

1 This Transcript has not been proof read or corrected. It is a working tool for the Tribunal for use in preparing its judgment. It will
2 be placed on the Tribunal Website for readers to see how matters were conducted at the public hearing of these proceedings and is
3 not to be relied on or cited in the context of any other proceedings. The Tribunal's judgment in this matter will be the final and
4 definitive record.

5
6 **IN THE COMPETITION**
7 **APPEAL TRIBUNAL**

Case No: 1332/4/12/19

8
9 Victoria House,
10 Bloomsbury Place,
11 London WC1A 2EB

06 November 2019

12
13
14 Before:

15
16 **HODGE MALEK QC**

17 (Chairman)

18 **PAUL DOLLMAN**

19 **DEREK RIDYARD**

20 (Sitting as a Tribunal in England and Wales)

21
22
23 **BETWEEN:**

24
25 **TOBII AB (PUBL)**

Applicant

26
27 -v-

28
29 **COMPETITION AND MARKETS AUTHORITY**

Respondent

30
31
32
33
34
35
36
37 *Digital Transcription by Epiq Europe Ltd*
38 *Lower Ground 20 Funnival Street London EC4A 1JS*
39 *Tel No: 020 7404 1400 Fax No: 020 7404 1424*
40 *Email: ukclient@epiqglobal.co.uk*
41
42
43
44
45
46
47
48
49
50
51
52
53
54
55

APPEARANCES

1
2
3
4
5
6
7
8
9
10
11

AIDAN ROBERTSON QC and MATTHEW O'REGAN (instructed by Preiskel & Co LLP) appeared on behalf of the Applicant.

KASSIE SMITH QC and DAVID BAILEY (instructed by the Competition and Markets Authority) appeared on behalf of the Respondent.

1 **Wednesday, 6 November 2019**

2 **(2.00 pm)**

3
4 **Housekeeping**

5 THE CHAIRMAN: Yes, Mr Robertson.

6 MR ROBERTSON: Chairman and members of the Tribunal, I appear with
7 Mr Matthew O'Regan for the applicant, Tobii. My learned friends
8 Ms Kassie Smith QC and Mr David Bailey appear for the respondent, the
9 Competition and Markets Authority.

10 THE CHAIRMAN: Since the last hearing I issued the direction on disclosure and, as
11 a result, we have the answers to the questionnaires. What I can say, for my
12 part, is I have only flicked through them, and I have read maybe four of them.
13 I haven't read all of them. So, that may be one thing just to bear in mind, we
14 haven't read all of those.

15 What we have read in detail is the skeleton argument, the pleadings and the witness
16 statements. We have all read the long report more than once.

17 Other documents we may have read or dipped into, so don't assume that we are fully
18 familiar with all the other key documents. Obviously, we looked at the
19 passages in your skeleton argument.

20 The authorities, I haven't reread the authorities for the purposes of the hearing. Most
21 of them I am quite familiar with, but remember that we have two wing
22 members. You may need to take them through at least the key passages of
23 some of the authorities, so they can understand what the principles are.

24 A transcript of this hearing will be prepared by the transcribers, so no one else is
25 allowed to record or stream these proceedings. We will have a break at about
26 3.15 pm for about five or ten minutes, but you choose a convenient spot

1 anywhere between 3.10 and 3.20.

2 MR ROBERTSON: Thank you very much. To pick up on the point about the
3 questionnaires, we will be going to those at a convenient point in my
4 submissions. We will sort of give a guided tour of the responses.

5 THE CHAIRMAN: I think that, you know, you are going to have plenty of time to
6 make the points that you want to make. Because I can see you have until
7 12 o'clock tomorrow.

8 MR ROBERTSON: Yes.

9 The way we anticipate dividing it up is that I will be covering introduction, legal
10 principles grounds 1 to 3. I would hope to have finished by 11 o'clock
11 tomorrow morning. I will then hand over to Mr O'Regan, who will deal with
12 grounds 4 and 5, and we will be finished by midday tomorrow.

13 Ms Smith and Mr Bailey will then have until 12 o'clock on Friday, and we will then
14 have an hour in reply on Friday morning.

15 THE CHAIRMAN: That is fine. Yes.

16 MR ROBERTSON: Confidentiality. There are some passages that are colour
17 marked for confidentiality reasons. Again, Ms Smith and I have agreed to
18 deal with this in the usual way in this Tribunal, which is if that there are
19 passages that are confidential to which we wish to refer, we will point the
20 Tribunal to them without reading them out.

21 THE CHAIRMAN: That is fine. That is convenient. Yes.

22 MR ROBERTSON: I am going to deal with factual background first.

23 THE CHAIRMAN: Yes.

24

25

26 **Submissions by MR ROBERTSON**

1 MR ROBERTSON: Our written submissions on the factual background you have
2 seen on our notice of appeal paragraphs 30 to 49, paragraph 12 of our
3 skeleton, so this is a summary.

4 Tobii Dynavox is a provider of AAC solutions, so augmentative and assistive
5 communications solutions. It has, as its origins -- in Tobii's AAC division and
6 the acquisition of the US business, Dynavox, in 2014. Mr Eskilsson, who is
7 sitting behind me, explained that in his witness statement, at paragraph 25.

8 It first established a UK sales operation in 2016, and the UK is still a relatively small
9 part of Tobii's international presence; that is paragraph 22 of his statement.

10 Prior to establishing its own UK sales operation, it had used resellers, including
11 Smartbox, to distribute its software and hardware products; paragraph 31.

12 Tobii acquired Smartbox in order to strengthen its ability to offer AAC solutions in
13 a changing market. The attraction of Smartbox was its software rather than
14 its hardware.

15 There is a slide presentation as to the commercial rationale for this acquisition given
16 by the chief executive of Tobii, Mr Ruben, at the main party hearing. You can
17 see that -- I am not going to take you to it now, but it is in hearing bundle 4, at
18 tab 10, page 311, and the following tab, starting from page 329, is the
19 transcript of that hearing.

20 The purpose of the acquisition was to combine complimentary businesses. So, for
21 Tobii Dynavox, it is hardware research and development; for Smartbox, it is
22 software and customer service. That was the attraction for us of that
23 business.

24 Our intention was to invest in new hardware and software and, in particular, to
25 expand into underserved areas, such as aphasia, which is a condition that
26 certain stroke victims suffer, whereby they become unable to communicate.

1 The idea was to eliminate duplication in research and development between
2 the two businesses, so build upon those efficiencies to invest in research and
3 development.

4 Now, what do we mean by AAC solutions? Principally, these are software solutions
5 that can be downloaded on to tablet computers. The software, the AAC
6 software, doesn't vary according to the hardware on which it is downloaded,
7 other than having to be compatible with the relevant operating system,
8 Windows or Apple iOS.

9 Tablet computers -- to state the obvious -- are touch screen operated, and they have
10 revolutionised our market. Now, tablet computers may be equipped with
11 peripherals, such as eye-gaze cameras, speakers a rugged casing, extra
12 battery packs. What combination you need on that depends on the needs of
13 the particular user. Some users need eye-gaze cameras, others don't.

14 There are essentially three types of device, mainstream tablets, with a case
15 because -- extra battery pack and so on, a wrapped tablet, in other words
16 a tablet in an integrated case sold as a single device, and then purpose-built
17 tablets with these features. I think it would be useful to have a look at some
18 photographs of some devices, just so we have a --

19 THE CHAIRMAN: Yes, let's have a look, yes.

20 MR ROBERTSON: -- what we're talking about. If you could take bundle 5, these are
21 photos exhibited by Mr Eskilsson. Tab 2, and the first couple of pages at
22 paragraphs 21 to 22, that is the Tobii eye-tracker. That's a device that can be
23 clipped into a computer, and then you can operate the computer by looking at
24 it and using your gaze to operate the computer, rather than using your finger.

25 THE CHAIRMAN: Quite impressive really. You can, with your phone, unlock it by
26 looking at it, but this is clearly much more advanced than that.

1 MR ROBERTSON: Yes. It is potentially a very wide application. It is already the
2 case that laptops are sold with eye-trackers integrated in them, so it is
3 becoming mainstream. It is not specific, as it were, to AAC.

4 THE CHAIRMAN: Would it be specific to an individual? You would have to sort of
5 program it to your eye and then -- yes, I would have thought you would. Just
6 like when I program my phone to --

7 MR ROBERTSON: To a particular fingerprint. But once it is set up, then anyone
8 can set it up and anyone can operate it.

9 THE CHAIRMAN: It would be designed for one person to use it because it would
10 have their eye, or whatever, as the one that is the operator?

11 MR ESKILSSON: You need to calibrate it very similar to how you would calibrate
12 your fingerprint reader on a smart phone.

13 MR ROBERTSON: We then get, at page 23, the I-Series, and Tobii, the 12, the 15,
14 refer to the size of the device. Over the page, the Tobii I-110. Just so you
15 can see what that actually looks like in reality, that is it. You can see at the
16 back -- so it is very much like an iPad. It has, at the back there, extra
17 speakers, battery, a clip, so you can clip it into wheelchairs, that sort of thing.

18 THE CHAIRMAN: You could drop it a few times without breaking it.

19 MR ROBERTSON: Yes, it is ruggedised. That is the one that is built to the US
20 specification, to get US funding.

21 There is then an Indi, on page 25, and let's make sure I get this right because they
22 look almost identical. That is the Indi. That has a touchscreen, a tablet there.
23 These are manufactured for Tobii by OEMs in the Far East. It comes
24 integrated with this -- again, it is very similar, almost identical in fact, carrying
25 case, speakers, extra battery. So that is the Indi.

26 On the CMA's case, that falls within the dedicated AAC solutions market definition.

1 I should say these don't have eye-trackers built into them. If you wanted
2 an eye-tracker, you would have to clip it in.

3 So, that is the Indi. That is the photograph of it there, that is it in real life.

4 Over the page, on page 26, you have the EyeMobile Plus. Now, what this is, is
5 a device -- so the lower of the two photographs -- that enables you to clip in
6 a tablet computer to be used with a Microsoft Surface Pro. You clip it in and it
7 gives you the functionality that is integrated into an Indi. This one, you can
8 see at the bottom of the top photograph, there is a bar built across the bottom,
9 that is the eye-tracker. Then, again, you see that on the next page. There is
10 an eye-tracker on that EyeMobile Mini.

11 Then, on page 28, this is the speech case, which is a peripheral built by Tobii and
12 sold, which enables you to use an iPad as --

13 THE CHAIRMAN: So, you can buy that in isolation, can you?

14 MR ROBERTSON: Yes, and you clip in the iPad. This is an example of it that I am
15 holding up here. As you can see, it is virtually identical to the Indi, but it has
16 clipped into it an iPad.

17 The CMA's case is that iPads aren't part of the dedicated AAC solutions market. As
18 I say, these are in a nice fetching shade of green. They also come in pink
19 because what we want to do is make these products as attractive as possible
20 for users. Users don't want to be marked as using something which is sort of
21 out of the ordinary. If you are suffering from one of the conditions, you aspire
22 to normalcy, and that is part of it, designing something that looks as close as
23 possible like a typical iPad, the sort of thing -- my children have an iPad that
24 has a protective case in it. It looks quite like that, of course it doesn't have the
25 speakers in, doesn't have the extra battery, but that is how you protect the
26 iPad every time they drop it on the kitchen floor.

1 So, they are the products.

2 I have already referred to the CMA's definition of dedicated AAC solutions. It's
3 paragraph 3 of the final report. It is a four-part definition, which you will have
4 read:

5 "... AAC solutions as a combination of four components: dedicated AAC hardware
6 ..."

7 Just stopping at that point. These are tablet computers either built by OEMs for us
8 or they're Surface Pros or iPads. They operate AAC solutions because you
9 download software onto them. They are not dedicated, they could run any
10 software. In this case, they happen to be loaded with AAC software.

11 So, anyway, it's dedicated AAC hardware, (2) AAC software itself;

12 (3) Access means in cases where the end-user cannot control the device solely
13 through the touchscreen, an AAC solution includes a means of access, such
14 as a switch, for people who have difficulties controlling their movement, or
15 an eye-gaze camera.

16 Then (4), customer support, including training, technical support and repairs.

17 Now, the only product that is Tobii Dynavox sells in the UK that fall within the
18 solution -- this definition of dedicated AAC solutions are the I-110 series and
19 the I-Series products. That is the black one on the far side. That represents
20 only a small proportion of Dynavox's unit sales volumes in the UK, as
21 Mr Eskilsson explains at paragraph 35 of his witness statement, and
22 Mr Cowen, at paragraph 17 of his witness statement.

23 As I said, the I-Series is built for US specification. In the UK, it is being superseded
24 by the Indi or iPads, using Tobii's speech case.

25 The curious finding in the report is that the CMA describe the Indi as falling within its
26 definition, that is paragraph 5.5 of the report, but it is not sold with customer

1 support and it doesn't have an access solution. In other words, it doesn't
2 have an eye-gaze camera on it. That is explained in more detail by Mr Cowen
3 at paragraphs 14 to 21.

4 THE CHAIRMAN: Let me just have a quick look at the report.

5 MR ROBERTSON: The report is --

6 THE CHAIRMAN: I have my own one, separate. Don't worry.

7 (Pause)

8 MR ROBERTSON: So, you see 5.4 sets out there are four categories.

9 THE CHAIRMAN: Yes.

10 MR ROBERTSON: Then, at 5.5:

11 "... Our definition of dedicated AAC solutions encompasses all solutions that meet
12 the criteria set out in paragraph 5.4 and is therefore broader. For example,
13 the Indi, a portable, purpose-built device sold by Tobii, is considered to be a
14 dedicated AAC solution for the purpose of our inquiry even though it is not
15 certified as a medical device in the US."

16 THE CHAIRMAN: Okay. Then just tell me, why do you say it isn't one?

17 MR ROBERTSON: It isn't one because it is not sold with the fourth element.

18 THE CHAIRMAN: That's customer support; yes?

19 MR ROBERTSON: Customer support. And it doesn't have the specialised access
20 means, such as an eye-gaze camera.

21 It has the functionality of an iPad, and it is manufactured and priced to compete with
22 the iPad. It has to do that because, when the iPad was introduced, it
23 revolutionised the market and certainly Dynavox found that it took away the
24 vast majority of its sales, which is the reason why Dynavox entered into
25 chapter 11 before we bought it.

26 So, I would also observe that the EyeMobile, that is the bracket that I showed you

1 the photograph of, that you clip the Surface Pro into, you know, that also
2 doesn't fall within the definition of "dedicated" because it is a bracket for
3 putting in the Surface Pro. You can buy the Surface Pro from anyone and
4 download the AAC software from Google, app stores. The software is
5 separately available, you just download it.

6 As for Smartbox, the only products sold by Smartbox that fall within the CMA's
7 definition are the Grid Pads 12, 10 and 8. The Grid Pad 12 is the product that
8 was launched only a month before the CMA commenced its inquiry and, prior
9 to then, Smartbox only sold the Grid Pads 10 and 8, which are wrapped
10 tablets, they use a Fujitsu tablet computers. They don't have the tablet
11 computers specially manufactured for them by OEMs.

12 In paragraph 3(a) of the defence, and it is also stated in the report as well, I just want
13 to note this: the CMA observed that end-users of these products can be
14 regarded as vulnerable consumers and we, of course, agree.

15 Tobii Dynavox's mission is to develop its products to address the needs of people
16 who require assistive technology for communication. That has a real impact
17 on how we do business.

18 As we explained at the main party hearing, exploiting consumers would be a death
19 knell for our reputation. The acquisition of Smartbox was intended to enhance
20 the combined parties' offering to vulnerable consumers. It is the CMA that is
21 seeking to stymie Tobii Dynavox's ability to do that by blocking the merger;
22 that is one of the reasons we feel so strongly that the CMA has this badly
23 wrong, and that is why we are bringing this challenge.

24 Ironically, one of our principal causes for complaint is that the CMA has not directly
25 engaged with the vulnerable consumers in this case, the end-users, parents,
26 carers, teachers, to obtain evidence of their views.

1 THE CHAIRMAN: Just so I can understand the background, Tobii is out to make
2 profits as well, isn't it, and pay dividends for its shareholders or whatever?

3 MR ROBERTSON: We are not a charity. The only way we can invest in new
4 products is to make money.

5 THE CHAIRMAN: Yes, but there are certain companies where it is part of their
6 object not to make a profit and no dividends or anything like that.

7 MR ROBERTSON: We are not a not-for-profit.

8 THE CHAIRMAN: You are there to make a profit, but obviously you want to plough
9 back money into the business to improve the product, to improve things for
10 the end-user.

11 MR ROBERTSON: If you don't do that, then you get overtaken by events, as
12 Dynavox, the original US business, found out when the tablet was introduced
13 in 2010 and almost overnight two thirds of its sales disappeared. You have
14 got to innovate to survive. Not least because we have the tech giants in this
15 market.

16 THE CHAIRMAN: They are very dynamic and they are big.

17 MR ROBERTSON: So, unless we can innovate and out-compete them in the range
18 of products that we offer, and the qualities of the products we offer, then we
19 would suffer the same fate that Dynavox suffered.

20 THE CHAIRMAN: Are there sites actually offering dedicated software that is free?
21 Are there any out there? Like Google, are they offering anything for free at
22 the moment?

23 MR ESKILSSON: Yes. Both Microsoft and Apple and Google are making significant
24 investments in enhancing and providing accessibility functionality that is
25 needed to go into the operating systems for Android, iOS, as well as in
26 Windows. One of our recent events, just the other year, was Microsoft who

1 actually had incorporated support for fairly advanced AAC eye-tracking
2 functionality in Windows 10, which we actually collaborated with Microsoft
3 around and defined as the standards for, and helped them build up into
4 Windows.

5 THE CHAIRMAN: Yes, I had read that somewhere, so I am not going mad.

6 MR ROBERTSON: The other main software -- as Mr O'Regan reminds me -- is
7 available for purchase on download at about £50.

8 THE CHAIRMAN: Yes, I have seen that. I just wanted to have a picture of what else
9 is out there that is free, if you see what I mean.

10 MR ROBERTSON: Well, it is really against this background of rapid innovation that
11 the CMA has intervened to block this, in our submission, obviously
12 pro-competitive merger, and it has done so because it has come to the view
13 that the market in which this merger has taken place is not one for AAC
14 solutions, but is instead what the CMA and, in our submission, no one else in
15 the UK industry calls a market for dedicated AAC solutions. That market
16 definition excludes all but a handful of suppliers of AAC solutions in the UK
17 and excludes the tech giants, despite their obvious success.

18 We understand the origin of the term "dedicated" to be in US regulation, and we
19 submitted to the CMA a detailed paper explaining that, headed "Regulatory
20 distortions."

21 It is exhibited by Mr Cowen, and it is in the hearing bundle volume 4, at tab 8. I am
22 not going to ask you to turn it up, but to give you the headline points:
23 dedicated hardware is purely a term to describe what is required as "medical
24 grade" by US regulation. When I say "US regulation" I am referring to
25 MediCare, at a federal level and Medicaid at state level. You have to meet
26 those requirements in order for the cost of acquisition of the hardware to be

1 reimbursed.

2 THE CHAIRMAN: Yes. Or that itself can distort the market, having that
3 reimbursement mechanism because you may end up having very expensive
4 equipment that people don't necessarily need, but they get it because it is
5 going to be free for them because they can get it through that route.

6 MR ROBERTSON: That is the origin of what is now the I-110. That is built to US
7 spec. It is a very high spec.

8 THE CHAIRMAN: You accept that there are certain people with needs that they
9 need high spec stuff, or not?

10 MR ROBERTSON: I think, in our submission, pretty much everything that most
11 users need is to be found on the Indi. There will be some users for whom --
12 who don't regard anything else than the I-110 as a substitute, but our
13 complaint about this investigation is there hasn't been a proper inquiry into
14 that.

15 I should also add: in the United States -- please don't go on the impression that
16 everyone uses a I-110 because that is where you get reimbursement. In the
17 US, lots and lots of users use iPads. They are just not reimbursed by
18 MediCare or Medicaid. As I say, the Dynavox experience, after the
19 introduction of the iPad, demonstrates that.

20 Now, that is important product for us, the I-110, globally because the vast proportion
21 or a large proportion of our sales, certainly over a majority of our sales are in
22 the US. Whereas the UK sales are still, in terms of our international
23 revenues, a very small proportion indeed, less than 5 per cent.

24 So, that is where dedicated comes from. It comes from US regulation. It requires
25 dedicated hardware to be built to a particular specification.

26 When we turn to look at the UK, of course, thankfully, we don't have an equivalent of

1 MediCare or Medicaid, we have the NHS. If we look at how the NHS
2 describes this market -- I think it would be helpful to look at the NHS
3 guidance. It's at hearing bundle 5, tab 5.

4 THE CHAIRMAN: Oh, yes, I have that.

5 MR ROBERTSON: You will see this is -- I should emphasise this is NHS England.

6 THE CHAIRMAN: Yes.

7 MR ROBERTSON: There are arrangements dealt with differently in Scotland,
8 Wales, Northern Ireland. There is effectively no such thing as a UK NHS.
9 This is the NHS England guidance. If we see at page 38, on the left-hand
10 side, "Description":

11 "This guide is intended to help all those coming into contact with AAC services to
12 understand the organisation of the service and its delivery, and offer signposts
13 for how to access the support it provides."

14 That the NHS provides.

15 Over the page, at page 41.

16 THE CHAIRMAN: Yes.

17 MR ROBERTSON: In the introduction at paragraph 1:

18 "AAC services help people communicate as effectively as possible when speech is
19 impaired. This guide describes how the commissioning of these services is
20 organised between local AAC services and specialised AAC services ..."

21 This is the distinction between local NHS provision and the specialised provision
22 through NHS hubs. As we will see later, the questionnaires were sent to NHS
23 hubs.

24 "What is AAC," heading 2:

25 "The term ... covers a wide range of techniques that support or replace spoken
26 communication. AAC techniques use a person's abilities, whatever they are,

1 to compensate for their difficulties with speech and to make communication as
2 quick, simple and effective as possible when speech is impaired. The
3 techniques include gestures, signing, symbols, communication boards and
4 books, as well as powered and computerised devices, such as voice output
5 communication aids ..."

6 Section 3 deals with who uses AAC services and, throughout the document, you will
7 see the references to AAC services.

8 Devices are referred to at -- sorry, I have missed out one section I need to take you
9 to.

10 On page 42, under the heading:

11 "Commissioning AAC services."

12 Section 4.2 describes the position today:

13 "Services for children and adults who need and use AAC are now commissioned as
14 specialised and local AAC services. This has been described as the AAC hub
15 and spoke model, with a number of regional hubs able to provide specialised
16 services and support to a number of associated centres, or spokes, offering
17 local AAC services."

18 Then, in paragraph 11:

19 "... around 90% of the AAC population require local AAC services and 10% of the
20 AAC population require specialised AAC services."

21 So, it is a continuum.

22 Paragraphs 10 and 11 above them give the incidents in the population. 0.05
23 per cent of the population, or 5 in 10,000 people, needing the specialised hub
24 services, and then ten times that 0.5 per cent of the population, or 50 in
25 10,000 people, requiring the local services.

26 Turning the page to page 44, the remit of specialised AAC services section 8,

1 paragraph 21:

2 "The role of specialised services ... provide equitable access ... to provide
3 appropriate powered communication aids as a long-term loan to patients for
4 as long as the patient needs the device ..."

5 Obviously, some patients will need devices for longer than others. Someone with
6 MND may well have a much shorter-term outlook than someone who has
7 a chronic condition.

8 We then turn to page 50, appendix 3, which defines communication aids:

9 "Communication aids typically provided by [this is halfway down] specialised
10 commissioning arrangements are devices intended for use by an individual
11 with a severe speech impairment ... These devices tend to include some or
12 all of the following features: ... language packages within AAC software ..."

13 We see the list there. Some use synthesised speech based on a computer platform,
14 some require alternative access methods.

15 "Communication aids provided by specialist commissioning arrangements may be
16 based on mainstream technology, such as tablet computers, or more
17 dedicated hardware. They will include specialist communication software
18 (that takes a user's input and outputs synthesised speech); vocabularies or
19 language systems loaded into the software; and accessories (such as access
20 methods speakers, etc.)."

21 So, we see there communication aids for AAC services being described across the
22 whole continuum, from tablets to more specialised devices.

23 How did the CMA arrive at what we say is an unrealistically narrow, contrived market
24 definition? So far as we can see, the CMA adopted the phrase "dedicated
25 AAC" as its phase 1 frame of reference.

26 Then failed to follow a proper procedure to examine whether that really did form

1 a product market.

2 Now, our complaints are that we weren't able to address this issue during the Inquiry
3 because the gist of the case on product market definition wasn't properly
4 disclosed to us. That is our first ground.

5 Our second ground is this complains about the way in which the CMA obtained
6 evidence about the product market. It placed a heavy reliance on a flawed
7 survey of limited categories of customers. That is a survey that didn't comply
8 with the CMA's own guidance as to how a survey should be carried out, and
9 asked skewed questions, which inevitably would lead to unreliable evidence.

10 We have now seen the questionnaire responses, and we can see there are concerns
11 about the questionnaire -- which we had pointed out so far as we were able to
12 do so in the Inquiry -- are certainly not without foundation. In fact, they are
13 confirmed.

14 Our third ground of challenge is that the CMA failed to test its proposed product
15 market definition because it failed to apply the standard and accepted
16 approach to product market definition as specified by its own guidance, as
17 well as indicated by this Tribunal, by carrying out a SSNIP test.

18 THE CHAIRMAN: We deal with that in Paroxetine, that came up as one of the
19 issues.

20 MR ROBERTSON: I am going to come to Paroxetine, yes. It is one of the cases
21 that Ms Smith relies upon against us on this, so I will deal with that when I get
22 to that point.

23 The other evidence the CMA seeks to rely upon, to the extent it has been disclosed,
24 in our submission doesn't reasonably support this contrived and narrow
25 product of market definition, so that is our third ground.

26 Before turning to those specific grounds, I just want to say a few words about

1 grounds of review in this Tribunal.

2 As to the legal framework in which this application is brought, it is common ground
3 this is a judicial review, not an appeal on the merits, and it falls to be
4 determined as such. I have relatively little to add on my feet on this topic to
5 what we have already put in writing.

6 Topic of judicial review in merger cases is certainly -- well, it is old hat to me, and
7 doubtless is old hat to the Chairman as well. We attempted in the BSkyB
8 case, or rather my leader Michael Beloff QC, attempted to argue that more
9 intensive review -- whatever that means -- should apply in this Tribunal, and
10 that was rejected by both the Tribunal in that case and then by the Court of
11 Appeal. So, we have the same principles in this Tribunal as in the
12 Administrative Court.

13 THE CHAIRMAN: Are there any differences as to what the test is between you and
14 the CMA, or is it fairly common ground? How you apply it may be different,
15 but --

16 MR ROBERTSON: I think it comes down to how you apply it. Our submission is the
17 grounds on which we rely are well within the ordinary parameters of judicial
18 review.

19 My learned friends, our submission is that they are encouraging you to take
20 an incredibly hands-off approach to the evidence before the CMA and,
21 essentially, their approach is: we had evidence, you can take our word for it.
22 Nothing to see here and move along.

23 We say, no, you have to look at the evidence and determine its relevance.

24 THE CHAIRMAN: What we can't do is sort of do the balancing exercise if there is in
25 fact evidence. So, if you say, "The evidence on one side is this", and they
26 say, "Well, the evidence on the other side is that way", and they make their

1 own assessment, it is difficult for us to intervene, even though we may have
2 come to a different view as to how strong the evidence either way is.

3 What is interesting about this case is that if it was no evidence, you clearly have no
4 problem and that falls within judicial review principles; you can't draw
5 conclusions with the absence of evidence. If it is wholly inadmissible
6 evidence, it is probably the same thing. If it's what you say is unreliable
7 evidence, it is not clearly black or white if it is unreliable evidence. It may be
8 reliability, one would say, is for the CMA to look at evidence and decide how
9 reliable something is, but presumably you say you get to a stage where
10 something is so manifestly unreliable that no reasonable decision maker could
11 rely on that. I am trying to figure out where the differences are between you.

12 MR ROBERTSON: Bearing in mind that it may be old hat to you and me, but to the
13 Tribunal members principles of judicial review might benefit just from just a bit
14 of explanation.

15 THE CHAIRMAN: I think it is important you do that, yes.

16 MR ROBERTSON: I think my learned friends rely upon -- just so we stand back,
17 ground 1 is about procedural fairness. The inquiry wasn't carried out
18 procedurally fairly.

19 THE CHAIRMAN: We will come to that in a minute. I have some points on that.

20 MR ROBERTSON: Grounds 2 to 5 are rationality challenges. Failure to take into
21 account relevant considerations, how you structure a survey, that sort of thing,
22 and/or lack of material evidential foundation.

23 Now, my learned friends rely upon the Stagecoach case decision of this Tribunal,
24 chaired by Vivien Rose, as she then was, and they cite paragraph 45 of that
25 decision. It might just be worth going to it. It is in the authorities bundle 2,
26 and it is tab 33.

1 Before we look at the decision, I should offer an apology for not having followed the
2 CAT guidance in providing as authorities the version available on the CAT's
3 website. This has been taken from a Thomson Reuters database. They do
4 have page numbers on the right-hand side of each page at the bottom, but
5 very, very faint, unfortunately. The passage to refer to is on page 11.

6 THE CHAIRMAN: Just give me the paragraph number.

7 MR ROBERTSON: It is 45 as cited by my learned friends, and we rely upon
8 paragraphs 47 and 48.

9 47 is a statement of the --

10 THE CHAIRMAN: Look, we have two wing members here. I think they should read
11 paragraph 45, and then we will go on to the other paragraphs.

12 MR ROBERTSON: If I suggest, Sir, if you can read paragraphs 45 to 48 --

13 THE CHAIRMAN: Yes, that is fine.

14 MR ROBERTSON: -- it will save me reading it out.

15 (Pause)

16 THE CHAIRMAN: Yes.

17 MR ROBERTSON: So, we say it is very neatly summed up in the last sentence of
18 the vice Chancellor in -- quoting the vice Chancellor in IBA health:

19 "Whether the decision is so unreasonable as to be a decision which no Commission
20 properly instructed and taking account of all, but only, relevant considerations
21 could arrive at."

22 THE CHAIRMAN: Traditional JR test.

23 MR ROBERTSON: Traditional judicial review, yes.

24 Just in broad summary, we say when it comes to ground 2, the evidence gathering
25 exercise failed to take account of relevant considerations; that is the need to
26 ask questions that comply with the advice given in the Commission's own

1 guidance on conduct of surveys. On ground 3, defining the product market, it
2 is failure to conduct a SSNIP test. SSNIP test is a highly relevant
3 consideration and it was omitted, in very broad terms.

4 THE CHAIRMAN: Yes. Can we put that volume away?

5 MR ROBERTSON: Yes. I just note, incidentally, that Stagecoach is an example of
6 a decision in which a rationality challenge to a decision succeeded. As
7 a result, the decision was set aside and would have been remitted were it not
8 for the fact that Stagecoach was in the process of selling the acquired
9 business anyway.

10 THE CHAIRMAN: I am sure Kassie Smith is well aware of that. She was junior
11 counsel in that one.

12 MR ROBERTSON: Yes. We have both been in a number of these cases.

13 THE CHAIRMAN: I am sure you have, yes.

14 MR ROBERTSON: So, that is really all I wanted to say by way of the legal
15 framework.

16 THE CHAIRMAN: Yes, legal framework on the JR test, but obviously when you get
17 to ground 1, I want to discuss what the legal test is on that.

18 MR ROBERTSON: Yes. As I have already indicated, I am going to deal with
19 grounds 2 and 3 first and then come to ground 1 because the points I want to
20 make on ground 1 are that much more clear when you can see the points that
21 we wish to make on grounds 2 and 3.

22 THE CHAIRMAN: That is all right. Yes.

23 MR ROBERTSON: Now, if the Tribunal could just remind itself of the agreed list of
24 issues, which is to be found in --

25 THE CHAIRMAN: We have that, tab 6 of bundle 1.

26 MR ROBERTSON: Tab 6 of hearing bundle 1.

1 THE CHAIRMAN: I find these agreed lists very helpful.

2 MR ROBERTSON: I was just about to express our gratitude to CMA's junior
3 counsel, Mr Bailey, for taking the lead in drafting this and coming up with
4 a version that was much more usable than our original draft.

5 THE CHAIRMAN: Yes, I think I may be responsible for this because it is in Ryanair
6 when I said this is what I wanted, and this is exactly what I wanted.

7 MR ROBERTSON: Mr Bailey alerted us to that, and I found it very helpful indeed.
8 My submissions and those of Mr O'Regan follow this structure.

9 THE CHAIRMAN: When it comes to writing the judgment, I want to have all the
10 references in one place and look at it, and this is a really good framework.

11 MR ROBERTSON: Yes.

12 So, dealing with, first of all, the principles that underlie -- I am going to refer to --
13 although they have been referred to as "issues", I will refer to them as
14 grounds 2(a), ground 2(b).

15 THE CHAIRMAN: That is fine. I understand that.

16 MR ROBERTSON: On the legal principle that underlies each of these, we take as
17 our starting point a case that my learned friends refer to, the BAA case, in
18 which the Tribunal, chaired by Mr Justice Sales, as he then was, said at
19 sub-paragraph 20.3:

20 "The CC, as decision maker, must take reasonable steps to acquaint itself with the
21 relevant information to enable it to answer each statutory question posed for
22 it."

23 I don't think there is any need to turn up BAA. For the note, it is authorities bundle 2,
24 tab 36, page 8.

25 The relevant statutory question is that set out in section 35, subsection 1(b):

26 "Whether the merger has resulted or may be expected to result in a substantial

1 lessening of competition within any market or markets in the United Kingdom
2 for goods or services."

3 Absolutely straightforward.

4 Less straightforward, in that it is disputed by my learned friends, is guidance given by
5 the Tribunal as to how you treat information -- the process of obtaining
6 information from customers through the use of surveys. For that I think we
7 should turn up the Tribunal's judgment in AkzoNobel. It is a Tribunal chaired
8 by Mr Justice Norris, and it is to be found in authorities bundle 2, tab 37. The
9 first paragraph to which I wish to draw your attention is paragraph 144. That
10 is to be found on page 26 of this report.

11 It is a different factual scenario to the current case, but there was an engagement
12 with customers, and there, there was an issue about which customers the
13 Commission had been engaged with, if I can try and put it neutrally that way.

14 The Tribunal observes:

15 "... there are only four buyers [in this market] of any significance in the UK. That
16 made the target population from which a sample could be drawn exceptionally
17 small to begin with. Secondly, it is, with such a small population, almost
18 impossible to carry out any probative statistical analysis. This means that
19 customer views (albeit that these must be properly tested) take on a renewed
20 significance that might not be seen in more diverse markets."

21 Then, turning to paragraph 145, there is a question there about sampling bias:

22 "The Commission plainly took care to gather views from a range of customers and
23 was alive to the dangers of placing too much emphasis on the views of [the
24 company being acquired's] customers alone. Beyond that, and in accordance
25 with the applicable judicial review principles set out ... above, the relative
26 weight to be placed on the views it received was principally a matter for the

1 Commission. ... The Commission sought to cross-check the conclusions it
2 drew based on customer views against empirical pricing data."

3 Then paragraph 146. So, what we get from that is that the CMA must take care to
4 avoid sampling bias by gathering views from a range of customers and not by
5 placing too much emphasis on one category of customer.

6 Then there is a complaint by AkzoNobel that the Commission used leading questions
7 in its customer survey. That then leads to the Tribunal's observation, at
8 paragraph 150, at the bottom of page 27, that:

9 "... it is clearly of the utmost importance that questions posed by the Commission in
10 merger investigations are neutral and do not presuppose any particular
11 answer, as per the OFT and Commission's guidance."

12 The guidance to which reference is being made there has now been replaced by the
13 CMA's guidance on survey good practice, to which we will come shortly:

14 "We do consider that the context in which [the question under consideration] was
15 asked is highly relevant. We do not doubt that the question could have been
16 phrased better. In our view, however, it was quite proper for the Commission
17 to follow-up on this issue that arose in the oral hearings before it. Had
18 a question phrased in this manner been put in the main questionnaire, we
19 would have had some concerns about the manner in which the Commission
20 conducted its enquiry."

21 The question that led to this challenge is that set out at paragraph 146 of this
22 judgment.

23 Now, we place stress on the statement that it is of the utmost importance that
24 questions posed by the Commission in merger investigations are neutral and
25 do not presuppose any particular answer, and the indication that guidance is
26 to be obtained from the CMA's own guidance on that.

1 My learned friends suggest, at paragraph 71 of their skeleton, that we have wrongly
2 elevate that into an absolute obligation. It is not, in our submission,
3 an absolute obligation to follow the guidance, but the guidance is of the
4 utmost importance, particularly when used in a main questionnaire.

5 We are dealing with, here, in main questionnaires, not in follow on questions, or
6 follow up questions, of the sort that were in issue in AkzoNobel.

7 We ought then to have a look at the guidance. That is to be found in authorities
8 bundle 1, tab 10, which we can see from the cover is entitled:

9 "Good practice in the design and presentation of customer survey evidence in
10 merger cases."

11 It is issued by the CMA in May 2018, and it is revised. It's the revised version of the
12 OFT and Commission guidance referred to in the AkzoNobel case.

13 If we turn to page 3, section 1, we see the status of the document set out.
14 Paragraph 1.1:

15 "... We believe that the use of statistically robust customer survey research can be
16 very important in reaching informed decisions, and we very much welcome
17 this type of evidence."

18 Paragraph 1.2:

19 "This document sets out our general views on good practice and the design conduct
20 and reporting of such surveys."

21 1.3:

22 "Where appropriate, the CMA may commission its own survey research and, if so,
23 the survey design, analysis, and interpretation of results are informed by
24 in-house statisticians who work closely with inquiry teams and the market
25 research agencies commissioned to conduct research on our behalf. The
26 principles described in this document apply equally to these surveys."

1 1.4:

2 "This document focuses on surveys for merger cases."

3 1.6, at the bottom of the page, it makes it clear that it is replacing the OFT and CC
4 guidance that was referred to in AkzoNobel.

5 1.7, on page 4:

6 "This document is about customer survey research for merger cases. We use the
7 term 'customer' here in a loose and non-technical sense. Usually the CMA
8 will be interested in surveying the person (or an entity, such as a business)
9 who buys a product or service directly from (one of) the merging Parties.
10 However, this is not always the case. For example, sometimes the CMA is
11 interested in surveying the end-customers of products or services even if they
12 do not purchase the product or service directly from the Parties."

13 Over to page 5, 1.17, just to note:

14 "The CMA is obliged, under the Merger Guidelines, to give Parties 24 hours to
15 comment on a draft questionnaire for any survey that it intends to commission
16 as part of a phase 2 merger inquiry. In practice, we always try to allow longer
17 ..."

18 Mr O'Regan reminds me to take you also to paragraph 1.8:

19 "This document provides principles and examples for illustration, not hard and fast
20 rules or bright-line tests. We recognise that circumstances vary and that
21 knowledge of the relevant scenario, along with judgment and reason, will be
22 required in applying customer survey research methods to a particular case.
23 Where time and/or resource constraints mean that the research possible
24 under particular circumstances cannot comply fully with all of the principles
25 set out here, we will still consider its use to the case."

26 So, it is of quite general application.

1 Turning over to page 6, paragraph 1.19 refers to the ways in which survey evidence
2 has been used. At sub-paragraph (e) of the examples there on page 7, (e):

3 "Closeness of competition – to estimate the closeness of competition between the
4 Parties themselves, and between the Parties and competitor third parties.
5 This is often the most influential part of the survey, using hypothetical
6 diversion questions to elicit the 'next best' options ... from respondents."

7 Then, on page 8, paragraph 1.26:

8 "We expect good surveys to be neutral and not biased towards one outcome or
9 another. Given the nature of the phase 1 legal test [that is the frame of
10 reference] there is a particular risk to Parties that survey results beneficial to
11 their case may be given little or no weight if they are perceived to have been
12 led by a biased survey design."

13 Then 1.27:

14 "We aim to be open and transparent in our work. ..."

15 Finally, on page 24, paragraph 3.1 sets out there how a questionnaire is to be
16 designed.

17 "While there is a well-developed body of good practice in questionnaire design for
18 social research, experience has shown that merger inquiry research requires
19 particular attention to specific (and sometimes small) details to help obtain
20 reliable and valid customer survey evidence. Any bias in response caused by
21 imprecise or leading question wording, or ordering of the questions, can
22 weaken the evidential value of a survey."

23 Now, putting that guidance away, just to go through what happened and the conduct
24 of the survey in this case, the CMA originally contacted us on
25 26 February 2019, stating that it intended to carry out a survey and issuing us
26 with a survey information request. That is explained by Mr Cowen, at

1 paragraph 10.1 of his witness statement.

2 We didn't get a draft of the questionnaire, nor were we given any opportunity to
3 comment upon a draft questionnaire.

4 We received a CMA questionnaire from a customer of ours in early March 2019, and
5 we then wrote to the CMA on 7 March 2019 raising concerns about it. That is
6 Cowen 10.2.

7 We now know that there were four different versions of questionnaires that were sent
8 out. That is explained by the inquiry chair, Mr Meek, at paragraph 74,
9 sub-paragraph (b) of his witness statement.

10 We know, now, that questionnaires were sent to some 69 customers of Tobii and
11 Smartbox, of which 30 responded. Those response rates are set out in the
12 final report at Table 5-1, that is on page 64 of the report.

13 There were also 16 -- what might be described as questionnaires sent to interest
14 groups, to which there were six responses. That can be seen at
15 paragraph 5.17 of the final report, page 65.

16 In reality, those questionnaires were just an email list of, in our submission, poorly
17 worded questions. An example of one of those questionnaires is in the
18 hearing bundle, volume 3, tab 12, 779 to 780.

19 THE CHAIRMAN: Let's just have a look at that.

20 MR ROBERTSON: We are going to spend lot of time on the questionnaires sent to
21 the NHS hubs. It is hearing bundle 3, tab 12. If you turn to the back of that
22 tab, page 779, it has been suitably anonymised, but --

23 THE CHAIRMAN: What page number again?

24 MR ROBERTSON: 779. It's the last page.

25 THE CHAIRMAN: Of the previous tab, yes.

26 MR ROBERTSON: Of tab 12. 779 to 780. It is an email. The questions are set out,

1 six questions are set out. That is sent to interest groups, six of which replied.

2 (Pause)

3 THE CHAIRMAN: The first time you saw the questionnaire on the phase 1 inquiry
4 was --

5 MR ROBERTSON: On the phase 2 inquiry.

6 THE CHAIRMAN: No, on the phase 1 inquiry. Was in the context of these
7 proceedings, was it?

8 MR ROBERTSON: Yes. Yes, we saw the questionnaire, but not the answers.

9 THE CHAIRMAN: Yes.

10 MR ROBERTSON: Now, of the questionnaires that were sent to NHS hubs -- and
11 we focus on those because they are the only questionnaires that had
12 structured questions relating to diversion. That is explained at paragraph 5.16
13 of the final report and at paragraph 5.22 of the final report.

14 12 out of the 17 NHS hubs that were contacted responded, and of those 12 only 10
15 provided sufficiently detailed information to calculate weighted, as opposed to
16 unweighted, diversion ratios. That is explained in the final report at
17 paragraph 6.49.

18 The CMA's position -- which was first set out in an email to us on 23 April 2019 --
19 was that it had not carried out a survey in this inquiry. That is explained by
20 Mr Cowen at paragraph 10.4 of his statement.

21 Mr Meek then elaborated on that at the main party hearing, on 1 May 2019, where
22 he said -- this is at page 70 of the transcript, lines 1 to 8:

23 "... this is not what we call it [ie the questionnaire]. A survey has a particular
24 meaning within the CMA and it has those best practice structures applied to
25 it."

26 When it comes to the final report, it is described as a "detailed customer engagement

1 exercise". That is paragraph 5.26 of the final report, to which the survey good
2 practice guidance does not apply. Paragraph 5.30. That is the line taken by
3 the CMA in its defence, paragraphs 85 to 86, and by Mr Meek in his witness
4 statement, paragraph 118.

5 Mr Meek argues that the survey good practice guidance only applies to a statistical
6 survey and therefore the guidance can be disregarded; that is paragraphs 120
7 to 123 of his statement.

8 We respectfully disagree. In our submission, the guidance sets out good practice for
9 evidence gathering from a range of respondents. Here the CMA sent out
10 questionnaires to 69 customers and to 16 interest groups, whether or not that
11 technically constituted a statistical survey is not relevant. The substance of
12 the survey good practice guidance ought to have been followed so that
13 questions were appropriately framed to ensure evidence obtained can be
14 relied upon. It is our submission that if the guidance is not followed, as it was
15 not, the evidence is likely to be unreliable.

16 I notice that, when we put in our own end-user customer survey, the CMA did,
17 ironically, rely upon the survey good practice guidance when giving feedback
18 on our draft survey. You see that -- I don't think we need to turn it up -- in
19 hearing bundle 4, tab 4, page 130.

20 So, that is what I wish to say by way of legal principles applicable specifically to
21 ground 2. I am now going to turn to ground 2(a), and I wonder whether that
22 would be a suitable moment to take a mid-innings break?

23 THE CHAIRMAN: That is a good idea. We will take a 10 minute break. We will be
24 back.

25 MR ROBERTSON: 3.18?

26 THE CHAIRMAN: Yes, okay. Thank you.

1 (3.09 pm)

2 (A short break)

3 (3.20 pm)

4 MR ROBERTSON: Sir, just to explain where I am going to go to between now and
5 4.30 pm. I am going to deal with grounds 2(a), 2(b), 2(c), 2(d), then I am
6 going to deal with the questionnaire responses.

7 THE CHAIRMAN: You can do all of that, can you, in that time?

8 MR ROBERTSON: Let's see.

9 THE CHAIRMAN: Yes, we will see.

10 MR ROBERTSON: So, ground 2(a). Was it unreasonable or irrational for the CMA
11 to focus its evidence gathering from customers to institutional customers,
12 such as NHS, schools, charities, and interest groups, and not directly to solicit
13 evidence from end-users of AAC solutions or their parents/carers?

14 It is common ground, as I believe, that the CMA did not collect any evidence from
15 end-users and did not place any weight on the only evidence that it had from
16 end-users, namely Tobii's survey of end-users.

17 By "end-users" I mean people using AAC solutions, their parents, carers or teachers.

18 So, the phrase "end-users" encompasses all of those categories.

19 We have set out in our skeleton, at paragraphs 50 to 52, the limited scope, as we
20 say it is, of the CMA's survey, which was heavily dependent on responses
21 from 12 out of the NHS AAC hubs.

22 As I have shown you from the NHS guidance, those hubs treat only around 10
23 per cent of those in England that get NHS support for an AAC solution, but
24 that minority represents the predominant source of evidence relied upon by
25 the CMA.

26 The CMA avers that it is reasonable not proactively to contact end-users, that is set

1 out in their defence at paragraphs 66 to 74, and by Mr Meek in his statement,
2 at paragraphs 111 to 117.

3 Our submission is that this narrow approach to obtaining evidence meant that the
4 CMA was unable properly to determine the overall extent of demand-side
5 substitutability for AAC solutions. We say there are four reasons why that
6 failure to obtain evidence from end-users was unreasonable.

7 Firstly, it meant that it didn't obtain evidence from an important source of demand for
8 AAC solutions, both generally and for product supplied by Tobii Dynavox and
9 Smartbox specifically. The CMA's justification set out in its defence, at
10 paragraph 68 and 74, for not doing so is in our submission unpersuasive.

11 Aside from the technical question of the applicability or otherwise of the survey good
12 practice guidance, the CMA essentially seeks to argue that it would have
13 been counterproductive to contact end-users because, as stated at
14 paragraph 74, sub-paragraph (a), the end-users are "relatively
15 unsophisticated purchasers". So, this is an assertion that the views of
16 vulnerable consumers or their parents, carers, teachers, are to be disregarded
17 due to some alleged lack of sophistication. In our submission, that can't be
18 accepted. These people are forced, due to the nature of their conditions or for
19 those they care for, to become very sophisticated in identifying and
20 addressing their needs.

21 When we get to the customer questionnaire responses, they show that end-users
22 are involved in the assessment process and are obviously well informed of the
23 available options. There is a range in their sophistication, as reported in
24 responses to that questionnaire, but they range from those who are happy to
25 let others advise them, to those who are well-informed purchasers.

26 The second reason that we rely upon is that the mix of AAC solutions purchased

1 varies significantly by customer segment. So, the CMA's assertion that Tobii
2 Dynavox and Smartbox do not differentiate their offering by customer
3 category, and therefore it is not necessary to obtain the views of end-users
4 when other customers that it did contact represented 90 per cent of the party's
5 sales by value, that assertion, we say, is misconceived.

6 Third, as the demand of the institutional purchasers that the CMA did contact was
7 derived from and, as we will see from the customer questionnaire responses,
8 was influenced by the demand of end-users, the CMA should have obtained
9 evidence from this group, the end-users, in order properly to assess the
10 information that it obtained from purchasers, such as NHS trusts and hubs.

11 Our fourth submission is that by adopting a narrow approach to gathering information
12 on demand for AAC solutions, the CMA failed to obtain sufficient and reliable
13 information for it to undertake a proper analysis of demand, substitution and
14 diversion.

15 What survey evidence was collected by the CMA is contradicted by the survey of
16 end-users conducted on behalf of Tobii. The CMA's case, at paragraph 11 of
17 its skeleton argument, is that Tobii's survey was "Lacking in rigour robustness
18 and reliability and so cannot be given any weight at all". In our submission,
19 that does not stand up to scrutiny.

20 The Tobii survey was an online survey of 101 end-users of AAC solutions. We see
21 that referred to in the final report at paragraphs 6.55 to 6.57 and appendix C.

22 The survey was constructed to comply as closely as possible with the
23 recommendations of the CMA's survey good practice guidance. Tobii did
24 not -- as is suggested at paragraph 75 of the defence -- ignore the difficulties
25 in achieving compliance in either designing the survey or interpreting the
26 results. By contrast, it was always fully open about these difficulties. It

1 explained in the introduction to the survey report:

2 "The specific nature of the market, in combination with the characteristics of the
3 end-users of AAC solutions, makes this a particularly hard to reach group."

4 That is a quote. You can see that in hearing bundle 4, tab 4, pages 45 and 46.

5 When we say a "hard to reach group", what is meant there is it is a different
6 exercise, contacting end-users, to a typical retail survey. As it happens, the
7 first case I was ever involved in as a professional lawyer, when I was
8 an articled clerk in a firm of solicitors in 1986, was a case called Scott v
9 Nice-Pak a passing off case, trade mark confusion case, about identical blue
10 tubs of baby wipes, where the plaintiff in that case obtained their survey
11 evidence by standing outside supermarkets, or having its researchers stand
12 outside supermarkets, and stopping -- and bearing in mind this is over
13 30 years ago -- housewives with young children, or pushing buggies, to ask
14 them if they purchased baby wipes. That is the way in which they contacted
15 that group.

16 The case ended up in the High Court before Mr Justice Walton, and in the Court of
17 Appeal in 1989, and the survey evidence was thrown out because it was
18 asking leading questions. Basically, they were asking housewives if they
19 were confused by a tub of baby wipes produced by our client that they had
20 never seen before and asked to compare it with the market leader.

21 That is an easy reach to group. You can stop people in the street and ask them: are
22 you a parent of children?

23 AAC users are different. Perhaps if we turn to the report --

24 THE CHAIRMAN: Can I just ask you one question? You had these responses to
25 the survey -- if you want to call it a survey, the questionnaires -- are you
26 saying that the CMA can't place any weight at all because of the flaws in the

1 design of the questionnaire, ie they should just ignore them completely, or are
2 you saying that in assessing the questionnaires they need to take a bit of
3 a pinch of salt and be very wary about the extent to which they can use them?
4 Which one is it, really?

5 MR ROBERTSON: It is that it is so badly designed, when it comes to diversion
6 ratios, that no competition authority could reasonably place weight on it.

7 THE CHAIRMAN: The second question is: do we have a feel as to the extent to
8 which the CMA followed up with the people who completed these surveys by
9 speaking to them directly, or interviewing them, or phone, or email contact?
10 To what extent --

11 MR ROBERTSON: We don't have a feel for it because --

12 THE CHAIRMAN: I think they refer to that happening, but I am not sure if I have any
13 feel at all as to the extent.

14 MR ROBERTSON: We have asked. We asked during the inquiry: can you tell us
15 what people are telling you? And they refused to do so. We had to pursue
16 the disclosure application in front of this Tribunal.

17 THE CHAIRMAN: Anyway, they have heard what I have said, so when they give
18 their submissions they can say whether it is anywhere in the final report.

19 MR ROBERTSON: Yes. I am drawing the contrast with the report that we
20 conducted, which they have not given any weight to at all. We say that is
21 a failure to have regard to a relevant consideration. There was other
22 evidence where the diversion ratios were way lower than those that they
23 calculated.

24 THE CHAIRMAN: But what they say about your survey, they have got their own list
25 of flaws, as you know, in relation to your survey. The question is: should they
26 have any regard to your survey at all?

1 MR ROBERTSON: They say they have had no regard to our survey.

2 THE CHAIRMAN: I agree. One of the questions is: is that the right approach? Yes.

3 You are saying, as regards to their responses from the questionnaires, they shouldn't

4 have any regard to them at all?

5 MR ROBERTSON: For diversion ratios, that is correct.

6 THE CHAIRMAN: In respect of other things, you say that they can.

7 MR ROBERTSON: Yes. But they are principally relied upon for diversion ratios, and

8 it is -- the results are just totally unreliable and contradicted by a survey that

9 we conducted, and which we say they couldn't reasonably entirely disregard

10 it.

11 They take issue with it.

12 MR RIDYARD: Mr Robertson, just a quick follow up on the Tobii survey, you said it

13 was 101 users of AAC solutions, is that 101 AAC solutions as defined by the

14 CMA or more generally?

15 MR ROBERTSON: It is more generally.

16 MR WILLIAMS: We didn't start from an assumed candidate market.

17 MR ROBERTSON: We are saying the starting point is wrong. It is broader. It is the

18 one referred to in the NHS guidance.

19 The points I want to make about the robustness of our survey are that we took

20 independent advice from an academic in the department of economics at

21 Oxford, Dr Donna Harris. We engaged market research specialists, someone

22 who specialises in healthcare surveys, Debbie Moorcroft of Caroline

23 Thompson Associates. Those are people with relevant expertise, the design

24 of surveys, and the CMA, in the final report, doesn't take any issue with their

25 independence or their relevant expertise.

26 So, when they say that the survey is lacking in rigour, robustness and reliability, we

1 have had people advise us as to those factors. They have said that it is
2 rigorous, reliable, robust.

3 THE CHAIRMAN: Yes, but that doesn't make them rigorous -- in fact, rigorous,
4 reliable and robust, does it? You say we have acted reasonably and in
5 accordance with professional advice, but they are not bound to follow that if
6 they have good reason to say why it is flawed.

7 MR ROBERTSON: But we don't have those good reasons.

8 THE CHAIRMAN: Well, that is a different issue, but they are not bound to follow it.

9 MR ROBERTSON: We shared the survey with the CMA. So, they were given the
10 opportunity to comment on the survey, which they did. A pilot survey was
11 done and the survey was refined.

12 Mr O'Regan reminds me that the CMA commented on the survey, and we didn't just
13 say, "Thanks very much", and plough on regardless. We amended the survey
14 in the light of those comments.

15 So, the survey report is set out, and I am not going to take you through the survey. It
16 is in hearing bundle 4, tab 4.

17 But, in our submission, that was a relevant consideration to take into account that
18 was disregarded for no good reason.

19 THE CHAIRMAN: Can you just show me the bit which deals with diversion ratios,
20 the headline point?

21 MR ROBERTSON: Yes. It is hearing bundle 4.

22 THE CHAIRMAN: Yes.

23 MR ROBERTSON: Tab 4.

24 THE CHAIRMAN: Here we are. Yes.

25 MR ROBERTSON: Well, just to run through it very quickly.

26 THE CHAIRMAN: I think that would be helpful.

1 MR ROBERTSON: So, the point at page 45, second paragraph under the
2 introduction, that is the reference to this being a particularly hard to reach
3 group:

4 "Accordingly, the survey methodology used has been carefully considered to reflect
5 this."

6 Then an explanation there as to what has been done.

7 The summary of the results is set out:

8 "(i) For both, AAC devices and AAC software, there is a high degree of
9 substitutability across the wide range of alternatives available in the market
10 (including, significantly, between purpose-built AAC devices and consumer
11 tablets)."

12 Over the page:

13 "(ii) The demand-side substitutability between the Parties' products is not as high as
14 with the other products in the market (although there might be an asymmetric
15 degree of competitive constraint imposed by Tobii Dynavox's AAC devices on
16 Smartbox's AAC devices ...

17 "(iii) End-users ... consider consumer tablets to be a very good alternative ...

18 "(iv) Although the extent of demand-side substitutability varies along the spectrum of
19 complexity of end-user needs ... there do not appear to be any "bright lines" /
20 "break points" that would indicate the existence of a separate market (from
21 which consumer tablets would be excluded) based on end-user medical
22 condition / needs."

23 And the results are generally based on a sample of 101:

24 "... findings must be seen in the context of what is practically possible with this
25 research."

26 So very careful, very measured.

1 Then we set out the introduction and background.

2 At page 50, initial survey design.

3 At page 51, pilot survey design. Reference to advice being taken from Caroline
4 Thompson Associates in the fourth and fifth paragraphs of that:

5 "... although the target audience is hard to reach, the survey methodology is highly
6 suitable to meet its purpose."

7 Over the page, 52:

8 "Resulting main-stage survey design."

9 Page 53:

10 "How our final design balances key methodological considerations."

11 Then, on the next page, 54, certain issues where, because of inherent trade-offs,
12 choices must be made. And the third one:

13 "... customer survey research aimed at ascertaining demand-side substitutability in
14 mergers would ideally include questions which would help calculate diversion
15 ratios between the Parties' products, as well as relative to other products in
16 the market. However, in practice in this market, it is not feasible to reach
17 a sample size which would allow strong inferences to be made. ..."

18 Then:

19 "Balancing these considerations [again, it is very measured. It's being totally
20 transparent about the issues that have to be weighed up] - and noting the
21 specific feedback from the CMA and Caroline Thompson Associates on the
22 pilot survey - the main-stage survey does include hypothetical diversion
23 questions. However, one should be mindful of the above issues (in particular,
24 the reduced sample size) when interpreting these results."

25 Then we get into the executive summary of the results on page 55, showing the
26 range of AAC device brands actively considered.

1 Page 56, setting out a figure of active consideration of brands:
2 "The largest number of respondents (51% of all respondents, and 52% of the Parties'
3 customers) actively considered the Apple iPad.
4 A significant proportion ... actively considered Smartbox ... and Microsoft tablets ...
5 Only 19% of all respondents and 27% of the Parties' customers considered Tobii
6 Dynavox ... when making the most recent purchase decision."
7 We then get into range of software brands being considered, and that is making the
8 point that there is quite a wide range now of software specifically designed
9 providing AAC solutions. You see those indicated in figure 2.
10 Then, on to page 60, and this is the specific answer to the Chairman's question,
11 "customer diversion." Diversion away from AAC devices, figures setting out
12 customer switching patterns away from Tobii Dynavox AAC devices, and then
13 the conclusions under the graph:
14 "Although the limited sample size makes it difficult to make robust inferences, from
15 the above, we note that: [the third bullet point] Only 17% of Tobii Dynavox's
16 customers of AAC devices would switch to Smartbox devices."
17 That contrasts with the CMA's finding of a range of between 50 to 60 per cent,
18 doesn't it?
19 THE CHAIRMAN: Yes, the results are diametrically opposed.
20 MR ROBERTSON: Yes, so that's the --
21 THE CHAIRMAN: Yes, that is enough of that. Thank you very much.
22 MR ROBERTSON: Yes, sorry, just the final point, page 138. I mentioned
23 Debbie Moorcroft --
24 THE CHAIRMAN: You did, yes.
25 MR ROBERTSON: -- leading this review. She has:
26 "... conducted projects on a wide range of subjects, including on issues surrounding

1 mobility, disability, physical and mental health. ... a highly experienced ...
2 researcher ... guest lecturer in market research practices at Durham
3 University Business School."

4 So, we have engaged the appropriate experts, and we have come up with a carefully
5 considered report, which is just dismissed as lacking in rigour, robustness and
6 reliability. In our submission, that is not a reasonable response to that report.

7 That is what I wanted to say on ground 2(a).

8 Ground 2(b):

9 "Were the questionnaires by which the CMA sought evidence from customers and
10 interest groups flawed such that the evidence that the CMA obtained lacked
11 credibility and was unreliable, such that the CMA could not reasonably rely on
12 it?"

13 Our submission is that the CMA used poorly structured and biased questionnaires to
14 obtain evidence from customers and interest groups, and that resulted in the
15 CMA obtaining and using evidence that was inherently unreliable.

16 The CMA's findings in the final report on both market definition and substantial
17 lessening of competition were principally based on data and other evidence
18 that the CMA obtained from customers and interest groups using written
19 questionnaires.

20 As we set out in the notice of appeal, paragraphs 89 to 90, this applied to market
21 definition, the assessment of horizontal unilateral effects, the calculation of
22 diversion ratios on a GUPPI analysis, the assessment of vertical input for
23 closure and the assessment of remedies.

24 Contrary to the CMA's assertion at paragraph 83 of its defence, this is not merely
25 a disagreement on the structure and content of the questionnaire. What the
26 CMA disparages as Tobii's granular approach merely reflects what we say are

1 numerous unreasonable errors made by the CMA in collecting and
2 interpreting evidence using the questionnaire, whether that evidence was
3 quantitative or qualitative in nature.

4 In our submission, it is clear that without this evidence the CMA's findings would
5 have been shorn of their principal evidential foundation.

6 Now, I am going to come back after I have dealt with grounds 2(c) and 2(d) to the
7 questionnaires, and the responses we have seen to the questionnaires.

8 Our criticisms of the questionnaires have been set out in our skeleton argument at
9 paragraphs 74 to 83, also in our supplementary skeleton at paragraphs 4 to 6.

10 It is not just us taking issue with the wording of the questionnaire, we obtained
11 independent expert advice from Dr Jonathan Cave, which we shared with the
12 CMA during the inquiry, after we had obtained the questionnaire from one of
13 our customers. He has identified several serious errors with the wording,
14 ordering and framing of the questionnaires, in particular on diversion, and also
15 the absence of questions on purchasing decisions and choices on suitability.
16 That report is in the hearing bundle, volume 4, at tab 7, pages 266 to 269.

17 Now, the specific errors made by the CMA in the framing and wording of the
18 questionnaire are set out in detail in our skeleton argument, at paragraphs 89
19 to 129.

20 They are, in summary: first, the CMA created a definition of and assumed the
21 existence of a product market for dedicated AAC solutions. It did not seek
22 customer's views on the relevance or otherwise of these four components in
23 purchasing decisions. It effectively carried over an assumed frame of
24 reference from phase 1 of the inquiry and used it in phase 2 without
25 reassessing whether in fact that was an appropriate starting point.

26 So, the investigation, on the basis of that, assumed product market definition was

1 therefore subject to confirmation bias. The CMA pre-judged the question of
2 market definition and its questionnaire contained leading questions that may
3 have resulted in respondents not giving a proper representation of their views
4 and purchasing behaviour. That is not consistent with the CMA's survey good
5 practice guidance, in particular paragraphs 3.10 to 3.11. But even if it wasn't
6 in their guidance, in our submission it is plain that these were leading
7 questions. So, we say the answers to those questions ought to have been
8 given little or no weight.

9 The second error that we have identified is that the questionnaire did not apply the
10 standard SSNIP framework used in market definition. As I will explain when
11 I come to ground 3, that is an essential part, we say, of the process of market
12 definition, but the CMA's questionnaires didn't adopt that standard approach
13 to market definition.

14 There was clear evidence of distinct segments in a group of highly differentiated
15 products supplied by the parties, and likely by their competitors as well, with
16 differences in functionality, price and customer purchasing patterns.

17 These factors, together with competition from what the CMA termed non-dedicated
18 AAC solutions, at paragraph 5.6 of the final report, should have highlighted,
19 we say, to the CMA the essential need for it to have properly considered how
20 demand-side substitution might vary by product using the SSNIP test
21 approach and the implications of this for market definition. But the CMA didn't
22 do so.

23 Instead, they presupposed a market for dedicated AAC solutions and, while we
24 admit that could in principle have been an appropriate hypothetical focal point
25 for applying the SSNIP test, it is clear from the CMA's questions that they did
26 not test other alternative market definitions. In particular, a broader market

1 comprising all AAC solutions irrespective of the device used. There were no
2 questions that expressly and directly tested the possibility of substitution
3 between dedicated AAC solutions, ie purpose-built devices, and
4 non-dedicated AAC solutions. In other words, solutions that include AAC
5 software installed on a mainstream consumer device.

6 The third error that we identify is that the questionnaire failed to take steps to
7 determine those completing responses to it had requisite knowledge of
8 available AAC solutions.

9 Now we have seen the responses to the questionnaires, they seem to us to reveal
10 that whilst some NHS hubs are obviously knowledgeable, they had difficulty
11 with the CMA's questions and responding in particular to the questions on
12 diversion. I will come to that later.

13 The fourth error is the questionnaire didn't establish the purchasing processes of
14 customers, so it didn't ask customers about their purchasing processes. So,
15 as a result, it didn't have a complete or robust understanding of the
16 purchasing decisions made by the customers it had contacted. That is a point
17 observed by Dr Cave, and has a number of implications, which we have
18 detailed in our skeleton argument at paragraphs 114 to 116.

19 The fifth error is that the framing of the questions was unclear, which gave rise to
20 a risk of inconsistency in the respondents' understanding of what they were
21 being asked and thus in their responses. That is in particular arising out of
22 the use of a defined term for dedicated AAC solutions that simply was not and
23 is not used in the industry. That is again contrary to the survey good practice
24 guidance, in particular paragraphs 3.9 to 3.11, which state that limited weight
25 can be given to evidence as a result of questions that are ambiguous, leading
26 or biased.

1 The sixth error -- and one that has some familiarity for those of us involved in the
2 baby wipes case -- is that the framing and ordering of some questions relating
3 to diversion was leading, and their sequencing was not neutral and did not
4 reflect how a customer would consider diversion between the products of
5 different suppliers.

6 So, this, the questions relating to diversion, questions 7 and 8, were leading, didn't
7 have neutral sequencing. The questionnaire didn't reflect how customers
8 would consider substitution and diversion between specific products of
9 different suppliers. It just refers to brand names. It doesn't deal with the
10 products, the actual devices that I was holding in my hand earlier this
11 afternoon.

12 Now, the CMA accepts that those products are highly differentiated and have or may
13 have different conditions of competition, but it only asked questions about
14 suppliers' products in the aggregate, at brand level. Contrast the test that the
15 CMA itself set in its final report at 5.22. At 5.22 of the report, it refers to:

16 "... closest alternatives to the products provided by the Parties. In differentiated
17 product markets, such products are the most relevant competitive constraints
18 on the Parties."

19 So, that is what the CMA reminds itself in the final report is the correct approach, but
20 it didn't apply it. It did diversion on a brand basis, not on a product basis.

21 Turning to ordering bias, it is well established that respondents to questionnaires or
22 surveys may be subject to ordering bias, in other words the likelihood of
23 selecting an answer is affected by the order in which the response options are
24 presented. That is recognised by the CMA in its survey good practice
25 guidance that states where prompt lists are used to suggest alternatives the
26 ordering of the alternatives should be randomised or presented systemically,

1 eg alphabetically; that is paragraph 3.50 of the good practice guidance.

2 Well, it is undoubted the CMA's questions were biased. Smartbox in question 7 and
3 Tobii in question 8 were placed at the top of the list of alternative suppliers,
4 with only two others listed by name. ie Liberator, which is PRC, and
5 Techcess, which is Jabbla. Whilst there was space for the respondent to add
6 in other manufacturers of dedicated AAC solutions, this wrongly and
7 improperly indicated to respondents that the merging parties faced
8 competition principally from these two competitors. PRC and Jabbla.

9 That in itself gave rise to a further risk of bias and was also inconsistent with the
10 survey good practice guidance. That is paragraphs 3.47 to 3.48, which
11 provides questions about diversion options should cover all possibilities and
12 permit spontaneous unprompted answers and avoid providing an incomplete
13 list of alternative suppliers.

14 That is precisely what the CMA didn't do.

15 So, as both questions 7 and 8 were leading and ambiguous questions and also
16 suffer from ordering bias, they fail to comply with the survey good practice
17 guidance. They were, quite frankly, leading questions of the sort that should
18 not appear on questionnaires.

19 As Mr Justice Norris had observed in AkzoNobel.

20 That is what we have to say on ground 2(b).

21 Ground 2(c) is: was it unreasonable or irrational for the CMA to generate diversion
22 ratio estimates based on data from the 12 NHS hubs?

23 Well, to a large measure I have already covered this. To recap, the CMA collected
24 information on diversion from a narrow category of intermediate purchasers;
25 that is the 12 NHS hubs. But, in fact, only 10 of those provided data that the
26 CMA could use to calculate weight of diversion ratios. That data was used to

1 calculate diversion ratios both for the market definition analysis and for the
2 substantive analysis of competitive effects, both ground 4 horizontal and
3 ground 5 vertical theories of harm.

4 CMA didn't obtain diversion information, whether quantitative or qualitative, from
5 other purchasers.

6 We have already covered why this was too narrow and inappropriate to provide
7 reliable diversion evidence.

8 The CMA's answer is simply to say it can place some weight on the diversion
9 evidence, but that doesn't withstand scrutiny. If you have the figures wrong,
10 then the diversion results -- diversion ratio results are going to be wrong. If
11 they are wrong by an order of magnitude, then the final weight you place on
12 them is meaningless. We have already covered just how different -- on the
13 two surveys before the CMA, how different the results on diversion were.

14 THE CHAIRMAN: At the end of the day, if we find that the questionnaires are
15 fundamentally flawed and that the CMA have to reconsider, are they going to
16 have to do another survey with all the right questions or is the population
17 already *parti pris*?

18 MR ROBERTSON: I don't think the population is *parti pris*.

19 In our submission, what we invite the Tribunal to do is to quash the decision and
20 remit it to the CMA to carry out a proper market definition analysis.

21 Mr Eskilsson and I were discussing that during the short break this afternoon. That
22 is all we are looking for, is for the CMA to go away and do the job properly.

23 THE CHAIRMAN: Yes.

24 MR ROBERTSON: On ground 2(d), was it unreasonable or irrational for the CMA to
25 rely on evidence obtained from its questionnaires?

26 Well, it follows from our answers to grounds 2(a) to 2(c) that Tobii does submit that it

1 was unreasonable for the CMA to rely on the evidence obtained from its
2 questionnaires in the context of the material before it.

3 We have had an exchange of supplementary skeletons on this topic. We have taken
4 the opportunity to go through the questionnaires in some more detail and, in
5 view of the Tribunal's indication that it would appreciate being taken to the
6 questionnaires that were disclosed in response to the disclosure request,
7 I propose to do so.

8 The points that can be made go across all of the grounds, but I think this is the
9 appropriate point to do it. To assist the Tribunal in doing that, so you are just
10 not constantly trying to follow what I am saying --

11 THE CHAIRMAN: Have you shown it to the other side?

12 MR ROBERTSON: I am just about to pass it over.

13 MS SMITH: No, I haven't heard of it.

14 THE CHAIRMAN: Don't give it to me --

15 MR ROBERTSON: It is a speaking note, I can just read it out, but if they would like
16 to have the script.

17 THE CHAIRMAN: I think it is always normal to let them have it.

18 MR ROBERTSON: It runs to 7 pages, 1,100 words.

19 THE CHAIRMAN: Where do you suggest we put that in the bundle?

20 MR ROBERTSON: Behind our supplementary skeleton.

21 (Document handed up)

22 THE CHAIRMAN: Mr Robertson, if you do have any other things like this make sure
23 the other side see it in advance.

24 MR ROBERTSON: This is all I have. If, in considering the case tonight or tomorrow
25 night, once I have it settled I will email it off to Ms Smith and to Mr Bailey so
26 they can see it at the first opportunity. But at the moment this is the only thing

1 that I wanted to go to.

2 As I say, I put it out in writing because this is -- as it says, this is my speaking note.

3 THE CHAIRMAN: It is fine, it is not a problem.

4 MR ROBERTSON: What we have done is set out what we get from the responses
5 to the questionnaires.

6 The questionnaires are in the hearing bundle, tab 6. They run to 278 pages, I am
7 not going to go through all 278 but you will get a flavour of the questionnaires
8 just by following up some of the references that I am going to take the
9 Tribunal to.

10 THE CHAIRMAN: I am sure you will give your best examples and they will give their
11 best examples.

12 MR ROBERTSON: I will pick out my plums and leave the duff for the CMA.

13 THE CHAIRMAN: When you do something like this, with these many responses,
14 you are bound to get some ambiguities and funny answers and things like
15 that. I think, at the end of the day, we are probably going to have go through
16 all of them on our own.

17 MR ROBERTSON: Well, we have given you specific page references --

18 THE CHAIRMAN: I know. It is going to be quite a task.

19 MR ROBERTSON: I think after a while you do get a flavour for it.

20 Paragraphs 1 and 2 of my speaking note are by way of introduction and you see the
21 point we make on gist.

22 Dealing with grounds, this is applicable to 2(a), 3 on market definition and 4,
23 horizontal effects.

24 Point 3. CMA, as we have said, didn't obtain evidence from end-users. They say
25 it wasn't necessary. At point 4 we say, in fact, the responses do show that
26 end-users -- parents, carers, teachers -- are deeply involved in assessments

1 for AAC solutions as these are person centred.

2 I should say, we don't know -- you can work out whether a questionnaire has been
3 returned by an NHS hub or not, as to whether it has got a diversion question
4 in it, because we know that those were only sent to the NHS hubs. Other
5 than that, we don't know who provided the responses. You could make
6 an educated guess in some circumstances that it is a school or it is a hub.
7 That is as far as we can take it, I think.

8 THE CHAIRMAN: Yes, but you can figure out which ones have been returned by
9 NHS hubs?

10 MR ROBERTSON: Yes, because they have got the diversion questions in.

11 So, page 25, this is question 6 on page 25:

12 "What role do end-users play?"

13 "End-users are central to all decision making. It is a person-centred approach and
14 they are consulted and shown different options. Similarly, we consult with
15 people who support in the environment, eg carers, teachers, families as they
16 also have views."

17 If we flick over to 46 and 47, you will see at the bottom of 46, "your assessment":

18 "Our assessments are all person-centred. ... We will gain input from the end-user
19 throughout assessment. The role end-users play is quite individual, some
20 end-users will have a clear idea of the technology they want to use, others will
21 not. The majority are generally happy to be guided by expert advice.
22 Although some may have seen technology they think will work they are
23 generally receptive if there are reasons why it is not appropriate."

24 Then, page 62:

25 "End users have a key role in the assessment process. We invite all key
26 stakeholders to the assessments so that the people that know the person the

1 most can contribute to the identification of the most appropriate piece of
2 equipment."

3 Then you can see the rest of that quote.

4 Page 84 --

5 THE CHAIRMAN: You see, at the top of 63 it is similar to the previous one. The
6 impression I got when I flicked through these before was that, yes, of course
7 they are going to speak to the end-users as broadly defined. Most of them
8 are going to be followed by the guidance of the expert, many of them may not
9 but they will have a discussion about it and they will decide what is best for
10 the person that is involved.

11 MR ROBERTSON: Yes. There is plainly a broad range of interaction with
12 end-users.

13 THE CHAIRMAN: One would have hoped so, yes.

14 MR ROBERTSON: We have set out in point 4 the various elements to that that we
15 can glean from the responses.

16 Point 5, the only respondent --

17 THE CHAIRMAN: What page, sorry?

18 MR ROBERTSON: Of my speaking note.

19 Point 5, we have only been able to find one of the respondents, which is a school,
20 not involving pupils or parents. We think the approach is the school, which
21 I think is a particularly specialist special needs school, wants consistency of
22 devices in the school. That is our inference.

23 Our submission on this is set out at point 6 of our note.

24 Then, in relation to -- this comes to market definition, which I am going to come on to
25 shortly -- use of mainstream devices, use of a tablet depends on user's needs,
26 responses show a widespread use of mainstream devices with AAC software

1 and peripheral to the AAC solutions and they are a viable solution for many
2 users. It is just a plethora of references to that. If there is one thing that
3 permeates through all the respondents, it is tablets are interchangeable. It
4 depends on the needs of the end-user.

5 The only exception to that is my third bullet point there. There are two small
6 customers appearing not to use tablets for policy reasons but that doesn't
7 seem to be down to the technical ability. The respondent at page 36 -- which
8 I think may be a local authority because under question 2 it refers to an AAC
9 service being part of a speech and language therapy department, children
10 and adults from across -- whatever it is. Answer to question 3:

11 "At present, my organisation does not allow the provision of standard mainstream
12 tablets for patient use, though we are looking at this again where the provision
13 of a consumer, mainstream tablet meets more of the requirements of the user
14 than a dedicated AAC device."

15 So, in our submission, what you do get out of these responses is that tablets are
16 considered as part of the range of AAC solutions.

17 MR RIDYARD: Mr Robertson, can I just ask, I am just trying to think why we are
18 asking these questions and why we are trying to get below the surface of
19 them. Isn't the answer that there is a hypothesis here, which I know you don't
20 accept, that a merger will create a lessening of competition and allow the
21 post-merger firm to raise price? What we really want to know is, if that were
22 to happen, so if all the high-end devices were to increase in price, who would
23 be the individual who would say, "wait a minute, I am not going to pay 10
24 per cent for this device I am going to switch to a glorified tablet instead"?

25 All these questions about people being interested and involved and engaged in the
26 process, it is all relevant stuff but I think we need to really focus on who is the

1 person who is going to say, "I am prepared to pay the current premium but
2 I am not prepared to pay an increased premium which has arisen because of
3 this anti-competitive merger, therefore I am going to switch to something
4 else". What I am not getting in this is any real understanding of who that
5 person is and where they come into the decision making process. Until we
6 get there I don't think -- that is going to be the most useful question to be
7 asking.

8 Do you see my point?

9 MR ROBERTSON: I do see your point, Sir. I think if we are standing back and
10 looking at who is procuring AAC solutions, bear in mind that not everyone
11 procures them through the NHS. A lot of people just buy tablets, buy the
12 software, they self-supply. They are not dependent upon being treated by the
13 NHS.

14 MR RIDYARD: We are interested in the, for want of a better term, the high-end
15 AACs here, because that is where the CMA perceives a problem to exist. So
16 it is who is buying those devices and how tolerant would they be to a further
17 increase in price?

18 (Pause)

19 MR ROBERTSON: It is likely to be predominantly for the high-end, the most -- by
20 "high-end" I think what you mean is the most expensive?

21 MR RIDYARD: What the CMA talks about -- yes, the so-called "dedicated devices",
22 which tend to be these ones which are £4,000 or £5,000 --

23 MR ROBERTSON: No, because on their definition of "dedicated device" we have
24 the Indi, and the Indi is priced to be competitive with the iPad. If we put up the
25 prices of the Indi, what will happen to us is what happened to Dynavox in
26 2010. So that doesn't make any sense.

1 MR RIDYARD: I think the SLC refers not to the Indi, doesn't it, it is to the more
2 expensive items. Ultimately, when the CMA reaches its views on the SLC,
3 the price increase they are worried about is a price increase in, not the Indi
4 but the other ones.

5 MR ROBERTSON: If there had been questions on diversion as between products,
6 we might have some material on which we could --

7 MR RIDYARD: Yes, agreed.

8 MR ROBERTSON: -- draw some conclusions.

9 MR RIDYARD: But just trying to make sense of the material that is there, I do think
10 we need to understand who are the decision makers who would care about
11 the price and respond to changes in the price.

12 MR ROBERTSON: Well, at the end of the day, it is whoever signs the cheque. We
13 know NHS budgets are constrained, so if we were to put up the price of
14 a product that we supply to the NHS, they might divert and say, "well, if we
15 are not going to use a Tobii I-110, we are going to switch to an Indi, because
16 it is a cheaper version. We don't have the budget to pay for a more expensive
17 I-110".

18 MR RIDYARD: So you are saying it is the NHS that is the right person to be asking
19 this question then?

20 MR ROBERTSON: The NHS is one of the range of purchasers but it is not the only
21 purchaser. They are also purchased by schools, charities, trusts, individuals.

22 The evidence that we have supplied to the inquiry is that they are already switching
23 to the cheaper devices. They are switching to tablets, which is why we
24 introduced the Indi.

25 MR RIDYARD: I understand that. That point has been made. But I still think it is
26 worth -- I mean, I believe it is 90 per cent of these devices are being bought

1 by the institutional purchasers; is that right?

2 MR ROBERTSON: It is not 90 per cent of our devices being bought by the NHS.

3 MR RIDYARD: Of course not but the devices which are of concern to the CMA as
4 regards the SLC.

5 MR ROBERTSON: The key point is that, if you are just looking at that subset of
6 NHS purchasers we don't know, because the CMA have not done the
7 exercise of identifying which products they would switch to if faced with
8 a SSNIP rise in the price of a Tobii I-110. We do know that sales of the Tobii
9 I-110 are flat, are declining, and we do know that people are switching to
10 consumer tablets or their equivalents, such as the Indi.

11 MR RIDYARD: That is a point of contention, isn't it, between you and the CMA.

12 MR ROBERTSON: We can't make a submission on what diversion evidence would
13 be when that evidence wasn't sought by the CMA. That is why we say it
14 ought to be remitted, so they can carry out a proper questionnaire. At the
15 moment, I can't make a submission as to what would happen if the price of
16 the Tobii I-110 went up, what purchasing authorities would do, because that
17 question wasn't asked during the inquiry and there simply isn't evidence
18 before us on that.

19 MR RIDYARD: You should move on to your script but, just to be clear, the reason
20 I started these questions was to understand, given a lot of people are involved
21 in the choices between these products, who is the best person to be asking
22 when it comes to the question which is most relevant to this matter, which is
23 who is going to care whether the price changes and do something about it?
24 That was the reason for the questions I was asking.

25 MR ROBERTSON: Yes. To which, it is the whole range of purchasers. It is product
26 by product.

1 Returning to the questionnaire, I was on paragraph 7 on page 3 of my note.
2 I pointed out that two small customers appeared not to use tablets for policy
3 reasons.
4 Our final point, which is to reflect the questionnaires fairly, is anywhere a user has
5 a significant physical disability, so needing specialist access such as
6 eye-gaze, it is only in that situation where a mainstream device like an iPad or
7 equivalent wouldn't be suitable. There is the evidence of that set out there.
8 I don't think we need to go through it.
9 So, in our submission -- this is point 8 -- when you look at the responses, they do
10 demonstrate considerable demand-side functional substitutability between
11 AAC solutions based on purpose-built devices and wrapped tablets, which the
12 CMA has defined as dedicated AAC solutions, and those based on
13 mainstream devices, non-dedicated AAC solutions.
14 The significance of customer support -- and this is one of the four component parts
15 of a dedicated AAC solution -- well, that is commented upon. The comments
16 concern post-warranty and technical support. It is really sort of an extended
17 warranty. The criticism of Tobii Dynavox on customer support is essentially
18 that it is being undertaken in Sweden or the US, in the main areas where we
19 are active. As I say, we have only got a small UK presence. Ironically, that is
20 one of the things we wanted to improve through the acquisition of Smartbox.
21 So far as we can see, the responses don't show their customer support is to be
22 regarded as an integral part of the product of an AAC solution. So we submit
23 at point 11 that, while what I have called extended warranty support and
24 repairs is important to customers, the questionnaires don't seem to reveal that
25 it is a separate feature of an AAC solution.
26 On 12, diversion data, well, the responses, in our submission, show only limited

1 quantitative data for calculating diversion ratios. Even NHS hubs, whose
2 responses were otherwise often detailed, expressed considerable difficulty in
3 answering the CMA's forced diversion questions. One said it was "difficult" to
4 estimate, another said it was "very difficult", "incredibly difficult". Several
5 provided no data, most of the others provided rounded numbers. Several
6 indicated that Liberator or Techcess were the equal or main alternatives but
7 they repeatedly stated that their alternative choice would depend on the
8 assessment, trial and use of individual users. So, when you come to look at
9 that -- I am not, given the hour, going to take you through each of those
10 responses -- but when you come to look at that and ask yourself how robust
11 this information was, our submission is that it wasn't accurate or reliable and
12 therefore couldn't have been reasonably relied upon.

13 Ground 5(a) on input foreclosure, I am not going to address now, I am going to leave
14 that to Mr O'Regan to deal with in the context of ground 5 and just point you to
15 our conclusion at point 17 in relation to the customer questionnaires. We say
16 they are relevant and revealing. They don't support the CMA's case on
17 market definition or an SLC, whether as a result of horizontal or vertical
18 effects.

19 Non-disclosure during the inquiry prevented us from making relevant and informed
20 submissions on the CMA's provisional findings and, in our submission, they
21 confirm that the CMA's findings on market definition and SLC did not have
22 a reliable evidential foundation and were unreasonable and irrational.

23 Now, that concludes what I wanted to say on ground 2. My next topic is ground 3,
24 market definition. Given that it is 4.27 --

25 THE CHAIRMAN: That is fine. I think we will probably stop for today.

26 Looking at the timescale, we have slowed you down by asking questions, so it may

1 be that --

2 MR ROBERTSON: I am on track to finish at 11.00 tomorrow and then an hour for
3 Mr O'Regan. That is assuming a 10.30 start.

4 THE CHAIRMAN: That is fair enough. If you are on track, that is fine.

5 MR ROBERTSON: I will be half an hour on market definition. Mr O'Regan will be
6 an hour on grounds 4 and 5.

7 THE CHAIRMAN: Once you get the transcripts of these hearings, if Mr O'Regan can
8 send us a new list of issues with the cross-referencing to the relevant pages
9 on the transcript, that would be helpful.

10 MR ROBERTSON: Yes.

11 THE CHAIRMAN: I know it always takes a week or so before they come in after the
12 hearing.

13 MR ROBERTSON: Certainly. I think the fact that, because we have got such
14 a good list of issues, it means it is a very structured approach.

15 THE CHAIRMAN: That would be helpful. Thank you.

16 I must say the skeletons on both sides are really high quality and the way the
17 bundles have been laid out has made our job much, much easier. It doesn't
18 mean that the answer is self-evident but at least our job is easier than it could
19 otherwise have been.

20 MR ROBERTSON: Thank you very much.

21 **(4.30 pm)**

22 **(The hearing adjourned until 10.30 am the following day)**