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6 **IN THE COMPETITION**

Case No. : 1298/5/7/18

7 APPEAL TRIBUNAL

8 Victoria House

9 Bloomsbury Place

10 London WC1A 2EB

11 20 February 2019

12 Before:

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

14 (Sitting as a Tribunal in England and Wales)

15 **BETWEEN:**

16 **Achilles Information Limited**

17 **v**

18 **Network Rail Infrastructure Limited**

19 \_\_\_\_\_  
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26 \_\_\_\_\_  
27 **HEARING - Day 1**

28

**APPEARANCES**

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

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

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1 Wednesday, 20 February 2019

2 (10.30 am)

3 MR. WOOLFE: Good morning, sir. I appear with Mr. Kuppen  
4 for the claimant, Achilles Information Limited, and my  
5 learned friends Mr. Flynn QC and Mr. Went appear for  
6 the defendant, Network Rail Infrastructure Limited.

7 Housekeeping

8 MR WOOLFE: Before going to my opening, there were some  
9 matters of housekeeping that I was going to raise, but  
10 before that, is there anything that the Tribunal has on  
11 its mind that we need to address at the outset?

12 THE CHAIRMAN: We have one housekeeping matter. We might as  
13 well deal with that now. It concerns the final day,  
14 Friday, 1 March. The Tribunal can't sit until midday,  
15 and so what we were proposing was to start at midday and  
16 to carry on with a half-an-hour lunch-break until 5.30,  
17 which would give the equivalent hearing time.

18 We were also going to suggest that the parties  
19 should supply the Tribunal with written submissions,  
20 with their written closings, by 9 o'clock on that day,  
21 if that's possible.

22 MR. WOOLFE: From our perspective, that should be absolutely  
23 fine.

24 THE CHAIRMAN: It may be that, having supplied the written  
25 closings, the oral hearing can be somewhat shorter so we

1           won't need to sit late, but, anyway, we can deal with  
2           that nearer the time.

3       MR. WOOLFE: That sounds fine from my point of view. My  
4           learned friend may have some ...

5       MR. FLYNN: That's fine.

6       MR. WOOLFE: First of all, to deal with the bundles, I do  
7           apologise for the sheer volume of them. Unfortunately  
8           due to the expedited nature of these proceedings, there  
9           hasn't been time for the parties to be as selective as  
10          they would otherwise have been and there will be a lot  
11          of material in volume H in particular which you were not  
12          taken to -- and I can only apologise for it --  
13          cluttering the room.

14                Can I just run through what you should have in order  
15                to make sure that we're all working from the same set.  
16                Volume A is pleadings, skeletons and orders; volume B is  
17                the claimant witness statement, including reply  
18                statements; and there are two volumes, C1 and C2, which  
19                are the exhibits to those statements; then D,  
20                conveniently, is the defendant's witness statements; and  
21                volumes E1 to E5 are the exhibits to those statements;  
22                volume F will be quite important. That is expert  
23                reports, including the joint statements of the experts  
24                and two supplemental notes as well.

25                Can I just perhaps check -- if I ask you to take up

1 volume F -- to check that those two supplemental notes  
2 have found their way in. They should be at tabs 7 and 8  
3 of volume F, the supplemental note from Mr. Parker, and  
4 one from ... (Pause)

5 THE CHAIRMAN: Yes, that's all fine.

6 MR. WOOLFE: Just to record that following -- at the time of  
7 the joint statement, as you might recall, there was some  
8 correspondence with the Tribunal because the claimant's  
9 expert economist, Mr. Parker, wanted to supplement his  
10 answers a little bit in the joint statement, so  
11 therefore he wanted to put in the supplemental note you  
12 will find at tab 7 and eventually, following some  
13 correspondence, it was agreed that that was fine,  
14 subject to the defendant's expert putting in a note as  
15 well, which is at tab 8, which I think is now in and  
16 agreed.

17 Then volume G -- G1 to G4. I'm just going to pause  
18 briefly here because this is a fairly important set of  
19 documents. These are essentially the core scheme  
20 documents in the case. G1 contains various Network Rail  
21 standards by and large, with, at the end, two rail  
22 industry standards published by the RSSB. I will be  
23 taking you through these in some more detail shortly.

24 G2 contains a set of documents relating to RISQS,  
25 the scheme that's run by the RSSB, the audit protocols

1 in relation to that.

2 G3 contains some documents relating to rail  
3 accidents. That's the Cullen Report into  
4 the Ladbroke Grove accident and an RSSB Inquiry report  
5 into the Tebay, which is important for the evidence of  
6 Mr. Spence and Professor Jack.

7 Then G4 I think importantly contains  
8 the Network Rail's health and safety management system.  
9 So there will be quite a lot of reference to those four  
10 volumes.

11 Then H is the long run of chronological documents.

12 I is the confidential -- a small number of,  
13 I believe, five volumes. I'll come back to  
14 confidentiality in a moment.

15 J is correspondence which hopefully we won't need to  
16 take you to.

17 As regards the treatment of confidential  
18 information, most of what is in volume I are documents  
19 that emanate from Achilles. There are a couple of  
20 documents in there emanating from Network Rail, which  
21 I think are in there because they contain material which  
22 was confidential to the RSSB.

23 Having discussed with Mr Flynn, the way we would  
24 propose to deal with it is by and large we can sit in an  
25 open session. There won't be much need to refer to

1 confidential information that much of the time. There  
2 may be some parts of cross-examination where in  
3 particular Achilles confidential documents may be being  
4 put to Achilles witnesses. We may have to see where we  
5 go with that. It may be necessary to go into a closed  
6 session, but if we can, I can indicate that certain  
7 parts are not in fact confidential and work around that.  
8 The schedule you have already commented on, sir, so  
9 I need not address you on that.

10 The one issue I did want to raise is about the  
11 examination of experts. We are proceeding on the basis  
12 of regular cross-examination, following which obviously  
13 the Tribunal can put its own questions if it wants,  
14 rather than have a concurrent hot-tub-style examination.  
15 However, our suggestion would be, given the nature of  
16 the case and the practice of the Tribunal, that if you  
17 do want to ask some questions at the end, it may be  
18 convenient for you to put them to both experts at  
19 the same time in a short session at the end of each  
20 discipline of expert evidence.

21 Opening submissions by MR. WOOLFE

22 MR WOOLFE: So turning to my opening, sir, I'm going to deal  
23 with it in six sections, the first being some  
24 preliminary remarks as to what the case is fundamentally  
25 about. Then I'm going to take you to the issues as they

1 are pleaded in the claim form and defence. Thirdly, I'm  
2 going to focus a couple of key points of law. I am not  
3 going to address you at length on all the law applicable  
4 because we have done that already in the skeleton.

5 Then the fourth element, I am going to take you to  
6 some of the key documents in volumes G1 and G2 to show  
7 you the scheme documents, how they fit together, so you  
8 can see how it works at that level.

9 Fifthly I am going to deal with some points which we  
10 as the claimants would emphasise in understanding this  
11 case.

12 Then sixthly I am going to address you briefly on  
13 relief. I appreciate that is unusual in opening, but  
14 I do anticipate that it will be on the Tribunal's mind  
15 when hearing the evidence of how this can practicably be  
16 dealt with. So I think it is worth addressing you  
17 briefly on that at the outset.

18 So what do we say this case is about? You have our  
19 skeleton in volume A, tab 4, and, as we say at  
20 paragraph 2, fundamentally this case is about  
21 Network Rail, an undertaking which controls access to  
22 the majority of the physical infrastructure for the rail  
23 industry in Great Britain, imposing a requirement  
24 through the key schemes that undertakings are assured  
25 exclusively by RISQS.

1           But in order to understand why that is a problem, we  
2           say you have to appreciate what it means to be assured  
3           by a scheme like RISQS. Fundamentally RISQS appears to  
4           be a combination of three things. Although they are  
5           provided in a bundle -- and there is nothing wrong with  
6           that -- it is important for clarity to keep those  
7           elements separate in one's head.

8           The first element is a performance standard or  
9           specification. I will take you to the RISQS audit  
10          protocols in volume G2 a little later, and those audit  
11          protocols in effect set out what it is that is checked  
12          by RISQS. They are a specification for the information  
13          that has to be verified. (Short pause to fix technical  
14          issue)

15          So as I was saying, sir, the audit protocols in  
16          RISQS do set out a specification or standard for  
17          the information which has to be checked, and you will  
18          see in due course that those specifications or standards  
19          do relate in certain ways to the standards that  
20          Network Rail itself maintains internally for  
21          the Sentinel scheme, the on-track plant scheme and  
22          the principal contractor scheme. The exact nature of  
23          those specifications and how they relate to each other  
24          will be explored with the witnesses. So that is  
25          the first element of RISQS.

1           The second element of RISQS is the process of  
2           checking information supplied or activities against  
3           the standard. Slightly different terms are used for  
4           different aspects of that activity. So in terms of  
5           checking the information that is supplied by suppliers,  
6           it is called "verification", I think, and in terms of  
7           a higher-level, more intensive checking, it is called  
8           "auditing", and this involves examining the documents  
9           that the company supplies. So the second element is  
10          this process of checking; in other contexts it might be  
11          called "testing" or "certification" or "conformity  
12          assessment", but essentially that is the purpose of  
13          checking.

14          The third element of RISQS is one of information  
15          management. It is the provision of the portal and it is  
16          the presentation of a specified set of assured  
17          information to users, in particular in a form that can  
18          be used for qualification of suppliers for procurement  
19          purposes.

20          Now, those three elements are distinct. In another  
21          context those elements are provided separately. I will  
22          take you to -- not in opening, but you will see in  
23          witness evidence the documents are relating to a scheme  
24          called "RISAS", which involves the checking of  
25          components -- checking the manufacture of components,

1           such as wheel sets and bogies and so on. In that  
2           scheme, the elements of setting the standard on the one  
3           hand and checking against the standard have been  
4           separated out. So the standards are set centrally by  
5           the RISAS scheme, whereas the auditing against  
6           the standard is done by a body called RISAB, Rail  
7           Industry Standards Accreditation Body. So you can see  
8           that those two are fundamentally different activities.

9           One can also plainly have a procurement information  
10          management system that organises and presents  
11          information that has actually been certified by somebody  
12          else. So these are three distinct elements, but RISQS  
13          provides them together.

14          It's not possible, as RISQS is set up, to have  
15          the auditing against the standards done by another  
16          independent body, but the information presented within  
17          the RISQS system. It only allows itself to audit  
18          the information.

19          Now, it is also said, I think by some of  
20          Network Rail's witnesses, Mr. Blackley in particular,  
21          that elements of the standard, such as the RICCL  
22          codes -- these are the product codes which identify what  
23          different kinds of products are and what standards they  
24          need to be checked against -- it's said that those codes  
25          are owned by the RSSB. I think it is correct. It seems

1 to be said that because of their ownership of those  
2 codes, it would be a matter for the RSSB to decide  
3 whether to permit Achilles to use those elements to  
4 provide audit or assurance.

5 Now, in that sense RISQS is a closed system and it's  
6 quite different from the situation where you have an  
7 open standard which anybody competent can put themselves  
8 forward as assuring or certifying against or indeed  
9 a situation such as RISAS where certification bodies  
10 have to be accredited.

11 Now, there is nothing wrong, we say, with providing  
12 a service of that nature combining those three different  
13 elements. It is what Achilles does, has done for a long  
14 time and it is what other companies do in other  
15 contexts. The problem, we say, arises when that closed  
16 standard system, a closed system for setting  
17 the standards, checking them and managing all  
18 the information regarding them, is in effect mandated  
19 across an entire industry because by doing that -- and  
20 we say Network Rail is -- Network Rail is in a sense  
21 setting -- is mandating the standard or specification  
22 that has to be met, but is also mandating that assurance  
23 to get that standard be provided only by RISQS and so it  
24 is eliminating competition in that dimension, and it is  
25 also mandating that the associated information

1 management services are provided by RISQS.

2 It is important to realise that those three elements  
3 are there from the point of view of assessing  
4 the effects on competition, but also when assessing  
5 whether or not this is objectively justified or  
6 necessary because you can look and see whether the  
7 benefits that are said to flow from mandating RISQS flow  
8 from, on the one hand, mandating a particular standard  
9 or mandating the information that has to be checked,  
10 and, on the other hand, mandating that a single person  
11 assures against it, and you can see the distinction  
12 between those.

13 So with those preliminary remarks, I am going to  
14 take the Tribunal to the way the issues are pleaded in  
15 the claim form and defence. The claimant's claim form  
16 is at bundle A, tab 1, and essentially after  
17 a preliminary setting out of the facts, the  
18 Chapter I case, which I'm going to start with, is set  
19 out at paragraphs 34 and following. It starts on  
20 page 14. We have set out our case in outline at  
21 paragraph 34 and then in more detail focusing on the key  
22 schemes from paragraphs 35 and following.

23 At paragraph 36 we say that each of the key schemes  
24 amounts to an agreement or concerted practice between  
25 undertakings, namely Network Rail and the undertakings

1 who are members or parties to those schemes. For your  
2 note, that is not admitted in the defence at  
3 paragraph 35 so there is no positive case advanced  
4 about it. It is not admitted.

5 Then at paragraph 37 we plead the effect on trade in  
6 the United Kingdom which, as we say in our skeleton, is  
7 very much a jurisdictional requirement. I am not going  
8 to address you at any great length on it. That is also  
9 not admitted in the defence at paragraph 36.

10 Then the most important element, we move on to  
11 the object and effect of the restriction of competition  
12 at paragraph 38. At paragraph 38.1 in effect we plead  
13 exclusionary object or effect -- that is what we say is  
14 going wrong here -- which is that Network Rail's  
15 inclusion of these terms prevents supplier assurance  
16 being provided by schemes other than RISQS, even if both  
17 of two conditions are met. Those conditions are firstly  
18 that the scheme -- that the alternative scheme assures  
19 to the standards set out in RIS 2750, which is an RSSB  
20 standard -- I will take you to it in a bit -- and  
21 the second element is that, even if the alternative  
22 scheme is adequate to meet the needs of the rail  
23 industry. So we expressly incorporate a requirement of  
24 adequacy and we are not saying that Network Rail should  
25 be obliged to take any supplier assurance provided by

1 any scheme.

2 At paragraph 38.2, what we point to there is the  
3 effect of Network Rail mandating RISQS in pushing RISQS  
4 down through the supply chain. The effect in particular  
5 we say are the Sentinel scheme because everybody who  
6 wants to have access to Network-Rail-managed  
7 infrastructure has to be Sentinel assured. Imposing an  
8 obligation to take RISQS pushes RISQS registration all  
9 the way down through the supply chain not only to tier 1  
10 contractors, those who contract directly with  
11 Network Rail, but also subcontractors, tier 2 and  
12 tier 3. Then we say that the result of that is that  
13 the object or effect of the requirement is to exclude  
14 all competition to RISQS in this market.

15 Now, I'll just take you what is said about this in  
16 the defence. This is in tab 2 of the same bundle at  
17 paragraph 37(a). It's said -- this is at page 34 of  
18 that bundle -- 37(a) it is said -- firstly 37(a)(i) that  
19 the requirements are objectively necessary; that it is  
20 necessary for the safe functioning of rail  
21 infrastructure. Then at 37(ii) there's a plea in effect  
22 of law that it does not meet -- is not part of  
23 the recognised categories of object infringement. Then  
24 also within the same subparagraph, (ii), it is said that  
25 it does not substantially affect actual or potential

1 competition.

2 Then 32(b) essentially puts the point that having  
3 a single scheme is necessary and proportionate for  
4 safety or economic efficiency reasons and, in effect, we  
5 read that as saying that there is no scope for  
6 competition in the provision of such schemes.

7 Sorry, I think I have misled you, sorry. There is  
8 a cross-reference back in 37 to paragraph 32 of  
9 the defence, and it is in 32, which is on page 33, so  
10 that is where it says it is necessary and proportionate  
11 to obtain safety benefits. They say that it is -- at  
12 32(b) (inaudible) point out there is some scope left for  
13 competition.

14 As regards the exemption case, we have a pre-emptive  
15 denial at paragraph 40 of the claim form, but I am just  
16 going to take you to the way the defendant pleads its  
17 case on exemption at paragraph 39. It sets out at  
18 paragraph 39(b) the four requirements, and it claims  
19 that, at 39(b)(i):

20 "The requirement in ... [this] scheme ... [is] to  
21 use a single assurance scheme gives rise to direct  
22 efficiencies (including through announcing safety) and  
23 therefore contributes to improving production or  
24 distribution and/or promoting technical or economic  
25 progress."

1           At (ii) they say:

2           "There is no other operationally and/or economically  
3 practicable and less restrictive means of achieving  
4 the efficiencies, and the requirement in the Schemes to  
5 use only a single assurance scheme is reasonably  
6 necessary to produce those efficiencies."

7           Thirdly they say that consumers receive a fair share  
8 of resulting benefits. Fourthly they say again that it  
9 does not eliminate -- the requirement to use a single  
10 assurance scheme does not eliminate competition in  
11 respect of a substantial part of the products or  
12 services concerned.

13           It is important to understand that the defendants  
14 themselves accept -- I think the point at (ii) -- that  
15 they have to establish, in order to get to exemption,  
16 that there is no other operationally and/or economically  
17 practical and less restrictive means of achieving this.

18           Now, we asked for some further particulars of their  
19 case on safety and economic efficiency. Those are  
20 provided in a letter dated 14 December, which is at  
21 tab 3 of the same bundle. It is quite a long letter.  
22 The specific way they particularise their case, which we  
23 needed at the time to understand what case we had to  
24 meet, has now effectively been absorbed into witness  
25 evidence therefore I am not going to read it all back to

1           you.

2           The one thing I would just note perhaps is, in terms  
3 of the structure of it, at paragraph 1.3 they set out  
4 the benefits from having a single scheme. There is  
5 a long list down to (j). Then how this fits together,  
6 as I understand it, at paragraph 2.3 they set out  
7 the mechanisms and features of the suppliers' assurance  
8 scheme which are necessary for attaining the benefits  
9 which they identify -- at least that is how it fits  
10 together.

11           It is perhaps just worth noting what they say  
12 at 2.3. They refer to having a single set of consistent  
13 and uniform supplier assurance requirements. Now, we  
14 would say that really relates to the first element I was  
15 talking about in RISQS of what it is that is being  
16 checked, the standard or specification.

17           They refer to a forum for developing consistent and  
18 uniform supplier assurance requirements, so they are  
19 referring there to the scheme governance.

20           Then they refer to having uniform and consistent  
21 application by a single auditor provider, so they are  
22 saying that a monopoly of audit is necessary.

23           At (d) they refer to having a single point of  
24 contact.

25           Then at (e), (f) and (g), they make a series of

1 points regarding having a single portal. So this  
2 relates to the third element I was splitting out for you  
3 about the information management portal and  
4 the advantages, they say, of why that is necessary.

5 Then they refer to consistency between those audit  
6 checks and the audit checks that they carry out.

7 If I can then just take you back to finish off on  
8 how the case is pleaded -- take you back to our case on  
9 Chapter II. This is pleaded at paragraph 32 of  
10 the claim form, which is on page 13. We set out  
11 the particulars of abuse. As you are aware, sir, this  
12 trial is proceeding on the basis of an assumption of  
13 dominance and therefore abuse is the issue.

14 At paragraph 32.2 you have the core of our case on  
15 abuse, which is that, "Network Rail is declining to  
16 accept supplier assurance provided by schemes other  
17 than RISQS, notwithstanding ..." -- again these two  
18 elements -- "... notwithstanding the other assurance  
19 schemes meet the requirements of RIS 2750 and are  
20 adequate to meet the needs of supplier assurance in the  
21 rail industry".

22 Again we do not say it is an abuse to refuse  
23 anything which does not meet those two tests.

24 At 32.3 we say:

25 "Further or alternatively, through its supplier

1 schemes, Network Rail Infrastructure Limited is  
2 requiring both its direct contractors and also all  
3 subcontractors to decline to accept supplier assurance  
4 provided by schemes other than RISQS."

5 Now, to be clear about this, our case is not that  
6 the key schemes contain a term which explicitly requires  
7 Network Rail contractors to use RISQS as buyers when  
8 procuring services downstream. We do say, however, that  
9 Network Rail aims to achieve and has in fact achieved  
10 the situation in which its contractors and  
11 subcontractors only use RISQS for assurance in  
12 the fields which it covers.

13 Our case on abuse is then denied at paragraph 29 of  
14 the defence, which starts at page 28. I am not going to  
15 take you through it line by line, but in short they rely  
16 on a range of factors at 29(a). They say that  
17 the conduct is being entered into for legitimate  
18 reasons, legitimate safety, cost and efficiency reasons.  
19 They refer to their right to choose with whom they deal  
20 at point 2.

21 At points 3 and 4 they make a sort of combined sets  
22 of points that they are not active on the supply of  
23 supplier assurance services and that they do not derive  
24 any competitive advantage from the conduct.

25 At point 5 they say that:

1            "We, Achilles, are not in a position of economic  
2            dependence vis a vis the defendant for the purposes of  
3            providing supplier assurance services."

4            Then finally they are saying that there is no  
5            material distortion of competition because they say  
6            effectively there is demand elsewhere which we could  
7            supply if we wanted to.

8            Then the other elements of the claimant's case are  
9            denied specifically at paragraphs (b) through to (d).

10           I have taken the issues fairly briefly in  
11           the pleading because I want to get on to other matters.  
12           Is there anything the Tribunal wanted to raise about how  
13           we put our case or ...?

14           THE CHAIRMAN: No, I do not think so at this stage.

15           MR. WOOLFE: Now, as regards the law, which is the next  
16           element of my submissions, if I may, sir, I would ask  
17           you to take what is in our skeleton as read as being our  
18           submissions on the law. I think there is actually  
19           fairly little difference between the parties on the vast  
20           majority of the law that is to be applied. There are  
21           one or two points which I think we can address in  
22           closing. Where we really part company is on  
23           the application of those principles to the facts of  
24           the case.

25           So what I am going to do on the law is just first of

1 all take you to certain propositions regarding  
2 the application of competition law to standards. For  
3 those purposes I will take you to the Horizontal  
4 Co-operation Guidelines, which are in the purple book.

5 Secondly, I am going to look at one key authority,  
6 the *Dutch Cranes* case, where there is  
7 a Commission decision and a general court judgment on  
8 appeal. Indeed that is it. So those are the two bits  
9 I am going to do on the law.

10 Now, the Horizontal Co-operation Guidelines are in  
11 the purple book, which you have, starting on page 1873  
12 at point 4.198. This is, roughly speaking, about  
13 halfway through the book in the EU materials.

14 THE CHAIRMAN: Can you just repeat the page?

15 MR. WOOLFE: Yes, so the page number which is in the centre  
16 close to the binding, 1873.

17 Sir, as you will be aware, this is a Commission  
18 guideline. It is soft guidance. It is not in any  
19 way -- hard law is not binding on you, but it is  
20 something that is routinely taken into account as being  
21 a statement from the EU's Competition Authority on  
22 the principles that it considers flow from Article 101  
23 in this case.

24 Now, this is in the Horizontal Co-operation  
25 Guidelines and it is focusing on the situation which you

1 often get in a standardisation context where you need  
2 cross-industry agreement on a standard and therefore  
3 that is a horizontal agreement by its nature. But we  
4 say that a number of the principles that it sets out are  
5 equally applicable here, where the standard is in effect  
6 being imposed or encouraged by an undertaking like  
7 Network Rail which dominates the entire industry.

8 The section on standardisation we then pick up at  
9 page 1913. They are the seventh -- I think this is  
10 the sixth category, but there's a point 7 -- category of  
11 agreements.

12 At paragraph 257:

13 "Standardisation agreements have as their primary  
14 objective the definition of technical or quality  
15 requirements with which current or future product,  
16 production processes, services or merits may comply.

17 "Standardisation agreements can cover various  
18 issues."

19 Then the third sentence.

20 "The terms of access to a particular quality mark or  
21 for approval by a regulatory body can also be regarded  
22 as a standard."

23 That, in that sense, is what I would say -- why  
24 the RISQS scheme in effect incorporates a standard of  
25 a form.

1           If I can take you down to paragraph 261, this sets  
2 out the different markets that may be affected by  
3 standardisation agreements. It says:

4           "Standardisation agreements may produce their  
5 effects on four possible markets which will be defined  
6 according to the market definition notice. First  
7 standard setting may have an impact on the product or  
8 service market or markets to which the standard or  
9 standards relate."

10          So here, for example, that may be the market for  
11 the provision of on-track plant or a market for  
12 the provision of construction services or the like.

13          "Second, where the standard setting involves  
14 the selection of technology and where the rights to  
15 intellectual property are marketed separately,  
16 the standards can have effect on the relevant technology  
17 market."

18          That is not such an important factor here.

19          "Thirdly, the market for standard setting may be  
20 affected if different standard-setting bodies or  
21 agreements exist."

22          That is something you do get -- in particular in  
23 the technology field you get competing standards and you  
24 see which one wins out.

25          "Fourth, where relevant, a distinct market for

1 the testing and certification may be affected by  
2 standard setting."

3 That is the market which we would emphasise in this  
4 case. That is the market in which Achilles has been  
5 active and we say that that is affected by the conduct  
6 at issue.

7 Then just to summarise what it says at  
8 paragraphs 263 and 264, it says that the standardisation  
9 agreements are often a very good thing. Briefly  
10 speaking, co-ordination can give rise to benefits as it  
11 says at the end of 263:

12 "... maintain and enhance quality, provide  
13 information and ensure inter-operability and  
14 compatibility, thus increasing value for consumers."

15 264:

16 "Standard setting can, however, in specific  
17 circumstances, also give rise to restrictive effects on  
18 competition by potentially restricting price competition  
19 and limiting or controlling production, markets,  
20 innovation or technical development."

21 This can occur through three main channels, namely  
22 (1) reduction in price competition, (2) foreclosure of  
23 innovative technologies and (3), "... exclusion of or  
24 discrimination against certain companies by prevention  
25 of effective access to the standard".

1           If I could jump down to the third one of those,  
2 paragraph 268:

3           "Third, standardisation may lead to anti-competitive  
4 results by preventing certain companies from obtaining  
5 effective access to the results of the standard-setting  
6 process."

7 THE CHAIRMAN: Actually, when you are reading, it reminds me  
8 that I was supposed to tell you at the beginning not to  
9 read too quickly for the transcribers. They had pained  
10 expressions on their face.

11 MR. WOOLFE: If I get too fast ...

12           (Pause)

13           So:

14           "Third, standardisation may lead to anti-competitive  
15 results by preventing certain companies from obtaining  
16 effective access to the results of the standard-setting  
17 process; that is to say the specification and/or  
18 the essential IPR for implementing the standard. If  
19 a company is either completely prevented from obtaining  
20 access to the result of the standard or is only granted  
21 access on prohibitive or discriminatory terms, there is  
22 a risk of an anti-competitive effect."

23           Then, as regards the analysis of these as an object  
24 restriction, you can see what is said at paragraphs 273  
25 and 274. I am not going to read it out, but I call

1 the Tribunal's attention to it.

2 I would like to move on to what is said about  
3 restriction by effect. That starts at paragraph 277 and  
4 it refers at 277 to the need to analyse in a legal and  
5 economic contest with regard to the actual and likely  
6 effect on competition.

7 "In the absence of market power, a standardisation  
8 agreement is not capable of producing restrictive  
9 effects on competition. Therefore, restrictive effects  
10 are most unlikely in a situation where there is  
11 effective competition between a number of voluntary  
12 standards."

13 Then moving down to paragraph 280:

14 "Where participation in standard setting is  
15 unrestricted and the procedure for adopting the standard  
16 in question is transparent, standardisation agreements  
17 which contain no obligation to comply with the standard  
18 and provide access to the standards on fair, reasonable  
19 and non-discriminatory terms will normally not restrict  
20 competition within the meaning of Article 101(1)."

21 Note 281 refers to the need to ensure "...  
22 unrestricted participation in the rules of the  
23 standard-setting organisation and guarantee that all  
24 competitors in the market or markets affected by  
25 the standard can participate in the process leading to

1 the selection of the standard".

2 Then there is need for a:

3 "... standard-setting organisation to have objective  
4 and non-discriminatory procedures for allocating voting  
5 rights and objective criteria for selecting the  
6 technology to be included".

7 With respect to transparency, "... the relevant  
8 standard-setting organisation would need to have  
9 procedures which allow stakeholders to effectively  
10 inform themselves of upcoming, ongoing and finalised  
11 standardisation work in good time at each stage of the  
12 development. Furthermore, the standard-setting  
13 organisation's rules would need to ensure access to the  
14 standard on fair, reasonable and non-discriminatory  
15 terms."

16 As regards the terms at 285:

17 "In order to assure effective access to  
18 the standard, the IPR policy would need to require  
19 participants wishing to have their IPR included in  
20 the standard to provide an irrevocable commitment in  
21 writing to offer to licence their essential IPR to all  
22 third parties on fair, reasonable and non-discriminatory  
23 terms (FRAND commitment)."

24 So where you have a horizontal agreement in that  
25 case which makes certain intellectual property

1 necessary, you cannot then restrict who you provide that  
2 intellectual property to. You may require them to pay  
3 for that intellectual property, but you cannot exclude  
4 people using it.

5 We would say if it is said that, for instance,  
6 the RICCL codes -- the RICCL codes, product codes, are  
7 intellectual property which is absolutely essential for  
8 participation in this market and Network Rail are  
9 saying, "We are going to specify things by those codes  
10 and only by those codes", that that is in a sense making  
11 a form of IPR essential to the assurance activity.

12 As regards the assessment of effects, pick that up  
13 at paragraph 292, and it says:

14 "Certain considerations follow."

15 At 293:

16 "Whether standardisation agreements may give rise to  
17 restrictive effects on competition may depend on whether  
18 the members of a standard-setting organisation remain  
19 free to develop alternative standards or products that  
20 do not comply with the agreed standard. If you bind  
21 members to only produce in compliance with the standard,  
22 the risk of a likely negative effect on competition is  
23 significantly increased and could in certain  
24 circumstances give rise to a restriction of competition  
25 by object."

1           294:

2           "The assessment of whether the agreement restricts  
3 competition will also focus on access to the standard.  
4 Where the result of the standard, that is to say  
5 the specification of how to comply with the standard  
6 and, if relevant, the essential IPR for implementing  
7 the standard, is not at all accessible or only  
8 accessible on discriminatory terms for members or third  
9 parties, that is to say non-members of the relevant  
10 standard-setting organisation, this may discriminate or  
11 foreclose or segment markets according to their  
12 geographic scope of application and is thereby likely to  
13 restrict competition. However, in the case of several  
14 competing standards or in the case of effective  
15 competition between standardised solution and  
16 non-standardised solution, a limitation of access may  
17 not produce restrictive effects on competition."

18           295 refers to access to the standard-setting  
19 process. That is an important factor as well.

20           296 says:

21           "To assess the effects of a standard-setting  
22 agreement [not a surprise], the market shares of  
23 the goods or services based on the services should be  
24 taken into account."

25           Then 297 finally:

1           "Any standard-setting agreement which clearly  
2           discriminates against any of the participating or  
3           potential members could lead to a restriction of  
4           competition."

5           Then it refers to a particular type of  
6           discrimination involving upstream or downstream  
7           competitors.

8           Then its guidelines on the exemption and analysis  
9           start at paragraph 308 over the page on page 1918. They  
10          say at 308 that:

11          "Standardisation agreements frequently give rise to  
12          significant efficiency gains."

13          That is not surprising.

14          309:

15          "To achieve those efficiency gains in the case of  
16          standardisation agreements, the information necessary to  
17          apply the standard must be effectively available to  
18          those wishing to enter the market."

19          310:

20          "The decimation of a standard may be enhanced by  
21          marks or a logo certifying compliance, thereby providing  
22          certainty to customers."

23          It goes on to say:

24          "Agreements for testing and certification go beyond  
25          the primary objective of defining the standard and would

1 normally constitute a distinct agreement and market."

2 So essentially what it is saying, merely because you  
3 agree what the standard is, it is a separate question  
4 whether or not you can make agreement as to who is to do  
5 the testing or certification.

6 Then if I could take you to -- under  
7 "Indispensability" some of the same factors crop up  
8 again. So this is the second requirement for exemption.  
9 It is dealt with at paragraphs 315 and following. At  
10 316 it is said:

11 "Participation in standard setting should normally  
12 be open to all competitors in the market or markets  
13 affected by this standard unless the parties demonstrate  
14 significant inefficiencies of such participation or  
15 recognise procedures are foreseen for the collective  
16 representation of interests."

17 317:

18 "... shall cover no more than what is necessary to  
19 ensure their aims."

20 318:

21 "Restrictions in a standardisation agreement making  
22 a standard binding and obligatory for the industry are  
23 in principle not indispensable."

24 Then you can see what is said about "pass on to  
25 consumers" at paragraph 321 and "no elimination of

1 competition" at paragraph 324, and I have no particular  
2 point to make regarding that.

3 So we would say that, although it is presented in  
4 the context of the analysis of the horizontal agreements  
5 between undertakings at the same level of production or  
6 distribution whilst seeking to agree on a standard, we  
7 say it is quite a helpful frame of analysis for  
8 setting out the different markets that may be affected  
9 by an agreement which mandates a certain standard and  
10 indeed as to how restrictive effects can arise and what  
11 it is that is actually necessary to achieve the benefits  
12 which are said to flow from a standard.

13 We would also say it supports the analysis which  
14 I presented at the outset, which is we should  
15 distinguish between mandating a standard on the one  
16 hand, mandating a certain person to provide testing and  
17 certification on the other and mandating a single point  
18 of contact as a third element. Although they are  
19 provided by RISQS as a bundle, Network Rail is in  
20 fact -- by mandating the standard, it is mandating all  
21 three, and that is an important consideration and we say  
22 it is supported by that.

23 Now, I am going to take you to the decision in  
24 *Dutch Cranes*, because that is a Commission  
25 decision and a general court case involving

1 a certification system that is quite similar in its  
2 nature. It is in authorities volume 4, or at least it  
3 should be. There was some movement of authorities  
4 around. What you will see is that we have tabs 56, 57,  
5 58, 59, 17 and 22, because 17 and 22 have been moved  
6 from an earlier volume into there. So I am referring  
7 you to tab 22, which is the Commission decision in  
8 *Dutch Cranes*.

9 Just in terms of the facts, you can see  
10 the complaint that was made --

11 THE CHAIRMAN: Sorry, I have not got that.

12 Yes, I have got it, yes.

13 MR. WOOLFE: You have got it?

14 THE CHAIRMAN: Yes.

15 MR. WOOLFE: A complaint was made by certain firms alleging  
16 that the -- what is called the "FNK", which is  
17 essentially the Dutch Crane Hire Association -- and an  
18 organisation called the "SCK--" I will not pronounce it  
19 in Dutch -- had infringed competition rules by excluding  
20 undertakings which are not certified by SCK when hiring  
21 out mobile cranes and also imposing fixed price rates.

22 You see these two elements to the complaints: there  
23 is the price fixing and then there is the certification  
24 complaint. They are dealt with separately and concluded  
25 on separately and we are focusing on the certification

1 element.

2 Then at recital 2, at the bottom under "SCK", it  
3 says:

4 "As notified, SCK's rules contain inter alia a ban  
5 on undertakings affiliated to SCK..."

6 So its members.

7 "... from hiring extra cranes from non-affiliated  
8 undertakings."

9 So it created in a sense a closed system where other  
10 crane operators could not hire cranes into that system  
11 if they were not certified by the SCK. This is referred  
12 to as the "inhuurv". I may not have pronounced that  
13 remotely correctly and Mr. Kuppen will pronounce it far  
14 better, I'm sure.

15 You see who the parties are at paragraphs 3 to 5.  
16 I focus on paragraph 5, SCK:

17 "According to its statutes, the objects of SCK,  
18 the organisation, is to promote and maintain the quality  
19 of crane hire companies. For that purpose SCK set up  
20 a private law certification system on a voluntary  
21 basis."

22 The nature of the certification being provided is  
23 described at recital 11, which, if you turn over  
24 the page, under a heading saying "SCK" -- 11:

25 "Under its statute SCK's object is to promote and

1 maintain the quality of crane hire firms. This is done  
2 by drawing up guidelines in the form of regulations on  
3 the establishment of the crane hire business,  
4 a certification system and a monitoring system for  
5 ensuring compliance with the guidelines."

6 Then it is interesting to see what certification  
7 covers, but there is quite a close analogy, we would  
8 say, between that and RISQS.

9 "Certification involves the monitoring of a number  
10 of aspects of the crane hire firm itself, compliance  
11 with legal requirements concerning tax and social  
12 security payments, evidence of insurance cover,  
13 creditworthiness and liquidity and evidence of the  
14 competence of the operatives to be employed. The firms  
15 also had to show they are registered with the Chamber of  
16 Commerce."

17 There is an issue which we are going to come to  
18 about that which had an effect in this case.

19 Last:

20 "Certification also covers the technical aspects of  
21 the cranes themselves."

22 They were obliged to apply FNK's general conditions.

23 So what you can see is the certification was in  
24 a sense a verification of certain basic financial  
25 commercial information, but was also technical and

1 safety-related in nature, spanning those two elements,  
2 which I think it is uncontroversial that RISQS does as  
3 well. The balance may be different, but it covers both.

4 The analysis of this element is then picked up at  
5 paragraph 22 and it runs through to paragraph 30 in  
6 terms of the effects analysis. At 22 it states again  
7 the term they were looking at there, which is this ban  
8 on certificate-holders from hiring in cranes which were  
9 not affiliated to SCK. It was ultimately withdrawn.

10 Paragraph 23:

11 "The Commission states in principle ..."

12 So the ban on calling on firms not certified by SCK  
13 as subcontractors restricts the freedom of action of  
14 certified firms.

15 "Whether a ban can be regarded as preventing,  
16 restricting or distorting competition within the meaning  
17 of Article 85(1) ..."

18 That is how it was numbered then. That is now what  
19 is Article 101(1):

20 "... must be judged in the legal and economic  
21 context. If such a ban is associated with  
22 a certification system which is completely open,  
23 independent and transparent and provides for  
24 the acceptance of equivalent guarantees from other  
25 systems, it may be argued that it has no restrictive

1 effects on competition, but is simply aimed at fully  
2 guaranteeing the quality of certified goods or services.  
3 As will be explained in more detail below, the hiring  
4 ban in this case is caught by the prohibition since the  
5 FCK certification system is in any case not completely  
6 open, at any rate until 1993, and does not permit  
7 the acceptance of equivalent guarantees from other  
8 systems."

9 So just pausing there, what the Commission is doing  
10 is saying, "You could have a ban on cranes that do not  
11 have certification if the certification you are looking  
12 at is one that can be provided freely and on an  
13 equivalent basis, but what you cannot do is have a ban  
14 on cranes that are not certified in this way if what you  
15 are running is a closed certification system".

16 24:

17 "From the start the SCK certification system had  
18 features of a closed system ..."

19 There is certain -- they are required to give  
20 preference to other members.

21 There was an issue specifically in relation to  
22 the fact you had to be registered initially with  
23 the Dutch Chamber of Commerce, and that had  
24 a discriminatory effect on cranes coming in from other  
25 member states. That is a distinct feature, admittedly,

1 of this case. Although that requirement -- I'm  
2 summarising -- had gone, the Commission says:

3 "Until January 1992 ..."

4 This is in the middle of the paragraph at the top of  
5 the page:

6 "... the costs of participation were considerably  
7 higher for non-members than for members. The firms  
8 affiliated to SCK are therefore in effect largely the  
9 same firms as the members of FNK and for foreign crane  
10 hire firms access to the certification system was  
11 further complicated by the fact that the certification  
12 requirements in particular were oriented on the Dutch  
13 situation."

14 So it is looking at the exclusionary effect. If  
15 specify you have to be certified in this way, it is  
16 difficult to come in from outside the system. In that  
17 case it had a national discriminatory effect.

18 The Commission goes on to say at 25:

19 "In addition the SCK certification system does not  
20 provide for the acceptance of equivalent guarantees from  
21 other systems, neither from certification systems set up  
22 by other private law institutions in the community, nor  
23 from government schemes which provide for equivalent  
24 guarantees relating to safety on the crane hire market."

25 Then what you have is there was some correspondence

1 about a proposed amendment which was debated between  
2 the SCK and the Commission and I think ultimately the  
3 inhuurverbod was abandoned, so that fell away.

4 Then 26:

5 "The inhuurverbod introduced on 1 January 1991  
6 reinforced the closed nature of the certification system  
7 and de facto promoted mutual exclusivity between  
8 the firms concerned."

9 They said it impeded access to the Dutch cranes  
10 market.

11 Then, as regards justification for this conduct,  
12 that is picked up at paragraph 36 over the page, and  
13 SCK argued that:

14 "The object of the certification system is to create  
15 transparency on the market and the inhuurverbod must be  
16 seen as the essential instrument for guaranteeing  
17 the quality of the cranes and of the service provided by  
18 the participating firms. The certification system is  
19 claimed to provide added value over and above  
20 the relevant requirements laid down by statute or  
21 regulation. It is also contended that the inhuurverbod  
22 is the only means of effectively monitoring compliance  
23 with the requirements imposed."

24 The Commission expresses scepticism about that at  
25 paragraph 37. I must say this is much more on the facts

1 of this case that this was not made out -- this is less  
2 of an analogy perhaps.

3 Then at the bottom of the page, at the bottom of  
4 page 37:

5 "Even if the advantages claimed by SCK for the  
6 certification system should outweigh the disadvantages  
7 thereof for non-affiliated firms, it still has not been  
8 shown that the SCK certification system could not  
9 function without the inhuurverbod."

10 That is the test which the Commission says has to be  
11 applied. It points out that it has in fact functioned  
12 without it for a period of time and it refers to  
13 paragraph 2.5 of the certification council's recognition  
14 criteria, which is derived from ISO standards for  
15 quality systems, and it says:

16 "Paragraph 2.5 offers three ways of monitoring  
17 the quality of the supplier firm ..."

18 In this case the crane firm hiring extra cranes.

19 "It makes it possible inter alia for the latter  
20 itself, as the principal, to judge on its own  
21 responsibility whether another crane hire company called  
22 in meets the statutory quality requirements, for example  
23 by the submission of testing certificates, a lifting  
24 certificate ...", etc.

25 What we would say about that -- clearly this is

1 specifically about crane hire, but the Commission is  
2 focusing on is there a less restrictive -- a means that  
3 is less restrictive of competition by which you can  
4 achieve these equivalent safety benefits. For those  
5 purposes it is looking at how a standardisation system  
6 could work, it is looking to ISO standards and the like,  
7 and considering how the necessary information to ensure  
8 safety and quality can be provided.

9 Now, that was appealed to the general court and that  
10 is in volume 2 at tab 24. If it is okay, I will not  
11 take you through the facts again because we will be  
12 seeing those.

13 On page 299 of the report, which is about two-thirds  
14 of the way through the tab, is where the relevant  
15 argument starts. You can see that the heading at  
16 the top -- the argument that the applicants were  
17 running:

18 "They alleged that the Commission had erred in law  
19 with regard to the reference to the criteria of  
20 transparency, openness, independence and acceptance of  
21 equivalent guarantees offered by other systems."

22 And then secondly erred in finding object or effect.

23 What the applicants were saying, as you see at  
24 paragraph 125, that by setting these criteria of  
25 openness, transparency, independence, acceptance and

1 equivalent guarantees, they say:

2 "The Commission infringed Article 85.1 of the Treaty  
3 by establishing on its own initiative general criteria  
4 for determining whether that provision applies to  
5 certification systems when those criteria are not set  
6 out therein ...", meaning in Article 85.1.

7 So essentially they were saying that the Commission  
8 has gone off and produced its own bit of law here, but  
9 that is not inherent in Article 85.1.

10 It is that point of law that is dealt with by the  
11 court at paragraphs 132 to 138, and at paragraph 132  
12 they refer to the same ban on cranes that are not  
13 certified by the system.

14 Then at 133 they refer to the Commission's  
15 decision -- the Commission's articulation of criteria of  
16 transparency, openness, independence and acceptance of  
17 equivalent guarantees. They say over the page:

18 "It should be noted that in the contested decision  
19 [paragraph 23] the Commission took the view that  
20 the anti-competitive nature of the prohibition on hiring  
21 could be assessed only by reference to the nature of  
22 the certification system with which that prohibition was  
23 associated."

24 That serves the point I was making at the start  
25 which is to understand why mandating RISQS is a problem,

1           you have to look at what RISQS is.

2           "For that purpose it laid down four criteria:  
3           openness, independence, transparency and acceptance of  
4           equivalent guarantees."

5           Then it refers to:

6           "... established principle of looking at things in  
7           their legal and economic context."

8           That's at 134.

9           At 135:

10          "However, in view of the fact the Commission relies  
11          solely on the lack of openness in SCK's certification  
12          system and on the failure to accept equivalent  
13          guarantees offered by other system ..."

14          In finding in this case it breached Article 101.

15          "... it is sufficient to determine whether those two  
16          criteria are pertinent."

17          So the general court is not approving or  
18          disapproving anything that is said about transparency or  
19          independence; it is just focusing on openness and  
20          the acceptance of equivalent guarantees.

21          At 136:

22          "There is no doubt that the criteria of openness of  
23          the certification system is pertinent to the assessment  
24          of the prohibition on hiring from the point of view of  
25          Article 85.1. The prohibition on hiring cranes from

1           uncertified firms affects significantly the competitive  
2           opportunities of those firms if it is difficult to gain  
3           access to the certification system."

4           The second criterion, 137:

5           "... relating to the acceptance of equivalent  
6           guarantees offered by other systems is also pertinent.  
7           The prohibition on hiring, preventing certified firms  
8           from calling on the services of uncertified firms, even  
9           if they provide guarantees equivalent to those of  
10          the certification system, cannot be effectively  
11          justified by an interest in maintaining the quality of  
12          the products and services ensured by the certification  
13          system. On the contrary, the failure to accept  
14          equivalent guarantees offered by other systems protects  
15          certified firms from competition from uncertified  
16          firms."

17          Now, clearly the reasoning there is focused on, in  
18          that case, the exclusion of competition in the crane  
19          market, and you will immediately appreciate, sir, that  
20          we are talking about a different thing here and we  
21          accept that. We are talking about exclusion of  
22          competition in the market for testing, auditing,  
23          verification. So we do not say more than this applies  
24          by analogy, but we do say it is an analogy and a strong  
25          one.

1 THE CHAIRMAN: It is that paragraph 137, is it?

2 MR. WOOLFE: Yes, 137. It is in particular the proposition  
3 that, "... excluding guarantees equivalent to the  
4 certification system cannot be objectively justified by  
5 an interest in maintaining the quality of the products  
6 or services that are ensured".

7 It is also fair to say that there may be  
8 a substantial factual question as to whether or not  
9 guarantees are equivalent in a particular case, but as  
10 a proposition of law, that, we say, is correct.

11 That is everything I need to take from that case.  
12 So the court goes on to -- there is an analysis of  
13 the facts of that case which then follows, but that is  
14 not, we say, relevant.

15 I do not know how are we doing in terms of  
16 the shorthand writers taking a break. Is that --

17 THE CHAIRMAN: That would be a good time.

18 MR. WOOLFE: In that case, that is a convenient moment for  
19 me, sir.

20 (11.38 am)

21 (A short break)

22 (11.54 am)

23 MR. WOOLFE: Sir, I will just come to the fourth element of  
24 my opening, where I was going to take the Tribunal  
25 through the key documents, the schemes and the RISQS

1 material and so forth. Now, this is, I will be  
2 honest -- it may be somewhat laborious. There is  
3 a certain amount that needs to be got through, but  
4 I think it is important for the Tribunal to have the  
5 documents fully in its mind at the outset. I think  
6 everything else will become much easier to understand at  
7 that juncture.

8 If I can start with the RIS 2750 standard/that is in  
9 bundle G1/12, at the back of the bundle. This is titled  
10 "Rail industry standard on supplier assurance" and it is  
11 dated December 2017. Just for your reference, if it  
12 becomes relevant, the previous version of the standard,  
13 which was the RIS 2450, is at the previous tab, tab 11.  
14 That was called "Qualification of suppliers for  
15 safety-critical engineering products and services". It  
16 has been replaced by a rail industry standard on  
17 supplier assurance. So you can see assurance and  
18 qualification are elements that go very closely together  
19 and to a point are synonyms.

20 Now, this is published as a rail industry standard  
21 by the RSSB and as such it is a voluntary standard.

22 If we can pick it up at paragraph 1.1.1, page 253 of  
23 the bundle, page 6 of the standard itself, it says:

24 "This document is a standard for the generation of  
25 supplier assurance that can assist the duty-holders and

1 those that supply them to discharge their  
2 responsibilities and legal duties to ensure the control  
3 of risks associated with procuring and supply of  
4 services."

5 If I could just ask the Tribunal to read down  
6 paragraphs 1.1.2 and 1.1, 3 rather than me read them  
7 out. (Pause)

8 At paragraph 1.3.1 there is a sort of a disclaimer,  
9 effectively, which is the user of the document has to  
10 bear in mind they bear their own responsibility. So  
11 the RSSB does not warrant that compliance with this is  
12 sufficient. It leaves it to the user to decide.

13 Now, just to note, at section 2.1 on page 255 you  
14 have a section setting out the duties and  
15 responsibilities to which companies buying within and  
16 supplying to the GB rail industry are subject. I am not  
17 going to read that out, but the Tribunal can note  
18 the things which are in there. So we have health and  
19 safety at work regulations; at point 3, the railway and  
20 other guided transport systems, which is called ROGS --  
21 they are specific duties on infrastructure managers and  
22 the like -- the requirement to have a safety management  
23 system; and there is reference to an EU regulation.

24 At point 8, "Other legislation that can have an  
25 impact on supplier assurance include construction,

1 design and management regulations". You will see that  
2 places in these documents refer to a "CDM", and briefly  
3 that involves placing obligations on what are called  
4 principal contractors, so those who are in charge of  
5 construction sites effectively.

6 Then you have the utilities contract regulations.  
7 So that is not a safety regulation. That is regulation  
8 in the procurement sphere -- fairness in procurement --  
9 railways and inter-operability regulations and EU common  
10 safety method and so on. So those are the kinds of  
11 obligations to which undertakings are subject which need  
12 to be taken into account.

13 Then at 2.2 you have a set of supplier assurance  
14 principles. Perhaps I should have said, the way this  
15 document is organised, where there is a "G" at the start  
16 of the paragraph number, it is a form of guidance rather  
17 than being an absolute of the standard.

18 At 2.2.1.4 you can see the different kind of risks  
19 that are involved in supplier assurance. It says "are  
20 not just safety risks", and they include train  
21 performance risks, sustainability, environmental,  
22 health, contractual, reputational, financial, product,  
23 legislative and so forth.

24 Now, it is perhaps worth noting at page 258  
25 the roles of the buyer and supplier. The definitions

1 that are used in this context are at 2.2.4.2 and  
2 2.2.4.3. I would ask the Tribunal to read those and  
3 I will make perhaps one point about them. (Pause)

4 The point I was going to make is that the "buyer" is  
5 not necessarily defined as the person who actually  
6 purchases the services; it refers to the "buyer" as  
7 being "a person or organisation actively involved in  
8 the procurement process", so there is a slightly wider  
9 definition of "buyer" than perhaps in some other  
10 contexts.

11 2.3, "Introduction to supplier assurance  
12 arrangements", it refers to something that was called  
13 the "supplier assurance framework project", and at  
14 2.3.1.2:

15 "The SAFF identified that significant savings may be  
16 made if the GB rail industry collaborates on  
17 the provision of assurance arrangements, particularly by  
18 avoiding duplication of information requests and  
19 audits."

20 Then:

21 "The SAFF defined a set of harmonised processes and  
22 interventions that can deliver meaningful assurance in  
23 the most effective way. They produced the RSSB  
24 publication 'Securing supplier assurance'."

25 That had certain definitions used within this

1 document.

2 "The output of the work of SAFP is presented within  
3 this RIS 2750 with additional information. Together  
4 this provides a framework for supplier assurance  
5 arrangements that the industry can choose to adopt  
6 either as an individual buyer organisation or as  
7 a collaborative scheme to realise the efficiency  
8 benefits identified by SAFP."

9 So this document, this standard, is intended to  
10 encourage collaboration and the avoidance of duplication  
11 by introducing an element of standardisation.

12 Then over the page you have a diagram, something  
13 called the "Assurance generator". I think it is perhaps  
14 clearer to look at the table on the following page, 261.  
15 What this is doing is talking about how assurance is  
16 provided at various stages in the life cycle of  
17 a contract, starting with -- at the life cycle stage,  
18 the first stage is capability assessment, then you have  
19 pre-tender selection, then you have assurance during  
20 the procurement process, assurance during contract  
21 delivery and post-contract review. You can see in  
22 the second column that it is talking about what  
23 assurances are provided at those different stages and  
24 there are different needs involved.

25 At the level of capability assessment, which is

1 ultimately what RISQS is about, this is, "... an  
2 assurance of proof of supplier status and capabilities,  
3 compliance with legislation and existence of management  
4 systems", and that is essentially the core element. But  
5 then it feeds into pre-tender selection and  
6 the provision, which is a separate matter, of detailed  
7 information to maximise the likelihood of making  
8 the best choice of supplier. But it is undoubtedly an  
9 integrated whole and the idea is, having let a contract,  
10 you then look and see how it works and you feed  
11 the lessons back.

12 This is all background, but then it gets more to  
13 the point when we move to part 3 and the requirements of  
14 a supplier assurance. There are some general  
15 principles, for instance at 3.271, that, "The supplier  
16 assurance arrangements shall reflect the risk associated  
17 with those products or services", a requirement for what  
18 competence criteria includes.

19 At 3.2.3 it refers to "use of a scheme" and it says:

20 "When relying on aspects of supplier assurance  
21 provided by a scheme, buyer shall check  
22 the applicability of any information it uses."

23 It goes on to say:

24 "It is important that the information provided by  
25 the scheme matches the assurance requirements for

1 the product or service concerned, otherwise the buyer  
2 may be getting false comfort."

3 Then "Guidance":

4 "Within the context of this document, use of this  
5 scheme refers to either (a) third-party scheme, an  
6 external approval, such as ISO 9001, 2015, IRIS, RISAS,  
7 RISQS, provided by a recognised international or GB rail  
8 industry arrangements, typically using independent  
9 accredited certification bodies, or (b) a second-party  
10 scheme, which is essentially a scheme run by a parent or  
11 sister company."

12 RISQS is identified as a third-party scheme here,  
13 and we would say that a scheme provided by Achilles,  
14 Achilles having provided RISQS itself for the last four  
15 years and before that Link-Up, would also count as an  
16 external approval scheme for these purposes.

17 Then paragraph 4 below that:

18 "Use of a scheme is typically dependent on the risk  
19 associated with the product or service. The greater  
20 the risk, the more the potential benefit of relying on  
21 a scheme."

22 There is a particular reference to the need to  
23 verify information provided by another party under ROGS  
24 and the need to check that the scheme information  
25 actually covers the product or service concerned. So

1           when an organisation such as Network Rail uses a scheme  
2           such as RISQS -- and this is a voluntary standard -- but  
3           what the voluntary standard are saying is that it should  
4           check that the information provided by RISQS suits its  
5           purposes -- should have some stage of doing that.

6           Part 4, paragraph 7:

7           "Part 4 provides guidance that buyers can use to  
8           evaluate the relative integrity of any scheme they may  
9           be relying on as parts of their assurance arrangements."

10          Okay.

11          Now, if we jump forward to part 4 -- so  
12          the remainder of part 3 sets out a series of different  
13          requirements of what suppliers have to -- has to be  
14          assured. For example, perhaps if I just pause you at  
15          3.4.1.3 at the top of page 268:

16          "The principle is a potential supplier shall be  
17          required to demonstrate their capability to supply  
18          identified products and services against the assurance  
19          requirements ...", and so on.

20          It refers in the paragraphs below to the ability to  
21          manage specifications and so forth.

22          Similarly, over the page, 269, you will see  
23          something about maintenance of buyer records and so  
24          forth. These are the kinds of matters -- we will see  
25          this in more detail in the RISQS documents themselves,

1 but the kind of matters which are covered by supplier  
2 assurance.

3 Then part 4 starts on page 276, and at 4 it says:

4 "The intention of this section is that it can be  
5 used as guidance both by scheme governance boards and by  
6 buyers."

7 4.2.1 starts to set out criteria for the kind of  
8 information that has to be provided, the requirement  
9 that, "... the information needs to be consistent and  
10 pertinent for both buyers and suppliers. A suggested  
11 list for the supplier assurance information for the  
12 products and services a scheme covers includes ..."

13 Then you have:

14 "Identification of products and services using  
15 a defined commodity classification structure as set out  
16 in A1."

17 So that is a commodity code scheme and I will come  
18 back to that in a moment:

19 "(b) the risk profile for each product and service  
20 type listed.

21 "(c) the defined supplier assurance requirements for  
22 each product and service type, recent history of any  
23 escalated incidents and certification and performance  
24 information on suppliers."

25 So what I am saying is you have to have a system for

1 identifying the products involved, then a risk profile  
2 for each of those products. So to put it simply,  
3 the putting up of a sign on a railway station is lower  
4 risk than work on track is a simple example.

5 Then mapping that through into defined supplier  
6 assurance requirements, what information has to be  
7 assured and the management information relating to  
8 incidents and certification of performance information.

9 A1 is at page 282. What that refers to is  
10 the RICCL, the rail industry commodity classification  
11 listing, and it sets out how it operates as a coherent  
12 classification of products and services. It follows  
13 the rules set out at A1.3 on page 284. Essentially it  
14 is just -- a coherent and watertight classification  
15 system is the gist of it.

16 Then 4.2.2, back on page 276, sets out the principle  
17 of, "Making scheme information available allows buyers  
18 to make informed choices".

19 The next paragraph:

20 "By making information on issues such as  
21 risk-related incidents available centrally, this allows  
22 a co-ordinated and efficient 'do-it-once; do-it-well  
23 approach that avoids the need for each buyer to  
24 undertake their own individual investigations (see 4.3  
25 'capability assessment')."

1           Then turning to 4.3, if you will recall capability  
2 assessment was this element at the first -- in  
3 the pre-contract qualification stage. That was  
4 the element that RISQS performs.

5           "Capability assessment is the first stage of the  
6 assurance generator and its principle is shown in  
7 figure 3."

8           That is over the page.

9           "... the intention is that the extent of its  
10 application is commensurate with the risk profile of  
11 the products and services concerned."

12           It defines three terms, "registration",  
13 "qualification" and "certification".

14           Over the page -- so 4.3.2 refers to core supplier  
15 information. That is the basic information about the  
16 supplier company details and factual information which  
17 is verified to some degree, and then capability  
18 demonstration. The capability demonstration is  
19 broadly analogous to the qualification and certification  
20 stages. It says "of the flow chart shown in figure 3",  
21 but that seems to be an error because I cannot see any  
22 reference to the qualification and certification there,  
23 but they are referred to on the previous page:

24           "... evaluating the capability of potential  
25 suppliers against pre-determined assurance criteria

1 provides detailed verified information to provide  
2 assurance for buyers commensurate with the risk profile  
3 of the products and services concerned."

4 The pre-determined assurance criteria are part of  
5 the available information referred to in 4.2, and this  
6 is the information which is to be provided to the buyers  
7 and suppliers.

8 Then more detail as to the qualification and  
9 certification is set out at 4.3.3.1 and 4.3.3.2, and  
10 this gives you some more detail on what it is that  
11 a scheme like RISQS is actually doing. So

12 "Qualification":

13 "Information provided by potential suppliers at  
14 the qualification stage can include examples/evidence of  
15 work done, competency records, recent contracts  
16 undertaken, together with details of any relevant  
17 approvals."

18 Then "Certification":

19 "Certification is a more rigorous process than  
20 registration or qualification. It provides a much  
21 higher level of assurance. It is therefore most  
22 appropriate for products with a high risk profile, for  
23 example rails and wheel sets. Certification can apply  
24 just to an assessment of an organisation's management  
25 system or in relation to an organisation's production

1 processes."

2 Then:

3 "... first assessed by management systems provides  
4 evidence that a supplier has the management systems in  
5 place to give it the capability to comply with specified  
6 requirements, but not that those requirements can or  
7 will be met."

8 So this is the point, if you like, about the kind of  
9 supplier assurance here. It is ultimately about  
10 assuring management standards, capability that an  
11 organisation as a whole has a certain capability to  
12 provide products or services. It is not actually  
13 assuring the nitty-gritty of whether those services are  
14 being delivered safely.

15 Then just for your note, 4.4 endorses the principle  
16 of co-operation between buyers and suppliers and 4.5  
17 sets out some principles of scheme governance.

18 So that is what the RSSB has published as a rail  
19 account you could industry standard for how supplier  
20 assurance should work when conducted internally and how  
21 it should work when conducted as a scheme, and that is  
22 there as a voluntary standard which people can assure  
23 against or comply with if they want to.

24 The next place I was going to go was to take you to  
25 the Network Rail schemes, the Sentinel scheme, the

1 contract plant and the principal contractor licensing  
2 scheme. The Sentinel scheme is in the same bundle at  
3 tab 2 and there is an earlier version of it at tab 1,  
4 but we do not need that for the moment. At page 44, if  
5 I could ask you, under "Purpose and scope", the fourth  
6 paragraph down says:

7 "This document applies to all organisations  
8 undertaking the role of sponsor and all individuals  
9 holding a valid Sentinel card."

10 Hopefully you will appreciate this from  
11 the skeletons, but Sentinel is the scheme where, if an  
12 individual has to have access to Network Rail  
13 infrastructure and in particular track, they have to  
14 hold a Sentinel ID card. Whoever they work for, they  
15 have to have one of those cards. It is ultimately about  
16 registering the individual, but there is also a role of  
17 registering the organisation who they are effectively  
18 working for, who may or may not be their employer in an  
19 employment sense, but who they are working for. What  
20 this document does is apply to organisations undertaking  
21 the role of sponsor.

22 There is a separate set of rules that apply under  
23 the rubric of Sentinel to the provision of training,  
24 which we may need to make reference to at some stage.  
25 I will hand those up as and when we need to, but we do

1 not need it now. You can see that because if you go  
2 down two paragraphs, it says:

3 "This document does not cover the rules associated  
4 with the delivery of track safety training and  
5 associated competence interventions. All activities and  
6 roles associated with railway training are detailed  
7 within the rail training accreditation RTAS scheme  
8 rules."

9 So what we are looking at here is a document which  
10 is essentially aimed at the sponsors, the organisations  
11 who employ people who are on the track and what  
12 management standards they have to comply with.

13 Now, if you need it, the definition of a "sponsor"  
14 is on page 65. The core case of a sponsor is  
15 the employer of an individual, but, as I say, you can  
16 get a situation where you have a sponsor who is not  
17 the employer in the narrow sense.

18 At point 1.1 on page 45, that sentence links  
19 the individuals to their sponsor.

20 1.2:

21 "All sponsors must be approved and shall continue to  
22 maintain approval through the Sentinel scheme assurance  
23 arrangements set out in section 6 of this document."

24 That is the key section that we are going to be  
25 going to in a moment. But what you can see from 1.1 and

1 1.2, every individual has to have a sponsor. If every  
2 sponsor has to be accredited -- the requirements to be  
3 RISQS-accredited are in this section 6 that we are going  
4 to come to, so in effect only individuals who work for  
5 RISQS-accredited companies are allowed onto  
6 the infrastructure.

7 I am going to jump over this quite briefly.

8 Section 2 sets out a range of roles and responsibilities  
9 for sponsors, core duties, at 2.1, to plan and authorise  
10 works and to provide safety-critical equipment -- this  
11 is on page 47 -- and to maintain all records associated,  
12 but those are the core duties of all sponsors.

13 There are more detailed obligations on primary  
14 sponsors to provide Sentinel cards, induction briefing,  
15 training and assessment and so on. They have to ensure  
16 that is all provided. They are responsible for entering  
17 into a contract of sponsorship with an individual as  
18 well which sets out these requirements.

19 Then there are several requirements and sub-sponsors  
20 and individual card holders. Then at section 3 there is  
21 a series of management system requirements which  
22 sponsors are required to comply with.

23 Perhaps we can just do the headings. There are  
24 requirements in respect of the pre-sponsorship process  
25 at 3.1; requirements in respect of the contract of

1 sponsorship at 3.2; at 3.3 they must have processes in  
2 place for the management of sub-sponsors; 3.4, they  
3 shall have a competence management system in place to  
4 flag training, assessment and mentoring requirements;  
5 they need, at 3.5, management of working hours, they  
6 shall have a fatigue risk management system; 3.6,  
7 provision of PPE, personal protective equipment. They  
8 shall have a process in place for the provision of it  
9 and suitable training free of charge; 3.7 covers routine  
10 briefings; 3.8 refers to processes for the procurement,  
11 management, transport, calibration and equipment for use  
12 by individuals. They must have assurance checks.  
13 Second paragraph up, they must have a documented  
14 register of the equipment; 3.9 and 3.10, rules relating  
15 to investigation of breaches; 3.11, management of  
16 records and some requirements in respect of  
17 de-sponsoring and confidential reporting.

18 What you can see from all of that is these  
19 requirements on sponsors are again at the level of  
20 management systems. They must demonstrate they have  
21 processes in place for monitoring competence, processes  
22 in place for monitoring fatigue, processes in place for  
23 monitoring the issue of personal protective equipment.

24 Section 4 deals with breaches; section 5 with  
25 investigations. We can skip over those.

1           Section 6 starts on page 61, and within 6.1 you can  
2           only be a sponsor if you are a primary sponsor; in  
3           effect you directly employ some people.

4           Then second paragraph:

5           "For an organisation to be approved by Network Rail  
6           as a sponsor, they must initially register with  
7           the railway industry supplier qualification scheme,  
8           RISQS."

9           So that is where the requirement to register is. If  
10          you want to have workforce who go on to rail, you need  
11          to be registered with RISQS. That is an absolute  
12          requirement.

13          Then there is a difference in level of sponsorship  
14          between trackside or non-trackside. We are particularly  
15          concerned with the trackside sponsorship, because that  
16          is, we say, key in this industry.

17          Then you can see "the Sentinel audit process at 6.2,  
18          which sets out what audit you are subject to under RISQS  
19          as a trackside sponsor:

20          "An organisation registered with RISQS as  
21          a trackside sponsor shall be subject to an annual  
22          assurance process. This will include a management  
23          system audit to demonstrate that the process has  
24          documented processes for the key management system  
25          requirements required to be a trackside sponsor."

1           So that is effectively the audit of the management  
2 standards we have just seen in section 3, whereas  
3 a non-trackside you have a random management audit.

4           Then in the last paragraph on the page there is  
5 a concise summary of the nature of the audit.

6           "The audit shall check the sponsorship management  
7 systems and processes are present and sufficient to meet  
8 the minimum requirements of the Sentinel scheme rules.  
9 The audit shall also review sample records throughout  
10 the processes to demonstrate that the management system  
11 processes are being robustly applied."

12           So this is a review of management systems and of  
13 records and it is setting them against the criteria that  
14 we have already seen.

15           Then the remaining requirements are not that  
16 important, but 6.5, perhaps just worth noting:

17           "Verification audits of Sentinel scheme  
18 administrators."

19           This is not controversial. The Sentinel scheme is  
20 owned by Network Rail, Network Rail controls  
21 the Sentinel scheme standard. The actual day-to-day  
22 administration is subcontracted, I believe, to Mitie, an  
23 outsourcing organisation, but I will be corrected if  
24 I am wrong about that.

25           "Network Rail reserves the right to audit the

1 Sentinel scheme administrators for the purposes of  
2 ensuring proper application."

3 So they reserve a right of audit to themselves.

4 So standing back, we would say you can see clearly  
5 that what we have is a scheme that imposes obligations  
6 on companies who put people onto Network-Rail-managed  
7 infrastructure, in particular a requirement, as  
8 a condition of being allowed to do so, that they  
9 register with RISQS and have their management systems  
10 audited by RISQS on an annual basis.

11 Now, the next one I was going to do is the  
12 principal contractor licensing scheme. The latest  
13 version of that is at G1/5, so tab 5 of the same bundle.  
14 I am going to deal with this slightly more out of order.  
15 The purpose and scope is set out on page 121. It says:

16 "The implementation of this standard enables  
17 Network Rail to verify that organisations/internal  
18 duty-holders have the capability to discharge principal  
19 contractor duties when undertaking construction work  
20 where Network Rail is the client ..."

21 And principal contractor duties, in particular  
22 a range of duties under the construction, design and  
23 management regulations 2015, if I can just interpolate  
24 to speed up.

25 "... and to provide ongoing assurance that the

1 organisation's capabilities are maintained or improved."

2 So this, I should say, is a Network Rail level 2  
3 business process standard. It says under 2 -- it says  
4 what the standard does and says at the bottom:

5 "This standard applies to all organisations  
6 undertaking PC [principal contractor] duties where  
7 Network Rail is the client."

8 So all principal contractors who contract with  
9 Network Rail have to comply with this standard.

10 Now, I am going to then jump to section 9 on  
11 page 130. I am going to come back to some of  
12 the intermediate bits. Section 9, which runs over  
13 a number of pages -- I am just going to refer you to  
14 the headings -- sets out the principle contractor  
15 requirements. These are the substantive criteria --  
16 expressed at a fairly high level, but still  
17 the substantive criteria which principal contractors are  
18 obliged to comply with.

19 So there is a requirement to hold an authorisation  
20 from Network Rail, so a licence, certificate or letter  
21 of compliance. There are requirements in respect of  
22 arrangements for control of the works; the price of  
23 documented management arrangements for temporary works;  
24 there are quite stringent requirements as regards  
25 specialist advice; they need to have people with NEBOSH

1 construction certificates, an IMA certificate or  
2 equivalent for working full-time for them; there are  
3 requirements in respect of specific competency  
4 requirements; requirements in respect of the capability  
5 to co-ordinate on-track plant. Requirements in respect  
6 of safety culture development; quality management  
7 standards. In fact, they are required to have a quality  
8 management system certified to ISO 9001 by an accredited  
9 third party, so there is a specific requirement to hold  
10 that certification.

11 Similarly, under "Environmental", they have to have  
12 an environmental management system certified by an  
13 accredited third party. There are a series of  
14 requirements in respect of health, safety and well  
15 being, quite extensive and so forth. So there are quite  
16 stringent requirements, as one would expect, and that's  
17 the substance of them.

18 If we go back to section 6, that importantly  
19 explains how compliance with the standard is verified.  
20 That is on page 126. It says at the start:

21 "This clause details how Network Rail will assess,  
22 verify and confirm compliance with this standard."

23 And 6.1:

24 "Industry minimum requirements module ...", and so  
25 on.

1           "Assessment in accordance with the IMR module and  
2 relevant RISQS product codes. Information will be  
3 assessed annually or when a RISQS auditable change is  
4 made. This assessment is carried out by the RISQS  
5 board's nominated auditor to confirm compliance.  
6 Reports are made available to the PC licensing assurance  
7 team."

8           So there is a set of checks that are done by RISQS  
9 and that information has to be made available to  
10 the PC licensing assurance team.

11           Then we go on with -- there are some further  
12 requirements of -- 6.1.2 deals with arrangements for  
13 internal principle contractors, so parts of Network Rail  
14 that effectively operate as -- doing construction.

15           6.2, "Initial management system audit":

16           "An initial audit of the organisation's management  
17 systems will be undertaken to confirm a minimum level of  
18 compliance to clauses 7, 8 and 9 as applicable. This  
19 will be completed by the PC licensing assurance team  
20 before commencement of works for the PC."

21           So there is a management system audit that is not  
22 conducted by RISQS; it is conducted separately by  
23 the PC licensing team within Network Rail.

24           Then that is followed at 6.3 -- you then  
25 get "Provisional licence issue", and then the following

1 stages are 6.4, "Initial sight audit":

2 "An initial site audit of a provisional PCL holder  
3 ..."

4 A principal contractor licence holder.

5 ... is carried out by the PCL licensing assurance  
6 team to verify the implementation of the audit and  
7 management systems detailed in 6.1 and 6.2."

8 So we are moving beyond the RISQS verification here  
9 into a higher level of verification that this is  
10 actually being done in the real world and that is being  
11 done by the PC licensing and assurance team.

12 6.5, "Ongoing maintenance", providing information.

13 6.6, "Ongoing risk review".

14 At 6.7 and 6.8 we have provision for announced  
15 on-site audits and unannounced on-site audits by the PC  
16 licensing assurance team.

17 THE CHAIRMAN: Can you remind me who is the PC licensing  
18 assurance team?

19 MR. WOOLFE: The PC licensing assurance team is a team that  
20 sits within Network Rail whose job it is essentially to  
21 license principal contractors and to check that they are  
22 up to scratch.

23 I do not think there is a defined term in section 3,  
24 but that is in a sense ...

25 THE CHAIRMAN: Okay, that is fine.

1 MR. WOOLFE: Just to finish off, if you go to section 8,  
2 this is called "pre-qualification", "Pre-qualification  
3 requirements of external organisations", and 8.1:

4 "Compliance with clauses 8.2, 8.3 and 8.4 shall be  
5 in place and verified prior to any application being  
6 submitted to become a Network Rail PC ..."

7 Network Rail principal contractor.

8 "... and prior to contracting to undertake PC  
9 duties."

10 So these are preconditions of licensing. You can  
11 see at 8.2 you need to have audited and verified  
12 compliance with the RISQS IMR module and auditable  
13 product codes. I understand that to be a reference to  
14 being audited against the various modules which relate  
15 to the product codes, relevant to the services they are  
16 providing.

17 Sentinel scheme rules -- there has to be audited and  
18 verified compliance with the Sentinel scheme rules.  
19 That is not surprising. We have seen what Sentinel  
20 says. Then a safe system of work planning:

21 "Trackside organisations shall demonstrate audited  
22 and verified compliance to developing safe systems of  
23 work on Network-Rail-managed infrastructure. This shall  
24 include audited and verified compliance to the RISQS  
25 product code for SSOW."

1           That is a system of work planning -- and B as well.  
2           So, again, what we have is a scheme which imposes  
3 obligations, preconditions and duties on construction  
4 firms that act as principal contractors on  
5 Network-Rail-managed infrastructure. There is  
6 a pre-qualification requirement that they register with  
7 RISQS for the IMR module and have their management  
8 systems audited by RISQS in the relevant respects for  
9 Sentinel and safe system of work. But then higher  
10 levels of assurance as to whether those -- whether what  
11 is being done is actually safe on-site is being  
12 conducted by Network Rail internally.

13           Then the last one of these schemes, you will be  
14 relieved to know, is the on-track plant operations  
15 scheme, which is at G1/6. Its purpose and scope is set  
16 out at page 149. It is perhaps worth noting what it  
17 says its purpose is because I am sure my learned friend  
18 will want me to, which is:

19           "The application of this module contributes to  
20 the control of the following risks:

21           "(a) Risk of runaway, uncontrolled movement and  
22 collisions by on-track plant ... with infrastructure,  
23 workforce or other vehicles;

24           "(b) Risk of personal injury ...

25           "(c) [And] risk of implementing ineffective

1 management control and supervision of OTP operations."

2 That is the aims of this scheme, the Network Rail  
3 scheme.

4 At 2 "Scope", second paragraph:

5 "This document applies to organisations carrying out  
6 OTP..."

7 That is "on-track plant operations".

8 "... on NRMI ..."

9 That is "Network Rail managed infrastructure".

10 "... and Network Rail projects."

11 So it does not just apply to organisations who  
12 contract with Network Rail; it also applies to  
13 organisations who contract with somebody else but are  
14 carrying out work on Network-Rail-managed  
15 infrastructure.

16 It sets out a series of prerequisites for  
17 compliance: safe use of plant; product introduction and  
18 change; engineering acceptance; and then specific rules  
19 controlled through the Sentinel scheme. So these are  
20 the requirements.

21 Just to note, at point 3 over the page there is  
22 a rule stating that:

23 "OTP operations on Network Rail infrastructure and  
24 Network Rail projects shall be carried out by an  
25 approved POS provider."

1           So you cannot come onto the infrastructure and carry  
2 out work unless you are approved under the scheme.

3           At point 8 within that:

4           "Suppliers used to provide OTP shall be  
5 Network-Rail-approved through the rail industry safety  
6 qualification supplier, RISQS."

7           There is obviously a typo there, but that is  
8 a reference to RISQS.

9           Section 4 sets out the responsible roles for  
10 POS providers, and that is management individuals who  
11 have to be available within the provider of plant.

12           Then section 5, which starts on page 152, is  
13 the management system requirements. Again, I will just  
14 run through the headings to give an idea of what is  
15 assured under here.

16           So 5.1 is a requirement they are approved  
17 essentially as part of the assurance requirements.

18           5.2, they have a management system and framework for  
19 safe delivery of OTP operations.

20           5.3, they have to have documented operational  
21 resource arrangements in place regarding training.

22           5.4, "They shall demonstrate their processes for  
23 communication and co-ordination within the possessions  
24 and work sites".

25           I assume "possessions" refers to sort of areas of

1 land there.

2 5.5, they have to have arrangements in place for  
3 proactive and reactive monitoring of their own  
4 performance and that of other suppliers.

5 5.6, emergency preparedness.

6 5.7, they have to demonstrate "... appropriate  
7 contract-specific insurance arrangements, documented  
8 processes in place", 5.8, "for approval, acceptance and  
9 maintenance of OTP", which is obviously very important.

10 5.9:

11 "Document a system identifying the scope of  
12 operations."

13 So how many bits of plant they have and details of  
14 accident and close calls, etc.

15 They have to demonstrate processes for selection and  
16 use of suppliers, including safety-critical goods,  
17 products or services, a series of operational  
18 requirements, which are quite -- they have to be able  
19 demonstrate at 5.11.

20 5.12, the requirement for on-track plant planning,  
21 which again is quite detailed.

22 5.13, arrangements of assuring competence.

23 Then 5.14, arrangements for reliability.

24 As you see, this is really quite a stringent set of  
25 requirements and we make no bones about that.

1           We can skip over 6, which is just about breach, and  
2           turn to 7, which is the scheme assurance arrangements.  
3           Similar to what you saw under the principal contractor  
4           scheme, you have a system of three separate audits: one,  
5           a minimum requirement for management systems audit; two,  
6           we then have a requirement for a technical audits, and  
7           that says:

8           "This shall be carried out in support of  
9           the management system audit of OTP acceptance and  
10          maintenance arrangements. The technical audit protocol  
11          shall be determined by Network Rail's head of plant and  
12          T&RS."

13          So that is an internal Network Rail approval.

14          Then there is a minimum requirement for on-site  
15          audits.

16          "On-site audits shall check the application of  
17          the management system processes ...", and that they are  
18          being applied.

19          So again that is another form of checking that goes  
20          beyond RISQS.

21          So when we are looking at all these very detailed  
22          requirements, you can see both checking that they have  
23          management systems in place is one thing and checking  
24          they are being applied is another.

25          So again what we have in the third case is a scheme

1 that imposes obligations on firms as a condition of  
2 supplying plant on Network-Rail-managed infrastructure.  
3 There is in a sense a pre-qualification requirement that  
4 they register with RISQS and have their management  
5 systems audited by RISQS, but with a high level of  
6 assurance being undertaken by Network Rail internally.

7 Now, I am just going to very briefly show you  
8 the documents -- not in anything like the same detail --  
9 at tabs 8, 9 and 10 of the same bundle. At tab 8 you  
10 have a standard described as "Level 1 supplier assurance  
11 framework", and, as I understand it, Network Rail have  
12 standards at three levels. A level 1 standard sets  
13 objectives and goals and policies and the like, and it  
14 is quite brief, as you will see, at a quite high level.  
15 Then you might have level 2 and/or level 3 standards  
16 which flesh that out, see below.

17 The intention of this document is to state  
18 Network Rail's supplier assurance policy at a high level  
19 and describe the framework of assurance. As we  
20 understand it, although this document is quite old -- it  
21 is 1 March 2008 -- this document is still listed by  
22 Network Rail as an extant standard.

23 The only thing to note is at point 7, the diagram  
24 which sets out the supplier assurance frameworks on  
25 page 195. You can see it is familiar because it looks

1           rather like what is now RAS 2750. It is slightly  
2           different, but it has the same journey, if you like,  
3           from supply qualification through selection, the life of  
4           the contract and then monitoring performance. So that  
5           is a very high-level standard, if you like, that  
6           describes Network Rail's objectives.

7           Then sitting below that you have, at tab 10,  
8           a level 2 standard, and a level 2 standard specifies  
9           what is supposed to be achieved at the level of business  
10          processes, assurance systems and controls, and  
11          everything we have been looking at so far from  
12          Network Rail is a level 2 standard, and this -- in  
13          relation to supply qualification -- and you just note on  
14          page 229 it specifies the arrangements for qualification  
15          activity within the supplier assurance framework, so  
16          the standard operates at that level.

17          Back to tab 9, we have another level 2 standard  
18          called "Supply qualification core requirements", dated  
19          3 September 2011, CPR 302 standard, and its purpose and  
20          scope is set out on page 202:

21                 "This document sets out the core management system  
22                 and management process requirements for suppliers of  
23                 products and services that import risk onto  
24                 Network-Rail-managed structure."

25                 As I understand it -- and we will have to explore

1           this in evidence -- the detail of this has, to a large  
2           extent, been supplanted by RISQS, by the IMR, but this  
3           standard still exists at some level with Network Rail,  
4           setting out there core requirements.

5           So those are the internal Network Rail standards.  
6           So I started with the RSSB standard of how one does  
7           assurance. Then we looked at a series of Network Rail  
8           standards of how they actually go about assuring certain  
9           specified things, so compliance with the Sentinel rules,  
10          with the principal contractor rules and the on-track  
11          plant rules.

12          Then what I might do, in the interests of time,  
13          is -- the RISQS documents I think I can take quite  
14          briefly because they are -- what we have is a series of  
15          detailed questions fleshing out, saying, "Can you  
16          document this? Can you check this?", and so on. Me  
17          reading it out to you is not going to be a very  
18          enlightening process for everyone and I think you are  
19          not going to want to read every single page of  
20          bundle G2.

21          So if I just take you to the Sentinel protocol at  
22          tab 16, G2/16, by way of illustration, and then perhaps  
23          I will ask you to read some other parts in due course.

24          As you will appreciate, the Sentinel scheme said you  
25          have to be audited by RISQS in order to be a sponsor and

1 allow your people onto the track, and then this document  
2 sets out RISQS' audit protocol for doing this. You can  
3 see the requirements at -- perhaps look at the contents  
4 page, page 357, and you can see what it covers.

5 Under "Management control", it covers management  
6 structure and management systems and policy control, and  
7 then there is a series of requirements in respect of  
8 safety risk management.

9 Under "Management control" over the page,  
10 "Management structure", the auditor is essentially  
11 required to check that there are defined roles and  
12 responsibilities for certain people who are responsible  
13 for the management of Sentinel-sponsored personnel.

14 Then "Management systems":

15 "The auditor shall verify that documented procedures  
16 within the management system contain processes for  
17 the management of ..."

18 Then a whole series of things that you will have  
19 seen. But, again, it is checking the level of  
20 documentation and procedure.

21 Over the page, 1.3, the auditor has to check that  
22 the organisation has produced brief and displayed copies  
23 of an alcohol and drugs policy statement -- because you  
24 do not want people on infrastructure who are drunk or on  
25 drugs -- and fatigue management.

1           Then we move into safety risk management, but,  
2 again, the point I am making is this is all at the level  
3 of processes and policies and records. So for PPE:

4           "The auditor shall verify that the organisation has  
5 processes for and records supporting the issue and  
6 management of rail-specific PPE for all primary  
7 sponsored personnel ...", and so on.

8           Then "Human resources", there is a requirement at  
9 3.1 to verify documented processes for the contract of  
10 sponsorship between the sponsor and the individuals.  
11 Again, I mean, the contracts themselves cover some  
12 important stuff, the issue of PPE, delivery of regular  
13 briefings and so on, so this is not trivial by any  
14 means. This is all important.

15           3.2:

16           "The auditor shall verify the sponsor has processes  
17 in place for the management of sub-sponsors and  
18 the requirements of what those management systems have  
19 to cover."

20           3.3, "Misconduct processes".

21           3.4, "Occupational health". You have to have  
22 arrangements for carrying out -- for checking employees  
23 meet health requirements, for carrying out medicals and  
24 so forth.

25           3.5, very important; alcohol and drugs management,

1 they should again have arrangements in place:

2 "The auditor shall establish that the supplier shall  
3 have arrangements in place for checking that the workers  
4 do not access infrastructure under the influence of  
5 alcohol or drugs."

6 Similarly in 3.6:

7 "The auditor should establish the general  
8 arrangements include the following:

9 "Identifying activities where fatigue may be an  
10 issue.

11 "Carrying out deep risk assessments.

12 "Working to time limits ...", and so on.

13 Again it is the auditor checking that the  
14 organisation has documented management processes for  
15 these things.

16 That is the point I was going to make about  
17 Sentinel.

18 I would make the same points at exhaustive length  
19 about the IMR protocol that is at tab 15, the safe work  
20 planning protocol at tab 17 and the plant operations  
21 scheme at tab 18, but I do not think it is going to  
22 really enlighten you much more. Perhaps at some point  
23 if can you read through those to check that you think  
24 that applies.

25 Now, having done that, there are just a very small



1           I am going to take you in a moment to another  
2 document which we think relates to this, a further  
3 planned response.

4           Then a few pages onwards, at 614 and 615, looking  
5 ahead, if I could ask you to read down in 5.1 and 5.2,  
6 and in particular we would stress the second bullet  
7 point under 5.2 when you get there. (Pause)

8           Now, I am going to take you to another document  
9 in -- this is in a non-confidential bundle and then make  
10 certain points about them together, if I may. That  
11 other document is at bundle H17, pages 4793 to 4794,  
12 a two-page document, and this is a -- it is called,  
13 "The rail industry supplier qualification scheme risk  
14 log". The date is here last reviewed -- it looks like  
15 4 May 2017. It might be 5 April, I suppose, but it  
16 looks likes 4 May.

17           This sets out similarly a series of risk  
18 descriptions and then a mitigation strategy. If I could  
19 ask you to look at 3, one risk:

20           "Buyers do not fully support and use the scheme,  
21 reducing effectiveness."

22           So they do not fully support it. The mitigation  
23 is -- I think it is a bit cut off:

24           "... to work with ORR and IMs [IMs being  
25 infrastructure managers] to highlight the assurance

1 requirements of buyers ...", with undertaking a review  
2 of what buyers are doing.

3 Then the ISAS project -- I'm not quite sure what  
4 ISAS refers to -- "... working with buyer to ensure  
5 stakeholder support."

6 So basically trying to get stakeholder support.

7 Then 4, the risk identified is:

8 "Buyers do not support the scheme and an alternate  
9 scheme is created."

10 The mitigation strategy is:

11 "Create a buyers' charter to show the support for  
12 the scheme so there is no perceived market for  
13 a competing scheme."

14 Then again there has been a bit cut off, comments on  
15 the right, but:

16 "Communications and project work being undertaken to  
17 ensure that everyone is aware of the support for  
18 the scheme ..."

19 Then it looks to me like it says:

20 "... to prevent an alternative."

21 Then it gets cut off, but that is what we can see.

22 So the buyers' charter, that is a document which  
23 I understand it is common ground -- it was said in  
24 Network Rail's evidence -- that Network Rail has signed  
25 along with TfL and some other organisations as well.

1 A copy of that is in bundle G2/13. So this RISQS  
2 charter, which, as we can see, has been identified as  
3 a way of addressing the risks of there being a competing  
4 scheme and sort of eliminating that perception that it  
5 is possible to compete, is a document which has been  
6 produced by RSSB. You see it has the RSSB logo on it  
7 and the RISQS logo, but it is to be signed by other  
8 people -- it has been signed by Network Rail. It says:

9 "We believe that:

10 "It is the responsibility of all buyers and services  
11 in the rail industry to ensure the quality of our  
12 suppliers to enhanced health, safety & environmental  
13 management, and supply chain reliability."

14 Second bullet:

15 "This will be achieved most efficiently if there is  
16 a central service and system providing the base level  
17 assurance for all industry suppliers, thereby allowing  
18 buyers to concentrate on such further assurance as may  
19 be needed through our specific supplier requirements."

20 So there is an efficiency justification put forward  
21 for having a central service.

22 Third bullet point:

23 "We believe the RISQS system managed through RSSB  
24 provides such a service and we are committed to working  
25 with RSSB to further develop and improve RISQS for

1 the benefit of our industry. We therefore commit to  
2 maintaining our involvement with RISQS and, where we use  
3 a supplier assurance scheme for auditable categories, we  
4 will utilise RISQS to provide baseline assurance for  
5 suppliers for our rail network. Further we will  
6 contribute to the oversight and development."

7 So it is says that where we need supplier assurance  
8 we will use RISQS. It is on an exclusivity obligation.

9 Now, this does not in itself lead to Network Rail  
10 having to mandate under the key schemes because that is  
11 a different point. This is Network Rail saying, "Where  
12 we use a supplier assurance scheme, we will utilise  
13 RISQS". It does not necessarily mean -- well, it is not  
14 quite clear how it relates to the requirements in  
15 the Sentinel scheme, for example, but you can clearly  
16 see, we say, the intent.

17 So that is a charter that has been produced by  
18 the RSSB, as you have seen in the RISQS matrix in  
19 volume H17, specifically with a view to eliminating  
20 the perception that it is possible to compete. It is  
21 one that has been signed up to by Network Rail.  
22 A Network Rail representative sits on the RISQS board.

23 We say that then, when you come to the next  
24 document, you need to bear all that in mind. The next  
25 document is the 14 May letter, which in a sense has

1 triggered all of this, where we say, "We would like to  
2 provide an equivalent scheme", and Network Rail say,  
3 "No, we don't accept that". That -- I think it appears  
4 in various places, but one place is in volume C1, so  
5 the exhibits to Ms. Ferrier's first witness statement  
6 at -- it is in tab 2 of that.

7 So what you can see -- perhaps page 28 is the best  
8 place to start. This is a letter from Achilles of  
9 10 April, referring back to some previous  
10 correspondence. They have been sending letters for  
11 a while but not receiving a reply. This had been going  
12 on.

13 "We refer to our letters of ... January ... and ...  
14 March ... Please accept this letter as confirmation  
15 that, with effect from 1 May 2018, Achilles ... will  
16 continue to offer to the rail industry a supplier  
17 pre-qualification management registration scheme in  
18 relation to the questionnaire and Network Rail audit  
19 modules - OTP, RIP and Sentinel."

20 RIP correlates to this. It is the SSW module in  
21 RISQS:

22 "Achilles' strategy was presented at meetings  
23 between Achilles and Network Rail in March, resulting in  
24 our understanding that equivalent schemes are legal,  
25 compliant and acceptable.

1           "The Achilles pre-qualification scheme will be known  
2 as Link-Up TransQ. In respect of [it] ..."

3           Then an assertion is made.

4           "... the Link-Up TransQ fully complies with all  
5 the requirements of RIS 2750 and therefore qualifies as  
6 an equivalent scheme. Please find attached copies of  
7 certificates that will be issued to customers that have  
8 successfully passed the modules."

9           We do not seem to have those in the bundle, but  
10 there we are.

11          "Achilles will start to communicate the availability  
12 of Link-Up TransQ. Achilles will provide Sentinel with  
13 any assurances it requires in relation to the operation  
14 of Link-Up TransQ and will provide any information to  
15 Sentinel that it may require in order to satisfy  
16 itself that Link-Up TransQ complies with both RIS 2750  
17 RST and ..."

18          Then there is a reference to a Network Rail standard  
19 number. That is the preceding version of the Sentinel  
20 scheme rules:

21          "We ... request that Achilles remains invited and  
22 included in any industry meetings and correspondence  
23 that is relevant to the successful operation of a ...  
24 pre-qualification scheme."

25          So basically we want it to be equivalent, we want it

1 to be accepted that our assurance is equivalent and we  
2 want to be allowed to participate in any  
3 standard-setting process.

4 The response from Network Rail of 14 May, page 29,  
5 a month later:

6 "I acknowledge receipt ... I note that it is  
7 Achilles' proposal to continue to offer a rail industry  
8 supplier pre-qualification registration scheme.

9 "As you are aware in 2014 RISQS was introduced as a  
10 mandatory requirement for the Sentinel scheme and were  
11 Network Rail's Principal Contractor Licensing and Plant  
12 Operator schemes. No alternative pre-qualification  
13 scheme is identified in the requirements for these  
14 schemes as a key objective of RISQS was to have a single  
15 rail industry scheme, allowing overheads to be kept to  
16 a minimum to reduce duplication and reduce audit burden  
17 throughout the supply chain."

18 So that's an efficiency justification being tendered  
19 at this stage, but no safety justification.

20 "In 2017 the RSSB competitively tendered ...  
21 Network Rail support RISQS as provided through the  
22 successful tender and its management ... such that  
23 the scheme is provided by the UK industry, for  
24 the industry."

25 That in a sense is what kicked off this litigation,

1           that refusal, and we would say that that that is an  
2           example of us saying, "We want to be allowed to offer  
3           equivalent certification audit", and Network Rail is  
4           drawing down the shutters and saying, "No, that is not  
5           possible". There is no issue, we say, with RISQS  
6           bundling together with standard setting and assurance  
7           and IT elements -- it is what we do -- but if you  
8           mandate a single scheme in those circumstances and  
9           require everybody who has access to Network Rail  
10          infrastructure to register with it, you effectively push  
11          everybody onto that one system and you eliminate -- as  
12          we saw from the RISQS matrix and Network Rail signing up  
13          to the RISQS charter, the effect of that is to eliminate  
14          the potential for competition in the provision of such  
15          schemes. That is our case on effects.

16                 Now, I appreciate it is lunchtime. I think I have  
17                 just a -- I think I covered these points. I think there  
18                 is just one more distinction I want to draw --  
19                 the question is whether you want me to do it now or  
20                 after lunch.

21         THE CHAIRMAN: Do it now.

22         MR. WOOLFE: Another important distinction finally that  
23                 needs to be made is there is a distinction between  
24                 Network Rail using RISQS as its qualification system for  
25                 procuring goods and services on the one hand and

1 Network Rail stipulating RISQS as a precondition for  
2 approval under its schemes, in particular the Sentinel  
3 and on-track plant schemes, and we will look at this in  
4 evidence.

5 Essentially what I want to do is clarify -- it is  
6 common practice for organisations to use a qualification  
7 system for procurement purposes. It is allowed and  
8 permissible under the Utilities Contracts Regulations.  
9 They are not in the bundle, but I think it is  
10 Regulation 77 and I will provide a copy to the Tribunal  
11 in due course, but that is allowable, that is fine.

12 It is no part of our case that Network Rail should  
13 be obliged to use Achilles as a qualification system or  
14 as its qualification system where it wants to procure  
15 goods and services. Our complaint is that, by making  
16 RISQS a precondition for scheme approval, Network Rail  
17 is pushing RISQS down through the supply chain, and it  
18 is essentially ensuring that all of the tier 2 or tier 3  
19 suppliers who want to are -- who contract with tier 1  
20 suppliers and so on further down, subcontractors -- or  
21 even those undertakings who do not supply Network Rail  
22 at all but need access to Network Rail's infrastructure  
23 to supply services to other people such as  
24 train-operating companies -- that all these other people  
25 have to be RISQS-registered and RISQS-audited, and once

1           they are on the RISQS system, there is then no scope for  
2           any competition, and that effectively gives RISQS  
3           a monopoly on the market. So that is our complaint.

4           Now, on relief, I do apprehend that what  
5           the Tribunal will be thinking is Network Rail raises  
6           certain concerns. Now, some of those may not be valid,  
7           some of them may be valid, but you may be thinking, "How  
8           can any of those concerns be met in any relief that is  
9           ultimately granted? Can we grant relief that is  
10          practicable that is actually going to work?" As I have  
11          said, we are not proposing that you should mandate  
12          Network Rail to use Achilles as a qualification system  
13          and what we are focused on is the terms of the key  
14          schemes. So in broad terms what we would be looking for  
15          is relief that would require Network Rail to recognise  
16          assurance of those requirements of its key schemes for  
17          which it currently recognises assurance provided by  
18          RISQS -- to recognise assurance of that type provided by  
19          other equivalent schemes, provided that the assurance is  
20          given to a satisfactory standard that Network Rail is --  
21          can be reasonably satisfied with and that it provides  
22          such recognition on fair, reasonable and  
23          non-discriminatory terms. That is broadly speaking what  
24          we say is required.

25          Now, the detail of that may need to come out in

1 the course of exploring the Network Rail's witnesses'  
2 concerns, but that is broadly it.

3 That is everything I wanted to say in opening.

4 Thank you for allowing me to run on a little.

5 THE CHAIRMAN: Thank you. We will start again at 2.10.

6 (1.10 pm)

7 (The short adjournment)

8 (2.13 pm)

9 Opening submissions by MR. FLYNN

10 MR. FLYNN: Thank you, sir. I hope the Tribunal does not  
11 find it too lugubrious. I have asked for the blinds to  
12 be lowered as it was shining right across our eyes at  
13 this level of the courtroom.

14 Members of the Tribunal, this stand-alone case  
15 before you is most unusual and involves, as we will hope  
16 to demonstrate, some extremely novel and ambitious  
17 propositions of law. From Network Rail's perspective,  
18 what is under challenge is a practice or a policy that  
19 it has had in place in an evolving context for over  
20 20 years, and this was well known at all times to  
21 Achilles as the incumbent provider for most of that  
22 time. The details of that are in the evidence and no  
23 doubt will be explored with the witnesses and I will not  
24 weary you with it now.

25 That status was unchallenged and unquestioned by

1 Achilles during those periods when it was, as it were,  
2 a beneficiary of the policy. But now that it is no  
3 longer the service provider for RISQS, it complains  
4 before you that the "RISQS-only rule", as we have  
5 called -- and I hope that is helpful shorthand -- that  
6 that rule is anti-competitive.

7 The services for provision of RISQS were, of course,  
8 competitively tendered, and the Tribunal will have  
9 noted, and it is also in the evidence, that Achilles did  
10 not succeed in relation to lot 1 of the tender because  
11 it submitted a non-compliant bid -- non-compliant  
12 because it was made contingent on winning lot 2. So  
13 once excluded from lot 1, chronologically it then chose  
14 to withdraw from the chance to succeed in the tender for  
15 lot 2.

16 I should also note that of course the services will  
17 be re-tendered again in a few year by the RSSB and  
18 Achilles will be able to enter the bidding for that  
19 re-tender on equal terms with any other interested  
20 party. So there can be no suggestion, in my submission,  
21 that the move from the concessionaire model to  
22 the outsourcing model that RISQS now has was motivated  
23 by any desire to exclude Achilles from service provision  
24 in relation to RISQS or indeed supplier assurance.

25 In fact, this case is not really about Achilles

1 at all. If you have read their original case and  
2 the evidence, you would think that the issue before you  
3 was largely about whether Achilles should be permitted  
4 to provide supplier assurance services to Network Rail  
5 and its suppliers alongside RISQS. But of course it is  
6 not about that and it cannot be, and I think my learned  
7 friend Mr. Woolfe moved somewhat back from that this  
8 morning.

9 Firstly, of course, competition law is about  
10 the protection of competition as a process, not about  
11 protecting individual competitors within that process,  
12 and Achilles has no special place and no accrued right  
13 here.

14 Secondly, any policy that Network Rail has in place,  
15 even if one envisages a change of policy in this regard,  
16 would have to ensure equal treatment for all qualified  
17 providers. Again, I think that point has now been more  
18 fully recognised and no doubt this matter will need to  
19 be fully explored in evidence. But if the RISQS-only  
20 rule is an unlawful one, as Achilles alleges before you,  
21 it is far from, as it were, the only show in town, if  
22 I can put it that way. There are several, if not many,  
23 other potential providers who would have to be  
24 considered. So any counterfactual evaluation, which is  
25 the evaluation the Tribunal will be required to conduct,

1 has to be on the basis of, let us say -- let's use  
2 the word "several" -- schemes or providers having to be  
3 accommodated.

4 In fact, the evidence shows that it is that  
5 situation or that prospect that is and always has been  
6 of concern to the professionals within the industry who  
7 have given evidence in these proceedings, notably, from  
8 Network Rail, Messrs Spence, Blackley and Cooke, from  
9 the RSSB, Ms. Scott, and from the Office of Road and  
10 Rail, as I believe it is now called, the chief inspector  
11 of safety. Those concerns are echoed by the safety  
12 experts, by Professor Jack, and a concern recognised as  
13 an important one by Dr. Cox. We also have the economic  
14 evidence of Mr. Holt, economic expert evidence from  
15 Mr. Holt, notably as to the loss of control on the part  
16 of buyers in the event of a proliferation of schemes as  
17 the schemes compete for attractiveness to suppliers,  
18 giving rise to the risk of a race to the bottom.

19 We say that the concerns that the witnesses manifest  
20 stem from a central point in this case, which is about  
21 safety on the railway. In my learned friend's skeleton  
22 it is said in terms that this is a new point arising in  
23 these proceedings as an ex post justification and is a  
24 bad point. The bad point will be for you, but we say it  
25 is an extraordinary contention to suggest that it has

1           only come up in the context of these proceedings as an  
2           ex post justification, and we say that that, at best,  
3           shows a failure to appreciate what the purpose of  
4           supplier assurance is in the safety-critical aspects of  
5           the business of an infrastructure manager such as  
6           Network Rail. In my submission, when you get into  
7           the evidence, you will see that it is actually all  
8           the other way and this is all about safety, and that is  
9           a good and we say a sufficient reason for the choices  
10          that Network Rail has made and it has made those choices  
11          in accordance with its statutory responsibilities.

12           You were taken this morning -- we probably do not  
13          need to go back to it -- but you were taken this morning  
14          to RIS 2750 and you were specifically taken to  
15          paragraph 1.3.1, which stresses the need for procuring  
16          entities in the safety-critical environment to make  
17          their own assessment of their requirements. That is  
18          a choice that Network Rail has conscientiously exercised  
19          and has decided that it is appropriate for there to be  
20          a single source of supplier assurance for the works and  
21          services that come within the scope of its three key  
22          schemes.

23           I think it is now recognised by Achilles that  
24          compliance with RIS 2750 is not a sufficient test of  
25          what it would call "equivalence" -- of being an

1 equivalent supplier. There is also evidence to that  
2 effect to say that compliance with RIS 2750 is no  
3 guarantee of meeting Network Rail's needs. To find out  
4 what Network Rail needs, you obviously need to  
5 examine -- and you will be able to do that -- the  
6 Network Rail schemes in some detail, and you will have  
7 evidence before you from witnesses who live and breathe  
8 this material and will be able to answer any questions  
9 the Tribunal has in a way that I am sure I could not.

10 Nevertheless, at this level, at this stage of  
11 the trial, it may be helpful just to outline a couple of  
12 ways in which we disagree with the presentation that my  
13 learned friend put on the structure of the schemes this  
14 morning.

15 There are two particular points I might just  
16 underline in that respect. One is the suggestion that  
17 the reviews carried out under RISQS are essentially  
18 low-grade documentary reviews and they just look for  
19 the existence of management systems and documents.  
20 That, we say -- and you will hear from the witnesses --  
21 is not a complete description of the process which is  
22 undergone under RISQS, where the auditors are required  
23 to see if those systems work, if they are understood, if  
24 training has been given, if they have been implemented  
25 and so forth. So it is actually finding out whether

1 they work in practice and are used. It is not a simple  
2 desktop documentary review.

3 One aspect of that, I think is said, is that all, as  
4 it were, the hard work, the detailed work, is done by  
5 Network Rail, and there I think you will see from  
6 the evidence that actually Network Rail does not  
7 duplicate anything that is done under RISQS. That is  
8 taken as an essential building block for supplier  
9 qualification or suitability to carry out the necessary  
10 works and the reviews that Network Rail carried out are  
11 on-site; in other words where the operation is taking  
12 place. They do not go back to the premises of  
13 the supplier for these purposes. This is to make sure  
14 that things are actually happening on the ground in  
15 accordance with the procedures that are required to be  
16 in place.

17 The second, possibly principal, aspect of the  
18 presentation with which we would like to disagree at  
19 this stage is in relation to the presentation about  
20 the IT portal as being essentially for the procurement  
21 purposes of buyers in the industry. I think that is to  
22 understate its importance and value quite considerably.  
23 It is a repository for all the audit material, and  
24 the idea is that you can verify that it is all up to  
25 date, you can see what has been done.

1           The other essential point about it is that it is  
2           the medium for what is called the "feedback loop"; in  
3           other words, the learning from experience and gathering  
4           together the industry experience about these vital  
5           matters is done through the portal. It is not just  
6           a database of suppliers. As I say, the Tribunal will be  
7           hearing and able to hear for itself the detail of how  
8           these schemes operate on the ground and the importance  
9           they play in fulfilling Network Rail's statutory  
10          responsibilities.

11          The nature of the competition law challenge that has  
12          been brought against the RISQS-only rule has, if I may  
13          say so, shifted about a bit. Before we look at it in  
14          some detail, perhaps I would just set a few relevant  
15          parameters about this. Firstly, obviously -- or perhaps  
16          not obviously -- Network Rail itself is not involved in  
17          supplier assurance. This case has no connection with  
18          the sort of case one has seen both in this jurisdiction  
19          and in the European jurisdiction; cases where  
20          a regulatory body takes in-house service provision and  
21          mandates that only its own training or course can  
22          satisfy towards a qualification. There is no  
23          commonality with that sort of case here.

24          By contrast, Network Rail here obtains no commercial  
25          benefit from the RISQS-only rule and we say that is

1 a vital distinction with that sort of case. Indeed you  
2 might say we have not really heard what the benefits to  
3 Network Rail or other buyers might be from abandoning  
4 the RISQS-only rule. The benefits that are put forward  
5 are essentially for Achilles only and possibly for some  
6 of its larger supplier subscribers.

7 Third, it is important to realise that despite its  
8 size and obvious importance, Network Rail does not  
9 represent all or even the majority of assurance demand  
10 in the British rail industry. That, again, will be  
11 explored in the evidence. But you will see that  
12 Achilles recognised that there were substantial  
13 opportunities for it to run its own schemes when it  
14 realised or appreciated that it would no longer be  
15 connected with the RISQS scheme.

16 You might think that a key issue in the case, if one  
17 was looking at it from the Chapter II dominance  
18 perspective, is whether Network Rail actually has  
19 a dominant position in the market for purchasing  
20 supplier assurance on the demand side -- that that has  
21 not been done.

22 Network Rail does not, of course, require that its  
23 suppliers themselves use RISQS for their own supplier  
24 assurance requirements. Outside the specified  
25 Network Rail activities, they are free to assure their

1 own supply chains as they see fit. You have had  
2 the operations of those schemes explained to you, but  
3 there are plenty of other things that their suppliers  
4 and of course other buyers do in the relevant space and  
5 Network Rail does not in any way seek to influence their  
6 choices of how they perform this function.

7 So what is being described to you as an elimination  
8 of competition is actually an expression of this  
9 particular buyer's, Network Rail's, choice of its source  
10 of supplier assurance. Supplier assurance is supposed  
11 to be a buyer-led process. It is done for the benefit  
12 and reassurance, as it were, of buyers, and Achilles  
13 plays plenty of lip service to the buyers' need to be  
14 able to source assurance appropriate to its needs --  
15 something we will have to come back to and that will be  
16 explored with the witnesses -- but, as I say, that  
17 phrase now seems to be coupled with the requirement to  
18 satisfy RIS 2750 so it is no longer being alleged that  
19 2750 by itself is enough; it is also appropriate -- and  
20 we would agree with that, of course -- for the buyer to  
21 be able to specify its own needs for supplier assurance.

22 Now, the case itself, now the emphasis is being put  
23 on the Chapter I case, in contrast with the situation  
24 when we were last in front of you, sir, when it was all  
25 about the Chapter II case. The Chapter II case is

1 obviously maintained, but the emphasis is all on  
2 Chapter I in the skeleton and in what you heard from my  
3 learned friend this morning. Mr. Parker seems to  
4 present his own view of the world, not rooted in  
5 the pleaded case or in the evidence, but that is  
6 something we will come back to.

7 So let me start with the Chapter I case.

8 A principal point which the Tribunal will be very aware  
9 of is that the agreements which are pleaded as  
10 infringing Chapter I are vertical in nature. They are  
11 the acknowledgments, effectively, by suppliers to  
12 Network Rail that they will adhere to the RISQS scheme  
13 as specified when acting as a principal contractor or  
14 whatever it might be. So the pleaded case is not  
15 a horizontal case. It was obviously considered at an  
16 early stage to bring the RSSB in as a defendant, but  
17 that was dropped before the case was served.

18 The fact that these are vertical agreements that you  
19 are asked to look at makes, in my submission,  
20 the reliance on the two, as it were, sources of law that  
21 Mr. Woolfe took you to this morning, which are both  
22 horizontal in nature, rather surprising. But he took  
23 you extensively to the Commission's guidelines on  
24 horizontal co-operation and to the case about the  
25 Dutch Cranes cartel. I should probably reply to some

1 extent to the points that were made there and I will try  
2 to do that briefly.

3 The horizontal guidelines -- I do not know if you  
4 have it near to hand and have flagged it. They start at  
5 page 1873 in the purple book. Just a couple of points  
6 that I wanted to make on those: firstly, as the name  
7 indicates, these relate to horizontal agreements, and  
8 vertical agreements are referred to in paragraph 12 as  
9 raising different concerns. So these are guidelines for  
10 horizontal co-operation between people essentially in  
11 the same market.

12 The other point that I think is perhaps particularly  
13 important in relation to these guidelines is  
14 the distinction that Mr. Woolfe said -- and Mr. Woolfe  
15 took you to this -- that the Commission -- I am just  
16 looking for paragraph, particularly, 261, which he took  
17 you to -- that's relevant markets -- that's  
18 paragraph 261 -- saying that standardisations may  
19 produce the effects on four possible markets. He drew  
20 particular attention to the distinct market for testing  
21 and certification, being, as he would say, the market  
22 that is affected by the fact that standards have been  
23 adopted for supplier assurance in the rail sector.

24 He took you to paragraph 268, which deals with  
25 anti-competitive results of standardisation. But what

1 is being looked at principally there is the prevention  
2 of companies from complying with the standard. The vice  
3 in so many of these standards cases -- if one thinks of  
4 the telecommunications standards via the European  
5 Telecommunications Standards Institute, the problems in  
6 competition law that have arisen with that sort of case  
7 are excluding people from participating in the  
8 development of the standard, one problem. So you have  
9 a big standard for inter-operability of equipment or  
10 handsets from which some suppliers or IPR owners are  
11 excluded, effectively by collusion amongst those who  
12 have got together in the voluntary standard-setting  
13 organisation, and the other problem they look at is what  
14 is sometimes called "hold-up", which is when you adopt  
15 a standard which incorporates some technology --  
16 proprietary technology owned by a particular party, and  
17 then, if you want to use the standard and inter-operate,  
18 you may have to pay licence fees. The theory is that if  
19 your technology is in the standard, you can charge what  
20 you like and hold people up. Those are the sort of  
21 concerns that most of this section is being aimed at.

22 What the Commission ultimately says about the market  
23 that my learned friend wishes to concentrate on -- you  
24 saw it in paragraph 310 which is on page 1918:

25 "Agreements for testing and certification go beyond

1 the primary objective of defining the standard and would  
2 normally constitute a distinct agreement and market."

3 So even if one looks at this as a standard-setting  
4 effort by the industry, the relevant market to have  
5 a look at is the certification market and not  
6 the primary market which the guidelines are inevitably  
7 focusing on.

8 So one asks oneself -- you know, you can see  
9 the problems in the sort of ETSI example that I have  
10 given. Ultimately why would a company in the position  
11 of Network Rail or other buyers in this sector go for,  
12 as it were, a single source of supplier assurance  
13 without a very good reason when they gain nothing, as  
14 I have said, from the commercial perspective by  
15 specifying a single source for supplier assurance.

16 You were taken earlier by my friend to a document  
17 from the RISQS board, which is in bundle I2. If I can  
18 just take you back to that, you will see what the reason  
19 is.

20 If you go back to page-615 in that bundle, to which  
21 you were taken, you will see, at the bottom of  
22 the page -- and I will follow my friend's practice and  
23 not read it out, but point out to the Tribunal  
24 the bulleted list at the bottom of that page which show  
25 why the RISQS board considered that it would be a good

1           thing if the situation identified in the second indent,  
2           which you were taken to, should assist, "... is and will  
3           remain", as it says there.

4           Is it convenient now for me to take the Tribunal to  
5           the *Dutch Cranes* material that you heard  
6           earlier?

7           THE CHAIRMAN: Sorry, was that a question?

8           MR. FLYNN: Yes, it was. You seemed to be reading the page  
9           there, sir. Is it convenient now to go to  
10          the *Dutch Cranes* material?

11          THE CHAIRMAN: Yes.

12          MR. FLYNN: The first one was in G4 and it was tab 22. In  
13          our submission, the situation which the Commission and  
14          then the Court of First Instance were dealing with in  
15          relation to *Dutch Cranes* is a very, very  
16          long way from the facts of our case. Without going  
17          through all the details of it, you will see that  
18          proceedings were taken against two bodies, the FNK and  
19          the SCK, and you will see that originally there was  
20          pretty substantial overlap between those two bodies.  
21          They were really -- the membership of the two bodies was  
22          essentially the same.

23          In short, the point I would make about this is that  
24          the certification scheme performed by the SNK,  
25          the foundation, was a support for the price-fixing

1           cartel carried out by the FNK, the federation, and these  
2           worked in parallel by excluding non-members of  
3           the cartel and particularly foreign suppliers of cranes  
4           for hire from the Dutch market, therefore facilitating  
5           the price-fixing infringement; a classic two-step, you  
6           might say.

7           If you look, for example, at paragraph 24 of  
8           the decision, you will see the overlap. The other thing  
9           that you will see from the next paragraph, 25, is that  
10          the accreditation scheme run by the foundation, the SNK,  
11          was effectively a gratuitous and bogus scheme.  
12          The Commission found -- this is at the bottom of  
13          the page on the left-hand side:

14          "The Commission informed SCK in writing that  
15          a proposal they had made did not meet the Commission's  
16          objectives since it had not been established that  
17          a private law certification scheme such as that  
18          introduced by SCK adds anything essential to the  
19          existing statutory requirements applying to cranes and  
20          lifting equipment."

21          That flowed from an EU directive and had a statutory  
22          body which was required to carry out verification, and  
23          even then, at one point at any rate, its verified cranes  
24          would still have been caught by the ban.

25          So the description, which we don't need to go

1           into -- but the description the Commission gives is of  
2           these two schemes, the accreditation scheme and  
3           the price-fixing scheme, working hand in hand.

4           So just looking at one and not the other, we would  
5           say that does not assist the Tribunal and shows you just  
6           how far away from the facts of the present case this  
7           Dutch Cranes cartel issue really is.

8           I probably do not need to take you to the appeal  
9           where the Commission's decision was, of course,  
10          unsurprisingly possibly, upheld, but just merely point  
11          out that this case has absolutely nothing to do with  
12          the exclusion of rival accreditation schemes. What it  
13          has to do with is the exclusion of competition on  
14          the crane market, where it was common practice for  
15          contractors to hire in additional capacity as needed and  
16          the purpose of the scheme was to limit their ability to  
17          do that, so a wholly different case.

18          Looking at the agreements which are actually pleaded  
19          here, the vertical agreements which are in Achilles'  
20          case, we say effectively these agreements are -- you  
21          might say do not have an economic function. There is no  
22          supply of goods or services made under these agreements,  
23          if agreements they are.

24          Network Rail's activities as an undertaking,  
25          purchasing or supplying services on the market, are

1 entirely separate from them. What Network Rail is doing  
2 when it relies on appraisals made under RISQS is to gain  
3 assurance of the quality and the safety of the services  
4 that it is buying in, and you will see more detail of  
5 that in due course.

6 So we say it is a highly artificial construct to say  
7 that these agreements, the acknowledgment by a supplier  
8 of the terms of the principal contractor scheme, for  
9 example, are the foundation of a market-excluding  
10 practice. These are nothing like the cases in  
11 the distribution context which have been relied on in  
12 the case law on acquiescence and concurrence of wills.

13 That sort of case -- you think of BMW and its  
14 distributors -- is concerned with the impact on  
15 the market of practices which the distributors carry out  
16 because of the terms imposed on with or without their  
17 acquiescence by the manufacturer. That sort of  
18 situation is entirely different from what is going on  
19 here. Those distribution cases are not in any way  
20 concerned with the agreement between BMW and  
21 a particular distributor as to the standards that it  
22 must meet as a distributor, the service standards and  
23 the quality of premises and so forth. Those are  
24 entirely different sort of agreements.

25 Because the impugned agreements are vertical, we say

1           that fundamentally affects the assessment that  
2           the Tribunal will have to carry out. It is whether  
3           Achilles could possibly be right to characterise them as  
4           an object infringement. We deal with that in our  
5           skeleton, paragraphs 12 to 15, which I think you have in  
6           the A bundle, if you wish to turn it up. It is,  
7           I think, the last -- let me get the numbers right.  
8           I think it will be tab 5 in the A bundle.

9           There we set out the law as most recently summarised  
10          in this Tribunal in the *Paroxetine* judgment  
11          from last year, which is effectively itself rehearsing  
12          the considerations set out in  
13          the *Cartes Bancaires* judgment of the Court  
14          of Justice, and those are the criteria we set out in  
15          paragraph 12.

16          In paragraph 13 we say, plainly, that the RISQS-only  
17          rule does not fall within the category of anything that  
18          has been recognised as an object infringement in  
19          previous cases or in the Commission's guidelines on such  
20          matters, and that actually finding an object  
21          infringement in a vertical context is an extremely rare  
22          event and we cite some authority for that proposition.  
23          No doubt we will have to come back to that.

24          The impugned conduct is one of exclusion, and it is  
25          recognised, I think, by the other side now, that it is

1 not enough for someone who wishes to participate in this  
2 market to say, "We satisfy RIS 2750". They also have to  
3 be, apparently, "adequate for the needs of the rail  
4 industry". Our response to that is that the best judge  
5 of what is adequate and appropriate for the rail  
6 industry is the rail industry and they have set out  
7 their requirements after much soul-searching and  
8 consultation in the RISQS rules within the context of  
9 the RSSB. That is what the rail industry requires; not  
10 necessarily what Achilles would like to provide to it.

11 In relation to effect on competition, essentially  
12 there -- again, if you still have the skeleton in front  
13 of you, that is dealt with in paragraphs 16 to 18,  
14 again, fairly shortly -- that effects have to be  
15 demonstrated and they have to be demonstrated against  
16 a realistic counterfactual, what would have happened in  
17 the absence of the rule. There our evidence is that  
18 there are two likely -- they have to be likely --  
19 counterfactuals, realistic counterfactuals. The two  
20 realistic counterfactuals are either RISQS continues to  
21 be the industry's preferred source of supplier  
22 assurance, in which case the rule has no effect, or  
23 there are several -- the word I suggest as being vague  
24 as to number, but certainly many more than two -- such  
25 providers, and that has both adverse implications for

1 competition, as Mr. Holt explains, and, as our factual  
2 witnesses explain, leads to many complications and  
3 expense at the level of Network Rail and, last but by no  
4 means least, inevitably and somewhat intuitively risks  
5 for safety. The more schemes you have, the more control  
6 verification auditing you have to do. This is not  
7 automatic; the greater the propensity is for something  
8 to go wrong which would have to be checked out.

9 THE CHAIRMAN: Is it relevant to take into account  
10 the tender process in considering effects on  
11 competition? You do not mention it.

12 MR. FLYNN: No, we do not mention it because we take it as  
13 read. It is -- and I think Mr. Holt goes into this to  
14 some extent. There is the distinction between  
15 competition in the market and competition for  
16 the market. These services are available on something  
17 like a five-year basis for people to tender for. I have  
18 already outlined -- and that will be explored --  
19 the circumstances in which it was not Achilles that  
20 prevailed in that tender. It could have done.  
21 The evidence is there. It would not have been unwelcome  
22 if it had won and therefore complied with the new  
23 specification. So we do say -- I mean, of course, part  
24 of the -- it is possibly part of the counterfactual  
25 analysis, except that if you entered into a situation

1 where Network Rail was required to recognise a number of  
2 equivalent providers, parking what is meant by that, you  
3 would then lose the ability to have an effective tender  
4 to be the preferred source.

5 So in the counterfactual world, I think -- we should  
6 no doubt put this to the economist -- but I think in  
7 a counterfactual world that is a possibility you would  
8 have blown. So it is an important consideration. It  
9 goes, we say, to the objective justification,  
10 the exemptability and generally the fairness of  
11 the scheme that is in place.

12 I am not sure that we can claim it as a benefit in  
13 the exemption context, but I will take that point under  
14 advisement because -- it is certainly a point on which  
15 we major because the whole idea of taking the scheme  
16 into the RSSB and contracting out services for RISQS was  
17 to make it a fairer, more effective, best in class type  
18 system, and that is what the tender was meant to  
19 achieve.

20 As my friend has been very short on the Chapter II  
21 case, I shall also be short on that too. You have seen  
22 our arguments in relation to other matters. We have  
23 said -- I remember saying it to you, sir, when we first  
24 came here -- that we can assume dominance on the stated  
25 market for the operation of provision of access to

1 infrastructure, but the precise relevance of that to  
2 the conduct complained of has yet, in my submission, to  
3 be elucidated.

4 We accept, of course, that the categories of abuse  
5 are not set so one takes a sort of principle from  
6 Article 102 and it can apply in many and various ways,  
7 and, as my friend says in his skeleton, attempts to  
8 shoehorn particular conduct into established categories  
9 may be deprecated by the court. But by the same  
10 token -- and in one of the cases he relies on --  
11 *Purple Parking*, the learned judge says you  
12 have to focus on the harm -- never mind the category,  
13 look at the harm. You have to bear it in mind that --  
14 and what is the harm here particularly? What is  
15 the consumer detriment? What on earth is the consumer  
16 detriment in what has happened here? You are having to  
17 bear in mind -- I'm not going to repeat it -- but these  
18 rules are there to safeguard the process of competition,  
19 not particular competitors.

20 Another point which comes out in the evidence and  
21 will no doubt need to be explored is that in our  
22 national -- Network Rail is not the whole of the market.  
23 There are plenty of other opportunities for Achilles to  
24 explore in the rail sector, never mind the transport  
25 sector or safety-critical industrial sector. There are

1 plenty of people to whom they can pitch and offer  
2 services, and Network Rail does not limit the freedom of  
3 its suppliers to participate in such schemes.

4 What is being jeopardised for it, particularly in  
5 the Chapter II case, is Network Rail's ability to choose  
6 its own trading partners, which is fundamentally what  
7 a system of undistorted competition should permit. I am  
8 not going to repeat the fact that it does not itself  
9 gain any competitive benefit from this conduct, but just  
10 thinking about categories of Article 102 cases in  
11 general terms, this is not one of withdrawing supply  
12 from an existing customer or anything like that; it is  
13 about the creation of a new relationship. That is what  
14 Mr. Woolfe seeks. In our submission, there has to be  
15 a very high threshold for someone who is not taking  
16 supply or indeed, in this case, in a position to offer  
17 it in particular respects -- a very high threshold for  
18 that sort of case to succeed.

19 I think that is why, on reflection and in  
20 the skeleton this morning, Mr. Woolfe addressed you on  
21 the question of relief and what they are actually asking  
22 for because the drift of the case up to now would be  
23 essentially an order from the Tribunal that we deal with  
24 them. I think he recognises that we have to -- even if  
25 he is not counting chickens and talking about relief,

1 he would have to step back and discuss what  
2 Network Rail's reasonable requirements would be. In my  
3 submission, that really gives the game away as to  
4 whether there's a competition problem here in the first  
5 place.

6 I think perhaps that will suffice as an outline of  
7 our case and where we are going over the next few days,  
8 sir, if that is helpful for the Tribunal.

9 THE CHAIRMAN: Thank you.

10 MR. WOOLFE: Thank you, sir, in which case we move on to  
11 calling our factual witnesses. The first witness I am  
12 going to call is Ms. Katie Ferrier.

13 If I can just note one point, sir. Ms. Ferrier is  
14 slightly hard of hearing and does wear a hearing aid.  
15 If I can just remind my learned friend in  
16 cross-examination and any questions from the Tribunal,  
17 if you could speak up and speak loudly and clearly, that  
18 would be -- I am grateful.

19 MS. KATIE FERRIER (sworn)

20 Examination-in-chief by MR. WOOLFE

21 MR. WOOLFE: Thank you, Ms Ferrier. Now, you should have  
22 a series of bundles there. If somebody could help you  
23 with them. Could you be passed bundle B, please?

24 If you could have a look behind tab 1, you should  
25 see a witness statement there dated 2 October 2018, top

- 1 right-hand corner. Is that your witness statement?
- 2 A. Yes, it is.
- 3 Q. Can you just turn to the last page in the tab -- or
- 4 the last but one page. You should see a signature at
- 5 the bottom of the page. Is that your signature?
- 6 A. Yes, it is.
- 7 Q. Is there anything you would like to clarify or amend in
- 8 any way in that statement?
- 9 A. No.
- 10 Q. Do you adopt that statement as your evidence?
- 11 A. Yes, I do.
- 12 Q. Then if you turn to tab 2, you will see another witness
- 13 statement there dated 25 January 2019. Is that your
- 14 statement?
- 15 A. Yes, it is.
- 16 Q. Again, if you turn to the last but -- not the last but
- 17 one page -- page 35 in the bundle numbering, very bottom
- 18 right-hand corner, is that your signature?
- 19 A. Yes, it is.
- 20 Q. Is there anything in the statement you would like to
- 21 clarify or amend in any way?
- 22 A. Yes, I'd like to go to schedule 1.
- 23 Q. So that is page 36 --
- 24 A. The diagram.
- 25 Q. What would you like to amend on that?

1 A. So I have made some assumptions in terms of who is  
2 conducting the audits based on my knowledge in terms of  
3 Capita winning the tender for the RSSB.

4 Q. You said you have made some assumptions. Do you mean --  
5 you say "Capita". You assume that Capita is carrying  
6 out ...?

7 A. Carrying out the audits themselves.

8 Q. In respect of the six boxes?

9 A. Correct, yes.

10 Q. Do you know that to be the case?

11 A. I don't know it, but I have assumed it from  
12 the information available.

13 Q. So subject to that, do you adopt that statement as  
14 amended as your evidence?

15 A. Yes, I do.

16 Q. Thank you.

17 Then you are getting the drill now. It is behind  
18 tab 3 -- not tab 3, tab 5. You will see another witness  
19 statement dated 1 February. Is that your statement?

20 A. Yes, it is.

21 Q. Can you turn to page 81. Is that your signature?

22 A. Yes, it is.

23 Q. Is there anything in this statement you would like to  
24 clarify or amend in any way?

25 A. Yes, there is on page 77, in paragraph -- it's the end

1 of paragraph 11, we refer to "... offered by Achilles in  
2 Ireland under the brand name supplier line". It is  
3 actually "supply line" not "supplier line".

4 Q. Subject to that amendment, do you adopt this statement  
5 as your evidence?

6 A. Yes, I do.

7 MR. WOOLFE: Thank you. I have no further questions.

8 Cross-examination by MR. FLYNN

9 MR. FLYNN: Good afternoon, Ms. Ferrier. As you might have  
10 heard earlier, I have been suffering from a cold and if  
11 you want me to speak up then please just signal because  
12 that should not be a problem for you.

13 The supplier assurance scheme that we are  
14 principally concerned with in these proceedings is  
15 called "RISQS", is it not?

16 A. Yes, it is.

17 Q. The main risks that RISQS is concerned with are safety  
18 risks, are they not?

19 A. I think there's a number of risks that -- the assurance  
20 process that RISQS covers, not just risks, but -- not  
21 just safety.

22 Q. But would you say safety was an important one? We saw  
23 some listed out earlier today.

24 A. Yes, I think safety is one of the risks, yes.

25 Q. You were probably in court earlier and you heard

1 a reference to RIS 2750.

2 A. Yes, I did.

3 Q. I do not know if you were following, but you maybe saw  
4 the document earlier today.

5 A. Correct.

6 Q. There was a reference in that to which the Tribunal was  
7 taken to a programme called the -- let me get it  
8 right -- "supplier assurance framework project".

9 A. Okay.

10 Q. Do you recall that?

11 A. I do.

12 Q. You do.

13 A. Should I look at it?

14 Q. Yes, I am going to provide that for you.

15 A. Thank you.

16 Q. Could Ms. Ferrier please be given that and I have some  
17 for the Tribunal. (Handed)

18 Astonishingly, sir, it is a document that is  
19 referred to by more than one witness but is not in  
20 the bundle.

21 I beg your pardon. You should have some too.

22 MR. WOOLFE: Yes, I can see you have plenty. (Handed)

23 Thank you very much.

24 THE CHAIRMAN: Shall we put it somewhere?

25 MR. FLYNN: Yes, I imagine we should carry on with bundle G,

1           should we?

2           MR. WOOLFE: Yes, that probably makes sense. There is some  
3           space at the back of --

4           MR. FLYNN: If it is convenient for the Tribunal -- we will  
5           make sure that the Tribunal has tabs and we will put it  
6           in the next document.

7           I do not know if this is going to arise regularly --  
8           it probably is not -- but I believe that some witnesses  
9           merely refer to documents that were available on  
10          the internet without annexing them and that has not been  
11          collected in the paper bundles. This may be an isolated  
12          example, but just to explain how this came about.

13          So Ms. Ferrier, if you recall this document,  
14          probably from your time at Network Rail, this was, as it  
15          were, on the way to the new -- the revised scheme for  
16          RISQS, wasn't it?

17          A. I believe so.

18          Q. If you turn to the first page with anything substantive  
19          on it, "Introduction: supply chain risk management" --  
20          I think it is actually page 2, but the page numbers seem  
21          to have been cut off.

22          The strap-line you see there:

23          "Rail industry buyers have a responsibility to  
24          manage risk imported from suppliers."

25          A. Yes, I see that.

- 1 Q. You see paragraph 1.1 including the phrase:
- 2 "Each company has its own duty and responsibility to
- 3 function, perform and succeed safely and reliably."
- 4 A. Yes.
- 5 Q. "This includes addressing risk and having processes in
- 6 place to manage it."
- 7 There is then a reference, you see, to the legal
- 8 duties that transport operators have under what is
- 9 colloquially known as the "ROGS"; do you see that?
- 10 Then:
- 11 "Safety management system holders like Network Rail
- 12 tend to be the buyers in the rail industry supply
- 13 chain."
- 14 You would agree that?
- 15 A. Yes, they are some of the buyers in the supply chain,
- 16 correct.
- 17 Q. It says:
- 18 "Their responsibility to manage risks extends to the
- 19 risk imported from suppliers ..."
- 20 You would recognise that responsibility?
- 21 A. Yes, I do.
- 22 Q. "... and tools and techniques to manage that include
- 23 supplier assurance."
- 24 You would --
- 25 A. Yes.

- 1 Q. -- agree with that?
- 2 Then 1.2:
- 3 "Managing the risk in a common supply chain.
- 4 "Procurement management should involve tackling
- 5 the risk imported by buyers from suppliers into
- 6 the supply chain."
- 7 This is what supplier assurance is about, is it not?
- 8 A. Yes, it is.
- 9 Q. "For railway industry buyers, procurement process of
- 10 specifying, procuring, contract-managing and
- 11 project-managing all involve a common supply chain.
- 12 Suppliers are expected to make sure that they meet
- 13 the industry's safety requirements."
- 14 You agree with that?
- 15 A. Yes.
- 16 Q. You may not now agree with, but you see the statement in
- 17 the next paragraph:
- 18 "A shared motive for managing risk along with
- 19 a common supply chain suggests a single framework for
- 20 supplier assurance."
- 21 You see that as an objective?
- 22 A. Yes, I see that, and in my belief, I believe that is
- 23 a framework in terms of a standard for supplier
- 24 assurance.
- 25 Q. "However", it says, "history has led to the development

1 of a range of different supplier assurance arrangements  
2 in an unstructured way."

3 So the aim of this project presumably was to  
4 straighten that out and have it arranged in a structured  
5 way; would you agree with that?

6 A. I assume that to be the case.

7 Q. You assume that is ...

8 If we move on to section 2, "Why do we need supplier  
9 assurance arrangements?" -- I think that is page 6.

10 "Supplier assurance is a necessary risk-management  
11 tool."

12 You would accept that, I think?

13 A. Yeah. I'm trying to see where you're reading from  
14 exactly.

15 Q. Sorry, just below -- it is the sort of --

16 A. Okay, yeah.

17 Q. -- strap-line below the chapter heading.

18 "The challenges of making the associated processes  
19 effective and efficient are not to be underestimated."

20 You would probably agree with that. It is not  
21 a straightforward process?

22 A. No, not at all, because it means different things to  
23 different people.

24 Q. Yes, and in fact that neatly brings us onto the next  
25 paragraph because it does mean different things to

1 different people and a common vocabulary was attempted  
2 to be sorted out, with a definition there, you see, of a  
3 "supplier assurance" which -- I do not know if you would  
4 disagree with that as a definition.

5 A. It's quite a generic definition.

6 Q. Indeed.

7 Then, if you look two paragraphs below that, it  
8 says:

9 "The better the risk management by people in safety,  
10 engineering and procurement, the greater the level of  
11 confidence."

12 Would you agree that that puts safety first --

13 A. Of course.

14 Q. -- in that list?

15 A. Yes.

16 Q. Yes, I thought you might.

17 If you look at the next paragraph, which basically  
18 says supplier assurance itself has to be risk-based,  
19 which makes perfect sense to you, I imagine -- that:

20 "Buyers will seek higher levels of assurance,  
21 providing a higher burden of proof of a supplier's  
22 capability when procuring products and services which  
23 represent a higher risk to safety and the business."

24 Again, you would accept that there is an emphasis on  
25 safety in that conclusion? I think you would.

- 1 A. I think -- yeah, it's risk-based and it's based on --
- 2 Q. It is risk-based and you will want higher levels of
- 3 assurance when what you are talking about is procuring
- 4 products or services which represent a higher risk to
- 5 safety?
- 6 A. So in my head, if there is a higher risk to safety, you
- 7 require higher levels of assurance and would put in
- 8 place additional levels of insurance [sic] to ensure
- 9 those standards are met.
- 10 Q. If you look at the next paragraph, "Why do we need
- 11 supplier assurance?", you will see -- again you will see
- 12 there are six bullet points there. I would say that
- 13 they are ranked in order of importance, but you might
- 14 not agree with that. But you see what they are, "To
- 15 comply with legislation" -- in this industry buyers need
- 16 to respect the law and there is a lot of law in this
- 17 area -- they need to demonstrate management and that
- 18 they control their risks; you would agree with that,
- 19 I am sure?
- 20 A. Yes.
- 21 Q. "To respond to learning from operational experience";
- 22 you would accept that as an important --
- 23 A. I would accept that as an important part of the overall
- 24 supplier assurance framework, yes.
- 25 Q. And then:

1            "To make procurement more efficient ...", and so on.

2            2.3 we have sort of already covered in the summary.

3            Things have grown up in an unstructured way.

4            Then 2.4, and then this will be -- this will all be  
5            the end, I think, from this document. 2.4, "Learning  
6            from operational experience" -- can we just look at some  
7            of the things that are said there?

8            "Experience of operating the railway provides an  
9            active indicator of where the supplier assurance is  
10           working and where improvements to assurance can be  
11           made."

12           I imagine you would not question the good sense of  
13           that?

14           A. No.

15           Q. Two paragraphs down:

16           "For example, capturing and acting on the learning  
17           from when things go right and wrong helps ensure  
18           continuous improvement in the management of safety and  
19           business performance."

20           A. Absolutely.

21           Q. Then there is a reference to the Cullen Inquiry into  
22           the Ladbroke Grove incident in 1999, with the case study  
23           on the opposite page.

24           It says that:

25           "The Cullen Report highlighted the need for

1 improvements to be made to existing arrangements for  
2 the management of safety-critical materials and  
3 services."

4 I think a statement of fact you would not disagree  
5 with.

6 "The industry's reaction to this has been a key  
7 driver in relation to management of safety-related risk  
8 arising from procurement arrangements."

9 The overall question for you from this is: it is  
10 right, is it not, that the supplier assurance framework  
11 programme which led to the new structure of RISQS had  
12 safety and learning from experience of when things go  
13 right and particularly when they go wrong at its heart,  
14 did it not?

15 A. I agree that this project led to a number of changes in  
16 the overall supplier assurance framework, and I think,  
17 actually, if you look at page 38, it covers a lot more  
18 than just the RISQS element. I think this framework  
19 stretched out into how contracts are let, how people are  
20 engaged across Network Rail, the various forums that  
21 were created after this to ensure that the shared  
22 learning happened. So I think -- yes, I agree RISQS  
23 link up Plan Assure, as it were, as part of that, but  
24 it's part of a bigger picture around supplier assurance  
25 as well.

1 Q. Can we go back to RIS 2750? I am sorry. That is in  
2 bundle G. The reference I have is 12/299. Let's see if  
3 that is right.

4 A. Sorry, did you say 29 ...?

5 Q. 299, if your bundle goes that far. It may be that some  
6 of the bundles are tabbed and some of them are not. Do  
7 you have it there?

8 A. This page (indicates)?

9 Q. Correct.

10 Can we just look at the definition? It is on  
11 internal page 52 of 299 in the bottom, the definition  
12 of "Supplier assurance":

13 "Arrangements implemented by a customer or  
14 organisation necessary to establish that suppliers are  
15 suitably competent, adequately resourced and  
16 consistently deliver their products to the customer's  
17 specification."

18 "Customer" is defined further up to cover all of end  
19 user, client, buyer, purchaser and procurer, as you see  
20 on the previous page.

21 A. Yes.

22 Q. So supplier assurance is about customers' or buyers'  
23 arrangements for reassuring themselves, as I said  
24 earlier, about their suppliers?

25 A. Yes, that's correct.

- 1 Q. That is where it originates: it is a service for buyers?
- 2 A. Yes.
- 3 Q. So in your evidence you say along those lines -- I do  
4 not know if you have got your statements in front of  
5 you, but in your second witness statement, which is  
6 tab 2 in bundle B, if you look at paragraph 115 of  
7 that -- of your witness statement, you are accepting,  
8 I think, there that the key to the success of a supplier  
9 assurance provider's business, shall we say, is getting  
10 the trust of buyers. Is that a fair summary of what you  
11 are saying there?
- 12 A. I think it's the trust of buyers and of suppliers,  
13 actually.
- 14 Q. But it being buyers who purchase -- you know, it is  
15 buyers' needs which is at the origin of supplier  
16 assurance?
- 17 A. It is buyers, but we also offer the service to our  
18 suppliers as well. So we focus on the continuous  
19 improvement of those suppliers, not just on the buyers'  
20 needs as well, so ...
- 21 Q. I think I have seen it described -- supplier assurance  
22 being regarded by suppliers as a tax.
- 23 A. In some industries that is the case, yes.
- 24 Q. Do you think it is the case in the rail industry, as  
25 a matter of interest?

1       A. I hear the phrase used occasionally, but actually  
2       I think there has been a lot of development over  
3       the past few years to add additional services to our  
4       suppliers. So typically we get very positive feedback  
5       from our suppliers when we're auditing them because it's  
6       not just about, you know, what typically in the past has  
7       been a tick-box exercise. It's really about that  
8       continuous improvement and action planning.

9       THE CHAIRMAN: Mr Flynn, would that be a convenient moment  
10       to break?

11       MR. FLYNN: Yes, I was just about to ask you, sir. Thank  
12       you.

13               We are having a five-minute break, I think, for  
14       the transcribers.

15       (3.29 pm)

16                               (A short break)

17       (3.41 pm)

18       MR. FLYNN: Ms. Ferrier, still within your second witness  
19       statement, which I think you may still have open, can  
20       you have a look at paragraph 122, please. Over  
21       the page, you are saying:

22                "In other industries with more than one provider of  
23       supplier assurance [so industries other than rail]  
24       offerings are similar. Buyers will typically choose one  
25       provider based on its commercial offering although they

1 can choose to recognise more than one scheme."

2 So it is normal, is it not, for a buyer to choose  
3 a single scheme of supplier assurance according to its  
4 needs?

5 A. It varies. Some buyers choose to have one scheme and  
6 I think somewhere later in my statement I say other  
7 buyers choose to recognise multiple schemes. It's very  
8 much a buyer preference.

9 Q. Here you say "typically choose one provider".

10 A. Yes.

11 Q. So typically a buyer chooses one. As you say, suppliers  
12 decide which scheme they wish to use, although it is  
13 the case that many will use more than one, and they do  
14 that because they want to appeal to buyers who are  
15 interested in a particular scheme; is that not right?

16 A. That's partly it, but also to meet the requirements of  
17 different industries as well. So I think some of  
18 the other industries that we operate in, such as  
19 utilities, have different requirements than the rail  
20 sector would have as well. So suppliers tend to pick  
21 based on the buyer they want to work with or perhaps  
22 the industry that they would like to work within.

23 Q. But they do not just choose the scheme that they like  
24 the look of if that is not an attractive scheme to  
25 buyers?

1       A. In some industries I think they do because of the  
2       competition. If I look at our construction market, for  
3       example, there are lots of -- there are lots of supplier  
4       assurance scheme providers. So generally the buyers in  
5       that industry recognise all of the different supplier  
6       assurance providers, in which case suppliers do tend to  
7       really pick which one suits their needs the most.

8       Q. What are buyers -- particularly buyers -- looking for in  
9       a supplier assurance scheme? You say, in the paragraph  
10      we were just looking at, 122 -- you refer to costs,  
11      efficiencies, prices. Are those particular points that  
12      would appeal to a buyer?

13      A. So I think it's, like I say here, the quality of  
14      the system, the price, the number of suppliers. Some of  
15      our buyers look at the global reach because they don't  
16      just operate in the UK but outside within the EU and  
17      globally as well. So, yes, it generally is around those  
18      areas.

19      Q. Perhaps we could have a look at a different view as to  
20      what buyers might like and look at Ms. Pearson's witness  
21      statement, which is in bundle D, behind tab 8. So there  
22      Ms. Pearson refers to things which are in the KPIs of  
23      the RSSB's scheme in its model services agreement, and  
24      if you look at paragraph 30 of her witness statement,  
25      you will see in (a) a list of some features for which

1 KPIs are set, key performance indicators. So those are  
2 things that would be attractive for buyers to be  
3 satisfied about, are they not: system availability,  
4 supplier system response times, help desk response  
5 times, fix times? Perhaps you would tell us what you  
6 understand "fix times" to mean.

7 A. So I understand that to mean if a system -- an IT system  
8 in particular -- goes down, the amount of time in  
9 response that you make to rectifying the situation.

10 Q. Said better than I could.

11 Satisfaction surveys, supplier audit renewal contact  
12 targets, audit publication times; those are all things  
13 that a buyer might be looking for?

14 A. Yes.

15 Q. Performance reviews as set out in paragraph (b) there?

16 A. Yes, I agree these.

17 Q. You agree with all those. Those might be key features  
18 that a buyer would be looking for in a supplier  
19 assurance scheme when it was choosing?

20 A. Yeah, I think they're a good reflection of how you could  
21 measure the success or the performance of that scheme.

22 Q. Can we look at your third witness statement, please,  
23 which is --

24 A. Third, did you say?

25 Q. Yes, and you can hand that one back, thank you.

1           Just behind tab 5. I think you are already there.  
2           You were mentioning schemes in other industries, and one  
3           of those is UVDB, utilities vendors' database. Here you  
4           are responding to some evidence from Mr. Blackley of  
5           Network Rail.

6           A. Mm-hm.

7           Q. You are setting out your take, as it were, on UVDB.

8           In paragraph 5 you say it is a buyer-led arrangement  
9           to meet the needs of the industry.

10          A. Yes, that's correct.

11          Q. That is a parallel you could draw with RISQS, is it not?

12          A. It's similar, but I've also set out ways in which  
13          I think it's quite different, whereas I think with RISQS  
14          we had a contract, effectively, with the RSSB. The way  
15          that UVDB operates is individual contracts with buyers,  
16          but in the spirit of collaboration we bring those buyers  
17          together in something we call a "steering group" and  
18          various working groups to collaborate to make sure we're  
19          not duplicating things. So it has similarities.

20          Q. It has similarities, and indeed the sort of focus group  
21          approach is something that you see within RSSB as well,  
22          is it not?

23          A. Yes, we have working groups in UVDB similar --

24          Q. That you would say are similar to RISQS.

25          In paragraph 11, under the description of the audits

1 carried out under UVDB, you say they are designed to be  
2 specific to the needs of the buyers who are members of  
3 the community.

4 A. Yes, they're focused on a utilities buyer, so those  
5 audits themselves are not solely for the use of UVDB  
6 buyers. Actually they're also used by our customers in  
7 Ireland, who are members of a different community supply  
8 line. So it's a product that is used not just in that  
9 community.

10 Q. Going back to -- hotching back to paragraph 5 in this  
11 witness statement, you say:

12 "No part of UVDB is mandated by law or by regulation  
13 ..."

14 Fine:

15 "... or by any similar obligation imposed by an  
16 owner of infrastructure."

17 That is not correct, is it? We understand that  
18 National Grid does specify UVDB and it also specifies,  
19 for certain types of tender, the use of your verify  
20 audits that are referred to in paragraph 10. That is  
21 right, is it not?

22 A. So National Grid use UVDB as one of their procurement  
23 tools. So they have chosen that to assure themselves  
24 from a supplier assurance perspective. It's not my  
25 belief that they mandate that throughout their entire

- 1 supply chain.
- 2 Q. For some types of contracts and safety-critical works,  
3 they require that performance under UVDB be verified by  
4 Verify, if I can put it that way.
- 5 A. Yes, correct.
- 6 Q. Which is a proprietary scheme of yours?
- 7 A. Yes, it is.
- 8 Q. That is a requirement of National Grid in respect of  
9 certain types of contract?
- 10 A. Yes, it is, for their procurement process.
- 11 Q. There are other infrastructure owners or managers in  
12 the utilities sector who do similar things, are there  
13 not?
- 14 A. Yes, some of the utilities buyers use us, some of them  
15 use some of our competitors --
- 16 Q. But some of them will specify for certain types of work  
17 that a Verify audit is the only thing that will do?
- 18 A. They specify it for their suppliers -- their direct  
19 suppliers, yes.
- 20 Q. That's their suppliers in relation to certain types --  
21 not all their suppliers, obviously, so their --
- 22 A. Correct, yes.
- 23 Q. -- suppliers in relation to certain types of contracts  
24 for works, maintenance or installation.
- 25 A. Yes, that's correct.

1 Q. I think particularly in the safety-critical end of their  
2 business, if I can put it that way?

3 A. I assume so. I don't know that.

4 Q. If you look at paragraph 7, again you are pointing out  
5 what you see as differences between UVDB and RISQS. You  
6 say:

7 "Achilles holds a contract directly with  
8 the relevant buyers."

9 Is that different from RSSB RISQS? They hold  
10 contracts with the relevant buyers, do they not?

11 A. We hold one -- we also held one directly with the RSSB  
12 and paid them effectively a fee to operate the service  
13 as well. So that's the distinct difference between  
14 the UVDB scheme and RISQS.

15 Q. But RISQS holds contracts with buyers and the buyers are  
16 free to exit RISQS on normal commercial terms, which is  
17 the point you make in the next paragraph.

18 A. Yes. I'm referring to how, when we were operating  
19 RISQS, it was different in that sense. So if I'm  
20 comparing an Achilles RISQS and a --

21 Q. And a UVDB.

22 A. -- and a UVDB, it was subtly different in terms of we  
23 held a contract with the RSSB for the provision of RISQS  
24 and then individual buyers. However, with UVDB we don't  
25 have a UVDB contract entity as such, it is held with

1 individual buyers, and the UVDB element is  
2 a working group that people choose -- buyers choose to  
3 join or not join, and they will participate in or they  
4 will not participate in it, and they will choose to set  
5 this audit as the standard to abide by or they will not  
6 choose to set that. So we have some buyers that are  
7 members of that working group who do not use the Verify  
8 audit protocol, for example. They have their own  
9 process.

10 Q. Sorry, I did not mean to interrupt.

11 So the comparison you are drawing in that paragraph  
12 is between UVDB currently --

13 A. Correct.

14 Q. -- and RISQS, when you were the incumbent --

15 A. Yes.

16 Q. -- rather than RISQS today and UVDB today?

17 A. Correct.

18 Q. I see. That may explain some of the differences.

19 At paragraph 8 you say:

20 "There is no industry requirement whether under law  
21 ..."

22 So no legal requirement.

23 "... or as a matter of practicality in order to do  
24 business."

25 So for any buyer to be a member of UVDB. Is that

- 1 the point you are making in that sentence?
- 2 A. Yes, that's correct.
- 3 Q. And so one large buyer, [EON?] you say, is out of UVDB and will  
4 have to make its own arrangements for supplier --
- 5 A. Yeah, correct. That's very recently they have chosen to  
6 leave. EDF is another one who operates differently.
- 7 Q. How will your audits now relate with EON? If EON, which  
8 will wish, as you say, to continue to assure its supply  
9 chain -- will any verification that has been carried out  
10 by Achilles be available to EON in that sort of context?
- 11 A. They will have availability up until the point that they  
12 no longer have a contract with us within UVDB.
- 13 Q. Just to be sure, in paragraph 10 you say that:  
14 "Whether a supplier goes through a UVDB Verify audit  
15 ..."  
16 Sorry, right at the end of the paragraph:  
17 "Whether a supplier goes through a UVDB Verify audit  
18 is ultimately a decision of the supplier on a  
19 case-by-case basis."
- 20 A. Yes, that's correct.
- 21 Q. But that decision would be taken, would it not,  
22 according to whether or not the buyer wanted it or  
23 required it?
- 24 A. No -- so this is on whether a supplier would like to  
25 provide those services to the buyers in that area, so

1           they could have an audit undertaken if they are wishing  
2           to break into the market as well. So a buyer can say  
3           to us, "We want to target this specific supplier. We  
4           would like them to undertake an audit", but ultimately  
5           it's the supplier's decision of whether they would like  
6           to participate or not.

7           Q. If they are prospecting for new business in this way and  
8           you carry out for them an, as it were, voluntary Verify  
9           audit that they say, "I think it would be useful to  
10          have", is that something that they can just then show to  
11          their prospective customer?

12          A. Yes. They have a copy. All of the copies of the audit  
13          reports are given to the supplier and to the -- made  
14          available to the buyers as well.

15          Q. In circumstances where the buyer is outside  
16          the scheme -- take EON. If a supplier thought, "Well,  
17          I wish to retain or get some new business with EON even  
18          though it is outside UVDB now, could it be useful to  
19          have a Verify audit?" -- they might think that, might  
20          they, and can they then show that to EON?

21          A. They would have a copy of the report, so if they want to  
22          show it to EON, they could. We wouldn't prevent them  
23          from showing it.

24          Q. As I think we have already discussed, other utilities  
25          require Verify audits for certain types of work. They

1           would include as far as some of the electricity  
2           generators and grids?

3       A.   Yeah, so we have people like SSE who use us, but they  
4           cross-use us in different communities, not just UVDB.  
5           In Ireland, for example, it's through Supply Line.  
6           But the Verify audit for those suppliers is relevant  
7           across both because it covers the needs.

8       Q.   Can we have a look at Ms. Scott's witness statement,  
9           please, her first witness statement -- I am sorry,  
10          I mean her second witness statement.  It is in tab 9.

11                 You give some evidence -- I think there is a pyramid  
12           which is attached to your first witness statement --  
13           your second witness statement, I am sorry.

14       A.   Mm-hm, yeah.

15       Q.   Maybe we should just have a look at that.  It is tab 2  
16           of bundle B on an unpaginated page, the penultimate page  
17           in the tab.

18                 What is the source of this pyramid, Ms. Ferrier?

19       A.   So the source of this was an attempt by me to make it  
20           a little bit easier to understand in terms of the  
21           supplier assurance framework, as I understood it, and  
22           who's operating in which areas.

23       Q.   Am I right in thinking it has been prepared for  
24           the purposes of these proceedings?

25       A.   Yes, it has.

1 Q. There are other pyramids elsewhere in the bundle,  
2 including in relation to Kier Construction that would  
3 show Achilles higher up on the pyramid, I think.

4 A. In relation to what? I'm sorry.

5 Q. Kier Construction. Do you recall that?

6 A. No. If you tell me where it is, I'll have a look.

7 Q. I will see if I can find it. You refer to Kier in your  
8 third witness statement at paragraph 26.

9 Sorry, this may not work because I am not sure where  
10 the relevant pyramid is to be found. It may be in one  
11 of the exhibits that is not in this bundle. Let us  
12 leave Kier. We may come back to that another time.

13 Looking at your original pyramid there, just to  
14 clear up a factual point, in the top of the pyramid,  
15 the bottom block in the upper segment of the pyramid,  
16 "Sentinel personnel register" --

17 A. Mm-hm.

18 Q. -- that is not an additional step, is it? That is just  
19 something which is not, as it were -- it is not an  
20 additional audit process or anything of the sort, is it?

21 It's --

22 A. So, no, it's a register -- so I think we've explained  
23 earlier in terms of Sentinel, it's a way for people to  
24 access the infrastructure and it's a way to check  
25 the competence of those individuals accessing

- 1 the infrastructure. So that's the 175,000 individuals.
- 2 Q. They basically have to have a kind of swipe-card to get  
3 onto the --
- 4 A. They have to undertake some quite detailed --
- 5 Q. Yes.
- 6 A. -- personal track safety exam training before they are  
7 given that swipe-card. So, yes, there is.
- 8 Q. That verification that they have been through all that  
9 sort of training is in the blue second-tier of the box,  
10 isn't it?
- 11 A. I don't think it's just in there because actually  
12 the verification of the training is done separately than  
13 through the Sentinel audit as such. So there's  
14 a whole -- and I'm not sure where it is here in  
15 the numerous bundles --
- 16 Q. No, you can be forgiven for that.
- 17 A. There is a separate industry scheme effectively that  
18 validates the training requirements that are required  
19 for individuals to access the infrastructure, rather  
20 than organisations managing those individuals.
- 21 Q. So the classrooms, as it were, are somewhere else, but  
22 the audit process is in the second line and the block in  
23 the orangey-beige colour is just a register; is that not  
24 right?
- 25 A. It's not just a register because it's actually those

1 training providers as well are assured to be of  
2 a competent level to actually deliver that training.

3 Q. They are the ones who are held on that register. It is  
4 Sentinel people and trainers?

5 A. But the training that those people are given --

6 Q. Yes.

7 A. -- are not audited by the Sentinel scheme rules.

8 Q. Right. So you might say there should be another block  
9 somewhere?

10 A. Yeah.

11 Q. It is not in that pyramid?

12 A. I think that's what I'm trying to cover off in terms of  
13 there's a level of assurance of individuals and training  
14 providers within those 175,000 individuals or the number  
15 of training providers that provide that service to them  
16 to make sure that those individuals are receiving  
17 the level of training that is adequate for them to  
18 access the infrastructure.

19 Q. I think the pyramid came up in discussion earlier in  
20 your second witness statement, and you then refer in  
21 paragraph 53 of that statement to matters that you say  
22 are outside the ambit of the RISQS scheme.

23 I just wanted to take you to the point made by  
24 Ms. Scott in relation to that, which is -- I think it is  
25 on page -- if you still have that, it is in tab 9 of

1 bundle B, the defendant's statements, and I think it  
2 must be page 97, in which she emphasises  
3 the safety-critical nature of the RISQS audit and  
4 emphasises also that any spot-checks that Network Rail  
5 may carry out in-house do not replicate what has already  
6 been done under RISQS. You would agree with that, would  
7 you not?

8 A. No, I don't agree with that. I think the RISQS audits  
9 themselves are there to check the management systems,  
10 and I think there are -- there is another diagram,  
11 actually, I think, which, if I could find it, would be  
12 quite useful because it's a Network Rail diagram -- that  
13 details in terms of the fact that the principal  
14 contractor licensing scheme and the plant operating  
15 scheme actually go and check that those management  
16 systems are being applied in the correct way. So  
17 whereas we -- effectively Achilles or any other  
18 assurance service provider look at the management  
19 systems, the fact they exist, the fact that they  
20 are correct --

21 Q. I think we can help you with the diagram. If it is not  
22 behind her witness statement there --

23 A. No, I couldn't --

24 Q. No --

25 A. -- see it.

- 1 Q. -- then I think it will be in E5 and then try tab 7.
- 2 A. Sorry? 7?
- 3 Q. 7.
- 4 MEMBER 3: Sorry, where are we?
- 5 MR. FLYNN: We are in E5 -- "E" for "elephant" --
- 6 defendants' exhibits.
- 7 Mine is, again, not paginated. Does it look like
- 8 that (indicates)? You might even have a colourful one.
- 9 Page 12, thank you.
- 10 A. Yeah, I have this.
- 11 Q. 1959 in the paginated bundle, I am told.
- 12 A. Yes, so this is -- this is -- I think there's a more
- 13 up-to-date version of this, but looking at -- looking at
- 14 what I'm referring to on the right-hand side in terms of
- 15 ongoing assurance, we look at RISQS' management systems,
- 16 RISQS' auditor, process assured, ongoing assurance,
- 17 verified on-site, all of Network Rail, and on
- 18 the right-hand side, the PCL team, route team, product
- 19 assurance, etc.
- 20 Q. Ms. Scott notes that the RISQS scheme is marked as
- 21 safety-critical; right?
- 22 A. Where am I looking at here?
- 23 Q. This is what she says at the paragraph we were looking
- 24 at earlier.
- 25 A. Okay.

1 Q. Now I do not have -- but that was page 97 in D/9. That  
2 is what got us to the diagram, I think.

3 So if you look beyond the coloured bit to the right  
4 and fairly low down, you will see "Rail industry":

5 "Any organisation that wants to  
6 supply a safety-critical or auditable RICCL code  
7 required ..."

8 That is against the RISQS evaluations.

9 A. Yes, it's not against the supply registration,  
10 the initial part --

11 Q. No. No. No.

12 A. -- which is the bottom part of my diagram.

13 Q. That's the entry part, as it were.

14 Was there another point -- I do not want to cut you  
15 off. Was there another point you wanted to make about  
16 that diagram?

17 A. Yes. If you look at the right-hand side, the reason  
18 I say actually that some of the management systems  
19 verification practically is done by the PCL team, by  
20 the plant-operating team -- if you look on  
21 the right-hand side, the process assured that the  
22 management systems are checked for their existence by  
23 the RISQS auditor and verified on-site by Network Rail,  
24 through a variety of means -- not just the PCL team,  
25 actually, but by the project teams, by the people that

1           are supervising the works as well.

2           MR. FLYNN:  Sir, what I am wondering is, I as I wanted to  
3           refer to one or two of the confidential documents, if  
4           now might be a good time to do -- just in, as it were,  
5           the last few minutes of ...

6           I do not know what the sensitivity to them will be  
7           on the part of my learned friend, but might that be  
8           a sensible use of the last ten minutes or so?

9           In other words, I was going to put some of  
10          the documents in bundle I to Ms. Ferrier and, as I say,  
11          I do not know whether that is going to be regarded as  
12          problematic or not by my learned friend.

13          MR. WOOLFE:  I have no problem with the documents being put  
14          to Ms. Ferrier.  The only issue is about the disclosure  
15          of offering them to the wider world.

16          It may be -- I do not like going into a closed  
17          session.  It might actually be simpler given we do not  
18          have the world and his wife here.  The lawyers certainly  
19          can stay in any event.

20          MR. FLYNN:  The other possibility is we do that first thing  
21          in the morning, rather than now, and I can carry on with  
22          something open now, as it were.

23          THE CHAIRMAN:  Let us do that, and perhaps you might want to  
24          speak to Mr. Woolfe about whether --

25          MR. FLYNN:  Yes.

1 THE CHAIRMAN: -- it is actually necessary to go into closed  
2 session.

3 MR. FLYNN: Yes, I will do that and I will try and group  
4 the issues so that it is done in one lump, if it has to  
5 be done.

6 MR. WOOLFE: If I can know the document numbers so I can  
7 take instructions as to the documents.

8 MR. FLYNN: Yes, indeed.

9 We may have to come back to one or two points  
10 tomorrow, but let us take this. In your third witness  
11 statement then -- you can hand back anything else that  
12 is still open on your desk if it is in the way -- if we  
13 look at paragraph 6 of that statement, this is a point  
14 on UVDB and a couple of other schemes. You say that is  
15 a scheme operated on a collective basis by buyers which  
16 achieves consistency for the buying community in a way  
17 that would be difficult if they all did it in-house. Do  
18 you see that, put it that way, as a valuable benefit for  
19 buyers?

20 A. Yes, I think setting a standard that can be met by  
21 suppliers that's consistent across the buying  
22 organisations really does achieve that.

23 Q. So, looking for another example in paragraph 24.3 of  
24 that statement, you refer to Balfour Beatty generally in  
25 paragraph 4. In subparagraph (3) you refer to

1 the Build UK working group focusing on an industry  
2 common assessment standard.

3 "The object of that working group is to establish  
4 a common set of assurance questions that can be  
5 delivered by any provider in the industry."

6 So a common set of questions is seen as a helpful --  
7 a valuable thing for buyers in that industry, is it not?

8 A. Yes.

9 Q. That consistency just is very difficult to achieve, is  
10 it not, in a hypothesis of many forums, many schemes all  
11 drifting about, and trying to attract different  
12 suppliers and buyers to them?

13 A. I think construction, which is the scheme that I'm  
14 referring to here, has a number of schemes and actually  
15 that is an example of the industry with Build UK  
16 bringing together all of those schemes to work  
17 collaboratively, to focus not just on the individual  
18 organisations, but actually on the common questions set  
19 for that industry. I think historically construction  
20 has been perceived as being quite competitive in its  
21 nature, so I think it's difficult, but not unachievable,  
22 and actually, when it does work, it works very well.

23 Q. In your second witness statement, paragraph 91 -- so  
24 that is in tab 2 -- you pick up Network Rail in some  
25 contexts for saying, "A single provider scheme enables

1           it to monitor, check and act on safety issues raised  
2           about particular suppliers in a timely, efficient and  
3           effective manner".

4           You say:

5           "There is no reason why more than one competent  
6           provider of assurance would compromise that ability."

7           So you think, do you, that several competent  
8           providers of assurance would not in any way jeopardise  
9           the ability of a buyer to monitor, check and act on  
10          safety issues raised about particular suppliers in  
11          a timely, efficient and effective manner?

12         A. I think the technology exists now to enable that to be  
13          done in a timely and efficient manner.

14         Q. So nothing to worry about; is that your position?

15         A. As long as processes and procedures are put in place,  
16          then I think it will be achieved.

17         Q. Yet you go on to say in paragraph 93 of that witness  
18          statement that the splitting of the RISQS services into  
19          two lots creates complexity. Is that not something that  
20          can be readily overcome -- inefficient communication  
21          structure and risks of delay?

22         A. It is, and predominantly our concern in this area was  
23          putting in place effectively the RSSB, the risks  
24          management team, as a buffer in between the service  
25          provider for system and the service provider for audit.

1           The RSSB had limited experience, I would say, in  
2           managing the complexities of those interfaces, and  
3           that's what concerned us as an organisation during that  
4           time period, how would that be managed.

5       Q.   In a hypothesis where you have several available  
6           schemes, some of them might be split in this way?

7       A.   Mm-hm.

8       Q.   Some might be organised in a way that you would consider  
9           better?

10      A.   Mm-hm.

11      Q.   But the fact that that sort of, as you would see it,  
12           less efficient and less effective scheme might be -- it  
13           might be in place, clearly, in your view, leads to some  
14           problems and complexity in the monitoring of the safety  
15           issue, does it not?

16      A.   Specifically in this case we were genuinely concerned  
17           because when we raised these concerns during the tender  
18           period, they weren't addressed and we asked how  
19           practically it was going to work.  So I'm hoping that  
20           during the period since Capita and Altius have been  
21           running the system that those issues have been ironed  
22           out.  But we were genuinely concerned at the time of how  
23           practically it would work and these questions were  
24           really never answered.

25      Q.   So, I mean, there are a number of documents in

1 the bundle in which you say that splitting in this way  
2 between the two lots introduces complexity, potential  
3 for process failure, all sorts of problems, because of  
4 additional interfaces between the systems. I mean, all  
5 of those you say are problems with the system that RISQS  
6 was tendering for, but at the same time you say, "Well,  
7 they're things that can always be overcome and there is  
8 no particular problem with having a proliferation of  
9 schemes; there will be a technical solution for ironing  
10 those things out and reducing the complexity for  
11 buyers", do you?

12 A. I think the specific areas we were concerned about was  
13 when we raised the issue around how it was practically  
14 going to work, those answers weren't given. However,  
15 I think if you have a process in place to ensure that  
16 you achieve what you would like to achieve, which is  
17 the sharing of information in an efficient way, I think  
18 those risks can be managed.

19 Q. I mean, all of those questions that you raised with  
20 RISQS and RSSB essentially go to the desirability of  
21 having a single provider for the services that were  
22 split in the tender, do they not?

23 A. It did, and that's the business model we operate and  
24 have operated across numerous industries successfully  
25 for a number of years.

1 Q. So you would consider, would you, that it would have to  
2 be only someone operating a single system à la Achilles  
3 could be an equivalent provider to the RISQS scheme in  
4 your hoped-for world of being accepted as a suitable  
5 provider to Network Rail?

6 A. Absolutely not. I think we perceive that that's  
7 the best model to adopt and it's how our internal  
8 systems, processes and people are structured, to operate  
9 in that way. So that's the reason predominantly for us  
10 withdrawing from lot 2 and actually putting in  
11 a non-compliant bid for the lot 1.

12 Q. But others obviously take a different view?

13 A. Yes.

14 Q. In the hypothesised world of multiple schemes, there  
15 could be others that adopt the RISQS model.

16 A. Yes.

17 Q. That, in your view, would put buyers such as  
18 Network Rail in a bad position because of complexity and  
19 failure to pick up on time on failures of audits or  
20 processes or ...?

21 A. I think our concern -- and I mentioned it earlier -- was  
22 around the lack of transparency of how that process was  
23 going to be managed. So I think if we set the standards  
24 in terms of how this would operate and the processes, it  
25 can be managed in an effective way.

1 MR. FLYNN: Sir, in my notes I keep coming across  
2 confidential documents and I think, given the time, if  
3 it would be acceptable to the Tribunal, I can probably  
4 arrange them better overnight and we do not have to have  
5 such a bitty exchange.

6 THE CHAIRMAN: Very well.

7 MR. FLYNN: Thank you.

8 (4.30 pm)

9 (Court adjourned until 10.30 am on Thursday,

10 21 February 2019)

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