SLAUGHTER AND MAY

FNZ RESPONSE TO THE GBST SUBMISSION ON THE CMA REMEDIES PAPER DATED 30 APRIL 2021

Case No. ME/6866/19

COMPLETED ACQUISITION OF GBST HOLDINGS LIMITED (‘GBST’) BY FNZ (AUSTRALIA) BIDCO PTY LTD (‘FNZ’)

SLAUGHTER AND MAY

WJT/JRQS/FXJ

12 May 2021

1. Introduction and executive summary

1.1 GBST's response to the CMA Remedies Paper has, once again, failed to provide any credible evidence of the '*complexities [REDACTED]*' (para 5.7) which are alleged to exist between its global wealth management (**GWM**) and capital markets (**CM**) businesses. Nor has GBST substantiated its claim that the CMA's sale-and-buyback remedy (the **Buy Back Remedy**) would not offer the requisite level of certainty as to its effectiveness.

1.2 In fact, as set out in FNZ's response to the CMA Remedies Paper, the Buy Back Remedy (with the modest but important refinements outlined in FNZ's response) would constitute an effective, proportionate remedy to any SLC and fully address any risks the CMA had previously identified with a partial divestment. FNZ notes that the only other respondent to the Remedies Paper, SS&C, has also expressed support for the Buy Back Remedy in its submission dated 5 May 2021.

1.3 By contrast, GBST's alternative remedy proposals – as well as being uncommercial, and therefore likely to deter suitable purchasers – would introduce a range of additional transaction risks (including asset and consequential risks), to the detriment of the purchaser, the viability of the GWM business, and GBST customers. It is GBST's proposals – not the Buy Back Remedy – that would fail to achieve the CMA's remedial goal of '*hav[ing] a high degree of certainty of achieving their intended effect*.'[1]

2. GBST's objections to the Buy Back Remedy are not substantiated or credible

2.1 GBST's submission claims that the Buy Back Remedy is a '*re-labelled*' partial divestiture which would not offer a '*high degree of certainty*'[2] of effectively remedying any SLC. GBST does not support this claim with evidence – in fact, it is clear that the Buy Back Remedy is materially different to 'Option A' (previously proposed by FNZ[3]), fully addresses any risks the CMA had previously identified with a partial divestment, and would be effective in addressing any SLC.

<u>The Buy Back Remedy does not give rise to the alleged transaction risks cited by GBST</u>

2.2 The Buy Back Remedy does not give rise to the composition, asset, purchaser or consequential risks that GBST alleges.

Alleged composition risks

2.3 GBST continues to allege material '*complexities [REDACTED]*' (para 5.7) between the GWM business and the core CM assets (including core CM IP) required by FNZ (**Core CM Assets**)[4] but it is striking that it has still put forward no evidence to support this. FNZ '*rejects*' GBST's allegations of complexities between the GWM and CM divisions (para

[1] GBST's response to the Remedies Paper, p.1.

[2] CMA Guidance on Merger Remedies (CM87), 13 December 2018, para 3.5.

[3] See FNZ's response to the RFI dated 2 February 2021.

[4] FNZ response to the CMA Remedies Paper, para 2.2 (A) and (B).

5.7) because the evidence it has seen indicates that these are distinct divisions, and any overlaps could be addressed through appropriate separation planning.

2.4 For example, GBST submits that '*it has Capital Markets customers that licence products containing common proprietary IP*' (para 5.9) – but does not identify or describe any such '*common proprietary IP.*' As explained in FNZ's previous submissions, FNZ understands that any shared layers of underlying IP are generic and commoditised, and can be replaced by FNZ using in-house resources or off-the-shelf from external providers.[5] All the evidence indicates that any further shared assets are also limited and readily replaceable by FNZ.[6] In any case, none of this goes to the viability of the GWM business, or the effectiveness of the remedy, as the purchaser will by default receive all shared resources – including the [REDACTED] and [REDACTED] cited by GBST at paras 3.2 and 3.3 of its submission.

2.5 Contrary to GBST's suggestion, there is in fact no '*tension*' in the Buy Back Remedy: the (clearly defined) perimeter around the Core CM Assets provides FNZ with the resources it requires to guarantee the CM customer proposition (also leveraging its own CM capabilities)[7], whilst affording the purchaser maximum discretion to optimise the GWM package's cost and asset base - ensuring that any residual composition risks sit with FNZ.

Alleged asset risks

2.6 GBST claims that there would be a *'[REDACTED]'* (para 5.1.2 (i)), but this is not correct. Commercially sensitive information relating to the GWM business will not be accessible to FNZ during the sale process because the Interim Order will continue to apply. Further protection will be offered through oversight by the Monitoring Trustee, and the outsourcing of separation planning and preparation work to external consultants – see para 3.13 of FNZ's response to the Remedies Paper.

2.7 GBST's claims at para 5.1.2 that '*disruption and [a] fundamental change to the nature of the GBST business*' would generate *'[REDACTED]'* are also unfounded[8] because:

(A) The (by default) wide but flexible asset perimeter ensures that the GWM business will have all the assets it needs to service its customers to the same standards, with the same staff and infrastructure, using the same GBST brand – it will very much be business as usual for GWM customers and staff. As such, there is no reason why [REDACTED];

[5] FNZ response to the CMA Remedies Paper, paras 3.5(B) and 4.5 *et seq.*

[6] FNZ response to the CMA Remedies Paper, para 3.5.

[7] FNZ agrees with the CMA's assessment (in para 1.226 of the Remedies Paper) that, because FNZ [REDACTED], it will be '*able to continue to service such customers effectively…As such, in our view, to the extent that such risks arise they are likely to be low. They may also be further reduced by the nature and scope of any agreed (subject to CMA approval) transitional services and/or separation resource/support committed/provided by GBST, the purchaser and/or FNZ in connection with separation.'* For further detail, see FNZ's response to question 2 of the RFI dated 5 March.

[8] In fact, as explained in paragraphs 3.6 et seq. below, [REDACTED] is significantly more acute under GBST's alternative remedy proposals as these would introduce considerable delay and uncertainty in relation to the scope of the buy back.

(B) Any internal (staff) disruption will be significantly mitigated by the assistance of external consultants (paid for by FNZ) and a relatively straightforward separation process, subject to appropriate separation planning and preparation;[9] and

(C) FNZ has indicated that it would be [REDACTED].[10]

2.8 Further, even if, as GBST alleges, [REDACTED]. FNZ therefore expects that CM customers would not object to the Buy Back Remedy, once FNZ has the opportunity to explain its plan for the CM proposition. [REDACTED]. Consequently, FNZ does not expect any material challenges in obtaining any customer consents for contract transfers [REDACTED], even if this is required. Again, any such risks would be borne by FNZ.

2.9 SS&C, in its response to the Remedies Paper, also appears to [REDACTED] GBST's claims of possible disruption to staff and customers. SS&C argues, at para 3.3 of its response, that in order to '*minimise disruption*', '*a suitable purchaser should have the necessary industry and M&A expertise and capability*'. However, [REDACTED]. FNZ has explained, at para 2.6(B) of its own response, that financial sponsors can also have the necessary resources, know-how and track record to successfully deliver the Buy Back Remedy.

Alleged purchaser risks

2.10 GBST's submission places most emphasis on an alleged '*material risk*' that, unless a purchaser is an '*actual owner/operator of GBST'*, it will (i) make '*good faith mistakes and mis-judgments about complexities that due diligence cannot adequately eliminate*,' and/or (ii) be subject to '*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 scope of the buy-back asset perimeter), and other deal negotiation pressure*',[11] with the consequence that a purchaser would '*absorb risks that will not serve the purchaser, GBST's customers, and the CMA's remedial objectives well in the medium to long-term*' (para 5.2). Indeed, GBST's alternative remedy proposals seem premised on the assumption that a purchaser 'cannot get it right', unless and until it is the '*actual owner/operator of GBST*.' In GBST's view, the transaction timeline must be delayed (significantly) to accommodate this.

2.11 FNZ strongly disagrees. The same alleged risks would arise in any M&A auction process involving a separation or carve-out, but this does not lessen buyer interest or prevent successful transaction execution. FNZ has provided examples of successful carve-outs involving UK financial services and software businesses – see Figure 6 of FNZ's response to the RFI dated 2 February 2021. The CMA has also approved (more complicated) carve-outs involving auction processes in the recent past. To give one example, viagogo has been required to divest the international secondary uncapped ticketing business of StubHub while retaining its North American operations. This will require time-limited IP licensing arrangements (including for brands, domains and software), the redirection, for a five year period, of traffic from StubHub's North American websites to the divestment

[9] FNZ response to the Remedies Paper, paras 3.10 *et seq.*

[10] FNZ response to the RFI dated 5 March, para 3.5.

[11] GBST submission on the Remedies Paper, executive summary.

business, and the novation of transitional services from eBay (StubHub's previous owner).[12]

2.12 FNZ notes also that [REDACTED] purchasers are sophisticated undertakings that can be trusted to protect the interests of the acquired business and its customers through due diligence and commercial negotiations, because these are aligned with their own interests. [REDACTED]. GBST's concerns about purchasers' '*lack of knowledge on what a separation would entail and how it might be implemented'* (para 5.14) are therefore unfounded.

2.13 Further, the Buy Back Remedy will be implemented according to standard M&A best practices; it will not involve '*horse-trading and compromise.'* FNZ has made clear to the Panel that it will not, during the sale process, lay claim to any assets other than the clearly defined, Core CM Assets.[13] FNZ would be prepared to commit to this transaction perimeter up-front, but considers that affording the purchaser the flexibility to leave with FNZ any other assets it does not need (to tailor the GWM asset and cost base to its particular business model) is likely to be more attractive to potential bidders. The checks and balances introduced by the CMA, effective throughout the divestment process (including the requirement for CMA approval of the identity of the purchaser, the transaction structure and the asset perimeter, both at Final Undertakings and at signing), will also ensure that the risks cited by GBST will not materialise.[14]

Alleged consequential risks

2.14 FNZ does not understand the basis on which GBST suggests that *'[REDACTED]'* and other, unspecified '*[REDACTED]'* will require transitional services arrangements '*for up to [REDACTED]*' (para 7.1.1). FNZ has explained that any relationship, reliance or co-operation between the purchaser and FNZ flowing from the transaction would be of limited scope and duration, in particular if FNZ is able to commence appropriate separation planning and preparation during the sale process – see paras 3.15 *et seq.* of FNZ's response to the Remedies Paper.

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[12] See the Final Undertakings given by the StubHub Group to the CMA, dated 9 April 2021. Other examples include: (1) *Diebold, Incorporated / Wincor Nixdorf AG* (2017), where the CMA required divestment of either Diebold or Wincor's customer-operated ATMs, but left it to the parties '*to determine the details of the divestiture package through commercial negotiations*', subject to subsequent approval by the CMA. The CMA also indicated that it '*would expect the Parties to offer,'* among other things: '*access to relevant software and parts for at least the life of the ATMs sold or the life of existing contracts; relevant training, technical know-how and support, diagnostic tools and R&D information, for a period to be approved by the CMA; right to modify the relevant ATM software, for a period to be approved by the CMA; access to hardware and software upgrades and any related support required, for a period to be approved by the CMA…'* (see paras 28 and 29 of the Final Report); and (2) *Ausurus Group / Metal & Waste Recycling* (2019), where the CMA approved a partial divestiture that had to include: '*MWR's Hitchin site with all associated staff and plant and equipment*', and '*all sites, assets, contracts, rights and staff necessary to carry out MWR tendering in the West Midlands and the North East'*, but the due diligence/divestment process would determine whether a purchaser would take '*some commercial staff from MWR (not based at Hitchin) - if the purchaser requires this to maintain commercial relationships in the South East'*; and *'MWR's London sites and related administrative and commercial infrastructure in London - if the purchaser does not have existing feeder sites and is unable to demonstrate that it does not require a feeder site to be an effective competitor'* (see paras 14.204 *et seq.* of the Final Report). The CMA also expressly excluded from the divestment scope a discrete list of MWR sites and assets, which would be (reverse) carved out of the sale package.

[13] See the transcript of the Oral Hearing of 28 April 2021.

[14] See also FNZ's response to the Remedies Paper, para 3.8.

The applicable legal standard does not mean that the CMA should be reluctant to accept partial remedies

2.15 GBST notes repeatedly that, per para 3.5(d) of the Remedies Guidance, '*the CMA will seek remedies that have a high degree of certainty of achieving their intended effect.*' However, the Remedies Guidance is clear that '*the effect of any remedy is always likely to be uncertain to some degree*' and that the key consideration is that '*customers or suppliers of merger parties should not bear significant risks that remedies will not have the requisite impact on the SLC or its adverse effects*' (emphasis added). Therefore, the Remedies Guidance does not suggest, and has not been interpreted in decisional practice to suggest, that the CMA should be reluctant to endorse remedies that fall short of total prohibition. Indeed, the next paragraph (3.6) of the Guidance provides that '*in order to be reasonable and proportionate, the CMA will seek to select the least costly remedy…of those remedy options that it considers will be effective*.'

2.16 As explained above, the Buy Back Remedy clearly does not generate any material risks that would suggest that the requisite legal standard is not met. Indeed, there are a number of recent examples of partial divestment remedies endorsed by the CMA, which appear to carry a risk profile that is at least as high - or indeed materially higher - than the Buy Back Remedy, for example because of: (i) what appear to be more extensive integrations and interdependencies between the separated businesses; (ii) a wider asset perimeter retained by the divesting party; (iii) a requirement for material ongoing links post-completion, and/or (iv) an absence of comparable 'safeguards' to those proposed by the CMA. These examples include *viagogo / StubHub*, *Diebold / Wincor* and *Ausurus / Metal & Waste Recycling*, referred to in paragraph 2.11 and footnote 12 above. See also *Ladbrokes / Coral* (2016), where the CMA approved the divestiture of a Ladbrokes or a Coral licensed betting office in each of the 642 areas where it had identified an SLC, but noted, at paras 14.39 -14.40 of its Final Report, that the '*package of assets…lacks an established infrastructure and its viability may therefore be more dependent on an appropriate match with the capabilities of the purchaser(s)…the divestiture package will consist of a mixture of assets from both Ladbrokes and Coral (a so-called 'mix-and-match' approach) which may further complicate the divestiture…Both the Parties and William Hill informed us that a transitional services agreement (TSA) would be likely to be required*.'

GBST's reliance on select third-party views is misplaced

2.17 In the absence of credible evidence to support its allegations about the Buy Back Remedy, GBST cites certain third-party views expressing concern at a partial divestment, claiming that '*the CMA must give equal weight to the submissions from GBST, its competitors and importantly customers'* (para 5.17). However, this is not persuasive.

2.18 First, third-party concerns expressed earlier in the remittal process and in Phase 2[15] do not take into account the safeguards proposed by the CMA in the Remedies Paper, which (along with FNZ's minor modifications) will guarantee the effectiveness of the Buy Back Remedy. In other words, they relate to a materially different remedy proposition.

[15] See, for example, the Remedies Paper, paras 1.82 *et seq.;* and the CMA's Phase 2 Final Report, paras 11.110 – 11.113.

2.19 Second, it would not be rational to give equal weight to submissions from third parties, irrespective of their provenance (level of knowledge, potential incentives etc.). FNZ agrees with the CMA that '*only limited weight [should be placed] on third party evidence*' because '*third parties are not particularly well placed to provide specific insight into these [separation] issues'* (para 1.31 and footnote 19). FNZ also notes that certain customers may be [REDACTED][16]); or (ii) [REDACTED].[17] FNZ intends to begin working closely with CM customers as soon as possible to effectively communicate its CM strategy. Appropriate separation planning and preparation will also reassure customers of the merits of the Buy Back Remedy.

2.20 Third, GBST's claim that '*there is a fundamental asymmetry in the treatment of evidence from GBST, customers, competitors in the market versus the unsubstantiated statements provided by FNZ…FNZ would have no better knowledge of [GBST's business] than any other competitor of GBST, or GBST's customers*' ignores the familiarity FNZ has developed with GBST and its products through its transactional due diligence process, post-closing integration planning workshops and [REDACTED], as well as the evidence FNZ has provided (e.g. expert evidence from [REDACTED]) to substantiate its views.

2.21 Fourth, SS&C's response to the Remedies Paper indicates that there is also material third-party support for a Buy Back Remedy, which is not acknowledged by GBST. SS&C noted, at para 4.1 of its response, that '*a full divestiture of GBST with a buy-back for FNZ of certain capital markets assets could also be an effective remedy and would be more proportionate than a full divestment.*'

3. GBST's alternative remedy proposals are uncommercial and generate significant additional risks

3.1 GBST's submission sets out two alternative remedies which it argues '*are manifestly better candidates to meet the CMA goal of a 'high degree' of certainty that they will be effective in practice*,' and 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*.'[18]

3.2 FNZ has explained in paras 2.10 *et seq.* above why the premise for these alternative remedies is not well-founded - they try to solve for alleged risks where none exist. In fact, GBST's proposals do not achieve their stated aims; instead, they are uncommercial and introduce significant additional risks for all key stakeholders in the remedy process, including GWM and the purchaser, which go to the heart of the effectiveness of the remedy. GBST's proposals would also not be acceptable to FNZ, as they would endanger the CM customer proposition.

GBST Option (2) is equivalent to a full divestment, but with added commercial uncertainty

[16] See FNZ's response to the Remedies Paper, para 5.4. A copy of the [REDACTED].

[17] See also FNZ's response to the Remedies Paper, paras 5.4 - 5.5.

[18] GBST response to the Remedies Paper, executive summary.

3.3 GBST's 'put option' gives the purchaser an option (but not an obligation) to sell certain, unspecified assets of the Capital Markets business back to FNZ, and FNZ an option (but not an obligation) to accept the purchaser's offer (subject to approval by the CMA). FNZ and the purchaser could strike such a deal even without GBST's 'put option', as part of ordinary course commercial negotiations – GBST's proposal is therefore in practice equivalent to a full divestment. In fact, any such put option 'branding' may actually make a full divestment more difficult, as it would simply generate confusion and commercial uncertainty for purchasers concerning its implications for the (perimeter of the) acquired business. FNZ therefore can see no merit in this proposal and will not discuss it further in this paper.

GBST Option (1) introduces significant unnecessary risks, undermining remedy effectiveness

3.4 GBST's other remedy proposal would involve a staggered full sale (**step 1**) and buy-back (**step 2**) transaction structure, with no possibility for separation planning or preparation, or negotiation and agreement of the terms of the CM buy back, prior to completion of step 1. The associated delay and uncertainty would be significant.[19] GBST suggests that it could add half a year to the process, but in fact the delay could be even more extensive. For example, GBST indicates, at para 6.1.1, that separation planning would only commence after an unspecified period following completion of step 1, once the purchaser has had a chance '*to develop a deeper knowledge of the interdependencies that exist within the current integrated structure*' (whereas under FNZ's proposal, separation planning would be well-developed by the time the global sale takes place). As such, it will not be practicable for FNZ to submit an application to the Australian Foreign Investment Review Board (**FIRB**) prior to completion of step 1 (i.e. concurrently with the purchaser's application, as would be possible under the Buy Back Remedy), due to the uncertainty over the buy back perimeter.[20] This delay and uncertainty is unreasonable, disproportionate, and would generate a range of additional, unnecessary risks that do not arise under the Buy Back Remedy, undermining the effectiveness of the remedy.[21]

Purchaser risks

3.5 The remedy package proposed by GBST simply would not be attractive for potential purchasers. By way of example:

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[19] FNZ indicated in section 4 of its response to the CMA Remedies Paper that carrying out appropriate separation planning and preparation prior to global completion was fundamental to providing the purchaser and GBST's GWM and CM customers with the required confidence in, and clarity on, separation parameters and implementation (including the perimeter around the Core CM IP), as early as possible in the sale process. This will ensure timely and effective completion of the Buy Back Remedy at, or as soon as possible after, global completion, and will also minimise any scope for ongoing links (e.g. transitional services).

[20] FNZ expects that two applications to FIRB will be required under a sale-and-buyback structure: one will be submitted by the purchaser for the acquisition of GBST as a whole; the other will be submitted by FNZ for the buy-back of the CM assets. A single FIRB approval process can take up to eight months or more.

[21] FNZ notes further that GBST management argue, at para 7.1.4, that the Divestiture Trustee should be mandated to sell the entire GBST business, rather than implement the Buy Back Remedy, upon expiry of the Initial Divestiture Period - or even earlier, as would be GBST's preference. [REDACTED]. It is therefore essential that the mandate of any Divestiture Trustee be limited to implementing the Buy Back Remedy, in line with CMA guidance and precedent (see FNZ's response to the Remedies Paper, paras 4.11 *et seq.)*, to give FNZ a fair opportunity - [REDACTED] - to implement the most proportionate, effective remedy to any SLC.

(A) Before (and even after) completing step 1, potential purchasers would have no commercial certainty concerning the perimeter of the businesses to be eventually retained and sold back to FNZ at step 2, restricting their ability to plan for, and incentive to invest in, the customer proposition.

(B) The purchaser would need to finance the entire GBST business, rather than just the GWM division (as would be the case for the Buy Back Remedy), generating an additional administrative and financial burden that is likely to put off bidders who do not want the CM business.

(C) The uncertainty around the transaction perimeter and timetable would be likely to discourage lenders, limiting the purchaser's access to debt financing for step 1 and/or imposing more onerous borrowing terms and conditions.

(D) The responsibility and associated costs and liabilities of operating the CM business would by default lie with the purchaser for an extended, unknown period, until completion of step 2.

(E) The extended period between completion of the two steps increases the risk of a change in the valuation of the buy-back CM assets, which could result in a tax charge for the purchaser on completion of step 2.

Asset risks

3.6 The delay generated by the staggered transaction structure would also generate an unnecessary period of uncertainty for both GWM and CM customers, and the GBST staff servicing them, concerning the scope and parameters of the buy back. GBST's submission indicates that *'[REDACTED]'* (paras 2.4.2 and 5.1.2(ii)). While FNZ is not aware of any evidence that supports this claim, if correct, GBST's remedy proposal would compound the problem [REDACTED], whereas the Buy Back Remedy would ensure an expedited, effective execution of the divestment ([REDACTED]).

3.7 GBST also suggests that parallel tracking divestment and separation planning would significantly increase [REDACTED] (para 5.5). However, this needs to be weighed against the [REDACTED] – particularly as FNZ has committed to minimise any burden on GBST management through hiring third party separation consultants.

3.8 Further, GBST states that, under the Buy Back Remedy, *'[REDACTED]'* (para 5.18). In reality, as the CM business would be held by a disinterested purchaser for an extended period under GBST's proposal, GBST Option (1) would expose the CM customer base to the risk of under-investment. By contrast, the Buy Back Remedy (with appropriate, early separation planning and preparation) would allow FNZ to maintain and develop the CM business - see footnote 7 above.

Consequential risks

3.9 GBST accepts (e.g. at paras 6.1.1 (v) and (vi)) that its remedy proposal would require ongoing monitoring by the CMA and/or the Monitoring Trustee through the (extended) period until completion of step 2 – a year or more from now. This would impose a

significant, unnecessary administrative burden on the CMA, the Monitoring Trustee and and the monitored parties, and extend and exacerbate the uncertainty [REDACTED].

3.10 By contrast, under the Buy Back Remedy, the terms and parameters of the sale-and-buyback would be contractually determined in detail (and approved by the CMA) at global completion, so no subsequent monitoring would be required. Indeed, the CMA noted at footnote 163 of the Remedies Paper that '*at [completion of the divestiture of GBST], the CMA will have approved the content of the asset package, the levels of separation support and the scope and amount of any transitional services, which would be set out in the transaction documents. Following the completion of the divestiture, we consider that compliance with the transaction documents and the terms of any undertaking or order will be adequately safeguarded by the purchaser'.*

Annex 1

[REDACTED]