



Neutral Citation Number: [2025] EWCA Civ 209

Case No: CA-2023-000696 and 000698

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**  
**KING'S BENCH DIVISION**  
**DIVISIONAL COURT (SINGH LJ and FOXTON J)**  
**Cases CO/4460/2022 and CO/4479/2022**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 05/03/2025

**Before :**

**LORD JUSTICE UNDERHILL**  
**(Vice-President of the Court of Appeal (Civil Division))**  
**LORD JUSTICE DINGEMANS**  
and  
**LORD JUSTICE ZACAROLI**

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**Between :**

**THE KING**  
on the applications of  
**(1) BRITISH GAS TRADING LIMITED**  
**(2) E.ON UK PLC**  
**(3) E.ON NEXT ENERGY LIMITED**  
**(4) E.ON ENERGY SOLUTIONS LIMITED**

**Appellants**

**- and -**

**THE SECRETARY OF STATE FOR ENERGY**  
**SECURITY AND NET ZERO (FORMERLY BUSINESS,**  
**ENERGY AND INDUSTRIAL STRATEGY)**

**Respondent**

**-and-**

**(1) THE NATIONAL ASSOCIATION OF CITIZENS'**  
**ADVICE BUREAUX**  
**(2) THE GAS AND ELECTRICITY MARKETS**  
**AUTHORITY**  
**(3) BULB ENERGY LIMITED (IN ENERGY SUPPLY**  
**COMPANY ADMINISTRATION)**

**(4) DANIEL FRANCIS BUTTERS, MATTHEW JAMES  
COWLISHAW AND MATTHEW DAVID SMITH, AS  
JOINT ENERGY ADMINISTRATORS FOR THE 3rd  
INTERESTED PARTY  
(5) OCTOPUS ENERGY GROUP LIMITED  
(6) OCTOPUS ENERGY RETAIL 2022 LIMITED**

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**Kieron Beal KC, Naina Patel and Warren Fitt** (instructed by **A&O Shearman LLP**) for the  
**First Appellant**  
**George Peretz KC and Harry Gillow** (instructed by **Pinsent Masons LLP**) for the **Second to  
Fourth Appellants**  
**Jason Coppel KC, Patrick Halliday, Malcolm Birdling and Alastair Richardson** (instructed  
by **Government Legal Department, Hogan Lovells International LLP**) for the **Respondent**  
**Tom Hickman KC, Gayatri Sarathy and Sean Butler** (instructed by **Linklaters LLP**) for the  
**Third and Fourth Interested Parties**  
**Lord Pannick KC, Jemima Stratford KC and Will Bordell** (instructed by **CMS Cameron  
McKenna Nabarro Olswang LLP**) for the **Fifth and Sixth Interested Parties**  
The First and Second Interested Parties did not appear and were not represented

Hearing dates : 21, 22 & 23 January 2025

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**Approved Judgment**

This judgment was handed down remotely at 10.30am on 5 March 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives (see eg <https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html>).

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**Lord Justice Zacaroli:**

Introduction

1. This is an appeal from the decision of the Divisional Court (Singh LJ and Foxton J – the “**DC**”) following a ‘rolled-up’ hearing of the claimants’ application for permission to bring a claim for judicial review. That application related to two decisions made by the defendant (and respondent to this appeal) the Secretary of State for Energy Security and Net Zero (formerly, and at the times relevant to the claims, the Secretary of State for Business, Energy and Industrial Strategy – “**BEIS**”) (the “**SoS**”).
2. The appellants (being two of the three groups of companies comprising the claimants below) are companies operating in the retail energy sector in the UK: British Gas Trading Limited (“**BGT**”) and E.ON Next Energy Limited, E.ON Energy Solutions Limited and E.ON UK plc (“**E.ON**”). A third claimant, ScottishPower Retail Energy

Limited and SP Smart Meter Assets Limited (“**ScottishPower**”), has not appealed the decision of the DC.

3. The decisions of the SoS under challenge related to the transfer of the business of Bulb Energy Limited (in energy supply company administration) (“**Bulb**”) to Octopus Energy Group Limited via Octopus Energy Retail 2022 Limited (for convenience, the fifth and sixth interested parties are referred to as “**Octopus**” in this judgment). Bulb was an energy supply company, which held electricity and gas supply licences. It supplied approximately 1.5 million domestic customers. In 2021, a year in which wholesale energy prices increased by more than 400%, Bulb ran into serious financial difficulties. On 24 November 2021, on the application of the energy regulator, the Office of Gas and Electricity Markets (“**Ofgem**”), Adam Johnson J made an Energy Supply Company Administration Order (“**ESCA Order**”) in respect of Bulb, pursuant to s.94 of the Energy Act 2011 (“**EA 2011**”).
4. The statutory objectives of an ESCA Order are to secure that energy supplies are continued at the lowest cost which it is reasonably practicable to incur and to secure that it becomes unnecessary, by one or both of the prescribed means, for the ESCA Order to remain in force for that purpose: s.95(1) EA 2011. By s.95(2), the prescribed means are: (a) the rescue as a going concern of the company and (b) transfers falling within s.95(3), namely, a transfer as a going concern either to one, or to more than one, other company of so much of the undertaking of the energy company as is appropriate to transfer for the purpose of achieving the purpose of the ESCA Order.
5. The Joint Energy Administrators (“**JEAs**”) traded the business with the benefit of funding provided by the SoS pursuant to an Administration Funding Agreement (“**AFA**”), following directions given by Adam Johnson J. In about February 2022 the JEAs retained Lazard & Co Ltd (“**Lazard**”) to undertake a sales process with a view to effecting a transfer pursuant to s.95(3) EA 2011.
6. The sales process which then ensued lies at the heart of the issues on this appeal. That process, and the role of the JEAs, their advisors, Lazard, BEIS, the SoS and others is set out in detail in the judgment of the DC, under the side-heading “Our findings on the facts” from §30 to §109.
7. The only bidder to emerge from that process was Octopus. Its bid depended on substantial financial support from the SoS. The JEAs recommended acceptance of Octopus’s bid and the entry into an Energy Transfer Scheme pursuant to s.95(3) EA 2011 (the “**ETS**”).
8. The legal mechanism for giving effect to the ETS is set out in Schedule 21 to the Energy Act 2004. Under that Schedule, it is for the JEAs to make a scheme for the transfer of property, rights and liabilities from the energy company subject to an ESCA Order. By paragraph 3(4), the ETS takes effect at the time appointed by the Court. By paragraph 3(5), the court may not appoint a time for the ETS to take effect unless the ETS has been approved by the SoS.
9. The first challenged decision – referred to as the “**Funding Decision**” – was the decision taken by the SoS on 27 or 28 October 2022 (announced in a press release on 29 October 2022) to provide funding to Bulb through to 31 March 2023, by way of an amendment to the AFA.

10. The second challenged decision – referred to as the “**Approval Decision**” – was that taken by the SoS on 7 November 2022, to approve the transfer of Bulb’s business pursuant to the ETS. The Funding Decision and Approval Decision are collectively referred to as the “**Decisions**”.
11. On 30 November 2022, sitting then as a judge in the Companies Court on an application by the JEAs, and acting under the power conferred by paragraph 3(4) of Schedule 21 to the Energy Act 2004 to appoint a time for the ETS to take effect, I directed that it take effect at 23:58 on 20 December 2022. Shortly before the substantive hearing to determine the effective time, the claimants had issued proceedings in the Administrative Court seeking permission to bring judicial review proceedings in respect of the Decisions. The decision to appoint the effective time was made against opposition from the claimants in these proceedings. My reasons are set out in the decision at [2022] EWHC 3105 (Ch). In summary, they were that the role of the Companies Court on such an application did not extend to reviewing the merits of any of the SoS’s decisions in approving the ETS, and that any such challenge would need to be made in the proceedings by then already issued in the Administrative Court. It was no part of my role to consider the merits of the ETS or the Decisions made by the SoS. Prior to the hearing of this appeal, all parties were made aware of my prior involvement with this matter and were content that I should be part of the constitution to hear the appeal.
12. In the proceedings in the Administrative Court, all parties sought expedition. The SoS (supported by Octopus and Bulb) sought a hearing in time for judgment to be given before the effective time (i.e. before 20 December 2022). The claimants sought an expedited rolled-up hearing in February 2023. Swift J, at a hearing on 6 December 2022, determined that – while it would be better if the matter could be resolved before 20 December 2022 – it was not in all the circumstances possible fairly to do so. He ordered that each of the applications be heard together on an expedited basis at the end of February 2023. No application for interim relief was made to the Administrative Court. Such an application would ordinarily be required to be supported by a cross-undertaking in damages.
13. The judgment of the DC, following a three-day hearing at which a substantial body of written materials was deployed and considered, was handed down on 31 March 2023. The DC, first, refused the claimants permission to apply for judicial review on the basis that they were guilty of undue delay. It went on, nevertheless, to consider the substance of the claims.
14. The claimants raised objections to the Decisions on the ground that they were unlawful on various public law bases (the “**Public Law Grounds**”), and on the grounds that the Funding Decision failed to meet various requirements of the “Trade and Co-operation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland of the other part” (the “**TCA**”) relating to subsidies (the “**Subsidy Control Grounds**”).
15. The DC concluded that it would have refused permission on the Public Law Grounds, and there is no appeal against that conclusion. The DC concluded that it would have granted permission in respect of the Subsidy Control Grounds, but would have refused judicial review on the merits.

16. The appellants appeal, with permission of Underhill, Phillips and Whipple LJJ, on the following three grounds:
- (1) The DC erred in law and/or fact in refusing permission on the grounds of delay because it (i) failed to recognise that the appellants were, at the time of the applications, entitled as of right under Article 373 of the TCA to apply by way of judicial review for a recovery order, the relevant limitation periods prescribed by the TCA not having expired; and/or (ii) erred in finding that the claims were not brought promptly;
  - (2) The DC erred in law in applying the wrong standard of review in the assessment of whether there had been compliance with the TCA, as implemented in the UK by s.29 of the European Union (Future Relationship) Act 2020 (“**EUFRA 2020**”); and
  - (3) The DC erred in law in the application of the principles required by Article 366 of the TCA and in the interpretation of Articles 364(3) and 367(3) TCA.
17. I address each of these grounds in turn, after setting out the legislative background.

The legislative background

18. The TCA established arrangements for co-operation between the UK and the EU following Brexit across a range of areas. Many parts of it have been enacted in the UK by specific legislation. Those parts relating to subsidies have been given effect to in the UK by the Subsidy Control Act 2022 (the “**2022 Act**”). At the time of the Decisions made in this case, however, the 2022 Act had not come into force. In that transitional period, the subsidy control provisions in the TCA were implemented generically pursuant to s.29(1) EUFRA 2020, which provides as follows:

“Existing domestic law has effect on and after the relevant day with such modifications as are required for the purposes of implementing in that law the [TCA] ... so far as the agreement is not otherwise so implemented and so far as such implementation is necessary for the purposes of complying with the international obligations of the United Kingdom under the agreement.”

19. The DC recorded that it was common ground that the effect of s.29 is to transpose the TCA into domestic law, “expressly and mechanistically changing it in the process”, citing *Heathrow Airport Limited v HMRC* [2021] EWCA Civ 783 (“*Heathrow Airport*”), per Green LJ at §228. It summarised, at §229, the principles to be derived from Green LJ’s judgment:

“(i) Prima facie the TCA does not have direct effect according to its own terms but this is without prejudice to how the UK decides to implement the TCA as a matter of domestic law.

(ii) Parliament has implemented the TCA into domestic law via the EUFRA 2020, in particular section 29. Section 29 does not lay down a principle of interpretation but is more fundamental and amounts to “a blanket, generic, mechanism to achieve full

implementation, without the need for any further Parliamentary or other Executive intervention”: see [227]. The section transposes the TCA into domestic law, expressly and mechanistically changing it in the process. Following section 29 domestic law on an issue means what the TCA says: see [228].

(iii) This is subject to two statutory clarifications. The first of these is that it applies only so far as required, i.e. it does not modify domestic law that is otherwise already consistent with the TCA. The second is not material for present purposes.

(iv) There will be many circumstances where a court must determine the meaning of domestic law by reference to the TCA. This is recognised in section 30 of the EUFRA 2020. That provision cross-refers to the TCA, which itself incorporates the 1969 Vienna Convention on the Law of Treaties: see section 30 and Article 4 of the TCA on ‘public international law’.”

20. The TCA defines a “subsidy” (by Article 363(1)(b)) as financial assistance which:

“(i) arises from the resources of the Parties, including:

(A) a direct or contingent transfer of funds such as direct grants, loans or loan guarantees;

(B) the forgoing of revenue that is otherwise due; or

(C) the provision of goods or services, or the purchase of goods or services;

(ii) confers an economic advantage on one or more economic actors;

(iii) is specific insofar as it benefits, as a matter of law or fact, certain economic actors over others in relation to the production of certain goods or services; and

(iv) has, or could have, an effect on trade or investment between the Parties.”

21. There is no dispute that the subsidy in this case is capable of having an effect on trade or investment between the UK and the EU.

22. The principles which the UK is obliged to apply with a view to ensuring that subsidies are not granted where they have or could have a material effect on trade or investment between the Parties to the TCA are set out in Article 366(1). This provides that “...each Party shall have in place and maintain an effective system of subsidy control that ensures that the granting of a subsidy respects the following principles (the “**SC Principles**”):

“(a) subsidies pursue a specific public policy objective to remedy an identified market failure or to address an equity rationale such as social difficulties or distributional concerns (“the objective”);

(b) subsidies are proportionate and limited to what is necessary to achieve the objective;

(c) subsidies are designed to bring about a change of economic behaviour of the beneficiary that is conducive to achieving the objective and that would not be achieved in the absence of subsidies being provided

(d) subsidies should not normally compensate for the costs the beneficiary would have funded in the absence of any subsidy;

(e) subsidies are an appropriate policy instrument to achieve a public policy objective and that objective cannot be achieved through other less distortive means;

(f) subsidies' positive contributions to achieving the objective outweigh any negative effects, in particular the negative effects on trade or investment between the Parties.”

23. Where (as occurred in this case) a subsidy is provided in the context of the rescue or restructuring of a business, Article 366(2) requires the UK to apply, additionally, the conditions set out in Article 367. For present purposes, the relevant ones are in Article 367(3) and (4):

“3. Subsidies for restructuring an ailing or insolvent economic actor without the economic actor having prepared a credible restructuring plan shall be prohibited. The restructuring plan shall be based on realistic assumptions with a view to ensuring the return to long-term viability of the ailing or insolvent economic actor within a reasonable time period. During the preparation of the restructuring plan, the economic actor may receive temporary liquidity support in the form of loans or loan guarantees. Except for small and medium-sized enterprises, an economic actor or its owners, creditors or new investors shall contribute significant funds or assets to the cost of restructuring. For the purposes of this paragraph, an ailing or insolvent economic actor is one that would almost certainly go out of business in the short to medium term without the subsidy.

4. Other than in exceptional circumstances, subsidies for the rescue and restructuring of insolvent or ailing economic actors should only be allowed if they contribute to an objective of public interest by avoiding social hardship or preventing a severe market failure, in particular with regard to job losses or disruption of an important service that is difficult to replicate. Except in the case of unforeseeable circumstances not caused by

the beneficiary, they should not be granted more than once in any five year period.”

24. By Article 366(3):

“It is for each Party to determine how its obligations under paragraphs 1 and 2 are implemented in the design of its subsidy control system in its own domestic law, provided that each Party shall ensure that the obligations under paragraphs 1 and 2 are implemented in its law in such a manner that the legality of an individual subsidy will be determined by the principles.”

25. Article 369, headed “Transparency”, sets out various requirements as to the publication of the grant of a subsidy. By Article 369(5), the UK is required to ensure that:

“(a) if an interested party communicates to the granting authority that it may apply for a review by a court or tribunal of:

(i) the grant of a subsidy by a granting authority; or

(ii) any relevant decision by the granting authority or the independent body or authority;

(b) then, within 28 days of the request being made in writing, the granting authority, independent body or authority shall provide that interested party with the information that allows the interested party to assess the application of the principles set out in Article 366, subject to any proportionate restrictions which pursue a legitimate objective, such as commercial sensitivity, confidentiality or legal privilege.

The information referred to in point (b) of the first subparagraph shall be provided to the interested party for the purposes of enabling it to make an informed decision as to whether to make a claim or to understand and properly identify the issues in dispute in the proposed claim.”

26. Article 371 of the TCA required the UK to establish or maintain “an operationally independent authority or body with an appropriate role in its subsidy control regime”. The relevant body in the UK is now the Competition and Markets Authority (the “CMA”), which was assigned this role under the Subsidy Control Act 2022. That Act was not, however, in force at the relevant time in this case. Accordingly, it was left to the UK to determine how its obligations under Article 366(1) and (2) were implemented, provided only that the legality of an individual subsidy “will be determined by the [SC Principles]” (see Article 366(3), quoted above).

27. The TCA draws a distinction between the “granting authority” and the courts or tribunals of the UK. Article 372 provides as follows:

“1. Each Party shall ensure, in accordance with its general and constitutional laws and procedures, that its courts or tribunals are competent to:



(a) review subsidy decisions taken by a granting authority or, where relevant, the independent authority or body for compliance with that Party's law implementing Article 366;

(b) review any other relevant decisions of the independent authority or body and any relevant failure to act;

(c) impose remedies that are effective in relation to point (a) or (b), including the suspension, prohibition or requirement of action by the granting authority, the award of damages, and the recovery of a subsidy from its beneficiary, if and to the extent that those remedies are available under the respective laws on the date of entry into force of this Agreement;

(d) hear claims from interested parties in respect of subsidies that are subject to this Chapter where an interested party has standing to bring a claim in respect of a subsidy under that Party's law.”

28. Article 372(3), however, provided that:

“...nothing in this Article requires either party to create rights of action, remedies, procedures or widen the scope or grounds of review of decisions of their respective public authorities, beyond those existing under its law on the date of entry into force of this Agreement.”

29. Article 373 requires each Party to have in place an effective mechanism of “recovery”. In the footnote to this Article in the TCA it is pointed out that this required a new remedy in the UK, “which would be available at the end of a successful judicial review, in accordance with the standard of review under national law...” but that “such review is not expanded in any other way...”. The footnote to Article 373(1) refers to the new remedy of recovery being made available in the UK “at the end of a successful judicial review”.

30. Although nothing in the end turns on this point, the reference to “judicial review” is not, in my view, a reference to the specific remedy known as judicial review in English law, but refers generically to such procedure as exists in this jurisdiction for reviewing decisions of public bodies.

31. Of particular relevance to the appellants’ arguments on the issue of delay is Article 373(2), which provides:

“2. Each Party shall ensure that, provided that the interested party as defined in Article 369 has challenged a decision to grant a subsidy before a court or a tribunal within the specified time period, as defined in paragraph 3 of this Article, recovery may be ordered if a court or tribunal of a Party makes a finding of a material error of law, in that:

(a) a measure constituting a subsidy was not treated by the grantor as a subsidy;

(b) the grantor of a subsidy has failed to apply the principles set out in Article 366, as implemented in that Party's law, or applied them in a manner which falls below the standard of review applicable in that Party's law; or

(c) the grantor of a subsidy has, by deciding to grant that subsidy, acted outside the scope of its powers or misused those powers in relation to the principles set out in Article 366, as implemented in that Party's law.”

32. By Article 373(3)(b), the specified time period is determined as follows:

“(i) it shall commence on the date on which information specified in Article 369(1) and (2) was made available on the official website or public database;

(ii) it shall terminate one month later, unless, prior to that date, the interested party has requested information under the process specified in Article 369(5);

(iii) once the interested party has received the information identified in point (b) of Article 369(5) sufficient for the purposes identified in Article 369(5), there shall be a further one month period at the end of which the specified time period shall terminate;

(iv) the date of receipt of the information in point (iii) will be the date on which the granting authority certifies that it has provided the information identified in point (b) of Article 369(5) sufficient for those purposes, irrespective of further or clarificatory correspondence after that date;

(v) the time periods identified in points (i), (ii) and (iii) may be increased by legislation.”

Ground 1: delay

33. The DC’s decision to refuse permission on the grounds of delay was taken against the following background (see the judgment of the DC at §107 to §113, and §138 to §144).

(1) The Funding Decision was published on 29 October 2022, and the Approval Decision was published on 9 November 2022.

(2) The circumstances of the transaction meant that there was a need to move “very speedily” from that point onwards (§138). The urgency of the situation was recognised by counsel then instructed for BGT, who suggested when appearing in the Companies Court on 11 November 2022 that reversing the transaction would create “total chaos”. (§139)

(3) The appellants had been aware of the “essential substance” of the matters which might support grounds for judicial review (namely that the process leading to the Decisions was unfair because the appellants were not provided with the same

opportunity and information by which they could make a bid knowing there was a subsidy available, and the grounds under the TCA relating to subsidy control) from early November. (§141)

- (4) The potential unlawfulness of the subsidy had itself been referred to by BGT in a letter to BEIS as early as 12 August 2022. In its letter to BEIS of 1 November 2022, BGT had put to Ofgem that the level of state resources being deployed meant that – consistent with the well-established principles of State aid – the correct approach was for the offer of financial assistance to be made available in a publicly available tender document for all potential bidders to review. This background knowledge was relevant to the need for urgent action once the Decisions were made. (§142)
  - (5) On 3 November 2022, BGT and ScottishPower sent letters to BEIS and the SoS expressing concern on various grounds about the Octopus transaction, and seeking information of various kinds. BEIS responded on 7 November 2022 confirming the fact of the transaction and stating that the information requests would be dealt with under the Freedom of Information Act 2000. (§107)
  - (6) The application to appoint the effective time first came before the Companies Court on 11 November 2022. BGT opposed fixing a date at all, alternatively doing so until it had the opportunity to obtain the information necessary to determine whether to bring a public law challenge, and to bring such challenge. On that occasion, I adjourned the application, in part so as to enable the appellants time to seek further information and to consider, and launch if thought appropriate, judicial review proceedings.
  - (7) On 15 November 2022, BGT wrote to BEIS seeking a significant amount of documentation. ScottishPower sought similar information the following day.
  - (8) Pre-action protocol letters were sent by BGT on 21 November and by ScottishPower on 23 November 2022.
  - (9) The SoS responded to BGT’s pre-action protocol letter on 23 November 2022, enclosing two key documents integral to the Decisions: (1) the Subsidy Control Assessment carried out by BEIS (the “SCA”); and (2) the Accounting Officer’s assessment of the transaction (the “AOA”).
  - (10) Claim forms were issued by BGT (on 28 November 2022) and by E.ON and ScottishPower (on 29 November 2022).
  - (11) At the resumed hearing in the Companies Court on 29 November 2022, BGT argued that the court should either set no effective time, or set an effective time after the conclusion of the judicial review claims. It pointed to the “chaotic” and “catastrophic” consequences for the market, consumers and Octopus if the ETS went ahead and had to be reversed.
34. The powers of the Administrative Court in respect of delay are set out in s.31(6) of the Senior Courts Act 1981, which provides:

“Where the High Court considers that there has been undue delay in making an application for judicial review, the court may refuse to grant–

(a) leave for the making of the application; or

(b) any relief sought on the application,

if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration.”

35. CPR 54.5(1) further provides:

“The claim form must be filed–

(a) promptly; and

(b) in any event not later than 3 months after the grounds to make the claim first arose.”

36. At §136, the DC said:

“The reasons why there are these strict time limits in judicial review proceedings are well known. The competing interests involved include the interests of third parties; and are not only private interests but include the public interest in good administration. This includes the requirements of decisiveness and finality, unless there are compelling reasons to the contrary: see *R v Monopolies and Mergers Commission, ex parte Argyll Group plc* [1986] 1 WLR 763, at 774-775 (Donaldson MR). As the Master of the Rolls said in *Argyll*, in the financial field, a delay even of a few days may be highly detrimental to the interests of third parties and good administration. Furthermore, the presence or absence of prejudice or detriment is likely to be “a key consideration” in determining whether an application has been made promptly or with undue delay: see *Maharaj v National Energy Corporation of Trinidad and Tobago* [2019] UKPC 5; [2019] 1 WLR 983, at [37] (Lord Lloyd-Jones).

37. The DC continued, at §137:

“The importance of compliance with time limits in the context of judicial review proceedings is emphasised in the Administrative Court’s Judicial Review Guide (2022), at section 6.4. In particular, at para. 6.4.2.2, it is said that the time limit begins to run from the date the decision to be challenged was made and not the date when the claimant was informed about it, citing *R v Department of Transport, ex parte Presvac Engineering Ltd* (1992) 4 Admin LR 121. It is emphasised, at para. 6.4.1, that, even if the claim has been commenced within 3

months from the date of the conduct challenged, it may be out of time if the claimant did not start the claim promptly.”

38. It further noted, at §147, that sending a pre-action protocol letter does not relieve a claimant of the need to file a claim promptly (relying on *Finn-Kelcey v Milton Keynes Borough Council* [2008] EWCA Civ 1067; [2009] Env LR 17, per Keene J at [27]).
39. Applying those principles, the DC concluded as follows:
  - (1) A claimant does not need to have full disclosure in order to launch judicial review proceedings. While it is generally correct that judicial proceedings should not be commenced before adequate information has been obtained from the defendant, everything depends on context. In the present context, attempting to unravel the ETS after 20 December 2022 would have been chaotic and catastrophic, and “it was of utmost importance that proceedings should be commenced very speedily”.
  - (2) There was a delay of four days after the first hearing in the Companies Court, at which the case was adjourned in part to enable the appellants to seek further information, before such further information was sought, and a delay of 10 days after that hearing before the pre-action protocol letters were sent.
  - (3) The appellants had in fact had sufficient information to send pre-action protocol letters *before* they received the information they had sought from BEIS and the SoS.
  - (4) The essential bases for the appellants’ complaints were known about and could reasonably have been made in an urgent application for judicial review soon after the first hearing in the Companies Court (with the details being fleshed out subsequently).
  - (5) Even if the SoS was guilty of any unreasonable delay in responding to the appellants’ requests for information, that cannot prejudice the position of third parties – including the JEAs and Octopus, who were not only entitled, but were required, to rely upon the validity of the Decisions until they were set aside.
40. As to the arguments based upon the TCA, the DC addressed the appellants’ contention that in view of the provisions of Article 373(2) (quoted above), so long as the claim was issued within one month, then no issue of delay can arise, as follows (at §154 to §158):
  - (1) The argument was only relevant to the remedy of recovery, and “that remedial tail cannot be allowed to wag the dog”;
  - (2) Article 373(2) requires only that a remedy is made available in domestic law, but does not prevent the court refusing such a remedy on discretionary grounds, and it is open to the court to refuse permission on the basis of delay under s.31(6)(a) of the Senior Courts Act 1981.
41. The appellants advanced arguments under two heads: (1) those which raised principles of domestic law; and (2) those which relied on the provisions of the TCA. As to the former, the detailed grounds of appeal are that the DC:

“(i) failed to have sufficient regard to the extent to which each of the Appellants, knowing of their rights under the TCA, made detailed requests for information about the subsidy but to which no substantive response was received to these until 23 November 2022;

(ii) failed to have sufficient regard to the fact that the application to the Companies Court was adjourned on 11 November 2022 to enable disclosure to be obtained by the Appellants and judicial review proceedings to be brought if so advised and that even Counsel for the JEAs then contemplated a claim being commenced “within the next week or ten days”;

(iii) failed to have any regard to the fact that Swift J found that the Appellants had acted properly in awaiting the disclosure finally given on 23 and 25 November 2022 to be able to plead their claims;

(iv) correctly concluded that the Appellants did not have “the details of the matters...to support any grounds for judicial review” but erroneously concluded that the essence of the case on public law and subsidy control grounds was sufficiently known by early November 2022;

(v) erroneously concluded that it would have been open to the Appellants to plead a sub-standard set of grounds, supported by a statement of truth, and then to seek to amend those grounds in due course when permission to amend might not have subsequently been given, and permission for judicial review might have been determined on those sub-standard grounds;

(vi) erroneously distinguished this case from *R (Young) v Oxford City Council* [2002] EWCA Civ 990 and inappropriately relied on *R v Monopolies and Mergers Commission ex p Argyll Group plc* [1986] 1 WLR 763, CA;

(vii) erroneously took the view that third parties were entitled and required to rely upon the validity of the decisions of the Defendant unless and until they were set aside when the relevant third parties were those involved in a transaction the validity of which they knew was impugned and was likely to be the subject of challenge;

(viii) failed to consider what prejudice the alleged delay in issuing proceedings between 7 or 8 November 2022 and 28-29 November 2022 caused any third parties and how likely such prejudice was given Swift J’s unappealed judgment that it was not possible to determine the claims before the end of the Michaelmas 2022 term and given the substantial work that then had to be done to prepare the case for trial in late February 2023;

(ix) erred in law and/or fact by declining to treat the question of detriment to third parties as potentially relevant to relief, rather than permission, but then declining to hear submissions on relief in the proceedings. It wrongly found that there was unspecified prejudice to the JEAs and Octopus without giving the Appellants the opportunity to address the Court on the terms of any relief which might minimise any such prejudice.”

42. Sub-paragraphs (i) and (ii) get nowhere near the threshold for an appeal against an exercise of discretion and I need say no more about them. While Swift J did make the comment recorded in sub-paragraph (iii), this was caveated by the judge’s recognition that the issues of delay were open to be re-argued before the DC.
43. The essence of the remaining sub-paragraphs is that the DC was wrong to conclude that, given the urgency and prejudice to third parties caused by the relief sought if the matter was not disposed of before the effective date, it was enough that the appellants had knowledge of the essential complaint they wished to make, without knowing many of the details which they would in due course need to plead.
44. In my judgment, insofar as the issue was whether the appellants should have permission to bring a claim seeking relief by way of quashing, or otherwise undoing the effect of, the Decisions, then the DC was entitled to reach the view that it did. It was right to comment that everything depends on context. Faced with the fact, as the appellants themselves had contended, that undoing the transfer effected by the ETS would have been catastrophic, including for third parties such as Octopus and the many customers whose contracts were transferred to it, delay was rightly measured in days: see, for example, *R v Monopolies Commission, Ex p Argyll Plc* [1986] 1 WLR 763 at pp.774-775. Accordingly, it was within the broad range of discretion afforded to the DC to conclude that the fact that the appellants were aware of the essential grounds of their complaint, when balanced against the harm that would ensue to third parties if the relief was granted, meant that permission should be refused.
45. Before this court, the focus has changed somewhat, in that it is recognised that there is now no possibility of seeking an order reversing the effect of the transfer, and all that remains is the possibility of financial remedy (either by way of recovery of the subsidy or damages). As regards that relief, the reasons which underpinned the DC’s conclusions do not have the same force: neither granting recovery nor awarding damages gives rise to the same chaos that was a major factor in the DC’s decision; the potential for harm to third parties is significantly reduced; and the context which justified measuring delay in days (as per the *Argyll* case) is removed.
46. Although these forms of relief were pleaded in the alternative, the appellants maintained before the DC their claim to an order quashing the Decisions. They did not specifically address the question of delay as it related to the alternative forms of relief. They did not, for example, address the DC on the possibility of granting permission subject to the condition that the appellants would not be entitled to seek a remedy that resulted in the reversal of the transfer. That was unsurprising, in circumstances where the DC indicated at the hearing that they would not address relief at the hearing, but would invite submissions on that question to the extent necessary after delivering judgment. There was also less need to focus on this given that the DC in any event went on to consider the merits of the applications.

47. With the different focus of attention in this court, and without the same potential for causing harm to third parties, I consider that the reasoning which led the DC to refuse permission on the grounds of delay does not justify refusing permission in respect of the claims for purely financial relief (i.e. relief other than that which would require the transfer to be unwound).
48. As an aside, since nothing in the TCA dictated the form of action that a party was to take in challenging a subsidy, it would have been possible (in the transitional period before the 2022 Act came into force) to challenge the subsidy, provided that the claim was for financial relief only, by way of proceedings in the King's Bench or Chancery Division, where there is no equivalent to s.31(6) of the Senior Courts Act 1981. (Under the 2022 Act, in contrast, a subsidy is challenged by way of appeal to the Competition Appeal Tribunal (the "CAT"): see s.70 of the 2022 Act. The CAT is to apply the same principles as would be applied by the High Court in determining proceedings on judicial review: see s.70(5) of the 2022 Act.)
49. The conclusion on this aspect of ground 1 makes it unnecessary to deal with the additional arguments based on the provisions of the TCA. Since those provisions are relevant only to decisions of a public authority in the transitional period before the coming into force of the 2022 Act, any decision on this point is unlikely to have any wider impact beyond this case. The same point does not arise under the 2022 Act, because it does not envisage a separate permission stage. The equivalent provision in the 2022 Act to s.31(6) of the Supreme Court Act 1981 states only that the CAT may refuse to grant any *relief* if it considers there has been undue delay in making the application, and the granting of relief sought would be likely to cause substantial hardship.
50. I will nevertheless set out briefly my conclusions on the key point argued before us. In their grounds of appeal and skeleton argument the appellants took issue with the DC's conclusion that the domestic procedural requirements as to promptness and undue delay are not incompatible with Article 373(2). In his oral submissions, however, Mr Peretz KC (who took the lead on this aspect, and appeared with Mr Gillow for E.ON) advanced a different argument, which the DC did not address, based on Article 369(5) of the TCA. That required that, where an interested party has communicated that it may apply for a review of a decision to grant a subsidy, the relevant public authority must, within 28 days of a request in writing, provide that party with "the information that allows the interested party to assess the application of the principles set out in Article 366", for the purposes of enabling them to "make an informed decision as to whether to make a claim or to understand and properly identify the issues in dispute in the proposed claim".
51. That provision, in my judgment, would ordinarily mean that the court ought not to refuse permission on the grounds of delay, where there is an outstanding request from the party seeking judicial review, of information reasonably required to enable it to reach a decision as to whether to make a claim or to identify the issues in dispute. That does not mean that, merely because a request has been made for information, the court could not exercise its discretion to refuse permission. It remains open to the court in any given case to conclude that the applicant for judicial review has sufficient information such that it should have acted without waiting for its request to be answered. As the DC's decision demonstrates, the sufficiency of information required to bring a claim may vary depending on the relief sought, the hardship likely to be caused by it and the resulting degree of urgency, and I do not think that Article 369(5)



requires any different answer to that I have given above, applying domestic principles, to the DC's decision to refuse permission insofar as the relief claimed required the transfer to be reversed.

52. Insofar as purely financial relief is claimed, however, until the appellants had received copies of the documents (specifically the SCA and AOA) which revealed to what extent, and how, the SC Principles had been addressed by the SoS, it would be reasonable to conclude that they did not have information that allowed them to assess the application of those principles, to make an informed decision as to whether to make a claim, or to properly identify the issues in dispute in the proposed claim. The appellants did not receive those documents until 23 or 24 November 2022. The three working days it took them to launch their applications for judicial review thereafter cannot be characterised as undue delay, so as to justify refusing permission on that ground. Accordingly, Article 369(5) reinforces the conclusion I have reached above, applying domestic principles, in relation to the claims for financial relief.

#### Ground 2: standard of review

##### *A brief summary of the conclusions of the DC*

53. The SoS contended before the DC that, on the basis of the above provisions of the TCA, the grounds of review of the Decisions were limited to the conventional domestic law public principles such as rationality, and did not include the principle of proportionality.
54. The DC addressed this issue briefly, concluding (at §235) that, in its view, “the TCA does envisage that the principle of proportionality must be complied with in the subsidy control regime.” That is clearly correct: Many of the SC Principles, taken together, reflect the broader concept of proportionality, and Article 366(1)(b) specifically refers to it. It is not clear from this paragraph, whether the DC went on to apply proportionality as a free-standing standard of review of the Decisions, although its conclusion at §246 (“As we have already said, the standard of review which is applicable is in principle that of proportionality”) suggests that it did. Whether it did so is largely academic for two reasons.
55. First, the DC accepted the SoS's alternative submission that when it comes to applying the principle of proportionality, the context is very important, and that it involved a relatively “light touch” review in the present case, in which an enhanced margin of appreciation is to be given to the decision maker. As such, “the outcome may not be materially affected by the distinction between the concept of rationality and the principle of proportionality”.
56. The DC applied, by analogy, the principle of proportionality in the context of the Human Rights Act 1998, as explained in particular by Lord Sumption in *R (Lord Carlile of Berriew) v Secretary of State for the Home Department* [2014] UKSC 60; [2015] AC 956. At §31, Lord Sumption said that, even in that context, a court of review is not entitled to substitute its own decision for that of the constitutional decision-maker: “However intense or exacting the standard of review in cases where Convention rights are engaged, it stops short of transferring the effective decision-making power to the courts.” Lord Neuberger said, at §68:

“Accordingly, even where, as here, the relevant decision maker has carried out the balancing exercise, and has not made any errors of primary fact or principle and has not reached an irrational conclusion, so that the only issue is the proportionality of the decision, the court cannot simply frank the decision, but it must give the decision appropriate weight, and that weight may be decisive. The weight to be given to the decision must depend on the type of decision involved, and the reasons for it. There is a spectrum of types of decision, ranging from those based on factors on which judges have the evidence, the experience, the knowledge, and the institutional legitimacy to be able to form their own view with confidence, to those based on factors in respect of which judges cannot claim any such competence, and where only exceptional circumstances would justify judicial interference, in the absence of errors of fact, misunderstandings, failure to take into account relevant material, taking into account irrelevant material or irrationality.”

57. The DC considered that this case, involving decisions on matters of commercial judgment, was one which – by reference to the spectrum referred to by Lord Sumption – justified a “light touch” standard of review.
58. Second, as I explain in greater detail below, the DC in any event reached its own conclusion on whether the Decisions complied with the SC Principles, at least in respect of those aspects of the Decisions to which objection was made by the appellants.

***The parties’ arguments in brief on this appeal***

59. The appellants’ primary case is that upon any application to review the Decisions, it is for the court to determine for itself whether a subsidy complies with the SC Principles. Specifically, in this case the DC should have reached its own conclusion as to whether a subsidy was proportionate and limited to what was necessary to achieve the objective in accordance with SC Principle (b).
60. That is because Article 366, in requiring the UK to have in place and maintain an effective system of subsidy control that “ensures” that the granting of a subsidy respects the SC Principles, imposes “outcome obligations”. The effect of s.29 of EUFRA 2020 is that those outcome obligations in Article 366 are implemented in the UK as hard-edged questions of law: any subsidy granted by a public authority in the UK *must* comply with the SC Principles, and the UK will be in breach of the TCA if a subsidy is granted which fails to do so. Accordingly, the DC should have answered that hard-edged question of law for itself, and determined whether the subsidy was proportionate and limited to what was necessary to achieve the objective.
61. It might be thought that the logical consequence of that argument is that the SoS’s decision that the subsidy did satisfy the SC Principles is legally irrelevant. Mr Beal KC (who appeared with Ms Patel and Mr Fitt, for BGT), however, accepted that the DC – in deciding for itself whether the subsidy was proportionate – was entitled to give “such weight as the context calls for” to the SoS’s decision. That was, he submitted, mandated by the approach adopted by this court in *R (Dalston Projects Ltd) v Secretary of State for Transport* [2024] EWCA Civ 172; [2024] 1 WLR 3327. That case concerned a claim

for judicial review of an executive decision (under the Russia (Sanctions) (EU Exit) Regulations 2019) on grounds of proportionality under the Human Rights Act 1998. This court concluded that under the Human Rights Act a first instance court was required to decide for itself whether the decision was proportionate, rather than simply to apply a standard of rationality. At §19 to §20, Singh LJ, with whom the other members of the court agreed, addressing a passage from the judgment of Lord Sales JSC in *Director of Public Prosecutions v Ziegler* [2021] UKSC 23; [2022] AC 408 in which he said that it was “well-established that on the question of proportionality the court is the primary decision-maker”, said:

“19 The only part of that passage which perhaps needs clarification is the reference to the court being “the primary decision-maker”. When the passage is read as a whole it is clear that Lord Sales JSC was not suggesting that the court is the primary decision-maker in the sense of the person who makes the underlying administrative (or legislative) decision which is under review. As Lord Bingham had said in *Huang*, at para 13, and Lord Sumption JSC had said in *Lord Carlile*, at para 31, the court never has that role, because its function is still one of reviewing the decision of the public authority concerned.

20 That said, the rest of para 130 in Lord Sales JSC’s judgment in *Ziegler* makes clear that the standard of review is not the rationality standard. It also makes clear that the issue under the HRA is not a question of process but a matter of substance. Finally, the passage makes clear that, depending on the context, the court may afford a measure of respect to the balance of rights and interests struck by a public authority.”

62. On the other hand, by a respondent’s notice, the SoS challenges the DC’s conclusion that the principle of proportionality is to be applied at all; instead it is submitted that “the TCA does not require the court to apply grounds or a standard of review different from the conventional domestic approach, i.e. the rationality standard.”
63. In the alternative, the SoS contends that if a proportionality standard of review is to be applied at all, the DC was right to conclude that only a “light touch” review is required in the circumstances of this case. Octopus agrees with the SoS’s submissions.
64. I address, first, the issue whether the standard of review required by the TCA, as implemented by s.29 of EUFRA 2020, involves proportionality, or is limited to conventional domestic principles of judicial review.

***Is the proportionality standard of review engaged?***

65. As Lord Pannick KC, who appeared with Mr Bordell and Ms Stratford KC for Octopus observed, two questions lie at the heart of this issue, and it is critical to distinguish between them.
66. The first question is what does the TCA require of the UK in terms of substance relating to subsidies? Put another way, what does the modification to UK law required by the TCA (and implemented by s.29 EUFRA 2020) look like? The second question is what

standard of review of a decision by a granting authority is required under English law to satisfy the UK's obligations under the TCA?

67. It is also necessary, in my judgment, to distinguish between two different uses of the concept of “proportionality”: first, as a legal standard of *review* of a relevant decision and, second, as a component of the *decision* under review. There is no doubt that proportionality is a component of the decision to be made by the relevant public authority pursuant to the SC Principles: Article 366(1)(b) expressly requires the decision-maker to determine whether the subsidy is “proportionate ... to achieve the objective”. It does not follow, however, that upon a review of that decision the court is required itself to apply a proportionality standard of review.
68. Mr Beal supported his contention that Article 366(1), as implemented by s.29 of EUFRA 2020, in requiring the UK to “ensure” that the SC Principles are respected, gives rise to a hard-edged question, relying on two matters. First, adopting a purposive approach, he submitted that the purpose of s.29 was to put in place a transitional period of subsidy control that effectively maintained in place the provisions that applied across the EU and the UK prior to Brexit. Second, he submitted that this was the consequence of Green LJ’s interpretation of s.29 in *Heathrow Airport*.
69. Despite the attractive simplicity of the appellants’ position, I am unable to accept it, for the following reasons, which largely reflect the submissions made by Mr Coppel KC (who appeared with Mr Halliday, Mr Birdling and Mr Richardson for the SoS) and Lord Pannick for Octopus.
70. The starting point is the wording of s.29(1) which, as Mr Coppel pointed out, implements the TCA “so far as such implementation is necessary” for complying with the UK obligations under the TCA. That means that domestic law is modified to the minimum extent necessary to ensure compliance with the TCA.
71. The TCA does not oblige the UK to *create* a power to grant a subsidy, but to impose a system of control where a public authority in the UK, pursuant to such powers that already exist in domestic law, grants something which falls within the definition of subsidy in Article 363. The circumstances in which a public authority in the UK might provide financial assistance to an entity which falls within the definition of subsidy in Article 363 are too many to enumerate. In the present circumstances, the relevant power is that found in s.165 of the Energy Act 2004, which provides that the SoS “...may make grants or loans to [a company subject to an ESCA Order] of such amounts as it appears to him appropriate to pay or lend for achieving the objective of the energy administration.”
72. Accordingly, s.29(1) implements Article 366 by modifying domestic law – in this case s.165 of the Energy Act 2004 – by imposing a requirement that any decision by the SoS to make a grant or loan under that section also respects the SC Principles.
73. The TCA does not require a UK court or tribunal to apply anything other than existing domestic principles when reviewing the decision of a public authority, where that decision has involved the grant of a subsidy. Article 372(1) provides that the UK must have in place a system for the review of a public authority’s decision to grant a subsidy by a court or tribunal, but Article 372(3) provides that nothing in Article 372 requires

the UK to widen the scope or grounds of review of decisions of their respective public authorities, beyond those available under its existing law.

74. Article 373(2) reiterates that point in relation to the remedy of recovery, referring to the possibility of a court or tribunal finding a material error of law where the grantor of a subsidy has either failed to apply the SC Principles (i.e. has failed to apply them at all) or has applied them “in a manner which falls below the standard of review applicable in that Party’s law.”
75. More generally, Article 4 of the TCA provides that nothing in it establishes an obligation to interpret its provisions “in accordance with the domestic law of either Party”. The UK, therefore, is not obliged to interpret any part of the TCA by reference to European law.
76. The effect of these provisions is clear: the UK will have satisfied its obligations under the TCA by imposing a system of subsidy control which (1) requires the relevant public authority charged with granting a subsidy to respect the SC Principles and (2) enables an interested party to review that decision before a court or tribunal according to its domestic law principles, i.e. conventional principles of judicial review.
77. Nothing in s.29 compels any different conclusion. As I have noted above, it was common ground before the DC that the legal effect in domestic law is as stated by Green LJ at §224 to §241 of *Heathrow Airport*. Before us, there was some debate as to whether the observations of Green LJ remain good law in light of the comments of the Supreme Court in the subsequent decision of *Lipton v BA Cityflyer Ltd* [2024] UKSC 24; [2024] 3 WLR 474. Before turning to that, however, I do not find anything in Green LJ’s observations that compel the conclusion that the SC Principles are implemented in domestic law as hard-edged principles of law as contended for by the appellants. The core of his reasoning is in the following passage from §228 of his judgment:

“Following section 29 *domestic law* on an issue means what the TCA says. It provides that domestic law (as defined) “*has effect ... with such modifications as are required for the purposes of implementing in that law the Trade and Cooperation Agreement*”. The phrase “*has effect*” is important. Parliament has mandated a test based upon the result or effect. The phrase “*has*” makes clear that this process of modification is automatic i.e. it operates without the need for further legislative intervention.”
78. While this might be seen to lend support to the appellants’ argument that the SC Principles are mechanistically incorporated into domestic law as “outcome obligations”, I do not think that this follows from Green LJ’s analysis. He was concerned with the automatic and mechanistic process by which the TCA is given effect in the UK – i.e. without the need for further legislation. He was not concerned to define *how* the specific obligations in each Article of the TCA were to be interpreted or, therefore, what the modified principle of UK law (whether statutory or common law) would look like in respect of each and every Article. That is hardly surprising: the TCA runs to 783 Articles, over 991 pages (or 2,500 pages including the appendices). Accordingly, I do not think that Green LJ’s analysis lends any support to the appellants’ submissions on this point.

79. Mr Coppel submitted that the approach taken by Green LJ in *Heathrow Airport* is no longer good law, in light of the Supreme Court’s decision in *Lipton*. He relied on the passage in the judgment of Lord Sales and Lady Rose (with whom Lady Simler agreed), at §79 and §80, which addressed Green LJ’s conclusion that s.29 of EUFRA 2020 had the effect that domestic law now means what the TCA says it means, regardless of the language used. They said:

“79. In our judgment section 29 does not have the effect Green LJ suggests in relation to provisions in the Trade and Co-operation Agreement which are expressed in such general and aspirational terms as article AIRTRN.22. The UK and EU expressly agreed in article COMPROV.16 that nothing in the Trade and Co-operation Agreement permits that agreement to be directly invoked in the domestic legal system of the UK and that it does not confer rights on individuals. Given that the aim of Brexit was to remove the influence of EU law from our domestic law, it would be entirely inconsistent with that aim and with the wording of article COMPROV.16 to interpret section 29 as having such an intrusive and automatic effect in our law.

80. There may be a future case arising from facts occurring post-Brexit where a party wishes to put forward an argument that the effect of section 29 is to modify the wording of some existing domestic law on which that party relies. If such a submission is made, that court or tribunal should consider submissions as to the meaning and effect of section 29 afresh. They should not have regard to what has been said by the Court of Appeal in this case.”

80. I note, however, that the Supreme Court specifically had in mind provisions of the TCA which were expressed in such general and aspirational terms as article AIRTRN.22. That stated: “[the UK and EU] share the objective of achieving a high level of consumer protection and shall co-operate to that effect” and went on to provide that the parties must ensure that “effective and non-discriminatory measures” are taken to protect the interests of consumers in air transport “including ... compensation in case of ... cancellation or delays”.
81. Article 366 is far narrower and more specific. I do not think, therefore, that the decision in *Lipton* requires any different approach to s.29 – as it implemented Article 366 – to that I have taken above, although it is not necessary to reach a concluded view on this, in light of the conclusion I have reached even on the basis of Green LJ’s approach in *Heathrow Airport*.
82. There is some further support for the SoS’s position in the fact that when the UK complied with its obligations under this part of the TCA by enacting the 2022 Act, it did so in a way which is consistent with that position. Lord Pannick submitted that this is relevant, because it is permissible – in seeking to determine Parliament’s intention in giving effect to Article 366(1) via the very broad terms of s.29 – to have regard to the later statute which expressly complied with the obligation in that Article.
83. The relevant provisions are s.12 and s.70 of the Subsidy Control Act 2022. By s.12(1):

“A public authority—

(a) must consider the subsidy control principles before deciding to give a subsidy, and

(b) must not give the subsidy unless it is of the view that the subsidy is consistent with those principles.”

84. As I have already noted above, by s.70(1) & (5), a challenge to a subsidy decision is by way of application to the CAT, which must apply the same principles as would be applied by the High Court in determining proceedings on judicial review.
85. It is not in dispute that EUFRA 2020 was – so far as the implementation of the subsidy control provisions of the TCA was concerned – a temporary measure. Section 29(2) expressly recognised that ss.(1) was subject to any other provision which is enacted for the purpose of implementing the TCA. The subsidy control provisions in the TCA necessarily required specific further legislation, if only because of the obligation to establish an operationally independent body “with an appropriate role” in its subsidy control regime. No amount of automatic or mechanistic implementation of the TCA could result in the establishment of such a body, in the absence of further specific legislation.
86. The admissibility of later legislation on the same subject matter as earlier legislation, as an aid to construction of ambiguous provisions in that earlier legislation, was said by Lord Sterndale M.R. in *Cape Brandy Syndicate v Inland Revenue Commissioners* [1921] 2 KB 403, at p.413, to be clearly established. He said:
- “I quite agree that subsequent legislation, if it proceed upon an erroneous construction of previous legislation, cannot alter that previous legislation; but if there be any ambiguity in the earlier legislation then the subsequent legislation may fix the proper interpretation which is to be put upon the earlier.”
87. That statement was approved (and said to have been referred to with approval in a number of other cases) by the Privy Council in *Comr of Inland Revenue v Hang Seng Bank Ltd* [1991] 1 AC 306, per Lord Bridge of Harwich at p.324. The Supreme Court has recognised the existence of such a principle in *News Corp UK & Ireland Ltd v HMRC* [2023] UKSC 7; [2024] AC 89, per Lord Hamblen and Lord Burrows (with whom Lord Hodge and Lord Kitchen agreed) at §59, and per Lord Leggatt at §121-122.
88. In my judgment, the principle has particular force here. Section 29 EUFRA 2020 was enacted as a temporary measure in order to ensure compliance by the UK, as soon as possible following its departure from the EU, with its international obligations under the TCA. It did so by implementing in one general and blanket provision numerous aspects of a long and complex agreement. The precise way in which that would operate, in respect of each of the different parts in that agreement, was not spelt out. Instead, it was left to be spelt out in subsequent legislation. I consider that the intention of Parliament as to the precise way in which its obligations under the specific Articles concerning subsidy control are to be implemented – as set out in detail in the Subsidy Control Act 2022 – is an admissible and useful guide to interpreting the earlier, general, provision.

89. Accordingly, I accept the submission of the SoS (supported by Octopus) that the standard of review of the SoS's decision to grant subsidies in this case is subject to review on conventional domestic law principles of judicial review, and that the DC was wrong to conclude that the standard of review to be applied in this case included proportionality (save to the extent that proportionality can be said to be an aspect of the conventional domestic law principle of rationality, an issue which it is not necessary to address in this judgment).
90. I do not, however, accept the SoS's further contention, as expressed in his respondent's notice, that the standard of review is limited to rationality. Conventional domestic principles of judicial review include error of law and procedural fairness. A review on the basis of error of law may mean that the court will need to decide for itself whether the decision is right or wrong, as discussed in paragraph 95 below.
91. I nevertheless accept Mr Coppel's submission that this makes no material difference so far as Article 366(1) is concerned (in contrast to, for example, Article 367(2), which I consider below). Any argument that the SoS made an error of law as regards SC Principle (b) would have to be on the lines that the particular subsidy was not "proportionate ... to the objective" as that phrase is properly to be interpreted as a matter of law. Even if in a particular case the complaint could properly be characterised in that way, as opposed to a complaint as to the evaluation of the facts in applying the correct legal test, the legal question in issue is one that is open to different conclusions, on which different decision-makers might rationally disagree.
92. In such a case, the court would – on conventional principles – apply the rationality standard in determining the legality of the decision: see the decision of the House of Lords in *R v Monopolies and Mergers Commission, Ex parte South Yorkshire Transport Ltd* [1993] 1 WLR 23. The case concerned a challenge to a decision by the Monopolies and Mergers Commission that the acquisition by the applicant of certain bus companies might operate contrary to the public interest. The Commission had jurisdiction to consider the reference to it if the precondition – that the reference area (in this case, the county of South Yorkshire) was "a substantial part of the United Kingdom" – was satisfied.
93. The Commission's argument on this point of jurisdiction was recited by Lord Mustill (with whose judgment the other members of the court agreed) at p.32:
- "The respondents say that the two stages of the commission's inquiry involved wholly different tasks. Once the commission reached the stage of deciding on public interest and remedies it was exercising a broad judgment whose outcome could be overturned only on the ground of irrationality. The question of jurisdiction, by contrast, is a hard-edged question. There is no room for legitimate disagreement. Either the commission had jurisdiction or it had not. The fact that it is quite hard to discover the meaning of section 64(3) makes no difference. It does have a correct meaning, and one meaning alone; and once this is ascertained a correct application of it to the facts of the case will always yield the same answer. If the commission has reached a different answer it is wrong, and the court can and must intervene."



94. Lord Mustill's response to that argument was as follows:

“I agree with this argument in part, but only in part. Once the criterion for a judgment has been properly understood, the fact that it was formerly part of a range of possible criteria from which it was difficult to choose and on which opinions might legitimately differ becomes a matter of history. The judgment now proceeds unequivocally on the basis of the criterion as ascertained. So far, no room for controversy. But this clear-cut approach cannot be applied to every case, for the criterion so established may itself be so imprecise that different decision-makers, each acting rationally, might reach differing conclusions when applying it to the facts of a given case. In such a case the court is entitled to substitute its own opinion for that of the person to whom the decision has been entrusted only if the decision is so aberrant that it cannot be classed as rational...”

95. It is instructive to contrast a challenge to a decision in respect of the application of the SC Principles, with a challenge (in a hypothetical case) to a decision that a particular subsidy was not an unlimited guarantee within Article 367(2). That provides that a subsidy in the form of a guarantee of debts or liabilities of an economic actor “without any limitation as to the amount of those debts and liabilities” is prohibited. In any review of a public authority's decision to grant a subsidy on the ground that it involved an error of law because the subsidy was by way of an unlimited guarantee, there is a rather more clear-cut, binary, question of law. In such a case it would be for the court to determine that question. That is, however, very far removed from the question raised by a challenge to a decision in respect of SC Principle (b), and most of the other SC Principles, for example, whether a subsidy is conducive to achieving the relevant policy objective (SC Principle (c)), or whether the subsidy's contributions to achieving the objective outweigh any negative effects (SC Principle (f)).
96. I have so far considered the appellants' case in respect of the SoS's decision on the satisfaction of the SC Principles. The appellants also challenge the SoS's decision that there was no subsidy *to Octopus*. This conclusion was explained in the SCA: by analogy with EU State aid law, public authorities are able to establish that there is no subsidy *to a buyer* where an open and competitive process has been followed. As Octopus' bid had been proposed following such an open and competitive process, therefore, there was no subsidy *to Octopus*.
97. Although it may be said that the question, here, is one of law (was there a subsidy to Octopus at all?), the answer to it is dependent on the application of a test which involves the exercise of commercial judgment (the market economy operator test). While the test is an objective one, the law recognises that there is a wide spectrum of reasonable reaction to commercial circumstances in the private market; accordingly, in practice State aid will only be found where it is clear that the relevant transaction would not have been entered into, on the terms the State in fact entered into it, by any rational market operator: *Sky Blue Sports & Leisure Limited v Coventry City Council* [2016] EWCA Civ 453, at §16 and §23-29 (approving in particular §88(x) of the decision of Hickinbottom J at first instance in that case). Moreover, as noted at [92] above, even if error of law is asserted, where – as here – the question is one which is open to more

than one conclusion, on which different decision-makers might rationally disagree, so it is only if the decision is irrational that it would be set aside.

Ground 3(a): alleged errors in the application of SC Principles

*The DC's judgment in more detail*

98. The DC, applying the “light-touch” standard of review, concluded (at §252) that “the SoS was reasonably entitled to conclude that the M&A Process had been conducted as an “open, non-discriminatory and competitive” bidding process such that he could treat the only bid which had emerged from the process as a fair reflection of the value which the market placed on Bulb’s business in the prevailing circumstances”.
99. It went on, however, to conclude:

“In any event, we are not persuaded that the process conducted by the JEAs in conjunction with Lazard was not one which could be relied upon so as to treat the only bid which had emerged from the process as a fair reflection of the value which the market placed on Bulb’s business in the prevailing circumstances.”
100. This was, in turn, based on a number of factual and evaluative findings including, of particular relevance to this ground of appeal, those referred to in the following paragraphs.
101. Following the sending of a “teaser” letter, 19 parties signed non-disclosure agreements and were sent a “Phase-1 letter”, inviting indicative offers of how they would bid on the indicative transaction structures and whether an alternative transaction structure would be preferred.
102. At the outset of the sales process, it was recognised that Government funding was likely to be required in order to conclude a sale of Bulb. It became a major theme of the sales process that BEIS’ professional advisers expressed the view that some form of Government funding would be required, but the Government was concerned that if it was seen as too forthcoming on its readiness to provide that funding, it would not secure the most advantageous offer from potential purchasers. Accordingly, it was decided that the availability of Government support would not be pro-actively publicised to bidders at the outset, but it was left to bidders to formulate their requirements. The DC concluded that this was a reasonable approach, noting that it is only too easy to see what criticisms might have been made if the Government had opened the process with a clear statement of its willingness to provide significant financial support: §253(i). The DC also concluded that this was consistent with Lazard’s advice: §253(ii).
103. Consistently with this approach, potential bidders were not informed that Government support *would* be available, but bidders were left to identify the need for it themselves. At that point, the potential availability of Government support was made clear to bidders, with the onus still on them to identify the nature and extent of support they would require. A critical finding made by the DC was that Octopus was not given materially different information in this respect to that provided to other bidders or non-bidders: §61(iv) and 120(iii). In particular:

- (1) E.ON, following its early decision to exit the sales process, was told that Lazard anticipated a mechanism to address two of the concerns expressed by E.ON, which could only have been understood as some form of Government support addressing the current macro and commodity volatility, and the absence of a hedge: §39. Lazard concluded that E.ON's decision to exit the sales process was for reasons other than the lack of Government support, and E.ON was not re-approached because Lazard concluded (reasonably in the DC's view) that the concerns they had raised could not be addressed by Government support: §59(iii).
- (2) BGT was specifically asked to identify its requirements and conditions, whether from the Government or Ofgem. It was aware that the Government was open to possible support to enable a transaction, and that there was scope for discussion as to Government support specifically in relation to hedging: §45; §46(iii); §77(i). BGT had made it clear on numerous occasions that it was not interested in acquiring Bulb's business as a whole, but was interested only in taking some of Bulb's customers: §73.
- (3) Another bidder, code-named Tulip, having cited the lack of Government support as a reason for not bidding, was told by Lazard that many of the issues it had identified could be mitigated: first by exploring a period of "joint ownership", which the DC inferred was intended to refer to the Government sharing the economic risk for a period; and then by offering a possible arrangement to resolve working capital and hedge collateral issues: §70(v) to (vii). Notwithstanding this, Tulip decided not to pursue a bid, concluding that there was not a package of support that would change their position: §70(viii).
- (4) ScottishPower was told that Lazard was open to proposals that contemplated some kind of Government support package, but chose to exit the process notwithstanding that possibility: §65.

104. As to the sales process overall, the DC concluded that it was conducted (as it would have been in the case of a disposal by a prudent market operator) with the involvement of experts in the form of the JEAs and Lazard, but that BEIS had followed the process, receiving regular updates as it progressed, such that the SoS was in a position to – and did – reach his own informed assessment of the extent to which he could rely upon the outcome of the exercise, and the expertise of those conducting it: §251(i) to (iv).

***Standard of review in this court of the DC's factual and evaluative findings***

105. Whatever the appropriate standard of review of the SoS's decision, the standard of review in this court on appeal from the DC's factual and evaluative findings is clear: this court will not interfere with such findings unless compelled to do so. As put by Lord Reed in *Henderson v Foxworth* [2014] UKSC 41; [2014] 1 WLR 2600, at §67:

“It follows that, in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of

fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified.”

106. While there are particularly strong reasons for this approach where the trial judge has heard live evidence, it applies even where the court at first instance has relied solely on documentary evidence in judicial review proceedings: *R (Z) v Hackney London Borough Council* [2020] UKSC 40; [2020] 1 WLR 4327, per Lord Sales at §74, endorsing the approach in §67 of Lewison LJ’s judgment in the Court of Appeal in that case (set out at §56 of Lord Sales’ judgment).
107. As noted by Lewison LJ in *Fage v Chobani* [2014] EWCA Civ 5 at §114, this applies to findings of primary fact and to the evaluation of those facts and inferences to be drawn from them. He there summarised some of the reasons for this approach:
- “i. The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.
  - ii. The trial is not a dress rehearsal. It is the first and last night of the show.
  - iii. Duplication of the trial judge’s role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.
  - iv. In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.
  - v. The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).
  - vi. Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done.”
108. The fourth of these points is particularly apposite here. Unusually for a judicial review claim, as the DC pointed out at §20, the volume of evidence (the chronological bundle ran to eight double-sided volumes) was more akin to that commonly found in a Commercial Court trial, and the DC received extensive written and oral submissions on the inferences to be drawn from that evidence. In contrast, we have been shown only a small proportion of the documents that were before the DC.

***The appellants’ arguments: discussion and conclusions***

109. The appellants contend that errors of law were made by the DC in relation to the SC Principles in relation to the following matters: (1) the question whether the sales process was “open, non-discriminatory, transparent and competitive”; (2) the application and satisfaction of the principles specific to restructuring subsidies; and (3) (in their skeleton argument, at least) the role of Ofgem and the CMA.

***Alleged error of law in connection with the open, non-discriminatory, transparent and competitive sales process***

110. The appellants' main contention under this heading is that the sales process was flawed because other bidders or potential bidders did not receive the same information provided to Octopus. They submit that, once it was apparent that a sale of Bulb could not be achieved without Government support, the availability of such support ought to have been made known to all potential bidders on an equal basis. This was the focus of most of Mr Beal's oral submissions.
111. Before addressing that main contention, however, I deal with certain over-arching points of principle made in the appellants' skeleton argument in relation to this aspect of ground 3.
112. The appellants first contend that the DC erred in treating the issue for the court as being whether the SoS was rationally entitled to rely on the advice of the JEAs that the process was open, non-discriminatory and competitive and/or whether the process had produced a fair reflection of market value, whereas those were matters for the court itself to be satisfied of. This repeats the objection made under ground 2, which I have rejected above.
113. The appellants then contend that the DC was wrong to conclude that the SoS was entitled to rely on the JEAs' particular expertise, because this ignored the fact that the JEAs had no regard to the SC Principles. There was a "schism", Mr Beal submitted, between the person responsible for conducting the SCA (the SoS) and the person conducting the sales process (the JEAs and Lazard).
114. The DC, it is submitted, characterised the sales process as no more than a means of obtaining a "market value bid", and it was therefore wrong to rely upon the outcome of that sales process in concluding that the SC Principles were satisfied.
115. In particular, the appellants submitted that the DC misunderstood that "proportionality" and "market value bid" are distinct concepts, and lost sight of the need to show, not that the sales process resulted in a market value bid (which the appellants contend could plausibly cover a range of outcomes), but that it was sufficient to satisfy the SC Principles. For the latter purpose, it had to be shown that the subsidy was the "minimum necessary" (albeit it must not be too small, so as to be sufficient to incentivise the recipient to do what is required to achieve the objective), and the "least distortive" way to achieve the claimed public policy objective.
116. I reject these arguments for two main reasons. First, in the context of this case, a "market value bid", as it related to the task the JEAs performed, is synonymous with the "best bid available in the circumstances at the time". Second, and leaving aside for a moment the specific objections to the manner in which the sales process was conducted (addressed in detail below), the SoS and the DC were right to regard the outcome of the sales process as important evidence relevant to the question of whether the SC Principles were satisfied, notwithstanding that those conducting it were not experienced in the SC Principles, or had not purported to comply with them.
117. As to the first reason, as noted above, the statutory objective of the ESCA Order is to secure that energy supplies are continued at the lowest cost which it is reasonably

practical to incur, and that it becomes unnecessary – either by transferring the business as a going concern, or by rescuing the company itself as a going concern – for the order to remain in force for that purpose. As the DC recognised at §125, energy administrators owe duties, when selling the assets of the company over which they are appointed, to obtain the best price that the circumstances (as they reasonably perceive them to be) permit.

118. The paradigm method of achieving the best price that the circumstances permit is via a competitive sales process. The JEAs, in recommending the Octopus deal to the SoS, did so because it offered “the best value for money” of the options on offer (see the DC’s judgment at §90). The AOA referred to the sales process as establishing the value the market was willing to place on Bulb in the current environment, and the recommendation from the JEAs to approve the Octopus deal after an extensive negotiation process with Octopus “to secure the best terms in the circumstances.” In the table annexed to the SCA, in identifying the extent to which the SC Principles had been satisfied, the sales process is described interchangeably as demonstrating that the Octopus bid represented “the best terms currently available from the market” (see under Box E in the table), or that the calibration of the Octopus bid “can therefore be taken as the value that the market is placing on Bulb in the current sector environment.”
119. The second reason follows on from this: the appellants’ argument fails to recognise that, while identifying the best bid for Bulb in the circumstances at the time is important in determining whether the SC Principles were satisfied, it is a discrete element which properly fell within the expertise of the JEAs and Lazard.
120. Whether a subsidy was required at all, and if so what form it should take, depended upon what other market participants were prepared to bid for Bulb and, critically, on what terms. The minimum subsidy necessary to achieve the relevant objective was the other side of the coin from the best bid for Bulb that was available in the market in all the circumstances. This was not a case where a subsidy of any particular amount or form was available, and the appropriate counterparty could be identified through a simple auction process. There were numerous structures which Government assistance to Bulb could have adopted; and in the circumstances of this case, where a key element of support was to counteract extreme market volatility, the cost to the Government of each of them could only be estimated.
121. To take a straightforward example, if a particularly well-capitalised entity had seen sufficient strategic value and long-term benefit in acquiring Bulb, then it might have been willing to do so without the need for Government support to compensate for Bulb’s lack of hedging, or support of a lesser duration or extent than that which Octopus required. Whether such a bidder was out there or, if not, what bidders would require by way of Government support, could only be determined through testing the market via a sales process, conducted by those with appropriate expertise.
122. As such, I reject the contention that the DC misunderstood that proportionality and “market value bid” are distinct concepts. On the contrary, the SoS and the DC were entitled to place reliance on the outcome of the sales process as a key piece of evidence supporting the conclusion that the SC Principles were satisfied.
123. Moreover, it is important to note two further matters. First, the JEAs and Lazard were not left to conduct the process on their own: BEIS remained closely involved

throughout the process: see §251(iv) of the DC’s judgment, and the numerous references to BEIS’ involvement in the sales process throughout the judgment. Second, the SoS’s decision that the SC Principles were satisfied was not based solely on the outcome of the sales process. The SCA contains a detailed consideration of whether each of the SC Principles was satisfied, based not only on the outcome of the sales process, but also on the (albeit relatively limited) sense-checks carried out by the JEAs and the separate advice commissioned from Ernst & Young LLP.

124. One of the points made by the appellants in this part of their skeleton is that the DC fell into error as a result of misreading certain passages in the Commission Notice on the Notion of State Aid, dealing with the methods used to establish compliance with the “market economy operator” test. In particular, issue is taken with the DC’s comment that a “competitive, transparent and non-discriminatory and unconditional tender procedure” is not the only means of establishing such compliance, and that other means – such as benchmarking to other transactions – may be used. Reading the passages referred to by the DC as a whole, I do not accept that it wrongly stated their effect. Ultimately, however, this point goes nowhere: (1) the DC’s reference to these materials was relevant only in confirming the conclusion at §248 – which for the reasons set out above I consider was clearly correct – that the open, competitive and non-discriminatory bidding process played an “essentially evidentiary role”; and (2) the sales process – as opposed to any other methods, such as benchmarking other transactions – was in fact the principal evidence relied on by the SoS in determining that the SC Principles were satisfied. I also note that (save to the extent that it is relevant to the economic market operator test, which the SoS applied in determining whether there was any subsidy at all *to Octopus*) neither the Commission Notice nor the BEIS guidance to the 2022 Act has any direct application in this case.
125. I also reject the suggestion made in the appellants’ skeleton that the sales process was flawed because it did not comply with the requirement – derived from public procurement rules – that “key information needs to be made available to all participants at the same time, and the key criteria for selecting bids cannot be altered or amended in a material way during the course of the selection of the winning bid”. Those rules do not apply in this case, and the analogy with them is inapposite in a case where the key determinant of the nature, structure and amount of subsidy to be provided depends on what potential bidders for Bulb identified they would require in order to complete a purchase. In any event – as I address in more detail below – I am satisfied that the DC’s finding that essentially the same information was given to potential bidders is one it was entitled to reach.

***Was the process flawed?***

126. As noted above, the appellants’ core contention is that the process was unfair because bidders and potential bidders were not provided with the same information as to the availability of Government support as Octopus.
127. Mr Beal submitted that, once it was apparent that Government support would be needed to enable any sale to be achieved, the Government should have made clear what the two problems facing a sale were (the lack of hedging and negative balance sheet) and that it would provide support to deal with those problems – asking bidders to identify how they would deal with them, and the form and quantum of Government support required.

128. The problem with this submission is that it ignores important findings of fact by the DC, noted at [101] to [104] above, particularly that the potential for Government support *was* made clear to bidders (including those who had declined to proceed further where the reason for doing so was the perceived need for Government support), and that bidders *were* asked to identify the form and quantum of support they required.
129. Insofar as it is suggested that there is a distinction between the *potential* availability of Government support and the *actual* provision of support, I consider this, on the facts as found by the DC, to be a distinction without a difference: the DC found at §46(iii) that it was clear to BGT that there was scope for discussion as to HMG support, but that it was up to BGT – as with any other bidder – to identify the nature and quantum of support they were seeking. I note, as did the DC at §83, that when Government support for the Octopus bid was mentioned in the press in early August 2022, and BGT expressed concerns to Lazard about this, there was no suggestion by it that this was the first it had heard of the Government being open to discussions on support. These were findings which the DC was entitled to make.
130. Mr Beal acknowledged in oral submissions that BGT assumed that Government support would be necessary but said that it was never forthcoming. He submitted that BGT “...didn’t have the assurance that Government funding would be made available.” That submission is contradicted by the DC’s findings (noted above) that BGT had decided, and made clear to Lazard on numerous occasions, that it was not interested in acquiring Bulb, or all of its business, but was interested only in acquiring a *part* of its customer book, and that it had been made clear to BGT (as it was to other potential bidders) that it was for *them* to identify the support they would require in order to acquire Bulb. The appellants have not advanced any basis on which those findings of fact could be successfully challenged in this court.
131. The appellants cite Tulip as an example of a bidder that withdrew because it was not aware of the availability of Government support. That is also contradicted by the evidence and findings recorded at §70 of the DC’s judgment. The appellants’ proposition is based on Tulip having said, in an email to Lazard of 16 June 2022, that they believed that on-going Government participation in the business would be needed and they were not clear that the Government had the appetite for such a role. As one of the two surviving bidders from Phase I, Tulip had been told by Lazard of the possibility of Government support, and the potential for “adjustment mechanisms and the transitional services required”, and that there would be an opportunity for further engagement with BEIS and for meetings with the SoS. That was the same basic message given to others. In fact, when Lazard went back to Tulip on 16 June 2022, almost immediately, offering assurance that many of the issues identified could be mitigated, and again a short while later offering a possible arrangement to resolve working capital and hedge collateral issues, Tulip declined, saying “there is not a package of support that would change their position.”
132. The appellants make a further, and different, complaint of unequal treatment based on Lazard’s responses to Tulip after receipt of its email of 16 June 2022, namely that the information it was given as to a possible “period of joint ownership” with the Government, and the later reference to arrangements to resolve working capital and hedge collateral issues, had not been offered to BGT or ScottishPower. Given that there was no material that suggested the Government contemplated *ownership* of Bulb, the DC interpreted the reference to “joint ownership” as the Government being prepared to



share the economic risks of the business. More substantively, the DC found that by this stage Tulip was the only bidder apart from Octopus who had not “closed the door on a “whole book” transaction”. The appellants cannot show that these were findings it was not open to the DC to make. As such, it was not inconsistent with the requirement to hold an open, transparent and competitive sales process to refrain from giving the same information to others who had by this stage closed the door on a “whole book” transaction.

133. For similar reasons, I reject the submission that the details of the support that the Government was ultimately prepared to offer Octopus, following negotiation with it, should have been shared with other bidders. Those details were moulded to the nature and scope of support that Octopus’s bid required. This occurred once no other potential bidder remained in play (apart, potentially, from Tulip, which *was* given similar information). It cannot be right that, once that position is reached, each development in the structure offered to support Octopus’s bid had to be shared with those whose participation in the process had ended, for reasons other than the lack of Government support. I agree in this respect with the DC’s conclusion that, while the extent to which information provided to one bidder should be shared with others was “obviously a matter for commercial judgment”, it might be thought a rather strange sales process, if any offer made to one negotiating counterparty had to be shared generally, thereby impairing the offeror’s prospects of doing better with someone else. The objective of achieving the best bid obtainable in the circumstances from the market would not have been served by doing so.
134. The appellants contend that the process was flawed because the basis upon which only some of the parties who had withdrawn at Phase 1 were re-approached was the antithesis of a transparent process, based on objectively verifiable criteria and applied in a non-discriminatory manner. That contention was based on the fact that, at §59 of the judgment, the DC said that the basis on which parties were re-approached was “not entirely clear”.
135. That must be read, however, with the remainder of §59 of the judgment:
  - “(i) The selection was not made or influenced by BEIS or the SoS, but by the JEAs and Lazard, although BEIS supported the JEAs’ decision to approach “key potential bidders” as determined by the JEAs and their advisors.
  - (ii) Those selected were seen by Lazard and the JEAs as “key strategic participants” in the energy market, being “medium and large incumbents” (or as it was put in a later “M&A Process Update” entry, to “medium and large incumbents (Octopus, [Daisy], ScottishPower and Shell)”).
  - (iii) No approach was made to a non-bidder who had raised objections to the proposed acquisition which Lazard did not consider could be addressed by HMG support. E.ON was not re-approached for this reason. If it matters, that was an assessment reasonably open to Lazard in the circumstances set out at [39] above.

(iv) The selection criteria were to a significant extent judgmental, but the choice was not made on an irrational basis, but by reference to the two criteria in (ii) and (iii) above.

(v) The scope of the re-engagement exercise was influenced by commercial concerns that too wide a process risked alerting the market to the limited response to the Phase-1 process, which was a view it was reasonably open to Lazard to hold from a commercial perspective.”

136. Reading the paragraph as a whole, the DC concluded that the basis on which potential bidders were re-approached was indeed a reasonable one. It necessarily depended on an exercise of judgment, but that did not make it irrational. That judgment was exercised by those with expertise in this area, such that it was appropriate for the SoS to rely on it. I consider that was a conclusion the DC was entitled to reach.
137. The appellants also submitted that the SoS’s decision not to provide clarity to all bidders/potential bidders on the Government support available was contrary to Lazard’s advice. I do not accept this. The DC expressly found (at §253(i)) that Lazard supported the approach taken at the outset.
138. The appellants accept that was so, but point to what Lazard said in their Phase I Bid Review and Next Steps Recommendation on 14 April 2022 (quoted at §54 of the judgment). They point first to the statement that “in order to achieve a sale, HMG will be required to provide clarity on the measures it will take to provide bidders with comfort around the uncertainty surrounding future losses and associated working capital requirements.” That, however, is addressing what will need to be done in order to achieve a sale. It did not relate specifically to what information needed to be relayed to potential bidders in order to get them to the next stage.
139. They next point to bullet points under the heading “Engagement with BEIS and Ofgem”, in which it is said that “serious engagement required with BEIS and Ofgem to define how to make Bulb (as well as the broader energy supply market) an investable opportunity”. The second and third bullet points state: “Define in detail and propose transaction structures/de-risking mechanisms that can be explored with remaining bidders. Assuming further clarity is provided on the issues and areas of uncertainty flagged by bidders, re-test interest with parties that withdrew from Phase 1 citing these uncertainties in an effort to maximise competitive tension.”
140. I do not read anything in that paper, however, as being inconsistent with the strategy that was adopted, in particular making known the potential for Government support and leaving it to bidders to identify what they required by way of such support. The reference to defining proposed transaction structures “that can be explored with remaining bidders” is not, to my mind, a recommendation that it was for the JEAs/Lazard to communicate such structures to bidders, as opposed to the JEAs/Lazard engaging with BEIS so that they would be in a position to discuss such structures as and when proposed by bidders. Critically, Lazard continued to be at the heart of the process, and there is no material which indicates that it thought the steps taken thereafter were contrary to advice it had given.

141. Finally, specific complaint is made of the communications which took place with Octopus, when it was re-approached with a view to encouraging it to participate in Phase II. The information said to have been shared with Octopus that was not shared with the appellants consists of the following:
- (1) Octopus was told that if a bid was received that was higher than zero during Phase I, it would be entered into the Phase II process;
  - (2) The acquisition would be capable of being sanctioned on a cash free, debt free basis, with consideration of £1 being sufficient;
  - (3) Government stakeholders were lined up to support that.
142. The appellants rely on an email of 12 May 2022 to Octopus from Mr Quantock of KPMG (which Octopus had by this stage engaged to assist it). Mr Quantock relayed to Octopus a conversation that he had had with Ms Kotzeva of Lazard.
143. The DC made findings about this at §62 to §63:
- (1) It was likely that Ms Kotzeva had done no more than make reassuring noises that any bid would be sufficient to get into the next phase of the process (which was consistent with the decision already taken by the JEAs, on Lazard's recommendation, that all parties that submitted an indicative bid would progress to Phase II);
  - (2) Any other interpretation did not make sense: if it was to be understood as meaning any bid of net positive value after taking account of Bulb's liabilities, then that set a far higher hurdle than Octopus's successful bid; if it was to be understood as meaning that the minimum necessary was a bid of £0, after the Government had taken care of all of Bulb's liabilities, then Octopus cannot have taken that seriously, in light of what it in fact bid;
  - (3) The conversation in any event took place 2 days after Octopus had sent a letter expressing its desire to re-engage in the sales process – so Lazard cannot have thought “any great carrot” was required to move matters along;
  - (4) BGT had progressed to Phase 2 without having to provide any number at all;
  - (5) Accordingly, the DC was not persuaded that the conversation involved any material communication of additional information which went beyond that provided to the appellants.
144. The appellants contend that the DC's evaluative findings on this issue are demonstrably wrong, and were not open to them. Mr Beal submitted that the email demonstrates that Octopus were being told “that Government [support] will be delivered”, and that there is no evidence whatsoever that the appellants were given that information.
145. I reject that submission, which ignores the specific findings the DC made about the conversation referred to in this email, as noted above. Insofar as the appellants' submission is based on the reference to the Government being “lined up”, what the email records is that Mr Quantock was told that Government stakeholders were lined up “and agree to this timetable”. The DC's finding (at §61(x)(e)) was: “It is clear to us

that the question and response was concerned with the tight timetable, rather than any wider import”.

146. It is not enough for the appellants to assert that the broad finding – that Octopus was not given any more information than the appellants – is “demonstrably wrong”. That finding is based on the DC’s analysis of the evidence, and the more granular findings about specific passages in the documents as noted above. Its reasoning is compelling but more importantly, so far as the test on this appeal is concerned, the appellants have not satisfied me that there is a basis for interfering with it.

### *Conclusion*

147. For the above reasons, I would dismiss this part of the third ground of appeal. The DC was entitled to reach the view it did that the SoS was reasonably entitled to conclude that the sales process was open, non-discriminatory, transparent and competitive. That is so whether applying the light-touch proportionality review referred to by the DC, or conventional domestic grounds of judicial review (i.e. even without applying a proportionality standard of review).

### Ground 3(b): alleged errors relating to restructuring subsidy

148. By Article 366(2), the conditions set out in Article 367 (where relevant) are to be applied. Article 367(3) relates to subsidies for “restructuring an ailing or insolvent economic actor.” One of the conditions is that the “economic actor or its owners, creditors or new investors shall contribute significant funds or assets to the cost of restructuring.” By Article 364(3), however, subsidies granted on a temporary basis “to respond to a national or global economic emergency shall be targeted, proportionate and effective in order to remedy that emergency”, and are exempt from Article 367.
149. The DC concluded – at §275 of the judgment – that the subsidy was clearly temporary. There is no appeal against that conclusion. At §276 it considered the remaining elements in Article 364(3), as follows:

“(i) The SCA concludes that the severe economic disruption and volatility caused by the “Russian invasion of Ukraine in February 2022” constitutes a national or global economic emergency, and that the subsidies provided to HiveCo constitute a “targeted, proportionate and effective” response in order to remedy that emergency.

(ii) We are satisfied that this was an assessment reasonably open to the SoS. While the Claimants point to the fact that Bulb had entered into SAR before the Russian invasion, it is clear the economic consequences of the invasion had a very significant impact on the support required for Bulb to exit the SAR, and that the support provided was a response to that state of affairs.

(iii) Finally, E.ON suggested that Article 364(3) could not apply to a subsidy given only to one market operator or undertaking. However, there is nothing in the language of Article 364(3) which would support such a limitation, nor were we referred to

any material which was said to fall within Article 32 of the VCLT and which was said to support that interpretation.”

150. The appellants accept that the impact on energy prices caused by the Russian invasion of Ukraine was a national or global economic emergency. They contend, however, that the DC mischaracterised, and therefore failed to deal with, the appellants’ principal submission, namely that a restructuring subsidy to an ailing or insolvent entity could not be said to be “responding” to a national or global emergency merely because that emergency had some causal relationship with the failure of that enterprise. In the present case, Bulb’s insolvency preceded the Russian invasion of Ukraine, so that the most that could be said was that the emergency had some causal link to the restructuring.
151. They contend that it is necessary to apply a restrictive reading of “respond to a national or global economic emergency”, such that it is applicable only where the subsidy is offered to all those affected by, or to specific sectors or classes of enterprises affected by, the emergency (an obvious example being the subsidies given to retail and hospitality businesses during the Covid pandemic).
152. Mr Peretz KC submitted that it cannot be right that where a business already has financial problems, and those are worsened by a national or global economic emergency, “you can freely give a restructuring subsidy to that business in reliance on Article 364(3)”. That would be viewed, not as a response to the emergency, but a response to the particular condition the business finds itself in, albeit exacerbated by the emergency. He said that it must be borne in mind that restructuring subsidies can have a distortive effect on competition.
153. I do not accept these submissions which focus too narrowly on the problems that Bulb, the entity, faced. The economic emergency which the SoS was seeking to address was that which faced the 1.5 million customers of Bulb. The point is explained in the SCA as follows:

“The national/global economic disturbance caused by the Russia/Ukraine situation has transformed the extent of support required to enable the transaction to complete and for Bulb’s customers eventually to be taken on by a new supplier and hence end the SAR. As stated above, without intervention by HMG, Bulb customers may be left without energy supply (due to their inability to charge prepayment meters) and the significant energy costs of its customers (distributed to other suppliers) could result in destabilisation of other energy suppliers, with wider and more serious ramifications for consumer confidence in the energy retail market.”
154. The nature of the special administration regime is also an important factor in this respect. It is used, in contrast to administration under Schedule B1 of the Insolvency Act 1986, in the case of businesses providing critical services, where maintenance of supply is essential (including, in addition to energy companies, entities involved in water supply, the running of the railways, air traffic control, banking, and payment and electronic money systems). As already noted, the objective of an ESCA Order is to ensure the continuation of supply at the lowest cost which it is reasonably practical to

incur. Once it was determined that it was not possible to achieve the SAR objective by rescuing the company as a going concern, and that this would need to be achieved through an ETS, then Bulb the entity ceased to be relevant, except as the conduit through which funding was provided.

155. According to an exit strategy paper from March 2022, prior to the invasion of Ukraine, although the possibility of Government support was envisaged, the Government had hoped for a “clean exit” from the process, and its “initial steer” to Lazard had been that it would not actively encourage structures which involved Government support. The paper continued:

“However, in the context of the recent Russia/Ukraine escalation (and resulting wholesale price increases and volatility) we consider it much more likely that we will need to utilise such structures.”

156. I consider, in light of the above factors, that the SoS’s decision that the subsidy responded to a national or global economic emergency was one that he was fully entitled to make. Accordingly, I would dismiss the appeal on that ground. That makes it unnecessary to address the final part of this ground of appeal, namely whether the conditions in Article 367 were satisfied.

Ground 3(c): alleged error in relation to the role of Ofgem and the CMA

157. In their skeleton argument, the appellants also contended that the DC erred in law in finding that the SoS was reasonably entitled to conclude that the subsidy had minimised negative effects on competition because of “the review by Ofgem and the CMA’s decision not to call in the transaction.” That was an error, it was contended, because both the CMA and Ofgem were considering merger control-specific questions unrelated to the question of compliance with the SC Principles.
158. No mention was made of this point in oral argument. I would in any event reject it. The relevant part of the DC’s decision is §269. (The appellants’ skeleton also refers to §202, but that was in relation to the Public Law Grounds, in respect of which no appeal is made.)
159. The DC was here referring to a passage in the SCA, specifically addressing the SC Principle that the subsidy is designed to achieve its policy objective “while minimising any negative effects on competition or investment within the UK”. It was noted in the SCA that by enabling Bulb to remain in the market, that had maintained competition and helped restore confidence in challenger and green energy suppliers. It then stated: “The proposed transaction is in the process of being reviewed by Ofgem and has been considered by the CMA’s mergers intelligence function”.
160. The DC’s conclusion, in §269, was that it was not persuaded that the SoS’s conclusion that the subsidy complied with this particular SC Principle was not reasonably open to him, noting that “the SoS was entitled to have regard to the review by Ofgem and the CMA’s decision not to call in the transaction in reaching that decision.”
161. I consider the DC was plainly right in this respect. The fact that neither Ofgem or the CMA was concerned to assess the process which led to the decision to grant the subsidy

does not disable the SoS from taking some comfort, in respect of the decisions he had to make, from those matters.

**Conclusion**

162. For the above reasons, while differing in some respects from the reasons given by the DC, I would dismiss this appeal.

**Lord Justice Dingemans**

163. I agree.

**Lord Justice Underhill**

164. I also agree.