IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1586/4/12/23

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Monday 26th June – Tuesday 27th June 2023

Before:
Hodge Malek KC
Dr William Bishop
Paul Lomas
(Sitting as a Tribunal in England and Wales)

BETWEEN:

Applicants

Dye & Durham Limited and Dye & Durham (UK) Limited

v

Respondent

Competition and Markets Authority

&

Intervener

TM Group (UK) Limited

A P P E A R AN C E S

Kieron Beal KC & Ben Lewy (Instructed by Dentons UK and Middle East LLP) on behalf of Dye & Durham Limited and Dye & Durham (UK) Limited
Ben Lask KC & Thomas Sebastian (Instructed by the CMA) on behalf of the Competition and Markets Authority
Robert O'Donoghue KC (Instructed by Fieldfisher LLP) on behalf of TM Group (UK) Limited

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Monday, 26 June 2023

(10.30 am)

Housekeeping

THE CHAIR: Some of you are joining us via livestream on our website so I must start therefore with the customary warning. An official recording is being made and an authorised transcript will be produced but it is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings and breach of that provision is punishable as a contempt of court.

I am chairing this hearing today, Dye & Durham Limited against the CMA. To the left of me is Mr Bishop, to the right of me is Mr Lomas, and there are two law students observing who have been provided with non-confidential versions of the skeleton arguments.

Yes, Mr Beal.

Submissions by MR BEAL

MR BEAL: May it please the Tribunal. I appear today for the applicants, Dye & Durham, with my learned junior Mr Lewy. Mr Lask KC, leading Mr Sebastian, appears for CMA and Mr O'Donoghue KC appears for TMG.

With the Tribunal's permission, what I am proposing do is very briefly look at the legislative background after some preliminary observation, turn to then look in slightly more detail at the factual background and then to cover the three grounds in turn.

I do propose to cover those three grounds in turn because in our respectful submission that's the logical order in which to address them.

THE CHAIR: That's fine. Look, let's just see, what we've read. We've read the pleadings, the skeleton arguments, the CMA decision, the twin-track proposal, the witness statements. We've read items 1 to 11 of your suggested reading list. I have

read all 14 but I don't think the other two have necessarily been through 12 to 14 yet. We have not been through the authorities. I certainly have not been through all the academic literature that's been provided but you'll obviously have to highlight what I need to focus on.

We've got two days. Have you got an agreed allocation of time between the three teams?

MR BEAL: Yes, I have indicated to Mr Lask that I will endeavour to be sat down by 3.45 or 4.00 pm this afternoon, all being well.

THE CHAIR: Yes.

MR BEAL: I am grateful for the indication on the pre-reading because I can therefore be quicker. The anticipation then is that at some point mid-afternoon tomorrow Mr O'Donoghue is given his half an hour that I understand he was asking for and then my reply. If I do go slightly over today then I will take the time out of my reply tomorrow.

THE CHAIR: Yes, I think we've got plenty of time. But we'll always see where we are at the end of the day and if we need to start early tomorrow we'll start early tomorrow if everyone can make it.

MR BEAL: Yes.

THE CHAIR: We'll certainly finish at the --

MR BEAL: On economic literature, I am proposing to give what I would describe as edited highlights to the Tribunal rather than going through all of it in depth.

THE CHAIR: No, that's ideal.

MR BEAL: To the extent --

THE CHAIR: I have not finished yet.

MR BEAL: I am sorry.

THE CHAIR: As regards the ruling on Pepper 1, we'll need to have redacted versions for the bundle of that statement, so if that can be done by the end of today. The

chronology I looked at went through all those items, that was very helpful, the way you've done it, so you get a tick for that.

The skeleton argument on behalf of the applicant at paragraph 5.2 says that there are certain matters which are largely between TMG and Dye, that we don't need to make any ruling. I just need to make sure that everyone agrees that's right.

MR LASK: Yes, subject to any (several inaudible words), that is agreed.

THE CHAIR: That's fine.

Yes, Mr Beal, you can start now, sorry.

MR BEAL: I am very grateful, sir, for that summary of where we are. I should just deal with confidential material. I am proposing, rather than to clear the court, to invite the Tribunal to read anything that may need to be referred to as confidential.

THE CHAIR: Yes.

MR BEAL: We say that the twin-track proposal has a number of key advantages. It helps to introduce a greater degree of competition into a bidding process for the sale of TMG. It represents an alternative to the sale of that business in what would otherwise be constrained or forced circumstances. It enables the true economic value of the company to be realised by the existing shareholders rather than a constrained sale that will then be reflected in reduced value for the existing shareholders if a forced sale takes place on terms that are reflective of a forced sale.

So all other things being equal it's a good thing.

The nuance, we say, of the CMA's case has, with respect, shifted from its provisional decision through its final decision to the defence and finally to its skeleton argument but I am not proposing to complain about that unduly; my submissions will be focused on the areas where, with respect, we say the CMA's final decision has been vitiated by one or more errors of law. Now, one of the key underlying issues, in our submission, is whether or not there is a substantial and therefore real risk of common

institutional shareholders posing a risk to the competitive independence of TMG as a spun-out company. If a risk is purely theoretical rather than substantiated or real then our submission is that that doesn't take it into the arena of being something that can be a relevant consideration, and of course one needs only to think of the classic example of a public listed company that has a small level of minority shareholding by a large number of pension funds or common institutional shareholders for the implications of the CMA's approach to have very significant repercussions for competition policy in this country. That's a fact that has been recognised in legal and academic and economic literature, predominantly in the United States where this issue through the Azar paper has largely taken place.

We note that there is no suggestion from the CMA that the blind trust arrangements that we have put in place, or are seeking to put in place, will not be effective. So there is no question in this case of my clients, D&D, retaining any control over TMG as a spun-off business through Spinco in due course.

THE CHAIR: Just remind me, what's the percentage of institutional shareholders?

MR BEAL: Well, if one looks at the common shareholding list.

THE CHAIR: That list, yes.

MR BEAL: The easiest place perhaps to do that is in bundle A, tab 3.

THE CHAIR: Yes.

MR BEAL: The last page, page 101. This is the latest update we have. Company listed at the top. I am not going to refer to any of their names but the Tribunal can clearly see the percentage of shares.

THE CHAIR: What page was it again?

MR BEAL: Page 101 the very last document in that tab.

THE CHAIR: Yes, so what does that add up to?

MR BEAL: I'm afraid I have not done the individual maths.

THE CHAIR: Tell me at the break, that's fine. I just want to know the percentage of institutional shareholders.

MR BEAL: I think there's some evidence from that --

THE CHAIR: I think there is somewhere. I just want to have the figure.

MR BEAL: -- in our application. I think if you split -- the difference is whether you exclude shareholder number 1 and if you do that it takes the percentage up to quite high. Obviously it's lower if you don't exclude shareholder number 1.

THE CHAIR: Give me the figures later.

MR BEAL: I'll give you the figures later.

So the position, we say, is that there is no substantiated basis for treating the existence of common institutional shareholders as giving rise to a real, as opposed to a theoretical, risk and that therefore the fact that that factor has been taken into account has led to a Wednesbury unreasonable decision. It also means that the failure to permit a less intrusive divestiture is disproportionate.

Now, for various reasons the CMA seeks to invert our grounds two and three. I am simply proposing to go through our grounds in order. How they address the Tribunal in due course is, with respect, a matter for them.

We do however invite, without wishing to introduce more heat than light, the Tribunal to take some care, if we may respectfully suggest doing so, with any suggestion that we've accepted something, that something is common ground, that something is not challenged, as those phrases are liberally used in the CMA's skeleton, because, with the greatest of respect, they are for the most part not accurate and I will go on to deal with why they are not accurate in due course.

THE CHAIR: I just note that you don't accept -- when they say something is common ground; unless you say it is, I will assume that it isn't.

MR BEAL: I would be very grateful if that were the approach taken.

Can I then come on please to the legislative background and could we pick it up please in bundle of authorities one, tab 21, starting at page 598.

Bundle authorities one, tab 21, page 598. This is the provision which enables the final undertakings to be given to the CMA in lieu of a final order under section 84 but also permits those undertakings to be varied. So one sees in subsection (2) that an undertaking shall come into force when accepted and may be varied or superseded by another undertaking or may be released. Now, we are not seeking the release of the undertaking nor are we contesting the need for divestment of the business. We are simply seeking to ensure that that divestment can take place through the spin-off procedure either because it already falls within the terms of the undertaking properly construed or because a very modest variation to the extent that it's necessary could be tolerated.

We then see in subsection (5) of section 82 that the CMA shall as reasonably practicable consider any representations received by it in relation to varying or releasing an undertaking under this section.

So this statutory power under subsection (2) permits a variation where one is requested. In contradistinction, if one then turns to section 92, we see that the CMA has a power of its own upon review or monitoring of the position to consider of its own volition whether or not something should be varied and we see under subsection 92(2) that the CMA shall in particular from time to time consider, subsection (b), whether by reason of any change of circumstances an enforcement undertaking is no longer appropriate; and sub (ii), it needs to be varied or to be superseded by a new enforcement undertaking.

Now, that is something that we see from section 92(4) on page 605, that it shall take such action as it considers appropriate in relation to any possible variation as and when effectively it arises.

So that is a power that the CMA may exercise of its own volition. Which obviously will only arise when the circumstances have changed because otherwise the CMA is going back on a public law position that it has made to accept an undertaking in the terms that it has.

We don't see the parallel requirement for a change of circumstances under section 82(2), page 598, but self-evidently we accept that if nothing has changed then there won't be a very good basis for asking for a request to the variation of the undertaking. So it's a practical matter but as a legal matter the power under section 82(2) is unconstrained by that requirement.

Finally, for my very brief tour d'horizon of the statutory provisions, if one turns please to page 608, one sees in section 120 the basis for the application that's been made in this case. I shan't belabour the provisions, they are very familiar to this Tribunal, but essentially it's an application for review and it takes place on standard judicial review principles and I will show the Tribunal in a moment the classic summary of the principles that was developed in the first instance by Mr Justice Sales and has been approved since.

Could I then please turn to the factual background. In light of the indication from the Tribunal that the witness statements of Mr Proud have been read, I can take this very lightly indeed. Mr Proud's witness statement is in bundle C1, tab 2, starting at page 21.

You will see at page 23, paragraphs 2.7 onwards he essentially establishes by way of a chronology the acquisition of TMG for a sum of money, the initial enforcement order that was made by the CMA in August 2021, through to provisional findings, hearings to deal with those provisional findings and/or remedies. Then over the page, after having gone through the nature and extent to which remedies were considered at that hearing, then on to the final decision and the final undertakings. Then finally some

evidence in 2.18 as to how the UK property market has taken a downturn since September/October 2022 which led to having a negative impact on the attractiveness of the business that was to be divested.

We then see a description of the sales process given at paragraphs 3.1 to 3.8. If I could simply invite the Tribunal to cast an eye over those paragraphs that have already been pre-read I would be very grateful. **(Pause)**.

THE CHAIR: In paragraph 3.6 you say "or a holding company of TMG to AIM" at the last line but was that ... when did ...

MR BEAL: I am going to go through the --

THE CHAIR: You are going to go through that. What I need to have is a better idea of the evolution because you have the twin-track proposal and that doesn't refer to any sort of Spinco idea. Then you get your sort of reply to the provisional decision on 13 March 2023, when you added this in as a sort of alternative, and that I need to understand when -- do you accept is that the first time you raised that as a possibility with the CMA in this process?

MR BEAL: There is a chronology.

THE CHAIR: Yes.

MR BEAL: And there is a point at which it's made more explicit --

THE CHAIR: Yes.

MR BEAL: -- that a route is to enable Spinco to be a new company to which the TMG shares are transferred.

THE CHAIR: You don't get that at all from the twin-track proposal, do you?

MR BEAL: It's referred to actually in some of the spreadsheet material but I agree it's not there with shining lights around it.

Does it make any difference is also a key consideration.

THE CHAIR: We discussed this at the CMC and on one view it's totally irrelevant

whether you have a Spinco in between, but then on another view you could say well, it's sort of relevant for ground one in the concept of it being a purchaser which you say should have been approved but then the CMA come back and they say well look it's common ground that you have to look at the whole process and what comes out at the end is that you are going to have the same shareholders ultimately even though you've got the Spinco in between.

So I know what the arguments are, I just want to understand what the chronology is. I certainly haven't picked up the point on the spreadsheets.

MR BEAL: There is a spreadsheet which goes through the steps and it refers to a New Co.

THE CHAIR: No, I must have missed that.

MR BEAL: It's quite small.

THE CHAIR: Yes.

MR BEAL: So that in a nutshell is the sales process and that is the evidence on the sales process.

THE CHAIR: Yes.

MR BEAL: I would now propose very briefly to touch on some of the underlying material to make essentially the following point: that this business has been held separate from Dye & Durham since August 2021 through a combination of the initial enforcement order and then through the final report indicating that that hold separate obligation should be maintained as it has been in the undertakings accepted by the CMA or indeed should it need be in an order, a section 84 order.

So turning please first to the initial enforcement order, that's behind tab 12 of this bundle. So bundle C1, tab 12, starting at page 107. Then at page 108, one sees paragraph 5 in terms saying:

"D&D UK and TMG shall at all times during the specified period except with the prior

written consent of the CMA carry on the business effectively separately ensuring that the business is maintained as a going concern with sufficient resources being made available for the development of the business ..."

It's essentially a business as usual order. D&D --

MR LOMAS: It's in very much standard form.

MR BEAL: It's replicated in pretty much every merger jurisdiction in the developed western world that deals with anti-trust. So the hold separate obligation is a pretty common obligation. We then see, for your note, in the final report at page 608 in this bundle at paragraph 10.124, behind tab 18, recognition from the CMA at 10.124 that TMG has been effectively held separate, and operated independently, from D&D since 27 August 2021. That TMG (see next paragraph) has retained its pre-merger core management team. TMG is a profitable standalone business and TMG funds its operations from, and then there is some evidence that's been excised.

Next please if we turn to page 615 starting at the bottom, paragraph 10.162: the final report concluded that the IEO should remain in place until acceptance of final undertakings or the imposition of an order and then its provisions will be included in the relevant document. The IEO acts to mitigate tacit risk and remains valid up until the remedy has been fully implemented.

We then see some observation on the divestiture process at top of page 616. No reason to depart from the conclusion that divestiture would be the best remedy. We don't in any way seek to go behind that. We recognise the business must become an independent business competing once again in the market; the question is how can that be achieved in the least intrusive manner.

Turning then please in the factual background to the --

THE CHAIR: In the final report there's obviously various bits where there have been redactions, are you provided with the full version, with the unredacted version?

MR BEAL: I don't think we were because of the hold separate obligations.

THE CHAIR: Yes, I understand that your client wouldn't have been but there's some sort of confidentiality ring that's been --

MR BEAL: I have not got a copy of it.

THE CHAIR: Nothing, that's fine.

MR LOMAS: Can I just, the question is how can this be achieved in the least intrusive manner. Is that really the question? Or from the CMA's point of view: how can it be achieved in a way that best protects competition in the market? Are you going to unpack that distinction at some stage?

MR BEAL: I accept for the sake of argument that if we have proposed a remedy that would still leave a real as opposed to a theoretical risk to the competition objective of the divestiture remedy not being achieved, then we will fail.

MR LOMAS: Thank you.

MR BEAL: Could I then please go to the background, to the development of the proposal and then look at the proposal and then look at the response to the provisional decision.

So if we could pick it up please in bundle C2, tab 22.

DR BISHOP: Sorry which tab.

MR BEAL: 22, page 734 it starts at. This is an email from the CMA to Raymond James, who were assisting with the divestment sales procedure, and then also some CMA colleagues who were also assisting in that.

We see, under the second paragraph, in the substance of that email it says:

"As I stated in our call on 18 January 2023, until the CIM [which is the investment memo] has gone out to prospective purchasers and there is a better idea of timetable to completion the group is not minded to grant an extension. Once the memo has gone out the group will consider an extension. It is important that any request for an

extension needs to be realistic and achievable."

So what had happened here, for reasons I am not going to dwell on because they are not relevant, was that there had been some issues with getting the investment memorandum out but the extension was not going to be granted at this stage.

Turning over the page at 735, this is the first reference we've been able to find in writing to the AIM listing option being considered. The underlying evidence seems to be that the monitoring trustee had mentioned it previously to the CMA and therefore it was on the CMA's radar at the end of January but this is the first written reference to it.

There's then a response from CMS on behalf of my clients which one sees at page 737, behind tab 23. It's dealt with specifically in a paragraph that I would invite the Tribunal now briefly to read, with your permission, headed IPO. **(Pause)**. I am sorry, I misdescribed this because I was thinking ahead to a responsive point. This is actually a follow-up from CMS, a response from CMS, the response comes in a moment on the same date.

MR LOMAS: It seems to me that there were two separate issues here. One was a confusion as to whether you were proposing an IPO and whether this deal met the requirements of an IPO, which seems to be one side, and then a separate debate about if it's not an IPO, nevertheless what's the structure and does it meet the requirements. Is that right and if so is the IPO question actually very material or is it a separate confusion?

MR BEAL: No, the IPO issue I am afraid is a red herring because we were never suggesting it. The reason for never suggesting it, as this Tribunal will know, is it's quite long and involved and it's not very easy to achieve in the time, whereas a spin-off procedure is much easier. The AIM listing, it was envisaged that the AIM listing could be conducted within the same period of time as the divestment procedure.

The properly described response from CMS in the form of Mr Young as their partner can be seen at page 739, tab 24. Again, to save your ears and my voice, could I please invite you to read from the top of 739 down to D&D's supply contracts. **(Pause)**.

Again, just to be clear, if I may, there is no explicit suggestion in that email of the use of Spinco as a transfer of TMG shares to Spinco, it's being dealt with on what I might describe as a classic M&A basis where they cut to the chase of what's going on and essentially it's talking about a corporate reorganisation with shares being transferred effectively so that TMG shares are now owned by shareholders but the shareholders own directly in TMG and TMG shares are then directly listed on AIM.

That is undoubtedly what was being envisaged. There's no reference in that email to Spinco as a separate aspect of it.

Albeit it seems --

MR LOMAS: It implies it will be the shares transferred directly without the interposing of a holding company. That's the implication of reading that. It may be shorthand but that's the implication of it.

MR BEAL: I fully accept that, sir. The difficulty is that in order to get the scheme of arrangement that you need from the Ontario court for D&D shares to go through that process, it does require an interstitial stage of them being transferred to somebody else, as one sees in the deed of arrangement in due course that I will come to.

We then move on please to the final proposal. I can take this relatively lightly since the Tribunal has kindly indicated that it has been read in advance. So the idea, paragraph 2.1, page 741, was that the AIM admission would proceed in parallel with continued efforts to sell the business, see top of page 741, paragraph 2.1. There's confirmation in paragraph 2.2 that the TMG senior management had expressed an interest in progressing the AIM admission in parallel and the submission was made

that it would satisfy the objectives of the remedy set out in the final report, namely achieve divestment of TMG but also at the same time provide an additional competitive dimension to the sales process. It could be run as an option without adversely affecting the timetable or potentially achieving a successful sales process.

3.1 confirms that the timetable set out in annex 1 would align with the sales process. That timetable is at page 748. I'm afraid this is where the spreadsheet is found and the writing on the left-hand side in column one is very small.

THE CHAIR: Yes, I can't read that.

MR BEAL: We could endeavour to, I hope, provide an A3 version of --

THE CHAIR: That's fine, yes, just give me something I can read, that's fine.

MR BEAL: Yes. For your note at this stage, the last three bold headings, which can I think be distinguished, deal with Canadian requirements, marketing and then admission.

THE CHAIR: Let's look at it when you've got a big copy. We'll look at it this afternoon.

MR LOMAS: Can I just check, Mr Beal, is this where you say there is a reference to Spinco?

MR BEAL: Yes, under admission there's:

"ISIN requested ...(Reading to the words)... admission document drafting, verification of admission document pathfinder published, re-register new Holdco as PLC, distribution in specie to new Holdco PLC, private PLC shareholding calculations ...(Reading to the words)... notifications [and so on], admission."

So the anticipation was that a new company, a new PLC, would be listed.

MR LOMAS: But if you read paragraph 3.2 of that at the top of page 7.42, it does on a first reading give a slightly different interpretation because it does talk about the shareholders "directly owning ...(Reading to the words)... of TMG".

MR BEAL: Yes.

MR LOMAS: So one could be forgiven for reading it that way.

MR BEAL: I accept that the point is latent rather than explicit. It's no part of my case that it was explicitly catered for. With respect, the reason why I think it wasn't explicitly dealt with is because the M&A team were focusing very much on the end result and not necessarily jumping through all of the hoops of the capital reorganisation that was needed in the Ontario Superior Court of Justice.

So they were focusing, at the top of page 742, on what D&D and TMG were going to have to do to enter into an arrangement to get the approval of D&D shareholders to enable effectively the distribution of the TMG votes in specie to the existing shareholders and those shares would then be held admittedly through a reorganisation with New Co if you read the fine print but they were focusing on the end result, which is that these shares end up de facto in the hands of the existing D&D shareholders but separate.

The key point that I think my clients wish to emphasise at that stage was that D&D itself would no longer hold any shares of TMG and TMG would be fully owned by the public shareholders who are institutional and other retail shareholders.

So that was their concern. Why would D&D no longer hold any shares? Well, any associated shares, then estimated to be in the order of the percentage figure you see halfway down 3.4, would be held in a blind trust arrangement and the blind trust would make sure that the exercise of any voting rights were independent of D&D and D&D therefore had no influence or control over the separate entity which would now be TMG with a separate management structure, as it has always had.

Stage two was then the AIM admission and details are there set out including the use of finnCap as a nominated adviser. 3.7, page 743, deals with the disposal of those blind trust shares in an orderly fashion over the period identified there and the point that that was designed to secure was an orderly disposal of shareholdings into what

would then be a listed market.

In paragraphs 4.13 to 4.15, which is at page 746, there are a series of submissions as to why any purchaser approval criteria in annex 3 would be met. They highlight, including in 4.13, the last few sentences there, the fact that the advantage of the proposal is that it permits a competitive re-entry to the market for TMG and spares the sales process from what are currently somewhat unfavourable market conditions for a simple sale to a third party. In short, the twin-track approach generates only upside benefits.

Protects shareholder value, 4.14. And we then see in 4.15 detailed evidence about the downturn in the property market, the short-term downturn in the property market which had persisted and which had made a simple divestment through an outright sale to a third party more challenging.

It's then said at 4.16 that we did not consider, and this remains our primary case, that a change to the final undertakings would be needed to achieve this but to the extent that the CMA took a different view D&D would be happy to request and discuss any such variation.

Now, that was accompanied by a letter at page 751, which was unsigned, which represented an expression of support for the proposal from TMG's management. There is something of a side issue which I am not proposing to open in any depth as to the signature of that letter or lack of signature of that letter but for your note if one -- well, in fact we should turn it up just for the sake of good order. In bundle F, tab 7, page 45, that is the final signed letter from TMG expressing support for the proposal.

THE CHAIR: Shall we just work from this version, it's corrected very quickly and CMA weren't going to rely on that one.

MR BEAL: That takes an awful lot of heat out of the situation.

THE CHAIR: Yes.

MR BEAL: Now, following a series of CMA queries, CMS sent a further letter on 2 March 2023. That's in bundle C, tab 27, page 758. Now, what we don't have I think is the underlying email sent by the CMA but the questions are replicated within the body of the letter at page 758. The question was asked: has D&D or its financial advisers spoken to shareholders to discuss the AIM admission? The answer was: D&D was constrained from being able to have selective discussions with its shareholders so it was proposing to do so only in due course.

We then see over the page, page 759, some information that was given about AIM and a view was expressed as to the appetite for shareholders to invest through the AIM listing. We then see at the bottom of page 759 the proposal paper sets out how the sales process and the AIM admission process would be run in parallel and:

"D&D would be happy to explain the detail of this to you in the remedies group. There will obviously be a point at which one route will be executed and completed in preference to the other in order to satisfy the final undertakings but D&D sees no practical reason why they cannot take place towards the very end of the twin-track process."

The reason for that was to maintain the competitive dynamic.

There was a list of shareholders that was also provided at page 764. You will see that a large number of those or a number of those are recognisable institutional investors and their shareholding percentages are indicated and, as I have indicated, we will get the maths. My learned junior is holding something up for me now. The shareholder information is set out in our skeleton at paragraph 32. Thank you very much.

So that's bundle I, tab 1, page 11. I think the relevant figures are at the top of page 12.

THE CHAIR: Yes.

MR BEAL: That gives you the underlying headline both for a number of independent

institutional shareholders and their combined percentage holding.

There then followed a supplemental submission starting at page 766 in bundle C2, behind tab 28. This document in section 2 really sets out some detail behind the proposition that the sales process had not been as satisfactory as had been initially hoped. I don't know if this is a document that the Tribunal has had a chance to read but if you'd be very kind to read please 2.1 through to 2.6 and then I will pick up with some further short submissions in relation to 2.7.

THE CHAIR: Wait a second, page?

MR BEAL: 766. Please would you read 2.1 to 2.6.

THE CHAIR: Okay.

MR BEAL: Thank you. **(Pause**). Then there were some reservations expressed about people who were potentially moving through to round two. That can be seen at 2.7. Then at page 769, paragraph 2.9, D&D said it had no objection in principle to receiving deferred or contingent consideration providing that could be agreed on terms acceptable to D&D and which secured the necessary independence and incentive to compete.

That was the position, therefore, as it stood immediately prior to the provisional decision. That provisional decision was communicated to my clients by email dated 8 March 2023. The Tribunal will have seen that provisional decision. So again I can deal with it lightly. In bundle D, tab 3, page 22.

In paragraph 1 we see a provisional view being expressed that the remedies group would not have sufficient confidence that the divested business would be owned by a purchaser that meets the purchaser approval criteria. It was not clear at that stage whether or not that's a sort of technical objection to there being no specific purchaser or whether it's said no, you aren't sufficiently independent as TMG with shareholdings being held by the same group of shareholders. But the concern seems to have been

more focused on commonality of shareholdings, see paragraph 2, and to the fact that there would be 100 per cent common shareholding with D&D at that stage albeit with 16 per cent in a blind trust arrangement.

It's then said at the bottom of paragraph 2 that in this case there is a risk that the shareholders holding stakes in both companies might have both the ability and an economic incentive to favour D&D over TMG or to seek to reduce competition between the companies. It would be very difficult for the CMA to assess the ability and incentive of institutional shareholders to be confident that they would meet the criterion of independence.

So that seems to be a suggestion that the mere commonality of shareholding between institutional investors would give rise to a threat to the independence of the divested group business.

Then in paragraph 3 a further expression of concern was related to the fact that if listed on AIM there wouldn't be any restraint on who could buy the shares.

(Paragraph 4) then said that this gives rise to a competition risk, essentially that it was too constrained or not appropriately configured to attract a suitable purchaser. It's then said in paragraph 5 that there would be a purchaser risk. That's not explained in any level of detail beyond a competition concern seemingly as a result of commonality of ownership but it was also worried that an unsuitable purchaser would lead to a position where the TMG business was degraded with the result that the remedy would be ineffective. That was said at paragraph 6 to give rise to significant risks and therefore the divestment remedy was not an effective remedy.

Paragraph 7, the provisional view was that the cost to the merging parties themselves was not a relevant factor to take into account.

That essentially is where things land on the provisional decision. That prompted a response from my client seeking to clarify quite a few things. That response is at

tab 29 of bundle C. So C2, tab 29, it starts at page 771. The point is made in paragraph 1.3 that if the concern was that the proposal ultimately for AIM admission was not within the scope of the existing undertakings as they stood then it was appropriate to consider whether or not a variation should be made.

1.6 then has in essence the meat of the complaint about the provisional decision. Please could I invite the Tribunal to read all of paragraph 1.6. **(Pause)**.

THE CHAIR: Where in the bundle is the paragraph 5.21 related guidance if I can just put the cross-reference there?

MR BEAL: The mergers remedies guidance is in the back of bundle 1 of the bundle of authorities.

THE CHAIR: Yes, okay.

MR BEAL: Tab 24.

THE CHAIR: Tab 24, that's fine.

MR BEAL: Bundle of authorities tab 24 and in particular I think section 5.21 is page 755.

THE CHAIR: Okay. Thank you.

MR BEAL: I will refer to that later.

THE CHAIR: Yes, of course.

MR BEAL: So just to pick up, if I may, some key points. Firstly, in 1.6(b) there is an express reference to the process requiring the creation or allotment of shares in a newly formed PLC which would own TMG and whose shares would be listed on AIM thereby securing a disposal of TMG ...(Reading to the words)... independent entity."

That response naturally dealt with any concern about there being no dedicated purchaser that was capable of being treated as a third party purchaser. Obviously if you have a new company that is a separate legal entity, that can sensibly be construed as a third party purchaser of the shares. The question then is whether or not that third

party entity is sufficiently independent under the purchaser approval criteria.

That reference is reinforced by the statutory citation in subparagraph (d) of the relevant terms of paragraphs 13.1 and 13.3 of schedule 8 to the Enterprise Act because they say, in terms, you can in fact as a remedy do things which involve both the creation of a company and the allotment of its shares to effect the division of a business.

We then see in 1.6(f) the point about well, if this restriction on institutional shareholders applies, then it has very real impact on a large number of PLCs being potential purchasers in divestment cases. And then at 1.6(g) we see a challenge to the suggestion that there would be any particular concern about common significant shareholding or why it would be a concern here.

In a nutshell what we see in 1.6(g) is a theme that I will pick up later, which is: it's one thing to recognise that if you have a merging entity that is being divested from a competitive firm and that competitive firm retains a shareholding in the divested entity, that's what I will call cross-shareholding, that's one thing; it's another thing to roll out the rationale that that's not a good idea from a perspective of independence, to roll that out to pure common institutional shareholdings by non-competitors who are simply investors in an open market and have a common share of institutional investments in a wide variety of firms.

THE CHAIR: Let's say that there are four companies in the market, each have 25 per cent shares and that you call them A, B, C and D, and A and B have exactly the same shareholders but you may have a different board in A and B. Is there a risk that the board will think: well, look, we've got common shareholders with B and you are the board of A, when we go out and look for increased sales, ie try and get a bit more market share, let's be looking at C and D, let's try and take the share away from C and D rather than from B where we have common shareholders, isn't that a risk or not?

MR BEAL: No.

THE CHAIR: Why not?

MR BEAL: It's not a risk for a variety of reasons. One is that the fundamental premise that common shareholding can constrain the activities of management requires a mechanism by which it would be effected and in fact the fiduciary duties, for example on management of company B in that situation, would be the same as the fiduciary duties on company A, which is to maximise profits for that company.

Indeed, the compensation package that will be agreed typically in a commercial market for companies in that position will be entirely related to the performance of company A or company B and not dependent on the performance of an unrelated company, i.e. company A or B, depending who you are looking at. So you then have --

THE CHAIR: You are not necessarily in breach of any duty. You are just, let's say you are the managing director of A and you are saying: well, look, we want to take a bigger share of the market. I've got the same shareholders as company B. What I am going to pinpoint, I've got a choice whether I go for market share from B, C and D. I am going to go for C or D because it's not going to affect my shareholders at all. I am not saying that there is anything wrong with that, I am not saying there is anything right with it, I am just saying: is that not just a risk, that's what I am asking you?

MR BEAL: No, because typically the most effective form of competition will be price competition, for the sake of argument. The decision to, for example, improve your pricing offer to the market will be applied to the market regardless of where those customers are coming from. So if you are underpricing company C and D, you are equally underpricing company A if you are company B.

THE CHAIR: It depends whether you are talking about split markets. Let's say you've got a market where there's four towns where there's a particular market. You may say: well, look, I am going try and go for that town, take the market away from there -

which is where D operates - rather than try and expand let's say town B, which is where B operates. I am just trying to test it because the CMA have taken this view that there are concerns and we need to see whether or not there is anything to it.

You say no, there's nothing to it.

MR BEAL: No.

THE CHAIR: It's not even arguable. They seem to say: well, we do have concerns and it is arguable and as a regulator we can take consideration of what's out there, different theories and as long as we are not acting with no evidence at all, we can go for whichever route that we want.

MR BEAL: The evidence that's relied upon consists exclusively in the Dow/DuPont Commission decision and to some footnoted references in that Commission decision to some economic literature. That economic literature purports to find an empirical basis for models on price through an impact through regression analysis of common institutional shareholding. That regression analysis has been widely criticised and indeed we say debunked in subsequent academic literature, none of which the CMA seemingly has taken into account.

Simply as a thought experiment, why would company B, i.e. TMG in its divested state, through its management think to itself: well, it's a really good idea if we put the foot on the brake because that will help out D&D? That's essentially what the CMA's argument is. They are concerned TMG's independent management in the spun-off company will essentially say to itself: well, we shouldn't try too hard to compete here because of course D&D will benefit if we don't try too hard to compete because D&D will then be in a competitively superior position and that's what the common institutional shareholders would want.

But a number of practical reasons why that shouldn't happen and I will go through them later, one of which, and a significant one, is that those directors would then be in

breach of their duties to that company to maximise the best interests of the companies and to pursue with reasonable care and skill the pursuit of the business and they won't be maximising the value of the entirety of the shareholding.

DR BISHOP: But are you saying, Mr Beal, that the management of TMG would be unaware that their bigger shareholders are the same shareholders as D&D?

MR BEAL: They may or may not be aware. I don't know to what extent they would be bothered as to whether or not they had common institutional shareholders. From their perspective they would simply think: I need to go out there and maximise my business profits. That would be objective because that would then feed in to the performance-related pay that typically senior management get.

DR BISHOP: Well, the performance-related pay is not laid down in any statute, it's something contractual that the company has with its senior managers. Is there any reason why the incentives couldn't be incentives to take share away from C and D rather than B?

MR BEAL: In a price competitive market, with the greatest of respect, I just don't see how that could be done because if you lower your prices that equally impacts --

DR BISHOP: That's fine where the law of one price applies but does that really apply here? These are services to large property companies, big solicitor firms, outfits like that. There's an element of service as well as the software and other things.

You know, it's a bit more like people bidding on, two or three accounting firms bidding on who is going to be your auditor. You choose whether to be very price competitive to lowball, as it's sometimes said, for some but not for others.

MR BEAL: But the big four accountancy auditors may well have institutional investors themselves. I don't know enough about the particular market structure of those companies. Imagine for the sake of argument that each of them had gone down the route that some solicitors firms had taken and gone out to the market, one can readily

imagine that they would have common institutional shareholders.

DR BISHOP: Right, but we're now talking about not only common institutional shareholders but very highly overlapping institutional shareholders, at least at the beginning.

MR BEAL: Just as a matter of a thought experiment, the statutory piece that you have referred to, sir, is obviously catered for by the strict fiduciary obligations that are imposed under the Companies Act 2006 on directors and senior officials of companies but just from a thought experiment process imagine that a common institutional shareholder tapped a spun-off TMG Spinco on the shoulder and said: look, go easy because we want to make sure that we are maximising profits between TMG and D&D in this post spin-off world, how would that actually be effective because whatever they did to soft pedal the competitive rivalry between TMG or Spinco and D&D couldn't guarantee that customers who would therefore not necessarily come to them because they were maintaining a higher price same quality approach to delivery of the services, they couldn't guarantee that those customers would come to them. When we come to look at the switching material in the final Report, that final Report makes very clear that one of the other competitors in this particular market, ATI, was very effective at sweeping up churn from customers who were leaving either D&D or TMG and going elsewhere and it's ATI who was making inroads in this market and significantly developing its business over time.

Therefore it wouldn't be economically rational for the board at TMG to think that they could take their foot off the gas in terms of competitive rivalry and all of their customers would thereby migrate to the more profitable D&D. So you couldn't ex-ante have a sensible commercial strategy that would guarantee that those customers would come to you.

So that is the thought experiment answer. There's also the simple fact that, with the

greatest of respect, there's simply no empirical evidence before the CMA to justify this point and nor is it a point that's been taken in the final decision. The focus in the final decision is simply a concern that somehow common institutional shareholders will put pressure on the Spinco to compete less effectively than it otherwise would do so as not to damage the combined profits of both D&D and Spinco.

DR BISHOP: Would you expect a lot of empirical research to be available some months into the divestiture period?

MR BEAL: If the CMA is proposing to rely upon a non-theoretical risk of something and they purport to identify evidence that they say backs it up, I would expect the evidence to back that up. If on proper analysis the evidence doesn't back up because actually it's been debunked and the statistics that were used to -- sorry, the process that was used to derive the regression analysis is flawed, then we are in a position where there is no substantiated risk of that coming to pass.

When one has the background legal framework that constrains directors and management from acting in the very way that is being suggested, we say you would need pretty clear empirical evidence to say: well, hold on, why would these directors breach their fiduciary duties and act in this way? This is a dialogue that's been held in the United States over the last five years and the conclusion has been very much to swing towards this why on earth would you do that, it doesn't make any sense either economically or as a matter of legal --

THE CHAIR: I still don't understand why it's necessarily a breach of fiduciary duty if you are a managing director of A saying: well, look, we have a sales team, we want to go out, get some more business, let's go out and try and get the customers from C or D and don't direct them to take away B, because it's not only a question of price when you are talking about a product like this. I don't necessarily see that's a breach of fiduciary duty.

MR BEAL: Well, it would be if the motivation for it was consciously to prefer the interests of another company.

THE CHAIR: You are not preferring the interests of another company, what you are saying is: we have a limited sales force, we can go out try and get some market share, let's say realistically we've got enough capacity to take another 5 per cent, another 10 per cent. Let's go and take that 5 or 10 per cent from D and C, sales team you go out and try and meet their solicitors, try and target them. Don't target necessarily the same solicitors that B are using, take B's product. I don't see that necessarily being something that is harming a business. I don't necessarily see it's a breach of fiduciary duty.

MR BEAL: Well, sir, I will come on, if I may --

THE CHAIR: Yes, we can come back to this later.

MR BEAL: I appreciate you were trying to get to the point and tease out the key point in some ways. All I would say at this stage, if I may, is there are a series of arguments as to why a theoretical risk does need to be established and therefore for there to be a real risk rather than a purely theoretical one. We say there is no justification for relying upon what is said to be relied upon by way of empirical evidence and the reason that it's now being deployed by this Tribunal is not reasoning that finds explicit echo in the CMA decision.

THE CHAIR: What we say is that there is a theoretical risk which I think you accept is a theoretical risk but you say it's not a real risk. Is that right?

MR BEAL: Well, the literature suggests that there could be a situation in which common institutional shareholders in, for example, a two-firm market would have an incentive to prefer the combined profits of both entities over preferring the profits of one being achieved at the expense of the profits/losses of the other. So as a thought experiment that would work.

THE CHAIR: That's why you are saying it's a theoretical risk not a real risk.

MR BEAL: The reason it's not a real risk, with the greatest of respect, is it doesn't hold up in a competitive four-firm market where firms C and D don't have the common institutional shareholders and where they will be competing on price and quality just on the simple market proposition. So if firms A and B regardless of their common shareholding want to keep their business from C and D, they need to make sure they offer price and quality terms that are at least parallel with C and D otherwise they will find their customers are walking out the door.

DR BISHOP: These are somewhat differentiated markets, aren't they? The offerings of each company, the salesman goes along and says: my service is better than the other guy, in some sense.

MR BEAL: They are competing on both price and quality, I accept that. But if you would be kind enough to turn in bundle C1 to tab 18 I will pick up on the switching point now.

DR BISHOP: C1.

MR BEAL: C1, tab 18. It's the final report.

THE CHAIR: I know we are pulling you away from your natural order but **(overspeaking)**.

MR BEAL: (Overspeaking) I am happy to respond to the Tribunal's questions when they arise. The market analysis begins at page 503. The Tribunal will there see a series of market shares for D&D, TMG, ATI and Landmark.

Then if we turn please to 504, the concern was that the merger combined two of the four main suppliers and would create the largest supplier. We see that the allegation is the market is highly concentrated, top of page 505.

Then at page 522 the CMA conducts its conventional switching analysis. If I could invite you please to read paragraphs 7.79 through to 7.82, you'll see that the evidence

is there set out as to who would stand to gain most if, for example, either TMG or D&D let their guard down and started underperforming on price or quality.

(Pause).

DR BISHOP: How far do you want us to read?

MR BEAL: Just the paragraph I indicated, 7.82. So the submission I make is who benefits if, for example, TMG management thinks to themselves: well, we won't target Manchester because D&D has a heavy presence there? Answer: ATI.

Could I take it back please in C2 to tab 29 and to finish off some points I was making on the response. I started at 771. I think I got as far as 775, please. So we see some common themes really in 3.2. One is mechanism, how would D&D have the ability to favour D&D over TMG through its shareholders? Next one, subparagraph (b), why would the shareholders of D&D have an economic incentive to favour D&D over TMG?

THE CHAIR: Where are we now, sorry?

MR BEAL: 776 please, sir. Structural points about TMG being managed by a board of directors and so on.

Paragraph 3.5, we then pointed out that three of the four round two bidders were derived from private equity and were likely to have institutional shareholders of their own. Then in 3.6 we pointed out a certain degree of common institutional shareholding with one of the particular bidders.

At 4.5 and 4.7 the point is taken, which I have already made, that this would essentially preclude a large number of PLCs from ever being recognised as a suitable purchaser for a divested entity.

MR LOMAS: I think the point is not whether any common institutional shareholder is a problem, which would, you know, bring the asset managers and PLCs generally into the train, but whether it was a concern given this degree of overlap which on day 1 is 100 per cent and eroding over time.

MR BEAL: Yes.

MR LOMAS: I think are you being entirely fair if you are generalising it to any institutional overlap? We have to look at the particular circumstances of this divestiture.

MR BEAL: I accept that. Sir, the fact that there's 100 per cent identity of certain common institutional investors --

MR LOMAS: On day 1.

MR BEAL: -- on day 1, accounting for even say at X per cent of --

MR LOMAS: A significant per cent.

MR BEAL: Assume it becomes a majority percentage, once you have stripped out a blind trust arrangement, then that is obviously a factor that won't necessarily apply to the same extent with a PLC. But against that of course, unlike in Dow/DuPont, where there was very high commonality of institutional shareholding across the five key market players, that's what you don't have in this case. You don't have that commonality of shareholding as far as I know for the other two companies that we have been looking at who are likely to be the beneficiaries of any take the foot off the gas competitive strategy. So if, and I fully accept that one needs to look at the market as it stands, but if one looks at the market as it stands, it's therefore crucially important to realise that there are two other active players in the market, one of whom has been going gangbusters on the commercial side of things for the last four years and who is standing ready, willing and able to pick up any business if you let your guard down.

DR BISHOP: Can I ask what was the date of the Dow/DuPont decision?

MR BEAL: 2016 I think.

DR BISHOP: 2016, okay, thank you.

MR BEAL: Possibly early 2017.

DR BISHOP: Right, okay.

MR BEAL: But in answer to what I anticipate will be a subsequent question, the literature kicking back on the Azar empirical analysis largely postdates that date and so the Commission itself did not have the benefit of seeing the strong critique of the regression analysis that the authors of the Azar paper had in fact adopted.

THE CHAIR: Yes.

We will take a 10-minute break now.

(11.50 am)

(A short break)

(12.04 pm)

MR BEAL: Please could I hand up the A3 --

THE CHAIR: That's great, something I can read. Yes, thank you. Shall we just quickly do this first?

MR BEAL: Yes. It's the first column of the spreadsheet.

THE CHAIR: Yes.

MR BEAL: Bottom left-hand corner, under admission process there are a series of entries.

THE CHAIR: Yes.

MR BEAL: Which I hope the Tribunal can now read, one of which includes new Holdco being registered as a PLC and then shares in new Holdco being listed.

MR LOMAS: Just for clarification, the purchase that you say a purchaser is making for the purpose of the final undertakings is the distribution in specie to a new Holdco, is that when the purchase takes effect? Because that's when the ownership of the company transfers to Spinco.

MR BEAL: The purchase strictly speaking has evolved since this distribution in specie, so it is now a formal transfer, we'll come on to see from the planning arrangement. So this concept of distribution in specie is not --

MR LOMAS: Superseded.

MR BEAL: It's been superseded, so therefore I am simply pointing out that there was in fact a reference to a new Holdco but the scheme of arrangement that has been put in place is now very clear so I would rather not dilute that clarity.

As a result of the interchange with the bench shortly before the break for the transcribers, there was obviously a discussion as to a four-firm market, understandably, and looking in reality at the position of TMG as Spinco competing with TMG post divestment. I would just like to make, if I may, three particular points that will come out from economic literature that I will go through later but which it's worth bearing in mind at this stage.

Firstly, the common institutional shareholders won't necessarily have the same approach and there's no suggestion that they would collaborate between themselves as to what the commercially strategic approach would be. So, for example, institutional shareholder A would not necessarily have the same view as institutional shareholder B and indeed they would have different client interests that they themselves were representing either through their particular indices or their funds or within their own portfolio.

The second point is that those each of those common institutional shareholders -- so just on that first point, it therefore follows that whilst there may be a percentage figure that one can derive from what their combined interests are, it would, in our respectful submission, be erroneous to treat that as a block that will necessarily vote or act the same way.

The second point is that each of those common institutional shareholders would themselves potentially be investing in either upstream services or downstream services in terms of service providers or service recipients. So it's entirely conceivable, and indeed we'd given evidence of one such example, that a particular institutional

shareholder may hold shares in a large conveyancing firm. Similarly they may own shares in a company that has one of the constituent elements that go into the reports. Thirdly, one has to bear in mind that in terms of Dye & Durham's overall status in the market, it's a relatively low level -- well, it isn't the sort of Dow and DuPont figures we are looking at in terms of revenue and therefore the interest and the attention span that an institutional investor has for Dye & Durham is not going to be of same order of magnitude as would it be, for example, for Dow and DuPont. That's the third point. And each of those points I'll make later because they find support and indeed they are replicated in arguments from judges, senior academics and so on in the American academic literature.

Could I then please go back to the factual background. There was one particular document I had not quite got to, which is a letter of support from finnCap. The Tribunal will find that at page 785 of bundle C2, tab 29. One sees it's dealing with independence at the bottom of the page:

"Shortly prior to AIM admission the company will become owned by a holding company that will be created as a PLC. The PLC will be subject to the takeover code. When a PLC is formed the takeover panel will start with the presumption that all shareholders are in concert with each other."

It then goes on to deal with this:

"We expect the takeover panel to determine that only the 16 ..."

I think that's not a confidential figure, 16 per cent management, I hope it isn't:

" ... an insider stake would be a concert party."

They then say they will put the concert party shares into a vehicle where no member will have any control for a given period of time to enable an orderly manner on the market of disposal.

They then go on to confirm what they would do as nominated adviser.

The second bullet point up from bottom at page 786:

"The company is in the process of appointing three independent non-executive directors, one of whom will be chairman."

Then they believe that a certain figure of Dye & Durham's register of shareholders is made up of institutional investors who act independently at all times.

Finally page 787, last bullet, it's confirmed that the company is profitable and other financial information is given about it.

So that was the evidence from the party that was charged with (a) helping with the disposal process and (b) would stand as nominated adviser in any AIM listing.

The documents that go behind that process start really at tab 30, with the Articles of Association of Spinco. One sees that the powers of the board are dealt with at page 831. Subject to any directions given by special resolution the business of the company shall be managed by the board.

Power to borrow is dealt with at page 833.

MR LOMAS: This is pretty standard stuff.

MR BEAL: Yes, but it's the board that exercises the power to borrow, not the shareholders. The arrangement itself can then be seen at tab 32, please, starting at page 860.

That confirms that Dye & Durham intends to apply to the Ontario Superior Court of Justice for an order approving the arrangement under the relevant Canadian legislation. Conditions precedent at page 867 include that TMG will have been transferred directly or indirectly from Dye & Durham to Dye & Durham Limited. So that's a hive up from UK subsidiary to Canadian parent. An interim order will have been granted. The arrangement resolution will have been approved by shareholders and relevant regulatory and judicial approvals will have been obtained.

The plan of arrangement itself begins for relevant purposes at page 876. One then

sees at the top of page 877 that there will be a change to the designation of the existing shares and the creation of a new class of shares so that essentially what is being done is there will be now two classes of shares: the new D&D shares and the Spinco shares. And we see then:

"Each issued and outstanding existing D&D common share shall be exchanged with Dye & Durham and the holder of such existing D&D common shares shall receive for such existing D&D common share one new D&D share."

So that's the share exchange. Then there is a requirement under the next subparagraph for the relevant capital adjustment to be made. Under subparagraph (b), next paragraph:

"Contemporaneously with that share exchange in consideration for issuance and delivery ..."

MR LOMAS: Sorry, that's the purchase, is it, for the purpose of the final undertakings?

MR BEAL: The purchase is in the next paragraph, that:

"Contemporaneously with the share exchange in consideration for the issuance and delivery of the Spinco ordinary shares by Spinco to the holders of the existing D&D shares in accordance with section ... each TMG share shall be transferred by Dye & Durham to Spinco."

MR LOMAS: I see.

MR BEAL: So you have transfer of the TMG shares to Spinco in consideration for which Spinco will issue shares in itself to the existing Dye & Durham shareholders. So the consideration --

MR LOMAS: That's in event of the sale.

MR BEAL: Yes, so in contractual terms the TMG shares are transferred for consideration to Spinco by Dye & Durham having been hived up to the Canadian company before that happens.

THE CHAIR: Is that subparagraph (c)?

MR BEAL: Subparagraph (b) is specifically -- and then everything else is about redemption of existing shares.

THE CHAIR: Okay, yes.

MR BEAL: So subparagraph (b) is the core step which represents the transfer of the TMG shares for consideration. The consideration is the Spinco will issue and deliver shares in itself to the holders of the existing D&D shares.

MR LOMAS: Sorry for having taken you slightly away. This is obviously the execution version. This went to the CMA. Is it clear when it went to the CMA?

MR BEAL: This is obviously dated 28 March 2023. I don't know specifically when it was sent to the CMA. I will find out.

MR LOMAS: But they did have it?

MR BEAL: Could I take instructions on that?

MR LOMAS: Sure.

THE CHAIR: It could only have been sent afterwards.

MR LOMAS: Unless they saw it in draft.

MR BEAL: I think a draft certainly had been circulated. I don't want to mislead the Tribunal.

THE CHAIR: There's no hurry. As long as we know by the end of the day, that's fine.

MR BEAL: Thank you very much. I will get the chronology right and then give it to the Tribunal.

The draft AIM admission documents are then at tab 33. I don't think I need to refer to any particular part of those. For your note, but no more at this stage, the AIM rules for companies are in bundle of authorities, bundle 1, tab 23, page 660.

The next stage is to go through the final decision. I think in the light of time marching on and the fact that I am acutely conscious that the Tribunal has read that decision

with care and our submissions on it with care, I don't need to do more than say at the moment what the three components were. Firstly, they said we needed a variation to the undertaking. Secondly, they said we had not justified that variation. Thirdly, assuming nonetheless that they were going to consider whether the purchaser approval criteria were met, they decided that they weren't, for reasons that will come on to in detail.

They took the view that the spin-off procedure was a novel procedure and we have taken issue with that. If I could perhaps simply give the Tribunal a flavour of the types of decisions where a spin-off procedure has been used, I will try and restrict it perhaps to three given I am running short of time. The first is the Alcan/Pechiney decision. This can be found initially in bundle of authorities 1.2, so the second volume of the first bundle of authorities, tab 30.

It starts at page --

THE CHAIR: Where are we, sorry?

MR BEAL: Bundle of authorities folder two of volume 1, so I have called it 1.2. Tab 30. It starts at page 1837. If I could cut to the chase and invite the Tribunal please to look at page 1872.

THE CHAIR: What tab are we looking at?

MR BEAL: Tab 30. I hope. It's 1.2, so it's the second volume of volume 1 that I have it in. If the Tribunal has a single composite volume 1 --

THE CHAIR: I've got volume 1.2 at the end. I have it.

MR BEAL: I think what happened was volume 1 was split into two. Tab 30, page 1872.

THE CHAIR: This is the Alcan one?

MR BEAL: This is the Alcan case and Alcan were giving a commitment to dispose of certain businesses so that they could fend off an EU commission investigation into the

merger.

We see at recital 175 that in relation to aluminium aerosol cans, Alcan commits that aerosol's business carried out by a number of subsidiary companies at plants in certain areas and Pechiney's aerosol business carried out at some other areas by subsidiaries "will cease to be under common ownership and controlled by Alcan. This will be accomplished by divesting either business as a viable going concern with all necessary assets and other resources."

So that was a commitment to divest themselves of certain business interests and in the light of that commitment at recital 182 the Commission accepted that it has decided not to oppose the notified operation and would declare it compatible with the Common Market.

Now, at page 1884 we see within the commitments offered by Messrs Freshfields at page 1881 a definition of divestment. So page 1884 is part of the commitments package and one sees divestment is defined as:

"The disposal by Alcan of its entire legal and beneficial interests in divestment business whether (a) by whether way of its sale to an unconnected third party purchaser pursuant to a binding sale and purchase agreement; or (b) by way of its distribution, transfer or sale by way of dividend, distribution in kind, reduction of capital or other similar transaction and/or by way of an initial public offering on one or more recognised securities exchanges and divested and divesting shall be interpreted accordingly."

There were also the standard hold separate manager requirements that one sees typically.

Now, following on from this, it involves tracking I am afraid through various different bundles to see what happened. In bundle of authorities file 2, folder two, tab C1, unfortunately that's a separate folder.

THE CHAIR: Do we put this folder away?

MR BEAL: That folder can go away now. I am sorry, could it stay on the judicial desk if I may be so impertinent because the next decision I am coming to --

THE CHAIR: I have folder two now.

MR BEAL: Folder two, it's divided into A, B, C and then C1.

THE CHAIR: Yes.

MR BEAL: Page 335 is the start of a tax court of Canada decision which is dealing with some tax issues but what it does have conveniently is a summary of what happened next. So at page 346 we see a description of the Novelis spin-off. In paragraph 41 we see that the court is indicating that while pursuing the Pechiney transaction, Alcan was aware that it would have to divest itself of certain assets in order to satisfy the European competition regulator, and we have seen the commitment that was given. Alcan provided undertakings to European and American competition regulators in respect of two requirements. They then identify the European competition regulators requiring one particular set of assets to be divested and the American competition regulators required a separate set of assets to be divested.

Then paragraph 50 says the Alcan's shareholder's record had essentially a spin-off transaction. As a result of that spin-off Alcan shareholders ended up as shareholders of two public entities: Alcan and Novelis.

So the means of divestiture was therefore through a spin-off of a new Novelis company. Then to --

MR LOMAS: Presumably the Alcan shares were very, very widely held?

MR BEAL: I would imagine so but I am afraid I don't specifically know. What I can point to I think is notice of special meeting being sanctioned. That's in bundle C1. So back in the documents bundle now, not the bundle of authorities and within C1, tab 9.

THE CHAIR: Where have we gone to now?

MR BEAL: This is documents bundle C, volume 1.

THE CHAIR: I can put this bundle away, can I?

MR BEAL: Bundle of authorities folder two again can go away momentarily.

THE CHAIR: Okay.

MR BEAL: I am sorry to leap around like this.

THE CHAIR: Now I go to which bundle?

MR BEAL: Documents bundle C, tab 9.1, page 82.1.

THE CHAIR: What page number?

MR BEAL: 82.1. This is a press release from the Alcan board.

THE CHAIR: Yes.

MR BEAL: Dealing with the Novelis spin-off. In the last paragraph on that page it says:

"On December 22, 2004 with 99.92 support Alcan shareholders approved a plan of arrangement and authorised the board of directors to implement the spin-off."

Next 82.3 behind tab 9.2 a notice of special meeting of shareholders was sent out. Under the arrangement, 82.4, it says:

"Under the arrangement Alcan will effectively transfer most of the aluminium rolled products business that it operates to Novelis and distribute the shares of Novelis to Alcan common shareholders."

So again the spin-off is being achieved through the creation of new company that will hold all the business assets and then the shares in Novelis are spun out to the Alcan common shareholders.

Reasons for the arrangement are then set out at the bottom of that page. That was sanctioned by both the European Commission and the Department of Justice, see page 82.5.

Then the final point to draw from this at page 82.6, behind tab 9.3, is confirmation from both the Department of Justice and the European Commission, see the fourth paragraph on that page by the second bullet point:

"Competition authorities in both the United States and the EU have confirmed that the spin-off satisfies the critical anti-trust divestment requirements associated with Alcan's acquisition of Pechiney."

So the European Commission certainly for the purposes of that commitment was willing to accept a spin-off arrangement which saw a new business formed through a Novelis company with the shares in the Novelis company then being given to the existing shareholders in Alcan.

To the extent that we can over the short adjournment find a better indication of who the existing shareholders in Alcan were, we will endeavour to do so.

MR LOMAS: We shouldn't dwell and dive too deeply into this because there were different transactions, but is it relevant to your argument that what Alcan were doing here was divesting a set of functions globally which from a strategic perspective didn't fit with its ongoing plan whereas in our case here we are talking about the divestment of something that competes directly with the core business?

MR BEAL: My understanding was that the businesses and assets that were being relocated, yes, there was a sort of commercial imperative to bundling those off and making them a viable business by themselves.

MR LOMAS: Because it was their rolled products division that was being spun out.

MR BEAL: It was a specific sector but that was part and parcel of otherwise the merged entity being perceived to have too much market power and hence the reason for the commitment that was divesting themselves of it. I don't know to what extent on the facts –

MR LOMAS: It reads from this, and I am not particularly familiar with the transaction,

that Alcan were exiting the market from a sector that had been spun off whereas in our case D&D are going to stay exactly in the market in which TMG would on your case have been spun off to operate in.

MR BEAL: I will need to investigate the extent to which Alcan still had a lingering process in the rolled aluminium products market, but my point is a more basic one I suspect, which is simply that the European Commission was willing to accept as a form of divestment a spin-off procedure and didn't think it was a novel or different remedy. I am not sure my submission advances further than that.

To like effect, if you would be kind enough please to bring out bundle of authorities second folder of folder one --

THE CHAIR: Look, I think you accept that it's all very fact-specific, isn't it? You can have one spin-off which is going to be acceptable depending on what the market is and another one which may not be acceptable? So it may be that spin-off is not necessarily a no-no from day 1. You have to look into it and see whether the theoretical can possibly be real on the facts of that particular transaction you are looking at.

MR BEAL: This submission is designed to deal with the proposition that this a novel remedy, that therefore for that reason alone essentially you have to work harder to justify it. If my proposition is: well, if you look at what the US courts have done and if you look at what the FTC have done and if you look at what the European Commission have done and if all of those regulatory bodies or courts have been willing to accept spin-off as a form of divestment, that punctures the suggestion that it's novel or complex and can't be done. If you are willing to take that from me, I don't need to go through quite a lot of the other ones.

DR BISHOP: It's an interesting point. Presumably the purpose of the spin-off was the European Commission let's say, maybe the FTC as well, said: look, Alcan, you are

buying Pechiney and we don't like it because there's not going to be enough competition left in the market for pipes and tubes. I think that's what rolled products are, I think. But we'll let you spin it off to your existing shareholders, make an independent company which will then compete against the assets you are acquiring from Pechiney so that you won't have too big a share in that market and there will be competitors out there.

Now, if that is the logic, I am not familiar with the case, if that's the logic of the case, then I see why you are citing it to us and it's a serious point but could you confirm that that is why the European Commission wanted it done, that it's in order to preserve competition in pipes and tubes, in aluminium?

MR BEAL: The passage in the decision that dealt with why the commitments were being accepted is the passage I have taken you to. So I can't elucidate on that. I think what I can do more thoroughly than I have at the moment and which I have notes for is try and elucidate the extent to which Alcan would remain a competitor in the market of the spun-off business. I think that's probably the best --

DR BISHOP: That's an important point.

MR LOMAS: (Overspeaking) a horizontal one, for example.

MR BEAL: Because I have been focusing on a different proposition in the case, I will come back to you after the short adjournment on that.

I have given the Tribunal a series of references in our written submissions as to other decisions and of course it's open to the Tribunal to read those. So I simply I think have to try and pick another example of in this case a court decision of a spin-off procedure being accepted.

That can be seen in bundle of authorities folder two, tab B1, page 25.

DR BISHOP: May I ask is this volume 1?

MR BEAL: No, this is volume 2.

DR BISHOP: Volume 2.

MR LOMAS: It should be --

THE CHAIR: So which tab?

MR BEAL: B1 volume 2 of the authorities and it's B at the back, tab 1. Tab B1, page 25 and I hope the Tribunal has a decision of the United States Court of Appeal ninth circuit in Iacopi.

The facts are summarised in the headnote at page 25 to do with network cable television.

MR LOMAS: My bundle is numbered consecutively all the way through so it starts at 335. Do you want to use the internal numbering?

MR BEAL: So the internal numbering bottom right-hand page is 25.

MR LOMAS: 25.

MR BEAL: So I hope that the panel has tabs A, B and C and behind tab B1 there should be bottom right-hand corner page 25. Unfortunately there's a number of tabs 1 because I have A1, C1, but it's B1 I am aiming for.

DR BISHOP: The internal numbering in one sense is 1142.

MR BEAL: Yes, I am sorry, internal numbering of the report 1142. The bundling number is 25. 1142 has a description of there was a regulatory requirement, I think it was a statutory requirement actually, for a television network to divest themselves of certain television, cable television and domestic indication interests by setting up a subsidiary, spinning off subsidiary by distributing stock in it to shareholders in a network on a pro rata basis and the Commission, the relevant Commission would then require network officers and directors to dispose of their interests and so on. So it's describing a spin-off procedure as a means of divestment.

The background to this can be seen internally at page 1145, bundle number page 28 top left-hand corner. There was a requirement essentially for CBS to comply with new

rules by divesting itself of its CATV and syndication interests. CBS planned to set up a subsidiary, which was Viacom, and to transfer to it all CBS CATV and syndication interests. CBS would then spin off its subsidiary by distributing the stock of Viacom to the shareholders of CBS on a pro rata basis. What then happened was that a series of minority shareholders of television signal corporation TVS through their petitioners Iacopi complained about this procedure and they said, see page 1146, first paragraph, they attempted to argue they'd been injured by the spin-off procedure. The argument was that if the Commission had disapproved the proposed spin-off, CBS would have had to place its TVS stock on the open market. Iacopi asserts that with CBS selling its shares on the open market Iacopi would have been able to (i) sell his interest to purchasers chosen by CBS or (ii) purchase CBS' interests or (iii) accept a new partner."

Now, the alleged anti-competitive effects were then dealt with at the bottom of page 1147. Bundle reference page 30. In the bottom right-hand corner the Tribunal will see a section that begins anti-competitive effect. Please could I invite you to read that and page 31 through to the beginning of paragraph 4 in the right-hand column. **(Pause)**.

DR BISHOP: Where?

MR BEAL: Bottom of page 30 of the bundle.

DR BISHOP: Page 30, yes.

MR BEAL: And then most of 31.

DR BISHOP: Yes. **(Pause)**.

MR LOMAS: Is this a process that is broadly equivalent to judicial review or is it an appeal on the merits? Again it's a slightly unfair question.

MR BEAL: It's a proceeding for a review and the view seems to be, see the last paragraph before subparagraph 4:

"We hold that on the issue of common control the Commissioners made a reasonable interpretation of its regulations supported by substantial evidence in the record. We defer to the Commission's ..."

MR LOMAS: That's what prompted my question.

MR BEAL: So it is a review process, I'm afraid I am simply not qualified to say whether it's a merits or judicial review because it would involve concepts of US procedure and substantive law.

I can simply say that it was said to be a review under whatever the relevant provisions were of the statute that permitted a review to take place of the Commission's decision, but inferring I think, as we must, it wasn't a full merits review.

What is sufficient to derive from it is that the steps that are described there were found not to give rise to a competitive concern. The divestment by spin-off was considered to be satisfactory. The hold separate obligations were effective and the requirement for existing CBS management to dispose of their stock also meant that the concerns about common control had been addressed.

DR BISHOP: This is a case in which the United States regulatory authorities decided that they wanted vertical separation between origination of programmes and distribution via cable TV back in the 1970s and so they were going to prohibit people at one level conferring at the other level or at least the big American networks were going to be prohibited from going into cable distribution.

Of course here we are dealing with a case in which the two companies are going to compete and so it's in that sense quite different.

MR BEAL: Yes. I mean, there is a third example I was proposing to turn to, which was the Veolia Suez endorsement of a spin-off of a new Suez company in order to give effect to competition commitments given to the EU Commission. I suspect that the Tribunal's question to me will be: to what extent are there horizontal overlaps left

following that? This is in bundle H of the documents bundle. It's the final example I was going to give of the EU Commission approving a spin-off procedure.

DR BISHOP: H is it now?

MR BEAL: Bundle H of the documents bundle, tab 3. So tab 3 has confirmation that the European Commission had approved the proposed acquisition of Suez by Veolia conditional on various aspects. The respective water and waste water sectors that they are involved in are then set out at page 5 and 6.

It was found that divestment of almost all of Suez's activities in the non-hazardous and regulated waste management markets and the municipal water board market in France and the divestment of almost all Veolia's activities in the mobile water services market, et cetera, as well as the divestment of part of Veolia and Suez's hazardous waste landfill activities, et cetera, would entirely eliminate competition concerns.

So it looks as though there was still a degree of remaining competition between Suez and Veolia in certain markets because it's talking about the partial divestment of certain activities in certain sectors. But nonetheless it was still approved.

We then see the way it's described in tab 4, page 10 is that the EU had cleared Veolia and Suez with significant carve-outs and a new company was then going to be owned by French state-backed Caisse des dépôts et consignations and an insurance subsidiary.

So that's an example of the EU Commission again approving a spin-off procedure with a New Co, a new Suez company then running the divested business.

In terms of an example of –

MR LOMAS: Sorry, was this a spin-off to shareholders?

MR BEAL: I had inferred.

MR LOMAS: A hive down distribution of the shares in specie to the shareholders?

MR BEAL: That was how I had read it for the simple reason that the new company's

owners would be Meridian and Global Infrastructure Partners as well as French state-backed Caisse des dépôts, and I had simply assumed that they were already the shareholders, because otherwise it wouldn't really be a spin-off.

In terms of a horizontal example of a spin-off being approved, I think probably the best example I can give at this stage, subject to the answer to the Alcan point, which I think I have been handed – no, I have not been handed a note on that – is the AT&T case which is in bundle of authorities – again, sorry for the confusion, it is folder two of volume 1, so it's bundle 1.2 of the bundle of authorities. Tab 45.

Within the bundle it should be page 2321. Within the report, the US report it should be top of the page 131.

MR LOMAS: I am sorry, I am completely lost.

MR BEAL: On the spine I hope it says volume 1, folder two Roman I.

DR BISHOP: I see, volume 1 folder two.

MR BEAL: Using Roman volume I, folder two.

DR BISHOP: Yes.

MR LOMAS: AT&T?

MR BEAL: AT&T.

MR LOMAS: Thank you very much, sorry for my confusion. It's entirely my fault.

MR BEAL: The bundle of authorities is split in a slightly idiosyncratic way. So at page 2321 we have a summary in the headnote of what's going on and we see that this is the United States District Court District of Columbia from 1982 and it's determining whether or not a divestiture ruling proposed pursuant to anti-trust requirements was valid or not.

A series of then legal issues arise. I think we can probably pick it up internal page 202. Actually 201, sorry. Page 2391 of the bundle. Paragraph 20 of the decision. One of the issues was whether or not by conducting a spin-off transaction you needed

consideration for the spin-off. The answer under US law was you didn't need consideration for that because you were simply transferring latent rights in the business from one set of shareholders to the other set of shareholders but they were keeping essentially the underlying entitlement to a particular and specific type of business.

Then at 2392 we find the court endorsing the spin-off procedure as a legitimate way of achieving divestment. Please would the Tribunal read, sorry, page 202 through to a paragraph that begins "it is worth noting in this connection". **(Pause)**.

DR BISHOP: Sorry, the page again?

MR BEAL: Internal 202 or bundle 2392. **(Pause)**.

AT&T obviously carried on functioning in the US market but it was stripped of certain operating companies operating in certain areas in order to deal with the anti-trust concern that had arisen. That seems, in my respectful submission, to be an example of a spin-off being sanctioned by a court in circumstances where the party that is divesting itself of the business will continue to operate in the same market.

That I think is all I wanted to say on novel and complex. What I would say is that these handful of examples I have taken the Tribunal to, plus the others listed in our written submissions, show that as a matter of principle common institutional shareholders seems unlikely to pose a routine problem because otherwise spin-off procedures would not have been accepted full stop, certainly in the Veolia and Suez example.

Could I turn then, please, to ground one. This is dealt with in our skeleton, paragraphs 11 to 19 and in the CMA's skeleton, 18 to 28. Now, the starting point for this submission involves looking at the final undertakings which I have not yet turned up. They are in documents bundle C1, tab 19, and they start at page 638.

The definitions provided at page 640 are important. Firstly, we have approved purchaser meaning:

"Any purchaser approved by the CMA, pursuant to the purchaser approval criteria set out in annex 3."

Control is defined. It is:

"The ability, directly or indirectly, to control or materially influence the policy of a body corporate."

Then divestiture is said to mean the sale of TMG by D&D.

Turning over the page to 641, the final disposal is defined as meaning:

"The completion of the divestiture of the TMG business, in accordance with the final undertakings, to an approved purchaser."

Remedy means – I am at the top of page 642:

"The divestiture by D&D of TMG, as set out in chapter 10."

We then see at page 643 a series of divestiture undertakings given by D&D. D&D undertook under 3.1(a):

"To give effect to and implement the final disposal within the divestiture period, having due regard to the findings in the report", and procured that the subsidiaries would do all the things necessary.

Under 3.1(d) one sees that D&D undertook to:

"Provide the CMA with sufficient information regarding each potential purchaser for which D&D seeks formal approval, having regard to the purchaser approval criteria, to enable the CMA to give its approval. The CMA's approval would not be unreasonably withheld."

Clause 3.8 essentially required D&D to obtain the imprimatur of the CMA to any final disposal.

3.10, significantly, says, page 644:

"Upon the completion date, D&D shall transfer the entirety of the shares it holds in TMG to an approved purchaser."

So the mechanism by which the disposal is to be obtained is by the transfer of the entirety of the shareholding in TMG and that has to be to an approved purchaser, which means any person approved by the CMA, pursuant to the purchaser approval criteria, not to be unreasonably withheld.

THE CHAIR: Is there any experience of the CMA – but the CMA can deal with this tomorrow – where you have a situation like the present? Because the ones I tend to see is where someone says: I've got a purchaser. Here are all the documents. This is what we want to enter into. You approve it or not approve it. That's what I typically see.

Here, they say: well, we are still trying to explore selling to a private purchaser, or whatever, but we have this as another option. You approve this other option, even though at the end of the day we are not saying these people are going to be the purchaser, we may or may not go ahead with it because we want to use this in a way as leverage to get a good price from someone else. I just wonder how unusual this is because I have not come across this before. Because the ones I've seen tend to be: here is the purchaser. Here are the transaction documents. Do you approve it? Whereas this is quite different from anything I've seen.

It's not really for you but they can deal with that tomorrow.

MR BEAL: I think the submission from the CMA, if it helps, is that this is the first such proposal they've dealt with. My learned friend Mr Lask will confirm that no doubt tomorrow.

THE CHAIR: Yes, okay.

MR BEAL: At 4.3, we see at the bottom of page 644 there is a ten year ban on effectively common ownership or influence – or control, sorry, I should say, rather than influence.

Then at 5.1 D&D undertakes to provide a written report to the CMA until final disposal,

so there is an ongoing monitoring process and we know the monitoring trustee has been brought on board.

Under clause 6 we find the hold separate obligations in their final form. So mirroring the final report that we looked at earlier, these are the transposition into the final undertakings of that hold separate obligation.

Clause 9.1, page 649:

"The terms of these final undertakings can be varied with the prior written consent of CMA, in accordance with sections 82(2) and 82(5) of the Act. The CMA undertakes to consider any requests as soon as reasonably practicable."

Clause 9.3 confirms that the consent of the CMA shall not be unreasonably withheld or delayed.

Then, finally, we have the purchaser approval criteria, page 661, which I will come on to when addressing ground two, but they will be very familiar to the Tribunal by reference to the parties' pleaded cases.

Now by way of short submission before the short adjournment, if I may, we say that the form of the final disposal of the TMG business is to be effected by a transfer of D&D shareholding in TMG, pursuant to clause 3.10 of the final undertakings. The effect of the arrangements that we looked at earlier is that D&D's shareholding will be transferred to Spinco. Shares in Spinco would then be held by the current shareholders in D&D but Spinco agreed to allot those shares in itself to D&D's shareholders in return for acquiring the shares in TMG.

So, in contractual analysis terms, you've got an undertaking by Spinco to acquire shares in TMG which will be transferred to it, in return, ie consideration for, Spinco then issuing shares in itself to the existing D&D shareholders; and that represents an offer and an acceptance of a share transfer transaction which is perfectly capable of being treated as a purchase of the shares precisely because what they are doing is

exactly what is contemplated by clause 3.10 of the final undertakings.

The question then becomes does that purchaser meet the purchaser approval criteria, and that is capable of being assessed by reference to Spinco.

MR LOMAS: Just pausing there, that contractual analysis seems to assume that the words "The sale" -- the definition of divestiture, the sale of TMG by D&D includes essentially an internal reorganisation of D&D, albeit for consideration, because at the time at which it occurs the purchaser is part of the D&D Group.

MR BEAL: At the time of the transfer of the shares to D&D, Spinco wouldn't be part of the D&D Group because --

MR LOMAS: Because it's all happening in the same scheme of arrangement.

MR BEAL: Yes.

MR LOMAS: So essentially you'd have instantaneously, at the same time, Spinco which exists and is the putative purchaser, acquiring the shares and issuing shares.

MR BEAL: That was the clause in the plan of arrangement, so contemporaneously.

MR LOMAS: Exactly.

MR BEAL: So the whole thing happens at the same time, and the consequence of that is that functionally what is happening here is it's a sale because there is an agreement to acquire the shares. The acquisition of those shares takes place because Spinco is saying: we will buy those or we will have those shares allotted to us, so we are purchasing those shares, and in return for that, ie consideration, we are issuing shares in ourselves to the existing shareholders.

MR LOMAS: Let me put it another way. So your submission is based on the fact that the words defining divestiture, the sale of TMG by D&D, are broad enough to include an internal reorganisation taking place by virtue of a scheme of arrangement?

MR BEAL: Precisely, because that plan of arrangement contemplates the transfer of shares for consideration.

MR LOMAS: Understood. Understood. But to get within your ground one you have to say that the final undertakings are to be interpreted widely enough to include that set of events?

MR BEAL: Well, I think it's sufficient for my purposes that I simply say the final undertakings contemplate a disposal taking effect through a transfer of the entirety of the TMG shareholding.

MR LOMAS: Okay.

MR BEAL: That is what is happening.

THE CHAIR: You say as soon as the shares are transferred to Spinco that's it, isn't it?

MR BEAL: That's enough, because that is contemplated by clause 3.10. D&D at that point has transferred the entirety of the shares it holds in TMG to an approved purchaser -- well, subject to the question of approval, it's transferred it to a separate legal entity, Spinco, which has separate management and which is no longer part of the D&D Group, and which can therefore be assessed as to whether or not it complies with the independence requirements.

The blind trust arrangements then prevent any influence or control by D&D or its associated shareholders over TMG. Those blind trust shares will then be sold in an orderly manner so as to cause no detriment to the Spinco share price, and we've got the ongoing ban on any common ownership or control for a period of 10 years which still remains a binding undertaking.

THE CHAIR: Okay, we'll adjourn until two.

(1.04 pm)

(The luncheon adjournment)

(2.00 pm)

THE CHAIR: Mr Beal, as regards timings, we can go on until 4.55 pm today. So don't

feel under any under pressure to rush through but I think we should aim at least to finish you today and then at the end of the day we can discuss whether or not we start early tomorrow.

MR BEAL: Sir, the advantage of having been asked some questions so far is that I have already deployed quite a lot of the arguments I wish to deploy.

THE CHAIR: That's good.

MR BEAL: So I may find that I catch up from where I am theoretically in my notes. Can I just deal with a couple of points of homework. Firstly, the Alcan decision if I may. That was in the bundle of authorities folder 1.2 that's I.2, tab 30.

Please could we start at page 1848. Now, it transpires that given the market size of the companies, which was very extensive, see, for example, recital seven, page 1839, combined aggregate worldwide turnover of more than 5 billion euro. There are a number of different product markets. So I am going to focus simply on flat-rolled products because the spin-off procedure that was sanctioned encompassed both aerosols and flat-rolled products.

At 1848 we see that flat-rolled products are a group of semi-finished flat aluminium products that are produced in a number of steps in hot and cold rolling mills and so on.

But recital 58 found there wasn't one single relevant product market, there were a number of different elements to it. We find practical examples of that at page 1850. So, for example, beverage can body stock, food can sheet and so on. So a classic example would be a tin of Coca-Cola, would be a classic example of a beverage can in stock.

We then see at recitals 69 through to 72, page 1852, that Alcan had production facilities in five facilities and Pechiney had itself five facilities. The effect of the divestment was to rid some of those facilities from the ownership of either Pechiney

or Alcan.

It was said the concentration would lead to horizontal overlaps in the following FRP markets and it gave examples of the types of differentiated products that we've looked at. In terms of market share, that's dealt with in 72 and you'll see the sorts of market shares we are looking at.

At recital 80, for example, there is a reference specifically to the food can body stock market with other competitors also existing.

At paragraph 163, which is at page 1689, essentially an initial version of commitments had been offered but those had not necessarily met all of the concerns, in particular in the light of interventions from the interested parties, such as the competitors in the aluminium food can industry. Therefore, the remedies package, page 1869, recital 163, was amended by adding certain facilities into the mix.

The assessment then takes place from recitals 164 through to 170. 164 consists of an analysis of the relevant market shares post that sort of level of divestiture of the individual facilities and the consequence would be, see 165, that once those facilities are removed, the market shares and therefore the market concentrations are pretty much back to where they were. So this isn't stopping competition in the market, it's simply taking it back to the stage it was at before and that would, see 166, 167, enable the divested entity to stand on its own two feet in a more meaningful way. 167 requires various R&D staff to be hived off to the new company.

We see then in 170 that in order to ensure the immediate restoration of competition the Commission wishes to emphasise that the purchaser must have the financial resources, et cetera, to develop the relevant divestment businesses as a viable and active competitive force in competition with Alcan and other competitors. All those elements will remain subject to the approval of the Commission and will be crucial to ensure the efficacy of the undertakings.

So it's going to remain there. It's been stripped back to an acceptable level. It's going to be a competitor in the market. So this is a horizontal case and the spin-off was considered to be appropriate means.

That's the first piece of homework. The second piece of homework, if I may, is to deal with the question: was the plan of arrangement sent to the CMA? The short answer to that is no, it wasn't. What was sent to the CMA is the document that I said I wasn't going to go to because I did not think I needed to, of course ironically. Tab 33 please in bundle C2 of the documents bundles.

It starts at page 882. This is the draft admission document. My instructions are that this was sent by email by CMS for my clients to CMA on 28 March 2022. We don't have a copy of that email in the bundle but it can be produced if that becomes the subject matter of any dispute between myself and my learned friend Mr Lask.

But what we see at page 884 is essentially a document that is setting out what is intended to happen with the admission process. There are consistent references to a company that is unnamed and is referred to as a bullet point in brackets and that's because at this stage it was envisaged that Callisto, as Spinco is known, wouldn't necessarily be the company that is being presented to the market, because of the Dye & Durham connection they would probably want to have their own independent name separate from Dye & Durham and Callisto. So that is being kept back. But in other regards what one sees at 894 is a definition of the company that therefore is identified by reference to that bullet point as a company with a registered number and that registered number will be the Spinco number.

There is a reference then to corporate reorganisation being as further described in the documents. Page 895, under the mark group, the definition of Group is given as TML and each of its consolidated subsidiaries prior to completion of the corporate reorganisation which was completed on blank 2023 and thereafter the company and

its consolidated subsidiaries.

So this is envisaging a presentation to the market of an ongoing and continuing business that has a business history. At 897, just for completeness, one sees TML is used instead of TMG to refer to TM Group (UK) Limited so that is TML equals TMG for our purposes.

Page 900, paragraph 2.3, I should say the history and background, for example, goes back to the launch of the group, ie defined as TML, until the corporate reorganisation from 1999 onwards but the platform for growth in 2.3 says:

"Following the conclusion of the CMA's inquiry Dye & Durham sold the group via the plan of arrangement that was approved by Dye & Durham shareholders on blank 2023. The group is currently owned by such shareholders and as a result of the plan of arrangement and the geographical location of the company's shareholder register is a reporting issue in certain provenances of Canada."

It then goes on to say:

"Having successfully established the group as a leading property search provider, in recent years the group has focused on scaling up its business ..."

And it goes on to describe its key strengths.

So there is a continuation of the business as perceived by those being invited to subscribe for listed AIM shares and the key point is at 2.3 the group is described as having been sold by Dye & Durham, including as a result of the plan of arrangement.

So true it is that the plan of arrangement was not with the CMA, but this document was.

THE CHAIR: Just to humour me, can we just put in when available the letter to the CMA of 28 March.

MR BEAL: Of course.

THE CHAIR: Unless one objects to it and we'll have that at the beginning of this tab.

MR BEAL: It's an email I think.

THE CHAIR: Just add in at the beginning of tab 33.

MR BEAL: Yes. That takes me essentially back to ground one.

THE CHAIR: If the CMA want the reply to it or whatever in, we can add that in as well.

MR BEAL: Thank you. Those who sit behind me will make a note of that.

THE CHAIR: Thank you very much.

MR BEAL: In terms of the submissions on ground one I have made the substantive submissions. Our submission is that properly construed the undertakings permit this type of arrangement through the transfer of the shares by D&D to Spinco and the effect of that disposal of shares in those ways can be properly construed as a purchase by Spinco of those shares for the purposes of giving effect to a disposal under the undertakings.

If you are with me on that construction of the final undertakings, then it follows that a view that the undertakings don't accommodate that construction would be an error of law. I don't anticipate that is a controversial proposition because of course this Tribunal will construe undertakings either as being a contractual document following the Clarence v Chapman decision, which the Tribunal has in bundle of authorities one, tab 19, page 550, or following Trump International looking at public bodies decision, in that case regulatory planning permission, one can construe this as equivalent to a final order and therefore as a binding obligation as a matter of public law on my clients and it would be construed then consistently with Lord Hodge's construction in Trump International at paragraphs 31 to 35 as akin to a planning permission document, which again brings in common contractual construction concepts and therefore an error in construction is an error of law. That's the proposition.

I don't think I need to develop that at greater length. If that proves controversial I will come back in reply.

THE CHAIR: Is it controversial?

MR BEAL: I hope not.

THE CHAIR: I don't think it is being contested but we'll hear from the CMA later.

MR BEAL: Yes, I also hope it's not controversial that there's no margin of discretion in an error of law. If authority were needed for that, it's in the Goodman Court of Appeal case bundle of authorities IV, tab 5, page 103, per Lord Justice Buxton at paragraph 8.

THE CHAIR: Where is that in your skeleton? I just want to have a look at it.

MR BEAL: Paragraph 9 says in terms no margin of appreciation is appropriate for errors of law. A regulator directing itself must do so accurately. And it cites the Kingston upon Hull case and the judgment of Lord Justice Kerr and Goodman is then cited over the page at the top of page (inaudible) per Lord Justice Buxton, paragraph 8.

THE CHAIR: Yes, I've got that.

MR BEAL: So what you don't get is -- law is either right or wrong and this Tribunal is the arbiter of what is the correct statement of the law. It's not open to the CMA to say: well, we thought we were getting it right, please give us a margin of appreciation. That would be inaccurate as a legal submission. I don't apprehend my learned friend is making that submission so hopefully this will not be a live issue.

What I think is perhaps a live issue is the extent to which the CMA, if it didn't fully understand what we were proposing, either was entitled to sit back and use that as justification for getting something wrong or should have come back to us and asked for clarification. As it happens, my submission to this Tribunal is that that doesn't matter because the proposition of law is either good or bad and who caused that or didn't cause that is not a relevant consideration. It's a simple question of construction. If I am wrong on that, then of course it is relevant to note that we had offered to explain any of these points to the CMA and to the extent that they didn't understand what we were thinking what they thought we were doing, contrary to the submissions I have

made this morning, which made it clear, then of course it was open to them to come back to us and ask us and to the extent that they genuinely have not got a clue what's going on then it may well be they've simply taken the decision on the wrong factual/contractual understanding of what was happening, which is not a brilliant starting point.

THE CHAIR: The two key documents that you say sets out your proposal is the twin-track proposal, plus the response that you took us through.

MR BEAL: To the provisional decision with the finnCap letter appended it to.

THE CHAIR: Yes, 13 March.

MR BEAL: Yes.

THE CHAIR: And you say that looking at that and construing the undertakings properly, then your situation doesn't require any variation and they say it does.

MR BEAL: Yes, which is a pure question of construction.

THE CHAIR: Yes.

MR BEAL: That is ground one, unless the Tribunal has any further questions for me on it.

Ground two, this is dealt with in our skeleton paragraphs 20 to 68 and in the CMA's skeleton at paragraphs 41 to 88.

Now, if I may, I will highlight some, what I hope are, acceptable legal principles before turning to the detail. The first is to refer to the well known decision of Mr Justice Sales in the BAA decision. So that's bundle of authorities one, tab 6, please.

There's quite a lengthy passage that begins at page 152 that sets out the principles. I am conscious that, subject to the learned chairman, these principles have been cited I think in the Ryanair case by the Tribunal but they are here. Perhaps if I could invite you to cast a very quick eye over those principles. The only one that needs qualification is principle number 5 dealing with the EU law test for proportionality where

things have moved on. But beyond the bottom of page 155, pages 152 to 157 set out the standard principles that are routinely cited in judicial review cases before this Tribunal. **(Pause)**.

THE CHAIR: Yes, there's been some qualification of this paragraph 20 but it's a starting point for any analysis.

MR BEAL: It is, yes. It was endorsed by the Court of Appeal in the form of Lord Justice Sullivan at paragraph 4, bundle of authorities, that's tab 7, that's the next tab, but there are some qualifications to aspects of it.

(Pause).

THE CHAIR: I think we know the passage pretty well, yes.

MR BEAL: There's been arguably some useful clarification of the rationality test by Mr Justice Saini in the Wells case. The Tribunal will find that in bundle of authorities five, tab 9, page 243.

His Lordship there at paragraph 32 indicates:

"A more nuanced approach in modern public law is to test the decision-maker's ultimate conclusion against the evidence before it and to ask whether the conclusion can (with due deference and with regard to the Panel's expertise) be safely justified on the basis of that evidence, particularly in a context where anxious scrutiny needs to be applied.

"I emphasise that this approach is simply another way of [putting the Wednesbury test] but it is preferable ... to approach [it] in more practical and structured terms ... : does the conclusion follow from the evidence or is there an unexplained evidential gap or leap in the reasoning which fails to justify the conclusion?"

Now, the qualification to the EU proportionality approach that was adopted in Mr Justice Sales' principles can be seen most clearly, arguably, in the decision of Lord Justice Green also in this bundle at page 214. It's part of the EU lotto decision.

This is behind tab 8, page 214. His Lordship at paragraph 56 pithily summarises a dispute that arose post the BAA decision following on from a case called Sinclair Collis. In Sinclair Collis what happened was that you had an approach to the proportionality of some legislation where the Court of Appeal in England and Wales took a view on whether or not it was appropriate to introduce a manifestly inappropriate test for proportionality analysis relating to the legislation and the Court of Session in Scotland said it wasn't, on essentially the same legislation.

So it came before the Supreme Court in the Lumsden case, which was a challenge to the Bar Standards Board's QASA requirements for barristers that there was this conflict of authority in Sinclair Collis and in the Lumsden case, reference to which I have made in my skeleton, the Supreme Court decided that it was Sinclair Collis and the Court of Sessions' approach that was to be followed. So we then see in paragraph 56 Lord Justice Green summarising that quite delicate series of cases and saying:

"It follows that the defendant cannot justify regulation for and on the basis that it is not manifestly inappropriate. The proportionality test has been applied in later cases."

And so on.

The practical consequence of that is then summarised in paragraph 58 as to proportionality ought to be followed. Please could I invite you to read paragraph 58.

(Pause).

Then at page 227 there are some helpful guiding comments on the appraisal of risk, which obviously assumes some resonance in this case. His Lordship says at paragraph 90, top of page 227:

"The appraisal of the level of risk arising ...(Reading to the words)... decision maker and as such imports an appropriate margin of appreciation. The court rejected the criticism on the basis of the actual evidence in Gibraltar Betting bearing in mind the

precautionary nature of the measures in issue."

At 91 it says:

"In any given case there is inevitably a correlation between the remoteness of the risk being protected against and the cogency of the evidence required to justify intervention. The more remote the risk, the more cogent must be of the evidence of risk. Consistent with this in Lumsden the court explained that the risk assessment could not be based on purely hypothetical considerations."

It sets out then at some greater length the approach that was adopted in Lumsden in the Supreme Court in that case.

Now, that chimes with some guidance from Mrs Justice Lieven in the JZ case, which the Tribunal will find at bundle of authorities one, tab 20, page 571. So that's bundle of authorities one, tab 20, page 571.

If we could start please -- I shan't go into the facts of the case. They are naturally very different. It concerns an Afghan judge who was trying to get to the United Kingdom to claim asylum but he had no way of providing biometric details for his out-of-country application and didn't want to go to Pakistan without having been promised safe refuge because it added risk.

Mrs Justice Lieven at page 582 looked at --

THE CHAIR: Five?

MR BEAL: 582, paragraphs 44 through to 46, looked at the competing risk to the public interest that was relied upon by the defendant and the risk to the individual through having to travel to Pakistan to submit to biometric testing.

She recognised, for example, at paragraph 48 it wasn't possible to quantify the risk to the claimant of trying to leave Afghanistan to get to Pakistan to access facilities there that did have biometric testing but she then held in paragraph 50, supporting an American Cyanamid grant of relief on an interim basis:

"The defendant's decision of 4 March applies the biometric policy without engaging whether there is any real as opposed to theoretical harm to the public interest in the maintenance of the policy. On JZ's own facts it is arguable the decision is Wednesbury irrational. There is therefore a serious issue to be tried."

Our submission simply put is that the risk here to competition engendered by selecting one form of divestment over another needs to be substantiated and real rather than theoretical.

With that in mind, please may I then turn to the purchaser approval criteria. They are in documents bundle C1, annex 3, page 661.

THE CHAIR: Sorry, the reference was?

MR BEAL: Page 661 of bundle C1, tab 19. This is the part of the undertakings that we looked at and I said I would come back to.

DR BISHOP: Sorry, which tab again?

MR BEAL: Tab 19, sir, please page 661.

Just looking at those criteria of independence and capability and commitment to the relevant market at this stage, I have some short submissions to make. Firstly, Spinco will not have any equity interest in Dye & Durham. It won't have any shared offices or management. It will be formed of the existing management of TMG which has been running the business on a hold separate basis since August 2021. We say that there are no arrangements in place which could reasonably be expected to compromise TMG's ability to compete.

The associated management of D&D will not have any active equity interest in Spinco because of the blind trust arrangements and that blind trust shareholding is going to be disposed of in an orderly manner in order to remove any influence or control that is capable of being exercised. It's held on blind trust arrangements so no control is possible prior to that stage.

Secondly, Spinco will benefit from the cash generative nature of the TMG business, which has been acknowledged by the CMA in its final decision. Spinco will be able to issue more shares on AIM if it wishes to do so and it will have access to the capital markets, where it can raise debt financing for any projects it may wish to commit to. The new management of TMG will be as committed to competing with D&D as they are now and the side issue of D&D's relationship with TMG gives substance to the proposition that they will compete actively with one another if nothing else.

So we do say that TMG is competing with D&D at the moment. It is profitable. It has a cash generative business and nothing will change with TMG after divestiture, save that some portion of its shareholding held in blind trust arrangements won't be capable of being used for voting purposes but that's consistent with the hold separate arrangements currently in place.

DR BISHOP: The new arrangements have been since September, October 22, is that right?

MR BEAL: The hold separate obligation has been effective from August 2021, so it's been effectively separated.

DR BISHOP: I see. Has anyone investigated the question of whether there have been any successful conquest sales, as it were, of getting someone to change loyalty from D&D to --

MR BEAL: I don't understand the CMA to have looked into that point.

MR LOMAS: The hold separate arrangement is a temporary arrangement to preserve the ring until a more substantial solution. If I understand what you were just saying in your last submission, you said that they were competing now under this temporary arrangement and that post a Spinco operation nothing would change. Surely the point is that to achieve the competition remedy, something should change, that TMG is in a better long-term position than it is under the temporary hold separate arrangements

because those are by definition just to limit damage.

MR BEAL: The nature and extent of the hold separate arrangements is such that these are functionally separate businesses. All that has happened is the cord is being severed between parent and baby. So what we are looking at is a wholly independent functioning business where its existing business interests are going to carry on being operated by TMG management and that management has no connection whatsoever with D&D.

The only connection with D&D which does exist at the moment but which will go is obviously the associated D&D shareholding on TMG.

MR LOMAS: But that's all on the assumption that this isn't an acceptable long-term solution. That's just simply a short-term holding of the ring to permit a long-term solution to be found and that seems to me to require that the long-term solution should be better than the interim solution rather than nothing will change.

MR BEAL: But in terms of looking at what is going to happen with a competitor, it's currently a functioning competitor because of the hold separate arrangements, it will be a functioning competitor but with no possibility of influence or control from the D&D shareholders so that's the bit that's going to change.

MR LOMAS: I understand that.

MR BEAL: But purely in terms of -- yes, with respect, I absolutely agree that divestment has to be of a completely self-standing independent unit and that's what will be achieved by the spin-off because it's a new company. The only issue and the only thing relied upon by the CMA is the common institutional shareholding point, which I will come on to deal with again. Well, I will deal with it in a moment.

Now, we also say that's consistent with the mergers remedies guidance and I took the Tribunal earlier to the criteria which effectively mirror those in annex 3. So if we meet the criteria in annex 3 then we are also acting in a way that is compatible with

paragraph 5.21 of the merger remedies guidance.

In addition, of course, the merger remedies guidance does recognise that as part of the test of proportionality the CMA will try to achieve the least cost remedy, albeit that the cost to the divesting parties are not at the forefront of that analysis, which I accept.

Now, in terms of the errors of law that we identify --

THE CHAIR: Were you taking us to paragraph 5.21?

MR BEAL: I thought I had, I am happy to again.

THE CHAIR: Yes, do it again.

MR BEAL: It was in bundle of authorities one --

THE CHAIR: I asked you for the reference, I did not actually look at the passage.

MR BEAL: You are absolutely right, sir. It's tab 24 of bundle of authorities one, page 755, please. I should say that this is statutory guidance given under section 106 of the EA2002, see page 715. The other guidance that we'll come on to look at isn't. Page 755 has the criteria that broadly mirror what we see in annex 3.

THE CHAIR: Authorities bundle volume 1, folder one, tab 24.

MR BEAL: 5.21, just going through them, they are the acquisition by the proposed purchaser must remedy, et cetera, the SLC, achieving as comprehensive a solution as is reasonable and practical. There is the one for independence, which includes the absence of common significant shareholders, share directors, et cetera.

Capability, you've got to have appropriate financial resources, expertise and assets to be able to function competitively in the post demerger landscape. And commitment, the CMA will have to satisfy itself that the purchaser has an appropriate business plan and objectives for competing and the incentive and ability effectively to do so.

Then, finally, absence of competitive or regulatory concerns, divestiture to the purchaser should not create a realistic prospect of further competition or regulatory concerns."

So, again, obviously to the extent that there is a concern that spin-off procedure would lead to impaired competition, it has to be a realistic concern that that may come to pass.

THE CHAIR: But under independence, it's:

"Purchasers should have no significant connection to the merger parties that may compromise the purchaser's incentives to compete with the merged entity ...(Reading to the words)... equity interest common significant shareholders."

MR BEAL: So it's common significant shareholdings. So that would be where, for example, the divesting party --

DR BISHOP: Shareholder.

MR BEAL: I am sorry.

THE CHAIR: Shareholders. The CMA will say this is one of the scenarios that's contemplated by 5.21. You have to say: no, there may be common significant shareholders but on the facts of the present case it does not compromise the purchaser's incentive to compete with the merged entity.

MR BEAL: But the common shareholders, query whether they are significant, consists of a series of shareholdings from 14 institutional investors.

THE CHAIR: Yes.

MR BEAL: I had not understood the CMA's case to be that those common shareholders, those common institutional shareholders would somehow vote in a block all together or in a coordinated way, because that's unrealistic, if I may say so.

THE CHAIR: But that's not necessarily their case.

MR BEAL: Well, if their case is simply that you can point to the fact that the demerged entity in a spin-off will have exactly the same institutional shareholdings as the previous entity, then that does not give rise by itself to a competition concern.

THE CHAIR: Their case I think may be on one level more complicated, or on another

level simpler, but their case appears to be: you have two companies and before they were completely separate, you then have the merger and then you divest yourself by having exactly the same shareholders in company A as company B and they say that represents common shareholdings 100 per cent, so subject to the blind trust point, which doesn't really take us very far.

And that in itself has competition concerns and the reason why the merger guidance is in these terms is that it can have concerns. You can say: no, on the facts of the case these are theoretical and they are not realistic, I understand that. But I think these merger guidelines are talking about common significant shareholders and we need to address that.

MR BEAL: The paradigm of a concern arising from a common shareholding would be where the divesting company retains an interest in the demerged company and that would be, as we recognise, not a good idea because it would be a means by which the divesting company could still continue to exercise a degree of influence or control over the management of the divested entity and that would be a concern.

THE CHAIR: Yes, because you have not fully divested yourself (audio distortion). But I think this is looking at the sort of scenario of where you have the company that is divesting itself of the other company, you've got a commonality of shareholders between that company and the other company. You say: no, it's not talking about that. So what do you say common significant shareholders means?

MR BEAL: Well, I mean, for example, I don't want to go into details of the given merger but we all know of recent high profile merger/demerger issues involving, say, multinational media conglomerates where the people behind both companies were substantially the same and where the interests of individuals who were key shareholders in each of those companies remained exactly the same and one can think of any number of multinational conglomerates where there is, for example, a key

family who has key shareholdings in many, many different companies and where the issue is the extent to which those companies should be permitted to merge or demerge, the existence of well known recognised individuals in a key area of industry may well be a cause of concern.

It's very different, in my respectful submission -- imagine you have 20 institutional investors each owning 4 per cent in a company, given the prevalence of institutional shareholding through mutual funds, through pension funds, through just general indices that track the market, the prevalence of their shareholding across the world in every area and every sector of commercial endeavour means that it's highly likely that in any given business there will be a degree of commonality of institutional shareholding.

THE CHAIR: It's quite a big commonality but here I think the common significant shareholders can be a competition concern depending on the facts of the case and the nature of the shareholders and how they work and what you are saying seems to be even if they are common significant shareholders there is a difference here because you are not talking about one individual or one block, you are talking about institutional shareholders who tend to have a generally hands-off approach, who are not a sort of unified body because they've all got -- it's not like a herd.

MR BEAL: No.

THE CHAIR: They can go in different directions. So what makes the difference in your case is that you are talking about a particular type of shareholder rather than anything else.

MR BEAL: The reason why that is the focus of my case is because that's been the focus of the final decision and in the final decision: what is the risk they point to? Well, they point to the use of informal means of influencing management as a result of common institutional shareholding and they say: well, because there are common

institutional shareholders both before and after, they will seek through informal means to try and influence the management decisions of both companies to effectively give rise (audio distortion) than would otherwise be the case. That's the crux of their case. So it isn't -- the hypothetical, the thought experiment that was put to me this morning was: well, why wouldn't management try and keep their shareholders happy? That's the opposite problem really from the problem that lies behind the final decision as explained, which is the CMA's concern is not that somehow the management of TMG will try and anticipate what the concern of their shareholders may or may not be and do the wrong thing, the CMA's concern is that institutional shareholders through informal means will try actively to persuade the management of TMG to take their foot off the competitive pedal of rivalry and competition.

That's the way the CMA's put its case. So you then need to explore, in my respectful submission, is that a substantiated and real risk or is that simply a hypothetical risk? So one explores well, what research did the CMA do into the particular features of this market and these competitors to understand why, for example, a given institutional investor, let's call them hypothetically Van Rock, why is there a risk that Van Rock would decide to try and lobby management to go easy on D&D; given the huge trillion dollar shareholding that Van Rock might have, why would the investment eye suddenly drill into D&D and say: we want to help out D&D therefore we are going to give the nudge to TMG, post spin-off that they should really take their foot off the gas in terms of competing in Manchester. That has not formed the way that the CMA have approached it. CMA have approached it instead by saying there is a risk which we derive from the Dow/DuPont analysis, that simply having common institutional shareholdings dampens competition and leads to increase in risk of prices and that's premised primarily on the Dow/DuPont analysis of (a) the Dow/DuPont market where in fact it wasn't simply a case of common institutional shareholders having interests in

two companies in a multi-firm market. The institutional investors there that were causing the Commission some concern about concentration levels, not about divestment, was the fact that the same institutional shareholders had substantial interests, 20 per cent plus, in all of the main players in the agrochemicals market, and we'll come on to look at Dow/DuPont in a moment.

THE CHAIR: Yes, we'll look at that later.

MR BEAL: So, in answer to your question, sir, we do need to focus on what is the risk, and the risk is not arising simply from common significant shareholding, it's a nuance beyond that, which is it's the risk of common institutional shareholders dampening competition on an empirical basis.

THE CHAIR: Yes.

MR LOMAS: Just picking up on that, before you move on, Mr Beal, if we play a game for a second of imagining a hypothetical. It's against the background that in the final report, paragraph 6.42 explains the dynamics of competition in the market and makes the point, not surprisingly, that there are a variety of dynamics of competition, not just price, around client service, technology, configuration of technology with the clients, ease of use, user interface, those types of things.

So you can imagine back to the A, B, C, D example that we had this morning, that A being TMG, the board, have a number of competitive choices that they can exercise to improve their position in the market, trying to improve the position of TMG acting as directors, fiduciary duties, in terms of the type of offering they make, the type of incentives they make and therefore they have a choice as to whether they target B, D&D; or C or D to gain business.

Now, the hypothetical is, imagine the remuneration meeting for the CEO of TMG a few months after the Spinco demerger. He turns up to talk to the remuneration committee and he says: we've had a fantastic time, I've taken 20 per cent of the market share of

D&D over the past four months by targeting their clients with some of these tools. Contrast, I turn up, the CEO turns up and says: I've had a fantastic period of time, I've taken 20 per cent of the client base of companies C or D and that's improved the performance of my company TMG.

Is not the remuneration committee process likely to go a slightly different way depending on whether he's taken market share from B or C or D or more to the point is he likely to think it might and could that affect his behaviour?

MR BEAL: Sir, with the greatest of respect, there's simply no evidence before this Tribunal to suggest there is a risk.

MR LOMAS: It was a hypothetical.

MR BEAL: It was a hypothetical and that's why I have started my submissions with the premise that hypothetical risks are not sufficient, they have to be real and substantiated. Nor is it a hypothetical that the CMA have landed on and therefore it forms no part of their case.

The short answer to the hypothetical experiment would be, assuming that that director is complying with his statutory obligations to pursue the best interests of the company and not the best interests of another company, it is in that director's interest to comply with his statutory obligations because otherwise there's a risk of minority shareholders suing him for having failed to prefer the interests of the company.

Now, the shareholders, the evidence as to the ability of shareholders to impact upon managerial decisions is very, if I may say so, slight in this case for the simple reason that none of those shareholders that we are talking about have a sufficient majority to be able to effectively stymie a special resolution. So none of them have blocking powers, they have not reached the magic 25 per cent figure to have a blocking power for a special resolution and the Articles of Association, as you indicated, sir, are in standard form and they put all of the power in the board unless there is a special

resolution overturning it. So there's no mechanism by which the shareholder disgruntlement, if it exists, can give effect to that hypothetical and that's a very important constraint.

The other thing of course is that not all of the institutional shareholders will have a combined interest. They may have completely different interests because they may have very different portfolios and some of them may well own, for example, shares in solicitors' firms where it's in their interests to see those solicitors' firms do well and requires therefore as active competition on the upstream market for the supply of these reports as is possible.

So if that hypothetical were to justify a thought experiment which was of a concern to this Tribunal, then at the very least it's incumbent upon the CMA to be directed to go away and think about it and try and find any evidence they might see fit to find in order to decide (a) whether they want to take the point and, (b) if they do, that there is a proper evidential basis for it somewhere. At the moment we are not at that stage.

THE CHAIR: Yes, I think this whole question of evidence is interesting because when you are looking at risks and a transaction doesn't go ahead, you are never going to know for sure what would have happened. If you have a transaction and it goes ahead, then you know whether that risk has materialised but here you are one stage earlier than that. They are taking, let's say, a precautionary approach where they say: look, we can see there's a number of theoretical outcomes. We don't know which outcome is going to materialise but looking at it from here we just don't want to take the risk.

MR BEAL: That's why --

THE CHAIR: They are never going to be in a position to come up with actual evidence of what would happened. No one is able to do that because the transaction never went ahead.

MR BEAL: But with the greatest of respect, that's why I took the Tribunal to the EU lotto decision because it talks about the need to have a basis for the assessment and that necessarily forms an evidential basis. It's not open, for example, to the CMA to simply say: well, we've decided that in principle there is a risk, because in principle there could be all sorts of risks, but it must have a rational logical basis for it in --

THE CHAIR: I accept there has to be a rational basis for it, I am not trying to say there isn't. But when you are looking at possible future ways things may go, you are never going to have anything that's particularly concrete.

MR BEAL: But that's why when responding to the provisional decision we noted that there was this reference to a concern about common institutional shareholding and the response therefore said we don't understand where that concern comes from, how on earth is Van Rock, to use my hypothetical example of an institutional investor, going to actively be able to persuade TMG management to stop competing vigorously with D&D when the directors clearly will be competing vigorously post spin-off?

So there does need to be a basis for it. Of course the CMA's response is in the final decision and it says: we have a logical rational basis for our conclusions about the risk of common institutional shareholders and it is to be found in the reasoning in Dow/DuPont.

THE CHAIR: Yes, that's why we need to look at that.

MR BEAL: Yes. In terms of there are some short errors of law, these are all set out in our skeleton --

THE CHAIR: Can we put this volume away for now?

MR BEAL: Yes. Yes, I have been helpfully reminded, of course the CMA also has to consider proposed mergers on a risk basis and therefore it is important to have a sustainable basis for the risk assessment.

I have three short points of law that are set out in our skeleton at paragraphs 20 to 29.

I am not sure to what extent it's necessarily worth doing more than simply summarising what the skeleton says on those points and then moving on.

THE CHAIR: Which paragraph are we at?

MR BEAL: 20 to 29. The first is paragraph 22, the error in relation to which was the purchasing entity, ie here it should have been Spinco rather than the D&D shareholders. We say it's clear from the construction of the arrangements that Spinco would be the purchaser of shares in TMG and it's Spinco shares which would be admitted to the AIM.

The second one, the second argument of law, is that by reference to the BAA decision it's important to adopt a proportionate approach to the remedy and that involves trying to achieve the divestment objective by the least intrusive or least costly approach to the parties. We say that what has not been done here is an overall balancing exercise of the benefits of the divestment remedy that we propose as against its detriment. We do say that's important because if, for example, the risk of a competitive detriment from divestment version A to investment version B is absolutely negligible, but divestment version A is much less intrusive, then that would suggest that the proportionality in assessment needs to come down in favour of investment A. What we don't have in the final decision is any calculus of that balancing exercise.

Then finally the third point raised there is that the final decision at paragraph 23 has proceeded on an incorrect concept of shareholders somehow delegating authority to the board. And that concept of principal agent view of shareholders and directors has been long since given its quietus by Lord Justice Greer in John Shaw & Sons Limited, bundle of authorities one, tab 2, page 35, and indeed going back to Automatic Self-Cleansing Filter Syndicate, bundle of authorities one, tab 1, page 1, per Lord Collins MR at page 9 and Lord Justice Cozens-Hardy at page 12. So there is a pure error of law in the appreciation of the extent to which directors are agents of the

shareholders as opposed to agents of the company.

THE CHAIR: Yes, so in which paragraph do you deal with that?

MR BEAL: That's in paragraph 28. It cross-refers back to the analysis on company law which has already preceded it. I am sorry, the reference is not back internally --

THE CHAIR: It's in your pleading, isn't it?

MR BEAL: I beg your pardon. You will appreciate I have been trying to cover off -- how can I put this -- the smaller points more quickly because of time. But the proposition that directors are agents of the company and not of the shareholders specifically I hope is uncontroversial. If it isn't for any reason, I will come back and deal with it again in reply.

Now, I therefore move on, if I may, to what I submit is probably the key issue in this case, which is the assessment of risk. In the final decision at paragraphs 54 and 55, it's clear, as I have indicated, that the CMA's key concern in this case arises from the existence of common shareholders in D&D and TMG at the instant post spin-off.

Now, we do say that the blind trust arrangements are important because they show the absence of any ongoing control by D&D in the putative management of TMG post the divestment remedy that we urge upon the CMA and it seems to us, with respect, that that has been accepted in paragraphs 56 and 57 of the final decision where the emphasis is on institutional shareholders rather than anyone else and indeed in paragraph 60(a) of the final decision there is a recognition that the twin-track proposal does not leave D&D with any control over TMG.

So one therefore has to look for the concern which must be located on the activities or putative activities of common institutional shareholders post spin-off.

Now, we say that the putative risk of common institutional shareholders being able to modify the conduct of TMG as a company is not substantiated for a number of reasons. One of those reasons and an important reason is the company law

constraints that do exist on directors. So one knows from the Companies Act, for example, we could pick this up in bundle of authorities one, tab 22, starting at page 613, please, section 33 of the 2006 Act --

THE CHAIR: So what section are we looking at?

MR BEAL: Section 33.

DR BISHOP: Sorry, which bundle is it in?

MR BEAL: Volume I, folder one, bundle of authorities. It's tab 22, page 613. Standard provision, provisions of a company's constitution bind the company and its members to the same extent as if they were covenants on the part of the company.

We then see at page 642 that ordinary resolutions require a simple majority, ie 50 per cent. At 644, special resolution require a majority of not less than 75 per cent.

At page 650, section 338 dealing specifically with public companies, and one bears in mind that Spinco will be registered as a PLC, says:

"The members of a public company may require the company to give to the members of the company entitled to receive notice of the next annual general meeting, notice of a resolution, which may properly be moved and is intended to be moved at that meeting."

So it's open to shareholders in a public company, if they meet the criteria set out in subparagraph 3 as to membership or voting rights, to ask that the resolution be tabled at the AGM but beyond that the rights are limited to the rights to pass a resolution either with a 50 per cent vote or a 75 per cent vote depending on whether it is ordinary or special.

Now, directors' duties are now codified in this Act at page 631 and onwards. So a director must act in accordance with the company's constitution. We had looked at the key provisions of the Articles of Association earlier. There is then a duty to

promote the success of the company, see page 632. A duty to exercise independent judgment, see 633. A duty to exercise reasonable care and skill, 634. And a duty to avoid conflicts of interest, 635. All of those statutory obligations bite on directors and compel them not to try and prefer the interests of shareholders of a different company to the shareholders of their company and indeed they must prefer the interests of the company full stop, not any given shareholders. So they have to act for the general good of the company and not the interests of an individual shareholder. We all know of course that minority shareholders can bring petitions in circumstances where they have been unfairly prejudiced by certain treatments from boards. A minority shareholder therefore cannot require TMG to exercise any managerial step and certainly not one that would be consistent with the director's statutory duties.

Now, there is no evidence in the final decision that the CMA took into account any of these constraints that would operate on conduct that they thought could give rise to competition concerns in the form of a common institutional shareholder persuading the management of TMG to prefer the interests of D&D to the interests of TMG.

MR LOMAS: What about the other way, Mr Beal? I can understand and anticipated what your answer would be but I quite accept that because of the blind trust arrangement the D&D management shares won't be voted by the management, there's no control; understood entirely. But if you are sitting in the boardroom of D&D on day 1, okay, immediately afterwards, when most of the shares in the blind trust will still be there, and you have a choice as to whether you take aggressive competitive action against newly spun out TMG or our mythical company C&D, are you not incentivised to go a little bit more lightly as D&D on TMG when you and your directors own -- I think the figure is confidential but a significant part of that company? Or would you say that the Companies Act obligations will mean that those incentives will never in reality affect their decisions?

MR BEAL: The directors who form the board of directors for D&D are going to be focused on maximising D&D's business.

MR LOMAS: Yes, but they have a choice as to how they do that and therefore which other competitors in the market they engage competitively with.

MR BEAL: Well, in key things such as pricing and product launches, they can't differentiate between who is going to get the receiving end of their good commercial products and who isn't.

MR LOMAS: Sure, but section 642 of the final Report suggests there are other competitive tools they have available.

MR BEAL: Well, with the greatest of respect, it's not entirely clear what steps the company management would take in practice to try and prefer competition against, say, ATI or Landmark over competition against TMG. There is no evidence that there is a real risk that that would happen simply on the basis of the dynamic of this particular market. True it is, as I have indicated, that there is a mixture of price and non-price competition, but it's very difficult to see how non-price competition could be gauged or calibrated so that it was directed only at certain competitors in the market and not others, precisely because, as I showed you with the switching information, for example, the person you need to have very much in your rearview mirror is ATI. So everything you need to do is about stopping ATI getting your customers and trying to grab customers in the market. At the moment I am simply not aware I am afraid of any basis for saying that my clients would try and prioritise competition against some people rather than others.

It has not been a point unfortunately that has been put by the CMA because otherwise my clients could have given you witness evidence and said: well, we would just never do that.

MR LOMAS: Let's not spend more time on that point, it's the mirror image of the point

we were discussing earlier.

MR BEAL: I accept that and it may be again if this an issue that's really causing this Tribunal concern, it may be that the solution is to require the CMA to go away and do some more work on whether or not this -- I don't mean to disparage it by saying it's a hypothetical thought experiment but whether there are any legs in the idea that my clients would indeed try and target and, if so, how they would do it, because of course it's one thing to say: well, you are going have a weather eye on trying to protect your contingent interests that may come into land as and when the shares are sold and then seeing how would you actually do that in practice, and that's quite difficult.

I will have a look, if I may, over the adjournment for the transcribers, at 6.42, was it, of the final Report, whether there is anything in there I need specifically to come back on?

MR LOMAS: I fully disclose that it's not very detailed but it does indicate the direction.

MR BEAL: I have accepted I think, and that's the best I can do, that there will be price and non-price competition in this market and it's not by any means alone in being that type of market.

Could I then come on to say that the position in terms of --

THE CHAIR: Can we put this file away?

MR BEAL: Yes. To the extent that it's relevant to deal with it, and it would be if there's a suggestion that somehow D&D's own shareholders are looking backwards in their rearview mirror at the fact that their shares are going to be subject to an orderly sale in the market in due course, one needs to bear in mind that the expert evidence that we've adduced, which the CMA said is not relevant and therefore does not need to be relied upon, is that my clients would have equivalent fiduciary duties to D&D as the TMG directors would have to TMG.

So there is exact parallel, as you would expect in two well-developed common law

jurisdictions, of treatment of a duty of directors to the company and to shareholders in both jurisdictions and so that becomes a relevant consideration when looking at what D&D would do, not at what TMG would do.

Now, if there were somehow a hypothetical theoretical risk of institutional shareholders wishing to direct TMG to compete less vigorously, what we have an absence of is any indication as to how they would go about achieving that. So the legal landscape is such that there is no way in which an institutional investor could pass a binding resolution without the support of another institutional investor and it has been, as I understand it, eschewed by the CMA that there is any suggestion that there would be collaboration between institutional investors with a view to trying to secure a market outcome for this particular line of business.

Similarly, we say that the risk in paragraph 57 of the final decision that somehow institutional investors would not support raising additional funds is misplaced for the simple reason that it's the board of directors that has the power under Article 23 of the Articles of Association to exercise the borrowing power and borrow funds in the debt market.

The next point shortly put is that there needs to be a rational basis upon which the institutional shareholders would want collectively to prefer the interests of TMG over the interests of D&D or vice versa. With the greatest of respect, in a four-firm market where the logical consequence of not having the most efficient market offering or the most attractive market offering is that customers will go to ATI or Landmark. If that is the commercial consequence of not having the best offering then it's difficult to see why a hypothetically rational institutional investor would see it in its advantage to try and push for preferring one over the other.

That we say is backed up by the switching evidence that I took the Tribunal to earlier.

I have now reached the point where I think I need to open on Dow/DuPont I. don't

know if that's a convenient moment to take a 10 minute or a 5 minute break?

THE CHAIR: I am just making a note of what you just said just now. Yes, we'll take a break now.

(3.17 pm)

(A short break)

(3.30 pm)

MR BEAL: This is the email trail.

THE CHAIR: Thank you very much.

MR BEAL: Just to go in front of tab 33. Bundle C2.

May I just deal very briefly as well with the paragraph 6.42 point.

THE CHAIR: Let me just have a quick look at it.

MR BEAL: It starts from the back as always so the first email is the last page and you then work forwards.

THE CHAIR: That was March 28 and where are we putting this? The date of the final decision was?

MR BEAL: The next day.

THE CHAIR: The 29th, the next day.

MR BEAL: It's been forwarded to the group for their consideration. A request then came back for an unredacted version. That was then sent on the next day. We have in the bundle only the redacted version.

THE CHAIR: Yes, okay.

MR BEAL: But hold separate teams, clean teams that have been working on --

THE CHAIR: Where do I put this again?

MR BEAL: Tab 33 is what has been suggested.

THE CHAIR: C2?

MR BEAL: Yes, C2.

On the paragraph 6.42 point, the non-price competition that's envisaged is, for example, standards of customer service, functionality and quality of the software and platforms, degree of integration with the customer software and so on. I appreciate those are factors which can differentiate between a business but they're extremely difficult to differentiate on a client by client basis unless you have bespoke software. My understanding is that these packages are marketed and sold on the basis that a common approach will be taken because that's the attraction of the product.

Similarly, standards of customer service, there will be a dedicated customer service team that give a response to customers. Again, it doesn't seem to be targeted towards a calibrated approach to certain competitors rather than others but that is my submission on it.

Can I then please come on to Dow/DuPont. That is bundle of authorities two, tab 29. Starting please at page 923. It was a decision ultimately to accept commitments that had been given but obviously the Commission was analysing market concentration levels and it's in the context of market concentration levels that the issue of common institutional shareholding comes up.

If we start please at page 1303. The numbering is slightly odd in the sense that we've excluded from the bundle a chunk of the pages because they weren't perceived to be relevant but the analysis of the key issues starts at page 1303. The Commission note in recital 2337 that the relevant list of shareholders supports the fact that the agrochemical industry is characterised by common shareholding. This section intends to characterise the significant of common shareholding. Just for the sake of argument, there were a series of common institutional shareholders who collectively and also individually held almost all of the shareholding in the five or six main players in this market. So it wasn't simply a two-firm scenario, it was an entire market scenario.

We then see at 1304 through to 1305 the analysis of the commonality of shareholding

and the extent to which individual key players in the agrochemical market were owned by the same or substantially the same institutional firms.

We see on the basis of that analysis recital 2347 says:

"The Commission concludes that the agrochemical industry is characterised by (1) the concentrated shareholder structure; (2) a significant level of common shareholdings across the main players and by the fact that a limited number of shareholders represent collectively a significant share of each single firm."

And they said the presence of a significant level of common shareholding tends to lower rivalry. They then refer to economic literature and you'll see in passing references to the Azar 2016 paper, which I will come on to, and what is said to be significant empirical studies. And then 2350:

"While the economic literature has, to the best of the Commission's knowledge, focused on the effects of cross-shareholding and common shareholding and price competition, the economic rationale of such effects applies to innovation and competition."

Following on from that and the other references to material footnoted on that page, the Commission concluded in 2352 that:

"A number of large agrochemical companies have a significant level of common shareholding and that in the context of innovation competition such findings provide indications that innovation competition in crop protection should be less intense as compared with an industry of no shareholding."

That's in the context of trying to understand the effects on competition of the concentration in the industry but I emphasise that it was each of the main players that was subject to substantially the same significant shareholding by a relatively small number of institutional shareholders.

We then have at page 1753 the start of annex 5. Annex 5 contains more of the detail.

They distinguish between cross-shareholding, which is what I've described as when a firm owns shares in a rival firm, and common institutional shareholding where they are not rivals but it's the same institutional investors that hold shares in more than one rival.

1758, we then see conclusions being set out on the basis of the analysis. Recital 17 of annex 5 says:

"The Commission concludes that the agrochemical industry is characterised by a significant level of common shareholdings, in particular related to passive shareholders, across the integrated R&D players [namely the five key players in question], and Monsanto, and that a limited number of shareholders collectively have a significant share of each single firm.

At 1761 the Commission relies upon a series of pieces of academic work, economic literature, starting with the Appel paper through the Azar paper through to Fichtner and so on. I am going to be having a quick look at each of those in a moment.

At 1764 recital 42 says:

"As summarised by O'Brien and Salop ..."

Just to put a marker down, O'Brien and Salop dealt with the implications of cross-shareholding not common shareholding and the Azar paper is the first paper that seeks to extrapolate from cross-shareholding where a rival owns shares in a rival, to common institutional shareholding and they refer in particular in recital 42 to Areeda and Turner in their seminal treaties, concluding that a non-controlling acquisition has no intrinsic threat to competition at all. They say that O'Brien and Salop thought that this intuition was not always correct. They found that partial investments can raise either larger or smaller concerns than complete mergers:

"This may be surprising, since a partial acquisition would appear to align the parties' interests less in all cases than would a complete merger."

But they then went on at recital 43 to assume:

"For the sake of argument, assume that a firm acquires a minority share in a competitor. When contemplating a price increase, the acquiring firm anticipates that part of its customers will react to this price increase by diverting their purchase to its competitors, which will see their sales increase, including the one in which it has a minority share. The extra profits generated by the diverted sales to the benefit of the partially acquired firm will, in turn, be partially redistributed to the acquiring firm."

So there is a trade-off between trying to do something that increases your market share to the detriment of a rival firm where you own a share in that rival firm.

So this is dealing with cross-shareholding. The conclusion is then reached in paragraph 45 that that same analysis which relates to owning shares in a rival and the complications that produces can be rolled out to common institutional shareholders and that's the controversial bit.

So we see that what they are relying upon for that development is Azar, developing the O'Brien and Salop approach in a model of oligopoly to this question of mixed motives, as and when you have cross-shareholding they say mixed motives also applies to common shareholding.

We then see at page 1767 and 1768 again references to a series of economic papers and I propose to go through each of them to give you edited highlights of what the key point was. 1772 then has the conclusion:

"In light of the above considerations and taking into account the recent insights provided, both theoretically and empirically, by the economic literature as regards the influence of the number of common shareholders as well as the level of shares possessed by them on the behaviour of companies in industries in which common shareholding is a widespread feature, the Commission concludes that common shareholding is a reality in the agrochemical industry. In particular, a small number of

common shareholders, 17, collectively own around 21 per cent of three competitors and 29 to 36 per cent of three others."

Now, in a nutshell that was an industry where anyone who chose to innovate in crops, pesticides, herbicides, whatever it may be, would incur costs, the costs of doing so would be a burden to that particular competitor but the competitor would then not see the benefits of that innovation because the other rival firms would no doubt replicate it and therefore each of the common institutional shareholders would not seek to drive or indeed would positively discourage some form of innovation competition or that was the risk and that was a factor to play into the concentration analysis.

But in fact as it happens the merger was cleared in that case, albeit with commitments.

Now, can I please turn to some economic literature which has looked at this. I am going to start with a report that's not featured in the Dow/DuPont decision for the simple reason it's a report that postdates it. But the author of that report is the ECON Committee of the European Parliament and it provides a report on barriers to competition through joint ownership. It's at bundle of authorities, the second folder of the first volume, so volume 1, folder two, at tab 27.

THE CHAIR: When you are looking at the position of the CMA, they have the analysis in Dow and DuPont and it goes through the literature and all of that and forms a particular view. Are you saying that halfway through the divestiture period you come up with a proposal and then they are expected to do a whole load of their own empirical research and analysis of all the literature and go behind this decision?

MR BEAL: They had already done that research because I am going to show you an April 22 review from the CMA when they recognised that the economic literature is developing and it says in terms that no definitive conclusions can be drawn. So the CMA had also already undertaken that task, they were aware of the developing and evolving economic literature but they still decided to nail their colours to the mast of

Du Pont.

THE CHAIR: Yes, but the thing is that you have to show that the way they've approached this is unreasonable, that there's no rational basis for the way they are going down this route.

MR BEAL: Yes.

THE CHAIR: Yes, that's fine. As long as you realise that's the test.

MR BEAL: I realise entirely that it's a high threshold but when you have an internal report from the CMA that says in terms: you can no longer reply upon this literature to draw any firm conclusions because things are moving and there are arguments either way, we do say it was incumbent on the CMA to investigate that literature and when you do that, hence why I'm referring to it, you see that in fact the mainstay of that entire argument has been debunked by reference both to theoretical concerns that it does not stack up and also the empirical research has been redone, various different assumptions properly qualified have led to a conclusion that there is no empirical outcome which shows an impact on prices from common institutional shareholding. So there's been a wholesale -- in a sense what happened was the Azar paper launched a series of quite alarmist papers in the US that said: this is a disaster, we are at the mercy of a series of institutional investors who are causing our prices for our consumers to go up. This is something we need to remedy. They proposed various remedies, including ex-ante anti-trust or ex-post anti-trust enforcement and some ex-ante anti-trust measures and of course everyone was handwringing for a while and then you had the backlash in the academic community, as one frequently sees, where a series of other economists and lawyers collectively pooled their wisdom, re-analysed the results and realised it wasn't at all as it had seemed and the outcome of all of that is that there is a recognition that if this is to be considered to be a concern, more work needs to be done on it. That's where the CMA comes out in the report I'll take you to

in a moment.

THE CHAIR: Yes, okay.

MR BEAL: I was going to take you first, if may, just to an empirical experiment that the EU chose to conduct for the EU banking industry as to whether or not competition was adversely affected by joint ownership by institutional investors. So at page 806 what one sees is the brief that has been set to the ECON Committee, the authors of this report are at the bottom of that page.

Again, cutting to the chase, I don't have time I'm afraid to develop the analysis in any detail by reference to any particular report, as part of executive summary at page 818, second paragraph:

"The current theoretical and empirical scholarship appears to be split on what common ownership means for competition. In particular a growing body of literature has argued that common owners have an ability to further their own interests in the context of firms whose shares they own at the expense of and to the detriment of other non-common shareholders. Such common owners are said to have both the incentives and the practical capability to influence managerial behaviour. This literature argues that such influence could lead to management of the rival firms being dis-incentivised to compete more vigorously with one another ..."

Collusion has not been relied upon by the CMA here so I don't need to deal with that risk. They then say in the next paragraph:

"Another stream of law and economics literature argues, however, that institutional investors have diverging and heterogeneous incentives, so that it cannot be assumed that softened competition between rival firms whose shares they own is desirable ... It also argues that management of those firms is constrained in furthering some owners' interests at the expense of others by corporate fiduciary duties ..."

So the fault lines of the argument have mirrored the discussion that I have been having

with the Tribunal during the course of my submissions and we see at page 819, second paragraph, third paragraph down, what had happened was the ECON Committee of the EP, the European Parliament, went out and collected data and did some analysis of its own and they found that:

"Data collected for the study was limited and aims to show the level of interconnectedness of the sampled banks. From this data, it is not possible to infer evidence of competition issues linked to the common ownership pattern of institutional investors in the EU banking industry."

They then point out that the -- well, the results are driven empirically by investigation amongst banks in certain countries, but the empirical analysis shows that:

" ... the presence of the same institutional investors in the 25 largest publicly listed European banks is counterbalanced by the specific ownership structure of the EU banking sector."

We then see, page 820, at the end of the first paragraph at page 820:

"The study's findings are inconclusive whether, and if so when, common ownership might give rise to coordinated effects ... The study suggests that future studies may be needed to establish this conclusively."

So that's a risk of collusion that isn't the risk that the CMA rely upon. They then say:

"An important outcome of the study is, however, that the assumptions and conclusions of US [debate show] the potential for common ownership to give rise to competition concerns cannot be applied directly in the EU banking sector: the sector regulation, market structure, bank ownership structures and prevailing business models are different than the market and business model conditions prevailing in the US, as well as its specific regulatory framework."

So they recommend further research will be needed. In other words, you can't simply lift the Azar empirical findings from the very specific industrial sector, namely US

airlines and US banks, and roll it across to the EU banking sector and say therefore common ownership gives rise to the same concerns. You have to do your own research. Such analysis as the ECON Committee had done did not lead to a conclusion that there was a competition issue arising from common ownership.

Now, the CMA itself has published its own review. This is in bundle H, please, tab 6, page 30. The report is headed The State of UK Competition April 2022. There is a specific section that deals with common ownership. Paragraph 35 says:

"The economic literature on common ownership is still developing. Our analysis of common ownership in chapter 3 is still preliminary and there are various ways in which it can be extended and improved upon. For instance, our results are sensitive to the control threshold used, further sensitivities could be built in to explore how our results are driven by our definition of common ownership groups."

They then suggest a further study.

Section 3 begins at page 69. The first bullet point says:

"Common ownership arises when one shareholder owns shares or has control in multiple companies."

That's what I call the cross-holding paradigm, namely one key powerful influential individual with intimate knowledge of the market --

THE CHAIR: Just tell me where you are?

MR BEAL: Page 69, first bullet. The concern is that those companies may well have a coordinated strategy to making profits because the same individual is essentially pulling the strings behind each of them. They then go on in bullet two to say they are:

"Constructing a novel data set on substantial common ownership among UK companies and find that roughly 160,000 businesses in the UK are linked to at least one other business through their common controllers. Amounting to less than 4 per cent of all businesses, this is most likely a substantial underestimate."

It then says:

"Our data set only contains information on large ownership stakes [ie the cross-shareholding issue], meaning we do not capture institutional investors who are more likely to have smaller holdings in many companies. Despite this, we find accounting for common ownership can lead to substantial increases in concentration."

So they are specifically not focusing on the issue that arises here.

When we then turn, please, to page 88, it looks as though the conclusions have been based on at the very least, see paragraph 3.59, a threshold of 25 per cent control either of shares, voting rights or rights to share assets. That means that we've likely overstated the common ownership we do have information on. So they've adopted a relatively low threshold. When they increased the threshold to 50 per cent, see paragraph 3.58, or 100 per cent ownership, it changes things.

But on any view it's not dealing with 2, 3, 4 per cent institutional shareholding portions.

In any event, see 3.60, it's a work in progress.

The key point is that not only is this review therefore not dealing with the Dow/DuPont issue, it has recognised that the economic literature is evolving and no concluded views on common ownership through institutional shareholders should therefore be capable of being drawn.

Now, we do say in the light of that review it must have been apparent to the CMA that there was a competing trend of literature and academic debate following on from principally the Azar paper but that has not been subject to -- sorry, I am being invited to take you back in there to page 74. If I have missed something, I am sorry.

My learned junior rightly pointed out that there is an express reference to the Azar work and subsequent works. It says:

"More recent empirical work has provided some evidence to support the proposition that common ownership can be anti-competitive. However, these results have been

contested and a clear consensus has yet to arise."

They then cite some of the works that I will be coming on to.

We see in 312(b):

"Using slightly different methodologies for how to account for common ownership, the two studies found inconsistent results. The former concluded that common ownership has an anti-competitive influence on the price of banking products. The latter found no evidence to this effect."

So the reality is that Dow/DuPont is focused on Azar, not on the Gramlich and Grundl counter-riposte. The CMA is aware of both reports and yet it has focused solely on the Dow/DuPont analysis.

I now have to do a bit of a canter I'm afraid through some of the literature. Can I start please in bundle E. They are all in bundle E. Bundle E, tab 1. Now, what had happened here, there was a quirk with two particular indices, the Russell 1000 and the Russell 2000, such that investors were more likely to back somebody appearing high up in the Russell 2000 index over somebody appearing low down in the Russell 1000 index even though in theory the firm in the Russell 1000 index was a more profitable firm than the Russell 2000.

It enabled them to therefore compare the influence of passive management funds on certain responses.

At page 7, essentially the key thing that is identified is an improvement in governance standards; in particular, for example, passive funds were more likely to lead to a greater degree of independent directors, fewer poisoned pills and less unequal voting rights, and therefore on the basis of those things passive investors improved firm value by insisting on basic governance-related changes which appeared to improve firm value but required a low level of costly monitoring.

Page 33, however, confirmed that the authors found relatively little evidence that

ownership by passive funds is associated with corporate policies related to investment, capital structure or cash holdings:

"In unreported results we find no difference in firms' leverage capital expenditure, R&D expenses, cash to asset ratio or acquisitions. These findings are consistent with anecdotal evidence that passive investors might lack the resources necessary to research and influence corporate policies that are inherently more firm specific."

So, if anything, it runs counter to the suggestion that common institutional ownership would lead to a particular concern that a firm would somehow change its rivalry in order to satisfy the perceived views of the institutional investor.

At page 39, bottom of the page:

"Ownership by passively managed mutual funds is associated with more independent directors on board, fewer takeover defences and more equal voting rights as captured by a firm being less likely to have a dual class structure. ...(Reading to the words)... corporate governance."

We then see essentially those are all the things that would militate against a board being able to pursue an objective that is contrary to the best interests of the company.

Now, the Azar paper is, as I have indicated, the linchpin paper that lies behind the Commission analysis in Du Pont and which is therefore -- essentially this is the key point -- the key paper relied upon de facto by the CMA. The abstract is at page 79 behind tab 2. The abstract essentially reaches the conclusion based on the regression analysis that taking common ownership into account implies increases in market concentration:

"We conclude that hidden social costs reduce product market competition the ...(Reading to the words)... and good governance."

I have been asked to slow down, I am sorry. I have been going at a fair lick.

Page, second paragraph:

"The overall conclusion was that using fixed effect panel regressions ticket prices are approximately 3 to 7 per cent higher in the average US airline route than would be the case under separate ownership."

And that was the startling figure that prompted some handwringing.

Page 84, some of the intuition that lay behind that was that institutional investors may prefer to have a quiet life bringing an overall balance to their overall margins rather than preferring to instigate price competition in which one of their portfolio interests would be preferred over the other.

In terms of the theory, hypothesis, at page 87 to 88 it's simply the case that it's envisaging a two-firm market. So it's looking at trade-off between firm A and B. It's not dealing with multiple firms. At page 120 the authors note that:

"It strikes some as surprising that mutual funds, often thought to be lazy investors, would actively engage with portfolio firms with the aim of decreasing the extent of product market competition. However, the claim that common ownership leads to higher prices is very different from the claim that an individual shareholder actively and consciously pursues an anti-competitive agenda, influences managers of portfolio firms to compete less aggressively against each other or even incites collusion. Indeed any such notion is not implied by our empirical results."

So even taking this report at its highest, it's simply saying: we've established that there's a correlation through regression analysis between common ownership and prices, ie prices are higher than they otherwise would have been, but they don't imply that individual portfolio firms would be incited to or influenced to compete less aggressively against each other.

The Anton paper behind tab 3, I think I'm afraid I don't have time to open particularly on these papers, but all seek to support the Azar analysis. Our point here is that this is a purely theoretical paper. It doesn't actually introduce any further empirical findings

and it relies upon the Azar paper for its empirical findings.

At page 208 the report recognises that real-world competition is more complex. Page 208, paragraph 2:

"Real-world competition between firms is more complex than our model assumes."

The next one is a law essay, tab 4. It's a paper by a professor of law at Harvard and he relies entirely on the Azar analysis and then makes various policy suggestions as to what should be done, including recommending that anti-trust enforcement actions should be adjusted to take account of the research that Azar had committed.

The next one, behind tab 5, again it's not an economics paper, it's a policy paper and at page 325 there are some references to key institutional investors with familiar names such as Vanguard, BlackRock, State Street and Fidelity, holding a very substantial chunk of a very large number of US companies.

So to the extent that this is indeed a competition concern, it's an absolutely huge issue because it will impact on many many different sectors and many many different businesses.

The learned author then posits a series of steps that might be taken to deal with the policy issues.

The next one is behind tab 6 and it looks at the so-called hidden power of the big three, namely the three largest institutional investors and again builds on the work that has been done by Mr Azar. Page 394, for example, expressly relies upon the Azar findings to support its contentions.

We then move on. Those are the key six papers that are essentially relied upon by the European Commission in the Dow/DuPont decision. You will have seen that when analysed, all of them actually, their empirical basis focus on and rely upon the work by Mr Azar, not by anyone else.

We then move on to what I might call the academic backlash, without any wish to be

discourteous, there was a response because the consequences and magnitude of the effect of common institutional shareholding giving rise to a competition concern was highly significant. In particular we see at page 403 the learned authors of this paper say in the first paragraph:

"This paper surveys the recent literature that examines the relationship between ownership of firms and the financial space. The primary concern is the common ownership hypothesis [and it says what that suggests]. The core of the idea is quite simple: firms maximise shareholder value but shareholders hold stakes in competitors, thus firms may want to maximise some combination of their own profits and their competitors' profits to maximise the value of their investors' portfolios. The implications of this possibility are enormous."

And it says why then in the next paragraph: so many assets are owned by so many mutual funds, pension funds and so on, why it would be such a big deal.

Now, at page 405 we see evidence of the response to Azar coming through and people suggesting that the regressions may simply be measuring correlations as opposed to true causal effects, see line 5, page 405. The summary is then given in paragraph 4, by the second hole punch:

"To summarise, we find that while the existing correlations explored in this growing literature are provocative and important, the methods and measures used to date make it difficult to draw clear conclusions. We believe that these early contributions are the beginning of a literature rather than the end, and before policy measures can be debated we need first to test these hypotheses in more settings using modern methods."

At page 420, the specific critique that is levelled is that in essence Messrs Azar and co et al adopted what's called a structure conduct performance paradigm, see the section beginning empirical results in literature, which in industrial organisation

economics dated back to 1951.

We then see at page 421 there had been a response to that approach and a critique of it leading to what is said at the bottom of the page to be the demise of the original SCP literature. In short, the concern was that it was a regression analysis that wasn't sufficiently nuanced, so it was picking up correlations which were not necessarily indicative of cause.

That critique is then rolled out at pages 423 and 424, where we see a summary at 423 of the Azar analysis and then a reference to the fact that they've attracted the responses at the bottom of the page, section 4.2, starting with Kennedy et al, Denis et al 2017, they claim to find no common ownership effects using alternative approaches in the same industries. So rather than using the discredited SCP approach to regression analysis, these papers had used more modern methods for data analysis and they had not found any causal link.

At 424 we then see a more detailed analysis of those five papers and the reasons within them for suggesting that the Azar analysis needed to be reconsidered at the very least.

That's the conclusion that's then reached at page 427 under first paragraph of the conclusion:

"Evidence of a common effect of ownership on prices is at this point suggestive at best. Early methods used to invest the question are problematic and so more work is required before broad conclusions should be drawn."

At tab 8 we then have a legal analysis by two professors of law, at page 435 we see the abstract. Now, because of the growth of law on economics in the United States -- sorry, a legal academic discipline, the authors don't feel precluded from having an economic critique of the economic literature as well but they start off with the theoretical argument at page 438.

They identify in particular what I have described as the switch from cross-shareholding or cross-ownership issues into common ownership issues and they identify in particular at the top of page 438 that O'Brien and Salop 2000 paper that has formed the bedrock for the cross-shareholding issue had been dealing solely with the effects of a firm acquiring stock in a competitor. That isn't what we are dealing with. They then said there were basically mixed motives.

At the bottom of the page they contend that:

"The core of Azar et al's empirical analysis thus assumes that managers will take into account the holdings of shareholders in competing airlines. This is a heroic and unconvincing assumption for a number of reasons."

That assumption of course lies behind some of the thought experiment discussions we've been having earlier. So first sticking with Azar at al's focus on airline industry, note the substantial heterogeneity of the holding of the largest shareholders, and they then present the table.

They then re-present the table at page 440 by reference to the impact of individual different airlines. Now, true it is that some institutional investors have shares across the range, so we can look at BlackRock, we can look at Vanguard and we can look at I suspect Fidelity, yes, each of those have low-level, relatively low-level shareholdings in each of the four main airline competitors, but then there's a whole raft of other institutional investors that don't or only have shareholdings in two or one. So they recognise that the issue was far more nuanced than perhaps had been presented.

Then at 441 we see the authors confirming that the matter was also complicated, see paragraph 2, when one realises that BlackRock and Vanguard also manage funds that own shares of airline suppliers and customers:

"For an index fund that owns market weighted position in all companies in the index, in essence the whole economy, factoring in the effect of an airline's strategy on the

fund's portfolio would be an extremely complex endeavour that would require determining the extent to which overcharging can or cannot be passed along to the ultimate consumers."

They then say:

"Of course most of the holdings of institutional investors are not in index funds."

They then say:

"Index funds themselves strive to match a specific index. Therefore the potential maximum gross returns will be identical, namely based on the performance of the index. Competition amongst index funds therefore is over the cost, namely management fee. The accuracy of the tracker in the index, customer service ..."

And it then says:

"Inducing soft competition will not help the index funds on any of these dimensions.

So in other words, the way that index trackers work with algorithmic decision-making and with algorithmic investment decisions does not enable the sort of isolated bespoke influence to try and encourage soft competition rather than hard competition to be formed. It's not the way that these trackers and indexes work.

We then see:

"Accounting for non-index fund holdings greatly complicates the strategy calculus, but it remains the case that confronted with the fundamentally heterogeneous conflicting and constantly changing preferences of shareholders with regard to whether and the extent to which the returns of other firms in the industry and outside it should count, the only strategy that will win support among the investors is to maximise the value of the single airline without paying attention to what happens to competitors."

We then see at page 442 that the analysis is, in any event, sensitive to the levels of individual shareholdings. So in the second subparagraph:

"While there are exceptional cases, in the most general O'Brien/Salop model [which is

the cross ownership model] the modified HHI index will depend on ownership shares, but these ownership shares are indigenous. This creates a substantial inference problem for Azar et al in applying that model to the common ownership case and non-controlling case. The authors failed to note a causal distinction between one investor holding 30 per cent, arguably a controlling position and likely indigenous, and three investors each holding 10 per cent, less likely to be indigenous. As we have discussed in greater detail below, control or a level of influence close to control are critical elements of the current legal framework and current enforcement policies."

So where one is looking at, here, a series of at best three institutional investors who each hold 10 per cent, these authors are saying, well, that changes the dynamic and you can't simply roll across the cross-ownership analysis.

We see at the bottom of that page that these concerns raise fundamental questions about the core theoretical move of Azar from going from a cross ownership model to a common ownership model.

They also make a number of other points. The ability argument is dealt with at page 443:

"One possibility would be through shareholder voting on directors, ie how are you going to achieve the influence on soft competition that you want to obtain, but we see no evidence [it says] that shareholders vote on competitive strategy and no evidence that directors run on a platform that is directed towards competitive strategy. In proxy statements, the information provided is limited to qualifications, expertise and other directorships and director stock ownership and compensation. In sum, there is no obvious way in which shareholders can vote for soft competition."

At page 444 they refer to Delaware corporate law, third paragraph, and they say shareholders do not do very much, in sum they vote, sell and sue. Activist shareholders may be different but of course the more passive institutional investors

are not going to be engaged actively in individual corporate strategies of an individual member of the portfolio which is huge.

At 446, for the sake of completeness, the last paragraph confirms that they have a variety of concerns about the empirical case made by Azar. Many go to the robustness of the results. Further analysis of data is needed. So there were some concerns about identifying the airline routes.

The next article is behind tab 9. This paper essentially is by two economists, including Daniel O'Brien, who was I think the O'Brien of the O'Brien and Salop fame, who argued that the Azar paper is not robust.

The abstract can be seen at page 472 saying:

"Azar research has received a great deal of attention, leading to calls for and actual changes in anti-trust policy. The authors find its conclusion regarding the effects of minority shareholding on competition are not well established. They want to reserve [keep their powder dry] until more rigorous empirical work is conducted, but the theory of partial ownership does not yield a specific relationship between price and modified HHI. In addition, the key explanatory variable is an indigenous measure of concentration that depends on both common ownership and market shares. Factors other than common ownership affect both price and MHHI. So the relationship between price and MHHI need not reflect the relationship between price and common ownership."

In short, you could find a correlation, even though there's no causal effect, and that's the concern.

At page 476 the authors, halfway down the page, express scepticism as to whether or not common ownership involving small minority shareholdings would have a significant impact on competition, and they refer to incentives being dependent upon how a manager is compensated.

Then over the page, at the top of page 477, first bullet, taking into account the laws on fiduciary obligations and referring to the possibility for minority shareholders to enforce those.

The conclusion at page 506, bottom of the page, is:

"The predictions relied upon mis-specify the models and therefore do not imply that common ownership by minority shareholders raises prices in airline banking or other industries, instead the research identifies correlations that are not unexpected given the model mis-specification. Therefore, researchers and policy makers are getting ahead of themselves in proposing and implementing policy changes based on this research."

Next up is a legal article, a legal paper rather than an economic one, by an acting Professor of law at the University of California, page 517, tab 10. He notes in the opening paragraph that, given the size of institutional investment in corporate USA, if that common ownership is indeed reducing consumer welfare, then the impact is potentially huge.

But at page 565 his conclusion, based on the analysis of the economic data, he says:

"The discussion above shows that, even though institutional investors' significant equity holdings in US companies generate high levels of common ownership, that alone is insufficient to conclude that the common ownership is causing substantial competitive harm in a relevant market, instead it depends on numerous factors, such as the nature and extent of common ownership, the structure of the market, shareholder incentives and managerial objectives."

And so on.

Instead, he recommends, see the top of page 567, that there should be a case-by-case approach to evaluate it. You can't simply, see the top of page 566, extrapolate from the previous research, the empirical research, and say that provides

a justification for anti-trust treatment of common institutional shareholders.

It's fair to say at page 575 he does not rule out the possibility theoretically of common ownership potentially generating competitive harm. So it does raise a potential issue. However, he then says there's no yes or no answer to the question whether common ownership will generate substantial competitive harm in a given market so you have to analyse it essentially on a case-by-case basis.

MR LOMAS: Mr Beal, case-by-case maybe a good point. This is absolutely fascinating stuff. I have read great papers. I am sure one can spend a great deal of time on it. But how does it actually link to your case because it's clear that there is an open debate in the literature about the impact of common ownership? Are you saying that the CMA can't take account of that concept in its risk assessment because the literature isn't clear because there are many issues on which the literature isn't clear? How does it link to what you say they did wrong under ground two?

MR BEAL: What they did wrong under ground two was to simply assume that Dow/DuPont was the final answer on the question.

MR LOMAS: So they placed too much weight on it essentially.

MR BEAL: No, they took that as the relevant evidential basis for the conclusion that common institutional shareholding presented a risk, without taking into account the numerous pieces of literature, which is why I am laboriously going through them, that say that that risk is either wrong as a matter of methodology or is not reflecting either an empirical truth or a perceived economic rationale.

So a number of arguments being deployed against the Azar paper -- and I have not even yet got to the Denis paper which basically recalculates the data and says: no, there is no --

MR LOMAS: We wait with anticipation.

MR BEAL: Well, I can speed it up and we can get there.

MR LOMAS: But what you are saying is Dow says: there is a competition problem here, assume, and what you are saying in the light of these papers is that the right analysis is: there may be a competition problem here. Is that the extent of the distinction you are making?

MR BEAL: No, it goes further than that because the underlying economic literature on which the Dow/DuPont approach is predicated has been substantially undermined, and because the CMA in that review paper I took you to has recognised that the economic literature has moved on, to refer to one paper when they know it's been undermined and say that provides the evidence we need is irrational. It's as simple as that.

MR LOMAS: Right.

MR BEAL: To only take into account effectively one paper or one strand of analysis --

MR LOMAS: One paper or one decision, the Dow decision?

MR BEAL: Well, the Dow decision is premised on the underlying --

MR LOMAS: (Inaudible due to overspeaking).

MR BEAL: We've seen it's the Azar paper that is basically the fons et origo of the entire stream of thinking.

MR LOMAS: Right.

MR BEAL: And that's the irrationality. The irrationality, whether one views it as a failure to engage in sufficient enquiry, or a failure to at least take into consideration the countervailing views, is the Wednesbury unreasonable approach.

MR LOMAS: Okay, thank you.

DR BISHOP: You are assuming that the citation of one of these papers was the actual motivation for the CMA's decision, that but for that paper they would have been happy with the spin-off analysis.

Now is that a safe conclusion? I mean, if this literature never existed, the CMA might

have said: look, we just don't like this as a solution. We've got a big overlap in shares between -- in fact, 100 per cent overlap in shares on day 1. Are you saying that they could not have drawn their conclusions?

MR BEAL: Yes, because the common institutional shareholders have no mechanism by which to give effect to the concern. The evidence that is relied upon in the final decision, given that we'd said, well, why are you complaining about common institutional shareholders, there's nothing they can do, the answer from the CMA in the final decision was: look at Dow/DuPont, that's what we are relying upon, and we are relying upon -- see the footnote in the final decision that expressly refers to the economic literature relied upon in that decision.

DR BISHOP: Yes, I see what you are saying.

MR BEAL: So we are simply dealing with the case we are facing.

Imagine, for the sake of argument, that the final decision picked on a different risk, say per impossible they said: Dye & Durham, we've looked at you, we've seen what you've done with the failure to notify the merger. We think there is a real risk that you would in fact then go and act anti-competitively with another competitor in the market and try and sew up the market in the UK because you are so keen to make money. Imagine they said that was the risk. It wouldn't happen because my clients don't operate that way. But would it really be open to the CMA to say, well, it's enough for me to think there is a risk of active collusion in this market between two other competitors to say therefore what we say goes and you must respect that appreciation of risk.

It seems to me it's important for this Tribunal to engage with the reasons that are given and to see whether or not there is in fact an evidential basis for the risk that is being assessed. Hence, one needs to start with the premise: what is the evidential basis for this risk? And if the evidential basis for that risk is the Dow/DuPont decision and the literature which is relied upon in the Dow/DuPont decision, and that literature has been

substantially discredited, for a variety of reasons, including re-running the analysis, then at the very least it behoves the CMA in that situation to go and review the literature and form a more educated view of what the right answer is.

We are not asking this Tribunal to say: well, having read the groundswell of support initially for a very provocative and ground-changing paper and then the understandable academic backlash -- we are not asking you to pick the winner from that, it's not your job, it's not my job, it's the CMA's job. But they do need to apprise themselves of this important literature to realise that if the stuffing has been taken out of the Azar decision then that has an impact on the Dow/DuPont analysis and that the proper approach is to reappraise. That is my submission.

I will go quickly -- I am very conscious of time and I do want to finish within the time frame allotted. But we see, for example, at page 577, tab 11, this is a judge of the US Court of Appeal for the District of Columbia and Professor of law at George Mason University concluding, for a variety of reasons, that the Azar analysis simply doesn't stack up, for both theoretical and empirical grounds. I would commend that paper to you in due course, simply because it is very unusual to have a judge come off the fence on an interesting academic/economic debate.

But the judge sets out from 585 onwards a series of practical real world reasons why this really doesn't make sense, in particular by reference to the nature and extent of the funds and how they are managed and how they deal with investment strategies.

Next up is O'Brien. This is at tab 12. Again my understanding -- and I will be corrected if I am wrong -- this is the O'Brien who was the Salop and O'Brien. I say that because at page 610 he refers to his own literature as the O/S paper and then says in paragraph 7 of page 210 there is a real issue about simply rolling out the analysis and saying it applies also to common ownership issues, especially when the "common workhorse", as he describes it, of industrial organisation theory is that shareholders

seek profit maximisation for the firms that they own shares in, and that that is consistent with fiduciary duties.

He also concludes at page 611 that the institutional investors themselves will have mixed incentives. There will be a cost associated with an asset manager trying to influence companies, and the downstream/upstream tension if these institutional investors own more than one particular level within a business structure. So what would be in the interests of an upstream supplier isn't going to be in the interests of the downstream competitor.

At page 613 he says:

"Theory alone does not provide the answer."

Now Denis et al at tab 13 is the deconstruction of the regression analysis by Azar. I don't propose to go through it in any detail because it gets very technical. But the upshot at page 620, in the second paragraph down, is that the paper demonstrates that the positive relationship between the delta for HHI and ticket prices documented by the Azar paper is driven by a variation in airline market shares rather than a variation in common ownership. So they have re-run the maths or the stats and they've worked out that the correlation actually is attributable to airline market shares. Therefore, they say, at the bottom of the page, there are no policy implications therefore (several inaudible words).

"On the contrary [at the bottom of page 622], our results suggest that common ownership does not exert a causal influence on airline ticket prices, rather they are consistent with variation in market shares, not ownership, identifying the effect and market share ...(Reading to the words)... generating spurious correlation between the measure of common ownership and average prices."

It compliments, see the top of page 623, other findings.

Now Gramlich and Grundl is one of the ones that was expressly referred to by the

CMA in its review that I took the Tribunal to. At page 684 we see that they in fact suggest a different way of analysing the empirical work and focusing on a different approach.

The upshot of their approach, see page 694, was any effect of common ownership was far more muted than the Azar paper had suggested. Therefore, the sign of the effect was not robust. So that is suggesting you can't rely on the Azar approach to reach a definitive conclusion, which was the conclusion that the CMA drew from it because that's what they said in their review paper.

Now problems with the theory are then addressed behind tab 15, page 725 to 728. We see at 725, in particular, there's a deconstruction of the necessary premise and confirmation at the bottom of that page:

"Competition amongst passively managed index funds is not based on fund returns but instead occurs on two dimensions; firstly, tracking and, secondly, management fees", which is to similar effect to the paper we looked at previously.

But there is a concern, to put it mildly, about the Azar analysis voiced at page 729 and onwards.

Then problems with the evidence is dealt with really at page 735 and 736, the failure to establish a causal relationship from a correlation.

Tab 16 is a Yale law journal which posits a potential different analysis. Again it's theoretical, not empirical, so I will pass over that and move on to the final report which is a KPMG study on ownership, common ownership in competition from January 2020.

We see at page 902 the policy debate is identified by reference to the US papers. The Azar papers took two different forms dealing with two different industries, but the detail doesn't matter.

Page 903, at the bottom of the page:

"In our view, there are significant gaps in the economic evidence base underpinning

the current debate on common ownership."

Then over the page, pages 904 and 905, they have a series of concerns about the economic principles and then also the conclusions drawn from them. Firstly, the first point is it's derived from cross ownership models rather than common ownership models, and that suffers from the flaw. The second one is holding shares in complimentary industries, ie upstream/downstream and so, so mixed motives.

Third:

"Where companies compete in R&D and innovation, knowledge spillovers may be internalised by common ownership leading to greater incentives to progress", which has not I think necessarily featured in any of the analysis thus far.

Then, finally, some practical points:

"Institutional investors frequently use proxy advisers and the wide range of holdings would make it extremely costly to be actively involved in voting on all of the proposals."

So, in other words, the eye of Mordor from institutional investors is not going to alight on Dye & Durham when it has 2,000 other industries and sectors to focus on, especially given the relative value of this particular business in this particular case.

Please can I move on to deal with capability and commitment criteria. This is dealt with extensively in our skeleton argument at paragraphs 62 to 68. Therefore, I can make, I hope, a series of seven short points.

Firstly, we say TMG would continue to be run as an independent competitor with the same resources it has at present. The hold separate arrangements mean that TMG is being run at the moment without any support from the wider D&D Group. Once it is an independent entity, it will be able to access the equity and debt markets to be able to finance any additional investment it wishes to take part in.

The concerns about a run on shares, the market suddenly undervaluing the shares is misplaced. We have an orderly procedure that we envisage and the market will pay

for the shares what value the market attributes to those shares.

TMG, in its skeleton, paragraph 33, says we've given no commitment to sell the other remaining shares. But, with respect, whether institutional investors buy or sell in a fully tradeable market is a matter for them. We have no control over it. Once the entity is AIM listed, those institutional investors will be able more frequently and more meaningfully to buy and sell shares in TMG which should improve its liquidity.

Concerns about inability to issue more shares are misplaced. That should, if anything, be easier once you have an AIM listing. There's no evidence at all, anywhere, from anyone, that a cash generative business such as TMG would not be able to access the capital finance markets and obtain financing on appropriate terms. No reason has been given to suggest that shareholders would veto that. Why would shareholders veto that if it's for the good of the company? And on what basis would shareholders veto that, given that the Articles of Association direct that the board of directors has to decide on debt financing, not anyone else?

The concern about deadlines for transition is misplaced because at the moment TMG is functioning. It's functioning as a separate entity. Yes, this process has taken longer than we hoped but that's because we've had to have this hearing. So we are where we are.

Finally, TMG will stand or fall in due course on the quality of its product and therefore the performance of its management and its business more generally.

Unless you have any further questions for me, that is ground 2. We do say on ground 2 that the Dow/DuPont reasoning cannot be relied upon by itself and that there has been a wholesale gap in the logic because the Dow/DuPont industries were a very different industry from this industry and there has been no attempt to try and explain why in a situation like Dow/DuPont, where you have all of the main players owned by common institutional shareholders, that same logic necessarily applies to a two firm

common shareholding in a wider four firm market, for the sake of argument, and indeed you have my submissions on why the economic literature has been fundamentally undermined.

Ground 3. I hope I can take this quickly. Many of the submissions from the intervener, with respect, miss the point. We are not trying to change or vary divestiture. What we are seeking to do is to have approval for a twin-track procedure which enables us to resort to a spin-off procedure should the need arise.

We only get to this point if you are with us on ground 2, that we would qualify as an independent -- it would be an independent TMG that was then competing in the market. If you find that there would be an independent TMG competing in the market, that the CMA irrationally ought to have concluded met the purchaser approval criteria, then the consequence of that is, having lost, one assumes, on ground one, that what is standing between us and a perfectly sensible approach to divestment is simply the express wording of the final undertaking.

If that's the case, we respectfully suggest that it would be appropriate to amend the wording of the final undertaking to enable something that is perfectly sensible to be carried out.

Nothing in the CMA guidance, which is in bundle D, tab 1, page 1, suggests you can't do that. On the contrary, this isn't statutory guidance. This is guidance that is being published. It does not have the imprimatur of section 106 lying behind it.

We see at page 4, tab 1 of the remedies guidance:

"The CMA will apply this guidance flexibly. This means that the CMA will have regard to the guidance when it deals with the reviews of undertakings and orders, but when the facts of an individual case reasonably justify it the CMA may adopt a different approach."

We've set out reasons why this is a case where it's appropriate to adopt a different

approach, namely to allow a very modest variation of the undertakings to enable divestment by spin-off procedure to be tolerated.

The short point is that where, as here, the situation has changed and market conditions have worsened and where, therefore, there is a very substantial risk of the value that is ascribed to the business being significantly less than the value that would be obtained on an AIM listing basis, unless there is a real risk or an identified and substantiated risk that the AIM listing would in fact produce a substantiated competition concern, then the proportionate response is to allow a small variation to the undertakings to take effect.

What would that wording look like? Well, that will need to be thrashed out, if it's right that the CMA should revisit this issue. But one need only look at the terms of paragraph 13 of schedule 8 to see that there are references to divestment being tolerated through the creation of a company and the allotment of shares to that company, and you've seen in the FTC decisions that we've referred to and some of the EU Commission commitments that the definition of divestment has been sufficiently broad to encompass the spin-off procedure and there has been no concern about that.

So the drafting is not the difficult bit. The difficult bit is overcoming the CMA's conceptual objection to spin-offs being a form of divestment, and that either stands or falls by reference to our ground 2 approach.

We would suggest to the extent that the CMA relies upon the guidance as imposing requirements -- and that's what their skeleton suggests at certain points -- that that amounts to the fettering of a discretion, which is not lawful. The guidance must be guidance. It's a tram line -- sorry, it's a guideline rather than a tram line. It's not meant to be a straitjacket as to what one can do, and it certainly doesn't amount to imposing statutory requirements that have to be met in order for the variation to be permitted.

Should the Tribunal need reference for that, the following references will suffice I hope. The bundle of authorities at tab -- bundle 5, tab 2, page 27 is the ex parte W case, in particular at pages 40, 42 and 43 where the court there said:

"It is appropriate to have a policy to encourage consistency but you must not treat it as binding in every case regardless of the facts."

Secondly, bundle of authorities 5, tab 1, page 19, a decision of Mr Justice McNeill, in particular at pages 19, 21 and 22, ex parte Madden case, where it was recognised that it wasn't appropriate for, in that case, the relevant police department to treat guidance as being something that had to be complied with come what may.

We say that the same follows here. The CMA 11 guidance is just that, it is guidance. It does say it won't be applied in appropriate cases. If you are with us on ground 2 that we were in principle a suitable purchaser through Spinco, then the level of harm or variation that needs to be done to the undertakings themselves is minimal and therefore any other approach would be disproportionate.

Not having my metaphorical gown tugged, unless you have any further questions for me, those are my submissions.

THE CHAIR: Thank you very much.

Mr Lask, how are we doing for time?

MR LASK: I was expecting to be on my feet before now. I am very happy to make a start now but I am conscious that the Tribunal wants to rise relatively soon.

THE CHAIR: Yes.

MR LASK: I would be grateful for an early start tomorrow perhaps.

THE CHAIR: Yes, we'll start -- if everyone can make it, we'll start at ten. Is that convenient to all leading counsel?

MR LASK: I am grateful.

THE CHAIR: How long do you think you'll be then, just looking at --

MR LASK: I was originally aiming to finish at around 2.45, but that was on the assumption that I would have about 45 minutes this afternoon, so perhaps I could aim for 3.30.

THE CHAIR: Mr O'Donoghue, you will need at least half an hour.

MR O'DONOGHUE: Yes, I mean I wasn't consulted by Mr Beal on my half hour allocation, save --

THE CHAIR: I said 45 minutes, didn't I?

MR O'DONOGHUE: Indeed. Well, between 30 minutes and 1 hour, 45 minutes seems to be --

MR BEAL: I am sorry, my learned friend says he wasn't consulted. I left a voicemail message for him --

THE CHAIR: We just want to get the timings right here.

MR O'DONOGHUE: I am obviously following Mr Lask and it depends to some extent on what he says. But I mean, certainly standing here today, it would be prudent to plan on the basis that it may be up to 45 minutes but of course if I can do it in less I certainly will.

THE CHAIR: Yes. If you have 45 minutes, you will be finished at the latest at let's say 4.15 and that will give us from 4.15 until five for a reply.

MR BEAL: I hope I would not need that long. The reason why I have been lengthier in opening --

THE CHAIR: Exactly, because I would have thought your reply would be about --

MR BEAL: Half an hour.

THE CHAIR: -- a minimum of half an hour, a maximum of 45 minutes, and obviously a lot depends on what comes out tomorrow. So I think we've got a plan then, that's fine.

Thank you very much.

(4.49 pm)

(The hearing adjourned until Tuesday, 27 June 2023 at 10.00 am)