Neutral citation [2006] CAT 19

IN THE COMPETITION APPEAL TRIBUNAL

Case: 1062/1/1/06

Victoria House
Bloomsbury Place
London WC1A 2EB

8 September 2006

Before:

Marion Simmons QC (Chairman)
Peter Clayton
David Summers

Sitting as a Tribunal in England and Wales

BETWEEN:

THE LONDON METAL EXCHANGE

Appellant

-and-

OFFICE OF FAIR TRADING

Respondent

Mr Mark Hoskins (instructed by Mayer, Brown, Rowe & Maw LLP) appeared for the Appellant

Mr Daniel Beard (instructed by the Solicitor to the Office of Fair Trading) appeared for the Respondent

Heard at Victoria House on 28 June 2006

JUDGMENT: COSTS

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I INTRODUCTION

1. The London Metal Exchange ("the LME") lodged an application for costs in this case on 2 June 2006. The background to the application is that the OFT had, on 1 July 2003, received a complaint from Spectron Group plc ("Spectron") about allegedly predatory and discriminatory pricing by LME in the provision of its electronic trading platform for non-ferrous base metals contracts, "LME Select". According to paragraph 6 of the OFT's Reasons for Direction, Spectron is the provider of an electronic trading platform, called "eMetals", in competition with LME Select.

2. On 27 February 2006 the respondent, the Office of Fair Trading ("OFT"), notified LME of an interim measures direction ("the Direction", "the IMD") pursuant to section 35(2) of the Competition Act 1998 ("the Act"). By the Direction, which was signed by the OFT Chief Executive Officer, the OFT directed LME not to increase the hours of trading available on its electronic trading platform, LME Select, outside of the hours of 07:00 to 19:00 (London time), which were its then current trading hours.

3. As set out in paragraphs 6 to 15 of the OFT's Reasons for the Direction, also given on 27 February 2006, the Direction was given by the OFT in the context of its investigation, initially pursuant to section 305 of the Financial Services and Markets Act 2000 and subsequently pursuant to section 25(5) of the Act, into behaviour of LME alleged to amount to an abuse of a dominant position, contrary to Article 82 of the EC Treaty.

4. On 26 April 2006 LME lodged a notice of appeal with the Tribunal against the decision to give the Direction ("the Decision"). By its notice of appeal the LME sought the setting aside of the Direction and an order that the OFT pay the LME's costs of the appeal.

5. By a letter sent to the parties on 3 May 2006 the Registrar of the Tribunal fixed the first case management conference in this appeal for 15 May 2006. Also on 3 May 2006 the OFT wrote to the Registrar to "summarise the current position in regard to the Direction given to the LME". According to that letter:

> "On 27 April 2006, the OFT contacted both LME and Spectron to inform them that the OFT was of the provisional view that the IMD is no longer appropriate and, accordingly, that it should be removed. On 2 May 2006, the OFT set out in writing its reasons for this provisional view to LME and Spectron, giving them until 5pm on Tuesday 9 May 2006 to make any representations…
>
> In summary, the OFT has kept the IMD under review since it was put into place on 27 February 2006. Since this date the OFT has received a substantial amount of evidence and submissions from the LME, Spectron and a number of customers of the LME and Spectron. The OFT has also held a number of meetings with interested parties, including with the LME, Spectron, the Financial Services Authority and representatives of a trade association. After careful consideration, the OFT is minded to withdraw the IMD on the grounds that its provisional view is now that it does not consider it necessary as a matter of urgency either to prevent serious irreparable damage to Spectron or to protect the public interest, to maintain the IMD in place.
>
> The OFT proposes to make a decision as to whether the IMD should be removed as soon as it has considered any representations from the LME and Spectron after 9 May 2006 and the OFT will ensure that the Tribunal is kept informed of how this matter progresses.
>
> I note from your letter today…that a case management conference has been scheduled for 15 May 2006. Having in mind that the provisional view of the OFT is that the IMD should be withdrawn, if that provisional view is maintained in a decision, it would clearly have a fundamental impact on the appeal and, indeed, the need for any appeal…"

6. On 11 May 2006 the Tribunal Registry wrote to the parties indicating that it would be helpful for the Tribunal to receive an indication in writing as to the up-to-date position by Friday 12 May 2006 so that the Tribunal might consider the agenda for the case management conference fixed for 15 May 2006.

7. On 11 May 2006 the OFT wrote to the Registrar stating:

> "On 9 May 2006 the OFT received representations from both the LME and Spectron. At present, the OFT is considering these representations and is proposing to reach and announce its final decision on whether or not to withdraw the IMD on the morning of Monday 15 May 2006. Given the fact that this decision is clearly going to impact on the appeal and that the LME would, no doubt, wish to consider its position after the announcement of this decision, the Tribunal may wish to postpone the case management conference until the week commencing 22 May…"

8. Although the LME's solicitors also indicated on 12 May 2006 that, in the light of the OFT's indications given on 11 May 2006, they would be content for the case management conference to be adjourned the Tribunal was not persuaded, at that stage, to adjourn the date for the case management conference.

9. At 11.15am on 15 May 2006 the OFT notified the Tribunal and the LME that it had, that day, taken a decision to withdraw the Direction given to the LME on 27 February 2006. The OFT's letter attached a "summary of reasons for withdrawal of the direction".

10. At the case management conference on 15 May 2006 the OFT indicated that it would be providing "full reasons" for withdrawing the Direction. The LME indicated that in the light of the OFT's decision to withdraw the Direction it would seek the permission of the Tribunal to withdraw its appeal against the Direction and that it wished to apply for its costs. The Tribunal ordered that the LME lodge its application for costs by 2 June 2006, that the OFT submit its reply by 23 June 2006 and that a hearing be provisionally listed for 28 June 2006.

11. In accordance with the Tribunal's Order of 15 May 2006 the LME lodged its application for costs on 2 June 2006. Its grounds for seeking an order for costs are set out at paragraph 10 of the application:

> "(a) The OFT failed to undertake adequate enquiries before adopting the Direction on 27 February 2006. If it had undertaken such enquiries, it would never have adopted the Direction.

(b) Further or alternatively, having adopted the Direction on 27 February 2006, the OFT failed to make appropriately expeditious enquiries prior to the expiry of LME's time for appeal on 27 April 2006. If the OFT had undertaken such enquiries expeditiously during the relevant period, it could have withdrawn the Direction before 27 April 2006, thereby obviating the need for the LME to lodge its appeal."

12. The circumstances giving rise to the application for costs are somewhat unusual. First, the Direction was the first direction given by the OFT pursuant to section 35 of the Act although that Act came into force almost six years earlier, on 1 March 2000. Secondly, having given the Direction on 27 February 2006, the OFT immediately thereafter commenced a detailed investigation into the facts and matters relied on in support of the Direction and then withdrew the Direction two and a half months later, without having reached any conclusion in respect of its underlying investigation of the LME's conduct under the Act.

13. Both parties, and in particular the LME, made extensive reference at the hearing of this costs application to the events leading to the imposition by the OFT of the Direction on 27 February 2006 and to the events subsequent to 27 February 2006 leading to the withdrawal of the Direction on 15 May 2006. It is necessary to have an appreciation of this background in order to understand the parties' submissions and we therefore set it out in some detail.

II THE EVENTS LEADING UP TO THE DIRECTION

14. On 1 July 2003 Spectron, through its then solicitors Jones Day Gouldens, submitted a complaint to the OFT alleging infringements of the Chapter II prohibition of the Act by the LME. The complaint alleged, *inter alia*, that the LME was abusing a dominant position by predatory and discriminatory pricing in respect of LME Select.

15. On 8 August 2005 the industry publication "Metal Bulletin" reported that LME was consulting its members on extending its trading hours on its Select electronic trading platform with the possibility of opening at 1:00am to capture trading in Asia.

16. On 16 August 2005, as part of its investigation of Spectron's complaint, representatives of the OFT had a meeting with representatives of Spectron, including Spectron's Chief Executive. The OFT's internal note of that meeting, disclosed to the LME, states that Spectron told the OFT that Spectron did not charge fees for its voice trading activities. Spectron told the OFT that its eMetals business had fallen drastically since the last meeting between Spectron and the OFT in 2004 and that LME Select's pricing was a significant factor. Spectron also discussed the possibility of refocusing its business with the OFT. The OFT's note records:

> "Spectron could refocus its business in that it could serve NYMEX (which also trades metals). However, NYMEX is not located in the UK. Spectron is also focusing on its overnight market where it picks up business from Asia. However, this aspect of Spectron's business may also be under threat as it is believed that LME will start to run trading overnight as well. Also, Spectron is focussing on its voice trading. Spectron believes that once LME takes business away from the overnight trading, Spectron eMetals will go out of business."

17. The OFT's note also records that the OFT requested up-to-date figures from Spectron to demonstrate how business had declined on eMetals and that Spectron would need to keep the OFT case team informed of developments.

18. On 14 November 2005 Frances Warburton of the OFT emailed Spectron and asked the following questions:

> "First, could you please provide a short update with regards to the status of your overnight operations for trading LME metals contracts. Is this still operating and do you currently plan to continue with it for the time being? We are aware that our investigation is ongoing, partly due to the complexity of the issues raised, and we would like to stay informed as to the potential effect on Spectron of the alleged behaviour.
>
> Second, it would be very helpful to understand how Spectron operates with respect to other equivalent exchanges, where you do not consider you have been excluded. It would be useful to understand how these arrangements differ from, or are similar to, how Spectron operates with regards to LME contracts."

19. It appears, from an email exchange culminating on 15 December 2005, that Spectron replied to these questions by no later than the end of November 2005. The Tribunal has not, however, seen the reply.

20. On 23 November 2005 LME issued an announcement to its "Category 1 and Category 2 Members" giving notice that with effect from 1 March 2006 the LME would open at 0100hrs London time. The LME was seeking required regulatory approvals for members to be able to use LME Select in various Asian countries and Australia. On 24 November 2005 "Metal Bulletin" made that information publicly available in an article entitled "LME to extend Select hours with eye on Asia".

21. On 15 December 2005 Frances Warburton of OFT emailed John Evans of Spectron stating, *inter alia*:

> "The comment made [by Spectron]…that "Spectron continues to keep its LME screen alive in the hope that the OFT will take action that gives us some redress for the damage to our business and allows us to try to rebuild it" seems to represent a somewhat different view than what we had understood from our meeting with you…on 16 August.
>
> Our understanding from the August meeting is that Spectron considered that since liquidity had moved from Spectron to LME, it would be very difficult for Spectron to re-enter the daytime trading market.
>
> If Spectron considers that the expansion of LME into overnight trading seriously threatens your future ability to re-enter the main daytime market (as well as being a serious threat to your overnight operations), this might raise the question of the suitability of Interim Measures. You will probably already be aware of this provision, but I have provided some further information in the note attached to this email.
>
> However, your consideration of how to proceed should take into account the level of evidence, in terms of harm to Spectron (or the public interest) that you would need to provide in order for interim measures to be realistically considered. Any further submission should also be made in the context of the OFT's continued assessment of how to take forward the main case arising from your complaint (including examining whether any further action lies within the Office's administrative priorities)."

22. On 5 January 2006 John Evans of Spectron sent an email to Frances Warburton of the OFT stating, *inter alia*:

> "Let me clarify our position for you. Your understanding from our meeting in August was correct in that with the LME charging the same to aggress as to initiate they have driven us out of the daytime trading market. However, our screens are still operational on dealers [sic] desks (at present) although remain unused as we cannot compete with the LME pricing structure. The longer this goes on the more difficult it will be to re-establish a screen trading relationship once the LME are forced to compete on more reasonable terms. However, the problem becomes compounded if dealers have a need for desk space and therefore remove our screen because it is not being used, or if we remove our screen because it is not being used, or if we remove them because we have been driven out of the business. Once our screens are off their desks we may not be able to get them back on again.
>
> At present we still run the servers that drive the screens both during the day and night markets as the revenue we receive from the night trading partly covers our costs. We have certainly been running this area of business at a loss for at least twelve months. We keep the system operational in the hope that your findings back up our claim for unfair trading by the LME. However, if the LME extend their practices into night time trading I can see we will have little alternative but to shut the screen completely, which of course is exactly what the LME are trying to achieve. Naturally, we can only continue working at a loss for a limited time in the hope that the OFT will find in our favour.
>
> The LME have declared their intention to extend their trading hours as from 1st March 2006. As things stand I imagine we will be forced to close our screen soon after. Naturally we would request that you use your powers under the Interim Measures to stop the LME from extending their hours until the OFT has completed its original investigations. Whether we are able to continue to offer a full 24 hour service will then depend on night time market activity and how long the OFT take to complete the very thorough investigations you are undertaking. The LME's actions are directed at Spectron in an attempt to drive us out of business and therefore create a market monopoly for the LME which cannot be in the public interest.
>
> If you need further information you need [sic] to enable you to grant our suggested interim measures please do not hesitate to ask."

23. On 10 January 2006 Frances Warburton sent a letter in reply to the email from John Evans of 5 January 2006 referred to above. The letter stated as follows:

"Thank you for your email of 5 January. In order for the OFT to consider granting interim measures in this case, we would need further evidence that the damage to Spectron from the LME extending Select's trading hours would be both serious and irreparable (or that interim measures are required to protect the public interest). I invite you to consider the guidance that I sent with my last email, in particular information on what might constitute serious and irreparable damage in the OFT Enforcement guidelines on our website.

Some issues you may wish to consider include:

1. Any further evidence to support the view that the extension of Select's trading hours will force Spectron to close its screens completely.

2. Given the *current* situation, what is the likelihood that Spectron could re-enter the daytime trading market and re-establish (at least some of) its lost liquidity?

3. If Spectron were to exit the market completely (following LME's extension of its trading hours), what is the likelihood that Spectron could re-enter the daytime trading market and re-establish (at least some of) its lost liquidity? A question here is whether the extension of LME's trading hours would create a significant disadvantage for Spectron in re-entering the market, compared to the current situation.

In addition, a number of questions arise from your recent email:

…

2. You refer to the possibility of dealers having a need for desk space and therefore removing Spectron's screens because it is not being used. Do you have any evidence that dealers have removed your screen from their desks or that they have any intention of doing so now? (…)

4. Our understanding from our August meeting was that you considered that because liquidity had shifted from Spectron to Select, it would be very difficult for Spectron to re-enter the daytime trading market. Can you please explain what measures could be introduced (by Spectron, the OFT or LME) such that Spectron could regain (at least some of) the lost liquidity on the assumptions that the OFT did conclude its investigation and find LME to have abused its dominant position?"

24. The covering email stated, "Please note the tight timescale that may exist here, as the OFT would be required to consult LME on any proposals for Interim Measures."

25. No direct reply to that email, if there was one, has been disclosed.

26. The Guidelines referred to in the OFT's letter to Spectron dated 10 January 2006 are the OFT's guidance entitled *Enforcement* (OFT 407, December 2004) ("the *Guidance*"). Part 3 of the *Guidance* concerns interim measures. As to the requirement of serious and irreparable damage, the *Guidance* states (footnotes omitted):

> "**3.3** The OFT may give interim measures directions before it has completed its investigation of the suspected infringement if:
>
> - the OFT has begun an investigation under section 25 of the Act and not completed it (but only so long as the OFT has power under section 25 to conduct that investigation), and
>
> - the OFT considers that it is necessary to act urgently either to prevent serious, irreparable damage to a particular person or category of persons, or to protect the public interest.
>
> **3.4** The circumstances in which the OFT has power to conduct an investigation under section 25 of the Act are described in the competition law guideline *Powers of investigation* (OFT 404). Broadly the OFT has this power where there are reasonable grounds for suspecting that an agreement falls within Article 81 or the Chapter I prohibition, or that there has been an infringement of Article 82 or the Chapter II prohibition.
>
> **3.5** What constitutes serious damage is a question of fact and will depend upon the circumstances of each case. However, damage may be serious where a particular person or category of persons may suffer considerable competitive disadvantage likely to have a lasting effect on their position. Serious damage is likely to include significant financial loss to a person (to be assessed with reference to that person's size or financial resources as well as the proportion of the loss in relation to the person's total revenue), and significant damage to the goodwill or reputation of a person might also constitute serious damage.
>
> **3.6** Irreparable does not mean that a person must be threatened with insolvency, though this will generally suffice. Less extreme forms of serious damage may still be irreparable, in so far as they cannot be remedied by later intervention. **Serious** and **irreparable** damage are cumulative, though inter-related, requirements. Thus, serious damage which is not irreparable will not suffice. The serious, irreparable damage must be shown to result from the alleged anti-competitive behaviour.

3.7 The OFT may consider that it is necessary to act urgently to protect the public interest, for example, to prevent damage being caused to a particular industry or to consumers as a result of the suspected infringement. It may also take action to prevent damage to competition more generally.

3.8 Interim measures directions may be given by the OFT on its own initiative or after receiving a request, provided that the tests in paragraph 3.3 above are satisfied and that the circumstances in paragraph 3.9 below do not apply. Any person requesting an interim measures direction should provide as much evidence as possible, demonstrating that the alleged infringement is causing, or is likely to cause, serious, irreparable damage or that it is necessary that the OFT act to protect the public interest. Such a request should also indicate as precisely as possible the nature of the interim measure sought.

3.9 Where the OFT's investigation under section 25 of the Act concerns an agreement, the OFT may not give interim measures directions where a party to the agreement has produced evidence to the OFT that, on the balance of probabilities, satisfies the OFT that the agreement is exempt from the Chapter I prohibition as a result of section 9(1) of the Act, or that the prohibition in Article 81(1) is inapplicable because it satisfies the conditions in Article 81(3), as appropriate."

(Emphasis in the original.)

27. On 2 February 2006 Spectron's solicitors, Messrs Maitland-Walker, sent an "application for interim measures" to the OFT on behalf of Spectron. Counsel for the OFT referred us to the following extracts from that application:

> 2.2 "Page 2 of the IM Bundle contains a spreadsheet detailing total revenues, costs and operating profits or losses of Spectron in operating eMetal for the fiscal year 2004/05. It will be apparent from this that in 2005, eMetal generated gross revenue of [redacted], total costs of [redacted] thereby suffering a loss of [redacted] for the year.
>
> 2.3 Page 3 to 5 of the IM Bundle gives the actual monthly trade revenues for 2004/05 broken down between day and night (i.e. evening) trades expressed in US Dollars. It will be noted from the table at page 3 of the IM Bundle that since August 2005 daytime trades have fallen substantially. In reality the figures for daytime trade is even lower than that shown and probably zero. Income from evening trades made overnight are left on the screen and completed soon after daytime trading starts so that they are not strictly daytime trades. The only remaining daytime trades would be those carried out on a bank holiday when Select is not operating.

2.4 Spectron has managed to retain eMetal offering a service to customers based in the Far East for "evening trades" (i.e. 6.00pm and 7.30am GMT). LME has not as yet offered an evening trade service.

2.5 Even with the evening trade, eMetal is loss making. If the evening trade revenue is lost, eMetal will have little or no revenue at all and will be unable to sustain the ongoing direct cost of maintaining the eMetal [electronic trading platform; "ETP"] currently running at [redacted] per annum.

2.6 Spectron has maintained and intends to maintain eMetal on the basis that when LME's anti competitive behaviour has been brought to an end through the intervention of the OFT, Spectron will be able to re-enter the daytime trade market from the foothold which it retains in the supply of ETP for evening trades.

2.7 Spectron believes the LME intends to launch an evening trades service through Select from 1st March 2006. The terms upon which the service is to be offered are not stated but will presumably be no less advantageous to traders than those currently offered for daytime trades. If LME do proceed to offer evening trades on Select, it is probable that the little business remaining to eMetal will be lost to Select, thus forcing Spectron to exit the market for ETP in Metals entirely. If Spectron were forced to close down eMetal this would make it much more difficult for Spectron to re-enter the market if and when LME is required to bring an end to the abuse of its dominant position.

(…)

Serious and Irreparable Damage

3.1 Spectron's main business is as an energy broker. It has developed a very successful ETP for energy trades which is now one of the largest in the world. Having established this expertise in operating ETPs, Spectron has invested considerable resources in the development of ETPs in relation to other commodities including metals.

3.2 Whilst LME's anti competitive conduct is unlikely to imperil Spectron's financial stability, it has and will continue to have a significant impact on Spectron's ability to develop eMetal. This will inevitably have a knock-on effect in relation to Spectron's ETP initiatives in other commodity markets.

3.3 LME's anti competitive conduct has already resulted in serious damage to Spectron in eliminating it as a competitor for ETP daytime trades. If LME

extends its anti competitive behaviour to ETP evening trades, this is likely to force Spectron out of the market for ETP in the metals market entirely.

3.4 Credibility and close business relationships are of critical importance in the development of ETPs and commodity trading in general. If Spectron is forced out of the metals ETP market, as will certainly occur if LME extends its anti competitive predatory pricing behaviour to evening trades, it will be extremely difficult, if not impossible, for Spectron to re-enter the market."

28. Having received Spectron's application for interim measures Frances Warburton of the OFT emailed Diarmuid O'Hegarty and Alex Morley of the LME on 7 February 2006 stating:

> "As discussed, I am sending you some general information on Interim Measures, as we are considering an application for Interim Measures with regards to your planned extension of trading hours for Select on 1 March 2006. We will be writing to you shortly regarding this application. The relevant provision in the 1998 Competition Act is section 35. Further information on Interim Measures can be found in Chapter 3 of the Enforcement guideline…"

29. On 13 February 2006 the OFT served the LME with a notice proposing interim measures directions under section 35 of the Act and required the LME to make any representations to the OFT in that regard by 5.00pm on 20 February 2006. The OFT indicated that an extension to the deadline for making a response to the notice would only be considered if the LME undertook not to make any changes to the business practices that were the subject of the proposed directions.

30. The notice served on the LME on 13 February 2006 stated, *inter alia*, as follows:

> 23. "To date, LME Select has not operated such as to cover early morning Asian trading. This is the only segment in which Spectron continues to have any significant volume of trading on its electronic platform. Spectron, in its application for interim measures directions to be given to LME, has indicated that it believes that if LME extends the trading hours on LME Select to cover early morning Asian trades, this is likely to cause a migration of Spectron's trading volume to LME Select, with the consequent elimination of any provision by Spectron of an electronic platform for the exchange-based trading of non-ferrous base metals contracts. On the basis of all of the available evidence the OFT considers this concern to be well-founded.

24. In circumstances where Spectron is the only operator competing with LME in the provision of electronic platforms for the exchange-based trading of non-ferrous base metals, the OFT considers that the elimination of Spectron is not in the interests of consumers, or in the public interest.

25. Moreover, Spectron has indicated in its application that if it is forced out of providing an electronic trading platform in the market, it will be extremely difficult, if not impossible, for it to re-establish a viable electronic trading platform at some point in the future. There are a number of factors to support this, including the reputation damage to Spectron with its customers, the cost and difficulty of re-introducing an additional trading screen to brokers' desks and the overall difficulty of overcoming the reputation effects of the alleged predatory behaviour. The OFT considers that these are credible concerns, and that they support the view of the OFT set out above that the elimination of Spectron is not in the interests of consumers, or in the public interest.

(…)

30. The OFT considers that if Spectron is forced to exit the market for the provision of platforms for the exchange-based trading of non-ferrous base metals contracts, this constitutes a considerable competitive disadvantage. There can be no greater competitive disadvantage than being forced, by the abusive conduct of a rival, to exit the market. Moreover, as outlined above at paragraph 25, the OFT considers, on the basis of the evidence before it, that this is likely to have a lasting effect on Spectron's position in that market, in that it considers that if Spectron is forced out of providing an electronic trading platform in the metals market, it will be extremely difficult, at least, for it to re-establish a viable electronic trading platform at some point in the future.

31. The OFT considers that if Spectron is forced out of the market by an extension of LME Select trading hours, there would be significant damage to the goodwill and reputation of Spectron. This reputation damage to Spectron with its customers is, in the OFT's view, likely to contribute significantly to the difficulty Spectron would face in trying to re-establish a viable electronic trading platform at some point in the future.

32. For all these reasons, the OFT considers that if LME extends the trading hours of LME Select, Spectron will suffer serious and irreparable damage and that therefore it is necessary, as a matter of urgency, to make an interim measures direction to prevent such an expansion."

31. The LME's representations on the OFT's notice of 13 February were served on the OFT on 22 February 2006 under cover of a letter from Mayer, Brown, Rowe & Maw LLP, LME's solicitors. That letter stated:

> "The Notice follows a period in excess of six months in which neither the OFT nor Spectron have taken any steps to address with the LME its plans to extend the trading hours for LME Select. This is notwithstanding the fact that over that time the LME has (a) been entirely transparent about its plans and (b) has published three notices explaining its plans…
>
> The extended hours are in response to a demand from more than half the members of the LME eligible to trade on LME Select that the trading hours of LME Select are extended so that the LME members can trade on LME Select during Asian trading hours. There is an absolute expectation on the part of the LME members that LME Select will go live with the extended hours on 1 March 2006.
>
> The LME members have been preparing themselves for that date including by obtaining their own necessary regulatory approvals and by investing in the necessary personnel and IT. The LME members have also created an expectation on the part of their LME customers that trade will be possible on LME Select during Asian trading hours with effect from 1 March 2006.
>
> For its part the LME has been working hard together with the support of the Financial Services Authority to obtain the necessary regulatory consents from the relevant regulatory authorities in Singapore, Japan, Australia and so on.
>
> The timing of the proposed directions, relative to the length of time the OFT and Spectron have been aware of the LME's plans, puts the LME in an impossible position of trading uncertainty that in all the circumstances is entirely disproportionate to (a) the alleged need to protect the public interest and (b) Spectron's interest in having interim measures imposed. The imposition of the proposed interim measures directions would put the LME, the members of the LME and their customers in an impossible position of trading uncertainty."

32. Counsel for the LME referred us to various passages in the LME's representations on the OFT's notice of 13 February 2006. We set out the relevant part of the representations:

"17. The OFT's principal ground for interim measures is to protect the public interest. Despite this, more than six months have elapsed since the LME announced its plan and the OFT has taken no steps to investigate the situation to establish whether or not the risk to the public interest was such that the OFT ought to be taking interim measures on its own initiative. …

27. There will be no grave and irreparable harm to the public interest through the LME's planned extension of the LME Select trading hours. The extension is a response to demands from members of the LME who want to be able to service the needs of their clients in all time zones. …

30. At any time since the OFT became aware of the LME's intentions in August 2005, the OFT could have taken steps to investigate the impact of the LME's plans on the public interest and on Spectron. At any time following such investigations the OFT could have given interim measures directions of its own initiative.

31. The fact that the OFT has not approached the LME in connection with its plan to extend the trading hours for LME Select, and has allowed more than six months to elapse without investigating the LME's plan renders it entirely hypothetical and improbable that the public interest or, in the alternative, Spectron, will be gravely and irreparably harmed unless the OFT takes urgent action now.

32. In fact, the OFT's lack of action runs directly counter to the OFT's claim that urgent action needs to be taken by the OFT to protect the public interest. In the face of the considerable period of inaction on the part of the OFT, the OFT's claim is without substance. …

35. There is no evidence of grave and irreparable damage to Spectron, there is no evidence of urgency.

36. Spectron provides no real evidence that the extended trading hours for LME Select will be such that the very existence of Spectron's business is threatened. …

41. It is reasonably to be expected that if there really were a danger of serious and irreparable damage occurring to Spectron as a result of the LME extending the trading hours for LME Select, Spectron would have taken action to protect its position immediately it was aware of the LME's intentions. It would not have let more than six months elapse before it took action. …

43. …at the beginning of November 2005 the OFT endeavoured to contact Spectron to provide it with an update on the status of the OFT's investigation of the LME and to raise a couple of questions of Spectron.

44. …This was the first contact the OFT had taken up with Spectron since its meeting with Spectron on 16 August 2005…

45. Spectron responded to the OFT's email more than a week later on 23 November 2005…

46. In its email, Spectron does no more than mention in passing that it is "concerned" by the LME's announcement that it is proposing to extend its trading hours from early 2006 to cover the overnight market. There is no sense of urgency and no plea to the OFT to take immediate action, whatever its form, to protect Spectron's position. Indeed, Spectron's email to the OFT of 23 November only followed a further chasing email from the OFT to Spectron dated 21 November 2005.

47. A further three weeks elapse following Spectron's email of 23 November 2005 before the OFT responds to it. In its response, the OFT suggests that Spectron might want to consider an application for interim measures.

48. Notwithstanding this, it is not until 5 January 2006 that Spectron takes up correspondence with the OFT. In a short email dated 5 January 2006 Spectron states that it is interested in the OFT pursuing the LME for interim measures. However, in this context, it reports that it ceased trading during European trading hours approximately a year ago. Its platform is used during Asian trading hours and the income it derives from that partially covers its costs of keeping the servers operational for 24 hours a day.

49. It is to be assumed that Spectron is able to maintain its electronic platform, eMetals, in operation despite the fact that it has been running at a loss for at least twelve months because Spectron is able to subsidise it from the revenues Spectron derives from its other business activities. Spectron is Europe's largest independent energy and commodity broker. It would seem to follow from this that even were Spectron to suffer damage as a direct result of the LME extending the trading hours for LME Select, the loss (a) would be purely financial, (b) could be compensated for if Spectron succeeds in its main complaint, and (c) would not threaten the very existence of Spectron or its eMetals business. Consequently there is no urgency and therefore no grounds for interim measures."

33. The LME's representations also had annexed to them, inter alia, a letter to LME from Goldman Sachs International dated 17 August 2004 stating that Goldman Sachs wished to extend its round the clock service to its LME business and to be able to give traders in Singapore access to LME Select. In that letter Goldman Sachs formally requested that the LME apply for authorisation for LME Select to be used in Singapore. Also annexed to the LME's representations was internal correspondence from July 2005 indicating that various LME members wished to be able to connect to LME Select from certain Asian locations, including 9 customers in Singapore, 6 customers in Sydney, 6 customers in Tokyo, 5 customers in Hong Kong and 4 customers in Shanghai.

III THE DIRECTION

34. On 27 February 2006 the LME was served with the Direction. The terms of the Direction were as follows:

> "1. This is an interim measures direction given by the Office of Fair Trading ("OFT") to the London Metal Exchange ("LME"), made pursuant to section 35(2) of the Competition Act 1998 ("the Act").
>
> 2. LME is directed as follows:
>
> 1. The London Metal Exchange shall not increase the hours of trading available on its electronic trading platform, LME Select, outside of 07:00 to 19:00 (London time), as is currently its practice; and
>
> 2. The London Metal Exchange shall confirm in writing to the OFT that it has complied with direction 1 within 5 working days of receipt of this direction.
>
> 3. This direction is effective from 27 February 2006."

35. Enclosed with the Direction were "Reasons for Direction". The OFT's grounds for giving an interim measures direction were set out at paragraphs 25 to 51 of those reasons. The first ground relied upon by the OFT was that it was necessary to impose

an interim measures direction as a matter of urgency to protect the public interest (section 35(2)(b) of the Act).

36. The OFT considered that there were two main public interest grounds (paragraph 26). The first was that the extension of the LME's trading hours would be likely to have the effect of extending or exacerbating existing abusive conduct, as it would apply the LME's then current pricing structure to an additional category of transactions (paragraph 27). The OFT considered that it was not in the public interest to allow the extension of behaviour which, in its preliminary view, was abusive conduct contrary to Article 82, and that in the interests of preventing damage to competition it was urgently necessary to issue the Direction (paragraph 28).

37. The second public interest ground was that it was necessary to act to prevent damage to the market which the OFT had defined, for the purposes of the Decision, as the market for the provision of platforms for the exchange-based trading of non-ferrous base metals contracts. The OFT considered that harm to the general competitive process, and to market conditions, was distinct and was to be considered separately from harm to Spectron (paragraph 29).

38. The OFT developed its reasoning on these two grounds by noting that migration of business from one platform to another may be evidence of a competition problem in the context of below-cost pricing and that the evidence before the OFT appeared to demonstrate the almost complete elimination of any trading volume of Spectron's electronic trading platform in those segments where LME Select is available (paragraph 30). In its application to the OFT for interim measures, Spectron had indicated that if the LME extended its trading hours to cover morning Asian trading this would cause a migration of a significant proportion of Spectron's remaining trading to LME Select and this likelihood was supported by evidence provided by Spectron (paragraphs 31 and 32). In circumstances where Spectron is the only operator currently competing with the LME in the market the OFT considered that the elimination of Spectron was not in the interests of consumers or in the public interest more generally. In particular, Spectron was, in the OFT's view, uniquely

well-placed to re-enter the market for electronic trading platforms in the future. Were Spectron to be eliminated it would, in the OFT's then view, be very difficult or impossible for Spectron to re-enter (paragraph 33).

39. The OFT noted that Spectron had "indicated" in its application for interim measures that if it were to be forced out of the electronic trading market it would be extremely difficult if not impossible for it to re-establish a viable electronic trading platform at some point in the future. The OFT considered that there were a number of factors which supported Spectron's indication, including (a) reputational damage to Spectron, (b) the cost and difficulty of re-introducing an additional trading screen to brokers' desks, and (c) the overall cost and difficulty of overcoming the reputational effects of the alleged predatory behaviour. The OFT therefore considered Spectron's concerns to be credible and noted that they supported the OFT's own view that the elimination of Spectron was not in the public interest (paragraph 34).

40. The OFT was not convinced by the LME's "mere assertion" that there would be no grave and irreparable harm to Spectron as a result of the LME extending its hours (paragraph 37). The LME had provided no evidence to show that Spectron would not be eliminated from the market or that such elimination would not be the "natural consequence" of an extension of LME's trading hours. Furthermore, the LME appeared to accept that Spectron had suffered significant damage from the introduction of LME Select in the past, namely that it had entirely ceased European day trading (paragraph 37). The LME had provided neither evidence nor reasoned argument to persuade the OFT that its understanding of the LME's pricing behaviour (i.e. that such behaviour was abusive) was not correct. The LME's arguments were "no more than an assertion" that its members desired it to extend its hours and had invested time and effort to obtain necessary regulatory approvals. Without more, those factors did not justify action which, in the OFT's view, would amount to an extension of abusive conduct (paragraph 38). It does not appear that the OFT directly addressed the LME's representation, noted by OFT in paragraph 36, that although the OFT and Spectron had been aware of its plans to extend its hours since August 2005

no action had been taken until February 2006, which in the LME's view cast doubt on the credibility of any public interest ground.

41. The OFT also considered that it was necessary to impose interim measures as a matter of urgency to prevent serious and irreparable harm to Spectron for the purposes of section 35(2)(a) of the Act. The OFT noted that, for the reasons it had given in paragraphs 30 and 32, it considered that the likely consequence of the extension of LME Select's hours would be the elimination of Spectron from the market (paragraph 41). The OFT considered that there could be no greater competitive disadvantage than being forced, by the abusive conduct of a rival, to exit the market and, for the reasons already considered, the evidence before the OFT was that if Spectron was forced out of providing an electronic trading platform it would be extremely difficult, at least, for Spectron to re-establish a viable electronic trading platform at some point in the future (paragraph 43).

42. The OFT considered that if Spectron were forced out of the market there would be significant damage to its goodwill and reputation. The OFT considered that damage to Spectron's reputation with customers would be likely to contribute significantly to the difficulty Spectron would face in trying to re-establish a viable electronic trading platform (paragraph 44).

43. The OFT rejected the LME's representations as to serious and irreparable harm to Spectron for the reasons it had already given in paragraph 37 of its reasons. The LME had not provided the OFT with either evidence or argument for its assertion that the OFT relied on "purely hypothetical" damage (paragraph 47). The OFT did not accept that the damage to Spectron would be purely financial loss which could be remedied by compensation (paragraph 48).

44. As regards the requirement of urgency, the OFT noted that the LME had made representations to it, including that more than six months had elapsed since the LME had announced its plans to increase its trading hours and no action was taken either by OFT or Spectron until 3 February 2006, that damage to Spectron would be purely

financial and that the relevant damage had already occurred (paragraph 55). The OFT did not consider that these representations altered the balance of view. The matter was urgent, in the OFT's view, as the LME intended to extend its hours on 1 March 2006 and there was no prospect of the OFT completing its investigation by that time (paragraphs 52 and 53). The OFT considered that it was unclear in August 2005, when the LME first proposed extending its hours, when the extension might occur. The OFT was not itself aware that the extension would take place on 1 March 2006 until after 23 November 2005 (paragraph 57). The OFT was unable itself to assess the likely impact on Spectron until Spectron had drawn the matter to its attention on 5 January 2006, and the full extent of the likely impact only became clear to the OFT on receipt of Spectron's application for interim measures. In the circumstances the situation was now urgent, in the OFT's view (paragraphs 57 to 58). Any alleged delay by Spectron in making its application to the OFT did not affect the urgency of the matter. The OFT noted that Spectron delayed making the application until that application became a matter of urgency, namely when the extension of LME Select's hours became imminent and when it became evident that the OFT's investigation would not be concluded before 1 March 2006 (paragraph 59).

45. The OFT noted the LME's representations that the giving of the Direction would (1) give rise to material trading uncertainty and grave practical problems; and (2) negatively affect the interests of third parties. However, the OFT was not persuaded by these representations and they had not been sufficiently developed or supported by evidence to be given any weight by the OFT (paragraph 63).

46. The next day the OFT issued the following press statement which was also published on the OFT website:

> "The OFT yesterday, 27 February, issued an interim measures direction to the London Metal Exchange (LME) to prevent LME from extending the hours of trading on its electronic trading platform, LME Select. The OFT is currently investigating a suspected abuse of a dominant position by LME and believes that this move by LME would further restrict competition.

> The OFT has issued this direction under section 35 of the Competition Act. This is the first time that the OFT has employed these powers..."

IV EVENTS FOLLOWING THE DIRECTION

47. The Direction was given to the LME on Monday 27 February 2006. On Wednesday 1 March 2006 Spectron issued an announcement to LME customers entitled "Spectron PLC – The OFT Investigation into The LME's Operation of Select". In that announcement Spectron stated, *inter alia*:

> "As the OFT had not completed its investigations [into the LME's pricing practices] it decided to introduce Interim Measures to prevent LME extending SELECT's activity into evening trading. However, given the negative publicity that the market is attracting and the restrictions on liquidity, Spectron has requested the OFT withdraw the Interim Measures order."

48. The same day, John Holmes (JH) of the OFT had a conversation with Mr Maitland-Walker (JMW), of Spectron's solicitors. The OFT's note of that conversation records the conversation as follows:

> "JMW – Outlined that his client, Spectron, had received a number of strong responses from their customers about the effects of the interim measures direction – that it would upset evening trades more generally. Spectron's customers did not consider that it would have resulted in a fall in trading volumes on Spectron's platform. They were very unhappy with Spectron's role in bring [sic] about interim measures. JMW's client's [sic] had considered whether they could request OFT to withdraw the direction. JMW considered that Spectron would present its position to customers as one in which the OFT had imposed the Directions due to the wider impact on competition. JMW emphasised that Spectron still wished OFT to pursue the investigation.
>
> JH – Explained that the Direction was imposed under two limbs – public interest and serious irreparable harm to a person. We would need additional information that could support a change in OFT's view that competition would not be harmed by LME extending its hours.
>
> JMW – Spectron were concerned that there could be a wider impact on their energy market trading from customers blaming Spectron for the Direction.

JH – Emphasised that the investigation was on-going, OFT had not found an infringement, and was going out to customer to develop understanding of some areas of the case. The customer would be LME members.

JMW – Considered whether LME members would be entirely impartial. Spectron may be able to provide a list of customers that use electronic trading platforms more generally who are not LME members."

49. Also on 1 March 2006 the OFT wrote to Mr Maitland-Walker. That letter stated:

"…In summary, from your conversation with Mr Holmes we understand that Spectron's customers have indicated that they do not consider that the planned extension of LME Select's trading hours, which is now prevented by the interim measures direction, would have led to a reduction in the volume of trading on Spectron's eMetal platform. Rather, on the basis of representations Spectron has now received from customers, we understand that this extension may in fact lead to an overall increase in trading.

The anticipated reduction in trading volumes on the eMetal platform which Spectron previously suggested would result from the extension of LME Select's trading hours was a significant factor considered by the OFT in deciding to give LME an interim measures direction. In order for the OFT to fully understand the implications of the new information now provided by Spectron, we ask that Spectron clarify in writing its *current* views of the impact that the extension of LME Select's trading hours would have on trading volume on the eMetal platform.

In particular, if the representations made by Spectron's customers have caused Spectron to change its views of the likely impact of such an extension in LME Select's trading hours from those expressed in Spectron's application for interim measures, sent to the OFT on 3 February 2006, please explain the nature of this change and the reasons for it. The OFT would also appreciate information in relation to these representations, such as which Spectron customers made these representations and confirmation of the substance of these representations. Documentary evidence in this respect would also be welcomed. In addition, Spectron's response on these points should consider (with reference to evidence where possible) how the market would develop were the interim measures direction given to LME removed by the OFT…

In view of the bearing which this information may have on whether the interim measures direction given to LME remains justified and the need for the OFT to consider this issue as a matter of priority, we ask that you respond to this letter by **5:00pm on Tuesday 7 March 2006**."

50. Also on 1 March 2006 a telephone conversation took place between Mr Finer of the OFT and Mr Evans of Spectron. The OFT's note of that conversation records:

> "I called John Evans (JE) on his mobile phone. He was at home. I explained that we were now in a very difficult position as a result of the statement that we had received from the LME, which was the first we'd heard of an actual request to withdraw the interim measures request. He said that he had instructed Julian Maitland-Walker (JMW) to withdraw the request for interim measures and it was his understanding that this is what JMW had done in his phone conversation with John Holmes (JH). As he was at home, JE did not have access to JMW's note of his conversation with JH. I said that I had tried to call JMW, but got no response and that JH was no longer in the office.
>
> JMW knew the contents of the statement that Spectron intended to issue when he spoke with JH. JMW had reported back that JH had said that it was extremely unlikely that the OFT would withdraw the interim measures direction and that we would only do so if we received evidence from Spectron and LME that to do so would not result in any harm to the public interest. Spectron then released its statement.
>
> JE said Spectron had taken the decision to withdraw the interim measures request as a result of the great deal of publicity that the issue had received, which was not doing the market any good whatsoever. The publicity had put the market in a bad light and was likely to harm liquidity. JE had expected this to be quietly dealt with.
>
> …"

51. The next day, 2 March 2006, the OFT sent a further letter to Spectron. This letter enclosed a formal notice pursuant to section 26 of the Act requiring Spectron to produce specified documents and specified information as set out in the notice. Spectron was required to provide the documents and information required by 5:00pm on Friday 3 March 2006 (i.e. the next day). The information and documents required by the OFT included the following:

> "1. Please identify any Spectron customers who made any representations concerning the OFT's proposal to give LME an interim measures direction. You should identify both i) the organisation and ii) the person within the organisation who communicated the representation.

2. For each representation made by a customer, please describe separately the nature of the representation made.

3. If representations made by Spectron's customers have caused Spectron to change its views of the likely impact of extension to LME Select's trading hours from those expressed in Spectron's application for interim measures (dated 3 February 2006), please explain the nature of this change and the reasons for it.

4. Please provide Spectron's *current* views (with reference to evidence where possible) of the impact that the extension of LME Select's trading hours would have on trading volume on the eMetal platform or any other developments within the market.

(…)

8. Please provide details of the daily trading volumes which occurred on each of Spectron's additional trading platforms (i.e. not eMetal trading) in the period 1 February 2006 to 1 March 2006.

9. Please state whether the daily trading volumes which occurred on each of Spectron's additional trading platforms (i.e. not eMetal trading) in the period 1 February 2006 to 1 March 2006 differ from what Spectron would ordinarily expect. If so, please provide Spectron's view of why this differs?"

52. On the same day, 2 March 2006, the OFT issued the following public announcement entitled "Statement on London Metal Exchange interim measures direction":

> "The OFT is issuing this statement in order to clarify the position in relation to the interim measures direction issued to the London Metal Exchange on 27 February.
>
> The OFT issued this direction to the LME on the basis of the information available to it as to the near complete elimination of competition in electronic trading for non-ferrous metals contracts that would likely result from the extension of LME Select's trading hours. This direction was issued by the OFT at the earliest possible opportunity following the firm announcement by the LME on 23 November 2005 of the date on which LME Select's trading hours would be extended and receipt of persuasive evidence from Spectron on 3 February 2006 as to the likely effect of the extension.
>
> Before issuing the direction, the OFT consulted with both parties and considered carefully the need for the proposed measures. The key factor in the

> OFT's consideration was that the direction was necessary to protect the wider public interest in maintaining as competitive a market as possible. The OFT considered that unless it granted the interim measures direction, it was likely that serious and irreparable damage to Spectron and the competitive process would arise that could not likely be subsequently remedied. The OFT would not have made this decision if it did not have serious underlying concerns about allegations of predatory pricing on the part of the LME.
>
> The OFT understands that Spectron issued a statement to its LME customers on 1 March indicating that it had withdrawn its request for interim measures in light of changed circumstances. The OFT is seeking urgent clarification and explanation from Spectron and the LME in relation to the current position.
>
> At this point in time, the interim measures direction remains in force pending completion of the OFT's urgent consideration of this issue in the light of the latest developments. The OFT will have to take account of the wider public interest in that consideration."

53. Also on 2 March 2006 the OFT sent formal notices pursuant to section 26 of the Act to both the LME and Spectron which required responses by 5:00pm on 3 March 2006. On 3 March 2006 the LME replied, enclosing *inter alia* email correspondence between the LME and its members in relation to the Direction. Likewise, Spectron replied on 3 March 2006. Under the heading "Provision of specified information", Spectron said:

> "1. Since Tuesday there have been various telephone conversations with the following:
>
> Adam Knight of Goldman Sachs
>
> Michael Overlander of Sucden
>
> Frans Pettinga of Koch Industries
>
> 2. Obviously the exact words cannot be recalled however the general tone of all three conversations was the same. They have all said that the interim measure that has been placed is stopping them from accessing SELECT in the hours that they wish to and therefore has the potential to restrict liquidity. Also that the publicity associated with this issue can only have a negative impact on the market generally and is not likely to be in the interest of their or Spectron's ongoing business. They also thought that others in the market felt similarly.

> 3 & 4. We still believe that the impact of extending SELECT's trading hours will have an adverse impact on the eMetals screen and we would not want to detract from the points that we have made both in the complaint and in the application for interim measures.
>
> However we have considerable concern that the adverse publicity that has been generated will damage Spectron's voice business as well as eMetals. Without doubt Spectron have been cast in a bad light over this matter and we are concerned that this may turn customers against us. Spectron are only currently able to offer their products to LME members with their own clearing facilities. As we understand it SELECT will be able to offer their prices to a wider range of user as a result of what is known as order routing. With no SELECT night market there are therefore likely to be fewer prices in the market, less liquidity and less market trading than there could have been.
>
> We would also like to point out that we have been amazed by the publicity that the introduction of interim measures has attracted. As far as Spectron are concerned we believe that this is very negative for the market and for the City in general…"

54. On 3 March 2006 Norddeutsche Affinerie AG, which states that it is Europe's largest copper producer, wrote to the Chief Executive of the OFT asking him urgently to reconsider the Direction and to permit the LME to extend its electronic trading hours as planned.

55. On 7 March 2006 representatives of the OFT held a meeting with representatives of Spectron, including Andrew Stephens, Chief Executive. Most of the OFT's note of that meeting was excised from the disclosure given to LME. However part of the note that was not excised records Mr Stephens as saying:

> "It is not clear that Spectron won't be able to re-enter the market. There is potentially more serious harm to Spectron if the OFT maintains the [IMD]. If Spectron get muscled out of the market it is not helpful for anyone else that is considering entering. But Spectron would need both reputation credibility and liquidity to re-enter daytime trading…AS agreed to contact OFT as soon as Spectron has decided whether the harm to Spectron is greater or less with the [IMD]. Spectron's relationship with its clients and volumes/liquidity are important for trading."

56. On 8 March 2006 Mr Thursby, a Principal Case Officer with the OFT, sent an email to Ms Murphy of the LME's solicitors. The email noted that the OFT had sent

notices pursuant to section 26 of the Act to both Spectron and to the LME and that the OFT had met Spectron to obtain further information from them. The email continued:

> "Nothing in the responses from the LME and Spectron to our requests for information currently leads the case team to a conclusion that there has been a material change in circumstances since the OFT's decision to give LME an interim measures direction or any failure on the part of the OFT to take into account matters relevant to that decision.
>
> It is plain that the OFT must consider the situation objectively in order to understand the likely consequences on undertakings of the imposition or withdrawal of an interim measures direction, and the OFT is doing this. Those undertakings are not limited to the LME and Spectron but include third parties.
>
> We intend to send further information requests to third parties towards the end of this week. We will of course consider the appropriateness of the interim measures direction in the light of information provided in response to these requests.
>
> I can assure you that the OFT continues to treat this matter as a high priority and that any decision to maintain, vary or remove the interim measures direction will be taken on the most reliable information that it has. That is the reason why the OFT met with Spectron yesterday and why we are ready to meet with the LME."

57. On 9 March 2006 Ms Murphy sent an email to Frances Warburton of the OFT in response to the above message. That email stated, *inter alia*:

> "You acknowledge in your email that the OFT is obliged to consider the imposition of interim measures objectively and in this context it needs to understand the likely consequences on third parties of the imposition of the interim measures direction. Despite this, however, it is our understanding that you did not approach third parties to address this issue prior to your imposition of the interim measures direction. In fact, it is our understanding that the OFT only started to seek the views of third parties after Spectron asked the OFT to withdraw the interim measures direction on 1 March 2006.
>
> We consider the fact that Spectron has asked for the interim measures direction to be withdrawn, and the fact that Spectron is saying that it and its customers share a concern that the interim measures directions are causing damage to the market, all constitute a material change in circumstance.

> If it is in fact the case that the OFT has not done any form of market testing prior to its imposition of the interim measures direction, we think that would reflect a failure on the part of the OFT to consider the situation objectively. By the OFT's own criteria, an objective assessment would have involved the OFT understanding the likely consequences on third parties were interim measures to be imposed. (…)"

58. On 10 March 2006 Frances Warburton of the OFT wrote to Ms Murphy in the following terms:

> "In your email you raise a number of points, and we will respond to all of these points in due course. However, I consider that it is important that I reply to you today on one point that you raise that has also been raised in the letter from Simon Heale to John Fingleton on 8 March 2006… The issue I am addressing in this letter concerns Spectron's notice to its customers of 1 March 2006 and the position with regards to Spectron's request for interim measures. In Spectron's 1 March notice Spectron indicated that it had requested the OFT to withdraw the Interim Measures order, citing negative publicity and restrictions on liquidity.
>
> The OFT's position is that at no point has the OFT received a clear request from Spectron for the OFT to withdraw the interim measures. In addition, yesterday (9 March) the OFT received formal written confirmation that Spectron does not wish to withdraw the request for interim measures.
>
> I trust this letter helps explain the situation with respect to OFT's position on this issue, but please do not hesitate to contact me if you require any further explanation. I will be writing to you on the other points you raise and with possible dates for a meeting shortly."

59. On 10 March 2006 the OFT sent letters to customers of Spectron and the LME containing an informal request for information which required a response by 10:00am on 15 March 2006. Among other things the OFT sought the customers' views as to whether there would be any changes to the market, including liquidity, if LME Select's trading hours were extended and whether the customer would switch its business to LME Select during those extended hours.

60. As counsel for the LME stated at the hearing, the responses received by the OFT to these information requests were overwhelmingly in favour of LME being able to extend its trading hours. Indeed, some customers complained that the OFT had, in

their view, apparently acted to protect the current "monopoly" of Spectron during these trading times, or that the Direction was preventing them (as customers) from accessing services that they wished to avail themselves of, or that the Direction was damaging to international competitiveness. No response from any customer whose response has been disclosed considered that the extension of LME's trading hours would be anti-competitive. In addition to those responses the Futures and Options Association wrote to Vincent Smith of the OFT on 15 March 2006 to pass on the concerns of a number of its members that the Direction impaired their ability to deal efficiently with customers in South-East Asia and to request a meeting to gain a better understanding of the concerns that had led the OFT to give the Direction.

61. Representatives of the OFT held a meeting with the LME on 16 March 2006. From a draft note of the meeting drawn up by the LME's solicitors, it appears that at that stage the OFT did not think there had been a material change in circumstances.

62. On 23 March 2006 representatives of the OFT attended a meeting with Spectron. From the meeting note drawn up by the OFT, it appears that it wished to know more about the changes in Spectron's charging for eMetals, "in particular the introduction of the charge for simply accessing eMetals" (paragraph 1). It was emphasised by the OFT that "there would need to be evidence that the [redacted] charge was not simply an opportunist move" as a result of the Direction (paragraph 7). Spectron agreed to provide the OFT with evidence that the charge was justified. The discussion then proceeded to the issue of screens. The OFT's note of the meeting records:

> "9. Spectron said that in general if "numbers" (i.e. bids and offers) were on eMetals, people would look at it. Traders might now have eMetals minimised on their screens during the day, but it might be used at night. Also whenever LME Select fails, traders switch to eMetals.
>
> 10. It was also noted that traders generally only used one monitor for each screen (window). Traders tended to be specific to their sector (energy, metals etc)."

63. Later on, under the heading "Reentry", the note states:

"26. Spectron thought that every market had room for platforms, so that they tried to re-enter when the LME incentive scheme was stopped. When they tried to re-enter in November, they used a hybrid system of voice and screen broking. This approach worked in other sectors, such as gas, where they traded more than was on IPE, where Spectron brokers provided 'colour' around the prices on screen.

27. The service they now offered had the 2½ cent incentive scheme, and offered voice services such as information, price discovery, execution etc. They were cheaper than Select for some users (net initiators). Voice broking allowed scope to be more pro-active, i.e. ring up customers etc.

28. Spectron only traded LME contracts, not OTC metals contracts – it had arranged only about two of these, one of which was a physical deal.

29. Spectron did not know whether the voice business could survive without screens. Spectron's voice metal business had held up even while business on eMetals had fallen. The voice business is not directly affected by the eMetal business, although voice may have grown more quickly with the existence of a viable eMetal business."

64. On the same day the OFT also held a meeting with the Futures and Options Association ("FOA"), a trade body for dealings in exchange-traded futures and options, and their solicitors, following a request to that effect contained in a letter from the FOA to the OFT of 15 March 2006. It appears from a note of that meeting that the FOA's members "wanted Select in Asian trading hours".

65. On 24 March 2006 Frances Warburton of the OFT wrote to Ms Murphy of the LME's solicitors in the following terms:

"…On the basis of the information that we have received from customers to date, we do not consider that this evidence alters our position that the IMD remains appropriate. A significant number of the responses suggest that if the trading hours on LME Select were extended to include 01.00 to 07.00 London time, this would lead to a migration of trading from Spectron to LME Select in this period. We consider this consistent with the reasoning set out in the IMD that Spectron would likely be forced out of the electronic trading of base metals contracts if the LME were to extend the hours of trading on LME Select.

A number of respondents have suggested that trading conditions would improve as a result of easier matching…and wider access to clients (through order

routing). These respondents suggest that increased liquidity and narrower bid-offer spreads would likely result. Respondents have been unable to support these views with any documentary evidence, but have based their submissions on trading experience and observed preference of clients."

66. On 30 March 2006 the OFT sent notices pursuant to section 26 of the Act to "Category I" and "Category II" Members of the LME. The notices contained 35 questions requiring a response by 21 April 2006. Questions 33 to 35 concerned customers' views on competition between electronic trading platforms (i.e. between Spectron and the LME) and on the possibility that Spectron might exit the market.

67. Also on 30 March 2006 the LME's solicitors wrote to the OFT asking for inspection of the OFT's file in respect of documents dated after 13 February 2006, the most recent opportunity given to LME to inspect the file. On 7 April 2006 the OFT responded to that request to the effect that rule 9 of The Competition Act 1998 (Office of Fair Trading's Rules) Order 2004, SI 2004 No. 2751 ("the OFT's Rules") applied only in respect of a person to whom the OFT "proposes to give a direction" in respect of a "proposed decision". As the Direction had already been issued on 27 February 2006 it ceased, from that date, to be a "proposed decision". The OFT did not therefore consider it appropriate to extend the LME an opportunity to inspect the documents added to the OFT's file after 27 February 2006. On 19 April 2006, following further correspondence between the OFT and LME's solicitors the OFT, in view of the "exceptional circumstances of the case", considered it was possible that it might be appropriate to disclose some further documents on the OFT's file to LME beyond the requirements of rule 9 of the OFT's Rules.

68. On 31 March 2006 the LME's solicitors wrote to customers of the LME stating that the LME was then preparing an appeal to the Tribunal against the Direction. In that connection the LME wished the customer to answer a question which there was no obligation on the customer to answer but the response, if made, would be important in the determination of the appeal. The question asked by LME was:

"Would you prefer:

(a) to have access to Select during Asian trading hours immediately even if this would lead to Spectron exiting the market in Asia and to not re-entering the Asian or European trading markets in the future; or

(b) not to have access to Select during Asian trading hours until the OFT completes its investigation (perhaps another twelve months) if this were to mean that Spectron would remain available with eMetals during Asian trading hours and might subsequently also re-enter the European daytime market?

Please provide an explanation for your answer. The fuller the explanation the better."

69. It appears, from the responses seen by the Tribunal, that the addressees were in general strongly in favour of option (a). Only one respondent positively preferred option (b).

70. On 4 April 2006 the OFT sent formal notices pursuant to section 26 of the Act to "Category IV" and "Category V" members of the LME requiring a response by 26 April 2006. The notices contained 16 questions, questions 14 to 16 of which sought customers' views as to competition between electronic trading platforms. The same questions were posed by the OFT in informal requests for information made to members of the LME not based in the European Union.

71. On 11 April 2006 the OFT sent a notice pursuant to section 26 of the Act to Spectron. The notice is detailed, containing 38 requests in total. Among the information and documents requested, the OFT made the following requests:

"**Spectron's ability to re-enter day-time electronic trading of LME contracts**

8. In Spectron's opinion was it the pricing of Select relative to telephone trades or the incentive schemes operated by LME which principally drove the migration of trading from Spectron to LME?

9. What would be the necessary market conditions for Spectron to re-enter daytime trading? Please comment in particular on price, liquidity and reputation amongst other things. How would these market conditions differ

from those which existed in November 2005 (when, we note, Spectron last considered re-entry into daytime trading)?

10. Please provide details of how many traders maintain a Spectron screen. In addition to current figures please provide figures as at 1 January 2001, 1 January 2002, 1 January 2003, 1 January 2004 and 1 January 2005."

72. Three further requests, largely excised from the version disclosed to the LME, fall under the heading "Spectron's proposed re-entry plan". Under the heading "Voice trading", the notice makes the following requests:

"20. Please describe in detail Spectron's voice broking service for base metals contracts. Please provide details of how Spectron charges for its voice broking service.

21. Please describe the interaction between Spectron's voice broking and screen broking services. What proportions of Spectron's base metals business are accounted for by voice broking and screen broking?

22. Could Spectron's voice broking service provide a foothold for the re-entry of Spectron into the day-time trading market? If so, would this still be the case if Spectron were to be eliminated from night-time trading?"

73. Under the heading "Other", the OFT made the following requests:

"31. Please indicate when exactly Spectron became aware of LME's plans to extend the trading hours of LME Select. …

36. At paragraph 2.10 of your submission on Interim Measures of 2 February 2006, you suggest that LME's behaviour has damaged Spectron's relationship with its customers. Please indicate if this is still your view and, if so, why."

74. On 12 April 2006 John Evans of Spectron sent an email to Mr Thursby of the OFT requesting an extension of the deadline for responding to the notice of 11 April 2006 (set at 21 April 2006). In an email reply of the same date, Mr Thursby said:

"LME has until 27 April 2006 to appeal the OFT's decision to give an interim measures direction. There is a significant risk that LME will appeal this decision.

> Although we have some sympathy given the circumstances you outline, it is critical that the OFT has an opportunity to consider its position in light of the information and documents requested before any appeal is made. We will be unable to do so if we accede to your request for an extension by about a week…
>
> I appreciate that this response may not be entirely satisfactory but, as stated, the information and documents we have requested are critical to the OFT's ability to respond to any appeal by LME."

75. As set out above, the LME lodged the present appeal on 26 April 2006.

76. It appears that on 26 April 2006 there took place a telephone conversation between Ms Murphy of the LME's solicitors and Simon Priddis of the OFT in the course of which Mr Priddis intimated that the OFT was of the provisional view that the Direction was no longer appropriate.

77. On 27 April 2006 Vincent Smith of the OFT sent a letter to Ms Murphy confirming that conversation and stating that the OFT proposed to withdraw the Direction. In accordance with an indication given in that letter, Mr Smith wrote again, to both the LME and Spectron, on 2 May 2006 enclosing in draft the "facts and reasons" forming the OFT's basis for its provisional view. Both the LME and Spectron were invited to submit representations on the OFT's provisional view by 9 May 2006. The LME submitted its representations on 9 May 2006.

78. On 15 May 2006 the OFT withdrew the Direction. In the decision to withdraw the OFT stated that it no longer considered it necessary as a matter of urgency to maintain the interim measures direction, and as a result the Direction was withdrawn with immediate effect. A summary of reasons was annexed to the decision to withdraw the Direction. It was stated that full reasons would be issued in due course.

79. On 24 May 2006 the OFT issued a document setting out in full the OFT's reasons for its decision to withdraw the Direction ("the Full Reasons"). We set out the relevant paragraphs below (footnotes omitted):

"34. When the OFT gave the Direction on 27 February 2006, this was in part based on the view that if LME Select was allowed to operate during Asian morning hours (01:00 to 07:00 London time) then, based on evidence then available, Spectron's e-Metals business was likely to be eliminated entirely from the market. Paragraph 41 of the Reasons for the Direction stated:

> *41. …the OFT considers that if it does not give a direction to prevent LME from extending LME Select trading hours, the likely consequence will be the elimination of Spectron [from the market for the provision of platforms for the exchange-based trading of non-ferrous base metals contracts]. Spectron has stated this expressly in its application to the OFT.*

35. In its Reasons for the Direction, the OFT referred to two key factors that led it to the view that it was necessary to act as a matter of urgency to prevent serious, irreparable damage to Spectron:

> **a.** that Spectron was uniquely well placed to re-enter the relevant market segment in the future; and
>
> **b.** that were it forced to exit, Spectron's re-entry would be very difficult or impossible, and in particular:
>
> • that adverse *reputational effects* would arise from its exit; and
>
> • that the *loss of screen space* on brokers' desks would be a real barrier to future re-entry.

36. The OFT's assessment of these two key factors is discussed in further detail below.

Spectron is uniquely well placed to re-enter

The OFT's view in the Reasons for the Direction

37. As indicated in particular in paragraph 33 of the Reasons for the Direction, the OFT considered that although no longer active in the provision of an electronic platform for day-time trading, Spectron was uniquely well placed to re-enter that market segment:

> *33.* A*lthough not currently active in day trading to any significant extent, the OFT considers that Spectron is at present uniquely well placed to re-enter that market segment in the future.*

38. Implicit in this view was the OFT's assessment that Spectron's eMetals screen-based business was essential for Spectron [and] gave it a unique position and ability to provide an electronic trading platform for nonferrous base metals contracts in competition with LME Select in the future. It appeared that elimination of eMetals would result in Spectron's permanent exit from this segment of the market.

39. This assessment reflected the OFT's limited understanding at that time of the significance of Spectron's voice broking business:

a. Early in the investigation, Spectron referred to its voice broking activities as a fledgling service with total revenues of US$2000.

b. Later, in August 2005, Spectron had said that its metals trading business had been severely damaged. Its voice broking business now formed the bulk of what remained. The OFT understood that Spectron did not charge fees or derive revenue from its voice broking business. Spectron did not identify voice broking as a strand of business which could operate independently from its eMetals business. Therefore, the OFT did not recognise that Spectron could continue to offer trading in non-ferrous base metals contracts notwithstanding the elimination of its screen-based eMetals business.

c. Spectron's application for interim measures made no reference to Spectron's voice broking activities in the metals sector.

d. LME's representations on the OFT's proposal to give a Direction noted only that Spectron was "*Europe's largest independent energy and commodity broker*" and "*able to subsidise* [eMetals] *from the revenues Spectron derives from its other business activities."* These representations made no reference to the significance of Spectron's voice broking in metals trading.

New information

40. After giving the Direction, the OFT acquired certain key pieces of new information concerning Spectron's voice broking business:

a. The OFT established that Spectron was in fact charging fees and deriving revenue from its voice broking business. Given that voice broking represents approximately [CONFIDENTIAL INFORMATION - REDACTED] per cent of its total metals business, this information indicated to the OFT that Spectron's voice broking business was more

significant (including in financial terms) than it had previously appreciated.

b. It also became apparent to the OFT that Spectron had not always had a significant presence in voice broking but had developed this strand of business over the course of 2005. In particular, a letter apparently sent by Spectron to its customers on 21 November 2005 (but first seen by the OFT on 16 March 2006) states: "*With your help we have now established our voice broking business in a year that has seen changes to both Spectron and LME*".

c. In a meeting with Spectron the OFT sought information about its voice broking specifically. Spectron said that it did not know whether its voice broking business could survive independently of its screen-based eMetals business. However, Spectron noted that voice broking volumes had held up even while business on eMetals had fallen. On this same date, Spectron provided the OFT with a copy of a letter to Dresdner Keinwort Wasserstein dated 14 November 2005 specifying fees for voice broking. These fees were confirmed in Spectron's response to a section 26 notice.

d. The Futures and Options Association noted in discussion with the OFT that Spectron carried out a significant amount of voice broking.

e. In response to a section 26 notice from the OFT, Spectron advised that it conducts trading via its voice broking business during the day and screen-based trading at night. It also advised that the types of trades carried out via voice broking and electronic platforms differ, with most screen business being for basic three month futures contracts and voice broking used for tailored time spreads. Spectron also advised that: "*relationships are key to any revival. Spectron has good voice broking contacts and would hope to build on [them]*".

f. On 9 May 2006, Spectron advised that its voice broking business is complementary to eMetals, and that this business is not picking up business lost from eMetals.

g. Information received from Spectron's customers tends to suggest that Spectron would continue to be viewed as a back up means of trading LME contracts, even if it provided voice broking only."

The OFT's current view based on new information

41. This new information has influenced in the following respects the OFT's view of the extent to which voice broking is relevant in assessing whether Spectron will remain uniquely well placed to re-enter the electronic trading segment:

a. Prior to giving the Direction, the OFT did not fully appreciate the full relevance of Spectron's voice broking business to its electronic metals trading business. Specifically, the OFT was unaware of Spectron's ability to maintain its voice broking business independently of its screen-based eMetals business. It now appears that Spectron's voice broking business can, and does, operate independently.

b. The OFT learned that the existence of Spectron's voice broking business allows it to maintain relevant contacts (Spectron's voice broking services are currently provided to Category l and 2 members of the LME) and voice broking staff. Although staff who conduct voice broking business are not always the same contacts as for an electronic trading platform (some customers have dedicated screen brokers), it now appears to the OFT that the existence of Spectron' s voice broking business is likely to assist it in re-entering electronic trading of non-ferrous base metals contracts, should it exit that sector.

c. Spectron made clear that key factors in relation to re-establishing an electronic trading platform are (a) having the appropriate contacts and relationships with potential customers and (b) having the appropriate broking staff, with (a) being particularly important.

42. This new information reinforces the OFT's view that Spectron remains uniquely well placed to provide a competing electronic platform for trading non-ferrous base metal contracts.

Re-entry would be very difficult or impossible

The OFT's view in the Reasons for the Direction

43. In its application for interim measures, Spectron argued that the ultimate consequence of an extension of LME Select's trading hours would be Spectron having to cease to provide an electronic trading platform for non-ferrous base metals contracts in competition with LME Select. Spectron argued that such a forced exit would make it very difficult if not impossible for it to re-enter with such a facility.

44. Spectron relied on two principal arguments as to why it would be very difficult or impossible for it to re-enter if eliminated:

a. adverse effects on its reputation would arise as a consequence of its elimination; and

b. the importance of users maintaining Spectron screens on their desks and related space issues.

45. These arguments were reflected in the Reasons for the Direction at paragraphs 34, 43, 44 and 48…

46. As regards the cost and difficulty of re-introducing an additional trading screen to brokers' desks, when the OFT gave the Direction it understood that for brokers to use Select and eMetals a separate, dedicated monitor would be required to display each electronic trading platform screen. In its application for interim measures, Spectron stated:

"*Desk space is always at a premium for* [brokers] *and having two screens as opposed to one will be a factor for many* [brokers]. *Also, the operation of a screen involves traders in significant IT costs*".

47. Spectron argued that it would be extremely difficult for it to persuade brokers to invest in the cost of a new screen and associated IT costs if Spectron wished to re-enter electronic trading.

New information

48. After giving the Direction, the OFT acquired the following key pieces of new information concerning the difficulty/impossibility of Spectron re-entering the market should its screen-based eMetals business be eliminated:

a. The OFT now understands that a key feature in relation to Spectron's ability to re-enter the market is the availability of broking staff. As stated above, Spectron's voice broking business enables it to retain the broking staff necessary to ensure that it remains uniquely well placed to re-enter the electronic trading segment should it wish to do so. In this regard, it is also relevant that Spectron has stressed its commitment to re-entry, stating that it "*…is an important electronic trading platform provider in several other commodity markets and intends to re-enter daytime trades with eMetals if trading conditions allow it to do so*".

b. On 7 March 2006, the OFT learned for the first time that by November 2005 Spectron was planning to re-enter trading in London day-time hours (although these plans were developed in a context where Spectron did not necessarily face elimination from Asian morning trading).

c. Customer information obtained by the OFT since the Direction was given confirmed the OFT's previous view that if LME Select's hours were extended to include Asian morning trading, a significant volume of trading would migrate from Spectron eMetals to LME Select.

49. As regards reputational effects specifically, the OFT acquired the following new information:

a. The OFT received responses from a significant number of third parties, and none indicated that that Spectron's credibility or reputation would be damaged if it were forced to exit electronic trading of metals contracts.

b. As noted above, Spectron would remain active in providing voice broking services in the metals sector in addition to being an important provider of electronic trading platforms in several other commodity markets.

50. As regards loss of screens specifically, the OFT initially understood that brokers generally use one monitor for access to each electronic trading platform screen. The continued presence of Spectron screens on brokers' desks was explained on the basis that Spectron operates in Asian morning hours. The OFT subsequently acquired the following new information:

a. Spectron informed the OFT that brokers do not in fact need separate screens for LME Select and eMetals, but that in fact both could be viewed on the same monitor.

b. On the other hand, LME suggested that separate monitors are in fact needed.

c. Many third parties commented that there are no significant barriers to brokers using more than one electronic trading platform. In responses to the OFT's s26 Notice sent to Category 1 and 2 LME members, there was a general consensus that the only or main limitation in using more than one electronic trading platform is liquidity, although there may be associated costs such as IT and licence fees.

51. This information altered in the following respects the OFT's view of the extent to which Spectron's re-entry into the electronic trading segment of the market would be difficult or impossible if its eMetals screen-based business were eliminated:

a. The OFT does not now believe that Spectron's plans for re-entry into London daytime trading hours would be irreparably compromised by Spectron's exit from Asian morning trading . This is because of (i) the importance to re-entry of maintaining relationships with customers and (ii) the presence of Spectron in voice broking independent from its electronic trading platform, which enables Spectron to maintain these relationships.

b. The independent presence of Spectron's voice broking business suggests that Spectron can retain key staff, even if it exits the electronic trading segment.

c. Some customers stated that even if they were to migrate business to LME Select if trading hours were extended, this would not necessarily be at the expense of all trading on Spectron eMetals.

52. As regards reputational effects specifically:

a. Spectron will remain active in providing metals voice broking services, which at present is more significant than its remaining electronic trading platform business. The OFT also notes that Spectron will remain an important electronic trading platform provider in several other commodity markets.

b. Further, Spectron's argument that it would suffer adverse effects on its reputation is not supported by any of the recent evidence. In these circumstances, the OFT is now less persuaded that Spectron is likely to suffer serious and irreparable damage to its reputation if LME Select trading hours are extended.

53. As regards loss of screens specifically:

a. The difficulty of re-introducing an additional trading screen to brokers' desks is now unclear. Some information suggests that desk space is a constraint on Spectron's ability to place a separate screen on brokers' desks. However, on balance it now appears that trading information both on LME Select and Spectron eMetals can be viewed using the same monitor.

b. The majority of customers of LME and Spectron that have provided new information give prominence to liquidity, rather than technical issues, as the main limitation in using multiple electronic platforms. There are differing views between LME and Spectron on this point.

c. The OFT does not now consider it to be sufficiently certain that, were Spectron's electronic trading platform to be discontinued, the removal of trading screens from brokers' desks would inevitably prevent it from later re-establishing an electronic trading platform. Consequently the OFT does not consider that this evidence can be relied upon as a significant factor supporting the maintenance of the Direction.

Conclusion on serious, irreparable damage

54. For the reasons given above, the OFT considers that it is no longer necessary as a matter of urgency to maintain the Direction to prevent serious, irreparable damage to Spectron. This view would hold even if Spectron were eliminated from the electronic trading segment of the market, which the OFT accepts is a possibility, on the basis that it is no longer clear that it would be very difficult or impossible for it to re-enter (see paragraphs 48-53 above).

PUBLIC INTEREST

OFT's view in Reasons for the Direction

55. The Direction was also based on the view of the OFT that giving the Direction set out in paragraph 2 was necessary as a matter of urgency to protect the public interest. The public interest limb of the Direction itself had two main grounds…

57. The Reasons for the Direction made clear that this public interest ground was distinct from the likelihood of serious, irreparable damage to Spectron…

58. Nonetheless, as was made clear at paragraphs 32 and 33 of the Reasons for the Direction, the position of Spectron, and the likely impact of an extension of the trading hours of LME Select on its position, were key to the OFT's consideration of this limb of the case…

59. Again, the OFT's decision was to a large extent predicated on the view that the likely consequence of the extension of LME Select would be the complete elimination of Spectron from the electronic trading segment of the market, with little prospect of re-establishing its electronic trading platform.

New information

60. Moreover, in addition to the significant new information relating to the position of Spectron which has been discussed above, the other principal developments which have come to light in relation to the public interest ground are as follows:

a. Some third parties indicated that the Direction may in fact be preventing the development of the market, harming liquidity and harming the LME's ability to compete with alternative exchanges. In addition, it appears that there is a significant customer demand for the extension of LME Select as evidenced by third parties and confirmed by Spectron's own analysis. LME's customers/members indicated that the Direction may be harming their ability to trade effectively with customers in Asia.

b. A number of LME's and Spectron's customers also suggested that the LME Select product is superior to eMetals in terms of functionality and reliability, although Spectron disputes this customer view. While the OFT recognises that these third parties may be influenced to some extent by their status as members of LME, their views must nevertheless be given weight on the basis that they are also Spectron's customers and are therefore also best placed to comment on the consequences of Spectron eMetals' elimination as an electronic trading platform."

The OFT's current view based on new information

61. In the light of all new information which the OFT has obtained, and in the circumstances of this case:

a. It now appears to the OFT that the effect on Spectron (as uniquely well placed re-entrant) of the proposed extension to LME Select's trading hours is unlikely to be as the OFT had expected when it gave the Direction. Although it still appears likely that Spectron may be eliminated from the electronic trading segment of the market, its position in metals voice broking suggests that it remains uniquely well placed to re-enter the electronic trading segment (see paragraphs 41-42 and 51-53).

b. Further, the weight of evidence suggesting a negative impact on the development of the market as a result of the Direction is:

i. not countered by expressions of concern from customers about the loss of Spectron's electronic trading platform; and

ii. no longer countered by evidence supporting the serious, irreparable damage to competition that was suggested by the evidence in front of the OFT when the Direction was given.

Conclusion on public interest

62. The OFT considers that it is no longer necessary as a matter of urgency to maintain the Direction to protect the public interest.

BALANCE OF INTERESTS

63. Given that the OFT now considers that the public interest considerations no longer favour the maintenance of the Direction, the OFT does not consider that maintaining the Direction is justified or proportionate, and considers that the balance of interests favours withdrawing the Direction."

V THE PARTIES' SUBMISSIONS ON COSTS

LME's application

80. As set out at paragraph 11 above, the LME's grounds for seeking an order for costs are as follows:

> "(a) The OFT failed to undertake adequate enquiries before adopting the Direction on 27 February 2006. If it had undertaken such enquiries, it would never have adopted the Direction.
>
> (b) Further or alternatively, having adopted the Direction on 27 February 2006, the OFT failed to make appropriately expeditious enquiries prior to the expiry of LME's time for appeal on 27 April 2006. If the OFT had undertaken such enquiries expeditiously during the relevant period, it could have withdrawn the Direction before 27 April 2006, thereby obviating the need for the LME to lodge its appeal."

81. Dealing with ground (a), in the LME's submission the various information identified in the document setting out the full reasons for the OFT's decision to withdraw the Direction, described by the OFT as "significant, new information", was available and could reasonably have been discovered prior to the adoption of the Direction; the OFT had simply failed to ask for it either from Spectron or from third parties.

82. The LME submits that the OFT's investigation prior to imposing the Direction was plainly inadequate. It naively took the statements made by Spectron in its application for interim measures at face value, relying heavily on the suggestion that if the LME extended its trading hours Spectron would be forced to close down eMetals and would find it much more difficult to re-enter the market subsequently. Spectron was not, however, an objective bystander: it had a commercial interest in the Direction being adopted. The LME submits that despite this, the OFT did not ask Spectron to justify or elaborate its statements, nor did it contact any third party (other than the LME) in an attempt to corroborate those statements. Indeed, it was not until the OFT issued a formal notice under section 26 of the Act to Spectron on 2 March 2006 that the OFT appeared to be taking an interest in Spectron's other business (there being a request for trading volumes in relation to additional trading platforms), but even then

the OFT did not ask any obvious questions as to Spectron's ability to re-enter the market were it to be eliminated as a result of an extension in Select's trading hours. That information seemingly only materialised at a meeting with Spectron on 7 March 2006 and was the subject of a formal information request by the OFT only on 11 April 2006.

83. The LME further points to the OFT's acceptance, in the document setting out its full reasons for the decision to withdraw the Direction, that its assessment of Spectron's eMetals screen-based business was based on a "limited understanding" at the time of the Direction of the importance of Spectron's voice broking business. However, the OFT had been informed of the existence of such business by Spectron in its original complaint, and Spectron had told the OFT at the meeting on 16 August 2005 that it was "focusing on its voice trading". In the LME's submission, the OFT failed to ask appropriate questions about the nature of such business until after it had adopted the Direction.

84. The LME also notes that in relation to "new" information received from third parties, the OFT apparently did not make any attempt at all to obtain information prior to adopting the Direction despite the limited number of third parties who would be directly affected by the potential grant of interim measures. The failure to seek information from third parties is, in the LME's submission, particularly surprising given the OFT's recognition in the Full Reasons (at paragraph 60(b)) that LME members are "best placed to comment on the consequences of Spectron eMetals' elimination as an electronic trading platform".

85. The LME submits more generally that the OFT cannot reasonably suggest that it did not have time to undertake any further investigation than that which it undertook prior to the adoption of the Direction:

    (a) the OFT had known of the possibility of LME extending Select's trading hours, and the possible effect this would have on Spectron's business, since 16 August 2005;

(b) it appears that Spectron informed the OFT around the beginning of December 2005 of the LME's definitive plans (which were in the public domain by 24 November 2005) to extend Select's trading hours;

(c) the OFT itself first raised the possibility of interim measures with Spectron on 15 December 2005;

(d) Spectron first requested interim measures on 5 January 2006;

(e) the OFT cannot hide behind the fact that Spectron did not make a reasoned application for interim measures until 2 February 2006. The OFT's power to adopt interim measures is not dependent on a formal application being made. This is particularly so where the OFT considered that the Direction was necessary to protect the public interest, not simply to prevent serious and irreparable damage to Spectron.

86. The LME submits that any urgency the OFT found itself in when deciding to adopt interim measures was entirely of its own creation. It could and should have acted much more swiftly when considering interim measures. In any event, there was time for the OFT to raise relevant questions with both Spectron and third parties after it had received Spectron's application on 2 February 2006, as demonstrated by the fact that the LME received answers within a matter of days from a significant number of its members to the question the LME had posed in a letter to them, namely whether the members would prefer (a) to have access to Select during Asian trading hours immediately or (b) not to have such access until after the completion of the OFT's investigation.

87. The LME submits that the inadequacy of the OFT's investigation is demonstrated by the OFT's full reasons for withdrawing the Direction. It is clear that it was only <u>after</u> it had adopted the Direction that the OFT carried out the sort of investigations it should have carried out beforehand. Had it carried out an adequate investigation beforehand, it would have been able to obtain the "new" information before the

Direction was ever adopted. The LME submits that in those circumstances the Direction would never have been adopted.

88. The LME submits that it is not necessary, for the purpose of determining the costs application, for the Tribunal to look at the merits of the appeal brought by the LME: the simple point is that the appeal would not have been made if the OFT had investigated properly and in good time. If the LME had to satisfy the Tribunal as to the merits of its appeal, be it on a broad brush approach or on the basis of *Wednesbury* principles, there would be no point in the LME seeking to withdraw its appeal.

89. As to ground (b), the LME submits that the OFT failed to undertake the further investigations it considered necessary with due diligence. Had it done so, it could have adopted the decision to withdraw the Direction prior to the expiry of the time limit for appealing the Direction. The appeal would therefore never have been filed and substantial costs would have been saved. In the LME's submission, the OFT was under a continuing obligation to keep the Direction under review, yet did not act reasonably in pursuance of that obligation.

90. Referring to the further investigations carried out by the OFT, listed at paragraphs 28 and 29 of the Full Reasons, the LME submits that whilst this information should have been obtained before the Direction was adopted, the OFT in any event had two months to "put its house in order". Yet the OFT did not issue a formal notice pursuant to section 26 of the Act to any LME members until 30 March 2006, one month after the adoption of the Direction, and to Spectron (seeking detailed information as to the effect of an extension of Select's trading hours) until 11 April 2006 – this despite the OFT being well aware of the high relevance of the information sought to the appropriateness of the Direction. Moreover, the formal request for information addressed to LME members was very detailed, containing 35 questions the majority of which referred to the substantive investigation, with a deadline of 21 April 2006 – i.e. a period of three weeks despite the urgency of the situation. In the LME's submission, the OFT's actions made no sense.

91. Moreover, in the LME's submission, Spectron's equivocation as to whether the Direction should be withdrawn should have alerted the OFT to the need to review expeditiously the appropriateness of the Direction, yet the Direction remained in place for around two and a half months. The LME submits that, in all these circumstances, had the OFT conducted itself with appropriate urgency it could have avoided the need for the LME to appeal. Its failure to do so should lead to it being required to pay the LME's costs of the appeal.

The OFT's submissions

92. The OFT submits that there is no good basis for a costs order against it. In summary, the OFT submits, first, that in the absence of a successful appeal there should be no award of costs, in particular where the appeal is against an interim measures direction; secondly, and in the alternative, that if contrary to the above the Tribunal does wish to consider an award of costs, it would need to consider the likelihood of the appeal succeeding; and, thirdly, that in any case the LME has provided no legal basis for its costs application, and its submissions as to the adoption of the Direction and the review of it are misconceived and wrong.

93. Turning to the first head of its submissions, the OFT notes that the Tribunal's approach to costs is flexible. There is no rule to the effect that a successful appellant will necessarily receive its costs; likewise, an unsuccessful appellant cannot assume that it will be immune to costs. *A fortiori*, where there has been no successful appeal there can be no assumption that the appellant will recover its costs. Indeed, any presumption which may apply would have to be to the effect that there will be no recovery absent a successful appeal. In the one case where a substantive appeal was withdrawn and costs considered, the Tribunal stated that where an appellant decides to withdraw its appeal it will often be the case that it should have to pay a proportion of the respondent's costs: see *Hasbro UK Limited v Office of Fair Trading* [2003] CAT 2. Whilst the OFT recognises that the *Hasbro* case is different from this one, in both cases (a) the appellant launched a precautionary appeal knowing that there was

OFT activity which might be relevant to whether that appeal was going to need to be pursued and (b) the appeals were withdrawn following a further decision of the OFT.

94. In the OFT's submission, the costs principle articulated in *Hasbro* is of all the more force where, as here, the case concerns an interim measures direction. Such directions are made as a matter of urgency. Information available to the OFT may be incomplete and the situation fast moving. It is, moreover, unlikely that the OFT will have completely impartial sources of information. It will have to use its own judgement, often very quickly, as to what information it can rely on. The OFT also points out that interim measures directions are only protective in nature and are only for use until the end of an investigation. They do not restore competition or punish unlawful behaviour. That notwithstanding, the OFT does not impose them lightly: this is the first such direction since the Act came into force. To make a costs award would act as a significant disincentive to the OFT in considering whether to issue an interim measures direction in the future. This concern is all the more acute given the levels of costs sought by appellants generally and by the LME in particular.

95. As to the second head of its submissions, the OFT submits that if the Tribunal does not accept the OFT's primary submissions, it should consider the merits of the appeal on a "broad brush" basis: an appellant would only be able to obtain an order for costs where the basis for the decision was unarguable and thus it was clear and obvious that the appeal would succeed. The Tribunal should bear in mind the nature of the statutory test set out in section 35 of the Act, in particular that the test is satisfied if the OFT "considers" that it is necessary for it to act. In contrast to decisions of infringement, the language of section 35 emphasises the role of the subjective view of the OFT. In the OFT's submission, it should only be where the OFT had acted unreasonably in considering that a direction was necessary that there would be a basis for overturning such a direction. Furthermore, the Tribunal should bear in mind the nature and purpose of an interim measures direction, which in the OFT's submission would continue to militate against an order for costs being made.

96. Turning to its third head of submissions, the OFT submits that the LME has failed in its application to provide any good legal basis for its claim for costs. The OFT did not lift the Direction for any of the reasons cited in the notice of appeal. Furthermore, in the OFT's submission, the assertions made by the LME are misconceived and wrong.

97. The OFT submits that it is not enough merely to point to certain information which could have been available to the OFT before it issued the Direction and which might have resulted in the Direction not being issued. The question for the Tribunal is whether it is unarguable that the OFT could lawfully have considered it necessary to issue the Direction as a matter of urgency. The fact that the material may have been imperfect does not render the decision unlawful. It should be noted that over and above the requirements set out in section 35(3) of the Act there is no statutory duty to consult particular persons. In the OFT's submission, the LME would have to show not only that enquiries should have been made but also that it was duty bound to make such enquiries before issuing the Direction. The material put forward by the LME is not sufficient, in the OFT's submission, to provide a basis for concluding on a broad brush basis that the LME would have succeeded in its appeal.

98. The OFT further submits that the LME's account of the OFT's actions is both tendentious and written with the benefit of hindsight. The OFT received Spectron's application, together with the necessary supporting evidence, on 2 February 2006, following which it needed to issue the statutory notice of consultation, allow the LME access to the file and grant the LME sufficient time to respond. It is clear, in the OFT's submission, that there was not time to carry out all of the other steps which the LME might have recognised as necessary to reach a decision that the Direction was not required. The LME fails to appreciate the sequential nature of the evidence-gathering process. While a path of enquiry may be obvious in hindsight, it is rarely so at the time. Moreover, some of the significant factors in the decision to withdraw the Direction were not brought to the OFT's attention by the LME in its

representations on the OFT's proposal to issue a direction, despite its apparent recognition now that these are significant.

99. As to the suggestion that the OFT "naively" accepted Spectron's submissions, in particular as to the likelihood of it re-entering the market were it forced to exit, the OFT accepts that Spectron is not an objective bystander but that does not diminish the importance of Spectron's market position and the information it can and did provide about it. Furthermore, the background to these proceedings cannot be ignored: the possible elimination of the closest competition to LME Select will necessarily cause the regulator to think about what it can do to maintain the status quo pending resolution of its investigation. In any event, it is far from naïve to consider the information provided by the competitor that it would struggle to re-enter more compelling than assertions and speculations put forward by a party under investigation. All of the substantive analysis pointed away from the suggestion that re-entry was easy. It was only once substantially more information had been provided, particularly to the effect that a "bridgehead" of experienced personnel with contacts in the metals market would remain with Spectron and that Spectron's submissions as to the need for separate screens for eMetals and Select were perhaps incorrect, that the position changed.

100. The OFT submits that there is no reason why it should have delayed putting in place the Direction in order to spend further time asking further questions about Spectron's ability to re-enter the market in circumstances where the OFT had concluded that it would be driven out by *prima facie* abusive behaviour. The material provided by the LME in its representations of 22 February 2006 did not allay the OFT's serious concerns as to Spectron's potential exit and ease of re-entry.

101. As to the nature of Spectron's voice broking business, the OFT submits that the LME attempts to use the wisdom of hindsight to impugn the Direction. Whilst it may have become clear subsequently, the OFT was not aware of its potential significance at the time it issued the Direction.

102. As to the LME's criticism of the OFT for not canvassing the views of third parties at an earlier stage, the OFT recognises that third party information is very useful, particularly in relation to the consequences of the exit of eMetals from the market, but that is no reason for concluding that the Direction was wrongly put in place or that the steps taken in the time available by the OFT were inappropriate such that the Direction should be impugned. Moreover, customers' views on the focal point, namely the ability of Spectron to re-enter the market, would have been of limited use. The OFT does not accept that it should have canvassed the views of third parties prior to receiving the LME's representations on 22 February 2006.

103. As to the general submission by the LME that the OFT had ample opportunity to undertake further investigation prior to issuing the Direction, the OFT notes that it was only in late November 2005 that the possibility of early morning trading became a proposal with a fixed date for implementation. Before considering whether a direction would be justified the OFT needed a reasoned submission from Spectron, supported by evidence, which was received on 2 February 2006. It was only when it had that material that the OFT considered that a direction might be necessary and appropriate. LME's representations were of relatively limited value and were largely unsupported by factual evidence or informed opinion from third parties. Contrary to the LME's submission, the urgency of the matter was not "self-imposed" but rather the result of the circumstances in which the OFT found itself dealing with Spectron's request. The OFT submits that given the highly specialised features of the market and the conduct in question, the OFT was not in a position to act on its own initiative without further information and evidence from Spectron about the need for an interim measures direction. In any event, it is unlikely that issuing the Direction slightly earlier would have obviated the need for the LME to appeal.

104. As to the LME's submission that the OFT failed to make appropriately expeditious enquiries prior to the deadline for the LME to appeal the Direction, such that the appeal would have been obviated, the OFT submits that there is no legal basis for the submission. It does not impugn the decision to issue the Direction. There is no duty

to keep interim measures under review, either under section 35 of the Act or otherwise. Moreover, whilst the OFT is always conscious to seek to avoid unnecessary costs by persons affected by its actions, the time limit for appeals does not either expressly or impliedly place a constraint on the manner in which the OFT deals with such directions.

105. The OFT submits that in any event it acted quickly to review the Direction. It acted expeditiously in considering new information and kept the Direction under continuous review with meetings, information requests and active consideration of the information being received. The Tribunal should be cautious in considering submissions that assert, with hindsight, that the investigation should have been run differently.

106. As to the LME's submissions on the notices under section 26 of the Act addressed to LME members, the OFT submits that (a) there was nothing wrong with the length of time taken to prepare the notices and (b) it was perfectly sensible to issue a notice dealing more broadly with the substantive investigation as well as the interim measures issue given the disruptions such notices create for organisations.

VI TRIBUNAL'S ANALYSIS

107. Rule 55 of the Competition Appeal Tribunal Rules 2003 (SI 2003/1372) ("the Tribunal's Rules") provides, in so far as material, as follows:

> "55. – (1) For the purposes of these rules "costs" means costs and expenses recoverable in proceedings before the Supreme Court of England and Wales …
>
> (2) The Tribunal may at its discretion, at any stage of the proceedings, make any order it thinks fit in relation to the payment of costs by one party to another in respect of the whole or part of the proceedings and, in determining how much the party is required to pay, the Tribunal may take account of the conduct of all parties in relation to the proceedings.

> (3) Any party against whom an order for costs is made shall, if the Tribunal so directs, pay to any other party a lump sum by way of costs, or such proportion of the costs as may be just. The Tribunal may assess the sum to be paid pursuant to any order made under paragraph (2) above or may direct that it be assessed by the President or Chairman or dealt with by the detailed assessment of the costs by a costs officer of the Supreme Court …"

108. The Tribunal has emphasised in its previous case-law that it has an unfettered discretion in relation to costs. It proceeds on a case-by-case basis, remaining flexible to meet circumstances as they arise consistently with the overriding objective of dealing with cases justly: see, inter alia, *Institute of Independent Insurance Brokers v DGFT (Costs)* [2002] CAT 2 ("*GISC: Costs*") at paragraph 48.

109. This is the first judgment of the Tribunal dealing with the question of costs in the context of an appeal against an interim measures direction adopted under section 35 of the Act. The Direction the subject of the present proceedings is also the first such direction adopted by the OFT.

110. The circumstances of this application are that the OFT, having made a decision to impose the IMD on 27 February 2006, thereafter made a second decision on 15 May 2006 in which it withdrew the IMD. However, the OFT stands by its first decision and submits that the second decision was made on the basis of new information which it did not have when it made the first decision. The time for appealing the first decision expired on 27 April 2006 and the LME lodged this appeal on 26 April 2006, i.e. the day before the expiry of the time limit for appealing. Having regard to the OFT's second decision, the LME has applied to withdraw its appeal against the first decision. The OFT consents to the withdrawal of the appeal.

111. The OFT submits that in all the circumstances it should not be ordered to pay the LME's costs of the appeal. The circumstances are as set out in paragraphs 112 to 122 below.

112. In paragraph 13 of its reasons for the Direction the OFT stated that:

> "the OFT considers that in this case it is necessary as a matter of urgency to give the above interim measures direction to LME to protect the public interest. Further or in the alternative the OFT considers that it is necessary as a matter of urgency for it to give the above interim measures direction to LME to prevent serious irreparable damage to Spectron."

113. The OFT relied on two grounds for the protection of the public interest (paragraph 26). First, on the evidence available it considered that the extension of trading hours was likely to have the effect of extending or exacerbating existing abusive conduct by the LME (paragraph 27). In the OFT's view, it was not in the public interest to permit the extension of such conduct, and in the interests of preventing damage to competition it was urgently necessary to issue the direction (paragraph 28). Secondly, a direction was urgently necessary to prevent damage to the market. This harm to the general competitive process and to market conditions was distinct from harm to Spectron itself (paragraph 29).

114. The OFT relied on the following:

(a) The introduction of LME Select at a below-cost price appeared to have led to the almost complete elimination of any trading volume on Spectron's electronic trading platform in those segments where LME Select is available (i.e. the European day trading market segment) (paragraph 30).

(b) Spectron indicated that if the LME extended the trading hours on LME Select this was likely to cause the migration of a significant portion of Spectron's remaining trading volume to Select. Information provided by Spectron supported the statement that extension would cause Spectron entirely to cease competing with LME Select (paragraphs 31 to 32).

(c) In circumstances where Spectron is the only competitor of LME, the elimination of Spectron was not in the interests of consumers or in the public interest more generally (paragraphs 33 to 34):

(i) Although not then active in day trading to any significant extent, the OFT considered that Spectron was uniquely well-placed to re-enter day trading in future.

(ii) Were Spectron to be eliminated, re-entry would be very difficult or impossible. There were a number of factors which the OFT considered supported this proposition (all of which were, the OFT considered, credible concerns):

- The reputational damage to Spectron caused by exiting the market.

- The cost and difficulty of re-introducing an additional trading screen to brokers' desks.

- The overall difficulty of overcoming the reputational effects of the alleged predation.

(d) If no direction were given, the OFT considered that any final directions would likely be ineffectual and insufficient to remedy the abusive conduct which the OFT had reasonable grounds for suspecting (paragraph 35).

115. The evidence on which the OFT relied in relation to the public interest was largely obtained from Spectron's application for interim measures dated 3 February 2006.

116. As to the serious, irreparable damage which in the OFT's view would be occasioned to Spectron, the OFT referred to the following matters:

(a) The OFT considered that if forced to exit the market this would constitute a considerable competitive disadvantage for Spectron (paragraph 43).

(b) On the evidence then before it, the OFT considered that such market exit was likely to have a lasting effect on Spectron's position in the market: it would be

extremely difficult, at least, for it to re-establish a viable electronic trading platform in this area in the future (paragraph 43).

(c) The OFT considered that if forced out, significant damage would be done to the goodwill and reputation of Spectron, which, in the OFT's view, was likely to contribute significantly to the difficulty it would face in trying to re-establish a viable electronic trading platform in future (paragraph 44).

(d) The OFT considered that an IMD would preserve Spectron's position in extended hours trading and preserve its status as uniquely well-placed to re-enter the day trading segment, pending completion of the OFT's substantive investigation (paragraph 44).

117. It was accepted at the hearing that the critical factor for the OFT under both heads was Spectron's ability to re-enter the market in the event that it was forced to exit it. For this reason, we focus on this particular aspect in our analysis.

118. On 1 March 2006, shortly after the IMD was adopted, Spectron issued a statement to customers announcing that it had requested that the OFT withdraw the Direction on the basis of the "negative publicity that the market is attracting and the restrictions on liquidity". On 9 March 2006 Spectron clarified its position and confirmed to the OFT that it wished the Direction to remain in place.

119. According to paragraph 24 of its full reasons for the decision to withdraw the IMD, the OFT kept the Direction under review. After having acquired significant new information, the sources of which are described in paragraphs 28 to 29 of the Full Reasons, and having carefully analysed the new information, the OFT's view was that it was no longer considered necessary as a matter of urgency to maintain the Direction in place either to prevent serious, irreparable damage to Spectron or to protect the public interest. In its oral submissions before us, the OFT submitted that it did not have a duty to keep an IMD under review but that in the circumstances of

this case the events immediately following the imposition of the IMD, in particular Spectron's statement of 1 March 2006, "triggered" the OFT's reconsideration.

120. Paragraphs 28 and 29 of the Full Reasons read as follows (footnotes omitted):

> "28. Since giving the Direction on 27 February 2006, the OFT has made the following requests for information:
>
> **a.** 1 March 2006, informal information request to Spectron;
>
> **b.** 2 March 2006, section 26 Notice to LME;
>
> **c.** 2 March 2006, section 26 Notice to Spectron;
>
> **d.** 10 March 2006, informal information request to UK-based LME members/customers;
>
> **e.** 30 March 2006, section 26 Notices to Category 1 and 2 LME members;
>
> **f.** 4 April 2006, section 26 Notices to UK-based LME Category 4 and 5 members;
>
> **g.** 4 and 5 April 2006, informal information request to non-EU based LME members/customers; and
>
> **h.** 11 April 2006, section 26 Notice to Spectron.
>
> 29. The OFT also met with LME, Spectron, the Financial Services Authority and the Futures and Options Association. The OFT also received information via unsolicited approaches from third parties (principally customers of LME, who are generally also members of LME). This led the OFT to obtain valuable additional information and an enhanced understanding of the parties' positions."

121. The new information is set out in paragraphs 40, 48 to 50 and 60. Those passages are set out at paragraph 79 above.

122. In paragraph 32 of the Full Reasons the OFT recorded that the new information that became available since the Direction was given affected the OFT's evaluation of the situation, and its assessment of information previously held by or known to the OFT. More specifically, this information raised issues in relation to the various elements of

the Direction and the need to maintain it as a matter of urgency, particularly as regards the following points:

(a) Whether there was likely to be serious irreparable damage to Spectron if LME Select's trading hours were extended.

(b) Whether there was likely to be damage to the public interest.

(c) Whether the balance of interests favoured the maintenance of the IMD.

123. The Tribunal is therefore considering a costs application in respect of an appeal the merits of which have not been (and will never be) considered.

124. The OFT submitted that the Tribunal's decision in *Hasbro v Office of Fair Trading*, cited above, enunciated the principle that where an appellant decides to withdraw, a costs order will not be imposed on the OFT, and indeed it will often be the case that the appellant should have to pay a proportion of the OFT's costs. The OFT submitted that we should follow that principle, at least in so far as it suggests that the OFT should not pay the costs of an appeal in the absence of a successful appeal.

125. We do not accept that submission. The facts in *Hasbro* are clearly distinguishable from the facts presently under consideration. In *Hasbro* the appellant filed an appeal against a first infringement decision in the knowledge that the OFT was on the verge of adopting a second and separate infringement decision, of which it expected to be an addressee. Once it had seen the second infringement decision (in which it was granted a 100% reduction in the level of the penalty), Hasbro decided, for its own commercial reasons, to withdraw its appeal against the first infringement decision. The first decision in that case had not been withdrawn by the OFT.

126. In the present case, by contrast, it was the OFT's decision to *withdraw* the Direction which led the LME to apply to withdraw its appeal against the Decision. Had the OFT withdrawn the Direction before the end of the expiry of the period for issuing an

appeal, no recoverable costs would have been incurred by LME. Accordingly, the *Hasbro* case is not relevant to our consideration of the LME's application for costs.

127. Under Rule 12 of the Tribunal's Rules the appeal can only be withdrawn with the permission of the Tribunal, and where the Tribunal gives permission it may do so on such basis as it thinks fit. It is under this rule that the Tribunal has jurisdiction to make costs orders where the appellant applies to withdraw its appeal. In exercising its discretion as to whether a costs order should be made (Rule 55), the Tribunal must consider the circumstances in which the OFT both gave the IMD and made the decision to withdraw it.

128. In its oral submissions, the OFT conceded that it should pay the costs if it were established that it took the first Decision on an inherently inadequate evidential basis. The OFT submits that that was not the case and that it was relying on "new" information which had not previously been available to it. The LME submits that the "new" information would have been available to the OFT when it took the IMD had it acted as a reasonable authority would have acted.

129. We consider that the issue before us is whether the process which the OFT adopted in giving the IMD, including as to the assessment of the quality of the evidence upon which it would rely, was one which an authority acting with due appreciation of its responsibilities under section 35 of the Act would have decided to adopt.

130. In considering whether the OFT adopted an appropriate process in reaching its decision to give the IMD, we focus on the following matters:

(i) what is the quality of evidence which it is appropriate for an authority to rely upon in exercising its functions under section 35 (paragraphs 137 to 142 below);

(ii) the quality of evidence before the OFT when it adopted the Direction (paragraphs 143 to 149 below);

(iii) whether there were other circumstances relating to the process which the OFT adopted in this case which are relevant to the exercise of its functions under section 35 (paragraph 150 to 163 below).

131. There is a significant difference between the quality of evidence on which the OFT relied when imposing the IMD and the quality of evidence on which it relied when withdrawing the IMD. In the Decision, the evidence on which the OFT relied was taken from the contents of Spectron's written application, together with information obtained through other informal channels such as meetings and email correspondence with Spectron. At the time of withdrawing the IMD the quality of the evidence on which it relied was very much more substantial: not only did it receive information from Spectron and from UK and non-UK-based LME members/customers pursuant to informal requests but it also obtained information in response to section 26 notices sent to the LME, Spectron, Category 1 and 2 LME members, and UK-based Category 4 and 5 LME members. It also held meetings with the LME, Spectron and the Financial Services Authority, and received information through unsolicited approaches from the FOA and other third parties (principally customers of the LME, who are generally LME members).

132. A section 26 notice is a written notice issued by the OFT requiring the addressee to produce to it a specified document or to provide it with specified information. It is an offence to fail to comply with a requirement imposed under section 26 (see section 42 of Act). It is also an offence if information is provided to the OFT in connection with any of its functions under the Act knowingly or recklessly which is false or misleading in a material particular (see section 44). A section 26 notice must indicate the nature of the offences created by sections 42 and 44 (see section 26(3)(b)). An addressee of a section 26 notice is therefore expressly warned that it is an offence knowingly or recklessly to supply false or misleading information to the OFT in response to such a notice.

133. We consider that the effectiveness of section 26 notices is evident from comparing, on the one hand, the contents of Spectron's application for interim measures and the

email correspondence between Spectron and the OFT prior to the adoption of the IMD with, on the other hand, what was later produced by Spectron in response, in particular, to the section 26 notice of 11 April 2006 addressed to it. For example, in Spectron's application for interim measures no mention was made of the significance of Spectron's voice broking business, in terms of maintaining contacts, relationships and broking staff, for its electronic metals trading business, yet in its response to the section 26 notice of 11 April 2006 Spectron stated that "relationships are key to any revival. Spectron has good voice broking contacts and would hope to build on [them]" (see paragraph 40e of the Full Reasons).

134. The other material difference in the quality of evidence on which the OFT relied for the imposition of the IMD as compared with the withdrawal of the IMD was that for the imposition of the IMD the OFT solely relied on the evidence of Spectron, whereas for the withdrawal it relied on evidence (mainly in response to section 26 notices) not only from Spectron but also from the various third parties to which we have referred above.

135. Furthermore, when reviewing the IMD the OFT obtained such evidence (including from Spectron) in a manner which made it clear to the maker of the statement that (s)he would be criminally liable in relation to any false or misleading information given knowingly or recklessly.

136. Section 35 of the Act does not give any indication as to the quality of the evidence which the OFT should rely upon when considering whether it is necessary for it to act under that section as a matter of urgency. Nor does the *Guidance* assist in that regard.

137. We accept that since the OFT is acting as a matter of urgency, the process it adopts before issuing an IMD must necessarily be flexible and must be proportionate to the particular circumstances of the case. However, before the OFT considers it necessary to act, it must be satisfied that the information it is relying upon is of such a quality that it is appropriate to rely upon it in all the circumstances of the particular case.

Where urgency is particularly acute, it may be appropriate, for the imposition of the IMD, to rely on evidence which is unsubstantiated, but the evidence should be substantiated as soon as practicable after adoption of the IMD, and at least in those circumstances the IMD should be kept under review. We do not have to decide whether in other circumstances the OFT should keep an IMD under review. We can, however, envisage a situation in which the OFT becomes aware of a material change in circumstances or of other matters which may be relevant to the continuing necessity of the IMD, which may mean that an IMD previously imposed should be reconsidered.

138. Section 35 of the Act gives the OFT significant power over undertakings suspected of having infringed the relevant prohibitions. Such power is similar to the power of the High Court to grant an injunction. It is therefore relevant to compare the quality of the evidence on which the OFT relied in this case (which was not corroborated or substantiated at all) with the quality of evidence which the Court requires in order to grant an injunction, particularly on an urgent basis.

139. Where a party seeks an interim injunction in the High Court it is incumbent upon it to support the application with evidence in the form of (1) a witness statement, which would include a statement of truth; (2) a statement of case, provided that it is verified by a statement of truth; or (3) the application, provided that it is verified by a statement of truth: see *Practice Direction – Interim Injunctions* (CPR Part 25), 25 PD 3 at paragraph 3.2. The evidence must set out the facts on which the applicant relies for the claim being made against the respondent, including all material facts of which the court should be made aware: *Practice Direction – Interim Injunctions*, 25 PD 3 at paragraph 3.3.

140. The obvious justification for the requirement of a statement of truth is that it provides some assurance that the statement is made with an honest belief as to the accuracy of its contents: see e.g. *Civil Procedure Volume 1 (The White Book Service 2006)*, editorial introduction to CPR Part 22 at paragraph 22.0.2 (p 501). Where a person makes, or causes to be made, a false statement in a document verified by a statement

of truth without an honest belief as to its contents, proceedings for contempt may be brought: CPR Part 32, paragraph 32.14.

141. Given that the addressee is expressly put on notice as to the consequences of knowingly or recklessly supplying false or misleading information, a response to a section 26 notice has similar significance to a witness statement supported by a statement of truth. Although it is not a requirement that the OFT only rely on information contained in response to section 26 notices and whilst recognising the width of the sanction contained in section 44, the OFT must assess the quality of the evidence it proposes to rely on when considering whether it is necessary to act under section 35. We can anticipate situations in which the OFT is satisfied that it has information of a sufficient quality on which it feels able to rely even if it is not provided in response to a section 26 notice. Such a situation may arise, for example, where it has independent corroborative information before it or where the evidence is found in contemporaneous documents. Where the information is not from an independent source the reliability of the information, taking into account all the circumstances, needs to be assessed.

142. We consider that the OFT should be circumspect about solely relying on uncorroborated information not contained in a response to a section 26 notice. This is particularly so where the source of the information is not impartial, as was the case here. On the other hand, where the OFT obtains information in response to a section 26 notice it would normally not need to conduct further investigation and substantiation of the facts set out in such responses unless it has other information which causes it to question its reliability.

143. Against that background we turn to consider the circumstances of the present case. First, as we have set out above, the information on which the OFT relied was uncorroborated information from the complainant not provided in response to a section 26 notice.

144. The OFT admits in the Full Reasons that it had a limited understanding of the significance of Spectron's metals voice broking service, which was a relevant factor in relation to Spectron's ability to re-enter the market. We are concerned that armed with only a "limited" understanding of Spectron's relevant business, and by extension the market in general, the OFT felt able to adopt an IMD based solely on information provided to it by Spectron without seeking information from "the market", in particular from affected third parties.

145. As to the limited understanding the OFT had of Spectron's voice broking business, that understanding was based on the elements set out in paragraph 39 of the Full Reasons, namely:

(a) An email in August 2003 describing voice broking as a fledgling service with total revenues of US$2,000;

(b) The OFT's understanding that Spectron did not charge fees or derive revenue from its voice broking business;

(c) That Spectron did not identify voice broking as a strand of business which could operate independently;

(d) That Spectron's application for interim measures did not refer to Spectron's voice trading activities; and

(e) That the LME did not itself refer to the significance of Spectron's voice trading activities.

146. Those elements seem to us to constitute a weak basis for an understanding of the relevant business. First, the information from Spectron was, by the time of the Direction, old information, much of it dating back to August 2003 or the meeting of 16 August 2005. The OFT should in our view have sought up-to-date information from Spectron. Our view is reinforced by the fact that at the meeting with the OFT of 16 August 2005 Spectron stated that "Spectron is focussing on its voice trading".

The OFT should have been aware that the market was evolving. It was quite foreseeable that conditions may have changed quite considerably by late 2005 or early 2006. Secondly, it was not information provided pursuant to a formal request which indicated the sanctions which could be imposed in the event that the respondent knowingly or recklessly provided false or misleading statements. Thirdly, it was not information obtained from an impartial source.

147. Likewise, in relation to the barriers to re-entry identified by the OFT (reputational damage to Spectron in the eyes of its customers and the question of screens), it appears that the OFT simply relied on Spectron's assertions without testing any of them with third parties. We would expect an authority acting responsibly to make at least some enquiries with the very customers in whose eyes Spectron's reputation would be damaged. Similarly, it seems to us that a cross-check on Spectron's assertions with regard to screens could have been made by enquiring of the same customers, who after all use the screens for trading, rather than simply relying on Spectron's statement that "having two screens rather than one will be a factor for many [brokers]" (application, paragraph 2.11). Such enquiries could have been made expeditiously by way of a section 26 notice.

148. As to the evidence on which the OFT relied in relation to the protection of the public interest, the OFT referred to the need to act "to prevent damage to the market", yet did not make enquiries of anyone in the market bar Spectron and the LME itself. As the OFT itself admitted in the Full Reasons, however, LME and Spectron customers are "best placed to comment on the consequences of Spectron eMetals' elimination" (paragraph 60 b). We consider this to be the case even if the weight to be attached to such evidence may legitimately take into account that the third parties have their own commercial interests. Even allowing for the fact that interim measures are taken in situations of urgency, as discussed below we consider that the OFT had more than enough time in this case to make adequate enquiries of affected third parties.

149. In our view, therefore, in the particular circumstances of the present case the quality of evidence on which the OFT relied in late February 2006 fell below the standard

which should normally be required by an authority such as the OFT when carrying out its functions under section 35 of the Act.

150. The next question is whether there are other circumstances relating to the process adopted by the OFT which are relevant to the exercise of its functions under section 35. The OFT rely in this regard on the urgency of the situation. The question is whether the urgency of the situation was such that the OFT had no alternative but to rely on such evidence, at least as a temporary measure. For the reasons set out below we do not consider that that was the position in the circumstances in which the OFT found itself.

151. The relevant history is set out in detail above. In summary, the OFT received a complaint from Spectron as to conduct by LME allegedly in breach of Article 82 EC in July 2003, more than two and a half years before the adoption of the IMD. The OFT commenced an investigation, initially under the Financial Services and Markets Act 2000, and on 10 March 2004 requested information from LME pursuant to section 305 of that Act. Whilst it is unclear precisely when the OFT decided to investigate under the Act, the first notice under section 26 of that Act was sent to the LME on 11 January 2005.

152. On 16 August 2005, at a meeting between the OFT and Spectron, it appears (from a note of that meeting) that the OFT was informed by Spectron of the latter's belief that the LME intended to "run trading overnight too", which would, in Spectron's view, threaten overnight business picked up by Spectron from Asia. On 24 November 2005 the publication "Metal Bulletin" made public LME's intention, announced to its "Category 1 and 2 Members" the day before, to extend the trading hours of LME Select from 1 March 2006. Although it is not clear when exactly the OFT became aware of the LME's intention to extend the trading hours of LME Select, it appears from an exchange of emails culminating in an email from the OFT to Spectron dated 15 December 2005 that the OFT must have been aware of the LME's plans by late November 2005.

153. In its email of 15 December 2005 to Spectron the OFT mentioned the possibility of interim measures and attached "some further information" relating to the power to grant interim measures. On 5 January 2006 Mr Evans of Spectron replied to the OFT's email of 15 December 2005, saying (among other things) that

> "if the LME extend their practices into night time trading I can see we will have little alternative but to shut the screen completely, which of course is exactly what the LME are trying to achieve."

154. Spectron's email went on:

> "The LME have declared their intention to extend their trading hours as from 1st March 2006. As things stand I imagine we will be forced to close our screen soon after. Naturally we would request that you use your powers under the Interim Measures to stop the LME from extending their hours until the OFT has completed its original investigations. Whether we are able to continue to offer a full 24 hour service will then depend on night time market activity and how long the OFT take to complete the very thorough investigations you are undertaking. The LME's actions are directed at Spectron in an attempt to drive us out of business… If you need further information you need to enable you to grant our suggested interim measures please do not hesitate to ask."

155. By an email to Spectron dated 10 January 2006 the OFT attached a letter which stated that in order for the OFT to consider granting interim measures it would need further evidence that the damage to Spectron as a result of the extension of LME Select's trading hours would be serious and irreparable or that an IMD was necessary to protect the public interest. The letter listed "a number of issues you may wish to consider". It appears that Spectron did not reply directly to that letter.

156. On 2 February 2006 Spectron sent an application for interim measures to the OFT. On 7 February 2006 Ms Warburton of the OFT emailed Mr O'Hegarty and Mr Morley of the LME sending "some general information on Interim Measures, as we are considering an application for Interim Measures with regards to your planned extension of trading hours for Select on 1 March 2006." The email continued: "We will be writing to you shortly regarding this application."

157. On 13 February 2006 the OFT served a notice on the LME proposing interim measures and requesting any representations to be made by 20 February 2006. On 22 February 2006 the LME submitted its representations. On 27 February 2006 the Direction was adopted.

158. It is quite apparent from this summary that the OFT had sufficient time to obtain information of an appropriate quality prior to the intended date for extension of LME Select's trading hours (1 March 2006). As set out above, it appears from an exchange of emails between the OFT and Spectron that the OFT must have been aware of the LME's plans by late November 2005, that it raised the question of interim measures with Spectron on 15 December 2005 and that it was aware in early January 2006 of Spectron's desire for interim measures to be adopted.

159. In our view, if the OFT considered that interim measures were potentially necessary *in the public interest* it could have commenced its investigation earlier. The OFT submitted that it was entitled to wait for Spectron's application, which it did not receive until 2 February 2006. Indeed, the OFT submitted at the hearing that it is solely for third parties to approach it with an application for interim measures. We do not accept this submission since it seems to us that in an appropriate case, where the OFT considers that interim measures may be necessary in the public interest as a matter of urgency, it should be prepared to act of its own initiative, as indeed is explicitly foreseen in the *Guidance* (see paragraph 3.8).

160. Having regard to the delay between 15 December 2005 and 2 February 2006 and to the dilatory attitude of Spectron in responding to the OFT's correspondence suggesting an application by Spectron for interim measures, the OFT should in our view have been more circumspect when considering whether it was necessary for it to act under section 35. If the public interest itself justified the making of the IMD then the OFT should have been obtaining the information it required to consider whether to make the IMD without waiting for Spectron's application. In that regard, by not taking any steps until it received Spectron's application, the "urgency" with which the OFT was confronted in February 2006 was entirely of its own making.

161. Had it acted earlier, it would have had time to obtain information of a sufficient quality well within the timeframe and before the intended date for extension of LME Select's trading hours came about. The "new" information which the OFT became in possession of in March 2006, as set out in paragraphs 40 and 48 to 50 of the Full Reasons, was all available by late November 2005 and could have been obtained quickly, as the period immediately succeeding the adoption of the IMD shows. In any event, it is common ground that the information would have been available if sought before the IMD was issued.

162. The OFT submitted, however, that it is only by obtaining the evidence sequentially that it could be seen what evidence was required. This submission does not, however, excuse the OFT from satisfying itself that it has evidence of a sufficient quality on which it may consider acting under section 35. In any event, had the OFT not delayed its consideration of whether to act under section 35 it would have had ample time to collect the evidence sequentially.

163. We consider that the OFT could have obtained evidence of the appropriate quality before deciding whether to give an IMD.

164. We now turn to whether there are any other relevant circumstances which we should take into account.

165. The OFT pointed to the fact that this was the first time it had adopted such a direction. The OFT was, it says, on a learning curve, which in its submission should be taken into account. The OFT submitted that it has acted cautiously thus far in the exercise of its powers under section 35 of the Act and that a costs award would serve as a deterrent to the OFT acting under section 35 in future.

166. We do not consider that such submissions affect our decision. The OFT should have given consideration internally to the process which it would adopt when considering whether to exercise its powers under section 35 of the Act, including the quality of the evidence it would require. In so doing, it should have considered the essential

features of the procedures under the CPR for urgent injunctions. Had it done so when it decided to consider exercising its powers under section 35, it would have had a process to follow. It is in our view inappropriate to suggest that it should learn from its mistakes in the first exercise of its powers under section 35 and that the addressee of the IMD should have to bear the burden of the OFT learning by its own mistakes.

167. Nor do we accept the argument that a costs award would, or should, act as a deterrent to the OFT exercising its section 35 powers in future. So long as the OFT relies on information obtained as we have indicated above (at paragraphs 137 to 142) in deciding whether or not to exercise its powers under section 35, it should be confident that a decision to adopt interim measures is likely to be made on a sound basis. As we have pointed out, in our view the process adopted by the OFT leading up to the contested decision was flawed.

168. The OFT also submitted that the Tribunal should only award costs if it is satisfied, on a "broad brush" basis, that the LME would clearly have been successful in its appeal. We reject that submission. The submission does not meet the circumstances of the present case. As set out above, in this case the Tribunal has decided that the process adopted by the OFT was flawed and that had a proper process been adopted, the OFT would have obtained the information which it subsequently obtained and on which basis it decided that the proper course was to withdraw the IMD.

169. Moreover, we see force in the LME's submission that if the OFT's submission were to be adopted, there would have been virtually no incentive for the LME to seek to withdraw its appeal. To come to a conclusion on whether the appeal would have been successful had the IMD been properly given would have been (i) hypothetical in the light of our conclusion that it was *not* properly given, (ii) pointless, since the Direction was withdrawn and (iii) disproportionately costly.

Conclusion

170. In all the circumstances, we have come to the conclusion that the OFT's investigative process was superficial and flawed and the IMD consequently ill-founded. The email sent by Mr Thursby of the OFT to Mr Evans of Spectron on 12 April 2006, referred to at paragraph 74 above, fortifies us in that regard. For the reasons set out above we have decided to exercise our discretion to award costs in favour of the LME as set out in paragraph 175 below.

171. Having regard to our conclusions as to the period prior to the adoption of the IMD, the parties' submissions as to the period between the adoption of the IMD and the decision to withdraw it do not fall to be considered.

Assessment of costs

172. At the hearing the Tribunal was not addressed on the question of assessment (although the parties had made written submissions on the point). It was agreed that if costs were to be awarded, the parties would seek to resolve the question of assessment. As a first step, it was agreed that the OFT would seek clarification of certain of the costs incurred by the LME in relation to its appeal.

173. Whilst we do not seek here to assess costs, we do however offer some observations on the basis of the material before us (which includes a summary schedule of costs filed by the LME at the Tribunal's request) so as to assist the parties.

174. We note from the oral submissions made to us that the costs that have been claimed include costs dating from February 2006 when the IMD was imposed. It appears that the costs claimed may include costs incurred by the LME in relation to the OFT's consideration of whether to withdraw the IMD. We do not, however, consider it appropriate to make an order with regard to those costs, which are not "costs…in respect of the whole or part of the proceedings" within the meaning of Rule 55 of the Tribunal's Rules. Those costs were incurred as part of the administrative procedure

before the OFT. In any event, in those circumstances we would not have considered it just for the OFT to be ordered to pay such costs.

175. In our view, the LME is entitled to the following heads of costs:

(a) the reasonable and proportionate costs of preparing its notice of appeal against the Direction;

(b) the reasonable and proportionate costs of attending the case management conference on 15 May 2006, bearing in mind that it must have been clear to the parties that the scope of that conference was very limited;

(c) the reasonable and proportionate costs of preparing its application for costs and attending the costs hearing.

176. We also consider that, at first sight, the rates charged by the LME's solicitors and counsel's brief fees are on the high side, the partner rates in particular being materially in excess of the Guideline Rate for Summary Assessment set out in the *White Book* (p 1415).

177. Finally, we are concerned at the high proportion of partner hours charged as against assistant solicitor hours.

Marion Simmons Peter Clayton David Summers

Charles Dhanowa
Registrar 8 September 2006