Neutral Citation Number: [2011] EWHC 735 (Comm)

Case No: 2011 Folio 139

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**COMMERCIAL COURT**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 1st March 2011

**Before** :

**MRS JUSTICE GLOSTER, DBE**

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**Between :**

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| | **Telenor East Holding II AS** | **Applicant** |
| | **- and -** | |
| (1 | **Altimo Holdings & Investments Ltd** | **Respondents** |
| (2 | **Altimo Cooperatief UA** | |
| (3 | **VimpelCom Ltd** | |

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**Joe Smouha Esq, QC, Vernon Flynn Esq, QC**, **Paul McGrath Esq** and **James Willan Esq** (instructed by **Orrick, Herrington & Sutcliffe (Europe) LLP**) for the **Applicant**
**Huw Davies Esq, QC, Stephen Houseman Esq** and **Anton Dudnikov Esq** (instructed by **Skadden, Arps, Slate, Meagher & Flom LLP**) for the **First & Second Respondents**
**Mark Howard Esq, QC** and **Oliver Jones Esq** (instructed by **Akin Gump LLP**) for the **Third Respondents**

Hearing dates: 25th February 2011

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# Judgment

**Mrs Justice Gloster, DBE:**

1. This is an application for an interim injunction pursuant to section 44 of the Arbitration Act 1996 which is made by the claimant, Telenor East Holdings II AS ("Telenor"), for an injunction restraining the third respondent, VimpelCom Limited ("VimpelCom"), and the first and second respondents, Altimo Holdings & Investments Limited ad Altimo Cooperatief UA, the latter as a shareholder in VimpelCom, from taking any action to convene, or proceed with, or vote at, a Special General Meeting of VimpelCom's shareholders to approve the authorisation or issuance of any shares in VimpelCom in connection with a transaction called the "Project Varsity" transaction except on what is referred to, in Telenor's draft order, as the "Permitted Basis".

2. That "Permitted Basis" is that the Project Varsity transaction is not a Related M&A Transaction as defined in a shareholders' agreement dated as of 4th October 2009 and made between the applicant, the respondents and others ("the SHA"), and that the

applicant's pre-emption rights or claimed pre-emption rights under the SHA are honoured.

3. There is a stated exception to the proposed order sought by Telenor, which is in the following terms:

> "6. If the Respondents agree in writing with the Applicant a procedure whereby any resolution for the approval of the authorisation and issuance of Shares in connection with the Project Varsity transaction also includes the approval of the authorisation and issuance to the Applicant of the Pre-Emptive Right Shares, with those Shares to be held in escrow to abide the determination of the pending arbitral proceedings, then nothing in this order shall prevent any person taking any step to implement the agreed terms."

4. Telenor is seeking the injunction to prevent VimpelCom from issuing shares in itself to a company called Weather II Investments Sarl ("Weather") as part of the Project Varsity transaction, under which VimpelCom hopes to acquire Weather's international telecommunications company subsidiary Wind Telecom SpA.

5. VimpelCom itself is a telecommunications company headquartered in Amsterdam and incorporated in Bermuda. It is one of the world's largest telecommunications companies, with a market capitalisation of about US$19.2 billion. It has two major strategic stakeholders, the Telenor Group, and the Alfa Group.

6. Telenor ASA is an international telecommunications company, with headquarters in Norway, that is majority state-owned. Telenor ASA is the largest provider of telecommunication services in Norway. Telenor ASA owns its interest in VimpelCom indirectly through its subsidiary Telenor, the claimant. Telenor currently holds a 36.03 per cent voting interest in VimpelCom.

7. Altimo Holdings & Investments Limited ("Altimo Holdings") specialises in telecommunications investments in Russia, the CIS and Asia and is part of the wider Alfa Group. The Alfa Group owns its interest in VimpelCom through the second respondent, Altimo Cooperatief UA, which is indirectly owned by the first respondent, Altimo Holdings. I shall refer to them together as "Altimo", as the evidence does. Altimo currently holds a 44.65 per cent voting interest in VimpelCom.

8. Telenor asserts that issuing the shares in VimpelCom as part of the Project Varsity transaction would constitute a violation of its rights under section 5.05(a) of the SHA unless Telenor is offered certain pre-emption rights allowing it to acquire further shares in VimpelCom so as to maintain its percentage holding.

9. The SHA is governed by New York law. It was entered into after lengthy negotiations between Telenor and Altimo to resolve long-standing differences and disputes between them which were the subject matter of earlier arbitration and court proceedings. Its intention was to establish new corporate governance principles, to be enshrined in a new shareholders' agreement to regulate their relations going forward.

10. VimpelCom's evidence is that it has taken appropriate New York legal advice in relation to the pre-emption issue; and that its board of directors, including three independent directors (but excluding the Telenor-nominated directors) have concluded that Telenor's assertion that it is entitled to exercise its pre-emption rights is wrong. The board of VimpelCom has consequently rejected Telenor's claims to exercise its pre-emption rights in relation to the Project Varsity transaction.

11. Pursuant to section 7.14 of the SHA, the parties agreed to submit any disputes arising from the SHA to arbitration in London under the UNCITRAL rules. The Special General Meeting of shareholders to vote on the proposed issue of shares to Weather has been fixed for 17th March 2011. However, the arbitral tribunal has not yet been constituted because, although Telenor and the respondents had appointed arbitrators as at the date of hearing before me, that is, 25th February 2011, no Chairman had been appointed. Therefore, Telenor sought relief from this court pending the constitution of the tribunal pursuant to section 44.

12. The grounds for Telenor's application was that it will suffer irreversible harm if its pre-emption rights are not recognised in the Project Varsity transaction, unless adequate protection is in place to ensure that its pre-emptive rights can be fulfilled at the conclusion of the arbitration and that it is not prejudiced by the dilution of its shareholding in the interim period. Accordingly, it seeks injunctive relief to ensure that its claimed contractual pre-emptive right to subscribe for shares so as to maintain its percentage ownership interest is protected in the event that VimpelCom proceeds with the Project Varsity transaction.

13. The dispute between the parties, in essence, is whether the Project Varsity transaction is a Related M&A Transaction as defined in the SHA, in which case Telenor is not entitled to exercise any pre-emptive rights under section 5.05. The respondents do not dispute that if the Project Varsity transaction is not a Related M&A Transaction, then Telenor is entitled to exercise its pre-emptive rights under the section.

14. So far as Telenor is concerned, the critical issue between now and the conclusion of the arbitration is that its holding should not be diluted below its current position of a 36 per cent voting interest in VimpelCom to a holding below 25 per cent. Telenor submits that there is a serious risk, if not an inevitability, of its holding being diluted below 25 per cent during the pendency of the arbitration, which would cause it very serious and irreversible harm, *inter alia*, because it would lose blocking rights for fundamental transactions. Even more crucially, if its holding dropped below 25 per cent, Telenor would require approval from the Russian competition and foreign investment authorities subsequently to increase its shareholding above 25 per cent once more. According to Telenor's evidence, experience suggests it would be unlikely to receive such approval, or it is uncertain whether it would do so.

15. Telenor goes on to submit that even if it is not further diluted, it may suffer serious harm as a result of being diluted to 25.01 per cent during the pendency of the arbitration. For instance, certain fundamental business can be passed in a shareholders meeting with a 66.66 per cent majority; a 36 per cent interest is sufficient to block such motions but a 25.01 per cent interest is not.

16. Telenor's voting power, it is also submitted, would be significantly reduced in respect of any ordinary business transacted at a general meeting.

17. Telenor's stated position in relation to the Project Varsity transaction is that, whilst it does not believe that the Project Varsity transaction makes economic or strategic sense for VimpelCom, it recognises that, if a majority of the latter's shareholders approve the transaction, then the transaction should proceed. However, in that event, Telenor wishes to participate fully in it by exercising what it claims are its pre-emptive rights and ensuring that those rights are available to it to maintain control and protect its existing investment. Therefore, Telenor states that its objective is to achieve a result by which Project Varsity may proceed whilst also enabling Telenor, if it wins the arbitration, to purchase the number of pre-emptive shares which it contends are exercisable pursuant to its rights under the SHA. Telenor has also stated that it will definitely exercise its pre-emptive rights if Project Varsity proceeds, and has offered to pay what it believes to be the very considerable purchase price, about US$2.8 billion in cash, into escrow.

18. Telenor, in its evidence, rebuts the allegation in Altimo's evidence that Telenor is simply trying to destroy Project Varsity and points to its, Telenor's, commitment to obtain and pay for the shares to which it claims it is entitled if the Project Varsity transaction is approved by the shareholders. Telenor contends that it has done everything it can to avoid the need for interim relief affecting the Project Varsity transaction, in particular by proposing the escrow arrangements.

19. So far as the position of the respondents is concerned, their stance is, and their evidence supports their stance, that the Project Varsity transaction is critical to the success and development of VimpelCom's future business. The respondents, and in particular VimpelCom itself, contend that commercially the Project Varsity transaction will bring benefits that are "transformational, strategic and extremely difficult to quantify in monetary terms" for VimpelCom, and that, if the transaction is completed, VimpelCom's annual turnover will increase from approximately US$10 billion to US$21 billion and that the acquisition will create the world's sixth largest mobile telecommunications operation, measured by subscribers, thereby doubling VimpelCom's subscriber base to 173 million and virtually doubling the countries the operator covers from 10 to 19. Accordingly, the respondents contend that the Project Varsity transaction is manifestly in the interests of VimpelCom and its shareholders.

20. The respondents point to the fact that VimpelCom itself, including its independent directors, irrespective of the Altimo-nominated directors and the Telenor-nominated directors, have concluded that the Project Varsity transaction is in the best interests of VimpelCom.

21. In essence, as demonstrated in the correspondence between the parties prior to the hearing before me, the issue between the parties is relatively narrow. It appears to be recognised by the respondents that some interim relief is required to hold the ring pending the outcome of the arbitration. The real issue, therefore, is what interim relief, in accordance with the principles governing the exercise of the court's jurisdiction and discretion under section 44, fairly balances the interests of the parties.

22. The competing positions are between, on the one hand, an escrow arrangement proposed by Telenor as set out in exhibit PSO2 to the second witness statement of Mr. Peter O'Driscoll; this proposes an escrow arrangement whereby the pre-emptive shares to which Telenor claims to be entitled would actually be issued by VimpelCom, and the shares and cash consideration which Telenor would be required

to pay for those shares would be held by the escrow agent until the end of the arbitration. In the event of Telenor succeeding in the arbitration, such shares would be transferred to Telenor; if Telenor failed in the arbitration, then the shares would be cancelled by VimpelCom. As I have said, the details of the escrow proposal are set out in the exhibit to which I referred.

23. On the other side for consideration are a set of undertakings proposed by Altimo and VimpelCom, including undertakings offered by Weather. These were, for the purposes of the hearing, set out in a letter dated 24th February 2011 from Skadden Arps Slate Meagher & Flom (UK) LLP, Altimo's solicitors, and a letter of the same date from Weather, as updated as a result of points which arose for submission and discussion in the course of argument before me. The current undertaking proposals are reflected in a draft order produced yesterday, dated 28 February 2011, put forward by VimpelCom, and also in a letter of the same date from Weather, addressed to counsel for VimpelCom, Mr. Howard QC and Mr. Jones. (It was confirmed today that Altimo support the proposals in the draft order).

24. As I have said, the critical issue is whether, in the light of the undertakings or proposals put forward by VimpelCom and Altimo, coupled with the undertakings offered by Weather, an injunction is necessary so as, in effect, to force the respondents to agree to the escrow arrangements put forward by the claimant or whether, in the light of the undertakings which are on the table, the parties' rights, and in particular Telenor's rights, are adequately protected pending the outcome of the arbitration.

25. Telenor submits that its escrow proposals (which necessarily, on the terms of the injunction which it seeks, have yet to be agreed between the parties) and its fallback position of an injunction, in the terms which I have summarised above, will provide a considerably more simple regime than the undertakings which have been offered by the respondents.

26. Whilst the respondents accept that, theoretically, the escrow proposal is an alternative way of protecting Telenor's position pending the arbitration, the respondents submit that it is unworkable and unnecessary, and damaging to the company's, that is to say, VimpelCom's interests.

27. There was little dispute about the general principles governing the exercise of the powers under section 44(3) of the 1996 Act. Section 44(3) provides that:

> "If the case is one of urgency, the court may, on the application of a party, or proposed party, to the arbitral proceedings make such orders as it thinks necessary for the purpose of preserving evidence or assets."

28. Section 44, subsection (5) provides that:

> "In any case, the court shall only act if or to the extent that the arbitral tribunal and any arbitral or other institution or person vested with power in that regard has no power or is unable for the time being to act effectively."

29. Realistically, this court is holding the ring until such time as the arbitrators are in position.

30. The respondents do not contend that this case is not one of urgency within the meaning of section 44(3), nor do they contend that the arbitral tribunal is currently able to act for the purposes of section 44(5). Likewise, the respondents admit the existence of an asset which, for the purposes of section 44 subsection (3), Telenor seeks to preserve, namely, its contractual right, pursuant to section 5.05 of the SHA, to pre-emptive rights in relation to non-Related M&A Transactions (See *Cetelem SA v Roust Holdings Limited* [2005] 1 WLR 355, a Court of Appeal decision dealing with the right to grant interim injunctions to protect contractual choses in action).

31. It is also common ground that the court may only make an order pursuant to section 44(3) if it considers such an order "necessary" for protecting Telenor's contractual rights. That question will generally be determined by reference to the usual principles that guide the court in the grant of interim relief, namely, that the applicant must demonstrate: (a) that there is a serious issue to be tried; (b) that there is a risk of irremediable prejudice to the applicant if the injunction was not granted, that is, harm which cannot be compensated for in damages; and (c) that this risk of prejudice outweighs the prejudice that would be caused to the respondent if the injunction were granted.

32. The respondents contend that they are confident that the conclusion that the Project Varsity transaction constitutes a Related M&A Transaction for the purposes of the shareholder agreement under New York law, because they have received advice from their legal advisors to this effect. Such decision apparently was the conclusion of the three independent directors. But the evidence shows that VimpelCom has relied on no less than four separate opinions in reaching its conclusions. Both VimpelCom and Altimo realistically accept that the matter is not free from doubt and that the question will ultimately be a matter for the arbitral tribunal.

33. Accordingly, all respondents accept that for the purposes of the section 44 jurisdiction there is a serious issue to be tried in relation to whether the Project Varsity transaction constitutes a Related M&A Transaction pursuant to the SHA.

34. Mr. Joe Smouha QC, on behalf of Telenor, submitted that the court should not accept the undertakings offered by the respondents in Skadden's letter of 24 or Weather's undertakings of the same date, and that the court should grant the injunction sought because that would, for practical purposes, result in the respondents having to agree, on a consensual basis, the escrow arrangements. He submitted that that would be the only realistic way of preserving Telenor's position pending the arbitration and ensuring that Telenor did not suffer irremediable prejudice.

35. In summary, Mr. Smouha submitted that the undertakings offered by the respondents, even in their developed form, will cause irremediable prejudice to Telenor for a number of reasons. In headline terms, his reasons were that: (1) the undertakings are not sufficient, both as to their reliability and their ability to guarantee that, if Telenor is successful in the arbitration, a declaration that Telenor has the pre-emptive rights can actually be implemented; and (2) do not provide adequate protection to Telenor during the pendency of the arbitration against the risks that Telenor's shareholding will be diluted during the period in which shares have been issued to Wind

shareholders but the tribunal has not yet ordered that the disputed pre-emptive shares be issued to Telenor.

36. In detail, Mr. Smouha submitted that, first of all, Altimo cannot be trusted to abide by its undertakings, given its egregious conduct in the past when it refused to honour arbitral awards that had been made against it.

37. Secondly, he submitted that unless, in the interim, Telenor can have the comfort of holding a 36 per cent voting interest in VimpelCom, which is what the proposed escrow arrangements envisage, there will be a real risk that Telenor's holding will be diluted and will fall foul of the Russian regulatory requirements and, therefore, will be exposed to the serious and unacceptable risk that it will drop below the required level of 25.01 per cent.

38. Third, Mr. Smouha submitted that the proposed undertaking, at paragraph 4 of Skadden's letter of 24 February, not to reduce Telenor's voting stake so that it falls below 25 per cent plus 1 share, or Telenor's and Altimo's combined voting stake to fall below 50 per cent plus 1 share, should not be subject to the proviso set out at the end of subparagraph (i) that Telenor has to exercise its pre-emption rights in the meantime to maintain its voting stake at 25 per cent plus 1 share.

39. Mr. Smouha submitted that this could expose Telenor to the risk of having to exercise its pre-emption rights in circumstances where commercially it would not choose to do so, and would not do so, if it had the buffer of the 36 per cent holding which it should have, according to Telenor's contentions, in the meantime and would have under Telenor's proposed escrow arrangements.

40. Mr. Smouha submitted that the requirement that Telenor had to exercise all its rights available to it under the shareholding agreement to maintain its voting stake at 25 per cent plus 1 share would be an imposition on it and would open up the possibility of abuse; for example, a transaction might be proposed whereby Altimo reversed, or sold into, VimpelCom an asset of its own at an over-value or at an inflated price and that, accordingly, the price at which Telenor had to exercise its pre-emption rights would be inflated.

41. Fourth, Mr. Smouha submitted that the undertaking given by Weather II, as set out at paragraphs 5 to 7 of the Skadden's letter, would not be binding on any transferee of Weather's shares.

42. Fifth, Mr. Smouha complained that the stop notice provisions at paragraph 9 of the Skadden's letter did not give any opportunity to Telenor to object to a transfer of Altimo's shares or the lifting of the stop notice, which Telenor contended breached the undertaking against transfer, notwithstanding the requirement in the undertaking for the provision of a QC opinion to the effect that such transfer was not prohibited by the undertakings. Mr. Smouha pointed to the possibility that the QC might not have been fully informed of the relevant factual position, and might accordingly be expressing his view on a mistaken factual basis. Mr. Smouha submitted that the process should be transparent so that Telenor was given notice of the proposed transfer and a copy of the opinion, and a sufficient opportunity to object to the transfer by seeking an injunction from the court or the arbitral tribunal.

43. Sixth, the undertaking regime meant that Altimo did not have to give prior notice, at this stage, as to whether it was proposing to exercise its pre-emptive rights if the arbitration went against it and determined that the Project Varsity transaction was not a Related M&A Transaction. This provided Altimo with an unacceptable commercial advantage of deciding whether to pre-empt at a later stage. It also opened up the possibility of Altimo's reducing its entitlement below 25 per cent, so as to get rid of its obligations under the SHA, and then, at a later stage, exercising pre-emptive rights in relation to the Project Varsity transaction.

44. Mr. Smouha accepted that under Telenor's alternative escrow proposals this was a risk that Telenor was subject to in any event. But, he submitted that in that event Telenor would have its 36 per cent cushion and would be more than adequately protected pending the outcome of the arbitration.

45. I should mention that Telenor's objections to the "drop dead" date offered in the undertakings (that is to say, a final termination date of 1st March 2012 for the undertakings to cease) were dropped during the course of the hearing, on the basis that the respondents made it clear that they accepted: first of all, that the arbitrators, once the tribunal was constituted, would have power in any event to grant injunctions or accept undertakings if there was any risk of the arbitration not being concluded by 1st March 2012; and secondly, that all parties would have liberty to apply to the arbitrators to grant further injunctions if the need arose.

46. Other objections by Telenor to the wording of the undertaking proposals and the terms of Weather's submissions to the jurisdiction of the English court were also resolved in the light of clarification by Mr. Mark Howard QC, on behalf of VimpelCom, during the course of the hearing. It is not necessary for me to refer to the detail of those but they are reflected, at least to a certain extent, in the draft order dated 28 February, as well as in the letter of undertaking of 28 February.

47. With one small exception, to which I will refer to in a moment, I am not persuaded that, if the undertakings were given in the proposed form, Telenor will suffer any irremediable loss in the interim, pending the decision of the arbitral tribunal. Nor am I persuaded that, with the one exception I have mentioned, the points made by Mr. Smouha lead to a risk of irremediable prejudice. My reasons are largely based on the submissions made by Mr. Howard QC on behalf of VimpelCom, and Mr. Davies QC on behalf of Altimo.

48. Moreover, I take the view that even if, under the undertaking proposals, there is a risk of prejudice to Telenor, that is outweighed by the risk of potential prejudice to VimpelCom and its independent shareholders under the injunction or escrow proposals. The court, in my view, should, in a corporate situation such as this one, be extremely careful not to do anything that would unduly interfere or prejudice the rights, or expectations, of third party shareholders of VimpelCom, save to the extent necessary to protect the claimant's position and the rights which it claims it has, pending the resolution of the arbitration. Nor, in my judgment, should this court attempt to substitute its views as to what is in the best commercial interests of the VimpelCom shareholders or VimpelCom itself, in substitution for the views of VimpelCom's independent directors.

49. I deal briefly with the points made by Mr. Smouha. First of all, I am not prepared to approach this matter on the basis that Altimo cannot be expected to honour its proposed undertakings to the court or that there is a real risk that it will not do so. The SHA, to which Altimo and Telenor and VimpelCom all agreed after the previous history of arbitration and court proceedings, sets the template going forward for corporate governance of the relationship between Telenor and Altimo, through VimpelCom. The parties signed up to that agreement after the history of acrimonious disputes between them. In those circumstances, in my view, it does not lie in Telenor's mouth to say that it should be entitled to greater protection than the SHA affords, or that might otherwise be justified, whether under the SHA or otherwise, because of the previous history of the matter.

50. Moreover, VimpelCom, which is party to the proposed undertakings, has independent directors apart from the Telenor and Altimo-nominated directors. There is no suggestion in the evidence that they have behaved, or would behave, in a manner that would amount to a breach of their fiduciary or other duties as directors, or that they would procure VimpelCom to act in breach of the undertakings which it is offering.

51. Next, I do not consider that the escrow arrangements proposed by Telenor, whereby shares are actually issued in the interim to Telenor, albeit held in escrow, so that its 36 per cent voting interest is maintained, are necessary to prevent Telenor in the interim from suffering irremediable harm of being diluted. I accept, of course, the evidence that it is critical to Telenor to maintain a holding of at least 25 per cent plus 1 share if it is not to fall foul of Russian regulatory requirements, and I can quite see that in the interim it might wish to maintain its current 36 per cent holding, which gives it greater power at meetings of shareholders. However, in my judgment, I consider that, in the round, the offered undertakings by the respondents adequately protect Telenor's position and safeguard it from any real risk that its shareholding might be diluted below 25 per cent in the interim.

52. I do not, therefore, consider that it is necessary that it should have the added protection of having the disputed pre-emptive share entitlement actually issued to it in the interim, on the postulated hypothesis that it will succeed in establishing its pre-emption rights in the arbitration. The mechanism of the SHA necessarily contemplated a hiatus between the assertion of pre-emption rights and the resolution of any dispute by arbitration. The SHA does not provide any mechanism for the issue of disputed pre-emptive shares in the meantime. The SHA could have provided such a mechanism. It does not.

53. I can see, of course, that Telenor would obviously welcome the buffer that the escrow arrangements would provide, but in my view such provision goes beyond not only the contractual entitlement, but also what is necessary to protect it against any breach by Altimo or VimpelCom of the pre-emptive provisions of the SHA.

54. Moreover, VimpelCom's evidence and submissions as to the prejudice that might be caused in the meantime under the escrow proposal demonstrates, in my judgment, a risk of prejudice that outweighs the risk of prejudice to Telenor, in circumstances where it has the benefit of the proposed undertakings.

55. First, if the disputed pre-emptive shares were issued, the result would be that more shares would be in issue during the interim period. That would necessarily reduce the

entitlement of third party shareholders to dividends declared in the interim. Their entitlement would be diluted so that the population of current shareholders would receive less by way of dividend than the company currently wants to pay them or might want to pay them.

56. That situation would not be cured even if Telenor lost the arbitration, as the evidence shows that in relation to any dividends declared on the disputed pre-emptive shares and held in escrow in the interim, once those shares were cancelled, the monies representing the dividends on the cancelled shares would be returned to the capital of the company. Whilst they might be available for future dividend, they would not be available for distribution to the shareholders of record at the dividend date declared during the interim period. The monies returned to the company's capital would not necessarily be available for distribution by way of dividend to the shareholders at that time; that would depend on the company's needs and requirements at the date when the arbitration had concluded, and whether, as a matter of law, it had distributable profits. More importantly, any monies available for dividend would be payable to a different population of shareholders.

57. Mr. Smouha submitted that that did not matter, because if, as is not disputed, the market knows through disclosure statements, filings and circulars, what the position is, shareholders, both current and future, could make their decisions accordingly, based on their perception of which way the arbitration would be determined.

58. I disagree. It seems to me that the risk of current shareholders (including in particular the third party minority shareholders) having their entitlement to, or expectation of, dividends reduced in the meantime, even though they may be informed of the position and make decisions accordingly, is an unwarranted interference with the minority shareholders' rights to receive the dividends which the company, in its commercial interests, may want to pay to its shareholders in the interim.

59. Accordingly, I conclude that such a requirement (that is to say, the issue of the disputed pre-emptive shares) is not necessary to protect Telenor's position, and I consider that such prejudice as may be caused to Telenor through not having the 36 per cent buffer is outweighed by the prejudice to shareholders.

60. Likewise, the escrow proposal, if implemented, would, as the evidence shows and as Mr. Howard submitted, have an adverse effect on the reported price earnings per share of VimpelCom. As a result, the VimpelCom share price might be consequently adversely affected. That would damage not only VimpelCom's shareholders but also VimpelCom itself, which would be impaired in its ability to use its shares as currency in respect of future transactions or, for example, in obtaining finance.

61. Again, I do not accept Mr. Smouha's submission that publication to the market of the dispute with Telenor, and the explanation of what are the potential alternative outcomes of the arbitration would cure this problem, so far as the market is concerned. I do not accept that, in reality, market analysts or the market would price in the uncertainties to the price earnings per share or the share price. I think the reality is, on the evidence before me, that the issue of the escrow shares, with the question mark over their continued existence, and the consequent impact on dividends and price earnings in the interim would have a deleterious effect on the VimpelCom share price.

62. Finally in relation to this first argument, namely, that the escrow proposals are necessary in order to prevent Telenor from suffering irremediable prejudice, I take into account the point made by Mr. Howard that the escrow arrangements necessarily create the risk of the SGM summoned for 17th March being delayed. The escrow arrangements have not yet been agreed. Although, as I have said, what is proposed by Telenor has been set out in an exhibit to its application, such arrangements would necessarily have to be the subject of further negotiation between the parties, if I were indeed to grant the injunction sought, with the exception relating to the escrow arrangements.

63. I take the view that there would, in those circumstances, be a serious risk that the SGM fixed for 17 March would have to be adjourned not least so that shareholders could be circularised about the revised escrow arrangements. On the evidence before me, there would be a serious risk that Weather might walk away from the transaction altogether. The evidence shows that Weather has clearly stated that it is not prepared to leave the deal on the table beyond the end of March.

64. The next point is Telenor's objection to the proviso to undertaking 4 in subparagraph (i), namely that the undertaking is dependent upon Telenor exercising the rights available to it to maintain its voting stake at 25 per cent. In my judgment, the problems to which Mr. Smouha referred, or the possible problems, are matters that can be adequately compensated for in damages.

65. First of all, it seems to me that the regime under the SHA should be maintained so far as possible. There is no provision in the SHA which, as it were, suspends its provisions in Telenor's favour, pending the resolution of the dispute as to whether or not a shareholder has pre-emptive rights in relation to a particular transaction. If Telenor is forced into a position where it has to exercise its pre-emptive rights at a price which it says was inappropriate, and which it would not have wanted to do, if it had had its full 36 per cent entitlement, then that is a loss that can be recovered in the arbitration and can be reflected in damages. As Mr. Howard submitted, if the proviso is not included in the undertaking, then, in effect, Telenor has an ability to block future M&A transactions which the board, including its independent directors, might consider are appropriate. If VimpelCom and Altimo give an undertaking, as is offered, to maintain Telenor's voting stake at 25 per cent plus 1 share and Telenor's and Altimo's combined voting stake at 50 per cent plus 1 share, but Telenor is not subject to the requirement to exercise its rights to maintain its voting stake at 25 per cent plus 1, effectively Telenor could decline to exercise its pre-emption rights. That would then lead to the consequence that a proposed M&A transaction would be blocked, because VimpelCom would not be able to issue further shares, because otherwise there might be a consequent risk that Telenor's holding would fall below the relevant 25 per cent plus 1 share threshold. That, in effect, would provide a tool to Telenor to block future acquisitions.

66. It seems to me that the more appropriate way to maintain the status quo pending the resolution of the arbitration is that if, in the interim, a transaction arises which the company considers is in its interests, then Telenor will have to maintain its share level at 25 per cent by exercising its rights.

67. I find it somewhat unreal, on the basis of the evidence, that Telenor, given its expressed concern to maintain not merely its 25 per cent plus 1 shareholding but its

current position of 36 per cent, would not in any event wish to maintain its voting interest as high as possible. Moreover, there is no evidential basis for supposing that the independent directors would be party to pricing the pre-emption share price at an inappropriately high figure so as, in effect, to inflate the price for the assets which, on Mr. Smouha's example, Altimo was selling to VimpelCom.

68. So far as the Weather undertakings were concerned, it was common ground that the undertakings given by Weather would not bind a transferee. But, as Mr. Howard submitted, the Weather undertakings were really icing on the cake (or gravy, to use the American term) and should be viewed in that light.

69. It seems to me that, on any basis, they are undertakings by a prospective minority shareholder and, again, whilst not binding on any transferee, so long as they last clearly give further protection to Telenor's position. I am satisfied that the revised letter of undertaking adequately deals with the points that the court raised and that Mr. Smouha raised as to Weather's submission to the jurisdiction.

70. The next matter that was raised was the stop notice provisions, and the fact that Telenor would not have an opportunity to challenge the view that the transfer of Altimo's shares was not prohibited by the undertakings.

71. In my judgment, there is force in Mr. Smouha's submissions on this point. The stop notice provisions, whereby a stop notice is entered on VimpelCom's register of members in respect of Altimo's shares, prohibiting any transfer, is clearly an important piece of the protective mechanism offered by the undertakings. It seems to me, in those circumstances, that it is appropriate, in order to protect Telenor's position and in order to give it an opportunity effectively to apply to the court or to the arbitral tribunal to restrain a transfer, that Telenor should have an opportunity of seeing the QC's opinion and also of having an opportunity, albeit a very short window of opportunity, of applying for an injunction if it disagrees with the view taken by the QC or the factual basis upon which the QC has advised, that the transfer is not prohibited.

72. Accordingly, I will hear argument from counsel at the conclusion of this judgment as to the appropriate form of wording to give effect to that decision on my part.

73. Finally, I deal with the point made by Mr. Smouha that Altimo would obtain a commercial advantage by not having to state clearly at this stage whether it is proposing to exercise its rights if the arbitration goes against Altimo and the tribunal accepts that Telenor does indeed have pre-emptive rights in relation to the Project Varsity transaction.

74. It seems to me that there is no reason why Altimo should be required to state here and now what its intentions are. The SHA does not provide for any such statement to be made, in the context of a dispute between the parties as to whether pre-emption rights arise in relation to a particular transaction. As was accepted during the course of argument, either the SHA provides that Altimo can exercise such rights at the later stage, once the arbitral tribunal rules, or it will have lost its rights if the SHA provides that it has to exercise its rights or give notice of intention to do so within a particular time. I do not consider it right that this court should impose a requirement on Altimo to do so and I do not consider that it is necessary, in order to protect Telenor against

the dilution risk, for such a provision to be included in the undertakings. Nor am I convinced or persuaded by the argument that somehow Altimo will, in the interim, reduce its shareholding so as to escape the provisions of the SHA and then pre-empt back up to 25 per cent after the conclusion of the arbitration (on the hypothesis that the arbitrators resolve against Altimo and hold that pre-emption rights exist in relation to the transaction).

75. Undertakings 4 and 8 require Altimo, pending the outcome of the arbitration, to maintain its combined voting stake with Telenor at at least 50 per cent plus 1 share and not to transfer any shares to reduce that position. In those circumstances, given that undertaking, and given the protection afforded by the stop notices, it seems to me that there is no need for any further protection for Telenor in this respect.

76. Again, I bear in mind the requirements of section 44, which require this court to exercise its discretion only insofar as it is necessary for it to do so and to the extent that the arbitrators are unable to act. It seems to me that if there is any risk of an inappropriate reduction of its holding below 25 per cent by Altimo, in breach of the obligations in the offered undertakings, then that is something which could clearly be the subject matter of a future application to the arbitral tribunal or, in the event that it was not able to act, to this court.

77. Accordingly, for those reasons, in my judgment the undertakings that have been offered in their revised form adequately protect the position of Telenor during the interim period. If it were necessary to do so, considerations of the balance of convenience also operate to indicate that the appropriate course is for this court to accept the undertakings offered, subject to any further detailed submission on the wording to give effect to this judgment, and, in particular, in relation to the opportunity to challenge the lifting of the stop notice.