Neutral citation [2026] CAT 24

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1753/4/12/25

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

19 March 2026

Before:

THE HONOURABLE MR JUSTICE SAINI
(Chair)
PROFESSOR IOANNIS KOKKORIS
GREG OLSEN

Sitting as a Tribunal in England and Wales

BETWEEN:

SPREADEX LIMITED

Applicant

– v –

COMPETITION AND MARKETS AUTHORITY

Respondent

Heard at Salisbury Square House on 19 and 20 February 2026

JUDGMENT

APPEARANCES

Tristan Jones KC and Alison Berridge (instructed by Herbert Smith Freehills Kramer LLP) appeared on behalf of the Applicant.

Ben Lask KC and Daisy Mackersie (instructed by the Competition and Markets Authority) appeared on behalf of the Respondent.

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A. OVERVIEW

1. This is a case about the identification of the appropriate counterfactual in a merger situation for the purposes of assessing the likely effects of the merger on competition. The Applicant, Spreadex Limited (**Spreadex**), applies pursuant to s. 120 of the Enterprise Act 2002 (the **Act**) for a review of the decision of the Competition and Markets Authority (the **CMA**) as to the appropriate counterfactual in a report entitled "Completed Acquisition by Spreadex Limited of the B2C Business of Sporting Index Limited: Remittal Final Report", and dated 19 September 2025 (the **FR**).

2. The FR relates to the acquisition by Spreadex of the business-to-consumer business of Sporting Index (the **B2C Business**) in November 2023 (the **Merger**) from Sporting Group, a subsidiary of La Française des Jeux (**FDJ**). Spreadex and Sporting Index were (and are) the only two licensed providers of online sports spread betting services in the UK. Through the acquisition, Spreadex has secured a combined 100% share of the relevant market (as defined by the CMA in the FR).

3. The CMA was informed about the Merger on 13 July 2023. The Merger completed on 6 November 2023, and the CMA undertook an investigation between 6 February and 22 November 2024. It concluded in an original final report of 22 November 2024 that the Merger gave rise to a substantial lessening of competition (**SLC**) and required Spreadex to sell the business. That decision was challenged by Spreadex before the Tribunal in Case No. 1700/4/12/24 and, as described in more detail below, this decision was (by consent) quashed in an Order dated 4 March 2025 and remitted to the CMA on procedural fairness grounds. Following remittal, the CMA issued the FR and again concluded that the Merger gave rise to an SLC and, by way of remedy, required Spreadex to sell the business. By Notice of Application dated 17 October 2025 (the **NoA**), Spreadex challenged the FR by applying for review under s. 120 of the Act. That is the application before the Tribunal.

4. In short, Spreadex says that the CMA's determination in the FR of the counterfactual to the Merger – that is, what would most likely have happened

had Spreadex not acquired Sporting Index – was unlawful on judicial review grounds. In brief, the CMA found that the appropriate counterfactual was that, in the absence of the Spreadex bid, another entity would have bought Sporting Index and continued to compete with Spreadex for the supply of licensed online sports spread betting services. In the course of the sales process in 2023, FDJ received bids for the B2C Business from two other bidders: 10star (**AB1**) and Star Sports (**AB2**) (together, the **Alternative Bidders**). The CMA found that both Alternative Bidders offered sufficiently high prices to have met FDJ's objectives for the sale, and AB1 would have been most likely to acquire the business and operate it as a competitor, absent Spreadex's bid. Accordingly, it decided that in the counterfactual, there would have been some competition to Spreadex and that the Merger, by comparison with the counterfactual, resulted, or may be expected to result in, an SLC in the supply of licensed online sports spread betting services in the UK. It concluded that the absence of competition to Spreadex had or is likely to have adverse effects for consumers in terms of the quality (both as regards product range and the user experience) and price of services. Having concluded that the Merger resulted, or may be expected to result, in an SLC, the CMA decided that the divestiture of the B2C Business would be an appropriate, effective, and proportionate remedy. There is no challenge before the Tribunal in relation to the remedy.

5. Spreadex advances two grounds of review, each of which concerns the identification by the CMA of the appropriate counterfactual:

   (1) **Ground 1** is that, when reaching its conclusion on the counterfactual, the CMA considered the likelihood that each of the necessary steps in its chain of reasoning, taken in isolation, would have come true. However, it wrongly failed to "stand back" and consider whether the uncertainties at each individual stage, taken together, meant that it was unable to conclude that continued operation of the business under the ownership of AB1 was the most likely counterfactual outcome. This is essentially a complaint about the CMA's alleged error in failing to consider the cumulative probabilities.

(2) **Ground 2** concerns what Spreadex describes as the "evidence base". It says, given the "delicate chain of reasoning" underpinning the CMA's counterfactual, and given the limitations in the evidence, the CMA's overall conclusion was not properly justified by the evidence. This is an irrationality challenge under conventional public law principles but it was divided at the hearing, as we describe further below, into rationality challenges to two specific conclusions by the CMA (**Ground 2A** and **Ground 2B**, respectively), and then an overall rationality challenge to the CMA's conclusion that a sale to AB1 was the most likely counterfactual outcome (**Ground 2C**).

6. In response, the CMA says:

(1) Ground 1 is based on a factually incorrect premise that the CMA did not assess the likelihood of particular counterfactual scenarios on the basis of the evidence "in the round". The CMA submits that the FR makes clear in terms that the CMA did form a view on the basis of the entirety of the evidence.

(2) Ground 2 is an attempt selectively to re-argue the merits of a series of evidential points that were carefully considered by the CMA. It says the CMA's findings on the two particular matters of complaint in Grounds 2A and 2B, and its overall conclusion (challenged in Ground 2C), reflected its detailed evaluation of a wide range of complex and necessarily imperfect evidence, which it assessed "in the round". As such, the CMA says, noting the significant hurdle which rationality challenges must overcome, its conclusions were justified by the evidence and rational.

7. Although the challenge before the Tribunal is limited to alleged errors in the CMA's counterfactual as described above, in order to put the competing submissions in context, it is first necessary to describe, in summary, the CMA's overall approach as set out in chapter 5 of the FR (**Chapter 5**). The FR itself is hyperlinked in paragraph §1 above and we will seek to avoid detailed recitation

of its text, where possible. We will however need to cite from the FR in more detail when addressing the Ground 2A and Ground 2B challenges.

8. We are grateful to Mr Jones KC and Ms Berridge, Counsel for Spreadex, and Mr Lask KC and Ms Mackersie, Counsel for the CMA, for their excellent oral and written submissions.

B. BACKGROUND

(1) The sporting business and the Merger

9. Spreadex and Sporting Index provide licensed online sports betting services to customers (principally) in the UK, including both "fixed odds" betting and "spread" betting services covering a range of sports and events. Sports fixed odds betting and spread betting services each involve a customer betting an amount of money on the outcome of a sports event, or on the likelihood of something occurring or not occurring during that event. The difference between them is that, in fixed odds betting, the payoff is determined based on odds set in advance (for example, 3:1 that Team X will win a football match). In spread betting, the provider offers a spread of outcomes (for example, a spread of 2.8–3.0 in relation to the number of goals scored by Team X) and customers "buy" (predict higher than the spread) or "sell" (predict lower than the spread). Customers will win if they make a correct prediction, and the amount of the payoff is determined by how accurate the customer is (e.g. the payoff for a customer who correctly predicted that Team X would score more than three goals will depend on the difference between the actual number of goals scored and three). Conversely, the customer can lose more than the initial amount staked if their prediction is far below the spread. This is a specialised and niche market with a limited range of potential customers.

10. There are a number of other providers of sports fixed odds betting services. However, Spreadex and Sporting Index are (and were) the only two providers of licensed online sports spread betting services in the UK. Until the Merger, Sporting Index was owned by Sporting Group, a subsidiary of FDJ. Sporting Group also had a business-to-business (**B2B**) arm – "Sporting Solutions" – which

was not sold to Spreadex. FDJ purchased Sporting Group from Mr Magnus Hedman in 2019.

11. FDJ began to explore potential sale options for Sporting Index in 2022. It decided at the end of that year, on 15 December 2022, to pursue a sale, following the commission of a detailed cost analysis of Sporting Group and its business lines by AlixPartners UK LLP (**AlixPartners**). FDJ commenced a formal sale process in January 2023. On behalf of FDJ, Oakvale Capital LLP (**Oakvale**) prepared what was called an "Investment Teaser" presentation which set out financial details about Sporting Index and its performance.

12. Preliminary bids were received from three potential purchasers in February 2023. These were AB1, AB2, and Spreadex. Their bids were as follows:

    (1) AB1 with a bid value of £3m (which was later confirmed on 24 March 2023) subject to the agreement of a Transitional Services Agreement (**TSA**) (that is, an agreement under which Sporting Group would provide essential operational support to AB1 for a transitional period following closing);

    (2) AB2 with a bid value of £2m (an increase on its initial intended bid of £1m) subject to Sporting Group's supply of operational support for the first year; and

    (3) Spreadex with a bid value between £5m and £7m (later increased to £7.5m on 22 March 2023).

13. AB1 is a global B2B sports betting business, registered overseas. It informed the CMA that its business is similar to the Sporting Solutions business (i.e., Sporting Group's B2B arm). AB1 was set up by Mr Hedman (who, as we note above, owned Sporting Group between 2015 and 2019, before selling it to FDJ). AB2 operates primarily as a sports fixed odds betting business in the UK, where it is regulated by the Gambling Commission (the **GC**). The GC regulates all gambling in Great Britain, apart from spread betting which is regulated by the Financial Conduct Authority (the **FCA**).

14. The initial price bid by Spreadex was substantially in excess of those of AB1 and AB2. In March 2023, FDJ's advisors recommended that Spreadex be selected as the preferred purchaser. The strategic rationale for Spreadex's decision to acquire Sporting Index was to: (i) obtain access to its client base, historical data and dormant accounts; and (ii) remove the competitive threat of another firm buying the business, with the result that Sporting Index would become a stronger competitor.

15. The Spreadex preliminary bid included caveats that its consideration was subject to CMA approval or the absence of interest from the CMA, however on 30 June 2023 the Spreadex board approved the Merger without CMA approval being a condition of completion. Given that Spreadex was already operating as a UK licensed spread betting provider with its own IT systems it required only a minimal and short-term TSA of up to eight weeks of assistance post-completion. The sale of the B2C Business to Spreadex completed on 6 November 2023.

16. The CMA referred the Merger for a Phase 2 inquiry on 17 April 2024. The CMA published its original final report, following conclusion of the Phase 2 inquiry, on 22 November 2024. In that report, the CMA decided that the Merger had resulted, or may be expected to result, in an SLC and imposed a divestiture remedy. On 20 December 2024, Spreadex filed a Notice of Application for review of the CMA's decision. Following receipt of that Application, the CMA identified a number of errors in the original final report, including instances where the summaries of third-party evidence did not accurately reflect the underlying material. The CMA asked the Tribunal to quash the decisions in the original final report and refer the matter back to the CMA for reconsideration as referred to above at §3.

17. The Tribunal made the order sought by the CMA on 4 March 2025. On the same day, the CMA appointed a remittal inquiry group. The FR followed seven months of investigation and deliberation by that group, including gathering additional information from third parties, receiving further submissions and information from Spreadex and further consultation with Spreadex.

(2) The CMA's decision following remittal: an overview

18. Under s. 35(1) of the Act, the CMA must decide on a reference: (a) whether a relevant merger situation (**RMS**) has been created; and (b) if so, whether the creation of that situation has resulted, or may be expected to result, in an SLC within any market or markets in the UK for goods or services. If the CMA finds that the merger has resulted, or may be expected to result, in an SLC in the relevant market, it must under s. 35(3) decide whether (and if so, what) action should be taken to remedy, mitigate, or prevent the SLC or any adverse effect that has resulted, or may be expected to result, from it. Section 35(4) requires the CMA to have regard, in particular, to the need to achieve as comprehensive a solution as is reasonable and practicable to the SLC and any adverse effects resulting from it.

19. The CMA concluded that the acquisition of the B2C Business by Spreadex gave rise to an RMS because: (i) the enterprises of Spreadex and Sporting Index had ceased to be distinct as a result of the Merger; and as a result (ii) the combined share of supply (by revenue) of licensed online sports spread betting services in the UK of Spreadex and Sporting Index was 100% (the threshold required for an RMS is 25%). In order to determine whether the Merger had, or might be expected, to result in an SLC, the CMA compared the prospects for competition with the Merger against the most likely competitive situation without the Merger (i.e., in the counterfactual).

20. The CMA concluded that, in the counterfactual, an Alternative Bidder (specifically, AB1) would have operated the B2C Business as a competitor to Spreadex, broadly in line with the pre-Merger conditions of competition.

21. The CMA found that the relevant market for the purpose of its assessment of the competitive effects of the Merger was the market for the supply of licensed online sports spread betting services in the UK. In its competitive assessment, the CMA noted that Sporting Index had performed less strongly than Spreadex in the years preceding the Merger and that Spreadex had taken significant market share from Sporting Index during this period. Spreadex submitted that this is because Sporting Index traded fewer sporting events, had invested less in innovation and

technical development and its promotions were less tailored to the needs of its customers. AlixPartners, in a report commissioned by FDJ, similarly suggested that the loss of market share by Sporting Index (including the loss of high value spread betting customers) since 2019 had been in part the result of under-investment in the Sporting Index technology platform. The CMA observed that greater competition from Sporting Index would have placed more competitive pressure on Spreadex.

22. The CMA's conclusion on SLC did not, however, rest solely on the potential for Sporting Index to have become a stronger competitor under alternative ownership. Instead the CMA proceeded on the basis that Sporting Index would have continued to exert a competitive constraint for at least two years under alternative ownership. As compared to that counterfactual, it concluded that the loss of rivalry between Spreadex and Sporting Index as a result of the Merger worsened the merged entity's incentives to compete on price, range of spread markets (i.e., the number of events and outcomes on which customers could place bets), and user experience for customers. The CMA observed that this reasoning applied even if the B2C Business would have been a *weaker* competitor under new ownership given that the parties are the only providers of licensed online sports spread betting services. It explained that the removal of the only other player in the market, even if this player would have been weaker under new ownership, would give rise to the competition concerns and adverse effects found by it. The CMA found that there were no countervailing factors that would prevent or mitigate the SLC. In particular, the CMA found that new entry was unlikely and would not be sufficiently rapid or at a scale to prevent the SLC.

23. During the original Phase 2 inquiry, Spreadex submitted a divestiture remedy to address the CMA's provisional finding on SLC. The remedy broadly involved: the divestment of Spreadex's shares in the Sporting Index legal entity (including its assets); the creation of a bespoke sports spread betting platform in lieu of the Sporting Index pre-Merger platform, which has not been operational since the Merger; and the provision of a TSA to the purchaser to facilitate the operation of the B2C Business for a transitional period. This remedy has been accepted by the CMA in the FR. We now turn to a more detailed consideration of the CMA's

approach to the counterfactual which is the basis of the application before this Tribunal.

(3) The counterfactual and the exiting firm test

24. The Merger Assessment Guidelines (the **MAGs**) are applicable to the CMA's phase 1 and phase 2 investigations. They form part of the advice and information published by the CMA under s. 106 of the Act and explain the substantive approach of the CMA to its analysis when investigating mergers. It was common ground that they provide the framework for the CMA's assessment. The Tribunal will summarise below the broad effect of the relevant provisions of the MAGs, but without detailed citations.

25. The central question for the CMA under the merger control regime is whether a completed or anticipated merger will give rise to an SLC in a market within the UK. To answer that question, the CMA will compare the prospects for competition with the merger against the competitive situation without the merger – i.e., in the counterfactual. There are three broad possibilities for competition in the counterfactual: (i) prevailing or pre-merger conditions of competition; (ii) stronger competition between the merger firms than under the prevailing or pre-merger conditions of competition; or (iii) weaker competition between the merger firms than under the prevailing or pre-merger conditions of competition. The CMA will generally conclude on the counterfactual in these broad terms, selecting the "most likely conditions of competition as its counterfactual against which to assess the merger" (emphasis added): see MAGs §3.13.

26. As recognized in the MAGs, and as a matter of common sense, establishing an appropriate counterfactual is an inherently uncertain exercise and evidence relating to future developments absent the merger may be difficult to obtain. A counterfactual assessment is not intended to be (and could not be) a detailed description of conditions of competition that would prevail absent the merger; and the CMA seeks to avoid predicting the precise details or circumstances that would have arisen absent the merger: see MAGs §3.11. The CMA's assessment will often focus on significant changes affecting competition between the merger firms absent the merger, for example entry into new markets in competition with

each other, expansion or exit by one of the merger firms. The CMA may use a different counterfactual in an exiting firm scenario – i.e., where one of the merger firms is said to be failing financially or would exit the market absent the merger for some other reason, such as a change of corporate strategy.

27. The MAGs explain at §3.21 and §3.23 that the CMA will consider an exiting firm argument raised by parties using a framework of two cumulative conditions: **Limb 1**, that the firm is likely to have exited (through failure or otherwise); and if so, under **Limb 2**, that there would not have been an alternative, less anti-competitive purchaser for the firm or relevant assets to the acquirer in question (i.e., in the present case, Spreadex).

28. The difficulty of establishing the appropriate counterfactual is naturally enhanced in the case of a completed merger where, for example in view of the stage at which an offer was accepted, there was no consideration, or (as in the present case) only limited consideration, of alternative purchasers. Against that background, the task for the CMA is to decide what outcome was "most likely" absent the merger, based on the available evidence: see MAGs §3.23. Spreadex accepts that this was the relevant question for the CMA to address.

29. In relation to alternative purchasers, the MAGs explain at §§3.30–3.31 that: (a) the CMA will seek to identify who the alternative purchaser(s) might have been and take this into account when determining the counterfactual; (b) the CMA may consider the marketing process for the target firm as well as offers received for it; (c) the CMA will not restrict its analysis to alternative purchasers who were willing to pay the same or similar price that was agreed in the merger under investigation. Relatedly and "[i]mportantly", the CMA will consider alternative purchasers that would have operated the business as a competitor; and (d) if the CMA considers that the *most likely* counterfactual would have involved an alternative purchaser for the firm, it will conduct its analysis of the impact on competition of the merger on the basis of that counterfactual (emphasis added).

30. In the case of a completed merger, the target company has in fact been sold. The issue is therefore whether in the counterfactual a *different* course would have obtained such that the business would <u>not</u> have been sold (to an alternative, less

anti-competitive purchaser), with the consequence that the target would instead have exited the market altogether. As explained in the MAGs at §3.24, the rationale for the transaction under review will therefore often be particularly important. That is, the CMA will want to consider *why* the purchaser has acquired a firm in the context of a claim that it would otherwise have exited from the market.

31. Consideration of the exiting firm test is logically prior to the CMA's assessment of conditions of competition in the counterfactual: (a) if the CMA is satisfied that the most likely outcome absent the merger is that one of the merger parties would have exited the market altogether, there would have been no competition from that party in the counterfactual and therefore plainly no SLC; (b) conversely, where the CMA is not satisfied that the test is met, the counterfactual will involve a continuing competitive constraint from the target entity under the continued ownership of the seller (Limb 1 not satisfied) or under new ownership of an alternative, less anti-competitive, purchaser (Limb 1 satisfied but Limb 2 not satisfied). In that circumstance, a finding of an SLC cannot immediately be discounted and, having rejected the exiting firm scenario, the CMA will: (i) make a broad assessment of the likely conditions of competition (i.e., pre-merger, weaker or stronger conditions) in the counterfactual; and (ii) carry out a detailed competitive assessment against that counterfactual to determine whether the merger gives rise to an SLC.

(4) The exiting firm submission in this case

32. Spreadex submitted to the CMA that, absent the Merger, FDJ would have wound down the B2C Business on the basis that there were no other viable purchasers. The CMA did not accept that there would not have been an alternative purchaser for the B2C Business. The Tribunal will set out how the limbs of the test were applied by the CMA.

(a) Limb 1: likelihood of exit

33. At Limb 1 of the test, the CMA focused on FDJ's rationale for the sale. It found that:

(1) FDJ had the ability to provide continuing financial support to Sporting Index. Whilst Sporting Index was a loss-making division within FDJ, it had received financial support from FDJ, and FDJ was in a position to continue to support it given the group's financial resources.

(2) FDJ was not, however, likely to have the incentive to continue supporting Sporting Index. The FCA and GC regulation had become more stringent after FDJ acquired Sporting Group. FDJ was concerned about the reputational risk and negative repercussions for FDJ's wider strategy that would arise from any regulatory breach in the UK. In these circumstances, the CMA concluded that, absent the Merger or sale to an Alternative Bidder, Sporting Index would likely have exited the market for strategic reasons. Limb 1 of the test was therefore met.

(b) Limb 2: alternative purchasers

34. At Limb 2 of the test, the question for the CMA was whether it could be satisfied that there would not have been an alternative, less anti-competitive purchaser to Spreadex. The CMA considered this question both from the purchasing side, i.e., whether there would have been potential alternative purchasers, and from the selling side, i.e., the economic incentives from FDJ's perspective of a sale to an alternative purchaser as compared to closing or liquidating the business. Having regard to the submissions made by Spreadex during the Phase 2 inquiry, the CMA structured its analysis of the evidence in the FR by reference to three questions: (i) whether FDJ would have been willing to complete a sale of the B2C Business to the Alternative Bidders; (ii) whether the Alternative Bidders would have been committed to completing a purchase of that business; and (iii) whether they would have gone on to operate the business as a competitor to Spreadex. The Tribunal will summarise the FR in respect of each of these questions below.

35. The FR shows that the CMA considered each of these questions in some detail and the Tribunal will address relevant aspects of the CMA's reasoning below insofar as relevant to the two grounds of review. In short, the CMA concluded that Limb 2 of the test was <u>not</u> met: it was not persuaded that, in the absence of

the Merger, there would not have been an alternative, less anti-competitive purchaser for Sporting Index. This conclusion was said to be based on all of the considerations set out in Chapter 5 and "taking the evidence in the round": FR, §5.216.

(i) FDJ's willingness to complete the sale

36. In considering this question, the CMA explained that it placed greatest weight on the evidence of FDJ itself. This reflected the fact that FDJ would ultimately have taken the decision about whether to proceed with a sale to a different bidder absent a bid from Spreadex. This aspect of the CMA's decision is the subject of Ground 2A below. In response to a request for information (**RFI**) which we will consider in more detail below, FDJ told the CMA that its objective in any such sales process would have been to recover the closure costs of the business, and that it would have sought to recover the consolidated net asset value of the business to the extent possible. The CMA's starting point was therefore to consider whether the Alternative Bidders' bid values were higher than the closure costs of the business. In this regard, the CMA estimated that the closure costs, including redundancy costs, would have been approximately: (i) £0.95m for the AB1 bid; and (ii) £1.25m for the AB2 bid. This difference reflected that AB1 intended to retain a higher number of the B2C Business staff than AB2, giving rise to lower redundancy costs. Given these estimates, both of the alternative bids were net positive, i.e., they exceeded the closure costs. The bids were: (i) £3m from AB1; and (ii) £2m from AB2. Thus, the net values of the bids (i.e. the value once closure costs are accounted for) were: (i) £2.05m for AB1; and (ii) £0.75m for AB2.

37. The CMA next considered whether the Alternative Bidders' bids were above the liquidation value of the business. The CMA explained that it did not consider that the liquidation value of the business was the relevant comparator on the facts of this case. That was because of the direct evidence from FDJ that its concern would have been to recover the costs of closing the business. Nonetheless, it carried out the analysis in the light of Spreadex's submissions, and having regard to the indication in the MAGs that consideration of liquidation value will generally be relevant. The CMA could not have regard to a liquidation value

estimated by the seller given that FDJ had successfully pursued its preferred outcome of a sale process through the Merger and therefore had not prepared a liquidation value (or identified the methodology, inputs or assumptions that would be used to generate a figure for the liquidation value). The CMA recognised that, as a result, its own estimate would be based on an assessment of such evidence as was available and would necessarily be imprecise and uncertain.

38. The CMA estimated the liquidation value of the business to be between £1.3m and £1.76m. Both the lower and upper bounds of the estimated range were lower than the net value of the AB1 bid but higher than the net value of the AB2 bid. We pause here to record that there is no longer any challenge by Spreadex to these liquidation estimates (that is because it abandoned at the hearing its original pleaded attack on the quantification by the CMA of the value of the customer list and brand as part of the liquidation value). There was also force in Mr Lask's point in submissions that the CMA was probably accurate in considering that the true liquidation value was likely closer to the lower figure of £1.3m. AB1's bid of £3m, with a net value of £2.05m, was substantially in excess of that.

39. The CMA also considered whether the need to maintain extensive TSAs with the Alternative Bidders would have undermined the viability of a sale from FDJ's perspective. The CMA focused its assessment on the position of AB1 (given AB1's higher net bid value). AB1 would have required an extensive TSA if it had acquired the B2C Business, and it submitted its preliminary bid on the basis of an indicative price of £4m for a TSA from Sporting Group (i.e. AB1 would have had to pay Sporting Group up to £4m for a TSA). The CMA accepted that an extensive TSA would have imposed a burden on FDJ (albeit one for which it was remunerated). Nonetheless, it explained that the contemporaneous documentary evidence showed that FDJ entered into the sale process with an expectation that it would need to enter into a TSA, and FDJ told the CMA that it would have accepted a TSA provided that its duration remained limited and its operational impact was therefore manageable. The CMA considered the likely scope and duration of the TSA required by AB1, as well as the potential disadvantages to FDJ (including the potential impact on a sale of the B2B business). The CMA concluded that it was most likely that FDJ would have been

willing to enter into an extensive TSA with AB1 to complete the sale of Sporting Index. In reaching this view, the CMA placed weight on (amongst other things) the net value of the AB1 bid to FDJ, FDJ's expectation from the outset that an extensive TSA would be required (which was broadly in line with AB1's likely requirements), and the fact that a sale was FDJ's preferred option. The transcript of AB1's evidence to the CMA during the investigation is also supportive of this position.

40. The CMA considered whether there were any non-financial considerations that might have affected FDJ's willingness to complete a sale to one of the Alternative Bidders. It recognised that FDJ and Sporting Group had non-financial concerns relating to the fact that: (i) the Alternative Bidders were not regulated by the FCA; and (ii) a sale to AB1 would effectively involve selling Sporting Index back to AB1 at a discounted price. It weighed these non-financial considerations against the other available evidence and concluded that they were unlikely to have dissuaded FDJ from a sale. Again, the CMA attached weight to FDJ's preference for a sale of Sporting Index. It also relied on FDJ's evidence that it would have pursued a sale process with any bidder that demonstrated a serious and credible commitment to securing the necessary authorisations to operate the B2C Business, and the contemporaneous evidence that FDJ and Sporting Group did engage on numerous occasions with AB1 notwithstanding the parties' history (that is, AB1's prior ownership). The CMA's conclusion on the position of FDJ was that it likely would have been willing to complete the sale of Sporting Index to an Alternative Bidder, most probably AB1, absent the Merger.

(ii) Commitment of the Alternative Bidders

41. The CMA's starting point was that each of the Alternative Bidders would have been well-informed based on their current businesses (in adjacent markets) and, in the case of AB1, its historic experience of Sporting Index specifically (Mr Hedman's ownership and Mr Trim's experience as a former CEO). Against that background, the CMA considered the likelihood that the Alternative Bidders would have seen through their bids to the conclusion of the sale process at the time of that process in 2023. The CMA analysed the cost base for Sporting Index

(pre-Merger) in detail and no challenge is made to this by Spreadex. On the basis of that analysis, the CMA recognised that its estimate of that cost base (£12.5m) was higher than Sporting Index's FY22 revenues (£9.8m). It followed that the Alternative Bidders would have needed to believe that they could improve the performance of the business to go through with a sale (just as Spreadex believed that it could do) – and the CMA identified evidence supporting this conclusion. That included direct evidence from the Alternative Bidders. AB1 told the CMA that it believed that it could combine its current B2B expertise with the Sporting Index brand to compete, in particular by setting more competitive prices. It also expressed the view that Sporting Index's profitability had been adversely affected by FDJ's overcautious approach to regulatory compliance, and that FDJ might have limited its investment in Sporting Index in order to focus on developing Sporting Solutions internationally.

42. AB2 also told the CMA that, although Sporting Index was loss-making, it believed that it would have begun to make a profit within six to 12 months if it had purchased the B2C Business. Its intention was to reactivate dormant accounts, and it considered it would have been able to reduce operating costs and compete with Spreadex on spreads for big events. Other evidence supported these statements, including the fact that Sporting Index's revenues during the period when it was owned by Mr Hedman were approximately double its revenues for FY22 under FDJ's ownership. The CMA further noted that its cost estimate for Sporting Index took no account of any costs synergies that the Alternative Bidders might have expected to generate from the integration of the B2C Business with their own operations. The CMA's conclusion was accordingly that both of the Alternative Bidders would likely have been committed to completing a purchase of the B2C Business in 2023, if the opportunity had arisen.

(iii) Operation of the B2C Business as a competitor to Spreadex

43. The CMA concluded that an Alternative Bidder would likely have operated the B2C Business as a competitor to Spreadex, broadly in line with pre-Merger conditions of competition. This was on the basis of the evidence that (in summary):

(1) The Alternative Bidders had bid for the B2C Business with the intention of competing in the supply of sports spread betting services in the UK.

(2) Although the future performance of the B2C Business under alternative ownership was uncertain, both Alternative Bidders operated in adjacent markets and had experience of spread betting, and each had a plan to turn around the B2C Business, including by relying on their existing knowledge and experience.

(3) There was evidence that the performance of the B2C Business could improve under alternative ownership.

(iv) Conclusions on Limb 2

44. The CMA found that the exiting firm test was not met by reason of a failure on Limb 2. Its overall conclusion is at §5.216 of the FR which we quote in full at §62 below.

45. Following this conclusion, the CMA found that the conditions of competition in the counterfactual would have been "broadly in line with the pre-Merger conditions of competition": see the FR at §5.218. This reflected the CMA's view that the most likely counterfactual outcome was that the B2C Business would have continued to compete for the supply of licensed online sports betting services under the ownership of AB1.

46. The CMA said that this conclusion on the most likely counterfactual reflected the entirety of its assessment in Chapter 5, which included (but was not limited to) its finding that the AB1 bid had a greater value to FDJ than the AB2 bid.

C. JUDICIAL REVIEW

47. There was no dispute as to the legal principles to be applied by the Tribunal. In these circumstances, the Tribunal will not cite every case referred to by the parties. Appeals to the Tribunal under s. 120 of the Act are to be determined applying public law judicial review principles. So, an applicant must establish a wrong under one of the following heads: (1) procedural unfairness; (2) an error

of law; or (3) irrationality (as understood in the modern public law sense which we describe at §§49–55 below). The Tribunal is not engaged in a merits review.

48. In *Ecolab Ltd v Competition and Markets Authority* [2020] CAT 12 at §§58–61, the Tribunal helpfully identified the following key principles when this judicial review jurisdiction is exercised:

(1) The CMA must take reasonable steps to acquaint itself with the relevant information to enable it to answer each statutory question posed for it. The extent to which it is necessary to carry out investigations to achieve this objective will require evaluative assessments to be made by the CMA, as to which it has a wide margin of appreciation. The Tribunal should not intervene merely because it considers that further inquiries would have been desirable or sensible, but only if no reasonable authority could have been satisfied on the basis of the inquiries made: *BAA v Competition Commission* [2012] CAT 3 (***BAA***) at §20(3).

(2) The Tribunal should show particular restraint in "second guessing" the educated predictions for the future that have been made by an expert and experienced decision-maker such as the CMA: *BAA* at §20(6).

(3) Where it is asserted that there is no or no sufficient evidence to support the CMA's findings, the applicant must show that there is simply no evidence at all to support the CMA's conclusions or that the CMA could not reasonably have come to the conclusion that it did on the basis of the evidence. The fact that the evidence might have supported alternative conclusions is not determinative of unreasonableness. The Tribunal must be wary of a challenge which is "in reality an attempt to pursue a challenge to the merits of the Decision under the guise of a judicial review": *Stagecoach Group Plc v Competition Commission* [2010] CAT 14 at §45.

49. Given the broad nature of Spreadex's rationality challenges, it is appropriate to identify the different ways in which a rationality case can be advanced. In modern public law, rationality challenges have come to be classified under two broad

heads. So, an applicant may complain that a public body has erred in the process of reasoning by which it reached a decision (sometimes referred to as "process rationality"), or the applicant may complain about the outcome (sometimes referred to as "outcome rationality").

50. Process rationality includes the well-known requirement that the decision maker must have regard to all mandatorily relevant considerations and no irrelevant ones, but it goes further. So, in addition, the public body's process of reasoning should contain no logical error or critical gap. As sometimes said in the cases, a decision that "does not add up" is one where there is an error of reasoning which robs the decision of logic. Another more practical way of putting this is to ask whether the body's conclusions follow from the evidence, or whether there is an unexplained evidential gap or leap in reasoning which fails to justify the conclusion. As we understand its case, Spreadex relies in particular on this aspect of irrationality in Ground 1. It is important, however, to always bear in mind that more than one conclusion can in public law terms follow from the evidence. That is particularly the case where a public body is required to make a decision based on inferences from incomplete evidence.

51. Outcome rationality, on the other hand, is concerned with situations where the process of reasoning is not materially flawed, but the outcome is outside the range of reasonable decisions open to a decision-maker. This is relied upon in relation to Ground 2 in its various sub-grounds.

52. On the question of the rationality standard more generally, in *Cérélia Group Holding SAS v CMA* [2024] EWCA Civ 352, [2025] Bus LR 94 (***Cérélia***), the Court of Appeal provided guidance. Four aspects of that decision (relied on by Spreadex) are presently relevant:

(1) First, the CAT is a specialist Tribunal (§37), and as Green LJ explained at §38:

> "In a given case therefore it may be the task of the CAT to determine whether there is 'adequate material' before the CMA to support its conclusion, an exercise the CAT is singularly well equipped to perform. It can be expected to examine closely the complaints made about a decision and its evidential underpinning. Such a deep dive into the evidence equips the CAT with the

information necessary, then, to make an informed judgement as to whether the decision under challenge was properly justified by the evidence. The extent to which the forensic sleeves must be rolled up the judicial arm is not to be confused with the margin of appreciation to be accorded to the decision maker. It is at the point that the CAT is seized of a detailed understanding of the evidence that it can then decide whether the CMA was acting within legitimate bounds in its determination and evaluation of the facts."

(2) Secondly, the degree of deference to be accorded by the Tribunal to the CMA is context dependent. It was observed at §39:

"…The CAT is also well placed to measure the adequacy of the decision maker's fact finding. In [*Office of Fair Trading v IBA Healthcare Ltd* [2004] EWCA Civ 142; [2004] ICR 1364] the CAT disagreed with the OFT over its analysis of a complex set of documents and facts and as to the extent to which inferences that could be drawn from this material entitled the OFT to conclude that the new system would create sufficient countervailing buyer power. The analysis of the CAT on the evidence and the facts as recorded in the judgment far exceeded that set out in the OFT decision. That detailed review enabled the CAT to conclude that the OFT had made errors in its analysis of the facts and it remitted the case to the OFT. […]"

(3) Thirdly, as to "deference" at §40, the Court of Appeal explained:

"It also follows that in a given case the breadth of the deference to be accorded to the decision maker may vary as between different grounds of challenge. It is, however, important to recognise that, because of its expertise, it is quite possible that the CAT will be critical of relatively complex evaluations by the decision maker, even where a non-specialist court might not be. That is a necessary corollary of the CAT having been instituted as a specialist body tasked to conduct precisely that sort of exercise."

(4) Finally, at §41:

"It is, though, important not to let semantics obscure the nature of the exercise. If, following a detailed review, the CAT concludes that the decision maker erred because, for example, it misconstrued the evidence or data, or failed properly to inquire into the evidence, then it is a matter of words only to say that the decision is in error because it was not supported by the evidence, or alternatively, that the decision was 'irrational'. Finally, none of this involves the CAT substituting its own view for that of the decision maker. It is simply holding the CMA to a proper standard."

53. It is important to note that nothing in *Cérélia* suggests that a review is a form of "merits" appeal. It remains a review on the principles we have set out at §48 above. As he explained, the "deep dive" to which Green LJ made reference at §38 of *Cérélia* is undertaken for the purposes of the Tribunal performing that limited judicial review function and not for a wider appeal-type purpose. A court

may need to "roll up its sleeves" in an appropriate case to determine whether a rationality challenge is well-founded.

54. In *British Sky Broadcasting Group Plc v Competition Commission* [2008] CAT 25, at §51, it was argued that the CMA ought to have applied the balance of probabilities test separately to each of the propositions on which the findings of RMS and SLC depended. The Tribunal did not agree and held that the "probabilistic test" applied only to the ultimate statutory question of whether there would be an SLC caused by the RMS. This conclusion was upheld on appeal in *British Sky Broadcasting Group Plc v Competition Commission* [2010] EWCA Civ 2, [2010] 2 All ER 907 at §69 in the following terms:

> "…It is not necessary for the Commission to isolate each step in the analytical process and to apply the balance of probability separately at each stage. The standard of proof applies to the Commission's conclusion on the points which it has to decide, namely first whether the Acquisition gave Sky the ability materially to influence the policy of ITV, and then whether this would cause an SLC. It does not have to be applied separately to each element in the analysis which is used to reach a conclusion on each of these points."

55. It is not in issue that the MAGs are consistent with this approach: they provide that, when considering the counterfactual and exiting firm test, the CMA will form a judgment as to what is *most likely* (rather than whether a given counterfactual scenario is more likely than not on what is the general civil *balance of probabilities* test).

D. GROUND 1

(1) Summary of the competing arguments

56. Spreadex's Ground 1 is that the CMA did not properly address its mind to what it terms the "overall question" of the likelihood of a sale to AB1. In short, Ground 1 concerns an alleged error in the CMA failing to consider cumulative probabilities. The error that Spreadex submits was made by the CMA is a failure by it to stand back and consider whether the uncertainties at each individual step of its analysis meant that, when taken together, continued operation of the business by AB1 was not the most likely counterfactual outcome.

57. Ms Berridge, who argued Ground 1 for Spreadex, isolated six particular steps in the chain of reasoning of the CMA in support of this submission:

(1) In relation to whether the financial considerations (price and TSA) would have been sufficient for Sporting Group to want to sell to AB1, the CMA says that whilst there would have been challenges, "taking the evidence in the round, our view is that FDJ would most likely have been willing to enter into a TSA with [AB1] in order to complete a sale": FR, §5.154.

(2) The fact of AB1's prior ownership was unlikely "on balance" to have been a sufficient reason for FDJ to reject the bid: FR, §5.168.

(3) FDJ was "not likely" to have had sufficiently serious regulatory concerns to cause it to reject AB1's bid: FR, §5.167.

(4) In relation to AB1's willingness to proceed with the purchase, "we conclude that the Alternative Bidders would likely have been committed to completing a purchase of the B2C Business": FR, §5.200.

(5) In relation to the need for AB1 to obtain FCA approval, "our view is that the Alternative Bidders would likely have proceeded to obtain FCA approval": FR, §5.213.

(6) In relation to the question of whether AB1 would have operated the business as a competitor, "we conclude that an Alternative Bidder acquiring the business would likely have operated the B2C Business broadly in line with the pre-Merger conditions of competition": FR, §5.215.

58. As explained by Ms Berridge, Ground 1 proceeds on the basis that each of these six steps (perhaps more accurately described as "sub-conclusions" as to what was "likely") was rationally made. She argued, even assuming they were rational, that the CMA did not address the fact that, for its counterfactual to be true, all of the above steps would need to be true. In her concise and well-structured submissions, Ms Berridge said that only one step in the chain would need to fail

for the counterfactual to become a liquidation scenario. In particular, she argued that although the CMA was not required to express its views on likelihood in percentage terms, it was obliged to reason logically. Spreadex's case invoked mathematics and posited the following: assume that each of the above steps was expressed with an 85% likelihood (which it says is a highly inflated figure) and assume also that those likelihoods were all independent of each other, the cumulative probability of them all being true would be just 38%. Ms Berridge properly accepted that the steps are not completely independent but relied on the mathematics to illustrate the fallacy of the CMA's approach. As explained in its skeleton argument, Spreadex's "crucial point" is that even if the CMA's counterfactual conclusion does rest on a series of logical steps, the CMA's reasoning addresses the steps one-by-one, and essentially "ticks each step off as being likely". The CMA does not then stand back and ask, by reference to the uncertainties inherent in each step of its analysis, whether it really is "likely" that all of those steps would have been satisfied together.

59. Ms Berridge also argued that the reasons given by the CMA for its conclusions were inadequate. This was not made as a free-standing point, but as what she described as a "sub-segment" of the Ground 1 arguments. Ms Berridge relied on s. 38(1) and s. 38(2) of the Act (the duty on the CMA to publish a report containing reasons for its decisions), and the cases *Ryanair Holdings Plc v Competition and Markets Authority* [2014] CAT 3 (***Ryanair***) at §105(3), and *Meta Platforms, Inc. v Competition and Markets Authority* [2022] CAT 26 (***Meta***) at §148(2).

60. The CMA's response, in summary, was as follows. Mr Lask argued that the fact that the CMA structured its analysis by considering the potential obstacles to a sale individually cannot sensibly be said to show that it failed to address its mind to the *overall* likelihood of a sale. He submitted that the CMA addressed that overall question explicitly, having regard to its assessment of the individual obstacles/factors, and that it did not omit any logical step from its analysis. He said that it is implausible to contend that as an expert regulator with extensive experience in merger control the CMA somehow failed to appreciate the relevance of those factors in combination.

(2) Analysis and conclusions

61. The Tribunal rejects Ground 1. In our judgment, it is based on a failure to read the FR fairly and as a whole. The Tribunal is satisfied that the CMA did in fact stand back and ask itself what the likely outcome was absent the Merger. The CMA did this by reference to the framework set out in the MAGs and having regard to all of the uncertainties and potential obstacles to a sale that it had assessed. The CMA stated, in terms, that its judgment was based on its assessment of all of the relevant considerations and of the evidence "in the round". Ms Berridge invited us to "infer" that the CMA did not, in fact, do what it said it had done. We decline that invitation. There is no basis to question that as an accurate statement of the task it undertook when one reads the FR as a whole.

62. Having decided Limb 1 of the Test was met, it was only after carefully weighing the evidence before it that the CMA concluded that Limb 2 of the test was not met. It explained at FR §5.216:

> "Based on our assessment of the Alternative Bidders' bids and the other considerations above and taking the evidence in the round, we are not persuaded that, in the absence of the Merger, there would not have been an alternative, less anti-competitive purchase for the B2C Business, noting in particular our views that:
>
> (1) FDJ would likely have been willing to complete a sale of the B2C Business to [AB1];
>
> (2) The Alternative Bidders would likely have been committed to completing a transaction of the B2C Business; and
>
> (3) The Alternative Bidders would have operated the B2C Business as a competitor."

63. The "considerations above" referred to in the first sentence of the quoted passage included all the factors taken into account in the CMA's extensive analysis of Limb 2 of the test, as set out in the preceding sections of the FR.

64. The CMA then set out its conclusion on the counterfactual conditions of competition at §5.218 of the FR:

> "Based on our assessment above, we conclude that the appropriate counterfactual is where the [Sporting Index] B2C Business, under the ownership

> of [AB1], would continue to complete in the supply of licensed online sports spread betting services, broadly in line with the pre-Merger conditions of competition."

65. The "assessment above" refers again to all of the preceding sections of the FR recording the CMA's extensive analysis and reasoning on the counterfactual. The reference to AB1 reflects the CMA's assessment that absent the Merger "FDJ would likely have been willing to complete a sale of [Sporting Index] to an Alternative Bidder, most probably [AB1]" (emphasis added) given its higher bid value (FR at §5.170).

66. In the Tribunal's judgment, it cannot sensibly be disputed that the CMA's conclusion on the most likely counterfactual was that FDJ would have been willing to sell the B2C Business to an Alternative Bidder (most likely AB1); *and* the Alternative Bidder would have committed to completing a purchase of that business; *and* the Alternative Bidder would have operated the business as a competitor to Spreadex (see for example FR, §5.216). There is no other way sensibly to read the FR, which is not meant to be construed as if it were a legislative instrument. Indeed, the Tribunal would underline that the very fact that the CMA identified and addressed these three factors demonstrates its appreciation that each of them was relevant to the overall question that it had to answer.

67. As the Tribunal has noted above at §56, the core point that Spreadex identifies in support of the contrary conclusion is that the CMA carried out its analysis by reference to a series of steps and addressed them one-by-one. But to suggest that the CMA therefore failed to consider the overall likelihood of the counterfactual having regard to these factors in combination is in the Tribunal's judgment both implausible and impossible to reconcile with the CMA's express reasoning. The structured approach adopted by the CMA was a rational and coherent means to analyse the various relevant considerations. That analysis was the basis for the CMA's overall assessment, not a substitute for it.

68. It is fair to say that the FR does not state expressly that a number of things would need to happen in combination for a sale to have been completed. But the Tribunal considers it is such an obvious proposition that it does not need to be

stated. Plainly there cannot be a sale if one party is willing to complete the transaction, but the other is not. For the reasons already given, the absence of an express statement to this effect does not reveal any error in the CMA's analysis.

69. As Spreadex rightly accepts, this was not a mathematical exercise. The CMA was not required to quantify the probability of any individual element in its reasoning and then calculate an overall likelihood. Such an approach would in any event be logically incoherent given that, as Spreadex recognises, the various factors are not wholly independent events. The CMA was instead required to form an overall judgment on the most likely conditions of competition absent the Merger, taking into account all the relevant factors and its evaluation of all of the evidence. Reading the FR fairly and as a whole, the Tribunal considers that is what it did by reference to the framework set out in the MAGs and having regard to all of the uncertainties and potential obstacles to a sale that it had assessed.

70. As to Ms Berridge's complaint about the reasons given by the CMA, we did not find the *Ryanair* and *Meta* cases of assistance. Those cases were decided in a wholly different context and do not provide general guidance. As to *Ryanair* at §105(3), this was a case about an alleged breach of the duty of sincere cooperation and the observations relied on by Ms Berridge were made in a context which did not involve a public law reasons or rationality challenge. No general principle of law was being identified. The comments relied upon from *Meta* at §148(2) were made in circumstances which bear no relation to the situation before us. That was a case where the CMA sought to address a complaint about redactions to provisional findings by seeking to defend the redacted version (and arguing unsuccessfully that the additional detail that had been redacted was not required to comply with its duty to give reasons). In our judgment, the CMA's reasons in the FR for deciding on the counterfactual amply satisfy the public law requirements as described in *BAA* at §20(1)-(8). Indeed, the CMA's approach at §5.216 of the FR reflects the common judicial approach to multi-factorial decisions, where a judge will set out the factors they have considered, and will then express an overall conclusion but without going again into the relative weights of each factor in the decision. To require the CMA to give weights to particular factors would be to fall into the error of assuming this

was a mathematical exercise as opposed to a holistic assessment of what was "likely".

71. We dismiss Ground 1.

E. GROUND 2

72. Ground 2 is a direct rationality challenge to the CMA's conclusion as to the appropriate counterfactual. Spreadex's case is that, given the "delicate chain of reasoning" underpinning the CMA's counterfactual, and given the limitations in the evidence, the CMA's overall conclusion was not properly justified by the evidence. Strong reliance is placed on *Cérélia* at §§37–41. The Tribunal has set out above in Section C the particular aspects of the reasoning in the Court of Appeal in that case which are relied upon. Spreadex forcefully argued, relying in particular on *Cérélia* at §38, that this Tribunal is required and able to assess rationality challenges by carrying out a "deep dive" into the evidence to decide whether the decision under challenge "was properly justified by the evidence".

73. As we clarified at the close of Mr Jones' opening submissions, there are, in fact, three distinct complaints underlying Ground 2. The next day, Mr Jones and Ms Berridge produced a very helpful document entitled "Spreadex Note on Ground 2" (the **G2 Note**) which sets out the three complaints. We will set out the precise way in which each complaint is put below but by way of broad summary: the first complaint (Ground 2A) is that the CMA came to an irrational conclusion on the facts as to FDJ's preferred outcome and objectives in the sale process; the second complaint (Ground 2B) is that the CMA came to an irrational conclusion on AB1's willingness to complete a purchase. Mr Jones described these as his "two big points". Spreadex's third complaint (Ground 2C), is that even if one puts aside these freestanding Ground 2A and Ground 2B rationality arguments, the CMA's overall conclusion that the most likely outcome was a sale to AB1 was irrational.

74. As we understood it, the distinction between Ground 2C and Ground 1 is that in addition to a complaint about a lack of logic in the CMA's approach to the six matters Spreadex relied on (the basis of Ground 1: see §57 above), the core

argument in Ground 2C is that the evidence does not rationally support the conclusion that there was a "very strong likelihood" that each of them individually would have come true.

75. In order to put Spreadex's complaints under Ground 2 in context, it is necessary to summarise the CMA's approach, which was as follows:

(1) It found that a sale scenario was FDJ's preferred outcome, and its objective in a sales process would have been to at least cover the redundancy and closure costs of the business, and to recover the consolidated net asset value to the extent possible (FR, §5.47). The CMA found that both alternative bids would have covered the redundancy and closure costs estimated by the CMA and at least some of the net asset value of the business (FR, §§5.51–5.60 and §§5.63–5.64). On that basis, neither bid was so low as to fail to meet FDJ's objective.

(2) In addition, it found that the net AB1 bid (but not the AB2 bid) *exceeded* the CMA's estimated liquidation value for the business (FR, §5.120). The Tribunal notes that the CMA carried out this analysis by reference to liquidation value for completeness only. The evidence which we set out below was that FDJ would not have assessed the value of the bids in this way and indeed had not even estimated a liquidation value at the time of the sale process (FR, §5.69).

(3) The CMA found that the need to enter into an extensive TSA would not have prevented FDJ from completing a sale to AB1. It explained that the evidence showed it was FDJ's expectation that a form of TSA would be required (FR, §5.129), and FDJ told the CMA that it would have agreed to provide transitional support under an appropriate TSA provided the overall economics of the deal remained compelling, the duration remained limited, and the operational impact was manageable (FR, §5.124). The CMA said that the evidence on the scope and duration of the TSA required by AB1, as well as the net value of its bid (and the fact that it would have been above the liquidation value) supported the

conclusion that FDJ would most likely have been willing to enter into a TSA with AB1 (FR, §5.154).

(1) Ground 2A: FDJ's objectives – closure costs

(a) The competing submissions

76. In the G2 Note, Spreadex describes Ground 2A as follows:

> "1. The CMA's conclusion (at FR §§5.51, 5.52 and 5.66) that, when assessing the bids before it, FDJ would only have been interested in ensuring that it recovered the closure costs associated with the proposed sale plus some additional asset value 'to the extent possible', and that it would not have evaluated the bids against the liquidation value, is not rationally supported by the evidence.
>
> 2. The CMA's conclusion (at FR §5.154) that FDJ would most likely have been willing to enter into a TSA with [AB1] in order to complete a sale of the B2C Business at a bid price of £3m is not rationally supported by the evidence because (see NoA §§62–75): (a) it incorporates the aforementioned error regarding closure costs (which is to say, the CMA evaluates the overall attractiveness of the package by reference to a flawed baseline), and (b) That error is not cured by saying (as the CMA says at FR §5.154) that the proposed TSA would likely have been in line with FDJ's expectations of a TSA when it initiated the 2023 B2C Sale Process, because although FDJ did expect to require a TSA it repeatedly emphasised that it would need to evaluate the overall economics of the deal (i.e. it would have needed to look at, among other things, the TSA alongside the bid value)."

77. Mr Jones argued that on the question of the bid value, there was an error in the CMA's conclusion that FDJ was only concerned to recover a sum greater than closure costs associated with the sale (such as redundancy payments for employees not required by the buyer), plus *if possible* an additional and unquantified amount. It was not, in other words, concerned to obtain a value higher than liquidation value. He forcefully submitted that that is a highly surprising conclusion. He asked: why would FDJ be so desperate to sell that it would sell for less than liquidation value, and reminded us that the business's assets as identified by the CMA consisted of cash and debts with a 100% recovery rate and a value of £2.6m. Mr Jones argued that (all else being equal) FDJ would have preferred not to enter into a sale with an extensive TSA. So, he asked, why would it have sold for less than the liquidation value? He submitted that the CMA's answer to that question largely rests on its misreading of some

answers given in FDJ's response dated 27 May 2025 to the CMA's RFI dated 22 May 2025, at questions two and three (we will set these out below at §91). He submitted that, ripped from context, those words could support the CMA's reasoning. But, when seen in context, he argued it becomes clear that FDJ was there answering a hypothetical question, which had been put to it by the CMA on the express premise that the bid was above liquidation value. Moreover, the answer which FDJ gave went on to emphasise, again, that it would have needed to look at the "overall economic balance of the transaction". In short, he argued that it was simply not rational to read that evidence as suggesting that FDJ meant that it would have sold for less than liquidation value.

78. In response, Mr Lask argued that when the total evidence base is considered, it is not arguable that there was any misreading of the FDJ position or irrationality. He argued that Spreadex's irrationality challenge under Ground 2A essentially concerns the CMA's adoption of a particular measure against which FDJ would have assessed the Alternative Bidders' bids. And this measure was based on what FDJ had *itself* told the CMA.

(b) Analysis and conclusions

79. In order to address this Ground, we need to cite, in some detail, from the FR. We begin by noting that, in the sections of the FR which are challenged, the CMA was seeking to ascertain whether FDJ would have dismissed the bids from Alternative Bidders as unviable, in light of its objectives for the sale process. FR §5.47 is at the heart of this challenge and it identified FDJ's objectives as follows:

> "FDJ submitted during the Remittal inquiry that its objective with a sale of the B2C Business would have been to preserve and recover as much value as possible from a sale transaction, with a view to at least covering the associated redundancy and closure costs, and, to the extent possible, recovering the consolidated net asset value. FDJ also submitted during the Remittal inquiry that it did not estimate or calculate a liquidation value for the B2C Business at the time of the 2023 B2C Sale Process, and that the liquidation value would likely only have been considered if, absent a bid from Spreadex during the 2023 B2C Sale Process, no viable sale options had materialised through the process of continuing to engage with interested third parties (including the Alternative Bidders) and exploring alternative transaction opportunities." (footnotes omitted)

80. At FR, §§5.51–§5.53, the CMA said as follows:

> "5.51 As explained above, FDJ submitted during the remittal enquiry that its objective in a sales process would have been to recover the redundancy and other closure costs of the business and that it would have recovered the consolidated net asset value of the business to the extent possible. We understand this to mean that FDJ would have assessed the liability of the alternative bidders' bids against the closure costs associated with a sale to the alternative bidders and at least some of the net asset value of the B2C business.
>
> 5.52 We also understand this to mean that FDJ was not seeking or necessarily expecting to recover the full net asset value of the business. FDJ also submitted that it would only have considered the liquidation value of the B2C business if it had concluded that the alternative bidders' bids were unviable.
>
> 5.53 For the purpose of assessing how the Alternative Bidders' bids would likely have been assessed by FDJ, we have estimated below (a) what the likely closure costs associated with a sale to the Alternative Bidders would have been, and (b) what the net asset value of the B2C Business would likely have been around the time of the 2023 B2C Sale Process. We have then considered whether these estimates are likely to have rendered the Alternative Bidders' bid values unviable to FDJ."

81. The "closure" costs estimated by the CMA were set out at FR, §5.59: total closure costs in relation to AB1's bid of approximately £0.95m and in relation to AB2's bid approximately £1.25m (we understand that the difference arises from different levels of redundancy costs). Then the CMA explained at FR §5.60:

> "5.60 By netting these estimated closure costs against [AB1's] bid of 3 million and [AB2's] bid of 2 million, we estimate [AB1's] net bid and its overall bid value to FDJ to be approximately £2.05 million (with the possibility that this would have increased if required, subject to engagement on the TSA)[147] and we estimate [AB2's] net bid and its overall bid value to FDJ to be approximately £0.75 million."

82. We note that in relation to [AB1] it was said at footnote 147:

> "During the Remittal inquiry we also asked [AB1] whether there was any scope for increasing their bid beyond the submitted figure if the increase was deemed necessary to place a deal. [AB1] submitted that whilst it was possible (maybe even likely) that it would have raised the 'headline bid' from £3 million, given the opportunity, this was dependent on FDJ engaging on the TSA properly in order for it to be able to value the overall deal (something that it had not been able to do to date). On this basis our view is that it is possible that [AB1] would have increased its bid beyond £3 million if needed, although this would be subject to its engagement with FDJ on a TSA[…]"

83. At FR, §5.62, the CMA said: "We note that at the time of the merger there were approximately £3m of net assets on the Sporting Index completion balance sheet

(as acquired by Spreadex under the merger)"; and at FR, §§5.63–5.64 the CMA compared these figures to the bids:

> "5.63 Our estimate of the alternative bidders' net bids are both positive, and given that these estimates have (in each case) netted off the approximate closure costs associated with the alternative bids, our view is that if FDJ were to have sold the B2C business to either of the alternative bidders, it would likely have more than fully recovered the closure costs associated with such a sale.
>
> 5.64 We also estimate that in a sale to 10star, FDJ would likely have recovered approximately 2.05 million of the net asset value of the business at the time of the merger whereas in a sale to Star Sports FDJ would likely have recovered approximately 0.75 million..."

84. Then the conclusion at FR §5.65 was:

> "Having regard to FDJ's submissions that absent the merger it would have continued discussions with the alternative bidders, and its objective with a sale of the B2C business would have been to at least cover the associated redundancy and closure costs and, to the extent possible, recover the consolidated net asset value, we conclude that the alternative bidders' bid values would not have rendered their bids to be unviable to FDJ on these grounds." (footnotes omitted)

85. We accept Mr Jones' submission that the CMA's understanding of FDJ's objectives (and thus the measure against which the alternative bids would be measured) fed through to multiple conclusions of the CMA we have set out above. In our judgment, it would follow that if this was an irrational conclusion on the evidence that fact would undermine the Limb 2 assessment.

86. However, having considered the evidence to which we were taken by Mr Jones and Mr Lask, we were not persuaded that the CMA's identification of FDJ's objectives was unsupported by the evidence and irrational. In short, we are satisfied that the CMA's assessment was based squarely on what FDJ said to it during the investigation and that is explained at FR §§5.66–5.67.

87. We also agree with Mr Lask that this is an arid debate in any event in relation to this ground, because the CMA went on to assess the liquidation value in the alternative and found that AB1's bid would have exceeded it (and that liquidation value is no longer challenged). We accept however that the closure costs matter, and the CMA's understanding of FDJ's objectives in

this regard, feeds into other sub-conclusions of the CMA as argued by Mr Jones.

88. We turn to the evidence base. In an RFI in April of 2025, FDJ was asked by the CMA at question 1(a): "Did FDG estimate or calculate a liquidation value for the B2C business at the time of the 2023 B2C sales process? If so, please state what this liquidation value was". It answered: "FDJ confirms that it did not estimate or calculate a liquidation value for the B2C business at the time of the 2023 B2C sales process". It was also asked at question 1(c): "If FDJ did not estimate or calculate a liquidation value at the time of the 2023 B2C sales process, how would FDJ have done so? Please include the methodology that FDJ would have used, including any inputs and assumptions that FDJ would have used, if available." It answered: "FDJ did not factor a liquidation scenario, as the sales process was the preferred and pursued option. Accordingly no methodologies inputs or assumptions for estimating a liquidation value were developed or considered by FDJ at the time as such exercise was so not necessary. FDJ further refers to our declarations from previous RFIs: a sale scenario was always preferred." At Question 1(d) FDJ was asked: "Would FDJ have estimated or calculated the liquidation value for the B2C business if Spreadex had not bid?". It answered: "Had Spreadex not submitted a bid during the 2023 B2C sales process, FDJ would have continued engaging with other interested third parties (including [AB1] and [AB2]) and explored alternative transaction opportunities (a list was previously provided to the CMA). A liquidation value would likely only have been considered if no viable sales options had materialised through this process."

89. In the light of this evidence, we agree with Mr Lask that it is untenable to submit that FDJ would, in fact, have assessed the viability of the alternative bid by reference to a liquidation value. We underline that it did not even estimate a liquidation value or related methodology because a sale of the business was a preferred option. It would only have considered a liquidation value if no viable sale options had materialised.

90. The issue for the CMA then was how viability would be assessed by FDJ if not by reference to a liquidation value. That was answered in a follow up RFI in May 2025. In that document, CMA explained its own estimated liquidation values and then asked FDJ three questions as follows:

> "[…] please explain whether:
>
> (1) FDJ has any comments on our estimates of the liquidation value (around £1.6m – £1.7m), in particular whether (if so, what) additional factors should be taken into account;
>
> (2) FDJ would likely have completed a sale to [AB1] on the basis of an effective bid of £2.5million and a liquidation value estimate of around £1.6m (ie the lower end of our range); and
>
> (3) FDJ would likely have completed a sale to [AB1] on the basis of an effective bid of £2.5million and a liquidation value estimate of around £1.7m (ie the upper end of our range)."

91. FDJ answered as follows:

> "Question 1. We do not have specific comments on this estimate based on the statutory accounts position.
>
> Questions 2 & 3. The Group's objective would have been to preserve and recover as much value as possible from a sale transaction with a view to at least covering the associated redundancy and closure costs and, to the extent possible, recovering the consolidated net asset value. Whether the group would have ultimately completed a sale to [AB1] would have depended on the overall economic balance of the transaction, in particular on whether the negotiation of the TSA terms rendered the offer financially viable in light of the anticipated burden and transitional risks as explained during the remittal phase. Considering the progress of negotiations with [AB1] throughout the process, both offers could have reasonably been viewed as aligned with the Group's expectations."

92. The CMA did not misinterpret FDJ's evidence of its objectives. It simply relied on what it had been told by a sophisticated commercial entity. We also consider there to be nothing odd in FDJ's answer which might make one question whether it had understood the question. We do not need to speculate as to why closure costs (plus net asset value, if possible) were attractive, as opposed to liquidation, but there could be a number of strategic or commercial reasons for FDJ identifying its objectives in this way.

93. For completeness, we should record that we did not follow the submission in Spreadex's skeleton argument that it was irrational for the CMA to conclude that FDJ would have sold Sporting Index at a loss. The CMA concluded both: (a) that

a sale to AB1 would have covered redundancy and closure costs, together with £2.05m of net asset value; and (b) that the AB1 bid was also above the CMA's estimated liquidation value in any event. That is why the CMA concluded that FDJ would likely have been willing to sell, most probably to AB1 (FR, §5.170). Indeed, as we have noted above, FDJ itself told the CMA that AB1's bid could reasonably have been viewed as aligned with its expectations.

(c) The TSA

94. Spreadex does not advance a free-standing rationality challenge to the CMA's decision as to the feasibility of an appropriate TSA. Its case is that the alleged closure costs error (which we have rejected immediately above) fed into the conclusion on the TSA. Mr Jones did however also spend some time in his oral submissions taking us to the evidence on this issue and making some criticisms of the CMA's approach. We understood this to be in support of his wider case as to the uncertainties.

95. Given that FDJ had not conducted an economic evaluation of the TSA issue, the CMA had to form its own judgment – again based on limited evidence as to the likely outcome if such an evaluation had been carried out. The issue of the TSA was considered by the CMA in some detail at FR, §§5.121–5.156 from the perspective of both FDG/Sporting Group and AB1 and also taking into account the submissions of Spreadex. In particular, we note that the CMA took care to identify the obstacles that the need to conclude an appropriate TSA would have created for FDJ/Sporting Group. As the CMA noted, for FDJ it was always ultimately about the "overall economics" of the deal. The CMA's assessment considered the evidence in detail and accepted that FDJ's responses as to whether they would have completed a sale to AB1 were "ambivalent" and there was "still a degree of uncertainty": FR, §5.151. It rationally concluded however that negotiations over a TSA were "unlikely to have rendered [AB1's] bid to be unviable from FDJ's perspective": FR, §5.151.

96. At FR, § 5.153, the CMA considered the TSA issue from the perspective of AB1. It said that it had not been provided with evidence that AB1 would not have ultimately agreed to the TSA quote of £4m in the context of its £3m bid if this

was considered necessary by FDJ, while AB1 had confirmed its preliminary bid of £3m having been provided with a TSA quote of £4m. Mr Jones submitted that it was "odd" for the CMA to say that it had not been provided with evidence that AB1 would not ultimately have agreed to the TSA quote – he said it was for the CMA to make enquiries. Given there is no rationality challenge to any aspect of the analysis in this section, it is difficult to see where this submission goes as a matter of law. In any event, as Mr Lask demonstrated by reference to transcript evidence, the CMA did make enquiries of AB1 on this point and was told that it was still very interested in doing a deal, notwithstanding the TSA cost (this was a call with Mr Trim, strategic advisor to AB1). The CMA also noted that AB1 was very aware that it was taking the risk that it could not reduce the cost of the TSA by transitioning earlier, and that any shortfall in the performance of Sporting Index would need to be funded by it, which it was willing and able to do.

97. We are satisfied that the CMA was entitled (on the evidence to which we were taken in submissions) to rationally conclude that even if FDJ would not have been willing to offer the TSA which AB1 required at a price lower than £4m, this would not materially have impacted the CMA's assessment of the counterfactual. The CMA was realistic in accepting at FR, §5.154 that a transaction with AB1 would likely have presented "challenges" from FDJ's perspective but it was entitled to form the view (taking the evidence in the round) that FDJ would most likely have been willing to enter into an appropriate TSA in order to complete a sale of the B2C Business. It identified reasons for this which included FDJ's objective in the sale process, and that it would likely have recovered approximately £2.05m more than the closure costs that it would have incurred if it were to have sold the B2C Business to AB1 (whose bid would in any case have likely been above the liquidation value of the B2C Business). It was also rationally concluded by the CMA that this result would be in line with FDJ's expectations of the need for an appropriate TSA when it initiated the sale process. We do not accept the submission for Spreadex that the CMA does not explain or does not deal with uncertainty or that it does not explain how it is accounting for that uncertainty in respect of the TSA.

(2) Ground 2B: AB1's knowledge of the financial position

(a) The competing submissions

98. In the G2 Note, Spreadex describes Ground 2A as follows:

> "The CMA's conclusion (at FR §§5.191-5.192) that [AB1] submitted its £3m bid on the basis of loss-making figures provided by Oakvale Capital for a standalone B2C Business is not rationally supported by the evidence. In fact the evidence set out at FR §5.190 demonstrated that [AB1] balked at the proposed £4m TSA and that it maintained its £3m bid on the basis of an understanding that the business broke even. The said error also undermines the conclusion (recorded at FR §5.153) that [AB1] would have paid £3m plus a TSA of £4m."

99. In order to unpack this complaint, we need to provide some figures, and to set out in some detail, what was said in the FR.

100. At FR, §5.177, the CMA explained that neither of the Alternative Bidders had completed due diligence on the sale, and that the CMA had to therefore ascertain what that due diligence (had it been done) would have revealed about the financial situation. The CMA explained at FR, §5.180 that Sporting Index's pre-merger accounts did not reflect the business which was on sale. The CMA therefore had to reconstruct a cost base for 2022. The overall result of its analysis was that the "standalone B2C business" had a "cost base" of £12.5m (FR, §5.187) and revenues of £9.8m (FR, §5.189), i.e. losses of about £3m.

101. As part of the CMA's analysis of this cost base, the CMA sought to ascertain the cost base of the "carve out" business which was put up for sale, and then to add the costs of the TSA which would have been required to make it a standalone business. The costs of the TSA would carry on being incurred even after the TSA itself was no longer needed, because in such a scenario the TSA costs would be offset by increased costs within the acquirer's own business (FR, §5.182). The cost of the TSA was said to be £3m (FR §5.183(i)). In addition to the anticipated £3m TSA costs, the CMA considered that there would be a further one-off "migration" cost of £1m, which was not factored in to the estimate for the underlying cost base of a standalone business because such a business would not incur one-off migration costs in the ordinary course of business (FR, §5.183(h)).

102. Having reached this point in the analysis of the costs and revenues, at FR, §5.189, the CMA set out the reasons why it considered AB1 would have proceeded with the sale, had it carried out due diligence, and notwithstanding those losses (with our underlined emphasis in relation to the reason challenged under Ground 2B):

> "5.189 We note that an underlying cost base of around £12.5 million is substantial in the context of Sporting Index's FY22 revenues of £9.8 million, and we consider that in order for the Alternative Bidders to have been committed to a transaction, they would have needed to consider that they could improve the performance of the business, by reducing its cost base and/or increasing its revenues. In this regard, we note that:
>
> a. As set out in paragraph 5.176 above, the Alternative Bidders are both experienced bidders, who operate in adjacent markets and have experience with sports spread betting specifically, and so we consider that they are bidders who we expect would have been well-informed about the underlying cost base required to operate a sports spread betting business, and the need for any additional investment;
>
> b. The £12.5 million cost estimate reflects the cost structure for a standalone B2C Business pre-Merger, and the Alternative Bidders had identified ways to improve the performance of the B2C Business by reducing these costs, as well as increasing revenues (as we set out in more detail in paragraphs 5.204 and 5.205 below);
>
> c. [AB1] had previously owned Sporting Index from 2015 – 2019, and in this time period, Sporting Index's revenues were on average approximately double compared to its revenues from FY22. We also note that from April 2016 to December 2018, [AB1] appeared to have significantly reduced the cost base of the business compared to prior years.
>
> d. <u>During the Remittal inquiry, the evidence from the Alternative Bidders was effectively that they were prepared to accept the cost of a TSA (potentially resulting in losses) in the short to medium term:</u>
>
> <u>i. [AB1] noted that it was very aware that it was taking the risk that it could not reduce the cost of the TSA by transitioning earlier, and that any shortfall in the performance of Sporting Index would need to be funded from [AB1]. [AB1] noted that it was willing and able to do that. [footnote reference to 10 April 2025 RFI response from AB1]</u>
>
> ii. [AB2] noted that the business could have dealt with the cost of a TSA period, though caveated this by stating that the current management team had not been involved in the 2023 B2C Sale Process. The Former [AB2] MD added during the Remittal inquiry that he would not have struck a deal if he did not think it was financially viable to do so, and that what [AB2] would have taken from FDJ would have been discussed in the final negotiation discussions.
>
> e. Spreadex's internal documents show that part of the rationale for the Merger was to diminish the competitive threat of an acquirer improving

the Sporting Index business, which suggest that Spreadex thought some improvement in performance was feasible – for example:

i. In Spreadex's proposed initial bid document from February 2023, a sports trading manager stated that after acquiring Sporting Index, Spreadex 'would not have […].

ii. In February 2023, the Spreadex CEO circulated an email discussing the benefits and costs of acquiring Sporting Index. One of the stated benefits was that […]."

103. At a time when these conclusions were provisional findings, Spreadex argued that when AB1 made its bid it had understood that the B2C Business was breaking even. It relied upon email exchanges (in particular an email of 24 March 2023) in support of this submission. We will cite the email and related exchanges below. We need to cite the relevant passages of the FR, §§5.190–5.192 in full in order for the complaint in Ground 2B to be understood:

> "5.190 Spreadex submitted in response to the Remittal Provisional Findings that it was also clear that, at that point in time, [AB1] had understood that the B2C Business was profitable, based on [AB1's] email to Oakvale Capital on 24 March 2023 stating that '[TSA] price has increased (from the original detail provided) from £2.4m to £4m++, and the way the detail is provided, we will need to explore this further with you to understand more clearly how these modules fit and how we can onboard with our own resources etc. A price of 4m++ would be what we would expect SSLN to charge a Tier 1 client who generates huge profits, SPIN b2C however will be a very small business which you tell us only broke even last year'.
>
> 5.191 We note that the [AB1] email Spreadex has cited above does not indicate [AB1's] views on the profitability of the B2C Business, but rather what it had been told previously by Oakvale Capital regarding the profitability of the business. In an email dated 24 March 2023, Oakvale Capital had told [AB1] that the 'current run rate is £12m', and we also note Spreadex's prior submission in the Remittal inquiry that [AB1] had been provided with a £12m million plus cost figure. [AB1] was also provided with a 2022 revenue figure of £10 million, and so on this basis, and noting that the £12 million plus cost figure is broadly consistent with our estimated cost base for a standalone B2C Business, our view is that [AB1] submitted its bid on the basis of loss-making figures provided by Oakvale Capital for a standalone B2C Business.
>
> 5.192 We acknowledge that Oakvale Capital had previously told [AB1] that the B2C Business was not loss making, which [AB1] had referred to in its preliminary bid (after being provided with a £12 million plus cost figure). We infer from Oakvale Capital's email that the increase in cost figures was a result of increases to the TSA price, and the factoring in of the fixed odds business, which previously had not been accounted for. Therefore, our view is that it is likely that the lower cost base figure referred to by [AB1] is smaller in scope and does not represent the cost base for a standalone B2C Business. However, as noted above, our view is that this email from [AB1] did not indicate [AB1's] views on the profitability of the B2C Business, and our view is also that the cost base for a standalone B2C Business had likely already been provided to [AB1]".

104. We turn to ABI's RFI response of 10 April 2025. In question two of the RFI, the CMA asked AB1:

> "2. If [AB1] had been successful in acquiring the B2C Business during the 2023 B2C Sales Process, would [AB1] have been willing and able to sustain the cost of a TSA (potentially resulting in losses) in the short to medium term while it transitioned away from a TSA with FDJ? If so, for how long would [AB1] have been willing and able to do so?"

105. In its answer, AB1 said:

> "We were very aware that [AB1] was taking the risk in the deal that we couldn't reduce the cost of the TSA by transitioning earlier, and FDJ benefitted financially the longer the TSA was in place. This is part of the reason why a more detailed discussion around the TSA was required, not least in understanding the commitment of FDJ in enabling a transition, but we were very aware from the outset that any shortfall in the performance of Sporting Index would need to be funded from [AB1] and we were willing and able to do that."

106. Mr Jones said that a premise of the above exchange was that it was the TSA which would, or might, cause losses. He said that that was explicitly a part of the CMA's question, which asked whether [AB1] would be able to sustain the cost of a TSA, potentially resulting in losses, "while it transitioned away from a TSA". Mr Jones said it was also implicit in AB1's answer. He accordingly submitted that the CMA was wrong to pick up on AB1's remark that it was willing and able to fund "any shortfall in the performance of Sporting Index" because, as one sees from the context, it was referring there to the shortfall which might arise on a temporary basis from the TSA.

107. Mr Jones argued that the problem with that is that it did not correspond with the CMA's own account, summarised above, in the FR, namely that the losses were not the result of a temporary transitional arrangement: rather, as the acquirer transitioned from the TSA, the costs of the TSA would be expected to continue just under a different guise. He said AB1 was not asked whether it was willing and able to fund losses in the region of £3m *with or without the TSA*.

108. In fact, Mr Jones submitted, the evidence is that AB1 thought that the business broke even in 2022. This point was the real focus of his oral submissions. He argued that this belief on its part is why AB1 complained, in an email dated 24 March 2023 (the **24 March Email**, referred to at FR, §5.190), about the proposed

increase in the cost of a TSA to £4m or more: "A price of £4m++ would be what we would expect SSLN to charge a Tier 1 client who generates huge profits, SPIN b2c however will be a very small business which you tell us only broke even last year" (underlined emphasis supplied and full version cited below at §114).

109. Mr Jones persuasively submitted that the CMA dealt in the FR with the 24 March Email in a way which was flatly contrary to its meaning. As we have noted above in the FR, §5.191, the CMA said that when AB1 referred in his email to "a very small business which you tell us only broke even last year" it must have been referring not to its *own* beliefs, but instead simply to what it had previously been told by Oakvale as to the profitability of the B2C Business. Mr Jones' core submission was that this is not a plausible reading of the 24 March Email. He said that in it AB1 was complaining about the high cost of the TSA, and if it had known that the business was in fact heavily loss-making, then that would have been "grist to the mill" strengthening its case for a lower TSA cost, and would obviously have been referred to. His submission was accordingly that the notion that AB1 realised that the business was heavily loss-making and that it was willing to support the losses is not, therefore, supported by the evidence.

110. Mr Lask's principal response to Ground 2B was that when the evidence base is fully considered it was open to the CMA to conclude that at the time AB1 confirmed its bid on 24 March 2023, it would have understood that a standalone B2C Business (i.e., factoring in the fixed odds and the TSA) was loss-making. He submitted that this was a reasonable interpretation of the evidence given that AB1 by that time had both the £10m revenue figure, and the higher £12m costs figure. This evidence is discussed further at §§115 – 118 below. It should be noted that the CMA did not in the course of its investigations explicitly ask AB1 the question of whether they knew the Sporting Index B2C Business to be loss-making at the time of placing its bid.

(b) Analysis and conclusions

111. Before we address the evidence relied on in support of Ground 2B, we underline three points:

(1) First, it is important to correctly characterise the nature of the CMA's assessment in FR, §5.189. In assessing whether the Alternative Bidders would have been committed to completing a purchase, the CMA's focus was not on what the alternative bidders would have done based on their *actual knowledge* in February or March 2023 when preliminary bids were submitted. Rather, the CMA appropriately asked itself what they would have done *had they been given the opportunity to complete their due diligence*. The CMA accepted that this would have revealed a loss-making business, with costs around £2.7m higher than FY2022 revenues, and this was the premise for its assessment: FR, §§5.177, 5.189**.**

(2) Second, the effect of the CMA's analysis in FR, §5.189 is that the cost base of a B2C standalone business exceeded Sporting Index's most recent revenue figures; in other words, the B2C Business would likely have been unprofitable in the hands of the Alternative Bidders, at least to start with. This was plainly the premise of the CMA's assessment. It meant that in the CMA's view the Alternative Bidders would need to believe that they could improve Sporting Index's performance in order to be committed to a purchase. So, in other words, the CMA was assuming here that when deciding whether to proceed with a purchase, having conducted due diligence, the Alternative Bidders would understand that Sporting Index would have been loss-making in their hands. The CMA then gave five broad reasons in the rest of the paragraph for thinking that the Alternative Bidders would nevertheless have been committed to completing a transaction but Spreadex's challenge focuses just on a single point (that in FR, §5.189(d)(i)).

(3) Third, Spreadex's challenge under Ground 2B is based on a granular textual analysis of emails, taken in isolation. But that approach is unrealistic in circumstances where the CMA's assessment was multi-factorial and clearly drew on a range of evidence relating to the Alternative Bidders as it set out in FR, §5.189. The Tribunal notes in particular that this included Spreadex's *own* contemporaneous view that a new owner could run the business better, e.g., by reducing spreads,

increasing investment and improving their compliance processes: FR, §5.189(e).

112. We first deal with the RFI (see our summary of the Spreadex argument at §106 above). We agree with Mr Lask that Spreadex's complaint about this document is a "strawman", constructed by taking words out of context. The CMA plainly only relied on this evidence from AB1 in the RFI to support a finding that the Alternative Bidders "were prepared to accept the cost of a TSA (potentially resulting in losses) in the short to medium term": FR, §5.189(d). And that is in line with Spreadex's own reading of the evidence, in its skeleton argument at §46. We say nothing further about the RFI point. However, it does mean that (subject to Spreadex's remaining point about whether AB1 believed the B2C Business to be breaking even), no part of the reasoning in FR, § 5.189 is subject to challenge.

113. So, we turn to this matter, and Mr Jones' oral submissions to the effect that AB1 did not understand that the Sporting Index business was loss-making when it made its preliminary bid, and that the CMA misread the evidence in this regard.

114. We were taken to the evidence in relation to this point in some detail. The relevant emails are as follows (Bobby Powell is a consultant at Powell Consulting who provided services to AB1 and Oakvale, Colm Ryan and Elliot Berg are employed by Oakvale, Simon Trim is a strategic advisor at AB1, and Magnus Hedman, as described at paragraph 10 above, is the founder of AB1 and former owner of Sporting Group who sold it to FDJ):

> "From: Bobby Powell
>
> Sent: Thursday, 23 March 2023, 5:13pm
>
> To: Colm Ryan
>
> Cc: Elliot Berg; Simon Trim
>
> Subject: Re: Follow up thoughts/questions
>
> > Guys,
> >
> > In a previous conversation you thought 2022 revenue was £10m (pls confirm) and that the B2C business being sold approx. broke even last year.

From the attached Q&A – see Q 9 – I can only find £8.5m of costs. Can you give us some detail to bridge from £8.5 to £10m? or has anything changed?

Bobby Powell

From: Colm Ryan

Date: Friday, 24 March 2023, 9:41am

To: Bobby Powell

Cc: Elliot Berg; Simon Trim

Subject: RE: Follow up thoughts/questions

Hi Bobby, Responses below:

- Current run rate is £12m +

- Qu.9 costs were broad brush and focused on Spreads, doesn't really factor in Fixed Odds fully and also the TSA is mixed in here, so this Is very far from clean.

Thanks,

Colm

From: Bobby Powell

Date: Friday, 24 March 2023, 11:14am

To: Colm Ryan

Cc: Elliot Berg; Simon Trim

Subject: Re: Follow up thoughts/questions

Just to confirm…current run rate on costs is £12m+? ie approx. 10m from 2022 plus the TSA added on? Pls call me to talk through when you have a moment.

Bobby Powell

From: Bobby Powell

Sent: Friday 24 March 2023, 3:29pm

To: Magnus Hedman; Simon Trim

Subject: FW: Project Silver - next phase

Spoke to them about the TSA not being clear enough to opine on without further discussion with the business. They said it was ok to send something a little vaguer. See below. I have also made minor amendments to the point about Staff.

[FURTHER TEXT OMITTED]

From: Bobby Powell

Date: Friday, 24 March 2023, 5:22pm

To: Elliot Berg , Colm Ryan

Subject: Revised LOI terms

Elliot, Colm,

I have attached the LOI again, updated only for today's date and exclusivity period moved from 30 days to 40 days as there is much, we still need to ascertain in relation to People, TSA, starting P&L and exactly what technology will move etc. In Relation to your updated requested criteria, we will act as follows:

Consideration and structure – As described in LOI, no change.

Expected timetable to completion - as described in LOI, we can move as fast as you can make the required information available. Given our knowledge of the business our DD will be only of a confirmatory nature. We know that the business has been managed prudently and responsibly by FDJ and therefore don't expect any negative surprises.

B2C staff assumptions made - Based on the information supplied to date we will almost definitely require at least 17 staff (highlighted in green on spreadsheet). There are also 19 people (highlighted in amber in the spreadsheet) who we will need some/all of but need further clarity on their exact roles.

Service agreement mark-up/assumptions - Thank you for the detail provided. We will need a substantial portion of the TSA but given that we only received the document a couple of hours ago, and given that the price has increased (from the original detail provided) from £2.5m to £4m++, and the way the detail is provided, we will need to explore this further with you to understand more clearly how these modules fit and how we can onboard with our own resources etc. A price of £4m++ would be what we would expect SSLN to charge a Tier 1 client who generates huge profits, SPIN b2C however will be a very small business which you tell us only broke even last year. (We have marked up the document to highlight some of the points which would need to be discussed and we can arrange to discuss this next week if desirable)

Any remaining DD requirements – This will mainly be financial DD so we can understand exactly what we are buying, clarification of the delivery of the technology and systems, and understating on how exactly the TSA will work

Key assumptions made e.g. regulatory capital, CMA risk, etc. We will add sufficient regulatory Capital and we do not perceive there to be any CMA risk.

Any other material considerations FDJ should take into account – Nothing that we can think of.

Regards,

Bobby"

115. In summary, the evidence shows:

(1) In the investment teaser from Oakvale, AB1 was informed that: (a) revenue for FY2022 was approximately £10m; (b) EBITDA for FY2022 was negligible; and (c) there was a "clear opportunity for an acquirer to … manage the cost base and return the company to profitability". There can have been little doubt (at least based on this document) that the financial position of the company was not good.

(2) The above email correspondence between AB1 and Oakvale from 23 and 24 March 2023 (after the submission of preliminary bids) was to the effect that:

(i) ABI had previously been told by Oakvale that the B2C Business "approx. broke even last year".

(ii) A document previously provided to AB1 by Oakvale had suggested that the costs of the business were £8.5m.

(iii) Oakvale told AB1 on 24 March 2023 that the "current run rate" on costs was "£12m+". It said that the £8.5m figure did not "factor in Fixed Odds full and also the TSA is mixed in here, so this is very far from clean". AB1 was unclear in the light of this response whether the £12m number included the TSA and asked for a call "to talk through". We do not know what took place during the call.

(iv) Later, on 24 March 2023 AB1 confirmed its preliminary bid. The cover email referred to the need to explore the costs of the TSA further. AB1 stated that it would expect the proposed TSA price of £4m to be the charge for "a Tier 1 client who generates huge profits" – as opposed to "a very small business which you tell us only broke even last year".

116. The CMA's view in the FR was that the email chains summarised "did not indicate [AB1's] views on the profitability of the B2C Business": FR, §5.192. In

our judgment, on a rationality assessment, this view cannot be impugned. We consider AB1 was clearly recording what it had been told by Oakvale. The CMA also reasonably took the view that, at the time that AB1 confirmed its bid on 24 March 2023, it would have understood that the standalone B2C Business (i.e., factoring in the fixed odds and the TSA) was plainly loss-making. This was self-evidently a reasonable interpretation of the evidence given that AB1 by that time had both the £10m revenue figure in the "teaser" document and the higher £12m costs figure.

117. We also consider Spreadex's case to the effect that AB1 was misinformed and acted on such misinformation as to the profitability of Sporting Index when making its bid to be somewhat unreal: AB1 was a sophisticated operator which was led by the former owner of Sporting Index, and had retained Simon Trim as a strategic advisor when they made their bid. Mr Trim had very recently left Sporting Index, where he had worked for 22 years, including as CEO. As he explained to the CMA during the investigation: "I left as CEO of the business formally in May 2022. I was on garden leave for the last 6 months. So I know the business very well, having worked there for so long, and in the industry as well": 9 February 2024 teleconference transcript at pages 22:23–22:25. The notion that they were making a bid on a wholly false basis as to perceived break-even financials is divorced from commercial reality.

118. The CMA also had evidence (in the same transcript) from Mr Trim and Mr Powell as follows:

(1) Pages 19:22–20:13:

> "[CMA]: So it is just good to know that the bid did factor in the cost of TSA. At the time you submitted your bid what due diligence had already been completed and what were the key outstanding areas of due diligence.
>
> [Mr Powell]: Well, I mean, given that we used to own the business, we probably were a bit different from anybody else looking at it. You know, we knew the business pretty intimately. So for us a lot of our work was really to understand how the separation would look, what exactly were we going to require and how could the transition be managed and therefore the TSA was really a big part of it from our perspective. You know, we know the underlying business. We know the customer base. We have a good understanding of the KPIs and all that kind of stuff already, and again we also understood how interdependent certain components of the group were, so really a key part for us was just understanding

how the separation and transition would look. That was mainly what we were focused on I would say. We didn't need to go into maybe some of the financial history or evolution of the business in the way other people might have."

(2) Pages 35:21–36:14:

"[Mr Park]: You mentioned despite FDJ's TSA price increase that 10star remained committed to completing a deal but did not get the option to. So I am assuming that even after factoring in the higher TSA pricing the business plan, the financials and the cashflows and the P&L still all worked from your perspective or were you expecting losses in the first few years which you would have to absorb.

[Mr Powell]: Yeah, again this is from memory, there was a certain amount of assumptions required and until we really got into the nitty-gritty of the TSA and how quickly you tend to move away from it, replacing it with our own proprietary stuff, it was difficult to be sure, but I think our starting point was that this business has not been very well managed since we sold it and there was a few different specific reasons for that, but I think the starting point was that we can get involved again and actually manage things a bit differently and improve things going forward. I mean Simon [Trim], you would have had some thoughts on maybe how things -- it was clear it wasn't in the focus of the seller, the spreads business in particular, and had perhaps been neglected a bit in favour of other parts of the business. So we saw that as an opportunity to get things back on a growth trajectory again."

119. In short, in our judgment, the CMA acted reasonably in forming the view that the language interrogated by Spreadex in the response to the Provisional Findings was consistent with a belief on the part of AB1 that the B2C Business broke even before additional TSA costs were considered – but that it was loss-making once those costs were accounted for. In any event, the fact that the evidence is open to interpretation is insufficient to show that the CMA's assessment is irrational. The totality of the evidence shows AB1 was in a position to assess the profitability of Sporting Index at the time it made its initial bid.

120. Moreover, it is important not to lose sight of the fact (to which we have already made brief reference above) that the CMA did not conclude that the Alternative Bidders were committed simply because they had submitted (or confirmed) an initial bid. Rather, the CMA assessed the likelihood that the Alternative Bidders would have completed a purchase of the B2C Business, at a stage when they would necessarily have understood that the business was loss-making. That is precisely why the CMA addressed the question of whether the Alternative Bidders would have considered that they could turn the B2C Business around. In other words, would the Alternative Bidders, knowing that the B2C Business was

loss-making, have committed to the purchase on the basis that they could return it to profitability.

(3) Ground 2C: Overall counterfactual conclusion was irrational

(a) The competing submissions

121. In the G2 Note, Ground 2C was set out on behalf of Spreadex as follows:

> "In the alternative (to Grounds 2A and 2B**)** the CMA's overall counterfactual conclusion was not rationally justified by the evidence."

122. In the G2 Note it was conceded that if one puts aside the freestanding Grounds 2A and 2B rationality points, then it is right to say that the only irrationality relied on under Ground 2C is what is said to be the CMA's irrational decision that the likely outcome was sale to AB1. That is, its conclusion on the counterfactual. Mr Jones submitted that this conclusion was irrational because: (a) it relies on a cumulative series of propositions (see the six steps at §57 above); (b) as a matter of logic the only way that all of those propositions could have come true together would be if there was a "very strong likelihood" that each of them individually would have come true; and (c) the evidence does not rationally support the conclusion that there was a very strong likelihood that each of them individually would have come true. Mr Jones underlined that the uncertainties in relation to the six-steps all fall to be factored into his global rationality challenge under Ground 2C.

123. In response, Mr Lask argued that Ground 2C, even as reformulated, was no more than a "thinly veiled" attempt to re-argue the merits of selected evidential points on which Spreadex disagrees with the CMA. He argued that Spreadex's arguments under Ground 2C do not disclose any public law error, and that they are in substance complaints that there is uncertainty about what would have happened, or that some of the evidence is inconsistent with the CMA's conclusions. He also referred back to his arguments on Ground 1 which he said was making an essentially similar point to Ground 2C.

(b) Analysis and conclusions

124. In the Tribunal's judgment, Ground 2C is not made out. Having considered the multiple evidential complaints made by Spreadex, the Tribunal does not consider it even arguable that the ultimate conclusion of the CMA as to the appropriate counterfactual was not justified by the evidence (and legitimate inferences from it) when taken as a whole.

125. We agree with Mr Lask that the substance of Spreadex's challenge is essentially a disagreement with the CMA's sub-conclusions on particular matters, as opposed to a properly arguable rationality challenge. Also, he was right to submit that Ground 2C is simply another iteration of the compound probabilities point but underpinned by reference to the CMA's substantive reasoning, rather than simply the CMA's methodology.

126. It is appropriate to set out again and in full the way in which the CMA expressed its conclusions on Limb 2 and its ultimate decision as to the counterfactual. At FR §5.216 it said:

> "Based on our assessment of the Alternative Bidders' bids and the other considerations above and taking the evidence in the round, we are not persuaded that, in the absence of the Merger, there would not have been an alternative, less anti-competitive purchaser for the B2C Business, noting in particular our views that:
>
> > (1) FDJ would likely have been willing to complete a sale of the B2C Business to [AB1];
> >
> > (2) The Alternative Bidders would likely have been committed to completing a transaction of the B2C Business; and
> >
> > (3) The Alternative Bidders would have operated the B2C Business as a competitor."

127. It then said at FR §5.218 that based on this assessment the appropriate counterfactual is where the B2C Business, under the ownership of AB1, would continue to compete in the supply of licensed online sports spread betting services, broadly in line with the pre-Merger conditions of competition.

128. We have summarised the CMA's approach in Section B of our judgment above, and having been taken through Chapter 5 in some detail by Mr Lask, we detect

no arguable irrationality in the overall conclusion. Mr Lask was right to submit that as the CMA went through its analysis in Chapter 5, and in arriving at sub-conclusions (as to what was "likely"), it took care to identify the areas where there was uncertainty, and these factors were "baked into its assessments". There was no obligation in law or logic for it to have been satisfied that there was a "very strong likelihood" that each of the six steps (which are essentially sub-conclusions) it considered individually would have come true. Indeed, one might convincingly argue that for the CMA to have decided that each of these six steps *was* likely (as it did) but then to have concluded that continued operation of the business by AB1 was *not* the most likely counterfactual outcome, would look rather odd. That would, to adopt Mr Lask's apt description, be an unexpected "plot twist".

129. In particular, the CMA was not required, before coming to a conclusion on the counterfactual, to assign a probability (let alone a high probability) to each of the six steps as being likely and then to approach matters mathematically, as Spreadex's case, on occasion, sought to suggest. Rather, the CMA had to stand back and (as it correctly directed itself) consider matters "in the round". We are satisfied it did so and came to a rational overall conclusion, which was open to it based on its earlier detailed sub-conclusions on the steps (in respect of which Spreadex's two particular rationality challenges have failed).

130. We underline that the counterfactual is not a statutory test. Rather it is no more than a form of analytical tool used to help the CMA in answering the statutory question on the SLC issue. The very nature of a counterfactual as such a tool (being simply a form of "but for" analysis) means that a rationality challenge to the selection of the right counterfactual will face substantial hurdles. That is a function of the fact that equally "reasonable" decision-makers (in public law terms) can come to different rational conclusions as to what might have occurred absent a merger. A range of equally reasonable inferences (and sub-conclusions) can also be drawn from the same evidence, and Parliament has given the CMA the power to decide between the options, subject only to rationality (and not merits) review by the Tribunal.

131. In our judgment, the CMA was required in this case to carry out a detailed evaluation of a wide variety of evidence, which was (given the timing of the acceptance of Spreadex's bid), necessarily incomplete. The CMA was, moreover, required to use that evidence to form a view on a purely hypothetical, and inherently uncertain, question as to the most likely conditions of competition in the counterfactual. The Tribunal considers this is precisely the kind of case in which the CMA will be afforded a margin of discretion.

132. We would, however, underline that in rejecting the Ground 2C rationality attack, the Tribunal has not approached Spreadex's complaints on the basis that some form of "deference" is owed to the CMA in its conclusion as to the counterfactual because it has a form of relevant expertise. This is not a case where the inferences to be drawn from the limited evidential material required such expertise, in the form of, for example, economic analysis or competition policy. Most of what the CMA had to decide in Chapter 5 as to the hypothetical was based on common sense inferences from the limited evidential material supplemented by RFI responses. Such an exercise is one where the Tribunal is just as well equipped as the CMA. Where Spreadex invited the Tribunal to reject as irrational particular findings under Ground 2A and 2B, it has considered the evidence without any deference. The remaining complaints about what is called the "delicate chain of reasoning underpinning the CMA's counterfactual" are no more than a list of general complaints (but not based on a rationality challenge) as to the CMA's sub-conclusions on a range of matters, including financial considerations and non-financial considerations. Spreadex has not suggested that any of these other sub-conclusions or parts of the chain of reasoning were irrational or not open to the CMA.

133. In our judgment, the totality of the CMA's analysis in Chapter 5 plainly justifies, on a rationality basis, the CMA's ultimate conclusion as to the counterfactual. Accordingly, we reject Ground 2C**.**

F. DISPOSITION

134. We dismiss this application for review.

135. This judgment is unanimous.

The Hon. Mr Justice Saini
Chair

Professor Ioannis Kokkoris

Greg Olsen

Charles Dhanowa, CBE, KC (Hon)
Registrar

Date: 19 March 2026