



Neutral citation [2022] CAT 9

**IN THE COMPETITION**  
**APPEAL TRIBUNAL**

Case No: 1298/5/7/18

Salisbury Square House  
8 Salisbury Square  
London EC4Y 8AP

11 February 2022

Before:

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

Sitting as a Tribunal in England and Wales

BETWEEN:

**ACHILLES INFORMATION LIMITED**

Claimant

- v -

**NETWORK RAIL INFRASTRUCTURE LIMITED**

Defendant

Heard at Salisbury Square House on 11-15 October 2021

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**JUDGMENT**

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## APPEARANCES

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

Mr David Went (instructed by Addleshaw Goddard LLP) appeared on behalf of the Defendant.

**Note:** Excisions in this Judgment (marked “[~~§~~”]) relate to commercially confidential information: Schedule 4, paragraph 1 to the Enterprise Act 2002.

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## A. INTRODUCTION

1. This judgment follows the trial of the Claimant's ("Achilles") claim for damages consequential upon the Tribunal's judgment on a preliminary issue in these proceedings ([2019] CAT 20) ("the Judgment"). That issue concerned a requirement in the Defendant's ("Network Rail's") Key Schemes, which impose terms on companies or individuals wishing to work on Network Rail's managed infrastructure, that those companies and individuals had to obtain supplier assurance only through the supplier assurance scheme known as "RISQS", an acronym standing for the Railway Industry Supplier Qualification Scheme, which is run by the Rail Safety and Standards Board ("the RSSB") and not through any other supplier assurance scheme. That requirement was referred to in the Judgment as the RISQS-only rule. The Tribunal found that the RISQS-only rule breached Chapter I of the Competition Act 1998 ("the 1998 Act") and, on an assumption that Network Rail holds a dominant position in the market for the operation and provision of access to national rail infrastructure in the UK, that it breached Chapter II of the 1998 Act. By an order of 12 September 2019, the Tribunal ordered Network Rail to recognise supplier assurance provided through schemes other than RISQS, subject to compliance with such reasonable and proportionate conditions as were objectively justified by the need to ensure safety on the railway network ("the Order").
2. Pursuant to the Order, Network Rail has now introduced a new Standard on Supplier Qualification requirements NR/L2/SCO/302 ("the NR 302 Standard") with effect from 5 September 2020. The NR 302 Standard abandons the RISQS-only rule and instead allows assurance to be provided by alternative providers which meet the appropriate standard, subject to (i) passing an audit, (ii) payment of a fee, and (iii) provision of information in respect of suppliers to Network Rail's nominated supplier assurance portal via an Application Programme Interface ("API").
3. Achilles' case at the trial of its claim for damages was that, as a result of the infringement of competition law found by the Tribunal, it was prevented from providing supplier assurance which it was entitled to provide and that it has consequently lost profits and will continue to do so. It contends that it was

forced to become dormant in the GB rail industry from 1 May 2018, upon the expiry of its concession agreement with the RSSB, that it was only able to re-enter the rail supplier assurance market and launch its Link-Up scheme in April 2021, that this delay would never have occurred had Network Rail already had in place a compliant standard such as the NR 302 Standard rather than the RISQS-only rule and that its three year absence from the market has permanently damaged its ability to compete. Achilles quantified its losses in the sum of £12,061,968.

4. In its pleaded Defence, Network Rail denied that Achilles had suffered any recoverable losses. It contended that there would not have been sufficient interest from customers for Achilles' scheme to be viable and that Achilles should have immediately mitigated its loss by cutting costs in May 2018. By the time of the trial of the damages claim, Network Rail accepted that Achilles had suffered some losses which it quantified at between £581,081 and £1,817,704. The differences between the parties' calculations of Achilles' losses are largely a reflection of the differing assumptions made concerning the counterfactual scenario which would have existed, but for the infringement, in particular as to the duration of Achilles' exclusion from the market and as to the numbers of buyers and suppliers it would have retained in competition with RISQS. There is also an issue as to whether Achilles is entitled to recover damages in respect of future losses.

## **B. THE CLAIM FOR DAMAGES**

### **(1) The Legal Framework**

5. The legal principles applicable to the damages assessment were not disputed.
  - (1) An infringement of Chapter I or Chapter II of the 1998 Act is a statutory tort. In order to recover damages for the infringement, it is necessary for the claimant to show on the balance of probabilities that it has suffered actionable harm or damage caused by the infringement.

- (2) Proving a causal link between the infringement and the damage involves application ‘but for’ test. The measure of loss is the amount of damages that will place the claimant in the situation it would have been in had the tort not been committed; see *Enron Coal Services Limited v English Welsh & Scottish Railway Limited* [2009] CAT 36, (“Enron”) at [85(a)], *2 Travel Group PLC v Cardiff City Transport Services Limited* [2012] CAT 19 (“2 Travel”) at [77]-[84]. In *2 Travel*, the Tribunal cited with approval the following passage from the (then current) 20th edition of *Clerk & Lindsell on Torts*:

“The first step in establishing causation is to eliminate irrelevant causes, and this is the purpose of the ‘but for’ test. The courts are concerned, not to identify all of the possible causes of a particular incident, but with the effective cause of the resulting damage in order to assign responsibility for that damage. The “but for” test asks: would the damage of which the claimant complains have occurred “but for” the negligence (or other wrongdoing) of the defendant? Or to put it more accurately, can the claimant adduce evidence to show that it is more likely than not, more than 50 per cent probable, that “but for” the defendant’s wrongdoing the relevant damage would not have occurred. In other words, if the damage would have occurred in any event the defendant’s conduct is not a “but for” cause.”

- (3) In the context of proof of loss, a distinction is to be drawn between, on the one hand, past facts and, on the other, future events or hypothetical actions. As observed by Lord Diplock in *Mallett v McMonagle* [1970] AC 166, at [176]:

“In determining what did happen in the past a court decides on the balance of probabilities. Anything that is more probable than not it treats as certain. But in assessing damages which depend upon its view as to what will happen in the future or would have happened in the future if something had not happened in the past, the court must make an estimate as to what are the chances that a particular thing will or would have happened and reflect those chances, whether they are more or less than even, in the amount of damages which it awards.”

- (4) The court demands only as much certainty and particularity in the proving of damage as is reasonable, having regard to the circumstances and to the nature of the acts by which the damage is done. The fact that it is not possible for a claimant to prove the exact sum of its loss is not a bar to recovery. In many cases, the assessment of damages will involve an element of estimation and assumption accomplished by the exercise of “sound imagination” and a “broad axe” or a “broad brush”: see *Asda*

*Stores v Mastercard Inc* [2017] EWHC 93 at [306(1)]-[306(3)] per Popplewell J and the authorities cited there.

- (5) The need to make assumptions and estimates is particularly acute in the context of the assessment of losses resulting from competition law infringements. The following passage from the Commission Staff Working Document, *Practical Guide on Quantifying Harm in Actions for Damages based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union* (OJ 2013 C167, p 19) was cited with approval by Popplewell J in *Asda Stores Ltd and others v Mastercard Inc and others* [2017] EWHC 93 (Comm) at [306(3)] and Marcus Smith J in *BritNed Developments Ltd v ABB AB* [2018] EWHC 2616 (Ch) (“*BritNed*”) at [12(8)(d)]:

“16. It is impossible to know with certainty how a market would have exactly evolved in the absence of the infringement of Article 101 or 103 TFEU . Prices, sales volumes, and profit margins depend on a range of factors and complex, often strategic, interactions between market participants that are not easily estimated. Estimation of the hypothetical non-infringement scenario will thus by definition rely on a number of assumptions. In practice, the unavailability of data will often add to this intrinsic limitation.

17. For these reasons, quantification of harm in competition cases is, by its very nature, subject to considerable limits as to the degree of certainty and precision that can be expected. There cannot be a single ‘true’ value of the harm suffered that could be determined, but only best estimates relying on assumptions and approximations...”

Marcus Smith J went on to observe (*BritNed* at [12(8)(d)]) that quantification of loss is not a question of mathematical calculation, although mathematical calculations will, no doubt, have their place, but turns on developing a robust understanding of what would have happened in the counterfactual case.

- (6) The assumptions on which the counterfactual hypothesis is based must be realistic. In Case C-382/12P *MasterCard Inc and others v Commission* ECLI:EU:C:2014:2201, the European Court of Justice held as follows:

“108. It should be pointed out that, irrespective of the context or aim in relation to which a counterfactual hypothesis is used, it is important that that

hypothesis is appropriate to the issue it is supposed to clarify and that the assumption on which it is based is not unrealistic.

109. Accordingly, in order to contest the ancillary nature of a restriction, as referred to in paragraphs 89 and 90 of the present judgment, the Commission may rely on the existence of realistic alternatives that are less restrictive of competition than the restriction at issue.”

- (7) The counterfactual world is “purged” of the competition law infringement in question and its consequences and any other unlawful conduct. That is to say, the Tribunal assumes, for the purposes of the counterfactual world, that Network Rail would not have engaged in any violation of competition law or any other unlawful conduct: see *Enron Coal Services Limited (In Liquidation) v English Welsh & Scottish Railway Limited* [2009] CAT 36 at [90] and *Albion Water Limited v Dwr Cymru Cyfyngedig* [2013] CAT 6 at [61].
- (8) A claimant cannot recover damages for losses which it could have avoided by the taking of reasonable steps to mitigate its losses. It is for the defendant to plead and prove any case on mitigation: see *Sainsbury’s Supermarkets Ltd v Visa Europe Services LLC and others* [2020] UKSC 24 at [207]-[216].

## **(2) The Infringement**

6. In the Judgment, the Tribunal determined that Network Rail was entitled to stipulate that companies directly contracting to supply services to Network Rail (“direct contractors”) be assured through RISQS, but, with the exception of direct contractors, it was not entitled to require that suppliers and persons seeking access to Network Rail’s managed infrastructure, pursuant to the Network Rail’s Sentinel Scheme and On-Track Plant Operations Scheme (as described at paragraphs 20 to 24 of the Judgment), be assured through RISQS.
7. Applying the legal principles summarised above, the central task of the Tribunal in quantifying Achilles’ recoverable losses has therefore been to establish, on the basis of reasonable assumptions and estimations, the counterfactual scenario that would have existed but for the infringement found by the Tribunal (“the Counterfactual Scenario”), that is to say the situation that would have existed if

Network Rail had not imposed the RISQS-only rule but allowed its direct contractors to mandate supplier assurance schemes other than RISQS for their supply chains, and to quantify the amount of damages that will place Achilles in the situation it would have been in had the Counterfactual Scenario been the reality.

### **C. THE WITNESSES**

8. Achilles called the following witnesses of fact to give evidence at the hearing:
  - (1) Katie Ferrier who is the Senior Vice President for Customer Enforcement at Achilles.
  - (2) William Nelson who is the Global Audit Programme Director for Achilles.
  - (3) Atle Gjertsen of Achilles Information AS, who has responsibility for Achilles' supplier assurance community in the oil and gas sector in the Nordics.
  
9. Network Rail called the following witnesses of fact:
  - (1) Kenneth Blackley who is Programme Director within Commercial & Procurement team with the Route Services function of Network Rail.
  - (2) Adam Berwick who is Procurement Lead at Balfour Beatty Vinci Systra, a joint venture from Balfour Beatty Group Limited;
  - (3) Amanda Bate who is Head of Compliance at Fusion People Limited;
  - (4) Darren Matthews who is Group Compliance Director for Readypower Rail Services Group Limited.
  
10. In addition, Network Rail adduced a witness statement from Sue Grant who is Business Operations Director at Fenix Rail Systems Limited.

11. The expert witnesses were David Parker, who is a director in the competition practice of Frontier Economics, called by Achilles, and Steven Law, a partner of BDO LLP (“BDO”) and a member of the Forensic Accounting and Valuation services group within BDO, called by Network Rail.
12. The Tribunal considers that all the witnesses were seeking to assist the Tribunal.

## **D. THE FACTUAL BACKGROUND**

### **(1) Achilles’ initial involvement in the rail industry**

13. As set out at paragraph 61 and following of the Judgment, Achilles became involved in the rail industry in January 1997 when it took over an internal database of suppliers called Link-Up which had been established by British Rail before being privatised in 1997. Link-Up was at that time a register of supplier details which Achilles developed into a supplier assurance scheme of the sort offered by Achilles in other industries. Link-Up became a two-sided product with buyer agreements between Achilles and the rail operators, who paid a subscription fee to Achilles, and supplier subscriptions for registration with Link-Up to ensure suppliers’ details would be available to the industry’s buyers and centrally registered. Achilles would also undertake on-site audits to verify information in the questionnaires completed by suppliers by way of validation and quality assurance.
14. In 2013, the railway buying community decided to develop Link-Up as an industry-wide scheme in order to avoid duplication and save costs. A new oversight board for the scheme, the RISQS Board, was created and the scheme was rebranded as RISQS. Achilles continued as exclusive provider of the Link-Up service under the RISQS name under a three-year contract with the RSSB commencing on 6 January 2014 with an expiry date of 30 April 2017, which was later extended to 30 April 2018 (“the Concession Agreement”).
15. The Concession Agreement was a concession arrangement for Achilles to supply to the RSSB and the RISQS Board website/IT portal operation and hosting and audit services for supplier and buyer organisations. Achilles was

required to pay a fixed annual fee to the RSSB (£150,000). The Tribunal's attention was drawn to a number of provisions in the Concession Agreement as being relevant to an understanding of Achilles' conduct in the run-up to 1 May 2018 and to an assessment of what would have happened in the Counterfactual Scenario.

- (1) Clause 4.5 provided that Achilles must not undertake activities that cause a conflict of interest in relation to the services that it agreed to provide pursuant to the Agreement.
  - (2) Clause 8.4 provided that the intellectual property in any joint developments between RSSB and Achilles would be joint owned with each granting the other a perpetual non-exclusive royalty-free right to use the joint intellectual property without the consent of the other.
  - (3) Clause 8.9 provided that Achilles was not permitted to use the Link-Up name for the period of the agreement except by agreement and with the approval of the RISQS Board.
  - (4) Schedule 5 set out the contractual communications policy which, amongst other things, required all RISQS-related communications to be approved by the RSSB.
  - (5) Clause 14.4 provided that on termination of the Agreement, Achilles was obliged to provide a copy of all its records concerning suppliers including audit reports under a perpetual royalty-free licence for use by the RSSB. There were no post-termination restrictions on Achilles' use of its information or branding or its rights of competition.
16. In December 2015, the RSSB decided to put out to tender the provision of IT and audit services for the RISQS scheme after the RSSB's contract with Achilles had come to an end on 30 April 2018. The new contract model, to take effect from May 2018, placed the RSSB in the position of the contracting party for the service, receiving subscription payments from buyers and suppliers and the

performance of the service subcontracted by the RSSB to separate service providers for the audit and IT functions.

17. Achilles was unsure whether to participate in the procurement at all and if so on what terms. The procurement exercise was split into two lots, “Lot 1” for IT solutions and “Lot 2” for audit services. Achilles decided to submit a non-compliant bid for Lot 1 which was submitted on the basis that the RSSB also took the Achilles audit service in Lot 2 (i.e, the bid was a 'bundle' that maintained the core of Achilles 'end to end' service model, contrary to the split service on which the procurement was based). On 31 March 2017, Achilles was notified that its bid had been unsuccessful in Lot 1. Achilles decided to withdraw from the procurement process.
18. In the Judgment (at paragraph 79), the Tribunal noted that the reasons for Achilles’ withdrawal were not clear. Ms Ferrier’s evidence was that Achilles did not wish to give up on its rail business and customer relationships for the sake of an audit contract with the RSSB, that it wished to compete with the RSSB on a full-service basis after 1 May 2018, and that it considered that it would have a very good chance of doing so successfully. She considered that Achilles could achieve a competitive advantage by being more supplier focused, for example by providing benchmarking report to suppliers to show them how their performance compared with their peers. That may well have been the view taken by Ms Ferrier and others within Achilles but there was no detailed plan for a competing service at this stage.
19. At a RISQS Board meeting on 22 February 2017, Richard Sharp, the RISQS scheme manager, told Achilles’ Regional Director UKI, Tom Grand, that Achilles would be perfectly entitled to operate its own Link-Up type service in the future. On 15 May 2017, immediately prior to formally notifying RSSB of the decision to withdraw from the procurement, Achilles’ Chief Executive Officer (“CEO”), Jay Katzen, had a short call with Susan Cooklin, Route Services Director at Network Rail, in which he mentioned Achilles’ intention to continue to provide supplier assurance services after 1 May 2018. Mr Katzen reported back to his colleagues that Ms Cooklin did not see any reason why Achilles and Network Rail could not work together given the 15-

year relationship to that point. Achilles' formal withdrawal letter also re-stated its commitment to the rail industry and the service it was able to offer.

20. Altius and Capita, the successful bidders in the procurement exercise, began providing services under the RISQS name from 1 May 2018.
21. In the financial year ending 30 April 2018 (i.e. the expiry date of Achilles' concession contract with RISQS), the supplier assurance market covered by RISQS had revenues of some £6.474 million per annum. Of that turnover, the split between buyers and suppliers was roughly as follows:
  - (1) 111 buyer subscriptions producing revenue of £0.868 million;
  - (2) 4,109 supplier registrations of whom 1,729 were audited suppliers producing revenue of approximately £5.5 million made up of £2.571 million from registrations and £3.036 million from audit services.
22. The income stream and profit margin from the business were consistent. The revenues for 2015/16 (£6.88 million) and 2016/17 (£6.81 million). For FY2018, Achilles' dedicated rail costs (i.e. those costs specific to running our rail scheme) were approximately £2.67million. Based on the revenue figures above, the margin was around 60%. Thus, as at 1 May 2018 the Achilles' rail business was some 20 years old and delivering approximately £3.8 million per annum in gross profit.
  - (2) **The run-up to the 1 May 2018 changeover**
23. The events and circumstances of the parties in the months leading up to 1 May 2018 are potentially relevant to an assessment of the Counterfactual Scenario to the extent that these events and circumstances would have been the same in the Counterfactual Scenario and would have impacted on Achilles' success in retaining buyers and suppliers.

*(a) Achilles' messaging to the market*

24. In an email dated 14 September 2017 (“the 14 September email”) to RISQS customers including Network Rail, Achilles made clear its intention to continue to offer supplier assurance services to the industry after the end of the Concession Agreement. The email informed customers that from 1 May 2018 Achilles would continue to offer rail assurance services under the brand name of Link-Up, a brand many in the rail industry would be familiar with. The email stated that the service provided by Achilles would remain in place without customers needing to take any further action outside of their usual renewal activities:

“Between now and the launch of the new RSSB qualification service, the RISQS service continues as usual and from May 2018 the Link-up service will provide a fully compliant Supplier Qualification Management Service to all current Buyers and Suppliers. Achilles is working closely with the RSSB to seamlessly terminate our current partnership and we wish the new RSSB service every success in meeting the needs of its sponsors from May 2018.”

25. The email went on to invite customers to a networking drinks event at County Hall on 10 October 2017, which was described as an opportunity for Achilles to share its vision on the future of Link-Up, and hear customers’ views on how the service can best meet their needs.

26. In an email dated 21 September 2017, Ms Ferrier reported on a conversation with the managing director of Colas Rail, a major supplier of railway infrastructure services, who expressed doubts about the viability of the proposed new RSSB split service and advised Achilles to publicise the fact that Achilles would be carrying on business as usual with the same product codes and improved assurance levels.

27. The 14 September email from Achilles caused some concern within Network Rail and the RSSB. The response of Kenneth Blackley was that Network Rail ought to make clear to suppliers that the existing RISQS would be continuing and that it would have the support of Network Rail and the RSSB. He would also “*like to go further and clarify that [RISQS] is the only scheme NR recognise, but will carefully consider the wording we are able to publish*”. At the event, Network Rail’s message to suppliers did not go as far as that, stating

only that Network Rail would continue to support RISQS and that suppliers would not be required to subscribe to any other scheme.

28. On 21 September 2017, Neil Willings, Achilles' head of sector, transport and audit development, spoke to a manager at Alstom who expressed the view that there was only room for one supplier assurance scheme, that RISQS with RSSB support might have the upper hand but the fact that Alstom would not have to do anything to remain with Achilles was a big plus on Achilles' side.
29. On 4 October 2017, Graeme Cox, the newly appointed head of supplier assurance at the RSSB, emailed RISQS customers telling them about the progress made by the new RISQS service providers Altius and Capita and asking them to report back if they had been approached by Achilles about its networking event on 10 October 2017. Mr Blackley discouraged Network Rail staff from attending that event. On the day of the event, he emailed Stephen Blakey who had agreed to speak at the event, expressing concern that Mr Blakey's participation might be perceived as Network Rail's support for Achilles' relaunch of Link-up which was in competition with RISQS, and asking that no Network Rail employee attend the event. Mr Blakey did not receive Mr Blackley's message in time and attended the event, prompting Mr Blackley to tell Mr Sharp that "we tried".
30. On 9 October 2017, the RSSB wrote to Achilles asserting that the networking event on 10 October 2017 was contrary to Clause 4.5(b) of the Concession Agreement and that the 14 September email was contrary to the communication policy in Schedule 5 referred to above. Whether or not that was a correct interpretation of the Concession Agreement, it appears that Achilles considered itself bound by these restrictions and believed that it was or might be contrary to those restrictions to promote its new offering during the currency of the Concession Agreement. There was no further public attempt by Achilles prior to 1 May 2018 to promote its future supplier assurance service.
31. Network Rail relies on the limited extent to which Achilles marketed its future supplier assurance offering, following RSSB's assertion that its marketing activities were in breach of the Concession Agreement, as relevant to an

assessment of how many buyers and suppliers Achilles would have succeeded in retaining in the Counterfactual Scenario.

32. There continued to be some behind-the-scenes contact between Achilles and the market. In an email dated 11 December 2017, Colin Flack, Achilles' recently appointed head of transport, referred to a planned meeting with the CEO of RDG (the Rail Delivery Group) in which he planned to discuss Achilles' future supplier assurance offering.
33. On 2 February 2018, James Hillam, an Achilles account manager, who was due to visit Volker Rail, an infrastructure contractor which had been enthusiastic about Achilles' future offering to the rail industry, asked internally about any updates about the new offering as "things had been quiet on this front". He was told that what information should be released to Volker was a matter for Mr Flack. On 18 February 2018, Mr Flack circulated an RSSB bulletin referring to the transition to an enhanced RSSB scheme. Mr Flack commented that that this was good news as it was the first time the RSSB had publicly recognised that Achilles was providing its own scheme. Ms Ferrier's response was that Achilles needed to move its communications forward but Mr Flack urged caution and that it was important to get the communications right.
34. In an internal email dated 18 February 2018, Mr Flack noted that Achilles had as yet been cautious in its communications with customers, "not least due to our difficult relationship with RSSB the drawdown of RISQS", and noting the existence of restrictions on what it could say and do vis-à-vis the UK rail industry. He also commented that the RSSB had failed to create a clear and coherent message and that this created an opportunity for Achilles to demonstrate leadership and give confidence.
35. By the time of a further Transport Sector Strategy document dated March 2018, it appears that Achilles had not taken advantage of any such opportunity. Mr Flack noted that "there appear to be significant legal constraints on our ability to go to market with alternative like for like product ahead of contract termination on 01 May 2018". He considered that the use of the Link-Up brand would be undesirable because of the legal constraints in Clause 8.9 of the

Concession Agreement but also because of the baggage that this name had. He went on to point out that any restrictions on Achilles ended on 1 May 2018 (so that activity in relation to RISQS must not conflict with the scheme) as follows:

“However, a product offering that will not come into effect until after 1 May 2018 cannot possibly be a conflict of interest. **We need to be robust and confident about this.**”

36. He proposed that, subject to their consent and revised T&C’s, existing customers would be migrated to the TransQ global scheme which was being developed by Achilles and which would enable Achilles to move away from supplier assurance being viewed as a “necessary evil” and to provide suppliers with a whole range of business support.
37. Later in March 2018, Rebecca Bancroft, head of Achilles’ corporate communications, prepared a briefing paper for an entity called “SAMS” with answers to possible questions, emphasising continuity between Achilles’ RISQS service pre-1 May 2018 and TransQ after 1 May 2018 and the fact that SAMS did not need to do anything to ensure the transfer of its data.
38. Achilles’ cautious approach to communications is further evidenced by an email sent by Achilles to Skanska dated 17 April 2018 acknowledging that, due to contractual obligations, Achilles was prohibited from communicating to its existing RISQS customer base anything that related to its future offering. In a subsequent email exchange on 25 April 2018, Skanska informed Achilles that, as a principal contractor with Network Rail, it would need to be assured with RISQS, that its suppliers would also be assured to the same standard and that it would have no need for an Achilles’ alternative.
39. In April 2018, Achilles finalised communications to be sent to suppliers and buyers on and after 1 May 2018 in support of the launch of TransQ.

***(b) Achilles’ planning***

40. In the months leading up to the changeover, Achilles discussed internally its plans to relaunch a supplier assurance service for GB rail offering after the end of the Concession Agreement and the level of business it would attract. These

discussions mostly took place before Network Rail made clear on 26 April 2018 that it would require its direct suppliers to mandate RISQS for their supply chain. Prior to that, Achilles expected that it would be allowed to compete with RSSB RISQS, as it had previously been assured that it could, and its plans were therefore not affected by the RISQS-only rule or the threat of it. With hindsight, these plans may therefore be seen as indicative of how Achilles believed that it would be able to compete in the Counterfactual Scenario.

41. The strategy document entitled “Transport Sector Strategy” and dated September 2017 described the rationale of the Link-Up launch as being to salvage significant revenue post the RISQS contract, to target new sectors and retain a presence in the sector in readiness for the potential failure of RISQS. The “KPIs” for the launch were stated to be 10 buyers remaining on Link-Up and full engagement and on-boarding of suppliers by those buyers. Achilles’ confidence in achieving these objectives was stated to be “medium”. The KPIs may be read as a minimum estimate of what was likely to happen following the launch.
42. In the presentation document entitled “Link-Up Mobility Update” dated December 2017, Ms Ferrier referred to a positive response from five buyers to Achilles proceeding with its own solution. In strategy documents dated November 2017 and March 2018, reference was made to 10 verbal agreements from RISQS buyers.
43. In a December 2017 “Executive Business Review” authored by Mr Katzen, Achilles mentioned that First Great Western had signposted its intention to renew with Achilles, while Colas and Midland Metro Alliance had asked Achilles to indicate what more it could offer them.
44. In emails dated 19 January 2018, 21 March 2018 and 10 April 2018, Achilles wrote to Mitie confirming its intention to continue to offer a pre-qualification scheme and audit services to the rail industry.
45. In an internal email dated 6 February 2018, referring to price modelling Zoe Ecclestone, a senior project manager, referred to an attached price matrix with

an unchanged audit price of £995 and subsidised supplier subscriptions and free buyer subscriptions based on the premise of retaining Network Rail as a buyer “as they drive the requirement for audit and we want to retain as many of their suppliers as possible for this purpose”. The email continued as follows:

“Current breakdown of RISQS £6m annual revenue stream (£3m audit/£2m supplier/£1m buyer) The modelling should not assume we will retain 100% of active suppliers and I think at this stage Colin [Flack] (correct me if I am wrong) would be satisfied in Year 1 if we were to retain 25% of these.”

46. In an internal email dated 18 February 2018, Mr Flack summarised Achilles’ strategy as being to redefine the role of supplier assurance, moving customers away from viewing supplier assurance as a “necessary evil” or some form of tax and instead as an “enabler that levers a wider range of supporting products” engaging a wider audience within companies and opening their eyes to the range of services that Achilles can offer.
47. In a draft position paper dated 25 February 2018, Mr Flack set down his thoughts on the new Achilles supplier assurance service for the rail industry going forward in preparation for the meeting with Network Rail planned for the following day. He noted that Achilles had withdrawn from the RSSB tendering process without the board having any clear ‘Plan B’ in mind. The current situation was that the RSSB had failed to come up with a comprehensive and pragmatic migration plan and failed to communicate effectively with the supply chain. Achilles had been in defensive mode for the last six months because of the fractious relationship with the RSSB and the contractual constraints on communicating with the market. The name Link-Up, whilst a good brand name, had some “baggage” from its previous iteration. The paper also recognised that a significant part of the supply chain would follow Network Rail’s lead in supporting RISQS after 1 May 2018, “since they are the single most dominant player/customer”. With reference to the future strategy for rail, Mr Flack noted that Achilles was regarded by most as “a safe pair of hands” although not seen in a positive light by all, detractors making much of the fact that they have been slow to process change and did not have a track record of being proactive or creating better value within the contract period.

48. On 26 February 2018, Ms Ferrier and Mr Flack met Gillian Scott, the assurance manager at Network Rail, to discuss the transition arrangements and Achilles offering post-1 May 2018. Ms Scott's position was that any supplier wanting to contract with Network Rail would need to be on RISQS, because RISQS interfaced with the Bravo portal used by Network Rail's procurement teams. She did not, however, say Network Rail would not recognise an alternative scheme for access to its infrastructure. In an internal email sent later on the same day, Ms Ferrier identified three possible options for Achilles to pursue. The first was to put together an aggressive challenge to Network Rail/the RSSB's new service, the second was to offer to collaborate with the RSSB, providing an audit service under the Achilles brand on the basis that it was recognised as an RISQS approved audit, and the third was to walk away from UK rail industry and focus on its transport strategy in other sectors.
49. Some board slides dated 1 March 2018 identified three buyers who were interested in the proposed TransQ Global product replacing RISQS from 1 May 2018.
50. By 9 March 2018, Achilles had decided on its future strategy. Ms Ferrier emailed her team, setting out the planned course of action for transition as follows:
- “1. On 1st May we will launch new Transq community – supplier and buyer data will not be automatically transitioned to this. We will craft a communication that gives them the option to join once agreeing new T&Cs etc the messaging re benefits is similar to the comms we devised Weds but must also include info on 2. We will then transfer the data on Transq if the supplier/buyer agrees.
2. On 1st May we will allow suppliers and buyers continuous access to the RISQS platform until their subscription ends - this is effectively a ghost platform that is not kept up to date. We obviously need the appropriate disclaimers visible on the opening page and if possible the RISQS name removing but this isn't a show stopper as long as a disclaimer is in place. We should put info directing them to the new service provider on here too.
3. Data transfer – Gareth and I are pulling something together I'll send a separate email to get sign off on this today...”
51. At a meeting with Mr Blackley on 12 March 2018, Mr Blackley told Ms Ferrier that suppliers working directly with Network Rail would have to register for the

scheme whereas if principal contractors or buyers wished to use another scheme to manage their supply, Network Rail would not inhibit them from doing so. When asked whether Achilles would have “equivalent scheme” status under the RSSB Standard RIS-2750-RST so as to be able to continue to offer supplier assurance from a Sentinel perspective, Mr Blackley said that he had not really thought through the implications of this and would come back to Achilles. He did not subsequently do so.

52. On 21 March 2018, Achilles sent a letter to the RSSB, copied to Network Rail, setting out its plans to deliver supplier data to the RSSB and expressing concern over the transition arrangements and stating Achilles’ belief that it was in the interests of the UK rail industry that there should be choice of audit providers and proposing a meeting to discuss how this would work in practice.
53. On 22 March 2018, Richard Sharp set out his thoughts as to what Network Rail’s response should be to Achilles’ approach to Mitie. He proposed that Network Rail should not proclaim the suitability of Link-Up, each buyer would have to make up its own mind as to the suitability of Link-Up. On 27 March 2018, Ms Scott drafted a response for Mitie mirroring the same points made by Mr Sharp, making clear that under the Sentinel Scheme, the On-Track Plant Operations Scheme and the Principal Contractor Licensing Scheme, Mitie was not in a position to approve any alternative to RISQS. This response was issued by Mitie in response to Achilles on 23 April 2018.
54. In a Transport Sector Strategy dated March 2018, Mr Flack noted that Achilles had 10 verbal agreements from RISQS buyers.
55. On 3 April 2018, Ms Ferrier sent an internal email to her team at Achilles setting out the way forward, including proposals to obtain recognition for its service as an equivalent scheme and to promote the scheme to buyers. and suppliers, while recognising that Network Rail and Transport for London (“TfL”) had decided to use RISQS/RSSB for their principal contractors. It was proposed that Achilles would give free access to the Link-Up system for an additional six months and a discounted audit offering. The email stated that Achilles needed a

one consistent message to offer to TransQ existing buyers and that once this was agreed, she would work on briefing people.

56. On 10 April 2018, Achilles wrote to Network Rail stating as follows:
- (1) With effect from 1 May 2018, Achilles would continue to offer to the rail industry a supplier pre-qualification management registration scheme under the brand name Link-Up TransQ;
  - (2) Link-Up TransQ would fully comply with all requirements of RIS-2750. Achilles provided copies of certificates that would be issued to customers demonstrating compliance with RIS-2750 and as appropriate with the PCLS standard;
  - (3) Achilles would provide Sentinel with any assurances it requires in relation to the operation of Link-Up TransQ and provide any information to Sentinel which might be required to demonstrate compliance with RIS-2750 and the PCLS standard.

57. On 11 April 2018 Chris Methven, the Chief Revenue Officer of Achilles, reported to Achilles' CEO Jay Katzen on the proposed pricing strategy for TransQ as follows:

“As you know existing RISQS is ~£6m, broken down very roughly as £3m audit, £2m CSMS, £1m Buyer. There are currently ~115 buyers, of which ~60 our principal contractors.

Our current understanding is that the ONLY business that we cannot go after is the buyer fees and any audit fees paid directly by the principal contractors, as it is being mandated by Network Rail that they use the NEW RISQS scheme. This means there is an immediate >£5m of addressable market for us to go after between the ~55 other buyers on existing RISQS, plus all the suppliers and audit of tier 2+. ... Then there is obviously the far greater market opportunity in the wider transport sector. Clearly the assumption here is that our audits will be fully accepted moving forwards for all but the principal contractors – which at least currently seems to be the case. On day 1 I understand from the team that we are providing no additional value in TransQ Global compared with the NEW RISQS solution, arguably less due to integrations provided by Altius, therefore this is a pure price play coupled with a promise of greater scale (not just rail) and greater capability (additional audit types / insights etc) coming quickly during FY19, but for the early adopters this later point is a bit of a leap of faith.”

58. The email went on to propose that existing principal contractors should be offered a 12 month subscription at zero cost and that other buyers should be offered a 12 month subscription at 50% cost.
59. On 26 April 2018, Mr Flack reported internally on a RISQS buyers launch event that day at which he had planted a question as to whether the RSSB/Network Rail would recognise Achilles audits as being Sentinel compliant and was told they would not and that anyone who had not gone over to RISQS within a month would have their Sentinel permissions revoked. Mr Flack commented: “This changes the game somewhat. We need a new plan and fast”. This is when the “penny dropped” in Ms Ferrier’s words.
60. Achilles continued to take renewals of subscriptions up to January / February 2018 (i.e., up to 3 months before the renewal date) on the assumption that the service could be rolled over. There was no agreement with the RSSB over the treatment of contracts that were in term at the 1 May 2018. Achilles hoped to retain that business by offering an alternative service to the RISQS brand for the period from 1 May 2018 as a competitive offering but it was willing to give refunds. The RSSB was content to take over any Achilles’ member contracts that were current at May 2018 without seeking any additional subscription from the member or Achilles for the balance of any term after 1 May 2018 and did not seek any payment from Achilles.

***(c) Messaging by the RSSB and Network Rail***

61. Between June 2017 and May 2018, the RSSB and Network Rail took steps to promote the RSSB’s RISQS which would come into operation on 1 May 2018.
  - (1) In June 2017, the RSSB sent an email to RISQS members informing them that the 2014 Agreement would end and that provision of RISQS would be taken over by the RSSB under a new contract structure. The email referred to the enhanced benefits that the new scheme would bring to contactors.

- (2) The RISQS December 2017 newsletter claimed that over 1,000 buyers and suppliers had signed up for a series of nationwide events to learn about the enhanced RISQS scheme and included a link to a promotional video. It included a message from Gillian Scott that in order to maintain their Sentinel status, suppliers would need to be RISQS-assured, and that meant signing in to the RISQS portal now.
- (3) The RISQS website transition guide dated February 2018 gave instructions to users on accessing the new improved service and informing customers that they should only pay invoices for renewals post-1 May 2018 if they were sent by the RSSB RISQS.
- (4) On 15 March 2018, Network Rail issued a bulletin with the headline “Act now or potentially lose rail market access” warning suppliers that if they did not sign up to RISQS by the end of April 2018 they risked being locked out of the UK rail market. It included a quotation from Gillian Scott, Assurance Manager for Network Rail, that in order to maintain their Sentinel status, suppliers would need to be RISQS-assured, and that meant signing in to the RISQS portal and that, if they left it to the end of April, they risked being invisible to buyers from 1 May 2018.
- (5) On 13 April 2018, RISQS issued a newsletter encouraging buyers to sign a charter, informing buyers about a pre-launch promotional event and warning suppliers that if they did not log in to RISQS soon they risked being wiped from the RISQS database and being rendered invisible to buyers.
- (6) On 20 April 2018, RISQS emailed members reminding them to log in to the new system.
- (7) On 24 April 2018, that is to say a week before the date on which the new RSSB service was to go live, Graeme Cox sent an internal email expressing concern that only 2200 suppliers out of 3800 (i.e., some 58%) had logged on to the new system. At a meeting of the RSSB Board on 28

March 2018, it was noted that some suppliers had not been positive about transition as it did not seem completely seamless.

62. In April 2018, the RSSB launched the RISQS Buyer's Charter ("the RISQS Charter"), a public statement that buyers would continue to use RISQS. The RISQS Charter was signed by Network Rail and by a number of other buying organisations including TfL, Babcock and Amey. The RSSB re-launched the RISQS Charter in late-2019 following the Judgment.
63. On May 2018, Darren Male of the Quensh Consultancy, with a supplier customer base, emailed Gillian Scott on behalf of Network Rail, enquiring about Network Rail's position if suppliers stayed with Achilles and expressing concern about the handover to Capita and Altius:

"There is a level of uncertainty in my client base on the ability of Altius and Capita to deliver the RISQS scheme. Having hosted a Capita RISQS audit already, I felt it didn't deliver the level of assurance and depth that Achilles provided. Also, as you are probably [aware] the transfer of data from Achilles to Altius platform was very poor. The tone of Capita's emails are also causing concern."

[redacted].

64. In her reply to Mr Male, Ms Scott stated that Network Rail supported RSSB and RISQS as a single supplier assurance scheme, thus ensuring value for money on behalf of the UK tax payer; she also asked for feedback on where Capita's audit was lacking.

### **(3) Events following the 1 May 2018 changeover**

65. On 1 May 2018, the RSSB's RISQS service went live.
66. On 14 May 2018, Network Rail wrote to Achilles, in response to Achilles' letter of 10 April 2018, to inform it for the first time that Network Rail would not recognise any pre-qualification scheme apart from RISQS on the Sentinel, the On-Track Plant Operations Scheme or the Principal Contractor Scheme .

"As you are aware in 2014 RISQS was introduced as a mandatory requirement for the Sentinel scheme and Network Rail's Principal Contractor Licensing and

Plant Operator schemes. No alternative pre-qualification scheme is identified the requirements for these schemes as a key objective [sic] of RISQS was to have a single rail industry scheme allowing overheads to be kept to a minimum, to reduce duplication and reduce audit burden throughout the supply chain.

In 2017 the RSSB competitively tendered for the provision of RISQS, thus ensuring value for money on behalf of the UK taxpayer. Network Rail support RISQS as provided through the successful tender and its management through RSSB such that the scheme is provided by the UK rail industry, for the industry.”

67. Achilles responded to Network Rail’s letter on 26 July 2018 alleging that Network Rail had infringed competition law. These proceedings were then issued on 2 October 2018.
68. Once Network Rail’s refusal to recognise Achilles’ scheme had become clear, Achilles experienced a progressive loss of business with customers either not renewing their contracts for the period after 1 May 2018 or – in the case of customers who had already renewed their contracts – asking for refunds. Although Network Rail continued to recognise Achilles’ audits undertaken before 1 May 2018 for 12 months from the audit date, it did not recognise Achilles’ right to continue to deliver audits undertaken after 1 May 2018, in particular for the purposes of Sentinel.
69. In August 2017, Achilles had forecast revenue for FY2019 of £6.7 million. By February 2018, its budget forecast revenue for FY2019 was approximately £2 million, reflecting the revenue booked at that point from customers renewing their contracts prior to May 2018 and Achilles’ concerns about whether its supplier assurance scheme would be recognised by Network Rail. In her first witness statement dated 2 October 2018, Ms Ferrier stated that Achilles’ revenue from its supplier assurance renewals business had depleted month by month; by October 2018, its actual revenues from renewed subscriptions were £209,532, much of which was being refunded on daily basis, compared with originally forecast renewal revenue of £5,427,773. Its revenue from new sales was £5,053 compared with a forecast revenue of £843,760. By the end of FY2019, Achilles generated income from its supplier assurance business totalling £1,539,000. In FY2020 this revenue fell to £14,000 and in FY2021 there was no revenue.

70. Once it became apparent that the business might not be sustainable, Achilles took steps to reduce costs, including the redundancy and redeployment of staff. Operational costs were reduced from £590,271 in FY2018 to £167,973 in the following year. In its Defence, Network Rail alleged that Achilles had failed to act reasonably in mitigation of its loss by not cutting the costs of its rail business in May 2018 following the loss of the Concession Agreement and the fact that Network Rail and other buyers could lawfully require their supply chains to use RISQS. This argument was not pressed by Network Rail at the hearing, however, and the Tribunal was not persuaded that it had any substance.
71. Ms Ferrier's evidence, which the Tribunal accepts, was that the period following 1 May 2018 was damaging to Achilles' reputation as Achilles had told customers that they would be competing with the RISQS scheme after 1 May 2018, having been told nothing to the contrary by Network Rail or the RSSB.

#### **(4) Events following the Judgment**

72. The Tribunal handed down the Judgment on 19 July 2019 and the Order giving effect to the Judgment on 12 September 2019 following a hearing on that date. The Order was stayed pending appeal but the Tribunal made clear at the hearing on 12 September 2019 that the stay should not prevent Network Rail from planning for the implementation of the Order, that it should proceed with its internal planning so that if an application for permission to appeal or an appeal was unsuccessful, Network Rail would be in a position to proceed to implementation of the Order without any further delay.
73. At a meeting on 11 September 2019, that is to say on the day before the Order was made, Mr Blackley discussed with other representatives of Network Rail and the RSSB the steps needed to implement the anticipated order. It was agreed that the RSSB would provide details of field names and requirements to Network Rail within 14 days, such that Achilles would be able to commence development of their application programming interface or API to transfer data into the RSSB system. After Network Rail had received details of the field names and requirements, Network Rail would confirm the most appropriate data transfer approach, then assumed to be the use of an API, after which Network

Rail would communicate this to Achilles to enable them to commence build of the API.

74. It was also agreed at the meeting as follows:
- (1) Network Rail would proceed by re-introducing a new RSSB standard which, following a significant re-write, would enable multiple supplier assurance providers to operate. It was anticipated that this could be completed by the end of October 2019.
  - (2) It would not be appropriate for the RSSB scheme manager to monitor other supplier assurance providers' compliance with the new standard.
75. At the hearing on 12 September 2019, the Tribunal was told by Counsel for Network Rail that it would take six months for the standard to be revised. There was no clear explanation for the discrepancy between this time estimate and the seven week time estimate agreed upon at the meeting on the previous day.
76. On 16 October 2019 Rachel Civval, Altius's software solutions manager, sent a draft of the revised API specification to Richard Sharp who was at the time employed as a systems manager by the RSSB. The "version history" on the second page of the specification records that it had been edited by Richard Sharp of the RSSB which he described as providing sufficient detail for a supplier assurance provider to evaluate the level of development required.
77. On 23 October 2019, Mr Blackley sent an internal email to Network Rail's Standards and Controls Management Team stating that he had created rough drafts of the two documents needed to implement a solution following receipt of the Order and asked for help in turning the drafts (that is to say, drafts of both the Network Rail standard and the API specification) into a workable standard within an extremely tight timetable. The email went on:

**"We must issue a draft to Achilles within 7 days** (by Friday 25 the October 2019) to enable Achilles to commence preparations to satisfy Network Rail that they can put in place the necessary arrangements to meet our standard.

If Boris can get an EU Brexit deal done in a week, I trust we can all move heaven and earth to get this standard issued in 7 days (acknowledging that it

will of course require to formally go through the standards approval process). I appreciate this may require us all reprioritising resource.”

78. In the event, it was not until 18 February 2020 that Network Rail sent Achilles copies of the new Network Rail standard and API specification. The covering letter referred to the fact that the RSSB had provided input as an administrator of the RISQS at the consultation stage in January 2020 but did not mention that it had contributed to the drafting stage. The letter said that the standard would allow Achilles to become a supplier assurance provider and that it was not anticipated that the final published standard would differ significantly from the draft.
79. In its reply dated 28 February 2020, Achilles raised a concern about the potential conflict of interest in the RSSB’s role in helping to develop the rules on which the RSSB would in future compete with other supplier service providers. It also asserted that the draft standard did not give effect to the Judgment in that it emphasised unduly the RISQS scheme and relegated reference to an alternative scheme to a footnote. Network Rail responded on 24 March 2020 giving details of the RSSB’s involvement and rejecting the complaint concerning the prioritisation of RISQS. Ms Ferrier replied on 31 March 2020, restating Achilles’ position that the draft standard gave undue prominence to RISQS. The letter annexed alternative wording which was subsequently adopted by Network Rail. There were no further issues concerning the standard.
80. A Microsoft Teams meeting was arranged by Network Rail to take place on 17 April 2020 to discuss the API. In an email dated 16 April 2020, Achilles expressed concern that representatives of Constructionline, a potential competitor for the provision of supplier assurance, were to take part in the meeting. In the course of the meeting, attended by representatives of Achilles, the RSSB, Altius and Constructionline, Ms Ferrier raised concerns about suppliers having to join RISQS in order to enable them to supply data onto the RISQS platform. The requirement that a supplier assurance provider should register with RISQS had been added to the standard at some point between September 2019 and April 2020. Mr Blackley stated that suppliers would not be required to accept RISQS terms and conditions. It was, however, not clear from

the minute of the meeting whether the Altius representatives had agreed with this position. The minute also recorded that Mark Chamberlain on behalf of Achilles asked whether there would be a charge to suppliers to access the RISQS account. Altius commented that there would be a charge. Mr Blackley confirmed that there would be no charge. This issue was left unresolved at the meeting.

81. On 7 May 2020, Ms Ferrier emailed Mr Blackley to register Achilles' concerns at the way the Order was being implemented by Network Rail and her surprise at recent comments by Mr Blackley to the effect that he could not see how Achilles could compete with the RSSB whose role as to deliver what was best for the industry rather than to make a profit, comments which Ms Ferrier said reflected his evidence at the trial of the preliminary issue which was rejected by the Tribunal. Mr Blackley replied on 13 May 2020, rejecting the suggestion that there was any conflict of interest at play. In a further letter dated 20 May 2020, Achilles confirmed its agreement that it would not be necessary for suppliers to be registered with RISQS and that it would suffice for suppliers to have a unique identifier.
82. A month later, in a response dated 23 June 2020, Mr Blackley notified Achilles that, as a result of Achilles' concerns about the visibility of its data to competitors, Altius was creating what was called a "Sentinel API Aggregator" which would enable supplier assurance providers to feed their supplier data into the Aggregator to be checked for inconsistency and duplication without any sight of or review by the RSSB/Altius. Mr Blackley accepted in cross-examination that Achilles' concern about the visibility of its data to competitors was a reasonable one. Achilles agreed with the new approach as it made clear in a letter dated 13 July 2020.
83. The final API was sent to Achilles some five months later on 13 December 2020. Mr Blackley's oral evidence was that this delay was attributable to resource constraints affecting Altius.
84. Network Rail introduced the NR 302 Standard with effect from 5 September 2020.

85. In November 2020, an issue arose concerning the identity of the auditor responsible for auditing Achilles' compliance with the new standard. Network Rail appointed RD Professional Assurance Ltd ("RDPA"), a consultancy recently set up by Richard Sharp and Don Clarke, who had both been members of the RSSB RISQS business. Achilles questioned the appropriateness of this appointment on the basis that RDPA was not independent. RDPA's appointment was terminated by Network Rail in March 2021 on the ground that RDPA had a subscription from RISQS.
86. Mr Blackley suggested that the delays in the finalisation of the standard and the API were attributable to a lack of cooperation and the raising of unnecessary questions on the part of Achilles. We do not accept this analysis. We consider that, had the standard and API been designed openly and cooperatively from the start with Achilles as we believe would have been the case in the Counterfactual Scenario, the substantial delays that occurred would have been avoided. We consider furthermore that, taking into account the time which it took Network Rail to revise the standard and for Altius to finalise the API, Achilles could not have launched Link-Up any sooner than its actual launch date of April 2021. The issue of delay is considered further below in the context of the Counterfactual Scenario.

**(5) Launch of Link-Up**

87. Link-Up was launched on 14 April 2021 (Link-Up rather than TransQ being the name now used by Achilles for its supplier assurance service) and since then, Achilles has been offering the service to the market. Prior to the launch date, in early 2020, Achilles had discussions with TfL. Although TfL eventually resolved to stay with RISQS, the Tribunal accepts Ms Ferrier's evidence that the fact that TfL, despite being a publicly owned infrastructure operator and signatory to the RISQS Charter, was sufficiently interested to have advanced discussions with Achilles was a positive indication that Achilles would be able to attract major buyers to its new service. Ms Ferrier was subsequently approached by two firms which provide consultancy services to railway suppliers who were interested in finding out more about Achilles' new offering and expressed dissatisfaction with the service provided by RISQS.

88. By the time of the hearing, five buyer organisations had signed agreements with Achilles to have access to its platform: First Great Western (“FGW”), UK Power Networks, Mace, Dragados UK Limited and Walker Construction. [REDACTED].
89. FGW is a train operating company rather than involved in work on the railway infrastructure. Achilles has been able to interest First Group plc (“First Group”), FGW’s parent company, in its supplier assurance and procurement service. Ms Ferrier’s evidence, which the Tribunal accepts, was that:
- (1) First Group has agreed to enter a contract with Achilles under which it will in future to mandate the use of Link-Up for all its suppliers. [REDACTED].
  - (2) Achilles has been working with First Group to develop a risk model based on the level of risk and the level of spend on each supplier to ensure the member package is suitable with higher risk suppliers going onto one of Link-Up’s paying packages and low risk, low spend suppliers joining on the basic package. [REDACTED].
  - (3) [REDACTED]. Currently FGW is accepting RISQS audit as proof of compliance for Sentinel.
  - (4) First Group was not willing to mandate the use of Link-Up as long as Achilles was not permitted by Network Rail to audit suppliers working on the Sentinel scheme. At present, First Group is accepting the RISQS audit as proof of compliance with Sentinel and the On-Track Plant Operations Scheme. [REDACTED].
90. UK Power Networks (“UKPN”) is a large buyer in Achilles’ UVDB (an acronym standing for Utilities Vendor Database) utilities community but it also uses rail suppliers. UKPN is still strategically deciding how to proceed with assurance in rail, given it now has a choice between RISQS and Link-Up. For the next 12 months, it will recognise supplier assurance from both RISQS and Link-Up whilst that review is undertaken.

91. Mace is a large construction company which has not historically had a large rail business but has formed a joint venture with Dragados to work on HS2 projects. Its construction suppliers are existing members of BuildingConfidence and UVDB, supplier assurance schemes operated by Achilles in other sectors. Ms Ferrier's evidence was that Achilles' recognition by Network Rail has enabled Achilles to offer a rail specific assurance service so that it can offer buyers a cross-industry service enabling them to manage their supplier assurance through one provider.
92. Dragados is the construction arm of a global infrastructure and engineering firm. It is involved in large rail projects, including cross-rail and other underground works. It has joined Link-Up because of its involvement in the joint venture with Mace. Dragados is not currently a buyer on RISQS.
93. Walker Construction is another construction company with a rail element to its business, although much smaller than Mace. [§<]. As well as being registered as a supplier on RISQS, Walker Construction is also a buyer on RISQS and is a Principal Contractor to Network Rail.
94. By the time of the hearing, 337 suppliers had registered with Link-Up of which 126 were on the Sentinel API Aggregator. Of those 126, three had passed the audit for Sentinel although the audits had not been performed by Achilles.

## **E. THE COUNTERFACTUAL SCENARIO**

95. In accordance with the legal principles set out earlier in this judgment (at paragraph 5 above), an assessment of Achilles' losses resulting from Network Rail's infringement of competition law requires a comparison to be made between the Counterfactual Scenario, the situation in which Achilles would have found itself in but for the infringement, and the situation Achilles has in fact found itself in. Specifically, this comparison requires the Tribunal to consider what would have happened if Network Rail had not imposed the RISQS-only rule or behaved otherwise unlawfully but had treated Achilles's supplier assurance service as equivalent to RISQS, save that Network Rail would have been entitled to mandate the use of RISQS by its direct suppliers.

96. The parties' competing contentions with regard to the Counterfactual Scenario gave rise to the following main issues:

- (1) When would Achilles have launched its alternative supplier assurance service?
- (2) Which party would have had the advantages of incumbency in the Counterfactual Scenario?
- (3) Is the experience of Achilles JQS in the Nordics a valid comparator for what would have happened to Achilles in the Counterfactual Scenario?
- (4) How many buyers and suppliers would Achilles have retained in the Counterfactual Scenario?

97. These issues are considered in turn below.

**(1) The launch date**

*(a) The parties' contentions*

98. Achilles' case was that, in the Counterfactual Scenario, Achilles could have continued to provide supplier assurance to the GB rail industry from 1 May 2018 and thus it has lost three years of business. This is on the basis that Achilles was at all material times open about its intention to continue to compete in the market and that realistically Network Rail needed to have had in place the necessary standards and an API (if specified) to facilitate competition from Achilles. The only remaining step would have been the processing of Achilles' application under the standard and carrying out the necessary audit of Network Rail which could have been completed prior to 1 May 2018.

99. Network Rail's case was that in the Counterfactual Scenario there would have been a two-year delay in the launch of Link-Up. This was on the basis of the following contentions:

- (1) It would not have been reasonable for Achilles or any other competing supplier assurance provider to have expected Network Rail to already have a technical system and structure in place immediately catering for more than one supplier assurance provider to provide assurance in respect of works carried out on Network Rail's managed infrastructure, given the costs and resources involved, on the off-chance that a second supplier which met Network Rail's stringent safety criteria came forward.
- (2) By Ms Ferrier's own admission, Achilles had not given "too much thought" to the formal and technical requirements involved in providing an alternative supplier assurance service. Achilles was aware of the safety critical aspects of RISQS and Link-Up in the GB rail industry and was aware or should reasonably have known that interoperability would be a pre-requisite to having more than one supplier assurance provider active in the industry and should therefore have been proactive in discussing interoperability requirements with Network Rail. It was not until 21 March 2018 that Achilles wrote to Network Rail formally to request realistic to expect Achilles to have been able to offer a viable supplier assurance service to buyers and suppliers in the industry from 1 May 2018.
- (3) Even if the RISQS-only rule in its original form had not existed, there would not have been any interoperability system in place. Network Rail's preferred option (also foreshadowed in the Judgment) was using a distinct part of the RISQS platform as its nominated platform into which data from other supplier assurance providers would integrate through an API feed. Network Rail provided a draft API to Achilles on 18 February 2020 and there were meetings at which Achilles raised questions relating to the API. At a meeting on 17 April 2020, Achilles confirmed it had all the information required to develop the API.
- (4) However, Achilles subsequently told Network Rail it was unwilling to accept RISQS as nominated platform. Although not required to do so, Network Rail chose to devise an alternative approach which it started to develop around mid-May 2020 and this involved a so-called API

Aggregator. The API to be used with the API Aggregator (which Network Rail commissioned and had designed and built by Altius) was provided to Achilles on 13 December 2020. Achilles started to develop its API and was ready to be audited in respect of the API solution and more generally in the second half of March 2021.

- (5) Accordingly, the time between Achilles being provided with the initial API and being ready to be audited was around 13 months. It would not likely have been a smooth transition in the counterfactual with Achilles raising concerns over Network Rail's proposed interoperability solutions thereby giving rise to similar delays as experienced in fact.

100. Achilles' response to Network Rail's submissions was that the fact that Network Rail took from September 2019 to December 2020 to put in place the NR 302 Standard and API Specification was due to Network Rail's conduct in: (a) acting unduly slowly; (b) allowing Achilles commercial competitors, Altius and RSSB, undue influence over the process; (c) failing to consult at an early stage with Achilles so as to identify potential issues with the standard and API; (d) allowing Achilles' commercial competitors, Altius and RSSB, to prepare an unacceptable API specification; and (e) allowing Altius to take six months to prepare an alternative API specification. It can be inferred that, had Network Rail started the process of amending its standards in September 2017, it could, acting reasonably, have had an API in place in time for Achilles to continue to provide supplier assurance without interruption after 1 May 2018.

***(b) The Tribunal's assessment***

101. These submissions give rise to issues as to the date by which Network Rail realistically needed to set in motion the requisite regulatory and technical changes to enable Achilles to compete and as to how long it would reasonably have taken for these changes to be made.
102. As to first of these issues, it is, in the Tribunal's view, a corollary of its finding in the Judgment that Network Rail infringed competition law by restricting competition through the imposition of the RISQS-only rule that, in the

Counterfactual Scenario, it may be assumed that Network Rail would have taken reasonable steps to resolve any regulatory or technical issues preventing other providers from competing with the RSSB's RISQS service from 1 May 2018 onwards. In the Tribunal's judgment, it must have been clear to Network Rail from October 2017, if not earlier, that Achilles intended to continue to provide supplier assurance services to the GB rail industry

103. The changes that were eventually made to Network Rail's standard to enable Achilles to compete were straightforward and could have been made within a few weeks, as agreed internally by Network Rail the day before the hearing in September 2019.
104. With regard to the API specification, the Tribunal does not accept Network Rail's case that it was primarily incumbent on Achilles to be proactive in discussing interoperability with Network Rail. In the Counterfactual Scenario it is to be assumed that Network Rail would have been so proactive. The Tribunal considers that it was for Network Rail, as the owner and operator of the GB rail structure, to be proactive in taking the necessary steps to ensure interoperability between the supplier assurance schemes and its own systems. The Tribunal accepts Achilles' case that the delays in achieving a satisfactory specification were not its fault and were the result of avoidable delays occasioned by Network Rail's failure to consult at an early stage with Achilles so as to identify potential issues with the standard and the API, by allowing Achilles commercial competitors, Altius and RSSB, to prepare an unacceptable API specification and by allowing Altius to take six months to prepare an alternative API specification.
105. It follows, in the Tribunal's judgment, that in the Counterfactual Scenario Achilles would have been able to continue to offer a fully integrated supplier assurance service to the GB rail industry in competition with RISQS from 1 May 2018 onwards.

**(2) Incumbency**

106. Achilles relied on its status as incumbent in the provision of supplier assurance services to the GB rail industry in support of the analogy which it sought to draw between its situation in the Counterfactual Scenario and the experience of Achilles JQS as incumbent in Northern Europe.

107. In her witness statements, Ms Ferrier relied on the following features of supplier assurance in support of the contention that Achilles was the incumbent:

(1) The fact that assurance contracts are a subscription arrangement rolling over each year means that customers are generally content to renew an existing service that they are broadly happy with, rather than shopping around owing to natural customer inertia. It is convenient for supplier customers to enter its main data once (in year 1) and to renew and update that data relative to starting afresh on a new scheme. It receives automated renewal notices and its subscription payment is set-up with Achilles requiring no changes with accounts. If a supplier moves to another scheme, it will incur a new subscription payment and have to go through the process of entering or exporting its data. For a buyer customer, using a single supplier assurance scheme as its assurance provider for the whole of its supply chain, a number of practical issues arise in moving schemes. As the supplier subscriptions renew throughout the year, either a buyer must migrate the supply chain one-by-one over a 12-month period (therefore using two schemes for a period), or move its suppliers on a single date with the result that suppliers will incur a second subscription charge for the balance of its existing membership period.

(2) Under the concession contract model, Achilles maintained direct contracts with the scheme members and also owned the systems upon which it operated.

(3) In a safety-critical industry such as rail, there is a value in the assurance provider being “tried and tested”. In May 2018, there was only one “tried and tested” provider of supplier assurance in the GB rail industry, namely

Achilles. By May 2018, Achilles had been servicing rail industry customers with rail assurance for over 20 years. A key part of the service offered by Achilles and the RSSB is an audit function, in which auditors attend a supplier's premises, often for days on end, and scrutinise their competence and compliance. A long-standing industry supplier who depends on audit approval to pre-qualify for contracts which represent its core business will place real value on an audit service which it knows and trusts and so which it can rely upon to deliver a fair and accurate report on its credentials. The procurement and assurance managers operating at buyer customers, in particular larger customers with diverse supply chains, would know and trust the Achilles' audit team and perceive them to be experts in the field.

- (4) The RSSB's RISQS scheme was a more complex, untested model following a re-structuring and procurement of the contract for separate IT and audit services. The audit function was also to be provided by Capita, a company with no technical rail audit experience at all. Colas Rail, a major buyer, made clear that it was apprehensive about RSSB managing the service (see paragraph 26 above).
108. Mr Blackley in his witness statement contended that it was the RSSB's RISQS that would have been seen as the established and incumbent scheme and that the majority of suppliers would be unlikely to switch unless buyers did so in first place and that none of the main buyers planned to switch to Achilles. Network Rail also relied on a reference in the Judgment to the RSSB's RISQS being in the position of the incumbent and on Mr Parker's evidence at the trial of the preliminary issue to the effect that Achilles would be market entrant, not the incumbent.
109. In his report in reply to Mr Law, Mr Parker expressed the view that neither party could be considered to have been the sole incumbent.
110. The Tribunal agrees with this assessment. In the Tribunal's view, the debate as to whether one or other party would be better characterised as the incumbent is

sterile. In the Counterfactual Scenario, neither scheme would have had a clear advantage as incumbent. This is for the following reasons:

- (1) Both schemes had some advantage in terms of a recognised brand name. The RSSB's RISQS had the benefit of the current RISQS name which had been around in the market for some four years. Achilles would have had the benefit of the Link-Up name which had been used from 1997 to 2014, despite the existence of some negative "baggage" associated with this name, as recognised internally by Achilles in March 2018.
- (2) Under the terms of the Concession Agreement, both parties would have had a copy of, and the right to use, information submitted by suppliers.
- (3) Achilles had existing direct contractual and commercial relationships with buyers and suppliers, although it did not adduce any evidence from buyers or suppliers as to the strength of those relationships whereas Network Rail adduced evidence from suppliers and buyers who were critical of Achilles' services. The evidence of Darren Matthews, group compliance director of Readypower, that Achilles did not listen to engage with suppliers. The evidence of Adam Berwick on behalf of Balfour Beatty was that there was limited engagement by Achilles compared with the engagement of the RSSB's RISQS. The evidence of Amanda Bate, head of compliance at Fusion People, was similarly that the RSSB's RISQS is more responsive to customers and more thorough than Achilles' RISQS service had been. This evidence was responded to by William Nelson, global head of Audit at Achilles, who adduced evidence of broadly positive customer feedback regarding Achilles' audit services. Ms Ferrier referred to the fact that the RSSB itself was very keen for Achilles to win Lot 2 to provide the audit service in the RSSB's procurement exercise in 2017. Moreover, there appear to have been concerns among suppliers, and within the RSSB itself, as to Capita's ability to carry out the audit function (see paragraph 63 above).
- (4) Whether suppliers wished to be registered on the RSSB's RISQS or Link-Up, it was necessary for suppliers to take active steps rather than simply

allowing a subscription to renew itself automatically. In order to avoid their data being wiped from the RSSB's RISQS scheme, suppliers had to log into the new platform leading some suppliers to complain to the RSSB that the transition was not completely seamless. For the Link-Up Scheme, it was necessary for buyers and suppliers to sign up to modified terms and conditions, removing references to RISQS.

- (5) There was some discontinuity between the scheme run previously by Achilles under the RISQS brand and the RSSB's scheme after 1 May 2018 as there would have been between Achilles' RISQS scheme and the Link-Up scheme in the Counterfactual Scenario. A large volume of data needed to be transferred from Achilles to the RSSB which was done in three phases between 29 March and 11 May 2018 thus Achilles' Link-Up would not have been completely live until 11 May 2018 at the earliest. The transfer excluded information obtained from third party sources with the result that a buyer switching to the RSSB's RISQS would not see the same information as before. The existing Achilles RISQS platform became a "ghost platform" with information directing buyers and suppliers to a new platform as described by Ms Ferrier on 9 March 2018.

**(3) Use of Achilles JQS as a comparator**

111. As noted above, Achilles contends that the performance in the Nordic oil and gas sector of its established supplier assurance scheme (known as "Achilles JQS"), when faced with competition from a new entrant, is the best available point of comparison for what would have happened to Achilles in the Counterfactual Scenario.
112. Achilles has operated Achilles JQS since 1990. Similarly to the GB rail industry, Achilles was the sole operator of supplier assurance schemes in the oil and gas industry in Northern Europe for more than 20 years. In 2016, a group of oil and gas operators in Northern Europe, which had used Achilles' supplier assurance scheme as buyers until then, decided to set up an alternative assurance scheme to be administrated by an association of operators of the Norwegian

Continental shelf known as EPIM (“EPIM JQS”). EPIM JQS went then live in January 2019.

113. The market was then presented with a choice between the Achilles JQS scheme, as the incumbent scheme with many buyers but without the buying organisations which had joined EPIM JQS, and EPIM JQS. After two years, Achilles JQS had retained 61 buyers, down from 112 in the period prior to January 2019. Its supplier volumes reduced from 3,474 in January 2019 to 2,859 in January 2020 and 2,576 in January 2021. After a decrease in the number of suppliers down to 82% in January 2020, the number has risen back to 90% in 2021. Revenue from suppliers has reduced moderately from around £1.9 million in January 2019 to £1.46 million in January 2021 (around 77% of the total in January 2019).
114. Achilles relies on these figures as evidence of the value of incumbency. Ms Ferrier’s evidence was that buyers chose to stay with Achilles JQS because they like and know the scheme and saw no reason to change. Suppliers stayed with Achilles JQS out of inertia and because a significant buyer continued to use Achilles JQS.
115. In his expert report, Mr Parker adopted the retention figures achieved by Achilles JQS to show what would have happened in the Counterfactual Scenario. He considered that the data from Achilles JQS suggest that suppliers are more likely than buyers to multi-home across different supplier assurance schemes, once a new scheme enters the market, on the basis that they perceive value in being members of more than one scheme. Whilst it lost almost 50% of its buyer base, Achilles JQS experienced a reduction of less than 30% in its supplier base as of January 2021. This suggested that many suppliers retained access to both supplier assurance schemes, presumably in order to reach a wider range of buyers.
116. Network Rail submitted that Achilles’ reliance on Achilles JQS experience in the Nordics as a comparator with its position in the Counterfactual Scenario was misconceived given the significant factual differences between the two situations.

117. In his closing submissions, Mr Woolfe, Counsel for Achilles, made clear that the position of Achilles JQS in the Nordics was not intended to serve as an exact analogy with the situation of Achilles in the Counterfactual Scenario in this case. Indeed, Mr Woolfe went so far as to accept that an analogy could be drawn between the position of Achilles in the Counterfactual Scenario as the entrant in the market and EPIM JQS rather than between Achilles and Achilles JQS as the incumbent.
118. There are clearly material differences between the Counterfactual Scenario and the situation of Achilles JQS in the Nordics. These include, in particular, the following:
- (1) The fact that, in the Nordics in January 2019 Achilles JQS was unambiguously the incumbent provider facing a competitive challenge from a new entrant. In the Counterfactual Scenario Achilles in May 2018, though it had some incumbent advantages, was in a much weaker position, offering a scheme, Link-Up, in competition with RISQS which was the established scheme of choice in GB rail.
  - (2) In the Nordics there is no organisation equivalent to Network Rail, controlling access to its infrastructure and in a position to mandate the use of RISQS to its direct suppliers.
  - (3) Achilles JQS, unlike Achilles in the Counterfactual Scenario, was not subject to perceived contractual constraints on its ability to market its new scheme.
  - (4) Whereas in Northern Europe Achilles JQS's contracts with buyers and suppliers could simply continue for the same Achilles JQS service on entry of EPIM JQS, this would not have been the case in the Counterfactual Scenario where positive action on the part of buyers and suppliers was necessary to enter the Link-Up scheme.
  - (5) The fact that in the Nordics, buyers who want their supply chain audited cannot use EPIM JQS. Only oil-field operators (i.e. the membership of

EPIM JQS) can request audits within EPIM JQS. Buyers who are not operators and who want to audit their supply chain need to stay on Achilles JQS; suppliers wishing to serve them would have to stay on Achilles JQS as well.

- (6) Buyers pay for the audits of their suppliers so there would be less costs to suppliers in multi-homing in the Achilles JQS situation than in the Counterfactual Scenario.
  - (7) As noted by Ms Ferrier, EPIM members who are also main buyers would have a vested interest in making the EPIM JQS scheme work. In the Counterfactual Scenario, buyers and suppliers had no equivalent interest in ensuring the success of RISQS.
119. Network Rail also relied on the fact that Achilles JQS had broader geographic coverage compared with EPIM JQS (therefore any customers requiring broader geographic coverage not offered by EPIM JQS would have needed to stay with Achilles JQS) whereas both RISQS and Link-Up related to GB rail. Mr Gjertsen was called as a witness to rebut the assertion that the geographical reach of Achilles JQS was wider than that of EPIM JQS. His evidence was that Achilles JQS remains focused on Norway. Out of 66 buyers registered with Achilles JQS, all but six have a location in Norway. Of those six, four are based in Denmark but the Danish oil market is very small in comparison with Norway and makes up less than 3% of activity on Achilles JQS. The Tribunal accepts that the more limited geographic range of Achilles JQS did not per se invalidate the comparison with Achilles in the Counterfactual Scenario.
120. In the Tribunal's view, the significant factual differences between the situation of Achilles JQS in the Nordics in January 2019 and that of Achilles in the GB rail industry in May 2018 are nevertheless such that the numbers of buyers and suppliers retained by Achilles JQS cannot be taken as a reliable indication of the numbers of buyers and suppliers that would have been retained by Achilles in the Counterfactual Scenario. In the Tribunal's view, the evidence of what happened to Achilles JQS does not go beyond illustrating the fact that (as was common ground) suppliers are likely to be more ready to multi-home than

buyers and that numbers of retained buyers and suppliers are likely to drop off following the entry into the market of a competitor before levelling off after two or three years.

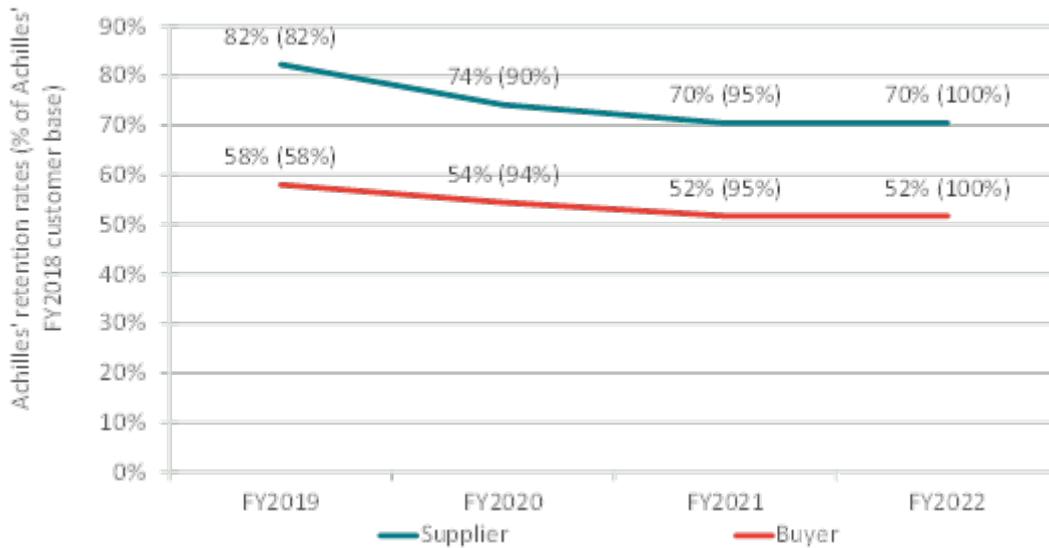
**(4) Numbers of buyers and suppliers retained by Achilles**

121. The issue of how many buyers and suppliers would have been retained by Achilles in the Counterfactual Scenario is central to the quantification of Achilles' losses. The parties' cases as to the numbers of buyers and suppliers that would have been retained by Achilles are set out in the expert reports. The large gap between the experts' assessments reflects the widely diverging assumptions on which the experts' calculations were based.

**(a) Achilles' case**

122. Mr Parker's conclusions as to the numbers of buyers and suppliers that would have been retained are based on the assumption that Achilles would have achieved the same retention rates in relation to buyers and suppliers in the first three years after 1 May 2018 as were achieved by Achilles JQS following the setting up of EPIM JQS, that is to say:

- (1) 58% of buyers in the first year (FY2019), 54% in the second year and 52% in subsequent years as shown by the red line in the diagram below. These retention rates equated to 64, 59 and 57 buyers out of the total of 111 buyers on RISQS as at 1 May 2018.
- (2) 82% of suppliers in FY2019, 74% in FY2020 and in the third and subsequent years 70% as shown by the teal line below.



Source: *Frontier analysis, based on Achilles' data.*

Note: *The percentages in parenthesis reflect Achilles' year-on-year retention rate.*

123. In her witness statements, Ms Ferrier contended that buyers would have chosen Achilles as their preferred provider of supplier assurance, and will do so in the future, because of a number of attractive features of Achilles' service, including the high quality of its audit service, the range of customisable audits that Achilles can provide, the pool of suppliers contracted to Achilles in 2018 and its cross-industry supplier database.

124. She pointed out that, as at May 2018, Achilles was providing an audit service in a form acceptable to Network Rail and every other buyer, and had a retained book of audit business. Supplier audits were undertaken by Achilles throughout the year with each successful audit having a 12-month validity period. She contended that, in circumstances where Achilles was recognised by Network Rail after May 2018 to provide assurance as an alternative service to RISQS, many buyers would have preferred to stay with Achilles for audit services to retain this continuity. Achilles' reputation as the only "tried and tested" provider in the supplier assurance market was particularly relevant in relation to the auditing service. Achilles' audits continued to be accepted after 1 May 2018 until the date for renewal in 2018 / 2019 when a new RISQS audit was required. In a world where Achilles was still in the market and offering accredited audit services at that renewal date (instead of RSSB/RISQS having a

free run), she considered that many buyers would have wanted to stay with Achilles' audits in 2019 and beyond.

125. The message to the supplier market at that time would have been that it was “business as usual”, buyers had chosen to stay with Achilles and Achilles’ audits were recognised by Network Rail in its role as infrastructure manager, including (crucially) for Sentinel. Any buyers who had chosen to stay with Achilles after May 2018 would have needed a full picture of their supply chain compliance including their suppliers having a Sentinel audit and any other specific audit modules for particular work streams. If Network Rail had also wanted to require a separate RISQS Sentinel audit for direct contracts for a large portion of suppliers who already had a recognised Achilles’ audit at that time (May 2018) there would have been competitive pressure in the market. In the longer term, it is likely that this competitive pressure would evolve towards the introduction of a common assessment standard by allowing mutual recognition of pre-qualification and data sharing between the main schemes, as has recently occurred in the construction industry.
126. Ms Ferrier disputed Mr Blackley’s evidence that there was a very limited pool of available suppliers and contended that he wrongly discounted the likelihood that many of the suppliers would multi-home in order to win business from both Network Rail and buyers registered on Achilles. The high level of retention assumed by Mr Parker was consistent with Ms Ferrier’s evidence that with a subscription arrangement there is natural customer inertia, meaning that customers are generally content to renew an existing service they are happy with rather than shopping around. For suppliers, in particular, the subscription model makes sticking with its existing provider very convenient. It must enter its main data once a year and it is straightforward to renew and update that data rather than starting afresh on a new scheme. It receives automated renewal notices and its subscription payment is set up with Achilles requiring no changes with accounts. If a supplier moves to another scheme it will incur a new subscription charge and will have to go through the process of entering or exporting its data.
127. The key commercial objective for suppliers is to get access to and qualify for buyer contracts which inevitably means multi-homing by suppliers. If a supplier

wished to win business from brought a buyer committed to RISQS and from a buyer committed to Link-Up it would have to be a member of both schemes. Ms Ferrier also referred to a revenue forecast for Achilles from August 2017 which assumed £100,000 revenue growth on the stable RISQS contract revenues of around £6.8 million for the year, reflecting the belief held by her and other senior commercial officers at Achilles at the time that we could retain a very substantial part of its existing rail subscriptions and revenues and add value to it.

**(b) Network Rail's case**

128. The starting point of Mr Law's analysis in his first report was Mr Blackley's evidence that, of the 88 buyers subscribing to RISQS in August 2020, 21 remained as potential subscribers to Link-Up after deduction of the numbers of buyers who had stated a commitment to RISQS or who signed the RISQS Charter or who had had direct procurement expenditure with Network Rail since 2015. In his second report, Mr Law took into account the fact that Achilles had recently signed up Walker Construction, which was a buyer on RISQS, suggesting that, contrary to Mr Blackley's evidence, such buyers were potential subscribers on Link-Up and that there were therefore 75 available buyers, excluding buyers that had already registered with Link-Up.
129. Mr Law then calculated Achilles' losses assuming the following:
- (1) A range of market percentage capture rates of 10% 20% and 30% applicable to the buyers with whom Network Rail had not had direct expenditure since 2015 or were not registered on BravoNR (the system through which prospective suppliers to Network Rail source work and submit tenders).
  - (2) A 10% capture rate to the other 51 buyers which did have Network Rail or were not registered on BravoNR.

- (3) A ratio of 37 suppliers to each buyer. This was based on Mr Parker’s calculation that in 2018 there were approximately 37 buyers registered on RISQS for each buyer.
- (4) A launch date for Link-Up of May 2018 or April 2021.

These figures are summarised below:

<b>Buyer Market Capture rate for buyers without Network Rail spend or BravoNR ID</b>	<b>10%</b>	<b>20%</b>	<b>30%</b>
<b>Buyer Market Capture rate for buyers with Network Rail spend or BravoNR ID</b>	<b>10%</b>	<b>10%</b>	<b>10%</b>
	<b>£</b>	<b>£</b>	<b>£</b>
Updated quantification of Achilles' loss	581,081	700,408	819,736
Sensitivity 1 - May 2018 counterfactual launch	1,244,517	1,530,811	1,817,104
Sensitivity 2 - April 2021 actual launch	766,978	923,747	1,080,515

130. Mr Law assumed that in the Counterfactual Scenario, Achilles’ performance in the first year Link-Up was launched would be the same as Achilles’ anticipated performance in FY2022, i.e. generating revenues of £[><] (by the time of the hearing, Achilles’ forecast revenues for FY2019 had increased to £[><]).
131. Mr Blackley’s evidence was that there was a very limited pool of suppliers available as customers for Achilles once there was excluded from the pool of potential customers (i) those suppliers with which Network Rail had direct expenditure since 2015, (ii) those suppliers who had registered themselves on Network Rail’s tender platform, Bravo NR, (iii) suppliers who had specifically indicated when registering in the scheme that they wished to supply Network Rail, including signatories to the RISQS Charter, and (iv) suppliers who are registered on Network Rails’ Oracle database. He contended that this left only 117 audited suppliers in RISQS who Achilles could realistically have sought to target and that this would not have been sufficient to run a viable scheme in the railway industry.

132. Network Rail contended that the assumptions underlying Mr Law's calculations were realistic, and the assumptions made by Mr Parker unrealistic, taking into account the following matters:

- (1) In circumstances where the RSSB had moved buyers and most suppliers over to the RSSB's RISQS platform by 1 May 2018, buyers would have been reluctant to require their supplier chains to be subjected to second set of supplier assurance costs by way of subscription and audit costs to TransQ. Ms Ferrier accepted that buyers will generally try to limit the inconvenience and cost caused to their suppliers by their assurance arrangements and that the majority of suppliers were in May 2018 were servicing Network Rail.
- (2) In May 2018, Achilles did not have a differentiated product that would have persuaded buyers that an increase in costs was justified.
- (3) In the period leading up to 1 May 2018, Achilles itself had consistently low expectations as to its ability to attract buyers. It hoped to retain between five and ten buyers. The low expectations are understandable given that:
  - (i) Achilles did not have any detailed business plan for its supplier assurance business;
  - (ii) Achilles did not have an effective communications strategy because it considered itself bound by the restrictive covenants in the Concession Agreement. Ms Ferrier's evidence that Achilles was talking to customers about Achilles' proposition between September 2017 and May 2018 was not supported by any documentary evidence or internal communications on this subject;
  - (iii) The RSSB was migrating buyers and suppliers to the RSSB's RISQS platform;

- (iv) Achilles could not just roll over its contracted with buyers; and
  - (v) There was no evidence of buyers communicating with Network Rail to ask whether Network Rail would recognise Achilles' supplier assurance and no evidence of buyers complaining to Network Rail or the RSSB about the RISQS only rule. There was no evidence from any buyers that they wished to move to TransQ in May 2018.
- (4) Network Rail's case that buyers would tend to single-home to RISQS was supported by the evidence of Adam Berwick that Balfour Beatty specifies RISQS for all direct subcontractors and suppliers engaged on site or providing a high risks service and that it would not use any other provider of supplier assurance services. Having a single supplier assurance scheme means that there is a single interpretation of the relevant rail standards and a single point of contact for the supply chain to interface with. It is convenient for Balfour Beatty as buyer to be audited on the same scheme as it uses as a supplier to Network Rail. Moreover, Balfour Beatty does not wish to import additional cost to the supply chain by requiring compliance with a further assurance scheme.
- (5) Achilles' current estimate of its FY2022 performance, provided a useful indication of Achilles' likely performance in the counterfactual world in the first year of its re-entry into the market.
- (6) Mr Parker's calculations failed to make any allowance for the likelihood that in the Counterfactual Scenario Achilles would lose the fee income paid to it by direct contractors. This was because, under the terms of the Order, Network Rail would be entitled to require direct contractors to be vetted by RISQS. The significant loss of income from direct contractors was envisaged by Achilles in April 2018 (paragraph 57 above).
- (7) Mr Parker's calculations presupposed that on the launch of Link-Up the GB rail supplier market would have undergone a significant increase in size which was unlikely.

*(c) The Tribunal's assessment*

133. In the Judgment (at paragraphs 149 to 151), the Tribunal concluded that in the Counterfactual Scenario buyers and suppliers might well eventually single-home to RISQS and that Achilles would be unable to compete to any material extent. This was, in summary, for the following reasons. Network Rail's, and its direct contractors', continued use of RISQS was likely to lead to a significant proportion of all other suppliers of services for Network Rail managed infrastructure related works continuing to use RISQS in order to simplify their dealings with direct contractors. The business demand of TfL, Amey and Babcock had also been committed to RISQS. It would be difficult for Achilles to compete successfully on price or to win significant volumes of business without significant differentiation in the type, scope or quality of their offer. The Tribunal nevertheless concluded that in the Counterfactual Scenario Achilles would compete with RISQS at least for a time and its competition would lead to some benefits in terms of lower prices and product differentiation, as contended by Achilles. Neither party suggested that the Tribunal should depart from these conclusions which serve as the framework to our assessment of Achilles' losses.
134. It was implicit in the Judgment that it would take some time for the final pattern to emerge. Even if buyers and suppliers eventually single-homed to RISQS, this would not happen overnight. In the Tribunal's view, there would be a period of years after the launch of Link-Up during which there would be some single-homing to Achilles and multi-homing by buyers and suppliers. This is relevant to our assessment of what would have happened in the early years of the Counterfactual Scenario.
135. The parties' experts agreed that it is the decisions of buyers that determine whether suppliers move to a particular supplier assurance scheme. Suppliers cannot choose which scheme to use if buyers they seek to serve mandate a particular scheme; the supplier must either join the mandated scheme or forego the business opportunity. The number of buyers that would have been retained by Achilles in the Counterfactual Scenario is therefore critical. A buyer would

only move to different supplier assurance scheme if it was going to obtain additional value to meet its needs.

136. It was also common ground that if a buyer multi-homes and gives its suppliers a choice as to which scheme to join in circumstances where other buyers (which those same suppliers seek to join) mandate the use of a particular scheme, such suppliers would probably single-home to the mandated scheme rather than pay for two subscriptions. Similarly, if a scheme offers buyers free buyer subscriptions but those buyers do not mandate the use of the scheme to its suppliers, it is unlikely that suppliers would choose to pay for a second subscription. Ms Ferrier accepted that limiting costs for suppliers was an important consideration for buyers.
137. Network Rail's case that buyers would tend to single-home to RISQS was supported by the evidence of Adam Berwick referred to above.
138. As stated above (at paragraph 120), the Tribunal considers that the evidence of Achilles JQS's experience in the Nordics, which, if taken as a reliable comparator, would indicate that Achilles would have retained between 64 and 57 buyers out of the total of 111 buyers on RISQS as at 1 May 2018, is of limited value in determining the precise extent to which Achilles would have retained either buyers or suppliers in the Counterfactual Scenario, because of the significant factual differences between the two situations.
139. In the Tribunal's view, the contemporaneous evidence of Achilles' expectations between September 2017 and April 2018 as to the numbers of buyers it would retain after 1 May 2018 is, as Network Rail submitted, of some relevance to an assessment of what would have occurred in the Counterfactual Scenario. This is because, during this period, Achilles was under the impression that its supplier assurance scheme would be recognised as equivalent by Network Rail. Its expectations were not affected by any anticipated loss of business resulting from the RISQS only rule but were based on its knowledge of the supplier assurance market and its own ability to compete with RISQS in the "new world" coming into existence after May 2018.

140. As set out in paragraphs 41 to 59 above, Achilles internal strategy documents and internal communications produced between September 2017 and April 2018 indicate that Achilles expected to retain only a minority of the buyers then on RISQS.
141. The expectation that it would only retain a minority of buyers may well have been influenced by the following matters which, in the Tribunal’s judgment, would have affected Achilles’ ability to retain buyers in the Counterfactual Scenario:
- (1) Given the direct contractors’ continued use of RISQS and the commitment to RISQS of major players such as TfL and the other signatories to the RISQS Charter, Achilles faced difficulties in competing successfully with RISQS after 1 May 2018 without significant differentiation in the type, scope or quality of its offering.
  - (2) Achilles had not yet developed a differentiated service. Ms Ferrier’s evidence was that Achilles’ emphasis in its communications with buyers was “business as usual”. There was no mention of any additional functionality. The email of 11 April 2018 from Chris Methven, Achilles’ revenue officer, referred to at paragraph 57 above, recognised that on day 1 Achilles would be providing no additional value, arguably less, compared with the new RISQS solution. It was a “pure price play” coupled with the promise of greater scale, not just rail, and greater capability. Additional functionality would come in quickly during FY19, but for the early adopters this was a “leap of faith”.
  - (3) In the event, it was not until the end of 2018 that Achilles launched its “MyAchilles platform”, which Ms Ferrier described as drawing together 27 platforms across the globe. Counsel for Achilles did not suggest that, in the Counterfactual Scenario, this would have occurred any earlier.
  - (4) In the run up to 1 May 2018, there was limited communication by with buyers by way of marketing of Link-Up/TransQ. Once Network Rail had made clear in September 2017 that it objected to Achilles’ marketing of

its future offering, promotional activity directed to the market as a whole ceased. Achilles appears to have considered itself bound by the restrictive covenants in the Concession Agreement, in particular Clause 4.5(a), not to engage in marketing. Admittedly Mr Flack appears to have taken the view that there was no conflict of interest arising from Achilles' marketing, during the currency of the Concession Agreement, that would come into effect after 1 May 2018 and called for a more robust attitude. However, this view does not appear to have widely shared or led to any major marketing initiative prior to 1 May 2018. Whether or not Clause 4.5(a) did as a matter of law prevent Achilles from marketing TransQ is, as Counsel for Network Rail submitted, immaterial. What matters is how it was in fact interpreted by Achilles. There were some meetings or discussions with a small number of buyers (see paragraphs 32 and 33 above) but Achilles took a cautious approach as to what to tell them (see paragraphs 33 to 38 above).

- (5) In the months leading up to 1 May 2018, the RSSB promoted its post-1 May 2018 RISQS service and succeeded in migrating the majority of the buyers on RISQS to the RSSB's RISQS prior to 1 May 2018.
  - (6) The retention of buyers by Achilles would have required buyers agreeing to modified contractual terms. It would not have been just a matter of rolling over existing contractual arrangements.
142. The Tribunal does not accept Ms Ferrier's evidence that the fact that Achilles failed to communicate more energetically with the market in the run up to 1 May 2018 was attributable to a lack of certainty on the part of Achilles as to whether its supplier assurance would be recognised by Network Rail and therefore that, inferentially, any failure to promote its new offering was the fault of Network Rail. There is no contemporaneous internal record treating lack of certainty as an obstacle to communication with the markets. There is no evidence of Achilles seeking to obtain clarification from Network Rail prior to 12 March 2018 with regard to its recognition. The explanation for the fact that it did not seek clarification earlier appears to be that, as Ms Ferrier said in her

witness statement, Achilles was proceeding on the basis that competition was possible and that there would be no practical or technological impediments.

143. The reasons for the limited extent of Achilles' public marketing appear to have been Achilles' perception of the effect of the restrictive covenants in the Concession Agreement (which Achilles did not suggest were other than lawful), the fact that Achilles did not settle on a plan for its business post-1 May 2018 until 9 March 2018 and the fact that Achilles believed, at least until April 2018, when Network Rail made clear its plan to rely on the RISQS-only rule, that it could rely on buyers and suppliers renewing their subscriptions out of inertia.
144. It was submitted on behalf of Achilles, and the Tribunal accepts, that certain of the communications sent by the RSSB to the market prior to 1 May 2018 reflected the RISQS-only rule and should therefore be "purged" in the Tribunal's assessment of the Counterfactual Scenario. These are: (i) the RISQS December 2017 newsletter asserting that in order to maintain their Sentinel status, suppliers would need to be RISQS-assured and that meant signing in to the RISQS portal immediately; (ii) the RISQS website transition guide dated February 2018 asserting that if suppliers did not sign in to the RISQS portal they risked being invisible to buyers from 1 May 2018; and (iii) the April 2018 RSSB newsletter warning suppliers about loss of data if they did not sign up to RISQS. These communications presupposed that suppliers could only be authorised via RISQS and would not have been true in the Counterfactual Scenario. It is likely that these communications had a chilling effect on the receptiveness of buyers and suppliers to Achilles' plans.
145. It is, in the Tribunal's view, reasonable to suppose that in the Counterfactual Scenario, in circumstances where Achilles was in a position to provide an integrated supplier assurance service by 1 May 2018 and was not faced with the prospect of the RISQS only rule as intimated by the RSSB/Network Rail from December 2017 onwards, a significantly greater number of buyers would have remained with Achilles and, if required to join RISQS, multi-homed, than Network Rail contended, taking into account (i) customer inertia, (ii) Achilles' status as a "tried and tested" provider of supplier assurance and a "safe pair of hands", (iii) apprehension on the part of buyers as to the capacity of Capita and

Altius to provide an equivalent service, and (iv) the prospect of an enhanced service from Achilles in due course. The assumption that total spend on supplier assurance would increase on the launch of Link-Up as a result of multi-homing is not, in the Tribunal's view, unreasonable. The increase would be a natural consequence of the availability of different schemes and the appetite of buyers and suppliers to multi-home.

146. The Tribunal does not accept Mr Law's assumption that in Counterfactual Scenario, Achilles' performance in the first year Link-Up was launched would have been the same as Achilles' anticipated performance in FY2022. The fact that Achilles had been kept out of the market for three years with no up-to-date database, during which time RISQS has been able to establish itself as a monopoly, means that Achilles is in a far more disadvantageous position now than it would have been in May 2018.
147. Turning to the position of suppliers, the Tribunal accepts Mr Parker's criticism of Mr Law's conclusion that the number of suppliers retained by Achilles should be calculated on the basis of the ratio of 1 to 37. This approach ignores the fact that many suppliers would serve a number of different buyers and that some buyers would have long supplier tails. The number of additional suppliers that would follow each additional buyer would be likely to diminish as the number of buyers increases but to start with there would be many more additional suppliers per additional buyer than the eventual average. Thus, Ms Ferrier's evidence was that one of the first buyers to join Link-Up (First Great Western) would bring 1,400 suppliers with it. It would only have taken the retention by Achilles of a small number of buyers with long supplier tails to lead to a substantial increase in supplier income.
148. In the Tribunal's judgment, a significant number of suppliers would have remained with Achilles in the Counterfactual Scenario, essentially for the reasons put forward by Ms Ferrier. The fact that Achilles' revenue from the provision of supplier assurance services in FY2019 was £1,539,000 (approximately 24% of its revenues in FY2018) despite the RISQS-only rule, is consistent with a tendency of suppliers to stay with a provider of supplier assurance with whom they are familiar. This tendency is also consistent with

the retention of suppliers by Achilles JQS in the Nordics, albeit that the circumstances of those suppliers were not strictly comparable with those of Achilles' supplier customers.

149. In the Tribunal's view, taking into account all the evidence before it and the submissions of the parties, the numbers of buyers and suppliers that would have been retained by Achilles in the three years FY2019 to FY2021 are as follows:
- (1) In FY2019, Achilles would have retained 30% of its FY2018 buyer base and 50% of its FY2018 supplier base.
  - (2) In FY2020, those percentages would have reduced to 25% of buyers and 40% of suppliers;
  - (3) In FY2021, the percentage of buyers would have reduced to 20% with 40% of suppliers.
150. These percentages are broad brush but, as recognised in the authorities cited at paragraph 5 above, constructing a counterfactual hypothesis in order to assess losses resulting from breaches of competition law is an inherently approximative exercise. The Tribunal is satisfied that these percentages are a realistic reflection of the market conditions that would have prevailed in the Counterfactual Scenario.
151. The main assumptions underlying the estimated percentages for FY2019 are as follows:
- (1) Achilles would have been in a position to provide a functioning, integrated supplier assurance service from 1 May 2018 onwards which Network Rail would have recognised as valid for suppliers or persons seeking access to its infrastructure under the Sentinel Scheme and the On-Track Plant Operations Scheme other than for its direct suppliers.

- (2) There would have been a significant level of multi-homing on the part of both buyers and suppliers, for the reasons put forward in Ms Ferrier's evidence and referred to at paragraph 126 above, including customer inertia, familiarity with and confidence in Achilles. Some buyers who were not committed to Network Rail/RSSB in May 2018 would have singled-homed with Achilles at least until the time of their next contract with Network Rail. This would have led to an increased retention of supplier revenues.
- (3) Achilles would have offered a discount of 20% to buyers and suppliers as an incentive to remain as customers.
- (4) Achilles' level of retention of buyers and suppliers would have been lower than that experienced by Achilles JQS following the establishment of EPIM JQS reflecting the fact that the position of Achilles JQS in the Nordics was stronger than that of Achilles in the Counterfactual Scenario.

152. The main assumptions underlying the estimates for FY2020 and FY2021 are as follows:

- (1) There would continue to be some single-homing to Achilles and multi-homing by buyers and suppliers but the numbers of buyers and suppliers retained by Achilles would fall as some buyers who were direct contractors to Network Rail decided to single-home to RISQS, leading to their supply chains no longer needing to multi-home in order to have access to those buyers.
- (2) Buyers and suppliers would continue to be offered a discount of 20% in order to incentivise them to stay with Achilles.
- (3) The numbers of buyers and suppliers would stabilise as Achilles' enhanced cross-industry service became available.

## **F. FUTURE LOSSES**

153. Achilles contends that, as a result of Network Rail's infringement of competition law, it will continue to suffer losses as a result of being in a worse position following exclusion and re-launch that it would have been had it stayed in the market. Mr Parker's calculation assumes that for five years Achilles will be unable to achieve actual revenue equal to more than 50% of the revenues that it would have been able to generate in the Counterfactual Scenario in those years (FY2022 – FY2026). Mr Law says that he has seen no evidence in support of a five-year period of loss, that business plans, budgets and forecasts are important documents when considering financial projections, in the absence of which Mr Parker's forecasts are based on arbitrary assumptions which cannot form a reasonable basis for an assessment of loss. His calculation assumes that Achilles could have launched Link-Up 12 months after the Tribunal's order dated 12 September 2019 (i.e. in September 2020) and that in subsequent years actual revenue would increase to the same level as counterfactual revenue i.e. that Achilles did not suffer any ongoing damage to its business as a result of being out of the market.
154. The Tribunal agrees with Mr Parker's response to Mr Law's criticism of his approach, namely that, whilst business plans can be important sources of evidence without which it can be harder to draw clear-cut conclusions about a business's future prospects, it is nevertheless possible to make a reasonable estimate as to what damage was suffered by Achilles as a result of its exclusion from the supplier assurance market.
155. The Tribunal has found that, as a result of the infringement and the subsequent delay in finalising the standard and the API, Achilles was kept out of the market for a period of three years. Being kept out of the market for that period, during which RISQS has been able to establish itself as the incumbent industry scheme, means that Achilles is now significantly less well placed to compete with RISQS than it would have been if it had not exited the market and that it will take time for Achilles to regain the position it would have been in.

156. Taking into account Ms Ferrier’s evidence as to Achilles’ progress since the launch of Link-Up, its marketing plans and the reasons why buyers and customers may choose Achilles as their preferred service provider, it is, in the Tribunal’s view, reasonable to assume that in FY2023 Achilles will achieve 50% of the revenues that it would have generated in the Counterfactual Scenario and that from FY2024 it will have regained the competitive position it would have been in, so that no further damages are recoverable in respect of FY2024 onwards. This broad brush assessment, based on realistic assumptions as to how Achilles’ business would have developed, is a legitimate way of assessing losses in a counterfactual scenario, consistent with the legal principles summarised at paragraph 5 above.
157. Mr Parker discounted Achilles’ future cash flows by 10.3% being Achilles’ Weighted Average Cost of Capital (“WACC”). This was, in our view, an appropriate discount rate to apply.

#### **G. COMPUTATION OF ACHILLES’ LOSSES**

158. The experts’ calculations have been summarised above. The differences in those calculations stem largely from the experts’ differing assumptions as to how Achilles would have performed in the Counterfactual Scenario and their differing approaches to future losses.
159. The experts each have a different approach to the modelling of Achilles’ losses, Mr Parker’s is a “top down” approach, starting with assumptions as to Achilles’ likely success in retaining buyers and suppliers and applying these assumed percentages to Achilles’ FY2018 revenues. Mr Law’s is “bottom up” approach, starting with assumptions as to the likelihood of Achilles retaining different categories of customers, depending on their previous commitment to Network Rail and going on to make detailed assumptions as to Achilles’ pricing strategies. The Tribunal considers that both approaches are in principle valid, although each is dependent on the correctness of the underlying assumptions.

160. The Tribunal has followed Mr Parker’s approach of applying percentages to Achilles’ FY2018 revenues but on the basis of different assumptions. It has calculated interest on past losses at base rate plus 1% as proposed by Mr Parker.
161. There were a number of specific issues between the experts’ calculations. First, there was an issue as to whether, in the Counterfactual Scenario, Achilles would have offered discounts to suppliers. Mr Law cited a “New TransQ Pricing Document” indicating that Achilles would have offered a 20% fee discount to suppliers in the Counterfactual Scenario. This was in the context of an internal email exchange dating from April 2018. Mr Parker suggested that this email was written at a time when it was becoming increasingly clear that Network Rail was engaging in behaviour that would exclude Achilles from the market (and which the Tribunal subsequently found to be anti-competitive). Hence, it is likely that the pricing strategy referenced in this email was influenced by Network Rail’s misconduct and therefore, this email does not provide a reliable basis on which to draw inferences about Achilles’ pricing strategy in the counterfactual. The Tribunal nevertheless considers that it is reasonable to assume that Achilles would have offered both buyers and suppliers discounts of 20% in the Counterfactual Scenario in FY2019 and successive years in order to incentivise them to stay with Achilles.
162. The second issue concerned Mr Parker’s treatment of central management staff costs. Mr Law agreed with Mr Parker’s overall approach to calculating costs but considered that the five members of central management staff included in Mr Parker’s calculation did not represent the incremental cost to Achilles associated with Link-Up, but rather a fixed central overhead, and so should be excluded from the loss calculation. Mr Law did not rely on any evidence in support of his opinion. In the Tribunal’s view, the cost of management staff was correctly treated by Mr Parker as a variable cost, as it was in the analysis of Achilles’ costs structure prepared by Deloitte in October 2019. The Tribunal estimates that Achilles’ costs would have equated to 45% of its revenues.
163. On the basis of the Tribunal’s conclusions as to the numbers of buyers and suppliers that would have been retained by Achilles, and the discount that would

have been offered to suppliers, its revenue and profits in the Counterfactual Scenario would have been as follows:

	<b>FY2018 (actual data)</b>	<b>FY2019 (estimates)</b>	<b>FY2020 (estimates)</b>	<b>FY2021 (estimates)</b>	<b>FY2022 onwards (estimates)</b>
<b>Revenues (buyers)</b>	868,000	208,320	173,600	138,880	138,880
<b>Revenues (suppliers)</b>	5,606,000	2,242,400	1,793,920	1,793,920	1,793,920
<b>Total revenues</b>	<b>6,474,000</b>	<b>2,450,720</b>	<b>1,967,520</b>	<b>1,932,800</b>	<b>1,932,800</b>

**Table 1: Tribunal’s estimate of Achilles’ revenue in the Counterfactual Scenario (£)**

164. On the basis of this data, the Tribunal estimates that Achilles’ loss of profits in relation to the period FY2019-FY2021 was £2,591,415 inclusive of interest as set out below.

	<b>Actual revenues</b>	<b>Actual costs</b>	<b>Actual profits</b>	<b>Counterfactual revenues</b>	<b>Counterfactual costs</b>	<b>Counterfactual profits</b>
	A	B	C=A-B	D	E	F=D-E
<b>FY19</b>	1,539,000	600,000	939,000	2,450,720	1,102,824	1,347,896
<b>FY20</b>	14,000	-	14,000	1,967,520	885,384	1,082,136
<b>FY21</b>	-	-	-	1,932,800	869,760	1,063,040
<b>Total</b>	<b>1,553,000</b>	<b>600,000</b>	<b>953,000</b>	<b>6,351,040</b>	<b>2,857,968</b>	<b>3,493,072</b>

**Table 2: Tribunal’s estimate of Achilles’ profits in the Counterfactual Scenario (FY19-FY21) (£)**

	<b>Actual profits</b>	<b>Counterfactual profits</b>	<b>Loss of profits</b>	<b>Interest component</b>	<b>Interest losses</b>	<b>Total loss of profits</b>
	A	B	C=B-A	D	E=C*D	F=C+E
<b>FY19</b>	939,000	1,347,896	408,896	3.95%	16,151	425,047
<b>FY20</b>	14,000	1,082,136	1,068,136	2.20%	23,499	1,091,635
<b>FY21</b>	-	1,063,040	1,063,040	1.10%	11,693	1,074,733
<b>Total</b>	<b>953,000</b>	<b>3,493,072</b>	<b>2,540,072</b>		<b>51,343</b>	<b>2,591,415</b>

**Table 3: Tribunal’s estimate of Achilles’ total loss of profits including interest (FY19-FY21) (£)**

165. The Tribunal’s estimates that Achilles’ actual and counterfactual future profits (£, FY2022-FY2023) are as follows:

	<b>Actual revenues</b>	<b>Actual costs</b>	<b>Actual profits</b>	<b>Counterfactual revenues</b>	<b>Counterfactual costs</b>	<b>Counterfactual profits</b>
	A	B	C=A-B	D	E	F=D-E
<b>FY22</b>	240,860	108,387	132,473	1,932,800	869,760	1,063,040
<b>FY23</b>	966,400	434,880	531,520	1,932,800	869,760	1,063,040
<b>Total</b>	<b>1,207,260</b>	<b>543,267</b>	<b>663,993</b>	<b>3,865,600</b>	<b>1,739,520</b>	<b>2,126,080</b>

**Table 4: Tribunal’s estimate of Achilles’ Counterfactual profits (FY22-FY23) (£)**

166. On the basis of this data, the Tribunal estimates that Achilles’ loss of profits in relation to the period FY2022-FY2023 inclusive amounts to £1,462,087 (i.e. £2,126,080 less £663,993). Discounted by Achilles’ WACC its loss of future profits is £1,282,662 as set out below.

	<b>Actual profits</b>	<b>Counterfactual profits</b>	<b>Loss of profits</b>	<b>Discount component</b>	<b>Present value</b>
	A	B	C=B-A	D	E=C*D
<b>FY22</b>	132,473	1,063,040	930,567	91%	846,816
<b>FY23</b>	531,520	1,063,040	531,520	82%	435,846
<b>Total</b>	<b>663,993</b>	<b>2,126,080</b>	<b>1,462,087</b>		<b>1,282,662</b>

**Table 5: Tribunal’s estimate of Achilles’ loss of future profits (FY22-FY23) (£)**

167. The total loss sustained by Achilles by reason of Network Rail’s infringement is accordingly £3,874,077 (i.e. £2,591,415 plus £1,282,662).

## **H. CONCLUSION**

168. Network Rail is liable to pay damages to Achilles in the sum of £3,874,077.

169. This judgment is unanimous.

Andrew Lenon Q.C.  
Chairman

Michael Cutting

Jane Burgess

Charles Dhanowa O.B.E., Q.C. (*Hon*)  
Registrar

Date: 11 February 2022