



Neutral Citation Number: [2023] EWHC 737 (Admin)

Case Nos: CO/4460/2022

**IN THE HIGH COURT OF JUSTICE**  
**KING'S BENCH DIVISION**  
**DIVISIONAL COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 31 March 2023

Before :

**LORD JUSTICE SINGH**  
**and**  
**MR JUSTICE FOXTON**

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Between :

<b>THE KING</b>	<b><u>Claimant</u></b>
<b>(on the application of</b>	
<b>BRITISH GAS TRADING LIMITED)</b>	
<b>- and -</b>	
<b>SECRETARY OF STATE FOR ENERGY</b>	<b><u>Defendant</u></b>
<b>SECURITY AND NET ZERO</b>	
<b>- and -</b>	
<b>(1) THE NATIONAL ASSOCIATION OF</b>	
<b>CITIZENS' ADVICE BUREAUX</b>	
<b>(2) THE OFFICE OF GAS AND</b>	
<b>ELECTRICITY MARKETS</b>	
<b>(3) SCOTTISHPOWER ENERGY RETAIL</b>	
<b>LIMITED</b>	
<b>(4) E.ON UK PLC</b>	
<b>(5) BULB ENERGY LIMITED (IN ENERGY</b>	
<b>SUPPLY COMPANY</b>	
<b>ADMINISTRATION)</b>	
<b>(6) DANIEL FRANCIS BUTTERS,</b>	
<b>MATTHEW JAMES COWLISHAW AND</b>	
<b>MATTHEW DAVID SMITH, AS JOINT</b>	
<b>ENERGY ADMINISTRATORS FOR THE</b>	
<b>5th INTERESTED PARTY</b>	
<b>(7) OCTOPUS ENERGY GROUP LIMITED</b>	<b><u>Interested</u></b>
<b>("OCTOPUS")</b>	<b><u>Parties</u></b>

**THE KING**  
**(on the application of**  
**(1) SCOTTISHPOWER ENERGY RETAIL LIMITED**  
**(2) SP SMART METER ASSETS LIMITED)**  
**-and-**  
**THE SECRETARY OF STATE FOR ENERGY SECURITY AND NET ZERO**  
**-and-**  
**(1) THE GAS AND ELECTRICITY MARKETS AUTHORITY**  
**(2) THE JOINT ENERGY ADMINISTRATORS OF BULB ENERGY LIMITED (IN ENERGY SUPPLY COMPANY ADMINISTRATION)**  
**(3) OCTOPUS ENERGY GROUP LIMITED**  
**(4) OCTOPUS ENERGY RETAIL 2022 LIMITED**  
**(5) BRITISH GAS TRADING LIMITED**  
**(6) E.ON UK PLC**  
**(7) THE NATIONAL ASSOCIATION OF CITIZENS ADVICE BUREAUX**

**Claimants**

**Defendant**

**Interested Parties**

**THE KING**  
**(on the applications of**  
**(1) E.ON UK PLC**  
**(2) E.ON NEXT ENERGY LIMITED**  
**(3) E.ON ENERGY SOLUTIONS LIMITED)**  
**-and-**  
**SECRETARY OF STATE FOR ENERGY SECURITY AND NET ZERO**  
**(formerly the**  
**Secretary of State for Business, Energy and Industrial Strategy)**  
**-and-**  
**(1) THE NATIONAL ASSOCIATION OF CITIZENS' ADVICE BUREAUX**  
**(2) THE GAS AND ELECTRICITY MARKETS AUTHORITY**  
**(3) BULB ENERGY LIMITED (IN ENERGY SUPPLY COMPANY ADMINISTRATION)**  
**(4) DANIEL FRANCIS BUTTERS, MATTHEW JAMES COWLISHAW AND MATTHEW DAVID SMITH, AS JOINT ENERGY ADMINISTRATORS FOR THE 3rd INTERESTED PARTY**  
**(5) OCTOPUS ENERGY GROUP LIMITED**  
**(6) OCTOPUS ENERGY RETAIL 2022 LIMITED**

**Claimants**

**Defendant**

**Interested Parties**

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**Paul Harris KC, Azeem Suterwalla and Ewan West** (instructed by **Towerhouse LLP** and **Shearman & Sterling (London) LLP**) for **BGT**

**Kieron Beal KC, Naina Patel and Warren Fitt** (instructed by **Allen & Overy LLP**) for **ScottishPower**

**George Peretz KC, Julian Gregory and Harry Gillow** (instructed by **Pinsent Masons LLP**) for **E.ON**

**Jason Coppel KC, Malcolm Birdling, Patrick Halliday and Alastair Richardson** (instructed by the **Treasury Solicitor** and **Hogan Lovells International LLP**) for the **Defendant**

**Tom Hickman KC and Sean Butler** (instructed by **Linklaters LLP**) for the **Joint Energy Administrators and Bulb**

**Lord Pannick KC and Will Bordell** (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for **Octopus**

Hearing dates: 28 February - 2 March 2023

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**Approved Judgment**

This judgment was handed down remotely at 10 a.m. on 31 March 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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## Lord Justice Singh and Mr Justice Foxton:

### Introduction

1. The Claimants, British Gas Trading Limited (**BGT**), Scottish Power Retail Energy Limited and SP Smart Meter Assets Limited (**ScottishPower**) and E.ON UK plc, E.ON Next Energy Limited and E.ON UK plc (**E.ON**), seek permission to bring a claim for judicial review to challenge two decisions made by the Defendant, the Secretary of State for Energy Security and Net Zero (formerly and at all times relevant in these proceedings, the Secretary of State for Business, Enterprise and Industrial Strategy). We will refer to the Secretary of State as **SoS** and his department, as it was known at all relevant times in these proceedings, as **BEIS**. The decisions under challenge were taken on 27 October 2022 and 7 November 2022 and arose out of the transfer of the business of Bulb Energy Limited (**Bulb**) to Octopus Energy Group Limited (**Octopus**). That transfer had been sought by the Joint Energy Administrators (**JEAs**) of Bulb.
2. At the “rolled up” hearing before this Court we heard submissions from Mr Paul Harris KC for BGT; Mr Kieron Beal KC for ScottishPower; Mr George Peretz KC for E.ON; Mr Jason Coppel KC for the SoS; Mr Tom Hickman KC for the JEAs; and Lord Pannick KC for Octopus. We are grateful to them and for all of their teams for the work which went into enabling this case to be heard expeditiously and efficiently. Although there are three separate claims before the Court, with slightly differing grounds, the parties co-ordinated their written and oral submissions in order to avoid duplication so far as possible. We will take a similar approach rather than treating each claim separately.
3. There is a Confidentiality Ring in this case, so as to limit access to sensitive commercial information to those who need to see it (including this Court). Where necessary we have redacted such confidential information from the publicly available version of this judgment. This does not detract from the public’s ability to understand the reasons for our decision in this case.

### The Core Facts

4. In this section we will set out the core facts, which we did not understand to be in dispute. In the next section we will set out our findings of fact in more detail.
5. In 2021 Bulb ran into serious financial difficulty. On 24 November 2021 an Energy Supply Company Administration Order (**ESCA Order**) was made by the High Court (Insolvency and Companies Court).
6. The JEAs then embarked upon a process for the sale of Bulb’s business. This included Phase-1, launched on 7 March 2022 with a deadline for indicative offers of 4 April 2022, although this was subsequently extended at the request of certain potential bidders.
7. On 16 March 2022 E.ON withdrew from the sales process.

8. BGT made an indicative offer on 7 April 2022. The only other bid in Phase-1 was by an entity referred to in this case as Tulip, on 8 April 2022.
9. At that stage both Octopus and ScottishPower made it clear that they would not be making a bid.
10. From mid-April 2022 there were communications with Octopus to see if it would be willing to consider re-entering the process to make a bid. Whatever the precise details of what may or may not have been said (which we address below), including in telephone calls, what is clear is that there were not precisely the same communications and discussions with these Claimants as there were with Octopus.
11. On 25 April 2022 Lazard & Co Ltd (**Lazard**) began the Phase-2 process with the two surviving bidders, requesting bids by 30 June 2022: BGT and Tulip.
12. On 24 May 2022 Octopus' re-entry into the process was approved.
13. Octopus submitted its Phase-2 offer on 00.22 on 1 July 2022. A revised formal offer was put forward on 26 July 2022.
14. In the ensuing months the JEAs recommended that this bid should be accepted. Ernst & Young LLP (**E&Y**) were retained by BEIS to provide an independent review of the JEAs' final recommendations.
15. On 23 October 2022 the Accounting Officer (**AO**) provided their assessment (**the AOA**) of the proposed transaction, recommending that the Government (**HMG**) agree to the Octopus bid and on the same date BEIS provided its subsidy control assessment (**SCA**). The Octopus transaction was signed on 28 October 2022. On 29 October 2022 HMG published a press release stating that it had approved the acquisition of Bulb by Octopus. This has become known as **the Funding Decision** in these proceedings.
16. On 7 November 2022 the SoS granted approval for the Energy Transfer Scheme (**ETS**): this has become known as **the Approval Decision** in these proceedings.

## **The Facts**

### ***The Approach to the Issues of Fact***

17. It has frequently been noted that “the processes of the Administrative Court, which are designed to permit the speedy auditing by the Court of the legality of decisions, are not well suited to resolving disputes of fact” (*R (LXD) v Chief Constable of Merseyside Police* [2019] EWHC 1685 (Admin) at [107], Mr Justice Dingemans). The court hearing a judicial review application will normally only receive evidence in writing, and does not set about determining disputed questions of fact (*R (St Helens Borough Council) v Manchester Primary Care Trust* [2008] EWCA Civ 931; [2009] PTSR 105 at [13], May LJ).
18. However, issues of fact can arise in judicial review cases, and the procedures for judicial review are sufficiently flexible to accommodate the determination of such disputes. These include orders for disclosure, for the cross-examination of witnesses

(which was not sought), and the court's ability, in appropriate cases, to draw inferences from the evidence which is before the court (*R (Olabinjo) v Westminster Magistrates' Court* [2020] EWHC 1093 (Admin) at [4], Holroyde LJ and Mr Justice William Davis).

19. Where, as was the case in these proceedings, no order is made for the cross-examination of witnesses, the general approach is to assume the correctness of the defendant's evidence unless other material before the court shows that "the evidence cannot be correct" (*R (Safeer) v Secretary of State for the Home Department* [2018] EWCA Civ 2518 at [16], Nicola Davies LJ; *R (FDA) v Minister for the Cabinet Office* [2018] EWHC 2746 (Admin) at [11], Mrs Justice Simler; *R (Soltany) v Secretary of State for the Home Department* [2020] EWHC 2291 (Admin) at [87]-[88], Mr Justice Cavanagh). It was submitted on behalf of BGT that this principle did not extend to the evidence of the Interested Parties. There was a certain irony in this submission, because it was the Claimants' case that the SoS had, in effect, delegated his (alleged) responsibility for conducting an open, fair and transparent process to the JEAs, with the effect that the way in which the JEAs and their advisors had conducted that process could (indirectly) be subject to a public law challenge. To the extent that the manner in which the JEAs conducted the process for selling Bulb's business or customer book (**the M&A Process**) is relevant to the determination of the Claimants' public law challenges, we are not persuaded that the evidence of the JEAs stands in any different category to that of the SoS so far as this feature of the Administrative Court's procedure is concerned. It is for the Claimants, who bring this claim, to prove their case on disputed matters of fact, since they bear the burden of proof.
20. Finally, we should note that there has been a very substantial degree of disclosure by the SoS and the Interested Parties in this case, much more than would normally be seen in the Administrative Court. The chronological bundles for the hearing ran to eight double-sided volumes, with the result that, so far as the documentary record in the case is concerned, the comprehensiveness of the evidence on the Defendant's and Interested Parties' side would not have been out-of-place in a Commercial Court trial. While the parties held different views as to the necessity at this hearing for an intensive review of the underlying facts, we received extensive written and oral submissions from both sides as to what conclusions should be drawn from the material. In these circumstances, and without suggesting that such an enquiry is necessary or appropriate in a judicial review claim, we have been able to reach clear conclusions as to the background facts which we set out below. In doing so, we have kept in mind the numerous judicial observations as to the greater reliability of the contemporaneous documents or inherent probability in determining what has happened, than the recollection of a witness (*Gestmin SGPS SA v Credit Suisse (UK) Limited* [2013] EWHC 3560 (Comm); [2020] 1 CLC 428 at [16]-[20], Mr Justice Leggatt), and the need for particular care when assessing factual evidence from a witness as to what they would have done in a counterfactual scenario where this is relevant to a claim in court proceedings (*Scullion v Bank of Scotland plc (t/a Colleys)* [2011] EWCA Civ 693; [2011] 1 WLR 3212 at [29], Lord Neuberger MR).

### ***Our Findings on the Facts***

21. Bulb was incorporated on 2 April 2013, and has held electricity and gas supply licences. It supplied around 1.5 million domestic customers, 1.1 million dual fuel customers and

400,000 single fuel customers. In 2021, a year in which wholesale energy prices increased by more than 400%, Bulb ran into serious financial difficulty during a period of volatility in the wholesale energy market. In or around September 2021, Bulb's parent company (Simple Energy Limited) appointed Lazard to act for and advise it in relation to its attempt to secure a buyer for or investor in Bulb's business, in an exercise given the code name "Project Finsbury". Both ScottishPower and BGT engaged in the early stages of this process, although only BGT made an indicative offer. That offer, which was made on 6 October 2021, assumed that Bulb had normal levels of working capital and hedging arrangements in place. In fact, Bulb's business had a significant unhedged exposure.

22. The Office of Gas and Electricity Markets (**Ofgem**) has the power to direct other licensed suppliers of energy to take over the customers of another licensee where circumstances exist which would entitle Ofgem to revoke that distressed supplier's licence. This process is known as the Supplier of Last Resort or **SoLR** process. BGT expressed interest in a transaction in which it would take over all of Bulb's customers on a SoLR basis. However, Ofgem decided that it was not feasible to use the SoLR process to transfer Bulb's customers to one or more other licensees. When this became apparent, BGT informed Lazard that it would not be proceeding with an offer.
23. On 22 November 2021, Bulb informed Ofgem that its financial position now made administration unavoidable. Accordingly, on 23 November 2021 Ofgem applied for an ESCA Order in relation to Bulb. This was granted by Mr Justice Adam Johnson sitting in the Insolvency and Companies Court on 24 November 2021.
24. The ESCA Order placed Bulb into a Special Administration Regime (**SAR**). Three JEAs were appointed as special administrators, all individuals from the consultancy firm Teneo Financial Advisory Limited (**Teneo**). The JEAs sought a direction from Mr Justice Adam Johnson that they enter into an Administration Funding Agreement (**the AFA**) with the SoS by which the SoS would provide funding for Bulb in an amount of up to £1.7 billion. The Judge gave that direction, explaining his reasons for doing so as follows (*In the matter of Bulb Energy Ltd* [2021] EWHC 3735 (Ch) at [32]):

"As far as Bulb is concerned, it is entirely obvious that in order to trade it needs funding, and the only available funding is that on the terms proposed by the Secretary of State. As the evidence makes clear, there are no other funding options available. The Funding Agreement is the only show in town. It therefore seems to me obvious that entry into the Funding Agreement is a proper exercise or would be a proper exercise of power by the Proposed Administrators."

Mr Justice Adam Johnson noted that the appointment of a SoLR was thought to be impractical, given the size and importance of Bulb as a supplier, and that Ofgem was not confident that a SoLR would be able to manage the transition of so many customers in a sufficiently orderly way, which the Judge described as "an entirely justified concern".

25. Given the significance which the Claimants attach in their arguments to the alternative of dealing with Bulb's customers through a SoLR process, it is helpful to summarise

the evidence of Mr Lawrence of Ofgem on that issue for the hearing before Mr Justice Adam Johnson:

- (i) A SoLR process was “not a feasible alternative”.
  - (ii) Bulb’s 1.5 million customers was a figure “far in excess” of any SoLR process which had been implemented to date.
  - (iii) Ofgem would have considerable concerns about directing a SoLR to take on Bulb’s customers, and would need to undertake significant due diligence as to the operational and financial capability of any volunteer.
  - (iv) There was a risk that a SoLR process would risk precipitating the failure of the SoLR, necessitating another government intervention.
26. Under the AFA, Bulb was precluded from entering into forward hedges, because HMG could not advance money for such a purpose (clause 8.1(g) of the AFA), meaning that Bulb had to purchase energy on the “day ahead” market. One inevitable consequence of this was that Bulb would, necessarily, be unhedged at the point any sale agreement was concluded. The AFA also provided that the SoS’s consent was required for any disposal of all or part of Bulb’s assets.
27. On 29 November 2021, the SoS prepared draft terms of reference for a body which would be “responsible for delivering effective governance and oversight of the SAR’s implementation, operation and exit, including the underlying financial support for the Energy Administrators” (**the Bulb Operations Board**). The board, which was operational in December 2021, consisted of representatives of BEIS, the Treasury (**HMT**), UK Government Investments (**UKGI**), the Insolvency Service and (as an observer only) Ofgem.
28. In December 2021, the JEAs circulated a paper discussing options for Bulb exiting the SAR. It set out the views of various stakeholders in Bulb, including HMT. HMT’s objective was identified as being to “minimise losses to taxpayer”, and raised the question: “any view on payment of a ‘dowry’ to secure a sale?” One of the issues which the timeline to a successful transaction identified included “Government approvals for the transaction, including regulatory approval, state aid considerations, HMG sign off, etc”, and another consideration identified was “appetite/ability for government to fund a purchaser to cover Winter 2021/22 losses to secure the sale”. It was noted that “the timing of exchange and completion would likely be dependent on the quantum of any funding required by a purchaser either provided directly to the purchaser by BEIS or via Bulb to acquire loss-making customers pre-April 2022”.
29. On 24 January 2022, the JEAs for Bulb entered into a transitional services agreement with Simple Energy, allowing for a transition period of up to 12 months. Such an agreement was entered into on 8 February 2022.
30. In around February, Bulb, acting through the JEAs, and its parent retained Lazard to undertake a further sales process with a view to taking Bulb out of the SAR. The issue of whether, and if so in what respects, HMG would be willing to provide financial support for a sale, was identified at an early stage. Lazard provided a series of responses to questions about the sales process on 17 February 2022:



- (i) One of the questions addressed was whether negative consideration offers (i.e. those which required a subsidy) would be acceptable, or whether the sales process would be pulled. This was described as “an important question that buyers will want to know the answer to before spending any bid costs”. Lazard’s response was that BEIS “are keen to sell and are not saying that negative consideration would not be possible, but they worry that if any indication is given of this it would lead the bidders and they could be foregoing value”.
  - (ii) This exchange exemplified what became a major theme of the sales process – BEIS’ professional advisers expressing the view that some form of HMG funding would be necessary to close a transaction, but concern by HMG that if it was seen to be too forthcoming on its readiness to provide that funding, it would not secure the most advantageous offers from potential purchasers.
  - (iii) Another question was: “is there a competition policy objective to keep in mind ... (independent supplier / new entrant benefit, maintaining technology platform competition)?” The answer was “no, purely value driven/ Will be ok with market concentration (subject to CMA views) even if customers go to Centrica” (a reference to the Competition and Markets Authority).
  - (iv) The paper also addressed the question: “Bidders question likely to arise as ‘What is BEIS proposal on mitigating market risk exposure [given unhedged position] to optimize value’”. Consistent with the answer at (i) above, the response was: “don’t want to provide indication of willingness to consider to avoid leading bidders. After some discussion, agreed that there is a risk that not providing guidance could actually deter bidders and that appropriate timing on suggesting any structures should be considered in context of how the process is going ...”.
31. On 21 February 2022, Lazard sent out a “teaser” document to over 70 parties who had been identified as possible purchasers. Recipients included ScottishPower (who had themselves contacted Lazard on 4 February saying that they were willing “to take another look if there is sufficient detail in the data”), BGT, E.ON and Octopus.
  32. On 24 February 2022, the Russian Federation invaded Ukraine. That event was mentioned at the Bulb Operations Board meeting on 1 March 2022, which noted that “BEIS are meeting with Teneo and Lazard’s to work through scenarios for financial structures”. The minutes record that BEIS was to “make sure that Lazard do not publicise these options for financial structures.”
  33. BEIS had prepared an “Exit Strategy Update Paper” for that meeting which discussed the implications of the Russian invasion on possible financial structures for the transaction. It also stated:

“We need to maximise the recovery from the sale value to minimise the overall exposure to the consumer. Therefore, our overall view is that the M&A process should be a primarily market driven one, focussing on cost. This principle extends to HMG not taking a position as to the desirability of bid profiles or investor types.

Given this construct, Teneo and Lazards will be responsible for undertaking the assessment of the M&A bids, as detailed in Annex C” [with certain exceptions].

Those exceptions included “financial structures”, “e.g. reliance on a portion of HMG funding remaining in the company”, and “subsidy control”, “if any value coming from Government funding is left in the company when it is sold, it may be considered a subsidy and therefore fall into the Subsidy control regime.”

34. The paper returned to the issue of “financial structures”, noting that the initial view communicated to Lazard/Teneo was that HMG would not proactively encourage alternative structures in the Phase-1 bidding, but that it would consider structures which prospective bidders proactively brought forward where they would maximise recoveries for HMG in the long term. It was noted that, in the context of the Russia-Ukraine crisis, “we consider it much more likely that we will need to utilise such structures”.
35. This was broadly consistent with a “Process Update & Areas for Preparation” paper prepared by Lazard at the same time. This paper recorded Lazard’s understanding that “negative consideration offers will be accepted rather than the sale process will be pulled”. The paper referred to various options for HMG financial support for the sale and noted “in order to achieve a sale, HMG may be required to provide clarity on the measures it will take to provide bidders with comfort around the uncertainty”.
36. On 7 March 2022, the 19 parties who had signed non-disclosure agreements were sent the Phase-1 letter which stated:

“There is optionality for interested parties on the scope / perimeter of the Potential Transaction, and we invite interested parties to indicate in their Indicative Offer both (i) how they would bid on the indicative transaction structures ... and (ii) whether an alternative transaction structure ...would be preferred”.

The deadline for indicative offers was 4 April 2022.

37. A meeting of the Bulb Operations Board of 15 March 2022 asked UKGI to “explore the precedent of HMG paying a buyer to take on an asset”, with the SAR team looking at the costs of a SoLR process “as a counterfactual”. The SoLR process to be reviewed included “splitting customer book into multiple options”, but the view was expressed that it was a “struggle to see how a SoLR could offer better value in aggregate than a sales process”. It was also noted that “we need a consideration of state aid or subsidy control review”.
38. The BEIS “Exit Update Paper” prepared for this meeting also referred to an “increased likelihood that there will need to be a form of financial structure to sit around such a transaction”, which was to be discussed by BEIS, Teneo and Lazard at a meeting that week. BEIS referred to steps to be taken to identify “potential subsidy control implications” of the financial structures.

39. On 16 March 2022, E.ON withdrew from the sales process, attributing this to “a combination of factors which include” “(1) the geo-political situation, (2) current macro and commodity volatility, (3) uncertainty regarding the UK supply market framework, (4) the absence of a full hedge and (5) “lack of value add service offerings.” Lazard responded saying that “on points (2) and (4) we would have anticipated a mitigation mechanism, but appreciate your concerns on the other points are difficult to mitigate”. We observe that this response expressed a positive anticipation that there would be a mitigation mechanism for volatility and the absence of a hedge, which, realistically, could only have been understood as some form of government support addressing these issues (and no other credible interpretation was suggested to us). There was no response from E.ON who, according to Mr Davies, did not even discuss the anticipated “mitigation mechanisms” because it had withdrawn from the process.
40. BEIS prepared a “Financial Structures Discussion Paper” for the next Bulb Operations Board meeting on 22 March 2022. The paper reviewed five possible financial structures which Teneo had identified since the last board meeting, noting “Teneo and Lazard both consider it to be highly unlikely that a transaction will be possible” without support of this kind. BEIS said that it did not consider it appropriate to confirm to Teneo, Lazard or to potential bidders its willingness to support a particular option at that stage. One of the issues identified for HMG consideration was whether the structures would trigger a subsidy control assessment (the answer in all cases being “too early to tell”). The paper noted that “Lazard have highlighted that not proactively setting out possible financial structures that could be used to support a transaction could put potential buyers off and reduce participation in the process”, but that this needed to be traded off against the fact that “if we communicate certain support to bidders, bidders may shape their offers to this”, undermining HMG’s ability to test market appetite and removing the chances of lower bids. The paper explained:
- “We have therefore held a firm line with Teneo /Lazard that (i) Lazard should not proactively advertise any potential financial structures to bidders (ii) we will not confirm the acceptability of any financial structure or communicate a preferred option(s) until we have seen and digested Phase-1 bids”.
- The minutes of the board meeting reflected that view, stating “it should be up to buyers to communicate to HMG what they need to take on the business” and that there was “nothing to be gained from communicating HMG willingness to provide support at this stage”. The minutes did note that Teneo were suggesting ““soft’ communications from HMG that support may be available could be necessary at some point”.
41. On 28 March 2022, the JEAs provided a paper discussing the five financial structures. This referred to “a significant risk that no party will be prepared to pay a positive value for the Bulb business at this time”. Six structures were outlined, with Hogan Lovells/HMT being tasked to consider “subsidy control implications”.
42. On the same date, the JEAs prepared a series of responses to the expected questions from potential bidders about HMG support for BEIS approval. This included an openness to consider the bidder’s proposal on hedging requirements (noting that there had been discussions with BEIS and HMT on potential options) and a similar openness to consider proposals on forecast trading losses “over the coming months” if this issue was directly raised by the bidder. Teneo informed BEIS that the paper sought to “strike

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 Cowlshaw 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 Cowlshaw 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 Cowlshaw, 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 Cowlshaw 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 Cowlshaw 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 Cowlshaw 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 Cowlshaw’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 Cowlshaw 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 Cowlshaw) 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 Cowlshaw 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 Cowlshaw’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 Cowlshaw’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 Cowlshaw 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 made 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 confirmation 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 Cowlshaw 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, but 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* (4<sup>th</sup>) 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* (6<sup>th</sup>) 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.



## **The Amenability of the Decisions to Judicial Review and the Scope and Standard of Review**

160. The two decisions which are under challenge in these proceedings were made by the SoS. Furthermore, they were made by him under statutory powers conferred by the EA 2004.
161. Section 165(2) confers a power on the SoS to make grants or loans to a company in respect of which an ESCA Order has been made, of such amounts as it appears to him appropriate to pay or lend for achieving the objective of the energy administration. The grant or loan may be made in whatever manner, and on whatever terms, the SoS considers appropriate: see subsection (3). By subsection (6) the consent of HMT is required for the making of such a grant or loan. Those are the provisions under which the Funding Decision was made in the present case.
162. The Approval Decision was made by the SoS under para. 3 of Sch. 21 to the EA 2004. This provides that the court must not appoint a time for a scheme to take effect unless that scheme has been approved by the SoS: see sub-para. (5). Sub-para. (7) provides that, in deciding whether to approve an ETS, the SoS 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.”
163. By sub-para. (8) the SoS must consult GEMA before approving an energy transfer scheme. That was done in the present case and no complaint is now made about that.
164. The two decisions under challenge were made by the SoS in the exercise of statutory powers. Accordingly, there can be no question but that the SoS’s decisions are amenable to judicial review.
165. At the hearing before this Court it was not suggested by Mr Coppel KC on behalf of the SoS that the decisions under challenge are not amenable to judicial review. He does submit, however, that the grounds upon which judicial review will be available are more limited in the commercial context than they might otherwise be. For that proposition he relies in particular on two decisions of the Judicial Committee of the Privy Council. The first case is *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd* [1994] 1 WLR 521, in particular at 529, where Lord Templeman said:
- “It does not seem likely that a decision by a state enterprise to enter into or determine a commercial contract to supply goods or services will ever be the subject of judicial review in the absence of fraud, corruption or bad faith.”
166. That passage was reiterated by the Privy Council in *State of Mauritius v CT Power Ltd* [2019] UKPC 27, at [66] (Lord Sales). At [41]-[43], Lord Sales made it clear that there is an important distinction to be drawn between the question whether a decision-making

process is in principle subject to judicial review; and the separate question what the relevant public law standards are in that context. At [63]-[64] Lord Sales said:

“63. The power of the Minister of Energy to undertake negotiations with CT Power as part of the conduct of the business of the Government is a wide one, conferring on the Minister a very wide discretion as to how best to proceed. The implication is that the Minister is permitted to participate in the commercial market in the usual way, i.e. through the exercise of the full bargaining power available to the Government in order to secure the best commercial deal possible and thereby promote the public interest. With that end in view, a court should be astute to ensure that application of public law standards in relation to the Minister does not cut down or undermine that bargaining power. Nor should public law standards be applied in such a way as to give a potential contracting counterparty a negotiating advantage which has not been bargained for.

64. In negotiating a commercial contract on behalf of the Government, the Minister, as a public authority, is not entirely free from constraints arising under public law. He is obliged to comply with basic public law standards which ensure that he properly seeks to promote the public interest. Accordingly, his decision-making as to how to conduct negotiations before a contract is entered into might be brought into question if, by way of purely hypothetical example, he acted out of personal spite or because he had been bribed. As a result, the potential counterparty is not exposed to what, if they were negotiating with another party, might be the pure capriciousness of that private party in deciding whether to enter into the contract and on what terms.”

167. In our view, important though those statements of principle are, they are not directly on point in a context like the present. They were concerned with the situation where the government (or other public authority) is simply acting like any other actor in the market, in particular by negotiating a commercial contract. The present case does not concern the negotiation by the SoS of a commercial contract. Rather it concerns the exercise of specific statutory powers, in particular the Funding Decision and the Approval Decision.
168. Nevertheless, in our view, the commercial context is important because the context is one in which the Court is called upon to perform a relatively “light touch” intensity of judicial review. This is far from a context such as that concerning, for example, the liberty of the individual, in which a more intensive scrutiny would be called for.
169. Furthermore, there are three other features of the statutory scheme in which the SoS’s decisions must be seen which again indicate that a relatively light touch intensity of judicial review is called for. First, the person appointed to be the energy administrator of a company must be qualified to act as an insolvency practitioner in relation to the

company: see section 158(4) of the EA 2004. In the present case, the JEAs were experts in the field in which they operate. Furthermore, they had access to expert advice from Lazard.

170. The second feature is that the JEAs are appointed by the order of the Companies Court and it is the JEAs who determine the content of the ETS in negotiations with the transferee (albeit the SoS's approval of the scheme as negotiated is required). The actions of the JEAs can be the subject of complaint to the Companies Court under the provisions of Schedule B1 to the Insolvency Act 1986 under the "unfair harm" remedy provided in paragraph 74 of Schedule B1 (as amended by Schedule 6, paragraph 20 of the EA 2004). Accordingly, the manner in which the JEAs perform their functions is not immune from judicial control; but that control is to be found in the specific statutory regime which governs the JEAs and not in the Administrative Court. It became clear at the hearing before this Court that it was not suggested by the Claimants that the JEAs themselves are amenable to judicial review; or at least that was not the subject of the present proceedings, which are brought only against the SoS in respect of the two decisions under challenge.
171. The third feature is that the JEAs, and not the SoS, conducted the exercise whose fairness is now challenged, at least indirectly, in these proceedings. The appointment and functions of the JEAs are set out in section 158 of the EA 2004. In particular the energy administrator is an officer of the court: see section 158(1)(a). The management by the energy administrator 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": see subsection (2).
172. This is a very important part of the statutory context in which the present case must be decided, in particular whether and to what extent the duty to act fairly applies here.

### ***Procedural fairness***

173. The principles in this area of law are well-established and were set out by Lord Mustill in *R v Secretary of State for the Home Department, ex parte Doody* [1994] 1 AC 531, at 560:

"What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates

the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.”

174. As Lord Mustill observed there, at (4), an essential feature of the context is “the statute which creates the discretion”, including “the shape of the legal and administrative system within which the decision is taken.”
175. It is clear therefore that one very important feature of the present statutory system is that the process for selecting the transferee (here Octopus) was not conducted by the SoS himself but rather by the JEAs.
176. Accordingly, in our view, the question of public law which arises is not whether the SoS acted fairly; but whether the SoS was reasonably and lawfully entitled to found his decisions upon the basis of the advice which he had received in particular from the JEAs.
177. The Claimants sought to get around this difficulty by making essentially two points. First, they submit that the SoS was in fact involved from time to time in the process conducted by the JEAs. That may be so but this does not detract from the essential point that the way in which the process was conducted was a matter for the JEAs and not the SoS.
178. Secondly, the Claimants submit that the SoS gave himself what they call a “self-direction” that the process conducted by the JEAs was in fact fair.
179. In that regard the Claimants place particular reliance on the decision of the House of Lords in *R v Secretary of State for the Home Department, ex parte Launder* [1997] 1 WLR 839, at 867 (Lord Hope of Craighead). *Launder* was decided before the European Convention on Human Rights (“ECHR”) was incorporated into domestic law by the Human Rights Act 1998. Nevertheless, in taking the decision under challenge in that case the Secretary of State had directed himself that there would not be a breach of the ECHR. In those circumstances the House of Lords considered that ordinary principles of judicial review permitted the court to assess the correctness of that self-direction because, if it was flawed in law, then the decision would be vitiated on conventional public law grounds.
180. The Claimants also submit that the question whether there has been a breach of the duty to act fairly is a question of law and is therefore one which the court itself must decide. It is not a question simply of whether the SoS’s decision was reasonably open to him: see e.g. *R (Balajigari) v Secretary of State for the Home Department* [2019] EWCA

Civ 673; [2019] 1 WLR 4647, in particular at [45]-[48], Underhill LJ, citing the judgment of Singh LJ in *R (Citizens UK) v Secretary of State for the Home Department* [2018] EWCA Civ 1812; [2018] 4 WLR 123, at [68]-[74].

181. We do not accept those submissions in the present context. In our view, the SoS did not give himself a “self-direction” as suggested by the Claimants. Rather the SoS received advice that the process which had been conducted by the JEAs was a fair one such that the bid which emerged from it could be regarded as a market bid. He had no reason to doubt that advice. This was simply a summary of the factual position rather than an assertion of law on the part of the JEAs. Accordingly, the standard of review which is appropriate in this context is the conventional one: was the SoS reasonably entitled on the material before him to accept the advice of the JEAs? In our view he was.
182. In support of his submissions on procedural fairness Mr Beal KC relied upon the decision of Mr Justice Richards in *R v National Lottery Commission, ex parte Camelot Group plc* [2001] EMLR 3. In that case the essential facts were as follows. The applicant had a licence to operate the National Lottery, which had been established by the National Lottery etc. Act 1993, for a period of seven years up to 2001. The award of a new licence was the responsibility of the Commission. In 1999 the Commission started an open competition for the award of the new licence. Although it was not obliged by the 1993 Act to hold an open competition, it decided to hold one since it considered that such a competition would help to achieve the best return for good causes in accordance with its overriding duty under the Act. In its “invitation to apply”, the Commission stated that it might seek improvements in commitments offered by applicants but, if so, it would ensure that it did not distort competition by allowing one applicant to make changes in a way that, if open to another bidder, could have led to the eventual selection being different. Bids were received from two companies, including Camelot itself. Having given initial consideration to both bids, the Commission sought various improvements. In due course the Commission announced that neither application met the statutory criteria. It decided to abandon the open competition and to adopt a new procedure consisting of exclusive negotiations with the other bidder.
183. The High Court granted the application for judicial review and quashed the decision. Mr Justice Richards concluded that the Commission had acted unfairly. He found it “remarkable” that the Commission chose to allow one company the opportunity to allay its concerns but to deny a similar opportunity to Camelot. “Such a marked lack of even-handedness between the rival bidders calls for the most compelling justification, which I cannot find in the reasons advanced by the Commission in support of its decision.” ([72])
184. However, we note that the relevant legal principles were not in any real dispute in that case: see [56]. Mr Justice Richards cited the well-known passages in the leading authorities on fairness, including *ex parte Doody*, which we have set out earlier.
185. Of most importance is the consideration that, in *Camelot*, the Commission was itself subject to the relevant statutory framework. It was acting directly under statutory powers and there was an implied duty of fairness in the exercise of those powers. As we have noted, the present context is very different because the SoS did not conduct

the M&A process. That was conducted by the JEAs. In any event, the factual and legal context of the *Camelot* case was very different from the present.

***Alleged breach of duty of consultation***

186. Although this argument was not developed at the hearing before this Court, the Claimants submit that the SoS was under a duty to consult them before taking the Decisions. We reject that submission.
187. It is well established that there is no general duty of consultation at common law. There is no general common law duty to consult persons who may be affected by a measure before it is adopted: see *R (Moseley) v Haringey London Borough Council* [2014] UKSC 56; [2014] 1 WLR 3947, at [35] (Lord Reed JSC).
188. The duty is usually imposed by statute. There may also be circumstances in which either there has been a promise to consult or there has been an established practice of consultation in the past, which will give rise to a legitimate expectation that it will continue. There may also be “in exceptional cases” a failure to consult which would lead to “conspicuous unfairness”: see *R (MP) v Secretary of State for Health and Social Care* [2020] EWCA Civ 1634; [2021] PTSR 1122, at [36] (Newey LJ), citing the Divisional Court in *R (Plantagenet Alliance Ltd) v Secretary of State for Justice* [2014] EWHC 1662 (QB); [2015] 3 All ER 261, at [98(2)].
189. In the present context, Parliament has prescribed the persons in respect of whom a duty to consult arises: see para. 3(8) of Schedule 21 to the EA 2004, which requires the SoS to consult GEMA before approving an ETS. This is a clear indicator of the extent of the consultation which Parliament thought it appropriate to require.
190. Insofar as it may be suggested that there was any promise of consultation, founded upon a letter from BEIS to Centrica dated 7 November 2022, where it was said that all relevant representations made to the SoS would be taken into account in the decision process, that was not a promise which was clear, unambiguous and devoid of relevant qualification so as to create a legitimate expectation. In any event, those representations which were made by the Claimants were in fact considered. They were summarised in the ‘Legal Risk Note’, which was annexed to the ministerial submission dated 4 November 2022.
191. Finally, we bear in mind again that the present context is one in which the SoS did not in fact conduct the M&A Process and, accordingly, it would be inappropriate to impose a general duty of consultation in circumstances where Parliament has been careful to create a statutory scheme which does not include such a duty.

***The alleged analogy with the Public Contracts Regulations 2015***

192. At one time the Claimants relied upon a specific ground that the decisions were made in breach of the process required by the Public Contracts Rules 2015. That ground has been abandoned but ScottishPower maintains the submission that, by way of analogy,

the SoS fell into error by not conducting the sort of process which would be open, fair and competitive under those Rules. At the hearing before this Court Mr Beal KC went so far as to submit that the reason he did not pursue the express ground based on the 2015 Rules was that he did not need to. We reject that submission.

193. It is plain that the 2015 Regulations by their terms do not apply to the present context. First, the JEAs were not a “contracting authority”. The phrase “contracting authorities” in Regulation 2 is defined to mean “the State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or bodies governed by public law”. Secondly, the Regulations apply to “public contracts”, which are defined by Regulation 2 to mean “contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and *having as their object the execution of works, the supply of products or the provision of services* but does not include concession contracts ...” (emphasis added). The present case concerned the sale of Bulb’s business and did not fall into that definition of a public contract.
194. We have come to the clear conclusion that it is not arguable that the SoS was subject to any common law duty by way of analogy to the express, detailed procedural code which is set out in the Public Contracts Regulations where that is what is thought desirable by the legislator.

#### ***The alleged regard to irrelevant considerations***

195. Although these points were not developed at the hearing before this Court, various criticisms which were made of the Decisions in writing, in particular by BGT. Some of these criticisms also appear in the Subsidy Control Grounds, where they were developed at greater length. Before we address them as conventional public law grounds, we emphasise that, in our view, such a critique is inappropriate in this context, for the reasons we have already set out above. Poring over the minutiae of the advice which was given to the SoS by experts and his officials is not appropriate in a claim for judicial review in this context. The Decisions were a matter for the SoS, which were taken on the basis of expert advice, and were rationally open to him. We stress, as has often been stressed in public law proceedings, that the merits of those Decisions are not a matter before this Court.
196. The first criticism which is made is that the SoS took account of “the incorrect and/or illogical account of the reasons why other bidders had purportedly withdrawn from the process”. Reference was made in particular to part of the Phase-2 bid review produced by Lazard dated 10 July 2022. We note that no specific criticism has in fact been made of why that account was inaccurate but, in any event, we are assured by the Defendant that this document was not put before the SoS when he took the Decisions. It is simply incorrect therefore as a matter of fact to say that the SoS took account of an irrelevant consideration in this regard. In any event, we have not been persuaded that this summary was inaccurate in any material sense.
197. The second criticism that is made is that the SoS took account of the “alleged need to maintain a ‘key challenger’ in the market”. Again, we are assured by the Defendant that this was not a matter taken into account by the SoS when taking the Decisions. We

address a similar argument that a subsidy was awarded for an impermissible purpose at [261]-[268] below.

198. The third criticism that is made is that the SoS took account of “alleged concentration (i.e. merger control) issues that would arise from a transaction with BGT (which are denied)”. Reference is again made to the Lazard review dated 10 July 2022. Again, we are assured by the Defendant that this document was not put before the SoS when he took the Decisions. Further, (i) the statement that acquisition by Centrica (the UK’s largest retail energy supplier) “may be limited by CMA concentration issues” was a reasonable opinion; and (ii) the statement was irrelevant in circumstances in which Lazard, the JEAs and the SoS were entitled to and did conclude that BGT was not interested in a “whole book” acquisition.
199. The fourth criticism that is made is that the SoS took account of “the incorrect assertion that BGT had withdrawn from the process”. As we have said in our findings of fact, the SoS was reasonably entitled to form the view that BGT was not interested in bidding because it did not wish to acquire the entire customer book of Bulb. In any event, we are assured by the Defendant that this was not a factor in the SoS’s Decisions. It did not feature in the Ministerial submissions.
200. Finally, E.ON alleges that the SoS wrongly took account of the assertion that, if a split book sale had been undertaken, the SoS would have been left carrying the majority of the Winter 2022 costs when, it is said, there was no sufficient evidence as to how long the transfers would take. However, when the Decisions were taken, it was entirely reasonable for the SoS to conclude that pursuing a programme of split book sales at that point, allowing for any agreements to be negotiated or statutory direction to be made, and customers to be transferred, would in all probability leave the SoS covering the majority of Bulb’s Winter 2022 costs.

### ***The alleged failure to have regard to relevant considerations***

201. Next it is submitted that, so far as the Approval Decision is concerned, the mandatory considerations prescribed by para. 3(7) of Schedule 21 to the EA 2004 were not taken into account although they were relevant considerations. These were (a) the public interest; and (b) the effect the Scheme is likely to have (if any) upon the interests of third parties.
202. In our view, this is plainly unarguable. The Approval Decision, signed by the SoS, expressly confirmed that he had had regard to the matters set out in para. 3(7). Further, the ETS submission referred to the statutory wording, and summarised the public interest issues and third party interests at stake. Both this document and the SCA addressed the issue of the effect of the subsidy on trade and investment between the EU and the UK. It also noted the absence of any competition concern on the part of the CMA or Ofgem.
203. A number of specific criticisms were also made in writing by ScottishPower. For example it was submitted that the SoS failed to have regard to the options of splitting the customer book across multiple energy suppliers. This is wrong as a matter of fact



but, in any event, it is the kind of criticism which it is simply not appropriate to make in the context of a judicial review of this kind.

***The allegation that the M&A Process was unlawful because it did not comply with Article 303 of the TCA***

204. This allegation is more appropriately considered when the terms of the TCA are addressed in the context of the Subsidy Control Grounds. For the reasons set out at [254]-[255] below, we are satisfied that the allegation is without merit.

***Conclusion on the Public Law grounds***

205. We have had regard to everything that has been set out both in writing and at the extensive hearing before this Court but we have reached the clear conclusion that none of the public law grounds of challenge advanced on behalf of the Claimants has any arguable prospect of success. For that reason, quite apart from the issue of undue delay, we would refuse permission to bring this claim for judicial review on those public law grounds.

**The Subsidy Control Grounds**

***The Subsidy Control Regime under the TCA***

***The Status of the TCA under UK Domestic Law***

206. It is common ground that the applicable Subsidy Control Regime for the purposes of these claims is set out in the TCA, implemented in United Kingdom domestic law by s.29(1) of the European Union (Future Relationship) Act 2020 (**EUFRA 2020**). This provides:

“Existing domestic law has effect on and after the relevant date with such modifications as are required for the purposes of implementing in that law [the TCA] ... so far as the agreement concerned is not otherwise so implemented and so far as such implementation is necessary for the purposes of complying with the international obligations of the United Kingdom under the agreement.”

207. Section 29(2)(a) of EUFRA 2020 provides that s.29(1) is “subject to any equivalent or other provision ... which (whether before, on or after the relevant date) is made by or under ... any other enactment .... which is for the purposes of (or has the effect of) implementing to any extent the [TCA]”. The Subsidy Control Act 2022 (**SCA 2022**) is such an enactment, but it came into force on 4 January 2023, after the Decisions. Nonetheless, the provisions of the SCA 2022, and guidance issued by HMG in relation to its application, featured both in the contemporary decision-making process, and in argument before us. We return to the SCA 2022 and associated guidance later below.

208. The effect of s.29(2)(a) of EUFRA 2020 was summarised by Green LJ in *R (Heathrow Airport Ltd) v HM Treasury* [2021] EWCA Civ 783; [2021] STC 1203 at [227]-[228] as follows:

“[Section 29] ... amounts to a blanket, generic, mechanism to achieve full implementation, without the need for any further parliamentary or other executive intervention.

The section transposes the TCA onto domestic law, expressly and mechanistically changing it in the process. Following section 29, *domestic law* on an issue means what the TCA says.”

### *The Approach to Interpretation*

209. Article 4 of the TCA provides:

“1. The provisions of this Agreement and any supplementing agreement shall be interpreted in good faith in accordance with their ordinary meaning in their context and in light of the object and purpose of the agreement in accordance with customary rules of interpretation of public international law, including those codified in the Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969.

2. For greater certainty, neither this Agreement nor any supplementing agreement establishes an obligation to interpret their provisions in accordance with the domestic law of either Party.”

210. The Vienna Convention on the Law of Treaties (**VCLT**) provides, in relevant respects, as follows:

“Article 31:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its

provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.”

211. Article 32 contains “[s]upplementary means of interpretation” as follows:

“Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.”

212. There was some debate before us as to how far it was permissible to have regard to case law of the CJEU addressing issues of State Aid within Article 107 of the Consolidated Version of the Treaty on the Functioning of the European Union for the purposes of interpreting the TCA. That question falls to be answered through the application of the VCLT. The principal interpretative tool is the text, and there can be no presumption that the terms of the TCA were intended to replicate, or materially depart from, EU State Aid law. However, it is permissible to have regard to supplementary means of interpretation to confirm the textual interpretation, or when the textual interpretation would engage one of the two provisos to Article 32. Where the language of the TCA substantially replicates the terms of EU law on the same subject, the settled meaning of the equivalent provisions under EU law may well be relevant in that context.

#### *The Substantive Provisions of the TCA in Issue*

213. Article 303 of the TCA, to which some limited reference was made at this hearing, provides:

“With the objective of ensuring fair competition, each Party shall ensure its regulatory framework for the production, generation, transmission, distribution or supply of electricity or natural gas is non-discriminatory with regard to rules, fees and treatment.”

214. Article 363 provides:

“1. For the purposes of this Chapter, the following definitions apply:

(b) ‘subsidy’ means financial assistance which:

i) arises from the resources of the Parties, including:

(A) a direct or contingent transfer of funds such as direct grants, loans or loan guarantees;

(B) the forgoing of revenue that is otherwise due; or

(C) the provision of goods or services, or the purchase of goods or services;

(ii) confers an economic advantage on one or more economic actors;

(iii) is specific insofar as it benefits, as a matter of law or fact, certain economic actors over others in relation to the production of certain goods or services; and

(iv) has, or could have, an effect on trade or investment between the Parties.”

215. Articles 364(3) provides:

“Subsidies that are granted on a temporary basis to respond to a national or global economic emergency shall be targeted, proportionate and effective in order to remedy that emergency. Articles 367 and 374 do not apply to such subsidies.”

216. Article 366 provides:

“Principles

1. With a view to ensuring that subsidies are not granted where they have or could have a material effect on trade or investment between the Parties, each Party shall have in place and maintain an effective system of subsidy control that ensures that the granting of a subsidy respects the following principles:

(a) subsidies pursue a specific public policy objective to remedy an identified market failure or to address an equity rationale such as social difficulties or distributional concerns (‘the objective’);

(b) subsidies are proportionate and limited to what is necessary to achieve the objective;

(c) subsidies are designed to bring about a change of economic behaviour of the beneficiary that is conducive to achieving the objective and that would not be achieved in the absence of subsidies being provided;

(d) subsidies should not normally compensate for the costs the beneficiary would have funded in the absence of any subsidy;

(e) subsidies are an appropriate policy instrument to achieve a public policy objective and that objective cannot be achieved through other less distortive means;

(f) subsidies' positive contributions to achieving the objective outweigh any negative effects, in particular the negative effects on trade or investment between the Parties.

2. Without prejudice to paragraph 1 of this Article, each Party shall apply the conditions set out in Article 367, where relevant, if the subsidies concerned have or could have a material effect on trade or investment between the Parties.

3. It is for each Party to determine how its obligations under paragraphs 1 and 2 are implemented in the design of its subsidy control system in its own domestic law, provided that each Party shall ensure that the obligations under paragraphs 1 and 2 are implemented in its law in such a manner that the legality of an individual subsidy will be determined by the principles”.

217. Article 367 provides:

“Prohibited subsidies and subsidies subject to conditions

(1) The categories of the subsidies referred to in Article 366(2) and the conditions to be applied to them are as follows ...

Subsidies in the form of unlimited guarantees

(2) Subsidies in the form of a guarantee of debts or liabilities of an economic actor without any limitation as to the amount of those debts and liabilities or the duration of that guarantee shall be prohibited.

Rescue and restructuring

(3) Subsidies for restructuring an ailing or insolvent economic actor without the economic actor having

prepared a credible restructuring plan shall be prohibited. The restructuring plan shall be based on realistic assumptions with a view to ensuring the return to long-term viability of the ailing or insolvent economic actor within a reasonable time period. During the preparation of the restructuring plan, the economic actor may receive temporary liquidity support in the form of loans or loan guarantees. Except for small and medium-sized enterprises, an economic actor or its owners, creditors or new investors shall contribute significant funds or assets to the cost of restructuring. For the purposes of this paragraph, an ailing or insolvent economic actor is one that would almost certainly go out of business in the short to medium term without the subsidy.

- (4) Other than in exceptional circumstances, subsidies for the rescue and restructuring of insolvent or ailing economic actors should only be allowed if they contribute to an objective of public interest by avoiding social hardship or preventing a severe market failure, in particular with regard to job losses or disruption of an important service that is difficult to replicate. Except in the case of unforeseeable circumstances not caused by the beneficiary, they should not be granted more than once in any five year period.”

218. Article 369 provides:

“Transparency

1. With respect to any subsidy granted or maintained within its territory, each Party shall within six months from the granting of the subsidy make publicly available, on an official website or a public database, the following information:
  - (a) the legal basis and policy objective or purpose of the subsidy;
  - (b) the name of the recipient of the subsidy when available;
  - (c) the date of the grant of the subsidy, the duration of the subsidy and any other time limits attached to the subsidy; and
  - (d) the amount of the subsidy or the amount budgeted for the subsidy.

3. In addition to the obligation set out in paragraph 1, the Parties shall make subsidy information available in accordance with paragraph 4 or 5.

...

5. For the United Kingdom, compliance with paragraph 3 means that the United Kingdom shall ensure that:
  - (a) if an interested party communicates to the granting authority that it may apply for a review by a court or tribunal of:
    - (i) the grant of a subsidy by a granting authority; or
    - (ii) any relevant decision by the granting authority or the independent body or authority;
  - (b) then, within 28 days of the request being made in writing, the granting authority, independent body or authority shall provide that interested party with the information that allows the interested party to assess the application of the principles set out in Article 366, subject to any proportionate restrictions which pursue a legitimate objective, such as commercial sensitivity, confidentiality or legal privilege.

The information referred to in point (b) of the first subparagraph shall be provided to the interested party for the purposes of enabling it to make an informed decision as to whether to make a claim or to understand and properly identify the issues in dispute in the proposed claim.”

219. Article 371(1) provides:

“Independent authority or body and cooperation

Each Party shall establish or maintain an operationally independent authority or body with an appropriate role in its subsidy control regime. That independent authority or body shall have the necessary guarantees of independence in exercising its operational functions and shall act impartially.”

220. As we explain below, the independent authority or body established by the UK was the CMA.

221. Article 372 provides:

“Courts and tribunals

1. Each Party shall ensure, in accordance with its general and constitutional laws and procedures, that its courts or tribunals are competent to:

(a) review subsidy decisions taken by a granting authority or, where relevant, the independent authority or body for compliance with that Party's law implementing Article 366;

(b) review any other relevant decisions of the independent authority or body and any relevant failure to act;

(c) impose remedies that are effective in relation to point (a) or (b), including the suspension, prohibition or requirement of action by the granting authority, the award of damages, and the recovery of a subsidy from its beneficiary, if and to the extent that those remedies are available under the respective laws on the date of entry into force of this Agreement;

(d) hear claims from interested parties in respect of subsidies that are subject to this Chapter where an interested party has standing to bring a claim in respect of a subsidy under that Party's law.

...

3. Without prejudice to the obligations to maintain or, where necessary, to create the competencies, remedies and rights of intervention referred to in paragraphs 1 and 2 of this Article, and Article 373, nothing in this Article requires either Party to create rights of action, remedies, procedures, or widen the scope or grounds of review of decisions of their respective public authorities, beyond those existing under its law on the date of entry into force of this Agreement.”

*The SCA 2022*

222. As we have stated, under s.29(2)(a) of EUFRA 2020, the UK has enacted the SCA 2022. Section 52 of the SCA 2022 requires that a public authority must request a report from the CMA before giving any subsidy “of particular interest” or where directed to by the SoS. Subsidies outside those categories can be referred by a public authority to the CMA on a voluntary basis (s.56(1)).

223. A subsidy “of particular interest” includes any subsidy the total amount of which over a three-year period exceeds £10m (Regulation 3(2) of the Subsidy Control (Subsidies and Schemes of Interest or Particular Interest) Regulations 2022).



224. The CMA is required to produce a report on a referred subsidy including its evaluation of the public authority's assessment of whether the subsidy complied with the subsidy control principles (s.59). Subsidies which are the subject of mandatory referral to the CMA are temporarily prohibited, to allow an opportunity to consider their report prior to implementation (s.31). However, the public authority is not bound by any determination by the CMA that the subsidy is non-compliant.
225. A person aggrieved by the grant of a subsidy may apply for a review to the Competition Appeals Tribunal (CAT): s.70(1). On such applications, the CAT applies the same principles as are applied by the High Court in applications for judicial review (s.70(5)).
226. BEIS has published *Statutory Guidance for the UK Subsidy Control Regime*, issued by the SoS under s.79 of the SCA 2022, and to which public bodies must have regard (s.79(6)) (**the Statutory Guidance**). We were referred to various provisions of the *Statutory Guidance* including the following:
- (i) [5.60], addressing restructuring subsidies, which stated that “as a general rule, the contribution by the enterprise or its owners, creditors, or investors should amount to at a minimum 50% of the total cost of the restructuring for large enterprises” but that “lesser contributions may be considered for large enterprises where the public authority is satisfied that the contribution remains substantial and the lesser contribution is justified on account of exceptional circumstances or by particular hardship”.
  - (ii) [5.76], stating that “public authorities should require the enterprise to agree to certain undertakings regarding its conduct on the market for the duration of the restructuring plan” which should aim to ensure that restructuring support is used for its intended purpose and not to distort competition. It is specifically stated that the enterprise should undertake to: refrain from using restructuring support to expand its market position through the acquisition of shares or assets, unless these acquisitions are strictly necessary to ensure its long-term viability; and refrain from using the fact that it is receiving restructuring support in its marketing activities.
  - (iii) [5.78] provides that the public authority should consider whether any actions relating to the structure of the enterprise, such as asset divestments, may be required to avert or reduce the potentially distortive effects of the subsidy.
227. The *Statutory Guidance* addresses the Commercial Market Operator principle. [2.18] provides that a subsidy “must confer economic advantage, meaning that the financial assistance is provided on favourable terms” and that:
- “Financial assistance will not confer an economic advantage if it could reasonably be considered to have been given on the same terms as it could have been obtained on the market. This is known as the Commercial Market Operator (CMO) principle.”
228. The *Statutory Guidance* provides:
- (i) [15.61]:

“where seeking to rely on the CMO principle, it is important that public authorities obtain sufficient evidence to show that the financial assistance provided could be made available in the market by a private operator with commercial objectives and is provided on terms that would be acceptable to such a private operator. In certain instances, public authorities can establish compliance with the CMO principle directly by using evidence that is specific to the financial assistance in question, for example where financial assistance is given at the same time and on the same terms as a significant investment by a private operator (also known as ‘pari passu’). However, other evidence based assessments may be undertaken, including the use of benchmarking and profitability analysis.”

(ii) [15.62]:

“any evaluation of compliance with the CMO should be undertaken with input from experts with appropriate skills and experience” and that “in cases where the commercial assessment is not straightforward, it is recommended that public authorities commission a reputable third party to conduct a report as evidence that the actions proposed to be taken are in accordance with the CMO principle.”

(iii) [15.63]:

“where financial assistance concerns the sale or purchase of goods or services ... public authorities can show compliance with the CMO principle where the financial assistance is carried out through a procurement process which is tendered at the market price and is open and competitive. To rely on this method, public authorities should ensure that the procurement process:

- gives equal and non-discriminative treatment to all bidders;
- is open and transparent; and
- is carried out in a proportionate manner.”

(iv) [15.64]:

“where public authorities are subject to public procurement rules, evidence of compliance with these rules will assist in demonstrating compliance with the CMO principle.”

(v) [15.65], that “in some instances, public authorities may receive only one bid in a tendered process”, in which case:

“it is key that public authorities are able to demonstrate that the process made it possible for more than one tenderer to submit a bid, and that there were adequate safeguards in place to ensure genuine and effective competition in the procurement process. Public authorities may also seek to verify that the outcome corresponds to the market price, using additional analysis, such as benchmarking analysis.”

(vi) [15.66]:

“public authorities may seek to undertake further analysis, such as benchmarking or profitability analysis, in order to determine further whether the price of the awarded tender is on market terms.”

(vii) [15.67]:

“the presence simply of some kind of competitive process is not sufficient to demonstrate that the financial assistance is not a subsidy.”

(viii) [15.68]:

“where conditions for a subsidy are met, a competition will not eliminate the presence of a subsidy. However, a competition that applies objective and appropriate assessment criteria can assist public authorities to demonstrate that the subsidy is the minimum that is necessary to achieve the objective of the subsidy, as required by the subsidy control principles.”

(ix) Finally, [15.72]:

“public authorities may also adopt other methods of economic analysis, that are based on objective and reliable data in order to assess compliance with the CMO principle”

including benchmarking analysis ([15.73]) and profitability analysis ([15.75]).

### ***The Standard of Review***

229. We did not understand there to be any dispute as to the legal effect in domestic law of the TCA. This was considered by Green LJ and Whipple J, sitting as both a Divisional Court of the High Court and as the Court of Appeal (Civil Division) in *R (Heathrow Airport Ltd)* at [224]-[241]. For present purposes the following principles can be distilled:

- (i) *Prima facie* the TCA does not have direct effect according to its own terms but this is without prejudice to how the UK decides to implement the TCA as a matter of domestic law.
- (ii) Parliament has implemented the TCA into domestic law via the EUFRA 2020, in particular section 29. Section 29 does not lay down a principle of interpretation but is more fundamental and amounts to “a blanket, generic, mechanism to achieve full implementation, without the need for any further Parliamentary or other Executive intervention”: see [227]. The section transposes the TCA into domestic law, expressly and mechanistically changing it in the process. Following section 29 domestic law on an issue means what the TCA says: see [228].
- (iii) This is subject to two statutory clarifications. The first of these is that it applies only so far as required, i.e. it does not modify domestic law that is otherwise

already consistent with the TCA. The second is not material for present purposes.

- (iv) There will be many circumstances where a court must determine the meaning of domestic law by reference to the TCA. This is recognised in section 30 of the EUFRA 2020. That provision cross-refers to the TCA, which itself incorporates the 1969 Vienna Convention on the Law of Treaties: see section 30 and Article 4 of the TCA on ‘public international law’.

230. Section 30 provides that:

“A court or tribunal must have regard to Article 4 of the Trade and Cooperation Agreement (public international law) when interpreting that agreement or any supplementing agreement.”

231. Article 372 of the TCA provides:

“1. Each Party shall ensure, in accordance with its general and constitutional laws and procedures, that its courts or tribunals are competent to:

(a) review subsidy decisions taken by a granting authority or, where relevant, the independent authority or body for compliance with that Party’s law implementing Article 366;

...

(c) impose remedies that are effective in relation to point (a) ..., including the suspension, prohibition or requirement of action by the granting authority, the award of damages, and the recovery of a subsidy from its beneficiary, if and to the extent that those remedies are available under the respective laws on the date of entry into force of this Agreement;

(d) hear claims from interested parties in respect of subsidies that are subject to this Chapter where an interested party has standing to bring a claim in respect of a subsidy under that Party’s law.

...

3. Without prejudice to the obligations to maintain or, where necessary, to create the competencies, remedies and rights of intervention referred to in paragraphs 1 and 2 of this Article, and Article 373, nothing in this Article requires either Party to create rights of action, remedies, procedures, or widen the scope or grounds of review of decisions of their respective public authorities, beyond those existing under its law on the date of entry into force of this Agreement. ...”

Footnote 1 states that, for greater certainty, the law of the United Kingdom for the purposes of this Article does not include any law [i] having effect by virtue of section 2(1) of the European Communities Act (“ECA”) 1972, as saved by section 1A of the European Union (Withdrawal) Act 2018, or [ii] passed or made under, or for a purpose specified in, section 2(2) of the ECA 1972. This makes it clear therefore that what is meant by domestic law in this context does not include that part of domestic law which had direct effect from EU law.

232. Footnote 1 to Article 373 (which is concerned with the new remedy of recovery) states that, for the United Kingdom, Article 373 requires a new remedy of recovery which would be available at the end of a successful judicial review “in accordance with the standard of review under national law”; and such review is not expanded in any other way, in accordance with Article 372(3).
233. The Claimants place emphasis in particular on the principles which are set out in Article 366 of the TCA. They submit that it is clear that these principles include the principle of proportionality: see in particular Article 366(1)(b) which says: “Subsidies are proportionate and limited to what is necessary to achieve the objective”. Furthermore, Article 366(3) provides that it is for each Party to determine how its obligations under paragraphs 1 and 2 are implemented in the design of its subsidy control system in its own domestic law, provided that each Party shall ensure that those obligations are implemented in its law “in such a manner that the legality of an individual subsidy will be determined by the principles.”
234. Accordingly, submit the Claimants, the ground of judicial review which must be made available in domestic law in order to implement Article 366 is not confined to rationality but must include the principle of proportionality.
235. On behalf of the SoS, Mr Coppel KC submits that the ground of review is confined to conventional domestic law public principles such as rationality and does not include the principle of proportionality. We do not accept that submission. In our view, the TCA does envisage that the principle of proportionality must be complied with in the subsidy control regime. Nevertheless, we would accept Mr Coppel KC’s alternative submission, that, when it comes to applying the principle of proportionality, the context is very important. The consequence may be that in practice the outcome may not be materially affected by the distinction between the concept of rationality and the principle of proportionality.
236. In this context the Claimants placed some reliance upon the decision of Foxton J in *R (British Sugar plc) v Secretary of State for International Trade* [2022] EWHC 393 (Admin), where he considered the ground of challenge brought under the subsidy control provisions of the TCA at [134]-[149]. However, the decision in *British Sugar* did not turn on any question as to the appropriate standard of judicial review in the context of application of the subsidy control regime in the TCA. The point was not in issue in that case nor was it the subject of argument. The only issue in that case was whether there was indeed a subsidy within the meaning of the TCA.
237. Our view is consistent with the approach which the courts have taken in applying the principle of proportionality in the context of the Human Rights Act 1998: see e.g. *R (Drexler) v Leicestershire County Council* [2020] EWCA Civ 502; [2020] ELR 399, at [76] (Singh LJ); and *R (Joint Council for the Welfare of Immigrants) v Secretary of*

*State for the Home Department* [2020] EWCA Civ 542; [2021] 1 WLR 1151, at [140]-[141] (Hickinbottom LJ).

238. As Lord Sumption JSC observed in *R (Lord Carlile of Berriew) v Secretary of State for the Home Department* [2014] UKSC 60; [2015] AC 945, at [31], even in the context of human rights adjudication, a court of review is not entitled to substitute its own decision for that of the constitutional decision-maker. “However intense or exacting the standard of review in cases where Convention rights are engaged, it stops short of transferring the effective decision-making power to the courts.” Lord Sumption continued, at [68]:

“Accordingly, even where, as here, the relevant decision maker has carried out the balancing exercise, and has not made any errors of primary fact or principle and has not reached an irrational conclusion, so that the only issue is the proportionality of the decision, the court cannot simply frank the decision, but it must give the decision appropriate weight, and that weight may be decisive. The weight to be given to the decision must depend on the type of decision involved, and the reasons for it. There is a spectrum of types of decision, ranging from those based on factors on which judges have the evidence, the experience, the knowledge, and the institutional legitimacy to be able to form their own view with confidence, to those based on factors in respect of which judges cannot claim any such competence, and where only exceptional circumstances would justify judicial interference, in the absence of errors of fact, misunderstandings, failure to take into account relevant material, taking into account irrelevant material or irrationality.”

239. An enhanced margin of appreciation will be given by the courts when reviewing the decisions of the executive in a context involving scientific, technical and predictive assessments: see *R (Mott) v Environment Agency* [2016] EWCA Civ 564; [2016] 1 WLR 4338, at [69] (Beatson LJ); see also his reference to the well-known concept of “polycentric” questions, which pose particular challenges to a judicial review court, at [75].
240. Even in the context of EU law, and even applying the principles of State Aid law, which are no longer directly applicable since the UK has now left the EU, it was recognised by the Court of Appeal in *R (Sky Blue Sports and Leisure Ltd) v Coventry City Council* [2016] EWCA Civ 453 that a wide margin of judgment was to be afforded to a public authority when considering commercial circumstances in the private market: see [88(x)] in the judgment of Mr Justice Hickinbottom, which was approved by Tomlinson LJ in [16]; and also [23]-[29], which make it clear that there is a wide margin of judgment to be applied in this context.
241. More generally, when applying the EU principle of proportionality, the Supreme Court has made it clear that it is a “flexible” principle in its application: see *R (Lumsdon) v Legal Services Board* [2015] UKSC 41; [2016] AC 697, at [34] (Lord Reed and Lord Toulson JJSC). When considering measures of EU institutions exercising a discretion involving critical economic or social choices, especially where a complex assessment

is required, the court will usually intervene only if it considers that the measure is “manifestly inappropriate”; see [40]. It is important to acknowledge that, at [101], the Supreme Court affirmed that it is for the court itself to decide whether the decision is disproportionate and, applying the principle of proportionality, it must reach its own conclusion. Nevertheless, for the reasons we have already given, the consequence is not that the court simply substitutes its own decision for that of the decision-maker. Depending on the context a wide margin of appreciation or judgment may be called for. In this context, we have reached the conclusion that it is.

242. We remind ourselves that, in the present context, the Court is not called upon to apply EU law. The TCA is not part of EU law. It is an international treaty between the UK and the EU and, to the extent required by section 29 of EUFRA 2020 is part of our domestic law. How the principle of proportionality should be applied in this particular context is therefore a matter for domestic law.
243. Article 371(1) of the TCA requires each party to “establish or maintain an operationally independent authority or body with an appropriate role in its subsidy control regime”. The relevant body in the UK is now the CMA, under the SCA 2022: in particular, Part 4 of that Act provides for referrals to be made to the CMA of certain subsidies. However, at the material time in this case the CMA did not have that function as the SCA 2022 had not yet come into force.
244. On behalf of E.ON we heard submissions to the effect that, as a consequence, this Court should take a more intensive approach in reviewing the decisions by the SoS, in effect putting itself into the shoes of the CMA if it had had this function at the material time. We do not accept that submission.
245. The first difficulty with that submission is that Article 371 does not specify in detail what the role of the independent authority or body established or maintained under it is to be. It simply refers to “an appropriate role”. This leaves a wide margin of appreciation to the State party in implementing this obligation. As we have noted the role which (in the event) the UK chose for the CMA within its subsidy control measure was not one which involved the CMA determining whether there had been a subsidy and, if so, whether it complied with the subsidy control principles, but a role in which the CMA would offer a non-binding assessment of those questions in those cases which were referred to it on a mandatory or voluntary basis: see [225]-[228].
246. Secondly, in the interim period before the SCA 2022 came into force, Article 366(3) of the TCA left it to each party to determine how its obligations under paragraphs 1 and 2 were implemented in the design of its subsidy control system in its domestic law, provided that it ensured that the obligations were implemented “in such a manner that the legality of an individual subsidy will be determined by the principles.” That is precisely what this Court is able to do in the present claim for judicial review. The TCA does not specify any particular manner in which domestic law is required to determine the legality of a subsidy. As we have already said, the standard of review which is applicable is in principle that of proportionality but the way in which that standard is applied depends on domestic law principles and is a relatively “light touch” standard of review in this context.

***Did the SoS wrongly proceed on the basis that the M&A process was open, non-discriminatory and competitive for the purposes of establishing:***

- (i) whether 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.***

247. At the outset, it is helpful to recall what the role of an “open, non-discriminatory and competitive” bidding process is in the context of a subsidy control assessment. As we have noted, it is not to give effect to some independent public law duty of fairness for the benefit of those who have or might wish to have engaged in the process. Rather its role is essentially evidential, in providing an evidential basis for the conclusion that transaction terms which emerge from such a process:

- (i) either involve no subsidy, because the transaction is being done on CMO terms (which is the SoS’s case so far as the alleged subsidy to Octopus is concerned); or
- (ii) that the subsidy is the minimum necessary (on the basis that, where a CMO would not transact without some form of subsidy, the bid process will have elicited the “most competitive” subsidy) (which is of particular relevance to the subsidy which it is agreed was provided to HiveCo).

Once the essentially evidentiary purpose of the tender process is recognised, BGT’s submission that “the JEAs have no particular experience in transparency and fairness” rather misses the point. The process was simply one means of obtaining a market value bid, something which was very much the particular expertise of the JEAs and Lazard.

248. The essentially evidentiary role of the “open, competitive and non-discriminatory bidding process” is confirmed in the materials to which we were taken by the parties in the course of submission.

249. We consider the European Commission Notice on the Notion of State Aid OJ C262, 19.7.2016 first, because it featured particularly prominently in Mr Peretz KC’s submissions, which took the lead on the subsidy control issues for the Claimants. This notes at §84 that compliance with the “market economy operator” principle (the EU equivalent of the CMO principle) can be established if the transaction is “carried out through a competitive transparent non-discriminatory and unconditional tender procedure”.

- (i) However, it is clear that it is not the only means of “establishing compliance with market conditions”. §83 refers to “situations in which the transaction’s compliance with market conditions can be directly established through transaction-specific market data and situations in which, due to the absence of such data, the transaction’s compliance with market conditions has to be assessed on the basis of other available methods”. The Notice identifies two other available methods:
  - a) “where the transaction is carried out ‘*pari passu*’ by public entities and private operators”; and



- b) “where it concerns the sale and purchase of assets, goods and services (or other comparable transactions) carried out through a competitive, transparent non-discriminatory and unconditional tender procedure”.
- (ii) A “transparent, non-discriminatory and unconditional tender procedure” is not, therefore a necessary means of establishing compliance with the CMO principle. The Notice at §97 also refers to compliance with market conditions being demonstrated by benchmarking or other assessment methods, including “independent studies”. It refers in this connection to the decision of the CJEU in C-14/12P, C-215/12P & C-223/12P *Land Burgenland v Commission* [2013] ECLI:EY:C:2013:682, [93] which stated that “for the purposes of checking the market price, the national authorities may take into consideration ... any expert’s report prepared at the time of transfer”. We were referred to other materials supporting the use of valuations as an alternative to an “unconditional bidding procedure”, including the Commission “Guidance Paper on state aid-compliant financing, restructuring and privatisation of State-owned enterprises” (Staff Working Document, February (2012), p.13.
  - (iii) Nor is a “transparent, non-discriminatory and unconditional tender process” always sufficient. At §89, the Notice provides that if there is such a process “it can be presumed that those transactions are in line with market conditions”, but if (however “transparent, non-discriminatory and unconditional” the process), only one bid is made, the Notice provides at §93 that “the procedure would not normally be sufficient to ensure a market price, unless either (i) there are particularly strong safeguards in the design of the procedure ensuring genuine and effective competition and it is not apparent that only one operator is realistically available to submit a credible bid or (ii) the public authorities verify through additional means that the outcome corresponds to the market price”.
  - (iv) At §105, the Notice observes that “prudent market economy operators typically assess their interventions by using several different methodologies” and “the presence of complementary valuation methodologies corroborating each other’s findings will be considered a positive indication when assessing whether a transaction is in line with market conditions”.
250. These provisions are broadly reflected in the BEIS *Statutory Guidance*, as set out at [226] above. Decisions of the World Trade Organisation (WTO) dispute resolution procedures also recognise a number of means by which it can be established that the price sought or paid is market price. The WTO appellate body in *Canada – Certain Measures Affecting the Renewable Energy Generation Sector* AB-2013-1, [5.228] referred to the use of “prices for the same product” and “price-discovery mechanisms such as competitive bidding or negotiated prices”.
251. In this case:
- (i) The M&A process was conducted (as it would have been in the case of a disposal by a prudent market operator) with the involvement of expert advisers in the form of Lazard and the JEAs.
  - (ii) In the “Phase II Bid Review and Next Steps Recommendation” document, Lazard advised the JEAs that “a competitive sales process has been run over the

past four months”, summarised what that process had involved, compared the Octopus offer with other “precedent transactions” and recommended the Orchid transaction.

- (iii) In their M&A Recommendations paper of 28 September 2022, the JEAs advised the SoS that, together with Lazard, they had run “a comprehensive M&A process ... over the last several months” and undertaken a “detailed analysis of the counterfactuals”; that the M&A process was “comprehensive”, and the JEAs expressed the expert assessment that the bid which emerged from that process was “the value that the market is placing on Bulb in the current sector environment.”
  - (iv) BEIS had itself followed that process, receiving regular updates in the form of weekly and monthly report packs and periodic reports. Further, it had made it clear to the JEAs that the process needed to be fair and capable of withstanding scrutiny, making specific observations on aspects of the process as necessary: [52]-[53] and [55]. The SoS was in a position to, and did, form his own informed assessment of the extent to which he could rely upon the outcome of the exercise which had been conducted, and the expertise of those conducting it.
  - (v) The JEAs’ recommendation did not rest solely on the outcome of the M&A Process, but was supported by counterfactual analysis and benchmarking analysis which had been performed by Lazard as part of the Phase II Bid Review.
  - (vi) BEIS commissioned an independent “high level analysis” of the JEAs’ recommendations from E&Y, including as to “whether Teneo has followed an appropriate process”, on Octopus’ offer and on the counterfactual analysis performed by Teneo, which did not raise any issues of concern.
252. Against that background, we are entirely satisfied that the SoS was reasonably entitled to conclude that the M&A Process had been conducted as an “open, non-discriminatory and competitive” bidding process such that he could treat the only bid which had emerged from the process as a fair reflection of the value which the market placed on Bulb’s business in the prevailing circumstances. In any event, we are not persuaded that the process conducted by the JEAs in conjunction with Lazard was not one which could be relied upon so as to treat the only bid which had emerged from the process as a fair reflection of the value which the market placed on Bulb’s business in the prevailing circumstances.
253. We can deal more briefly with three more detailed aspects of the Claimants’ attack on the SoS’s conclusion that the Octopus bid reflected market value because it had emerged from an “open, non-discriminatory and non-transparent” bidding process:
- (i) First, the suggestion that the entire M&A Process was flawed because the availability of HMG support had not been pro-actively publicised to bidders at the outset, but it had been left to the bidders to formulate their requirements (i.e. the issue had been “market led” rather than HMG-led). We are satisfied that this was a matter of judgment, and (as we explain at (ii) below), we are satisfied the JEAs, Lazard and BEIS all supported the approach taken. It is only too easy to see what criticisms might have been made if HMG had opened the process with

a clear statement of its readiness to provide significant financial support to potential bidders. Indeed we note that at the early stages of the M&A Process, the JEAs observed on 5 April 2022 that it was “difficult to assess the extent to which a purchaser may require the payment of a dowry” and that “a purchaser may request a lower level of financial support (or none)”.

- (ii) Second, we reject the Claimants’ contention that in adopting the course in (i) above, the SoS was ignoring or failing to follow Lazard’s and/or the JEAs’ advice. Mr Cowlshaw of Teneo confirms in his evidence that Lazard and Teneo agreed with this approach, at least in the first instance, for various commercial reasons which he sets out, while acknowledging that the matter had to be kept under review.
- (iii) Third, we reject BGT’s contention that there was unfairness (which, in the present context, must mean that the reliability of the M&A process as a means of establishing market value was undermined) because information provided to one bidder in the context of the specific negotiations with that bidder was not automatically shared with other bidders (criticising an early statement by BEIS that “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)”). That is obviously a matter for commercial judgment, but we would simply note it might be thought a rather strange M&A process, at least from a prudent market operator perspective, if any offer made to one negotiating counterparty had to be shared generally, thereby impairing the offeror’s prospects of doing better with someone else.

254. Finally ScottishPower raised, but did not develop orally, an argument based on alleged breach of Article 303 of the TCA, which provides:

“1. With the objective of ensuring fair competition, each Party shall ensure that its regulatory framework for the production, generation, transmission, distribution or supply of electricity or natural gas is non-discriminatory with regard to rules, fees and treatment.”

255. ScottishPower contends that “the unfair bidding procedure fails to comply with the principles on open competition and non-discrimination for the electricity and gas supply markets found in Article 303 of the TCA, as given effect by section 29 EUFRA 2020.”

256. There is nothing in this point. First, Article 303 is directed to each Party’s regulatory framework. ScottishPower has not pointed to any aspect of the regulatory framework which was not “non-discriminatory with regard to rules, fees and treatment”. Allegations of unfairness in the operation of a commercial M&A process for the sale of a particular business are not engaged by Article 303. Second, we have rejected ScottishPower’s submission that the M&A process was unfair in any event.

***Did the Defendant’s reasoning on the application of Article 366(1) TCA to the subsidy take into account irrelevant considerations and/or fail to have regard to relevant considerations and/or fail 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?***

257. We have largely dealt with these complaints in the context of the Public Law Grounds at [195]-[203] above. We deal with the remainder now.

- (i) It is alleged that the SoS failed to take account of the fact that, if the wholesale cost of acquiring energy exceeded the amount of the Ofgem wholesale price cap, the full amounts paid to HiveCo under the WAMA would not be repaid. However, the “wholesale differential” is expressly addressed in the SCA and the AOA, and is inherent in a hedge (which, in functional terms, is what the WAMA is).
- (ii) It is alleged that the SoS failed to take into account the fact that no interest was to be charged in respect of the payments made to HiveCo under the WAMA, which were paid in advance of the cashflows due from HiveCo to Bulb. Once again, this was expressly addressed in both the SCA and the AOA, and the decision reasonably reached that “with interest, the economics of the deal structure would not work”, and the terms of the transaction sought to address the benefits of the time value of money to some degree (as explained by Mr Cowlshaw in his third witness statement at para. 115).
- (iii) E.ON say that, while the JEAs conducted a sensitivity analysis of the Octopus transaction to show the effect of upwards and downwards movements in wholesale energy prices or demand, no sensitivity analysis was performed for the counterfactual scenarios. Beyond stating that this would have been “a sensible thing to do when comparing various options”, it was not suggested that any particular insight would have been derived from it (it being obvious that higher energy costs made the counterfactual scenarios even less attractive, and lower energy costs would make the WAMA less onerous). We can see no credible basis for concluding that the JEAs’ failure to include such an analysis prevented the SoS from reasonably relying upon their recommendation.
- (iv) It is said that the comparison with other transactions provided by Lazard in the “Phase 2: Bid Review” document was misleading because no account was taken of the Equity Injection being made into HiveCo to ensure it had a net asset value. However, on the assumption that the comparator transactions were for solvent rather than insolvent entities (and we have been shown nothing to suggest the contrary), the comparison was appropriate, in each case comparing the price paid per customer for a solvent business. So far as other differences between the comparator transactions and the Octopus transaction are concerned, the material before the SoS, in the form of the SCA, noted limitations as to the comparability of the other transactions given the different market conditions in which they were concluded, stating only that the price per customer being paid by Octopus was “broadly in line with transactions prior to the current levels of volatility”. It was never going to be possible to find a perfect comparator for the Octopus transaction, given the highly volatile market and the economic disruption caused

to the UK retail energy market, but the analysis provided a rough “sense check”, and was not presented as doing anything more.

- (v) It is alleged that the SoS wrongly failed to benchmark the Octopus transaction against a SoLR process. However, the information provided by Ofgem on 12 August 2022 that there had only been a compulsory SoLR process for 3,000 customers, and that “in the light of market conditions and the preceding M&A process, we consider that there would be considerable risk that use of such powers could be difficult to justify for 1.6m customers, and as well bringing risk of further customer detriment and financial instability for suppliers, could also face legal challenge”. Ofgem were unable to offer any considered assessment as to how long the process would take, beyond stating it would take “a number of months” with other matters needing to be “factored into estimates of timescale/planning”. Further, the SCA identified risks of high levels of staff attrition, operational risks, significant funding costs and increased stress of the debtor book if Bulb remained in the SAR, while Lazard’s advice was that in the medium term the outlook for an M&A process would deteriorate. Against that background, and given the obvious reluctance by Ofgem to implement a SoLR process for Bulb, it cannot be said that the SoS acted unlawfully in failing to include this as a benchmarked scenario.
- (vi) It is alleged by E.ON that the SCA confused the issue of which course provided “best value for money” for the SoS, and which minimised the amount of money payable by way of subsidy. However, the increased costs which the SCA identified as a consequence of Bulb remaining in the SAR largely involved payments to Bulb in the SAR, or events which would increase the payments to Bulb necessary to move it out of the SAR (as a result of a deterioration in its net asset position).
- (vii) It is alleged that there was failure properly to take into account changes in the applicable regulatory regime identified at [84] and [86]. However, the effect of those changes was considered by Lazard and the JEAs on 28 September 2022, and factored into their recommendation of the Octopus transaction. The implications of the changes were also addressed in the AOA.

***For the purposes of Articles 366(1)(b) and (e), was the regulatory change protection that has been provided to HiveCo/Octopus linked to any of the Defendant’s objectives and/or disproportionate?***

258. The Claimants point to the protection offered by the SoS against the consequences of a change in the regulatory regime which prevented customer credit balances being used to collateralise hedging arrangements once the WAMA had come to an end (see [96(iv)]). They contend that the SoS failed to identify how this measure served a legitimate subsidy objective. In our assessment, this argument seeks artificially to isolate part of what was an integrated transaction for the purposes of the SCA. The regulatory change protection formed part of the package of measures intended to ensure that HiveCo could hedge wholesale energy acquisition costs going forward, together with the WAMA (covering the period to 31 March 2023). This particular feature of the package was specifically identified in the SCA as a subsidy, and it was noted that the

protection was necessary “to protect the working capital requirements to run the business transferred and on which [the] funding calculations are fundamentally based”. In circumstances in which, as we have found, the Octopus bid was the only bid received following what the SoS was entitled to conclude was an open, transparent and competitive M&A process, and the SoS was entitled to conclude that transacting on the terms of the Octopus bid was the most proportionate of the available options to meet the objective of avoiding social hardship, it necessarily followed that the SoS was entitled to (and had) concluded that the regulatory ring-fencing protection was a proportionate means of meeting that objective.

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

259. We have addressed this complaint at [202] above. Further, the transaction placed a number of limitations and restrictions on the conduct of the HiveCo business during the period of funding:

- (i) Octopus agreed it would not “interfere with or do anything the purpose of which will, or could reasonably, be expected to impair or adversely affect the relationship of HiveCo with its customers or cause any customers to transfer away from HiveCo”.
- (ii) There were contractual restrictions on the conduct of HiveCo and Octopus BidCo which could only deal with the wider Octopus group on an arms-length basis, including when procuring services.
- (iii) Restrictions were imposed on the payment of dividends, management fees and other fees by the ringfenced entities to the wider Octopus group.

260. These restrictions were considered in the SCA, which concluded that they ensured that the object of the subsidy could not be pursued by less distortive means. The SoS was entitled to accept and act on that assessment.

***For the purposes of Article 366(1), did the Defendant err 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?***

261. The Claimants contend that the objectives of the subsidy, as identified in the SCA, were not legitimate and/or that the SoS could not rationally have concluded that the subsidy to HiveCo would advance the identified objectives.

262. The SCA identified as one objective of the subsidies to HiveCo avoiding social hardship to Bulb’s customers which would follow from a “hard close insolvency”. The Claimants challenge the rationality of that conclusion on two grounds.

263. First, it is suggested that the SoS could not rationally have concluded that there was any risk of social hardship to Bulb’s customers even if there was a “hard close insolvency”, because energy would continue to flow through to the retail point of delivery, regardless of the solvency of those buying and selling energy upstream of the consumer. We are satisfied that the SoS was entitled to conclude that a “hard close insolvency” of Bulb would give rise to social hardship to Bulb’s customers. As the SCA identifies, in that eventuality Bulb’s customers would lose access to any form of customer service, customers would lose their credit balances and those on pre-payment meters (who were most likely to be vulnerable and “fuel poor”) would face the risk of being left with no energy at all.
264. Second, it is suggested that the alternative courses of action open to the SoS would also have avoided a “hard close insolvency”, so that it cannot be said the objective of proceeding with the Octopus transaction was avoiding a “hard close insolvency”. Mr Peretz KC illustrated this argument by submitting that “someone cannot give as their objective or justification for taking a private jet to Edinburgh as opposed to taking an ordinary flight or going by train that they want to get to Edinburgh: the objective or justification for that choice must be something else, such as speed or privacy”.
265. We are satisfied that this argument is without merit. The fact that there may be more than one means of achieving a particular objective (sc. getting from London to Edinburgh) does not change the objective of the journey. In circumstances in which there may have been more than one means of achieving the desired objective of avoiding the social hardship which would follow from “a hard close insolvency”, each with their own risks and opportunities, it was for the SoS to form a rational view as to which of those alternatives was the most proportionate means of achieving the desired object. It was open to the SoS on the material before him to conclude that the other options were inferior to proceeding with the Octopus bid, involving significant execution risks and higher forecast costs.
266. The second objective referred to in the SCA is that “the subsidy is also aimed at remedying the failure of the loan market in terms of willingness to provide affordable finance to energy companies given the economic climate”. We have difficulty in seeing how the SoS could rationally have concluded that the unwillingness of the loan market to provide funding to Bulb in the financial difficulties it was in before it went into the SAR evidence a failure of the loan market. The normal and proper functioning of that market is one in which lenders would be expected to distinguish between applicants for funding depending on their financial strength, and to be reluctant to lend substantial funds to a business whose business model had left it in severe funding difficulties. However, we note that this is identified as a secondary and subsidiary objective, avoiding social hardship being described as “the main public/social policy objective”. Even when addressing the need to remedy Bulb’s inability to raise loan finance, the SCA refers to the fact that the funding will “protect ...supply to Bulb’s customers”, and describes one consequence of not providing funding as being that “certain groups of Bulb’s customers be without energy supply (due to their inability to charge prepayment metres)”. While we accept, therefore, that the SoS could not lawfully have granted a subsidy solely for the purpose of remedying a perceived failure in the loan market in this case, the reference to this subsidiary objective does not in the circumstances we have set out have the effect that the subsidy was not granted for a lawful objective.

267. Finally, the Claimants suggest that the SoS was seeking to achieve an impermissible objective in awarding the subsidy, namely allowing a key challenger to remain in the market and maintain competition. That submission reflects the following passage in the SCA:

<p>Additional principle from the SCA: The subsidy is designed to achieve its specific policy objective <i>while minimising any negative effects on competition or investment within the UK</i></p> <p>(emphasis added)</p>	<p>The ESC special administration and Subsidy to date has not adversely impacted the energy market. Indeed by enabling a key challenger to stay in the market, the subsidy has maintained competition and helped restore confidence in challenger and green energy suppliers as well as protecting supply to Bulb’s customers. The proposed transaction is in the process of being reviewed by Ofgem and has been considered by the CMA’s mergers intelligence function ...</p>
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268. It will be apparent that the SCA does not identify allowing a key challenger to remain in the market and maintain competition as an objective of the subsidy, but rather states that the subsidy seeks to achieve its (ex hypothesi different) object “while minimising any negative effects on competition.” We did not understand any of the Claimants to contend that it was not appropriate for the SoS to seek to minimise negative effects of the subsidy on competition (and we note that one of the sources relied upon by E.ON before us, *Communication from the Commission: Guidelines on State aid for broadband networks* (2023/C 36/01), §115 refers to impact on competition as an aspect of proportionality as a matter of EU State Aid law).
269. We are not persuaded that the conclusion that the subsidy sought to reach its objective while minimising negative effects on competition was not reasonably open to the SoS, and the SoS was entitled to have regard to the review by Ofgem and the CMA’s decision not to call in the transaction in reaching that decision.

***For the purposes of Article 367(4) TCA, did the Defendant err 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?***

270. This raises essentially the same issue as arises in relation to Article 366(1). We have concluded it was rationally open to the SoS to conclude that the subsidies granted to HiveCo contributed to an objective of public interest by avoiding social hardship, namely avoiding the consequences of a “hard close insolvency” on Bulb’s customers.



***Was the Funding Decision unlawful on the basis that the subsidy included an unlimited guarantee prohibited by Article 367(2) TCA?***

271. Article 367(2) of the TCA prohibits “subsidies in the form of a guarantee of debts or liabilities of an economic actor without any limitation as to the amount of those debts and liabilities or the duration of that guarantee.” ScottishPower and BGT (but not E.ON) contend that the WAMA constituted such a prohibited guarantee because, for the period to 31 March 2023, the SoS committed to provide funding to HiveCo sufficient to cover the wholesale cost of energy during that period.
272. We received very little argument on the interpretation of Article 367(2). Unlimited guarantees were the subject of special consideration within the EU State Aid regime, and were the subject of Commission Notices “On the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees” (2000/C 71/07 BS) and “On the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees” (2008/C 155/02). These Notices would suggest, as a matter of EU law at least, that the concept of guarantee is not limited to promises made to a principal to meet the liabilities of a debtor, but would extend to taking an unlimited equity participation in the debtor, the effect of which would be to provide unlimited recourse to the state for the debtor’s liabilities. However, we have seen nothing to suggest that the concept is sufficiently elastic that it can extend to what, in the case of the WAMA, is an agreement for the exchange of cashflows (the SoS agreeing to pay the actual wholesale cost of HiveCo’s acquisition of energy in return for payment for the same amount of energy at the Ofgem wholesale price cap). That transaction is in the nature of a hedge or swap, which depending on market movements can involve net cashflows in either direction (and, as matters stand, will involve a net payment flowing from HiveCo to Bulb). We do not accept that a transaction of this kind is a guarantee.
273. Further, we note from Commission Notice (2008/C 155/02) that one of the perceived vices in unlimited guarantees is that the extent of the guarantee cannot be properly measured when it is granted. We were shown no material to suggest that the value of the hedge offered by the WAMA was not capable of being subject to a reasonable valuation when it was entered into. The fact that the price of energy (like any other floating rate in a hedge or swap) will move after the date of entry does not preclude a market valuation at Day 1, and while the volume of energy which would have to be paid for was not capped, the number of Bulb customers, and the limit of the WAMA payments to meeting Bulb’s wholesale energy costs, to supply those customers would appear to provide reasonable parameters to assess the range of possible payments. It was for the Claimants to persuade us that the realistic degree of residual uncertainty was such as to preclude a reasonable valuation of the WAMA at the date of entry, and they have not done so.
274. Finally, Article 367(2) does not apply to subsidies “granted on a temporary basis to respond to a national or global economic emergency”, provided that the subsidy was “targeted, proportionate and effective in order to remedy the emergency” (Article 364(3)). We now turn to this issue.

***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.