

# 11KBW

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***How has the National Lottery case changed existing thinking on the practical application of the Commercial Market Operator test going forward?***

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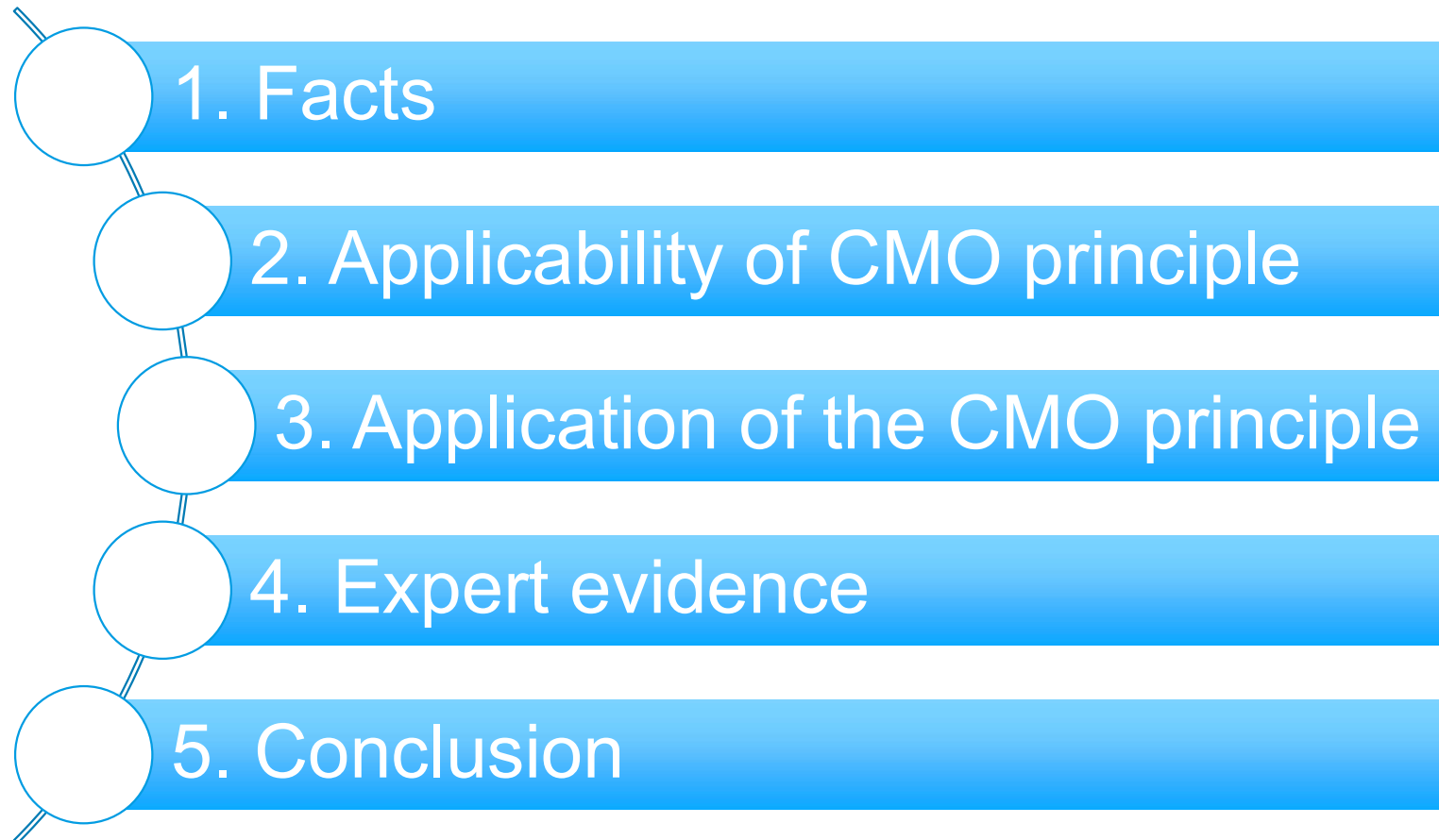
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**TNLC v The Gambling Commission**

**[2026] CAT 14**

**[2025] CAT 54**

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1. Facts
  2. Applicability of CMO principle
  3. Application of the CMO principle
  4. Expert evidence
  5. Conclusion

# 1. Facts

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- Third National Lottery licence – between Camelot and Gambling Commission. Structured similar to concession contract – Camelot profit based on ticket sales.
- Complicated payment mechanism in 3NL – various deductions from ticket sales. “Returns to Good Causes” paid into the National Lottery Distribution Fund, under control and management of SoS
- GC overarching stat duty: duty to do their best to secure that the net proceeds of the NL (sums paid into NLDF) are as great as possible
- TNLC case was that GC gave a subsidy to Camelot and to Allwyn, when GC exercised powers under 3NL to enable Camelot to retain around £70m that it would otherwise have had to pay to the NLDF to jointly fund increased marketing investment

# 1. Facts

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- Under 3NL, Camelot required to pay primary contributions and secondary contributions into the NLDF
- Condition 23 – licensee notice of investment opportunity. Joint investment
- Implemented the joint investment by adjusting the primary contribution – so additional gross revenues of NL were retained by Camelot and spent in accordance with agreed marketing investment procedure for the financial year.
- Aim: increase ticket sales, end up paying more into NLDF
- GC operated a “not for profit” principle re marketing investment proposals. Any additional profit that Camelot was forecast to generate from increased sales was offset by additional financial expenditure

# 1. Facts

- Joint investment been possible since 2015 – made these decisions on an annual basis since 2018
- How tell whether additional funding on marketing leads to increased ticket sales? How do you know this is having a positive effect?
- Detailed econometric model produced by Camelot, updated annually with sales data and refined each year, variables changed. Predicted level of investment to maximise sales
- Econometric model – also showed each investment had led to significant increase in ticket sales, increased RtGC, very high rate of return on investment

## 2. Applicability of CMO principle

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- Section 2(1)(b) – subsidy means financial assistance which “confers an economic advantage on one or more enterprises”
- Section 3 explains what financial assistance confers an economic advantage

**“Financial assistance is not to be treated as conferring an economic advantage on an enterprise unless the benefit to the enterprise is provided on terms that are more favourable to the enterprise than the terms that might reasonably have been expected to have been available on the market to the enterprise”**

## 2. Applicability of CMO: Argument

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No difference between CMOP  
and MEOP in EU law

EU case law says there has to  
be an actual market

If EU law does not say that, then  
section 3(2) of the Act does

## 2. Applicability of CMO principle

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- CMO is equivalent to the MEOP under EU State aid law
- EU case law – not binding, but “strongly persuasive” as to correct approach to the CMO principle
- If CMO principle were to represent a material departure from the MEOP, would have expected that to have been made clear in the Act and/or the Statutory Guidance
- Nothing to suggest Parliament intended there to be a material departure from the MEOP. Nothing in s3 to suggest different approach.
- Principles from MEOP cases are generally applicable unless “some obvious reason” to depart from them.

## 2. Applicability of CMO

State acting in a public capacity

- Q: Does it matter if State is acting in a public capacity, as opposed to carrying out a private/commercial function?

No private market for the activity?

- A argued if no actual market comparator, then MEOP is inapplicable. Can't have a hypothetical private market.
- GC regulator, stat powers, no private operator ever be in same position

*Chronopost, EDF, Volotea, Danish Slaughterhouse*

- Does EU law have the answer?

## 2. Applicability of CMO

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- Line of case law culminating in *Danske Slagtermestre*
  - Fact that the State is using prerogatives of a public authority – legislative/fiscal means, pursuit of public policy objectives – does not mean MEOP doesn't apply. Focus on the economic nature of the State intervention, not means used to put it into effect.
  - Comparison – measure economic in nature, compared to quantitative rebate
  - Even if no market, doesn't render MEOP inapplicable – “*in absence of any possibility of comparing the situation of a public undertaking with that of a private undertaking, normal market conditions, which are necessarily hypothetical, must be assessed by reference to the objective and verifiable elements which are available*”
  - *Chronopost; EDF; Volotea*
  - MEOP does not apply where State intervenes through performance of activity private undertaking could never replicate. Looking for some equivalence on the market.

## 2. Applicability of CMO in GC case

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- Joint investment – commercial character, distinguishable from GC's public functions
- Fact only the GC could make the joint investment in the way it did (modifying 3NL) is nothing to the point – private investor could have made same investment in different way
- Joint financing, provision of detailed econometric modelling and evaluation of return on investment
- Investment in marketing to drive additional sales – inherently commercial activity
- Comparison with franchisor/franchisee, supplier/distributor, concession – investment very similar to that which occurs in many ordinary commercial contexts
- GC statutory duty under s4(2) of 1993 Act – do best to secure sums paid into NLDF are as great as possible. Statutory policy objective is commercial in nature

### 3. Application of the CMO principle

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- Burden of establishing that decision is a subsidy rests on applicants – have to establish that disputed financial assistance was provided on terms more favourable than those that might reasonably have been expected to be available on commercial market.
- Objective test, burden on applicant to show transaction would not have been entered into by any rational market operator. *Sky Blue* applies under SCA
- If rational private market operator might have done so, CMO principle satisfied
- Wide spectrum of reasonable reactions to commercial circumstances in private market.
- Wide margin of judgement for PA – only State aid if beneficiary “manifestly unable to obtain comparable terms” from private operator. Same for subsidy

### 3. Application of CMO

Conferred longer term benefits on Camelot and/or Allwyn GC did not consider  
Criticisms of econometric analysis – said to be irrational/Tameside

- relied on criticisms in expert report (w/o admitting it)
- EE reports, concerns re Camelot modelling, rational person would have required refinements/further information before making decision

GC: Decision pursued inherently commercial objective – maximizing net RtGC

Risk averse, expert-informed assessment of econometric modelling and marketing plan

GC: relied on expert advice and its own expert knowledge

- EE, April Strategy, years of granting LNIO, returns generated

Criticisms evolved over time, including between skeleton and hearing

- Pleading crucial

### 3. Application of CMO

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- Notional negotiation between private investor and Camelot – private investor concerned about additional gains Camelot/Allwyn might have obtained
- Rational investor would have sought to obtain better terms from Camelot
- Look at facts: projections of RtGC, RoI of 1:1.7
- Additional profit to Camelot - £3.6m, increase in Camelot's minimum marketing expenditure, additional further investments not required under 3NL (retail advocacy, staff retention costs) - total £9.3m
- No evidence of potential value of indirect benefit to Allwyn. No evidence how private investor approach these issues. "little more than speculation"
- Comfortably within wide margin of judgement for GC.

### 3. Application of CMO

- Detailed criticisms of econometric modelling
- Essentially abandoned. In any event, rejected. Evidence from experts responsible for models re variables, predicted outcomes, testing. Carefully designed models. Other econometricians might have made different choices, didn't come close to establishing irrationality
- EE reports identified some issues with Camelot modelling, GC should have followed those up, insisted further modelling work. But ultimately – EE advice was that econometric evidence was “defensible”. Entirely rational for GC to rely on it, with appropriate caution.
- Challenge to adequacy of econometric modelling was “hopeless”.

## 4. Expert evidence

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### Two cases on CMO

- *Weis, TNLC*
- No CMO report

### Role for expert evidence criticising CMO conclusions?

- Earlier cases – assumed expert evidence admissible
- BUT this is JR....

## 4. Expert evidence

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- Earlier cases proceeded on assumption could have expert evidence, CAT granted permission for it in *Weis*
- TNLC wanted to challenge econometric evidence – flaws and gaps in the modelling. Disclosed EE reports, identified some issues with that modelling
- Application to file expert report
- Opposed it in principle at 1<sup>st</sup> CMC – already been expert econometric analysis from Camelot, and GC took expert advice from EE. GC entitled to rely on it, expert report could not be admissible.
- CAT not prepared to rule it out in principle. TNLC filed expert report, considered at 2<sup>nd</sup> CMC

## 4. Expert evidence

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- CAT is applying JR principles in subsidy control challenges. Must apply JR test for admissibility of expert evidence
- No special test for subsidy control cases
- Certain “gateways” for admissibility in *Lynch/Powis*
  - to show what was before/available to decision maker
  - For the purpose of an issue of jurisdictional fact
  - Establish whether proper procedure was followed
  - To prove an allegation of bias or other misconduct on part of the authority
- *Law Society* – if contention is that decision has been reached by process of reasoning that involved “serious technical error”, that is not obvious to the court, but can be demonstrated by a person with relevant technical expertise.
- Technical error must be “incontrovertible”: if C expert contradicted by rational opinion expressed by another qualified expert, it is not admissible

## 4. Expert evidence

- Does this mean expert evidence is never admissible when considering the CMO principle?
- Not necessarily: if acting for a public authority, well advised to obtain expert advice before decision is taken, take their expert advice into account.
- Then difficult (but not impossible) for claimant to satisfy test – by definition their expert will not be providing incontrovertible evidence
- May need to get own expert to comment on C draft expert report
- If for a claimant: there are ways to get it in, but have to address the legal test from the outset. Short, concise, address the right things, explain why shows authority evidence is irrational (or other public law error)

### *TNLC – has it changed existing thinking?*

- First proper analysis of *applicability* of CMO principle in the first place
- Confirms CMO equivalent to MEOP, relevance of EU case law
- No change to *Sky Blue* approach on *application* of CMO
- Real change on admissibility of expert evidence