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IN THE COMPETITION
APPEAL TRIBUNAL

Case Nos. 1258/5/7/16

Victoria House,
Bloomsbury Place,
London WC1A 2EB

7 October 2016

Before:

THE HON. MR. JUSTICE ROTH
(President)
MARGOT DALY
DR CLIVE ELPHICK
(Sitting as a Tribunal in England and Wales)

BETWEEN:

UKRS TRAINING LIMITED

Claimant

- and -

NSAR LIMITED

Defendant

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Mr. T. JONES (instructed by Berkeley Square Solicitors) appeared on behalf of the Claimant.
Mr. G. WIGNALL (instructed by Greenwoods Solicitors LLP) appeared on behalf of the Defendant.

HEARING
DAY TWO

INDEX

| | Page |
|---|------|
| Mr. RICHARD LAWRENCE SMITH, Affirmed | |
| Examination-in-chief by Mr. WIGNALL | 2 |
| Cross-examination by Mr. JONES | 5 |
| Questions by THE TRIBUNAL | 14 |
| Re-examination by Mr. WIGNALL | 16 |
| | |
| Mr. GUY WILMSHURST-SMITH, Sworn | |
| Examination-in-chief by Mr. WIGNALL | 20 |
| Cross-examination by Mr. JONES | 22 |
| Re-examination by Mr. WIGNALL | 31 |
| Questions by THE TRIBUNAL | 36 |
| Further re-examination by Mr. WIGNALL | 38 |
| | |
| Closing submissions by Mr. JONES | 39 |
| Closing submissions by Mr. WIGNALL | 63 |
| Reply submissions by Mr. JONES | 83 |

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
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23
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25
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27
28
29
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(10.30 am)

THE PRESIDENT: Yes, Mr. Wignall. Good morning.

MR. WIGNALL: Good morning. Sir, you will remember that we were to produce our draft replacement of paragraph 5 and carry out some investigations. So far as the draft is concerned, I believe you will have received a copy this morning.

THE PRESIDENT: Yes.

MR. WIGNALL: So far as disclosure is concerned, Network Rail have carried out an investigation through its usual sophisticated channels, it means it had to carry out key word searches. It has found no emails for the relevant period. It has found emails in May, which have been disclosed, no emails for the particular word searches between 16th June and 21st June. It has found privileged material in July. Otherwise, there are no documents from Network Rail.

THE PRESIDENT: So that meeting, the formal review meeting, there are no minutes or record or note nothing?

MR. WIGNALL: No.

In the emails that you have seen, you will remember there is a reference in the email from Tracey Troth; there is a reference to a summary report.

THE PRESIDENT: Yes.

MR. WIGNALL: We do have that, but my understanding is that that has already been disclosed.

THE PRESIDENT: Yes. That was the attachment to her email.

MR. WIGNALL: Exactly, yes.

Very briefly, I had a discussion with my learned friend about the draft substituted paragraph 5, but only very briefly, so I wouldn't want to venture a --

THE PRESIDENT: Well, we have looked at it. It does seem that it is now recognised that NSAR took the decision in May as well as the decision, as you told us, on the appeal. They discussed it with Network Rail, maybe they got approval in conjunction. It was certainly their decision. It is not said it wasn't their decision at all. In the light of that I don't think, it seems to us, that it presents any issue for this hearing, which is on the preliminary issue and that the appropriate course is not, in fact, to deal with this now.

If you are successful on the preliminary issue and NSAR is not an undertaking, this case goes away. If you are unsuccessful and NSAR is an undertaking, you are going to have to plead a full defence to the other parts of the claim and that would be the time then to amend paragraph 5.

1 MR. WIGNALL: Yes.

2 THE PRESIDENT: Then -- you have had to do this in a hurry overnight, it is obviously
3 materially different from the draft you produced yesterday -- you might want to think
4 further about it and that we proceed that way.

5 We did find, I have to say, a slight difficulty with this in that paragraph 5.4 says:

6 "The power to suspend has been delegated."

7 Paragraph 5.2 says:

8 "The decision was taken in conjunction with or subject to approval."

9 There seemed a certain tension between those two statements. We were a little surprised in
10 5.5 saying "There is no mechanism for enforcement" because the undertaking that was
11 given to this Tribunal back, I think, in July was not to enforce.

12 So if something -- I'm not quite sure what that undertaking meant. I just make those
13 comments, as I say. We are not going to -- we don't intend to deal with this now, unless Mr.
14 Jones tries to persuade us that it is imperative that we do but we would rather, as it were,
15 park that for decisions it is accepted were NSAR decisions and we want to get on.

16 MR. JONES: Sir, yes, and I have nothing to add.

17 THE PRESIDENT: That's what we will do so we shall note that you are going to seek to amend
18 paragraph 5 and that can be done if you are unsuccessful on the preliminary issue and have
19 to, in any event, amend your or extend your pleading.

20 MR. WIGNALL: May I express some apology for taking the Tribunal's time up yesterday with
21 the discussions.

22 THE PRESIDENT: Yes, but I do not think it was your fault, Mr. Wignall.

23 So shall we go on to our next witness. Can I just mention this: we sat late yesterday. We
24 have to rise at 4.45 pm today. We cannot sit any later than that. Obviously we have to
25 finish today. I trust that doesn't present a problem. If you think that we are running into
26 difficulties we can have a shorter lunch break but we can't extend the other end of the day.

27 MR. WIGNALL: Thank you.

28 The witness I propose to call is Mr. Richard Smith.

29 MR. RICHARD LAWRENCE SMITH, Affirmed

30 Examination-in-chief by Mr. WIGNALL

31 THE PRESIDENT: Do sit down, please, Mr. Smith.

32 MR. WIGNALL: You, then, are Richard Smith, General Counsel Routes, employed by Network
33 Rail Infrastructure Limited.

34 A. That is correct.

1 Q. I daresay Network Rail has an address. What is the business address?
2 A. It is 1 Eversholt Street, Euston.
3 Q. Now, if the gentleman behind you could be kind enough to hand you bundle 5 --
4 A. Thank you.
5 Q. -- if you turn I think to tab 4, I hope it is.
6 A. Yes, I have that.
7 Q. If you turn to the end of your witness statement you should find your signature. The
8 contents of your statement, I take it, are true?
9 A. Yes.
10 Q. I want to ask you just a couple of small questions. Now, there was a change in the
11 constitution or make up of Network Rail, I think, in September 2014. Could you just
12 perhaps tell us a little bit about that and the practical effects on the organisation?
13 A. Yes, certainly. September 2014 was when the company was reclassified, which meant that
14 it was transferred -- its accounts were transferred onto the public books. Now, it was
15 originally described as a bookkeeping exercise but it has become far more than that.
16 Network Rail is described as an arm's-length body of the Department for Transport and in
17 very many respects we are directly controlled or come under the control of the Department
18 for Transport.
19 So we are -- the company is in quite a different position to that which it was in, so when
20 Network Rail was first established in 2003, whilst it was a company limited by a guarantee
21 it was very much more an independent organisation, albeit that it had members who were
22 made up of members of the public who could influence the organisation.
23 Since September 2014 we have one shareholder and that is the Secretary of State for
24 Transport. Our board is directly accountable to the Secretary of State and we are directly
25 controlled by DFT and HMT in many number of ways whether it is a such matter of
26 needing HM Treasury approval, in my case a settled piece of litigation that I might be
27 involved in or to -- that the managing public money requirements apply directly to us.
28 So that is a very -- having been with the railway in various forms since 1993, from BRB to
29 Railtrack, which is very much a private organisation, to the original Network Rail which is
30 something of a hybrid, we effectively have come full circle and we are an emanation of the
31 state in anything but name.
32 Q. I want to ask you one other question. Now, I would like you to try to assist the Tribunal
33 with what particular drivers there are in the industry, what the most important drivers have
34 been over the last few years and how does that bear on this particular case --

1 THE PRESIDENT: What do you mean by "drivers in the industry"?

2 MR. WIGNALL: If we talk about the shape of the industry, what there has been behind the
3 industry. What is it that is moving the railway industry generally forward and what has
4 been moving it forward for the last 10 or so years?

5 A. I think it's privatisation. What has caused the jumps in the evolution in the rail industry or
6 change in the rail structure has always been linked to safety incidents. So whether it was
7 Hatfield, which brought about the collapse of Railtrack, to Potters Bar, which led to
8 maintenance work being brought in-house and 17,000 people transferred in, it is always the
9 major safety incidents and safety generally that is the paramount driver for why we make
10 the changes that we make and why we are constantly being driven to make more changes.

11 THE PRESIDENT: You make other changes, as a result of European legislation, for example.
12 There are a whole load of reasons why you make changes.

13 A. But the prime driver -- it may just be that I see it because in my world I have been involved
14 in every major safety incident since 1993. It may be because yesterday I was having to
15 prepare answers for the minister in Parliament because again we were being asked questions
16 about our safety record.

17 THE PRESIDENT: But EU rail liberalisation package had a huge influence, didn't it? No?

18 A. Not in the direct and an immediate way that a safety incident would or some blemish on our
19 safety record. It is those things which grab the headlines and grab the attention of our key
20 stakeholders who sit in Parliament.

21 THE PRESIDENT: But you are talking about you Network Rail rather than the rail industry
22 generally?

23 A. Yes, but it is -- when I say me Network Rail I'm also talking really about the Railtrack
24 change as a result of those safety incidents. That brought about a dramatic change in the
25 structure of the industry.
26 Those various incidences. It can't be understated that the minds of people who work within
27 Network Rail, the importance that we attach to safety. It is not a cliché it is not just
28 something we trot out --

29 THE PRESIDENT: Well, we hope so, yes.

30 A. -- and that does influence our decisions in a large number of cases.

31 THE PRESIDENT: Yes.

32 MR. WIGNALL: I wonder whether we might have a look at some of the exhibits to your
33 statement.

34 THE PRESIDENT: I mean, how long is this going to go on, Mr. Wignall?

1 MR. WIGNALL: I will leave it there.

2 THE PRESIDENT: It stands as the evidence. If you want to clarify a passage here or there, like
3 your first question, but --

4 MR. WIGNALL: I don't wish to ask any other questions.

5 THE PRESIDENT: -- the whole timetabling of this case is on the basis there isn't more than five
6 minutes of supplementary questions, otherwise there should have been a supplementary
7 statement.

8 MR. WIGNALL: Yes. I have done my five minutes. I'm grateful.

9 THE PRESIDENT: I don't want to be discourteous to Mr. Smith but he has put in a long
10 statement, if there's more he wanted to say, he could have put, in some weeks ago, a
11 supplementary statement.

12 MR. WIGNALL: No, I'm trespassing out of what's already in the papers. I'm grateful.

13 Cross-examination by Mr. JONES

14 MR. JONES: Mr. Smith, good morning.

15 A. Good morning.

16 Q. Could you please turn to bundle 4, at tab 10A. You should have there a case from almost
17 ten years ago now involving Network Rail; do you see that?

18 A. Yes, I do. It is a case I'm very familiar with. Not only was it my case but I gave evidence
19 to the Tribunal.

20 Q. Yes, and we see that over the page at paragraph 8 where you refer to your evidence, and you
21 gave a detailed witness statement.

22 A. Yes.

23 Q. Now, this case was about environmental impact or information regulation, so it was a
24 different context, but essentially the issue, do you remember, was whether Network Rail
25 was a public authority?

26 A. I do, yes.

27 Q. Can I just ask you to look please at paragraph 28. Mr. Smith, I should have made it clear,
28 you of course will be aware of this, but for the Tribunal's benefit, you of course put in a
29 statement to support the contention that you were not a public authority.

30 A. Yes, I did. That was before we were reclassified and it was very different times.

31 Q. Yes, that's what I'm going to go through. So if you focus on the questions that I ask and we
32 can look again at reclassification if we need to.

33 Paragraph 28, what is being said there, first sentence:

1 "Network Rail runs a railway system, just as South West Water ran a water supply
2 and sewage service. It does not administer anything, save in the sense that it runs its
3 own business. It is not a regulator. That is the role of the ORR."

4 Now, you have described what you say have been the changes but that's still right, isn't it?
5 You don't still regulate anything; that's ORR's function?

6 A. We don't regulate anything, that is correct. We are now subject to the environmental
7 information regulations and we are now subject to the Freedom of Information Act as well -
8 -

9 Q. Mr. Smith, we are short of time and I'm afraid those last two remarks didn't go in any way
10 to my question. So you are subject to the regulations, that's true, but let's focus on these
11 questions.

12 So you are not a regulator. It then goes on:

13 "Unlike its predecessor, it doesn't set safety standards."

14 That's still --

15 A. We set company safety standards. We have -- the hierarchy of standards is that they are
16 group standards and then there are company standards that sit below those.

17 Q. But what's being referred to here, 2007, is the general safety standards, isn't it? They
18 weren't saying you didn't set company safety standards?

19 A. I would have been referring to the group standards that are set by the RSSB --

20 Q. That's still true --

21 THE PRESIDENT: They still are --

22 A. They are, yes.

23 THE PRESIDENT: Did you set company safety standards in 2007?

24 A. We did to some extent but they would largely mirror and interpret the group standards.

25 MR. JONES: Then it says:

26 "Like any commercial concern, its ability to influence or control the conduct of those
27 with whom it deals derives not from a regulatory power but from the terms on which
28 it contracts."

29 That's still true, isn't it?

30 A. Yes, it is.

31 Q. Then paragraph 29:

32 "Whatever the position in 1947, running a railway is not seen nowadays in the United
33 Kingdom as a function normally performed by a government authority."

34 That's true, isn't it?

1 A. I think that's probably rather more contentious.

2 Q. Let's --

3 A. If we look at European countries and how they are established as well, I think when I gave
4 evidence we did talk about the different jurisdictions and how they are set up in different
5 ways.

6 Q. Let's go down to 30 to see what the background to this was. You will see there a reference
7 to council directive on the Development of the Community's Railways, which was
8 implemented by the 1993 Act.

9 I haven't got the directive because I hadn't appreciated that Network Rail considers itself
10 now as an emanation of the state, but this hasn't changed. What is cited there:

11 "Member states must guarantee that railway undertakings are afforded a status of
12 independent operators behaving in a commercial manner and adapting to market
13 needs."

14 That is still the case, isn't it?

15 A. If that has changed then that's still the case.

16 Q. Then over the page at 32, please:

17 "To summarise, the directive which gave birth in large measure to the 1993 Act
18 adopts the principle that running railways is an activity for independent bodies,
19 however created and funded, operating as competitive commercial concerns according
20 to the dictates of the market ...(Reading to the words)... function of governmental
21 authorities."

22 That's all still true, isn't it?

23 A. Well, apart from the fact that clearly Network Rail is a state regulated monopoly. It couldn't
24 be said it to -- it refers here to competitive independent bodies. Clearly, we don't have a
25 competitor. We are in a rather different category.

26 Q. No, you don't have a competitor in that sense but you are acting in a market when you
27 purchase your services and you need to be competitive on that market?

28 A. Yes, that would be right.

29 Q. That's what's being referred to here because, of course, you were a state regulated monopoly
30 in 2007, weren't you?

31 A. Yes, we were.

32 Q. In terms of the accreditation system that has been set up, could I take you next please to
33 bundle 2.

34 THE PRESIDENT: Can we put bundle 4 away?

1 MR. JONES: Put bundle 4 away, sir, although I will be returning to it in a moment. Bundle 2,
2 tab 3, page 119.
3 Page 119 is just the front of the document so you can see what it is. I'm using the
4 pagination that's in the middle -- yes, you found it.
5 THE PRESIDENT: Just help us, this is an ORR document?
6 MR. JONES: This is an ORR document summarising its approach to developing and
7 maintaining staff competence.
8 THE PRESIDENT: Maintaining staff competence, yes, as stated in the title. Thank you.
9 MR. JONES: If one goes forward please to page 131. The heading is:
10 "Legislative background."
11 This is at paragraph 23, the ORR's summary, essentially, of what in light of that background
12 the client company can do.
13 Now, the client company, which in the context I'm talking about is Network Rail?
14 A. Yes.
15 Q. "The client company remains responsible for operational safety and operational health and
16 safety...(Reading to the words)... agency staff or self-employed."
17 A. Yes.
18 Q. "The company supplying labour also has a duty."
19 So you have a duty, and I think this is one of the main points you make in your statement,
20 regardless of where the work has come from --
21 A. Yes.
22 Q. -- to ensure they meet the relevant standards.
23 Then at 24 there are two options for client companies employing contract and subcontract
24 staff. The options are either: (1) essentially include them in your own safety training and
25 record keeping system --
26 A. Yes.
27 Q. -- or (2) -- I apologise, I think I have -- the other way round. (2) was, in fact, treat them as
28 your own and number (1) was:
29 "... include them in a competence management system that uses the same or
30 equivalent standards."
31 So it is a separate system?
32 A. Yes.
33 Q. In that case, you should be able to verify and audit the competence management system?
34 A. Yes.

1 Q. So you have that choice. What Network Rail has now chosen to do is the first of those; that
2 is right, isn't it?

3 A. Yes.

4 Q. You have also chosen to outsource the auditing function?

5 A. Yes.

6 Q. I think it is common ground, you say in your statement, you could take that back in-house?

7 A. Yes.

8 Q. I now want to turn, please, to the appointment of RTAS Limited, which one sees in bundle
9 3, please, tab 5, page 42. This is a memorandum from August 1999. One sees it is
10 concerned with the appointment of RTAS Limited. You will see what it records at the start
11 is:

12 "RTAS was established as part of the project Sentinel initiative ...(Reading to the
13 words)... and therefore they decided to outsource."
14 So that was why it was outsourced originally, because it had become a time consuming
15 process; is that right?

16 A. I'm not aware of that as being the primary, indeed the only reason, but I do not have a
17 recollection of the decisions that were made. Whilst I see it was signed off by my then
18 superior, Simon Osborne, company secretary, well that's (inaudible), I couldn't comment on
19 that.

20 Q. You are aware, are you, I think this is common ground, RTAS Limited was a profit driven
21 company?

22 A. Yes.

23 Q. One other point I just want to pick up on this is one sees here, third paragraph down:
24 "As part of the contract, Railtrack has the right to appoint a suitably qualified and
25 experienced person and I have selected Bill Alexander."

26 A. Yes.

27 Q. It is right, is it not, that, even where a profit driven company is doing this, they can make
28 use of any expertise they want to here by having someone appointed or indeed they could
29 buy that expertise in. It is just a statement of obvious?

30 A. It is a statement of the obvious, I was just checking in my mind because I thought there was
31 something I was missing, but it is a statement of the obvious, isn't it? Yes.

32 Q. I would like to go next back to bundle 4 please, questions about Achilles, now, moving on
33 from RTAS Limited.
34 It is back in tab 10, 10D, back of the bundle. Mr. Smith, have you seen this letter before?

1 A. Yes, I was shown it yesterday.

2 Q. So this is a letter from Achilles, in fact, to my instructing solicitor sent just a few days ago
3 in raising issues relating to this case.

4 A. Yes.

5 Q. Could I just pick up a few points at the bottom. The first few paragraphs you will have read
6 essentially say that they don't accept the criticisms that have been made of them?

7 A. Yes.

8 THE PRESIDENT: You have had a chance to read this letter, have you?

9 A. Only briefly, sir. I glanced through it yesterday.

10 MR. JONES: You say you saw it yesterday?

11 A. I glanced through it, yes.

12 MR. JONES: The first bullet point:
13 "Achilles' contract with Network Rail was signed on 16th December 2005 with
14 provisions starting in January 2006."
15 Is that right? Do you have any reason to doubt that?

16 A. I have no reason to doubt that.

17 Q. It is only that paragraph 47 of your statement suggests that they started in 2010 or 2011. So
18 that is wrong, is it?

19 A. I don't know. That was the information I was given when I was completing my statement.
20 As I hopefully made clear in the statement, where it is from my knowledge I made that
21 clear, where I have relied upon information other people have given me, that should be
22 apparent. That was the information that I was given at that time.

23 Q. Now, the various criticisms you make of Achilles, is that based on your personal experience
24 or is that based on --

25 A. No, and -- I don't think I made -- or the comments I made about Achilles, I don't believe I
26 made many criticisms of them, certainly not that would be -- because I was merely passing
27 on the information that I had been given by others. I have had some dealings with Achilles
28 over the years when we have had issues that have come up that I and my team have had to
29 advise on, so I have had some experience of them.

30 Q. I see.

31 A. But if the date is wrong -- and I do apologise -- that was what I was told.

32 Q. Yes. Then where they say that they had the contract renewed several times, that's also
33 outside your knowledge, is it?

1 A. Yes, if -- so the information I give in my statement is what I believe to be true as having
2 been told it.

3 Q. The second bullet point:

4 "The scope of services under contract was determined by Network Rail and Achilles
5 performed its responsibilities in accordance with the services required under the
6 contract."

7 Any reason to doubt that in your own knowledge?

8 A. No, but it would be dangerous for me to say that that is true as well because I'm unable to
9 say one way or the other.

10 THE PRESIDENT: Would the first part be true:

11 "The scope of the services required of Achilles in the contract was determined by
12 Network Rail."

13 You would have drafted the contract to say what you wanted Achilles to do.

14 A. Sir, whilst that makes imminent sense, as I do not have first-hand knowledge of that, I'm
15 unable to say whether that is true. It may be that Guy Wilmshurst-Smith, who comes after
16 me may have first-hand knowledge of that. I'm just reluctant to commit to something that is
17 not within my personal knowledge.

18 THE PRESIDENT: I was only asking because you are the solicitor and so contractual matters, I
19 thought, might come within your --

20 A. I have a team of lawyers who work for me. I am actually a litigation lawyer, so I don't get
21 involved -- or if I do it would be very dangerous -- get involved in drafting commercial
22 agreements. But also in a number of cases we have so many contracts that Network Rail
23 lets, we have templated contracts that we allow our supplying chain or procurement people
24 to produce.

25 THE PRESIDENT: You don't know, I understand.

26 MR. JONES: Mr. Smith, just to give an example, you say in 53 of your statement:

27 "Achilles only undertook unannounced(sic) audits."

28 They say in their letter -- "only undertook announced audits", I apologise.

29 They say in their letter that that's not right, we can look at that, we could go through the
30 contract and spend a bit of time on that but is your essential position you actually don't
31 know?

32 A. I have been told that they only undertook announced audits and that's why it is in my
33 statement.

34 Q. I understand.

1 A. What you are telling me is they say something different.

2 Q. That is right. Could I, just to cut this short ask you to read the final three bullet points over
3 the page and just let us know if there's anything in there that you have first-hand knowledge
4 of.

5 A. It would be true to say I do not have first-hand knowledge of anything in those paragraphs.
6 What I know of them is what I have been told by members of the Network Rail team who
7 were directly involved in it.

8 Q. Thank you. We can put that bundle away then.

9 THE PRESIDENT: Can you just help me, when in your statement, in paragraph 53, if you look
10 at that on page 11 -- I appreciate this is what you have been told and not your own direct
11 knowledge -- when you say, third line from the end:
12 "Network Rail's view is that Achilles made a cursory check of its ..."
13 Who in Network Rail, whose view? Who formed that view that they conveyed to you?

14 A. The information I was relying upon was from Guy Wilmshurst-Smith's team. Guy's team
15 manages that relationship, so that is where I was getting that information from.

16 THE PRESIDENT: But he himself only came in November 2010, as I understand it. So he
17 wouldn't know, would he, himself?

18 A. That was the -- in preparation of this statement, that was what I was told. Clearly there
19 were large areas of this that I was not able to deal with from my first-hand knowledge. I
20 think the intention was there would be just one statement from Network Rail originally and
21 it would be some form of composite. There were clear areas that I can express a first-hand
22 view on but there are areas in relation to the management of the contract which I cannot, but
23 I think that is why Mr. Wilmshurst-Smith is here now.

24 THE PRESIDENT: Yes.

25 MR. JONES: What about risks audit which you also mention in your statement, is that something
26 you know about and can assist the Tribunal on?

27 A. That I know from first-hand knowledge, no. It's what I would have been told in the process
28 of preparing this statement.

29 Q. Before, maybe, we spend too much time on this I have some questions about risks, should I
30 direct them to you or Mr. Wilmshurst-Smith?

31 A. I would suggest Mr. Wilmshurst-Smith.

32 Q. The rules, the RTAS rules, could we have a quick look at them? They are in bundle 1,
33 please. Can you go to tab 3?

1 Firstly, the RTAS rules start on page 3, I'm using the small numbering in the bottom right-
2 hand corner. Just a couple of small points here. If one turns to page 6, again using those
3 numbers that start BSQ --

4 A. Yes.

5 Q. -- you will see there at 2.1 the accreditation organisation. It says:

6 "The role of the accreditation organisation is to deliver RTAS on behalf of Network
7 Rail."

8 A. Yes.

9 Q. "They are responsible for ensuring that training providers and individual trainers and
10 assessors accredited under RTAS rules meet the specific requirements of Network Rail."

11 A. Yes.

12 Q. That is the function performed by NSAR, isn't it? They are the accreditation organisation?

13 A. Yes, as I understand it.

14 Q. I should just highlight, also, page 23, there is a definition of accreditation organisation. One
15 sees:

16 "A body identified by Network Rail to provide rail training accreditation following an
17 inspection."

18 Again, this may sound like an obvious question but the people they are providing rail train
19 accreditation to are training providers, aren't they?

20 A. Yes.

21 Q. There's nothing in the rules which would prevent you from appointing a profit-making
22 entity to do that?

23 A. No, I understand not. It is just what is considered desirable or what would be best practice.

24 Q. There are also then what's been called, I think, document 202, which one sees at page 53,
25 which has a slightly different structure. (Pause)

26 A. This looks like a Network Rail company standard we are looking at here, from the format of
27 it, yes.

28 Q. If one turns to page 58:

29 "Approving organisation: the company are individually authorised by Network Rail to
30 review and approve applications."

31 It seems duplicative and we maybe don't need to pick apart how this fits with RTAS but that
32 function, if it is a separate function, is also -- NSAR is the approving organisation within
33 this document as well, as I understand it?

34 A. Right.

1 Q. Is that right or not, or do you not know?

2 A. That seems to me to be the case, it seems another thing that seems obvious, but I'm
3 concerned that I'm saying that from looking at this document and saying, yes, that is my
4 understanding. To say that I'm afraid there is a trick -- but, I mean, yes, that seems to be
5 correct.

6 Q. Mr. Smith, finally, one of the points which you make in your statement, in particular around
7 paragraph 58, is that Network Rail needs an independent body to carry out this task. Now,
8 the legal obligations on Network Rail, health and safety obligations, and so on, which you
9 have described, of course all predated NSAR's appointment?

10 A. Yes.

11 Q. You are not suggesting that when you appointed a profit-making company that you were
12 somehow breaching those obligations, are you?

13 A. No, certainly not. But it is -- any competent organisation is expected to learn and improve
14 their safety systems and if it is determined that there is -- an element of risk is introduced, or
15 we are not reducing risk as low as reasonably practical because we have a commercial
16 organisation when it is being determined the risk is low if we have a non-commercial
17 organisation, then I think we could be criticised if we haven't made that step or made that
18 step of evolution.

19 Q. You will be aware, I assume, that professional auditors always have to face the question of
20 independence?

21 A. Yes.

22 Q. There are many professional tasks, and others, which need to be carried out with duties of
23 independence, notwithstanding that the client may be paying for them?

24 A. Yes, I think this is -- we would have a particular nervousness around training because of the
25 history we have had over the recent years over the number of police investigations and
26 unusual behaviour that we have witnessed that has put us on our guard, rather more than if
27 we were dealing with a firm of external auditors of the type of PwC, or something like that.
28 I think that nervousness is reflected in us looking constantly to see what we can do to
29 improve the process and give ourselves additional assurance.

30 MR. JONES: Yes, well, I'm grateful for that. Thank you. I have no further questions.

31 Questions by THE TRIBUNAL

32 THE PRESIDENT: Just one moment.

1 Can I just ask you, you talked about evolution of Network Rail and I appreciate you are
2 more a litigation solicitor but has Network Rail had any funding from government or loans
3 from government?

4 A. Our funding comes in the form of control periods, so we have -- we are currently in CP5,
5 control period 5, so our funding is for a five-year period and in the -- prior to the start of
6 CP5 we will have gone into a protracted negotiation with government where we set out
7 what we would like to do in the next control period and that will be in terms of major
8 projects that we need to deliver but also safety improvements that we want to introduce and
9 it will go into a significant amount of detail.

10 It is an iterative process. It is a negotiation, effectively, with government, which ultimately
11 ends with government saying "And this is your budget for control period 5", and we are
12 then expected to live within our means.

13 THE PRESIDENT: Yes. Is that a loan or it is just straight --

14 A. It is straight funding. It is funding. Our funding comes from three sources. We do get
15 some revenue from our property portfolio. We do get some revenue that comes in from the
16 train operators but many of those, actually, are receiving subsidies from government, so it is
17 a very circular thing.

18 THE PRESIDENT: Are there any state aid issues that have arisen that you have had to look at,
19 or your solicitor.

20 A. For my team, state aid is something we are very mindful of because, quite frequently, we
21 may come across a situation where we have had to ward off a business because we are
22 concerned we are going into a state aid situation. But I would like to think my team are
23 very conscious of this and we do keep that sort of thing constantly under review when we
24 are asked to advise on some new project or plan.

25 THE PRESIDENT: Yes. The other thing I just wanted to ask was, in your statement, at
26 paragraph 75 on page 15 -- perhaps it starts a bit earlier but pick it up at 74:

27 "NSAR and Network Rail entered this agreement under a concession. Network Rail
28 entered into the concession agreement with NSARE, now NSAR, which commenced
29 after 1st September 2011."

30 There is, Mr. Jones, a contract somewhere, isn't there?

31 MR. JONES: Yes, sir.

32 THE PRESIDENT: We were taken to it before. Is it in bundle 4, the disclosure bundle?

33 MR. WIGNALL: I believe in tab 1.

34 THE PRESIDENT: I think it is in tab 1 of bundle 4. You say in 57:

1 "Network Rail entered into this concession agreement with NSARE. Unfortunately,
2 to date, I have been unable to locate a signed agreement. I assume that its contents
3 ..."

4 You are referring to this document?

5 A. Yes, I am.

6 THE PRESIDENT: So this -- it was -- you are saying it was put into effect, that's your
7 understanding, but you can't locate the signed copy.

8 A. No, that's absolutely right.

9 THE PRESIDENT: It is a bit surprising, I have to say --

10 A. I was puzzled by --

11 THE PRESIDENT: -- an agreement of this significance, there's not on your files a signed
12 agreement.

13 A. No, I would have expected it to be somewhere in the procurement team. When this actually
14 came to my attention, I think earlier in the year or the end of last year, on the related matter
15 and I, of course, asked for the contract documentation, as one would, in order to advise, this
16 is all that was produced and it seems to me it is part of the -- what we call the NR suite of
17 contracts, it is NR3, that I can only assume someone in the procurement team has generated.
18 They consider it is the closest thing to an appropriate document to evidence the relationship.

19 THE PRESIDENT: Yes.

20 A. But I have no reason to believe they took any advice on it from my team and it does look
21 like just a template document has been used but where the signed copy would be, I have
22 been unable to determine.

23 THE PRESIDENT: A bit paradoxical in a case which arises because of complaints about
24 UKRS's failure to keep signed copies and properly file documents that Network Rail itself --

25 A. No, I can see that.

26 THE PRESIDENT: -- can't produce --

27 A. No, I'm afraid not.

28 THE PRESIDENT: Right. We have no questions beyond those, Mr. Wignall. Any re-
29 examination?

30 Re-examination by Mr. WIGNALL

31 MR. WIGNALL: I would be very grateful if you would make sure you have a copy of bundle 2
32 please. You were asked various questions in respect of the document at tab 21.

33 MS. DALY: There is no tab 21.

34 MR. WIGNALL: Bundle 2, tab 21, I have the ORR document.

1 THE PRESIDENT: This only has three tabs.

2 MR. JONES: It is bundle 2, tab 3, page 119 is the ORR document.

3 THE PRESIDENT: Thank you.

4 DR. ELPHICK: Sorry, which page?

5 MR. WIGNALL: Page 119 is the ORR documents.

6 THE PRESIDENT: Yes.

7 MR. WIGNALL: Now, if you turn, please, to page 127 there is a reference to "competence" and
8 at paragraph 9 a reference to a "competence management system". Is that sort of system
9 one with which you are familiar in your practice in Network Rail?

10 A. In principle but not in detail, I understand we operate a competence management system
11 and there have been occasions, particularly following safety incidents, when I have had
12 cause to refer to the records kept within it.

13 Q. If I'm asking you questions and you think that they are not appropriate for you to answer,
14 and perhaps Mr. Wilmshurst-Smith is best placed to answer them then please let me know.
15 If we go to 132, it is what is described as the outline of the guidance, the competence
16 management system, and I see that this is set out in five phases and I see that phase 5 says:
17 "Verify, audit and review the CMS."
18 Now, this is the area that we are talking about, isn't it, in respect of the activities --

19 A. I understand so. I have to say if we go any further down this line it probably is something
20 which is probably better addressed to Wilmshurst-Smith.

21 Q. We will see how we get on but if we really hit a place where you don't think you can't go
22 any further do let me know. So there appears to be five phases and that appears to be
23 verify, audit and review CMS.
24 If we turn to page 135. 135 again addresses phase 5:
25 "Phase 5: verify, audit and review the CMS. The verification audit of the system
26 checks on the competence of assessments and assessment process."
27 You were asked a question whether it is possible in the rules to appoint a private company
28 to undertake auditing.

29 A. Yes.

30 Q. Now, is auditing on its own sufficient for Network Rail's purposes in a competence
31 management system or do you need to do more than just audit? What does auditing
32 involve? Is it sufficient to have a private company to look at audits or does one need more?

33 A. One would certainly need more from the point of view if you mean simply carrying out an
34 audit. Yes, the extent to which that audit is purposeful rather than just merely a tick-box

1 exercise, the extent to which there is then a review of the operations and the lessons learnt
2 from that audit and so those lessons can be applied and there can be continuous
3 improvement to the way in which these processes are done. It goes beyond just a tick-box
4 exercise carrying out an audit.

5 Q. If we go then to paragraph 138, we can see that ORR divides up these various phasing into
6 two principles. We can see the bottom, phase 5 is divided into two principles, principle 14
7 and 15. 14 appears to be:

8 "Verify and audit the competent ...(Reading to the words)... system."

9 15:

10 "Review and feedback review and analyse ...(Reading to the words)... into the
11 competence management system."

12 So is Network Rail looking at a private auditor which goes on and looks at what happens in
13 particular courses or is more expected today for --

14 A. I think far more is expected today. Far more thought is expected to be put into the conduct
15 of the audit, the lessons that are then drawn from that audit, how that is fed back and the
16 changes that are then made to improve the training and improve safety.

17 Q. I wanted to ask you about the lessons to be learnt. If you go to page 176. Principle 14 is set
18 out a little more:

19 "Verify and audit the CMS."

20 If we just have a look at the overview, perhaps. You see on "Overview", it says:

21 "The integrity of the competence management system ...(Reading to the words)...
22 Recommendations should be made where appropriate."

23 Does that tell us anything about whether it is possible to have a private company which goes
24 along and just does auditing of what's happening?

25 A. Yes, I think it is the same point again, isn't it? You cannot have that as an isolated action
26 but what we are expecting is significantly more from that and it goes beyond the exercise of
27 the audit but it is learning the lessons from it, reviewing those actions and then applying
28 them to improve the quality of the training, and ultimately improve safety.

29 DR. ELPHICK: Is it not the case that what we are really focusing on here is the skills and the
30 competence of the auditors. That's what really is at the heart of that. They may or may not
31 work for an organisation which is for profit?

32 A. Yes, I think that is what we are saying but I think it is -- it does come down to skills and
33 competencies but I guess what we are saying is there is a cultural or a behavioural aspect to
34 that as well, which is why we are in the situation we are describing. We are distancing from

1 that of a black and white audit process, we are saying it is about taking those lessons from
2 that audit and working with, in this case, Network Rail collaboratively to improve, in this
3 case, the training services being provided, but ultimately to the safety that comes from that.

4 DR. ELPHICK: I suggest that the big four financial auditors would claim that that's precisely
5 what they do for their clients.

6 A. I am sure they would too, sir, yes.

7 MR. WIGNALL: Maybe perhaps this isn't a matter you can help us with but are you able to say
8 whether the previous companies who were employed, engaging auditors, RTAS and
9 Achilles, were able to achieve this function and assist the process with a process of review
10 and assurance; did that happen or is that a matter for Mr. Smith?

11 THE PRESIDENT: I think Mr. Smith said quite fairly that he really has no direct knowledge of
12 how Achilles, and those questions -- what he knows came if not directly from Mr.
13 Wilmhurst-Smith but at least from his correspondence with his team. So perhaps those are
14 questions for another witness.

15 MR. WIGNALL: If a firm of private auditors came in just to do an auditing function, as has
16 happened in the past, then who would monitor or audit those auditors; can you help us with
17 that? Would there be any process to do that?

18 A. It would very much depend on how the contract was set up. I would expect it to be via Mr.
19 Wilmhurst-Smith's team, so that they would then -- although, having said that -- yes, I
20 suppose it would be open to us as to how we ran that contract. But there would have to be
21 involved an element of supervision and overview from an internal team. Whether that was
22 Mr. Wilmhurst-Smith's team or another team, I couldn't say in those circumstances.

23 Q. How many fatalities have there been on the railway this year?

24 MR. JONES: Sir, I know I keep interrupting and I do apologise, but I'm concerned about time --

25 THE PRESIDENT: Well, I'm not sure that's a question that arises from cross-examination.

26 MR. WIGNALL: I would say it does because it has been suggested that --

27 THE PRESIDENT: It has not been suggested that there are no fatalities or x number of fatalities
28 or lack of safety or --

29 MR. WIGNALL: But the Tribunal may be interested in the increase in number of fatalities.

30 THE PRESIDENT: We are, as ordinary human beings who travel by rail, yes, but in terms of the
31 Tribunal dealing with the question of whether NSAR is an undertaking, I'm not sure that's
32 relevant.

33 MR. WIGNALL: I have no other questions then, sir. Thank you.

34 Thank you, Mr. Smith.

1 THE PRESIDENT: Thank you, Mr. Smith. You are released, Mr. Smith.

2 (The witness withdrew)

3 MR. WIGNALL: Can I invite Mr. Guy Wilmshurst-Smith, please?

4 Mr. GUY WILMSHURST-SMITH, Sworn

5 THE PRESIDENT: Do sit down, Mr. Wilmshurst-Smith, and I should apologise to you
6 straightaway, I think it is the time when we should take our short break and I had not
7 realised the time, and this is the obvious point to take it before you start your evidence. So
8 you have five minutes to spare and we will come back in five minutes' time.

9 (A short break between 11.30 a.m. and 11.35 a.m.)

10 Examination-in-chief by Mr. WIGNALL

11 MR. WIGNALL: Sir, I intend to ask just one preliminary question and that relates to the letter
12 from Achilles that we have seen.

13 THE PRESIDENT: It is my fault, because obviously I should have asked for the break before
14 Mr. Wilmshurst-Smith was sworn, I do not think he has been taken to his statement yet,
15 which is in bundle 5.

16 MR. WIGNALL: I'm very grateful. Bundle 5, do you have that with you, tab 3?

17 A. I have it.

18 Q. You explain who you are at paragraph 1 and then I think you will find on page 5 your
19 signature. Are the contents of your statement true?

20 A. Yes.

21 Q. I wonder whether you could be handed bundle 4, please. If you go to the end of these papers
22 you should find what I think is tab 4C, which is a letter that you will have heard being
23 discussed earlier from Achilles. I have it at 4C.

24 DR. ELPHICK: In bundle 4?

25 MR. WIGNALL: I have it in bundle 4.

26 DR. ELPHICK: Yes, I have found it.

27 A. I'm struggling here. (Pause)

28 THE PRESIDENT: This is the letter from Achilles, it is at tab D at the end.

29 MR. WIGNALL: I'm grateful.

30 A. Yes.

31 THE PRESIDENT: The letter of 4th October, just very recent.

32 MR. WIGNALL: Now, Mr. Wilmshurst-Smith, have you had a chance to read this letter?

33 A. I had a chance to scan it and read it in an outline before today.

1 Q. You will also have heard the cross-examination and re-examination of Mr. Richard Smith
2 who gave evidence just before you and you remember that he discussed his account of
3 Achilles' performance. Do you remember also there was some discussion about whether a
4 private auditor could fulfil the role currently being fulfilled by NSAR? I would just like to
5 ask you, in relation to Achilles and what is set out in this letter, how did they perform the
6 contract, was it a good job and in any sense have we moved on? Could they carry on with
7 the same role today after 1st January 2016?

8 A. So Achilles had been in the job for quite a while when I -- and they were coming to the end
9 of their time when I took over the job and, in terms of managing what we had asked them to
10 do as part of the contract, I thought they were doing a reasonable job. The fault and the lack
11 of service wasn't a fault of Achilles, I don't think. It was a fault of what we had been asking
12 them to do as part of the contract.

13 THE PRESIDENT: Yes.

14 A. You know, the fault lay as much with ourselves as it does with Achilles. I wouldn't actually
15 put any blame on Achilles in that respect. We had asked them to carry out a really naked
16 inexpert auditing function: go in there, tick the boxes, and come out again. That had been
17 going on for a number of years and it had taken us on a journey that had improved the
18 training provision across the industry and had taken -- but our belief was it had taken us
19 about as far as that rather unsophisticated and inexpert approach could take us. So what
20 were we going to do next was the question that we had.

21 Letting another more defined contract, we didn't think we could do because, me and my
22 team, we lacked the expertise and the knowledge and the sophistication indication about the
23 sort of commercial training environment to be able, we thought, to let a really effective
24 commercial contract.

25 We needed help, and we needed time to sort of refine what we were going to do. But the
26 contract was coming to an end. So we really had two choices at that point which was to go
27 and do another contract and try to improve it by contract by contract, which takes time, or
28 we could effectively bring it in-house, in my perspective.

29 By working with NSAR, who -- bear in mind in parallel to this, we had been part of an
30 industry initiative to set the national skills academy up. They were a not-for-profit
31 organisation, we were on the board of NSAR, they were part of the home team. And as a
32 result, by establishing NSAR, not just to tick box the sort of minimum standard of
33 accreditation to sort of get you out of jail card type compliance, that's where the industry
34 used to be.

1 Our ambition was, I hope, better than that. We wanted to improve and uplift the whole
2 quality of training across the industry. We wanted people to focus not just on getting the
3 tick in the box on the safety compliance but we wanted to -- people to think about the
4 productivity of people, to drive the efficiency in the way in which we delivered training and
5 to sort of reduce the overall unit cost of training, and so on.

6 This was not something that we particularly had the expertise to work with in that
7 commercial environment, and we wanted the expertise that NSAR was establishing to do
8 that. Because it was still early days and we set it up initially in a sort of concession that had
9 a lot of contractual frameworks to it, if you like, to really help us gather our thoughts about
10 the sort of minimum line that we wanted to have, so that we could delegate the authority to
11 suspend to NSAR.

12 But there is a big difference between what we do in RTAS, which is the minimum bottom
13 line, and what you see in the NSAR assurance process. Their assurance process -- this is
14 why what we saw immediately after them taking over was the ability to guide and assure a
15 training company to see whether they were merely scraping a bottom line as a satisfactory
16 company or whether they were good or whether they were outstanding.

17 This represented the start of our journey to recognise that ambition of uplifting the total
18 quality of skills across the industry.

19 MR. WIGNALL: Sir, I had better leave it there, I think.

20 Cross-examination by Mr. JONES

21 MR. JONES: Thank you, good morning.

22 A. Good morning.

23 Q. Could I start with this question: my version sorry of your witness statement, your name is
24 spelt W-I-L-M-H-U-R-S-T; is that right?

25 A. No, there is an S in the middle between the M and the H but it is so commonly misspelt that
26 I have got used to it over the years and I'm relaxed about it, to be honest.

27 Q. I see you are relaxed, but it appears in the heading and then in paragraph 1. It leads me to
28 ask this question: what was your involvement in drafting this statement?

29 A. We had a long and detailed telephone conversation. The parts of that were then sent to me
30 about to what I had said. I then went through it and spent some time editing it so that it
31 reflected my honest view of what I believe.

32 Q. Did you actually sign it or is that an electronic signature at the back?

33 A. I think that's an electronic signature. That's common practice, where we are, to be honest.

34 THE PRESIDENT: Not for witness statements in court, Mr. Wilmshurst-Smith.

1 A. Okay.

2 THE PRESIDENT: Didn't you -- before you authorised your electronic signature, didn't you read
3 it?

4 A. Yes.

5 THE PRESIDENT: You didn't think it right to correct the spelling of your name on a witness
6 statement in court?

7 A. Forgive me if I'm implying some element where I was not taking it seriously, but it is so
8 common for my name to be misspelt that --

9 THE PRESIDENT: Is it misspelt on your passport?

10 A. No.

11 THE PRESIDENT: If you made a passport application would you take care that it is spelt
12 properly?

13 A. I would.

14 THE PRESIDENT: Because, as you know, there are criminal penalties if you misspell in your
15 passport.

16 A. I was not aware of that.

17 THE PRESIDENT: There is a declaration in the application that you sign.

18 A. There is a fair degree of naivety on my part there about the importance of getting --
19 something that I see every day in my name being spelt wrongly.

20 THE PRESIDENT: Yes.

21 MR. JONES: Could I pick up on a point you were discussing a moment ago, which is NSAR
22 being able to offer the framework, the new framework, and you just tie this in your witness
23 statement, you mention at paragraph 10:
24 "We were aware of the possibility an Ofsted-style approach."
25 You say at the end of that:
26 "My recollection as to these discussions is otherwise not distinct."
27 Just to be clear, that's when you pick up at paragraph 16:
28 "NSAR uses a framework for the assurance process."
29 That is the same framework, isn't it? It is changed in 2016, we have been through that, but
30 the framework you are talking about is the Ofsted approach?

31 A. Yes, I think so.

32 Q. Now, you have said that your recollection isn't distinct but could I just ask you to look at
33 Mr. Alexander's witness statement which is in bundle 3. It is at tab 3.

34 A. Which page?

1 Q. Page 26 of this statement, please. If we pick it up at page 25, you will see at paragraph 122
2 he explains that he joined NSAR in 2011 and there had already been discussions between
3 Gil Howarth and Network Rail. Then 123:

4 "NSAR's initial plans had been to replicate what had been delivered by Achilles."
5 Then if one turns over, you see 124 essentially -- well, 124, Derek Walker was going to be
6 taking a role but he couldn't. But 125:

7 "I reviewed the plan and in my professional opinion there was a significant flaw."
8 He then describes there the flaw, "stagnant audit protocol", and so on, and in fact we have
9 seen these bullet points in slides that we went to yesterday, I think you were in court
10 yesterday. 126:

11 "It was decided to completely review the proposals and they came up with this offset
12 approach.

13 So to summarise that, the reason why NSAR was able to do this was in large part because
14 Mr. Alexander joined them and took his expertise with him?

15 A. Not at all. Not that Bill doesn't have lots of expertise, but bear in mind that we had a
16 number of other systems working within Network Rail and we were running an
17 apprenticeship scheme, one of the industry's biggest apprenticeship schemes for which we
18 were already using an Ofsted inspection. Of course, Bill, before he left us, before we let
19 him go, he was actually running our apprenticeship scheme, so he had that knowledge of the
20 way in which we were using Ofsted but he wasn't the only person that was involved in that.

21 Q. No, but we have seen it from NSAR's point of view. In theory, he could have gone to work
22 for Achilles and taken that expert knowledge with him or any other auditing organisation?

23 A. That's because if we are focusing just as though Ofsted by itself, as in the auditing process,
24 is something that was the be all and end all of what we were looking for. So that is not what
25 we were really trying to achieve from our relationship with NSAR. What we are really
26 trying to do was something much more than you see in the face of this pure auditing
27 process.

28 It was about creating a partnership, essentially bringing a team in-house where we could
29 explore the art of the possible. What was going to work? You know, we had had a classic
30 auditing system working for us for a number of years. I mean, put it in context here, since
31 2009 we have had 162 investigations which have led to suspension or fraud-type dealings in
32 a supply chain of 112-ish training providers and the auditing approach that we had had was
33 not picking up on this stuff.

1 So we wanted something that, yes, had the Ofsted bit for the learner journey. We still
2 wanted those hard bottom-line auditing aspects, but we also wanted to start a journey where
3 we would work to uplift the qualitative elements of the way in which we encouraged the
4 industry to improve its performance. This is why we were moving to this area where we
5 had satisfactory, good, outstanding. We were working for something more, we wanted to
6 incentivise the training providers to do more than just tick a box.

7 Q. Where you have come back to, at the end of that answer, is that you wanted the kind of
8 framework that we have seen in the Ofsted framework. You wanted more than a tick box.
9 You wanted, as you said, capacity to improve, and so on, and you have been here as people
10 have explained that was done by Tribal until the end of 2015. You have heard Ms. Millen-
11 Stirling agree with me that the change in the quality assurance framework at the start of
12 2016 was simply an evolution. You have heard her explain that that is still done by private
13 consultants. What I have now shown you is that the very idea for it came from an
14 individual who could have gone anywhere.

15 Isn't the essential lesson from all of this that if one has skilled individuals, one can do what
16 you want to have done?

17 A. But, again, that's looking at it as though -- we as a company want to use our relationship
18 with NSAR to develop this much broader strategic approach. So what I would describe
19 here is that the way we brought NSAR in was not just into the solution. Because everything
20 you have just described there is the assurance and auditing solution. Actually they did
21 much more with us than that. They were actually coming the other side of the line, if you
22 like, working with us to actually mature the rules, identify what the right rules should sit
23 underpinning the scheme.

24 Q. Are you talking about a curriculum or the RTAS rules?

25 A. No, the RTAS rules themselves.

26 Q. Well --

27 A. It is something that's matured over the full length of that relationship.

28 I think if you see the latest letter that we produced that showed that we have now moved
29 from a point that has almost no sort of contractual basis at all, actually what we are doing is
30 that we have handed the thought leadership for assurance in the industry, we have handed
31 that banner on to NSAR and we now simply acknowledge that their processes are ones that
32 we will accept and endorse for the industry.

1 Q. Just on the rules, Mr. Wilmshurst-Smith, 202, that's one of the sets of rules, doesn't appear
2 to have changed since December 2011. The RTAS rules looks like there was an
3 amendment --

4 THE PRESIDENT: Is that right: 202 hasn't changed?

5 A. I'm not aware of it changing. Changing a standard takes a huge amount of work and it takes
6 something fairly significant for us to go through a change in there. If it is not needed
7 changing then we don't tend to.

8 MR. JONES: Now, in the RTAS rules, the version we have here December 2013; does that sound
9 right?

10 A. Yes.

11 Q. You also would have been here when Ms. Millen-Stirling explained that the more general
12 work that NSAR does, it could do anyway, it does for other organisations on their courses,
13 even where it is not accrediting and auditing?

14 A. Well, of course; of course it does.

15 Q. Could I --

16 A. That's where we get the expertise from. This is where they are bringing the expertise from
17 the power sector and nuclear sector, and so on, all brings in and gives us this breadth and
18 professionalism that we have been looking for.

19 Q. Can I pick up on just one other point in Mr. Alexander's statement. He explains the
20 payments that were made to these various bodies. You will see at paragraph 90 --

21 A. Is that on the same statement?

22 Q. Do you have paragraph 90?

23 A. Yes.

24 Q. This is a worked example, this is under Achilles in 2011:

25 "Large provider with eight trainers/assessors."

26 This is accepted by NSAR. As I understand it, they are not challenging this.

27 So this is a worked example, £5,000 plus VAT. He has another example at paragraph 120,
28 which is what NSAR originally charged, the same situation, so eight accredited trainers, and
29 he says £5,800 plus VAT.

30 If you go to paragraph 143, what NSAR now charges, so over time its role has developed,
31 £9,326 plus VAT, in addition, 144, to all these other charges.

32 So it is right, isn't it, that when you compare the service you got from Achilles with what
33 you now get from NSAR, you are not comparing like with like?

1 A. No, we are not. One was an audit; this is a total assurance system. It is very much more
2 sophisticated and value adding.

3 Q. Could we just have a quick look at the Achilles contract. It is in bundle 5, tab 5, page 406.
4 Page 406 is where it starts, although we should pick it up, if we could, at page 424. So you
5 see quite how tick box this was. At 424, you will see there is a definition of the services:
6 "The assessment, accreditation and licensing and audit of the rail training organisation
7 ...(Reading to the words)... their qualified employees."
8 You see that.

9 Then we need to go forward a bit to see the detail of what they are required to do, page 440.
10 There is a small point on this page but just to pick up an issue which has been floated,
11 paragraph 3.3, second bullet point, you will see the supplier has to do unannounced
12 inspections, without notice; do you see that?

13 A. Mmm.

14 Q. Mr. Wilmshurst-Smith, you may need to say "yes" for the benefit of the transcript?

15 A. Sorry. Yes, I can see that.

16 Q. Then over the page, "Perform the audits". Some of this exercise one might call "tick box":
17 first of all, manage and undertake the auditing activity; secondly, maintain records; thirdly,
18 compile an audit.
19 Fourthly:
20 "The provider should supply Network Rail with details of any issues arising from the
21 audit."
22 So they were supposed to report back to you; is that right?

23 A. Yes.

24 Q. Fifth:
25 "Provide guidance of interpretation on the standard of achievement to approve
26 providers. So you agree they were supposed to do that as well?

27 A. Yes.

28 Q. "Manage the registration", is the next one:
29 "Manage and supervise an enquiry service for all third parties ...(Reading to the
30 words)... the service provider."
31 Do you see that?

32 A. Yes.

33 Q. At the bottom you have got:
34 "Provide an appeal procedure for training providers."

1 Further down the page, we see "contract governance", at bullet point 1 "service review
2 meetings", "management information reporting" at the bottom. Service review meetings
3 were monthly meetings for the purpose of discussing any problems in relation to the audit
4 process?

5 A. Yes.

6 Q. So, Mr. Wilmshurst-Smith, I'm not suggesting that what they were doing was exactly the
7 same as what NSAR was doing but I do put to you that it is not quite right to try to
8 characterise this as simply a tick-box exercise?

9 A. I would disagree with that because I think that there are lots of -- as always lots of words in
10 the contractual documents, but the effect and the experience on the ground was that people
11 were being visited in a pre-planned way, they knew when people were coming and what we
12 were clear was they were coming away with a series of ticks against all the things we were
13 asking them to do and yet in the background we were having -- what we knew was we were
14 having whistle-blower investigations emerging, showing that the other side of this particular
15 tick-box exercise we were finding fraudulent or inappropriate activity within our training
16 providers.

17 So the two didn't add up. Now -- and, yet, when we were sitting having our contract
18 meetings with Achilles, and I only attended a couple of them to sort of educate me when I
19 first arrived, the two in my mind didn't square that we had all these investigations going on
20 where we were finding fraud, where we were finding malpractice, and yet the audit system
21 that we had set about to do all of this wasn't picking them up.

22 I'm afraid, in those circumstances, we had to start a journey. We realised we would not get
23 there overnight and that's why what you see in our relationship with NSAR is something
24 that has grown over the years. We weren't perfectly aligned to start with, which is why it
25 had that sort of concession "contractorese", if you like, approach to it.

26 We have now moved to a point where they provide the thought leadership, where we have
27 handed over the baton of assurance for the whole of the industry in order to assure the
28 quality, both the safety, which this does, but also the performance and productivity aspects
29 that we have as an ambition as an industry, all of us, to uplift.

30 Q. Could I move on to the risks audit. I understand you are the man to ask about that; is that
31 right?

32 A. Well, I'm aware of the risks audit but the risks audit is something, it sits within our
33 procurement teams. I say "us": the Network Rail teams. It is a prequalification check.
34 Remember with Sentinel, Sentinel is not specifically about training provision. Sentinel is a

1 full end-to-end process about people's skills and competence, and it goes out to 100,000
2 people across the industry. In the risks bit, that's where we identify, within that pre-
3 qualification of whether that company can work on our infrastructure or not, is whether we
4 determine whether they need to work within the Sentinel rules for access to the rail
5 infrastructure, or whether they operate in what we call the high street environment. So if
6 they are building a car park or something they don't need to comply with all those particular
7 levels of rigour and they don't get subjected then to the RTAS and all those other bits and
8 pieces.

9 Q. As I understand it, Mr. Wilmshurst-Smith -- I don't want to cut off your evidence unduly but
10 if you could keep your answers short, it would assist us to get through the rest of today -- is
11 this right, it is an industry-wide requirement for anyone, broadly speaking, who is in the
12 supply chain in the rail industry?

13 A. Risks?

14 Q. Yes.

15 A. I believe it is, yes.

16 Q. Is it right to say that one of its main focuses is track worker safety?

17 A. I don't believe that it is. But I'm not an expert on the risks. My understanding is that it is a
18 pre-qualification check to see that it is a viable company and that was my understanding.
19 But you would need to ask someone from our procurement teams to qualify that.

20 Q. Am I right to understand that it is overseen by the RSSB?

21 A. Yes, I think so.

22 Q. Now, that's the Rail Safety Standards Board?

23 A. Yes.

24 Q. So I understand you said you don't quite know what its focus is but I think we could
25 probably infer from that that it has something to do with safety?

26 A. Not necessarily. I do not think that's a direct link. I go back to my original point. My
27 understanding is that that it is a pre-qualification check, so that when we contract with a
28 company we know they are going to be in business and they are viable.

29 THE PRESIDENT: They are viable in what sense: financially?

30 A. I think there is a combination of things, that they have systems in place to operate
31 competently as a business but I'm reaching the limit of my expertise here on that, I'm
32 afraid.

33 MR. JONES: Can we just look at one of their audits. It is one example. It is in bundle 1, tab 4,
34 page 162. This is a very short document, so there is a limit to what one can draw from it,

1 but this was the one, or one of the ones which UKRS was subject to. But one sees from
2 page 163 there are various headings there.

3 A. Yes.

4 Q. I wonder, you can't draw from that that it is just about seeing whether the company is
5 viable. They are very summary headings but none of them seem to be about financial
6 viability or anything of that nature.

7 A. That would seem to be the case, but I'm no expert on it. The fact that what I see here in the
8 Sentinel module -- and bear in mind that Sentinel also covers medical, drugs and alcohol,
9 and so on -- that this is about had they -- as I understand it, it is about are they now aware
10 they need to join that assurance system?

11 THE PRESIDENT: This audit wasn't about medical and drugs, not applicable, I think.

12 A. No, but what I was referring to was Sentinel overall covers that full breadth of things, that's
13 all.

14 THE PRESIDENT: On page 165, where they are listing what was found on the audit, it says "the
15 RRS documentation viewed", and it is picking up some failings. What is RRS
16 documentation?

17 A. I really don't know, sir.

18 MR. JONES: Just one final question. I noticed in one of the document that is within the Sentinel
19 process there are two auditing processes: one is the auditing of training providers and one is
20 the auditing of medical assessors; is that right?

21 A. I believe so. That is handled -- so I look after the training provision stuff. The medical
22 stuff is handled by the medical teams within the safety branch of Network Rail. So, again,
23 you would have to ask them.

24 Q. It is only one question: are you aware of who does that auditing?

25 A. I'm not.

26 Q. So if I suggest to you that it is Achilles, you have no knowledge of that?

27 A. I don't have a knowledge of it but if what they require is a simple tick in the box, then that
28 would be fine.

29 MR. JONES: Thank you, I have no further questions.

30 THE PRESIDENT: Mr. Wignall any re-examination?

31 MR. WIGNALL: Yes, thank you.

32
33
34

Re-examination by Mr. WIGNALL

1
2 MR. WIGNALL: You were asked about your witness statements and you told us that an
3 electronic version went on it, as far as you are aware. Is there anything in that document
4 which isn't your own evidence?

5 A. No.

6 Q. It is dated 16th September 2016. Did you go on holiday at all at around that period?

7 A. Blimey. Yes, I was. Around about that time I was heading off on holiday shortly after that,
8 I think, that's when I went to --

9 THE PRESIDENT: It probably feels a long time ago now.

10 A. It certainly does, yes. It was, I have had a funny old week. So, yes, I think I was away two
11 weeks in Cornwall, walking the south-west coast path.

12 MR. WIGNALL: What day did you set-off for Cornwall, do you remember?

13 A. No, I was going to a party of a commando friend of mine.

14 Q. You were asked about the possibility of somebody being at NSAR and then setting up their
15 own outfit to undertake auditing. If that person went off and set up on their own is there
16 anything they would lack that you would expect them to have or be useful for the process of
17 RTAS and assurance?

18 A. I think -- absolutely. I think what we have been trying to achieve with our ambition with
19 NSAR is something that is really quite unique. We are wanting expertise in how to audit,
20 we are wanting expertise on rail industry business, but we are also wanting a cross sector
21 expertise on picking up practice from other industries.

22 In our work with NSAR to constitute them in the right way that's exactly what we have been
23 working on to achieve. I guess it is -- our ambition is really to lift this up and make it a
24 mature understanding of improving the productivity as well as the safety of the industry.

25 Q. Would you have any concerns about a private individual at home in front of their computer
26 doing some research to help out with that? Does that fulfil the model?

27 A. No, we wouldn't -- this is a sophisticated business. It would have to be run professionally.

28 Q. You gave us some figures, you said since 2009 there have been 162 investigations in respect
29 of 112 providers. Are you able to break that analysis down to tell us when most of those
30 investigations took place? Did they take place in 2009 or 2015 or -- could you break that
31 down at all?

32 THE PRESIDENT: I wasn't quite clear, sorry to interrupt you, was that between 2009 and to
33 date?

34 A. Yes, it is.

1 THE PRESIDENT: Sorry, Mr. Wignall. Yes, the 162, you were asking questions.

2 MR. WIGNALL: Are you able to break that down a little to tell us when they took place.

3 A. No, I couldn't. There has been a constant dribble of them, if you like, because of the way in
4 which whistleblowing works. But actually we probably picked up more in recent years.
5 What we seem to have, I'm really glad to say actually, is more in the recent -- as we have
6 improved the quality of the assurance system and made it more sophisticated, we are
7 picking up other indicators, other than just the straightforward tick box. That's allowed us
8 to carry out subsequent investigations, and we are picking up on the numbers, and it is
9 coinciding with an increase in whistleblowing and the sort of overall credibility of the
10 whole training provision process.

11 Q. Since 1st January 2016, are the investigations carried out by Network Rail or by NSAR?

12 A. They have been carried out by NSAR.

13 Q. Before 2016, were they carried out by Network Rail or NSAR?

14 A. NSAR, I think. I'm not -- we have been involved in some investigations with the BTP.
15 When it is involved in criminality, some of the deep expertise on the specific railway
16 competencies, I have got people who write those competencies and really understand them.
17 But I think when you described this as it is us or NSAR, that's, again, slightly missing the
18 point because us and NSAR, in this respect, are the same creature.

19 Q. Did Achilles carry out investigations, can you help me?

20 A. Do you know what, their involvement was when I was first in the company and I really
21 cannot recollect the details of that hearing.

22 THE PRESIDENT: You came in November 2010?

23 A. In 2010. The rail industry is a complicated place and you are a rabbit caught in the
24 headlamps for the first six months.

25 MR. WIGNALL: You refer to a letter which you said set out the new upgraded system. Just to
26 make sure I understand which letter that is, could you have a look at bundle 0, please.
27 Could that be handed to you. I'm going to invite you to turn to page 94.

28 A. What was that tab?

29 Q. Bundle 0. If you would just go towards the end, it may be after tab 5, there should be a
30 page 94.

31 THE PRESIDENT: Is this in the 0000 stamp numbering?

32 MR. JONES: It is tab 5, sir.

33 THE PRESIDENT: But there are two numbers that's all. What is it -- take it this way --

34 MR. WIGNALL: If go about two-thirds of the way in you get some bold --

1 THE PRESIDENT: It is the bold numbering?
2 MR. WIGNALL: Yes. Bold large type numbers.
3 THE PRESIDENT: So this document?
4 MR. WIGNALL: It is.
5 THE PRESIDENT: Like that, Mr. Wilmshurst-Smith.
6 MR. WIGNALL: It is a letter of 16th December.
7 THE PRESIDENT: With your name correctly spelt.
8 A. Yes.
9 MR. WIGNALL: You have that at page 93, do you?
10 A. That's this one, sir, "Rail training accreditation scheme", 17th November?
11 Q. Rail planning assurance scheme.
12 THE PRESIDENT: That is 93, but I think you were asked to turn over to 94, letter of 16th
13 December.
14 A. Yes, I have seen it.
15 MR. WIGNALL: You were talking about a letter which went out referring to the assurance of
16 auditing, and you said it was a more mature version, I think. Is this the letter to which you
17 were referring us?
18 A. Yes.
19 Q. So what is significant then about A to E at the bottom?
20 A. I think what it describes is the -- our approach has expanded about creating an approach
21 that's about quality as much as it is about scraping along and achieving the minimum
22 standard.
23 Q. You were asked questions about RTAS and protocol 202, and it was suggested you to that
24 the versions you currently have are rather old. Can I remind you of the evidence of Kim
25 Millen. This is her witness statement, page 10, paragraph 47, sir.
26 Her evidence is that:
27 "NSAR has an input into RTAS and protocol 202. Currently there are interim
28 documents in place. We are discussing new permanent documents with Network Rail.
29 Since I have been with NSAR we have made numerous recommendations which tend
30 to be accepted."
31 She goes on:
32 "Proposals travel backwards and forwards."
33 Does that refresh your memory in any way about the status of RTAS and protocol 202?

1 A. Certainly. Kim -- the state of maturity that we were at that stage, what we did was hand the
2 RTAS rules across to Kim and say "Look, actually, what we want you to do -- this is as far
3 as we can get to in terms of the minimum bit, we now need you to mature those rules and
4 almost tell us what rules we need to apply".

5 Q. Can you tell us, is there another document somewhere which is under discussion or not, as
6 far as you are aware?

7 A. Not that I'm aware of. Our approach has -- this aspect where we have handed the baton
8 across to NSAR, they are now the driving seat for quality assurance across the business. I
9 no longer have a team in my training teams that look after RTAS, right? This is because, in
10 effect, NSAR are part of Network Rail in terms of delivering that approach to industry.
11 That's because their governance has a Network Rail director on their board that does this on
12 behalf of the whole industry and it is much more collaborative and business focused, which
13 is what we wanted to achieve all along.

14 THE PRESIDENT: Just so I understood that, you had a team that looked after RTAS before?

15 A. What it was: it was sat within the responsibilities of individuals who would do the contract
16 meetings with Achilles, and so on, and who were part of that broader training material
17 design piece. We have slimmed them down a bit and -- because we do not need them to do
18 that anymore.

19 THE PRESIDENT: Have any of them gone to join NSAR?

20 A. No.

21 MR. WIGNALL: So when she says we are discussing new permanent documents with Network
22 Rail, could that be somebody else with Network Rail, or would it have to be with you?

23 A. The strategy is broadly with me. So Neil and I will talk about the strategic direction that we
24 want to go to and then, having established that alignment, frankly NSAR get on with it.

25 Q. Now, you were taken to some documents in Mr. Alexander's statement, I think, and you
26 were asked about why there had been an increase in various costs. I want to ask you about
27 the costs of the system. Who ultimately determines the price of fees to auditor's assessors;
28 is that NSAR or Network Rail? Who has the control?

29 A. I'm not sure we have tested that to be honest. I would say that those prices are established
30 by NSAR. We take a view on it, we never disagreed, so we have never tested actually who
31 holds the stick on that, frankly.

32 What I do know is in the early days, I think NSAR underestimated how much this activity
33 costs, so they under appreciated the level of activity and the costs that are now in there

1 reflect both a greater level of realism about what the activity undertakes, as well as
2 reflecting the broader activity that they do.

3 I think, actually, in the early days NSAR lost money but I'm not sure.

4 Q. Could I ask you please to take hold of bundle 2. Could bundle 2 be handed to you. (Pause)
5 Tab 1A, you have the fifth witness statement of Mr. Robertson, do you have that Mr.
6 Wilmshurst-Smith?

7 A. Yes.

8 Q. You see at the first page, just so that you have an opportunity to comment on this, you will
9 see at paragraph 2, he says:

10 "In November every year, NSAR meets with Network Rail to discuss the fees which
11 NSAR is obliged to charge to recover its costs to administer the scheme. During these
12 meetings we collectively review ...(Reading to the words)... its regime."

13 It goes on:

14 "The purpose of the meeting is to inform Network Rail of the cost of administering
15 the scheme so that it can set the next year's basis of charging ...(Reading to the
16 words)... of the scheme."

17 Then he goes on:

18 "NSAR's suggestions can and have been rejected by Network Rail. By illustration
19 ...(Reading to the words)... cost of investigations."

20 Does that refresh your memory in any way about meetings you have; when are your
21 meetings?

22 A. We have very regular meetings. But we do periodically, perhaps once or twice a year, sort
23 of more formalise those meetings so that we agree the sort of cost areas, we agree things
24 like the overall level of service provision, and so on. So, yes, it is an incredibly informal
25 relationship, but we do add a tinge of formality on a regular basis, just so that we are all
26 square about who's responsible for what.

27 Q. Who fixes the fees, ultimately?

28 MR. JONES: Sir, this question --

29 THE PRESIDENT: The answer you gave to the previous question is that "The prices are
30 established by NSAR, we have never disagreed, so we have never tested who controls", as I
31 noted it down. Mr. Robertson says that the fees are set by Network Rail. Can you just help
32 about that? There is an inconsistency there.

33 A. I strongly suspect where that came from but I couldn't lay evidence to it, and that is that
34 clearly my Sentinel team deal with the detail of the fees, and so on, and if there was a

1 dispute on it that couldn't be resolved at the team level, then it would get to the conversation
2 that myself and Neil would have.

3 My direction to my team was that they weren't to allow the costs of the system, the
4 approach for assurance, to become an unreasonable burden on the industry. It had to be
5 proportionate and I left them to get on with that activity. There was nothing that I have
6 been aware of until it was mentioned here, where there was a level of disagreement that
7 was so substantial that it required elevation to sort of executive level.

8 THE PRESIDENT: Because if there had been, do I understand what you are saying, then it is
9 something you would have --

10 A. Then it would have done, yes. But we haven't had that disagreement at our level.

11 MR. WIGNALL: Thank you, sir.

12 Thank you, Mr. Wilmshurst-Smith.

13 Questions by THE TRIBUNAL

14 DR. ELPHICK: One question, if I may. In your first answer to Mr. Jones you said Network Rail
15 lacked expertise to let a good commercial contract for accreditation and auditing services.
16 So, given that lack of expertise, it is reasonable to assume that the course you actually
17 follow was perfectly sensible, working with NSAR and hopefully improving safety as a
18 result of that. But it all seems to hinge on the fact that there was a lack of expertise. Had
19 you had that expertise, is there any reason to think you would not have been able to have
20 had a contract with a for-profit organisation which would have worked as well?

21 A. I think -- in theory, I think that's the case. If we had really understood our business and we
22 had had that breadth of understanding, yes, of course I think -- after all we let contracts for
23 all sorts of things, but the -- I do not think there's anything that can't be contracted, but here
24 what we were talking about was a journey that we were on where we had reached the limit
25 of what we could do knowingly, and I feel confident that in the distant future, right, there
26 will come a time where we have an assurance regime in the industry that is good and we
27 could, at some point, contract it. But we are not there yet.

28 We are still seeing a discord between what we achieve in assurance and what we are getting
29 out of whistle-blower investigations, and so on, until I get that alignment and am confident
30 that the criminal and sort of disproportionate behaviour that we are seeing within the supply
31 chain is settled, at that point, then I would feel confident that we were at an stage where we
32 could move it into the profits sphere, if you like.

33 DR. ELPHICK: Thank you.

1 MS. DALY: I just want to make sure things are clear in my mind. We were taken to the contract
2 between Network Rail and Achilles and went to the list of activities in an annex. I think I
3 heard you say: contracts are full of words, what basically happens in real life is different.
4 Was that basically what you were trying to convey?

5 A. Yes, and I actually rather hoped that's the case because, you know, we always believe the
6 contracts are for dark days and actually your relationship with contractors should be one
7 that is one where you are not relying on the contract every day to do your business.

8 MS. DALY: That list of schedules had a lot of things which I, in my language, would call
9 "enrichment". It didn't seem to be happening for Achilles, is that right; they were not
10 providing those things?

11 A. We certainly weren't detecting it and, again, it comes back to that point, what we were
12 seeing from our relationships in reporting back wasn't being reflected through the volume of
13 whistleblowing activity that we were getting on the ground.

14 MS. DALY: So the contract as it was written wasn't really being executed to the spirit --

15 A. As far as we could tell.

16 MS. DALY: Then I have one other question, in your witness statement, if I can find it, I think
17 there is a -- maybe it is in paragraph 4 --

18 THE PRESIDENT: That's bundle 5.

19 MS. DALY: Sorry, bundle 5, paragraph 4.

20 THE PRESIDENT: Tab 3.

21 MS. DALY: Paragraph 4, I think it is on page 2, by my pagination. Of course, it is a matter for
22 the Tribunal, for our legal interpretation, but:

23 "So far as I'm aware, Network Rail has never intended that any RTAS assurance
24 provision should be undertaken for profit driven motives."

25 Just square that with the service that Achilles was doing for you?

26 A. I think there is a difference between the pragmatism for us being able to carry it to a level of
27 activity and our ideals.

28 We don't see assurance by itself as something that should be done for a profit driven
29 activity. What we wanted to do is to be more idealistic than that, if you like. It is about
30 lifting up quality and ensuring that the standards are met. So I acknowledge that you can do
31 it for a profit but it is not what we set out in our vision.

32 MS. DALY: My last question, and this is in William Alexander's statement, which I think is
33 bundle 3, tab 3, page 27. It is paragraph 128. In the last part of that paragraph, I was just
34 hoping you would help me understand, it says:

1 "Tribal were paid a fixed fee per inspection carried out. The contract was structured
2 in such a way as the maximum expenditure with Tribal was incurred in 2012 and the
3 subsequent years had the possibility of reducing payments to Tribal whilst NSAR
4 maintained the same level of income potentially increasing the surplus from the
5 accreditation scheme."

6 Just talk to me about what that really means because I'm not sure I understand the flow of
7 monies?

8 A. To be honest, I have absolutely no idea, it makes no sense to me whatsoever.

9 THE PRESIDENT: Are there any questions arising out of that? Mr. Wignall?

10 Further re-examination by Mr. WIGNALL

11 MR. WIGNALL: I would like to ask a question arising out of that but, sir, if you think that it is
12 beyond the normal remit, especially given the timetable, then please stop me.

13 THE PRESIDENT: If it arises out of an answer just given and relates to that you are entitled to
14 do that.

15 MR. WIGNALL: Mr. Wilmshurst-Smith, do you have bundle 5 with you please? I need 5 and 4.
16 In 5 it is tab 7.

17 THE PRESIDENT: We don't, what is it?

18 MR. WIGNALL: 406. It should be the contract, again.

19 THE PRESIDENT: I think it is at 5 in our bundle, near the end. Page 406.

20 MR. WIGNALL: That's the Network Rail Achilles contract. Could you have that, but could you
21 also have bundle 4, behind the tab I have, I have the Network Rail NSAR contract.

22 THE PRESIDENT: This is bundle?

23 MR. WIGNALL: I have that in 4.

24 A. Sorry, whereabouts?

25 MR. WIGNALL: Bundle 4, I would like you to turn to tab 1, please. Behind that there should be
26 the contract between Network Rail and NSAR; do you have the two?

27 A. Okay, yes, I think I do.

28 Q. In respect of the Achilles contract, you were asked questions by Mr. Jones and Ms. Daly, I
29 think, about what is on page 441, which are the various bullet points.

30 You were asked about the language and the nature of the exercise. Do you remember those
31 questions?

32 A. I believe I do.

33 Q. It is a little bit difficult to do, I'm afraid, because the other contract, the contract with
34 NSAR, is not paginated. But if you go into that, if you look -- perhaps you can help me

1 with this, I think you will find these various bullet points at page 441 do not appear in the
2 NSAR contract.

3 In the NSAR contract, did we have the document which is towards the end of tab 1, which
4 is prepared by Mr. Alexander, in fact, called "Schedule 1, part B". Is that the framework?
5 Can you find that? The framework is the last document which runs to 31 pages. It begins
6 page 1 of 31, and then goes on.

7 THE PRESIDENT: If you work backwards from the end of that tab and go to 1 of 31.

8 A. Got you. Where do you want me to go to in that?

9 MR. WIGNALL: If you go to 1 of 31, this is schedule 1, part B, inspection framework, July
10 2011, prepared by Bill Alexander. We will see this sets out on page 2 of 31 "Overall
11 effectiveness", and so it goes on. Is that something that was attached to the Network
12 Rail/NSAR contract for going forwards from the beginning of 2012?

13 THE PRESIDENT: Sorry, what we are looking at here is what's been disclosed by your client as
14 the contract; is that right?

15 MR. WIGNALL: Yes, that's as I understand it.

16 THE PRESIDENT: That's this whole document in tab 1 including --

17 MR. WIGNALL: Yes.

18 THE PRESIDENT: So that is the contract.

19 MR. WIGNALL: That's as I understand it.

20 THE PRESIDENT: Then what was your question?

21 MR. WIGNALL: Yes. If you look at the schedule 1, part B, was that new in the contractual
22 arrangements, can you remember? If you can't remember, maybe we can try and look at it
23 later.

24 A. I really can't remember that specific. I know that we expanded and broadened. This was
25 the start of our journey of broadening the assurance service, and we had so many iterations
26 in between. This is the whole thing. It changes in the actual reality of the service almost
27 every day and that's the whole point.

28 To be honest, 2011. I would be honest --

29 MR. WIGNALL: Thank you very much. Thank you, sir.

30 THE PRESIDENT: Thank you very much Mr. Wilmshurst-Smith, you are released.

31 Give us just a moment to put everything back.

32 Closing submissions by Mr. JONES

33 THE PRESIDENT: Yes, Mr. Jones.

1 MR. JONES: Sir, could I start with the basic test as to what is an undertaking. My authorities
2 bundles are numbered 1 to 3; are the Tribunal's numbered in the same way? If they are, I
3 would like bundle 3 please, authorities volume 3.

4 This is the Hofner and Elser case that one sees referred to in many of the later cases. It
5 concerned a statutory body which had a monopoly for recruitment.

6 THE PRESIDENT: You are in tab 6, yes?

7 MR. JONES: Tab 6.

8 A German statutory monopoly to conduct employment procurement activities. We can go
9 straight to the test. It is at paragraph 21 of the judgment. So the judgment follows from the
10 opinion at the start. It is page 333 in the top corner.

11 One sees 21 is the test that gets repeated over and over:

12 "It must be observed in the context of competition law, first that the concept of an
13 undertaking encompasses every engagement ...(Reading to the words)... the way in
14 which it is financed."

15 Secondly:

16 "Employment procurement is an economic activity."

17 22:

18 "The fact that procurement activities are normally entrusted ...(Reading to the
19 words)... carried out by public entities."

20 So that's the court's reasoning and they say that, therefore, it is an undertaking, even though
21 it is a statutory monopoly. Of course, there the distinction being drawn is public entities, on
22 the one hand, and non-public entities, on the other hand. The question of non-profit entities
23 has come up in a couple of places but, firstly, in tab 8, it is called Albany.

24 Albany is a case which concerned a pension fund, so there was a compulsory pension fund
25 into which, in this case, workers and employers in the textile industry had to pay
26 contributions. This forms part, really, of a series of cases dealing with social entitlements
27 and so a lot of the discussion in this case is rather niche and I don't want to bog the Tribunal
28 down too much with that. But I need to pick up a couple of points, because it feeds into the
29 broader point about not-for-profit organisations.

30 If one looks firstly in the opinion, page 513. This is Advocate General Jacobs. Paragraph
31 306:

32 "At issue is whether the Dutch sectoral pension funds are undertakings."

33 At 307, there is a list of features. You will see the last one is that the fund is non-profit
34 making. He then, in 311, says:

1 "As already stated, the court has generally adopted a functional approach. The basic
2 test is therefore whether the entity in question is engaged in an activity which could, at
3 least in principle, be carried on by a private undertaking in order to make profits."

4 That, as far as I can see, is the first time that what was previously referred to as whether a
5 public body necessarily has to carry it out is now essentially asking whether a non-profit or
6 public body has to carry it out.

7 That's where the case law moves on. He then draws the distinction a few pages on, at
8 paragraph 338. This is where one sees the essential line which is drawn -- in these cases
9 concerning social security funds, there is a line drawn. First:

10 "In light of the FSSA judgment ...(Reading to the words)... by the state."

11 You will see he goes on to say, in a similar way, meaning here could be non-profit, but:

12 "I cannot see any even theoretical possibility that without state intervention ..."

13 So he is posing the theoretical question, could this theoretically be done by a profit-making
14 enterprise? Where current contributions finance the currently retired he says, no. Then he
15 goes on to say at the bottom of this page, if you pick it up:

16 "By contrast, it is clear that the market has generated pension schemes operated on the
17 basis of the capitalisation principle."

18 That was the case in the fund in question and that was why it was held to be an undertaking.
19 So that is the line which is drawn and it is a theoretical question which the court needs to
20 ask.

21 The court addresses this on page 558. You will see at paragraph 81 there is reference to the
22 principle of capitalisation. Now, the court doesn't itself pick up on the Advocate General's
23 test, whether it could in principle be carried on by a profit-making enterprise. That's picked
24 up in the case I will come to next. The court here doesn't pick that up, but it is essentially
25 the approach they are applying. They talk there about the principle of capitalisation.

26 If one goes down from 85:

27 "The fact that it is non-profit making is not sufficient to mean it is not an
28 undertaking."

29 86:

30 "The pursuit of the social objective could render it less competitive but essentially that
31 also makes no difference."

32 The court concludes it is an undertaking.

33 The court's endorsement of the test comes in the next case at tab 12. This case concerned,
34 among other things, where non-profit bodies like the German Red Cross, which provided

1 ambulance services, were undertakings and, again, it is Advocate General Jacobs and we
2 can pick his opinion up on page 743.

3 At paragraph 67 he says:

4 "It will be recalled for the purpose of community competition law ...(Reading to the
5 words)... be carried out by a private actor in order to make a profit."

6 So at least in principle. What he is actually citing is himself for there in the footnote, in
7 Albany, which we have just been to.

8 68 is interesting because, again, he is asking this theoretical question:

9 "Could it be carried out by ...(Reading to the words)... emergency transport services.
10 Nothing suggests that the nature of either of them must necessarily be carried out by
11 public entities."

12 69:

13 "That conclusion is not affected by the legal status of the medical aid organisations
14 ...(Reading to the words)... in the public interest."

15 The test that I said was endorsed by the court is at paragraph 20, page 770.

16 THE PRESIDENT: The rest of 69 is perhaps interesting. In the Advocate General's opinion,
17 services in the public interest.

18 MR. JONES: Yes.

19 THE PRESIDENT: Then in the judgment --

20 MR. JONES: It is in the judgment at 20. It is not quite as clear, perhaps, as in the Advocate
21 General's opinion.

22 THE PRESIDENT: That's often the way.

23 MR. JONES: Paragraph 20, page 770. It says:

24 "Such activities have not always been and are not necessarily carried on by such
25 organisations or by public authorities."

26 That appears to mean by non-profit making organisations.

27 THE PRESIDENT: Yes, he does say -- or the court says that activity is carried out on a market --

28 MR. JONES: Yes, they are carried out on the market.

29 THE PRESIDENT: -- on a particular market, a market for emergency transport services and
30 patient transport services.

31 MR. JONES: That then is, in my submission, the basic test whether the service could be carried
32 out for profit. All of those three cases that we have just looked at of course involved public
33 policy issues of one type or another: statutory monopoly, recruitment, pension fund in the
34 public interest, the ambulance service, and so forth, but they were all undertakings.

1 The question which then arises is: well, in what certifications can the public or
2 administrative nature of an activity take it outside the scope of an economic activity?
3 For that, we need to go to bundle 2, please, authorities 2, at tab 6. This is the first of two
4 cases concerning EuroControl.

5 EuroControl is a body established by a convention, so between signatory states, with
6 functions relating to the regulation of air space. You will see, if you look over the next
7 page, 209, the summary just -- the first indented paragraph, but underneath that:

8 "EuroControl is an international ...(Reading to the words)... charges levied for those
9 services."

10 This case arose out of that collection of charges function. The question was whether, in
11 collecting charges, it was acting as an undertaking.

12 If we could go straight to the judgment at page 221. The first point just to note is that at
13 paragraph 4 makes clear:

14 "In accordance with article 2.1.1 of the amended convention, EuroControl's function
15 is in particular to establish and collect the charges levied on users of their navigation
16 services, in accordance with the multilateral agreement on behalf of the above
17 mentioned contracting states."

18 So the very function that was in issue here was one which it had been given under a
19 convention. It wasn't a different function that it was somehow exercising.

20 Over the page, 223 -- in fact, if we could turn first to the end which is 225, paragraph 30,
21 just to show you what the test is.

22 The essential test which the court applies is at paragraph 30:

23 "Taken as a whole, EuroControl's activities, by their nature, their aim and the rules to
24 which they are subject, are connected with the exercise of powers relating to the
25 controlling supervision of air space, which are typically those of a public authority."

26 So its conclusion is that it is not an undertaking. That's the telescoped reasoning. But one
27 does need to go back and unpick precisely what that means. The nature, the aim and the
28 rules. If one then turns back to paragraph 19:

29 "In order to determine whether EuroControl's activities are those of an undertaking
30 within the meaning of 86 and 90, it is necessary to establish the nature of those
31 activities."

32 So the nature of the activities; what it then immediately goes on to say -- the court -- at 20
33 is:

1 "Under article 1 of the convention, the contracting states recognise that every state has
2 complete and exclusive sovereignty."

3 It is the exercise of that sovereignty that states ensure the supervision of their air space.

4 Then 21:

5 "According to the convention establishing it, EuroControl is a regionally orientated
6 international organisation, whose aim is to strengthen co-operation between the
7 contracting states in the field of ...(Reading to the words)... civil and military
8 authorities."

9 So when asking itself the question of what's the nature of these activities, the first answer is
10 goes to is that they arise out of a convention. They arise out of a convention which is
11 concerned, yes, with safety but in a context where, of the highest state significance, it is
12 difficult to think of a context of greater sovereign significance than control over air space
13 which, as it says here, includes, for instance, defence considerations.

14 You will see at 22 the tasks include research planning coordination, and so on. 23:

15 "EuroControl is competent to establish and collect the route chargers."

16 You will see at the end of that paragraph just again to reiterate:

17 "The charges are collected on behalf of the contracting states, to which they are paid
18 over after a deduction corresponding to the administrative rates."

19 24:

20 "The operational exercise of air navigation control is limited, since EuroControl can
21 only carry on that activity at the request of the contracting states."

22 You will see halfway in that paragraph:

23 "EuroControl is vested with rights and powers of coercion which derogate from
24 ordinary law and which affect users of air space. In exercising these particular powers
25 it must ensure compliance with international agreements and national rules ...(Reading
26 to the words)... of the contracting states."

27 26, you will notice that the activities are financed by contributions of contracting states.

28 27, just reiterates it thus carries out, on behalf of contracting states, tasks in the public
29 interest.

30 Then at 28:

31 "Contrary to SAT's contention, EuroControl's collection of route charges cannot be
32 separated."

33 Those charges are merely the consideration payable by users for the obligatory and
34 exclusive use of air navigation. It is the end of that paragraph:

1 "EuroControl must, in collecting the charges, be regarded as a public authority."

2 So those are the considerations which lead to that conclusion in paragraph 30.

3 The next EuroControl case --

4 THE PRESIDENT: Can I stop you just to inquire how we are doing because, of course, we have
5 now reached 1 o'clock. On the timetable, as you know, we were supposed to have started
6 at 11, of course you started at 12.45, and were allowed, I think, two hours each, which
7 creates some problems.

8 I don't know if you have had a chance to consider with Mr. Wignall how we proceed? We
9 can go on, as I say, to 1.15 or 1.20, but we obviously need a break. When do you think you
10 will finish?

11 MR. JONES: Sir, if we go until 1.15 I will use the break to see what further I can cut from my
12 remaining submissions. It may then be that we pick that up after lunch and I can have a
13 discussion with Mr. Wignall.

14 THE PRESIDENT: As I say, we have to stop at 4.45 pm.

15 MR. JONES: Yes.

16 THE PRESIDENT: We can do a bit of reading of authorities afterwards, if you give us
17 references. I appreciate you, and maybe Mr. Wignall, want to take us to certain cases, and
18 the law is obviously important here. We are dealing with a legal term, undertaking, which,
19 as you have started to show us, has quite a lot of case law.

20 So let's do that then, we will go to 1.15 pm, which will enable us to do EuroControl 2 and
21 see what you come up with. So that is where --

22 MR. JONES: That is in bundle 3, at tab 17.

23 THE PRESIDENT: I think it might be better -- I have been asked to have a break for the
24 transcriber. Should we stop now and come back early, would that be better? It doesn't make
25 sense to have a five-minute break now and then come back.

26 We will stop and come back at 1.45 pm.

27 (The short adjournment)

28 THE PRESIDENT: Yes, Mr. Jones?

29 MR. JONES: Sir, we are agreed that if I wrap up by 3 o'clock, it gives time for a short break, Mr.
30 Wignall until 4.30 pm, if necessary, and that would still leave 10 or 15 minutes for a reply.

31 THE PRESIDENT: Yes.

32 MR. WIGNALL: Sir, I have said to my learned friend that he shouldn't -- as far as I'm concerned,
33 he shouldn't consider 3 o'clock a guillotine, if he wants to stop some time either side of
34 3.00, then I'm quite content. Thank you.

1 THE PRESIDENT: It is important, you know, that you are not cut short.

2 MR. WIGNALL: Yes, thank you.

3 THE PRESIDENT: Yes, we just opened the Selex case at authorities 3, tab 17.

4 MR. JONES: So over on page 1084, which is the second page, you will see the summary and the
5 background, picking up halfway through that paragraph describing what the court of first
6 instance, the CFI, did:

7 "The CFI drew a distinction to the relevant activities in which EuroControl was
8 involved ...(Reading to the words)... and the third, assisting national administrations,
9 was an economic activity."

10 And that EuroControl was an undertaking in that respect, so that was a task that hadn't been
11 considered in the first EuroControl case that we looked at, and the CFI said that that was an
12 economic activity.

13 The court here, on appeal from the CFI, disagrees and holds that, actually, they are all part
14 and parcel of the same function and they are all public activities, none of them are economic
15 activities.

16 The reason for that, if we can pick it up in the court judgment, paragraph 73, just a few
17 pages from the end, it is essentially applying the exactly the same reason we saw in the first
18 EuroControl case. Paragraph 73:

19 "It is apparent from article 1 of the convention that, in order to achieve harmonisation
20 and integration ...(Reading to the words)... for defence needs."

21 74:

22 "To that end, under certain articles, the functions of EuroControl include to adopt and
23 apply common standards and specifications to harmonise ...(Reading to the words)...
24 encourage common procurement."

25 Then this at 75:

26 "Article 2.2(a) of the convention provides that EuroControl may, at the request of one
27 or more of the contracting parties and on the basis of special agreements, assist such
28 contracting parties in the planning, specification and setting up of air traffic systems
29 and services."

30 Now, that's the basis of the power underlying the function at issue in this case. So the
31 assistance which they provided, which was said to have been by the court of first instance a
32 separate function, also derived from the convention. So their power to give that assistance
33 came from the same convention.

34 That's why at 76, it says:

1 "It can be inferred from the convention that the activity of providing assistance is one
2 of the instruments of corporation entrusted to EuroControl by that convention
3 ...(Reading to the words)... attainment of the objective."

4 Over the page, just at the end of that paragraph, you will see:

5 "It is therefore closely linked to the task of technical standardisation entrusted to
6 EuroControl by the contracting parties in the context of co-operation among states,
7 with a view to maintaining and developing the safety of ...(Reading to the words)...
8 exercise of public powers."

9 You will see, as I said, it's essentially exactly the same logic as was applied in the first case.
10 It is closely linked, why is it closely linked? Well, the power derives from the same
11 convention and the purpose of the power is to pursue the same objective.

12 So those are the EuroControl cases. There are a couple of other cases on public powers or
13 state powers. The first one I won't go to because of the time but could I just give you the
14 reference. *Diego Cali v Port of Genoa*, which is in bundle 3, at tab 7, is another case
15 concerning a statutory function, so that case concerned anti-pollution surveillance, so
16 watching over a port to ensure that it isn't polluted, essentially. It was a statutory function
17 which the port authorities had and which they had delegated to a private body, although the
18 act of delegation was also in fact a piece of legislation by decree.

19 The same test is applied there and the same factors are relevant. It is a legislative body and
20 the function that was carried out was held there to be not economic.

21 Really, the only additional point in that case is that it didn't, on the facts, make any
22 difference -- once they had a public power, the fact that it was then appointed to a private
23 company didn't change its nature in that case. That's *Diego Cali*.

24 *Wouters* is the next case I want to turn to, it is in authorities bundle 2, at tab 11.

25 This is a case concerning the Dutch bar, and a rule which prohibited members of the Dutch
26 bar from practising in partnerships with accountants. So the Dutch bar association had
27 prevented members of the bar setting up partnerships with accountants.

28 There was a challenge to that rule. Now, the first question which arose was whether the
29 members of the bar, such as the barristers, were undertakings, because it was said that the
30 bar association was an association of undertakings.

31 If one turns to page 995, this is in the judgment, paragraph 48, the discussion is: are
32 barristers undertakings? One sees at paragraph 48:

1 "Members of the bar offer for a fee services in the form of legal assistance consisting
2 in the drafting of opinions ...(Reading to the words)... must bear the deficit
3 themselves."

4 This that then is the essential reasoning as to why they are undertakings and I draw that to
5 your attention because, as I mentioned in opening, my learned friend places some emphasis
6 on the notion that an undertaking is, as it were, by definition, something which takes
7 financial risks.

8 I think that he draws from paragraph 48 to support that contention. But, as I have shown
9 you, the test is whether in principle the activity could be done for profit and all that's being
10 said here in 48 is essentially a question of proof. If it is, in fact, being done for profit, well
11 then of course in principle it could be done for profit. So the court isn't here setting any
12 different rule or any different test, it is simply observing that it was, in fact, done for profit
13 and they are therefore undertakings.

14 I wanted to pick up on a slightly different issue in this case, which is the question of
15 whether the Dutch bar association, in imposing regulations, is exercising a state power and,
16 for that, one sees at 51:

17 "The respondent in the main proceedings claims that, in as much as the Dutch
18 legislature created the Dutch bar as a body governed by public law and gave it
19 regulatory powers to perform a task in the public interest, it cannot be regarded as an
20 association of undertakings, especially in connection with an exercise of its
21 regulatory powers."

22 That was the argument.

23 THE PRESIDENT: That was the association of undertakings?

24 MR. JONES: That is association of undertakings.

25 THE PRESIDENT: Isn't the relevant question 3 in the judgment, at 1004? The third question
26 asks essentially whether the Dutch bar is to be treated as an undertaking. Question: this is
27 about the association of undertaking.

28 MR. JONES: Yes, that is right, sir. Although the reason why it is not an undertaking in question
29 3 is because it isn't engaging in an economic activity.

30 THE PRESIDENT: Yes. Well, that --

31 MR. JONES: But the question -- sir, that was common ground, in fact. That, we may need to
32 look back in the judgment. It was common ground in this case that they were not engaged
33 in economic activity.

34 THE PRESIDENT: There seems to be a question asked by the national court.

1 MR. JONES: If one looks back to the questions at page 993, you will see question 3 there.

2 THE PRESIDENT: Yes, I see. What they are saying is if it is an association of undertakings,
3 does that make it an undertaking?

4 MR. JONES: Yes, so they are asking a question which doesn't arise here. So question 3 is: if it is
5 an association of undertakings, does that mean it is an undertaking, even if it is not engaged
6 in economic activity?

7 It is common ground that it is not engaged in economic activity and that's why the answer to
8 question 3 is: no, you need to be engaged in economic activity.

9 THE PRESIDENT: Yes.

10 MR. JONES: So that's question 3. But what comes up in the earlier question, 1(a), in relation to
11 whether it is an association of undertakings, it arises in a different context, I accept, but the
12 approach is the same when one is asking: are these functions public or state functions? The
13 answer to that question must be guided by the same approach, whether you are asking it in
14 respect of an undertaking or an association of undertakings. So that is why I go to these
15 passages. That's where one sees at 57 the principle of law which has been developed, as we
16 have seen in the context of the undertaking cases, not association of undertaking cases:

17 "So according to the case law, the rules don't apply to an activity which by its nature
18 ...(Reading to the words)... sphere of economic activity."

19 Then at 58, you will see:

20 "When it adopts regulation, such as the regulation in question, a professional body,
21 such as the Dutch bar, is neither fulfilling a social function ...(Reading to the words)...
22 the practice of which constitutes an economic activity."

23 It is very similar here, of course, acting as the regulatory body, essentially, of training
24 providers.

25 Then in, in the next paragraph:

26 "In that respect, the fact that article 26 entrusts the general council with the task of
27 protecting the rights and interests of the members of the bar can't exclude that
28 organisation from the scope of the treaty, even where it performs its role of regulating
29 the practice of the profession."

30 That's the essential reasoning. There are then, as you see in 60, other indicators which
31 support this conclusion, and they are less important, but at 61:

32 "Governing bodies of the bar are composed from members of the bar."

33 62, doesn't have to adopt measures by reference to specified public interest and criteria.
34 63, because of the context it doesn't fall outside the sphere of economic activity.

1 THE PRESIDENT: So what you are saying, if I have understood this from this case, the fact that
2 it is a regulatory body, regulating people who are undertakings doesn't make it a public
3 authority outside the field of competition, albeit it doesn't conversely necessarily make it an
4 undertaking, because you have to look and see whether it itself carries on an economic
5 activity --

6 MR. JONES: Absolutely. I will come onto that latter question in a moment.

7 THE PRESIDENT: -- which is question 3.

8 MR. JONES: Which is question 3, which is different to what it is. Yes, that is what I'm saying.
9 Of course, in Wouters the context was a statutory body. So, in a sense, the argument in
10 favour of concluding that it was a public body was even stronger in Wouters than it would
11 be here, because you start from the point of view that you have a body set up by statute. So
12 that is Wouters.

13 I do now intend to turn to the related question of: what does it mean to be offering a service
14 or providing a service on a market and what do the cases say about that, particularly if a
15 regulatory context?

16 For that, could I start please with British Leyland, which is in the first bundle of authorities,
17 tab 6. British Leyland concerned parallel imports. So there were companies which looked
18 to import right-hand drive vehicles, Metros, from the continent and convert them and sell
19 them here, and because of a price difference between the countries this was an attractive
20 thing to do. If they wanted to do that they would have had to obtain a certificate of
21 conformance from British Leyland or at least information from British Leyland to enable
22 them to acquire permission to import the vehicles.

23 The case concerned, in part, that issue of certificate of conformity. British Leyland was
24 required by statute to issue a certificate, as it happens, but one sees on the first page that, at
25 the bottom of that page:

26 "By decision dated 2nd July 1984, the Commission found that British Leyland had
27 infringed article 86 by (1) refusing to issue certificates of conformity in accordance
28 with section 47.5 of the Road Traffic Act 1972 ..."

29 So that was the complaint. They were essentially not providing the certificates. If one
30 picks it up in the Advocate General's report first, which is at page 141, at G, you will see
31 how the argument was put by British Leyland. British Leyland argues that:

32 "The issue of certificates of conformity cannot be regarded as a market. It is
33 fulfilling a function arising under public law imposed by legislature ...(Reading to the
34 words)... in light of article 30."

1 In any event, you will see in British Leyland's view:

2 "The Commission's separation of the decision to issue certificates ...(Reading to the
3 words)... vehicles is artificial."

4 So that was British Leyland's position. It is discussed by the court at page 163. At
5 paragraph 3, the court says:

6 "It is necessary to establish the relevant market."

7 They describe at 4 the issuing of the certificate of conformity or the fact that information
8 needs to be provided.

9 Then at 5:

10 "In light of those rules, the relevant market is not that of the sale of vehicles, as BL
11 claims, but a separate ancillary market, namely that of services which are in practice
12 indispensable for dealers who wish to sell the vehicles manufactured by BL in a
13 specific geographical area."

14 You will see down at 9:

15 "The British rules therefore confirm on BL a form of administrative monopoly in the
16 relevant market ...(Reading to the words)... economic dependence, which is
17 characteristic of a dominant position."

18 So that was a case concerning product conformity certificates. There is then a much more
19 recent case which builds on that which I am going to have to hand up, I'm afraid, sir,
20 because it wasn't included in the bundles. (Handed)

21 This case concerned certification of a different type. It was a form of quality certification
22 that companies who essentially wanted to bid for public contracts had to satisfy. There was
23 an Italian law, you will see at paragraph 4 on page 2, a legislative decree which set the
24 framework for this certification.

25 At paragraph 1:

26 "Persons carrying out public works in any capacity must be authorised. They must
27 ensure that their activities comply with the principles of quality ...(Reading to the
28 words)... shall be subject to certification in accordance with the legislation in force."

29 So there was this rather wide reaching certification obligation and the legislation set price
30 limits so that the undertakings who were offering certification had to comply with certain
31 price limits, set by the legislation.

32 You will see there that actually how the Italian legislation worked was that it enabled
33 different bodies to compete on this market. So you could set yourself up as an SOA --
34 which I think is an Italian acronym. It is used throughout, I am not sure what it stands for,

1 but it is essentially the certification body. So you could set yourself up as an SOA and you
2 could charge for your services in certifying that various relevant standards were met.

3 THE PRESIDENT: Yes, it is the end of paragraph 2 of the judgment, what it stands for.

4 MR. JONES: Then page 8, "European competition law" is the heading at the bottom, you will see
5 at paragraph 26:

6 "In order to answer the question which was before the court, it is necessary in the first
7 place to determine whether SOAs constitute, in the context of their certification
8 activities, undertakings."

9 They then at 27 cite the standard tests that I have taken you to.

10 28:

11 "In this case, the Italian legislature introduced a certification scheme to be carried out
12 by private bodies, namely SOAs. The latter are commercial undertakings entrusted
13 with supplying certification services, the receipt of an appropriate certificate being a
14 necessary condition in order for interested persons to participate in public works
15 contracts in accordance with national legislation."

16 29:

17 "However, SOAs activities have an economic character. They issue certificates
18 ...(Reading to the words)... actual market demand."

19 That is a continuation of the logic of British Leyland. One sees British Leyland cited in 35.

20 Now, it is right to say, of course, that if one goes back to 29 -- I didn't read the next
21 sentence:

22 "Furthermore, they assume the financial risks."

23 The court goes on to say that there is a market here because the legislation has required this
24 to be done on a competitive market.

25 But, as I have already explained, those matters of themselves are not tests. They are being
26 used here in an evidential way, in the same way they were used in the earlier cases.

27 What is significant about this is the confirmation that the provision of a certification service
28 for remuneration is a service on the market. There is one more case, which is even closer,
29 but I'm afraid obiter, which is why I'm going to it last which makes the point. It is at
30 authorities bundle 3 --

31 THE PRESIDENT: This is a market in that -- I see you say provision of the certification service,
32 that can be a service but on a market. Well, there was a market because there were
33 competing SOAs.

34 MR. JONES: Yes, where there are competing organisations then --

1 THE PRESIDENT: It's pretty obvious that's a market, rather like your client is competing on a
2 market.

3 MR. JONES: That's why I say that answers the question of whether -- the question is: are they
4 providing services for remuneration? Where there's a market then one can see quite clearly
5 that they would be, and that's why I describe this as evidential, because if you look at, for
6 instance, British Leyland, it wasn't the position there and the test which is being applied is
7 not whether there is in place a competitive market. That can't be the starting point. That
8 puts the horse before the cart, according to competition law. One starts by asking whether
9 here it could be done by a profit-making company and, as part of that, you need to know
10 whether it is a service being provided for remuneration.

11 I say it is. Whether it is provided on a competitive market or not comes later. The fact that
12 something is being done competitively doesn't make it a service.

13 THE PRESIDENT: Can we put that -- find a home for it at tab 19 of authorities bundle 3?

14 MR. JONES: Yes. The final case is actually a decision of this Tribunal. It is in authorities 3, tab
15 9. This case concerns the establishment of a body called the General Insurance Standards
16 Council, which was intended to be a self-regulatory body in the insurance sector. It one
17 looks at paragraph 10, you will see that it all arises out of the GISC's identification to the
18 director of their rules. At paragraph 11, the particular rule, which was causing concern, was
19 rule F42:

20 "Members of GISC agree not to deal with intermediaries engaged ...(Reading to the
21 words)... or the appointed agent."

22 Now, there was already a self-regulatory body or organisation in this sphere and that was
23 the Institute of Independent Insurance Brokers.

24 It took objection to this. Now, the first part of the judgment is concerned with the question
25 of whether this rule restricted competition between insurance providers, essentially, and the
26 answer was that it did. If one turns to page 317, you will see that at the top of the page, rule
27 F42 falls in the chapter 1 prohibition. Then they say at 290:

28 "Having arrived at that conclusion it is strictly speaking unnecessary for us to
29 ...(Reading to the words)... GISC has set itself up as the sole provider of a regulatory
30 scheme for general insurance."

31 It was a different way of looking at the problem and the question here was it had essentially
32 infringed/restricted competition as between self-regulatory bodies. You will see at
33 paragraph 220 --

1 THE PRESIDENT: Sorry, just to help me, it is a long time since I have looked at this case. So
2 the first bit, the infringement, falls within -- was that because it was an association of
3 undertakings?

4 MR. JONES: Yes.

5 THE PRESIDENT: That's how they treated it?

6 MR. JONES: Yes.

7 THE PRESIDENT: Yes, I see.

8 MR. JONES: 220:

9 "On this part of the case, the IIIB submits essentially that the competition is restricted
10 or distorted because GISC excludes the possibility of an alternative regulatory body or
11 certification scheme for independent brokers ...(Reading to the words)... creates
12 conflicts of interests. They say this leads to a general lowering of the standards."

13 If one then turns to paragraph 232, you will see the Tribunal is there saying that a
14 potentially important means of competition, but here as between independent brokers,
15 would be for independent brokers to establish their own regulatory or quality assurance
16 scheme, by means of which they may collectively promote themselves as meeting the
17 quality standards of their own scheme:

18 "The evidence of the IIIB with regards to its attempts to launch IDRC mark 2
19 indicates the importance ...(Reading to the words)... as a means of competing. We
20 conclude that there is plainly a market for the provision of regulatory or certification
21 services to independent brokers as an alternative to and in competition with GISC."

22 Again, I say that's important because, when one asks the question of what service is there
23 being provided, it is a certification service or a regulatory service in which insurance
24 brokers are paying for the services of a regulator.

25 So that's the service and the market and if one then turns forward to the discussion on
26 whether it is an undertaking, paragraph 245, you will see that on this part of the case the
27 director didn't investigate any of the above matters and he did so because, in light of the
28 European case law, GISC's regulatory function does not constitute an economic activity
29 and therefore is not an undertaking.

30 The Tribunal says it has difficulty in accepting that starting point. At 247, this is why I say
31 the discussion which follows, which I am about to go to, is obiter because they do say at
32 247:

1 "We don't need to pursue any theoretical debate as to what are the proper spheres of
2 competition policy, since, in our respectful view, the grounds on which the ...(Reading
3 to the words)... decision by an association of undertakings."

4 So, picking it up then at 251:

5 "It is thus unnecessary for us to consider whether GISC is itself an undertaking."

6 So it was a restriction because it was an association of undertakings. It was not necessary to
7 consider whether it was an undertaking. But they add the brief comments set out below and
8 they, in 252, set out the familiar tests, in 253 go into this question of the difference between
9 public powers and official authority. I think it might be more efficient if I ask you to read to
10 yourselves 254 to 257.

11 (Pause)

12 THE PRESIDENT: Yes, so I suppose it is technically obiter.

13 MR. JONES: Yes.

14 THE PRESIDENT: It is a reasoned discussion indicating their conclusion; is that right?

15 MR. JONES: Yes. So, with that, I turn then to the facts of this case. I said in opening that there
16 were three central factual issues. I'm going to resile from that slightly because there is, I
17 think, an additional factual issue which logically comes first, which is the one we have just
18 been discussing: is NSAR providing a service for remuneration? So that would be my first
19 issue. Secondly, is the accreditation function a distinct activity? Thirdly, could the function
20 be carried out for profit? Fourthly, is it a state function?

21 Firstly, is NSAR providing a service for remuneration? Clearly it is remunerated. What's
22 the service? It accredits training providers. That's its role under the scheme.

23 I have just taken you to cases which demonstrate that certification, or this form of
24 regulation, can be a service. I just repeat my submission that the fact that it is provided by a
25 monopoly provider can't change that, that can't change the question of whether it is a service
26 or whether it is a market. That affects later stages of the competition analysis but doesn't
27 affect those critical starting points.

28 In truth, it isn't clear to me how much difference there is between myself and Mr. Wignall
29 on this because Mr. Wignall's case is that there is a contract and I looked very carefully
30 back at yesterday's transcript to see what he said was being provided under the contract and
31 he said that, in return for payment, NSAR agrees to apply the RTAS rules to training
32 providers. You will recall his suggestion was we could go to the county court to enforce that
33 obligation.

1 Now, whether that's right or not, as a matter of contract law, for today's purposes there
2 doesn't seem to me to be any real difference between those. Whether my client is paying to
3 have the rules applied to it or whether it is applying to be accredited, because of course
4 having the rules applied to it results, provided they satisfy the rules, in accreditation.

5 THE PRESIDENT: It was clear from NSAR's evidence that they don't just apply the rules, they
6 help people applying to gain accreditation, point out what more they need to do --

7 MR. JONES: Yes.

8 THE PRESIDENT: -- put on workshops, trying to get the best speakers, and so on.

9 MR. JONES: Yes.

10 THE PRESIDENT: So there are various things that they provide.

11 MR. JONES: That is right. They do provide all of those ancillary services and I think Mr.
12 Wignall put it to Ms. Millen-Stirling that they are all essentially geared towards helping
13 training providers to satisfy the rules.

14 THE PRESIDENT: Yes.

15 MR. JONES: In broad terms, that appears to be right. So, sir, there are those ancillary services. I
16 say, in any event, I don't want to hang my case too heavily on ancillary events because
17 what's really happening here is accreditation, and yes it ought to be accredited but, as a
18 matter of economics, looking at this transaction, what the training providers are trying to
19 buy is accreditation in accordance with the rules.

20 Mr. Wignall would say, yes, in accordance with the rules, that's what they are purchasing
21 and that's the service.

22 THE PRESIDENT: Well, that's the outcome, if you like, but one imagines that the providers, if
23 they put on good workshops, they appreciate workshops, they don't have to go and study
24 elsewhere or arrange for separate training for themselves to meet the standard expected of
25 them, for accreditation or an audit. No doubt, part of the reason that the costs are where
26 they are, the fees are where they are, is because of the various things NSAR does. So it is
27 all part of a package, isn't it?

28 MR. JONES: It is part of a package. It is part of a package and there are various things that
29 NSAR is doing. We did hear a list of those: workshops, meetings, assistance with any
30 problems with Sentinel, and so forth.

31 THE PRESIDENT: So it is not purely a cold audit, as it were.

32 MR. JONES: Well, it definitely isn't purely a cold audit, no. It is not only accreditation either
33 but, of course, the reason we are here is because my clients were suspended from the
34 scheme and it is the accreditation that they are interested in and so, tempting though it is to

1 put a lot of weight on these ancillary functions, I do say, properly analysed, the service that
2 my clients are purchasing is an accreditation service, yes, with all of these additional
3 ancillary services.

4 The second question is whether accreditation is a distinct activity. It is a role defined in the
5 RTAS scheme rules, we saw that, accreditation and organisation. It has been treated
6 separately in contracts. Even in the MoU it appears in two subparagraphs, both of which
7 deal with slightly different components of it, management and improvement, broadly
8 speaking.

9 Network Rail agrees that it can be taken back in-house. NSAR treats it as self-financing.
10 Mr. Robertson emphasises in his second statement that it is a separate and discrete function
11 and he confirmed that in cross-examination.

12 I would invite you to re-read that statement, paragraphs 6, 11 and 67 go to that particular
13 point. I didn't cross-examine Mr. Robertson at any great length --

14 THE PRESIDENT: Which statement?

15 MR. JONES: His second statement, Mr. Robertson. You may have noticed that, in fact, my
16 clients' supply cited extensively from Mr. Robertson's evidence, and large parts of that are
17 accepted and are helpful to my clients. So I would invite you to re-read his statement. Yes,
18 I cross-examined on some of it. Those paragraphs are where he emphasises the separate
19 and discrete function.

20 Ms. Millen-Stirling accepted that the two subparagraphs in the annex to the MoU, which
21 relate to RTAS are separable. She conceded they were separate functions and so, in theory,
22 the management of RTAS could be given to one organisation and the other, broadly
23 speaking, improvement functions could be done, for example, by NSAR. Indeed, of course,
24 she also confirmed that that is what NSAR does for other training courses.

25 Now, I don't dispute that these functions might have synergies. I don't dispute that there
26 may be benefits in having NSAR perform this but it is plainly for the reasons I have just
27 given a distinct activity and a separate function.

28 The third issue is whether it could be performed by a profit-making company, whether the
29 accreditation service could be supplied by a profit-making company. There are, in my
30 submission, two simple points which provide a complete answer to this. The first is that it
31 has been provided by profit-making companies and you saw in some of the cases that one is
32 asking here a theoretical question and that fact is of very great significance.

1 Of course, when I say it has been provided I don't just mean RTAS Limited and Achilles.
2 One also needs to keep in mind that Tribal Limited conducted the educational style audits
3 on which rather large emphasis was placed until 2015.

4 That's the first point which I say is of particular significance. The second is -- sir, this was
5 in response to your question, I think -- Mr. Wilmshurst-Smith confirmed that it could be
6 done by a profit-making body and he said in evidence that the reason that Network Rail
7 couldn't have set that up was that it didn't have sufficient in-house expertise to manage that
8 kind of a contract. He said he would expect that in the future Network Rail might have such
9 expertise and it might therefore be done for profit. Those two points are, in my submission,
10 insurmountable.

11 Now, nonetheless, we have gone, of course, in great detail through the evidence on exactly
12 what the functions are and whether they can be done by a private making company, so I
13 will, as quickly as I can, go through some of that. We looked firstly at the audit
14 requirements and I took Ms. Millen-Stirling through those.

15 You know that the Ofsted-style ones were done by Tribal. You will recall that there was a
16 new quality assessment framework introduced at the start of this year but Ms. Millen-
17 Stirling agreed with me that it was simply a development, an evolution, of what Tribal had
18 done, and she confirmed that, in any event, that type of auditing will still be done at least in
19 part by private contractors.

20 We looked then at the audits which NSAR does, which have been described as railway
21 audits. There is, in my submission, a difference between the Ofsted-style one and the
22 NSAR one when one looks at the documents because the Ofsted-style ones plainly involve
23 considerable exercise of discretion and judgment, whereas, as I discussed with Ms. Millen-
24 Stirling, the railway audits, which NSAR does, start by looking through documents, long
25 lists of documents.

26 Of course, I don't suggest that there's no exercise of judgment involved or that one wouldn't
27 look at the documents and maybe make suggestions. But one cannot, in my submission,
28 look at these different audits, the educational ones and the railway ones and say: well, the
29 educational ones can be done by a private company, whereas these railway ones have to be
30 done by someone like NSAR because they are so complicated. Quite the opposite.

31 There's nothing to suggest that a private profit-making company couldn't be doing the
32 railway audits just as they had done the educational audits.

33 It is then said, in various places, that NSAR and Network Rail work collaboratively. You
34 have seen from the Achilles letter that they say they had meetings as well with Network

1 Rail. They weren't told of any problems. There's nothing intrinsic to a collaborative
2 working relationship which means it can't be done in the for-profit sector and, indeed, Mr.
3 Robertson accepted that the for-profit sector has collaborative working arrangements that
4 companies want to impress their clients, and so don't necessarily just stick to the corners of
5 the contract, so they can get repeat work, and indeed the fee structures can be negotiated in
6 various different ways. Of course, there might be one but there might be all sorts of
7 different structures that would allow for collaborative working.

8 Secondly, this is related, it was said that NSAR brings its broader expertise. Again, I'm not
9 going to take issue with the suggestion that SAR has broader expertise, which it brings to
10 bear on this auditing function.

11 Of course, this has its limits. Mr. Robertson explained to you that the rail auditors, when he
12 was describing his Chinese wall comments, he said rail auditors are not in the office that
13 much, just a couple of days a week. Of course, every company can buy in specialist skills.
14 As it happened, Mr. Alexander went to NSAR, he could have gone anywhere else. Why
15 was Tribal being used, because they had brought the skills of former Ofsted inspectors, so
16 they were able to offer that expertise.

17 Every organisation has its own strengths. One can well imagine that if KPMG was doing
18 this function and some case had arisen in which, for some reason, you have to ask what
19 does KPMG have to do this? One can well imagine witnesses coming and telling the court:
20 we have had enormous benefit from KPMG, it has huge expertise of detecting fraud, of
21 auditing excellence, and so on and so forth. But the fact that they have found particular
22 advantages in working with NSAR, does not mean that the function with which this
23 Tribunal is concerned couldn't be carried out by another body for profit.

24 Thirdly, it has been said that Network Rail needs an independent body, free from the profit
25 motive. Of course, profit-making companies have all sorts of important functions including
26 in safety. Profit-making entities can act independently. We looked at the Wouters case on
27 barristers, in this country a barrister's overriding duty is to act independently, in the interests
28 of justice and as a duty to the court.

29 More importantly, auditors, of course, have duties of independence; that's what auditing is
30 all about.

31 Mr. Smith was asked what would happen if auditors were appointed -- profit-making
32 auditors -- to audit this and he said Network Rail would have to reorganise itself internally
33 and his team would take more responsibility for overseeing it. Yes, that is a very sensible

1 step to take and it demonstrates that this would be a perfectly feasible way of managing this
2 function.

3 It is also important not to exaggerate the extent to which NSAR is, as it were, above the fray
4 or immune from these commercial pressures. It is non-profit-making, yes. But it is a
5 company which, as you have seen, is required to act primarily in the interests of its
6 members. Its members are mainly companies in the sector. It has a board which is
7 representative of industry. Mr. Alexander's statement goes into this in some detail,
8 especially around paragraph 103, for your note, in which he explains that from the very
9 outset it was emphasised that NSAR was to be a small private sector body but operating on
10 what he describes as a private sector or commercial ethos.

11 For those reasons, I say this function could be carried out by a profit-making company.

12 Then I come to my fourth and final issue. Is it a state function or a public function within
13 the SAT Fluggesellschaft line of cases?

14 One needs then to look at the aim, nature and rules of the function in question and, of
15 particular importance, I say one asks whether the power is derived from statute. The answer
16 to that is that it is not. It is derived from Network Rail's appointment of NSAR.

17 If one goes a step further and asks: what about Network Rail's power, where does that come
18 from? That is also not statute. The Network Rail case -- you don't need to turn to but just
19 for your note it is in bundle 4, tab 10A -- we went to that case and, in a nutshell, when I
20 went through this with Mr. Smith, he agreed with me that all of the things which were
21 important to the decision there still apply. It is not a regulator. It doesn't set standards. Its
22 power comes from its agreements with other bodies in the industry, not from statute.

23 The conclusion in that case was that conducting a railway, managing a railway, is the
24 antithesis of a governmental function.

25 THE PRESIDENT: Antithesis may be a little bit strong, but it is no longer -- maybe 15 years ago
26 it would have been seen as a government function, like lots of other things, like the Post
27 Office, but now, following liberalisation, it is not. I think that's what the case says.

28 MR. JONES: The word antithesis may be strong but it is emphasising how far things have come
29 in the last 50 years.

30 THE PRESIDENT: If Network Rail is not in the public body, taking that as the antithesis of
31 undertaking, if Network Rail is an undertaking, although it may be close to government, it is
32 effectively managing infrastructure which is what Railtrack did.

33 MR. JONES: Yes.

34 THE PRESIDENT: So Railtrack was clearly an undertaking, Mr. Smith said so --

1 MR. JONES: Yes.

2 THE PRESIDENT: -- which might make it difficult to say well Network Rail is essentially
3 doing the same thing; it would also be an undertaking.

4 MR. JONES: Yes, that is right, sir. It is very difficult to see how one could conclude that
5 Network Rail is not an undertaking.
6 Now, of course, one would need to take a functional approach.

7 THE PRESIDENT: Yes.

8 MR. JONES: So if Network Rail were conducting the auditing accreditation function, the
9 question would be: is it an undertaking in that context? But my answer there would be the
10 same, which is, in that context, it would not be exercising any state power, still. Because
11 there isn't a statutory requirement or obligation to do this. It is not a statutory body.

12 THE PRESIDENT: Yes.

13 MR. JONES: We have looked at why Network Rail has chosen to structure things this way. You
14 see, it has chosen to structure the market this way. It has health and safety obligations, but
15 it has chosen to structure the market in this way, it has chosen to outsource auditing, and it
16 is, in light of those choices, that one sees this structure.
17 So if it was being done by Network Rail it won't be a public or state function and, in light of
18 that, I do say it is really very, very difficult to see how Network Rail could create a state
19 function by appointing someone like NSAR to undertake it.

20 THE PRESIDENT: If it wouldn't be a public state function for Network Rail, it can't become one
21 just because they outsource it.

22 MR. JONES: Very difficult to see how it could become one.

23 THE PRESIDENT: It is a functional question, looking at the nature of the function --

24 MR. JONES: Absolutely.

25 THE PRESIDENT: -- no matter who does it.

26 MR. JONES: Yes.

27 THE PRESIDENT: Equally, if it is a public function with NSAR, then if Network Rail did it in-
28 house you could say: look at it separately and it is a public function. But I can't see that the
29 outsourcing changes things.

30 MR. JONES: No, sir. Not unless one goes down the road of saying: well, NSAR has some
31 special status because it is concerned with training and it is concerned with safety. But that
32 doesn't change things.

33 THE PRESIDENT: That may be, but if Network Rail did that in-house, to be concerned with
34 training, and safety functions, but it doesn't change --

1 MR. JONES: Yes. I said in my opening, just to reiterate very briefly, one does need to start by
2 asking: what is the state power? Because, as I understand my learned friend's case, he says,
3 even if it is not a state power it is connected to a state power.

4 The first question then is: which state power is it connected to? Firstly, they refer to their
5 own training duties, NSAR refers to its own training duties. Of course, there is no statutory
6 basis for that and that wouldn't be a state function.

7 Indeed, Mr. Robertson says in paragraph 15 of his second statement:

8 "NSAR furthers its skills independently of direct government pressure and control."

9 So there isn't even direct government pressure, let alone a statutory footing.

10 Secondly, it is said there are these general safety considerations but the point I have just
11 made is there is also no statutory basis for that, Network Rail has chosen to set up the
12 framework. We saw that in the ORR document, which makes the choice clear. That was
13 bundle 2, tab 3, page 119. Mr. Smith agreed with me that they had chosen, firstly, to
14 require their contractors to arrange training from training providers and, secondly, they have
15 chosen to outsource auditing and accreditation.

16 But then, secondly, even if one could identify a state power with which this is said to be
17 connected, one would then need to ask: is it closely enough connected, closely related
18 enough to come within the exception? You saw from Selex and SAT Fluggesellschaft that
19 where those cases talk about powers being connected with public power, public authority,
20 state authority, seen in context, they are in fact saying it is wrapped up with state authority;
21 it is connected in the sense of being attached to, not in the sense of being related to, let
22 alone related in some distant way, which is hard to pin down.

23 There isn't a relevant state power and, even if there were, this isn't related to it, it isn't
24 connected to it.

25 The closest one comes to a state power in this entire framework is, of course, the ORR. The
26 ORR isn't exercising any relevant power or authorising anyone else to exercise any relevant
27 power.

28 Sir, unless I can be of any further assistance, those are my submissions.

29 THE PRESIDENT: Thank you very much. You have kept within time.

30 Would it be sensible, Mr. Wignall, to take a short break now --

31 MR. WIGNALL: Yes.

32 THE PRESIDENT: -- and come back for 3 o'clock?

33 MR. WIGNALL: Yes, sir.

34 (A short break between 2.55 p.m. and 3.00 p.m.)

Closing submissions by Mr. WIGNALL

1
2 THE PRESIDENT: Yes, Mr. Wignall.

3 MR. WIGNALL: Sir, you have, if I may say so, rather a lot of paperwork from both sides but,
4 also from the defendants, you have a lengthy defence with legal submissions at the back.

5 THE PRESIDENT: Yes.

6 MR. WIGNALL: You have a skeleton, which, if I may say so, was an attempt carefully to select
7 the correct references for you to consider and to put them in order.

8 THE PRESIDENT: Yes.

9 MR. WIGNALL: So, in those circumstances, I would feel it is a little audacious to take up your
10 time with a lengthy recital of either, so I'm going to try to make my points relatively brief
11 and I'm going to try to put them in an appropriate framework.

12 What I propose to do is say something about NSAR as it appears in this case, because I do
13 suggest, in answer to Ms. Daly that this is a unique organisation, in a unique position.

14 I'm going to say a little bit about Network Rail in the connection of the case and also NSAR
15 and UKRS for that matter. I'm going to say something about what has happened up to
16 2016. Then I'm going to deal with the principal issues which are whether services are being
17 provided, whether a profit is being taken and whether these services could be undertaken for
18 a profit if there are any services.

19 I'm going to say a little bit about risk, and then I may say something about the additional
20 authorities.

21 So far as authorities are concerned, perhaps it is my own fault for introducing the word
22 "regulatory" somewhere at the beginning of the various hearings before you because that is
23 a word, clearly, which encompasses all sorts of different areas and you should be reluctant,
24 if I may say so, to say, well, one case can be said to be about a regulatory matter, therefore
25 it must have an application on the facts to some other regulatory circumstances, and indeed
26 to this matter, which I have characterised as a regulatory matter.

27 Indeed, it is a regulatory matter but it is a specific type of regulation. My learned friend
28 would like to characterise it as services for accreditation. Then he has a specific bullet. He
29 can try and dress that up as a market, and you can say there may be private providers who
30 can provide those services which provide accreditation services. But we will be saying that
31 the bundle of activities which are undertaken are much more than mere accrediting.

32 It is accrediting the people who do the provision of the training, who are accredited, they
33 must also supply competence assessments, so it is a slightly wider activity. It is not just
34 auditing, it is also a process of assurance which is a process towards Network Rail. It is a

1 process of keeping an eye on the whole RTAS scheme. So it is not just a process of the
2 accreditation.

3 If the panel is being seduced down the line of saying, well, this is simply an accrediting role
4 which, in theory, other private providers can provide, we have seen it before with RTAS
5 and Achilles, then I urge you to resist the temptation of going down that route, because I
6 would say that would be inappropriate.

7 My learned friend has referred expressly today to one or two cases about regulatory matters,
8 in a broad sense. One is the British Leyland case; the other is the Italian public procurement
9 case; and then there is the General Insurance case.

10 Again, these are unique and special on their facts and one has to approach them with a
11 functional test and examine each on a functional test, and just because a certain conclusion
12 is reached on one of those cases I respectfully suggest that is not a reason for saying that
13 these facts are within those cases, within the application of the law within those cases.

14 THE PRESIDENT: I suppose in every case, one has these broad outlines of the tests and then
15 one has to look at the facts of the particular case and they are always different.

16 MR. WIGNALL: Of course. That's why you are a judge of a Tribunal and not a machine.

17 THE PRESIDENT: Not a tick-box exercise!

18 MR. WIGNALL: Not a tick-box exercise. You might be on a market then.

19 The British Leyland case, for instance, is a case where payments were made and it is a case
20 about the provision of information which allowed people who imported vehicles, parallel
21 importers, to bring materials from Belgium into England. These are not safety critical
22 cases. This member state's European Court does not consider themselves critical. In those
23 cases, there is an initial type approval granted by the member state. The member state
24 Department of Transport in that case goes and examines the original design, the original
25 chassis, absolutely all the parts, and make sure they are in conformity with the application
26 for the approval of the particular type of vehicle and, once that is done, the parallel
27 importers only have to ask for a chassis number and then they are allowed to import their
28 vehicle.

29 There are, in fact, four very simple changes that are carried out. One is the wing mirrors are
30 put on the other side of the car, then the fog light is changed, there are two other changes, I
31 can't remember immediately what they are. One is to do with the direction of the beams at
32 the front of the car.

1 There is a initial type of approval in that case, which is carefully examined and scrutinised
2 by Department of Transport officials and then, down the line, that case is about certificates
3 of conformity. Indeed, there are a number of cases on the same topic.

4 We are a long way away from the sort of role that I say applies here on these unique facts,
5 which are cases where the auditor assessors from NSAR, and the ones they have contracted
6 in, indeed, go and examine exactly what's happening on this highly safety critical area to
7 make sure that a worker has an appropriate competence, and that the Sentinel card is up to
8 the minute and up to date and it is safe for people to go in the car on the infrastructure and
9 do whatever it is they have to do.

10 My learned friend, despite his appeal to cases like these conformity cases, standardisation
11 cases, private standardisation cases, cases involving associations of undertaking, there isn't
12 another case that he can advance to you that involves this actual process of keeping an eye
13 on what people are doing, which are carried out on particular sorts of accredited activity and
14 making sure they are doing it properly, with a view to reporting back to the people who set
15 up the scheme, in this case Network Rail, to make sure they are doing it properly, and
16 adding to that a whole assurance process of making sure the scheme is working effectively,
17 deciding whether it can be proved.

18 One has to say, in this period, because we are talking about what has happened after the 1st
19 January 2016, when the new memorandum of undertaking came into place, when Tribal
20 was dispensed with, we are still looking at an position where there are an awful lot of
21 extremely bad practitioners, doing extremely bad things and allowing men and women to go
22 work on the railways without having a Sentinel card, which they should have.

23 There is a really serious problem, as you will have heard from the evidence. There have
24 been, I think, 162 investigations with 112 providers. There has been a history of terrible
25 accidents in the past. Just where we are now, Network Rail has used NSAR to -- and used
26 its special skills as a skills academy, drawing from the other range of academies, to inform
27 the process, to use its skills as a policy adviser to the government, knowing where the skills
28 should be delivered in the railway service. All these are coming forward to make sure there
29 is a proper system.

30 We are talking about a target date, if you like, for May 2016 and, as Mr. Wilmshurst-Smith
31 said, it may be that some time in the future this sort of case can be let out privately.

32 But my respectful submission is we are not in that place at the moment. My learned friend
33 says this is just a theoretical exercise. We just have to examine, make a few changes, a few

1 adjustments here and there, one can divide up these various activities, one can find private
2 providers who could do this sort of thing in theory.

3 Now, that is on a two day hearing. There is no expert evidence, and I do suggest that there
4 comes an evidential moment when mere theory isn't enough.

5 I just say that, when it comes to the matters which you are critically interested in, whether
6 or not there are services being provided, whether or not a profit is being earned or could be
7 earned, whether or not any risks are being taken, who is carrying the risks, I say that these
8 are all matters where the burden of proof is largely on the claimant. The claimant must
9 satisfy you that this is an undertaking and an economic activity.

10 THE PRESIDENT: I think that's clear, that the burden is on the claimants.

11 MR. WIGNALL: It is perhaps more difficult when the suggestion is being made that this is, in
12 essence, an activity typical of a public authority. What we think in those certifications is it
13 is for the defence to satisfy a burden that the --

14 THE PRESIDENT: Well, a sort of evidential issue, but prima facie it is the claimant who has to -
15 - if you dispute your undertaking, they have to formally add the burden of proof, I think.

16 MR. WIGNALL: Yes. So I did say that I would address the facts in a little detail. Before I do
17 that, I hope you will forgive me if I just go to Wouters.

18 Wouters is in the second bundle of authorities at tab 11.

19 THE PRESIDENT: Yes.

20 MR. WIGNALL: Sir, it should be at tab 11. I would be grateful if you would turn to page 994.

21 I'm sorry to go over the old principles. 994, at the bottom of the page, at paragraph 46,
22 there are what I suggest and I think is generally taken are the appropriate principles:

23 "According to settled case law in the field of competition law, the concept of an
24 undertaking covers any entity engaged in economic activity regardless of its legal
25 status and the way in which it is financed."

26 It suggests that whether it is a private or public company is, to a point, neither here nor
27 there. Clearly though, if it were a public company, which had its existence and emanated
28 from the legislature then that would be a strong guidance towards what sort of operation it
29 was.

30 A lot of these cases, if I may say so, sir, are all cases which derive from article 106. So they
31 are really 106/102 cases where the question is whether the member state has put in place a
32 measure or kept one in force which has allowed a public entity, a public authority or those
33 various other authorities into position such that the competition and other laws are breached.

1 So one can see that when Hofner came along, and the other cases came along, these were
2 necessarily state cases, where the problem for the European Court of Justice was that if they
3 were obviously public entities then how would you say that they are an undertaking in the
4 market if, on the face on it, they are entities set up by the state.

5 Which is why I suggest that the functional approach is indeed all-important and, indeed,
6 when the case says that this is regardless of its legal status, one shouldn't again 40/50 years
7 down the line start unpicking whether it is a private or public company on the basis that that
8 would therefore necessarily have consequences for competition law.

9 Anyway, the case continues:

10 "It is also settled case law that any activity consisting or offering goods or services on
11 a market is an economic activity."

12 There are various references of mine, including to Commission against Italy. You have
13 seen this before:

14 "Members of the bar offer for a fee services as a form of legal assistance...(Reading
15 to the words)... they must bear the deficit themselves."

16 I do say that is not confined simply to this case of Wouters. That is an evidential matter in
17 which the Tribunal would be interested, so that in the OTOC case, if I could just give you
18 the reference, you will find this in paragraph 37, the court is just as interested in the
19 evidential question whether or not anybody bears the financial risks and the deficit
20 themselves.

21 THE PRESIDENT: Which case, sorry?

22 MR. WIGNALL: This is the last case, it is 18 in bundle 3.

23 It is the one about the accountants, in which the accountants' profession itself set up by the
24 state refused to accredit other people as training providers while they are carrying out
25 training themselves.

26 THE PRESIDENT: Is it the Portuguese case?

27 MR. WIGNALL: Is it Portuguese? I'm grateful.

28 THE PRESIDENT: Yes.

29 MR. WIGNALL: So it is paragraph 37. You will see, towards the end there is an interest in the
30 financial risks relating to the activities.

31 We would say: why not? Why is that not an evidential question to anybody inquiring into
32 whether or not an entity is an undertaking for the purposes of competition law? In this
33 case, you remember the evidence is that NSAR are, in a sense, permanently bailed out by
34 the government, the government itself, which keeps a loan available for it to keep it alive,

1 carrying out its various functions, including the function of advising the government as to
2 skills policy.

3 THE PRESIDENT: If the accreditation activity is supposed, as we heard, to be self-financing --
4 that's the way it is conceived of and that's NSAR's approach to it -- why isn't there an
5 element of financial risk? They might get bailed out in the end but they are seeking to match
6 their revenue, their charges for it, with their expenditure.

7 MR. WIGNALL: Well, you will remember that Mr. Robertson's uncontested evidence is that
8 these are not prices that NSAR has fixed. They are prices that Network Rail has fixed. I do
9 suggest that when one looks at the framework and the structure of these activities, NSAR
10 collects in the money, this is really what Mr. Robertson says, but it is really Network Rail's
11 money. NSAR collects it in, but NSAR is also supported by the Sentinel levy --

12 THE PRESIDENT: You say it is Network Rail's money. Not for the fees for accreditation? It
13 appears on the NSAR accounts, doesn't it? It is NSAR's money, it is not Network Rail's
14 money?

15 MR. WIGNALL: Mr. Robertson deals with it, I think, in his first statement, when he says that the
16 process of carrying out accounting within NSAR is really quite rudimentary and, although
17 they all go into the books that is, in essence, for the sake of convenience.

18 THE PRESIDENT: Well, they have audited accounts. It is not -- I don't see how he says it is
19 Network Rail's money. Network Rail may have a role, which by the end was not totally
20 clear to me because of some inconsistency it was pointed out by Ms. Daly between what
21 Mr. Wilmshurst-Smith said and what Mr. Robertson said about who approves or fixes the
22 fee. But it is still the accreditation fees go to NSAR, and that's how it is self-financing; isn't
23 that right?

24 MR. WIGNALL: It is self-financing in that way, yes. But it is, nevertheless, Network Rail's
25 which fixes the amounts of money. It is Network Rail who have set the scheme up, there
26 are discussions with Network Rail every November, and Network Rail tell NSAR how
27 much they are entitled to charge for the accrediting.

28 THE PRESIDENT: I thought the evidence from Network Rail was that NSAR proposes what it
29 wants to charge and, generally, Network Rail is happy with that but if they think that
30 charging at a level that would be a burden to providers they might say that's too much. That
31 seemed to be the process. But I'm not sure that matters. Simply the fact that that activity is
32 to be self-financing suggests to me there is an element of financial risk because it could fail
33 to pay for itself and have to draw on, say, the consultants, the work that NSAR does which
34 everyone has agreed is distinct.

1 MR. WIGNALL: There's no indication anywhere that NSAR is ever going to bite the dust, as it
2 were. There is no indication that if NSAR isn't getting money in from one particular
3 activity that it will come to an end or even stop that activity. Perhaps the consultancy is
4 different. The consultant is not part of the activities we are looking at. But there is nothing
5 in the evidence, there is nothing to suggest that there must be a reconciliation of the money
6 coming in and the amount being expended on this part of their activities.
7 Indeed, the evidence in the fifth witness statement is that there must be a small loss, because
8 Network Rail have said no you can't charge those full amounts you want to charge.
9 Because I do suggest that the activities that Network Rail receives and the industry receives
10 is a large bundle of activities. Part of the process they do, and they do for Network Rail, is
11 to carry out the auditing and the assurance of the RTAS system. There is no indication
12 that, in that system, which is supposed to be self-financing, that if there were any major
13 deficit that NSAR would come to an end or even that that particular activity would come to
14 an end.

15 THE PRESIDENT: Yes, you mean there's not a risk they would go out of business on that?

16 MR. WIGNALL: It is not a risk they would go out of business. It is not a risk -- it is known that
17 there is a risk that the auditing assurance role would stop. That wasn't put to Network Rail
18 and Network Rail has not said that and one might say that the reason for this discussion
19 about price between Network Rail and NSAR is one which is to the best interest of the
20 training providers, because then the amount they are actually charged, in essence, on the
21 direction of Network Rail, is not considered to be excessive. So the evidence is there's
22 already a loss on this self-financing part of the activities carried out by NSAR.
23 On the other hand, NSAR has this part of its various roles and there is no indication, there is
24 no evidence that if a third of the providers suddenly started to stop paying any money that
25 NSAR would either go out of business or it wouldn't carry on this auditing assurance role.
26 I was looking at Wouters, sir, we were looking at those preliminary issues with which the
27 Tribunal will be interested.

28 Then it goes on over the page. I slightly interrupt myself, as it were, by just drawing your
29 attention to paragraph 56, while we are on the route. Paragraph 56 says:

30 "The question to be determined is whether, when it adopts a regulation such as the
31 1993 regulation, a professional body is to be treated as an association of undertaking
32 or, on the contrary, as a public authority."

33 My learned friend made something of the fact that, although this professional body had its
34 origins in statutes, the group of barristers was considered an association of undertakings.

1 But on a functional approach that was solely with a view to an assessment of its role in
2 relation to the 1993 regulation. The 1993 regulation is the regulation which specifically
3 deals with whether or not you can have a mixed practice.

4 Under the 1993 regulation, the bar had the right to decide to have regulators and, in some
5 circumstances, to have mixed practices, but it decided specifically not to have a mixed
6 practice with accountants, because there were issues about privilege and confidentiality.

7 I just say that in passing because it may be that, if there were some other function, which the
8 court was considering, then the court would have decided that it was, in essence, a public
9 authority or to be treated as a public authority.

10 I say that that's by way of passing because I wanted to come to the next couple of
11 paragraphs. 57:

12 "According to the case law of the court, the treaty rules on competition do not apply to
13 activity which, by its nature, aims and the rules to which it is subject does not belong
14 to the sphere of economic activity ..."

15 Sir, those are really the points we have covered in the evidential issues at 46 through to 48.
16 57 continues:

17 "... or which is connected with the exercise of the powers of a public authority."

18 I just wanted to make that point and go over this useful starting point for the approach of a
19 court or Tribunal because my learned friend appeared to be veering towards a submission
20 that your proper starting point should be not only whether the activities are characteristic of
21 a public authority, further than that, whether or not they actually derive from public law
22 rules and, when I mean that, it looks as though my learned friend was suggesting that the
23 powers connected with the public authority had to derive specifically from statute and not
24 from government.

25 My learned friend appeared to be saying that that should be your starting point and you
26 must examine what the public powers are and then all the other questions might follow on
27 from that.

28 THE PRESIDENT: I'm not sure he went quite that far. I think he said that if they were that
29 would be a very strong pointer, like so many things of these tests, they are not binary.

30 MR. WIGNALL: Yes.

31 THE PRESIDENT: That's part of the difficulty with the exercise. I mean, if they did derive then
32 that would be very powerful but the fact they don't is not determinative. I think that's
33 accepted. But they have to have a -- and I think it is almost conceptual. It has to be the sort
34 of thing that is typically that of a public body and then one has to exercise judgment.

1 MR. WIGNALL: Yes. That is ultimately an exercise of judgment. I heard you in discussion
2 with my friend who said, well, things have changed these days and in this country it is quite
3 clear what the railway infrastructure is an undertaking and nothing else. But I do venture to
4 suggest that that is perhaps too characteristically a British approach and we can see that in
5 the extract from Bellamy & Child that my learned friend refers to, also the General
6 Insurance case, which suggests very strongly that to be connected with a public authority, to
7 have some activity which is typically of that a public authority, then your powers must
8 obviously and clearly derive from a statute that has gone through the Parliamentary process.

9 THE PRESIDENT: We know that Railtrack, that goes back a while, was an undertaking. So it
10 has been carried out by an undertaking meeting all these tests.

11 Network Rail, essentially, have taken over from Railtrack. So it does seem to follow that
12 Network Rail, even if they are sole shareholders, the government is also an undertaking. I
13 find it hard to -- it is not a question of whether this is something that could, in principle, be
14 carried out by a non-governmental body. It actually has been for quite a while. It does seem
15 to me that Network Rail is an undertaking. You can then say, well, we look functionally at
16 different things it does; it may not be an undertaking in everything that it does. I see that
17 question arises.

18 But the assurance that if you operate the railway infrastructure, that the staff working and
19 with access to the infrastructure are properly safety trained and vetted might be thought of
20 as integral to operating the railway infrastructure, might it not?

21 MR. WIGNALL: Well, this is again a matter of judgment. I wonder if we can look briefly at the
22 first EuroControl -- perhaps the Genoa Port case?

23 THE PRESIDENT: Yes, we have not been taken that, so perhaps that would be useful.

24 MR. WIGNALL: That's in bundle 3 at tab 7.

25 At tab 7, paragraph 23, this is on page 519 at the bottom, 22 to 23:

26 "The anti-pollution surveillance, for which SEPG was responsible in the Port of
27 Genoa, was a task in the public interest which was part of the essential functions of
28 the state, as regards protection of the environment in maritime areas."

29 It goes on, which is the passage which derives from the first EuroControl case:

30 "Such surveillance is connected by its nature, its aim and the rules to which it is
31 subject with the exercise of powers relating to the protection of the environment,
32 which are typically those of a public authority. It is not of an economic nature
33 justifying the application of the treaty rules on competition."

34 THE PRESIDENT: Just one second. (Pause)

1 Yes, 22 and 23.

2 MR. WIGNALL: Yes. Now, when we saw that passage which is at 23 in the EuroControl case,
3 my learned friend took you just before lunch very carefully before the convention -- the
4 various conventions which set up EuroControl. But you remember the case, that case was
5 actually about the multiparty agreement which determined how fees were to be assessed,
6 although it appeared from the paragraph to which my learned friend -- there is an extract
7 from the convention which says you have the ability to collect fees. But it is by no means
8 clear, if I may respectfully say so, from paragraph 23 that, of course, the courts necessarily
9 had the provisions about the convention in mind when it gave that judgment.

10 Here, I respectfully suggest as well, this is a matter of judgment, so that in paragraph 22,
11 when it says "This is a task in the public interest which forms part of the essential functions
12 of the state", that was really a matter of judgment for the court and, indeed, in academic
13 circles, I think, people often said, well, this is the first time that these sort of environmental
14 matters by entities have been considered as an undertaking.

15 Ultimately, it would be a matter of judgment depending on the various indicators.

16 That must necessarily mean, I would suggest, that the European Court of Justice is bound to
17 apply what one might call almost an autonomous approach to what is a state-style entity in
18 these circumstances, as a matter of judgment, because some railway lines will still be full of
19 state monopolies, with all their powers deriving from the state legislature, as with postal
20 services, for instance.

21 So this is why I suggest that the phrase used says:

22 "They are powers, typically those of a power authority, not of an economic nature
23 justifying the application of the treaty rules on competition."

24 I do respectfully suggest that when the learned editors of Bellamy & Child, from time to
25 time, and various authorities say that the real question is whether this is -- there are powers
26 which come from the legislature, I say that is perhaps going too far and there will be cases
27 where it is appropriate to say, given a functional approach, that the activities, even if
28 undertaken by a clearly private entity, are activities which are typically those of a state.

29 THE PRESIDENT: The SEPG, looking back in the facts --

30 MR. WIGNALL: These were Italian decrees by Italian authorities. The harbour police were set
31 up, and the harbour police have the power to create this particular authority and, indeed, not
32 only do they then, in principle, create a particular authority, they grant this particular entity,
33 SEPG, the individual right to carry out the activities.

34 THE PRESIDENT: Yes, SEPG is a private --

1 MR. WIGNALL: It is a private entity but it is granted the right or power -- paragraph 9 on page
2 489, I think:

3 "By decree number 118, the presidents of the CAP entrusted the service in the form
4 ...(Reading to the words)... or better known as SEPG."

5 That does follow, I would suggest, from the fact that these early cases are really 106 cases.
6 So, as I say, it is hardly surprising that when the court has interpreted Hofner and MOTOE,
7 and all the other cases which came before it, and they are all public cases where aggrieved
8 parties, agreed private undertakings, have sought to persuade the court that the public
9 undertaking is in fact an undertaking within the ambit of competition law.

10 So it is hardly surprising that there should be a heavy weight of authority about the role of
11 public authorities, but that does not mean that one should turn the compass the other way up
12 and say that therefore any private entity is necessarily a purely private activity, which is not
13 carrying out activities which typically those of the state.

14 THE PRESIDENT: Looking at what they have to do, which is on -- looking in the Advocate
15 General, paragraph 10 -- it is the same in the judgment paragraph 6, actually, exactly the
16 same: constant surveillance of the waters, then immediate reporting and then containing the
17 spill.

18 MR. WIGNALL: Yes, of course, these are two different types of activities. There is the constant
19 surveillance and then there is the pollution.

20 THE PRESIDENT: Well, constant surveillance to identify risks of spills and then, if you do, take
21 immediate action.

22 MR. WIGNALL: If I may say so, again in passing, these are both cases -- the first EuroControl
23 case and the Port of Genoa case, I think as I said in the opening, these were both cases
24 where charges were levied and SEPG, in this case, and EuroControl, in the other, had to go
25 and get their money from the court.

26 You will remember that, indeed, in the EuroControl case the monies which are paid over for
27 the activities undertaken, the monies being fixed separately by another undertaking here are
28 described as the mere consideration for the activities.

29 THE PRESIDENT: I think here too the fees are fixed aren't they, in this case?

30 MR. WIGNALL: I do say that's just like our case because, at the very least, we couldn't fix --
31 couldn't have the prices fixed every year unless Network Rail didn't tell us what they could
32 be, and I do say that that's not our choice and this is just, as it is said in EuroControl, a mere
33 consideration which is why these proceedings should be properly brought in county courts.

1 There is no inconsistency in saying they should be a ward of the county court. We are
2 saying this is not a competition case because we are not on a market.

3 Sir, for all the reasons set out in the witness evidence before you, I say this is an absolutely
4 unique organisation, emanating from the skills academies, which were originally set up by
5 Parliament. You have the references. Network Rail, in September 2014, becomes a part of
6 government, in essence, and you have heard evidence about how it is treated, and I do say --
7 I don't have to say this but I do say -- that the whole framework looks like something which
8 is typically that of a state, and some deference should be allowed to Network Rail in the
9 arrangements it makes.

10 Now, in the skeleton, sir, I set out at paragraph 35 all the activities which Network Rail
11 have put in place, insofar as they concerned Sentinel. Ultimately, Network Rail have
12 absolute control of the ability of any Sentinel cardholder to make use of the card and gain
13 access. 35.2, they devise the rules which govern the use and deployment of Sentinel. 35.3,
14 they devise and control the contents of the two protocols. They wrote RTAS and protocol
15 202. They devised and take responsibility for the curriculums. They take payments from
16 training provider members when competence assessments are loaded onto Sentinel.

17 It insists that NSAR audits training providers by the use of the framework documents and
18 further, the defendant obtains the consent of training providers to be audited according to
19 the terms of the framework, and so on.

20 Indeed, the essential correspondence is all about that period at the end of 2015, beginning of
21 2016, so that in bundle 0 -- I think in tab 5 -- towards the end I have page 93 which has the
22 letter of 17th November 2015. That's the one which says so NSAR get on with it, I want
23 you to raise minimum standards by use of your quality assurance participation scheme,
24 which is the new improved framework you would have seen exhibited towards the end of
25 Mr. Robertson's second witness statement. I won't take you to it.

26 Sir, you will find that at page 279 and following. That's the revised document which comes
27 into place. Then on 16th December, page 94 in bundle 0, this is the letter from Network
28 Rail, who clearly have control of everything, saying:

29 "There has been a review of RTAS. The new quality assurance participation scheme
30 is appropriately aligned to RTAS and Sentinel rules and it would deliver all of the
31 following, including delivery of assurance be brought in-house, ad hoc visits outside
32 schedule plan, evaluation will be risk based ...(Reading to the words)... much more in
33 depth."

34 Over the page, their current pricing structure remains unchanged.

1 So then we have the memorandum of understanding which is at page 87. I won't take you
2 through that again but in the annex I suggest that there is a bundle of activities that Network
3 Rail wants from NSAR.

4 THE PRESIDENT: But this activity of auditing, which is a distinct function, a lot of the things
5 in paragraph 35, they are done by, as you say, Network Rail devise the rules, takes
6 responsibility for curriculum, etc., makes key announcements. But the auditing, as you say,
7 has been carved out, given to NSAR. Your case is, as I understand it, it is a distinct
8 function of NSAR.

9 MR. WIGNALL: No, I'm sorry. If that is right, I'm creating an erroneous impression. It is one of
10 the functions.

11 THE PRESIDENT: I thought your case is that it is a distinct function, isn't it?

12 MR. WIGNALL: No. I have two approaches. One is that all these -- the defence puts the matter
13 in alternatives. I say you wrap up all these matters as one. You wrap up all these matters as
14 one and they are not divisible because Network Rail is getting the benefit of all these
15 activities together and that informs the RTAS process. This isn't a simple process of an
16 auditing function. I say you wrap them all up.

17 THE PRESIDENT: So the defence says that.

18 MR. WIGNALL: The defence says that.

19 THE PRESIDENT: Help me, the defence is in bundle 0 at tab 4.

20 MR. WIGNALL: What one does, what the court --

21 THE PRESIDENT: Just bear with me a moment. If you look at the defence at tab 4 -- and the
22 defence is signed as true by Ms. Millen -- paragraph 21, page 64 starts:

23 "The defendant is establishing its main overarching skills function."

24 It talks about the history following the Ladbroke Grove disaster and the Cullen inquiry.

25 Paragraph 23:

26 "... was established to ensure that a suitably qualified set of skilled workers would be
27 available to meet the needs of the industry ..."

28 Other aims in paragraph 24.

29 But then at paragraph 27, it said:

30 "The defendant's mission, which focuses on skills forecasting the delivery of the rail
31 industry's skill strategy, constitutes its main function."

32 Paragraph 28 says there is a quite separate function of consultancy, work that we are not
33 concerned with that.

34 Then at just above paragraph 32, the heading:

1 "The defendant and its distinct function as auditor of RTAS related programmes."

2 32 reads:

3 "Separately from its main function the defendant has the role entrusted it by Network
4 Rail...(Reading to the words)... which requires it to act as auditor of the RTAS rules."

5 It goes on to its auditing role. Paragraph 33:

6 "It is this auditing aspect which is the subject matter of the claimant's claim."

7 I understood that, particularly from the heading and the paragraph there, for the defendants
8 saying this is a distinct function.

9 Of course there are certain synergies, the benefits from the fact it has other functions but it
10 is a distinct function. Is that not what's being said?

11 MR. WIGNALL: Perhaps this is a matter of semantics. I'm certainly not trying to say that it is a
12 distinct function which can be cut out and transferred over somewhere else, and the
13 evidence certainly is saying that it is a function, which is -- all the evidence from the
14 defendant is going to say that all the activities of the defendant inform each other and
15 inform the auditing process. So that on the auditing process, one also examines the RTAS
16 scheme, how the RTAS scheme is being operated and performed and there is a reporting
17 back then to Network Rail about how it is performing and what changes need to be
18 undertaken.

19 So, I'm not trying to chop them up into distinct areas or activities but I am trying to identify
20 what the different functions might be. So there are skills functions and there are functions
21 in trying to get less advantaged members of society into work.

22 One can say that, in a sense, they are separate functions but one would say together they are
23 an attempt to improve skills. So there is a process of trying to look at each in turn and
24 examine what they might be. But it is certainly not an attempt, that would be contrary to all
25 my evidence, to suggest that you chop these up into different specific areas and, there are
26 you are, it's parcelled and packaged. That is completely contrary to Network Rail's position.

27 DR. ELPHICK: Is it not the case that, for example, the consultancy activity will have synergies
28 with the other activities, but it is essential to your case that the consultancy function is
29 separate because you have said it is an undertaking? Is it not similarly the case for the
30 accreditation and auditing is separate and a function for us to consider whether or not it is
31 an undertaking?

32 MR. WIGNALL: No, because of all the evidence before the Tribunal. Because we say, for
33 instance, that if the providers are teaching on curriculums, certain specific curriculums, we
34 might realise when we go out and examine what's happening, see how the curriculums are

1 being used, that they need to be improved or the timing when operations are carried out
2 need to be improved because competencies are not overlapping at the same time and people
3 are having to upload their competencies too often.

4 We say, for instance, that if we have updated the occupational standards that we draft and
5 we realise that these will have a change down the line, because the whole process of the
6 framework, you will see when you read it, is about improving things. We contact Network
7 Rail and we say the occupational standards are approving. We might also note, as a skills
8 academy, that the government wants all providers to be level 4 providers and all these feeds
9 back to Network Rail who then change their system.

10 This is how we interpret RTAS, and this is how our specific railway auditors go about their
11 business, having been informed by all of this.

12 Sir, may I -- I'm anxious not to bite into Mr. Jones' time for reply. May I take you to an
13 authority, which is related to this, which I hope will help?

14 THE PRESIDENT: Yes.

15 MR. WIGNALL: What I'm really trying to say, I think, is that there is this shorthand auditing
16 role that, on any view, it is auditing and assurance of the system and that also benefits from
17 all our other roles, for instance as a skills provider, what we learnt from other academies. So
18 if the financial markets academy for instance, there may be a meeting of all the skills
19 academies who come together and say this is a new way to process matters, we would have
20 the benefit of that, and that would all feed into the shorthand version of auditing assurance.
21 Then I also say that, supposing you were to say that we must look at those overall activities
22 and facility, the auditing/assurance, then I hope you will say that it is fair to say that is
23 informed by all the other processes and this is a unique undertaking or entity, which cannot
24 be carried out by another undertaking. Or, I hope you will say, this is an activity carved out
25 of Network Rail's RTAS Sentinel scheme, which we are managing for good public policy
26 reasons and it is just impossible to divide any of those activities up because we are funded
27 by the loan, we are funded by the Sentinel cards, which apparently fund everything on that
28 annex, so you cannot separate them up.

29 I said I would take you to an authority that is Selex itself. I think that's in the third bundle
30 of the authorities.

31 THE PRESIDENT: Yes, just one moment. (Pause)

32 We will look at the evidence on this point about how separate the activity is, how distinct.

33 MR. WIGNALL: The case of Selex, tab 17 of that third bundle.

1 So my learned friend says, well, it is just a theoretical activity. I mean, I am sure we can
2 find some company somewhere which could do it. But in the social security cases or the
3 pensions cases that might occasionally work because we know there is active fund
4 management and there may be categories of cases where that sort of theoretical activity
5 assistance is valid. But there will be other activities where it is not valid and the burden
6 being on the party to prove that an entity is an undertaking would have to prove, I suggest
7 that the activity, in fact, can be undertaken by something else.

8 In the case of MOTOE, you will remember that the organisation which organised
9 motorcycling activities became a undertaking as soon as it organised events and started
10 asking for money from sponsors, from advertising, and it was said that, in that case, the
11 defendant was on a market because there was no doubt that there were other entities which
12 could provide the service, although none were identified. But there will be occasions when
13 there has to be some hard concrete evidence before a Tribunal.

14 If we go to the Attorney General here at page 1109, paragraph 63 -- the Advocate General.
15 I have forgotten his or her name, I'm afraid.

16 THE PRESIDENT: Don't worry about that.

17 MR. WIGNALL: Whatever it was says at 63:

18 "The court of first instance qualifies its own conclusion when it acknowledges, at
19 paragraph 89 of the judgment under appeal, that the services in question are not at the
20 current time offered by private undertakings ...(Reading to the words)... offer such
21 services."

22 I do say that there will be areas when very highly unusual sets of facts come before the
23 Competition Appeal Tribunal, or similar tribunals, where it is just not enough to say it
24 might be possible to do this on the market, it might be possible to provide services on a
25 market. I say that's where we are now.

26 Mr. Wilmshurst-Smith has said very frankly there may come a time when we can let this
27 out on a contract, perhaps when it has settled down, we know what we are doing, we can set
28 up something like the current MoU but we cannot do it now, we have serious problems, we
29 must weed out bad performers, there are too many police and other investigations, we must
30 get this on an even road.

31 Network Rail says we don't really have the competence to do it, we trust NSAR which is in
32 a special position.

1 So, very briefly, I would like to make a few points and then stop, so my learned friend can
2 have his reply. I would like to make this point about AOK Bundesverband. It is the
3 Advocate General --

4 THE PRESIDENT: Where is the case, in which bundle?

5 MR. WIGNALL: It is the third bundle again at tab 15.

6 Now, this is a case again in which the Advocate General was Francis Jacobs, and he said, in
7 this case, these funds are undertakings and he pointed out very persuasively three different
8 areas in which there was competition.

9 But the court said, this is at paragraph 56 to 58, it said -- I will just give you the first
10 sentence or so, it makes the point that:

11 "Some competitive activities are appropriate on the part of an organisation, apparently
12 in a social service, because it gives them principles of sound management."

13 So we should not be surprised if there are other activities, even consultancy activities, or the
14 £15,000 a year received from financial -- further education colleges.

15 There's also a strange passage -- no.

16 Can I just say one more thing about -- back to Selex. If you have Selex with you.

17 THE PRESIDENT: Which is 17, yes?

18 MR. WIGNALL: Thank you. At page 1110, paragraph 64, you will see at the end of that
19 paragraph --

20 THE PRESIDENT: This is the Advocate General?

21 MR. WIGNALL: He says:

22 "Nevertheless, the court of first instance failed to assess those facts ...(Reading to the
23 words)... as an economic activity."

24 I say also there will come an occasion when there will be some very strange, unusual facts,
25 when there are will be occasions when it would be wrong for a Tribunal, save for the most
26 compelling evidence from a claimant, to say you must split up these activities and it is safe
27 to do so for the following reasons. I say we are not in that position here.

28 Sir, then on the crucial issues, on the question of services, what services is the claimant
29 obtaining? The claimant is obtaining no services which are not intimately connected with
30 the full raft of obligations they face under RTAS and all the other schemes. They are not
31 really getting any benefits, Mr. Robertson says in his witness statements there is no benefit
32 to the industry, there is no commercial imperative, they get some roadshows, they are
33 helped along a bit to see how the scheme can operate, so it is fair, but they get no services.
34 Network Rail has said "Hey, you lot, you have to have accreditation on the scheme and

1 NSAR is going to police that and you just have to have that accreditation", and that's down
2 to Network Rail.

3 But, in essence, if one looks at this properly, I respectfully suggest there are no services of
4 the nature that one might expect a commercial undertaking to be receiving. There is no
5 service in an ordinary sense, there is no give and take, there's no reason why they should
6 come into the market because they like that proposition, save that they need accreditation
7 because Network Rail said they have got to have it.

8 My learned friend struggles completely going through old documents under the old schemes
9 to try and find some services but there are no services in a conventional sense on a
10 marketplace. It is not connected with policing themselves.

11 MS. DALY: Can I ask what your definition of services in a conventional sense is?

12 MR. WIGNALL: Yes. The common law still has the notion that a contract of employment is a
13 contract of service and service is something which a servant provides to somebody else.
14 Save for saying what an ordinary English definition might be, I'm not sure that we can take
15 it any further because it will be fact specific and depend on the market. But it indicates an
16 element of serving someone you want to work for for remuneration, to get back a benefit,
17 which I say doesn't apply in this case. It has that sort of indication. Even at that first hurdle,
18 there are no real services which are collected, save that there are a few things they fairly get
19 in order to keep their accreditation in order to run their lucrative business to provide their
20 training.

21 If they are not providing this sort of training, they can provide health and other training in
22 respect of the railways.

23 So, on the public authority point, I have made my submissions about risk. I say it is an
24 important evidential factor. When it comes to profit, just as SEPG in the Genoa case and
25 just as EuroControl, NSAR would manfully go on and carry on doing its activities, auditing,
26 assuring, even if people weren't paying.

27 No one has identified another organisation which could carry out what Network Rail wants,
28 Network Rail should be allowed an element of deference. I have made my submissions
29 about risk.

30 THE PRESIDENT: Got that point.

31 MR. WIGNALL: Just three further points. One is the NTAR matter. I hope that is dead and
32 buried now. There is no profit from NTAR, it is in the witness statement what NTAR is.
33 Then two points about public policy. One is there is a perceived problem because you will
34 see at the end of Ms. Millen's witness statement she says she had finally persuaded Network

1 Rail to have some external auditing assurance of its own processes and that is provided by
2 NSAR.

3 There might otherwise be a notion of a fear of lack of transparency or conflict internally to
4 other providers if it says its own processes were fine and didn't have someone to look after
5 them. NSAR is perfectly placed.

6 Then, finally, my final point I have mentioned before is a matter of importance to public
7 policy and that is the potential risk to the public, workers in the public, the conflict between
8 health and safety requirements and operational requirements and so there is a risk that
9 Network Rail would be tempted to go to train providers and say: can you give me 200
10 workers tomorrow and the providers: say we can, they are not quite there yet but you know
11 give them a few more days they will be there; and if NSAR is the policing activity
12 independently of Network Rail then that is a proper function.

13 When it comes to the -- I do say that the activity --

14 THE PRESIDENT: That's a good reason, perhaps, for contracting it out to someone independent.

15 I am not sure. How does that feed into the question of undertaking?

16 MR. WIGNALL: Because the ultimate question is about whether matters are properly matters of
17 competition law and, yes, we have seen various --

18 THE PRESIDENT: No, one may have lots of opinions of what might be a proper matter of
19 competition law. It is a slightly narrower question of whether it is an undertaking and we
20 have this rather broad definition of undertaking, but that's the question.

21 Is it a public body or is it carrying on an economic activity? That is the question. I just
22 don't, at the moment, quite understand why the fact that it may be sensible for Network Rail
23 to contract it out, to have some independent entity, to use a neutral word, that does this role
24 in Network Rail itself, how that changes the answer one way or the other, the question of
25 whether it is an economic activity or in the nature of a public activity.

26 MR. WIGNALL: Yes, the evidence is before the Tribunal and I think in fact the makers of the
27 witness statements, there are elements of their evidence which seeks to explain or almost
28 persuade the reader why these are relevant matters. So I am not sure I -- given the time --
29 that I ought to go over that.

30 I do say, finally, the other question -- those are all questions about whether something is
31 characteristically an undertaking or not -- I do say then that one looks at the further residual
32 question: are these matters typically of a public authority?

33 During the re-examination I took witnesses to ROGS, the transposition of the directive, and
34 I do say there is such a weight of obligations on Network Rail which reports back to the

1 government. I do respectfully suggest the court should look at these in an autonomous
2 manner, which I respectfully suggest is consistent with the Court of Justice, and which I say
3 are typical of a state and of a public authority, making sure that there is a form of competent
4 assessment and there are sufficient health and safety checks of workers. Those are not just
5 private law rights. They go further than that. They are typically the sort of social state
6 functions for the protection of people that are undertaking.

7 THE PRESIDENT: It would apply, of course, not just to a body like Network Rail but there are
8 quite a lot of bodies, entirely in the private sector, which are subject to onerous regulatory
9 or statutory safety obligations. If they failed to properly implement them the consequences
10 could be extremely serious. The nuclear power industries, people who operate nuclear
11 power stations, if something went badly wrong there, even the horrors of a bad rail crash
12 might be less than a nuclear disaster from a power station, a Chernobyl-type disaster,
13 heaven help us in the UK.

14 So there are a whole range of people in the private sector that have onerous obligations and
15 have to make sure by various checking, call it auditing, call it assessment, call it
16 surveillance, that people working there, in the safety critical areas, are properly qualified,
17 behave properly, etc.

18 MR. WIGNALL: Well, sir, the Tribunal should perhaps best wait until one of those cases comes
19 along to look at those specific facts but if, for instance, in the nuclear industry whoever ran
20 the nuclear activities, I know nothing about the industry at all, I'm afraid, in a position like
21 Network Rail, which was in essence a branch of government reported to government, and
22 has all its health and safety matters discussed in Parliament and on endless committees,
23 supposing there were such an entity which was regulated by a committee such as ORR, and
24 supposing there were some regulations similar to ROGS, which were a transposition of a
25 directive, then I wouldn't shy -- fight shy of the submission that an entity in the position of
26 NSAR would also be able to say that these are activities which are typical of those for a
27 public authority or of a state.

28 Sir, you gave the example of an aeroplane earlier --

29 THE PRESIDENT: Airline, yes.

30 MR. WIGNALL: One can see with an aeroplane, aeroplanes are run by people who are the
31 equivalent of train operators -- the three, I think it is, train operating companies. But then
32 we have EuroControl that looks after safety in the airways, so there will be areas where
33 there are matters of judgment, for instance, in the airways, there may be people who audit,
34 assess and assure what activity is going on, what activities is being carried out by those who

1 run and guide EuroControl and those people, I would suggest, would be in this position.
2 They would be running activities which, as a matter of judgment, are typically those of a
3 state, even though they cannot be identified within state legislation passed and discussed in
4 the member state Parliament.

5 THE PRESIDENT: Thank you.

6 MR. WIGNALL: You have allowed me very kindly to make the submissions I would like to
7 make.

8 THE PRESIDENT: It is important. Thank you very much. I'm sorry Mr. Jones, we have eaten
9 into your time a bit.

10 MR. JONES: No, sir, not at all. It is quite all right. Indeed, I understand that the transcribers
11 need a break. Now would be a convenient moment and that will give me 10 minutes at the
12 end.

13 THE PRESIDENT: Yes, you might want to perhaps address the case you hadn't referred to,
14 which is the Port of Genoa.

15 (4.25 pm) (A short break)

16 (4.30 pm)

17 MR. WIGNALL: Sir, Mr. Jones is feeling in a very generous mood and I told him I felt
18 aggrieved because I had forgotten to give you a reference, so he said as long as I give you
19 the reference and sit down --

20 THE PRESIDENT: Yes, please do.

21 MR. WIGNALL: On this point about public authorities and public power and Port of Genoa, the
22 reference is the case of MOTOE, advocate General, paragraph 43, it refers to exclusively
23 social or public interest activities.

24 THE PRESIDENT: MOTOE itself --

25 MS. DALY: In which binder?

26 MR. WIGNALL: MOTOE to is in tab 10 of bundle 2.

27 The other reference is one I did give you which is I probably didn't identify a purpose,
28 which was Wouters, which is tab 11 of the same bundle at paragraph 57 of the judgment.

29 Thank you.

30 THE PRESIDENT: Yes, Mr. Jones.

31 Submissions in Reply by Mr. JONES

32 MR. JONES: Sir, I'm grateful.

33 On this question of which factors are taken into account when deciding whether a body is
34 exercising public powers, I do say, for the avoidance of doubt, that the question of the

1 source of its power is of particular importance and one sees that in the discussion in SAT,
2 the EuroControl case which I took you through. I will go in a moment to the Porto di
3 Genoa case. So these are of special significance. I don't go so far as to say if it doesn't have
4 a statutory basis then it couldn't conceivably be a public power. I don't know of any case
5 where that, however, has been held. So the passage I asked you to read from the General
6 Insurance case touched on this and this Tribunal, they expressed some scepticism about the
7 possibility that that might ever arise in practice.

8 But I don't deny that it is plainly, in theory, a flexible test. There is clearly, in these cases,
9 an exercise of judgment in which the court looks at the phenomenon before it and asks itself
10 whether it is the sort of thing which one would expect a public body necessarily to be doing.
11 That, of course, is why I took you to the Network Rail case, which it considered that very
12 issue, not in relation to this function but generally in relation to Network Rail's functions.

13 THE PRESIDENT: Is the Port of Genoa -- was it a statutory source?

14 MR. JONES: Yes. It is at tab 7. So you will see paragraph 2, as you know, concerned the
15 payments to be made for preventative, anti-pollution services performed by SEPG. 3:

16 "At the material times the Port of Genoa was managed by the CAP, which was then
17 replaced by the port authority ...(Reading to the words)... conferred by legislation."

18 THE PRESIDENT: Sorry, you are where?

19 MR. JONES: Paragraph 3.

20 THE PRESIDENT: Of the judgment?

21 MS. DALY: Is there a page?

22 MR. JONES: It is page 516.

23 THE PRESIDENT: Paragraph 3, yes.

24 MR. JONES: So the it starts with the CAP:

25 "The CAP was a public body with administrative and economic functions conferred
26 by legislation."

27 Then what happens in 4 is the president of the CAP, in his capacity as delegate of the
28 government approves further regulations, and at 5 they include creating a compulsory
29 surveillance and intervention service. It is that service which then, looking at paragraph 7,
30 the president of the CAP, by decree, entrusted to SEPG and approved the tariffs. That is in
31 paragraph 8.

32 So if one traces the power back, it was a statutory power, which was then conferred onto
33 SEPG and that's why I said really all this case adds to the EuroControl case is that it is

1 possible for a statutory power to be delegated in certain circumstances and it still remains a
2 public power.

3 THE PRESIDENT: The source of the power does not appear to be part of the reasoning in
4 paragraphs 22 and 23, is it, of the judgment? That would be a simple solution.

5 MR. JONES: But, sir, those are the conclusions and they rest, as in when I went through the
6 EuroControl case I took you, firstly, to essentially the final conclusionary paragraph, which
7 had the test which one sees now in this case in paragraph 23, its nature, aim and rules and I
8 said one needs to ask: what does that mean, how did they get there, what is the nature, aim
9 and rules?

10 In EuroControl I then traced it back where they first asked the question about the nature of
11 the body and they leap-frogged from that into a discussion about the convention. It is the
12 same here; that's the conclusion from what goes before.

13 THE PRESIDENT: Yes.

14 MR. JONES: Sir, there is another related point which is of some importance, which is there is a
15 question as to whether a factor, which is to be placed in the mix, is whether or not
16 consideration is being given for a service because, as I understood Mr. Wignall's
17 submissions to you, it was, he said, in this case, consideration was being given for a service.
18 That's the same, he said, here because UKRS is giving consideration for a service, therefore
19 you should go to court, therefore it is not governed by a competition law.
20 That would be one factor, that's what I understood he was saying, to suggest that it is a
21 public body. But just standing back from that, that would be an extraordinary position
22 because you are giving something consideration, you are paying consideration for a service,
23 that's actually the starting point to say that it is an undertaking, it is a service, it is governed
24 by competition law, and if there is a contract, one would also expect that to be governed by
25 competition law.

26 THE PRESIDENT: I think he said it is not a service. It is consideration for what they do by
27 giving you accreditation, but you are not getting any service. You could complain if they
28 don't do it properly, but it is not a service, like -- forget about contracts of service, not a
29 service like a club you join and you get facilities, for example.

30 MR. JONES: He, of course, draws that distinction. I may have misunderstood but I had
31 understood him to be suggesting that, in this particular case, there was consideration for a
32 particular service.

33 The only point I wanted to draw to your attention is 19 and 20, in fact, the money which
34 was being paid wasn't for a particular service, for instance, in cleaning up after pollution

1 caused by the company in this case. So, sir, you pointed out that there were different
2 functions, there was the general surveillance and there was the clean up and, actually, all
3 that was relevant here was the general surveillance function. That was what the money was
4 being paid for. It was a kind of tax.

5 DR. ELPHICK: I was going to say it is more like a tax than a tariff.

6 MR. JONES: It is more like a tax.

7 DR. ELPHICK: Yes.

8 MR. WIGNALL: But they still went to court for it.

9 MR. JONES: Well, tax authorities do go to court and it is the same, as it happens, in SAT, if one
10 turns to that, it's in authorities bundle 2 at tab 6.

11 It is in the Advocate General's opinion, but page 219, at the bottom of that page, there is a
12 discussion about how the rates differ according to what the member state wants. They
13 might want to recover a lot of their costs they might not. Again, the same -- it is precisely
14 this point:

15 "Moreover, those charges constitute a tax burden. There is some financial contribution
16 to the costs incurred by the state. Yes, payable by the individual for the benefit he has
17 received, chiefly in the interests of the community."

18 THE PRESIDENT: Yes.

19 MR. JONES: Sir, on the question of commercial risk, the Ordem dos Tecnicos case that was
20 mentioned, the chartered accountants, includes in it language, the same as in Wouters, to the
21 effect that the accountants were taking commercial risks, and my response to that is exactly
22 the same to my response in Wouters, which is, yes, it is evidential -- in fact I think that was
23 my learned friend's word -- because if they are taking risks, that shows they can
24 theoretically be done for profit.

25 I would also remind you we went to the contract with Achilles but, for your note, bundle 5,
26 tab 5, page 444, the rates were set for Achilles as well by Network Rail. That's not
27 something which is unique to NSAR. They were set in that contract too.

28 Lastly, given that there was a discussion about the extent to which NSAR's evidence casts
29 light on this question on whether it is a separate function, I have already recommended to
30 you various paragraphs in Mr. Robertson's statement. Can I just give a few more paragraph
31 references just so you have all of them.

32 THE PRESIDENT: This is the second one?

33 MR. JONES: The second witness statement. He went great lengths to advertise it was a separate
34 function: paragraphs 6, 11, 20, 34, 67, 79, 80. Sir, those are my submissions.

1 | THE PRESIDENT: Thank you very much and for ending precisely on time. Thank you all. We
2 | will obviously take time to consider our decision, and you will be notified when it is ready
3 | to be handed down in the usual way. I also thank, from all of us, our conscientious
4 | transcribers, who have worked hard with fewer breaks at times than they would have
5 | wished for.

6 | _____
7 |