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Case No: HT-2019-000158
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HT-2019-000187

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

The Rolls Building, 7 Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 17/06/2020

2019 RAIL FRANCHISING LITIGATION

Before :

Mr Justice Stuart-Smith

Between :

STAGECOACH EAST MIDLANDS TRAINS LTD	<u>Claimants</u>
and others	
- and -	
THE SECRETARY OF STATE FOR	<u>Defendant</u>
TRANSPORT	
- and -	
ABELLIO EAST MIDLANDS LIMITED and	<u>Interested</u>
ARRIVA RAIL EAST MIDLANDS LIMITED	<u>Parties</u>
WEST COAST TRAINS PARTNERSHIP	<u>Claimants</u>
LIMITED and others	
- and -	
DEPARTMENT FOR TRANSPORT	<u>Defendant</u>
- and -	
(1) FIRST TRENITALIA WEST COAST RAIL	<u>Interested</u>
LIMITED	<u>Parties</u>
(2) MTR WEST COAST PARTNERSHIP	
LIMITED	
STAGECOACH SOUTH EASTERN TRAINS	<u>Claimants</u>
LIMITED and others	
- and -	
THE SECRETARY OF STATE FOR	<u>Defendant</u>
TRANSPORT	
- and -	

**(1) LONDON AND SOUTH EAST PASSENGER
RAIL SERVICES LIMITED**

**Interested
Parties**

(2) SOUTH EASTERN RAILWAYS LIMITED

**Tim Ward QC, Ewan West and Daisy Mackersie (instructed by Herbert Smith
Freehills LLP) for the Stagecoach Claimants**

**Jason Coppel QC and Patrick Halliday (instructed by Ashurst LLP) for the
WCTP Claimants**

**Rhodri Thompson QC, Fionnuala McCredie QC, Naomi Ling, Anneli Howard, Brendan
McGurk, Azeem Suterwalla, Fiona Banks, Rachael O'Hagan, Tetyana Nesterchuk,
Niamh Cleary and Alfred Artley (instructed by Addleshaw Goddard LLP, DLA Piper UK
LLP and Eversheds Sutherland (International) LLP) for the Defendant**

Valentina Sloane QC (instructed by Burges Salmon LLP) for the FTWC Interested Party

Hearing dates: 20th/21st/22nd/23rd/24th/27th/28th/29th/30th/31st January 2020 and
12th/13th/14th February 2020

Approved Judgment - Redacted

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Covid-19 Protocol: This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to bailii. The date and time for hand-down is deemed to be 10:30am on Wednesday 17th June 2020.

.....

MR JUSTICE STUART-SMITH

Mr Justice Stuart-Smith:

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Introduction

1. The basic problem that gives rise to this litigation can be stated simply and shortly. The Defendant Secretary of State was conducting three franchise procurement competitions during a period when there was considerable uncertainty about the scope of potential pension liabilities because of intervention by the Pensions Regulator (“TPR”). The three competitions were for the South Eastern, East Midlands and West Coast Partnership franchises, commonly referred to as the SE, EM and WCP franchises. It was anticipated that the SE franchise would commence on 1 April 2019 and run for 8 years, that the EM franchise would commence on 18 August 2019 and would run for 8 years, and that the WCP franchise would commence on 15 September 2019 and run for 7 or 12 years.
2. The WCP franchise differed from the others because it was structured to accommodate the development of the High Speed railway link between London and the North (“HS2”) when that came on stream. The WCP franchise arrangements provided that when that happened (which was envisaged in the procurement documents as being on 1 April 2026, with provision for it to happen later) the franchisee would run it and the franchise would switch from what was known as the ICWC (InterCity West Coast) period to what was known as the IOC (Integrated Operator Contract) period. When that switch happened, the financial arrangements would change from being those of a normal franchise to an arrangement under which the Government would bear all costs and revenue risk, with the franchisee being remunerated on a cost reimbursement model to ensure flexible delivery of the integrated West Coast and HS2 services.
3. This case is only tangentially concerned with what would happen to the WCP franchise during the IOC period. It is substantially concerned with what would happen to the SE and EM franchises and what would happen to the WCP franchise during the ICWC period and any additional period between 1 April 2026 and the switch to the IOC period.
4. The Secretary of State decided to offer contract terms for each franchise which, subject to defined but limited protection, would place the risk of pension liabilities on the Train Operating Company (“TOC”) that succeeded in securing the franchise. The protection mechanism was known as the Pensions Risk Sharing Mechanism (“PRSM”). The Claimants are TOCs who submitted bids that rejected the Secretary

of State's allocation of the risk of pension liabilities and offered to contract on different terms. The Secretary of State was not prepared to contract on the terms proposed by the Claimants and disqualified them from further involvement in their respective procurement competitions, notifying them of that decision by letters dated 9 April 2019.

5. Three Claimants (who may conveniently be referred to generically as Arriva, Stagecoach and WCTP) issued proceedings challenging the decision of the Secretary of State to disqualify them and making other complaints about the procedure the Secretary of State had adopted. Their complaints may broadly be divided into two categories: (a) those relating to pensions and (b) other matters.
6. After an expedited process, the pensions issues came on for trial over three weeks in January and February 2020. Arriva settled on the Friday before trial on terms that are confidential and not known to the court. Arriva has remained an interested party in relation to the EM competition and proceedings. Its legal team (Mr Moser QC, Mr Barrett, Mr Williams and Ms McAndrew instructed by Stephenson Harwood LLP) had played a full and constructive part in the litigation until then, but they took no part in the trial hearing. This judgment is the result of the trial of pensions issues that followed. At the request of those representing the Defendant, I shall only use gender-specific terms if referring to the holder of the office in person; otherwise I shall refer to the Defendant generically as "it". I shall refer to the Department for Transport as "the DfT" or "the Department" indiscriminately.

The Legal Framework

7. It is common ground that, in procuring these franchises, the Defendant was subject to:
 - i) Articles 49 and 56 of the Treaty on the Functioning of the European Union ("TFEU");
 - ii) The duties imposed by Regulation 1370/2007 ("the Railway Regulation"); and
 - iii) General Principles of EU law, specifically the principles of non-discrimination, proportionality, transparency, equal treatment, the protection of legitimate expectations, the requirement to act without manifest error, and good administration.

Articles 49 and 56 TFEU

8. The Claimants submit that Articles 49 and 56 are relevant to Issue 4.
9. Article 49, concerning freedom of establishment, provides:

"Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.”

10. Article 56, concerning freedom to provide services, materially provides:

“Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended. ...”

The Railway Regulation

11. The Invitation to Tender (“ITT”) for each franchise included the statement that:

“This ITT forms part of a competitive procurement conducted in accordance with relevant legal requirements including Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road (as amended ...). This procurement will be conducted in line with the applicable general principles of EU law and the requirements of English law.” [See the EM ITT at paragraph 1.2.1]

12. The most relevant provisions of the Railway Regulation are Articles 4(1) and 5(3). Article 4(1) provides;

“Public service contracts and general rules shall:

(a) clearly set out the public service obligations, defined in this Regulation and specified in accordance with Article 2a thereof, with which the public service operator is to comply, and the geographical areas concerned;

(b) establish in advance, in an objective and transparent manner:

(i) the parameters on the basis of which the compensation payment, if any, is to be calculated; and

(ii) the nature and extent of any exclusive rights granted,

in a way that prevents overcompensation. In the case of public service contracts not awarded according to Article 5(1), (3) or (3b), these parameters shall be determined in such a way that no compensation payment may exceed the amount required to cover the net financial effect on costs incurred and revenues

generated in discharging the public service obligations, taking account of revenue relating thereto kept by the public service operator and a reasonable profit;

(c) determine the arrangements for the allocation of costs connected with the provision of services. These costs may include in particular the costs of staff, energy, infrastructure charges, maintenance and repair of public transport vehicles, rolling stock and installations necessary for operating the passenger transport services, fixed costs and a suitable return on capital.”

Article 5(3) provides:

“Any competent authority which has recourse to a third party other than an internal operator, shall award public service contracts on the basis of a competitive tendering procedure, except in the cases specified in paragraphs 3a, 4, 4a, 4b, 5 and 6. The procedure adopted for competitive tendering shall be open to all operators, shall be fair and shall observe the principles of transparency and non-discrimination. Following the submission of tenders and any preselection, the procedure may involve negotiations in accordance with these principles in order to determine how best to meet specific or complex requirements.”

13. There is an academic dispute between the parties about whether or not Article 5(3) applies directly. The Defendant says that it does not because of the terms of Article 8. Article 8(1) lays down the general rule that “Public service contracts shall be awarded in accordance with the rules laid down in [the Railway Regulation]”. Article 8(2) however states that, with specified exceptions:

“the award of public service contracts by rail and by road shall comply with Article 5 as from 3 December 2019. During this transitional period Member States shall take measures to gradually comply with Article 5 in order to avoid serious structural problems in particular relating to transport capacity.”

Accordingly, the Defendant submits, because these procurements were conducted during the transitional period before 3 December 2019, no obligation to comply with Article 5 was directly imposed by the Regulation as full compliance was not required to be achieved until that date.

14. The point is academic because the Defendant concedes that it was required to act in accordance with the principles of transparency and non-discrimination because they apply as general principles of EU law. I therefore do not decide the point of construction of the meaning of Regulation 8. The concession is undoubtedly correct, not only because of the ITTs’ acceptance that the procurement would be conducted in accordance with the Railway Regulation and the applicable general principles of EU law, but also because of express references in the ITTs to elements of Article 5 (though not to Article 5(3)) which render unsustainable the proposition that Article 5

was not incorporated as part of the structure of obligations governing the conduct of the procurements.

State aid

15. The Defendant submits that the Railway Regulation must be understood and interpreted within the broader context of EU State aid law. There are a number of strands to this submission. The first is that the Regulation's "primary objective is not to regulate the procurement of rail passenger services by the Member States but rather to define the extent to which the Member States can grant suppliers of such services compensation out of public funds." Second, the Defendant submits that, in order to avoid transgressing EU prohibitions on State aid, it is necessary for public service contracts and general rules to comply with the requirements of the Railway Regulation. Specifically, Article 6 requires that "all compensation connected with a general rule or a public service contract shall comply with Article 4, irrespective of how the contract was awarded". Article 4(1) (cited above) requires Public Service contracts and rules to define the services to be provided and the parameters for compensation, as well as determining the arrangements for the allocation of costs, including staff costs, in a way that prevents overcompensation: see Article 4(1)(b).
16. The Defendant continues by submitting that the way for an authority such as the Defendant to avoid giving prohibited State aid to a franchisee is to comply with the requirements of Article 4, and to ensure that the public service compensation granted to rail operators satisfies the four *Altmark* conditions: see Case C-280/00 *Altmark Trans GmbH v Nahverkehrsgesellschaft Altmark GmbH* [2003] ECR I-7747 at [89]-[93]. For present purposes, the most relevant of the *Altmark* conditions are the third and fourth, which are:
 - i) "Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations"; and
 - ii) "Fourth, where the undertaking which is to discharge public service obligations ... is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run ... would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations." In other words, this fourth requirement would be satisfied by a properly constituted competitive public procurement exercise.
17. The Defendant concludes and summarises this submission as follows:

"Regulation 1370/2007 is, thus, a legislative measure whose Treaty basis permits the granting of aid in the context of rail passenger services which might otherwise have been prohibited aid under Article 107(1), albeit subject to the conditions and limitations set out in the Regulation and the wider State aid

principles and guidelines that have been issued in the rail sector.”

18. I accept the general proposition that the Railway Regulation is concerned with the flow of State aid, though Article 1 states the Regulation’s purpose in terms which are wider than the narrow concentration on State aid that the Defendant’s submissions suggest. The Article states that:

“The purpose of this Regulation is to define how, in accordance with the rules of Community law, competent authorities may act in the field of public passenger transport to guarantee the provision of services of general interest which are among other things more numerous, safer, of a higher quality or provided at lower cost than those that market forces alone would have allowed.

To this end, this Regulation lays down the conditions under which competent authorities, when imposing or contracting for public service obligations, compensate public service operators for costs incurred and/or grant exclusive rights in return for the discharge of public service obligations.”

19. In my judgment, the Defendant’s concentration on the need to avoid unlawful State aid does little to advance the case, for four main reasons. First, it is not suggested that the protection against pensions risks provided by the PRSM infringed EU prohibitions on State aid. Nor was the wider scheme of support, which was promoted by the Department but rejected by the Treasury, rejected on grounds that it would or might amount to unlawful State aid. Second, the scheme of support that the Claimants proposed in their bids was not rejected on the basis that it would or might constitute unlawful State aid. Third, the existence and terms of the Railway Regulation are an acknowledgement that State aid may be lawful in the context of rail passenger services, provided that “overcompensation” is avoided: see, for example, Recitals 5 and 27. Fourth, as the Defendant recognises, protection against overcompensation is achieved by a competitive procurement process in which the level of compensation will reflect the level and allocation of risk established by the contract. Recital 33 to the Regulation recognises that compensation does not constitute unlawful State aid provided the *Altmark* conditions are satisfied. The Defendant has not demonstrated that further or different levels of support could not have been adopted without constituting unlawful State aid, provided the last two *Altmark* conditions were satisfied as they would be in any reasonably foreseeable circumstances. However, the Defendant submits that it is for the Claimants to prove that any increased protection would not have amounted to unlawful State aid. If there had been any suggestion in the contemporaneous materials before the Court that increased protection had even been questioned on the basis that, although offered in the context of a competitive procurement, it was or might contravene the rules on unlawful State aid, this submission would have substance. However, so far as I am aware, no such suggestion was ever made, which is not surprising given the context of a competitive procurement exercise. In other words, unlawful State aid was simply not an issue. Therefore, and subject to one qualification, although the Defendant in its submissions routinely characterises any level of support (including the PRSM) as State subsidy or indemnity or aid, I do not find this characterisation helpful in trying to decide the

issues that are raised in this trial. The qualification is that any level of governmental support involved the allocation of public resources, to which I now turn.

Policy and allocation of resources

20. It is well established in EU and English jurisprudence that Member States are afforded a wide margin of appreciation in relation to decisions involving the discretionary allocation of public resources. The principle was stated by the Supreme Court in *R (Lumsdon and others) v Legal Services Board* [2015] UKSC 41 at [40]:

“Where EU legislative or administrative institutions exercise a discretion involving political, economic or social choices, especially where a complex assessment is required, the court will usually intervene only if it considers that the measure is manifestly inappropriate.”

21. The rationale for this approach was stated by Lords Sumption and Neuberger in *R (Rotherham Metropolitan BC) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 6, a case involving the allocation by the Secretary of State of EU funds between competing regions of the United Kingdom. Lord Sumption at [22]-[23] made important preliminary points of principle that bear repeating in full:

“22. The first is that the Secretary of State’s allocation is a discretionary decision of a kind which the courts have traditionally been particularly reluctant to disturb. There is no “right” answer prescribed by the EU Treaty or the 2013 Regulation to the question how EU Structural Funds should be distributed within a Member State. There is not even any clear principle on which this should be done. Instead, the Secretary of State was required to make a complex evaluation of a wide range of overlapping criteria, all of which involved difficult and sometimes technical judgments about matters of social and economic policy.

23. Secondly, it was a judgment of a particularly delicate kind, involving the distribution of finite resources, including domestic taxpayers’ funds as well as EU funds, between the four countries and the distinctive regions of the United Kingdom. In such cases, the Secretary of State is in reality arbitrating between different public interests affecting different parts of our community. It is an exercise in which the legitimacy of the decision-making process depends to a high degree on the fact that ministers are answerable politically to Parliament. As Lord Hoffmann observed in a lecture given in 2001, “Separation of Powers”, 7 JR 137 (2002)), at paras 19-20:

“... there are certain areas in which, although the decision is formally justiciable because it involves the interpretation of statute or the common law, the outcome is likely to have an important impact upon public expenditure. The allocation of

public expenditure - whether we should spend more or less on defence, health, education, police and so forth, whether at a national or local level - is very much a matter for democratic decision. Furthermore, a court deciding a case which will affect one form of public expenditure - for example, impose a burden of expenditure upon education authorities - has no way of being able to decide whether such expenditure should or should not have a prior claim over other forms of expenditure. It may consider that, viewed in isolation, it is fair and reasonable that children in schools should receive certain benefits or financial compensation for not having received other benefits. But because it can only view the matter in isolation, it has no way of knowing whether this means that other people dependent upon social security, police protection and so on will have to make sacrifices because there is less money for them. The only people who can make such decisions are the democratically elected bodies who are in charge of the budget as a whole. This means that even when a case appears to involve no more than the construction of a statute or interpretation of a common law rule, the courts are very circumspect about giving an answer which would materially affect the distribution of public expenditure.”

22. At [62]-[63] Lord Neuberger gave a succinct summary of the reasons why the courts should give such a wide margin of appreciation in cases involving the allocation of public funds:

“62. The importance of according proper respect to the primary decision-making function of the executive is particularly significant in relation to a high level financial decision such as that under consideration in the present case. That is because it is a decision which the executive is much better equipped to assess than the judiciary, as (i) it involves an allocation of money, a vital and relatively scarce resource, (ii) it could engage a number of different and competing political, economic and social factors, and (iii) it could result in a large number of possible outcomes, none of which would be safe from some telling criticisms or complaints.

63. Therefore, like Lord Carnwath, I agree with the Court of Appeal that the Secretary of State’s decision under consideration in this case is in the “classic territory” where the courts afford the decision-maker “a wide margin of discretion” – [2014] EWCA Civ 1080, [2014] PTSR 1387, para 57. ...”

23. The decision on the level of support to give to potential franchisees in this case falls within the ambit of this principle. Two points illustrate the potential sensitivity of whatever decision might be made. First, increasing the contractual support for the TOCs would give rise to contingent liabilities that could affect other areas of government, all of which were competing for limited resources. Second, any proposal for support in the present franchising competitions would give to the successful bidder

a level of governmental protection against pensions risks that was not available to existing franchisees who were exposed to the same risks by TPR's intervention. In my judgment, the Defendant is right to submit that this is "classic territory" where the courts should afford the decision-maker a wide margin of appreciation.

Service concession contracts

24. The ITT for each franchise included the statement:

"This ITT invites Bids from Bidders in respect of a service concession contract (as that term is defined in the Concession Contracts Regulations 2016 although for the avoidance of doubt those Regulations do not otherwise apply to this contract award)."

25. Regulation 3 of the Concession Contracts Regulations 2016 provides the following definition:

"(3) A "services concession contract" means a contract—

(a) for pecuniary interest concluded in writing by means of which one or more contracting authorities or utilities entrust the provision and the management of services (other than the execution of works) to one or more economic operators, the consideration of which consists either solely in the right to exploit the services that are the subject of the contract or in that right together with payment; and

(b) that meets the requirements of paragraph (4).

(4) The requirements are—

(a) the award of the contract shall involve the transfer to the concessionaire of an operating risk in exploiting the works or services encompassing demand or supply risk or both; and

(b) the part of the risk transferred to the concessionaire shall involve real exposure to the vagaries of the market, such that any potential estimated loss incurred by the concessionaire shall not be merely nominal or negligible.

(5) For the purposes of paragraph (4)(a), the concessionaire shall be deemed to assume operating risk where, under normal operating conditions, it is not guaranteed to recoup the investments made or the costs incurred in operating the works or the services which are the subject-matter of the concession contract."

By definition, therefore, the franchise agreements in this case transferred operating risk to the franchisees that would involve potential losses that were not merely nominal or negligible and where the franchisees were not guaranteed to recoup their investments made or costs incurred in operating the franchises. It is also implicit in

the definition that such risks would include risks which the franchisees could not control, such as risks attributable to the vagaries of the market or risks which may be determined by the actions of third parties over whom neither contracting party has control: see, for example, *Stadler v Zweckverband für Rettungsdienst und Feuerwehralarmierung Passau* (ECLI:EU:C:2011:130). What this definition does not do is determine whether the allocation of any particular risks is acceptable and lawful by reference to other public law principles. However, it is apparent that the transfer of such risks is not of itself incompatible with fundamental Treaty principles.

The principle of equal treatment

26. The principle of equal treatment requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified. There is, however, a wide margin of discretion available to a contracting authority in designing and setting award criteria and the fact that some potential bidders will find it relatively more or less easy than it is for others to comply with those criteria does not establish or even necessarily provide evidence of a breach of the equal treatment principle. What is forbidden is unequal treatment that falls outside the margin of discretion that is open to a contracting authority or that is “arbitrary or excessive”: see *Abbvie Ltd v The NHS Commissioning Board* [2019] EWHC 61 (TCC) at [53], [59]-[67].
27. Two other aspects of the principle of equal treatment should be mentioned here. First, once a contracting authority has laid down the terms on which bidders are required to tender, it is obliged to require strict compliance, at least with “fundamental requirements” or “basic terms” of the tender. As the ECJ explained in *Commission v Denmark* (ECLI:EU:C:1993:257):

“37. ... observance of the principle of equal treatment of tenderers requires that all the tenders comply with the tender conditions so as to ensure an objective comparison of the tenders submitted by the various tenderers

39. With regard to the Danish Government's argument that Danish legislation governing the award of public contracts allows reservations to be accepted, it should be observed that when that legislation is applied, the principle of equal treatment of tenderers, which lies at the heart of the directive and which requires that tenders accord with the tender conditions, must be fully respected.

40. That requirement would not be satisfied if tenderers were allowed to depart from the basic terms of the tender conditions by means of reservations, except where those terms expressly allow them to do so.”

Having explained that the tender in question failed to comply with a fundamental requirement of the tender conditions that specified the conditions governing the calculation of prices, the Court continued:

“43. In those circumstances, and since the condition in question did not give tenderers the option of incorporating reservations into their tenders, the principle of equal treatment precluded Storebælt from taking into consideration the tender submitted by ESG.”

28. Second, one of the consequences of the principle of equal treatment is that a contracting authority may not subsequently change one of the essential conditions for the award if it may have enabled tenderers to submit a substantially different tender:

“116. Although, therefore, any tender which does not comply with the specified conditions must, obviously, be rejected, the contracting authority nevertheless may not alter the general scheme of the invitation to tender by subsequently proceeding unilaterally to amend one of the essential conditions for the award, in particular if it is a condition which, had it been included in the notice of invitation to tender, would have made it possible for tenderers to submit a substantially different tender.

117. Consequently, in a situation such as that arising here, the contracting authority could not, once the contract had been awarded ... amend a significant condition of the invitation to tender such as the condition relating to the arrangements governing payment for the products to be supplied.” [Case C-496/99P *Commission of the European Communities v CAS Succhi di Frutta SpA* [2004] ECR I-3801 at [116]-[117]]

The principle of transparency

29. Case C-19/19/00 *SIAC Construction Limited v County Council of the County of Mayo* [2001] WCR 1-772 provides a convenient and succinct summary of the principle of transparency:

“41. ... [T]he principle of equal treatment implies an obligation of transparency in order to enable compliance with it to be verified

42. More specifically, this means that the award criteria must be formulated, in the contract documents or the contract notice, in such a way as to allow all reasonably well-informed and normally diligent tenderers to interpret them in the same way.

43. This obligation of transparency also means that the adjudicating authority must interpret the award criteria in the same way throughout the entire procedure ...

44. Finally, when tenders are being assessed, the award criteria must be applied objectively and uniformly to all tenderers. Recourse by an adjudicating authority to the opinion of an expert for the evaluation of a factual matter that will be known

precisely only in the future is in principle capable of guaranteeing compliance with that condition.”

30. The principle, which has been restated in similar terms in many cases, applies not just to award criteria in the narrow procurement sense, but to all conditions and detailed rules of the award procedure, which could cover conditions about disqualification of bidders: see *Commission of the European Communities v The Netherlands* (Case C-368/10) [2013] All ER (EC) 804 at [109], *MLS (Overseas) Ltd v Secretary of State for Defence* [2017] EWHC 3389 (TCC) at [79]-[80]. A recent reiteration of the principle is provided by Case C-375/17 *Stanley International Betting* (ECLI:EU:C:2018:1026) (19 December 2018) where the Court said at [57]:

“In that context, *the purpose underlying the principle of transparency*, which is a corollary of the principle of equality, *is essentially to ensure that any interested operator may take the decision to tender for contracts on the basis of all the relevant information and to preclude any risk of favouritism or arbitrariness* on the part of the licensing authority. It implies that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner to, first, make it possible for all reasonably informed tenderers exercising ordinary care to understand their exact significance and interpret them in the same way and, second, to circumscribe the contracting authority's discretion and enable it to ascertain effectively whether the tenders submitted satisfy the criteria applying to the relevant procedure” (Emphasis added)

This reiteration, which is an almost verbatim repetition of [111] of the *Succhi di Frutta* case, is useful in reminding the Court of the underlying purpose of the principle, which I have highlighted in the citation above and which provides a useful touchstone when assessing the limits of the principle.

31. In *Healthcare at Home v Common Services Agency* [2014] UKSC 49, the Supreme Court explained the implications of the “reasonably well informed and normally diligent” (“RWIND”) tenderer. It held that the standard of the RWIND tenderer is an objective one and that “the rationale of the standard of the RWIND tenderer is thus to determine whether the invitation to tender is sufficiently clear to enable tenderers to interpret it in the same way, so ensuring equality of treatment”. It follows that evidence about what tenderers themselves thought a tender document meant will generally be irrelevant - its meaning is to be assessed objectively: see *Healthcare at Home* at [12] and [26]-[27].
32. When considering whether the tender documents achieve the necessary standard of clarity and comprehensiveness for the RWIND tenderer, the CJEU has stated in *eVigilo* ECLI:EU:C:2015:166, after referring to [42] of *SIAC* that:

“55. It ... is for the referring court to assess whether the tenderer concerned was in fact unable to understand the award criteria at issue or whether he should have understood them by

applying the standard of a reasonably informed tenderer exercising ordinary care.

56. In the context of that assessment, it is necessary to take into account the fact that the tenderer concerned and the other tenderers were capable of submitting tenders and that the tenderer concerned, before submitting its tender, did not request clarification from the contracting authority.”

33. The principles of equal treatment and transparency also require an authority to disclose any matter which it intends to consider when evaluating bids. In Case C-331/04 *ATI EAC* [2005] ECR I-10109 the Court stated at [24]:

“...in order to ensure respect for the principles of equal treatment and transparency, it is important that potential tenderers are aware of all the features to be taken into account by the contracting authority in identifying the economically most advantageous offer, and, if possible, their relative importance, when they prepare their tenders”

34. Applying these principles, in *Energysolutions EU Ltd v Nuclear Decommissioning Authority* [2016] EWHC 1988 (TCC) at [255] Fraser J said:

“The principles of equal treatment, non-discrimination and transparency require a contracting authority that has adopted a decision-making procedure for assessing bids to comply with it once it has begun to do so. A different way of expressing the same principle is to state that a contracting authority that has set rules for that procedure must follow them, applying those rules in the same way to the different bidders. Changing the decision-making procedure during the process of assessment risks arbitrariness and favouritism, a risk that it is the purpose of such requirements to avoid. In C-226/09 *Commission v Ireland* [2010] ECR I-11807 the weighting was altered after tenders had been submitted and after an initial review of those tenders had been performed. This was held to be conduct that was not consistent with the principle of equal treatment and the obligation of transparency.”

35. In *NHS Foundation Trust v Lancashire County Council* [2018] EWHC 1589 (TCC) at [10], I summarised the central features of the principle of transparency as follows:

“...tender documents are to be construed on the basis of an objective standard, that is the standard of the reasonably well informed and normally diligent (RWIND) tenderer. It follows that the tender documents must state the process to be followed, including how marking of bids will be carried out, in terms that can be objectively assessed and understood by a RWIND tenderer; and, having done so, the contracting authority must stick to it.”

36. In practice this means that there will be very limited circumstances in which it could be appropriate for a bidder to be permitted to amend their bid after the deadline for submissions; and it will seldom, if ever, be permissible for a contracting authority to vary the criteria that it has laid down or to permit non-compliance with them. Transparency and equal treatment require rigour in maintaining and enforcing the framework against which bidders have been asked to tender.
37. One gloss needs to be added. A contracting authority is generally not obliged to divulge its system of marking or its methodology of evaluation though, if it does so, it would be obliged to stick to that too: see *Orange Business Belgium v Commission* ECLI:EU:T:2016:385 at [138]-[139]. In carrying out its evaluation the contracting authority must be able to have some leeway in how it carries out its task provided that it does not change the award criteria that it has established: see *TNS Dimarso* ECLI:EU:C:2016:555 at [27]-[30], [36]-[37].

Financial robustness tests

38. The ITT set out a Financial Robustness Test at Section 7.6, the utility of which is criticised by the Claimants.
39. There was and is no requirement of EU or UK Law that there should be a Financial Robustness Test or any test of the ability of franchisees to withstand downside risks or the vagaries that may affect the operation or financial outcome of the franchise. No such requirement can be deduced from EU Treaty principles. There is no such requirement in the Railway Regulation or the Procurement Directive; and such a requirement would sit uneasily with the provisions of the Concessions Directive and the Concessions Contracts Regulations 2016, both of which contemplate that a concession contract may fail because of the eventuation of financial risks: see [24]-[25] above and Recital 18 to the Concessions Directive, Directive 2014/23/EU. Article 58 of the Procurement Directive provides that contracting authorities *may* impose requirements ensuring that economic operators possess the necessary economic and financial capacity to perform the contract but only as requirements for participation.
40. Three further points should be noted. First, it is in the nature of a Service Concession Contract that it may fail because of risks allocated to the concessionaire: see [24]-[25] above. Second, neither EU nor UK public law mandates any particular form or criteria that shall be adopted if a contracting authority chooses to introduce a Financial Robustness Test. Third, and in accordance with the principle of transparency, if a contracting authority chooses to introduce a Financial Robustness Test as part of its procedure for choosing to whom a contract should be awarded, it must set out the requirements of the test clearly and must then stick to them.

Exercising discretions

41. The exercising of discretions at various stages in any public procurement is commonplace and is capable of engaging and infringing the principles of equal treatment and transparency.
42. The terms of any ITT and proposed contract may define (to a greater or lesser extent) the circumstances in which, and the principles according to which, a discretion may

be exercised. Sometimes the scale and extent of this definition may effectively preclude the exercising of an independent discretion as commonly understood and may instead mandate an outcome: at the extreme end of this process fall provisions decreeing automatic disqualification in certain circumstances where otherwise disqualification is not automatic. At the other end of the scale a discretion may be stated in unqualified terms. Examples of both ends of the scale may be found in the present ITTs.

43. For the purposes of the present litigation, discretions are exercisable by the Defendant at three main points:
- i) When setting the terms of the ITT and Franchise Agreement;
 - ii) When exercising the stated discretion to disqualify; and
 - iii) When deciding to abandon a competition.
44. Certain general principles are well-established. Where a discretion is not stated to be qualified, it remains subject to principled limits and may not be exercised on an unlimited, capricious or arbitrary basis. Where, as here, the ITT specifies that it will be conducted “in line with the applicable general principles of EU law and the requirements of English law”, the position is doubly clear: see [11] above.
45. Relevant principles are to be found in *British Telecommunications Plc (Appellant) v Telefónica O2 UK Ltd and Others* [2014] UKSC 42. At [37] when considering the interpretation of an apparently unqualified unilateral discretion Lord Sumption (with whom the other members of the Court agreed) said:

“37. The manner in which English law ensures that contractual effect is given to the Article 8 objectives is by treating BT’s discretion under Clause 12 as limited. As a general rule, the scope of a contractual discretion will depend on the nature of the discretion and the construction of the language conferring it. But it is well established that in the absence of very clear language to the contrary, a contractual discretion must be exercised in good faith and not arbitrarily or capriciously: This will normally mean that it must be exercised consistently with its contractual purpose: Interconnection agreements are made in a regulated environment. The regulatory scheme may change, quite possibly after interconnection terms have been agreed (as it did in this case). But the intention of the parties must be to comply with the scheme as it stands from time to time so far as the contract permits. That intention necessarily informs the scope and operation of any contractual discretions. In my opinion, it is entirely clear that the discretion conferred by clause 12 of the Standard Interconnect Agreement is limited by reference to the purposes set out in Article 8 of the Framework Directive. It follows that contractually BT was entitled to set its own charges, but only within limits which are fixed by those objectives.”

46. I respectfully adopt this as a principle of EU and English law of general application when considering the existence of apparently unqualified discretions in the context of an ITT and draft franchise agreement. The Defendant is therefore right to submit that any discretion exercisable by the Defendant in these competitions (a) was expressly stated in the ITT to be subject to EU (and English) law and (b) was “not exercisable on an unlimited or arbitrary basis ... either as a matter of UK or of EU law: any discretionary power retained by the Secretary of State was required both as a matter of public and private law to be exercised rationally and in accordance with the policy on which it was based”
47. When setting the terms of the ITT and Franchise Agreement, including designing and setting award criteria, contracting authorities are afforded a wide margin of appreciation. This is because the terms (and in particular the award criteria) will reflect the contracting authority’s views about what it considers valuable: see *Abbvie* at [53]. This margin of appreciation applies fully in relation to the allocation of risks and obligations, particularly in relation to financial risks and obligations where the actual or potential expenditure of public funds is concerned, for a combination of the reasons outlined at [20] to [23] above and the entitlement of a contracting authority to set the terms of what it wants to procure.
48. The discretion to disqualify in the present competitions is stated at Section 3.5 and paragraph 4.1.2 of the respective ITTs: see [105] and [106] below. It is not expressly qualified save for the reference in paragraph 1.2.1, as already noted, to “the applicable general principles of EU law and the requirements of English law”: see [11] above. It is to be contrasted with the automatic disqualification provisions at Section 3.6 of the ITT. The discretion to disqualify is therefore subject to the general principles to which I have referred at [45] and [46] above.
49. As a matter of fact, these have been standard terms, applied in multiple previous rail franchise procurements. Their existence and meaning would have been fully appreciated and understood by any RWIND tenderer, including the Claimants. The terms were not challenged as being unlawful in the context of the present procurements before the disqualification decisions in this case were taken. Nor, for that matter, have they been challenged before or after the disqualification of Stagecoach from an earlier South-West franchise competition or at all in other competitions; though that does not mean or imply that the present challenges are not good ones.
50. The Claimants rely upon the decision in *R (Law Society) v Legal Services Commission* [2008] QB 737 (CA) and upon the decision in *Succhi di Frutta*, which they submit preclude reservation of an unqualified discretion to disqualify as contrary to the principle of transparency.
51. In the *Law Society* case a proposed new contract reserved to the Legal Service Commission the power to amend any terms of the contract after its execution if it considered it necessary to do so in order to facilitate a reform of the legal aid scheme, which was defined in the contract as such reforms as it might wish to implement in order better to comply with its statutory duties or fulfil its statutory functions. The Court of Appeal held that the fact that a contract contained an express power of amendment and a consultation procedure was not, of itself, sufficient to satisfy the principle of transparency. The case therefore concerned certainty of contractual terms

in the light of a reserved power to amend the terms of a contract after it had been executed, as to which the Court of Appeal said at [72]:

“What is also plain is that among the most important factors for compliance with the principle of transparency are the definition of the subject matter of the contract and need for certainty of terms.”

So it is clear that the *Law Society* decision goes beyond consideration of the principles applying to the exercise of a discretion and has at its heart the question of certainty of terms.

52. The fatal flaw in the *Law Society* case was that “the power of amendment is so wide in this case that it amounts to a power to rewrite the contract.” That additional element is not present in the exercise of the discretion to disqualify in the present case. To the contrary, the decision to disqualify is an act that tends to sustain the certainty of the terms of the ITT and franchise agreement by refusing to countenance deviation from the contractual terms defining the allocation of risk arising from the pensions problem.
53. The *Succhi di Frutta* case also concerned the ability of a contracting authority to change the contract conditions after execution of the contract. I do not understand it to lay down any general principle about how discretions should be exercised; nor is it directly in point in the present case.
54. In my judgment, and for these reasons, neither the *Law Society* nor the *Succhi di Frutta* case supports a submission that the reserved power of disqualification in the ITTs in the present franchise competitions was inherently unlawful.
55. A further material consideration is the application of the principle of equal treatment as applied to the discretion to disqualify. It follows from the principles laid down in *Commission v Denmark*, which I have cited at [27] above, that there may be circumstances in which a failure to disqualify a tenderer who has departed from the “basic terms” of the tender conditions would amount to a breach of the principle of equal treatment: see also [116] of the *Succhi di Frutta* case, which I have cited at [28] above. In such circumstances, it could not reasonably be argued that the power to disqualify was unlawful or that it had been unlawfully exercised.
56. The discretion to cancel the procurements is also expressed in broad terms in the ITTs in the present cases - “where [the Defendant] considers it appropriate to do so”: see Paragraph 1.9.1 cited at [106] below. As such it would be subject to the general principles I have identified. EU law recognises a broad discretion that may be exercisable in a wide range of circumstances: see *Amey Highways Ltd v West Sussex CC* [2019] EWHC 1291 (TCC) at [12] and [59], where I summarised relevant principles in the context of a claim arising under the Public Contract Regulations 2015.

Proportionality

57. The EU law of proportionality is not a single, uniformly applicable concept. I refer to and adopt with gratitude the helpful clarification by the Supreme Court in *Lumsdon* at

[23]-[26], [33]-[39] and [50]-[74]. Under the general umbrella-heading of “proportionality”, one critical aspect of the principle is the intensity with which it is applied. The level of scrutiny that will be appropriate and the threshold requirements that will justify intervention by the Court are context specific and will depend upon the nature of the measure in issue. This is made clear in *Lumsdon* at [37]-[38]:

“37. Proportionality as a ground of review of national measures ... has been applied most frequently to measures interfering with the fundamental freedoms guaranteed by the EU Treaties. Although private interests may be engaged, the court is there concerned first and foremost with the question whether a member state can justify an interference with a freedom guaranteed in the interests of promoting the integration of the internal market, and the related social values, which lie at the heart of the EU project. In circumstances of that kind, the principle of proportionality generally functions as a means of preventing disguised discrimination and unnecessary barriers to market integration. In that context, the court, seeing itself as the guardian of the Treaties and of the uniform application of EU law, generally applies the principle more strictly. Where, however, a national measure does not threaten the integration of the internal market, ... a less strict approach is generally adopted. ...

38. Where member states adopt measures implementing EU legislation, they are generally contributing towards the integration of the internal market, rather than seeking to limit it in their national interests. In general, therefore, proportionality functions in that context as a conventional public law principle. On the other hand, where member states rely on reservations or derogations in EU legislation in order to introduce measures restricting fundamental freedoms, proportionality is generally applied more strictly, subject to the qualifications which we have mentioned.”

This passage is complemented by [73]-[74]:

“73 Member states must also comply with the requirement of proportionality, and with other aspects of EU law, when applying EU measures such as Directives. As when assessing the proportionality of EU measures, to the extent that the Directive requires the national authority to exercise a discretion involving political, economic or social choices, especially where a complex assessment is required, the court will in general be slow to interfere with that evaluation. In applying the proportionality test in circumstances of that nature, the court has applied a “manifestly disproportionate” test:... . The court may nevertheless examine the underlying facts and reasoning:

74 Where, on the other hand, the member state relies on a reservation or derogation in a Directive in order to introduce a measure which is restrictive of one of the fundamental freedoms guaranteed by the Treaties, the measure is likely to be scrutinised in the same way as other national measures which are restrictive of those freedoms.”

58. The same distinction is drawn in Case 265/87 *Schrader* [1989] ECR 2237:

“21. The Court has consistently held that the principle of proportionality is one of the general principles of Community law. By virtue of that principle, measures imposing financial charges on economic operators are lawful provided that the measures are appropriate and necessary for meeting the objectives legitimately pursued by the legislation in question. Of course, when there is a choice between several appropriate measures, the least onerous measure must be used and the charges imposed must not be disproportionate to the aims pursued.

22. However, with regard to judicial review of compliance with the abovementioned conditions, it must be stated that, in matters concerning the common agricultural policy, the Community legislator has a discretionary power which corresponds to the political responsibilities imposed by Articles 40 and 43. Consequently, the legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution intends to pursue”

59. In my judgment the distinction may be summarised in the following way:

- i) Where a Member State acts in a way that imposes restrictions on EU fundamental rights such as the right of establishment and the right to pursue an economic right, which flow from Articles 49 and 56 of TFEU, then, although the Member State will enjoy a margin of discretion in its choice of policy choices and implementation, that discretion is subject to relatively rigorous scrutiny; and the principle of proportionality will be applied so that the measure must not go beyond what is necessary and appropriate to safeguard and achieve the relevant policy objective and must not be disproportionate to the benefits secured by it;
- ii) On the other hand, where a Member State is acting within the scope of EU law and does so without imposing restrictions on an established right conferred by the EU Treaties, it enjoys a very broad discretion and the Court will only intervene on proof of “manifest error”.

60. *Fabricom SA v Belgium* [2005] ECR I-1559 is an example of the former category: the national rule at issue automatically forbade companies which had been involved in preparatory work for a public contract from bidding for that economic opportunity. That was held to go beyond what was necessary to attain the objective of equal

treatment of all tenderers. *Lumsdon* was also such a case, being concerned with freedom of establishment for barristers; but the result in *Lumsdon* demonstrates that, even in such a case, the principle of proportionality is not to be applied mechanistically and allows a measure of judgment for the decision-maker about what steps are appropriate to be taken.

61. The first decision to be made, therefore, when considering the specified issues in detail, will be which limb of the proportionality principle will apply. That being a context-specific question, I shall return to it in the specific context of the issues to be determined later in this judgment.

Manifest error in assessment

62. In matters of evaluative judgment the Defendant has a significant margin of appreciation and its assessment should only be displaced where there has been “manifest error”: see *Lion Apparel Systems Inc. v Firebuy Ltd* [2007] EWHC 2179 (Ch) at [37]. The decision whether or not to disqualify the Claimants for their admitted breaches of the tender conditions is a paradigm case of such an evaluative judgment.
63. In Case T-250/05 *European Dynamics v Commission* (at [89]), which concerned a procurement by the EU institutions conducted under the Financial Regulation, the Court stated as a general preliminary point that:

“... it should be recalled that the Commission has broad discretion with regard to the factors to be taken into account for the purpose of deciding to award a contract following an invitation to tender, and that review by the Court must be limited to checking that the rules governing the procedure and statement of reasons are complied with, the facts are correct and there is no manifest error of assessment or misuse of powers”

This is a salutary reminder that the Court should always resist the temptation simply to substitute its view for that of a contracting authority and should only intervene where sufficiently material breaches of obligation are shown.

64. It is common ground that “...the word ‘manifest’ does not require any exaggerated description of obviousness. A case of ‘manifest error’ is a case where an error has clearly been made”: see *Energysolutions* at [273] to [277]. “Manifest error” is broadly equivalent to the domestic law concept of irrationality: see *Woods Building Services v Milton Keynes Council* [2015] EWHC 2011 (TCC) at [14]; *Energysolutions* at [312]. That in turn imports an obligation for the decision-maker to take reasonable steps to acquaint himself with the relevant information to enable him to answer the question correctly: see *Secretary of State for Education and Science v Tameside MBC* [1977] AC 1014, 1065.
65. The requirement to act without manifest error does not cease to apply merely because the decisions in question are based upon complex or technical assessments: see *Gibraltar Gaming and Betting Association Ltd v Secretary of State for Culture, Media and Sport and others* [2015] 1 CMLR 28 at [100]. It is not necessary and would be

wrong, in my judgment, to import an additional requirement that the error must be “fundamental”, though it must be of sufficient materiality to justify the Court’s intervention.

Proof of reasons and reasoning

66. The requirement that “the reasoning followed by the authority which adopted the measure” must be disclosed “in a clear and unequivocal fashion” means that two things may need to be proved to the satisfaction of the Court when it exercises its supervisory jurisdiction. The first is what reasons and reasoning were followed by the authority in deciding to adopt the measure. The second is that the contracting authority has disclosed the reasons and reasoning clearly and unequivocally and in sufficient detail to enable the person concerned to defend their rights and the court to exercise its jurisdiction.
67. There is a major dispute of fact between the parties about whether the reasons set out in the disqualification letters were in fact the reasons adopted by the Secretary of State in reaching his decision. I deal with that dispute in detail at [359] below. For present purposes it is sufficient to note that there is no formal note recording what happened at the meeting on 1 April 2019 at which the Secretary of State reached his decision to disqualify the Claimants from further participation in the three franchise competitions. Nor is there any witness evidence from the Secretary of State himself or any other person who was present at the meeting at which the decision was made. There is accordingly no direct witness evidence of what may have been the Secretary of State’s thought processes and reasoning that led him to disqualify the Claimants. The Defendant disclosed substantial documentation, which evidences the thinking of various officials within the Department for Transport and the Treasury over time, and copies of the cross-cutting submission (“the CCS”) and the EM franchise Ministerial Submission which were provided to the Minister in order to brief him and which made recommendations for future progress, together with brief emails recording the decisions that had been made: see [332] ff below. As will be seen, some of the decisions taken by the Secretary of State were in accordance with the recommendations being made to him by those submissions; but some were not.
68. Until the very end of the trial hearing the Defendant did not disclose any notes taken at the meeting on 1 April 2019 by any of the persons who attended it. Eventually the Defendant gave disclosure of notes relating to that meeting as follows:
 - i) On 14 February 2020, the 13th and last day of the trial hearing, the Defendant disclosed a handwritten note by Ms Walters, an in-house lawyer at the Department who attended the meeting. It was (and is) heavily redacted for legal professional privilege. The unredacted parts do not mention pensions or disqualification;
 - ii) On 25 February 2020, eleven days after the conclusion of the trial hearing, the Defendant disclosed notes of the meeting taken by the Secretary of State’s Private Secretary and the two Directors General from the Department.
69. This and other late disclosure reignited a smouldering debate about what evidence is appropriate to prove the Secretary of State’s reasoning and reasons for taking a

decision such as the decision (or decisions) to disqualify the Claimants from these competitions.

70. The Defendant's initial submission was founded on cases relating to domestic planning decisions and was, in summary, that where there is a report by officials to a decision-maker, it is a reasonable inference in the absence of evidence to the contrary that the decision-maker accepted the reasoning of the report, at all events where the decision-maker follows the report's recommendations: see *Oakley v South Cambridgeshire DC* [2017] EWCA Civ 71 at [20], *R (Palmer) v Herefordshire Council* [2017] 1 WLR 411 at [7], and the summary of principles by Hickinbottom J in *Sky Blue Sports & Leisure Ltd and Ors v Coventry City Council* [2014] EWHC 2089 (Admin) at [139].
71. In reply, the Claimants submit that these domestic planning cases do not relate to the EU obligation to give clear and sufficient reasons and that there is no general common law duty to give reasons in all planning cases. They rightly point out that none of the authorities referred to by the Defendant address the point whether the reasons of a Minister for a decision are to be taken to be some or all of the reasons set out in a Ministerial Submission. That is true of the first tranche of authorities advanced by the Defendant. However, support for the Defendant's submission is to be found in *R (National Association of Health Stores & Anr) v Department of Health* [2005] EWCA Civ 154 at [27] where Sedley LJ set out his view of "the reality of modern departmental government":

"The reality, subject no doubt to occasional lapses, is that ministers (or authorised civil servants) are properly briefed about the decisions they have to take; that in the briefings evidence is distinguished from advice; and that ministers take some trouble to understand the evidence before deciding whether to accept the advice."

72. Where that reality holds, the knowledge of officials is not to be imputed to the Minister without being imparted to him. The officials must bring to a Minister's attention:

"the salient facts which give shape and substance to the matter: facts of such importance that, if they are not considered, it could not be said that the matter has been properly considered."

and:

"... a minister who reserves a decision to himself - and equally a civil servant who is authorised by him to take a decision - must know or be told enough to ensure that nothing that it is necessary, because legally relevant, for him to know is left out of account. This is not the same as a requirement that he must know everything that is relevant. Here, for example, much that was highly relevant was appropriately sifted by the Commission in formulating its advice and then distilled within the department in order to make a submission to the minister which would tell him what it was relevant (not simply

expedient or politic) for him to know. What it was relevant for the minister to know was enough to enable him to make an informed judgment.” (*Health Stores* at [61]-[62])

73. It will therefore always be appropriate and necessary to look to the briefing that has been submitted to the Minister. Borrowing from principles developed in the context of planning law, documents such as Ministerial Submissions should be subjected to close scrutiny to discover their true meaning. They should not be read with undue rigour or as if they were a statute but with reasonable benevolence, bearing in mind that they are written for Ministers who may have prior knowledge, general or particular. “Reasonable benevolence”, to my mind, merely implies a disposition to find coherence if it is there to be found. In my judgment, the Court should always bear in mind the sifting that will have taken place in the preparation of such documents, and should not be astute to pick up on any and every imperfection that can be identified under the forensic microscope of contested litigation. The better approach is to look for the coherence in the document and to be concerned only by errors that would or might materially mislead the recipient. The object is to see whether the Minister had sufficient information to enable her or him to make an informed judgment and whether the reasoning and reasons for the Minister’s decision can be inferred from a combination of the briefing and the decision itself. But, in my judgment, it would not be justified to elevate this sensible and necessary step into a presumption (let alone a legal presumption) that a Minister will have adopted all of the reasons in a report, even where the Minister has made a decision which is in accordance with the recommendations in the briefing. The question is one of inference and proof. In some cases, particularly those that are complex and multi-factorial, it may be difficult to infer with any confidence that the Minister accepted all arguments and reasons set out in the briefing. It may also be undesirable from the decision-maker’s point of view if the briefing contains anything that the Court later holds should not have been relied on. Those difficulties will be increased if it is apparent that the Minister has accepted some recommendations but rejected others.
74. Particular problems may also arise where, as in the present case, the materials are incomplete. For example, the CCS in the present case is heavily redacted for privilege. It is of course a decision-maker’s right not to waive legal professional privilege; but if it is not waived, it may leave gaps in the relevant information and logic which limit a court’s ability to draw inferences about the decision-maker’s reasons and reasoning with confidence. In contested litigation, it will always be for the parties to decide what evidence is required in order to substantiate their case. While I do not suggest that it is or need be the norm for the actual decision-maker to attend court to give evidence about their reasons and reasoning, I do not accept that the combination of a briefing plus a decision will always be sufficient evidence to substantiate what were the reasons in a particular case. Nor do I accept that the briefing and decision are the only sources of evidence that may be available and admissible. The questions of inference and proof are to be resolved on the basis of all relevant and admissible evidence.

The duty to give sufficient reasons

75. It is common ground between the parties that there is a duty to provide reasons for a decision such as the disqualification in the present case and that the obligation to state reasons is an essential procedural requirement. The level of detail which must be

given in order to satisfy this duty will inevitably be context and fact specific. The guiding principle, as affirmed by the Supreme Court in *Healthcare at Home* at [17] is that:

"The reasoning followed by the authority which adopted the measure must be disclosed in a clear and unequivocal fashion so as, on the one hand, to make the persons concerned aware of the reasons for the measure and thereby enable them to defend their rights and, on the other, to enable the court to exercise its supervisory jurisdiction."

76. Where the context permits, that reasoning can be in summary form as happened in Case T-183/00 *Strabag Benelux NV*. A different context requiring different levels and means of explanation is provided by the facts of *Lancashire Care NHS Foundation Trust & Anor v Lancashire County Council* [2018] EWHC 1589 (TCC), where I summarised the relevant principles and their underlying rationale at [49]-[55]. It remains my view that a procurement in which the contracting authority cannot explain the reasons for its decision fails the most basic standard of transparency. That said, there is no requirement that the reasons and reasoning must all be contained in one document (whether that be the document conveying the decision or otherwise), though the later the purported explanation, the greater the scrutiny that will be required to ensure that what is being provided is in fact the reasons or reasoning that prevailed at the relevant time and not merely an ex post facto justification.

Parliamentary privilege

77. A discrete issue concerning the scope of parliamentary privilege arises out of an answer given by the Secretary of State to a question before the Transport Select Committee ("TSC") on 17 July 2019. In the context of the Department having been subject to legal action on a number of fronts over the previous 12 months the Secretary of State was asked "Why do you think the Department keeps getting sued?" In the course of his answer, which ranged across other disputes as well as the present, he replied:

"Let us start with the rail issue. I am absolutely clear that the Department has followed and taken the best legal advice that we can. We are being taken to court over a decision to exclude around pension rights. It is worth saying that the decision was based on very clear legal advice, absolutely clear and categorical legal advice. It is not something I would have chosen to do; it is a matter of regret, but we have done what we are told that clearly we legally have to do. It is also worth saying that it is a matter of public record that across the franchise bids there were six different owning groups that put in bids. Only two of those owning groups were excluded on grounds that they had made non-compliant bids on pensions, so it is not something where the Department is somehow out there. In each of the other bids, we have compliant bids to consider, otherwise we would have taken the same step with the other owning groups."

78. Initially the Claimants asserted that this statement to the TSC amounted to a waiver of legal professional privilege. That assertion is no longer pursued. They now submit that this statement is different from the reasons stated in the notification letters of 9 April 2019 and corresponds to only part of the reasoning which appears in the redacted version of the CCS which formed part of the briefing to the Secretary of State and is, where not redacted, in evidence. For its part, the Defendant submits that this statement is covered by parliamentary privilege and should be left out of account when the Court is determining what the Defendant's reasons for the decision to disqualify the Claimants may have been.

79. The parties corresponded with the Speaker's Counsel, to whose views I give appropriate weight. Neither the parties nor the Court felt it necessary to request the presence of the Speaker's Counsel at trial. In its letter of 28 January 2020 the Speaker's Counsel said:

“The Government, as we understand it, wishes strongly to dispute the inference drawn from what was said to the Committee. It is not, therefore, in the category of Parliamentary material identified by Stanley Burnton J (*OGC*, para. 64) when he says, "If the evidence given to a Committee is uncontentious, i.e. the parties...agree that it is true and accurate, I see no objection to its being taken into account".

We do not, of course, contend that there is a 'Harry Potter cloak of invisibility' over statements made in proceedings of either House of Parliament (a perspective considered, and rejected, by Green J in *R (Justice for Health) v Secretary of State for Health and Social Care*). There can be no objection to noting that the statement was made. However, this is not a case in which the Secretary of State expressly set out reasons for a decision in the course of proceedings in Parliament (as in *Justice for Health*). *The quoted extract merely indicates that there were reasons, contained in legal advice, but does not set them out. It is impossible to draw any conclusion about what those reasons were without questioning, or drawing inferences from, the proceedings in Parliament.*” (Emphasis added)

80. By a letter dated 5 February 2020 Messrs Ashurst wrote on behalf of the Claimants to the Speaker's Counsel and the Defendant referring to *Toussiant v AG of St Vincent and the Grenadines* [2007] 1 WLR 2825 in support of their argument that what Mr Grayling said to the TSC was not covered by parliamentary privilege. They stated that they do not seek to challenge the truth or accuracy of Mr Grayling's remarks; rather they rely upon them “as an explanation of his reasoning for his decisions. Accordingly this material remains “uncontentious”... .”

81. The Defendant's solicitors replied on 6 February 2020 and set out the Defendant's position:

“8. For the avoidance of any doubt, while the Defendant does not dispute the truth of the Secretary of State's comments to the Transport Select Committee (“TSC”) on 17 July 2019, it does

dispute their accuracy as a guide to the issues relevant to this case, as it is the Defendant's position that those comments do not set out the entirety of the reasons for the decisions challenged by the Claimants." (Underlining in the original)

The Defendant also restated its position on proof of reasons as had been previously been articulated by Leading Counsel in opening submissions:

"The point I was making, ..., is that frequently, and there are numerous examples in these papers and [many]¹ others, there are decisions which are taken which are attributed to the Minister, and rightly attributed to him, but where the best evidence of what was done is, particularly in this age, the electronic records of the submissions that were put up and the reasons that were put up. So we have come defending our case on the basis of those reasons, rather than trying to go into the minutiae of who said what, when, or [where] the decision was actually taken by an individual. So we would say that was the normal approach. And we don't defend our case by reference to what Mr Grayling said in the Select Committee, although obviously if it is put to us, we will deal with it."

82. I note in passing that, for reasons already given, I do not accept that the Ministerial Submissions are the only relevant evidence that may be considered when deciding what the Minister's reasons may have been for disqualifying the Claimants: see [66] ff above. However, it appears from this submission and the terms of paragraph 8 of the letter of 6 February 2020 that, despite accepting and asserting that what Mr Grayling said was true, the Defendant would not rely upon what Mr Grayling said to the TSC. If what Mr Grayling said was put to it by the Claimants, it would "deal with it" by saying that the statement was not an accurate guide to the issues in the case and that Mr Grayling's comments do not set out the entirety of the reasons for the decisions challenged by the Claimants.
83. The Speaker's Counsel wrote again on 7 February in the light of the letters of 5 and 6 February 2020 to which I have just referred:

"... . [A]s it is our understanding that the Defendants do dispute that that statement fully reflects the reasons for the decision, it is our view that Parliamentary privilege continues to be in issue in this case and that the material cannot be described as "*uncontentious*" as suggested in Ashurst's letter. That letter states that the Claimants rely on the Secretary of State's remarks "*as an explanation of his reasoning for his decisions*".

Ashurst's letter cites *Toussaint v Attorney General of St Vincent and the Grenadines* as a precedent for use of the Parliamentary material in this case. However, it is our view that that case can be distinguished from the present one, for the good reason that

¹ The transcript says "any" but the sense suggests "many".

the Defendants have expressly stated that they dispute the interpretation to be placed on the Parliamentary material.

The Privy Council in *Toussaint* raised the possibility, in the passage quoted in Ashurst's letter, that "If the Prime Minister were to suggest that he expressed himself incorrectly, and did not intend to say what he said, then it would not be Mr Toussaint who was questioning or challenging what was said to the House". However, they did not go on to consider what the effect of such questioning or challenging would be on the court or the Prime Minister, presumably because the suggestion was hypothetical and was not before them in that case. In *OGC* that matter is expressly considered (in the context of an opinion of a Select Committee from which a party wishes to dissent, placing the tribunal in the position of having to determine whether or not the Parliamentary Committee was correct). Stanley Burnton J says (para 58): "... a party to litigation should not seek to rely on the opinion of a parliamentary committee, since it puts the other party at an unfair disadvantage, and if the other party does dispute the correctness of the opinion of the committee, would put the tribunal in the position of committing a breach of parliamentary privilege if it were to accept that the parliamentary committee's opinion was wrong".

After citing from *Kimathi and others v Foreign and Commonwealth Office (Speaker of the House of Commons intervening)* [2017] EWHC 3379 (QB), the Speaker's Counsel continued:

"In this case, the Claimants seek to use the Parliamentary material as evidence of fact, and the Defendants dispute those facts. This appears to us to be in line with *Kimathi*. Other cases that support this approach are *Coulson v Her Majesty's Advocate, R (Age UK) v Secretary of State for BIS* and *R (Butt) v Secretary of State for the Home Department*, all cited in *Kimathi* (para 24). In particular, in *Coulson* the court says (para. 20): "[The principles of Parliamentary privilege] prohibit the leading of evidence questioning anything forming part of proceedings in Parliament but they also prohibit the leading of evidence for the purpose of relying on the truth etc of anything forming part of proceedings in Parliament; otherwise establishing the credibility of any person; or inviting the drawing of inferences or conclusions wholly or partly from anything forming part of these proceedings."

In the light of the case law and the Defendants' statement of the position, our position remains that the use proposed to be made of the Parliamentary material in this case infringes Parliamentary privilege."

84. I have set out the contents of the letters from the Speaker's Counsel at some length, being mindful of the need to give due weight to his views and because it provides a

clear indication of the area of dispute that arises between the parties on this point. I note in passing that it was not strictly accurate to say, as set out above, that the Defendant disputed the facts stated by Mr Grayling: the Defendant's case is that what he said is true but incomplete and should therefore not be taken as a complete statement of the reasons for disqualification. However, in the light of these passages, it is not necessary to provide extensive additional citation from multiple authorities: I refer specifically to two.

85. In *Office of Government Commerce v Information Commissioner* [2008] EWHC 737 (Admin) (“OGC”) Stanley Burnton J conducted a wide-ranging review of previous authority, specifically addressing the question whether the rule laid down by Article 9 of the Bill of Rights 1689 extends to cover statements which invite the drawing of inferences or conclusions over and beyond the objective meaning of the statement itself. His review of the decision of the Privy Council in *Prebble v Television New Zealand Ltd* [1995] 1 AC 1 demonstrated a degree of ambivalence and ambiguity on the point, particularly on what would amount to prohibited “questioning” of a statement: see [31]-[34]. At [36] Stanley Burnton J pointed to *Church of Scientology of California v Johnson-Smith* [1972] 1 QB 522, where Brown J stated (in a passage subsequently approved by the House of Lords in *Pepper v Hart*) the general principle that prohibits the use of extracts from Hansard “in any way which might involve questioning, in a wide sense, what was said in the House of Commons as recorded in Hansard.” Having identified a similar degree of ambivalence in the later decision of the House of Lords in *Hamilton v Al Fayed* [2001] 1 AC 395 Stanley Burnton J said, at [39]:

“That Parliamentary privilege does prevent a challenge to the accuracy or veracity of something said in Parliamentary proceedings is, I think, confirmed by what [Lord Browne-Wilkinson] said at 407F [of *Hamilton*]:

“... The normal impact of parliamentary privilege is to prevent the court from entertaining any evidence, cross-examination or submissions which challenge the veracity or propriety of anything done in the course of parliamentary proceedings. Thus, it is not permissible to challenge by cross-examination in a later action the veracity of evidence given to a parliamentary committee.”

“Veracity” is apt to include accuracy.”

86. At [44] he considered *Toussaint* noting that Mr Toussaint did not in that case allege that the Minister had misled Parliament but, to the contrary, was alleging that what was said in Parliament disclosed the Minister's true intention. And, after reviewing the decision of Bean J in *R (Bradley and others) v Secretary of State for Work and Pensions* [2007] EWHC 242 (Admin) and his own earlier decision in *R (Federation of Tour Operators) v HM Treasury* [2007] EWHC 2062 (Admin) he said at [46]-[49]:

“[46] These authorities demonstrate that the law of Parliamentary privilege is essentially based on two principles. The first is the need to avoid any risk of interference with free speech in Parliament. The second is the principle of the

separation of powers, which in our Constitution is restricted to the judicial function of government, and requires the executive and the legislature to abstain from interference with the judicial function, and conversely requires the judiciary not to interfere with or to criticise the proceedings of the legislature. These basic principles lead to the requirement of mutual respect by the Courts for the proceedings and decisions of the legislature and by the legislature (and the executive) for the proceedings and decisions of the courts.

[47] Conflicts between Parliament and the Courts are to be avoided. The above principles lead to the conclusion that the Courts cannot consider allegations of impropriety or inadequacy or lack of accuracy in the proceedings of Parliament. Such allegations are for Parliament to address, if it thinks fit, and if an allegation is well-founded any sanction is for Parliament to determine. The proceedings of Parliament include Parliamentary questions and answers to. These are not matters for the Courts to consider.

[48] In my judgment, the irrelevance of an opinion expressed by a Parliamentary Select Committee to an issue that falls to be determined by the Courts arises from the nature of the judicial process, the independence of the judiciary and of its decisions, and the respect that the legislative and judicial branches of government owe to each other.

[49] However, it is also important to recognise the limitations of these principles. There is no reason why the Courts should not receive evidence of the proceedings of Parliament when they are simply relevant historical facts or events: no questioning arises in such a case: see 35 above. Similarly, it is of the essence of the judicial function that the courts should determine issues of law arising from legislation and delegated legislation. Thus, there can be no suggestion of a breach of Parliamentary privilege if the Courts decide that legislation is incompatible with the European Convention on Human Rights: by enacting the Human Rights Act 1998, Parliament has expressly authorised the Court to determine questions of compatibility, even though a Minister may have made a declaration under s 19 of his view that the measure in question is compatible. The Courts may consider whether delegated legislation is in accordance with statutory authority, or whether it is otherwise unlawful, irrespective of the views to that effect expressed by Ministers or others in Parliament: *R (Javed) v Secretary of State for the Home Department* [2001] EWCA Civ 789, [2002] QB 129 at 33, [2001] 3 WLR 323:

“... Legislation is the function of Parliament, and an Act of Parliament is immune from scrutiny by the courts, unless challenged on the ground of conflict with European law.

Subordinate legislation derives its legality from the primary legislation under which it is made. Primary legislation that requires subordinate legislation to be approved by each House of Parliament does not thereby transfer from the courts to the two Houses of Parliament, the role of determining the legality of the subordinate legislation...”

87. At [58]-[59] Stanley Burnton J, in a passage cited by the Speaker’s Counsel, exposed the difficulties that may arise when parties seek to rely on statements made in Parliament in the different context of contested litigation:

“[58] In addition, in my judgment, there is substance in Mr Chamberlain's further submission, summarised at para 23(b)(i) above. If a party to proceedings before a court (or the Information tribunal) seeks to rely on an opinion expressed by a Select Committee, the other party, if it wishes to contend for a different result, must either contend that the opinion of the Committee was wrong (and give reasons why), thereby at the very least risking a breach of Parliamentary privilege, if not committing an actual breach, or, because of the risk of that breach, accept that opinion notwithstanding that it would not otherwise wish to do so. This would be unfair to that party. *It indicates that a party to litigation should not seek to rely on the opinion of a Parliamentary Committee, since it puts the other party at an unfair disadvantage and, if the other party does dispute the correctness of the opinion of the Committee, would put the tribunal in the position of committing a breach of Parliamentary privilege if it were to accept that the Parliamentary Committee's opinion was wrong.* As Lord Woolf MR said in *Hamilton v Al Fayed* at [1999] 1 WLR 1586G, the courts cannot and must not pass judgment on any Parliamentary proceedings.

[59] If it is wrong for a party to rely on the opinion of a Parliamentary Committee, it must be equally wrong for the tribunal itself to seek to rely on it, since it places the party seeking to persuade the tribunal to adopt an opinion different from that of the Select Committee in the same unfair position as where it is raised by the opposing party. Furthermore, if the tribunal either rejects or approves the opinion of the Select Committee it thereby passes judgment on it. To put the same point differently, in raising the possibility of its reliance on the opinion of the Select Committee, the tribunal potentially made it the subject of submission as to its correctness and of inference, which would be a breach of Parliamentary privilege. This is, in my judgment, the kind of submission or inference, to use the words of 16(3) of the Parliamentary Privileges Act 1987, which is prohibited.” (Emphasis in [58] added)

88. At [64] in another passage cited by the Speaker's Counsel, Stanley Burnton J said:

“My conclusion does not lead to the exclusion from consideration by the Commissioner or the tribunal of the opportunity for scrutiny of the acts of public authorities afforded by the work of Parliamentary Select Committees. They may take into account the terms of reference of Committees and the scope and nature of their work as shown by their reports. If the evidence given to a Committee is uncontentious, ie, the parties to the appeal before the tribunal agree that it is true and accurate, I see no objection to its being taken into account. What the tribunal must not do is refer to evidence given to a Parliamentary Committee that is contentious (and it must be treated as such if the parties have not had an opportunity to address it) or to the opinion or finding of the Committee on an issue that the tribunal has to determine. Nor should the tribunal seek to assess whether an investigation by a Select Committee, which purports to have been adequate and effective, was in fact so.”

89. I respectfully agree with and adopt the analysis of Stanley Burnton J in *OGC*. Subsequently, a number of first instance decisions, conveniently summarised at [24] of *Kimathi and others v Foreign and Commonwealth Office (Speaker of the House of Commons intervening)* [2017] EWHC 3379 (QB) and the decision of *Kimathi* itself, have taken a cautious attitude to the possibility of infringing parliamentary privilege where statements may be relied upon to prove the facts to which they relate, either directly or by inference. The present high-water mark in this tide of caution is probably [20] of *Coulson v HM Advocate* [2015] HCLJ 49 (a passage cited in part by the Speaker's Counsel) which concludes:

“Parliamentary proceedings are simply off-limits when it comes to litigation. They cannot be relied on either to make or to rebut a case and it does not matter whether, for the purposes of litigation, their integrity is being disputed or is being endorsed.”

90. Tending in the opposite direction is the discussion (obiter) by Green J in *R (Justice for Health Limited) v Secretary of State for Health* [2016] EWHC 2338 (Admin) at [151]-[162] upon which the Claimants rely. The nature of the Grounds of Challenge in that case are important. Ground I was that, properly analysed, a decision taken by the Secretary of State on 6 July 2015 was a decision that certain contract terms would be *imposed* on all NHS employing bodies (and, by that route, upon employed doctors) even though the Minister had no power to impose such a contract. The issue of parliamentary privilege arose in the context of Ground II, which was that, even if the Minister had the power to make the decision he did, the manner in which the decision was taken was so opaque and confused that it violated the principles of transparency and good administration. The gist of the argument was that over a period of months, starting with a Ministerial Statement on 6 July 2016, the Secretary of State in public conveyed the message that the action he was taking amounted to a binding decision to impose a contract on doctors and that he had power to make such a decision. By the time of trial, the Secretary of State's case was that he had been doing no more than

making a recommendation or proffering guidance to NHS employers. It was this mismatch that led to the allegation of opacity and lack of transparency. The Claimants' case that the principle of transparency had been violated relied upon the Ministerial Statement (which was alleged to be in mandatory and declaratory language inconsistent with the case being advanced by the Defendant at trial) as an occasion constituting at least a part of the breach of the duty of transparency. As in the present case, the decision of the Minister that was being challenged was a decision taken outside Parliament.

91. On Ground II Green J first considered the evidence (including evidence about the nature and terms of the Statement to Parliament) and concluded that, although the Ministerial Statement left the doctors with the impression that compulsion was in play and no negotiating daylight was left, the Minister's Statement had been subject to subsequent elaboration and clarification and that, from the date of that clarification, there had been no ambiguity. He concluded at [148] that the principle of transparency applied but held that there had been no breach of the principle because, although the Ministerial Statement led to a degree of misapprehension (by which the Judge meant misunderstanding on the part of the doctors) "the Minister has speedily removed that ambiguity or confusion and made his position clear."
92. Having reached this decision, which was determinative of the Ground being advanced by the Claimants before him, Green J turned to consider the Defendant's submission that the Ministerial Statement should have been left out of account because of parliamentary privilege, on the basis that referring to it inevitably involved criticising the Minister for his conduct in Parliament, including in relation to the accuracy of his statements. At [156] he identified that the difficulty in that case was that "in a relatively brief statement of reasons an issue of significance to one category of relevant addressee was not spelled out (viz., the scope for negotiations with employers) and did thereby lead to misapprehension." In other words, the Ministerial Statement was itself the substance and target of the challenge alleging lack of transparency. After citing from *Toussaint*, including that there was no challenge to the accuracy of the Prime Minister's statement in that case, Green J held that the case he was considering was analogous to that arising in *Toussaint*. He relied upon the fact that there was no suggestion that the Ministerial Statement in the case he was considering had misled Parliament and that "the worst that can be said is that in a short summary statement there were various matters not expressly addressed that caused some addressees to form an incomplete and inaccurate view.": see [162].
93. There are a number of strands of argument that lead me to conclude that I should not take what the Secretary of State said to the TSC into account when determining the reasons for his decisions to disqualify the Claimants.
94. I start by noting the context in which the Secretary of State said what he did. He was not asked for an explanation for his decisions to disqualify the Claimants. He was asked and responded to the much more politically loaded question why the Department kept getting sued. I have set out the passage of his answer relating to rail franchising; but in fact his answer continued and was more wide-ranging. When read fairly, in full and in context, it was not an attempt to answer the different question, which he had not been asked, namely why he had disqualified the Claimants.

95. The result of this different question and context contributed to the fact that his answer was self-evidently not a full explanation of the reasons for disqualification. Furthermore, it is relevant to bear in mind that, when talking about legal advice, the Secretary of State is not and does not profess to be a lawyer. His answer was given at a very high level of non-lawyerly abstraction and should not be read otherwise.
96. These two initial reasons of themselves would fully explain why the Secretary of State's answer provided no detail about the terms of the legal advice that he had been given, apart from the fact that it was compelling. This is in stark contrast to the extreme investment in legalistic precision that the parties have brought to this litigation. The fact that his answer was obviously not intended to be a complete answer to the question he was not asked is also demonstrated by the complete absence of any detail about what reasons he took into account (either for or against disqualification) that were not legal advice. He merely said that disqualification was not something that he would have chosen to do, which itself is ripe with ambiguity.
97. Next, this is not a case such as *Justice for Health* where what was said in the Ministerial Statement was alleged to be at least part of the substance of the breach alleged by Ground II. At its highest it could be relevant evidence about the earlier conduct that is said to have amounted to breach of duty. The degree of removal of this evidence from the substance of the alleged breach is shown by the fact that the present proceedings had been issued in May and June 2019 and at least two CMCs had taken place before the Secretary of State went before the TSC on 17 July 2019.
98. Applying the principles that I have summarised above, the Claimants cannot rely upon the statement unless it may properly be regarded as "uncontentious." The reasoning and statement of principle of Stanley Burnton J at [58] of *OGC*, cited above, applies by parity of reasoning to a statement made to a select committee by a Minister as it does to the opinion of a Parliamentary Committee as was the case in *OGC*.
99. I do not accept that the statement can be described as "uncontentious". Although the Defendant appears by paragraph 8 of its letter on 6 February 2020 to endorse what was said by the Secretary of State to the TSC, even that endorsement is rendered equivocal by what follows. That is because, on a literal reading of the Secretary of State's answer, it could reasonably be concluded that compelling legal advice was the *only* reason for disqualification, which the Defendant does not accept in its letter or more generally in the litigation. This discrepancy is noted by the Claimants in their closing submissions where they point out that the reason given to the TSC is different from those stated in the notification letters on 9 April 2019 and corresponds with only part of the reasoning in the CCS. So, although the fact that legal advice was given and received is beyond any doubt (as is conclusively shown by the extent of redactions to the CCS), the Secretary of State's reply to the TSC cries out for questioning and inference about what that advice might have been, as submitted by the Speaker's Counsel: see [79] above. The result is that, since the Defendant now runs a more complicated case, it runs the immediate risk of having to challenge the Secretary of State's answer, however hard it has tried to avoid doing so in its letter of 6 February 2020. This should not be entertained by the Court: see [58] of *OGC*.
100. The incomplete nature of the answer and the context in which it was given bring into play the first of the principles identified at [46] of the *OGC* decision, namely the need

to avoid interfering with free speech in Parliament. To my mind, there could be a significant chilling effect if ministers asked one question before the TSC had to be conscious that their answer might subsequently be picked over in relation to another question in the different context of disputed litigation. This is not an attempt to rely upon what was said merely as an historical fact or event.

101. For these reasons, I reject the analogy with the *Justice for Health* case. Although I would not adopt the unqualified terms of [20] of *Coulson*, I conclude that what the Secretary of State said to the TSC on 17 July 2019 is covered by parliamentary privilege and should not be taken into account in this litigation.

Factual Background

Privatisation of the Railways and the Statutory Role of the Secretary of State

102. The railways in England and Scotland have been privatised since the 1990s. Pursuant to the terms of the Railways Act 1993 passenger rail services are provided by TOCs that have entered into franchise agreements with the Secretary of State after a competitive procurement process conducted under the Railway Regulation. Those franchise agreements define the services to be provided by the franchise holder and the terms on which they are to be provided. Franchise agreements have been in relatively standard form for some time so far as is material to this litigation. Each franchise agreement will cover the provision of passenger rail services for a defined geographical area. Any franchise is a major commercial undertaking involving the investment of large sums with associated risks and potential rewards.

The process of franchising

103. Typically, the Defendant issues an ITT which will regulate how the procurement process is to be conducted. The ITT will be issued to potential tenderers who have pre-qualified and are known as passport holders. The desired end result of the procurement process is the decision of the Secretary of State to enter into a franchise agreement with the preferred bidder, which in turn leads to the execution of the franchise agreement itself. The terms of the ITT and the franchise agreement are set by the Secretary of State. The draft franchise agreement is annexed to the ITT so that bidders may see the terms on which they will be required to contract, though there is the possibility of communication and clarification during the process, including the ability for bidders to raise requests for clarification by questions (known as clarification questions or CQs).

104. Occasions may arise where the provision of passenger rail services is required in the absence of a franchisee appointed pursuant to a competitive procurement, either because a new franchisee has not been appointed or because a franchise is terminated part-way through. Where a franchise comes to its end and no new franchise has been agreed, the existing franchisee (or another TOC) may be appointed to continue (whether on existing terms or new, directly negotiated, ones); and where a franchise is terminated part-way through, it may be necessary for the Secretary of State to appoint another operator to provide the services after a direct negotiation and award or to take over the franchise as the Operator of Last Resort. I accept the evidence of Mr Smith, the Defendant's Director for Policy, Operations and Change within the Rail Passenger Services Directorate, that direct awards are not the Secretary of State's preferred option because they involve negotiating with a single operator who is by definition in a strong bargaining position and whose profit margin tends to end up higher than after a competitive process; and because it is difficult to build in proposals for improvements to the provided service or investment for the longer term e.g. by the provision of new rolling stock.

The terms of the ITT

105. The ITT for each franchise in this case dealt with the question of non-compliant bids at Section 3.5. On its face it gave the Defendant an unqualified discretion to

disqualify bidders who submitted non-compliant bids. The SE and WCP ITTs, which differed very slightly from the EM ITT, provided as follows:

“Non-compliant Bids

3.5.1 A Bid will be non-compliant if it ...fails to follow the Department's instructions set out in this ITT, or if one of the elimination events in subsection 3.6 (Automatic elimination) occur,

3.5.2 If the Department considers that a Bid may be non-compliant, it may (but it is not obliged to) seek additional information or clarification from the relevant Bidder

3.5.3 Where a Bid is found to be non-compliant ... and except where subsection 3.6 (Automatic elimination) applies, the Department may at its sole discretion reject the Bid and disqualify the Bidder who has submitted that Bid from the competition.

3.5.4 Where a Bid is found to be non-compliant in accordance with subsection 3.5.1 and where the Department decides not to reject the Bid and disqualify the Bidder pursuant to subsection 3.5.3 above, it may start to evaluate the Bid and:

a) Take into account the effect of the non-compliance in all relevant elements of the evaluation (including, without limitation, in the allocation of evaluation scores and in the Financial Robustness Test); and

b) May also, where appropriate, correct the Modelling Suite for the purposes of running the FRT ... as necessary to take into account its reasonable view of the most likely financial impact of the non-compliance on the Department in accordance with subsection 7.6 (Evaluation of Financial Robustness),

except that the scoring of the Bid ...may not be improved as a result of the process set out in this subsection.

3.5.5 Where the Department determines that it is not appropriate to reject the Bid, or to complete the evaluation of the Bid and address the non-compliance through the process set out in subsection 3.5.4, the Department will at its sole discretion take any other action it considers necessary and appropriate in the circumstances, including but not limited to:

a) Disregarding the non-compliance;

b) Adjusting the requirements of this ITT, and giving all Bidders the opportunity to adjust or update their Bids to reflect the revised requirements; or

c) Requiring any or all Bidders to adjust or update their Bids so that they are compliant.

In so doing the Department shall have sole discretion as to whether or not any such action would have a material impact on any or all of the Bids such that any element of the evaluation requires to be reopened or Bids are to be adjusted or updated.

...”

106. In addition:

i) Paragraph 1.9.1 stated:

“The Department is not and shall not be liable for any costs incurred by those expressing an interest or negotiating or tendering for this contract, their Associated Entities or any other person. The Department reserves the right not to award a contract, to make whatever changes it sees fit to the structure and timing of the procurement process (including issuing updates and amendments to this ITT), to cancel the process in its entirety at any stage and, where it considers it appropriate to do so, to make a direct contract award pursuant to Articles 5(5) or 5(6) of Regulation (EC) 1370/2007.”

ii) Paragraph 3.5.6 required bidders to provide a Non-compliance Statement listing all requirements of the ITT with which they were not able to confirm compliance in full at the time of Bid submission and to provide full details of the reasons for the non-compliance;

iii) Section 3.6 listed events that would trigger automatic disqualification, none of which apply on the facts of this case;

iv) Paragraph 4.1.2 expressly prohibited qualifications or the proposing of alterations to the terms of the Franchise Agreement – including, specifically in relation to the allocation of risk - as follows:

“The Department expects to receive Bids that contain no qualifications. Bidders shall not propose amendments to the Franchise Signature Documents ... , including by proposing their own Secretary of State Risk Assumptions or any other contractual amendments which seek to transfer risk from the Franchisee to the Secretary of State. For the avoidance of doubt, any failure by a Bidder to comply with the requirements of this subsection 4.1 shall mean that the Bid is deemed non-compliant, and the provisions of subsection 3.5 (Non-compliant Bids) of this ITT shall apply.”

v) Paragraph 5.1.8 reiterated the overarching need to comply with the Franchise Signature Documents:

“As part of this procurement, Bidders are not permitted to mark up the Franchise Signature Documents other than to fill gaps denoted by the drafting note 'Bidders to populate'. It is an overarching requirement that Bidders' proposals set out in each Delivery Plan and Sub-Plan are compliant with the Franchise Signature Documents. For the avoidance of doubt, any Initiative contained within a Bidder's response to this Section 5: (Detailed Bid submission requirements - Delivery Plans) which is non-compliant with the Franchise Signature Documents will not meet the Department's requirements, and will result in a Bid being treated as non-compliant.”

vi) Paragraph 7.2.1.5 provided:

“If:

a) A Bid is found to be non-compliant in accordance with subsection 3.5 (Non-compliant Bids);

b) The Department decides not to exercise its right to reject the Bid and disqualify the Bidder who has submitted that Bid from the competition; and

c) The effects of the non-compliance include a likely financial impact on the Department (in the Department's reasonable view),

the Department may adjust the Modelling Suite and re-run the Financial Robustness Test in accordance with subsection 7.6 (Evaluation of Financial Robustness), to take into account its reasonable view of the most likely financial impact of the non-compliance on the Department, provided that this shall only reduce the value of P used in the calculation of the Final Score for that Bid.”

vii) Paragraph 7.12.1 reserved to the Defendant the right at any time prior to notification of the preferred Bidder, to require one, some or all Bidders to submit revised bids (a) where all Bidders had failed the Financial Robustness Test or (b) in the event that the Department at its sole discretion considered it would be appropriate in the circumstances to do so, for any reason;

viii) Because of the uncertainties to which I refer below, pensions were treated lightly in the ITTs as originally issued and further contractual details were provided by Rebid instructions at a later date. Paragraph 3.16.1 of the original ITTs drew the attention of the Bidder to Schedule 16 of the Franchise Agreement which normally sets out the requirements for pensions (of which more later) and continued:

“... For the avoidance of doubt, the Department will not provide any indemnity regarding any payments that may be

required under the Railways Pension Scheme (Protection and Designation of Schemes) Order 1994 (SI1433) or otherwise.”²

The Bidding Consortia

107. Bidding TOCs are typically (and were in the case of the present Claimants) relatively thinly capitalised special purpose vehicles established either by individual parent companies or owning groups. Their financial liabilities as franchisees (and those of their sponsoring parents) are limited to pre-determined levels of parent company support (“PCS”) and bonds that are required as part of the overall agreement for the franchise.
108. The Stagecoach group participated in the SE and EM franchise competitions through such SPVs, being Stagecoach South East Trains Limited (“SSETL”) and Stagecoach East Midlands Trains Limited (“SEMTEL”). It participated in the WCP franchise competition as part of a consortium with members of the Virgin and SNCF groups through another SPV, West Coast Train Partnership Limited (“WCTP”).

The Railways Pension Scheme (“RPS”)

109. The main structure of the RPS is laid down by the Railways Act 1993. It is a sectionalised defined benefit (“DB”) pension scheme that was set up to replace the British Rail Pension Scheme on privatisation. It had approximately 344,000 members at the end of 2018, being present and past employees in the rail industry; and there were 106 sections, each covering a different section of the industry. It has a Trustee Board consisting of 16 directors, of whom 8 are employer-nominated and 8 are member-nominated. The close involvement of the trade unions is a feature of the RPS as it is of the rail industry generally. The rules of the sections of the RPS are derived from Appendix 22 of the Railways Pension Scheme Order 1994.
110. There are a number of features of the RPS that are material to the present dispute:
 - i) Although it is commonplace to refer to the RPS as a single entity, it is divided into sections. There was a different section of the RPS for each of the three franchises with which the court is concerned. Historically, it has been a feature of franchise agreements that the Defendant has required the TOC to become a Designated Employer for the relevant section of the RPS for the duration of the franchise contract and has made the TOC responsible for paying the employer’s share of pension contributions during that period. If the TOC’s payments are up to date at the end of the franchise period, the TOC has no liability to make further payments thereafter: the burden of funding any deficit that might be identified later falls on the TOC’s successors when and after the deficit is identified. Similarly, the TOC is not entitled to benefit if it is determined that its contributions have generated a surplus at the end of its franchise;
 - ii) The RPS is, and has always been regarded by Government as, a private pension scheme. The operation of the RPS is governed by a trust deed and

² When the EM ITT was first issued, Section 3.16 was removed altogether and Schedule 16 (on the requirements for pensions) was left blank. Schedule 16 was also left blank in the WCP ITT.

rules, with each section having its own rules. In theory these rules can be changed, but the realpolitik of the rail industry means that change, if any, is only likely to be achievable on an industry-wide basis;

- iii) TOC sections are open to new members and a substantial proportion of the liabilities of the TOC sections relates to active members who are still accruing benefits;
- iv) The cost of contributions is shared: hence the term “shared cost sections”. Contributions are payable both by the employer TOC and employees in the prescribed proportion of 60:40, though it would be open to the employer to pay a greater proportion. This is commonly referred to as the “Shared Cost Agreement”;
- v) The scheme is funded by contributions which fall into two categories. “Future service contributions” (“FSCs”) are designed to fund the ongoing accrual of employees’ entitlement to benefits. “Deficit reduction contributions” (“DRCs”) are designed to eliminate any identified funding deficit over a specified period known as “the recovery period”. This means that employees’ contributions go not only to fund the accrual of their own benefits but may also cover a proportion of identified past funding deficits. There may therefore be a tension between the interests of present, past and future members;
- vi) The Pensions Act 2004 (“the Act”) requires the RPS Trustee to obtain an actuarial valuation at least once every three years, with the conclusion of the triennial valuations to be agreed within 15 months of the valuation date. The scheme’s “Technical Provisions” (or liabilities) are to be calculated as the present value of the future expected benefit payments from the scheme, calculated by reference to members’ service to the date of the valuation. Assumptions adopted in valuing the Technical Provisions are required to be “prudent”. The assumptions to be made include assumptions as to the appropriate discount rate to be applied when assessing the present value of expected future benefit payments: the higher the discount rate, the lower the present value placed on the liabilities. Other assumptions are the subject of the expert actuarial evidence but do not need to be mentioned here. Once calculated on given assumptions, the Technical Provisions are compared with the scheme’s current assets at the valuation date to identify whether or not the scheme meets its statutory funding objective of having sufficient assets to cover its Technical Provisions. To the extent that a deficit is identified, the trustees and sponsoring employer must agree a recovery plan to clear the deficit by the payment of DRCs;
- vii) For present purposes, it is sufficient to note that prime factors affecting the assessment of Technical Provisions include risks associated with the strength of the employer’s covenant, risks associated with chosen investment strategies and risks related to funding. Self-evidently, these risks are likely to be inter-related;
- viii) Historically, the triennial valuations have been calculated by the RPS Trustee adopting the assumption that the covenant strength of the TOCs was category

1, the highest category. This appears to have been on the basis of an assumption that, despite the absence of a formal Crown Guarantee, the Government would be standing behind the TOCs and the scheme so that there was no real risk of default. The 2016 draft valuation was prepared on this basis and showed the relevant sections of the scheme to be in surplus as at 31 December 2016. It is the questioning of this assumption that has led directly to the present litigation, as appears below;

- ix) As Mr Salter, the expert actuary called by the Claimants, explained, the choice of assumptions does not directly affect the cost to the scheme of providing the scheme benefits: the ultimate cost will depend upon the experience of the scheme over the long term. Rather, the choice of assumptions affects the pace at which anticipated liabilities are funded. This in turn may bring another factor into play, namely industrial relations: any increase in employee's contributions is likely to be sensitive and there will be limits beyond which it is simply not feasible to call upon employees to contribute more. At that point it may become practically impossible to maintain the 60:40 split in funding contributions from the employer and employees respectively. The potential implications for an employer engaged in a heavily unionised industry with a defined benefit shared-cost scheme that must be funded both as to FSCs and as to DRCs do not need to be spelt out in detail here.

111. The 2013 triennial valuation was completed in March 2015. For reasons that will appear, the 2016 valuation has not yet been agreed. As a result, no changes based on the 2016 valuation have been implemented and TOCs are still making contributions based on the 2013 valuation.

The Pensions Regulator

112. TPR is a creature of the Act. It is independent of Government, including the Defendant, and is not to be regarded as a servant or agent of the Crown: see [29] of Schedule 1 to the Act. S.5 of the Act provides:

“(1) The main objectives of the Regulator in exercising its functions are—

(a) to protect the benefits under occupational pension schemes of, or in respect of, members of such schemes,

(b) to protect the benefits under personal pension schemes of, or in respect of, members of such schemes within subsection (2),

(c) to reduce the risk of situations arising which may lead to compensation being payable from the Pension Protection Fund
...

(cza) ... to minimise any adverse impact on the sustainable growth of an employer,

...”

113. TPR has extensive regulatory powers which include:
- i) Information gathering powers: under s.72 of the Act TPR may, by notice in writing, require an individual or individuals to produce any document, or provide any other information, which is relevant to the exercise of TPR's functions; and
 - ii) Regulatory and enforcement action: TPR has the power to prohibit trustees from acting as trustees of occupational pension schemes and to appoint independent trustees; and it has the power to issue improvement notices where there has been a failure to comply with pensions legislation. Furthermore, and of direct relevance to the present litigation, s.231(2) of the Act provides that TPR may give directions as to (i) the manner in which the scheme's Technical Provisions are to be calculated, including the methods and assumptions to be used in calculating the scheme's Technical Provisions, or (ii) the period within which, and manner in which, any failure to meet the statutory funding objective is to be remedied; and TPR may impose a schedule of contributions specifying (i) the rates of contributions payable towards the scheme by or on behalf of the employer and the active members of the scheme, and (ii) the dates on or before which such contributions are to be paid.
114. I accept the evidence of Mr Salter that, although TPR would usually prefer to find consensual solutions to identified problems, these provisions mean that TPR has a big stick. They vest considerable power in TPR, which TPR can and will use if driven to do so and which is ever-present even when TPR is advocating a consensual approach. Ultimately, TPR is bound to do what it regards as necessary to achieve its statutory objectives.

The Rail Delivery Group ("RDG")

115. The RDG is a rail industry body which leads and co-ordinates various cross-industry initiatives. All TOCs are members of the RDG, as is Network Rail. The RDG has a Pensions Steering Group which has, with the benefit of expert legal and actuarial advisers, been closely involved in attempting to find an industry-wide solution to the pension problems that have given rise to this litigation, as described in more detail later.

The Brown Review

116. The Brown Review of the Rail Franchising Programme was commissioned after the failure of the InterCity West Coast franchise competition in 2012. Mr Brown was asked to explore the wider implications of that failure, building on the relevant findings of an independent study into what had occurred, known as the Laidlaw Inquiry.
117. One of the key recommendations of the Brown Review was at paragraph 1.14:

“Franchisees should be responsible for risks they can manage and should not be expected to take external macroeconomic, or exogenous, revenue risk; there should be a clear mechanism to adjust franchise premium/support

payments for variations in Gross Domestic Product (GDP) and Central London Employment (CLE) growth rates. Not taking exogenous revenue risk will enable franchisees to bid lower profit margins, so giving better value to Government. Franchisees should, however, take clear responsibility for delivering the management initiatives that they promise and bear greater responsibility for costs, particularly infrastructure costs. ...”

118. The Claimants rely heavily upon this passage in support of a submission that there was acceptance of a principle that *no* exogenous risks should be imposed on or taken by franchisees. They rely upon partial quotation from paragraph 3.9, which in full states:

“The proposition for each franchise must include appropriate risk transfer that reflects the fact that franchisees cannot manage exogenous revenue risks. Only those risks which can be managed by a franchisee should be transferred to it, allowing franchisees to focus on those areas where they can best add value. Inappropriate risk transfer reduces value for money for Government as bidders add margins into their pricing for risks they cannot manage, thereby adding cost. The risk proposition should be tailored to each franchise, as there may be occasions where revenue risk transfer is not the best value for money option, e.g. when there are significant infrastructure works and disruption.”

119. It is immediately apparent that both of these passages refer expressly to exogenous *revenue* risks. The Government’s Response to the Brown Review accepted his recommendation that “franchisees should be responsible for the risks they can manage and should not be expected to take exogenous revenue risk.” Its reaction was to analyse the implications of implementing a revenue risk sharing mechanism and, in due course, steps were taken to implement such a mechanism. Its formal acceptance and response can therefore be seen to be in relation to revenue risks. Elsewhere, the Brown Review makes clear that it takes a different attitude to *costs* risks. Brown did not expressly consider pension costs. This is probably, at least in part, because at that time pension costs were regarded as being assessed on a settled basis and therefore as being reasonably predictable. However, Brown’s overall attitude to costs risks was that franchisees should be exposed to a greater proportion of cost risk, and that “a particular weakness of franchising to date has been that franchisees have not been exposed to the large majority of infrastructure cost risk, despite infrastructure accounting for broadly half the industry’s cost base”. It was his view that “franchisees need to have greater risk exposure to the true variable costs of the railway if serious inroads in efficiency are to be made”: see paragraphs 4.30-4.33. There was no equivalent acceptance in the Government’s Response to the Brown Review of a need to protect franchisees from exogenous costs risks.
120. It is not clear whether Brown had pension risks in mind as part of the “true variable costs of the railway”, but his logic applied to them as much as to other costs: the RPS is a private pension scheme and, as between franchisees and the Defendant, it was franchisees who were in a better position to take steps to limit the risks both by virtue

of their relationship with the RPS Trustee and the possibility of negotiating reform with employee members of the scheme.

121. I do not accept that the Brown Review itself supports the view that all exogenous risks should be borne by the Defendant rather than by Franchisees. Nor does it provide any express support for the view that the risk of pension costs should be allocated to the Defendant rather than to franchisees. On the evidence that I have seen that view did not emerge until the current pensions problem emerged some years later, since when it has been pressed into service. In my judgment, the most that can be said of Brown on this topic is that he recognised there to be a danger that, if unmanageable risks were allocated to franchisees, bidders would add margins into their pricing for those risks, thereby adding cost and reducing value for the Government and passengers. This consideration was recognised by the Defendant, but it did not at any stage become entrenched or formalised as policy, not least because there was a simultaneous desire to incentivise pension reform, which was thought more likely to be effective if pension costs were allocated to the TOCs (which were directly involved with the RPS) rather than to the Government (which was not). That said, it was by the middle of 2018 openly acknowledged in a Ministerial Submission addressing the pensions problem that “in principle, our policy is to ensure that TOCs only take on the risks they can bear and to incentivise pension reform.”

Departmental Committees

122. Mr Wilkinson was the Defendant’s Senior Responsible Owner (“SRO”). The two main departmental bodies with which this judgment is concerned were the SRO’s Investment Appraisal Panel (“SIAP”) and the Board Investment Commercial Committee (“BICC”). SIAP was a panel which Mr Wilkinson chaired. SIAP played an advisory role to the SRO, its purposes including that its deliberations would enable the SRO to put proposals for major franchising decisions, including proposed award decisions, to the Directors General of the Department who would then decide whether to sponsor or recommend those proposals to BICC. BICC was a sub-committee of the Departmental Board and was the Department’s highest investment board. It was chaired by the Permanent Secretary with membership that included the Directors General, Legal Director, heads of professional functions including the commercial function and two non-executive directors. BICC’s role was to consider and test proposals and the process to be followed at appropriate stages of the franchising competitions and to approve the submission of final recommendations to Ministers in relation to any major Departmental commercial matter. Mr Wilkinson was not a member of BICC but would attend when asked to help present or explain proposals. BICC had final authority to decide what to recommend to ministers and the basis for such recommendations. BICC would often meet more than once to consider a particular issue. Its involvement is an integral part of the sifting process to which Sedley LJ referred in *Health Stores*: see [72] above.

The pensions problem in outline

123. Historically, the risk of pension payments was routinely allocated to the franchisee. This was done by Schedule 16 to the Franchise Agreement which provided that “the Franchisee shall participate in and become the Designated Employer in relation to the Shared Cost Sections of the Railway Pension Scheme as specified [in an appendix to the Schedule]” and that “the Franchisee shall pay the employer contributions required

under the schedule of contributions applicable to each Franchise Section ... in respect of the Franchise Term”. The Schedule also provided that “the Secretary of State shall at the end of the Franchise period ensure that the Franchisee has no liability for any deficit in the Franchise Sections (other than for contributions due and payable by the Franchisee to the Franchise Sections for any period prior to the end of the Franchise Term) and shall have no right to benefit from any surplus which may exist in the Franchise Sections”.

124. Pensions did not cause a problem for the first 20 years or so of franchising. Since 2007 the Trustee’s funding strategy has been broadly constant: it has approached its valuations on the basis that the TOCs were entitled to the “Covenant Category 1” rating, which was the highest available. This covenant rating in turn influenced investment strategy and discount rates such that the financial situation of the various sections of the RPS was not considered likely to give rise to volatile or unpredictable additional liabilities. The effect of this stability, at least since about 2007, has been that it has also been comparatively straightforward for TOCs to project pension costs and to price them in when bidding for franchises.
125. This happy state of affairs ceased when TPR intervened in and from about 2014 with progressively increasing force and urgency. In June 2014 TPR wrote to the Department indicating concerns about the long-term sustainability of the RPS. Specifically, TPR questioned whether it was reasonable that “these TOC Sections are effectively funded on the assumption of very long term Government support which will cover all downsides should they materialise.” By its response, in March 2015, the Department clarified that there was no Crown Guarantee for pension liabilities and that “in practice this means that the Department does not cover any downsides for the TOCs in relation to their pension liabilities.”
126. In 2016 TPR opened an investigation into an individual TOC with a view to exercising its powers pursuant to s.231 of the Act. On 10 November 2016 it wrote to the RDG stating that it had been engaging with the Trustee and the Department for a number of years but that its concerns had not been addressed to its satisfaction. It suggested that there was scope for the parties to amend their approach to funding the TOC Sections in a manner which would negate the need for TPR to take enforcement action. It identified its concerns as being (a) on covenant, that employer covenant strength was currently being rated higher than it should be for all TOC Sections; (b) on investment, that the risk being taken for all TOC Sections was not fully supportable by the employer covenant and that it was not necessarily appropriate to assume (as was currently the case) that a notional portfolio of 100% return-seeking assets would continue in perpetuity; and (c) on funding, that, in light of (a) and (b) above, Technical Provisions were not being set sufficiently prudently and hence funding deficits were being materially understated; and that in some cases unnecessarily and inappropriately long recovery periods were being set. The letter stated TPR’s view that “the Technical Provisions should be set at least 25% higher” and pointed to the fact that the Scheme’s funding continued to be based upon an approach assuming implied Government support, which would continue indefinitely. Under the heading “Next Steps” TPR said that it would “expect the TOCs to work together through the RDG alongside the Trustee and the Trade Unions to put in place an action plan and timetable for agreeing and implementing a TOC-wide solution in

short order.” If a satisfactory plan were put to TPR it would then provide reassurances that it would not pursue its s.231 powers until the process was complete.

127. The following day TPR wrote to the Trustee outlining its concerns about covenant strength, investment, funding, and recovery periods. Although the letter addressed the specific problem of the individual TOC it was investigating, TPR made clear that this was an RPS-wide problem, outlining its concerns in terms similar to its letter to the RDG the previous day.
128. On 10 October 2017, shortly before issuing the ITT for the SE franchise, the Department wrote to all passport holders informing them of TPR’s investigation into one particular section of the RPS and its implications for others because of the generally applicable nature of TPR’s concerns. In the course of the letter the Department recognised the uncertainties that the information would cause TOCs but made clear its position that “[t]he Designated Employers of the TOC Sections of the RPS are private sector entities and the UK Government has no responsibility for the funding or management of these Sections.”
129. On 28 November 2017 TPR gave a presentation setting out its position to a meeting attended by the Department, TPR, the RDG and TOCs (including a representative from Stagecoach). The presentation took place the day before the issuing of the ITT for the SE franchise on 29 November 2017. Its significance could not have been in doubt for any of the participants. Having summarised its powers TPR indicated its willingness to work collaboratively to find a TOC-wide solution and then set out its concerns about covenant strength, investment approach and funding. It gave TPR’s view that the TOC section covenant ratings were no higher than “CG2 (Tending to Strong)”, that the current strategy of investing up to 100% of the TOC sections’ assets in return-seeking assets was not supportable, and that the current Technical Provisions did not incorporate a sufficient level of prudence. Once again it gave its view (which it said was supported by expert actuarial evidence) that Technical Provisions were “at least 25% understated” and that some recovery plans were unnecessarily and inappropriately long. TPR repeated its expectation that every TOC section should be taking a more prudent approach to funding, that Technical Provisions should be “at least 25% higher” for all sections and that the resulting deficits should then be cleared over an appropriate period – “the stronger the covenant, the shorter the recovery period should be”. Once again it stated its expectation that the TOCs should work together through the RDG alongside the Trustee and the Trade Unions to put in place an action plan and timetable for a TOC-wide solution in short order.
130. In December 2017 a steering group was established between the Department, TPR, the RDG and the scheme administrators of the RPS to oversee the process of finding an industry-wide solution to the Regulator’s concerns. At a steering group meeting on 22 January 2018 TPR set out its “parameters for a TOC-wide solution”. These included that, contrary to its normal practice and only in the interests of reaching a TOC-wide solution, TPR was willing “to be pragmatic and agree to the use of uniform TOC-wide covenant grades and Technical Provision ... increases.” TPR made clear that, if it was obliged to resume regulatory action (because of a failure to find a TOC-wide solution) it reserved its position “in respect of individual sections’ assessments of covenant, Recovery Plan ... length and [Technical Provisions].” Its stated parameters, in the interests of agreeing a TOC-wide solution, were that it would be prepared to assume for all TOC sections that the covenant rating was CG2 or

“Tending to Strong” and that the increase in Technical Provisions was 25% from the (draft) 2016 valuation results. It proposed that, if a valuation showed a deficit then a recovery plan needed to be put in place that would end “no later than either ... the end date of the next franchise agreement(s) subject to a maximum of 15 years; or, if sooner, the date that the TOC no longer employs protected persons.” The presentation also made clear that these parameters were not once-and-for-all: in particular, investment strategy should be reviewed at each valuation period and covenant strength would need to be reviewed at each valuation. The big stick was present: TPR reserved the right to take regulatory action if the TOC-wide solution was abandoned or not implemented within a reasonable time period and that “to be clear, TPR will use its s.231 powers on each TOC section if required to enforce the change needed.”

131. These parameters were repeated in a letter from the Department to all passport holders on 6 March 2018 and an updated presentation from TPR in June 2018, which added a further parameter that the calculation of FSCs should be carried out “in a manner consistent with the [Technical Provisions]; so 25% higher than what they would be if calculated using current [Technical Provisions] assumptions.”
132. By October 2018 the RDG had formulated a proposed solution, the features of which included phased introduction of changes in contributions from employers and employees, the provision of contingent security when a new franchise starts, the possibility of benefit reform for the future, and a risk-sharing mechanism with the Department to limit the overall increases in employer and employee contributions. This proposal fell short of satisfying TPR’s stated parameters. Throughout the period of the franchise competitions with which this case is concerned, no TOC-wide solution had been found. That remains the position to the date of this judgment.
133. I accept Mr Salter’s evidence that the period from 2014 to 2018 can be seen as a gradual ramping up of pressure by TPR; and I accept Mr Punter’s evidence that the Regulator and the regulatory environment for DB pension schemes is only going to get tougher in the future. So far as the court is aware, TPR has not yet resorted to regulatory action.
134. The impact of TPR’s intervention for the RPS in general and for potential bidders in the three live procurement competitions can barely be overstated. Adopting what TPR regards as “more objectively measured PPF ... funding levels”, TPR in June 2018 asserted “indicative” figures showing a deficit in the scheme’s assets that deteriorated from £4.8 billion as at 31 December 2013 to £7.5 billion as at 31 December 2016. The precise figures may be subject to argument, but the overall impact of adopting what TPR regards as an appropriately prudent approach to valuation of the scheme is not.

The effect of TPR’s intervention

135. With one qualification, I accept Mr Salter’s evidence that “the net effect of TPR’s involvement in the Scheme is that the future funding position and associated funding costs of the Scheme are uncertain” and that “the nature and scale of these uncertainties [are] very different from the uncertainties that existed before TPR’s involvement and the resulting change in covenant analysis.” The qualification is that there was always a risk that such uncertainties would be generated by such an

intervention by TPR, but the risk was (for understandable reasons) not appreciated or perceived until the intervention happened.

136. Two things were and are clear and would have been appreciated by anyone concerned with rail franchising, including both current and prospective franchisees and the Department. First, application of TPR's parameters could have the effect of transforming what had previously been thought to be stable sections operating with a sufficiency of assets into sections that would be in deficit and would require significant additional funding of both FSCs and DRCs, quite apart from requiring a fundamental review of investment strategy and restricting recovery periods. Second, TPR's parameters were expressed to be *minimum* requirements that were (a) contingent upon the implementation of a TOC-wide solution that was acceptable to TPR and (b) liable to become more onerous on future valuations. Adopting TPR's parameters, therefore, would not give certainty that future pension risks had been predicted or covered. At the same time, however, any discussion of the *risk* of further intervention should also bear in mind that TPR's approach was controversial and not accepted by the RPS Trustee or the RDG: the apparent stalling of TPR's initiative (which, on the evidence before the Court, continues to this day) lends some substance to the view that TPR may yet not achieve its stated minimum requirements.
137. For existing franchisees who had contracted on the terms of Schedule 16, TPR's intervention left them exposed to any additional pension risks that arose during their franchise period, whether on the basis of the 2016 and succeeding valuations or otherwise. For TOCs who might wish to bid in forthcoming franchise procurements, the problem was how to assess and price the pensions risks implicit in TPR's approach and, more fundamentally, whether they had the risk appetite to bid at all in the face of risks which were potentially substantial and, at the same time, not capable of reliable prediction and calculation.
138. There is a dispute between the parties about the likelihood of further regulatory intervention by TPR to impose more onerous requirements and the scale and likelihood of the risk that further Technical Provisions were likely to be necessary. Views amongst bidders, Government and experts could reasonably differ about the likelihood and timing of further TPR intervention and whether the 25% uplift in Technical Provisions to which TPR repeatedly referred was likely to be all that would be required by the Regulator. What all have in common is a recognition that TPR's intervention generated uncertainty.
139. The experts agree, and I accept, that at the time of the bidding process "there was uncertainty regarding the outcome of the 2016 Valuation, because of the intervention by TPR"; and that "the extent of any regulatory intervention at future valuations was at that time and still is uncertain, but the experts differ in their views regarding the likelihood and impact of further regulatory intervention at 2019 and subsequent valuations." In summary, Mr Salter holds the opinion that it is "highly unlikely that TPR's intervention in the funding of the TOC sections will be limited only to a 25% uplift in the Technical Provisions, particularly if a TOC-wide solution cannot be found." Mr Punter's opinion is that "it is unlikely that TPR would seek further changes at subsequent valuations, if a 25% uplift in Technical Provisions were ultimately to be incorporated within the 2016 valuation." These summaries (which are taken from the experts' joint statement) demonstrate a mismatch in their approach, which permeated their reports and evidence, with Mr Salter accentuating the risks that

would arise if a TOC-wide solution were not found, and Mr Punter expressing a more optimistic view which is predicated on a TOC-wide solution being found, at least to the extent of the imposition of the 25% uplift in Technical Provisions in the 2016 draft valuation.

140. In his report, Mr Salter gave as his opinion that it was highly unlikely that TPR's intervention in the funding of the TOC sections would be limited only to a 25% uplift to the Technical Provisions at the 2016 Valuation, for a number of stated reasons. These reasons included that TPR's stated parameters applied only to the 2016 Valuation and were contingent upon a TOC-wide solution being reached, which (as events have shown) is not guaranteed either within a particular time-frame or at all. Second, the discount rate assumption used for the TOC sections is significantly out of line with those used for other UK DB schemes and this would be the case even after adjusting the draft 2016 valuation Technical Provisions to increase liabilities by 25%. This fact alone suggests that TPR will press for further increases in funding with time. Third, this suggestion is fortified by the facts that, even with a 25% increase, the ratio between (a) the Section 179 valuation (which is known to be of particular interest to TPR because of the statutory objective that it should protect the PPF), and (b) the RPS's Technical Provisions would be significantly worse than 95% of other DB schemes in the market, which indicates a level of risk to the PPF that the Regulator is statutorily obliged to try to manage. Fourth, TPR had stated that any Recovery Plan for the Scheme should end at the earliest of 15 years or the end of the next franchise period and any deficit that emerges during that period will have to be managed during a progressively diminishing window. Viewed overall, it is Mr Salter's opinion that the RPS is a significant outlier in terms of the calculation and funding of liabilities, that it will remain so even after a 25% increase in the liabilities shown in the draft 2016 valuation, and that it is clear that TPR has the RPS firmly in its sights. I accept Mr Salter's overall evidence and opinion as just summarised in the last sentence.
141. Mr Punter's opinion and modelling is more sanguine than Mr Salter's. He draws attention to the fact that the Trustee has resisted suggestions that the approach to funding the RPS is in need of an overhaul. He points to the highly prescriptive approach adopted by TPR in specifying the parameters that it considers should be adopted, which Mr Punter considers makes it less likely that TPR would seek further changes at subsequent valuations if a 25% increase in Technical Provisions were to be incorporated in the 2016 valuation. He also takes issue with Mr Salter's aggregation of risks and with his linking of falls in the discount rate with falls in bond yields, because the RPS Trustee does not set its discount yields by direct linkage to bond yields. These are points of substance which form part of the grist for the mill of differing opinions between reputable experts. They do not establish that one or other opinion is "right" or "wrong" when dealing with potential risk, particularly from a bidder's perspective.
142. The Claimants identified a number of apparent omissions from Mr Punter's report, most of which appear to flow from a view that a 25% increase in Technical Provisions for the 2016 valuation is the likely limit of TPR's intervention. It is surprising, in my judgment, that his report did not mention the fact that TPR's currently stated parameters were and are stated to be conditional upon a TOC-wide solution being reached within a satisfactory time-scale, or that the parameters require "at least" a 25% increase to the Technical Provisions in the draft 2016 valuation, or that TPR's

recovery periods of 15 years or, if earlier, the end of the next franchise were also conditional upon a TOC-wide solution. Consistently with these omissions, his report contained no consideration of whether or when a TOC-wide solution would be achieved. Equally, his report did not refer to TPR's expressed concern to reduce the funding deficit of the RPS on the PPF measure. His suggestion that TPR might countenance longer recovery periods than 15 years appears unduly optimistic even taking into account the statutory objective of affordability. He did not acknowledge that, even with the current parameters introduced, the approach to the setting of discount rates for the RPS is an outlier that looks unsustainable, particularly if the TOCs' covenant strength is down-graded. His report did not attempt to model the effect of any combinations of potential risks, though he accepted that to do so would be "a legitimate enquiry"; nor did it take account of "tail risk" which could be a legitimate concern for commercial enterprises. To my mind, these criticisms of Mr Punter are of a rather different order to the criticisms that the Defendant makes of Mr Salter's approach. But, once again, I do not consider that the criticisms demonstrate that one or other expert is either "right" or "wrong". The important conclusion is that both experts maintain opinions that fall within the range that might reasonably have been held by reasonable actuaries advising bidders or the Defendant at the time of the competitions.

143. It was common ground between the experts that *if* there was to be further intervention by the Regulator over and above any intervention on the 2016 valuation, it was more likely to be for valuations from 2022 onwards than for the 2019 valuation. The Defendant submitted that there was no real risk of the current franchises being adversely affected by reference to the 2022 and subsequent valuations because of their timing within the currency of the franchises and the 15-month period for settling valuations. In my judgment that is too simple an approach. The fact of delay and the risk of a failure to achieve a TOC-wide solution in respect of the 2016 valuation (with the consequential continuation of contributions being made on the basis of the 2013 valuation) has the effect that the pensions problem is being pushed back so that (in TPR's view) there will have been a more prolonged period of inadequate funding to be remedied in a diminishing remaining period for these franchises. While it would have been reasonable for bidders to assume that the existing delays should mean that further intervention in relation to the 2019 valuation had become unlikely, it does not follow that franchisees would be immune to further intervention or that the 25% uplift first proposed by TPR in late 2016 would be the limit of TPR's requirements during the period of the franchises. In particular, the power of TPR under s.231(2)(c) of the Act to impose a schedule of contributions could not be discounted or ignored. This is not to lose sight of the fact that, as Mr Salter agreed, TPR (a) does not want to use its s. 231 powers, and (b) if it did, would be likely to select one TOC section and one that was near to the start of its franchise period. However, these mitigating features, together with the freedom from further liability that a TOC would have after its franchise had come to an end, would not and did not eliminate the risk of further intervention.
144. Mr Salter's evidence about predicting future regulatory intervention was that "you can't really ascribe probabilities to regulatory intervention." His view received support from Mr Humphrey (the Head of Specialist Actuarial at the Government Actuary's Department ("GAD")). Mr Humphrey considered that any hypothesis adopted by GAD about further intervention would have been "entirely arbitrary" and

that any attempt to anticipate an industry wide solution and to build it into their analysis when GAD was advising the Department would have been “premature and speculative.” This was also the view of PwC when advising the Department in February and March 2019, though expressed in different terms. Viewed overall, I consider that Mr Punter’s evidence did not fully reflect the level of risk of further intervention though his opinion was not outside the range of opinions that might have been expressed by an expert actuary at the time of bidding. I accept the evidence of Mr Salter and Mr Humphrey about the impossibility of ascribing probabilities to the risk of future intervention, though Mr Salter’s evidence viewed overall could be said to maximise perception of the risk. More importantly, I accept the evidence of Mr Paterson (Stagecoach’s Finance Director who, with their CEO Mr Martin Griffiths, was responsible for the Stagecoach bids) that, from a bidder’s perspective, the probability of a (further) regulatory decision was inherently uncertain.

The Defendant’s response to the pensions problem

145. For the Defendant unpredictability and potential size of the pensions risks gave rise to the possibility that the TOC market would not have the risk appetite to bid in such circumstances, thereby reducing competition, or that it would price in margin for risks that might not eventuate, leading to a windfall for the TOC if the risk proved to be less than anticipated or to inadequate provision if the reverse was true. The uncertainty of the situation was a recurring theme in the Department’s internal documentation. For example, in December 2018 a report to BICC referred to the financial impact of adopting TPR’s parameters in full and assuming that new contribution rates would commence from January 2020 and continued:

“... but there is a significant amount of uncertainty around these numbers given there is no plan for finalising the valuation, what covenant rating would be acceptable to TPR and when contribution rates might change.”

146. Mr Baghurst, the Department’s Passenger Services Lead on Pensions, summarised the Department’s concerns succinctly in a “Contingent Liability Checklist” submitted to the Treasury in the course of negotiations about providing protection to bidders:

“The Pension Regulator's investigation into the TOC Sections of the Railways Pensions Scheme has created significant uncertainty and concern for incumbent TOCs, Owing Groups and bidders for live franchise competitions. In particular the live investigation creates significant uncertainty about the handling of future valuations - and the potential impacts that the outcome of the investigation might have on key assumptions including the pension fund investment strategy and recovery periods. The funding position could vary significantly at further valuations undertaken during the franchise term.

... Without a protection, we run the risk of competitions failing and also resulting in dis-incentivising pension reform with costs ultimately being borne by Government.”

None of these outcomes were regarded as satisfactory in the Department's pursuit of value for money and identifying the most economically advantageous tender.

147. There was, however, a tension between the pragmatic consequences of seeking to impose unpredictable risks on the TOCs and the starting point, which was that the RPS is a private pension scheme which is not underwritten by Government. This tension is reflected in a letter from the Defendant Secretary of State to the Chief Secretary to the Treasury on 17 May 2018 in which the Secretary of State wrote:

“My policy is that as far as possible the TOCs should continue to bear the pension liabilities as private sector companies. It is therefore right that the Rail Delivery Group have been facilitating a voluntary TOC led approach to this investigation.

...

However, as a result of the significant current uncertainty surrounding future pensions liabilities, bidders for the South East franchise competition have been unable to price pensions-related risk. This has created significant legal, procurement and value for money risks to this and other current live and future franchise competitions.

...

The provision of a risk share mechanism is consistent with the recommendations of the Brown Review into rail franchising, which recommended only allocating risks to TOCs that they could manage efficiently.”

148. The potential liabilities that flowed from TPR's intervention were perceived by the Defendant at the time of bidding to be unquantifiable because the risks were uncertain and unpredictable. The Contingent Liability Checklist accurately reflected the Department's view in stating that “it is not possible to estimate the maximum size of the contingent liability. It is deemed unquantifiable.”
149. The Department's response to its perception of the risks, which was endorsed by the Secretary of State, was that some protection would need to be provided to bidders to prevent distortion of the bidding process. After a protracted negotiation that led to limited agreement with the Treasury, it came to offer the PRSM, which became part of the contractual framework against which the TOCs were required to bid.
150. The PRSM provided defined but limited protection against DRCs arising from any recovery plan which may be agreed in connection with the 2019 valuation. It provided no protection for any pension costs arising out of the 2016 valuation. It provided no protection against FSCs arising under any valuation and provided no protection against any additional DRCs (over and above the levels arising out of the 2019 valuation) which may arise out of the 2022 or subsequent valuations: they would continue to be borne by the franchisee and active members.

151. As additional information, bidders were provided with illustrative calculations by the RPS Scheme Actuary, Willis Tower Watson, (“the WTW Figures”) illustrating the effect of increasing Technical Provisions in the draft 2016 valuation by 25% to assist them in pricing pension risks that might arise under that valuation into their bids. Bidders were told in the instructions and in bilateral meetings that the Department would take the WTW figures into account but would not necessarily be limited by them. The effect of this was that bidders could adopt the WTW Figures or instruct their own advisers to come up with alternative figures if they thought that to be more appropriate.
152. The structure of the PRSM was to define a “Baseline Deficit Contribution”, which it assumed would be a lump sum payable annually on or before 31 December 2020 to 31 December 2034. That figure was in line with the adjusted 2016 DRCs provided by the WTW Figures. There was then an “Upper Threshold Amount” and a “Lower Threshold Amount” at designated monetary points above and below the Baseline Deficit Contribution figure. If the DRCs payable pursuant to the 2019 valuation fell between the Upper and Lower Threshold Amounts, they were payable in full by the franchisee and active members, with no contribution from the Defendant: this was known as “the Nil Band”. If the DRCs payable pursuant to the 2019 valuation proved to be greater than the Upper Threshold Amount, the Defendant would (subject to certain conditions) become obliged to make payments to the franchisee; and if they proved to be less than the Lower Threshold Amount, the franchisee would (subject to certain conditions) become obliged to make payments to the Defendant. The potential payments in either direction included x% plus a PRSM top up.
153. There were additional provisions relating to the WCP franchise as from 1 April 2026 that reflected the possible change in the terms on which the franchisee would operate from that date, as to which see below at [425]. Put shortly, if there was a switch to the IOC Period on 1 April 2026 (or on a subsequent date), the franchisee would no longer be subject to the pension risks that are the subject of this litigation because the contract would switch to a “cost plus” or management model. If, however, there were to be a delay to the commencement of the IOC Period (because HS2 is cancelled or delayed), the period from 1 April 2026 until the earlier of the end of the franchise or a later switch to the IOC period would be known as the Reset Period. During a Reset Period the franchisee would continue to be subject to costs risks including the pension risks and a modified version of the PRSM would apply, which was similar though not identical to the unmodified PRSM and was known as the Pensions Reset Protection (“PRP”).
154. From the perspective of the DfT and the Treasury, the proposal for possible support was exceptional in making provision for supporting those engaged in a private pension scheme, but consistent with the principle of incentivising the franchisees as Designated Employers to manage potential additional pension costs as far as was possible and feasible. From the perspective of the Claimants the support provided by the PRSM suffered from significant limitations. In addition to the fact of being limited to DRCs and only those DRCs resulting from the 2019 valuation, the provision of payments under the PRSM was subject to contingencies which meant that it could not be predicted with certainty in advance whether any payments would be made once the DRCs were outside the Nil Band or, if they would be, what the sum of those payments would be (whether from or to the Defendant). There were two

areas of potential uncertainty affecting possible support for the franchisees that need to be mentioned. [TEXT REDACTED] Not all of the conditions were within the control of the franchisee. The franchisee's position was protected by the express requirement that, in assessing whether the conditions had been met, the Defendant was to "act reasonably (including taking into account whether or not matters were within the reasonable control of the Franchisee)". [TEXT REDACTED]

The Claimants' response to the risks posed by the pensions problem

155. Some bidders, including First in the WCP competition and Abellio in the EM competition, were prepared to and did bid on the terms proposed by the Defendant. Arriva, Stagecoach and WCTP did not. So far as Stagecoach and WCTP are concerned, their reasons emerge clearly from the evidence. Stagecoach called evidence from persons at different levels of its decision-making structure for its bids. WCTP called no separate evidence. This raised eyebrows on the Defendant's side but reflected the fact that, on the evidence in this trial, Stagecoach was the dominant partner in deciding how to approach the WCP procurement.
156. The parties expended great litigation effort in trying to accentuate (in the case of the Claimants) or minimise (in the case of the Defendant) both the degree of uncertainty and the potential financial consequences of TPR's intervention. In relation to both uncertainty and size of financial consequences the court was assisted by direct lay evidence and expert opinion evidence of high quality. It is not necessary to provide an assessment of the quality of the witnesses individually. Each attempted to assist the Court and gave evidence which they now believed to be sound. To a greater or lesser extent the Defendant's witnesses tended to be slightly (and understandably) protective of the steps and decisions that had been taken and, on occasions, attempted to provide justifications or explanations that were the product of diligent reconstruction rather than unvarnished recollection. Only once did I have the sensation that true meaning was being concealed by the art of civil-service-speak; and that was not critical or, ultimately, indecipherable. On the Claimants' side, I was generally impressed by the level of frankness of the witnesses at all levels, particularly in their oral evidence. My major reservation, which I shall detail later, concerned the evidence about their contemporaneous perception of the level of the risk of disqualification for non-compliance as expressed in their witness statements.
157. Turning to the experts, Mr Punter and Mr Salter are both distinguished actuaries whose evidence was cogent. The fact that I found Mr Salter's evidence to be clearer and more compelling in its approach and explanation does not mean that any aspect of Mr Punter's evidence can be discounted out of hand. That said, I tended to prefer the approach and evidence of Mr Salter as being closer to the realities as perceived by at least some of the bidders for these three franchises.
158. The lay witness evidence from Stagecoach and First was informative about their respective approaches to and perceptions of the risks that TPR's intervention generated. As Mr Punter rightly accepted, there was a very broad spectrum of risk in this case that a reasonable actuary could properly model. Implicit in that acceptance is the corollary that a reasonable actuary advising potential bidders could properly have modelled a broad spectrum of possible financial outcomes, as did Mr Salter and Mr Punter. Mr Punter did not suggest that Mr Salter's assumptions could not be adopted by a reasonable actuary modelling the risks that confronted bidders; and the

Defendants have (rightly) not suggested that Mr Salter's modelling falls outside the range of what a reasonable actuary could have done. Mr Salter confirmed that he could, subject to one qualification, have provided essentially the same report and advice had he been consulted by an actual or potential bidder in the course of the franchise competitions; and Mr Humphrey confirmed that an actuary acting for either the Government or a bidder at the time of the bids could have predicted the size of the scheme deficit in five years' time, taking into account the likely movement in assets and the likely movement in liabilities over that period. I accept that evidence. It follows that, although it would not be possible to predict the size of any future deficits with any degree of certainty, a reasonable actuary advising a client in the position of the bidders could have undertaken modelling that generated very large potential deficits in the relevant TOC sections by the time of the 2022 valuation, as Mr Salter has done for this litigation.

159. The wide range of financial outcomes modelled by the actuarial experts is instructive because both the Department and the bidders had (or could have had) access to high quality actuarial and other financial advice when conducting the procurement for the three franchises in question. In my judgment, the expert actuarial evidence from Mr Salter and Mr Punter demonstrated two things beyond argument: first, that the level of uncertainty of outcome was something upon which experts could reasonably disagree and in relation to which, even with the benefit of some hindsight, there is as yet no "right" answer; and, second, that the figures that expert actuaries would produce, either at the time of bidding or now in the context of litigation, would be entirely dependent upon the assumptions they either were asked or chose to make.
160. My conclusion is that detailed findings that seek to calibrate the degree of uncertainty or to identify precisely the potential financial consequences would be spurious for two main reasons. The first is the nature of the uncertainty about possible future developments and, specifically, the risk of further regulatory intervention, which defies quantification. The second is that what mattered both for the Department and the bidding TOCs was their perception of risk and its allocation rather than trying to predict the outcome with certainty. This distinction is important and must be borne in mind at all times. Uncertainty of outcome is the essence of risk. The fact that the outcome of the pensions problem was uncertain meant that bidders were dealing with commercial risk. It is inherent in any substantial procurement that there will be areas of uncertain outcome that generate commercial risk for bidders; and that each bidder is likely to approach that risk differently for any number of commercial reasons including past experience, current financial strength, specific policy and general appetite for risk in the given circumstances. For this reason it is, in my judgment, wrong simply to equate "uncertainty" of outcome with "uncertainty" of commercial risk, though the two are closely related and were often used indiscriminately by witnesses. Although I accept that the outcome of the pensions problem was uncertain and that the possible outcomes covered a wide range, I reject the submission that it was not possible to reach a commercial estimate of that risk. Different bidders' assessment of the risk would differ for any and all of the commercial reasons to which I have just referred; but that is not the point. It is for that reason that Mr Paterson was right to accept that Stagecoach could have found a number that, if priced in, would make them comfortable taking the risk: see [258] below. In other words, I accept Mr Punter's evidence that "it was possible for bidders to assess and evaluate the level of pensions-associated risks, taking account of the PRSM, so as to reach an informed

view as to their exposure to pensions risks.” In the event, Stagecoach chose not to price in the risk and, instead, took the decision to offer a different allocation of risk to the Secretary of State, which he rejected.

161. On the evidence of Mr Clancy, which I accept, First appreciated that the pension problem gave rise to uncertain risks. First’s approach to those risks differed in many respects from the approach taken by Stagecoach. The Claimants submit that First assumed a considerable amount of downside risk and that its acceptance of that risk in its bid illustrates the uncertainty faced by bidders. I would state the point rather differently: the nature of the pensions risk meant that there was no single approach for bidders that was “right” to the exclusion of all others; but differing approaches to uncertain risks are, in the experience of this court, commonplace in large-scale procurements and are certainly not unique to this case. Mr Clancy was cross-examined rigorously and at length about First’s approach. The cross-examination came nowhere near showing that First’s approach could be characterised now as unreasonable. It merely showed that different (major) commercial entities may have a different appetite for risk and different approaches to catering for such risks in a complex bid.
162. From the Claimants’ perspective I accept Mr Paterson’s succinct summary that Stagecoach considered the pensions risk to be “very uncertain and potentially enormous”. I also accept his evidence that, although advice was given and received about different risks being “additive”, “to try and sum up the probability of [downside risk] by multiplying a number of mathematical probabilities is not the way we would have looked at it, because of the inherent uncertainty in determining the probability of a regulatory decision like a change in the discount rate.”
163. To similar effect, Mr Kavanagh, who played a leading role for Stagecoach on the rebids, explained that the EM, SE and WCP competitions differed from those that had gone before because “TPR was involved in the TOC Sections of the RPS. There was suddenly a great deal of uncertainty as to what impact this involvement would have over the life of [the three franchises] given the possibility of significant change taking effect during the course of the franchise term. What the change would look like was (and remains) unknown; the risk being that the cost of funding benefits (including the quantum of any deficit) would increase substantially, and effectively overnight in response to TPR’s ongoing investigation.” There was nervousness because there was (from the bidder’s perspective) little or nothing the franchisee would be able to do to defray or mitigate those increased costs. The steps that might immediately recommend themselves, such as reducing benefits, closing the section of the scheme to new members or closing the scheme to future accrual, would require agreement between the Trustee, the franchisee and the Department and would have obvious implications for industrial relations, as would trying to effect savings elsewhere by reducing staff numbers. I accept the general thrust of this evidence though it tends to maximise the difficulties facing franchisees.
164. Turning to the potential size of the risk, many figures were generated during the bidding process. It was a surprising feature of the evidence that, in retrospect, Stagecoach’s witnesses were frequently unable to identify the basis for figures that appeared in the contemporaneous documents. This applied regularly to the more eye-catching large figures that were said to represent or approximate to the worst case. That said, the size of the numbers depended upon the assumptions that were made,

some of which were not correctly worked through, as Mr Kavanagh acknowledged. Mr Micklethwaite, Stagecoach's Commercial and Business Director, Rail, and Mr Kavanagh were right to accept that the very highest figures represented a hypothetical worst case, and that they were based upon risks that were extremely ("vanishingly") unlikely to eventuate.

165. Mr Kavanagh provided a useful summary of Stagecoach's perception for each competition in his witness statements which, though incomplete, gives an indication of perceived scale. For the EM competition Stagecoach estimated that additional pensions costs could be in excess of £600 million (on the basis of assumptions set in order to approximate the outer limit of the liability). Assuming that TPR sought to reduce the discount rate by a further 1% in the 2019 or 2022 valuation generated an estimated additional £105 million in pensions costs. For the WCP competition Stagecoach estimated an outer limit of liability of approximately £1 billion. Different assumptions generated a figure of £189 million. For the SE competition, assuming a further reduction in the discount rate in the 2019 or a later valuation generated an estimated additional costs of £167 million which would increase to £216 million if there was a 10% fall in the RPS's asset values, with the outer limit of potential liability being several times higher.
166. Mr Paterson's evidence was that, although he didn't have as detailed a grip on numbers as some others, his understanding was that Hymans Robertson ("Hymans" - the actuaries advising Stagecoach) were advising that on the WCP competition alone, additional deficit contributions over the franchise period could be in excess of £1 billion. That figure derived from a presentation to the West Coast Partnership Bid Steering Committee on 16 November 2018 which assessed the worst case potential risk as being over £1 billion and proposed as a possible solution including £189 million of additional costs in the bid to cover a reasonably likely level of downside costs. A Stagecoach summary of the Pensions Position originally prepared in November 2018 and updated in April 2019 referred to a possible shortfall for the SE Section of over £1.1 billion on a solvency basis and gave a total reasonably likely risk of £156 million NPV. Although Mr Paterson accepted in evidence that the solvency basis figure was "a kind of marker" rather than a realistic risk, it was evidently regarded as material to be presented to Stagecoach's decision-makers and carried some influence in the formulation of Stagecoach's position.
167. Considerable time was spent analysing internal correspondence and discussions within Stagecoach and between Stagecoach and its external advisers. For example, an exchange of emails on 22 November 2018 shows different views being expressed on the individual and cumulative likelihood of two different market shocks and a further round of intervention by TPR. I do not propose to catalogue or analyse that correspondence in detail for two reasons. First, on a fair reading what the correspondence evidences is differing perceptions of uncertainty both as to the scope and likelihood of stated risks eventuating; and, second, the numbers that could be generated by modifying the assumptions as to scope and likelihood of risk were very substantial and were sufficient to drive the managerial decisions that Stagecoach took as to the bids it was prepared to submit.
168. I accept Mr Kavanagh's evidence that precise numbers would probably not have changed the ultimate decision by the steering group that Stagecoach was not prepared to accept the allocation of risk represented by the final iterations of the ITT and draft

Franchise Agreements. His evidence was that the steering group reached a decision “based on the nature of the risk ... and it was about the risk transfer from the Department to the private sector which drove that decision rather than the ability to quantify the probability of quantum of the risk.” In Mr Kavanagh’s words “irrespective of the value of the risk, the nature of the risk was such that this was not something we were willing to accept.”

169. Mr Kavanagh’s evidence was consistent with the oral evidence of Mr Paterson, who said that Stagecoach were not prepared to take material risks that they did not feel they could manage. I accept that evidence as a succinct but incomplete summary of Stagecoach’s reasons for not bidding compliantly. It represents a commercial judgment which Stagecoach was entitled to reach based upon its assessment of its own position, experience and interests. Its relevant experience included, as Mr Paterson accepted in evidence, Stagecoach’s sobering experience (shared with Virgin) of losing a lot of money on the failed East Coast Franchise, which contributed to making Stagecoach “risk aware”. It may also explain why Stagecoach, despite Mr Hamilton’s promptings, did not pay closer attention to the likelihood (or unlikelihood) that the large numbers that had been generated in the course of its deliberations would eventuate if it became franchisee.
170. Stagecoach faced an acute commercial dilemma, as did Virgin. Rail passenger transport formed a major part of their groups’ businesses; and bidding non-compliantly risked disqualification and exclusion from future participation in that industry, at least for a time.
171. I accept the general thrust of Mr Paterson’s evidence that Stagecoach had invested heavily in bidding for all three franchises and that they wanted to bid compliantly on pensions if they could find a way to do so because of the obvious risk of disqualification if they did not do so. Responsible people within Stagecoach described that risk on different occasions as “significant”, “high” and “very high”. Others used similar epithets both before and after the bids were submitted.
172. There were ample reasons why Stagecoach could have been in no doubt about the probability that they would be disqualified if their bids were non-compliant on pensions. Those reasons included:
 - i) The terms of the ITT and draft franchise agreements combined with the magnitude of the issue as a matter of practice because of the potential size of the risk and as a matter of principle because of the significance of attempting to transfer risks arising from a private pension scheme from the franchisee to the Defendant contrary to Paragraph 4.1.2 of the ITT: see [106.iv)] above;
 - ii) At a meeting on 13 June 2018, Mr Griffiths told the Secretary of State in person that Stagecoach would not take pension risks, which he described as a “big ticket” risk;
 - iii) The description of the problem as a “big ticket” one, was a recurring theme and the significance of the pension risks and their allocation was fully understood both before and after the decision to disqualify: see [190] below;

- iv) Stagecoach were told by the Department in July 2018, in the context of the first prospective rebid in the SE competition, that it expected full compliance in terms which left it in no doubt that if they didn't change their current non-compliance on pensions the Department would not take their bid forward for evaluation: see [214] below;
 - v) The Department reminded bidders in clear and uncompromising terms of the need for compliance and to accept the Franchise Signature Documents in their entirety when issuing the rebid instructions for each competition: see [220] and [230]-[235] below;
 - vi) On 12 October 2018, after a call between RDG members, Mr Paterson, Mr Griffiths and Mr Hamilton, Stagecoach's Group Director of Pensions & Benefits, were told (in what was a clear reference to the pensions problem) that the Department and the Treasury were expecting bidders to be able to bid compliantly and that the Department was not able to change what they had now signed off with the Treasury (i.e. the PRSM);
 - vii) The issuing of AQs 218 and 219 were, and were understood by Stagecoach to be, a clear warning that disqualification would follow if their non-compliance was maintained because the Department was in effect refusing their attempt to build in additional protection: see [242]-[248] below;
 - viii) A conversation between Mr Micklethwaite and Mr Wilkinson on 20 November 2018 gave Stagecoach no comfort: see [265] below;
 - ix) At a further meeting with the Secretary of State on 21 November 2018, Mr Griffiths told him that Stagecoach had been working with RDG and wanted to work with the Department to solve the pensions problem. The Secretary of State stated that Stagecoach should work out "what the franchise is worth" and bid on that basis, but that they should not "strike out parts of the Franchise Agreement". Stagecoach's account of the meeting recorded that the Secretary of State's key messages included reiterating that they should work out what they thought the franchise was worth and Stagecoach being clear that they could not bid on a compliant basis. I accept the evidence of Mr Wilkinson that "the Secretary of State could not have been clearer that bidders were not entitled to pick and choose" and that marking up the bid non-compliantly risked disqualification.
173. Had Stagecoach been in any doubt about the probable consequences of pensions non-compliance despite all the indications to which I have just referred, they could have asked for formal clarification by posting a CQ. They did not do so. There is, however, ample evidence that Stagecoach fully appreciated that their non-compliance on pensions gave rise to a high probability of disqualification, including:
- i) Mr Paterson accepted that Stagecoach was familiar with the risks of non-compliance as they had been disqualified from the competition for the South-West franchise. Their non-compliance on that occasion was not for attempting to re-allocate the pensions risk but included an attempt to mark up the franchise agreement to provide additional protection on infrastructure risks;

- ii) On 19 July 2018 Mr Paterson is recorded as having said that he didn't want Stagecoach to mark up or qualify their SE bid "unless it's inevitable due to the level of risk as there is a very high chance that to do other than bid a value will lead to disqualification";
- iii) On 2 August 2018 Mr Winnie, Stagecoach's Bid Director for the SE franchise, reported to the Group Board that "the DfT has confirmed that it is not in a position to accept any conditionality imposed by bidders in revised bids, and will not proceed with evaluating any bid which qualified or otherwise marked up any areas of the franchise agreement." He had said much the same in an email on 19 July 2018 to Mr Hampshire, the Business Development Director of Stagecoach's UK Rail Division;
- iv) A summary paper on the WCP pensions rebid authored by Mr Kavanagh, which was addressed to Ms Barlow and others and dated 15 November 2018, reported industry sources (including RDG) as suggesting that the Department "is unable to offer any further protection beyond what is contained in the current contractual drafting. Our assessment is that an attempt to seek more protection would be likely to end in a bidder being disqualified for non-compliance" and that proposing to amend the PRSM "would carry a high risk of disqualification": see [254] below;
- v) A summary paper on the SE second rebid on pensions authored by Mr Winnie, which was addressed to Mr Griffiths, Mr Paterson and others and dated 16 November 2018, recorded that the Department had uploaded a question to the data room asking Stagecoach to accept unequivocally the terms of Schedule 16.2 of the Franchise Agreement as issued and indicated that the outcome if Stagecoach did not do so was "likely disqualification": see [250] below;
- vi) A presentation to the WCP Bid Steering Committee on 16 November 2018 assessed the risk of disqualification if the bid requested additional protection over and above the PRSM as being "very high": see [256] below;
- vii) An internal SNCF email on 16 November 2018 reported on an "unpleasant" discussion between the WCP shareholders (i.e. Stagecoach, Virgin and SNCF) at the WCP Bid Steering Group meeting that day on the issue of pensions. It reported that

"Stagecoach and Virgin will not take any risk regarding pensions. Yet these risks are real, in a range from £200M to roughly £700M. This is an impossible choice:

 - Refusing to take the risk and keep a statement of non-compliance on this issue. We will be eliminated unless our two competitors do the same. ...";
- viii) An EM Pensions Summary prepared by Mr Kavanagh on 17 November 2018 gave the same assessment that the risk of disqualification if the bid requested additional protection over and above the PRSM was "very high": see [260] below.

174. Stagecoach's witness statements included evidence about the possibility of further discussion about the pension problem and altering the allocation of risk set out in the ITT, the draft Franchise Agreements, the rebid instructions and the PRSM. The evidence in the witness statements was not an accurate description of their perception at the time or the reality of the situation. It is contradicted by the contemporaneous evidence that I have summarised at [172] and [173] above, and I reject it.
175. In his witness statement Mr Paterson said that he did not expect the Stagecoach bids to be disqualified. In support of that statement he points to his being told that the Department was still trying to find a solution on pensions and that the expectation was that discussions on the pensions issue would continue after the bids were submitted; and that not all non-compliant bids lead to disqualification; and that Stagecoach's initial bids for the SE franchise had not (yet) been disqualified. Mr Kavanagh described the decision to disqualify their bid on the WCP competition as "entirely unexpected" in the light of the terms of the ITT that permitted a variety of alternatives to disqualification. His witness statement said that "our expectation was that our suggested risk-sharing mechanism would lead to a discussion with the Department in connection with pensions risk-sharing, and an agreement on this would be reached." It said that their expectation that there would be further engagement on pensions "was informed by the fact that discussions between the Department, the RDG, the Trustee and TPR regarding a potential industry-wide solution were still ongoing throughout the bidding process." In oral evidence he was more restrained, saying that there was a general view within Stagecoach that they "hadn't reached the end of the line on pensions" while accepting that they were faced with increasingly firm language from the Department; and he regarded it as "not impossible" that the Treasury might change its position. Even this evidence was inconsistent with Mr Kavanagh's assessment on 15 November 2018 in the updating memorandum on the WCP pensions rebid that amending the PRSM in their bid "would carry a high risk of disqualification"; and he accepted that there was very little hard evidence at that time to suggest that the pensions position was still moving.
176. Mr Hyde's evidence was also more restrained, and was that there was a level of dialogue going on with the Department that gave "some hope" to the optimists within Stagecoach that there was some constructive working together notwithstanding the terms of the ITT with respect to non-compliance.
177. The terms of the ITT and draft Franchise Agreements together with the final rebid instructions were clear and self-evidently laid down the terms on which bidders were to bid. There was nothing in the documents to suggest or encourage the belief that they might be treated as mere negotiating documents that were susceptible to a counter-offer that re-allocated the risks generated by the pensions problem. The fact that there were still discussions involving the Department, the RDG, TPR and others about the pensions problem itself provided no basis for believing that the documents on which the TOCs were required to bid for these franchises were part of some continuing iterative process.
178. In the face of this evidence I find that all relevant people within Stagecoach (including Mr Griffiths and Mr Paterson) realised that the probable result of a bid that was non-compliant on pensions would be disqualification, for the simple reason that everyone appreciated that it was a very major ("big ticket") issue because of the sums involved and because of the clear indications from the Secretary of State himself, who could

not have made it clearer that amendments to the allocation of risk would not be acceptable or accepted. There was no good reason to think that he was or might be bluffing.

179. Nor was there any good reason to draw comfort in November 2018 from the fact that previous non-compliant bids in the competitions had not yet led to disqualification. As a matter of fact, the Defendant had not previously reached that stage in its decision-making processes. To the contrary, until the issuing of the second rebid instructions (of which more later) it was clear that the pension problem and the Department's responses to it were a moveable and moving feast. That changed with the second rebid instructions which made clear that they were the basis upon which the TOCs had to bid; and there was no reason for the Claimants to think that their not yet being disqualified amounted to endorsement of a non-compliant approach in their rebids.
180. For these reasons, I reject Stagecoach's witness statement evidence about what they expected or hoped would happen. Even Mr Hyde's evidence was, if accurate, a triumph of unjustified hope in the face of reality. That does not mean that I reject his evidence that the bids that were submitted were meant to be constructive alternatives to what was proposed in the ITT and draft Franchise Agreements: that was the only alternative if the Claimants were not to withdraw from the competitions and the domestic rail passenger industry altogether. But that of itself provided no good reason to think that the Defendant would be prepared to transform the basis upon which the three procurements were being conducted in response to Stagecoach's constructive suggestions.
181. Whatever descriptive epithet is used, I find that Stagecoach perceived and believed that they were very likely (by which I mean much more likely than not) to be disqualified if they bid non-compliantly on pensions even if they clung to a vain hope that some other outcome might be possible.
182. The Defendant submits that there was another reason why Stagecoach was prepared to bid non-compliantly, because it harboured the hope that most or all of its competitors would also bid non-compliantly, making it necessary for the Defendant to re-run the competition on a basis that the market would tolerate. There are suggestions in the evidence that tend to support this submission, but it is not necessary to make any findings on it as it cannot affect the lawfulness of the Defendant's conduct in disqualifying the Claimants the following April. What does appear, however, is that Stagecoach had information by 3 December 2018 that it was the only non-compliant bidder in the SE competition and that it had therefore "clearly lost". Yet, when it was given a chance to withdraw its non-compliances by AQ219 on 7 December 2018, it did not take the chance and maintained its non-compliance. To my mind this tends to support my conclusion that the main driver for Stagecoach's decision to bid non-compliantly was its unwillingness to take the commercial risks to which the pension problem gave rise.
183. Later in this judgment, at [236] to [271], I identify evidence about how Stagecoach approached its bids in the three competitions, which complements the evidence to which I have just referred. On the basis of that evidence and the evidence I have just summarised, I conclude that Stagecoach's decision to bid non-compliantly was driven by a commercial decision that had three main strands of reasoning. The first was the

level of risk that their Board was prepared to approve. On the SE bid, there is evidence that the Stagecoach Group Board had identified a figure that it would accept as its residual risk attributable to the pensions problem and that, on the numbers being presented, if they were to rely only on the PRSM they would be accepting double that risk: see [247], [248] and [250] below. The same position held when it came to submitting the EM and WCP bids, with Mr Paterson pointing out that they did not have Board Approval to take the residual risk on WCP that was indicated by the figures with which they were working: see [259] below. The second strand was Stagecoach's unwillingness to take on risks of that nature. This was part of its wider policy position that it should not accept risks that it felt the private sector could not realistically manage. This point was made by Mr Paterson in his 11 October 2018 discussion document and reiterated immediately before submission of the EM and WCP bids: see [239] and [262]-[263] below. The third strand was that, although a number could have been found that would make them comfortable to take the residual risk, they feared it would have made their bid uncompetitive: see [258] below. This last strand was allied to Mr Griffiths' commercial policy decision that he was not interested in "gaming" the process: see [261] below. I accept that Stagecoach had in mind the possibility that other bidders might all bid non-compliantly, though it realised that it would only take one to break ranks and bid compliantly in order to scupper its bids. Subject to that, which was speculation with no solid foundation, if anyone really believed that the outcome would or might realistically be further discussions and a further change to the risk allocation required of bidders, they had no good reason for that belief. Stagecoach's strategy was certainly not driven by any such a belief. Despite Stagecoach's commercial muscle as a significant player in the railways business, to have founded a strategy on the hope or expectation that the Defendant, when confronted by their non-compliant bids, would re-allocate the pensions risk to the Government's disadvantage would have been no more than hubris. While some may have entertained the hope, it was not a foundation for Stagecoach's strategy.

184. The combined effect of these strands was that by the time for submitting final bids, and although they could have priced the risk at a level that they would have found comfortable, Stagecoach (and, in particular, Mr Griffiths and Mr Paterson) were opposed to taking the residual risk with only the PRSM as protection, a position that was reflected in different ways in the different bids. With this reasoning, the precise extent of the residual risk was not determinative though the decision-makers were influenced by the scale of the numbers with which they were being presented as possible downside risks, whether or not they clearly understood the likelihood or otherwise of those risks eventuating. If it were necessary to my decision (which I think it is not) I would hold that Stagecoach's decision-makers concentrated on the size of the numbers that were presented to them without giving close attention to the likelihood or unlikelihood of those risks eventuating.
185. This conclusion is not undermined by criticisms of the reasoning underlying different individual figures, particularly where those figures appear in post-bid documents prepared for purposes other than preparing the bids. For that reason, for example, though significant time was spent at trial attacking a figure of £589 million that appeared in documents created in 2019, and although the end result of those attacks is that I am not convinced that the adoption of that figure was sound, it does not matter when trying to understand what the Claimants were trying to do in the run up to

lodging their bids save, tangentially, as a further illustration of the way in which the uncertainty surrounding pension risks could generate widely divergent figures.

The decisions

186. On 1 April 2019 the Defendant decided to disqualify the Claimants and Arriva and to award the EM franchise to Abellio.
187. On 9 April 2019 the Department wrote letters to each of SSETL, SEMTL and WCTP informing them that their respective bids were disqualified and rejected. In the case of SSETL and SEMTL the reason was for non-compliance on pensions; in the case of WCTP, in addition to non-compliance on pensions, the reason included other non-compliances that are not the subject of this trial.
188. The disqualification letters were in similar but not identical form and terms. Each identified that the ITT had stated that bidders should not propose amendments to the Franchise Signature Documents, including by making any amendments which sought to transfer risk from the Franchisee to the Secretary of State and that any proposed amendments would result in the bid being deemed non-compliant in accordance with subsection 3.5 of the ITT. The letters referred to later communications, including rebid instructions, which emphasised the need for bids to be compliant with the Franchise Signature Documents and prohibited marking them up. The letters then identified the relevant non-compliances in relation to the pensions issue. For example, the letter to SSETL stated:

“Your re-bid submitted 8 October 2018 assumed a mechanism different to that which was provided within the specimen drafting, with assumptions that would have required additional drafting in the Franchise Agreement. These matters of non-compliance were expressly raised with you in AQ 218 and AQ0859, and in response to the latter you provided a non-compliance statement confirming non-compliance with a proposal to allocate risks arising from future pension contribution changes. In accordance with the ITT and the rebid instructions this would be deemed to be a mark-up which seeks to transfer risk from the Franchisee to the Secretary of State, contrary to subsection 4.1.2 of the ITT.”

189. Each disqualification letter then contained passages in materially identical terms. I take the letter to SEMTL as illustrative. It said:

“Consequently, your Bid was non-compliant for the purposes of subsection 3.5.1 of the ITT as the non-compliances constituted a proposed contractual amendment to the Franchise Signature Documents (as defined in the ITT) which seeks to transfer risk from the Franchisee to the Secretary of State, contrary to subsection 4.1.2 of the ITT.

6. The Department has decided that, in all the circumstances, disqualification and rejection is the appropriate response to this non-compliance, given the following factors in particular:

- Inconsistency with the Department's policy in respect of the allocation of risk on this issue, as reflected in the East Midlands specification. This was communicated clearly to bidders in the Rebid Instructions.
- The financial elements of your Bid are predicated on your position with regard to pensions (which would require changes to the Franchise Signature Documents and seeks to reallocate risk to the Secretary of State), meaning that your tendered price cannot be compared on a fair basis with the prices tendered by bidders submitting compliant bids.

7. The Department also considered its obligations under EU and English law, including in particular its duties of transparency and equal treatment of bidders, as well as the requirement to act proportionately in making a decision to reject a bid and/or disqualify a bidder.

8. We have not taken this decision lightly. Ultimately, however, the Department has to treat all bidders in the competition fairly. Bidders that complied with the Department's clear instruction with respect to the allocation of the pensions risk will have submitted bids taking into account their considered view of their risk exposure. In view of the Department's duties of transparency and equal treatment, we do not see how the Department could properly have come to any decision other than to reject your Bid for non-compliance.”

190. The EM disqualification letter informed SEMTL that Abellio had been awarded the franchise. The following day there was a feedback meeting, which repeated the reasons for disqualification that had been given but did not elaborate on them: the slides for the meeting stated that their purpose was to give SEMTL feedback on the quality of its Delivery Plan submissions and was not to discuss the decision that had been made. The day after that, SEMTL wrote to the Department raising further questions and asking for further disclosure. In the course of that letter SEMTL described the issue in relation to the pension requirements as “a very significant one with industry-wide consequences” and complained of lack of engagement either before or after the submission of final bids. Further correspondence followed including a letter from Mr Wilkinson on behalf of the Department on 15 April 2019. On 2 May 2019 the Department provided a further note explaining the process that had been followed in assessing SEMTL’s non-compliance and disqualification. On 9 May 2019 the Secretary of State entered into the EM Franchise Agreement with Abellio. The franchise commenced on 18 August 2019.
191. On 13 May 2019 solicitors acting for the Defendant sent a letter to solicitors acting for SSETL giving further explanation of the reasons for disqualification. On 7 August 2019, the SE Franchise competition was cancelled.
192. A feedback session with WCTP referred to the reasons for disqualification but did not elaborate on them. On 26 April 2019 WCTP’s solicitors wrote to Mr Hayes, the Department’s WCP Project Director, requesting detailed information from the

Department, to which Messrs Addleshaw Goddard replied on behalf of the Department on 10 May 2019. That letter included a note setting out the Defendant's provisions and process when considering WCTP's non-compliances, which referred to much of the history set out above and in the more detailed chronological section below. The note was in similar form to that provided to SEMTL on 2 May 2019. On 28 August 2019 the Defendant entered into the WCP Franchise Agreement with First. The franchise commenced on 8 December 2019.

These claims

193. These claims were launched by Part 7 Claim Forms that were issued in May and June 2019. Concurrent Judicial Review proceedings have been ordered to be case managed with the Part 7 claims and have been stayed on the basis that the current actions provide a suitable vehicle for determination of all relevant issues. As already indicated, the pensions issues were hived off to be dealt with in the present trial, which does not deal with causation or remedies.
194. Some 450 pages of pleadings have been distilled into agreed issues, which I address in turn after providing some of the chronology and evidence in greater detail.

Additional Chronology, Evidence and Findings

The development of the ITTs, PRSM and rebid instructions

195. The following chart sets out some of the critical dates:

Document	Date		
	SE	WCP	EM
ITT	29 Nov 2017	27 March 2018	7 June 2018
Original bid submission	14 March 2018	13 July 2018	5 September 2018
Draft Rebid Instructions	29 June 2018	N/A	9 October 2018
First Rebid instructions	13 July 2018	5 October 2018	17 October 2018; 23 October 2018 (revised: extension of time)
Second Rebid instructions	19 September 2018	N/A	N/A
Schedule 16.2 (draft)	10 October 2018	N/A	17 October 2018
Schedule 16.2 (final)	26 October 2018	7 November 2018	9 November 2018
Final bid submission	29 October 2018	23 November 2018	21 November 2018

196. The first issue of a formal (as opposed to draft) ITT was for the SE franchise competition on 29 November 2017. As with other franchise competitions, the formal ITT was itself the culmination of a process involving the publication by the Defendant of draft documents with the possibility for prospective bidders to engage with the Defendant and ask questions about prospective provisions. Such meetings continued after issue of the ITTs and provision was made for bidders to raise questions and for the Department to provide information through its AWARD system. The formal SE ITT and draft Franchise Agreement contained standard form instructions and terms on pensions; it did not refer to or reflect the fact of TPR’s investigation. The date specified for submitting bids was 14 March 2018.
197. On 2 February 2018 a Ministerial Submission³ to the Secretary of State set out “key policy principles” for his agreement, including that (a) “the RPS TOC Sections are private pension schemes and therefore a matter for the TOC employers and the RPS Trustees, not DfT” (which was said to be consistent with his previous steer); and (b) that “the baseline Franchise Agreement should, going forward ... put the formal responsibility on TOCs to bear all pension costs” (which was said to be in line with the Chief Secretary to the Treasury’s steer that TOCs should be bearing the cost risk, while noting that economically the cost is likely to filter through to the Government).
198. On 15 February 2018, the RDG (which was by now participating in the steering group established in late 2017) wrote to all bidders and passport holders with bidding guidance, which included the suggestions that bidders should accept the full 25%

³ Unless I indicate to the contrary, I accept the contents of all Ministerial Submissions that I cite as reasonably reflecting Departmental thinking at the time.

uplift in costs implied by TPR's proposals which, together with contributions derived from the current (2013) schedule of contributions, should set the cap on the employers' contributions rate.

199. On the same day, Mr Griffiths wrote on behalf of Stagecoach to the Permanent Secretary, Ms Kelly, noting that bidders in the SE franchise competition were "required to estimate the implications of the [TPR's] current and future reviews, as part of a wider change of approach to rail industry pensions without financial limit" and that they had been instructed not to amend the current draft Franchise Agreement. He urged the DfT to review the risk transfer associated with the SE franchise competition and to consider delaying the deadline for the submission of bids "until a clear specification for each scheme and risk share arrangements is defined." He wrote that "without a rethink by the Department, any bid we might submit would be non-compliant with your bidding instructions" in relation to pensions and another topic. In their reply on 6 March 2018, Ms Hannant and Ms Payne, the Directors General for the Rail Group, referred to the possibility of collective negotiations by the RDG and TOCs with TPR. Consistently with the Department's approach of treating the RPS as a private pension scheme, they suggested that TPR's parameters "provide a helpful steer to enable the development of options to inform a satisfactory solution to TPR's concerns." The letter, while cordial, provided no comfort for the concerns that Stagecoach had raised about potential non-compliance, though it encouraged Stagecoach to continue to liaise with the SE Project Team.
200. At about this time, tensions began to emerge between the policy and project teams within the Department about how to deal with the pensions problem in the context of current and future competitions. The tensions are reflected in a pensions paper co-authored by Mr Baghurst on 27 February 2018 and submitted to the Rail Investment Board the same day, which referred to the uncertainties created by TPR's intervention and the fact that bidders had expressed strong concerns about the scale of the uncertainty about the potential RPS deficit and about maintaining a level playing field for the competitions. As against those concerns, the paper recorded the policy team's concerns, backed by the Treasury, that the RPS is not subject to a Crown Guarantee and their wish "to avoid any suggestion that the Department ... is giving an indemnity which relates to pensions." It is these conflicting concerns which dominated discussions within Government (and, in particular, between the Department and the Treasury) over the coming months. The paper asked for agreement to the Department engaging with the Treasury about the extent of any protection the Department could provide to bidders.
201. The result of the Rail Investment Board meeting on 28 February 2018 was that Mr Wilkinson wrote to all SE competition bidders on 2 March 2018, setting out the current state of TPR's parameters. These now included that current live competitions would be treated as an existing franchise and that TPR had confirmed they would take into account serious affordability concerns. While this may have provided some modest comfort in relation to the length of recovery periods, it did not suggest a willingness on the part of the Department to make adjustments to the basic allocation of risk, whether by providing financial support or guarantees or otherwise. That became the subject of detailed negotiations between the Department and the Treasury.
202. Bidders' responses to Mr Wilkinson's letters were mixed. Govia generally welcomed the approach and suggested that future pensions uncertainties could be the subject of a

rebid if necessary. Abellio asked for common assumptions about pensions that all bidders could use, raising the prospect of unequal treatment if that was not done. Stagecoach pointed out the absence of any reference to the RDG guidance and asked whether the Department still supported an industry-wide solution. It pointed out that Mr Wilkinson's letter did not form part of the tender documentation and that it had been expecting an update to Schedule 16.

203. Despite suggestions that there should be an extension to the date for submission of bids in the SE competition, that did not happen. Bids were submitted on 14 March 2018. Stagecoach's bid was non-compliant on pensions, proposing that the Department should reimburse them for any additional contributions or costs, losses, liabilities or expenses directly or indirectly arising from TPR's investigation. It included a statement of non-compliance which expressed the hope that bidders would be given the opportunity to adjust their bids to take account of an informed view of the impact of a prospective industry-wide solution, and said that its bid was "subject to contract" in relation to pensions.
204. On 27 March 2018 the ITT for the WCP competition was issued, with a draft Franchise Agreement annexed. Schedules 16A and 16B, the normal provisions on pensions, were purposely omitted from the draft Franchise Agreement in light of the uncertainty following TPR's intervention and the continuing discussions it had generated. On the same date the Department issued a notice stating that it anticipated providing Schedules 16A and 16B "shortly" and at the same time expected that it would provide further information in relation to its expectations from bidders in relation to pensions. It reserved the Department's right to change or amend its approach to pensions as outlined in the ITT. The date for submission of bids was 13 July 2018.
205. During this period, the Department obtained advice from GAD. On 8 March 2018 Mr Baghurst wrote to GAD asking them to provide a range of valuation outcomes for the SE and WCP models and an estimate of the Department's potential exposure if protection were to be given, though at that stage the level of any possible protection was undefined. It was understood that the same principles would also apply to the EM competition and Mr Baghurst duly gave GAD instructions to do similar valuations for that competition. GAD provided initial results on 23 March 2018, with subsequent iterations before what were treated as final results on 18 May 2018 – that being the version that was used in developing the final formulation of the PRSM. The GAD analysis did not purport to be a full-scale actuarial analysis of the Department's potential exposure. In particular, as Mr Humphrey accepted in evidence, their analysis considered investment risk (at a high level that was very sensitive to assumed investment return) but not risks relating to the RPS's liabilities; and it assumed that TPR's intervention would be limited to the 2016 valuation.
206. The Department had in mind to share GAD's work with bidders "to assist in reducing bidder uncertainty in addressing potential future deficit reduction payments in their bids." GAD did not give permission for their work to be shared with bidders "because the assumptions and methodology [had] been selected for a particular purpose - to assist in HMG discussions about DfT shielding/protecting TOCs from TPR parameters" and because there were issues around (a) whether GAD would have "chosen the same assumptions or have tilted them in a different way for prudence when looking at this from a TOC point of view", and (b) how GAD's numbers might

be interpreted by TOCs. They expressed the view that bidders should rely upon their own actuarial advice, which is generally what happened. GAD was, however, content for its analysis to be shared with PwC, the financial advisers on the SE competition, requesting that their attention be drawn to the facts that (a) GAD's analysis was high level and the figures very sensitive to the assumptions adopted; (b) other valid approaches to asset performance were possible; and (c) other percentile outcomes could be modelled and used, which could produce quite different results, there being no single right answer.

207. On 12 April 2018 the Department's project team held its first weekly risk adjustment workshop for the SE competition, at which attendees would discuss proposals for risk adjustment and assess the extent to which bidders' approach on costs and revenues corresponded with the Department's view of the most credible outcome. The following day Ms Letten, the Department's project director for the SE competition, received an initial report from PwC which provided their high-level review of the pensions treatment by the bidders in that competition and showed different approaches from different bidders.
208. On 17 April 2018 Ms Stayte, the Head of Rail Workforce Strategy, Rail Strategy Projects, provided a Ministerial Submission which noted the concern amongst SE competition bidders about how to approach the deficit identified by TPR and how to deal with the uncertainty of future valuations. The submission expressed the view that, unless a way was found to manage the issue, it would not be possible to complete the other current franchise competitions or that they would provide poor value for money. The submission proposed the offer of "a short-term risk sharing mechanism for uncertain and significant pension costs that may arise during the franchise term and are outside the control of the TOC employers" on the basis that any offer would be linked to appropriate and timely action by the TOCs to reform pensions in order to maintain long-term affordability. The recommendation was that the Department should rapidly develop a short-term risk protection mechanism with a view to obtaining Treasury agreement once it was developed. The submission expressed the view that bidders' concerns about current and future valuation risks would, if priced into the bids, not reflect value for money; and it drew the analogy with revenue risks in proposing some protection. The advantages of offering some protection were stated to be that bidders would be able to quantify and therefore price risk into their bids effectively, which would enable the SE competition to proceed. It noted the need to get Treasury agreement and, since it raised the prospect of contingent liabilities for the Department, said that Treasury Ministers were expected by their officials to be "sceptical of any protection which reduces the incentives for the TOC and Trade Unions to reform the current scheme" and that officials judged that Treasury Ministers "would instinctively prefer an approach which would allow bidders to price in the pension risks."
209. The Secretary of State gave his approval in principle to the development of a risk sharing mechanism at a meeting on 23 April 2018. By then Mr Baghurst had already commissioned PwC to assist in developing a risk-share agreement. The idea was to determine the levels above which the Department should provide protection and below which the Department should gain some benefit, one of the aims being to minimise the Department's potential exposure and another being to continue incentivising the franchisees to enable and support pensions reform. At a meeting on

27 April 2018 with the Department’s external advisers it was agreed that the support mechanism would focus on DRCs and not include FSCs. One reason for this was the Department’s perception that bidders were more worried about DRCs than FSCs. A PwC discussion draft dated 9 May 2018 listed the Department’s objectives under three headings: first, that “requirements of bidders should be fair i.e. where they are on risk for costs, bidders should have sufficient information to make a proper estimate of future costs with a high likelihood that these estimates will be the same/similar in order to avoid pensions costs have [sic] a significant impact on the evaluation of bids”; second that “material uncertainty being transferred to bidders should be avoided – it will not represent value for money for bidders to have to build in contingencies which may subsequently prove to be unnecessary, resulting in windfall gains for the winning bidder. Equally, DfT does not want a failure to forecast future costs accurately to undermine the financial robustness of a TOC”; and third, that “Bidders/TOCs should be incentivised to share additional costs with the employees rather than simply bearing the whole of the costs themselves. However, it is recognised that there is a limit to the amount of the cost burden, ... which can be transferred to employees without triggering industrial relations issues.” Though only a draft, this provides a useful snapshot of strands of the Department’s thinking, though not necessarily in order of importance.

210. During subsequent meetings and discussions the Department adopted the solution for dealing with the 2016 valuation of providing the WTW Figures to bidders as additional working information when formulating their bids. To lend substance to those figures, it was also decided to show the WTW Figures to TPR in advance for confirmation that the figures accurately reflected TPR’s stated parameters. During the same period, DfT officials met Treasury officials to explain the principles of what they were proposing to do; and PwC progressively developed their advice in the light of feedback and instructions from the Department. This process continued up to and after the Ministerial Submission of 10 May 2018 to which I refer next, with important iterations of PwC’s work on 23 May and 2 July 2018.
211. There was a further Ministerial Submission, addressed to the Secretary of State and the Permanent Secretary on 10 May 2018. It reported that the Department had developed a short-term risk sharing mechanism to cater for the pensions problem by sharing the risk and rewards of changes in the funding position of the RPS which might arise in future valuations, from 2019 onwards. The three main features of the mechanism were that it “enables bidders (i) to price the pension risks in the usual way on the current 2016 Trustees’ valuation uplifted by [TPR’s] recent guidance on parameters, and (ii) leaves the future service risk with the bidders, but (iii) proposes a risk share on future valuations of the deficit during the franchise term above a certain threshold – this protects TOCs from potential exogenous risks outside their control (e.g. stock market crash) whilst incentivising them to consider long-term pension reforms” The submission stated that “in principle, our policy is to ensure that TOCs only take on the risks they can bear and to incentivise pension reform. This is consistent with the Brown review of only allocating risks to TOCs that they can manage efficiently. ... Without a protection, we run the risk of competitions failing and also resulting in dis-incentivising pension reform with costs ultimately being borne by Government.” Among the prospective benefits that were put forward in support of the proposal was that its inclusion was likely to result in better value for money than doing nothing because, in the absence of a support mechanism, bidders

were likely to make pessimistic pension assumptions in their bids, reducing the premium (or increasing the subsidy) being offered to the Department.

212. On 17 May 2018 the Secretary of State wrote to the Chief Secretary to the Treasury seeking her approval for the proposed risk sharing mechanism: see [147] above. The support mechanism he proposed was in line with the Ministerial Submission of 10 May 2018: i.e. it would provide protection in respect of DRCs above the nil-risk band arising under all future valuations from 2019 while leaving the consequences of the 2016 valuation and all FSCs to the TOC. This proposal was not accepted by the Treasury. It was considered by Treasury officials on 22 June 2018. Limited acceptance by the Chief Secretary did not come until 18 July 2018.
213. At a bilateral meeting on 18 May 2018 between officials and Stagecoach about the SE franchise competition, Ms Letten and Mr Baghurst outlined the current proposal for support, emphasising that it was at present hypothetical and subject to Treasury approval and stating that, if approved, it could be the trigger for a rebid on pensions. The proposal was for protection against DRCs from the 2019/2022 valuations onwards. The initial reactions from the Stagecoach representatives were that it seemed a reasonable but pragmatic proposition. After the meeting Mr Winnie wrote to Ms Letten expressing support for a risk-sharing mechanism but asking that it should be extended to cover all employer contributions i.e. FSCs as well as DRCs. The transcript of the bilateral meeting and Mr Winnie's email shows the wide-ranging nature of the discussions that were available to bidders during what was inevitably an uncertain period (both for them and for the Department) while the Department determined what could and should be done. Ms Letten took the view (almost certainly correctly) that the Treasury would never wear extending a mechanism to cover future FSCs as well as DRCs; so that suggestion was and remained dead in the water. A similar bilateral meeting took place in relation to the WCP competition on 24 May 2018, at which the currently proposed PRSM was explained to representatives of WCTP. Other bilateral meetings with representatives of Stagecoach took place on 31 May 2018, 2 July 2018 and 17 October 2018.
214. At the meeting on 2 July 2018, in the context of a prospective rebid in the SE competition, the Department reiterated that it expected full compliance with the ITT, Franchise Agreement, and rebid instructions. Stagecoach fully understood the implications of what it was being told: Mr Winnie, Stagecoach's Bid Director for the SE competition, recorded in his notes of the meeting on the subject of pensions that "our current bid submission is unacceptable. If we don't change it in some way, then the DfT will not take our bid forwards for evaluation. Of all the non-compliances, this is the one they seemed most definite on." He said the same in his paper to the Stagecoach Board on 2 August 2018. In evidence he accepted the implication that it was crystal-clear that a non-compliant pensions bid would lead to disqualification. In separate notes of the meeting, Mr Winnie was equally clear. Under the heading "FA "mark ups"" he wrote that "[i]f our bid submission remains conditional on pensions (as it was originally) the Bid cannot be taken forward." As further reaffirmation, if it was needed, Ms Letten wrote to Mr Winnie on 11 July 2018:

"As communicated during last Monday's bidder bilateral, the need to maintain a level playing field has been a key objective when considering options to proceed with the South Eastern franchise competition.

...

Again, bidders are requested to note that the Department requires full compliance with the requirements of the Invitation to Tender”

215. Meanwhile, on 7 June 2018 the Defendant had issued the ITT for the EM competition with Section 3.16 (which would refer bidders to Schedule 16 of the draft Franchise Agreement for pension requirements) removed and a footnote stating that further information would be provided to bidders in due course.
216. On the same day a first consolidation meeting on the SE competition concluded that all three bids had substantial non-compliances and all bidders should be asked to rebid, specifically amending material areas of non-compliance, including but not limited to a rebid on pensions. SIAP accepted that recommendation at its meeting on 19 June 2018.
217. Also on 19 June 2018, in what was clearly an interim measure, additional instructions about pensions were sent to the WCP bidders. An earlier set of instructions had been sent out 5 days earlier, on 14 June 2018. Bidders were told that schedules 16A and 16B of the Franchise Agreement would not be issued to bidders before the 13 July 2018 bid submission date. They were also told that no decision had been made about whether a risk sharing mechanism for future pension costs would be provided as part of the rebid process or, if such a mechanism were provided, what form it would take. The instructions required bidders to exclude pensions details from their 13 July 2018 bid submissions, with a view to pensions being dealt with in the proposed rebids. All bidders complied with these instructions when submitting their bids on 13 July 2018.
218. On 22 June 2018 officials at THE TREASURY provided a Ministerial Submission in which they recommended agreeing in principle the PRSM proposed by the DfT but reserving final agreement until (i) the DfT limited the mechanism to the 2019 valuation point only and (ii) sight of the RDG’s proposals for pension reform and good evidence that the unions would agree to them. The submission noted that the “best estimate” modelling of the 2019 valuation point suggested that the mechanism would result in no additional cost to Government and that the worst-case scenario suggested a cost to Government of around £50 million per year. The submission canvassed the wide-ranging policy considerations in play, including raising the TOCs’ expectation of further protection in future, the need for an exit strategy and the need for any protection to be accompanied by meaningful reform of the TOC RPS chapters. It also provided a succinct summary of the Treasury’s view of the pensions problem as it was affecting current competitions:

“Since the industry realised that there is no crown guarantee for TOC pensions it has become very risk averse on the pensions issue. Specifically, it is concerned that the next RPS valuation point, 2019, will show a larger deficit requiring even higher contributions. Given other financial pressures facing TOCs at the moment, resulting from lower than forecast passenger

growth, TOCs say they are unable to price or bear the risk of additional costs.

...

2 bidders on the South Eastern franchise competition have made wildly different assumptions on the pensions risk, which we cannot compare for purposes of continuing the competition; the third has refused to factor in the risk, assuming that DfT will provide some financial comfort at the point of contract.”

The submission recorded the belief of the Treasury officials that there was no alternative to offering a risk share mechanism on pensions if Government wanted to continue with franchise competitions.

219. During June 2018 DfT officials communicated frequently with Treasury officials to provide more information and clarification about the PRSM. It was the Department’s view (which they explained to the Treasury) that it was not feasible to await a TOC-wide solution because bidders were saying they could not bid without some clarity on the position and because it was thought unlikely that a TOC-wide solution would be in place in time to enable the three current competitions to accommodate them – a view that was shown to be justified by subsequent events.
220. The SE first rebid instructions were issued on 13 July 2018 and required rebids to be submitted by noon on 29 August 2018. The rebid instructions addressed various areas including pensions. Paragraph 3.3 reiterated that bidders’ proposals must be compliant with the Franchise Signature Documents and that bidders were not permitted to mark up those documents and must accept them in their entirety. The instructions provided the WTW Figures as illustrative results and said that where the new information affected bidders’ approach they could re-submit affected sections of their bid. The bidders submitted their bids on time. Stagecoach remained non-compliant on pensions, proposing its own mechanism that would provide additional protection and leave them with a residual annual risk that was acceptable to Stagecoach’s board.
221. On 18 July 2018 the Chief Secretary to the Treasury wrote to the Secretary of State, recognising that TPR’s investigation and subsequent identification of a £1 billion deficit in the TOC sections of the RPS had had a significant impact on the current competitions. She agreed with the principle of offering a PRSM “given the uncertainty around future pensions liabilities”; but she withheld approval pending sight of the industry’s reform proposals and assurance that the mechanism would be limited to the 2019 valuation point only. This latter condition would “limit the amount of risk borne by the Government and will incentivise the industry to implement pension reforms ahead of the next valuation point in 2022.”
222. At the Secretary of State’s request, DfT officials wrote to their Treasury counterparts on 26 July 2018 to progress agreement on the terms of the PRSM. The letter expressed the Department’s concern that “as currently framed the requirement to limit the protection to the 2019 valuation only will so reduce its value that either bidders will walk away, or price pensions risks into their bid to such an extent that value for money is seriously undermined.” They pointed out that the SE competition was now

pressing, so that the Department hoped to be able to obtain the Treasury's agreement to the protection the Department had designed (i.e. covering all valuations from 2019 onwards) and bidders had time to take it into account for their rebids at the end of August. They argued that the post-2019 valuations were further into the future and posed higher uncertainty because of that fact; and that their proposed protection struck the optimum balance for achieving value for money and incentivising participation in a permanent solution. They expressed the view that, without the protection, one or more bidders may withdraw, with the ultimate risk that the competition could fail. The concerns raised in the letter represented the real concerns of Mr Smith, one of the co-signatories, and of the Department generally. It was his view at the time that limiting the PRSM to the 2019 valuation point substantially though not entirely undermined the purpose of the mechanism. As will be seen, his fears (and the fears of those who shared them) that bidders would walk away did not materialise and bids that were compliant on pensions were received in all three competitions.

223. On 3 and 13 August 2018, the Department issued interim instructions to EM bidders on pensions, which were swiftly updated on 17 August 2018. The 13 and 17 August 2018 instructions indicated that there would be a rebid process in the competition. As with the WCP interim instructions on 19 June 2018, bidders were told that no decision had been made about whether a risk sharing mechanism for future pension costs would be provided or, if it was, what form it would take. They were instructed to roll over existing pension costs from the incumbent into their bids but to omit pensions details that might be referable to TPR intervention from their 5 September 2018 bid submission. Bids were submitted on time. Stagecoach bid compliantly, there being no pensions details or proposals referable to TPR intervention included.
224. Discussions between the DfT and the Treasury continued during August and September 2018, with Treasury officials looking for ways to make a PRSM acceptable to the Treasury and the DfT advancing the case for extending the mechanism for all valuations from 2019 and beyond. Mr Baghurst appreciated that the range of possible outcomes (in terms of the valuation position) increased as time went on, which led to him suggesting that, if it was to be time-limited, the mechanism could be limited to the 2022 valuation and beyond; but his favoured option was to have a mechanism that would remain in operation in 2019 and for subsequent valuations.
225. In the course of these negotiations, the Secretary of State wrote to the Chief Secretary to the Treasury on 5 September 2018 indicating his intention to continue with all three competitions and pressing for urgent resolution on the issue of the support mechanism. He pressed for a mechanism that was not time-limited to a specific valuation on the basis that time-limiting "would so reduce its value that we risk bidders pricing pensions risks into their bid and seriously reducing the value for money ... or in a worst case walking away from the competition." However, in about mid-September the Secretary of State changed his mind and accepted the Treasury's condition that the PRSM should apply to the 2019 valuation only. The evidence does not disclose and I make no finding about why he changed his mind. The change caused dismay among officials because of their belief that a more extended mechanism was necessary and because they identified unintended consequences of limiting it to one valuation which would be adverse to the franchisee and which, at its highest, Mr Baghurst described as "irrational". In the same email he expressed the

hope that this outcome would be limited to the SE competition and that he hoped the Department would be able to do something more rational for the WCP and EM competitions; but in relation to the SE competition he was clear: “This is not a point for further negotiation – this has been agreed and is how we must proceed.” In another email to colleagues later the same day he wrote: “You guys all need to stop panicking and trust me. It’s all in hand and under control. Worst case scenario is that WCP and EM adopt the same approach as South Eastern. Far from ideal, but not much we can do given HMT’s position on this.”

226. On 4 October 2018 the Chief Secretary to the Treasury replied to the Secretary of State’s letter of 5 September 2018. As before, she copied her letter to the Chancellor of the Exchequer. Having referred to her understanding that officials were working together on a rolling mechanism “designed to make sure Train Operating Companies are on risk for pensions costs within their control” and having said that “in principle, this sounds promising”, she reiterated her stance on the time-limitation of the mechanism:

“To limit the open-ended nature of any mechanism and the risk borne by the Government, I therefore maintain that any risk share must be tied to the 2019 valuations point only. However, I would be willing to reconsider this position if, and when, further information on the feasibility and costs of implementing a rolling mechanism that limits the risk to Government are shared with my officials. This is important to ensure Train Operating Companies are held to account for costs within their control and to protect the taxpayer from undue pensions risk.”

227. On the face of the letter, the Chief Secretary to the Treasury’s stance was clear and permitted revisiting only if there was further information on the feasibility and costs of implementing a rolling mechanism that limited the risk to Government. Mr Smith said in evidence that he regarded this as leaving the Treasury’s door ajar rather than open and that he would “interpret this as not completely excluding the possibility, but I don’t think the door was very open.” At the time he treated it as an effective fait accompli so far as the current competitions were concerned, writing in an email on 8 October 2018: “This is frustrating, given all the efforts we have put in”, to which Mr Bailey, the Department’s Director of Rail Strategy, Reform and Analysis, replied “Agreed. Infuriating. But at least we have clarity.” Mr Wilkinson regarded the language, coming as it did from a very senior politician, as unequivocal. When Mr Baghurst saw the Chief Secretary to the Treasury’s letter on 8 October 2018 he reported to his colleagues that it would take time for the actuaries to work through all of the issues associated with excluding post-2019 accruals and that they would then need to go back to the Treasury. He stated his view that “given the timescales both WCP and EM are working to, we will only be able to offer risk sharing related to the 2019 valuation i.e. that employed on South Eastern”. In evidence he repeated the point that, in the absence of certainty in the workings of the actuaries and given the time constraints on the competitions, the mechanism was now limited to the 2019 valuation point only. They therefore proceeded with a mechanism which had not originally met their objectives as far as they wanted it to, but which did provide some protection to bidders and which bidders seemed to have valued in the conversations the Department had had with them earlier in the year. I accept this evidence of Mr

Smith, Mr Wilkinson and Mr Baghurst as a reasonable reflection of their views at the time and that their views of the prospect of further movement from the Treasury were reasonably held.

228. The Claimants submit that the Chief Secretary to the Treasury's response on 4 October 2018 shows the Treasury to have been open to giving consideration to an alternative risk sharing mechanism that would have provided significant protection for future valuations and that the DfT did not pursue that option because of concerns about meeting the timetables for the current competitions. Mr Baghurst accepted that time was one factor, combined with the complexity and cost of what was being proposed and the lack of any clarity about how the mechanism would work or certainty of outcome. The Claimants submit that only 2-4 week's actuarial work was required at that point. Even if that had been achievable, which was not certain, it would then have been necessary to work up the proposal, go through the necessary processes to submit the proposal to the Secretary of State and then, if he approved, resubmit to the Treasury where both the timescales and the outcome were uncertain. A paper submitted to BICC for its meeting on 18 February 2019 said, in relation to a potential rebid, that:

“Any additional rebid would have an adverse impact on franchise competition schedules, and the implementation/delivery of planned passenger benefits. On pensions, negotiation time would be required to agree a position with HMT (potentially several months) and once this was agreed, the additional rebid required would add at least an additional eight weeks on to project timescales, along with the time required to re-evaluate bids. Any additional rebid would push East Midlands into the final periods of its existing Direct Award, risking another, and reduce the time remaining on the West Coast Partnership Direct Award.”

This assessment appears reasonable. It was echoed and amplified at [24] of Annex A to the CCS: see [337] below. There is no basis on which the Court could properly reject it or substitute a different view of its own.

229. What is certain is that, although the possibility was recognised, no one thought it feasible to go back to the Treasury yet again at that stage with a view to changing the Treasury's mind or substituting a new risk sharing mechanism for the purposes of the three current competitions. Given the past history of negotiations between the two departments, the Treasury's well-established policy position in relation to private pension schemes and the time constraints that applied to the three current competitions, that was sensible, realistic and, in practice, inevitable. The PRSM in its final form was therefore limited to the 2019 valuation only.
230. The immediate consequence was that new rebid instructions, described as the Second Re-bid Instructions, were issued for the SE competition on 19 September 2018. The principles of the PRSM and the WTW Figures relevant to the SE competition (which had been adjusted since initially being provided to bidders in July 2018) were annexed, with drafting for Schedule 16.2 to follow “shortly”: in fact the final draft of Schedule 16.2, which set out the terms of the PRSM, was not posted on AWARD until 26 October 2018.

231. The Introduction to the instructions referred to the bilateral meetings with bidders on 17 May 2018 where a hypothetical pensions risk sharing mechanism had been presented to address the future valuation risk arising from TPR's intervention, and continued by alluding to the negotiations with the Treasury that had since happened and the cross-governmental nature of the decisions that had resulted in the PRSM:

“The Department continued work on a potential risk sharing mechanism and obtained approval from the Secretary of State and Her Majesty's Treasury to introduce a pensions risk sharing mechanism on the South Eastern Franchise. The principles of the mechanism that the Department has obtained approval for are described in Annex A below.”

232. The instructions reiterated at section 3.1 that proposals had to be compliant with the Franchise Signature Documents:

“3.1.1. Pursuant to the Form of Tender and subsection 5.1.8 of the ITT, Bidders' proposals must be compliant with the Franchise Signature Documents. Bidders are not permitted to mark up these documents - save where there are areas specifically denoted for Bidders to populate - and must accept them in their entirety.

3.1.2. It is an overarching requirement that Bidders' proposals set out in each Delivery Plan and Sub-Plan (and for the avoidance of doubt, the Record of Assumptions) are compliant with the Franchise Signature Documents. Where a Bidder has not in fact marked up a Franchise Signature Document but has made a proposal or statement in its Bid which, to be given effect, would necessarily mean a mark-up of a Franchise Signature Document would be required, the Department will deem such a proposal to be a mark-up and that will result in the Bid being treated as non-compliant in accordance with subsection 5.1.8 of the ITT.”

233. Resubmission of bids was required to be by noon on 8 October 2018, which was later extended to 29 October 2018.
234. On 5 October 2018 the Department issued its rebid instructions for WCP. The draft Schedule 16, containing the PRSM, and draft Schedule 8.7A, containing a revised Reset mechanism and setting out what would happen to the pensions mechanism at and after Reset, were issued two weeks later. Resubmission of bids was required to be by midday on 23 November 2018. In a notice to bidders on 21 September 2018 (“Notice-0007”) the Department had restated its position on non-compliances in the context of the rebid, namely that it expected that all bidders would submit an updated and final non-compliance statement (or withdraw their current one); that the terms of the Franchise Signature Documents would be accepted in full, without amendment; and that the Department did not expect the bid to be qualified or subject to any other non-compliances at that point. The Department reminded bidders that, among the actions available to it, where a bid was found to be non-compliant, the Department may at its sole discretion reject the bid and disqualify the relevant bidder from the

competition. In the context of a rebid on pensions where there had been prior non-compliance on pensions and the pensions problem was known to be of such importance to bidders and the Department, the seriousness of Notice-0007 and its potential implications should have been lost on no one.

235. On 17 October 2018 the Department issued rebid instructions for EM franchise bidders covering pensions, ticketless travel and non-compliances. The instructions provided details of the PRSM and revised WTW Figures. The instructions reiterated the need for compliance in terms substantially identical to those used in the SE Rebid Instructions. Revised rebid instructions were issued on 23 October 2018. Resubmission of bids was required to be by noon on 21 November 2018. A further reminder of the need for compliance with the Franchise Signature Documents was posted on the AWARD system on 16 November 2018.

Formulation of the final bids

236. The PRSM was clear and understood by all tenderers. The terms of the ITTs, draft franchise agreements and rebid instructions were also clear on pensions and understood by all tenderers. What was uncertain was how the pensions problem would play out in practice: whether the inherently uncertain risk of increased future pension liabilities in the changed landscape after TPR's intervention would eventuate and, if so, what numbers might attach. In an earlier section of the judgment I have addressed that inherent uncertainty. As with any risk affecting commercial enterprises, the question for the tenderers was how to cater for the uncertainties inherent in that risk. The commercial choice facing the Claimants and all other bidders on each competition was clear-cut, though making the choice was not necessarily straightforward: it was whether to bid compliantly, or non-compliantly, or not at all. This section of the judgment concentrates in greater detail than before on how the Claimants addressed that question.
237. Stagecoach had the advantage of an acknowledged pensions expert in Mr Hamilton, their Group Director of Pensions & Benefits who was also a director of the Trustee of the RPS and engaged in the RDG Steering Group's search for a TOC-wide solution. Below board level he played a leading role in Stagecoach's internal discussions, as did Mr Kavanagh when the rebids were in contemplation. Mr Kavanagh gave evidence. Mr Hamilton did not. Others played their part including, at board level, Mr Paterson, who gave evidence, and Mr Griffiths, who did not. Stagecoach were advised by Hymans Robertson, external expert actuaries who were also involved in advising the RDG Steering Group, though the extent of their involvement with the Steering Group does not emerge with clarity.
238. The Defendant submits that the Court should draw adverse inferences from the absence of Mr Hamilton and Mr Griffiths as witnesses. I do not do so because, despite Mr Hamilton's acknowledged expertise and Mr Griffiths' seniority, the witnesses who were called (up to and including Mr Paterson) provided a wide spread of seniority and knowledge in giving their evidence. On reviewing the available documentary and witness evidence as a whole for the purposes of writing this judgment, I am satisfied that it is sufficient to enable the Court to determine all necessary issues of fact without it being necessary or justified to draw inferences from those witnesses' absence and that embarking on the exercise of drawing of adverse inferences would not change the factual findings that I make.

The SE rebid

239. On 11 October 2018 Mr Paterson produced a discussion document in which he set out the options and decisions facing Stagecoach on the SE competition. The bidding options were (1) bidding on the basis of the current level of pensions contributions, (2) bidding in accordance with the RDG proposal that was then current, (3) including an increased level of contributions based on the latest rebid guidance (i.e. bidding compliantly), and (4) bidding at a point between the RDG proposal and the rebid guidance. Mr Paterson listed pros and cons for each option. The cons for options 1, 2, and 4 included “could be cause for DfT to disqualify bid (but likely to bid non-compliantly in some respects on pensions anyway)”. The sole con for option 3 was “could make our bid (premia) appear more expensive than others.” Separately, he considered the options facing Stagecoach under the heading “Should we demand any protection versus base case over and above what DfT has offered?” The points in favour of demanding additional protection were “reduces in-franchise exposure on pensions to an acceptable level” and “consistent with wider Stagecoach policy position on not accepting risks that private sector cannot realistically manage”. The cons were “Potentially non-compliant bid on pensions” and “could be disqualified before opportunity to re-negotiate pensions as a preferred bidder”. The points in favour of living with the protection offered by the DfT were “could be compliant bid on pensions” and “opportunity to re-negotiate at preferred bidder stage and improves chances of getting to that stage”. The cons included “cost and effort to get to preferred bidder stage when it still might be impossible to negotiate adequate protection”, “could be seen as willingness to sign franchise without protection” and “could undermine Stagecoach policy position (and comments to Williams Review) on not accepting risks that private sector cannot realistically manage”.
240. In my judgment, and in the light of the internal Stagecoach discussions and debates that I summarise elsewhere, this document provides a revealing and accurate snapshot of Stagecoach’s thinking as it approached the rebids. Certain strands stand out, namely (1) an appreciation of the risk of disqualification if it bid non-compliantly, (2) the hope that it might achieve preferred-bidder status and then use the leverage that might give it to negotiate for more protection, (3) a balancing of the risk that disqualification for bidding non-compliantly would prevent it achieving preferred bidder status against the risk that bidding compliantly, while maximising its chances of achieving preferred bidder status, would leave it exposed if it failed to achieve extra protection and would cut across Stagecoach policy. The reference to the possibility that bidding compliantly would be seen as willingness to sign the franchise agreement without protection indicates that Mr Paterson had in contemplation bidding compliantly but not signing the franchise agreement if they were unable to obtain additional protection at that stage. Mr Kavanagh confirmed that, saying in evidence that Stagecoach intended to renegotiate if it were the preferred bidder. Mr Paterson said, and I accept, that he “was aware there was a school of thought that said we could bid compliantly as an attempt to remain in the competition, but with some opportunity to renegotiate later, and I reflected that here. Personally, it wasn’t an approach I favoured” On any view, it would have been a dramatic step to take, for legal, commercial and reputational reasons.
241. Stagecoach’s rebid on 29 October 2018 was materially non-compliant on pensions but did not include a statement of non-compliance. In their Record of Assumptions,

Stagecoach purported to have bid in accordance with the DfT's rebid instructions but added further assumptions, including that the PRSM mechanism would also apply to the 2022 and subsequent valuations if they further amended the DRCs payable by the franchisee.

242. The Department's response was to issue AQ218 on 14 November 2018. It highlighted the passages in the Record of Assumptions that either expressly or implicitly contradicted the terms of the ITT and PRSM and concluded:

“The Department does not anticipate amending the risk sharing mechanism set out in Schedule 16.2.

Please could you confirm by return that that:

- you unequivocally accept the terms of Schedule 16.2 of the Franchise Agreement as issued to you;
- no amendments are required to Schedule 16.2 to reflect the statements made in your Record of Assumptions and that these statements will be removed from your Record of Assumptions should you be taken forward as the leading Bidder;
- as a consequence of the above, no other amendments will be required to your Bid including without limitation the Financial Model or the Franchise Payments in Appendix 1 and the Franchise Payment table set out in Appendix 2 to Schedule 8.1.”

243. Stagecoach provided an answer to AQ218 on 22 November 2018 which did not provide the confirmation that the Department had requested. Instead it stated that, following work by its Actuary, it now believed that the PRSM should apply in respect of all valuations carried out during the term of the SE franchise, excluding payments relating to the outcome of the 2016 valuation. And it provided background and insight into its position regarding risk share for pensions, including a description of industry efforts to try to find a solution to the pensions problem and its views on public/private sector risk allocation.

244. The Department tried again on 29 November 2018 with AQ219:

“The Department requires that the Bidder re-review the queries raised in AQ 218 and responds to these specific queries and in particular please could you confirm by return that:

[It then repeated the three bullet point questions from AQ218, as set out above.]

If this is not confirmed in the affirmative, please could you complete a non-compliance statement

If no response is received to this clarification question, the Department will consider your Bid as being non-compliant in

relation to pensions and a deemed mark-up of the Franchise Agreement.”

245. Mr Winnie posted Stagecoach’s answer on 7 December 2018, stating that it was unable to give the requested confirmations. Stagecoach subsequently provided the requested statement of non-compliance.
246. The evidence about how Stagecoach came to submit and maintain its non-compliant bid as it did is lightly sketched. Mr Kavanagh said in evidence that, while they recognised that AQs 218 and 219 were an attempt to get Stagecoach to change its position, and that the risk of disqualification was clearly there, they regarded it as “not impossible” that the Treasury would move again. He reasoned that the DfT had previously shared Stagecoach’s view of some of the risks that it did not want bidders to take, and that there was therefore “a reasonable prospect, perhaps not a high prospect” that something different to disqualification would result. In the light of the AQs, which stated expressly that the Department did not anticipate amending the PRSM, and for reasons given elsewhere in this judgment, I cannot accept that this view, if it was held at the time, was realistic.
247. More reliable evidence is provided by four contemporaneous documents. On 26 October 2018, Mr Winnie sent to Messrs Griffiths, Paterson, Kavanagh, Hamilton and others a paper that provided an overview of Stagecoach’s response. He traced the approach to the original bid and first rebid by reference to the stated figure that the Stagecoach board would accept as a residual pensions risk. Turning to the second rebid he recorded that, following work by Hymans, if Stagecoach were to rely only upon the PRSM, it would be accepting a residual risk that was approximately “double the risk that the Board was prepared to accept in the First Rebid and falling outside the boundaries of our subsequent internal discussions.” It therefore proposed in the second rebid that the PRSM should also apply for the 2022 valuation. The possibility of achieving preferred bidder status but then refusing to sign remained if they were unable to achieve what they regarded as a suitable protection mechanism and no suitable industry-wide mechanism was yet in place was still in contemplation: “we ultimately do not have to sign the Franchise Agreement consistent with the Board position with our First Rebid.” The paper also raised the possibility that other bidders would be as prudent as Stagecoach and could therefore be expected to also be non-compliant on pensions. I accept his evidence that this was not a statement of the strategy that had driven Stagecoach’s approach, though Stagecoach were always conscious of the possibility that the Department might have to rethink its strategy if it received no compliant bids at all. Stagecoach was also conscious of the risks that existed if it was non-compliant and other bidders were compliant, as is shown by an exchange of emails between Mr Winnie and Mr Shoveller, Stagecoach’s Managing Director of their UK Rail Division at the time, on 13 June 2018.
248. Mr Winnie’s 26 October 2018 analysis is corroborated by an email from Mr Hamilton to Hymans and Mr Kavanagh (which was subsequently copied to Mr Paterson) on 14 November 2018 in the light of the Department’s request for confirmation of compliance that day. Mr Hamilton understood the consequences of AQ218, namely that “in effect they are refusing our additional protection language”; and he summarised the position as being that, with the PRSM alone, the residual risk was double that which Stagecoach had built in by their proposed additional protections.

249. On 15 November 2018, by which time he had received Mr Hamilton’s email and knew about AQ218, Mr Paterson replied to Mr Hamilton and others:

“There are only two options that I feel are acceptable to us:

- maintain the position set out in our second re-bid or;
- accept the DfT's position and price in the downside.

I favour the first. The risk is difficult to eliminate in the second unless we put in a huge increase in pension costs. It would, however, be worth setting out both for the DfT so it sees the figures just in case we could win on the second basis.”

250. On 16 November 2018 Mr Winnie provided for the same recipients as his 26 October analysis a paper summarising the position after the questions raised by AQ218. He summarised that the Department were seeking confirmation that Stagecoach would retract their non-compliances and make no further amendments, and he listed three options. The first, doing nothing, would be compliant with Board Approval but involved “likely disqualification from the competition as we will be non-compliant with the [Franchise Agreement]”. The second, falling into line on all three questions, would be compliant with the Franchise Agreement and would mean that Stagecoach remained in the competition; but it would add substantial additional risk over and above that approved by the Board and would not be compliant with Board Approval. The third, agreeing to the first two requests but not the third and pricing the additional risk, would be compliant with the Franchise Agreement and Board Approval and would mean they remained in the competition; but they would be in a less competitive position. The basis of this summary, therefore, is that the residual risk that the Board had approved was incompatible with the greater level of risk that would be accepted by a successful compliant bid.

251. This evidence supports a finding that Stagecoach’s non-compliance in the second SE rebid was the result of a decision by the Stagecoach Board about the level of residual risk that they were prepared to accept and an assessment based on internal and external advice that reliance on the PRSM alone would expose them to approximately twice that level of risk. This commercial assessment of risk led to the submission of a bid with additional (non-compliant) protection mechanisms that were designed to reduce the residual risk to acceptable levels. The alternative, which Mr Paterson did not favour, was thought to be to add “a huge increase in pension costs” to guard against the residual risk. The nature of Stagecoach’s assessment (as set out by Mr Hamilton and Mr Winnie) demonstrates that although the risks were uncertain and (to a large extent) unmanageable by franchisees, they were not unquantifiable for the purposes of making commercial decisions about whether and how to bid. This feeds into my overall findings about the nature and reasons for Stagecoach’s non-compliant bids: see [183] above.

The WCP and EM rebids

252. On 31 October 2018 Mr Kavanagh drafted an updating paper about the WCP pensions rebid which combined many of the features of Mr Paterson’s 11 October and Mr Winnie’s 26 October 2018 documents about the SE rebid. The document shows that

he understood the PRSM and the choices facing bidders. He also recognised the industrial relations risks that were implicit in substantial rises in contributions. He adopted Mr Paterson’s analysis of the options facing the WCTP bidders, including the acknowledgement that demanding extra protection risked their being disqualified before they had the opportunity to re-negotiate pensions as a preferred bidder – another indication that Stagecoach still had this possibility in contemplation. Commenting on the paper the next day, Mr West, who was then Stagecoach’s Finance Director for the EM and SE bid teams, said he would be surprised if other bidders did anything different from complying and said that he didn’t think there would be an opportunity to renegotiate.

253. Mr Kavanagh’s updating paper was subject to amendment with time. By 14 November 2018, when he sent it to Hymans with a request for assistance in filling in numbers, it still contained the same assessment of the risks of disqualification arising from non-compliance; and it now contained a (draft) recommendation that Stagecoach/WCTP should bid compliantly. The draft paper concluded that:

“we would not propose to materially amend the risk share mechanism proposed within Schedule 16.2, although we would seek to include wording in our bid assumptions to clarify the circumstances in which [TEXT REDACTED]. Although there is a risk that such wording may ultimately not be accepted, our assessment is that, because it is explanatory in nature the risk of it being assessed as a non-compliance leading to disqualification would be very low.”

The contrast between the assessment of risk of disqualification for a non-compliant bid and the “very low” risk of adding wording that could be characterised as explanatory is instructive and suggests that Mr Kavanagh considered the risk of disqualification for a non-compliant bid to be both higher and unacceptably high.

254. There was a WCP Bid Steering Committee meeting scheduled for 16 November 2018. During the previous evening, after receiving further input from Hymans, Mr Kavanagh circulated a further iteration of his update paper. In the summary and recommendation section it said:

“... industry sources (RDG and others) would suggest that the DfT is unable to offer any further protection beyond what is contained in the current contractual drafting. Our assessment is that an attempt to seek more protection would be likely to end in a bidder being disqualified for non-compliance. We believe that the DfT is actively seeking compliant, but necessarily expensive bids.”

After outlining that there was considered to be a reasonable risk of up to £189 million associated with the future funding of pension liabilities with a worst-case scenario multiple times that figure, the paper recommended pricing the assessed reasonable risk into the bid and concluded with the recommendation that:

“... we would not propose to amend the risk share mechanism proposed within Schedule 16.2, since our assessment is that this would carry a high risk of disqualification.”

After some equivocation, Mr Kavanagh accepted in evidence that this sentence accurately reflected his assessment that if they proposed to amend the PRSM there would be a high risk of disqualification.

255. There are two versions of the slides for the meeting. The first was prepared on 15 November 2018 and the second some time later. The first set stated that:

“Latest intelligence suggests that mark-up in respect of pension risks carries a very high risk of disqualification, and that DfT is expecting compliant bids, which will therefore be very expensive”.

256. After setting out the options as (1) requesting additional protection and (2) not requesting additional protection but pricing in the risk of increases in pension costs to mitigate the risk to shareholders, the recommendation commenced:

“As we believe the risk of disqualification is very high with option 1, we would recommend option 2 is adopted.”

The slides recommended compliance but pricing in £189 million of cost relating to future risks. The recommendation concluded with

“Given the very high potential risks involved, however, we should recognise that the fallback option of not signing the Franchise Agreement has to remain a possibility if we are not able to obtain sufficient comfort.”

257. The second set of slides included a more extensive risk assessment but identified the same two options and gave the same recommendations (subject to immaterial changes in wording).

258. The Defendant criticises the methodology and calculations of risk adopted in the paper and slides and at least some of the criticisms appear valid. However, what mattered at the time and what matters for present purposes is what Stagecoach/WCTP thought and how it influenced their approach to the bids. In that context the exercise undertaken by Stagecoach at this stage of the bidding process illustrates the wide range of outcomes that could be reached by substantial commercial concerns possessed of high levels of internal competence and with the benefit of external expert advice. It also shows that, although the outcome of the pensions problem (and therefore the eventuating of the risk to which it gave rise) was uncertain, it was possible to estimate the risk for the purposes of taking commercial decisions on whether and how to participate further in the bidding process. Mr Paterson was right when he accepted that they could have found a number that was big enough to price in and that they would then have been comfortable taking the risk. They were concerned about putting a large number in, for reasons that he explained, but “[he] wasn’t necessarily of the view that it was impossible to price the risk.”

259. At the meeting on 16 November 2018 both Mr Griffiths and Mr McCall of Virgin were opposed to taking the residual risk and Mr Paterson pointed out that Stagecoach did not have Board approval to do so. It was decided that there should be a further call the following Monday, 19 November 2018, by which time more information about the likelihood of an outcome worse than their current reasonable estimate was required. It was after the meeting of 16 November that the SNCF representative reported on the “unpleasant” discussion that had occurred: see [173(vii)] above.
260. The weekend of 17/18 November 2018 was a busy one. Mr Kavanagh produced another Pensions Summary, this time for the EM competition. He adopted an approach that was similar to his presentation to the WCP Bid Steering Committee. The figures were different, but the recommendations remained essentially the same as for WCP. He stated in his recommendation that “we believe the risk of disqualification is very high with option 1” (i.e. requesting additional protection) “and would recommend option 2 is adopted.” Option 2 was “do not request additional protection but price in for *some* of the additional pension risk” In evidence Mr Kavanagh was unable to identify where some of his important figures came from, a feature which characterised the evidence of other Stagecoach witnesses. However, once again, what matters is not whether the figures were right or wrong but that they informed Stagecoach’s thinking when making its commercial decision whether and if so how to bid. Of most relevance for that purpose was a figure of £0.6 billion which represented an estimate of “the only minimal risk approach”, which would be achieved by funding both past and future accruals on a risk-free basis (i.e. gilt funded).
261. Also on 17 November 2018 Mr Hamilton sent a long email to Mr Griffiths, Mr Paterson and Mr Shoveller. In it he argued that there may be a financial opportunity provided by pricing in additional sums to cover the residual risks if bidding compliantly. His argument was partly strategic, that the Department must eventually look for a lower cost option (which would require it to give added protection), and partly principled, questioning the likelihood of the downside risks eventuating and warning against talking up “scary numbers”. Mr Griffiths’ reaction was to call for a discussion as soon as possible, and that “for me this is simply about protecting the downside. I have no interest at all in gaming the system or making money out of/or second guessing future pension provision.”
262. There is no direct evidence of the discussion which took place between Mr Griffiths, Mr Paterson and Mr Hamilton in the wake of Mr Hamilton’s email. It is, however, apparent that they spoke and that Mr Hamilton’s argument did not cause Mr Griffiths to change his mind about shouldering the residual pensions risks. On 19 November 2018 Mr Hamilton told Mr Kavanagh that he had been talking to Mr Griffiths and Mr Paterson over the weekend and that they had reached the position that they would not take the pensions risks and would set out what they referred to as the principled position about the allocation of risk from the Department to the TOCs.
263. A further set of slides were then prepared, either by Mr Kavanagh or Mr Hamilton. This set stated that the principled position was that the operator “should not accept long term risks that it is not able to manage, control or influence” and proposed that they should price some additional costs into the bid model but require that the PRSM protection be extended over the whole term of the franchise and be extended to cover necessary increases in member contributions or increases in salary. They suggested

offering to discuss with the Department two other options which would transfer more risk to the franchisee. The evidence does not disclose how this change of position came to be formulated, but it must have been with the authority of Mr Paterson and Mr Griffiths.

264. It is evident that the overall view of Mr Griffiths and Mr Paterson held sway, because both the EM and the WCP bids were non-compliant when submitted on 21 and 23 November 2018 respectively. There was, however, a period of frenetic activity between the meeting on 19 November and the last of the rebids being submitted on 23 November 2018.
265. On 20 November 2018 Mr Micklethwaite rang Mr Wilkinson and told him that Stagecoach would not be bidding compliantly, effectively asking if that would be alright. Mr Wilkinson said that he could not give him any comfort and that he was expecting some compliant bids.
266. On the same day Mr Shoveller spoke to Mr Plummer, the Chief Executive of the RDG, who told him that he was in constant dialogue with other groups of owners. Mr Plummer said he was feeding a consistent message to the Department on the owners' position (i.e. that the pensions risks should not be allocated to franchisees) but that "all are aware of [Mr Wilkinson's] comments that it only takes one to bid compliantly. Conversely, it is reasonable to conclude that everyone is aware that a compliant bid, however that is judged, is likely to win." There was therefore a clear awareness on the part of the Claimants that one compliant bid could scupper Stagecoach's position, as Mr Micklethwaite accepted in evidence.
267. On 21 November 2018 Stagecoach submitted their pensions rebid for the EM competition. Stagecoach sought to extend the PRSM to all deficits arising from the 2019 and subsequent valuations and for all FSCs (including both employer and employee shares) to the extent that those contributions were higher or lower than the amounts included in SEMTL's Rebid Financial Model. Stagecoach duly submitted a statement of non-compliance in respect of its pensions rebid.
268. The same day Mr Griffiths and Mr Shoveller attended a meeting with the Secretary of State who made it clear that Stagecoach was at risk of being disqualified for submitting bids that were marked up non-compliantly: see [172(ix)] above.
269. On 22 November 2018 Mr Micklethwaite spoke to Mr Wilkinson and told him that they had submitted their EM rebid the previous day in accordance with their previously stated position, which Mr Wilkinson knew already. Mr Micklethwaite accepted in evidence that by then Stagecoach had made their decision to bid non-compliantly and that nothing Mr Wilkinson could have said on the call would have changed that decision. I accept Mr Micklethwaite's evidence that Mr Wilkinson was unhappy about the situation and that he said that the Treasury had put the Department in an "appalling" position. It is, however, far from clear that Stagecoach would have bid compliantly if required to bid against the PRSM as originally proposed by the Department. While that would have reduced Stagecoach's residual risk, it would not have done away with Stagecoach's policy/principled objections to taking a pensions risk at all that it regarded as unmanageable by the TOCs.

270. On 23 November 2018 WCTP submitted its rebid for the WCP competition. Its approach was non-compliant (consistently with the approach adopted on the EM competition) and it submitted a statement of non-compliance in respect of pensions (and other matters).
271. Mr Hamilton’s view, expressed on 22 November 2018, was that “with a little knowledge we might have spooked ourselves out of these bids”. On the evidence I have seen, he may well have been right because, at the critical juncture, decision-makers were being confronted by “scary numbers” representing a worst case which was extremely unlikely to eventuate and in respect of which (a) Stagecoach’s witnesses were not subsequently able to replicate, explain or justify the numbers and (b) no (or no adequate) assessment of the unlikelihood of the risk eventuating was provided.
272. I provide my overall findings about the nature of and reasons for Stagecoach’s non-compliant bids at [183] above.

Assessment and decisions

273. I refer to the bidders by name throughout though their identities were masked by code-names in the assessment and decision-making documentation. That said, Stagecoach told the Department and the Secretary of State himself that they would not bid compliantly, and the existence of one non-compliant bidder in each competition was known to all.

The evaluation process

274. The end point of the Defendant’s evaluation process was meant to be to determine which bid represented the Most Economically Advantageous Tender (“MEAT”). The ITT’s review and risk adjustment procedures were intended to identify issues “which in the Department’s reasonable view might generate a material risk of a materially different financial outcome from that projected by the Bidders’ Modelling Suites”: paragraph A3.2.1.1 of Appendix 3 to the ITT. Paragraph A3.3.2 of Appendix 3 stated that:

“Where the Department identifies in its reasonable view a material risk of a materially different financial outcome from that projected in the Bidder’s Modelling Suite, whether with respect to cost or revenue, it may risk adjust either revenue, cost, or both, as appropriate in order to reflect its reasonable view of the most credible financial outcome.”

This allowed the Defendant to exercise judgment in two separate respects, first about whether there is a risk of a *materially* different outcome and, second, about what constitutes the *most credible financial outcome*. Overall, and in the context of these two separate exercises of judgment, the Defendant had a discretion about whether to risk adjust revenue, cost or both. In doing so, it could take a reasonable view of the nature of the potential financial impact of a risk and could take account of any mitigations or contingencies identified by the bidder: paragraphs A3.3.3-A3.3.5 of Appendix 3.

275. The evaluation process should be carried out in accordance with the detailed provisions in Section 7 and Appendix 3 of the ITT as explained by the Bid Evaluation Guide (“BEG”), there being no formal procedure laid down by the Railway Regulation. It was described by Ms Palmer, the Department’s Head of Procurement Excellence, and Mr Baghurst. The first step was to risk adjust the submitted bids. The purpose of this risk adjustment was to attempt to assess whether the bidder’s cost and revenue proposals represented the most credible financial outcome for a relevant element of its bid. The risk adjustment process was led by technical advisors with support from financial advisors, who were responsible for raising a form for each Potential Area of Proposed Risk Adjustment (“PAPRA”). If a bid did not represent the most credible financial outcome, the Department would risk adjust it on the basis of the PAPRAs to what it considered to be the most credible outcome. In an average competition there would be approximately 50 different PAPRAs dealing with different areas of risk.
276. At the first stage of risk adjustment, all bids were risk adjusted until what is known as the first consolidation. During the first stage, the evaluators considered exogenous risks such as GDP, employment rates and changes in interest rates. The result of this first stage was to derive and establish the P (price) score. That was combined with the quality and deliverability (“Q&D”) scores to identify the preferred bidder or bidders who would then be taken forward to the next stage of evaluation. The Q&D evaluators could also propose additional areas for risk adjustment. The second stage of risk adjustment involved evaluation by reference to endogenous risks, such as marketing and staffing costs, though exogenous risks could still be brought into account if new information emerged. The second level risk adjustment would take about 8-12 weeks and is resource heavy. For reasons of time and resource, it was only applied to the preferred bidder or bidders.
277. It should be noted that the ITT-based risk adjustments, as just described, looked to identify the most credible financial outcome of the bid in question and did not attempt to analyse the likelihood that the outcome would be worse or to what extent it could be worse. In that respect they were not a risk assessment as normally so called and they differed fundamentally from the risk assessment exercise that bidders might reasonably undertake in preparing their bids. Once the PAPRA analysis is complete and the risk adjustment team has determined what risk adjustments should be made to the bid, a Proposed Risk Adjustment report (“PRA”) is prepared which summarises the adjustments to be made as a consequence of the PAPRA process. At that point, the risk adjustment process is taken to have identified the most credible financial outcome. Once the PRA report has been approved, the Financial Robustness Test (“FRT”) is run by the financial advisor, based on the central risk adjusted scenario. In other words, the FRT is run on the most credible financial outcome of bids as identified by the risk adjustment process.
278. The ITTs make provision for the FRT in Section 7.6 (SE and EM ITTs) or Section 7.7 (WCP ITT). It is intended to enable the Defendant to assess the financial risk in the bids and to provide confidence in the robustness of the bids and to reflect that in the assessment of MEAT. There are two elements of the test. The first is a pass/fail element. In simplest terms, the bidder’s risk adjusted bid is run through a model which checks whether the bidder will fail the required financial covenants during the franchise’s core term, even after taking into account available PCS and allowing for a

threshold. If it does, the test is failed and automatic elimination follows. This test is based upon the Department's assessment of the most credible financial outcome and does not involve assessing downside risks that would result in a worse outcome than the most credible financial outcome. Its stated purpose is "the assessment of whether the level of financial risk is acceptable": paragraph 7.7.1.1 of the WCP ITT and equivalent paragraphs of the other ITTs.

279. The second element of the FRT involves establishing a Central Risk Adjusted Scenario ("CRAS") and a Downside Risk Adjusted Scenario ("DRAS") in order to give further insight into the level of financial risk in the bid. The CRAS broadly equates to the most credible financial outcome in the light of the risk adjustments. The DRAS is achieved by a further (downward) adjustment of the bidder's passenger revenue projections. It is then used to adjust the bidder's P score. It was an innovation for the three competitions that are in issue in these proceedings. I accept Mr Baghurst's evidence that it was introduced because of concerns about bids that were over-ambitious in their passenger revenue projections and on the basis of external advice that operating costs and other revenues were subject to less risk than passenger revenue and the belief that a significant proportion of operating costs were either fixed or fully protected. For that reason, no further adjustment was made in the FRT either for non-passenger revenue or for operating costs. Specifically, for that reason, there was no further downside risk analysis on pensions included in the FRT. The ITT made the position clear, stating that "no adjustment will be made to the forecasts in the Central Risk Adjusted Financial Model of non-passenger revenue, or operating or capital costs" at paragraph 7.7.3.1 of the WCP ITT and equivalent paragraphs of the other ITTs.

The assessments

280. At a SIAP meeting on 3 December 2018 it was agreed that Mr Baghurst should provide a paper for BICC setting out the issues with the submissions on the three franchise competitions and risks associated with the bids, which he did with assistance and input from others. He attended the BICC meeting on 17 December 2018 to present his paper, which had been signed off by Mr Wilkinson and stated that its purpose was to make BICC aware of the issues and risks and which did not seek any decisions.
281. The paper provides an instructive insight into the Department's thinking in the early stages of evaluating the bids. It addressed the problems arising from the receipt of some bids that were compliant and others that were not. It identified the potential risk of industrial action arising from increases in employee contributions. Having outlined the current bidder concerns on pensions the paper said:

"Were the Department to change the allocation of pension risk, a decision would need to be taken as to whether this would apply across all of the competitions and whether rebids would be required. It is considered that it would be exceptionally difficult to get HM Treasury agreement to a change in the Department's current policy, including on that of sharing risk/reward on deficit contributions only, particularly given the challenges of securing agreement to a risk sharing mechanism as detailed in paragraph 7. Any change in risk allocation

approach is likely to adversely impact franchise competition schedules, and the implementation/delivery of passenger benefits.”

282. Specifically on the difficulties posed by receipt of compliant and non-compliant bids, the paper said:

“If non-compliant bids (in relation to pensions) are eliminated from the competition and the franchise contracts are awarded to compliant bids, then the Department would be significantly constrained in how it could deal with pensions policy in-life and may in fact feel it is appropriate to make this clear to compliant bidders to test whether they are assuming that protection would be provided in life (see legal advice)”

283. The main options were summarised as being (a) continue with the competitions, (b) change the risk allocation approach and require rebids on a new basis, and (c) cancel/abandon the competitions. In relation to (b) the paper said:

“This would have significant timescale and potential procurement challenges (see legal risk section), and would be dependent on getting sign off for any new mechanism by HMT.”

284. The legal advice has all been redacted as privileged. But the passages set out above show an appreciation of the potential application of the principles of equal treatment and transparency in the event of eliminating any bidder for non-compliance (whether in one competition or all) or calling for a rebid; and they flag up the problems that would be caused by delay in the event of a re-structuring or further rebid on one or all of the competitions. In addition, they evidence the Department’s current perception of the likelihood of obtaining Treasury approval for a change in the risk-allocation provisions for the three competitions.

285. The minutes of the meeting record concerns being expressed by members of the Committee about the deliverability of the compliant bids. This mirrored a concern that Mr Wilkinson had expressed in an email on EM progress on 29 November 2018: when told that the team was progressing the EM competition with one pensions-compliant bidder, his specific concern had been that an unexpected pensions decision in future might make the (compliant) winner ask for contractual modification at that time. The Chair concluded the item, noting the systemic issues and the need to discuss further at BICC, and that:

“The team should continue to engage with HMT on the scope for protection, especially on the historic liabilities, as there was a shared interest in avoiding problems with franchise competitions and ensuring best value for money for Government. The team should return to BICC after further engagement with HMT but before the competition decisions, so that BICC could understand the balance of risks in order to make an informed judgement.”

286. As recorded, this does not amount to an instruction to seek alteration of the risk-allocation effected by the PRSM in the live competitions. Mr Baghurst accepted that he would take it as an instruction and that the inference was that the PRSM could, potentially at least, be further explored with the Treasury; but he did not accept that it meant that the Department should attempt to have its protection extended to future valuations (i.e. valuations beyond 2019), which in context was a reference to the live competitions. Mr Wilkinson rejected the suggestion that it was an instruction to engage with the Treasury on the scope of the protection for the current competitions, though he accepted that “it was an instruction to go back to Treasury and discuss the risks and issues pertinent to the pension risk-sharing mechanism”. Mr Smith’s evidence was that BICC was here acting in an advisory capacity and giving advice (rather than instructions) on what they would expect to see later. He rejected the suggestion that the original plan had been to ask the Treasury for a change to the PRSM for the live competitions, saying that the Department was keeping its options open about future conduct of the competitions in the light of what BICC had said.
287. After the meeting Mr Smith had a meeting with the Directors General and others which agreed the way forward. The net result was that Mr Baghurst prepared a draft note to be sent by the Directors General to the Treasury. His contemporaneous note recorded that “after the meeting it was agreed that [he] would draft a letter for the [Directors General] to send to HMT, effectively explaining the issues and requesting that we have a further conversation about risk allocation.” He sent it to Ms Palmer with a covering note which said:

“Following BICC on Monday, we were going write to HMT setting out the issues, and essentially saying we wanted to change the risk allocation approach. We’ve backed off slightly now, and intend to instead for the [Directors General] to send a factual note.”

Once again, as recorded, this does not say that they were going to ask the Treasury to change the risk allocation approach for the current competitions.

288. The draft note was sent to the Directors General on 21 December 2018 and sent to the Treasury in its final form on 8 January 2019. As sent, it did not say that the Department wished to change the risk allocation approach, but it did address the scope for protection, especially on the historic liabilities, and the shared interest in avoiding problems with franchise competitions and ensuring best value for money for Government. It also demonstrated an appreciation of the legal problems that could arise if, after non-compliant bidders had been eliminated, a compliant bidder sought to amend the pensions related elements of the contractual documentation prior to award or during the currency of the franchise; or if the risk allocation were changed and a rebid was required on the basis of a revised risk allocation. The note was framed by reference to the current competitions, though it recognised implications for the future, and raised the prospect of revising the risk allocation applicable to the current competitions. The tone of the note was epitomised towards the end:

“This is a complex issue and we would appreciate our teams working closely together on this over the coming weeks, particularly in the event that we decide Government’s objectives would be better met by a change in the risk

allocation approach. Any decisions that are made with respect to the live franchise competitions need to be consistent with our policy position on RDG's industry-wide proposals to address The Pension Regulator's investigation. We are working closely with your team on this also and will be advising DfT and HMT ministers in the New Year. The competition timescales are very tight - franchise competitions need to continue to proceed in order to ensure passenger benefits are delivered.”

289. The note reflected the approach that Mr Smith had signalled in an email on 20 December 2018 when he said that “although we’re not seeking their approval at this point for any change to the mechanism, it is not impossible we will have to do this in future, for example once we have clarified whether lead bidders are definitely willing to sign up to the FA terms unamended, if there turn out to be other issues with the lead bid, or BICC is still concerned about the degree of risk transfer – so I think they [i.e. HMT] need to be briefed.” In other words, a change to the PRSM for live competitions was still a possibility for a range of reasons and the Department wanted all options on the table.
290. The meeting between the Department and the Treasury took place on 16 January 2019. It was attended by (amongst others) Mr Phil Duffy, a Director in the Treasury’s Enterprise and Growth Unit, and Ms Kohler, a Senior Policy Adviser, on behalf of the Treasury and by Ms Payne, one of the Department’s Directors General, Mr Wilkinson, Mr Smith and Ms Kneen, who was the Department’s Rail Workforce Strategy Policy Lead, for the Department.
291. Mr Smith’s evidence was that the meeting “didn’t focus primarily” on the current competitions and that most of the meeting had been discussing general principles of risk sharing and the Treasury’s general points; but he accepted that there had been a conversation about where they were on the current competitions. After the meeting, Ms Kneen sent an email summarising what had happened. There is reference to pensions giving rise to an immediate franchising issue and that “HMT are proposing to make this a franchising issue and focus on what we offer TOCs at the start of new franchise terms. We will need to confirm the details – but it sounds like HMT are prepared to share risk on employer deficit recovery contributions only for the duration of new franchise terms.” Although there is a heading for “Live competitions” there is nothing there noted to suggest a discussion about extending the PRSM protection in the live competitions; and Mr Smith was cross-examined on the basis that the Department had not asked for an extension of the protection in the live competitions, with which he agreed. The note records that Mr Duffy would write to the Department “to outline HMT views and a proposal on pensions risk sharing for future franchises”. There is no similar note relating to the live competitions; but when Mr Smith received Ms Kneen’s email he responded by saying that they needed to consider if they would want to go back to bidders to ask them to reprice on a revised basis. While noting that there would be significant timescale impact as well as legal risks, he commented that “Accept the answer to this may well be no, but think we need to have considered.”
292. In Mr Smith’s first witness statement he said that Treasury Officials had indicated that they were willing to recommend the seeking of rebids on the basis of a PRSM covering all triennial valuations. His second statement sought to clarify this evidence by saying that the indication was only applicable in relation to future competitions.

His evidence in trying to find consistency between the two statements was opaque and, to my mind, unconvincing. However, it is clear that his second statement was made after considering a sequence of emails passing between Ms Kneen and Ms Kohler on 17 January 2019, which clarified the position. In the light of that clarification, which I set out below, I reject Mr Smith's evidence as presented in his first witness statement.

293. Ms Kneen wanted to confirm whether Mr Duffy's proposals were for future competitions or for current live competitions: she said she thought it was the former but wanted to confirm. Ms Kohler replied:

“To be clear, our assumption (and my understanding from the conversation yesterday) is that any agreement will apply for future live comps. As there only appears to be one bidder on one competition who is non-compliant because of pensions, I'm not sure it seems sensible to pause all competitions to restart this process. My working level conversations with competition teams suggests that is not what they want either.”

294. The reference to there only being one non-compliant bidder on one competition was wrong. Mr Smith's evidence was that the Treasury would have been guided by the points set out in the briefing note and that Ms Kohler's error was unlikely to have made a difference. I accept that evidence. I note in passing that there is no evidence or reason to suppose that Mr Duffy, whose opinion was what mattered, shared Ms Kohler's mistake. Ms Kneen replied to Ms Kohler that she had taken away the same message from the meeting and that she didn't think anyone at the Department wanted to recommend restarting the process, but they needed to show BICC that they had considered options.

295. Later in the course of negotiations about the terms of the letter, Ms Kohler made the Treasury's position clear, while at the same time repeating her error about there being only one non-compliant bidder. In the course of an email on 22 January 2019 she wrote:

“While I've taken on board comments to help improve clarity and shared understanding, I won't be taking on any substantive changes that cross HMT red lines. As you'll appreciate we've spent a lot of time and energy getting to this position, and Treasury's position on private sector pensions is not going to change because of difficulties with TOC pensions.”

And she reaffirmed that the possibility of further change “should only be for future competitions and DAs. ...”

296. Between 17 and 25 January 2019, when it was issued in final form, the Department and the Treasury jointly drafted the letter from the Treasury to the Department's Directors General. The letter said that the Treasury was “content (subject to ministerial clearance) for a contingency pricing mechanism to be included for the TOC sections in future franchise agreements and DAs. [TEXT REDACTED]” The letter laid down various conditions and concluded by “noting that we agreed that the risk allocation approach for the three live competitions should remain unchanged.”

297. On 7 February 2019 SIAP met and recommended cancelling the SE competition. The main reasons in evidence were a lack of clarity and potential conflict between the specialist reports provided by the Technical Advisor and Network Rail's Specialist Reports, the risk that the expiration of bids in August 2019 may lead to further re-evaluation and the risk that further delay to the contract award date could coincide with the output of recommendations from the Williams' Review. There may have been other contributory factors, but they are redacted for privilege and not in evidence. There is no evidence that pensions were discussed or played a part in the decision to make the recommendation to cancel.
298. The next BICC meeting was on 18 February 2019. Amongst others, it was attended by Ms Payne and Mr Wilkinson, both of whom had been at the meeting with the Treasury on 16 January 2019. The paper entitled "Non compliances on live franchise competitions" was signed off by Mr Wilkinson. The version that was presented to BICC⁴ accurately rehearsed what BICC had asked the pensions team to do at the 3 December 2018 meeting as set out above. It reported on the Treasury's position in two places:

"23. On pensions, HMT have stated that they will not permit the Department to change its risk sharing approach on the live franchise competitions, but stated they would be content, subject to ministerial clearance, for a different risk sharing mechanism to be offered for future franchises. Given this position, it would be exceptionally difficult to get HMT agreement to a change in the Department's policy on live competitions, including the decision to only share risk/reward in respect of deficit contributions, particularly given the challenges of securing agreement to a risk sharing mechanism previously. Were HMT's position to change, DfT would need to revise the requirements in each of the live competitions and permit each bidder on each competition to rebid in order to make this a deliverable option."

and

"30. Policy officials engaged with HMT in early 2019 further to the steer given at the December meeting of BICC. HMT stated that it will not permit the Department to change its risk sharing approach on these three live franchise competitions. HMT agreed to a limited protection mechanism in respect of the deficit recovery contributions required as a result of the 2019 valuation and that this is what bidders on the three competitions bid against."

299. Before the meeting the Directors General requested that these paragraphs should be amended because the Department had not asked the Treasury to change the terms of the current live franchise competitions. There is no sign in the minutes of anyone suggesting that the Treasury *should* have been asked or requiring the Department to

⁴⁴ {XG-D/2086.1/7}

go back and do so. As the briefing paper and the minutes make clear, BICC was not requested to make any decisions on the pensions issue or non-compliances.

300. A separate paper presented to BICC recommended cancellation of the SE competition. As presented to the court, the paper is subject to extensive redactions for legal privilege. However, although the prospect of eliminating a bidder (SSETL) for pensions non-compliance is mentioned (with cross-reference to the non-compliance paper), the substantial reasons for recommending cancellation that appear in the open sections of the document are a major and irreconcilable disagreement in the assessment of the two pensions-compliant bids on non-pensions issues between the Department's technical and operational advisers, Steer and Network Rail. BICC members agreed to the recommendations in the paper. SSETL's non-compliance on pensions is given as one of two reasons why its bid had not been considered further, the other being that "significant affordability issues with this bid meant it was unlikely to win the competition." The paper highlighted that a decision to proceed with the competition meant that "the Department" would have to make a decision whether or not any of the bidders should be eliminated based on the identified non-compliances. Conducting a further rebid was said to be "unattractive" for a number of reasons including that it may open the Department to accusations of bias or trying to help one bidder to avoid the decision to eliminate. Other considerations included the fact that the current franchise was due to expire on 23 June 2019 with an agreement having been reached for a short Direct Award being possible before the next franchise operator took over.
301. It is convenient to draw some of the strands of the engagement between the Department and the Treasury together at this point. There is no doubt that initially the Department were looking for a protection mechanism that covered both the 2019 valuation and subsequent valuations. This was not acceptable to the Treasury despite extensive engagement during which the Department's officials tried their best to persuade their counterparts in the Treasury of the benefits of more extensive protection. The Treasury had a significant policy block because, as a matter of policy, it did not wish to become embroiled with what it saw as a private pension scheme and because it took the view that intervention would reduce any prospect of long-term reform. In those circumstances, the PRSM was as good as the Department could get. Although the Chief Secretary to the Treasury's letter of 4 October 2018 left open the theoretical prospect of further adjustments to the PRSM, that was reasonably considered to be not feasible. Specifically, I consider that Mr Smith's belief that the chance of the Treasury agreeing to change the approach on the live competitions was "vanishingly small" was a reasonable view for the Department's officials to take and was generally reflective of the views that were reasonably held by the Department's officials as summarised at [227], [281], [288] and [298] above.
302. I do not accept that what BICC asked the team to do on 17 December 2018 amounted to an instruction to ask the Treasury to agree to change the pensions risk-allocation applicable to the current competitions. This is for four reasons. First, the meeting was generally advisory on pensions (though this would not of itself have prevented BICC giving a hard-edged instruction); second, the minute does not record such an instruction; third, the Directors General decided what was to happen after the meeting and there is no reason to believe that they would have departed materially from what BICC had asked to be done if it was in truth a binding instruction, properly so called;

and, fourth, when it was noted at the meeting of BICC on 18 February 2019 that the Treasury had not been asked to change the terms of the current competitions, there is no sign of anyone registering that it should have been.

303. I find that the position that was established by BICC was more subtle and gave the Directors General and their officials flexibility about how to engage with the Treasury. At its highest it was, as Mr Wilkinson accepted “an instruction” (I would add, in the very broadest sense of the word) “to go back to Treasury and discuss the risks and issues pertinent to the pension risk-sharing mechanism”, which was done. That said, while it is accepted that the Treasury were not asked to change the risk allocation for the current competitions during the meeting on 16 January 2019, the tenor and content of the correspondence between Ms Kohler and Ms Kneen after the meeting and the terms of the jointly-agreed letter that Mr Duffy sent to the Directors General provides support for the view that further movement by the Treasury in relation to the current competitions would have been very unlikely indeed, even if they had been asked. By this stage there were two main reasons for this unlikelihood. First was the Treasury’s general reluctance, born of its overarching policy outlook. Second was that, by now, the bids (including pensions-compliant bids) were in for three competitions that were under varying degrees of time pressure and all participants were aware of the risks of changing competition criteria in the circumstances then prevailing: see [288] above. In these circumstances, the suggestion that the Department could or should have persuaded the Treasury to change the risk-allocation basis for the current competitions seems to me to lack practical realism. Like it or not, the current competitions were stuck with the PRSM. Whether that was a lawful outcome and basis on which to proceed, I leave to later.
304. The minutes of the BICC meeting on 18 February 2019 record that Ms Payne referred to a scheduled meeting with the Secretary of State the following day. They record that:
- “Further actions for the team, specifically the potential undertaking of a series of legal and procurement tests with the remaining bidders to ensure bidders were confident in their bids, would be agreed following the meeting with SoS.”
305. The meeting between Department officials and the Secretary of State, the purpose of which was to consider the recommendation to cancel the SE competition, duly took place on 19 February 2019. The submission to the Secretary of State annexed the paper on cancellation that had been before BICC the day before. The Summary section of the Ministerial Submission stated that:
- “The three bids for South Eastern Franchise competition have now been fully assessed by both the Department and Network Rail (NR). Network Rail, having worked closely with the Department from ITT design to final evaluation and engaging with Bidders during the course of preparing their plans, has written to the Department to advise it that in their view all the bids received present significant problems with operational deliverability. The Department has therefore had to conclude that none of the bids provide a sound basis for awarding the

franchise contract. [Sentence redacted] It is on this basis that it is recommended the competition is cancelled.”

306. The Background section of the Ministerial Submission, while stating that following final evaluation “significant concerns relating to operational deliverability remained”, gave details of operational issues for the other two bids but merely referred to Stagecoach remaining “firmly” non-compliant in regard to the pension risk assumption. Under the heading “Considerations” the paper listed the available options as:
- Proceed with the competition. This would mean first deciding whether or not to eliminate Bidder(s) based on non-compliances and getting further independent analysis on the train service proposals and ultimately making an award decision that Network Rail might not fully support;
 - Conduct a further re-bid to resolve remaining problems with bids; under Equality of Treatment this would mean inviting all Bidders to re-develop their plans against prescribed criteria for re-work that we would have to develop with Network Rail. Timing, price-expiry etc; or
 - Cancel the competition.”
307. The recommendation was to cancel the competition “on the basis that any other path brings significant [redacted – but almost certainly “legal”], reputational and operational risks.” Thus, although the Summary stated that the basis for the recommendation was operational issues, the fact that Stagecoach was non-compliant on pensions, which necessitated a decision whether to disqualify them, was adverted to in the Background section and the stated Considerations.
308. Ms Hannant’s note of the meeting does not mention pensions; but it is incomplete because of redaction. It does, however, record that the Secretary of State quizzed the Department representatives on Stagecoach’s bid as it was “the most [Network Rail] compliant”, meaning that it was the least deficient on operational issues. The response is redacted. After the meeting Ms Hannant sent a message to Ms Kelly and Ms Payne in which she described the meeting as “pretty awful” and that the Secretary of State was “in mood of cancelling everything”. The emphasis in her message is Network Rail; pensions are not mentioned. An email from Mr Wilkinson to the Directors General and the Project Directors for the procurement referred to a telephone conversation he had with Network Rail after the meeting and emphasised that “it is now more necessary than ever before, we can demonstrate consistency and rationality in arriving at whatever our final position is please.” Another message, which was sent on 21 February 2019 (and whose sender is not identified) reports that the Secretary of State accepted “yesterday” that “he needed proper advice before taking decisions but it’s clear he will take some persuading not to cancel EM and WCP”.
309. The Defendant did not attempt to adduce any evidence about the 19 February 2019 meeting until Day 8 of the trial when Mr Wilkinson was about to be called. Its attempt was refused, for reasons set out in a separate judgment; and the Claimants

then took the decision (as they were entitled to do) not to ask questions about the meeting of witnesses who might have been able to give relevant evidence if asked. The documentary evidence is therefore the only available evidence about what happened at the meeting.

310. It appears from a handwritten note by Ms Hannant, which was disclosed by the Defendant after the trial hearing, that there was a further meeting with the Secretary of State, Ms Hannant, Ms Kelly and possibly others (including Mr Andrew Jones MP, the Parliamentary Under Secretary of State for Transport), on 20 February 2019 to discuss the current competitions. Pensions are not mentioned in the note. There is, so far as I am aware, no witness evidence about this meeting either.
311. Based on this evidence I find that the Secretary of State had it in mind to cancel but needed more advice on the specific question whether to cancel or proceed with the SE competition. For the time being, the Secretary of State did not accept the recommendation he had received and did not cancel the SE competition. The next question is what work the Secretary of State himself wanted done.
312. Shortly before the BICC meeting and the meeting with the Secretary of State, on 15 February 2019 the first steps occurred that led to what has become known as the PwC Analysis. An email during the evening of 20 February 2019 from Ms Hannant to Mr Wilkinson and Ms Walters spoke of “some further work [the Secretary of State] and [the Permanent Secretary] want us to do arising from discussions this week”, which included what became the PwC work. One of the two workstreams requested was on pensions and included “get[ting] independent advice on the deliverability of compliant bids on pensions (as [the Permanent Secretary] asked for last week) in terms of their impact on sustainability of the franchise in life should pension risk materialise and that we think bidders have fully and properly evaluated the risks.” The second workstream was on operational issues and Network Rail’s position on the deliverability of the SE bids as well as the other competitions. A reading of the full email supports the interpretation that the first workstream, which led to the PwC Analysis, was wanted by the Permanent Secretary and that the other workstream was wanted by the Secretary of State. Mr Baghurst accepted in evidence that the second limb of the first workstream quoted above (“... and that we think bidders have fully and properly evaluated the risks”) was not done after he took legal advice. What remained of the first workstream formed the basis for PwC’s work and Analysis.
313. In an email to the Directors General and Mr Wilkinson on 21 February 2019, Ms Walters referred to the work having been commissioned by the Permanent Secretary “to support deciding whether to proceed with pensions compliant bids or cancel the competitions.” Mr Baghurst’s evidence in his witness statement was that PwC’s work was requested by the Permanent Secretary and the Directors General although the request was relayed by Mr Wilkinson. On this evidence I find that the initial impetus for the work that led to the PwC Analysis came from the Permanent Secretary who asked for it to be done, though others were involved in turning her wish into action. The Secretary of State’s requirement was for further work on the operational issues affecting the future of the SE competition i.e. the second workstream referred to in Ms Hannant’s email to Mr Wilkinson on 20 February 2020.
314. The PwC work was directly commissioned by Mr Baghurst. PwC set out their terms of reference as follows:

- “Objectives: Confirm deliverability and sustainability of pensions compliant bids in-life should pension and pensions-related risks materialise.
- ...
- Scope/Key tasks:
 - Review data for each competition and confirm whether or not it is sufficient to provide advice/assurance. If not sufficient, develop data/information request.
 - Review analysis spreadsheet and confirm its integrity.
 - Perform any extra analysis that might be required, including running sensitivities.
 - Conclude whether or not pensions compliant bids should remain robust/sustainable in the event that pensions and pensions-related risks materialise.
 - Document outputs of work.
 - Liaise with GAD as necessary.”

315. There is a dispute about the purposes and legal consequences of the PwC Analysis, which is the subject of Issue 9.4 at [568] ff below. In an apparently draft or pre-final version of the paper for the 18 February 2019 BICC meeting⁵, which was probably drafted by Mr Baghurst, the paper referred to the need for the Department to be confident that winning bids would be sufficiently robust, and pointed to the fact that the downside scenario that formed part of the FRT did not include a downside on costs: that is consistent with PwC’s terms of reference, set out above, and with Mr Baghurst’s evidence, which I accept, that the purpose of the PwC Analysis was “to enable those who requested it to be comfortable that the leading (and pensions-compliant) bids in each competition would remain robust if some potential pensions downside risks materialised”. I accept also his alternative formulation in the course of his evidence that the PwC report was commissioned because the Defendant “wanted some further reassurance that we could proceed to award.”

316. There is documentary and witness evidence, which I accept, that the Department always realised that there were severe procurement risks in adding to the ITT’s evaluation criteria and that any different or additional work needed to be kept separate from the ITT’s evaluation process. The draft paper for the BICC meeting on 18 February 2019 cautioned that “to build such a downside in to the [FRT’s] downside scenario would be change in the basis on which bids are evaluated, and carry a risk of being deemed to be discriminatory.” This passage was omitted from the final version,

⁵ {XG-D/2013/5}

but the acute awareness of the need to keep the PwC work separate from the evaluation procedure mandated by the ITT was restated in the paper for the BICC meeting on 13 March 2019: see [326] below. That passage formed the basis for a similarly detailed exposition of the “very significant procurement challenge risk” that would be introduced if the evaluation or award decision was made or influenced by the downside analysis conducted by GAD or PwC in the CCS that was ultimately presented to the Secretary of State on 28 March 2019: see paragraph 15-17 of Annexe A to the CCS at [337] below.

317. The Defendant’s witnesses emphasised that the application of the PwC Analysis was separate from the risk adjustment and other FRT procedures set out in the ITT. It was to provide additional assurance on whether the competitions might continue and was not taken into account in the decisions to disqualify the Claimants for non-compliance with the pensions requirements of the ITT. “Accordingly” as Mr Baghurst put it “the test did not affect the Claimants’ position as they would have been disqualified in any event.” He accepted that it was “an extra test of deliverability”; but he rejected the suggestion that in substance it formed part of the evaluation of the leading bids, because “as we clearly said, it couldn’t inform the evaluation score because that was set out in the ITT.” His evidence was that he was always “very, very acutely aware that [they] should only ever do and take into account in the evaluation process what the ITT said [they] would do.”
318. Mr Hayes’ evidence was as unequivocal as Mr Baghurst’s and was that the PwC Analysis had not had any impact on the evaluation of bidders’ bids on the WCP competition. Its purpose was to assist BICC’s decision-making process on continuation with the competitions and formed no part of the WCP project team’s assessment of non-compliances. When in early February 2019 Mr Hayes was mooting the idea that there should be work done to give assurance that pensions would not bankrupt the winning bidders, he drew a distinction between such an exercise and the ITT process of evaluation, suggesting that “we include any such analysis in the FBC⁶ for each competition, to separate it completely from the evaluation process.” When cross-examined about this passage he explained that “the FBC is a decision whether to go ahead with the project, it is not the evaluation process which is who should the contract be awarded to, so they are two different things... .” Drawing the distinction between mere presentation and reality, he said that this “was more than just presenting. It is ensuring it was not part of the evaluation process.”
319. Ms Palmer said that her concern was not that there was risk analysis being done outside the terms of the ITT but that she was concerned that it should be made clear to BICC that it had no part to play in the procurement process (as laid down by the ITT). In carefully measured answers she drew the distinction between the evaluation process, which in her view was robust and assured and had selected the leading bidder, and the different issue, which in her view did not fit within the procurement process and had nothing to do with selecting the leading bidder, namely whether they should be awarding franchise contracts at all or cancelling the competitions. She drew the distinction clearly in the following questions and answers in cross-examination:

⁶ Full Business Case

“Q: [The PwC Analysis] can affect whether a contract is awarded at all to the leading bidder can’t it?”

A: I think potentially it affects the choice of whether the competition is cancelled or not.

Q: Whether the contract is awarded to any bidder?

A: Whether it is awarded to anyone, yes.”

320. Mr Smith drew the same distinction, describing the purpose of the PwC Analysis as being “to provide assurance that it was still effectively rational to proceed with the competitions.” The results of the PwC Analysis would not change the result of the competition (i.e. who was the leading bidder) but in his view “there was a separate decision that Ministers had to make as to whether to proceed with the competitions at all. Ministers ... were alive to the possibility of cancelling these competitions. It appeared a very ... real option at this point in ... January/February.” That was a clear policy choice for the Minister, which was separate from the procurement evaluation process and the FRT.
321. PwC provided their final analysis by a letter to the Department on 11 March 2019, which was backed by two annexes. They identified downside risks that franchisees would face in respect of their obligations to the RPS, which included (a) factors reducing the (anticipated) funding level of the scheme; (b) an increase in the level of prudence used in the scheme assumptions, which could be driven by a reduction in strength of the scheme covenant or a change in approach by the Trustee or TPR; and (c) factors causing an increase in the annual payments required to meet any deficit, such as a requirement to fund deficits over a shorter period than current expectations. They had previously, by an email to Mr Baghurst on 22 February 2019, said that they would “struggle to express a view on pensions risks per se. This is due to the inherent uncertainty in pensions – for example, the Pensions Regulator could require something different at future valuations, which we haven’t taken into account.” The PwC Analysis, when it came, was consistent with these cautionary words.
322. There are a number of features of the PwC Analysis that bear mentioning:
- i) PwC adopted 5 downside scenarios, namely: (1) increase in annual DRCs: this was to address the risk of DRCs increasing because of the 2019 valuation or later valuations requiring a higher annual level of DRCs; (2) increase in FSCs paid by the franchisee; (3) increased member contributions triggering industrial action, with consequential loss of income to the franchisee; (4) a combination of 1 and 3; and (5) a combination of 1, 3 and 4;
 - ii) In relation to each scenario, PwC stated the assumptions that they were adopting. For example, they stated that they had used actuarial analysis and probabilities provided by GAD; and in relation to Scenario 1 they identified that they were applying increases to deficit contribution reflecting GAD’s earlier assessment of a downside that would occur in 5% of future economic scenarios, while stating that the outcome of a future valuation could be worse or better than this. In relation to scenario 2 they expressly contemplated a breaking of the 60/40 contribution share;

- iii) PwC stated that it was important to note the limitations of their analysis. These included that “it considers pensions risk in isolation of other factors that may impact resilience, and only considers a limited range and magnitude of potential scenarios.” Specifically, they later cautioned that their modelled scenarios in isolation ignored other risk scenarios that may also occur, such as downside revenue risk in respect of the economic impact of Brexit. Having highlighted once again that their analysis ignored non-pensions risks, and that it is important to understand whether PCS would remain adequate if downside pensions scenarios crystallised alongside other downside risks, they advised that “correlation of risks is important” and that they had not been asked to analyse or determine the likelihood that modelled pensions risks would occur at the same time as other downside risks;
- iv) PwC drew attention to the fact that the modelled scenarios were limited in scope and that more extreme changes in scheme funding requirements were possible;
- v) PwC advised that the probability of scenarios (including their chosen scenarios) arising was difficult to assess, with no probability model being readily available for other factors such as the strength of the sponsoring employer and the length of time over which the deficit had to be repaid;
- vi) PwC pointed out as “mitigating factors” the partial protection against risk from the 2019 valuation provided by the PRSM and TPR’s statutory objective to “minimise any adverse impact on the sustainable growth of an employer”;
- vii) PwC’s conclusions were necessarily limited and were stated to be reached in the context of the considerations they outlined as limitations of their review in the following terms:

“Our analysis indicates that in respect of the modelled scenarios in isolation (e.g. ignoring other risk scenarios that may also occur, ...), the bidders would have access to sufficient Parent Company Support to tolerate crystallisation of the downside risks modelled. However, the scenarios modelled show reductions in the level of profits generated by the franchise and reduction in the level of dividends that could be paid to shareholders.”

323. Mr Salter draws attention to limitations in the PwC Analysis. Chief among them are that:

- i) PwC’s adoption of the WTW Figures as providing their baseline of DRCs and FSCs does not consider the possibility of that baseline being exceeded because of the failure to achieve a TOC-wide solution;
- ii) Reliance on the GAD’s analysis is inappropriate because it was undertaken for a different purpose and does not illustrate the full range of pension risk faced by the TOCs. This criticism was given support by Mr Humphrey whose evidence was that the purpose of their work was to feed into the development of the PRSM and not to provide a comprehensive analysis of the risks

underlying the scheme; and that, although commissioned for a different purpose, their work could be used as “a component” in feeding into building downside scenario testing, for example as “one element of a downside scenario”; and that there could be many other downside elements of PwC’s analysis, but that would have been their (PwC’s) responsibility;

- iii) Scenario 5 potentially underestimates the pension costs, compared to a scenario in which the factors causing the increase in the FSCs also result in an increase in DRCs, though he acknowledges that PwC recognise this possibility in their analysis;
 - iv) Consistently with his views expressed elsewhere, he suggests that the statutory objective of preserving the solvency of the sponsoring employer can be overstated and that “TPR will not prioritise sustainable growth over protecting members’ interests and the PPF unless that sustainable growth is considered to be in the long-term interests of the members or the PPF”;
 - v) He regards the absence of any analysis of the possible impact of non-pensions risks occurring at the same time as the pensions downside risks and any correlation between the two as being a significant weakness from the perspective of someone relying on the report.
324. If the PwC Analysis had purported to be a full analysis of the potential future impact of all risk scenarios, these points would be well made and potent. However, the Department had commissioned a limited piece of work, and that is what it got. What is more, the PwC Analysis gave notice of the main limitations that were inherent in and integral to its work, namely the limitation to pensions risks only as set out in the report and the prospect that the outturn could be worse than their analysis showed. To that extent it drew the sting of Mr Salter’s criticisms. The real issue, therefore, is whether the use that the Department made of PwC’s work vitiated all or part of its procurement process, which I consider later: see [568] ff below.
325. On 13 March 2019 a meeting of SIAP agreed to recommend (1) the disqualification of the bids for the EM and WCP competitions that were non-compliant on pensions (i.e. Arriva and SEMTL for the EM competition and WCTP for the WCP competition) and (2) to recommend that Abellio be awarded the EM franchise.
326. The same day there was an extraordinary meeting of BICC. The sole item on the agenda was cross-cutting issues on the live franchise competitions. The participants were provided with a draft cross-cutting submission for the Minister, to which the PwC Analysis was attached. That paper addressed the PwC Analysis, setting out the procurement risks that would follow if it were used for the wrong purposes:

“74. As part of the risk adjustment process, each live franchise competition has considered the most credible financial outcome for pensions and pensions related costs, and these would/will be factored in to the FRT. *In view of the potential for increased pensions costs to materialise in-life, the Department has carried out further assessment to provide assurance that it would be appropriate to proceed with the competitions.* The

Government Actuary's Department has, separately, considered a number of downside scenarios.

75. PwC, as the Department's financial advisers, have considered the deliverability and sustainability of pensions compliant bids in-life should pensions and pensions related risks materialise, and they have concluded that, in isolation, risk should be bearable and the bidding approach/strategy does not look unreasonable. This is because any downside risks that do materialise could be absorbed by not paying dividends as planned and by drawing down on parent company support (PCS). These risks have had to be considered in isolation at this stage because the result of the FRT is not known on any competition, but the most credible financial outcome in terms of pensions will be included a part of the final FRT testing - this will consider the validity of the bid assumptions in combination with other risks. *It is critical that no evaluation or award decision is made or influenced by the downside analysis conducted by the Government Actuary's Department or PwC as the ITT does not allow for this, and to do so would introduce very significant procurement challenge risk.*" (Emphasis added)

327. The minutes are severely redacted for privilege, but it can be deduced from what remains that there was discussion about the available options on all three competitions. The end result was that the Chair asked the team to return to BICC on 18 March with more assured analysis on both value for money and affordability as part of the wider advice to the Secretary of State. BICC supported the recommendation to cancel the SE competition, to continue with the WCP competition, and to award the EM franchise to Abellio.
328. The further meeting of BICC on 18 March 2019 included as items on the agenda (a) the EM Full Business Case, and (b) WCP pension non-compliance:
- i) The EM paper to BICC asked it to "note the outcome of the evaluation process of the [EM competition] and that the leading bidder has passed the FRT and is thus considered to have acceptable financial risk" and to "determine the treatment of bidders in relation to pension non-compliances and agree to make a recommendation to the Secretary of State to eliminate those bidders from the competition." The paper outlined the FRT that had been carried out by Grant Thornton and concluded that Abellio could continue to be regarded as the leading bidder. At the time of drafting the FRT was being replicated by Atkins to further assure the result. There was no mention of PwC or the PwC Analysis. On pensions non-compliance, the concluding paragraph is redacted. What remains records that the two non-compliant bidders (Arriva and Stagecoach) had proposed changes which would amend the Franchise Signature Documents and alter the balance of risk in their favour on pensions, declining to accept the risk sharing mechanism provided by the Department in the Franchise Agreement.
 - ii) The WCP paper asked BICC to note its contents and the interactions with other franchise competitions and to approve the recommendation to disqualify

WCTP from the WCP competition. It noted that WCTP had made six amendments to the Franchise Agreement that the project team considered to merit disqualification, of which one was pensions-related. The pensions-related amendment was described as “significantly enhance[ing] protection against the risk associated with pension contributions, beyond that offered by the Department. This proposal is inconsistent with policy and has the potential to give rise to negative financial impacts for the Department in-life.”

329. The BICC meeting on 18 March 2019 also had an additional paper on cross-cutting issues which said that it should be read alongside the cross-cutting paper that had been submitted to the meeting on 13 March 2019. As requested at that meeting, it addressed value for money and affordability for the three options (continuation of all three competitions, continuing EM and WCP but either cancelling or seeking further rebids on SE, or cancelling all three).
330. The minutes of the meeting on the EM competition agenda item allude to the PwC work, though not by name, stating that “six bid stress tests had been carried out, to provide a greater understanding of the extreme potential downside economic scenarios that the incoming franchisee would face. These tests had been carried out in addition to the FRT and were not required by the process set out in the [ITT].” At the conclusion of the item, BICC endorsed the team’s recommendation to award the franchise.
331. The minutes on the WCP pension non-compliance record that the item covered two objectives: (a) cross-cutting risks on live franchise competitions; and (b) the recommendation to disqualify WCTP from the WCP competition. They record discussion on cross-cutting issues which primarily focused on value for money. At the end of the meeting BICC concluded to maintain its recommendation to the Secretary of State that the SE competition should be cancelled and that the EM and WCP competitions should continue. There is no reference to the PwC Analysis in this section of the minutes. On non-compliances there was reference to legal advice, all of which has been redacted. It is clear from the context that one of the aspects of the legal advice related to the proposed amendments to the franchise agreements in each competition. The minutes record that the consideration paper provided strong reasoning for the elimination of WCTP and that a decision should be taken in short time, within the wider context of decisions to be taken on franchise competitions (which I take to be a reference to decisions on whether or not to continue the current competitions, though this inference is not critical). BICC concluded that further work was necessary, including that “clear and consolidated legal advice should be shared with ministers, recognising the risks and exposure to challenge of any disqualification”; but, at the conclusion of the item, endorsed the recommendation to disqualify WCTP from the competition.

The Ministerial Submissions

332. The Department then prepared the documents for submission to the Secretary of State and Rail Minister. On 28 March 2019 they submitted the CCS, entitled “Cross-cutting issues on live rail franchise competitions”, and a second paper which sought the Minister’s approval to award the EM franchise to Abellio subject to the agreement of the Chief Secretary to the Treasury.

333. The recommendations made by the CCS were that the Minister should by 1 April 2019:

“• Agree to:

- o Award the contract to the identified lead bidder (Abellio) on the East Midlands franchise competition;
- o Continue with the West Coast Partnership competition;
- o Cancel the South Eastern competition given the [redacted] operational risks identified, noting also the risks around the alternative approaches that have been considered.”

and

“• Agree to formally exclude [Arriva and SEMTL] from the East Midlands competition as a result of non-compliance on pensions, and agree to make one further consequential bid exclusion [i.e. WCTP] on the West Coast Partnership competition on both pensions and other issues.”

334. There is no mention in the recommendations of excluding SSETL on grounds of pensions non-compliance. I accept the explanation given by Mr Brandenburger, the Department’s project director for the SE competition after Ms Letten’s departure in October 2018, that there was no recommendation to disqualify because the recommendation was to cancel the SE competition altogether, which would render questions of disqualification redundant.

335. The CCS gave advice on cross-cutting issues affecting all three competitions: financial robustness of bids, pensions and issues relating to train service proposals. It described the pensions non-compliances on WCP and EM as “significant”. It concluded that financial robustness was not an area of serious cross-cutting concern based on the current position of the three competitions. Because of train service issues that were specific to the SE competition, the recommendation was to cancel that competition, though the paper suggested that, if the Minister were minded to continue the competition, “there may be a way forward” that would involve further risk adjustment work on the two pensions-compliant bids.

336. The CCS discussion of pensions was wide-ranging in the main body of the document and in Annex A though the version available to the Court is subject to significant redactions for privilege. Annex B, which contained detailed legal advice and an overview of legal risk assessment (amounting to 14 of the CCS’s 67 pages) is entirely redacted. In the main body, after a brief reference to TPR’s intervention and to the PRSM, it continued:

“32. Given the very significant financial risks on pensions, we have commissioned an independent review (from PwC) of the robustness of franchise bids to 'downside' in-life pension cost scenarios across all three live competitions, given the risks that we are seeking to transfer to bidders. Further detail is given

below - see also Annex A for more detail on the background to the pensions issues, bidder concerns and risks associated with a number of options.

33. Across these three competitions, 9 bids have been received in total (3 in each case). In 5 of these 9 bids (representing 4 out of the 6 competing owning groups), the bidder has accepted the pension risks set out via the above mechanism and have complied with the Department's instructions. In the remaining 4 the bidder has stated that the proposed cost / risk allocation is not something that they can accept, and they have effectively 'marked up' the contractual documentation to propose an alternative allocation of risk relating to pension costs. ...

34. Under the Department's standard ITT text, it is made explicit and transparent to all bidders that a mark-up of the franchise signature documents constitutes a non-compliance. All three live competitions contain this standard wording. Bidders were warned, before final bids were submitted, that a mark-up of these documents could result in the elimination of that bid from the competition. Despite this, four of the bids received have proposed actual or de facto amendments to the franchise signature documents which would alter the balance of risk in their favour, and these are therefore considered to be significantly non-compliant. [line redacted]

35. [Redacted as referring to legal advice]

36. The accompanying submission on the East Midlands franchise recommends that the contract is awarded to the leading bid (Abellio which is pensions compliant). On the above basis, it also recommends that the second and third placed bids (SEMTL and Arriva, neither of which are pensions compliant) should be formally excluded from the competition at the same time.

37. The question of excluding a bid on the grounds of pensions non-compliance has to be considered on a competition-by-competition basis, although the precedent set in making a decision on one competition would inevitably mean similar decisions would need to be made on the other two competitions. We do not have an objective justification for taking a differential approach on this issue across the three franchises.

38. [Redacted as referring to legal advice]

39. On this basis we recommend that you formally exclude the pensions non-compliant bids across all three competitions. However, please note that the pensions non-compliant WCP bidder also has serious non-compliances that also warrant

exclusion on six other areas, and that bidder would also be excluded for those areas.

40. However, in considering this issue, it should be noted that the Owing Group of one of the non-compliant bids for the East Midlands competition is also a bidder (either alone or partnering with others) for both the South Eastern and West Coast Partnership competitions. Their approach to pensions risk has been consistent across all three competitions and as such none of their bids are pensions compliant. Therefore, if [you] were to take an exclusion decision for the East Midlands competition in isolation, the Owing Group would immediately deduce that an exclusion for pensions non-compliance there will almost certainly lead to parallel exclusions of their bids from the other two live competitions as well.

41. We have also considered the in-life risks from awarding contracts to pensions compliant bidders in the current circumstances. We have commissioned an independent review of the reasonableness of the assumptions employed, and the likely sustainability of the potential franchisees, if pensions risks were to crystallise in isolation for those bidders who are compliant. This has been undertaken by PwC and is separate to the bid evaluation process. The review looked at a series of increasingly punitive scenarios for the three competitions (for example if sustained strike action occurred as a result of increased employee pensions contributions without any additional government support). This review concluded that, on all three competitions, the leading / prioritised bidder would survive if those risks crystallised, with the impact absorbed through a mixture of lower dividends and temporary calls on Parent Company Support.

42. As with any contract, there is a risk that the leading (and pension compliant) bidders seek further financial support from the Department to manage pension issues during the life of the contracts after award. However, you should note that there would be substantial procurement risk in providing this support if you were minded to, as to do so would implicitly alter the assumed balance of pension risks which underpinned the original award decision.

43. Given that:

(a) the majority of bidding groups across the three competitions have accepted the pensions risk allocation;

(b) the leading / prioritised bidders on each competition have accepted the pensions risk allocation; and

(c) an independent review has provided reassurance that the leading bids are robust in a number of downside pensions scenarios (albeit in isolation from other downside financial factors);

Our assessment is that the risks from awarding contracts to pensions-compliant bidders should be manageable.

44. We consider that the alternative of cancelling all the competitions on pensions grounds, or inviting re-bids on the basis of a different specification, would carry a high risk of being challenged by disappointed market participants. Further, we consider there to be a medium-high risk that such a challenge would succeed bearing in mind that: (a) most bidders have bid compliantly based on the current risk allocation; and (b) PWC's analysis suggests that those bidders were not behaving unreasonably in so doing. The concern is that an inference would be drawn that the Department had acted in a discriminatory manner against those bidders who have bid compliantly. If such a claim were to succeed the claimant would be very likely to recover not only its wasted bid costs but also its lost profit, a claim which in the case of current leading bidders could be very substantial indeed given the strong arguments they could make that they would otherwise have been awarded the contract.”

337. Annex A provided further detail about the background and current situation:

“5. The live TPR investigation, the lack of an agreed TOC-wide solution, the 2016 valuation not yet being finalised, and the wide range of possible outcomes from future actuarial valuations (which occur every 3 years) has created significant uncertainty across the industry, and particularly for bidders on live franchise competitions (South Eastern, East Midlands and West Coast Partnership). Bidders on all three competitions flagged that the lack of any protection on pensions was a material issue in whether they could bid compliantly (or at all).

6. In order to mitigate the threat to competitions and to minimise uncertainty as far as possible, you agreed, in April 2018, that the Department should develop a pension risk share mechanism to enable live franchise competitions to proceed whilst ensuring value for money and retaining incentives for pension reform (noting that the RPS is a shared cost scheme). In May 2018, you wrote to the Chief Secretary to the Treasury seeking agreement for the inclusion of a risk sharing mechanism which applied to changes to deficit recovery contributions resulting from the 2019 actuarial valuation and each subsequent actuarial valuation during the relevant franchise term. In order to incentivise TOCs to take a long-term view on pension provision, TOCs were to remain on full risk

for changes to future service contributions. After a lengthy delay, and extensive engagement at senior official level, the Chancellor eventually agreed to the use of a mechanism, but stated that it must be limited to the 2019 valuation point only.

7. Bidders on the three live franchise competitions were invited to bid on the basis of the mechanism as approved by the Chancellor. Bidders were provided with illustrations, developed by the RPS Scheme Actuary, showing the potential impact of applying TPR's parameters in full to the draft results of the 2016 valuation. The Department advised bidders that it would make reference to these illustrations when risk adjusting bids, but did not state that bidders must use the illustrations when developing their bids.

Content of bids in respect of pensions and non-compliances

8. At a high level, the bids indicate that transport owning groups have different appetites in respect of managing pensions and pensions related risks.

9. A number of bidders (the majority of the 6 larger bidding groups) have accepted the risks and have complied with the Department's instructions, whilst others have stated that the proposed cost/risk allocation is not something that they can accept, and have effectively marked up the contractual documentation to propose an alternative allocation of risk relating to pension costs.

...

12. Where an alternative pensions cost risk allocation has been proposed, there is evidence that this has been done after the bidder has engaged with actuaries on the Detail of the risks and issues. However, while no leading bid has explicitly considered future valuation risks and considered how to address them, at least one pensions compliant bid has done. The Department has [issued/will issue] a letter to all confirmed leading bidders through the clarification question process outlining its understanding of the bidders' acceptance of the terms of the Franchise Agreement, the pricing of the bid on those terms, and the submission not being conditional or dependent on the Department providing any financial support (other than through the risk sharing mechanism) or varying the terms of the Franchise Agreement.

...

Evaluation of bids

15. During the evaluation of bids, risk adjustment and the Financial Robustness Test (FRT) are undertaken. Risk adjustment involves making any necessary adjustments to a bid (or bids) to reflect the Department's 'reasonable view of the most credible financial outcome' for all revenues and costs. The Department assesses the financial robustness of the prospective operator in this scenario and a 'downside' scenario (which includes a reduction in passenger revenue). The ITT does not state that the Department will run a downside scenario on costs, including pensions costs, as part of the FRT.

16. As part of the risk adjustment process, each live franchise competition has considered the most credible financial outcome for pensions and pensions related costs, and these would/will be factored in to the FRT. In view of the potential for increased pensions costs to materialise in-life, the Department has carried out further assessment to provide assurance that it would be appropriate to proceed with the competitions. The Government Actuary's Department has, separately, considered a number of downside scenarios.

17. PwC, as the Department's financial advisers, have considered the deliverability and sustainability of pensions compliant bids in-life should pensions and pensions related risks materialise, and they have concluded that, in isolation, risks should be bearable and the bidding approach/strategy does not look unreasonable. This is because any downside risks that do materialise could be absorbed by not paying dividends as planned and by drawing down on parent company support (PCS). These risks have had to be considered in isolation at this stage because the result of the FRT is not known on any competition⁷, but the most credible financial outcome in terms of pensions will be included [as] part of the final FRT testing — this will consider the validity of the bid assumptions in combination with other risks. It is critical that no evaluation or award decision is made or influenced by the downside analysis conducted by the Government Actuary's Department or PwC as the ITT does not allow for this, and to do so would introduce very significant procurement challenge risk.

...

19. HM Treasury officials have been briefed on the pensions content of the bids received, and the non-compliances. They have also been briefed on the potential risks associated with contracting compliant bids, including the Department likely being significantly constrained in how it could deal with pensions policy and risks during the contract term (if it was to

⁷ This was in fact an error as the EM FRT had been done. But I do not consider it to be material to the overall picture or result.

eliminate non-compliant bidders), HM Treasury officials have recognised that, without the provision of a risk sharing mechanism going forwards, there is a risk that the market's response to pensions could become a disproportionate driver of the relative value for money and compliance of bids for franchises, and therefore of the outcome of competitions as a whole (as opposed to the delivery of passenger benefits). ...

20. You should note that the Department is likely to be significantly constrained in how it could deal with pensions policy and the allocation of pensions cost risks during the contract term.

21...

22. There may be in-life contract management risks associated with contracting pensions compliant bids, including a franchisee being unable to meet the cost of increased pensions contributions and industrial relations issues associated with any attempts to reform the funding of the pensions sections. The Department may be asked to intervene to mitigate the impact of increased pensions contributions and/or any industrial action. [Balance of paragraph redacted]

Change in risk allocation approach

23. There are a number of potential risk and issues with changing the risk allocation approach. Additionally, and based on the Department's assessment of the risks associated with this option, HMT officials have indicated that they would recommend to their Ministers that the Department should not change its risk sharing approach on the live franchise competitions, but stated they would be content, subject to the Chancellor's clearance, for a different risk sharing mechanism to be offered for future franchises. It is considered that it would be exceptionally difficult to get HMT agreement to a change in the Department's policy on live competitions, including the decision to only share risk/reward in respect of deficit contributions, particularly given the challenges of securing agreement to a risk sharing mechanism previously, there are a number of compliant bids and the independent advice from PwC indicates that the risks (albeit in isolation) should be bearable.

24. If it was decided that the risk allocation approach should change, the Department would need to revise the requirements in each of the live competitions and permit each bidder on each competition to rebid in order to make this a deliverable option, taking several months to resolve. Any additional rebid would push East Midlands into the final periods of its existing Direct

Award, risking another, and reduce the time remaining on the West Coast Partnership Direct Award.

25. Legal advice is [rest of paragraph redacted]

26. It is also considered to be unlikely that a change in risk sharing approach, to a mechanism that HMT would be prepared to permit, would result in non-compliant bids becoming compliant or offer better overall value for money to the Department.”

338. I note the following strands that emerge from these passages:

- i) Bidders had been explicitly warned about the potential consequences of marking up the Franchise Signature Documents;
- ii) Five of the bids spanning the three competitions had accepted the pension risks. Four had proposed actual or de facto amendments to the signature documents which would alter the balance of risk in their favour. The bids that had proposed these amendments were considered “significantly non-compliant”;
- iii) The question of excluding for pensions non-compliance had to be considered on a competition by competition basis but there is no objective justification for taking a differential approach to the issue across the three franchises;
- iv) The PwC work considered pensions-risks “in isolation” and had been undertaken separately to the evaluation process. On each occasion it is raised with reference to the possibility of cancelling the competitions: see paragraph 44 of the main text and paragraphs 16-17 of Annex A. The distinction between the evaluation process and the PwC work was made twice, once in the body of the CCS and once in the Annex where it was stated to be “critical” that no evaluation or award decision was made or influenced by the work conducted by GAD or PwC;
- v) Providing additional or different financial support during the life of the contracts would give rise to “substantial” procurement risk as it would “implicitly alter the assumed balance of pension risks which underpinned the original award decision”;
- vi) Cancellation or further rebids would carry a high risk of challenge by disappointed market participants with a medium-high risk that such a challenge would be successful on grounds of discrimination against compliant bidders;
- vii) Any change in the risk allocation would give rise to a number of risks and issues. Furthermore, although the Treasury had indicated willingness (subject to the Chancellor’s clearance) for a different mechanism to be offered for future franchises, it was considered that it would be “exceptionally difficult” to get Treasury agreement to a change for the current competitions. The CCS did

not state or imply that the Treasury had been asked to agree to change the mechanism for the current competitions;

- viii) It was considered unlikely that any change in the risk-sharing approach that would be acceptable to the Treasury would result in non-compliant bids becoming compliant;
- ix) The process was subject to time pressures for both the EM and WCP franchises.

339. The CCS from paragraph 50 onwards identified as the three options:

- i) Cancel all competitions;
- ii) Proceed to award on EM and continue the WCP competition as planned, including eliminations of non-compliant bidders on both competitions; but cancel the SE competition. This was the paper's recommended option. It said that, as part of a cancellation announcement, the Secretary of State would need to make a decision on pensions non-compliant bidders "because this would become clear on SEF at the time that feedback is provided";
- iii) Proceed to award on EM and continue the WCP competition as planned including the elimination of non-compliant bidders. On SE consider significant non-compliances (including exclusions), proceed with further risk adjustment and complete evaluation.

340. The paper then covered wide-ranging policy, political and financial considerations for and against each option, including assessment of legal risk which has been redacted in each case. Those considerations included questions that are not obviously within the court's competence to assess such as, for example, the interplay between the three franchises and the forthcoming spending review that was due to take place during the 2019/2020 financial year. It was implicit in this section that (a) the Secretary of State would have to make a decision on exclusion for pensions non-compliance in the SE competition even if he cancelled it, and (b) the Secretary of State would have to make a decision on exclusion for pensions non-compliance in all three competitions, come what may. It is a matter of forensic interest that most of the section on the available options from paragraph 50 onwards was barely referred to during the trial, the focus of attention being on the earlier passages and Annex A to the virtual exclusion of all else. The section and reasoning on options was, however, an integral part of the submissions provided to Ministers.

341. The EM Franchise paper requested the Secretary of State's urgent approval to award the EM franchise to Abellio, subject to agreement of the Chief Secretary to the Treasury. The Recommendation to the Minister was in the following terms:

"It is recommended that you:

- Agree to award the East Midlands franchise to [Abellio], and that the Managing Director of Passenger Services should have delegated authority to approve final contractualisation elements ...;

- Agree to write to HM Treasury to seek approval to enter into the East Midland Franchise Agreement and associated legal documents (draft letter at Annex G);
- Agree that bidders [Arriva and SEMTL] should be informed that they have been disqualified from the competition on the grounds of their non-compliance with pension requirements (see paras 45-46). The Department would make clear to these bidders that they would have not been successful irrespective of pensions non-compliance; and
- Confirm that you:
 - o have considered the legal requirements set out in the Equalities Act 2010,”

342. The Background section stated that all bids had been evaluated in accordance with the EM franchise ITT and that Abellio had achieved the highest Quality and Deliverability Score and the highest price score. Under the heading “Robustness of Bids” it referred to the carrying out of the risk adjustment process and the FRT and concluded (at paragraph 39) that “[Abellio’s] bid passed the FRT with significant headroom.” Then, under the further and separate heading “Further Stress Testing” it stated (at paragraph 40) that “in addition to the FRT set out above that is part of the evaluation process, the project team has carried out additional stress testing of the bid model. [Abellio] passed all downside stress test scenarios modelled in the core term.”

343. Under the heading “Non-Compliances” paragraph 45 said:

“[Abellio’s] Bid contains no material non-compliances. [SEMTL and Arriva] both have material non-compliances in respect of pensions. They have proposed changes which amend the franchise signature documents and alter the balance of risk in their favour on pensions, declining to accept the risk sharing mechanism provided by the Department in the Franchise Agreement. A similar non-compliance (a Bidder amendment to the Franchise Agreement to alter the balance of risk in its favour) resulted in the elimination of a bidder on a previous competition.”

Paragraph 46, which is the second of the two paragraphs dealing with non-compliance is redacted, presumably for reasons of legal privilege. A later section entitled “Legal Issues” at paragraphs 60-64 is entirely redacted, presumably for the same reason.

The Ministerial decisions

344. Having been sent the submissions early in the afternoon of 28 March 2019, during the evening the Secretary of State asked for a meeting the next morning, 29 March 2019, because he was concerned that there was not a robust approach on pensions for the three competitions and that if, for example, pensions issues were to lead to industrial relations action, the Department would be left having to bail out the TOC. There is no direct evidence about what happened at that meeting as Mr Smith and Mr Wilkinson,

who attended it, did not mention it in their witness statements and were not asked about it. The exchanges of emails before the meeting are uninformative about what was said during it. It appears from a sequence of emails that Mr Smith prepared for the meeting by obtaining a copy of the PwC Analysis and information about the basis of the bidders' non-compliances on pensions across the three franchises. A late-disclosed note made by Ms Greig, the Secretary of State's private secretary, evidences that Stagecoach's non-compliance on pensions was discussed, that there was a "basket of issues" on the SE competition, and that if there was an award on the EM competition, Stagecoach would know at that point that they would be disqualified from all competitions, a point made separately in the EM Franchise submission to the minister. Her note, taken in conjunction with another (late-disclosed) note from a Mr Edwards, suggests that the Secretary of State was told that Stagecoach were trying to transfer all risk to the Government which would leave them with no incentive to pursue reform of the RPS and, more generally, that the Secretary of State was expressing significant concerns about the ability to get the SE competition "over the line". There is what appears to be a reference to the PwC Analysis and to "extreme scenarios" being tested. However, these notes are far from verbatim and need to be treated with caution in the absence of any explanatory witness evidence.

345. The decisions to disqualify the Claimants and Arriva for non-compliance on pensions were taken by the Secretary of State and Rail Minister on 1 April 2019. No one who attended the meeting at which the decision was made has been called to give evidence. There is therefore no direct evidence of what happened or what was discussed or what led the Secretary of State to make the decisions as and when he did.
346. The decisions are recorded in three emails sent by Ms Greig during the evening of 1 April 2019. The first recorded that, following a meeting with officials that day, the Secretary of State and Rail Minister had requested further advice by 2 May 2019 (the end of purdah for local government elections) on whether it was feasible to continue with the SE competition; and that until that advice had been received, Ministers had made no decision in respect of the future of the SE competition.
347. The second email stated:

"As officials discussed with the Secretary of State and Andrew Jones this afternoon, both Ministers are content to:

- Agree to award the East Midlands franchise to [Abellio]
- Agree that the MD of Passenger Services have delegated authority to approve final contractualisation elements
- Agree to write to HM Treasury to seek approval to enter into the East Midland Franchise Agreement (final, signed and sent letter attached for info)
- Agree that bidders [Arriva and SEMTL] be informed that they have been disqualified from the competition on the grounds of their non-compliance with pension requirements

- And confirm they have considered the legal requirements set out in the Equalities Act 2010”

This wording followed very closely the structure and wording of the Recommendation to the Secretary of State at the start of the EM paper: see [341] above.

348. By the third email Ms Greig added the additional disqualification decisions in the WCP and SE competitions:

“• The Secretary of State and Andrew Jones are also content to agree to make one further consequential bid exclusion on the West Coast Partnership competition on both pensions and other issues, and a bid exclusion on Southeastern on pensions.”

349. It is evident from these three emails that the Secretary of State was following the Department’s recommendations on EM, and was continuing the WPC competition and implementing the CCS’s recommendation to disqualify WCTP on both pensions and other issues. In addition, and consistently with the request for further information made on 29 March 2019, he was not immediately following the recommendation to cancel the SE competition but, since that competition was continuing for at least the time being, was disqualifying SSETL. The disqualification of SSETL from the SE competition had not been the subject of a specific recommendation, for the reasons already identified; but it was foreshadowed in options (ii) and (iii): see [339] above; and it was consistent with the logic outlined in the CCS that there was no objective justification for taking a different approach to pensions non-compliance in different competitions.

350. As previously mentioned, on Day 13 of the trial hearing the Defendant disclosed a note by Ms Walters (much of which was redacted) of the 1 April 2019 meeting at which the disqualification decisions were taken. On further enquiries being directed, notes of the meeting and other relevant documents from Ms Greig, Ms Payne and Ms Hannant were disclosed for the first time on 25 February 2020, eleven days after conclusion of the hearing. Ms Walters’ note, which is partially redacted, does not mention pensions or disqualification. Nor does the handwritten note of Ms Hannant, though the printed OneNote of Ms Payne appears to refer to the possibility of excluding Stagecoach from the EM competition, possibly in the context of a conversation before the meeting with the Secretary of State. Ms Greig’s note does not mention disqualification or pensions. An email from Ms Walters to Ms Greig, which appears to have prompted the third of Ms Greig’s emails confirming decisions says that the Minister’s decision to disqualify SSETL was taken “in view of his decision to ask for further advice” on the feasibility of a successful SE franchise award.

351. Once the decisions had been made, a signed letter of the same date was sent by the Secretary of State to the Chief Secretary to the Treasury. It was specific to the EM franchise and requested her agreement to award the franchise to Abellio. The letter addressed pensions in two places. In the first the letter stated:

“Pension shortfall: The department retains certain risks in relation to pension costs, notably those arising from the 2019 valuation of the Railway Pension Scheme. Our approach to

apportioning pension cost risk on this franchise has previously been agreed with HM Treasury. It should be noted that, whilst the bid submitted by [Abellio] is a pension compliant bid, there may be in-life contract management risks, including the franchisee being unable to meet the cost of increased pensions contributions and industrial relations issues associated with any attempts to reform the funding of the pensions sections. If these arise, we will work closely with HM Treasury in managing them.”

352. In the second, a two-paragraph section headed “Non-compliances”, the first paragraph said:

“No significant non-compliances have been identified in [Abellio’s] bid. *Serious* non-compliances were identified in both [Arriva’s and SEMTL’s] responses to the Department’s rebid specification. *After further analysis these non-compliances were considered as being sufficiently serious to merit disqualification of these two bidders from the competition, due to the level of risk on pensions which these bidders sought to transfer back to the Department.* I have therefore authorised the disqualification of these two bidders. However, it is important to note that [Abellio] was the leading bidder even before these significant non-compliances were identified.” (Emphasis added)

The second paragraph is redacted for reasons of legal privilege.

353. It can be seen that the first paragraph bears comparison with paragraph 45 of the EM Ministerial Submission paper, with two differences. First, the submission described the non-compliances by SEMTL and Arriva as “material”: in the letter they are described as “serious”. Second, the letter adds the sentence which I have emphasised and which provides further information on the reasons why the Secretary of State made his decision to disqualify SEMTL from the EM competition. There was no equivalent letter to the Chief Secretary to the Treasury at or about this time about the disqualification decisions in the WCP and SE competitions as those decisions in the context of continuing competitions did not call for Treasury agreement.
354. On 5 April 2019 the Chief Secretary to the Treasury replied, providing approval for the Secretary of State to award the EM franchise to Abellio.
355. On the same day there was a meeting of SIAP. The minutes record that it was “to confirm that the rationale for eliminating pensions non-compliant bidders on the South Eastern franchise remained appropriate in particular by reference to whether the rationales for the East Midlands and West Coast Partnership competitions are equally applicable. This SIAP has been called particularly in the light of a request for further analysis and work on evaluation and risk adjustment by the Secretary of State ... in response to a recommendation from officials that the competition be cancelled.” This stated purpose and the minutes as a whole are remarkable in not appearing to acknowledge that the Secretary of State had already made his decision to disqualify SSETL on 1 April 2019. Yet Mr Wilkinson, Mr Baghurst, Ms Sally Palmer and Mr

Brandenburger, who were at the meeting, had all been recipients of Ms Grieg's email notifying them of the disqualification decision on that date and cannot have been unaware of it, either singly or collectively. The minutes record a discussion of cogent reasons that would support a decision if one were still to be made. This discussion included mention of the differences between the pensions non-compliance in the SE competition and those in the EM and WCP competitions, the fact that there were in the EM competition additional pensions non-compliances by a different bidder (Arriva), and that Stagecoach had confirmed that its bid was intentionally non-compliant. The last three paragraphs summarise the overall tenor of the discussion as reflected in the minutes:

“7. In summary, SIAP agreed that the bid was non-compliant with the stated pensions position in the ITT and the Franchise Agreement. The non-compliance was of a material nature:

a. It was a deliberate, de facto mark up of the Franchise Signature Documents, which is prohibited in the ITT and was explicitly prohibited in both the original re-bid and the pensions re-bid instructions; and

b. changed the allocation of risk in such a way that the Department would not be able to evaluate their price or fairly compare their tender with that of other bidders.

8. It was noted to SIAP that a decision not to eliminate [SSETL], which would in effect be equal to allowing them to remain in the competition, would be incompatible with the equal treatment of all bidders.

Decision:

The Chair agreed that acting consistent with the advice provided to BICC in the minutes of the 13th March 2019, and confirming the reasons above, that [SSETL] should be eliminated from the South Eastern Franchise Competition.”

356. After the SIAP meeting Mr Wilkinson sent an email to Ms Kelly, the terms of which again give the impression that he, as Chair of SIAP, was not aware of the decision taken on 1 April 2019. It concludes:

“The fact remains: having reviewed once again at SIAP their bid on South Eastern it is our view that [SSETL] remains non-compliant in a way where we believe disqualification is the most appropriate way to deal with such non-compliance.

Given the above, [SSETL] will be informed of their disqualification from the South Eastern competition next week.”

357. Mr Baghurst and Mr Brandenburger confirmed their recollection that the minutes were an accurate record of the meeting. Mr Brandenburger agreed that the points

itemised at paragraphs 7(a) and (b) of the minutes were the same reasons as those given in the disqualification letters: see [189] above. But he said that, although the second point did not feature in the CCS, the reasons were already in existence before the SIAP meeting and before the decision was taken to disqualify on 1 April 2019 and that SIAP merely confirmed them. His evidence on this point was confirmed by Mr MacDonald who said that the Department were very uncertain about how to unwind and price a risk so as to create equality between the bids or assess how the bids would have looked if they had been bid on the same basis. Their evidence is also supported by the terms of an email from Grant Thornton on 12 February 2019. I accept their evidence that the Department had been conscious of the difficulty or impossibility of equalising bids where some had accepted the pensions risk and others had not. That evidence referred to internal departmental thinking. It does not of itself demonstrate or evidence that the Secretary of State had the point in mind when deciding to disqualify the Claimants. Mr MacDonald, who signed the disqualification letters, said (and I accept) that he took advice to consider what should be written in the letters, and confirmed that the letters were drafted by the legal team. There is no evidence that the letters were referred to Ministers before being sent. They were sent on 9 April 2019, in the materially identical terms set out at [188] above.

358. On 5 August 2019 the Secretary of State wrote to the Chief Secretary to the Treasury in similar terms to those that had been used by his predecessor on 1 April 2019 requesting the Chief Secretary to the Treasury's agreement to award the WCP franchise to First and to cancel the SE competition. The Chief Secretary to the Treasury replied on 6 August 2019 agreeing to the Secretary of State's proposals.

The Defendant's reasons for disqualifying the Claimants

359. It is clear beyond argument, as it has been to all since 9 April 2019, that the Claimants were disqualified because their bids were non-compliant in rejecting the allocation of the risk of pensions in the tender documents and proposing contractual amendments which sought to transfer the pensions risk from the franchisee to the Secretary of State. That said, it is convenient at this point to review and make main findings about what reasons for the disqualifications are shown by the evidence. In doing so, I bear in mind that the relevant decision-maker is the Secretary of State himself and that he made his decisions after receipt of the briefing documents that I have described at some length: see [332] ff above. He had also received the Ministerial Submission before the meeting on 19 February 2019, which attached the paper that had been submitted to BICC on 18 February 2019: see [299] and [305] above. In my judgment, the other primary sources of evidence to be examined are the letter that the Secretary of State sent to the Chief Secretary to the Treasury on making his decision: see [351] above; the emails from the Secretary of State's private secretary recording the decisions: see [346]-[349] above; and the disqualification letters themselves: see [187]-[190] above. Although I have referred to subsequent correspondence in the course of outlining the chronology, the Defendant did not submit that it added anything of substance that could materially affect the outcome of the case. I agree.
360. It is always necessary for a fact-finding court to review evidence in its proper context. The Secretary of State did not make his decisions on 1 April 2019 in a contextual vacuum. In my judgment the relevant context includes that everyone knew pensions to be a major issue, for the reasons discussed at length elsewhere in the judgment. Its seriousness was reflected in the terms of the ITTs, Franchise Signature Agreements

and rebid instructions. Its seriousness was also reflected in the continuing discussions during 2018, in the course of which representations were made to the Department, the Department gave bidders sight of an “hypothetical” PRSM that was stated to be subject to Treasury approval, and then the Department formulated the Government’s final position (including the PRSM and PRP) by the terms of the Rebid instructions that were reinforced by re-iterated warnings about the need for compliance. Intense lobbying, right up to the Secretary of State himself, had consistently been met with the response that bidders could not cherry pick and were to price the franchise compliantly. Leaving all these considerations temporarily on one side, the allocation of risk is, self-evidently, a central feature of any major procurement; and attempts to re-allocate risk back to Government in the knowledge (confirmed in answer to AQ218) that it was and would be treated as non-compliance were attempts knowingly taken to adjust basic terms of the contract proposed by the Government. Every time the Claimants at trial emphasised the magnitude of the risk to which they say they were being subjected by the Defendant’s proposed terms, they illuminated the self-evident seriousness of their re-allocating non-compliance.

361. I shall consider the application of the principles of equal treatment, transparency and proportionality in greater detail when addressing the Issues for decision. However, at a high level of generality, any proposed participant in these procurement competitions (be it the Department, the Claimants, other bidders or the notional RWIND tenderer) should have been aware that any course short of disqualification was likely to give rise to (at least) substantial risks of legal challenge for the reasons set out elsewhere in this judgment. That does not of itself prove what the Defendant’s reasons were, but it does provide part of the context of knowledge on all sides and may in due course affect the level of detail that needed to be provided when giving and receiving reasons and reasoning for the decisions that were taken.
362. The factual context that is evidenced as being specific to the Secretary of State himself relevantly commences with his meeting with Mr Griffiths on 21 November 2018, at which he said that Stagecoach should not strike out parts of the Franchise Agreement and that doing so would risk disqualification. The next direct involvement is his meeting with officials on 19 February 2019. Little can be gleaned from the Submission, the annexed BICC paper on cancellation or the scant information about the meeting itself save that the Secretary of State’s focus seems to have been on the operational difficulties affecting the two SE competition bids that were pensions compliant. The reference to SSETL being “firmly” non-compliant provides little additional colour and is not reliable evidence about the Secretary of State’s thinking on the question of disqualification for pensions non-compliance.
363. Turning to the CCS, I have noted various strands that emerge from the passages I have set out from the main text and Annex A at [338] above. The CCS approached the question of disqualification on the basis that the pensions problem gave rise to “very significant financial risks” and that the four bids that were non-compliant on pensions “proposed actual or de facto amendments to the Franchise Signature Documents which would alter the balance of risk in their favour, and these are therefore considered to be significantly non-compliant.” It is not possible to deduce the specific terms of the legal advice that has been redacted from paragraphs 35 and 38 from their context in the document and, legal professional privilege having been claimed, it would not be appropriate to try. That said, paragraph 37 is clear and

correct in saying that disqualification decisions had to be taken on a competition-by-competition basis but that there would be no objective justification for taking a differential approach on the issue across the three franchises. The words “on this basis” at the start of paragraph 39 are apt to describe the observations in paragraph 37 as well as whatever may have been redacted from paragraph 38.

364. Paragraphs 41 to 43 of the CCS address the question whether it would be too financially risky to award contracts to pensions-compliant bidders. A conclusion that it was too risky would inevitably mean cancellation of the competitions. But the CCS is astute at paragraph 41 to distinguish between evaluation of bids and the decision to continue with or cancel the competitions and warns that the PwC Analysis is separate to the bid evaluation process, the warning being repeated in stronger terms at paragraphs 16 and 17 of Annex A. This distinction between the bid evaluation and carrying out additional stress testing using the PwC work is also present in the EM Franchise paper. Paragraph 44 then addresses the alternatives of cancellation or calling for a rebid on the basis of different risk allocation, and concludes that either course would carry a high risk of being challenged and a significant risk that such challenges would be successful. This is an obvious recognition of and reference to the public law principles and procurement risks arising from them that are the subject of this action. Those principles and procurement risks are revisited at paragraphs 23-26 of Annex A. Paragraph 25 evidently refers to the question of varying the risk sharing approach that was currently in place: no other deductions can be made.
365. The EM Franchise paper’s main contribution to the reasoning supporting disqualification of SEMTL and Arriva is in paragraph 45, which I have set out at [343] above. The features of note are that the non-compliances on pensions are described as “material”, the identification that the changes alter the balance of risk in their favour, declining to accept the risk sharing mechanism provided by the Department, and the coded reference to Stagecoach’s previous disqualification from the SW competition on similar grounds.
366. The redaction of anything that could be legally privileged means that the court has only the broad indications that appear in the un-redacted remains of the documents. It is not for the court to speculate why wholesale redaction was thought to be desirable or necessary. All that it is necessary (and sufficient) to know is that it must have been the result of a deliberate decision, either specific to this litigation or more general.
367. For the reasons set out at [344] above, I approach the limited evidence about the meeting on 29 March 2019 with caution. The overall tenor of the evidence is that the Secretary of State was mostly concerned during the meeting with whether he should cancel all competitions because of lack of financial robustness in the bids.
368. The record provided by the first of Ms Greig’s emails evidences that the Secretary of State was still concerned with whether it was feasible to continue with the SE competition. Her second email provides support for a finding that the recorded decision was taken in the context of and by reference to the EM paper because of the adoption of the language of its recommendation. That decision and the decision evidenced by her third email are consistent with the principles set out in the CCS and its reasoning once the decision was taken not to cancel the SE competition at that time. It therefore provides some support for a finding that the decisions taken together were taken in the light of the reasoning and (subject to the non-cancellation

of the SE competition) recommendations in the two briefing papers. I note in passing that the fact-finder's task would have been more straightforward if the emails (or any document that was referable to the Secretary of State's taking of his decision) had added the magic words "... for the reasons set out in [x]" or their equivalent, with or without further elaboration or qualification. As I hope is clear, I do not consider that the absence of any such additional words either precludes the court from looking at the evidence that is available or permits it to duck that task.

369. Further support is provided by the terms of the Secretary of State's letter to the Chief Secretary of the Treasury: see [351] above. I consider that this letter is of importance because it is the only direct evidence of the Secretary of State's thinking, being signed by him.
370. The same cannot be said of the disqualification letters themselves, which were not referred to the Secretary of State or sent by him. This lessens the weight to be attached to any possible assumption that the letter contains his reasons or reasoning, though I have no doubt that the letters were intended to be a fair reflection of what officials thought would have been significant for him to consider and would have been his reasons. It is therefore in a different category from the Ministerial Submissions (or, by analogy, the report to a planning authority where the recommendations are accepted and there is no ambiguity about the reasons that support it). I would not exclude it from consideration altogether because the officials who were responsible for its creation and sending were steeped in the arguments that had led to the submission to the Secretary of State, though there is no evidence that they had direct knowledge of his reaction to the constituent parts of the CCS and EM paper.
371. The difficulty arises in relation to the second bullet point under paragraph 6. I have no doubt that the inability to compare prices on a fair basis where one bid was non-compliant on pensions and another was compliant formed part of the Department's thinking from February 2019 (at the latest). However, whether because of redactions or otherwise, there is nothing in the EM franchise submission or the CCS that adverts specifically or by necessary implication to this point; and the direct evidence about how it came to be formulated does not demonstrate that the point was in fact part of the Secretary of State's thinking: see [355]-[357] above.
372. The reasons and reasoning were not confined to paragraph 6 of the disqualification letters. Paragraphs 7 and 8 also provided reasoning based upon the Defendant's duties of transparency and equal treatment of bidders and the need to act proportionately and fairly. In doing so they echoed reasons and reasoning that are to be found in the EM franchise paper and the CCS. It is a reasonable inference that they reflected at a fairly general level the legal advice which was provided to the Secretary of State.
373. On these materials I find that the Secretary of State disqualified the Claimants (and Arriva) in each case because their non-compliances on pensions were considered as being sufficiently serious to merit disqualification from the competitions due to the level of risk on pensions which those bidders sought to transfer back to the Department. That was, in my judgment based on the immediately relevant materials assessed in the context of all of the evidence about the importance of the pensions issue for all parties, the reason for the disqualification. As the disqualification letters

correctly stated, it represented inconsistency with the Department's policy in respect of the allocation of risk on the issue as reflected in the specification. The reasoning supporting the Defendant's reason included that the Claimants' bids proposed actual or de facto amendments to the signature documents which would alter the balance of risk in their favour and were therefore considered to be significantly non-compliant; and that there was no objective justification for taking a differential approach on the pensions non-compliance issue across the three franchises. The decision was taken in the knowledge and taking into account that for the Defendant to make further changes to the risk allocation approach that it had put in place would carry a high risk of being challenged by disappointed market participants with an unacceptable risk that such a challenge might succeed because the inference would be drawn that the Secretary of State as decision-maker and the Department had acted in a discriminatory manner (in other words, in breach of its public law duties raised in this action). It would have been "exceptionally difficult" (which in context meant practically impossible) to get Treasury agreement to a change in the Department's policy on risk allocation in the three competitions; and any mechanism that the Treasury would be prepared to permit would be unlikely to result in non-compliant bids becoming compliant or offer better value for money to the Department. Combining these supporting strands of reasoning, and particularly in the light of its public law duties, the Department and Defendant concluded that he could not properly have come to any decision other than to reject the bids for non-compliance.

Issue 1: Did the terms of the relevant ITT governing the Defendant's treatment of non-compliances and/or disqualification breach the Defendant's duties of transparency and/or fairness?

374. The Claimants rely on three aspects of the ITTs. First, they say that the definition of "non-compliance" in paragraph 3.5.1 is "exceedingly broad" in covering any failure of any instruction set out in the ITT, however serious or trivial. Second, they say that the ITT purported to confer an "unlimited" discretion as to how to respond to a non-compliance, which included the discretion to reject the bid and disqualify the bidder or to take any other action it considered necessary and appropriate in the circumstances. The Claimants complain that no guidance whatsoever is given about which option might be adopted in which circumstances. Third, they say that the Defendant's Head of Procurement gave wrong evidence that a bidder which did not accept all the terms of the signature documents had to be disqualified out of fairness to other bidders but later accepted that marking up the signature documents gave rise to a broad discretion and that the ITT does not indicate that disqualification is more likely than for any other form of non-compliance.
375. Basing themselves on these three aspects, the Claimants submit, first, that the breadth of the discretion afforded by the ITT breached the requirement for the conditions and detailed rules of the procurement to be clear, precise and unequivocal. Second, they submit that the breadth of the discretion breached the principle that contracting authorities should not reserve an excessive level of discretion in deciding how to award a contract, relying primarily upon the *Law Society* decision. This excessive level of discretion, they submit, goes against the purposes underlying the principle of transparency because the rules of the ITT left bidders in a state of uncertainty.
376. The Defendant points to the principles of EU and UK law that are applicable to the exercise of the discretion to disqualify and submits that the terms of the ITT were transparent and fair. It points to the terms of paragraph 4.1.2 of the ITT, which specifies that marking up the Franchise Signature Documents by proposing their own Risk Assumptions or any other contractual amendments which seek to transfer risk from the franchisee to the Secretary of State *will* be treated as non-compliance. And the Defendant submits that any RWIND tenderer would have realised that such an attempt to re-allocate risk to the Secretary of State would be a non-compliance of such seriousness as to make disqualification highly likely if not inevitable.
377. The principles that are relevant to this issue are summarised at [29]-[55] above. In particular in that section I explain the factual distinction between the *Law Society* decision and the present case: the *Law Society* decision was concerned with a discretion that led to the terms of the contract being uncertain because it amounted to a power to rewrite the contract. That is not the case here, where the terms of the contract are not liable to be rewritten or otherwise subverted by the discretion to disqualify.
378. The parties disagree about the time by reference to which this issue should be answered. The Claimants submit that the court should limit itself to interpreting the terms of the ITT as and when originally issued. The Defendant submits that the appropriate time is the time that bids were submitted because that is when the bidders committed themselves to engagement with the current terms of the procurement. The Defendant is right on this point because, on the particular facts of this case, the

Claimants' challenge is to the process of the rebids and their evaluation. On the rebid, bidders did not bid solely against the terms of the ITT – they bid also on the terms of the rebid instructions (the lawfulness of which is no longer subject to separate challenge): see [230]-[234] above. By that time, the context in which the ITT and bidding instructions fell to be interpreted by RWIND tenderers had also developed to some extent. However, to avoid unnecessary disputation later, I will decide this issue (a) by reference to the time of the issuing of the original ITT and (b) by reference to the time of the rebids.

379. The provisions of the original ITT specifying what would or may be treated as non-compliance were clearly stated and admitted of no misunderstanding by a RWIND tenderer. Specifically, under the terms of the original ITT, paragraph 4.1.2 was clear, precise and unequivocal in stating that a contractual amendment which sought to transfer risk from the franchisee to the Secretary of State would mean that the bid was deemed non-compliant. There is, in my judgment, no reasonable basis for an argument that the provision breaches the obligation of transparency or fairness. It could only be interpreted in one way by any RWIND tenderer and was not unfair either as between tenderers or as between tenderers and the Defendant. Terms about and in support of a contractual allocation of risk are subject to a wide margin of appreciation because (a) they reflect the terms on which the contracting authority is prepared to contract as part of an overall package of rights, risks and obligations, and (b) the terms about allocation of risk in the ITT are the contractual manifestation of policy decisions about the allocation of public resources. It is not reasonably arguable that a term such as paragraph 4.1.2 which is present to support and emphasise the ITT's provisions about allocation of resources is outside the scope of proper contract terms as between the Department and bidders or that it is in any sense lacking in transparency or fairness.
380. Turning to the discretion to disqualify, the words of paragraph 3.5.3 do not stand alone: they are to be interpreted in accordance with principles of EU and UK law and read in context so far as that would inform a RWIND tenderer's understanding. Once that is done, there is no lack of clarity or precision, and the term is unequivocal. Nor is the discretion "unlimited" as the Claimants suggest. It is limited by the requirement that the discretion be exercised on a principled basis. It is therefore to be exercised rationally and in accordance with the policy upon which it is based; and it may not be exercised on an unlimited, arbitrary or capricious basis. These principles are sufficiently well known and definite to render the discretion transparent. The RWIND tenderer would know that it was protected by the need for any exercise of the discretion to be exercised on a principled and proportionate basis and to be challengeable if it was not.
381. Because the discretion would have to be exercised on a principled and proportionate basis, it was not necessary for the ITT to go further in identifying specific circumstances in which a non-compliance might lead to disqualification or to provide further guidance on graduated risks arising from particular examples or categories of non-compliances. Where no discretion could be exercised, because a particular non-compliance would lead to automatic disqualification, the principle of transparency required that to be stated – and it was. Otherwise, the non-compliant RWIND tenderer could predict with reasonable certainty what non-compliances did not give rise to any real risk of principled disqualification and those that did. Among the

former would be the Claimants' favoured example of an error in font size; among the latter would be non-compliances going to the basic terms of the contract: see [27] and [55] above. Viewed in isolation, the terms of the ITT drew specific attention to the prohibition on attempting to reallocate risk from the franchisee to the Secretary of State, which would (even without this indication) reasonably be regarded as touching directly on the basic terms of the contract. However, the terms of the ITT should not be viewed in isolation but in context; and by the time the first ITT (for the SE competition) was issued in November 2017, the pensions problem was well known to the passenger rail industry, including any RWIND tenderer: see [125] ff above. There could be no doubt for any interested party that the pensions problem was serious and that the provisions of the ITT dealing with the allocation of risk were terms of high importance, reasonably justifying description as "basic terms".

382. The Claimants submit, and the evidence shows, that non-compliances are common in franchise tenders but disqualifications are rare. But this fact is uninformative and, if anything, tends to support the validity of an approach which does not seek to micro-manage the discretion but relies upon it being exercised in accordance with established principle. What is more informative is not the frequency or infrequency of disqualifications but whether the working out of a principled approach can be seen to have led to capricious or arbitrary results. That is not the evidence here. The evidence is that a party has been disqualified for non-compliance only once in recent times, that being Stagecoach's disqualification from the SW competition because they proposed significant amendments to the Franchise Agreement. Nor is there evidence of similar situations being treated differently in the exercise of the discretion provided by the ITT: although other bidders submitted bids that were non-compliant in other respects they were assessed separately and (correctly) were not treated as if they were the same as or similar to non-compliance on pensions.
383. In support of their submission that the terms of the ITT governing non-compliances and disqualification breached the Defendant's duties of transparency and/or fairness, the Claimants submit that (a) they did not expect to be disqualified for their non-compliances, or (b) did not know whether they would be or not. I reject (a) as a matter and finding of fact: see [173] to [181] above. As to (b), the submission is literally correct, because the outcome of any exercise of discretion is unknown until the discretion is exercised; but that does not assist the Claimants, even if they are to be taken as the personification of a RWIND tenderer. In my judgment, any RWIND tenderer should and would have realised that material non-compliance on pensions gave rise to a serious risk of principled disqualification. That risk was not reduced by the fact that no TOC-wide solution had yet been found. The period for contractual discussion, including bilateral meetings up to and including meetings with the Secretary of State himself, came to an end when tenderers were invited to tender their final rebids against the terms then on offer. There was no indication and no reason to believe that those terms were anything other than final or that they invited counter-proposals on the allocation of risk.
384. In reaching these conclusions I take into account the fact that other tenderers bid compliantly and that neither Stagecoach nor any other tenderer asked for clarification by submitting a CQ. Though by no means determinative, this supports the finding that the provisions of the ITT about disqualification for non-compliance satisfied the RWIND test of transparency and fairness.

385. For these reasons I reject the submission that the terms of the ITT governing the Defendant's treatment of non-compliances and/or disqualification breach the Defendant's duties of transparency and/or fairness if assessed at the time of the original issuing of the ITT.
386. By the time of the rebids, the Defendant had issued the rebid instructions, which reiterated the need to be compliant with the Franchise Signature Documents in the specific context of a pensions rebid. Any RWIND tenderer in these competitions would have been aware, at least in general terms, of the protracted process by which the Department had arrived at the position of offering the PRSM; and any RWIND tenderer who had been contemplating bidding non-compliantly would (or at least should) have raised that possibility, as Stagecoach did, with the Department in bilateral meetings or written clarificatory questions. Had they done so, the RWIND tenderer would have received the same unequivocal message that the Department required compliance with the Franchise Signature Documents in the specific context of the pensions rebid. All that had happened since the original issuing of the ITTs had served to re-emphasise the "big ticket" nature of the issue or, in other colloquial terms, that this was a "monster problem" (for the Department and bidders alike). Accordingly, if assessed at the time of the rebids in the broader context then prevailing (including but not limited to the rebid instructions and associated information provided by the Department) the terms of the ITT were transparent and fair.
387. I therefore conclude that the answer to issue 1 is in the negative. The terms of the ITT governing the Defendant's treatment of non-compliances and disqualification did not breach the Defendant's duties of transparency and fairness.

Issue 3⁸: Did the Defendant breach his duties of transparency and/or fairness and/or his duties under Articles 4(1) and/or 5(3) of the Railway Regulation by: (i) seeking to impose allegedly large or uncertain pension risks on franchisees? (ii) allegedly not describing the pensions requirements pursuant to the Re-Bid Instructions or the contract in a way which was capable of uniform interpretation by RWIND bidders? (iii) failing to make clear his own view of the potential scale of the pensions risk?

388. As formulated in their closing submissions, the Claimants seek findings that the Defendant breached the duty of transparency and Articles 4(1) and 5(3) of the Railway Regulation by tendering franchise agreements which: (a) imposed highly uncertain and unpredictable pension obligations; (b) could not be understood by all bidders in the same way; and (c) were subject to unilateral change in exercise of the Defendant's discretion. This appears to be largely a reformulation of Issues 3(i) and (ii), though the Claimants do refer to the "sheer scale of the uncertainty" as being critical.
389. In support of their submissions the Claimants rely upon and emphasise the evidence about the uncertainty of the outturn of TPR's intervention and whether there would be further interventions in the future. They highlight that different actuaries could model widely divergent figures depending upon their assumptions, which meant that different bidders might come to different views about the potential levels of

⁸ Issue 2 ("Were the pensions re-bid instructions ... issued by the Defendant lawful?") is no longer pursued by the Claimants.

contributions and the risk of particular outcomes eventuating. They point to the limitations of the WTW Figures, including that they did not address the prospect of changes that might take place in relation to valuations after the 2016 valuation, and the non-provision of the GAD forecasts of potential pension liabilities. And they point to the exogenous nature of the pensions risks and the contingencies built into the PRSM which affected the possible recoveries of support that a franchisee might receive.

390. I have considered the evidence about uncertainty of outcome and made necessary findings of fact, primarily at [123]-[168] and [236]-[271] above. The following features are of particular relevance in relation to the present issue:
- i) The net effect of TPR's involvement in the Scheme is that the future funding position and associated funding costs of the Scheme were and are uncertain. The nature and scale of these uncertainties are very different from the uncertainties that were perceived to have existed before TPR's involvement and the resulting change in covenant analysis: see [135] above;
 - ii) Ascribing probabilities to the risk of future intervention is impossible and, from a bidder's perspective, the probability of a (further) regulatory decision was inherently uncertain: see [144] above;
 - iii) The wide range of financial outcomes modelled by the actuarial experts is instructive because both the Department and the bidders had (or could have had) access to high quality actuarial and other financial advice when conducting the procurement for the three franchises in question: see [159] above;
 - iv) The highest figures, representing the worst case, were based upon risks that were extremely ("vanishingly") unlikely to eventuate: see [164] above;
 - v) It is wrong simply to equate "uncertainty" of outcome with "uncertainty" of commercial risk, though the two are closely related: see [160] above;
 - vi) Although the outcome of the pensions problem (and therefore the eventuating of the risk to which it gave rise) was uncertain, it was possible to estimate the risk for the purposes of taking commercial decisions on whether and how to participate further in the bidding process: see [258] above;
 - vii) The PRSM provided limited protection but was clear and readily understood by RWIND tenderers. [TEXT REDACTED]
391. While acknowledging that bidders were able to obtain expert advice to assist them in quantifying and thereby pricing in their potential exposure, and that all bidders were in a similar position as all received the same terms and information against which to bid, the Claimants submit that the scale of uncertainty about pension risks breached the requirement that all tenderers should know what the contract would require of them and meant that there was a lack of transparency about the "value" of the contract because the uncertainty about pensions costs meant that there was no transparency about the contractor's remuneration. They submit that different RWIND tenderers were liable to form very different views about the pensions requirements under the

contract and the value of the contract and that the uncertainty could not be reliably modelled by the actuaries. This uncertainty, they submit, was exacerbated by the Defendant's limited disclosure of information and, specifically, by the Defendant not releasing GAD's forecasts. The uncertainty was imposed in circumstances where the Claimants submit that the Defendant's FRT, as specified in the ITT, would not establish whether the bidder would be able to bear the risk. They submit that the contingencies in the PRSM amounted to powers of unilateral amendment of the terms of the contract and, as such, breached the duty of transparency, again relying upon the *Law Society* decision.

392. On Issue 3(i) the Defendant submits that there is no principle of law prohibiting the allocation of risks to a contractor where the outturn of those risks is uncertain. It submits that there is no principle requiring the provision of any or any particular level of state support or protection against what are essentially commercial risks and submits that the allocation of financial risks is a normal and permitted part of the contracting authority's role in specifying the terms of the contract it wishes to let. Particularly where the allocation of risks reflects policy decisions about where and how to allocate public resources, the Defendant submits that it has a wide margin of appreciation and that no material or argument has shown it to have strayed outside that wide margin. Turning to the contingencies in the PRSM, it submits that these are discretions that neither vitiate the contractual certainty of the mechanism nor permit the rewriting of the contract under the guise of a discretion. It therefore submits that the *Law Society* decision is inapplicable. In summary, it submits that its decision about the allocation of financial risks was lawful and that the principle of transparency does not require a contracting authority to quantify risks arising under a contract: that is for the bidder to do, bringing its own expertise, appetite and advice to bear.
393. On issues 3(ii) and (iii) the Defendant submits that the terms of the contract were clear and satisfied the obligation of transparency: it was only the cost of meeting the contract requirements that was uncertain, both for the Defendant and for bidders. In those circumstances, it was legitimate to determine that the risk would be allocated to the franchisees and not to Government. Bidders were in a position to reach their own informed view of the commercial risks they would face; and the Defendant was not obliged to tell them what its view might be.
394. The applicable principles are not controversial and are summarised at [29]-[55] above. The tender documents must clearly set out the requirements of the authority so that RWIND tenderers will be aware of what they will be required to do under the contract and (as appears from the provisions of the Railway Regulation) the terms as to remuneration and costs that apply.
395. Allocation of risk is one of the key functions of any ITT. Acceptance of risk is in the nature of service concession contracts: see [24] ff above. Allocation of risk and public resources is an area where a Defendant contracting authority has a wide margin of appreciation: see [20] above. The Claimants again rely upon the *Law Society* decision; but again it is necessary to bear in mind the distinction between a discretion to rewrite the terms of the contract, which is unacceptable because it gives rise to a lack of certainty of terms, and a discretion which goes to the implementing of terms that are otherwise sufficiently certain, which will be subject to the general principles

of EU and UK law that I have identified and which is in principle generally acceptable.

396. The Claimants submit that “the imposition of such contractual obligations was not a “natural” or inevitable feature of operating a rail business but was decided upon by the Defendant when settling the franchise documentation for each competition.” It is not clear precisely what is meant by this submission. In one sense it is correct, because imposition of the contractual obligations was a consequence of the Defendant’s decisions on allocation of risks and resources and would not have happened otherwise. But this is not of any material assistance in deciding whether the imposition of the risks on the franchisees was lawful. In another, more general, sense the submission is wrong. A pension scheme for employees is a “natural” incident of running any business; and it has been an established feature of employment on the railways in the United Kingdom since before privatisation. What is more, the RPS is a *private* pension scheme for the benefit of railway employees, including those who are the TOC’s employees during the franchise, and the franchisee is the Designated Employer for its duration. It is therefore, in any normal sense, an inevitable feature of operating a passenger rail business in the United Kingdom.
397. The evidence shows that both the Government and the TOCs had good reasons for wishing that the other should shoulder the risks arising out of the railway’s private pension scheme. Franchisees would prefer not to be subject to potential liabilities, for obvious commercial reasons. The Government has policy reasons associated with incentivising reform and avoiding the disbursement of public funds on a private pension scheme. Leaving aside the question of uncertainty of outturn, neither side’s wishes or reasons triggered any known principle of EU or UK law that required the Defendant to accept that risk rather than imposing it on the franchisee, as had always been the case. Subject to the questions raised in Issue 4, there is no principle of EU or UK law that limits the size of a risk that may be allocated to one contracting party or another in a public procurement.
398. Nor can I accept that uncertainty of outcome engaged the principle of transparency so as to render the imposition of the risk upon the franchisees unlawful. First, as I have said earlier in this judgment, uncertainty of outcome is the essence of risk; and bidders have to deal with commercial risk in any substantial procurement. Their ultimate protection is always to decline to bid, as it was in this case. There is no principle of EU or UK law that a procurement must be so structured that every potential bidder can or will bid or even that a particular subset of potential bidders can or will bid: see *Concordia Bus Finland Oy Ba* [2002] ECR I-07213 at [85]. If all were to decline to bid, that would be an intensely unsatisfactory outcome, but it would not mean or even suggest that the terms being offered were unlawful, either for reasons of transparency or otherwise. Second, this was a risk that could be estimated and priced as any other, as Mr Paterson rightly acknowledged. It is to be expected and normal that different bidders would reach different estimates of any risk and the fact that scarily large worst-case numbers could be generated does not affect the question of principle. This is as true for thinly capitalised special purpose vehicles with limited exposure of capital in the form of bonds and PCS as it would have been for bidders with greater financial substance and greater sums at risk. Third, if the complaint is that the Defendant failed to provide an estimate of the outturn costs, the bidders were in as good a position as the Defendant to estimate the risks, being

formed by substantial and experienced concerns and having access to actuarial and other advice of high quality. Fourth, the margin of appreciation that is open to a contracting authority in relation to the allocation of public resources, including the level of state support or protection that it will make available to a prospective bidder, is wide. Fifth, the Defendant would not be in a better position than the franchisee to manage the risks as and when they arose and, in some respects (e.g. in the face of prospective industrial action) would be in a worse position because of its lack of direct involvement. Sixth, the adequacy or otherwise of the FRT as a means of identifying whether a bidder would be able to bear the risk does not affect the transparency or fairness of the allocation of pension risks to the franchisees. They could assess for themselves whether the risk was bearable. If its FRT was inadequate the Defendant lacked a degree of assurance about the future financial stability of the franchise. That might be regrettable; but it does not render the contract unlawful.

399. I therefore reject the submission that the pension risks were of a type or had characteristics that meant that it was unlawful for them to be imposed on the franchisees. For essentially the same reasons I reject the submission (if it is maintained) that it was unlawful for the Secretary of State not to have made clear his own view of the potential scale of the risk. He was entitled to say, as he did on 21 November 2018, that Stagecoach should work out what the franchise was worth and bid on that basis.
400. As it was, the imposition of the risks upon the franchisees was ameliorated by being subject to the limited protection afforded by the PRSM. Both the allocation of the pensions risk and the scheme of the PRSM were set out in terms that satisfied the RWIND test of transparency. It is a notable feature of the case that the Claimants do not submit that the meaning of the PRSM was unclear. Their main complaint is that it did not go far enough in relieving them of the allocation of the pension risk. Since I conclude that it would have been lawful for the pension risk to have been allocated to the TOCs as it always had been without any form of protection or support, the limited nature of the support afforded by the PRSM was also lawful, provided that it was not vitiated by internal uncertainties that rendered it non-transparent.
401. There [TEXT REDACTED]. However, [TEXT REDACTED] do not amount to a rewriting of the contract terms; nor do they render the terms of the contract uncertain; nor are they unlimited or unprincipled. [TEXT REDACTED] I therefore reject the submission that [TEXT REDACTED] that are built into the PRSM offended against the principle of transparency or any other vitiating principle of EU or UK law.
402. For these reasons I answer Issue 3 in the negative. The Defendant did not breach his duties of transparency and/or fairness and/or his duties under Articles 4(1) and/or 5(3) of the Railway Regulation by: (i) seeking to impose allegedly large or uncertain pension risks on franchisees; (ii) allegedly not describing the pensions requirements pursuant to the rebid instructions or the contract in a way which was capable of uniform interpretation by RWIND bidders; or (iii) failing to make clear his own view of the potential scale of the pensions risk.

Issue 4: Did the Defendant breach his duties of proportionality and/or fairness and/or the Claimants' rights under Article 5(3) of the Railway Regulation and/or Articles 49 and/or 5 of the TFEU by seeking to allocate pension risks to the franchisees which were exogenous and/or outside their control?

403. The Claimants seek a finding that “by imposing on bidders potentially enormous pensions risks which were outside their control, the Defendant breached its duties of proportionality and fairness.”
404. In support of their submissions on this issue, the Claimants rely upon the same evidence as in relation to Issue 3 and set out their perspective of the history from the time of the Brown Review to the issuing of rebids incorporating the PRSM in late 2018. They return to their theme that all exogenous risks were subject to a Brown Review recommendation that they should not be allocated to franchisees. As set out at [116]-[121] above, this overstates the position. It is also an overstatement for the Claimants to submit that the Transport Select Committee concluded in September 2018 that franchise agreements needed more appropriate risk-sharing mechanisms, at least in relation to costs risks.
405. The recommendation cited by the Claimants in support of this assertion came at the end of a passage which is, largely though not exclusively, referring to evidence about the management of exogenous revenue risks, in respect of which there had been a formalised change of policy and the introduction of protection mechanisms since Brown. At paragraph 25 of the Report of the Committee the recommendation was:

“We recommend that the Department clarify, in detail, exactly what its current and future approach to macroeconomic risk-sharing is, in doing so, it should make clear how it has implemented the relevant Brown Review recommendations.”

The court does not know what the Department's clarifying response may have been. What is certain is that there was and is no formalised Departmental or Government policy which, as such, would prevent exogenous costs risks from being lawfully allocated to franchisees.

406. More generally, the Claimants emphasise the evidence that the Department wanted to have a more extensive protection mechanism than what became the PRSM and suggest that the failure to go back to the Treasury after receipt of the Chief Secretary to the Treasury's letter of 4 October 2018 was solely due to perceived pressures of time. I have traced this history, including reference to most of the evidence on which the Claimants specifically rely for this issue, at [112]-[120] and [159] ff above. I have made the following findings of particular relevance:
- i) For the Defendant the size and unpredictability of the pensions risks gave rise to the possibility that the TOC market would not have the risk appetite to bid in such circumstances, thereby reducing competition, or would price in margin for risks that might not eventuate, leading to a windfall for the TOC if the risk proved to be less than anticipated or to inadequate provision if the reverse was true: see [145] above;

- ii) There was, however, a tension between the pragmatic consequences of seeking to impose unpredictable risks on the TOCs and the starting point, which was that the RPS is a private pension scheme which is not underwritten by Government: see [147] above;
 - iii) The Department's response to its perception of the risks, which was endorsed by the Secretary of State, was that some protection would need to be provided to bidders to prevent distortion of the bidding process. After a protracted negotiation that led to limited agreement with the Treasury, it came to offer the PRSM, which became part of the contractual framework against which the TOCs were required to bid: see [149] above;
 - iv) Based on information provided by Treasury Officials, the Department understood that Treasury Ministers were expected to be sceptical of any protection which reduced the incentives for the TOCs and Trade Unions to reform the current scheme, and that officials judged that Treasury Ministers would instinctively prefer an approach which would allow bidders to price in the pension risks: see [208] above;
 - v) In about mid-September the Secretary of State changed his mind and accepted the Treasury's condition that the PRSM should apply to the 2019 valuation only: see [225] above;
 - vi) On a literal interpretation, the Chief Secretary to the Treasury's letter of 4 October 2018 left the door ajar. Views varied within the Department but senior civil servants reasonably held the view that the letter was an effective *fait accompli* so far as the current competitions were concerned or, coming as it did from a very senior politician, that it was unequivocal: see [227] above;
 - vii) Producing and implementing a further version of the PRSM would have taken time, which was in short supply, and it would not have been straightforward. Although further actuarial work may have taken only 2-4 weeks, it would then have been necessary to work up a proposal and take it through the necessary stages to present to the Treasury, with an uncertain outcome. No one thought it feasible to go back to the Treasury yet again at that stage with a view to changing the Treasury's mind or substituting a new risk sharing mechanism for the purposes of the three current competitions. Given the past history of negotiations between the two departments, the Treasury's well established policy position in relation to private pension schemes and the time constraints that applied to the three current competitions, that was sensible, realistic and, in practice, inevitable: see [228] above.
407. The Claimants submit that the PRSM was inadequate to protect bidders from pensions liabilities that were disproportionate and uncertain. The net effect was that the Defendant was effectively asking bidders to price in most of the risk of the pensions problem. They submit that such risks were a deterrent to rail businesses that were bidding for rail franchises and therefore offended against the principles of freedom of establishment and freedom to provide services under Articles 49 and 56 of the TFEU. It was also a restriction on bidders' rights under Article 5(3) of the Railway Regulation because it rendered the competitive tendering procedure unfair.

408. On this basis the Claimants submit that the onus is on the Defendant to show that it was proportionate to impose the pensions risks on bidders subject only to the limited PRSM, which the Defendant has neither pleaded nor proved.
409. The Defendant submits that the freedoms under Articles 49 and 56 are not engaged or affected; that the procurement process was fair and transparent within the meaning of Article 5(3) of the Railway Regulation; that the risk was in any event not entirely exogenous in the sense considered by the Brown Review; and that there is no principle of law that requires the Defendant to have retained all or any particular part of the pensions risk to itself.
410. The underlying principles are summarised at [8]-[25] and [57]-[61] above. As explained in those sections, “proportionality” is not a free standing and all-trumping principle that requires a contracting authority to contract on the terms that are most favourable (or even that are acceptable) to its potential bidders. The level of scrutiny that will be appropriate and the threshold requirements that will justify the court’s intervention are context-specific and depend, amongst other things, on whether the measure that is under review interferes with the fundamental freedoms guaranteed by the EU Treaties. It is conventional and not intrinsically unlawful for a concession contract to allocate exogenous risks to a contractor such as the rail franchisees.
411. The first question must be whether it would have been lawful to allocate the pension risks to the franchisees with no protection at all. It is worth starting with the private law position: the Defendant was entitled to stipulate the terms on which it wished to contract including terms as to allocation of specific risks. The ITT and rebid instructions set out a complicated bundle of rights and obligations, against which prospective franchisees were free to choose to bid or not.
412. Refocusing to view the process through a public law prism, where a public authority, as here, settles on a complicated package of rights and obligations and invites bidding in a competitive procurement, the grounds on which the court will interfere on the basis that the package is unlawful, assuming that the process is transparent and fair, are limited. This is because of the underlying point that it is for a contracting authority to determine the nature and extent of the contracts into which it wishes to enter. There is no self-contained principle of EU or UK public law that prohibits the allocation of large risks (whether certain or not) to bidding parties. The ultimate protection for bidders is that they are not obliged to bid and, if they do, need only bid if they conclude that the balance of risks and rewards that goes to make up their bid is commercially acceptable to them. Obviously, to some extent, every burden that is allocated to a bidder will make the package less attractive and may affect the willingness of prospective bidders to bid at all or, if they are prepared to do so, the price at which they will bid. Thus a package such as set out in these ITTs and draft Franchise Signature Agreements may not have been the optimum solution for achieving value for money and may not have appealed to all prospective franchisees; but those considerations do not demonstrate or even suggest that the packages fell outside the wide margin of appreciation allowed to a contracting authority to stipulate how it proposes to allocate public resources. Similarly, the Department’s fears that some bidders would find the risk unacceptable and walk away might be real and might, in the event, have been realised; but that does not of itself demonstrate that such an allocation was unlawful.

413. The Claimants rely upon their characterisation of the pensions risk as exogenous. The classic example of an exogenous risk is a market crash over which a contracting party will have no control at all. The pensions risk is not of the same order. The RPS is a private pension scheme directly affecting and funded by the TOCs as Designated Employers and the members. This direct interest is also reflected in the composition of the Trustee Board. As was made clear in the early stages of TPR's intervention, the UK Government has no responsibility for funding or managing sections: see [127] above. By contrast the franchisees have a closer relationship with the Trustee than does the Department, though under the provisions of Schedule 16 the Defendant's permission is required before certain steps can be taken; and they are in a better position than the Department to promote and negotiate reform or change with their employees and the trade unions, both as Designated Employer and through the medium of the RDG. It is in their interests to do so, not least because they will be most immediately and directly affected in the event of industrial unrest amongst their employees. So although the franchisees have no control over TPR, it is incorrect to suggest that they have no control or influence over the pensions problem and the liabilities which it may generate. These features all go to support the Treasury's established wish to keep its distance from what it regards (correctly) as a private pension scheme. More importantly, there is no principle of EU or UK law that requires that such a risk must be allocated by contract to Government rather than to other contracting parties. Nor, as I have said, was there any formalised policy (in the wake of the Brown Review or otherwise) which required such risks to be allocated to Government such that failure to do so would render the allocation unlawful. More generally, there is no principle of EU or UK public law that prohibits the allocation of exogenous risks (properly so called) to bidders rather than to Government.
414. The Claimants go on to submit that the pensions risk was so enormous that imposing it on franchisees was a deterrent that breached the freedoms guaranteed in Articles 49 and 56 of the TFEU. This submission is very lightly sketched and is supported by reference to a single sentence in the Ministerial Submission on 17 April 2018 to which I refer at [208] above. The relevant passage, with the words that the Claimants cite highlighted, is at paragraph 10 of the submission:
- “10. It appears that, until prompted by TPR's investigation, Owing Groups may not have fully understood the significant pension risks they are carrying (through the TOCs) under the current industry pension arrangements. They briefly raised concern about this risk at the RDG round table with you on the 14th March and we have agreed to hold further senior official level round tables. Whilst *the Owing Groups* are not able to change their obligations under existing contracts, they are free to decide whether or not to enter into new contracts, and *have indicated serious concern about entering into further contracts with the same level of pensions risk exposure, under current conditions.*”
415. The partial selection cited by the Claimants does not convey the sense of the passage in context. A number of points arise. By the time of this submission, the three original bids had been received on the SE competition, which does not support the suggestion that the pension risks had acted as an effective deterrent despite the fact

that different approaches to the problem had been adopted by different bidders. Second, the passage recognises that what had changed was the TOCs' understanding of the risks that they had always been carrying. Third, there is recognition that franchisees were not able to change their obligations under existing franchises. Fourth, there is the recognition that TOCs were free not to enter into future franchises, which would apply whatever their reasons for eventually not wishing to take on the pension risk or if there was some other reason altogether. Fifth, taken in context, the cited passage does not evidence any effective or substantial deterrent effect, referring only to "serious concern".

416. Viewed more widely, there is no evidence that the allocation of the pensions risk to franchisees acted as an effective deterrent so as to breach the freedoms guaranteed by Articles 49 and 56. There was substantial transnational engagement in each competition. This engagement included bids involving Trenitalia, RENFE, SNCF, Deutsche Bahn (of which Arriva was a subsidiary), Nederlandse Spoorwegen (of which Abellio was a subsidiary) and Keolis (as a joint venturer in Govia) having involvement over the three competitions. Of these, SNCF formed part of WCTP and, as appears from the evidence of the meeting on 16 November 2018, were effectively led into the decision to bid as WCTP did by Stagecoach and (perhaps to a lesser extent) Virgin. Arriva's reasons for not bidding compliantly are not the subject of evidence because of the settlement of their actions immediately before trial. That leaves Stagecoach, whose reasons for bidding non-compliantly on pensions have been examined in detail in this judgment. They are complex and are based on a commercial choice not to price in the risks. As outlined elsewhere, Stagecoach's decision-makers were influenced by extreme estimates of worst-case projections, the likelihood of which was vanishingly small, though I am not in a position to find that their influence was determinative (rather than merely contributory). Viewed overall, however, the evidence supports the finding that Stagecoach could have bid compliantly at a level that would have given them protection with which they were comfortable. That they chose not to bid accordingly does not lend support to a submission that the enormity of the potential outturn of the pensions risk acted as a deterrent that breached the freedoms guaranteed by Articles 49 and 56; still less does it demonstrate breach. Stagecoach were not prevented from participating in the procurements: they simply chose not to participate compliantly. I therefore reject the submission that there was any breach of those freedoms. And, for the avoidance of doubt, I would reject a submission that the procurement process would have breached those freedoms even if the PRSM had been omitted. The procurements were and would have been transparent and fair in being clearly stated, affecting all bidders equally, and being capable of being met by compliant bids that priced in the risks to which bidders were exposed.
417. It follows that, in the absence of the PRSM, I would reject the submission that the principle of proportionality required the stricter approach that would be appropriate where a measure interfered with a fundamental freedom guaranteed by the EU Treaties. The test would therefore be whether the allocation of the pension risk to the franchisees, given the wide margin of appreciation that would apply, was proved to be "manifest error". The Claimants do not advance a case on this basis, their case being that the allocation of risk with the PRSM failed to achieve the policy objective of protecting the bidders from risks that were disproportionate and uncertain and that they could not control. That case rests on the submission that the Department could

and should have gone back to the Treasury after 4 October 2018 and, by implication, could and would have obtained a better protection mechanism for use in the three current competitions had they done so.

418. However, once it is concluded (as I have) that imposing the pensions risk on franchisees was not intrinsically unlawful, and in the light of my conclusions on Issue 3, the provision of partial protection could not convert what would otherwise have been in accordance with the fundamental freedoms into a procurement that breached them. For all its limitations, the PRSM was a benefit for bidders. The Claimants' submission that "the onus is ... on the Defendant to show that it was proportionate to impose these pension risks subject only to the more limited PRSM which it eventually offered" is therefore wrong and rejected. Adopting the less strict approach to proportionality that is appropriate to the decision to allocate the pension risks to the franchisees, it cannot be said that there has been manifest error or that the Defendant acted outside the wide margin of appreciation that was available to it. The countervailing policy considerations that were in play included, on the one hand, the DfT's wish to improve value for money and, on the other, the Treasury's policy position on private pension schemes: see [147] and [200] above. This is an area where the court should be very slow to intervene. In my judgment it would be an unwarranted judicial intervention to second guess the proper outcome of these policy tensions. And, for the avoidance of doubt, I am not satisfied that, had the DfT gone back to the Treasury in October 2018, the outcome either would, should or even might have been any different for the current competitions.
419. For similar reasons I do not accept that the procurements would have offended against Articles 4(1) or 5(3) of the Railway Regulation in the absence of the PRSM or that they did with the limited PRSM added in.
420. I therefore answer Issue 4 in the negative: the Defendant did not breach his duties of proportionality and/or fairness and/or the Claimants' rights under Article 5(3) of the Railway Regulation and/or Articles 49 and/or 5 of the TFEU by seeking to allocate pension risks to the franchisees which were exogenous and/or outside their control.

Issue 5:

5.1. (Phase II issue) Did the Defendant breach his duties of transparency and fairness by failing to inform bidders of the increasing likelihood of HS2 being altered, delayed or cancelled (in so far as it relates to the pensions issues)?

5.2. Insofar as there was any such breach, would the provision of such information have affected bidders' attitudes to the Defendant's proposals on the PRSM?

421. The Claimants and Defendant agree that Issue 5.1 is a Phase II issue which cannot and should not be determined as part of this trial because the scope of any duty of transparency in relation to information about the likelihood of HS2 being altered, delayed or cancelled may depend on facts and matters going beyond the pensions problem. First, as an Interested Party, acknowledges their agreement. However, the court is requested to determine Issue 5.2 on an assumed basis, indicated by the introductory words "Insofar as there was any breach... ." There is a degree of circularity in this division of issues, because it is conceivable that the scope of any duty may be affected by whether or not earlier provision of information about

potential delays to HS2 would have affected bidders' attitudes to the Defendant's proposals on the PRSM. In order to give sense and substance to the Issue, it must be deemed to cover the Defendant's proposals for both the PRSM and the PRP. For these reasons I agree that, in the absence of Issue 5.1, Issue 5.2 must be limited to the factual question whether the more timely provision of information about potential delays to HS2 would have affected bidders' attitudes to the Defendant's proposals on the PRSM and the PRP. The Claimants seek a finding that it would have done so. The Defendant resists.

422. Issue 5 arises because a Ministerial Submission on 8 October 2018 told the Secretary of State that, because of schedule pressures, the delivery in service date for HS2 was likely to be 2028, assuming a reasonable level of float. That information was not communicated to bidders for the WCP franchise before they tendered. As a matter of fact, even Mr Hayes did not become aware of delays until March 2019.
423. WCTP's pleaded case, set out at [106d] of the Re-amended Particulars of Claim, is that "the Defendant's public position had a material impact on the formulation of bids in the procurement and that their tender, and that of the other bidders would have been materially different if the Defendant had revealed the true position, and/or the information known to it, during the Procurement." It alleges that the provision of the information about delay would have meant that "the commercial significance" of the PRSM and PRP would have been affected by the prospects of "delay, alteration and/or cancellation of HS2." This is exceptionally vague, as the Defendant pointed out in its Re-amended Defence. No significant improvement was achieved by WCTP's Reply which asserted that "if bidders had been told that there was more likely to be a "Reset" period on account of HS2 delay or cancellation, they would have appreciated that they therefore faced even greater pension risks than they would have been facing if a "Reset" period was less likely". It alleges that such an appreciation "may have affected the contents of the MTR and/or FTWC bids" including the premium payments they were willing to offer and their willingness to comply with the limitations in the PRSM and PRP mechanisms.
424. I have provided a brief outline of the structure of the PRSM and PRP and the arrangements for the WCP franchise before and after 1 April 2026 at [2] and [150]-[153] above. The dispute between the parties on Issue 5.2 focuses on the provisions and evidence about the potential for a Reset Period and the potential pensions liabilities during any Reset Period that might occur. It is therefore necessary to look at them in greater detail than before.
425. The objective of the WCP Franchise was explained at paragraph 2.5.2 of the WCP ITT:
- "2.5.2 The objective of the West Coast Partnership Franchise is to combine the operation and improvement of the ICWC Services with preparation for the introduction of HS2 (Shadow Operator Services), followed by the integrated operation of both services from the High Speed Start Date until 2031 (Integrated Services). The Franchisee, from the Start Date up to the High Speed Start Date, will be required to operate and improve the ICWC Services. At the same time, the Franchisee will be working closely with the Department and HS2 Ltd as a

Shadow Operator of the High Speed Services to shape the future High Speed and ICWC Services, as well as preparing for the HS2 operations. Following the High Speed Start Date, the Franchisee will be required to run High Speed Services and reconfigure and operate the revised ICWC Services on the existing route.”

426. The High Speed Start Date was defined by the ITT and Franchise Agreement as the date on which the franchisee’s integrated ICWC and High Speed railway passenger services commenced operation. The Anticipated High Speed Start Date was defined as being in December 2026 or such later date as the Secretary of State might notify the franchisee under defined circumstances. The possibility of a delay to the High Speed Start Date was therefore expressly contemplated.
427. Section 6.15 of the ITT set out detailed provisions relating to the Reset Period including:
- “6.15.1 As a contingency, the Secretary of State may choose not to exercise the switch to the IOC at 1 April 2026 but to continue with the operation of ICWC Services under the same contractual terms as the Initial Franchise Period for a period determined by the Secretary of State. This decision will be at the discretion of the Secretary of State and is intended as a contingency dependent on the circumstances prevailing at the time. The duration of this period could be up to a maximum of 5 years in length, through to 31 March 2031. The full, potential extension period is referred to as the Reset Period. Prior to entering this period a limited resetting process will be undertaken in accordance with Schedule 8.7A of the Franchise Agreement.
- 6.15.2 During any Reset Period, the Shadow Operator Services are anticipated to continue subject to the terms of Schedule 18 of the Franchise Agreement.
- 6.15.3 The resetting process will only be undertaken once in order to arrive at reset Franchise Payments through to 31 March 2031 and these payments will apply until that date or the Integrated Operator Start Date, if earlier.
- 6.15.4 As part of the bid submission, Bidders’ ICWC Modelling Suites should extend (and be populated) for the full Core Franchise Term from 15 September 2019 to 31 March 2031 including the Reset Period from 1 April 2026 to 31 March 2031.”
428. Schedule 8.7A to the November 2018 revision of the draft Franchise Agreement set out the circumstances in which a Reset would occur and the processes by which various financial provisions would be determined and effected. Paragraph 3.1 of Schedule 8.7A provided for 1 April 2026 to be the default date for a switch to a Reset Period as follows:

“Reset shall occur effective at 02:00 on 1 April 2026, provided that the Secretary of State has not notified the Franchisee, ..., that the Integrated Operator Start Date shall occur at that time.”

429. Appendices 1 and 3 to Schedule 8.7A set out financial adjustments that would apply during a Reset Period, including the details of the PRP. I describe the effect of these provisions below, but integral to their operation was that there would be a re-baselining (described as “resetting”) of DRCs by reference to the DRCs that were payable under the Recovery Plan that was current as at 1 April 2026, as provided for by Paragraphs 6.15.1 and 6.15.3 of the ITT.
430. Mr Hayes explained that, upon a switch to IOC terms, the Government would bear all costs and revenue risk, with the franchisee being remunerated on a cost reimbursement model to ensure flexible delivery of the Integrated Services. After some debate it was concluded that, if and while there was a Reset Period, protection should be offered against DRC liabilities. As explained by Mr Hayes and Mr Baghurst, the Department’s concern was that, because bidders could not include specific financial proposals in their bid for the period from April 2026, if they were left exposed to DRC liabilities during a Reset Period, they might build a contingency into their bid for the pre-April 2026 period, resulting in a reduction in premium payments for a contingency that might not arise. The proposal and the drafting were run past the Treasury to ensure cross-governmental agreement.
431. Mr Baghurst described how the PRP would work in his first statement, at [224]-[227] as follows:

“224. ... [T]o ensure value for money the Defendant proposed to revise the deficit recovery contribution payments to what take account of what they were on and then after 1 April 2026. If the level of those payments had increased (beyond, in the case of post 1 April 2026 changes, a small nil band i.e. the Threshold Amount), the franchisee’s premium payment to the Government would reduce and there was therefore no need for the Franchisee to include a contingency for that risk which might never arise (but would, if a contingency was included, lead to reduced premium payments and therefore worse value for money for the Government and the taxpayer). In the event of decrease, the same process applies in reverse.

...

226. If Reset occurs on 1 April 2026, the franchisee obtains further protection (replacing and updating that offered by the PRSM). Upon Reset, the Financial Model will be updated based on the then current Recovery Plan. Reset operates by a run of the Financial Model and certain, specified cost and revenue items will be Reset Revised Inputs for the run of the Financial Model as set out in Schedule 8.7A. One of the Reset Revised Inputs is calculated by reference to the ... “the Deficit Contributions described in the 2026 Recovery Plan”. The 2026 Recovery Plan is the recovery plan that is current at 02:00 on 1

April 2026 and, for the purposes of Schedule 8.7A, includes the Schedule of Contributions applicable to that Recovery Plan. That is, the actual pensions deficit recovery contributions as at 1 April 2026 will be used in the Run of the Financial Model for calculating the Franchisee's premium payments.

227. By updating the financial model on Reset to ensure that the pensions deficit recovery payments payable at the 1 April 2026 were included, then the calculation of the Franchisee's premium would be based on that level of deficit recovery contributions and would, as a consequence, be lower, meaning that the risk of increase (as at 1 April 2026) is taken by the Secretary of State and so the bidders need not price in that contingency."

432. Mr Baghurst described the Reset provisions as meaning that, if there were to be a Reset Period, there would be "an immediate Reset adjustment with effect from 1 April 2026 to reflect actual deficit recovery contribution liabilities which, if they had changed relative to the previous financial model ... would mean a[n] update to premium payments." He returned to the theme in his second statement, describing the relative positions in the event of a switch to IOC terms or there being a Reset Period:

"If there is a switch to IOC terms, all cost risk including pensions cost risks (both DRCs and FSCs) passes to the Secretary of State so that the franchisee bears no risk at all from March 2026 onwards;

The Reset and post Reset (Pensions Deficit Contribution Change) mechanisms apply in the event that the franchise does not switch from ICWC Terms to IOC Terms on 1 April 2026. If the DfT does not serve notice to switch to the IOC Terms on 1 April 2026, those mechanisms apply during the "Reset Period" (1 April 2026 to 31 March 2031). [TEXT REDACTED] If there is, for example, subsequent to the finalisation of the 2025 valuation, an increase in the DRCs (beyond a small nil band ...) payable from July 2027, the DfT will provide protection in accordance with Schedule 8.7A Appendix 3 to the Franchise Agreement."

433. The Claimants submit that the pensions risks during any Reset Period were "objectively very large" and that, if any RWIND bidder had been told that it was likely to be subject to the Reset Period terms for two years longer than the default position, it would have been relevant to the bidder's assessment of whether the limitations in the PRP were acceptable. Those limitations are characterised by the Claimants in the same terms as their criticisms of the PRSM: see [154] above.
434. There are a number of formidable obstacles in the Claimants' path on Issue 5.2. The first is that WCTP advanced no evidence in support of the assertion that either their or other bidders' attitude would have been affected by receipt of the information on which they rely; nor did they advance evidence referable or relevant to the attitude of a RWIND tenderer. Given their pleaded case, as summarised above, it is a bad start

for the Claimants that Stagecoach's refusal to bid compliantly would have been entirely unaffected by the prospect of any pensions consequences of delay to HS2: they chose to bid non-compliantly across all three franchise competitions, of which only the WCP competition involved resetting. Neither they nor any other bidder raised a CQ about current prospects for timely delivery of HS2 in 2026, which they could have done had it been of any materiality to their thinking or the formulation of their bids. Stagecoach's financial modelling included the assumption that there would be delay for the whole 5 year period; but there is no other evidence that Stagecoach gave any consideration to the consequences of a delay to HS2 and whether it would be detrimental to their interests, even though (a) the prospect was plainly stated by the terms of the ITT and Franchise Agreement and (b) the Defendant had given no representation in the context of the procurement or otherwise that HS2 would in fact come on stream in time. This is only explicable on the basis that it was not a material factor in their thinking.

435. Second, and of equal importance, it was not put to Mr Clancy that First's attitude to the PRSM and the PRP would have been affected if First had known the information, which it should have been in order to lay any evidential foundation for the present submission. All that can be said with confidence is that Mr Clancy did not share Stagecoach's reservations about the limitations on the PRSM or the PRP and First was prepared to bid in the knowledge that the date of 1 April 2026 was not fixed and that there could be a Reset Period. He understood the mechanisms and their limitations; he also understood the concept of re-baselining and consequential premium reductions; and he assumed (as was reasonable even if others would not necessarily share his view) that if a question arose about an underlying contingency not being satisfied, the Department would, as with other similar clauses, enter into dialogue and would not wish to operate the mechanism in such a way as to put the franchise in financial difficulty.
436. Third, there is evidence (which I accept) that other bidders took a less jaundiced view of the protection provided by the PRSM than did Stagecoach. Apart from Mr Clancy, whose assessment was that both the PRSM and the PRP provided valuable protection such that First resolved that it could and should bid, there was on 3 December 2018 a series of email exchanges when Mr Griffiths was attending a dinner with representatives of other bidders. It became apparent that others did not share Stagecoach's views, with Go Ahead and Abellio saying that they thought the protection provided by the PRSM was better than what they currently had and better than the solution then being promoted by the RDG. In an email on 4 December 2018 to most of the relevant operating groups, including Mr Griffiths for Stagecoach, Mr Long of MTR said "We would like it to be made clear somewhere in [a proposed letter that was under discussion] that we support the current franchise bids being evaluated on the basis and methodology and assumptions that have been provided by DFT to bidders for each competition." The fact that the majority of bidders bid compliantly on pensions itself evidences that they were comfortable to bid compliantly against the overall package, including the protection provided by the PRSM.
437. Fourth, the case was not put to any of the Defendant's witnesses, which was necessary if the evidence of Mr Hayes and Mr Baghurst that I have set out above was to be challenged. This cannot simply be dismissed as being a necessary choice of subjects

under the exigencies of a pressured trial. Furthermore, to the extent that there was any cross-examination of Mr Hayes, it proceeded on the false basis of an assumption that the ICWC phase would be pre-HS2 and then the IOC phase would be once HS2 began. This was incorrect because, as Mr Hayes explained, the division was between pre-April 2026, which would be on ICWC terms typical of other franchises, and then from April 2026 when the Department had a choice about whether to move to IOC terms or not: although the Department needed to switch to IOC terms in order to operate HS2, it was not required that HS2 should be in operation in order for IOC to come into place. It was therefore not inevitable that the Department would trigger a Reset Period if HS2 was in delay: it might for reasons prevailing at the time (of which Mr Hayes gave a credible example in cross-examination) decide to switch to IOC terms in any event. Accordingly, delay to HS2 may not lead to a Reset Period or to the risk of any further exposure to pensions liabilities.

438. Fifth, the Claimants' case does not acknowledge the beneficial effect of the re-baselining that would occur if there was a Reset Period which, of itself, would reduce potential pensions liabilities as explained by Mr Baghurst as set out above.
439. Sixth, the Claimants have not addressed the question whether a franchisee either when bidding or in 2026 might regard a Reset Period as overall more favourable than a switch to IOC terms. This is fundamental for Issue 5.2 because, at least in theory, if a franchisee thought that Reset Period terms were overall more favourable than IOC terms, its attitude to a disadvantageous component part of the overall package may be more benign and accepting than if it thought the opposite were true. Nor is it simply a theoretical or abstract objection to the Claimants' case. Mr Clancy and First took the commercially sensible approach of [TEXT REDACTED]. There is no basis for questioning or dismissing that assessment, which is the only direct evidence about how other bidders would or might react to the news of delay to HS2.
440. Seventh, although the PRP left the risk of FSCs with the franchisee (for reasons discussed elsewhere in this judgment) and was subject to contingencies as applied to the PRSM, a bidder might reasonably form the view that FSCs were likely to be stable and that any discretion would be exercised by the Defendant on a principled basis so that those risks, though not protected by the PRP, were manageable and not disturbing in the context of a possible delay in the switch to IOC terms.
441. These objections taken in conjunction with the evidence of Mr Hayes and Mr Baghurst set out above, which I accept, lead me to conclude that there is no sound basis for a finding that information that HS2 was increasingly likely to be delayed or cancelled would have been likely to have affected bidders' attitudes to the Defendant's proposals on the PRSM. This is not merely a failure of proof on the part of the Claimants: on the evidence and for the reasons set out above, I find it to have been probable that the information would not have affected bidders' attitudes. I therefore answer Issue 5.2 in the negative.

Issue 6. Were the decisions to disqualify the Claimants' bids unlawful for the reasons alleged by the different Claimants?

6.1. Inherent illegality: Was the Claimants' disqualification unlawful because of some underlying illegality in the ITT, the Re-Bid Instructions and/or the transfer of the pension risks itself (see Issues 1, 3 and 4 above)?

6.2. Undisclosed criteria: Did the Defendant breach his duties of transparency and/or fairness by taking the decision to disqualify the Claimants' tender responses on the basis of undisclosed evaluation criteria and / or methodologies by:

6.2.1. applying a scale for non-compliances (on a scale of 1 to 5); and/or

6.2.2. allegedly treating a refusal to accept the terms of the Franchise Signature Documents as automatically warranting a high rating; and/or

6.2.3. relying on or taking account of his conclusion that he could make an award to pensions-compliant bidders, which itself is alleged to have been based on the application of undisclosed criteria (see sub-issues 9.1.2, 9.5 and 9.6.3 below)?

6.3. Proportionality:

6.3.1. Did the Defendant have alternative, more proportionate options open to him instead of disqualification?

6.3.2. Was the Defendant required to consider those alternatives?

6.3.3. If so, did the Defendant breach his duties of proportionality by failing to adopt any of those alternatives?

6.4. In disqualifying the Claimants, did the Defendant breach his said obligations of fairness, proportionality and/or equal treatment, and/or make any manifest errors, by allegedly:

6.4.1. [Gone]

6.4.2. treating "inconsistency with the Department's policy" as a reason to exercise his discretion to disqualify (as opposed to a trigger for the non-compliance discretion to arise); and / or

6.4.3. failing to quantify the financial impact of the pensions non-compliance on the Defendant; and / or

6.4.4. [WCTP] omitting to take account of the fact that the Claimants' proposals would allegedly have no impact if the Defendant's view of the "most credible financial outcome" were to materialise; and / or

6.4.5. wrongly concluding that the Claimants' bids could not be compared fairly with compliant bids; and / or

6.4.6. failing to have regard to the impact of the non-compliance on the Defendant's objectives, as set out in table 2.1 of the ITTs; and / or

6.4.7. [Gone]

6.4.8. accepting bids which ignored and failed to consider pension risks, but disqualifying bids which allegedly rationally addressed pension risks in a manner consistent with the successful delivery of the franchise; and / or

6.4.9. omitting to take account of HMT's and/or the Defendant's change in policy as to the appropriate extent of pension risk-sharing in future franchises; and/or

6.4.10. [Gone]

6.4.11. [Gone]

6.4.12. relying on or taking account of his assessment of the financial robustness of bids which the Claimants allege to have been unlawful (see issue 9 below)?

6.1. Inherent illegality: Was the Claimants' disqualification unlawful because of some underlying illegality in the ITT, the Re-Bid Instructions and/or the transfer of the pension risks itself (see Issues 1, 3 and 4 above)?

442. For the reasons set out in relation to Issues 1, 3 and 4 above, I answer Issue 6.1 in the negative.

6.2. Undisclosed criteria (first part): Did the Defendant breach his duties of transparency and/or fairness by taking the decision to disqualify the Claimants' tender responses on the basis of undisclosed evaluation criteria and / or methodologies by:

6.2.1. applying a scale for non-compliances (on a scale of 1 to 5); and/or

6.2.2. allegedly treating a refusal to accept the terms of the Franchise Signature Documents as automatically warranting a high rating;

443. The Claimants formulate their approach to these issues by reference to a non-compliance log maintained by the Defendant during the process of evaluating bids. The Claimants submit that the Defendant's approach (which is alleged to have amounted to an undisclosed policy or criterion for the evaluating of bids) was to treat any refusal to accept the terms of the Franchise Agreement that involved a transfer of risk to the Secretary of State as an especially serious form of non-compliance, which should result in disqualification. They submit that the non-compliance log included an undisclosed scale of 1-5 for rating the "seriousness" of non-compliances on which scale non-compliances involving a transfer of risk to the Secretary of State would be given a high mark. It is also submitted that this amounted to an undisclosed policy or criterion which contradicted the terms of the ITT because Section 3.5 and paragraph 7.2.1.5 of the ITT provided for non-compliant bids to be accepted and compared with compliant bids.

444. The Defendant submits that the non-compliance log was no more than an administrative tool for use in deciding on the allocation of resources, and that ascribing a high mark on the non-compliance log did not either predetermine or pre-suggest the outcome when the Defendant came to exercise its discretion on how to react to a particular non-compliance or to certain types of non-compliance in general. It submits that there was no policy (undisclosed or otherwise) that non-compliances involving a transfer of risk to the Secretary of State should result in disqualification. That does not detract from the fact that, overall, the Defendant submits that the non-

compliances in these cases were so serious that disqualification was the correct exercise of the Defendant's discretion.

445. The relevant principles are summarised at [29]-[37] above.
446. In support of their submissions, the Claimants refer to the structure of the ITT which made provision for non-compliant bids to be treated in ways falling short of disqualification. They then characterise the evidence about the non-compliance log as showing the existence of the non-disclosed policy that is alleged to give rise to this issue.
447. The Defendant maintained a non-compliance log which was based on a template. I accept the evidence of Ms Palmer that each project was given the same template and could customise it as they wished by adjusting its application to the specific features and circumstances of the particular competition on which they were working. The template provided for potential non-compliances to be rated on a scale from 1 to 5, with 1 being low and 5 being high. The template allocated descriptions to each number on the scale, ranging from "ignore" for 1 up to "consider elimination" for 5. It was open to people taking part in the processing of bids to substitute their own labels for each number and some did so. For example, Eversheds Sutherland relabelled 1 or 2 as "Minor – a technical non-compliance..." and progressed up to 5 which was relabelled as "Serious – an amendment to the terms of a Franchise Signature Document which alters the risk allocation as between DfT and Franchisee or a disregard by the bidder of the procedural requirements of the ITT ...". The Eversheds Sutherland template separately recorded "Available Decisions", which were not correlated to the 1-5 scale and ranged from "Ignore" through "Dialogue with bidders" and "Adjust ITT e.g. if DfT wishes to accept non-compliance and apply to all bidders" to "Eliminate".
448. The use to which the 1-5 scale was put does not appear on the face of the documents. However, I accept the evidence of Ms Palmer, Mr Hayes, Mr Brandenburger and Mr MacDonald that it was treated solely as an administrative tool, the purpose of which was to assist in prioritising which identified potential non-compliances should be worked on first either because of their complexity or their potential seriousness. I refer to "potential" non-compliances because I accept the evidence of Mr Hayes that entering something on the log did not mean that it would ultimately be treated as a non-compliance. I accept and find that, at a later stage in the process, the evaluation of the potential non-compliances was carried out by a different team that was kept separate from the team that did the administrative prioritisation using the 1-5 scale. The scale was not itself a part of that later evaluation of non-compliances. In Mr MacDonald's words, the scale was used "as a means only to identify whether the non-compliances were significant for the purpose of allocating administrative resource and did not form any part of the evaluation process itself." In short, though the phrase is ugly, I accept Ms Palmer's evidence that the scale was conceived and applied as "an internal administrative prioritisation tool" and not as part of the substantive evaluation process. It was not itself part of the methodology by which the Defendant decided how to respond to non-compliances. Decisions on how to respond came later and were not influenced or determined by the scale. The scale did not amount to an evaluation criterion or sub-criterion (however described) used by the Defendant (or any members of the teams for whom it was responsible) in deciding whether to disqualify the Claimants or in making other material decisions.

449. On these findings of fact, the existence and use of the non-compliance log scale neither was nor evidences the existence of an undisclosed policy as alleged by the Claimants. Nor was its existence or use inconsistent with what bidders were told in the ITT. The provisions of the ITT left the principled exercise of the discretion about how to react to non-compliances with the decision-maker, as explained elsewhere in this judgment; and neither that discretion nor its exercise was affected by the existence or use of the non-compliance log scale. Thus, whatever number had been allocated in the non-compliance log, it remained for the decision-maker to decide how serious a given non-compliance was and how it should be treated. Even a non-compliance involving allocation of risk to the Secretary of State could be trivial by, for example, an adjustment and identifiable transfer of a few hundred pounds. No one suggests that the Claimants' non-compliances were of such triviality; but if they had been, the existence of the principled discretion would protect the Claimants, whatever rating was ascribed in the non-compliance log – just as with the adoption of wrong font size. The allocation of a number in the non-compliance log was separate from and irrelevant to the exercises of discretion that led to the disqualification of the Claimants in these cases. The use of the non-compliance log scale thus falls within the ambit of the leeway that was available to the Defendant in carrying out its evaluation: see [37] above.
450. In my judgment there is no evidence of the existence of an undisclosed policy that all non-compliances involving the allocation of risk to the Defendant were to be treated as an especially serious form of non-compliance. The fact that the Claimants' non-compliances on pensions were treated as significant and justifying disqualification does not evidence such a policy because, as a matter of fact, they *were* significant and serious, as the Claimants themselves always recognised. Whether the exercise of the discretion to disqualify can be challenged on other grounds remains to be seen and is the subject of later issues.

6.2.3 Undisclosed criteria: Did the Defendant breach his duties of transparency and/or fairness by taking the decision to disqualify the Claimants' tender responses on the basis of undisclosed evaluation criteria and / or methodologies by:

... relying on or taking account of his conclusion that he could make an award to pensions-compliant bidders, which itself is alleged to have been based on the application of undisclosed criteria (see sub-issues 9.1.2, 9.5 and 9.6.3 below)?

451. By their closing submissions, the Claimants link this sub-issue to Issue 6.4.12 (“unlawful conduct in relying on or taking account of his assessment of the financial robustness of bids which the Claimants allege to have been unlawful (see issue 9 below)”). In stating the findings for which they contend they focus on the Defendant's use of the PwC Analysis. The Defendant adopts a different approach, suggesting that this sub-issue is effectively subsumed by Issues 9.1.2, 9.5 and 9.6.3, and deals with the purpose and use of the PwC Analysis elsewhere in their submissions.
452. The Claimants deal separately with the question whether the commissioning and use of the PwC Analysis was a departure from the methodology prescribed by the ITT when tackling Issue 9.4. It is convenient to deal with all issues arising from the PwC Analysis in one place. I shall deal with them under Issue 9.4. On that basis, I do not

understand that there is any separate substance left in Sub-issue 6.2.3 and will deal with Sub-issues 9.1.2, 9.5 and 9.6.3 below.

Issue 6.3. Proportionality:

6.3.1. Did the Defendant have alternative, more proportionate options open to him instead of disqualification?

6.3.2. Was the Defendant required to consider those alternatives?

6.3.3. If so, did the Defendant breach his duties of proportionality by failing to adopt any of those alternatives?

453. The Claimants submit that either a further rebid or cancellation of the three competitions would have been “more proportionate” options open to the Secretary of State. During the trial the Claimants suggested that there might have been a re-evaluation of the pricing of their bids in accordance with either paragraph 3.5.4 or paragraph 7.2.1.5 of the ITT.
454. The Claimants correctly submit that the ITT made provision for other outcomes than disqualification in the face of non-compliances. They characterise their non-compliant approach to pensions risks as being consistent with the Defendant’s policy following the Brown Review which they assert will be adopted in future competitions; and they point to the fact that, at an earlier stage, the DfT had proposed a more extensive risk sharing mechanism (described at the time as “hypothetical”) than was finally adopted as the PRSM. They also point to the fact that the Secretary of State was advised that while no leading bid had explicitly considered future valuation risks and considered how to address them, at least one pensions compliant bid had done: see paragraph 12 of Annex A to the CCS. They rely upon the evidence that, on the Defendant’s view of the most credible financial outcome, their pensions non-compliances would have no adverse financial impact, which they say was a highly relevant consideration. And they assert that “there were other options available to the [Secretary of State] which were less restrictive of the Claimants’ interests”.
455. It is immediately to be noted that the Claimants’ use of “more proportionate” in this context means “less restrictive of the Claimants’ interests”. There is no sensible basis for arguing that any of the participants other than the Claimants would have regarded either a further rebid or cancellation of any or all of the competitions as a more proportionate response to the Claimants’ non-compliances on pensions.
456. It is common ground that proportionality must be considered in context. Unsurprisingly, the Defendant’s approach to relevant context barely overlaps with that of the Claimants. Put shortly, the Defendant relies upon the contextual evidence that shows the Claimants’ non-compliance to have been deliberate and sustained and in the full knowledge of the high risk that disqualification would follow. I have made my findings on this evidence: see [172]-[173] above for a relatively brief summary. In addition, the earlier iterations of the PRSM and the Department’s views on the meaning and applicability of the Brown Review fade from direct relevance once the Department set out its actual and current policy on risk allocation by the terms of the ITT, the re-bid Instructions and the draft Franchise Signature Agreements.

457. The starting point is the terms of the Defendant's discretion. It arose from the provisions of the ITT and was to be exercised in a principled manner as outlined at [44]-[56] above. It fell to be exercised having regard to the interests and legal entitlements not only of the Claimants and the Defendant but of the other bidders, particularly those who had bid compliantly. Because, as I have held, the terms of the ITT and re-bid Instructions allocating the pensions risks were not inherently unlawful, it cannot be suggested that the Claimants had any public or private law right to have their proposed terms as to risk allocation imposed on compliant bidders, whether by way of a rebid or, more drastically still, by cancellation with or without a follow up competition. The principles of equal treatment and transparency upon which the Claimants rely in support of their interests applied equally to protect the interests of compliant bidders, the difference being that they had complied with the requirements of the ITT and had a legitimate public law interest in the treatment of their compliant bids satisfying the principles of equal treatment and transparency that I have outlined at [26]-[36] above. In such circumstances, the Defendant's discretion *not* to disqualify was circumscribed by the principles of transparency and equality of treatment. An obligation to treat other bidders fairly and equally did not remove the Defendant's undoubted discretion – but it provided reasons why the discretion should be exercised in a particular way.
458. I have summarised the relevant principles of proportionality at [57] ff above. The Claimants had no legal right to insist upon their preferred allocation of pensions risk. The exercise of the Defendant's discretion concerning the Claimants' non-compliances accordingly fell within the scope of EU law; and it did so without imposing restrictions on an established right conferred by the EU Treaties. That being so the court would only intervene with his exercise of the discretion on proportionality grounds on proof that the exercise was "manifestly inappropriate".
459. The theoretical alternatives to disqualification were:
- i) Repricing the Claimants' bids pursuant to paragraphs 3.5.4 or 7.5.1.2 of the ITT;
 - ii) Disregarding the non-compliance, adjusting the requirements of the ITT and giving all bidders the opportunity to adjust or update their bids to reflect the revised requirements, or requiring any or all Bidders to adjust or update their bids so that they are compliant pursuant to paragraph 3.5.5 of the ITT. No one suggests that disregarding the Claimants' non-compliance was a feasible option and I do not consider it further;
 - iii) Ordering a rebid on the Claimants' chosen terms as to allocation of pensions risks as provided for in paragraph 7.12.1 of the ITT; or
 - iv) Cancelling the current competitions, with or without replacing them by a substitute competition incorporating the Claimants' chosen terms as to allocation of pensions risks, as provided for in paragraph 1.9.1 of the ITT.
460. As a preliminary matter of fact, I accept the evidence of Mr Hayes that the Department did consider alternative options but concluded that the only option available in terms consistent with the principles of equal treatment, fairness, transparency, non-discrimination and proportionality was disqualification. That is

also reflected in the CCS and the Secretary of State's reasons and reasoning as found at [372] above.

461. Turning first to the option of repricing the Claimants' bids as provided for by the ITT, there is a pervasive ambiguity and lack of clarity in the Claimants' case that seems to me to be fundamental to this option and, more generally, to this issue. The Claimants have not made clear whether it is their case that, after a repricing exercise (however conducted), the Defendant should have contracted with the Claimants (a) on terms that incorporated their proposed allocation of risk or (b) on the Defendant's terms as set out in the ITT and rebids. This problem is not merely hypothetical because the Claimants had confirmed repeatedly (including by their original bids, face-to-face with the Secretary of State and by their responses to AQ218) that they were not prepared to contract on the Defendant's terms; and there was and is no obligation upon the Defendant to contract on Stagecoach's. Taking for the moment the prospect of the Defendant contracting with the Claimants on Stagecoach's favoured terms, what would have been required was a repricing of the compliant bids in an attempt to bring them into line with the Claimants' approach. Taking the alternative prospect of contracting with the Claimants on ITT terms (and ignoring for the moment the fact that the Claimants would not do so), that would require repricing the Claimants' bids in an attempt to bring them into line with the compliant bids. Assuming either of these routes to have been possible for the Defendant, it would appear to have been the clearest possible breach of the principle of equal treatment to have done so without reverting to the compliant bidders. The risk of a challenge would have been not merely high but virtually certain; and the outcome would have been very likely to be adverse to the Defendant. So, in practical terms, a repricing could not have led to the Defendant contracting with the Claimants either on the terms set out in the ITT or on the terms proposed by the Claimants. This ambiguity, which was identified during the trial, has not been addressed, still less clarified, by the Claimants.
462. In the event of a re-pricing, rebid or cancellation and new competition, there is no direct evidence to suggest whether, and if so how, the other (compliant) bidders in the competition would have reacted and whether (and, if so, with what financial consequences) they would have been prepared to restructure their compliant bids to take into account the terms now being adopted or imposed in order to accommodate the Claimants' wishes. However, First's submissions in this action support the assumption, which I make, that they would have objected to any other route than disqualification of the Claimants on equal treatment and transparency grounds.
463. There were powerful reasons why the Secretary of State neither should nor, in practical terms, could reasonably have exercised his discretion so as to engage in a repricing exercise as suggested by the Claimants.
- i) The first is that it would have exposed him to public law claims from compliant bidders who would have relied upon the principles set out at [26]-[37] above in submitting that the principle of equal treatment of tenderers and transparency required that Stagecoach should not be permitted to depart from the basic terms and fundamental requirements of the ITT as to allocation of risk and that continuing with the Claimants' bids breached that principle. The potential for such claims existed whether the Defendant re-priced and adjusted the terms of the Claimants' bids to make those terms compliant (i.e. the course which the Claimants had resolutely refused to take) or performed some other

exercise which retained the Claimants' chosen terms as the basis for contracting.

- ii) Second, there was no good reason for the Secretary of State (or, now, the court) to think that the Treasury would or might accept the Claimants' terms about allocation of risk, even if it were possible to carry out a re-pricing exercise to "equalise" the Claimants' bids with those of the compliant bidders: see [228]-[229] above.
- iii) Third, I accept the submission that it was not possible by reference to a repricing as permitted by the ITT to reach a position that genuinely compared the Claimants' adjusted bids with those of the compliant bidders. It is no answer to say that the Defendant assessed the most credible outcome of incorporating Stagecoach's extension of the PRSM to cover all future valuations as having no net effect for the Defendant. As Mr Baghurst explained in evidence:

"The price that the other bidders offered took account of the risk that they were taking on. The Stagecoach bid, their price didn't take account of that risk that would have potentially caused the Department to incur costs, and so the two prices were not comparable. An adjustment to the price to take account of the potential cost to the Department wouldn't have made the bids comparable."

In deciding whether to conduct a repricing exercise, the Defendant would have been bound to take into account that adding in the extended pensions risk would inevitably reflect somewhere in the contract price. As Mr Macdonald explained in evidence, there could be diverse perceptions of the pensions risk that would have been factored in to the compliant bids; and there could be no confidence that the Defendant could make an adjustment to the Claimants' bids (or the compliant bids) that accurately represented the Claimants' evaluation of the risk or that of their competitors. In other words, irrespective of what would be the outcome of following the procedure laid down by paragraphs 3.5.4 or 7.2.1.5 of the ITT, had the Defendant chosen to use them, it was not possible to quantify the financial impact of the pensions non-compliance on price with any reliability, as had been pointed out by Grant Thornton in their email on 12 February 2019. Nor would it have been possible to predict how a compliant bidder's bid would have changed if they had known that the Claimants' allocation of risk would be acceptable and accepted. I therefore accept the accuracy of First's submission that quantifying the financial impact on the Defendant does not address the discrete issue of the impact on the other bidders of accepting the non-compliance and does not address the requirements of equal treatment. These considerations would feed directly into a compliant bidder's challenge based on breaches of the principles of equal treatment and transparency: as it was not possible to compare compliant and non-compliant bids on a genuine like-for-like basis, any attempt to do so would involve treating the bidders unequally.

- iv) Fourth, the suggestion of a repricing ignores the fact that it could not benefit Claimants whose scores were already evaluated as falling short of being the

preferred bidder. For example, in the WCP competition, First's score was so far ahead of the other two bidders' scores that it alone was taken forward. The Claimants were assessed as coming last in each competition, though the SE competition evaluation was incomplete when SSETL was disqualified. Paragraph 3.5.4 of the ITT provided that the scoring of the Bid may not be improved as a result of the process set out in that section; and paragraph 7.2.1.5 provided that the exercise "shall only reduce" the value of P used in the calculation of the Final Score for that bid. Quite apart from those provisions, the Claimants' position could only be worsened by repricing to take into account the reallocation away from them of a risk now described by the Claimants as enormous. Repricing and reassessment that took into account the fact that the Claimants had not originally accepted the pensions risks could only make them even less competitive than they were already. This has the look of an exercise in pure futility.

464. For these reasons, the notion of a repricing of Stagecoach's bid within the context of the existing competitions was not a feasible or reasonable exercise of the Defendant's discretion as an alternative to disqualification.
465. Turning to the possible implementation of paragraph 3.5.5 of the ITT, the Defendant gave SSETL the opportunity to adjust or update its bid so that it was compliant in the SE competition by AQ218 and AQ219, which offer had been refused. It would have served no useful purpose to try yet again, either in that competition or in the others. The alternative of adjusting the requirements of the ITT and giving all bidders the opportunity to adjust or update their bids to reflect the revised requirements proposed by the Claimants effectively amounted to a further rebid, which I consider next.
466. The ITT made provision for a rebid at paragraph 7.12.1. There was a residual discretion to require some or all bidders to submit revised bids in the event that the Department at its sole discretion considered it would be appropriate in the circumstances to do so, for any reason. That discretion would have to be exercised on the same principled basis as applied to the Defendant's discretion to disqualify. Calling upon the Claimants alone to submit a compliant rebid would have been an idle exercise given the Claimants' confirmation that they had no intention of complying on pensions and because it would have run into precisely the same issues of equal treatment and transparency as would have applied to a re-pricing exercise. Therefore the only option would have been to call for a rebid from all bidders.
467. Once again, adopting this course would have been fraught with difficulty and danger. In terms of practical difficulty, the Claimants' non-compliances went beyond the limited indication that the Chief Secretary to the Treasury had given in her letter of 4 October 2018 and the Treasury had given about future competitions in Mr Duffy's letter of 25 January 2019, in which the Treasury had also reaffirmed that the current competitions should be conducted on the basis of the PRSM: see [225] and [295] above. There was and is therefore no reason to think that the Treasury would, if asked, change its stance in order now to accommodate the Claimants' wishes. The second practical difficulty is that a rebid would cause delays in competitions that were already up against the wire on timing, which could prejudice the implementation of cost and operational improvements. Third, the risk of a successful challenge by compliant bidders would remain acute on equal treatment and transparency grounds: this risk was adverted to by paragraph 23 of Annex A to the CCS. There was an

obvious and serious risk that a rebid would lead to a finding that the Defendant was treating the Claimants' bids differently and more favourably than the compliant bids who had accepted the full extent of the risk as laid down in the ITT.

468. Once again there is a pervasive ambiguity at the heart of the Claimants case: on what terms should a putative rebid be held and why? There was no obligation to be derived from public or private law principles that required the Defendant to contract on the Claimants' preferred terms. Quite why the Claimants' wishes should be given precedence over the terms on which the Defendant proposed and the compliant bidders agreed to contract has never been answered by the Claimants.
469. In my judgment, these reasons singly and cumulatively provided compelling justification for not requiring a further rebid: further rebids were not a practical or feasible alternative to disqualification of the Claimants.
470. The last and most draconian potential exercise of the Defendant's discretion was to cancel the competitions. It is true that the Secretary of State was considering the possibility of cancelling all three competitions in February/March 2019 and that he called for further work on the operational difficulties facing the compliant bids on the SE competition. But it is not obvious why the Claimants' unwillingness to bid compliantly should, of itself, have been used as a reason for cancellation. I have recognised that Stagecoach may have had in mind that, if all bids were non-compliant, the Defendant might have to think again: see [182] above. But that is not what had happened, as the majority of bids were compliant on pensions. Once again, the same objections arise as applied to a putative rebid, including the lack of any substantial answer to the question on what terms should new competitions be conducted and why?
471. I accept that there was no objective justification for treating the non-compliances differently in different competitions, since the magnitude of the non-compliances were essentially the same and the potential objections to any alternative course were essentially the same in each case. Because I have not heard full argument in the context of a challenge by compliant bidders on equal treatment grounds in circumstances where the Defendant had chosen another option, and because the ingenuity of arguments based upon deceptively simple principles such as transparency and equality of treatment sometimes appears to know no bounds, I am cautious about expressing a final view that a challenge by compliant bidders would definitely have been successful. However, on the basis of the wide-ranging arguments during this trial, my view is that, if the Defendant had chosen any other route than disqualification, the risk of a successful challenge by compliant bidders would have been extremely high and not a risk that the Defendant could sensibly contemplate unless absolutely compelled to do so, which he was not. Viewed from the perspective of the Defendant therefore, the public law risks inherent in any other course than disqualification should have been potent and highly persuasive. With this in mind, the use of the word "compelling" is apt.
472. I therefore conclude that there were very substantial and persuasive practical and legal objections to the Defendant exercising his discretion in any way other than by disqualifying the Claimants from each competition. To use the language of being "compelled" to disqualify requires the explanation I have just given because it may otherwise suggest the absence of a discretion, which would be wrong. It was a

linguistic trap into which a number of witnesses fell; but their fall was understandable when viewed fairly and in context. Their meaning was clear: the objections to other courses of action led inexorably to the conclusion that disqualification was the proper exercise of the Defendant's discretion.

473. The questions of proportionality raised by Issue 6.3 cannot be finally resolved without returning to the nature and extent of the Claimants' non-compliance on pensions. It is described in detail elsewhere in this judgment. In my judgment the Defendant is justified in describing the breach as "not ... a minor or incidental non-compliance but a directly confrontational refusal to accept the allocation that was clearly and specifically" (and, as I have found, lawfully) "set out in the Pensions Rebid Instructions." And it was a breach deliberately committed in full knowledge of its seriousness and the very high risk of disqualification.
474. Placing all these matters in the balance, it is impossible to conclude that the Defendant's decision to disqualify the Claimants was "manifestly inappropriate". For the avoidance of any doubt, if the threshold had been the more restrictive test applicable in cases of infringement of rights guaranteed by the Treaties, I would conclude that the objections to any alternative course that I have summarised in this section were so substantial as to justify the decision to disqualify rather than to adopt any other course.

Issue 6.4. In disqualifying the Claimants, did the Defendant breach his said obligations of fairness, proportionality and/or equal treatment, and/or make any manifest errors, by allegedly:

6.4.2. treating "inconsistency with the Department's policy" as a reason to exercise his discretion to disqualify (as opposed to a trigger for the non-compliance discretion to arise); and / or

6.4.3. failing to quantify the financial impact of the pensions non-compliance on the Defendant; and / or

6.4.4. omitting to take account of the fact that the Claimants' proposals would allegedly have no impact if the Defendant's view of the "most credible financial outcome" were to materialise; and / or

6.4.5. wrongly concluding that the Claimants' bids could not be compared fairly with compliant bids; and / or

6.4.6. failing to have regard to the impact of the non-compliance on the Defendant's objectives, as set out in table 2.1 of the ITTs; and / or

6.4.8. accepting bids which ignored and failed to consider pension risks, but disqualifying bids which allegedly rationally addressed pension risks in a manner consistent with the successful delivery of the franchise; and / or

6.4.9. omitting to take account of HMT's and/or the Defendant's change in policy as to the appropriate extent of pension risk-sharing in future franchises; and/or

6.4.12. *relying on or taking account of his assessment of the financial robustness of bids which the Claimants allege to have been unlawful (see issue 9 below)?*

475. In closing submissions, the Claimants referred to the “somewhat atomised” nature of the issues in Issues 6.3-6.4. Their approach was to regroup the issues under five main headings, of which one was that the disqualifications were a disproportionate response to the Claimants’ non-compliances, which I have just addressed under Issue 6.3. The regrouping is helpful in identifying what case the Claimants now pursue, and I will follow their case as now presented. It is not always obvious how the Claimants’ new groupings relate to the issues as agreed between the parties for determination. For completeness, therefore, I will provide short form answers to each sub-issue that has not been expressly abandoned.
476. The Claimants’ four remaining groupings are as follows:
- i) Error of law: incorrect view that disqualification was the only option.
 - ii) Manifest errors: misleading Ministerial Submission.
 - iii) First reason in notification letters: “inconsistency with the Department’s policy”, if it was a relevant reason of the Secretary of State, was not a lawful reason for the exercise of the discretion to disqualify.
 - iv) Second reason in notification letters: “tendered price cannot be compared on a fair basis with the prices tendered by bidders submitting compliant bids”, if it reflected a relevant reason of the Secretary of State, was manifestly erroneous.
477. As an overarching point, the Claimants contend for a finding that it is not possible for the court to determine what the reasons of the Secretary of State were for the disqualifications save that (a) it is to be inferred that the Secretary of State relied on the PwC Analysis in deciding to disqualify the Claimants, and (b) the Secretary of State decided to disqualify the Claimants because of legal advice that he was required to do so. In particular, they submit that the Defendant has not established that the reasons given in its letters of 9 April 2019 were the reasons of the Secretary of State. This point can be partially unpicked at the outset.
478. I have made my findings about the reason for the disqualifications and the supporting reasoning that is shown on the evidence to have been relevant at [359] to [373] above. The submission that the Secretary of State relied on the PwC Analysis in deciding to disqualify the Claimants is addressed separately at Issue 9.4 below. For the reasons given there, I do not accept the submission. The submission that the Secretary of State decided to disqualify the Claimants because of legal advice that he was required to do so is based by the Claimants primarily upon what the Secretary of State said to the Transport Select Committee, which I have excluded for the reasons given at [77] to [101] above, though they also rely upon paragraph 44 of the CCS. For the reasons explained when deciding Issue 6.3, I would accept that, as a matter of fact, the legal risks attendant upon changing the basis of risk allocation were high and unacceptable; and that they formed part of the Secretary of State’s reasoning, as I have found. Since the Claimants had rejected the possibility of contracting on the terms of the ITT, the effect of the legal risks attendant upon changing the basis of risk allocation can reasonably be described as “compelling” in favour of disqualification.

479. I reject the submission that the Defendant could not have been criticised for acting non-transparently or unequally by implementing a different option which was expressly contemplated by paragraphs 7.2.1.5 or 7.12.1 of the ITT, for the reasons already given. Financial adjustment or a rebid could be available in other circumstances which did not go to the fundamental or basic terms of the procurement; but in this case the Secretary of State was constrained by the position of the compliant bidders and the duties of transparency and equal treatment as already explained. Nor is it any answer to submit that the compliant bidders were on an equal footing in enjoying no right that the Defendant would respond in any particular way to a non-compliance and no right that the Defendant would take the competition to a conclusion based on the existing rules and requirements of the procurement. As a general proposition that is correct, but it does not assist in determining whether the Defendant's exercise of his discretion in deciding to disqualify these Claimants for serious non-compliance on basic terms was lawful. On the facts of these cases, the Secretary of State was entitled to keep the competitions running and to exercise his discretion in favour of disqualification. It does not take the argument further to submit that the Secretary of State *could* have taken the view that the evaluation mechanism contained in the ITT was not capable of assessing robustness of bids to withstand downside risks. The Defendant was not obliged to include any test of robustness and was not obliged to change tack after receipt of compliant bids simply because the FRT that he had put in place did not give total assurance of financial robustness.

Error of law: incorrect view that disqualification was the only option.

480. The Claimants seek a finding that the decision to disqualify the Claimants was based on an error of law, namely an incorrect view that disqualification was the only lawful option. Even if what the Secretary of State said to the Transport Select Committee were taken into account, that is not what he said; nor is it what is said in the CCS or the decision letters. Nor is it consistent with what I have found to be the relevant reason and reasoning on which the evidence shows the decision to disqualify was made. There is, in my judgment and understanding, a material difference between saying and meaning that disqualification was the only option and saying and meaning that the legal risks in adopting any other course led to the conclusion that the Claimants could and should be disqualified.

Manifest errors: misleading Ministerial Submission.

481. The Claimants seek findings that the disqualifications were manifestly erroneous in that they were taken on the basis of a Ministerial Submission which contained misleading omissions and errors as to (a) whether PwC had provided independent advice that leading bidders had "fully and properly evaluated the risks"; (b) the limitations in the analysis undertaken by PwC; and (c) the true course of negotiations with the Treasury.

482. The CCS did not say that PwC had provided independent advice that leading bidders had "fully and properly evaluated the risks". The quoted words derive from Ms Hannant's email to Mr Wilkinson and others on 20 February 2019, which I have addressed in detail at [311]-[312] above, finding that the impetus for the workstream that led to the PwC Analysis came from the Permanent Secretary. The second limb of the first workstream referred to bidders fully and properly evaluating the risks should

pension risks materialise. That work was not ultimately done, as Mr Baghurst accepted and the CCS neither said nor implied that it had been. The Claimants rely on citations from paragraphs 41 of the main text and 17 of Annex A to the CCS which are set out in full and in context at [336]-[337] above. The following points immediately emerge:

- i) Both paragraphs refer to the scope of PwC's work being limited to considering the effect if pensions risks were to crystallise "in isolation";
- ii) Paragraph 41 of the main text refers to PwC being commissioned to review the reasonableness of the assumptions employed "if pensions risks were to crystallise in isolation" and then describes what PwC had done and their conclusions with reasonable accuracy;
- iii) Paragraph 43 of the main text gave a further indication of the limited nature of the PwC Analysis, saying that "an independent review has provided reassurance that the leading bids are robust *in a number of downside pensions scenarios (albeit in isolation from other downside financial factors).*" (emphasis added);
- iv) Paragraph 12 of Annex A told the Secretary of State that "while no leading bid has explicitly considered future valuation risks and considered how to address them, at least one pensions compliant bid has done", which would be an antidote to any prospective belief that PwC's advice was that all compliant bidders had fully and properly evaluated the pensions risks;
- v) Paragraph 17 of Annex A again referred to the scope of PwC's work as being an assessment of the impact of pensions and pensions related risks materialising and said PwC "have concluded that, in isolation, risks should be bearable and the bidding approach/strategy does not look unreasonable. This is because any downside risks that do materialise could be absorbed by not paying dividends as planned and by drawing down on [PCS]".

483. When taken in context, I do not accept that the passages on which the Claimants rely were capable of materially misleading the Secretary of State about what had been done by PwC. On the contrary, neither of the passages on which the Claimants rely said or implied that the compliant bidders had fully and properly evaluated all pensions risks. Even if I were wrong and the initial impetus for the first workstream came from the Secretary of State rather than the Permanent Secretary, the terms of the CCS upon which the Claimants rely, when read in full and in context, are not materially misleading.

484. Turning to the limitations of the PwC Analysis, the Claimants rely upon the same two paragraphs in the main text and Annex A to the CCS. Their submission is that the CCS was misleading because it did not tell the Secretary of State that the PwC Analysis had not included any consideration of further regulatory intervention. I am unable to accept the submission. When read fairly and in context, the CCS told the Secretary of State that the PwC Analysis was limited both in treating pensions risk in isolation and by taking "five increasingly punitive scenarios" for the three competitions. It did not suggest that the scenarios were, either singly or in combination, exhaustive of the risks that could materialise or that one of the scenarios

that PwC had taken either was or was not a risk of further regulatory intervention. To my mind, the reference in the CCS to the tests being “punitive” was reasonable and, overall, the references to the PwC Analysis merely suggested that it gave *some* assurance and comfort and did not materially overstate what had been done. The CCS was wrong in stating that no FRT results were known on any competition but, to my mind, this could not have had a materially misleading effect in the context of the CCS as a whole and the decisions that the Secretary of State was required to make. Put another way, the work that had in fact been done on robustness did not portray a materially different picture from that which, overall, was given by the CCS.

485. The Claimants’ third allegation that the CCS was misleading relates to “the true course of negotiations with HMT”. I have tracked those negotiations in detail and made my findings above: see in particular [147], [212], [218]-[219], [221]-[222], [224]-[229], [281], [285]-[302]above.

486. The Claimants rely upon the words at paragraph 23 of the CCS that I set in context and highlight below:

“There are a number of potential risk and issues with changing the risk allocation approach. Additionally, and based on the Department’s assessment of the risks associated with this option, *HMT officials have indicated that they would recommend to their Ministers that the Department should not change its risk sharing approach on the live franchise competitions, but stated they would be content, subject to the Chancellor’s clearance, for a different risk sharing mechanism to be offered for future franchises.* It is considered that it would be *exceptionally difficult* to get HMT agreement to a change in the Department’s policy on live competitions, including the decision to only share risk/reward in respect of deficit contributions, particularly given the challenges of securing agreement to a risk sharing mechanism previously, there are a number of compliant bids and the independent advice from PwC indicates that the risks (albeit in isolation) should be bearable.”

487. The Claimants submit that there was no sound basis for saying that it would be “exceptionally difficult” to get Treasury agreement to a change in policy on live competitions and that, contrary to what the CCS said or implied, the Treasury had in fact indicated that it was open to such a change. They allege that this was highly material to the decision that the Secretary of State had to take and rely on what they describe as Mr Baghurst’s acceptance that, if the Secretary of State had understood that a change in the Treasury’s position on live competitions was a possibility, then a further rebid on pensions might have been the outcome.

488. I reject the factual premise on which these submissions are based. While it is true that the Department had not asked the Treasury to change its position again in early 2019, the whole course of the negotiations between the two departments supported the assessment that it would be exceptionally difficult to get Treasury agreement to a change in policy on live competitions, for the reasons set out previously. In my judgment, as set out earlier, further movement by the Treasury in relation to the

current competitions would have been very unlikely indeed: it was a reasonable belief that the chance of their agreeing to change the approach was “vanishingly small” and the suggestion that the Department could or should have persuaded the Treasury to a change in the risk-allocation basis for the current competitions that would have accommodated the Claimants’ preferred allocation lacks practical realism.

489. The answer from Mr Baghurst on which the Claimants rely was typically careful and left the possibility of a rebid firmly in the sphere of the hypothetical or theoretical:

“Q. Would you accept that if it had been understood that a change in the Treasury's position was a possibility, then a further rebid on pensions would also have been a possibility?”

A. I think, yes, I think if we had indicated that we might be able to share more risk and reward, then in theory we could have potentially done a rebid.”

Once the proposition is brought back to earth, the DfT reasonably believed that there was no realistic prospect of the Treasury shifting its position even if asked; and that belief was well-founded.

490. For these reasons I reject the submission that the CCS was materially misleading in any of the three respects alleged.

First reason in notification letters: “inconsistency with the Department’s policy”, if it was a relevant reason of the Secretary of State, was not a lawful reason for the exercise of the discretion to disqualify.

491. As I have found at [373] above, the reason for the Claimants’ disqualification was their non-compliances on pensions which, as the disqualification letters correctly stated, represented inconsistency with the Department’s policy on the issue as set out in the specification.

492. The Claimants submit that “inconsistency with the Department’s policy” is merely a recitation of the non-compliance and was not a lawful reason for the exercise of the discretion to disqualify, let alone a proportionate justification for excluding the Claimants from the competitions. In support of the main submission, they submit that the Defendant considered other options as a response to their pensions non-compliance; and that, in fact, their proposals on pensions were consistent with the Department’s “fundamental” policy, which they say was “the Brown principle that franchisees should not be made to bear exogenous risks which they cannot manage.”

493. There is no substance in these submissions. First, the Department’s relevant policy was the allocation of risk as set out in the ITT. This case is not based on breach of a Brown-based policy; nor could it be as there was never a formalised policy in relation to costs risks and therefore no basis for asserting that the Department was bound to follow one. As the narrative sections of this judgment show, the policy-based approach to the pensions risk that was finally adopted came after cross-governmental debate that led to the inclusion of the PRSM. There was no wider policy about allocation of risk that is of any relevance to the determination of this litigation. To the extent that the submission is based upon “the Brown principle”, it is therefore

misconceived. What the rest of this judgment demonstrates and concludes is that the Claimants' non-compliant inconsistency with the Defendant's policy on pension risk allocation was serious and deliberate, which supported the exercise of the discretion in favour of disqualification.

494. Second, the Claimants' non-compliance with the Department's policy by submitting their non-compliant bids was *both* a non-compliance *and* the reason for the Claimants' disqualification. The two are not mutually exclusive. This is not to say or imply that every inconsistency with the ITT would justify disqualification; but, on the facts and on my findings as to the reasons and reasoning that underpinned the decision, this non-compliance did. It was a deliberate and serious rejection of basic terms of the ITT on an issue of known importance where the Claimants fully understood the significance of what they were doing and what the likely outcome would be, as explained in detail elsewhere in this judgment.

Second reason in notification letters: "tendered price cannot be compared on a fair basis with the prices by bidders submitting compliant bids", if it reflected a relevant reason of the Secretary of State, was manifestly erroneous.

495. I have reviewed how the second bullet point reason came to be included in the disqualification letters at [355]-[356] and explained the difficulties to which it gives rise at [371]. For those reasons, the inability to compare on a fair basis with the prices tendered by bidders submitting compliant bids does not feature in my findings on the reasons and reasoning that are proved on the evidence. That said, I would accept that this may well have been a strand of the Secretary of State's reasoning when considering his public law duties, though proof that it was is lacking. I also accept the evidence that, as a matter of fact, it was not possible genuinely to compare on a fair or like-for-like basis the Claimants' tendered price with the prices tendered by bidders submitting compliant bids, for the reasons given at [463] above.
496. In their submissions on this point the Claimants draw a distinction between the facts of the present case and the facts of the *Commission v Denmark* case. The proposed distinction is that (a) in the *Denmark* case the stated principle was that "the requirement of equal treatment would not be satisfied if tenderers were allowed to depart from the basic terms of the tender conditions by means of reservations, except where those terms expressly allow them to do so", whereas (b) in the present case the ITT permitted the Defendant to proceed with non-compliant bids without disqualification and so did not rule out "reservations". In my judgment this is a false distinction. The terms of the ITT about price and allocation of risk were "basic terms" and the Claimants were not permitted to depart from them. The *Denmark* principle therefore applies. The fact that the Defendant is given a discretion which is in terms that covers all non-compliances from the most trivial to the most serious does not amount to permission to depart from the ITT's basic terms. Conversely, the existence of the *Denmark* principle does not mean that the discretions under the ITT cease to exist though it may lead to the conclusion that the discretion should be exercised in a particular way, depending on the nature of the non-compliance.
497. For these reasons, if the second bullet point in the disqualification letters should be included in the reasons and reasoning that are found to have been the Secretary of State's, it was well founded.

Issues 6.4.2-6.4.5

498. The Claimants' groupings appear to cover Issues 6.4.2-6.4.5. For the reasons set out above, the Defendant did not breach his obligations in the ways suggested by those sub-issues.

Issue 6.4.6: Failing to have regard to the impact of the non-compliances on the Defendant's objectives as set out in table 2.1 of the ITTs.

499. Table 2.1 of the SE franchise ITT stated:

“The following objectives were published in the franchise prospectus issued to the Bidding market in March 2017, prior to the Expression of Interest deadline:

- Making more space for passengers
- Improving performance
- Making passengers feel like valued customers
- Improving connectivity
- Improving the timetable
- Simplifying fares and ticketing
- Improving stations
- Working with others
- Capability
- Sustainability”

500. The WCP Table 2.1 was markedly different. It said that the franchise's objectives were:

“1. Drive growth in passenger numbers using the ICWC Services and develop the market for intercity travel between the cities served by the franchise ahead of the introduction of HS2. In doing so, maximise passenger benefits and create the best foundation for the future of the ICWC Services and High Speed Services.

2. Deliver a step change in customer experience for passengers on the West Coast, minimising the impact of HS2 construction whilst delivering a new benchmark in passenger satisfaction through the introduction of new technology in advance of HS2.

3. Take full advantage of a once in a lifetime opportunity to deliver a transformation in customer experience on HS2 and the existing network.
4. Act as a partner for Department for Transport, HS2 Ltd, Network Rail and other relevant bodies to support the development and delivery of the High Speed Services to maximise the long term benefits to passengers and deliver the wider socio-economic benefits associated with HS2.
5. Deliver the benefits of existing investment in the ICWC business whilst developing and delivering the maximum long term sustainable benefits for passengers associated with HS2, integrating services with the rest of the rail network by optimising the use of available capacity across the whole geography while taking account of taxpayer interests.
6. Achieve whole industry benefits through continued investment in workforce and innovation and partnership working to deliver the services in a cost effective manner.
7. Successfully deliver the service transition in 2026, including the ability to respond quickly, in real time, to changes required once high speed and recast conventional services commence.”

501. The EM table of franchise objectives was different again:

“Support the Government agenda to make the Midlands region an engine for growth, working particularly to develop connectivity within and outside the region; to focus on supporting the region's industry and leisure economy. To improve the quality, frequency and timings of journeys on the east of the franchise network and to seek to develop new services and connections.

Provide the franchise capacity to address predicted growth in demand, in particular into St Pancras International but also for local crowded services like Derby-Crewe, working with Network Rail to minimise the impact on passengers and the effective running of train services during any redevelopment works.

Invest in the East Midlands train fleet to bring this up to world class standard of on-train passenger facilities and improve fleet capacity, operating performance and reliability, whilst complying with Persons of Reduced Mobility Technical Specification for Interoperability (PRM - TSI) and reducing operating costs and the carbon footprint.

Develop a maintenance and stabling strategy for a new proposition for rolling stock which will be introduced during the next franchise.

Improve passenger satisfaction and public perception of the railway

- including the ticket purchasing experience. The range of ticketing media and fulfilment options should see active innovation, including barcode, print at home, smartcard and solutions that support the Government's manifesto commitments to improve compensation arrangements. In addition, in line with passenger expectations and the Department's policy, to deliver high speed Wi-Fi and wireless connectivity to passengers.

Develop fully aligned incentives between management in the Train Operating Company and Network Rail to secure the investment and improvement in the route's infrastructure, including the services to Corby & Kettering, and infrastructure improvement where most needed, to reduce journey times on long distances and achieve a high level of service resilience and reliability.

Invest in the Franchise workforce, their training, skills and career development to create an environment that makes this franchise a place its staff is proud to work in. To develop opportunities to give employees a share in decision-making in the franchise and the potential to share in the franchise's successes.

Develop coastal, leisure and high value tourist services, including working collaboratively with heritage railways.”

502. The Claimants did not, so far as I am aware, put a case on this issue to any witness; and they have not made any opening or closing submissions about it. In the absence of any assistance from the Claimants I am not able to identify any pensions-based issue from these base materials. On any view, accommodating the Claimants' non-compliances would have led to delay, which was inimical to the achievement of the various objectives, and the Department had this well in mind. The issue is not framed by reference to the benefits of having a compliant bidder in place on time as franchisee, but it is plain that the Department was conscious of these benefits throughout, which is why potential delay (whether leading to a direct award, a further competition or both) was regarded as undesirable.
503. In these circumstances, even if the issue has not been abandoned by the Claimants, no case on it has been established.

Issue 6.4.8: accepting bids which ignored and failed to consider pension risks, but disqualifying bids which allegedly rationally addressed pension risks in a manner consistent with the successful delivery of the franchise.

504. The Claimants did not make any separate closing submissions by reference to this issue.
505. The issue is framed by reference to two factual assertions. The first is that the accepted bids ignored and failed to consider pension risks. The assertion is not supported by the evidence. The direct evidence comes from Mr Clancy of First, who explained First's approach to and consideration of the possible eventuation of the pensions risks and how they priced those risks into their bid. I have held that the challenges to his evidence came nowhere near showing that First's approach was unreasonable. There is no evidence to substantiate a finding that other bidders ignored pension risks either. The evidence is to the contrary and is that, with the benefit of the PRSM, bidders were prepared to contract on the basis of the Defendant's terms as to allocation of the pension risks, not on the basis that those risks were ignored. Although Stagecoach took the commercial decision that it would not bid compliantly it was the view of Mr Hamilton and Mr Paterson that it could have done so: see [258] and [261] above. The fact that it did not pursue a compliant course does not even suggest that those who did bid compliantly ignored the pensions risk.
506. The second factual assertion is that the Claimants' bids rationally addressed the pension risks. I have made my findings elsewhere on the Claimants' approach and what drove their decision to bid non-compliantly. Even after thorough examination which left the basis for some of their larger figures opaque or overstated or both, I would not characterise their approach as irrational; but there is no proper evidential base to support a finding that their approach was more rational than that of the compliant bidders.
507. I would therefore answer this sub-issue in the negative because the Claimants have not shown that the leading bids ignored or failed to consider pension risks.

Issue 6.4.9: omitting to take account of HMT's and/or the Defendant's change in policy as to the appropriate extent of pension risk-sharing in future franchises

508. The Claimants made no separate submissions on this issue in closing, though it overlaps to some extent with part of their second grouping: see [484]-[489] above.
509. Taken at face value, a change of policy as to the appropriate extent of pension risk-sharing in future franchises would be of no assistance to the Claimants unless it heralded a change of policy for the current franchises, which it did not. I have made my relevant findings on the case as developed at trial at [228]-[229] and [488]-[489] above. In the light of those findings, and the fact that the Claimants' non-compliances went beyond anything that the Treasury had contemplated even for future franchises, and the delays that would be inherent in going back to the Treasury and the public law risks arising from the fact that the Department had compliant bidders in place, it cannot reasonably be argued that the Department was obliged to go back to the Treasury on what would have been a fool's errand.

6.4.12. relying on or taking account of his assessment of the financial robustness of bids which the Claimants allege to have been unlawful (see issue 9 below)

510. The Claimants did not make separate submissions on this sub-issue. I deal with the case relating to the FRT under issue 9. For the reasons I give there, it was not unlawful for the Defendant to rely upon the FRT as it did.

511. In summary conclusion, I answer the atomised issues under Issue 6.4 and the Claimants regroupings as set out above in the negative.

Issue 8: Did the Defendant breach his duty of transparency by allegedly failing to provide clear and/or sufficient reasons for the disqualifications and/or contract award decisions?

512. The Claimants seek a finding that the Defendant failed to provide clear and sufficient reasons so as to enable them to understand and challenge their disqualification and to enable the court to exercise its supervisory jurisdiction.

513. The Claimants rely upon the history from 19 February 2019 onwards, which I have summarised earlier in this judgment. They highlight (a) that there was no recommendation to disqualify SSETL in the Ministerial Submissions which, instead, recommended cancellation of the SE competition, (b) the evidence about the SIAP meeting on 5 April 2019 and subsequent formulation of the disqualification letters without reference back to the Minister, and (c) the lack of direct evidence about the Minister's thinking either from the Secretary of State himself or from anyone who attended the decision-making meeting on 1 April 2019. I have taken all these matters into account in reaching my findings about what were the Defendant's reasons and reasoning for his decision to disqualify the Claimants: see [305] ff above. There was no recommendation to disqualify SSETL because the recommendation was to cancel the competition, in which case no question of disqualification would arise: see [334] above. However, once the Secretary of State decided that, for the time being at least, the competition would continue, the logic for disqualifying SSETL was precisely the same as it was for the non-compliant bidders in the other competitions. As the CCS correctly said, there was no objective justification for taking a differential approach across the three franchises.

514. On the basis of that history (and by reference to what the Secretary of State said to the Treasury Select Committee, which I have excluded) the Claimants submit that the disqualification letters cannot be relied upon as representing the Secretary of State's reasons or reasoning for the disqualification.

515. The Defendant invites the court to find that the disqualification letters sent on 9 April 2019 provided clear and sufficient reasons for the disqualification decisions and that they were supplemented by further explanation of the decisions that were provided before the issue of proceedings.

516. The relevant principles are summarised at [66]-[76] above. The twin objectives that must be satisfied by the reasons that are given are, in the present case, (a) to make the Claimants aware of the reasons for their disqualification and thereby enable them to defend their rights, and (b) to enable the court to exercise its supervisory jurisdiction. Context is important and, provided the twin objectives are satisfied, there are no

formal requirements as to length or the level of detail that must be included when providing reasons.

517. I have summarised and set out parts of the disqualification letters at [188]-[189] above. I look first at the question whether they were sufficient to make the Claimants aware of the reasons for their disqualification and thereby to enable them to defend their rights.
518. The context for the decisions and the giving of reasons was well known to the Claimants, for the reasons I have set out earlier in this judgment. It was known to each of the Claimants, and would have been known to any RWIND tenderer, that serious non-compliance on pensions was a matter that was at least likely to lead to disqualification. That background was set out in each of the letters in sufficient detail to explain to any recipient who might yet have been in any doubt about it, including reference to the terms of the ITT and Franchise Signature Documents and to later communications emphasising the need for compliance and prohibiting the mark-up of Franchise Signature Documents. No further or more extensive recitation of the background was required to inform the knowledgeable recipients of the letters of the circumstances in which they chose to submit non-compliant bids.
519. The disqualification letters then identified the Claimants' non-compliance in terms that were clear and could leave the recipient in no doubt that the letter was dealing with the recipient's non-compliance on pensions and the fact that it necessitated a mark-up which sought to transfer risk from the Franchisee to the Secretary of State. At paragraphs 6 to 8 the letters then told the Claimants that "in all the circumstances, disqualification and rejection is the appropriate response to this non-compliance"; and indicated that the following factors in particular had been taken into account:
- i) The fact that the bids were inconsistent with the Department's policy in respect of the allocation of risk in relation to pensions, which had been clearly communicated in the Rebid instructions;
 - ii) That the non-compliant bids could not be compared on a fair basis with the prices tendered by bidders submitting compliant bids;
 - iii) The Department's obligations under EU and English law, including the duties of transparency, equal treatment of bidders, and the requirement to act proportionately in making a decision to reject a bid or disqualify a bidder;
 - iv) The requirement to treat bidders fairly and the duties of transparency and equal treatment towards all bidders meant that the Department "could not properly have come to any decision other than" to disqualify the Claimants bearing in mind that compliant bidders would have submitted bids taking into account their considered view of their risk exposure.
520. The reasons and reasoning as expressed in the disqualification letter were concise, clear and sufficient to enable the Claimants to know that they had been disqualified for serious non-compliance on pensions, which was the actual reason for disqualification. Although the letters were prepared without reference back to the Minister, their concentration on the Defendant's need to comply with its obligations

of fairness, equal treatment and transparency reflected the Secretary of State's reasons and reasoning as I have found them to be: see [373] above.

521. It will immediately be noticed that I have not made a finding in the precise terms of the second bullet point of paragraph 6. However, the terms of that sub-paragraph could not lead to significant confusion or misunderstanding, not least because the assertion was correct and fed directly into the broader issue of the Defendant's public law duties which formed part of the Secretary of State's reasoning and were sufficiently and accurately reflected in the later paragraphs of the disqualification letters. There is nothing in the second bullet point of paragraph 6 that would prevent the Claimants from understanding why they had been disqualified or disadvantage them in defending their rights. This is demonstrated by the wide-ranging scale of the Claimants' attack on the pensions-based decisions in this trial, which has shown neither confusion nor inhibition.
522. For completeness I add that, although I have left what the Secretary of State said to the Transport Select Committee out of account in reaching my conclusions in this trial, if I *had* taken it into account a fair and not unduly rigorous interpretation of what he said in that context would have reinforced my conclusion that the disqualification letters accurately reflected his thinking in making his decision, specifically by reference to the second bullet point of paragraph 6 and paragraphs 7 and 8.
523. I have found that it is clear beyond argument, as it has been clear to all since 9 April 2019, that the Claimants were disqualified because their bids were non-compliant in rejecting the allocation of the risk of pensions in the tender documents and proposing contractual amendments which sought to transfer the pensions risk from the franchisee to the Secretary of State. If it were necessary to do so, I would hold that it would have been sufficient for the disqualification letters to have said that and no more: in context that was all the Claimants needed to know to make them aware of the reasons for their disqualification and to enable them to defend their rights. However, in fact the letters went further and, as has been amply demonstrated by the course of this litigation, has enabled the Claimants to defend their rights fully and with the maximum application of forensic rigour.
524. Not only were the reasons given by the Defendant in the disqualification letter sufficient for a RWIND tenderer, they were also sufficient for the Claimants. There are a number of documents emanating from Stagecoach which state in terms their understanding that they had been disqualified because of their non-compliance on pensions. One illustrative example is the notice from Mr Griffiths to Stagecoach staff on 10 April 2019:

“Last night we were informed by the Department for Transport (DfT) that we have been disqualified from the current three UK rail franchise competitions: We have been told that our bids were determined as non-compliant principally in respect of pensions risk. Bidders for these franchises were asked to bear full funding risk on the relevant sections of Rail Pension Scheme at a time when The Pensions Regulator has expressed concerns about the level of contributions required to ensure they are fully funded.”

525. The reasons provided by the Defendant in the disqualification letters have also proved sufficient to enable the court to exercise its supervisory jurisdiction as, I hope, this judgment shows. In these circumstances it is not necessary to consider the additional information that was provided to the Claimants before the issuing of proceedings.

526. For these reasons, I answer Issue 8 in the negative.

Issue 9. Did the Defendant breach his duties (namely, his duties of equal treatment, transparency, proportionality and/or fairness, and/or his duty not to make manifest errors in the assessment of bids) by failing to take proper account of the pension-compliant bids' exposure to pension-related risks and accordingly concluding that he could proceed to make an award to a pensions-compliant bidder?

Sub-issues are set out below.

General: 9.1. Was the Defendant's adoption of the WTW illustrative figures as representing the "most credible financial outcome" for the purposes of the Financial Robustness Test:

9.1.1. manifestly erroneous and/or;

9.1.2. a breach of his duty of transparency, in circumstances where he had not informed bidders, prior to the submission of bids, that he intended to do so and / or without having disclosed the relevant advice from GAD?

9.2. Did the Defendant breach his said duties by failing, when performing the Financial Robustness Test, to take account of pension risks during any 'Reset' period which might result from delay to HS2?

9.3. Downside Risks: Was it necessary to take account of the downside risks of pensions costs for the purpose of assessing whether bids were financially robust?

If so:

9.3.1. What were the risks that should have been taken into account in each procurement process?

9.3.2. Were those risks taken into account by the Defendant in his evaluation of the pensions-compliant bids (i) properly or (ii) at all?

9.3.3. Did the Defendant breach his said duties by failing to perform any assessment of the 'downside' pension risks (i.e. the risk of pension costs being higher than the illustrative WTW figures, and of more than 2 days' strike action on account of escalating employee pension contributions or pension benefit reform) when assessing whether bids were financially robust?

9.4. PwC's review of downside pensions risks ("PwC 2019 Report")

9.4.1. For what purpose did the Defendant commission or use the PwC 2019 Report? In particular, was that Report used for the purpose of (a) evaluating the leading bidders' financial robustness, and/or (b) otherwise to assess the sustainability of the winning bids?

9.4.2. Did the commissioning or use of the PwC 2019 Report for such purpose(s) depart from or change the methodology prescribed by the ITT?

9.4.3. If so, was this contrary to the Defendant's duties of transparency, fairness, non-discrimination and/or equal treatment?

9.5. If the Defendant could not lawfully take into account downside pension risks within the evaluation methodology prescribed by the ITT (as is alleged), were the ITT provisions which had that effect accordingly unlawful?

9.6. To the extent that the Defendant did rely on the PwC 2019 Report was that reliance and/or the reliance on the GAD analysis (on which the PwC 2019 Report was based):

9.6.1. unlawful on account of its alleged omission of various aspects of the pension-related risks;

9.6.2. unlawful because the Defendant allegedly failed to consider PwC's downside scenarios of pension risks alongside other downside risks;

9.6.3. a breach of the Defendant's duty of transparency, in circumstances where the Defendant had not informed bidders, prior to the submission of bids, of GAD's forecasts and/or his intention to rely on such forecasts?

527. Issue 9 has a collection of sub-issues, each of which concerns the Defendant's approach to the robustness of bids. Their order in the List of Issues is set out above. In closing submissions, the Claimants re-ordered the sub-issues in a way that is coherent and I shall follow, starting with sub-issues 9.3 and 9.5.

528. The Defendant takes the preliminary point that, if lawfully disqualified, the Claimants have no further legitimate interest in whether or to whom the franchises were ultimately awarded. Its submissions on the specifics of the case brought against it are made without prejudice to this preliminary point. I do not deal with or decide the point in this judgment and nothing I say in this judgment should be taken as expressing a view or inhibiting any future view that the court might take on the preliminary point. It remains open for the Defendant to pursue should the need arise at a later stage in this litigation.

9.3. Downside Risks: Was it necessary to take account of the downside risks of pensions' costs for the purpose of assessing whether bids were financially robust?

If so: 9.3.1. What were the risks that should have been taken into account in each procurement process?

9.3.2. Were those risks taken into account by the Defendant in his evaluation of the pensions-compliant bids (i) properly or (ii) at all?

9.3.3. Did the Defendant breach his said duties by failing to perform any assessment of the 'downside' pension risks (i.e. the risk of pension costs being higher than the illustrative WTW Figures, and of more than 2 days' strike action on account of escalating employee pension contributions or pension benefit reform) when assessing whether bids were financially robust?

9.5. If the Defendant could not lawfully take into account downside pension risks within the evaluation methodology prescribed by the ITT (as is alleged), were the ITT provisions which had that effect accordingly unlawful?

529. The Claimants seek findings that, by adopting, maintaining and applying the ITT's FRT which took no account of downside pension risks, the Defendant:

- i) Took a manifestly erroneous approach to the assessment of bids' financial robustness; and

- ii) Breached its duty of fairness, by failing to adopt a competitive tendering procedure which was capable of reliably assessing, and distinguishing between, the robustness of bids.
530. In support of such findings the Claimants rely upon evidence that it is wise to test the financial robustness of franchise tenders exhaustively:
- i) They refer to the failure or financial precariousness of other franchises, with the implication that those difficulties could or would have been avoided by more extensive testing of financial robustness.
 - ii) They take support from the recommendation of the Brown Review that “evaluation should assess the financial robustness and deliverability of bids. The Department should describe the criteria it will use for this assessment.” Elsewhere Brown said that there should be a test of whether bidders’ proposals “show an appropriate level of financial robustness so that the Department can satisfy itself that the bidders’ proposals do not pose unacceptable probabilities of default.”
 - iii) The Government’s response was that “the ability of a franchisee to meet its financial projections will continue to be assessed as part of the financial evaluation of a bid ...” and that “alternative methodologies for assessing and mitigating financial risk are currently being developed... .”
 - iv) In September 2018 the Transport Select Committee enquiry into the failure of the VTEC franchise had concluded that the franchise had failed “because the revenue projections underpinning the VTEC bid were over-optimistic and it simply ran out of money” and that the Defendant’s “financial stress-testing of the bids was not robust enough.” Later the TSC said that bids had not been “tempered by the prospect of bid evaluation against downside scenarios” and that “while some downside testing was conducted by the DfT, the robustness of the bid was only evaluated against a single central case scenario”.
531. As noted at [119] above, the Government’s response to the Brown Review was to implement a revenue risk sharing mechanism; but it did not formulate or implement a cost sharing mechanism until the PRSM in 2018. Also, in 2017 the Government introduced the DRAS element of the ITT’s methodology, which involved adjusting bidders’ revenue projections as part of the FRT because of concerns about over-ambitious revenue projections in bids: see [279] above. The Claimants are therefore correct to say that these three competitions did not include financial robustness testing by reference to costs risks in general or pensions risks in particular. The fact that GAD’s input took account of a 25% increase in technical provisions does not alter the basic premise on which the Claimants’ case is based, which is that the Defendant should have tested all realistically possible pensions downside outcomes as an obligatory component of robustness testing under the ITT.
532. It is the Claimants’ case that, in the light of TPR’s intervention, the Defendant should have amended the ITT FRT so as to take account of “downside costs/pension costs” and that it failed to do so “even when it became apparent that only a limited 2019 valuation PRSM was to be offered to bidders.” They submit that “the penny finally dropped” after the rebids had been received and that various officials recognised the

deficiency of the ITT FRT “as being incapable of assessing bids’ robustness in the face of the downside pensions risks resulting from TPR’s intervention and the limitations of the PRSM.” Despite this, it submits, the Defendant went ahead with the application of the FRT in accordance with the ITT methodology which identified the Defendant’s view of the most credible financial outcome but involved no analysis of potential downside pension risks. The Claimants allege that this amounted to taking a manifestly erroneous approach to the assessment of bids’ financial robustness and breached the Defendant’s duty of fairness because of the Defendant’s inability to assess reliably and distinguish between the robustness of different bids.

533. The Defendant submits that the Railway Regulation does not prescribe any specific requirements for the evaluation of bids. What is required by Article 5(3) is that the competitive tendering procedure should be open, fair, transparent and non-discriminatory. It points to the provisions and purposes of the review and adjustment process, which I have set out at [274] above; and it emphasises the wide discretion that these provisions give it when determining whether and to what extent it will take into account and adjust for particular downside risks. It would not be expected that the contracting authority would address downside risks in the same way as or from the perspective of the bidder and it submits that adjustments based upon the WTW Figures and the GAD analysis were reasonable for its assessment of the most credible financial outcome. It rejects the proposition that it should have reviewed all risks and the full extent of downside risks to which a bidder could be exposed in life. What it did was to carry out its assessment taking into account the WTW Figures (which built in the 25% uplift in Technical Provisions) and the GAD analysis (which took into account downside risks for investment returns and movements in asset valuations, the 25% uplift in Technical Provisions, and varying percentiles over a wide range), which it submits was reasonable. While it is true that the implementation of the FRT did not include additional downside for the possibility of future regulatory intervention, that was a permissible and reasonable view, even if it was not one with which Mr Salter or Stagecoach agreed. On this basis, it submits that the process of risk adjustment as set out in the ITT, including the FRT, was reasonable, fair and transparent, having been set out precisely in the ITT and as presaged by Appendix 3 in general and paragraph A3.3.2 in particular.
534. The basic principles relating to financial robustness tests are set out at [38]-[40] and [62]-[64] above. In short, there is no requirement of EU or UK law that requires a contracting authority to include a test of financial robustness in the criteria for acceptance of bids; but if it does so, the requirements of the test must be set out clearly and adhered to.
535. The Claimants rely upon *Henry Bros (Magherafelt) Ltd v Department of Education for Northern Ireland (No 2)* Con LJ 2009, 25(6) 457-477 at [28], a decision of the Northern Ireland Queen’s Bench Division, as an example of a case where the contracting authority’s published evaluation methodology was found to involve a manifest error. The procurement in *Henry* was for a framework contract and was conducted under the Public Contracts Regulations 2006 which, by Regulation 30(1)(a), required the contract to be awarded on the basis of the offer which was the most economically advantageous from the point of view of the contracting authority. The contracting authority’s methodology required tenderers to submit direct fee percentages, sub-contract fee percentages and indicative fee percentages for design

services: see [6(vii)]. No other information directly relating to price was taken into account. The Plaintiffs demonstrated that this was not a reliable indicator of economic outturn unless the fees were assumed to be based on constant prices across all tenders, which was not the case. On this basis, the court held that the Contracting Authority's methodology was incapable of identifying the most economically advantageous tender without the provision of further information, which was lacking: see [27]. The court concluded that the "decision to rely upon the percentage fees and bands was based upon an incorrect factual assumption sufficient to amount to a manifest error, namely, that costs would always be the same in the construction industry"

536. *Henry* is to be distinguished on its facts and is of no assistance in resolving this issue. The outcome was based on a fundamental misconception in the construction of the ITT such that it could not satisfy its intended purpose. That is not the case here. The discretion given by Appendix 3 of the present ITTs was different and did not require a comprehensive analysis of or adjustment for downside pensions risks. The FRT that was put in place was limited; but it was known to be limited and its limits were transparently set out in the ITT. There is in my judgment no scope for an argument that seeks to impose a legal obligation to carry out a more comprehensive risk assessment or adjustment given the lack of any general obligation to carry out FRTs and the fact that the FRT that was put in place was in accordance with the discretion and limits laid down by the ITT.
537. Even if there were an obligation based upon the reasonableness of doing more, I would hold that the scope of the FRT was not unreasonable given the existence of the PRSM which provided significant protection and reduction of the risk that would otherwise have been inherent in the bids, even though it was not considered sufficient by the Claimants. It is not a necessary part of any FRT that it should be capable of eliminating all risk or adjusting for every eventuality and the contracting authority has a wide margin of appreciation in deciding what level of assurance it wishes to have. None of the preceding history upon which the Claimants rely imposed a public law obligation upon the Defendant to implement robustness testing that analysed the potential downside to bidders of the pensions risk as protected by the PRSM or that required any particular level of assurance to be achieved. In setting the terms of the ITT the Defendant was entitled to determine the extent of any robustness testing it wished to put in place. Nothing in the terms of the ITT itself imposed an obligation upon the Defendant to institute an FRT that would give total assurance of robustness or that would incorporate downside risks going beyond what the Defendant assessed to be the most credible financial outcome. The Claimants have not shown that the Defendant's assessment of the most credible financial outcome was not open to it: see also [547] below. In my judgment it is bordering on hyperbole to describe the decision to omit provision for testing by reference to downside pension risks as an "extraordinary oversight." It might have been unwise; but that does not render it unlawful.
538. I therefore reject the Claimants' submissions that (a) the FRT adopted, maintained and applied a manifestly erroneous method for assessing bids' financial risks and robustness, and (b) the FRT breached the duty of fairness under Article 5(3) of the Railway Regulation. Fairness did not oblige the Defendant to include a mechanism

that would reliably and comprehensively assess and distinguish between the financial robustness of different bids.

539. I therefore answer Issues 9.3 and 9.5 in the negative. In the light of this conclusion, Issues 9.3.1, 9.3.2 and 9.3.3 do not call for separate answers.

9.2. Did the Defendant breach his said duties by failing, when performing the Financial Robustness Test, to take account of pension risks during any 'Reset' period which might result from delay to HS2?

540. The Claimants seek findings in the WCP proceedings that, by adopting, maintaining and applying an ITT FRT which took no account of "Reset" pensions risks, the Defendant:

- i) Took a manifestly erroneous approach to the assessment of bids' financial robustness; and
- ii) Breached its duty of fairness, by failing to adopt a competitive tendering procedure which was capable of reliably assessing, and distinguishing between, the robustness of different bids.

541. In support of these findings the Claimants rely upon:

- i) The evidence summarised under Issue 5 above at [422]-[433] about the potential for a Reset Period and its potential consequences;
- ii) Evidence which the Claimants say emphasises the importance of testing bids' robustness, to which I refer at [530] above; and
- iii) The fact that the WCP FRT did not address the possible consequences of a Reset Period.

542. It is the Claimants' case that, if awarded the WCP franchise, First would be accepting continuing pensions risks beyond 1 April 2026. Although not of the same magnitude as the Defendant's failure to take account of pensions risks more generally when applying the ITT FRTs, the Claimants submit that the failure to consider WCP pensions risks beyond 1 April 2026 gave rise to the breaches of duty identified above, which are essentially breaches of the same character as alleged in relation to Issues 9.3 and 9.5.

543. The same principles apply to this Issue as apply to Issues 9.3 and 9.5 and provide a complete answer to this issue for reasons that are similar or identical to those set out at [534] ff above. However, the Defendant also relies upon submissions that mirror those made in relation to Issue 5 in asserting that the Claimants have not shown that it was either reasonable or necessary in the FRT to make special provision, or give special heed to, what might happen after 1 April 2026. In summary, the Defendant submits as follows:

- i) The Claimants have again failed to appreciate that a Reset Period was not the only option available to the Defendant if HS2 were to be delayed beyond 2026: the Defendant had the option to switch to IOC terms on 1 April 2026 even if HS2 were then in delay;

- ii) The pensions liabilities that would be incurred even if a Reset Period were triggered would be limited because of the re-setting of DRC and consequential adjustment to the premium payments that the franchisee would be required to make to the Defendant beyond 1 April 2026;
- iii) FSCs beyond 1 April 2026 were likely not to change materially, were manageable and were not a significant risk;
- iv) Hence the pensions risks post 1 April 2026 did not justify or require separate consideration as a part of the FRT.

544. In the light of the discussions of principles and findings of fact already undertaken for Issues 5, 9.3 and 9.5 above, I can provide my reasoning and conclusions shortly:

- i) For the reasons summarised under Issues 9.3 and 9.5 above, there was no obligation imposed by EU or UK law that required specific risks such as the WCP pensions risk post-1 April 2026 to be included as part of the Defendant's FRT. The Defendant had a wide discretion about what levels of assurance it wanted in respect of what risks, and the omission of these risks from the FRT was within the scope of the Defendant's discretion;
- ii) It was necessary for the WCP ITT to be transparent about what risks it would bring into account in the FRT, and it was. Those risks did not expressly include the post-1 April 2026 pensions risk and they were not included by necessary implication;
- iii) In any event, based on the findings I have made in relation to Issue 5, the Claimants have not shown that the post-1 April 2026 pensions risks were a significant feature either when viewed in isolation or when seen as part of the overall package that would apply in the event of there being a Reset Period: see [422]-[441] above.

545. For these reasons I reject the submission that, by adopting, maintaining and applying an ITT FRT which took no account of "Reset" pensions risks, the Defendant either:

- i) Took a manifestly erroneous approach to the assessment of bids' financial robustness; or
- ii) Breached its duty of fairness, by failing to adopt a competitive tendering procedure which was capable of reliably assessing, and distinguishing between, the robustness of different bids.

546. I therefore answer Issue 9.2 in the negative.

Issue 9.1: Was the Defendant's adoption of the WTW illustrative figures as representing the "most credible financial outcome" for the purposes of the Financial Robustness Test:

9.1.1 manifestly erroneous and/or;

9.1.2 a breach of his duty of transparency, in circumstances where he had not informed bidders, prior to the submission of bids, that he intended to do so and/or without having disclosed the relevant advice from GAD?

547. The Claimants now seek findings that:
- i) The Defendant's adoption of the WTW Figures as its view of "the most credible financial outcome" was manifestly erroneous, in that it failed to take reasonable steps to validate those figures, and failed to consider matters which were obviously likely to affect the validity of those figures; and
 - ii) The Defendant breached its obligation of transparency by failing to tell bidders that it would use the WTW illustrations as "the most credible financial outcome" when risk-adjusting bids.
548. In support of the first proposed finding, the Claimants submit that the adoption of the WTW Figures as "the most credible financial outcome" was unreasonable in three respects:
- i) First, the Defendant took no expert advice beyond advice from GAD and therefore gave no consideration to liability risks, including regulatory risks;
 - ii) Second, the Defendant failed to ask TPR what it would be likely to insist on by way of improvement to the funding of the RPS in the future, whether with or without a TOC-wide solution; and
 - iii) Third, Mr Baghurst did not consider factors beyond investment risk – namely potential changes in liabilities, the Trustee's views or TPR's views.
549. In support of the second proposed finding, the Claimant relies upon evidence that the Defendant had decided to use the WTW Figures as representing the most credible outcome before submission of bids but did not tell bidders.
550. The Defendant's case is that:
- i) It did not make any manifest error or exceed its margin of discretion in determining the risk adjustment process. It acted reasonably in having regard to the illustrative figures provided by the scheme actuary for the reasons set out in greater detail below; and
 - ii) The obligation of transparency did not require the Defendant to disclose to bidders what its view of the most credible financial outcome would be but, in any event, the Defendant made it sufficiently clear to bidders how it would approach the risk adjustment and that it would have regard to the WTW Figures for that purpose.
551. The relevant principles are summarised at [29]-[37] (transparency) and [62]-[65] (manifest error) above.
552. I have provided a summary account of the process of risk adjustment and role of the most credible financial outcome at [274] ff above. As there set out:
- i) Paragraph A3.3.2 of Appendix 3 allowed scope for the Defendant to exercise evaluative judgment both about whether there was a risk of a materially different outcome and about what constitutes the most credible financial outcome: see [274] above;

- ii) The evaluation process should be carried out in accordance with the detailed provisions of Section 7 and Appendix 3 of the ITTs: see [275] above;
- iii) The ITT-based risk adjustments looked to identify the most credible financial outcome of the bid in question and were not a full risk-assessment (as normally understood) that aimed to identify and make adjustments for all risks irrespective of whether the eventuation of those risks formed part of the Defendant's view of the most credible financial outcome: see [277] above.

553. I have also referred to the use made of the WTW Figures, the fact that the Defendant checked with TPR that the WTW Figures accurately reflected TPR's current parameters, and their provision as part of the Rebid instructions and discussions with bidders, who were told that the Department would take them into account but would not necessarily be limited by them: see [151], [210] and [220] above.

554. It is now necessary to delve slightly deeper for this Issue.

555. In addition to paragraph A3.3.2, paragraph A3.1.4 of Appendix 3 to each ITT stated:

“All risk adjustments will be made on the basis of the Department's reasonable view of the most credible financial outcome taking into account all relevant information available to it, including new information released after the issue of the ITT, existing industry/Department guidance and research, new research and other evidence put forward by Bidders in associated Delivery Plans or Sub-Plans, the Record of Assumptions, or any other relevant information submitted with Bids....”

This re-stated the scope for evaluative judgment by the Department about what constituted the most credible financial outcome and permitted the Department to take into account all relevant information available to it.

556. Paragraph 7.3.2 of the ITT provided that the Department could commission specialist reports from within the Department and, if appropriate from its technical, legal and financial advisers, which it did throughout the evaluation process and which is not subject to any challenge. Once again, the decision whether the Department should commission specialist reports was subject to the Department's reasonable evaluative judgment about whether it was necessary to do so in the light of all other available information.

557. Mr Baghurst gave the primary evidence about why the Department adopted the WTW Figures as representing the most credible outcome. WTW were commissioned to illustrate the effect on the draft 2016 valuation of applying TPR's parameters as set out in January 2018 and updated in June 2018. None of the other major players (the RDG and the RPS Trustee) had agreed those parameters, with the result that no TOC-wide solution had yet (or has yet) been achieved, but Mr Baghurst and the Department (correctly) took the view that there was no concrete evidence available to the Department at the time that would have justified adopting a different assumption as to the levels of future pensions contributions. Furthermore, although the WTW Figures did not reflect all possible downside risks, that was not the function of the WTW Figures or the assessment of the most credible financial outcome. On this basis, the Department took the view that the WTW Figures provided the best available evidence at the time about future contribution levels.

558. The lack of concrete evidence is highlighted by the fact that, on the evidence before the Court, there is even now no clarity about what TPR's intentions or actions may be given the absence of any TOC-wide solution. The best evidence remains that of Mr Salter, which I have accepted, that TPR typically favours a consensual outcome: that evidence cannot be regarded as providing any concrete evidence to replace the use of the WTW Figures: see [114] above.
559. The Claimants criticise the Defendant for not asking GAD or TPR whether the WTW Figures represented the most credible financial outcome, and for failing to take potential liability risks deriving from changes to the discount rate or other assumptions that might flow from TPR's investigation or the prospect of further regulatory intervention. They repeat their submission that a 25% increase in Technical Provisions merely represents the starting point and not the end point of TPR's investigation and that there is a risk that TPR will seek more at a later date, as the Defendant should have realised.
560. I have discussed the uncertainties engendered by TPR's intervention earlier: see [135] ff. One of the things to emerge from the expert evidence in this case is the wide range of assumptions that could reasonably be adopted and the lack of certainty about what assumptions would ultimately be proved to be correct. In such circumstances it is conceptually easier to conduct a full risk-assessment that takes into account all possible downside risks than it is to identify the most credible financial outcome with any degree of confidence. The Claimants' criticisms of the Defendant's decision to adopt the WTW Figures would be more cogent if the Defendant had been trying to conduct a full risk-assessment or to assess a worst-case outcome; but that is not what the Defendant was trying to do – nor was it obliged to do so.
561. The suggestion that the Defendant should have gone to TPR to ask whether the WTW Figures represented TPR's view of the most credible financial outcome seems to me to be fanciful. TPR had specified its parameters. It is not clear why or whether TPR would unilaterally disclose to the Department any more than was already contained in its published parameters. Nor would it have been realistic to expect TPR to give an assessment of the prospects of a TOC-wide solution being achieved or not. If it had done so, quite apart from the fact that doing so would run the risk of queering the pitch on which it might wish to conduct future negotiations, it is not self-evident that TPR's assessment would have been any more reliable than that of the Department or, for that matter, the RDG or individual bidders.
562. Given the nature of the exercise that the Defendant was undertaking and the inherently speculative nature of drawing a most credible financial outcome line in the shifting sands that prevailed at the time, the Defendant's decision to adopt the WTW Figures was and is reasonable. It had the great advantage of being anchored to what TPR had actually said and relating it to the existing draft 2016 valuation.
563. In my judgment the Claimants have not shown any good reason why the Defendant should have rejected this "concrete" evidence or why it required further advice to enable it to settle on the WTW Figures as its most credible financial outcome. In absolute terms, there was and is no "right" answer, but the Defendant's case is assisted by the fact that the Claimants have not specified, let alone proved, that a different line would have been "right" (or better) where the Defendant's line was "wrong" (or worse). The available evidence suggests that, if anything, they may have

been unduly pessimistic, as Mr Kavanagh accepted that the assumptions on which they were based represented a more prudent approach to pensions contributions than had been adopted by Stagecoach's own expert actuary, Hymans Robertson.

564. Translating this into the language of “manifest error”, the Claimants have not demonstrated that the Defendant's adoption of the WTW Figures was unreasonable. Turning to the constituent elements of the Claimants' criticisms and the finding they seek under this issue:
- i) I reject the submission that the Defendant failed to take reasonable steps to validate the WTW Figures as the basis for their assessment of the most credible financial outcome. The figures were produced by the Scheme Actuary and the accuracy of the calculations is not criticised. They were validated by obtaining TPR's confirmation that they accurately reflected TPR's parameters. Some advice was taken from GAD who, while accepting the obvious fact that the WTW Figures were a limited exercise, did not undermine them. To the contrary, on a best estimate basis, GAD supported the view that DRCs were unlikely to change materially after the 2019 or 2022 valuations. It was not, in my judgment, necessary for the Defendant to take further steps or to seek further advice before making its decision as it did. It is not clear what advice the Claimants allege would have been given. Had it simply been that there were other risks that were not included in the formulation of the WTW Figures, that would not have demonstrated or even suggested that the WTW Figures were an inappropriate point at which to draw the line;
 - ii) I reject the submission that, in adopting the WTW Figures as the basis for the most credible financial outcome the Defendant “failed to consider matters which were obviously likely to affect the validity of those figures.” I accept that further downside assumptions were not included in the WTW Figures; but that is not the point. The question is whether, given the existence of other downside risks, it was unreasonable for the Defendant to adopt the WTW Figures as the most credible financial outcome. For the reasons just given, the answer to that question is that it was not. Specifically, I reject the submission that the Defendant should have adjusted the figures or performed a different calculation on the basis that the 25% increase in Technical Provisions was merely the starting point and that TPR *will* seek further increases at future valuations. As explained earlier in this judgment, the prospect of further regulatory intervention was uncertain and unquantifiable. What cannot be said is that adoption of TPR's current parameters was manifestly erroneous.
565. Turning to the allegation of lack of transparency, there was no obligation upon the Defendant to specify what would be its view of the most credible financial outcome in advance of bids being submitted. The terms of the ITT not merely permitted but mandated that the Defendant should take all relevant information into account in deciding what was the most credible financial outcome: see paragraphs A3.1.4 and A3.3.2 of Appendix 3. I accept the evidence of Ms Palmer that there might be a significant change in costs in the six months or so between bid submission and risk adjustment of a leading bidder's bid. Such a change should properly be taken into account. It would therefore have been wrong for the Defendant to have pinned its colours irrevocably to the WTW Figures' mast before submission of bids.

566. As a matter of fact, the Defendant gave the Claimants every legitimate encouragement to recognise the likely relevance of the WTW Figures by incorporating them in the Rebid instructions for each competition, having previously discussed them on multiple occasions in bilateral meetings attended by Stagecoach (and others). Thus, for example, on 17 May 2018 Mr Baghurst told representatives from Stagecoach that “the Department may make reference to [the WTW Figures] when it risk adjusts.” He made the same point at a bilateral meeting with Stagecoach on 17 October 2018 when he said that “we will take the Willis Tower illustration into account but you won’t be limited by it.” Mr Kavanagh’s note was to the same effect, recording that the Department would take the WTW Figures as a start point for its risk adjustment. Mr Baghurst’s formulation was carried over into the Rebid instructions, informing bidders that “the Department will take into account but will not necessarily be limited by” the WTW Figures. That was accurate and was a reasonable statement of the Department’s decision given the possibility that the Department’s view of the most credible financial outcome might change after submission of bids.

567. For these reasons I answer Issue 9.1 in the negative.

9.4. PwC’s review of downside pensions risks (“PwC 2019 Report”)

9.4.1. For what purpose did the Defendant commission or use the PwC 2019 Report? In particular, was that Report used for the purpose of (a) evaluating the leading bidders’ financial robustness, and/or (b) otherwise to assess the sustainability of the winning bids?

9.4.2. Did the commissioning or use of the PwC 2019 Report for such purpose(s) depart from or change the methodology prescribed by the ITT?

9.4.3. If so, was this contrary to the Defendant’s duties of transparency, fairness, non-discrimination and/or equal treatment?

568. The Claimants seek findings that:

- i) The Defendant’s use of the PwC Analysis was an unlawful departure from the ITT methodology in that it was used:
 - a) As a different method for assessing financial robustness from that which was prescribed by the ITT; and/or
 - b) In order to decide whether to disqualify the Claimants; and/or
 - c) In order to decide whether Abellio and FTWC should be awarded the EM and WCP franchises.
- ii) Even if the PwC Analysis was used purely in order to decide whether to ‘abandon’ the procurements, this still amounted to a breach of the duty of transparency.

569. In support of proposed findings (i) and (ii), the Claimants rely upon aspects of the evidence that touch on the purposes for which the PwC Analysis was commissioned and the uses to which it was put. They refer to the draft paper for the BICC meeting on 18 February 2019 as showing an appreciation by officials of the limitations of the ITT FRT: see [315]-[316] above; and to the subsequent commissioning of the PwC

work which, as PwC's terms of reference show, had as its objectives to "confirm deliverability and sustainability of pensions compliant bids in-life should pension and pensions-related risks materialise": see [314] above. They refer to the extract from the minutes of the 18 February 2019 meeting that is set out at [304] above as being a reference to the need for the PwC Analysis. They rely upon the fact that the PwC work featured "prominently" in the CCS; and to the fact that, when the Secretary of State on 28 March 2019 raised concerns relating to the robustness of bids, Mr Smith took a copy of the PwC Analysis with him to the meeting the next day: see [344] above. And they rely upon the fact that the Secretary of State decided on 1 April 2019 to award the EM franchise to Abellio, to continue with the SE competition and to continue with the WCP competition with First as lead bidder after being advised of the contents of the PwC advice.

570. Relying upon this evidence the Claimants submit that the PwC Analysis departed from the ITT methodology in two respects. First, it supplemented the ITT FRT with a new and different test of financial sustainability. Second, and more generally, it supplemented the methodology under the ITT for determining when a franchise agreement would be awarded to one of the bidders. The main dispute has been on the second of these two submissions. Whether or not the PwC Analysis materially "supplemented" the ITT FRT depends upon the use to which it was put.
571. The Defendant maintains that the purpose and use of the PwC Analysis was separate and distinct from the process of evaluation that led to the disqualification of the Claimants for pensions non-compliance and to the identification of Abellio and First as lead bidders to be taken forward on the EM and WCP competitions. It submits that the intended purpose of the PwC Analysis and the use to which it was put was to inform the separate and legitimate exercise of the Defendant's discretion whether to continue with the competitions or to cancel them. It therefore did not change, "supplement" or depart from the methodology prescribed by the ITT for the evaluation of bids and the disqualification process that was permitted by paragraph 1.9.1 of the ITTs: see [106] above.
572. The legal issue here is one of transparency as applied to the evaluation process and the discretion to cancel the competitions. The relevant principles are summarised at [29]-[37] (transparency) and [41]-[56] (discretion). It is, or should be, common ground that it would have been unlawful to add the PwC Analysis as a requirement, criterion or sub-criterion (however expressed) that was additional to and supplemented the ITTs' criteria (a) for the evaluation of which bidder should be treated as the leading bidder or awarded the franchise or (b) for deciding whether to disqualify the Claimants. The criteria for those two lines of decision-making were set out in the ITT and, having set them, the Defendant was obliged to stick to them. The discretion to cancel the competitions was separate and distinct: it was not determined, trammelled or fettered by the need to follow the ITT methodology or to apply the ITT criteria for those other decisions. The grounds upon which the Defendant could cancel the competitions were not specified in paragraph 1.9.1 or elsewhere in the ITT and would be subject to principles of EU Law including those identified at [12(h)] of *Amey*. There is no principle of EU Law that requires a decision to cancel a competition to be taken solely on the basis of information generated by the ITT.
573. Issue 9.4, therefore, is essentially an issue of fact in the context of principles that are not substantially in dispute. The Claimants accept that, in theory at least, there is a

distinction between “evaluation”, “award” and “abandonment” decisions; but they say that the PwC Analysis infected and vitiated the decisions to award and disqualify. The Defendants say that it did not.

574. This Issue cannot be resolved simply by asserting that the PwC Analysis was an “additional” test of financial robustness or sustainability. Having regard to the elasticity of language, it is necessary to look beyond this bald assertion and to identify the substance of what was done.
575. I have summarised the evidence about the commissioning and use of the PwC Analysis at [304], [312]-[345] above. In doing so, I have not listed every item of evidence to which the parties referred in their closing submissions; but I have for the purposes of writing this judgment followed every reference offered by the parties on this issue as on all others. The summary of evidence that I have set out therefore reflects what appear to me to be the most important features.
576. As I have already indicated, I accept that the PwC Analysis was intended to provide assurance about the deliverability and sustainability of the examined bids in the event that pensions-related risks materialised. That is evidenced beyond argument to the contrary by:
- i) The references in the pre-final version of the paper for the BICC meeting on 18 February 2019 to the need for the Department to be confident that winning bids would be suitably robust and to the absence of any downside testing on costs in the FRT: see [315] above;
 - ii) The description of the proposed workstream as set out in Ms Hannant’s email on the evening of 20 February 2019: see [312] above;
 - iii) PwC’s terms of reference: see [314] above;
 - iv) Mr Baghurst’s acceptance that the purpose of the PwC Analysis was to enable those who requested it to be comfortable that the leading and pensions-compliant bids in each competition would remain robust if some potential pensions downside risks materialised: see [315] above;
 - v) Paragraphs 75 and 76 of the paper for the extraordinary meeting of BICC on 13 March 2019: see [325] above;
 - vi) Paragraphs 32 and 41 of the CCS and paragraphs 16 and 17 of Annex A to the CCS: see [336]-[337] above.
577. However, from a very early stage, it was fully appreciated by all concerned that the PwC Analysis must not affect or influence the outcome of the ITT evaluation process or any decision to disqualify; and that the only legitimate purpose for the PwC Analysis was to inform a decision whether to proceed with the competitions or to cancel one or more of them. This too is clear beyond argument to the contrary. The minute of the BICC meeting on 18 February 2019, which I have set out at [304] above is, if taken in isolation, equivocal because it does not make the distinction, but the position emerges from what came after:

- i) On 21 February 2019 Ms Walters recorded that the purpose of the PwC Analysis was “to support deciding whether to proceed with pensions compliant bids or cancel the competitions”: see [313] above;
- ii) The draft paper for the BICC meeting on 18 February 2019 shows a clear appreciation of the need to keep any different or additional work separate from the ITT’s evaluation process: see [316] above;
- iii) The paper for the BICC meeting on 13 March 2019 stated expressly that the purpose of the PwC Analysis was “to provide assurance that it would be appropriate to proceed with the competitions”; and it stated in forceful terms that it was “critical” that no evaluation or award decision was made or influenced by the PwC Analysis: see [326] above;
- iv) These statements were carried through to the CCS, specifically at paragraphs 16 and 17 of Annex A: see [337] above. Annex A provides part of the context for the passages of the main text of the CCS. When read with that context in mind, paragraphs 41-44 of the main text are a discussion of cancellation, for which the PwC Analysis is a relevant consideration: see [336] above.

578. With the benefit of these contemporary documents I turn to assess the evidence of the Defendant’s witnesses as summarised at [315]-[320] above. Each witness was clear in their evidence, which reflected the appreciation of the procurement risks that is found in the documents. Each avoided the snares that were set for them by skilful cross-examiners by concentrating on the underlying substance of what had happened, often by very careful and perceptive answers. Having tested their evidence against the contemporaneous documents and reviewed their responses in cross-examination, I accept their evidence that the distinction being drawn at the time was a distinction of substance and not merely of form. Specifically, I accept:

- i) Mr Baghurst’s evidence that the assurance that was wanted was about whether they could proceed to award i.e. whether or not the competitions should be cancelled⁹;
- ii) Mr Baghurst’s evidence that the PwC Analysis could not inform the evaluation score because that was set out in the ITT; and that the test did not affect the Claimants’ position as they would have been disqualified in any event;
- iii) Mr Hayes’ evidence about the distinction between the decision whether to go ahead with the project and the evaluation process, which were two different things; and that this was a distinction of substance and reality and not merely of presentation;
- iv) Ms Palmer’s careful drawing of the distinction between the evaluation process, which selected the leading bidder, and the question whether they should be awarding franchise contracts at all or cancelling the competitions;
- v) Mr Smith’s evidence, which was consistent with those of the other witnesses, that the results of the PwC Analysis would not change the result of the

⁹ In their closing submissions, at [443], the Claimants misquote this evidence by inserting “an” before the word “award”. There is a subtle but real difference between the two.

competition but that there was a separate decision for Ministers to make about whether to proceed with the competitions at all. This answer was given in the context of his evidence that cancellation appeared a very real option in January/February 2019, which evidence I also accept.

579. On this evidence I find that all concerned were aware at all material times of the critical need to insulate the evaluation process from the PwC Analysis and vice versa, and to confine the PwC Analysis to the question whether to proceed or cancel. That awareness is reflected in the CCS, which shows the determination of officials to ensure that the Minister did not confuse the discrete decisions he had to make or the relevance of the PwC Analysis to one but not to the others. I therefore do not find the fact that Mr Smith equipped himself with the PwC Analysis for the meeting with the Secretary of State on 29 March 2019 to provide any support for the Claimants' submissions and case. The stated concern of the Secretary of State went directly to the question whether the competitions should be continued or cancelled, for which the PwC Analysis was relevant material: see [334] above. There is no basis for a speculation that officials would have ceased to be aware of the need to confine the ambit of the PwC Analysis at that meeting: all the evidence, as summarised above, supports the finding I have made that they were aware at all material times of the need to confine it.
580. The Claimants assert that "the PwC work was used as an integral part of the franchise award decisions" and that "the PwC advice was ... used to determine whether the "leading" bids would be successful in the respective competitions". But, to my mind, these statements merely assert what the Claimants seek to prove. Nor is it informative to rely upon the Defendant's acceptance in opening submissions that, if the PwC Analysis had reached different conclusions, the Defendant would have considered rebids or cancellation of the competitions. On the evidence that I have summarised, what in fact happened was that the Defendant took the PwC Analysis into account in deciding whether or not to cancel the competitions. The question then is whether it was legitimate for him to do so. That question is not affected by the fact that, if the Defendant had cancelled the competitions, the leading bidders would not have been awarded the franchises. Such an outcome would have been the result of the Defendant's exercise of his discretion to cancel and not of the evaluation process mandated by the ITT. It is, in my judgment, unduly loose use of language when considering this issue to assert that the PwC Analysis was "used" to determine whether the leading bids would be successful in the respective competitions. Once it is accepted that there is a theoretical difference between "evaluation", "award" and "abandonment" decisions, what matters is whether the Claimants have proved that the difference was theoretical only and that the PwC Advice was not excluded from consideration when making evaluation and award decisions. There is, in my judgment, no evidence at all to support such a finding; and, in the light of the evidence which I have summarised, there is no basis for drawing an adverse inference in this case because of the decision maker not giving evidence.
581. If the submission is made that the Secretary of State was not permitted to rely upon the PwC Analysis for the purposes of his decision whether or not to cancel the competitions, I would reject it. There was no provision of the ITT and no principle of EU or UK law that required a decision to cancel to be taken solely on the basis of information generated by the terms of the ITT: see [572] above. As discussed earlier

in this judgment, the PwC Analysis had significant limitations: see [322]-[324] above. That did not mean that it was an irrelevant or illegitimate consideration when considering whether to cancel. It merely meant that, as was known, the level of assurance it could contribute was similarly limited.

582. For these reasons I answer Issue 9.4.1 by finding that the PwC Analysis was commissioned and used as a test to inform the Defendant's exercise of the discretion given by paragraph 1.9.1 of the ITTs to cancel the competitions and that it was not used for any other purpose. Specifically, it was not used as part of the evaluation process or the process leading to the decision to make the awards to Abellio and First in their respective competitions. That decision was taken on the basis of the evaluation process mandated by the ITT. Nor was it used in order to decide whether to disqualify the Claimants. That would have happened in any event.
583. I answer Issue 9.4.2 in the negative, for the reasons given above. Issue 9.4.3 therefore does not arise.
584. Subject to Issue 9.6 below, the commissioning and use of the PwC Analysis for this purpose was not contrary to the Defendant's duties of transparency, fairness, non-discrimination or equal treatment.

Issue 9.6: To the extent that the Defendant did rely on the PwC 2019 Report was that reliance and/or the reliance on the GAD analysis (on which the PwC 2019 Report was based):

- 9.6.1. unlawful on account of its alleged omission of various aspects of the pension-related risks;*
- 9.6.2. unlawful because the Defendant allegedly failed to consider PwC's downside scenarios of pension risks alongside other downside risks;*
- 9.6.3. a breach of the Defendant's duty of transparency, in circumstances where the Defendant had not informed bidders, prior to the submission of bids, of GAD's forecasts and / or his intention to rely on such forecasts?*

585. The Claimants seek findings that:
- i) The Defendant's use of the PwC Analysis was a manifestly erroneous assessment of the robustness of the leading bids, because it took no account of:
 - a) the risk that further TPR intervention or reductions in Government bond yields would result in liability increases;
 - b) the combined effect of pension risks and other downside risks, in particular revenue risks.
 - ii) The Defendant's use of the PwC Analysis was manifestly erroneous because:
 - a) it was based on a set of calculations by GAD which were produced for the purposes of the proposed alternative risk-sharing mechanism and excluded the cost of post-2019 accruals;
 - b) in the WCP competition, it excluded consideration of Reset pension risks;

- c) the limitations in the PwC Analysis were not drawn to the Secretary of State's attention in the CCS, which (in particular) gave a misleading reason for considering pension risks in isolation.
 - iii) The Defendant breached its duty of transparency by relying, through the PwC Analysis, on GAD's advice as to 'investment return' scenarios without having disclosed that advice to bidders.
- 586. The proposed findings under sub-heading (ii) depart from the agreed list of issues but have been covered during the trial and may be determined without disadvantage or unfairness.
- 587. In support of these findings the Claimants rely upon the limited scope of the five scenarios adopted by PwC. They point to Mr Humphrey's evidence that the GAD figures on which Scenarios 1, 4 and 5 were based were not suitable for looking at potential liabilities from the TOC's point of view and excluded deficit arising from post-2019 accrual. They rely in particular upon the fact that the PwC Analysis considered pensions risks in isolation and ignored non-pensions risks and Mr Baghurst's acceptance in cross-examination of PwC's advice that it is important to understand the combined impact of pension risks and other risks. And they rely upon PwC's advice to the Defendant that they would "struggle to express a view on pensions risks per se" because of the inherent uncertainty in pensions.
- 588. In relation to what they allege to be PwC's "pension risk oversights" they point to the fact that PwC did not take account of the possibility of further intervention by TPR, did not analyse liability risks arising from the risk of the adoption of more prudent actuarial assumptions or reductions in bond yields, and modelled their Scenario 2 without any detailed consideration of the increase in the cost of accrued liabilities within the Scheme. Relying upon Mr Salter's evidence they say that the inclusion of these additional factors may, in various plausible downside scenarios, lead to pension costs that are "vastly higher" than the scenarios modelled by PwC. They rely upon the evidence that they say should have led to the conclusion that no TOC-wide solution was likely to be achieved within a reasonable time and that, in its absence, TPR was likely to impose greater demands than the "minimum objectives" represented by its current parameters. In addition they rely upon the Defendant's failure to take into account the risk of pensions costs during any WCP Reset period and the treatment of the PwC Analysis in the CCS.
- 589. Relying upon this evidence, the Claimants submit in support of the findings they seek that:
 - i) It was a manifest error on the part of the Defendant to rely upon the PwC Analysis as a test of bidders' robustness because of its failure to consider uncertainty over the impact of TPR's intervention, which had caused the pensions problem in the first place, and the possible impact of changes in liabilities. These failures are submitted to be failures to consider relevant matters or to take reasonable steps to obtain information about them;
 - ii) Considering PwC's Analysis in isolation without combining its pensions downside scenarios with other downside risks was a manifest error in circumstances where the Defendant was advised by PwC (and should have

appreciated in any event) that it should do so. The Claimants have, by way of illustration, combined PwC's downside figures with revenue downside figures that were in the Defendant's possession which, unsurprisingly, show an aggregation of risk that goes beyond what PwC presented by their analysis;

- iii) The PwC advice used the wrong set of GAD figures because the PRSM as implemented did not provide protection against risks accruing from post-2019 valuations;
- iv) Pension costs during a likely Reset period were a "significant category of pensions risk" such that it was a further manifest error not to take any account of that risk;
- v) It was manifestly erroneous for the CCS not to inform the Secretary of State of the limitations in the PwC Analysis. The Claimants rely in particular upon the failure to inform the Secretary of State that the PwC Analysis took no account of the risk of future regulatory action or the need to consider pensions risks in combination with other risks, including revenue risks. It is submitted that the Secretary of State was materially misled by this error;
- vi) The Defendant breached its obligation of transparency by failing to inform bidders that it would rely upon the undisclosed GAD advice as part of its award methodology.

590. The Defendant responds compendiously and by reference to its submissions elsewhere that the Secretary of State's reliance on the PwC Analysis (including its use of the GAD data) was appropriate and lawful as part of his determination whether or not to proceed with the competitions even though he had received compliant bids that satisfied the FRT. The limitations of the PwC Analysis were known and were not misrepresented to the Secretary of State by the CCS. As a piece of information being used in relation to the Defendant's discretion to continue or to cancel in accordance with paragraph 1.9.1 of the ITT, the Defendant's use of the PwC Analysis did not offend against the principles of transparency or equal treatment in circumstances where the evaluating requirements of the ITT had been implemented properly and the Claimants were lawfully to be disqualified in any event.

591. I refer to:

- i) [312], [314], [321]-[324] and [575]-[582] above in relation to the limitations of the PwC Analysis and the Defendant's knowledge of those limitations;
- ii) [123]-[168] above in relation to the likelihood of further TPR intervention and the scale of potential pensions risks;
- iii) [421]-[441] and [540]-[546] above in relation to the risk of pensions costs during any WCP Reset period; and
- iv) [481]-[483] above in relation to the treatment of the PwC Analysis in the CCS.

592. The criticisms of the Defendant's use of the PwC Analysis when it did not address the risks of further TPR intervention or liability increases or the effect of combining the

effect of pension risks and other downside risks misunderstand the nature and purpose of the work that PwC were commissioned to undertake. As commissioned and as delivered it was and was expressed to be limited in scope, as discussed earlier in this judgment. PwC pointed out more than once in its report that its consideration of pensions risks was in isolation from other risks; and it had previously told the Defendant that it would struggle to express a view on pensions risks per se for a number of reasons that contributed to the inherent uncertainty in pensions, including possible future intervention by TPR. PwC therefore caveated the Analysis appropriately both before and within the report itself. Therefore, in each of the respects alleged by the Claimants, the Defendant knew the limitations of the work it had commissioned and received.

593. Similarly, the purpose of the work was limited in three important respects. First, it was to provide a measure of assurance: it did not purport to be and was not a full risk assessment of all features that might affect the eventuation of pensions risks. Second, it did not purport to provide assurance about what the outcome might be if pensions risks were combined with non-pensions risks. The PwC Analysis itself was explicit about these limitations and they cannot have been misunderstood by the Defendant. Third, its purpose was to provide some information for the purpose of the Defendant's decision whether to continue or cancel the competitions. The Defendant was not bound to obtain any report going to the question of robustness for the purpose of taking that decision; but it was entitled to do so. On choosing to do so, there was no particular form, scope or content for such a report mandated or prohibited by the ITT and considerations of transparency or equal treatment. The Defendant was exercising a broad discretion that may be exercisable in a wide range of circumstances, with a correspondingly broad discretion about the nature and scope of the information it chooses to take into account. No known principle of EU or UK law required the Defendant to commission PwC to carry out a full and comprehensive risk assessment covering all possible risks, provided that the limitations of the work that was in fact commissioned were known and did not materially mislead. On the facts of this case the limitations were known and there is no evidence to support a finding that they materially misled the Secretary of State in exercising his discretion on continuation or cancellation.
594. The criticisms based on PwC's use of the GAD figures and exclusion of consideration of Reset pension risks are also without substance. Accepting that the GAD figures excluded potential liabilities accruing post-2019, it has not been shown that this would have made a material difference to PwC's Analysis or conclusions or that any difference would have been material to the Secretary of State's exercise of his discretion so that their omission was materially misleading. At most, it suggests a lack of precision in the output from the PwC Analysis, but not that it would have been influential or material.
595. The criticism of the omission of the WCP Reset pension risks fails because of the Claimants' failure to show that it was of any materiality to bidders or, by extension, to the decision the Secretary of State was taking: see [421]-[441] and [540]-[546] above.
596. The allegation that the CCS was misleading in failing to inform the Secretary of State about the significant limitations in the PwC Analysis duplicates the issue discussed at [484] above and is rejected for the same reasons as given there. I also reject the submission that the CCS was misleading because it failed to inform the Secretary of

State of PwC's warnings about the need to consider pensions risks in combination with other risks. The CCS was explicit in stating three times that the PwC Analysis had considered the pensions risks "in isolation". It is necessarily implicit in these statements, and should not need to be spelt out to any Ministerial decision maker, that the PwC Analysis was limited in scope and did not give a full picture of all relevant risks. But, in any event, it was not the purpose of the PwC Analysis to give a full picture of all relevant risks. It was to provide some information that would give a measure of assurance in relation to the decision whether or not to cancel. There is no reason to believe that the Secretary of State was materially misled about the decisions he had to take or the materials on the basis of which he was being asked to make his decisions.

597. As expressed in the Claimants' closing submissions, the last criticism is that the PwC Analysis incorporated or relied upon advice given to the Defendant by GAD which related to investment return and had not been disclosed to the bidders. It follows from the reasons already given that there was no obligation upon the Defendant to disclose the GAD advice any more than there was an obligation to disclose the PwC Analysis itself. This follows from the findings I have made about the purpose and use of the PwC Analysis being limited to the exercise of the Secretary of State's discretion to continue the competitions or to cancel them.
598. It follows that I reject the Claimants' proposed findings and answer Issue 9.6 in the negative.

Issue 11: Are the award and ongoing performance of the First and Abellio Franchise Agreements unlawful on the basis that the Procurements were unlawful as alleged under the previous issues?

599. For the reasons given earlier in rejecting the challenges under the previous issues, I answer this issue shortly.
600. No.

Conclusion

601. For the reasons given in this judgment, the Claimants' pension-based challenges fail.