Neutral citation [2023] CAT 46

Case No: 1586/4/12/23

IN THE COMPETITION

APPEAL TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

10 July 2023

Before:

HODGE MALEK KC
Chair
PAUL LOMAS
WILLIAM BISHOP

Sitting as a Tribunal in England and Wales

BETWEEN:

DYE & DURHAM LIMITED
DYE & DURHAM (UK) LIMITED

Applicants

- v -

COMPETITION AND MARKETS AUTHORITY

Respondent

and

TM GROUP (UK) LIMITED

Intervener

Heard at Salisbury Square House on 26 and 27 June 2023

JUDGMENT (NON-CONFIDENTIAL VERSION)

APPEARANCES

Mr Kieron Beal KC and Mr Ben Lewy (instructed by Dentons UK and Middle East LLP) appeared on behalf of the Applicants.

Mr Ben Lask KC and Mr Thomas Sebastian (instructed by the Competition and Markets Authority) appeared on behalf of the Respondent.

Mr Robert O'Donoghue KC (instructed by Fieldfisher LLP) appeared on behalf of the Intervener.

Note: Excisions in this Judgment (marked "[✂]") relate to commercially confidential information: Schedule 4, paragraph 1 to the Enterprise Act 2002.

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A. INTRODUCTION

1. On 8 July 2021, Dye & Durham Limited ("**D&D**"), through its subsidiary Dye & Durham (UK) Limited (together, the "**Applicants**") acquired the entire allotted and issued share capital of TM Group (UK) Limited ("**TMG**") (the "**Merger**"). The Respondent (the "**CMA**") was not notified of the acquisition and no clearance had been sought from the CMA for the acquisition.

2. On 27 August 2021, the CMA served an Initial Enforcement Order ("**IEO**") on the Applicants, preventing them from doing anything to integrate TMG's business into their own or otherwise impair the ability of TMG to compete independently. The IEO also imposed hold-separate arrangements onto TMG, requiring (*inter alia*) that TMG's business be carried on separately from the Applicants' business.

3. The CMA commenced a Phase 1 investigation into the Merger on 14 October 2021. It made its decision on whether there was a relevant merger situation and the potential of a substantial lessening of competition ("**SLC**") on 9 December 2021.

4. On 23 December 2021, the CMA referred the Merger for a Phase 2 investigation and report. The CMA published its provisional findings and a notice of possible remedies on 18 May 2022. It published its final report on 3 August 2022 (the "**Final Report**").

5. In summary, the Final Report concluded that the Merger would result in a SLC in the market for property search report bundles ("**PSRBs**"). The Final Report found that full divestiture of TMG was the only effective solution to the SLC.

6. Both the Applicants and the Intervener made a number of submissions on the proposed remedies. The Applicants agreed with the CMA and gave a final set of undertakings on 13 October 2022, which required that they divest ownership of TMG (the "**Final Undertakings**") to a purchaser whom the CMA had previously approved. Annex 3 to the Final Undertakings contained the Purchaser Approval Criteria.

7. The Applicants then engaged in a private sale process to divest TMG by selling it to a third-party buyer. A significant amount of interest was shown. On 15 January 2023, the Applicants reported that a large number of potential purchasers had indicated their interest in the sale process, demonstrating a clear demand for the business.

8. On 23 February 2023, roughly half-way through the six-month divestment period, the Applicants submitted a paper titled "*Proposal Paper – Twin Track Divestment Process*" to the CMA (the "**Proposal Paper**"). That paper set out a twin-track approach to the fulfilment of the Final Undertakings, which would "see a process for the proposed admission of TMG's Ordinary Shares to trading on AIM…in parallel to the current private company sale process" (the "**AIM Proposal**"). The details of this proposal – and in particular the identity of the company which the Applicants proposed to list on AIM – were subject to considerable debate between the parties during these proceedings (see paragraphs 25 to 42 below).

9. The CMA issued a provisional decision on 8 March 2023 (the "**Provisional Decision**") rejecting the AIM Proposal. The Applicants responded to that decision on 13 March 2023 (the "**PD Response**").

10. In its final decision of 29 March 2023 (the "**Decision**"), the CMA concluded, in summary, that:

    (1) The AIM Proposal would require a variation to the Final Undertakings. The Applicants had not justified such a variation. Further, the CMA did not consider that a review of the Final Undertakings was appropriate at the current stage of the remedies implementation process;

    (2) The AIM Proposal would not be an acceptable means of the Applicants complying with their obligations under the Final Undertakings. The terms of the Final Undertakings clearly made provision for the disposal of TMG to a single purchaser via a private sale process - in particular, the Final Undertakings require divestment of the shares in TMG to a purchaser approved by the CMA; and

(3) The CMA could not be satisfied that the AIM Proposal would result in divestment to a suitable purchaser with the characteristics required to restore competition in the relevant market, namely independence, capability and commitment as set out in the Purchaser Approval Criteria.

11. On 21 April 2023, the Applicants filed an application for review pursuant to s.120 of the Enterprise Act 2002 (the "**2002 Act**") of the Decision, under four grounds of review ("the **Application**"). These grounds were:

(1) The CMA erred in law in finding that the AIM Proposal would require a variation to the Final Undertakings.

(2) The CMA erred in finding that the Purchaser Approval Criteria (as defined in the Final Undertakings) were not met, in particular:

(i) The CMA erred in considering the Purchaser Approval Criteria by reference to TMG itself, or the shareholders of the Applicants. The Applicants argued that under the AIM Proposal, it would be a holding company of TMG ("**SpinCo**") which would be listed on AIM;

(ii) The CMA failed to take into account material considerations and was disproportionate because it failed to balance the perceived risk of the AIM Proposal against its advantages;

(iii) The CMA erred in law in failing to avoid undue detriment to the Applicants' shareholders; and

(iv) The CMA was wrong to conclude that the AIM Proposal did not meet the independence, capability and commitment criteria contained in the Purchaser Approval Criteria.

(3) The CMA erred in law in finding that no variation to the Final Undertakings should be given (in the event that Ground (1) fails but

Ground (2) is successful). The CMA was wrong to conclude that there was no sustainable basis for such variation.

(4) The fourth ground of review, regarding the refusal of the CMA to extend the deadline for divesting TMG, fell away at the start of these proceedings following the CMA's agreement to such an extension.

12. On 12 May 2023, TMG applied for permission to intervene in these proceedings. TMG's application stated that it did not support the AIM Proposal, on the basis that it constituted a profound change to its corporate structure and threatened to complicate and delay the divestiture, which could adversely affect TMG. The Tribunal granted TMG permission to intervene at the case management conference ("**CMC**") held on 15 May 2023: [2023] CAT 32 at [4].

13. Within their Notice of Application, the Applicants sought permission under Rule 27 of the Tribunal Rules to call expert evidence in the field of Canadian corporate law and practice, in the form of an expert report of Mr Walied Soliman dated 20 April 2023. Whilst this evidence was not before the CMA at the time of the Decision, the Applicants submitted that this was because they had not had the opportunity to present evidence concerning the independence of institutional investors, that was governed by Canadian law and the Tribunal would require expert evidence on that subject. The Applicants submitted that the CMA had not, prior to the Decision, expressed its belief that there was a risk that institutional shareholders may influence TMG management to compromise its ability to compete with D&D.

14. The Applicants also applied for permission to adduce witness statements of Mr Proud, CEO of D&D, dated 21 April 2023, and Mr Franklin-Adams, of finnCap Limited, dated 21 April 2023. Mr Proud's statement sought to provide a summary of events leading up to the Decision, and Mr Franklin-Adams' statement sought to outline his understanding of how TMG would operate as an independent AIM listed company.

15. During the CMC held on 15 May 2023, the Tribunal admitted in part the expert report of Mr Soliman and the witness statement of Mr Proud, but excluded the statement of Mr Franklin-Adams: [2023] CAT 32.

16. The CMA submitted responsive expert evidence to Mr Soliman's report in the form of a five-page letter from Gardiner Roberts LLP, setting out that firm's view of Mr Soliman's report regarding Canadian corporate law principles applicable to D&D.

17. Ultimately there was no real dispute between the experts on what are the Canadian corporate law or governance principles, including the duties and powers of directors and the rights of shareholders. The real dispute between the parties was on how relevant these principles are in resolving the issues in these proceedings.

18. Two weeks after the first admissibility ruling, TMG sought to adduce, as part of its Statement of Intervention, a witness statement of Mr Pepper, the CEO of TMG. This sought to provide a background to TMG, the history of the Merger with the Applicants, the progress of the private sales process, and the AIM Proposal and its impact on TMG. In its Ruling dated 23 June 2023, [2023] CAT 42, the Tribunal admitted Mr Pepper's statement in part.

19. The witness statements did not significantly contribute to the resolution of the issues in the proceedings. Whilst the witness statements did contain some parts which were helpful, much of their content duplicated what was already in the materials before the CMA and in other documents quite properly before the Tribunal. Most of the witness statements to the extent that they were admitted were not referred to at the substantive hearing before the Tribunal.

B. BACKGROUND

(1) The Parties

20. D&D provides cloud-based software and technology for legal, financial and business professionals. It operates in the UK, Canada, Australia and Ireland. It

is headquartered in Canada and listed on the Toronto Stock Exchange. Its technology includes software that automates searches conducted by conveyancers and intermediaries for use in property transactions (for example in relation to environmental, flooding or planning issues). PSRBs can be supplied together as part of a single pack. They assist in the evaluation of the value and risk, as well as the general context, of a property and its surroundings, and they are ordered during the due diligence process of property transactions.

21. TMG is headquartered in England. It provides technology to assist with real estate due diligence for conveyancers and intermediaries. This includes PSRBs.

22. D&D and TMG overlap in the supply of PSRBs in England and Wales. As found in the Final Report, suppliers of PSRBs compete on a number of different aspects of quality and service approach as well as on price. The market is highly concentrated and the merged entity of D&D and TMG is significantly larger in terms of market share than the next largest competitors (ATI and Landmark). D&D and TMG are close competitors. The CMA concluded in the Final Report that the Merger eliminates a major national PSRB supplier from the market; in addition to the merged entity only two large national PSRB suppliers would remain; and that the constraint on the merged entity from the two large suppliers, franchisees and smaller suppliers would not be sufficient to offset the effects of the Merger (para. 39 of the Final Report). It is in this context that the CMA required the divestiture of the shares in TMG to remedy an SLC arising from the Merger.

(2) The Final Undertakings

23. The terms of the Final Undertakings of relevance to these proceedings are set out below:

> "**1. Interpretation**
>
> 'Approved Purchaser' means any purchaser approved by the CMA pursuant to the Purchaser Approval Criteria set out in Annex 3;
>
> 'Divestiture' means the sale of TMG by D&D;

'Final Disposal' means completion of the divestiture of the TMG business in accordance with the Final Undertakings to an Approved Purchaser;

"Remedy" means the divestiture by D&D of TMG as set out in Chapter 10 of the Report;

'Transaction Agreements' means the sale agreement and all other agreements to be concluded between D&D and the Approved Purchaser which are necessary in order to effect the Final Disposal;

…

1.1 The purpose of these Final Undertakings is to give effect to the Remedy identified in the Report and they shall be construed in accordance with the Report.

…

1.6 Unless the context requires otherwise, the singular shall include the plural and vice versa and references to persons includes bodies of persons whether corporate or incorporate. Any reference to person or position includes its or their successor in title.

…

3. Divestiture Undertakings

3.1 D&D gives the following undertakings:

(a) to give effect to and implement the Final Disposal within the Divestiture Period having due regard to the findings in the Report and procure that its Subsidiaries do all things necessary to ensure D&D is able to comply with these Final Undertakings;

(b) to comply with any written directions given by the CMA under these Final Undertakings and to procure that its Subsidiaries also comply, and to take such steps as may be specified or described in the directions for complying with these Final Undertakings, in particular the appointment of a Divestiture Trustee;

(c) to inform the CMA as soon as practicable, and in any event, within six weeks of the Commencement Date, of a shortlist of potential purchasers of the TMG business being drawn up for the CMA's formal approval against the Purchaser Approval Criteria;

(d) to provide the CMA with sufficient information regarding each potential purchaser for which D&D seeks formal approval from the CMA, having regard to the Purchaser Approval Criteria to enable the CMA to give its approval of that potential purchaser, which shall not be unreasonably withheld.

…

3.6 The CMA will advise the Parties whether any potential purchaser is an Approved Purchaser within a reasonable period from the time the CMA concludes it has received sufficient information about the potential purchaser. The CMA will promptly inform the Parties where it considers it has received insufficient information about the potential purchaser.

…

3.8 D&D undertakes to seek CMA approval of the final terms of the Divestiture prior to the Final Disposal, to send the CMA a copy of all the final form Transaction Agreements constituting or relating to the final terms before they are entered into (or other information the CMA may reasonably require) and not to complete the Final Disposal until the CMA has given its written consent to these terms.

…

3.10 Upon the Completion Date, D&D shall transfer the entirety of the shares it holds in TMG to an Approved Purchaser.

…

5. Divestiture Reporting Obligations

5.1 D&D undertakes to provide a written report to the CMA every four weeks from the Commencement Date or such other interval as agreed with the CMA, until Final Disposal. With the consent of the CMA, the reports may be provided through the Monitoring Trustee. The report shall outline the progress D&D has made towards the Final Disposal, and the steps that have otherwise been taken to comply with these Final Undertakings and shall in particular report on:

(a) details of the efforts taken by D&D and its financial advisers to solicit purchasers for the TMG business;

(b) the total number of persons who have indicated an interest or lodged a formal bid with D&D for the acquisition of the TMG business since the publication of the Report;

(c) the name, address, email address, contact point and telephone number of each person who has lodged a formal bid or indicated an interest with D&D since the publication of the Report;

(d) the name, address, email address, contact point and telephone number of all those persons who have been short-listed by D&D as a preferred purchaser;

(e) the status of any discussions that have been held with potential purchasers of the TMG business;

(f) the progress that has been made against the Approved Timetable;

(g) the progress that has been made towards agreeing heads of terms (if applicable);

(h) the steps that have been taken towards reaching Transaction Agreements and the persons to whom any draft agreements have been distributed; and

(i) such other matters as may be directed by the CMA or Monitoring Trustee from time to time.

…

9. Variations to these Final Undertakings

9.1 The terms of these Final Undertakings may be varied with the prior written consent of the CMA in accordance with sections 82(2) and 82(5) of the Act.

9.2 Where a request for consent to vary these Final Undertakings is made to the CMA, the CMA will consider any such request in light of the Report and will respond in writing as soon as is reasonably practicable having regard to the nature of the request and to its statutory duties.

9.3 The consent of the CMA shall not be unreasonably withheld or delayed.

…

13. Extension of time

13.1 The Parties recognise and acknowledge that the CMA may, where it considers it appropriate, in response to a written request from either of the Parties showing good cause, or otherwise at its own discretion, grant an extension of any period specified in these Final Undertakings within which the Parties, the Monitoring Trustee and the Divestiture Trustee (as the case may be) must take action. The grant of any such extension shall not be unreasonably withheld or delayed."

24. The Purchaser Approval Criteria in Annex 3 of the Final Undertakings are as follows:

"These Purchaser Approval Criteria are to be construed in a manner that is consistent with, and for the purpose of giving effect to, the Report in the Relevant Market.
The CMA shall on reasonable request give D&D guidance on the interpretation of specific aspects of these Purchaser Approval Criteria, so as to enable D&D to ensure that its selected purchaser for TMG will meet the requirements of this Annex 3.

1. **Independence**
1.1 An Approved Purchaser should not have any connection (for example financial, management, shared directorships, equity interests, reciprocal

commercial arrangements) to D&D and/or TMG that could reasonably be expected to compromise the Approved Purchaser's ability or incentives to compete with D&D after the Final Disposal.

2. **Capability**
2.1 An Approved Purchaser should have access to or be able to secure appropriate financial resources, expertise and assets to enable TMG to be an effective competitor. This access should be sufficient to enable TMG to continue to develop as an effective competitor.
2.2 When assessing the capability of a potential purchaser of the TMG, an Approved Purchaser should:
(a) be independent of the Parties; and
(b) be committed to TMG competing in the supply of PSRBs in E&W.

3. **Commitment to the Relevant Market**
3.1 An Approved Purchaser should demonstrate to the satisfaction of the CMA that it is committed to and has credible plans for TMG competing in the supply of PSRBs in E&W. This should be evidenced by an appropriate business plan and objectives demonstrating how the purchaser will maintain and operate the TMG business as a viable business actively competing in the market for the supply of PSRBs in E&W.

4. **Absence of competitive concern**
4.1 The CMA shall consider whether the terms of the Transaction Agreements would give rise to a material risk that the Divestiture would not remedy the SLC and the adverse effects that may be expected to result from them. Further an Approved Purchaser should not give rise to a realistic prospect of any further competition or regulatory concerns."

(3) The Sale Process and Development of the AIM Proposal

25. Following the acceptance of the Final Undertakings, the Applicants have been engaged in attempts to divest TMG to a third-party buyer. At the time of the Proposal Paper, negotiations with potential bidders for TMG were continuing. However, the Applicants had been concerned that the sales process might not lead to the divestment of TMG on acceptable terms for the following reasons.

(1) Bidders know that the Applicants must sell TMG by a certain date and is, for that reason, a forced seller, limiting competitive tension amongst bidders; and

(2) The downturn in the UK property market since September 2022 has reduced the number of residential property transactions in England. Prospective buyers seem to expect this to have a negative impact on TMG's valuation, whose business involves selling PSRBs in anticipation of property transactions.

26. The Applicants therefore explored the possibility of pursuing an alternative means of divestment of TMG, specifically an AIM listing to provide both competitive tension and another means of realising value for their shareholders. The first instance of the CMA being made aware that the Applicants were considering an AIM listing was in late January 2023, following a report of the Monitoring Trustee (who was monitoring the divestiture process). On 6 February 2023, the CMA asked the Applicants in email correspondence "whether the AIM listing option is still being considered". The CMA followed this up by email on 8 February 2023:

> "We note in the fourth report from the Monitoring Trustee that D&D is pursuing the introduction of TMG onto AIM as a potential alternative exit mechanism in parallel with the divestment process. You will be aware that the CMA has never approved an IPO as an alternative exit mechanism to divestment, for reasons around purchaser risk (suitability, investor approval process, practical issues) as well as asset risk (timing and execution). It is likely that these same risks will also apply in this case and therefore the introduction of TMG onto AIM would be unlikely to satisfy the objectives of the remedy set out in the Final Report. For these reasons we expect that the Group would be very unlikely to approve this IPO as a potential alternative exit mechanism. We strongly recommend that this course of action is not pursued."

In the same email, the CMA, responding to D&D's request, granted a three week extension to the divestiture period, but indicated that it would be unlikely to be able to grant any further extensions.

27. The Applicants' solicitors replied by email on 10 February 2023:

> "There appears to be a fundamental misunderstanding on this. To be clear, D&D is not seeking to propose an IPO. D&D and TMG senior management have expressed interest in exploring a direct admission of TMG to AIM (discussions to which the Monitoring Trustee has been a party). This would be done by way of a share for share exchange so that TMG shares held by Dye & Durham Corporation would be transferred out to all of Dye & Durham Corporation's public shareholders by way of a court sanctioned plan of arrangement. TMG would then be held by a diverse group of public shareholders and become publicly traded. D&D and TMG believe a direct admission of TMG to AIM would be a path that provided absolute transaction certainty for the CMA, without the counter party risk which would be a particular issue in challenging markets. This is because what TMG have expressed interest in exploring does not involve a share offering to raise any money. The transfer of TMG shares would simply be a dividend out to the D&D public shareholders and TMG would carry on competing as an AIM listed company.

> D&D is very confident this could be achieved within the divestment period and in a way that would satisfy the CMA's approved purchaser criteria as an effective remedy for the SLC identified by the CMA in the Final Report, without giving rise to the risks you mention in your email. D&D is therefore preparing a detailed proposal and timetable on this and intends to present this to you next week for your careful consideration."

28. During oral submissions, Mr Beal KC for the Applicants acknowledged that these emails contain no explicit suggestion of the use of SpinCo, within that arrangement, as the purchaser of TMG shares. SpinCo was to become a central part of the Applicants' case. He explained that the transaction was being presented on a "classic M&A basis where they cut to the chase of what's going on". He submitted that to execute a scheme of arrangement in Ontario, a holding company would be required, but this had been elided for the purposes of simplicity.

29. The Applicants submitted the Proposal Paper to the CMA on 23 February 2023. It set out the AIM Proposal formally for the first time. It outlined the key steps of the proposed transaction as follows:

> "**Stage One**: D&D will conduct a capital reorganisation (the "**Reorganisation**") pursuant to a court approved plan of arrangement in Canada (the "**Plan of Arrangement**"). The outcome of this Reorganisation would be that (i) D&D has no ownership interest in TMG and (ii) the ultimate shareholders of D&D (the "**Public Shareholders**") directly own the entire issued share capital of TMG. Stage One requires:
>
> 3.2.1 D&D and TMG to enter into an arrangement agreement for the Reorganisation and attend an interim hearing with the Ontario Superior Court of Justice (the "**Court**") who would issue an interim order in respect of the Reorganisation;
>
> 3.2.2 D&D to send the Public Shareholders an information circular describing the Reorganisation and calling a special meeting of shareholders, at which the Reorganisation would be approved with 66 2/3% of the shares voting in favour; and
>
> 3.2.3 After a further Court hearing, the Court would issue a final order and the Reorganisation would become effective.
>
> […]
>
> 3.4 Note that certain of the Public Shareholders are members of D&D management or connected persons of D&D management. As a result of the Plan of Arrangement, this means that certain members of D&D management

> will hold shares in TMG. D&D recognise that this needs to be properly dealt with in order to comply with the Final Undertakings. Based on the known shareholders listed in Annex 2, approximately 16.5% of the shares in TMG will be held by shareholders who may be considered to be connected to D&D management and their connected persons (the "**Blind Trust Shares**"). To ensure TMG is fully independent, the Blind Trust Shares will be placed in an independently managed blind trust as part of Stage One until they are sold in an orderly market process managed by the NOMAD (as defined below) following the AIM Admission (see Stage Three) (the "**Blind Trust**"). **The Blind Trust will not exercise any of the voting rights relating to the Blind Trust Shares and no member of D&D management will have any influence over the management of TMG or the ownership or sale of the Blind Trust Shares**.
>
> **Stage Two:** TMG will apply for the AIM Admission. This is not an "Initial Public Offering" as TMG will not be raising any new capital or issuing shares to new shareholders at the time of the AIM Admission. Instead, it will only apply for TMG's shares to be admitted to trading on AIM and therefore become listed.
>
> [**…**]
>
> **Stage Three:** At appropriate points during the period of between 3 and 18 months after AIM Admission, the Blind Trust Shares held by the Blind Trust will be sold by FinnCap into the market (as TMG's NOMAD and broker). It is necessary to wait three months from AIM Admission before beginning sales of the Blind Trust Shares in order to ensure an orderly market in TMG's Ordinary Shares is retained and that TMG remains fully independent while D&D fully divests itself of TMG. The Blind Trust would be maintained throughout this period. This orderly market sale process provides certainty and reduces price volatility for the other shareholders of TMG in the crucial initial trading period following the AIM Admission whilst ensuring no members of D&D management can have any influence on the management or operation of the business of TMG."

30. Section 4 of the Proposal Paper sought to address each of the approval criteria set out in the Purchaser Approval Criteria. It was submitted that the CMA would not be required to open a consultation on the satisfaction of the Final Undertakings as the AIM Admission (as defined in the Proposal Paper) would be a form of divestiture within the Final Undertakings which could satisfy the Purchaser Approval Criteria. If, however, the CMA considered that any variation to the Final Undertakings was required to give effect to the twin track approach, D&D stated it would be happy to request and discuss any such variation (para. 4.16). At the hearing, D&D conceded that the proposal as set out in the Proposal Paper did not fall within the Final Undertakings because they contemplated a sale to a single purchaser, whereas the Proposal Paper specified

a structure whereby the shares in TMG would be issued to multiple purchasers, namely the individual shareholders in D&D.

31. The Proposal Paper did not refer to SpinCo. The only reference to it, as accepted by Mr Beal KC during the hearing, was contained in two lines on a spread-sheet work-plan which was annexed to the Proposal Paper, setting out the detailed implementation steps required for the transaction, which included the lines for action: "reregister new Holdco as Plc", and "distribution in specie to new Holdco Plc" (and, arguably, a reference to "private Plc shareholding calculations"). He submitted that the elision of a description of SpinCo could be explained for the same reasons as its elision from the earlier email correspondence, i.e. the M&A team were "very much focusing on the end result and not necessarily jumping through all of the hoops of the capital reorganisation that was needed in the Ontario Superior Court of Justice". The CMA submitted in oral argument that the AIM Proposal as originally described provided unambiguously for the transfer of TMG's shares directly to D&D's shareholders, of which there were at least 17, followed by the listing of those shares on AIM.

32. On 28 February 2023, the CMA sent a number of questions to the Applicants' solicitors regarding the AIM Proposal, expressing concerns about the appetite of the Applicants' shareholders to hold shares in an AIM listed company, and querying whether it was possible to run the AIM Proposal and the private sale process at the same time. The Applicants' solicitors provided answers to these questions on 2 March 2023.

33. The Applicants' solicitors made further submissions on 6 March 2023, providing a summary of the outcome of round one bids in the private sales process, setting out the issues with the bids received, and highlighting difficulties in the sales process caused by market problems relating to raising acquisition finance and the downturn in the UK residential property market. It expressed concerns as to the likely deliverability of the bids. It submitted that the AIM Proposal offered considerable advantages to the private sales process, in particular by adding a competitive dimension into the divestiture process, and the prospect of maximising returns to the shareholders of the Applicants. The 6

March 2023 submissions did not reference a SpinCo structure or SpinCo being the designated purchaser of the TMG shares as part of the reorganisation.

34. The Provisional Decision ("**PD**"), on 8 March 2023, proposed rejecting the AIM Proposal. It treated the Proposal Paper as suggesting the direct listing of TMG on AIM, stating "immediately on admission to AIM, TMG will have a 100% common shareholding with D&D".

35. In the PD Response of 13 March 2023, the Applicants' solicitors made further submissions, arguing the Provisional Decision was a breach of the CMA's statutory duties and was *Wednesbury* unreasonable, disproportionate and irrational. The PD Response set out explicitly, for the first time, that the AIM Proposal could involve a SpinCo structure involving the issue, allotment and listing of shares of a SpinCo which would be the purchaser of TMG (para.1.6(b)):

> "The Remedy Group wrongly directed itself that the common shareholding would constitute D&D and TMG having "common significant shareholders" by reference to paragraph 5.21 of the CMA's Merger Guidance (CMA87), but AIM Admission would involve the formation of a new company to hold shares in TMG and the allotment and listing of shares in that independent entity, not in a purchase of TMG by a third party competitor …"

36. Other, less explicit, references to SpinCo in the PD Response include references to paragraphs 13.1 and 13.3 of Schedule 8 of the 2002 Act, which relate to the creation of a company and the allotment of its shares to effect the division of a business, and references to the listing of TMG "or its parent". However, some other passages are consistent with the shares in TMG being acquired directly by the shareholders of D&D.

37. The PD Response does not state that it is proposing a modification of the AIM Proposal. However, in their written submissions the Applicants argued that the PD Response did modify the AIM Proposal, with the main modification being "to incorporate an explicit step in which a new UK PLC would be formed, SpinCo, and the relevant D&D shareholding in TMG would be transferred to SpinCo before the AIM Admission. The purpose behind this modification was to address the CMA's apparent concern about the absence of a suitable purchaser".

38. A letter accompanied the PD Response, from finnCap, a company engaged by TMG to act as its financial adviser, broker and NOMAD as part of the AIM Proposal, which stated "[s]hortly prior to the AIM Admission, the Company will become owned by a holding Company that will be created as a PLC (the PLC)."

39. The Applicants submitted that the PD Response specifically identified that TMG shares would end up being held by a newly formed PLC, i.e. SpinCo. The CMA submitted that the PD Response did not suggest that the AIM Proposal had been modified and that any modification to the AIM Proposal would need to be explicit and unambiguous. It would, moreover, need to contain the key factual elements of the proposal that are said by the Applicants to bring it within the Final Undertakings. In any case, the CMA considered that the central thrust of the AIM Proposal remained the same.

40. The Applicants submitted that the meaning and content of the AIM Proposal were a matter of construction and the CMA erred in law by failing to construe it as including an acquisition by a single purchaser in the form of SpinCo. The CMA contended that, although the meaning and content of the Final Undertakings were a matter of legal construction, the question of what the AIM Proposal encompassed was a question of fact. The significance of this difference in approach is that the construction of a written contract is a matter of law and D&D sought to argue that the true construction of the AIM Proposal was also a matter of law. It is well established that a decision which applies an incorrect legal construction may be vitiated by an error of law. On the other hand, if the issue is regarded as simply an error of fact as to what the AIM Proposal includes or not, then different considerations and principles apply, albeit a mistake of fact giving rise to unfairness may be a head of challenge on an appeal on a point of law as recognised by the Court of Appeal in *E v. Secretary of State for the Home Department* [2004] QB 1044 at [66]:

> "In our view, the time has now come to accept that a mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of law, at least in those statutory contexts where the parties share an interest in co-operating to achieve the correct result. Asylum law is undoubtedly such an area. Without seeking to lay down a precise code, the ordinary requirements for a finding of unfairness are apparent from the above analysis of *CICB*. First,

> there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable. Thirdly, the appellant (or his advisers) must not have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the Tribunal's reasoning."

41. The Tribunal does not consider that the construction of the PD Response, and whether or not it should be treated as amending the AIM Proposal, are akin to the construction of a written contract or statutory provision. The PD Response is simply a form of a submission, by the Applicants, to the CMA in response to the Provisional Decision that the CMA was minded to reject the AIM Proposal. Any error by the CMA in not appreciating that the PD Response was in effect putting forward a revised AIM Proposal was one of fact. It was incumbent upon the Applicants to make sufficiently clear to the CMA what it was requesting the CMA to consider and approve including whether it constituted a new or at least revised proposal, and, specifically, whether the shares in TMG would be transferred directly to the D&D shareholders or acquired by SpinCo, the shares which would be issued to those shareholders – particularly when the Applicants submit that this distinction is crucial for the understanding of their proposal and its compliance with the Final Undertakings. The CMA might not have understood the PD Response as amending the AIM Proposal, but their failure to appreciate that was the case was, at worst, an error of fact. However, even if so, it was caused by the Applicants' failure to expressly state clearly either the clarification that they were making to the AIM Proposal or that they were revising the AIM Proposal and that the CMA should proceed on the basis set out as an alternative in the PD Response rather than in the application submitted on 23 February 2023 in the Proposal Paper.

42. In any event the point is academic in the light of the analysis of the terms of the Final Undertakings below. However, were it ever to be relevant, the Tribunal does not find that there was any unfairness in the CMA's approach or that it was acting outside any margin of appreciation in its consideration of the PD Response. It is important to note in that respect that the substance and effect in competition terms of either variant of the AIM Proposal were the same result, namely the shares in TMG were to become, whether directly or indirectly, owned by the shareholders in D&D who would have an AIM tradeable interest

in TMG. The competition considerations were the same whether or not a SpinCo was to be interposed.

(4) The Decision

43. The Decision rejected the AIM Proposal considering that it involved a capital reorganisation of TMG which would result in TMG's entire issued share capital being transferred to the ultimate shareholders of the Applicants who would be able to trade their interests in TMG on AIM. It acknowledged that the shares held by D&D management or connected persons would be independently managed in a blind trust arrangement before being sold between three and 18 months after admission.

44. The CMA concluded that the AIM Proposal could not be accommodated within the existing terms of the Final Undertakings, with reference to clauses 3.8, 3.10 and 5.1 in particular.

45. Further, the Decision found that the timetable for remedies implementation was not intended to accommodate new, complex proposals which were not foreseen, or proposed, at the time of the Final Report. The AIM Proposal could require extension of the divestiture period, prolonging uncertainty around TMG's future ownership, thereby undermining the objective of the Final Report to adopt a process which could quickly and effectively address the CMA's competition concerns. Further, the proposed form of demerger was a very specific form of divestiture which raises other forms of issues.

46. Regarding the Applicants' request to vary the Final Undertakings, the CMA concluded that D&D had not explained or provided evidence as to the relevant change in circumstance, nor provided the information required under the CMA's guidance set out in CMA11 dated August 2015 (the "**Variation Guidance**"). The CMA does not normally take account of costs or losses that will be incurred by the merger parties as a result of a divestiture remedy. The Applicants had also not explained how the Final Undertakings should be varied in order to accommodate the AIM Proposal. In considering the variation request,

the CMA also noted that any such variation would likely require a consultation, which would further extend the divestiture timetable.

47. Having concluded that the AIM Proposal did not satisfy the terms of the Final Undertakings, and that there were no grounds to vary their terms, the CMA nevertheless went on to consider whether the AIM Proposal would satisfy the conditions in the Final Undertakings.

48. The CMA concluded that the AIM Proposal did not meet the independence criteria in the Final Undertakings. At the time of the AIM Admission, D&D and TMG would have identical shareholders with identical shareholdings. The CMA concluded this common ownership would create unilateral incentives to maximise value by reducing competition between TMG and D&D. It found that there was a risk that the institutional shareholders would exercise influence over TMG management via either formal or informal means which might compromise their incentive or ability to compete with D&D. This risk would not require the shareholders to coordinate their actions in order to exercise their votes in the same way. This is because they would each individually have a common interest in reducing competition to increase shareholder returns. In particular, the CMA was concerned that there was a risk that TMG shareholders, who are also D&D shareholders, might not support TMG management in raising additional funds which they may require to compete effectively.

49. Regarding the capability and commitment criteria, the CMA expressed concerns about TMG's ability to raise funds under the AIM Proposal – instead of being part of a larger corporate group with access to additional resources, it would be independently listed. Further, whilst the common ownership with D&D shareholders continued, its market price may be depressed due to an expectation that D&D shareholders would be looking to sell their shares, which could impact on its ability to raise equity finance.

50. The CMA therefore concluded that the AIM Proposal would require a variation to the Final Undertakings, that no such variation should be made, and that even if it were made, the AIM Proposal would not be an acceptable means of

complying with the Final Undertakings as the CMA could not be satisfied that TMG would be divested to a suitable purchaser.

C. LEGAL AND POLICY FRAMEWORK

(1) Remedies and Variation

51. The functions of the CMA in relation to mergers are set out in Part 3 of the 2002 Act. S.35 sets out the steps the CMA must take following a decision that there is an anticompetitive outcome in relation to a merger:

> "**35 Questions to be decided in relation to completed mergers**
> […]
>
> (3) The CMA shall, if it has decided on a reference under section 22 that there is an anti-competitive outcome (within the meaning given by subsection (2)(a)), decide the following additional questions—
>
> (a) whether action should be taken by it under section 41(2) for the purpose of remedying, mitigating or preventing the substantial lessening of competition concerned or any adverse effect which has resulted from, or may be expected to result from, the substantial lessening of competition;
>
> (b) whether it should recommend the taking of action by others for the purpose of remedying, mitigating or preventing the substantial lessening of competition concerned or any adverse effect which has resulted from, or may be expected to result from, the substantial lessening of competition; and
>
> (c) in either case, if action should be taken, what action should be taken and what is to be remedied, mitigated or prevented.
>
> (4) In deciding the questions mentioned in subsection (3) the CMA shall, in particular, have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the substantial lessening of competition and any adverse effects resulting from it.
>
> (5) In deciding the questions mentioned in subsection (3) the CMA may, in particular, have regard to the effect of any action on any relevant customer benefits in relation to the creation of the relevant merger situation concerned.
>
> (6) In relation to the question whether a relevant merger situation has been created, a reference under section 22 may be framed so as to require the CMA to exclude from consideration—
>
> (a) subsection (1) of section 23;
>
> (b) subsection (2) of that section; or
>
> (c) one of those subsections if the CMA finds that the other is satisfied.
>
> (7) In relation to the question whether any such result as is mentioned in section 23(2)(b) has arisen, a reference under section 22 may be framed so as to require the CMA to confine its investigation to the supply of goods or services in a part of the United Kingdom specified in the reference."

52. S.41 of the 2002 Act sets out the CMA's duty to take action to remedy an SLC, by taking action through final undertakings (s.82) or final orders (s.84):

> "**41 Duty to remedy effects of completed or anticipated mergers**
>
> (1) Subsection (2) applies where a report of the CMA has been prepared and published under section 38 within the period permitted by section 39 and contains the decision that there is an anti-competitive outcome.
>
> (2) The CMA shall take such action under section 82 or 84 as it considers to be reasonable and practicable—
>
> (a) to remedy, mitigate or prevent the substantial lessening of competition concerned; and
>
> (b) to remedy, mitigate or prevent any adverse effects which have resulted from, or may be expected to result from, the substantial lessening of competition.
>
> (3) The decision of the CMA under subsection (2) shall be consistent with its decisions as included in its report by virtue of section 35(3) or (as the case may be) 36(2) unless there has been a material change of circumstances since the preparation of the report or the CMA otherwise has a special reason for deciding differently.
>
> (4) In making a decision under subsection (2), the CMA shall, in particular, have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the substantial lessening of competition and any adverse effects resulting from it.
>
> (5) In making a decision under subsection (2), the CMA may, in particular, have regard to the effect of any action on any relevant customer benefits in relation to the creation of the relevant merger situation concerned.
>
> […]
>
> **82 Final undertakings**
>
> (1) The CMA may, in accordance with section 41, accept, from such persons as it considers appropriate, undertakings to take action specified or described in the undertakings.
>
> (2) An undertaking under this section—
>
> (a) shall come into force when accepted;
>
> (b) may be varied or superseded by another undertaking; and
>
> (c) may be released by the CMA**.**
>
> (3) An undertaking which is in force under this section in relation to a reference under section 22 or 33 shall cease to be in force if an order under section 76(1)(b) or 83 comes into force in relation to the subject-matter of the undertaking.
>
> (4) No undertaking shall be accepted under this section in relation to a reference under section 22 or 33 if an order has been made under—
>
> (a) section 76(1)(b) or 83 in relation to the subject-matter of the undertaking; or
>
> (b) section 84 in relation to that reference.

(5) The CMA shall, as soon as reasonably practicable, consider any representations received by it in relation to varying or releasing an undertaking under this section.

[…]"

53. S.92 of the 2002 Act sets out the duties on the CMA to monitor undertakings and final orders made under ss.82 and 84:

"**92 Duty of CMA to monitor undertakings and orders**
(1) The CMA shall keep under review—

(a) the carrying out of any enforcement undertaking or any enforcement order; and

(b) compliance with the prohibitions in sections 77(2) and (3) and 78(2) and in paragraphs 7(2) and (3) and 8(2) of Schedule 7.

(2) The CMA shall, in particular, from time to time consider—

(a) whether an enforcement undertaking or enforcement order has been or is being complied with;

(b) whether, by reason of any change of circumstances, an enforcement undertaking is no longer appropriate and—

(i) one or more of the parties to it can be released from it; or

(ii) it needs to be varied or to be superseded by a new enforcement undertaking; and

(c) whether, by reason of any change of circumstances, an enforcement order is no longer appropriate and needs to be varied or revoked.

[…]"

54. The CMA's guidance on divestiture is set out in Merger Remedies (CMA87) dated 13 December 2018 (the "**Remedies Guidance**"). The sections of relevance to the issues in these proceedings are set out below.

"3.4. There are common principles that apply to the assessment of remedies at Phase 1 and Phase 2, although the application of these principles will take account of the relevant differences in the decisions to be taken at each phase. The CMA will seek remedies that are effective in addressing the SLC and its resulting adverse effects and will then select the least costly and intrusive remedy that it considers to be effective. The CMA will seek to ensure that no remedy is disproportionate in relation to the SLC and its adverse effects. The CMA may also have regard, in accordance with the Act, to any relevant customer benefits (RCBs) arising from the merger. In the following paragraphs, we consider these factors and their interaction in greater detail.

3.5. The CMA will assess the effectiveness of remedies in addressing the SLC and resulting adverse effects before going on to consider the costs likely to be incurred by the remedies. Assessing the effectiveness of a remedy will involve several distinct dimensions: (a) Impact on SLC and resulting adverse effects. The CMA views competition as a dynamic process of rivalry between firms

seeking to win customers' business over time. Restoring this process of rivalry through structural remedies, such as divestitures, which re-establish the structure of the market expected in the absence of the merger, should be expected to address the adverse effects at source. Such remedies are normally preferable to measures that seek to regulate the ongoing behaviour of the merger parties (so-called behavioural remedies, such as price caps, supply commitments or restrictions on use of long term contracts). Behavioural remedies are unlikely to deal with an SLC and its adverse effects as comprehensively as structural remedies and may result in distortions when compared with a competitive market outcome. (b) Appropriate duration and timing. Remedies need to address the SLC effectively throughout its expected duration. Remedies that act quickly in addressing competitive concerns are preferable to remedies that are expected to have an effect only in the long term or where the timing of the effect is uncertain. (c) Practicality. A practical remedy should be capable of effective implementation, monitoring and enforcement. To enable this to occur, the operation and implications of the remedy need to be clear to the merger parties and other affected parties. The practicality of any remedy is likely to be reduced if elaborate and intrusive monitoring and compliance programmes are required. Remedies regulating ongoing behaviour are generally subject to the disadvantage of requiring ongoing monitoring and compliance activity. (d) Acceptable risk profile. The effect of any remedy is always likely to be uncertain to some degree. In evaluating the effectiveness of remedies, the CMA will seek remedies that have a high degree of certainty of achieving their intended effect. Customers or suppliers of merger parties should not bear significant risks that remedies will not have the requisite impact on the SLC or its adverse effects.

3.6. Having decided which of the remedy options would be effective in addressing the SLC and resulting adverse effects, the CMA will then consider the costs of those remedies. In order to be reasonable and proportionate, the CMA will seek to select the least costly remedy, or package of remedies, of those remedy options that it considers will be effective. If the CMA is choosing between two remedies which it considers will be equally effective, it will select the remedy that imposes the least cost or that is least restrictive. The CMA will seek to ensure that no remedy is disproportionate in relation to the SLC and its adverse effects.

[…]

3.9. In particular, for completed mergers, the CMA will not normally take account of costs or losses that will be incurred by the merger parties as a result of a divestiture remedy, as it is open to the merger parties to make merger proposals conditional on the approval of the relevant competition authorities. It is for the merger parties to assess whether there is a risk that a completed merger would be subject to an SLC finding, and the CMA would expect this risk to be reflected in the agreed acquisition price. Since the cost of divestiture is, in essence, avoidable, the CMA will not, in the absence of exceptional circumstances, accept that the cost of divestiture should be considered when selecting remedies.

[…]

5.2. To be effective in restoring or maintaining rivalry in a market where the CMA has decided that there is an SLC, a divestiture remedy will involve the

sale of an appropriate divestiture package to a suitable purchaser through an effective divestiture process.

5.3. Divestitures may be subject to a variety of risks that may limit their effectiveness in addressing an SLC. It is helpful to distinguish between three broad categories of risks that may impair the effectiveness of divestiture remedies, as follows: (a) Composition risks: these are risks that the scope of the divestiture package may be too constrained or not appropriately configured to attract a suitable purchaser or may not allow a purchaser to operate as an effective competitor in the market. (b) Purchaser risks: these are risks that a suitable purchaser is not available or that the merger parties will dispose to a weak or otherwise inappropriate purchaser. (c) Asset risks: these are risks that the competitive capability of a divestiture package will deteriorate before completion of the divestiture, for example, through the loss of customers or key members of staff.

5.4. The incentives of merger parties may serve to increase the risks of divestiture. Although merger parties will normally have an incentive to maximise the disposal proceeds of a divestiture, they will also have incentives to limit the future competitive impact of a divestiture on themselves. Merger parties may therefore seek to sell their less competitive assets/businesses and target them to firms which they perceive as weaker competitors. They may also allow the competitiveness of the divestiture package to decline during the divestiture process.

[…]

5.20. The identity and capability of a purchaser will be of major importance in ensuring the success of a divestiture remedy. The merger parties will therefore need to obtain the CMA's approval of the prospective purchaser.

5.21. The CMA will wish to satisfy itself that a prospective purchaser is independent of the merger parties; has the necessary capability to compete; is committed to competing in the relevant market; and divestiture to the purchaser will not create further competition concerns. The relative importance that the CMA attributes to each of these criteria will depend on the circumstances of the investigation. These criteria are considered in more detail below: (a) The acquisition by the proposed purchaser must remedy, mitigate or prevent the SLC concerned or any adverse effect resulting from it, achieving as comprehensive a solution as is reasonable and practicable. (b) Independence. The purchaser should have no significant connection to the merger parties that may compromise the purchaser's incentives to compete with the merged entity (eg an equity interest, common significant shareholders, shared directors, reciprocal trading relationships or continuing financial assistance). It may also be appropriate to consider links between the purchaser and other market players. (c) Capability. The purchaser must have access to appropriate financial resources, expertise (including managerial, operational and technical capability) and assets to enable the divested business to be an effective competitor in the market. This access should be sufficient to enable the divestiture package to continue to develop as an effective competitor. For example, a highly-leveraged acquisition of the divestiture package which left little scope for competitive levels of capital expenditure or product development is unlikely to satisfy this criterion. The proposed purchaser will be expected to obtain in advance all necessary approvals, licences and consents

> from any regulatory or other authority. (d) Commitment. The CMA will wish to satisfy itself that the purchaser has an appropriate business plan and objectives for competing in the relevant market(s), and that the purchaser has the incentive and intention to maintain and operate the relevant business as part of a viable and active business in competition with the merged party and other competitors in the relevant market. (e) Absence of competitive or regulatory concerns. Divestiture to the purchaser should not create a realistic prospect of further competition or regulatory concerns.
>
> […]
>
> 5.24. In requiring that the proposed purchaser be independent of and unconnected to the merger parties, the CMA will pay close attention to any links that would exist between the merger parties and the purchaser following divestment. This includes any proprietary interest that the merger parties would retain in or over the divested business that could impede the successful, independent operation of the divested business.
>
> […]
>
> 5.26. In terms of determining whether the proposed purchaser has the financial resources, expertise, incentive and intention to maintain and operate the divestment business, the CMA is seeking to assess whether the purchaser will compete vigorously in the future on the basis of what it has acquired to address the SLC or the adverse effect resulting from it. The CMA will consider carefully the evidential basis on which the merger parties (and the proposed purchaser) assert that the proposed purchaser will have an incentive to compete going forward."

55. The CMA's guidance on the variation and termination of merger, monopoly and market undertakings and orders is set out in the Variation Guidance. The sections of relevance to the issues in these proceedings are set out below.

> "2.4 In considering variation and termination of undertakings and orders, either upon request from a party or under the CMA's own initiative (see paragraphs 3.2 to 3.8), the CMA will consider whether there has been a change of circumstances. If there has, the CMA will then consider what action, if any, should be taken.
>
> 2.5 The precise nature of the CMA's consideration of any change of circumstances will depend entirely on the individual circumstances affecting a particular undertaking or order. However, the change of circumstances must be such that the undertaking or order is no longer appropriate in dealing with the competition problem and/or adverse effects which it was designed to remedy, if it is to lead to either variation or termination.
>
> […]

> 3.3 Parties may request that undertakings or orders be varied or terminated by reason of a change of circumstances. Any submission making such a request should set out clearly and with supporting evidence:
> • what the change of circumstances is
> • how and why this makes it appropriate to vary or terminate the undertakings or order
> • the possible consequences for consumers and businesses impacted by the remedy
> • why a review of the order and undertakings meets the CMA's published prioritisation principles, and
> • whether the request is being raised in order to avoid a breach of the undertakings or order".

(2) Standard and Intensity of Review

56. The Applicants' challenge to the Decision is governed by s.120 of the 2002 Act. Accordingly, the Tribunal must apply "the same principles as would be applied by a court on an application for judicial review" (s.120(4)).

57. As to judicial review proceedings before the Tribunal, the Court of Appeal held in *Office of Fair Trading and others v IBA Health Limited* [2004] EWCA Civ 142 ("**IBA**") that, notwithstanding its specialist composition, the Tribunal is to apply the ordinary principles of judicial review in determining applications pursuant to s.120(4) of the 2002 Act (see IBA at [53] and [88]). As regards the intensity of review, Carnwath LJ observed that:

> "91. Thus, at one end of the spectrum, a 'low intensity' of review is applied to cases involving issues 'depending essentially on political judgment' (de Smith para 13-056-7). Examples are *R v Secretary of State, ex p Nottinghamshire CC* [1986] AC 240, and *R v Secretary of State ex p Hammersmith and Fulham LBC* [1991] 1AC 521, where the decisions related to a matter of national economic policy, and the court would not intervene outside of 'the extremes of bad faith, improper motive or manifest absurdity' ([1991] 1AC at 596-597 per Lord Bridge). At the other end of the spectrum are decisions infringing fundamental rights where unreasonableness is not equated with 'absurdity' or 'perversity', and a 'lower' threshold of unreasonableness is used:
>
> > 'Review is stricter and the courts ask the question posed by the majority in Brind, namely, 'whether a reasonable Secretary of State, on the material before him, could conclude that the interference with freedom of expression was justifiable.' (De Smith para 13-060, citing *Brind v Secretary of State* [1991] AC 696).'
>
> 92. A further factor relevant to the intensity of review is whether the issue before the Tribunal is one properly within the province of the court. As has often been said, judges are not 'equipped by training or experience or furnished

with the requisite knowledge or advice' to decide issues depending on administrative or political judgment (see *Brind* [1991] 1AC at 767, per Lord Lowry). On the other hand where the question is the fairness of a procedure adopted by a decision-maker, the court has been more willing to intervene:

> 'Such questions are to be answered not by reference to Wednesbury unreasonableness, but 'in accordance with the principles of fair procedure which have been developed over the years and of which the courts are the author and sole judge'' (*R v Takeover Panel ex parte Guinness plc* [1990] 1QB 146, 184, per Lloyd LJ).

93. The present case, as the Tribunal observed (para 223), is not concerned with questions of policy or discretion, which are the normal subject-matter of the Wednesbury test. Under the present regime (unlike the [Fair Trading Act 1973]) the issue for the OFT is one of factual judgment. Although the question is expressed as depending on the subjective belief of the OFT, there is no doubt that the court is entitled to enquire whether there was adequate material to support that conclusion (see *Tameside* case, [1977] AC at 1047 per Lord Wilberforce)."

58. *British Sky Broadcasting Group PLC v The Competition Commission and The Secretary of State for Business, Enterprise and Regulatory Reform* [2008] CAT 25 ("**BSkyB**") concerned a judicial review application under s.120 of the 2002 Act in respect of the Competition Commission's finding that there was a relevant merger situation which was expected to result in an SLC and recommendation that there be a partial divestiture of ITV shares that Sky had purchased. In that case Sky submitted that Parliament chose to allocate the power of review to the Tribunal, a specialist body, as opposed to a generalist court, and Parliament must be taken to have anticipated particular consequences for the intensity of review that would follow from that choice. Thus, whilst applying the same principles as the Administrative Court would apply, the Tribunal should do so with a greater intensity of review because it is a specialist judicial body. The Tribunal did not accept this submission and clarified that, although the Tribunal is a specialist body and enjoys a degree of familiarity with the statutory regime, relevant case law and some of the legal and economic concepts which arise:

> "62. However, in our view none of this means that the Tribunal is applying judicial review principles in a different way or is exercising a higher intensity of review than would be the case if the matter were before the Administrative Court. Further, by no means all of the findings which may be the subject of a section 120 challenge are such as would necessarily call for expertise in competition law and practice. For example, in the present case there is a challenge to a finding by the Commission that, by reason of (in particular) the

> size of its shareholding, Sky is likely to be able to exercise material influence over the policy of ITV through its ability to block a special resolution or a scheme of arrangement. In assessing the adequacy of the factual basis for this finding the Tribunal can, of course, bring to bear the business knowledge and experience of its panel members, but has no other intrinsic advantage that might not be found in the Administrative Court.
>
> 63. […] We consider that the principles we should apply in this application are those which are helpfully set out and discussed in, in particular, Tameside and IBA, and which were applied in the Tribunal decisions cited to us. As the Commission and the Secretary of State submit, the Tribunal must avoid blurring the distinction which Parliament clearly drew between a section 120 review and an appeal on the merits. We shall need to bear this distinction in mind when we come to deal with the specific points raised by Sky in relation to the factual basis upon which the Commission reached the challenged 28 findings. It is one thing to allege irrationality or perversity; it is another to seek to persuade the Tribunal to reassess the weight of the evidence and, in effect, to substitute its views for those of the Commission. The latter is not permissible in a review under section 120."

59. Sky appealed against the Tribunal's decision, contending amongst other things that the Tribunal erred in law as to the content of its obligation to apply judicial review principles. In *British Sky Broadcasting Group PLC v The Competition Commission and The Secretary of State for Business Enterprise and Regulatory Reform* [2010] EWCA Civ 2 ("**BSkyB (CA)**"), the Court of Appeal rejected Sky's argument and endorsed the Tribunal's reasoning in BSkyB at [63] (see BSkyB (CA) at [32] and [41]). It is this approach that applies in relation to the present Application.

60. Regarding the grounds of challenge relating to legal error, the Applicants correctly submitted there is no margin of appreciation to be afforded to the CMA – the construction of a legal provision is either right or wrong (*Mercury Communications Ltd v Director General of Telecommunications* [1996] 1 WLR 48, HL).

(3) **Rationality and Proportionality**

61. *Stagecoach Group PLC v Competition Commission* [2010] CAT 14 ("**Stagecoach**") concerned a judicial review application under s.120 of the 2002 Act. One of the grounds of challenge was that the Competition Commission acted irrationally by arriving at a counterfactual that was not supported by sufficient or any evidence. The Tribunal applied the approach set out by the

Court of Appeal in IBA and endorsed in *BSkyB* (CA) (see *Stagecoach* at [41]) and observed that:

> "42. […] it is not the Tribunal's task to reassess the relative weight of different factors arising from the evidence before the Commission. The task is to assess whether the Commission had an adequate evidential foundation for arriving at the factual conclusions that it did, in the sense that, on the basis of the evidence before it, it could reasonably have come to those conclusions. […]
>
> 45. […] Where Stagecoach asserts that there is no or no sufficient evidence to support one of the Commission's key findings, Stagecoach must show either that there is simply no evidence at all to support the Commission's conclusions or that on the basis of the evidence the Commission could not reasonably have come to the conclusions that it did. The fact that the evidence might have supported alternative conclusions, whether or not more favourable to Stagecoach, is not determinative of unreasonableness in respect of the conclusion actually reached by the Commission. We must be weary of a challenge which is 'in reality an attempt to pursue a challenge to the merits of the Decision under the guise of a judicial review' […]
>
> 46. The Commission also reminded us that it is important to consider the evidence relied on in the Decision 'taken as a whole' and that the Decision should not be analysed as if it were a statute. The Tribunal must consider the materiality of any 'fact' found by the Commission which the Tribunal determines has no evidential foundation – not every failure in fact-finding and analysis by a decision making body requires or permits its finding or decision to be quashed.
>
> […]
>
> 48. […] The question we must ask ourselves, paraphrasing the description of the Wednesbury test expressed by the Vice Chancellor (as he then was) in *Office of Fair Trading v IBA Health Ltd* [2004] EWCA Civ 142, is whether the Decision is so unreasonable as to be a decision which no Commission properly instructed and taking account of all, but only, relevant considerations could arrive at."

62. The Tribunal considered the standard of rationality in *BAA Limited v Competition Commission* [2012] CAT 3 ("**BAA**") when determining a judicial review application under s.179 of the 2002 Act. The *BAA* case concerned a report by the Competition Commission following a market investigation, which found that a number of features of the market each gave rise to an adverse effect on competition ("**AEC**") and required BAA to sell one of its Scottish airports and both Gatwick and Stansted airports. BAA's challenge included the submission that the Competition Commission was obliged to carry out its functions in a way that is compatible with Convention rights and the divestiture

remedy it imposed on BAA involved a disproportionate interference with its Convention right as set out in Article 1 of the First Protocol to the ECHR. The Tribunal applied *IBA* and *BSkyB (CA)* and held at [20(3)] to [20(8)] that:

> "(3) The CC, as decision-maker, must take reasonable steps to acquaint itself with the relevant information to enable it to answer each statutory question posed for it (in this case, most prominently, whether it remained proportionate to require BAA to divest itself of Stansted airport notwithstanding the MCC the CC had identified, consisting in the change in government policy which was likely to preclude the construction of additional runway capacity in the south east in the foreseeable future): see e.g. *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014, 1065B per Lord Diplock; *Barclays Bank plc v Competition Commission* [2009] CAT 27 at [24]. The CC 'must do what is necessary to put itself into a position properly to decide the statutory questions': *Tesco plc v Competition Commission* [2009] CAT 6 at [139]. The extent to which it is necessary to carry out investigations to achieve this objective will require evaluative assessments to be made by the CC, as to which it has a wide margin of appreciation as it does in relation to other assessments to be made by it: compare, e.g., *Tesco plc v Competition Commission* at [138]-[139]. In the present context, we accept Mr Beard's primary submission that the standard to be applied in judging the steps taken by the CC in carrying forward its investigations to put itself into a position properly to decide the statutory questions is a rationality test: see *R (Khatun) v Newham London Borough Council* [2004] EWCA Civ 55; [2005] QB 37 at [34]-[35] and the following statement by Neill LJ in *R v Royal Borough of Kensington and Chelsea, ex p. Bayani* (1990) 22 HLR 406, 415, quoted with approval in Khatun:
>
> > 'The court should not intervene merely because it considers that further inquiries would have been desirable or sensible. It should intervene only if no reasonable [relevant public authority – in that case, it was a housing authority] could have been satisfied on the basis of the inquiries made.'
>
> (4) Similarly, it is a rationality test which is properly to be applied in judging whether the CC had a sufficient basis in light of the totality of the evidence available to it for making the assessments and in reaching the decisions it did. There must be evidence available to the CC of some probative value on the basis of which the CC could rationally reach the conclusion it did: see e.g. *Ashbridge Investments Ltd v Minister of Housing and Local Government* [1965] 1 WLR 1320, 1325; *Mahon v Air New Zealand* [1984] AC 808; *Office of Fair Trading v IBA Health Ltd* [2004] EWCA Civ 142; [2004] ICR 1364 at [93]; *Stagecoach v Competition Commission* [2010] CAT 14 at [42]-[45].
>
> (5) In some contexts where Convention rights are in issue and the obligation on a public authority is to act in a manner which does not involve disproportionate interference with such rights, the requirements of investigation and regarding the evidential basis for action by the public authority may be more demanding. Review by the court may not be limited to ascertaining whether the public authority exercised its discretion 'reasonably, carefully and in good faith', but will include examination 'whether the reasons adduced by the national authorities to justify [the interference] are 'relevant

and sufficient'' (see, e.g., *Vogt v Germany* (1996) 21 EHRR 205 at para. 52(iii); also *Smith and Grady v United Kingdom* (1999) 29 EHRR 493, paras. 135-138). However, exactly what standard of evidence is required so that the reasons adduced qualify as 'relevant and sufficient' depends on the particular context: compare *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26; [2001] 2 AC 532 at [26]-[28] per Lord Steyn. Where social and economic judgments regarding 'the existence of a problem of public concern warranting measures of deprivation of property and of the remedial action to be taken' are called for, a wide margin of appreciation will apply, and – subject to any significant countervailing factors, which are not a feature of the present case – the standard of review to be applied will be to ask whether the judgment in question is 'manifestly without reasonable foundation': *James v United Kingdom* (1986) 8 EHRR 123, para. 46 (see also para. 51). Where, as here, a divestment order is made so as to further the public interest in securing effective competition in a relevant market, a judgment turning on the evaluative assessments by an expert body of the character of the CC whether a relevant AEC exists and regarding the measures required to provide an effective remedy, it is the 'manifestly without reasonable foundation' standard which applies. One may compare, in this regard, the similar standard of review of assessments of expert bodies in proportionality analysis under EU law, where a court will only check to see that an act taken by such a body 'is not vitiated by a manifest error or a misuse of powers and that it did not clearly exceed the bounds of its discretion': Case C-120/97 *Upjohn Ltd v Licensing Authority* [1999] ECR I-223; [1999] 1 WLR 927, paras. 33-37. Accordingly, in the present context, the standard of review appropriate under Article 1P1 and section 6(1) of the HRA [1998] is essentially equivalent to that given by the ordinary domestic standard of rationality. […]

(6) It is well-established that, despite the specialist composition of the Tribunal, it must act in accordance with the ordinary principles of judicial review: see I*BA Health v Office of Fair Trading* [2004] EWCA Civ. 142 per Carnwarth LJ at [88]–[101]; *British Sky Broadcasting Group plc v Competition Commission* [2008] CAT 25, [56]; *Barclays Bank plc v Competition Commission* [2009] CAT 27, [27]. Accordingly, the Tribunal, like any court exercising judicial review functions, should show particular restraint in 'second guessing' the educated predictions for the future that have been made by an expert and experienced decision-maker such as the CC: compare *R v Director General of Telecommunications, ex p. Cellcom Ltd* [1999] ECC 314; [1999] COD 105, at [26]. (No doubt, the degree of restraint will itself vary with the extent to which competitive harm is normally to be anticipated in a particular context, in line with the proportionality approach set out by the ECJ in Case C-12/03P *Commission v Tetra Laval* [2005] ECR I-987 at para. 39, but that is not something which is materially at issue in this case). This is of particular significance in the present case where the CC had to assess the extent and impact of the AEC constituted by BAA's common ownership of Heathrow, Gatwick and Stansted (and latterly, in its judgment, Heathrow and Stansted) and the benefits likely to accrue to the public from requiring BAA to end that common ownership. The absence of a clearly operating and effective competitive market for airport services around London so long as those situations of common ownership persisted meant that the CC had to base its judgments to a considerable degree on its expertise in economic theory and its practical experience of airport services markets and other markets and derived from other contexts;

(7) In applying both the ordinary domestic rationality test and the relevant proportionality test under Article 1P1, where the CC has taken such a seriously intrusive step as to order a company to divest itself of a major business asset like Stansted airport, the Tribunal will naturally expect the CC to have exercised particular care in its analysis of the problem affecting the public interest and of the remedy it assesses is required. The ordinary rationality test is flexible and falls to be adjusted to a degree to take account of this factor (cf *R v Ministry of Defence, ex p. Smith* [1996] QB 517, 537-538), as does the proportionality test (see *Tesco plc v Competition Commission* at [139]). But the adjustment required is not as far-reaching as suggested by Mr Green at some points in his submissions. It is a factor which is to be taken into account alongside and weighed against other very powerful factors referred to above which underwrite the width of the margin of appreciation or degree of evaluative discretion to be accorded to the CC, and which modifies such width to some limited extent. It is not a factor which wholly transforms the proper approach to review of the CC's decision which the Tribunal should adopt; (8) Where the CC gives reasons for its decisions, it will be required to do so in accordance with the familiar standards set out by Lord Brown in *South Buckinghamshire District Council v Porter (No. 2)* [2004] UKHL 33; [2004] 1 WLR 1953 (a case concerned with planning decisions) at [36]:

> 'The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision.' In applying these standards, it is not the function of the Tribunal to trawl through the long and detailed reports of the CC with a fine-tooth comb to identify arguable errors. Such reports as to be read in a generous, not a restrictive way: see *R v Monopolies and Mergers Commission, ex p. National House Building Council* [1993] ECC 388; (1994) 6 Admin LR 161 at [23]. Something seriously awry with the expression of the reasoning set out by the CC must be shown before a report would be quashed on the grounds of the inadequacy of the reasons given in it."

63. The 2002 Act stipulates that applications brought under s.120 or s.179 are to be determined by applying judicial review principles. Therefore the principles set

out in *BAA* equally apply in the context of a review under s.120 of the 2002 Act. This was recognised by the Tribunal in *Intercontinental Exchange, Inc. v Competition and Markets Authority* [2017] CAT 6 ("**ICE**") at [30].

64. In ICE, which was a judicial review application under s.120 of the 2002 Act, the Tribunal applied the principles set out in *BAA* and stated that:

> "101. We agree that divestiture by ICE of its interest in Trayport would be an intrusive step, but not so seriously intrusive as an order for divestiture in a market investigation. This is because, in the case of a completed merger, the merging parties have taken the foreseeable risk that the CMA may make an order for divestiture. In contrast, an order for divestment in a market investigation context may be more intrusive, since it requires a change in the status quo and intervenes in an existing structure which, quite possibly, comprises integrated activities that represent the product of investment and development over a long period of time. This distinction however does not undermine the fact that divestiture is an intrusive remedy where one would expect the CMA to have exercised appropriate care in the analysis of the SLC and selection of the remedy required. Even in such a case as emphasised in *BAA* at para 20(7) the CMA retains a wide margin of appreciation and discretion. […]".

65. Accordingly, the standard of review applied by the Tribunal in *ICE* was:

> "124. […] whether the CMA had a sufficient basis in light of the totality of the evidence available to it for making the assessments that it did, as to which there must be evidence available to the CMA of some probative value on the basis of which the CMA could rationally reach the conclusion that it did."

66. Regarding the grounds of challenge which the Applicants argued concerned proportionality (Grounds (2) and (3)), the Applicants denied that the test is one of "without manifest foundation". They submitted that the Tribunal must assess the balance which the CMA has struck and decide for itself whether the decision is proportionate, not merely whether it is within the range of reasonable responses: *R v SSHD ex p Daly* [2001] 2 AC 532, and that a proportionality assessment does not call for a light touch review.

67. This submission appears to overstate the extent to which proportionality is a factor in deciding the issues in this case which arise after a decision has already been made, and not challenged, that the intrusive remedy of divestiture should be imposed. The level of review on proportionality grounds is sufficiently set out for current purposes in *BAA*.

68. The CMA has a wide margin of appreciation in assessing the AIM Proposal against the Purchaser Approval Criteria, which permits the CMA to make educated and rational predictions regarding risk. It is not for this Tribunal to make its own assessment of proportionality.

D. THE APPLICANTS' GROUND 1 - ERROR OF LAW IN FINDING A VARIATION TO THE FINAL UNDERTAKINGS WAS NEEDED

(1) The Parties' Submissions

The Applicants

69. The Applicants contended that the CMA erred in law in finding that the AIM Proposal would require a variation to the Final Undertakings. The conclusion that the AIM Proposal requires a variation in the Final Undertakings is an error of law because the construction of a written contract is a question of law, and the Final Undertakings are to be construed as if they were a contractual document. Alternatively, the construction of an order akin to a final or enforcement order is a question of law susceptible to review by the Tribunal, citing *Trump International Golf Course v Scottish Minister* [2015] UKSC 54. The CMA therefore has no margin of appreciation regarding the interpretation of the Final Undertakings. The CMA agreed with this proposition.

70. The AIM Proposal involved the creation of SpinCo which would operate independently of the Applicants. Step 3 of the AIM Proposal constituted a qualifying sale of TMG to SpinCo, since the shares in TMG would be transferred to an independent third-party entity. SpinCo would be the purchaser of the TMG business for the purpose of the Final Undertakings and would be eligible for approval under the Purchaser Approval Criteria. In essence, as part of the corporate reorganisation, SpinCo would acquire the shares in TMG which would be transferred to it in consideration for SpinCo issuing shares in itself to existing shareholders of D&D. Mr Beal KC submitted in the hearing that the definition of divestiture within the Final Undertakings was broad enough to include an internal reorganisation taking place by virtue of a scheme of

arrangement, where that scheme contemplates the transfer of shares for consideration.

71. The AIM Proposal could therefore comply with the Final Undertakings, in particular clauses 3.1(d), 3.8, and 5.1, through the provision to the CMA of copies of the AIM Proposal transaction documents. The Applicants submitted that the failure of the CMA to treat the AIM Proposal differently from a sale of TMG to a third party for the purpose of the Final Undertakings was therefore an error of law.

72. The Applicants also submitted that the CMA's criticisms of the AIM Proposal were founded on irrelevant considerations, or involved the CMA acting in a procedurally unfair manner and/or behaving in a *Wednesbury* unreasonable manner as regards the following findings by the CMA:

(1) D&D did not put forward any alternative construction of the Final Undertakings: The Applicants submitted they had put forward alternative constructions of the Final Undertakings which allow for the AIM Proposal.

(2) D&D did not explain the role of SpinCo prior to the Final Decision: The Applicants had sufficiently explained the role of SpinCo prior to the Decision, in the PD Response.

(3) The Proposal was not advanced by D&D before the Remedies Group prior to the acceptance of the Final Undertakings: The CMA made an error of fact in stating this. The Applicants had raised it as a possibility before the Final Undertakings were given.[1]

[1] During a Remedies Hearing with the CMA on 14 June 2022, the Executive Vice President of D&D made allusions to a potential IPO as a means of divestiture: "The other thing that definitely has come up is the potential, depending on markets, for an IPO of this, and that is a possibility, but it would depend. Maybe a combination of the two to be totally honest. Those are all possibilities that are very real…The other one is what I described and it is trying to set up a management buyout/IPO or something like that…Our anticipation would be just start a formal process. Like, we would hire an investment banker and probably create what we call a dual process which you guys are pretty familiar. Whereby, you try to get like a private sale, at the same time try to get to an IPO and see what you can get done first. You thereby create competitive tension between the two essentially…Like, not to state the obvious but markets, especially the IPO markets, are not as good as they were, sort of -- we are told that this could

(4) The AIM Proposal was a "new, complex proposal" which could require further extension of the divestiture period: The CMA's conclusion that the AIM Proposal might require extension of the divestiture period was unfair when the CMA had taken nearly five weeks to reach a final decision on the AIM Proposal. It was *Wednesbury* unreasonable given TMG was and had been operated in a functionally independent manner and where an extension of time was already otherwise required. Further, regarding the allegation that the AIM Proposal was novel, the US Courts and EU Commission have both recognised "spinoffs" as a means of divestiture. Mr Beal KC pointed to a number of examples of spinoffs in other jurisdictions, arguing that they demonstrated that, as a matter of principle, common institutional shareholders were not considered necessarily to pose a problem, and that spinoffs are neither novel nor complex as a form of divestiture.

(5) The Proposal would produce further uncertainty for TMG with its future ownership unknown: It is irrational to prefer a sub-standard outcome to a better one, simply because the sub-standard outcome can be achieved more quickly. The implied contention there is, thereby, a risk to the competitive capacity of TMG cannot be sustained given that the UK property market stands to improve. (The Tribunal notes that there was no evidence submitted to it on future property market conditions.)

The Respondent

73. The CMA submitted that the Final Undertakings clearly require a private sale of TMG's shares to a single approved purchaser. The Final Undertakings' definitions of divestiture, final disposal, and transaction agreements, and the requirement under clause 3.1(d) for D&D to seek formal approval for each potential purchaser clearly point to a private sales process involving one buyer. Clauses 3.8, 3.10 and 5.1 of the Final Undertakings also clearly envisage such a process. No other process was proposed during the negotiations of the Final

definitely get done. But maybe not…I think in talking to some of the banks about it, they thought it depends what path you go down. An IPO could be faster than a sale process was their thinking."

Undertakings. Mr Lask KC submitted that the rationale for requiring a private sale is easily discernible since the purchaser approval process (which would be difficult to apply to multiple shareholder purchasers who could be trading their interest from day one) is integral to the Final Undertakings.

74. The Applicants have never disputed that the Final Undertakings require a private sale to a single purchaser. The Applicants' (purported) insertion of SpinCo into the AIM Proposal in the PD Response is an acceptance by them of the need for a single purchaser.

75. The AIM Proposal, as originally described to the CMA by the Applicants, unambiguously involved the transfer of TMG's shares to multiple D&D shareholders, followed by a listing of those shares. This would not amount to a disposal to a single purchaser via a private sales process, and so variation of the Final Undertakings would be necessary. The Applicants had not proposed a construction of the Final Undertakings which would accommodate the AIM Proposal as it is worded.

76. The CMA characterised Ground (1) as, in reality, a challenge to whether the CMA had misconstrued the AIM Proposal (i.e. mis-understanding whether it involved SpinCo and the impact of that inclusion) and not a challenge to the actual construction of the Final Undertakings. On that basis, the challenge was related to an error of fact, not an error of law. As the Applicants were themselves responsible for the error of fact, given their failure to properly explain the AIM Proposal or its alleged modification, it could not constitute a ground of challenge.

77. The CMA rejected the Applicants' submissions that D&D had modified the AIM Proposal in the PD Response to incorporate the formation of SpinCo. The Applicants did not explain any such modification clearly, state that the AIM Proposal had been amended, or propose that SpinCo should be considered under the Purchaser Approval Criteria. The CMA accepted there were references in the PD Response to a new holding company PLC, but these were unexplained and cryptic, and the PD Response continued to propose the listing of TMG on AIM. Such allusions were not enough to indicate that the very clear plan put

forward in the AIM Proposal was being modified. The CMA was therefore entitled to consider that the AIM Proposal involved the transfer of TMG's shares to multiple shareholders, followed by AIM Admission, and to consider the need for a variation on that basis. The later provision of further information by the Applicants regarding the nature of the AIM Proposal and SpinCo in their Notice of Application was irrelevant for the purposes of this challenge, as all parties agree that the Decision must be reviewed according to the materials before the CMA at the time it made that Decision.

78. Mr Lask KC submitted that the cryptic references to SpinCo within the PD Response were not sufficient to trigger a duty on the CMA to conduct further enquiries into whether the AIM Proposal was being modified, nor was it irrational for the CMA not to do so. It was incumbent upon the Applicants to make it clear if they were modifying the AIM Proposal.

79. Further, even if the PD Response had modified the AIM Proposal, the central thrust remained that TMG would, in substance, be transferred to multiple D&D shareholders and then listed on AIM, whether directly or via SpinCo. This would not constitute a private sale to a single buyer. The argument that the interim step of transferring TMG shares to SpinCo would satisfy the Final Undertakings was one of form over substance, and amounted to a superficial attempt to circumvent the need to vary the Final Undertakings. Mr Beal KC's submissions that the earlier documents presented to the CMA did not refer to SpinCo because they were focusing on the end result of the AIM Proposal supported the argument that the core thrust of the proposal remained admission to AIM, which is not within the Final Undertakings. The Applicants had themselves acknowledged that SpinCo was inserted as a means (purportedly) to meet the need to have a Purchaser to whom (a) a sale took place and (b) to which the Purchaser Approval Criteria could be applied.

80. The CMA confirmed during the hearing that the AIM Proposal was the first such proposal it has dealt with in the context of a divestment remedy.

(2) The Tribunal's Analysis

81. The Tribunal has already found that the CMA made no error of law in not appreciating that D&D had, in effect, amended its application for approval in the PD Response to add, as an alternative to a direct transfer of shares to the multiple D&D shareholders of TMG shares, their acquiring the shares through a SpinCo which would issue shares in itself to those shareholders as part of a transaction whereby TMG's shares would be transferred to SpinCo. It was common ground at the hearing that the AIM Proposal as set out in the Proposal Paper did not fall within the Final Undertakings. The Tribunal considers that, even on the assumption that SpinCo were part of the AIM Proposal, it does not fall within the Final Undertakings which contemplate a private sale to a single purchaser.

82. The analysis of the CMA as set out in paragraph 29 of the Decision was that the Final Undertakings require disposal of TMG to a single purchaser via a private sale process. In particular, it reasoned:

> "The Remedy Group does not consider that the AIM Admission would satisfy the terms of the Final Undertakings as agreed with D&D and TMG and accepted by the CMA on 13 October 2022. Neither the Final Report nor the Final Undertakings specify in what way D&D must dispose of the TMG business. In this regard, the general obligation is on D&D to complete the divestiture of the TMG business in accordance with the Final Undertakings to an Approved Purchaser within the Divestiture Period.[2] However, the specific terms of the Final Undertakings clearly make provision for the disposal of TMG to a single purchaser via a private sale process. In particular, Clause 3.10 of the Final Undertakings requires D&D to transfer the entirety of the shares it holds in TMG to an Approved Purchaser. D&D is obliged to provide the CMA with sufficient information regarding each potential purchaser for which D&D seeks formal approval from the CMA, having regard to the Purchaser Approval Criteria, to enable the CMA to give its approval of that potential purchaser.[3] There are other references to the CMA's review of transaction agreements (Clause 3.8) and the contents of the reporting obligations which include providing details of bids received (Clause 5.1) which are consistent with the disposal of TMG to a single purchaser via a private sale process."]

83. That the Final Undertakings contemplate the private sale to a single purchaser is evident from the wording of the undertakings. In particular:

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[2] Clause 3.1(a) of the Final Undertakings.
[3] Clause 3.1(d) of the Final Undertakings.

(1) In Clause 1(a) "Final Disposal" means completion of the divestiture of the TMG business in accordance with the Final Undertakings to "an Approved Purchaser".

(2) Other provisions of the Final Undertakings refer to a potential purchaser in terms that a single purchaser is envisaged (e.g. Clauses 3.1, 3.6 and 3.10).

(3) The Purchaser Approval Criteria are also in terms of "an Approved Purchaser".

84. It is inconceivable that the terms "sale" and "disposal" encompass a distribution in specie to D&D shareholders of TMG's shares in the context of the Final Undertakings and the Final Report (which called for the disposal of TMG's shares to remedy a significant lessening of competition inherent in the Merger). The CMA clearly required that the shares be disposed by way of a sale to a single purchaser to be approved by the CMA. The Final Report itself is expressed in terms of a sale to a single purchaser - it considered the availability of suitable purchasers and concluded it was likely that a suitable purchaser would be found for the divestiture package (paras.10.133-10.141).

85. At no time prior to the finalisation of the Final Undertakings did D&D seek to amend the wording of what is based on a CMA template to provide for a sale to multiple purchasers or for something akin to a corporate reorganisation or listing of TMG's shares on AIM. Consistent with the Final Undertakings as requiring a private sale to a single purchaser, D&D then sought to do just that during the divestiture period. It solicited interest and offers from potential purchasers and reported on progress on that to the Monitoring Trustee and the CMA.

86. The insertion of a SpinCo in the process as set out in the PD Response (at best, very late in D&D's application for approval of the AIM Proposal) did not change the substance. The Final Undertakings were to remedy a competition issue. The insertion of SpinCo into the transaction has no effect on the competition law analysis, being purely a matter of internal corporate structuring. It is not credible that the parties to the Final Undertakings would have formed

the common intention that such a change in form, which had no impact on the substantive competition issue, would have turned a structure that clearly did not meet the terms of the Final Undertakings into one which, on construction, did.

87. The economic interest in TMG was to be owned by the shareholders in D&D whatever corporate structure was adopted. This is far removed from a private sale to a single purchaser. It was the Applicants' case that the introduction of SpinCo was made to get around a perception arising from the Provisional Decision that the CMA might regard it necessary for there to be a single purchaser for the AIM Proposal to fall within the Final Undertakings (Reply, paras. 9 and 18). In reality and substance however, the transaction, even if amended, was still aimed to transfer the beneficial ownership in TMG to multiple D&D shareholders. It did not constitute a private sale as envisaged and certainly did not transfer the beneficial ownership of TMG to an individual shareholder. The insertion of SpinCo, as an alternative to TMG's shares being directly transferred to D&D's shareholders, was no more than a mechanism to seek to satisfy a very narrow and technical reading of the Final Undertakings which is not sustainable.

88. The conclusion that the AIM Proposal even with SpinCo does not fall within any credible interpretation of the Final Undertakings is not surprising. The CMA has never used or approved a spinoff approach for divestiture in a merger situation. It was evidently not in the parties' contemplation at the time the Final Undertakings were concluded that it was intended that this would be a permissible means of disposal. One would have expected very specific wording to be inserted to permit such a technique, in such circumstances.

89. The Tribunal therefore dismisses Ground (1) of the Application. Since the CMA did not err in concluding that a variation of the Final Undertakings was required, it is logical to consider next Ground (3) in relation to the CMA's decision that no variation to the Final Undertakings should be given.

E. THE APPLICANTS' GROUND 3 – ERROR OF LAW IN FINDING THAT NO VARIATION TO THE FINAL UNDERTAKINGS SHOULD BE GIVEN

(1) The Parties' Submissions

The Applicants

90. The Applicants submitted that if Ground (1) failed but Ground (2) were successful, the CMA committed an error of law in finding that no variation to the Final Undertakings should be given to permit a transaction to which there was substantive approval in competition terms. There were issues with the private sales process and advantages to the AIM Proposal, which Mr Beal KC characterised, during the hearing, as introducing a greater degree of competition into the bidding process, representing an alternative to a sale of a business in constrained or forced circumstances, and allowing the true economic value of the company to be realised by existing shareholders. The Applicants submitted that, in light of these circumstances, it was *Wednesbury* unreasonable for the CMA to refuse to allow for a variation of the Final Undertakings to permit the AIM Proposal. The difficulties in obtaining a sale to a third-party purchaser constitute a change in circumstances which would justify a variation.

91. The Applicants characterised the CMA's reliance on the need for a consultation ahead of any approval of a variation to the Final Undertakings as an error of law. Such consultation is not required by statute, and a short form consultation could in any case have been conducted.

92. During oral submissions, the Applicants also submitted that nothing in the Variation Guidance suggests the requested variation is not possible, noting that it was not statutory guidance. Further, the guidance itself notes that the CMA will apply it flexibly. The Applicants submitted that to the extent that the CMA relies on the Variation Guidance as imposing requirements amounts to an unlawful fettering of discretion, citing *R v Hampshire County Council ex p W* [1994] ELR 460 and *R v Police Complaints Board ex p Madden* [1983] 1 WLR 447.

93. The Applicants contended that this is a case where it is appropriate for the CMA to allow a modest variation of the Final Undertakings to permit the AIM Proposal. Where the market conditions have changed such that there is a substantial risk of a private sale at significantly less value than would be achieved via an AIM listing, and there is no real or substantiated risk of a competition concern, it would be disproportionate to refuse a small variation of the Final Undertakings.

The Respondent

94. The CMA submitted that the Applicants failed to identify or evidence a relevant, or sufficient, change in circumstances, since they entered into the Final Undertakings, to justify a variation to the Final Undertakings.

95. The Applicants had not explained how a downturn in market conditions was a relevant change for the purposes of the Variation Guidance: i.e. one which meant the Final Undertakings were no longer appropriate for dealing with the competition problem identified and/or adverse effects which it was designed to remedy. No evidence was provided by the Applicants to suggest that the Final Undertakings were no longer appropriate to remedy the SLC identified and its adverse effects. Rather, their concern was the likely price to be realised.

96. The fact a party may not achieve a sales price that it considers acceptable is not, on its own, a relevant change of circumstance. There is no requirement that a company must realise a particular price in order for a remedy to be proportionate. It need only be given the opportunity to obtain fair market value (*BAA*) – a private sales process provided this to the Applicants. Further, the Applicants have adduced no evidence that the AIM Proposal would result in a better price.

97. The Applicants had not, prior to the hearing, suggested that the CMA should depart from the Variation Guidance. On the contrary, the CMA is under a basic public law duty to follow its own guidance unless there are good reasons not to do so. The CMA's duty is to remedy an SLC, not to protect the commercial interests of the divesting entity. All divesting entities subject to Final

Undertakings will to some extent be seen as forced or constrained sellers – allowing a variation on this ground would undermine the CMA's ability to impose divestment remedies.

98. Further, according to the CMA, the Applicants failed to satisfy any of the other requirements for a variation in the Variation Guidance. Since those requirements are cumulative, this was, they submitted, fatal to Ground (3).

99. Finally, the Applicants' assertion that the Decision contained errors of law regarding the need for consultation was wrong. The CMA had not suggested that there is a statutory requirement to conduct a consultation, but it had referred to normal practice as set out in the Variation Guidance. The fact that a consultation is not mandated by statute does not imply it would be irrational to conduct one. The CMA was entitled to conclude that conducting and considering the results of a consultation would likely have required a further extension of the divestiture period.

TMG

100. TMG submitted that no public law error arises in the CMA's conclusion that the Applicants have not justified their request for a variation to the Final Undertakings. Neither of the reasons provided by the Applicants for the variation request – (i) it could potentially increase the value realised in disposing of TMG via the AIM Proposal as compared with a private sale, and (ii) it would add competitive tension to the private sales process underway – provides sufficient basis for variation. The key part of the Variation Guidance – clause 2.5 – is not even mentioned by the Applicants in their written submissions.

101. Further, the Applicants have never suggested, including in their submissions regarding a variation to the Final Undertakings, that full divestiture of TMG to a private independent buyer was no longer an appropriate remedy. The Variation Guidance is clear that commercial risks are subsidiary to the need to ensure divestiture within the period specified in the Final Undertakings. Further, UK merger control does not operate to ensure the divesting undertaking can obtain

the highest price possible – the Merger Guidance is clear that the CMA will attribute less significance to the cost of a remedy.

102. TMG also submitted that the Applicants raised the possibility of the AIM Proposal too late. It was proposed half-way through the divestiture period, not at the time of the Final Undertakings. This created obvious risk of delay to the divestiture timetable. The CMA was entitled to conclude for timing reasons alone that the variation was unjustified. The Applicants fail to address this point, and the fact that the materials required for the AIM Proposal were not yet ready at the date of the Decision evidenced the likely delay that approach would cause to the divestment process. The stasis and uncertainty which the AIM Proposal created risks potentially harming TMG.

103. Finally, there was no public law error in the CMA concluding it would need to consult third parties on a remedy that is unprecedented in UK merger control and raised, for the first time, months after the Final Undertakings were adopted.

(2) The Tribunal's Analysis

104. In the Decision, the CMA considered whether the Applicants had provided evidence of a change of circumstances within the meaning of paragraph 2.4 of the Variation Guidance and paragraph 9 of the Final Undertakings.

105. The key point relied upon by the Applicants as amounting to a change in circumstances is the downturn in the property market which is referred to in the Proposal Paper in the following terms:

> "4.15 **Due process**: Although the AIM Admission was not formally proposed during the negotiation of Final Undertakings by the CMA and D&D between August and October 2022, the CMA must as a matter of fair process consider alternative ways of achieving its objectives, particularly if circumstances have changed. As the CMA will be aware, since the Final Report was issued in August 2022 and the Final Undertakings were agreed between D&D and the CMA in October 2022, the short-term downturn in the UK property market has persisted which, combined with the increasing lack of access to liquidity and unfavourable interest rates (both in respect of the residential lending for property purchases and also commercial lending for leveraged acquisitions by purchasers who may have been likely to acquire TMG utilising debt financing, both driven by the increase in

> Bank of England rates to 4%), mean a simple divestment through the Sale Process has become more challenging since the Final Undertakings were agreed. The AIM Admission represents an alternative method of delivering the CMA's preferred remedy which does not rely on the debt market."

106. The Applicants hoped that having a twin-track approach of pursuing a private sale process and having the possibility of an AIM listing would maximise value for the shareholders in TMG. The presence of the possibility of disposing of TMG via the AIM Proposal would mean that the Applicants would no longer be seen as forced sellers by potential purchasers, who may then be tempted to offer better prices for TMG. If there was no private sale, then the shares in TMG or SpinCo could be listed and the D&D shareholders could benefit from any increases in TMG's value as reflected in its share price (Proposal Paper, para. 4.14).

107. The CMA found that there had been no change of circumstances. In particular, as set out in the Decision:

> "39. The Remedy Group has considered the merits of D&D's submission that the AIM Admission (run in parallel to the private sale) should be accepted as being a better means of achieving the divestment of TMG since it would maximise potential value to D&D's shareholders in paragraph 24 above. In addition, the Remedy Group does not consider that D&D's submission explains or provides evidence as to why the Final Undertakings are no longer appropriate in dealing with the SLC that they were designed to address by achieving a divestiture to a suitable purchaser. The Remedy Group notes that nearly **[✂]** potential purchasers were involved in the initial stage of the sale process and **[✂]** non-binding indications of interest were received at Round 1 with **[✂]** potential purchasers being shortlisted for Round 2."

108. The critical element for the CMA's exercise of its discretion is set out in para 2.5 of the Variation Guidance, where it states that "the change of circumstances must be such that the undertaking …. is no longer appropriate in dealing with the competition problem and/or the adverse effects that it is intended to remedy". D&D did not squarely address this issue. The whole point of the AIM Proposal was not that the divestment was not appropriate (it was not challenged at the time and the Applicants expressly affirmed that they accepted the remedy) but rather that the remedy could be implemented by a methodology that they considered would be more favourable financially to them. That does not satisfy the test of the remedy being no longer appropriate.

109. The Tribunal finds no basis for finding that the CMA was unreasonable in its assessment that there was no sufficient change in circumstances to justify a variation to the Final Undertakings. When parties merge without seeking CMA clearance in advance, they take the risk that the CMA will ultimately find that the merger should be unwound on competition grounds and that the shares in the company acquired should be subject to a compulsory process of divestiture. In such circumstances, a purchaser will usually, ultimately, be in a position of being a forced seller under an obligation to dispose of its shareholding within a fixed period. The market price for the shares may well be different to when the shares were originally required, and this could involve a loss.

110. The CMA found the Applicants were not faced with a dearth of potential purchasers. It may well be that the prices being offered were significantly less than the Applicants may have hoped, but that is not a proper basis for a variation application based on a change of circumstances.

111. The CMA's core findings in the Final Report (that the remedy for the significant lessening of competition should be by way of a divestiture of the shares in TMG and that it is likely that a suitable purchaser would be found for the divestiture package (para. 10.141)) were not challenged. It was entitled to consider that the remedy should be implemented as set out in the Final Undertakings.

112. In addition to finding that there was no change in circumstances, the CMA also expressed concern over the timing of the request and the impact it would have for the divestiture process, the remedying of the SLC and on TMG and its business as an independent entity. As the CMA found in its Decision:

> "17. As a result, the Remedy Group considers that the timetable for remedies implementation (which the Remedy Group has already extended once in this case) is not intended to accommodate new, complex proposals such as the AIM Admission which were not foreseen at the time of the Final Report. To do so could require further extension of the Divestiture period thereby prolonging a period of uncertainty for TMG in which its future ownership is unknown, increasing the risk of deterioration of its assets and competitive capability. This would undermine the objective of the Final Report in adopting a divestiture process that could quickly and effectively address our competition concerns.

…

40. Any request for a variation of undertakings would typically require the issuing of an invitation to comment and a three-week consultation to give interested parties a chance to comment.[4] In exceptional circumstances such as where the CMA believes that the claimed change of circumstances constitutes in and of itself specified information (within the meaning of Part 9 of the Act) publication of an invitation to comment may not occur.[5] The remedy Group does not consider that the evidence suggests that there exist any exceptional circumstances which would justify dispensing with a consultation in this case[6] and considers that, given the novelty of the demerger and AIM Admission, it would be important to consult and ensure that all relevant factors were taken into consideration. This would likely require a further extension to the Divestiture period taking it beyond 5 May 2023. The Remedy Group has also taken this into account in assessing the variation request. As noted above at paragraph 17, this would extend the period of uncertainty for TMG and would conflict with the need for a remedy to act quickly in addressing the competition concerns.

41. After consultation on the request for a review, the CMA would then decide whether or not to conduct a review of the undertakings. In taking this decision, the CMA will act in accordance with its prioritisation principles.[7]

Conclusion on the variation request

42. Having had due regard to D&D's request of 13 March 2023 to consider variation of the Final Undertakings to accommodate a twin track approach including the AIM Admission, for the reasons given above the Remedy Group, now under Clause 9.2 of the Final Undertakings informs D&D that it has failed to justify the variation request. In addition, the Remedy Group has considers whether the circumstances merit the launch of a review of the Final Undertakings and does not consider a review would be appropriate at this stage of the remedies implementation process given the progress made in the private sale process envisaged by the Final Undertakings (and the CMA's powers to appoint a Divestiture Trustee to sell the divestment business on behalf of D&D at no minimum price in the event that such a sale is not achieved within the Divestiture Period)."

113. The Tribunal finds no error in the CMA's approach. The AIM Proposal had the following features:

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[4] CMA11, at paragraph 3.6.
[5] CMA11, at paragraph 3.6.
[6] Whilst paragraph 3.6 of CMA11 indicates that in exceptional circumstances the CMA may decide not to consult on a variation request, the Remedies Group does not consider this would be appropriate in this case. D&D could have raised the AIM option at the time the Final Undertakings were given and has chosen not to do so. This cannot now be raised as a valid reason to depart from the usual process and timeframe for variation of undertakings.
[7] CMA11, paragraph 3.10.

(1) It was being raised very late in the day, after the Final Undertakings had been given and mid-way through the divestiture period.

(2) The level of interest by private purchasers did not contradict the CMA's assessment in the Final Report that it was likely that suitable purchasers would be attracted by the divestiture package.

(3) The AIM Proposal was a twin-track proposal. The Applicants did not commit themselves to an AIM listing, but wished to use it as an incentive to obtain better offers from prospective purchasers, but only if no acceptable offer was forthcoming would the AIM Proposal be carried through.

(4) For the CMA, a divestiture by way of demerger and AIM admission was novel and raised competition considerations.

(5) The AIM Proposal could lead to delay in the process of divestiture.

(6) The AIM Proposal did not satisfy paragraph 2.5 of the Variation Guidance.

(7) A variation required the satisfaction of five cumulative criteria. Irrespective of whether the Applicants had a valid case as to there being a qualifying change of circumstances, they had not sought properly to satisfy, in particular, the requirements to explain, with evidence: the possible consequences for consumers or businesses impacted by the remedy (essentially why common shareholdings would not undermine the effectiveness of the remedy); or how the proposed review would meet the CMA's published prioritisation principles. The weakness of the application, in this respect, is a further reason why the CMA did not err in not acceding to it when applying its own public guidelines.

114. As to the Applicants' argument that divestiture by way of using a SpinCo was not novel as such approaches had been permitted both by the European

Commission and the US authorities in respect of specific mergers,[8] this fails to deal with the CMA's concern. The CMA did not state a divestiture could never be acceptable through such a mechanism, although it was common ground that it was novel in the sense that it had never been done under the UK merger regime. Whether or not it would be acceptable, would be very much fact specific and no doubt require close and careful consideration. Here, however, it was being raised late in the process and in relation to an outcome where at least initially the ultimate shareholders of both D&D and TMG would be the same.

115. Further the CMA was entitled to ensure that any remedy was an effective remedy and implemented without delay. Delay has an impact on TMG, which was facing continued uncertainty, with the risk of deterioration of its assets and competitive capability.

116. The CMA had a discretion whether or not in the circumstances to curtail its usual consultation process, which typically entails the issuing of an invitation to comment and a three week consultation to give interested parties a chance to comment. Whilst in exceptional circumstances the CMA could decide to curtail or even omit consultation, it was quite entitled to form a view that this was not appropriate. Such a decision was rational in that:

(1) the CMA had already found that there was no change in circumstances;

(2) there were other persons who may well be affected by any variation, such as potential purchasers who may well wish to make their own observations on the variation request; and

(3) the request was a novel one for the CMA as already explained above.

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[8] The Applicants referred the Tribunal to a number of examples of Court and regulatory decisions where spinoffs have been sanctioned as a means of implementing a mandatory divestment:
USA v AT&T 552 F. Supp. 131 (1982); *Case No. COMP/M.3225 Alcan/Pechiney (II); Case No COMP/M.3935 Jefferson Smurfit / Kappa*; *Iacopi v Federal Communications Corporation and US* (1971) 451 Federal Reporter, 2d series 1142, the US Court of Appeal (9th Circuit); *US v The Wachovia Corp. and American Credit Corp.* (1975) WL 979; *Valspar Corporation, Et Al.* (1994) – Consent Order – 117 FTC; *Oerlikon-Buhrle Holding* 119 FTC 117 (1995); *First Data Corp* 121 FTC 1 (1996); *Case M.9969 Veolia/Suez*; and *Re Telefonica, S.A.*, 27 OSCB 4654. None of these cases in fact provide any competition analysis on the issue of common ownership.

117. Accordingly, the Tribunal dismisses Ground (3).

F. THE APPLICANTS' GROUND 2 - ERRORS OF LAW IN FINDING THE CRITERIA FOR APPROVAL WERE NOT MET

118. As acknowledged by the parties, Ground (2) only arises if the Applicants succeed on either Ground (1) or Ground (3). These grounds have been dismissed as set out above. Nevertheless, it is appropriate for the Tribunal to express its conclusions on Ground (2), which was fully argued by the parties.

(1) The Parties' Submissions

The Applicants

119. The Applicants submitted that the Decision, and in particular its assessment of the Purchaser Approval Criteria, is vitiated by a number of errors of law and/or is *Wednesbury* unreasonable.

120. Firstly, the CMA erroneously applied the criteria by reference to TMG itself, not SpinCo. The CMA erred in law in characterising the AIM Proposal as involving the admission of TMG shares to AIM.

121. Secondly, the Decision failed to take into account material considerations and was disproportionate, since it failed to balance the perceived risk of the AIM Proposal against its significant advantages. By reference to the judgments in *BAA* and *BAA Ltd v Competition Commission* [2012] EWCA Civ 1077, they submitted that it is important that the CMA adopts an approach to the remedy which involves achieving the divestment objective by the least intrusive and costly method possible. The CMA failed to address the submission that the AIM Proposal would meet the CMA's competition concerns whilst allowing the Applicants to secure a proper price for its shares in TMG. The Decision ignored these countervailing factors, thereby rejecting a less burdensome way of achieving the divestment objective, contrary to clause 3.6 of the Remedies Guidance. According to the Applicants, the CMA had simply stated that it does

not normally take account of costs or losses incurred by parties as a result of a divestiture remedy.

122. Thirdly, the CMA erred in law when analysing the benefit of the AIM Proposal (in that it avoids undue detriment to the Applicants' shareholders). The remedy is disproportionate and should take into account the costs incurred by the Applicants' shareholders. The Decision proceeded on an incorrect concept of shareholders delegating authority to the board, utilising a principal / agent view of shareholders and directors which has been discredited.

123. Fourthly, the CMA erred in law in its application of the Purchaser Approval Criteria, in particular the independence criterion and the capability and commitment to the market criteria. Whilst the Applicants made a number of submissions under this theme, their main focus of attack was on the CMA's reference to the *Dow/DuPont* decision, arguing that the reasoning in that case cannot be relied upon by itself (as the empirical analysis on which that case had relied had subsequently been undermined) and that there was a gap in logic between the conclusions in that case and the facts of this case.

(1) Independence: The CMA concluded that there was a risk that the institutional shareholders of TMG and SpinCo (who would be identical immediately after SpinCo's admission to AIM) would exercise influence over TMG management to compromise their incentive or ability to compete with the Applicants. This was flawed in law and / or *Wednesbury* unreasonable:

(i) Canadian and UK company law constraints limit the managerial powers available to institutional shareholders as diversified as in the case of D&D. These shareholders have no lawful means by which to exercise undue influence over the commercial decisions of the TMG board. For example, whilst shareholders of a public company can ask that a resolution be tabled at an AGM, beyond that, rights are limited to the rights to pass a resolution with 50 or 75% of the votes. Further, directors' duties will compel them not to prefer the interests of shareholders of a different company

to the shareholders of their company. They must act for the general good of the company. Mr Beal KC rejected the suggestion, put to him during proceedings, that directors might be incentivised to compete with the companies with whom they share no common shareholders rather than those with whom they do, without breaching their fiduciary duties. He also argued that it was unclear how a company would in practice take steps to compete against only certain competitor firms but not others. If there were somehow a hypothetical, theoretical risk of institutional shareholders directing TMG to compete less vigorously, there is no indication as to how they would go about achieving that.

(ii) The CMA does not identify a substantiated risk of conscious or unconscious coordinated behaviour by institutional shareholders. If a risk is purely theoretical rather than substantiated, then it is not a relevant consideration. Hypothetical risks are insufficient.

(iii) The CMA's approach is inconsistent with regulatory practice elsewhere, where spinoffs have been accepted as a means to implement a mandatory divestment. If common institutional shareholders pose a risk to the independence of SpinCo in the abstract, the concerns expressed in *Dow/DuPont* would have precluded regulatory or judicial endorsement of spin-offs elsewhere.

(iv) Through its reliance on the *Dow/DuPont* decision, the CMA relied on outdated and criticised economic analysis to support its concerns about common ownership by institutional investors, applying the headline conclusions of the case without any further deliberation or consideration as to their application in this case in the light of later thinking. The papers cited in the *Dow/DuPont* decision as supportive of its reasoning either do not support its reasoning, have been debunked, or are inconsistent with the

CMA's own reasoning. Mr Beal KC pointed in his oral submissions to a report of the CMA dated April 2022 which stated that economic literature on common ownership is still developing, and took the Tribunal through a number of economic papers on the question of common ownership which suggested it did not pose competition concerns. The CMA failed to take into account this literature at all, failed to acknowledge there was evidence that undermined *Dow/DuPont*, and used *Dow/DuPont* alone as an evidential basis for their conclusion. This was irrational as a failure to engage in sufficient inquiry, and / or a failure to take into consideration relevant countervailing views.

(2) Capability and Commitment to the Market: The CMA's conclusion that SpinCo might, as a result of its common shareholder ownership with D&D, struggle to raise funds in future and therefore not be an effective competitor was based on an error of law. Minority shareholders cannot veto a board decision to raise additional funds, nor did the CMA provide evidence of a risk of shareholders withholding support which would make fundraising less attractive. The CMA's concerns about SpinCo's share price falling in the expectation that D&D shareholders would seek to sell their shares is an irrelevant consideration as this would not have a detrimental effect on TMG's ability to compete. This concern is also inconsistent with the CMA's statement that shareholders may struggle to sell their shares. The Decision failed to take into account that the AIM Proposal specifically envisaged an orderly disposal of shares in the blind trust to avoid market disruption.

The Respondent

124. The CMA submitted that Ground (2) failed to disclose any public law error in the CMA's risk assessment of the AIM Proposal.

125. The AIM Proposal would have resulted, at least initially, in a complete overlap in shareholding between TMG and D&D, placing it at the extreme end of common ownership, for an unknown period. This was the cause of the CMA's

concerns, in a context where it is entitled to require a high degree of confidence in the success of a proposed remedy[9] aiming to eliminate the SLC, not least because the CMA would have no further jurisdiction once the remedy was implemented.[10]

126. The CMA's conclusion that common shareholders would have the incentive to reduce competition between D&D and TMG was an evaluative judgment, based on its expertise and experience, which fell well within its margin of appreciation (see the section above on the standard of review).

127. The CMA also noted that the requirements under the Purchaser Approval Criteria are cumulative – whilst the Applicants focused almost exclusively on attacks against the independence assessment, a failure to meet the capability and commitment criteria would alone be fatal to this claim:

(1) Independence: the CMA assessed whether the common shareholdings could reasonably be expected to compromise TMG's ability or incentive to compete – not whether the common shareholders would on the balance of probabilities in fact affect competition between D&D and TMG. The CMA only needed evidence of some probative value as the basis of a rational conclusion regarding material risk of the AIM Proposal (*BAA*, [20]). The Remedies Guidance itself recognises that common shareholdings may prevent independence (5.21(b)). None of the company law propositions call into question its reasoning, and its analysis was grounded in an established body of economic literature:

(i) The Decision does not contain any express findings on company law. None of the provisions raised by the Applicants undermine the Decision. Further, the alleged errors are challenges to an alleged failure to consider implications of company law for the CMA's risk assessment – not errors of law. The company law provisions raised by the Applicants would not preclude common shareholders from exercising influence over TMG in the manner

[9] See *Ecolab v CMA* [2020] CAT 12, at [83].
[10] See *Ryanair Holdings Plc v CMA* [2015] EWCA Civ 83, at. [57].

identified in the Decision. Common shareholders could exercise their votes in the same way or influence TMG management through formal or informal means – the Decision was not premised on legal power to control company conduct. The Applicants also do not explain why concerted attempts by shareholders to dampen competition would give rise to breaches of directors' duties.

(ii) The CMA did identify evidence to substantiate the risks of common shareholdings. The test for whether this evidence was an adequate basis for the CMA's conclusions is one of rationality (see *BAA* and *Ecolab*, cited above). The CMA was not deciding whether the risks would materialise on the balance of probabilities – it was assessing whether the AIM Proposal carried an acceptable level of risk having regard to its duties to ensure that no SLC ensues. The risks are underpinned by economic evidence which is reflected in the CMA's Purchaser Approval Criteria and Remedies Guidance, and the CMA identified mechanisms by which shareholders could influence management. The CMA was not required to go further than this.

(iii) The argument that other jurisdictions have sanctioned spin-offs as a form of divestiture is irrelevant. The CMA operates in a different merger regine, subject to its own duties and guidance. In *Ecolab* at [93], the Tribunal found that previous merger decisions "do not constitute precedents and it is axiomatic that each case turns on its own facts and that the characteristics of one market may be very different to those of another. Consistency is achieved by the CMA applying its statutory guidance…". If previous CMA decisions in different contexts are of little assistance, then decisions taken in other jurisdictions are of even less assistance. Further, the foreign decisions which the Applicants cited to the Tribunal do not contain any kind of analysis which could assist the Tribunal as to why common ownership might weaken competition.

(iv) The Applicants' criticisms of the economic literature relied on by the CMA are an impermissible merits challenge. There is an established body of economic literature that common shareholding of competitors reduces incentives to compete (*Dow/DuPont*). As an expert regulator with considerable experience in the design and implementation of merger remedies, the *Dow/DuPont* material was more than adequate as a basis for assessment. There was clearly a rational basis for the CMA's concerns in this case, and it did more than simply take *Dow/DuPont* and decide to reject the AIM Proposal – it conscientiously applied the principles recognised in that decision, the Remedies Guidance, and the Purchaser Approval Criteria. It was entitled to rely on the fact that according to economic literature, common ownership tends to reduce incentives to compete, but it was not required to resolve academic debate or identify supporting empirical evidence. The CMA was aware of the research that followed *Dow/DuPont*, but it does not indicate that the economic literature relied on for the Decision is outdated or that common shareholdings are no longer a concern – it merely illustrates there is ongoing debate around the empirical analysis.

(2) Capability and Commitment: The Applicants do not challenge the CMA's basic finding that TMG would have access to additional resources as part of a larger group compared to an independent company listed on AIM, such that the latter proposal would lead to greater uncertainty. The inability of minority shareholders to veto a board decision to raise funds is irrelevant. The CMA's concern about a fall in TMG's share price relates to its ability to raise additional equity finance. This concern is not inconsistent with a concern about the uncertainty as to how long it would take for common ownership to diversify.

128. The CMA also submitted that the Applicants' position that the costs incurred by D&D's shareholders should be taken into account is contrary to the Merger Guidance and relies on an artificial distinction between D&D and its

shareholders. Otherwise, any company could complete a merger without approval and then rely on potential costs to shareholders to resist divestiture.

TMG

129. TMG submitted there was a sufficient and essentially unchallenged basis for the CMA's concerns about the AIM Proposal regarding the Purchaser Approval Criteria.

(1) Firstly, the Applicants did not challenge the CMA's conclusion that TMG's share price may be depressed by the expectation that D&D shareholders would be selling their shares, and this would impact on TMG's ability to raise additional equity finance. The fast-moving market in which TMG operates is particularly acquisitive, and so ready access to financing is particularly important. The Applicants' only response to this appeared to be to point to financing in the alternative via debt.

(2) Secondly, the Applicants ignored the CMA's concern about the uncertainty as to when the overlap of common shareholders would end in contrast to the certainty of a private sale route. This was a particular concern in relation to the need for TMG to have a long-term investment strategy and business plan, which would be undermined by an open-ended process whereby the common ownership was unwound.

(3) Thirdly, the CMA's concerns regarding the independence criterion of the Purchaser Approval Criteria were sound in public law. It would be sufficient if the common shareholders had unilateral incentives to influence TMG management on TMG's ability to compete. The PSRB market is comprised of four significant players, where D&D and TMG would account for almost half of the market. The CMA's suggestion that there was some risk of benefits in a reduction of competition between two of these players was rational and reasonable.

130. TMG also argued that the delay to the ongoing divestment process had and was continuing to have a material adverse effect on TMG and its ability to compete. These issues of uncertainty and delay were firmly part of the CMA's assessment and were a separate concern in addition to the Purchaser Approval Criteria.

(2) The Tribunal's Analysis

131. The Applicants contended that the CMA erred in not finding that the Purchaser Approval Criteria had been met in relation to the AIM Proposal. Before dealing with that, it is appropriate to note the Applicants' three preliminary criticisms of the CMA approach. These fall under the following headings:

(1) the CMA erred in considering the Purchase Approval Criteria by reference to TMG itself or to the shareholders of D&D rather than to SpinCo;

(2) the CMA failed to balance the perceived risk of the AIM Proposal against the significant advantages identified by the Applicants; and

(3) the CMA erred in law in analysing the benefit of the AIM Proposal in avoiding undue detriment to existing shareholders by providing an alternative to a forced sale. The CMA had also incorrectly relied on the proposition that shareholders are ultimately responsible for the appointment of management and delegate day-to-day control of the party to that management.

132. Criticism (3) is dealt with below when considering the independence criteria, where shareholder powers and incentives are relevant.

133. As to Criticism (1), it is true that the CMA considered the Purchaser Approval Criteria by reference to TMG itself or the shareholders of D&D rather than specifically in relation to SpinCo. This was correct as that was the AIM Proposal as set out in the Proposal Paper. The alternative involving SpinCo was only raised in the PD Response of 13 March 2023. We have already found that the CMA did not commit an error of law in not specifically dealing with that

alternative. It is common ground that the insertion of a SpinCo does not affect the competition analysis of the AIM Proposal as the ultimate beneficial owners of the TMG shares remain the same under either variation.

134. As to Criticism (2), the CMA was well aware that the Applicants' rationale for the AIM Proposal was that it was designed to maximise the price that might be obtained for the shares in TMG for the benefit of D&D and its shareholders. The CMA was not required to carry out a further proportionality assessment at this stage simply based on a desire midway through the divestiture period to have such a fundamental change in approach with a view to getting a higher price for shares.

135. The CMA found that the AIM Proposal did not satisfy the independence, capability and commitment requirements in the Purchaser Approval Criteria. The main focus of the Applicants' challenge was in relation to the CMA's findings on independence.

Independence

136. The Purchaser Approval Criteria stipulate as follows in relation to independence:

> "An Approved Purchaser should not have any connection (for example financial, management, shared directorships, equity interests, reciprocal commercial arrangements) to D&D and/or TMG that could reasonably be expected to compromise the Approved Purchaser's ability or incentives to compete with D&D after the Final Disposal".

This is also reflected in paragraph 5.21(b) of the Remedies Guidance.

137. In the Decision, the CMA found that the independence criteria had not been met. The CMA noted that under the AIM Proposal there would be upon the AIM admission a 100% overlap in shareholders in D&D and TMG. The CMA had no certainty as to when in practice these shareholders would diverge (Decision, para. 54). The CMA went on to find:

> "55. The Remedy Group considers that common ownership creates unilateral incentives to maximise value by reducing competition

between commonly held firms so as to increase shareholder returns overall.[11] In the Provisional Decision, the Remedy Group said that *"In this case there is a risk that the shareholders holding stakes in both companies might have both the ability and an economic incentive to favour D&D over TMG or to seek to reduce competition between the companies"*. In the Response, D&D submitted that the institutional shareholders would have no ability to favour D&D over TMG as they are each minority shareholders who do not have material influence over D&D.[12] For the reasons explained in paragraph 57 below, the Remedy Group considers that common shareholders in TMG may have both incentive and ability to reduce competition between the companies, whether by favouring D&D over TMG or by other means.

56. D&D accepts that TMG shares being held by members of D&D management and their connected persons would cause concerns from an independence perspective and proposed that these shares would be placed in a blind trust and sold off in an orderly fashion post-listing. D&D has submitted that the blind trust will not exercise any of the voting rights in relation to the blind trust shares and no member of D&D management will have any influence over the management of TMG or the ownership or sale of the shares in the blind trust.[13]

57. Directors must act in a way that they consider, in good faith, would be most likely to promote the success of the company for the benefit of its shareholders, and shareholders can and do seek to hold directors to account on the commercial policies they follow. The Remedy Group considers that there is a risk that the institutional shareholders would exercise influence over TMG management either via formal or informal means which might compromise their incentive or ability to compete with D&D. While the approach of institutional investors varies in practice, the Remedy Group considers this would be a material risk in circumstances in which there would be a complete overlap of shareholders on admission to AIM. In addition, a very substantial overlap of shareholders could persist for an unknown, potentially significant period of time thereafter. The Remedy Group has considered the letter provided with the Response by finnCap and the points that it makes about the institutional shareholders acting independently of each other. However, the risk that the Remedy Group is concerned about would not require the shareholders to coordinate their actions in order to exercise their votes in the same way. This is because they would each individually have a common interest in reducing competition to increase shareholder returns. In particular, the Remedy Group considers there is a risk that TMG shareholders, who are also D&D shareholders, might not support TMG management in raising additional funds which they may require to compete effectively. This risk also arises in relation to other decisions that may need the approval of TMG shareholders.

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[11] Case M.7932 – *Dow/DuPont* – Decision of the European Commission at paragraph 2348: *'The economic literature on cross-shareholding, which extends to common shareholding, tends to show that common shareholding of competitors reduces incentives to compete as the benefits of competing aggressively to one firm come at the expense of firms that belong to the same investors' portfolio'*. See also Annex 5 to the Commission Decision.

[12] Response, paragraph 3.2(a).

[13] Proposal Paper, paragraph 3.4.

> 58. This uncertainty as to TMG's ability to compete is much less likely to arise in the sale of the company to either a listed or private equity purchaser, where the commonality of that purchaser's shareholders with that of D&D would in all likelihood be much lower. Moreover, in the case of a private equity purchaser, the day to day rights and influence of investors may be less than in a listed company and this would need to be taken into account."

138. In essence, the Applicants' case is founded on the following propositions:

(1) as a matter of company law none of the institutional shareholders in D&D would end up with a shareholding which would permit them lawfully to exercise undue influence over the decisions of the board of SpinCo;

(2) the board of directors of a company must act in accordance with their legal obligations and in the best interests of the company; and

(3) the CMA was wrong in its analysis of the potential adverse effects on competition of the presence of common institutional shareholders in companies which compete in the same market.

139. There was no real dispute between the parties on the powers and duties of directors of companies, and the power of shareholders over the boards of companies, both as a matter of English and Canadian law. It was not the CMA's case that the institutional shareholders would collude together to cause the board of SpinCo to act in a way to reduce competition between TMG and the Applicants or that individual shareholders had powers to do so. The concern of the CMA had a different focus, as set out in the Decision.

140. There is a great deal of literature on the competition impacts of companies in a competing market having common shareholdings.[14] Much of this is in relation

[14] The key papers to which we were referred during these proceedings were:
Appel, I. (2016) *Passive investors, not passive owners*, Journal of Financial Economics; Anton, M. (2017) *Common ownership, competition, and top management incentives*, Journal of Political Economy; Azar, J. (2018) *Anti-competitive effects of common ownership*, Journal of Financial Economics; Elhauge, E. (2016) *Horizontal Shareholding*, Harvard Law Review; Fichtner, J (2017) *Hidden power of the Big Three, Passive index funds, re-concentration of corporate ownership, and new financial risk*, Business and Politics; and Posner, E. (2016) *A Proposal to Limit the Anti-Competitive Power of Institutional Investors*, Antitrust Law Journal.

to cross-shareholdings, but some of the literature and indeed the *Dow/DuPont* decision of the European Commission in Case M.7932 applies the same reasoning to common shareholdings, suggesting that they also have an impact on incentives to compete as the benefits of competing aggressively from one firm come at the expense of firms that belong to the same investors portfolio (*Dow/DuPont*, para.2348). This analysis can be based on both economic theory and empirical research. The Applicants contended that the empirical research, as well as the economic theory, had been discredited since the *Dow/DuPont* decision. However, the Tribunal, having reviewed all the literature placed before it, considers that there is an ongoing academic debate, particularly acute on the empirical side, but one cannot simply conclude that the CMA's concerns are not well founded. The CMA was perfectly entitled to conclude that in the light of its experience and knowledge of the debate, including in the *Dow/DuPont* decision that the AIM Proposal posed an unnecessary and not easily quantifiable risk to the quality of competition which it was its duty to protect.

141. The ongoing debate is reflected in the study of Frazzani and others provided by the Policy Department for Economic, Scientific and Quality of Life Policies at the request of the ECON committee, which contains the following summary:[15]

> "The current theoretical and empirical scholarship appears to be split on what common ownership means for competition. In particular, a growing body of literature has argued that common owners have an ability to further their own

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The parties also referred to the following papers: Backus, M., (2019) *The Common Ownership Hypothesis: Theory and Evidence,* Brookings Economic Studies Report; Rock, E., (2017) *Defusing the Antitrust Threat to Institutional Investor Involvement in Corporate Governance,* NYU Law and Economics Research Paper No. 17-05; O'Brien, D., (2017) *The Competitive Effects of Common Ownership: We Know Less Than We Think,* Antitrust Law Journal 729; Patel, M., (2018) *Common Ownership, Institutional Investors, and Antitrust*, 82(1) Antitrust Law Journal 279; Ginsburg, D., (2018) *Common Sense About Common Ownership*, Concurrences Review N◦ 2-2018, Art. N◦ 86847; O'Brien, D., (2017) *The Competitive Effects of Common Ownership: Ten Points on the Current State of Play*, prepared for the OECD; Dennis, P., (2019) *Common Ownership Does Not Have Anti-Competitive Effects in the Airline Industry*, FRB Atlanta Working Paper No. 2019-15; Gramlich, J., (2017) *Estimating the Competitive Effects of Common Ownership,* 2017 Finance and Economics Discussion Series 2017-029 Lambert, T., (2018) *The case for doing nothing about institutional investors' common ownership of small stakes in competing firms*, University of Missouri School of Law Legal Studies Research Paper No. 2018-21; Hemphill, C., (2020) *The Strategies of Anticompetitive Common Ownership,* 129 Yale Law Journal 1392; Gilje, E., (2019) *Who's Paying Attention? Measuring Common Ownership and Its Impact on Managerial Incentives*, NBER Working Paper 25644; and KPMG (2020) *Common Ownership and Competition.*

[15] *Barriers to Competition through Joint Ownership by Institutional Investors* (2020), at p.11.

interests in the context of the firms whose shares they own, at the expense and to the detriment of other non-common stakeholders. Such common owners are said to have both the incentives and the practical capability, through corporate governance mechanisms, to influence managerial behaviour to behave anti-competitively. This literature argues that such influence could lead to management of the rival firms being dis-incentivised to compete more vigorously with one another, as well as increasing the potential for collusion – including tacitly – among these firms (with the common owner being a conduit through which such collusion could occur). As such, this scholarship argues that common ownership has the potential to give rise to anti-competitive effects, which may manifest themselves in two types: unilateral effects and coordinated effects.

Another stream of law and economics literature argues, however, that institutional investors have diverging and heterogeneous incentives, so that it cannot be assumed that softened competition between rival firms whose shares they own is desirable from the common owners' portfolio standpoint. It also argues that management of those firms is constrained in furthering some owners' interests at the expense of others by corporate fiduciary duties (namely, the duty to act in all shareholders' interest), but also by the risk of incurring into liability as a result of violating competition laws.

Most of the above-mentioned scholarship comes from the US, while no investigation of the impact of common ownership in the EU banking sector has yet been carried out in the EU. This study attempts to fill this gap by examining the ownership patterns and analysing the role of common ownership in the EU banking sector. This analysis will be done against the background of the governance structure of the EU banking sector, the ownership pattern that characterises a sample of major European banks for a defined period of time when data is available, and the way in which corporate governance and competition rules could apply in this context. This study remains agnostic on the implications for competition of the common ownership pattern it identified in the relevant sector: it neither concludes that there are anti-competitive effects from common ownership, nor concludes to the contrary. Neither does the study purport to answer the question as to what should be done about the current antitrust toolbox were such effect to be identified."

142. The CMA was well aware of the state of research and literature and dealt with common ownership in its paper, *The State of UK Competition*, April 2022 (CMA 158). As set out in that paper, the CMA understood the lack of consensus and that there was a need for further research:

> "3.10 Several studies provide theoretical models and examples that show that common ownership leads to anti-competitive incentives and outcomes. Studies in this area have usually built on standard economic models to account for (direct and/or indirect) common ownership links.
>
> 3.11 More recent empirical work has provided some evidence to support the proposition that common ownership can be anticompetitive. However, these results have been contested and a clear consensus has yet to arise in the empirical literature.

3.12 For example:

(a) The work by Azar, Schmalz and Tecu (2018) provides evidence that common ownership causes higher prices in the US airline industry.[16] The paper studies the relationship between the MHHI and price using pricing data from the Department of Transportation and ownership data from Thomson-Reuters dataset.[17]

(b) Both Azar et al (2016) and Gramlich and Grundi (2017) studied the impact of common ownership in the US banking industry.[18] Using slightly different methodologies for how to account for common ownership,[19] the two studies found inconsistent results: the former concluded that common ownership has an anti-competitive influence on the price of banking products; the latter found no evidence of this effect."

143. It was reasonable for the CMA to conclude that there were competition risks. Here there would initially be a 100% overlap between the shareholders in D&D and (through SpinCo) in TMG (a more extreme case than those considered in the literature). There were only a limited number of other competitors in the sector. Any loss of business and market share in TMG through aggressive competition from the Applicants could well reduce the value of the shares in TMG (or vice versa). These incentives to maximise the value of shareholders and to focus any increase in market share by winning business from other players in the market exist irrespective of whether the institutional shareholders themselves collude together to direct the board of SpinCo not to compete in a way which harms TMG or the value of shares in TMG. As set out in the Final Report, companies in the PSRB sector compete not just in terms of price, but also on quality. Business can be targeted, away from rivals, by way of discounts, incentives, ancillary products and incentives. The board of D&D (or indeed SpinCo/TMG) may find it in their interest (where they hold shares even

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[16] Azar, J. Schmalz, M. & Tecu, I. (2018) Anticompetitive effects of common ownership. *The Journal of Finance*.

[17] However, several studies – some of which funded by institutional investors – have raised concerns with the methodology used by the authors and the robustness of the findings, see Appendix B for a detailed discussion of these critiques.

[18] Azar, J., Raina, S., & Schmalz, M. 2016. Ultimate ownership and bank competition, Gramlich, J., & Grundi, S. 2016. Estimating the competitive effects of common ownership. *FEDS Working Paper No. 2017-29*.

[19] Azar et al (2016) used the GHHI – a variation of the MHHI which accounts for cross as well as common ownership – whilst Gramlich and Grundi (2017) use the ownership weightings (the component from MHHI's derivation which isolates the extent of common ownership). The latter is a more theoretically grounded approach according to O'Brien (2017) – See Appendix B for a more detailed discussion of this.

subject to a blind trust) and that of the institutional shareholders in D&D, that any increase in market share is not gained at the expense of TMG if that can be achieved by taking it from other rivals such as ATI.

144. It was not incumbent upon the CMA at this stage of the divestiture process to obtain its own empirical evidence in relation to the impact of the common shareholdings. Its policy was well known, as reflected in the Purchaser Approval Criteria and the Remedies Guidance, that having common shareholders may raise competition concerns, and the AIM Proposal was an extreme form of common shareholdings with an initial 100% overlap.

Capability and Competence

145. The CMA's concerns were not limited to independence. As set out in the Decision the CMA was not satisfied that the AIM Proposal satisfies the capability and commitment requirements in the Purchaser Approval Criteria. Its central finding was that:

> "65. The Remedy Group recognises that TMG is currently profitable and cash generative but considers that, in order to compete actively in a fast-moving technology market, TMG may need or wish to raise additional funds in the future. The Remedy Group has two concerns around TMG's ability to raise additional funds:
>
> *(a)* As part of a larger corporate or investment group TMG would have access to additional resources.[20] As an independently listed company on AIM, TMG would be reliant on its own financial resources or the support of its shareholders to issue shares to raise capital. The AIM Admission would result in a greater degree of uncertainty than would be the case under the private sale process currently envisaged in the Final Undertakings, and this concern would be further exacerbated by the fact that, for the reasons set out at paragraph 57, whilst there is significant common shareholder ownership between TMG and D&D, the willingness of such shareholders to approve an increase in share capital or otherwise provide further financial support to TMG may be influenced by the potentially adverse impact on D&D of providing such support.

[20] The Remedies Group notes D&D's position in the Proposal Paper (paragraph 4.8.4) that some private equity buyers under the sale process may be more incentivised to cut costs rather than invest in growth and innovation. This would be an area of focus for the CMA during the purchaser approval process and the Remedies Group would be able to scrutinise potential purchasers plans for TMG to mitigate this risk.

> *(b)* Whilst such common ownership continues, the market price of TMG's shares may be depressed by the expectation that the D&D shareholders, including the blind trust, will be seeking to sell their TMG shares. While the Remedy Group agrees with finnCap's submission that a share price fall would not have a detriment effect on TMG's ability to compete in its own market day to day, it would have an impact on the ability of TMG to raise additional equity finance on attractive terms."

146. There was no real answer to these concerns, and we find that there was no error in the CMA's assessment.

147. As to capability and commitment, the CMA was entitled to find that TMG may be in a less advantageous position under the AIM Proposal to raise funds in a competitive and fast moving market (which is categorised as having a significant amount of potential take-over activity and technology development costs) than would have been the case under a sale, as envisaged, to a single purchaser, even if it would not actually be precluded from raising funds. If TMG is acquired by an appropriate purchaser under a private sale arrangement, then TMG would become part of a larger corporate or investment group which would have access to additional resources. They would not be reliant on the willingness of the common shareholders in D&D and TMG to approve an increase in share capital or otherwise provide financial support to TMG. It is evident from the Final Report there is a reasonable likelihood that capital will be required for acquisitions or development of new technology.

148. With the common shareholdings, there may be less support by shareholders for injecting funds or the raising of capital for the development of TMG's business. The CMA was entitled to find that this was a risk, which would be avoided by a private sale to a single purchaser as envisaged by the Final Undertakings.

149. The Tribunal notes that the Independence and the Capability and Commitment criteria are cumulative in that both must be satisfied for a purchaser to be acceptable. It is therefore necessary, for the Applicants to succeed, that they can demonstrate that the CMA erred on both points.

150. The Tribunal therefore finds that the CMA did not step outside the bounds of reasonableness in its application of the Purchaser Approval Criteria and dismisses Ground (2).

G. CONCLUSION

151. For the reasons set out in this judgment, the Tribunal unanimously decides that each of the Grounds is dismissed.

152. Finally, we thank the parties and their legal teams for their excellent submissions and assistance they have provided us in relation to this case.

Hodge Malek KC
Chair

Paul Lomas

William Bishop

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

Date: 10 July 2023