Neutral citation [2020] CAT 1

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1332/4/12/19

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

10 January 2020

Before:

HODGE MALEK Q.C.
(Chairman)
PAUL DOLLMAN
DEREK RIDYARD

Sitting as a Tribunal in England and Wales

BETWEEN:

TOBII AB (PUBL)

Applicant

- v -

COMPETITION AND MARKETS AUTHORITY

Respondent

Heard at Victoria House on 6-8 November 2019

JUDGMENT

APPEARANCES

Aidan Robertson Q.C. and Matthew O'Regan (instructed by Preiskel & Co LLP) appeared on behalf of the Applicant.

Kassie Smith Q.C. and David Bailey (instructed by the Competition and Markets Authority) appeared on behalf of the Respondent.

Note: Excisions in this Judgment (marked "[✂]") relate to commercially confidential information: Schedule 4, paragraph 1 to the Enterprise Act 2002.

CONTENTS

A. INTRODUCTION

1. On 1 October 2018 the Applicant ("Tobii") acquired the entire issued share capital of Smartbox Assistive Technologies Limited ("SATL") and Sensory Software International Limited ("SSIL") (together, "Smartbox"). The Respondent (the "CMA") was not notified of the acquisition.

2. On 27 November 2018 the CMA commenced a Phase 1 investigation and adopted its decision on relevant merger situation and substantial lessening of competition regarding the completed acquisition by Tobii of SATL and SSIL on 25 January 2019 (the "Phase 1 Decision").

3. On 8 February 2019 the CMA referred the completed acquisition for a Phase 2 investigation and report, pursuant to s.22 of the Enterprise Act 2002 (the "2002 Act"), and a Phase 2 Inquiry Group comprising panel members and a chair was created at the CMA to investigate and report on it.

4. On 15 August 2019 the CMA adopted its final report regarding the completed acquisition by Tobii of SATL and SSIL (the "Final Report"). In summary, the CMA decided that:

   (1) The completed acquisition has resulted in the creation of a relevant merger situation.

   (2) The completed acquisition has resulted or may be expected to result in a substantial lessening of competition ("SLC") due to:

      (i) Horizontal competition concerns in the supply of dedicated augmentative and assistive communication ("AAC") solutions in the UK;

      (ii) Vertical competition concerns with regard to input foreclosure by the merged entity of Smartbox's Grid software to competitors in the downstream supply for dedicated AAC solutions in the UK; and

(iii) Vertical competition concerns with regard to customer foreclosure by the merged entity of Tobii's upstream competitors in the worldwide supply for eye gaze cameras to providers of dedicated AAC solutions, including providers serving customers in the UK (together, the "SLC Decision").

(3) A full divestiture remedy is the only effective action to achieve the legitimate aim of comprehensively remedying the SLC and its resulting adverse effects, and the full divestiture remedy would be proportionate to the SLC and its resulting adverse effects (the "Remedy Decision").

5. On 13 September 2019, Tobii filed an application for review pursuant to s.120 of the 2002 Act of the CMA's SLC Decision and Remedy Decision. Tobii's Notice of Application ("NoA") contained six grounds of review (see [12] of this judgment).

6. On 30 September 2019, the CMA disclosed to Tobii copies of the questionnaires that were used to collect customer evidence in Phase 1 and Phase 2 of its investigation.

7. The Tribunal held a case management conference on 3 October 2019 (the "CMC"), at which it ordered that any specific disclosure application by Tobii shall be filed and served by 16 October 2019. The Tribunal also excluded certain paragraphs from the witness statements (both dated 12 September 2019) of Mr Timothy Cowen, a partner at the firm of Preiskel & Co LLP ("Preiskel"), and Mr Henrik Eskilsson, the Chief Executive Officer and co-founder of Tobii, and refused permission for Tobii to adduce an expert report dated 10 September 2019 by Mr Sam Williams of Economic Insight. The Tribunal issued its reasons in its ruling on the admissibility of evidence on 10 October 2019 ([2019] CAT 23).

8. On 11 October 2019, the CMA filed its Defence and a witness statement dated 10 October 2019 of Mr Kingsley Meek, the Chair of the CMA's Phase 2 Inquiry Group.

9. On 16 October 2019, Tobii applied for specific disclosure of three classes of documents:

(1) Responses to the CMA's requests for information sent to customers and interest groups in Phase 1 and Phase 2;

(2) The CMA's requests for information sent to competitors in Phase 1 and Phase 2 and the responses received; and

(3) Unredacted versions of Tables 6-1 and 6-2 of the Final Report and the underlying data used by the CMA to calculate market shares, broken down by product.

10. On 23 October 2019, Tobii decided not to proceed with its sixth ground of review, which challenged the CMA's Remedy Decision as disproportionate and unreasonable.

11. The Tribunal issued its ruling on Tobii's specific disclosure application on 25 October 2019 ([2019] CAT 25), which directed that the CMA disclose anonymised versions of 30 customers' responses referred to at paragraph 5.15 and Table 5-1 of the Final Report (the "Anonymised Customer Responses") within a confidentiality ring and refused Tobii's request for specific disclosure in relation to competitors and market share data. The CMA disclosed the Anonymised Customer Responses to Tobii on 28 October 2019.

12. By the time of the substantive hearing, which commenced on 6 and concluded on 8 November 2019, Tobii and the CMA had distilled the issues falling for determination by the Tribunal as follows:

(1) **Ground 1**: Did the CMA breach its duty of procedural fairness by failing to disclose relevant evidence to Tobii?

(i) **Issue 1(a)**: Was disclosure of the questionnaires sent to customers and interest groups, the responses thereto, and the transcripts of hearings, interviews or telephone calls with

customers and interest groups, required in order for the CMA to disclose the gist of its case?

(ii) **Issue 1(b)**: Was disclosure of Smartbox information including transcripts of hearings, interviews or telephone calls with Smartbox, responses to information requests and internal documents, required in order for the CMA to disclose the gist of its case?

(iii) **Issue 1(c)**: Was disclosure of the questionnaires sent to competitors (suppliers of AAC solutions or mainstream devices, resellers of AAC solutions or eye gaze camera suppliers) and the responses thereto, and the transcripts of hearings, interviews or telephone calls with competitors required in order for the CMA to disclose the gist of its case?

(2) **Ground 2**: Did the CMA commit material errors in respect to the collection of evidence?

(i) **Issue 2(a)**: Was it unreasonable or irrational for the CMA to focus its evidence gathering from customers to institutional customers (such as the NHS, schools and charities) and interest groups and not to directly solicit evidence from end users of AAC solutions (or their parents/carers)?

(ii) **Issue 2(b)**: Were the questionnaires by which the CMA sought evidence from customers and interest groups flawed, such that the evidence that the CMA obtained lacked credibility and was unreliable, such that the CMA could not reasonably rely on it?

(iii) **Issue 2(c)**: Was it unreasonable or irrational for the CMA to generate diversion ratio estimates based on data from 12 NHS Hubs?

(iv) **Issue 2(d)**: Was it unreasonable or irrational for the CMA to rely on evidence obtained from its questionnaires?

(3) **Ground 3**: Was it unreasonable or irrational for the CMA to define the relevant product market as one for 'dedicated AAC solutions'?

(i) **Issue 3(a)**: Did the CMA err in failing to apply the SSNIP test?

(ii) **Issue 3(b)**: Did the CMA err in focusing its evidence gathering on institutional purchasers of AAC solutions and not obtaining evidence from end users?

(iii) **Issue 3(c)**: Did the CMA erroneously create a definition of a market for dedicated AAC solutions?

(iv) **Issue 3(d)**: Did the CMA rely on a flawed questionnaire in coming to define the market?

(v) **Issue 3(e)**: Did the CMA err by not obtaining evidence on the substitutability of different *products* but only of different *suppliers*?

(vi) **Issue 3(f)**: Was it unreasonable or irrational for the CMA to ignore the NHS's own guidance that mainstream devices are widely used for even users with complex communications needs?

(vii) **Issue 3(g)**: Did the CMA erroneously ignore extensive evidence of the use of consumer tablets in AAC solutions?

(viii) **Issue 3(h)**: Did the CMA erroneously include within the relevant market products that were not within its created definition of a dedicated AAC solution?

(4) **Ground 4**: Was the CMA's finding of an SLC as a result of horizontal unilateral effects unreasonable or irrational as a result of not having a sufficient and reliable evidential foundation?

(i) **Issue 4(a)**: Was the evidence relied on from customers, competitors and the internal documents of Tobii and Smartbox insufficient and unreliable?

(ii) **Issue 4(b)**: Was the CMA's assessment of diversion ratios and its GUPPI analysis based on credible and reliable evidence?

(iii) **Issue 4(c)**: Did the CMA have other evidence on which its SLC finding could reasonably be based?

(iv) **Issue 4(d)**: Was the CMA irrational in not evaluating substitutability of the merging parties' products and the closeness of competition between them on a product-by-product basis?

(v) **Issue 4(e)**: Did the CMA err in law in failing to identify the extent of any lessening of competition and thus whether it was 'substantial'?

(5) **Ground 5**: Was the CMA's finding of an SLC as a result of vertical effects unreasonable or irrational?

(i) **Issue 5(a)**: Was the CMA's finding on input foreclosure based on an error of law and/or without a reasonable and reliable evidential foundation?

(ii) **Issue 5(b)**: Was the CMA's finding in respect of customer foreclosure without evidential foundation?

13. Thus in the present case the task of the Tribunal is to deal with as many as 22 issues. These issues have a degree of overlap and it is evident that Tobii has

made a root and branch challenge to the SLC Decision as a whole, in part verging on a challenge to the merits of aspects of the SLC Decision rather than a narrower judicial review challenge. The Tribunal endeavours to deal with challenges to merger decisions with as much expedition as practicable.

B. BACKGROUND

(1) Assistive technology solutions and AAC solutions

14. Assistive technology solutions ("ATS") are designed to support people in maintaining or improving their independence, safety and wellbeing. ATS products are designed to address a number of conditions including visual, hearing and communication impairments.

15. AAC solutions form a specific part of ATS. AAC solutions cater to the needs of those who may find communication difficult for a number of reasons, which may be a congenital disability (such as cerebral palsy, learning disability or autism), a progressive condition (such as Motor Neurone Disease) or a sudden acquired disability (through stroke or brain damage following an injury). AAC solutions are used to address the communication needs of a spectrum of individuals.

16. According to 'Guidance for commissioning AAC services and equipment' published in March 2016 by NHS England (the "NHS England AAC Guidance"), NHS England uses a 'hub and spoke' model to offer AAC services to children and adults whereby, in England, NHS Hubs provide specialised services and support to a number of associated centres or "spokes" offering local AAC services.

    (1) In England, NHS Hubs offer specialised AAC services to children and adults who have a severe or complex communication difficulty associated with a range of physical, cognitive, learning or sensory deficits and there is a clear discrepancy between their level of understanding and ability to speak. Such individuals may also have experience of using low-tech AAC equipment which is insufficient to

enable them to realise their communicative potential. The specialised AAC service would provide appropriate powered AAC equipment. Approximately 10% of the AAC population in England require specialised AAC services.

(2) In England, NHS local centres offer local AAC services to children and adults with less complex communication needs. A local AAC service would provide low-tech and non-specialised AAC equipment and resources. Approximately 90% of the AAC population in England require local AAC services.

17. The techniques used in AAC include the use of symbols, communication boards and books, as well as computerised devices such as voice output communication aids.

18. The range of AAC solutions available to users typically includes one or a combination of two or more of the following: hardware, software and an access method. Typically, AAC solutions for individuals with complex communication needs also include customer support, such as training in how to use the AAC product.

19. Hardware used in AAC solutions include:

(1) Purpose-built devices which are designed specifically for users with AAC needs.

(2) Adapted commercial or consumer tablets which generally involve combining a consumer or commercial tablet with a purpose-built component, such as a blackbox or bracket that incorporates additional batteries, speakers, ports and mounting options, aimed at the user's AAC needs. Adapted commercial or consumer tablets are sometimes referred to as 'wrapped tablets'.

(3) Mainstream consumer tablets installed with apps designed for AAC users. Sometimes, these are used with an access method and additional peripherals such as speakers and additional batteries.

20. Software used in AAC solutions allow users to input a message in different ways, such as through electronic picture boards containing texts or symbols, which the software can communicate in a number of ways, such as speech generation.

21. An access method provides users with the means to access the hardware and control the software, which are used in the AAC solution. Examples of access methods include touch screens, special keyboards, switches, joysticks, head mice, eye gaze cameras and infrared cameras.

22. In the UK, AAC solutions are supplied either directly to customers or through resellers. In some cases, resellers develop their own AAC solution by combining AAC components from different suppliers. For example, they might develop and produce hardware, which they then combine with other AAC components from other suppliers.

(2) Tobii

23. Tobii is a public company listed on the Nasdaq Stockholm stock exchange with its registered office in Sweden. Tobii was founded in 2001 and operates in 15 countries, including the US and the UK.

24. As of 1 January 2019, Tobii has three wholly-owned subsidiaries: Tobii Tech AB ("Tobii Tech"), Tobii Pro AB ("Tobii Pro") and Tobii Dynavox AB ("Tobii Dynavox"):

(1) Tobii Tech develops eye-tracking hardware, both as USB peripherals and as integration components, for integration into other manufacturers' hardware devices such as laptops, tablets, cars and virtual reality headsets. Tobii Tech sells its peripheral devices and component parts to consumers and manufacturers, as well as to Tobii's other two business

divisions, Tobii Pro and Tobii Dynavox, for integration in their product portfolios.

(2) Tobii Pro develops and supplies eye-tracking solutions for studying and understanding human behaviour.

(3) Tobii Dynavox develops AAC hardware and software. Some of the hardware devices that Tobii Dynavox sells incorporate eye-tracking technology. Tobii Dynavox employs nine people in the UK, who focus on sales, training and support of its UK customers and end users.

25. Tobii Dynavox was created through the merger in 2014 of Tobii's AAC business with a US company, Dynavox Systems LLC, that provided AAC solutions. According to Mr Eskilsson:

> "Tobii Dynavox is a very purpose-driven company. We take profound and genuine pride in our mission to bring a voice to people with disabilities, a pursuit that resonates very strongly with virtually all our employees and is also deeply rooted in our strategy. Our mission statement is '*To empower people with disabilities to do what they once did, or never thought possible*' and the number one goal that we have iterated in monthly meetings for our entire staff in the past three years has been '*Bring a voice to 100,000 new users in need*'."

26. Tobii Dynavox offers three categories of AAC solutions:

(1) Purpose-built AAC devices: these range from high-end medical-grade devices that are primarily designed to meet US regulatory requirements to mid-range consumer-grade devices which are sold to health services, schools and individuals. Tobii Dynavox's current portfolio of products that fall within this category comprises the I-Series (I-12+ and I-15+), the I-110 and the Indi range (Indi and Indi 7).

(2) AAC peripheral solutions: these are peripheral solutions that extend the AAC capabilities of mainstream consumer devices such as standard tablets and PCs, making them into a more complete AAC solution. Tobii Dynavox's current portfolio of products that fall within this category comprises the EyeMobile range (EyeMobile Plus and EyeMobile Mini), Speech Case and Eyegaze peripherals.

(3) AAC software: there is a range of different AAC software, which are sold bundled with AAC devices and AAC peripheral solutions or available separately to run on any consumer device such as an iPad. Tobii Dynavox's current portfolio of products that fall within this category comprises Snap, Communicator 5, Compass, Snap Scene, Accessible Literacy Learning for Windows and Windows Control.

27. Tobii Dynavox's current portfolio also includes other products such as Boardmaker, which is a software that enables the creation and use of symbol-based educational materials in schools, and Gaze Viewer, which is a software that allows therapists to assess a user's cognitive abilities and capability to use eye control as an input method. Tobii Dynavox also resells other developers' software, such as Smartbox's Look to Learn software.

28. Tobii Dynavox sells its products worldwide through a network of resellers. The majority of Tobii Dynavox's UK sales in 2017 were made directly to customers, as opposed to through resellers.

29. In 2018, Tobii invested 38% of its revenue in research and development ("R&D").

(3) Smartbox

30. The Smartbox business comprises SATL and SSIL, which are companies incorporated in England and Wales. Smartbox has offices in Malvern and Bristol in the UK, as well as a US office in Pennsylvania.

31. SATL develops and resells ATS. SSIL previously developed the software products of SATL. In 2017, the business activities of SSIL were transferred to SATL and SSIL no longer carries out meaningful business activities although SSIL continues to hold Smartbox's intellectual property rights to one of its AAC software products called the Grid.

32. Smartbox's AAC product range includes:

(1) Purpose-built AAC devices: Smartbox's product in this category includes the Grid Pad 12.

(2) Wrapped tablets: Smartbox's products in this category include the Grid Pad 8 and Grid Pad 10.

(3) AAC peripheral solutions: Smartbox's products in this category include iPad Essentials and Eyegaze peripherals.

(4) AAC software: Smartbox's products in this category include the Grid (Grid 3 and Grid for iPad) and Look to Learn. The Grid is Smartbox's flagship AAC software and is an open platform that allows third parties to integrate their own hardware and access method with the Grid, even where individual hardware device requirements vary.

33. Smartbox does not develop its own eye gaze cameras.

34. Smartbox sells its products worldwide through a network of resellers. The majority of Smartbox's product sales in 2017 were in the UK, of which a significant proportion was directly to customers as opposed to through resellers.

(4) Other suppliers and resellers of AAC solutions

35. There are other companies that supply and resell AAC components and solutions in the UK. Examples include:

(1) Prentke Romich Company Inc. ("PRC"), which is a US company that uses a subsidiary company, Liberator Limited ("Liberator") to distribute its AAC products in the UK. Although PRC and Liberator sell their own products, Liberator also resells Smartbox's Grid software.

(2) Jabbla BVBA ("Jabbla") is a Belgium-based company, which uses its UK business, Techcess Limited ("Techcess"), to sell its AAC products in the UK. Although Jabbla and Techcess sell their own products, Jabbla

typically sources eye gaze cameras from other suppliers and Techcess also resells third parties' AAC software.

(3) Inclusive Technology Limited's products include educational needs software, access components and assistive technology. It also resells AAC solutions.

(4) Abilia AB is a Swedish company whose products include its AAC solutions and assistive technology. It sells its products in the UK through a network of distributors, and it acts also as a reseller of Smartbox's products.

(5) AssistiveWare BV is headquartered in the Netherlands and supplies AAC products, although its focus is on AAC software.

(6) EyeTech Digital Systems Inc ("EyeTech") is a US company whose products include eye gaze cameras. EyeTech sells its eye gaze cameras in many countries including the UK.

(7) Irisbond Crowdbonding SL ("Irisbond") is a Spanish company that sells eye gaze cameras in many countries. In the UK, Irisbond sells its eye gaze cameras through resellers. Historically, Smartbox has been the main UK partner of Irisbond, with Smartbox's Grid software integrated with Irisbond's eye gaze technology.

(8) Alea Technologies GmbH ("Alea") is a German company that supplies eye gaze devices in the UK and other countries.

(9) LC Technologies Inc ("LC Technologies") is a US company that manufactures and sells eye gaze equipment worldwide. Its Eyegaze Edge Communication System is compatible with Smartbox's Grid software. LC Technologies also resells Smartbox's Grid software, and Smartbox resells LC Technologies' eye gaze devices.

C. LEGAL FRAMEWORK

(1) The 2002 Act

36. Part 3 of the 2002 Act sets out the functions of the CMA in relation to mergers. Within Part 3, s.22 sets out the circumstances when the CMA is under a duty to refer a completed acquisition to its chair for the constitution of a group under Schedule 4 to the Enterprise and Regulatory Reform Act 2013:

> "**22. Duty or make references in relation to completed mergers**
>
> (1) The CMA shall, subject to subsections (2) and (3), 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 believes that it is or may be the case that—
>
> (a) a relevant merger situation has been created; and
>
> (b) the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services.
>
> (2) The CMA may decide not to make a reference under this section if it believes that—
>
> (a) the market concerned is not, or the markets concerned are not, of sufficient importance to justify the making of a reference; or
>
> (b) any relevant customer benefits in relation to the creation of the relevant merger situation concerned outweigh the substantial lessening of competition concerned and any adverse effects of the substantial lessening of competition concerned.
>
> […]"

37. Sections 23 and 24 of the 2002 Act define a relevant merger situation and the time limits for determining when two or more enterprises cease to be distinct. Tobii does not challenge the CMA's finding that the completed acquisition of Smartbox is a relevant merger situation.

38. Where the CMA has referred a completed acquisition, s.35 of the 2002 Act places the CMA under a duty to decide the following:

> "**35. Questions to be decided in relation to completed mergers**
>
> (1) Subject to subsections (6) and (7) and section 127(3), the CMA shall, on a reference under section 22, decide the following questions—

(a) whether a relevant merger situation has been created; and

(b) if so, whether the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services.

[…]

(3) The CMA shall, if it has decided on a reference under section 22 that there is an anti-competitive outcome (within the meaning given by subsection (2)(a)), decide the following additional questions—

(a) whether action should be taken by it under section 41(2) for the purpose of remedying, mitigating or preventing the substantial lessening of competition concerned or any adverse effect which has resulted from, or may be expected to result from, the substantial lessening of competition;

(b) whether it should recommend the taking of action by others for the purpose of remedying, mitigating or preventing the substantial lessening of competition concerned or any adverse effect which has resulted from, or may be expected to result from, the substantial lessening of competition; and

(c) in either case, if action should be taken, what action should be taken and what is to be remedied, mitigated or prevented.

[…]"

39. Further, s.38 of the 2002 Act places the CMA under a duty to publish a report on the reference:

"**38. Investigations and reports on references under section 22 …**

(1) The CMA shall prepare and publish a report on a reference under section 22 […] within the period permitted by section 39.

(2) The report shall, in particular, contain—

(a) the decisions of the CMA on the questions which it is required to answer by virtue of section 35 […];

(b) its reasons for its decisions; and

(c) such information as the CMA considers appropriate for facilitating a proper understanding of those questions and of its reasons for its decisions.

(3) The CMA shall carry out such investigations as it considers appropriate for the purposes of preparing a report under this section."

40. Section 39 of the 2002 Act sets out the time limits for the CMA's investigation and report.

41. Where the CMA's proposed decision on the questions mentioned in s.35(1) or s.35(3) of the 2002 Act is likely to be adverse to the interests of a relevant party, s.104 places duties upon the CMA to consult and to give reasons for its proposed decision to that party:

> "**104. Certain duties of [the CMA] to consult**
>
> (1) Subsection (2) applies where the relevant authority is proposing to make a relevant decision in a way which the relevant authority considers is likely to be adverse to the interests of a relevant party.
>
> (2) The relevant authority shall, so far as practicable, consult that party about what is proposed before making that decision.
>
> (3) In consulting the party concerned, the relevant authority shall, so far as practicable, give the reasons of the relevant authority for the proposed decision.
>
> (4) In considering what is practicable for the purposes of this section the relevant authority shall, in particular, have regard to—
>
> (a) any restrictions imposed by any timetable for making the decision; and
>
> (b) any need to keep what is proposed, or the reasons for it, confidential.
>
> (5) The duty under this section shall not apply in relation to the making of any decision so far as particular provision is made elsewhere by virtue of this Part for consultation before the making of that decision.
>
> […]"

42. The ability to and manner in which a person can challenge the CMA's decisions in relation to a relevant merger situation are set out at s.120 of the 2002 Act:

> "**120. Review of decisions under Part 3**
>
> (1) Any person aggrieved by a decision of the CMA … 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.
>
> […]
>
> (4) In determining such an application the Competition Appeal Tribunal shall apply the same principles as would be applied by a court on an application for judicial review.
>
> (5) The Competition Appeal Tribunal may—
>
> (a) dismiss the application or quash the whole or part of the decision to which it relates; and

(b) where it quashes the whole or part of that decision, refer the matter back to the original decision maker with a direction to reconsider and make a new decision in accordance with the ruling of the Competition Appeal Tribunal.

[…]"

43. Part 9 of the 2002 Act deals with information. Section 238 defines specified information as follows:

"**238. Information**

(1) Information is specified information if it comes to a public authority in connection with the exercise of any function it has under or by virtue of—

(a) Part […] 3 […];

[…]

(2) It is immaterial whether information comes to a public authority before or after the passing of this Act.

[…]"

44. Sections 237, 239 and 241 of the 2002 Act restrict the disclosure of specified information:

"**237. General restriction**

(1) This section applies to specified information which relates to—

(a) the affairs of an individual;

(b) any business of an undertaking.

(2) Such information must not be disclosed—

(a) during the lifetime of the individual, or

(b) while the undertaking continues in existence,

unless the disclosure is permitted under this Part.

[…]"

"**239. Consent**

(1) This Part does not prohibit the disclosure by a public authority of information held by it to any other person if it obtains each required consent.

(2) If the information was obtained by the authority from a person who had the information lawfully and the authority knows the identity of that person the consent of that person is required.

(3) If the information relates to the affairs of an individual the consent of the individual is required.

(4) If the information relates to the business of an undertaking the consent of the person for the time being carrying on the business is required.

(5) For the purposes of subsection (4) consent may be given—

(a) in the case of a company by a director, secretary or other officer of the company;

(b) in the case of a partnership by a partner;

(c) in the case of an unincorporated body or association by a person concerned in the management or control of the body or association."

"**241. Statutory functions**

(1) A public authority which holds information to which section 237 applies may disclose that information for the purpose of facilitating the exercise by the authority of any function it has under or by virtue of this Act or any other enactment.

(2) If information is disclosed under subsection (1) so that it is not made available to the public it must not be further disclosed by a person to whom it is so disclosed other than with the agreement of the public authority for the purpose mentioned in that subsection.

(2A) Information disclosed under subsection (1) so that it is not made available to the public must not be used by the person to whom it is disclosed for any purpose other than that mentioned in subsection (1).

[…]"

45. Section 244 of the 2002 Act sets out the considerations that the CMA must have regard to before disclosing specified information:

"**244. Specified information: considerations relevant to disclosure**

(1) A public authority must have regard to the following considerations before disclosing any specified information (within the meaning of section 238(1)).

(2) The first consideration is the need to exclude from disclosure (so far as practicable) any information whose disclosure the authority thinks is contrary to the public interest.

(3) The second consideration is the need to exclude from disclosure (so far as practicable)—

(a) commercial information whose disclosure the authority thinks might significantly harm the legitimate business interests of the undertaking to which it relates, or

(b) information relating to the private affairs of an individual whose disclosure the authority thinks might significantly harm the individual's interests.

(4) The third consideration is the extent to which the disclosure of the information mentioned in subsection (3)(a) or (b) is necessary for the purpose for which the authority is permitted to make the disclosure."

(2) The Human Rights Act 1998

46. Particular Articles from the European Convention on Human Rights (the "ECHR") are incorporated into UK law through the Human Rights Act 1998 (the "HRA 1998"). Section 1 of the HRA 1998 defines "Convention rights" as:

> "**1.— The Convention Rights**
>
> (1) In this Act "the Convention rights" means the rights and fundamental freedoms set out in—
>
> (a) Articles 2 to 12 and 14 of the [ECHR],
>
> (b) Articles 1 to 3 of the First Protocol, and
>
> (c) Article 1 of the Thirteenth Protocol,
>
> as read with Articles 16 to 18 of the [ECHR].
>
> […]"

47. Article 1 of the First Protocol to the ECHR is set out in Schedule 1 to the HRA 1998 and relates to the protection of property:

> "**Article 1**
>
> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

48. Section 6 of the HRA 1998 states that:

> "**6.— Acts of public authorities**
>
> (1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

[…]

(3) In this section, 'public authority' includes—

(a) a court or tribunal

[…]"

(3) The standard and intensity of review

49. As to judicial review proceedings before the Tribunal, the Court of Appeal held in *Office of Fair Trading and others v IBA Health Limited* [2004] EWCA Civ 142 ("*IBA*") that, notwithstanding its specialist composition, the Tribunal is to apply the ordinary principles of judicial review in determining applications pursuant to s.120(4) of the 2002 Act (see *IBA* at [53] and [88]). As regards the intensity of review, Carnwath LJ observed that:

> "91. Thus, at one end of the spectrum, a 'low intensity' of review is applied to cases involving issues 'depending essentially on political judgment' (de Smith para 13-056-7). Examples are *R v Secretary of State, ex p Nottinghamshire CC* [1986] AC 240, and *R v Secretary of State ex p Hammersmith and Fulham LBC* [1991] 1AC 521, where the decisions related to a matter of national economic policy, and the court would not intervene outside of 'the extremes of bad faith, improper motive or manifest absurdity' ([1991] 1AC at 596-597 per Lord Bridge). At the other end of the spectrum are decisions infringing fundamental rights where unreasonableness is not equated with 'absurdity' or 'perversity', and a 'lower' threshold of unreasonableness is used:
>
> > 'Review is stricter and the courts ask the question posed by the majority in *Brind,* namely, 'whether a reasonable Secretary of State, on the material before him, could conclude that the interference with freedom of expression was justifiable.' (De Smith para 13-060, citing *Brind v Secretary of State* [1991] AC 696).'
>
> 92. A further factor relevant to the intensity of review is whether the issue before the Tribunal is one properly within the province of the court. As has often been said, judges are not 'equipped by training or experience or furnished with the requisite knowledge or advice' to decide issues depending on administrative or political judgment (see *Brind* [1991] 1AC at 767, per Lord Lowry). On the other hand where the question is the fairness of a procedure adopted by a decision-maker, the court has been more willing to intervene:
>
> > 'Such questions are to be answered not by reference to *Wednesbury* unreasonableness, but 'in accordance with the principles of fair procedure which have been developed over the years and of which the courts are the author and sole judge'' (*R v Takeover Panel ex parte Guinness plc* [1990] 1QB 146, 184, per Lloyd LJ).
>
> 93. The present case, as the Tribunal observed (para 223), is not concerned with questions of policy or discretion, which are the normal subject-matter of the *Wednesbury* test. Under the present regime (unlike the [Fair Trading Act

> 1973]) the issue for the OFT is one of factual judgment. Although the question is expressed as depending on the subjective belief of the OFT, there is no doubt that the court is entitled to enquire whether there was adequate material to support that conclusion (see *Tameside* case, [1977] AC at 1047 per Lord Wilberforce)."

50. *British Sky Broadcasting Group PLC v The Competition Commission and The Secretary of State for Business, Enterprise and Regulatory Reform* [2008] CAT 25 ("*BSkyB*") concerned a judicial review application under s.120 of the 2002 Act in respect of the Competition Commission's finding that there was a relevant merger situation which was expected to result in an SLC and recommendation that there be a partial divestiture of ITV shares that Sky had purchased. In that case Sky submitted that Parliament chose to allocate the power of review to the Tribunal, a specialist body, as opposed to a generalist court, and Parliament must be taken to have anticipated particular consequences for the intensity of review that would follow from that choice. Thus, whilst applying the same principles as the Administrative Court would apply, the Tribunal should do so with a greater intensity of review because it is a specialist judicial body. The Tribunal did not accept this submission and clarified that, although the Tribunal is a specialist body and enjoys a degree of familiarity with the statutory regime, relevant case law and some of the legal and economic concepts which arise:

> "62. However, in our view none of this means that the Tribunal is applying judicial review principles in a different way or is exercising a higher intensity of review than would be the case if the matter were before the Administrative Court. Further, by no means all of the findings which may be the subject of a section 120 challenge are such as would necessarily call for expertise in competition law and practice. For example, in the present case there is a challenge to a finding by the Commission that, by reason of (in particular) the size of its shareholding, Sky is likely to be able to exercise material influence over the policy of ITV through its ability to block a special resolution or a scheme of arrangement. In assessing the adequacy of the factual basis for this finding the Tribunal can, of course, bring to bear the business knowledge and experience of its panel members, but has no other intrinsic advantage that might not be found in the Administrative Court.
>
> 63. […] We consider that the principles we should apply in this application are those which are helpfully set out and discussed in, in particular, *Tameside* and *IBA*, and which were applied in the Tribunal decisions cited to us. As the Commission and the Secretary of State submit, the Tribunal must avoid blurring the distinction which Parliament clearly drew between a section 120 review and an appeal on the merits. We shall need to bear this distinction in mind when we come to deal with the specific points raised by Sky in relation to the factual basis upon which the Commission reached the challenged

> findings. It is one thing to allege irrationality or perversity; it is another to seek to persuade the Tribunal to reassess the weight of the evidence and, in effect, to substitute its views for those of the Commission. The latter is not permissible in a review under section 120."

51. Sky appealed against the Tribunal's decision, contending amongst other things that the Tribunal erred in law as to the content of its obligation to apply judicial review principles. In *British Sky Broadcasting Group PLC v The Competition Commission and The Secretary of State for Business Enterprise and Regulatory Reform* [2010] EWCA Civ 2 ("*BSkyB (CA)*"), the Court of Appeal rejected Sky's argument and endorsed the Tribunal's reasoning in *BSkyB* at [63] (see *BSkyB (CA)* at [32] and [41]).

(4) Rationality

52. *Stagecoach Group PLC v Competition Commission* [2010] CAT 14 ("*Stagecoach*") concerned a judicial review application under s.120 of the 2002 Act. One of the grounds of challenge was that the Competition Commission acted irrationally by arriving at a counterfactual that was not supported by sufficient or any evidence. The Tribunal applied the approach set out by the Court of Appeal in *IBA* and endorsed in *BSkyB (CA)* (see *Stagecoach* at [41]) and observed that:

> "42. […] it is not the Tribunal's task to reassess the relative weight of different factors arising from the evidence before the Commission. The task is to assess whether the Commission had an adequate evidential foundation for arriving at the factual conclusions that it did, in the sense that, on the basis of the evidence before it, it could reasonably have come to those conclusions.
>
> […]
>
> 45. […] Where Stagecoach asserts that there is no or no sufficient evidence to support one of the Commission's key findings, Stagecoach must show either that there is simply no evidence at all to support the Commission's conclusions or that on the basis of the evidence the Commission could not reasonably have come to the conclusions that it did. The fact that the evidence might have supported alternative conclusions, whether or not more favourable to Stagecoach, is not determinative of unreasonableness in respect of the conclusion actually reached by the Commission. We must be weary of a challenge which is 'in reality an attempt to pursue a challenge to the merits of the Decision under the guise of a judicial review' […]
>
> 46. The Commission also reminded us that it is important to consider the evidence relied on in the Decision 'taken as a whole' and that the Decision should not be analysed as if it were a statute. The Tribunal must consider the

> materiality of any 'fact' found by the Commission which the Tribunal determines has no evidential foundation – not every failure in fact-finding and analysis by a decision making body requires or permits its finding or decision to be quashed.
>
> […]
>
> 48. […] The question we must ask ourselves, paraphrasing the description of the Wednesbury test expressed by the Vice Chancellor (as he then was) in *Office of Fair Trading v IBA Health Ltd* [2004[EWCA Civ 142, is whether the Decision is so unreasonable as to be a decision which no Commission properly instructed and taking account of all, but only, relevant considerations could arrive at."

53. The Tribunal considered the standard of rationality in *BAA Limited v Competition Commission* [2012] CAT 3 ("*BAA*") when determining a judicial review application under s.179 of the 2002 Act. The *BAA* case concerned a report by the Competition Commission following a market investigation, which found that a number of features of the market each gave rise to an adverse effect on competition ("AEC") and required BAA to sell one of its Scottish airports and both Gatwick and Stansted airports. BAA's challenge included the submission that the Competition Commission was obliged to carry out its functions in a way that is compatible with Convention rights and the divestiture remedy it imposed on BAA involved a disproportionate interference with its Convention right as set out in Article 1 of the First Protocol to the ECHR. The Tribunal applied *IBA* and *BSkyB (CA)* and held at [20(3)] to [20(8)] that:

> "(3) The CC, as decision-maker, must take reasonable steps to acquaint itself with the relevant information to enable it to answer each statutory question posed for it (in this case, most prominently, whether it remained proportionate to require BAA to divest itself of Stansted airport notwithstanding the MCC the CC had identified, consisting in the change in government policy which was likely to preclude the construction of additional runway capacity in the south east in the foreseeable future): see e.g. *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014, 1065B per Lord Diplock; *Barclays Bank plc v Competition Commission* [2009] CAT 27 at [24]. The CC 'must do what is necessary to put itself into a position properly to decide the statutory questions': *Tesco plc v Competition Commission* [2009] CAT 6 at [139]. The extent to which it is necessary to carry out investigations to achieve this objective will require evaluative assessments to be made by the CC, as to which it has a wide margin of appreciation as it does in relation to other assessments to be made by it: compare, e.g., *Tesco plc v Competition Commission* at [138]-[139]. In the present context, we accept Mr Beard's primary submission that the standard to be applied in judging the steps taken by the CC in carrying forward its investigations to put itself into a position properly to decide the statutory questions is a rationality test: see *R (Khatun) v Newham London Borough Council* [2004] EWCA Civ 55; [2005] QB 37 at [34]-[35] and the following

statement by Neill LJ in *R v Royal Borough of Kensington and Chelsea, ex p. Bayani* (1990) 22 HLR 406, 415, quoted with approval in *Khatun*:

> 'The court should not intervene merely because it considers that further inquiries would have been desirable or sensible. It should intervene only if no reasonable [relevant public authority – in that case, it was a housing authority] could have been satisfied on the basis of the inquiries made.'

(4) Similarly, it is a rationality test which is properly to be applied in judging whether the CC had a sufficient basis in light of the totality of the evidence available to it for making the assessments and in reaching the decisions it did. There must be evidence available to the CC of some probative value on the basis of which the CC could rationally reach the conclusion it did: see e.g. *Ashbridge Investments Ltd v Minister of Housing and Local Government* [1965] 1 WLR 1320, 1325; *Mahon v Air New Zealand* [1984] AC 808; *Office of Fair Trading v IBA Health Ltd* [2004] EWCA Civ 142; [2004] ICR 1364 at [93]; *Stagecoach v Competition Commission* [2010] CAT 14 at [42]-[45].

(5) In some contexts where Convention rights are in issue and the obligation on a public authority is to act in a manner which does not involve disproportionate interference with such rights, the requirements of investigation and regarding the evidential basis for action by the public authority may be more demanding. Review by the court may not be limited to ascertaining whether the public authority exercised its discretion 'reasonably, carefully and in good faith', but will include examination 'whether the reasons adduced by the national authorities to justify [the interference] are 'relevant and sufficient'' (see, e.g., *Vogt v Germany* (1996) 21 EHRR 205 at para. 52(iii); also *Smith and Grady v United Kingdom* (1999) 29 EHRR 493, paras. 135-138). However, exactly what standard of evidence is required so that the reasons adduced qualify as 'relevant and sufficient' depends on the particular context: compare *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26; [2001] 2 AC 532 at [26]-[28] per Lord Steyn. Where social and economic judgments regarding 'the existence of a problem of public concern warranting measures of deprivation of property and of the remedial action to be taken' are called for, a wide margin of appreciation will apply, and – subject to any significant countervailing factors, which are not a feature of the present case – the standard of review to be applied will be to ask whether the judgment in question is 'manifestly without reasonable foundation': *James v United Kingdom* (1986) 8 EHRR 123, para. 46 (see also para. 51). Where, as here, a divestment order is made so as to further the public interest in securing effective competition in a relevant market, a judgment turning on the evaluative assessments by an expert body of the character of the CC whether a relevant AEC exists and regarding the measures required to provide an effective remedy, it is the 'manifestly without reasonable foundation' standard which applies. One may compare, in this regard, the similar standard of review of assessments of expert bodies in proportionality analysis under EU law, where a court will only check to see that an act taken by such a body 'is not vitiated by a manifest error or a misuse of powers and that it did not clearly exceed the bounds of its discretion': Case C-120/97 *Upjohn Ltd v Licensing Authority* [1999] ECR I-223; [1999] 1 WLR 927, paras. 33-37. Accordingly, in the present context, the standard of review appropriate under Article 1P1 and section 6(1) of the HRA [1998] is essentially equivalent to that given by the ordinary domestic standard of rationality. […]

(6) It is well-established that, despite the specialist composition of the Tribunal, it must act in accordance with the ordinary principles of judicial review: see

IBA Health v Office of Fair Trading [2004] EWCA Civ. 142 per Carnwarth LJ at [88]–[101]; *British Sky Broadcasting Group plc v Competition Commission* [2008] CAT 25, [56]; *Barclays Bank plc v Competition Commission* [2009] CAT 27, [27]. Accordingly, the Tribunal, like any court exercising judicial review functions, should show particular restraint in 'second guessing' the educated predictions for the future that have been made by an expert and experienced decision-maker such as the CC: compare *R v Director General of Telecommunications, ex p. Cellcom Ltd* [1999] ECC 314; [1999] COD 105, at [26]. (No doubt, the degree of restraint will itself vary with the extent to which competitive harm is normally to be anticipated in a particular context, in line with the proportionality approach set out by the ECJ in Case C-12/03P *Commission v Tetra Laval* [2005] ECR I-987 at para. 39, but that is not something which is materially at issue in this case). This is of particular significance in the present case where the CC had to assess the extent and impact of the AEC constituted by BAA's common ownership of Heathrow, Gatwick and Stansted (and latterly, in its judgment, Heathrow and Stansted) and the benefits likely to accrue to the public from requiring BAA to end that common ownership. The absence of a clearly operating and effective competitive market for airport services around London so long as those situations of common ownership persisted meant that the CC had to base its judgments to a considerable degree on its expertise in economic theory and its practical experience of airport services markets and other markets and derived from other contexts;

(7) In applying both the ordinary domestic rationality test and the relevant proportionality test under Article 1P1, where the CC has taken such a seriously intrusive step as to order a company to divest itself of a major business asset like Stansted airport, the Tribunal will naturally expect the CC to have exercised particular care in its analysis of the problem affecting the public interest and of the remedy it assesses is required. The ordinary rationality test is flexible and falls to be adjusted to a degree to take account of this factor (cf *R v Ministry of Defence, ex p. Smith* [1996] QB 517, 537-538), as does the proportionality test (see *Tesco plc v Competition Commission* at [139]). But the adjustment required is not as far-reaching as suggested by Mr Green at some points in his submissions. It is a factor which is to be taken into account alongside and weighed against other very powerful factors referred to above which underwrite the width of the margin of appreciation or degree of evaluative discretion to be accorded to the CC, and which modifies such width to some limited extent. It is not a factor which wholly transforms the proper approach to review of the CC's decision which the Tribunal should adopt;

(8) Where the CC gives reasons for its decisions, it will be required to do so in accordance with the familiar standards set out by Lord Brown in *South Buckinghamshire District Council v Porter (No. 2)* [2004] UKHL 33; [2004] 1 WLR 1953 (a case concerned with planning decisions) at [36]:

> 'The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons

> need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision.'
>
> In applying these standards, it is not the function of the Tribunal to trawl through the long and detailed reports of the CC with a fine-tooth comb to identify arguable errors. Such reports as to be read in a generous, not a restrictive way: see *R v Monopolies and Mergers Commission, ex p. National House Building Council* [1993] ECC 388; (1994) 6 Admin LR 161 at [23]. Something seriously awry with the expression of the reasoning set out by the CC must be shown before a report would be quashed on the grounds of the inadequacy of the reasons given in it."

54. The 2002 Act stipulates that applications brought under s.120 or s.179 are to be determined by applying judicial review principles. Therefore the principles set out in *BAA* equally apply in the context of a review under s.120 of the 2002 Act. This was recognised by the Tribunal in *Intercontinental Exchange, Inc. v Competition and Markets Authority* [2017] CAT 6 ("*ICE*") at [30].

55. In *ICE*, which was a judicial review application under s.120 of the 2002 Act, the Tribunal applied the principles set out in *BAA* and stated that:

> "101. We agree that divestiture by ICE of its interest in Trayport would be an intrusive step, but not so seriously intrusive as an order for divestiture in a market investigation. This is because, in the case of a completed merger, the merging parties have taken the foreseeable risk that the CMA may make an order for divestiture. In contrast, an order for divestment in a market investigation context may be more intrusive, since it requires a change in the *status quo* and intervenes in an existing structure which, quite possibly, comprises integrated activities that represent the product of investment and development over a long period of time. This distinction however does not undermine the fact that divestiture is an intrusive remedy where one would expect the CMA to have exercised appropriate care in the analysis of the SLC and selection of the remedy required. Even in such a case as emphasised in *BAA* at para 20(7) the CMA retains a wide margin of appreciation and discretion. […]"

56. Accordingly, the standard of review applied by the Tribunal in *ICE* was:

> "124. […] whether the CMA had a sufficient basis in light of the totality of the evidence available to it for making the assessments that it did, as to which there

> must be evidence available to the CMA of some probative value on the basis of which the CMA could rationally reach the conclusion that it did."

(5) Procedural fairness

57. In *R v Secretary of State for the Home Department, ex parte Doody* [1994] 1 AC 531 ("*Doody*") at page 560 Lord Mustill set out six principles regarding fairness as follows:

> "What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."

58. In relation to the extent of disclosure required in *Doody*, which concerned a mandatory life prisoner's access to judicial advice provided to the Home Secretary who determined the penal element of the prisoner's mandatory life sentence, Lord Mustill explained at page 564 that:

> "This does not mean that the document(s) in which the judges state their opinion need be disclosed in their entirety. Those parts of the judges' opinions which are concerned with matters other than the penal element (for example any observation by the judges on risk) need not be disclosed in any form, and even in respect of the relevant material the requirement is only that the prisoner shall learn the gist of what the judges have said. This will not necessarily involve verbatim quotation from the advice, although this may often be convenient."

59. The Tribunal applied these principles from *Doody* in *BMI Healthcare Limited v Competition Commission* [2013] CAT 24 ("*BMI*"), *Groupe Eurotunnel S.A. v*

Competition Commission [2013] CAT 30 ("*Eurotunnel*") and *Ryanair Holdings PLC v Competition Commission* [2014] CAT 3 ("*Ryanair*").

60. *BMI* was a market investigation case where the Tribunal considered the interaction between the Competition Commission's duty to consult and duty to protect confidential information. In applying *Doody*, the Tribunal noted that "*the Commission is not obliged to disclose each and every piece of specified information as part of its duty to consult*" and the Chairman's Guidance on Disclosure of Information in Merger Inquiries, Market Investigations and Reviews of Undertakings and Orders accepted or made under the Enterprise Act 2002 and Fair Trading Act 1973 (CC7 (Revised), April 2013) (the "CC7 Guidance") is entitled to "*great weight*" (see *BMI* at [39(4)] and [39(5)]). The Tribunal explained at [39(6)] that:

> "[…] whilst what is a fair process in the context of the [2002] Act is one for the Tribunal as a matter of law, the Commission's approach in any given case is entitled to great weight. The consideration of the potentially competing interests of due process and the protection of confidential information is a nuanced one, to be undertaken in light of all the circumstances. It is the Commission, and not the Tribunal, that stands in the front line when assessing such matters, and the Tribunal should be slow to second-guess decisions of the Commission, in particular as to how confidential certain material is, and how best to protect the confidentiality in that material."

61. In *Eurotunnel*, which concerned a completed merger that had been referred to the Competition Commission for investigation, Eurotunnel submitted that two recent Supreme Court decisions had fundamentally altered the law in relation to closed procedures such that the Competition Commission was under an absolute and unqualified obligation to disclose all material information including exculpatory evidence, inculpatory evidence, transcripts or at least summaries of oral evidence and data sets. The Tribunal held at [187] that the Supreme Court's observations in the two closed procedure cases did not apply generally to administrative decisions, and *Doody* and *BMI* remain good law. The Tribunal also noted that:

> "230. […] provided that the gist is properly disclosed, redactions or other forms of withholding of material can be perfectly proper. In order to succeed in its challenge, Eurotunnel must go significantly further than simply pointing out that material was withheld. It must show that this withholding meant that Eurotunnel was unable to understand the gist of the case being made by the Commission.

[…]

> 236. […] the relevant question is not whether Eurotunnel would have had something material to say in relation to information it did not see. Rather, the relevant question, in light of the duty to consult under section 104 of the [2002] Act, is whether on the basis of the information that Eurotunnel did see, Eurotunnel was in a position properly to formulate its response to issues likely to adversely affect it."

62. Accordingly, the "adequate gist" which the Competition Commission had to provide pertained to:

> "245. […] the issues in relation to which the Commission proposed to take a decision adverse to Eurotunnel's interests. If there was information or evidence that the Commission considered immaterial to its conclusions […] the Commission was not obliged to provide the gist of such information to Eurotunnel. […]"

63. In *Ryanair*, Ryanair's acquisition of a minority stake in Aer Lingus was referred to the Competition Commission under s.22 of the 2002 Act for investigation. The Competition Commission provided Ryanair with certain information in redacted form. Ryanair contended that it was not accorded procedural fairness during the Competition Commission's inquiry as it was not provided with certain evidence or information, without which it was not able to respond effectively to the allegations or case being made, and that the material, as a minimum, should have been provided to its advisers within a confidentiality ring. The Tribunal explained that:

> "116. Fairness is an evolving concept. What may have appeared fair at one time or in a particular circumstance, may now be regarded as unfair as the importance of procedural fairness has developed. It is a basic principle of administrative law recognised in many reported decisions. In *O'Reilly v Mackman* [1983] 2 AC 237 at 279F-G, Lord Diplock rightly emphasised the fundamental nature of the right afforded by the rules of natural justice or fairness, namely to have afforded to the person concerned 'a reasonable opportunity of learning what is alleged against him and of putting forward his own case in answer to it.'
>
> 117. In the context of enquiries by the CC, procedural fairness does not necessarily require the production of the underlying evidence obtained by it. It is for the CC to assess the evidence it acquires, including as to its reliability, relevance and weight. Much of what the CC receives may be highly confidential. The CC needs to rely upon the evidence and information provided by third parties, who may be unwilling to come forward or be forthcoming if commercial secrets or sensitive negotiations are made public or available to a competitor."

64. Accordingly, the Tribunal took into account the particular context of the case. The underlying evidence and information from third parties, which Ryanair claimed should have been disclosed, pertained to specified information under s.238 of the 2002 Act. The Tribunal recognised that Part 9 of the 2002 Act has specific provisions in relation to restrictions on disclosure of specified information and s.104 of the 2002 Act concerning the duty to consult refers to the need to protect confidentiality. The Tribunal considered in detail various paragraphs of the CC7 Guidance, which explained the Competition Commission's approach to the handling and disclosure of information received during inquiries and noted at [128] that, in accordance with paragraph 7.1 of the CC7 Guidance, the Competition Commission uses its publication of provisional findings and notices of possible remedies as a means of complying with its duties to consult.

65. The Tribunal proceeded to apply the principles from *Doody* and *BMI*, noting that:

> "133. […] one of the reasons why fairness may require disclosure to a person who may be affected by a decision, is to enable that person to have a proper opportunity to respond, challenge and correct.
>
> 134. We accept that once it has been determined by the CC that fairness does require disclosure, then disclosure should be made whether directly to the person affected or to his representatives in some form (including by way of confidentiality ring or data room process). If the material is so sensitive that no such disclosure can be made, then it should usually follow that the CC should not rely upon such material in its decision."

66. Applying these principles regarding fairness alongside the principles from *BAA*, the Tribunal found that the Competition Commission disclosed a sufficient gist of the information which was redacted for Ryanair to understand the case it had to meet and for it to make worthwhile representations to the Competition Commission. Procedural fairness did not dictate that the redacted information be disclosed, even to Ryanair's advisers within a confidentiality ring, because Ryanair did not need that type of detail in order to respond to the Competition Commission's report. (See *Ryanair* at [139] to [144].)

D. CMA GUIDANCE

67. The CMA has a duty to prepare and publish advice and information regarding how it exercises its functions. For example, s.106 of the 2002 Act states that the CMA shall prepare and publish general advice and information as follows:

> "**106. Advice and information about references under sections 22 and 33**
>
> (1) The CMA shall prepare and publish general advice and information about
>
> (a) the making and consideration by it of references under section 22 […], and
>
> (b) the way in which relevant customer benefits may affect the taking of enforcement action in relation to such references.
>
> (2) The CMA may at any time publish revised, or new, advice or information.
>
> […]
>
> (5) Advice and information published under this section shall be prepared with a view to—
>
> (a) explaining relevant provisions of this Part to persons who are likely to be affected by them; and
>
> (b) indicating how the CMA expects such provisions to operate.
>
> (6) Advice (or information) published by virtue of subsection (1) may include advice (or information) about the factors which the CMA may take into account in considering whether, and if so how, to exercise a function conferred by this Part.
>
> (7) Any advice or information published by the CMA under this section shall be published in such manner as the CMA considers appropriate.
>
> (8) In preparing any advice or information under this section, the CMA shall consult such persons as it considers appropriate."

68. Examples of advice and information that have been published (or adopted) by the CMA, which are of relevance to these proceedings, include:

(1) Merger Assessment Guidelines (OFT1254, CC2 (Revised), September 2010) (the "MAG"). This was published by the then Competition Commission and the Office of Fair Trading and has been adopted by the CMA.

(2) The CC7 Guidance. This was published by the then Competition Commission and has been adopted by the CMA.

(3) Good practice in the design and presentation of customer survey evidence in merger cases (CMA78 (Revised), May 2018) (the "Survey Guidance").

E. THE CMA'S INVESTIGATION

(1) Collection of Evidence

69. During the CMA's Phase 1 investigation, it collected evidence from Tobii, Smartbox, and third parties such as customers and suppliers of AAC solutions. According to Mr Meek, the Chair of the CMA's Phase 2 Inquiry Group, the CMA used the evidence already obtained as part of the Phase 1 investigation and collected further evidence in Phase 2 from Tobii, Smartbox and third parties such as customers, interest groups, competitors and resellers of AAC hardware and software.

70. The CMA also published on its website non-confidential versions of documents, such as its issues statement regarding the completed acquisition by Tobii of SATL and SSIL (the "Issues Statement"), and invited comments.

71. During the CMA's investigation, the CMA received written evidence from Tobii and Smartbox, and members of the CMA's Phase 2 Inquiry Group, accompanied by CMA staff, carried out separate site visits to Smartbox's facility at Malvern in the UK on 5 March 2019 and Tobii's headquarters in Stockholm, Sweden, on 18 March 2019.

72. According to the CMA, it issued questionnaires to 69 customers of Tobii and Smartbox and to 17 interest groups. It received 30 responses from customers and eight responses from interest groups. In respect of these responses, the CMA made follow-up calls to three customers (two NHS Hubs and one school). The CMA also obtained evidence through telephone conversations and written requests with 23 competitors/suppliers and seven resellers. A list of third parties is set out at Appendix B to the Final Report.

(a) Phase 1 customer questionnaires

73. The questionnaires sent to customers in Phase 1 of the CMA's investigation contained 11 substantive questions. There was a list of definitions at the start of the questionnaire, which defined the following terms:

> "• Hardware: devices (eg tablets) specifically designed or adapted for people with disabilities or special needs
>
> • Software: operating systems specifically designed for people with disabilities or special needs to perform any of communication aid, computer control and/or environmental control.
>
> • Access methods: accessories used to access the hardware and control the software (such as switches, head mice and eye-gaze cameras).
>
> • Eye-gaze camera: a type of access method that allows the user to navigate and control devices by tracking eye movements."

74. The questions in the Phase 1 questionnaire sought information regarding the customer's needs in relation to ATS, purchasing decisions, ATS spend, spending patterns and preferences. Customers were also asked for their views regarding viable alternatives. Three of the questions read as follows:

(1) *"Q8. To what extent is a standard consumer tablet (eg iPad or Surface Pro) a viable alternative to a hardware product sourced by Smartbox or Tobii? If this varies by the needs of the final user, please explain."*

(2) *"Q9. To what extent is a software application for a consumer tablet (eg Prologuo2Go) a viable alternative to the software products provided by Smartbox (ie Grid software) or Tobii (ie Snap + Core and/or Communicator software)?"*

(3) *"Q11. Among all suppliers you are aware of, please list the best alternative suppliers (one or more, best first) to each of Tobii and Smartbox for each product category. If relevant, please include Smartbox as an alternative to Tobii and vice versa.*"

	Tobii	***Smartbox***
Software		
Hardware		
Eye-gaze camera		

(b) Phase 2 customer questionnaires

75. In Phase 2 of the CMA's investigation, the CMA used four questionnaire templates, which were sent to customers as follows:

(1) Template 1 – NHS Hubs which were existing customers of the merging parties;

(2) Template 2 – NHS Hubs which had not been contacted in Phase 1;

(3) Template 3 – non-hub NHS customers; and

(4) Template 4 – non-NHS customers.

(i) Template 1

76. In Phase 2 of the CMA's investigation, the questionnaire sent to NHS Hubs which were existing customers of the merging parties contained 13 substantive questions. There was a list of definitions at the start of the questionnaire, which defined the following terms:

> "• 'Tobii' refers to Tobii AB and any entities and businesses controlled by Tobii AB
>
> • 'Smartbox' refers to Smartbox Assistive Technology Limited (Smartbox) and Sensory Software International Ltd (Sensory Software) and any entities and businesses controlled by Smartbox and Sensory Software.
>
> • 'Parties' refers to Tobii and Smartbox.
>
> • 'AAC' refers to augmentative and assistive communication.

• 'End Users' refers to individuals with AAC needs.

• 'AAC Software' refers to software which is specifically designed for people with communication disabilities allowing them to communicate.

• 'Dedicated AAC Hardware' refers to hardware which has been developed and designed primarily for integrating with AAC software, supporting the needs of people with communication disabilities.

• 'Dedicated AAC Solution' refers to the supply for a dedicated AAC Device (combining dedicated AAC hardware with AAC software and an access method such as an eye gaze camera) alongside customer support and training services."

77. The use and definition of the term 'dedicated AAC solution' was introduced in Phase 2, and the questions in the Phase 2 questionnaire to existing customers of the merging parties sought information such as the role of end users in the selection of an AAC solution, purchasing data and purchasing decisions. Four of the questions read as follows:

(1) "*Q3. Please provide details of your purchases of dedicated AAC solutions using the table below*

Notes:

- *we understand that some NHS organisations purchase dedicated AAC solutions jointly with other types of assistive technology solutions (ATS), and we previously asked for this data for all ATS products. To the extent possible, please provide data for AAC only.*
- *In this context, the 'supplier' is the entity you purchased the products from, ie it could be the manufacturer of the product, but it could also be a reseller*
- *we listed a number of suppliers of AAC solutions that we are aware of in the table, but please provide data for all your suppliers of AAC solutions"*

	2016		***2017***		***2018***	
Supplier	***(£)***	***(units)***	***(£)***	***(units)***	***(£)***	***(units)***
Tobii						
Smartbox						
Liberator (PRC)						

Techcess (Jabbla)						
[Add supplier]						
[Add supplier]						
[Add supplier]						

(2) "*Q7. Suppose that Tobii dedicated AAC products were no longer available in the market, which products would you use instead? Please use the table below.*

Supplier	*Estimated proportion of AAC products previously bought from Tobii that you would buy from that alternative supplier (%)*
Manufacturer of dedicated AAC solutions	
Smartbox	
Liberator (PRC)	
Techcess (Jabbla)	
[Add supplier]	
[Add supplier]	
[Add supplier]	
Suppliers of other alternatives (eg tablets)	
[Add supplier]	
[Add supplier]	
[Add supplier]	

If you feel you need to provide further explanations or qualifications to these estimates, please use the box below:"

(3) "*Q8. Suppose that Smartbox products were no longer available in the market, which products would you use instead? Please use the table below.*

Supplier	*Estimated proportion of AAC products previously bought from Smartbox that you would buy from that alternative supplier (%)*
Manufacturer of dedicated AAC solutions	
Tobii	
Liberator (PRC)	
Techcess (Jabbla)	
[Add supplier]	
[Add supplier]	
[Add supplier]	
Suppliers of other alternatives (eg tablets)	
[Add supplier]	
[Add supplier]	
[Add supplier]	

If you feel you need to provide further explanations or qualifications to these estimates, please use the box below:"

(ii) Template 2

78. In Phase 2 of the CMA's investigation, the questionnaire sent to NHS Hubs which had not been contacted in Phase 1 contained 18 substantive questions. The list of definitions at the start of the questionnaire was the same as that in Template 1 (sent to NHS Hubs which were existing customers of the merging parties).

79. The questions in the Phase 2 questionnaire to NHS Hubs which had not been contacted in Phase 1 sought information such as the availability of other solutions, the customer's decision process, the role of end users in the selection

of an AAC solution, purchasing data and purchasing decisions. Two of the questions read as follows:

(1) "*Q5. To what extent is a standard consumer tablet (eg an iPad or Surface Pro) a viable alternative to a dedicated AAC solution? To what extent does this vary depending on the needs of the user?*"

(2) "*Q6. In circumstances where a standard consumer tablet is a viable alternative for a particular user, how do you decide between a consumer table and a dedicated AAC solution?*"

80. The Phase 2 questionnaire to NHS Hubs which had not been contacted in Phase 1 included questions identical to Q3, Q7 and Q8 in Template 1 (sent to existing customers of the merging parties).

(iii) Template 3

81. In Phase 2 of the CMA's investigation, the questionnaire sent to non-hub NHS customers contained 15 substantive questions. The list of definitions at the start of the questionnaire was the same as that in Template 1 (sent to NHS Hubs which were existing customers of the merging parties) and Template 2 (sent to NHS Hubs which had not been contacted in Phase 1).

82. The questions in the Phase 2 questionnaire to non-hub NHS customers sought information such as the availability of other solutions, the customer's decision process, the role of end users in the selection of an AAC solution, purchasing data and purchasing decisions. It included questions identical to Q5 and Q6 in Template 2 (sent to NHS Hubs which had not been contacted in Phase 1) and Q3 in Template 1 (sent to existing customers of the merging parties). However, it did not contain either of the "diversion questions" that were at Q7 and Q8 in Template 1 (sent to existing customers of the merging parties).

(iv) Template 4

83. In Phase 2 of the CMA's investigation, the questionnaire sent to non-NHS customers contained 15 substantive questions. The list of definitions at the start

of the questionnaire was the same as that in Template 1 (sent to NHS Hubs which were existing customers of the merging parties), Template 2 (sent to NHS Hubs which had not been contacted in Phase 1) and Template 3 (sent to non-hub NHS customers).

84. The questions in the Phase 2 questionnaire sent to non-NHS customers were identical to those in Template 3 (sent to non-hub NHS customers).

(2) Consultation

85. During the CMA's Phase 2 investigation, the CMA's engagement with Tobii included the exchange of documents, papers, submissions and correspondence, and the CMA conducted a main party hearing with Tobii:

(1) On 26 February 2019, the CMA provided Tobii with its Issues Statement.

(2) On 1 March 2019, Tobii provided the CMA with its response to the CMA's Phase 1 Decision.

(3) On 7 March 2019, Tobii's solicitors, Preiskel, wrote to the CMA that Tobii was informed by some of its customers that the CMA sent customer surveys to them and a copy of one such survey had been provided to Tobii. Preiskel set out Tobii's concerns of bias in the questions.

(4) On 8 March 2019, Tobii provided the CMA with an initial submission for the CMA's Phase 2 review.

(5) On 12 March 2019, Tobii provided the CMA with its response to the Issues Statement.

(6) On 18 April 2019, the CMA provided Tobii with:

(i) An annotated Issues Statement; and

(ii) Various working papers relating to vertical effects (the "Vertical Effects Working Paper" or "VEWP"), horizontal effects, entry and expansion, and the counterfactual.

(7) Also on 18 April 2019, Tobii provided the CMA with various submissions, which included:

(i) Evidence on demand-side substitutability contained in a report on a survey of end users ("Tobii's End User Survey"). Tobii's End User Survey was developed by Economic Insight, a firm of external economists instructed by Tobii, with feedback on the survey design sought from the CMA, Dr Donna Harris of Oxford University and Caroline Thompson Associates, an independent qualitative research and consulting firm;

(ii) An analysis of Tobii Dynavox's transactions data prepared by Economic Insight;

(iii) An AAC profitability analysis prepared by Economic Insight;

(iv) A substitutability matrix of competitor offerings; and

(v) A submission on regulatory distortions.

(8) On 19 April 2019, the CMA provided Tobii with further working papers relating to the industry and financial background, and the transaction background.

(9) On 23 April 2019, Preiskel wrote to the CMA requesting copies of all the CMA's questionnaires sent out to customers, the responses to which the CMA relied on in its working papers and annotated Issues Statement.

(10) Also on 23 April 2019, the CMA replied to Preiskel explaining that the CMA had not carried out a survey. Rather, it had collected information from third parties through a combination of detailed requests for

information and by a series of phone interviews. It was not the CMA's practice to provide copies of information requests but sufficient information was included in the working papers to provide Tobii with a gist of the evidence gathered without compromising confidentiality concerns.

(11) On 24 April 2019, Preiskel wrote to the CMA submitting why it was important for Tobii to see the requested questionnaires. Tobii was not seeking to see any confidential replies or results to such questions, just the questions put by the CMA exactly as they were seen by the NHS Hubs.

(12) On 26 April 2019, Preiskel wrote to the CMA requesting disclosure of Smartbox's transactions and volume data used in the CMA's analysis.

(13) On 29 April 2019, the CMA wrote to Preiskel explaining that the annotated Issues Statement and the working papers provided sufficient detail for Tobii to understand the overarching points in the Inquiry Group's thinking so as to respond to the Inquiry Group's questions at the main party hearing on 1 May 2019. It stated that the Inquiry Group would consider whether Tobii's disclosure requests are appropriate for the consultation on the CMA's provisional findings.

(14) On 30 April 2019, Tobii provided the CMA with submissions on each of the CMA's working papers and a presentation slide by Tobii Dynavox's Chief Executive Officer, Mr Fredrik Ruben, for the main party hearing with the CMA.

(15) On 1 May 2019, the CMA held a main party hearing with Tobii where Tobii gave a presentation and made submissions.

(16) On 9 May 2019, Tobii provided the CMA with additional analytical submissions including:

(i) A Gross Upward Price Pressure Index ("GUPPI") analysis and diversion ratios prepared by Economic Insight; and

(ii) An independent review of the CMA's customer questionnaire by Dr Jonathan Cave, an applied game theorist and regulatory economist who is Associate Professor of Economics at the University of Warwick, an Economist Member of the UK Regulatory Policy Committee and a Turing Fellow at the Alan Turing Institute.

(17) On 10 May 2019, Tobii provided the CMA with:

(i) A customer support clarification paper; and

(ii) A submission regarding AAC software.

(18) On 30 May 2019, the CMA provided Tobii with its provisional findings report on the completed acquisition by Tobii of SATL and SSIL (the "Provisional Findings"), which contained three appendices, and issued a notice of possible remedies (the "Notice of Possible Remedies").

86. Following the Provisional Findings, the CMA and Tobii continued to engage. This included the exchange of further documents, papers, submissions and correspondence, and the CMA conducted a further hearing with Tobii:

(1) On 13 June 2019, Tobii provided the CMA with separate responses to the Provisional Findings and Notice of Possible Remedies.

(2) On 18 June 2019, Preiskel wrote to the CMA requesting disclosure of the CMA's customer questionnaires and transcripts of interviews with or responses from such customers. Preiskel also made further submissions regarding the CMA's product definition.

(3) On 20 June 2019, Tobii provided the CMA with a finalised version of its response to the CMA's Provisional Findings.

(4) On 24 June 2019, the CMA held a main party response hearing with Tobii.

(5) On 26 June 2019, the CMA wrote to Preiskel explaining that the Inquiry Group considered Tobii had enough information to make representations regarding Tobii's concerns of framing bias in the CMA's customer questionnaires and the terminology used in the questionnaires based on what was in the Provisional Findings and that, therefore, the level of disclosure had been sufficient.

(6) On 28 June 2019, Preiskel wrote to the CMA requesting disclosure on a strictly external counsel only confidential basis of the transcripts of the CMA's main party hearing and response hearing with Smartbox on 29 April 2019 and 25 June 2019 respectively.

(7) On 3 July 2019, Preiskel wrote to the CMA regarding the CMA's refusal to disclose various requested documents. Preiskel argued that the CMA had not fully provided the gist of the CMA's case set out in the Provisional Findings, of which Tobii and Preiskel had been provided with only a heavily redacted non-confidential version. Preiskel also made submissions regarding procedural and substantive errors made during the CMA's investigation.

(8) On 8 July 2019, Preiskel wrote to the CMA regarding non-confidential versions of end user submissions published on the CMA's website. Preiskel made submissions contending that the CMA had failed to consult appropriately with end users, their parents/carers and support groups.

(9) The CMA replied to Preiskel on 10 July 2019 explaining that it continued to be of the view that Tobii had sufficient disclosure of the customer evidence relied upon to reach its Provisional Findings and that the remedies working papers sufficiently conveyed the gist of Smartbox's evidence. In the interests of co-operation and transparency, the CMA would disclose into a confidentiality ring limited documents

relating to the CMA's calculations regarding diversion ratios. The CMA stated that it would also carefully consider Tobii's representations before reaching its final decision.

(10) On 11 July 2019, Preiskel wrote to the CMA arguing that the CMA's response remained deficient. Tobii considered the CMA's refusal to disclose the remaining requested information even into a confidentiality ring unreasonable. Preiskel also requested that the CMA disclose into the confidentiality ring the data used in calculating the market shares set out in Tables 6-1 and 6-2 of the Provisional Findings, including unredacted versions of those tables.

(11) On 15 July 2019, the CMA wrote to Preiskel stating that it was satisfied the evidence and reasoning set out in the Provisional Findings and Notice of Possible Remedies, including the market share estimates in the form of ranges, provided Tobii with the gist of the case.

(12) On 18 July 2019, Preiskel wrote to the CMA making submissions regarding the documents that were disclosed into the confidentiality ring. This included submissions on horizontal unilateral effects and on vertical foreclosure.

(13) On 19 July 2019 the CMA wrote to Preiskel regarding disclosure.

(14) On 22 July 2019 the CMA issued a notice of extension of inquiry period under s.39(3) of the 2002 Act for the reference relating to the completed acquisition by Tobii of SATL and SSIL, extending the statutory deadline to 19 September 2019.

87. During this period, the CMA and Tobii also exchanged documents, papers (including working papers), submissions and correspondence regarding remedy proposals.

88. On 15 August 2019, the CMA adopted its Final Report, which contained eight appendices.

F. THE CMA'S FINAL REPORT

89. The CMA's assessment, findings and conclusions on the issues in dispute in these proceedings are set out in the Final Report. A high-level summary of relevant parts of the Final Report is provided in this section to assist in understanding this judgment. Many of the criticisms of the CMA's approach and findings were specifically raised by Tobii prior to the Final Report being issued. Thus to a certain extent the criticisms have been responded to in the Final Report itself.

(1) Market definition (Final Report section 5)

90. The CMA found that Tobii and Smartbox both develop and supply AAC solutions for individuals with complex communication needs who require specialised AAC services. It defined 'dedicated AAC solutions' as comprising four components (Final Report paragraph 5.4):

(1) Dedicated AAC hardware – this includes both purpose-built devices and wrapped tablets;

(2) AAC software – this includes communication software, computer control software and may include additional content such as educational software, accessible apps, third party content or environment control functionalities;

(3) Access means – in cases where the end user cannot control the device solely through the touch screen, an AAC solution includes, for example, a switch, an infrared camera or an eye gaze camera in cases where the end user cannot control the device solely through the touch screen; and

(4) Customer support – this encompasses training, technical support and repairs.

This product definition was used also in the Provisional Findings (paragraph 5.4), and as the product frame of reference in the Phase 1 Decision (paragraphs 3, 28 to 30, and 48 to 86).

91. The CMA considered there was one downstream product market and two upstream markets. (Final Report paragraphs 5.7 to 5.10.)

92. In respect of the downstream product market, the CMA recognised that dedicated AAC solutions are differentiated products as they differ notably in terms of size of device, access options, functionalities, software and the level and quality of support associated with them. In the CMA's view, particularly when products are differentiated, the boundaries of the market may be blurred. (Final Report paragraphs 5.3 and 5.7.)

93. In particular, the CMA recognised that some customers build their own non-dedicated AAC solutions based on mainstream consumer devices, typically by combining an iPad or a Microsoft Surface tablet with AAC software and sometimes additional peripherals that are bought independently. In the CMA's view, such non-dedicated AAC solutions are sold with less extensive customer support, do not include any purpose-built hardware element and customers source and assemble the different components themselves. Hence, they fall outside the CMA's definition of dedicated AAC solutions. (Final Report paragraphs 5.6 and 5.79.)

94. Paragraphs 5.10 to 5.77 of the Final Report and Appendix C set out the CMA's analysis in determining the downstream product market. The Final Report refers to Tobii's submissions, evidence from customers, evidence from competitors and resellers and internal documents from Tobii and Smartbox, which the CMA used to assess substitutability, diversion ratios and trends in unit sales and pricing.

95. The CMA concluded that the competitive constraint exerted by non-dedicated AAC solutions on suppliers of dedicated AAC solutions is much weaker than that exerted by suppliers of dedicated AAC solutions on each other (Final Report paragraph 5.79) and the narrowest candidate downstream market for

assessing horizontal unilateral effects is the supply of dedicated AAC solutions in the UK (Final Report paragraph 5.10). The CMA's reasons are set out in the Final Report at paragraphs 5.78 to 5.90, which included a response to Tobii's representations on the Provisional Findings.

96. The two upstream product markets that the CMA identified were: the supply of AAC software to suppliers of dedicated AAC solutions and the supply of eye gaze cameras to suppliers of dedicated AAC solutions. (Final Report paragraph 5.9.) The CMA set out its considerations regarding the upstream markets at paragraphs 5.91 to 5.97 of the Final Report, which refer to evidence from third parties and submissions from Tobii.

97. Section 5 of the Final Report refers to various submissions, which Tobii made during the CMA's investigation, regarding market definition:

(1) Final Report paragraph 5.5 and Appendix C paragraphs 22 to 23 (also Provisional Findings paragraph 5.5 and Appendix C paragraphs 21 to 22) regarding Tobii's submission that the term 'dedicated' sometimes is used in the narrower sense of being certified as a medical speech-generating device in accordance with US regulations and Tobii's submission on regulatory distortions.

(2) Final Report paragraph 5.12 and Appendix C paragraphs 2 to 8 (also Provisional Findings paragraph 5.12 and Appendix C paragraph paragraphs 2 to 8) regarding Tobii's submission that both Tobii and Smartbox face strong competition from AAC solutions using mainstream consumer devices and that AAC software is the same regardless of whether it is installed on a mainstream consumer device or a purpose-built device.

(3) Final Report paragraphs 5.24 to 5.32 and Appendix C paragraphs 9 to 21 (also Provisional Findings paragraphs 5.24 to 5.32 and Appendix C paragraphs 9 to 20) regarding Tobii's submissions on diversion ratios, which included that the CMA's questions to the NHS Hubs were biased, leading and not in line with the CMA's Survey Guidance.

(4) Final Report paragraphs 5.52 to 5.54 (also Provisional Findings paragraphs 5.52 to 5.54) regarding Tobii's submission that the CMA misunderstood its internal documents.

(5) Final Report paragraphs 5.56 to 5.64 (also Provisional Findings paragraphs 5.56 to 5.64) regarding the analysis of Tobii Dynavox's transactions data prepared by Economic Insight.

(6) Final Report paragraphs 5.65 to 5.77 (also Provisional Findings paragraphs 5.65 to 5.74) regarding a pricing ladder analysis prepared by Economic Insight.

(7) Final Report paragraph 5.80 (also Provisional Findings paragraph 5.77) regarding Tobii's submission that the CMA's analysis must take into account likely technological and other developments which will make mainstream consumer devices even more suitable for delivery of AAC solutions.

(8) Final Report paragraphs 5.81 to 5.89 regarding Tobii's submissions on market definition in its response to the Provisional Findings.

(9) Final Report paragraphs 5.94 to 5.96 (also Provisional Findings paragraphs 5.82 to 5.84) regarding Tobii's submission that there is a distinct market for eye gaze cameras, which comprises eye gaze cameras for all applications.

(10) Final Report Appendix C paragraphs 24 to 27 (also Provisional Findings Appendix C paragraphs 23 to 26) regarding the AAC profitability analysis prepared by Economic Insight.

(2) Assessment of horizontal unilateral effects (Final Report section 6)

98. The CMA concluded that the completed acquisition by Tobii of SATL and SSIL has resulted and may be expected to result in an SLC in the supply of dedicated AAC solutions in the UK. It set out its reasons in the Final Report at paragraphs

6.61 to 6.80, which included a response to Tobii's representations on the Provisional Findings.

99. The CMA estimated market shares in dedicated AAC solutions using data provided by customers and suppliers. It concluded that the merged entity would have a market share in the supply of dedicated AAC solutions in the UK of between [60% to 70%] by value (with an increment of [10 to 20%]) and between [50% to 70%] by volume (with an increment of between [10 to 30%]). (Final Report paragraphs 6.7 to 6.11, including Tables 6-1 and 6-2.)

100. The CMA considered a range of evidence to assess the closeness of competition between Tobii and Smartbox relative to their competitors, including representations from customers and suppliers, representations and internal documents from Tobii and Smartbox and calculated weighted and unweighted estimates of diversion ratios based on responses from NHS Hubs. (Final Report paragraphs 6.3, 6.13 to 6.20, 6.29 to 6.30, 6.32 to 6.40, 6.42 to 6.43 and 6.45 to 6.52.)

101. The CMA defined a diversion ratio from firm A to B as the proportion of firm A's sales that customers would switch to firm B in the event that firm A's product was no longer available. The CMA estimated the sales-weighted diversion ratio from Tobii's dedicated AAC products to Smartbox's to be [40 to 50%] and from Smartbox's dedicated AAC products to Tobii's to be [30 to 40%]. The CMA's estimates of the unweighted diversion ratio from Tobii's dedicated AAC products to Smartbox's was [50 to 60%] and from Smartbox's dedicated AAC products to Tobii's was [30 to 40%]. (Final Report paragraphs 6.46 to 6.49 and Tables 6-6 and 6-7.) The CMA also combined these diversion ratios estimates with estimates of the variable margins of each party to form an estimate of the GUPPI, which provided the CMA with an indication of the incentive of the merged entity to raise price unilaterally post-merger. The CMA found the GUPPI figures from Tobii to Smartbox to be [10 to 20%] and from Smartbox to Tobii to be [10 to 20%], and the CMA considered these high. (Final Report paragraphs 6.50 to 6.52.)

102. The Final Report refers to various submissions, which Tobii made during the CMA's investigation, regarding horizontal unilateral effects:

(1) Final Report paragraph 6.5 (also Provisional Findings paragraph 6.5) regarding Tobii's submission that Tobii's acquisition of Smartbox is unlikely to lead to an SLC as result of horizontal unilateral effects because Tobii and Smartbox are not particularly close competitors. Tobii Dynavox had particular strengths in AAC hardware while Smartbox had particular strengths in AAC software, and the merged entity will continue to face significant competition from numerous other suppliers of dedicated AAC solutions.

(2) Final Report paragraph 6.12 (also Provisional Findings paragraph 6.11) regarding Tobii's submission disputing the CMA's market share estimate for Tobii.

(3) Final Report paragraphs 6.21, 6.41 and 6.44 (also Provisional Findings paragraphs 6.32 and 6.35) regarding Tobii's submissions on Tobii's and Smartbox's internal documents and future product development.

(4) Final Report paragraphs 6.22 to 6.28, 6.54, 6.56 to 6.57 and 6.65 to 6.80 regarding Tobii's response to the Provisional Findings.

(5) Final Report paragraphs 6.53, 6.55 and 6.57 (also Provisional Findings paragraph 6.44, 6.47 and 6.49) regarding the GUPPI analysis prepared by Economic Insight.

(6) Final Report paragraphs 6.59 to 6.60 (also Provisional Findings paragraphs 6.51 to 6.52) regarding Tobii's submissions on closeness of competition.

(7) Final Report paragraph 6.64 regarding Tobii's submission on the appropriate counterfactual.

(3) Assessment of vertical effects (Final Report section 7)

103. The CMA found that Smartbox and Tobii are also involved in the upstream supply chain in the supply of AAC software and eye gaze cameras in AAC applications. (Final Report paragraph 7.1.) The CMA used a three-step approach to assess two vertical theories of harm: input foreclosure and customer foreclosure. (Final Report paragraphs 7.2 to 7.6.) It concluded that the completed acquisition by Tobii of SATL and SSIL:

(1) Is likely to result in an SLC in the supply of dedicated AAC solutions in the UK as a result of input foreclosure by the merged entity of Smartbox's Grid software to competitors in the downstream supply of dedicated AAC solutions in the UK (Final Report paragraph 7.75); and

(2) Is likely to result in an SLC in the worldwide supply of eye gaze cameras to providers of dedicated AAC solutions as a result of customer foreclosure by the merged entity of Smartbox's Grid software to competitors upstream on a worldwide basis and, as a consequence, adverse effects in the market for dedicated AAC solutions in the UK (Final Report paragraph 7.142).

(a) Input foreclosure of the Grid software

104. In its three-step analysis, the CMA concluded that:

(1) Ability – the merged entity is likely to have the ability to partially foreclose its downstream competitors in the supply of AAC solutions in the UK either by selling the Grid on worse terms to downstream competitors (Final Report paragraphs 7.15 to 7.17 and 7.75) and/or by deteriorating the quality of competitors' access to the Grid through reducing the extent to which it supports competitors' dedicated AAC hardware (Final Report paragraphs 7.18 to 7.19 and 7.75). This is because the merged entity has a strong position in the upstream supply of AAC software due to its control of the Grid and weak competitive

constraints from alternative software. (Final Report paragraphs 7.20 to 7.39.)

(2) Incentive – the merged entity is likely to have incentives to partially foreclose rival suppliers of dedicated AAC solutions from the Grid and such incentives are significantly greater than Smartbox's pre-merger incentives. (Final Report paragraphs 7.59 to 7.65 and 7.69.) This is because customers of dedicated AAC solutions that combine the Grid with rival AAC hardware are more likely to switch to dedicated AAC solutions that have the Grid than they are to switch to other options due to the Grid being a key driver of sales of dedicated AAC solutions in the UK and there are significant barriers to developing AAC software that would be a credible alternative to the Grid. (Final Report paragraphs 7.41 to 7.53 and 7.58.)

(3) Overall effect on competition in the affected market – a partial foreclosure strategy either to increase the wholesale price of the Grid to downstream competitors or to deteriorate the quality of competitors' access to the Grid by reducing the extent to which it supports competitors' dedicated AAC hardware would substantially weaken the competitive constraints exerted on the merged entity by competitors of the merged entity, reduce the range of options that can effectively meet end user needs and harm customers through higher prices. (Final Report paragraphs 7.70 to 7.74.)

105. In the CMA's view, the merged entity has more limited scope to adopt a partial foreclosure strategy which produces different versions of the Grid for its dedicated AAC solutions as for competitors, or to adopt a total foreclosure strategy of ceasing to license the Grid to competitors or making the Grid incompatible with competitors' hardware, due to factors such as increased development costs, added complexity in the development process, the availability of retail versions of the Grid and the fact that the Grid uses the same operating system as competitors' dedicated AAC hardware. (Final Report paragraphs 7.11 to 7.13.)

106. The CMA's analysis on input foreclosure of the Grid refers to evidence from customers, competitors and documents, data and representations from Tobii and Smartbox. (Final Report paragraphs 7.19, 7.23 to 7.26, 7.28, 7.30, 7.33 to 7.35, 7.45, 7.48, 7.51 to 7.53, 7.56, 7.63, 7.67 and 7.73 to 7.74.)

107. The Final Report refers to various submissions, which Tobii made during the CMA's investigation, regarding the merged entity's ability to foreclose competitors:

(1) Final Report paragraphs 7.16 to 7.17 regarding Tobii's submissions on the feasibility of an increase in the wholesale price of the Grid software to competitors.

(2) Final Report paragraph 7.19 regarding Tobii's submissions on the credibility of a foreclosure strategy which reduces the extent to which the Grid supports rival hardware.

(3) Final Report paragraphs 7.20 to 7.26, 7.28, 7.30 to 7.36 (also Provisional Findings paragraphs 7.16 to 7.20) regarding Tobii's submission that the Grid is not an essential or 'must have' input and there is other alternative software developed in-house by competitors.

(4) Final Report paragraph 7.27 regarding Tobii's submission that the CMA's evidence from competitors relates to what might happen in the event of total foreclosure and the CMA has no evidence as to what might happen in the event of partial foreclosure.

(5) Final Report paragraph 7.29 regarding Tobii's submission that there is no evidence in the monitoring trustee's third report that any market players other than Tobii purchased the Grid.

(6) Final Report paragraph 7.37 regarding Tobii's submission that customers can side step completely any hypothetical foreclosure strategy by downloading the Grid themselves.

108. The Final Report refers to various submissions, which Tobii made during the CMA's investigation, regarding the merged entity's incentive to foreclose competitors:

(1) Final Report paragraphs 7.54 to 7.57 (also Provisional Findings paragraphs 7.42 to 7.43) regarding Tobii's submission that it would suffer adverse reputational effects if it were to foreclose its rivals in the supply of dedicated AAC solutions from the Grid.

(2) Final Report paragraphs 7.64 to 7.65 regarding Tobii's submission that the merger would not change Smartbox's pre-merger incentives to foreclose its rivals.

(3) Final Report paragraphs 7.66 to 7.67 regarding Tobii's submission on the additional costs that would be incurred in the hypothetical partial foreclosure scenario.

(4) Final Report paragraph 7.68 regarding Tobii's submission that the CMA had ignored evidence that customers are not concerned about a price increase.

(b) Customer foreclosure of Tobii's eye gaze camera competitors

109. In its three-step analysis, the CMA concluded that:

(1) Ability – the merged entity is likely to have the ability to foreclose its rival suppliers of eye gaze cameras for AAC applications by limiting the compatibility of the Grid with their cameras. (Final Report paragraph 7.113.) This is because a substantial share of each rival supplier's worldwide sales of eye gaze cameras in AAC applications in 2018 was for dedicated AAC solutions that included the Grid, there are significant barriers to developing AAC software that would be a credible alternative to the Grid in the foreseeable future, and switching to alternative AAC software could entail significant switching costs. (Final Report paragraphs 7.89 to 7.109.)

(2) Incentive – the merged entity is likely to have incentives to limit the compatibility of the Grid with rival eye gaze cameras in AAC applications. (Final Report paragraph 7.130.) This is because, in the CMA's view, it is unlikely that worldwide providers of dedicated AAC solutions who previously used Smartbox's Grid software in combination with non-Tobii cameras as part of their AAC solution would continue using the non-Tobii camera and switch to an alternative AAC software due to the absence of a credible alternative AAC software to the Grid and significant switching costs. This would make it profitable for the merged entity to foreclose its eye gaze camera competitors and the CMA found that Tobii would be likely to have wider strategic incentives to engage in such a foreclosure strategy. (Final Report paragraphs 7.116 to 7.129.)

(3) Overall effect on competition in the affected market – a customer foreclosure strategy where the merged entity limited the compatibility of the Grid with rival eye gaze cameras would reduce the extent to which eye gaze camera competitors invest in improving their cameras for AAC applications, could lead to an increase in prices of eye gaze cameras in AAC applications worldwide and is likely to have adverse effects in the downstream market for dedicated AAC solutions in terms of price, quality and range (Final Report paragraphs 7.133, 7.137 to 7.141.)

110. The CMA's analysis on customer foreclosure of Tobii's eye gaze camera competitors refers to evidence from eye gaze camera manufacturers and competitors, suppliers of dedicated AAC solutions, customers and representations and documents from Tobii and Smartbox. (Final Report paragraphs 7.79 to 7.80, 7.86 to 7.87, 7.90 to 7.91, 7.94 to 7.96, 7.98 to 7.101, 7.104 to 7.105, 7.107, 7.109 to 7.110, 7.112, 7.119, 7.122 to 7.127, 7.133 to 7.137 and 7.140.)

111. The Final Report refers to various submissions, which Tobii made during the CMA's investigation, regarding the merged entity's ability to foreclose rival suppliers of eye gaze cameras:

(1) Final Report paragraphs 7.91 to 7.92 (also Provisional Findings paragraphs 7.68 to 7.71) regarding Tobii's submission on the feasibility of limiting the compatibility of the Grid with rival eye gaze cameras.

(2) Final Report paragraphs 7.99 to 7.109 regarding Tobii's submission on the evidence that the CMA received from competitor suppliers of eye gaze cameras.

(3) Final Report paragraphs 7.110 to 7.112 (also Provisional Findings paragraphs 7.87 to 7.89) regarding Tobii's submission that eye gaze cameras are used for multiple applications outside of AAC, the technology required for non-AAC applications is the same as for AAC applications, and the future growth in total demand for eye gaze cameras is forecasted to be driven mainly by non-AAC applications.

112. The Final Report refers to various submissions, which Tobii made during the CMA's investigation, regarding the merged entity's incentive to foreclose rival suppliers of eye gaze cameras:

(1) Final Report paragraphs 7.122 to 7.123 regarding Tobii's submission refuting the CMA's interpretation of Tobii's internal documents.

(2) Final Report paragraphs 7.125 to 7.129 (also Provisional Findings paragraphs 7.101 to 7.105) regarding Tobii's submission that the merged entity would not have the incentive to limit the compatibility of the Grid with rival eye gaze cameras due to the high reputational costs that such a strategy would imply for the merged entity.

113. The Final Report refers to submissions, which Tobii made during the CMA's investigation, regarding the overall effects on competition from foreclosing rival suppliers of eye gaze cameras:

(1) Final Report paragraph 7.134 to 7.137 (also Provisional Findings paragraphs 7.110 to 7.112) regarding Tobii's submission that research and innovation in eye gaze cameras is currently driven by the demands

of the mass market consumer electronics and automotive sectors as opposed to the AAC sector.

G. TOBII'S GROUND 1: BREACH OF DUTY OF PROCEDURAL FAIRNESS BY THE CMA'S REFUSAL TO DISCLOSE RELEVANT INFORMATION TO TOBII AND/OR ITS EXTERNAL ADVISERS

114. Tobii alleges that the CMA's investigation was not carried out in a procedurally fair way as the material disclosed by the CMA to Tobii was insufficient, such that Tobii did not have full knowledge of the case against it and in circumstances where Tobii's ability to make meaningful representations was entirely dependent upon having sight of the evidential material and data.

115. This ground relates to three categories of underlying documents, disclosure of which was requested by Tobii during the investigation and refused by the CMA.

(1) Preliminary observations

116. At the hearing, Tobii and the CMA agreed that the relevant legal principles regarding disclosure for procedural fairness which are set out in *Ryanair* apply. These principles are referred to at [63] to [66] of this judgment.

117. *Ryanair* reiterated the principle from *BMI* that the competition authority is not obliged to disclose each and every piece of specified information as part of its duty to consult (see *Ryanair* at [132]) and recognised that, pursuant to paragraph 7.1 of the CC7 Guidance, the disclosure of provisional findings and notices of possible remedies is the main means by which a competition authority ensures due process and fulfils its duty to consult under s.104 of the 2002 Act (see *Ryanair* at [128]). Where the competition authority consults, one of the reasons why fairness may require disclosure is to enable the person affected to have a proper opportunity to respond, challenge and correct (see *Ryanair* at [133]). When disclosing specified information, the competition authority is under a duty to comply with Part 9 of the 2002 Act. The sections in Part 9 concerning specified information and its disclosure are set out at [43] to [45] of this judgment.

118. The Tribunal considered at [143(2)] Ryanair's submission that it was not able to respond effectively to the case against it because evidence relating to the discussions between Aer Lingus and other airlines which had been summarised in the Competition Commission's report had been redacted and was not provided to it. The Tribunal concluded that it was for the Competition Commission to assess the evidence as to its reliability and relevance and provide a sufficient gist to Ryanair to understand the case it had to meet and make representations to the Competition Commission.

119. Ryanair also argued that it needed to know the identity of an airline, which was unnamed in the Competition Commission's report, to verify the information it provided to the Competition Commission, and that Ryanair needed disclosure of the identity of an unnamed shareholder referred to in the Competition Commission's report to know whether the shareholder might have their own reasons for wanting to persuade the Competition Commission to find against Ryanair. Ryanair suggested that the information could be protected by a confidentiality ring.

120. The Tribunal held at [143(3)] that it was not necessary for Ryanair, and even for Ryanair's advisers within a confidentiality ring, to conduct an exercise of vetting or verifying the information received by the Competition Commission on every aspect or point of detail. The Tribunal further held at [143(6)] that the requested disclosure was not necessary for Ryanair, and even for Ryanair's advisers within a confidentiality ring, to challenge the propositions made by the unnamed shareholder.

(2) Issue 1(a): Was disclosure of the questionnaires sent to customers and interest groups, the responses thereto, and the transcripts of hearings, interviews or telephone calls with customers and interest groups, required in order for the CMA to disclose the gist of its case?

(a) The parties' submissions

(i) Tobii

121. Tobii submitted that the CMA relied extensively on consumer evidence in its Provisional Findings and Final Report but did not disclose the qualitative and/or quantitative evidence obtained from customers that constituted the gist of the findings that were central to its SLC Decision.

122. Tobii disputed that the use of a 'put back' procedure by the CMA to verify information received from customers discharged the CMA's responsibilities. Tobii contended that it was entitled to make full and informed submissions on the case against it, including on the credibility and reliability of evidence that may have been adverse to it.

123. Without the disclosure of the customer evidence, Tobii claimed that it was unable to make specific, informed and meaningful submissions regarding the CMA's evidence gathering process, such as:

(1) Whether the framing of the CMA's Phase 2 questionnaire to NHS Hubs was appropriate;

(2) Whether the customer evidence was tainted by bias in the framing of questionnaires;

(3) Whether the CMA had a reliable basis for asserting that the sophistication of respondents mitigated against any bias in its evidence collection; and

(4) Whether the CMA had a reliable basis for its assertion that the margin of error in customers' stated expenditure could be explained by accounting systems.

124. Further, Tobii argued that it was also unable to make specific, informed and meaningful submissions regarding the CMA's assessment, analyses and reliance on the customer evidence. In particular:

(1) Whether the CMA had fairly and accurately reflected and considered the totality of the evidence from customers;

(2) Whether the CMA had an evidential basis for the four dimensions of its definition of dedicated AAC solutions; and

(3) Whether the CMA's quantitative assessments and analyses (such as for market shares, diversion ratios, GUPPIs and closeness of competition) of customer evidence were accurately, correctly and fairly assessed and relied on.

125. Tobii contended that it was limited to making generalised submissions and critiques and the fact that it was able to make some response to and put forward arguments regarding the Provisional Findings did not mean that the CMA fulfilled its duty to act fairly.

126. Tobii argued that the CMA had disclosed during the investigation limited documents into the confidentiality ring. In Tobii's submission, by refusing to disclose other documents and data on which the CMA based its findings and that are thus core to the gist of its case, the CMA did not behave consistently, fairly and rationally. Tobii relied on *Ryanair* at [134] and contended that, had the CMA considered the information so sensitive that it could not be disclosed, then it should not have relied on the information at all.

127. Tobii submitted that the CMA's justification for refusing disclosure in order to protect the candour of parties' dealings with it was without merit. The CMA's confidentiality obligations did not prevent disclosure into a confidentiality ring

as s.244(4) of the 2002 Act expressly states that confidentiality is not a bar to disclosure and the CMA's own guidance expressly states that the CMA may use confidentiality rings and data rooms when its functions require it to disclose confidential information. Following the CMA's disclosure in these proceedings to Tobii of the Anonymised Customer Responses, Tobii submitted that the fact that the CMA had now disclosed them demonstrated that disclosure into a confidentiality ring during the CMA's investigation was feasible.

128. Further, having been provided now with the Anonymised Customer Responses, Tobii submitted that the CMA did not adequately disclose the gist of its case because the responses show a different picture from that painted by the CMA. The summaries of evidence made by the CMA and disclosed in its working papers and Provisional Findings did not reflect the totality of the evidence the CMA collected in a balanced way but were very partial, presented only the CMA's view and were drafted to support the CMA's case. In oral submissions, Counsel for Tobii described the CMA's approach not as bad faith but one of confirmation bias in that the CMA looked at the evidence it had and used it to support a market definition that it had already determined was the correct market definition.

129. Looking at the actual responses, the position is asserted to be much more nuanced and much broader than presented by the CMA in its Provisional Findings. According to Tobii, the Anonymised Customer Responses instead show that:

(1) The vast majority of Phase 2 respondents considered mainstream devices to be a credible and significant AAC solution for end users and many respondents stated that many of their end users use AAC solutions based on consumer tablets;

(2) 62% of respondents identified Tobii Dynavox's customer support as a weakness. This suggested that either customer support is not a key component of dedicated AAC solutions and the CMA had defined the market incorrectly, or that customer support is a key component of

dedicated AAC solutions and Tobii Dynavox was a weak competitor; and

(3) 46% of respondents stated that the end user is a key driver of the purchasing decision.

130. In Tobii's submission, fairness required disclosure of the actual evidence on which the CMA relied.

(ii) The CMA

131. The CMA submitted that it is well established that a party does not have an absolute right to see the evidence obtained by a public authority or to verify the accuracy of the evidence (*BMI* at [39(4)]). Rather, a party is entitled to adequate disclosure of the gist of the case it has to answer so that it can make informed submissions to the authority (*Doody*). Depending on the facts of the case, this may include – but does not necessarily require – disclosure of the underlying evidence (*Ryanair Holdings PLC v Competition and Markets Authority* [2013] CAT 25). The CMA disagreed that Tobii should be able to test whether the CMA's summaries reflected the totality of that evidence in a balanced way because the CMA relied extensively in its Final Report on information provided to it by third parties and had only provided Tobii with summaries of that information rather than the evidence itself.

132. Before the CMA published the views of the merging parties or third parties in working papers, the Provisional Findings and the Final Report, the text that the CMA proposed to include was checked with the relevant person through a 'put back' process where the CMA sought confirmation of its accuracy and confidentiality representations. This 'put back' process is a standard verification process in all merger inquiries and was used in this case. The CMA noted that Tobii dismissed the CMA's careful 'put back' process, but submitted that this process is important because it meant that summaries or descriptions of specified information were sent to the party who had provided the information in order to verify the factual correctness of its content and identify any confidential material prior to publication.

133. The CMA submitted that paragraphs 6.2 and 6.3 of the CC7 Guidance specifically addresses how the competition authority should deal with information received during the course of an investigation:

> "6.2 The information received through such responses from main and third parties is predominantly of a factual nature (often of confidential information relating to the firm's business) although there may be some content that expresses the party's views. The factual information in particular may be revised or supplemented in the course of the CC's inquiry or review. Particularly in inquiries, some of the information initially received may enable the development of the CC's understanding of the market and the parties concerned but may not be of relevance to the CC's analysis and ultimately, its findings.
>
> 6.3 **In most inquiries and reviews it will not be appropriate to disclose these responses. However, as the inquiry or review develops, the Group may need to consider which of the factual information provided is relevant to its analysis and as such should be disclosed. The usual form of disclosure of such information will be through the incorporation of relevant material into the CC's documents (eg annotated issues statement, any disclosed working papers, provisional findings decision and report, and for reviews, the provisional decision and final decision or notice of intention to vary or terminate the remedy). Data will often be aggregated** (see Part 9). See paragraphs 6.4 to 6.8 below in relation to the handling of any views included in such responses." [CMA's emphasis]

134. Although the CMA did not provide Tobii with the requested documents during the investigation, it gave Tobii a detailed explanation of what it had done and took from the questionnaires to enable Tobii to understand the case against it and to respond to that case. The witness statement of Mr Meek also sets out specifically what the CMA did as regards the customer questionnaires and responses in this case. The CMA included detailed explanations in its Provisional Findings on the customer evidence underlying the CMA's findings, including explaining the qualitative questions asked and providing a summary of the responses received with specific examples. The CMA considered this was sufficient information to enable Tobii to make worthwhile representations on the CMA's approach to evidence gathering and its assessment of the evidence, and Tobii had not shown the Tribunal anything or any specific problems with the disclosure made in the Provisional Findings.

135. In particular, the CMA argued that the level of detail which it provided in this case as regards the questionnaires was unusually extensive. In response to Tobii's concerns regarding the customer questionnaires, the CMA even

identified in footnotes to the Provisional Findings the exact wording of the questions in the questionnaires. (For example, Provisional Findings footnotes 153, 154 and 198.) This was to enable Tobii to make informed submissions, which it did in its response to the Provisional Findings and which the CMA took into account.

136. The CMA submitted that the information contained in its working papers and Provisional Findings enabled Tobii to make informed submissions and was more than adequate to discharge its obligations. For example, the CMA communicated to Tobii the gist of the customer evidence regarding:

(1) Market definition (Provisional Findings paragraphs 5.14 to 5.21, 5.68 and 5.70 to 5.72);

(2) Its assessment of horizontal unilateral effects (Provisional Findings paragraphs 6.7 to 6.9, 6.12 to 6.19, 6.37 to 6.43 and 6.53);

(3) Its calculation of diversion ratios (Provisional Findings paragraphs 5.22 to 5.23 and 6.36 to 6.40) and GUPPI (Provisional Findings paragraphs 6.41 to 6.49); and

(4) Its assessment of vertical input foreclosure (Provisional Findings paragraphs 7.21, 7.39 to 7.41 and 7.54).

Tobii was able to and responded to these in written correspondence, its response to the Provisional Findings and at the main party hearing.

137. The CMA disputed Tobii's argument that the CMA's disclosure of a limited set of material into a confidentiality ring meant the non-disclosure of all other types of confidential information requested by Tobii was unfair and unreasonable. The CMA decided to disclose the underlying data for the CMA's GUPPI calculations and the evidence relied upon in the CMA's counterfactual analysis into the confidentiality ring in the interest of transparency and co-operation. The other documents were not disclosed to Tobii because the CMA considered

it had adequately communicated the gist of the case to Tobii and further disclosure was therefore not necessary.

138. In the CMA's submission, it was lawful for it to balance the need to ensure Tobii was treated fairly during the inquiry, on the one hand, and the need to provide suitable protection for commercially confidential and sensitive information of others, on the other. The necessity and lawfulness of such a balancing exercise was recognised by the Tribunal in *Eurotunnel* at [221] and in the CC7 Guidance at paragraph 9.13. Furthermore, the CMA needs to encourage, as far as possible, third parties to disclose information to it and not to generate the perception that information disclosed in confidence to the CMA will routinely be disclosed in whatever form. Moreover, the CMA did not and does not seek to justify its refusal of Tobii's requests for disclosure on the ground that the information is confidential. Part 9 of the 2002 Act requires the CMA to be satisfied that disclosure is necessary for discharging its s.104 duty to consult a party affected by a proposed decision. This is considered before the question of confidentiality even arises.

139. The CMA submitted that a confidentiality ring is not always the appropriate method of protecting confidential information that must be disclosed. Paragraph 9.14 of the CC7 Guidance explains that there are at least eight ways that access to such information may be provided. The CMA also disputed Tobii's argument that the CMA's disclosure to Tobii of the Anonymised Customer Responses demonstrated that disclosure into a confidentiality ring during the CMA's investigation was feasible. Tobii's argument disregarded the legitimate concern about the risks of confidentiality rings being higher in a merger inquiry than in proceedings before the Tribunal. The risks are higher because the CMA does not have the same powers of enforcement as the Tribunal.

140. The CMA disagreed with Tobii's analysis of the disclosed Anonymised Customer Responses. It submitted that the questionnaires asked a number of open questions and, consequently, the respondents' answers to those questions are not susceptible to the quantitative analysis that Tobii attempted. Instead, it

is necessary and appropriate to read the entirety of each response in order to understand the respondent's views properly. In particular:

(1) The CMA disputed as incomplete and irrelevant Tobii's claim that the vast majority of Phase 2 respondents considered mainstream devices to be a credible and significant AAC solution for end users. Tobii failed to acknowledge that many customers also identified a range of circumstances where a mainstream device could not be substituted for a dedicated AAC device. Paragraph 6 of Appendix C to the Final Report also explains why it is irrelevant:

> "The question is not whether the Parties' customers could or could not use a non-dedicated AAC solution, but whether a significant share of these customers consider non-dedicated AAC solutions as their closest alternative to the dedicated AAC solution they are using pre-Merger".

(2) Tobii's binary thesis regarding customers' views of Tobii's customer support is a 'straw man'. It is not the necessary implication of the evidence before the CMA. Customers identifying Tobii Dynavox's customer support as a weakness did not mean that non-dedicated AAC solutions exert a sufficient competitive constraint on the merging parties' dedicated AAC solutions. A reasonable decision maker must take into account all relevant evidence and then exercise its judgment as to the proper scope of the relevant market, which is exactly what the CMA did. (Final Report paragraph 5.78.) Moreover, the fact that a number of customers perceived Tobii's customer support as a weakness did not mean Tobii was a weak competitor. A supplier's strengths and weaknesses must be considered in the round, and the CMA took into account both that evidence and the ample evidence of Tobii's strengths as a competitor. (For example, Final Report paragraphs 6.15(a), 6.23, 6.27, 6.29 and 6.34.)

(3) With regard to Tobii's analysis that 46% of responses stated that end users are a key driver of the purchasing decision, the CMA accepted that most respondents emphasised that end users are consulted and, understandably, that their views are important. More importantly, however, more than 50% of the responses said that end users were

mostly or usually happy to be guided by expert advice. Of the remaining responses, most said that the position varied and that some end users had strong views but others were happy to be guided by expert advice. This demonstrated again that the responses are not really suitable for quantitative analysis of the kind attempted by Tobii and should be read as a whole.

(b) The Tribunal's analysis

141. In the context of this case, the CMA was not obliged during its investigation to disclose to Tobii every piece of specified information it received (see *BMI* at [39(4)], which is summarised at [60] of this judgment). It was entirely reasonable for the CMA to disclose evidence to Tobii by means of its Provisional Findings and in a way which complied with the CMA's obligations under Part 9 of the 2002 Act. Therefore, the question for this Tribunal is whether the disclosure which the CMA made to Tobii in the Provisional Findings was fair. In short, was the evidence and information disclosed by the CMA to Tobii in its Provisional Findings sufficient to enable Tobii to understand the gist of the case it had to answer?

142. As the Tribunal observed in *Ryanair* at [116], fairness is an evolving concept. In light of the particular contentions raised by Tobii following its review and analysis of the Anonymised Customer Responses, fairness in respect of the customer evidence in this case also includes whether the disclosures made by the CMA in the Provisional Findings were misleading or contained material omissions such that Tobii was unable to understand sufficiently the gist of the case it had to meet and make representations to the CMA.

143. In assessing whether the disclosure of customer evidence in the Provisional Findings was fair, the Tribunal is not influenced in this case by the number of requests for disclosure made by Tobii during the CMA's investigation. The Tribunal also has, in the particular circumstances of this case, the benefit of the customer questionnaires and the disclosed Anonymised Customer Responses in addition to the Provisional Findings and Final Report.

144. The Tribunal has carefully read the customer questionnaires, Anonymised Customer Responses and the relevant paragraphs in the Provisional Findings, which provide summaries of the customer evidence. In the Tribunal's view, the disclosure of customer evidence provided by the CMA to Tobii in the Provisional Findings was fair. The CMA outlined the topics that were contained in the customer questionnaires and, in respect of particular questions, the exact wording of the question. The CMA's summaries of the Anonymised Customer Responses in the Provisional Findings were also fair. Although the customer evidence was presented in a way to satisfy the CMA's duty under s.104(2) and (3) of the 2002 Act to provide reasons for its proposed decision, the Tribunal is satisfied in this particular case that the CMA's summaries of the Anonymised Customer Responses were neither inaccurate nor misleading and the disclosure made in the Provisional Findings informed Tobii of the gist of the case it had to meet and for it to make meaningful representations to the CMA. The Tribunal notes that the Provisional Findings in this case also included information and customer evidence, which Tobii could rely on to seek to refute, challenge or undermine the CMA's proposed decision. For example:

(1) The CMA recognised that customers placed a high priority on meeting end user needs. (Provisional Findings paragraphs 5.18 and 7.54.)

(2) The CMA acknowledged that there were a few customers who had positive views about the merger. (Provisional Findings paragraph 6.15.)

(3) The CMA recognised that customers used mainstream devices and non-dedicated solutions, although customers also identified technical and practical limitations. (Provisional Findings paragraphs 5.18 to 5.19 and 5.71 to 5.72.)

(4) The summaries noting that customers were concerned about a reduction in range and deterioration of Smartbox's customer service reflected the customer responses. (Provisional Findings paragraphs 6.1, 6.17, 6.19 and 6.55.)

(5) The summaries provided a considerable level of detail of particular customer responses and their identities. (For example, Provisional Findings paragraphs 5.20 to 5.21, 5.70 to 5.72, 6.14(e) and (g), 6.19 and 7.40; Provisional Findings footnotes 253 to 255 and 292 to 294.)

(6) The CMA identified the range of competitors identified by customers. (For example, Provisional Findings paragraphs 6.8, 6.13, to 6.14, 6.53(b) and 8.45; Provisional Findings footnote 196.)

(7) The CMA acknowledged that the availability of the Grid on Liberator or Techcess devices was not very important to two (out of 18) customers. (Provisional Findings paragraph 7.39(b).)

(8) The CMA identified limitations or qualifications to its analysis of customer evidence. (Provisional Findings paragraphs 5.30 to 5.31, 6.40 and 7.33 to 7.35; Provisional Findings footnote 256.)

(9) The wording of particular questions in the customer questionnaires was provided in the Provisional Findings. (Provisional Findings footnotes 153 to 154 and 198.)

145. In respect of Tobii's argument based on *Ryanair* at [134] (which is set out at [126] of this judgment), the Tribunal does not consider it applicable in this case as the CMA's reason for refusing to disclose the customer questionnaires and responses to Tobii during the investigation was not due to the sensitivity of the evidence.

146. Accordingly, the Tribunal finds that the disclosure of the actual customer questionnaires and responses were not required in order for the CMA to disclose the gist of its case. Tobii was able to respond to the Provisional Findings and in fact did so by way of detailed and extensive submissions (including in Part E to its response to the Provisional Findings). It was evidently aware of the case and concerns that it had to meet. It is for the CMA to conduct its own investigation within a relatively short time frame and to gather, analyse and pull together the evidence. It is not desirable or appropriate for the CMA to provide

the underlying evidence to the affected party, so as to enable the affected party itself to carry out its own analysis and review of the underlying evidence. To require disclosure to such a level would have a detrimental impact on the process. It may lead to persons becoming less willing to co-operate, as well as delays in a field where decisions on mergers should be made as quickly as reasonably practicable.

(3) Issue 1(b): Was disclosure of Smartbox information including transcripts of hearings, interviews or telephone calls with Smartbox, responses to information requests and internal documents, required in order for the CMA to disclose the gist of its case?

(a) The parties' submissions

(i) Tobii

147. Tobii submitted that the CMA relied extensively on information and internal documents provided by Smartbox's management in its Provisional Findings and Final Report, but only brief summaries of the parts of Smartbox's evidence that the CMA considered to be of assistance to its case were set out in the Provisional Findings.

148. Without sight of the actual Smartbox evidence, Tobii stated that it was unable to make representations on whether the CMA's interpretation of and reliance on them were appropriate and justified.

149. Tobii claimed that it was also unable to challenge or make detailed representations on the veracity and reliability of the evidence provided by Smartbox's management, which had a vested interest in an outcome that could have provided an opportunity to re-acquire Smartbox for considerably less than Tobii paid for it.

150. Tobii contended that it was limited to making generalised submissions and critiques and the fact that Tobii was able to make some response to and put

forward arguments regarding the Provisional Findings did not mean that the CMA fulfilled its duty to act fairly.

151. Tobii argued that the CMA had disclosed during the investigation limited documents into the confidentiality ring. Tobii submitted that, by refusing to disclose other documents and data on which the CMA based its findings and that are thus core to the gist of its case, the CMA did not behave consistently, fairly and rationally. Tobii relied on *Ryanair* at [134] and contended that had the CMA considered the information so sensitive that it could not be disclosed, then it should not have relied on the information at all.

152. Tobii submitted that the CMA's justification for refusing disclosure in order to protect the candour of parties' dealings with it was without merit. The CMA's confidentiality obligations did not prevent disclosure into a confidentiality ring as s.244(4) of the 2002 Act expressly states that confidentiality is not a bar to disclosure and the CMA's own guidance expressly states that the CMA may use confidentiality rings and data rooms when its functions require it to disclose confidential information.

(ii) The CMA

153. The CMA's submissions set out under Issue 2(a) (which are set out at [131] to [133] of this judgment) regarding the principles established by the case law, the CMA's 'put back' process and the CC7 Guidance apply also in respect of Smartbox's information and documents.

154. The CMA submitted that it provided to Tobii the gist of the CMA's case in respect of the information received from Smartbox and enabled Tobii to make informed submissions. The information included:

(1) Rationale for the merger (Provisional Findings paragraph 3.20);

(2) Counterfactual (Provisional Findings paragraphs 4.6 to 4.13, 4.23 to 4.26, 4.41, 4.43(a), 4.44(b) and 4.45 to 4.46);

(3) Market definition (Provisional Findings paragraph 5.71);

(4) Horizontal effects (Provisional Findings paragraphs 6.24 and 6.30);

(5) Vertical effects (Provisional Findings paragraphs 7.12, 7.15(a) 7.23, 7.82(c), 7.86(a), 7.111(a) and (b));

(6) Entry and expansion (Provisional Findings paragraphs 8.13 to 8.22 and 8.56).

Further, Tobii was able to and responded to these in some detail in its response to the Provisional Findings and at the main party hearing.

(b) The Tribunal's analysis

155. Similar to the customer questionnaires and responses considered by the Tribunal under Issue 1(a), the relevant legal principles regarding disclosure for procedural fairness which are set out in *Ryanair* apply in respect of Smartbox's information and documents.

156. For the reasons set out by the Tribunal at [141] of this judgment, the CMA was not obliged during its investigation to disclose to Tobii the specified information it received from Smartbox. It was entirely reasonable for the CMA to disclose that evidence to Tobii by means of its Provisional Findings and in a way which complied with the CMA's obligations under Part 9 of the 2002 Act.

157. In respect of Smartbox's information and documents, the Tribunal notes that the Provisional Findings included summaries of:

(1) Smartbox's view on the rationale for the merger with Tobii and the CMA's assessment of it. (Provisional Findings paragraph 3.20 to 3.22.)

(2) Smartbox's view on the counterfactual had the business not been acquired by Tobii and the CMA's assessment of it. (Provisional Findings paragraphs 4.6 to 4.13, 4.17 to 4.30 and 4.41 to 4.57.)

(3) Smartbox's internal documents concerning non-dedicated AAC solutions. (Provisional Findings paragraphs 5.42 to 5.47.)

(4) Smartbox's internal documents relating to the monitoring and benchmarking of competitors. (Provisional Findings paragraphs 6.24 to 6.26 and 8.23.)

(5) Smartbox's internal documents outlining its product development plans. (Provisional Findings paragraphs 6.30 to 6.32.)

(6) Information from Smartbox regarding the Grid. (Provisional Findings paragraphs 7.15, 7.21(d), 7.86(a) and 8.56; Provisional Findings footnotes 235 and 246.)

(7) Information from Smartbox regarding AAC eye tracking technology. (Provisional Findings paragraphs 7.111(a) and (b).)

(8) Smartbox's view on entry and expansion in the UK AAC sector and the CMA's assessment. (Provisional Findings paragraphs 8.13 to 8.23.)

158. In the Tribunal's view, these summaries of Smartbox's information and documents in the Provisional Findings provided Tobii with a sufficient gist of the case it had to meet and for it to make representations to the CMA.

159. Furthermore, the Smartbox information referred to in the Provisional Findings that appears in redacted form largely relates to Smartbox's commercial information, such as its revenue and sales figures. (Provisional Findings paragraphs 2.52; Figure 2-1; Tables 2-4 and 2-5.) The Tribunal does not consider it necessary for Tobii's external advisers to be permitted access within a confidentiality ring to the commercial details in Smartbox's information and documents in order to understand the case it had to meet and make representations to the CMA.

160. In relation to Tobii's contentions that, without sight of the underlying Smartbox information and documents, it was unable to challenge or make detailed representations on the CMA's interpretation of the documents or on the veracity and reliability of the evidence provided by Smartbox's management, the

Tribunal refers to the observations and reasoning set out in *Ryanair* at [143(3)] and [143(6)]. These are summarised at [120] of this judgment.

161. Although Tobii's contention in respect of Smartbox's information and documents does not relate to the identity of the information and document owner, the principles and reasoning in *Ryanair* can be applied to this case. It was not necessary in this case for Tobii or its external advisers within the confidentiality ring to check the CMA's interpretation of the Smartbox information and documents or the veracity and reliability of the evidence provided to the CMA by Smartbox's management. It was also not necessary for Tobii or its external advisers within the confidentiality ring to be permitted access to Smartbox's information and documents in order for Tobii to raise its concerns regarding the Smartbox management's vested interests. Indeed, Tobii raised this concern after receiving the Provisional Findings and without having sight of the underlying Tobii information and documents, and the CMA addressed Tobii's concern in its Final Report at paragraph 10.6.

162. The Tribunal's reasons at [145] of this judgment regarding the applicability of *Ryanair* at [134] to the customer questionnaires and responses apply equally in respect of Smartbox's information and documents.

163. The Tribunal also reiterates *Ryanair* at [138], which addressed Ryanair's submission that the redacted material it sought could have been protected by a confidentiality ring: "*These points are indeed relevant if it is decided that it was in fact necessary as a matter of procedural fairness for disclosure to have been made*". In this case, a sufficient gist of the case Tobii had to meet was provided in the Provisional Findings, so it was not necessary for Tobii or its external advisers to have Smartbox's information and documents. Tobii was able to provide detailed and meaningful responses to the Provisional Findings in its written response to the Provisional Findings, which were provided to the CMA on 13 June 2019.

164. Accordingly, the Tribunal finds that the disclosure of Smartbox's information and documents was not required in order for the CMA to disclose the gist of its case.

(4) Issue 1(c): Was disclosure of the questionnaires sent to competitors (suppliers of AAC solutions or mainstream devices, resellers of AAC solutions or eye gaze camera suppliers) and the responses thereto, and the transcripts of hearings, interviews or telephone calls with competitors required in order for the CMA to disclose the gist of its case?

(a) The parties' submissions

(i) Tobii

165. Tobii submitted that the CMA relied extensively on competitor evidence in its Provisional Findings and Final Report, in particular for its vertical foreclosure findings and quantitative analyses for which independent statistical data was not available.

166. Without sight of the competitor questionnaires and responses, Tobii alleges that it was unable to make informed representations on the competitor evidence. In light of the CMA's inclusion of sales of Tobii's Indi and Eye Mobile products (Final Report paragraphs 5.4 and 5.5) even though Tobii contended that they were not sold with customer support and thus fell outside the CMA's definition of dedicated AAC solutions, Tobii had no means without the underlying data of verifying the accuracy of the CMA's analysis, such as which competitor product sales the CMA had included within the relevant market defined by it.

167. Tobii contended that it was limited to making generalised submissions and critiques and the fact that Tobii was able to make some response to and put forward arguments regarding the Provisional Findings did not mean that the CMA fulfilled its duty to act fairly.

168. Tobii again relied on *Ryanair* at [134] and made similar submissions on confidentiality and the CMA's failure to act consistently, fairly and rationally to those set out under Issue 1(b) (which are set out at [126] and [151] of this judgment).

(ii) The CMA

169. The CMA's submissions set out under Issue 2(a) (which are set out at [131] to [133] of this judgment) regarding the principles established by case law, the CMA's 'put back' process and the CC7 Guidance apply also in respect of the competitor questionnaires and responses.

170. The CMA submitted that it communicated to Tobii the gist of the competitor evidence and enabled Tobii to make informed submissions. This included information regarding:

(1) Market definition (Provisional Findings paragraphs 5.33 to 5.40, 5.78 and 5.83);

(2) Horizontal effects (Provisional Findings paragraphs 6.7 to 6.11, 6.20 to 6.21 and 6.53);

(3) Vertical effects (Provisional Findings paragraphs 7.17 to 7.21, 7.58 to 7.60, 7.64 to 7.65, 7.73 to 7.76, 7.78 to 7.86, 7.89, 7.109, 7.111, 7.113 and 7.116); and

(4) Entry and expansion (Provisional Findings paragraphs 8.25 to 8.42, 8.60, 8.64 to 8.66 and 8.72 to 8.73).

Therefore, Tobii was placed in a position where it could make informed submissions, which it did in its response to the Provisional Findings and at the main party hearing.

171. Moreover, the CMA carefully considered and responded to the various submissions made by Tobii in response to the provisional finding of an SLC in the Final Report.

(b) The Tribunal's analysis

172. Similar to the customer questionnaires and responses considered by the Tribunal under Issue 1(a), the relevant legal principles regarding disclosure for

procedural fairness which are set out in *Ryanair* apply in respect of the competitor questionnaires and responses.

173. For the reasons set out by the Tribunal at [141] of this judgment, the CMA was not obliged during its investigation to disclose to Tobii the specified information it received from competitors. It was entirely reasonable for the CMA to disclose the competitor evidence to Tobii by means of its Provisional Findings and in a way which complied with the CMA's obligations under Part 9 of the 2002 Act. Tobii was able to provide sufficiently detailed and meaningful responses to the Provisional Findings as a whole, as noted at [163] of this judgment.

174. The Tribunal refers to the observations and reasoning set out in *Ryanair* at [143(2)] and [143(3)]. These are summarised at [118] and [120] of this judgment. Applying these principles to the present case, it was not necessary for Tobii or its external advisers within the confidentiality ring to be permitted access to the competitor questionnaires and responses to conduct a verification exercise on the competitor data and points of detail in the CMA's statistical and quantitative analysis. It is for the CMA to assess the competitor evidence and put a sufficient gist of its case to Tobii for it to make representations. The Tribunal has read the relevant paragraphs in the Provisional Findings, which set out the competitor evidence on market definition, horizontal effects, vertical effects and entry and expansion and considers that a sufficient gist of the case Tobii had to meet and for it to make representations to the CMA was disclosed.

175. The Tribunal's reasons at [145] of this judgment regarding the applicability of *Ryanair* at [134] to the customer questionnaires and responses apply equally in respect of the competitor questionnaires and responses.

176. The Tribunal's reasoning at [163] of this judgment regarding whether the material sought could have been protected by a confidentiality ring applies equally in respect of the competitor questionnaires and responses.

177. Accordingly, the Tribunal finds that the disclosure of the competitor questionnaires and responses was not required in order for the CMA to disclose

the gist of its case. Therefore the Tribunal dismisses Tobii's challenge under Ground 1 in its entirety.

H. TOBII'S GROUND 2: MATERIAL ERRORS IN THE COLLECTION OF EVIDENCE MEAN THAT THE FINDING OF AN SLC IS NOT SUPPORTED BY THE EVIDENCE

178. Tobii alleges that the approach taken by the CMA to collect evidence was outside its margin of appreciation. In particular, the CMA collected evidence from a narrow subset of third parties and committed material errors in respect of the collection of evidence, which meant that the CMA's finding of an SLC was not supported by relevant, reliable and consistent evidence.

(1) Preliminary observations

179. At the hearing, Tobii and the CMA agreed that the relevant test that the Tribunal is to apply in relation to Tobii's Ground 2 is the rationality test in judicial review, following the principles set out in *BAA*. However, they were not agreed what impact, if any, the divestiture remedy and, thus, Article 1 of the First Protocol to the ECHR had on the application of those principles. Nonetheless, Tobii and the CMA were in agreement that, in accordance with *BAA* at [20(3)], the CMA must, in the case of Tobii's acquisition of SATL and SSIL, take reasonable steps to acquaint itself with the relevant information to enable it to answer each statutory question posed to it.

180. The extent of such reasonable steps has been considered by the Tribunal in *Akzo Nobel N.V. v Competition Commission* [2013] CAT 13 ("*Akzo Nobel*"), which concerned an application brought under s.120 of the 2002 Act for a review of the Competition Commission's decision that the proposed acquisition by Akzo Nobel of Metlac Holding S.r.l. ("Metlac") would lead to an SLC for one particular segment of the metal packaging coatings market. In *Akzo Nobel*, the proposed acquisition had been considered by the Competition Commission and a number of other competition authorities, including the Bundeskartellamt. As part of the Bundeskartellamt's investigation under German law, it carried out a postal survey of customer views and collected pricing data. A subset of these

survey responses comprising Metlac's customer data was provided by the Bundeskartellamt to the Competition Commission (the "Metlac Customer Data"). During the Competition Commission's investigation, it analysed the Metlac Customer Data, as well as customer views provided in response to its own customer surveys, oral hearings and written follow-up questions. The Competition Commission also made site visits and conducted its own pricing analysis. Akzo Nobel alleged that, by relying on a partial set of pricing data from the Bundeskartellamt's survey, the Competition Commission failed to have regard to a material consideration, namely the pricing data from a broader range of customers. Akzo Nobel also contended that there were flaws in the Competition Commission's survey due to sampling bias and the use of leading questions, and the Competition Commission failed to conduct a sufficient inquiry because, rather than simply attaching limited weight to its pricing data, it should have conducted further inquiries and analyses to ensure it was comparing like for like.

181. The Tribunal rejected Akzo Nobel's challenge that the Competition Commission failed to have regard to a material consideration because the Competition Commission had carried out its own inquiries and was aware of the dangers of placing too much emphasis on the Metlac Customer Data and cross-checked its conclusions:

> "144. … First, it must be recalled that there are only four buyers of B2E products of any significance in the UK. That made the target population from which a sample could be drawn exceptionally small to begin with. Secondly, it is, with such a small population, almost impossible to carry out any probative statistical analysis. This means that customer views (albeit that these must be properly tested) take on a renewed significance that might not be seen in more diverse markets. Thirdly, whilst the Commission does accord prominence to the views of Metlac's customers in the Report, it is not accurate to say that it ignored the views of other buyers. In particular, we note that the Commission sent detailed questionnaires to 15 large customers, all of which were supplied by AkzoNobel and 14 of which bought from Metlac (see Report, Appendix K, paragraph 12). The Commission records that it actually received more responses from AkzoNobel's customers than it did from Metlac's (Report, Appendix K, paragraph 14). It further records that it considered whether the views were biased towards existing customers of Metlac alone and concluded they were not (Report, Appendix K, paragraph 15).
>
> 145. It is our view that, on that basis, it cannot be said that the Report suffered from some inherent sampling bias. The Commission plainly took care to gather views from a range of customers and was alive to the dangers of placing too much emphasis on the views of Metlac's customers alone. Beyond that, and

> in accordance with the applicable judicial review principles set out in Section III. above, the relative weight to be placed on the views it received was principally a matter for the Commission. In any event, and as will be seen when we come to consider the Commission's own pricing analysis in Section V.D. below, the Commission sought to cross-check the conclusions it drew based on customer views against empirical pricing data."

182. The Tribunal also found that the context in which the Competition Commission's questions were asked was highly relevant. Although the Tribunal considered that the disputed question could have been phrased better, it was a follow-up question in relation to a matter that had already arisen and posed not to laypeople but to customers in the coatings industry:

> "150. Whilst it is clearly of the upmost importance that questions posed by the Commission in merger investigations are neutral and do not presuppose any particular answer, as per the OFT and Commission's guidance, we do consider that the context in which this question was asked is highly relevant. We do not doubt that the question could have been phrased better. In our view, however, it was quite proper for the Commission to follow-up on this issue that arose in the oral hearings before it. Had a question phrased in this manner been put in the main questionnaire, we would have had some concerns about the manner in which the Commission conducted its enquiry. As a follow-up question in relation to a matter which had squarely arisen and formed only one strand of the Commission's analysis on pricing, however, it is less objectionable. We also consider it relevant that this was not a question posed to consumers, in the sense of laypeople, but to customers in the coatings industry, who are undoubtedly of some commercial sophistication.
>
> 151. We are not persuaded that the less than perfect formulation of the question at issue undermines the Commission's entire conclusion on pricing, which is the subject of wider discussion and consideration in the Report."

183. As regards Akzo Nobel's argument that the Competition Commission failed to conduct a sufficient inquiry, the Tribunal disagreed and stated that:

> "160. […] As the Tribunal said in *Somerfield* (at [176], cited above), the question of precisely where the line is drawn in determining when an inquiry has gone far enough is an issue for the Commission to evaluate. We agree with the view of the Tribunal in *Somerfield* that it would need a strong case indeed to show that the Commission had manifestly drawn the line in the wrong place. AkzoNobel's case falls short of that standard. The Commission analysed the data arising from its price comparison and took it into account, albeit according it little weight for the reasons it gave. That it decided not to carry out further analyses, with a view to potentially attaching more weight to those findings, is very far from a manifest error.
>
> […]
>
> 163. Had the Commission based the SLC finding solely on this pricing data, the result of this challenge might have been different. In the event, however, the Commission considered a range of evidence regarding the competitiveness

> of Metlac's prices, most of which lent support to the conclusion that Metlac generally (but not always) offered low prices in the relevant markets. In attaching limited weight to its own pricing comparison, and balancing pricing information relied on by the BKartA with customer views, the Commission appropriately considered and weighed the available evidence. In our view the Commission did not commit a reviewable error and AkzoNobel's argument regarding the Commission's pricing analysis fails."

(2) Issue 2(a): Was it unreasonable or irrational for the CMA to focus its evidence gathering from customers to institutional customers (such as the NHS, schools and charities) and interest groups and not to directly solicit evidence from end users of AAC solutions (or their parents/carers)?

(a) The parties' submissions

(i) Tobii

184. Tobii submitted that the CMA focused its investigation unduly narrowly and its approach to obtaining evidence was unreasonable. The CMA did not proactively obtain evidence from end users of AAC solutions or their parents/carers, who represent 90% of AAC users and are not supported through specialist NHS Hubs. Instead, the CMA relied heavily on evidence from a subset of immediate purchasers, principally specialist NHS Hubs in England, which treat only about 10% of those in England that require an AAC solution, and other NHS bodies, schools, local authorities and charities. Moreover, only 30 customers out of the 69 contacted by the CMA responded and only 6 of the 16 interest groups contacted by the CMA responded.

185. According to Tobii, the CMA's approach of collecting evidence from institutional customers who constitute only a part of the total demand for AAC solutions meant that it was unable to properly determine the overall extent of demand-side substitutability for AAC solutions and diversion to reach an informed view on the substitutability between dedicated and non-dedicated AAC solutions.

186. In Tobii's submission, the CMA should have collected evidence from end users because they are a very important customer segment in their own right. End users represent a significant part of the merging parties' customer base for AAC

solutions, both through sales of devices with pre-installed software and standalone sales of AAC software, which end users download onto their own devices as an alternative to purchasing products such as Tobii's Indi and Smartbox's Grid Pad 8 and 10. Tobii did not accept the CMA's justification that it would have been counterproductive to contact end users because people are forced, due to the nature of their conditions or those they care for, to become very sophisticated in identifying and addressing their needs. Indeed, the Anonymised Customer Responses confirmed that the needs and preferences of end users are an important factor in the demand for AAC solutions.

187. Further, the demand of institutional purchasers such as NHS Hubs is derived from and influenced by the demand of end users.

188. In addition, AAC solutions are highly differentiated products and the mix of AAC solutions purchased varied significantly by customer segment, of which end users are a significant customer group. Tobii Dynavox's transactions data confirmed that there was substantial variation in demand by customer segment and showed that the CMA's assertion that Tobii Dynavox and Smartbox did not differentiate their offering by customer category was misconceived. The CMA's assertion that NHS purchasers interacted with the market more frequently had no evidential basis and was inconsistent with the CMA's approach to diversion where its questions were framed on the basis that NHS Hubs purchased infrequently on a bulk basis.

189. Tobii also commissioned its own End User Survey, which was an online survey of 101 end users of AAC solutions and their parents/carers that was constructed to comply as closely as possible with the recommendations of the CMA's Survey Guidance. Tobii engaged market research specialists, Caroline Thompson Associates, and took independent advice on its survey design from Dr Harris from the Department of Economics at Oxford University. Tobii gave the CMA the opportunity to comment on the survey, which it did, and Tobii amended its survey in light of those comments. Tobii's End User Survey showed very different conclusions to the information the CMA obtained from institutional customers. In particular, it showed that:

(1) The diversion ratios between Tobii Dynavox and Smartbox were much lower than the 40 to 50% calculated by the CMA; and

(2) For many end users, AAC solutions based on mainstream consumer tablets were a relatively close alternative to the merging parties' products.

190. However, the CMA refused to give any weight whatsoever to Tobii's End User Survey and did not extend its own evidence gathering to include end users. Tobii submitted this was unreasonable in the absence of any other evidence on the demand of end users who actually use AAC solutions. Thus, the CMA unreasonably failed to take into account the possibility of differences in demand-side conditions across customer segments and that the divergence of results between Tobii's End User Survey and the evidence obtained by the CMA could have been due to shortcomings in the robustness of the CMA's own evidence.

191. In response to the CMA's objections to Tobii's End User Survey, Tobii submitted that the CMA ignored the need to make trade-offs between complying with the Survey Guidance in its entirety and obtaining data that had at least some evidential value.

(ii) <u>The CMA</u>

192. The CMA highlighted that evidence from customers was just one part of the whole evidential basis upon which the CMA relied in reaching its conclusions in this case. It looked at a broad range of evidence, which included evidence from customers, suppliers, competitors and the merging parties themselves. Paragraphs 5.78(a) to (e) of the Final Report set out the evidence that the CMA relied upon in reaching its conclusions on market definition, while paragraphs 6.61(a) to (k) summarised the evidence it considered in reaching its conclusions on horizontal effects. The CMA's summary of its findings at paragraph 6.61 of the Final Report state:

> "(a) The Parties' market shares in the supply of dedicated AAC solutions in the UK are [10-20%] for Tobii and [40-50%] for Smartbox, depending on the

source and metric considered, indicating that they have a very significant market presence at present. This gives them a substantial combined market share of approximately [60-70%], with a significant increment arising from the Merger. Market shares also indicate that there are only two other sizeable competitors in the market, Liberator and Techcess (with Techcess being significantly smaller than the other three).

(b) Most customers identify the Parties and Liberator as the main suppliers of dedicated AAC solutions in the UK, with Techcess mentioned as a smaller, lesser-known competitor.

(c) The majority of the customers who responded to our questionnaire raised concerns about the impact of the Merger. Most of the concerns raised related to potential deteriorations in quality, service (including customer support) and/or the range of products available.

(d) Submissions from competitors and resellers were consistent with the views expressed by customers. In general, they identified the Parties, Liberator and Techcess as the only significant suppliers of dedicated AAC solutions in the UK. Other market participants were generally described as providing different types of products or focusing on more specific customer segments.

(e) Based on the internal documents we have seen, Smartbox benchmarks its offering of dedicated AAC solutions exclusively against the three other providers of dedicated AAC solutions, namely Tobii, Liberator, and Techcess. Tobii appears to be mentioned more often than Liberator, which in turn appears to be mentioned more often than Techcess.

(f) Based on the internal documents we have seen, Tobii's monitoring of competition for dedicated AAC solutions focuses on Smartbox and [✂]. The documents show that Tobii considered Smartbox as a strong competitor, in particular due to the quality of its software. There are examples of Tobii expanding its product range and improving its software specifically in response to competition from Smartbox. The sequence of documents indicates that, over the 18 months preceding the Merger, Tobii was increasingly concerned by the competitive threat posed by Smartbox. [✂].

(g) Smartbox's product development plans indicate that, in the period leading up to the Merger, it had [✂] to improve its hardware.

(h) Tobii's product development plans indicate that, in the period leading up to the Merger, it was conscious of a competitive gap between its software offering and that of Smartbox. [✂].

(i) The closeness of competition between Tobii and Smartbox indicated by third party views and the Parties' internal documents and development plans is also supported by our estimates of the diversion ratios from Tobii's dedicated AAC solutions to Smartbox's products (at [50-60%]) and from Smartbox's dedicated AAC solutions to Tobii's products (at [✂] [30-40%]). Combining these diversion ratios with estimates of variable margins gives an estimate of the Gross Upward Pricing Pressure Index (GUPPI) of around [10-20%] for both Parties. We consider that the conclusion that the Parties face a significant incentive to raise prices post-merger is robust to potential measurement uncertainty: even if diversion ratios were half the level we have estimated, the Parties would face high GUPPIs and, therefore, would have strong incentives to raise prices post-Merger. Diversion to other suppliers indicates that only

> Liberator and, to a lower extent, Techcess, represent a meaningful constraint on the Parties.
>
> (j) As discussed in Chapter 5 (Market definition), the competitive constraint exerted by non-dedicated solutions on suppliers of dedicated AAC" solutions is much weaker than that exerted by suppliers of dedicated AAC solutions on each other. As such, the competitive interaction with non-dedicated solutions is unlikely to alleviate the effects of the removal of Smartbox as a competitor to Tobii.
>
> (k) As discussed in paragraph 5.50, Tobii's internal documents indicate that it developed the Indi [✂] to compete on price against non-dedicated AAC solutions, while Tobii's transaction data suggests that the introduction of the device has [✂] on sales of Tobii's other dedicated AAC solutions. As noted in paragraph 6.34(f), Smartbox's internal documents show that some of its devices, notably the Grid Pad 8 and the Grid Pad 10, compete to an extent with the Indi. Based on this evidence, our view is that the Indi is subject to stronger competitive constraints, particularly on price, from non-dedicated AAC solutions than the rest of the dedicated AAC solutions market and, as such, we consider it unlikely that Tobii could profitably raise the price for the Indi post-Merger."

193. As regards the collection of evidence from customers, the CMA submitted that it was rational for it to focus its customer inquiries on institutional customers such as NHS Hubs, other NHS bodies, schools, local authorities and charities because 90% of the merging parties' sales of dedicated AAC solutions are made to institutional customers who purchased these devices on behalf of end users and only 10% of their sales of dedicated AAC devices are made directly to individual end users. The CMA properly exercised its judgment by gathering evidence from NHS Hubs rather than from all end users with AAC needs because, in a merger case, it is the preferences and diversion patterns of the merging parties' customers of the products that form the basis for the SLC concern (in this case dedicated AAC solutions) that determine the merged entity's incentives to raise price and the likelihood of an SLC. (Final Report paragraphs 5.14 and 6.26 and Appendix C paragraph 5.)

194. Further, the CMA found that the merging parties offered the same prices, same range and same levels of service to institutional customers as they offered to end users buying directly. (Final Report paragraph 8.81.) There was no evidence that end users who purchased dedicated AAC solutions directly from the merging parties had different preferences and even if they did, this would not affect the CMA's findings since the average preferences and diversion behaviours of the merging parties' customers will be more heavily influenced

by the preferences and diversion behaviours of the customer groups who account for the vast majority of their sales of dedicated AAC solutions. (Final Report paragraph 6.26 and Appendix C.) In any event, the CMA did take into account the views of individual end users that were submitted. (Final Report paragraphs 6.22 to 6.28.)

195. Moreover, the CMA found that the purchasing decisions of institutional buyers are made by expert assessors in consultation with end users. Speech therapists evaluate the needs of end users and discuss options with them, but their decisions are not determined mechanistically by the needs and preferences of end users. (Final Report paragraphs 2.19 and 5.14.) The Anonymised Customer Responses showed that many or most end users were content to be guided by expert guidance. Therefore, it was not correct to say that the demand of institutional buyers is derived from the demand of end users. The CMA submitted that the snippets from the Anonymised Customer Responses that Tobii relied on were taken out of context and the responses should be read as a whole and considered alongside other evidence that the CMA took into account in the Final Report.

196. The CMA's conclusion that the evidence showed that the merging parties did not flex any aspect of their AAC offering depending on the identity of the customer was rational. (Final Report paragraph 6.56(c).) Tobii's contention that the analysis carried out by Economic Insight of Tobii Dynavox's transactions data showed errors in the CMA's approach demonstrated that Tobii was in reality making a merits-based challenge. In any event, Tobii's argument elided two points that have different economic implications for the substantive analysis: (i) whether the merging parties flex some parameters of their offering across different customer groups and (ii) whether different customer groups buy different product mixes. It is the first point that is relevant to the question of whether the CMA should analyse demand segment-by-segment or in aggregate. In the market for dedicated AAC solutions in the UK where the merging parties did not vary any aspect of their offering according to individual purchaser, it was not necessary to determine the preferences and likely diversion ratios for each customer segment.

197. The CMA considered in detail Tobii's End User Survey and decided not to give it any weight because, in the CMA's view, Tobii's End User Survey suffered from significant methodological flaws. These were addressed in the Provisional Findings (paragraph 6.46 and Appendix C) and the Final Report (paragraph 6.55(b) and Appendix C), and Tobii had not shown that the CMA's conclusion was irrational.

(b) The Tribunal's analysis

198. Under Issue 2(a), the CMA's finding at paragraph 5.14 of the Final Report that, based on the merging parties' transactions data, institutional customers such as the NHS, schools and charities comprised roughly 90% of their direct customers for dedicated AAC solutions was not in dispute. What Tobii disputed was the CMA's alleged failure to collect and consider evidence also from the end users with a full range of AAC needs, whether or not they were the purchasing customers of the AAC devices they used.

199. *Akzo Nobel*, referred to at [180] to [183] of this judgment, reinforced the principle that the question of precisely where the line is drawn in determining whether an inquiry has gone far enough is an issue for the relevant authority to evaluate and the Tribunal will need to be shown a strong case to show that the relevant authority manifestly drew the line in the wrong place (see *Akzo Nobel* at [160]).

200. The CMA explained at paragraphs 5.14 and 6.26 of the Final Report and at paragraph 5 of Appendix C its rationale for focusing its evidence gathering from customers to institutional customers, which comprise roughly 90% of the merging parties' dedicated AAC solutions customers. In the CMA's evaluation, in a merger case, it is the preference and diversion patterns of the merging parties' customers for the products that form the SLC concern that determine the merged entity's incentives to raise price and the likelihood of an SLC. Consequently, the CMA sent its customer questionnaires to institutional customers. (Final Report paragraph 5.15.) Nonetheless, the Final Report noted that the CMA also received evidence from some end users, who responded to the Provisional Findings, and the CMA considered their evidence. (Final Report

paragraphs 6.22 to 6.28.) The approach of the CMA as to from whom to seek evidence, focusing on institutional customers in particular, was entirely rational and reasonable.

201. Although the CMA did not exclude from its investigation consideration of evidence it received from end users, the CMA excluded in its assessment the results provided by Tobii from its End User Survey. The CMA explained its reasons in detail at paragraph 6.55(b) of the Final Report and paragraphs 9 to 15 of Appendix C to the Final Report.

> "6.55(b) We have discussed the second of Tobii's points (reliability of Tobii's survey of end-users) in Appendix C to this document. In our view, Tobii's survey suffered from several significant methodological flaws. In particular, the survey did not target the relevant population (it targeted individual purchasers of AAC solutions in general, rather than purchasers of the dedicated AAC solutions sold by the Parties), it achieved an insufficient sample size, it lacked transparency around the recruitment and composition of its online panel, and screening and consistency checks were not sufficiently rigorous for us to be confident that respondents were actually purchasers of AAC solutions. For these reasons, we cannot put any weight on this evidence."

202. Appendix C, to which paragraph 6.55(b) of the Final Report referred, contained a detailed elaboration of the CMA's observations in relation to each of the methodological flaws it identified.

> "10. We consider that some major issues have not been addressed and the survey has the following limitations. First, it is based on an online panel. Paragraph 2.29 of the CMA's [Survey Guidance] explains that samples for such panels are not random and that the CMA tends to place less evidential weight on results from them. Given the non-random nature of the sampling methodology, the CMA made clear to the Parties the importance of transparency and rigour of panel recruitment and data weighting methods for assessing the robustness of survey evidence. The Parties' submission includes a description of the methodology for the online panel written by Dynata, the market research company that conducted the survey. However, this description is not specific and provides little useful information for assessing the validity of this survey's results.
>
> 11. Second, the relevance and size of the sample falls short of the CMA's usual requirements for survey evidence in merger cases. The survey was completed by 101 end-users of AAC solutions or individuals who are responsible for making decisions on their behalf. Of these, 62 were customers of the Parties. The number of responses to diversion questions is very low – 6 responses from customers of Tobii Dynavox devices, 9 from customers of its software, 10 from customers of Smartbox devices and 19 from customers of its software. These numbers fall a long way short of the CMA's usual requirement of 100 respondents from customers of each Party. Tobii has acknowledged that the

small sample sizes make it difficult to draw strong inferences from the survey results.

12. Third, we have some reservations about the credibility of the achieved sample. Tobii's submission states that in 2018 Tobii Dynavox sold just over [✂] AAC products to [✂] individual customers. The survey purports to have obtained responses from [✂] purchasers of Tobii Dynavox products (hardware and software), ie 29% of the target population. This suggests that the online panel is either very large, or very significantly over-recruits among the types of people who are eligible for this survey. An alternative explanation might be that some respondents claimed to be eligible for the survey when they are not. The description of the online panel methodology makes clear that survey respondents are rewarded for taking part in surveys, and potential respondents therefore have an incentive to claim eligibility. Indeed, some of the survey metrics suggest that this may have happened; only 30 of the 101 survey respondents gave 'Disorder which requires technology to aid communication' as a response to one of the first two screener questions. The CMA has not been provided with sufficient information to assess the credibility of the achieved sample. In the absence of an explanation for the numbers obtained there remains a risk that some, or even most, respondents are not customers of the Parties, or of AAC solutions at all.

13. Fourth, the diversion question used by Tobii allowed respondents to divert to multiple brands without specifying the spend diverted to each brand. In our view, it is not possible to use responses to these questions to build diversion ratios that have a meaningful economic interpretation."

203. These portions of the Final Report show that the CMA considered Tobii's End User Survey, albeit it ultimately decided not to give any weight to it. This was an evaluative assessment that the CMA was entitled to make in respect of where to draw the line in its investigation. The CMA was not bound to accept Tobii's End User Survey and it provided a number of intelligible and adequate reasons why (see *BAA* at [20(8)]).

204. The Tribunal considers the reasons given by the CMA for focusing on the institutional customers whose demand comprised roughly 90% of the purchases of the products of concern to the CMA and for rejecting Tobii's End User Survey that did not focus on customers of these products convincing. The CMA's evaluation to focus its evidence gathering from institutional customers and to disregard Tobii's End User Survey was not unreasonable or irrational.

(3) Issue 2(b): Were the questionnaires by which the CMA sought evidence from customers and interest groups flawed, such that the evidence that the CMA obtained lacked credibility and was unreliable, such that the CMA could not reasonably rely on it?

(a) The parties' submissions

(i) Tobii

205. Tobii submitted that there were errors in the CMA's questionnaires, which were used to obtain data and evidence from customers and interest groups. It alleged that the CMA used poorly structured and biased questionnaires to obtain evidence from customers and interest groups, and that resulted in the CMA obtaining and using evidence that was inherently unreliable.

206. According to Tobii, some of the definitions used in the CMA's questionnaire did not appear to be based on any evidence as to the views of customers and did not make sense, having the potential to cause misunderstanding amongst respondents. For example, the CMA's definition of 'dedicated AAC solutions' appeared to exclude all AAC solutions that do not include an access method because the user is able to use the device's touch screen. Nonetheless, the CMA considered Tobii's Indi and I-110 devices (which do not include an access method) to be within the scope of the CMA's product definition. However, the questionnaire did not provide any indication as to which products of the merging parties or their competitors the CMA considered to be dedicated AAC solutions and respondents were left to determine this for themselves.

207. Tobii also submitted that the CMA's customer questionnaires did not comply with its own Survey Guidance. Although Counsel for Tobii accepted in oral submissions that *Akzo Nobel* did not place upon the CMA an absolute obligation to follow its Survey Guidance when obtaining evidence from third parties, Tobii submitted that the Survey Guidance was of the utmost importance particularly as regards the CMA's main questionnaire, which were not follow-on or follow-up questions of the sort that were in issue in *Akzo Nobel*.

208. Tobii pointed out that paragraph 5.26 of the Final Report referred to the questionnaires as a "*detailed customer engagement exercise*" and disagreed with the CMA's explanation that the Survey Guidance only applied to a statistical survey and therefore can be disregarded. Tobii argued that whether or not the questionnaires sent to customers technically constituted a statistical survey was not relevant. The substance of the Survey Guidance ought to have been followed so that questions were appropriately framed to ensure evidence obtained can be relied upon. By contrast, when Tobii submitted its End User Survey to the CMA, the CMA relied upon the Survey Guidance when giving feedback on the draft of Tobii's End User Survey.

209. During the investigation, Tobii presented to the CMA Dr Cave's independent expert report, which identified six errors with the wording, ordering and framing of the CMA's customer questionnaire, but the CMA unreasonably ignored or rejected them by asserting that the risk of bias was "*low*" and "*small*". (Final Report paragraphs 5.29 and 5.31.) Tobii described the six errors as:

Error 1

(1) The questionnaire created and assumed the existence of a product market for dedicated AAC solutions, which was not a distinct market but an assumed frame of reference carried over from the CMA's Phase 1 Decision and used in the CMA's Phase 2 investigation without reassessing whether in fact that was an appropriate starting point. The questionnaire used leading questions, contrary to paragraphs 3.10 to 3.11 of the Survey Guidance, and did not seek customers' views on the relevance or otherwise of the four components in the CMA's assumed market definition. It also did not ask customers about the broad range of alternative solutions that they purchased for end users which are based on consumer electronic devices, nor test whether dedicated and non-dedicated AAC solutions were in the same product market.

(2) This was confirmed by the Anonymised Customer Responses, which showed that the CMA constructed its questionnaire to confirm its assumed definition of dedicated AAC solutions, rather than to test which

components respondents considered important and to obtain their views on the dimensions of the relevant market. Therefore, the questionnaire was not objective or neutral and led to confirmation bias in the CMA's investigation. This was unreasonable, given that the CMA found that AAC solutions were a highly differentiated product market.

Error 2

(3) The questionnaire did not apply the standard hypothetical monopolist SSNIP approach used in market definition. It did not obtain evidence that would enable the CMA to assess the range of products which were viewed by customers and end users as substitutes. In particular, the questionnaire did not take into account that Tobii's Indi and Smartbox's Grid Pad 8 and 10 faced strong competition from mainstream computer devices. It did not take into account software-only sales and did not test substitutability on a product-by-product basis. This was unreasonable, given that the CMA had evidence that AAC solutions were highly differentiated and substitutability between different solutions depended on the needs of each end user.

Error 3

(4) The questionnaire had no questions to determine whether those completing it understood the questions, had good knowledge and understanding of AAC solutions and considered the full range of available options. Therefore, notwithstanding the CMA's warning on the questionnaire that it was a criminal offence to provide false or misleading information, whether knowingly or recklessly, the CMA had no reasonable basis to assume that the respondents provided credible and reliable answers.

(5) The Anonymised Customer Responses revealed that, while some NHS Hubs are obviously knowledgeable, they had difficulty with the CMA's questions and, in particular, responding to the questions on diversion. 47% of respondents indicated that diversion was difficult to estimate.

Error 4

(6) The questionnaire did not establish the purchasing processes of customers. For example, it did not establish whether institutional customers made purchases of AAC solutions as needs arose or in bulk to cover a period of time. Nor did it establish the frequency with which customers made purchases of AAC solutions.

Error 5

(7) The framing of questions was unclear and misleading, which gave rise to a risk of misunderstanding and inconsistencies in the respondents' understanding of what they were being asked. For example, the questionnaire used the term 'dedicated AAC solutions', which was not used in the industry and did not explain what the term 'tablets' meant in the diversion questions. The diversion questions also did not make clear on what basis the estimates of purchases with alternative suppliers should be determined, such as by value or volume, or the time period over which such a calculation should be made. Further, a question incorrectly asked the extent to which a standard consumer tablet is a viable alternative to a dedicated solution, rather than whether a standard consumer tablet with required peripherals and AAC software installed would be a viable alternative. Paragraphs 3.9 to 3.11 of the Survey Guidance state that limited weight can be given to evidence as a result of questions that are ambiguous, leading or biased. Therefore, without taking any steps to clarify the terms used in the questionnaire or verifying that respondents properly understood their meaning, the credibility and reliability of the responses were severely prejudiced and it was unreasonable for the CMA to place any weight on them.

Error 6

(8) The framing and ordering of some questions relating to diversion were leading, biased and not neutral. In particular, the questionnaire did not reflect how customers would consider substitution and diversion between specific products but asked questions about suppliers' products

at brand level. This was contrary to the correct approach identified at paragraph 5.22 of the Final Report, which recognised that the purpose of the diversion question was:

> "to elicit information about what customers see as the closest alternatives to the products provided by the Parties. In differentiated product markets, such products are the most relevant competitive constraints on the Parties".

(9) Two diversion questions in the CMA's questionnaire also presented a prompted list of alternatives that was neither randomised nor presented systematically, contrary to paragraph 3.50 of the Survey Guidance. Instead, Smartbox and Tobii were placed at the top of the list of alternative suppliers with only two others listed by name. Although there was space for a respondent to add in other suppliers, this improperly indicated to respondents that Tobii and Smartbox faced competition only from the two named competitors.

(10) It was speculative of the CMA to dismiss the risk of biased results on the unverified assertion that the customers who responded to the questionnaires were sophisticated purchasers with good knowledge of their options. Therefore it was unreasonable for the CMA to place any weight on the evidence it obtained on diversion.

(11) The Anonymised Customer Responses showed that the listing of particular suppliers prompted the majority of respondents to divide in a broad-brush way their possible alternatives between these suppliers and they did not consider AAC solutions based on mainstream devices nor other suppliers of dedicated AAC solutions who were not listed. Also, fewer than 20% of respondents made purchases in bulk, which suggested it was not appropriate for the diversion questions to be framed in terms of annual purchases.

210. In addition, Tobii submitted that the other evidence, which the CMA said it also relied on, was either unreliable or insufficient to constitute a reasonable evidential foundation for the CMA's findings on market definition or horizontal effects. The email to interest groups, which was exhibited to Mr Meek's witness

statement, used terms such as 'dedicated AAC solutions' without any definition at all. It was also likely that the CMA's questionnaire to competitors and resellers suffered from many of the same fundamental flaws as those contained in the customer questionnaire sent to NHS Hubs. Consequently, the reliability and credibility of evidence from third parties will be adversely affected.

(ii) The CMA

211. The CMA highlighted that Tobii's criticisms of the definitions used in the CMA's questionnaire were raised during the investigation and answered by the CMA. (For example, Final Report paragraph 6.56(a) and Appendix C paragraph 18.) Further, Tobii's criticisms regarding the definitions used in the questionnaire were in respect of wording and terminology used in a Phase 2 questionnaire and which reflected the knowledge and insights that had been provided by customers during Phase 1. There was no indication during the Phase 2 investigation that the respondents did not understand any of the terms used.

212. In respect of Tobii's criticism that the questionnaire did not list products of the merging parties or their competitors which the CMA considered to be dedicated AAC solutions, the CMA submitted that only one customer raised a question and there was no indication in the responses received that customers understood the definition to exclude all devices accessible solely through touch screen. If this were the case, their reported purchases would have been systematically smaller than suggested by Tobii Dynavox's transactions data, and the CMA specifically checked that this was not the case. (Final Report paragraph 6.56(a).)

213. The CMA submitted that *Akzo Nobel* neither obliged nor implied that the CMA was required to follow its Survey Guidance. *Akzo Nobel* at [144] to [148] did not mention the Survey Guidance at all and mentioned that the relative weight to be placed on customer views the CMA received was principally a matter for it. *Akzo Nobel* at [150] cited the Survey Guidance in support of the proposition that questions posed by the Competition Commission in merger investigations are neutral and do not presuppose any particular answer, but it does not mean

that the CMA is legally required to follow all aspects of the Survey Guidance regardless of whether the CMA was carrying out a statistical survey or trying to gather customer views in another way that befitted the particular circumstances of the case.

214. The CMA also referred to paragraph 1.5 of the Survey Guidance, which made clear the type of survey that the Survey Guidance is to apply to is a statistical sample survey. Whereas in the present case, what the CMA was engaged in with its questionnaires was a qualitative and limited quantitative exercise, not a statistical sample survey. Although Counsel for the CMA accepted in oral submissions that it was under a public law obligation as a public authority to ensure it engaged in a fair inquiry and, therefore, not to ask biased or misleading questions, the CMA submitted that it was neither necessary nor appropriate in the present case that its questionnaires, which were not intended to be statistical surveys, complied with all aspects of the Survey Guidance. Tobii's points regarding the Survey Guidance were raised during the CMA's investigation and addressed in the Final Report at paragraphs 5.26 to 5.32.

215. The CMA explained that following the Survey Guidance was inappropriate or counterproductive and would likely have led to poorer, less informative answers because:

(1) A survey typically involves obtaining information from hundreds or thousands of relatively unsophisticated purchasers such that only relatively simple, multiple-choice questions that leave no room for interpretation or nuance that can be processed quantitatively using statistical software can be used. Whereas in this investigation, the CMA engaged with fewer, more sophisticated customers such that it was feasible and more informative to ask more open questions that enabled the respondent to provide a narrative.

(2) A survey is typically limited to asking questions about respondents' most recent purchase and it is unrealistic to expect them to answer diversion questions about a wider set of purchases. Whereas in this investigation, the CMA engaged directly with professional purchasers

who frequently engaged with the market such that it was feasible and more informative to ask questions about their preferences in general as well as their likely diversion for their annual purchases.

216. The CMA designed its questionnaire carefully and took steps to limit the risk of bias and ensured that any bias from the ordering of options in a diversion question would be immaterial. (Final Report paragraphs 5.30 to 5.31.) The CMA also framed the questions by reference to the knowledge, expertise and characteristics of the NHS Hubs, which were large, experienced and specialist buyers. (Final Report paragraphs 5.26 to 5.29.)

217. The CMA considered the independent expert report of Dr Cave. (Final Report Appendix C paragraphs 16 to 21.) In respect of the six alleged errors:

Error 1

(1) The CMA did not assume or prejudge the existence of a market for dedicated AAC solutions. The merging parties overlapped in the supply of dedicated AAC solutions and this was the narrowest candidate market for the purpose of market definition. This was a reasonable starting point for the CMA's market definition and it was wrong to say that the CMA simply used the supply of dedicated AAC solutions as a frame of reference for Phase 1 only. The CMA explained its approach in the Final Report at Appendix C paragraphs 4 to 6. The CMA proceeded with an open mind in its Phase 2 investigation and sought evidence on the extent to which customers of dedicated AAC solutions regarded non-dedicated AAC solutions as close substitutes for their needs. Tobii's assertion that the CMA failed to ask questions to customers about the broad range of alternative solutions based on consumer electronics devices was wrong. The CMA also asked a number of questions on the differentiation between dedicated and non-dedicated solutions. The Phase 1 questionnaires asked a number of questions about alternative products without prejudging what the boundaries of the relevant market were. There was also no suggestion as to who the alternative suppliers might be. The diversion questions on the Phase 2 questionnaire sent to NHS

Hubs that were contacted in the Phase 1 investigation used open questions and the Phase 2 questionnaire sent to NHS Hubs not previously contacted by the CMA had a question about the extent to which a standard consumer tablet is a viable alternative to a dedicated AAC solution. Based on the customer responses and all other evidence before the CMA, it was reasonable for the CMA to come to the conclusions it did on market definition at paragraphs 5.78 to 5.79 of the Final Report.

(2) Tobii's observations regarding the Anonymised Customer Responses needed to be understood in context against the relevant questions which elicited those responses. The questions were expressed in an open way and did not require respondents to comment on each individual component. The fact that some customers did not expressly refer to all four components does not mean or imply that they considered other components to be irrelevant. Tobii appears to have simply counted the references in the responses to the four components of a dedicated AAC solution such that, if a customer did not mention a specific component, Tobii appears to have assumed that the customer must have considered that component to be unimportant. However, there is no basis for making such an assumption. Further, the questions sought qualitative evidence by way of explanation or comment. It follows that the weight to be given to the answers is not, or not simply, a matter of counting the number of responses. The probative value of the responses also turns upon their content, level of detail and reasoning.

Error 2

(3) Tobii's objections regarding the CMA's failure to apply the SSNIP test on a product-by-product basis, which were raised during the CMA's investigation, are addressed in the Final Report (paragraph 6.56(c) and Appendix C paragraph 19). The CMA had good reason in this case not to analyse switching on a product-by-product basis because some of the most important aspects of the merging parties' offering cannot be flexed product-by-product but were determined at the level of their range – for

example quality, customer service and innovation – and the CMA framed the questionnaire accordingly. In addition, other sources of evidence available to the CMA suggested that, with the possible exception of the Indi, the conditions of competition did not vary significantly for different products and the same four suppliers were active across the range of dedicated AAC solutions. The CMA's submissions regarding the application of the SSNIP test are in more detail under Issue 3(a) below. These submissions are set out at [265] to [271] of this judgment.

Error 3

(4) The questionnaire asked respondents to state their position within the organisation and warned that it was an offence to provide false or misleading information, whether knowingly or recklessly. There was nothing in the responses received, whether considered on their own or alongside other evidence, to suggest that the respondents did not have the requisite knowledge. On the contrary, the responses received were generally detailed and well articulated.

(5) Tobii's assertion that 47% of respondents indicated that the diversion question was difficult to answer was misconceived. The obvious implication of Tobii's own percentage calculations was that a majority of respondents answered the question without difficulty. Further, the diversion question was difficult to consider because it asked respondents to engage with a hypothetical scenario that they had not encountered and a future situation. The responses said it was a difficult thing to do, not that they did not understand the wording of the question. In any event, the CMA used diversion responses in order to form a view of average diversion across customers, rather than a precise estimate for individual NHS Hubs. There was no credible basis to suggest that the average of these responses was biased one way or another.

Error 4

(6) The CMA ascertained the purchasing priorities and processes of respondents at Phase 1 and Phase 2 through the questionnaires and in bilateral calls. For example, a number of questions in the Phase 1 questionnaire related to the customer's ability to integrate components from different suppliers, the role of medical certification and the role of distributors and resellers. Given the information about purchasing processes acquired at Phase 1, there was no reason to believe at Phase 2 that respondents did not have up-to-date knowledge of the market and their purchasing options. The evidence from customers did not show that infrequent purchases in bulk was widespread.

Error 5

(7) The questions were framed sufficiently clearly. The questionnaire expressly defined 'dedicated AAC solution' at the outset and the terminology used in the Phase 2 questionnaire reflected the knowledge and insights that had been provided by customers during Phase 1. When the CMA spoke to NHS organisations during the investigation, there was no indication that respondents did not understand any of the terms used. Regarding Tobii's contention that one of the questions erred in failing to refer to a standard consumer tablet with required peripherals and AAC software, the responses received showed that customers clearly understood the nature of the question because they commented on the role of peripherals in the suitability of non-dedicated AAC solutions. (Final Report paragraphs 5.18 to 5.21 and Appendix C paragraph 18.)

Error 6

(8) Tobii's concerns regarding the framing and ordering of the diversion questions were raised during the CMA's investigation and addressed in the Final Report at paragraph 5.30 to 5.31. Paragraph 5.31 of the Final Report acknowledged that the options were ordered in a non-random way and the CMA was mindful that this ordering may have some impact on the responses. However, the CMA did not accept that the question

was leading or misleading or suffered from some sort of ordering bias. The questionnaire was addressed to expert buyers who purchased both dedicated and non-dedicated AAC solutions on a regular basis and had good knowledge of the options available to them. Therefore, the CMA expected any possible bias to be small. Moreover, respondents were specifically asked to provide diversion estimates for all options, whereas ordering effects typically arise in circumstances where respondents are asked to select only one of several options out of a list.

(9) With regard to Tobii's analysis that under 20% of the respondents made purchases in bulk, this was a minority of responses and Tobii did not explain why those making bulk purchases made it impossible for an NHS Hub to answer the diversion question by reference to annual purchases. Irrespective of whether an NHS Hub purchased 20 devices in four orders of five devices or 20 individual orders, it was not unreasonable to expect that NHS Hub to have a view on what drove its choices of devices and alternatives.

218. In the CMA's submission, Tobii speculated that the questionnaire sent to competitors suffered from the same alleged flaws as that sent to customers, and the email to interest groups asked six questions, which were open questions.

(b) The Tribunal's analysis

219. The Tribunal agrees that, generally speaking, the Survey Guidance is targeted at commissioned statistical sample research surveys of the sort described at paragraph 1.5 of the Survey Guidance. The last line of paragraph 1.5 of the Survey Guidance states that "*Good practice for qualitative research methods is outside the scope of this guidance*". That does not necessarily mean that the illustrations and examples of good practice and appropriate techniques, which are set out in the Survey Guidance, to use to generate robust evidence have no application or relevance in respect of other types of research, such as those which are qualitative in nature. If a competition authority wishes to rely on customer questionnaires that fall outside the definition of a statistical survey, it seems appropriate and fair in respect of the questions used for the authority to

take reasonable steps to avoid any significant risk that they will derive biased or misleading responses.

220. Paragraph 3.1 in the introduction of the 'Questionnaire' section of the Survey Guidance recognises that "*Any bias in response caused by imprecise or leading question wording, or ordering of the questions, can weaken the evidential value of a survey*" and the 'Questionnaire' section contains guidance regarding the structure, language and question types that help obtain reliable and valid customer survey evidence. The Tribunal accepts that, strictly speaking, the Survey Guidance does not apply in respect of the CMA's customer questionnaires used in this case. Nonetheless, the principles of good practice from the Survey Guidance in respect of question wording or ordering can still be applicable, where appropriate, to the CMA's customer questionnaires. Consistent with this, Counsel for the CMA accepted in oral submissions that it was under a public law obligation as a public authority to ensure it engaged in a fair inquiry and, therefore, not to ask biased or misleading questions. This acceptance of such a public law obligation is clearly correct as a matter of principle.

221. The Tribunal notes that most of Tobii's criticisms of the CMA's customer questionnaires relate to the one used in Phase 2 of the CMA's investigation and, in particular, Template 1 of the Phase 2 customer questionnaire that was sent to NHS Hubs, which were existing customers of the merging parties and who had been previously contacted by the CMA in Phase 1 of the investigation.

222. In respect of Tobii's alleged Error 1 in the CMA's customer questionnaire, it was reasonable and rational for the CMA to start with a narrow product group and to ask customers about their propensity to switch from this product group to alternatives. In doing so, it was also reasonable for the CMA to build upon the information obtained in Phase 1 of its investigation to frame the wording and terminology of the questions used in the Phase 2 customer questionnaires. Further, these were sophisticated and professional customers who would have a good knowledge of the market and their own buying patterns and preferences. There is no reason to believe that those who responded to the questionnaires did not properly consider and answer them. However, in analysing and giving

weight to such questionnaire responses, it is prudent for the CMA to bear in mind the risks of inaccurate responses and imperfections in respondents' understanding of the task at hand. The Tribunal considers that the questions posed were sufficiently clear and properly framed. In the circumstances the Tribunal can deal with each of the alleged errors in a concise way as set out below.

223. In respect of Tobii's alleged Error 2 in the CMA's customer questionnaire, it was not unreasonable for the CMA not specifically to apply the standard SSNIP test question about responses to a hypothesised 5 to 10% price increase in its questionnaire. The Tribunal's reasons are set out under Issue 3(a) below, which concerns whether the CMA erred in failing to apply the SSNIP test, and are set out at [272] to [275] of this judgment.

224. As for Tobii's alleged Error 3 in the CMA's customer questionnaire, the CMA's approach of asking respondents to state their position within the organisation with a warning that it was an offence to provide false or misleading information, whether knowingly or recklessly, was reasonable. In any event, the CMA reviewed the responses received and found nothing to suggest that the respondents did not have the requisite knowledge.

225. Tobii's alleged Error 4 in the CMA's customer questionnaire is a criticism of the Phase 2 customer questionnaire taken in isolation from the Phase 1 customer questionnaire. As the CMA pointed out, it ascertained the purchasing priorities and processes of customers through its Phase 1 and Phase 2 questionnaires and bilateral calls.

226. Tobii's alleged Error 5 in the CMA's customer questionnaire relates to the definition used by the CMA and a failure to clarify certain other terminology used in the questionnaire, such as 'tablets'. Tobii contended that the term 'dedicated AAC solutions' was not a term used in the industry. However, the questionnaire set out at its beginning what the CMA defined as 'dedicated AAC solutions'. Therefore, while there was a theoretical risk that some respondents may not have fully appreciated the options available to them, the CMA did take reasonable steps to provide a clear and transparent context for the questions. In

respect of other terminology such as 'tablets', the Tribunal notes that some of the responses commented on the role of peripherals in the suitability of non-dedicated AAC solutions, indicating that these customers understood the nature of the question.

227. Furthermore, as noted by the Tribunal in *Akzo Nobel* at [150], the context in which questions were asked is highly relevant. In this case, the Tribunal considers it relevant that the questionnaire, which Tobii complains of, was sent to NHS Hubs that provided specialised AAC services to children and adults and who undoubtedly had good knowledge of AAC solutions and the available options. Nevertheless, it is evident from the Anonymised Customer Responses that several NHS Hubs experienced difficulty in responding to the question from which the CMA derived diversion ratios and a number of them either declared themselves unable to address this question or made estimates that contained clear warnings as to the reliability of their answers ("too difficult", "very difficult", "incredibly difficult", "percentage is extremely mobile" etc.). This should not be surprising in view of the fact that they were asked to quantify their hypothetical alternative choices across (in some cases) several hundreds of separate instances in the recent past when they had made individual assessments of the AAC needs of specific patients. It is therefore likely that respondents who did attempt an answer to the CMA's diversion ratio question gave a broad-brush impression rather than provided a detailed analysis of their choices over the last three years and the possible alternatives at a granular level. It was reasonable for the CMA to expect these competent and experienced professionals to make such an assessment and to expect that the responses provided gave a fair overview of their alternative choices at a broad level, but given the inherent difficulty of the task it would also be wise for the CMA not to rely on the responses with any mathematical precision. The Tribunal considers that the CMA did not err in this respect.

228. In respect of Tobii's alleged Error 6 in the framing and ordering of the diversion questions, paragraph 5.30 of the Final Report explained that the CMA designed its questionnaire carefully to limit the risk of any framing bias and the CMA acknowledged at paragraph 5.31 of the Final Report that the options were ordered in a non-random way. The CMA recognised that in general the ordering

of options in a diversion question may have some impact on the responses, but the CMA stated that it would expect any bias to be small and not to impact on its conclusions materially. Accordingly, the CMA concluded at paragraph 5.32 of the Final Report that:

> "For these reasons, we consider that it is appropriate to put some weight on these diversion result, albeit this evidence has also been assessed alongside several other evidence sources."

229. By implication, this is a recognition that it would have been preferable had the options in the diversion questions of the CMA's customer questionnaire been ordered in a random way. The CMA did not provide a reason in its Final Report why, in its carefully designed questionnaire, it used a non-random ordering. In its submissions the CMA noted that respondents were specifically asked to provide diversion estimates for all options, whereas ordering effects typically arise in circumstances where respondents are asked to select only one of several options out of a list.

230. In light of the CMA's Final Report and submissions, the Tribunal considers that the ordering of the options in a non-random way had the potential of affecting the responses to the diversion questions and that the options should have been listed in a random way. Nonetheless, the Tribunal considers the context important. As the Tribunal noted in respect of Tobii's alleged Error 5, the customer questionnaire and, thus, the diversion questions were put to NHS Hubs that provided specialised AAC services to children and adults and who undoubtedly had good knowledge of AAC solutions and the available options. Furthermore, the Tribunal is mindful of the CMA's submission that the respondents were asked to provide diversion estimates for all options and the need for these to sum to 100% would counteract to some extent the risk of ordering bias. In light of these, the Tribunal considers that the impact of the non-random ordering of the options was in all probability more limited than it might be in other contexts. The position of the CMA as set out at paragraphs 5.31 and 5.32 of the Final Report, which implies that some caution should be exercised in relying on such results in isolation, was an approach it could reasonably take.

(4) Issue 2(c): Was it unreasonable or irrational for the CMA to generate diversion ratio estimates based on data from 12 NHS Hubs?

(a) The parties' submissions

(i) Tobii

231. Tobii submitted that the CMA's failure to obtain diversion data from a wider range of customers was unreasonable. AAC solutions are highly differentiated products and customers are not homogeneous, with different purchasing profiles and end users have individualised requirements. Therefore, demand side conditions are not uniform across customer segments. However, the CMA assumed demand was uniform across customer segments by collecting information on diversion from a narrow category of intermediate purchasers – namely, NHS Hubs only – and did not ask diversion questions of other purchasers (such as other NHS purchasers, charities, local authorities, schools or end users), even those others from whom the CMA obtained information.

232. Further, out of the 16 NHS Hubs that the CMA contacted during its investigation, only 12 responded to the CMA's questionnaires. Of these 12 NHS Hubs that responded, only ten provided purchase value data that the CMA could use to calculate weighted diversion ratios. According to Tobii, it was unreasonable for the CMA to interpret diversion results relating to ten NHS Hubs as if they provided a measure of diversion for the market as a whole and to place even "*some weight*" on the diversion evidence it collected (Final Report paragraph 6.57).

(ii) The CMA

233. Tobii's complaint that the CMA collected information relevant to diversion from NHS Hubs, which comprised a narrow subset of customers, was addressed in the Provisional Findings at paragraph 6.45 and the Final Report at paragraph 6.56(b).

234. The weighted diversion ratios were calculated using data from NHS Hubs which accounted for roughly half of the merging parties' sales of dedicated AAC

solutions. The CMA considered it was appropriate to place "*some weight*" on the estimates of diversion ratios and properly went on to weigh all evidence before it in order to reach its conclusions on horizontal effects.

235. There was qualitative evidence from smaller institutional customers, such as schools, charities and interest groups, that did not reveal a systematic difference between their choice of dedicated AAC solutions and those of NHS Hubs. Therefore, the CMA considered that the diversion ratios for NHS Hubs broadly reflected the preferences for the merging parties' key customers. (Final Report paragraph 6.56(b).)

236. The CMA's sensitivity analysis also found that, even if the diversion ratios were half the level that the CMA estimated, the GUPPIs would still be 5 to 10%, which is a level that the CMA typically finds competition concerns. (Final Report paragraph 6.55(c) and 6.61(i).)

237. Further, there was a body of evidence from customers, interest groups, other suppliers, internal documents and Tobii's sales data which corroborated the CMA's finding of a low level of diversion from dedicated AAC solutions to non-dedicated alternative products. (Final Report paragraphs 5.78(e) and 6.61(i).)

(b) The Tribunal's analysis

238. Given that institutional customers such as the NHS, schools and charities comprised roughly 90% of the merging parties' customers for the dedicated AAC solutions that formed the basis for the SLC concern, it was entirely reasonable and rational for the CMA to rely on the data from the institutional customers to generate diversion ratio estimates. What Tobii disputed in particular was that, of the 16 NHS Hubs contacted by the CMA, only 12 responded to the CMA's questionnaire and of which only ten provided data that the CMA could use to calculate weighted diversion ratios.

239. The Tribunal notes that the CMA calculated weighted diversion ratios using the ten NHS Hubs' data, as well as non-weighted diversion ratios using the 12 NHS

Hubs' data. (Final Report paragraph 6.49 and Tables 6-6 and 6-7.) The CMA further corroborated its finding of a low level of diversion from dedicated AAC solutions to non-dedicated alternative products based on the NHS Hubs' data by cross-checking it against a body of other evidence such as qualitative evidence from smaller customers, evidence from interest groups, other suppliers and Tobii's sales data. (Final Report paragraphs 5.75, 5.78(e) and 6.56(b) and 6.61.) Although not all the NHS Hubs that were contacted provided responses and not all who responded provided expenditure data, this did not preclude the ability of the diversion ratios to provide some relevant insight to the CMA.

240. In this context and bearing in mind the principles set out in *Akzo Nobel* at [144] to [145], the Tribunal considers it was not irrational or unreasonable for the CMA to generate diversion ratios based on the data from the responses of the 12 NHS Hubs.

(5) Issue 2(d): Was it unreasonable or irrational for the CMA to rely on evidence obtained from its questionnaires?

(a) The parties' submissions

(i) Tobii

241. Tobii submitted that it followed from the answers to Issues 2(a) to (c) that it was unreasonable for the CMA to rely on the evidence obtained from its questionnaires to determine market definition, assess horizontal unilateral effects, calculate diversion ratios and a GUPPI analysis, assess vertical input foreclosure and assess remedies.

242. Tobii submitted that the Anonymised Customer Responses confirmed that the poorly drafted questionnaires resulted in customers providing inconsistent and unreliable information upon which the CMA's findings of market definition, market shares, diversion ratios, GUPPI analysis or the finding of an SLC could not properly and reasonably be determined.

243. In particular, the Anonymised Customer Responses showed that some respondents complained about the questions, expressed confusion and their responses had internal contradictions. In relation to the CMA's assertion that the respondents had good knowledge of their options, Tobii submitted that the responses showed that knowledge of the products available was not the issue. No amount of knowledge can remedy the fact that the wrong questions were asked and, inevitably, incorrect, misleading, incomplete and/or inconsistent responses were provided.

244. The Anonymised Customer Responses also confirmed that the framing of the diversion questions influenced and prejudiced the responses such that the information provided was not consistent and reliable. Therefore, the CMA could not reasonably rely on its diversion ratios and, thus, its GUPPI analysis for either market definition or its SLC assessment.

(ii) The CMA

245. The CMA argued that the Anonymised Customer Responses, which Tobii relied on as examples, displayed a degree of familiarity with the solutions in question and appropriate levels of engagement with the question such that meaningful and reliable answers could be inferred.

246. The CMA noted that Tobii had singled out answers from three out of 30 Anonymised Customer Responses to demonstrate that some respondents complained about the questions. As to two of those, Tobii selectively quoted from the customers' answers. When read as a whole, it was clear the customers understood the question. The customers' responses were also either consistent with the views of other customers or consistent with the definition used in the CMA's questionnaire and did not indicate confusion. As to the third example that Tobii referred to, the CMA took into account the points made by the customer and followed up by way of a telephone call with the customer. None of the three examples cited by Tobii constituted a complaint.

247. According to the CMA, Tobii cited just one example to submit that there was confusion and internal contradictions in the Anonymised Customer Responses.

However, that customer response revealed no such thing. The CMA submitted that snippets should not be taken out of context and, when read as a whole, it was clear that the customer did not provide a contradictory response. As only one respondent expressly said the definition of dedicated solutions was subject to interpretation, it was unclear on what basis Tobii inferred that other respondents were confused. Even on Tobii's analysis, the vast majority of respondents were not confused by the term 'dedicated'. When one looked at the customer responses as a whole and in context, they did not show confusion to the extent that one cannot put any weight on them.

248. The CMA contended that Tobii's repeated argument regarding the wording of the diversion question had no basis and was addressed in the Final Report at paragraphs 5.24 and 5.29 to 5.32. Ordering bias occurs where respondents are asked to select one or several options from a list. The ordering of options may result in either so-called "primacy bias" (i.e. respondents have a higher propensity to select the first option because they did not bother to read the full list) or "regency bias" (i.e. respondents have a higher propensity to select the last option because they cannot remember the first options at the point of answering). Neither primacy nor regency bias was a concern in the present case because respondents were specifically asked to provide diversion figures for all entries in the list supplied. That is to say, respondents were forced to consider each entry and their answers had to add up to 100%. Therefore, it was not unreasonable for the CMA to deduce that respondents considered carefully how their responses would fit together.

249. Regarding the reliability of the customer responses, the CMA made follow-up calls and carried out a number of cross checks and sensitivity analyses on all the data that it obtained from the customer responses. The CMA cross-checked the data it obtained from the customers as to their purchases against the equivalent sales data it had obtained from the merging parties and suppliers, and the CMA came to the conclusion that there were no systematic differences of concern. (Final Report paragraphs 6.8 to 6.11 and Tables 6-1 and 6-2.) The diversion ratios were also consistent with other evidence that pointed in the same direction. (Final Report paragraphs 5.78(e) and 6.56(b).) Further, the CMA's sensitivity analysis on the diversion ratios that it obtained from the customer

responses showed that, even if the diversion ratios were half of what the CMA had calculated, the GUPPIs were still of a magnitude that would cause concern. (Final Report paragraph 6.55(c).) The CMA was also careful to say that it afforded the diversion ratios "*some weight*", alongside all the other evidence that it had. (Final Report paragraphs 5.32 and 6.57.)

250. Further, supposing that customers had misunderstood the CMA's definition of the product, for example by excluding wrapped tablets from the scope of dedicated AAC solutions, one would expect to see a systematic bias between their reported purchase volumes of AAC solutions from Tobii and Smartbox and the sales data of the merging parties for the products which fall under that definition. The CMA checked and that was not the case. That gave the CMA additional confidence that customers understood the product definition. (Final Report paragraph 6.56(a).)

(b) The Tribunal's analysis

251. The Tribunal has concluded in respect of Issues 2(a) to (c) that it was not irrational or unreasonable for the CMA to focus its evidence gathering from customers to institutional customers, that the responses from the CMA's customer questionnaire were not unreliable and that it was not irrational or unreasonable for the CMA to generate diversion ratio estimates based on data from 12 NHS Hubs.

252. Accordingly, the Tribunal does not consider it unreasonable or irrational for the CMA to place some reliance on the evidence obtained from its customer questionnaires. This is not to say, however, that the customer questionnaire evidence was perfect, or that the diversion ratio estimates that were derived from it can be relied on absolutely. In this context, the Tribunal notes that the CMA was mindful to reflect on the quality of the customer responses to conclude that it would afford it "*some weight*" (Final Report paragraph 5.32), that the customer responses were not the only source of evidence that the CMA had (Final Report paragraphs 5.33 to 5.40, 5.42 to 5.51, 5.78 to 5.79) and that, in its assessment of the customer evidence, the CMA cross-checked whether the estimates it derived from the customer questionnaire responses, for example

with respect to diversion ratios, were consistent with other sources of evidence (Final Report paragraphs 6.8 to 6.11 and 6.61). Having reviewed in detail the Anonymised Customer Responses and the other evidence relied on by the CMA, the Tribunal does not consider that it was unreasonable or irrational for the CMA to place some reliance on the responses to the customer questionnaire in reaching its findings.

I. TOBII'S GROUND 3: THE CMA FAILED PROPERLY TO DEFINE THE RELEVANT MARKET FOR AAC SOLUTIONS

253. Tobii alleges that the CMA failed to take into account relevant considerations and, thus, failed to define properly the relevant product market for AAC solutions, which it incorrectly defined as 'dedicated AAC solutions'. The CMA unreasonably and irrationally excluded from the relevant product market the majority of AAC solutions used in the UK, i.e. those based on consumer devices such as an Apple iPad or Microsoft Surface Pro and combined hardware, AAC software and an access device (if needed) and which are an equally technically effective and efficient alternative for most end users.

254. Tobii alleges that the CMA made eight fundamental errors in its assessment of the relevant product market. These are discussed in turn below.

(1) Issue 3(a): Did the CMA err in failing to apply the SSNIP test?

(a) Preliminary observations

255. The first step in the assessment of whether a merger will result in an SLC is to define the product and geographic market. The purpose of market definition is to identify the competitive constraints that the merging parties face and the actual competitors of the merging parties that are capable of constraining their behaviour. This is explained at paragraph 2 of the European Commission's Notice on the definition of relevant market for the purposes of Community competition law (the "Commission's Notice on Market Definition") and confirmed by the MAG, which states:

> "5.2.1 The purpose of market definition is to provide a framework for the Authorities' analysis of the competitive effects of the merger. The Authorities will identify the market within which the merger may give rise to an SLC (the relevant market). The relevant market contains the most significant competitive alternatives available to the customers of the merger firms and includes the sources of competition to the merger firms that are the immediate determinants of the effects of the merger (ie the Authorities' aim when identifying the relevant market is to include the most relevant constraints on behaviour of the merger firms). The Authorities will ensure that the relevant market they identify satisfies the hypothetical monopolist test (see paragraphs 5.2.9 to 5.2.20).
>
> 5.2.2 Market definition is a useful tool, but not an end in itself, and identifying the relevant market involves an element of judgement. The boundaries of the market do not determine the outcome of the Authorities' analysis of the competitive effects of the merger in any mechanistic way. In assessing whether a merger may give rise to an SLC the Authorities may take into account constraints outside the relevant market, segmentation within the relevant market, or other ways in which some constraints are more important than others."

256. The hypothetical monopolist test or the SSNIP test is normally used to determine the range of products which are viewed as substitutes by the consumer unless there are good reasons for not using it. The SSNIP test is set out in the Commission's Notice on Market Definition at paragraphs 15 to 19. The MAG describes the hypothetical monopolist test at paragraph 5.2.8 as "*a tool to check that the relevant product market is not defined too narrowly*", noting that "*the relevant product market may potentially be wider than the narrowest market that satisfies the hypothetical monopolist test*".

257. Furthermore, paragraph 5.2.7 of the MAG states that:

> "The relevant product market is identified primarily by considering the response of customers to an increase in the price of one of the products of the merger firms (demand-side substitution). The evidence the Authorities may consider when evaluating the closeness of competition between different products is described at paragraph 5.2.15."

258. Paragraph 5.2.15 of the MAG sets out the evidence as follows:

> "Accordingly the Authorities may consider evidence on the following factors when evaluating whether a SSNIP by the hypothetical monopolist would be profitable.
>
> (a) Closeness of substitution. If the products in the candidate market are close substitutes, the hypothetical monopolist test is more likely to be satisfied because the hypothetical monopolist will recapture a significant share of the sales lost in response to a SSNIP, making the price rise less

costly. The closeness of substitution between products can be indicated by the diversion ratio or cross-price elasticity of demand between them. Evidence used to assess the closeness of substitution between products may include:

- information about product characteristics such as physical properties and intended use that can indicate similarities between different products;

- information about relative price levels and the extent to which prices of products within the candidate market are correlated with each other, as compared with the prices of products outside the candidate market;

- information on prices and sales volumes over time or across areas that permit analysis of the way that customers respond to changes in prices or to firms entering and leaving the market;

- responses from customers, competitors and interested and informed third parties to questions—sometimes posed in surveys—about customer behaviour and the hypothetical monopolist test; and

- documents such as marketing studies, consumer surveys prepared in the normal course of business, market analyses prepared for investors, and internal business analyses (eg board papers, business plans and strategy documents).

(b) Variable profit margins (sales revenue minus direct costs of sales). If the variable profit margins of the products in the candidate market are high, the hypothetical monopolist test is more likely to be satisfied because the value of the sales recaptured by the hypothetical monopolist will be greater, making the price rise less costly. Evidence about variable margins can come from internal documents containing accounting information. Evidence that customers are very sensitive to price can also indicate low variable profit margins.

(c) Price sensitivity of customers. If customers are insensitive to changes in the price of products in the candidate market, the hypothetical monopolist test is more likely to be satisfied because the SSNIP will not lead to many lost sales, making the price rise less costly. The own-price elasticity of demand can be an indication of the extent to which customers switch away from a product when its price increases. Evidence that can inform the Authorities about the closeness of substitution of the products in the candidate market will often also be useful in providing information about the overall sensitivity of customers to price. Information enabling the estimation of 'switching costs', if any, that customers might incur in changing from the product of one supplier to that of another can also be relevant."

259. In *Genzyme Limited v The Office of Fair Trading* [2004] CAT 4, a Competition Act 1998 appeal, the Tribunal recognised at [150] that matters such as relevant product market "*may require a more or less complex assessment of numerous interlocking factors, including economic evidence. Such an exercise intrinsically involves an element of appreciation and the exercise of judgment*."

260. In *British Telecommunications PLC v Office of Communications* [2017] CAT 25 ("*BCMR*"), a Communications Act 2003 appeal, the Tribunal referred to the Commission's Notice on Market Definition and stated that the SSNIP test was the appropriate conceptual framework for a determination of whether BT had significant market power. The Tribunal explained at [156] that "*in certain situations it may be possible for an authority to avoid conducting a full relevant market analysis. For example, a decision may not hinge on the precise boundaries of the market in question*" and held at [157] that the appeal in *BCMR* was not such a case so it was not open to Ofcom to define the relevant market without full reference to the SSNIP framework.

261. In *Generics (UK) Limited and others v Competition and Markets Authority* [2018] CAT 4 ("*Paroxetine*"), a Competition Act 1998 appeal, the Tribunal cited supporting authority from the General Court (Case T-699/14 *Topps Europe Ltd v Commission* EU:T:2017:2 at [82]) and held at [401] that:

> "In our view, it is artificial to rely on the SSNIP test, even as a framework, when a particular feature of this market is that demand for the product is not price-sensitive. Although frequently useful, either conceptually or in actual application, it is not a necessary approach to market definition".

262. In *Paroxetine*, the Tribunal recognised at [403] that the approach was novel but noted that it was well recognised that market definition is contextual and can vary to reflect relevance to the issue under consideration.

(b) The parties' submissions

(i) Tobii

263. In oral submissions, Counsel for Tobii agreed that there were cases in which the SSNIP test was not necessary, either because there were good reasons why it cannot be applied or it was inappropriate to do so. Tobii submitted that *Paroxetine* was a special case and was distinguishable from the present case due to the two factors identified by the Tribunal in *Paroxetine* at [384]. First, there was the 'cellophane fallacy' in *Paroxetine* where the supplier had already been able to price the product at substantially above competitive levels. Secondly, the choice of product was not made by the person who paid for it. In *Paroxetine*,

the prescribing doctor chose the drug whereas it was the NHS, by reimbursing the pharmacy, which paid. As this was not the situation in the present case, the normal starting point for market definition, following the Commission's Notice on Market Definition, paragraphs 5.2.9 to 5.2.16 of the MAG and *BCMR*, ought to apply and the CMA's suggestion in its Defence that it did apply the SSNIP test was at odds with the relevant facts. Instead, the CMA did not apply the SSNIP test when determining whether what it called 'dedicated' and 'non-dedicated' AAC solutions constituted a single economic product market, but assumed there was a subcategory of 'dedicated AAC solutions' by taking a US regulatory definition.

264. Tobii argued that the CMA's failure to apply the SSNIP test was unreasonable as it did not obtain the credible and reliable evidence that it required to reach its decision on the relevant product market for AAC solutions and to assess whether the merged entity would have market power. Tobii contended that the evidence, namely diversion ratios, customer evidence, competitor evidence and the merging parties' internal documents, which the CMA relied on to show that there was an absence of substitutability between 'dedicated' and 'non-dedicated' AAC solutions did not support any such conclusion when properly analysed. In particular, the Anonymised Customer Responses showed that:

(1) Customers' comments on the level of customer support concerned post-sale warranty and technical support, troubleshooting, repairs and replacement/loan devices whilst a device was being repaired. There is no evidence that customers regarded customer support as an integral part of the product of an AAC solution.

(2) The CMA had obtained only limited quantitative data for calculating diversion ratios from some but by no means all NHS Hubs in England.

(ii) <u>The CMA</u>

265. The CMA submitted that Tobii had not established that the CMA acted irrationally in defining the relevant product market. Paragraph 5.2.2 of the

MAG made clear that in a merger control context, the role of market definition is as a useful tool, which frames the competitive assessment, but not an end in itself because, in a merger control context, market definition does not determine the outcome of the CMA's analysis of the competitive effects of a merger in any mechanistic way. Further, there is no rule of law that the SSNIP test must always be applied. The CMA distinguished *BCMR* on the basis that it related to a different statutory scheme, which expressly required Ofcom to identify the relevant market as part of its market power determination.

266. The CMA relied on *Paroxetine*, where the Tribunal recognised at [401] that the SSNIP test is not a necessary approach to market definition, and submitted that that proposition applies when the CMA has to determine whether a relevant merger situation gives rise to an SLC. The CMA contended that it was not appropriate to rely on price-based questions to understand demand elasticity in Tobii's case, which concerned differentiated products and where the CMA had evidence that customers were not particularly sensitive to price as their priority was meeting end users' needs. (Final Report paragraphs 5.3 and 7.74.) The CMA argued that the SSNIP test worked well where competition was on price and when one was dealing with commodity type products. However, in the case of differentiated products the results can be complicated by the fact that the boundaries of the market can be blurred. Moreover, in the present case, the competition concern was not solely or even mainly that the merger may lead to higher prices, but also on other factors such as a reduction in the quality of the products, the range of products offered, level of innovation and/or reduced levels of customer support and service, which were important parameters of competition.

267. Paragraph 19 of Appendix C to the Final Report showed that the CMA considered the application of a formal SSNIP test (in the sense of a hypothetical 5% price increase) but decided instead to ask customers to respond to a 'forced diversion' question on the ground that this was more appropriate in a context where the SLC concerns related to both price increases and quality deterioration. Although the CMA did not apply the SSNIP test in the strict sense of asking about customers' reactions to a unilateral 5 to 10% rise in prices, it used the SSNIP test framework as it carried out an assessment of demand-side

substitutability with a view to identifying whether suppliers of dedicated AAC solutions were constrained by the existence of other AAC products and solutions, including the customer's option to add AAC software and peripherals to a consumer tablet. The Final Report paragraphs 5.2 to 5.3, 5.50 to 5.51, 6.61(k) and 6.73 show that, entirely consistent with the approach set out at paragraph 5.2.2 of the MAG, the CMA took into account the strength of competitive constraints from inside the relevant market (as between dedicated AAC solutions) and from outside the relevant market (from non-dedicated AAC solutions). In particular, the CMA's approach to market definition was consistent with paragraph 5.2.15 of the MAG by considering a range of relevant considerations including (i) the characteristics of dedicated AAC solutions based on information from customers, competitors and interest groups, (ii) the merging parties' internal documents, (iii) information on the merging parties' prices and volumes over time, and (iv) a low diversion from dedicated to non-dedicated AAC solutions. (Final Report paragraph 5.78.)

268. The CMA acted reasonably in examining various sources of differentiation between dedicated and non-dedicated ACC solutions that limited the degree of substitutability between them for some users, including (i) the availability of customer support (Final Report paragraphs 5.70 to 5.72) and (ii) the fact that complex solutions based on consumer tablets were often impractical and unreliable (Final Report paragraphs 5.74 to 5.75). The CMA noted that this was also consistent with the way Tobii itself characterised the difference between its products and non-dedicated solutions in its internal documents. (Final Report paragraphs 5.50, 5.71 and 5.76.)

269. The CMA submitted that if customers had genuinely believed that dedicated and non-dedicated AAC solutions were sufficiently interchangeable from the viewpoint of current users of dedicated AAC solutions, this would have transpired in responses to the forced diversion questions in the customer questionnaire. Instead, customers told the CMA that there were many circumstances where dedicated and non-dedicated AAC solutions are not interchangeable. (Final Report paragraphs 5.18 and 5.22 to 5.23.)

270. The CMA referred to paragraphs 5.70, 5.72 and 5.75 of the Final Report in response to Tobii's argument that the Anonymised Customer Responses showed that customer support was not an integral part of an AAC solution. The CMA contended that the number of customers who mentioned various aspects of customer support showed that it was important to them and Tobii had not shown how or why the CMA's finding that customer support was a component of a dedicated AAC solution was irrational.

271. In the CMA's submission, the evidence obtained from a number of NHS Hubs provided a reasonable basis for the calculation of diversion ratios since NHS Hubs account for a significant proportion of the merging parties' sales. Furthermore, the diversion ratios estimated by the CMA from the NHS Hubs' evidence were consistent with the wider body of qualitative and quantitative evidence that it assessed.

(c) The Tribunal's analysis

272. The purpose of any SSNIP test or analysis is to identify competitive constraints between competing products and services. However the form of SSNIP test within the meaning of paragraphs 5.2.11 to 5.2.12 of the MAG is not the only way in which to identify such competitive constraints. In an appropriate case, the task of identifying competitive constraints can be done with the assistance of forced diversion questions to customers or any of the other means set out in paragraph 5.2.15 of the MAG for example. The Tribunal agrees with paragraph 5.2.2 of the MAG where it states that "*Market definition is a useful tool, but not an end in itself, and identifying the relevant market involves an element of judgement*".

273. The authorities relied on by both parties and summarised at [260] to [262] of this judgment are clear: there are certain situations where the application of a SSNIP test in the standard, classic price increase sense is not appropriate. *BCMR* was not such a situation whereas *Paroxetine* was. The question here is whether the present case is one where the CMA ought to have followed the SSNIP test by asking customers how they would respond to a price change.

274. The Tribunal notes that the CMA's competition concern was not solely or primarily that the merger may lead to higher prices. It was concerned about other factors such as a reduction in the quality of the products, the range of products offered, level of innovation and/or reduced levels of customer support and service. These concerns were clearly set out and given consideration by the CMA in the Final Report at paragraphs 5.18 to 5.23, 5.33 to 5.40 and 5.78 to 5.79. The CMA employed forced diversion questions in the customer questionnaire and assessed demand-side substitutability by considering the range of relevant considerations outlined at paragraph 5.2.15 of the MAG. One feature of a forced diversion question is that it collects information across all customer preferences, whereas strictly speaking the unilateral effects analysis should focus only on the alternative choices of marginal customers. However, the forced diversion approach has the pragmatic advantage that it is much simpler to implement in a customer questionnaire. Further, given that the CMA's concerns laid with non-price as well as price considerations it was possible that an exclusive focus on consumers who would be marginal to price changes might not pick up relevant evidence on the (possibly different) group of consumers who might be marginal to changes in quality.

275. Therefore, the approach taken by the CMA in not asking customers the classic SSNIP test question in the sense of how they would respond to a 5 to 10% price increase was a reasonable one. The forced diversion questions were pragmatic and appropriate in that price was not the only or predominant concern in this case.

(2) Issue 3(b): Did the CMA err in focusing its evidence gathering on institutional purchasers of AAC solutions and not obtaining evidence from end users?

276. The parties' submissions under Issue 3(b) overlap with those advanced under Issue 2(a), and the Tribunal has addressed them at [198] to [204] of this judgment. For the reasons set out there, it was not unreasonable or irrational for the CMA to focus its evidence gathering on institutional purchasers of AAC solutions when defining the relevant market.

(3) Issue 3(c): Did the CMA erroneously create a definition of a market for dedicated AAC solutions?

277. The parties' submissions under Issue 3(c) overlap with those advanced in respect of the alleged 'Error 1' under Issue 2(b), and the Tribunal has addressed them at [222] of this judgment. For the reasons set out there, the CMA adopted a reasonable approach in defining the market. However, as set out in the Tribunal's analysis of Issue 3(h) at [332] to [337] of this judgment, it may have been better had the CMA excluded the Indi from the relevant market as its main competitive constraint on price came from consumer tablets (with AAC software and appropriate accessories) rather than from other dedicated AAC solutions.

(4) Issue 3(d): Did the CMA rely on a flawed questionnaire in coming to define the market?

278. The parties' submissions under Issue 3(d) overlap with those advanced under Issues 2(b) and (d), and the Tribunal has addressed them at [219] to [230] and [251] to [252] of this judgment. For the reasons set out there, it was reasonable for the CMA to rely on the evidence collected through its questionnaire as part of its assessment of the relevant market.

(5) Issue 3(e): Did the CMA err by not obtaining evidence on the substitutability of different *products* but only of different *suppliers*?

(a) The parties' submissions

(i) Tobii

279. Tobii noted that paragraph 15 of the Commission's Notice on Market Definition and paragraphs 5.2.1 to 5.2.19 of the MAG referred to market definition by identifying the products that are substitutable by consumers. However, the CMA's questions on substitution and diversion in the customer questionnaire did not refer to the products that customers would consider as substitutes, but instead to the suppliers by name, i.e. at the brand level.

280. Tobii submitted that the CMA should have assessed substitution at the individual product level and, by not doing so, it unreasonably failed to follow both its own guidance and established principles for analysing the relevant market. This meant the data obtained from the customer questionnaires on substitutability and diversion was unreliable and could not reasonably be relied upon by the CMA to reach its conclusions on market definition.

281. Tobii criticised the CMA's approach of starting at its asserted candidate market, which included all of the merging parties' products, notwithstanding the obvious differences between them in price as misconceived. According to Tobii, the approach failed to recognise the very obvious feature of the market, which was that each individual user was unique and their solution was tailored to their needs. Further, as the CMA's assessment included, at one end Tobii's Indi, which cost around £999, and extended to Tobii's I-15+, which cost just under £9,000, that made it inevitable that the CMA would be unable to determine the relevant boundaries of the market or markets and assess competition within it. Indeed, the CMA's own case was that within the market for dedicated AAC solutions, the Indi faced sufficient competition from out of market solutions provided via consumer tablets. (Final Report paragraphs 5.51, 5.79 6.61(k) and 6.70.) However, the CMA did not undertake a product-by-product analysis of closeness of competition that would have objectively allowed it to determine whether and how the closeness of competition varied between products but instead looked at the market as a whole.

282. Tobii submitted that by not undertaking a product-by-product analysis, the CMA failed to collect the evidence necessary to inform itself about the closeness of competition and precluded the possibility of obtaining information as to how customers viewed their willingness and ability to substitute across products and, crucially, whether that varied for the Indi in respect of other devices. Tobii argued that Smartbox's product range had changed considerably in recent years, given its history as being primarily a developer of AAC software and a reseller of other suppliers' products; Smartbox had only recently started to develop purpose-built hardware such as the Grid Pad 12.

283. In response to the CMA's reasoning set out at paragraph 6.56(c) of the Final Report on why it did not obtain evidence on the substitutability of different individual products, Tobii contended that it was clear that Tobii could not raise the price for the Indi because it was constrained by the ability of consumers to switch to an AAC solution based on a standard consumer tablet such as the iPad. Tobii submitted that the CMA's finding that the competitive constraint on the Indi was only in relation to price was wrong as it also competed on quality, durability, battery life, sound quality and other factors. In particular, there was competition between the Indi and the iPad that went beyond hardware and extended into software. Tobii considered the CMA's suggestion that it could put on less good software and exploit customers that way as fanciful because, as Tobii told the CMA at the main party hearing, losing one's reputation in the market was commercial suicide.

284. Tobii submitted further that innovation and R&D for Tobii's high-end devices, the I-110 and I-Series, was not driven by competition in the UK at all but by competition at a global level, including between devices that were eligible in the US for healthcare funding. That was a segment in which Smartbox had little or no presence but the CMA irrationally did not reflect that in its decision.

(ii) The CMA

285. The CMA submitted that, based on its experience and expertise in merger inquiries, it made an informed judgment in the present case that it was not necessary, appropriate or justified as a matter of evidence to evaluate the level of competition on a product-by-product basis. Accordingly, the Tribunal should show particular restraint in 'second guessing' it. Furthermore, Tobii had not come close to showing that the CMA's analysis and judgment was irrational.

286. In the CMA's submission, the focus of concern for both customers and the CMA was on the range of products as a whole that Tobii offered, which included the Indi, and on other aspects of Tobii's offering that were valued by customers, such as quality and range, the level of service and the incentives to engage in R&D to develop better products and develop better software, would deteriorate post-merger. Consequently, it did not look at each product but across the range.

287. The CMA referred to paragraph 6.56(c) of the Final Report, which set out the three reasons why it did not obtain evidence on the substitutability of different individual products:

> "With respect to Tobii's third point (diversion should be measured for individual products), we consider that this has no basis for three reasons. First, from a methodological standpoint it is only appropriate to measure diversion ratios at individual product level where suppliers can flex all parameters of competition (price, quality, range, service) for individual products. In the market for dedicated AAC solutions this is not the case. Some of the decisions made by suppliers (eg in terms of the development of new software, or the quality of customer service) have implications for their whole product range, and therefore incentives to flex these parameters will be shaped by diversion at the level of the product range. Second, as a practical matter the CMA has not seen any evidence (either at phase 1 or in the course of this inquiry) that conditions of competition vary materially across different products within the relevant market (with the possible exception of the Indi). The Parties do not tend to monitor different competitors for different products, and the four main competitors all offer a range of dedicated AAC solutions with different levels of portability, access options, and price points. It is therefore unlikely that diversion ratios would be significantly different for individual products (and no customer has raised this point as an issue). Third, as our diversion ratios are effectively average diversion ratios across the Parties' product ranges, to the extent that these product ranges include products over which the Parties compete less closely (eg the Indi), then they would underestimate the closeness of competition between the Parties for other products."

288. In respect of the third reason set out at paragraph 6.56(c) of the Final Report, Counsel for the CMA highlighted in oral submissions that if the product ranges included products which had lower competitive constraints, such as the Indi, the CMA's diversion ratios in fact underestimate the closeness of competition between the parties' other dedicated AAC solutions.

289. The CMA further submitted that, while it decided not to collect evidence from customers on substitutability product-by-product or specifically on the positioning of the Indi, it considered it had sufficient evidence from other sources, such as the merging parties' internal documents and transactions data, to reach a conclusion on substitutability and closeness of competition, and the CMA explained the interaction between these different sources of evidence at paragraph 8 of Appendix C to the Final Report. On the basis of that evidence, the CMA decided that conditions of competition did not vary materially across the market, with the possible exception of the Indi.

290. The CMA disputed Tobii's contention that it failed to collect evidence necessary to inform an assessment of the closeness of competition. Paragraphs 6.13 to 6.57 of the Final Report set out extensive evidence on closeness of competition from customers, competitors, the merging parties and diversion ratios. Furthermore, Tobii's contention that, by including the Indi in the relevant market, the CMA effectively precluded the possibility of obtaining information as to how customers viewed their willingness and ability to substitute across AAC products was misconceived. It misunderstood the purpose of market definition in a merger case, which was explained at paragraphs 4 to 7 of Appendix C to the Final Report, and, as a practical matter, the CMA did not find any evidence, whether at Phase 1 or Phase 2 of its investigation, that conditions of competition varied materially across different products within the relevant market, with the possible exception of the Indi on price (Final Report paragraph 6.56(c)).

291. The CMA contended that Tobii cannot derive any assistance from its claim that Smartbox's product range had changed considerably in recent years. The detailed product-by-product assessment favoured by Tobii would only make sense if the product range of the merging parties and their competitors was fairly static. If, however, suppliers of dedicated AAC solutions regularly introduced and withdrew new products, then it was reasonable to consider closeness of competition between competitors based on their overall positioning and general competitive strengths and weaknesses.

(b) The Tribunal's analysis

292. The question here is whether the CMA should have taken the differentiation between different products into account when defining the market.

293. The CMA explained at paragraph 6.56(c) of the Final Report (which is set out at [287] of this judgment) its reasons for not obtaining evidence on the substitutability of different individual products. Furthermore, although the CMA did not collect evidence from customers on the substitutability of different individual products, it considered other sources of evidence to inform itself about the closeness of competition and found that conditions of competition did

not vary materially across the market, albeit with the possible exception of the Indi. (Final Report paragraphs 6.13 to 6.57 and 6.61 to 6.62.)

294. It is often the case, in considering a suitably narrow relevant market for the purposes of assessing SLC concerns, that the candidate market will include differentiated products that do not all exert the same competitive constraint on one another. In framing a market definition, one may not necessarily reflect the diversity and richness of competition between differentiated products, but this does not make the definition itself incorrect or redundant.

295. In this context, Tobii has not demonstrated that there was manifest error in the CMA's approach in not obtaining evidence on substitutability on a product-by-product level. Had the CMA's assessment of the other sources of evidence shown that conditions of competition did vary materially across the market, the result might be different. As regards the specific case of the Indi, however, where the CMA did identify that conditions of competition varied from those for other dedicated AAC solutions, we deal with this under Issue 3(h) at [332] to [337] of this judgment.

(6) Issue 3(f): Was it unreasonable or irrational for the CMA to ignore the NHS's own guidance that mainstream devices are widely used for even users with complex communications needs?

(a) The parties' submissions

(i) Tobii

296. Tobii submitted that the CMA took no account of either the NHS England AAC Guidance, clinical practice or its own findings in defining the relevant market. The NHS England AAC Guidance makes clear that "*communication aids provided by specialised commissioning arrangements may be based on mainstream technology, such as tablet computers, or more dedicated hardware [that] will include specialist communication software*". According to Tobii, NHS England therefore recognises that AAC solutions for even the 10% of users

who have the most complex communication needs can and will be provided communication aids based on mainstream consumer tablets.

297. The CMA therefore failed to identify the range of products which were viewed as substitutes by customers and end users or to consider the extent to which AAC solutions based on different devices were considered by professionals and end users to be functionally interchangeable and good substitutes.

(ii) The CMA

298. The CMA submitted that the NHS England AAC Guidance did not address or establish the preferences and likely behaviour of the merging parties' customers in relation to relative changes in the price, quality, product range and/or innovation of dedicated AAC solutions, which were relevant to market definition. The CMA cannot be criticised for failing to mention in the Final Report guidance which does not concern market definition. In any event, although the CMA did not refer to the NHS England AAC Guidance in name, the CMA referred to the proposition that Tobii sought to draw from it at paragraph 5.18 of the Final Report.

299. The CMA contended that what was relevant for the purposes of market definition in this case was assessing the most significant competitive alternatives for the merging parties' customers because their behaviour and preferences were germane to whether the merger gives rise to an SLC. This was set out at paragraph 6.26 of the Final Report:

> "We are aware that many people with AAC needs do not obtain their solutions through the NHS, and in many cases do not use the type of dedicated AAC solutions sold by the Parties. However, for the purpose of assessing whether this Merger gives rise to an SLC, the relevant population of customers is not all people with AAC needs, but the Parties' customers. It is the preferences of these customers that will determine the Parties' incentives to raise price post-Merger (or otherwise deteriorate their offer). As explained in paragraph 5.14, 90% of the Parties' sales of dedicated AAC solutions in the UK are made to organisations such as the NHS, schools and charities, who purchase dedicated AAC solutions on behalf of end-users (only 10% of the Parties' sales of dedicated AAC solutions in the UK are made directly to end-users). In this context we considered it was more appropriate to obtain evidence on relevant customer preferences by engaging with these organisations and the majority of those who responded to our questionnaire raised concerns about the impact of the Merger (paragraph 6.16)."

(b) The Tribunal's analysis

300. In the Tribunal's view, Tobii's contention that the CMA unreasonably ignored the NHS England AAC Guidance is untenable. We do not consider it either necessary or fair to expect the CMA to specifically follow in this respect the NHS England AAC Guidance, which is not directed at market definition.

301. As set out in paragraph 5.18 of the Final Report, the CMA did ask customers about the extent to which a standard consumer tablet was a viable alternative to a dedicated AAC solution, to which the CMA recognised that many customers responded that a consumer tablet used along with AAC software and any required accessories can be a viable alternative for those users who can access the device through touch. However, many customers also identified a range of circumstances where a mainstream device could not be substituted for a dedicated device. Paragraph 5.18 of the Final Report then proceeded to list the five circumstances identified by customers. The customer evidence was consistent with the NHS England AAC Guidance, which stated that specialised commissioning arrangements "may" be based on mainstream technology, because it showed that for some users consumer tablets with AAC software and accessories were a viable alternative whereas for others it was not, including the circumstances when it was not.

302. In the Tribunal's view, it is the CMA's task to assess the relative weight of evidence or factors arising from the evidence and for Tobii to demonstrate that the CMA's assessment fell outside the width of its margin of appreciation or degree of evaluative discretion. As noted at [179] of this judgment in respect of Ground 2, the parties agreed that the rationality test which the Tribunal is to apply in judicial review proceedings follows the principles set out in *BAA*. However, they were not agreed what impact, if any, the divestiture remedy and, thus, Article 1 of the First Protocol to the ECHR had on the application of those principles. In our view, *BAA* at [20(5)] makes clear that the standard of review appropriate under Article 1 of the First Protocol to the ECHR and section 6(1) of the HRA 1998 is "*essentially equivalent to that given by the ordinary domestic standard of rationality*".

303. Accordingly, the Tribunal considers that the limitations as to the substitutability of mainstream devices (with AAC software and accessories) for dedicated AAC devices that emerged from the customer evidence and summarised by the CMA at paragraph 5.18 of the Final Report were of probative value for the CMA to rationally reach the conclusion that it should give weight to them.

(7) Issue 3(g): Did the CMA erroneously ignore extensive evidence of the use of consumer tablets in AAC solutions?

(a) The parties' submissions

(i) Tobii

304. Tobii argued that the CMA recognised at paragraphs 5.18 to 5.19 and 5.29 of the Final Report that there was extensive use of consumer tablets as a platform for an AAC solution, including by NHS trusts. However, the CMA ignored this extensive evidence when defining the relevant market.

305. According to Tobii, the CMA also found at paragraph 6.61(k) of the Final Report that Smartbox's Grid Pad 8 and 10 wrapped tablets competed with the Indi and that both competed with AAC solutions based on mainstream devices. Tobii noted that Mr Eskilsson's witness statement stated that the Indi was developed precisely to compete with mainstream consumer tablet devices, and Tobii contended that it was reasonable to assume that at least some of the products of other companies that the CMA considered to be dedicated AAC solutions also competed directly with consumer devices. In oral submissions, Counsel for Tobii referred to the paragraphs in Mr Eskilsson's witness statement, which described the dramatic rise in Tobii's total AAC solutions sales volumes between 2016 and 2018, and explained that that was driven by the sales of the Indi, Speech Case and software sales due to the trend of a decline in high-end devices and switching to consumer devices. Speech Case was Tobii's fastest growing product and the Indi was fast growing by volume because it was 10% the price of the I-15+.

306. Tobii contended that, by not taking account of these findings, the CMA unreasonably failed to define properly the relevant market by failing to take account of AAC solutions based on consumer tablets, which must be considered by customers and end users to be sufficiently functionally interchangeable as to be substitutes and to impose a sufficient competitive constraint on dedicated AAC solutions, so as to be within the same relevant market.

(ii) The CMA

307. The CMA submitted that Tobii's contention failed to identify any evidence that was before the CMA but was not taken into account. The CMA asked specific questions in its questionnaires about whether customers considered the use of consumer tablets to be a substitute or alternative to the merging parties' dedicated AAC solutions products (Final Report footnote 160) and the use of consumer tablets was explicitly addressed in the Final Report (Final Report paragraphs 5.18 to 5.19). The CMA did not find at paragraphs 5.18 to 5.19 of the Final Report that a consumer tablet was never a viable alternative to a dedicated AAC solution for any user. The CMA concluded on the evidence as a whole that consumer tablets did not exert a strong enough competitive constraint on dedicated AAC solutions to form part of the same product market, and this was a judgment that the CMA was reasonably entitled to reach on the evidence.

308. Paragraph 6.61(k) of the Final Report reflected that the CMA carefully considered competitive pressures from outside the relevant market when it assessed the competitive effects of the merger. As part of its competitive assessment the CMA considered the extent to which non-dedicated AAC solutions exerted a competitive constraint on the merging parties' dedicated AAC solutions and concluded that the merger was unlikely to generate an incentive to raise the price of the Indi. (Final Report paragraphs 5.50 to 5.51, 6.61(k) and 6.73.) Counsel for the CMA reiterated in oral submissions that it considered the Indi individually and found it was in a slightly different position to other products. The CMA recognised at paragraph 6.61(k) of the Final Report that there were stronger constraints as regards price on the Indi that were exercised on it from outside the relevant product market.

309. According to the CMA, Tobii's thesis that there was considerable demand-side substitutability between dedicated AAC solutions and non-dedicated AAC solutions was wrong because the correct question for the purpose of defining the market that is relevant for the assessment of the merger was whether a significant share of these customers considered non-dedicated AAC solutions as their closest alternative to the dedicated AAC solution they were using pre-merger. (Final Report Appendix C paragraph 6.) In any event, Tobii failed to show that the CMA's findings were unreasonable or unsupported by the evidence. There was no perversity or unreasonableness in the CMA weighing up all the evidence – including representations from customers, representations from competitors, the merging parties' internal documents and the pricing and features of alternatives to dedicated AAC solutions – and then using its judgment to define the relevant market. The CMA explained at paragraphs 5.79 and 6.73 of the Final Report that it found the constraint exerted by non-dedicated AAC solutions on suppliers of AAC solutions was much weaker than that exerted by suppliers of dedicated AAC solutions on each other and why it was appropriate to define a relevant market for dedicated AAC solutions. In assessing the evidence, it was for the CMA to decide what weight to place upon different aspects of it.

(b) The Tribunal's analysis

310. As the Tribunal has already noted in respect of Issue 3(f), it is the CMA's task to assess the relative weight of evidence or factors arising from the evidence. Under Issue 3(g), the question is whether the CMA's assessment of what weight to place on the evidence it received concerning the use of consumer tablets in AAC solutions went beyond the width of its margin of appreciation and degree of evaluative discretion. This is subject to the ordinary domestic standard of rationality (see *BAA* at [20(5)]).

311. In the Tribunal's view, the CMA considered whether consumer tablets formed part of the same product market and the CMA acknowledged at paragraph 5.18 of the Final Report, which is headed "*Qualitative views on substitutability*", that many respondents considered consumer tablets with AAC software and any required accessories a viable alternative:

> "We asked the Parties' AAC solutions customers about the extent to which a standard consumer tablet is a viable alternative to a dedicated AAC solution. All respondents to this question (21 respondents, including both NHS hubs and smaller customers) considered that the extent of substitutability between dedicated AAC solutions and mainstream devices is dependent on the needs of each specific end-user. Many respondents specified that a consumer tablet (used along with AAC software and any required accessories) can be a viable alternative for those users who can access the device through touch, although other user requirements are also taken into account during the assessment (as described in more detail below). […]"

312. Nonetheless, the CMA assessed and weighed it alongside the evidence from other customers and interest groups. The remainder of paragraph 5.18 and paragraph 5.19 of the Final Report continue:

> "5.18 […] However, many customers also identified a range of circumstances where a mainstream device could not be substituted for a dedicated device. Such circumstances included the following:
>
> (a) When the user cannot access the device through direct touch and instead requires complex access methods, such as eye gaze cameras or switches. Many customers noted that adding the required access method as an accessory to a consumer tablet is not always feasible or convenient.
>
> (b) When the user spends most of the day outside of home and/or in a wheelchair. This requires a device that is more rugged, robust, has louder speakers and a longer battery life than a mainstream device. In some cases it is possible to add accessories to a mainstream device to replicate some of these features (eg external speakers, batteries, etc), but some customers commented that this can be unwieldy and impractical.
>
> (c) When the user requires environment control functionalities (eg controlling lighting, doors, or a TV). Some customers commented that such functionalities are harder to incorporate into mainstream devices as they require infrared or radio connectivity.
>
> (d) When the user is likely to require continuous support and training. Suppliers of dedicated AAC solutions typically provide a higher level of support and repair service than is available with a solution based on a mainstream device. For example, suppliers of dedicated AAC solutions may provide temporary replacement devices while performing repairs; they guarantee the integrated operation of their solutions; they provide initial training.
>
> (e) When the user requires certain AAC software functionalities or language packages that are only available on a dedicated AAC solution. For example, one customer commented that Scottish and regional voices are typically less available on AAC software for iPads.
>
> 5.19 The responses from interest groups were broadly similar in substance to those obtained from customers. One interest group thought that the improvement of mainstream devices could somewhat lessen (though not

> completely remove) the impact of the Merger. Other respondents said that a large number of users can and do use mainstream devices, but there is a subset of users who have a strong preference for dedicated solutions."

313. This explains the CMA's evaluation of the evidence as to why, although some customers considered consumer tablets a viable alternative in AAC solutions, there were also other customers for whom a consumer tablet with AAC software and accessories were not a viable alternative. The arguments advanced by Tobii do not show that the CMA did not have evidence of sufficient probative value to rationally reach the conclusion that it did.

314. Moreover, the Tribunal notes that the CMA did consider a broad range of evidence from the merging parties, customers, competitors and observed market trends, which explored the extent to which tablets and dedicated AAC solutions competed with one another. These are summarised in paragraphs 5.78 to 5.79 of the Final Report.

315. Accordingly, the Tribunal considers that the CMA did not act unreasonably or irrationally by giving weight to the consumer evidence that provided a range of situations where consumer tablets with AAC software and accessories were not a viable alternative to dedicated AAC solutions.

(8) Issue 3(h): Did the CMA erroneously include within the relevant market products that were not within its created definition of a dedicated AAC solution?

(a) The parties' submissions

(i) Tobii

316. Tobii contended that the CMA included within the relevant market products that did not meet its definition of a dedicated AAC device because the CMA included the Indi and the Eye Mobile bracket despite neither being sold with customer support included in the purchase price.

317. Tobii submitted that the normal two-year warranty that was offered with the Indi and the 90-days telephone support provided by Tobii Dynavox for the Indi

were not 'customer support' as referred to in the CMA's definition of dedicated AAC solutions or in the Anonymised Customer Reponses. The two-year warranty was required by Article 3 of Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (as amended) (the "Consumer Sales Directive"). Although the 90-day telephone support was not required by the Consumer Sales Directive, it was neither technical support for damage nor for faulty goods. Moreover, consumer tablets such as Apple's iPad and Samsung's tablets were sold with similar customer telephone support.

318. Tobii contended that, by erroneously including the Indi within the relevant product market, the CMA overstated Tobii's market shares. Logically, given the closeness in price and product features of the Indi to tablet-based solutions and since the CMA considered the Indi to be constrained by consumer tablet-based solutions on price, the two would more likely be within the same market. If this distinction was made, then Tobii's sales volumes of the Indi should be excluded from the calculation of market shares and Tobii's market shares in the UK would be materially lower than as reported by the CMA.

319. In response to the CMA's submissions regarding diversion ratios, Tobii submitted that the diversion ratios were assessed on the basis of the product range as a whole, not on the basis of individual products, and the CMA accepted that its diversion ratios were averages.

(ii) The CMA

320. The CMA submitted that it was reasonable for it to consider that the Indi included customer support and was, thus, a dedicated AAC solution. It noted that Tobii's marketing material emphasised the availability of technical support for the Indi and Eye Mobile. Customers also had the option of purchasing additional warranties and support for these devices. Although the default level of support associated with these devices was lower than that associated with other dedicated AAC solutions such as the I-110, the level of customer support offered by Tobii for both the Indi and I-110 go beyond what was provided by mainstream devices. Indeed, Tobii's internal documents referred to at

paragraph 5.76 of the Final Report referred to the difference between the level of support offered for the Indi and that provided by non-dedicated AAC solutions.

321. The CMA's characterisation of the Indi as a dedicated AAC solution was also consistent with the customer evidence, and the CMA referred to specific responses in the Anonymised Customer Responses which showed that customers understood the Indi to be within the definition of a dedicated AAC solution.

322. The CMA also contended that it was also reasonable for it to consider customer support as a factor of differentiation compared to non-dedicated AAC solutions. Paragraphs 2.16 and 5.4 of the Final Report explained that customer support encompassed training, technical support and repairs. The CMA considered the two-year warranty and 90-day telephone support offered with the Indi to constitute customer support within the meaning set out at paragraph 5.4 of the Final Report. In addition to the two-year warranty and 90-days of telephone support, the Indi included access to Tobii's proprietary 'mytobiidynavox' learning and sharing community, which included back up, update and archiving capabilities. Customers also had an option to purchase additional TD Care support for two years with the same coverage as for more expensive AAC devices, whereas this option was not available to purchasers of non-dedicated AAC solutions.

323. The CMA disputed Tobii's case that the two-year warranty was required by the Consumer Sales Directive or by the Consumer Rights Act 2015 that implements the Consumer Sales Directive in the UK. The CMA contended that the two-year warranty was in addition to and operated alongside a consumer's statutory rights conferred by ss.19, 23 and 24 of the Consumer Rights Act 2015, which implemented Article 3 of the Consumer Sales Directive in the UK. The CMA agreed that the 90-day telephone support offered with the Indi was not required by the Consumer Sales Directive.

324. The CMA disagreed with Tobii's submission that mainstream tablets included the same level of customer support, training and warranty as a dedicated AAC

solution. (Final Report paragraphs 5.70, 5.72 and 5.85.) In respect of the Apple iPad, Apple's UK website stated that all Apple products (except the Apple Watch Edition) had a one-year 'Apple Limited Warranty', which operated alongside and in addition to a consumer's statutory rights under UK consumer law. This did not cover accidental damage, damage to peripherals or the provision of a replacement/loan device. The Apple Limited Warranty offered 90 days of technical telephone support but this did not extend to installing AAC applications or using peripherals. As such, a consumer trying to replicate the functionalities of an Indi by buying separately an iPad, AAC software and peripherals would not benefit from the same level of telephone support. The Microsoft Surface Pro also came with a one-year warranty, and Samsung offered a 24-month warranty for its tablets that did not refer to providing customer support with installing AAC applications or using peripherals. In any event, the CMA had not seen any evidence indicating either that Samsung tablets played a significant role in AAC solutions or that the merging parties benchmarked Samsung tablets as part of their monitoring of competition.

325. The CMA further submitted that it recognised that the assessment of the Indi was more finely balanced. It submitted that the assessment of evidence was a matter of judgment on the part of the CMA and, on the basis of the evidence taken as a whole, it was reasonable for the CMA to include the Indi in the relevant product market. The CMA properly recognised that dedicated AAC solutions were differentiated products that differed in terms of their size, access options, functionality, software and the level and quality of support and, particularly where products were differentiated, the boundaries of the market may be blurred. (Final Report paragraphs 5.3 and 5.7.) The CMA's approach was consistent with paragraph 5.2.2 of the MAG. It examined the extent to which the strength of competitive constraints might differ for individual products, both within the relevant market and outside it (Final Report paragraph 5.3), and the CMA carefully considered the evidence indicating that non-dedicated AAC solutions exerted stronger competitive constraints, particularly on price, on the Indi, as well as constraints that the Indi exercised on other products within the market (Final Report paragraphs 5.50(a), 5.51, 5.58, 5.64, 5.76 to 5.78, 6.37(a), 6.61(k) and 6.70).

(1) The CMA considered evidence indicating that the Indi did compete with, and constrain, other dedicated AAC solutions. In particular, the merging parties' internal documents reflected that Tobii noted that the Indi impacted on Smartbox in the UK and Smartbox benchmarked the Indi when considering the competitiveness of its products, notably its more portable devices Grid Pad 8 and 10. (Final Report paragraphs 6.34(f) and (g) and Figure 6-3.)

(2) The CMA considered evidence that competition on non-price elements of competition such as service, range of products, innovation and R&D took place across Tobii's entire range and Smartbox's entire range, including the Indi. (Final Report paragraph 6.56(c).)

(3) The CMA also had regard to the views of Google, Apple and Microsoft. Apple told the CMA that it thought the merging parties were distant competitors to itself as they offered hardware and software dedicated to serving the AAC market. (Final Report paragraphs 5.36 to 5.40.)

(4) The CMA received customer evidence that there were circumstances where non-dedicated AAC solutions may not replicate the performance of a dedicated AAC solution and complex solutions incorporating a mainstream device and peripherals were often impractical and unreliable. (Final Report paragraphs 5.73 to 5.74.)

326. The CMA also considered what the position would be on market share and diversion ratios if the Indi had been taken out of the relevant market. In respect of market shares, the CMA referred to footnote 211 to paragraph 6.11 of the Final Report, which reflected that Tobii's market share would decrease by an immaterial amount and that Smartbox's market share would increase by an equally small, insignificant amount:

> "Given the evidence suggests that the Indi is subject to stronger price constraints from non-dedicated AAC solutions (paragraph 5.79), we have also estimated market shares excluding the Indi from the relevant product market. However, we note that such exclusion would not have a material impact on market share estimates: Tobii's market share would decrease from [10-20%] to [10-20%] by value, and from [20-30%] to [10-20%] by volume; and

> Smartbox's market share would increase from [40-50%] to [40-50%] by value and from [40-50%] to [40-50%] by volumes."

327. In respect of diversion ratios, the CMA referred to paragraphs 6.56(c) and 6.70 of the Final Report and footnote 259. The CMA noted in particular that:

> "6.70 […] The Indi only represents [✂] of Tobii's sales of dedicated AAC solutions in the UK in value and, therefore, excluding that product from the market is unlikely to materially change the results of our analysis.[259] […]"
>
> "Footnote 259 In relation to market share estimates, see footnote to paragraph 6.11. In relation to diversion ratio estimates, if anything, the inclusion of the Indi might imply that our estimates of diversion ratios overstate diversion to non-dedicated AAC solutions and understate diversion between the Parties. As respondents to our questionnaire took account of their purchases of Indi when responding to the diversion question, then measured diversion to non-dedicated solutions is in fact higher than it would have been if we had asked respondents to only take account of their purchases of dedicated AAC solutions excluding the Indi."

328. The CMA acknowledged that the evidence did not suggest a clear-cut boundary between the Indi and other dedicated AAC solutions (Final Report paragraph 6.68), and the CMA carefully weighed all the evidence before it (Final Report paragraph 6.61). The CMA also took into account that only some parameters of competition, specifically price, could be flexed at the level of the individual product. (Final Report paragraph 6.56(c).) Although the CMA found that an increase in the price of the Indi was unlikely (Final Report paragraph 6.61(k)), it considered that it was not appropriate to exclude the Indi from the scope of products on the basis that:

(1) While the Indi was subject to stronger competitive constraints from non-dedicated AAC solutions, it also acted as a competitive constraint on Smartbox's most portable devices. (Final Report paragraphs 6.34(f) and (g) and 6.61(k).)

(2) If Tobii reduced the quality of its software and customer service for other devices, that would necessarily affect the Indi. (Final Report paragraph 6.56(c).)

(b) The Tribunal's analysis

329. This is a judicial review challenge to the CMA's SLC Decision and, in respect of Tobii's challenge of the CMA's inclusion of the Indi in the relevant product market, the Tribunal is to apply a rationality test, according to the ordinary domestic standard of rationality (see *BAA* at [20(4)] and [20(5)]). In applying that standard, it is not the Tribunal's task to reassess the relative weight to different factors arising from the evidence before the CMA (see *BSkyB* at [63] and *Stagecoach* at [42]), nor it is the function of the Tribunal to trawl through the CMA's report with a fine-tooth comb to identify arguable errors (see *BAA* at [20(8)]). The question for the Tribunal is whether the CMA had a sufficient basis in light of the totality of the evidence available to it for making the assessments and reaching the decision it did.

330. Although Issue 3(h) as phrased is whether the Indi falls within the CMA's definition of dedicated AAC solutions, the Tribunal notes that at the hearing and in further written notes submitted by the parties to the Tribunal, the dispute between the parties broadened to a second, more substantive question as to whether the Indi properly fell within the relevant product market.

331. As regards the narrower definitional issue, the Tribunal considers that there was sufficient evidence which showed that the Indi did meet the technical definition adopted by the CMA as to what constitutes a dedicated AAC solution. The fact that the Indi is supplied with some level of customer support included is sufficient for it to meet the fourth criterion in the CMA's definition.

332. As regards the broader substantive question, the totality of the evidence informed the CMA that, although the Indi shared other characteristics with products in the candidate market, distinct competitive pricing constraints applied to it. Indeed, the CMA recognised at paragraphs 5.50 to 5.51, 5.56 to 5.64 and 5.76 to 5.78 of the Final Report that:

    (1) the Indi was launched specifically to compete with the iPad, Tobii's internal documents benchmarked the price of the Indi against that of the

iPad, and that non-dedicated AAC solutions had a very specific positioning, competing on price mainly with the Indi;

(2) Tobii specifically told the CMA at the main party hearing that the Indi was targeted at different users than the I-12+, and that these were "*two different markets*" in which sales of the Indi had not cannibalised sales of Tobii's other dedicated AAC solutions; and

(3) This absence of cannibalisation was also supported by the CMA's assessment of sales and pricing data, which found that a large increase in Indi sales had not materially reduced sales of the I-12+ or I-15+, and that there had been no downward price pressure on the sales of these higher priced products as a consequence of the Indi's launch.

333. Further, whilst some of the Anonymised Customer Responses may have included the Indi within the dedicated AAC solution category and Smartbox's internal documents considered the Indi may be in competition with two of its products, Grid Pad 8 and Grid Pad 10 (Final Report paragraphs 6.34(f) and (g), 6.61(k) and 6.73), the evidence of the Indi actually being in the same market as the rest of dedicated AAC solutions was very thin. Indeed, Tobii introduced the Indi in order to compete with iPads and did so in terms of price in particular. (Final Report paragraphs 5.48(a), 5.50, 5.51, 5.76, 5.77, 6.37(a), 6.61(k) and 6.68.)

334. This assessment of the Indi being subject to a distinct and different set of competitive pricing constraints is further underlined in the CMA's conclusions on the unilateral effects. Paragraph 6.61(k) of the Final Report states that the competitive constraints posed by tablets will mean that it is unlikely that Tobii could profitably raise the price for the Indi post-merger, whilst paragraph 6.62 of the Final Report notes the absence of such constraints on other dedicated AAC solutions will allow their prices to rise.

335. At the same time, the CMA found that some elements of its SLC finding, notably the concern that AAC software R&D would be significantly diminished as a result of the merger, could affect the whole range of dedicated AAC

solutions, including the Indi for the reasons summarised at [372] of this judgment. However, since the CMA found that the Indi was competitively constrained by tablet-based AAC solutions, even if this reduction in software quality does apply to the Indi in the future, the CMA has not explained how that would result in any significant consumer detriment, since actual or potential Indi customers would remain free to switch to tablet solutions.

336. The Tribunal notes that it is quite possible for one product to be part of a narrowly defined market within a larger market, as well as being within what could be defined as a separate market, and that the boundaries of a market may be fluid. One of the CMA's tasks in merger investigations is to assess and weigh up the evidence, which may not be clear-cut. In this instance, however, the CMA's own assessment of the evidence on the different competitive conditions facing the Indi and other dedicated AAC solutions did indicate that they were not the same, particularly in relation to price. In those circumstances, it might have been better and clearer had the CMA excluded the Indi from the product market.

337. Accordingly, the Tribunal considers that, on the totality of the evidence before it, the CMA was in error in not excluding the Indi from the relevant product market for the purposes of its analysis. Nevertheless, the Tribunal notes that the CMA was careful to consider the impact of its evaluative judgment on the analysis if, so to speak, it was wrong in its judgment to include the Indi in the relevant product market. The CMA looked at the impact on market shares and diversion ratios if the Indi were instead excluded from the product market and found that the impact on market shares was immaterial and the impact on diversion ratios was to reinforce the closeness of competition between the merging parties and the separation between dedicated and non-dedicated AAC solutions. This is of relevance to the CMA's SLC analysis on horizontal unilateral effects, which the Tribunal considers under Issue 4(d) at [378] to [381] of this judgment.

J. TOBII'S GROUND 4: THE FINDING OF AN SLC AS A RESULT OF HORIZONTAL UNILATERAL EFFECTS WAS NOT SUPPORTED BY RELEVANT, RELIABLE AND SUFFICIENT EVIDENCE

338. Tobii alleges that the CMA's evidence from customers, competitors and the merging parties' internal documents was, individually and collectively, insufficient to form a reasonable evidential basis for the CMA's finding of an SLC due to horizontal unilateral effects and the CMA erred by not establishing that the SLC was 'substantial'.

(1) Preliminary observations

339. The CMA's published advice and information regarding its approach to assessing and analysing the effects of a merger and whether or not it could lead to an SLC is set out in Part 4 of the MAG. According to paragraph 4.1.3:

> "[…] Some mergers will lessen competition but not substantially so because sufficient post-merger competitive constraints will remain to ensure that rivalry continues to discipline the commercial behaviour of the merger firms. A merger gives rise to an SLC when it has a significant effect on rivalry over time, and therefore on the competitive pressure on firms to improve their offer to customers or become more efficient or innovative. A merger that gives rise to an SLC will be expected to lead to an adverse effect for customers. Evidence on likely adverse effects will therefore play a key role in assessing mergers."

340. In *Global Radio Holdings Limited v Competition Commission* [2013] CAT 26 ("*Global Radio*"), which concerned a judicial review under s.120 of the 2002 Act of the Competition Commission's decision that an acquisition had resulted or may be expected to result in an SLC, Global Radio submitted that "*substantial lessening of competition*" as set out in s.35 of the 2002 Act meant "large", "considerable" or "weighty". However, this was rejected by the Tribunal at [24] to [25].

341. In relation to the competition authority's SLC assessment, the Tribunal held in *BSkyB* at [80] that:

> "So, in the context of an assessment as to whether there is likely to be an SLC in the future, the Commission must give full and proper consideration to the evidence which it has gathered, and apply the "probabilistic test" at the end-point. In other words it must ultimately ask itself whether it is satisfied on the balance of probabilities that there will be an SLC caused by the [relevant

merger situation], but the Commission is not under an obligation to make findings of fact (whether on a balance of probabilities or otherwise) in respect of each item of evidence. Nor is it obliged to find that any particular potential investment is more likely than not to occur before it can take it into account in its overall assessment of the probability of SLC."

(2) Issue 4(a): Was the evidence relied on from customers, competitors and the internal documents of Tobii and Smartbox insufficient and unreliable?

(a) The parties' submissions

(i) Tobii

342. Tobii submitted that the evidence obtained by the CMA lacked credibility and was unreliable such that no reasonable authority could have relied on it. The CMA did not obtain sufficient information from a wide cross-section of purchasers and users of AAC solutions. Its assessment of horizontal unilateral effects relied heavily on evidence obtained in Phase 2 from a relatively small number of institutional customers and interest groups who represented only a subsection of all purchasers of AAC solutions. Further, the evidence in Phase 2 of the CMA's investigation was obtained using customer questionnaires and email requests that were deeply flawed and biased.

343. Tobii contended that the unreliability of the evidence that the CMA obtained from customers was confirmed by simple cross-checks against data and other evidence that Tobii provided to the CMA, such as the Tobii End User Survey and Tobii Dynavox's transactions data. In particular:

(1) There were substantial inconsistencies between the data provided by customers to the CMA and the results of Tobii's End User Survey, particularly as regards closeness of competition and diversion ratios. The CMA acted unreasonably by failing to verify the accuracy of the customer data it received and whether its preliminary conclusions on closeness of competition and diversion were reliable and robust, and by dismissing Tobii's End User Survey in its entirety.

(2) There were significant discrepancies between (i) the expenditure data provided by NHS Hubs and relied on by the CMA in calculating diversion ratios and GUPPIs and (ii) the sales to NHS Hubs recorded in Tobii Dynavox's transactions data, which the CMA did not dispute. The CMA acted unreasonably by not cross-checking the reliability of the NHS Hubs' evidence and instead asserting without evidential support or real attempt at analysis that the discrepancies "*could reflect differences in how transactions are recorded in accounting systems*" and explained this was due to differences in recording rebates and discounts even though sales to the NHS are usually at list price without discounts. (Final Report paragraphs 6.54(d), 6.56(d) and 8.81.)

(3) The evidence provided by customers was inconsistent with the available contextual evidence. In particular, the very high diversion ratios calculated by the CMA using customer data were inconsistent with ratios that would be implied by suppliers' market shares. The CMA never addressed the point that diversion from Tobii to Smartbox was broadly in line with that which would be expected by market shares because, where competitors were of equal closeness in their offering to customers, their respective shares of diverted sales in the event of a forced diversion of the remaining suppliers will be roughly proportionate to their market shares. At paragraph 6.47 of the Final Report, the CMA found the diversion ratio from Tobii's dedicated AAC products to Smartbox's products to be [50 to 60%], which was broadly the same level as would be expected if one were just to calculate diversion on the basis of market shares alone. On that basis, Tobii submitted that it and Smartbox were not particularly close competitors whereas the CMA asserted at paragraph 6.47 of the Final Report that they were "*close competitors*".

(ii) <u>The CMA</u>

344. The CMA submitted that it was primarily a matter of assessment and judgment on the part of the CMA whether the body of evidence before it was sufficient to justify a finding that the merging parties were close competitors. Although

Tobii disagrees with the CMA's conclusion, it had not shown the CMA's conclusions to be perverse or irrational. Tobii had already made many of these arguments before the CMA during the investigation and its attempt to re-argue them go to the merits and beyond what was appropriate on a judicial review challenge.

345. The CMA referred to its submissions under Issues 2(a) and (b) to answer Tobii's allegations that the CMA unreasonably collected evidence from a subsection of all purchasers of AAC solutions, used flawed and biased customer questionnaires and disregarded Tobii's End User Survey.

346. The CMA submitted that it was reasonable for it to conclude that the differences between the NHS Hubs' expenditure data and Tobii Dynavox's transactions data would not affect the robustness of its analysis because the differences between the two datasets were not material and the discrepancies did not materially affect the CMA's findings. The CMA also checked and tested the NHS Hubs' expenditure data, which it used (i) to calculate market shares and (ii) to weight diversion ratios:

(1) The CMA cross-checked the NHS Hubs' reported purchase volumes of dedicated AAC solutions from Tobii and Smartbox against the merging parties' sales volumes of dedicated AAC solutions and found that customers did not systematically under-report purchases of dedicated AAC solutions. (Final Report paragraph 6.56(a).)

(2) The CMA also gathered sales data from suppliers and confirmed that both datasets from customers and suppliers produced broadly consistent estimates of market shares. (Final Report paragraph 6.10 and Tables 6-1 and 6-2.)

(3) The CMA carried out a further cross-check on the market shares by taking the Indi out of the relevant product market and found no material impact on market share estimates. (Final Report footnote 211.)

(4) The CMA used weighted and unweighted diversion ratios to inform its assessment of diversion patterns and closeness of competition, and the CMA checked that its estimates of weighted diversion ratios were not sensitive to its choices of weights. (Final Report paragraph 6.56(d).)

347. The CMA contended that Tobii's claim that the high diversion ratios using customer data were inconsistent with the ratios implied by suppliers' market shares was misconceived because diversion ratios measure the closeness of competition whereas market shares measure market concentration. (See paragraphs 5.3.2 to 5.3.3, 5.4.9(a) and 5.2.15(a) and footnote 52 of the MAG.) Therefore, there was no meaningful sense in which market shares may be used as a cross-check on diversion ratios. The CMA cross-checked the diversion ratios by reference to the merging parties' internal documents, in the sense that the suppliers who seemed to attract more diversion should also be the suppliers who were more heavily monitored in internal documents. (Final Report paragraphs 6.31 to 6.44.)

348. The CMA disputed Tobii's complaint that it failed to acknowledge that, relative to its volume of sales, Techcess was the closest competitor to each of Tobii Dynavox and Smartbox, was unsound. According to the CMA, there was consistent and wide-ranging evidence upon which a reasonable competition authority could find that Tobii and Smartbox were close competitors. These included:

(1) The merging parties' internal documents and their respective development plans (Final Report paragraphs 6.31 to 6.44 and 6.61(b) to (i)).

(2) The evidence from customers (Final Report paragraph 6.15).

(3) The evidence from competitors, including Techcess (Final Report paragraph 6.29).

(4) The weighted diversion ratios from Tobii's dedicated AAC solutions to Smartbox's products and vice versa (Final Report paragraphs 6.47 to 6.49).

The CMA submitted that this body of evidence on market shares, diversion ratios, the merging parties' internal documents and evidence from customers all pointed to the same conclusion, i.e. that Techcess was significantly smaller than the other three suppliers of dedicated AAC solutions and, as such, exerted a lesser constraint on the merging parties. Indeed, Techcess itself acknowledged that it was much smaller and less well-resourced than Tobii, Smartbox and Liberator. (Final Report paragraphs 6.29(b) and 6.61(a) to (c), (e) to (f) and (i).)

(b) The Tribunal's analysis

349. The parties' submissions under Issue 4(a) concerning the reliability of the customer evidence overlap with those advanced under Issues 2(a), (b) and (d). The Tribunal addressed them at [198] to [204], [219] to [230] and [251] to [252] of this judgment. For the reasons set out there, it was not unreasonable or irrational for the CMA to focus its evidence gathering on institutional customers and to disregard Tobii's End User Survey, nor were the customer responses to the CMA's questionnaire unreliable, and it was not unreasonable or irrational for the CMA to afford some weight to the customer evidence. The weight given to the customer evidence was reasonable in the Tribunal's assessment.

350. While the focus of Tobii's submissions under Issue 4(a) was the customer evidence, Tobii also alleged that the competitor evidence and internal documents were unreliable and that it was insufficient for the CMA to rely on customer evidence, competitor evidence and the merging parties' internal documents to inform its SLC assessment. As regards the reliability of the competitor evidence and internal documents, the CMA noted that it cross-checked the data from the competitor evidence against that from the customer evidence and found both datasets produced broadly consistent estimates of market shares. Further, the CMA cross-checked the merging parties' internal documents against the diversion ratios it generated from the

customer data and found that the merging parties monitored those suppliers who attracted more diversion. The body of evidence pointed in the same direction.

351. As regards the sufficiency of the customer evidence, competitor evidence and internal documents, whether the CMA's investigation had gone far enough in the collection and analysis of evidence to inform its SLC assessment is an issue for the CMA to evaluate and Tobii needs to show a strong case that the CMA manifestly drew the line in the wrong place (see *Akzo Nobel* at [160]). This is what Tobii has failed to do.

352. As the Tribunal noted at [228] to [230] of this judgment in respect of the alleged 'Error 6' under Issue 2(b), the fact that the diversion ratios (and the way they were compiled) were not perfect does not preclude their ability to provide some relevant insight. In the Tribunal's view, the CMA took reasonable steps to explore and dismiss the discrepancies that Tobii alleged within the questionnaire responses. More importantly, it also obtained a considerable body of other evidence from customers, competitors and internal documents that indicated that buyers of dedicated AAC solutions would not easily switch to tablet-based solutions. Due to the existence of this other evidence, the CMA's conclusion of an SLC as a result of horizontal unilateral effects did not solely depend on the diversion ratios.

353. Further, the Tribunal does not find that Tobii's arguments about closeness of competition help its case. Generally speaking, a finding that diversion ratios are consistent with relative shares in a narrow dedicated AAC solutions market would be enough to justify the CMA's SLC conclusion, since it is perfectly reasonable for a competition authority to find that a merger involving the market leader and a reduction in the number of significant players from four to three gives rise to an SLC.

354. Accordingly, the Tribunal does not consider that Tobii has shown that the CMA's approach in collecting and taking account of evidence from customers, competitors and the internal documents of Tobii and Smartbox fell beyond its margin of appreciation, and the CMA was not wrong to take account of that evidence in the way that it did. The CMA acted reasonably in obtaining and

assessing a range of evidence from different sources before reaching the conclusions that it did.

(3) Issue 4(b): Was the CMA's assessment of diversion ratios and its GUPPI analysis based on credible and reliable evidence?

355. The CMA's estimated diversion ratios were calculated using data collected from questionnaires sent to NHS Hubs (Final Report paragraphs 5.22 to 5.23 and 6.46 to 6.49) and the GUPPI figures were calculated by combining the diversion ratios with estimates of the variable margins of each party (Final Report paragraphs 6.50 to 6.52). The parties' submissions under Issue 4(b) were in respect of the CMA's use of the NHS Hubs' data to calculate diversion ratios and, thus, GUPPI figures. Therefore, they overlap with those advanced under Issue 2(c), and the Tribunal has addressed them at [238] to [240] of this judgment. For the reasons set out there, it was not irrational or unreasonable for the CMA to generate diversion ratio estimates based on data from 12 NHS Hubs. Accordingly, it was not unreasonable for the CMA to place such weight as it did on the diversion ratios and GUPPIs in its SLC assessment, especially since that evidence was combined with other material summarised at paragraph 6.61 of the Final Report that corroborated the CMA's case on the existence of an SLC as a result of horizontal unilateral effects.

(4) Issue 4(c): Did the CMA have other evidence on which its SLC finding could reasonably be based?

(a) The parties' submissions

(i) Tobii

356. According to Tobii, the CMA's finding of an SLC as a result of horizontal unilateral effects was primarily based on data received from customers, which it used to calculate market shares, diversion ratios and GUPPIs, and the CMA relied to a very limited extent on other information, which was insufficient and unreliable, to support its SLC finding.

357. In response to the CMA's assertion that its finding of an SLC on horizontal unilateral effects was based on a wealth of evidence, which were referred to at paragraph 6.61 of the Final Report, Tobii pointed out that the CMA had three sources: customers and interest groups, competitors and resellers, and the merging parties' internal documents.

358. Tobii also submitted that the customer questionnaires sought opinion evidence from customers that they were not really qualified to provide. In particular, customers were asked "*If you have any other views or comments on the merger and its potential impact on the market for dedicated AAC solutions, please provide them below*". (Final Report footnote 214.) However, ultimately whether there is a negative effect on competition was a matter for the CMA and not, for example, for a speech and language therapist to provide opinion evidence on. In any event, only 30 of the 69 customers contacted by the CMA responded and only 18 of them expressed any negative views of about the merger. (Final Report Tables 6-3 and 6-4.) Furthermore, paragraphs 6.19 to 6.20 and 6.61(c) of the Final Report and the Anonymised Customer Responses reflected that not all the customers' concerns had anything to do with a loss of competition due to the merger. One of the perceived negative effects of the merger that customers were very concerned about was the effect on customer service. That was because Tobii was operating from Sweden, which was not very customer friendly and effective particularly for UK customers who needed a replacement device almost immediately, and therefore was more about Tobii from the perspective of a purchaser, rather than about whether that loss of customer service and quality was actually going to be a result of a loss of competition.

359. Tobii noted that competitors were asked to "*identify their competitors and comment on their relative positioning, strengths and weaknesses*" (Final Report paragraph 6.29), and this did not enable the CMA to determine whether the merging parties were close competitors and whether the merger was going to substantially lessen competition. Tobii submitted that the questionnaires sent to competitors and resellers in the CMA's Phase 2 investigation suffered also from many of the same fundamental flaws as those contained in the customer questionnaires and this adversely affected the reliability and credibility of the

evidence received by the CMA. Counsel for Tobii also argued in oral submissions that competitors had their own agendas. Furthermore, section 6 of the Final Report, which was on horizontal effects, contained little reference to what competitors and resellers actually said.

360. Tobii contended that the merging parties' internal documents, showing that they monitored and assessed their product range and software against each other's and Tobii's internal documents relating to its plans for the merger, did not provide the CMA with a reliable basis for determining that they were close competitors and that the merger would result in an SLC. Tobii submitted that the way the CMA interpreted the internal documents was not a fair reflection of the actual position but was partial, selective and lacking in objectivity.

(1) In a market where there were relatively few manufacturers of purpose-built devices and wrapped tablets, it was unsurprising that the merging parties would keep an eye on what each other were up to in the market. In any event, Tobii also monitored a much broader range of competitors, not necessarily in the UK. For example, Figure 6-3 in the Final Report showed half a dozen competitors in the AAC space and Figure 5-1 in the Final Report showed that Tobii monitored proxies such as Apple and Microsoft for all the AAC solutions that were based upon their platforms using third party applications and software, as well as developers of AAC applications.

(2) The plan to discontinue some products was not a deliberate reduction in range and customer choice, but was designed to create better and new products for users based on Tobii's highly-regarded hardware and Smartbox's well-known software.

(3) In relation to R&D, the intention was to avoid unnecessary duplication and have more focused R&D, and any reduction in R&D spending was not about reducing the amount of R&D at all. Indeed, the merger plan for the R&D budget was largely the same as it was pre-merger.

(ii) The CMA

361. The CMA disagreed with Tobii's contention that it had no other reliable evidence to support its finding of an SLC. The CMA's conclusion was based, not on any single category of evidence in isolation, but on all the evidence taken together. This was apparent from paragraphs 6.61 to 6.63 of the Final Report. Whether the evidence as a whole was sufficient was a matter of expert judgment for the CMA, subject only to the question of rationality and Tobii failed to advance any argument which might support a finding of irrationality.

362. The CMA submitted that its approach to customers' views on the merger was not irrational because they were relevant to the SLC and properly weighed by the CMA as part of all the evidence to find horizontal effects. (Final Report paragraphs 6.16 to 6.28 and 6.61(c).) In general, it was neither necessary nor reasonable to expect customers to have to articulate their concerns in a way that mirrored principles of competition economics. Nevertheless, the fact that many customers thought that such adverse effects were possible and even likely was consistent with the proposition that they thought Tobii would not be sufficiently constrained by the remaining competition post-merger.

363. The CMA also submitted that its approach to competitor evidence was also rational because it was relevant to the SLC analysis and properly weighed as part of all the evidence to find horizontal effects. (Final Report paragraph 6.61.) Tobii's contention that the competitor questionnaires suffered from design flaws was speculative.

364. According to the CMA, Tobii's summary of the internal documents substantially understated the significance of their contents. The documents did not simply show that the merging parties monitored each other and that Tobii considered one of its software products to be weaker than that of Smartbox. The internal documents showed explicit evidence of competitive interaction between the merging parties and explicit plans to deteriorate the merging parties' competitive offering post-merger. The CMA's assessment of the internal documents was set out at paragraphs 6.31 to 6.44 and 6.61(e) to (h) of the Final Report and the CMA was entitled to take the view that how the

merging parties saw one another prior to the merger was relevant and material in assessing the competitive harm likely to arise from the merger.

(b) The Tribunal's analysis

365. The Tribunal reiterates that it is the CMA's task to assess the relative weight of evidence or factors arising from the evidence. Consequently, in its SLC analysis, as long as there was some evidence on which to base its decisions, it was for the CMA to weigh up the totality of the evidence it had and to reach conclusions that were supported by evidence of some probative value (see *BAA* at [20(4)]).

366. The Tribunal accepts that the CMA looked at a range of evidence. On this aspect, this is not a case where the CMA was operating in an evidential void. Although, as Tobii submitted, the CMA's evidence derived from three categories of sources, the evidence that the CMA reviewed was wide and related to a range of factors and considerations relevant to the SLC assessment. The customer and competitor evidence came from multiple NHS Hubs and suppliers or resellers and contained information such as customer needs and preferences, customer purchasing data, suppliers' sales data, product ranges and product strengths, which related to a range of factors. The merging parties' internal documents contained information such as sales data, the monitoring and benchmarking of competitors, business strategy and product development plans, which related to a range of factors too. These led to the list set out by the CMA at paragraphs 6.61(a) to (k) of the Final Report and its summary at paragraphs 6.62 and 6.63 of the Final Report of its assessment of the totality of the evidence.

367. Tobii's granular arguments regarding particular questions put to customers and to competitors by the CMA do not establish that the weight placed by the CMA on the totality of the evidence it considered was unreasonable or irrational. As regards the CMA's interpretation of Tobii's internal documents, that is again an evaluative assessment by the CMA, which, in light of the CMA's finding that there was a contrast between the merged entity's post-merger plans and their pre-merger documents, Tobii has not shown to fall beyond the CMA's margin of appreciation.

(5) Issue 4(d): Was the CMA irrational in not evaluating substitutability of the merging parties' products and the closeness of competition between them on a product-by-product basis?

(a) The parties' submissions

(i) Tobii

368. Tobii submitted that, having recognised that the Indi faced sufficient competition from out of market solutions provided via consumer tablets such that there were no horizontal concerns regarding this product (Final Report paragraphs 5.51, 5.79, 6.61(k) and 6.70), it was irrational for the CMA not to undertake a product-by-product analysis of closeness of competition and find that, for the market as a whole, the merger gave rise to horizontal effects concerns sufficient to find an SLC (Final Report paragraph 6.81).

369. Further, Tobii submitted that, having recognised that the Indi faced effective competition from AAC solutions based on consumer devices and would continue to do so post-merger, thus preventing any price increase, and finding that Smartbox's Grid Pad 8 and 10 products competed to some extent with the Indi (Final Report paragraph 6.61(k)), it was unreasonable that the CMA did not examine whether other products also faced different conditions of competition.

370. Tobii disputed the CMA's justification that it took an informed judgment based on its experience and expertise in merger inquiries as unreasonable in the context of this case. Tobii contended that the CMA had no economic basis for its assertion at paragraph 6.56(c) of the Final Report that a product-by-product analysis was not appropriate because "*the four main competitors all offer a range of dedicated AAC solutions with different levels of portability, access options, and price points*". Instead, the reality was that different devices did have different parameters of price, quality, range and service, and it was also inconsistent with the CMA's finding at paragraphs 5.3 and 5.7 of the Final Report that AAC solutions were highly differentiated products and the conditions of competition varied for different dedicated AAC solutions.

371. According to Tobii, assuming the CMA was correct to have included the Indi in the relevant market, it would logically have needed to take into account the relative size of the Indi segment and other segments where it suggested there was an SLC. Further, the factual evidence showed that there had been a rapid increase in the volume of product sales accounted for by the Indi in the UK, relative to the volume of higher-end devices sold. Therefore, the CMA would have needed to pay close attention to the shift in demand across these segments to cheaper solutions in order to reach a conclusion on how the likely size of those segments might change over time and assess detriment in the context of segment size. These were essential to determine whether any possible detriment that arose from the merger was sufficiently large to reach an SLC finding for the market as a whole in which all products of the merging parties were included. Further, this could be considered relative to segments where the merger might have more pro-competitive impacts.

(ii) The CMA

372. The CMA pointed out that Tobii's contention under Issue 4(d) was addressed in the Final Report at paragraph 6.56(c). The key point was that non-price competition affected the whole range of dedicated AAC solutions, such as developments in software or changes in the quality of service. Accordingly, the CMA took into account the fact that suppliers of dedicated AAC solutions made decisions in terms of the development of new software and the quality of customer support, which had implications for their whole product range, which in the case of Tobii included the Indi. Indeed, the CMA found that the merging parties specifically competed with one another on product development plans prior to the merger (Final Report paragraphs 6.61(f) to (h)) and Tobii's internal documents also showed that one of its recent software improvement projects applied across the range of Tobii's products (Final Report paragraphs 6.42 to 6.43).

373. The CMA submitted that it did take into account the relative size of the Indi segment, and it found that the Indi only accounted for [✂] of Tobii's sales of dedicated AAC solutions by value. (Final Report paragraph 6.70.) The CMA also considered whether the conditions of competition materially varied across

different products and found that they were not materially different across the products within the relevant market, with the possible exception of the Indi. (Final Report paragraph 6.56(c).) This finding was based on evidence from the merging parties' internal documents and transactions data. (Final Report paragraphs 5.50 and 5.58.)

374. The CMA contended that the fact that the volume of sales of the Indi had increased relative to other dedicated AAC solutions did not affect the likelihood of an SLC. (Final Report paragraph 5.58 and Figure 5-2.) It was the value of sales that mattered because the analysis was primarily concerned with the effect of the merger on Tobii's incentives to deteriorate quality and reduce innovation, which in turn, depended on the implications of such decisions for its overall profits.

375. The CMA submitted that it specifically checked the impact of including the Indi in the relevant market and found that it did not materially affect its estimate of market shares (Final Report paragraph 6.11 and footnote 211), its diversion ratios (Final Report paragraph 6.56(c)) or its overall analysis (Final Report paragraph 6.70 and footnote 259). This meant that the CMA's SLC finding of horizontal effects is materially unaffected by the inclusion of the Indi in the relevant market.

376. The CMA also pointed out that if it had excluded the Indi from the relevant market, then the average diversion ratios would likely be higher (Final Report paragraph 6.56(c)), which would reinforce the CMA's finding of an SLC.

377. Further or alternatively, the CMA submitted that a reasonable decision maker would still have reached the same SLC conclusions even if the Indi had been outside the relevant market of dedicated AAC solutions.

(b) The Tribunal's analysis

378. The parties' submissions under Issue 4(d) are linked to those advanced under Issues 3(e) and (h), and the Tribunal has addressed Issues 3(e) and (h) at [292] to [295] and [329] to [337] of this judgment.

379. In a dynamic market with a high degree of product differentiation it is not reasonable to expect the CMA's merger analysis to necessarily include a detailed assessment of the interaction between each and every product. However, the CMA's contention at paragraph 6.56(c) of the Final Report that it is appropriate to analyse competition on a product-by-product basis only where suppliers can flex all parameters of competition for individual products, in the Tribunal's view, goes too far. This can be seen from the CMA's own SLC conclusions with respect to the Indi, where the CMA found that the price of the Indi would be constrained by competition from non-dedicated AAC solutions post-merger but that Tobii would be able to significantly increase the price of its other dedicated AAC solutions, since the tablet constraint did not operate on these products. (Final Report paragraphs 5.79, 6.61(k) and 6.70.)

380. Nevertheless, we do not consider that the CMA's conclusions on whether there was an SLC due to horizontal unilateral effects are fatally flawed by the CMA's approach in paragraph 6.56(c) of the Final Report. The Final Report has largely anticipated this issue and the CMA pointed out at footnotes 211 and 259 and paragraph 6.70 of the Final Report that removing the Indi from the relevant market as an *ex-post* adjustment did not materially change market shares or the substantive analysis. It adds some unnecessary and avoidable uncertainty in the SLC assessment, but the concerns with competition and choice among other dedicated AAC solutions remains even when the Indi is stripped out of the assessment. As a result, the Tribunal does not consider the CMA's approach renders that assessment unsound.

381. Accordingly, the Tribunal concludes that it was not irrational for the CMA not to conduct a product-by-product evaluation. Whilst the Tribunal has already concluded that it may well have been better and clearer had the CMA excluded the Indi from the relevant product market, this has no material impact on the overall analysis of the effects of the merger in this case.

(6) Issue 4(e): Did the CMA err in law in failing to identify the extent of any lessening of competition and thus whether it was 'substantial'?

(a) The parties' submissions

(i) Tobii

382. Tobii submitted that the CMA's finding of an SLC was unreasonable because, although the CMA considered that the merger would lead to an SLC through increased prices, a worsening in the quality and range of products or service, or reduced innovation (Final Report paragraph 6.62), it did not quantify the effects nor determine that any SLC was 'substantial'.

383. Tobii noted that the CMA found at paragraph 6.61(k) of the Final Report that an SLC was not expected to arise in relation to the Indi as it was subject to stronger competitive constraints, particularly on price, from non-dedicated AAC solutions, and the CMA found at paragraphs 6.34(f) and 6.61(k) of the Final Report that Smartbox's Grid Pad 8 and 10 products were substitutable for the Indi. Therefore:

(1) Smartbox's Grid Pad 8 and 10 would also have faced effective competition from non-dedicated AAC solutions.

(2) If no SLC arose in respect of the Indi, then it could only have arisen in respect of Tobii's I-110 and/or I-Series devices.

384. However, the CMA did not make any attempt to quantify the extent of the price effects of any reduction of competition, nor assess how the merger may have reduced product quality, service or innovation for these products.

385. Further, Tobii submitted that, even on the CMA's assertion at paragraph 6.51 of the Final Report of a post-merger GUPPI of [10 to 20%] and applying it to Tobii's 2018 sales figures provided in Mr Eskilsson's witness statement, it would result in an annual post-merger price increase that is *de minimis* and, therefore, not a 'substantial' adverse effect on competition.

(ii) The CMA

386. The CMA argued that there was no error of law and its finding was not unreasonable or irrational. As a matter of law, s.35 of the 2002 Act did not require the CMA to quantify the extent of the price or non-price effects of a merger in order to find an SLC, nor was the CMA required to establish that the lessening of competition would be "*large*", "*considerable*" or "*weighty*" (*Global Radio* at [18] to [25]). The CMA referred also to paragraph 4.1.3 of the MAG. This paragraph of the MAG is set out at [339] of this judgment and *Global Radio* is summarised at [340] of this judgment.

387. The CMA referred to *R v Monopolies and Mergers Commission, ex p South Yorkshire Transport Limited* [1993] 1 WLR 23, which concerned the word 'substantial' in the phrase 'substantial part of the United Kingdom' and submitted that it had a comparable meaning in the phrase 'substantial lessening of competition' and therefore, a broad meaning calling for "*the exercise of judgment rather than an exact quantitative measurement*" (at [32]).

388. The CMA refuted Tobii's contention that the CMA did not find that an SLC was expected to arise in relation to the Indi. While the CMA found that it was unlikely that Tobii could profitably raise the price for the Indi, it also found that horizontal effects in the supply of dedicated AAC solutions resulted or may be expected to result in adverse effects in the form of lower quality, reduced product range and/or reduced innovation, which included the Indi. This was because some of the most important aspects of the merging parties' offering were determined at the level of the product range (notably the quality of the software) and because there was some evidence that Smartbox considered the Indi to compete to some extent with its more portable devices. (Final Report paragraphs 6.61(c), (f) and (k), 6.62 to 6.63 and 9.2(a).)

389. The CMA also argued that Tobii was incorrect in suggesting that it had found that Smartbox's Grid Pad 8 and 10 products were substitutable for the Indi. The Final Report paragraphs 6.34(f) and 6.61(k) simply recorded that those Smartbox devices "*compete to an extent*" with the Indi. The implication that the CMA therefore also did not find that an SLC was expected to arise in relation

to the Grid Pad 8 and 10 products was incorrect for this reason, as well as because this was not what the CMA found as regards the Indi. Tobii's submission that an SLC could logically have only arisen in respect of Tobii Dynavox's I-110 and/or I-Series devices was, therefore, also misconceived.

390. The CMA submitted that Tobii's claim that any effect of the merger was *de minimis* confused the size of one merging party's sales in one year with the separate issue of the likely effects of the merger because the number of units sold by Tobii did not determine whether any lessening of competition would be substantial.

391. The CMA contended that its SLC finding was based on all the evidence that showed that the merger would eliminate competition between the merging parties and that the remaining constraints on the merged entity would not prevent the merger from leading to higher prices, a reduced range of products being offered, reduced levels of customer service and/or fewer new products being developed. (Final Report paragraph 6.62.) This was further corroborated by the undisputed fact that the merging parties had already decided to bring about two of the possible manifestations of an SLC, namely a reduction of products available to customers and a reduction in R&D. These events were about to materialise prior to the CMA's investigation. (Final Report paragraph 6.63.) The CMA noted that the relatively small size of the market did not attenuate the harm that was likely to be significant and to have widespread impact upon vulnerable end users who rely on dedicated AAC solutions to complete everyday tasks. (Final Report paragraph 10.365.)

(b) The Tribunal's analysis

392. *Global Radio* referred to at [340] of this judgment makes clear that in an SLC assessment, the competition authority is not required to show that the SLC is "*large*", "*considerable*" or "*weighty*".

393. Accordingly, the Tribunal rejects Tobii's contention that the CMA was required to quantify the SLC. As regards Tobii's contention that any potential post-merger price increase would be *de minimis*, the Tribunal notes that the

CMA's competition concerns regarding the merger was not confined to price and included other non-price concerns such as a reduced range of products being offered, reduced levels of customer service and/or fewer new products being developed (Final Report paragraph 6.62). Consequently, even if it were the case that any price increases would in fact be *de minimis*, Tobii has not shown in our view that the CMA's SLC conclusion as regards the non-price effects was unreasonable or irrational.

K. TOBII'S GROUND 5: THE FINDING OF AN SLC AS A RESULT OF VERTICAL FORECLOSURE EFFECTS WAS BASED ON AN ERROR OF LAW AND WAS NOT SUPPORTED BY THE EVIDENCE

394. Tobii alleges that the CMA's findings of an SLC on the basis of input foreclosure of Smartbox's Grid software and of customer foreclosure of eye gaze cameras for AAC applications were unreasonable as they were not supported by reliable evidence.

(1) Preliminary observations

395. The CMA's published advice and information regarding its approach to assessing and analysing non-horizontal mergers is set out in section 5.6 of the MAG. According to paragraph 5.6.6:

> "Despite the differences in detail between cases, the Authorities will typically frame their analysis of non-horizontal mergers by reference to the following three questions:
>
> (a) *Ability*: Would the merged firm have the ability to harm rivals, for example through raising prices or refusing to supply them?
>
> (b) *Incentive*: Would it find it profitable to do so?
>
> (c) *Effect*: Would the effect of any action by the merged firm be sufficient to reduce competition in the affected market to the extent that, in the context of the market in question, it gives rise to an SLC?"

396. In respect of these three questions, paragraphs 5.6.10 to 5.6.12 explain that:

> "**Ability**
>
> 5.6.10. In assessing the ability of the merged firm to engage in partial input foreclosure, the Authorities may consider evidence on the following factors:

(a) *The cost of the input relative to all costs of the final product.* All else being equal, if the input accounts for only a small part of the total costs incurred, the merged firm will be less able to harm its rival manufacturers' ability to compete than if the input accounts for a greater part of the total costs.

(b) *The extent to which rival manufacturers can avoid a price increase by switching away from this input.* If downstream rivals can turn to many good substitutes for the input, the merged firm will be less able to impose a price increase than if there were few alternative providers of the input.

(c) *Pass-through of cost increases.* The Authorities will consider the extent to which any increases in the costs of the input to rival manufacturers would be passed on to customers of the final product

Incentive

5.6.11 To assess whether the merged firm would have an incentive to increase the prices charged for the input to its rival manufacturers, the Authorities will consider the factors affecting the profitability of such an increase in the input price, and the extent to which these factors change as a result of the merger. In particular, the Authorities may assess the following:

(a) *Loss of profits in the input market.* The merged firm increases the input price but loses sales of the input as rival manufacturers switch to alternatives for the input. This switching will be more costly to the merged firm if competition in the input market is intense.

(b) *Gain in profits in the market for the final product.* The merged firm gains from partial input foreclosure if it forces rival manufacturers to raise their prices for the final product, and, as a result, customers in the market for the final product switch to the merged firm's own final product. This benefit will be reduced if:

- customers in general do not react strongly to changes in prices for the final product (for a discussion on types of evidence on the closeness of substitution and the price sensitivity of demand, see paragraph 5.2.15); and

- the merged firm's final product is a poor substitute for those made by rival manufacturers, so that the diversion ratio to the merged firm is low (for a discussion of evidence on the diversion ratio, see paragraph 5.2.15).

(c) *The relative level of variable profit margins on the input and the final product.* If variable profit margins are higher in absolute terms for the input than for the final product, the negative impact on profitability of lost sales in the input market may outweigh the positive impact on profitability of additional sales in the market for the final product.

Effect

5.6.12 To the extent that the merged firm has both the ability and incentive to increase prices so as to foreclose to some extent its rival manufacturers, the Authorities will consider the impact of such foreclosure on competition in the downstream market. The Authorities may also need to take account of any

> stimulus to rivalry in the downstream market that may arise as a result of efficiencies from the merger."

397. In *ICE*, the Tribunal described its approach to a review of findings of fact and conclusions in respect of vertical mergers, as follows:

> "114. It is clear that vertical mergers can and do raise competition concerns. Whether a particular merger is likely to give rise to an SLC is fact specific. Here we do not consider that there is any special elevated evidential burden on the CMA in deciding whether this merger gives rise to a SLC. Any conclusions by the CMA must be based on evidence and it is for the CMA carefully to review the evidence and make such enquiries it considers appropriate in order to reach a rational conclusion in accordance with the principles stated in *BAA*."

398. Furthermore, the Tribunal observed that "*[t]he assessment of facts and forecasts of what may happen in the future is a matter primarily for the CMA's judgment*" (see *ICE* at [246]).

(2) Issue 5(a): Was the CMA's finding on input foreclosure based on an error of law and/or without a reasonable and reliable evidential foundation?

(a) The parties' submissions

(i) Tobii

399. Tobii submitted that the CMA did not have a reasonable basis for concluding that any input foreclosure would lead to a 'substantial' lessening of competition because the CMA had not demonstrated that the merged entity had the ability to engage in partial foreclosure or the incentive to foreclose rivals, and, even if there was the ability and incentive to foreclose, the CMA had no evidence of possible negative effects of a strategy of partial input foreclosure or that any effects were 'substantial'.

Ability

400. Tobii referred to paragraph 5.6.10 of the MAG and to paragraphs 34 and 35 of the European Commission's guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (the "Non-Horizontal Merger Guidelines"), which explain that:

> "34. Input foreclosure may raise competition problems **only if it concerns an important input for the downstream product**. This is the case, for example, when the input concerned represents a significant cost factor relative to the price of the downstream product. Irrespective of its cost, an input may also be sufficiently important for other reasons. For instance, **the input may be a critical component without which the downstream product could not be manufactured or effectively sold on the market**, or it may represent a significant source of product differentiation for the downstream product. It may also be that the cost of switching to alternative inputs is relatively high.
>
> 35. **For input foreclosure to be a concern, the vertically integrated firm resulting from the merger must have a significant degree of market power in the upstream market.** It is only in these circumstances that the merged firm can be expect to have a significant influence on the conditions of competition in the upstream market and thus, possibly, on prices and supply conditions in the downstream market." [Tobii's emphasis]

401. Accordingly, Tobii submitted that:

(1) The CMA did not undertake any assessment of market power in the upstream market for the licensing of AAC software worldwide nor demonstrate that Smartbox had market power on that upstream market. The CMA merely inferred and asserted without empirical analysis that Smartbox had a "*strong position*" (Final Report paragraph 7.39), and the CMA's conclusion that the Grid was "*the most popular software included as part of dedicated AAC solutions in the UK*" and that in 2018 [50 to 60%] of dedicated AAC solutions sold in the UK included the Grid (Final Report paragraph 7.28(a)) reflected Smartbox's position in the downstream market in the UK. However, this told nothing about whether Smartbox had market power on an upstream market for the licensing of software that was worldwide in scope. Tobii contended that Smartbox might have a large presence in the UK but it was a small player globally as its software was much less commonly used internationally.

(2) Furthermore, the Grid was not indispensable or critical. According to paragraph 50 of the VEWP, no customer stated that the Grid was either indispensable or essential for a supplier or an AAC solution to be able to supply them, although several considered that it varied depending on the needs of the user. The Anonymised Customer Responses showed that the Grid was less important or less common for some customers and the non-availability of the Grid was only an issue where a replacement

device was being purchased for an existing user, not for a new user of AAC and there are a great many new users each year for AAC solutions.

(3) The Grid was neither essential nor critical to other suppliers' ability to compete in the supply of dedicated AAC solutions. The reality was Liberator and Techcess offered Grid as "*a software option*". (Final Report paragraph 7.26.) The CMA's finding that the Grid was an "*important*" input for suppliers of dedicated AAC solutions was contradicted by the available evidence. Before the merger, very few of Tobii Dynavox's devices were sold with the Grid pre-installed; the Indi, which was Tobii's largest selling device in the UK, generally did not have the Grid but was sold predominantly with Snap. Liberator and Techcess had their alternative software, which they installed on all their own devices. Indeed, the CMA found at paragraph 7.26 of the Final Report that Liberator and Techcess both made substantial sales of devices without the Grid pre-installed on them.

(4) Additionally, the CMA had no evidence or concrete examples of how input foreclosure by making the Grid work less well with competitors' hardware might be implemented. The CMA made only generalised assertions about a reduction in technical support and concluded that it was "*a credible foreclosure strategy*". (Final Report paragraphs 7.19 and 7.63.) However, the evidence showed that competitors were not concerned about this. Paragraph 21 of the VEWP stated that Liberator and Techcess told the CMA it would be technically difficult to make the Grid incompatible with their devices as the Grid operates on Windows 10.

(5) Moreover, the cost of a Grid licence was not a significant part of the total cost of a dedicated AAC solution and the wholesale price of the Grid licence cannot exceed the retail price so the possible increase in the wholesale price of the Grid was limited.

(6) Liberator and Techcess had credible software alternatives and can also improve their own software.

(7) According to the paragraphs 44 to 48 of the VEWP, the CMA had no evidence of what would happen if the wholesale price of the Grid increased. The CMA only asked customers and competitors what would happen if the Grid was no longer available in Liberator or Techcess devices, which was a scenario of total foreclosure. In any event, the Anonymised Customer Responses did not corroborate the assertions made by the CMA. Instead, it showed that many customers said they would likely still purchase hardware from Liberator and Techcess but use other software. Others said it would depend on end user requirements, including whether hardware or software would be more important and whether a user could use a different software. Although Liberator and Techcess told the CMA they would have lost "*some*" sales, it appeared from paragraphs 25(a) and 44(b) of the VEWP that this was due to speech therapists' "*inertia*", i.e. preferences for and familiarity with the Grid and reluctance to try alternative software solutions, rather than due to an absence of credible alternatives. However, no customer said in the Anonymised Customer Responses that "*inertia*" on their part was a reason for choosing the Grid over another software and the customer evidence did not quantify the likely volume of lost sales in such an event.

Incentive

402. Tobii submitted that:

(1) The CMA did not have quantitative estimates of diversion and did not calculate critical diversion thresholds for its partial foreclosure scenario. (Final Report paragraphs 7.45 to 7.47.) Therefore, it had no quantitative evidence to support its assertion at paragraph 7.49 of the Final Report that diversion would exceed the critical diversion threshold. As such, the CMA's assessment was essentially qualitative in nature, in particular "*due to the Grid being a key driver of sales of dedicated AAC solutions in the UK*". (Final Report paragraphs 7.49 to 7.53). However, Tobii disputed that the Grid was a "*key driver*".

(2) The CMA had no evidence that Liberator and Techcess would have passed on any increase in the wholesale price of the Grid by increasing the price of their AAC solutions. The CMA asked them only about the effects of a scenario in which the Grid was not available at all, i.e. total foreclosure. Neither were asked for nor provided any evidence on what they might have done in the event of an increase in the wholesale cost of the Grid.

(3) The CMA's assertion at paragraph 7.27 of the Final Report that estimates of lost sales in the event of total foreclosure were relevant to a scenario of partial foreclosure was fanciful. Unlike in a scenario of total foreclosure, Liberator and Techcess would still be able to include Grid, meet customer requirements, and the commercial effects, if any at all, would necessarily be different. In any event, Tobii put forward calculations to demonstrate that any net additional profit to the merged entity was extremely modest and, particularly in an industry dedicated to serving vulnerable customers, insufficient to justify a commercial strategy of input foreclosure that would have potentially significant and global reputational risks.

(4) The CMA's theory of input foreclosure was also inconsistent with Smartbox's pre-merger behaviour. According to Tables 6-1 and 6-2 of the Final Report, Smartbox was the largest supplier of dedicated AAC solutions in the UK, with a share of [40 to 50%]. Nonetheless, Smartbox did not foreclose downstream rivals by either not licensing the Grid or increasing its licensing fees. Instead, Smartbox's strategy was to achieve the widest possible use of its software, whether on its own devices or those of others, including creating a version of the Grid specifically for iPads.

(5) The CMA merely asserted that "*there were other factors that were precluding Smartbox from engaging in an input foreclosure strategy, which were not related to reputational risks*" and that the merged entity was likely to have significantly higher incentives to foreclose than Smartbox did pre-merger. (Final Report paragraphs 7.56 and 7.59 to

7.66.) However, the CMA did not identify or examine these "*other factors*" and failed to assess why these unidentified pre-merger constraints on foreclosure would not be effective post-merger.

(6) The CMA also merely stated that any adverse reputational harm from foreclosure would be outweighed by the financial benefits of foreclosure. (Final Report paragraph 7.57.)

(7) The CMA failed to identify any evidence that Tobii Dynavox had considered foreclosing its competitors. According to Mr Eskilsson's witness statement, Tobii's clear strategy was always to maximise the sales of its software at low prices.

(8) Mr Eskilsson's witness statement also explained that the whole reason for Tobii being in business was to assist those who were less fortunate and had disabilities to live more full and productive lives and to communicate with each other. It was not a sector where success can be achieved by exploiting vulnerable people but a long-term business and one that had a specific culture and ethos of working to make people's lives better. Tobii submitted that that was something one saw also in other suppliers, including Smartbox. In this sector, the relationships with AAC users and reputation were extremely important. It was not reasonable or rational for the CMA not to take this particular feature of the business into account when determining whether Tobii had the incentive to foreclose its competitors.

Effects

403. Tobii submitted that:

(1) The CMA did not provide any examples of what negative effects on product quality might be (or ask Liberator or Techcess for their views on how they might address them), let alone attempt to quantify their effects, if any. Instead, the CMA focussed on price effects and its case that competitors (i.e. Liberator and Techcess) would be "*likely*" to pass

on an increase in the wholesale licence fee for the Grid to customers (Final Report paragraphs 7.72 to 7.74) was an unsupported assertion. Competitors were not asked whether they would pass through any increase in the wholesale cost of the Grid and, according to paragraph 59 of the VEWP, customers were not specifically asked for their views on what they would do if the price of the Grid were to increase. Tobii submitted that customers were price sensitive.

(2) The dedicated AAC solutions on which Liberator and Techcess may wish to install the Grid (i.e. medical-grade devices) were high-priced products that sold for between £4,000 and £7,000 and the CMA considered any increase in price would be [0 to 5%]. (Final Report paragraph 7.15(a).) Tobii noted that the CMA did not appear to have margin data for Liberator or Techcess. Tobii submitted that these high-priced dedicated AAC solutions had high gross margins, which indicated that if Liberator and Techcess were at risk of losing a sale due to a higher price for the Grid, they would be able to absorb an increase in the wholesale price of the Grid easily. Indeed, Liberator was not charging extra today for the Grid (and did not raise its price when the Grid price recently increased). Further, Tobii put forward margin and price calculations to demonstrate that, as the upper limit of any increase in wholesale price of the Grid was set by the retail price, any effects in the event of pass through would be *de minimis*.

(3) The CMA also had no evidence of the effects of a partial foreclosure strategy, including on the likely loss of sales for products with the Grid installed in either unit or value terms. Tobii contended that the Anonymised Customer Responses confirmed that some customers would have continued to purchase devices from Liberator and Techcess even if the Grid was not available at all. In any event, the proportion of global sales lost for products with the Grid installed in the event of a strategy of partial foreclosure was negligible since the UK was only a small part of total global AAC demand.

(ii) The CMA

404. The CMA argued that it gathered a wide range of evidence from different interested parties and its task was to assess the relative weight of different factors arising from the evidence. Its assessment of vertical effects was evidence-based and it appropriately considered and weighed the available evidence to make findings that were reasonably open to it. Although Tobii's challenge was couched in terms of unreasonableness, in truth it was simply an assault upon the merits of the CMA's conclusions on vertical effects and often a repetition of arguments that were made by Tobii and rejected by the CMA during the investigation.

Ability

405. The CMA submitted that there was a body of evidence which was logically capable of sustaining the CMA's finding that Smartbox had a strong position in the upstream market due to its control of the Grid (Final Report paragraphs 7.15 to 7.19, 7.24, 7.28, 7.31 to 7.34, 7.36), and the CMA's conclusion that that implied a significant degree of market power in relation to its UK downstream competitors purchasing the Grid was not irrational. Although the Final Report did not use the phrase 'market power', the CMA clearly found at paragraph 7.39 of the Final Report that, based on its assessment of evidence, the merged entity had a strong position in the upstream market due to its control of the Grid, which accounted for [50 to 60%] of dedicated AAC solutions sold in the UK in 2018 (Final Report paragraph 7.28(a)), and that competitive constraints from alternative software were weak. As the question here was 'what would the effect of the merger be for those customers who were using the Grid?' and both Liberator and Techcess only installed the Grid on devices that they sold in the UK, the CMA assessed the substitutability between the Grid and other alternative AAC software for dedicated AAC solutions in the UK, which was key for the assessment of the ability to foreclose downstream competitors in the UK.

406. According to the CMA, Tobii's arguments contending that the Grid was not an important input for dedicated AAC solutions were no more than arguments that

the CMA's evaluation at paragraphs 7.23 to 7.39 of the Final Report was incorrect. They did not reveal a public law error because:

(1) Tobii's contention that no customer stated that the Grid was indispensable or essential was irrelevant because, as the CMA explained at paragraph 7.21 of the Final Report, for vertical effects to arise from a merger an input does not need to be 'must have' or essential. The relevant question to assess the ability to foreclose was whether competitors could turn to good substitutes of the input and thus avoid an input price increase or quality deterioration by the merged entity.

(2) Paragraph 50 of the VEWP noted that only five out of 18 customers indicated that the importance of the availability of the Grid on Liberator or Techcess devices varied depending on the needs of the user and 11 out of the 18 found the availability of the Grid of high or significant importance. The fact that the other five customers considered that the importance of the Grid depended on the user implied that, at least for some end users, the availability of the Grid on competitors' solutions was important. Indeed, the evidence from customers was that the availability of the Grid was important to their purchase of a dedicated AAC solution. (Final Report paragraph 7.28(b).)

407. Although Liberator and Techcess had their own in-house software, the Grid accounted for [20 to 30%] of Liberator's sales of dedicated AAC solutions in the UK and for [30 to 40%] of Techcess'. (Final Report paragraph 7.24.) The CMA submitted that this suggested that the Grid was differentiated from their own software and was an important driver of their dedicated AAC sales. This was supported by the estimated proportion of sales that they would lose if they no longer offered the Grid as an option on their dedicated AAC solutions: [20 to 30%] in the case of Liberator and [10 to 30%] in the case of Techcess. (Final Report paragraph 7.26.) This evidence was consistent with customer evidence on the importance of the Grid and its strengths over Techcess' and Liberator's software. (Final Report paragraphs 7.28 and 7.51 to 7.52.) Further, user inertia over changing AAC software made it difficult for suppliers of dedicated AAC solutions to switch away from the Grid. (Final Report paragraph 7.28(e).) The

CMA also assessed the availability of third party alternatives but concluded that none of them offered a credible alternative to the Grid. (Final Report paragraphs 7.31 to 7.36.) That was a judgment that the CMA was reasonably entitled to reach on the evidence.

408. The CMA submitted that there was ample evidence provided by the merging parties themselves to support the CMA's conclusions on the merged entity's ability to reduce the extent to which the Grid supported rival hardware. These were set out at paragraphs 7.19 and 7.63 of the Final Report.

409. The CMA further submitted that the cost of a Grid licence was not decisive in circumstances where existing users of the Grid needed and wanted that software for their dedicated AAC solutions and there was a degree of inertia to change to other software. (Final Report paragraphs 7.24 to 7.26, 7.28(b) and 7.28(e).)

410. The CMA set out in the Final Report its reasons for concluding that there was no credible alternative AAC software to the Grid (Final Report paragraphs 7.31 to 7.34) and that there were significant barriers to developing AAC software that would be a credible alternative to the Grid (Final Report paragraph 7.36). Indeed, both Smartbox and Tobii had noted the strengths and advantages of the Grid over alternative, competing AAC software (Final Report paragraph 7.28(c) and (d)) and Tobii's internal documents indicated prior to the merger that it was conscious of a competitive gap between its software offering and that of Smartbox (Final Report paragraphs 6.42 to 6.43).

411. The evidence provided by Liberator and Techcess on the impact on their sales if the Grid was no longer offered as a software option on their dedicated AAC solutions was relevant to partial foreclosure as it enabled the CMA to evaluate what would happen if, in response to partial foreclosure, those rivals stopped offering it as part of their dedicated AAC solutions. The evidence indicated that Liberator and Techcess would have limited ability to defeat a price increase or quality deterioration by switching away from the Grid as this would significantly weaken their competitive position downstream. (Final Report paragraph 7.27.) This was corroborated by further evidence on the importance

of the Grid and lack of credible third party alternatives. (Final Report paragraph 7.28.)

412. The CMA noted that a wholesale price increase of the Grid was only one of the input foreclosure mechanisms identified by the CMA, the other being a reduction of the Grid's support of competitors' hardware. (Final Report paragraphs 7.15 to 7.19 and 7.71.) Tobii's argument was irrelevant to the latter mechanism and to the SLC that arose as a result of it, which were unaffected by the CMA's finding on the pass on of wholesale price increases. In any event, Tobii's submission on pass on was unsustainable because:

(1) The CMA was not required to demonstrate that any price increase would necessarily be passed on to customers. Assessing whether a price increase would be passed on involved an educated prediction based on the CMA's expert judgment and experience.

(2) The CMA recognised in the Final Report that there was some scope for a price increase to be absorbed and, when Liberator faced cost increases of the Grid recently, it did not increase its prices. (Final Report paragraphs 7.73 to 7.74.) However, the CMA considered that that did not exclude the real risk that cost increases in future will be passed on. The CMA concluded that pass on was likely because, in this case, 17 out of 20 customers did not identify cost as a factor affecting their purchase of dedicated AAC solutions and their primary concern was to meet end users' needs even at higher cost. Based on the evidence, the CMA considered that customers in this market were not particularly price sensitive and prioritised meeting the needs of end users. (Final Report paragraph 7.74.)

(3) Absent any public law error in the CMA's approach, Tobii's argument that any increase could easily be absorbed is a mere disagreement with the CMA's conclusions.

413. Although the Anonymised Customer Responses showed that some customers said they would still purchase hardware from Liberator or Techcess, others said

it would depend on end user requirements, which still implied that at least for part of the customers' user base, the Grid was important and paragraph 7.51(b) of the Final Report noted that two customers subsequently indicated that there were generally fewer users for which hardware features were more important than software features. Furthermore, there were still other Anonymised Customer Responses that underscored the importance of the Grid.

414. In addition, the CMA submitted the fact no customer used the word "inertia" was irrelevant. What was relevant was that the Anonymised Customer Responses showed that many customers considered that the availability of the Grid was important (Final Report paragraph 7.28(b)), which Tobii accepted. Moreover, the CMA received evidence from both Liberator and Smartbox that "*people don't like changing operating systems*" (Final Report paragraph 7.28(e)), which was a form of user inertia, which made it difficult for suppliers of dedicated AAC solutions to replace the Grid with other software.

415. The CMA had gathered customer evidence on the relative importance of the Grid for customers of Liberator and Techcess. (Final Report paragraph 7.51.) Further, footnote 308 to the Final Report recorded that:

> "We do not have diversion estimates on what customers would do if they could no longer combine the Grid with dedicated AAC hardware from Liberator and Techcess (or if these combinations were more expensive or more prone to technical issues) since what customers do depends on how important the specific features of the Grid or the Liberator/Techcess device are for each end-user. Nevertheless, **we consider that the importance that customers place on the Grid strongly indicates that the diversion ratio to the merged entity's dedicated AAC solutions (which offer the Grid) would be significant. That is, out of the customers that stopped buying dedicated AAC solutions which combined Liberator/Techcess hardware with the Grid, a significant proportion of their sales are likely to divert to the merged entity's solutions (which offer the Grid), rather than divert to Liberator/Techcess' dedicated AAC solutions that use other software.**" [CMA's emphasis]

Incentive

416. The CMA submitted at the hearing that the diversion ratios and critical diversion ratio that it relied upon when looking at the incentive to foreclose were in respect of diversion from the two competitors, Liberator and Techcess, to the merged

entity, and were set out in the Final Report at paragraphs 7.26 and 7.48 and used in the CMA's qualitative analysis from paragraph 7.49 onwards.

417. The CMA referred to paragraph 5.6.10(c) of the MAG and submitted that the passing on of higher wholesale prices to customers is relevant to the ability of the merged entity to engage in partial input foreclosure. The CMA noted that Tobii's arguments in this regard did not address the other input foreclosure mechanism identified by the CMA, namely a reduction of the Grid's support of competitors' hardware. (Final Report paragraph 7.71.)

418. According to the CMA, the evidence that it gathered on the limited ability of Liberator and Techcess to switch away from the Grid was just as germane to the likelihood of partial input foreclosure as to total foreclosure because the ability of the merged entity to increase price or degrade quality was affected and strengthened by the limited ability of Liberator and Techcess to switch away.

419. The CMA contended that how Smartbox behaved in the past did not determine how the merged entity is likely to behave in the future, nor was it necessary or relevant for the CMA to determine why Smartbox had not sought to foreclose the upstream market prior to the merger. The CMA considered that the merged entity was likely to have significantly higher incentives to foreclose than Smartbox did pre-merger and set out the reasons why it came to that conclusion. (Final Report paragraphs 7.60 to 7.65.) The assessment of facts and forecasts of what may happen in the future was a matter primarily for the CMA's judgment and Tobii had not shown the CMA's judgment to be irrational.

420. The CMA submitted that it was not required to gather evidence or prove that Tobii Dynavox had considered foreclosing its downstream rivals.

Effects

421. The CMA argued that Tobii's case disputing the likelihood of Liberator and Techcess passing on an increase in the wholesale price of the Grid to their respective customers was misconceived because:

(1) The CMA had a sufficient evidential basis to find a degree of pass on (Final Report paragraph 7.74) and the Tribunal should not intervene merely because it considers that further inquiries on pass on would have been desirable or sensible (*BAA* at [20(3)]).

(2) Tobii's claim that Liberator and Techcess could absorb a wholesale price increase did not mean that they would do so.

(3) Tobii's argument did not affect the reasonableness of the CMA's finding of likely partial input foreclosure with respect to the quality of downstream competitors' access to the Grid. (Final Report paragraph 7.71.)

422. The CMA noted that the figures put forward in Tobii's calculations to demonstrate that any effects in the event of pass through would be *de minimis* were inconsistent with the CMA's. The CMA's calculations were based on Smartbox's transactions data (Final Report paragraph 7.15(b)) and the CMA considered that an increase in both the retail and wholesale price of the Grid could not be ruled out so the increase in prices for competitors could be even higher (Final Report paragraph 7.17). The CMA also noted that Smartbox's average downstream gross margin in 2018 was materially lower than Tobii's average downstream gross margin in 2018. Liberator's and Techcess' downstream margins on downstream solutions using the Grid could be lower than Smartbox's average downstream gross margin since Smartbox sells the Grid to them at a margin.

423. The CMA submitted that it was not required to quantify the lessening of competition or customer detriment in order to establish that the lessening of competition was substantial and denied that it had not determined the overall likely effects of a successful partial foreclosure strategy. The CMA had expressly addressed the effects of input foreclosure in the Final Report. In particular, it concluded that:

(1) The competitive constraints exerted on the merged entity by Liberator and Techcess in the downstream supply of dedicated AAC solutions would be substantially weakened. (Final Report paragraph 7.70.)

(2) A reduction in the extent to which the Grid supported competitors' hardware would significantly deteriorate the quality of their dedicated AAC solutions, weaken their offerings in the market and reduce the range of options that could effectively meet end user needs. (Final Report paragraph 7.71.)

(3) An increase in the wholesale price of the Grid was likely to be passed on to customers, thereby harming customers through higher retail prices. (Final Report paragraph 7.74.)

424. The CMA did not accept the figures and calculations set out by Tobii to demonstrate that any loss of sales for products with the Grid installed was negligible. The CMA relied on the figures set out at paragraphs 7.24 to 7.26 of the Final Report: in the event of total foreclosure, Liberator and Techcess estimated they would lose [10 to 30%] of their total sales of dedicated AAC solutions. At paragraph 7.27 of the Final Report, the CMA stated that these estimates of the effect of total foreclosure were also relevant to the partial foreclosure scenario.

(b) The Tribunal's analysis

425. The CMA's partial input foreclosure concerns were that the merged entity could either increase the wholesale price of a Grid licence to competitors in the downstream market and/or reduce the extent to which the Grid supports rival dedicated AAC hardware, with a net result that competition in the downstream market for dedicated AAC solutions will be reduced.

Ability

426. The Tribunal considers that the CMA was entirely justified to find that Smartbox had a strong position in the upstream market due to its control of the Grid. The Tribunal does not accept Tobii's submission that the Non-Horizontal

Merger Guidelines require an input to be indispensable, critical or "must have". Paragraph 34 of the Non-Horizontal Merger Guidelines refers to an "*important input*" and the example provided uses the phrase "*may be*" when referring to "*a critical component*".

427. The Tribunal refers to *BSkyB* at [80] and *ICE* at [114] and [246] set out at [341] and [397] to [398] of this judgment concerning the SLC assessment, as well as the rationality test set out in *BAA*. Applying these, the question for the Tribunal in respect of the CMA's finding on ability to engage in partial input foreclosure in this case is whether the CMA had a sufficient evidential basis in light of the totality of the evidence to satisfy itself on the balance of probabilities that the merged entity had the ability to engage in partial input foreclosure.

428. It was not disputed between the parties that the cost of a Grid licence did not form a significant part of the total price of a dedicated AAC solution, although they had differing views as to its relevance. The CMA submitted it was not decisive, and Tobii considered it impacted on the CMA's findings both as to the extent to which any increases in the wholesale price of the Grid would be passed on by suppliers of dedicated AAC solutions to customers and whether it could provide a sufficiently large impact to have a significant effect on downstream competition.

429. As regards the passing on of any cost increase in the wholesale price of a Grid licence by suppliers to customers, the CMA took the view at paragraph 7.74 of the Final Report that:

> "However, we consider that it is likely that suppliers of dedicated AAC solutions would pass on cost increases, particularly if they are more significant than the recent cost increases of the Grid faced by Liberator. This is due to evidence that customers in this market are not particularly sensitive to price as their priority is meeting end-user needs:
>
> (a) When asked about their decision process for the purchases of dedicated AAC solutions, only three customers mentioned cost as one of the factors under consideration (out of 20 customer responses).
>
> (b) Even where cost is a factor, there is evidence that customers place higher priority on meeting end-user needs. For instance, the Scottish Centre of Technology for the Communication Impaired told us that it observes and discusses with the user and their support team the needs and requirements

> of the user and system, and then matches these to the most cost-effective solution that meets all of those needs and requirements."

430. In response to Tobii's challenge that the CMA had no evidence of what would happen if the wholesale price of the Grid increased because the CMA only asked customers and competitors what would happen if the Grid was no longer available, the CMA submitted that it had evidence from Liberator and Techcess on the impact on their sales if the Grid was no longer offered as a software option and that was relevant to partial foreclosure as it enabled the CMA to evaluate what would happen if, in response to partial foreclosure, those suppliers stopped offering it as part of their dedicated AAC solution. Further, the question as regards passing through of price increases was not whether the supplier "could", but whether it "would".

431. The Tribunal in *BAA* observed at [20(3)] that the competition authority has a "*wide margin of appreciation*" as to the extent to which it is necessary to carry out investigations in order to acquaint itself with the relevant information to enable it to answer each statutory question posed for it, and the Tribunal in *ICE* held at [114] that the principles stated in *BAA* applied in respect of vertical mergers. Notwithstanding that wide margin of appreciation, the Tribunal considers that, in this particular instance, by not obtaining evidence as to whether suppliers would pass on price increases to customers, the CMA did not acquaint itself with the necessary relevant information to inform its assessment as regards its concern of partial input foreclosure through an increase in the wholesale price of a Grid licence, particularly when its evaluation differed from its evidence, which showed that Liberator had recently absorbed a price increase. (Final Report paragraph 7.74.) The totality of the evidence, which included evidence that Liberator did not pass on a recent price increase and did not include evidence from competitors as to how they would respond to a further increase in the price of a Grid licence, was insufficient for the CMA to properly satisfy itself that suppliers were likely to pass on cost increases to customers and, thus, to properly assess whether the merged firm had the ability to engage in partial input foreclosure through a rise in the wholesale price of a Grid licence.

432. Nonetheless, the Tribunal notes that pass through of cost increases was one of the factors, amongst others, that was weighed up in the analysis that the CMA had to carry out in assessing whether the merged entity has the ability to foreclose its rivals. Furthermore, the CMA's concerns on partial input foreclosure was not confined to price increases.

433. As regards the CMA's non-price concern that the merged entity would have the ability to reduce the extent to which the Grid supported rival dedicated AAC hardware, it was not disputed during the hearing that the CMA did not have evidence from competitors such as Liberator and Techcess as to how they would respond to a reduction in the extent to which the Grid supported their rival dedicated AAC hardware. Nevertheless, the Tribunal notes that the CMA had other evidence, which showed that the availability of the Grid was important for some customers and end users who bought dedicated AAC solutions from Liberator and Techcess (Final Report paragraphs 7.26, 7.28(b) and (e), 7.51 and 7.53), the Grid had strengths over existing competitor software (Final Report paragraphs 7.28(c) and (d), 7.31 to 7.35 and 7.52), competitors with their in-house software were also selling AAC solutions with the Grid (Final Report paragraphs 7.23 to 7.25), it was possible to reduce the extent to which the Grid supported rival dedicated AAC hardware (Final Report paragraphs 7.18 to 7.19 and 7.63), and there were significant barriers for competitors to develop credible alternative software within the near future (Final Report paragraph 7.30, 7.36, 8.20 to 8.22 and 8.55 to 8.58).

434. Although it would have been preferable that the CMA had evidence from competitors such as Liberator and Techcess concerning their likely response to a partial foreclosure scenario whereby there is a reduction in the extent to which the Grid supported their rival dedicated AAC hardware, the Tribunal considers that the totality of the evidence was sufficient to enable the CMA to conclude that the merged entity would have the ability to reduce the extent to which the Grid supported rival dedicated AAC hardware.

435. Accordingly, the Tribunal considers that the CMA did not have a sufficient basis to conclude that the merged firm had the ability to engage in partial input foreclosure through an increase in the wholesale price of a Grid licence, but

there was a sufficient basis for the CMA to find that the merged entity had the ability to engage in partial input foreclosure by reducing the extent to which the Grid supported rival dedicated AAC hardware.

Incentive

436. As already noted, the CMA's evidence related to a total foreclosure situation and it had not asked competitors what they would do in a partial foreclosure situation where the price of a Grid licence increases and/or where there is a reduction in the extent to which the Grid supported rival dedicated AAC hardware.

437. The CMA's conclusion that the merged entity would have the incentive to engage in partial input foreclosure was based on its assessment as to whether the foreclosure strategy would be profitable. (Final Report paragraph 7.44.) It concluded that the financial benefits to the merged entity were likely to be higher than the financial costs because the diversion to the merged entity's dedicated AAC solutions was likely to be higher than the critical diversion threshold. (Final Report paragraph 7.49.) The Tribunal notes that the critical diversion ratio calculated by the CMA related to total foreclosure. Paragraphs 7.45 to 7.49 of the Final Report state:

> "7.45 We do not have quantitative estimates of diversion in these foreclosure scenarios, but we can use the Parties' margins to calculate the minimum diversion ratio that would make a total foreclosure strategy profitable (the 'critical diversion threshold'). It is then possible to undertake a qualitative assessment of whether the diversion is likely to exceed this critical diversion threshold.
>
> 7.46 We only calculated critical diversion thresholds for total foreclosure. It is not straightforward to estimate a critical diversion threshold for other scenarios. For example, in a partial foreclosure scenario based on charging higher prices to competitors, the critical diversion threshold depends on the scale of this price increase (on which we would have to make an assumption) and the volume of sales of the Grid to competitors that the merged entity retains at a higher price (of which we do not have an estimate).
>
> 7.47 The critical diversion threshold in a partial foreclosure scenario will, however, be lower than in a total foreclosure scenario: the merged entity needs to recapture fewer sales for a partial foreclosure strategy to be profitable because of the additional benefits involved (see paragraphs 7.42 and 7.43). The critical diversion threshold under total foreclosure is therefore still informative for assessing the incentives to engage in partial foreclosure. If we find that

> diversion is likely to exceed this threshold under total foreclosure, then diversion is also likely to exceed the lower threshold under partial foreclosure.
>
> *Assessment of whether diversion is likely to exceed the critical diversion threshold*
>
> 7.48 The average wholesale variable margin made by Smartbox on its sales of the Grid software to competitors and resellers of dedicated AAC solutions in 2018 was £[✂]. The average variable margin made by Smartbox and Tobii on sales of dedicated AAC solutions in 2018 was £[✂] (where the margins made by Smartbox and Tobii were weighted by their sales in the UK market). The critical diversion threshold in a total foreclosure scenario is therefore [10-20%]. That is, the merged entity would need to recapture at least [10-20%] of the lost upstream sales volumes of the Grid software made via competitor devices through customers switching to its dedicated AAC devices.
>
> 7.49 We consider that diversion to the merged entity's dedicated AAC solutions is likely to be higher than the [10-20%] critical diversion threshold. It is our view that customers of dedicated AAC solutions that combine the Grid with rival AAC hardware are more likely to switch to dedicated AAC solutions that have the Grid (ie the merged entity's solutions) than they are to switch to other options (ie dedicated AAC solutions offered by Liberator and Techcess that use these rivals' in-house AAC software). This is due to the Grid being a key driver of sales of dedicated AAC solutions in the UK, which we explain further below."

438. Further, footnote 308 to the Final Report acknowledged that the CMA did not have a diversion ratio estimate for a total foreclosure scenario:

> "We do not have diversion estimates on what customers would do if they could no longer combine the Grid with dedicated AAC hardware from Liberator and Techcess (or if these combinations were more expensive or more prone to technical issues) since what customers do depends on how important the specific features of the Grid or the Liberator/Techcess device are for each end-user. Nevertheless, we consider that the importance that customers place on the Grid strongly indicates that the diversion ratio to the merged entity's dedicated AAC solutions (which offer the Grid) would be significant. That is, out of the customers that stopped buying dedicated AAC solutions which combined Liberator/Techcess hardware with the Grid, a significant proportion of their sales are likely to divert to the merged entity's solutions (which offer the Grid), rather than divert to Liberator/Techcess's dedicated AAC solutions that use other software."

439. Whilst it was reasonable for the CMA to conclude at paragraph 7.47 of the Final Report that the critical diversion threshold in a partial foreclosure scenario will be lower than in a total foreclosure scenario, the Tribunal notes that the relevant diversion ratio in a partial foreclosure scenario may not be the same as that in a total foreclosure scenario, which in any event the CMA did not have an estimate of. The Tribunal is mindful that the CMA has to gather, analyse and pull together a large volume of evidence to conduct merger investigations within a

relatively short time frame. The Final Report is detailed and thorough and demonstrates the careful thought and analysis that the CMA has put into this investigation. However, in the Tribunal's view, the necessary enquiries were not made to enable the CMA to conclude in this particular instance that the diversion ratio in a partial foreclosure scenario was likely to exceed the lower, applicable critical diversion threshold.

440. The Tribunal also does not accept the CMA's argument that the passing on of higher wholesale prices to customers is confined to the question of whether the merged entity has the ability to engage in input foreclosure because, in this case, the ability of the supplier or reseller purchasing the Grid to pass on price rises to their customers affects their sensitivity to changes in the price of the Grid. This is reflected in the language of paragraph 5.6.11(b) of the MAG, which is set out at [396] of this judgment.

441. In respect of Smartbox's pre-merger behaviour, the CMA recognised that pre-merger, Smartbox may already have the ability and some incentive to foreclose downstream rivals from the Grid. (Final Report paragraph 7.59.) However, based on the CMA's assessment of the evidence, it considered that the foreclosure incentives of the merged entity would be significantly higher than those of Smartbox absent the merger (Final Report paragraph 7.60) and it set out at paragraphs 7.61 to 7.65 of the Final Report the reasons why. Tobii has not demonstrated that the CMA's reasons for reaching this view were unreasonable or irrational.

442. Nonetheless, in light of the Tribunal's view that the CMA did not take reasonable steps to acquaint itself with the relevant information to enable it to estimate the relevant diversion ratio and critical diversion ratio and assess whether the former exceeded the latter in a partial foreclosure scenario, the CMA did not have a sufficient evidential basis to properly satisfy itself that the merged entity had the incentive to engage in partial input foreclosure, whether through an increase in the wholesale licence price of the Grid or a reduction in the extent to which the Grid supported rival dedicated AAC hardware.

Effects

443. As regards the effects of price increases in the Grid, the Tribunal has already concluded that the evidence before the CMA was not sufficient for it to reasonably conclude that cost increases would be passed on to customers. If the CMA is to rely on this form of partial input foreclosure, it should undertake afresh an analysis of this aspect and gather further evidence on it.

444. In respect of the effects on competition in the market if the merged entity engaged in input foreclosure by reducing the extent to which the Grid supports rival dedicated AAC hardware, Tobii's contention that the CMA did not quantify the effects on product quality overlaps with that advanced under Issue 4(e) is addressed by the Tribunal at [392] to [393] of this judgment. Nonetheless, the Tribunal's decision in respect of the incentive of the merged entity to reduce the extent to which the Grid supports rival dedicated AAC hardware also means that the evidence before the CMA was not sufficient for it to reasonably conclude that there would be a weakening of competitors' offering in the market for dedicated AAC solutions. If the CMA is to rely on this form of partial input foreclosure, it should undertake afresh an analysis of this aspect and gather further evidence on it.

445. Accordingly, in our view, the CMA did not have sufficient evidence to inform its assessment as to the impact that a partial foreclosure strategy by the merged entity would have on competition.

(3) Issue 5(b): Was the CMA's finding in respect of customer foreclosure without evidential foundation?

(a) The parties' submissions

(i) Tobii

446. Tobii submitted that the CMA did not have a reasonable basis for concluding that any customer foreclosure would lead to a 'substantial' lessening of competition because the CMA had not demonstrated that the merged entity had

the ability or incentive to engage in a strategy of customer foreclosure, and the CMA had no evidence of the potential effects of such a strategy.

Ability

447. Tobii submitted that:

(1) The CMA had not established that the merged entity would have sufficient market power in the upstream market for the licensing of AAC software so as to be able to engage in a strategy of customer foreclosure.

(2) The CMA identified three theoretical ways in which the merged entity could "*potentially*" limit the compatibility of the Grid with rival eye gaze cameras (Final Report paragraph 7.89), but it did not explain how such a strategy would in fact be implemented or the costs of implementing such a strategy. It merely repeated, without explanation or critical assessment, an assertion by Smartbox that "*disabling full integration with the Grid for any specific non-Tobii camera would be a quick, not technically challenging task*". (Final Report paragraph 7.91.) The CMA did not identify in any Tobii internal document, whether prepared before or after the merger was announced, any suggestion that Tobii had considered such a strategy technically feasible or commercially attractive because Tobii had never considered such a strategy, which would have damaged severely its reputation with end users and others.

(3) The CMA did not have any evidence of actual and credible competitor concerns about technical foreclosure and the available evidence did not support the CMA's finding of an SLC as a result of customer foreclosure. Other competitors of eye gaze cameras told the CMA that they could respond to customer foreclosure (VEWP paragraph 126) and, at most, one competitor "*expressed concerns about the viability of its business as a result of customer foreclosure*" (VEWP paragraph 125). However, it appeared from paragraph 128 of the VEWP that this competitor's concerns were on the basis that Smartbox would cease to

source eye gaze cameras from Tobii's rivals or promote Tobii's eye gaze cameras over rival cameras.

Effects

448. Tobii submitted that, even if the CMA had been able to substantiate that the merger would have led to customer foreclosure, it did not attempt to quantify this in terms of the number of unit sales that might potentially be affected.

(ii) The CMA

449. The CMA submitted that its decision on vertical effects fell well within its margin of appreciation and Tobii's arguments did not come close to establishing that the CMA was irrational in reaching its findings.

Ability

450. The CMA referred to its submissions in respect of Tobii's similar argument under input foreclosure that the CMA had not established that the merged entity would have a sufficient degree of market power in the upstream market for AAC software. The CMA noted that the focus of its assessment was on the substitutability between the Grid and other AAC software as a route to market for worldwide providers of eye gaze cameras in AAC applications.

451. The CMA disputed Tobii's submission that it had no evidence of how the customer foreclosure strategy would be implemented. The CMA identified at paragraph 7.89 of the Final Report three ways in which the merged entity could make the Grid incompatible with non-Tobii eye gaze cameras.

452. The CMA submitted that, so far as the question of technical feasibility was concerned, the CMA was entitled to rely on what the merging parties themselves said. They confirmed that it would be possible for the merged entity to limit the Grid's compatibility with rival eye gaze cameras. Tobii acknowledged this would be "*technically feasible*", whilst Smartbox said it would be a "*quick, not technically challenging task*". (Final Report paragraph 7.91.) In any event, the CMA also considered the range of other evidence concerning rival eye gaze

camera suppliers' dependency on the Grid and their possible alternative routes to market. (Final Report paragraphs 7.93 to 7.109.) Tobii's four main competitors in the supply of eye gaze cameras provided cogent evidence of their dependency on the Grid as a route to market. Each of them told the CMA that a substantial share of its worldwide camera sales was for dedicated AAC solutions that included the Grid. (Final Report paragraph 7.95.) It was reasonably open to the CMA to rely on this evidence in order to reach its conclusions on customer foreclosure, which were in no way perverse or irrational.

453. The CMA disputed Tobii's contention that it had no evidence to support its finding of an SLC as a result of customer foreclosure. A summary of the evidence from competitors was set out at paragraphs 7.94 to 7.112 of the Final Report. This included the ways in which competitors said they could respond to customer foreclosure, such as finding alternatives to the Grid, but they went on to find that such alternatives were in fact limited. (Final Report paragraphs 7.99 to 7.109.)

Effects

454. The CMA noted that Tobii's argument on effects repeated the same point about the substantial nature of the lessening of competition caused by the merger and referred to its submissions in relation to Issue 4(e) that s.35 of the 2002 Act did not require the CMA to quantify the lessening of competition.

(b) The Tribunal's analysis

455. The CMA's customer foreclosure concern was that the merged entity could limit the compatibility of the Grid with rival eye gaze cameras, with a net result that competition in the upstream market of eye gaze cameras and in the downstream market for dedicated AAC solutions using eye gaze cameras will be reduced.

Ability

456. The parties' submissions in respect of market power overlap with those advanced under Issue 5(a), and the Tribunal has addressed them at [426] of this

judgment. As regards the CMA's submission on the focus of its assessment, the Tribunal agrees that, with respect to the CMA's customer foreclosure theory of harm, the relevant market power arises from the worldwide dependence of non-Tobii eye gaze camera rivals on suppliers of dedicated AAC solutions which include the Grid in some or all of their dedicated AAC solutions. Paragraph 7.95 of the Final Report sets out the substantial share of each eye gaze camera rival's worldwide sales in 2018 that were for dedicated AAC solutions that included the Grid. This evidence shows the extent to which they rely on compatibility with the Grid for their route to market for eye gaze cameras in AAC applications.

457. The CMA set out at paragraph 7.89 of the Final Report three ways that the merged entity could potentially limit the compatibility of the Grid with rival eye gaze cameras, and it explained the reasons why it considered such a strategy technically feasible by reference to what it was told by the merging parties (Final Report paragraph 7.90 to 7.91) and evidence from eye gaze camera competitors (Final Report paragraph 7.93 to 7.109). In light of this, the Tribunal considers that the CMA had a sufficient basis to form the view that limiting the compatibility of the Grid with rival eye gaze cameras was technically feasible. In the Tribunal's view, given the evidence it received, the CMA was not required to particularise in technical detail how the merged entity would implement it physically.

458. Tobii's contention that the CMA did not have evidence of competitor concerns is untenable. Paragraph 7.94 of the Final Report stated that:

> "We contacted Tobii's main competitors in the supply of eye gaze cameras in AAC applications: EyeTech, Alea, Irisbond and LC Technologies. All four suppliers had concerns about the loss in sales that they would face if the merged entity were to make the Grid incompatible with their eye gaze cameras."

459. Paragraph 7.95 of the Final Report then set out the estimated proportion of their sales of eye gaze cameras in AAC applications that incorporated the Grid or would be affected if the Grid was incompatible with their eye gaze cameras.

460. Accordingly, the Tribunal considers that the CMA's finding that the merged entity had the ability to engage in customer foreclosure was not unreasonable or irrational.

Effects

461. The parties' submissions in respect of effects overlap with those advanced under Issue 4(e), and the Tribunal has addressed them at [392] to [393] of this judgment. For the reasons set out there, the CMA was not required to quantify the SLC. The CMA was entitled to reach the conclusions that it did in relation to effects for the reasons it had given.

L. CONCLUSION

462. For the reasons set out in this judgment, the Tribunal unanimously decides that:

(1) Ground 1 – Tobii's challenge fails to establish that the CMA breached its duty of procedural fairness by refusing during the investigation to disclose to Tobii or its external advisers the actual, underlying customer questionnaires and responses, Smartbox's information and documents, and competitor questionnaires and responses.

(2) Ground 2 – Tobii's challenge fails to establish that the CMA's approach in the collection of evidence during the investigation was unreasonable or irrational.

(3) Ground 3 – Tobii's challenge fails to establish that the CMA's approach to market definition was unreasonable or irrational.

(4) Ground 4 – Tobii's challenge fails to establish that the CMA's finding of an SLC due to horizontal unilateral effects was unreasonable or irrational.

(5) Ground 5 – Tobii's challenge fails to establish that the CMA's finding of an SLC due to customer foreclosure was unreasonable or irrational. However, it does succeed in demonstrating that the CMA's finding of

an SLC due to partial input foreclosure did not have a sufficient evidential basis. If the CMA wishes to rely on an SLC due to partial input foreclosure, it will need to consider this issue further and conduct such enquiries as it sees fit in the light of the matters set out in this judgment.

463. Accordingly, the Tribunal dismisses Grounds 1, 2, 3 and 4 of Tobii's NoA. In relation to Ground 5 of Tobii's NoA, this is dismissed save that we quash the Final Report to the extent that it finds that there is likely to be an SLC in the supply of dedicated AAC solutions in the UK as a result of the merged entity having the ability and incentive to foreclose its rivals by increasing the wholesale price of the Grid charged to rivals and/or as a result of the merged entity having the incentive to foreclose its rivals by reducing the extent to which the Grid supports rival dedicated AAC hardware.

464. We invite submissions from the parties on the impact of the quashing of that part of the Final Report and the form of order.

Hodge Malek Q.C. Paul Dollman Derek Ridyard
Chairman

Charles Dhanowa O.B.E., Q.C. (*Hon*) Date: 10 January 2020
Registrar