

Achilles Information Limited v Network Rail Infrastructure Limited **[2019] CAT 20**

Alfred Artley, Pupil Barrister, Monckton Chambers

Philip Woolfe and Stefan Kuppen appeared on behalf of the Claimant

Preliminary

1. Achilles Information, a provider of 'supplier assurance' to the rail sector and other industries, successfully challenged Network Rail for breaches of both Chapter I and Chapter II of the Competition Act 1998. The Claim related to the terms of certain authorisation schemes operated by Network Rail, which authorised suppliers providing services on Network Rail infrastructure. The terms required, as a condition of authorisation, that suppliers obtained assurance from Network Rail's chosen provider, RISQS. The decision underlines that public-sector entities need to be alert to the potential application of competition law even where they are pursuing public interest objectives.

The Facts of Case

2. Supplier assurance ensures that suppliers meet certain requirements specified by buyers. These requirements may be very general in nature or highly specific to the products or services provided, but their general purpose is to assure the buyer that a prospective supplier has systems in place to ensure that it can deliver what it purports to offer.
3. Network Rail is the public-sector company which has owned and managed the UK's rail infrastructure since 2002 when Railtrack was renationalised. It sells its services to the train operating companies who hold the various UK rail franchises. Achilles, a technical solutions firm, had operated as the sole provider of supplier assurance to the rail industry under the Rail Industry Supplier Qualification Scheme ("RISQS"), latterly under contract with the Rail Safety Standards Board ("the RSSB"); however, in 2016 the RSSB decided to split RISQS into separate IT and audit services, and tendered for the two inputs in separate lots. Achilles took part in the procurement, but both contracts were awarded to other companies.

4. Achilles did not challenge the procurement itself, but rather wished to continue to offer a supplier assurance scheme to the rail industry to run in parallel to RISQS. Network Rail, however, indicated that it would refuse to recognise alternative assurance for the purpose of certain 'Key Schemes'. These are (broadly) the means by which Network Rail controls who and what has access to its infrastructure: for example, under the Sentinel Scheme, only individuals who have been sponsored by a Network Rail-approved sponsor can do work 'trackside'. However, under the terms of the scheme, Network Rail would only approve a company to act as a sponsor if it used the RISQS scheme. The 'On Track Plant Operator' and 'Principal Contractor Licensing' Schemes operate to similar effect.
5. Achilles' complaint did not relate to Network Rail's own choice about whom to use for supplier assurance when it was acting as the buyer, but the terms Network Rail imposed in the 'Key Schemes'. As these terms required Network Rail's immediate contractual partners to use RISQS for their own supplier assurance, RISQS was effectively forced down through the supply chain and Achilles was effectively excluded from the market.

The Claim

6. In competition law terms, there were two parallel aspects to Achilles' claim: firstly, that the 'RISQS-only rule' in the Key Schemes was an anti-competitive agreement contrary to Chapter I of the Competition Act; secondly, that Network Rail was dominant (assumed for the purposes of this trial) and was abusing its dominant position in the market for the operation and provision of access to UK rail infrastructure by requiring the use of the RISQS and thereby excluding competition.
7. Network Rail's defence was, in summary: (i) that the Key Schemes were not agreements or concerted practices for the purposes of Chapter I; (ii) that the RISQS-only rule was not anti-competitive by object or effect; (iii) that the rule was in any event objectively justified by safety considerations; (iv) that for similar reasons it was not abusing its dominant position.

Judgment

8. The Tribunal found in Achilles' favour on both grounds, though the principal focus of the decision is the Chapter I violation.

Breach of the Chapter I prohibition

9. The Tribunal accepted that each of the Key Schemes was an agreement or concerted practice between Network Rail and those undertakings who wished to have access to its infrastructure. It did not matter that the

agreements were imposed on the scheme participants rather than freely negotiated.

10. Network Rail had sought to argue that its economic activity should be distinguished from its regulation of its managed infrastructure, and that the Key Schemes related to the latter. However, the Tribunal rejected this: in C-205/03P *FENIN v Commission* EU:C:2006:453, the case relied on by Network Rail, the health authorities concerned were not pursuing an economic activity in supplying medicines to patients free of charge, whereas Network Rail's operation of the rail infrastructure was an economic activity.
11. The Tribunal were not persuaded, though, that the RISQS-only rule was a 'by object' restriction of competition. Following *Sainsbury's v MasterCard* [2016] CAT 11, they agreed that this category should be construed narrowly and not merely used to avoid difficult investigations into anti-competitive effects. On the facts of the present case, they accepted that it was currently unviable to offer an alternative supplier assurance scheme, but this might simply be because stakeholders found it more convenient to use a single scheme, rather than as a direct consequence of the rule. The Tribunal also accepted that the motivation behind the rule was to promote efficiency (by avoiding duplication of audits) rather than to exclude competition.
12. However, the RISQS-only rule was held to be a restriction 'by effect'. Following *Socrates v Law Society* [2017] CAT 10 and the European judgment in C-1/12 *Ordem dos Técnicos v Autoridade da Concorrência* EU:C:2013:127, the Tribunal agreed that it was sufficient for the anti-competitive effect to be felt on only one segment of a market. They rejected Network Rail's argument that these cases could be distinguished because Network Rail was not seeking to reserve a share of the market for itself, as in both the earlier judgments; rather the Tribunal said it was the effect on competition that was determinative.
13. There was considerable disagreement amongst the parties' economic experts as to the correct counterfactual. Achilles' expert foresaw a competitive market for supplier assurance, at least for a period of time, though he accepted that it was possible that ultimately only one scheme might survive. He also thought this competitive pressure would yield benefits in terms of price, quality or product differentiation (Achilles in particular envisaged offering an 'integrated' supplier assurance service, especially for suppliers who were active across a range of sectors). Network Rail's expert instead postulated two different counterfactuals: one where all suppliers simply stayed with the RISQS as the most cost-

effective scheme; the other where there was a 'race to the bottom' between the multiple schemes, with schemes competing to lower standards in order to attract suppliers (buyers having no choice in the matter as they would have to accept all schemes).

14. The Tribunal noted that the value of the contestable market was relatively modest and thus likely to be insufficient to sustain a large number of different schemes. However, the correct counterfactual was one in which Achilles would be able to compete, thereby providing competitive benefits to the market. Given their experience of the sector, the evident strength of Achilles' desire to re-enter the market was compelling. As such, it was not for Network Rail to decide on behalf of other industry buyers whom to use for supplier assurance. While Achilles might be at something of a competitive disadvantage trying to re-enter the market now, this was in part attributable to their exclusion; consequently, anti-competitive effect should be assessed on the basis of how the market would have been had the RISQS-only rule never existed.
15. A central issue at the trial was whether the RISQS-only rule was objectively justified on safety grounds, and the Tribunal heard expert evidence on this from both sides. Network Rail submitted that there were important benefits that flowed from the current restrictions, such as a uniform set of safety standards, consistent audit standards, and reduced risk of confusion among suppliers and buyers. It also claimed the RISQS framework provided a means to disseminate safety reports and share best practice within the industry. Achilles accepted that the work done by suppliers on Network Rail infrastructure was safety-critical, but that the RISQS-only rule was not necessary for the Key Schemes to function and for the rail network to operate safely. Network Rail could instead specify in objective terms the standards against which suppliers needed to be assured and the standards by which audits needed to be conducted, and could then recognise alternative supplier assurance providers who met these requirements. Achilles also noted that the safety appeared to be an ex post justification for the RISQS-only rule, which prior to the proceedings had been defended by Network Rail predominantly on efficiency grounds.
16. The Tribunal accepted that the lack of prior evidence of safety concerns was somewhat at odds with Network Rail's emphasis on safety in these proceedings. On the detail of Network Rail's safety justification, it found that the risks of confusion adverted to by the Network Rail's witnesses assumed a market involving a proliferation of supplier assurance providers, a situation which the Tribunal had also held to be unlikely. As such, their safety fears were somewhat overblown. Adding some additional complexity into the system need not necessarily lead to safety being compromised: in other safety-critical markets (such as oil and gas), Achilles is one of

several competing supplier assurance providers. While there might be some technical issues as regards interoperability of different schemes, the evidence suggested that it perfectly feasible to address these through appropriate technology. Moreover, contrary to Network Rail's case, it was not clear that suppliers would be more incentivised to maintain higher standards if there continued to be only one supplier assurance provider. Competition might instead lead to improvement in the service, bringing safety benefits rather than risks.

17. The Tribunal then considered whether the restriction was exempt from the Chapter I prohibition under s.9 of the Competition Act (equivalent to Article 101(3) TFEU). In order to rely on this exemption, the undertaking concerned must satisfy four cumulative conditions, but Network Rail fell at the first hurdle, failing to establish that the RISQS-only rule could be justified on efficiency grounds. Network Rail's estimates of the costs of recognising additional supplier assurance providers were held to be excessive, and failed to account for any efficiencies that might flow from a competitive market.

Breach of Chapter II prohibition

18. The Tribunal agreed with Achilles that the RISQS-only rule was a prima facie abuse of dominance. As it had held in respect of Chapter I, the rule foreclosed competition in a sector of the relevant market, and the fact that the RSSB had tendered for two key inputs of the RISQS did not detract from this; the tender process took place only periodically, limiting the 'dynamic evolution' of the market and potentially locking in sub-optimal outcomes as a result of under-bidding and compromised service delivery. Indeed, it was not consistent with recourse to normal methods of competition for a dominant infrastructure operator to foreclose competition in ancillary service markets in the absence of fair competition for the market; the tender process had not provided this, as it was only for two components of the mandatory scheme, not the scheme itself.
19. Network Rail also relied on the fact that it derived no commercial benefit from the RISQS-only rule, in contrast to more typical Article 102 cases. While there was some support for this in T-155/04 *SELEX v Commission* EU:T:2006:387, T-128/98 *Aéroports de Paris v Commission* EU:T:2000:290 pointed the other way; as for domestic authorities, *Arriva v London Luton Airport* [2014] EWHC 64 (Ch) had also rejected the need for commercial benefit as prerequisite for abusive conduct. Network Rail had tried to distinguish the latter two cases on the basis that different principles applied in the cases involving an 'essential trading partner', but the Tribunal did not find this distinction well-founded. It also rejected an analogy with *Speed Medical v Secretary of State for Justice* [2015] EWHC

3585 (Admin), a case involving a regulator imposing restrictions on the downstream market for which it is responsible. Network Rail, by contrast, was not following legal requirements or implementing government policy in mandating the use of RISQS.

20. As to objective justification on safety or efficiency grounds, Network Rail's defence on these points failed for the same reasons as the parallel defences under Chapter I. In its overall conclusion, the Tribunal stressed that in deciding that the RISQS-only rule was not justified on safety grounds, it was not saying that the protection of competition was more important than health and safety, which it accepted was a legitimate aim. However, for a restriction to be justified it need to be indispensable for safety purposes, and Network Rail had failed to demonstrate this.

Comment

21. It is well established the competition law serves to protect the competitive process, not individual competitors. Competition on the merits may drive undertakings out of a relevant market if they are less efficient than their rivals. This case, however, illustrates the converse of that principle: simply because an undertaking is not competing on a particular market cannot absolve it from the requirements of competition law where its conduct nevertheless has anti-competitive effects. This may come as something of a surprise to those who run such undertakings, in situations where they have not sought to exclude competition, nor to derive to economic benefit from the restriction (which the judgment confirms is not a pre-requisite for a Chapter II violation). This is likely to be a particular problem for undertakings who are dominant on some market, as their conduct may have impacts on other parts of the value chain, upstream or downstream, even if they are not active in those areas. Privatised state monopolies who continue to enjoy significant market power and publicly-owned commercial vehicles such as Network Rail may find themselves particularly vulnerable.
22. A notable feature of Network Rail's defence in the present proceedings was its insistence that the opening up of the supplier assurance market to other providers would have adverse effects on quality and standards, contrary to the general assumption that competitive pressure in a market tends to be beneficial. As such, there may a lesson here for other former national monopolies that they should be cautious about demanding uniform procedures across their industry if the effect is to foreclose potential competition unless they have considered whether they are able to justify such measures on safety, efficiency or other recognised exemptions to normal competition principles.
23. Aside from the public-sector legacy aspects, the present case is also

interesting in showing the extent to which competition law can restrict a landowner's freedom to determine what happens on their property. As the rail infrastructure owner, Network Rail was entitled to choose a supplier assurance provider for its own buying needs, but it could not require anyone who wished to have access to its infrastructure to use its preferred supplier assurance provider. Given the choice between the competitor's freedom to compete and the landowner's freedom to dispose of its property, the Tribunal vindicated the former.

24. As to the consideration of the correct counterfactual in respect of the economic assessment of the case, the Tribunal ruled that the position needs to be determined as though the restriction had never existed, and consequently the damage to the competitive environment that the restriction may have caused in the meantime cannot be taken into account in determining whether or not it might be possible for an excluded participant to re-enter. This is surely correct as a point of principle; were the position otherwise, undertakings whose conduct damaged the competitive structure of the market sufficiently might thereby protect themselves from being held to account in subsequent proceedings.
25. As to the distinction between factual and expert evidence, the Tribunal noted that factual witnesses on both sides had offered their opinions on safety issues; however, the Tribunal did feel able to take this account in so far as it was based on the witnesses' relevant professional experience. As to experts *stricto sensu*, parties should perhaps also consider how they brief their chosen expert witnesses: the Tribunal criticised Network Rail's safety expert, himself a former Network Rail employee, for the extent to which he simply repeated the opinions of its factual witnesses. While more independently-derived analysis can be more nuanced (Achilles' expert, for example, did not rule out safety-risks if the additional supervisory mechanisms required failed to operate effectively), overall such expert views are likely to carry more weight with the Tribunal.

The comments made in this case note are wholly personal and do not reflect the views of any other members of Monckton Chambers, its tenants or clients.

Monckton Chambers
1 & 2 Raymond
Buildings
Gray's Inn
London, WC1R 5NR

Tel: +44 (0)20 7405 7211
Fax: +44 (0)20 7405 2084
Email: chambers@monckton.com
www.monckton.com