Linklaters

30 APRIL 2021

FNZ / GBST: GBST Response to the CMA's Remedy Paper

1 Executive summary

It is common ground that a full divestiture of GBST would comprehensively and effectively remedy all aspects of the SLC and the resulting adverse effects that the CMA has provisionally found without incurring undue risks.

In contrast, the "FNZ Option B" or "*divestiture of GBST with the right for FNZ to buy back certain assets of the Capital Markets business*" remedy is a re-labelled reverse carve-out or partial divestiture of GBST. As currently crafted, the Remedy Paper's proposed nuances in legal form and in process do not, in substance, materially alter the risk assessment of a partial divestiture or reverse carve-out (which the CMA had previously rejected as too risky).

In essence, this is because the proposed parallel agreement of the full sale and partial buy-back asset perimeter is envisaged before the purchaser is the *actual owner/operator* of GBST. The purchaser therefore risks making good faith mistakes and mis-judgments about complexities that due diligence cannot adequately eliminate. Moreover, the inherent lack of intimate knowledge of GBST is compounded by the proposed parallel sequencing: the purchaser is, in all likelihood, subject to (i) actual or perceived competitive pressure from other bidders whom it may believe are competing to become FNZ's preferred bidder with terms more attractive to FNZ (including as to the scope of the buy-back asset perimeter) and (ii) other deal negotiation pressure. Negotiations under pressure can certainly produce "horse-trading" and compromise. They can yield a negotiated deal at a negotiated price. However, they carry a material risk of an outcome that, in retrospect, compromised the best interests of GBST's customers and the CMA's remedial objectives.

Accordingly, despite the provisional finding as to its effectiveness, the FNZ Option B as outlined by the CMA in the Remedy Paper carries material risk for GBST's business and its customers (both Wealth Management and Capital Markets) in its current form. GBST does not consider that the safeguards proposed by the CMA in the Remedy Paper, while directionally helpful and addressing some risks, would sufficiently mitigate those and all risks for the reasons outlined in this Response. As such, FNZ Option B fails to achieve the CMA remedial goal of "*hav[ing] a high degree certainty of achieving their intended effect*" (cf. *Merger Remedies*, CMA87, para. 3.5(d), judicially cited e.g. in *Ecolab v CMA* [2020] CAT 12 at para. 88).

That said, in seeking to engage constructively with and build upon this provisional thinking, and while not as de-risked as a full divestiture, GBST nonetheless proposes two alternative structures that will mitigate the risks to a materially greater degree than FNZ Option B and are manifestly better candidates to meet the CMA goal of a "*high degree*" of certainty that they will be effective in practice.

Without prejudice to the arguments in favour of full divestment of GBST, GBST notes that either option it proposes would mitigate against mistakes and/or compromises by the purchaser which harm the longer-run competitive integrity of the Wealth Management business and reduce the shorter-run disruption to the GBST business and, importantly, its customers. At the same time, either option would maintain a more favourable outcome to FNZ than full divestiture (which would normally be coupled with a standard CMA prohibition on re-acquisition of any GBST assets).

GBST Option (1) - **Staggered timing of full sale and reverse carve-out (buy-back)** – to mitigate the risk of the remedy, under this alternative there would be an appropriately focused timeframe (e.g. 3-6 months) between two steps.

The first step is the completion of the sale of the entire GBST business to the purchaser, along with a parallel agreement, enforceable by FNZ, regarding the *mechanism* for agreeing the precise perimeter and asset list of subsequent asset sale (but not the asset list itself).

The second step would be the execution of the definitive asset purchase agreement (setting out the detailed terms of any subsequent buy-back) and completed transfer of certain Capital Markets assets by FNZ. This gap between the two steps would allow the purchaser the ability to focus on swiftly developing [✂].

In particular, the parallel agreement would include binding commitments to a defined process (with arbitration safeguards to prevent any "deadlock") to reach an asset sale for "*assets relating to the GBST Capital Markets business* [✂]" (or similar, as the CMA will determine) within the relevant timeframe. The agreement would indicate an initial price that is subject to a valuation adjustment, as is common in M&A, and would include a process whereby the proposed asset list is put forward by the purchaser to FNZ, with provision for independent expert arbitration in the event of a dispute, with the CMA ultimately able to appoint (an) arbitrator(s) up-front if the parties cannot agree on one in a timely fashion. Additional monitoring provisions could be added to ensure that the separation of the assets to be bought back by FNZ and the implementation of the buy-back does not weaken the Wealth Management business and proceeds with minimal disruption; or

GBST Option (2) - Put Option – the remedy could be structured as a full divestiture of GBST to the purchaser with a *Put Option* at the purchaser's discretion to sell certain assets of the Capital Markets business back to FNZ (but, unlike a typical put option, subject to FNZ's veto if it did not wish to acquire the relevant asset package). This could be triggered if the purchaser concludes that it is commercially feasible and desirable following completion of the acquisition of the GBST business and (as noted above) [✂] but, again, without deal negotiation pressure during a standard arms-length due diligence process. The terms of the Put Option could be settled up-front, but not the precise asset perimeter.

Again, it would be prudent to include CMA monitoring provisions to ensure that the separation of the assets to be bought back by FNZ and the implementation of the buy-back (if it occurs) does not competitively weaken the Wealth Management business and proceeds with minimal disruption.

GBST has explored each of these options below and would be happy to provide further detail to the CMA. GBST's main priorities, and indeed the CMA's main priorities, must be to (i) achieve a high degree of certainty that any remedy will be effective insofar as it safeguards, and does not harm, GBST's longer-run viability and competitiveness; and (ii) minimise the potential disruption to GBST's customers in the interim.

2 Introduction

2.1 This submission is made by GBST Holdings Limited ("**GBST**") in response to the CMA's Remedy Paper of 14 April 2021 in relation to the completed acquisition of GBST by FNZ (Australia) Bidco Pty Ltd ("**FNZ**") (the "**Transaction**").

2.2 In the Remedy Paper, the CMA identified the following potential structural remedies to the substantial lessening of competition ("**SLC**") in the market for the supply of Retail Platform Solutions excluding the in-house supply of software in the UK (the "**Relevant Market**") provisionally identified in the CMA's Provisional Report dated 15 April 2021:[1]

2.2.1 the full divestiture of GBST; and

2.2.2 the full divestiture of GBST with the right for FNZ to buy back certain assets of the Capital Markets business (also referred to as "FNZ Option B" and, in this response, as the "**Reverse Carve-Out Remedy**").[2]

2.3 The CMA has stated that "*while we currently consider that the divestiture of GBST with the right for FNZ to buy back certain assets of the Capital Markets business represents an effective and proportionate remedy, we are actively considering whether there are any remaining risks associated with the proposed remedy and, if so, whether and how these risks can be effectively managed.*"[3] GBST has always considered that there are risks associated with the Reverse Carve-Out Remedy and has outlined those risks and the potential ways to mitigate them in this Response.

2.4 In summary:

2.4.1 **CMA remedies policy seeks a high degree of certainty as to effectiveness.** The Reverse Carve-Out Remedy in its currently contemplated form and process is risky. While not demanding the impossible (absolute certainty), the Remedies Guidance is consistent with international best practice among peer regimes and seeks to play it safe with customer welfare. It cautions that the "*CMA will seek remedies that have* a *high degree of certainty* of achieving *their intended effect*" (*CMA Guidance on Merger Remedies*, CMA87, para. 3.5(d)).[4] A high degree of certainty is captured by the CMA's general preference to divest an "*existing business*" (GBST) over the "*divestiture of a part of a business or a collection of assets*" (such as GBST Wealth Management minus Capital Markets; cf. para. 5.12).

2.4.2 [✂]. As the CMA is aware, [✂] The starting point for a "high degree of certainty" to craft an effective remedy must takes into account [✂].

2.4.3 **The Reverse Carve-Out safeguards are insufficient to provide a high degree of certainty.** If the CMA moves away from this general preference against a carve-out, by way of exception, then it follows that exceptional caution is warranted in order to maintain the same *"high degree*" of certainty. The safeguards proposed in the Remedy Paper are not sufficient to manage and mitigate the risks associated with the Reverse Carve-Out Remedy. In fact, the safeguards proposed, in particular regarding the premise of a "one shot game" agreement on all aspects of the sale and carve-out in the short initial divestiture period, *and* the purchaser bearing the risk of the remedy with no ongoing monitoring, render the remedy proposal as one likely to produce a carve-out that is rushed, pressured, and inherently at risk of mistakes and

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1 Remedy Paper, paragraph 1.11.

2 CMA merger policy generally, including on remedies, focuses on substance over form and on economic and practical realities over legal terminology. In substance, the "divestiture of GBST with the right for FNZ to buy back certain assets of the Capital Markets business" remedy is a re-labelled reverse carve-out or a partial divestiture of GBST due to the contemporaneous agreement of the transactions, not a complete divestiture, with some nuances that do not alter the risk assessment of a partial divestiture or reverse carve-out (which the CMA had previously rejected as too risky).

3 Remedy Paper, paragraph 1.12.

4 CMA Guidance on Merger Remedies, 13 December 2018 (CMA87) (the "**Remedies Guidance**").

unintended consequences that cannot be reversed. Given the detail is intricate and complicated, even the most diligent supervision by the CMA cannot be expected to second-guess the purchaser's judgment so as to tease out mistakes or misjudged risks (unless they were so blatant or naïve as to render the purchaser of questionable suitability). This would apply even if the deadlines for achieving everything in parallel were leisurely, rather than compressed.

2.4.4 **Particular weight should be given to customer perceptions.** Customers must decide to entrust their ongoing business with the post-remedy GBST Wealth Management business for it to be a successful competitor to its close rival, FNZ. Their perceptions therefore are critical, regardless of whether those perceptions are verifiably "correct" or not. [✂]. It is unsafe to disregard the coherent body of evidence of GBST's customers, corroborated by third parties in the market and potential purchasers, on the risks and unknowns of breaking up GBST (summarised at paragraphs 1.82-84 of the Remedies Paper) in favour of general statements by FNZ with no supporting evidence.

2.4.5 **FNZ has no superior or granular insight into GBST's business.** FNZ has no better insight into GBST's business and the way it operates than any of GBST's other competitors or its customers because it has never *operated* (i.e. managed) GBST; it has only owned it, at arm's length, due to the CMA's interim measures. Further, any information that FNZ or its advisers received during the FNZ acquisition of GBST was not prepared in contemplation of a split of the Wealth Management & Capital Markets divisions, as the sale was for the entire GBST business only. Legal ownership (title to shares) cannot therefore be conflated with intimate knowledge of a business and the integrated nature of its *assets*, which requires being an owner-*operator* with unfettered access to GBST management, SMEs and its other expert personnel familiar with the requisite IT environment, product software, back-office and other operational detail.

2.4.6 **GBST has dedicated effort to de-risking a carve-out remedy via two proposals.** GBST has considered whether, if the CMA is inclined to adopt some form of reverse carve-out remedy as proposed by FNZ, there are alternative structures that will mitigate the risks. In that regard, GBST has identified two alternative structures that could reduce the risk of a longer-run [✂] and disruption to the GBST business and, importantly, its customers: (i) staggering the timing of the Reverse Carve-Out Remedy and subjecting it to sufficient arbitration and monitoring; and (ii) a full divestiture with a put option.

3 Overview of how GBST operates

3.1 GBST has set out how its business is structured and operates in previous submissions to the CMA, including GBST's response to the CMA's Notice of Possible Remedies dated 14 August 2020 (the "**GBST NPR Response**"), GBST's submission in respect of FNZ's Response to the CMA's Notice of Possible Remedies dated 8 September 2020 (the "**GBST Remedies Submission**"), GBST's submission in response to FNZ's remedy proposal of 11 March 2021 (the "**GBST Remittal Submission**") and various other submissions and RFI responses.

3.2 GBST does not propose to repeat in detail the submissions made to the CMA but urges the CMA to take these into account fully. As the CMA is aware, the GBST business comprises two divisions – Wealth Management and Capital Markets – [✂].[5] [✂][6]

3.3 Subject matter experts ("**SMEs**") are specialists in common components, [✂][7]

4 Scope of the divestiture package: full divestiture

4.1 Absent the requested changes to the Reverse Carve Out Remedy, which are summarised above and discussed further below, the Reverse Carve Out Remedy carries real risks for GBST's business. GBST maintains that a full divestiture represents the only comprehensive and effective remedy to all aspects of the SLC and the resulting adverse effects that the CMA has provisionally found. Reasons for this are set out in GBST's previous submissions to, and in discussions with, the CMA. This has not changed since the CMA's Phase 2 inquiry – in fact, while GBST has no criticism of the CMA as to the remittal, the effect of the FNZ litigation and remittal has been to [✂] by the continued uncertainty of the extended investigation. It follows that the starting point for considering remedial options is [✂] business, as opposed to a conditional divestiture remedy in an anticipated merger.

5 Scope of the divestiture package: Reverse Carve-Out Remedy

5.1 The Reverse Carve-Out Remedy gives rise to unnecessary risks which may further damage the [✂] competitive position of GBST's Wealth Management business in the UK because, as discussed further below, it will entail disruption to the business in implementing the separation. Furthermore, the Reverse Carve-out Remedy is, as currently described in the Remedy Paper, lacks monitoring and enforcement as explained further below, with uncertainty as to the exact scope of the divestiture increasing risk. These risks include:

5.1.1 Composition risks

(i) Composition risks are "*risks that the scope of the divestiture package may be too constrained or not appropriately configured to attract a suitable purchaser to operate as an effective competitor on the market*".[8] GBST's Wealth Management business is integrated with the Capital Markets business [✂] in order to operate as a viable business and an effective competitor (and vice versa).

(ii) As set out in the Remedy Paper, the CMA found that "*a separation of a UK Wealth Management business from the integrated GBST business would be likely to result in a structurally weaker competitor compared to the pre-Merger situation*"[9] and that "*this introduces additional risks, relative to the divestiture of a standalone business unit*".[10] Without introducing the safeguards as set out in the summary above and described further below, these concerns apply to the partial divestment or reverse carve-out of the

[5] GBST NPR Response, paragraphs 2.1-2.6; GBST Remedies Submission, paragraph 2.2.

[6] GBST NPR Response, paragraph 2.5.

[7] GBST NPR Response, paragraph 2.7-2.8; GBST Remedies Submission, paragraph 2.3.

[8] Remedies Guidance, paragraph 5.3(a).

[9] Remedy Paper, paragraph 1.48.

[10] Remedy Paper, paragraph 1.47.

Global Wealth Management business – this is not a 'standalone business unit' within GBST.

(iii) In fact, FNZ itself does not appear to know or understand which assets the Reverse Carve-Out Remedy would comprise. There is a clear tension in the fact that, on the one hand, FNZ intimates that the purchaser has significant discretion in reserving assets to itself and on the other hand describes certain assets as "non-negotiable" for FNZ.[11]

(iv) None of the potential purchasers cited in the Remedy Paper who were interested in a partial divestiture had assessed "*the feasibility and practicality of separation*"[12] and it is clear from their responses that they do not understand the composition risks associated with a Reverse Carve-Out Remedy.

5.1.2 Asset risks

(i) Asset risks are "*risks that the competitive capability of a divestiture package will deteriorate before completion of the divestiture, for example, through the loss of customers or key members of staff.*"[13] The disruption and fundamental change to the nature of the GBST business as a result of the Reverse Carve-Out Remedy could give rise to [✂].

(ii) The consequence could be that the competitive capability of the Wealth Management business would deteriorate before completion of the divestiture. The CMA is aware that GBST [✂] – the risk that this [✂] cannot be ignored.

5.1.3 Purchaser risks

(i) From what it can establish from the Remedies Paper, GBST understands that there are interested purchasers that, on paper, appear to be suitable candidates. However, purchaser risks are "*risks that a suitable purchaser is not available or that the merger parties will dispose to a weak or otherwise inappropriate purchaser*[14] which, in GBST's submission, can include an insufficiently-informed purchaser who, quite understandably, makes mistakes or engages in compromise to achieve a deal in the heat of negotiation. The structure of the Reverse-Carve Out Remedy gives rise to purchaser risks because, as discussed above, it is clear from the responses cited in the Remedy Paper that potential purchasers have no detailed understanding of the feasibility and practicality of separating GBST's business divisions, nor could they without first conducting extensive due diligence.

(ii) The CMA's comment that "*GBST's Global Wealth Management business is profitable and there were other bidders for the whole of GBST prior to the Merger with FNZ*" does not reflect the complexity and costs associated with attempting separation and does not mean that a fully informed purchaser will be interested in buying anything short of the whole of GBST (especially

[11] Remedy Paper, paragraph 1.57.

[12] Remedy Paper, paragraph 1.147.

[13] Remedies Guidance, paragraph 5.3(c).

[14] Remedies Guidance, paragraph 5.3(b).

without proper diligence of the risks), or, if interested in a carve-out, does not mean it can properly assess detailed issues of asset perimeter without being owner-operator for even a short period.

5.2 The fundamental practical risks of the timing and sequencing as envisaged in the Remedy Paper are, in essence: (i) standard arms-length purchaser due diligence is no substitute for the knowledge available under actual ownership when defining the right divestment perimeter;[15] (ii) expecting the buy-back vs. "keep perimeter" to be negotiated between FNZ and purchaser when the latter faces possible competitive tension of other shortlisted bidder(s) and commercial "horse-trading" negotiation pressure with FNZ is a short-term recipe for "getting a deal signed" while absorbing risks that will not serve the purchaser, GBST's customers, and the CMA's remedial objectives well in the medium to long-term.

5.3 The safeguards proposed in the Remedy Paper, while directionally helpful, are not sufficient to manage and mitigate the risks associated with the Reverse Carve-Out Remedy. GBST considers that some of the safeguards proposed by the CMA, in particular regarding trying to achieve agreement on all aspects of the carve-out in the short initial divestiture period and the purchaser subsequently bearing the risk of the remedy with no ongoing monitoring, render the remedy inherently risky (as opposed to de-risking it).

5.4 The CMA notes that no steps to implement the separation will be completed by the Initial Divestiture Period (i.e. while GBST is under FNZ's ownership). This *does* address the issue that, in the cut and thrust of separation, FNZ will not be the asset owner. However, it does *not* address the fundamental issue that the purchaser will be negotiating the complexities before fully understanding their implications, and under bidding and/or deal pressure. Moreover, the detailed agreement as to what will be included, how it will be separated, how long separation will take and what transition services will be required will occur under FNZ's ownership. This means that FNZ will receive even further detailed commercially sensitive knowledge to negotiate the carve out than if the buy-back was negotiated under the purchaser's ownership.

5.5 Moreover, GBST has no doubt that, based on its experience of M&A transactions, any remedy short of a full divestment will require significant management time and investment. Even with the assistance of third party consultants, there will necessarily be reliance on [✂] can be somewhat mitigated by the alternative options proposed in Section 5 below, as these would give the management team and SMEs more breathing space to assist in working through the complex separation issues.

5.6 The initial divestiture period [✂] GBST understands that the typical period is six months or less. GBST asked the CMA to ensure that a short initial divestiture period was imposed during the Phase 2 investigation in the context of a full divestiture because of the continued negative impact on the business. However, it is unrealistic and potentially damaging to expect that same period to provide "*ample time for FNZ to identify a purchaser and negotiate a full divestiture that included a subsequent reacquisition by FNZ of the approved asset package, including any separation support/transitional services arrangements*."[16]

5.7 In terms of the assets that FNZ may be entitled to retain or seek to buy back, there is a clear tension between FNZ citing some assets as "non-negotiable" on the one hand, and committing to the CMA that the purchaser will have the right to retain all assets required to

[15] A conclusion of the seminal FTC (A Study of the Commission's Divestiture Process, 1999) and EC (Merger Remedies Study, October 2005) remedies studies.

[16] Remedy Paper, paragraph 1.191

effectively run the divested business on the other. GBST has explained the complexities and [✂] FNZ rejects that these complexities [✂] exist.[17] GBST can only assume that FNZ will negotiate the buy-back with the purchaser on this erroneous basis and the purchaser will also be none the wiser. It is unlikely to suit CMA remedial objectives to mitigate risk, or protect customer welfare if, for sake of argument, both FNZ and the purchaser are "equally ignorant" or "both wrong" as to the complexities that reside in separating GBST into two businesses.

5.8 Some of the "non-negotiable" assets that FNZ would retain or buy back will be difficult to separate from the divested business. The detail of the "*core proprietary Capital Markets software, including source code and IP*"[18] that FNZ would retain has been redacted from GBST and, therefore, GBST is (perversely) not able to comment on the specificities of the separation. However, some of GBST's software, source code and IP are common to both business divisions.

5.9 By way of further example, FNZ has also included "*all Capital Markets customer contracts*" as a non-negotiable asset. Yet, FNZ also states that "*the purchaser would own and have exclusive use of …common proprietary IP."*[19] GBST has previously submitted that it has Capital Markets customers that licence products containing common proprietary IP… [✂].

5.10 The CMA has stated that "*we have particular concerns about these risks in the context of a separation process overseen by FNZ prior to the divestiture of GBST's Wealth Management business. We have therefore given careful consideration to alternative implementation methods to help reduce the risk*."[20] The CMA has preferred FNZ's "Option B" structure "*for the GBST business to be divested in full to a purchaser within the Initial Divestiture Period, after agreement over the perimeter of the assets that FNZ will buy back and the perimeter of any separation resource or transitional services that will be required from GBST (and how FNZ will support separation)*."[21]

5.11 In the CMA's view "*this structure avoids the risks that arise from separation being implemented under FNZ's ownership as GBST would be under independent ownership before any separation occurs. This approach will minimise the composition risk that a divested Global Wealth Management business would be a weaker competitor than would have been the case absent the Merger*."[22]

5.12 The contemporaneous agreement of the sale of GBST to the purchaser and the terms of the buy-back to FNZ, does not reduce these risks. The composition risks will not be minimised by the proposed "Option B" structure. According to the Remedy Paper, Option B would involve the purchaser and FNZ agreeing the detailed terms of the separation under FNZ's ownership at the same time as agreement on the terms of the sale of the overall business during a standard arms-length due diligence process. This suggested process gives rise to a number of concerns:

(i) First, notwithstanding the fact that the agreements will be subject to CMA approval, there is a material risk that those commercial negotiations may result in an agreement that disadvantages the divested business at the expense of price or other

[17] FNZ clarifications to the GBST Submission, 30 March 2021, pages 2, 3, 4 and 6.

[18] Remedy Paper, paragraph 1.57.

[19] FNZ response to the Remittal RFI on remedies, 9 February 2021, paragraph 1.28; Remedy Paper, paragraph 1.74.

[20] Remedy Paper, paragraph 1.167.

[21] Remedy Paper, paragraph 1.180.

[22] Remedy Paper, paragraph 1.180.

commercial considerations. As the negotiation will occur under FNZ's ownership, [✂].

(ii) Second, the suggested process assumes that the steps necessary to achieve an effective separation can be fully identified, agreed and documented in the sale agreements during the initial divestment period, and subsequently implemented by the purchaser and FNZ without the need for any further independent monitoring. Even assuming [✂]. In this scenario, FNZ will continue to be involved with and have influence over the separation process, and the risks associated with the remedy will be transferred to the purchaser with no ongoing monitoring post-completion by the CMA, which will give rise to increased composition and implementation risks.

(iii) A live example of this is the issue mentioned above [✂]. These are issues that need to be worked out as part of the reverse carve-out product [✂].

(iv) Finally, it is inconsistent and irrational for the CMA to disregard evidence provided by GBST's customers, potential purchasers and other third parties in the market in favour of broad brush and unevidenced statements from FNZ on the ease of separating GBST's business divisions and the impact on GBST's customers.

5.13 As set out in the Remedy Paper, "*none of GBST's UK Wealth Management customers that we received responses from during the Phase 2 Inquiry supported any form of partial divestiture, whether a UK or global Wealth Management divestiture. GBST's UK Wealth Management customers told us that they considered that a partial divestiture may create risks to the quality of service they receive from GBST because of the time and disruption that would be needed to separate an integrated business*."[23] These concerns apply with equal force to the Reverse Carve-Out Remedy, which is a form of partial divestiture and may give rise to significant disruption and risk to GBST's customers, of both the Wealth Management and Capital Markets divisions.

5.14 In addition, as discussed above, the potential purchasers of the divestment business "*indicated they have not had the opportunity to assess properly the feasibility and practicality of separation*."[24] The comments from these competitors / potential purchasers indicate a worrying lack of knowledge on what a separation would entail and how it might be implemented, which applies equally to FNZ, given it has very little insight to GBST's business (and no better insights than other competitors) and has openly disagreed with GBST's own assessment of GBST's business interdependencies.[25] A third party in the market gave the CMA "*an example of the issues that can arise in such a scenario*", indicating that it had a 14-month transitional agreement for a recent acquisition, and also estimates that it may have taken the vendor 12 months to align the business in order to separate it. This supports the evidence provided by GBST but again, the CMA has disregarded the evidence in favour of unsubstantiated statements from FNZ on the ease of separation.

5.15 The CMA has stated that "*we considered that third parties will have limited specific insight into the risks of partial divestiture, which relate largely to the extent of integration between GBST's operating divisions, and the associated challenges of separating them*"[26] and that "*third parties were able to provide evidence concerning these types of separations more generally. However, because the evidence supports that the ease or difficultly of separation*

[23] Remedy Paper, paragraph 1.84.

[24] Remedy Paper, paragraph 1.147.

[25] FNZ clarifications to the GBST Submission, 30 March 2021, pages 2, 3, 4 and 6.

[26] Remedy Paper, paragraph 1.82.

is largely dependent on the nature of the specific business(es) we have placed only limited weight on this third party evidence."[27]

5.16 There is a fundamental asymmetry in the treatment of evidence from GBST, customers, competitors and third parties in the market versus the unsubstantiated statements provided by FNZ. If the evidence supports that the ease or difficultly of separation is largely dependent on the nature of the specific business(es), then FNZ would have no better knowledge of this than any other competitor of GBST, or GBST's customers, and FNZ most definitely would not have a better or more educated view than GBST itself.

5.17 The CMA must give equal weight to the submissions from GBST, its competitors and importantly customers, the latter of which are the ones that the remedy will affect and is designed to protect. If the Reverse Carve-Out Remedy is accepted by the CMA in its current form, it [✂]

5.18 The CMA has also concluded that the risks to GBST's Capital Markets customers would be "minimal or low", without citing sufficient evidence to support this conclusion.[28] GBST is not aware of any evidence that the CMA has contacted GBST's Capital Markets customers to seek their views. [✂] GBST is not aware that FNZ has any experience in Capital Markets and it is not clear on what basis [✂] [✂].

6 Potential alternatives to mitigate the risks

6.1 GBST's main priorities must be to protect its customers and the viability of the GBST business. In that regard, GBST has considered whether, if the CMA is inclined to adopt some form of reverse carve-out remedy as proposed by FNZ, there are alternative structures that will mitigate the risks associated with the Reverse Carve-Out Remedy. GBST has identified two alternative structures that could reduce the disruption to the GBST business and, importantly, its customers:

6.1.1 Alternative option 1

(i) There needs to be an appropriate timeframe (e.g. 3 – 6 months) between:

step 1 -- the completion of the sale of the entire GBST business to the purchaser and the entry into force of a binding parallel agreement setting out a process to achieve the sale of Capital Markets assets to FNZ; and

step 2 -- the execution of the definitive asset purchase agreement that enshrines the carve-out asset perimeter and any ancillary issues.

This staggered approach would allow the purchaser, post-acquisition of the entire GBST business, to develop a deeper knowledge of the interdependencies that exist within the current integrated structure (which cannot be gained during a standard arms-length due diligence process) and create an appropriate separation plan that ensures minimal disruption to both business divisions.

(ii) As noted, the initial binding agreement for FNZ to sell all of GBST to a divestment purchaser would include a parallel binding agreement to reach an asset sale for "*assets relating to the GBST Capital Markets business* [✂]"

[27] Remedy Paper, paragraph 1.31, footnote 19.

[28] Remedy Paper, paragraph 1.231

(or similar terms stipulated by the CMA). The agreement would indicate an initial price that is subject to a valuation adjustment (which could also include an adjustment to protect FNZ from any interim degradation of the Capital Markets business). It would also include a process whereby the proposed asset list within the scope of the definition is put forward by the purchaser to FNZ within a defined time period.

(iii) In the event of dispute, the asset list would be submitted to independent arbitration in line with standard market practice. The arbitration individual or panel would be a third-party expert(s) agreed by FNZ and the purchaser. In the event that FNZ and the purchaser cannot agree, the CMA (with the assistance of the Monitoring Trustee) would stipulate the expert(s).

(iv) [✂]

(v) In addition, aside from the fact that the proposed Initial Divestiture Period is a very ambitious timeline based on GBST's and Linklaters' experience of carve-out negotiations (particularly if the Initial Divestiture Period is actually shorter than 6 months), the fact that there would be no ongoing monitoring by the CMA or monitoring trustee following this compressed timeline renders the remedy and its implementation extremely risky. Ensuring that the remedy is monitored for a sufficient period post-completion (for example, 3 – 6 months) would in GBST's view be essential to mitigate this risk.

(vi) Therefore, additional monitoring provisions should be added to ensure that the separation of the assets to be bought back by FNZ and the implementation of the buy-back proceeds with minimal disruption to the GBST business, and at minimal risk to the purchaser of the business.

(vii) GBST sees no reason why FNZ should object to such a mechanism. In the event that the separation of the Capital Market assets is straightforward to agree (as FNZ has suggested in its submissions), the separation could proceed quickly without recourse to arbitration. The proposed mechanism would simply operate as a valuable safeguard in the event (as GBST believes will be the case) that the separation proves more complex to design and implement in practice than in the abstract.

6.1.2 Alternative option 2

(i) The remedy could be structured as a full divestiture of GBST to the purchaser with a *Put Option* at the purchaser's discretion to sell certain assets of the Capital Markets business back to FNZ if the purchaser concludes that this is feasible following completion of the divestiture of GBST (and FNZ wants to buy back the relevant assets, but it would not be obliged to do so as per a more typical put option).

(ii) This would give full discretion to the purchaser to develop, with the benefit of sufficient time and full access to the GBST business after completion, a [✂], and ascertain whether separating the business divisions is commercially and practically feasible before deciding which (if any) assets could be put back to FNZ.

(iii) Unlike the Reverse Carve-Out Remedy, this structure would take the decision on whether and when to implement the separation out of FNZ's

hands and allow the purchaser sufficient time to assess the risks, thus better mitigating them. It therefore represents further de-risking relative to Option 1 but is still more favourable to FNZ than full divestiture with no prospect of (and indeed a standard CMA prohibition against) buy-back of any target business (GBST) assets.

(iv) In addition, as for Option 1, ensuring that the that the remedy is monitored for a sufficient period post-completion (for example, 3 – 6 months) would in GBST's view be necessary to mitigate the implementation risk.

6.2 GBST would be happy to discuss these alternatives and the reasons they would mitigate the risks for GBST in further detail with the CMA.

7 Divestiture process

7.1 GBST reiterates the concerns raised in Phase 2 that an efficient, independent and effective divestiture process is required in order to ensure the viability of the GBST business. In addition to the alternative remedies outlined above, GBST has commented on some of the specific procedural elements of the divestiture process below.

7.1.1 **Transitional arrangements**: It will not be possible for all [✂] to be immediately replaced or replicated in a reverse-carve out in a low risk, timely manner. GBST estimates that, due to the [✂], any transitional services arrangements may need to be in place for up to [✂]. This means that the divestment may necessitate significant and lengthy ongoing links.

7.1.2 **Monitoring trustee**: In a scenario where the CMA places the responsibility implement the Reverse-Carve Out Remedy on to the purchaser and no monitoring takes place, the CMA will have no visibility on or control over the separation process once the divestment takes place. The proposed structure means that the risk is transferred to the purchaser with no ongoing monitoring post-completion by the CMA or monitoring trustee, which gives rise to increased risk.

7.1.3 **Divestiture trustee**: In relation to the list of criteria for the appointment of a DT, the CMA should add another criterion whereby the right to appoint a DT is reserved where the CMA reasonably believes that the negotiations between the purchaser and FNZ on the buy-back are such that the separation will give rise to material and unacceptable risks.

7.1.4 The Remedies Guidance provides that "*the CMA may require that, in the event that the merger parties' preferred divestiture does not proceed to its satisfaction within the timescales set out in the UILs, Final Undertakings or Final Order, a divestiture trustee may be appointed to ensure the sale of an alternative package*."[29] If the remedy package comprising the Reverse Carve-Out Remedy cannot proceed to the CMA's satisfaction during the initial divestiture period and a DT is appointed, then the sale must comprise an alternative divestiture package of a full divestment of GBST in order to mitigate further disruption to the GBST business.

[29] Remedies Guidance, paragraph 5.18.

8 Proportionality considerations

8.1 In this case, it was open to FNZ to make its merger conditional on approval by the relevant competition authorities. However, FNZ took a commercial risk, and the cost of that should not be borne by third parties. The CMA Guidance is clear that "*as the merger parties have the choice of whether or not to proceed with the merger, the CMA will generally attribute less significance to the costs of a remedy that will be incurred by the merger parties than the costs that will be imposed by a remedy on third parties, the CMA and other monitoring agencies*".[30]

8.2 As will be common ground with the CMA, proportionality or the "least costly remedy" (to FNZ) only becomes relevant in law and practice as a second-level inquiry if the CMA reasonably believes there is *more than one effective* remedy option in the first place, having applied the "*high degree of certainty*" standard for effectiveness (CMA87, para. 3.6)

8.3 Proportionality does not properly colour the question of *whether* a given remedy option has a "*high degree of certainty*" that it will be *effective* and nor does it have the effect of "rounding up" the probability of effectiveness. Proportionality only assists in *selection* between two options once two or more effective remedy options have properly been identified.

9 Conclusion

9.1 GBST trusts that this Response is helpful to the CMA in highlighting why FNZ Option B does not offer a high degree of certainty as to effectiveness and is unduly risky.

9.2 Moreover, while GBST continues strongly to favour the remedial comfort offered by full divestiture of all of a GBST as an existing business, without prejudice to this, it has also actively engaged with trying to de-risk the FNZ proposal via its proposed Options 1 and 2 above. Should the CMA be minded to entertain a conclusion that a reverse carve-out remedy might be effective, then, relative to FNZ Option B (albeit not full divestiture), the proposed GBST options above are substantially more robust and less risky in protecting customer welfare and therefore substantially more compatible with the CMA's remedial objectives of seeking a "*high degree of certainty*" as to effectiveness.

[30] Remedies Guidance, paragraph 3.8.