Neutral citation [2008] CAT 36

IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1107/4/10/08

Victoria House
Bloomsbury Place
London WC1A 2EB

10 December 2008

Before:

THE HONOURABLE MR JUSTICE BARLING
(President)
MICHAEL BLAIR QC
PROFESSOR PETER GRINYER

Sitting as a Tribunal in Scotland

BETWEEN:

MERGER ACTION GROUP

Applicants

-v-

SECRETARY OF STATE FOR BUSINESS, ENTERPRISE AND REGULATORY REFORM

Respondent

supported by

HBOS PLC
LLOYDS TSB GROUP PLC

Interveners

Heard at Victoria House on 8 and 9 December 2008

JUDGMENT

APPEARANCES

Mr. Ian Forrester QC (of White & Case LLP) and Mr. Andrew Bowen (instructed by Mr. Walter Semple) appeared for the Applicants.

Mr. K.P.E. Lasok QC, Mr. Paul Harris, Miss Elisa Holmes and Mr. Gerry Facenna (instructed by the Treasury Solicitor) appeared for the Respondent.

Mr. Nicholas Green QC and Mr. Aidan Robertson (instructed by Allen & Overy LLP) appeared for the Intervener HBOS plc.

Miss Helen Davies QC and Mr. Andrew Henshaw (instructed by Linklaters LLP) appeared for the Intervener, Lloyds TSB Group plc.

I INTRODUCTION

1. By a notice of application dated 28 November 2008 the Merger Action Group ("the Applicants") apply for a review pursuant to section 120 of the Enterprise Act 2002 ("the Act") of a decision of the Secretary of State for Business, Enterprise & Regulatory Reform ("the Secretary of State") dated 31 October 2008 not to refer to the Competition Commission ("CC") under section 45 of the Act the proposed merger ("the Merger") between Lloyds TSB Group plc ("Lloyds TSB") and HBOS plc ("HBOS") ("the Decision").

2. Having considered the contents of a report dated 24 October 2008 produced by the Office of Fair Trading ("the OFT") under section 44 of the Act ("the OFT Report") and the submissions made to the OFT (and cited in the OFT Report) by HM Treasury, the Financial Services Authority ("FSA") and the Bank of England, the Secretary of State concluded in the Decision that, on balance, ensuring the stability of the UK financial system justified the predicted anti-competitive outcome of the Merger which had been identified in the OFT Report, and that the public interest was best served by clearing the Merger.

3. The Applicants seek an order from the Tribunal under subsection 120(5) of the Act quashing the Decision and referring the matter back to the Secretary of State with a recommendation that he make a decision to refer the Merger to the CC for review.

4. In an application for review under section 120 the Tribunal is required by subsection 120(4) of the Act to apply the same principles as would be applied by a court on an application for judicial review.

5. The application was lodged with the Tribunal at the end of the final day of the four week period during which such a challenge to the Decision could be made. The Secretary of State, who is the respondent to the application, together with Lloyds TSB and HBOS both of whom have been permitted to intervene, requested the Tribunal to hear and decide the matter with exceptional expedition so as to enable the result to be known prior to the general meeting of HBOS due to take place on 12

December 2008. The Applicants raised no objection to this request, and in our view it was clearly important to comply with it if at all possible. Accordingly a case management conference ("CMC") was held on 3 December in order to determine the directions which would be required to achieve this. Further pleadings were dispensed with, and arrangements were made for evidence from the Secretary of State to be supplied the next day within a confidentiality ring set up by order of the Tribunal dated 3 December; skeleton arguments from all parties were directed to be supplied by close of play on 5 December, and the substantive hearing was fixed for 8 and 9 December 2008, with a view to judgment being given, or at least the effect of our decision being announced, prior to the HBOS general meeting on 12 December.

6. We are very grateful to the parties' legal teams for their very full and helpful written and oral submissions, all produced within the exacting timetable mentioned above. No discourtesy to counsel is intended by our failing to refer to all those submissions in this judgment. This is a factor of the urgent need to produce our judgment without delay. We have of course considered all the submissions.

7. At the CMC on 3 December the Tribunal also determined pursuant to rule 18 of The Competition Appeal Tribunal Rules 2003 (S.I. 2003 No 1372) ("the Tribunal Rules") that the appropriate forum for the dispute was Scotland but that in view of the severe time constraints the venue for the imminent hearing would need to be in London. These issues were contentious (see our judgment of 3 December 2008 [2008] CAT 34).

8. A further contentious issue ventilated at the CMC related to the standing of the Applicants to bring this application, the Respondent and the Interveners having indicated that the Applicants did not appear to fall within the description of "person aggrieved" within the meaning of subsection 120(1) of the Act. The Applicants are a recently formed unincorporated association. At the time the application was lodged no information as to the identity or other details of any of the Applicants were supplied. In the course of the CMC some details of six members including their names, addresses and occupations, were provided to the Tribunal and the other parties. In the light of this the question of the Applicants' standing was, with the

consent of all parties, stood over to be determined, if necessary, at the same time as the substantive issues. In the event the matter remained contentious and we refer to the issue further below (paragraphs [32] ff).

II BACKGROUND AND STATUTORY FRAMEWORK

9. Before examining the Applicants' grounds of review in further detail, it is necessary to outline the factual background and statutory framework relevant to these proceedings.

10. It is a matter of public record that throughout the events with which we are concerned, including at the time the Decision was taken and, indeed, up to the present time and continuing, world financial markets have been to a greater or lesser extent in crisis as a result of almost unprecedented turbulence; major banking institutions in the United Kingdom and elsewhere have experienced difficulties, and have been taken into public ownership; others such as HBOS have been seen as vulnerable; some, such as Lloyds TSB, while perceived as more secure, require public funds and other support to maintain their stability. Even now no-one can be sure how events will ultimately turn out; at various junctures urgent action has been required by governments and others on a number of different fronts; it is not certain whether or to what extent any particular solution will be effective; governments including our own have been subject to sudden and intense pressure to safeguard the stability of their financial systems which are crucial to the wider economy and to the lives of all citizens. The Merger and the Decision represent part of the response to the current situation so far as this country is concerned.

11. Both Lloyds TSB and HBOS are large UK-based financial services groups that provide a wide range of banking and financial services to personal and corporate customers.

12. On 18 September 2008 Lloyds TSB and HBOS announced that they had agreed the terms of an acquisition by Lloyds TSB of HBOS under which HBOS shareholders would receive 0.83 Lloyds TSB shares for every HBOS share. The bid was conditional on no reference to the CC being made. Both the decision of Lloyds TSB

and HBOS to merge and the Decision itself were made against the background of exceptional instability in global financial markets to which we have referred, and which are described in the OFT Report as follows:

> "49. The UK and global financial markets are experiencing a period of extraordinary, perhaps unprecedented change. The current turbulence, which many see as originating from sub prime mortgages in the US, took on a global dimension as it became clear that non-US banks were exposed to the risk of sub prime mortgage related securities.
>
> 50. Events in the US and Europe (including the particularly harsh financial situation affecting Iceland) since the Secretary of State's intervention in this case on 18 September 2008 indicate the progressive and severe strain affecting financial systems globally. For example: Bradford & Bingley's mortgage book has been nationalised. Hypo Real Estate, Dexia and Fortis in continental Europe have received significant government investment. Government intervention in the US has been extensive to rescue AIG, Fannie Mae and Freddie Mac. Other US banks, notably Washington Mutual and Wachovia, have been the subject of M&A activity in response to the risk of them 'failing', and the investment bank, Lehman Brothers, has filed for bankruptcy."

13. On 8 October 2008, following consultation with the Bank of England and the FSA, the Government announced that it was bringing forward specific and comprehensive measures to ensure the stability of the financial system and to protect ordinary savers, depositors, businesses and borrowers. The proposals were intended to:

> "• Provide sufficient liquidity in the short term;
>
> • Make available new capital to UK banks and building societies to strengthen their resources permitting them to restructure their finances, while maintaining their support for the real economy; and
>
> • Ensure that the banking system has the funds necessary to maintain lending in the medium term." (see press notice 100/08)[1]

Lloyds TSB, HBOS and The Royal Bank of Scotland Group plc ("RBS") confirmed their participation in the Government-sponsored recapitalisation scheme.

14. In the context of further turbulence in global financial markets, the Government announced on 13 October 2008 that it would be implementing the set of measures announced on 8 October to make commercial investments in UK banks and

[1] This document is available at http://www.hm-treasury.gov.uk/press_100_08.htm

building societies to help stabilise their position and support the long term strength of the economy. The press notice (105/08) provides[2]:

> "The Government is making capital investments to RBS, and upon successful merger, HBOS and Lloyds TSB, totalling £37 billion…
>
> The measures the Government is announcing today support stability in the wider financial system, and protect the interest of taxpayers, depositors and savers."

15. On the same day, Lloyds TSB and HBOS also announced that they had agreed to proceed with the Merger on revised terms from those set out on 18 September: the agreed rate was now to be 0.605 Lloyds TSB shares for every HBOS share. The government financial support announced for HBOS and Lloyds TSB was to proceed expressly on the assumption that the Merger went ahead.

16. Additional steps to shore up the global financial system were adopted by various other bodies internationally, including the Federal Reserve in the United States and the governments of Iceland, the Netherlands, Belgium and Luxembourg. The majority of rescue packages took the form of injections of capital or full nationalisations. On 13 October, the European Commission ("the Commission") issued a Communication entitled "The application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis" (OJ [2008] C 270/2) ("the Commission Communication"). Under Article 87(3)(b) of the Treaty establishing the European Community ("the EC Treaty"), the Commission may allow aid granted by a Member State or through State resources "to remedy a serious disturbance in the economy of a Member State." The Commission Communication clarifies the practice that the Commission will adopt in the context of the current financial environment. At paragraph 9 it provides as a general principle:

> "In the light of the level of seriousness that the current crisis in the financial markets has reached and of its possible impact on the overall economy of Member States, the Commission considers that Article 87(3)(b) is, in the present circumstances, available as a legal basis for aid measures undertaken to address this systemic crisis. This applies, in particular, to aid that is granted by way of a general scheme available to several or all financial institutions in a Member State."

[2] This document is available at http://www.hm-treasury.gov.uk/press_105_08.htm

The Commission Communication proceeds to examine a number of specific state aid measures, including guarantees covering liabilities, recapitalisation and controlled winding-up of financial institutions. The rescue package announced by the UK Government on 13 October 2008, which is described as taking the form of a guarantee and provision of risk capital, received approval by the Commission on the same day (OJ [2008] C 290/4).

17. In the light of that background to the current financial crisis and the Merger, it is now necessary to retrace our steps slightly in order to consider in a little more detail the relevant statutory framework and its application to the Merger and the Decision.

18. On the 18 September 2008, the same day as the Merger was announced, the former Secretary of State Rt. Hon. John Hutton, issued an intervention notice under section 42(2) of the Act ("the Intervention Notice").

19. Section 42 provides, so far as relevant, as follows:

> "**Intervention by Secretary of State in certain public interest cases**
>
> (1) Subsection (2) applies where—
>
> (a) the Secretary of State has reasonable grounds for suspecting that it is or may be the case that a relevant merger situation has been created or that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation;
>
> (b) no reference under section 22 or 33 has been made in relation to the relevant merger situation concerned;
>
> (c) no decision has been made not to make such a reference (other than a decision made by virtue of subsection (2)(b) of section 33 or a decision to accept undertakings under section 73 instead of making such a reference); and
>
> (d) no reference is prevented from being made under section 22 or 33 by virtue of—
>
> (i) section 22(3)(a) or (e) or (as the case may be) 33(3)(a) or (e); or
>
> (ii) Community law or anything done under or in accordance with it.
>
> (2) The Secretary of State may give a notice to the OFT (in this Part "an intervention notice") if he believes that it is or may be the case that one or more than one public interest consideration is relevant to a consideration of the relevant merger situation concerned.

> (3) For the purposes of this Part a public interest consideration is a consideration which, at the time of the giving of the intervention notice concerned, is specified in section 58 or is not so specified but, in the opinion of the Secretary of State, ought to be so specified.
>
> …
>
> (7) Where the Secretary of State has given an intervention notice mentioning a public interest consideration which, at that time, is not finalised, he shall, as soon as practicable, take such action as is within his power to ensure that it is finalised.
>
> (8) For the purposes of this Part a public interest consideration is finalised if—
>
> > (a) it is specified in section 58 otherwise than by virtue of an order under subsection (3) of that section; or
> >
> > (b) it is specified in that section by virtue of an order under subsection (3) of that section and the order providing for it to be so specified has been laid before, and approved by, Parliament in accordance with subsection (7) of section 124 and within the period mentioned in that subsection."

20. Thus Parliament recognised that the need to include a particular public interest consideration in the statutory scheme might be identified whilst a specific merger is under consideration. The statute also envisages that at the time an intervention notice is given the introduction into section 58 of the relevant public interest consideration may not have been "finalised".

21. The Intervention Notice provides in its second recital as follows:

> "Whereas the Secretary of State believes that the stability of the UK financial system ought to be specified as a public interest consideration in section 58 [of the Act] and the Secretary of State believes that the stability of the UK financial system may be relevant to a consideration of the merger situation;"

It continues:

> "Now, therefore, the Secretary of State in exercise of his powers under section 42(2) of the Act, hereby gives this intervention notice to the Office of Fair Trading and requires it to investigate and report in accordance with section 44 of the Act within the period ending on 24th October 2008."

22. The Intervention Notice also indicated that the Secretary of State would lay before Parliament for its approval an affirmative resolution to specify the new public interest consideration under section 58 of the Act. The relevant order (The Enterprise Act 2002 (Specification of Additional Section 58 Consideration) Order 2008 (S.I. 2008 No. 2645)) was laid before Parliament on 7 October. It was subsequently approved by the House of Lords on 16 October and by the House of

Commons on 22 October. It came into force on 24 October. The new public interest consideration has been added to the Act as section 58(2D) which provides:

> "The interest of maintaining the stability of the UK financial system is specified in this section…."

23. Section 44 of the Act, so far as relevant, states:

> "**Investigation and report by OFT**
>
> (1) Subsection (2) applies where the Secretary of State has given an intervention notice in relation to a relevant merger situation.
>
> (2) The OFT shall, within such period as the Secretary of State may require, give a report to the Secretary of State in relation to the case.
>
> (3) The report shall contain—
>
> (a) advice from the OFT on the considerations relevant to the making of a reference under section 22 or 33 which are also relevant to the Secretary of State's decision as to whether to make a reference under section 45; and
>
> (b) a summary of any representations about the case which have been received by the OFT and which relate to any public interest consideration mentioned in the intervention notice concerned and which is or may be relevant to the Secretary of State's decision as to whether to make a reference under section 45.
>
> (4) The report shall, in particular, include decisions as to whether the OFT believes that it is, or may be, the case that—
>
> (a) a relevant merger situation has been created or arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation;
>
> (b) the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services;
>
> …
>
> (e) any relevant customer benefits in relation to the creation of the relevant merger situation concerned outweigh the substantial lessening of competition and any adverse effects of the substantial lessening of competition; or
>
> (f) it would be appropriate to deal with the matter (disregarding any public interest considerations mentioned in the intervention notice concerned) by way of undertakings under paragraph 3 of Schedule 7.
>
> (5) If the OFT believes that it is or may be the case that it would be appropriate to deal with the matter (disregarding any public interest considerations mentioned in the intervention notice concerned) by way of undertakings under paragraph 3 of

> Schedule 7, the report shall contain descriptions of the undertakings which the OFT believes are, or may be, appropriate.
>
> (6) The report may, in particular, include advice and recommendations on any public interest consideration mentioned in the intervention notice concerned and which is or may be relevant to the Secretary of State's decision as to whether to make a reference under section 45.
>
> (7) The OFT shall carry out such investigations as it considers appropriate for the purposes of producing a report under this section."

24. Pursuant to section 44 the OFT subsequently produced the OFT Report which provides at paragraph 2:

> "As required by section 44(4) of the Act, the OFT's report contains four principal 'decisions'. These are that the OFT believes that it is or may be the case that:
>
> • arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation
>
> • the creation of that merger situation may be expected to result in a substantial lessening of competition (SLC) within a market or markets in the United Kingdom for goods or services, including personal current accounts, banking services to small and medium enterprises (SMEs), and mortgages, such that further inquiry by the Competition Commission (CC) is warranted
>
> • any relevant customer benefits in relation to the creation of the relevant merger situation concerned do not outweigh the substantial lessening of competition and any adverse effects of the substantial lessening of competition, and
>
> • it would not be appropriate to deal with the matter by way of undertakings under paragraph 3 of Schedule 7 to the Act."

25. It followed, and the OFT so found, that the test for a reference to be made to the CC on competition grounds contained in section 33 of the Act was met in respect of three out of the dozen or so areas of overlap between the businesses of the merging companies (i.e. personal current accounts ("PCAs"), banking services to small- and medium-sized enterprises ("SMEs") and mortgages). In order to satisfy that test it was necessary that the OFT "*believes that it is or may be the case that*… [the anticipated merger] may be expected to result in a substantial lessening of competition within any market or markets…" (emphasis added). This test is to be distinguished from the more rigorous test which must be applied by the CC if a reference is actually made: in that situation the CC must decide pursuant to section 47(5)(a) "whether [the anticipated merger]…may be expected to result in a substantial lessening of competition in any market or markets…" It is not in issue that whereas the CC must be satisfied as to the *probability* of a substantial lessening

of competition ("SLC"), the OFT's belief need not be based on the balance of probabilities, and can amount to no more than "a realistic prospect" that an SLC will occur. In the OFT Report the OFT's findings of SLC in the three markets in question were made expressly on this basis (see paragraphs 10 and 11 thereof). The OFT accepted that it was "by no means a forgone conclusion that the CC would reach a similar finding, to the balance of probabilities standard, at the end of a detailed 24 week inquiry." (See paragraph 140 of the OFT Report, dealing with the PCA market; see also paragraph 173 in respect of the SME market.)

26. It is also important to note, in the light of the way in which some of the Applicants' submissions have been framed, that the statutory scheme and in particular section 44 does not require the OFT, in a report to the Secretary of State under that section, to make any findings or recommendations in respect of the public interest consideration in question, still less does it require the OFT to carry out any balancing exercise such as the Secretary of State carried out pursuant to subsection 45(6), the result of which is embodied in the Decision. The OFT's only duty in that regard is, by virtue of subsection 44(3)(b), to summarise any representations which have been received by the OFT relating to that consideration. Whilst subsection 44(6) of the Act leaves it open to the OFT to offer advice or recommendations on the public interest consideration, the OFT did not do so in the OFT Report but simply complied with its obligations under subsection 44(3)(b).

27. As to the effect of the OFT's conclusions, subsection 46(2) of the Act states:

> "The Secretary of State, in deciding whether to make a reference under section 45, shall accept the decisions of the OFT included in its report by virtue of subsection (4) of section 44…"

Thus, the OFT's findings in respect of *inter alia* the possible effects of an anticipated merger on competition are binding on the Secretary of State when he comes to consider under section 45 whether to refer the merger to the CC for further investigation.

28. Subsection 45(4) provides that:

> "The Secretary of State may make a reference to the Commission if he believes that it is or may be the case that—

> (a) arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation;
>
> (b) the creation of that situation may be expected to result in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services;
>
> (c) one or more than one public interest consideration mentioned in the intervention notice is relevant to a consideration of the relevant merger situation concerned; and
>
> (d) taking account only of the substantial lessening of competition and the relevant public interest consideration or considerations concerned, the creation of the relevant merger situation may be expected to operate against the public interest."

29. As to the balancing exercise to be carried out by the Secretary of State as between an anti-competitive outcome and a relevant public interest consideration, subsection 45(6) provides:

> "For the purposes of this Chapter any anti-competitive outcome shall be treated as being adverse to the public interest unless it is justified by one or more than one public interest consideration which is relevant."

30. The Decision states that the new public interest consideration contained in section 58(2D) of the Act, namely the interest of maintaining the stability of the UK financial system, is relevant to this case and that taking account only of the SLC and that public interest consideration, the Secretary of State believes that the creation of the relevant merger situation is not expected to operate against the public interest. It continues (at paragraph 12):

> "The OFT has decided that it is or may be the case that the creation of the relevant merger situation may be expected to result in an anti-competitive outcome, in particular in view of its potential to result in a substantial lessening of competition in the market for personal current accounts, for banking services to small and medium sized enterprises (SMEs) in Scotland, and in the supply of mortgages. However, having had regard in particular to the submissions made to the OFT by the tripartite authorities (HM Treasury, the Financial Services Authority and the Bank of England), the Secretary of State considers that the merger will result in significant benefits to the public interest as it relates to ensuring the stability of the UK financial system and that these benefits outweigh the potential for the merger to result in the anti-competitive outcomes identified by the OFT. As a result of this decision, no reference will be made to the CC."

31. A general meeting of Lloyds TSB's shareholders overwhelmingly approving the Merger took place on 19 November 2008. HBOS' general meeting of shareholders is due to take place on 12 December 2008. A court hearing to decide whether to

sanction the Merger by way of a scheme of arrangement under sections 895 and 899 of the Companies Act 2006 has been fixed for 13 January 2009.

III STANDING OF THE APPLICANTS

32. The Secretary of State, supported by HBOS and Lloyds TSB, submits that in principle and on authority the Applicants have failed to establish that they are "persons aggrieved" by the Decision within the meaning of subsection 120(1) of the Act and that accordingly the application should be dismissed on that ground, no matter how the Tribunal may have found on the merits of the case.

33. The Applicants are members of an unincorporated association[3]. Shortly before the case management conference on 3 December 2008 the Tribunal was provided with a signed copy of an "Agreement Between Members of the Merger Action Group" (an unsigned copy having been annexed to the Notice of Application). The signatories to the Agreement are: Mark David Shaw, Alexander Malcolm Fraser, Timothy Noble, Peter de Vink, David Alexander and Dan Macdonald. Further brief particulars of the Applicants were provided at the CMC and on the first day of the main hearing. Those particulars indicate that the interests of the Applicants vary in nature: one of the Applicants is identified as a shareholder in HBOS, although the extent or duration of the shareholding is not identified; all of the Applicants are described as having a personal bank account with HBOS; and three Applicants currently hold business bank accounts with HBOS. The Applicants describe their interest in the present application as follows:

> "The above persons have significant business and personal interests which rely upon the availability of banking services in Scotland. Each of them is concerned about the reduction of choice in the banking sector due to the merger of HBOS and Lloyds TSB. Each of them shares the concerns expressed by the OFT on that topic."

34. The Applicants put forward three main reasons as to why they should be granted standing to bring their application: they are concerned about the reduction of choice in the banking sector due to the Merger; no other applicant has raised this issue before the Tribunal, and in a matter of such importance the Decision should be open to public scrutiny; there is a significant interest among the general public in the

[3] Further details are available from the Applicants' website: http://www.mergeractiongroup.org.uk/

issues at stake, highlighted by correspondence sent to the Tribunal by the consumer organisation Which?, the Cabinet Secretary for Finance and Sustainable Growth of the Scottish Government, John Swinney MSP, and Sir George Mathewson CBE, the former chairman of RBS. Mr Ian Forrester QC, who appeared for the Applicants, emphasised that the Applicants' submissions as to standing were not based on the fact that some of the Applicants have bank accounts with or shareholdings in HBOS, but rather that the Applicants' association is a group of responsible individuals pursuing a real and legitimate interest.

35. Mr Forrester submitted that Scottish law is tolerant of actions by responsible individuals who bring breaches of duty by public bodies to the attention of the courts. He referred us to principles of the law of Scotland where the issue of standing is to be determined prior to and distinct from the merits of the case (*Scottish Old People's Welfare Council, Petitioners* (1987) S.L.T. 179 at 184) and where a person can bring proceedings for judicial review if they can establish title and interest (*D. & J. Nicol v Dundee Harbour Trustees* 1915 S.C. (H.L.) 7). He accepted that the standard applicable in this case was "person aggrieved" within the meaning of section 120(1), and he submitted that the Applicants are "aggrieved" by the Decision, within the meaning of that provision.

36. The Respondent submits that the use of the term "aggrieved" in section 120(1) of the Act means that to have standing to challenge a decision, a person must be more than merely interested in the decision in question. "Aggrieved" implies that the person concerned can be differentiated from the general body of consumers or members of the public and has been injuriously affected by the decision under challenge. The Applicants do nothing more, the Respondent submits, than express a generalised interest that the Applicants have in the banking sector in the United Kingdom. There is therefore nothing specific in the nature of an injurious effect on the rights or lawful interests of the Applicants. Accordingly, the Applicants have failed to make out any case as to how they meet the "person aggrieved" standard under section 120(1).

37. HBOS and Lloyds TSB support the submissions made by the Respondent. In addition, HBOS submits that the correct test under section 120(1) is whether any of

the Applicants has a genuine grievance because the Decision prejudicially affects his or her interests. The Applicants are merely, in the words of counsel for HBOS, Mr Nicholas Green QC, an "officious bystander" and have identified nothing which differentiates them from the millions of other persons and businesses in the UK who might have an identical concern.

38. Subsection 120(1) of the Act, so far as relevant, provides as follows:

> "any person aggrieved by a decision of […] the Secretary of State […] may apply to the Competition Appeal Tribunal for a review of that decision."

39. The Act contains no definition of "person aggrieved". HBOS submits that it is stricter than the standard that is used in judicial review proceedings before the Administrative Court in England and Wales. That standard is contained in section 31(3) of the Supreme Court Act 1981 which provides that:

> "the court shall not grant leave [to proceed with a claim for judicial review] unless it considers that the [claimant] has a sufficient interest in the matter to which the [claim] relates."

40. This may be the case, and it is worth bearing in mind that, unlike applications brought under section 120, in claims for judicial review before the Administrative Court the Court's permission to proceed is required (see Civil Procedure Rules, rule 54.4). The filter of proposed applications at the permission stage enables the Court to consider standing as well as points relating to the merits at the outset, and to refuse permission if the applicant obviously has no interest and is, in reality, no more than a meddlesome busybody.

41. Although the relevant tests for standing in claims for judicial review in England & Wales and under section 120 of the Act are phrased differently, and thus the ease with which an applicant can establish standing may well differ, we see no reason why the factors that inform the question of standing should be wholly different. In the Notice of Application the Applicants refer to the *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte World Development Movement Ltd* [1995] 1 All E.R. 611. This was a case in which the applicable test was the normal English law judicial review test of "sufficient interest". At page 620 Rose LJ in the Divisional Court lists a number of factors which may affect the question of

standing, including: the importance of vindicating the rule of law; the importance of the issue raised; the likely absence of any other responsible challenger; the nature of the breach of duty; and the prominent role of the applicant in giving advice, guidance or assistance with regard to the subject matter of the decision under challenge.

42. As regards the meaning of the words "person aggrieved", HBOS submits that the analysis of Lord Denning in *AG of the Gambia v N'Jie* [1961] A.C. 617 was a correct statement in principle of the concept, where he said at 634:

> "The words 'person aggrieved' are of wide import and should not be subjected to a restrictive interpretation. They do not include, of course, a mere busybody who is interfering in things which do not concern him: but they do include a person who has a genuine grievance because an order has been made which prejudicially affects his interests."

43. We note that, in granting permission to appeal in *IBA Health Ltd v Office of Fair Trading* [2003] CAT 28, the Tribunal made the following observations on the concept of "any person aggrieved" under section 120, at paragraphs [55]-[56] when considering whether, in the circumstances of that case, a competitor had standing to seek a review of a decision of the OFT not to refer a proposed merger to the CC:

> "In giving 'any person aggrieved' a right to apply for a review, it seems unlikely that Parliament intended that officious persons should be able to use 'spoiling tactics' to disrupt prospective mergers on far-fetched or spurious grounds. The Tribunal is alert to this danger, but it does not arise in the present case. IBA has advanced a serious case.
>
> As we see it, in giving the wide category of 'any person aggrieved' standing to apply for a review, Parliament is not implying that any special precedence should be accorded to the interests of the particular person who happens to be 'aggrieved' in a particular case, over and above the interests of other parties concerned. As we have said, these proceedings are not primarily an inter partes matter. As we see it a 'person aggrieved' who presents a serious case is simply the catalyst which triggers a review by the Tribunal, in the wider public interest, not of the merits but of the legality of what has taken place. The purpose of that review is to ensure that the decision in question does not thwart or run contrary to the policy and objects of the 2002 Act." (references omitted)

44. The question of whether an applicant is an aggrieved person is one which should be determined in the light of all the circumstances of the case. The following considerations seem to us to be relevant to the Applicants' standing to bring the application in the present case:

(a) There is clearly a good deal of public interest in the Merger, particularly, although by no means exclusively, in Scotland. In our judgment on forum and venue ([2008] CAT 34) we referred to the "head of steam" generated in Scotland by the Decision (paragraph [10]). This is attested to by letters and other material to which we refer at paragraph [34] above.

(b) The application relates to a "public interest case" under Chapter 2 of Part 3 of the Act which, by definition, raises matters of wider public concern than normal merger cases. The public interest consideration specified in this case (and inserted as section 58(2D) of the Act) is defined as the "interest of maintaining the stability of the UK financial system", a matter of obvious national interest at the present time.

(c) The Applicants claim to have a genuine interest in the proper functioning of banking services in Scotland and the rest of the UK. Such a concern could fairly be said naturally to lead to an interest in the OFT's finding that there is a realistic prospect that the merger will result in SLC in banking services, in particular for SMEs in Scotland (see section VIII of the OFT Report), and to the Decision.

(d) The Applicants are all resident in Scotland and in some cases they, their families, and their businesses have bank accounts with HBOS, and/or are in receipt of other banking services in Scotland.

(e) One of the Applicants is a shareholder in HBOS.

(f) Had the Applicants not brought this application for review, there would have been no other timely challenge to the Decision (the application having been lodged at the end of the last day).

45. On the other side of the ledger are the following:

(a) The Applicants' Group is a newly formed entity, apparently expressly created for the purpose of challenging the Decision. They are not a well-

established and well-respected pressure group of the kind that has been held to have standing in certain cases applying the sufficient interest test (see for example the *World Development Movement* case).

(b) The Applicants have adduced no real evidence of their standing other than to assert through their Notice of Application and through their counsel that they have a generalised consumer interest in UK banking. They have certainly failed to establish any specific concern that differentiates them from the general body of consumers of banking services.

(c) We have found on examination of the substantive issues raised by the Applicants in this application, that their challenge to the lawfulness of the Decision has no legal merit.

46. In our view the Applicants' standing is borderline, a position which has not been assisted by the exiguous information about them, and the drip-feed approach to releasing what there was. Even with an urgent application such as the present, it is not satisfactory that no real effort is made to confront the evidential task of establishing their standing under the relevant statutory provision. We consider that much of the other parties' criticism levelled at the way this issue has been addressed by the Applicants is justified.

47. Nevertheless we consider that in the wholly exceptional circumstances of this case, and particularly in view of the specific interest and strong feeling which the Merger has aroused in Scotland, the Applicants are "persons aggrieved". In our view it would be undesirable to interpret "person aggrieved" in this context in such a way as to limit the possibility of challenge to a merger decision by shutting out those with a less immediate connection to the subject-matter of the dispute than, for example, competitors in the market place but who may well also be adversely affected, albeit in a different way.

48. We considered whether the fact that the application has, on examination, no legal merit should tip the balance the other way. We would certainly not wish to encourage unmeritorious and last minute applications of this kind. In the end, and

with some hesitation, we have come to the conclusion that the wholly exceptional factors to which we have referred are decisive.

IV GROUNDS OF REVIEW

49. The Applicants' challenge to the lawfulness of the Decision, as it appears from the Notice of Application, consisted essentially of the following contentions:

(a) *Fettering of discretion*: By statements made 6 weeks or so before the Decision the Secretary of State had unlawfully fettered his discretion to make the Decision and/or his discretion in that regard had been unlawfully fettered by others, notably the Prime Minister and the Chancellor of the Exchequer. The Secretary of State had thereby prevented himself from taking account of the changed circumstances which existed at the time the Decision was made. Under this head the Applicants also allege that the unlawful fettering led to what they have termed "a disproportionate market outcome", by which is meant that, absent that fetter, the merging parties would have engaged with the OFT more effectively as to possible remedies to address the competition concerns identified by the OFT. (See paragraphs 71-88 of the Notice of Application.)

(b) *Irrationality*: In making the Decision the Secretary of State exercised his discretion irrationally in that he closed his eyes to, or at least paid little attention to, relevant considerations, including in particular the availability of the government bailout package for banks, which the Applicants submit presented a real alternative to the need for the Merger in order to save HBOS. Under this head the Applicants also contend that the Secretary of State "gave undue weight" to the FSA's views in regard to HBOS's ability to be an effective standalone competitor should the Merger not take place, as opposed to the legally binding views of the OFT which, the Applicants contend, were more detailed and more expert in regard to competition matters, and which the Secretary of State effectively ignored and misrepresented in the Decision. The result was a decision which no

reasonable Secretary of State could have reached. (See paragraphs 89-93 of the Notice of Application.)

(c) *Irrelevant considerations*: Here, in an overlap with the irrationality ground, the Applicants repeat and expand upon the contentions summarised in the previous subparagraph, and also characterise the alleged preference for the FSA's views on the competition implications of the Merger as an error of law. In addition the Applicants submit that the Secretary of State has taken account of irrelevant considerations and/or has erred in law in that the FSA's references to the State aid provisions of the EC Treaty, which were recited in the Decision, allegedly in their view contained inaccuracies. It is also submitted that the Decision overlooked certain developments in the Commission Communication on compliance with the State aid rules in the context of the current financial crisis. (See paragraphs 94-120 of the Notice of Application.)

(d) *Proportionality*: Finally the Applicants argue that the EC law general principle of proportionality was engaged so that the Secretary of State was obliged to respect that principle when exercising his discretion. They contend that he failed to inquire into the adverse competitive impact of the Merger and thereby infringed that principle. (See paragraphs 121-123 of the Notice of Application.)

50. However, at the outset of his submissions to us at the main hearing Mr Forrester QC, who represents the Applicants, modified and clarified these grounds. He identified a number of matters on which he said that we are *not* being asked to pronounce. First, the Tribunal was not concerned with the pro-competitive or anti-competitive merits of the Merger. Second, he accepted that under the Act the Secretary of State is entitled to intervene on the grounds of public interest. It follows that neither the Secretary of State's decision to issue the Intervention Notice, nor the decision to introduce the new public interest consideration, nor the Order by which such consideration was inserted into section 58 of the Act are the subject of any challenge. Third, Mr Forrester stated that the dispute is not about whether HBOS was or was not in financial difficulties, and we were not concerned

with which of the various submissions about its future would be correct. Nor, he said, were the Applicants trying to diminish the scope of the problems that the financial sector was facing and is still facing.

51. The Applicants' challenge to the lawfulness of the Decision is said by Mr Forrester to be a narrow one. He put the Applicants' case in two ways: first what he called a general over-arching argument, and second a specific narrow one. The over-arching argument is that the government had preordained that the competition rules would not be invoked against this Merger, regardless of whose responsibility it was to take the Decision, and that this must have constrained how the Secretary of State analysed the Merger before him.

52. In regard to this point it is not suggested that Lord Mandelson either did or said anything himself which could be regarded as a fetter on his discretion. Mr Forrester also accepted that, contrary to the submission made in paragraph 29 of the Notice of Application, the Applicants no longer contended that any part of the Intervention Notice dated 18 September 2008 represented a fetter by the then Secretary of State, Mr Hutton, upon his own or his successor's discretion. Rather the Applicants relied upon certain statements attributed to the Prime Minister and the Chancellor of the Exchequer, and in particular upon the remarks made by the Chancellor when being interviewed on the Today programme on 18 September. Mr Forrester arranged for the relevant part of this interview to be played to us. We have also been provided with the full transcript of the interview. The main passages upon which Mr Forrester relies are quoted below in this judgment (paragraph [72]). Mr Forrester argues that the Prime Minister and the Chancellor were not legally permitted to waive the competition rules or to announce on 18 September 2008 that the Government would do so. Under the Act only the Secretary of State can intervene in the public interest in mergers, and the grounds upon which he can act are closely limited. He may indicate only at the stage of intervention that he believes a public interest consideration is relevant. Mr Forrester submits that it is very difficult, listening to the Chancellor's interview, to avoid the conclusion that he is saying that a decision has been taken by the Government without any legal basis to brush aside competition law as to this Merger.

53. The Applicants' narrower, more specific point relates to the way in which the Secretary of State framed the Decision. In this regard it was argued that the Secretary of State should have taken the competition concerns identified by the OFT, and by which he was bound, and then asked himself whether those concerns were outweighed by the public interest consideration which he had found to be relevant. But he is said not to have done that. Instead he tried, in Mr Forrester's words, to "denigrate" or to "discard" the competition law concerns by failing to mention in the Decision the inconvenient parts of the OFT Report which were binding upon him, and relying for competition input on other sources (in particular the FSA) whose views he should have considered only in relation to the public interest consideration. That was a manifestation of the fettering effect which the Prime Minister's and Chancellor's earlier statements had imposed on him. As part and parcel of this narrower contention Mr Forrester also argued that the FSA's views as to the effect of the EC State aid rules were inaccurate, and that by referring to them, and to the FSA's other comments on the competition concerns, the Secretary of State had adopted them or at least had wrongly regarded them as relevant considerations. The Decision was rendered unlawful in this respect too.

54. These two strands of the argument represented the main thrust of Mr Forrester's submissions to us, and we deal with them first.

55. The Applicants' arguments were, not surprisingly, hotly disputed by the Secretary of State and by the two Interveners. In relation to the main argument as to the fettering of the Secretary of State, in essence it was contended by Mr Paul Lasok QC for the Secretary of State that it is a question of fact and not of law whether discretion was fettered, and whether, when he made the Decision, the Secretary of State was acting at the dictation or under the sway of others in the government and therefore had a closed mind. At least two factors must be proved. The first is some event or some action that is said to have caused the fettering of the discretion; secondly, there must also be the actual fettering of the discretion. If either is not established the argument fails. Mr Lasok argued that on the evidence neither factor has been established by the Applicants and that the available evidence actually shows clearly that when he made the Decision the Secretary of State exercised his

discretion independently and entirely in accordance with the legal requirements. Therefore, the allegation of fettering ought to be rejected.

56. In support of these submissions the Secretary of State has provided evidence in the form of a witness statement from Mr David Saunders. Mr Saunders is a Director at the Department for Business, Enterprise and Regulatory Reform, and at the relevant time was the head of the Consumer and Competition Policy Directorate, and was responsible for advising the Secretary of State on the intervention made in respect of the Merger. This evidence is not in any way disputed, and Mr Forrester accepted that it correctly describes the process which the Secretary of State ought to have followed in regard to the Decision (but which he contends Lord Mandelson did not follow).

57. Mr Saunders describes the Secretary of State's power to intervene in public interest cases, which has been used in seven cases to date, including in relation to the Merger. He explains the background to the Secretary of State's decision to issue the Intervention Notice and make an order specifying the stability of the UK financial system as a public interest consideration under the Act. Mr Saunders then describes the internal decision-making process which culminated in the Decision. That process was, in summary, as follows. On 24 October, the day the OFT reported to the Secretary of State, he was advised by government officials on the next steps to be taken following the OFT Report. He was advised, in particular, that whilst he retained the power to make a reference to the CC, he was bound by the OFT's findings as to the impact of the Merger on competition. On 28 October, officials submitted advice to the Secretary of State on the decision he was required to make under the Act. That advice set out the competition concerns identified by the OFT, the representations of the parties and third parties concerning the public interest consideration and the government officials' suggested assessment of the Merger. The Secretary of State also received representations directly from Lloyds TSB and Mr Alex Salmond, the First Minister of Scotland, on 24 and 29 October respectively. Before making his decision on the afternoon of 30 October, the Secretary of State spoke to Mr John Fingleton, the Chief Executive of the OFT, received a letter from the Chancellor of the Exchequer (re-confirming the views of the Tripartite Authorities) and held discussions with officials at BERR.

58. The Interveners supported the Secretary of State's submissions.

59. By virtue of subsection 120(4) we must determine this application applying the same principles as would be applied by a court on an application for judicial review. In this regard it is common ground that, at least so far as the substantive grounds of review are concerned, the relevant principles do not materially differ as between the jurisdictions of Scotland and England & Wales. The grounds on which an administrative act or decision can be called into question by judicial review are well-established i.e. the traditional grounds of illegality, irrationality and procedural impropriety. These principles were elaborated upon by Lord Diplock in *Council of Civil Service Unions v Minister for Civil Service* [1985] AC 374, at 410:

> "By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. […] By "irrationality" I mean what can by now be succinctly referred to as "*Wednesbury* unreasonableness" […]. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. […] I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice."

60. These principles have been considered by the Tribunal on a number of occasions (see, for example *Somerfield v Competition Commission* [2006] CAT 4, paragraphs 55-57 and the case-law there cited). As noted by the Tribunal in its recent judgment in *British Sky Broadcasting Group plc v The Competition Commission and the Secretary of State for Business, Enterprise and Regulatory Reform* [2008] CAT 25, at paragraph [107], the exercise of judicial review should be contrasted with an appeal "on the merits", a standard which the Tribunal is required to apply in appeals under the provisions of the Competition Act 1998 and Communications Act 2003. In an appeal on the merits, the Tribunal is entitled to substitute its own views for those of the decision-maker. In contrast, judicial review proceedings are solely concerned with the lawfulness of a decision and not its correctness.

61. It is clear that the exercise of discretion by a public body to whom the discretion is entrusted by law is capable of being impugned under one or more of these grounds of review where the holder of the discretion disables himself from exercising it by the adoption of a rigid rule or policy, or where he purports to exercise the discretion but does so under the dictation of another person. (See De Smith's Judicial Review, 6th edition, paragraphs 9.002 and 5.170.)

62. The case of *H. Lavender and Son Ltd v Minister of Housing and Local Government* [1969] 1 WLR 1231, cited by the Applicants, is an example of a case combining both these features. There the relevant decision (a refusal by the Minister of Housing and Local Government of permission to extract gravel, set out at page 1236) stated on its face that the Minister's policy was to refuse permission "unless the Minister of Agriculture is not opposed to working", and that in the present case "the agricultural objection has not been waived and the Minister has, therefore, decided not to grant planning permission for the working of the appeal site." Willis J held (at page 1241) that by acting "solely in accordance with his stated policy" the Minister had fettered his discretion and that "upon the true construction of the Minister's letter the decision … while purporting to be that of the Minister, was in fact, and improperly, that of the Minister of Agriculture…"

63. Similarly, in *Bromley LBC v GLC* [1983] 1 A.C. 768, cited to us by Miss Helen Davies QC, who appeared for Lloyds TSB, the House of Lords, upholding the Court of Appeal, struck down a decision of the GLC to reduce bus and tube fares by 25 per cent, partly because the evidence showed that the decision was taken purely on the ground that it gave effect to a binding manifesto commitment. In the Court of Appeal Oliver LJ had stated (in a passage approved by Lord Diplock on appeal to the House of Lords, at page 830):

> "Of course it does not follow that a decision which happens to accord with a pre-announced policy is simply on that account vitiated. But the fact of pre-announcement, the concept of a commitment come what may, however firmly or even blindly believed in, cannot properly be made a substitute for a fair and rational exercise of a statutory discretion. I have in the end been convinced on the documents before the court that that is what occurred here." (pp 795-796)

64. The principles were further helpfully articulated by Lord Browne-Wilkinson in *R v Secretary of State for the Home Department, Ex p Venables* [1998] A.C. 407 (at 496-497):

> "When Parliament confers a discretionary power exercisable from time to time over a period, such power must be exercised on each occasion in the light of the circumstances at that time. In consequence, the person on whom the power is conferred cannot fetter the future exercise of his discretion by committing himself now as to the way in which he will exercise his power in the future. He cannot exercise the power nunc pro tunc. By the same token, the person on whom the power has been conferred cannot fetter the way he will use that power by ruling out of consideration on the future exercise of that power factors which may then be relevant to such exercise."

65. The position in Scottish law appears to be the same. Miss Davies referred us to *Adams v Licensing Division No 3 of the South Lanarkshire Council* [2002] LLR 271, where the Court of Session (Outer House) summarised the relevant legal principle as follows:

> "The fettering of a discretion can only properly be described as having occurred when the board have allowed their policy to exclude any other legitimate and relevant considerations in coming to their decision in any particular case, or not considered any particular case on its merits."

66. In *M'Lean v Patterson* (1939) J.C. 52, cited by the Applicants, legislation for milk suppliers provided for exemption from registration for persons selling small quantities to employees or neighbours for their own consumption. Instead of considering M'Lean's individual case for exemption on its merits, the Milk Marketing Board was found to have applied a rigid policy to that question. On an appeal from the Sheriff Court to the Court of Session by case stated, the Board was held to have failed to determine whether M'Lean was exempt, and a criminal charge of supply while unregistered was precluded.

67. We were referred by Miss Davies to other Scottish authorities to the effect that even if the decision maker has made a preliminary statement about the matter, and even if government ministers have pressed for a particular outcome, the decision should not be impugned if on the evidence the decision-maker has acted properly.

68. In *City of Aberdeen Council v Local Government Boundary Commission for Scotland* (1998) S.L.T. 613, the city challenged the decision of the Boundary

Commission to reduce the number of electoral wards in its area. The Commission had foreshadowed its intention and had invited representations from the city. When the Commission implemented the reduction despite the representations made by the city, the city applied for judicial review, arguing that the Commission had failed to carry out its own decision-making. The Court of Session (Outer House) dismissed the application, Lord Penrose stating (at 623):

> "But there was nothing objectionable, in my view, in the commission forming the opinion it did on 17 June with a view to progressing to the next stage in the consultative process. If that is done and the petitioners make representations, the commission may be persuaded and alter its intended recommendation. It may do so with or without a local inquiry. Quite apart from those stages in the procedure which are in the hands of the Secretary of State, the commission itself will require to consider Aberdeen's position again if there are representations against its deposited proposals. That process has not been vitiated by the decision of 17 June, in my view."

69. In *Malloch v Aberdeen Corporation* (1973) S.C. 227, an education authority dismissed a teacher on the ground that his continued employment had been rendered unlawful by an amendment made to the relevant statutory provision by the Secretary of State, and also on the ground that his employment as an unregistered teacher was contrary to their policy. The court dismissed an action by the teacher in which he challenged the validity of the amendment and of his dismissal, arguing amongst other things that the decision had been taken under outside pressure. As to the latter Lord Migdale stated (at 257-258):

> "Mr Malloch referred to pressure put on the committee from the outside to employ only registered teachers. There is no proof that this was done but even if there was canvassing of members by an outside body or person I do not think that would vitiate a decision on policy. The decision must have been reached by a majority. It may be that a minority took a different view, but the view of the majority would still rule. I find no evidence of bad faith and divergence of opinion does not mean that the reason of the majority is insufficient."

70. In the same case Lord Cameron stated (at 268):

> "It was urged by the pursuer that the decision on policy was in fact the result of pressure from the Secretary of State, but even if that were so every decision in a matter of choice or discretion is one which is determined by considerations, arguments or even pressures. The weight to be accorded to these elements determining a choice of action or policy to be followed, assuming neither bad faith, corruption, misdirection nor the taking account of irrelevant or illegitimate matters, is for the authority clothed with the power of choice."

71. With those principles and cases in mind we return to the way in which the Applicants put their argument in relation to fettering.

72. As already noted, Mr Forrester no longer argues that the Secretary of State did or said anything to fetter his own discretion. Reliance is placed upon remarks by the Prime Minister and the Chancellor of the Exchequer. Most were in the nature of spoken, unscripted statements. We set out the main ones below:

(a) On 18 September 2008, the day the Merger was announced, the Chancellor of the Exchequer, in an interview given on the Today program on BBC Radio 4, stated as follows:

> "In relation to the [HBOS] Lloyds TSB coming-together, that is a decision that I think was absolutely right, it was necessary because as people… the commentators are saying if we hadn't done it the alternative was very bleak indeed. So I think this was absolutely right…
>
> …
>
> I think in this particular case […] I want to put this beyond doubt. We have made a decision that we will waive the competition requirements in relation to these two banks, that's not going to get revisited."

(b) On 19 September 2008, in an interview with Sky TV, the Prime Minister responded to questions regarding the government's conduct in relation to the Merger:

> "Interviewer:
>
> Did you fix the HBOS deal?
>
> Prime Minister:
>
> I think the issues that arose in the HBOS and Lloyds TSB deal was whether the government was prepared to look at the competition laws and look as to whether the issue of financial stability was important enough for us to say that a deal, such as was being proposed, was the right thing to do. I think we have taken the right decision. We have also insisted on assurances from the new company about their mortgage lending in the market place so that they will not reduce it, they say they will expand it and it will remain a very high share of the lending in the market place, and I think that was the right thing to do as well. So obviously in a deal which involves the legislative process, the government has to be involved, and yes

I and Alistair Darling did talk to the parties that were involved because it was the right thing to do."

Interviewer:

Did you fix the deal?

Prime Minister:

I am not claiming, this was a deal that took place between two companies, it involves no government money.

Interviewer:

With a little help from the government.

Prime Minister:

But we had to deal with the issues of competition and we had to deal with some of the other issues that flow from that, like the maintenance of the mortgage market."

(c) A press briefing by the Prime Minister's Spokesman on 30 September also dealt with the Merger. In response to a question in relation to the possibility that Lloyds TSB may wish to pay less for HBOS, the Spokesman stated:

"Our role in this was to make a commitment to introduce legislation in order to facilitate the takeover and we stood by that commitment."

(d) In a statement to the House of Commons made by the Chancellor on developments in the financial markets on 6 October 2008, he stated (at paragraphs 22 and 23) :

"22. In September, we amended the competition regime to allow the interests of financial stability to be considered in the merger between Lloyds TSB and HBOS.

23. We took this exceptional measure because financial stability had to come before normal competition concerns."

(e) During a debate on the Banking Bill in the House of Commons on 14 October 2008, Mark Lazarowicz MP (Edinburgh North & Leith) asked the Chancellor about the changed circumstances that had transpired since the

announcement of the Merger, in particular the government rescue package of 8 and 13 October. The Chancellor's answer was as follows:

> "My hon. Friend will recall that the decision to merge was taken by the boards of HBOS and Lloyds TSB; it was their commercial judgment that was important. It was the judgment of ourselves, the Financial Services Authority and the Bank of England that it was also in the interests of greater financial stability that the merger should go through. Indeed, that is why we amended the provisions on the competition law. As I said at the time, that was one example of where financial stability trumped competition concerns, and that remains our view."

We were also referred to a number of press articles published around the time the Merger was announced which, in the Applicants' submission, further indicate that the discretion of the Secretary of State was substantially fettered.

73. It is obvious in the light of the statements we have set out that as and when each of them was made the government generally, and the Treasury (in the person of the Chancellor) in particular, were very much in favour of the Merger as being, in their estimation, the best solution both to rescue HBOS in its perceived very vulnerable state, and to ensure the stability of the UK's financial system which was then perceived as being delicately poised on the edge of an abyss. It is clear from those extracts that the government was being "up front" about its view of the Merger, and also about the fact that legislative changes were necessary if there was to be clearance of it without the delays and uncertainties that would be caused by a reference to the CC. The government clearly committed itself to effect those legislative changes, which amounted to the addition of a new "maintaining financial stability" consideration to the existing high-level public interests in section 58 of the Act. The government made this commitment because it wished to do everything it could to facilitate the Merger. In this sense it is perfectly fair to say that it was the policy of the government to do this.

74. The Chancellor was arguably even more categorical in his statements than the Prime Minister. What was perhaps the high-water mark of these came in the Today interview (quoted above) given on 18 September some 6 weeks before the Decision. Further, in the debate on the 14 October he expressed again the view that the competition concerns were outweighed ("trumped") by the need to ensure financial stability. The latter statement, made in the House of Commons, is instructive. The

Chancellor referred to "the judgment of ourselves, the Financial Services Authority and the Bank of England that it was also in the interests of greater financial stability that the Merger should go through." It seems to us highly likely, as Mr Lasok suggested, that the reference to "ourselves" is to the Treasury, which is the third member of the so-called Tripartite Authorities, along with the Bank of England and the FSA who are mentioned in the same sentence. All three bodies were providing representations to the OFT for the purposes of its Phase I inquiry. They would also be providing representations separately to the Secretary of State, urging him to find that the public interest consideration did indeed outweigh the competition concerns when he came to make the Decision (see for example the letter from HM Treasury to the Secretary of State dated 30 October 2008).

75. Mr Lasok stated that there was nothing surprising or remarkable about three of the public bodies most closely concerned with the financial stability of the country expressing their views in this way to the various decision makers, including the Secretary of State. We agree, and Mr Forrester did not really argue otherwise. Indeed it seems to us that those bodies would be failing in their public duty if they did not express their views, and did not do so forcefully where appropriate. Mr Forrester accepted in the course of argument that the Tripartite Authorities had particular expertise in relation to issues of financial stability and that the Secretary of State would need to take account of their views.

76. The real question, as we believe Mr Forrester acknowledged, is whether what was said by those senior members of the government (which included a member of the Tripartite Authorities, namely the Treasury) must have caused the Secretary of State to fail in his duty to exercise his discretion independently, and instead to exercise it at their dictation. This depends on the evidence relating to the taking of the Decision.

77. As to that evidence, we have already referred to the witness statement of Mr Saunders, which describes in some detail the steps taken from the original decision to intervene in the Merger right up to the taking of the Decision, along with the material and advice which was before the Secretary of State when he took it, covering the findings of the OFT on the competition concerns and their binding

nature, the representations of various interested parties on the public interest consideration and the financial risks that were to be weighed. Paragraph 34 of the witness statement states:

> "[On the afternoon of 30 October], the Secretary of State met with officials to discuss the advice and submissions he had received and to reach a decision. At our request, officials from HM Treasury were also present in case the Secretary of State had any specific further questions about the evidence of the Tripartite Authorities relating to the implications of the merger for financial stability. Having satisfied himself that all the evidence and options had been fully examined, the Secretary of State reached the decision, in line with our recommendation and on the basis of the arguments set out in the submission dated 28 October 2008, not to refer the merger to the Competition Commission."

Mr Forrester does not take issue with anything in this witness statement. Indeed he stated that there could have been no challenge to the Decision if what is set out in that paragraph as having been done was in fact done.

78. We should also refer to an exchange which took place in the House of Lords on 16 October 2008 when Lord Mandelson was moving the Order which was the vehicle for introducing the relevant public interest consideration into the Act. In the course of that debate the Secretary of State said:

> "The order specifies the maintenance of stability in the UK financial system as a public interest consideration under Section 58 of the Enterprise Act 2002 – a new public interest consideration. This will enable the Secretary of State to intervene in those mergers in order to be able to make the final decisions based on the vital public interest of financial stability, alongside the competition issues.
>
> As Secretary of State, I am unable to take decisions on this merger until parliamentary approval is received for the order. Subject to approval of the order by your Lordships, I will ensure that I receive all available advice and views before I make any decisions. This will include advice from the Treasury, the Bank of England and the FSA, which make up the tripartite authorities. I am sure that your Lordships would agree that swift, decisive action is needed to give investors the regulatory certainty that they need and to send a clear signal to the market about the proposed merger between Lloyds TSB group and HBOS.
>
> The order will allow us to make careful and urgent consideration of financial stability an additional part of our assessment process, and as a result, support our work to help millions of UK businesses and families get through these very difficult times. It is a critical addition to the public interest considerations specified in the Act and I commend it to your Lordships.
>
> …

> The caveat is this: the order that we considering [sic] is brought forward to allow for the careful consideration of financial stability as part of our assessment of the proposed merger between Lloyds TSB Group and HBOS. This debate, therefore, is not about the assessment, which I have yet to undertake. I will do so following receipt by me of the OFT's recommendations as to the competition and public interest issues which are due by 24 October. I have an open mind to both the competition and the public interest considerations.
>
> …
>
> Therefore, I do not envisage a one-, a two- or a three-year review following whatever decision I take on the merger in due course. I will not be drawn on conditionality in advance of my decision, but I assure your Lordships that, should a decision be taken for the merger to go ahead, we will not relax our vigilance at any time when it comes to the proper protection of consumers."

79. Mr Forrester makes no criticism whatsoever of Lord Mandelson's statements to Parliament. In effect he accepts that if they are taken at face value they reveal, not merely no evidence of fettered discretion, but a wholly proper approach to the decision making process which is envisaged. He was, however, understandably reluctant to acknowledge the logic of the conclusion that would follow if his overarching fettering submission was correct; the conclusion would be that the Secretary of State's statements to Parliament, the process of instructing the OFT to investigate and report to him, the receipt and consideration of representations from other bodies including the Treasury and the carrying out of the processes described in Mr Saunder's witness statement were little more than an elaborate sham designed to deceive Parliament and others and achieve a preordained result without the exercise of the independent decision-making required by the governing legislation. Mr Forrester avowed that his clients' case attributed no personal reproach to the Secretary of State, but concentrated its fire on the Decision, which he said contained manifestations of a readiness to waive the Merger through without a reference to the CC – a readiness which could only be attributed to the fettering effect of the government's statements. We must therefore now turn to consider what those manifestations are, and whether they are sufficient to vitiate what Mr Forrester accepts was, on the face of it, an otherwise unimpeachable process, by demonstrating that the Decision was made by Lord Mandelson effectively at the dictation of other senior members of the government.

80. According to the Applicants the Decision was subject to three manifestations of the alleged fettering effect. First, instead of an acceptance of the OFT's binding competition analysis followed by a balancing of those competition concerns against the public interest consideration, there was what Mr Forrester variously called a "tinkering", a "denigrating" or a "discarding" of those concerns. This took the form of failing to record certain inconvenient parts of the OFT Report and relying for competition input on other sources (in particular the FSA) whose views he should have considered only in relation to the public interest consideration. This submission was based on the way in which a section of the Decision summarising the OFT Report and the various submissions from other interested parties which had been received by the OFT in the course of its inquiry, had been drafted. Two alleged shortcomings in the Secretary of State's summary were identified. It was suggested that in describing, in paragraph 18 of the Decision, the two counterfactuals (short term and medium or long term) used by the OFT to assess any adverse effects on competition of the Merger, the Secretary of State had failed fully to reflect the OFT's more optimistic prognosis in relation to the Stage II counterfactual as set out at paragraph 85 of the OFT Report. The comparison was between the OFT's version:

> "In the medium to longer term Government would have withdrawn its support, leaving either a fully independent HBOS once more, or an HBOS in the hands of a "no overlap" purchaser: the Stage II counterfactual. In these circumstances HBOS would also constitute a significant player in the market place in the medium term." (paragraph 85 of the OFT Report)

and the précis in the Decision:

> "In the medium term, once stability had returned to the markets, the Government would sell HBOS on to a new owner or owners." (paragraph 18 of the Decision)

81. There is absolutely nothing in this point. The drafting neither diminishes the OFT finding nor indicates that the Secretary of State was failing to treat that finding as binding. In fact the Decision emphasises in two paragraphs (7 and 14) the binding effect of the OFT's competition conclusions which, in the disputed passage, the Secretary of State is simply summarising. Those OFT findings are set out in full in a public document for all to see. It is difficult to see what could have been gained by misrepresenting them in the Decision. Nor, in our view, does the Decision do so.

82. The second manifestation of the alleged fettering effect also relates to the section of the Decision where the Secretary of State summarises submissions made to the OFT by interested parties. Here the Applicants point to the fact that in the submissions which the FSA made to the OFT there is mention of the competitive strengths of HBOS under different scenarios, and that the Secretary of State mentions the FSA's submissions in his summary in the last three sub-paragraphs of paragraph 22 of the Decision. It is submitted by the Applicants that this mention amounts to the Secretary of State going to the FSA for competition analysis rather than to the OFT, and is further evidence of the fettering effect he was labouring under.

83. This argument, too, is wholly without merit. The Secretary of State is doing no more than reciting the submissions made to the OFT, a body which is under a statutory obligation to record any submissions which have been received from third parties in the course of its investigations and touching on the public interest consideration. The submissions of the FSA do concern the consideration of maintaining the stability of the financial system, and are summarised in a section of the Decision which is expressly dealing with that consideration and not with the OFT's competition concerns. The competition findings are set out in an earlier section of the Decision. Nothing in the Decision or anywhere else suggests that the Secretary of State has done anything other than treat the OFT's findings on competition as binding, or that he has treated the FSA's submissions as diminishing those findings.

84. The third vice said to be found in the Decision also concerns the FSA's submissions. Those submissions are said to contain an error of law relating to the effect of the State aid provisions of the EC Treaty upon a banking institution which is in receipt of aid. By referring to this in his summary of submissions made to the OFT the Secretary of State is said to have incorporated the error of law into the Decision thereby vitiating it. It is also said to provide further evidence of fettering, in that the FSA's views are said to differ from those which the OFT put forward in the OFT Report, and the latter are belittled by reference to the former. The alleged error relates to the FSA's assertion recorded towards the end of paragraph 22 that:

> "EU State aid rules preclude a government-owned entity from competing aggressively with private sector banks".

This is said to be wrong in law. In support of that contention Mr Forrester referred us to the Commission Communication on the grant of state aid to financial institutions in the context of the present global crisis. This, he said, indicated that the Commission's recently modified approach meant that there would be little if any constraint on the competitive ability of a recipient of State aid.

85. This argument is opposed by the Secretary of State and the Interveners at a number of different levels. First the premise that the FSA's view of the law was wrong is challenged. In this connection we were taken in some detail to the terms of the Commission Communication. There is considerable force in Mr Lasok's argument that the position is rather more complicated than Mr Forrester indicated. For example the Communication makes it clear that companies in receipt of State aid by way of guarantees must expect to have imposed on them behavioural constraints and restrictions on their commercial conduct which could limit their competitive effort as the price of the aid (see paragraph 27 of the Communication). However, we do not need to decide whether there was or was not an error by the FSA: suffice it to say that at the level of generality of the FSA's statement we very much doubt if their remarks could be criticised. Moreover, those remarks are not so very different from the comments of the OFT on the effect of the State aid rules which the Secretary of State also cited in the Decision. The OFT said

> "While [bringing HBOS into partial or full public ownership] may have led to the imposition of restrictions on the scope of HBOS to compete in the market (to comply with EC law on state aid), a publicly owned HBOS would continue to exert some competitive pressure in the market though it would be potentially a significantly weaker force in comparison with conditions prior to the current financial crisis."

Therefore both bodies took the view that the State aid rules could have a dampening impact on competitive efforts of a recipient. In any event, the Secretary of State was doing no more than reciting the submissions received by the OFT. There was no adoption of them by the decision maker, and the conclusions relating to competition concerns had already been dealt with earlier in the Decision.

86. In our view this is a hopeless point. It cannot conceivably represent a manifestation, or indeed any other kind of evidence, of a fettering of the Secretary of State's discretion. We doubt if there was any error of law by the FSA, and if there was we do not consider that it had any effect on the validity of the Decision, which did not adopt it and did no more than recite what had been said by the FSA to another body.

87. As to the Applicants' contention that the Prime Minister's and other senior government ministers' statements about the Merger had led Lloyds TSB not to offer any undertakings to the OFT, Mr Forrester conceded that this was not itself a separate ground upon which the validity of the Decision could be impugned; but it was, he said, a manifestation of the unlawful and regrettable consequences of a Government acting too categorically when it lacks the power to do so. In other words it was a result of the fettering statements. It should be recorded that the factual premise, namely, that what was said about the Merger by the government affected Lloyds TSB's engagement with the OFT and/or their willingness to discuss or provide undertakings, was strenuously disputed by Miss Davies on behalf of Lloyds TSB. She stated that those statements had no such effect. In view of the fact that this issue cannot affect our conclusions as to validity of the Decision we do not need to resolve it or to say any more about it.

Tribunal's conclusion on the Applicants' fettering of discretion ground

88. In the light of the above we consider that the Applicants' contention that the discretion of the Secretary of State was fettered by the statements of the Prime Minister and the Chancellor of the Exchequer, and that the Decision is vitiated on that ground, fails.

Other contentions

89. As we mentioned earlier the Applicants' Notice of Application included a contention that in considering the continuing need for the Merger the Secretary of State closed his eyes to, or at least paid little attention to the availability of the government bailout package for banks, which in the Applicants' submission presented a real alternative to the need for the Merger in order to save HBOS. Mr

Forrester did not really develop this submission in his oral presentation, which was concerned almost entirely with issues relating to the main fettering point. However he did say that he was maintaining the argument that, in view of the fettering effect he was under, the Secretary of State's attention was elsewhere, with the result that he paid insufficient attention to alternative means of addressing the problem of HBOS. He also focussed overly on the Merger and on the FSA's views in regard to HBOS's ability to be an effective standalone competitor should the Merger not take place, as opposed to the legally binding views of the OFT. The alternative means in question was the recapitalisation scheme announced by the government on 8 October 2008.

90. The main problem with this argument is that it is simply unsustainable in the light of the evidence. The question of the need for the Merger to go ahead in the light of the government rescue package was discussed by the Secretary of State during the House of Lords debate to which we have referred. In the run up to the Decision the Secretary of State received representations from several sources dealing with this issue, as referred to in the witness statement of Mr Saunders (see paragraphs 26-34 thereof). In particular the Tripartite Authorities urged the view that the recapitalisation programme was complementary and not alternative to the Merger and, accordingly, that the Merger was necessary notwithstanding the recapitalisation programme. Further, this very issue was specifically considered in the briefing note dated 28 October 2008 prepared for the Secretary of State by his officials. This note is referred to by Mr Saunders at paragraphs 24ff of his statement.

91. The evidence is therefore all one way and there is simply no basis for the allegation that the issue of the continuing need for the Merger was not properly considered by the decision-maker. Nor, for the reasons already given, is there any substance in the claim that the Secretary of State wrongly took account of the views of the FSA on the competitive strength of HBOS in preference to the position of the OFT, or failed to have regard to the Commission's latest position on state aid. It follows that these points, whether under a label of irrationality or failure to take account of relevant considerations or some other label, also fail.

92. Finally although the Applicants originally contended that the EC law principle of proportionality was engaged and infringed in respect of the Decision, Mr Forrester abandoned this point in the course of his oral presentation to us, and we therefore say no more about it.

V CONCLUSION

93. For the reasons given above, the Tribunal unanimously decides as follows:

(a) The Applicants are "persons aggrieved" within the meaning of section 120(1) of the Act

(b) The Applicants' application under section 120 of the Act is dismissed.

The Honourable Mr Justice Barling Michael Blair Peter Grinyer

Charles Dhanowa
Registrar

Date: 10 December 2008