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5 **IN THE COMPETITION**  
6 **APPEAL TRIBUNAL**

Case No: 1753/4/12/25

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8  
9 Salisbury Square House  
10 8 Salisbury Square  
11 London EC4Y 8AP

12 Friday 20<sup>th</sup> February 2026

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14  
15 Before:

16  
17 The Honourable Mr Justice Saini  
18 Gregory Olsen  
19 Professor Ioannis Kokkorris

20  
21 (Sitting as a Tribunal in England and Wales)

22  
23  
24 BETWEEN:

25  
26 **SPREADEX LIMITED**

**Applicant**

27  
28 v

29  
30 **COMPETITION AND MARKETS AUTHORITY**

**Respondent**

31  
32  
33 **A P P E A R A N C E S**

34  
35 Tristan Jones KC and Alison Berridge (Instructed by Herbert Smith Freehills Kramer LLP)  
36 on behalf of Spreadex Limited

37  
38 Ben Lask KC and Daisy Mackersie on behalf of Competition and Markets Authority

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1 **Friday, 20th February 2026**

2 **(10.30 am)**

3  
4 **Submissions on behalf of CMA (cont.)**

5 **MR JUSTICE SAINI:** Sorry. My seat is getting lower and lower. I am going to  
6 disappear into the ground soon. Mr Jones, thank you very much for your note. That  
7 is very helpful. If you want to come back to it, please do when you respond to Mr Lask.  
8 Thank you very much.

9 **MR LASK:** Good morning.

10 **MR JUSTICE SAINI:** Morning.

11 **MR LASK:** When we ended yesterday I had just addressed the tribunal on the first  
12 two of the four sub-issues under the first question that the CMA addressed. So I had  
13 addressed the tribunal on the right comparator that FDJ would have used to assess  
14 the bids, namely closure costs and net asset value and I had addressed the tribunal  
15 on liquidation value.

16 What I want to do now is turn to the third topic that the CMA assessed under the first  
17 heading and that's the feasibility of a TSA.

18 Now this, as we understand it, is not the focus -- not the core focus of Spreadex's  
19 challenge as now put, but I do want to show you how the CMA assessed this matter,  
20 because there are still some more granular submissions that are made in relation to  
21 this. It also feeds into some of Spreadex's wider submissions.

22 So, for example, on ground 1 Ms Berridge said yesterday that the CMA had failed to  
23 explain in para 5.216 how it had accounted for uncertainty and how it had weighed  
24 uncertainty in its analysis. What I want to show you is it did exactly that throughout  
25 the main body of its assessment. So when it summarised its conclusions at 5.216, the  
26 weighing up of the evidence and accounting for uncertainty was baked into those

1 summary conclusions. So that's another one of the reasons I would like to show you  
2 how the CMA dealt with this matter.

3 If we could pick it up, please, in bundle C, page 67, para 5.127:

4 "We note that both alternative bidders would have required a TSA if they were to  
5 acquire the B2C business, and at the time of the merger neither FDJ nor either of the  
6 alternative bidders fully assessed the extent of the TSA that would have been required.

7 In this section we consider whether FDJ and Sporting Group would likely have been  
8 incentivised to agree to a TSA with the alternative bidders. We address the TSA from  
9 the perspective of the alternative bidders below."

10 So it assesses the TSA from both angles. As the CMA explains, because FDJ hadn't  
11 conducted an economic evaluation of the TSAs it would have been offered, the CMA  
12 had to form its own judgment again based on limited evidence as to the likely outcome  
13 if such an evaluation had been carried out.

14 At 5.129:

15 "We note that FDJ had entered into the sale process with the expectation that it would  
16 enter into a TSA. In particular, we note that AlixPartners' report set out the potential  
17 for an extensive TSA pursuant to the carve-out proposed for the B2C sale process,  
18 with estimated service terms going up to 12 months, and FDJ also submitted during  
19 the remittal inquiry ... that it understood that transitional support would be part of the  
20 discussions and that FDJ would have accepted such an arrangement, provided its  
21 duration remained limited and its operational impact was therefore manageable. As  
22 explained above, FDJ advised the CMA that had a sale to Spreadex not proceeded, it  
23 would have sought to pursue a sale to an alternative purchaser, and we note that FDJ  
24 was aware that both the alternative bidders would have required a TSA."

25 Then 5.130:

26 "We note FDJ's submissions that a TSA would not have been a profit generating

1 activity and it would have diverted resources away from the B2B business."  
2 So, just pausing there, the CMA is recognising there are two sides to this matter.  
3 There is uncertainty:  
4 "This implies that entering into a TSA on a standalone basis would have been  
5 unattractive from FDJ's perspective due to the opportunity cost on the B2B business  
6 from having to provide these transitional services. However, in the context of a sale  
7 of the B2B business our view is that FDJ would likely have been willing to enter into a  
8 TSA as long as the scope, duration and overall operational impact of the TSA was  
9 manageable from FDJ's perspective and the overall economics of the deal made  
10 sense. We first consider the likely scope, duration and overall operational impact of  
11 a TSA from FDJ's perspective before considering this in the context of the overall  
12 economics of a sale below."  
13 What then follows is a detailed assessment of those matters. Just pausing there, we  
14 don't understand Spreadex to have any objection to the way in which the CMA  
15 identified those relevant issues and the way in which it then went on to assess them.  
16 It was clearly logical and rational based on the evidence from FDJ.  
17 As I say, there then follows detailed reasoning. I don't want to take you through every  
18 passage, but if I could just pick out a couple that are particularly relevant. 5.131:  
19 "Based on a document provided by Sporting Group to 10star broadly outlining the  
20 proposed scope of the TSA, we note that the duration for the TSA services proposed  
21 by Sporting Group had been split into two phases."  
22 So at the outset FDJ and Sporting Group are not only expecting a TSA but they are  
23 making proposals in relation to a TSA to one of the alternative bidders, to 10star.  
24 Then if we could turn forward, please, to 5.137, and this is where -- we saw from 5.130  
25 that the CMA was dealing with things under two broad headings, firstly scope, duration  
26 and operational impact and then overall economics. This is still under those headings:

1 Scope, duration and operational impact. 5.137:

2 "In light of the above", namely the evidence it has considered, "our view is that both  
3 alternative bidders would likely have had the capability to transition away from  
4 particular aspects of the TSA relatively quickly. For certain other aspects, such as any  
5 pricing models that would be required to be built from scratch, they would likely have  
6 required a TSA for a longer period -- perhaps two to three years. Given 10star's  
7 submissions above on the time it takes to bid pricing models and also Spreadex's  
8 submission that 90% of Sporting Index's pricing models could have been developed  
9 by a potential remedy taker within 12 months. Our view is that an alternative bidder  
10 would likely have transitioned away from an extensive TSA in 12 months, although we  
11 do not rule out the possibility that it would have required a TSA that was much smaller  
12 in scope for another one to two years."

13 So that is an illustration of the way in which the CMA is weighing up the evidence and  
14 accounting for uncertainties.

15 5.140 on page 72:

16 "Our view is therefore that the operational cost of a TSA with the alternative bidders to  
17 FDJ (noting both its likely scope and duration) would likely have been manageable  
18 from FDJ's perspective and a TSA with one of the alternative bidders would likely have  
19 been in line with its expectations of a TSA when it had initiated the 2023 process."

20 There is then a reference to a Spreadex argument to which the CMA responds at the  
21 end of this paragraph:

22 "However, our view is that maintaining pricing models for a minority of sports would  
23 naturally have significantly reduced the burden on Sporting Group relative to  
24 an extensive TSA and noting our view that FDJ would likely have been willing to offer  
25 an extensive TSA for at least 12 months and potentially longer if required, our view is  
26 that the overall operational cost of a possible tiered TSA would have been in line with

1 FDJ's expectations."

2 Then at 5.151. This is now in the section where the CMA is dealing with the second  
3 broad issue here, the overall economics of a TSA.

4 5.151:

5 "Spreadex submitted in response to the remittal provisional findings that FDJ's  
6 response was ambivalent, and we agree that there is still a degree of uncertainty. In  
7 particular, FDJ have acknowledged that the negotiation of TSA terms with 10star may  
8 have rendered its bid unviable and, as noted above, FDJ did not enter into these  
9 negotiations with 10star. However, we infer from FDJ's response that, based on the  
10 early discussions and negotiations it had with 10star, including on the TSA, and in  
11 particular the £4 million TSA quote that had been provided to 10star prior to 10star's  
12 preliminary bid, 10star's bid could have reasonably been viewed as being aligned with  
13 FDJ's expectations. As set out above, our view is that a TSA required by 10star would  
14 likely have been in line with FDJ's expectations of a TSA when it had initiated the sale  
15 process. Therefore on this basis our view is that negotiations over a TSA were unlikely  
16 to have rendered 10star's bid to be unviable from CMA's perspective."

17 So the CMA is there recognising that in some respects the evidence is ambivalent and  
18 it's partial but the CMA still has to reach a judgment based on the evidence in the  
19 round as to what it considers is most likely, but the suggestion that the CMA does not  
20 explain or does not deal with uncertainty or does not explain how it is accounting for  
21 that uncertainty is unsustainable when one actually looks at the detailed reasoning  
22 that one sees in the main body of the report, chapter 5.

23 The key conclusion on the TSA topic is at 5.154:

24 "For the avoidance of doubt, our view is that a transaction with 10star would likely have  
25 presented challenges from FDJ's perspective. However, taking the evidence in the  
26 round, our view is that FDJ would most likely have been willing to enter into a TSA

1 with 10star in order to complete a sale of the B2C business ..."

2 So the CMA is asking itself what is most likely here:

3 "... on the basis that: (a) FDJ's objective in the sale process was to recover closure  
4 costs associated with a sale, and FDJ would likely have recovered approximately  
5 2.05 million more than the closure costs that it would have incurred if it were to have  
6 sold the B2C business to 10star; (b) 10star's bid would in any case likely have been  
7 above the liquidation value of the B2C business", and those were the issues we were  
8 dealing with yesterday, "(c) FDJ submitted that 10star's bid could have reasonably  
9 been viewed as being aligned with FDJ's expectations subject to negotiations over the  
10 TSA; (d) a TSA with 10star would likely have been in line with FDJ's expectations of  
11 a TSA when it had initiated the process; (e) the perceived disadvantages in relation to  
12 the B2B business from a buyer's perspective would not likely have dissuaded FDJ  
13 from entering into a TSA; and (f) FDJ submitted that the sale scenario was always  
14 preferred to liquidation."

15 We saw the evidence of that yesterday. So what one sees there is a careful  
16 multi-factorial weighing of the evidence and a thorough explanation of why the CMA  
17 has reached the conclusion it has.

18 Now Mr Jones said yesterday that it was irrational for the CMA to include the reason  
19 at 5.154 (a) because it was based on a misinterpretation of the evidence. As  
20 I submitted yesterday, based on the underlying evidence we say that submission is  
21 untenable. It also shows the danger in Spreadex's approach, which is to focus on  
22 individual -- at least under grounds 2(a) and (b) -- is to focus on individual selected  
23 items of evidence often taken out of context. That approach in my submission lacks  
24 reality, because the CMA, as you see here, as you see throughout chapter 5, the CMA  
25 did not base its conclusions on single items of evidence. Its conclusions were always  
26 multi-factorial and always based on evidence in the round.

1 Now Spreadex also submits, and I think we see this in the note that Spreadex provided  
2 this morning, that para 5.154(d) does not cure the error in (a), because FDJ said it  
3 would have to look at the overall economics but, of course, as I have shown you, the  
4 CMA assessed the overall economics so that point goes nowhere. As one sees from  
5 5.154 in any event (d) was one of six reasons given by the CMA, it wasn't the only fact  
6 that it relied on. In any event, as I say, the CMA did assess the overall economics  
7 very carefully.

8 A further point that arose yesterday during Mr Jones' submissions was the  
9 suggestion -- and this was a point made in relation to para 5.153, which hopefully you  
10 still have in front of you. Mr Jones submitted that it was odd for the CMA to say that it  
11 had not been provided with evidence that 10star would not ultimately have agreed to  
12 the TSA quote of 4 million and he said it was for the CMA to make enquiries. The  
13 answer to that is the CMA did make enquiries of 10star on this point and were told that  
14 10star were still very interested in doing a deal, notwithstanding the TSA cost.

15 If I can just show you where it says that. It is bundle C, tab 8, page 451. This is the  
16 notes of a telephone conference in the CMA and Mr Trim, who was strategic adviser  
17 for 10star. You see that on the first page. It took place in February 2024.

18 If we could turn, please, to page 456, starting at line 5, Mr Alchini for the CMA:

19 "Could you take us through any discussions I mean conscious that might be  
20 Bobby" -- I think that is Bobby Powell -- "who has better knowledge of this, but to the  
21 extent that you know about the discussions that you had with Spreadex regarding a  
22 potential TSA, their willingness I suppose and their initial reactions to it, it would just  
23 be helpful for us to understand that from your perspective.

24 Mr Trim: So the TSA would have been with the FDJ. Yeah, Sporting Solutions. I feel  
25 there was certainly there was a willingness to do it and in many ways actually would  
26 have been I think financially favourable. Certainly felt in the early start, the early part

1 of the negotiation that our bid was strong and that because of the value of the TSA  
2 over time it would maybe have -- obviously it is down to all conditions being met but it  
3 would have been worth more to the selling party.

4 The main negative obviously against it is the FDJ wanted a quick exit and turnaround  
5 and we were not able to give them that because we could not do everything from day  
6 one, so it was really a trade-off ..."

7 Just pausing there, you will recall that I made the submission yesterday that one of the  
8 reasons the FDJ may have been willing to accept a sale that did not give it more than  
9 it would have recovered under a liquidation scenario is because it was looking for  
10 a quick exit and that point is reiterated here.

11 He carries on:

12 "I feel that actually we got to a point where the TSA was quite tightly locked down in  
13 terms of longevity and price, but that changed and there was an extra -- I think an extra  
14 couple of million from memory that they wanted into the TSA that came at quite a late  
15 stage. So really they upped the price to a point where they did not feel it was  
16 economically viable, so economically viable for us anymore ..."

17 So he seems to be saying that the FDJ did not think 10star were going to go for it at  
18 the higher TSA price:

19 "... but certainly a deal that we would have still done at the price."

20 So he is disagreeing with FDJ's perspective:

21 "Yeah, it was the TSA that we would have needed that Spreadex did not need and  
22 that became the choice for FDJ I think about how they wanted to execute it.

23 Mr Alchini: Am I correct in understanding that you would have considered pursuing  
24 this even with the higher TSA fee that they put forward at the last minute?

25 Mr Trim: Yeah. We did not pull out. We were still very involved in doing the deal."

26 So in those circumstances in my submission it was obviously reasonable for the CMA

1 to say it had no evidence to suggest that 10star would ultimately have been put off by  
2 the £4 million figure.

3 Just before leaving this document if I could show you really for completeness  
4 page 453. 452 is where it starts. Mr Trim is just setting out his professional  
5 background. You see 452, line 20:

6 "I am a strategic adviser to 10star, but I am really working full time for 10star in my  
7 capacity. My background actually is at Sporting Index. I worked for Sporting Index for  
8 23 years in total. I joined as a junior football trader. I left as CEO of the business in  
9 formally May 2022. I was on garden leave for the last six months. So I know the  
10 business very well, having worked there for so long, and the industry well.

11 In my capacity at 10star I am working for 10star because in 2015 Sporting Index was  
12 acquired by Magnus Hedman, who sold the business in 2019 to FDJ. After he exited  
13 the business, he set up a new entity called 10star in 2020, and I have been working  
14 for them since July last year, July 2023. So that is my work history ..."

15 Just pausing there, we saw a moment ago that he was giving evidence in relation to  
16 earlier in 2023, March 2023, when that discussion was taking place between 10star  
17 and FDJ about the bid. Just for the avoidance of doubt I am going to actually show  
18 you -- you can see those e-mails Mr Jones took you to. He is copied in on those  
19 e-mails, but what one sees from another transcript, which I am going to actually hand  
20 up a bit later, is that he was already working as an adviser for 10star at March 2024 at  
21 the time of the bid and during those discussions with FDJ.

22 **MR JUSTICE SAINI:** 2023.

23 **MR LASK:** I am so sorry. 2023, yes. right. That is all I wanted to say for now on the  
24 TSA heading.

25 The next one is non-financial considerations, which is addressed by the CMA starting  
26 at page 77 of the bundle. We don't understand Spreadex to allege any specific error

1 in relation to this assessment, but again I do want to show you how the CMA dealt with  
2 the matter, because it again goes to the ground 1 submissions that Ms Berridge was  
3 making and it shows how the CMA is weighing up matters.

4 If we could pick it up, please, on page 79 at 5.164:

5 "We note that the FDJ did not conduct a formal assessment of the non-financial risks  
6 associated with a potential liquidation, and so there is limited contemporaneous  
7 evidence of how it would have evaluated any non-financial risks associated with the  
8 alternative bidders' bids against the option of liquidation. However, we note that FDJ's  
9 strategic focus was to execute a sale and that it would have only considered liquidation  
10 in the event that no viable bidder acquiring on terms acceptable to FDJ could be found,  
11 and it submitted that its objective in the sale process was to recover the closure costs  
12 rather than the liquidation value ... We infer from this that, subject to the identity of the  
13 purchaser, FDJ preferred in principle to sell the B2C business as a going concern as  
14 long as this was at least as financially viable as the option of liquidation."

15 5.165:

16 "We recognise that FDJ and Sporting Group had non-financial concerns regarding  
17 a sale to the alternative bidders. Specifically, they had concerns about (a) the fact that  
18 the alternative bidders were both unregulated by the FCA, and (b), FDJ would be  
19 selling the business back to 10star at a discounted price."

20 5.166:

21 "In relation to FDJ and Sporting Group's regulatory concerns we note FDJ's  
22 submission that as long as a buyer demonstrated a serious and credible commitment  
23 to securing the necessary authorisations, FDJ would have pursued a sale process  
24 regardless. In this regard, we note that the FDJ and Sporting Group did not raise any  
25 concerns about the alternative bidders' ability and commitment to obtain a licence, and  
26 we note also that the alternative bidders both had experience with regulatory

1 compliance in the context of sports betting. In particular, Star Sports was regulated  
2 by the GC" -- I think that's the Gambling Commission -- "as part of its provision of  
3 sports fixed odds betting services and 10star had direct experience in complying with  
4 FCA regulations from when it owned Sporting Index previously."

5 Then just going to 5.168:

6 "In relation to ..."

7 Sorry. I should pick up the end of 5.167:

8 "We note FDJ's submission that its concerns would have been resolved if the  
9 alternative bidders had chosen to be FCA approved and regulated and the fact that  
10 both alternative bidders had submitted that they intended to go through the licensing  
11 process. In view of the above, our view is that the FDJ is not likely to have had any  
12 sufficiently serious regulatory concerns to cause it to reject the bids and the alternative  
13 bidders would likely have proceeded to obtain FCA approval."

14 Then 5.168:

15 "In relation to FDJ and Sporting Group's specific concerns about selling the business  
16 back to 10star, we note that (a) they engaged with 10star multiple times on the basis  
17 of their bid during the 2023 process and (b) FDJ's submission to us was that under  
18 a scenario where Spreadex had not bid, they would have continued to engage in  
19 discussions with 10star. Our view is therefore that although FDJ had non-financial  
20 concerns about selling the business back to 10star at a discounted price, this would  
21 likely have been balanced against the alternative and in FDJ's view less preferable  
22 option of liquidation. On balance our view is that this would not have been a sufficient  
23 reason to cause FDJ to reject the 10star bid."

24 So there you see the CMA weighing up the factors pointing in different directions and  
25 reaching a reasoned conclusion.

26 Then 5.169:

1 "FDJ and Sporting Group preferred in principle the option of a sale compared to  
2 a potential liquidation but they also had specific non-financial concerns with a potential  
3 sale to the alternative bidders. There is limited contemporaneous evidence on how  
4 FDJ would likely have evaluated these non-financial factors. On balance, having  
5 careful regard to all of the evidence set out above, our view is that the non-financial  
6 considerations would not likely have dissuaded FDJ from a sale to one of the  
7 alternative bidders."

8 So again you see throughout the assessment the CMA is addressing the uncertainty  
9 arising from the fact that this is a hypothetical assessment for which there is limited  
10 contemporaneous evidence. Throughout it explains how it weighs up the evidence  
11 and it gives reasons for each of its conclusions along the way.

12 So to say, as Spreadex does, that the CMA does not explain how it has weighed up  
13 the evidence or accounted for uncertainty when you get to the end, when you get to  
14 5.216, is to ignore all of the analysis that has gone before.

15 If we could just end please on 5.170. I think I have already shown you this. Perhaps  
16 I could ask the tribunal to refresh its memory and read 5.170, please.

17 In my submission there is clearly no error in that assessment. The CMA gave seven  
18 reasons for its conclusion on FDJ's willingness to sell. Spreadex has only seriously  
19 challenged one of them and that challenge is unfounded for the reasons I gave  
20 yesterday. So far from disclosing any irrationality, this paragraph, this conclusion and  
21 the reasoning that goes before it shows that the CMA had very good reasons for  
22 concluding that the FDJ would likely have been willing to sell to an alternative bidder,  
23 most probably 10star.

24 With that I would like to turn on to the second broad question that the CMA asked  
25 itself, which begins on page 81. It's the same page we are on. The question is  
26 whether the alternative bidders would have been committed to completing the

1 purchase of the B2C business. It is this section of the decision that is the focus of  
2 Spreadex's ground 2(b). For reasons I will develop ground 2(b) in my submission rests  
3 on a misinterpretation of the March 2023 evidence that Mr Jones focused on yesterday  
4 and also on a misunderstanding of the role that the evidence played in the CMA's  
5 assessment.

6 So the starting point is para 5.176 on page 84. Here the CMA notes:

7 "... that the alternative bidders each operate in adjacent markets and would have been  
8 well-informed bidders based on their current business and past experience and  
9 management of one of the alternative bidders had previously operated the Sporting  
10 Index business. In particular:

11 (a) Star Sports, registered in the UK and regulated by the Gambling Commission,  
12 operates primarily a sports fixed odds betting business in the UK and based on its  
13 latest published statutory accounts at the time of its bid generated total annual  
14 revenues of around 35.9 million and gross profit of around 24.4 million ... its sister  
15 company Star Spreads Limited operates in Ireland where it holds a licence for sports  
16 spread betting.

17 (b) 10star, registered in Malta, is a global sports betting operator and a B2B business,  
18 offering bespoke pricing, trading and risk management services to licensed sports  
19 operators with annual revenues of around 7 million in 2023. 10star told us that it  
20 operated a similar business to Sporting Solutions. 10star was set up by Magnus  
21 Hedman, who had previously acquired Sporting Index in 2015 before selling it to FDJ  
22 in 2019. 10star's strategic adviser", so that's Mr Trim," was also formerly CEO of  
23 Sporting Group at the time Sporting Index was sold to FDJ. 10star also told us that it  
24 provided similar B2B services as Sporting Solutions."

25 So the alternative bidders were well-informed bidders for reasons given by the CMA.

26 5.177 is important. We note however that neither alternative bidder had submitted a

1 binding bid, nor had they been given a chance to complete their due diligence on the  
2 B2C business. We therefore consider below whether the alternative bidders would  
3 likely have remained committed to completing a transaction had they been able to  
4 complete their due diligence on Sporting Index's financial position."

5 So, as one sees, the focus of the CMA's assessment was on what the alternative  
6 bidders would have done if they had been able to complete due diligence on Sporting  
7 Index's financial positions. One sees that clearly from 5.177 and from the analysis  
8 that follows.

9 Of course, the fact that they hadn't had a chance to complete their due diligence or  
10 submit binding bids, again the evidence was necessarily limited. So again the CMA  
11 had to use its judgment to evaluate what would have happened if matters had  
12 progressed further.

13 Now to inform its assessment the CMA carried out quite a detailed exercise of  
14 estimating the underlying cost base for a standalone B2C business based on figures  
15 provided by Alix Partners and also on other evidence submitted by the parties.  
16 Standalone means the B2C business carved out from the wider business, which  
17 included B2B as well.

18 Its approach is explained -- CMA's approach to estimating the cost is explained at  
19 5.178:

20 "In considering the costs of operating the Sporting Index business, we have  
21 considered (a) the operating costs associated with the business that was being offered  
22 for sale by FDJ, and (b) the operating costs associated with a TSA for that business."

23 Pausing there, it has to include the TSA costs, because it is asking itself "What are the  
24 alternative bidders going to see if they complete due diligence?"

25 "In December 2022 AlixPartners prepared a report for the B2C business carve out that  
26 included an assessment of the cost base for that business. Spreadex has contested

1 the Alix Partners' cost estimate ... in our assessment below we consider the cost  
2 estimate prepared by AlixPartners, Spreadex's submissions and evidence from FDJ  
3 and Sporting Group."

4 I emphasise that the TSA was a substantial part of the cost base for a standalone B2C  
5 business. One sees that if one turns forward to page 86, 5.183. This is where the  
6 CMA is explaining its careful adjustments to the AlixPartners' cost figures. I don't need  
7 to take you to the detail, but if you turn forward to -- you can see it is a long paragraph.  
8 If you turn forward to page 89, page 89 is sub-paragraph (i). You see the CMA says:  
9 "In view of the above, our view is that Alix Partners' £2.6 million TSA figure should be  
10 adjusted to the £3 million TSA run rate costs quoted to 10star."

11 So that's the TSA element.

12 Then if you turn forward to page 90, you see 5.187:

13 "Our view is therefore that no further adjustments are required and so AlixPartners'  
14 estimate for the B2C business cost base should be adjusted to 12.5 million as set out  
15 in the table below."

16 So you have total costs of 12.5 million and you have TSA costs of 3 million,  
17 a substantial portion of the cost base.

18 I emphasise this because Spreadex seeks to diminish the importance of 10star's  
19 evidence to the CMA, where it explained its attitude to having to absorb losses if it took  
20 on the Sporting Index business. It seeks to diminish the importance on the basis that  
21 that evidence -- I am going to come on and show it to you -- that that evidence was  
22 only concerned with losses arising from a TSA, but, as I have shown you here, a TSA  
23 was a substantial and integral part of the cost base. So 10star's attitude to funding  
24 losses arising from TSA costs is in my submission clearly informative of its attitude to  
25 losses more generally.

26 5.188:

1 "Having established an approximate cost base for a standalone B2C business, noting  
2 that we have not made any adjustments to reflect any cost synergies which  
3 an alternative bidder may have expected to generate from the integration of Sporting  
4 Index with its own operations we now consider whether the alternative bidders would  
5 likely have been committed to complete a transaction had they proceeded to  
6 undertake due diligence on the financial position of the B2C business."

7 So again the focus of the CMA's enquiry is on what these bidders would have done if  
8 they had proceeded to due diligence, not -- I emphasise this -- not on what they  
9 thought at the time of their preliminary bids.

10 5.189:

11 "We note that an underlying cost base of around 12.5 million is substantial in the  
12 context of Sporting Index 2022 revenues of 9.8 million and we consider that in order  
13 for the alternative bidders to have been committed to a transaction, they would have  
14 needed to consider that they could improve the performance of the business by  
15 reducing its cost base and/or increasing its revenues. In this regard we note that ..."

16 Just pausing there, so CMA's analysis shows that the cost base of a B2C standalone  
17 business exceeds Sporting Index's most recent revenue figures; in other words, the  
18 B2C business would likely have been unprofitable in the hands of the alternative  
19 bidders, at least to start with. So this was the premise of the CMA's assessment. It  
20 meant that in the CMA's view the alternative bidders would need to believe that they  
21 could improve Sporting Index's performance in order to be committed to a purchase.

22 So, in other words, the CMA is assuming here that when deciding whether to proceed  
23 with a purchase, having conducted due diligence, the alternative bidders would  
24 understand that Sporting Index would have been loss-making in their hands.

25 The CMA then gives five broad reasons in the rest of 5.189 for thinking that the  
26 alternative bidders would nevertheless have been committed to completing a

1 transaction. If I could just ask the tribunal, please, to read subparagraphs (a) to (e).  
2 (Pause.)  
3 I want to emphasise three points on that reasoning. The first, the CMA does not rely  
4 on the state of mind of either alternative bidder at the time of the preliminary bids. It  
5 does not suggest the preliminary bids were evidence of what the alternative bidders  
6 would have done following due diligence. As I will show you in a moment, the CMA  
7 only addressed that issue, the 2023 evidence, in response to a submission from  
8 Spreadex.  
9 Second, as my learned friend accepted yesterday, the evidence of Spreadex's views  
10 at para 5.189 (e) is relevant here. It is relevant because it corroborates the alternative  
11 bidders' belief that they could improve the performance of Sporting Index.  
12 Now Mr Jones said that this evidence wasn't relevant to any other step in the CMA's  
13 analysis. You will recall he took you to a passage in our skeleton. He said it was only  
14 relevant to this, not to any other step. That is wrong, and you will see under the third  
15 question that CMA addressed, which I will come on to, para 5.205 (d), that the CMA  
16 again relies on this evidence from Spreadex. So it is not just relevant to the second  
17 question; it is relevant to the third as well.  
18 The third point I emphasise is, as indicated at 5.189 (d) the CMA specifically asked  
19 the alternative bidders what their attitude would have been to absorbing losses in the  
20 event that they purchased Sporting Index.  
21 I would like to show you what 10star said in response, please. It is tab 14 page 605.  
22 This is 10star's April 2025 RFI response. You will see it is provided by Simon Trim,  
23 the strategic adviser. The CMA asks:  
24 "1. At the time 10star was submitting its bid for the B2C business was there any scope  
25 for increasing 10star's bid beyond 3 million if an increase was necessary in order to  
26 close the deal? If so, what was 10star's maximum price?"

1 Answer: To recap, a key part of the negotiation for a 10star acquisition of Sporting  
2 Index was the discussion around the contemplated TSA, which would have been  
3 additional to the headline bid of 3 million."

4 Then just picking it up in the last paragraph on this page:

5 "Whilst it is possible (maybe even likely) that we would have raised the headline bid  
6 from 3 million given the opportunity, it was dependent on FDJ engaging on the TSA  
7 properly in order for us to be able to value the overall deal. In this respect we didn't  
8 have a maximum price as such, but we were already willing to negotiate on a £7 million  
9 plus offer. Given this, we believe that price was not the key determinant for FDJ in  
10 closing the deal."

11 So, to summarise, 10star did not have a maximum price as such. It was willing to  
12 negotiate on the overall package of 7 million plus and it was possible, maybe even  
13 likely, that it would have raised the headline bid of 3 million, given the opportunity. So  
14 that is strong evidence in my submission of 10star's commitment to doing a deal.

15 Then question 2, at the top of page 606. CMA asks:

16 "If 10star had been successful in acquiring the B2C business during the sales process  
17 would 10star have been willing and able to sustain the cost of a TSA potentially  
18 resulting in losses in the short to medium term while it transitioned away from the TSA  
19 with FDJ. If so, for how long would 10star have been willing and able to do so."

20 Picking up the answer in the second sentence:

21 "We were very aware that 10star were taking a risk in the deal in that we couldn't  
22 reduce the cost of a TSA by transitioning earlier and FDJ benefited financially the  
23 longer the TSA was in place. This is part of the reason why a more detailed discussion  
24 around the TSA was required, not least in terms of understanding the commitment of  
25 FDJ in enabling the transition, but we were very aware from the outset that any shortfall  
26 in the performance of Sporting Index would need to be funded from 10star and we

1 | were willing and able to do that."

2 | In my submission this is obviously important evidence, which is why the CMA  
3 | specifically relies on it at para 5.189. It is important because it tells the CMA what  
4 | 10star's attitude would have been to absorbing losses in the event it purchased  
5 | Sporting Index. As we have seen 10star says in terms it was willing and able to fund  
6 | any shortfall in Sporting Index's performance.

7 | Now we don't understand Spreadex to say that the CMA misinterpreted this evidence,  
8 | but it does seek to sideline it, as I have said, on the basis that 10star was only referring  
9 | to the shortfall which might arise from the TSA.

10 | Now if Spreadex does not say the CMA misinterpreted this evidence, its case must be  
11 | it was irrational for the CMA to place weight on it given that it was concerned with  
12 | a TSA.

13 | There is no merit in that submission. We agree that 10star's evidence was provided  
14 | in the context of a question about the costs of sustaining a TSA, but, as I have shown  
15 | you, the TSA was itself an integral and substantial part of the overall cost base for the  
16 | standalone B2C business, 3 million out of 10.5. So 10star's willingness to fund losses  
17 | arising as a result of TSA costs is obviously informative of its willingness to sustain  
18 | losses more generally. TSA covered important cost items such as staff and IT costs  
19 | and these would be provided by FDJ to 10star on a transitional basis under the TSA,  
20 | but it wouldn't simply disappear after the TSA. So they were real costs, costs of  
21 | running the business, and, as we have seen, 10star said in terms it was willing and  
22 | able to fund any shortfall in the performance of Sporting Index, and it didn't qualify that  
23 | statement by reference to the cause of the shortfall. So it is important evidence and  
24 | the CMA was clearly entitled to rely on it.

25 | Now Spreadex also says in its skeleton that whatever 10star said here it was not asked  
26 | whether it would have been willing to fund losses of £3 million after the TSA ended,

1 so once it transitioned away, but the problem with that submission is that it  
2 presupposes that after the TSA Sporting Index will have continued to suffer the same  
3 losses that would have arisen under the TSA. There is no evidential basis for that.  
4 The CMA's £3 million estimate reflected the TSA quote provided by FDJ to 10star. As  
5 10star says in this evidence it would have been looking to reduce the costs associated  
6 with the TSA as it transitioned away to self supply arrangements. That is what it is  
7 saying here. Obviously it is also going to be looking to increase revenues during this  
8 period.

9 So it makes no sense in my submission to argue 10star may have said something  
10 different about losses of 3 million if they thought they were going to continue after the  
11 TSA. The whole point of transitioning away from the TSA is to reduce those costs.

12 I want to come now, please, to Spreadex's case on the March 2023 e-mails. As the  
13 tribunal will appreciate, this is one of three central planks to ground 2 as now put.

14 Now I have already shown you that the focus of the CMA's assessment was on what  
15 the alternative bidders would have done if they had proceeded to due diligence. I have  
16 shown you the key reasons the CMA relied on at 5.189.

17 It we can go, please, to page 92, 5.190. This is immediately after the CMA's reasoning  
18 at 5.189.

19 5.190:

20 "Spreadex submitted in response to the remittal provisional findings that it was also  
21 clear that at that point in time 10star had understood that the B2C business was  
22 profitable based on 10star's e-mail to Oakvale Capital on 24th March 2023."

23 Then you see that the CMA responds to that submission at 5.191 and 5.192. It says  
24 in the last sentence of 5.191:

25 "10star was also provided with a 2022 revenue figure of 10 million and so on this basis  
26 and noting that the 12 million plus cost figure is broadly consistent with our estimated

1 cost base for a standalone B2C business, our view is that 10star submitted its bid on  
2 the basis of loss-making figures provided by Oakvale Capital for a standalone B2C  
3 business."

4 Now I entirely accept that this forms part of CMA's reasoning. Of course it does. It is  
5 there in the report, but it is essentially responsive and it is not something on which the  
6 CMA places particular weight. As we have seen, it is not mentioned in any of the  
7 reasons at 5.189, nor is it mentioned in the conclusion to this section at 5.200, which  
8 we see on page 96. It says there:

9 "Based on our assessment above and noting in particular our view is that the  
10 alternative bidders would have been well informed bidders and have identified ways  
11 to improve the performance of the B2C business, we conclude that the alternative  
12 bidders would likely have been committed to completing of the purchase of the B2C  
13 business."

14 Indeed, the whole section after 5.189 from 5.190 to 5.199 is essentially responsive. It  
15 is the CMA responding to Spreadex's submissions.

16 In any event it is Spreadex that misinterprets the underlying evidence, not the CMA.

17 If we could turn, please, to the e-mails in question at tab 4, page 434. The tribunal  
18 was taken to it yesterday by Mr Jones. This is the exchange beginning on March 23rd  
19 between Bobby Powell who is consulting for 10star and Oakvale, who are representing  
20 FDJ. You will see that Simon Trim is copied into these e-mails. It begins at the bottom  
21 at 5.13 on the Thursday, Bobby Powell to Oakvale:

22 "Guys,

23 In a previous conversation you thought 2022 revenue was 10 million (please confirm)  
24 and that the B2C business being sold approx broke even last year.

25 From the attached Q and A -- see Q 9 -- I can only find 8.5 million of costs. Can you  
26 give us some detail to bridge from 8.5 to 10 million or has anything changed?"

1 So 10star had been told that revenue for 2022 was 10 million and that the B2C  
2 business broke even last year. That would, of course, imply that costs were 10 million  
3 in 2022, but question 9 seemed to identify costs of 8.5 million. So Bobby Powell is  
4 asking for some detail on the difference. He says:  
5 "Or has anything changed?"  
6 I ask you to move up the page. We see the answer he gets from Oakvale, which is  
7 important:  
8 "Hi, Bobby,  
9 Responses below.  
10 Current run rate is £12 million plus.  
11 Question 9 costs were broad brush and focused on spreads. Doesn't really factor in  
12 fixed odds fully and also the TSA is mixed in here, so this is very far from clean."  
13 So they are making two points here. First Q9 costs were broad brush and didn't factor  
14 in certain things. The implication of that is that question 9 had understated costs, but  
15 whatever the position for 2022, Oakvale are saying:  
16 "Current run rate is £12 million plus."  
17 So that's the answer to Bobby Powell's question "Has anything changed?" Then you  
18 see Bobby Powell's response at the top of the page. It is now at 11.14 on the Friday:  
19 "Just to confirm current run rate on costs is £12 million plus? Ie approximately  
20 10 million from 2022 plus the TSA added on?  
21 Please call me to talk through when you have a moment."  
22 So that response in my submission indicates that 10star understands this to mean the  
23 current running costs are over 12 million, including the TSA.  
24 Now I accept that this exchange is truncated, but I don't accept that it is completely  
25 unclear, as Mr Jones submitted yesterday, and the point is really a short one. 10star  
26 has been told that on the most recent figures for 2022 revenue is at 10 million. It has

1 also been told that the current run rate on costs is over 12 million. So whether or not  
2 Sporting Index broke even in 2022, it is not breaking even now unless revenue has  
3 risen in the first three months of 2023, which no-one suggests in these e-mails.

4 So in my submission it is simply unreal to contend that 10star would have come away  
5 from this e-mail exchange thinking that the business was currently breaking even.

6 **MR OLSEN:** Sorry to interrupt. Do we know whether the telephone call took place  
7 after this e-mail exchange and is there any evidence on the content of that  
8 conversation?

9 **MR LASK:** I think there is an e-mail saying the call took place but not revealing the  
10 content of the call. If I can just have a moment, I will double check. I will come back  
11 to that in a moment if we may, while we will look for the reference.

12 If I could just turn in the meantime to the document at tab 5, page 438. This is the  
13 10star covering e-mail for its bid letter which is referred to as the LOI, Letter of Intent,  
14 and this is also 24th March at 5.22, and Mr Jones places significant emphasis on this.  
15 He says this shows 10star thought it was bidding for a business that was breaking  
16 even, but what Bobby Powell actually says and we see this in the fourth bullet point is:  
17 "This is a small business which you told us only broke even last year."

18 We see that at bullet 4:

19 "Thank you for the detail provided. We will need a substantial portion of the TSA but  
20 given that we only received the document a couple of hours ago and given that the  
21 price has increased from the original detail provided from 2.5 to £4 million plus and the  
22 way the detail is provided we will need to explore this further with you to understand  
23 more clearly how these modules fit and how we can onboard with our own resources,  
24 etc. A price of £4 million plus would be what we would expect SSLN to charge a tier  
25 1 client who generates huge profits, spin B2C however, will be a very small business,  
26 which you tell us only broke even last year".

1 So in my submission Bobby Powell is simply repeating what Oakvale had told him  
2 about last year in order to lay down a marker for the further discussions 10star wanted  
3 to have on the TSA.

4 Now it is true he doesn't say here "And also current costs are now over 12 million",  
5 and we can't be sure why he doesn't say that. This is clearly a negotiation, but it bears  
6 emphasis that costs are only 12 million because the TSA is now baked in. He is  
7 querying the price of the TSA here. So if he had cited costs of 12 million plus, that  
8 might undermine his querying of the TSA price, because he might be taken to buy into  
9 that premise. He is not yet ready to accept that premise.

10 Just standing back for a moment, it is implicit in Spreadex's submission that -- I mean  
11 they say that 10star did not realise that Sporting Index was loss making -- we disagree  
12 with that -- but it is implicit in the submission that if 10star realised Sporting Index was  
13 loss making once the TSA was factored in, then either it wouldn't have bid at all in  
14 March, or it would have bid but pulled out once it did due diligence, but both of those  
15 propositions are very difficult to reconcile with the April 2025 RFI that I showed you  
16 a few minutes ago where 10star said it was willing and able to fund any shortfall.

17 Standing even further back, it is not unusual for a company to buy a loss making  
18 business. Indeed, that possibility is baked into the exiting firm framework, because  
19 the exiting firm test, as we saw from the merger assessment guidelines, envisages  
20 a counterfactual scenario where a firm that would otherwise have exited the market,  
21 including because of financial failure, is acquired by an alternative purchaser. So it is  
22 not uncommon and, of course, it bears emphasis that Spreadex itself bought the B2C  
23 business following due diligence and notwithstanding the financial position. It did so  
24 in part to ensure that nobody else could buy the business and make it more  
25 competitive.

26 Just while we are on that topic could I show you, please, page 139 of the decision,

1 para 6.124, there is some confidentiality highlighting here I which don't think applies  
2 any more, but I don't think I need to read it out. You have actually seen the evidence  
3 referred to in (a) and (b) already. Was it 5.189? If you could just cast your eye over  
4 that paragraph and particularly sub-paragraph (c), which you have not seen before.  
5 (Pause.) I don't need to take you to them, but if it is of interest to the tribunal, the  
6 underlying evidence referred to there is in the bundle at tabs 37, 38 and 39.  
7 Tab 27, page 720 of the bundle, we see an e-mail from Bobby Powell at 3.29 on 24th  
8 March to Magnus Hedman and Simon Trim. Page 720 where he says:  
9 "Spoke to them about the TSA not being clear enough to opine on without further  
10 discussion with the business. They said it was okay to send something a little more  
11 vague. See below. I have also made minor amendments to the point about staff."  
12 Then he sets out -- attaches a draft of the covering e-mail. For what it is worth, that  
13 draft doesn't include the passage that we see in the final draft about the TSA and about  
14 breaking even.  
15 That is all I need to say on those e-mails. The chairman asked yesterday whether the  
16 CMA had asked 10star directly about its knowledge of the financial position of Sporting  
17 Index at the time of its bid. Now I have explained that that was not the focus of the  
18 CMA's analysis, but there was a telephone conference between 10star and the CMA  
19 in May 2024 and we have the transcript. There are a couple of passages that are  
20 relevant. They are not directly -- they don't directly ask the question, but I think they  
21 are relevant and probably helpful for the tribunal to see. I think my learned friends  
22 have copies. Do you have copies?  
23 You see on the front page this is a call made May 2024 in the CMA and Simon Trim  
24 and Bobby Powell for 10star. If we could pick it up, please, on page 19, line 22. The  
25 CMA asks this:  
26 "So it is just good to know that the bid did factor in the cost of TSA. At the time you

1 submitted your bid what due diligence had already been completed and what were the  
2 key outstanding areas of due diligence."

3 Then over the page Mr Powell says:

4 "Well, I mean, given that we used to own the business, we probably were a bit different  
5 from anybody else looking at it. You know, we knew the business pretty intimately.  
6 So for us a lot of our work was really to understand how the separation would look,  
7 what exactly were we going to require and how could the transition be managed and  
8 therefore the TSA was really a big part of it from our perspective. You know, we know  
9 the underlying business. We know the customer base. We have a good  
10 understanding of the KPIs and all that kind of stuff already, and again we also  
11 understood how interdependent certain components of the group were, so really a key  
12 part for us was just understanding how the separation and transition would look. That  
13 was mainly what we were focused on I would say. We didn't need to go into maybe  
14 some of the financial history or evolution of the business in the way other people might  
15 have."

16 Then the second passage begins on page 35. Again Mr Park:

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

22 Mr Powell says:

23 "Yeah, again this is from memory, there was a certain amount of assumptions required  
24 and until we really got into the nitty-gritty of the TSA and how quickly you tend to move  
25 away from it, replacing it with our own proprietary stuff, it was difficult to be sure, but  
26 I think our starting point was that this business has not been very well managed since

1 we sold it and there was a few different specific reasons for that, but I think the starting  
2 point was that we can get involved again and actually manage things a bit differently  
3 and improve things going forward. I mean Simon", that is Simon Trim, "you would  
4 have had some thoughts on maybe how things -- it was clear it wasn't in the focus of  
5 the seller, the spreads business in particular, and had perhaps been neglected a bit in  
6 favour of other parts of the business. So we saw that as an opportunity to get things  
7 back on a growth trajectory again."

8 The tribunal will have seen from the CMA's reasoning at 5.189 that the alternative  
9 bidders believed they could improve the performance of the business and this is part  
10 of the evidence base for that.

11 On the third point in relation to this topic, namely the alternative bidders' commitment  
12 to completing a transaction, Mr Jones emphasised yesterday that the relevant market  
13 was in decline -- this was at the beginning of his submissions -- and he relied on the  
14 Sporting Group transcript from August 2024. As I understand it, the suggestion was  
15 that even though 10star had achieved higher revenues and lower costs when it owned  
16 the business previously (inaudible) now, the market was declining.

17 Turn, please, page to 5.191. You see 5.189 (c).

18 "10star had previously owned Sporting Index from 2015 to 2019. In this time period  
19 Sporting Index's revenues were on average approximately double compared to its  
20 revenues from 2022. We also note that from April 2016 to December 2018 10star  
21 appeared to have significantly reduced the cost base of the business compared to  
22 previous years."

23 Then if we turn, please, to page 21 of bundle C. This is the CMA's decision. You see  
24 there the CMA's findings on the extent to which the market had decreased.  
25 (Inaudible). We saw previous passages which I just showed you that 10star achieved  
26 revenues on average double those achieved in 2022 and given the extent of the

1 market decline found by the CMA that would imply in my submission that the higher  
2 revenues achieved by Sporting Index under 10star's ownership were due to more than  
3 simply the market being larger given it had achieved revenue double.

4 Second, and if we go back to 189(c), please, on page 91, you see there that 10star  
5 had managed to significantly increase the cost base in the years 2016 to 2018  
6 compared to the period prior to 2016 whereas the market decline according to the  
7 CMA was after 2018. So the fact that the market reduced in size after 2018 obviously  
8 has nothing to do with the cost reduction before 2018.

9 Third, and if I could ask you, please, to turn to page 136 of the CMA decision, we see  
10 para 6.115:

11 "Our view is that it is more likely than not that the spread betting market in the UK will  
12 continue to decline. However, our view is that there has not been a rapid decline and  
13 that (absent the merger) it is likely that competition would have continued for at least  
14 two years."

15 There is obviously no challenge to that finding and in my submission it does imply that  
16 there would have been scope for Sporting Index to continue competing under the  
17 ownership of 10star, notwithstanding a smaller market. That was precisely what  
18 Spreadex were seeking to mitigate against when they purchased Sporting Index.

19 I am going to come on next to the wider topic of whether Sporting Index would have  
20 been operated as a competitor under the ownership of an alternative bidder. In fact,  
21 I am coming on to that now, but if it is a convenient moment, I am happy to pause for  
22 a break.

23 **MR JUSTICE SAINI:** Yes. Let's take a break I think. Thank you.

24 **(Short break)**

25 **MR LASK:** I am turning now to the third broad question that the CMA asked itself,  
26 namely whether the alternative bidders would have operated the B2C business as

1 a competitor. Now Spreadex does not allege any specific errors in the CMA's  
2 assessment under this heading, but Mr Jones submitted yesterday that there was  
3 uncertainty in relation to this factor, which he says supports his ground 2(b) submission  
4 that the overall conclusion was irrational even if the underlying assessments were not.  
5 Now, as I explained yesterday, we say that submission is misconceived, but I do want  
6 to briefly show you how the CMA dealt with this issue and how it dealt with uncertainty,  
7 not least because it also goes to Ms Berridge's submission there is no indication how  
8 the CMA dealt with uncertainty in the decision.

9 It is important in my submission to appreciate at the outset the purpose and nature of  
10 the question the CMA was asking itself at this stage of the analysis. In line with limb  
11 (ii) of the exiting firm test what the CMA was seeking to ascertain was whether a sale  
12 to an alternative bidder would have raised fewer competition concerns than a sale to  
13 Spreadex. One sees that from para 5.41 on page 41 of the decision.

14 Now the tribunal will recall that the sale to Spreadex resulted in a combined market  
15 share of 100%, but post merger there is no competition at all in the relevant market.  
16 Now if Spreadex had instead been acquired by one of the alternative bidders, there  
17 are a number of things that could have happened in principle. The alternative bidder  
18 might have liquidated the business, although there is absolutely no evidence for that.  
19 It might have continued to operate it as a competitor in line with pre-merger conditions  
20 or it might have operated it as a weaker competitor than pre-merger, or operated it as  
21 a stronger competitor than pre-merger.

22 Now if the alternative bidder had liquidated the business, limb (ii) would be satisfied,  
23 limb (ii) of the exiting firm test, because there would be no competition between  
24 Spreadex and Sporting Index in that scenario. The sale to the alternative bidder would  
25 be equally as anti-competitive as the sale to Spreadex, but if under the ownership of  
26 an alternative bidder Sporting Index would have imposed any competitive constraint

1 on Spreadex, then a sale to the competitive bidder would raise fewer competition  
2 concerns than a sale to Spreadex. So limb (ii) wouldn't be satisfied in those  
3 circumstances.

4 So when addressing this question, the CMA did not need to conclude that the  
5 competitive constraint exerted by Sporting Index would have increased under the  
6 ownership of an alternative bidder. The question was simply whether the alternative  
7 bidder would have operated Sporting Index as a competitor; in other words, whether  
8 it would have imposed any competitive constraint on Spreadex under the ownership  
9 of the alternative bidder even if unprofitable.

10 Indeed, as I will show you, the CMA recognised that Sporting Index was unprofitable  
11 and would likely have remained unprofitable for a period after acquisition by  
12 an alternative bidder, but that didn't preclude it from concluding that it would  
13 nevertheless have continued to compete.

14 I will show you the CMA's assessment, if I may, starting on page 96, please, para  
15 5.203:

16 "For the purpose of assessing the counterfactual the MAGs provide that the CMA will  
17 consider alternative purchasers that would have operated the business as  
18 a competitor."

19 That is the point I have just been making:

20 "We consider this below."

21 5.204:

22 "We note that both alternative bidders had bid for the B2C business primarily for its  
23 sports spread betting business, planned to continue to compete by supplying sports  
24 spread betting services in the UK and outlined their respective plans for the B2C  
25 business. More specifically.

26 Star Sports told us that while Sporting Index was loss-making, it believed that if it had

1 | been successful in purchasing Sporting Index, it would have begun to make a profit  
2 | within six to 12 months."

3 | Then you will see some specific reasons provided by Star Sports at (i), (ii) and (iii).

4 | Then:

5 | "(b) 10star told us that it had submitted a bid to purchase Sporting Index as it believed  
6 | that it could combine its current B2B expertise with Sporting Index's strong brand to  
7 | develop a product to compete in the UK B2C sports spread betting segment. 10star  
8 | explained that as the industry shifted from price differentiation to pricing as content  
9 | over the past five to ten years, skills and knowledge in price setting had disappeared  
10 | from bookmaking and that sports betting was now a homogenous market. 10star told  
11 | us that market prices rarely differed, as neither sportsbooks nor the existing supply  
12 | chain possessed the knowledge to differentiate in price nor react in real time to the  
13 | risk generated on their book. 10star told us that 10star had a lot of expertise in this  
14 | area of understanding risk and setting strong prices."

15 | 5.205:

16 | "We further noted evidence setting out the potential upside opportunities for the B2C  
17 | business, including that the B2C business could have been a competitor under  
18 | different ownership.

19 | (a) 10star told us that it believed that Sporting Index's profitability had been negatively  
20 | impacted by FDJ's over-cautious approach when it came to regulatory compliance. It  
21 | explained that the Gambling Commission's rules on consumer due diligence (which  
22 | applied to sports fixed odds betting) were more stringent than those enforced by the  
23 | FCA (which applied to spread betting). It told us that it believed that the FDJ, in  
24 | endeavouring to remain within the Gambling Commission's rules, applied overly  
25 | stringent measures ... to Sporting Index's sports spread betting business even though  
26 | these services were not subject to those Gambling Commission rules. As also noted

1 above, Sporting Index's revenues under 10star's ownership were approximately  
2 double compared to its Revenues in 2022.

3 (b) Similarly the former Star Sports MD told us that given FDJ's ambitions to enter the  
4 US market, FDJ did not want to risk the FCA or the GC finding failings within the  
5 Sporting Index business that could devalue FDJ and undermine its US entry plans."

6 Just pausing here, what we see in 5.205 and the previous paragraph, 5.204, is Star  
7 Sports' evidence corroborates 10star's evidence and vice versa. They were not giving  
8 precisely the same reasons or setting out precisely the same plans, but they are both  
9 saying they think they can improve the business.

10 5.205(c):

11 "... 10star told us that it believed that FDJ might have limited its investment in Sporting  
12 Index, as it had focused on developing Sporting Solutions internationally, noting that  
13 FDJ's primary aim in purchasing Sporting Group was the acquisition of the B2B arm."

14 Then this is the point I made earlier:

15 "(d) As set out in paragraph 5.189(e) above, Spreadex's internal documents also  
16 suggested that the B2C business could have been run more effectively as a competitor  
17 under different ownership."

18 In 5.207 on page 99:

19 "A potential purchaser of a business of this type would have been a commercially  
20 rational actor, and the evidence provided to us in relation to the alternative bidders is  
21 consistent with that proposition. We have concluded above that an alternative  
22 purchaser would likely have acquired the B2C business, taking account of the costs  
23 of operating that business."

24 Just pausing there, where it says "we have concluded above", it is referring to the  
25 previous question whether the alternative bidders would have been committed. So  
26 this is just one example of where the CMA is recognising there is an interaction

1 between the different questions it is asking itself. They are not independent unrelated  
2 questions. It continues:

3 "While the future performance of the business was uncertain, the evidence also shows  
4 that both alternative bidders, both of whom operate in adjacent markets and have  
5 experience with spread betting specifically, were seeking to acquire the B2C business  
6 with a view to turning it around and operating it as a competitor in the market in the  
7 long-term. We have considered above whether there is evidence provided to us that  
8 was unavailable to the alternative bidders that would lead to the conclusion that the  
9 alternative bidders would not have been committed to completing a purchase of the  
10 B2C business and we have concluded that we do not have evidence that would  
11 support such a conclusion. We have also concluded on the basis of the evidence  
12 provided to us that the alternative bidders would likely have been committed to  
13 completing a purchase of the B2C business."

14 So again the CMA is recognising the interaction between the different elements of its  
15 analysis. It recognises here that future performance is uncertain, but it is weighing  
16 everything in the round and reaching an overall judgment.

17 Over the page on page 100, 5.211:

18 "As set out in paragraph 5.189 above" so that's another reference back to its previous  
19 heading, "we have found that the B2C business was not profitable under FDJ's  
20 ownership and would likely have been unprofitable on a standalone basis under  
21 different ownership at the time of acquisition and for some period thereafter.  
22 Nonetheless, as noted in paragraph 5.189 (d) above, the evidence from the alternative  
23 bidders is effectively that they were prepared to accept the costs of a TSA (potentially  
24 resulting in losses) in the short to medium term, and given each of the alternative  
25 bidder's experience and plans for the B2C business set out in paragraphs 5.204 and  
26 5.205 above, and their expectations of profit in the longer term if they were successful,

1 our view is that the alternative bidders would have been sufficiently resourced and  
2 committed to endeavour to implement these plans and effect a turnaround following  
3 an acquisition of the B2C business. Our view is therefore that in the following two  
4 years absent the merger, the alternative bidders would have operated the B2C  
5 business as a competitor."

6 So that's its overall judgment, having weighed up the evidence and the various  
7 considerations. Just for completeness, 5.212:

8 "For the avoidance of doubt, our view is not that the alternative bidders would have  
9 operated the B2C business as a competitor for only two years or that they would have  
10 been unsuccessful in effecting their turnaround plans. The two year period simply  
11 reflects a reasonably foreseeable future time period in the market and we have not  
12 sought to predict how the market or efforts to turnaround the business would have  
13 developed beyond that point.

14 As regards any FCA approval ... as set out in more detail in paragraph 5.167 above,  
15 our view is that the alternative bidders would likely have proceeded to obtain FCA  
16 approval."

17 Again there is interaction between the different topics the CMA is assessing.

18 Then the conclusion 5.214:

19 "Based on our assessment above, we conclude that in the counterfactual  
20 an alternative bidder would have operated the B2C business as a competitor.

21 As regards the conditions of competition our view is that an alternative bidder would  
22 have looked to supply licenced online sports spread betting services broadly in line  
23 with the services provided by Sporting Index pre-merger based on the alternative  
24 bidder's plans for the business set out above. We also note that while an alternative  
25 bidder would have faced challenges if they were to acquire and operate the B2C  
26 business (as set out above) the performance of the B2C business had the potential to

1 improve under different ownership and both alternative bidders were interested in  
2 acquiring the business with a view to improving its performance. In view of the above,  
3 we conclude that an alternative bidder acquiring the business would likely have  
4 operated the B2C business broadly in line with the pre-merger conditions of  
5 competition."

6 Now I made the submission at the outset of this section that for the purposes of this  
7 question alone the CMA simply was asking itself would it have been a competitor?  
8 The reason it goes on at 5.215 to consider what the conditions of the competition  
9 would have been -- would it have been pre-merger stronger or weaker -- is because  
10 that's a necessary component of its overall conclusion on the counterfactual. As we  
11 see in the MAGs what the CMA is ultimately seeking to do is identify a counterfactual  
12 and identify broadly the conditions of competition in that counterfactual. So that's why  
13 it goes on to conduct that analysis at 5.215.

14 So I emphasise in relation to this topic that according to the evidence that the CMA  
15 had both alternative bidders intended to compete in the relevant market and outlined  
16 their plans for doing so. Both of them believed they could improve Sporting Index's  
17 performance, for example, by reducing cost, increasing investment, taking other  
18 measures such as reactivating dormant accounts. Star Sports believed it could turn a  
19 profit within six to twelve months. 10star said it had would have been willing to  
20 increase its bid and fund any shortfall and both of them were well informed bidders  
21 with knowledge and experience in the spread betting sector.

22 So in my submission the CMA was entitled to place substantial weight on the evidence  
23 that the alternative bidders provided here, notwithstanding the uncertainty, and the  
24 conclusion that the CMA reached at 5.214 and 5.215 had ample evidential support  
25 and was entirely rational.

26 I made a couple of references in this section to Star Sports which my learned friend

1 took some time addressing towards the end of his submissions yesterday. As we saw  
2 at para 5.170 (inaudible) the CMA concluded that FDJ would most likely have been  
3 willing to complete a sale to an alternative bidder, most probably 10star, not least  
4 because 10star's bid was above liquidation value. Now since it found that a sale to  
5 10star was most likely, it didn't need to bottom out the likelihood of a sale to Star  
6 Sports. It only needs to identify the most likely outcome, not the second and third most  
7 likely outcomes as well, but the CMA did not rule out a sale to Star Sports or, as we  
8 have seen, exclude it from the remainder of its assessment, because we have seen in  
9 these subsequent sections, second and third topics, that the CMA addresses Star  
10 Sports' evidence as well as 10star's. The fact that Star Sports remained part of the  
11 assessment is relevant because the evidence in relation to Star Sports continued to  
12 inform CMA's assessment of the exiting firm test.

13 So even though the CMA does not ultimately conclude that the most likely  
14 counterfactual is one where Star Sports becomes the owner, its evidence was still  
15 relevant. Its evidence was still informative. So, for example, as we have seen, Star  
16 Sports' evidence about its belief that it could improve the performance of the B2C  
17 business corroborated 10star's evidence on this point.

18 So in my submission it was entirely appropriate and correct for the CMA to have regard  
19 to Star Sports' evidence, even though Star Sports was not part of the CMA's most  
20 likely counterfactual.

21 I would like to turn now, please, to ground 1 and it is useful for this purpose to keep  
22 open the decision at page 101, because this is where the CMA sets out its conclusions.  
23 We have seen that in assessing limb (ii) of the exiting firm test CMA asked itself three  
24 broad questions. Number one: whether FDJ would have been willing to complete  
25 a sale to the alternative bidders; number two, whether the alternative bidders would  
26 have been willing to completing a purchase; number 3, whether the alternative bidders

1 would have operated the business as a competitor.

2 Its answers were as follows. Number one, FDJ would likely have been willing to  
3 complete a sale to an alternative bidder, most probably 10star; number two, the  
4 alternative bidders would likely have been committed to completing a purchase; and,  
5 number three, the alternative bidders would have operated the business as a  
6 competitor, most likely broadly in line with the pre-merger conditions of competition.

7 Just for your note the conclusions on each of those points are at para 5.170, 5.200,  
8 5.240.

9 Now CMA had to do two things. First, it had to answer the question posed by limb (ii)  
10 of the exiting firm test, namely whether there would not be an alternative less  
11 anti-competitive purchaser for the B2C business. In answering that question, as we  
12 saw from the merger assessment guidelines, the CMA had to consider what was most  
13 likely.

14 Second, it had to identify the most likely conditions of competition in the counterfactual.  
15 I will express those two in turn but they are obviously closely linked.

16 So the limb (ii) conclusion. At para 5.216 on page 101:

17 "Based on our assessment of the alternative bidders' bids and the other considerations  
18 above and taking the evidence in the round, we are not persuaded that in the absence  
19 of the merger there would not have been an alternative, less anti-competitive  
20 purchaser for the B2C business, noting in particular our views that.

21 (a) FDJ would likely have been willing to complete a sale of the B2C business to  
22 10star.

23 (b) the alternative bidders would likely have been committed to completing  
24 a transaction of the B2C business; and.

25 (c) the alternative bidders would have operated the B2C business as a competitor.

26 We therefore conclude that limb (ii) is not met."

1 Now there is no suggestion by Spreadex that the CMA failed to apply the approach  
2 set out in the merger assessment guidelines. The complaint instead is that the CMA  
3 made an error of logic or reasoning. Now Spreadex has put its case in various ways,  
4 but at its core the complaint is that the CMA failed to address what Spreadex called  
5 the issue of compound probabilities in reaching its conclusions. The way this ground  
6 was put yesterday was also that whilst 5.216 says that the CMA considered matters  
7 in the round to reach its overall conclusion on limb (ii), it didn't explain how it did that.  
8 Now in my submission there is no merit in that complaint or in ground 1 more generally,  
9 however it is characterised on any fair reading of the final report and I want to make  
10 five key points, please.

11 First, CMA satisfied itself all three of the questions it had assessed were likely, all  
12 three. That's evident from para 5.216 which I have just read out. The CMA  
13 summarised its view the FDJ would likely have been willing to complete a sale. The  
14 alternative bidders would likely have completed the purchase and the alternative  
15 bidders would have operated the business as a competitor.

16 Now it is well established and I showed you the Stagecoach authority yesterday that  
17 a CMA decision should not be read like a statute. In my submission on any fair reading  
18 of the final report, the CMA clearly appreciated the need to consider these three factors  
19 in combination. It didn't treat them as distinct and unrelated.

20 One can see that from 5.216 itself where the CMA treats them as cumulative. It says  
21 "and" between sub-paras (b) and (c). One can also see it from earlier on where the  
22 CMA sets out these questions in the first place. It is actually page 42 of the decision.

23 You see page 42, paragraph 5.48:

24 "Spreadex submitted that an alternative sale would not have proceeded as FDJ and  
25 the alternative bidders would ultimately have concluded that a sale would not make  
26 economic sense largely as a result of the following: the value of the bids from the

1 alternative bidders; Spreadex's estimate of the liquidation value ...; the costs  
2 and obligations that would have been required under a TSA; and the overall  
3 profitability of the B2C business."

4 5.49:

5 "In response to Spreadex's submission in assessing limb 2 we have considered the  
6 following."

7 Then you have the three questions. So what the CMA has done there is identify those  
8 three questions as all being relevant to a single overarching submission made by  
9 Spreadex. So in my submission -- and one sees this through the body of  
10 chapter 5 -- the CMA clearly appreciated the need to consider these factors in  
11 combination and that was its conclusion at 5.216.

12 Indeed, in my submission it is implausible to contend that the CMA carefully analysed  
13 these three issues over some 70 pages and failed to appreciate the relationship  
14 between them or the need to consider them in combination. CMA is an expert  
15 regulator with extensive experience in merger control. This was not its first rodeo.  
16 That's my first point.

17 My second point is this. For the reasons I have given in relation to ground 2 the CMA  
18 was reasonably entitled to reach the three conclusions it did as summarised at 5.216.  
19 None of them were irrational.

20 Now in those circumstances, having found that all of these things were likely, the  
21 natural conclusion was that limb 2 wasn't met. If FDJ would have likely been willing to  
22 sell to 10star, 10star would likely have been committed to the transaction and 10star  
23 would have operated the business as a competitor, it follows logically that the most  
24 likely counterfactual outcome was that FDJ would have sold Sporting Index to 10star,  
25 who would have continued to operate it as a competitor. That conclusion flows  
26 naturally from the conclusion that all three things were likely. So in those

1 | circumstances no fresh analysis was required to support a judgment that limb 2 was  
2 | not met.

3 | Nevertheless if we could just turn back, please, to 5.216 just so we have it open,  
4 | page 101, nevertheless, the CMA makes clear here that it did stand back and consider  
5 | the limb 2 question in the round, having regard to all the evidence in its preceding  
6 | assessments.

7 | To put it another way, it carried out a cross check of asking itself whether its overall  
8 | conclusion was consistent with the whole of the evidence. That is what's going on in  
9 | 5.216. That in my submission was an entirely reasonable and lawful approach.

10 | Now Spreadex seeks to invoke this cross check against the CMA. Ms Berridge  
11 | submitted yesterday that the CMA failed to explain here how it had weighed all the  
12 | uncertainties in order to reach its overall conclusion, but as I have submitted, that is  
13 | wholly unrealistic, because what one sees from the final report, and I have sought to  
14 | show you examples, is that the CMA carefully and consistently identified the  
15 | uncertainties and weighed them against each other together with all of the evidence  
16 | in its detailed analysis. That analysis is contained in the body of chapter 5, but it is  
17 | baked into these summary conclusions in 5.216. So it follows that no further  
18 | independent analysis exercise needed to be carried out. There is no leap in logic or  
19 | reasoning. There is no missing piece of the puzzle.

20 | Third, it is implicit in Spreadex's case on ground 1 that even having lawfully concluded  
21 | that all these three things were likely, by stepping back, the CMA could nevertheless  
22 | have concluded actually liquidation was the most likely counterfactual outcome overall.  
23 | Even having reached these three conclusions at 5.126 (a), (b) and (c), they could have  
24 | stood back and said "Given the uncertainty, we think liquidation is the most likely  
25 | outcome".

26 | In my submission that would be a very surprising conclusion, a pretty dramatic plot

1 twist. Spreadex has never explained why if the CMA was entitled to conclude that  
2 FDJ would likely have been willing to complete a sale to 10star and if it was entitled to  
3 conclude that 10star would have been likely to have committed to a transaction and if  
4 it was entitled to conclude that 10star would have operated Sporting Index as  
5 a competitor liquidation may still have been the most likely outcome. It never  
6 explained it, and in my submission it is counter-intuitive at best. Even if that were  
7 theoretically possible, it can't be sensibly said to give rise to an obligation on the CMA  
8 to carry out some further unidentified analysis. In the real world there is simply no  
9 logical gap between the CMA's underlying assessment and its overall conclusion.

10 That's my third point. Fourth, we have frankly struggled to pin down exactly what  
11 Spreadex say the CMA was required to do and on what legal basis. As Spreadex  
12 rightly accepts, the CMA did not need to quantify the probability of any individual  
13 element in its analysis or calculate an overall likelihood for its chosen counterfactual.  
14 You will note that's Spreadex's skeleton, paragraph 61. Indeed, we say such an  
15 approach would be logically incoherent where, as Spreadex accepts, the various  
16 factors are not independent.

17 To give one example of the lack of independence, the likelihood that 10star would  
18 have operated Sporting Index as a competitor, question 3, is obviously connected to  
19 the likelihood that it would have been committed to completing a purchase, Sporting  
20 Index, question 2. 10star's plan was to buy Sporting Index so that it could run the  
21 business as a competitor, not so it could liquidate. So the possibilities just don't lend  
22 themselves to a cumulative probability analysis of the kind proposed, whatever that  
23 might mean.

24 We have elaborated on this in our defence, paras 104 to 106, bundle B, tab 2, page  
25 66. We don't need to go there. Also for the tribunal's note the case of Tobii, another  
26 merger case before the tribunal. It's in the bundle at D1, tab 8, and the tribunal

1 explains there at paras 393 and 461 that the CMA is not required to quantify substantial  
2 lessening of competition.

3 So absent an obligation to quantify these matters -- and I should say that although  
4 Spreadex accepts at least on the face of it that there is no obligation to quantify, one  
5 does see throughout the submissions references to "For illustrative purposes if you  
6 were doing the maths, this is how the probabilities would look". Perhaps that is to be  
7 expected given the applicant here is Spreadex, a betting company. So in the nature  
8 of things, but it is telling in my submission, because, as I say, we struggled to  
9 understand what it is CMA was supposed to do.

10 All that's left it seems is the suggestion that the CMA failed to recognise the need to  
11 consider cumulative probability, but whatever that might mean, it seeks to impose on  
12 the CMA an analytical framework that has no basis in statute, no basis in the merger  
13 assessment guidelines and for the reasons I have given was not required as a matter  
14 of logic.

15 I repeat, and I am sorry to repeat myself, but these points do overlap, the CMA  
16 concluded that all of the three steps in its analysis were likely and gave very detailed  
17 reasons for its conclusion. In those circumstances the natural and logical conclusion  
18 was that limb 2 wasn't met. There is just no need, no warrant, certainly no requirement  
19 for some assessment of cumulative probabilities.

20 Just standing back, we do say that Spreadex's case is highly theoretical and frankly  
21 detached from the reality of what the CMA is actually doing when it assesses the  
22 counterfactual.

23 Now although this is not essential to my case, Spreadex's case does appear to rest  
24 on a silent assumption that the CMA was required to assess limb 2 (ii) and select a  
25 counterfactual on the balance of probabilities. That was the original basis for ground  
26 1 before Spreadex amended it. You see that from its reply, paragraph 9. Spreadex

1 acknowledges that it had originally understood CMA to be assessing this on the  
2 balance of probabilities. We said that was wrong in our defence. Spreadex said  
3 "Okay. We see that, but it doesn't alter ground 1". That is the reply at paragraph 9,  
4 bundle B, tab 3, page 87. So it is common ground that the CMA was not required to  
5 assess the counterfactual on the balance of probabilities and I showed you the B Sky B  
6 case yesterday, but in my submission the balance of probabilities standard continues  
7 to infect Spreadex's submissions.

8 If we could just look, please, at the Spreadex skeleton in bundle A, tab 1, page 17, you  
9 see paragraph 61:

10 "The CMA does not express its views on likelihood in percentage terms and nor does  
11 it need to. It does, however, need to reason logically and in that regard it is helpful to  
12 have in mind some basic mathematical propositions."

13 We say it is not for the reasons I have given:

14 "Assume that each of the above propositions was expressed with an 85%  
15 likelihood -- a highly inflated figure which doesn't reflect the various caveats and  
16 careful language in the CMA's decision -- and assume also that those likelihoods were  
17 all independent of each other", which, as I have explained, is not a legitimate  
18 assumption. "If they were each expressed with 85% likelihood, the cumulative  
19 probability of them all being true would be just 38%."

20 So the implication there is 38% probability is not sufficient. Now we don't accept that  
21 this sort of analysis is appropriate, as I have explained, but in any event where, as  
22 here, there are several possible outcomes, one has a 38% probability, it may in fact  
23 still be the most likely one, and it is the most likely standard that the CMA was applying.  
24 That is the standard set out in the merger assessment guidelines. Most likely means  
25 more likely than other possible outcomes.

26 In case it is said in response by my learned friend "Actually there were only two

1 possible outcomes" there weren't, because if you look at the three questions the CMA  
2 was asking itself, within them there are multiple various outcomes. It could have been  
3 a sale to 10star and operation under pre-merger, conditions of competition. There  
4 could have been a sale to 10star with stronger conditions of competition. There could  
5 have been a sale to 10star with weaker conditions of competition. There could have  
6 been a sale to Star Sports, and operation under pre-merger conditions or stronger  
7 conditions or weaker conditions. There could have been a sale to either alternative  
8 bidder followed by liquidation. There could have been liquidation by FDJ. There could  
9 have been retention by FDJ. So there were multiple possible outcomes and the CMA's  
10 role, its task was to identify the most likely one. If the most likely outcome had a 38%  
11 probability so be it. CMA wasn't obliged to go over 50% because it wasn't applying  
12 a balance of probabilities standard, but, as I say, Spreadex's case seems to be  
13 infected by that original misunderstanding in its notice of application.

14 Similarly both of my learned friends submitted yesterday on a number of occasions  
15 that all these individual propositions had to happen in order for the CMA's  
16 counterfactual to come about, but again the CMA's task was to identify the most likely  
17 counterfactual, and whilst that entailed the consideration of various relevant factors,  
18 the CMA did not need to satisfy itself those factors would definitely have occurred, or  
19 even that they were more likely than not in order for its counterfactual to stand.

20 In each case the CMA rightly asked itself whether the thing in question was likely, and  
21 having concluded that all of them were likely, it was entitled to reach the conclusion it  
22 did on the counterfactual.

23 Just to be absolutely clear, likely obviously doesn't mean more likely than not. That's  
24 not what the merger assessment guidelines say and that's not how the CMA explained  
25 its task at the beginning of chapter 5 of the final report.

26 That's my fourth point. My fifth point is that the suggestion that CMA's reasoning was

1 deficient is a remarkable one. The CMA conducted a thorough analysis of the three  
2 questions that were relevant to its assessment and gave detailed reasons on each of  
3 them and its overall conclusion on limb 2 referred to and relied on those earlier  
4 reasons, and the conclusion at 5.216 did not leave any room for doubt as to why the  
5 CMA decided the matter as it did.

6 Just on that if we could go, please, to the authorities bundle, D1, tab 6. This is the  
7 BAA case in this tribunal before a panel --

8 **MR JUSTICE SAINI:** Which page is that?

9 **MR LASK:** Sorry. Page 282 -- before a tribunal chaired by Mr Justice Sales, as he  
10 then was. If we go, please, to page 298. It might be helpful to start at 293 for  
11 navigation purposes. You will see paragraph 20 on 293, the bottom of that paragraph:  
12 "In our judgment the principles to be applied are as follows."

13 Then there are a number of key principles set out governing the standard of review  
14 and the test that this tribunal applies in judicial review cases.

15 Then on page 298 we see sub-paragraph (8):

16 "Where the CC gives reasons for its decisions, it will be required to do so in accordance  
17 with the familiar standard set out by Lord Brown in Porter (No 2)."

18 Then there is a quote from Porter which is well-known, but perhaps I could ask the  
19 tribunal just to read through that quote, please. (Pause.)

20 Then at the end of the quote the tribunal adds:

21 "In applying these standards it is not the function of the tribunal to trawl through the  
22 long and detailed reports of the CC with a fine tooth comb or identify arguable errors.  
23 Such reports are to be read in a generous, not a restrictive way ... something seriously  
24 awry with the expression of the reasoning set out by the CC must be shown before  
25 a report would be quashed on the grounds of the inadequacy of the reasons given in  
26 it."

1 In my submission Spreadex has not identified any deficiency in the CMA's reasoning,  
2 let alone one that may have caused it substantial prejudice, and you will have seen  
3 the reference to substantial prejudice in the quote from Porter.

4 Now the suggestion that the CMA failed to identify the relevant weight that it placed  
5 on each of the three factors is also misconceived, because those three questions were  
6 steps in the CMA's analysis, not competing factors that had to be weighed against  
7 each other. They all pointed the same way, as I have shown you at 5.216. The CMA  
8 conclude that all of them were satisfied. So it wasn't a question of weighing them  
9 against each other.

10 So that's the conclusion on limb 2 (ii), the exiting firm test.

11 Then if I could turn on, please, to the overall conclusion on the counterfactual, which  
12 is page 102 of the CMA decision, para 5.218. I can deal with this one more briefly:

13 "Based on our assessment above, we conclude that the appropriate counterfactual is  
14 where the B2C business under the ownership of 10star would continue to compete in  
15 the supply of licensed online sports spread betting services broadly in line with the  
16 pre-merger conditions of competition."

17 As I have just submitted, the CMA was entitled to conclude that limb 2 wasn't met and  
18 the reasons that justified its conclusion on limb 2 also justified its overall conclusion  
19 on the counterfactual. Having reached the conclusions that we have seen  
20 summarised at 5.216 for the purposes of the exiting firm test, it was logical and rational  
21 for the CMA to conclude that the appropriate counterfactual was most likely one in  
22 which Sporting Index continued to compete in the relevant market under the ownership  
23 of 10star. Any other conclusion would have required further explanation, but the  
24 conclusion we see at 5.218 flowed naturally from the assessment. Again there is no  
25 gap in the CMA's logic or reasoning.

26 If I could then deal briefly with authorities that Ms Berridge took the tribunal to

1 yesterday. The first is the Ryanair case, which is at bundle D1, tab 7, page, page 380.  
2 Sorry. Could we start on page 372? One sees here the tribunal introduces the ground  
3 of challenge that it is dealing with in the passage that Ms Berridge relies on.  
4 "Ground 1: duty of sincere cooperation.  
5 Ryanair contends that the CC's order to divest its shareholding in Aer Lingus, leaving  
6 it with a maximum holding of 5%, is contrary to the EU law duty of sincere cooperation  
7 embodied in article 4(3) of the treaty."  
8 So this ground was not an rationality or reasons challenge. The argument was  
9 concerned with the divestiture remedy and the duty of sincere cooperation because  
10 there were ongoing proceedings in Europe. Then, as you saw yesterday -- actually if  
11 you go back a page to page 369 and 370 you will see the CC set out the long list of  
12 factors that it had regard to in deciding that it wasn't required to defer the action in  
13 order to comply with the duty of cooperation.  
14 Then the passage Ms Berridge relies on at page 380 is paragraph 105(3). The tribunal  
15 says:  
16 "Paragraph 8.9 of the final report is unsatisfactory in that whilst it identifies a list of  
17 factors it did not go on to state what weight it placed on those factors individually."  
18 Then if one goes to page 384, paragraph 113:  
19 "We find that there is no breach of the duty of sincere cooperation in the proposed  
20 divestiture order of the CC."  
21 So the passage relied on was an observation made by the tribunal in a context that  
22 didn't involve a reasons challenge or a rationality challenge and it was an observation  
23 that led nowhere because the ground of challenge was dismissed. So it is not authority  
24 for the proposition that the decision maker must always explain the weight given to  
25 individual factors in order for its decision to be lawful. What is required by way of  
26 reasons depends on the circumstances, as we saw from paragraph 20(8) of the BAA

1 decision.

2 The second authority is the Meta case at D2, tab 11, page 849. This was an unusual  
3 case, because it concerned -- well, this part of the judgment concerned Meta's  
4 argument that the CMA's redactions had impeded its ability to respond effectively to  
5 the provisional findings. So it was a fair process argument. One sees that from para  
6 146 on page 848.

7 The reason it is a bit of an odd case is because the CMA sought to sidestep that  
8 objection by saying that it would defend the redacted version of the decision and that  
9 the additional detail that had been redacted was not required to comply with its duty  
10 to give reasons. The tribunal did not accept that and that is what we see at 148(2)  
11 which Ms Berridge relied on. What the tribunal says there is that:

12 "The addressees of a decision ... are entitled to understand exactly the basis on which  
13 the decision is made ..."

14 The CMA can't (inaudible) a variant of the decision that leaves things out. That is just  
15 not the case at all. That's not what has happened here. There is no relevant  
16 redactions. There is no fair process argument. So the Meta case is a case dealing  
17 with a very, very different point.

18 Finally, I would like to say something briefly on Spreadex's note of this morning and  
19 particularly in relation to ground 2(c). I am hoping the tribunal has that note.

20 **MR JUSTICE SAINI:** Yes.

21 **MR LASK:** Paragraph 7 on page 3:

22 "If one puts aside the freestanding 2(a) and 2(b) rationality points, then it is right to say  
23 that the only rationality relied on under 2(c) is what Spreadex contends is the CMA's  
24 irrational decision that the most likely outcome was a sale to 10star. That overall  
25 decision was irrational because (a) it relies on a cumulative series of propositions; (b)  
26 as a matter of logic the only way that all of those propositions could have come true

1 together would be if there was a very strong likelihood that each of them individually  
2 would have come true; and (c) the evidence does not rationally support the conclusion  
3 that there was a very strong likelihood that each of them individually would have come  
4 true."

5 Now, as I submitted yesterday, we say ground 2(c) is misconceived. We say that if  
6 the CMA's conclusion on each of the three key questions was rational, adequately  
7 supported by the evidence, as we say it was, and if ground 1 fails, as we say it must,  
8 there is simply no proper basis on which to contend that the CMA's overall  
9 counterfactual conclusion was irrational. The overall conclusion is based on three  
10 underlying conclusions, all of which were rational and all of which were amply  
11 supported by the evidence.

12 As regards paragraph 7 two points. First, we struggle to see how this differs from  
13 ground 1. In any event all of the points I have made in relation to ground 1 I make in  
14 relation to this argument as well.

15 Secondly, and more specifically, it again misunderstands the standard that the CMA  
16 applies when addressing the counterfactual. I made the point a few minutes ago  
17 about the balance of probabilities still infecting Spreadex's submissions, and one sees  
18 it here. The CMA was not required to satisfy itself that all of these propositions would  
19 have come true or even that they were more likely than not. It was simply required to  
20 identify what it regarded as the most likely counterfactual. So to that end it was  
21 sufficient for the CMA to conclude, as it did, that all the propositions were likely. It  
22 simply didn't need to put its case any higher than that.

23 Unless I can assist the tribunal further, those are my submissions.

24 **MR JUSTICE SAINI:** I am just checking if we have any questions. Thank you very  
25 much.

26 Mr Jones.

1 **MR JONES:** Thank you.

2

3 **Reply on behalf of SPREADEX**

4 **MR JONES:** My Lord, the target is that the counterfactual identified by the CMA is the  
5 most likely counterfactual. So that's the target, but it is right to say that for reasons  
6 which Mr Lask has just touched on and which I am going to go into in a bit more detail,  
7 it is helpful to have in mind when they say most likely, what is the context in which that  
8 is said. You don't need to put a number on it, but is it something which is approaching  
9 balance of probabilities? Is it something much, much lower than that? That's the point  
10 Mr Lask was just been talking about.

11 I want, therefore, to take you to my reply, please, to our reply. It is in bundle B.  
12 Page 84 is where it starts, and just to remind you of what the background is on this  
13 particular debate. You will see at the top of page 85 we set out what we understood  
14 to be common ground and I still understand this to be common ground.

15 "The CMA must apply a 'balance of probabilities' test to the ultimate statutory question  
16 of whether the merger has caused an SLC ...

17 "The CMA's practice ... is to identify the 'most likely conditions of competition' as a  
18 counterfactual ..."

19 "In the present case [that was] sale to 10star."

20 Now, as paragraph 3 explains, in principle it is possible that you could identify  
21 a counterfactual as the "most likely outcome" but then when you come to ask whether  
22 or not there is an SLC, you take account of other possibilities and that is discussed,  
23 for example, in that B Sky B case in the Court of Appeal, but it is just an obvious point.  
24 Logically you could you take into account other possibilities and in that scenario the  
25 most likely outcome may be something less, possibly significantly less, than 50%  
26 probability.

1 On the other hand, paragraph 4, if there is only one possible outcome that has been  
2 identified by the decision maker and that is the counterfactual, then just logically what  
3 is implicit in that is this counterfactual is more than 50% likely, because otherwise they  
4 were not going to get home on SLC.

5 What the CMA said in its defence on this was "Well, there were other possibilities".  
6 We address those other possibilities at paragraph 5. Broadly speaking, what we are  
7 saying is these are not identified in the decision. Liquidation, which was referred to,  
8 was not a sensible point for the CMA to have listed in that particular list in the sense  
9 that liquidation is obviously what Spreadex relies on as the counterfactual. So it is not  
10 something which, if it were a possibility, would support the finding of SLC, but the other  
11 things they highlighted are just not in the decision as points which are relied upon  
12 when the CMA asks whether there is an SLC.

13 As we said at paragraph 6, for those reasons, although the final reports sometimes  
14 uses the language of the MAGs in describing the counterfactual as most likely, when  
15 you look at the reasoning it is actually what they are saying is the only outcome they  
16 are going to take into account. We can't challenge or take issue with other possible  
17 outcomes that the CMA has not described in the report and give it an opportunity to  
18 actually address.

19 So that's where it was left in the reply. Now, of course, we amended the notice of  
20 appeal and we did that because it is right to say we recognise that the counterfactual  
21 was done by reference to the most likely test, and I said that from the outset. So we  
22 have brought that into line with most likely, and if Mr Lask had been able to persuade  
23 you -- perhaps he has -- but if he has persuaded you that actually the decision relies  
24 on other possible outcomes, then fine. Our ground still stands, because we are  
25 targeting most likely and that is where we have amended.

26 However, has he given you material to persuade you that the decision does actually

1 rely on other possible outcomes? In my submission he hasn't. I thought when Mr Lask  
2 got to the Star Sports question, and, of course, I had made extensive submissions on  
3 the relevance of Star Sports and how it doesn't feature in the reasoning, my  
4 understanding of what Mr Lask was saying earlier today at first was the CMA relies on  
5 Star Sports as evidential support for these conclusions, in other words, not as  
6 a possible purchaser in its own right, but because the evidence that it gave was  
7 supportive of essentially the sorts of things that 10star had said. So that was my  
8 understanding until towards the end of my learned friend's submissions he came out  
9 with an even longer list of possible outcomes. I don't think I wrote them all down, but  
10 it was sale to 10star being a stronger competitor, a weaker competitor, the  
11 same competitor, sale to Star Sports on all of those possibilities, sale to them followed  
12 by liquidation.

13 None of it is in the decision, and a theme that I am going to pick up on a few times as  
14 I go through my submissions is the CMA does now need to be tied to this decision,  
15 because there are other aspects of my learned friend's submissions to you which  
16 speculated about what might have been going in ways which we have addressed  
17 historically and the CMA has no longer pursued. I will deal with that in a moment.

18 My point for now is that my learned friend can't just come up with new points on his  
19 feet and new ideas about how the CMA might have addressed these things. The CMA  
20 did not in my submission factor in this long list of other possible outcomes into its SLC  
21 analysis. That is why we have not been able to challenge it and we have not  
22 challenged it.

23 We challenge the finding that the most likely outcome was sale to 10star, and I do say  
24 that when you look at that in context, what the CMA in context is saying is that that is  
25 likely on the balance of probabilities, because they don't give any other possible  
26 outcome.

1 **MR JUSTICE SAINI:** (Inaudible), but does it help us to get into the balance of  
2 probabilities, because lawyers can't even agree with that means? Don't we just  
3 proceed on the basis of what's in the MAGs, because I am not sure how the balance  
4 of probabilities debate helps us. It is a diversion.

5 **MR JONES:** It helps in this way, because what I am coming on to is how strong does  
6 the evidence need to be? Mr Lask made a point to you at the start of his submission  
7 yesterday, which I agree with completely, which is the higher the threshold that you  
8 are trying to meet, the stronger the evidence needs to be. So he explained, and it is  
9 an obvious point, if you are in a civil trial, 50% chances, you need evidence which is  
10 going to meet that threshold. It is very different to a criminal context, beyond  
11 reasonable doubt. You would need much stronger evidence.

12 That, of course, is correct and it is at the heart of the compound probability point that  
13 I am about to come on to, but when you have that in mind as a starting point, what  
14 flows from that is that you need to know what the target is, and the target here is the  
15 most likely counterfactual. That is what the CMA is saying.

16 Now if by most likely counterfactual they meant something which is not that likely, but  
17 the most likely among a series of unlikely outcomes -- let's give it a number,  
18 20% -- then you can see the evidence needed to support that finding would be weaker  
19 than if they were saying "This is an overwhelmingly likely outcome".

20 So that's why although I am targeting "most likely", and I am going to come on to  
21 develop my submissions on that, it does help to have in mind the wider context and  
22 what do they mean by "most likely" and how does it fit into their SLC analysis? I do  
23 say it fits in at 50% essentially because they don't rely on anything else. They just  
24 have that as their counterfactual.

25 Now on the issue of compound risk my learned friend's core submission to you  
26 yesterday and just at the end of his submissions just now is that if each of the CMA's

1 individual conclusions on likelihood are rational, then the overall conclusion must also  
2 be rational.

3 That in my submission encapsulates the issue, and if you agree with him on that, then  
4 he will win that side of the case, but I say that that is not correct, and it fails to  
5 understand the point which we make about compound risk.

6 Now I am going to use numbers, and the reason I am going to use numbers is because  
7 it is just the easiest way of making the logical points that I rely on. I will come back at  
8 the end to just reiterate that I am not saying they had to do it in a mathematical way,  
9 but, my Lord, as in any judgment, no judge goes about their judgments by attaching  
10 probabilities to everything mathematically before then saying, "This has resulted in  
11 a more than 50% decision. Therefore the claimant wins", but that does not change  
12 the fact that behind the scenes one has to think about what thresholds one is looking  
13 at and one has to weigh the evidence carefully against that threshold. So I am using  
14 numbers not for any reason other than it makes it easy for me to make these logical  
15 points.

16 Now if one takes as a starting point 50%, balance of probabilities, and one is looking  
17 at three steps -- my Lord, I think the points I am making are obvious, but I am making  
18 them because I think Mr Lask disagrees with them, so I am going to run through them  
19 again.

20 There are three events that one is considering. Let us say at the first stage the  
21 decision maker says, "The evidence supports my conclusion that this event is likely to  
22 happen at 50% probability". They then turn their mind to the next one and say, "The  
23 evidence supports my conclusion that this is likely to happen on a 50% probability".  
24 They then turn round to the third one and say the same thing.

25 Now each of those conclusions could individually be rational, but for all of them to  
26 come true together you would have to consider the cumulative probability, and if in this

1 example that I'm giving you they were three truly independent events, then to get to  
2 the conclusion that there's a 50% likelihood of them all coming together -- all coming  
3 true together, you would have to say that the evidence on each of them was strong  
4 enough to predict on each of them that it would come true with 80% confidence, or  
5 perhaps you would say 90% on one and 70 on another, or 100 on one and the others  
6 could be zero.

7 But that is my point, that the evidence has to be stronger when you have a series of  
8 different propositions. There is an important difference between saying the evidence  
9 is strong enough for this on its own, this on its own and this on its own versus the  
10 evidence is strong enough to say all of them would have come true.

11 Now the CMA did not need to attach mathematical probabilities, and that applies in  
12 any case. I am not saying that to get out of my mathematical example. In any case  
13 where the CMA is applying in the ordinary course of things a 50% likelihood, if they  
14 are looking forwards and predicting what is happening in the future, they don't need to  
15 say it's a 50% likelihood. They look in a more nuanced, textured way. I completely  
16 accept that.

17 But they needed not to make the mistake which I say they have made and Mr Lask  
18 has reiterated of saying if you look at these things in a piecemeal way and on a rational  
19 basis conclude that the evidence supports a conclusion on likelihood on each of them  
20 individually, then we can just drive them all together and say that logically they would  
21 all have come true.

22 That is a logical error in my submission, and that logical error flows through into many  
23 of the points which my learned friend has submitted to you, because when he took you  
24 through the decision, he emphasised to you at various points that the CMA was  
25 carefully weighing the evidence and was recognising ambivalence.

26 That is right, but that is for each of them individually. That is our point. So, yes, when

1 they came to look at each of the individual stages, they looked at the evidence relevant  
2 to that particular stage and they did put it all in the mix and they did balance it. I accept  
3 that, but that is not our criticism. Mr Lask was wrong to say that we had criticised  
4 those stages on that particular basis. We hadn't.

5 Our criticism is that when you run those six largely independent, although we have  
6 acknowledged there are cross-overs between them, six different hurdles, when you  
7 look at those and try and stack all of those up next to each other, that is the point at  
8 which the CMA did not do the exercise that we say needed to be done of considering  
9 the cumulative possibility of all of them coming true.

10 **MR JUSTICE SAINI:** Can I just ask what's the difference then between your ground  
11 1 and your ground 2(c)?

12 **MR JONES:** Ground 1 is they didn't do it. Ground 2 (c) is if they did do it, it was  
13 irrational, because the evidence doesn't support it, which is why on ground 1  
14 Ms Berridge made the points about reasons, because it just feeds into a submission  
15 that if the CMA had done this, you would expect to see the reasoning for it in the  
16 decision, whereas, of course, you don't see that reasoning in the decision, but what  
17 you do see is these references to conclusions have been reached on balance, to  
18 things being likely, and, importantly, all of the passages which recognise the  
19 ambivalence and which recognise the complexity are things which we rely on.

20 Why do we rely on them? Because what they serve to emphasise when you read  
21 them in the decision is that there is considerable uncertainty at each of these six steps,  
22 and it is because there is such uncertainty at each of these six steps and because we  
23 say the conclusions on each of the steps are reached on balance -- they don't just use  
24 the word "on balance" without thinking about it. If you read it in context, broadly  
25 speaking each of these sections -- I say there are six. The CMA cuts them into three,  
26 but some of them have subsections, as you know. So you read what the CMA is

1 saying and broadly speaking they are saying, "Well, there are points on both sides.  
2 The evidence is difficult. It's a bit ambivalent", but something like, "On balance this is  
3 our conclusion".

4 That is why we positively rely on that, because that is what we say emphasises that  
5 the CMA has not said at each of these six stages the chances of this coming true are  
6 very high, so high that all of them together would have come true. They have said,  
7 "Well, on balance, ambivalent, different things to factor in on each side".

8 Essentially, my Lord, that is obviously our key point and it is our key point on ground  
9 1 and 2. They do overlap and I accept that. In a way that is why is our notice of appeal  
10 is drafted as it is, where grounds 1 and 2 are just explained at the front and then  
11 decisions explained and described and we simply summarise what grounds 1 and 2  
12 are.

13 There is a reason why my Lord keeps asking me what's the difference between them  
14 and the reason for that is they are really similar and they really do overlap and I fully  
15 accept that, but I think they are two logically distinct points, but they are really similar,  
16 but there is two logically distinct points, which is the CMA either did not appreciate that  
17 it needed to do this, and that is what we have called ground 1; or if it did appreciate  
18 that it needed to do it and did it, then its conclusion was not rational on the basis of  
19 the evidence before it, because we can see how delicately balanced all of this is in  
20 their own discussion. It is just very hard to see in that context how they could have  
21 reached the conclusion that this was the most likely outcome overall.

22 I see the time. It would be I am sure in everyone's interests if I could get through this  
23 before breaking, but I am not sure that is going to be possible I'm afraid.

24 **MR JUSTICE SAINI:** I am not expecting you to do it in five minutes. How long do you  
25 think you will need?

26 **MR JONES:** No. Well, I was going to ask if we could sit a bit late to 1.10 or so, but

1 I don't think -- I am not going to get through it in that time, my Lord. So it may be  
2 sensible to ...

3 **MR JUSTICE SAINI:** That's fine. Don't worry about that. There's no hurry. So let's  
4 reconvene at 2 o'clock.

5 **(12.56 pm)**

6 **(Lunch break)**

7 **(2.00 pm)**

8 **MR JONES:** My Lord, I have taken time over the adjournment to make sure I am not  
9 detaining us on points you already have and that I have already made. I don't need to  
10 say anything more unless it would help on grounds 1 and 2(c). I think that that  
11 discussion that we had just before the break really covered what we wanted to say in  
12 reply on those topics.

13 So I just need to pick up on the 2(a) and 2(b) points essentially. 2(a), we are looking  
14 at FDJ's objective in the sale process. Before coming on to the answer which FDJ  
15 gave and which the CMA we say mistakenly relies on in the decision it is important to  
16 keep in mind that before that point FDJ had answered several times the question of  
17 what they would have done if Spreadex had not bid.

18 I just want to remind you of their first answer to that. It is at page 444, where back in  
19 January '24 they said in answer to question 3, picking it up halfway down:

20 "Only Spreadex had all the pre-requisites to operate overnight without external  
21 support. In our view maintaining these TSAs even with same bid value would have  
22 questioned us on the overall economics of the sale versus closing the business.  
23 Therefore an in-depth analysis would have been asked prior to making any decision  
24 to pursue."

25 As you know, because I showed you, they made the same point on several later  
26 occasions. I am going to go back to one of those in a moment, but just pausing here,

1 | if one asks the question, "What does it mean to question the overall economics of the  
2 | sale versus closing the business?", sale, clear. Work out the value of the sale. There  
3 | is the price that you are going to be paid. There is the divorce costs. Closing the  
4 | business, well, how would you assess the economics of closing the business? In my  
5 | submission it only can mean we would have looked at things like redundancy costs,  
6 | on the one hand, and assets, on the other hand. Keep in mind that the assets here  
7 | are not complicated or hidden away assets. We are talking about debts and cash.  
8 | That must be what it means, that they would have looked at those things; in other  
9 | words, liquidation. So we are saying liquidation value, but that is not meant to be  
10 | something enormously complicated. It is just what are going to be the costs of closing  
11 | this down and what cash are we going to get out of it?

12 | We don't see what else that could mean in that context. I don't think my learned friend  
13 | offered an answer to that. While we are looking at this page, of course they are not  
14 | saying here that whatever the bid that they were given from any potential purchaser  
15 | they would have worked out the economics of closing the business. They didn't do  
16 | that with Spreadex's bid, and you can understand that, because they know what their  
17 | balance sheet is. They can look at the bid that comes in. Spreadex's bid was  
18 | obviously high enough for them not to need to think about the economics of closing  
19 | the business. So they didn't need to think about it and they didn't.

20 | If we look, please, at page 504, this is where Sporting Group were asked about this.

21 | At the bottom of 504, line 25, the answer:

22 | "I think we would probably explore 10star again the other strategic options of closing  
23 | the business or some kind of restructure of the business."

24 | Then the question is:

25 | "Have you or FDJ at any time estimated Sporting Index's liquidation value ..."

26 | Actually let's just read the full question out:

1 "Okay. Okay. I am going into that closure scenario. Have you or FDJ at any time  
2 estimated Sporting Index's liquidation value and the costs of its liquidation to arrive at  
3 some net liquidation proceed value?"

4 The answer is:

5 "FDJ might [do] that separately ... but ... it is not something that we look at ..."

6 So the question of the CMA there is asking the logical and correct question, because  
7 he realises that closure equals liquidation value, and the answer that comes back is  
8 not, "No, you have misunderstood. When I said closure, I didn't mean liquidation.  
9 I meant some different thing". The answer is, "That is not something that we would  
10 have done". What is said is, "Well, I'll pick it up essentially with FDJ, because the  
11 people aren't on the call".

12 They did pick it up with FDJ and that's what Mr Lask showed you at page 613. If we  
13 go to that next, please. At 1(c) they didn't look at liquidation because sale was  
14 preferred, which I accept, and of course, they didn't look at liquidation. They had  
15 Spreadex's offer on the table. They didn't need to look at liquidation value.

16 "1(d). Had Spreadex not submitted a bid during the 2023 B2C sales process, FDJ  
17 would have continued engaging with other interested third parties (including 10star  
18 and Star Sports) and explored alternative transaction opportunities (a list was  
19 previously provided). A liquidation value would likely only have been considered if no  
20 viable sale options had materialised through this process."

21 The question then is: what do they mean when they say no viable sales options had  
22 materialised? What's a viable sale option? We know that Spreadex was a viable one,  
23 because Spreadex was the bid they went for and it was a bid that didn't involve working  
24 out liquidation value. They didn't require them to look at the economics of closure.

25 In my submission what they're saying here and the only logical thing for them to be  
26 saying here is, "We would have seen if we could get any other offers which didn't

1 require us to look at closure value like Spreadex's didn't, so an offer which is high  
2 enough that we don't need to go looking at closure value".

3 If they meant something different, it would be inconsistent with all the things they had  
4 said previously, but it also just would not make logical sense to say, "We would have  
5 just tried to get a bid high enough to cover divorce costs associated with sale", which  
6 I think is how Mr Lask reads this, how the CMA reads this.

7 One has to ask if that is this means, why would they ever be working out a liquidation  
8 value? They are saying in this bit that they would in some contexts have worked out  
9 a liquidation value. That's part of what their answer is, but why? If the CMA's reading  
10 is right, if they only want to recover more than the divorce costs, as I'm calling them,  
11 on a sale, why would you ever be working out a liquidation value, because if you have  
12 a bid in front of you and you're going to compare it to divorce costs, that's all you do.  
13 You would not need to be working out liquidation value.

14 So it doesn't make sense on the face of the document or in the context, and it also  
15 obviously doesn't make commercial sense self-evidently. Now Mr Lask realises that  
16 it doesn't make commercial sense -- his approach doesn't make commercial sense,  
17 which is why he then speculated about possible reasons why they might have been  
18 willing to sell for less than liquidation value.

19 What he suggested was that they would or might have done a deal for less than  
20 liquidation value because they wanted to get it done quickly. That is not something  
21 that is said in the decision. It is for good reason. I am just going to show you why,  
22 why it is not in the decision and why there is good reason not to be there.

23 Mr Lask pinned his submission on paragraph 5.39. If we just look at that, please. It  
24 is on page 40. Now you might recall it is actually dealing with a different point. The  
25 CMA says here:

26 "We also consider it unlikely that FDJ would have concluded a sale of the business if

1 | it could not have done so with an alternative bidder."

2 | So someone apart from Star Sports or 10star.

3 | "Although [they] would likely have reached out to other potential purchasers, there was  
4 | very limited interest for business under the 2023 sale process. We note that FDJ had  
5 | considered multiple scenarios for the business, but our view is that it was unlikely that  
6 | it would have decided to pursue a separate sales process under a differently  
7 | configured transaction perimeter given, (i) its incentives to quickly dispose of the  
8 | business and (ii) its willingness to engage in this would likely have been impacted by  
9 | the limited interest ..."

10 | Now, as you see, that is dealing with a different question about whether they would  
11 | have possibly pursued sale to some other purchaser, not an alternative bidder.  
12 | Mr Lask took you to it because it has in that (i) a reference to "incentives to quickly  
13 | dispose of the business". He took you to another document later on where he made  
14 | a similar submission. He developed that into a submission that that may have been  
15 | why they would have been willing to sell for less than liquidation value.

16 | Now Mr Lask's point was made by the CMA in the original decision. So if you turn,  
17 | please, to page 681, and just by way of context the CMA in the original decision also  
18 | didn't think that it needed to be assessed against liquidation value, but for different  
19 | reasons. They didn't have the answers that they now rely on. So they had different  
20 | reasons for saying they didn't need to use liquidation value. Those have now all fallen  
21 | away, but one of them was this one at 5.86:

22 | "We first note that FDJ told us that it was incurring significant losses from continuing  
23 | to run the business and that as part of any economic evaluation of the alternative  
24 | bidder's bids it would have considered the benefit of quickly offloading a non-core and  
25 | loss-making business by completing a deal more quickly. Our view is that a simple  
26 | comparison of headline bid values understates the value to FDJ and Sporting Group

1 of concluding a sale of a non-core and loss-making business."  
2 So that's Mr Lask's point, but it doesn't appear in the decision anymore, and it doesn't  
3 appear because it was one of the points that was challenged by Spreadex last time  
4 round. They then obviously got the evidence that is referred to, but the main logical  
5 point that they were making in the last round was if FDJ had just been trying to get out  
6 of this business quickly, that would actually tend towards liquidation, not towards sale  
7 with anyone, because the quickest way to get out of the loss-making business would  
8 be to close it down, especially given, as is said in this paragraph, it is loss-making and  
9 they did want to get out of it. They did want to stem the losses.  
10 So the point has deliberately dropped by the CMA and it's not part of our challenge,  
11 but, as I said at the start of my submissions, it shows again the problem if the CMA  
12 shifts its position and moves the goalposts on its reasoning.  
13 Where it leaves us on this particular topic is that there is not a sensible commercial  
14 explanation for the theory that FDJ would have evaluated bids not against the  
15 economics of closing, which is what it said, which means liquidation, but rather only  
16 as against whether they would cover the divorce costs.  
17 That is the context in which you then finally come to the document at page 629 -- we  
18 may not need to turn it up, but just to remind you what we are talking about -- where  
19 they talk about looking at closure costs in that way. As you know, my submission there  
20 is it just can't bear the meaning that the CMA attaches to it when you keep in mind the  
21 context, when you keep in mind the question that they were asked was a question  
22 which built in liquidation value assumptions. That was the basis on which they  
23 answered it, and they reiterated -- when they were asked, they reiterated in their  
24 answer that they were thinking of the particular hypotheticals that were put to them.  
25 Now, of course, all of that is irrelevant if this does not play through in the CMA's  
26 decision. I accept that obviously there is the further question, "Does any of this

1 matter?" given that the CMA goes on to say that the 10star bid was anyway above  
2 liquidation value, and I will just reiterate that Spreadex's case is that it does matter. It  
3 remains a very important consideration, because the closure cost benchmark that the  
4 CMA adopts continues to act and is the main benchmark, the main comparator that  
5 they use when they come to assess whether the 10star deal would have been  
6 accepted.

7 They say that expressly at page 46, paragraph 5.66, when they are explaining why  
8 they don't really need to look at liquidation value. It is at the end of that paragraph:  
9 "We therefore consider that the closure costs associated with the sale to the alternative  
10 bidders are the relevant comparator when assessing whether FDJ would likely have  
11 proceeded with a sale or closed the business in the counterfactual."

12 That comparator is then, as you know, carried through to their overall assessment on  
13 page 76 at paragraph 5.154.

14 2(b). Did 10star realise that the business was losing £2 or £3 million? Mr Lask took  
15 you back to page 91 and at paragraph 5.189 emphasised that when the CMA was  
16 here discussing whether or not the alternative bidders may have had confidence that  
17 they could reduce costs, it wasn't approaching it on the footing that they necessarily  
18 realised that the business was losing money. So he said they were not relying here  
19 on a state of mind. They were simply saying that these businesses would have  
20 realised or would have thought that they could have saved costs.

21 As you know, my answer to that is well, yes, but it is obviously relevant to those  
22 potential acquirers when they decide whether to make a bid and whether to pursue  
23 a bid whether the business is actually losing money and, if so, how much money.  
24 I think I made the point that it is one thing to think that you can cut costs if you're buying  
25 a business which is breaking even and it's quite different to think you can cut costs  
26 and make a profit if you are buying a business which is already losing £3 million per

1 year.

2 My learned friend then sought to sideline paragraph 5.191 on the basis that it was just  
3 responsive to something Spreadex had said and was not really the core of the CMA's  
4 reasoning, but it was responding to a critical point that Spreadex had made, and for  
5 the reason I have just given it is critical to ask what did they know at the time they  
6 made the bid? So the CMA was right to engage with that. It just reached the wrong  
7 conclusion about it.

8 Now if we can go back to page 438 just to remind you of the e-mail:

9 "It will be a very small business which you tell us only broke even last year."

10 My simple question is why would they say that -- why would they use that form of  
11 words if they now thought that it was losing millions of pounds a year? Mr Lask's  
12 answer is, "Well, they are just reporting what they have been told". He has to say that.  
13 That's what the decision says. So Mr Lask has to stay with what the decision says on  
14 this particular point, but why? It simply doesn't make sense if they understood at this  
15 time that it, in fact, was losing millions of pounds.

16 Now on page -- if we go back to page 434, as I understand it, what is being suggested  
17 is that when they read the email about the run rate, they should have -- not should  
18 have -- did, in fact, take from that that the costs had risen from £10 million the previous  
19 year, which is what they had been told, to suddenly £12 million plus in the few months  
20 at the start of 2023.

21 Now just as a starting proposition that is quite startling. Why would costs suddenly  
22 have gone up £2 million over the course of -- on an annualised basis but over the  
23 course of a few months?

24 Secondly, if that really was what they took from this e-mail, one would expect them to  
25 have raised it in some way and asked the question, "Why have costs gone up suddenly  
26 from 10 million to 12 million over the course of a few months?"

1 Thirdly, in my submission the answer to those questions is they didn't raise that point  
2 because that is not how they understood it. They actually did find it difficult to follow.  
3 You see that from Mr Powell's e-mail at the top where he tried to get more clarity on  
4 what was being said. You will recall that he was speculating about whether it may be  
5 something from last year plus a TSA added on, but when you see that in context, if  
6 you dig into the numbers, that is wrong, because the so-called 10 million from last year  
7 itself includes a TSA. So there was a misunderstanding about what he was being told  
8 not surprisingly, because what he had been told was very unclear.  
9 But apart from all of those points, when you then look again at page 723, which is  
10 an e-mail which postdates all of this, you will remember that Mr Powell was  
11 still -- I have just jumbled the timeline ever so slightly, so let me just correct that. Sorry.  
12 It is the previous one, 720. Sorry. It took me a while but I have got there finally. 721  
13 is where I wanted to go. 24th March at 13.28:  
14 "Still waiting for the detail to bridge the costs."  
15 So he still at that point in my submission had not understood that what they had been  
16 told previously about the business breaking even was incorrect and he was still trying  
17 to understand the figures that had been given.  
18 Finally, one short point, but I just want to pick up one comment that Mr Lask made  
19 about the risk of financial failure. He said the CMA did not find that the business was  
20 at risk of financial failure.  
21 If you just look at page 38, please, of the decision, para 5.32 and 5.33 explain why it  
22 was not at risk of financial failure. I just invite you to read that.  
23 **MR JUSTICE SAINI:** Financial support effectively.  
24 **MR JONES:** It is financial support. It doesn't tell you anything about the health of the  
25 business. That is all it is.  
26 Unless I can be of further assistance, those are my submissions.

1 **MR JUSTICE SAINI:** I'll see if my colleagues have got a question.  
2 Thank you all very much for your very helpful arguments and for being so succinct.  
3 We will obviously reserve our judgment. I hope it is a matter of weeks, not months.  
4 I am trying to think if there's anything else I need to ask you. I don't think there is.  
5 Thank you.

6 **(2.24 pm)**

7 **(Hearing concluded)**

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### Key to punctuation used in transcript

--	Double dashes are used at the end of a line to indicate that the person's speech was cut off by someone else speaking
...	Ellipsis is used at the end of a line to indicate that the person tailed off their speech and did not finish the sentence.
- xx xx xx -	A pair of single dashes is used to separate strong interruptions from the rest of the sentence e.g. An honest politician - if such a creature exists - would never agree to such a plan. These are unlike commas, which only separate off a weak interruption.
-	Single dashes are used when the strong interruption comes at the end of the sentence, e.g. There was no other way - or was there?