Neutral citation [2026] CAT 14

Case No: 1730/12/13/25

IN THE COMPETITION APPEAL TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

26 February 2026

Before:

THE HONOURABLE MRS JUSTICE BACON
(President)
BEN TIDSWELL
DEREK RIDYARD

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) THE NEW LOTTERY COMPANY LIMITED
(2) NORTHERN & SHELL PLC
(3) THE HEALTH LOTTERY ELM LIMITED

Applicants

- v -

THE GAMBLING COMMISSION

Respondent

- and -

(1) CAMELOT UK LOTTERIES LIMITED
(2) ALLWYN UK HOLDING B LTD
(3) ALLWYN ENTERTAINMENT LIMITED

Interveners

Heard at Salisbury Square House on 10 and 11 December 2025

JUDGMENT

APPEARANCES

Sa'ad Hossain KC and Harry Gillow (instructed by Bryan Cave Leighton Paisner LLP) appeared on behalf of the Applicants.

Joanne Clement KC and Richard Howell (instructed by Hogan Lovells International LLP) appeared on behalf of the Respondent.

Marie Demetriou KC and Tim Johnston (instructed by Clifford Chance LLP) appeared on behalf of the Interveners.

A. INTRODUCTION

1. This is the Tribunal's judgment in an application for review (the **Application)** under s. 70 of the Subsidy Control Act 2022 (the **SCA**) of a decision of the Gambling Commission (the **Respondent**) dated 19 July 2023 (the **Decision**), brought by the New Lottery Company Limited, Northern & Shell PLC and The Health Lottery Elm Limited (collectively the **Applicants**). This judgment is delivered following the hearing of the Application on 10 and 11 December 2025.

2. The Applicants allege that the Decision constituted the grant of a subsidy to one or more of Camelot UK Lotteries Limited (**Camelot**) and/or either Allwyn UK Holding B Ltd or Allwyn Entertainment Limited (together **Allwyn**) (collectively the **Interveners**). Camelot was, at the time of the Decision, the operator of the National Lottery under the Third National Lottery Licence (**3NL**). The commercial relationship between the Interveners and their involvement in these proceedings will be set out below.

3. The Decision was made following a marketing investment proposal submitted by Camelot to the Respondent (the **2023/24 MIP**) by way of a Licensee Notice of Investment Opportunity (**LNIO**) for the retention of some of the National Lottery revenues as an investment in the marketing of the National Lottery. The Respondent, following modification of Camelot's proposal, granted the use of £70.21m for this purpose, taken from funds which would otherwise have been paid to the National Lottery Distribution Fund (**NLDF**). The Applicants allege that this sum of £70.21m constituted a subsidy within the meaning of s. 2 of the SCA.

4. The Applicants seek declarations that: (i) the Respondent has granted a subsidy to Camelot and Allwyn by forgoing the sum of £70.21m that would otherwise have been payable into the NLDF, for the purposes of the marketing and promotion of the National Lottery; and (ii) the subsidy did not comply with the subsidy control principles set out in Schedule 1 to the SCA. The Applicants also seek a recovery order requiring the Respondent to recover the £70.21m from Camelot and Allwyn. Until the hearing, they also sought an order quashing the

Decision, but at the hearing they confirmed that this head of relief was no longer being sought.

5. The Applicants' skeleton argument was prepared by Michael Bowsher KC and Mr Gillow; at the hearing the Applicants were represented by Mr Hossain KC and Mr Gillow. The Respondent was represented by Ms Clement KC and Mr Howell; and the Interveners were represented by Ms Demetriou KC and Mr Johnston.

6. Following the hearing, the Tribunal invited the parties to provide further brief written submissions on some specific questions relating to the interpretation of ss. 2(2)(b) and 2(1)(c) of the SCA (i.e. the concept of "forgoing revenue that is otherwise due" and the concept of specificity of the aid, respectively). The parties' further submissions on those points were provided on 10 February 2026, and we have taken these into account in our analysis below.

B. THE EVIDENCE

7. All of the parties submitted witness statements. No party sought to cross examine any witness.

(1) Applicants' witnesses

8. Richard Martin is the Group Commercial Director of the Second Applicant and a Director of the First Applicant. He was formerly a Director of the Third Applicant. Mr Martin provided two short witness statements, stating that he was not aware of the Decision until 15 January 2025 when reviewing Camelot's 2023/24 Annual Report (the **2023/24 Annual Report**) for the purpose of separate High Court proceedings which we refer to below.

9. Martin Ellice is the Joint Group Managing Director of the Second Applicant and the Managing Director of the Third Applicant. Mr Ellice made one short witness statement, stating that neither he nor his organisation had knowledge of the Decision or previous marketing investment approvals before January 2025.

10. Robert Sanderson is the Joint Group Managing Director of the Second Applicant and a Director of the First Applicant. Mr Sanderson made one short witness statement. As with Mr Ellice, his evidence was that neither he nor his organisation had knowledge of the Decision or previous marketing investment approvals before January 2025.

11. Digby Rancombe is the Group Finance Director of the Second Applicant. Mr Rancombe made one short witness statement, explaining his review of the 2023/24 Annual Report in October 2024, and an email he then sent to his colleagues about that report. He stated that although he reviewed the 2023/24 Annual Report at that time, he did not identify or appreciate references to the Decision. Rather, his focus was on identifying high level financial performance information.

(2) Respondent's witnesses

12. James Holdaway is the Director of National Lottery Regulation at the Respondent. Prior to holding this position, he was Head of National Lottery Licensing and Enforcement at the Respondent from 2012–2017. Mr Holdaway provided two witness statements, giving a detailed account of Camelot's LNIO process, including the structure and purpose of its marketing investment proposals and the Respondent's review methodology. He explained the Respondent's longstanding use of joint financing of marketing under 3NL, and set out the basis on which the Decision was ultimately made and approved. In particular, he set out the Respondent's understanding of Camelot's econometric modelling and the advice the Respondent had received on that modelling from Europe Economics (**EE**), consultants retained by the Respondent, explaining why the Respondent considered the modelling, though imperfect, sufficiently reliable for its decision-making purposes. He described the historic use by Camelot of similar modelling, and the manner in which EE's criticisms of Camelot's modelling were addressed within the Respondent's overall assessment.

(3) Interveners' witnesses

13. Sinead Nanson is an economist and econometrician and holds the position of Senior Marketing Effectiveness Manager at Allwyn, prior to which she was the Senior Marketing Optimisation Manager at Camelot. She made one witness statement, setting out in detail the technical development, structure and evolution of Camelot's econometric models since 2019, including variable selection, diagnostic testing, and the use of "Monte Carlo" simulations. She explained Camelot's preparation of the 2023/24 MIP and its engagement with the Respondent and EE, and she responded directly to the Applicants' criticisms of Camelot's modelling.

14. Deepa Popat is the Commercial Finance Manager at Allwyn and has held similar roles at Camelot. She made one witness statement explaining the financial, operational, and compliance aspects of Camelot's 2023/24 MIP. In particular, she set out the way in which 3NL governed Camelot's allocation of funds for marketing, how marketing expenditure was accounted for and monitored by Camelot and the Respondent, and the practical implications of unwinding the 2023/24 MIP.

15. Mark Dimech is the Head of Commercial Regulation at Allwyn and previously performed the same role at Camelot. Part of his role involved leading a team of individuals that formed a working group charged with preparing marketing investment proposals each year. He made one witness statement addressing the preparation and submission of those proposals, including the methodology for calculating returns to good causes and the performance of previous marketing investments. His evidence provided financial information regarding the 2023/24 MIP, including expected incremental sales and projections about return on investment.

C. BACKGROUND

(1) The parties

16. The First Applicant was established by the Second Applicant for the purposes of competing for the Fourth National Lottery Licence (**4NL**). The Second Applicant is a major business with a significant background in the media industry, property development and venture capital, and has since 2011 operated the Health Lottery through its subsidiaries, one of which being the Third Applicant. The main activity of the Third Applicant is the provision of lottery management services to the Health Lottery.

17. The Respondent is a body corporate established by s. 20(1) of and Schedule 4 to the Gambling Act 2005 and is the regulator of, among other things, the National Lottery. It is responsible for awarding the licence to run the National Lottery pursuant to the National Lottery etc. Act 1993 (the **1993 Act**).

18. Camelot was the licensee under the first three National Lottery licences. It was unsuccessful in its efforts to secure the licence to operate 4NL, which was awarded instead to Allwyn in September 2022. In February 2023 the Allwyn group acquired Camelot. The First Applicant was also one of the unsuccessful bidders for the 4NL licence, and is challenging the Respondent's decision to award that licence to Allwyn in separate ongoing High Court proceedings.

(2) The National Lottery

19. The National Lottery is the UK's State-franchised lottery established in 1994 under the 1993 Act. It is operated by private providers under licences awarded periodically by the Respondent under s. 5 of the 1993 Act.

20. A central feature of the 1993 Act is the establishment of the NLDF. The fund is under the control and management of the Secretary of State, and serves to collect revenues from the National Lottery for the purposes of paying those out to "good causes" in accordance with the distribution provisions in the 1993 Act.

(3) The Third National Lottery Licence

21. 3NL commenced on 1 February 2009 and was initially awarded for a period of ten years, to expire on 31 January 2019. Under its terms, Camelot was entitled to retain part of the gross sales of tickets in order to operate the business of running the lottery. The gross income from National Lottery sales under 3NL was allocated as follows:

    (1) lottery duty, charged at 12% on the value of each lottery ticket;

    (2) prize payments;

    (3) retailer commission;

    (4) payments into the NLDF, i.e. returns to good causes, under Condition 11 of and Schedule 8 to 3NL; and

    (5) gross and net sales retention for Camelot calculated in accordance with Schedule 8 to 3NL.

22. As to (4), Camelot was required under 3NL to pay primary contributions and secondary contributions into the NLDF:

    (1) Primary contributions were calculated under Schedule 8 §6. They were determined by first deducting lottery duty, prize payments, gross retention and retailer commission, and then applying the percentage represented by 100 minus the relevant net retention rates shown in table 1 of Schedule 8. The gross and net retention rates were intended to cover Camelot's fixed and variable costs, capital expenditure and a profit element. Further adjustments to primary contributions could be made under Schedule 8 §6.1.

    (2) Secondary contributions were payments into the NLDF out of any "surplus" generated by Camelot from running the National Lottery. This was any surplus beyond the surplus originally forecast under the terms

of 3NL. The secondary contribution was calculated pursuant to Schedule 8 §§4.2–4.7.

23. Under Schedule 10, Camelot was required to meet certain minimum expenditure requirements from its profits, which included a minimum marketing expenditure of 1.07% of total ticket sales for the period April 2014 to January 2019.

24. Of particular importance for present purposes is Condition 23 of 3NL, under which the Decision was made. Condition 23 allowed for extensions to 3NL, and it specifically provided for: (i) an extension of 3NL by agreement for a maximum period of five years (Condition 23.1); (ii) an extension of 3NL in the case of a licensee investment (Condition 23.2–23.8); and (iii) an extension of 3NL to facilitate a handover or running the competition for 4NL (Condition 23.9–23.11). Condition 23.2 provided that in the case of a licensee investment, the licensee should submit the details of its proposed investment, including details of the costs and impact on the returns to good causes, and the period of the proposed extension of 3NL; and that this would then be evaluated by the Respondent. If accepted, the parties would enter into any agreements necessary to modify 3NL.

25. In 2012, pursuant to Condition 23, Camelot submitted to the Respondent an LNIO which proposed an extension to the period of 3NL. The LNIO was approved with modifications and 3NL was extended by four years to 31 January 2023. It was subsequently extended by a further year to 31 January 2024. As part of the initial extension, Condition 23 was modified and a requirement was inserted into Condition 23.2(d) for any LNIO to include "proposals for the means of jointly financing the proposed investment, and the basis on which this has been calculated".

26. As a consequence, from 2012 Condition 23 read as follows:

> "**23. Licence extensions**
>
> …
>
> **Licensee investment opportunities**

23.2 If the Licensee wishes to propose a Licensee Investment it must serve a Licensee Notice of Investment Opportunity (which shall include the implementation plans) on the Commission which shall set out:

(a) the proposed Licensee Investment in sufficient detail to enable the Commission to evaluate it in full (for the avoidance of doubt, such detail shall include the costs of the Licensee Investment, the Licensee's assessment of the impact of the proposed Licensee Investment upon returns to good causes, the savings which will be made by the Licensee as a consequence of the Licensee Investment, and the benefits that the Licensee Investment will have for the National Lottery);

(b) the Licensee's reasons for proposing the Licensee Investment;

(c) any implications of the Licensee Investment for the Licensee, the National Lottery and/or the Commission; and

(d) proposals for the means of jointly financing the proposed investment, and the basis on which this has been calculated.

23.3 The Commission shall have the right to determine and provide to the Licensee, further details of the procedure which shall apply to the proposal by the Licensee of a Licensee Investment.

23.4 The Commission may in its absolute discretion require the Licensee to propose a Licensee Investment in accordance with Condition 23.2 and the Licensee shall co-operate with the Commission in providing such a proposal.

23.5 The Commission shall consult with the Licensee and shall evaluate the Licensee Notice of Investment Opportunity in its absolute discretion and may propose modifications or accept or reject the Licensee Notice of Investment Opportunity.

23.6 If the Commission proposes modifications to the Licensee Notice of Investment Opportunity, the Licensee shall consult with the Commission and shall evaluate the modifications and may either reject the modifications and withdraw the Licensee Notice of Investment Opportunity without any obligation to proceed, or accept the modifications to the Licensee Notice of Investment Opportunity.

23.7 If the Commission accepts the Licensee Notice of Investment Opportunity (with or without modification), the Licensee shall issue a final version of the Licensee Notice of Investment Opportunity (which shall be modified as may be necessary to meet the Commission's concerns). The final version of the Licensee Notice of Investment Opportunity shall be subject to the approval of the Commission prior to issue.

23.8 The parties shall enter into any agreements necessary to amend this Licence and/or any other documents necessary to give effect to such Licensee Investment, and the Licence shall continue on the terms set out in the Licence, or such other terms as the Licensee and the Commission may agree and the Licensee Investment shall be

> implemented in accordance with the implementation plans as set out in the Licensee Notice of Investment Opportunity. …"

27. According to Mr Holdaway, the reason for the modification of Condition 23 was that by 2012 historic expectations in relation to marketing spend under 3NL had turned out not to have been correct, largely because the cost of marketing the National Lottery's products had increased relative to expectations. As a result, there was no incentive for Camelot to increase its own marketing spend to the level that the Respondent thought necessary to deliver the National Lottery in line with the Respondent's statutory objectives, and the Respondent was therefore falling short of its duty and objective to maximise the revenues generated by the National Lottery for good causes. To resolve this problem, it was thought appropriate to provide a mechanism to permit Camelot to use gross revenues from the National Lottery in order to fund additional marketing expenditure that would boost ticket sales in such a way that the financial contribution to good causes would increase.

28. From 2015, under the revised Condition 23, Camelot submitted LNIOs relating to marketing investment proposals under 3NL on more or less an annual basis. The way in which these funds were granted to Camelot in each case was that the primary contribution was adjusted under Schedule 8 to 3NL, such that additional gross revenues of the National Lottery were retained by Camelot and spent in accordance with the relevant agreed marketing investment procedure for a given financial year.

29. The Respondent operated a "not for profit" principle in relation to marketing investment proposals. This was intended to ensure that any additional profit that Camelot was forecast to generate from the increased sales predicted in the LNIO would be offset by additional financial expenditure beyond that to which Camelot was already committed.

30. From at least 2019, Camelot provided econometric analysis to the Respondent in support of its marketing investment proposals. The analysis in support of each proposal was subject to commentary by EE, as well as review by the Respondent's marketing advisors, April Strategy.

(4) The initial LNIO

31. On 2 December 2022, Camelot submitted an initial LNIO with its 2023/24 MIP, proposing a total incremental investment of £89.6m, with incremental "NLDF investment" of £85.6m. The difference between the £89.6m NLDF investment and the £85.6m total incremental investment reflected a £4m increase to Camelot's minimum marketing expenditure, resulting from the increased projected ticket sales. In addition, Camelot proposed to spend an additional £4m on staff retention and £1.5m on retail advocacy, against a projected increase in profit of £4.3m. The increased return to good causes, net of the marketing investment, was predicted to be £43.7m. The LNIO contained econometric modelling to support Camelot's view that the additional marketing spend would result in the desired increase in ticket sales and increased net contribution to good causes, and Camelot confirmed that it would submit its economic assurance report by 23 December 2022.

32. On 19 December 2022, the Respondent provided initial feedback to Camelot on its LNIO, making suggestions as to further evidence Camelot should provide to support the 2023/24 MIP and its profit forecast, and suggesting an increase in Camelot's own proposed investments including a direct contribution to marketing.

33. Camelot submitted an econometric assurance report (entitled November 2022 Econometrics Assurance Report) to the Respondent on 20 December 2022, and the Respondent then instructed EE to analyse Camelot's modelling methodology. EE had previously provided reports in relation to Camelot's earlier modelling, including in particular reports in November 2019, January 2022 and May 2022. EE issued a report providing a preliminary assessment of Camelot's econometric assurance report on 20 January 2023. In assessing what confidence the Respondent should have in relation to Camelot's economic modelling, the EE report noted that the November 2022 report did not implement all of EE's previous recommendations, and EE was not convinced that Camelot's latest models came any closer to providing an accurate point estimate of the true returns of additional media spending than previous models. Nevertheless, EE did not consider that following up on these points would make

a material difference for the purposes of assessing funding under the 2023/24 MIP. As with previous reports, EE recommended that the Respondent should treat the forecasts generated by the modelling with caution.

34. According to Mr Holdaway, the findings of the EE report supported the Respondent's provisional view that the proposed level of marketing investment should be reduced.

(5) The amended LNIO

35. On 1 February 2023 Camelot submitted an updated 2023/24 MIP in the form of an amended LNIO, which contained increased commitments from Camelot, as well as additional supporting information and responses to some of the points raised by EE.

36. On 24 February 2023, April Strategy issued an assurance note responding to questions from the Respondent about Camelot's proposal, concluding that "whilst the proposed objectives and [marketing proposal] are sound, the level of investment required to deliver it looks too high and [we] would advise challenging Camelot".

37. On 14 March 2023, EE submitted a second report. That set out a conclusion identical to the conclusion in the January 2023 report regarding the confidence Camelot's econometric modelling should provide to the Respondent.

(6) The Decision

38. Mr Holdaway's evidence set out the manner in which the Respondent's National Lottery Committee (the **Committee**) went about considering the 2023/24 MIP following its assessment of the amended LNIO. By way of a paper submitted to the Committee dated 22 March 2023, Mr Holdaway and his team recommended that the Committee agree to approve the investment, provided that Camelot agree to a reduction of the total marketing investment from £89.6m to £74.2m total, with a reduction in the NLDF investment from £85.6m to £70.2m, and a commitment by Camelot to £4m staff retention expenditure. Mr Holdaway

stated in his evidence that both he and the Respondent had regard to, in particular, the advice from EE.

39. On 22 March 2023, the Committee approved Mr Holdaway's recommendation and the Respondent informed Camelot of the Committee's decision by email the following day, with a formal confirmation letter sent on 31 March 2023. The Respondent noted, however, that it was willing for Camelot to proportionately decrease its own commitments to the investment based on the revised EBITDA impact of the Committee's decision. On 28 April 2023, Camelot confirmed that it accepted the modifications proposed by the Respondent. It then provided the Respondent with a final LNIO which included updated figures showing the adjusted level of investment. The updated calculations projected a net increased return to good causes of £43.4m.

40. On 19 July 2023, Mr Holdaway made the Decision with authority delegated to him by the Committee, approving the proposal set out in the final LNIO, and this was communicated to Camelot in a decision letter.

(7) Events following the Decision

41. The Decision was published on the Respondent's website on around 28 August 2023. On 26 January 2024 EE provided a final econometric assurance report for 3NL. That set out a review of Camelot's approach to justifying marketing investment proposals under 3NL, and commented on whether returns to good causes had been enhanced in the period since 2018 as a result of marketing by Camelot.

42. 3NL expired on 31 January 2024 and on 1 February 2024 4NL began, operated by Allwyn.

43. Camelot's 2023/24 Annual Report was published on 7 October 2024, making reference to the LNIO and the retention of £70.5m from gross revenue (this comprised the £70.2m approved under the 2023/24 MIP plus a carry forward of an underspend of £294,000 from the 2022/23 MIP). The next day, Mr

Rancombe emailed other directors in the Applicants' corporate group with comments on the 2023/24 Annual Report, but did not refer to the Decision.

44. Mr Martin said that he first found out about the Decision on 15 January 2025. He immediately emailed the Applicants' solicitors referring to this and attaching the relevant extracts from Camelot's accounts. On 19 March 2025 the Applicants' solicitors wrote to the Respondent to make what they contended was a pre-action information request under s. 76 of the SCA.

45. The Respondent's solicitors responded to that request on 11 April 2025, asserting that s. 76 did not apply but providing limited information about the Decision (including providing the Decision itself). The Applicants replied on 16 April 2025, complaining about the adequacy of the information provided and seeking further information. The Respondent's solicitors sent holding letters, promising a response in the week of 6 May 2025.

46. The Applicants issued the present proceedings on 8 May 2025, before receiving any substantive response from the Respondent's solicitors.

D. LEGAL FRAMEWORK

(1) The National Lottery etc. Act 1993

47. Part I of the 1993 Act (ss. 1–20) sets out the functions of the Respondent in respect of the authorisation and regulation of the National Lottery. Sums paid into the NLDF, which is controlled and managed by the Secretary of State, are distributed to good causes under Part II of the 1993 Act (ss. 21–44).

48. Section 1 of the 1993 Act defines the National Lottery as meaning all the lotteries that form part of the National Lottery, taken as a whole. A lottery forms part of the National Lottery if certain conditions are satisfied, including that the lottery is promoted or proposed to be promoted by the person licensed to run the National Lottery under s. 5 of the 1993 Act, or in pursuance of an agreement that has been made between that person and the lottery's promoter or proposed promoter.

49. The overriding duties of the Respondent and the Secretary of State are set out in s. 4, and include the duty to do their best to secure that the net proceeds of the National Lottery, i.e. the sums paid into the NLDF, are as great as possible: s. 4(2) and (3).

50. The Respondent is responsible for licensing a person to run the National Lottery: s. 5(1). The National Lottery is therefore in essence a statutory monopoly, as only one person may be licensed at any one time: s. 5(2).

51. The licence conditions must include a requirement on the licence holder to make payments into the NLDF: s. 5(6). The amounts of those payments are not specified in the 1993 Act. Rather, s. 5(6A) provides that the amount of payments under s. 5(6) and the timing of those payments are to be specified in the licence granted under s. 5. Under s. 9(3) the Secretary of State has a statutory right to recover sums which the licence requires to be paid into the NLDF as a debt due to the NLDF.

52. Under s. 7(1), a licence granted under s. 5 must be in writing and must specify the period for which it is to have effect. Section 7(1B) provides, however, that the licence may be extended by the Commission, or by agreement between the Commission and the licensee, subject to s. 7(1A) which sets a maximum length for the licence of 15 years. Section 8 provides powers for the variation of licence conditions by the Respondent.

53. The NLDF is established by s. 21. Section 22 then provides for the apportionment of the sums paid into the NLDF, between the arts, sport, national heritage and other good causes. The subsequent sections of the 1993 Act specify, in detail, the distribution system.

(2) Relevant provisions of the SCA

54. A "subsidy" is defined in s. 2(1) of the SCA as financial assistance which:

> "(a) is given, directly or indirectly, from public resources by a public authority,
>
> (b) confers an economic advantage on one or more enterprises,

> (c) is specific, that is, is such that it benefits one or more enterprises over one or more other enterprises with respect to the production of goods or the provision of services, and
>
> (d) has, or is capable of having, an effect on—
>
> (i) competition or investment within the United Kingdom,
>
> (ii) trade between the United Kingdom and a country or territory outside the United Kingdom, or
>
> (iii) investment as between the United Kingdom and a country or territory outside the United Kingdom."

55. It is not in dispute that for these purposes the Respondent is a public authority (as defined by s. 6(1)) and Camelot was an enterprise (as defined by s. 7(1)).

56. Under s. 2(2), the means by which financial assistance may be given include:

> "(a) a direct transfer of funds (such as grants or loans);
>
> (b) a contingent transfer of funds (such as guarantees);
>
> (c) the forgoing of revenue that is otherwise due;
>
> (d) the provision of goods or services;
>
> (e) the purchase of goods or services."

57. For the purposes of determining the criterion of "economic advantage" under s. 2(1)(b), s. 3(2) provides:

> "Financial assistance is not to be treated as conferring an economic advantage on an enterprise unless the benefit to the enterprise is provided on terms that are more favourable to the enterprise than the terms that might reasonably have been expected to have been available on the market to the enterprise."

58. This principle is referred to in the Department for Business and Trade Statutory Guidance for the UK Subsidy Control Regime (5th ed, August 2025) (the **Statutory Guidance**) as the commercial market operator principle or **CMO principle**.

59. The "specificity" criterion in s. 2(1)(c) is elaborated in s. 4(2), which provides that financial assistance will not be regarded as being specific if the distinction in the treatment of enterprises is justified by principles inherent to the design of the arrangements of which the financial assistance is part.

60. Where financial assistance given by a public authority constitutes a subsidy as defined in s. 2, s. 12(1) requires the public authority to consider the subsidy control principles set out in Schedule 1 to the SCA before deciding to give the subsidy, and prohibits the grant of the subsidy unless the public authority is of the view that the subsidy is consistent with those principles. As set out further below, it is common ground that the Respondent did not treat the Decision as a subsidy and therefore did not consider the subsidy control principles. No issue therefore arises as to the content and/or application of those principles in the present case.

61. Pursuant to s. 70(1), an "interested party who is aggrieved by the making of a subsidy decision may apply to the Competition Appeal Tribunal for a review of the decision." "Interested party" is defined in s. 70(7) to include "a person whose interests may be affected by the giving of the subsidy or the making of the subsidy scheme in respect of which the application under subsection (1) is made".

62. The time limits for seeking a review of a subsidy under s. 70 are set out in s. 71, by inserting the following Rule into the Competition Appeal Tribunal Rules 2015 (S.I. 2015/1648) (the **Tribunal Rules**):

> "**98A Time limits for applications**
>
> (1) An application to the Tribunal under section 70 in respect of a subsidy decision must be made by sending a notice of appeal before the end of one month beginning with the relevant date in relation to that decision.
>
> (2) The 'relevant date' in relation to a subsidy decision is—
>
> (a) in a case where a pre-action information request in respect of the subsidy or scheme concerned is made within one month of the transparency date, the date on which the notice under paragraph (8) is given;
>
> (b) in a case where a post-award referral is made in respect of the subsidy or scheme, the date on which the post-award referral report is published under section 62;
>
> (c) in any other case, the transparency date for the subsidy or scheme.
>
> (3) If both of sub-paragraphs (a) and (b) of paragraph (2) apply, the relevant date is the later of the dates given by those sub-paragraphs.
>
> (4) In paragraph (2)—

(a) ‘pre-action information request’ means a request for information under section 76;

(b) ‘the transparency date’ for a subsidy or scheme is—

(i) in a case where the application relates to a subsidy or scheme in respect of which the duty under section 33(1) or (5) does not apply, the date on which the interested party first knew or ought to have known of the making of the subsidy decision;

(ii) in any other case, the date on which an entry in respect of the subsidy or scheme is made on the subsidy database in accordance with the duty under section 33(1) or (5);

(c) ‘post-award referral’ means a referral made under section 60.

…

(8) For the purpose of paragraph (2)(a), a public authority must give notice to the interested party that the public authority has provided information in response to a request made under section 76(1). …”

63. Section 72 sets out the powers of the Tribunal to order relief on applications under s. 70:

“**72 CAT powers on review: England and Wales and Northern Ireland**

(1) This section applies to applications under section 70 in England and Wales or Northern Ireland.

(2) The Tribunal must either dismiss the application or grant the following kinds of relief—

(a) a mandatory order;

(b) a prohibiting order;

(c) a quashing order;

(d) a declaration;

(e) an injunction.

(3) Where the Tribunal grants relief under subsection (2)(c), it may refer the matter back to the person who made the decision with a direction to reconsider and make a new decision in accordance with its ruling.

(4) In making a reference under subsection (3) the Tribunal may not direct the person who made the decision to take any action that the person would not otherwise have the power to take in relation to the decision.

(5) Relief under subsection (2) granted by the Tribunal—

(a) has the same effect as the corresponding relief granted by the High Court on the determination of proceedings for judicial review, and

(b) is enforceable as if it were relief granted by the High Court on an application for judicial review.

(6) In deciding whether to grant relief under subsection (2) the Tribunal must apply the principles that the High Court would apply in deciding whether to grant that relief on an application for judicial review.

(7) Where the Tribunal grants relief under subsection (2), it may also make a recovery order in accordance with section 74.

(8) The Tribunal may refuse to grant any relief sought on an application if the Tribunal considers—

(a) that there has been undue delay in making the application, or

(b) that granting the relief sought on the application would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration.

…"

64. Section 74 sets out the Tribunal's powers regarding recovery orders:

"**74 Recovery orders**

(1) The Tribunal may make a recovery order if—

(a) in exercise of its powers under section 72 or 73, it grants relief in respect of a decision of a public authority to give a subsidy or make a subsidy scheme, and

(b) in granting that relief the Tribunal finds that the decision did not comply with a requirement of Chapter 1 or 2 of Part 2.

(2) A recovery order is an order that—

(a) confers a right on a public authority that has given a subsidy to recover the amount of that subsidy from the beneficiary, and

(b) requires the public authority to exercise that right in accordance with the order.

(3) A recovery order may—

(a) provide for how the right to recover a subsidy under the order is to be exercised;

(b) require that the right is exercised by such time as the order may specify;

(c) relate to the whole of a subsidy or to such part as the order may provide;

(d) where made in relation to subsidies given under a subsidy scheme, relate to all such subsidies or only to those subsidies specified in the order;

(e) require the payment of interest in accordance with the order.

(4) A recovery order is enforceable as though it were an order made by the High Court or, in relation to Scotland, the Court of Session."

65. Section 76 requires public authorities to respond within 28 days to certain pre-action requests for information about a subsidy or subsidy scheme, where made by an interested party.

66. Under s. 79(6), public authorities are required to have regard to the Statutory Guidance (so far as applicable) when giving a subsidy or making a subsidy scheme.

(3) Case law on the CMO principle

67. As noted above, the CMO principle is a creature of the SCA. It reflects the equivalent "market economy operator principle" developed in cases under European Union (**EU**) State aid law, in relation to the definition of a State aid under Article 107(1) of the Treaty on the Functioning of the EU (**TFEU**). Some of the EU cases refer to this as the "market economy investor" or "private investor" principle, where the specific comparison is with a private investor, but the test applies equally to other transactions where the State is acting as a market participant. This judgment therefore generally refers more generically to the market economy operator principle.

68. The interpretation and application of the CMO principle is a central issue in these proceedings. All three parties referred extensively to EU case law on the market economy operator principle, but advanced opposing submissions (as between the Applicants on the one hand and the Respondent and Interveners on the other) as to the interpretation of the relevant EU authorities. We therefore consider this now before turning to the issues in the case.

(a) Relevance of the EU case law

69. It was common ground that the principles developed in the EU authorities in relation to the market economy operator principle, while not binding on this Tribunal, were strongly persuasive as to the correct approach to the CMO principle. That is consistent with the approach taken by the Court of Appeal in *R (British Gas Trading) v SS for Energy Security and Net Zero* [2025] EWCA Civ 209, [2025] 1 WLR 3342, which concerned the application of the Trade and Cooperation Agreement between the EU and the UK (the **TCA**), which contained transitional subsidy control principles that were implemented by the EU (Future Relationship) Act 2020 (**EUFRA 2020**), pending the establishment of the regime for subsidy control under the SCA. At the time of the decision in issue in that case, the SCA had not come into force.

70. Zacaroli LJ, delivering the leading judgment, referred to the market economy operator principle at §97, citing and applying the prior pre-Brexit judgment of the Court of Appeal in *R (Sky Blue Sports) v Coventry CC (No. 2)* [2016] EWCA Civ 453, which in turn had defined the market economy operator principle by reference to the relevant EU case law:

> "Although it may be said that the question, here, is one of law (was there a subsidy to Octopus at all?), the answer to it is dependent on the application of a test which involves the exercise of commercial judgment (the market economy operator test). While the test is an objective one, the law recognises that there is a wide spectrum of reasonable reaction to commercial circumstances in the private market; accordingly, in practice state aid will only be found where it is clear that the relevant transaction would not have been entered into, on the terms the state in fact entered into it, by any rational market operator: *R (Sky Blue Sports & Leisure Ltd) v Coventry City Council (No 2)* [2016] EWCA Civ 453 at [16] and [23]-[29] (approving in particular para 88(x) of the decision of Hickinbottom J at first instance in that case). Moreover, as noted at para 92 above, even if error of law is asserted, where—as here—the question is one which is open to more than one conclusion, on which different decision-makers might rationally disagree, so it is only if the decision is irrational that it would be set aside."

71. While the *British Gas* case concerned transitional provisions under the TCA, those were put in place in anticipation of the UK Government meeting its obligations under the TCA, which included a requirement for each party to have in place and maintain an effective system of subsidy control that ensured that the grant of subsidies respected certain specified principles: Article 366(1) of

the TCA, discussed at §§18–22 of *British Gas*. As explained there, pending the entry into force of the SCA, the subsidy control provisions in the TCA were implemented generically pursuant to s. 29(1) of EUFRA 2020, which provided that existing domestic law should take effect with such modifications as required for the purposes of implementing the TCA. The SCA then crystallised the fulfilment of the UK's subsidy control obligations under the TCA. In those circumstances, it would be surprising if the continuity of approach represented by the Court of Appeal's decision in *British Gas* under the transitional subsidy control regime should not also be followed in relation to the CMO principle under the SCA itself.

72. Further, if the CMO principle were to represent a material departure from the EU case law on the market economy operator principle, we would have expected that to have been made clear in the articulation of the CMO principle in the SCA and/or the Statutory Guidance. There is, however, nothing in either the SCA or the Statutory Guidance to suggest that the legislature intended that the CMO principle should be narrower than the market economy operator principle as applied in EU case law on Article 107(1) TFEU.

73. We therefore conclude that the CMO principle is intended broadly to replicate, within the framework of the SCA, the approach taken by the EU courts in relation to the market economy operator principle. On that basis, we will treat the principles emerging from the market economy operator cases under Article 107(1) TFEU as generally applicable unless there is some obvious reason to depart from them. This appears also to have been the approach taken by the Tribunal in *Weis v Greater Manchester* [2025] CAT 41, which is the only other case under the SCA to have considered the issue.

(b) The test under the CMO principle

74. It is common ground that the burden of establishing that the Decision constituted a subsidy rests upon the Applicants: see e.g. *Credit Suisse Securities (Europe) v Revenue and Customs Commissioners* [2019] EWHC 1922 (Ch), [2019] STC 1576 at §8. It is therefore for the Applicants to establish, under the CMO principle, that the disputed financial assistance was provided on terms more

favourable than those that might reasonably have been expected to be available on the commercial market.

75. That involves an objective test, with the burden placed on the Applicant to show clearly that the transaction would not have been entered into by any rational market operator. In *Sky Blue Sports* at §16, the Court of Appeal endorsed a number of propositions set out by Hickinbottom J at first instance, including the following:

(1) Whether aid distorts or threatens to distort competition depends upon the objective test of whether a rational private investor, creditor or vendor (as the case may be) might have entered into the transaction in question on the same terms, having regard to the foreseeability of obtaining a return and leaving aside all social and policy considerations: *Sky Blue Sports* §16(iv).

(2) Whether the transaction was one which a rational private market operator might have entered into in the same circumstances is a question for the court to consider objectively and to decide, on the basis of the information available at the time of the decision, and developments then foreseeable: *Sky Blue Sports* §16(vi).

(3) Although the test is an objective one, the law recognises that there is a wide spectrum of reasonable reactions to commercial circumstances in the private market. Consequently, a public authority has a wide margin of judgment, and the transaction will not amount to State aid unless the beneficiary would manifestly have been unable to obtain comparable terms from a private operator in the same situation. State aid will therefore in practice only be found where it is clear that the relevant transaction would not have been entered into, on such terms as the State in fact entered into it, by any rational private market operator in the circumstances of the case: *Sky Blue Sports* §16(x).

76. The EU State aid cases have considered two further questions of particular relevance to these proceedings:

(1) Whether it matters if the State is acting in a public capacity when providing the financial contribution, as opposed to carrying out a private (i.e. commercial) function.

(2) How to deal with a situation where there is no private market for the activity in question, especially where the contribution is linked to infrastructure which no private operator would be able to create.

77. These questions have been considered in a line of cases which are conveniently summarised in the General Court's judgment in Case T-486/18 RENV *Danske Slagtermestre v Commission* EU:T:2024:217. That case concerned a change in Danish law which had the effect of reducing the charges for waste water treatment (per cubic metre of waste water) for larger volumes of water, on a degressive "staircase" model. The Commission had found that this did not amount to State aid under Article 107(1) TFEU, on the grounds that a market economy operator would have adopted the staircase model. The applicant, a trade association for small butchers and wholesalers, disputed that conclusion on the ground that there was no real market for the collection of waste water in Denmark. The Court rejected this argument, finding that:

(1) The question of whether a State measure confers an advantage for the purposes of Article 107(1) is carried out by applying the market economy operator principle, unless there is no possibility of comparing the State conduct at issue in a particular case with that of a private operator because that conduct is inseparably linked with the existence of infrastructure that no private operator would ever have been able to create, or unless the State acted in its capacity as a public authority: §52.

(2) The mere exercise of the prerogatives of a public authority such as the use of means that are legislative or fiscal in nature, or the pursuit of public policy objectives, do not by themselves render the market economy operator principle inapplicable. It is the economic nature of the State intervention at issue and not the means put into effect for that purpose that renders that principle applicable: §52.

(3) The measure in question was economic in nature and could be likened to a quantitative rebate granted by the operator of an infrastructure to some of its customers, such that the State conduct at issue could be compared to that of a private operator and assessed on the basis of the market economy operator principle: §§53–4.

(4) Even if it were to be established that there was no market for the treatment of waste water, that would not render the market economy operator principle inapplicable, since "in the absence of any possibility of comparing the situation of a public undertaking with that of a private undertaking, normal market conditions, which are necessarily hypothetical, must be assessed by reference to the objective and verifiable elements which are available": §55, referring to Cases C-83/01 etc *Chronopost v Ufex* EU:C:2003:388, §38.

78. Mr Hossain relied heavily on the *Chronopost* judgment cited in *Danske Slagtermestre*. In *Chronopost* a trade association of courier operators claimed that the logistical and commercial assistance that Chronopost received from La Poste, the French State monopoly postal service, amounted to State aid. The argument before the Court of Justice of the EU (**CJEU**) concerned the proper comparator for the purposes of the market economy operator principle, and specifically whether the remuneration for the services provided by La Poste to Chronopost should be assessed by reference to the costs of an undertaking with the structural advantages enjoyed by La Poste, or by reference to another private operator of similar size without the benefit of a reserved sector.

79. The CJEU noted that La Poste was in a situation which is very different from that of a private undertaking acting under normal market conditions, since it had available a substantial infrastructure and resources enabling it to provide a basic postal service to all users, even in sparsely populated areas where the tariffs did not cover the cost of providing the service in question. That network would never have been created by a private undertaking (§§33–6). The provision of logistical and commercial assistance to Chronopost therefore consisted in making available a network that had no equivalent on the market (§37).

80. Accordingly, in the passage at §38 referred to in the *Danske Slagtermestre* judgment, the CJEU found that "normal market conditions" should be assessed "by reference to the objective and verifiable elements which are available". The CJEU considered that the costs borne by La Poste in respect of the provision to Chronopost of logistical and commercial assistance could constitute such "objective and verifiable elements". There was therefore no State aid if it was established that the price charged properly covered the additional, variable costs incurred by La Poste in providing the logistical and commercial assistance, an appropriate contribution to the fixed costs arising from use of the postal network, and an adequate return on the capital investment in so far as it was used for Chronopost's activities, and if there was nothing to suggest that those costs had been underestimated or fixed in an arbitrary fashion (§§39–40).

81. In addition to the *Chronopost* judgment, the Applicants relied on C-124/10 P *EDF v Commission* EU:C:2012:318 and Cases C-331 and 343/20 P *Volotea v Commission* EU:C:2022:886. In *EDF* the issue was whether a balance sheet restructuring of the State-owned company EDF, which involved accounting reclassifications giving rise to a capital injection and the waiver of a corresponding tax liability, amounted to State aid. EDF's argument was that (contrary to the decision of the Commission) the French State had acted as a private investor in making a capital injection into a company it owned. The CJEU concluded, in agreement with the General Court, that the market economy operator principle could not be excluded simply because the means employed by the French State were fiscal, if it appeared that the advantage was conferred in by the French State in its capacity as a shareholder of EDF (§§91–2).

82. The CJEU also noted that it was *not* argued that it was impossible to compare EDF's situation with that of a private undertaking operating in sectors identical to those in which EDF operates. For the purposes of making that comparison, the CJEU said that it followed from *Chronopost* §38 that the assessment must be carried out by reference to the available objective and verifiable evidence (§§101–2).

83. The CJEU's conclusion on that point departed from the analysis of Advocate General Mazák who had recommended setting aside the judgment of the

General Court. In a passage at §§112–3 relied on by the Applicants, the Advocate General took the view that the CJEU in *Chronopost* had rejected the application of the market economy operator principle, and that it followed from that case that where a public operator was placed in a situation with which a private operator could not be faced, "there is nothing to compare". That approach was, however, not followed by the CJEU.

84. The CJEU's more recent judgment in *Volotea* concerned regional subsidies for Italian airport operations. The CJEU upheld the appeal, finding that the General Court (and the Commission in its decision) had wrongly rejected the application of the market economy operator principle. At §108 the Court cited its earlier judgments in the *Chronopost* and *EDF* cases, stating that the market economy operator principle was to be applied unless there is no possibility of comparing the State conduct at issue in a particular case with that of a private operator because that conduct was inseparably linked with the existence of infrastructure that no private operator would ever have been able to create. The mere exercise of the prerogatives of a public authority, however, such as the use of means that are legislative or fiscal in nature, does not by itself render that principle inapplicable. Rather, it is the economic nature of the State intervention at issue and not the means put into effect for that purpose that renders that principle applicable.

85. Advocate General Ćapeta made similar comments in her opinion, noting that the market economy operator principle is applicable in all those situations in which a State's intervention on the market "can be assimilated" to the action of a private market operator (§74), or where the State acts in a way "comparable to a market operator" (§83). If, therefore, the State grants a benefit of the same nature as a private operator could have granted, such that it "finds equivalency" on the market, then the market economy operator principle is applicable, even if that benefit is granted through fiscal means (§87). The market economy operator principle does not, however, apply where the State intervenes through the performance of an activity which a private undertaking could never replicate (§89).

86. At the hearing, Mr Hossain relied on *Chronopost, EDF* and *Volotea* for the proposition that under EU State aid law, in cases where there is no actual market comparator for the specific benefit in question, the market economy operator test is inapplicable. Instead, he said that the question of whether there is an economic advantage in such cases must be determined by way of an assessment based on objective and verifiable evidence, which he said is a different kind of examination.

87. We do not accept that submission (which was not foreshadowed in the Applicants' skeleton argument). The CJEU's judgments in the cases set out above are clear and consistent. The reference in *Chronopost* to "normal market principles" is quite obviously a reference to the market economy operator principle, and the "objective and verifiable elements" described in §38 of that judgment refer to the evidence needed to apply that test. The CJEU was thereby making the point that if it was not possible to find a private comparator carrying out the same activity as that of the State entity said to have granted a State aid, a market comparison could still be made by reference to objective and verifiable evidence such as (in that case) the ascertainable fixed and variable costs of La Poste. That interpretation is confirmed by the CJEU at §§101–2 of *EDF*, which explicitly recognised the reference to "objective and verifiable evidence" as an application of the market economy operator principle.

88. *Volotea* repeated the reasoning in *Chronopost* and *EDF*, confirming that it is the "economic nature" of the State intervention at issue, and not the means put into effect for that purpose, that determines whether the market economy operator principle is applicable. As Advocate General Ćapeta explained, that requires consideration of whether the State's intervention can be assimilated to or is comparable to that of a private operator.

89. That was also the approach adopted most recently at §55 of *Danske Slagtermestre*, which found that even if there was no market for the treatment of waste water, that would not render the market economy operator principle inapplicable, but would simply require normal market conditions to be assessed by reference to other available objective and verifiable elements.

90. The high point of Mr Hossain's argument was the comments of Advocate General Mazák in *EDF*. As we have noted, however, the opinion of the Advocate General was not followed by the CJEU.

91. We therefore reject the Applicants' contention that the market economy operator principle (and, by analogy, the CMO principle) should not apply in circumstances where there is no actual market comparator. Instead, the question that must be asked in such a case is whether the State intervention can be assimilated to or is comparable to that of a private operator. If so, the correct approach is then to assess what the normal market conditions might be for the provision of the relevant benefit, on the basis of the objective and verifiable evidence available.

92. That position is consistent with s. 3 of the SCA, which entrenches the CMO principle as a statutory basis for qualifying the concept of economic advantage as used in s. 2(1)(b). Mr Hossain's approach would require s. 3(2) to be disregarded in the assessment of economic advantage when there is no actual market comparator. We see no basis in s. 3 for taking such an approach. On the contrary, the inclusion in the SCA of a specific provision dealing with the CMO principle indicates an intention to give that test a central importance in the assessment of economic advantage. It would therefore be very odd to disregard that test altogether, contrary to both the legislative scheme and the well-established approach under EU State aid law.

E. ISSUES

93. The Applicants' Amended Notice of Appeal set out four Grounds of review, namely that: (1) the Respondent erred by failing to recognise that the contributions to Camelot under the Decision constituted a subsidy, and thereby failing to consider the subsidy control principles in Schedule 1 to the SCA; (2) the alleged subsidy provided by the Decision would in any event have failed to meet the requirements of those principles; (3) the Respondent failed to make any or any proper inquiry as to the errors in Camelot's econometric assurance report prior to making the Decision; and (4) the grant of the alleged subsidy was contrary to the conditions of 3NL.

94. The Respondent readily agreed that it did not consider the subsidy control principles, since it did not consider that the Decision amounted to a subsidy. Ground 2 was therefore not pursued. In addition, at the hearing, Mr Hossain said that the Applicants were no longer pursuing Grounds 3 and 4, since those points would only arise if the Tribunal found that the Decision was a subsidy, and in that event those points would not add materially to the Applicants' case. The only remaining substantive ground of challenge was therefore Ground 1.

95. As to the relief sought if the Applicants succeeded on that ground, Mr Hossain confirmed that the Applicants no longer sought a quashing order, and did not contend that the Tribunal could at this hearing determine the terms of any recovery order. The Applicants did, however, maintain their application for a declaration. The parties' submissions on relief therefore addressed the questions of whether any relief, including in the form of a declaration, should be refused on grounds of delay; and whether a declaration should be refused in any event for lack of useful purpose.

96. It follows that two main issues arise for determination at this stage:

(1) Whether the Decision constituted the grant of a subsidy to Camelot or Allwyn; and

(2) Whether any relief should be refused on grounds of delay, and whether a declaration should be refused in any event for lack of utility.

F. THE ARGUMENTS OF THE PARTIES

(1) The Applicants' case

97. On the question of whether the Decision granted a subsidy, the Applicants said that it conferred a benefit to Camelot and/or Allwyn which was specific and which was granted from public resources by forgoing sums that would otherwise have been payable into the NLDF. In relation to the economic advantage criterion, the Applicants' primary case was that the CMO principle could not apply in this case, since there was no market and therefore no possible

market comparison. In those circumstances, the test to be applied was simply one of considering, objectively and verifiably, whether there was an economic advantage conferred on Camelot or Allwyn. On that basis the Applicants submitted that there was an advantage to both, including longer-term benefits from the investments in staff retention, retail advocacy and marketing, which the Respondent had failed to consider.

98. Alternatively, if the CMO principle is applicable in this case, the Applicants argued that the Respondent's approach did not accord with that which any rational private investor would have taken, both because of the longer-term benefits not considered by the Respondent, and because (the Applicants said) the Respondent acted irrationally in placing any reliance, or alternatively the degree of reliance it did, on the econometric evidence put forward by Camelot.

99. As regards the latter of those points, the Amended Notice of Appeal contained a long section (occupying 23 of the 50 pages of the document) referring to the reports which EE submitted to the Respondent, and identifying what were said to be serious and systemic errors in the econometric material put forward by Camelot. The Applicants submitted that these errors rendered Camelot's econometric material unreliable. The Applicants had sought to support this point by expert evidence, but the Tribunal refused permission for such evidence to be adduced: [2025] CAT 54.

100. The Applicants' skeleton argument narrowed these criticisms to a contention that if (contrary to their primary case) the CMO principle applied, the Decision was nevertheless not one that a rational private operator would have made, given the problems apparent in the econometric material. These arguments were not, however, pursued by the Applicants in any detail at the hearing. Instead, Mr Hossain's submission was limited to an argument that, on the basis of the EE reports of January and March 2023, in which EE raised significant concerns about Camelot's modelling, a rational person would have required refinements and further versions of the model before making any decision.

101. On the question of delay, Mr Hossain said that no limitation period had started to run, and there had been no undue delay in bringing these proceedings. He

sought a declaration at this stage in order that the Tribunal could then go on (at a subsequent hearing) to consider whether to make a recovery order.

(2) The Respondent's case

102. The Respondent's main case on the existence of a subsidy was that the Decision should be assessed by reference to the CMO principle. On that basis the Respondent contended that no economic advantage was conferred, since the Decision pursued an inherently commercial objective – i.e. maximising net returns to the NLDF/good causes – through a risk averse, expert-informed assessment of Camelot's econometric modelling and marketing plan. Although EE and April Strategy had advised caution, they still supported proceeding after making a downward adjustment to the proposals submitted by Camelot. If the CMO principle does not apply, the Respondent contended that the Applicants' submissions on the benefits to Camelot and Allwyn were unevidenced assertions.

103. The Respondent also argued that the public resources and specificity criteria in s. 2(1) of the SCA were not met in this case. In relation to the use of public resources, the Respondent submitted that the Decision did not involve a "forgoing of revenue that is otherwise due", since the National Lottery licence is a statutory licence, and Condition 23.2 expressly permitted the joint financing of unanticipated investments. The Decision was therefore a permissible modification of the terms regulating payment into the NLDF as part of a joint investment. The Respondent also said that the likely ultimate effect of the Decision was to augment, not diminish, the NLDF funds.

104. As to the specificity condition, the Respondent relied on s. 4(2) of the SCA and argued that any financial assistance was justified by principles inherent in the design of the arrangements of which it formed part, namely Part I of the 1993 Act and the terms of 3NL. Those arrangements impose an overriding statutory duty on the Respondent to maximise returns to good causes, and Condition 23.2 was one of the mechanisms by which that purpose was achieved.

105. Even if the Respondent did grant a subsidy, it argued that relief should be refused on the basis of undue delay and a lack of candour on the Applicants' part as to when they first became aware of the Decision. The Respondent also submitted that declaratory relief would in any event be academic and serve no useful purpose given 3NL's expiry.

(3) The Interveners' case

106. The Interveners' submissions broadly aligned with the Respondent's case, arguing that the Decision did not provide a subsidy under the SCA, since the CMO principle applies and was satisfied. In the alternative, the Interveners made some further submissions on why the Decision conferred no economic advantage, addressing and rejecting the Applicants' criticisms of Camelot's econometric modelling.

107. The Interveners also contended that the Tribunal should refuse to grant relief in any event as a result of undue delay, detriment to good administration, substantial hardship/prejudice, and the Applicants' failure to comply with their duty of candour.

G. EXISTENCE OF A SUBSIDY

108. The parties' arguments on the existence of a subsidy give rise to four questions:

(1) Whether the CMO principle applies in this case.

(2) If the answer to (1) is "yes", whether the Decision provided a benefit that was consistent with the terms that might reasonably have been expected to be available on the market? If the answer to (1) is "no", whether the Decision provided an economic advantage on any other basis.

(3) Whether the benefit provided by the Decision was given from public resources, by the forgoing of revenue otherwise due.

(4) Whether the Decision provided a benefit that was specific.

109. We address these in turn below.

(1) Whether the CMO principle applies in this case

110. We have already addressed the Applicants' arguments on the interpretation of the EU case law on the market economy operator principle, and by analogy the CMO principle. Our conclusion, as set out at §91 above, is that the absence of an actual market comparator does not preclude the application of the CMO principle. Rather, the decisive question in such a case is whether the State intervention can be assimilated to or is comparable to that of a private operator. If so, the question is then whether the intervention was consistent with normal market conditions, on the basis of the objective and verifiable evidence available.

111. In the present case, the transaction said to have given rise to a subsidy is the investment in marketing under the 2023/24 MIP in accordance with the final LNIO, as approved in the Decision. Mr Hossain accepted, at the hearing, that the Decision was the relevant transaction for the purposes of considering whether a private comparator can be found.

112. We agree with the Applicants that 3NL is an important backdrop to the Decision and the 2023/24 MIP. It is common ground that 3NL created an environment in which only the Respondent could agree to provide the investment in question. There was therefore, in that sense, no "market" for the provision of a marketing investment to support the National Lottery. It is also undoubtedly the case that the Respondent was, in adopting the Decision and making the marketing investment, pursuing public policy objectives.

113. Nevertheless, in our judgment, the decision to invest in marketing the National Lottery has a commercial character which is readily distinguishable from the Respondent's public functions:

(1) Condition 23 of 3NL, which permitted and governed the investment, was expressed in terms which suggested an essentially commercial decision. The word "investment" appeared frequently throughout the Condition; there was express reference in new Condition 23.2(d) to "jointly financing the proposed investment"; and the Condition anticipated the provision of detailed financial information and a process of evaluation of the return on investment (see Conditions 23.2(a) and 23.5), which were both consistent with commercial decision-making.

(2) Those observations are consistent with the reasons for the amendment to Condition 23.2(d), which addressed a failure to align incentives in 3NL and allowed for a level of marketing that would maximise the commercial potential of the National Lottery. The exercise of determining the appropriate level of marketing involved a negotiation which adjusted the existing terms of the marketing arrangements to the perceived satisfaction of both the Respondent and Camelot.

(3) Such an activity of agreeing the terms of an investment in marketing to drive additional sales is inherently a commercial one. There are many close commercial market analogies that could be derived from franchisor/franchisee or supplier/distributor relationships. In each case, the outcome of the negotiation as to the level of any such investment will depend on a wide range of case-specific factors and the relative bargaining power of the two parties. But the notion that two trading parties might engage in adjustments to their commercial arrangements to better align their incentives, and might thereby achieve an outcome that makes both parties better off, is entirely in line with normal commercial dealings between them.

(4) The commercial nature of the Decision is reinforced by the fact that the Respondent and Camelot engaged in a detailed evaluation of the likely return on investment, including the provision of econometric modelling by Camelot which was tested by the Respondent's economic advisers and marketing consultants. Considerable effort was put into establishing that funds which were retained by Camelot and invested in marketing,

instead of being remitted to the Respondent, would in turn generate sufficient additional ticket sales to create a net benefit to the NLDF and thereby a net increase in contributions to good causes.

(5) The Respondent's public duty under s. 4(2) of the 1993 Act to maximise the returns to good causes requires the Respondent to seek to maximise the sales of lottery tickets in an efficient manner. Accordingly, notwithstanding the various public functions the Respondent has as the overseer of the National Lottery, one of its most important policy objectives is commercial in nature.

114. It is therefore not difficult to identify a commercial context to assist in determining the likely reaction of a rational private investor to the terms of investment in the 2023/24 MIP set out in the final LNIO. The commercial activity is a familiar one. As noted above, it is very similar to the situation where a franchisor and franchisee or supplier and distributor are making a joint investment of a significant sum in the marketing of a consumer-facing product, in order to generate additional profit from the enterprise.

115. In a commercial context, the decision to invest would obviously depend on an analysis of what the likely return from the investment would be. One would expect both quantitative evidence (such as econometric modelling) and qualitative assessment (in the form of advice from those with experience of the product and the market) to form part of that analysis. One would also expect the parties to the investment to find some way to share the anticipated gain between them. The precise outcome of such a negotiation would depend on a wide range of factors.

116. The Decision therefore involves an investment which is very similar to one which would occur in many ordinary commercial contexts, and the key features of that type of commercial transaction are readily identifiable. The Decision can therefore readily be compared with normal market conditions under the CMO principle.

117. As the Court of Appeal emphasised in both *Sky Blue Sports* and *British Gas*, cited above at §§69–70, there is a wide spectrum of reasonable reactions to commercial circumstances in the private market. The test to be applied is therefore whether it is clear that the relevant transaction would not have been entered into, on the terms the Respondent in fact entered into it, by any rational market operator. The burden is, accordingly, on the Applicants to establish that no rational private market operator would have concluded the negotiation in that way. The test is applied by reference to the information available at the time the decision was made.

(2) Whether the Decision was consistent with normal market conditions

118. In light of our answer to the first question, it is necessary to consider the Applicants' submission that no rational private market investor would have entered into a transaction in the form of the Decision. While we do not, given our conclusion above, need to consider the Applicants' primary case as to economic advantage assessed without reference to the CMO principle, we note that the Applicants' arguments under that primary case materially overlapped with their alternative arguments on the application of the CMO principle. Indeed, it was clear from both the Applicants' skeleton argument and the submissions of Mr Hossain that the arguments in both cases were very similar.

119. The Applicants advanced, in that regard, essentially two arguments: first, that the Decision conferred longer-term financial benefits on Camelot and/or Allwyn to which no rational private investor would have agreed, and which the Respondent had not considered; and secondly, that a rational private investor would have required further refinement of the econometric modelling before making an investment decision based on that. We address these in turn.

(a) Rationality of the benefits conferred on Camelot and/or Allwyn

120. The Applicants' submissions on this point were not easy to follow, and evolved considerably between their skeleton argument and the hearing. Our understanding of the point ultimately advanced by Mr Hossain (particularly as formulated in his reply at the hearing) was that in a notional negotiation between

a private investor and Camelot, the private investor would have been concerned about the additional gains which Camelot (during the final part of 3NL) and/or Allwyn (as the new operator of 4NL) might have obtained as a result of the 2023/24 MIP, and would therefore have declined to proceed on the terms of the Decision. Instead, Mr Hossain submitted, the rational investor would have sought to obtain better terms from Camelot.

121. The factual material before us establishes that:

(1) Camelot's final projections suggested that the additional marketing investment of £74.2m proposed in the final LNIO would deliver a net £43.4m gain to the Respondent in additional payments to good causes. That represented a predicted rate of return of around 1:1.7 (i.e. £1.70 extra contribution to good causes for every £1 of retained surplus invested in marketing by Camelot).

(2) The increase in ticket sales that created this effect would in turn deliver additional profit to Camelot of £3.6m.

(3) Camelot accepted that it needed to make an investment in marketing from its own resources, so that there was a joint investment in accordance with Condition 23.2(d). That was primarily done through an increase in Camelot's minimum marketing expenditure obligations under 3NL. The final LNIO set that amount at £3.5m.

(4) Camelot also agreed to make further investments in retail advocacy (which we understand to involve assistance to the network of retailers selling lottery tickets) in the sum of £2.5m, and staff retention costs (which we understand to have been financial incentives and other arrangements to mitigate a concern that key personnel might leave Camelot as the end of 3NL approached) in the sum of £3.3m.

(5) The total of the proposed additional investments by Camelot was therefore £9.3m. This, it was said in the final LNIO, "more than outweighs" Camelot's estimated additional profit of £3.6m. The

Respondent considered that these additional investments ensured adherence to its "not for profit" principle.

(6) The Camelot investments were the subject of negotiation between the Respondent and Camelot, and the Respondent sought and obtained increases in Camelot's commitments as part of that process, leading to the final figures summarised above.

122. The Applicants did not challenge the Respondent's conclusions on the "not for profit" principle. They did, however, submit that Camelot's investments in retail advocacy and in staff retention would have created additional indirect benefits for Camelot and/or Allwyn, which had not been addressed by the Respondent but would be relevant to a rational private investor. It was common ground that there had not, at any stage in the LNIO negotiation process, been any attempt to quantify any indirect benefits to Camelot (e.g. in brand value) arising from the retail advocacy and staff retention investments, or the benefits which might have accrued to Allwyn in the 4NL licence period from the enhancement to the National Lottery brand. The Applicants argued that it was irrational for the Respondent to ignore those benefits to Camelot/Allwyn, and that no rational private investor would have done so.

123. Ms Clement suggested at one stage in her argument that we should not be concerned with any potential gains for Camelot or Allwyn, as the primary concern of the private investor would be its own financial returns. We do not think that can be completely correct, as the point of the present exercise is to assess the commerciality of the negotiated outcome which the public authority has achieved. That means taking account of the potential gains available to both parties and the basis on which a decision has been made to share those.

124. However, the Applicants did not adduce any evidence as to the potential value of the alleged indirect benefits to Camelot and/or Allwyn. The immediate effect on ticket sales within the period of 3NL was addressed by Camelot's projections regarding additional sales, but there was no evidence of any other value accruing to Camelot from those additional sales. Nor was there any evidence as to the enhanced value of the National Lottery brand after 3NL, save for some evidence

suggesting that the beneficial effect on the National Lottery brand attributable to a single marketing initiative would typically have a half-life of approximately eight months, which suggests at best a modest effect on ticket sales after the end of 3NL.

125. There was also no attempt by the Applicants to quantify the residual benefit to Camelot (still less Allwyn) of the investments in retail advocacy or staff retention. Any such benefit is not something likely to be easily quantified, which suggests that it is unlikely to have been a material item in any negotiation about the gains to be shared by parties to such an arrangement.

126. Most importantly, however, we have no evidence before us about how a private investor might approach these issues. It is possible that a private investor might have sought to extract further value from Camelot because of the perceived benefits. It is alternatively possible that a private investor might have taken the same view as the Respondent in focusing primarily on the immediate economic impact on Camelot of the increased sales, without considering the more nebulous, and no doubt more difficult to quantify, potential indirect benefits. Indeed, it is possible that a private investor might have had no concern about the "not for profit" principle (which was important to the Respondent, as a public authority), and instead might have been more willing to share the substantial commercial benefits of increased ticket sales with the operator, leading to an agreement *more* generous to Camelot.

127. In summary, the Applicants' submissions were little more than speculation. That seems to us to fall considerably short of the hurdle that the case law sets for the application of the CMO principle. In our view, the Respondent's assessment of the adequacy of Camelot's additional investments, to offset the projected increase in profitability of the additional ticket sales, fell comfortably within the wide margin of judgment available to the Respondent, and there is no basis for a conclusion that a rational private investor would not have entered into the arrangement because of the potential for Camelot/Allwyn to receive further benefits additional to those which the Respondent focused on at the time. The Applicants' first argument therefore fails.

(b) The econometric modelling

128. The Applicants' second argument concerns the adequacy of the econometric modelling, and the submission that no rational private investor would have entered into the transaction without carrying out further investigation into the likely economic impact of the 2023/24 MIP.

129. The Applicants' criticisms of Camelot's econometric modelling were set out in detail in the Amended Notice of Appeal. In summary it was said that Camelot:

(1) Failed to ensure or provide evidence that an adequate or robust modelling design was adopted.

(2) Failed to implement an adequate econometric modelling approach by (a) excluding relevant explanatory variables, such as consumer income, unemployment rate, socioeconomic variables and seasonality, likely leading to omitted variable bias; and (b) including statistically insignificant variables.

(3) Failed to test that the econometric models were fit for the purpose for which they were being used by (a) failing to test the models' ability to accurately predict within the data sample; (b) not testing for multicollinearity; and (c) failing to undertake an adequate set of statistical diagnostic tests more generally.

130. As we have explained above, the Applicants' case on the second and third of those alleged errors was not pursued at the hearing, and it was unclear whether the Applicants maintained these points at all. For the avoidance of doubt, however, to the extent that the Applicant does maintain a submission that these errors indicated that a rational private investor would not have adopted the Decision, we do not accept that argument. Both alleged errors were addressed in the witness statement of Ms Nanson, on behalf of Camelot. Her (unchallenged) evidence was as follows:

(1) It was a matter of judgment as to which explanatory variables to include in the regression model, and the variables chosen were reliable and adequate to capture the factors that the Applicants said were excluded. While some variables with statistical insignificance were indeed included in some models, this was done deliberately and transparently to provide consistency between the estimates of the impact of different kinds of marketing effort across the different Camelot products. Confidence interval testing made it clear that the inclusion of these variables did not result in a fatally flawed outcome.

(2) The predicted outcomes of the Camelot models were constantly tested against actual outcomes, which gave Camelot greater confidence in the validity of its estimation approach. The problem of multi-collinearity (where different explanatory variables sometimes moved together, thus making it harder to distinguish the effect of one such explanator from another) was an inherent challenge that would be encountered by many approaches to demand estimation. The challenges of dealing with this feature were a known factor which did not necessarily invalidate the modelling findings. She also explained that Camelot had in fact carried out a range of statistical diagnostic tests, such as running "Monte Carlo" simulations to test the performance of the models under changing assumptions.

131. These points were reiterated in the skeleton arguments of the Respondent and the Interveners, and Mr Hossain offered no response at the hearing. We see no reason to doubt Ms Nanson's evidence. That evidence indicates that, faced with a complex empirical challenge, Camelot gave considerable thought to designing a model that could assess the impact of marketing on ticket sales. In doing so, it made various choices about model design, specification (including the selection of variables) and testing which were considered and reasonable. While other econometricians might potentially have made different choices, none of the Applicants' criticisms in this regard comes close to establishing that the Respondent acted irrationally.

132. That leaves the first criticism, alleging in broad terms that Camelot had failed to ensure or provide evidence of a sufficiently robust modelling design. In relation to that, Mr Hossain's argument at the hearing was that the EE reports themselves made it plain that there were deficiencies in the Camelot models which essentially made them unfit for purpose, with the consequence that any public authority acting rationally, and any rational private investor, would have insisted on further modelling work before agreeing to make the investment.

133. In support of that, the Applicants relied on extracts from the EE reports which, they said, demonstrated the need to obtain better modelling. In particular, both EE's January 2023 and March 2023 reports took the view that while Camelot's modelling had in some respects improved compared to previous modelling provided, and had addressed some of the concerns previously raised, there were other points on which concerns remained. A particular concern was with the changes to the variables included in the models, where EE considered that Camelot's approach was inconsistent and not supported by strong evidence. In relation to the optimal investment amounts, however, EE was comfortable with the way in which Camelot's calculations had been derived and considered that they were supported by econometric evidence that was "defensible".

134. The March 2023 report set out the following conclusions:

> "… we found that some but not all of the [recommendations from previous reviews of Camelot's modelling] had been addressed. However, we have not recommended demanding remedial action from Camelot. The advantages of doing so would be if such an update was likely to change our opinion on what the optimal spend was or it would help establish a precedent on what Camelot was expected to produce such that future evaluations will be easier. We doubt that update would alter the conclusions that it would be appropriate for the Gambling Commission to draw from the econometrics work. There will remain considerable model uncertainty. The value of setting a precedent to improve the quality of future submissions is diminished by the fact that the exercise of reviewing investment requests from Camelot is coming to an end.
>
> We broadly think that the Gambling Commission can attach the same confidence to the current econometrics modelling as in previous rounds. It would continue to be wrong to place undue emphasis on point estimates. There is considerable uncertainty about how effective the marketing spend will be that the econometrics modelling cannot be expected to resolve fully."
>
> "The November 2022 update does not provide any notable change in the approach already implemented by Camelot in the previous report. Not all the recommendations provided in our previous report have not *(sic)* been

> implemented by Camelot. More generally, we have not been convinced that the extended models are any closer to estimating the true returns to media spending than the baseline models, but equally the extended models are not conclusively worse. However, we doubt that following up on these points will make a material difference for the purposes of assessing funding for the final year.
>
> As ever, we recommend the Gambling Commission treat the point forecasts generated by the modelling with caution. The confidence intervals calculated by Camelot show that there is a substantial level of model uncertainty.
>
> Assuming that the Gambling Commission will adopt a risk-averse approach when determining how much investment to spend, the potential error concerning switch points is unlikely to materially alter conclusions."

135. (We assume that the statement in the third paragraph extracted above that "Not all the recommendations provided in our previous report have not been implemented" contained a surplus "not" and should have read "Not all the recommendations provided in our previous report have been implemented".)

136. The Applicants also relied on the content of EE's final report of January 2024, although this of course postdated the Decision and is not therefore a document which can properly be taken into account. Mr Hossain sought to rely on it insofar as it recorded views which had previously been expressed, but on that basis it adds nothing to the earlier reports.

137. We consider that the Applicants significantly overstated the significance of the criticisms in the EE reports. Those reports were a culmination of a series of reports in which EE had reviewed and analysed Camelot's econometric modelling. It is clear from the earlier reports provided to us that EE did view the models as being in general terms reasonable evidence for the purposes of making LNIO decisions. For example the EE January 2022 report (which was referenced repeatedly in the January and March 2023 reports) had included the following statements:

> "The in-house econometric modelling presented by Camelot in this submission does not differ greatly in design from the April 2021 submission. The models from April 2021, covering the period w/c 31-Aug-14 to w/c 20-Dec-20 are used as baseline models. These models were deemed to be defensible following our review last year."
>
> "For the purposes of assessing media spend effectiveness and thinking about future investments, the materials provided by Camelot probably offer sufficient

> comfort for the Gambling Commission. Reservations we have noted in the past about what weight to place on the econometrics evidence remain."

138. While EE's January 2022 report had identified concerns with some of the variables used in Camelot's extended models, and recommended stronger evidence for the changes made to the modelling in Camelot's future modelling, it had concluded that there were not serious causes for concern, and that addressing its concerns would not be likely to have a material impact on the conclusions on the impact of marketing on the return to good causes:

> "We do not think there are any serious causes for concern in Camelot's latest modelling. In large part, the extended models are using the same sets of variables as the previous models. However, where variables have been altered or new variables added, the underlying reasoning for Camelot's decisions to make changes given in the Assurance Report is not entirely satisfactory."
>
> "The extended models provided by Camelot are defensible. Camelot have followed the approach we recommended previously, using its initial in-house models from April 2021 as a starting point for this latest submission. While we are not always persuaded by the need to make all the changes that Camelot has made to the April 2021 models, addressing the concerns we have identified in this note would be unlikely to have a material impact on the conclusions on media contribution to Good Causes revenue.
>
> The Gambling Commission should continue to treat the point forecasts generated by the modelling with caution. The confidence intervals calculated by Camelot show that there is a substantial level of model uncertainty. There is not significant evidence that the extended models are any closer to estimating the true returns to media spending than the baseline models, but equally the extended models are not conclusively worse."
>
> "We are advising the Commission tolerates the issues we have identified in this note, but it is important that future modelling from Camelot does not ignore these concerns."

139. EE's previous advice had therefore been that the Camelot models were defensible, but that the nature of the modelling exercise was itself so inherently uncertain that the results should be approached with caution, and its concerns with some aspects of the modelling should be addressed in the next iteration.

140. By the time of EE's January and March 2023 reports, however, it was known that 3NL was coming to an end, and that Camelot would not be the operator of 4NL. Whereas in previous years there seems to have been an approach to seek to improve the modelling year on year, that was evidently no longer sensible given that Camelot was no longer going to be the licensee. As EE noted in its

January 2023 report, in relation to its continued concerns about the variables in the econometrics model, if the modelling was part of a repeated process, EE might have requested changes to be made, but for the purposes of assessing Camelot's final request for funding it was doubtful that there would be much to be gained from asking for further work. That view was maintained in the March 2023 report, as set out in the extract above, explaining why EE did not recommend demanding remedial action from Camelot. The Respondent was entitled to accept that advice.

141. Any attempt to assess the link between various types of marketing spend and ticket sales through econometric modelling is moreover (as we have already noted) a complex task. There were many areas in which judgment was required in the construction and assessment of the models, and it is not surprising that there were differences in view between Camelot and EE. The key point is that EE's conclusion on Camelot's previous modelling had been that it was "defensible", and in relation to the econometric work for the 2023/24 MIP it maintained that conclusion. In light of those conclusions, it was entirely rational for the Respondent to regard Camelot's modelling as a proper source of evidence on which to base the Decision, albeit with the caution advised by EE.

142. We note that the 22 March 2023 submission to the Committee by Mr Holdaway and his team stated that "Camelot's rationale for continued marketing investment is sound, and we are content that its financial assumptions and the underlying evidence base are robust." Read in isolation, that might be regarded as an overstatement of the strength of the evidence provided by the models. That comment needs, however, to be read alongside the other comments in the same document regarding Camelot's modelling. In particular we consider that the statement earlier in the same document that "the financial assumptions related to the investment are broadly underpinned by an appropriate rationale and evidence base" reasonably reflected the advice received by the Respondent from EE. The submission also noted that Camelot had not presented a compelling case for the full levels of investment requested, and that EE's review had recommended a slightly more risk averse approach. Again, that reflected the caution which EE had advised in relation to Camelot's modelling.

143. It should also be noted that the Respondent did not rely solely on the econometric models as evidence to support the Decision. Mr Holdaway explained the other factors which the Respondent took into account, which included Camelot's financial commitments, assurance from its marketing experts, April Strategy, and its consideration of the long-term health of the National Lottery. The Respondent also decided on a reduced level of marketing investment, based on Mr Holdaway's recommendation, precisely in order to reflect the risks inherent in the 2023/24 MIP and the uncertainty in Camelot's modelling in that regard.

144. Against that background, the Applicants' challenge to the Decision based on the adequacy of the econometric modelling is hopeless. There is no basis on which it can sensibly be said that the Respondent if behaving rationally should have investigated the econometric modelling further, given that EE's advice was precisely the opposite (i.e. that any further investigation was unlikely to make any difference). Still less is there any basis for a conclusion that no rational private investor would have invested without further work in that area.

(c) Conclusion on the CMO principle

145. The Applicants' case on the CMO principle therefore fails. For the reasons set out above, the Decision was consistent with normal market conditions, and therefore did not confer a subsidy on any of the Interveners.

146. Given that conclusion, it is not necessary for us to determine the Respondent's alternative arguments that the Decision did not involve specific financial assistance granted through public resources. We nevertheless set out our conclusions on those points, in case the matter goes further. In doing so we note that these two issues were treated by both the Applicants and the Respondent as subsidiary points in both their written and oral submissions for the hearing, and were not at that stage addressed by the Interveners at all. All three parties did, however, develop their submissions further in their post-hearing written submissions.

(3) Whether any benefit was provided from public resources

147. The Respondent submitted that the Decision involved a permissible modification of terms regulating payment into the NLDF as part of a joint investment, which did not amount to a "forgoing of revenue that is otherwise due" within the meaning of s. 2(2)(c) of the SCA. Accordingly, the Respondent said that the Decision did not grant financial assistance from public resources within the meaning of s. 2(1)(a) of the SCA, since there was no other basis on which the Applicants contended that public resources were engaged.

148. The Respondent noted that the language of s. 2(2)(c) was similar to the wording of the definition of a subsidy under Article 1 of the Agreement on Subsidies and Countervailing Measures (the **SCM Agreement**), which in Article 1.1(a)(1) specifies that a subsidy will be deemed to exist if, among other things, "(ii) government revenue that is otherwise due is foregone or not collected" . The Respondent therefore referred to World Trade Organisation (**WTO**) case law which approached the question of the "forgoing of revenue" by comparing the revenues due to the State under the contested decision with the revenues that would be due under an appropriate comparator benchmark, based on the structure and organising principles of the relevant domestic legal framework. The Respondent cited, in particular, the approach taken in AB-1999-9 *US: FSC* (24 February 2000), §90, and AB-2017-7 and AB-2017-8 *Brazil Taxation* (13 December 2018), §§5.162–5.163.

149. On that basis, the Respondent argued that the central organising principle in this case under the 1993 Act and 3NL was the maximisation of returns to good causes. Condition 23.2 of 3NL furthered that principle and determined what was "due" to the NLDF from time to time, for the purpose of s. 2(2)(c) of the SCA. A decision taken under that Condition was therefore (the Respondent submitted) not a derogation from the benchmark which amounted to a forgoing of revenue. That was particularly the case where it could not be shown that, overall, the NLDF had received less money than it would have done absent the Decision (and on the contrary, the Respondent said that it was probable that the NLDF received significantly *more* than it would have done absent the Decision).

150. The Interveners did not initially make any submissions on this point. In their further post-hearing written submissions, however, they essentially supported the position of the Respondent, arguing that a variation to the terms of 3NL was not the forgoing of revenue due, but a modulation of the licence in a manner consistent with the reference framework, to secure the overall objective of that framework.

151. The Applicants objected that the Respondent's approach would take all marketing investments made under Condition 23.2 outside the concept of a subsidy, regardless of whether they were made on commercial market terms. While Mr Hossain accepted that it was necessary to identify a benchmark against which to compare the effect of the Decision, he submitted that the appropriate benchmark was the provisions of the original 3NL, and contended that an adjustment made following a marketing investment proposal approved under Condition 23.2 should not set a new benchmark for the purposes of the application of s. 2(2)(c).

152. We agree with the Respondent that s. 2(2) of the SCA appears to have been closely modelled on the provisions of Article 1.1(a)(1) of the SCM – a point also noted, in relation to Article 363(1)(b)(i) of the TCA, by Foxton J in *R (British Sugar) v SS for International Trade* [2022] EWHC 393 (Admin), §136. The concept of the "forgoing of revenue otherwise due" to the State is, however, not a peculiarity of the SCM Agreement, but is also a well-established concept in EU State aid law: see for example the Commission Notice on the notion of State aid as referred to in Article 107(1) TFEU [2016] OJ C262/1 (**Notice on the notion of State aid**), §51, stating that in order to establish that the advantage is granted through State resources, a "positive transfer of funds does not have to occur; foregoing State revenue is sufficient. Waiving revenue which would otherwise have been paid to the State constitutes a transfer of State resources." While the judgments of the European Court do not usually use the specific phrase "forgoing revenue otherwise due", the Court frequently uses expressions with the same broad meaning, such as references to the "renunciation by the authorities concerned of tax revenue which they would normally have received": Case C-465/20 P *Commission v Ireland* EU:C:2024:724, §318. It is

therefore appropriate to consider the EU case law on this point alongside the WTO decisions.

153. As was common ground before us, in order to establish whether a public authority has forgone revenue otherwise due, it is necessary to identify the relevant benchmark for comparison. As the *US:FSC* decision notes at §90, the term "otherwise due" requires a comparison between the revenues due under the contested measure and the revenues that would be due in "some other situation". The same is implied under the EU case law, with the reference in the case law to the tax revenue which the authorities "would normally have received".

154. The question is then what that benchmark is. In some cases, it may be straightforward to ask what revenues would have been "otherwise" due to the State, absent the contested measure. The Appellate Body in *US:FSC* observed that in that case it was not difficult to establish in what way the foreign-source income of a Foreign Sales Corporation would have been taxed "but for" the contested measure (§91). In other cases that may be a more difficult question. Where the disputed measure is a tax measure, in particular, it may be difficult to identify a "general" rule of taxation and exceptions to or derogations from that rule. The Appellate Body in *Brazil Taxation* therefore commented that the determination of the relevant benchmark required the identification of the tax treatment of comparable taxpayers by reference to the objectives of the relevant tax system.

155. A very similar analysis features in the EU case law in the context of general tax measures, albeit that this analysis is typically conducted in relation to the application of the selectivity condition that is the EU State aid equivalent of the concept of "specificity" under the SCA. The essential point is that in the analysis of whether a measure forming part of a system of general taxation constitutes a State aid under Article 107(1) TFEU, it is generally necessary to compare the measure under examination with an appropriate benchmark or reference system: Notice on the notion of State aid, §§127–141.

156. In the present case, the Decision does not form part of a broader system of taxation, or any similar structure, but is an *ad hoc* measure applying (by its very nature) to a single enterprise, namely Camelot. It is, moreover, straightforward to identify whether the Decision resulted in the Respondent forgoing revenue that would "otherwise" have been due to it, by considering the revenues that would have been due if the Decision had not been adopted. Condition 23, as amended, provided a mechanism for Camelot to propose, and the Respondent to agree, a jointly financed investment, but did not mandate such an investment or specify its amount. Absent a decision taken under Condition 23, therefore, the contributions into the NLDF remained as specified under 3NL. The effect of the Decision was therefore to permit Camelot to retain additional revenues from the National Lottery which would otherwise have been paid into the NLDF. The retention of those additional revenues was, indeed, the means by which the investment in marketing was "jointly financed" by Camelot and the Respondent pursuant to Condition 23.2(d) of 3NL.

157. The fact that revenues paid into the NLDF were calculated on the basis of a complex formula does not change that analysis; nor does the fact that (as we have set out above) Camelot made marketing investment proposals pursuant to LNIOs every year from 2015, under the revised Condition 23. There is no doubt that this occurred quite properly pursuant to the licence framework, in order to secure the objectives of increasing ticket sales. But that does not diminish the fact that on each occasion the approval of the marketing investment proposal by the Respondent meant that Camelot retained substantial additional revenues that would otherwise have been paid to the NLDF under the terms of 3NL. If we had reached the conclusion (contrary to our analysis above) that the Respondent had approved an additional marketing investment in an amount that no rational private investor would have agreed, and financed (as this investment was) through a reduced contribution to the NLDF, it is very difficult to see how that could not have been regarded as financial assistance provided through public resources.

158. That conclusion is also not undermined by the argument of the Respondent (and, in their post-hearing submissions, the Interveners) that the purpose of the Decision was ultimately to generate an increased return to the NLDF. In the first

place, while the economic modelling projected an increased net return, there was clearly the possibility that the NLDF would receive reduced funds as result of the Decision, given that the 2023/24 MIP had the character of a commercial investment with associated risk.

159. More importantly, it is well-established under the EU case law that a measure exempting certain undertakings from the normal tax burden will engage State resources even if the measure has the net effect of increasing overall tax revenues: see the commentary at Bacon, *European Union Law of State Aid*, §2.103. As Advocate General Léger noted in his opinion in Cases C-182 and 217/03 *Belgium and Forum 187 v Commission* EU:C:2006:89, §308, the material factor is the public nature of the resource, and not the question of whether the measure in issue ultimately increases or diminishes the budget of the State. The conclusion of the Advocate General on this point was followed by the CJEU at EU:C:2006:416.

160. We do not see any reason why the same analysis should not apply to the application of ss. 2(1)(a) and 2(2)(c) of the SCA, given that the relevant question is whether financial assistance is given from public resources, including by the forgoing of revenue otherwise due, and not whether that ultimately leads to an increase or diminution of the revenue accruing to the relevant public authority under the regime in question.

161. It follows that if we had found that the Decision conferred an economic advantage within the meaning of s. 2(1)(b) of the SCA, we would have found that the advantage was granted through public resources for the purposes of s. 2(1)(a).

(4) The specificity of the benefit conferred by the Decision

162. Under s. 2(1)(c) of the SCA, in order to constitute a subsidy financial assistance must be "specific", in the sense that it "benefits one or more enterprises over one or more other enterprises with respect to the production of goods or provision of services". As set out above, s. 4(2) of the SCA provides that financial assistance will not be regarded as being specific if the distinction in

the treatment of enterprises is justified by principles inherent to the design of the arrangements of which the financial assistance is part.

163. On the basis of s. 4(2), the Respondent argued that financial assistance provided to a particular enterprise is not invariably specific; and that the benefit provided to Camelot was inherent in the arrangements under the 3NL which reflected the requirement to maximise returns to good causes. Other enterprises providing lotteries were not (the Respondent said) in a comparable position to Camelot, since they operated under a fundamentally different legal regime. The Interveners adopted essentially the same position as the Respondent in their post-hearing written submissions.

164. The Applicants said, by contrast, that the specificity criterion was clearly satisfied in the present case. While the contract to operate 3NL was awarded following an open and competitive procedure to ensure that the licence did not itself constitute a subsidy, if during the term of 3NL the conditions of the licence were varied so as to confer a financial benefit on Camelot, that was clearly capable of constituting a subsidy.

165. We can address this issue shortly. Section 4(2) of the SCA reflects the EU State aid case law concerning measures that are not selective (in the language used by the EU case law) on the basis that those measures are consistent with the relevant benchmark or reference system. As we have already noted, that analysis is relevant to cases involving general measures (particularly general tax measures), where it is necessary to identify whether there is a derogation from a relevant benchmark or reference system. To make that assessment it is necessary to consider what the EU case law refers to as the "nature or general scheme" of the reference system, on the basis of the principles inherent in that system: Notice on the notion of State aid, §138. The effect of s. 4(2) is, however, not that any financial assistance that has an objective aligned with the overall purpose of the relevant regime cannot be regarded as specific. That would be to confuse the identification of a measure as a subsidy under s. 2(1) of the SCA with the subsidy control principles which must be considered by the public authority if it is giving a subsidy.

166. In the present case, we have already noted that we are not concerned with the analysis of a measure of general taxation, or any similar general measure, but with an *ad hoc* variation to the 3NL licence. We agree with the Applicants that this was clearly specific. The fact that an enterprise has been awarded a public concession contract such as 3NL, putting it in a different position to other undertakings, does not mean that any financial assistance that it receives pursuant to that contract is immune from scrutiny under the provisions of the SCA. Moreover, while the Decision was adopted under a mechanism set out in Condition 23, it was not inherent in the design of 3NL that such a decision should have been adopted. On the contrary, by providing for the investment to be proposed by the licensee and then subject to a detailed process of evaluation and if necessary modification by the Respondent "in its absolute discretion", the process set out in Condition 23 underscored the specific nature of any decision taken under that mechanism.

167. In this case, we have concluded that the Decision was consistent with normal market conditions and was for that reason not a subsidy within the meaning of s. 2(1) of the SCA. Had we reached the opposite conclusion, however, we would have concluded that the Decision was indeed a subsidy within the meaning of that provision, requiring consideration of the subsidy control principles before it was granted.

H. RELIEF

168. Given the conclusion we have reached that the Decision did not confer a subsidy on any of the Interveners, as a consequence of the application of CMO principle, it is not strictly necessary to consider the issues between the parties relating to relief. However, the facts of these proceedings raise a question about delay and the appropriate conduct of challenges under the SCA, so we will add some observations on that subject.

169. Two separate questions about delay arise:

(1) When did or should the Applicants have become aware of the Decision?

(2) Once the Applicants were or should have been aware of the Decision, how quickly were they required to issue their proceedings?

(1) When should the Applicants have become aware of the Decision?

170. The Decision was published on the Respondent's website in August 2023. The Applicants said that that they did not see this at the time. Instead, their evidence maintained the position that they were not aware of the Decision until 15 January 2025, when Mr Martin reviewed Camelot's 2023/24 Annual Report for the purposes of the High Court proceedings. His evidence is that at that stage he identified a reference to the investment arising from the Decision and immediately advised the Applicants' solicitors in these proceedings.

171. However, it is apparent from documents disclosed by the Applicants in these proceedings that Mr Rancombe had reviewed the same set of accounts on 8 October 2024, sending emails to various executives of the Applicants containing points of note and some extracts from the accounts. Mr Rancombe's emails did not specifically identify the Decision, although the pages he referred to contained references to the investment arising from the Decision. Mr Martin's evidence was that Mr Rancome's emails did not alert him to the fact of the Decision.

172. Mr Rancombe said in his witness statement that he was tasked with identifying high level performance information for his executive colleagues, was likely to have reviewed the accounts on his phone on the train, and that he had no recollection of reviewing the part of the accounts that disclosed the investment arising from the Decision. He said that he was not aware of that investment until Mr Martin's discovery of the matter in January 2025.

173. We are not entirely satisfied by the thoroughness of the Applicants' disclosure on this point. On 18 July 2025, the Tribunal ordered the Applicants to carry out a reasonable and proportionate search for documents indicating when they first became aware of the Decision. It is apparent that the Applicants took a somewhat narrow view of this obligation, including the selection of electronic search terms which seem unlikely to have captured all relevant documents. The

Applicants' apparent ignorance of the Decision also seems somewhat surprising in the context of their bid for 4NL and their subsequent challenge to the Respondent's 4NL decision in the High Court proceedings, which commenced in 2022.

174. We have nevertheless resisted the temptation to conclude that the Applicants should have known of the Decision by the time of Mr Rancombe's email of 8 October 2024, since there does seem to be a question about whether it is reasonable to expect Mr Rancombe, tasked as he was to do a high level review, to appreciate the significance of the references in the accounts to the investment. If the Decision had been mentioned expressly in the Camelot accounts reviewed by Mr Rancombe, that might have been a different matter.

175. We therefore start from the position that the Applicants and their solicitors were aware of the Decision by 15 January 2025, and do not for these purposes find that they should have known about this earlier. The question is then whether, after 15 January 2025, the Applicants delayed in taking steps to issue proceedings.

(2) How quickly were the Applicants required to issue proceedings?

176. It is common ground that the Applicants did not contact the Respondent for over two months after becoming aware of the Decision. Their first contact concerning this matter was on 19 March 2025, when they sent a pre-action information request. Proceedings were not then issued until 8 May 2025. The Respondent and Interveners submitted that this constituted undue delay in making the application, such that relief should be refused by the Tribunal under s. 72(8)(a) of the SCA. The Applicants responded that they had acted sufficiently promptly and that there was no real evidence of prejudice arising from any delay.

177. As set out at §62 above, s. 71 of the SCA, amending the Tribunal Rules, sets a "relevant date" after which subsidy challenges must be lodged within one month. That relevant date is either the "transparency date" or, where an applicant seeks information within one month of the transparency date, the date

on which the requested information is provided. The transparency date is in turn either the date on which the subsidy is entered into the public subsidy database pursuant to s. 33(1) or (5) of the SCA or, in particular circumstances where the duty to make an entry on the subsidy database "does not apply" to a subsidy or scheme, the date on which the applicant knew or should have known of the Decision: Rule 98A(4)(b). We interpret the latter to be a reference to the situations set out in s. 33(2) and (6), which provide that the duties to make entries in the subsidy database do not apply to certain subsidies under subsidy schemes, and certain modifications of subsidies.

178. None of that appears to apply to the situation where the public authority does not consider that it has made a subsidy decision and there is therefore no entry in the subsidy database. The SCA gives no express guidance as to what time limits might be appropriate in such circumstances. Nevertheless, in our view the time limits set out in s. 71 and the new Rule 98A provide a useful guide as to the expectations of the legislature in relation to challenges of this sort. These provisions make it plain that subsidy challenges are required to proceed on a tight timetable. That is understandable, as there would otherwise be uncertainty for all those involved and the risk of undue interference with good administration. We do not consider that a materially different approach is justified for a case where the applicant challenges a measure which it regards as being a subsidy, but which has not been recognised by the public authority as such.

179. In principle, therefore, we consider that challenges to decisions where the public authority has not treated the assistance as a subsidy should be subject by analogy to the expectation that proceedings should normally be issued within one month of the date on which the applicant was or should have been aware of the decision, unless within that one month period a request is made for the provision of information. Where information is requested, the proceedings should normally be issued within a month of the information being provided. If proceedings are not issued within those timescales, that will in our view normally constitute grounds for the refusal of relief on the basis of undue delay, absent exceptional circumstances.

180. In the present case there has been no explanation given for the delay between 15 January 2025, when the Applicants and their solicitors became aware of the decision, and the request for information two months later. We do not consider that the making of that request, after that period of time had elapsed, should entitle the Applicants to additional time (and notably the Applicants were able to issue their proceedings on 8 May 2025 without the benefit of any substantive response to that request for information).

181. In all the circumstances, we consider that the Applicants did not act sufficiently promptly. Either the proceedings should have been issued on or before 15 February 2025; or if the Applicants did require further information, their request for that should have been made during that period. What the Applicants were not, in our judgment, entitled to do was simply to wait on the basis that the Decision had not been recorded as a subsidy on the subsidy database. On that basis, had the Applicants been entitled to relief, we would have been inclined to refuse it.

I. DISPOSITION

182. The Applicants' application for declarations and a recovery order in relation to the Decision is dismissed.

183. This judgment is unanimous.

The Honourable Mrs Justice Bacon President	Ben Tidswell	Derek Ridyard

Charles Dhanowa CBE, KC (*Hon*)
Registrar

Date: 26 February 2026