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IN THE COMPETITION APPEAL TRIBUNAL

Case Nos. 1216/4/8/13
1217/4/8/13

Victoria House,
Bloomsbury Place,
London WC1A 2EB

11th September 2013

Before:

MARCUS SMITH QC
(Chairman)
HERIOT CURRIE QC
DERMOT GLYNN

Sitting as a Tribunal in England and Wales

BETWEEN:

GROUPE EUROTUNNEL S.A.

Applicant

-v-

COMPETITION COMMISSION

Respondent

- and -

THE SOCIÉTÉ COOPÉRATIVE DE PRODUCTION SEA FRANCE S.A.
DFDS A/S

Interveners

THE SOCIÉTÉ COOPÉRATIVE DE PRODUCTION SEA FRANCE S.A.

Applicant

-v-

COMPETITION COMMISSION

Respondent

- and -

GROUPE EUROTUNNEL S.A.
DFDS A/S

Interveners

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HEARING
DAY TWO

APPEARANCES

Mr. Nicholas Green QC and Mr. Alistair Lindsay (instructed by Pinsent Masons LLP) appeared for the Applicant, Groupe Eurotunnel S.A. ("GET")

Mr. Daniel Beard QC and Mr. Rob Williams (instructed by Reynolds Porter Chamberlain LLP) appeared for the Applicant, The Société Coopérative De Production Sea France S.A. ("SCOP")

Mr. Paul Harris QC, Mr. Ben Rayment and Mr. T. Sebastian (Instructed by the Treasury Solicitor) appeared for the Respondent.

Mr. Meredith Pickford (instructed by Hogan Lovells International LLP) appeared for the Intervener, DFDS A/S.

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THE CHAIRMAN: Yes, Mr. Beard?

MR. BEARD: Yesterday I was starting on Ground 5 and had run through certain relevant case law and started on parts of the documentation. I have explained that the Remedies Notice provided by the Commission had not made any mention of a prohibition remedy. The Supplementary Remedies Notice had had a very limited mention of a possible prohibition remedy. The SCOP had come back in emphatic terms saying it was most concerned about those sorts of issues if they were going to be pursued. Then, as I say, we had nothing until the working paper, but of course the working paper was not provided to us.

I was going to turn now to the working paper which is in bundle 2B, tab 33. The first thing to notice is - I am tempted to say "never mention the quality, feel the width" - that in contrast to the Supplementary Remedies Notice, which runs to three or four pages, what we have here is something of an epic text on the nature and consideration of remedies in this matter. The main part of the analysis is over 45 pages long. It is dealing with, first, issues concerning possible divestiture remedies, and then if one turns on to p.29 one looks at issues concerning the possibility of prohibitions on certain routes. So, even at this stage, the more extensive consideration is of divestiture remedies, but nonetheless what we get here is consideration of prohibition on routes. Here, for example, we have got recounted the brief but emphatic concerns articulated by the SCOP at para.87, and there is DFDS and P&O. If we turn over the page there is "Our assessment" of these matters. Then if you look at para.94:

> "We considered the SCOP's view that a remedy prohibiting the operation by GET of ferry services at the port of Dover would contravene the Order. As set out in Appendix B we do not agree with the SCOP's view because we do not accept that the Order provides for the preservation of the employment of the SCOP's members."

So here we have a section of the operative reasoning in this paper which is directly taking issue with the position outlined by the SCOP.

Then we turn on to appendix B, which is at p.2.1154. This whole appendix running to 17 pages is all about the assessment of the effect of the French Commercial Court's Order on the Commission's ability to implement structural remedies. It says:

> "We have received representations from GET, SCOP and DFDS …"

They are relatively limited at this stage, but there are submissions nonetheless on the inalienability clause and other matters.

I am not going to go through all of this, just highlight one or two bits. Paragraph 5:

"The SCOP also submitted that a remedy requiring GET to cease operating ferry services into Dover would be incompatible with the Order because it would not protect GET's labour related commitments and would not avoid any speculative transaction to the detriment of creditors."

Then one turns over the page and sees at para.8:

"By contrast, DFDS made the following points …"

So these were DFDS's submissions which we later found out were based on a legal opinion that DFDS had put to the Commission. Then we have got ----

THE CHAIRMAN: Is that the document that is referenced in the excised footnote 62?

MR. BEARD: I believe that is right. Yes, it is. The reason we can work that out is because effectively this appendix B to the working paper in the main became appendix J to the report. When you look at the footnote in appendix J, footnote 5, you can work it out. I am sure the Competition Commission will correct us if we are wrong, but that is our working guess for the moment.

THE CHAIRMAN: Appendix J, did you say?

MR. BEARD: Appendix J, yes. This illustrates the point I was going to make a little later, that this appendix B is just transposed into appendix J.

THE CHAIRMAN: Yes, I see.

MR. BEARD: There are no doubt certain specific differences, but in the main.

THE CHAIRMAN: I can see where you draw the inference anyway, Mr. Beard. We will leave it at that.

MR. BEARD: So you have got views expressed by SCOP and Eurotunnel, and then you have got, on the other side, the DFDS view relying on their legal implication.

Then we have got a section on the implications of the insolvency regulations. Then we move on to the interpretation of the Order at para.12, "DFDS's Legal Opinion stated" - so here, as soon as we get into discussion of the inalienability clause, we are straight into the DFDS legal opinion. That is referred to again at para.15, para.17, para.19. It is the underlying theme that the Competition Commission is considering, and indeed relying upon, the analysis provided by DFDS. It is adding some analysis of its own in relation to the interpretation of a French law Order. It is there setting out quite a detailed analysis of what it thinks are the key points for the interpretation of the Order.

It goes on to deal with issues even going to tax liability under French law. I just pick that up in para.19(b). It may feel like a somewhat abstruse matter, but it is a clearly a matter the

Competition Commission thought was important at this point. Interestingly, if one turns over the page, 19(b), part way down:

> "… the SCOP has not provided an analysis of the origins of and/or the reasons for the tax liability that would support their position."

So they are saying specifically here, "One of the reasons we have reached these sorts of conclusions is because we have not heard from the SCOP on these sorts of matters".

Then we move on to a subset of consideration of interpretation in the Order, the extent to which the Order requires the continued operation of the ship by the SCOP. Then there is a brief reference to what the SCOP has said in submissions so far.

THE CHAIRMAN: Sorry, just to interrupt. I think it is inferentially very clear, but I just want it clear on the transcript, SCOP was not asked to provide any kind of analysis of tax liability via the CC?

MR. BEARD: No. Then we move on to the extent to which the Order requires the continued operation of the ships by the SCOP. Then this section draws on the preceding analysis that has considered the DFDS opinions, the submissions and so on and gone through that detailed reasoning, and you can see that, from 22, above. "As explained in the section above, inalienability clauses are limited in purpose …" and then in 23 reference is made to the DFDS legal opinion and then 25 we are back into considering the SCOP's argument that the order should be interpreted to require the continued operation of the vessels by the SCOP for the duration of the inalienability clause and there is an argument about whether or not the inalienability clause is to be treated as global and indivisible – in other words requiring the continuing employment of the SCOP employees, and the Competition Commission going through SCOPs submission and making its own observations about various matters then reaches a conclusion at 29, and this is interesting, not only for the emphatic nature of the conclusion being reached in a working paper, which we were not provided with, but just going back to one or two of the points that were made earlier in relation to ground 2 about the nature of the transaction.

> "We therefore consider that the Eurotunnel's 'global and indivisible' offer …"

which was put forward:

> "concerns only the package of assets and this should not be read to include the employment of the SCOP."

In other words the predicate of the CC's reasoning here is that the SCOP employment is no part of that transaction which has been the focus of the jurisdiction issues.

"30. In addition we noted that the commitments of Eurotunnel to recruit former SeaFrance employees through the SCOP is subject to a caveat:"

so they are then passing the nature of the commitments offered by Eurotunnel.

"31. We found that there were inconsistencies between the interpretation of the Order put forward by the SCOP and the commercial realities presented to us by Eurotunnel."

The interpretation of the order put forward by SCOP and Eurotunnel's view about the commercial realities, not the SCOP's view about the commercial realities:

"and reflected in the commercial arrangements between Eurotunnel and the SCOP."

- in other words Eurotunnel's submissions about those contractual arrangements, not the SCOP's, the counterparty to those contractual arrangements.

Then 32 talks about extended line of SCOP's argument, and then in the end it is all dismissed. So what we have here is a detailed working paper, focusing on the SCOP's arguments, deciding to reject them, accepting the legal submissions of others, considering the submissions of Eurotunnel in relation to a matter that was clearly of the highest importance to the SCOP and in circumstances where Eurotunnel may well be taking a very different line from the SCOP in relation to the analysis going to remedies, and plainly people like DFDS were as well, and yet it was not shown to the SCOP, we only get to see it when Eurotunnel includes it in its appeals documents.

What was remarkable was that this was shown to Eurotunnel. So the SCOP is massively affected by the proposed remedies. It was plainly interested and plainly concerned that it is not shown these documents.

If we could turn to the witness statement of Professor Smith at bundle 1, tab 4, and paras. 49 and 50 at p.16 (internal numbering).

"On 29 April 2013, the Group having considered responses to the Notice of Possible Remedies published on 19 February 2013 and the Supplementary Remedies Notice published on 02 April 2013 and formed a provisional view on the preferred remedy. Inquiry staff sent the remedies working paper to GET for comment."

No criticism of that.

"At the same time, GET was informed that the CC intended to send the paper to SCOP for comment and invited it to identify any material in it which it did not want to be disclosed to SCOP."

Then he says:

> "It is worth noting that SCOP had not requested to see the remedies working paper at any point during the remedies process."

Let us just deal with those two points. First, the CC was right to have the intention to send the material to the SCOP, it was wrong to change its mind. As to the asking it is a funny point to raise given the emphatic nature of the response that the SCOP had given in the supplementary remedies' notice as to its level of concern about these matters, and the idea that it could properly have put forward all its considerations in relation to these matters, in relation to a short remedies notice which did not engage with its arguments in any detail at all. In any event the SCOP, of course, does not know what is going on in relation to any working paper pertaining to remedies because it had not seen it, so to say: "You have not asked for it" just does not take you anywhere. The SCOP have made very clear at all times that it wanted to engage with the Competition Commission. Of course, none of this changes the fairness of what the CC did.

Then there is a passage that explains that Eurotunnel hopped up and down and said: "No, no, no, we do not want this document going to the SCOP at all – not at all". I will leave the Tribunal to read that passage, but there is a bit redacted just at the bottom.

> "Therefore GET requested that the CC should not disclose the working paper to any third party …"

THE CHAIRMAN: We will read it.

MR. BEARD: I would emphasise the words in the second line that is marked yellow: "In particular there was …"

THE CHAIRMAN: Yes.

MR. BEARD: Then we get to para.50 and these are the reasons for the Commission's change of mind. First, it says that "we do not have to disclose all working papers" – that may or may not be right in relation to issues of fairness, but it is immaterial here because it was disclosed. Secondly, it is not always the case that we will disclose matters to third parties – again, that may or may not be the case, but the Competition Commission rightly recognised that the SCOP was such a person to whom this should be disclosed initially at least. But then it says that "given that the CC regarded SCOP and GET as associated persons" – how on earth does this matter? This is another instance of the Competition Commission getting into a muddle about the concept of associated persons.

There is a wonderful irony here: if SCOP really is an associated person then effectively it is being deemed a merging party at which point it is plain that it should have had this material

disclosed to it. But it was not because the Competition Commission seemed to have got itself into some view that there was a miasma, and made up of that cloud were Eurotunnel and SCOP in some way, and that if you provided material to the Eurotunnel you were somehow providing it to the SCOP, or Eurotunnel would be providing all the responses that were appropriate, and fair procedure would be met in relation to SCOP. It is somewhat ironic, given that the CC recognises that Eurotunnel's submissions were not suggesting that there was some perfect congruence of interests, to put it at its very lowest. Then we have got the situation further down, so there is no justification there in relation to associated persons. Then we have got the two rounds of public consultation, well, we have dealt with that. That was the Remedies Notice that never mentioned the prohibition remedy, and then the Supplementary Remedies Notice that did very very briefly — and that is it.

MR. HARRIS: Can you read the rest of it?

MR. BEARD: I am sorry, I am perfectly happy for the CC to read —

THE CHAIRMAN: What do you want us to read, Mr. Harris?

MR. BEARD: "Sensitivity of the information relating to Eurotunnel in the working paper and the potential adverse impact on Eurotunnel's share price if that information were to be provided to a third party". Well, what are the interests? What are the concerns about sensitivity and confidentiality in relation to legal submissions being made in relation to remedies, here? And if there were any such concerns, that was not a basis for withholding the entirety of the document. If there were particular bits that should have been redacted, fair enough. It is very hard to see why a body so affected as SCOP was should not have seen this document at all and should not have seen all of the bits that are concerned with engagement with its arguments and its interests. It was an important document which proposed arrangements catastrophically adverse to SCOP, and it was imperative, as a matter of fairness, that it was able to comment on it and not just be left with only having seen the Supplementary Remedies Notice.

There is a second point here. If you are going to consult, you have got to do it fairly, and it was plainly unfair to provide the document to Eurotunnel and not to the SCOP — and of course this background sets out why it was that withholding the DFDS legal opinion was also so important. We are dealing with French law issues interpreting a French law judgment. Yes, as the CC recognises at para.10 of appendix J, it would be a matter that in the end an English court would consider, but that is the jurisdiction, not the law. In order to understand the proper arguments on interpretation of that Order, you needed to have the French legal opinions that were being put forward and put them to your French lawyers to

comment on them. That is what we have only just been able to commence doing in relation to these matters. Key underlying document, it was not provided to us in addition to the working paper. It was quite wrong not to do when such reliance was being placed on it because, as I say, that appendix B of the working paper is translated into appendix J. It is the reasoning that dismisses the SCOP's arguments and it was not fair to do so.

I just want to mention two things. The SCOP did not sit on its hands all this time. As is made clear in the witness statement of Monsieur Doutrebente, when we heard from Eurotunnel that this prohibition remedy that had been vestigial in the Supplementary Remedies Notice appeared to be taking on a greater life, we provided a brief letter saying, "Look, these issues create real concern for us". That is to be found (just for your notes) at bundle 2C, tab.37 at p.2.1347. And, of course, in addition we have subsequently gone off to the French court and asked for clarification of the Order, but the court said, "Well, it is inadmissible", although as Mr. Genin indicates, there are some useful bits in there. But we have provided the statement from Monsieur Genin, which is to be found at tab.7 in the pleadings bundle. That witness statement just sets out that there are things that we would have wanted to say, and just to summarise this, the essence of what Monsieur Genin is saying in paras.12 and 15-20 is that the analysis put forward by DFDS of the Order was wrong. You had to read the Order closely intertwined with the interpretation of the liquidators' report on the bid, and that liquidators' report looked at the inter-action of the commitments in relation to employment and the acquisition of the vessels. And that is why the Order contains provisions requiring review of the employment situation on a six-monthly basis. That, we say, as a matter of French law was something that properly should have been considered by the CC. Whether the CC wants to take its own French law legal advice is a matter for it, but what is wrong is to have taken on board one party's French law advice, an intervener's advice, place such reliance on it to the detriment, fundamental detriment, of one of the key parties to the proceedings.

THE CHAIRMAN: We have certainly got that point, Mr. Beard. You are into the last couple of minutes, now, I think.

MR. BEARD: By my reckoning I just had over half an hour and I started at five past. I am going to zip on to ground six. I am going to have to deal with this very quickly. If we could turn to —

THE CHAIRMAN: Just before you do move on, obviously you did not see this working paper.

MR. BEARD: Yes.

THE CHAIRMAN: You also did not even know of its existence, is that right?

MR. BEARD: I do not know that we did not know of its existence. I think that we may have known that there existed something called a "Working Paper on Remedies". I think that is why the Competition Commission in Professor Smith's Commission say "Why didn't you ask for it?" We have constantly said we would be willing to engage. We did not know what was in there. Obviously, we were being given bits and pieces of put-back along the way as well. And what we did not understand was that, effectively, a chunk of what we put forward as arguments had been effectively rejected and those were not being put back to us, so we were not assuming that there was any problem in those circumstances. We only saw summaries of our arguments, not any of the analysis of answers.

THE CHAIRMAN: Thank you.

MR. BEARD: Let us deal with ground six. Obviously, we have set this out fairly fully in writing, but the way I will deal with it if I may is by turning up the report at internal page number 128 wherever you have got it. It is probably at tab.50 in bundle 2D.

THE CHAIRMAN: Sorry, when you say "report" —

MR. BEARD: Sorry, yes, the Competition Commission's report.

THE CHAIRMAN: And the reference was, again —?

MR. BEARD: Internal page numbering 128. I am going to go to para.10.133.

THE CHAIRMAN: Yes.

MR. BEARD: Here, we are dealing with the Remedy costs. So, the section we are in is entitled, "Remedy Costs", at the top of 10.130 and just a bit further down. Now, 10.133, I have two points to make at the outset:

First of all, the CC made clear that it would take into account losses suffered by the SCOP, and here it is considering what those losses might be. At 10.133, this is the description of how the SCOP puts the position:

> "That the prohibition remedy would be 'catastrophic' for the SCOP".

It would devastate the industrial sector that employment in Calais that the SCOP was securing through My Ferry Link in an area of high unemployment where this was a real concern. And a large number of people would be put out of work. The very reason for the existence of the SCOP to find employment for those people would be undermined.

Now the first argument against considering that as any sort of loss is at 10.134 where what the Commission says, is "Ah, yes, well, when you enter into a merger, you can normally make those sorts of mergers conditional, so that if you can walk away from the merger, if you had a choice, in those circumstances any losses you suffered by us blocking the merger

or undermining the merger or taking steps that mean the merger does not work, that is at your own risk.

That orthodox position may be perfectly rational. It does not apply in relation to the SCOP. The SCOP could not walk away. The very nature of what the SCOP was set up to do was to seek employment for these people. It was only supporting the Eurotunnel bid in order to get that employment. It had tried previously to acquire the vessels itself in order to secure the employment. It could not walk away from the Eurotunnel bid; it could not walk away from any bid that was going to secure those vessels and make available the employment. So this just does not work here. You cannot say that the SCOP would not have incurred the loss if the merger had not gone ahead. All of that unemployment, the benefits of the employment with My Ferry Link, that would have been lost. It was not avoidable in the terms used in the report.

So 10.134 does not work as a basis for saying that there was no loss to the SCOP. Saying that the SCOP could have imposed a degree of conditionality on its participation in the transaction is just unreal. It could not do that.

10.135 then adopts a different route. What it says is we should weigh up the net potential impact on employment, risk of losses of jobs to DFDS if the merger goes ahead, DFDS potentially taking some SCOP workers on if the merger is stopped. Then it asserts on balance there is no loss.

A couple of preliminary points. First of all, it is accepting that net job loss is a real loss. Of course, that fits with the Commission guidance, CC 8 in particular at paras. 1.10 to 1.11 (bundle 3F/82) - in other words third party losses matter. It might well be that looking at net overall employment loss may well be a way of considering these matters. But no attempt was made to quantify that balancing. There is not actually any proper balancing carried out. For example, there is no regard for the ability of DFDS to redeploy its workers if, in theory, it were to be exiting the market with the merger going ahead which, as Mr. Green has explained, is an unjustified assumption and conclusion in any event. So in the netting process you would have had to take into account the possibility that DFDS would not have exited, and if it had that actually the loss of jobs would have been minimised by redeployment. Against that, you have a certain mass unemployment in relation to the SCOP. The other possible netting effect that is identified is if DFDS were to stay and hire more crew absent Eurotunnel, so that there is more employment potentially for SCOP members. But again, one does not see any flavour of how one assesses that. Of course,

what that does not consider is how does the inalienability clause work in relation to these matters? How does this work if you are not in a position to go and buy the other vessels? So of the two netting factors, both are speculative and one is actually inconsistent with other reasoning. Neither is remotely quantified. We are not saying quantified down to the last penny or anything silly like that. We are talking about quantification on a broad scale. We accept that that is the sort of approach that has to be adopted but there was no attempt to look at the broad size; there is just an assertion that they net off and there is nothing left. The final sentence of 10.135 saying well, we would look at the efficient levels of employment driven by the market does not help. It is just circular. If the CC does not intervene, the level employment is higher; if it does, it is lower. Neither outcome is the market finding its level; it is a regulatory intervention. But even if it could be said that the CC is trying to be the market, the market as operated by the CC is still causing a loss to a third party.

Then we have got 10.136 which is then concerned with a separate issue. It is concerned with contributions. The key bits are redacted here. The point to emphasise is that in the last sentence of 10.136 the CC says:

> "Even if we were minded to regard these contributions as relevant costs, we considered that they were significantly outweighed by the potential cost to consumers of the SLC discussed in paragraphs 10.138 and 10.139."

And that is what is done in 10.138 and 10.139, a broad brush assessment of detriments to consumers. Then the conclusion that is reached is (141):

> "We concluded that given the costs to customers of the SLC and that we have not identified any relevant third-party costs of the prohibition remedy, the prohibition remedy is a proportionate remedy. We do not consider any costs that would be incurred by GET or the SCOP to be relevant but note that even if we were minded to treat the claimed costs as relevant [this is the costs in 136 and 137], they would be substantially outweighed by the benefits of eliminating the SLC and its consequential adverse effects on customers."

In its Defence and Skeleton the Commission misreads this paragraph and says that what it says is that the conclusion being reached is that the consumer benefits outweigh any losses referred to in paras. 133 to 135. That is not correct. It is plain from the start of 141: "We concluded that given the costs to customers of the SLC and that we have not identified any relevant third-party costs of the prohibition remedy ..." that is talking about 133 to 135. It then looks at the contribution issues in 136 and 137 and says they would be outweighed by

the consumer benefits. So there was not a balancing exercise, and it involves a re-reading of the report to reach any other contrary conclusion.

In the circumstances, that provides no answer. There was a failure properly to assess the costs to the SCOP of the prohibition remedy because there was just an assumption that they were netted off, and it was never properly considered in the balance with any other benefits.

Unless I can assist the tribunal further, those are the submissions of the SCOP. Obviously, I have not dealt with any matters in relation to the intervention. We have dealt with those in writing. The only other thing to mention is that yesterday during the course of submissions you raised a question, sir, about the definition of the transaction that was considered. We have been through the report; we do not pretend it is comprehensive but we have got a note of various of the references that we are happy to pass up.

THE CHAIRMAN: That would help. Thank you very much, Mr. Beard.

MR. BEARD: I am grateful.

THE CHAIRMAN: Mr. Harris.

MR. HARRIS: Sir, I am grateful. At the risk of starting with a nautical metaphor (I hope there will not be too much of that) I want to clear the decks. I want to begin with a few home truths so as to set the scene.

This is a case in which market operator number one, GET, already in a very strong market position, took over the business of market operator number three, SeaFrance, with the idea and intent to exclude a new market entrant. It did so with a number of calculated intentions. First of all, that it would increase its yields and its profit margins; secondly, that it would (to use GET's own word) "rationalise" (I will take you to the passage where that appears in just a moment) capacity, i.e. would reduce capacity; thirdly and deliberately, that it would reduce, or at any rate prevent, aggressive competition of any nature - service, quality, price or whatever - from a rival. All of this would be at the expense of consumers.

It did so, it had these intentions, with a very clear appreciation of how things were likely to work out in this market. It is a very experienced market operator. Those are, effectively, the words of GET itself. If I could invite your attention to the main report at para.3.43 the final sentence: "GET also stated that it had a very good understanding of the cross-Channel market". That is correct, so when it had these calculated intentions of increasing yields and profit margins, of rationalising capacity and of reducing competition from its rivals - all at the expense of consumers - it did so having a very good understanding of how the market would work.

Indeed, something we will look at slightly later but I just draw it to your attention, it had a detailed internal appreciation of specific pricing strategies that it would employ, whether it took on MFL by itself in isolation of other rivals, whether it had another rival in the form of DFDS, whether it should do what they call soft or aggressive pricing, how that would impact upon yields, market shares or what have you. We will have a look at that later on. That is in appendix G. That is the degree of understanding that this outfit had in this market.

It even calculated the benefit to it of this anti-competitive strategy. We are still in the same part of the Report, indeed if we can keep this part open for a few moments and turn over the page to 3.65, the final sentence says, and obviously I will not read out the numbers because they are confidential to GET, but what is important is:

> "The potential commercial upside of this strategy was recorded in the 6 January minutes of the GET board …"

This is an internal document, and look at the size of the numbers.

THE CHAIRMAN: They are big numbers, yes, indeed.

MR. HARRIS: They are enormous numbers that they knew perfectly well they were going to be achieving given their great understanding of the market.

What has happened, of course, in this report, and this will not have escaped the Tribunal's attention, is that the CC has essentially agreed with this strategy that GET have, that it had worked through, that it fully understood given its privileged position on the market. It has essentially agreed with it. It said, yes, it will reduce capacity, it will raise prices, it will knock out a competitor and "rationalise" capacity.

When we effectively agree with GET, suddenly GET in its challenge is heard to say essentially two things. First of all, it says that the theory of harm is impossibly "convoluted and speculative". That is one of myriad annexes. I have lost how many links in the chain he eventually got to.

THE CHAIRMAN: I think it was 21.

MR. HARRIS: By the end it seemed to be hundreds. This is GET's own theory of harm.

THE CHAIRMAN: I take it you do not agree with the 21 stage causation chain that Mr. Green articulated?

MR. HARRIS: We say that it is a complete side show, as are so many of the annexes. The fact of the matter is that we took a reasonable view about a theory of harm and the key point is that this is the self-same theory of harm that GET had.

Secondly, and even more incredibly, GET essentially says that it was at such an incredible and profound loss as to how the anti-competitive object would be attained that it could not possibly deal with the CC's investigation into the issue. It was in a position, we now learn, somehow analogous to a terrorist in a terrorist trial in a closed procedure facing bolts from the blue. That is the absurd submission that we have heard from Mr. Green.

With respect, these protestations are preposterous. The theory of harm that is said to be so hypothetical - at one point it was like the lioness in Regent's Park, do you remember that at one stage of the written submissions - it is GET's own theory of harm. It acted on it, presumably thinking that it was not impossibly ludicrous and speculative and not links in the chain. If it was that bad, why did GET pursue that strategy?

The suggestion that GET is somehow caught short in appreciating how to respond to the theory of harm - this is all this procedural unfairness submission - that is equally unsustainable. Its own internal contemporaneous documents and its submissions to the French court explain that it wanted to resurrect SeaFrance, bond over Calais by purchasing the vessels and other assets, the website, the customer lists, and what have you, and thereby prevent another more aggressive ferry operator - as it happens it was DFDS - from gaining a foothold in the market and engaging in a price war.

Let us just have a look at one of those contemporaneous internal documents. It is the same part of the report that we were just in. Can I invite your attention, please, to 3.33. This is another GET internal document, a board meeting record no less:

> "… discussed the possible consequences of the SeaFrance liquidation and noted the possibility that the Vessels could be bought cheaply by a competitor, which could 'exacerbate a policy of some already aggressive Short Straits prices'."

That is why they engaged in this policy, thereby mitigating - now I am on 3.36 ----

THE CHAIRMAN: Yes, that is yellowed up, or 3.35 is, do you want us to read it?

MR. HARRIS: I would invite you to read 3.35, the yellow bit, to yourselves, but just note that it is yet more internal documentation from GET. Then 3.36 is one of the many references to rationalisation - that euphemism for knocking your competitor out of the market and reducing capacity, and thereby to prevent the risk of a new price war with none other than DFDS. It is not as though GET were the only ones who could appreciate it. This is a very straightforward theory of harm. No matter how many times Mr. Green says it is umpteen links in the chain, it is extremely straightforward, and people who have no internal sights of GET documentation, the very thing which is now said to disable GET from responding to

its theory of harm. People who had no sight of any of this stuff that is said to be so essential also appreciated this very straightforward theory of harm.

Let us just have a look at the next paragraph, 3.37. That is a reference to a report prepared by a shipbroker appointed by the French court. That is a well and truly outside party. "In this document the shipbroker set out his observations on the bid and in respect of the GET bid it noted that GET's strategy was essentially defensive and its intention was" [no less than] "to 'hinder the implementation of a seagoing rival'", at one point called New Channel, we now know that is DFDS and Louis Dreyfuss, "while enjoying the image of a "white knight" for regional employment".

Mr. Rayment reminds me that is a very straightforward and far from novel theory of harm. This is exactly what you would expect and it is exactly what they did, it is exactly what they knew that they were doing, and exactly what they had intensively internally analysed before they did. We say those exact words are in appendix G.

How would it actually implementation of DFDS? We have seen these references to capacity consolidation. That is the euphemism used by a GET board member in 3.34, you have read that. Then there is the rationalisation of capacity at 3.36.

When GET now tries to claim that it was not able to appreciate what was going on in the CC's inquiry, we say that that complaint rings very hollow indeed. The whole point of what it was doing was to engage in driving DFDS out of the market. You will recall that Mr. Green's submissions focus on two aspects of the reasoning, do they not, in this SLC chain, exit and re-entry. We know perfectly what was going on. They were driving DFDS out of the market, and these are the reasons in their own internal documentation.

The re-entry, that is a complete side show, it is just an aspect of driving somebody out. If you have driven somebody out in the short term because they cannot sustain themselves, it is hardly likely that they are going to pop up again two minutes later re-entering on the very same route. I will develop that.

Just take a step back. The amount of time and attention devoted to that is completely disproportionate given the sheer common sense of the situation.

What we instead have, no doubt because it is very difficult to deal with this from a few steps back having cleared the decks as I have just done, an almighty focus upon disclosure and detail. We say from a step back what is really going on here is that this forensic focus upon little bits of detail here and there is apt, possibly even intended, who knows, but it is certainly apt to create a mysterious fog. It is a bit like in the Hound of the Baskervilles,

where the hound is shrouded in the fog on Dartmoor so that nobody can see it. This fog is intended to obscure, or has the effect of obscuring the real question.

The real question is did GET have a meaningful appreciation of how the CC's thinking and analysis was developing during its administrative procedures for GET to be able fairly to respond to the issues that were, in the words of the statute, likely adversely to affect it. The two that Mr. Green focuses on are exit and re-entry. It is perfectly clear that they knew all about exit and inability to re-enter. We say that the Tribunal should be "apt" throughout its deliberations on these issues not to be seduced or unnecessarily distracted by this focus upon detail against the background of these home truths that I am just elucidating.

THE CHAIRMAN: You will, I am sure, be coming to it, but three short markers for later on. It would be extremely helpful for us to have your formulation as to what natural justice requires, not generally but of the CC in merger inquiries. Secondly, what we apply as a Tribunal in order to determine whether or not that process is compliant with natural justice. I raised that with Mr. Green yesterday as to whether there was a reasonableness test, and he cited *Guinness* back at me saying there was not. Thirdly, the point you have just been making, how far in terms of natural justice and fairness considerations of how expert a party is, how far that should affect the process conducted by the authority. You have made a great deal of play of GET's expertise, and I would be interested to know your submissions as to how relevant that would be to natural justice, but do not feel you have to answer that now.

MR. HARRIS: I will not do that now, largely those questions will be answered when I actually go through the relevant case law as opposed to *Al Rawi* and *Bank Mellat* which have nothing to do with this, and they will largely be answered – indeed, there is one passage, and I am going to do that in a moment beginning with a summary of the case law in *BAA* and one of the cases that is cited there talks about, if you like, the fact that the party to whom a body such as the CC is addressing its reasoning is an expert party who knows a great deal about the subject matter. I will deal with those.

On the question of re-entry – I made the point that, as a matter of commonsense, it is hardly likely that somebody would pop back into the market having just been driven out, and, of course, one of the oddities about this submission is that if GET really thought that, why did it engage in the strategy in the first place? It would have been a totally pointless strategy.

What is more, on this topic the CC is placed reliance on the credibility and reliability of ferry operators, particularly in the view of freight customers, and we are heavily criticised for that, but we find this criticism impossible to fathom because both GET and the SCOP

agreed with the CC about the need for reliability and credibility on the part of ferry operators when it came to ferry operations.

So when GET somehow claimed that it had not been fairly treated, because it did not appreciate how or why DFDS would not or could not re-enter, we say: "Come on, get serious". This is a part of the report that is very easy to understand and that you fully appreciated at the time and you do not need to have significant amounts of additional confidential internal materials in order to address the issues that are "likely adversely to affect your interests" within the meaning of s.104 of the Statute, which I will obviously take you to in due course. It is difficult to take seriously the notion that they did not appreciate, so they could make intelligent comments upon this leg of the reasoning, given GET's position on the market.

From this high level, if you like, overview position, just a few words upon jurisdiction and remedy and then I am going to turn to the case law which, of course, will largely determine, in my respectful submission, how this Tribunal deals with the submissions that have been put to it – the relevant case law.

THE CHAIRMAN: Deal with natural justice first and jurisdiction second, is that right?

MR. HARRIS: Within the case law?

THE CHAIRMAN: In your submissions?

MR. HARRIS: No, I was going to deal ----

THE CHAIRMAN: With SCOP first?

MR. HARRIS: I was going to make a couple of overview remarks, about literally five minutes, on jurisdiction and remedy, and then I am going to deal with the case law, and then as to specific submissions I am going to deal with it in the order of the defence, so I am going to deal with Mr. Beard's submissions on jurisdiction first and then natural justice and then the remedy.

Just by way of overview, the jurisdiction provisions, that we will come to in more detail in due course, they are broad and general, that is our position. They are intended to allow scrutiny of anti-competitive situations in the public interest. There is no warrant for construing them narrowly, but this is the overview point. Every single one of Mr. Beard's submissions on jurisdiction require a narrow technical reading down, often in multiple respects of the statutory provisions. That is the wrong approach conceptually. Purposively, there is absolutely no reason for reading them down in the manner that he is constrained to do on every single occasion. Some of them we say are not even arguable, because they require so much of a reading down, but no credence should be given to them on any

sensible approach because from this overview position the parties to the transaction have admitted what it is that they were trying to do because they submitted it to the French Court. The key paragraph is the one that talks about rekindling – we will come on to that and look at it in a bit more detail in due course, but that is what the parties themselves thought they were doing, bringing back an operation that had temporarily become dormant.

Then that only leaves remedies, and by way of overview on the issue of fairness, the obvious remedy for this sort of a merger would have been divestiture; that would have been the obvious starting point, we were entitled to do that, indeed, we did do that. The spanner in the works for divestiture, properly so-called, was the fact that there was a French Court Order. The CC analysed that order and in the full knowledge – this is something that one cannot lose sight of – in the full knowledge of all the parties, and the interested party that it was analysing the French Order, it gave out information as to what its preferred or possible remedies were. It said, Mr. Beard has freely admitted this – he has taken you to the Supplementary Remedies Notice – that it was looking at prohibition remedies. The Supplementary Remedies Notice sets out a potential starting point of this alternative remedy, given that divestiture cannot be affected in the face of a court order, of a more severe prohibition remedy prohibiting altogether operations on the short sea. But then it says something else it is considering, particularly through the lens of proportionality, is a less severe prohibition on something less than all short sea remedies, and the parties were invited to make known their views on this order, and the critical thing is that parties did do just that, including in the case of the SCOP with the aid of a French law opinion. We say that despite all the forensic analysis from a step back it is impossible to see the unfairness. What was in issue? The French Court Order and whether or not there should be some prohibition remedies, everybody knew that and everybody put in French legal opinions addressing those exact issues. The CC is obliged to give an opportunity for effective and realistic and meaningful submissions on the issues, that is what the parties did, so the CC cannot be criticised.

As to two vessels versus one, that is one of Mr. Green's points. Removing only one vessel from GET would obviously leave in the clutches of GET two vessels and that simple point would not avoid all "realistic risk" of the remedy being effective. That is what the case law says, I am about to take you to the case in question and that is the end of that point. As for job losses, that is the point we have just had, albeit in a truncated version, this point is, frankly, misconceived. It is said that somehow the CC would be responsible in the relevant sense of your analysis of the report, for SCOP job losses if the transaction had not gone

ahead. But, if the transaction had not gone ahead there would not have been any remedy, so it is impossible to see how any loss that occurs in that situation is the responsibility of the CC imposing a remedy. It would not have been, there would not have been a remedy. The truth of the matter is that, unfortunate as it may be, for the individuals involved, and I am the first to acknowledge that, the SCOP is not – certainly was not – in a position to create sustainable employment opportunities for its members in any event. It does not have any financial backing, all kinds of things appear to be wrong with it. In any event it would not have created these jobs because it did not have any other opportunities. That is not the responsibility of the CC and it certainly has nothing to do with the remedy that the CC has imposed, so it is a misconceived point.

Inevitably, at a later point I am going to get drawn into the detail that has been presented to you, whether it be in writing or in some of the oral submissions. I will have to deal with these points and I will deal with them but you should, with respect, we contend, never lose sight of this bigger picture that what is going on here was fundamentally well known to GET and well known to SCOP, and the complaints that they did not understand and were unfairly prejudiced because they were not able to deal with it ring very hollow on the particular facts of this case.

Secondly, let us not lose sight of the fact that if the challenges succeed, the very significant damage to consumers that it fully intended to impose upon this market will be sustained. So that is what I wanted to say by way of introduction and overview. The next section of my submissions lies in dealing, I hope, with the points that you, Mr. Chairman, have put to me on legal issues, and to run through the relevant authorities, and I am going to begin, if I may, with *BAA*, because it is a very helpful summary, and that is to be found in bundle 3D of the authorities at tab.57. This one will probably take the longest, and I apologise for that because to some extent these points of law are set out in writing and the Tribunal will be familiar with it, but I have no choice because we have been led along a path, I would say, to use their metaphor, "a garden path", by Mr. Green, by reference to some completely different case law which we say is of effectively no assistance whatsoever and has been a complete distraction.

BAA — if we could pick it up, please, at para.20 and as you are flicking through to that I will just remind you that this was a section 120 judicial review challenge to a divestiture remedy presented by none other than Mr. Green on behalf of the applicant. That point is relevant to a specific submission that I will come on to in a minute, but picking up — so, we have a very experienced Tribunal presided over on that occasion by none other than one of

the most experienced administrative practitioners in the country, Mr. Justice Sales, and he helpfully gives an overview of the relevant principles, starting at para.20. I am not going to read all of it, but I do invite you, again, if you have not done it recently, to re-read all of it, and I am going to pick up some particular points. It repays reading right from the beginning of his first sub-point through to his ninth, I believe, eighth sub-point which is some four or five pages later. All of these points arise in this challenge, so whilst I would invite you to read all of it, I am just going to highlight some particular bits.

So, point number (1) there is a point about the comprehensiveness of remedies. Well, that arises here. Point number (2) there is a reference to Convention rights, and then in reference (2) later this is again on proportionality. The point that I am going to read out and invite you to highlight is the indented citation from *Tesco*, the President of the Tribunal:

> "[C]onsideration of the proportionality of a remedy cannot be divorced from the statutory context and framework under which that remedy is being imposed. The governing legislation must be the starting point. Thus the Commission will consider the proportionality of a particular remedy as part and parcel of answering the statutory questions [etcetera]".

There is a danger that that point is being lost sight of in some of the submissions that you have heard. And at point number (3) this begins to address one of the points that you were asking about is set out. This is the law, the actual law:

> "The CC, as decision-maker, must take reasonable steps to acquaint itself with the relevant information to enable it to answer each statutory question posed for it".

In this case that was about divestiture of Stansted. And then this citation of other good law remains in place, *Tameside* and *Barclays Bank*. Picking up over the page, about five lines down:

> "The CC 'must do what is necessary to put itself into a position properly to decide the statutory questions'".

This tribunal, with respect, never lose sight of the fact that the CC is a creature of statute. It does what the statute tells it to do.

> "The extent to which it is necessary to carry out investigations to achieve this objective will require evaluative assessments to be made by the CC, as to which it has a wide margin of appreciation as it does in relation to other assessments to be made by it".

So, just pausing there, that is partly the answer to one of your questions, sir. To what extent is natural justice in play? Well, of course it is in play, of course it is a matter for this

Tribunal, I will come on to that in a minute, but it is against the background of CC carrying out investigation that require evaluative assessments and as to which we have that old favourite, "a wide margin of appreciation". This is all but ignored by Mr. Green on behalf of Eurotunnel in his submissions.

> "In the present context, we accept [none other than] Mr. Beard's primary submission that the standard to be applied in judging the steps taken by the CC in carrying forward its investigations to put itself into a position properly to decide the statute questions is a rationality test".

So, this is very closely related to what you are doing in this set of proceedings today. And then there is the familiar citation from *Khatun*, but highly apposite to the exercise in which you, sir, and the members are engaged:

> "The court should not intervene merely because it considers that further inquiries would have been desirable or sensible".

I just pause there because the entirety of Mr. Green's attack on the DFDS internal papers fails at this juncture. The entirety of it.

> "The court should not intervene merely because it [let alone because GET] considers that further inquiries [I will insert there the brackets, into the internal papers of DFDS in I think it was early 2012 was the principal focus] would have been desirable or sensible".

You should not do that.

> "It should intervene only if no reasonable authority could have been satisfied on the basis of the inquiries made".

Well we did make inquiries. We did get information. We were satisfied, and that is the end of that, unless "no reasonable authority could have [done it]".

I will show in a moment why it was perfectly reasonable what we did, bearing in mind that the DFDS internal papers, about which we have heard so much, is a minor part of one strand of a whole raft of reasoning, the vast bulk of which is not challenged at all. There is not even mention of why DFDS exited the market and could not re-enter. So this is a good example of how from a step back one should not be seduced by the forensic detail. Inevitably, I will deal with the detail, but this is a good way of summarising why that is the wrong approach.

Next point, Mr. Justice Sales', point (4):

> "Similarly, it is a rationality test which is properly to be applied in judging whether the CC had a sufficient basis in light of the totality of the evidence available to it for

making the assessments and in reach the decisions it did. There must be evidence available to the CC of some probative value on the basis of which the CC could rationally reach the conclusion it did".

Again pausing, most of Mr. Green's submissions on the detail are, "Well, you could have done some more, and if you had done some more, in particular if you had given us some more, we would have said all manner of things about it". I do not doubt for a minute that that is what would happen, but that is not the nature of what the CC faced in its statutory task. The question for you is did it have evidence of some probative value? Well, on every single point, yes; and could it rationally reach the conclusion that it did? Well, on every single point, yes. That is the actual analytical framework that you should employ.

Point number (5) I am going to go to the middle of point number (5) because this is a longer paragraph, but it is a further expression of effectively the wide margin of appreciation. Picking it up halfway down, between the two hole punches, a reference to the famous case of *Daly* in the House of Lords, and then thereafter:

"Where social and economic judgments regarding 'the existence of a problem of public concern warranting measures of deprivation of property and of the remedial action to be taken' are called for [ie this case] a wide margin of appreciation will apply, and — subject to any significant countervailing factors, which are not a feature of the present case [or indeed, I interpose, of our case] the standard of review to be applied will be to ask whether the judgment in question is 'manifestly without reasonable foundation'".

That is the standard that you are to apply in assessing the attacks upon this report. Over the page, number (6):

"It is well-established that, despite the specialist composition of the Tribunal, it must act in accordance with the ordinary principles of judicial review [and they obviously include natural fairness, so I do not take issue with that]. Accordingly, the Tribunal, like any court exercising judicial review functions, should show particular restraint in 'second guessing' the educated predictions for the future that have been made by an expert and experienced decision-maker such as the CC" …

(7) This is why I mentioned that it was Mr. Green presenting the case for BAA on that occasion. (7) and I am just picking out below the reference to *ex parte Smith*, the case about gays in the military:

"But the adjustment required is not as far-reaching as suggested by Mr. Green at some points in his submissions".

Just pausing there, we have been treated, with all his usual eloquence, to the same thing in this case yesterday that Mr. Justice Sales was treated to in *BAA* a year ago, which was an attempt by Mr. Green to suggest a vastly augmented standard of review in judicial review and the vastly experienced Sales J and is fellow tribunal members said no, these are the principles that apply and what you are trying to do is be too far-reaching. That is a very apt description of what Mr. Green on behalf of GET is trying to do by reference to *Al Rawi* and *Bank Mellat* in particular.

Number (8), this is the point that I said I would come to in response to one of your questions, Mr. Chairman. Duties to give reasons. Familiar standards of the Dame Shirley Porter case:

> "The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues'."

I just pause there. It does not say on every single minute issue that could be resolved after having disclosure and judicial review.

> "... disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depend entirely on the nature of issues falling for decision. The reasoning must not give rise to a substantial doubt .. but such adverse inference will not readily be drawn."

The last two sentences I hope respond in part to your point:

> "Decision letters [or in this case decision report] must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced."

One could be forgiven for thinking that GET had no idea what was going on in this market, or, for that matter the SCOP. But that is not how you go about assessing the cogency of reasoning in a report. They are well aware of the issues involved and the arguments advanced. It was their own case that they had a "very good understanding" of this market.

> "A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

We are not in that territory in this case.

Then the last one. I will not go through it. Everyone is familiar with *MMC v National House Building Council* ... the mantra of the CC defending cases like this. But nevertheless, it is still good law. You do not take a fine tooth comb to this decision; you do not pick out

words here and the odd sentences there and say: crikey, that is the end of that; you do not ignore previous sections of the reasoning or subsequent sections of the reasoning, or, for that matter, even something that is relevant that is in another chapter, let alone ignore whole appendices, which is what we have got with this head. That is not what you do. As I say, that is the longest I am going to spend with any case.

I am just going to take you to one or two more paragraphs, but I do it very deliberately. That is the law, that is the legal framework that you apply. I am going to deal with *Al Rawi* and *Bank Mellat* in terms in due course. They are not the law, the relevant law.

THE CHAIRMAN: Mr. Harris, subject always to what Mr. Green says in reply, I think you are pushing at an open door in terms of the importance of this as a statement of principles in this tribunal. Indeed, it has been cited in subsequent tribunal cases. I am thinking particularly of the MCT decision in which the CC featured, which went on to the Court of Appeal, and those are both authorities which I anticipate you might want to rely upon. But it is not quite a comprehensive statement of all the principles, including the points that Sales J touches upon: the extent of the inquiry the body must go through (subpara.3); the basis for its conclusion and rationality test; its mark of appreciation (paras. 4 and 5); and statement of reasons. But what is not, and is not because it did not arise, discussed in these cases is the extent to which material needs to be provided to parties in order to make the process fair. In other words, simply the point that Mr. Green was making yesterday that in order to be able to critique and respond to the process that it is engaged in the participants in it need to have a certain amount of (Mr. Green would say full) information as to what the CC has and that does not seem to be addressed here.

MR. HARRIS: There was not in the same way presented by Mr. Green for BAA a natural fairness or procedural impropriety attack. I am going to be dealing with some cases in due course that deal with the standards of natural fairness and the margin for the CC, but what I would say is this, that it would be most odd (to put it at its mildest) that when the tribunal in *BAA* addressed the issues of duty to give reasons, duty to conduct an investigative procedure, duty to have regard to material of some prohibition, all of those points, they signally failed to recognise that the entire landscape was now critically reshaped, we are told, by *Al Rawi*, which was preceding *BAA*. There is no mention of it at all.

THE CHAIRMAN: Yes, Mr. Harris, but there could be no reason for that. Who knows what the nature of the confidentiality ring if any that was imposed? We are speculating here.

MR. HARRIS: With respect, sir, I take issue with that because the sheer breadth and extremity of the position adopted by Mr. Green by reference to *Al Rawi* and *Bank Mellat* critically hinges

upon considerations such as set out in *BAA* about the CC takes all reasonable steps to acquaint itself with relevant information, about the necessity to carry out investigations to achieve this objective, and about the scope of the totality of the evidence that it had before it. What we are told by Mr. Green is *Al Rawi* and *Bank Mellat* mean that we should have done vastly greater investigations into unseen aspects of this decision.

Take the one that he keeps focusing on: DFDS internal documentation.

THE CHAIRMAN: I think Mr. Green was making several points, but the point that I am putting to you at the moment is this. Let us suppose that the Competition Commission in its discretion decides to conduct an interview with another market participant and that market participant wants its interview to be kept confidential. We are not suggesting that there is any criticism about further enquiries; all I am saying is that there was this interview and it is confidential. Mr. Green's point is that that interview needs somehow to be made available to the other parties to the process despite its sensitivity, and that point does not seem to me to be a point that is addressed here.

MR. HARRIS: I accept that, not in a level of generality. I will not get there in the next set of submissions I make, but what I will be doing as part of my legal submissions is reminding the tribunal (although I have no doubt it is very familiar so I apologise in advance) of what the statute actually says and what the considerations are that we are actually obliged to have regard to, and then I am going to show you how that is perfectly sensibly translated into a statutory guidance in many forms, including the paragraph that you and, with respect, Mr. Currie put to Mr. Green about the different manners in which confidentiality can be dealt with. To anticipate myself, the fact of the matter, Mr. Currie, is yes to two of your points. Mr. Green's submissions inevitably mean that as soon as we had regard to our guidance we were acting illegally, whether he calls it an absolutist or something less than absolutist. I am not quite sure what that was, but something like that. Then it would mean, in response I think to your question Mr. Chairman, that all of that has to be deleted or thrown in the bin, save only for the bit he likes which is confidentiality.

I will show you that by reference to the case law that talks about our duty of fairness, and by reference to the statutory context (which critically conditions, it is the .... of what is going on) what we do, then our guidance is perfectly acceptable. So I will come on to that.

Whilst we are still in bundle 3D, I would just like to draw your attention to tab 58, the next one, on a short point, which disposes completely as a matter of law of one of the grounds of appeal about "We would have liked to have started operations", we are now told, "on Dover-Boulogne". That is a submission that failed *in limine* by reference to *Stericycle* case.

Can we pick it up at para.17, a reference back to *Somerfield* endorsing the proposition that the CC in a case like this is entitled to consider divestment of the entity acquired as a starting point. That is just so that we are grounded as to where that proposition comes from. Then, more importantly, 20 and 21:

> "There is nothing in the procedure followed by the CC that suggests that the CC assumed that only full divestment would be an effective remedy or that it failed to give proper consideration to other options proposed.
>
> We agree with the CC that it is not required to investigate of its own volition every possible configuration of divestment package before concluding that divestment of the business acquired is the only effective option. It is sufficient if it assesses those which present themselves …"

i.e. present themselves to the CC -

> "… as likely candidates to the members of the panel considering the issue or which are proposed by consultees, including, of course, the parties to the merger."

That is the end of that submission about Dover-Boulogne. That did not present to us, it was not reasonable to present itself to us and was not presented by the party either. It is not even now said that GET wants to act on Dover-Boulogne. It fails completely.

Then still in the same bundle, there is tab 47, the *BSkyB* case. This was, of course, a challenged by both Virgin and BSkyB to a remedy imposed upon BSkyB about its shareholding in ITV, that they bought 17.9, they were "remedied down" (if I can put it like that) to 7.5, BSkyB said they should not have been remedied down at all, and Virgin of course predictably said they should have been remedied down to zero. That is the context. Can I pick it up at para.63. This Tribunal was presided over by Mr. Justice Barling, the President, was facing submissions about the principles of judicial review. Can I pick it up half way down 63:

> "As the Commission and the Secretary of State submit, the Tribunal must avoid blurring the distinction which Parliament clearly drew between a section 120 review and an appeal on the merits. We shall need to bear this distinction in mind when we come to deal with the specific points raised by Sky in relation to the factual basis upon which the Commission reached the challenged findings. It is one thing to allege irrationality or perversity, it is another to seek to persuade the Tribunal to reassess the weight of the evidence and, in effect, to

substitute its views for those of the Commission. The latter is not permissible …"

That very succinctly describes a large chunk of the submissions that you are faced with, whether it be on jurisdiction or whether it be upon links in the chain of reasoning as regards DFDS exit or DFDS re-entry having exited. They are, in effect, inviting you to reassess the weight of evidence and effectively to substitute your views for those of the Commission. You cannot do that in this judicial review proceeding.

THE CHAIRMAN: I quite take your point as far as the conclusions reached in terms of the anti-competitive effect, but surely when one is determining whether there is jurisdiction the test is rather different.

MR. HARRIS: Jurisdiction is a good example, sir. Take material influence, it is dressed up as misdirection, not understanding the statute, and all the rest of it. We did investigate it, we did have evidence, we assessed it and weighed it, and Mr. Beard on behalf of the SCOP says, "Actually, I do not agree because you did not have a board representation" - this is what it boils down to - "you did not have a shareholding". That is effectively inviting you to reassess the weight of the evidence that we did have, and say it should be outweighed by the fact that you did not have that evidence.

THE CHAIRMAN: Let us take another point though, the meaning of the word "enterprise", and whether there was an enterprise in the form of the three vessels.

MR. HARRIS: Yes, but even that one on analysis is exactly the same type of approach. What he is saying is, "I am telling you that they were not activities", that is the critical word that he relies upon on the question of enterprise, "I am telling they were not activities because look at this factor and look at that factor". In fact, it is more or less just look one factor, seven and a half months. That is basically what his submission was, seven and a half months, end of story.

It is not the end of the story, because we did have evidence on our side of the scale. We have things like the hot lay-by of the vessels, and a whole rack of others that I will come to when I deal with that. The point is that we assess that and we reach an evaluative judgment based upon that evidence that we had uncovered. We said that our judgment, based upon assessing and evaluating that evidence, is X, and it simply does not matter that Mr. Beard's judgment on behalf of his client would be different. With great respect, it does not matter even if this Tribunal's substantive assessment of those factors in the balance would be different. That is not the sort of thing that can enable this Tribunal to overturn that sort of

substantive assessment. To say that it is all about the meaning of "activities" as a matter of law does not advance the debate any further.

THE CHAIRMAN: So you say that the margin of appreciation in the Competition Commission extends to questions of what I would call "jurisdictional fact" - in other words, where you need to find a certain factual situation to arise in order to have jurisdiction in the first place?

MR. HARRIS: Absolutely, yes.

MR. CURRIE: Can I just ask you this, Mr. Harris: what would your view be if I suggested to you that the correct approach was that it was for the CC to find the facts in relation to whether or not GET had acquired the activities or part of the activities of the business, but ultimately, once the CC has found the facts, it is a matter of law whether those facts constitute the activities or part of the activities of a business. Would you agree with that or not?

MR. HARRIS: My answer to that is that one has to fit in the evaluative assessment that is reached upon the facts by the CC within the words of the statute. There is a cross-relation between what we come out with at the end of our balancing exercise and whether or not it would be "activities". I do not think there is any sensible doubt - certainly not in our submission - that the factors that we did have regard to are capable of being viewed as activities?

MR. CURRIE: Surely, ultimately that is a matter of law.

MR. HARRIS: I accept that is a matter of law as to what the true meaning of the word "activities" is, but what I am saying is that on this challenge what is effectively being said is, "You have had regard to something that could reasonably amount to activities and we have had regard to some other factors that possibly are not some activities". It is really trying to upset the balance. It is dressed up. That is my submission, it is dressed up as, "This does not fit within the meaning of activities". When we come to look at the factors that we did actually rely upon as saying that there was an "enterprise", first of all, we plainly directed ourselves to the answer of the statutory question, that is beyond doubt when we go to the report.

Then my submission will be that on no sensible approach can it be said that the factors we relied upon could not rationally or properly be connected to a conclusion or a judgment that they were "activities".

THE CHAIRMAN: I think you are agreeing that as the list of factors as identified by the CC as constituting "enterprise", we look at those, but the question of whether, having regard to

those factors, whether they are not capable of constituting an enterprise is, at the end of the day, a question of law?

MR. HARRIS: Yes, I do accept that, that is common ground between us. One does not even have to take a full step back, this is just a half a step back. What is really going on in that part of the challenge is it is inviting you to reassess the factors in the balance. That is what he is really doing. That is our submission, and that is what we say is met by the passage from *BSkyB* that I have just drawn your attention to.

Then, picking up further passages in *BSkyB*, there is a particular passage at para.75. This is on the question of the umpteen links in the chain and the allegedly convoluted reasoning about theory of harm and SLC. Paragraph 75:

> "We do not consider that Sky's approach to the statutory tests is correct. As far as SLC is concerned (and similar reasoning applies to the RMS issue) we agree with the Commission that the appropriate question for the Commission to ask itself is whether skeleton argument may be expected (i.e. on the balance of probabilities) to have the opportunity to exercise its consumer influence so as to give rise to an SLC in a relevant market. This is not the same thing as asking whether it is more likely than not that a specific investment opportunity will materialise. We agree with the Commission that where there is a range of ways in which competition in a market might be lessened substantially, the Commission is not required in respect of each potential transaction identified by the Commission to establish that it is more likely than not to occur. In our view Sky's suggested approach (see paragraph [73] above) would not only be more than is required in law, but would also be wholly unrealistic, and would probably emasculate the merger regime."

Then over the page, on the same line of reasoning, there is the reference to Lord Hoffmann in *Rehman*, so this is the indented passage at the bottom of the page:

> "I agree with the Court of Appeal that the whole concept of a standard of proof is not particularly helpful in a case such as the present. In a criminal or civil trial in which the issue is whether a given event happened, it is sensible to say that one is sure that it did, or that one thinks it more likely than not that it did. But the question in the present case is not whether a given event happened but the extent of future risk."

So that is the territory of *Rehman*, that is the territory of our case.

"This depends upon an evaluation of the evidence of the appellant's conduct against a broad range of facts with which they may interact. The question of whether the risk to national security …"

- and we could replace that with the risk of SLC on this market: "… is sufficient to justify the appellant's deportation"/prohibition:

"… cannot be answered by taking each allegation seriatim and deciding whether it has been established to some standard of proof."

That is the link in the chain argument of Mr. Green – that is completely the wrong approach. As it says at para. 80:

"So, in the context of an assessment as to whether there is likely to be an SLC in the future, the Commission must give full and proper consideration to the evidence which it has gathered and apply the "probabilistic test" at the end-point. In other words it must ultimately ask itself whether it is satisfied on the balance of probabilities that there will be an SLC caused by the RMS, but the Commission is not under an obligation to make findings of fact (whether on the balance of probabilities or otherwise) in respect of each item of evidence. Nor is it obliged to find that any particular potential investment is more likely than not to occur before it can take it into account in its overall assessment of the probability of SLC."

What it boils down to and, if I may put it like this, I respectfully contend, a … phrase is that used in this Judgment at para. 107, I respectfully contend that this should be almost a litmus test of what you do in adjudicating upon these challenges.

"… in an application for judicial review, and therefore also in an application under section 120 of the Act, a challenge to a decision may be based upon an allegation that the decision in question, or a key finding, was irrational or was perverse, or was a decision or finding which the decision-maker was not entitled to make in the light of the evidence."

Those are the sorts of challenges you are faced with. This is what the Tribunal said:

"These characterisations are,to a very considerable extent interchangeable."

That is right, they merge into one another, especially on the submissions that we have heard: "and they all describe" – and this is the phrase:

"the absence of a minimum relationship between a decision and the evidence relating to it which was available to the decision –maker."

That is how a report fails if it has an absence of a minimum relationship between the decision and the evidence relating to it.

"This exercise is to be contrasted with the approach required of the decision-maker itself, and also of a court …"

- or, for that matter, this Tribunal: "… when hearing an appeal 'on the merits'." We are not in that territory.

Before leaving BSkyB I would like to take you to some relevant passages on remedy reasoning, picking it up at para. 285

"In deciding what remedy to recommend to the Secretary of State the Commission is required by subsection 47(9) of the Act in particular to have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the SLC and consequent adverse effects …

The CC Guidelines state that the Commission's starting point will normally be to choose the remedial action and restore the composition that has been, or is expected to be, substantially lessened …"

- that was our *Somerfield* point.

"The CC Guidelines further state that remedies that aim to restore all or part of the market structure prior to a merger are likely to be a direct way of addressing the adverse effects."

And then there is the *Somerfield* point again. This is the law that applies to the remedies challenges that you are facing and it is just worth reminding ourselves of how this works under the Statute, and further elucidation is given at paras. 293 and 294. This is of critical importance – this is the actual law that you should apply on the remedies challenges.

"These arguments fall to be considered in the light of the Commission's statutory obligation to have regard to the need to achieve 'as comprehensive a solution as is reasonable and practicable' … The Tribunal considers that in the light of this obligation …"

i.e. this Statutory obligation:

"… the Commission was clearly entitled to consider whether and if so at what level a partial divestiture would ensure that there would be …"

- a very important phrase in today's case:

"there would be *no realistic prospect* of Sky being able to exercise material influence over ITV's strategy."

I will read the next sentence in a minute. What the Tribunal is saying here is that the Commission was clearly entitled in light of its Statutory obligation and it should impose a remedy that gave rise to no realistic prospect of the evil, and we agree with the Commission

that this is not simply a matter of calculation but includes a significant element of judgment, so we are again into the wide margin of appreciation or manifestly no reasonable foundation territory. 294 – I will just preface this – the particular facts you may recall of this shareholding challenge was about whether, with a lower shareholding Sky could block ITV's commercial strategies because it was a shareholder. The argument was: do you need 17.9 or is 7.5 enough, or a bit more or a bit less? This is what is said about how the CC behaved:

> "Sky's ability to block a special resolution depends on the level of turnout at the general meeting. Predicting how low that turnout might realistically be (and therefore how significant Sky's voting power) is not an exact science."

- and then the next sentence:

> "The Commission was entitled to adopt a cautious, conservative approach to future turnout."

So these points all go hand in hand, there is a comprehensive remedy by Statute as far as reasonable and practicable. You are to leave no realistic prospect of the evil remaining in place and you are expressly entitled to adopt a cautious conservative approach to the means, if you like, to your reasoning, and that reasoning is only to be subjected to scrutiny or overturned as being improper if it is wholly outside the wide margin of appreciation. So that is the law on remedies. Then under the next tab, just a very quick reference to *Tesco* at para. 139, again, because it is directly relevant to one of the criticisms that Mr. Beard made, just before sitting down, on a remedies point. He says that we should have calculated the quantitative value of job losses – I am not quite sure whether it was now job losses or net job losses, but any rate a quantitative valuation of job losses – albeit then, somewhat oddly, he did not offer you any way of doing it and, at one point, I heard him say it can be done "on a broad scale", but I will come back to those points.

The point is wrong as a matter of law. At para.139:

> "The margin of appreciation extends to the methodology which the Commission decides to use in order to investigate and estimate the various factors which fall to be considered in a proportionality analysis …"

- and there is the point I made just a minute ago, in parentheses:

> "There is nothing in the governing legislation, or in the general law, which requires the Commission to follow any particular formal procedure or methodology when it comes to consider the effectiveness of a possible remedy, or its relevant costs, adverse effects and benefits."

Well, that is the end of that point as a matter of law.

Then I am going to leave this bundle of authorities and invite you, please to take up a passage that we looked at – one of the few cases that we actually turned up with Mr. Green, tab 8, *Hoffmann La Roche*, because although you edit the paragraph from p.368, of course, he scooted over the point that is most germane to this Tribunal's – I am sorry, it is the first bundle of authorities, 3A and it is tab 8. I make no apologies for reading the same passage that you have already read because the germane parts require emphasis. It begins between (c) and (e) on p.368, the speech of Lord Diplock:

> "The Commission makes its own investigation into facts".

This, of course, is talking about the predecessor of the CC, the MMC, so it is a highly germane context.

> "The Commission makes it own investigation into facts. It does not adjudicate upon a lis between contending parties. The adversary procedure followed in a court of law is not appropriate to investigations".

I just pause there for a minute. As we shall see in a moment, *Al Rawi* and *Bank Mellat* were exactly those things that Lord Diplock has said the MMC and the CC are not doing.

Moving on:

> "It has a wide discretion as to how they should be conducted. Nevertheless, I would accept that it is the duty of the commissioners to observe the rules of natural justice in the course of their investigations — which means no more than that they must act fairly by giving to the person whose activities are being investigated a reasonable opportunity to put forward facts and arguments in justification of his conduct of these activities before they reach a conclusion which may affect him adversely".

Now, I accept that that is only a broad statement, and it obviously has to be developed.

I shall develop it in two ways, by reference to the statute which we will look at, and then by reference to the statutory consulted guidance which we say is firmly and properly grounded upon the statute. But I just note that the foundation stone is what, it is "to give a reasonable opportunity to put forward facts and arguments in justification of his conduct". It does not say, "in sharp contrast to a lis between contending parties as is going on in a court of law". In sharp contrast to that it does not say that it requires effectively full disclosure of all documents, whether being inculpatory, exculpatory, whether they are peripheral or tangential evidence or central elements. It does not say that you have to give full disclosure, it does not say that you have to do it in a confidentiality ring, it does not say that there is

some absolutist approach. All of that is overlay which we say is falsely placed by GET upon the relevant context.

And indeed the next one I would like to take you to is *Doody* which is the next bundle of authorities, 3B, at tab.19. Just as we are turning this up, I would remind you what *Doody* is about was the case of mandatory life sentences being imposed by the court in the case of murder, which sits highly anomalously in any civilised system of justice, and this is where the straw finally broke the camel's back, during the reign of Leon Brittan as Home Secretary. The mandatory life sentence regime came under sustained attack and was effectively undermined in these challenges. The passage that I would like to take you to is Lord Mustill at p.560 of the report. The prisoners were complaining that effectively their first chance of parole in the context of a mandatory life sentence came as a bolt out of the blue. They had not got the faintest idea what the trial judge was telling the Home Secretary; what the Lord Chief Justice was telling the Home Secretary; what any other judicial body or for that matter anybody else was telling the Home Secretary. They had not got any idea what was being put to them, had not got any idea how he was determining it, what factors were taken into account. Lord Mustill said, against that background:

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

And then (4) almost the single most important factor for the challenges that you face

> "(4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken".

Now, just pausing there for a minute, that is what has gone wrong in Mr. Green's challenge. He has ignored the essential feature being the statutory context, we say.

"(5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to [giving him] a favourable result; or after it is taken, with a view to procuring its modification; or both".

Well, GET did have that opportunity.

"(6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer".

In a moment (well, in a few moments) I shall take you to *Bank Mellat (No.2)* which is the high water mark of my learned friend's submission, suggesting that all of the old law is being swept away, it is no longer good law, it should be — well, the foundation stone of Lord Sumption's propositions about fairness in *Bank Mellat (No.2)* that he so earlier relied upon. What is the foundation? It is this passage from *Doody*, It is the self-same passage.

THE CHAIRMAN: About this passage, could I ask you this? Point 2 of Lord Mustill is that the standards of fairness are not immutable.

MR. HARRIS: Yes.

THE CHAIRMAN: Would it be fair to say that although taking your point that the Supreme Court cases are dealing with litigation in court, not the process before administrative tribunals, nevertheless the climate has been changed by the Supreme Court cases as regards proposition 6?

MR. HARRIS: Possibly Lord Sumption had sight of this very passage and then said, "But of course here I am in *Bank Mellat* with my judicial brethren in *Bank Mellat* overtaking it. It is no longer to be relied upon as the foundation", possibly. But he does not say that, quite the opposite, and says, "I now follow that". I will take you to the exact passage in due course. And as for immutable and moving on, well, that is an uncontroversial proposition, I accept that, but of course the chairman's guidance and the procedure guidance are regularly updated and moved on in the light of experience, and that is exactly what Professor Smith's witness statement says. Indeed, one of the critical bits of guidance, the chairman's disclosure guidance, was in the process of moving on at more or less the time that this investigation/inquiry, was ongoing. You will recall from Professor Smith's statement that they do take into account the CC experience that they have of operation of, for example, confidentiality rings, he gives evidence about that. Operation of data rings, he gives evidence about that. That is how the guidance gets updated. And he does not suggest for a minute that it is set in stone, and nor do I on their behalf. But what has not moved on,

and we say critical to your determination in these challenges, is that it remains good law that in this statutory context what has to be done per *Hoffman La-Roche* and *Doody* is to give a reasonable opportunity to make submissions on the issues that affect him and that can be done by giving information as to the gist of the case and that, well, not only did he do that, but I do not for a minute accept that we only did that. I do not accept for a minute that all that the CC did was give a gist of the nature of its inquiry to any of the affected parties, quite the opposite. There were hearings, hearing summaries, summaries of evidence, there was put-back, and this is all in the context of somebody who knows a great deal about the market and, as I said in opening, pursuing a theory of harm which is their own theory of harm; and we have got to get rid of that.

MR. CURRIE: Mr. Harris, the word might just be regarded as a bit vague or elastic. Would you be able to help in deciding whether the gist of the case had been given, that one would apply some sort of objective test as to whether the recipient of the gist had been given enough information for a particular purpose? Would you agree that is how we would —

MR. HARRIS: The way I understand, Mr. Currie, is as follows, you have to assess whether or not they have got the gist by reference to the nature of the reasoning that is set out in the report, obviously the Provisional Report because that is the time that they are assessing. What we will do, in particular on DFDS exit and DFDS re-entry, is we will look at the nature of the reasoning that they were presented with to see whether, having been presented with that reasoning they were given a proper opportunity to respond intelligently, bearing in mind their knowledge of the market. So I accept that it has to be assessed by reference to the overall reasoning expressed in the report. What I do not accept is that somehow we suddenly morphed from being a domestic administrative body bound by our statutes and our guidance into an EU merger body bound by not only different guidance but different legislation. As I understood Mr. Green's submission ... somehow they should be able to test the gist by reference to all the underlying documents and that this tribunal (I think this is how the submission went) should also be able to double test that, what was going on by gist, by reference to the underlying documents.

That is not what the case law says, that is not what the statute says, and that is not what is in the guidance. It has not been anybody's practice at any stage and so that would be a truly fundamental departure for this tribunal to now say that what is required as a matter of law is that both the parties and the tribunal to have full underlying disclosure so it can test the gist of the documents.

MR. CURRIE: So if I can understand what you are saying in essence (I may not be formulating it precisely as you did) whether or not there has been enough given to the target in this case will depend upon whether he has been given a reasonable opportunity to deal with the points against him?

MR. HARRIS: Yes, we will look at section 104 in a second, but the wording and the structure, the critical contents, Lord Mustill fourth point in the statute is ... its interests. That is all we are saying. What we are saying is read in isolation from the report, which I ... so at a later stage I will show you how we did do the critical, more than critical, this was gist plus to the ... about the issues, why did it adversely affect their interests in a context where (I know I am repeating myself but it cannot be stressed enough) they knew a great deal about the market.

MR. CURRIE: Thank you.

MR. HARRIS: Then it is just worth knowing what happened in *Doody*. This is mandatory life sentence prisoners knowing absolutely nothing, and then the results of the judicial review is that they are allowed to know something. But what they did not get, expressly did not get, was the report written by trial judge to the Home Secretary, the report written by the Lord Chief Justice to the Home Secretary, or any other reports, notwithstanding that (I am sorry, I could not find it again last night) somewhere Lord Mustill describes this as being: once you sentence, the single most important thing in their entire lives is how long he is going to be in jail, the single most important thing. The single most important in his entire life; he does not get the underlying documents; he is not allowed to test the gist. The underlying documents do not go to the court, so they do not get the gist. What he says, Lord Mustill, on 564 between C and D:

> "This does not mean that the document(s) in which the judges state their opinion need be disclosed in their entirety. Those parts of the judges' opinions which are concerned with matters other than the penal element (for example any observation by the judges on risk) need not be disclosed in any form, and even in respect of the relevant material the requirement is only that the prisoner shall learn the gist of what the judges have said."

THE CHAIRMAN: In a nutshell, your position is that this 1994 statement of the law remains good?

MR. HARRIS: Absolutely. The next case to which I refer, unless the tribunal - I am just conscious of the time. It maybe an opportune moment. It does not make any difference to me.

THE CHAIRMAN: Mr. Harris, to the extent we are in your hands, when would be a convenient moment for you?

MR. HARRIS: I would prefer to make short reference to two more cases and then have a short break, and after that I will refer to the statutory provisions and the chairman's guidance. So probably four more minutes.

THE CHAIRMAN: Fine.

MR. HARRIS: The first one I do not need to turn up. It is *Ex parte Guinness*. This was an issue raised yesterday. When is the review of natural fairness or natural justice ... or otherwise? No, it does not go that far. Ultimately, this tribunal is the arbiter, I entirely accept, of what is said. You have to come to a view of what is said, albeit against the background of the cases to which I have drawn your attention. Nevertheless, what it says in *Guinness* and what we cited in our skeleton is that great weight should be placed upon a tribunal's own view of what is fair. The great weight is at p.184D of *Guinness* at tab 15.

That then only leaves *Claymore* on the cases. This is of course absent my reference to *Al Rawi* and *Bank Mellat* which are the two other cases I will deal with in due course.

Claymore, this is on the question of confidentiality rings. It is at tab 42 3C para.115. The background facts are not ... for these purposes ... decision not to pursue, carry on pursuing ... At an early stage there had been a disclosure within a confidentiality ring. There was a complaint about failure to provide sufficient information to the parties, then picking up at the end of 114 and then 115, this is the learned President of the tribunal:

> "Great care is necessary when the issue concerns the potential disclosure of sensitive business secrets by one competitor to another. (115) Whilst the Tribunal is prepared, in some cases, to order disclosure within a confidentiality ring (as happened earlier in this appeal), such confidentiality rings have disadvantages. There is undoubtedly scope for error. The amount of information disclosed within them should be kept to a minimum necessary to do justice in a case. They should not be overloaded."

Two points to make in response to that. Whose error is it? That is ... and failure on the part of professionals. Mr. Green dismisses that in his submissions. He says that is not worth the paper it is written on. But here, with respect, is the President of the tribunal saying that it is more than worth the paper that it is written on. This is a factor that the CC did and is entitled to take account of in deciding whether or not to use confidentiality rings. Professionals, bless their hearts, can all make errors.

Then the next point is that he says that they should be kept to a minimum necessary to do justice in the case and they should not be overloaded. With respect, GET's submission amounts to an archetypal example of overloading. So far as I could make out it needed every document on a CPR disclosure type basis to be put into the confidentiality ring. I say that because so far as I could understand it, you could not possibly begin to know for sure that you were going to have all inculpatory documents, or all exculpatory documents, particularly when the CC is not allowed to take any view of any of this, so we are told. You could not possibly begin to know whether you have properly been able to exercise your right of defence (so the submission goes) unless you have every single document.

That is a classic example, indeed it is the archetypal example, of overloading confidentiality. We are entitled to have regard to practice such as set out by the President of the tribunal in this respect.

After a short break, I will be dealing with the precise statutory context and guidance and then dealing with the EU law point and *Bank Mellat* and *Al Rawi*.

THE CHAIRMAN: Thank you, Mr. Harris, can I leave you with a question. I do not want an answer to it now, but clearly the standard applied by the CC and this Tribunal are different, we are operating at judicial review level, you are deciding on the merits, effectively, but you would accept that so far as confidential material in front of this Tribunal is concerned, we would be bound by the *Bank Mellat* approach, in that really material that is confidential can only be protected by a confidentiality ring, assuming, of course, it is relevant to the judicial review. That would be the only way of dealing with it. There would not be any other way of withholding it from other parties to the litigation?

MR. HARRIS: Yes, I accept that, and it will not have escaped your attention, I believe, that the CC had no difficulty with a confidentiality ring in the context of this court proceedings, but they, as I am about to develop, stand in sharp contrast to the administrative law proceedings and are not a *lis* between contending parties in a court of law, which is what *Al Rawi* and *Bank Mellat* were all about.

THE CHAIRMAN: Thank you. We will rise for five minutes.

(Short break)

THE CHAIRMAN: Yes, Mr. Harris.

MR. HARRIS: Sir, I am grateful. I said I would take you to the critical framework. I have it in the Purple Book, but I believe it is tab 1 of authorities bundle 1, so 3A, Somewhat unsurprisingly, in our respectful submission, this was not touched upon by Mr. Green. The

starting point is s.104 of the Act. The heading is "Certain duties of relevant authorities to consult".

> "(1) Subsection (2) applies where the relevant authority is proposing to make a relevant decision in a way which the relevant authority considers …"

What is it that we, the relevant authority, have to consider? We have to consider whether what we are proposing to do is likely to be adverse to the interests of a relevant party. So that is a statutory issue. Then:

> "(2) The relevant authority shall, so far as practicable, consult that party about what is proposed before making that decision.
>
> (3) In consulting the party concerned, the relevant authority shall, so far as practicable, give the reasons of the relevant authority for the proposed decision."

I am just going to pause for a minute. I hope it will not have escaped the Tribunal's attention that that is what the CC did in this case. The reason it did it was because it was following the statutory framework. It was not doing something else because the statute tells it what to do and it did it.

> "(4) In considering what is practicable for the purposes of this section the relevant authority shall, in particular, have regard to -
>
> (a) any restrictions imposed by any timetable for the making the decision …"

Again, I pause. This point is completely overlooked by the challengers. The suggestion that there should be a full confidentiality ring with effectively full TPI disclosure in which there should then be a forensic dissection of the magnitudes such as, for instance, we have seen in annex G for what little that document is worth. That it should all happen within what Mr. Green was at pains to point out yesterday was a mandatory statutory deadline is, with respect, absurd, and yet we are statutorily obliged to have regard to the restrictions imposed by any timetable, and any need to keep what is proposed or the reasons for it confidential. I am going to come back to that because it appears in part 9.

That is the starting point. Why were we doing what we were doing? Why were we doing it in the order and way we were doing it? Answer, the statute tells us to do it like that.

Part 9 of the Act we need to look at. It begins at s.237 and s.238. Section 237 applies to specified information, including at (1)(b), it relates to the business of an undertaking. That is our case. This was all about business, and so we are in that territory.

Section 238, information is specified information. That is a term of art:

"… specified information if it comes to a public authority [i.e. the CC] in connection with the exercise of any of any function …"

Obviously we were carrying out our functions. So we get business information which is specified information into our hands in connection with the exercise of our functions.

We will skip over a couple of sections and then come back to the intervening ones. What happens when we have got specified information is that we are subject to s.245, and can I invite you to turn that up, please:

"245 Offences

(1) A person commits an offence if he discloses information to which section 237 applies in contravention of section 237(2).

(3) A person commits an offence if he uses information disclosed to him under this Part for a purpose which is not permitted under this Part."

Then there are the statutory penalties.

That gives rise to the possibility or risk of criminal offences being committed by the CC - of course not just the CC, but including the CC, if it discloses information save as permitted by the statutory framework.

What is permitted manner of disclosure by the statutory framework. They are what are colloquially known as the "gateways". The two relevant gateways - that term does not appear in the Act but that is how everyone refers to it - are s.239 under the heading "Permitted disclosure", and 241(1), and I will take you to both of those in a minute. Both of those gateways have to be employed by express reference to 244.

What I am going to do now is take you to 239, 241 and 244. "Permitted disclosure", gateway 1.

"239 Consent

(1) This Part does not prohibit the disclosure by a public authority of information held by it to any other person if it obtains each required consent."

That is straightforward. More important for today's purposes, 241(1):

"Statutory functions

(1) A public authority which holds information to which section 237 applies may disclose that information for the purpose of the facilitating the exercise by the authority of any function it has under or by virtue of this Act or any other enactment."

That includes the very consultation we just looked at in s.104. So we have the ability to do that under the statute.

Section 244, what do we expressly have to have regard to and how is that ability to be exercised? Answer, the statute tells us.

> "244 Specified information: considerations relevant to disclosure
>
> (1) A public authority must have regard to the following considerations before disclosing any specified information …"

So there is a public interest, one, not terribly germane to today. That was the interest in *Sports Direct* that we will have a look at later on the question of limitation.

Then sub-section (3) is the most relevant one:

> "The second consideration is the need to exclude from disclosure (so far as practicable) -
>
> (a) commercial information whose disclosure the authority thinks might significantly harm the legitimate business interests of the undertaking to which it relates …
>
> (4) The third consideration is the extent to which the disclosure of the information mentioned in subsection (3)(a) [for our purposes] is necessary for the purpose to which the authority is permitted to make the disclosure."

So the statutory framework, the very foundation for all of this part of the case is that we shall have regard to these considerations and we need to exclude from disclosure commercial information except where we consider that it is necessary for the purpose for which the authority is permitted to make their disclosure, the purpose being the statutory 104 consultation mechanism which, as we have just seen, talks about disclosure in a consultation process of items or matters that the relevant authority considers are likely to be adverse to the interests and we shall give them so far as practicable the reasons for why we think that something is likely to be, and all of that to be expressly in the context of having regard to the timetable and the need to keep what is proposed or the reasons for it confidential.

We say that that is the Statutory framework that fundamentally underpins this entire unfairness challenge, and preface again myself in *Sports Direct*, which was a case of alleged procedural unfairness arising from failure to disclose in the context of a merger inquiry conducted by the CC, how did the Tribunal analyse it? It analyses it in exactly the way that I have just done, it starts with 237 and 238, recognises criminal penalties, talks about the gateways and then says: "This is what you have to have regard to, it has to be necessary in the exercise of your functions as per 104". Then it says: "Must start with the Statutory framework".

So where do we go after that? Where we go is to the Statutory Guidance, and that is in the bundle of authorities, tab 85, which is the final bundle of authorities. This is a document that, with respect, repays careful reading in its entirety, but given the time constraints I am going to just draw your attention, if I may, to a few paragraphs beginning at 1.1. It just refers to how this guidance has been issued by the CC Chairman under the Statutory procedure for consultation, just so you have the references, you know how and why I keep referring to this as 'Statutory Guidance upon which there has been consultation', that is where that reference is, it is easier to do it that way than in the Act.

Then how does, if you like, this Statutory procedure translate into on the ground behaviour? The whole guidance is relevant, particularly para. 5.2. At 5.1 – must have regard to the Statutory framework, and then 5.2: "Additionally, Groups should have regard to: (a) the desirability of Groups taking a consistent approach." (b) ...avoiding unnecessary burdens on business. Pausing there, one dreads to think the sort of representations we would get from businesses within a statutory deadline of six months if we said: "Oh, you do know what we are going to do now is to release every single document, but only to your lawyers and then we want your representations on absolutely everything that you say is inculpatory and exculpatory".

> "(c) the need to disclose information supplied to the CC so that interested persons … are able to comment on matters affecting them."

"(d)", and this is a point that is specifically picked up by Professor Smith in his unchallenged evidence:

> "The need to protect some information provided to it in the course of its inquiries or reviews and the importance of maintaining the CC's reputation for doing so."

How this is being statutorily consulted upon as set out in the guidance on gist is at para. 6.6. "Generally, Groups should aim to disclose key arguments through publication". At 6.7 – "Similarly, Groups should aim to disclose third parties' key arguments". 6.8 "Generally, Groups should aim to disclose responses to publications through publication." 6.13: "Groups should consider the need to disclose key arguments by providing a summary of the key points." 6.14, surprisingly: "When preparing summaries of key points, Groups should have regard to the need to exclude confidential information." All of this guidance follows on from the Act. 7.1:

> "The disclosure of provisional findings and a provisional decision on remedies is the main means by which the CC ensures due process and fulfils its duty to consult on certain decisions under s.104 of the Act."

We did that. 7.2:

> "The CC is not subject to a general obligation to disclose all its thinking …"

- and I would interpose: 'or every document':

> "… in advance of consulting on its provisional decisions."

Further down:

> "The annotated issues statement provides an overview of the CC's current thinking…"

It is no surprise that we put the guidance and consulted on it, and published it in this way, because this all stems from the Act.

Then at 7.3 there is a reference in the second sentence to the *Sports Direct* case saying: "there is no general obligation to disclose all working papers" – a point that the Tribunal in that case expressly endorsed; we will see that in due course.

Then in s.9 there is a reference to parts of the Statute that I have already drawn your attention to, then s. 9(b) (internal p.16) 9.11: "With the exception of certain key CC documents" – things like annotated statement of reasons, and findings, etc. "there is no presumption that disclosure is in a particular manner" and here I make the point that a lot of what Mr. Green, on behalf of Eurotunnel had been submitting is that it simply has to be done in the manner that he contends otherwise it could not possibly be fair. Well, 'no' – just fat 'no'. As Mr. Justice Mann put to me when I was making a submission about a procedural unfairness in the context of disclosure not very long ago: "There is more than one way to skin a cat", and that applies in this situation. We do not have to do the 'absolutist' full Monty" approach that Mr. Green suggests is mandatory, there is more than one way to create a statutory fair procedure, particularly against the background of what we are obliged to do under the Act. Indeed, 9.14 sets out the different ways to skin a cat, all of which depending upon the precise facts of the precise case can be capable of giving rise to a perfectly fair procedure. 9.14 is featured in some of the written submissions and I do not apologise for going back to it.

> "Groups will often have to consider how information contained in any disclosed documents should be presented or how access should be allowed to confidential information in order to provide protection."

There are a number of possible ways in which confidential information may be protected. That is entirely unsurprising and uncontroversial, save if you are in the 'absolutist' world – "including" and there is (a) through (h). We did employ a number of these methods of skinning the cat in order to be fair on the facts of this particular case. We simply do not

accept that on the approach of Eurotunnel in this case you should effectively draw a blue line through every single one except (g) or, indeed, seemingly throw the whole guidance in the bin except for sub-paragraph (g) of 9.14.

It is obviously the case that, depending upon the facts of any particular inquiry, provision of ranges can be an acceptable way of giving adequate disclosure of the key reasons on the matters of reasoning likely adversely to affect the party in question. The ranges one is a very good example. I might as well make submissions about it now.

There were ranges about break-even market share, there were ranges provided; this is what we employed, this method of, for example, diversion ratios and, for example, short-term profit margins in the IPR and the GUPPI analysis. That was a perfectly adequate way of fairly allowing GET to comment on those aspects of the reasoning that applied to those particular sub-links of their chain of emerging thinking.

Let us take, for example, the diversion ratios which we now see. This appeared to be somewhat incredibly, the very best example, in this voluminous Annex G – this was point 77, Mr. Green's point 77 yesterday, that they could not possibly understand it. They would have advanced all kinds of other information, they would have employed their phalanx of economists to devote no doubt a further report to it. Let us just dispel this, this is complete nonsense. The fact is that IPR and GUPPI are not rocket science. IPR and GUPPI talk about two things, well, first of all before I say what the two things are, they are not predictive, they are purely illustrative. So the fact that we have not used that illustration would not have made any difference to anything. They do not say that this is why something is going to happen or exactly how it is going to happen. They just come up with an illustrative number so as, if you like, to give one economists's representation or presentation of a point that is already made. They depend upon two things:

* The first is that they depend upon there being a diversion; and
* the second thing they depend upon is that a business that is diverted achieves some level of profit.

It is as simple as that. And the fact that there is a formula does not really add a great deal. Now, as to those two links in the chain, the diversionary —

MR. GREEN: I am very sorry to interrupt, just so we understand the point that I did make, I relied on that item simply to show us about the only data point that we have even a range on, and the vast majority of data points we had not been given a range on.

MR. HARRIS: Well, that item, 77, is in an annexe which is said to be a whole list of factors that we were treated unfairly upon. And in the column on the right hand side which is, did we

disclose reasoning by way of gist or not, it says "No", on item 77. That is what it says. It is his annexe. If he wants to resile from it now, that is fine, but the point is that this is very straightforward. I am just demonstrating how and why, given our statutory functions, this was a perfectly adequate way of dealing fairly with the situation. So, is there going to be diversion? Is there going to be a profit margin? Answer: there is obviously going to be a diversion because if you look at the whole of appendix C which is talking about the effect upon the market of market shocks or impacts, or what they call "event analysis", namely when there was a strike, when there was a fire in the tunnel (and I think there was one other than, I now cannot quite remember, I think there were three) and what all the hard empirical data all shows is that there was going to be a diversion, on to what? On to short sea ferry routes including Dover/Calais à la MFL's Dover/Calais route. And then the profit margin is even more straightforward, what on earth would be the point of GET starting up an MFL ferry operation in conjunction with its tunnel unless it either thought it was going to make an additional profit, or perhaps more accurately was not going to lose as much on its combined operations of the tunnel in conjunction with its ferry operations as it would have done if DFS had been able to enter without the MFL operation. So, the two things are utterly straightforward — utterly straightforward — you do not have to be an economist to realise how straightforward they are. And so to the extent that the suggestion is made that they were unfairly unable to deal with diversion analysis, IPR or GUPPI, it simply does not stand to reason. If you get a range that goes, I think it was from 5-20 on the diversion ratios and I think, I cannot remember what the range was on short term profit margin, any self-respecting individual, let alone an economist, let alone an economist of the eminence of Compass Lexecon, would realise full well that you would have to come up with a diversion ratio of basically nil, or a short term, or for that matter long-term, and that debate is a little bit of a red herring, of basically nil. But they could not begin to do that because that would have been absurd in the light of all the other information in the report. So, to be told now that somehow this is an unfairness does not get off the ground. That is a perfectly acceptable way — Compass Lexecon did not do that because they knew perfectly well that it would have been absurd. What did they in fact do, and this again bears on all these allegations about the supposed inability on the part of GET. That is what we are told, they were unable to deal with critical elements of the reasoning of DFDS exiting the market based upon the internalisation theory. Unable to deal with it, we are told, it was so unfair that they could not deal with it. They did not know what was going on. But in fact, when you look at appendix G you see that Compass Lexecon adduced and then argued in more

than one, I believe more than one hearing, I will stand corrected if it was not that, an entire report on critical loss analysis. I mean, the facts speak for themselves. This is in respect of a part of the reasoning on DFDS's exit that they are said to be befuddled by. It just does not withstand any scrutiny.

The same points, similar points, I will not go into specific detail on all of them because it would take far too long, but there is (b) (c) and (d) provision of aggregated data, that is a perfectly acceptable and sensible way of dealing with data when your statutory obligation is to consult on the key reasoning of your emerging reasoning on issues likely to affect the parties. Likewise with (b) and with (d).

I will just pause, actually, on (c) because a bad point was made by Mr. Green yesterday that I need to correct. Summaries of submissions and summaries of hearings and that type of thing, you will recall that that was one of his specific sub-headings, that it all went wrong including/because for example the civil servants are too stupid to know what they were listening to and they could not summarise it properly. Well, leaving aside that we dispute the slur, the fact is that the hearing summaries are put back to the parties who were in the hearing in order for those parties to assess and comment upon the accuracy of the summary. So, we do not accept that particular criticism.

Then there is excision of confidential information from documents. Let me give an example of this which is, again, a criticism levelled at us certainly in the written submissions. It did not seem to feature very heavily in yesterday's oral submissions, the extent of the losses said that we heard from DFDS about their continued operations on Dover/Calais in particular years. It is said, certainly as I understood it, by GET that they needed to know that number. Certainly they needed to know that number within the confidentiality ring so for some reason their lawyers and proponents could so something with it. It is nonsense. You do not need to know the exact sense of the losses when in the very next sentence of — which we will look at in the report the CC says effectively it does not matter how big the losses are, because both companies whether they be GET or DFDS can sustain those losses.

Anonymising the information, again, depending upon precise reason and we have done that as regards customers, nobody can pretend to know they need to know exactly who A was or D was. "Disclosure to one or more parties", well that did not arise. "Disclosure subject to restrictions", well, that is the one Mr. Green pins all his colours to that mast. That is a confidentiality ring.

Well, it might be capable of being used, it all depends upon the particular facts, it all depends upon whether it is necessary within the meaning of section 244(3). Professor Smith's evidence was that for the reasons that he gave the bits that are now said to have been necessary, the CC did not say, did not think that they were necessary bearing in mind its statutory duties. And then there are data rooms, well, again Professor Smith says that that might, depending on different facts, be necessary so as to do justice but whereas in Aggregates it was, in this case it was not. So these, we say, are all perfectly sensible and coherent practical hands-on ways of dealing with the job that actually faces under the actual statute with which we are presented.

What we are not presented with, I have finished now with the —

THE CHAIRMAN: In that case, Mr. Harris, keep it open because I have got a question.

MR. HARRIS: Yes.

THE CHAIRMAN: Excuse the interruption, but you said a while back that there were a number of ways of "skinning a cat" as regards confidentiality.

MR. HARRIS: Yes.

THE CHAIRMAN: And I am sure in some cases that is absolutely right. But would you agree that the appropriate way in which to deploy these various alternatives, handling of confidential information, is context sensitive in that in some cases one course may be better than another.

MR. HARRIS: Yes.

THE CHAIRMAN: And indeed you made the very good point about customer data where you anonymise the customer and that may be all that needs to be done before the information can be safely disclosed to other parties who might want to see it. So, whilst there may be alternatives within this range, sometimes one alternative will be clearly better than another.

MR. HARRIS: Yes.

THE CHAIRMAN: Let us take a case, though, where in order for a party to understand the case being made against him, in other words in order for the CC to meet its section 104 consultation obligation, the confidential document needs to be disclosed in its entirety. In other words, in order to understand the point, you cannot actually use any of points A-H. You cannot redact it. I am taking a quite extreme example, but it has cropped up last year when we tried *Cardiff Bus*, we had an application to admit a witness statement which could only be disclosed to the lawyers of the other side, not to the client. That was a very fact-heavy witness statement which required instructions from the lay client in order to understand whether it was true or not. The approach that the tribunal took in that case was

to say you either disclose it to everyone, including the lay client, or you cannot rely on it at all. Clearly, had there been a way of dealing with it by way of redaction, we would have done, but that simply was not possible. So none of these particular heads had worked. So taking that rather extreme case, which trumps which? Does confidentiality trump consultation, or vice versa?

MR. HARRIS: I think with respect the correct question is: is it necessary, within the meaning of s.244(3) in order for the CC to perform - I will turn up the exact language - "necessary for the purpose for which the authority is permitted to make the disclosure, i.e. the statutory consultation". So what you are positing to me, and what Professor Smith acknowledges expressly in his witness statement is if you get to a point in time at which something arises that has to be put across (to use a neutral term) in order for you to consult consistent with your 104 statutory consultation obligation (it is necessary) and you cannot do it except in one particular way for some factual reasons that apply to that document, then yes, you would have to disclose if that formed a part of the ... that you were obliged to consult upon within the meaning of s.104. Consistently, 104 was saying "so far as practicable".

THE CHAIRMAN: Yes, that is exactly what I was getting at. "So far as practicable" qualifies the obligation to consult. As you have pointed out, s.104(4) refers expressly in defining what is practicable to have regard to the needs of confidentiality. That is why I am interested in the priority between these two values, because I would be interested to hear your submission as to if it is not practicable to consult without disclosing confidential information, whether you have to disclose the confidential information or not. As I understand it, you are saying that it is the consultation obligation in that situation that trumps the confidentiality, not the other way round.

MR. HARRIS: If I may, may I address you on the "so far as practicable" issue after the short adjournment? I will take some further instructions on that point.

The critical thing for today's purposes is - very good, and I am happy to take instructions on it - what Professor Smith says that we do not reach that stage. What he says is it is all fascinating (he does not use that word), but the gist of it is if we let the ... only be impossible to disclose what I and my ... needed to disclose for the purposes of s.104 by using the confidentiality, then I would have had to address confidentiality ring. Indeed, ... in some other cases, it went wrong in a particular case. It did not arise in this case by reference to the statutory duties on this case. But that being said, I will take some more instructions and address you on that after the short adjournment.

That is the statutory framework, that is the statutory guidance. Then just a few words on EU, because we say this is effectively a red herring. We do not take issue unsurprisingly, that the general principles of EU law are applicable. What we do take issue with is the procedure under the merger regulation. There is not ... it needs to be said, but I do say it because one would have thought from some of the submissions you were faced with yesterday that somehow we were directly in the territory of the procedures referred to in *Solvay* and that we were operating under the merger regulation, or the merger implementation ...

I will take you to one particular provision of the merger regulation in just a moment, but whilst the general principles of fairness and proportionality we accept do apply, one ought not also to lose sight of the fact that another general principle is that of national procedural autonomy. We are talking about a domestic regime and a procedure within the domestic regime. It is too trite to lead any citation of authority that they are matters for members states, albeit under the general principles.

I will just turn up the merger regulation and I just invite your attention to recital 8, lest anyone should have lost sight of this really rather obvious point.

> "The provisions to be adopted in this Regulation should apply to significant structural changes, the impact of which on the market goes beyond the national borders of any one Member State. Such concentrations should, as a general rule, be reviewed exclusively at Community level, in application of a 'one-stop shop' system and in compliance with the principle of subsidiarity. Concentrations not covered by this Regulation come, in principle, within the jurisdiction of the Member States."

That is why we are looking at the ... part of that in the chairman's domestic guidance and the ... upon domestically. That is why we are not, unlike GET for reasons best known to themselves, looking at something that does not apply. If I may respectfully put it like this, it is very aptly summarised by a paragraph in *Solvay* that my learned friend turned up when he was making these submissions about European procedure. Mr. Currie put it to him that there is a different procedure and different legislation, and in *Solvay* it says in terms that the legislation governing the European procedure is one in which there is a critical fundamental difference, namely a prohibition on commercially confidential information being disclosed. It is like comparing chalk and cheese. ... detailed procedure ...

That, then, takes me to *Al Rawi* and *Bank Mellat* and I would aim to finish these submissions before the short adjournment, then after that deal with your point about "so far as practicable", and then I will be straight into the specifics on jurisdiction.

Bank Mellat might, to be uncharitable to me, be described as jury points, but nevertheless I will make it. We say it is telling that the SCOP makes no mention of *Al Rawi* or *Bank Mellat*, even though it makes a procedural fairness challenge, very telling when you consider that Mr. Beard appeared in *Al Rawi* which is said fundamentally to have changed the framework of procedural. A major submission, at least in my submission, that Sales J in *BAA* makes no mention of it. I say that in those circumstances this tribunal should be very, very wary to be seduced by a similar sort of thing that did not persuade Sales J. Namely, with respect to him, an over the top presentation by Mr. Green of the augmented standards that apply. They do not. I have given you the gist.

With those introductory remarks, we would like to get a few things straight. Both *Al Rawi* and *Bank Mellat* were addressing the powers of the court in a trial, in a criminal trial. There was no suggestion that they apply to the CC's conduct of a regulatory investigation. One only has to turn up para.1 of *Bank Mellat* where it says that, and para.1 of *Al Rawi* where it says that the issue that arises on this appeal is whether the court has the power to closed material procedure described in the preliminary ... Silber J for the whole or part of the trial of a civil claim for damages. Well, we are not in that territory. So whatever they do, even if they do have some kind of absolutist approach (which I frankly do not recognise from the actual judgment and ...) whatever that does mean, if it applies to a civil common law trial where there is a ... between competing adversarial parties, even if that is right, that is not this case.

So as soon as you recognise that, largely, we say, the case is then lost because Mr. Green was forced to recognise that whether it be his primary, subsidiary, or his secondary case, ... case. The case is that it is not absolutist. Bingo! As soon as it is not absolutist, what do you do, you go to the statute and you say to yourself, "What does the statute require?" We have seen what the statute requires, and it is not the absolutist approach.

There is another problem with the absolutist approach, or even with the high standard of approach number two, which is that it proves far too much. Let me give you a very good example of where it goes completely over the top, with respect. Cross-examination: this was a most peculiar part of Mr. Green's submission. He is busy telling you that there is some absolutist need to have all of these open procedures with all the corollaries except the one that makes the submission look really absurd, namely calling witnesses of other people

and then cross-examining. At that point he suddenly says, "You do not need that, That is incomprehensible". Either you need the absolutist lock, stock and barrel or you do not. You cannot just say when you are presented with the absurd corollaries of your argument, "I do not like that bit, so let us forget about that bit". That is what it boiled down to.

The same is true of disclosure. The ineluctable consequence of his argument is that you need full disclosure in every administrative law proceeding where there is any possibility of a remedy, at least, if not more than that, and you need full disclosure into the confidentiality ring.

That is the consequence of his argument and it is an absurd argument to say that in every administrative law proceeding you need full disclosure, so you can see every inculpatory, every exculpatory, and everything else to find out whether it should have been classified as inculpatory and exculpatory, so you can subject it to a detailed forensic analysis, put it back to the administrative authority and they say, "Well, actually we do not think this", and then you say to the administrative authority, "Now you have got that you plainly have not looked sufficiently into this, that and other on that document, this, that and the other, and the other, and the other on that document", and umpteen other lines of inquiry on the other documents, and even when you have done that - and this is where the logic takes you - you then put all back that to the party in the administrative proceedings so that they can employ economists and armies of lawyers to say, "Well, I can now say the following things about it". It is never ending, it is a nonsense, and yet that is where the argument takes me, it is a non-starter.

We say that it cuts across long-standing authority that the requirements of natural justice are flexible and context dependent, and that critically administrative bodies, of the type such as ours in this case, are not conducting an adversarial trial.

Another point that was, we say, with respect, overlooked in these submissions is, for example, the outcome of bias, number one. The submissions seem to be that closed procedure is an absolute anathema and basically cannot be done. In *Bank Mellat (No. 1)* the Supreme Court did allow closed procedure. That was the point of the application. Can the Supreme Court conduct a closed procedure? Answer, yes. They might not have liked it, and one can understand why. One of the few points that rings really true about Mr. Green's submission is his repeated remark that this was controversial, it was. That is what they did.

Another point is the point about new law and overtaking all of these cases to which I have been referring. That must just be wrong on the face of the judgments. To state the obvious, in neither *Bank Mellat (No. 1)* or *(2)* was the Supreme Court confronted with the issue of

whether a particular summary or gist was adequate, it did not arise; much less whether that was sufficient in the context of a regulatory investigation which was not subject matter. One would have thought that if the Supreme Court was going to be overruling all of this well-established authority it might have actually said so, but it does not. Quite the opposite. The point I said I would come back to in opening, could you turn up *Bank Mellat (No. 2)*, which is at tab 61, bundle 3D of the authorities. It is para.29 of Lord Sumption's speech at tab 61.

"*The Bank's procedural grounds*"

This was obviously the Bank complaining about the imposition of the blocking order on it:

> "The duty to give advance notice and an opportunity to be heard to a person against whom a draconian statutory power is to be exercised is one of the oldest principles of what would now be called public law."

Just pausing there for a minute, this is well established. It is not as though the principle suddenly emerges in *Bank Mellat*.

> "In *Cooper v. Board of Works for the Wandsworth* (1863) the Defendant local authority exercised without warning a statutory power to demolish any building erected without complying with certain preconditions, 'I apprehend', said Willes J at 190, 'that a tribunal which is by law invested with power to affect the property of one of Her Majesty's subjects is bound to give such subject an opportunity of being heard before it proceeds, and that rule is of universal application and founded upon the plainest principles of justice'."

Then the passage that we have been to, including the very passage, including the critical point number 5. So at the beginning of Lord Sumption's speech on procedural grounds he refers to well known and long standing authority that is over a century old, which I apprehend is now said to have been overtaken, and then to the very passage in *Doody*, including a reference to statutory framework as being an essential feature, and the reference to gist. This is the very same passage that talks about gist at the bottom. Then what does he say at 31? He says. "It follows that", not, "That is irrelevant and I overrule it", or, "It has been overtaken and there has been such a development in the jurisprudence and thinking on procedural fairness that *Doody* can be effectively put in a drawer, which was basically what Mr. Green submitted about *Hoffmann La Roche*, "That is all very interesting but 35 years old, let us basically ignore it, I will tell you what the law is, it is all about *Bank Mellat*". What does *Bank Mellat* found itself on on these points? The case that I rely upon. He says:

"It follows that, unless the statute deals with the point, the question whether there is a duty of prior consultation cannot be answered in wholly general terms. It depends on the particular circumstances in which each direction is made."

That is the point that I have been making, which is so critical to your determination, it depends upon principally the statute and how that has been put into the guidance.

Then the last point is that, so far as we understand the case and I am afraid this will only be something you can resolve on a more detailed reading, but at the end of para.31, so far as we understand the case, having cited expressly *Doody*, including the point on gist and having said, "It follows that", what you should do, at the end of 31, it would have been acceptable for the Treasury to disclose the gist.

What happened in this case was that the Treasury did not disclose anything. So what he says in the final sentence is:

"In justifying the direction in the course of these proceedings …"

"in the course of these proceedings", so this happened after the blocking order had been imposed in the proceedings -

"… the Treasury disclosed the gist of the closed material including the provision of banking facilities to Novin and Doostan and their alleged provision to [names I cannot pronounce]. I cannot see why they should have had any greater difficulty in disclosing before the making of the direction the material that they were quite properly required to disclose afterwards."

In other words, the gist. That is what I have to say about *Al Rawi* and *Bank Mellat*.

THE CHAIRMAN: Can I ask you a question about those? Clearly there are two extremes. There is 103, and you have been addressing us on it, which is that these cases have fundamentally changed the legal landscape and we have your points on that. The other extreme is that they are utterly irrelevant to what we have to address today, because they deal with proceedings before a court of law rather than administrative tribunals. Is there a middle course - it is going back to the point I raised regarding Lord Mustill's second point, … is not immutable. The one thing one does glean from these judgments is a real hostility to, to use Mr. Green's term, closed material. Does that affect temperature or change the atmosphere in which decisions regarding confidentiality versus candour need to be made, or are the cases irrelevant even on that basis?

MR. HARRIS: I am prepared to accept that the general atmosphere in which these decisions are taken are one of hostility towards not scrupulously adhering to rights of defence. I have no difficulty with that at all. What Professor Smith's evidence is is that is precisely the

atmosphere in which he, in conjunction with the inquiry, found was conducting his detailed appreciation of what disclosure was required even in the statutory context. So he begins by saying, "I want to disclose as much as possible but of course I am bound by the statutory framework and the guidance that flows on from it, and in particular I cannot disclose, cannot, under the statute, disclose confidential materials of a business variety from another undertaking received in this inquiry, I say where it is necessary in order to perform my statutory consultation function. I cannot speak for Professor Smith, but one gets the impression, from the way in which he starts his evidence that he is temperamentally opposed to it as well, and I have no difficulty with that.

Certainly for me that is a convenient moment. I will deal with SCOP's jurisdiction points in the order they appear after the short adjournment. I have taken on board the reasonable practicability point again.

THE CHAIRMAN: I am very grateful, Mr. Harris, we will resume at half past one.

(Adjourned for a short time)

THE CHAIRMAN: Yes, Mr. Harris.

MR. HARRIS: Good afternoon. In a moment I will turn to SCOP, where I was on the associated person, but before I do I will just address you briefly on the issue that arose before the short adjournment on reasonable practicability under section 104. The answer is as follows though, as you heard me submit, it does not arise on the facts of this particular case. But if there were something that was central to the key reasoning of the CC in its emerging provisional findings that it felt that it ought fairly to consult upon with an affected party, the CC would seek to reach a consensus between the affected party whose information it was, and the party to whom it was in their interests fairly to disclose.

And if that could not be agreed, then the next stage would be for the CC to propose that it would be minded to disclose it to the interested parties if you like, lawyers on a confidential basis, ie a confidentiality ring, and see if a consensus could be reached that way, which it sometimes is.

THE CHAIRMAN: Yes.

MR. HARRIS: If it could not be reached in that way because people within the ring said, "No, I need some lay client instructions", then we could try to reach consensus between the affected and the interested party in that way, but that ultimately if push came to shove and the CC was not prepared to abandon that link within the reasoning because it was a key part of the reasoning and therefore was necessary to consult upon in order fairly to carry out its duty of investigating the market in coming to findings on RMS and SLC and what-have-

you, and if it was not prepared to abandon that link then it would issue a decision to the effect that it had to be disclosed in a certain manner notwithstanding that it was confidential. But then, of course, critically there would be an opportunity for that decision to be challenged independently before this tribunal. We will come on to timescales of that when I talk about the limitation challenge, because that is absolutely no impediment to making a challenge. So, that is the way it would work. That is how practicability is dealt with in practice, we respectfully contend that is a very sensible way of doing, and that is how we do the balance. So, I suppose one way of putting it would be ultimately it was key and the report could not be progressed without that key part being disclosed, then we would disclose it, but the person would have an opportunity to engage with it throughout and ultimately to challenge it before the cat was out of the bag. I know that cats recur a few times, but perhaps a skinned cat out of the bag.

What I would also add on this point is that it should not be lost sight of that, actually, the CC's emerging thinking, almost by definition, does evolve and so there are situations in which at one point in time a party considers that it is desperately affected by non-disclosure or by disclosure as the case may be, but that at an even slightly later stage in the proceedings in the inquiry it realises that actually what was thought to be central is not in fact central; and a practicable way of dealing with that sometimes, I am told, my instructions are, is that a party can be assured that actually things are moving or have moved on, and therefore there does not need to be the type of disclosure that is thought to be so important at one point in time.

THE CHAIRMAN: Yes, indeed, context can be taken in a couple of ways. One of them undoubtedly must be temporal context in that the CC obviously is working through an investigation, and points that at one stage may seem important may cease to be, and vice versa.

MR. HARRIS: You have taken the words right out of my mouth.

THE CHAIRMAN: Yes, I am sorry, Mr. Harris.

MR. HARRIS: So therefore what we have is SCOP's jurisdiction grounds. The first one is associated person. The starting point for this ground is para.4.32 of the CC's report. This is the one where the challenge is effectively "You have not got to act together, but you have also got to secure control together, that is the only way you can remain an associated person".

But the starting point, if you take the report at 4.32, is that this question, this is under the heading of "Associated persons", involves examining the considerations leading up to

GET's bid. One of the criticisms in the written case against us was that we had lost sight of anything but the bid, and were only focusing on the bid. Well, it is just not right. We were examining the considerations leading up to the bid and the bid itself, the reasons for GET's success and GET's and the SCOP's activities post-acquisition. So the lead-up period, the bid itself, the reasons for it and what happens afterwards in order to analyse whether GET and SCOP can be said to have acted together, ie the relevant question under the Act.

And then of course I place reliance upon the entirety of 4.35. I know that you have got this in mind, but this is an absolutely central consideration. We have examined a range of evidence relating to the inter-actions between GET and the SCOP, again, leading up to, during and after the transaction took place:

> "In our view on balance [so we knew what we were doing and the balance of the exercise] there is a significant body of evidence [well, there is no doubt we are about to read what that body of evidence is, six, seven numbered sub-sections and the relevant footnote] which taken together indicates that the SCOP acted together with GET in preparing [so, again, "preparing"] ... and its involvement was instrumental in securing the Sea France assets for GET".

Now if we just go down (a) through (d) these are not the bid, these are matters in advance of the bid, all of them: "(a) GET and the SCOP were in advanced discussions over the Sea France project from (at least) January 2012, and here is an important footnote at 84. "GET told us that further documentary evidence did not exist, but confirmed that there was a process of unofficial discussions with the SCOP. The SCOP also confirmed that it was working with GET from January-February 2012" and then "similar conditions" were in *Swedish Match*. So, here is evidence cited in the report of what was going on in the lead-up period in terms of the SCOP working with GET as regards the project, the Sea France project.

The second one is, again, well before the bid: "From an early stage, GET and the SCOP presented a united front in public and to third parties. GET made several statements to the press referring to its proposed relationship with the SCOP, this is in the lead-up period, and the importance of that relationship to its bid. Mr. Giguet of the SCOP told us that when he first me the President of the Chamber of Commerce in January-February 2012, he described himself as follows:

> "I represent the SCOP, but I also have the agreement of Eurotunnel".

Mr. Giguet told us that GET invited him to join them for the meeting at the court, so the question is, are they acting together in putting together this project? Answer: "Well, here

are two pieces of evidence that we, on balance, weighed up and we thought that that showed that they were acting together in putting together a project including the bringing of the employees. "Mr. Giguet was paid by GET" — this is (c) — "during the period". Again, that plainly, whatever one may think of it on the merits, it plainly is a piece of evidence that is capable of supporting on balance the consideration that we made that the facts pointed to parties acting together in the lead-up period, and GET's internal consideration of the proposed acquisition — this is (d) — "were informed by the SCOP's business plan". Well, the SCOP's business plan was presented to the GET board and when was that? That was back in January 2012. So the SCOP's business plan, we heard repeatedly how the raison d'être of SCOP is to find employment opportunities for its members we know that it came into existence as a legal entity under French law in October 2011. Later on I shall be showing Mr. Doutrebent's witness statement in fact shows that they did not have their 500 employees in place back in October 2011. I will come to that in a minute. What they had was, I think 12 employees; and then in this very period when they are having discussions with us, presenting their project, creating internal business plans and present to the GET board, that is the point at which the SCOP project really takes off. And then they say in (ii) "The document Groupe Eurotunnel Newlink Project - Proposed Structure", based upon, this is GET's project simulations are based upon the business plan of SCOP. So, there is little doubt — and this is even before we get to sub-point (e) little doubt that these are considerations that fairly can be said to be factors that we are entitled to weigh in the balance in coming to a view on the facts that this was people acting together. There is no magic in those words, "Were they acting together or not?" Answer, "Well, these four things say that they were, at least in our reasonable view".

But then the high water mark, unfortunately I cannot read it out because it is confidential to GET.

THE CHAIRMAN: Shall we read it now, just to remind ourselves?

MR. HARRIS: Yes, please.

THE CHAIRMAN: Yes.

MR. HARRIS: I mean, that speaks for itself. What do they think they were doing? There is reference to a partnership and a project and a re-kindling. Well, that says it all. Were they acting together in order to secure control over a business? We respectfully contend that this is a document contemporaneously created between the two of them when acting together, and it shows what they were trying to do.

THE CHAIRMAN: I just want to check. Is Mr. Harris saying that SCOP saw this document and read it, and it was prepared with SCOP because I do not think that is right, and I do not think, to be fair, that is what the Commission said previously.

MR. HARRIS: It makes no difference to my argument whether the SCOP saw it at the time or not. I do not know the answer to that, but it does not make any difference to me.

Subparagraph (f) and (g) the court order approving talks about the use of the former SeaFrance employees supported by a previously existing SCOP. Then the completion date. Then at 4.37 is a reference to the continued acting together to secure GET's control, so we rely upon that. And the continued GET financial support, which is set out in a bit more detail in 4.44.

So it is against the background of that. What is challenging our reasoning and our legal conclusion here, and what we conclude at 4.38:

> "We therefore consider [i.e. based upon the material that I have just shown you] that the SCOP actively assisted in preparing GET's bid, that GET and the Court both considered that the SCOP relationship was an important factor in making GET's bid the most attractive, and that the two continue to act together to secure GET's control over the liquidation assets and MFL enterprise."

What we say is that is perfectly clear and coherent and we are entitled to take it all into account in coming to a view that those factors led to the conclusion that they were acting together to secure control of an enterprise or assets.

Of course, I will address in due course the separate question of whether it was truly an enterprise in the sense of activities, but that is not this ground. This is the "were we acting together to secure control?". A lot of this has to be, we respectfully contend, assessed against the background of a purporsive interpretation, if that is even needed, to the relevant provision within s.127(4) of the Act. We say that you do not need it, and it is just a natural reading of "are they acting together to secure control?" On these factors we are entitled to come to the view that they were, but absolutely all doubt is dispelled if you give any thought to what these provisions are intended to do. What they are not intended to do is allow, by means of technical devices or narrow constructions, a coming together of people in the context of two businesses ceasing to be distinct to escape scrutiny because of some narrow construction. That would be utterly pointless. No reason has been advanced for it, and it does not work unless you do.

Indeed, we say that one way of characterising the narrowness is by effectively Mr. Beard's submission having to read in words. We had said that you would have to read in the word

"together" after the words "to secure control" if the thrust of his submission is to secure control ... but we now learn that in fact he says that it would only make sense if you add in the word "together" twice. That just further illustrates my point. After adding two narrowing "together"s in order to make your construction work.

THE CHAIRMAN: I am not sure that was quite the point that Mr. Beard was making. I think he was suggesting that it all supported his case and one "together " was enough.

MR. HARRIS: One or two; it does not make any difference to me. The point is that if you read in a narrow construction against no sensible reason for having a non-purposive approach, then you do not get to the right result. Why would you do it? It is completely contrary to the merger assessment guidelines. You do not need to turn them up; they are cited in the defence but we turned them up yesterday. They specifically said that you do not need to have both parties together having control over the enterprise that has been - both of the enterprises that cease to be distinct. It says that in terms. So presumably the guidance is completely wrong on this approach. Perhaps Mr. Beard does not shrink from that.

What we say is you do not need to do it on a natural reading, you do not need to do it on a purposive reading, and we have got plenty of evidence to support our reasonable purposive interpretation. So that is the end of it.

That only leaves, were it not for two additional ... I would be moving on to the next one. But Mr. Beard has not left it there on behalf of his client. What he has done is he has said that there is effectively a floodgates argument that avails him. What he says is: you the CC, your approach will necessarily encompass too many people, there will be too many people who are associated personally, particularly the bank funders. That proves that your point cannot be right. Everyone has a bank funder; they all have bank funding documents and therefore you are wrong.

Of course, there is nothing in this point for two reasons. What the Act talks about is acting together, nor acting for. So if you have got a lawyer, a banker, or a consultant or economist or what have you, and they are acting for a principal party, maybe they are following instructions and no doubt getting paid fees as a result, they are acting for a party; they are not acting together with a party. So that rules out nearly all of these situations that are said to be floodgates.

THE CHAIRMAN: Testing that in this case, if the SCOP was doing no more than providing a labour force, albeit a labour force arising in the vast majority of ex-SeaFrance employees, that would be simply "for" rather than "together".

MR. HARRIS: You are acting as a recruitment consultant providing a paid for service.

THE CHAIRMAN: A provider, as Mr. Beard said, of human capital.

MR. HARRIS: If it were doing no more than providing a service analogous to a bank providing a loan or an economist providing a consultancy service, or what have you, then we would not be in that territory, but the fact is we identified in 4.35 they are not in that territory. In particular, in the redacted portion at 4.35(e) the terminology used there is completely inconsistent with a bank or a lawyer. I certainly, with great respect to them, do not enter into partnerships or partnership projects with those people for whom I act. I will come on to an abnormal situation in a minute. In a normal situation would a bank funder, or somebody of that ilk? But if it were a different situation with different factors and not the ones we identify in our reasoning, then it is possible that somebody simply providing an employee (I am happy to adopt the phrase) if it were no other than human capital - maybe a good example is somebody who goes on secondment, and in that different situation it might be the case that they are not associated persons within the meaning of the Act. But I do not have to address that situation given what we have got, including how they describe it themselves.

What I do not resile from though is the fact that on different facts from a normal bank funding situation there could be a situation in which a bank is an associated person. Indeed, we have addressed you in written submissions on the case of *BUPA* which was precisely such a case. I may leave the tribunal just to have regard to *BUPA*, which I think came in a supplemental bundle of authorities in its own time. The relevant paragraphs are 2.38 to 2.43. The reason I do not need to turn it up is because I can summarise it very easily. There was a merchant bank involved with BUPA there. BUPA was trying to obtain a controlling stake in I believe another medical entity. There were, unsurprisingly, competition problems with that and commitments to the competition authorities. So in order to nevertheless get effectively control over the entity with which it wished to merge it engaged the services of a bank to do more than provide a bank loan. The bank, or a subsidiary of the bank, actually had to obtain the shareholding in the private company, and it therefore obtained some voting rights in it. It said, because you can see the problem there, if we have got voting rights and we are in partnership, i.e. not just providing a loan; we are actually buying out some of the assets that go into the mix for the merger equation analysis, and we exercise voting rights, we can see how people might say we are acting - I tell you what, we will not exercise them. It still was not good enough. The CC's analysis was that BUPA and the relevant merchant bank subsidiary should be regarded as acting together under a commercial reality arrangement because the commercial reality was that they would

only hang on to the stake in the target company until such time as BUPA had dealt with its competition commitments with the competition authorities and at a later point in time the intention was for BUPA to get its hands on CHG. It was also funding obviously, because otherwise it would not have made any money, it was funding the arrangement but it went above and beyond funding, and it did stray into the territory of acting together so as to secure control. I reject floodgates on a standard approach for the reasons I have given. I do say that, depending upon the facts, and they are not normal then there can be associated persons in that situation.

That is all I have to say about jurisdiction Ground 1. We say that it does not succeed for the reasons that I have given.

That takes me then to SCOP jurisdiction challenge Ground 2. This is the timing of the transaction. It is critical to Mr. Beard's analysis that he is able to distinguish between what he says was already there, namely the labour, and what he says came later, namely the new assets, by which he means principally vessels, but also, as we know, the website, the customer lists and a little bit of things of that nature. It is absolutely critical that he has to time-capsule the approach between what was already there and what came at a later stage. That is why we described it as a precise chronological dissection. I know he takes issue with that language, but the fact is that his argument does not work unless you do that. What we say is that there absolutely no explanation, let alone a coherent reason, for why a broad and general deeming provision - and this, and perhaps we should turn this up, s.127(1)(a), authorities 1, tab 1 - so 127(1)(a), when do you treat people as being associated persons? You do it:

> "… for the purpose of deciding under section 26 whether any two enterprises have been brought under common ownership or common control."

This is a very broad and general, if you like, deeming provision or analysis provision. It is for the purpose of deciding under s.26. There is no reason to think that on the basis of that language you have to dissect things, time capsule things or do anything of the manner that is critical to Mr. Beard's analysis.

Just for your note, so that we do not have to turn this up at a later stage, could you all, please, read to yourselves sub-section (2), which is relevant to a different argument on a jurisdiction point. (After a pause) So sub-section (2), whatever happens under sub-section (1) by way of associated person, it does not mean that you are excluded from what would happen under s.26. We will come back to that because that was completely ignored by Mr. Beard on the 'mutually exclusive' argument.

We say that, against the background of these broad and general words of for the purpose of deciding, there is no reason to have some kind of narrow, chronological dissection or precise adherence to the mechanics of a particularly structured transaction. All you are doing is asking yourself, for the purpose of answering the question under s.26 of whether two or more enterprises have been brought under common ownership or control, whether you can treat two people as one person.

We say that, first of all, on its natural reading, but again certainly by reference to a purposive reading, which, having a look at the substance of the relationship that has been created, having a looking at the substance of whether or not there were two enterprises and now there is one, and basically having a looking at the substance of everything, there is no reason for you to adopt a construction of s.127(1) that requires some kind of narrow construction, number one, let one that is critically dependent upon a precise chronological dissection of the transaction. Mr. Beard has to have this chronological dissection, otherwise his argument does not work. The only time limit is, in fact, that we went through with him yesterday, so I will not repeat it, but the only time limit is that at the moment of final cessation of distinction of the businesses as has to be within four months of the reference date. That is our case. We say that the moment of final cessation of the distinction between the two businesses was within four months because it was the date of the court sanction transaction, when the vessels transferred. So there is no problem on timing. What this section does not do is it does not say that there is no warrant for any of this, that even though the moment of final cessation of the distinction between the two businesses was within the four month period somehow you cannot have regard to anything that happened at any lead up stage. There is, first of all, no warrant in the statutory language, and then utterly no point in doing it. Indeed, it would be highly dangerous because what it would mean is that you would inevitably in almost every case, and certainly in this case, you would leave out of consideration critical lead up activities - I will not use “activities”, but for lack of a better word, “background”. What has been going on in the run-up - maybe that is the way to put it - to the moment of final cessation?

There is no reason, when you are looking at something for the purposes of deciding whether one thing has lost separation from another thing, why you should leave out of account the relevant run-up or background. There is no warrant for that at all. What you do need to do is have a final cessation within the four months. We have got that. That is when the transaction took place.

It would be dangerous for another reason, because not only would it leave out of account relevant materials, but you can just imagine the licence that it would give to clever lawyers and other advisers in structuring merger transactions. They would make absolutely sure, would they not, let us be honest, that something that was part of the cessation of distinction happened even a day before the four months. Then they would say, "You do not have jurisdiction to look at that because that happened a day before".

It is a bit like the argument that we are going to come to in due course about a period of non-trading. To preface myself, I will obviously come on to this properly in a minute, if it were right that a period of non-trading was the answer for avoiding jurisdiction you can be absolutely sure that every merger would have a few hours or a day, or even a week, of non-trading and then they would say - "Too bad, you cannot look at that".

We say that there is nothing in the statutory language, there is nothing in a purposive construction, it would be dangerous and counter-productive.

Then there is another criticism that is made of us which is that the SCOP says, "We cannot really understand the reasoning". We have seen the law on reasoning. These people are not ignorant of what is going on here. You do not have to set out some magnus opus, exegesis of reasoning, on every fine little detail when they are in the market and they know what is going on. They say, "We cannot understand how the labour force came to be considered by the CC as part of the relevant merger situation". There is nothing in this. We have just seen in the report that the CC perfectly expresses itself in two paragraphs, 4.32 and 4.35, about its considerations leading up to the bid as well as the bid and, although not relevant for this purpose, after the bid.

We have seen that it regard at footnote 84 to the period of unofficial discussions with the SCOP and the SCOP confirmed that it was working with GET from January/February 2012, and it ends with the conclusion, and there is another relevant one in 4.68 of the Report, in particular at (b), to have the SeaFrance employees of a certain proportion ended up engaged in running the MFL service. We are somehow supposed to take at face value the complaint that they do not know how the SCOP employees came to be involved in what the parties were describing as a partnership and a project to rekindle you know what. It does withstand any sensible scrutiny and it is all the worse when one has regard to M. Doutrebente's evidence for the SCOP which is at bundle 1, tab 2, it is under the heading: "Creation of the SCOP" 10 to 15. I got the number wrong, I said 12 and in fact it is 14. The SCOP was initially created but not registered as a formal legal entity, on 7th October 2012 by a group of 14 former SeaFrance workers, prior to the liquidation and cessation. Various donations,

and then it says: "There are currently 451 employees." So, we go from a stage in October 2011 and one would be forgiven for thinking from Mr. Beard's submission that 14 October 2011 – 'bingo' – there are all of a sudden all the SCOP employees, because what he said was that you compare a situation in time at which all the SCOP employees were with the SCOP and then a separate section in time when suddenly added to them are the vessels and their website and what have you. But, in fact, that is not the case. In fact, on his own client's evidence, it was on 7 October 2011 there were 14 people – it is not clear to me whether they were even employees at that point. They seemed to be registered, but be that as it may what then has to happen, and what he says in 11, 12, 13, 14 and 15 is how the SCOP, if you like, really takes off. In 11 the purpose of SCOP was to make an offer – rejected. Then it was formally registered ----

THE CHAIRMAN: We see in 13 that at registration it had 827 subscribers.

MR. HARRIS: Yes, exactly, that is right.

THE CHAIRMAN: So query the difference between the subscribers and ----

MR. HARRIS: It is critical, because 13 describes what is meant by subscribers: "individuals who have expressed their support for the SCOP and signed up to the SCOP without paying any share capital, but who had made a minimum contribution of €50 per person".

THE CHAIRMAN: Yes.

MR. HARRIS: Then 14 proves my point. These members subscribe to the SCOP with a view to future employment, and then what does he say? It "was (at that stage) anticipated on the basis that SCOP would acquire the entire SeaFrance fleet at that time", but what we know is that that did not work and the future employment came to be realised through a combination with GET. So what is germane about these paragraphs is that at the very period of time that we refer to in our para. 4.35(a) and (b) and our footnote 84, it turns out that we do not have a pre-existing entity called "The SCOP" containing 500 or 827 or anything more than 14.

THE CHAIRMAN: Mr. Harris, maybe nothing turns on this, but it is not clear from para.10 whether the 14 workers are subscribers or employees. I infer that they are subscribers. So we have an increase in two months from 14 to 827.

MR. HARRIS: Yes, but of subscribers. The contrast in 10 is between subscriber members and people who are "451 employees on permanent contracts".

THE CHAIRMAN: Indeed, but is not the point that they cannot be employed until the GET acquire the vessels and can employ the SCOP ----

MR. HARRIS: Yes, that is exactly my point, that is how they came together. They came together when, in discussions with GET, GET and the SCOP can see that there is a potential

partnership project potentially available to them, but it requires the actual obtaining of the vessels and the website and what have you, and that is when the actual employment takes off, and takes effect. This point I say I do not need because of the true construction, let alone the purposive construction and you do not narrowly time capsule it up, but what I am saying is that I do not accept the characterisation of time capsuling that is presented by Mr. Beard in any event as if there was some nice clear cut distinction between, on the one hand, October 2011 when all the labour force was with the SCOP – this is how he presented the case – and, on the other hand, some vessel being added to that at a much later point in time. This seems to be a much more nuanced case than that on the facts. Yet, whilst, if you like this nuancing was going on, there was an increase in subscribers, and subscribers were being converted into permanent contract employees, at some point after October 2011 that has to happen, to the point where they get currently 451 employees on permanent contract, that is the very point in time that we refer to in 4.35(a) and (b) and footnote 84 as being when they are engaged in discussions with GET and working with GET.

THE CHAIRMAN: I suspect there is nothing in this, but my expectation would be that the employees would enter contracts actually after the acquisition of the vessels had taken place.

MR. HARRIS: Yes, but all that goes to show, if that is right, is that there is an ongoing combination between the GET and the SCOP that includes the employment of the ex-SeaFrance employees, and we are being criticised that somehow there is a complete divorce between the pre-existing employment, and the subsequent acquisition of the vessels, and what I am saying – and it sounds, I think, that you are agreeing with me, is that that does not seem to be a clear or a fair distinction to draw on the facts.

THE CHAIRMAN: All I am trying to work out is what exactly the distinction between subscribers, employees is and, as I understand it – Mr. Beard, you can correct me if I am wrong ----

MR. BEARD: No, you are absolutely right. What happened was the SCOP was established – it was established by its founder member subscribers – it then, because it was established, got more subscribers very rapidly so that by December it had a substantial number of subscribers, the majority of whom are ex-SeaFrance employees. It then considered the possibility of getting vessels itself, it was not able to do so. It then looked around for other opportunities by which it could fulfil its commercial objectives which were finding employment for its subscribers. It therefore supported the bid. The transaction goes through whereby Eurotunnel gets the vessels from the liquidator with SCOP supporting it

and saying: “We will make sure that our people are available”. Then, once commercial arrangements have been put in place there will be employment contracts put in place. The bit that we find a mystery is how the discussion is going on in relation to what the SCOP did previously and then a discussion supposedly when the employment contracts – but I will leave that to Mr. Harris.

THE CHAIRMAN: Leave that to Mr. Harris, but the employment contracts would have incepted after the vessels were operational.

MR. BEARD: Yes, it is dealt with in the statement, I believe, so I do not believe that is a matter of any contention.

MR. HARRIS: I am quite happy with that, we say it stands full square in support of our analysis.

THE CHAIRMAN: I am just glad I understand it, and I will leave it at that.

MR. HARRIS: Just to finish off on 2, there was a 'mutually exclusive' point – that is why I drew your attention to s.127(2), that is a complete answer to the 'mutually exclusive' point. Mr. Beard’s submission was that if you are an associated person within 127(4), you cannot have material influence under s.26, but the Statute says the exact opposite – first point. Second point, *Swedish Match*, that is an authority at tab 74 – you do not need to turn it up. The paragraph references are 7.58 to 7.60. The reason you do not need to turn it up is because it is simply a case in which I believe the predecessor, who was the MMC, I believe, came to the conclusion on the jurisdiction question, on the facts of that case that you could be both a material influence and associated person, so there is contrary authority let alone contrary Statute. We do not accept it as a matter of logic anyway because s.127(4) is just the deeming provision. You can deem two people to be one person for certain purposes, wholly without prejudice to other purposes in a different section, but even if you did deem them to be one person for certain purposes it would not mean that the facts about influence, whether material or otherwise disappear. They do not disappear, it is just that for one purpose they have been deemed to be irrelevant because you are already one person. The facts do not disappear, so that enables us to look at the facts and that is what we did. This is prefacing challenge to and material influence, we will take you to what facts there were but we are entitled to look at them. Then, as if that is not enough, again, these provisions are to be read purposively but I say we do not even get close to that.

That left only a curious submission, which was that at para. 4.26 of the report, and then at para. 4.46 it uses the word “either” but not the word “or’, and in 4.46 it uses the words “alternative reason” but “alternative”, yes, they were alternatives and they are alternatives, but that does not get Mr. Beard home. He has to say that they were mutually exclusive

alternatives. But it does not say that in 4.26 or 4.46. They are alternatives, I stand by that, but that does not mean they are mutually exclusive for the reasons I have given.

Just so there is no doubt on the topic, as we have said in the written submissions, if the CAT, contrary to what I have just submitted, were to consider that there was a need to analyse the acquisition of the assets alone, the vessels, the website, their customer list and what-have-you, absent the labour force because you have agreed with Mr. Beard that that is a separate chronological aspect and irrelevant, which I do not agree with, but then we have not addressed that question. So that would be a matter that would have to be remitted to the CC. We did not address that question because we were content on our analysis of associated person to have regard to both the labour force and the vessels as assets. So, just so that we are clear on that, that would not be, simply did not arise, so if you say that it should have arisen then we should go off and do it. We should remit to us so we can go and do it.

That then takes me on to SCOP ground 3, material influence. We had a slight interchange on this earlier on. What we say is that this boils down essentially to a disagreement about either SCOP with a uniquely fact-dependent assessment by the Commission of what facts there were to support the question of material influence, they are facts. It is common ground with the SCOP that this, and here I quote from my learned friend's notice of application, is a matter of fact and degree to be determined on a case by case basis. So, by reference to the case law that I took the trouble to draw the Tribunal's attention before the short adjournment, you can only, we respectfully contend, upset this determination if there was no material upon which the CC could properly base itself or it had effectively taken leave of its senses, ie, acted irrationally when it came to weighing up the significance of that material. That is the territory of judicial review within which we sit, so that would be in my submission, and yet against that background the facts to which we have regard are in 4.44 of the report. So, if I could invite you to turn that up. I obviously rely upon all of (a) through (e). It begins with SCOP being in a position of high economic dependence in its relationship with GET. Just pausing there, you may recall that that was the exact terminology of the final paragraph of the relevant section of the CC's guidance. Do you recall Mr. Beard took you through the bit that talked about shareholding, poor representation, and then he said "Well, basically, that is the real key to all of this", but then at the end it talks about other factors, and he says, "Oh, they're to be dismissed in terms of their importance because they're subordinate to all of this, no foundation for any of that, just on a matter of approach and text". But, critically, the very thing that is now criticised

as not being capable as a matter of law of supporting the finding of material influence, which is a fact analysis, is economic dependence, and yet that is the very thing that is mentioned in that paragraph of the CC's guidance. So, it is not a terribly optimistic starting point, if I could put it like that, for Mr. Beard's submission.

But then the factors, well, they are clearly fact-specific. The first one is redacted so I leave you to read that to yourself. But, having read it, the reference to a certain type of responsibility that is in it highly fact-dependent. We are, obviously, rationally entitled to have regard to that highly fact-specific piece of data in coming to a view on material influence. And (b) is another highly fact-specific point. It needed, the SCOP needed, provision of working capital in advance in order to ensure its continued survival, but whatever you may think about that on the merits, we were rationally entitled to treat that as a factor that supported our view that that gave rise to influence. They are not, to borrow the phrase that I think came from the end of BSkyB, there is a sufficient degree of connection, I am not paraphrasing it exactly, but there is the minimum relationship between the decision and the evidence (you recall that passage). Even if you disagree it cannot be said that that is rationally unconnected with a conclusion that there was material influence.

And likewise at (c) no viable source of income other than GET. And then I do expressly rely upon the passage in yellow redaction, so I would invite you to read that sentence to yourselves.

We are obviously entitled to come to that view on the evidence, that is a matter for us, and we are self-evidently entitled to come to the view that that piece of evidence rationally supports a finding of material influence. Indeed, it goes significantly further than that because we are now criticised, indeed it was one of the higher points of my learned friend's submissions on this topic for not referring to, in a section of the analysis, the word "policy". Well, obviously you do not need to refer to the word "policy", the guidance clearly refers to policy and this is an example of a policy being dictated by the factual conditions in which the SCOP found itself. So, we do not accept any suggestion that the CC did not understand the nature of material influence test, or the need to have regard to issues of policy and commercial direction is I think the other way that it is put. This is obviously an example of that. And then on this point it is also worth noting my learned friend's own notice of application in bundle 1 in tab.2 at para.132. To quote his own case (this is on a different point, of course) he says at 132:

> "Unlike an acquiring party in a normal transaction", so he is expressly recognising that this was not a normal transaction, "there was no way that the SCOP could walk

away from possible arrangements to put the vessels into operation on the Dover/Calais route without undermining the very basis for the SCOP becoming involved in MFL - to create jobs for its workers".

Well, with respect, we completely agree. On the abnormal facts of this case it is clear there was a relationship of such dependence that they could not walk away. Well, that is a policy decision, he is just being told that that policy decision was taken away from him because of the relationship of material influence with the GET. So, not consistent with what he was submitting yesterday about the directoire taking all policy decisions and strategic commercial decisions. The true analysis is that he did not have any choice, for the reasons that he has given in another part of his submissions, and he did not have any choice about this particular thing that is in yellow in the middle of 4.44(c). And then he goes on. I mean, it is not as though that is the end of the factors that we were entitled, rationally considered were connected with the question of material influence, there is (d) and (e) as well, so they could not set up their own service, could not raise necessary finance, and then there were shared employees.

So the point here is material influence is not some particularly difficult legal test, it is not really any issue of law in here at all, it is a question of what were the relevant facts in a highly fact-dependent assessment. Did the CC make an investigation and have some evidence of some probative value which it could rationally weigh and come to a rationally defensible conclusion? And, for the reasons that I have given, we say that that is obviously a burden that is overcome.

THE CHAIRMAN: Mr. Harris, is that not slightly eliding two different questions? We touched upon this this morning, so I do not want to spend too much time on it now, but is not the first step for the CC to identify the facts which are listed in here, 44(a) through to (e)? Having found the facts (and we can articulate a test which accords the CC a degree of discretion in terms of the fact-finding) but having found the facts, you have then got to ask yourself whether those facts, and let us take them as read, actually fall within the legal words of section 26, in other words do they or do they not amount to control or material influence of policy? Now, surely it could be the case that the CC — and I am not saying this is this case — but the CC could list various factors, none of which come close to influencing policy. And the mere fact that it says, "Oh yes, this is a material influence policy", does not take it any further, and then one has got to do as a tribunal is look at these facts that you have listed and say: are they sufficient to meet the legal test in s.26? Would you agree or disagree?

MR. HARRIS: No, I am happy with that. What we say is that on any sensible view, these facts are capable of supporting the conclusion that we came to which was that there was material. What I further say is that it may be that you would not agree. But that does not matter on a judicial review analysis. It may be that there are other facts that in other cases have had some importance, like shareholdings, or like board representation. But that does not matter either. It is of particular relevance, as I started out by saying, that the guidance itself talks about economic dependency as being potentially a factor that is highly germane. Here we are, this happens to be a case of economic dependence. It is not just economic dependence. There are the other sub-parts about shared employees, financial - inability to raise finance, methods of operating on the market (the other bit of 4.44(c)), and the bit about similar type of responsibility in 4.44(a). So, if you like, it is economic dependence with bells on it, or with extra bits.

So where Mr. Beard then goes is he says: well, look, it cannot be right because again it would mean you would be over-inclusive. This is another floodgates type argument. This one is the farmer analogy. He says the farmer might be in a position of economic dependence with a supermarket. That is all very interesting, some other facts of some other case, but I am not addressing some other facts of some other case. But what I would say is that on a totally normal supplier arrangement, perhaps a normal Tesco and chicken farmer or what have you, that would not necessarily give rise to dependence. I would draw the line at where he intends to take that analogy. I think he was talking about different types of curry. I think I prefer to say if Tesco were to somehow force a chicken farmer to become an egg farmer, that is a change in policy. If that were foisted upon him without choice, that would be capable of being a material influence.

THE CHAIRMAN: Let us test that, shall we? Let us suppose that the farmer enters into a contract which allows Tesco to dictate what he produces on reasonable notice. So the farmer has read the contract in draft, he sees what he is being paid, he sees that he is compelled to change what he is farming on, say, two weeks' notice because that is what the contract says. He signs the contract and six months later Tesco says yes, you move from pigs to cabbages?

MR. HARRIS: With respect, these are not the most productive debates to have on some hypothetical set of facts. The point is that it is all a question of degree. It is all a question of degree upon the specific facts of any particular case. What I am positing is a case - perhaps I should not have done it because they are not the most helpful - where the analogy is one where what is going on in the relationship is that there is an all-powerful body that is

disabling some other body from being able to carry out the strategic direction of its choice when it wants to do it. A situation in which you sign a contract allowing the other person to do it is not that situation.

Luckily, what is clear by the SCOP's own admission is that this is not a normal case. That is what they say themselves in para.132 of their Notice of Application. This case has features that are, we say, unique. Obviously most cases do, but these are the unique factors that we have relied upon. They are capable of supporting material influence, and for that reason the challenge falls.

Just a few subsidiary points on this ground of challenge. Mr. Beard referred to the ITV/BSkyB OFT reports and not the CC reports that we were looking at before. He attempts to draw some support from the fact that seemed to spend a lot of time talking about shareholdings and whether they were over 25% or 15%. You may recall that submission. With respect, it is no wonder that it focuses upon shareholdings and does not mention other factors that might bear upon material influence, because that was a case all about shareholdings. So that does not take matters any further.

That takes me on to SCOP ground of challenge 4, again partly prefaced in a strange introductory. We say again this is an activities point. This is an enterprise. Does it amount to activities or a business or part of a business? We say that in truth again this is essentially a challenge to substantive assessment levels fact-dependent.

THE CHAIRMAN: Can we be absolutely clear what enterprise we are talking about, which is the point that I finished with Mr. Beard on, because looking at s.26, have we got the statutory definition of two enterprises seeking to be distinct? Perhaps you will correct me if my understanding is wrong. On the one side we have one enterprise which, assuming you are right on points 1, 2 and 3 and we are not with Mr. Beard, you have got the tunnel, all of GET's employees, you have got the SCOP and its subscribers; and on the other side you have got the vessels, the brand and goodwill, and the customer lists.

MR. HARRIS: No, we do not subscribe to that analysis. There are two enterprises. There is the GET tunnel, and then there is the former SeaFrance business. Those are the two that cease to be distinct in the context of this transaction, which is not to be chronologically parcelled up, or time capsuled in the manner that Mr. Beard would rather you do it. Those are my submissions about only the last step in the transaction, ... within the four months and there is no warrant for disregarding one up or background events. So I do not accept the analysis that you have on the one hand the GET tunnel, its website and its assets and the SCOP employees.

THE CHAIRMAN: On your analysis, then, where does the SCOP and its subscribers fit in, which side of the equation?

MR. HARRIS: They are one of two enterprises that ceases to be distinct. There is the former SeaFrance business ceasing to be distinct with the GET tunnel business. That is what is going on; that is the substance of this transaction. That is what we were analysing.

MR. CURRIE: So I am understanding, particularly if you look at the chronology of Mr. Doutrebente's statement, that your position is that GET acquired the vessels, the goodwill and so on in June or July, and subsequently acquired by some means the employees? Is that how it works?

MR. HARRIS: So far as we can discern, there is no nice bright line introduced when it comes to the question of their employees. What has happened is that within the relevant timeframe (that is the phrase that we use in the report - I know it is criticised but it is relevant for the reasons that we have already given that we can have regard to lead-up or background periods within the time provisions of the Act - s.24 in particular) you have gone from a situation in which there was formerly a GET-Eurotunnel business on the one hand and a SeaFrance business, separate, doing their own thing, to a situation in which there is not a separation between those two.

THE CHAIRMAN: What is the SeaFrance business? Define it for us?

MR. HARRIS: The SeaFrance business was the operation of these vessels with these crews on this route across the Channel.

THE CHAIRMAN: So you are including in the enterprise that is acquired by GET the vessels, brand name, customer lists and the employees?

MR. HARRIS: Absolutely, in the manner that you went through, sir, with - it might have been Mr. Green or Mr. Beard, I cannot remember.

THE CHAIRMAN: It was Mr. Beard who suffered that particular ordeal!

MR. HARRIS: That is you have seen in this part of the report. This is starting on the internal page numbering of the Report, p.23, just above para.4.3, "*Enterprises: what are relevant assets and do they constitute an 'enterprise'?* GET's views, SCOP's views, context. Then there is a section on vessels. Then there is a section on ----

THE CHAIRMAN: We went through that, absolutely. Just to cut the matter short, I just want to be absolutely clear what you are saying so we can understand where your argument is going, you stand by the summary in 4.68 as being in (a), (b), (c) and (d) essentially the SeaFrance assets?

MR. HARRIS: Yes, absolutely.

THE CHAIRMAN: So I can put a nice little bracket by the side of these and label them "SeaFrance"?

MR. HARRIS: The former SeaFrance business, yes.

THE CHAIRMAN: This is what was acquired by GET?

MR. HARRIS: Yes, precisely, our analysis is that on the facts of this case, properly fitted into the statutory tests, that was the enterprise that ceased to be distinct from the GET, Eurotunnel, other enterprise.

THE CHAIRMAN: Excellent. Again for absolute clarity, looking at s.26(1), we are talking about any two enterprises ceasing to be distinct. On the one side of the fence we have got GET; and on the other side of the fence the second enterprise is what is described is what is described in para.4.68?

MR. HARRIS: Yes, absolutely.

THE CHAIRMAN: I am sorry about that, but I just wanted to be absolutely clear.

MR. HARRIS: No, not at all, I am sorry there was any confusion. That is absolutely the Commission's case, and it absolutely stands by it on the facts of this case slotted into the relevant jurisdictional hurdles.

There was a complaint of varying intensity in the written and oral submissions - possibly recognising the difficulty that we do actually have of factual matters to which we can point and say these are what we think amount to activities or an enterprise on the facts of this case - that we, so far as I could understand it, have not appreciated what it was that we were supposed to be doing, and that is, if you like, a misdirection case so as to avoid my point about you cannot sensibly seek to overturn our substantive assessment of the competing factors. This is a non-point because at 4.9 of the Report, right at the outset of this section, having set out GET's views and SCOP's views, and then under "Context of the analysis" at 4.9 the CC obviously sets out the right question:

> "Rather the question is whether, on balance, the totality of the assets transferred constitutes the activities, or part of the activities, of a business."

Can I also, just whilst we are here, invite you to have regard to 4.12, the first sentence, "a key part of the context for this analysis", and that is the seven and a half months point. So it is, right at the beginning, described as a key part of the analysis. I am obviously gong to deal with that in a minute.

What I am now drawing your attention to is that at 4.9 we obviously set out the right question. At 4.13 we note that "each assessment is independent and must be considered on its own unique facts". That is the third sentence of 4.13.

Then just to put to rest any doubt at all (although I do not believe there is any doubt), just on our last interchange, sir, 4.15:

> "In what follows, we consider the SeaFrance assets acquired by GET, in particular vessels, staff, brand and customer records …"

They are all part of what ceased to be this thing.

Then at 4.71 - so this is on the asking ourselves the right question, at the beginning we set the right question and then at the end, having gone through all of the sub-headings that you are familiar with - it says:

> "On balance, and taking all of the above factors into account including the length of time …"

"including the length of time", so there is yet another reference to the length of time -

> "… we have concluded that … the components referred to in paragraph 4.68 above do meet the statutory definition of an 'enterprise', and constitute the activities, or part of the activities, of a business."

So, whatever else you may say about this, we did not ask ourselves the wrong question. So the misdirection point does not get off the ground.

Looking at the factors that we took into account, we say that these are not seriously sustainable criticisms. A critical thing to bear in mind is this point in 4.35(e) of the Report. It is a pity that this is in yellow so I cannot actually read it out, but the terms employed, "partnership" and "project" and "rekindling" being critical ones, they are to be distinguished in any normal approach to a business that is brand new, starting from scratch, or a start-up. These are submissions that have been levelled against us. It is said by the SCOP that this was a brand new business, it was a start-up, it started from scratch, it effectively had nothing to do with SeaFrance. That is the case against us, because we are saying, "No, no, this was a continuation of activities within the meaning of the statute". They said, "No, it was not, it was completely brand new, a start-up, it was just some assets that we bought off the market, just some labour that we recruited. That is not what was going on on the facts of this case. I accept that in some other case where there has been a seven and a half month hiatus and there are assets lying around, unused, any Tom, Dick or Harry can come along and buy them and start up a business with them. That was not this case. This is a critically fact dependent assessment, this is what the parties were doing, they were consulting throughout the period, and again the particular details of whether a person becomes registered or subscribed or becomes a permanent contracted employee does not really matter, because what is going on in this particular case is at the period when they are

morphing from subscribers through to permanent contract employees and discussing with each other, they have got joint employees, they are making joint representations, they are giving joint presentations to the press and they are describing themselves to the French court in this way. That is a series of factual assessments that are undisputed as facts and upon which we were entitled to come to the view that this was a continuation.

THE CHAIRMAN: This is where I think we have some difficulty. We are not, I think engaged in any kind of factual dispute, it is more the correct legal characterisation of facts that are, I sense, largely common ground. Speaking purely for myself, let me identify two aspects of your case where I see legal points emerging rather than factual points emerging. Looking again at 4.68, it is clear that the key factors in terms of the acquired enterprise are, (a) the vessels, and (b), the employees. (c) you would have some limited value to, and (d) the CC discounts altogether. So let us look at (a) and (b). Vessels, in this case it is clear that they were laid up, they were not operational at the time, and they had not been operational for some months. They did not have slots into which to sail to, those had to be reconstituted, and they did not have any contracts with customers. One can say that they were really just the boats, or the boats that were suited for the purpose of crossing the short-sea. The legal question, and I will do it in a more composite set of questions, if I may, Mr. Harris, viewing the vessels on their own is they do amount to an activity of the business, looking at the s.129 test, and the question is: is a seven month lay-time where they are not being active, and where they clearly not doing business, is that so significant as to render them merely assets rather than a business? You add to that the employees, but on the employees my question is this: what actually did the SCOP acquire from SeaFrance? As I see it, what happened was that the employees of SeaFrance became ex-employees of SeaFrance, they were unemployed, and all that the SCOP did was engage with them, initially as subscribers, and subsequently, once the vessels had been purchased and put into operation, employed them, or some of them. I am in some difficulty to understand what exactly it is that moved from SeaFrance to SCOP in terms of assets. There is no contract that was transferred. All that happened was that SCOP engaged people who happened to be, because the business went under, former employees of SeaFrance. That again seems to me to be a legal question not a factual question. The third point is, is it necessary to your case that you succeed on both? In other words, are you contending that there is an enterprise, if one looks at the vessels alone, or the employees alone, or do you need to succeed on both in order for there to be an enterprise? I am sorry, that is a rather long interruption.

MR. HARRIS: Yes, let me take the last question first. We had proceeded on the basis that it is both. We had not proceeded on the basis that it is only the vessels' website, that was the point that would need to be remitted if you think that that was the wrong approach.

Let me take the first question next, and then the second question last. The vessels alone? We do not accept two things about what you put to me. The first is that you can analyse the vessels alone because you have to analyse them in conjunction with the other things that came at the same time, the (b), (c) and the (d).

Secondly, and of critical importance in this case, let us not overlook the fact that these vessels – this is, as we know, a uniquely fact dependent analysis. The vessels in this case were not just abandoned vessels or resting and rusting in a shipyard. These vessels were in the state of what they call "hot lay-by" and we respectfully contend that, on a uniquely fact dependent analysis, the fact that these vessels were put in hot lay-by during a liquidation process precisely so that they could be put into operation, continued operation we contend, on the very same routes by the very same staff, or largely the very same staff, is a critical part of the factual analysis.

So, insofar as you put to me, which at times it was bordering on this: they are just vessels and they are almost sitting there, that is not right. They are having their engines turned over, and they maintain some – I accept not all, but some – of their necessary maritime certification, they obviously did not need it all because they did not have passengers on for a little while, so they do not need the passenger related ones, but they need the health and safety ones, and the engine turnover ones, and that is also critical.

In some other case, if there had been vessels used for purpose A and then stopped, they are in fact the "Norwegian Blue", completely dead, then that might be one case. But these are not Norwegian Blue ferries – the Norwegian Blue parrot was dead as a Dodo – the better analogy for this one would be a parrot on life-support. These were vessels that were being more than ticked over, they were kept in a state of hot lay-by precisely so that they could be brought back into operation within the shortest possible reasonable time bearing in mind, if you like, the laws of engineering and physics. That disposes of my learned friend, Mr. Beard's point about his car. He was saying that "If my car didn't start for seven and a half months I'd say that that car had been finished", or something like that – a "dead car". But that just betrays his lack of maritime background. (Laughter) These are bits of kit, which we know from other papers in here, although they were only sold for tens of millions they were valued at well into 100/150 million. These are complicated and sophisticated big bits of kit, and they were not just abandoned. To get complicated bits of sophisticated kit that

had been in a state of hot lay-by ready just takes some time and some money. You have to fire things up and do whatever else you need to do for the certificates. So there was a distinction on the facts of this case between physical assets that have just been abandoned, and then they get bought if you like, off the shelf, or out of the scrap yard, or from the corner shop or wherever it might be, and then brought into operation by somebody else. These bits of kit were not like that, they were being maintained in a state of readiness for reuse on this route.

That takes me on to ----

THE CHAIRMAN: It is the "for use on this route" that I was raising my eyebrows at.

MR. HARRIS: Yes, well that takes me on to the relevance of the staff, so your last point: what about the ex-employees? Our understanding, and what we have set out in our report, and we go back to 4.35(a), is this was a partnership and a project of ex-SeaFrance employees presented to the court in order to do what? Well, look, it is the last line of 4.35(e). I cannot read it out. If I could that would precisely answer your point – the words "so as to". What were they doing? They were doing it with these people, with these vessels on this route, and we know that from Mr. Beard, because he was just talking about the 'disastrous' or to use his other favourite term, 'catastrophic' consequences for what? For employment in the Pas de Calais, it was not employment in Marseilles, or Timbuktu or somewhere like that. These were people who were in business. He just said that their raison d'être was to create employment in the Pas de Calais for ex-SeaFrance employees, and they would critically depend upon these vessels, and that is what they said to the court they were going to do, and that is why I am entitled to say that we rely upon that as being an answer to your question: what were they being used for? They were being used for this purpose on the facts of this case – this is not some other case.

Then, if you are with me on that point, in our respectful submission you have to be very wary about intervening because we say that on information like that, but not just (e), it is in combination with the other things, including all the discussions that were going on in (a) and (b) and footnote 84, that this was a rational assessment of the facts that we were entitled to come to in order to conclude that – and this is very important – when you end up in the situation where it is the same vessels on the same route, using very largely the same staff as before, i.e. in the SeaFrance world, and then lo and behold you have the post-SeaFrance world, which is the same vessels, the same route, obviously from and to the same place, and mostly the same people, and then you ask yourself: is the CC rationally entitled, properly entitled as a matter of law, and rationally under its assessment of the evidence, to come to

the view that this was the continuation of a business? The answer is "Yes". You may not agree, but this is a judicial review, and you cannot sidestep the fact that we did have evidence and it was rationally connected.

Then it takes me on to the seven and a half months' point. The answer to that is obviously the one that I have just given, and this is a question of assessing factors in the round on a uniquely fact dependent basis. Mr. Beard's case respectively was seven and a half months, well, that is the end of the story, you could not conceivably have a continuation on any set of facts where it was seven and a half months, but that does not succeed because he himself drew attention to *Medicopharma* (tab 75) and he himself said that that was a case in which there was a cessation of trading activities for a certain period of time – it was supposed to be, I think, Sunday to a Monday, he was saying, and it went Sunday to a Wednesday. All that proves is that there are questions of degree. I am delighted he referred to *Medicopharma* because not only does it prove the point I just made about questions of degree but it also serves to reinforce the point which he took you to in our guidance which says, in terms, that a fact that a business is not trading is not a reason to consider that there was not a continuation of the activities of a business. So we are consistent with our guidance, we are consistent with case law. We have factors that we can rationally explain as having a minimum relationship or connection between evidence and decision, and that is sufficient in our respectful submission.

THE CHAIRMAN: In this case – specifically in this case, Mr. Harris – what do you say the business was?

MR. HARRIS: I am sorry, sir, which business?

THE CHAIRMAN: The business that was acquired by GET?

MR. HARRIS: This is the former SeaFrance business.

THE CHAIRMAN: What was the business? Describe it, not in terms of SeaFrance business, but what were they doing?

MR. HARRIS: It was running these ferries on this route across the Channel with these people.

THE CHAIRMAN: Right, so it was providing passenger and transport services across the short sea?

MR. HARRIS: Yes, I am happy with that as a phrase.

THE CHAIRMAN: So if that is the business, how is it an activity, because nothing is happening for seven months?

MR. HARRIS: This is my point about degree, sir.

THE CHAIRMAN: Indeed, but the problem with degrees is you drop off the edge of the cliff, do you not?

MR. HARRIS: Of course you do. Let me put it another way. This is the point I believe either you, sir, or Mr. Currie put to Mr. Beard that what he is saying is that their activities have to be synonymous with a going concern.

THE CHAIRMAN: I think you say he did not say that. I rather asked him to and he declined.

MR. HARRIS: I say you put it. You put it.

THE CHAIRMAN: I put it to him.

MR. HARRIS: Yes, exactly. I think I said that, but if I did not then that is what I meant to say, that you put it to him and he said, "No, no, that's not right", but in fact on the logic of his argument that is right. What he is saying is that when you have a hiatus in trading operations or a non-trading period, then effectively there cannot be continuing activities. But we know that that is not right because it is not what the guidance says, and it is not what *Medicopharma* says. So, as soon as you recognise that you are into questions of degree and you know, I accept, but more importantly the CC also accepted, that a key part of the balance or the context (and here I am reminding myself of their terms at I think 4.12 of their report which we deliberately looked at). A key part of the analysis, a key part of the context was the fact that the vessels had not been trading for seven and a half months, so what the CC did was it correctly directed itself as to the relevant factors including a key one. Nobody pretends that it was not key, it was key. It might have even been a borderline decision. It does not matter. The fact is that there were these pieces of information and evidence that were, that had this minimal degree of rational connection with the decision, and that is sufficient for it to withstand a judicial review challenge. And the fact that in some other case seven and a half months might have been too much is neither here nor there. Some other case might not have involved sophisticated big bits of kit in hot lay-by and some partnership project that is gestating over a period of months in the face of a liquidation process before the French court. That is not some other case, and so seven and a half months, yes, it is a powerful tug in the opposite direction, but it is not decisive. More particularly, even if you would have said that it is decisive, that does not mean that the CC was wrong in coming to a different view.

There are other cases where businesses cease trading. Take a typical case of changing over some shops. You obviously cease trading when you sell shop premises to somebody else, sometimes for months. We all know how long builders take and when they do not show up, they have to change the fascia, the insides, the decoration and bits of the assets and the kit

that is inside and the what-have-you. That could easily take months. These are other cases where there would be a non-trading period that do not mean that when one retailer sells some of its shops to a competing retailer but they need to be re-fitted suddenly there is not a merger situation.

THE CHAIRMAN: It does seem to me there is a legal and a factual allowance in the sense that, take the word "activity", surely that is something which in the first instance one has got to define as a matter of law. Now, were we to take as an example to say, "Oh, active actually means going concern, and unless it is a going concern it is not an activity", that would mean that certain factors that the CC regarded as irrelevant fall off the radar.

MR. HARRIS: Yes.

THE CHAIRMAN: And it is the interplay, again, between factual and legal questions, and the mere fact that the CC says something is an activity does not make it so.

MR. HARRIS: No, but of course to take that particular example, nobody here is saying, even Mr. Beard is not saying, that means going concern.

THE CHAIRMAN: No, I picked it as an hypothetical example.

MR. HARRIS: Well, I am in danger of repeating myself, because then it means that the one factor that he highlights almost to the exclusivity of every other factor is not determinative.

MR. CURRIE: Can I just ask this of Mr. Harris — at what point in time does one have to decide whether what one has acquired are the activities of the business? Does one have to do it at the time of the acquisition, or are you entitled to take into account the fact that some months subsequently, according to you, the business that was operating was identifiably the same business as had been operating under Sea France?

MR. HARRIS: Can I take that matter later? I apprehend there will be one more short break before I am finished and I will have a think about that.

MR. CURRIE: Thank you.

THE CHAIRMAN: You have had a lot of interruptions, Mr. Harris. How are we doing for time?

MR. HARRIS: I have finished everything on SCOP's jurisdiction. I am going to deal with limitation next, then I am going to deal as best I can with the rather, well, the oral submissions made on natural justice assuming enough time, and then I have got remedies which, akin with everybody else, they are much shorter, I think they have been dealt with largely in writing.

THE CHAIRMAN: According to Mr. Lusty's notes that he has helpfully compiled, you have got until three-thirty and you have a little bit of latitude but not — three forty-five.

MR. HARRIS: (Well, I know what I am up against, I will try and shut up). Limitation, GET's procedural challenges, they are all out of time. They are all out of time for this reason, they say that they received a decision on 7th March or at the latest 5th April. Can I just turn up the decision letter, it is at bundle 2B at tab.21. It says in the second paragraph:

> "The Group has carefully considered all of these disclosure requests and reached the decisions which are set out below".

You do not need to look at the text of the decisions, that is a decision letter on any view of the world, and GET now tells you that that set of decisions was so grossly unfair that they could not begin to deal with this inquiry. Obviously, if that is right then they should have challenged, and the authority for that is two cases and I make quick reference to the *PPC* and *Orange* cases that arose yesterday. The first one is *Sports Direct* in tab.52. I do not need to turn it up, I think you are familiar with the case, it is on all fours, it is a suggestion that there was manifest and gross unfairness in not disclosing remedies working (I beg your pardon) some provisional thinking working papers in the context of a merger inquiry. *Sports Direct* said that they were so unfair that they could not have the working papers and they could not proceed, so what did they do? They challenged. Now at that point in time the CC as it happened, allied with the OFT, said, "No, no, that is premature". The issue in the case at tab.52 is, is it premature? The answer is "No, it is not premature". You can challenge that. You can challenge it because what it said at para.56, it was the type of decision that was said to be so unfair to allow the procedure to proceed in the manner envisaged. And so they said, "Well, if that is your case then the decision you have reached about non-disclosure to you of some working papers is so unfair as to allow the procedure to continue in the manner envisaged is, well, what you do is you can challenge it and you are not out of time", and that is what they did.

That is exactly what is happening in this case. We are told that it is grossly unfair in umpteen respects and yet they did not challenge, and their refrain seems to be, "Well, we would have been told that it was premature". The answer is at one point the CC took that view, they ran their case before the tribunal and were told "No, you're wrong, CC, it is not premature, you can do it". SCN and Sports Direct would have carried on doing it if only the decisions had not been withdrawn. Just one other point to make about Sports Direct and it is about the circumstances of urgency in which that was conducted. Another point taken by my learned friend "Oh well, there is a statutory time limit, this would bog things down", etcetera, etcetera. The dates were as follows: the decision was on 16th November 2009, the notice of application was two days later on 18th November. I remember this well. I think

Mr. Beard and I were both in this one. The hearing was only a few days later, on 4th December, and even the judgment was less than a month later, on 14th December. These things can be done with great urgency if they need to be before the specialised tribunal and they often are. That one is by no means the most urgent. Some of us in this room were involved in the MAG, the Merger Action Group, the *Lloyds/HBOS* challenge. I took the trouble last night to look up the dates of that. At one point they were burned into my memory, but they are horrific. The notice of application was on 28th November, the CMC was after the weekend on 3rd December, the hearing was on 8th December and the judgment was on 10th December, so that was 12 days from beginning to end including two weekends. So, there is absolutely nothing in the point about prematurity or inability to fit it in.

But then there is the case of *Elders* which is tab.12. I do not invite you to turn it up because I can summarise sufficiently the facts. This was a brewery merger between Allied Lyons and Elders, I think IXL, the Australian brewing enterprise. This was a judicial review of a disclosure decision during the course of the merger inquiry, albeit this was an MMC one and a judicial review in the High Court. This is a pre-Enterprise Act. Elders said that the details of its proposed refinancing of a hostile takeover were unbelievably commercially confidential. One can understand why the details of financing a hostile takeover are confidential from the subject matter of the takeover, Allied Lyons being the subject. Allied Lyons said that they could not possibly deal with the central feature of analysis in the text, which was whether or not it was in the public interest for a takeover to happen in a certain manner with this type of refinancing, unless it saw the refinancing. So hugely commercially confidential for Elders but the other side saying we cannot possibly comment unless we have seen it. Then the MMC (as it then was) weighed up all the considerations and issued a decision letter. As it happens, the decision letter in that case was: we hear what you say about commercial confidence but in fact we have listened to it all and we are going to have to disclose it all because it is so central. It is a bit like where we were just after the short adjournment.

At that point, in the midst of the merger inquiry, before it could go any further, Elders said: enough is enough; this is so unfair to disclose that commercial confidence to the subject matter of our hostile takeover, we cannot have it; we are going to go to court. The court said that that was fine, they could bring a judicial review. There was no suggestion there that it should not or could not be done, or that it was premature or anything like that. So it is another direct analogy.

Just for your note, the dates again were very, very rapid: decision letter 10th March, permission letter 26th March, challenge 22nd April, judgment 29th April. So that took place a month and a half, well before the report was finalised. No suggestion that they had to wait, or indeed were obliged to wait, until the outcome of the report. It makes sense, if something is so grossly unfair that you cannot carry on without being wrongly treated, to stop and challenge it.

Orange and *PPC*: we say that we had a look at those last night and we say that they are helpful, but nevertheless to be distinguished. Critically, in your judgment sir in the latter, you do not decide on other issues of disclosure in other cases, so that is probably we have done the most important point. But of course, as you will recall from those cases, they were firstly under the Communications Act, not under the Enterprise Act, and secondly, they were about live, ongoing issues that have a life up until and indeed during and beyond the disclosure of the final report. They were about jurisdiction and that is not this case where it is about interlocutory matters of disclosure.

So we say that there is the statutory framework to be found in *Sports Direct*. As you said, sir, it is s.120 and the rules of the tribunal of one month, we are well outside. They have not even made an application for exceptional circumstances and there are none. So it is with some relief that I am able to say that in actual fact, although you may wish to delve into the minutiae of what I am about to turn to now, some of GET's procedural grounds, in fact not only can you dismiss them, but you are statutorily bound to dismiss them as a matter of jurisdiction because they are out of time.

Doing the best I can now, unless you wish to take a break?

THE CHAIRMAN: I am in your hands again, Mr. Harris.

MR. HARRIS: It may be that the sensible course is for me to perhaps spend 15 to 20 minutes of my time remaining before a break, trying to deal with all of the natural justice grounds, then have a short break, and that will leave a discrete period for the remedies.

THE CHAIRMAN: Yes.

MR. HARRIS: Obviously, we rely upon our written submissions. We went to some trouble in the short time available to us to go through the voluminous skeleton of my learned friend Mr. Green and deal with them, so obviously I stand by all of those points.

The critical issue that I am going to begin with is the reasoning on DFDS exit. This is absolutely essential to why these grounds are misconceived. I invite you to turn up para. 140 of the defence in pleadings bundle 1 tab 4.

We know from s.104 and the rest of the Enterprise Act what it is that we are obliged to consult on. The key reasoning of a key strand of an issue like that versus the interest. We accept where the DFDS exit is an issue likely to adversely the interests. So what do we tell them about our key reasoning? Answer: 140. All of the footnotes are for your assistance because the report set out where it was in the PFs. Obviously, I am not going to turn them up.

So there was a minimum efficient scale, point one. This is where the reasoning begins. We have to begin here because nearly all of this is ignored by GET. Point (b) Significant excess capacity could only be removed through the existence of either DFDS or MFL so they were the only choices: one or the other. (c) "DFDS had made, and expected to make, losses...". (d) Absolutely central to our reasoning, which we have not heard a single word about at all in any of the written submissions from GET or in any of its oral submissions:

> "GET had significantly stronger incentives than DFDS to operate on the Dover-Calais route and to continue to sustain losses. GET also had higher exit costs. (e) GET was prepared to continue to sustain losses until the end of 2014 or 2015 but there was no evidence that DFDS was prepared to sustain losses for as long a period... (f) Accordingly, DFDS was more likely than GET to exist the Dover-Calais route. (g) The CC's initial view was that DFDS's exit would occur in the short to medium term but it subsequently altered its view and concluded that DFDS would exit in the short term."

So that is the issue more likely adversely to affect the interests. That is the key reasoning, completely and clearly set out to GET and yet the nature of this challenge is that they were so unfairly treated that they could not sensibly and intelligently respond to this, bearing in mind my point in opening, and this is their own theory as well. We do not buy it for a minute. What we say is that all of this focus upon forensic analysis of DFDS internal documents, or, for that matter, the FCA file is entirely beside the point when you are faced with a clear exegesis of fact, reasoning that is likely adversely to affect your interests. We say that significantly is this point about the stronger incentives on the part of GET versus DFDS. There is para. 8.85 of the report.

MR. CURRIE: Can I just intervene very quickly. Can you explain to me how it is that in light of 140(e) "there was no evidence that DFDS was prepared to sustain losses for so long a period", you can say that the DFDS internal documents and the FCA file are irrelevant or have got nothing to do with it? As I understand it, the very point that is made against you,

or sought to be made against you, is that those areas of enquiry which it is said were not followed through would have borne directly upon that finding.

MR. HARRIS: No, I do not say the DFDS documents are irrelevant or an exploration of these matters with DFDS is irrelevant. What I am saying is that they form a part only of the key reasoning which we are obliged to consult upon. When I get to it, the submission is that we did explore with DFDS in a manner that we considered to be rational and reasonable and to give rise to some probative evidence about DFDS' ability or willingness to stay upon the route. The criticism that is levelled against me is that on that specific, discrete subcategory of one part of one leg of the reasoning only, we did not go to the Nth degree, it is said. Actually, we do not agree with this. We are challenged legally. It is said that we should have overturned, upturned if you like, and then disclosed to GET every single document that could have borne upon that issue at every point in time from the moment of pre-entry through to, well I am assuming every point post-entry of DFDS.

Our response to that is we did not have an obligation when one has regard to the case law to which I drew your attention before lunch to exhaustively pursue every single line of enquiry in the manner that is contended for by GET. So that is one part of the answer, Mr. Currie. The second part of the answer is we simply do not accept the case that is now advanced by GET for which there is no support that somehow or other there was some brush off, or that somehow DFDS was engaged in embroidering, or was at risk of embroidering all that we were asking from the documents and they deliberately were concealing or hiding from them. There is absolutely no foundation for that submission whatsoever, it is completely undermined by Mr. Færge's evidence which we think is an entirely acceptable piece of evidence to adduce in response to these allegations. What, in fact, we did get and we were shown this yesterday, was in response to some questioning, including at some hearings. DFDS gave us its internal thinking in the form of a bid document that it had issued, served, if you like, or sent to the liquidator in, I believe, October 2011, in any event, before it bought the assets.

The submission is made with some either real or feigned incredulity that we were not entitled to take DFDS's word when they made these submissions that they do not have any documents in a CC hearing. We do not accept that either. Parties know that if they lie to us in hearings they are committing offences and they can be called to account. We remind them of that before the hearing commences, and there is no basis for thinking that DFDS's public annual reports or, for that matter, its board papers have been embroidered after the event with a view to hoodwinking the CC. That is what I say in relation to that. It is not as

though we did not look at it, we did. We took it as we reasonably thought we needed to, bearing in mind it is one sub-set of one link of one part of the overall reasoning, other parts of which are much more important, and we had no obligation to exhaust it. Even if we had, which we do not, there is then no obligation to hand it all over in some disclosure exercise way so that it can be forensically examined either by GET or by this Tribunal.

What is going on, and at all stages in this attack about DFDS exit or, for that re-entry, is that this is ignored. It is the whole set of reasoning, all of which was well known to GET as a market player. Indeed, as I said, it was its own theory.

Then on the question of precise timing, because criticism is made of that, they say at one point you say they are going to exit in the short to medium term and then it is the short term, but that is a misconceived attack. The precise dates simply do not matter, it is just a sequence, is somebody going to exit before somebody else. It is a binary choice, is it DFDS or MFL? Answer, it was going to be MFL for the reasons that we have disclosed to you, which is that you were all making losses but you can all cover but you, one of you two, has a significantly greater incentive and a significantly greater set of costs for leaving than the other one. Who is that one? It is GET, and that is why you are going to stay in. Whether it happens in whenever, December this year, or April next year, it is simply is neither here nor there. So the criticism that is made about one redacted piece of information, a date, relating to a particular charterparty, is completely irrelevant. It is a good example of how the challengers are losing sight of only needing to be able intelligibly to respond to key reasoning on issues likely to adversely affect them. Of course if you get more information you can say more about it, but that does not mean to say that we did something wrong in not handing over the information.

We have dealt with the break-even market shares and the IPR/GUPPI. I took them a little bit out of turn. Then there is the FCA file. The FCA file, that is, with respect, another hopeless submission. The FCA, we know from file 2D, para.65, that we spoke to the FCA. I do not turn it up. You have perhaps seen the note of the conversation. We have seen a number of amazing things that emerged from that that the FCA admitted, though they did not have internal documentation. The FCA admitted that they were doing a phase one investigation, not an in-depth investigation like us. They admitted that they were looking at the situation at a different point in time. Little wonder that we might come to a different view, but it is not as though we simply said to ourselves, "What is relevance of that because it is a different point in time and we have got new information and they were only doing phase one". We did not in fact end there even though we would have been entitled to end

there because it is just not that germane. Instead we went to the trouble of having provisional responses on our provisional findings and actually engaging and liaising with them. What we are not obliged to do under the case law that applies is conduct an exhaustive investigation into everything they have and exactly when they had it, follow up everything and then disclose it all. It is just not germane to the key reasoning or our duties under the Act.

We have dealt with the magnitude of losses point. That is neither here nor there since both companies could deal with that.

Then there is the re-entry point, another critical strand of the reasoning that they said they are unable to comprehend and are being grossly unfairly treated. We say again that this is a question of weighing the evidence, but it is not a particularly difficult weight or balance that was conducted in this case about whether or not somebody who has been forced out of the market by a dominant player would suddenly pop back into the market when the dominant player starts raising prices. This is not difficult stuff, that they might not do that. We submit that it would be a bold Tribunal indeed that would accede to a judicial review challenge on that sort of a basis. We think it stands rational scrutiny, and indeed it is not as though this was the CC going off on a frolic of its own. GET itself said that credibility and reliability of ferry operators in the face of freight customers was important, and so did the SCOP. There is a deep irony in this challenge, and we were agreeing with the very people that now say they cannot understand why we were saying what we were saying.

There are some points about inculpatory and in particular exculpatory material, if you like, known and unknown material. They can all be put to one side. Fascinating though they were, that is not the procedure that we are obliged to conduct under the Enterprise Act or under our guidance for the reasons that I went to earlier on.

There was another specific example of failure to give, unfairly, grossly unfairly, to give exculpatory evidence related to the issue of departure from a Dover-Dunkirk route. Again, there is nothing in this point. This was a point upon which we agreed with GET. They said, "No, do not believe them, they will not leave Dover-Dunkirk as well, they are an established operator on that route", and we said, "Okay, fine, we agree with you". That is what we say in the Report and that is what we said in the provisional findings and now we are said to have somehow treated them unfairly in relation to the issue.

There was a list of things that were said by Mr. Green not to have been provided on the issue of exit or re-entry, staff hearings, transcripts of hearing with DFDS in January and March, with the staff, the secret meetings point, that it was not on the web, no transcripts,

no summaries. None of this gets round the point that I have raised by reference to the defence, para.140, that we set out quite clearly the gist of the provisional reasoning on all of the points, and they were both able to and did in fact address all of those points.

That takes me on to the issue of credibility. We are told that it was of central importance about credibility and somehow GET was unfairly treated by not being able to deal with it. But they did deal with it. They made extensive submissions to us about how DFDS could not be trusted, and how we should not take them at their word and how what they say in the press was not consistent with what they were saying to us behind the scenes or with their public documents. What is more, in the report we actually say, "We agree, things that they say in the press, they cannot be taken at face value". As it happens, exactly the same is true of what GET were saying to the press. So what is sauce for the goose is sauce for the gander.

It may be an opportune moment to take a break. If there are any other specific points that the CC want me to take on natural justice points I will do that after a short break, and then that will leave me with a short period of time to deal with the remedies. If that is a convenient moment?

THE CHAIRMAN: That is a convenient moment. We will rise for five minutes …

THE CHAIRMAN: We will rise for five minutes.

(Short break)

MR. HARRIS: I am grateful. Just a few moments then on one or two remaining procedural points. The first is that the suggestion, I believe, was made, that the customer A and D evidence came as a complete surprise and they had not been presented with any of that, but in fact they were provided with summaries of the evidence of customer A and D, they are to be found in bundle 2A, at tabs 14 and 11.

Then there is the appendix H – I have dealt with the only example in item 77 that Mr. Green actually took you to. You have seen what we said in the skeleton, it was a very unwieldy and unmanageable document. We say the basic flaw in the approach of this document is that what they say is: "Here is a document we did not have. We would have said something about it, namely, the following, if only we had had it." Actually, it is highly un-illuminating when you actually read any of the boxes, what they say they would have said. The reason it is flawed is because the relevant question is: did they have sufficient information based upon the documents they did get in order to be able to address the issues likely to adversely affect them, not were there some other documents that they would have been able to say

something about if only they had seen them, so it is largely an exercise in futility that lengthy annexe.

That then takes me, in the remaining time, on to questions of proportionality. SCOP has a couple of points. The first one was alleged unfairness during the remedies stage because of not having the DFDS opinion it is said, and not having the remedies working paper.

There is one factual point that has just been drawn to my attention, so I will tell you what it is. My instructions are that, as was admitted by Mr. Beard on behalf of his clients, the SCOP did know about the existence of the remedies working paper and he freely accepted that. They did not have all of it, so we are still on common ground, but what happened was that the extracts relating to SCOP were extracted from the remedies working paper and sent to the SCOP – those are my instructions, I am simply telling you what they are. SCOP was then told that the remainder of the paper – am I getting this right – was to be sent to GET, and they did not object to that. SCOP did not then say, having known about the fact that there was a remedies paper, and the fact that they had received part of it but not all of it, and that it was going to go to GET and not to them, did not then say: "This is grossly unfair, you have to stop, we cannot possibly carry on."

THE CHAIRMAN: Are these documents in the bundles?

MR. HARRIS: What, showing what happened behind the scenes by way of procedure?

THE CHAIRMAN: Setting out or making good the points that you are making?

MR. HARRIS: No, this is only ----

THE CHAIRMAN: I understand.

MR. HARRIS: I apologise, this is as far as I find myself – these are points that emerged, certainly to me, in the course of Mr. Beard's ----

THE CHAIRMAN: I am making no criticism at all, Mr. Harris.

MR. HARRIS: I have no doubt that if we had to we could put them in the form of a quick statement, augmenting Professor Smith's, as to what was going on behind the scenes, we could.

MR. BEARD: If it assists, my understanding is there are a few paragraphs, as I said in submissions, that were provided to us, they were to do with the arguments that we had put. We were not on any notice that they were being disagreed with, that other material was being relied upon, and when we were being told about other material going to Eurotunnel that was confidential, we did not have any indication that it engaged with the material we had put in. We did not know about the other legal opinion, for example, at all. That is not cutting across anything that Mr. Harris has said, but it is perhaps just explicating it slightly.

THE CHAIRMAN: It sounds as if there is a great deal of common ground. It might assist – I am not sure how far it all goes – but if you could, with Mr. Beard, prepare a short clip of documents ----

MR. HARRIS: Good idea, yes.

THE CHAIRMAN: -- we will look at them in due course, but let us not take any more time on it.

MR. HARRIS: Another point, just a factual in setting the scene, is in Mr. Doutrebente's witness statement, that is Mr. Beard's witness at para. 49 – you do not need to turn it up, it is a very short one – he says that:

> "Shortly before 10th May 2013 GET informed me that they would be attending a further hearing with the CC. Following the hearing, around 15 May 2013 GET informed me that the CC appeared to be favouring a remedy that would prohibit MFL from operating out of Dover."

So what we have is the common ground about them seeing the supplementary remedies notice and what it said, and then we have his client's evidence saying that they then heard more from GET about what was going on. Then, obviously, the critical point in my response to this submission is what is set out in 50, and what we can see on the file, which is that "As a result I sought further advice from …" – some of the detail may be confidential, but the point is it is not confidential that an advice was sent to the CC and, indeed, there is a copy of the advice. That is worth just turning up, because you will bear in mind this is a procedural unfairness ground, it is said: "We were caught completely short, we did not know what was going on, we could not say what we wanted to say about it", but they actually submitted in response to what they were told from GET in a supplementary remedies notice, an opinion on the very point that Mr. Beard says he would have wanted to say some things about, namely, what the effect is of the French Order. That is to be found at 2C, tab 37. There is a French version beginning on bundle p.2.1343. Luckily, you do not have to read the substance of this because this is a procedural point. It is a bit like the latest opinion from Mr. Genin. All you have to know is that they did do it.

It may also be worth noting that at the top of the second page of the English version, which appears on the next document at 2.1348, there is a reference to what the liquidator was saying – "the Liquidateur underlines that", the detail does not matter. Then the next sentence: "The Liquidateur also underlined that …"

What was said in the submission was that there was unfairness because they did not have an opportunity sensibly or fairly to address the court order, and they either did not or could not say something about the liquidator's involvement, but in actual fact they did both. How and

why did they do both? It is obvious, because they saw it in the supplementary remedies notice and they were also being told by the GET some of the things that were going on. So on the question of fairness we say that, with respect, we do not understand how we have failed to meet our statutory duties to set out the key part of our reasoning on remedies as applied to them, that enabled them to know that they should address the meaning and effectiveness of a court order as it applied in the first iteration to divestiture, and then in the latter iteration – because, of course, there was a second opinion – prohibition remedies.

I know how Mr. Beard put his case, he said: "Look at that, we would have wanted to say this, that and the other", but that is not how these procedures work. The question is: did we give them a sufficient opportunity to make known their views about the meaning and effect of the court order, because they knew that we were considering a prohibition remedy? Answer: yes, and they did do it. The fact that it could have said more, and the fact that they could have analysed and had a counter-opinion from DFDS is neither here nor there, they had a sufficient opportunity intelligibly to address the point, and they did.

Another minor point was made about: they would have liked to have addressed the tax position. With respect, that is an example of some minor detail point that you do not need. In any event, it is a particularly bad one because SCOP did not own these vessels, or know anything about the tax position. In fact, when we asked GET , who had purchased the vessels about the tax position, they said: "We do not know either". Anybody could make more points if they have more documentation but that does not mean they are wrong. In particular it does not mean that we are wrong to have received – this is what we received – an opinion from DFDS, and opinion from GET and two opinions from SCOP on the topic in question, and we have weighed it all up and have formed an opinion. There is a limit to the degree to which we have to say: "We have now received this in from somebody else. You have a look at that and you have a say. We have now received this from somebody else, you take a look. You all have a look at this and put in some more legal opinions."

The fact of the matter is we received an opinion, or more than one opinion from everybody on a point that they knew about, they addressed it and that is the end of it, no unfairness.

That takes me on then to SCOP's second proportionality ground. This is the one about failure to quantify the job losses point. You have seen on the *Tesco* citation that I gave you about proportionality that it is just wrong as a matter of law, we do not have to do that. We do not have to quantify, full stop, let alone quantify in any particular manner. We are entitled to take a qualitative view and we did.

There was a point taken about the construction of para. 10.141 of the Report – I am not going to take you back but you are welcome to read that as many times as you like. It says clearly "any" twice – "any costs". That refers to "any costs' because that is why it says it, and that includes all the costs that have previously been talked about. It is not some subset of costs, it is a thoroughly bad point.

Then they made this point as regards net job losses, that somehow the analysis that we put forward in the report saying that the transaction could have been avoided, or there could have been some issue like competition amelioration of the potential transaction, competition protection if you like, they say that is a bad point. But, with respect, it is not a bad point, it is a perfectly logical point. The fallacy is on my learned friend's side.

First, and I mentioned this point in opening but I will just repeat it, if we do not impose a remedy because there is no transaction, obviously the remedy cannot have caused any losses. The hypothesis here is that there would not have been a transaction and yet we are somehow responsible for the job losses. That is obviously wrong because the only relevant thing is does our remedy impose losses in a proportionality analysis. If there is no remedy then we have not caused anything.

Then you ask yourself the question: unfortunate though it may be, why is it there would have been job losses in that situation? The answer is because SCOP was not sufficiently attractive to anybody else for them to achieve job creation with anybody else. That is very unfortunate, but it has nothing to do with us so we cannot be held responsible for it. The point we were making is job losses, whether they be net or gross are not relevant, because if you had not undertaken the transaction you would have suffered the job losses anyway. That is a perfectly good point and nothing that Mr. Beard has said undermines the point.

The last point is that there was some incredulity expressed in the written and oral submissions about how we could effectively have come to the view that, to use our phraseology, the loss to consumers would "substantially outweigh" any job losses or any relevant costs that there may have been. As you recall, our defence is two-fold. We say it is all relevant so you do not need to worry about it, but even if we had it would have been substantially outweighed. It is a fairly obvious point. It is just intuitive, leaving aside that we do not have to quantify.

On one side of the scale, if this is relevant, you have got, as we saw, quantified in GET's internal documentation to the tune of €X million annually which we calculate as a net present value over five years of a big figure on the one hand. That is damage to consumers. This is, on the other hand, so not job losses to one company active in one part of one sector

at one particular point in time. You do not have to be a rocket scientist to figure out which way the balance comes out in that regard. In any event, we have got a huge margin of appreciation when it comes to that, and our methodology of going back it and assessing it. We do not accept that there is anything wrong with net job losses. It is obviously right. This is ... job losses. We have obviously got to look at them in Mr. Pickford's client's hands as well. We cannot just leave them out of account, as if people who lose a job at DFDS they are somehow irrelevant.

So that takes me on to, I am pleased to say, the two proportionality challenges brought by Mr. Green. With respect to those grounds, they will not take very long. The first one is the Dover-Boulogne route. As I said in opening, that is hopeless in the face of *Stericycle*. What that says (and this is all in our written submissions) is that you do not have to catch every conceivable potential thing that a merging party might do. They might have wanted to operate (I am only being semi-facetious here) from Dover to Marseille or somewhere else in Europe. So what? That was not presented as a realistic opportunity. It certainly did not present itself to us. It was not suggested by GET that they wanted to do that, so we did not have any duty to analyse it.

Indeed, it gets far stronger than that. That is good enough for me. Case law says that that is the answer so he loses. But it goes far far further than that on this case. What in fact gets said to us was that if it was not allowed to operate on Dover-Calais it would not operate at all full stop on a ferry service. It is absolutely breathtaking that it should now be suggested that our entire report on remedies should collapse in the face of a route that was never suggested to us, quite the opposite was suggested, and which even now is not said to be something they are going to do. It is absolutely signal in this ground of challenge that there is no evidence from GET and there is no submission from GET that they are vitally concerned with operating on that particular route. It is a complete non starter.

Then slightly more involved, but I am pleased to say we will still finish within the time allotted to me, is the challenge to "not more than one ferry; you should not have disabled us from operating with more than one ferry". This is wrong for the reasons I gave. I went to the trouble of taking you to the remedies part of the President's words in *BSkyB* all about remedies. In particular the phrase "no realistic prospect" and in particular the phrase "cautious and conservative approach". That was in the context of divesting of shareholdings. What is said is that it is an integral part of our reasoning on SLC that you need to have a minimum efficient scale of two ferries and a third - two fully operational and

a potential to access a third if not three fully operational. So as soon as you take one of them out of the equation there goes the SLC.

That is just the wrong approach. When we are criticised in the report for saying that we reject that in principle, we do reject it in principle; it is completely and utterly wrong. What the case law says and what the statute says is that we have a statutory duty to impose a remedy that is as comprehensive as is reasonable and practicable - as comprehensive as. That does not involve getting rid of only one ferry if that does not impose a comprehensive remedy. It is no accident that we came to the conclusion that in the case of GET you have to get rid of more than one ferry, effectively via a prohibition policy, as things moved on from divestiture. But that is for a number of very good reasons. We will start with one of the better ones which is it is just obvious. Secondly, GET was telling us that it had very powerful incentives to carry on operating, even if it only had two ferries, and that it would. That is the end of this round of challenge again. Thirdly, that GET also has a tunnel. Whoops! That seems to have been overlooked in the submission. So we could have two ferries and a tunnel. That is tantamount to two ferries and an extra ferry in the background. The reason you need a third ferry in the background is in case something goes wrong with one of your ferries. Well, you could shift to your tunnel instead. So none of this is difficult stuff.

Then, as if that is not enough, as cited I believe at the beginning of my opening, there was a reference from the GET board member saying that effectively they only needed two ferries because they had a tunnel. So it is not as if I have just made this stuff up about having a back up facility. 8.27 and 8.28 of the report, if you could please have regard to those in relation to this ground. We say that that, together with our written submissions, disposes of the proportionality challenge ...

May I just have one moment?

THE CHAIRMAN: Of course, Mr. Harris. (Pause)

MR. HARRIS: Thank you very much. One postscript: we received, several hours after the hearing last night, some additional written submissions from GET. We have not had a chance to digest them. We will digest them and if there is anything that needs to be responded to, we will respond to that in writing. What I can say is that in the short amount of time I did have to look at them, we have noted that they comment on some of the very same passages in the mysterious Annex H and they say different things about them. So I am not convinced at the moment that we will need to respond at all, but if and in so far as we do, I am afraid we will have to do it in writing.

MR. GREEN: This was the document you asked us to provide so that if they had things to say about it they could respond today.

THE CHAIRMAN: Indeed.

MR. HARRIS: With respect, what we were told by Mr. Green in the hearing was it might take me a few minutes to deal with it now, but I could deal with it straight away in writing. In fact it was over three and a half hours later we received this not short document, and it is confusing us because it is inconsistent in places and duplicative of something that they had already put in. So if he wants to rely on it, we will look at it and if it needs any response we will put in a response.

THE CHAIRMAN: Mr. Harris, provided it is confined solely to this document, and provided it comes pretty quickly a written response can be required. We will think then whether we will be assisted by a further response from GET, but GET should not, I think, assume that they should put something in.

MR. HARRIS: I am grateful. I should just say to the tribunal at the moment I am not convinced there is a need for any response, but if there is it will be short and it will be quick.

THE CHAIRMAN: Thank you very much.

MR. HARRIS: Unless I can assist further, those are our submissions.

THE CHAIRMAN: Thank you very much. Mr. Pickford, you are next. Can I just make two general points. First, as regards your position, Mr. Pickford, obviously we are really only interested in points in addition to those that Mr. Harris has made. I know you will not take it amiss if I say less might be more from you, but do not let me inhibit you.

In terms of the replies, my second point, I know there is an assumption that we have forgotten everything you said in opening. We have not; we will be reading transcripts again. We really are only interested in new points arising out of what Mr. Harris and Mr. Pickford have said. Hopefully, that will mean that we will be able to finish in good time. Mr. Pickford.

MR. PICKFORD: Thank you. Sir, in relation to that point that you just made to me, obviously there are some issues where there was a very nuanced debate between the tribunal and Mr. Harris. I think it would be still helpful for us to put our position on those. It may be that we are fully behind Mr. Harris; it may be that we are slightly different and therefore it is important I think you hear me. Mostly obviously, I will try to canvass points that Mr. Harris has not even touched on at all if at all possible.

Then also, in relation to the document that was received by the CC from GET last night, we did not even see that document until this morning. I very much doubt we will have

anything to say on it, but obviously we would ask for the same permission: if there is anything in it, we would come back very quickly, very shortly. Like Mr. Harris, I doubt there is.

THE CHAIRMAN: Very grudgingly yes, but it is a very grudging yes, Mr. Pickford.

MR. PICKFORD: Thank you. We did not see it last night, I only saw it this morning, so I have not had a chance to look at it properly.

Sir, I am going to focus principally on the SCOP jurisdictional grounds, and I am then going to look at briefly the legal test under GET application ground one, the limitation point, a couple of points to add on that. To the extent I have time, I am going to make a few remarks on the remedies grounds and then, in my last few minutes (if I still have some at that point) I have a very short point to make: it is a confidential point and it relates to our confidential information, so I will be asking if the tribunal will be able to clear the court for about a minute, for me to make it. But I leave that to the end because that should facilitate, I hope, the expeditious conduct of these submissions.

I am not going to go to primary documents but because I am trying to pick up little bits that have not been mentioned by others, it might be a little bit like Reply submissions in that I am picking pieces here and there.

On jurisdiction we make essentially two overarching points. There were three but I think Mr. Harris has made one for me. The first, the topics have been canvassed but I think it is important to go over them again just so the tribunal is clear where we are coming from on them, is that the key issues are whether SCOP and GET are associated persons; whether GET had a material influence over SCOP's policy; and what constituted GET's acquired business. They are mixed points of law and ones of appreciation. The way that we say that the tribunal should go about assessing those is as follows. It needs to ask itself whether the CC directed itself properly according to any relevant law. It needs to consider whether the CC addressed relevant considerations. So if in law something it considered was irrelevant, then plainly there would be an error of law. It needs to check whether the assessment of the CC is *Wednesbury* unreasonable. If it goes through those kinds of judicial review tests, if it is satisfied on that basis it should not interfere.

So you are entitled to ask yourselves what is the meaning, for example, of associated persons in abstract terms? There is then a question of the application of the facts as found by the CC to that abstract meaning (the question of law) and that is one of appreciation. That is the question that you can only interfere with on the standard judicial review basis. So to answer Mr. Currie's question, it is not merely that you take the facts as found by the

CC and then you apply your own analysis as a point of law. The pure legal question really is what are the meanings of these words in abstract terms? The question of appreciation you have to leave for the CC. The authority we would cite in relation to that is the *Tesco v. Secretary of State for the Environment* (I am not going to take you to it) at 3B/20/780F to G.

The second overarching point (and this really does bear emphasis, albeit we began to get drawn into it about three quarters of the way through Mr. Harris' submissions) is it is not disputed by the SCOP that GET now operates a freight and passenger ferry service across the short sea, using the same vessels as SeaFrance on the same route, with a large proportion of ex-SeaFrance staff, targeting amongst others ex-SeaFrance customers and which GET took to be a partnership. It is not in dispute that SCOP was formed for the very purpose of continuing the SeaFrance operations in so far as possible, and that it worked towards that objective for the entirety of the seven month pause in trading which took place during mainly the low season of 2011-2012. Nor is it disputed by the SCOP in its application that the transaction could be expected to lead to a substantial lessening of competition.

If we take all those points together, we say it is very difficult to see how the SCOP can sensibly claim that none of the activities of the SeaFrance business came under the control of GET, and that the CC was not therefore empowered to act to prevent what it saw as a lessening of competition. Just in passing, the French competition authority obviously had no problem in asserting jurisdiction and no-one has ever sought to challenge that.

Turning then to ground one specifically, that is the argument about associated persons and the meaning under s.127(4)(d). Mr. Beard poured scorn on the CC for saying that on his construction there had to be read in an extra two "togethers". He made a point about it in support of him. We say that turns it on its head because the language difficulty is the SCOP's not the CC's. He has to be able to demonstrate that his interpretation is required by s.127(4)(d) and we say it is not. The natural meaning, what was adopted by the CC was perfectly open to it; it is the natural meaning of the words. It is he who has the strained approach.

Why does he adopt that strained approach? It seems to basically come down to the bank funding point. He says if it is not that way it is too inclusive. We support what the CC says on that. I would add two further points. The first point is this. Suppose that a bank providing funding were an associated person in general. Mr. Harris dealt with a specific case where it might be. Let us suppose that it is in general. Mr. Beard has not demonstrated that that matters substantively in terms of causing problems with the merger regulation so

that it then brings within the scope of the merger rules transactions that should obviously stay outside it. Because s.127 is not the end of the matter. You have to go back to s.26 and look at whether enterprises have ceased to be distinct. His analysis just does not go that far. He says it would be terrible if a bank was an associated person. Well, we say actually so what? What matters is what then follows from that under s.26.

My second point is this. Even if SCOP is right that, first, to be associated persons within the meaning of s.127(4)(d), both persons must have some degree of control. (That is the opposed by Mr. Harris). Secondly, that both staff and vessels are necessary ingredients. (Again, Mr. Harris says they considered the two together but they would have to go back and look at it again if it were merely vessels that were the part of the assets that came into GET's control). Thirdly, that SCOP controlled the relevant staff without material influence over its policy from GET. Let us suppose all those factors in favour of Mr. Beard. We say that even on those assumption, GET and SCOP were nevertheless associated persons within the meaning of s.127(4)(d) simply because they were acting together to secure control of an *enterprise*. Most of the discussion has been about acting together to secure control of assets, but plainly in his assumptions, even if he is right about his assumptions, they were acting together to secure control of an enterprise. GET obtained control of the vessels and various other relevant assets; SCOP obtained control of a significant number of SeaFrance staff. Between them they acted together to secure control of the whole or part of the former SeaFrance business. That is an immediate answer to ground one.

It is true that the CC did not express itself in quite those terms in the report. But we say that that is irrelevant because it is a pure point of law. It does not depend on any facts that have not been found, and the Tribunal can, if necessary, address the matter. Obviously, if it accepts the CC's reasoning it does not need to go there, but before it makes a declaration as sought by the SCOP that there was no jurisdiction, it plainly must assess if that is true. We say there is an alternative legal argument which gets you home with that. That is ground one.

Ground two, again we support what has been said by Mr. Harris. The points we add to that are effectively twofold. One I think is really a restatement of Mr. Harris's point, but I would like to put it in these terms. There is nothing in the merger rules that says that control of all elements of what constitutes the enterprise must be acquired by the same route or at the same time. In the present case we have the following points: firstly, SCOP is to be treated as the same person as GET by the operation of s.127(4)(d). That is the working assumption of Ground 2.

Secondly, the staff are included because the SCOP acquired them. Either it acquired them as subscribers to it, or alternatively, it acquired them ultimately as its employees when the project was finally got off the ground in the summer of 2012. It did that purely for the purpose of running the former SeaFrance business on former SeaFrance vessels. Indeed, Mr. Beard is at pains to emphasise under his Ground 5, the SCOP has no independent life beyond that operation.

Thirdly, we then have GET that comes along and acquires the vessels. Given that it already had control of the staff through SCOP because it has been treated as the same person, we say that was sufficient to bring it within the scope of the merger rules. That is the first point.

The second point is that my alternative analysis that I have just articulated in relation to Ground 1 also answers Ground 2 immediately, because on the SCOP's assumptions there was still, without doubt, joint control of the former SeaFrance enterprise. That meets Mr. Beard's point. It is irrelevant that the transaction in relation to the vessels only led to the acquisition of the vessels and various other related assets, and not the staff. The SCOP acquired the staff. Between them SCOP and GET together secured control of the enterprise. So again, my alternative analysis provides a very simple way through, even if you are not convinced on the primary case of the Commission advanced by Mr. Harris, which we support. That is Ground 2.

Ground 3, I essentially have four short points. Firstly, simply as a matter of logic so that we are all clear, Ground 3 is irrelevant if SCOP lose on Grounds 1 and 2. Secondly, there is a complaint about the absence of a reference to the word "policy". We say in the context of the findings that were made by the CC in its report that is unproductive because if GET could materially influence the SCOP to the degree that was set out in the Report it matters not that whether policy was not mentioned; it could plainly influence what the SCOP does and thus its policy. To the extent that it exercised the control that it did, obviously that would not be the case in every situation, but on the facts as found by the CC it is quite plain that it was.

The third point is that the SCOP's own case on Ground 5 is, we say, fatal to its Ground 3, because it says that the CC's remedies, which remember are only actually directed at GET, they do not directly engage with the SCOP, they prevent GET from doing various things. It says that if GET does not operate a ferry service from Dover it has the obvious consequence of bringing to an end the SCOP's entire business. It also says it would be catastrophic, devastating.

To suggest in those circumstances that GET does not have material influence over its policy when it is in a position of apparently 100 per cent absolute unequivocal control of its entire future, because without GET SCOP is nothing, we say it is simply untenable to suggest that it does not have material influence in that situation.

Finally, on the agricultural analogy, we tend to agree with Mr. Harris that it is not particularly helpful to get drawn into these kinds of analogies, but if one was to try to make it more accurate it would be a farm that was established purely to service the supermarket, that had no independent life conceivably of any sort of its own, that the farm was, in fact, owned by the supermarket and then leased back to the farmer, that the operations were loss making and the losses were met by the supermarket, and without the supermarket the farmer would have no business whatsoever and was 100 per cent at the mercy of the supermarket. In those circumstances you might expect a material degree of influence.

What we would certainly say is that if you were to draw that conclusion it would not be a *Wednesbury* unreasonable conclusion, because of course, as I emphasised at the beginning, the Tribunal's task is to assess whether what the CC did was *Wednesbury* unreasonable or it otherwise misdirected itself.

Ground 4 is essentially a factual quarrel dressed up as a point of law. The simple points to make are these: nowhere in the definition of an "enterprise" in s.129 does the statute say that the activities of a business have to be being performed at the date of acquisition in the sense of actually trading at that date. So we say that the questions that one answers are quite simple, and they are these: is GET an enterprise? Plainly, yes. Was SeaFrance an enterprise? Plainly, yes. Do the activities carried out by MFL form part of the activities that were formerly carried out by SeaFrance? Yes, see Report, para.4.68. Did GET cease to be distinct from the activities of the SeaFrance? Yes. Certainly in November 2011 they were distinct, seven and a half months later they were not. Does the temporary pause in trading prevent the two businesses being, in substance, the same? No, certainly not in the CC's judgment. Is that *Wednesbury* unreasonable? Again, no. So that, we say, is the end of the analysis.

Mr. Beard placed a considerable emphasis on TUPE, which he said did not apply. He did not so far as I recall point us to any finding to that effect anywhere. Certainly we have not been able to find any finding that anyone has made so far that TUPE did not apply. It appears to be the case that nobody has brought a TUPE case in respect of MFL. That is hardly surprising for two reasons: one, the SCOP is bound up with the relevant unions and so it might be surprising to see the unions, who generally are behind TUPE cases, bringing

that kind of case. Secondly, employees were indeed transferred in any event to the new business. So we say that, for those reasons, it is difficult to place a great reliance on what Mr. Beard says about TUPE.

In any event, we do not accept that TUPE is relevant. Here we are dealing with merger regulations. TUPE may or may not be different. We also know that Mr. Beard did not produce any authority that TUPE is precluded from operation by reason of a pause in supplying the market. So he has not really made his TUPE case good either.

Finally, in relation to this Ground, we would note - and I think this is a point that probably has come out already - that the whole *raison d'être* of course for SCOP was to restart operations on the Dover-Calais route using the SeaFrance vessels. It is not as if, during the seven and a half month period, nothing was going on. It was actively taking steps to get things moving again, and that is a relevant consideration which was taken into account by the CC.

Just to answer a point that, Mr. Chairman, you raised with Mr. Harris, you said that you were struggling in relation to the issue of the transfer of the employees because contractually there was no transfer. We say that the question one asks oneself is not a contractual one, it is one of substance rather than form. Indeed, that is why one has TUPE regulations in employment law. Very often employees are not transferred in contractual terms, but that does not answer the question as to whether some sort of transfer has taken place. We say TUPE has its own rules, but similar questions arise in relation to the merger rules, and the fact that there has been a contractual transfer does not answer the question. It is one of substance, not form.

Those are my additional points on the SCOP jurisdictional grounds.

I am just trying to keep an eye on my time.

THE CHAIRMAN: I think you have until 4.20.

MR. PICKFORD: Thank you. Limitation: if I could just hand up two cases. There are very short passages that I need to take the Tribunal to, but I think it would be helpful if I did so. These cases concern the obligation to bring a judicial review challenge particularly promptly in circumstances where the interests of third parties are affected. Could I ask you, please, to look at the case *R v. Secretary of State for Trade and Industry, ex parte Greenpeace Limited,* and turn, please, to p.438. About half way down the court said as follows:

> "The courts have very firmly stated that a judicial review applicant must proceed with particular urgency where third party interests are involved. The respondents cite [a range of cases] …"

With respect, I need not, I think, set out any of the passages relied on; the principle is plainly established.

Then could you look, please, at the *Terry Adams* case, again an equally short point. Would you turn, please, to p.478, and down towards the bottom of the page, the court says as follows:

> "There is much importance in the principle that, if objection is to be made by an objector to the conduct by a public authority of a continuing administrative process, in which costs will be incurred by the authority and other intended parties, application should be made promptly."

It is not a very surprising principle, it is a very obvious one, that if you are going to prejudice other people by waiting then you should not. If you are going to invoke the powers of the court to interfere with a decision that an administrative body is taking in good faith you need to act promptly in order to minimise the extent of the prejudice that arises in relation, in particular, to third parties. We say that principle applies with considerable force in the present case because, of course, GET is operating a service between Dover and Calais, which the CC believes is contrary to UK merger law, so effectively they should not be there on that route operating as they do. The unchallenged motivating force behind GET's operation of the MFL service is to prevent competition from my clients, and ultimately to drive my clients off the route, again unchallenged.

The longer GET can continue to operate its service, and the longer my clients have to sustain the consequent losses, the greater GET's chance of bringing about the very outcome that the CC found that it desired, which was causing my clients ultimately to give up and leave the short sea. One can see that GET, in fact, has quite a lot to gain from a delay in this case because it gets to remain in the market when ultimately it should not be there.

By contrast, my clients have everything to lose because they continue to make losses for the time that GET remains present.

THE CHAIRMAN: I see the force of your promptness cases, but is not the slight difficulty here that we have a statutory regime which actually gives them one month.

MR. PICKFORD: I was going to come on to that. We say that they are given one month and Mr. Harris has taken you to the authority which says: "Your one month starts now, as soon as a clear decision in relation to the procedural point has been taken". The only answer to that,

we would say, from the Tribunal's point of view, is the Tribunal might say in a given case: "Technically time started within one month, but actually in all the circumstances of a particular case it was okay to wait until the final decision because there is no prejudice, and so implicitly we are going to extend time, notwithstanding that you could have appealed at the time of the original decision". There is no application from GET for that extension here, and we say certainly it would fail if it were made because of the prejudice caused to my clients in relation to it. So that is the reason why we rely additionally on that analysis which supports the point that Mr. Harris has made.

Then, briefly, in relation to the law on what needs to be provided to a consultee in the position of GET or SCOP. Plainly the *Al Rawi* and *Bank Mellat* cases do not change everything. They are proceedings before a court, and we say they do not even change the temperature as regards administrative proceedings. There is nothing in those cases that indicates they are intending to lead to any change in the law as regards administrative proceedings. They are not court proceedings and consultation is not litigation. If I could just read to the Tribunal – if it could turn it up, please, in its own time – the *Eisai* case that Mr. Green took us to is quite helpful on this point. It is said at paras. 25 to 26, in part quoting *Coughlan*. Paragraph 25:

> "It has to be remembered that consultation is not litigation: the consulting authority is not required to publicise every submission it receives or (absent some statutory obligation) to disclose all its advice."

Paragraph 26:

> "The mere fact that information is 'significant' does not mean that fairness necessarily requires its disclosure to consultees. In *Coughlan* itself, for example, it was held that there was no need to disclose to the claimant a report which had been received from a third party in response to the consultation exercise, even though that report was plainly significant."

We say that answers Mr. Beard's point about our expert report, as do a number of other authorities. So how should a Tribunal go about reviewing the CC's approach to confidentiality, it is a difficult question and I would, if I may, like to set out our position on that.

It is common ground that the requirements of a fair hearing are ultimately for the Tribunal to determine. Does that mean that reasonableness and a margin of appreciation entirely disappear from the equation? We say "no", it does not. The reason for that is this: the interests of confidentiality on the one hand, and fair procedure on the other, require a

balance to be struck. Should the Tribunal strike that balance entirely for itself? No, we say not. The starting point, as Mr. Harris explained, is the relevant statutory context, and there are two key provisions there, one is s.244, which deals with the need to exclude from disclosure as far as is practicable commercial information whose disclosure *the authority thinks* might significantly harm business interests of the undertaking to which it relates. For obvious reasons the emphasis is on the authority's thoughts in relation to that because the authority is charged with the investigation and is in the best position to make that kind of determination. So merely because the Tribunal thinks that a decision on whether to protect a particular type of information as confidential is not one that it would have taken, that of itself does not entitle the Tribunal to intervene.

The same principles are reflected in s.104 where the duty of consultation is "so far as practicable", and again that requires a balancing exercise to be carried out by the CC. So, given all that, when should the Tribunal interfere? We say it is only if two conditions are satisfied. First, the CC withheld information that there would practicably have been a means of disclosing in particular without unduly compromising confidentiality or the timing of its report and, secondly, without that information GET was unable to understand even the gist of the case it had to meet. In those circumstances the Tribunal is entitled to say that the CC erred. But it has to remember that, certainly in relation to the first part of that test, it still has to allow the CC a margin of appreciation in terms of allowing the CC to determine what is practicable within its own procedures, for example.

So the test is not: "Would we, the Tribunal, have given GET this piece of information" and nor is it "Could GET have said something more had it been provided with this" because, as Mr. Harris has ably explained, of course, we see the horrors of annex H in relation to what can be provided by an able legal team if it puts its mind to it.

In relation to the question that you, Mr. Chairman, asked: what happens when there is a conflict between the two? We would say that there is no trump card for the need to see information that necessarily overrides confidentiality. The two are to be balanced and in every case it comes down to the particular facts of that case: which ultimately the CC considers to be more important in relation to the overall scheme of its decision. Obviously the CC explained the kind of process it would adopt in relation to that. But it is not compelled always to cede to any kind of trump card in relation to the need to see information because if it was then the whole analysis would collapse. It would no longer be a balancing exercise, it would effectively be consideration one that always wins out. That is reflected obviously in the statutory language of s.104.

I am very nearly there. I have two very quick points to make on remedies, and one minute, if I may, on the confidential point.

First, on remedies, SCOP's ground 6, we say, is a very peculiar ground. The SCOP's very existence is integrally tied up with GET being able to carry out activities on the Dover/Calais route using ex-SeaFrance vessels and staff, no dispute. So its existence is predicated on something that we now know – assuming that it is not otherwise set aside, and we have got to the remedies stage, to be contrary to UK merger law, and that is unlawful. So it is hard to see in those circumstances why the CC should be giving a great deal of weight to the demise of an entity whose very coming into being is predicated on events that are contrary to the Enterprise Act 2002. We say it simply does not make a lot of sense.

A final point in relation to the divestment remedy. Mr. Harris has already pointed you to para. 8.28 of the Report where GET's own board explained that it could operate using its tunnel to serve as the third ship. Also, it has to be remembered, of course, that GET's objective was to drive my clients from the market, so it does not stand to reason that GET will necessarily continue to act in a way that is profitable. It might continue to remain in the short sea on that particular route, even if it was not economically viable, because in the short run it probably was worth it because of the exceptional long run gains if my clients were actually to leave.

If I may take one minute on my final point?

THE CHAIRMAN: Right. For those of you who have not signed the undertakings admitting you to confidentiality ring, I am afraid I am going to ask you to leave the court room for the purpose of this point. We will try to keep this hearing as short and as rare as possible.

MR. PICKFORD: It will be very short.

THE CHAIRMAN: I am just explaining to those who are not members why this is happening. But there are some points which arise where frankly the point cannot be made without reference to these.

(For in private hearing, see separate transcript)

THE CHAIRMAN: Mr. Beard.

MR. BEARD: Ground one, a couple of preliminary points. It has been said ours is a narrow interpretation. We are saying, "No, we are just defining the law". Jurisdiction for an intrusive regime such as merger control, should not be interpreted expansively. Expanding the scope of merger control jurisdiction expands the uncertainty in the commercial environment that comes within a wider regulatory ambit.

It is suggested that there is no basis for saying acting together to secure control in section 127 (4)(d) could mean each of the relevant persons getting some control. We say control is the key concept and people end up — having control together can use it together to soften competition. It is said by Mr. Harris that our approach is rejected in the CC merger guidelines. That is not right. For your notes, the relevant part of the CC merger guidelines is at 3F, tab.81, and the relevant paragraphs are those concerned with associated persons. Paragraph 3.42 describes associated persons, 3.43 says this:

> "This situation [being associated persons] will most commonly arise where the acquiring persons are related or have signed an agreement to act jointly to make an acquisition, although the Act does not require that each of the acquiring parties should themselves individually have control over the acquired entity for them all to be regarded as associated persons".

We accept that. That means control for the purposes of the Act. You do not have to be associated persons in a sense that each of you obtain material influence at least, you can be associated persons obtaining lesser levels of control but using it such as to have material influence or *de facto* control, *de jure* control.

The third point on ground three, it is said we are putting forward some floodgates argument to which the easy answer is, "You won't catch anyone in the merger control regime if you distinguish between acting with and acting for".

Well, we find that distinction extremely difficult to understand. It seems to depend on whether or not a bank or funder is active in a bidding process or really just a passive provider of funds. As soon as they actually get involved and sponsor and push along with a bidding process, then they will be acting with the acquirer providing that financial capital. Indeed, the irony of the reference to the *BUPA* case to which Mr. Harris referred is that it reveals how that distinction just does not work for him, because in *BUPA*, what happened was BUPA wanted to acquire a health care organisation called CHG, it was not allowed to buy shares in that entity because of previous undertakings relating to a subsidiary of CHG called IBH. It therefore launched a public bid with the assistance of Solomon Smith Barney. And what it did was, it got a bank subsidiary to go off and buy shares for it, for it. Not with it, for it, in those circumstances. And para.2.39 of the report said, "BUPA said that the arrangements between BUPA and the Solomon Smith Barney entity were intended to assist a possible future acquisition of control of CHG by BUPA". So the BUPA case actually illustrates where there was a finding of a relevant situation, but in fact it cuts across the very distinction that he is dealing with. And one can immediately conjure other

examples that create those sorts of problems. For instance, if an acquirer enters into an option arrangement, say Eurotunnel entered into an option arrangement with SCOP. Is SCOP acting with or for Eurotunnel in those circumstances. So, it is not a good distinction. It would raise uncertainty. Mr. Pickford was fairly candid about it. Well, so what? We say you are drawing within the scope of merger control entities whose activities in funding, in particular, merger control activities should not fall for scrutiny, and it is undue regulation.

Ground two, on the basis that SCOP and the GET are one person, they are one person for the purposes of section 26, and for the purpose of section 26 you are asking yourself the question whether or not enterprises have been brought under common ownership and control. Mr. Harris is saying that in deciding what the SCOP/GET associated person together brought under control, he says he brought under common control both the vessels and the labour. But it makes no sense. As I have said, it is bad jurisdictional maths, because this single person did not bring the labour under common control; it already had the labour under common control. There was no bringing involved.

It is actually very difficult still to understand what Mr. Harris' case is as to when the labour is supposed to have moved.

We passed a note up to the tribunal setting our various references to the fact that the transaction was on 2nd July. Just in answer to the question posed by Mr. Currie about timing in relation to these matters, the answer lies in para. 4.79: "the transaction was completed on 2nd July 2012".

Mr. Harris' three-fold 'look before/look after/you can look in the round' type analysis is not right. You look at a transaction; what enterprise has been brought into common control with other enterprises? Obviously, he has run a new argument in oral submissions that has not been run before, which is that if you do not take into account earlier developments (and we still do not know what labour was supposed to move, but some sort of earlier developments) you risk circumvention because you can do mergers by a series of steps and that would mean merger control was circumvented.

This is not a good point. I am going to ask you briefly to turn up bundle 3A, the first authorities bundle, tab 1 p.3.8 s.27:

> "Time when enterprises cease to be distinct. (1) Subsection (2) applies in relation to any arrangements or transaction - (a) not having immediate effect or having immediate effect only in part; but (b) under or in consequence of which any two enterprises cease to be distinct enterprises. (2) The time when the parties to any such arrangements or transaction become bound to such extent as will result on

effect being given to their obligations, in the enterprises ceasing to be distinct enterprises shall be taken to be the time at which the two enterprises cease to be distinct enterprises. (5) The decision-making authority may [so it is permissive but it would need to undertake the analysis], for the purposes of a reference, treat successive events to which this subsection applies as having occurred simultaneously on the date on which the latest of them occurred."

The relevant period within which it can make that decision is in relation to events occurring within the preceding two years. What you see in section 29 is the possibility of obtaining control by stages, also falling within the scope of merger control. There is a specific statutory regime that has been put in place to deal with precisely what Mr. Harris is saying you need to interpret s.26 and s.127(4)(d) broadly to deal with. We say no you do not; the statute is already there.

Just on mutual exclusivity, he has again got a new argument, never referred to in the defence or skeleton. You do not have mutual exclusivity between material influence and associated persons because in 127(2)(i) concerned with associated persons "shall not exclude from s.26 any case which would otherwise fall within that section". That is not the same thing. It is saying if you do find material influence in a particular case, or there is some other arrangement that brings a set of arrangements within the scope of s.26, s.127(1) does not trump it or cause it to fall outside for whatever reason.

That is an entirely different proposition from saying you can both simultaneously be a pair of associated persons and one with material influence over the other. You have our submissions in writing on that. Furthermore, it is not the way in which the Competition Commission dealt with it. Just in relation to the authority he cited in relation to this proposition, *Swedish Match*, he said that *Swedish Match* indicated that you could be both. Well, no, it does not. Just for your notes, in bundle 3E tab 74 para.7.60 p.3.3292 says: "[o]n either basis [associated persons or material influence] ... we would find that a merger situation had been created". Either basis, not both bases. There is not any authority there to assist him. That is ground two.

MR. HARRIS: For your note, the reference to s.127 is para.61.

MR. BEARD: I apologise. Ground three: economic dependence just does not equal material influence on policy. Again, it is bad maths. You can make all sorts of findings about economic dependence, you can be heavily economically dependent on a particular customer, or a particular supplier because you have chosen to do so by entering into contractual arrangements, potentially exclusive contractual arrangements, potentially very

onerous contractual arrangements, but that does not mean you have ceded your own policy decision making.

Mr. Harris recognised the Competition Commission did not refer to the term "policy" in the section. He said it does not matter if the guidance does, but it clearly does matter because it is a vital ingredient of the statutory test. He referred instead to various paragraphs in the report at para.4.44 and in particular he relied on (c) which is a section which says SCOP is highly economically dependent on its relationship with Eurotunnel. He says SCOP has no viable source of income other than Eurotunnel. That is undoubtedly right at the moment. That is because of the contractual arrangement it has entered into. It tells you nothing about the extent to which policy is dictated by Eurotunnel. Mr. Doutrebente's statement sets out the position in relation to policy decision making. Just in relation to (e), Mr. Harris repeatedly said that there were shared employees between Eurotunnel and SCOP. That is not right. Jean-Michel Giguet is an employee now of SCOP, not of Eurotunnel, and was not a joint employee.

We recognise that in relation to the guidance effectively, as I went through, the normal situation will be material influence will be given by a shareholding normally of 25 per cent or more. That is reflected in the CC's own decision in *Sky/ITV* which is why we refer to it. That will give you material influence on policy. There may be more exceptional cases where board representation will do. It is the most exceptional case where only non-board representation or shareholding could give rise to material influence. The guidance is merely recognising you never say never.

But if you are going to so radically depart from all of the previous cases dealing with material influence you need the very clearest reasoning. The very clearest reasoning plainly does not mean you do not refer to the concept of policy, which is instrumental in the legal test. The legal test has not been correctly applied here, and it needs to be so.

In the course of Mr. Harris' submissions, at one point Mr. Chairman you said it is the role of the CAT to look at the findings and consider whether they meet the relevant threshold. That is part of the job, but of course this Tribunal must ask itself: did the Competition Commission actually apply the right analysis itself? If it did not, the report is flawed in any event.

Ground four. The Tribunal has essentially put the key questions on this. There are no activities here. It is not really even analysed in the report. What you get is what Mr. Harris said: at 4.10 the Commission refers to the fact that there has been a seven and a half month period where there has been no operation at all of passenger ferry services on the vessels.

He entirely accepts that the employees were ex-employees. He says it is part of the context. The concept of activities is not dealt with at all.

You then get a conclusion in 4.71 saying, actually, yes, this did constitute the transfer of activities, but there is no analysis of what the impact of seven and a half month gap was, no sailings, no passenger transport activities on the short-seas, there is nothing there.

Mr. Harris also kept referring to the question of whether or not the vessels had been abandoned. That is not the test here. We are not interested in abandonment. What we are talking about are activities and not assets. These are obviously valuable assets, but we are dealing with a merger control regime not an asset acquisition control regime here.

Ground 5: we went through quite a lot of case law, but for our purposes on Ground 5 and fairness of procedure all of that case law made it very clear that if persons are going to be adversely affected, severely adversely affected, they need proper opportunity to comment. I just refer you to the quotes included in *Bank Mellat (No.2)* at paras.29 and 30 of *Cooper* and *Doody*, both of which are setting out that proposition. The reference to *Coughlan* to which Mr. Pickford has made some comment just now does not change of that. The situation is clear, we should have been provided with that report.

The reference to the fact that when we heard from Eurotunnel that actually the prohibition remedy was moving from a vestigial reference in the Supplementary Remedies Notice to something more important we did something about it. We sent in a two page letter from M. Genin. That was the best we could do. What it showed was we were not playing a game here, we were desperately trying to engage when there were any concerns, but as I have shown by going through the working paper and in relation to the material from M. Genin now there were many things that the SCOP would and could have said about that material in relation to the issues that arise. There was no real issue of confidentiality in relation to the vast majority of the material that affected SCOP in that working paper, if any. It is worth bearing in mind that the confidentiality concerns that were being expressed appear to have been expressed by Eurotunnel, but our concerns were about a DFDS submission and the weight that was being placed upon it.

In those circumstances, there was not a good analysis of why it was that this material was not provided to us. Professor Smith quite properly does not suggest that there was any sort of detailed Part 9 consideration. It plainly should have been given to us.

If I may, bundle 3F, tab 85. This is the Chairman's Guidance on Disclosure of Information. Mr. Harris went through various paragraphs in this, I think principally aimed at Mr. Green. I will just refer you to a couple. First of all, 6.7, internal p.9, which stresses:

"Similarly, Groups should aim to disclose third parties' key arguments on the issues raised in the inquiry or review …"

We say that is right.

Perhaps most instructively, if one turns to 7.1, it says:

"The CC's Rules require the CC to publish a number of documents, notably the provisional findings and notice of possible remedies, during an investigation. Additionally, the CC has developed a practice of consulting on its provisional decision on remedies (usually through disclosure to the merger parties in merger inquiries and publication in market investigations). The disclosure of provisional findings and a provisional decision on remedy system is the main means by which the CC ensures due process and fulfils its duty to consult on certain decisions under section 104 of the Act. When reviewing remedies, the CC similarly publishes a provisional decision either before or as part of publishing a notice of intention to vary or terminate …"

Footnote 25 says:

"As described in CC8, in merger inquiries a provisional decision on remedies may be set out in the form of a remedies working paper or a provisional decision document."

Here it was the remedies working paper.

Mr. Williams rightly says, it is published on the CC website or circulated to relevant parties. On one view, given that the CC was considering that we were part of an associated person, we were actually a main merger party. In any event, we were plainly the most relevant of parties, perhaps apart from Eurotunnel, to have received that material. Plainly we should have done. It was a singular failing that we did not. As I say, M. Genin's letter was a last minute attempt in circumstances where we were hearing whispers from GET in relation to what was going on. It was not that we had a proper opportunity to answer the material being put forward.

There was comment on the fact that tax position issues were not matters that the SCOP could comment upon. The reason I referred to those matters is because the working paper itself specifically referred to the fact that the SCOP had not made submissions. Of course we had not. We had no idea that this was the sort of issue that arose.

Just one point, there was a reference to two legal advices going in to the CC at one point. It is correct that an earlier legal advice went in in response to the original remedies notice, but

of course that had nothing in it at all concerned with a prohibition remedy with which we are most concerned and were most concerned thereafter.

I will deal briefly at the end with a couple of points from Mr. Pickford, but just on Ground 6, it is worth bearing in mind that both in the remedies notice and in the supplementary remedies, it was the CC that said that they would look at the impact of remedies upon SCOP. That was fitting with the guidance. Our criticism is that that was right. Having said that they would do so, they had to do it properly. The first basis on which they said there was no loss to SCOP was on the basis of conditionality. Mr. Harris made no submissions in relation to the conditionality point at all.

In relation to the second point, the netting off point, he says, "We do not have to quantify things, we can deal with things qualitatively". If you are netting off you cannot net off qualitatively. It is a quantitative exercise. We accept it can be dealt with broadly, but it was not. There was no proper balancing exercise. The CC in 10.135 just did not do the job it should have been doing and said it was doing. When looking at cases such as *Tesco*, what you need to have, *Tesco* says, is a broad sense of the weights of the different values. They did not ever assess those broad weights in Ground 6.

The point that is additionally by Mr. Harris that there would have been no transaction so there were no losses is just the wrong approach. Having said they were going to consider the losses to SCOP, they should have considered the losses to SCOP. The merger situation that the CC says is identified had already gone ahead. It is not a mandatory notification regime, it is not a prohibition regime. In those circumstances, unwinding the situation is something they should properly have considered and in those circumstances they failed to do so.

As to the points referring to 10.141, you already have our submissions on that. It is a wrong reading of the report. In 10.141 what is said is that the consumer detriments that allegedly arise from the terms of the arrangements outweigh the contributions being made by SCOP and Eurotunnel, it does not deal with whether or not they outweigh the detriments caused to the SCOP by job losses. He says it is not a matter of rocket science to say it would have outweighed. It may not be a matter of rocket science, but it is an exercise that had to be gone through and it was not gone through and therefore you cannot tell whether or not they would have been outweighed. It is not a matter that simply stands to reason.

Just picking up, finally, a couple of points from Mr. Pickford, he suggested it was common ground that we were acting in partnership with Eurotunnel. We were not. Indeed, Mr. Harris at various times conflated SCOP and Eurotunnel and made assertions as if we

were one person. It is just not right, indeed, Mr. Harris at one point said: "the SCOP well knew about Eurotunnel's strategies and expectations." We did not. Indeed, we did not know the terms of the bid that was eventually put in. We do not accept that there was a continuing operation of the SeaFrance business, as Mr. Pickford put it, and we do not understand the relevance of the position in relation to the French Competition Authority.

In respect of his points concerning the alternative way in which the Competition Commission might have reached its conclusion, of course, the central problem with his analysis of ground 1 and ground 2, that somehow SCOP brought the labour to the party and that Eurotunnel brought the vessels to the party, and they were acting as associated persons in doing so, fails to take into account at the time when the SCOP obtained all the signatures there was no relationship of any material sort between Eurotunnel and the SCOP because the SCOP was trying to get hold of the vessels on its own without the Eurotunnel being involved at all. So his alternative analysis breaks down at that point. We were not associated persons. Of course, there was no finding by the CC. There was a murmur of laughter with the idea of this alternative coming forward, that it had not been put in quite this way in the Commission's report – it was not so much it has not been put quite in this way in the Commission's report, it has not been put at all this way in the Commission's report. His attempt to rescue the Commission, though valiant, fails.

His analogy with a farm I am not even going to go into, it goes too far – far, far too far – in relation to these matters.

The final point I will pick up, just is on TUPE. We have emphasised that in relation to questions of continuity of enterprises and activities TUPE is a relevant comparison. There is, in fact, evidence in relation to the French application of TUPE – for your notes that is bundle 2C, tab 37, in particular pp. 2.1211 and 1205. TUPE is a relevant indicator, particularly in relation to our ground 4 submissions, that is why it was used by the Competition Commission in the *Cineworld* and *Zavvi* cases to assess these sorts of issues, whether or not there was a transfer of employees, of activities – continuity of activities. There was no continuity of activities in this case and ground 4 succeeds on that basis alone.

Unless I can assist the Tribunal further those are the reply submissions of SCOP.

THE CHAIRMAN: Thank you very much, Mr. Beard. Yes, Mr. Green.

MR. GREEN: We are approaching port! I am going to start by dealing with a number of points which you raised with Mr. Harris under the general matter of justice ground 1 heading. First, you asked him about the duty of the Tribunal in this case, and I would just make three points on that. Point 1 - in line with *Solvay* and, indeed, with the approach of the Supreme

Court in *Bank Mellat*, where they only made an assessment of the relevance of the evidence once it had been fully disclosed to them. It is our submission that in the absence of the proper disclosure of evidence to a court or a Tribunal of the material which has been withheld, it is not open to a Tribunal to make an assessment of materiality, otherwise everything is speculation and guesswork.

Point 2 – where submission of data is provided, including exculpatory and inculpatory evidence, the threshold is still low. The courts here and the Court of Justice have used phrases such as whether the information would be useful, whether the company could test its accuracy, whether it could be used to rebut something, whether the truthfulness of evidence could be challenged. Thirdly, *Wednesbury* does not apply. I cited *Guinness* to you yesterday and the Competition Commission appears to accept this today, there is no margin of appreciation to violate a fundamental right, it is for the Tribunal to make a ruling about fairness.

The second point, Mr. Harris started his submissions by accepting that general principles of European law apply. This is a concession, he disputed it in his skeleton argument. We have, in fulfilment of the promise I made yesterday, handed you excerpts from **Wade** which explains that in two circumstances general principles apply, one, when the free movement principles are engaged – services and establishment – and generally when an area is generally, and indeed, the way it says 'tenuously' connected to European law, but there is no dispute between us.

What are the implications of that? European competition cases are based on general principles, they are illustrations of general principles, as applied to competition and merger regulation. We see that from *Solvay* para. 47. Rights of defence are said to be fundamental, as is the principle of good administration set out in Article 41 of the Charter of Fundamental Rights. This, said the court, as a general principle applicable to competition cases includes:

> "The opportunity to make known views on the truth and relevance of the facts alleged and on the documents used."

It also stated in that case, at paras. 49 and 66, that this implies a right of access to exculpatory documents. That is the application in broad terms of general principles which the Commission say do apply.

Point 3 – the Commission's case on gist. It boils down to this, that disclosure is not required. All that is needed is the broad thrust of a small number of factual propositions. They are summarised in the defence at para. 140, you were taken to them. Most of those

concerned, certainly from (f) onwards, DFDS' conduct, or its position, or its financial status. It was said that provided that was provided that was sufficient.

Of course, if one takes the actual Decision, which is a reflection of the provisional findings, when you get to the bit of the gist of DFDS' position it is all redacted, so we do not even get the gist of the gist, so everything that we are meant to get about DFDS' view, for example, 8.57, 8.58, 8.59, 8.60 and so on, is redacted. So we do not get the evidence and we do not even get the gist because it is redacted and withheld from us; we do not get the gist of the gist. So disclosure is not needed, oral evidence is not needed, gist of gist is not needed if, in fact, it is said by a complainant, with a vested interest, to be confidential. It is then said: "Everything was fine. Everything was unproblematic" – a fairly remarkable situation.

What is the gap then between natural justice and the CC's position? The CC's broad thrust is that you do not need to give evidence or data or transcripts. Professor Smith, in his witness statement at para. 43, focused upon the very issue which Mr. Harris made submissions about – DFDS' position. You will recollect that he believed it was clear that we understood and he plainly misunderstood the submission that was made to him, in fact, the very opposite had been made to him. Putting that together you get this: that the CC in relation to the entire question of DFS, did not even give a gist of gist, and it appears it is because Professor Smith embarrassingly misunderstood a submission made to him by Mr. Lougher.

We circulated last night, and it was sent to the Tribunal I think either last night or this morning, the additional submissions we might have made on a number of key paragraphs. Interestingly, these paragraphs are essentially about DFDS, and all I am going to say about these paragraphs is that if you look at the material which was redacted it covers the following subject matter: who was the market leader in terms of pricing? The ability to use bundling as a defensive device, relations with investors, charter leasing strategy, losses in 2013, relationship between exit and charter capacity, trends in freight volumes, trends in passenger volumes, profitability on Dover/Calais, profitability on Dover/Dunkirk, breakeven, external factors of a non-commercial nature, such as regulatory or environmental, which might affect exit. Those are the key points which were redacted from us, and we have simply pointed out in this chart that on those subject matters which were pivotal to the Commission's key point we would have had things to say.

At the European level, in a Phase 2 merger, the Commission issues a statement of objections which, as you will know, may be 50, 100, 150, 200 pages long. Then they give you access to the file. Here we get provisional findings which are redacted and we are the

target, we are the company being investigated. The gulf between Europe, which applies general principles in merger cases, to achieve a fair right of defence, and the CC, is schismatic.

Point 4 – practicability, it is all too hard for the CC. This is a very 1970s point to make. For decades, we have been treating as workaday and routine the right of access to file in EU merger cases, we do not give it a second thought. It is like a time warp listening to the Competition Commission saying they just cannot do it – they cannot do something that the EU takes as elementary.

Remember of course that the objectives of the EU and the CC are similar, they apply the same general principles. They both work together in merger cases when cases will be remitted one to the other, particularly from Europe back to national Member States, and they have the same objective, which is controlling anti-competitive mergers and, with great respect, if the position is that it all turns on the facts, cases on nurses – *Coughlan*, or lifers – *Doody*, one might say are slightly less apposite than merger cases from the EU.

Point 5 – skinning the cat.

THE CHAIRMAN: Not again!

MR. GREEN: The CC's position is very much one of principle. They do not give exculpatory evidence as a result of principle. They do not give us a confidentiality ring because of generic objections, which is essentially: "We never give it to you". Their objection was not based upon the facts of the case.

EU law is a routine every day litmus test, and it should be the standard from which one departs to see where the CC would go to. One would say even if they were going to operate a sub-EU standard, why did they not disclose the key documents into a ring, even if there was no broader file access. Why did they not introduce the key data into a ring, or transcripts of the non-confidential meetings, or the anonymised data where the identity of the person was anonymised. There were numerous points on the scale between the two extremes which could have been operated.

Expertise of defendant – a point raised by the Tribunal. You do not use your procedural rights because you are expert in your own market. When we go with clients to the EU every defendant is generally much more expert than the European Commission, certainly at the start of an investigation. Moreover, we go with our own expert economists, and econometricians, and technical experts, yet it has never been suggested that simply because we are expert, and we plainly understand the thrust of the Commission's objections, that justifies a denial of our rights.

The Commission's submissions on the Enterprise Act. There are two points to make in relation to this. Mr Harris kept banging on saying it is all about necessity. Section 214 says they may disclose confidential information if it "facilitates" the exercise of their duties. It plainly facilitates the decision making process to give the target of your investigation access to documents for the reasons that Lord Sumption gave in *Bank Mellat (No.2)* para.32, that it improves the quality of decision making. It means that you can correct errors, correct misconceptions, rebut things.

The second point on the Act is that the construction of the Act is merely the starting point. You move from construction to the principle laid down by the House of Lords in *Lloyd v McMahon,* and this is at tab 14, pp.702 and 703. I will simply read it to you to be on the transcript – it is only a short paragraph, but it is the relationship between natural justice and statutory construction. This was Lord Bridge in 1987, p.702 at H:

> "My Lords, the so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make …"

- and then this:

> "… and the statutory or other framework in which it operates. In particular, it is well-established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed …"

- and then this, critically:

> "… but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness."

which is a pretty uncontroversial statement that if you have a statutory power you exercise it in a manner which achieves fairness and general principles, it really should not be controversial at all, but it is a two-stage analysis. You ask yourself first of all, would disclosure of confidential information facilitate the exercise of the duty and part of that is ensuring procedural fairness, that is the correct analysis we would submit.

The next point concerns the Commission on "Mood Music". How strong is GET's right in the light of "Mood Music", what is the temperature, what is the climate? The Supreme Court did, at the very least this, it elevated the principle of open and not closed procedures

as fundamental. It concluded that there was no scope for exception unless Parliament abrogated the principle. They stated that it was inherently unfair not to provide exculpatory evidence. They emphasised that the target of procedure was entitled to more rights than other parties. Let us assume that the principle is not absolute. How close to a court is the Competition Commission? It has (i) draconian powers, (2) the ability to drag unwilling defending companies into its clutch, of which GET is an example. (3) it hears evidence from companies who have a vested interest in an adverse outcome, (4) it is inquisitorial, (5) it has powers to compel evidence which are penal and criminal. In fact, it has powers which exceed those of the High Court in terms of the orders that it may make in requiring companies to divest.

Natural justice would apply strongly to the Competition Commission, it would be a rigorous, tough and demanding principle, and that is consistent with EU law. That is all I wishi to say about ground 1.

Ground 2 - the 2012 documents. The issue seems to boil down to this: we have Professor Smith who says it is relevant, para. 43 and onwards of his decision. We have the French Competition authority who consider the issue to be relevant. We have the CC that ultimately obtained one document which we are now told is October 2011, and then some documents in 2013 with one exception, a November 2012 email in which everything seemed to be going very swimmingly. We therefore have a sandwich, we have one piece of bread which is 2011, the other which is 2013. We have nothing for DFDS in 2012. The CC considered they were relevant, they asked for the documents, for whatever reason, I do not need to impugn anybody, it is simply a fact, they did not get 2012 documents. This is a self-contained identifiable group of documents relating to DFDS' analysis of profitability and prospects and break even points during the period when MFL had entered the market. The first document that is referred to in October 2011 preceded MFL's entry into the market, and what the CC needed to know was how things changed. They then simply needed to compare and contrast that with the 2013 documents. They would have been entitled, had they done so, to come to the conclusion that DFDS' evidence was credible but without investigating that then there was no ability for them to come to that conclusion.

MR. HARRIS: Is this right, just trying to understand it, is the submission that we failed to provide documents we were asked for, or that other documents should have been asked for? Because obviously our evidence goes to the first point, the second point we did not know had been made.

MR. GREEN: I think the submissions I have made have been very clear. The question 3 posed by the Commission in January was for documents – a certain category of documents. You will see from the transcript, and you will see from the documents themselves, they were asked for a particular type of document. You heard my submissions yesterday as to how DFDS construed them. You also heard me say yesterday that that was really the starter. What they should have been asking for was the identified group of documents relating to an analysis of profitability and break even in 2012 after MFL entered. No part of my submission should be taken as involving the criticism of DFDS, it is an irrelevance. Good faith, bad faith is an irrelevance, my criticism of the CC …..... it is an irrelevance. Good faith/bad faith is an irrelevance. My criticism of the CC failing to get hold of a category of documents. I am very happy to confirm that for the record so far as my client's position with DFDS is concerned.

Just one example, which was very interesting coming out of Mr. Harris' submissions, he said (and I noted it down) that the question of dates about charter parties was "completely irrelevant". I simply ask you to look at the decision confidential part 8.58, 8.59 and the note which addresses the entire question of charter party relevance, and you will have heard Mr. Pickford address the question of relevance at an earlier point a few moments ago *in camera*. It was absolutely fundamental the question of charter party. So at the end of the day this is a classic *Tameside, Unichem, Tetra Laval* analysis. It was failure to address or collect a relevant category of evidence.

It is said by Mr. Harris this is a margin of appreciation point and he took you to *BAA*. Let me make the distinction between two categories of case. On the one hand you may have the criticism of a decision maker who has gone out and collected relevant evidence, and the criticism might be they should have gone further, but they had addressed their mind to the category, they had collected it and the question is whether they should have gone a bit further in this direction or that. That might fairly be said to be margin of appreciation point. If the criticism is that there was a category of documents which is relevant but that was simply not obtained, that is a procedural *Tameside* type argument. You have simply got a gap. You have not got something which was collected and you argue about whether they could have done a little bit of analysis here or gone and collected something else. Here you have got an identified chunk of documents from 2012 which were simply not collected. It is not a margin of appreciation point.

If that is relevant, which is the question for you: is that category relevant? The French competition authority thought it was and they did not get it. That is *Tameside*. It is a

classic judicial review ground. We summarised all the relevant cases in an annex to our skeleton and you can review them later.

Ground three, re-entry, Mr. Harris just did not grapple with the point that we have made, which is our central criticism, which is the question of the balance of probabilities, the clash between para. 8.161 and 6.27. In 8.161 on the footnote they say we have got some evidence from freight passengers, and then we learn later and only later that it was two. At 6.27 they say we have got 3,000 people in a survey, 189 of them responded but that is insufficient, and yet they rely on two customers as satisfying the balance of probabilities for this fact. Instead, what he now says is that he can throw the kitchen sink at us and resort to common sense. When people do that it is usually when they are in a desperate strait. He says that the CC disclosed sufficient in the footnote, and he said they disclosed sufficient actually because we got the summaries of the hearings. Again, I do not ask you to look it up now, but we set it out in our skeleton 140. We did not know there were only two people. We do not now know their identities, and in fact the summary of the evidence does not even disclose the facts they now rely upon. We have analysed them and they are set out in the skeleton argument. I refer you also to *Tesco* which you, para.125 tab 48 bundle 3D: you cannot entertain new evidence now; it is too late. The link to ground one is a strong one. If the CC's case is now based upon a raft of new evidence, we did not even get the gist, we had no advance warning of it, we never saw it. That really is the end of their ground two.

Finally, in relation to remedies - one or two vessels. There is a fundamental error in the way the CC have approached their submissions. Mr. Harris refers to the fact that you can adopt a comprehensive remedy, but s.41 of the Act is very clear. You can address a comprehensive remedy to identify the SLC as found. The two are inextricably linked. The remedy must address the SLC. So you must always go first to the SLC and identify what it is in the decision. The SLC in relation to one vessel or two - and it is clear and unequivocal at 8.32 and it bears repetition:

> "We therefore consider that the minimum efficient scale of operation requires two fully operational ships and access to one additional ship for back-up".

Not a tunnel. There is no finding that the tunnel plus two ships was sufficient, it was three ships, not two plus a tunnel. There was no finding that two plus a tunnel for us would have enabled us to create an SLC. On the contrary, the minimum efficient scale was directly connected to the SLC, and they said that the evidence was consistent. It was a clear-cut finding and that was the SLC. Therefore, applying s.41 you may comprehensively make sure that it is one vessel, the right vessel and so on, but you cannot go beyond it. That is a

pure question of jurisdiction. They have no jurisdiction to go beyond it, and in so far as they do it would be disproportionate. They must meet the test of proportionality laid down in *FEDESA* and *Tesco* which says that you may not go beyond the minimum required to cure the SLC. That has nothing to do with comprehensiveness because that is a circle you draw around the defined SLC.

Remedies and Boulogne, same point. The SLC was in relation to routes: Dover-Calais, Dover-Dunkirk. The Remedies paper said that a remedy would be in relation to routes. The first time we realised it was going to be addressed to ports was in the decision itself. It was never put back to us that it was going to be a port based remedy; it was always going to be a route based remedy. It is a clear excess of powers. You cannot get round it by saying we did not make submissions on business plans about Boulogne or something else. It is completely beyond the point. You do not have jurisdiction to go beyond the SLC.

Limitation finally. Mr. Pickford's two cases; *Greenpeace* and *Adams*. Can you please note the House of Lords in *Burkett* rejected both of those cases. *Burkett* bundle 3B tab 33 paras. 44, 47 and 51. They disapproved of *Greenpeace* and *Greenpeace* applies *Adams*. So when Mr. Pickford said it is all common sense, it is essential, it is absolutely right and absolutely right, the House of Lords disagreed.

THE CHAIRMAN: Which tab is that, sorry?

MR. GREEN: Tab 33. The relevant bits are paras. 44, 47 and 51.

At 44 they deal with *Greenpeace*. At the end of 44 they begin their criticism of it. They then in 47 say that the judgment in *Greenpeace* and the Court of Appeal do not produce certainty. On the contrary, they say that it leads to uncertainty and they therefore adopt the opposite position.

In relation to the points made by Mr. Harris, we promised you yesterday that we would deal in reply with limitation and pull together our various strands. We have today produced a short note which actually deals with all the points that Mr. Harris has made. What I am going to do is just hand it to you. Given the time I will just summarise the points, because it essentially deals with the argument made about *Sports Direct* and we have just addressed the two cases you referred us to yesterday: *Orange* and *British Telecom*. I think many of the other points you have already raised with Mr. Harris.

In essence, the starting point is that rule 26 must be construed purposively. The issue is what decision is GET challenging? In the present case the Competition Commission's interpretation that in fact everything should be challenged at an early stage is not only inconsistent with the House of Lords in *Burkett*, but more specifically it shoots itself in the

foot for the reasons that we have set out in para. 12. We know that the Competition Commission made precisely the opposite submission in *Sports Direct*, as was recorded by the Tribunal that if in fact people had to make early challenges they would be unable to fulfil their statutory duty. So Mr. Harris has seen a bandwagon coming his way and he has jumped on it with alacrity, notwithstanding the inconsistency of the position they took in principle in *Sports Direct*.

We have given some examples in para. 12 which operate upon the consequence that you cannot extend time for a CC inquiry. It is a 32 week period. There are numerous permutations. It is obvious that what would happen if you have a judicial review on procedural grounds ongoing while the 32 weeks are running, and they lead to a position which the CC quite rightly identified as "impossible".

Sports Direct does not take matters further for the CC. On the contrary, it actually made it clear that the normal rule is that you should apply under s.120(1) with regard to the Final Decision. That is para.55. The question in *Sports Direct* was whether you could go earlier. The Tribunal said, notwithstanding that the normal position is that you go later, exceptionally you can go earlier. It does not say that you cannot go later. On the contrary, the starting point of the normal position is that you go later. This led to complaints from the CC that it would make their life unworkable, and the Tribunal said, "We would be very vigilant to ensure that that is not the case".

Orange v. British Telecom we deal with in para.8. These were challenges to jurisdiction, and the Tribunal found that could be brought against the Final Decision as well as potentially the decision asserting jurisdiction, and it is equally applicable. You have a choice but it would be in accordance at least with ordinary judicial review principles that there is a real risk that the Tribunal will say you are premature and inappropriate if you bring the Decision before you know whether it is really necessary. The judicial review cases are analogous for reasons that we explain here in para.21 onwards.

I took you yesterday to *Eisai v. NICE*. I will not go back to that again.

I think, in essence, those are the points I wish to make. I think that everything else is in our skeleton argument already because we have simply put together what is, in part, in our skeleton.

In short, the judicial review cases say you go with the Final Decision. The Tribunal cases say that you may, I would add exceptionally, go at an earlier stage, but the Competition Commission's submission today has been that that is going to cause chaos, it will block merger procedures, it is a recipe of disaster, until of course they saw the bandwagon.

Nonetheless, what is clear is you can go later and, exceptionally, earlier. In the present case, until we know whether or not it was going to be an adverse decision there would have been no utility or sense in us challenging it.

Unless the Tribunal has anything further, I think I am now time barred and those are my final submissions to the Tribunal.

THE CHAIRMAN: Thank you very much, Mr. Green.

MR. HARRIS: May I just make the obvious point … respond to it in writing.

THE CHAIRMAN: It is, to be fair to Mr. Green, mostly authority rather than submission.

MR. HARRIS: Yes, I am delighted to see that it is mostly authorities, but somewhat extraordinarily in the few seconds that I have had to peruse this, I see that at the back, which has not been addressed at all, in fact there is a new application being made to the Tribunal.

MR. GREEN: Just so you understand, this is absolute belt and braces. It was barely worth mentioning because we are confident of our position.

MR. HARRIS: No, you are not …

MR. GREEN: I think it is blindingly self-evident, frankly.

MR. HARRIS: It is not being made.

MR. GREEN: It is being made, it is there.

MR. HARRIS: So there is a new application that was not mentioned, but it is being made. One wonders …

MR. GREEN: If you were against us, of course you have a discretion to permit something on exceptional circumstances. It is there on paper. I will elaborate at length, if you wish.

THE CHAIRMAN: No. Thank you very much. One housekeeping point before we rise. At 2B, tab 16, we have got the provisional findings of the Commission. The first question I suspect is for Mr. Harris. Was this document issued only in one form, i.e. with redactions in it, to all the parties, or were there various versions?

MR. PICKFORD: Sir, I have one question, if I may, it is a housekeeping question from my clients. We quite understand that we are entirely in the Tribunal's hands, but my clients were anxious to know whether the Tribunal had any sense of when it might be able to deliver a judgment in this matter? It may not be possible to answer that, but I have been asked to ask the question?

MR. HARRIS: The answer is the PFs are published in redacted form, but obviously if it is that party's confidential information it gets a version with its information, but not the other party.

THE CHAIRMAN: In that case, although we have very helpfully got the final version, if, Mr. Green, your clients could provide us with a copy of the provisional version that your clients got it may just assist us with filling in the gaps.

To answer Mr. Pickford's question, we will do it as quickly as we can. We would like to get something out within a month, but no promises.

Unless there is anything else, thank you all very much.

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