Neutral citation [2019] CAT 13

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1301/6/12/18

Victoria House
Bloomsbury Place
London WC1A 2EB

13 May 2019

Before:

THE HONOURABLE MR JUSTICE MORRIS
(Chairman)
MICHAEL CUTTING
PAUL DOLLMAN

Sitting as a Tribunal in England and Wales

BETWEEN:

B&M EUROPEAN VALUE RETAIL S.A.

Applicant

- v -

COMPETITION AND MARKETS AUTHORITY

Respondent

Heard at Victoria House on 6 February 2019

JUDGMENT (JURISDICTION & INTERIM RELIEF)

APPEARANCES

Mr Richard Moules (instructed by Gordons LLP) appeared on behalf of the Applicant.

Mr Robert Palmer and Mr Ben Lask (instructed by CMA Legal) appeared on behalf of the Respondent.

A. INTRODUCTION

1. B&M European Value Retail S.A. ("**the Applicant**")[1] applies to the Tribunal under section 179(1) of the Enterprise Act 2002 ("**EA 2002**") for review of the Competition and Markets Authority's ("**CMA**") decision dated 1 November 2018 to designate the Applicant as a Designated Retailer ("**the Designation Decision**") pursuant to Part 2, Article 4(1)(b) of The Groceries (Supply Chain Practices) Market Investigation Order 2009 ("**the 2009 Order**"). The Applicant also challenges the CMA's refusal on 11 December 2018 to de-designate the Applicant ("**the Refusal**"). The Applicant seeks interim relief suspending the effect of the Designation Decision until final determination of its substantive application.

2. The Applicant however questions whether the Tribunal has jurisdiction to determine its application. Accordingly, it has also issued a claim for judicial review in the High Court of Justice Queen's Bench Division, Administrative Court in relation to the same decisions which are the subject of this application. The Applicant has also issued an application for interim relief in the Administrative Court.

3. In its Notice of Application, the Applicant requested that both cases be put before the same judge (who is both a Chairman of the Tribunal and an Administrative Court judge) so that the appropriate forum could be determined expeditiously and efficiently. Accordingly, Morris J was appointed to hear both sets of proceedings.

4. On 6 February 2019, a hearing took place in order to determine: (i) the correct forum for challenging the Designation Decision; and (ii) the Applicant's application for interim relief.

5. Having heard the parties, the Tribunal determined that it did have jurisdiction to hear the application under section 179 of the EA 2002; and having so determined, the Tribunal went on to consider, and refuse, the Applicant's application for interim relief. This Judgment sets out the reasons for those decisions. The jurisdiction issue is addressed in section D below; interim relief is addressed in section E below.

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[1] The parties referred to B&M as an "appellant" in their written and oral submissions. However, in proceedings for review under sections 120 and 179 of the Enterprise Act 2002, references to "appellant" means references to "applicant" and references to "notice of appeal" means references to "notice of application": see Rule 26 of the Competition Appeal Tribunal Rules 2015 (2015 S.I. 1648).

B. LEGAL FRAMEWORK

6. Section 179 of the EA 2002 makes provision for the review of decisions under Part 4. Section 179(1) provides that:

> "**Review of decisions under Part 4**
>
> Any person aggrieved by a decision of the CMA, the appropriate Minister or the Secretary of State in connection with a reference or possible reference under this Part may apply to the Competition Appeal Tribunal for a review of that decision."

Under s.179(2) certain decisions are excluded from the ambit of s.179(1).

7. The CMA's power to make references is contained in s.131. Pursuant to s.131(1):

> "The CMA may, subject to subsection (4), make a reference to its chair for the constitution of a group under Schedule 4 to the Enterprise and Regulatory Reform Act 2013 if the CMA has reasonable grounds for suspecting that any feature, or combination of features, of a market in the United Kingdom for goods or services prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in the United Kingdom or a part of the United Kingdom"

8. A reference under s.131 triggers a market investigation by the CMA. It is referred to in Part 4 as a "market investigation reference": s.131(6).

9. Pursuant to s.134, the CMA is obliged to decide certain questions on a market investigation reference. In particular, it is required to decide whether any feature(s) of the relevant market gives rise to an adverse effect on competition **("AEC")**: s.134(1)-(2). If it does, the CMA must go on to decide *inter alia* whether, and if so what, action should be taken under s.138 for the purpose of remedying the AEC or any consumer detriment that results from it: s.134(4).

10. Section 136 requires the CMA to prepare and publish a report on a market investigation reference within the period permitted by s.137. It must carry out such investigations as it considers appropriate for preparing the report, and the report must contain its decisions on the questions that it is required to decide under s.134: s.136(1)-(3).

11. Where the CMA decides that there is one or more AECs, it is required to take such action under s.159 or s.161 as it considers reasonable and practicable to remedy the AEC and any consumer detriment that results from it: s.138(2). Such action must normally be taken within six months of the publication of its report: s.138A.

12. Sections 159 and 161 empower the CMA to accept undertakings or make orders in accordance with s.138. An order under s.161 – referred to as an "enforcement order" – may contain anything permitted by Schedule 8, and any supplementary provision that the CMA considers appropriate: s.161(3). It may, moreover, authorise the CMA to make directions (s.164, s.87), or make provision for matters to be determined under the order itself (Schedule 8, paragraph 21(3)). The 2009 Order is an enforcement order made under s.161. An enforcement order may be varied or revoked by another order: s.161(4). Under s.162, the CMA has a duty to monitor orders, including considering whether, by reason of any change of circumstances, an order needs to be varied or revoked and a power to take such action as it considers appropriate to that end. Where an order under s.161 has been made, the time when a market investigation reference is "finally determined" is the making of the order concerned: s.183(4)(c).

C. FACTUAL BACKGROUND

(1) The parties

13. The Applicant is a general merchandise retailer operating in the value sub-market and/or a limited assortment discounter. Under the B&M fascia the Applicant operates 600 stores in the UK.

14. The CMA is a non-ministerial government department responsible for strengthening business competition and preventing and reducing anti-competitive activities. It was established under Part 3 of the Enterprise and Regulatory Reform Act 2013, and it assumed many of the functions of the previously existing Competition Commission and Office of Fair Trading.

(2) The 2000 Report

15. On 8 April 1999, the Director General of Fair Trading (predecessor to the Office of Fair Trading) referred to the Competition Commission for investigation and report under the monopoly provisions of the Fair Trading Act 1973 the supply in the UK of groceries from multiple stores. The Competition Commission's investigation led to its report "Supermarkets – A report on the supply of groceries from multiples stores in the United Kingdom 2000" ("**the 2000 Report**"). As a result of anti-competitive practices it identified at that time, the Competition Commission determined that a code of practice should be developed and any party with at least 8% of the grocery market should be

required to give an undertaking to comply with the code of practice. In March 2002, the "Supermarket Code of Practice" ("**the SCOP**") was introduced. The SCOP applied to Asda, Tesco, Sainsbury's and Safeway – although Morrisons later agreed to comply with the SCOP following its acquisition of Safeway in 2004.

(3) The 2008 Report

16. On 9 May 2006, the Office of Fair Trading referred the supply of groceries by retailers in the UK to the Competition Commission for investigation under the EA 2002. The Competition Commission undertook an investigation which led to its report "The supply of groceries in the UK market investigation 2008" ("**the 2008 Report**").

17. The 2008 Report investigated various issues in the grocery market. For the purposes of this case, it is the Competition Commission's treatment of supply chain practices and buyer power which is in issue.

18. The Competition Commission noted that 85% of the grocery market is held by the 12 largest grocery retailers, with the top four accounting for just over 65% of sales from large grocery stores.

19. In relation to its key behavioural concerns, the Competition Commission highlighted (at paras 9.37 to 9.81):

    (a) Supply chain practices – namely retrospective variations to price;

    (b) Demand withholding – preventing market demand from being passed on to suppliers;

    (c) The sale of own-label products.

20. Demand withholding was not considered to be an issue prevalent in the UK market. The Competition Commission noted, however, that "*the principal manner in which excessive risks or unexpected costs can be transferred from grocery retailers to suppliers is through retailers making retrospective adjustments to the terms of supply"* (para 9.45). Of the 380 concerns submitted to the investigation, one-third related to retrospective payments or other adjustments to the terms of supply (para 9.59).

21. Thus, to address the issues identified in the 2008 Report, the Competition Commission determined that the Groceries Supply Code of Practice (set out in Schedule 1 to the 2009 Order) ("**the Code**") should be created, building on the SCOP (Summary, para 46).

22. In determining which retailers should be covered by the Code, the Competition Commission decided that any UK grocery retailer which had a grocery retail turnover over £1 billion should be designated (para 11.282). Whilst making that assessment, the Competition Commission explained, at para 11.277, that its "*threshold will inevitably be somewhat arbitrary, but consider that practicability considerations outweigh these concerns*."

(4) The 2009 Order

23. The Competition Commission made the 2009 Order under s.161 of the EA 2002 on 4 August 2009; it came into force on 4 February 2010.

24. Central to the operation of the 2009 Order is the status of "*Designated Retailer*". Article 2(1) of the 2009 Order provides, *inter alia*, as follows:

> "**Designated Retailer** means a retailer listed in Article 4(1)(a) of this Order or who is designated as a Designated Retailer in accordance with Articles 4(1)(b) or 4(1)(c) of this Order."

25. Article 2(1) goes on to define "Retailer" as "any person carrying on a business in the United Kingdom for the retail supply of Groceries".

26. Article 2 (1) defines "Groceries" as follows:

> "**Groceries** means food (other than that sold for consumption in the store), pet food, drinks (alcoholic and non-alcoholic, other than that sold for consumption in the store), cleaning products, toiletries and household goods, but excludes petrol, clothing, DIY products, financial services, pharmaceuticals, newspapers, magazines, greetings cards, CDs, DVDs, videos and audio tapes, toys, plants, flowers, perfumes, cosmetics, electrical appliances, kitchen hardware, gardening equipment, books, tobacco and tobacco products, and Grocery shall be construed accordingly…"

27. Article 4 addresses "Designated Retailer" in the following terms:

> "(1) The following will be Designated Retailers for the purposes of this Order:
>
> (a) from the date of this Order, each of those persons specified in Schedule 2.

(b) any Retailer with a turnover exceeding £1 billion with respect to the retail supply of Groceries in the United Kingdom, and which is designated in writing as a Designated Retailer by the [CMA].

[...]"

28. Pursuant to Article 4(1)(a), those specified in Schedule 2 were Asda Stores Limited, Co-operative Group Limited, Marks & Spencer plc, Wm Morrison Supermarkets plc, J Sainsbury plc, Tesco plc, Waitrose Limited, Aldi Stores Limited, Iceland Foods Limited, and Lidl UK GmbH. Thus, when the 2009 Order was made, these were the only Designated Retailers.

29. Article 4(1)(b) confers a discretionary power on the CMA to designate further Designated Retailers. The Designation Decision is the first time that power has been exercised. The CMA's pre-action reply accepted that "*the CMA had a discretion over whether to designate B&M based on the nature of the business meeting the turnover threshold and the purposes of the Order*".

30. Paragraph 18 of the Explanatory Note to the 2009 Order describes the effect of Article 4 as follows:

> "Article 4 specifies those retailers who will be 'Designated Retailers' for the purposes of the Order. The article lists retailers identified in the report as those who would be covered by the Code, and sets out the criteria which the [CMA] will consider to determine whether additional retailers will be covered by the Code in the future. As currently drafted, the [CMA] will designate a grocery retailer as a Designated Retailer as soon as it obtains evidence that it meets the £1 billion turnover threshold. The [CMA] has a discretion as to whether to appoint a business meeting the turnover threshold as a Designated Retailer, based on the nature of the business meeting the turnover threshold, and the purposes of the Order. There is no express provision for the removal of a retailer from the list of designated retailers. Any request for removal from the list of designated retailers (for example, in the event of a Designated Retailer's turnover falling under the £1 billion turnover threshold, or the acquisition of a substantial part of a Designated Retailer that falls under the £1 billion turnover threshold) would be considered by the [CMA] under its duty to monitor undertakings in section 162 of the Act." (Emphasis added).

31. Under the terms of the 2009 Order, a Designated Retailer:

(1) must not enter into or perform any Supply Agreement unless that Supply Agreement incorporates the Code and does not contain any provisions that are inconsistent with the Code (see Article 5);

(2) must supply all suppliers with the information prescribed in Article 6;

(3) must keep records and provide information and documents to the CMA for the purposes of enabling the CMA to monitor and review the operation of the Order (see Article 7);

(4) must train staff with respect to the Code (see Article 8);

(5) must appoint an in-house compliance officer (see Article 9);

(6) must deliver an annual compliance report to the CMA, copied to the Grocery Supply Code of Practice Ombudsman ("**the Ombudsman**") (see Article 10); and

(7) is subject to arbitration by the Ombudsman in disputes with suppliers (see Article 11).

(5) The Consultation

32. The Groceries Code Adjudicator ("**the GCA**") was established to regulate the Code by the Groceries Code Adjudicator Act 2013 ("**the GCAA 2013**"). Section 15 of the GCAA 2013 requires the Department for Business, Energy and Industrial Strategy ("**BEIS**") to undertake a statutory review of the GCA on a periodic basis.

33. On 18 October 2016, BEIS undertook its first statutory review of the GCA. Alongside that statutory review, BEIS undertook a secondary consultation called "Groceries Code Adjudicator: extending its remit" ("**the Consultation**").

34. The Consultation concluded in February 2018. BEIS reported that it had seen concerns that "*The UK groceries market is a highly successful and dynamic sector, featuring the growth of online retailing and the expansion of groceries portfolios by "non-grocery" retailers*" and "*the CMA has agreed to formalise its current activities, by reviewing publicly available information on an annual basis. Where there are reasonable grounds for suspecting that any additional retailer may have reached the turnover threshold specified in the Order, the CMA will request further evidence from it. This will allow the CMA to assess whether that retailer should be added to the list of designated retailers*." (Groceries Code Adjudicator Review: Part 2 – Government response to the Call for Evidence on the case for extending the Groceries Code Adjudicator's remit in the UK groceries supply chain, page 10).

35. Following that agreement with BEIS, the CMA began contacting retailers seeking details of their 'groceries' turnover.

(6) The correspondence preceding the Designation Decision

36. On 26 March 2018, the CMA wrote to the Applicant stating that:

> "The CMA has carried out a review of publicly available information on grocery retailers in the UK, and as a result considers that the turnover of B&M European Value Retail (B&M) with respect to the retail supply of Groceries in the United Kingdom appears to exceed the £1 billion turnover threshold.
>
> Please confirm whether you consider that B&M has a turnover exceeding £1 billion with respect to the retail supply of Groceries in the United Kingdom in the financial year preceding the date of this letter.
>
> […]
>
> Following receipt and consideration of this information, the CMA will write to you with its provisional decision as to whether it intends to designate B&M as a Designated Retailer. The CMA will consider any response you choose to make."

37. On 4 May 2018, the Applicant replied stating:

> "Further to our conversation earlier this week, we have reviewed our revenues per the definition included within the letter and for the year ending March 2017 we would have been marginally above the £1 billion of revenues, although within that calculation there are some product sub-categories that should be excluded and the actual revenue figure may have been under the £1 billion figure.
>
> However, given that we have also grown in the last 12 months and we have acquired a convenience chain, Heron Foods in August 2017, then for the 12 ended March 2018 we would have exceeded the £1 billion figure and given that this is the direction travel (sic) and rather than get involved in some detailed analysis of product revenues then we should be regarded as having hit the £1 billion of grocery revenues."

38. On the same day, the CMA responded to the Applicant stating:

> "In response to your questions, we will be looking to make a provisional decision re designation in the next few weeks, which we will send to you.
>
> …
>
> Our deadlines may slip a little as we are looking to make announcements regarding multiple Grocers at the same time, and not everyone is as prompt at replying as you have been."

39. On 6 July 2018, the CMA wrote to the Applicant indicating it was minded to designate the Applicant:

> "The CMA has considered the information provided, and as a result is minded to designate B&M under article 4(1)(b) of the Order.

> Before reaching a final decision on designation of B&M, we would like to offer you an opportunity to make any representations in relation to this potential designation. Please provide any comments to me in writing by 20 July 2018. We will take account of any representations received when reaching a final decision on designation.
>
> …
>
> On the date of designation, the CMA would expect B&M to provide it with a statement explaining the extent to which B&M is already compliant with the Order, and what else needs to be done (and the anticipated timescale) to attain full compliance. The CMA would require regular updates from B&M on progress made towards compliance.
>
> Moreover, on the date of designation, the GCA would expect B&M to provide it with a statement explaining the extent to which B&M is already compliant with the Code, and what else needs to be done (and the anticipated timescale) to attain full compliance. The Groceries Code Adjudicator will also require regular updates from B&M on progress made toward compliance…" (Emphasis added).

40. On the same day, the Applicant emailed the CMA stating: *"given our method of trading and non-complex business model, net pricing, paying suppliers on time etc then I am anticipating that we will already be largely compliant"*.

41. On 10 October 2018, the CMA wrote to the Applicant stating that it had decided to designate the Applicant:

> "Thank you for the information you have provided to the CMA in regard to its assessment of whether or not to designate B&M European Value Retail SA under the Order. As the relevant turnover of groceries for B&M European Value Retail SA exceeded the threshold in the Order, the CMA has considered whether or not it would be appropriate to exercise its discretion to designate B&M European Value Retail SA.
>
> The CMA has decided to designate B&M European Value Retail SA under the Order. This designation will take effect from 1 November 2018, and a Notice of Designation will be sent to B&M European Value Retail SA on 1 November 2018."

(7) The Designation Decision

42. On 1 November 2018 the CMA made the Designation Decision, by way of a formal "Notice of designation of B&M European Value Retail S.A.". By paragraph 7, the Designation Decision recognised that the CMA had a discretion whether or not to designate the Applicant, "based on the nature of the business meeting the turnover threshold and the purposes of the Order". Paragraph 8 of the Designation Decision stated:

> "8. The purposes of the Order include the prevention of the exercise of buyer power over suppliers by large grocery retailers. This is demonstrated by the following extracts from the Competition Commission's final report:
>
> 'We found that the exercise of buyer power by certain grocery retailers with respect to their suppliers of groceries, through the adoption of supply chain practices that transfer

> excessive risks and unexpected costs to those suppliers, was a feature of the markets for the supply of groceries.
>
> … [further extracts from paras, 9.7, 11.410 and 11.411 of the 2008 Report]'.

43. The Designation Decision then sets out the CMA's reasons for designating the Applicant:

> "9. We have established that B&M European Value Retail SA has a UK retail turnover of groceries that is greater than the £1 billion threshold specified in the Order.
>
> 10. Having established that B&M European Value Retail SA has turnover that exceeds this threshold, the CMA gave consideration of whether or not to designate it, having regard to representations made, the nature of its business and the purposes of the Order.
>
> 11. B&M European Value Retail SA noted that its acquisitions and recent growth meant it accepted designation under the Order.
>
> 12. The CMA notes that B&M European Value Retail SA is a retailer that undertakes retail sales in the UK of a wide range of consumer goods including a range of grocery products, with a focus on low prices and fast-moving consumer goods, with its products being sourced from a range of suppliers. The CMA therefore considers that these arrangements, together with the scale of grocery retailing activities undertaken by B&M European Value Retail SA mean that it may be expected to have the ability to exert buyer power over at least some of its suppliers. In light of this assessment, the CMA considers that it would be appropriate to exercise its discretion to designate B&M European Value Retail SA as this would be consistent with the purposes of the Order."

(8) The Applicant's request that the Designation Decision be revoked

44. On 27 November 2018, the Applicant wrote a pre-action letter to the CMA. In that letter, the Applicant also set out in detail why the nature of the Applicant's business meant that the Applicant should not be designated. The Applicant requested that the CMA quash the Designation Decision or revoke its designation with immediate effect having regard *inter alia* to the information supplied in relation to the nature of the Applicant's business.

45. In its pre-action reply dated 11 December 2018, the CMA refused to agree to quash the Designation Decision or to revoke the designation of the Applicant. This is the Refusal.

(9) Communications between the Groceries Code Adjudicator and the CMA in January 2019

46. On 14 January 2019, the CMA wrote to the GCA. The GCA was asked to provide the CMA with information concerning the costs of compliance with the Code and related matters. The GCA replied on 16 January 2019. In that letter, the GCA referred to the potential uncertainty for its budgeting of potentially regulating twelve Designated

Retailers for part of its financial year but only being able to spread the expense of doing so across eleven of them should the Applicant's case succeed. The GCA went on to say that "…*I would like to be clear about which retailers I am regulating and which I am not, so that I may do so consistently and effectively. This is not something I can decide; nor should it properly wait until final determination of the proceedings between [the Applicant] and the CMA*".

(10) The grounds of review in summary

47. By its Notice of Application, the Applicant applies under s.179(1) of the EA 2002 for an order quashing the Designation Decision and the Refusal on the following three grounds:

    (1) The CMA misinterpreted the purposes of the 2009 Order;

    (2) The CMA failed to understand and consider the exercise of its discretionary power; and

    (3) The CMA failed to have regard to relevant considerations and its decisions are disproportionate.

    These grounds are considered in detail in section E below.

D. THE JURISDICTION ISSUE

48. The issue of jurisdiction is whether a decision by the CMA to designate a retailer under Article 4(1)(b) of the 2009 Order may be challenged before the Tribunal on a review under s.179 of the EA 2002. The question is "Is the Designation Decision (or the Refusal) a "*decision of the CMA … in connection with a reference … under [Part 4 of the EA 2002]"* within the meaning of s.179(1) EA 2002?"

49. As explained in paragraph 2 above, the Applicant issued parallel proceedings in the Administrative Court and the Tribunal in order to protect its position pending resolution of the question of whether the Tribunal has jurisdiction.

(1) The parties' submissions

The Applicant's submissions

50. The Applicant does not object to the claim being heard in either the High Court or the Tribunal. However, given what it said was the uncertainty over the Tribunal's jurisdiction, the Applicant argued that the prudent course of action would be to hear the claim in the High Court which undoubtedly does have jurisdiction. In either forum the challenge will be determined by application of the same principles as would be applied by the High Court on a claim for judicial review. This was not a question of forum shopping and no such allegation has been made.

51. The Applicant said its concern was that the Tribunal is a creation of statute that enjoys no inherent jurisdiction. Consequently, the parties could not confer jurisdiction on the Tribunal by agreement, and the Tribunal could consider this application only, if properly construed, the subject matter falls within the scope of s.179 EA 2002.

52. The Applicant first submitted that the words *"under this Part…"* in s.179(1) mean that the decision in question has to be a "decision under Part 4", rather than a "decision in connection with a reference under Part 4". On that basis the Applicant argued that the Designation Decision was made "under the 2009 Order" and not "under Part 4 of the EA 2002".

53. The need to read s.179(1) in this way was supported by the wording in s.120(1) of the EA 2002 which is the parallel provision in relation to applications concerning the merger control regime.

54. Section 120 reads:

> "**Review of decisions under Part 3**
>
> Any person aggrieved by a decision of the [CMA], [OFCOM,] [or the Secretary of State] under this Part in connection with a reference or possible reference in relation to a relevant merger situation or a special merger situation may apply to the Competition Appeal Tribunal for a review of that decision." (Emphasis added).

55. Sections 179 and 120 of the EA 2002 should be interpreted in the same way. The headings of both s.120 and s.179 refer to "Review of decisions under Part". Further the precise order in s.120 puts the words "under this Part" immediately after the "decision" and before "in connection with". This strongly suggests that the decision had itself to be made *under* a provision within Part 4 of the Act and thus would not extend to a decision made under an order that derived from a reference. Thus the words "under this Part" qualify the "decision" and not the "reference" and s.179 should be construed as

dealing with review of "a decision under Part 4 in connection with a reference" rather than of a "a decision in connection with a reference under Part 4".

56. Secondly, the Designation Decision could not be said to be "in connection with" a reference or possible reference since many years had passed and the reference had been finally determined in accordance with s.183(4)(c) EA 2002 with the making of the 2009 Order.

57. Thirdly, it could not be the case that any decision made by the CMA whilst reviewing the operation of remedies would be caught by s179(1) – it questioned for example the hypothetical case of a pure failure to consult. The Applicant argued there had to be a limitation on the Tribunal's jurisdiction (as a creation of statute); that Parliament would have intended to have clear ascertainable lines, and that the phrasing "decisions under this Part" provided such a demarcation; and that the power to designate new retailers under the 2009 Order was wholly referable to the 2009 Order, albeit that this fell to be construed by reference to the 2008 Report which set out the mischief to be remedied or prevented.

58. Fourthly, there is no policy reason why the Tribunal should take jurisdiction since the issue in the case was one of statutory interpretation. Finally, whilst the Applicant conceded that the Refusal could be said to be a decision not to revoke or vary the Order subject to s.162 and therefore reviewable under s.179, that decision could also be reviewed by the Administrative Court.

The CMA's submissions

59. The CMA argued that the Tribunal has jurisdiction in this case. It argued, first, that s.179 applies to any decision of the CMA "in connection with a reference or possible reference" under Part 4 of the EA 2002. The language "in connection with" is deliberately broad. Case law, although arising in other areas of law, supports a broad interpretation of the phrase "in connection with"; points to the need to take the context into account; and concludes that the phrase is wider than "arising out of" and that the relevant connection may be direct or indirect: see *Barclays Bank Plc v Commissioners for Her Majesty's Revenue and Customs* [2007] EWCA Civ 442 at [18] to [22] and [30]; *Khanty-Mansiysk Recoveries Ltd v Forsters LLP* [2016] EWHC 583 (Comm) at [39] and [40] and *Hockin v Royal Bank of Scotland and National Westminster Bank PLC* [2016] EWHC 925 (Ch) at [21], [29] to [30].

60. Secondly, Parliament could have chosen to specify the decisions that would be amenable to review by the Tribunal (e.g. s.46 of the Competition Act 1998 (**"CA 1998"**) which also allows for appeals in relation to directions pursuant to decisions under that Act) but decided instead to adopt a broad and flexible formulation. The formulation is apt to encompass a range of decisions that the CMA may take under Part 4 where it has made, or is proposing to make, a market investigation reference under s.131 of the EA 2002. It covers, equally, decisions taken before, decisions taken during the course of, and decisions taken as a result of, a reference. There is no limitation based on the decision's proximity in time to the reference in question. There is explicit provision for decisions that are not subject to review under s.179(1) set out in s.179(2)(a). If Parliament had intended to exclude directions or decisions made under an order, such as that in issue, it would have done so explicitly.

61. The CMA pointed to the following decisions which have been challenged in the past under section 179:

(1) a decision not to devote any further resources to addressing whether to make a market investigation reference: *Association of Convenience Stores v OFT* [2012] CAT 27;

(2) a decision to accept undertakings in lieu of a reference: *John Lewis Plc v OFT* [2013] CAT 7;

(3) a decision following a reference that certain features of a market do not have an AEC: *Federation of Independent Practitioner Organisations v CMA* [2016] EWCA Civ 777; and

(4) a decision following a reference as to the remedy that should be adopted to address an AEC: *Tesco Plc v Competition Commission* [2009] CAT 6 and *HCA International Limited v CMA* [2015] EWCA Civ 492.

Although jurisdiction was not expressly addressed by the Tribunal in these cases, they illustrated the breadth of decisions that have been dealt with under s.179 without any apparent controversy.

62. Thirdly, the nature of a market investigation reference is important in this regard. In broad terms the purpose of a reference is to investigate whether any feature(s) of a given

market has an AEC in the UK. Parliament's intention, to which s.179 gives effect, was that any decision connected with a competition investigation of this kind should be subject to the specialist jurisdiction of the Tribunal. This is, moreover, part of a clear wider trend. Parliament's general approach is to confer jurisdiction on the Tribunal in respect of challenges and claims that concern competition: e.g. s.46 CA 1998; s.47A CA 1998; s.120 EA 2002 and also s.16 EA 2002 and Rule 72 of the Competition Appeal Tribunal Rules 2015 (S.I. 2015 No 1648) ("**the Tribunal Rules**"), which provide for the transfer of competition claims from the High Court to the Tribunal.

63. The rationale for Parliament's approach is easy to discern: the Tribunal has specialised knowledge and experience in competition matters, which "enables it to perform its task with a better understanding, and more efficiently": see *BSkyB v Competition Commission* [2010] EWCA Civ 2 at [37]. Section 179 should be construed so as to give effect to Parliament's intent. Indeed, since a decision such as the present concerns the exercise of buyer power in a sector where an AEC has been identified, it is hard to see why, contrary to its usual approach, Parliament would have chosen to allocate jurisdiction over such decisions to the High Court rather than the specialist Tribunal.

64. Fourthly, it is clear that a decision to make an enforcement order under s.161 (or accept undertakings under s.159), and decisions as to the content of such an order, are decisions "in connection with" a reference under Part 4. Such decisions are taken as a result of the reference in question, and are based on the findings reached during the course of that reference. They are, moreover, made in pursuit of the statutory duties that arise where a reference is made: see ss. 134, 136 and 138. An order under s.161 is one of the remedies that the CMA may adopt where, as a result of a reference, it has found an AEC. It follows that the decision to make the order is plainly "in connection with" the reference out of which it arises.

65. By the same token a decision taken under an enforcement order is a decision "in connection with" the reference from which the order arises. Like the order itself, such decisions are taken as a result of the reference in question, and in an effort to remedy the AEC identified during the course of the reference. Once it is accepted that a decision to make an enforcement order following a market investigation reference is a decision "in connection with" the reference, it follows that a decision taken under the order is so too. The same arguments apply in relation to an order that varies or revokes the original order under s.161(4).

66. As to the Applicant's specific arguments about whether the Designation Decision was made under Part 4, the statutory scheme expressly provides for an enforcement order under s.161 to contain "provision for matters to be determined under the order" (see s.161(3), Schedule 8 paragraph 21(3)) and/or to authorise the person making the order to give certain directions (s.164(2), s.87). If Parliament had intended such decisions to be excluded from the review procedure in s.179, it would have been expected to spell this out.

67. As to the contention that s.179(1) should be read in the same way as s.120(1), the CMA submitted there was no good policy reason why the two provisions should have different scopes. However, their scope should be interpreted broadly; the order of the words is a red herring; and the meaning advanced by the Applicant is contrary to Parliament's intentions. Moreover, were the Applicant correct, then the Tribunal would not have had jurisdiction to decide *Stericycle International LLC v Competition Commission* [2006] CAT 21, where a challenge was brought under s.120 EA 2002 to directions made under an interim order made pursuant to s.81. In that case no issue was raised as to whether the directions were "in connection with" the reference out of which the order arose. Similarly, in *WM Morrison Supermarkets Plc v Competition Commission (Interim Relief)* [2009] CAT 33, the proposed application, brought under s.120, challenged a decision made under an order that had been made to give effect to the remedy adopted by the Competition Commission following a merger reference. Again, no issue had been raised on jurisdiction in that case.

68. The CMA further argued that just as the CMA's original decision to designate the retailers referred to in Article 4(1)(a) and Schedule 2 of the 2009 Order was amenable to review under s.179, so too is any subsequent decision to designate further retailers under Article 4(1)(b). There was in the CMA's submission no logical reason why the former should fall within the jurisdiction of the Tribunal but not the latter.

69. The Applicant's argument based on "final determination" under s.183(4)(c), this was a *non sequitur*. The term "finally determined" demarcates a number of specific matters in Part 4, such as the circumstances in which a reference may be made where there has already been another reference in relation to the same matter (s.131(4), s.132(4)); and the period in which interim orders may have effect (s.158(1), s.158(4)). The term does not, however, affect the scope of s.179. There is no reason in principle why – and nothing in the legislation to suggest that – a decision cannot be "in connection with" a reference that has been finally determined.

70. Dealing explicitly with the question of the passage of time, this made no difference to the question of jurisdiction. There is nothing in the legislation to suggest that whether a decision is "in connection with" a reference depends on its proximity in time to the reference in question. Thus, once it is accepted in principle that a designation decision made under Article 4(1)(b) of the 2009 Order is "in connection with" the reference in question, it could not make any difference to the Tribunal's jurisdiction whether the decision was made the day after the 2009 Order or some years later. In this context the CMA noted that, in *WM Morrison Supermarkets Plc v Competition Commission (Interim Relief)* [2009] CAT 33, the impugned decision was taken some seven months after the relevant order had been made. Pursuant to s.79 EA 2002, the merger reference would have been "finally determined" when the order was made.

71. The fact that the Applicant accepted that the Tribunal would have jurisdiction over decisions under s.162 of the EA 2002 to vary, supersede or revoke any remedy contradicted its case on both s.183(4)(c) and the passage of time.

(2) The Tribunal's analysis

72. In our view, the Tribunal has jurisdiction under section 179 of the EA 2002 to hear this case.

73. We start with the wording of the provision: Section 179(1) provides that: *"Any person aggrieved by a decision of the CMA, the appropriate Minister or the Secretary of State in connection with a reference or possible reference under this Part may apply to the Competition Appeal Tribunal for a review of that decision."* (Emphasis added).

74. In this case the Designation Decision is a decision made by the CMA relating to the implementation of the remedies imposed following the investigation into the grocery market under the market investigation regime. Since the decision relates to the implementation of remedies following a reference under Part 4 of the EA 2002 we conclude that the Designation Decision is a decision of the CMA made in connection with a reference under Part 4.

75. Moreover, the Refusal (i.e. to quash or revoke the designation), in so far as it is a reviewable decision, is a decision either not to vary that remedy provision (in which case the analysis in the previous paragraph applies) or a refusal to engage in a review

and variation of remedies under s.162 EA 2002. If it is properly to be constructed as a decision under s.162 we conclude that it is equally a decision to which s.179(1) applies.

76. In our view, first, these conclusions follow from the plain wording of s.179(1). Secondly, further support is provided by the case authority on the interpretation of the words "in connection with". In particular, the phrase is to be given a broad interpretation (wider than "arising out of"), to be considered in the light of the context in which it appears and, importantly, includes indirect connection, as well as direct connection: see paragraph 59 above.

77. Thirdly, as to the Applicant's contention that, in view of the heading to s.179(1) and the word order in s.120, there has to be a "decision under Part 4", we do not consider that this leads to the conclusion that the Tribunal does not have jurisdiction in this case. The operative words in the present case are those in the body of s.179(1) itself. Moreover, the text of the heading to s.179 ("Review of Decisions under Part 4") either alone or when taken with the similar text of the heading to s.120 is at most a possible aid to interpretation and is not of such weight as to override an otherwise proper interpretation of the section.

78. Furthermore, the word order in s.120(1) does not lead to a different conclusion. We recognise that, in s.120(1), the order in which the phrases "decision under this Part" or "in connection with a reference or possible reference" appear is different. Even if, which we do not accept, this might suggest a difference in meaning and that the s.120 word order gives rise to a narrower meaning, this is not a reason to ascribe a narrower meaning to s.179 (by a process of "reverse engineering" from a different provision).

79. Further, and in any event, we consider that the Designation Decision here is a decision falling within s.179(1), regardless of the order in which the phrases "decision under this Part" or "in connection with a reference or possible reference" appear. We believe this approach to (and reconciliation of) the drafting of sections 120(1) and 179(1) of the EA 2002 to be entirely consistent with Parliament's intention for the scheme of applications and review under the EA 2002, as well as consistent with the scope of the (differently worded but corresponding) provisions for appeals under the CA 1998 cited to us.

80. Even if there were a requirement for the decision to be a "decision under Part 4", the Designation Decision is such a decision. The decision to designate further retailers is

made under Article 4(1)(b) of the 2009 Order which itself was made under provisions in Part 4 (namely s.161(3) and Schedule 8, paragraph 21(3)). We would therefore regard the Designation Decision as a decision under Part 4, if that were necessary to decide this case.

81. Fourthly, we are reinforced in our view that the Tribunal has jurisdiction in this case by the fact that both parties cite significant passages from the 2008 Report in supporting their respective positions. It seemed to us clear that the issues arising on the Applicant's challenge to the Designation Decision are "in connection with the reference" originally made and determined by the Competition Commission. (These issues are explained in more detail in section E below). That supports jurisdiction taking account of the interpretation of "in connection with". Moreover, it supports the policy intention that the Tribunal, with its particular skills and experience, should deal with such cases. In this regard we accept the CMA's submissions, based on the *BSkyB* case, at paragraph 63 above. In particular, the Tribunal's specialised knowledge and experience derives from the wide and varying expertise of the constituent members of its three-person panel, which is necessarily greater than that of a judge sitting alone in the Administrative Court (even where that judge is also able to chair the Tribunal panel).

82. Fifthly, we see no merit in the Applicant's argument that the reference was finally determined by the 2009 Order and that therefore the Designation Decision could not be "in connection with" it because there was no longer a reference. That cannot have been the construction intended by Parliament since it would raise a question over the jurisdiction of the Tribunal to consider reviews on remedies, decisions and decisions under s.162 of the EA 2002. We also reject the Applicant's argument that too much time has passed since the reference and the 2008 Report or the 2009 Order for the Designation Decision to be "in connection with the reference". Such an approach is not supported by the legislation. Further, our view, which both parties accepted at the Hearing, that the Tribunal would clearly have jurisdiction over decisions made under s.162 means the passage of time since the relevant reference cannot be a relevant limitation on the Tribunal's jurisdiction.

83. Finally, the Applicant put to us that there must be limits on the Tribunal's jurisdiction and that there may be decisions by the CMA in the general course of its review of market investigation or merger references where the alleged failure raises purer issues amenable to judicial review that were not, or not necessarily, "in connection with" a reference. We observe that that may be so, and we make no judgment now on whether

those cases would fall outside s.179 (or s120). Nevertheless, for the reasons given, we conclude this case clearly falls within s.179 of the EA 2002.

E. THE APPLICATION FOR INTERIM RELIEF

84. On 21 December 2018, at the same time as filing its Notice of Application, the Applicant lodged an application with the Tribunal seeking the suspension of the Designation Decision. The Applicant's application was accompanied by witness evidence from Mr Paul McDonald, Chief Financial Officer of the Applicant, relating mainly to the process before the CMA, the nature of the Applicant's business and the consequences for it of the Designation Decision. Mr McDonald provided a second witness statement prior to the hearing expanding on those points.

85. The CMA relied on a witness statement of Mr Adam Land, Senior Director of Remedies, Business and Financial Analysis at the CMA.

(1) The Tribunal's power to grant interim relief

86. Unless the Tribunal makes an order to that effect, an application for review under s.179 does not suspend the effect of the impugned decision: s.179(3) EA 2002. The starting point therefore is that a decision will take effect in accordance with its terms, unless and until the Applicant can demonstrate otherwise.

87. The Tribunal's power to order interim relief is contained in Rule 24 of the Tribunal Rules. Rule 24 provides:

> "Power to make interim orders and to take interim measures
>
> (1) The Tribunal may make an order on an interim basis—
>
> > (a) suspending in whole or part the effect of any decision which is the subject matter of proceedings before it;
> >
> > (b) in the case of an appeal under section 46 (appealable decisions)(a) or 47 (third party appeals)(b) of the 1998 Act, varying the conditions or obligations attached to an exemption;
> >
> > (c) granting any remedy which the Tribunal would have the power to grant in its final decision.
>
> (2) Without prejudice to the generality of paragraph (1), if the Tribunal considers that it is necessary as a matter of urgency for the purpose of—
>
> > (a) preventing significant damage to a particular person or category of person, or

(b) protecting the public interest,

the Tribunal may give such directions as it considers appropriate for that purpose.

(3) The Tribunal shall exercise its power under this rule taking into account all the relevant circumstances, including—

(a) the urgency of the matter;

(b) the effect on the party making the request if the relief sought is not granted;

(c) the effect on competition if the relief is granted; and

(d) the existence and adequacy of any offer of an undertaking as to damages.

[…]"

88. Rule 24 came into force on 1 October 2015. It replaced Rule 61 of the Competition Appeal Tribunal Rules 2003 (S.I. 2003 No. 1372) ("the 2003 Rules") ("**Old Rule 61**"). Old Rule 61 was drafted in similar, but not identical, terms to Rule 24. In particular, Old Rule 61(2) provided:

"(2) Without prejudice to the generality of [paragraph (1)], if the Tribunal considers that it is necessary as a matter of urgency for the purpose of—

(a) preventing serious, irreparable damage to a particular person or category of person, or

(b) protecting the public interest,

the Tribunal may give such directions as it considers appropriate for that purpose."

89. Whilst Old Rule 61 referred to "serious, irreparable damage", Rule 24 refers to "significant damage". It is common ground that "significant damage" under Rule 24 includes "serious and irreparable damage".

(2) The relevant principles to be applied to the grant of interim relief: the "*Genzyme* questions"

90. The Tribunal's approach to an application for interim relief, now under Rule 24, was first set out in *Genzyme Limited v OFT* [2003] CAT 8 (***"Genzyme"***), where, at [79], the Tribunal identified five questions which fall to be considered. That approach was slightly modified in the more recent case of *Flynn Pharma Ltd v CMA* [2017] CAT 1 (**"*Flynn*"**), especially at [29] to [33], to take account of the introduction of Rule 24 and other developments in the law.

91. In *Flynn* the Tribunal re-framed the so-called "*Genzyme* questions" in the following terms:

(a) Are the arguments raised by the applicant as to the merits of its substantive appeal, at least *prima facie*, not entirely ungrounded, in the sense that the applicant's arguments cannot be dismissed at the interim stage of the procedure without a more detailed examination?

(b) Is urgency established?

(c) Is the applicant likely to suffer significant damage if interim relief is not granted?

(d) What is the likely effect on competition, or relevant third party interests, of the grant or refusal of interim relief?

(e) What is "the balance of interests" under heads (c) and (d) taking into account all the relevant circumstances including the existence and adequacy of any offer of an undertaking as to damages?

92. The *Genzyme* questions involve a two-stage assessment of whether or not interim relief should be granted. In the first stage the Tribunal must ask questions (a) to (c) to establish whether it has jurisdiction to grant interim relief. The second stage involves the exercise of the Tribunal's discretion and reflects the terms of Rule 24(3). The Tribunal must ask questions (c) (for the second time), and (d) and reach a view on the balance of interests under question (e). Only if the balance of interests favours the grant of interim relief will the Tribunal exercise its discretion to make such an order.

(3) The Applicant's case for interim relief

(a) Prima facie case on appeal

93. The Applicant's case on its three grounds of challenge to the Designation Decision is as follows.

Ground 1: The CMA misinterpreted the purposes of the 2009 Order

94. The Applicant contends that the Designation Decision is unlawful because the CMA misinterpreted the purposes of the 2009 Order. The CMA accepts that its discretion to

designate further retailers under Article 4(1)(b) must be exercised having regard to the purposes of the 2009 Order. But, the Applicant contends, the CMA wrongly interpreted the purposes of the 2009 Order as including "*the prevention of the exercise of buyer power over suppliers by large grocery retailers*": see the Designation Decision, paragraph 8. The CMA erroneously proceeded on the basis that the 2009 Order sought to prevent buyer power of large grocery retailers *per se*, rather than focusing on whether the particular buyer power of the retailer in question gave rise to the limited circumstances in which the AECs, as identified by the Competition Commission, that the 2009 Order was designed to remedy might occur. The 2008 Report made clear that *"the exercise of buyer power does not necessarily of itself constitute an AEC"* (at para. 9.3). Instead, buyer power was found to raise concerns only in *"certain limited circumstances"* (para. 9.5). The Applicant's position was that the nature of its business model, sourcing methods, patterns of contracting and business scale made its position different from the other Designated Retailers and made it unlikely or unable to undertake the behaviours which the Code seeks to address.

Ground 2: The CMA failed to understand and consider the exercise of its discretionary power

95. The Applicant contends that the CMA had a discretion, not a duty, to designate retailers with a turnover exceeding £1 billion with respect to the retail supply of groceries in the United Kingdom. The CMA erroneously proceeded on the assumption that it should designate any retailer with a turnover exceeding £1 billion with respect to the retail supply of groceries in the United Kingdom.

96. The CMA did not take any, or any reasonable, steps to acquaint itself with the relevant information in relation to the nature of the Applicant's business. The correspondence between the CMA and the Applicant did not discharge the CMA's duty of sufficient inquiry because the CMA did not specifically enquire about the nature of the Applicant's business. The fact that this was the first ever decision to add new Designated Retailers heightened the requirement for the CMA properly to understand the nature of the Applicant's business and the extent to which it was likely to engage in any of the supply chain practices that the Code seeks to control. In summary, the CMA had designated the Applicant on the basis that it was a grocery retailer, it met the relevant £1 billion grocery turnover threshold and it bought directly from suppliers, without consideration of any other factor in the exercise or purported exercise of its discretion.

Ground 3: The CMA failed to have regard to relevant considerations and its decisions are disproportionate

97. The Applicant contends that the CMA accepted that it was required to consider the nature of the Applicant's business and the purposes of the 2009 Order but failed to take a number of plainly relevant considerations into account. Further, the Designation Decision and the Refusal are disproportionate.

98. First, it was relevant for the CMA to consider the extent to which the Applicant's business was likely to give rise to the AECs that the 2009 Order was enacted to remedy. There is no evidence that the CMA considered these points. Paragraph 12 of the Notice merely speculates that the Applicant *"may be expected to have the ability to exert buyer power over at least some of its suppliers"* without considering whether the nature of the Applicant's business gives rise to any of the supply chain practices that might cause the AECs that the 2009 Order seeks to remedy.

99. Secondly, the CMA failed to consider the proportionality of the regulatory burden that designation would impose upon the Applicant in terms of the likely costs to it compared to the extent to which it could engage in the behaviours of concern. A retailer subject to the Code would incur significant compliance costs and such costs should have been known to the CMA. Further the Applicant notes that the £1 billion threshold referred to in the 2009 Order and the 2008 Report had not been adjusted for inflation and that the CMA's failure to review that threshold heightened the need for the CMA to ensure proportionality in its subsequent Designation Decision.

100. At the Hearing, the Applicant also suggested that paragraph 11 of the Notice (that the Applicant's acquisitions and recent growth meant it accepted designation under the order) was an error on the face of the Designation Decision: whilst the Applicant had accepted in its correspondence with the CMA that it met the criteria for potential designation, it had not consented to or otherwise accepted designation.

101. Finally, the CMA had also taken a decision in its pre-action reply letter to refuse to suspend or revoke the Designation Decision, despite the evidence that it then had; the Refusal could not be supported given the Applicant's arguments on the appropriateness of the Designation Decision.

102. The Applicant submitted that these grounds are arguable; and more generally, its application raises an arguable and important issue of law concerning the scope and interpretation of the CMA's discretion under Article 4(1)(b) of the 2009 Order.

(b) Urgency

103. The Applicant claimed that its request was urgent because otherwise it would be required to take time-consuming and expensive steps to comply with the 2009 Order. Moreover, the matter is urgent because of the uncertainty confronting the GCA as to whether the Applicant should be treated as regulated by the Code or not and the consequential impact on GCA resources.

(c) Significant damage

104. The Applicant submitted that it will suffer the following harm by implementing, pending the final hearing, its obligations imposed by the Designation Decision:

(a) First, it would be required to incur expenditure to comply with the 2009 Order. Its position on the scale of that expenditure changed considerably between the filing of its claim and the Hearing. By the Hearing its estimate of possible costs, though comprised of specific estimates (for example for staff training, audit and advice, documentation, potential IT spend, lost worker time) had fallen to around £250,000 for compliance measures but rose to around £800,000 if the further (non-specified) costs of undoing those measures, in the event its claim was ultimately successful, were taken into account.

(b) Secondly, it would suffer real disruption in terms of the effort to secure (compliance and the changes to its terms and conditions with suppliers (and further disruption to reverse those changes in the event its claim was successful). In this context, the Applicant highlighted in particular the administrative burden and costs of the rules on delisting notices which it argued would be particularly burdensome for its business because of the frequency with which it changes stock listings.

(c) Thirdly, the Applicant said this disruption would extend to the confusion caused to its suppliers by its moving in and out of the operation of the Code.

(d) Impact on third party interests and competition

105. The Applicant contended that there would be no real adverse effect on competition if interim relief was granted. There would be no impact on competition from its supply practices. Moreover, since none of its competitors in the discount or bargain sector of the market faced the same compliance burden, not granting relief was more likely to have an adverse impact on competition than would the granting of relief.

106. Further, granting relief would also have a positive impact so far as concerns the GCA. It would avoid the situation where the GCA incurred costs regulating the Applicant but then had to refund the Applicant its levy payment because its application was successful, leaving those costs to be borne by the other Designated Retailers. The Applicant argued that the GCA had supported the Applicant's position in its letter of 16 January 2019 (see paragraph 46 above). Significant weight should be given to the view of the GCA that it should have certainty pending resolution of this case.

(e) Balance of interests

107. Since the effects of relief on third parties were either minimal or positive in the case of the GCA and the effects on the Applicant of not granting relief were significant the balance of interests strongly favoured granting the relief.

108. The Applicant accepted that there would be a higher threshold for relief in so far it was seeking a mandatory order by way of interim relief against the Refusal.

(4) The CMA's case on interim relief

109. The CMA strongly contested the Applicant's application for interim relief.

(a) Prima facie case on appeal

110. In the CMA's submission, each of the grounds advanced by the Applicant in support of its substantive challenge was entirely ungrounded.

Ground 1 – The CMA misinterpreted the 2009 Order

111. The contention that the CMA misinterpreted the 2009 Order was demonstrably incorrect. The purpose of the 2009 Order could be ascertained from the 2008 Report.

The 2008 Report recognised that the exercise of buyer power did not necessarily constitute an AEC (para 9.3). It found, however, that buyer power gave retailers the ability and incentive to engage in certain supply chain practices that had an AEC which, if left unchecked, would have a detrimental effect on consumers (paras 9.5, 9.43, 9.83, 11.410). The purpose of the 2009 Order was to curb the ability of retailers to exercise buyer power through engaging in such practices (paras 41 and 10.11). The CMA had plainly understood this, as is clear from the terms of paragraph 8 of the Notice (set out in paragraph 42 above). Thus, the CMA recognised that what the 2009 Order sought to address was, not buyer power *per se*, but the particular manifestation of such power that had been identified by the Competition Commission.

112. So far as concerned the Applicant's argument that the nature of the Applicant's business is such that it is unlikely to engage in any of the supply chain practices that the Code seeks to control, since the relevant material (set out in the Applicant's letter of 27 November 2018) was not before the CMA at the time it issued the Designation Decision, it could not offer any support for the argument that the CMA misinterpreted the 2009 Order.

113. So far as concerned the challenge to the Refusal, the Applicant's request was contained in a pre-action protocol letter and was not a request for de- designation in accordance with the 2009 Order or a request to review, vary or amend the 2009 Order but was directed at the Designation Decision. In any event, the Applicant had not put forward evidence designed to show a change of circumstances or otherwise engage in an administrative process. Further, to the extent the Applicant had said that parts of the Code were not apt because its business model made it unlikely that it would engage in the behaviours and harms to which the 2009 Order was addressed: (a) there were provisions of the 2009 Order which were immediately relevant to the Applicant's business such as the provisions for fair dealing; and (b) the Applicant's business might develop in the future in ways which would engage other obligations under the 2009 Order which was intended to be preventative.

Ground 2 - Duty of sufficient inquiry

114. The CMA submitted that it had conducted a careful review of publicly available information and, importantly, wrote to the Applicant on 6 July 2018, expressly inviting representations on the proposal to designate it: see paragraph 39 above. However, the Applicant had failed to provide any substantive response, whether within the specified

timeframe or at any time prior to the Designation Decision some four months later. The contention that the CMA failed in its duty of sufficient inquiry was entirely without merit.

Ground 3 - Relevant considerations and proportionality

115. The Applicant's argument that, although it provided information on the nature of its business in its letter of 27 November 2018, the CMA "unlawfully failed to consider these matters prior to the Designation Decision" is obviously untenable. Since the information relied upon was not provided until after the Designation Decision, the CMA could not sensibly be criticised for failing to consider it before the Designation Decision was taken.

116. As to the allegation that the CMA had failed to consider the likely costs of designation to the Applicant or whether, in light of those costs, designation was proportionate, the CMA submitted:

(a) The Applicant had failed to produce any information as to the particular costs that it expected to incur as a result of designation prior to the commencement of its challenge; and

(b) Having seen the Applicant's estimates of costs prepared for the Hearing, these were a small fraction of the Applicant's turnover and profits and so provided no basis for revisiting the Competition Commission's conclusion on proportionality nor the CMA's decision to designate the Applicant.

117. As to the alleged "error on the face" of the Designation Decision, in fact the Applicant *had* tacitly accepted the designation and at no point prior to the Designation Decision had the Applicant made representations that it should not be designated.

118. Accordingly, the Applicant did not meet the threshold test under question (a) and, for that reason, interim relief should be refused. Alternatively, even if the substantive challenge was not "entirely ungrounded", its weakness militated against the grant of interim relief, under question (e) below.

(b) Urgency/(c) Significant Damage

119. Whether a matter is urgent is an aspect of whether the applicant will suffer significant damage: see *Genzyme* at [88]. As such, the CMA addressed questions (b) and (c) together.

120. As a matter of principle, the test of significant damage imposes a higher threshold than in proceedings involving only private interests. In making the Designation Decision the CMA followed a neutral, independent administrative interest, with no interest of its own but only the public policy interest in upholding the efficient working of markets and the interests of consumers. In support of this proposition the CMA referred, first, to what it said was the higher threshold for interim relief in proceedings before the Court of Appeal (see *Novartis AG v Hospira UK Ltd* [2013] EWCA 583 and *DEFRA v Downs* [2009] EWCA Civ 257) and, secondly, to the approach of President Vesterdorf in the CFI in Case T-201/04R *Microsoft Corp. v EC Commission* [2004] ECR II-4463. These cases supported the principle that the damage must be serious and irreparable or the harm must be irremediable.

121. In the present case, the Applicant's estimate of its costs of compliance did not begin to suggest that it would suffer serious and irreparable, or significant, damage. The estimate represented only 0.009% of the Applicant's turnover and 0.10% of its profit for the year ending March 2018. Further, since the Applicant had stated that its business was already largely compliant with the terms of the Code, any changes to its practices would not or would not likely amount to a major upheaval in the Applicant's business nor would it suggest that the Applicant would suffer significant damage, pending the determination of its claim.

122. The suggestion that, if its claim succeeded, the Applicant would have to spend some £600,000 in order to "undo all the work" was unsubstantiated and unrealistic.

123. Finally, since designation took effect on 1 November 2018, and had not been suspended, the Applicant ought to have taken many of the necessary steps before now. Insofar as it had, the costs and work involved in such steps had already been incurred and could not be remedied by the grant of interim relief. If no such steps had been taken, the Applicant was in breach of the 2009 Order and should not be able to invoke its failure to comply in support of its application.

124. If the Applicant was concerned about the costs and work involved in implementation, the appropriate course would have been for it to bring its application for interim relief promptly. It is after all "*a fundamental principle that an applicant for interim relief should not sit on his rights but should raise his challenge and any application for interim measures as soon as practicable*": *WM Morrison Supermarkets Plc v Competition Commission* [2009] CAT 33 at [23]. The Applicant did not in fact bring its application for interim relief until 21 December 2018, some six weeks after the Designation Decision (notwithstanding that the Tribunal is empowered to grant such relief *before* the commencement of the substantive challenge: see Rule 24(6)(e) and Guide to Proceedings 2015, para. 4.131). This delay further undermined the Applicant's case on harm and militated strongly against the grant of interim relief.

(d) Effect on competition and third parties

125. The CMA submitted that the 2009 Order was designed to serve the interests of suppliers and that suspension of the Designation Decision would mean that the Applicant's ability and incentive to adopt harmful supply chain practices of the type regulated by the 2009 Order would go unchecked, with adverse effects for suppliers and ultimately consumers. The 2009 Order was intended to be preventative so that whether or not the Applicant was currently complying with its terms was not dispositive. In any event, as well as the specific rules, it contained a duty of fair dealing and provisions for arbitration and investigation. These remained relevant whether or not the Applicant's other practices were "largely compliant" with the Code and there was no basis for relief from these. Further, there was a public interest in maintaining a level playing field between grocery competitors.

(e) Balance of interests

126. The CMA submitted, first, that, given the lack of merit in the Applicant's substantive claim and/or its failure to establish anything like the damage required to justify a grant of interim relief, the Tribunal need not consider the balance of interests at all.

127. Secondly, and in any event, if, nevertheless, the balancing exercise fell to be conducted, the potential harm to competition if relief were granted and the claim failed, outweighed the risk of damage to the Applicant by a significant margin.

128. Thirdly, the Tribunal should consider the question of interim relief "in all the circumstances" and should in particular take into account aspects of the Applicant's behaviour in relation to the Designation Decision, namely:

(a) its failure to make representations as to whether it should be designated or not, despite the CMA's explicit invitation to do so in its letter of 6 July 2018;

(b) its failure at any stage prior to the Designation Decision to indicate that it had any opposition to, or even difficulty in relation to, possible designation provided it had enough notice and therefore at least its tacit acceptance of designation;

(c) its apparent failure to take any legal advice on possible designation and the implications of designation until after the Designation Decision was made;

(d) its failure to engage with the GCA though invited to do so; and

(e) its failure to make a request for review of the Designation Decision in a reasonable way and instead its unreasonable demand for revocation within 14 days of its pre-action letter of 27 November 2018.

129. The CMA characterised the application as a rearguard action to shift blame for the Applicant's failure to engage ahead of the Designation Decision. Further, the claim that the Refusal was itself a reviewable "decision" was a "dressed up merits challenge" to the Designation Decision. There were compelling public interest reasons as to why a large, well resourced, company should not be granted interim relief in circumstances where it has failed to engage substantively with the CMA's process at the correct point in the administrative process for assessing whether it should be designated but has rather sought to challenge it in the courts after the event.

130. The CMA said that no cross-undertaking in damages had been, or could be, offered so as to remedy the harm that could arise from the relief sought by the Applicant. That harm was not purely financial but encompasses a detrimental effect on consumer welfare and the public interest. Consequently, in all the circumstances, the CMA argued that the balance of interests clearly favours the refusal of interim relief and the full implementation of the Designation Decision without further delay.

(5) The Tribunal's analysis

Does the Tribunal have jurisdiction to grant interim relief answering the first three *Genzyme* questions?

131. In order to determine jurisdiction to grant interim relief, we first address *Genzyme* questions (a) to (c).

(a) Prima facie case on appeal

132. We note that this test sets a relatively low threshold. In *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* [2001] CAT 1, at [38], the Tribunal considered that, whilst in most cases it may be impracticable to go into the merits, there might be some cases in which it may be necessary to consider the merits more fully than otherwise would be the case. In the present case, we have not done more than consider the arguments of the parties in their filed documents and arguments at the Hearing. On that basis, although we have doubts as to whether certain aspects of the application have any prospect of success, we conclude that the Applicant's substantive grounds for relief are not entirely ungrounded. They cannot all be dismissed without a more detailed examination. In particular, the contentions that the CMA failed, in the overall circumstances (and particularly given the years which have elapsed since the 2008 Report and changes in the market which may have occurred since then), adequately to inquire into, or take into consideration, the Applicant's particular business model are arguable.

(b) Is urgency established?

133. We consider that the test of urgency is not met. Six weeks passed from the Designation Decision to the application for interim relief and, despite having significant advance notice, no objection was made to the Designation Decision, prior to it being made.

134. Further, we do not believe the position of the GCA makes this case one of urgency. The position of the funding of GCA is capable of being addressed (and we return to this under question (d) below) and does not tip the balance of the argument under this heading.

(c) Is the applicant likely to suffer significant damage if interim relief is not granted?

135. Whether or not the test is the same as, or includes, "serious, irreparable damage" and whether or not this test suggests a high or special threshold as the CMA argued, it is not met in this case. We conclude that the degree of financial costs which the Applicant claims it will incur does not amount to significant damage. The EU courts jurisprudence cited in *Genzyme* at [80] suggests that financial loss must be severe before this test is met. In particular in Case T-184/01R *IMS Health Inc v EC Commission* [2002] 4 CMLR 2 at [120] to [121] President Vesterdorf considered that the possibility of an undertaking being unable to recover financial losses is not generally sufficient in Community law to constitute serious and irreparable damage unless the survival of the undertaking is threatened. That is plainly not the case here given the Applicant's publicly reported revenue and profit results. Even if we were to apply a lower threshold than whether the survival of the undertaking is threatened, we would not regard the level of costs anticipated by the Applicant to be significant damage either in nominal terms or in the context of the Applicant's revenues.

136. It is clear from the UK and EU case authoritiess that non-financial loss - in the form of business disruption and loss of business freedom - may also be considered in this context and (as the Applicant argued) *Genzyme* at [81] provides authority that the "*jurisdiction [to order interim relief] must remain flexible, ready to be adapted to the particular circumstances of the case where the interests of justice so require.*"

137. Having considered the Applicant's arguments and evidence carefully we nevertheless conclude that the disruption and loss of business freedom that it will suffer here do not meet this test, whether alone or combined with each other and with the financial costs. The Applicant has maintained throughout its dealings with the CMA that its policies are largely compliant with the Code, suggesting that no material changes to its policies will be required. We do not consider that the changes in its business behaviour or freedom or the costs of compliance are significant. (We note that these consequences are of a different magnitude to the changes confronting the applicants in *Flynn* and *Genzyme*).

138. We therefore answer *Genzyme* questions (b) and (c) in the negative and accordingly conclude that the jurisdiction to grant relief is not established in this case.

If the Tribunal has jurisdiction, should it exercise its discretion to grant interim relief: Genzyme questions (c) to (e)?

139. In light of the foregoing conclusion, we do not need to consider the second stage of discretion, involving the further *Genzyme* questions. However, since the points having been carefully argued before us, it is right to set out our view on those further questions. As regards question (c) in the context of discretion, we repeat the analysis above for this purpose.

(d) What is the likely effect on competition, or relevant third party interests, of the grant or refusal of interim relief?

140. If interim relief were granted, the Applicant would enjoy a competitive advantage over the Designated Retailers who are subject to the Code. We conclude that, on the facts of this case, this would be a minor point in favour of the refusal to grant relief. On the other hand, we do not consider the Applicant would be at a material competitive disadvantage *vis-à-vis* undesignated retailers given that the costs of compliance would be relatively small. We give more weight to the argument that a grant of interim relief would mean that suppliers to the Applicant would not have the protections afforded them by the 2009 Order.

141. We consider that the position of the GCA would be served by refusal of the interim relief as it would clarify that the Applicant should be regulated. In the event that the Applicant were ultimately to succeed in its claim, we do not regard it as a material point that it would have been subject to a regulatory burden for a limited period of time. Further we attach no significant weight to the Applicant's argument that there would be confusion and disruption to its suppliers were it to be subject to the 2009 Order and then subsequently not subject to it, should it succeed in its claim. Many of those suppliers will supply Designated Retailers and so will be familiar with the regime. In any event it would be in their interests for their relationship with the Applicant to be within the Code. So far as concerns the issue of the costs to the GCA of regulating the Applicant for a period and then finding it could not recover those costs from the Applicant, we consider that the likely degree of "cross subsidy" involved in any increased costs borne by, and spread between, the other Designated Retailers would be likely to be minimal and in any event not high enough to support the Applicant's case, even assuming they were incurred at all.

(e) What is "the balance of interests" under heads (c) and (d) taking all the relevant circumstances into account?

142. There is no possible offer of an undertaking as to damages for us to take into account under Rule 24(3)(d). In any event, we conclude that the balance of interests we have identified under heads (c) and (d) would lead to us concluding that interim relief should not be granted in any event. We also take into account "all the relevant circumstances". In that light we see considerable force in the CMA's submissions that it is relevant to take account of the failure of the Applicant (being a relatively large public company) to engage with the CMA during the administrative process on the merits of designation or to indicate that it had any objections to its designation or faced any material costs in complying with it, until after the Designation Decision was made. Consequently, even if we had concluded that jurisdiction had been established under questions (a) to (c) or that there was a closer judgment to be made in balancing heads (c) and (d), we would have declined to exercise our discretion to grant interim relief in this case.

143. For completeness, our conclusions apply both to the arguments in relation to the Designation Decision and to the Refusal. Additionally, as regards the latter, the interim relief sought appears to have required a mandatory order to revoke the Designation Decision (rather than to suspend its effect) and we would not have been satisfied that, in the exercise of discretion, such an order should be made on an interim basis.

F. CONCLUSION

144. For the reasons set out in this judgment, we unanimously conclude: (1) the Tribunal has jurisdiction to hear the Applicant's substantive application for review under s.179(1) EA 2002; and (2) the Applicant's application for interim relief is refused.

The Hon. Mr Justice Morris
Chairman

Michael Cutting

Paul Dollman

Charles Dhanowa O.B.E., Q.C. (*Hon*)
Registrar

Date: 13 May 2019