a balance between providing bidders with suitable comfort to their key questions without offering any definitive commitments".

43. On 29 March 2022, BEIS responded saying that it appreciated "that some version of support outlined in the financial structure paper is almost certainly going to be needed… we still feel there is a separate decision regarding the **timing** at which this is confirmed" (emphasis in original), saying BEIS' understanding had been that the JEAs would limit the acknowledgement of potential support during the Phase-1 process, and be more open during Phase-2. BEIS thought that the prepared responses were too "forward leaning" at that time, and sought further explanations and discussions. The issue was discussed in a telephone conversation between BEIS and the JEAs on 30 March 2022. A BEIS email following the call summarised the agreed position:

> "The onus should be on potential participants to set out a way(s) in which they could make the transaction work in current market conditions … We'd be keen to minimise the assurances provided to what is necessary for each specific party (i.e. not to be shared with other parties that are not asking these specific questions)".

44. On 1 April 2022, HMG announced the Energy Bills Support Scheme for the winter of 2022/23.

45. On 5 April 2022, BGT sought and was granted an extension of time within which to file its Phase-1 bid. Lazard informed BGT that it should "specify in [its] response the requirements and conditions whether that is from government or Ofgem". This was a clear indication to BGT that Lazard was looking to BGT to identify what HMG support it was asking for.

46. By early April, it had become clear that only two bids would be received, one from BGT and one from another entity referred to in this case as Tulip. Due to extensions of time, those indicative offers came in on 7 and 8 April 2022. As to these:

    (i) BGT's bid noted that "we understand that Bulb remains largely unhedged, and that the valuation of the exposed volume is material. Finding a treatment of this exposure that is acceptable to all parties will be an important factor in the outcome of this process and we would seek to engage with the government on this".

    (ii) BGT also stated that it understood that "Lazard and [the JEAs] will be in contact with the Government and may develop a position on acceptable transaction structures. We are open to discussing these structures further when appropriate".

    (iii) It was clear to BGT, therefore, that there was scope for discussion as to HMG support in relation to hedging (the only potential scope for such support which BGT had flagged), albeit BGT was anticipating a proposal from HMG.

    (iv) Tulip's bid stated "we are also considering a potential option for the government to continue funding the business throughout the summer price cap period

following [the] acquisition. This would be aimed at removing the hedging execution risk …".

(v) Tulip, therefore, had also flagged a potential need for HMG support in the area of hedging, although it contemplated coming forward with its own proposal.

47. On 5 April 2022, Teneo asked Lazard for more feedback from declining bidders, including "detailed feedback from other key strategic parties that have a solid understanding of the UK market" (including Octopus and E.ON). The following day, Teneo sent an email to Lazard setting out certain queries raised by BEIS, including:

(i) whether two bidders was sufficient to achieve competitive tension (the answer being that two serious bidders was sufficient, but there was a significant risk of both bidders falling away due to the regulatory environment); and

(ii) whether it was likely that participation would improve "if we were able to provide more information on the types of support available" (to which Lazard's answer was "more information on support available is essential to the two parties envisaged to remain in the process as well as for potentially bringing other parties back into the process").

48. Octopus' feedback was that the "economics make investment into renewable generation and EV business more compelling than in retail, which is high risk at the moment, but open to discussion if the process fails". A summary of the Phase-1 bidding process produced on 12 April 2022 amplified Octopus' position:

> "Topics that Ofgem has still not provided clarity on make this sector very risky. Ofgem has not yet resolved the backwardation issue and the potential ringfencing of credit balances could mean that soon retail could be of no interest even to us …buying in this context doesn't make sense …. We expect that others will pay a strategic premium for the Brand and Tech which to us are of no value".

"Backwardation" referred to the position when the forward period for the price suppliers can charge differs from the forward period a nominal supplier would use for its hedging.

49. ScottishPower also announced that it would not be making a bid, their feedback being [REDACTED].

50. On 12 April 2022, the JEAs sent BEIS its "recommended next steps for the M&A Process" which included a recommendation that the JEAs re-engage with parties that had withdrawn from the Phase-1 process in order "to talk to regulatory concerns and ability to structure a deal to de-risk the transaction given some of the feedback".

51. We are satisfied that the suggestion to approach bidders who had withdrawn came from Teneo, who recommended that course to optimise the M&A Process, and that BEIS was content for the JEAs to follow that course. That is clear from the 12 April 2022 paper, and from the minutes of the Bulb Operations Board meeting of 24 May 2022, which amended wording in a draft paper to make it clear that "the decision to re-engage with parties that didn't submit was Teneo's".

52. On 13 April 2022, BEIS responded to that suggestion, asking:

> "How are you going to decide who to engage with – are there any legal / presentational risks (i.e. of a perception that this wasn't a fair and open process)? Specifically, how do we ensure that were there a JR of the process this would not be found to be unfair?
>
> Could you explicitly, for our records, set out the purpose of this engagement?"

53. As this message makes clear, BEIS wanted the M&A Process to be a "fair and open process", and to avoid any legal challenge that it was not, but it was looking to the JEAs and their advisors, Lazard, to address that issue.

54. Lazard prepared a "Phase 1 Bid Review and Next Steps Recommendation" on 14 April 2022. It recommended that "in order to achieve a sale, HMG will be required to provide clarity on the measures it will take to provide bidders with comfort around the uncertainty surrounding future losses and associated working capital requirements". It recommended proceeding to Phase-2 with the Phase-1 bidders, noting that "a pulled process would result in reputational damage that would further weigh on the business, as well as any future sales initiative". It said that "serious engagement" was required with BEIS and Ofgem, which would "define in detail and propose transaction structures / de-risking mechanisms that can be explored with the remaining bidders" . The key risks which Lazard identified were hedging and forward price cap limitations (including potential support for a significant collateral requirement), transfer of the negative value of the forward loss position due to backwardation and the reduction of the risk of other retail regulatory market measures. The conclusion reached was:

> "assuming further clarity is provided on the issues and areas of uncertainty flagged by bidders, re-test interest with parties that withdrew from Phase 1 citing these uncertainties in an effort to maximise competitive tension".

55. The fact that only two Phase-1 bids had been received was discussed at the Bulb Operations Board meeting on 14 April 2022. In a context in which it was proposed to allow more time to another potential bidder code-named Snowdrop, the question was posed "How do we ensure that we keep the process fair with slower bids" (as to which we repeat [53] above). The topic of "engagement with parties that have not engaged" was also discussed. It was noted that BEIS could not be involved in the re-engagement conversations, that the JEAs would not be able to say much, but that the process would "be valuable to test the market in this way for HMT seniors". BEIS stated it wanted "a written response of who are the bidders, what approach are you taking to address this, how are you going to keep it fair."

56. Teneo responded to various queries BEIS had raised on 20 April 2022:

    (i) BEIS had asked for more detail on the conversations the JEAs intended to have with BGT and Tulip on financial structuring. Teneo stated that this would

> "consist of the script on financial structuring which has been previously reviewed and approved by BEIS".

(ii) BEIS had asked how the JEAs were going to decide which non-bidders to engage with. Teneo replied that "such feedback would be very beneficial for the overall sale process, particularly to reconfirm that each bidder does not have any potential interest in the opportunity" and that it would have "discussions with the strategic buyers (i.e. Shell, Octopus, [Daisy], ScottishPower) which were considered to be key potential bidders for the Bulb assets at the start of the marketing process".

57. The reference to a script appears to have been understood by BEIS to be to the document first circulated on 28 March 2022, which BEIS had suggested on 29 March was too "forward-leaning" (see [43]). BEIS responded on 21 April 2022 saying "to be 100% clear we did not approve the attached script and had a number of comments which we discussed in a meeting and followed up with an email". It transpired that a further script had been prepared which had yet to be shared with BEIS. This was provided to BEIS on 26 April. That made it clear it was for bidders to identify the steps necessary to "make the transaction work in current market conditions" which the JEAs were open to considering, and emphasised that "responses to only be provided to specific questions from bidders".

58. A planning paper prepared for a meeting of the Bulb Operations Board on 22 April 2022, noted that "Teneo have indicated that a process with two parties is sufficient to achieve a competitive tension", but that there was an increased risk of the process collapsing in Phase-2. The paper referred to certain "contingency planning activities" by way of a "Plan B" to the "Plan A" which involved the BGT and Tulip bids proceeding through Phase-2. One of those contingency plans was "Engagement with interested parties which failed to submit bids". Given the importance of this proposal to the issues in the case, we set out in full what the planning paper said about it:

> "We have agreed with Teneo that they engage with key strategic participants that signed up to NDA but didn't subsequently make submissions into Phase-1. One of the purposes of this engagement is to understand if there would be a future point (e.g. after specific regulatory decisions) that parties would be interested in the Bulb proposition. This information could be important should we need to pause and re-start the M&A process at a future point, to identifying when that future point should be.
>
> Teneo have offered a meeting .. to [Daisy], Octopus, Shell and ScottishPower. As it stands this offer has been accepted by [Daisy] and Octopus …
>
> If one or both of these parties were to indicate that they are not interested in the proposition now, but could be at a future point, we will consider whether it could be helpful and appropriate for Teneo to continue to engage with these parties … such that it would be easier to bring them back in a scenario in which we needed to pause and then subsequently restart the process. **Does**

> **the board have any steer on whether such engagement would be beneficial/appropriate?**"

(emphasis in original).

59. The basis on which parties who had signed non-disclosure agreements but not submitted a Phase-1 bid were selected for a further approach is not entirely clear. However, we are satisfied of the following:

    (i) The selection was not made or influenced by BEIS or the SoS, but by the JEAs and Lazard, although BEIS supported the JEAs' decision to approach "key potential bidders" as determined by the JEAs and their advisors.

    (ii) Those selected were seen by Lazard and the JEAs as "key strategic participants" in the energy market, being "medium and large incumbents" (or as it was put in a later "M&A Process Update" entry, to "medium and large incumbents (Octopus, [Daisy], ScottishPower and Shell)").

    (iii) No approach was made to a non-bidder who had raised objections to the proposed acquisition which Lazard did not consider could be addressed by HMG support. E.ON was not re-approached for this reason. If it matters, that was an assessment reasonably open to Lazard in the circumstances set out at [39] above.

    (iv) The selection criteria were to a significant extent judgmental, but the choice was not made on an irrational basis, but by reference to the two criteria in (ii) and (iii) above.

    (v) The scope of the re-engagement exercise was influenced by commercial concerns that too wide a process risked alerting the market to the limited response to the Phase-1 process, which was a view it was reasonably open to Lazard to hold from a commercial perspective.

60. We will now briefly summarise the nature of the re-engagement with Octopus, ScottishPower and [Daisy], on which the submissions to us were focussed.

61. So far as Octopus is concerned:

    (i) On 14 April 2022, Mr Morton, a Director at Teneo, sent a text to Mr Stuart Jackson, Octopus' CFO and co-founder, asking if he would be willing to discuss Octopus' decision not to make a bid and "whether there could be an alternative structure which could work". Mr Jackson offered a call on 19 April. An internal (Teneo) text referred to the fact that a "script [was] agreed with BEIS" for such a call which we have concluded is the "further script" referred to at [57] above. Teneo said they were "keen to understand what they would have needed to be interested." The texts suggest that the call had still not taken place by 17.40 on 19 April, when Mr Morton was still trying to arrange it. We are not persuaded that the substance of that initial communication was materially different to communications with BGT ([45]), ScottishPower ([65]) and E.ON ([39]).

(ii) On 27 April, a Zoom meeting took place between Mr Morton, Mr Cowlishaw and Mr Harris of Teneo, and Mr Jackson and others of Octopus. We think it likely that this was the "call" which Mr Morton had been trying to initiate since 12 April, rather than a further call, because there had clearly been difficulties arranging the call, and there is no evidence that Teneo and Octopus actually spoke before this date.

(iii) Notes of the call show Teneo asking what factors would have changed Octopus' decision and indicating that they were still open to a conversation if Octopus wished to become involved. Octopus identified its main issues as the hedge book, and the need for working capital while credit balances were built up over the summer months. However, Octopus stated that it would love to do the deal and had no operational issues with it. A note records someone as stating "if there is a way to de-risk the issues [Octopus] sees, Teneo open to conversation on possible solutions". Octopus identified two issues – the hedge gap and working capital during the winter – and it was asked to provide a bullet point email of what it would need to consider the bid. While we do not think anything turns on this, we have concluded that it is more likely that Octopus first raised the issue of HMG support during the call, albeit, given the purpose of the re-engagement, Teneo would have made some reference to it if Octopus had not done so.

(iv) We do not believe the stance of the JEAs in this meeting was materially different to what had been or was to be communicated with other bidders or non-bidders: ascertaining what by way of HMG support Octopus would seek, without stating it would be provided, or making a proposal from the selling side as to what was on offer.

(v) Either after this call, or possibly a further call between Mr Jackson and Mr Cowlishaw shortly thereafter (as reflected in a later document referring to Teneo and Octopus discussing the latter re-entering the bidding process in the week commencing 2 May), Mr Stuart Jackson contacted his CEO and co-founder, Mr Greg Jackson, to discuss whether the purchase of Bulb's business with some kind of funding support was something Octopus could undertake. The vagueness of that conversation – "some kind of funding support" – is consistent with our conclusion at (iv).

(vi) Octopus responded rapidly and positively to those initial communications from Teneo, which led to an intensity of interaction between the JEAs and Octopus which did not occur with the other potential bidders. By 3 May 2022, Octopus had asked KPMG to assist it in its consideration of the transaction, and a call between Teneo (Mr Cowlishaw, a licensed insolvency practitioner and a Senior Managing Director) and KPMG (Mr Quantock) was arranged for the same day. After that call, Mr Quantock sent an email to Mr Cowlishaw and Mr Jackson of Octopus referring to "a great conversation" and to Mr Quantock having spoken to Mr Jackson after it who was "keen to progress". Further calls between Teneo and Mr Quantock followed. We have seen nothing to suggest that Mr Cowlishaw provided any further detail as to what HMG support might be on offer in these exchanges, and think it unlikely that he would have done. Given the care taken to "script" what could be said about even the possible availability of such support, we are satisfied that there would have been documented engagement with HMG before any detailed proposal was floated.

(vii) On 6 May 2022, Mr Cowlishaw informed Mr Quantock that Octopus would need to set out in writing "the parameters of their interest", and "a view on value".

(viii) Octopus sent a letter formally confirming its interest on 10 May 2022, in which it alluded to the terms of the sale involving (what would necessarily have been an HMG) hedge on the selling side.

(ix) A meeting appears to have been arranged for 11 May between Teneo, Lazard and KPMG, who were unintentionally left off the invite list (Mr Cowlishaw's notes saying "meant to have a call with their adviser this am – but didn't join").

(x) On 12 May 2022, Mr Quantock held a discussion with Ms Kotzeva, Managing Director of European Energy and Renewables at Lazard. Mr Quantock's email to Mr Jackson after that conversation records the following points:

a) Lazard wanted an indicative offer quickly, and if it was interesting, Octopus would be in the next phase.

b) Binding offers would be sought in early June with a decision in "in a matter of days / weeks".

c) There were other bidders in the process, some already in round 2. While there was some suggestion by BGT that this statement involved discriminatory treatment for Octopus, it was clearly appropriate for Lazard to avoid Octopus getting the impression that they were the only game in town, for reasons of competitive tension. We note the SoS had communicated a similar sentiment to BGT on 15 May [REDACTED].

d) Ms Kotzeva had said that if we are "over 0 then we would get into the next phase (this ignores working cap) cash free debt free", on which Mr Quantock commented "to me this says that they have offers of a pound with a guarantee from government on the WC". We return to the "Over 0" aspect of the note at [62] below.

e) That "all government stakeholders are lined up and agree to this timetable". Mr Quantock pushed as to who the stakeholders were and all he was told in response is "they reiterated that government would be delivered". It is clear to us that the question and response was concerned with the tight timetable, rather than of any wider import.

f) Mr Quantock said "I sense their [sic] isn't really a proper process here and they are playing it by ear and seeing if they can [get] a deal that works as it's very far away right now."

(xi) Notes of 13 May 2022 suggest that there was contact between Mr Cowlishaw and Mr Jackson that day, in which Mr Jackson said that Octopus' model was "pretty much updated", that the issue of whether customer balances would have to be ring-fenced would impact their funding requirements. While Mr Jackson revealed more of what Octopus would be looking for, the evidence does not suggest that they received any form of assurance at this stage that it would be provided.

(xii) There was also a meeting between Ms Kotzeva of Lazard and Mr Jackson that day, in which Ms Kotzeva said that "access to stakeholders including government can be made available for structuring conversations". It is apparent from an email that day from Ms Kotzeva to Teneo that Mr Jackson communicated Octopus' desire to talk to HMT about the "art of the possible" on reducing the risks of the transaction.

(xiii) The meeting (either virtual or in person) between Teneo and Lazard, and Mr Jackson, took place on 13 May. It is clear that at this meeting, Octopus provided some further insight into what they would be looking for by way of HMG support. In particular, the issue of ring-fencing customer balances was discussed, which it was said would make a difference to Octopus' funding requirement. Octopus was given dates for an SoS meeting. Lazard's note said:

> "They seem keen to talk to Treasury on art of the possible re risk … I said they should talk to us, not go direct. They asked if there could be protection from some of the open Ofgem risks."

Octopus' report of the meeting to Mr Quantock said that Lazard had "explained that access to stakeholders including government can be made for structuring conversations". There may have been a further call between KPMG and Teneo that afternoon.

(xiv) Octopus' non-binding indicative offer was submitted on 15 May 2022, offering [REDACTED] per active paying dual fuel Bulb customer, and [REDACTED] per single fuel customer, which, on the basis of 1.5 million customers, involved a price of [REDACTED]. It identified a requirement for certain costs to be set off against the consideration, including an adjustment for the difference between actual hedged costs and an agreed wholesale cost. It did not set out any HMG funding structure.

(xv) On 17 May 2022, the Bulb Operations Board was asked to approve allowing Octopus to proceed to Phase-2. Lazard and Teneo recommended granting approval, to increase competitive tension in Phase-2, something seen as particularly valuable "in the context of minimal engagement from [BGT]". It was suggested that Octopus was the only party which had submitted a clear, assumption-backed bid to date (including the two Phase-1 bidders). The board approved Octopus' re-entry into the process on 24 May 2022.

(xvi) On 9 June 2022, Mr Greg Jackson met the SoS. The issue of what support might be available from HMG was not discussed.

62. So far as the "Over 0" aspect of the note is concerned, there is hearsay evidence from Ms Kotzeva (through a witness statement of Mr Cowlishaw) in which she challenges this aspect of the note, saying that "what she told Mr Quantock [was] that to get into Phase-2, Octopus would need to submit an indicative bid with a value but there would be an opportunity to update that value following due diligence". There was no witness statement from Ms Kotzeva herself, and no explanation as to why no statement was provided. As to this:

(i) It is relevant, in our view, that Mr Quantock was being told what was necessary *to get into Phase-2*, not what was necessary to win a bid in which Mr Quantock was told there were already two other entrants.

(ii) The conversation took place *after* Octopus had sent its 10 May 2022 letter expressing its desire to re-engage in the M&A Process, so Ms Kotzeva cannot have thought any great carrot was required to move matters along.

(iii) We think it likely that Ms Kotzeva made reassuring noises that any bid would be sufficient to get into the next phase of the process. That would be consistent with the decision that the JEAs had taken on Lazard's recommendation in the Phase I Bid Review and Next Steps Recommendation of April 2022 "that all parties that have submitted or will submit an indicative bid are taken through to the next stage of further engagement without delay". It should be noted that BGT was progressed to Phase-2 without having provided a number at all, and Tulip had not been willing to provide a figure in writing.

(iv) If the message was intended to go further than that, then we find it difficult to understand quite what was being suggested, because the effect of the two possible constructions are either too arduous or too generous to be realistic candidates for what Ms Kotzeva was intending to say or what Octopus can have understood. If the message was that the minimum necessary to get into Phase-2 was a net positive value *after taking account of Bulb's liabilities*, then that set a far higher hurdle than Octopus' successful bid, and would have been meaningless without an understanding of what Bulb's liabilities were. If the message was that the minimum necessary was 0 for Bulb after HMG had met its liabilities and rendered it debt-free, then Octopus cannot have taken that seriously because it bid[REDACTED].

63. We are not persuaded that this conversation involved any material communication of additional information to Octopus which went beyond that provided to BGT, E.ON and ScottishPower. In any event, it is inherent in any negotiating process that active engagement by a potential bidder will give rise to a dynamic process in which positions on both sides develop, something which will necessarily not happen for those who choose, no doubt for their own good commercial reasons, not to engage.

64. Nor are we willing to infer, as we are asked to by ScottishPower, that Octopus was given "significant comfort from the JEAs and Lazard during the discussions in late April and early-May 2022 … that a very substantial sum of Government funding would be made available":

(i) That is not the evidence of Mr Cowlishaw or Mr Jackson, it being for the Claimants to persuade us that such evidence "cannot be correct": [19].

(ii) Nor is it the effect of the internal contemporaneous documents now produced, with no explanation having been offered for why the expressions of "significant comfort" of a "very significant sum" would not have left some discernible documentary imprint.

(iii) For the JEAs and/or Lazard to have offered "significant comfort" would have involved a very significant departure from what HMG had told them it was

willing to do at that stage, on an issue of obvious sensitivity for HMG. The Claimants have pointed us to no material which would justify us concluding that the JEAs and/or Lazard exceeded their clear brief in such a significant respect.

(iv) All that is said is that Octopus was the only entity which put in a bid assuming such a significant level of HMG funding, from which it follows that it must have received "information … which was not available to [ScottishPower] or other bidders". That is, with respect, a very weak basis for such a strong inference, and ignores an equally or more obvious explanation: that Octopus, because it saw greater commercial possibilities in the acquisition than the much larger Claimants, decided to engage with the suggestion that they set out their "ask", on the basis that the only downside would be that the answer was "no".

65. As to ScottishPower:

(i) On 19 April 2022, there was a call between Lazard and ScottishPower, of which no note survives, in which ScottishPower accepts that it was told that Lazard was now open to proposals that contemplated some kind of Government support package, but that it would be for ScottishPower to propose such a package rather than the Government offering one.

(ii) It is Mr Cowlishaw's recollection that on 25 April 2022 ScottishPower suggested that they would be sending a letter in the coming days with a view to participating in Phase-2, and that he was told ScottishPower was interested in the customer book, rather than the entire Bulb business. Mr Baker of ScottishPower says that such a conversation would have been with him, and he does not believe he would have been that committal. However, Mr Cowlishaw's account is supported by a contemporaneous email ("ScottishPower – they just called Luba [i.e. Ms Kotzeva] to say they will send a letter in the coming days (including a number) to try and get into Phase-2. [REDACTED]").

(iii) Further, ScottishPower's response of 28 April strongly suggests it had said it would be making a written submission, but was now changing its position, stating it "had been drafting a formal submission of interest for the process however we have now had a strategic change of course", and it was "regrettably unable to continue discussions with you". ScottishPower said that if BEIS wanted feedback, the decision was "due to the continued market volatility and our perceived risks around forward market purchases, *even if these were to be under a government backed adjustment mechanism"* (emphasis added).

(iv) A note made by Mr Cowlishaw on 13 May 2022 attributes the following statement to Mr Baker: "if want a part" – i.e. not the whole book – "should be in same process. Difficulty [REDACTED]".

(v) Given those statements, we do not find it remotely surprising that the JEAs concluded that ScottishPower had closed the door on a bid, notwithstanding the signalled possibility of HMG financial support.

66. Finally, [Daisy]:

(i) On 29 April 2022, Teneo spoke to [Daisy] who said its decision not to bid "all comes down to [the] regulatory landscape", with higher capital requirements, the stabilisation mechanism and "backwardation" mentioned.

(ii) Very much later on in the process, on 28 October 2022, [Daisy] submitted an indicative offer.

67. In May 2022, Ofgem announced a statutory consultation on proposed changes to the price cap wholesale methodology, due to start in October 2022. It included a proposal to update the price cap mechanism to include backwardation.

68. At this point, we turn to the two Phase-1 bidders. On 25 April 2022, Lazard began the Phase-2 process with the two surviving bidders, requesting bids by 30 June 2022. Lazard informed them that there would be an opportunity for "further engagement with BEIS" in relation to the transaction, and for meetings with the SoS, and it also referred to "potential adjustment mechanisms and the transitional services required".

69. We will consider subsequent dealings with the two Phase-1 bidders in turn.

70. As to Tulip:

(i) On 6 May, Teneo held a call with Tulip to discuss the transaction, in which "forward purchases – potential funding?" was raised by Tulip, and Teneo said that it would need to see something in writing, but that it had done some thinking and needed to understand what Tulip's thinking was. Tulip was offered a meeting with the SoS but does not appear to have taken up the opportunity.

(ii) Mr Harris KC sought to suggest that Tulip had received more favourable treatment in this conversation, because Tulip was told that what had been decided upon was a hive-down structure, under which those parts of Bulb's business which Tulip wished to purchase would be "hived down" into a company which was sold. However, the letter sent to all potential bidders on in March 2022 had make it clear that bidders could bid for "some or all" of Bulb's business, with the sale taking place "either directly or via a hive-down" (something which is a commonplace mechanism for M&A transactions as BGT would have known).

(iii) The minutes of the Bulb Operations Board meeting of 24 May 2022 record "lots of activity from Tulip", and it is clear on the evidence that they instructed lawyers and undertook a considerable amount of due diligence.

(iv) On 16 June 2022, Tulip contacted Lazard to inform them "that following extensive work and review … as well as discussions with our stakeholders, we have concluded that an investment in Bulb is not in [Tulip's] best interests at the current time". Tulip pointed to the risks of the wholesale energy market and said that "we believe that an on-going HMG participation in the business is likely to be essential to help the business through the short to medium term uncertainty and underpin the valuation however it has not been clear to us if HMG has appetite for such a role".

(v) Lazard responded 40 minutes later stating that "many of the issues you have identified …. can be mitigated" and "you raise a point about Government participation". Lazard stated it wanted "to explore if a period of joint ownership … could mitigate the collateral requirement and other issues that you have identified and could be an alternative structure. It is clear that is not HMG's preferred plan but is certainly not also ruled-out".

(vi) It is not entirely clear to us what the expression "joint ownership" was intended to refer to. There is no material we have seen which suggests that it was ever contemplated the HMG would enter into a split equity arrangement with any bidder. It seems to us more likely that what had not been ruled out was HMG continuing to share the economic risks of the business (i.e. HMG financial support). That did not go materially further than the preliminary indications given to any of the Claimants, albeit it did not elicit any positive engagement from Tulip.

(vii) Lazard sent a further email to Tulip on 28 June, offering a possible arrangement to resolve working capital and hedge collateral issues (effectively a guaranteed wholesale price which would remove the need for a hedge). We return to the decision to approach Tulip, and only Tulip, in these terms at [71] below.

(viii) On 12 July 2022, Tulip responded saying it had concluded that "there is not a package of support that would change their position".

(ix) Lazard's later review recorded Tulip stating that the decision was due to the collateral requirement from its hedge supplier being potentially greater than the value they put on Bulb's business, the potential exposure to the business if prices were not hedged, given the price cap and the risk of retaining or attracting new customers given the negative press surrounding Bulb.

71. The reasons for the decision to approach Tulip on 28 June 2022 are explained in Lazard's Phase-2 bid review, prepared on 10 July 2022. It was noted that a decision had been taken to "re-test … informally any additional support beyond hedging with Tulip (the only other party that had not formally withdrawn)", and that this has not been done more widely because doing so "would pose [a] high risk of Orchid [i.e. Octopus] walking away resulting in a failed auction, and is expected to be unlikely to generate wider executable interest". This reasoning was attacked by the Claimants:

(i) It was said that there was no reason to test the offer with Tulip, and not with any of BGT, ScottishPower and E.ON, and that the implicit suggestion that BGT had withdrawn from the process was wrong.

(ii) It is clear from the Phase-2 bid report that Lazard expressly considered the position of BGT and ScottishPower. Given the matters in [72] below for BGT, and [65] above for ScottishPower, we are satisfied that Lazard could reasonably have concluded that BGT and ScottishPower had closed the door on the acquisition of the entirety of Bulb's customer book. While there is no documented reference to E.ON, we are satisfied that the view that Tulip was the only other bidder who had not closed the door on a "whole book" transaction was reasonably open to Lazard given the matters in [39] above.

(iii) In particular, on the evidence Tulip had conducted extensive work by way of due diligence, and their response had offered the possibility for further engagement by saying "we have concluded that an investment in Bulb is not in [Tulip's] best interests *at the current time*" (emphasis added).

(iv) The degree of risk of Octopus pulling out of the negotiations if the broad outline of the transaction it was discussing with the JEAs was shared more widely in the market was a matter for commercial judgment, on which Lazard and the JEAs were well-placed to form a view.

72. As to BGT:

(i) Press reports of possible BGT involvement surfaced in late April, which suggested that BGT was asking for HMG support. In a conversation on 27 April, BGT told Lazard that the press coverage was unfair, had "upset a number of people there" and that Lazard might not hear from them for a while.

(ii) At the Bulb Operations Board meeting on 10 May, it was suggested that BGT was "still not engaging", and a SoS meeting was identified as one means of encouraging BGT's engagement. On 12 May, Lazard sent Mr O'Shea, the CEO of BGT and Centrica, a message from which it is clear that an SoS meeting had already been offered, and BGT's response was awaited.

(iii) On 15 May 2022, in the context of a communication on another subject, Mr O'Shea informed the SoS that BGT's interest was in taking only *some of* the customers (which would necessarily have involved a split book solution).

(iv) Lazard sent a further prompt to BGT on 16 May, but the Bulb Operations Board meeting on 24 May noted there was still "limited activity" from BGT.

(v) The meeting between BGT and the SoS duly took place on 9 June 2022. At that meeting, handwritten notes taken by Jane Walker (Deputy Director, Energy Markets and Consumers at BEIS) record BGT's position as being "we don't want to buy Bulb. Could take some customers … 500k max" – i.e. a response to the same effect as the 15 May communication quoted at (iii) above. The SoS indicated that selling as a "job lot" would be the preferred approach. Handwritten notes taken by an official at BEIS and the typed notes of a member of the SoS's private office (both of whom were at the meeting) are to the same effect.

(vi) We are satisfied that these notes captured the essence of Mr O'Shea's position as communicated at that meeting, which is also consistent with the internal BEIS email sent after the meeting which stated "we've had conformation that [BGT] will not bid but would be prepared to take a share of the customer book if there are no other bidders (as confirmed by them in the meeting with SoS earlier)" and that BGT "will not bid". We can see no credible reason why BEIS, which was clearly concerned by the implications of BGT dropping out of the Phase-2 process, should have formed a negative view of BGT's intentions unless that was the outlook BGT objectively conveyed to them. Indeed it is noteworthy that on 10 June, Lazard was asked to contact BGT to see if they "could be persuaded to re-enter the process" – reflecting a perception on the selling side

that they had dis-engaged, and a desire to reverse that state of affairs. If, as Mr Bessell (Group Head of M&A at Centrica plc) and Mr O'Shea (of Centrica) have stated, BGT did not intend to leave "the impression that BGT would not entertain a bid and/or was not open to continuing discussions", that was nonetheless the impression they left.

(vii) Nor can we accept that BGT's statements ought reasonably to have been understood as a statement only of a desire not to acquire "the whole of Bulb the company" (as Mr Harris KC put it) rather than the entirety of Bulb's customer book (the interpretation Mr O'Shea offered once the numerous notes of the 9 June meeting had been produced). BGT's communications are consistent in their assertion of a readiness only to take *some* customers (limited to "500k **max**" as it was put at the 9 June – emphasis added).

(viii) There were subsequent text exchanges between Mr O'Shea of BGT and Ms Kotzeva of Lazard on 10 June in which Lazard expressly asked if the meeting with the SoS had "change[d] your mind on getting back into the process? We'd be happy to have you in there!" Mr O'Shea did not challenge the characterisation that BGT had left the process, but said "our position is the same. We would be willing to take some of the customers in a break up of the company". This was entirely consistent with the account of the 9 June meeting in BEIS' notes and internal email.

(ix) In his text, Mr O'Shea also referred to press stories suggesting that [Daisy] and Octopus were bidding, on which he had been asked to comment. This was a reference to a well-informed report which had appeared in *The Financial Times* that day, alleging that Octopus was in negotiations to buy the Bulb business, and that HMG was expected to offer a clean balance sheet, with no debt, as well as a generous financial dowry, albeit "government has not set out how much money it would be prepared to inject in the deal, and is instead waiting to see what the three bidders offer". Mr O'Shea stated "I trust no-one will be giving them cash to take on Bulb only to watch that cash disappear and come back to hit the taxpayer!!" Ms Kotzeva on behalf of Lazard replied "government support conversations as per discussion with your team – balance sheet restructuring and hedging transition only".

(x) We have not seen any material which supports a finding that there had been earlier discussions between Lazard and BGT on the subject of balance sheet restructuring and hedging transition, beyond the generalised references in the documents we have set out above. However, Ms Kotzeva was clearly referencing the possibility of such support in her message, and doing so in the context, known to Mr O'Shea, of press reports of the business being sold on a debt-free basis with a generous financial dowry. Mr O'Shea's response – which was consistent with his later communications – was not to express surprise at the fact that HMG support was in contemplation, but concern as to who it might go to. He suggested "immediate cash injection to companies with rumoured credit problems could be problematic", to which Lazard responded "Agreed!".

(xi) Later on 10 June 2022, Mr Cowlishaw sent an email to Ms Kotzeva and others saying it was very clear that BGT was "not going to bid for all customer book. Not negotiating tactic. Have been out of the sales process for some time".

(xii) Mr O'Shea says that he spoke to Ms Kotzeva of Lazard "subsequently" and confirmed that BGT remained interested in Bulb, and that he "did not limit Centrica's involvement to any particular structure". We consider the evidence on this question at [73] below.

(xiii) Lazard's later summary referred to BGT's concern "about government supporting a sale to an insufficiently capitalised competitor", and to BGT emphasising the need for resilience and evidence of adequate funding.

(xiv) BGT did not, in the period after 10 June, indicate any willingness to submit a further offer for Bulb's entire book, although, as we explain below, it raised the option of splitting the book again on 1 August 2022.

73. As we have stated, Mr O'Shea says that he spoke to Ms Kotzeva of Lazard after the exchanges on 10 June, and confirmed that BGT remained interested in Bulb, and that he "did not limit Centrica's involvement to any particular structure". No date is given for the communication, and there is no documentary evidence relating to it, whether from BGT, Lazard or between Lazard and the JEAs, the JEAs and BEIS or internally within BGT:

(i) Given the consistency and clarity of BGT's communications that it was only interested in taking some of Bulb's customers, it would have taken a particularly clear communication from BGT to alter that message.

(ii) Mr O'Shea says that he did not "limit [BGT's] involvement to any particular structure". That does not suggest that he made a positive statement of any wider interest beyond taking some of the customers, which is what would have been required.

(iii) Had there been any clear communication to this effect by BGT to Lazard, we find it inconceivable it would not have been mentioned by Lazard (not least because it would have been very welcome news). Lazard was keen to increase the competitive tension in the process, and keen for BGT to engage. Yet there is no hint in any subsequent Lazard document after 10 June (including the Phase-2 bid review) that BGT's position was other than as communicated at the meeting on 9 June and in the exchanges on 10 June.

(iv) As we explain below, when BGT engaged in further communications on 31 July, 1 August and 12 August 2022, its position was always that it did not want to buy the Bulb business, only to split the book. This is a further reason why we are not persuaded that BGT said anything to Lazard which qualified the clear messaging on 9 and 10 June, whatever Mr O'Shea's intention may have been. Nor would his request that Lazard contact Mr Bessell have reasonably been understood by Lazard as offering possibilities other than the "split book" scenario which BGT had clearly communicated was the limit of its interest.

74. A number of internal analyses were performed by the JEAs and Lazard of alternative courses of action, if the Octopus bid was not accepted:

(i) On 27 May 2022, the JEAs analysed eleven alternatives to the ongoing marketing process. "Continuing with the ongoing sale process" was identified as the best option.

(ii) On 24 June 2022, the JEAs conducted a further analysis of the option of split book sales, and once again concluded that a sale of Bulb through the ongoing sales process remained the best option.

75. By 27 June 2022, the JEAs had prepared an analysis of the costs of hedging for the Bulb business, indicating a likely cost of £305m and a collateral requirement of c.£2 billion. At or around this time, an Ofgen consultation paper addressed the issue of credit balance ringfencing and led another possible bidder to confirm it was withdrawing from the process, due to uncertainty as to the funding requirement for any hedge (which it was suggested could be in the hundreds of millions or billions).

76. Octopus submitted its Phase-2 offer on 30 June, offering [REDACTED] per dual fuel customer and [REDACTED] per single fuel customer, and a total price of [REDACTED]. It proposed two funding structures – Structure A and Structure B. Under Structure A, the Winter 2022 wholesale exposure would not be hedged, but borne by BEIS. Structure B involved a hedge supported by BEIS guarantees. This was the only Phase-2 bid received.

77. On 10 July 2022, Lazard prepared its Phase-2 bid review. It stated:

(i) BGT had "been aware of government openness to possible support to enable a transaction, and encouraged to put forward their requirements in order to commence a discussion on possible structures but post withdrawal have noted and objected to press coverage regarding possible government cash support: "immediate cash injection to companies with rumoured credit problems would be problematic" (a clear reference to Mr O'Shea's text to Lazard of 10 June 2022). We are satisfied that this was a fair characterisation of the position.

(ii) "A competitive sale process has been run over the past four months against a highly challenging market backdrop", which had delivered only one transactable bid (the Octopus' bid).

(iii) Octopus' bid "envisages certain transitional support" regarding the lack of hedge, working capital and the trading collateral implications of rising government debt.

(iv) Octopus' bid "seems better value" than the two identified counterfactuals – keeping the business in SAR, or breaking up the book for split sales, which would be "higher risk and likely more expensive". It recommended closing the Octopus deal.

78. The JEAs prepared an analysis of the Octopus bid on 12 July 2022. This made the same recommendations as Lazard. It evaluated Structure A as requiring [REDACTED] of working capital from BEIS, and possibly a guarantee for Octopus' gas supplier. Structure B required a [REDACTED] hedging cost, working capital guaranteed by HMG of [REDACTED] and potentially [REDACTED] of collateral for Octopus' wholesale supplier. However, it advised that the Octopus bid was better than the

counterfactuals of maintaining operations or "multiple book sales", noting that the latter course was considered a "high-risk structure to pursue" since there was "no guarantee that sufficient bids would be achieved to deliver this option".

79. On 19 July 2022, BEIS produced a paper seeking ministerial approval to proceed in accordance with Lazard's and the JEAs' recommendations. The paper outlined the significant support from HMG which the transaction would entail:

(i) [REDACTED] would have to be injected into Bulb before the sale to ensure an overall net consideration of at least £1 on its transfer to Bulb UK Operations Ltd (**HiveCo**). In the event, the necessary equity injection was [REDACTED]: **the Equity Injection**. There was also an obligation on the part of the Octopus Group, if certain conditions were met, to make a deferred equity injection of [REDACTED] on 30 September 2024.

(ii) For Structure A, under which Octopus would buy energy on the "day ahead" markets, the acquisition cost being funded by HMG, with Octopus paying HMG at the price cap six months later, a cost of [REDACTED], and a funding cost of [REDACTED] before repayments commenced.

(iii) For Structure B, a wholesale price adjustment funded by HMG over Winter 2022 of [REDACTED], working capital of [REDACTED] for up to three years and, potentially, [REDACTED] of collateral required by Octopus' wholesale supplier.

It advised that "both figures are highly uncertain and could be materially more or less depending on wholesale price movements".

80. On 20 July 2022, following negotiations with the JEAs, Octopus submitted a proposed new structure – Structure C – under which Octopus would pre-pay wholesale invoices, and cash would be accumulated by HiveCo in a custodian account which could be used to collateralise wholesale energy purchases, and under which Octopus had an option to defer the outstanding wholesale balance amount for an additional 12 months. Structure C included a number of amendments which were advantageous to Bulb as against Structures A and B.

81. That new structure was put forward in a revised formal offer on 26 July 2022. The JEAs reviewed the new structure, noting that the price adjustment in Structure C was [REDACTED] (as against the previous figure of [REDACTED]) and the total Winter 2022 wholesale cost was [REDACTED]. It was now proposed that Octopus' wholesaler would receive a guarantee secured against HiveCo's working capital. A ministerial update on the new proposal was prepared on 1 August 2022.

82. On 31 July 2022, in communications between Mr O'Shea of Centrica and the SoS, Mr O'Shea identified splitting the book as an alternative to the Octopus sale, and made various adverse comments about Octopus' financial strength. The SoS said that he had favoured splitting the book but the position now was BEIS [REDACTED]. It is striking that, even after learning of the Octopus bid and the press reports of HMG financial support in connection with that bid, BGT's response was not to express a willingness to make a "whole book" bid on better financial terms, but to re-iterate the "splitting the book" offer it had made on 9 and 10 June, and express the same concerns about funding

a less-capitalised competitor. BGT expressed similar concerns to Lazard on 1 August 2022, in which potential issues relating to the provision of state aid were flagged. BGT stated of its "splitting the book" proposal:

> "If however you believe you have landed on a structure that is superior for consumers to what we have outlined we would like to understand what that might be".

Lazard responded saying that BGT "have been part of our process" and "well aware that the book is unhedged and that government has been open to discussions relating to required support … If you have a proposition you would like to discuss please do send it in writing".

83. There was no response suggesting that this was the first BGT had heard about the government being open to discussions on support. While it was initially suggested that there had been such a response 11 days later, in the 12 August letter BGT had sent to HMT, BEIS and Ofgem, raising its concerns about reports of the Octopus deal, Mr Harris KC accepted that this issue was not addressed in the letter.

84. Ofgem confirmed changes to the price cap methodology on 4 August 2022. This set a limit on the amount suppliers could charge certain consumers for a unit of energy, and moved to setting the default retail tariffs on a quarterly basis. It also made provision for the recovery of "backwardation" costs when the price cap methodology had led to a material under-recovery.

85. On 24 August 2022, the JEAs carried out a further analysis of the Octopus offer in its current form which was compared against certain other options. The JEAs continued to recommend the Octopus offer on the basis that it was forecast to have the lowest overall cost to HMG. The JEAs expressed doubts about the achievability of possible alternative transactions in the prevailing market conditions.

86. HMG announced the Energy Price Guarantee on 8 September 2022, which reduced the unit cost of electricity and gas for consumers for the period from 1 October 2022 to 1 March 2023. A support scheme for businesses in relation to their energy bills was announced on 21 September 2022.

87. On 23 September 2022, senior officials within BEIS recommended an increase in the amount of the AFA from £1.7 billion to £3.9 billion, in anticipation that it would be necessary to cover Bulb's costs of acquiring energy for a longer period than the AFA had originally assumed. The SoS approved that change on 3 October 2022.

88. Lazard and the JEAs produced yet further analyses on 28 September 2022. These considered the Energy Price Guarantee Scheme announced on 8 September 2022. They noted that "the recent Government regulatory announcements and broader market changes are marginally improving the investability case for retail supply relative to before" but continued to recommend proceeding with the Octopus bid on the basis that:

    (i) a comprehensive M&A Process had been run by the JEAs and Lazard;

    (ii) there had been extensive negotiations with Octopus; and

(iii) the counterfactual scenarios (postponing the sale or splitting Bulb's book) showed "less favourable anticipated outcomes" and carried "significant execution risk".

89. In its analysis, Lazard expressly considered Ofgem's revision to the price cap methodology announced on 4 August 2022 and the Energy Price Guarantee and concluded that these measures did not materially increase the prospects of an alternative buyer being found if the marketing process were to be re-run.

90. The JEAs' analysis concluded that the Octopus deal offered "the best value for money" of the options on offer, and would "deliver the quickest exit from SAR and minimise wider market disruption owing to the sale of the business to an established energy provider". The alternative options reviewed, but assessed to be inferior, comprised:

(i) deferring a sale to some point in the future;

(ii) split book sales;

(iii) invoking the SoLR regime;

(iv) restarting the sales process in July 2023;

(v) winding-down Bulb and offering its customers a financial incentive to move to other suppliers.

91. These analyses were reviewed at a meeting of the Bulb Operations Board on 4 October 2022. The BEIS assessment was that, if anything, the JEAs' analysis was too positive on the consequences of the various counterfactual options.

92. On 10 October 2022, another energy supplier contacted Lazard expressing generalised interest in bidding for Bulb. Lazard held a discussion with the supplier, and reported on 24 October that the supplier was not in a position to firm up pricing until the end of the year, and was dependent on raising equity and on obtaining energy supplies on an uncollateralised basis. Lazard advised that they "did not consider that this represents anything that can sensibly be taken forward at this time". We are not persuaded that this view was not reasonably open to Lazard as a matter of its commercial judgment.

93. On 11 October 2022, ScottishPower wrote to the SoS expressing concern about press reports of £1 billion of taxpayer funding being offered to Octopus in relation to the Bulb transaction, and seeking information about the deal. The letter referred to "procedural unfairness" and alleged that government support had not been offered to other bidders. These remain ScottishPower's core complaints in these proceedings.

94. E&Y were retained to provide an independent review of the JEAs' final recommendations paper for BEIS. The report noted that it had been prepared under time constraints "as you had a need, for internal BEIS reasons, for a quick turnaround in the production of the report". It referred to the substantial, and uncertain, amount of HMG support envisaged and the fact that the amount of support required and the repayment profile had recently become more adverse. It noted that "all of the counterfactuals have significant execution, operational and financial risks associated with them". It said that provided that the outstanding commercial points – "**whose significance cannot be**

understated" – could be resolved to HMG's satisfaction, then the JEAs' "very clear recommendation to accept the [Octopus] offer cannot be considered an unreasonable conclusion to reach despite the uncertainty" inherent in the offer, the repayment risk and the counterfactuals (emphasis in original). E&Y also expressed the view, based on what they had seen and been told, that "we do not consider the process followed to be unreasonable". In the Appendix, E&Y identified several questions to be answered before E&Y could offer a concluded view. The Claimants point to the time pressure under which the report was prepared, and the caveats included. Those are fair observations, but the fact remains that the independent review identified no red (or even orange) flags in either the process or its outcome.

95. On 23 October 2022, the AO provided their assessment of the proposed transaction, the AOA, recommending that HMG agree to the Octopus bid. The AOA referred to "a competitive and extensive sales process" in which the market established the value it was willing to place on Bulb, and referred to an "extensive negotiation process with [Octopus] to secure the best terms in the circumstances and analysis of counterfactual options (which all show less favourable anticipated outcomes and carry significant operational and execution risks and uncertainty of an ultimate buyer)".

96. On the same date, BEIS finalised its SCA. It noted that the existing financial support for Bulb had taken the form of a "rescue subsidy", but that the support for the Octopus transaction could be regarded as involving a "restructuring subsidy". It identified the following elements of the post-completion support which "could be regarded as constituting restructuring subsidies":

(i) The wholesale pricing adjustment under the Wholesale Adjustment Mechanism Agreement (**the WAMA**) by which HMG was to loan to Bulb for onward payment to HiveCo money to purchase energy in the period up to 31 March 2023, at an estimated cost of £4.5 billion, with Bulb/HiveCo's repayment obligation limited to the amount of the price cap:

a) the loan not being on commercial terms because the repayment amount was limited to the price cap;

b) there was an option to repay the funding on a deferred basis;

c) the interest charged on the loan would not be passed onto HiveCo, who would only be obliged to pay interest at 2% if it failed to make payments when due or exercised its right to defer payments.

(We should add, by way of parenthesis, that in economic terms, this involved HMG assuming the role of HiveCo's hedge counterparty, with HMG paying the prevailing energy costs in the market and receiving the amount of the "wholesale cost allowance" assumed by Ofgem under the Ofgem price cap when setting the amount energy companies were permitted to charge retail customers. At the date of the Octopus transaction, HiveCo was "in the money" under this "hedge" to the tune of £1.2 billion, but the ultimate position would inevitably depend on the state of the energy market over the 6 month period. We accept, however, that HMG was providing a more perfect hedge in terms of matching HiveCo's actual sourcing costs than would have been available from a market counterparty. That is because it was not limited by reference to a particular

volume of energy purchases (beyond the fact that they had to be necessary for supplying HiveCo's customers), and there was no risk of any timing mismatch between the profile of demand assumed in the hedging transaction and the actual demand faced by HiveCo, and thereby avoided "volume" and "shaping" risks – although if the market moved the other way, the "perfection" of the hedge could increase the amount payable by HiveCo to Bulb).

(ii) It was envisaged that this six month period would allow HiveCo to accumulate cash reserves which could be used to collateralise a hedge entered into with a market counterparty.

(iii) A one-off adjustment ("the Stub Period Price Cap Amount") payable to HiveCo to ensure that the financials of the deal remained broadly equivalent to those as at 1 October 2022, which was the date when Octopus' offer was intended to take effect. This was effected by way of a loan from Bulb to HiveCo equivalent to the amount Bulb would have paid for wholesale electricity and gas between 1 October 2022 and completion, had it been hedged in line with the price cap methodology. It was to be repaid on the same timeline and repayment terms as the wholesale pricing adjustment.

(iv) Regulatory change protection, by allowing HiveCo to defer repayments if this was needed to protect against the costs of complying with any ringfenced protections imposed by Ofgem in respect of customer credit balances and renewables obligations. This reflected the fact that HiveCo intended, during the period that the wholesale pricing adjustment was payable, to build up working capital to collateralise a subsequent market hedge. A change in the regulatory regime ring-fencing positive customer balances would impact on that plan.

97. The SCA concluded that the subsidies were "fully compliant" with the Subsidy Control Principles in the Trade and Cooperation Agreement and the Subsidy Control Act, for reasons set out in two Annexes. The SCA also addressed the issue of whether the transaction involved a subsidy to Octopus, including the Equity Injection to Bulb to bring the net asset value of the assets transferred to HiveCo to £1. It concluded:

> "The draft Subsidy Control Act 2022 guidance … and EU State aid law indicate that public authorities will be able to show that there is no subsidy/aid to the buyer where an open and competitive process has been followed. As Orchid's bid has been proposed following such an open, non-discriminatory, and competitive sales process, there is no subsidy to Octopus as the buyer."

98. Mr Peretz KC submitted that the Subsidy Control Assessment was concluded in a rush, and that the work should have begun earlier. It is clear to us that in fact the issue of subsidy control was on BEIS' radar from an early stage: see [33], [37]-[38] and [40]-[41] above. It is right to note that we have no documents showing what work was being undertaken on this issue. However, this was an exercise which could not be completed until the final terms of the proposed funding were known and the SCA itself appears to us to be a considered, rather than rushed, evaluative exercise.

99. The AOA and the JEAs' recommendations were reviewed at a joint meeting of the BEIS Project Investment Committee and HMT's Approval Process on 25 October 2022, and a decision was taken to recommend the transaction with Octopus, and the steps necessary on HMG's part to facilitate it, to the SoS.

100. On 25 October 2022, the JEAs prepared a "Draft Addendum Restructuring Plan" which stated that "our analysis indicates that the overall cost to the taxpayer/HMG of the Offer is currently forecast to be lower than in any of the possible counterfactuals even in a sensitised downside scenario". It concluded that Octopus' cashflow forecasting "demonstrates viability" and:

> "Repayment of HMG funding is a realistic outcome given that the wholesale risk has been addressed with the transaction structure and assuming that [Octopus] can run the business efficiently in line with the Ofgem price cap structure."

101. On 26 October 2022, the JEAs submitted their Recommendation Paper to BEIS which recommended the Octopus transaction. The JEAs assessed that the counterfactuals indicated a worse outcome for HMG and consumers of between £0.3 billion and £0.7 billion than the Octopus transaction.

102. On the same date, BEIS made a submission to the SoS seeking approval for the Octopus transaction, seeking "an urgent decision on this submission" and recommending approval of the sale to Octopus and the associated financial support requirements. In referring to the difference between the amount to be advanced by HMG and the amount to be repaid by reference to the wholesale price cap, the submission stated:

> "The difference (15 Sept estimate £1.2bn) which HMG would otherwise bear in the counterfactual options, will be a permanent price adjustment not recoverable from the SPV – but may be recovered under the shortfall mechanism from consumer bills."

E&Y produced a final version of their report, in similar terms to the draft at [94], on 27 October 2022.

103. On 27 October 2022, the Chancellor gave budgetary clearance for the transaction conditionally upon the SoS using a shortfall direction to recover any net shortfall in government support not repaid by Bulb. The SoS then made the Funding Decision, approving the amendment of the AFA so as to provide funding to Bulb through to 31 March 2023.

104. The Octopus transaction was signed on 28 October 2022. The supplier who had contacted Lazard on 10 October made an indicative offer at 11.30pm. The JEAs were unable to consider the offer at that late stage, given the focus on signing the Octopus transaction – a view which we are satisfied was a reasonable position to adopt, given the lateness of the indicative offer and the fact that the signing of the Octopus transaction was imminent. The transaction was signed that day. The effect of the transaction was as follows:

(i) Bulb agreed to transfer the relevant parts of its business to HiveCo by way of an ETS, to take effect on the effective date of the ETS.

(ii) Bulb agreed to transfer the shares in HiveCo to Octopus Energy Retail 2022 Ltd (**Octopus BidCo**) by way of an ETS.

(iii) The JEAs entered into an agreement to sell the shares in HiveCo to Octopus BidCo on the following basis:

a) Bulb agreed to inject equity into HiveCo to the extent that its liabilities exceeded its assets such that the net value of HiveCo was £1 (with provision for post-completion payments in both directions if the calculation of the amount necessary to achieve the £1 net value changed);

b) Octopus BidCo agreed to inject £108m into HiveCo, with a further equity injection of not less than £42m on 30 September 2024 if certain conditions were met;

c) Octopus agreed to share any profit made in the financial-year ending April 2023 with Bulb.

(iv) HiveCo was to operate as a fully ringfenced entity within the Octopus group, with HiveCo only able to deal with other group entities on an arms-length basis, and restrictions on the payment of dividends and management fees by HiveCo to the wider group. These restrictions would only be removed once all payments due from HiveCo to Bulb had been paid.

(v) Octopus BidCo, Bulb and the JEAs entered into the WAMA.

(vi) BEIS entered into the Amendment and Restatement Agreement with Bulb, amending the AFA and providing Bulb with the loan financing it would need to discharge its obligations under the WAMA.

(vii) Octopus BidCo, its parent, HiveCo and its wholesale energy supplier entered into a supply agreement.

105. On 29 October 2022, HMG published a press release accompanying an ETS notice stating that HMG had approved Bulb's acquisition by Octopus, with the acquisition to be implemented via an ETS. That report stated that HMG was willing to provide the funding necessary to ensure that the special administration was wound up in a way which protected customers' supply, and would provide financial support for the procurement of energy for Bulb's customers over the course of the winter of 2022. It stated that the support would be repaid in accordance with an agreed repayment schedule (making it clear that some form of credit arrangement was contemplated), but said nothing about the terms of the loan.

106. On 31 October 2022, the SoS provided an update on the acquisition to the House of Commons. This referred to a new loan facility in connection with the Octopus bid.

107. On 3 November 2022, BGT and ScottishPower sent letters to the SoS and Permanent Secretary for BEIS expressing concerns on various grounds about the Octopus transaction, which was understood to involve significant financial support from HMG, and seeking further information of various kinds. BEIS responded to ScottishPower's

letter on 7 November confirming the fact of the transaction, and stating that the information requests would be handled under the Freedom of Information Act 2000.

108. On 4 November 2022, Ofgem responded to a letter sent on behalf of the SoS by way of consultation on the proposed transaction (the SoS being required to consult with Ofgem before approving an ETS under Schedule 21 to the Energy Act 2004 (**EA 2004**)). Ofgem noted that it has engaged with BEIS and the JEAs in relation to the ETS and completed its assessment under the standard licence conditions (a so-called SLC 19AA Assessment), with a view to assessing whether HiveCo would have suitable financial and operational capabilities in place to ensure that consumers' interests are protected. Ofgem confirmed it had no additional comments on the ETS.

109. Also on 4 November 2022, the ministerial submission seeking approval of the ETS was prepared, and the SoS's approval was granted on 7 November 2022. That approval was published on 9 November 2022 and ScottishPower was notified on 10 November.

110. The JEAs applied in the Chancery Division to fix the effective date for the ETS. At that hearing, which came on before Mr Justice Zacaroli on 11 November 2022, BGT applied to be joined to the application, and asked the court either not to fix an effective date at all, or to do so some time in the future to allow BGT to obtain the information necessary to consider bringing, and if appropriate to bring, a public law challenge. The skeleton outlined a series of matters which were said to have given BGT "serious concerns" about the ETS and HMG's funding, and identified various adverse consequences which it was said would follow if the ETS took effect, and a public law challenge subsequently held that the SoS had acted unlawfully. At the oral hearing, BGT suggested that reversing the transaction would create "total chaos" and be "deeply unsettling". That hearing was adjourned.

111. On 15 November, BGT wrote to BEIS again seeking a significant amount of documentary material, and ScottishPower's solicitors sent a similar letter the following day. BGT sent its Pre-Action Protocol letter on 21 November, and ScottishPower on 23 November. The SoS responded to BGT's PAP letter on 23 November 2022, enclosing the SCA and the AOA.

112. BGT issued its claim form on 28 November 2022, and on the same date, each of the Claimants issued an "application for urgent consideration", stating that it was first appreciated that an urgent application might be necessary on 24 November. The Claim Forms of E.ON and ScottishPower were issued on 29 November 2022.

113. On 29 November 2022, the resumed hearing before Mr Justice Zacaroli took place. BGT argued that the court should either set no effective time, or an effective time after the conclusion of the judicial review claim, referring to the "chaotic" and "catastrophic" consequences for the market, consumers and for Octopus itself if the Octopus deal went ahead, and was then found to be unlawful and had to be reversed.

114. On 30 November, Mr Justice Zacaroli fixed the Effective Time of the ETS as 23.58 on 20 December 2022. In his judgment, *In the Matter of Bulb Energy Limited* [2022] EWHC 3105 (Ch), the Judge noted that he had adjourned the hearing on 11 November for various reasons including to allow the Claimants "to seek further information and to consider, and launch if they wished to do so, judicial review proceedings" ([6]). He rejected BGT's contention, observing at [105]:

> "What in substance is being asked for by BGT, SPR and E.ON is interim relief in the context of their application challenging the lawfulness of the Secretary of State's decision. It is common ground that interim relief can be applied for, and is commonly granted, in the Administrative Court; and that such relief could include suspending the effect of the Secretary of State's decision pending the resolution of the challenge to it."

He identified a number of reasons why it was the Administrative Court which was the appropriate forum for considering an application for interim relief.

115. On 6 December 2022, Mr Justice Swift held a directions hearing in the judicial review applications (*R (British Gas Trading Limited and others) v Secretary of State for BEIS* [2022] EWHC 3456 (Admin). He rejected the SoS's application for an expedited hearing with a view to having the applications determined before 20 December 2022, on the basis that there was insufficient time to prepare for and complete the hearing within that period. In that context, he made some criticisms of the time taken by the SoS to respond to letters from the Claimants. However, he had made it clear in the course of argument that he was not intending to make any findings on the issue of delay and certainly none that would bind this Court. No applications were made for interim relief.

116. On the Effective Date of the ETS, the majority of Bulb's assets were transferred to HiveCo, and the shares in HiveCo were transferred to Octopus BidCo.

The Claimants' Submissions on the Counterfactual Position

117. BGT has adduced evidence to the effect that it would have bid for the whole book of Bulb's customers if it had been treated in the same way as Octopus (or Tulip):

(i) Mr Bessell, in his first witness statement on 28 November 2022, stated;

> "if potential bidders had been notified during the sale process that there was, in fact, a significant subsidy on offer from the Government, *as we now know is to be included as part of the Proposed Transaction, and had Government described to us the terms of that subsidy, that would have naturally increased the attractiveness of the Bulb opportunity,"* and *"we would have been able to reassess the level of risk involved in bidding for all or some of the unhedged book and may very well have submitted a bid that was more competitive than the one that the Government agreed to".*

(emphasis added).

(ii) Mr O'Shea, in his first witness statement of 20 January 2023, stated that "had BGT been notified of the availability *and nature* of the financial support from the Government … I am confident that we would have been able to put forward a bid for the entire Bulb customer book that was materially better than Octopus' and that I would have been comfortable to recommend to the Centrica Board that it formally approve such a bid and the subsequent transaction." The Board

had stated that "knowing what it now knows about the Government support available and the Transaction structure, including the ring-fencing arrangements in relation to the target company, and taking into account that this is now a hypothetical question that would have involved consideration of a range of factors at the time, the Board would have considered my recommendation to submit a binding bid favourably and there is a high probability the Board would have wished to proceed to transact".

(iii) In his second witness statement of 20 January 2023, Mr Bessell said "had I received the emails that Tulip did on transaction parameters and what might be acceptable to Government, I would have been keen to explore that and would have considered that there was a deal to be done". Referring to Mr O'Shea's evidence, he agreed that "had BGT known about the availability and nature of Government support available, it would have been in a position to put forward a bid which would have been materially better than Octopus'".

118. So far as ScottishPower is concerned:

(i) In his first witness statement of 28 November 2022, Mr Ward referred to ScottishPower losing "the ability to compete for … a unique opportunity" to achieve a one-off increase in customer base.

(ii) In his second witness statement of 20 January 2023, Mr Baker (Director of the Corporate Development Team at Iberdrola SA, ScottishPower's ultimate shareholder) said that if he had been provided with the information in Table 1 of BEIS' discussion paper of 22 March 2022 (which was not provided to any bidder), it "may well have been sufficient to enable us to continue engaging in the Sales Process"; that if Lazard had re-engaged with ScottishPower as it did with Tulip, this "would certainly have required us to reconsider our position with respect to the Sales Process and would likely have led us to" take certain action; and that "knowing what we now know about the transaction and its backing from Government, if the Sales Process were to be re-run now and we received comfort that the Government support package tendered was realistic as well as the disaggregated data previously requested, I believe ScottishPower would devote material resources to participating in such a re-run process" and that it would be a process "in which many market participants would seriously consider participating."

(iii) In his second statement of 20 January 2023, Mr Ward agreed with Mr Baker's statement as to what would happen if the M&A Process were to be re-run, while suggesting that there were other credible options, including a SoLR process, with ScottishPower being "very likely to" take certain action if a particular package had been offered.

119. Finally, turning to E.ON, it does not suggest that it would have been willing to enter into a transaction on the same basis as Octopus, even with all that is now known, although it does suggest that it would have participated in a split book SoLR process. That provides a useful confirmation of the correctness of Lazard's assessment that E.ON was not interested in a whole book transaction of the kind which the JEAs had recommended. All that is said is that if it had known the precise level of HMG support, E.ON "would have considered this when making our decision to bid or withdraw".

120. It is not straightforward to identify what would have happened in a counterfactual analysis, and as Lord Neuberger has noted (see [20]), when the issue arises in litigation in which the answer may influence the determination of the dispute, such evidence must be approached with a certain caution. Our conclusions of fact are as follows:

(i) BGT's evidence, which underwent the "firming up" often seen in litigation, was essentially focussed, not on the counterfactual of what would have happened if they had had the same statements made to them as were initially made to Octopus, which, following prompt and intense engagement by Octopus, culminated in the final transaction, but on what their position would have been if they had been aware of the terms of the final transaction.

(ii) That is also true of ScottishPower's and E.ON's evidence, and even when less confident statements of a willingness to participate in the process are made, they are premised on more information being provided to them than was provided to Octopus which led to its decision to re-engage.

(iii) Even on the Claimants' case, we do not believe either of these counterfactuals are appropriate. What the Claimants have proved conspicuously unable to say is that the statements which were sufficient to lead Octopus to re-engage would have led them to engage and remain in the process to the point of actually bidding. We do not find this surprising, because we are not persuaded that there was any significant difference between the content of the "teasers" of HMG support given to potential bidders, only in the reactions of the recipients to those teasers. We would also observe that, at least from a commercial perspective, a process which allowed potential bidders not to participate in the bidding process, thereby reducing the commercial tension in that process, buy to be offered the chance to transact on the terms of the final deal (negotiated in the context of that reduced commercial tension) would be wholly unworkable and inimical to a competitive M&A transaction. The "after the event" counterfactual is also inappropriate because it offers the Claimants access to information, and leaves them open to the influence, of factors which would not have been part of the process "in real time" – including the identity of the successful bidder, and a knowledge of how far HMG was prepared to go.

(iv) As to the evidence of what would have happened if BGT and ScottishPower had received the approach made to Tulip on 28 June 2022, we have already noted that, as a matter of commercial judgment, it was reasonably open to Lazard to reach the view that only Tulip should be approached. In any event, the counterfactual evidence from BGT and ScottishPower falls far short of showing that a similar approach would have led them to re-engage to the point of making a bid.

(v) Even at this stage, both ScottishPower and E.ON make it clear that their preference was for a split book process, and we are confident (based on its consistent contemporaneous messaging) that this was BGT's strong preference too (BGT's reliance on its November 2021 bid ignoring the very significant change both in the commercial landscape and its own messaging after that process was pulled). Both Lazard and the JEAs had advised that the Octopus bid was preferable to a counterfactual which involved a split book process. We return to that recommendation below.

The Legal Framework: the Energy Market

The EAs 2004 and 2011

121. Bulb is an energy supply company within s.94 of the Energy Act 2011 (**EA 2011**). Section 158 of the EA 2004 makes provision for the appointments of "energy administrators", pursuant to the SAR for energy companies which run into financial difficulties. Section 158(1) provides that energy administrators are officers of the court, and s.158(2) and (3) make provision for the manner in which the energy administrators are to undertake the administration:

(i) Section 158(2) provides that "the management by the energy administrator of a company of any affairs, business or property of the company must be carried out for the purpose of achieving the objective of the energy administration as quickly and as efficiently as is reasonably practicable."

(ii) Section 158(3) provides that:

> "the energy administrator of a company must exercise and perform his powers and duties in the manner which, so far as it is consistent with the objective of the energy administration to do so, best protects—
>
> (a) the interests of the creditors of the company as a whole; and
>
> (b) subject to those interests, the interests of the members of the company as a whole."

(iii) Section 165 allows the SoS to make loans or grants to the company "of such amounts as it appears to him appropriate to pay or lend for achieving the objective of the energy administration".

122. The EA 2011 makes further provision for the administration of energy companies. Section 95(1) provides that "the objective of an energy supply company administration is to secure (a) that energy supplies are continued at the lowest cost which it is reasonably practicable to incur; and (b) that it becomes unnecessary, by one or both of the following means, for the esc administration order to remain in force for that purpose." The identified means are "the rescue as a going concern of the company" (s.95(2)(a)) or transfer as a going concern to another company of all or parts of its business (s.95(3)). The means by which a transfer can be effected include a "hive down" – transfer of the business or some part of it to a wholly owned subsidiary of the company and a transfer of the securities in the subsidiary (s.95(4)). Section 95(3) provides that the objective of an energy supply company administration may be achieved by transfers to another company only to the extent that "the rescue as a going concern of the company … is not reasonably practicable", "the rescue of that company as a going concern will not achieve that objective or will not do so without such transfers" or where a transfer to another company would better realise certain specific outcomes.

123. The transfer of all or part of the business of an energy company in special administration may be effected by an ETS which requires the approval of the SoS. Schedule 21 to the EA 2004 provides:

(i) At paragraph 2, that it is for the energy administrator, while the energy administration order is in force, to act on behalf of the old energy company in the doing of anything that it is authorised or required to be done by or under the Schedule.

(ii) At paragraph 3(4), that the ETS will take effect at a time appointed by the court (but the court is not to appoint a date until the ETS has been approved by the SoS: paragraph 3(5)).

(iii) At paragraph 3(6), that the SoS may only modify the ETS with the consent of the transferring company (through its administrators) and the transferee company.

(iv) At paragraph 3(7), that "in deciding whether to approve an energy transfer scheme, the Secretary of State must have regard, in particular, to— (a) the public interest; and (b) the effect the scheme is likely to have (if any) upon the interests of third parties."

(v) At paragraph 3(8) provides that "before approving an energy transfer scheme, the Secretary of State must consult GEMA" (but mandates no other consultation).

The Companies Court's Supervision of Administrators

124. The SAR introduced by the EA 2004 is one of a number of such regimes introduced since the enactment of the Insolvency Act 1986 for companies carrying out a statutory function of a public nature, where their functions are funded, in whole or part, by private sector finance (Goodison *et al*, *Corporate Administrations and Rescue Procedures* (4th) at [20.1]: ***Corporate Administrations***). The editors state:

> "The usual structure is that the special regime draws on some of the principles underpinning the administration regime which is available for companies generally, but includes additional purposes which will normally take priority over, or even replace altogether, the objectives for which an ordinary administrator is required to perform his functions."

125. The editors of *Corporate Administrations* note at [20.32] that "an energy administrator is an officer of the court, acts as an agent of the protected energy company and must exercise his powers for the purpose of achieving the statutory objective as quickly and efficiently as possible". In addition to their statutory duties, administrators owe duties to the company at common law to obtain the best price that the circumstances (as they reasonably perceive them to be) permit (*Re Charnley Davies Ltd* [1990] BCC 605, 618), subject, of course, to the pursuit of their statutory objectives.

126. In terms of how the administrators set about realising their statutory objectives, *Lightman & Moss on the Law of Administrators and Receivers* (6th) observe:

> "12-008 The general attitude of the court when: (i) considering the strategies proposed by the prospective administrator in support of administration applications under Sch. B1.para. 12; or (ii) considering or reviewing decisions, acts and transactions of the administrator undertaken within the scope of his extensive statutory powers, is one of deference to the commercial judgment of insolvency practitioners as experts and regulated professionals. This reflects a broad judicial understanding of the nature of the administrator's task and the challenges that he faces on appointment; an appreciation, in particular, that the administrator will invariably be operating at pace in difficult and urgent circumstances which dictate the need for quick decision-making, often based on less than perfect information, if value is to be preserved and the purpose of administration achieved. It also reflects an institutional judgment that licensed professionals are better placed than the court to formulate and implement commercial strategy according to the circumstances in which they find themselves.
>
> 12-009 Accordingly, the exercise of the administrator's wide powers, inter alia, to manage the company's business and to realise its assets are regarded as matters for the commercial judgment of the administrator, rather than as being appropriate matters for directions by the court. In the words of David Richards J, the court 'would not normally give directions to an administrator as to the means by which he should market assets, any more than as to which particular deal to make.' Consistent with this approach, the court will not usually be prepared to review the commercial strategy that the administrator wishes to pursue in advance. Thus, the court will not generally interfere where the administrator wishes to dispose of the company's assets speedily, in order to preserve goodwill that may otherwise rapidly diminish, before creditors have received his proposals or have had the opportunity to consider and approve them in their decision-making procedure.
>
> …
>
> 12-014 … The critical point to be borne in mind is that the court will generally allow the administrator a wide measure of independence and latitude in the performance of his functions, having regard both to the statutory framework which vests the management of the company's affairs in him and to the commercial exigencies that he faces."

127. The provisions of Schedule B1 to the Insolvency Act 1986 apply to SARs under the EAs 2004 and 2011, subject to the modifications of Schedule 20 to the EA 2004. These modifications provide that the right to apply to the court to challenge the energy administrator's conduct extends to the SoS, GEMA (with the consent of the SoS) and a

creditor or member of the company (Schedule 20, paragraph 16). Under paragraph 75 of Schedule B1, the court may examine the conduct of someone appointed as an administrator or energy administrator, on the application of the persons identified in paragraph 75(2). The court has power under paragraphs 74 and 88 of Schedule B1 to remove the administrator from the office (provisions which are not amended by the EAs).

The Issues For Determination

128. This is a rolled-up hearing of the Claimants' application for permission to bring a claim for judicial review in which they challenge:

(i) the Funding Decision ([15]) and

(ii) the Approval Decision ([16]);

(together **the Decisions**).

129. The preliminary issue which arises is whether, in respect of any grounds, permission should be refused on the basis that the claims were not brought promptly and/or there was undue delay, in breach of CPR 54.45. Delay is relied upon both as a reason why it is said permission should be refused (s.31(6)(a) of the Senior Courts Act 1981) and as to why relief should be refused (s.31(6)(b)).

130. The grounds for the Claimants' applications fall into two broad categories, which we refer to as the Public Law Grounds and the Subsidy Control Grounds.

The Public Law Grounds

131. The Claimants raise the following Public Law Grounds:

(i) The Decisions were unlawful because the SoS was wrongly directed, or because he wrongly directed himself, that the M&A Process had been fair, open, non-discriminatory and competitive.

(ii) The Decisions were unlawful because the M&A Process failed to comply with the principles on open competition and non-discrimination for the electricity and gas supply markets found in Article 303 of the Trade and Co-operation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland of the other part (**the TCA**).

(iii) The Decisions were unlawful because the M&A Process breached a duty on the part of the SoS to act fairly.

(iv) The Decisions were unlawful because:

a) the SoS took account of irrelevant considerations;

b) the SoS failed to take account of relevant considerations, including those under para 3(7) of Schedule 21 to EA 2004;

c) the SoS did not make proper enquiries of Ofgem;

d) they were not decisions that a reasonable decision-maker would have made.

(v) The Decisions were unlawful because they were taken in breach of a common law duty of consultation.

The Subsidy Control Grounds

132. The Claimants raise the following Subsidy Control Grounds:

(i) The Funding Decision failed to meet the requirements of the subsidy control principles set out in Article 366(1) of the TCA on one or more of the following bases:

a) The SoS wrongly proceeded on the basis that the M&A process was open, non-discriminatory and competitive for the purposes of establishing (i) whether the subsidy provided to Bulb and HiveCo satisfied the subsidy control principles set out in Article 366(1) of the TCA and (ii) whether Octopus was a recipient of that subsidy.

b) The Defendant's reasoning on the application of Article 366(1) TCA to the subsidy took into account irrelevant considerations and/or failed to have regard to relevant considerations and/or failed to make adequate enquiries in (i) placing weight on particular benchmarks and comparators to the amount of subsidy and/or (ii) in considering (or failing to consider) particular aspects of the subsidy, including "zero interest" financing to HiveCo.

c) For the purposes of Articles 366(1)(b) and (c), the regulatory change protection that has been provided to HiveCo/Octopus was not linked to any of the Defendant's objectives and/or was disproportionate.

d) For the purposes of Article 366(1)(f), the Funding Decision failed properly to take into account the potential scale of distortions to competition and to trade and investment caused by the subsidy.

e) For the purposes of Article 366(1) the Defendant erred in law in identifying, as objectives of the subsidy, the need to remedy a perceived "market failure", the avoidance of social hardship from a "hard close insolvency" and/or allowing a "key challenger" to remain in the market.

(ii) The Funding Decision was unlawful on the basis that the subsidy included an unlimited guarantee prohibited by Article 367(2) TCA.

(iii) The Funding Decision was unlawful under Article 367(3)-(4) TCA for some or all of the following reasons:

a) The Defendant erred in law in concluding that the subsidy responded to a national or global economic emergency for the purposes of Article 364(3) TCA.

b) The Defendant erred in law in concluding, for the purposes of Article 367(3) TCA, that Octopus contributed significant funds or assets to the cost of restructuring, or that there was a credible restructuring plan.

c) For the purposes of Article 367(4) TCA, the Defendant erred in law in identifying, as "objectives of public interest" of the subsidy, the need to remedy a severe market failure and the avoidance of social hardship.

(iv) The Approval Decision was vitiated because the Funding Decision involved the grant of an unlawful subsidy.

Remedies

133. In the event that the Decisions were found to be unlawful on one or more of these grounds, further issues arose as to what relief, if any, should be granted. We informed the parties at the hearing that we would not address the issue of relief at this stage, but invite further submissions on that question, to the extent necessary, after delivering judgment on the issues of permission and, if permission were granted, whether the Decisions were unlawful.

Delay

134. Section 31(6) of the Senior Courts Act 1981 provides:

> "Where the High Court considers that there has been undue delay in making an application for judicial review, the court may refuse to grant–
>
> (a) leave for the making of the application; or
>
> (b) any relief sought on the application,
>
> if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration."

135. CPR 54.5(1) provides:

> "The claim form must be filed–

(a) promptly; and

(b) in any event not later than 3 months after the grounds to make the claim first arose."

This is a reference to the legally operative decision, for example a planning permission: see *R v Hammersmith and Fulham London Borough Council, ex parte Burkett* [2002] UKHL 23; [2002] 1 WLR 1593. The date upon which a claimant becomes aware that they may have grounds in law for seeking to challenge a decision is irrelevant to the question of when the grounds to make a claim first arise. It may, however, be relevant to the question of whether the claim was filed promptly or whether time should be extended to bring the claim: see *R (Braithwaite and Melton Meadows Properties Ltd) v East Suffolk Council* [2022] EWCA Civ 1716, at [50].

136. The reasons why there are these strict time limits in judicial review proceedings are well known. The competing interests involved include the interests of third parties; and are not only private interests but include the public interest in good administration. This includes the requirements of decisiveness and finality, unless there are compelling reasons to the contrary: see *R v Monopolies and Mergers Commission, ex parte Argyll Group plc* [1986] 1 WLR 763, at 774-775 (Donaldson MR). As the Master of the Rolls said in *Argyll*, in the financial field, a delay even of a few days may be highly detrimental to the interests of third parties and good administration. Furthermore, the presence or absence of prejudice or detriment is likely to be "a key consideration" in determining whether an application has been made promptly or with undue delay: see *Maharaj v National Energy Corporation of Trinidad and Tobago* [2019] UKPC 5; [2019] 1 WLR 983, at [37] (Lord Lloyd-Jones).

137. The importance of compliance with time limits in the context of judicial review proceedings is emphasised in the Administrative Court's Judicial Review Guide (2022), at section 6.4. In particular, at para. 6.4.2.2, it is said that the time limit begins to run from the date the decision to be challenged was made and not the date when the claimant was informed about it, citing *R v Department of Transport, ex parte Presvac Engineering Ltd* (1992) 4 Admin LR 121. It is emphasised, at para. 6.4.1, that, even if the claim has been commenced within 3 months from the date of the conduct challenged, it may be out of time if the claimant did not start the claim promptly.

138. On the facts of the present case the two relevant decisions were taken on 27 October 2022 and 7 November 2022. In the case of the first (the Funding Decision) HMG published a press release about its approval of Bulb's acquisition by Octopus on 29 October 2022. Although the Approval Decision of 7 November 2022 was not published until 9 November and ScottishPower was notified of it on 10 November 2022, there was a need to move very speedily indeed from that time onwards. Indeed the Claimants themselves appreciated this, as BGT applied to be joined to the application in the Chancery Division before Mr Justice Zacaroli on 11 November 2022. Despite this BGT did not issue its claim form until 28 November 2022 and the other Claimants issued theirs on 29 November 2022.

139. As we have said earlier, each of the Claimants issued an application for urgent consideration by the High Court stating that it was first appreciated that an urgent application might be necessary only on 24 November 2022. We regard that as disingenuous. As we have mentioned, counsel for BGT appearing before Mr Justice

Zacaroli on 11 November 2022 had himself suggested that reversing the transaction would create "total chaos". The urgency of the situation was and certainly should have been appreciated much earlier than 24 November 2022.

140. Furthermore, as we have noted earlier, Mr Justice Zacaroli treated what was then being sought by the Claimants as in substance "interim relief in the context of their application challenging the lawfulness of the Secretary of State's decision." He adjourned the proceedings on 11 November 2022 precisely so that the Claimants could seek further information and consider, and launch if they wished to do so, judicial review proceedings. In our view, it was then incumbent upon the Claimants to move very speedily after 11 November 2022.

141. Although the Claimants may not have been aware of the details of the matters which might enable them to support any grounds for judicial review at that stage, they were aware of the essential substance of the grounds that would be available to them. The grounds which have been advanced before this Court fall broadly into two categories: first, the public law grounds (essentially that the process leading up to the decisions was unfair because the Claimants were not provided with the opportunity and information by which they could make a bid knowing that there was a subsidy available); and, secondly, the grounds under the TCA relating to subsidy control. Those two points were essentially known to the Claimants in the early part of November 2022. Although they did not know precisely what had been said to Octopus, they did know what *they* had *not* been given in the preceding months. They had also suggested that there was an unlawful subsidy, including in correspondence with the Defendant. Once judicial review proceedings are commenced, it is open to a claimant to seek to amend its grounds. Indeed, that has been done extensively in the present case.

142. We note that the potential unlawfulness of any subsidy was being referred to by BGT in its letter to BEIS dated 12 August 2022. At that stage no decisions had been taken and the Claimants were reliant upon press reports. We do not suggest that applications for judicial review should be commenced on the basis of press reports. Nevertheless, once the decisions had been taken, the Claimants' background knowledge was relevant to the need for urgent action then to be taken.

143. Similarly in its letter dated 1 November 2022, BGT was putting to Ofgem (at para. 9(a)), that given the level of state resources being deployed, the correct approach, consistent with well-established principles governing State Aid, should have been for that offer of financial assistance to be made available in a publicly available tender document for all potential bidders to review.

144. We note also that ScottishPower, in its letter to the SoS dated 11 October 2022, was making a complaint about "procedural unfairness", in which it said that:

> "At the time bids were invited there was no Government support being offered to potential bidders. This background informed the approach which potential bidders, such as ScottishPower, took when deciding whether or not to submit a bid for Bulb."

145. Furthermore, a claimant does not need to have full disclosure in order to launch judicial review proceedings. Indeed, it is usually the grant of permission which is the trigger for the duty of candour and cooperation with the Court to arise. As we have said earlier, it is not the norm in judicial review proceedings for there to be disclosure of the type that there would be in ordinary civil litigation. As it happens, there has been very extensive disclosure in the present case, going far beyond what would normally occur in judicial review proceedings, but that could have awaited (as it did) the period after the commencement of proceedings.

146. The Claimants submit that they had to write pre-action protocol letters before they could properly launch legal proceedings. In very urgent cases, it is not necessary for there to be a pre-action protocol letter. We refer again to the Administrative Court's Judicial Review Guide. It is emphasised, at para. 6.2.4, that a judicial review claim must be brought within the time limits fixed by the CPR and the protocol process does not affect those time limits. It is said that the fact that a party is following the steps set out in the protocol would not, of itself, be likely to justify a failure to bring a claim within the time limits set by the CPR, nor would it provide a reason to extend time. Further, at para. 6.2.5, it is observed that, if the case is urgent, it may not be possible to follow the protocol in its entirety but the party should attempt to comply with the protocol to the fullest extent possible. Although it is recommended that a pre-action letter should be sent and the defendant should normally be given 14 days to respond to it, it is also emphasised that the claimant should allow the defendant a reasonable time to respond "where that is possible in the circumstances of the case and without putting time limits for starting the case in jeopardy": see para. 6.2.8.

147. The courts have also confirmed that sending pre-action letters does not relieve a claimant of the need to file a claim promptly: see *Finn-Kelcey v Milton Keynes Borough Council* [2008] EWCA Civ 1067; [2009] Env LR 17, at [27] (Keene LJ).

148. In any event, we note that the first pre-action protocol letter (from BGT) was only sent on 21 November. That was 10 days after the hearing before Mr Justice Zacaroli. Before that it was not until 15 November (four days after that hearing) that BGT wrote to BEIS again seeking a significant amount of documentary material; and ScottishPower sent a similar letter on the following day. They did not in fact receive any further information until 23 November; in other words they sent the PAP letters on the basis of information that they already had at or shortly after the hearing on 11 November 2022.

149. It is true that the SoS responded to BGT's PAP letter on 23 November, enclosing the SCA and the AOA. Nevertheless, the fact remains that, in the context of this very urgent and fast moving situation, even a delay of a few days after the hearing before Mr Justice Zacaroli means that these applications were not made promptly.

150. It was submitted at the hearing before this Court that, while time limits are important, it is also important that judicial review proceedings should not be commenced before adequate information has been obtained from the defendant which would justify launching those proceedings: see *R (Young) v Oxford City Council* [2002] EWCA Civ 990; [2003] JPL 232 at [33]-[34] (Pill LJ) and [43] (Potter LJ). We accept of course that that approach is generally to be commended but everything depends upon the context. In the present context, as was emphasised by this Court in *Argyll*, it was of the utmost importance that proceedings should be commenced very speedily.

151. In a written note submitted for the purposes of reply at the hearing, BGT submitted that it could not reasonably have advanced the grounds for judicial review which it did in its original statement of facts and grounds until after the disclosure provided on 23 November 2022. For example, it is submitted that BGT did not know what the funding was for Octopus prior to 23 November and therefore it could not have made its submission that Government funding was not proportionate.

152. We do not accept submissions to that effect. As we have said, the essential bases for the Claimants' complaints were known about and could reasonably have been made in an urgent application for judicial review soon after the hearing before Mr Justice Zacaroli on 11 November 2022. The details could have been fleshed out subsequently.

153. Very importantly, it is essential to appreciate that, even if the Defendant was guilty of any unreasonable delay in responding to the Claimants' requests for information, that cannot prejudice the position of third parties, including the JEAs and Octopus, who were not only entitled to rely upon the validity of the decisions of the Defendant but were required to do so unless and until they were set aside.

154. The Claimants place reliance upon Article 373(2) of the TCA to suggest that, so long as the claim was brought within one month of the date on which the prescribed information was published or provided, no issue of delay can arise. We do not accept that submission.

155. First, this argument can only be relevant to the remedy of recovery. It simply has no relevance to the other complaints and remedies sought in this case. That remedial tail cannot be allowed to wag the dog, which is whether the substantive grounds for judicial review have merit.

156. Secondly, Article 373(2) requires only that a remedy of recovery is in principle made available by domestic law. It is expressed in permissive terms ("recovery may be ordered"). It clearly does not prevent the court refusing such a remedy on discretionary grounds, such as delay.

157. We accept the argument made by Mr Hickman KC on behalf of the JEAs that it is open to this Court to refuse permission ("leave") on the basis of delay under section 31(6)(a) of the Senior Courts Act 1981. In any event, as this judgment makes clear, and since the present case was heard on a "rolled up" basis, the substantive arguments will in fact be addressed by this Court even though the end result is that we have concluded that permission should be refused.

158. We therefore do not consider that the domestic procedural requirements as to promptness and undue delay are incompatible with the requirements of the TCA.

159. In those circumstances, we have reached the conclusion that these applications for permission must be refused on grounds of delay alone under section 31(6)(a) of the Senior Courts Act 1981, although we will proceed to consider the merits of the grounds in any event.

Did the Defendant err in law in concluding that the subsidy responded to a national or global economic emergency for the purposes of Article 364(3) TCA?

275. The subsidy provided by the WAMA was clearly temporary – it only ran to 31 March 2023. While we do not accept that the SoS should have concluded that there was no credible restructuring plan for HiveCo (see [279(ii)]), whether or not that is the case does not affect the time-limited nature of the WAMA.

276. As to the other elements of Article 364(3):

(i) The SCA concludes that the severe economic disruption and volatility caused by the "Russian invasion of Ukraine in February 2022" constitutes a national or global economic emergency, and that the subsidies provided to HiveCo constitute a "targeted, proportionate and effective" response in order to remedy that emergency.

(ii) We are satisfied that this was an assessment reasonably open to the SoS. While the Claimants point to the fact that Bulb had entered into SAR before the Russian invasion, it is clear the economic consequences of the invasion had a very significant impact on the support required for Bulb to exit the SAR, and that the support provided was a response to that state of affairs.

(iii) Finally, E.ON suggested that Article 364(3) could not apply to a subsidy given only to one market operator or undertaking. However, there is nothing in the language of Article 364(3) which would support such a limitation, nor were we referred to any material which was said to fall within Article 32 of the VCLT and which was said to support that interpretation.

Did the Defendant err in law in concluding, for the purposes of Article 367(3) TCA, that Octopus contributed significant funds or assets to the cost of restructuring, or that there was a credible restructuring plan?

277. Article 367(3) provides that, for a restructuring subsidy to be granted, then "except for small and medium-sized enterprises, an economic actor or its owners, creditors or new investors shall contribute significant funds to the cost of restructuring". The Claimants contend that Octopus, as the "new investor", has not made such a contribution. They rely in this regard on the statements in [5.59]-[5.60] of the BEIS *Statutory Guidelines* that such a contribution should be "as high as possible" and "should amount to at a minimum 50% of the total cost of the restructuring" save in "exceptional circumstances", in which case the contribution should nevertheless be "substantial". It notes that "exceptional circumstances" may include "rare events and circumstances which are not straightforward to foresee, and which have a significant economic impact" ([8.4]).

278. As to this:

(i) The SCA expressly considered the amount of Octopus' contribution.

(ii) It concluded that Octopus' equity injection of [REDACTED] was sufficient in the prevailing circumstances.

(iii) In circumstances in which the Octopus transaction was the only bid to emerge from a lengthy M&A process which the SoS was entitled to conclude was open, transparent and competitive, that was an assessment lawfully open to the SoS.

(iv) We would also note that the transaction involved Octopus assuming operational and reputational risks, assuming responsibility for Bulb's employees, providing access to its Kraken system on the basis that payment would not be made until the ring-fencing period was over, and it assumed the economic risk of the counter-payments under the WAMA.

279. Finally:

(i) ScottishPower challenge the Funding Decision on the basis that the subsidy provided to HiveCo for the purposes of the Octopus transaction constituted a second subsidy to Bulb in under five years, in alleged breach of Article 367(4). However, Article 367(3) permits the granting of temporary liquidity to an economic actor while a restructuring plan is prepared. The prohibition on more than one subsidy in five years does not prevent an economic actor which has received temporary liquidity funding while a restructuring plan is being prepared from then receiving a restructuring subsidy when the restructuring plan is implemented.

(ii) E.ON contends that there was no credible restructuring plan, with the result that no restructuring subsidy could lawfully be granted (Article 367(3)). However, the restructuring plan implemented by the Octopus bid was supported by the JEAs and Lazard, and the SoS was reasonably entitled to conclude that it was credible.

Was the Approval Decision vitiated because the Funding Decision involved the grant of an unlawful subsidy?

280. As the Funding Decision did not involve the grant of an unlawful subsidy, this issue does not arise.

Conclusion

281. For the reasons we have set out above, these applications for permission are refused on the ground of undue delay under section 31(6)(a) of the Senior Courts Act 1981.

282. We have nonetheless addressed the merits of the grounds on which judicial review is sought and would, in any event, refuse permission on the Public Law grounds because they are not, in our view, reasonably arguable.

283. If it had not been for the undue delay, we would have granted permission on the Subsidy Control grounds under the TCA but would have rejected those grounds on their merits.