(1) of the 1998 Act, Achilles must first establish that the two relevant Key Schemes (i.e. the Sentinel Scheme

and the OTPO Scheme) constitute agreements between undertakings, decisions by associations of undertakings or concerted practices.

97. Achilles contended as follows:

(1) Network Rail is an undertaking carrying out economic activities in the operation of its managed railway infrastructure;

(2) The Key Schemes are agreements or concerted practices within the meaning of section 2(1) of the 1998 Act in that each of the Key Schemes provide for responsibilities and undertakings which are agreed to by the undertakings which sign up to them as a condition of being authorised.

(3) In order to constitute an agreement there must be concurrence of wills. As held by the Court of Justice in Case C-74/04P *Commission v Volkswagen AG* EU:C:2006:460 at [37]:

> "in order to constitute an agreement within the meaning of Article [101(1) TFEU], it is sufficient that an act or conduct which is apparently unilateral be the expression of the concurrence of wills of at least two parties, the form in which that concurrence is expressed not being by itself decisive."

(4) It does not matter that the agreement is "imposed" by one party on the other provided that there is acquiescence. In Joined Cases 32/78, 36/78 to 82/78 *BMW Belgium SA and others v Commission* EU:C:1979:191 it was held at [36] that a circular, sent by BMW Belgium and signed up to by local dealers, prohibiting exports of BMW cars to other member states constituted an agreement for the purposes of Article 101(1) TFEU because, although dealers were under pressure to accept the ban, it was possible for them to withhold their consent.

98. Network Rail did not admit that the Key Schemes were agreements or concerted practices for the purposes of Chapter I and submitted that the Key Schemes did not involve offering goods or services on a market which is the essence of economic activity to which the competition rules apply, as held by the Court of Justice in Case C-205/03P *Federación Española de Empresas de Tecnología Sanitaria (FENIN) v Commission* EU:C:2006:453 ("*FENIN*"). Network Rail

contended that the Key Schemes are a set of rules applying to those who require access to Network Rail's managed infrastructure with a view to ensuring safety. Network Rail's role involves regulating the provision of goods and/or services on a market rather than offering goods or services itself.

(b) The Tribunal's Analysis

99. We accept Achilles' contention that each of the Key Schemes embodies an agreement or concerted practice between Network Rail and the undertakings who wish to have access to Network Rail's managed infrastructure. Each of the Key Schemes in terms provides for responsibilities and obligations that are undertaken by the undertakings which sign up to them as a condition of being authorised. It does not matter that the agreements are imposed on suppliers rather than freely negotiated. By participating in the Key Schemes, undertakings acquiesce in their provisions. That is sufficient to constitute an agreement, as established by the car dealership cases relied on by Achilles.

100. As to whether the Key Schemes are subject to competition rules, we consider that the distinction sought to be drawn by Network Rail between its economic activity and the regulation of its managed infrastructure is not well founded and is not supported by the judgment of the Court of Justice in *FENIN*.

101. In *FENIN*, the issue was whether state-funded management bodies which purchased medical goods and equipment to be used to provide services to patients free of charge in the Spanish public health service were undertakings engaged in economic activity. The Court of Justice held that the management bodies' purchasing activity should not be dissociated from the downstream use to which those purchases were put (which was not an economic activity) and that the management bodies were therefore not undertakings engaged in economic activity.

102. In the present case, allowing access to its managed infrastructure is an essential part of, and not dissociable from, Network Rail's operation of the railway infrastructure which is an economic activity. The fact that in operating the Key Schemes Network Rail is setting out rules with a view to ensuring safety and to

comply with regulatory obligations does not take it outside the scope of that activity.

103. It follows that the Key Schemes, of which the RISQS-only rule is a term, are agreements between undertakings for the purposes of section 2(1) of the 1998 Act.

(c) Effect on Trade Within the UK

104. Although Network Rail did not formally admit that the Key Schemes affect trade in the UK, this jurisdictional requirement is clearly met where the conduct in question is that of an undertaking whose rules affect the procurement of supplier assurance services in the GB rail industry.

(4) Issue 2: Does the RISQS-only rule have as its object the prevention, restriction or distortion of competition?

(a) The Parties' Contentions

105. Achilles invited the Tribunal to make the following findings in support of its case that the RISQS-only rule is a restriction of competition by object:

(1) The terms of the Key Schemes directly exclude the possibility of any provider of assurance services undertaking the activity of providing the management system audits required by those schemes.

(2) The exclusivity conferred on RISQS in respect of the Key Schemes renders it unviable to offer a second supplier assurance/pre-qualification service in parallel to RISQS to buyers other than Network Rail for the product codes covered by RISQS.

(3) Network Rail has adopted a policy, in consultation with the RSSB, that there should be only one provider of supplier assurance in the field covered by RISQS in GB and has implemented that policy by maintaining the requirements in the Key Schemes. Network Rail clearly

acted with the subjective intention of excluding competition (irrespective of whether it may have believed that such restriction was justified).

(4) Applying the formulation in Case C-209/07 *Competition Authority v Beef Industry Development Society Limited and Barry Brothers (Carrigmore) Meats Limited* EU:C:2008:643 at [15] to [17] ("*BIDS*"), it is evident from reading the terms of the Key Schemes and an understanding of their economic and legal context that, by its very nature, the RISQS-only rule is injurious to the proper functioning of normal competition.

(5) Applying the formulation in Case C-67/13P *Groupement des cartes bancaires (CB) v Commission* EU:C:2014:2204 ("*Cartes Bancaires*") at [51] to [52], such a term when contained in a scheme imposed by an undertaking in the position of Network Rail (which is a gatekeeper for access to the rail infrastructure) is a type of coordination which reveals a sufficient degree of harm to competition to be considered an object restriction.

(6) The references in the Commission's Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements ("the Horizontal Cooperation Guidelines") to standardisation agreements potentially having restrictive effects on competition are relevant as is the principle stated in the decision of the Court of First Instance (as it then was) in Joined Cases T-213/95 and T-18/96 *Stichting Certificatie Kraanverhuurbedrijf (SCK) and Federatie van Nederlandse Kraanverhuurbedrijven (FNK) v Commission* EU:T:1997:157 ("the *Dutch Cranes* case") that contractual arrangements which require economic operators to be certified under a specific private scheme without allowing for the acceptance of equivalent guarantees from other systems are such as to restrict competition and cannot be objectively justified by an interest in maintaining quality.

106. Network Rail denied that the RISQS-only rule was a restriction of competition by object on the following grounds:

(1) The RISQS-only rule does not fall into any recognised category of object infringement. The purpose of the rule is to promote safety.

(2) The RISQS-only rule does not harm competition. Even if Network Rail was required to recognise other providers of supplier assurance, RISQS would remain the rail industry's preferred provider of supplier assurance. Alternatively, there would be a proliferation of providers of supplier assurance which would be damaging to competition.

(3) Achilles overstates the impact of the RISQS-only rule. RISQS does not have anything like a monopoly in the market for supplier assurance in the GB rail industry as a whole. A large number of suppliers in the GB rail industry are not parties to the Sentinel Scheme (or the other Key Schemes) and hence do not need RISQS accreditation. Of the 4,319 suppliers on RISQS, only 1,811 were assured for Sentinel (42%). As RISQS accounts for approximately 70% of supplier assurance in the GB rail industry, this implies that only 29% of supplier assurance requirements in the GB rail industry are met by the Sentinel Scheme.

(4) Contrary to Achilles' case, Network Rail does not "push RISQS down through the supply chain". It does not dictate which supplier assurance schemes its direct (tier 1) contractors should use themselves to audit their own supply chains – if indeed they wish to use a third party scheme at all to audit their own suppliers, since there is no requirement for them to do so and they could carry out this process in-house. Network Rail's policy leaves other buyers which are active in the GB rail industry free to make their own decisions on how they source supplier assurance and does not seek to restrict their choices in this regard. These buyers include Principal Contractors like Murphy, Balfour Beatty, Volker Rail, TOCs, freight operating companies, rolling stock owners and other entities involved in the supply chain which do not supply Network Rail.

(5) The RISQS-only rule is less restrictive than single branding (whereby buyers are required to purchase exclusively from a single supplier) since Network Rail's suppliers are not required to source their supplier assurance requirements only from RISQS but rather are only required to use RISQS when supplying products and services to Network Rail. Even single branding does not amount to an object infringement as noted by the Court of Appeal in *Gascoigne Halman Limited v Agents' Mutual Limited* [2019] EWCA Civ 24 at [46].

(6) The Horizontal Cooperation Guidelines are not relevant as the Key Schemes are a series of vertical agreements between Network Rail and each of its suppliers and are not within the compass of the Horizontal Cooperation Guidelines. Nor are they standardisation agreements within the meaning of the Horizontal Cooperation Guidelines, i.e. agreements which "*have as their primary objective the definition of technical or quality requirements with which current or future products, production processes, services or methods may comply*" (see [257]).

(7) The facts and legal issues raised by the *Dutch Cranes* case were fundamentally different from the present case in that it involved a price fixing cartel. In particular:

(i) The purpose of SCK's ban on crane hire companies not certified by SCK was to increase crane-hire prices. There is no such purpose in the present case.

(ii) SCK's certification system was a "closed" system that excluded competing crane hire companies from the Dutch market. It was not concerned with restricting competition among providers of certification services which is alleged to be the effect of the RISQS-only rule.

(iii) The ban was not indispensable to the certification system since the system had previously functioned without it. By contrast, Network Rail has always mandated the use of RISQS.

(iv) The ban involved the exclusion of foreign competitors.

(b) The Tribunal's Analysis

107. The leading authority on the concept of restriction of competition by object is *Cartes Bancaires* in which the Court of Justice held as follows:

> "49. … it is apparent from the Court's case-law that certain types of coordination between undertakings reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects (see, to that effect, judgments in *LTM*, 56/65, EU:C:1966:38, paragraphs 359 and 360; *BIDS*, paragraph 15, and *Allianz Hungária Biztosító and Others*, C-32/11, EU:C:2013:160, paragraph 34 and the case-law cited).
>
> 50. That case-law arises from the fact that certain types of coordination between undertakings can be regarded, by their very nature, as being harmful to the proper functioning of normal competition (see, to that effect, in particular, judgment in *Allianz Hungária Biztosító and Others* (EU:C:2013:160) paragraph 35 and the case-law cited).
>
> 51. Consequently, it is established that certain collusive behaviour, such as that leading to horizontal price-fixing by cartels, may be considered so likely to have negative effects, in particular on the price, quantity or quality of the goods and services, that it may be considered redundant, for the purposes of applying Article [101(1) TFEU], to prove that they have actual effects on the market (see, to that effect, in particular, judgment in *Clair*, 123/83, EU:C:1985:33, paragraph 22). Experience shows that such behaviour leads to falls in production and price increases, resulting in poor allocation of resources to the detriment, in particular, of consumers.
>
> 52. Where the analysis of a type of coordination between undertakings does not reveal a sufficient degree of harm to competition, the effects of the coordination should, on the other hand, be considered and, for it to be caught by the prohibition, it is necessary to find that factors are present which show that competition has in fact been prevented, restricted or distorted to an appreciable extent (judgment in *Allianz Hungária Biztosító and Others* (EU:C:2013:160), paragraph 34 and the case-law cited).
>
> 53. According to the case-law of the Court, in order to determine whether an agreement between undertakings or a decision by an association of undertakings reveals a sufficient degree of harm to competition that it may be considered a restriction of competition 'by object' within the meaning of Article [101(1) TFEU], regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms a part. When determining that context, it is also necessary to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question (see, to that effect, judgment in *Allianz Hungária Biztosító and Others* (EU:C:2013:160), paragraph 36 and the case-law cited).
>
> 54. In addition, although the parties' intention is not a necessary factor in determining whether an agreement between undertakings is restrictive, there is nothing prohibiting the competition authorities, the national courts or the

Courts of the European Union from taking that factor into account (see judgment in *Allianz Hungária Biztosító and Others* (EU:C:2013:160), paragraph 37 and the case-law cited).

55. In the present case, it must be noted that, when the General Court defined in the judgment under appeal the relevant legal criteria to be taken into account in order to ascertain whether there was, in the present case, a restriction of competition by 'object' within the meaning of Article [101(1) TFEU], it reasoned as follows, in paragraphs 124 and 125 of that judgment:

> '124. According to the case-law, the types of agreement covered by Article [101(1)(a) to (e) TFEU] do not constitute an exhaustive list of prohibited collusion and, accordingly, the concept of infringement by object should not be given a strict interpretation (see, to that effect, [judgment in *BIDS*], paragraphs 22 and 23).
>
> 125. In order to assess the anti-competitive nature of an agreement or a decision by an association of undertakings, regard must be had *inter alia* to the content of its provisions, its objectives and the economic and legal context of which it forms a part. In that regard, it is sufficient that the agreement or the decision of an association of undertakings has the potential to have a negative impact on competition. In other words, the agreement or decision must simply be capable in the particular case, having regard to the specific legal and economic context, of preventing, restricting or distorting competition within the common market. It is not necessary for there to be actual prevention, restriction or distortion of competition or a direct link between [that agreement or decision] and consumer prices. In addition, although the parties' intention is not a necessary factor in determining whether an agreement is restrictive, there is nothing prohibiting the Commission or the Community judicature from taking it into account (see, to that effect, [judgments in *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343], paragraphs 31, 39 and 43, and [*GlaxoSmithKline Services v Commission*, C-501/06P, C-513/06P, C-515/06P and C-519/06P, EU:C:2009:610] paragraph 58 and the case-law cited).'

56. It must be held that, in so reasoning, the General Court in part failed to have regard to the case-law of the Court of Justice and, therefore, erred in law with regard to the definition of the relevant legal criteria in order to assess whether there was a restriction of competition by 'object' within the meaning of Article [101(1) TFEU].

57. First, in paragraph 125 of the judgment under appeal, when the General Court defined the concept of the restriction of competition 'by object' within the meaning of that provision, it did not refer to the settled case-law of the Court of Justice mentioned in paragraphs 49 to 52 of the present judgment, thereby failing to have regard to the fact that the essential legal criterion for ascertaining whether coordination between undertakings involves such a restriction of competition 'by object' is the finding that such coordination reveals in itself a sufficient degree of harm to competition.

58. Secondly, in the light of that case-law, the General Court erred in finding, in paragraph 124 of the judgment under appeal, and then in paragraph 146 of that judgment, that the concept of restriction of competition by 'object' must not be interpreted 'restrictively'. The concept of restriction of competition 'by object' can be applied only to certain types of coordination between undertakings which reveal a sufficient degree of harm to competition that it

> may be found that there is no need to examine their effects, otherwise the Commission would be exempted from the obligation to prove the actual effects on the market of agreements which are in no way established to be, by their very nature, harmful to the proper functioning of normal competition. The fact that the types of agreements covered by Article [101(1) TFEU] do not constitute an exhaustive list of prohibited collusion is, in that regard, irrelevant."

108. The Tribunal draws the following propositions from this judgment:

(1) For an agreement to be held to restrict competition by object, it must by its very nature reveal a sufficient degree of harm to competition.

(2) Certain types of behaviour are so likely to have negative effects on competition that they are to be treated as restrictions by object without an investigation of their effects.

(3) In determining whether an agreement reveals a sufficient degree of harm, it is necessary to look at the content of its provisions, its objectives and its economic and legal context.

(4) The parties' subjective intentions may also be relevant, but are not necessarily determinative.

(5) The concept of restriction by object should be interpreted restrictively in the sense that it should only be applied to those categories of agreement whose harmful nature is easily identifiable.

109. We do not consider that either the Horizontal Cooperation Guidelines or the *Dutch Cranes* case relied on by Achilles are of assistance in the analysis. The Horizontal Cooperation Guidelines are not applicable to the Key Schemes as they are not horizontal agreements as defined in the Horizontal Cooperation Guidelines, i.e. "*agreements between undertakings, decisions by associations of undertakings and concerted practices ... pertaining to horizontal co-operation*" (see [1]). Nor are the Key Schemes standardisation agreements as defined as they do not have "*as their primary objective the definition of technical or quality requirements with which current or future products, production processes, services or method may comply*" (see [257]). The potentially anti-competitive

concerns of such agreements identified in the Horizontal Cooperation Guidelines, such as agreements between competitors that exclude other competitors from the market and agreements that directly influence the prices charged to customers, are not relevant here.

110. The *Dutch Cranes* case was concerned with the exclusion of competition in the crane market rather than exclusion of competition in the market for certification services (which is said to be the effect of the RISQS-only rule). We agree with Network Rail that the facts of that case were very different from the facts of the present case. Moreover, the central proposition in that case relied on by Achilles, namely that a system of certification which excludes equivalent guarantees cannot be objectively justified by an interest in maintaining the quality of the certified products or services, does not address the central issue raised in the present case. That issue is essentially whether the imposition of a single certification system can be justified on safety or economic grounds.

111. As to whether the RISQS-only rule can be taken to cause serious harm to competition without a detailed examination of its effects, which is the test laid down by *Cartes Bancaires*, the Tribunal's starting point is that the RISQS-only rule is very different from the types of agreement or concerted practice that are, by their very nature, categorised as restrictions by object such as agreements fixing minimum resale prices or agreements which limit sales into particular territories or to particular customer groups. The general purpose of the Key Schemes, of which the RISQS-only rule is a term, is to ensure the competence and safety of personnel working trackside, companies acting as Principal Contractors and in the use of on-track plant.

112. Turning to the legal and economic context of the RISQS-only rule, it is common ground that that the RISQS-only rule precludes any other provider from undertaking the supplier assurance required under the Sentinel Scheme and OTPO Scheme.

113. Moreover, the Tribunal accepts Achilles' submission that it is not currently viable for Achilles to offer a second supplier assurance/pre-qualification service to buyers and suppliers who subscribe to RISQS. This is because, first, a high

proportion of the revenue from supplier assurance services is generated by the audit work required for the Key Schemes which is reserved to the RISQS service provider. Any alternative audit service provider is therefore limited to seeking to win the relatively low-value work of verifying basic registration details in respect of suppliers who do not require the higher levels of assurance of the Key Schemes, and therefore do not require an audit.

114. Secondly, the Tribunal accepts, based on the oral evidence of Mr Berwick, the Head of Procurement Rail & Utilities at Balfour Beatty, and that of Mr Matthews, the Group Compliance Director for Readypower, that it does not currently make sense for contractors to make use of any supplier assurance service other than RISQS when subcontracting work involving trackside activity because anyone working on or near the railway has to be RISQS qualified.

115. It does not, however, follow that the difficulties facing an alternative provider of supplier assurance are necessarily a consequence of the RISQS-only rule, as opposed to being a consequence of RISQS's position as the established scheme of choice for supplier assurance in the rail industry. It is by no means obvious that, if Network Rail were required to recognise other providers of supplier assurance under its Key Schemes, suppliers and buyers would actually make use of any alternative scheme rather than staying with RISQS. This is an aspect of the "chicken and egg" phenomenon considered in more detail later in this judgment in the context of the effects of the RISQS-only rule. Buyers would only be willing to join another scheme if it provided information about additional suppliers and suppliers would only be willing to join a new scheme if it provided access to additional contractors. Buyers and suppliers may consider that, because of the widespread use of RISQS, there would be no sufficient advantage to registering with another scheme, even if one was offered as an alternative to RISQS. It is therefore by no means obvious that, viewed in its legal and economic context, the RISQS-only rule has a significantly restrictive effect on competition. Whether or not the RISQS-only rule does sufficient harm to competition, taking into account the possibility of the market tipping in favour of RISQS irrespective of the rule, requires further evidence

and analysis of its effects. This supports the conclusion that the RISQS-only rule is not an object restriction.

116. With regard to the parties' subjective intentions, the Tribunal is not persuaded that Network Rail's intention in mandating the RISQS-only rule was to restrict competition. Network Rail's policy has always been to recognise a single supplier assurance scheme. Indeed, prior to the changes in 2018, that single supplier was Achilles. There is no evidence that, when it first adopted the RISQS-only rule, Network Rail's aim was to restrict competition. The primary rationale for the RISQS-only rule appears to have been to promote efficiency by reducing duplication of audits.

117. In support of its case that Network Rail's intention is that there should be only one provider of supplier assurance, Achilles referred to Network Rail's signature of the RISQS Charter. Network Rail recognises, however, that the Charter in terms only referred to committing to use RISQS to provide assurance for "suppliers for our rail work", i.e. direct contractors.

118. The Tribunal accepts that, by signing the RISQS Charter, Network Rail made public its commitment to RISQS in circumstances where one interpretation of its motivation was to pre-empt potential switching to Achilles. That commitment was, however, also consistent with its long-standing support for the Link-Up and RISQS schemes and its concern to manage apparent confusion in the market. We therefore make no finding of anti-competitive intent from those circumstances. Even if we had done so, that finding would have not been determinative on the issue of whether the RISQS-only rule is an object restriction.

119. Finally, we bear in mind that that the category of object restrictions should be approached restrictively and that classification of restriction by object "*should not be used as a means of avoiding a difficult investigation of anti-competitive effects*" (see *Sainsbury's Supermarkets Limited v MasterCard Incorporated and others* [2016] CAT 11 at [101(2)]).

120. Taking these various considerations in to account, the Tribunal concludes that the harm to competition arising from the RISQS-only rule is not so obvious that an examination of its effects can be dispensed with and that the RISQS-only rule is therefore not a restriction by object.

(5) Issue 3: Does the RISQS-only rule have as its effect the prevention, restriction or distortion of competition?

(a) Legal Principles

121. The Tribunal approaches the question of whether the RISQS-only rule constitutes a restriction of competition by effect by reference to the following legal principles which were largely common ground between the parties.

(1) In cases where it is not plain and obvious that the object of the agreement in question is to restrict competition it is necessary to consider the effect of the agreement. See Case 56/65 *Société Technique Minière v Maschinenbau Ulm GmbH* EU:C:1966:38 ("*LTM*").

(2) There is no presumption of anti-competitive effect. It is necessary to show that the agreement has an appreciable effect on competition. Appreciable does not mean substantial; it means more than *de minimis* or insignificant. It must be demonstrated with a reasonable degree of probability that the agreement affects actual or potential competition to such an extent that negative effects on prices, output, innovation or the variety or quality of goods and services in the market can be expected. See *Socrates Training Limited v The Law Society of England and Wales* [2017] CAT 10 ("*Socrates*") at [154]; the Commission's Guidelines on Vertical Restraints at [8]; the Commission's Guidelines on the application of Article 81(3) of the Treaty ("the Article 101(3) Guidelines") at [24].

(3) In order to gauge the restrictive effects of an agreement, it is necessary to conduct a detailed analysis of its effect on the relevant market or markets. As stated in the Commission's Notice on the definition of

relevant market for the purposes of Community competition law, the European Commission explained the purpose of market definition at [2] as follows:

> "Market definition is a tool to identify and define the boundaries of competition between firms. It serves to establish the framework within which competition policy is applied by the Commission. The main purpose of market definition is to identify in a systematic way the competitive constraints that the undertakings involve face. The objective of defining a market in both its product and geographic dimension is to identify those actual competitors of the undertakings involved that are capable of constraining those undertakings' behaviour and of preventing them from behaving independently of effective competitive pressure."

(4) An effect on competition must be demonstrated by reference to the situation which would pertain on the market in the absence of the agreement or restriction in question: "*the competition in question must be understood within the actual context in which it would occur in the absence of the agreement in dispute*" (see *LTM*). This requires a consideration of the appropriate counterfactual situation.

(5) An anti-competitive effect can consist in the segmenting of a market and a distortion or restriction of the way that competition operates in that segment of the market, even if competition may continue in other segments. See *Socrates* at [160].

122. In *Socrates*, a case relied on by Achilles, the claimant, who was a provider of training courses, contended that a requirement under the Conveyancing Quality Scheme operated by the Law Society that members of the scheme had to obtain training in anti-money laundering exclusively from the Law Society was an abuse of a dominant position. One of the issues considered by the Tribunal was whether that requirement had an appreciable effect on the downstream market for the provision of training courses to firms. In finding that this requirement was satisfied, the Competition Appeal Tribunal referred to the decision of the Court of Justice in Case C-1/12 *Ordem dos Técnicos Oficiais de Contas v Autoridade da Concorrência* EU:C:2013:127 ("the *OTOC* case"). That case concerned a Quality Control Regulation adopted by the Portuguese organisation of chartered accountants ("OTOC"). The Regulation required chartered accountants to obtain professional training divided into two types: "institutional

training" and "professional training". Institutional training could only be obtained from OTOC whereas professional training could be obtained either from OTOC or from independent training providers approved by OTOC. The Court of Justice noted that the effect of the Regulation was artificially to segment the market for the compulsory training of chartered accountants and that it was likely to distort competition on the market of compulsory training for chartered accountants by affecting the normal play of supply and demand. Having referred to the *OTOC* case, the Tribunal in *Socrates* concluded at [160] as follows:

> "We think this demonstrates that the question of effect is not to be assessed simply on the basis of market share or complete foreclosure, but can result from a segmenting of the market and a distortion in the way competition operates affecting one segment."

123. Network Rail sought to distinguish *Socrates* on the basis that the Law Society, like the OTOC, was reserving part of the market to itself which is different from the present case where Network Rail is not reserving any part of the market to itself but mandating the use of RISQS which is operated by the RSSB. That is not, in our view, a relevant distinction. We accept Achilles' submission that, if the effect of the RISQS-only rule is to reserve to RISQS/RSSB a significant part of demand for supplier assurance, thereby impairing actual or potential competition from other suppliers of such services or schemes, there may be an appreciable restriction of competition.

(b) Market Definition

124. It was common ground between the economic experts for Achilles and Network Rail that the market for supplier assurance services is two-sided, that is to say it is a market in which a firm acts as a platform selling different products or services to different groups of consumers with the demand from one group of consumers depending on the demand from the other group. The more users there are on one side, the more attractive the platform is to the users on the other side. A two-sided market is defined by the OECD in its paper entitled 'Rethinking Antitrust Tools for Multi-Sided Platforms' as "*a market in which a firm acts as a platform and sells different products to different groups of consumers, while recognising that the demand from one group of customer*

depends on the demand from the other group(s)." Examples of platforms giving rise to two-sided markets are newspapers that connect readers and advertisers, shopping centres that connect retailers and shoppers, and estate agents that connect house sellers and house buyers.

125. On one side of the market for supplier assurance in the present case there are buyers of services in the rail industry who use the results of audits in order to ensure that their suppliers are suitably competent and adequately resourced. They may use access to an IT database of accredited suppliers for procurement purposes. On the other side of the market there are suppliers such as construction and engineering contractors who wish to access potential contracts with buyers. They need supplier assurance services in order to tender for such contracts. Suppliers who wish to provide services to a specific buyer must register with a supplier assurance service that is accepted by the buyer in question.

126. Demand from buyers for a given supplier assurance service affects demand from suppliers because suppliers are more likely to sign up to a supplier assurance scheme with a large number of registered buyers or with buyers that award high-value contracts. A scheme with only a few buyers or that award only low-value contracts to suppliers would be of limited value. Demand from suppliers affects demand from buyers because the larger the pool of suppliers the greater the value of the supplier assurance scheme to buyers.

127. There were differences in the way that the two economic experts defined the scope of the relevant market for supplier assurance services, applying the SSNIP or "small but significant non-transitory increase in price" test. This test seeks to identify the smallest relevant market within which a hypothetical monopolist could impose a profitable significant increase in price. Mr Parker, Achilles' economic expert, considered that the relevant market was the market for Key Scheme compliant supplier assurance schemes on the footing that it would not be possible for a provider operating a different supplier assurance scheme to start providing Key Scheme compliant supplier assurance services because only Network Rail can give the necessary recognition. Mr Holt, Network Rail's economic expert, disagreed and considered that the relevant market should be

more broadly defined as the market for supplier assurance schemes in the GB rail industry on the basis that there would be significant competitive restraints on a hypothetical monopolist from collective intervention from buyers and suppliers. If a hypothetical monopolist sought to increase prices or decrease qualities, buyers and suppliers could intervene collectively as happened in 2016 when the previous RISQS scheme was put out to tender by the RSSB.

128. We prefer the definition of the market advanced by Mr Holt, for the reasons he gave. This definition of the market corresponds to the way the relevant market is defined in Achilles' claim form, i.e. the market for the provision of supplier assurance services in the GB rail industry.

(c) The Counterfactual

129. In carrying out an assessment of the economic effects of the RISQS-only rule, it is necessary to identify the correct counterfactual – the market situation that would have pertained absent the RISQS-only rule.

130. Mr Parker considered that the correct counterfactual in circumstances where Network Rail was required for the purposes of the Key Schemes to recognise any other provider of supplier assurance that met the appropriate minimum standards for the Key Schemes was either that there would be ongoing competition between Achilles and RISQS, or that there would be competition between Achilles and RISQS for at least a limited period of time before one of the schemes exited, or that multiple schemes would enter the market. In Mr Parker's view it was not possible to determine which of these three counterfactuals was the most likely.

131. In support of his contention that, in the absence of the RISQS-only rule, there would be competition from Achilles or any other provider for the provision of supplier assurance schemes Mr Parker relied on the following points:

(1) Achilles' evident desire to provide supplier assurance in competition with RISQS.

(2) The fact that the Achilles service would have somewhat differentiated features to RISQS (e.g. for buyers, data analytics/know-how; for suppliers, the ability to read across some common audit elements from other industries) and so would be likely to be more attractive to certain buyers and suppliers.

(3) Achilles or any other provider would be able to offer good deals to buyers and/or suppliers initially to attract them to the scheme, including a buyer or supplier that was particularly important to the other side of the market.

(4) It is therefore highly likely that Achilles (or any other scheme provider) would be successful in attracting at least some customers on both sides of the market.

(5) This would be to some extent self-reinforcing as it may lead to "multi-homing" (i.e. use of multiple schemes). Suppliers that would like to reach buyers on different schemes may well list on both schemes. Buyers that would like to reach suppliers on different schemes may well list on both schemes.

(6) Many if not most two-sided markets can support multiple suppliers over time.

132. Mr Parker was of the view that competition from Achilles or any other provider, whether ongoing or for a short time, would yield competitive benefits including lower prices, higher quality, differentiated products (for example, through Achilles' plans to integrate its provision of a supplier assurance scheme in rail with its provision in other industries), and/or lower costs over time due to the dynamic incentive to innovate and invest in cost-reducing activities. Even if Achilles (or any other provider) was unsuccessful in attracting buyers and suppliers, there would still be competitive benefits during the period in which it was in existence because buyers and suppliers using RISQS could credibly threaten to switch to Achilles or another provider, and so negotiate better terms with RISQS, even if none of them actually did switch.

133. These improvements would directly benefit consumers of Key Scheme compliant supplier assurance schemes, for instance suppliers of rail infrastructure and maintenance services. There would also be the potential for ongoing price or non-price benefits to consumers from innovations undertaken during the period of competition even after the weaker firm has exited.

134. Mr Holt, Network Rail's economic expert, was of the view that the correct counterfactual in a situation in which Network Rail was required to recognise all adequate supplier assurance schemes meeting the requirements of RIS-2750 and Network Rail's reasonable safety requirement would be that buyers and suppliers would continue to "single-home" on RISQS, i.e. they would choose to deal with RISQS as the sole provider of supplier assurance schemes, and there would be no new entrants in the market. There would be a "tipping" of the market towards RISQS which would not result from the RISQS-only rule.

135. This counterfactual postulated that other buyers in addition to Network Rail would choose to accept only RISQS and that suppliers would therefore also choose RISQS. In this scenario, there would be no incentive for suppliers who wished to supply multiple buyers from participating in any other scheme, since this would not add to their access to buyers' contracts and would increase costs. Similarly, buyers would not need to accept any other schemes to access suppliers. On the basis of this counterfactual, the RISQS-only rule has not had any exclusionary effect.

136. Achilles disputed this counterfactual on the basis that if a second scheme could carry out supplier assurance for the purposes of the Key Schemes, it could gain a sufficient critical mass of suppliers and buyers to be viable and then buyers might well choose to use it.

137. The main alternative counterfactual postulated by Mr Holt was on the assumption that all buyers, in addition to Network Rail, would have to accept any supplier assurance service complying with RIS-2750. Schemes would not then have to compete to be attractive to buyers and would instead offer features that are primarily of interest to suppliers. Buyers would then need to join all

supplier assurance schemes to cover these suppliers. This would lead to a proliferation of schemes.

138. Mr Holt considered that in this situation suppliers would probably choose cheaper supplier assurance services compared with RISQS. This is because, with suppliers being the focus of competition for scheme providers, providers would have incentives to offer the minimum costs on the supplier side while recouping high fees from buyers. This would give rise to what Mr Holt described as the phenomenon of a competitive bottle-neck and other adverse effects on competition.

139. The bottle-neck issue was the subject of extensive examination and cross-examination. At its heart the assertion was that competing providers of supplier assurance schemes would, as a result of their audit work, generate and possess information that was required by Network Rail and Network Rail would need to access the competitors' IT portals to access that information. As the ability to choose a preferred supplier assurance scheme would be removed, each of the schemes would in effect be able to "name their price" to the buyers safe in the knowledge that buyers subject to the condition would not be able to reject that price by threatening to drop their participation in the scheme. Mr Holt was of the view that this would result in adverse effects on competition (compared to the RISQS-only rule) because the market would be characterised by all buyers (or at least Network Rail) having to accept all suppliers causing a significant change in market dynamics and bottle-neck issues. Network Rail could not exercise any competitive choice so that competition was distorted on the buyer side of the market.

140. Achilles submitted that there were no bottleneck issues, at least as far its involvement was concerned. Network Rail would not be "over a barrel". For the purposes of its own procurement needs, Network Rail's suppliers would be registered on RISQS and Network Rail would not need access to Achilles' data. For the purpose of verifying that a supplier using Achilles' service had met the requisite level of supplier assurance, Achilles (or the supplier itself) could provide a certificate to Network Rail free of charge.

(d) The Tribunal's Analysis

141. Of the possible counterfactuals referred to above, the Tribunal considers the least likely is that of multiple new entrants in the market. This is for the following reasons.

142. First, the size of the market for supplier assurance schemes for the GB rail industry, excluding demand from suppliers contracting directly with Network Rail which Achilles conceded would be likely to remain with RISQS, is, in the Tribunal's view, not large enough to sustain multiple entrants.

143. The evidence before us related primarily to supply and demand for supplier assurance schemes for suppliers (and buyers) for works on Network Rail's managed infrastructure. The size of the market for supplier assurance schemes for suppliers/buyers separate from Network Rail's managed infrastructure (be that other networks such as HS1 or HS2 or for works for TOCs or rolling stock operating companies where access to Network Rail's managed infrastructure was not required) was not clarified but was said by Achilles to be smaller or lower value.

144. In its closing submissions, Network Rail relied on Achilles' estimate of the value of auditing in the GB rail industry as being approximately £3 million. It pointed out that, of the 2,488 suppliers registered with RISQS who required an audit as at 1 March 2019, 1,007 (40%) were registered as prospective tenderers to Network Rail, including the large Principal Contractors. Network Rail contended on this basis, assuming that the prospective tenderers to Network Rail would not be interested in an alternative supplier assurance scheme, that the value of the market opportunity open to new entrants was no more than £1.8 million.

145. Achilles countered that the value of the market was not limited to the value of the audit fees but also included additional revenue from suppliers by virtue of having them on the platform and the revenue from buyers associated with them. It referred to its internal estimate of its revenue from renewals in 2018/2019 in the sum of £5.4 million.

146. We accept that the value of the market opportunity is not limited to the audit fees but, even allowing for some additional revenue from both sides of the market, we consider that the market would not sustain multiple new entrants. As already noted, new entrants would face a "chicken and egg" problem in that buyers would only be willing to join another scheme if it provided information about additional suppliers. A new scheme would not provide such information. In addition, buyers may have an incentive to prescribe the use of RISQS in so far as they find it easier to deal with one scheme rather than multiple schemes and suppliers would naturally wish to purchase supplier assurance services from one provider so as to avoid incurring multiple audit and compliance costs. Moreover, supply is characterised by at least a proportion of fixed costs (e.g. IT) and/or costs not avoidable in the short term (e.g. the need to employ a network of auditors) such that the market was unlikely to support "many" entrants.

147. Secondly, although Network Rail's witnesses referred to many potential entrants having shown some interest during the initiation of the tender processes conducted by the RSSB for supply of IT and audit services to RISQS, the evidence of Ms Pearson, who was responsible for leading the tender on behalf of the RSSB, was that there were only six tender responses for each lot; three responses for each lot were eliminated on the basis that they failed to meet the RSSB's requirement, leaving two tenderers for each lot (apart from Achilles). Since that tendering was on the basis of the chance to supply all of RISQS's supplier assurance requirements, it is unlikely that a greater number or even the same number would invest to enter when the scale of the prize (in light of RISQS's incumbency and Achilles' re-entry) was significantly lower.

148. It follows that the problem of bottle-necks, which was postulated as a possible consequence of multiple scheme entrants, would not arise. Even if there were multiple schemes, we consider that Network Rail would have sufficient market power to deal with the situation in which it needed access to information held by any competitors to RISQS and we do not think any scenario where that balance of economic power changed is realistic.

149. The following factors suggest that the correct counterfactual in the absence of the RISQS-only rule, i.e. in circumstances where Network Rail is required to recognise other supplier assurance schemes, might well be that suppliers and buyers would "single-home" to RISQS and Achilles would be unable to compete to any material extent:

(1) The market opportunity available to Achilles would be limited. The removal of the RISQS-only rule would only affect demand from buyers other than Network Rail participating in the Sentinel Scheme and the OTPO Scheme. As already noted at paragraphs 6, 28 and 44 above, Achilles accepted that Network Rail would use RISQS as the supplier assurance scheme for its direct contractors and that those suppliers wanting to contract with Network Rail or to tender via RISQS would also do so and that it was not part of Achilles' case that this was anti-competitive. Network Rail's and its direct contractors' continued use of RISQS was likely to lead to a significant proportion of all other suppliers of services for Network Rail managed infrastructure related works continuing to use RISQS in order to simplify their dealings with direct contractors.

(2) The evidence of Mr Berwick was that Balfour Beatty had chosen to use a single provider of supplier assurance for its railway business for the following reasons, amongst others:

> "We did not want to import additional costs to the supply chain by requiring compliance with a further assurance scheme where those deploying workers trackside would already be registered with RISQS for other clients. In particular this would not be fair on smaller suppliers who have a relatively low turnover with Balfour Beatty and could not afford registration fees across a number of different schemes or the costs associated with multiple audits.
>
> …
>
> Indeed, once a supplier is on RISQS it provides them with access to the rail industry outside of Balfour Beatty for the same level of cost. More generally, the use of a common assurance system across the industry in our view reduces barriers to entry for new suppliers, particularly the smaller suppliers. It is necessary for suppliers to invest in only one assurance scheme to be able to work across multiple clients in the industry.

> Having a single supplier assurance scheme for our Rail business means that there is a single interpretation of the relevant rail standards and a single point of contact for the supply chain to interface with in the development of the approach to be taken."

(3) In year 1 the RISQS' pricing was set equal to Achilles' pricing in its last year but the intention was for pricing to be reviewed with a view to reductions to reflect lower costs (from the outsourced supply of IT and audit services and to reflect the RSSB's position as a not-for-profit organisation). Although Achilles questioned whether RISQS was necessarily a not-for-profit service and noted the profit maximising incentives of the suppliers of the outsourced inputs, we accept the evidence that the RSSB would seek to reduce prices for the RISQS services. We conclude that this would make it harder for Achilles or other entrants to compete successfully on price or to win significant volumes of business without significant differentiation in the type, scope or quality of their offer.

(4) As to that, Achilles emphasised that its position in the supply of assurance and other supply chain services to clients operating in different sectors meant that it could offer a wider range of services and a "one stop shop" offering to clients who are active in both rail and other sectors (such as construction). However, some of those clients will be prime contractors to Network Rail and will therefore remain with RISQS. Mr Holt also pointed us to statements in the Achilles internal documents that recognised that Achilles faced certain reputational problems in the GB rail industry arising from its conduct (or perceptions of its conduct) under the concession arrangements between 2014 and 2018. Furthermore, smaller domestic or regional operators may not be interested in Achilles' broader product offering or international benchmarking. Consequently, we conclude that the pool of target clients for the broader Achilles product offering may not be as large as Achilles suggests and its prospects of success may well be limited.

(5) In its closing submissions Achilles submitted that it was the RISQS-only rule that rendered it unviable to provide another supplier assurance

scheme in parallel to RISQS and that the removal of the RISQS-only rule would make all the difference between a non-viable and viable business because of the increase in demand from buyers other than Network Rail. However, the business demand of TfL, Amey and Babcock has also been committed to RISQS, meaning that Achilles needs to find viability in demand from the rest of the (non-Network Rail) market. It is, in the Tribunal's view, open to doubt that Achilles could do so.

(6) Consequently the scope for price reductions from competition from Achilles may be limited and the scope for the claimed benefits of Achilles' broader offering and effect on competition is at best uncertain. The conditions for the "tipping" of the two-sided market to RISQS may exist and the differentiation that would be offered by the Achilles scheme might not suffice to offset that.

150. Notwithstanding these factors, the Tribunal considers that, for the reasons summarised below, the correct counterfactual is one in which Achilles would compete with RISQS at least for a time and that its competition would lead to some benefits in terms of lower prices and product differentiation, as contended by Achilles.

151. In this context, the Tribunal attaches significant weight to the fact that Achilles, with its experience and detailed knowledge of the market, wishes to compete with RISQS and believes that it can do so. It has already incurred a substantial proportion of any costs of entry and has a recent presence in the market. The Tribunal accepts that there may well be real benefits to allowing that choice and allowing competition in the market to evolve. These benefits would include not just the general benefits which can be expected to flow from making the quality and pricing of the services currently provided subject to competitive constraints, but also the possibility of solutions better tailored to the needs of buyers and suppliers, whose activities are not limited to the GB rail sector. Whilst it might be argued that the impact of competition from Achilles (and other suppliers of assurance schemes) in other sectors would continue to be felt by members of the RSSB and the community of suppliers in the rail industry who are also active

in other sectors even if Achilles was not active in the railway sector, that impact would be less direct.

152. Given that the RISQS-only rule in the Sentinel Scheme and OTPO Scheme has a *prima facie* restrictive effect on competition, in that it reserves to a single scheme provider a significant segment of the market for supplier assurance to the rail industry, the Tribunal would be reluctant to find that the restriction has no *actual* effect on the basis of Network Rail's case that only the market would tip in favour of RISQS. It is fundamentally not for Network Rail to make the decision for other buyers and suppliers that they would prefer RISQS to other supplier assurance services.

153. Furthermore, the difficulties facing Achilles in establishing itself as a viable competitor to RISQS are partly attributable to the effects of the RISQS-only rule itself. If Achilles had been allowed to compete with RISQS for business from buyers and suppliers using the Sentinel Scheme and OTPO Scheme from May 2018 onwards, it might be at less of a competitive disadvantage now. The Tribunal considers that the issue whether the RISQS-only rule has an appreciable effect on the market should be assessed by reference to the state of the market as it would have been had the rule never existed rather than by the reference to the state of the market now.

154. Although the scope for price competition (in the absence of loss-leading or cross-subsidisation on a long-term basis) and product differentiation would be limited, we conclude that the RISQS-only rule does cause significant foreclosure of demand in a significant segment of the market for supplier assurances schemes in the GB railway sector and that the RISQS-only rule has an appreciable effect on competition in that market.

(6) Issue 4: Is the RISQS-only rule objectively justified?

(a) Legal Principles

155. If an agreement is not itself anti-competitive then restraints which can be regarded as necessary for the agreement to be workable or to achieve its purpose

will also fall outside the Chapter I prohibition as an ancillary restraint. In Case C-382/12P *MasterCard Inc and others v Commission* EU:C:2014:2201 ("*MasterCard (Court of Justice)*"), the Court of Justice stated as follows:

> "89. It is apparent from the case-law of the Court of Justice that if a given operation or activity is not covered by the prohibition rule laid down in Article [101(1) TFEU], owing to its neutrality or positive effect in terms of competition, a restriction of the commercial autonomy of one or more of the participants in that operation or activity is not covered by that prohibition rule either if that restriction is objectively necessary to the implementation of that operation or that activity and proportionate to the objectives of one or the other …
>
> 90. Where it is not possible to dissociate such a restriction from the main operation or activity without jeopardising its existence and aims, it is necessary to examine the compatibility of that restriction with Article [101 TFEU] in conjunction with the compatibility of the main operation or activity to which it is ancillary, even though, taken in isolation, such a restriction may appear on the face of it to be covered by the prohibition rule in Article [101(1) TFEU].
>
> 91. Where it is a matter of determining whether an anti-competitive restriction can escape the prohibition laid down in Article [101(1) TFEU] because it is ancillary to a main operation that is not anti-competitive in nature, it is necessary to inquire whether that operation would be impossible to carry out in the absence of the restriction in question. Contrary to what the appellants claim, the fact that that operation is simply more difficult to implement or even less profitable without the restriction concerned cannot be deemed to give that restriction the 'objective necessity' required in order for it to be classified as ancillary. Such an interpretation would effectively extend that concept to restrictions which are not strictly indispensable to the implementation of the main operation. Such an outcome would undermine the effectiveness of the prohibition laid down in Article [101(1) TFEU]."

156. A restrictive provision will only be objectively necessary if the main operation would be impossible to carry out in the absence of the restriction, and not merely more difficult. See *MasterCard (Court of Justice)* at [91].

157. The objective to which the restriction is ancillary does not have to be a pro-competitive or commercial one. In its judgment in Case C-309/99 *JCJ Wouters, JW Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten* EU:C:2002:98 ("*Wouters*") the Court of Justice held at [97] and [109] that a restriction having the effect of restricting competition will not fall within Article 101(1) TFEU provided that its purpose is to achieve a legitimate objective, that the restriction is inherent in the pursuit of that objective and the restriction goes no further than is necessary to achieve that objective. The restriction in that case was a rule preventing members of the

Dutch bar from forming partnerships with accountants for the purposes of ensuring the proper practice of the legal profession.

158. The reasoning in *Wouters* was followed and applied in 2006 in Case C-519/04P *David Meca-Medina and Igor Majcen v Commission* EU:C:2006:492 in which the Court of Justice held at [45] and [54] that the anti-doping rules of the International Olympic Committee did not restrict competition incompatibly with Article 101(1) TFEU since they were justified by a legitimate objective, namely *"the organisation and proper conduct of competitive sport and its very purpose is to ensure healthy rivalry between athletes*" and did not go beyond "*what is necessary*".

159. The burden is on Network Rail to establish any objective justification for the restriction. See Case T-201/04 *Microsoft Corp v Commission* EU:T:2007:289 ("*Microsoft*") at [688] (in the analogous context of Article 102 TFEU).

160. Objective justification will not be established if the legitimate purpose of the restriction can be achieved by alternative, less restrictive measures. In the *OTOC* case, OTOC, a non-profit making regulator, argued that the requirement for a minimum number of hours of institutional training was objectively necessary as a means of guaranteeing the quality of the services offered by chartered accountants. The Court of Justice disagreed on the basis that the objective could be achieved by allowing other bodies to provide training, subject to effective monitoring of standards:

> "99. Similarly, as regards the conditions for access to the market of compulsory training for chartered accountants, the objective of guaranteeing the quality of the services offered by them could be achieved by putting into place a monitoring system organised on the basis of clearly defined, transparent, non-discriminatory, reviewable criteria likely to ensure training bodies equal access to the market in question.
>
> 100. It follows that such restrictions appear to go beyond what is necessary to guarantee the quality of the services offered by chartered accountants."

(b) Network Rail's Case

161. Network Rail's case was that the RISQS-only rule is objectively necessary and proportionate to the goal of health and safety pursued by Network Rail through

the Key Schemes. It referred to the Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings ("the Article 102 Guidance") which specifically refers at [29] to health or safety reasons as potentially constituting an objective justification.

(i) Network Rail's Safety-Related Obligations

162. It was not disputed that Network Rail operates within a safety-critical environment in which serious accidents can occur if Network Rail or its contractors and their subcontractors fail to adhere to high safety standards.

163. As a duty holder under health and safety legislation, Network Rail has onerous safety-related obligations. Network Rail and undertakings which have access to the rail network owe duties under sections 2 to 3 of the Health and Safety at Work Act 1974 ("the HSWA") in respect of the health and safety of its employees and other persons who may be affected by their work. Under section 4 of the HSWA it has a duty to ensure that premises over which it has any degree of control and any plant or substance in the premises or provided for use there, is or are safe and without risks to health.

164. Network Rail has on several occasions been fined substantial sums or served with improvement notices under the HSWA in connection with unsafe work by its contractors. These include a fine of £3 million in 2011 following the failure by a contractor to maintain a set of points at Potters Bar in 2002 and the consequential deaths of seven people and a fine of £666,666 in October 2009 after two workers were killed on a site where a Principal Contractor failed to manage its activities safely.

165. Other relevant legislation includes the following:

(1) The CDMR applicable to all construction and engineering projects in GB, including in relation to rail infrastructure. Of particular relevance to this case, the regulations define the responsibility of the client

(ultimately Network Rail) and the role of the Principal Contractor. Regulation 4(1) and 4(2) states that the client:

> "… must make suitable arrangements for managing a project... [to] ensure that... the construction work can be carried out, so far as is reasonably practicable, without risks to the health or safety of any person affected by the project."

(2) The Directive 2004/49/EC of the European Parliament and of the Council of 29 April 2004 on safety on the Community's railways and amending Council Directive 95/18/EC on the licensing of railway undertakings and Directive 2001/14/EC on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification (Railway Safety Directive) ("the Railway Safety Directive"), which created a common European framework for railway safety. In GB, the requirements of the Railway Safety Directive are applied through the Railways and Other Guided Transport Systems (Safety) Regulations 2006 (S.I. No. 599 of 2006) ("the ROGS regulations").

(3) The central requirements of the ROGS regulations are that railway operators should maintain an effective safety management system and hold a safety certificate (in the case of TOCs) or authorisation (in the case of infrastructure operators) indicating this system has been accepted by the ORR as the appointed national safety authority.

166. Mr Spence, Network Rail's Head of Passenger and Public Safety, and Ms Scott emphasised that having a robust and structured approach to safety throughout the organisation is critical because Network Rail relies on its supply chain partners (i.e. direct (tier 1) contractors and indirect (tier 2 and tier 3) contractors) to deliver major works on the network. The way that work is carried out must enable Network Rail to comply with its onerous duties as a duty holder and operator of safety-critical infrastructure.

167. Under Mr Spence's direction, Network Rail has developed a safety "vision" and ten-year strategy for developing a safe and reliable railway ensuring the safety

of passengers, members of the public using its infrastructure and the workforce, which he described in the following terms:

> "Our safety vision, and accompanying commitment to continually monitor, learn from and innovate in our approach to reduce risk across the network, marked a critical evolution for our approach to safety, moving from an environment where Network Rail focused on compliance with internal standards to satisfy basic legislative requirements to an ambition for Network Rail and its supply chain partners to transform the way in which they deal with safety within their businesses. The vision is enshrined in our vision "Everyone Home Safe Every Day" (EHSED). EHSED is our simple and all-encompassing approach to safety in an incredibly complex and changing industry … and has driven major improvements on safety culture and performance on our managed infrastructure, driving improved outcomes for all."

168. Network Rail monitors safety performance and reports to the National Safety Authority annually on safety outcomes. The transfer of Link-Up to RISQS and enhancements to the Sentinel system (including the use of electronic chip technology to allow 'real time' checking of competence in the database and improved controls on site access and management of risk due to fatigue), were undertaken as part of Network Rail's drive to manage key safety risks.

169. The Key Schemes are part of Network Rail's safety management system. The Sentinel Scheme ensures that the employees accessing the managed infrastructure are competent for the duties they perform. The PCLS requires that all Principal Contractors working on Network Rail's managed infrastructure are consistent in their approach to project delivery and safety. The OTPO Scheme supports safe planning, control, and use of track plant and equipment. Supplier assurance by RISQS is an integral part of that safety management system, ensuring that potential suppliers are pre-qualified and suppliers of safety-critical products and/or services are subject to annual audits.

170. Mr Spence and Professor Jack, Network Rail's safety expert, referred in their evidence to the Tebay rail accident in 2004 which claimed the lives of four railway workers killed by a runaway wagon. They referred to this as an illustration of the safety-critical nature of supplier assurance. The accident happened after a trailer laden with sections of scrap rails ran away down a hill because it did not have properly working brakes and became uncoupled from its parent rail-road vehicle ("RRV"). Following the incident, Mark Connolly,

whose company MAC Machinery Services Limited ("MMSL") operated the trailer, was convicted of manslaughter and for breaches of health and safety legislation. Although Link-Up had, prior to the accident, conducted an audit of MMSL in order for the company to become a registered supplier for Carillion Rail, the audit had not covered the trailer used that evening.

171. In its report on the accident, the Inquiry panel noted a concern about the scope of the Link-Up audit: the fact that whether it did or did not include trailers or other attachments was somewhat ambiguous and the fact that as no qualification to the Link-Up audit was made this was interpreted as indicating that MMSL were qualified for the supply of RRVs and all attachments, including trailers.

172. It was put to Mr Spence and to Professor Jack in cross-examination that the Inquiry panel did not identify any failures in the Link-Up audit as being causative of this accident. Mr Spence and Professor Jack nevertheless maintained, with justification in our view, that the report into the Tebay accident illustrates the fact that confusion and misunderstanding of the supplier assurance process in the supply chain can compromise the safety performance required to operate and maintain the railway in GB.

173. Network Rail's case, as articulated in its skeleton argument, was that the RISQS-only rule gives rise to the following eight specific safety benefits which are considered in greater detail below:

(1) A uniform and clear set of safety standards applied though a consistent standard of audit;

(2) A reduced risk of confusion among suppliers and on the part of Network Rail;

(3) Facilitation of timely and efficient dissemination of safety reports;

(4) Facilitation of efficient and effective monitoring by Network Rail of issues arising through the audit process;

(5) Provision of a single forum and process for industry feedback and continuous development;

(6) Provision of a mechanism for Network Rail's representation on the RISQS Board to ensure it can continuously manage safety risks in its supply chain;

(7) Better compatibility and interoperability between the chosen safety assurance scheme and Network Rail's own safety systems and processes;

(8) Incentivisation of suppliers and supply chain partners to invest continuously in the improvement of their management systems in response to the requirements of a single scheme.

(c) Achilles' Case

174. Achilles accepted that the activity undertaken by suppliers on Network Rail was safety-critical and that supplier assurance, involving the auditing of suppliers' management systems, can avoid accidents happening. Mr Flynn Q.C. cross-examined Ms Ferrier on an internal email within Achilles on 15 December 2017 from Estelle Whittaker, Chief Commercial Officer at Achilles, which stated in relation to a declining trend in audit sales as follows:

> "There is no logical reason why audit sales should not be much higher than they are, it is a supplier validation service to help reduce the risk for our buyers and with the added value of the labour practises audit product being available it is essential we share this with our Buyers to help reduce modern slavery. We have a proven track record of reducing risk, there is an average of 40% less accidents when a Buyers [sic] makes use of Achilles Audit. Think of all the incidents which could have been avoided, to name just a few ... Accidents happen in every industry in every location; thousands of people have been killed or severely injured because of poor human judgement [sic], noncompliance [sic] with health and safety regulations etc."

175. When asked whether this email shows that Achilles is aware of the safety-critical nature of the work that Achilles itself carries out, Ms Ferrier agreed that Achilles frequently informs its buyers and other organisations that, by checking the management systems, the processes and the procedures that suppliers and

their partners have in place, it reduces the risk of accidents: "*I think it's fair to say that if you have a documented management system in place, you are inherently more safe than if you don't, yes.*"

176. Achilles contended, however, that Network Rail's assertion that the RISQS-only rule is justified on grounds of safety is an *ex post facto* justification. It drew the Tribunal's attention to the fact that prior to these proceedings, including in particular in the RISQS Charter and in the letter of 14 May 2018 quoted above, Network Rail referred to cost efficiencies as a justification for RISQS but did not mention safety considerations. Network Rail's response to this submission was that safety was the essential basis of supplier assurance in the safety-critical aspects of the rail industry and that for twenty years Network Rail has mandated the use of a single supplier assurance scheme for safety reasons.

177. More fundamentally, Achilles submitted that the high threshold which must be met in establishing objective justification of an ancillary restraint (i.e. the impossibility of carrying out the main operation without the restraint in question) was not made out on the facts. It submitted that it would not be impossible to carry out the Key Schemes without the RISQS-only rule in circumstances where:

(1) Network Rail could specify in objective terms the scope of the audits which it wanted to be carried out by other providers of supplier assurance schemes;

(2) Network Rail could require that other providers operated to the standards set out in openly available standards such as ISO 17021 or RIS-2750;

(3) Network Rail could impose proportionate and reasonable monitoring requirements. Network Rail could either require the standards to be complied with and monitor those standards or it could reduce its monitoring costs by requiring the assurance provider to be certified

against ISO 17021 by an accreditation body such as the United Kingdom Accreditation Service.

178. Achilles further submitted that Network Rail failed to identify any concrete benefit flowing from maintaining a single supplier assurance scheme. The only generalised benefit was framed in terms of reducing complexity or risk. However, the evidence of Achilles' safety expert Dr Cox was that complexity cannot be assumed to result in an increase in risk.

179. Achilles contended that Network Rail failed to show that having a single supplier assurance scheme is indispensable to the management of the safety risks in question. Professor Jack accepted that in other safety-critical industries, multiple supplier assurance schemes may be used to audit health and safety requirements and can be made to work. He was referred in cross-examination to the Safety Schemes in Procurement ("SSIP") forum in the construction industry under which members agree to mutually recognise others' supplier assurance:

> "Q. So that is an example, is it not, from a sector where safety is important, of different supplier assurance schemes agreeing to mutually recognise each other's standards of assessment?
>
> A. Yes.
>
> Q. So it can be made to work, can it not?
>
> A. Yes, it can."

(d) The Eight Grounds

180. We now summarise the parties' respective positions in relation to the eight specific grounds relied on by Network Rail in support of the RISQS-only rule.

(i) Uniform and Clear Set of Safety Requirements

181. The evidence of Mr Spence, Mr Prosser and Professor Jack was that the RISQS-only rule was necessary in order to ensure that there is a uniform and clear set of safety requirements to be applied when assessing suppliers (whether direct contractors or working trackside) so that Network Rail can ensure in a consistent

and reliable manner that suppliers have appropriate management systems, procedures and processes in place. This was said to be particularly important as different suppliers are frequently working on the same project, for example as part of a consortium or joint-venture.

182. Mr Spence's evidence was that if there were multiple providers of assurance there would be a risk that a set of requirements will be interpreted in different ways and hence become less effective. Mr Cooke was concerned that different providers would set questions or approach their audits in different, inconsistent ways. When it was put to Mr Spence that consistency from multiple providers of supplier assurance can be achieved by the imposition of a common quality management standard such as ISO 9001, Mr Spence's evidence was that, in his experience, "*the more that you fragment a process, the greater the risk of difference between the parts of that process. ... So with multiple providers, the greater the risk of difference between those providers*".

183. When asked whether applying consistent standards through a consistent standard of audit can be achieved without having a single supplier of supplier assurance, Mr Prosser said:

> "It is … more difficult, because the … key here is how you maintain and ensure that you've got consistent and reliable auditing and the standards of that audit. So it's … one of the benefits and it's … a matter of being able to assure yourself that you have got that consistency."

184. Professor Jack considered that while it is possible to have a standard that deals with any particular challenge or problem, the challenge of different interpretation and application of it is not necessarily achieved just by having another standard; it is achieved by a "*much more rounded set of arrangements involving feedback loops, direct communication, etc.*"

185. Mr Spence went on to say that if Network Rail were required to recognise multiple supplier assurance schemes this would give rise to incentives for schemes to lower their requirements and audit standards in order to attract business from suppliers based on the ease with which they may pass an audit, creating a "race to the bottom":

> "If Network Rail were obliged to recognise Achilles and deal with multiple supplier assurance schemes, this would fundamentally shift the entire ethos and purpose of the supplier assurance regime and Network Rail's objectives as an operator of safety-critical infrastructure, and would shift the choice entirely to suppliers (which would have an incentive to join the scheme which is easiest to comply with). In practice, a significant burden would be placed on Network Rail to satisfy itself that each of the [Network Rail] Schemes and its audit quality were adequate and that all [Network Rail] Schemes applied a sufficiently high set of safety requirements and applied these with a sufficient qualify [sic] of audit that would satisfy Network Rail's legal obligations on [health and safety] and its safety objectives."

186. When it was put to Mr Spence that a race to the bottom could be prevented by certification of the auditor to an appropriate standard, Mr Spence referred to the "hierarchy of risk control":

> "There is a principle in health and safety law that elimination is the first choice, elimination of hazard is the first choice, and then through a series of steps, before you come to processes and other less effective means, that you control risk. By introducing the scope for confusion, we're already a step down that risk control hierarchy. … Our responsibility as an infrastructure manager -- in fact, our duty in law is to make sure that risk is managed by the most effective means following that risk control hierarchy."

187. This view was echoed by Professor Jack:

> "I think, going back to what Dr Cox and I agreed on it, in theory you can put something in place to overcome any problem that you identify. So I identify a problem, you identify a way of overcoming it, but every time you identify a way of overcoming it, you introduce a degree more complexity."

188. Ms Scott's evidence was that if Network Rail were forced to recognise multiple supplier assurance providers there would be a conflict of interests for providers of consultancy services acting both as safety management consultants to, and auditors of, the same supplier. Currently these conflicts are effectively managed within one scheme and this would be practically impossible to achieve if Network Rail had to recognise any number of schemes.

189. Asked in cross-examination as to whether Network Rail could achieve consistency as to question sets or audit approach simply by specifying that as a condition of recognising another supplier assurance scheme, Mr Cooke of Network Rail responded:

> "I would comment that we have many, many processes and standards and requirements for our suppliers to achieve and we expect full achievement.

> However, unfortunately I've got an accident book that tells me that we often get things wrong and there is -- there's a failure in the system, and with that failure, when you look at it, it's -- we have a set of rules, everyone should be following to a set of rules to a certain agreed standard and yet we don't always do it, we don't get full compliance. And assurance is just the same as accident investigation, as in product acceptance. It's -- we can have all the processes and systems in place with key requirements for everyone to follow and yet there is no mechanism for ensuring that that is constantly followed or applied."

190. The evidence of Ms Ferrier for Achilles was that consistency could be achieved by ensuring that checking was undertaken by a competent body which is capable of assessing against the relevant standards. She referred to the RISAS scheme which is the rail industry's scheme for the assessment and certification of suppliers of safety-critical products and materials. Unlike the single provider of assurance through the RISQS scheme, the assessment of the adequacy of suppliers' procedures, practices and competence to manage risks for the purposes of RISAS is carried out by independent third party assessment agencies who have been accredited as Railway Industry Supplier Approval Bodies ("RISABs"), which are accredited by the RSSB in accordance with the requirements contained within RSSB document RISAS004/01 dated 12 May 2006 entitled 'Accreditation of Approval Bodies within the Railway Industry Supplier Approval Scheme'.

191. Ms Ferrier also referred to the construction industry where Achilles operates a product called BuildingConfidence and its main competitor is Constructionline. According to Ms Ferrier, the SSIP acts as an umbrella organisation that mandates a standard set of "core" health and safety questions for the construction industry and ensures that all member schemes assess to the same standard.

192. Ms Ferrier also referred to the fact that many different Principal Contractors carry out work on the most safety-sensitive works such as track renewals or bridge repairs. Consistency in their works is achieved by making the contractors work to established standards and by judging their record, expertise and capability to undertake the work. She suggested that supplier assurance was no different.

193. Dr Cox was of the view that consistency could be ensured by the RIS-2750 standard. Any organisation providing supplier assurance should be audited from time to time, and this is the standard, endorsed by the RSSB, against which the audit should be conducted.

194. Both safety experts agreed that some suppliers would try to select the supplier assurance provider which was, or was perceived to be, the most lenient but Dr Cox was of the view that what matters is whether the supplier assurance providers are working to broadly the same standard of safety performance. This could be ensured by a significant additional set of supervisory activities by Network Rail to ensure that they all work to a common standard of performance and with compatible and linked IT systems. This would introduce additional complexity in the system overall.

195. The safety experts disagreed as to whether such additional complexity imported additional risks. Professor Jack was of the view that the complexity of the additional supervisory activities required would give rise to additional safety risks. There could be solutions to mitigate the risks, but the very complexity of the arrangements that would be required increases the risks. Dr Cox thought that such risks could only arise if the additional supervisory mechanisms were not adequately resourced or designed and operated well enough.

(ii) Risk of Confusion

196. Mr Spence's evidence was that multiple supplier assurance schemes would give rise to a risk of confusion on the part of suppliers as to the requirements to be met and that this may lead to a failure to adhere to standards and the importing of material safety risks:

> "With a single scheme, suppliers are clear that they will be required to meet the relevant requirements of the RISQS scheme modules for each of the [Network Rail] Schemes (as appropriate). We are only as safe as the weakest link in our supply chain, and it is therefore critical that there is no scope for suppliers to misunderstand what is required from them as part of the assurance process and have an incentive to work consistently to meet expectations and improve their safety processes. Perhaps most importantly, the consistency and alignment through all of the [Network Rail] Schemes provides a coherence and strength to the assurance framework that would be jeopardised if a more piecemeal approach were to be forced upon the business. I could not, in my

> professional capacity, support a weakening of those critical safety arrangements in response to a commercially-driven approach from Achilles."

197. Mr Spence's oral evidence was that there are many small, unsophisticated companies for whom a single arrangement to become eligible, for example, as a Sentinel Sponsor, and an accreditation approach with one provider, is valuable.

198. When it was put to Mr Spence that there would be no confusion on the part of Mitie as administrator of the Sentinel Scheme as it would be a simple task to recognise if an audit against the Sentinel Scheme had been carried out by an authorised provider or not, Mr Spence's answer was that it depended on the number of providers and that he had in mind a world of twenty, not two, and that the risk of error starts once the number of providers is more than one:

> "The scope for confusion and error being made weakens the measures that are in place at the moment, whether delivered before 2018 by Achilles or currently by a different provider. That provides us with the most rigorous arrangements and it has served us well. It's taken us from the dark days, when we had such events as Tebay, into the much better performance that we have today. To weaken that and dilute it with alternative providers would risk taking us backwards, and that is what I cannot countenance."

199. Ms Scott, Mr Cooke and Mr Berwick considered that confusion might arise from multiple providers of supplier assurance schemes producing different results (an audit pass and an audit failure) in relation to the same supplier. Ms Scott said as follows:

> "But what I'm trying to say is if you had -- say there was five platforms and they were all auditing the same thing, you may come out with five different results, you may come out with two different results, a pass and a fail, and then which of those reports is right? Which of those reports, when they all get fed into the system -- will -- so, in itself it's a sampling exercise, so therefore you can't determine if you go into the same audit and the same -- a different auditor would find the same information. We are finding that now that we're getting a bigger number of non-compliance -- and if two audit reports go into the same system, one says "pass", one says "fail", which one do you believe? And if you ignore the "fail", what happens?"

200. Mr Blackley said in his witness statement that if there were a number of supplier assurance schemes using their own coding structures this would be extremely confusing for buyers and suppliers. The RICCL codes are "owned" by the RSSB and administered by the RISQS scheme and are regularly being updated.

Permitting the use of different coding structures (which would not be Network Rail's decision as it does not own these) would introduce a safety risk that does not exist today. The RICCL codes are different to the RISQS codes used by Achilles pre 1 May 2018 and have changed significantly from the account codes which Network Rail used to use when Link-Up was in operation. Having multiple supplier assurance schemes could also result in suppliers having approval for different time periods – so being able to produce a valid accreditation notwithstanding having been suspended under one scheme. As long as suppliers had one live audit approval permission, suppliers would be unlikely to disclose failures on other schemes and therefore a significant burden would be shifted to Network Rail in establishing whether each supplier had failed an audit across multiple schemes.

201. Professor Jack also considered that there was scope for confusion on the part of Network Rail if there were multiple providers of supplier assurance if, for example, a supplier was found to do an urgent job and they claimed incorrectly to be an approved provider of supplier assurance. However it was pointed out to Professor Jack that without actual approval as a Sentinel Sponsor, Sentinel access would not be turned on and with the other Key Schemes, Network Rail itself would have to have separately authorised the supplier in question so that there was no real possibility of confusion.

202. The evidence of Dr Cox, for Achilles, was that if the standards to be attained were the same he could not see what confusion could arise. Compliance with the RIS-2750 standard, which could be monitored from time to time, would ensure that the providers of supplier assurance schemes were consistent and reliable. It would be nothing more than a short list of qualified supplier assurance scheme providers.

203. Ms Ferrier's evidence was that there was no reason why having multiple providers of supplier assurance schemes would lead to confusion by suppliers. All that is required is clear communication to suppliers from the relevant stakeholders as to the appropriate standards they must meet and which scheme providers are authorised to assure compliance with those standards. Nor was there any reason to believe that multiple scheme providers would lead to

confusion on the part of Network Rail. The purpose of supplier assurance is to check whether the supplier is compliant with the relevant standards (i.e. that it has appropriate and documented management systems). According to Ms Ferrier and Mr Chamberlain, there is no reason why more than one scheme provider cannot communicate such compliance to Mitie as the administrator of the Sentinel Scheme and/or to Network Rail. It is technically possible to relay the information directly into Network Rail's systems. The supposed risk of confusion does not stop Network Rail permitting the use of multiple audit service providers under RISAS and multiple schemes for construction works as mentioned above.

204. Mr Chamberlain considered that, with multiple scheme providers, a supplier would be audited more frequently, which would be an advantage, and that in the event of an audit "pass" followed by a "fail" a short time later Network Rail would act on the "fail" and this would not give rise to any practical difficulty.

(iii) Dissemination of Safety Reports

205. Mr Spence also contended that the use of a single system meant that Network Rail has the ability to ensure that safety reports are disseminated and acted upon promptly and that it would otherwise be challenging for Network Rail to ensure that all suppliers are updated in a timely and efficient manner on key developments in safety. A requirement to recognise multiple supplier assurance schemes would necessarily make the process of updating suppliers more complicated and prone to human error, thereby creating a risk that suppliers would not be properly updated on key safety developments which are safety-critical.

206. Professor Jack agreed with Mr Spence's view that communications would become more complicated and potentially slower if there were multiple supplier assurance schemes and he was sceptical about the ability of joined up IT systems as described in some of Achilles' witness statements, however sophisticated, to deal with all the complexities and potential safety risks that could arise from multiple schemes.

207. Dr Cox agreed that communication of safety information both ways in the supplier/buyer community is important but believed on the basis of his instructions from Achilles that different computer systems could be interfaced so as to ensure that communications can pass between all participants on both systems with negligible delay or inconvenience. He considered that there could be an adverse safety impact associated with a monopoly supplier in that, without Network Rail necessarily being aware, settled relationships could develop between the assurance scheme provider and the suppliers which blunt the effectiveness of audits.

208. Ms Ferrier's evidence was that Network Rail also predominantly uses other methods to distribute safety information including Bravo (an e-tendering software product) and Safety Central (Network Rail's dedicated safety communications tool). Achilles already has integration with Bravo for customers in other communities including utilities in Spain. Achilles frequently uses APIs to link its systems with those of the relevant authority or other provider issuing the communications and other data sharing. The use of APIs can allow the seamless sharing of data and information between systems. Again, the supposed risk of information not being disseminated does not stop Network Rail permitting the use of multiple audit service providers under RISAS or multiple providers of suppler assurance for construction works. Mr Blackley took issue with her views and asserted that it is not possible to use APIs to enable multiple schemes to cooperate with Network Rail's systems and there are no APIs in place at present to link RISQS to Bravo.

(iv) Ability to Monitor Safety Issues

209. Mr Spence's evidence was that a single supplier assurance scheme enables Network Rail to monitor, check and act in a timely way on safety issues or concerns about particular suppliers:

> "A single scheme is necessary for Network Rail to remove suppliers which have deficient safety management systems quickly. If there were multiple supplier assurance schemes which Network Rail had to recognise then individuals at Network Rail would have to weigh the confidence they had in any reported failures, or indeed an absence of non-compliances, in determining whether to take further action. This would give rise to a risk of confusion or human error within Network Rail in checking whether suppliers are compliant

with safety-critical requirements and potential delay in acting against suppliers with safety-critical management system flaws."

210. It was put to Mr Spence that the information could be delivered to Network Rail via an API to which Mr Spence's response was that the greater the number of interfaces the greater the risk of gaps appearing.

211. Ms Ferrier's evidence was that the use of APIs and data sharing arrangements would be capable of resolving any issue in monitoring safety issues with suppliers. She pointed out that Network Rail itself has recently launched its own "Supplier Qualification System" ("SQS") for suppliers in technology, professional services, solution delivery and support services which is separate to the RISQS scheme (and covers technology solution suppliers). This must mean that Network Rail has already anticipated interacting with more than one supplier assurance system.

212. Mr Chamberlain's evidence was that there was no reason in practice why effective monitoring could not be achieved with multiple scheme providers. Collation of data requires agreement on a specified format and delivery of the data. Agreeing a common standard is common in sectors such as education, health, and oil and gas. For example, in the US oil and gas sector, a not-for-profit industry body has set out a detailed data standard for supplier data in that sector to facilitate exchange between companies. In the health sector, NHS England has developed standards supporting interoperability and aggregation. In the education sector, there are many different providers of examination services, for example, the Joint Council for Qualifications represents eight different and competing members who agree to provide examination data in a consistent format.

(v) A single forum

213. Mr Spence's evidence was that a single scheme provides a single forum and process for feedback from industry-wide experience relating to safety and safety assurance and provides for continuous development and improvement in supplier assurance service provision. Governance of the RISQS scheme is provided by the RISQS Board, which reports into the RSSB Board. The RISQS

Board includes representatives from Network Rail, other buyers in the GB rail sector, and industry representatives. It acts as a single forum through which the rail industry can provide updates on safety developments and practices which acts as a "feedback loop" into the management of the RISQS scheme and facilitates the continuous improvement of supplier assurance.

214. When it was put to Mr Spence that a single forum could be achieved by allowing everyone to participate, Mr Spence's view was that in principle that was correct but if those businesses were competing there was a question as to whether that would work as effectively as the arrangements currently in place. The forum was different from the Safety Management Intelligence System run by the RSSB, which was a collation of incident data rather than input into the supplier assurance scheme.

215. Professor Jack's view was that one of the features of the rail industry which is not reproduced in many other sectors is the existence of the RSSB, which was designed to enable the industry to get together and shape its standards. It is the ownership and control of that activity through this entity that is the RSSB which gives the industry that unique sort of direction and control over the evolution of its supplier assurance scheme. A single governing RISQS Board would be difficult to replicate if there were multiple assurance scheme providers.

216. Dr Cox agreed that if there were multiple providers of supplier assurance schemes in the rail industry there would be fragmentation but that this would be beneficial because it would allow more voices to be heard.

217. Ms Ferrier's evidence was that if there were more than one provider of supplier assurance scheme in the GB rail industry, this would not necessarily lead to more than one forum for Network Rail or other industry stakeholders. One collaborative forum of all competent providers could be created with the cooperation of the providers. Even if the schemes did result in more than one forum this would not necessarily be a bad thing as it might drive new ideas and result in a range of relevant views being heard, which could be openly communicated to Network Rail.

(vi) Representation on the RISQS Board

218. Mr Spence's evidence was that Network Rail's representation on the RISQS Board, which is responsible for "*specification, review and update of scheme documentation*", also contributes to its ability to ensure that the scheme's requirements (and the standard of audit against them) satisfactorily address Network Rail's needs concerning safety risks in the supply chain and those of the broader industry. If Network Rail were required to satisfy itself of the quality and effectiveness of multiple supplier assurance schemes, this would be an onerous task with a greater risk of gaps arising. If there were multiple schemes, there would be a greater risk of different interpretation of Network Rail's requirements. Making clear its needs through membership of the RISQS Board enables Network Rail to achieve absolute clarity.

(vii) Interoperability

219. The evidence of Mr Spence and Ms Scott was that with multiple schemes it would not be possible to ensure compatibility and interoperability between the supplier assurance schemes and Network Rail's own systems and processes it carries out relating to safety, including where relevant technical and on-site audits are carried out by Network Rail. This interoperability and compatibility contributes to delivering safe outcomes and is facilitated through the use of a single scheme. With multiple scheme providers there was a greater risk of lack of interoperability.

220. Professor Jack felt unable to comment in his report on the issue of compatibility with Network Rail's system interoperability although in his oral evidence he suggested that if there was a change to the IT system or introduction of a new platform or a new generation of the cloud and one of the suppliers does not have an IT strategy that takes them in that direction and another one does not have the investment funds available to make the change, what started out on day one as a common system ends up being confusing for all because not every supplier of those schemes can introduce the system on the same day to the same specification.

221. Ms Ferrier's evidence was that interoperability is facilitated by data sharing and the application of common standards/specifications which is common in many markets with multiple providers of supplier assurance schemes including construction. There is no reason why Achilles could not provide the same information to Network Rail via the TransQ product in such form as required by Network Rail including by integration with systems including Bravo.

222. Mr Chamberlain's evidence was that the cost of entry and the effort required to enable multiple scheme providers to operate and facilitate interoperability are not particularly high or difficult to achieve. In the building sector, various buying organisations use multiple providers of pre-qualification services whose data sets are aggregated. Mr Chamberlain's evidence was that interoperability can be achieved by agreement on a common data standard. Even in the absence of such a standard, TransQ can facilitate interoperability simply by supplying data or audit sign-off through the TransQ web portal which can then be viewed by Network Rail. This could be done by means of a PDF containing all questions, answers and audit outcomes but the PDF format is hard to search through. It is therefore to be expected that a specification for a minimum set of pre-qualification data would need to be agreed. Achilles accepted the cost of ensuring data compatibility would not fall on Network Rail but it would be for the relevant alternative scheme provider "*to make a commercial decision as to whether they want to invest or have to make changes to satisfy the requirement*".

(viii) Disincentive from Investing

223. Mr Spence's evidence was that if there were multiple providers of supplier assurance then suppliers would be disincentivised from investing in and improving their management systems, procedures and processes. Multiple providers would have divergent requirements and approaches whereas a single provider would encourage investment and continuous improvement to comply with that provider's requirements.

224. It was put to Mr Spence that suppliers will invest freely or not, as they see fit, in whatever systems they think are appropriate and not necessarily in response to a single scheme. Mr Spence's response was that if one dilutes between many

different supplier assurance providers, there is a reduced incentive to invest in developing the schemes.

225. Achilles argued that competition between supplier assurance schemes would itself provide incentives to develop the schemes. Ms Ferrier's evidence was that the pressures of a competitive market encourage innovation and investment so as to improve the customer offering. She said that a large part of her day-to-day role is engagement with customers who are keen to see value added to their service by Achilles.

(e) The Tribunal's Analysis

226. There was no issue as to the vital importance of the Key Schemes in ensuring the safety on the railway network. Achilles accepted that the purpose of the Key Schemes is to ensure the safety of workers carrying out work and ultimately the safety of rail passengers. Nor was there any issue as to the need for suppliers working on the railway to be subject to supplier assurance. Achilles did not dispute that supplier assurance is part of Network Rail's safety management system, that it plays an important role in ensuring that suppliers adhere to high safety standards and that it contributes to a reduction in accident rates.

227. The issue for the Tribunal is a narrower and more specific one, namely whether the requirement in the Sentinel Scheme and OTPO Scheme that suppliers must use the supplier assurance provided by RISQS is objectively necessary to achieve the safety purposes of the Key Schemes. In other words, is it essential to the fulfilment of those purposes that supplier assurance be provided by the RISQS scheme to the exclusion of any other suitably qualified provider including Achilles? Would it be impossible to achieve those safety objectives if Network Rail were required to recognise other suitably qualified and competent providers of supplier assurance schemes?

228. In approaching this issue, we take into account the following considerations.

229. First, with regard to Achilles' contention that the safety justification is an *ex post facto* argument for the RISQS-only rule, we accept that there was no

evidence that, as supplier assurance developed over the 20 years or so, Network Rail had ever actually expressly identified the RISQS-only rule as being essential to the safety purposes of the Key Schemes. The Arthur D Little Report commissioned by the RSSB in 2008 entitled 'Supplier Assurance Framework Review and Analysis of Existing Supply Chain' was principally concerned with costs savings and the avoidance of duplication. It does not mention safety as being a benefit of supplier assurance sourced from a single provider.

230. The fact that the safety benefits of the exclusivity of the RISQS-only rule were not previously highlighted is to some extent explained on the basis that the RISQS-only rule was not challenged so that the question of whether multiple schemes were inherently unsafe had not become an issue until Achilles raised it. When it did become an issue after Achilles sought to compete with RISQS, Graham Hopkins, the most senior person within Network Rail's safety technical and engineering group, identified efficiency not safety as the justification for the RISQS-only rule in his letter of 14 May 2018. Whilst the Tribunal does not suggest that the safety justification was concocted as a justification for the RISQS-only rule in response to Achilles' claim, the promotion of safety being the fundamental aim of the Key Schemes as a whole, and we recognise that there is an overlap between the goals of efficiency and the promotion of safety, the absence of evidence that Network Rail historically regarded the RISQS-only rule as essential to the safety purposes of the Key Schemes coupled with the absence of any reference to safety in the letter of 14 May 2018 is somewhat at odds with the emphasis which Network Rail now places on the importance of safety as the justification for the RISQS-only rule.

231. The fact that Network Rail has not considered in detail what changes it would need to make to facilitate competition (because as Mr Spence said "*it hadn't become an issue*") undermines to some extent its case that such changes would make it significantly less likely that the safety benefits would be achieved (using the language of [79] of the Article 101(3) Guidelines).

232. Secondly, we have given careful consideration to the evidence of the senior Network Rail witnesses who gave evidence on the issue of safety. We bear in mind that Network Rail makes no commercial gain from the RISQS-only rule,

the fact that Mr Prosser, Mr Spence and Mr Cooke are responsible for the management of passenger and public safety on the railways, and that they clearly believe the RISQS-only rule is essential to the safety purposes of the Key Schemes. The Tribunal does not lightly reach a different conclusion.

233. The Tribunal does, however, take into account that the Network Rail witnesses' views as to the risks involved in multiple providers of supplier assurance schemes appear to have premised, at least in part, on the prospect of Network Rail being required to recognise numerous additional providers of supplier assurance.

234. Thus, Ms Scott's views as to confusion resulting from inconsistent audit results from different platforms was based an assumption of "*15 or 17*" organisations setting up their own platforms. Mr Spence said he had in mind a world of "*20*" authorised providers. Mr Blackley's evidence was that when calculating the costs of additional schemes:

> "So therefore I'm envisaging, when I did my calculations over the initial cost, that if we had multiple schemes, then a procurement practitioner would have to look at RISQS and then come out of RISQS and look at Achilles TransQ, come out of that and then look at scheme 3, scheme 4, scheme 5, if indeed we had multiple schemes."

235. The risks of confusion and other negative consequences apprehended by Network Rail might conceivably arise if there were numerous providers of supplier assurance to suppliers wishing to work on Network Rail's infrastructure. For the reasons set out at under Issue 3 above, however, the Tribunal considers that it is not realistic to anticipate that there will be numerous providers. The likelihood is that Achilles will be the only other provider and it is not, in our view, appropriate to assess the safety justification for the RISQS-only rule by reference to an unrealistic scenario. If in the future there were a realistic prospect of numerous providers of supplier assurance schemes entering the market, it is possible that a restriction on the number of providers who would be qualified under the Sentinel Scheme and OTPO Scheme could be objectively justified but that does not justify the current exclusion of all providers other than RISQS.

236. The Tribunal also considers that there was some foundation for the criticism made by Achilles of the evidence of Mr Spence in that he was not familiar with the actual operation of the RISQS scheme, either in terms of its functionality or in terms of how it is used within Network Rail, and was unaware that RISQS was not used as set out in Network Rail's Health and Safety Management System ("HSMS"). Mr Spence commented that the fact that RISQS did not work as set out in the HSMS was "*news to me*" and accepted that the rest of his statement was setting out general views as to the importance of assurance rather than "*specific knowledge of those standards or the specific ways in which auditors undertake their work*". General statements that multiple supplier assurance schemes would add some complexity, and therefore some level of risk, and that, in the hierarchy of health and safety principles, the elimination of risk is preferable to its mitigation are of little assistance in establishing the necessity of the RISQS-only rule. What matters are the specific, practical consequences of multiple scheme provision. If the risk of complexity can be averted by the taking of reasonable and proportionate measures, the safety purposes of the Key Schemes would not be compromised. The Tribunal also considers that there was some force in Achilles' observation that Professor Jack's evidence rested heavily on the opinions of Mr Spence and did not add significant substantive analysis to those opinions.

237. Thirdly, the Tribunal approaches the question of the safety implications of the RISQS-only rule on the basis that the appropriate framework for reference is not a free for all in which any provider of supplier assurance would be entitled to provide accreditation for the Key Schemes, regardless of their competence or the standard of their services. Network Rail would be entitled to require that other providers of supplier assurance worked to the RIS-2750 standard and any reasonable and proportionate substantive standards set by Network Rail and to a reasonable degree of compliance monitoring by Network Rail.

238. Fourthly, the existence of multiple providers of supplier assurance schemes in other safety-critical industries, including the Norwegian oil and gas market referred to by Ms Ferrier where Achilles' JQS service competes with the service offered by EPIM, a membership organisation representing operations on the Norwegian Continental Shelf, and the construction industry where there are a

number of supplier assurance providers including Constructionline which acts in competition with Achilles' BuildingConfidence scheme and other providers, indicates that the provision of supplier assurance schemes by multiple providers does not necessarily jeopardise safety. The RISAS scheme, operated by the RSSB, in which multiple independent bodies (RISABs) can be approved as audit assurance providers also suggests that it is possible for multiple providers of supplier assurance to operate satisfactorily in a safety-critical environment although we accept that RISAS is significantly different from RISQS in that that there are only around 30 suppliers assured by RISAS compared with over 4,000 suppliers assured by RISQS and RISAS is concerned with product assurance rather than the more complex area of business where are tiers of contractors.

239. Fifthly, as noted earlier in this judgment, the role of the RISQS scheme is to provide a basic level of information and management system assurance which is necessary to demonstrate that suppliers have requisite capabilities to do certain types of work on the rail infrastructure. The assurance undertaken is concerned with collecting data from suppliers on their management systems and ensuring this is applied in their business processes. Operational safety checking is undertaken outside the ambit of RISQS. Under the OTPO Scheme, Network Rail carries out its own audit which involves physical inspections including a maintenance depot visit and a live operational visit. Only after Network Rail has completed these checks can the operator apply for authorisation under the OTPO Scheme Rules.

240. Sixthly, we note that any other buyer of supplier assurance services for works on Network Rail managed infrastructure or other railway services would also have safety-related obligations under applicable legislation which would extend to supplier assurance. Consequently, it does not follow that Network Rail is the only party concerned with safety or that Network Rail should be the sole arbiter of the relevant standards when other buyers (or at least buyers who are not in the Network Rail supply chain) are involved. Achilles pointed to *dicta* in Case T-30/89 *Hilti AG v Commission* EU:T:1991:70 at [118] to [119] that it is primarily the role of public authorities, not dominant undertakings, to set and enforce safety standards.

241. Turning to the specific grounds put forward by Network Rail, we start with the need for a uniform and clear set of safety requirements.

242. The Tribunal accepts that the effectiveness of any supplier assurance scheme depends upon reliable and high-quality verification and that consistency of standards and clarity in the expression of those standards is integral to the effectiveness of the scheme. We are not, however, persuaded that the consistency or clarity of standards would be compromised by allowing more than one provider of supplier assurance audit services.

243. Consistency could, in our view, be achieved by requiring that any provider of supplier assurance is effectively monitored against the relevant auditing standards. These standards could include not only RIS-2750 referred to at paragraph 32 above but also standard ISO 17021, which is a standard published by the International Organization for Standardization governing the auditing of management systems. Compliance with this standard involves certification by an accreditation organisation and entitles an assessment body to recognition in all European Union member states, as Mr Prosser confirmed. It is the standard which Capita is required to meet under its contract with the RSSB.

244. There is no obvious reason why the number of providers should affect the consistency of the applicable standards. Network Rail did not, in our view, establish that allowing more than one provider of supplier assurance would compromise standards. As in the *OTOC* case, Network Rail could impose a monitoring and supervisory regime to ensure quality. Any differences in judgment would then all be at least above the relevant safety levels.

245. Similarly, we do not consider that clarity in the expression of standards would be compromised by allowing alternative providers of supplier assurance to operate or that this would lead to uncertainty in the interpretation of auditing standards. The witnesses did not give any relevant examples of a potential difference in interpretation which might arise in practice. Ambiguity and uncertainty can be avoided by ensuring that the relevant standards are clearly drafted in the first place, rather than by restricting the number of providers of supplier assurance.

246. The imposition of an appropriate auditing standard and effective monitoring would also obviate the risk of suppliers opting for the most lenient accreditation service (which may not in reality arise given that any viable accreditation service will have to be adopted by buyers as well as suppliers). The Tribunal does not accept that the need for additional monitoring inevitably gives rise to a materially increased risk to safety. We accept the evidence of Dr Cox that the risks would only increase if the additional supervisory mechanisms were not adequately resourced or well enough designed or operated. We note that a number of Network Rail's points of defence assumed (and related to) a scenario in which Network Rail had to accept a very much larger number of schemes than our counterfactual analysis assumes but even in that scenario the principles stated here would apply.

247. The Tribunal considers that the risk of confusion was overstated by Network Rail. It is not clear why the possibility of alternative providers of supplier assurance audit services should cause confusion on the part of suppliers. With regard to buyers, Network Rail (or other buyers) would be in a position to know whether a provider of supplier assurance was authorised by it. In the event of two different audit outcomes in relation to the same supplier (i.e. an audit pass from one provider and a subsequent fail from another), Network Rail (or another buyer) would be notified of the fail and could decide that a supplier which has failed an audit by one provider's service could not be accredited by another provider without first achieving a corrective pass in the service that had failed it.

248. The need for interoperability, the ability to monitor safety issues and to disseminate safety reports are related in that they all require the seamless transmission of information from the provider of supplier assurance to Network Rail and to other users. The IT platform is clearly a key component of a successful supplier assurance scheme. Achilles argued that interoperability between its IT platform and Network Rail would ensure that there was no diminution in the quality and reliability of information available within and via the RISQS scheme. It became clear however, particularly in the oral evidence (both in relation to certain projects within Achilles and to the development of APIs for the rail industry), that there are likely to be technical issues to

overcome in order to allow parallel IT systems to facilitate one workable overall system with the appropriate confidence in speed and accuracy of records for safety on the railway.

249. The Tribunal considers that, although there may well be technical issues to address in order for the IT platforms of other supplier assurance providers to be linked effectively to RISQS, it would be entirely possible to address these issues effectively without compromising safety. Similar issues of interoperability appear to be satisfactorily addressed in other sectors where there is sharing of data from multiple accrediting bodies.

250. The Tribunal accepts Achilles' evidence that interoperability could be achieved by the adoption of a common data standard, which could be defined by the RSSB or Network Rail, and by requiring data to be provided in a format complying with that standard. This is what happens in other sectors including health, oil and gas and education where data from multiple sources is aggregated. Data is transmitted by the use of APIs, which Achilles already uses to link data from different systems.

251. Network Rail could make it a condition of recognition of another supplier assurance service provider that its IT interfaces with RISQS's and/or that any information on the alternative scheme provider's database relating to verification would be available to Network Rail for free. Network Rail may require any supplier of assurance services other than RISQS to develop and prove through testing at its own expense the interfaces required to preserve the comprehensiveness and immediacy of the RISQS IT system.

252. The benefits of RISQS as a single forum and of Network Rail's representation on the RISQS Board do not in the Tribunal's view make the RISQS-only rule indispensable on safety grounds. A single forum could operate with representatives from different supplier assurance providers and there may be advantages to such an arrangement in terms of opening up the possibility of cross-comparisons, as submitted by Achilles. Network Rail could make known its requirements to other providers in the same way as it does to RISQS through its membership of the board.

253. The Tribunal does not consider that the investment incentives arising from a single supplier arrangement are a compelling justification for the exclusivity of the RISQS-only rule. Contrary to Network Rail's case, it is far from clear that suppliers would be more incentivised to maintain high standards if there were only one provider of supplier assurance services in the market than if there were more than one. On the other hand, competing providers of supplier assurance services might well be incentivised to improve their services with a beneficial effect on safety, as argued by Achilles.

254. In summary, for the reasons set out above, the Tribunal is not persuaded that the RISQS-only rule is objectively justified as being ancillary to the safety purposes of the Key Schemes. Network Rail has not established that those purposes would be impossible to achieve without the RISQS-only rule. The Tribunal considers that those safety purposes could be achieved by alternative providers of supplier assurance services working to the same standards as RISQS and subject to effective monitoring, with their IT platforms linked to RISQS's and/or their data freely accessible to Network Rail and with the RISQS forum open to participation by other providers of supplier assurance services.

255. The Tribunal appreciates that if a change to Network Rail's HSMS so as to permit multiple assurance providers was considered to be a significant change it would have to be reviewed by the ORR. The Tribunal expects that this review process would be handled appropriately.

(7) Issue 5: Is the RISQS-only rule exempted from the Chapter I prohibition pursuant to section 9 of the 1998 Act?

256. A restriction will benefit from exemption under section 9 of the 1998 Act if four cumulative conditions are met:

(1) The agreement must contribute to improving the production or distribution of goods or contribute to promoting technical or economic progress;

(2) Consumers must receive a fair share of the resulting benefits;

(3) The restrictions must be indispensable to the attainment of these objectives; and

(4) The agreement must not afford the parties the possibility of eliminating competition in respect of a substantial part of the products in question.

(a) The Parties' Contentions

257. Network Rail's case was that, if, contrary to its primary case, the RISQS-only rule involves an agreement giving rise to an appreciable restriction of competition, the RISQS-only rule in any event satisfies the criteria for an exemption set forth in section 9 of the 1998 Act because the benefits and efficiencies arising from the Network Rail Key Schemes (into which the RISQS-only rule is integrated) outweigh any restriction of competition.

258. In summary, Network Rail submitted as follows:

(1) The Network Rail Key Schemes and the RISQS-only rule contribute to improving the production or distribution of goods and/or to promoting technical or economic progress, giving rise, in particular, to material health and safety benefits.

(2) The Network Rail Key Schemes allow consumers a fair share of the resulting benefits, including safety and efficiency, and costs savings passed on by suppliers.

(3) The Key Schemes and RISQS-only rule are indispensable to the attainment of these health and safety benefits and economic efficiencies.

(4) The RISQS-only rule does not eliminate competition in respect of a substantial part of the products in question. There are opportunities available to Achilles in the GB rail industry outside of Network Rail. Moreover, Achilles chose to withdraw from the tender of supplier assurance services for RISQS which ensures a competitive marketplace

and avoids competition being eliminated. It will have the opportunity of re-tendering in future for the RISQS IT and audit services.

(5) Accordingly, the RISQS-only rule is not caught by the Chapter I prohibition.

259. Achilles submits, in summary, as follows:

(1) Exemption requires that the benefits arise from the specific element of the agreement which restricts competition; it is not sufficient that other elements of the agreement or of the undertakings' business produce such benefits. See Case T-111/08 *MasterCard Inc and others v Commission* EU:T:2012:260 ("*MasterCard (General Court)*") at [203] to [207], upheld in *MasterCard (Court of Justice)* at [232].

(2) Exemption will not be granted if the benefits said to arise from the restriction do not outweigh its anti-competitive effect. See Case 45/85 *Verband der Sachversicherer eV v Commission* EU:C:1987:34 at [61].

(3) Network Rail has failed to discharge the burden of proof in respect of either the putative safety justification or the costs justification for the RISQS-only rule.

(4) Network Rail has exaggerated the extra costs which would be incurred if it were required to recognise multiple supplier assurance service providers.

(5) The criterion of indispensability requires that there is no other economically practicable and less restrictive means of achieving the claimed efficiencies. See the Article 101(3) Guidelines at [75]. Network Rail has failed to demonstrate that there is no less restrictive means of producing any cost efficiency.

(6) The effect of the RISQS-only rule is to eliminate competition in a significant segment of the market.

(7) Network Rail has failed to demonstrate that consumers benefit from its restrictive conduct.

(b) The Tribunal's Analysis

(i) Condition 1

260. In order to satisfy the first condition, the relevant benefits must be causally linked to the relevant restriction, here the RISQS-only rule. It is not sufficient to identify benefits which result from supplier assurance or from the Key Schemes generally. Furthermore, the causal link between the relevant benefits must be established by facts and evidence supported by empirical analysis and data and not just economic theory. See the Article 101(3) Guidelines at [50] to [57].

261. With regard to safety, the Tribunal accepts that the operation of the RISQS-only rule has ensured that supplier assurance has been carried out to a uniform standard and that it has permitted supplier assurance to develop by, for example, enabling the RISQS Board to take account of the experience and feedback of a wide range of buyers and suppliers. The Tribunal does not accept, however, for the reasons set out under Issue 4 above, that the safety benefits attributed to the RISQS-only rule by Network Rail are causally linked to the restriction as opposed to being the consequence of an effective and efficient regime of supplier assurance.

262. With regard to economic efficiencies, the safety experts agreed that there would need to be significant oversight by Network Rail in a multiple scheme environment.

263. Network Rail's case was that, at the lower end of its estimates, being required to 'use' one additional supplier assurance scheme would cost Network Rail several hundreds of thousands of pounds per year:

(1) At the lower end of Network Rail's estimates, Mr Blackley's evidence was that a requirement to use one additional supplier assurance scheme

would cost Network Rail £456,888 in the first year and £429,488 per year thereafter. At the upper end of Network Rail's estimates, one additional supplier assurance scheme would cost Network Rail £656,888 in the first year and £629,488 per year thereafter.

(2) At the lower end of Network Rail's estimates, being required to use two additional supplier assurance schemes would cost Network Rail £753,776 in the first year and £698,976 per year thereafter. At the upper end of Network Rail's estimates, two additional supplier assurance schemes would cost Network Rail £1,113,776 for the first year and £1,058,976 per year thereafter.

264. Achilles challenged these estimates as excessive but recognised that there would be some need for additional costs for the monitoring of audit quality by alternative providers of supplier assurance services (consistent with the view of both parties' safety experts), for cooperation between schemes to achieve desired safety outcomes and for consequential IT processes. Achilles accepted that the one-off costs of mapping any proprietary codes to the RICCL coding structure used by the RSSB and RISQS would be borne by the relevant scheme and not by Network Rail.

265. We agree with Achilles that Network Rail's estimates were excessive for the following reasons.

266. First, a major element of the costs increases claimed by Network Rail consists of additional costs of checking multiple supplier assurance schemes at the "expression of interest" stage of its procurements. These were estimated by Mr Blackley to be an extra £150,000 to £300,000 annually per additional scheme. There were also additional staff training costs estimated at £44,000 per scheme in year 1, falling to £22,000 per scheme annually thereafter, the payment of registration fees for multiple schemes estimated at £50,000 per additional scheme annually, and the costs of ongoing reconciliation of category supplier lists.

267. These estimated additional costs presupposed that Network Rail would have to use all available pre-qualification schemes in parallel to RISQS for procurement purposes. A requirement that Network Rail recognises other supplier assurance schemes for the purposes of the Sentinel Scheme and OTPO Scheme would not, however, entail an obligation on Network Rail to use all available supplier assurance schemes for its procurements. The Tribunal accepts that no such requirement exists and that Network Rail would not be in breach of the Utilities Contracts Regulations 2016 (S.I. No. 274 of 2016), which permits the use of a pre-qualification system, such as RISQS, as long as its use is appropriately notified to potential suppliers, for example through a notice in the supplement to the OJEU. As a result, the very significant incremental costs for managing the procurement process at the "expression of interest" stage referenced would fall away.

268. Secondly, the incremental costs of coordination activities with additional service providers are, in the Tribunal's view, likely to be marginal (in the thousands rather than tens of thousands of pounds) and appear unlikely to weigh heavily against even a conservative estimate of efficiency benefits which would arise out of competition. These additional costs would comprise the largely one-off task of mapping any proprietary product codes to the RICCL coding structure used by the RSSB and RISQS, which as noted above, Achilles accepted would fall on the other scheme, not Network Rail.

269. Thirdly, we accept Achilles' submission that Network Rail's estimate of the cost that it would need to incur in order to assure itself of the quality of additional supplier assurance service providers entering the market is excessive and out of proportion to any comparable activity that Network Rail undertakes currently in relation to RISQS.

270. Mr Blackley estimated that the costs to Network Rail of assuring itself of the quality of additional assurance schemes would be in the region of £200,000 to £250,000 annually for a second scheme to enter the market, plus an additional £40,000 to £50,000 for each further scheme. This estimate was based on three additional full-time employees plus some external support and justified by reference to five employees currently undertaking this task at the RSSB.

Network Rail's evidence was, however, that it currently does not audit or otherwise proactively assure the performance of RISQS, other than through involvement in its governance at board level and an implicit reliance on contractual requirements imposed by the RSSB. The full-time supervision of Capita by the RSSB is not an appropriate benchmark for these costs. Those are internal quality assurance activities, which every scheme will need to undertake itself, and which in the case of the RISQS scheme may be amplified by the fact that the RSSB has chosen to outsource the IT and audit inputs.

271. Mr Cooke, who had day-to-day experience of the Key Scheme audits, explained that the rate at which he receives audit failure notices gave him the "*assurance the audits are being completed diligently and effectively*" and that he would know to investigate if this rate either rose or fell meaningfully. Some additional resource may well be required to achieve a similar level of supervision for multiple schemes, but in the Tribunal's view it is unlikely to be on the scale of multiple employees.

272. With regard to the potential additional costs for suppliers, there will be some duplication of costs arising out of the need, in practice, for at least some suppliers to be registered with multiple schemes. Network Rail did not put forward a specific figure but submitted that the use of a single market scheme gives rise to economies of scale. There would be some scope for mutual recognition of supplier assurance schemes as we understand occurs with the SSIP forum in the construction industry.

273. We note that Network Rail's case makes no allowance for the potential efficiencies which could be achieved from competition in the market, from the differentiation of service offerings and, in the case of Achilles, from realising synergies between assurance needs in different sectors which is what Achilles aims to achieve through its TransQ scheme. We consider that integration across sectors could deliver potential benefits to buyers and to suppliers of the GB rail industry by allowing some buyers to manage their supply chains across sectors and allowing some suppliers to avoid duplication. This is relevant, because some suppliers may well be active across sectors and may have a relationship with a buyer in multiple contexts, for example as providers of civil engineering

services in the construction industry, the rail industry and to utilities. All these suppliers and buyers are currently subject to different assurance requirements on separate pre-qualification systems.

274. We conclude that, if Network Rail is required to recognise alternative providers of supplier assurance services, some additional costs of oversight will be required and that these would not be limited to occasional meeting attendance as contended by Achilles. We accept Network Rail's argument that it would be appropriate for Network Rail to be involved in some monitoring rather than rely on a system of mutual recognition between supplier assurance audit providers as advocated by Achilles. Network Rail currently relies on internal RSSB oversight for monitoring of quality within the RISQS processes. Our assessment is that Network Rail will need to employ at least one full-time employee for the purposes of monitoring and coordinating safety processes. That suggests an upper limit for incremental HR costs of £65,000 to £85,000 (based on a *pro rata* adjustment to the estimate by Network Rail for a team of three employees), together with some additional technology costs which would not be significant.

275. In our view, these incremental costs are insufficient to outweigh the benefits of competition, either in terms of price or other benefits. Although the contestable market may only have a total estimated value of £1.8 million and the scope for price reductions is limited, the incremental costs are such that it would only take a slight reduction in margin, which would probably result from competition, to outweigh them. Moreover, any cost benefits are outweighed by the potential non-price benefits of competition such as the potential for offering supplier assurance crossing between different industry sectors.

(ii) <u>The Other Conditions</u>

276. As Network Rail has failed to satisfy the first condition under section 9 of the 1998 Act, it is not strictly necessary to consider the remaining conditions. However for completeness we also consider that Network Rail has failed to satisfy the third and fourth conditions. In the interests of brevity we do not find it necessary to consider Condition 2 (fair share for consumers).

277. If we had found that the RISQS-only rule gave rise to safety benefits, it would have been necessary to consider whether Condition 3 (indispensability) was satisfied in relation to those benefits. Paragraph 75 of the Article 101(3) Guidelines states that Condition 3 "*requires that the efficiencies be specific to the agreement in question in the sense that there are no other economically practicable and less restrictive means of achieving the efficiencies*".

278. In the *OTOC* case considered above the Court of Justice's finding that OTOC's requirement for institutional training was not objectively necessary (because its purpose could be achieved by less restrictive means) was determinative of the issue of indispensability. Similarly in the present case, it necessarily follows from our finding that the RISQS-only rule is not objectively justified on safety grounds because its safety purposes can be achieved by other less restrictive means, such that the RISQS-only rule is not indispensable.

279. If it had been necessary to consider Condition 4 (no elimination of competition), we would have found that the RISQS-only rule in the Sentinel Scheme and OTPO Scheme affords Network Rail the possibility of eliminating competition in respect of a substantial part of the market for supplier assurance services. Namely, that part of the market consisting of buyers and suppliers needing access to Network Rail's managed infrastructure pursuant to those Key Schemes. The effect of the tender for the RISQS services is considered later in this judgment in the context of Achilles' Chapter II claim.

280. It follows that the RISQS-only rule is not exempt from the Chapter I prohibition.

(8) Conclusion on Chapter I

281. In summary, the Tribunal concludes that, by including the RISQS-only rule in the Sentinel Scheme and the OTPO Scheme, Network Rail is entering into agreements between undertakings which have as their effect the prevention, restriction or distortion of competition within the UK.

E. CHAPTER II

(1) Legal Framework

282. Section 18 of the 1998 Act provides as follows:

> "(1) … any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market is prohibited if it may affect trade within the United Kingdom.
>
> (2) Conduct may, in particular, constitute such an abuse if it consists in –
>
> (a) directly, or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
>
> (b) limiting production, markets or technical development to the prejudice of consumers;
>
> …
>
> (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts.
>
> (3) In this section –
>
> "dominant position" means a dominant position within the United Kingdom; and
>
> "the United Kingdom" means the United Kingdom or any part of it."

283. This trial has been ordered to proceed on the basis of an assumption as to Network Rail's dominance on the market for the operation and provision of access to national rail infrastructure in GB. See Order of the Chairman dated 22 October 2018.

(2) The Issues

284. The main issues between the parties under Chapter II were as follows:

(1) Is Network Rail's conduct in mandating the RISQS-only rule in the Sentinel Scheme and OTPO Scheme *prima facie* an abuse of its dominant position?

(2) Is Network Rail's conduct objectively justified?

285. There is a substantial overlap between the parties' respective cases under Chapter I and Chapter II and our conclusions under Chapter II largely flow from our conclusions in respect of Chapter I.

(3) Issue 1: Is Network Rail's conduct in mandating the RISQS-only rule in the Sentinel Scheme and OTPO Scheme *prima facie* an abuse of its dominant position?

(a) The Parties' Contentions

286. Achilles submitted, in summary, as follows:

(1) Network Rail has abused its dominant position by maintaining as a part of the Sentinel Scheme and OTPO Scheme terms the RISQS-only rule which confers exclusivity on RISQS and by its refusal in the letter of 14 May 2018 to recognise supplier assurance schemes provided by any other undertaking as equivalent for those purposes, apparently under any circumstances;

(2) Given the importance for suppliers in the GB rail industry of the Key Schemes operated by Network Rail, the consequence of RISQS having exclusive status under those Key Schemes is that all other providers of supplier assurance schemes which would otherwise compete with RISQS are *de facto* excluded from the rail industry;

(3) Network Rail's conduct cannot be regarded as commercially normal, acceptable or justified. In refusing recognition, Network Rail has plainly acted with an intent to exclude competition against RISQS.

287. Network Rail submitted, in summary, as follows:

(1) It is common practice for buyers across various sectors seeking supplier assurance services to use a single provider of supplier assurance with their suppliers (and therefore to specify to their suppliers that they use a particular supplier assurance provider), while infrastructure owners in

rail systems in other countries equally mandate the use of a single in-house supplier assurance scheme.

(2) The purpose of the Chapter II prohibition is to prevent distortion of competition – in particular to safeguard the interests of consumers – and not to protect the position of particular competitors. The RISQS-only rule does not lead to any consumer detriment.

(3) Network Rail's conduct does not eliminate effective competition. The RSSB tendered the supply of supplier assurance services for RISQS and will do so in future. The tender ensures a competitive marketplace and avoids competition being eliminated. Although Achilles chose to withdraw from the tender process for RISQS, it will have the opportunity of re-tendering in future.

(4) Outside the specific circumstance where the dominant company is an essential trading party, there can be no abuse where the dominant company derives no competitive advantage from the alleged abusive conduct. Network Rail is not an essential trading partner of Achilles, is not active on the supplier assurance market, and derives no competitive advantage from the RISQS-only rule.

(5) There can be no abuse where a regulator acting in the public interest and which is not itself active, nor with any financial economic interest in, the downstream market which it is regulating imposes a rule that restricts the freedom of economic players in that downstream market.

(b) The Tribunal's Analysis

288. In Case 85/76 *Hoffmann-La Roche & Co AG v Commission* EU:C:1979:36 at [91], the Court of Justice defined 'abuse' as follows:

> "The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in

> products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition."

(i) Anti-competitive Effects

289. This definition requires the Tribunal to focus on the anti-competitive effects of the conduct complained of.

290. This is a 'related market' case. For the purposes of this trial, Network Rail is assumed to be dominant in the market for the operation and provision of access to national rail infrastructure. The anti-competitive effects complained of are felt in the market for the provision of supplier assurance services in the GB rail industry.

291. The general principles relevant to a finding of abuse in 'related market' cases were summarised by the High Court in *Streetmap.EU Limited v Google Inc & Ors* [2016] EWHC 253 (Ch) ("*Streetmap*"). In order to constitute an abuse, the conduct complained of must lead to anti-competitive foreclosure on the related market and the effect on the related market must be more than *de minimis* (i.e. it is reasonably likely to have a serious or appreciable effect in the related market), at least in cases where the conduct is pro-competitive in respect of the dominated market. See *Streetmap* at [96] to [98].

292. Under Issue 3 of the Tribunal's Chapter I analysis we concluded that the RISQS-only rule does cause significant foreclosure of demand in a significant segment of the market for supplier assurance services in the GB railway sector and that the RISQS-only rule has an appreciable (i.e. more than *de minimis*) effect on competition in the market for supplier assurances service in that sector.

(ii) The Tender Exercise

293. Network Rail nevertheless relied on the tender process conducted by the RSSB as showing that competition is maintained in respect of supplier assurance IT and audit services in the GB rail industry and that this was inconsistent with Achilles' case on abuse.

294. In response, Achilles pointed out that the RSSB did not tender for the provision of an end-to-end pre-qualification service, but for the provision of certain inputs and that the RSSB Board retains control over pricing for the RISQS scheme. Whilst the RSSB as a whole acts as a not-for-profit body, its constitutional objective is to promote the interests of its members, a group largely distinct from RISQS users, and there is no formal requirement on the RSSB that Network Rail could point to which would require the RSSB to operate RISQS as a not-for-profit activity.

295. In response to Mr Holt's suggestion that tendering for the IT and audit inputs to RISQS was particularly effective because more firms can bid to provide IT and audit inputs than an end-to-end solution, Achilles noted that in fact only one bidder was left for the provision of audit services following Achilles' withdrawal from the bidding process and that two bidders submitted bids for both lots, which would suggest that there was no advantage in the separate tenders in terms of numbers of potential bidders.

296. The Tribunal agrees with Achilles' contention that opening a market up to competition only periodically in the form of a tender limits the dynamic evolution of the market and risks locking in a sub-optimal outcome as a result of, for example, a bidder under-bidding and having to compromise on delivery quality or not being subject to sufficient competition in the tendering process. There was no evidence that Network Rail or the RSSB ever considered these in opting for the tender of the RISQS inputs.

297. In our view, whilst Achilles remains able at some future date to compete to replace the RISQS scheme or to replace the suppliers of the outsourced components of the RISQS scheme (should Network Rail consider moving away from the RISQS scheme supplied by the RSSB or when the RSSB re-tenders the IT and audit components of the RISQS scheme), the RISQS-only rule has the effect, in the interim, of weakening competition in the market. The tender exercise that was carried out, and the possibility of a further tender exercise for the market in the future, do not affect, justify or compensate for the elimination of competition in the meantime.

(iii) Normal Conditions of Competition

298. In support of its case that its conduct in mandating the RISQS-only rule in the Sentinel Scheme and OTPO Scheme reflects and is consistent with normal conditions of competition, Network Rail referred to examples of single providers of supplier assurance in the rail industry in Europe and other safety-critical industries.

299. Professor Jack said in his expert report that he had found it relevant to benchmark Network Rail's practices with those adopted by rail infrastructure operators in other European countries. Namely, SNCF and Deutsche Bahn, both of which operate an in-house supplier registration facility, which he had found out about on their websites. Professor Jack also referred to (i) the Gas Safe Register which is a register recording the qualifications of UK gas engineers and to (ii) the First Point Assessment Limited ("FPAL") scheme which is a registration scheme, currently operated by Achilles, used by buyers in the UK offshore oil and gas sector. He said that the adoption of single schemes in these different contexts showed that the adoption of a single scheme is considered best practice to mitigate against safety risks.

300. The Tribunal did not find these examples to be of assistance in establishing that the RISQS-only rule is consistent with normal conditions of competition. None of the arrangements was comparable with the mandating of RISQS in the Sentinel Scheme and OTPO Scheme. SNCF's and Deutsche Bahn's use of in-house facilities did not involve any restriction of competition. The Gas Safe Register is a register that accepts evidence of accreditation from multiple sources. FPAL is part of a voluntary code of practice and is not mandated.

301. We were not shown an example of a situation in which an infrastructure owner mandates the use of a single provider of supplier assurance by other entities as a condition of access to the infrastructure. Network Rail referred to the Utilities Verification Database scheme ("UVDS") operated by Achilles and used by National Grid and other buyers in the utilities sector when compiling lists of potential suppliers. UVDS is not, however, mandated by anyone. It is freely chosen by buyers and suppliers. Achilles also showed us examples of operators

in safety-critical industries, such as construction and the Norwegian oil and gas industries where there is more than one supplier assurance service. The Tribunal would be reluctant to hold that it is consistent with recourse to normal methods of competition under Chapter II for a dominant infrastructure operator to foreclose in-market competition in ancillary service markets in the absence at least of fair competition for the market (which the tender process here did not deliver since it was only for two of the component services).

(iv) No Commercial Benefit

302. Network Rail relied on the decision of the General Court in Case T-155/04 *SELEX Sistemi Integrati SpA v Commission* EU:T:2006:387 ("*SELEX*") in support of the proposition that, outside the specific circumstances where the dominant company is an essential trading party of the party alleging abuse, there can be no abuse where the dominant company derives no competitive advantage from the alleged abusive conduct. The General Court held at [108] as follows:

> "It should be stated that in the present case the applicant has not shown that Eurocontrol's conduct, in the context of its activity of advising national administrations, satisfied these criteria. In particular, it has not indicated the methods 'different from those governing normal competition in products or services on the basis of the transactions of commercial operators' to which Eurocontrol had recourse. Since Eurocontrol is not carrying out any activity on the market for supply of ATM equipment and it does not have any financial or economic interest in that market, it seems that there can be no relationship of competition between it and the applicant or any other undertaking active in the sector. In particular, it is not apparent that Eurocontrol could have derived any competitive advantage from the fact of being able to influence, by dint of its advisory services offered to the national administrations, the administrations' choice as to their suppliers of ATM equipment in favour of certain undertakings."

303. *SELEX* was considered in *Sel-Imperial Limited v The British Standards Institution* [2010] EWHC 854 (Ch) ("*Sel-Imperial*") which concerned the British Standards Institution, a non-profit organisation established by Royal Charter, which certifies through its Kitemark scheme compliance with its standards but other than charging fees gains no commercial or economic benefit by doing so. The defendant in *Sel-Imperial* submitted on its strike out application that, where the dominance and abuse are in one market and the effect is felt in another market, the alleged abuser must at least have some economic interest in the outcome for there to be an abuse within Article 102 TFEU.

Although Roth J considered that *SELEX* provided some support for that position, he considered at [67] that the law was not sufficiently clear on this point and that, if the point remained in issue at trial, it might be necessary to make a reference to the Court of Justice of the European Union.

304. In Case T-128/98 *Aéroports de Paris v Commission* EU:T:2000:290 (*Aéroports de Paris*) the General Court rejected the argument advanced by the claimant, as the operator of Orly Airport, that its conduct in charging different fees to different ground-handling concessionaires was not abusive because it had no presence in the market for ground handling services and no interest in distorting competition on that market. The General Court held at [173] as follows:

> "In that regard, it should be recalled that the concept of abuse is an objective concept and implies no intention to cause harm. Accordingly, the fact that ADP has no interest in distorting competition on a market on which it is not present, and indeed that it endeavoured to maintain competition, even if proved, is in any event irrelevant. It is not the arrival on the market in groundhandling services of another supplier that is in issue, but the fact that at the time of the adoption of the contested decision, the conditions applicable to the various suppliers of those services were considered by the Commission to be objectively discriminatory."

305. In *Arriva the Shires Limited v London Luton Airport Operations Limited* [2014] EWHC 64 (Ch) ("*Arriva the Shires*") Rose J (as she then was) rejected at [99] the argument that it was necessary for there to be some commercial benefit to be gained by the dominant undertaking from its conduct before that conduct can be condemned as abusive:

> "In my judgment, the ruling of the General Court in *Aéroports de Paris* shows that it is not necessary for there to be some commercial benefit to be gained by the dominant undertaking from its conduct before that conduct can be condemned as abusive. Mr Ward sought to distinguish that case from the instant dispute on the basis that *ADP* was a foreclosure case based on discriminatory pricing case rather than on a refusal to supply. The Court did not draw that distinction but regarded the proposition that presence on the downstream market was not required as flowing from the well-established and generally applicable principle that no intention to cause harm need be shown in order for conduct to be abusive. The complete absence of any commercial gain on the part of the dominant undertaking may well be highly relevant in a particular case, for example on the issue of objective justification. If a dominant undertaking can show that it has nothing to gain from refusing to supply a customer, that would support its contention that, as a matter of fact, the refusal was based on an entirely legitimate objective justification – why else would it forego the sale? I do not accept, however, that as a matter of law, a foreclosure of the downstream market distorting competition among competitors on that market should be an abuse only if it generates an economic

> gain on the part of the dominant undertaking. That is inconsistent with the case law which emphasises the objective nature of abuses and which establishes that motivation and intention are generally not relevant to the question of infringement (otherwise than in some clearly established instances such as predatory pricing)."

306. In the Tribunal's view, Network Rail's argument that it is necessary for there to be some commercial benefit to be gained by the dominant undertaking from its conduct before that conduct can be condemned is inconsistent with the law as explained by the General Court in *Aéroports de Paris* and the High Court in *Arriva the Shires*. The case law does not support the distinction, contended for by Network Rail, depending on whether the dominant company is, or is not, an essential trading partner of the party alleging abuse.

307. Network Rail also relied on the case of *Speed Medical Examination Services Limited v Secretary of State for Justice* [2015] EWHC 3585 (Admin) ("*Speed Medical*") in support of the proposition that there can be no abuse where a regulator acting in the public interest imposes a rule that restricts the freedom of economic players in that downstream market which it regulates. This was a judicial review case in which the claimant challenged the legality of part of the Government's reforms to the process for handling soft tissue whiplash claims. The reforms included a requirement for personal injury solicitors to identify and instruct independent, accredited medical experts for the provision of initial medical reports via an online portal, which was administered by MedCo Registration Solutions ("MedCo"). The claimant contended that the way in which MedCo administered the system was an abuse of a dominant position. That argument was rejected by Cranston J at [68] on the ground that MedCo was a regulator, acting in the public interest, implementing a policy of the Secretary of State and acting in a role given to it under the UK's Civil Procedure Rules.

308. In the Tribunal's view, the position of MedCo was materially different to that of Network Rail. The RISQS-only rule is not an implementation of government policy and, in mandating the RISQS-only rule, Network Rail, unlike MedCo, is not complying with a legal requirement recognised under Schedule 3 to the 1998 Act (Schedule 3 provides that the Chapter II prohibition does not apply to a conduct engaged in in order to comply with a requirement imposed by law).

Speed Medical is distinguishable from the present case and does not assist Network Rail.

(4) Issue 2: Is Network Rail's conduct objectively justified?

309. Network Rail argued that, even if the RISQS-only rule was considered to amount to a potential abuse of dominance, it is objectively justified on safety, efficiency and costs grounds. This was disputed by Achilles. The parties' arguments mirrored the arguments deployed in relation to objective justification and exemption in respect of Chapter I.

310. Conduct that is *prima facie* abusive can be justified as not amounting to an abuse if it is objectively justified. Since this is not explicit on the face of Article 102 TFEU (or the Chapter II prohibition under the 1998 Act) there is some debate in the authorities of whether this requires a two-stage analysis or whether the issue must be considered in the round in a single analysis. Mann J at [180] in *Purple Parking & Anor v Heathrow Airport Limited* [2011] EWHC 987 (Ch) ("*Purple Parking*") adopted a two-stage analysis on the basis that this was apparently required by the authorities. The burden of proving objective justification is on Network Rail as the dominant undertaking (see *Microsoft* at [688]).

311. For the defence of objective justification to succeed, the dominant undertaking must show that the exclusionary effect is counter-balanced or outweighed by advantages that benefit consumers and that the conduct is proportionate. In Case C-209/10 *Post Danmark A/S v Konkurrencerådet* EU:C:2012:172, the Court of Justice said at [42] said that the conduct must be "*necessary for the achievement of those gains in efficiency and that it does not eliminate effective competition, by removing all or most existing sources of actual or potential competition*" (cited by Roth J at [144] of *Streetmap*).

312. In terms of proportionality, the starting position may be that there must be no less anti-competitive alternatives to the conduct that are capable of producing the same efficiencies (see the Article 102 Guidance at [30]). However, as Roth J said in *Streetmap* at [149]:

> "… proportionality does not require adoption of an alternative that is much less efficient in terms of greatly increased cost or which imposes and unreasonable burden (at the very least in a case where there is no suggestion that the conduct impugned was likely to *eliminate* competition)."

313. We have dismissed Network Rail's arguments in support of objective justification under Chapter I on the basis that Network Rail failed to establish that the safety purposes of RISQS-only rule could not be met by less restrictive requirements and failed to establish that the RISQS-only rule generated cost efficiencies of a scale to offset the loss of competition resulting from the rule. We dismiss Network Rail's arguments in support of objective justification under Chapter II on the same grounds.

(5) Conclusion on Chapter II

314. On the assumption that Network Rail has a dominant position in the market for the operation and provision of access to national rail infrastructure in GB, its conduct in mandating the use of RISQS in the Sentinel Scheme and OTPO Scheme is an abuse of its dominant position.

F. OVERALL CONCLUSION

315. The central issue raised in this case is whether a restriction on competition in a safety-critical industry is justified on health and safety grounds. Our conclusion that the RISQS-only rule was not justified on this basis should not be taken as an indication that the Tribunal regards the protection of competition as more important than the protection of health and safety. The Tribunal recognises that health and safety is a legitimate purpose capable of justifying conduct which restricts competition. In order to be justified, however, the restriction must be shown to be indispensable to the achievement of the health and safety purpose. On the facts of this case, Network Rail failed to establish that the exclusivity of RISQS mandated in the Sentinel Scheme and OTPO Scheme was indispensable to the health and safety purposes of those Key Schemes.

316. For these reasons, we unanimously allow Achilles' claim that the requirement in the Sentinel Scheme and OTPO Scheme that suppliers and persons seeking access to Network Rail's managed infrastructure must obtain supplier assurance

only through RISQS and not through alternative schemes infringes the Chapter I and Chapter II prohibitions. We will hear further submissions from the parties as to the form of order to be made in the light of this judgment.

Andrew Lenon Q.C. Michael Cutting Jane Burgess
Chairman

Charles Dhanowa O.B.E., Q.C. (*Hon*) Date: 19 July 2019
Registrar