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

Case No: 1332/4/12/19

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

07 November 2019

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14 Before:

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16 **HODGE MALEK QC**

17 (Chairman)

18 **PAUL DOLLMAN**

19 **DEREK RIDYARD**

20 (Sitting as a Tribunal in England and Wales)

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22
23 **BETWEEN:**

24
25 **TOBII AB (PUBL)**

Applicant

26
27 -v-

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29 **COMPETITION AND MARKETS AUTHORITY**

Respondent

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APPEARANCES

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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 **Thursday, 7 November 2019**

2 **(10.30 am)**

3

4 **Housekeeping**

5 THE CHAIRMAN: Just a couple of points. I know we touched upon this yesterday,
6 but I think it could be potentially relevant at the end of the day.

7 What is the difference between the Tobii Indi product and the other high-end
8 dedicated AAC devices that are referred to in the report? That is the first half.

9 The second half is: what is the impact of the CMA including within its definition?

10 You don't need to answer it now, but at some stage.

11 MR ROBERTSON: The first question is something for Mr Eskilsson to tell you.

12 THE CHAIRMAN: That is fine. I know you half told me yesterday, but just do it
13 again.

14 MR ESKILSSON: Yes. No, I am happy to.

15 So, the products -- may I even approach the bench?

16 THE CHAIRMAN: Yes, of course, just stand here.

17 MR ESKILSSON: I will come and show you.

18 THE CHAIRMAN: It is easier if you go in there, the witness box.

19 MR ESKILSSON: So, basically, when you talk about AAC solutions, as was
20 presented yesterday, the essence of the AAC solution is actually a piece of
21 AAC software; that is sort of the foundation of it. A piece of software that
22 allows a person with a disability to communicate effectively.

23 Today, in the modern world, AAC software can run on virtually any kind of computing
24 device. It can run on iPads, it can run on a regular PC, or a surface tablet, or
25 on other kinds of hardware devices that may have been augmented or even
26 designed specifically for AAC.

1 An absolute vast majority of all the AAC software that is used today runs on
2 consumer electronics. More than 90 per cent of all AAC software runs on
3 consumer electronics today because it is very cost effective and consumer
4 electronics is actually a very capable piece of hardware, even for an AAC user
5 today.

6 Then, when you talk about AAC hardware devices, again you have just the plain
7 iPad, or any kind of consumer tablet, or a plain PC is one way of realising
8 AAC hardware.

9 Another way to realise AAC hardware is to add certain peripherals or encapsulations
10 to a piece of consumer electronics. A third way is to design something from
11 the ground up, purpose-built for AAC hardware.

12 In hardware for AAC, you often differentiate between touch operated AAC and
13 eye-gaze operated AAC hardware. Touch-based AAC hardware is a kind of
14 hardware that you operate with touch. So, basically, for a person who can
15 use their hands they can touch on the screen, and that is usually a very
16 effective way to control your device.

17 There is also a number of people who maybe cannot use their hands to touch on
18 symbols or keyboards directly on a screen, but instead they operate what is
19 called a "switch". A switch can be essentially a physical button they can touch
20 with their elbow or foot, or you can even have a tongue switch or something
21 like that. That is often used in conjunction with a touch-based device.
22 Because a switch is simply a -- you plug it in to a USB port or you can do it
23 over Bluetooth or you can have a particular so-called switch port, which
24 operates with most hardware, including consumer electronics.

25 So, roughly 90 per cent of all people who use AAC solutions today use
26 a touch-based solution.

1 About 10 per cent of people who use AAC also need eye-gaze because they have --
2 in addition to having a voice impairment to be able to communicate, they also
3 have a physical impairment whereby they cannot use their hands directly,
4 neither to touch directly or even to use a switch. Then they use eye-gaze.
5 So, they can just look at a computer screen and make things happen just by
6 looking at it.

7 That is roughly the categorisation. What they talked about yesterday, and showed
8 you yesterday, is a range -- is basically Tobii Dynavox's range of touch-based
9 AAC hardware devices. So, for people who don't use eye-gaze, again there is
10 a vast majority of all the users use touch-based devices.

11 And we showed you the speech case, which is essentially -- it is an iPad in a case,
12 and I can even just take it out.

13 This is an iPad, regular iPad, this is the case. This case, what it is on a physical
14 level is a pair of speakers. It has a little bit of a battery, it has a wheelchair
15 mount. This sells for a couple of hundred pounds. Then you have that
16 together with an iPad. When you put them together they look exactly like the
17 Indi.

18 The functionality and features of these two devices are identical. The only difference
19 that you can see from a functionality standpoint is runs iOS as the operating
20 system, this runs Windows as the operating system.

21 This one actually is a device that we design and hand manufactured, built from
22 scratch with Taiwanese ODMs, so they built this for us. This is a computing
23 device that we have manufactured and designed ourselves, but the
24 functionality is identical.

25 THE CHAIRMAN: On that one, can you open it up like the other one, or not? Or is it
26 solid?

1 MR ESKILSSON: No, it is solid.

2 Well, actually, this thing here is a rubber encasing, but it actually -- the speakers
3 are --

4 THE CHAIRMAN: They are there.

5 MR ESKILSSON: They are still here. So, it just kind of integrates it a little bit
6 different. But it -- I mean, yes, it still is in two pieces, in that sense.

7 Again, the functionality is identical.

8 THE CHAIRMAN: What is the price of that one?

9 MR ESKILSSON: This is £999. This one is about £250 for the speech case, £50 for
10 the software, plus the price of the iPad. If you add that together, it is identical
11 price.

12 THE CHAIRMAN: What is the difference -- the question I had --

13 MR ESKILSSON: With this?

14 THE CHAIRMAN: Yes.

15 MR ESKILSSON: This is our high-end device. This is the I-110. This we sell for
16 £3,200 in the UK. What is the difference?

17 The functionality is identical to the functionality of the Indi and an iPad with a speech
18 case. It runs exactly the same software. Like the Indi, it is based on the
19 Windows operating system. It has -- you can see from the physical form, you
20 can see it is the same kind of speakers. It is -- yes, it is a device. It has the
21 same capabilities, identical to these devices.

22 There is one material difference. This one is designed to meet medical grading
23 requirements. This is a medical device, and that means that we have to
24 design the electronics a little different, we have to choose different kind of
25 components, et cetera. It originally stems from the fact that medical devices
26 are supposed to be able to be operated in a hospital environment without sort

1 of interfering or disturbing with each other, so you have to go through other
2 kind of quality assurances and other things. So, it is more expensive.

3 THE CHAIRMAN: What about the robustness? Is it more robust, in the sense can
4 you drop it a few times --

5 MR ESKILSSON: Historically, one of the key claims of high-end devices like this is
6 that they were more robust. Unfortunately for us, that is no longer the case.

7 It is almost impossible, today, to design something more robust than an iPad. You
8 can put an iPad on the bottom of the sea floor and take it up and it is still
9 going operate. This thing will die if do you that.

10 THE CHAIRMAN: I'll tell you my son has already broken my iPad.

11 MR ESKILSSON: Yes. At least it appears more ruggedised, but the thing is that you
12 could then ask yourself -- I assume the question you are asking yourself: why
13 is anybody paying £3,000 for this one?

14 First of all, I think the simple answer is they don't. In the UK, people -- and people
15 including the NHS -- is no longer buying this device.

16 The NHS has over the past 3, 4, 5 years dramatically and radically switched, and are
17 today, from us, buying these devices.

18 In 2018, we sold 200 of the Indi, we sold 200 of the speech cases, comes with
19 an iPad, and we sold 44 units in total, in the UK, of this device. That was
20 a significant decline from the year before and it is declining further this year.

21 Now, why do we even bother doing this then?

22 Because the US is our biggest market by far and, in the US, this sells really, really
23 well because the US reimbursement system demands medical grading.

24 THE CHAIRMAN: Okay, that has been very helpful. Let's just see if Mr Robertson --
25 don't go yet.

26 Is there anything that arises from that?

1 MR ROBERTSON: I don't think there is.

2 THE CHAIRMAN: He has answered the question very fully. We have a transcript,
3 so I can bear that in mind.

4 MR ROBERTSON: Just to cross-refer the figures that Mr Eskilsson is talking about,
5 they are in his witness statement. They are at paragraphs 35, 36, and then
6 the table after paragraph 38.

7 THE CHAIRMAN: Yes. If at 4.30, or whatever, towards the end of the day, you can
8 turn on one of those machines and show us, if that's all right.

9 MR ESKILSSON: I have to check, actually, if they're charged, but I can see if I can
10 make that work.

11 THE CHAIRMAN: Otherwise we can do it tomorrow.

12 MR ESKILSSON: We can definitely do it tomorrow.

13 THE CHAIRMAN: It would give me a better feel for the product and how it works,
14 and everything like that.

15 MR ESKILSSON: I would love to.

16 THE CHAIRMAN: I don't want to take too much court time. The idea would be, if
17 you are going to do it, you would do it at 4.30.

18 MR ROBERTSON: Yes, we'll try and get them powered up.

19 MR ESKILSSON: We will try to make that work.

20 THE CHAIRMAN: Thank you very much.
21 Do you have any questions at this stage?

22 MS SMITH: I don't. It is rather unusual, taking evidence in the middle of a JR.

23 THE CHAIRMAN: It is not really taking evidence. I asked a question, and
24 Mr Robertson took the view that the easiest way to give me the answer was
25 this way, and it has been quite helpful.

26 MS SMITH: So, no, I don't. I am not going to engage in any cross-examination or

1 anything like that.

2 THE CHAIRMAN: No, you don't have to cross-examine, but if there is anything you
3 wanted to be clarified, you could raise it later if you want.

4 MS SMITH: Thank you.

5 MR ROBERTSON: That has actually covered points I was going to address about
6 Mr Eskilsson's witness statement.

7 THE CHAIRMAN: That is fine. It just gives us a bit of colour because a lot of what
8 he said was familiar from reading the report, but it comes alive when you hear
9 it and he explains it, which is very, very helpful.

10 Can you deal with the second question, which is: what is the impact of the CMA,
11 including the Indi, within the definition?

12 Because it is your case -- well, it seemed to be your case, yesterday, that they
13 erroneously included the Indi within the definition, and one of the factors you
14 pointed out was you said you don't have the customer support. Although
15 I think the CMA would say: no, it does fall within it.

16 It is one of those things that -- I just feel before we all leave tomorrow, we drill down
17 to (a) whether Indi is in fact a dedicated AAC solution, (b) to what extent it
18 was treated as such by the CMA, (c) whether they were right or wrong to do
19 that, and (d) what are the implications for this case and their report having
20 done that?

21 So, you know what I want to know. As long as I have the answer by the time we all
22 leave at lunchtime on Friday. But those are the four steps that I need some
23 guidance on.

24 MR ROBERTSON: We will answer those in writing on two sides of A4.

25 THE CHAIRMAN: Yes, that is fine. As long as I have the answer before lunchtime
26 tomorrow.

1 Of course, for the CMA, if you want to respond to that, that would be helpful as well.
2 But it is a point you raised yesterday, and sometimes you think: well, I haven't really
3 come to the bottom of that yet.

4 That is what I felt this morning when I came in, and I do want, when we leave
5 tomorrow, have a good feel for where this is going.

6 MR ROBERTSON: By this time tomorrow, I will have put in a short paper on that.

7 THE CHAIRMAN: If you can put it in and serve it on the CMA by 8 o'clock tonight,
8 then they will have enough time to consider it. If they don't have enough time
9 to consider it, then they will be allowed to put in their written response to that
10 by close of business on Monday. So, it will just be in writing, but I do want
11 everyone to have enough time on that.

12 MR ROBERTSON: I will put it in by 7 o'clock this evening.

13 THE CHAIRMAN: That is fine. Ms Smith, is that adequate time for to you respond
14 to it?

15 MS SMITH: Yes, that would be very helpful.

16 THE CHAIRMAN: Thank you very much.

17

18 **Submissions by MR ROBERTSON (continued)**

19 MR ROBERTSON: That brings me on then to ground 3, market definition.

20 This isn't divided into sub-issues in the list of issues.

21 Our case, in summary, is that the CMA failed to take a proper approach to defining
22 the market at the relevant product market and, as a result, the definition of
23 dedicated AAC solutions wasn't correctly arrived at and therefore can't be
24 relied upon.

25 This is not -- as the CMA submits at paragraph 98 of its defence -- a challenge to the
26 merits of the decision on market definition. This is a challenge to their

1 approach to market definition, which we say failed to take into account
2 relevant considerations, in particular the need to carry out a proper SSNIP
3 test analysis.

4 Now, the CMA seeks to down play, in its skeleton and defence, the importance of
5 market definition. In our submission, that wrongly ignores the importance of
6 a structured approach to market definition, where the key issue in this case is
7 the product market definition.

8 Market definition is the first and essential step in an analysis of whether a merger will
9 result in a substantial lessening of competition, and the SSNIP test is normally
10 an essential component of market definition unless there are good reasons for
11 not using it.

12 We get that from the CMA's merger assessment guide lines, which are set out in the
13 authorities bundle at volume 1, tab 9.

14 THE CHAIRMAN: Do you want us to have a quick look at that?

15 MR ROBERTSON: Yes. The passages to which I wish to refer start on page 29,
16 paragraph 5.2.1.

17 THE CHAIRMAN: Yes.

18 MR ROBERTSON: "The purpose of market definition is to provide a framework for
19 the Authorities' analysis of the competitive effects of the merger."

20 At the bottom of that paragraph:

21 "The Authorities will ensure that the relevant market they identify satisfies the
22 hypothetical monopolist test."

23 SSNIP test.

24 Then, at paragraph 5.2.8, over the page:

25 "The authorities use ..."

26 Well, 5.2.7 says:

1 "The relevant product market is identified primarily by considering the response of
2 customers to an increase in the price of one of the products of the merger
3 firms ..."

4 Reference there to products, not brands:

5 "The Authorities [5.2.8] use the 'hypothetical monopolist test' as a tool to check that
6 the relevant product market is not defined too narrowly. The relevant product
7 market may potentially be wider than the narrowest market that satisfies the
8 hypothetical monopolist test."

9 Then, the test is then set out at paragraphs 5.2.9 to 5.2.16. I don't think there is any
10 need to read those out, but those are the passages that we rely upon.

11 We also observe that the hypothetical monopolist test is set out in the European
12 Commission's guidance on notice on market definition, which you have in the
13 authorities bundle at tab 12, but I am not going to read the passage out.

14 THE CHAIRMAN: You are not saying in all cases they have to conduct a SSNIP
15 test, are you?

16 MR ROBERTSON: It is the normal starting point, unless there are good reasons for
17 not using it.

18 THE CHAIRMAN: Yes, it is a starting point. I understand that.

19 MR ROBERTSON: We pointed out in our skeleton that the Tribunal's regularly cited
20 with approval the Commission's notice on market definition. We refer there to
21 the decision of the Tribunal in the business connectivity market review case,
22 the BCMR case, chaired by Mr Justice Snowden.

23 If I take the Tribunal to that decision, it is in authorities bundle 3, tab 47, and the
24 relevant passage is at page 36, under the heading: "F Product Market
25 Definition."

26 THE CHAIRMAN: Which paragraph?

1 MR ROBERTSON: It is paragraph 150, beginning on page 36.

2 THE CHAIRMAN: Yes.

3 MR ROBERTSON: That refers to the European Commission Notice.

4 THE CHAIRMAN: Yes.

5 MR ROBERTSON: Then, on the next page, 37, it sets out -- paragraphs 15 to 17 --
6 the SSNIP test.

7 Then, over the page, on page 39 of this report, paragraph 156:

8 "We accept that in certain situations it may be possible for an authority to avoid
9 conducting a full market analysis. For example, a decision may not hinge on
10 the precise boundaries of the market in question, the finding on dominance or
11 significant market power, or in the case of a merger significant lessening of
12 competition may be obviously the same, whether market definition X or Y is
13 adopted.

14 "In other cases, the outer limit of the market may be so obvious that it is beyond
15 dispute when product Z falls outside a scope and therefore no further
16 investigation is necessary."

17 In our submission, this is not such a case.

18 Paragraph 157:

19 "However, this appeal is plainly not such a case: the proper definition of the relevant
20 product market or markets is obviously highly contentious [as it is here].
21 Accordingly, to the extent that Ofcom or [its internal economist] Ms Curry were
22 trying to suggest that Ofcom could appropriately attempt to assess the
23 sufficiency of the competitive constraints exerted by the [relevant] products
24 upon each other without reference to the SSNIP framework, we reject that
25 submission."

26 My learned friends rely in their skeleton on the Paroxetine case, which is at the next

1 tab, tab 48, for the proposition that SSNIP test is not a necessary approach to
2 market definition.

3 Now, we agree there are cases in which the SSNIP test is not necessary, as
4 Mr Justice Snowden explained in BCMR at 156. But, in our submission,
5 Paroxetine was a special case, as is clear from the passage that my learned
6 friends refer to, which is at paragraph 401, on page 160:

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

11 And then they cite the general court in Topps Europe.

12 That is why we say it is a relevant consideration. If there are good reasons for not
13 applying it, then you don't apply it; or if it unnecessary to apply it, you don't
14 apply it, but that is not the situation in this case.

15 You will see the Tribunal's reasoning about the difficulties of dealing with applying
16 the SSNIP test in Paroxetine back at paragraph 384, on page 153, where,
17 halfway down paragraph 384, the Tribunal observed:

18 "... there are two practical difficulties with applying a SSNIP test, even conceptually,
19 in the present case. First there is the so-called 'cellophane fallacy': where the
20 supplier has already been able to price the focal product at substantially
21 above competitive levels, a further increase in price may induce customers to
22 switch to other products but it would be wrong to conclude from this that those
23 other products are in the ..."

24 THE CHAIRMAN: Which paragraph are you referring to?

25 MR ROBERTSON: Paragraph 384, on page 153.

26 THE CHAIRMAN: Yes.

1 MR ROBERTSON: The court says, if there is a cellophane fallacy, this is not such
2 a case, look at the Indi, and it is obviously competitive on price with the iPad.

3 Then, secondly, and this was specific to Paroxetine:

4 "... with a prescription medicine, the choice of product is not made by the person
5 who pays for it: the prescribing doctor chooses the drug, whereas it is the
6 NHS, by reimbursing the pharmacy, which pays the price. Hence, at least at
7 the relevant time, GPs were relatively insensitive to price."

8 Here, of course, it is the NHS who pays for it in many cases, or a charity or trust, or
9 school, or the individual, and it is the person choosing the product who pays
10 for it.

11 THE CHAIRMAN: In Paroxetine, one of the issues was that you had the doctors
12 prescribing the medicine, at the relevant time at least, they weren't very
13 sensitive to what the price was. They just prescribed it.

14 MR ROBERTSON: Yes. That is what is set out there at paragraph 384. That is not
15 the situation in this case.

16 We also submit that BCMR can't be, the approach to the SSNIP test can't be
17 explained away on the basis that the BCMR case involved a market power
18 determination under the Communications Act 2003. The critical issue in that
19 case was market definition. The principles in that case are not telecoms
20 specific.

21 We have set out in our skeleton --

22 THE CHAIRMAN: Basically, you agree that there is no absolute requirement to carry
23 out the SSNIP test, it depends on whether or not there is a good reason not to
24 have it? Or are you able to apply some other test or some other means of
25 getting the result?

26 MR ROBERTSON: In principle, you ought to apply it, unless there is a good reason

1 why it can't be applied, or is obviously inappropriate. That is our submission.

2 THE CHAIRMAN: Okay, that is fine.

3 MR ROBERTSON: Now, I have set out the errors in the definition of the relevant
4 product market in our skeleton argument. We have identified eight errors.

5 THE CHAIRMAN: Just give me the paragraph numbers.

6 MR ROBERTSON: So, error 1, failure to apply the SSNIP test, that is in our
7 skeleton at 143 to 146.

8 THE CHAIRMAN: Yes.

9 MR ROBERTSON: Error 2, focussing evidence gathering on institutional purchasers
10 and not end-users, that is paragraphs 147 to 149.

11 Error 3, creating the CMA's own definition of a market for dedicated AAC solutions.
12 That is in paragraph 150. We covered it under ground 2.

13 The fourth error, reliance on a flawed questionnaire, that is 151 in our skeleton. It
14 was covered in relation to ground 2.

15 Fifth error, not obtaining evidence on substitutability of different products, but only of
16 different brands. That is paragraphs 152 to 154, and we covered that
17 yesterday.

18 Sixth error, ignoring the NHS's own guidance that mainstream devices are widely
19 used, even for users with complex communications needs. That is 155 to
20 157.

21 The seventh and eighth errors, ignoring extensive evidence of the use of consumer
22 tablets in AAC solutions, and including within the relevant market products
23 that were not within its created definition of a dedicated AAC solution. That is
24 158 to 161.

25 THE CHAIRMAN: Yes, okay.

26 MR ROBERTSON: So, those are the errors. We have set out our case on those in

1 writing.

2 THE CHAIRMAN: Yes, you don't need to go through those in more detail.

3 MR RIDYARD: One more question, Mr Robertson, with any differentiated product
4 market -- you know, industry. If you apply the SSNIP test, the normal
5 approach is, I think, to start with a narrow candidate and then work outwards
6 as you reject various hypotheses until you find one that works. As you do that
7 in a differentiated product market, aren't you always going to end up with
8 a candidate market which comprises a bunch of very different products,
9 maybe different price levels?

10 So, can you just explain to us what you wanted the CMA to do? Once they got to
11 a certain level of products -- a candidate product market, which included some
12 different products, how would you propose they carry out the SSNIP test?
13 Conceptually, I mean, not in nuts and bolts, but how would you propose they
14 do it, given they are starting with a bunch of products that are not identical to
15 one another?

16 MR WILLIAMS: I would be happy to say a few words if that is helpful?

17 THE CHAIRMAN: No, I think --

18 MR ROBERTSON: I will take instructions from Mr Williams.

19 (Pause)

20 I was just checking whether we had put in a paper on this to the Inquiry, and we will
21 double check that and give you a reference to it.

22 The simple answer is: we don't know what would happen because they didn't do it.
23 We think it is likely that you might end up with possibly a narrower market,
24 possibly a wider market. Whatever you would end up with, we don't think you
25 would end up with the market they did arrive at, but at the end of the day,
26 since they didn't do it, we don't know.

1 MR RIDYARD: One of your objections is that they ended up asking the question,
2 you said across the brands rather than individual products, but when you do
3 the SSNIP test you reach a certain hypothesised market, a group of products
4 which are differentiated from one another, and then you impose a 5 per cent
5 or 10 per cent price rise on that group of products. When you do that, aren't
6 you inevitably having to do that across a bunch of products that are different
7 from one another? Doesn't that inevitably run into the problem you criticise
8 the CMA for?

9 MR ROBERTSON: If it reveals that there are different product markets, then that is
10 the answer: there are different product markets.

11 MR RIDYARD: I am talking about the situation where you maybe started very
12 narrow and included two or three other products, so you have these different
13 products from one another in your candidate market. You are happy that no
14 one of them is a separate market on its own, so then you are looking at the
15 next stage out. So, inevitably you are carrying out the SSNIP test then across
16 a group of products, which are different from one another with different prices.
17 So, can you just explain how you would expect the CMA to have dealt with
18 that?

19 Because that is one of the criticisms you make of the CMA; that they apply the
20 SSNIP across, you know, a wide range of products.

21 What I am saying is: is it not inevitable in the SSNIP test that you do end up doing
22 that?

23 MR ROBERTSON: If doing that exercise reveals that products are in a chain of
24 substitution, and so they do operate as a competitive constraint on each
25 other, then you end up with a wider market.

26 MR RIDYARD: Yes.

1 MR ROBERTSON: We think if you apply the SSNIP test here, we think you would
2 end up with a market for AAC solutions, not for this subcategory of dedicated
3 devices. What that may reveal is there is a chain of substitution.

4 MR RIDYARD: Okay. I understand that point.

5 MR ROBERTSON: You could apply that, for example, in motor cars.

6 MR RIDYARD: Of course, I understand what you are saying.

7 (Pause)

8 MR ROBERTSON: Sir, I think it is an exercise, in our submission, that was
9 appropriate and ought to have been done and would have revealed
10 information about the product market that on the CMA's approach is just
11 assumed by taking an US regulatory definition.

12 MR RIDYARD: Yes. I understand that is your argument. Okay.

13 THE CHAIRMAN: Is that ground 3?

14 MR ROBERTSON: That is ground 3. Ground 1 is essentially covered by yesterday.
15 It's failure in particular to disclose questionnaires.

16 THE CHAIRMAN: On ground 1, this whole argument about non-disclosure, gist and
17 what you should have been told, and all that sort of stuff, I dealt with in a lot of
18 detail in Ryanair. You have seen how I analysed it there. Are there any
19 additional points of law that you want to make that are different from how it
20 was analyse in Ryanair? It has a legal section that set out everything.

21 MR ROBERTSON: In Ryanair, you said it is essentially fact specific, what the gist is
22 depends on the facts of the case. We say that what was disclosed to us
23 about the information gathering exercise wasn't sufficient during the Inquiry to
24 enable us to make proper submissions on the approach to be taken to the
25 evidence that was gathered by the CMA. We can compare and contrast that,
26 what happened during the Inquiry, with what we have now been able to do

1 having seen the responses to the customer questionnaires.

2 We say what was disclosed during the Inquiry was very partial, presented only the
3 CMA's view, and when you actually look at the responses to the
4 questionnaires, the position is much more nuanced and much broader than
5 presented to us in the provisional findings. So, that's what we want to say on
6 the --

7 THE CHAIRMAN: Yes. You see, ordinarily in mergers you don't get the sort of
8 underlying material, in the sense that they will go out and speak to people and
9 get people to give their responses, and they will provide a summary of that
10 and give you the gist of it. Then, from that, you should have a sufficient
11 opportunity to make informed representations.

12 It is all a question of fact and degree, and how important something is.

13 But are you saying that the CMA misrepresented anything? Now you have the
14 questionnaires and their responses, are you saying that there is
15 a misrepresentation in their analysis?

16 Because if you look at the report, it does say quite a lot about what is in those and it
17 provides -- when you get this material, it is not just simply repeating what is in
18 there. You assess it, you analyse it, you pick out what the key points are, but
19 are you saying that what they produced was either misleading themselves or
20 misleading everyone else in the final report?

21 MR ROBERTSON: It presented a partial view of the evidence from the customers.

22 THE CHAIRMAN: Yes. That is quite a hard thing to allege because, you know, the
23 CMA team, no one has an axe to grind on anything on this, people just do
24 their jobs. They get all this material in from lots of different sources, and they
25 analyse it and they summarise what they have, they give you the opportunity
26 to respond --

1 MR ROBERTSON: I wish to make it clear: we are not alleging bad faith.
2 What we are saying is it was confirmation bias. They looked at the evidence they
3 had and they used it to support a market definition that they had already
4 determined was the correct market definition. So, when they went to give us
5 the opportunity to respond in the provisional findings, we weren't able to
6 respond properly to it because we couldn't see the underlying evidence.

7 THE CHAIRMAN: You are saying it is confirmation bias, but you are not saying the
8 CMA were in fact biased in this case, are you?

9 MR ROBERTSON: Sorry?

10 THE CHAIRMAN: Is it your case that the CMA were in fact biased in the way that
11 they produced this final report?

12 MR ROBERTSON: I don't say it is a deliberate bias, but it omits a proper
13 representation of the evidence. That is why I say it is a partial representation.

14 THE CHAIRMAN: Yes, but look --

15 MR ROBERTSON: It is a sin of omission.

16 THE CHAIRMAN: Yes. Okay, I understand what your case is.

17 MR ROBERTSON: I am going to hand over to Mr O'Regan, who is going to deal
18 with grounds 4 and 5.

19 THE CHAIRMAN: Mr O'Regan, what I plan to do is have the break once you have
20 finished. So, if you can finish by, let's say, 11.50, we will have our break then.

21

22 **Submissions by MR O'REGAN**

23 MR O'REGAN: Yes, Sir. I will endeavour to do so. I am only going to address you
24 orally on a couple of our sub-grounds. So, grounds 4(a) on foreclosure, and
25 5(a) on the vertical foreclosure.

26 THE CHAIRMAN: On the list of issues can we just have a quick look at the list of

1 issues?

2 MR O'REGAN: Yes, Sir. Bundle 1, tab 6, Sir. Do you have that?

3 THE CHAIRMAN: Yes, I have that. What are you going to address me on?

4 MR O'REGAN: I am going to address you, Sir, at page 283, so internal page 5; that

5 is ground 4, that is the overall view.

6 Over the page, at 4(a):

7 "Was the evidence relied upon from customers, competitors and the parties' internal

8 documents insufficient and unreliable?

9 I will address you on that, Sir.

10 THE CHAIRMAN: Why is there no 4(d)?

11 MR O'REGAN: I think that is a typographical error, Sir. I wasn't aware there was a

12 4 --

13 THE CHAIRMAN: Shall I put 4(e), 4(d)?

14 MR O'REGAN: Yes, Sir, I was going to advert to that. Ground 5 is underneath that,

15 on page 285. At the bottom of the page there, point 16, 5(a):

16 "Was the CMA's finding on input foreclosure based on an error of law and/or without

17 reasonable and reliable evidential foundation?"

18 THE CHAIRMAN: You can be sure that I have been through everything, all the

19 references in that last column already.

20 MR O'REGAN: You have, Sir?

21 THE CHAIRMAN: I have.

22 MR O'REGAN: I am grateful.

23 THE CHAIRMAN: So, the main thing that I would benefit from is where there are

24 specific parts of the report or specific documents I need to look at and focus

25 on. Then that helps me.

26 MR O'REGAN: I am grateful.

1 There is a preliminary point, Sir. It is put to us in my learned friend's skeleton, at
2 various points, that grounds 4 and 5 are merely reruns of arguments made to
3 the CMA and that were addressed in its final report. We would dispute that.
4 Some of the points --

5 THE CHAIRMAN: You can't win.

6 MR O'REGAN: I'm sorry, Sir?

7 THE CHAIRMAN: You can't win on that, because either you put it during the Inquiry
8 and they say you have answered it. Or you haven't put it in the Inquiry and
9 then they say it is too late to raise it. It is one of those things that you can't
10 really win.

11 MR O'REGAN: Yes, Sir. It is. They are points we say are still in error, and may well
12 have been addressed, but are still in error. Therefore the final report's
13 findings on an SLC remain irrational.

14 THE CHAIRMAN: My impression on that -- just to say what it is -- is that the points
15 you made were basically put during the Inquiry, and they are dealt with -- you
16 may say not properly, but they are dealt with in the final report.

17 Are there any particular points that you say either you didn't raise during the Inquiry,
18 ie a new point, or that you did raise in the Inquiry, but is not dealt with at all in
19 the final report?

20 MR O'REGAN: I think we get to the vertical section, Sir, there are some points
21 relating mainly to incentive and effect. I don't think we put them in quite the
22 way we do now, if we put them at all. I think they are, to a large extent,
23 covered in the note.

24 Have you handed that note up?

25 MR ROBERTSON: Not yet.

26 MR O'REGAN: No. I'm grateful. We prepared a short written note relating to input

1 foreclosure largely because --

2 THE CHAIRMAN: Has Ms Smith seen this?

3 MR O'REGAN: She has, Sir. It was emailed over.

4 MS SMITH: I saw it very shortly before we started this morning. I have had

5 a chance just to glance at it. I can only reserve my position on it at the

6 moment. We will obviously seek to deal with it when we can.

7 THE CHAIRMAN: If you don't have time to deal with anything --

8 MS SMITH: It is three pages long. We will seek to deal with it. If we need more

9 time, we --

10 THE CHAIRMAN: I am happy for you to put something in writing after the event if it

11 is something new.

12 MS SMITH: Sir, we are grateful.

13 THE CHAIRMAN: Most of the points you can see are dealt with in the final report,

14 and that is fine.

15 MS SMITH: Absolutely.

16 THE CHAIRMAN: There are some points that are new points, or are sort of nuanced

17 on a previous point. We had this at the CMC. We raised this and you will

18 see, when we looked at the witness statements, there was this -- it was

19 unclear sometimes whether something was a 100 per cent a new point or

20 a slightly different way of saying an old point, or an existing point.

21 I want to understand that if there is something that is a completely new point, or

22 a different nuance on a point, that is pointed out to me today.

23 MS SMITH: Yes.

24 THE CHAIRMAN: You don't need to do it. That is his job.

25 MS SMITH: I will say, in effect, everything is addressed in the final report. Insofar

26 as it is slightly nuanced or addressed in a different way, I will seek to -- well, I

1 will address it.

2 THE CHAIRMAN: Yes, of course.

3 MR O'REGAN: I will just hand some copies up. Six in all.

4 THE CHAIRMAN: Yes. Tell me where to put it.

5 MR O'REGAN: Sir, I think this then would go in bundle 1. I don't know what tab we
6 are up to now, we might have run out of tabs. Just at the back. It might be
7 tab 10, Sir. I think we handed up something yesterday, that was tab 9.

8 Sir, this was sent across to Ms Smith and Mr Bailey at about 9 o'clock this morning.
9 It doesn't contain anything new.

10 The main reason for doing it in writing is twofold. One is that some of it contains
11 confidential information, including information that Mr Eskilsson has not seen
12 because it relates to Smartbox.

13 The second one is we effectively correct an error in our skeleton relating to what we
14 say would be a reasonable assessment as to what the quantity and effect of
15 foreclosure would be. So, that is probably better, both for confidentiality
16 reasons and also because it contains lots of numbers, not very difficult
17 numbers. It's probably best to put that in writing. We are correcting an error
18 our learned friends adverted us to. We say once one does the numbers
19 properly, it does make an awful lot of difference to our submission.

20 In terms of legal principles, we have been well covered already in the parties' written
21 submissions, and in my learned friend Mr Robertson's submissions yesterday.

22 We say that the CMA investigation was inadequate and unreasonable, as it didn't
23 have all relevant information. That is from the Eurotunnel judgment, chaired
24 by Mr Marcus Smith QC as he then was.

25 As a result, the SLC findings were manifestly without reasonable foundation. We
26 take that from BAA, at paragraph 20, sub-paragraphs 3 to 5. As a result the

1 CMA did not have "a sufficient basis in light of the totality of the evidence
2 available to it ... of ... probative value ... [and therefore] could [not] rationally
3 reach the conclusion that it did."

4 We take that from paragraph 124 of the Tribunal's judgment in Intercontinental
5 Exchange, chaired by you, Sir.

6 Finally, we say that, in some respects, there was no evidence to support points
7 raised by the CMA in the final report, or on the basis of the evidence that it did
8 have it could reasonably have come to the view that it did. We take that from
9 paragraph 45 of the Stagecoach judgment.

10 Turning to ground 4, Sir, unilateral effects, we are not merely -- as has been said by
11 the CMA -- challenging the evidence from customers. We challenge, first of
12 all, evidence from customers and interest groups. As we discussed yesterday
13 and Mr Robertson submitted, the CMA did not obtain any evidence at all from
14 end-users.

15 Secondly, we challenge the CMA's reliance on diversion ratios in the final report,
16 both the market definition and for substantive analysis. Substantive analysis
17 is at paragraphs 645 to 649, and those diversion ratios were then used also
18 for the GUPPI analysis at paragraph 650 to 6.55 of the final report. So, we
19 challenge that evidence as well.

20 Thirdly, we challenge the evidence relied upon that was obtained from competitors.
21 That is set out in the final report at 6.29 and 6.30.

22 Finally, we challenge the reliability of the CMA's assessment of the parties' internal
23 documents. So, it is a pretty broad challenge on the evidence.

24 We say when one looks at those individually they are not incredible and reliable, and
25 therefore, as a whole, the findings of the SLC also cannot be.

26 Turning to ground 4(a), Sir, that was the evidence relied upon from customers

1 competitors and the parties' internal documents insufficient and unreliable.

2 Grounds 4(b) through 4(d), Sir. Mr Robertson addressed 4(b) on diversion ratios
3 and GUPPIs yesterday, and also ground 4(c) on analysis of competition on
4 a product by product basis. They have both been addressed orally by
5 Mr Robertson and also in our written submissions, as indeed is his ground
6 4(d), whether any lessening of competition was substantial.

7 THE CHAIRMAN: On this question of how far you go, the evidence can take many
8 forms, and some evidence you can look at you just say: well, that evidence
9 is -- there is no evidence at all.

10 That is clear. You can't make a decision based on no evidence at all.

11 But once you have some evidence, isn't it really the CMA's job to form their own
12 assessment of that evidence? They may realise, saying, "We have this piece
13 of evidence. It doesn't prove something 100 per cent, in that sense it is not
14 reliable. But it is still something we are going to take into account".

15 Then they use their own professional judgment to come to a conclusion.

16 Because I am not sure about this reliable concept, because unless something you
17 say absolutely proves a fact, you can then try and categorise that as being
18 unreliable. You define reliability as something that is an absolute, concrete,
19 black and white, proven fact. But, once you go below that, every piece of
20 evidence is has different weight. Is your reliability concept just saying: well,
21 this evidence has very little weight?

22 MR O'REGAN: Sir, it obviously is for the CMA, in the first instance, to exercise its
23 judgment on what weight to give to pieces of evidence, and no piece of
24 evidence is -- unless you have some kind of smoking gun -- going to be 100
25 per cent conclusive. This is all assessed on the balance of probabilities.

26 But if you look at the evidence individually, it is lacks reliability for a variety of

1 reasons, either because it is obtained from leading questions, for example, or
2 it is clearly not consistent with the evidence as a whole. You can't build
3 a reliable case with a solid evidential foundation if the individual pieces don't
4 stack up.

5 THE CHAIRMAN: Okay, let's say you have a questionnaire and you say there is
6 something wrong with the questionnaire, in the sense that there is a leading
7 question that has been asked, and that there is an answer.

8 You can say because of the way that question was framed, you can't say that the
9 answer is 100 per cent reliable, in the sense it proves something to 100
10 per cent, but you can say it is consistent with something else or he could be
11 right. But then you have got other evidence you test it against.

12 You know, your case seems to be you look at the questionnaires and that is it the
13 beginning and the end.

14 The CMA's case is, "We have the questionnaires. Look, we appreciate that the
15 questionnaires themselves aren't conclusive, in the sense everything is black
16 and white and this is black, and you can tell it is black". They also say, "We
17 are looking at all these other things". What is your answer to that?

18 MR O'REGAN: If you are looking at something like diversion ratios, for example,
19 they either are usable or they are not. We would say they are not, so that falls
20 away.

21 If one looks at some of the customer evidence, some of it is opinion. "What do you
22 think the effects of the merger are going to be?", for example.

23 They are not in a position -- they can provide a view upon what products are and
24 how competition might work in the market, but, ultimately, whether or not
25 there is a negative effect on competition is a matter for the CMA. So, they are
26 providing opinion evidence on matters that as -- I'll give you speech and

1 language therapists, they are not really qualified for, for example.

2 Or if you look at what the competitors were asked for, they were asked for qualitative
3 comments on competitors' relative positioning strengths and weaknesses; that
4 doesn't tell us very much at all about how a merger is going to substantially
5 lessen competition.

6 It is the same when you come back to the customers. They may have had concerns
7 about the merger, not all of those necessarily had anything to do with
8 competition. So, if one looks at the effects that customers were very
9 concerned about the effect on customer service. Now, that really was
10 because Tobii Dynavox frankly had a poor reputation for customer service
11 because -- we accept that is the case. We are doing it from Sweden, which
12 obviously is remote and not very customer friendly and effective, particularly
13 for customers who needed a replacement device almost immediately. That
14 was more about Tobii Dynavox as a purchaser, rather than about whether that
15 loss of customer service and quality was going to be a cause -- a result of
16 a loss of competition.

17 So, it is not necessarily evidence, we say, that is probative at all of whether the
18 merger has had an effect on competition.

19 So, one has to look through at the evidence the CMA relies upon to see whether or
20 not it is evidence that weight could be given to at all; that is essentially our
21 case.

22 Even if some weight can be given, it is not sufficient to find an SLC in circumstances
23 where our Convention rights are engaged; that is essentially the analysis we
24 are making.

25 It is somewhat granular, we accept that, but that is the case, the finding that we have
26 to challenge. It is based upon a number of things. We say, when you look at

1 them this individually, they don't stack up. Therefore, collectively, they don't
2 stack up either; that is essentially what we are saying.

3 That is not a merits review. It is whether or not there is a reasonable evidential
4 foundation for the finding that was made, not whether or not you could have
5 reached a different one on the basis of that evidence; that is essentially what
6 our case is.

7 THE CHAIRMAN: They say that, in effect, you are trying to do a merits-based
8 review. That is what they say.

9 MR O'REGAN: They are saying that, Sir, and I can understand why they would. But
10 there either is a relevant evidential basis or there is not.

11 As the Tribunal said in Stagecoach, that can either be because there is no evidence
12 on some matters, as I will submit in due course. The CMA didn't ever ask the
13 question, so there was no evidence because they never asked for it. So,
14 therefore, the conclusion couldn't be based on any evidence.

15 The other issue is whether or not, on the basis of the evidence that the CMA had,
16 whether it could reasonably have come to the conclusions that it did. We say
17 it couldn't. We have analysed the evidence, and it doesn't stack up.

18 THE CHAIRMAN: Anyway, it is going to be a detailed consideration for us. We are
19 going to have to look at each of your points individually, and there is no way
20 you will ever have time to take us through every single one.

21 MR O'REGAN: No, Sir.

22 THE CHAIRMAN: That's our job.

23 MR O'REGAN: They are addressed in detail in writing. I was really adverting to
24 some high-level points of what we say are the key errors.

25 THE CHAIRMAN: That's fine. That's what we want.

26 MR O'REGAN: We have probably covered some of them just now, Sir.

1 Returning to --

2 MR RIDYARD: Sorry, just one: I would benefit from a little more from you on -- you
3 mentioned the term "smoking gun". The CMA, in some sense, in their report
4 said they did find a smoking gun in Tobii's post-merger plans for R&D. Can
5 you just briefly remind us what your position is on that.

6 MR O'REGAN: That was one point I would be getting to, Sir, at the end of my
7 submissions, ground 4(a).

8 MR RIDYARD: Fine, do it --

9 MR O'REGAN: No, I will deal with it now, Sir, because it has come up and I think it's
10 very helpful to do so. We can address that point quite head on.

11 In relation to internal documents, and in relation to plans for the merger, there was
12 a reduction -- removal of some products.

13 We say that wasn't to do with a deliberate reduction in range and reducing
14 customer's choice, but merely to create best of breed products, if you wish.
15 Smartbox was well-known for its software, but its hardware, I think in the
16 customer responses -- say that was of pretty poor or variable quality.
17 Certainly not of the quality of Tobii Dynavox, which is highly regarded in that
18 respect.

19 Conversely, Tobii Dynavox's software was -- certainly the Communicator 5 software
20 and the Compass was pretty out of date. No one was buying it on
21 a standalone basis and it wasn't really a suitable product to maintain and keep
22 going forwards. Obviously, its other software Snap was.

23 Also, Smartbox's hardware -- because of the small number of units that were
24 involved -- was relatively expensive to manufacture, so the intention was
25 simply to create better products.

26 Now, that may involve change for some people, but products are discontinued all the

1 time and new products are introduced. So, the intention wasn't to reduce
2 choice or to reduce range, but to produce products that would be better for
3 people, better for users.

4 In relation to R&D, the intention was to have more focused R&D. So, it would avoid
5 unnecessary duplication. It is not about reducing the amount of R&D at all.
6 The intention really was to strip out unnecessary duplication, particularly in
7 people who weren't actually doing the R&D, but were managing it. So,
8 resources would be used more effectively and in a more focused way,
9 focussing on the complementary strengths in software and hardware.

10 The merger plan for the R&D budget was, on a pro forma basis, largely the same as
11 it was pre-merger, so in terms of how much money was going to be spent.
12 Indeed, following the merger.

13 I don't have the reference in the final report, unfortunately. There is a reference to
14 the post-merger business plan for 2019 through 2021, which was adopted
15 whilst the investigation -- I think it was at the end of phase 1 probably, which
16 had a significant net increase in R&D.

17 Mr Eskilsson, in his witness statement, adverts to the company spending and
18 continuing to spend very substantial amounts on R&D. That is largely driven
19 by the competition that is being --

20 THE CHAIRMAN: Yes. If you don't invest in R&D, you die in the long run.

21 MR O'REGAN: Very much so. We invest a very substantial amount. Somewhere
22 between 15 and 20 per cent of revenue is put back into R&D, so we simply
23 don't say that what the CMA has interpreted in their internal documents is
24 a fair reflection of the actual position.

25 Turning to the customer evidence, we have obviously already dealt yesterday with
26 the questionnaires that were sent to not just the hubs, but all other

1 respondents as well, and that the evidence, as a result, is flawed. That is not
2 merely on diversion, but also on other matters. My learned friend
3 Mr Robertson addressed that.

4 The evidence, we say, is also inconsistent with other evidence and CMA never really
5 tested that. They accepted in paragraph 656 of the final report that there
6 were discrepancies, which it attempts to explain away in both its defence and
7 in its skeleton, but they are just mere assertions because they never actually
8 went back and tested whether or not the discrepancies were meaningful in
9 any way.

10 It simply speculates on that.

11 The most it can say is that its data was broadly consistent, but there was no real
12 attempt to analyse that. Even after we had informed the CMA that there were
13 discrepancies, which we say was unreasonable and irrational, whether our
14 doubts had been raised as to the views of the customers. Correct and
15 reasonable thing would have been to check whether it was reliable and not
16 merely plough on regardless.

17 There was limited qualitative information from customers on most matters, but there
18 was certainly nothing at all on substitution or diversion. So, the CMA was
19 reliant merely upon the information from the ten NHS hubs, which were all in
20 England; they are not UK wide. So, there was very little evidence on
21 qualitative evidence on how customers viewed closeness of competition.

22 THE CHAIRMAN: On customers' views though -- and this is really for Ms Smith to
23 explain to me later -- you have the responses to the questionnaires; yes? But
24 I need to have a better feel for what else is out there and was done with those
25 customers.

26 So, let's say you have one hub, it has filled out the questionnaire, it has come back

1 to the CMA. Insofar as there are things which aren't clear, would that have
2 been followed up on a call or spoken to? Or was it -- that was it? They
3 looked at it -- I am just not clear on that.

4 MR O'REGAN: We simply don't know what happened, Sir, because we have not
5 had disclosure. The CMA will say that they did, but we don't know what was
6 done on that. It is not something we can really pass any comment on at all.

7 THE CHAIRMAN: Yes.

8 Just on one thing, on the let's say you have 30 big buyers on this, and you can either
9 send out the questionnaire, and they reply and they give you something in
10 writing. You say some of the questions are leading and you object to that.

11 MR O'REGAN: Yes, Sir.

12 THE CHAIRMAN: That is one way. Another way in some merger cases I have
13 seen, they have gone out and spoken to lots of people. Actually gone out and
14 interviewed them and chatted with them, then prepared statements and notes
15 of meetings. But, in the course of that, they have all sorts of leading
16 questions. You will be sitting down trying to work out what their view is and,
17 when you probe someone to get your answer, you will be asking leading
18 questions.

19 What is the divide between getting a questionnaire, where you may or may not have
20 some questions which are leading, and going out sitting with the customers
21 and saying, "Let's just go through this in detail"?

22 Because in some cases that is what they will do. There will be a limited number of
23 people and they will sit down and go through it. What is the divide?

24 You are not saying it is objectionable if they go out and meet one of the customers
25 for them to --

26 MR O'REGAN: No, Sir.

1 THE CHAIRMAN: -- go through it, and ask leading questions and --

2 MR O'REGAN: We would object if we were to know that the only questions -- that
3 they discussed matters with a customer one-to-one, in person or on the
4 phone, if all the questions were leading and intended to lead to a particular
5 answer, that would clearly be improper.

6 We can't say whether that happened or not. We simply don't know. But I think one
7 has to look at the evidence that you get from customers in the round, and
8 there were clearly issues with obtaining that evidence, but, also, it doesn't
9 really support the CMA's case in many respects.

10 THE CHAIRMAN: That is the separate point we went through with Mr Robertson
11 yesterday.

12 MR O'REGAN: It is. That is right, Sir. That's why I am not going to take you
13 through it again.

14 In terms of customers' more general views, the CMA relies heavily on 18 customers
15 raising concerns about the merger. Obviously, only 30 responded, so that is
16 less than half. Presumably that means most other customers were not
17 concerned about the merger.

18 THE CHAIRMAN: It just means they haven't bothered --

19 MR O'REGAN: Or they can't be bothered to respond.

20 THE CHAIRMAN: I am always being sent questionnaires and surveys. I have one
21 rule: I press the delete button and forget about it. It doesn't mean I agree with
22 whatever the approach is of the body asking me for the survey. It's just I am
23 not going to bother to do it. I have other things to do.

24 I would not infer, merely because someone has not completed a questionnaire, any
25 position one way or another.

26 MR O'REGAN: But, as I adverted to a few moments ago, Sir, those were merely

1 opinions, they were right in the box at the end of the survey, and it clearly isn't
2 in itself -- it may be something that would have -- a properly advised authority
3 would consider further and investigate, because there are concerns, whether
4 they are justified or not. But it is not in itself evidence that a merger will lead
5 to a substantial lessening of competition.

6 Clearly an investigation isn't some kind of opinion poll, and responses may not be
7 reliable or representative.

8 Moving on to competitors, Sir. It seems information from competitors is relied upon
9 for only two reasons. First of all, in calculating market shares. That is Table
10 6-2. We don't know, but it seems reasonable to assume that competitors
11 were sent questionnaires that also contained the assumed and misleading
12 definition of dedicated AAC solution, which my learned friend has taken you to
13 already. All the customer surveys, the questionnaires we have seen contain
14 those questions, and they were also contained in the questionnaires that were
15 sent to Tobii. So, it seems they were used across the board, so we have
16 concerns that the answers, as a result, were either misleading or based upon
17 a misunderstanding of the questions, which reduces the reliability of that
18 information.

19 The second point was that the only other point that customers -- competitors'
20 information is relied upon for the horizontal analysis is at paragraph 629 of the
21 report; that is that they were asked for qualitative comments on competitors'
22 relative positioning strengths and weaknesses.

23 In our submission, that doesn't in itself enable the CMA to decide, as it did, that the
24 parties were close competitors and the merger would lead to an SLC. Of
25 course, competitors also have their own agendas, which is something that --

26 THE CHAIRMAN: Show me, again, the reference in the report.

1 MR O'REGAN: It is 6.29, Sir. That is in hearing bundle 3, tab 1. I will just get the
2 page reference.

3 THE CHAIRMAN: Just the paragraph of the report.

4 MR O'REGAN: It is 6.29, Sir. That is on -- the page number in the bundle is 103,
5 internal 101. So, it starts at 6.29:

6 "We asked parties, competitors and resellers to identify their competitors and
7 comment on their relative positioning strengths and weaknesses".

8 THE CHAIRMAN: Yes, I have that now.

9 MR O'REGAN: Then you have the responses of the different parties.

10 That doesn't take matters much further as to whether there is likely to be an SLC or
11 not. The evidence simply wasn't obtained or relied upon from competitors.

12 That was the only other point I was going to make on competitors.

13 THE CHAIRMAN: Yes, that is fine. I have that.

14 MR O'REGAN: I am grateful.

15 Turning to internal documents, in answer to the question from Mr Ridyard, we have
16 addressed some of that already in terms of post-merger plans.

17 But, more generally, the CMA has made the finding that the internal documents
18 show that the parties were close competitors. We would say that even though
19 it is clear that the parties did monitor each other, amongst others, that doesn't
20 in itself tell us that the parties are particularly close competitors and the
21 merger would lead to an SLC. It is obviously something one can take into
22 account and give weight to, but in a market where there are relatively few
23 manufacturers of purpose-built devices and wrapped tablets, that is not
24 unsurprising that the parties would keep an eye on what each other were up
25 to, in the market.

26 Of course, Tobii monitored a much broader range of competitors, not necessarily in

1 the UK. If I could take to you the final report at Figure 6-3, so tab 3 again.
2 Bundle 3, tab 1, page reference --

3 THE CHAIRMAN: Don't worry about the page reference. I have my report out
4 separately anyway, so the paragraph number.

5 MR O'REGAN: I am grateful, Sir. Figure 6-3 is on internal page 109.

6 MR RIDYARD: Paragraph reference?

7 MR O'REGAN: Just below 6.38, Sir. Just an extract from an internal Tobii Dynavox
8 document from 2018, quarter 1, so January through March. You will see
9 there that there are half a dozen names of competitors all doing different
10 things in the AAC space. So, PRC is number 3 on that list, that would be
11 Liberator in the UK.

12 Then there is Table 6-5 over the page.

13 Which again looks at a number of competitors. There is another reference I am just
14 trying to find, Sir.

15 (Pause)

16 I can't find it for the moment, Sir. We will address that later in the interests of time.

17 It shows that the parties didn't just merely monitor -- Tobii didn't merely monitor
18 Smartbox or PRC, but there are also internal documents, particularly more
19 recent ones, include Apple and Microsoft. Not so much in their capability, as
20 a device manufacturers, but more that they are proxies for all the solutions
21 that are based upon their platforms using third party Apps and software.

22 So, our submission is that -- yes, sorry, Sir, I do have it. It is at 5.1. Table 5. Figure
23 5-1.

24 THE CHAIRMAN: Under paragraph 5.15?

25 MR O'REGAN: No, Sir. The very bottom of the page. Page 72, I am grateful. The
26 very bottom of internal page 72 in the bundle. It is at page 74.

1 THE CHAIRMAN: Okay. Yes, you said Table 5-1, you mean Figure 5-1.

2 MR O'REGAN: Figure 5-1, Sir, yes. You see a whole range of different competitors,
3 that does include Microsoft, Tobii Dynavox and Apple in the context. Not so
4 much as equipment manufacturers, but as platforms. So, it is quite clear
5 that ...

6 That is from the current business plan. Clearly because focussing very closely on
7 AAC solutions on mainstream devices, which is also confirmed if one looks on
8 the left side of the bottom left-hand corner of that chart. You will see
9 a number of software only providers, so AssistiveWare with Proloquo2Go,
10 Avaz, Coughdrop. They are all developers of AAC Apps. So, we clearly are
11 monitoring a much broader group of competitors than merely manufacturers
12 of purpose-built devices and wrapped tablets. So, the CMA has not properly
13 interpreted the internal documents in that respect.

14 I think, Sir, to conclude on this -- and it is something we have touched on already --
15 an SLC finding would need to be based upon the totality of the information
16 available. It says:

17 "The evidence must have sufficient probative value."

18 We say that means it must be relevant, credible and reliable. We say much of the
19 evidence doesn't meet this test, either because there are serious concerns in
20 its collection or it simply doesn't support the findings that were made.

21 Of course, there is also, Sir, the issue that there is a complete failure to collect any
22 evidence at all from end-users of AAC solutions, which we say was manifestly
23 unreasonable in the circumstances of this case, and that properly advised and
24 reasonable authority would have done so.

25 That is ground 4, Sir. I am very conscious of time.

26 On ground 5, input foreclosure and dedicated AAC solutions. We deal with that in

1 our skeleton argument at paragraphs 189 to 213. It is also – 5(b) is customer
2 foreclosure. That is in our skeleton at 214 to 219. I won't talk about and
3 address customer foreclosure at all.

4 It is clear, Sir, that an analysis of potential vertical input foreclosure requires
5 an assessment of three things.

6 The first is the ability to foreclose, access to inputs, that requires the merged entity to
7 have significant market power on the upstream market.

8 The second one is you need to demonstrate an incentive to foreclose.

9 Thirdly -- these are cumulative factors -- it is necessary to assess whether
10 foreclosure would have a significant detrimental effect on competition
11 downstream. I think they are fairly well established propositions in both the
12 European Commission non-horizontal merger guidelines, paragraph 32.

13 I don't propose to take you to it, unless it would assist, Sir.

14 THE CHAIRMAN: No.

15 MR O'REGAN: Then the CMA merger assessment guidelines at 5.6.6. That is in
16 the authorities bundle 1, at tab 9. The Commission guidelines are in bundle 1,
17 at tab 13.

18 So, the key starting point, Sir, and gentlemen, is the assessment of market power.

19 Now, we say that the CMA simply didn't do any assessment of market power at all in
20 the upstream market. That market is the market for the licensing of AAC
21 software; that is at paragraph 5.92 of the report. We would agree that is
22 a relevant market, and we also agree with the CMA's finding that is a global
23 market -- that's at 5.97 -- and that it is a differentiated market with all sorts of
24 software in there.

25 Smartbox is a small player globally. It might have quite a large presence in the UK,
26 but, internationally, Smartbox and its software is much less commonly used.

1 The key problem is that the CMA never checked Smartbox's position or assessed its
2 position as a licensor of software. There is no empirical analysis and there is
3 no other analysis. It merely asserts that Smartbox had a strong position on
4 this market due to its control of Grid, and that it was an important software for
5 AAC users. That is at paragraph 7.39 of the final report. That appears to be
6 based upon its assessment that the Grid is the most popular software in the
7 UK for AAC end-users. Certainly for dedicated AAC solutions.

8 That really reflects Smartbox's own sales of AAC solutions. Relatively few copies of
9 Grid are sold each year to competitors for AAC solutions. So, what we have
10 is an assessment that Smartbox has a strong position in the downstream
11 market and therefore that is used to imply a strong position and a significant
12 market power in the upstream market.

13 The position in the UK can't tell us anything at all about Smartbox's position on that
14 worldwide upstream market. So, we say that the CMA's foreclosure analysis
15 simply has no evidential foundation because it has failed completely to
16 undertake the first step, which is that there is market power on the upstream
17 market. Because without market power, you don't have the ability to
18 foreclose.

19 It is not enough for the CMA, as it does, to simply say Grid is an important input.

20 We say that, in any event, it is not an important input.

21 The reality is that Grid, as the final report finds at paragraph 726, is offered by
22 Liberator and Techcess as an option, "a software option". That is the wording
23 that is used in the final report and those words are clear.

24 Something that is an option is neither indispensable nor critical, which is a necessary
25 pre-condition to have the ability to foreclose. That, again, is clear from the --
26 particularly the Commission's non-horizontal merger guidelines. They find, at

1 paragraph 35, that one of the reasons for given ability to foreclose is either it
2 is an important input or a critical component, without which the downstream
3 product cannot be manufactured or sold.

4 Now, if something is an option it can't possibly be critical, even if it might be
5 necessary to meet the requirements of a particular end-user.

6 No customer said that it was indispensable or critical. At its highest, they could say
7 that for some end-users, not for all, but for a small minority, it was something
8 of high or significant importance. Indeed, 70 to 80 per cent of Liberator's AAC
9 solutions and 60 to 70 per cent of Techcess's, on the CMA's own case, did
10 not have Grid pre-installed. It wasn't sold with Grid, so how can it be critical?

11 Indeed, before the merger, Tobii Dynavox sold almost no devices with Grid installed
12 at all. So, in our submission, it simply doesn't get over the first hurdle of
13 something being -- Grid being a critical input.

14 Turning to how foreclosure might be affected -- and I will stop there I think.

15 The first theory is that there would be technical foreclosure by reducing the extent to
16 which Grid supports rivals' hardware. That is addressed in my learned
17 friend's skeleton at paragraph 193. It is also in the final report.

18 Now, the final report contains no evidence or concrete examples as to how this might
19 be done, merely that somehow it might be a theory that could be
20 implemented. But it is clear, if one looks at the working paper -- and this is set
21 out in our written submissions -- that rivals were not concerned about this, not
22 least because Grid runs on Windows, as do the devices of Techcess and
23 Liberator. It simply isn't something that they were concerned about. They
24 were more concerned about not having access to Grid at all.

25 The evidence the CMA obtained from Liberator and Techcess was about total
26 foreclosure, so a complete refusal to supply. There is no evidence at all as to

1 whether or not what the situation -- or they think the situation would be in the
2 event of partial foreclosure due to an increase in the licensing fees for Grid.

3 So, we simply don't know and they were never asked: what would you do in
4 the event of a hypothetical increase in the price of Grid?

5 We don't find that evidence anywhere in the working paper or in the provisional
6 findings, nor indeed in the final report.

7 I have already addressed the issue as to it wasn't a critical input.

8 Another reason why, according to the guidelines, both the CMA's and the
9 Commission's, there may be an ability to foreclose is where the input is
10 a significant cost factor relative to the price of the downstream product.

11 The price of Grid simply isn't a significant part of the dedicated AAC solution. Now,
12 the CMA itself finds these sell for between £4,000 and £7,000. The retail
13 price of Grid at the moment is £449. Obviously, there is a reduction at
14 wholesale level; that is set out in our written submissions. It's a confidential
15 number, but it is not significant. It is very modest. So, the risk of the increase
16 is only a proportion of the price as well. We are talking about a relatively
17 small additional cost in relation to the selling price of the downstream product.

18 Indeed, in the final report, the CMA says it is between 0 and 5 per cent. On our
19 calculation, it is towards the bottom end of that range.

20 In any event, Liberator and Techcess have credible alternatives. They have their
21 own software. PRC, Liberator's parent, is developing new software, which we
22 say in our written submissions the CMA finds in the working paper was
23 a positive effect on competition. So, that is the response: if you are at risk of
24 foreclosure, improve your own products.

25 That is a very simple point, and that is something that they are doing and indeed can
26 do.

1 MR RIDYARD: Mr O'Regan, sorry to interrupt you in mid-flow. Just to go back
2 briefly to the mechanism. I think you missed one of the mechanisms out
3 slightly because one of them -- as I understood it, one of the mechanisms the
4 CMA talks about is obviously the Grid can still be available because it is
5 Windows and iOS compatible, but they talk about the mechanism of
6 withdrawing the Grid support for more clever kind of forms of integration
7 between the software and other people's AACs.

8 MR O'REGAN: That is the technical foreclosure point I mentioned, Sir. There's two,
9 there's either technical foreclosure or an increase in price.

10 MR RIDYARD: You said it wasn't possible to prevent them from having the Grid
11 software at all because they could always buy a retail copy, as it were.

12 MR O'REGAN: That is another reason as to why foreclosure isn't very credible
13 because there is an easy way round it, whether for --

14 MR RIDYARD: This aspect raised by the CMA is that withdrawing the Grid support
15 for integrating the Grid with rival AAC solutions could be another way of --
16 mechanism for implementing the alleged foreclosure mechanism.

17 MR O'REGAN: That is one of the two theories. Can I take instructions?

18 THE CHAIRMAN: You can take instructions, yes.

19 MR O'REGAN: I am grateful.

20 (Pause)

21 I think partly, as my clients are telling me, is that is also related, I think, partly to
22 customer foreclosure. But, in the context of vertical foreclosure, it is one of
23 the two theories the CMA advances. We say two points in relation to that.
24 You don't actually explain how you do it. It might be a theory, but that is not
25 sufficient.

26 Secondly, in any event, competitors have told you they are not concerned about it,

1 so therefore it clearly isn't a credible foreclosure mechanism if the only two
2 competitors have told you that it isn't an issue.

3 So, the only other theory the CMA has is the price increase.

4 We say any price increase is going to be negligible in relation to the downstream
5 selling price with something that could easily, being a relatively small
6 three-figure number, be absorbed. Again, the CMA never asked the question,
7 so we just don't know. We say that is a failing on its part.

8 In any event, one looks at what customers told the CMA. It is addressed in the
9 speaking note we handed up yesterday. Many of them said they were still
10 likely to purchase hardware from Liberator and Techcess if the Grid wasn't
11 available, but use other software. I am not going to take you through all of
12 those now. I have addressed those in writing.

13 Most customers are saying: whether or not we would depends on end-user
14 requirements.

15 So, it is quite clear, at least to some extent, the customers would continue to
16 purchase Liberator and Techcess, which completely undermines Liberator's
17 submissions to the CMA, that they would lose all of their sales if Grid wasn't
18 available or the price of Grid were to go up.

19 The only evidence on them losing sales is indeed what Liberator and Techcess have
20 told the CMA, which is obviously to some extent at least self-serving and
21 unreliable because customers have said they would still buy it.

22 If one looks at the incentive, which is in the paper we handed up this morning, any
23 up side for Tobii Dynavox from implementing such a strategy would be
24 extremely modest. We are talking about a small five figure number.

25 It is quite clear that the global company is not going to risk its global reputation. The
26 CMA said we would. It is clear for that kind of gain it is simply not worth the

1 candle to risk putting your global reputation at stake, particularly in an industry
2 dedicated to serving vulnerable consumers, to make an extra few sales in the
3 UK, which is an insignificant part of your global business. But, again, that is
4 something the CMA just never considered.

5 To conclude on input foreclosure, our case is simply that the CMA's findings are not
6 based upon reliable evidence. There is not a reasonable evidential
7 foundation. Partly because in many cases they do not have the evidence
8 because they didn't ask competitors what would happen in the event of partial
9 foreclosure, and whether they would lose sales at all, whether they would
10 absorb the price increase. Or if they were to pass it through, what that would
11 mean for competition.

12 In other cases, the evidence simply isn't consistent because customers say that they
13 would still be purchasing from them, even if Grid wasn't available at all. So,
14 we say that ground 5(a) is made out for that reason.

15 MR RIDYARD: Mr O'Regan, just before you move on from that. Are you going on to
16 customer foreclosure?

17 MR O'REGAN: I am not going to address it, unless you wish me to do so, Sir.

18 MR RIDYARD: Just for my benefit, for clarification, you are saying that the
19 foreclosure strategy would need to be implemented on a global basis, even
20 though it may have effects in the UK, amongst other places. But it would be
21 a single strategy across the globe.

22 MR O'REGAN: Input foreclosure?

23 MR RIDYARD: Yes.

24 MR O'REGAN: I think the CMA's case is it would be implemented in the UK.
25 Obviously, licensing is to some extent territorial. Whether or not you could get
26 round that, you need to extend that to the whole of the EU is again another

1 unexplored question.

2 I don't think the CMA's case is based upon us having to implement it globally
3 because licences aren't granted on a global basis, as I understand it. I will
4 just take instruction on that.

5 (Pause)

6 I think the instructions are that you tend to have a global licence, but it would be
7 a bundle of national rights. So, one could -- presumably the CMA's case is --
8 they don't say this -- would be to carve out the UK, or maybe the EU as
9 a whole.

10 MR RIDYARD: I only ask because the costs and benefits of doing so might differ,
11 whether you could compliment it at a national level or whether you were
12 obliged to implement it globally, so that's why I asked the question.

13 MR O'REGAN: The theory is there would be an effect on competition in the UK.

14 MR RIDYARD: Incentive to do it in the first place will differ according to whether it
15 can be implemented on one single footprint or a series of different --

16 THE CHAIRMAN: Okay, I think you have finished now.

17 MR O'REGAN: Yes, Sir. Unless you would like me to address you on foreclosure?

18 THE CHAIRMAN: No.

19 MR O'REGAN: That concludes Tobii's submissions, unless I can assist you further,
20 Sir.

21 THE CHAIRMAN: Okay, we will be back at 12.05 pm.

22 MR O'REGAN: I am grateful, Sir.

23 **(12.00 pm)**

24 **(A short break)**

25 **(12.10 pm)**

26 THE CHAIRMAN: Ms Smith, yes, your turn now.

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Submissions by MS SMITH

MS SMITH: Thank you, Sir, and members of the Tribunal.

In line with Mr Robertson and Mr O'Regan's approach I will address grounds 2 through to 5 before returning to ground 1.

Before I do that, I do need to address a small number of the submissions made yesterday by Mr Robertson on the factual background. There are three points that I had anticipated addressing.

The first was we do not accept, for the record, what was said by Mr Robertson as regards the rationale for the merger.

We say the rationale is shown by the contemporaneous internal documents, which the CMA obtained from Tobii and Smartbox during the Inquiry. I will come back to what those showed.

Second, we don't accept, for the record, the submission made by Mr Robertson yesterday and again by Mr Eskilsson for Tobii this morning. As Mr Eskilsson put it, there has been a radical switch from sales of more high-end, more expensive devices, to sales of cheaper devices, specifically iPads and Indi. Mr Robertson said they have been superseded.

We addressed that issue. I am not going to take you to it, but for your note we addressed that had issue in paragraph 5.58 of the final report and Figure 5-2. What those paragraphs and that figure show, in summary, is that, yes, there has been -- well, I can show you the Figure at 5-2. Internal page numbering 78.

THE CHAIRMAN: Yes.

MS SMITH: The explanation is on the previous page and quite a lot of that is confidential. The explanation is in paragraph 5.58, on page 77. But what we

1 say in --

2 THE CHAIRMAN: Let me just read that to myself for one second.

3 MS SMITH: Yes, Sir.

4 (Pause)

5 THE CHAIRMAN: Yes.

6 MS SMITH: So, the data to support what is said in paragraph 5.58 is found in the
7 table over the page, at Figure 5-2. You will see there exactly illustrated what
8 is said in paragraph 5.58.

9 The third point, Sir, I anticipated addressing was Mr Robertson's submission
10 yesterday that it was, he said, curious for the CMA to have included Indi within
11 the relevant product market.

12 Given the questions, the further questions, Sir, that you posed this morning, and
13 Mr Robertson's indication that they are going to produce a note on that, if
14 I may, I will come back to that point.

15 THE CHAIRMAN: Of course, yes.

16 MS SMITH: So, what I will do then is turn to grounds 2 and 5, and my submissions
17 on the law, and on the legal principles which you, as a Tribunal, are to apply
18 to grounds 2 to 5.

19 Under those grounds Tobii takes issue with the way the CMA collected evidence
20 during the Inquiry. It also argues that the CMA's conclusions as to market
21 definition and SLC's didn't have an adequate basis or were irrational.

22 We say the legal test the Tribunal is to apply under grounds 2 to 5 is the same. It is
23 one of Wednesbury unreasonableness or irrationality. It appears from what
24 Mr Robertson said yesterday there was no issue between the parties on that
25 test. That is the relevant test in a judicial review.

26 Now, Tobii however did -- and Mr O'Regan mentioned it again this morning -- in their

1 skeleton argument, placed much emphasis on the fact that the CMA ordered
2 full divestiture in this case, full divestment, and emphasised their Article 1
3 protocol rights are engaged. Article 1, protocol 1 rights are engaged.

4 We say that in the cases cited in our skeleton, BAA number 2, Ryanair number 3,
5 and the Court of Appeal and CAT's judgments in BSKyB, they also concerned
6 cases where divestment had been ordered and where the claimants' Article 1,
7 protocol 1 rights had been engaged. In cases, all those cases, the judgments
8 confirmed the test remained one of rationality.

9 As regards which the CMA, as an expert specialist regulator, had a wide margin of
10 appreciation.

11 Now, Sir, I don't know if it is necessary, I was going to refer to you a couple of
12 extracts from one judgment in that regard if it would assist you --

13 THE CHAIRMAN: I think it would be helpful because you have to remember I am
14 not the only one here.

15 MS SMITH: -- and your lay members. If I could ask you to turn to authorities
16 bundle 2, tab 36 in authorities bundle 2.

17 So, tab 36, this is the judgment of the Tribunal in the BAA case. If I can ask you to
18 turn to internal page 7, paragraph 19 of the judgment, you will see on
19 paragraph 19, by virtue of section 6(1) of the Human Rights Act the CC in that
20 case obliged to carry out its function in a way that is compatible with
21 Convention rights.

22 Then you see that BAA complained. The remedy imposed in that case was
23 a divestment remedy, and they complained about a disproportionate
24 interference with our Convention rights as set out in Article 1, protocol 1.
25 Article 1, protocol 1 was directly in issue in that case.

26 Nevertheless in paragraph 20 and following, at paragraph 20 of the judgment, the

1 Tribunal made it absolutely clear that the standard test, judicial review test of
2 irrationality applies.

3 If I can ask you first to turn over the page to sub-paragraph 5 -- it is just below the
4 hole punch on the lower hole punch, sub-paragraph 5 starts:

5 "In some contexts where Convention rights are in issue and the obligation on
6 a public authority is to act in a manner which does not involve
7 disproportionate interference with such rights, the requirements of
8 investigation and regarding the evidential basis for action by the public
9 authority may be more demanding."

10 Then you will see it just after the references to the various cases:

11 "However, exactly what standard of evidence is required so that the reasons
12 adduced qualify as 'relevant and sufficient' depends on the particular context."

13 Then he compares the case of Daly, which is a case where social and economic
14 judgments had to be made, to a case such as the present. He says there:

15 "Where, as here, a divestment order is made so as to further the public interest in
16 securing effective competition in a relevant market, a judgment turning on the
17 evaluative assessments by an expert body of the character of the Competition
18 Commission whether a relevant AEC exists [here SLC] and regarding the
19 measures required to provide an effective remedy, it is the 'manifestly without
20 reasonable foundation' standard which applies."

21 One may compare, in this regard, he says, the approach of the European courts to
22 the question of proportionality. Then, this is the part we would ask to you
23 underline, the final line on that page:

24 "Accordingly, in the present context, the standard of review appropriate under
25 Article 1, protocol 1 and section 6(1) of the HRA [Human Rights Act] is
26 essentially equivalent to that given by the ordinary domestic standard of

1 rationality."

2 He then goes on to say Mr Beard even says, if it is a higher standard we met that
3 one anyway.

4 So we say it is clear from BAA that, even when a case engages Article 1, protocol 1,
5 the same standard of review applies.

6 Just while we are on that judgment, it may be useful for you to look at the test that
7 we say the Tribunal should apply in a case such as the present, when the
8 evidence gathering process is criticised and the adequacy of evidence is
9 criticised, which is what is effectively grounds 2 to 5.

10 As to the evidence gathering process, if I can ask you to look at sub-paragraph
11 20(3), it is up the page, it is just prior to what we were looking at, the top of
12 page 8, sub-paragraph 3. Do you have that?

13 Sub-paragraph 3:

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

17 Then he goes on to refer to various cases:

18 "The CC 'must do what is necessary to put itself into a position properly to decide the
19 statutory questions'."

20 There is the previous case of Tesco.

21 "The extent to which it is necessary to carry out investigations to achieve this
22 objective will require evaluative assessments to be made by the CC, as to
23 which it has a wide margin of appreciation as it does in relation to other
24 assessments to be made by it."

25 Then he goes on to say:

26 "... we accept Mr Beard's primary submission that the standard to be applied ... is

1 a rationality test."

2 So that is the test we say should be applied and we would ask the Tribunal to apply
3 in this case as to the evidence gathering process. The CC has a wide margin
4 of appreciation and whether it gathered evidence or took reasonable steps to
5 acquaint itself with the information necessary to answer the statutory
6 questions is a rationality test.

7 Then, finally, sub-paragraph 4:

8 "Similarly, it is a rationality test which is properly to be applied in judging whether the
9 CC had a sufficient basis in light of the totality of the evidence available to it
10 for making the assessments and in reaching the decisions it did. There must
11 be evidence available to the CC of some probative value on the basis of
12 which the CC could rationally reach the conclusion it did."

13 So, again, we say that is the test to be applied as regards sufficiency of evidence.

14 Can I ask you to put away that bundle.

15 I think that sums up -- we have set out other cases in our skeleton but that really
16 sums up what we say the general approach should be to a case such as the
17 present.

18 If I then turn --

19 THE CHAIRMAN: I don't think the other side really dispute that, do they?

20 MS SMITH: No, Sir. That is not what I understand now to be the case, given what
21 Mr Robertson said yesterday.

22 Turning then to Tobii's substantive arguments under grounds 2 to 5.

23 There are a number of substantive criticisms that Tobii makes and those criticisms
24 appear often in slightly different guises under different grounds. So, for
25 example, Tobii makes the argument that the CMA should have but failed to
26 obtain evidence from end-users of dedicated AAC solutions. That appears

1 under its ground 2, ground 3 and ground 4. What I propose to do is I will
2 generally seek to address those points on the first occasion they are raised
3 and I won't address them subsequently again, unless substantially different
4 arguments are made in their regard.

5 I will seek to flag each of the issues in the list of issues as I go through my
6 submissions as to where we are.

7 Ground 2, which is ground 2 in the list of issues.

8 Tobii takes issue under ground 2 with the way in which the CMA collected evidence.

9 Tobii's case in that regard is focussed almost exclusively on the evidence that
10 the CMA collected from the parties' customers. It is important to note, and we
11 say extremely important to note in this case as a preliminary point, that the
12 evidence from the customers was just one part of a number of pieces of
13 evidence, it was just one part of the whole evidential basis, upon which the
14 CMA relied in reaching its conclusions in this case. That can be illustrated
15 very clearly if I take you back to the final report, if I may.

16 As regards market definition first, if I could ask you to turn to internal page
17 numbering 85 of the final report. The CMA sets out there, at just above
18 paragraph 5.78, its conclusions on the product market. This is the
19 downstream product market definition. It sets out its conclusions in
20 sub-paragraphs (a) through to (e). It sets out the evidence that it has relied
21 upon in reaching its conclusions on market definition.

22 First of all, in sub-paragraph (a) you see the stakeholder requests for information; (b)
23 Smartbox's benchmarking of competitors; (c) Tobii's internal documents; (d)
24 an analysis of the price of the parties' dedicated AAC solutions; and (e)
25 diversion ratios.

26 They reach the conclusion in paragraph 5.79:

1 "This evidence demonstrates, taken together --"

2 And that is another important point, you have to look at the evidence taken as
3 a whole:

4 "-- that, in general, the competitive constraint exerted by non-dedicated AAC
5 solutions on suppliers of dedicated AAC solutions is much weaker than that
6 exerted by suppliers of dedicated AAC solutions on each other."

7 Then they go on to say:

8 "Therefore, we consider that non-dedicated AAC solutions do not form part of the
9 same product market as dedicated AAC solutions."

10 Then there is a slight caveat as regards Indi. The position is that the CMA did
11 include Indi in its definition of the relevant product market but, more
12 importantly, it considered that the position of Indi was slightly different when
13 one looked at the strength of competitive constraints that were exercised on
14 the Indi by non-dedicated AAC solutions. I will come back to this but, just in
15 summary, the CMA held that, as regards price -- but only price, not as regards
16 the other elements of competitive constraint -- Indi was subject to stronger
17 competitive constraints from non-dedicated AAC solutions. But I will come
18 back to why that is relevant and how that is relevant, if I may, later.

19 That is the range of evidence that was taken into account by the CMA as regards
20 market definition.

21 As regards the horizontal SLC effects of the merger, if I could ask you to turn to
22 internal page numbering 120. At the bottom of page 120 we have the
23 heading, "our findings on horizontal unilateral effects". Under paragraph 6.61,
24 the CMA summarises its findings and effectively summarises the evidence it
25 considered in reaching its conclusions on horizontal effects.

26 You will see through, again, from sub-paragraph (a) through to (k) in this paragraph,

1 the range of evidence that the CMA took into account. So (a) we have the
2 parties' market shares; (b) we have who customers identify as the main
3 suppliers; (c) we have the customers' concerns raised about the impact of the
4 merger; (d) we have submissions and evidence from competitors and
5 resellers; (e) we have Smartbox's internal documents; (f) we have Tobii's
6 internal documents; (g) Smartbox's product development plans; (h) over the
7 page, Tobii's product development plans; (i) the diversion ratios; (j) the
8 competitive constraints exerted by non-dedicated AAC solutions; and (k) the
9 position as regards Indi.

10 Now, the evidence showed, we say, that, as regards horizontal effects, the parties
11 were close competitors. We looked at all this evidence in reaching that
12 conclusion. They were effectively the two largest suppliers -- or two of the
13 largest suppliers -- of dedicated AAC solutions in a market with really only
14 three major suppliers, that is Tobii, Smartbox and Liberator, and one smaller
15 supplier, Techcess. The conclusion reached by the CMA was that the
16 removal of one of those three main suppliers is likely to allow the merged
17 entity to increase prices and/or reduce other aspects of its competitive
18 offering, as regards price, range, levels of customer service and R&D and
19 innovation.

20 In this regard, as was highlighted by, I think, Mr Ridyard this morning, the evidence
21 from the parties' internal documents was particularly and unusually strong. If
22 I could ask you to look back at what is in (f) of paragraph 6.61, some of it is
23 confidential but if I could ask you to read what is said there as regards the
24 rationale. It is shown, by Tobii's internal documents, its consideration of what
25 the rationale for the merger was.

26 (Pause)

1 If I could also ask you to look over the page at the top of the next page,
2 sub-paragraph (h), as regards what Tobii's product development plans say
3 about the closeness of competition between Tobii and Smartbox prior to the
4 merger, which the CMA was concerned would be reduced by the merger.

5 There is also striking evidence, in our submission, about what the parties to the
6 merger had decided to do, and were about to do before the CMA initiated its
7 investigation -- that is recorded at paragraph 6.63 of the final report, on the
8 next page, internal page 123 -- which is that:

9 "... at least two of the three possible manifestations of an SLC, namely a reduction in
10 the range of products available to customers and a reduction in R&D, had
11 been decided upon prior to completion of the Merger, and were about to
12 materialise when the CMA initiated its investigation."

13 Remember, here we have a case where the parties proceeded with the merger
14 without notification to the CMA and the CMA only investigated it -- it came to
15 their attention after the merger had taken place.

16 THE CHAIRMAN: That is one of the risks, isn't it --

17 MS SMITH: In effect you have voluntarily assumed that risk if you go ahead without
18 referring.

19 Mr O'Regan, this morning, just before the short break, sought to give or made
20 various submissions on why these things happened, the removal of some of
21 the products post-merger and the reduction in R&D. He said it wasn't
22 malicious, it was an intention to create better products, it was to strip out
23 unnecessary R&D.

24 Those were exactly the submissions that were made by Tobii to the CMA during the
25 course of the investigation and were carefully considered by the CMA. I don't
26 think I need to take you the paragraphs but it is important, just for your

1 note, that, as regards the products, the reduction in products range, I would
2 ask you to note that that was addressed in paragraphs 6.20 and 6.21 of the
3 report.

4 As regards --

5 THE CHAIRMAN: Let me just check that I have marked it.

6 MS SMITH: Yes. You may not have.

7 THE CHAIRMAN: I have marked 6.20, yes. But not 6.21. Okay.

8 Yes.

9 MS SMITH: As regards reduction in R&D, that is probably best addressed in
10 a section of the report you may not have marked up, the section on
11 countervailing benefits, paragraph 8.97 and 8.99. I am not going to read
12 those out because a lot of that is confidential.

13 THE CHAIRMAN: I have marked those already. Yes.

14 MS SMITH: Yesterday, Mr Robertson repeated almost verbatim what is asserted in
15 Tobii's skeleton argument. At the transcript, page 41, he said:

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 the CMA obtained from customers and interest groups using written
19 questionnaires."

20 He went on, lower down that page, 41 of the transcript, to say:

21 "Without this evidence, the CMA's findings would have been shorn of their principal
22 evidential foundation."

23 I hope I have shown you that is clearly not the case. The CMA looked at a broad
24 range of evidence and you need to bear that in mind when considering the
25 criticisms that are made under ground 2 by Tobii of the customer evidence.

26 Moving then to the particular arguments and criticisms made by Tobii under ground

1 2. I will follow the list of issues ground 2(a) through to ground 2(c).

2 Ground 2(a) is the alleged failure by the CMA to obtain evidence from end-users.

3 Mr O'Regan again said this morning:

4 "The CMA strikingly failed to obtain any evidence from end-users."

5 That is not correct but I will come back to that. There are a number of points that
6 need to be teased out from the submissions made by Tobii, if I may, because
7 a number of these points do go to different issues, but they were all
8 addressed by the CMA.

9 The first two points have become slightly confused in some of the submissions
10 made, but I think they are different points and there are different answers to
11 them.

12 The first point, which is a point made by Tobii in its skeleton argument, paragraphs
13 50 and 51, was that the CMA was wrong to collect evidence from the
14 institutional customers, principally the NHS hubs, because they only treat
15 about 10 per cent of those people who require an AAC solution in England.
16 The CMA ignored the 90 per cent of end-users who are not supported through
17 NHS hubs. Mr Robertson made that point again, yesterday, by reference to
18 the NHS guidance.

19 This point, insofar as it is a point, appears to be that we ignored all those end-users,
20 who have AAC needs, who don't come buy through an NHS hub or don't buy
21 from the parties.

22 But the point is the CMA made a conscious decision to collect evidence from the
23 parties' customers, not all end-users who may have AAC needs.

24 The relevant evidence in a case of a merger is what the parties' customers might do
25 if the merger took place. That decision, the decision to collect evidence from
26 the parties' customers, we say was made for perfectly rational reasons. It is

1 explained in the final report. If I can ask you to go back to the final report,
2 internal page numbering 100, this is a section where the CMA responds to
3 points made by Tobii in response to its provisional findings. This was one of
4 the points made by Tobii in response to the provisional findings.
5 Paragraph 6.26. The first part of it deals with this first point:

6 "We are aware that many people with AAC needs do not obtain their solutions
7 through the NHS, and in many cases do not use the type of dedicated AAC
8 solutions sold by the Parties. However, for the purpose of assessing whether
9 this Merger gives rise to an SLC, the relevant population of customers is not
10 all people with AAC needs, but the Parties' customers. It is the preferences of
11 these customers that will determine the Parties' incentives to raise price
12 post-Merger (or otherwise deteriorate their offer)."

13 That point is explained in a little more detail in appendix C to the final report, which
14 you may have with the final report or it may be in the subsequent tab of your
15 bundle. Appendix C is in tab 2 of hearing bundle 3, and if you can turn to
16 internal page numbering C2 -- C2, paragraph 5, this is a comment made in
17 appendix C, which you will see on the previous page is:

18 "Further Tobii submissions in respect of market definition.

19 "This appendix discusses some submissions made by Tobii on market definition and
20 the question of whether non-dedicated solutions should be included in the
21 relevant product market."

22 Paragraph 5 addresses this point precisely:

23 "... we disagree with Tobii's suggestions in several respects. First, we do not
24 consider that the purpose of the exercise is to analyse the whole 'spectrum' of
25 needs of users of AAC solutions, or to identify 'break points' in that spectrum
26 between different groups of users with different needs and substitutability

1 options. Our focus should be on customers of the product supplied by the
2 Parties, as it is the preferences of these customers that will shape the Parties'
3 incentives to raise price post-Merger (or otherwise deteriorate quality, range
4 or service levels). The preferences of individuals who use other products
5 before the Merger is not relevant to this assessment. These individuals have
6 opted for alternative options at pre-Merger prices, and therefore they would be
7 unlikely to change their behaviour if the price of dedicated AAC solutions was
8 higher (as it may be following the Merger)."

9 So, the explanation there, we say, is a perfectly rational explanation, and carefully
10 considered by the CMA.

11 Now, the second related but distinct argument that Tobii makes is that by obtaining
12 evidence from institutional customers of the parties, rather than end-user
13 customers, because there are some end-users who buy directly from the
14 parties, the CMA failed to obtain evidence from what they describe as:

15 "An important source of demand for the parties AAC solutions."

16 I have to deal with this point, I am afraid, but yesterday Mr Robertson referred to
17 paragraph 74(a) of our skeleton argument and said that the CMA had there
18 given a justification for not gathering evidence from end-users because they
19 are unsophisticated. He then went on to say:

20 "How can you say these vulnerable end-users who need these products are
21 unsophisticated?"

22 He said that we had said:

23 "The views of vulnerable customers or their parents, carers, teachers, are to be
24 disregarded due to some alleged lack of sophistication."

25 That is yesterday's transcript, page 32, lines 10 to 12. With respect, that is a gross
26 misrepresentation of what we said in our skeleton.

1 Paragraph 74 simply made submissions generally about when we say it is
2 appropriate and not appropriate to use the CMA survey guidance. We said
3 that a survey, as the term is understood and used by the CMA -- and I will
4 come back to that -- to which the CMA's good practice guide applies, we said
5 typically involves obtaining information from hundreds or thousands of
6 relatively unsophisticated purchasers. That is all we said.

7 But moving from that to the substance of the criticism, that by obtaining evidence
8 from institutional customers, rather than end-user customers, the CMA failed
9 to obtain evidence from an important source of demand for the parties' AAC
10 solutions. Again, that was a point raised by Tobii during the Inquiry. It was
11 considered by the CMA, and we say the CMA took a reasonable approach on
12 the evidence to that point.

13 If I can ask you to go back to the final report, page 100 internal page numbering.

14 This second related point was addressed in the second part of
15 paragraph 6.26. The second part of paragraph 6.26, about halfway down,
16 says:

17 "As explained in paragraph 5.14, 90% of the Parties' sales of dedicated AAC
18 solutions in the UK are made to organisations such as the NHS, schools and
19 charities, who purchase dedicated AAC solutions on behalf of end-users (only
20 10% of the Parties' sales of dedicated AAC solutions in the UK are made
21 directly to end-users). In this context, we considered it was more appropriate
22 to obtain evidence on relevant customer preferences by engaging with these
23 organisations ..."

24 Then they go on to say:

25 "The majority of those who responded to our questionnaire raised concerns about
26 the impact of the Merger."

1 So, this was a reasoned decision by the CMA to focus on that. Those customers
2 who accounted for 90 per cent of the parties' sales.

3 I say that was a reasonable approach to take and a reasonable decision to make,
4 first of all because 90 per cent of the parties' sales is obviously the vast
5 majority of the parties' sales, but the CMA went further. The CMA said, "Well,
6 we have considered the evidence and it shows us that the parties don't
7 differentiate in their offering by customer, category or segment."

8 In effect, what they found, which is a matter of fact, is the parties in effect offered the
9 same prices, the same range, the same levels of service, et cetera, to
10 institutional customers as they offered to end-users buying directly.

11 So, as the parties themselves -- that, just for your note as regards price, is in
12 paragraph 8.81 of the final report.

13 The prices and the service and the range are the same, whether the customer is an
14 institutional customer or an individual end-user customer.

15 So, going back again to what the CMA's concern is in this case, as the offering is the
16 same, the parties' incentives to raise prices and reduce competition after the
17 merger -- which is what we are concerned with here -- will depend on average
18 preferences and responses across customer segments. It doesn't differ
19 depending on the nature of the customer.

20 THE CHAIRMAN: When you say "90 per cent of the parties' sales", that includes the
21 Indi, does it?

22 MS SMITH: Yes.

23 THE CHAIRMAN: Because I would have thought, priced at £1,000, they might be
24 able to sell more to the public direct than through the NHS.

25 MS SMITH: Now, I am still on the point that it was rational for the CMA to look at the
26 customers who accounted for 90 per cent of sales. It is on value, the figure of

1 90 per cent.

2 Because we say it was a large proportion. Secondly, because we say there was
3 an evidence -- or not that there was no evidence the parties don't differentiate
4 their offering by customer category, but there was evidence that they do not
5 differentiate their offering, same offering, regardless of customer category.

6 That second point, Tobii criticise as misconceived in paragraph 55 of their skeleton,
7 and the point was made again by Mr Robertson yesterday, transcript page 32,
8 lines 20 to 21, he said the mix of AAC solutions purchased differs by customer
9 segment. But that rather misses the point.

10 The point we are making is we are looking at whether the parties charge different
11 prices or flex their competitive offering for different customers for the same
12 products. We found, as a matter of fact, they do not, and therefore concluded
13 that it was appropriate, in that case, to focus our enquiries on the sales to
14 institutional customers.

15 MR RIDYARD: Sorry, is that what 8.81 says?

16 MS SMITH: 8.81 says there was no difference in price lists or discounts.

17 MR RIDYARD: It says there are volume discounts offered by the parties, but
18 obviously if you are an institutional buyer, you are more likely to qualify for
19 a discount than if you are a single buyer.

20 MS SMITH: Actually, I am not sure that is the case if you look -- and I can get into
21 the evidence if we wish -- but on the numbers -- if you look at the customer
22 responses, the numbers of units bought by each of these institutional
23 customers is often 1, 2, 3. We are not talking 100 or 200, or 20 even.

24 MR RIDYARD: Is there any information on how these volume discounts are set up?

25 MS SMITH: I can check whether there is any information in the final report and get
26 back to you on that.

1 The third and final and important point is the CMA did not ignore material evidence
2 that was submitted to it by end-users.

3 On the contrary, that was considered by the CMA. Evidence of the views of
4 end-users was submitted to the CMA during the Inquiry and it was addressed
5 by the CMA in paragraphs 6.22 to 6.28 of the final report. I am not going to
6 read that all out. It is on pages 99 through to 101 of the final report, but you
7 will see at the start of paragraph 6.22:

8 "In response to our provisional findings, we received a number of submissions from
9 customers and individual end-users ..."

10 Then they go on to consider those submissions in some detail, in paragraphs 6.23
11 through to 6.28. So, there was evidence from individual end-users before the
12 CMA during the Inquiry and it was considered by the CMA.

13 The third point that Tobii makes under ground 2(a) is they argue -- I am not sure
14 whether they say the CMA should have obtained evidence from end users in
15 addition to that obtained from institutional customers or whether it should have
16 obtained evidence from end-users instead of that obtained from institutional
17 customers. But it says that the CMA should have obtained evidence from
18 end-users "as the demand of the institutional customers is derived from the
19 demand of end-users", you will recall that point. That was raised again, and it
20 is raised again in Tobii's speaking note on the responses to the CMA's
21 questionnaire.

22 But, that point, that you should obtain evidence from end-users, rather than that from
23 institutional customers because it is the end-user demand that is important,
24 was raised by Tobii in the Inquiry and was again considered by the CMA.

25 We say that the CMA reached a rational judgment based on the evidence. The CMA
26 considers this point -- if I can start by taking you to paragraph 2.19, internal

1 page number 19 of the final report. That just records the situation:

2 "When an individual requires a dedicated AAC solution they are usually referred to
3 an expert, eg an NHS speech therapist. This expert will typically assess the
4 needs of the individual resulting in a recommendation for an appropriate
5 communication aid."

6 Then if I can ask you to turn to paragraph 5.14, internal page numbering 61.

7 Paragraph 5.14, it's the bottom of page 61 of the final report, is assessing the
8 evidence obtained by the CMA from customers. You will see that just above
9 5.14:

10 "Roughly 90% of the Parties' sales of dedicated AAC solutions are made to [these]
11 organisations, [these institutional customers,] who purchase AAC solutions on
12 behalf of end-users."

13 That, you will see, is based on the CMA's analysis of the parties' transaction data,
14 footnote 159.

15 Then the paragraph goes on to say:

16 "Purchasing decisions are typically made by speech therapists and specialist
17 assessors within these organisations based on their evaluation of the needs
18 and preferences of end-users. In this context we considered it appropriate to
19 gather evidence on customer preferences and substitutability patterns from
20 these organisations (referred to as 'customers'), which are large and expert
21 buyers of the Parties' products and account for 90% of the Parties' sales ...,
22 rather than to engage with end-users or their carers directly, who represent a
23 small proportion of the Parties' sales ... and do not engage with the market
24 regularly. ... We have also considered submissions made by customers and
25 individual end-users made in response to our provisional findings."

26 That is 6.22 that I have just shown you.

1 So, this was a conscious decision, again made by the CMA, to focus on questions,
2 or focus on evidence from customers, institutional customers, rather than to
3 engage with end-users for these two -- well, for the reason I have already
4 made, in fact, about the small proportion of sales, but also who engages with
5 the market regularly on a regular basis, and it is the institutional customers
6 who tend to buy more regularly, than an individual end-user who might buy on
7 an irregular basis.

8 We are not saying and the CMA does not say that the end-user's preferences and
9 needs are irrelevant. Of course not. It simply says that those are reflected in
10 the choices made by the institutional customers. What happens here is not --
11 sometimes, maybe, an end-user who has a clear view of what they need and
12 a clear understanding of the products available will say to the NHS hub or to
13 the speech therapist, "I want this particular product", but more often what
14 happens -- and you can see this from the customer responses -- is that it is
15 a process between the two, between the end-user and the speech therapist,
16 or the buyer for the NHS hub. The end-user says, "These are my needs", the
17 speech therapist is saying, "This is what available, but actually I think you
18 need a head mouse. I think you need these other access things", and it is
19 a collaborative decision-making process as to what product to buy.

20 It was wholly rational, in our submission, for the CMA to focus in those
21 circumstances on evidence from the customer, the institutional customer.

22 Just on that point, if I could refer you -- if you have our skeleton argument open, it is
23 probably the easiest way to look at this material, unless you want me to take
24 you directly to the customer responses. We have cited, just by way of
25 example, in paragraph 65 of our skeleton argument, page 26 in my printout,
26 but paragraph 65 of our skeleton argument, we have cited just three examples

1 from the customer responses, which we say make this abundantly clear --
2 what the process here is.

3 I hope you have the cross-referenced version of the skeleton. You will see that the
4 second quotation is one in fact that, I think, was discussed between
5 Mr Robertson and the chair yesterday on page 62 of bundle 6, over to
6 page 63.

7 Mr Robertson in his speaking note extracted the first part of that quotation:

8 "People often come into assessments with preconceived notions regarding what they
9 want the outcome of the assessment to be."

10 What he didn't draw your attention to, but I think the Chair drew his attention to, on
11 the top of page 63 of bundle 6:

12 "As a general rule of thumb though, most people are happy to be guided by the
13 team's expert opinion."

14 You will recall that. So, this is a question of rationality. We say it was wholly rational
15 for the CMA to have made that decision.

16 One final point I hope I can deal with, which will finish ground 2(a) before lunch, very
17 briefly.

18 This is Tobii's criticism of the CMA's decision not to give any weight to its end-user
19 survey.

20 Remember, Mr Robertson yesterday took you to the end-user survey.

21 Again, we say that this was a decision that was made by the CMA, carefully
22 considered by it, and wholly rational. It is explained in quite a lot of detail in
23 the final report. If I can take you to internal page numbering 116 of the final
24 report, paragraph 6.55(b). This is the CMA's assessment of a number of
25 Tobii's submissions, and it says at (b):

26 "We have discussed the second of Tobii's points (reliability of Tobii's survey of

1 end-users) in appendix C to this document. In our view, Tobii's survey
2 suffered from several significant methodological flaws. In particular, the
3 survey did not target the relevant population (it targeted individual purchasers
4 of AAC solutions in general, rather than purchasers of the dedicated AAC
5 solutions sold by the Parties."

6 That comes out very clearly from the survey itself. We don't even know that those
7 101 respondents to Tobii's survey -- we don't even know if they have bought
8 any products from the parties.

9 Second, it achieved an insufficient sample size; that was expressly recognised in
10 those extracts from the end-user survey that Mr Robertson read out to you
11 yesterday.

12 Then, the third point:

13 "It lacked transparency around the recruitment and composition of its online panel,
14 and screening ..."

15 I think they were paid £10 or given a £10 voucher to answer the online survey:

16 "... and consistency checks were not sufficiently rigorous for us to be confident that
17 respondents were actually purchasers of AAC solutions."

18 So, we didn't even know if they were purchasers of the parties' AAC solutions. More
19 than that, we couldn't even be confident they actually purchased AAC
20 solutions at all. So, "For these reasons, we cannot put any weight on this
21 evidence".

22 Now, as said in that sub-paragraph, these points are developed in a lot more detail in
23 appendix C. I am not going to read out the whole of appendix C, but I do
24 think -- if I may ask you just to turn to that. It is internal page numbering C3 to
25 C5, paragraphs 9 to 15 of appendix C.

26 Appendix C starting at paragraph 9, on page C3. You will see the heading:

1 "Survey of end-users."

2 "Tobii's submission", paragraph 9:

3 "Tobii commissioned a survey of end-users ... and used the results to discuss
4 demand-side substitution between dedicated and non-dedicated AAC
5 solutions."

6 Then, above paragraph 10, "Our assessment".

7 Paragraph 10:

8 "We consider that some major issues have not been addressed and the survey has
9 the following limitations. First, [we make the following point] ..."

10 I am not going to read it out. If I could ask to you read it in your own time.

11 Second goes to the relevance and size of the sample in paragraph 11. Third, in
12 paragraph 12, reservations about the credibility of the achieved sample.
13 Paragraph 13, fourth is about the questions that were asked. So, there are,
14 we say, perfectly rational reasons on the basis of which the CMA carefully
15 considered Tobii's end-user survey, came to a reasoned decision not to put
16 any weight on it.

17 Now, neither in paragraphs 58 to 64 of its skeleton, nor in Mr Robertson's oral
18 submissions yesterday, did Tobii make any argument, in my submission,
19 which goes to the rationality of the CMA's approach.

20 Tobii simply disagreed with the CMA's concern about the survey and emphasised
21 that the survey came to different conclusions from those that the CMA drew
22 from its customer questionnaire. But we say that is not enough to establish
23 that the CMA's decision in this regard was irrational.

24 Sir, that brings me to the end of ground 2(a).

25 THE CHAIRMAN: Yes, that is fine. What we will do is we will start again at 2.00.

26 We will have a break at about 3.15, and you will finish for the day about 4.30.

1 We will have a ten minute break then. Then Mr Eskilsson will show us two
2 devices, one is the Indi and the I-12+. I am not asking for any evidence. I just
3 want to see it and see how it works.

4 MS SMITH: Thank you, Sir.

5 **(1.04 pm)**

6 **(The short adjournment)**

7 **(2.00 pm)**

8 THE CHAIRMAN: Yes.

9 MS SMITH: Sir, members of the Tribunal, I had got to ground 2(b) of the list of
10 issues. Ground 2(b) relates to the alleged flaws in the questionnaire sent to
11 customers.

12 In that regard, Tobii makes two arguments. First of all, an overarching argument or
13 criticism that the CMA failed to follow its good practice guidance on customer
14 survey research and then, secondly, a more detailed argument, to the effect
15 that there were six design errors in the questionnaires which the CMA sent to
16 customers and interest groups. I will deal with each of those in turn.

17 First of all, the failure to follow the CMA's good practice guidance. If I could ask
18 you -- you were taken to that by Mr Robertson, if I can ask you to turn it up
19 again. It is in authorities bundle 1, tab 10.

20 THE CHAIRMAN: It does raise one question, which is: what is a survey?

21 MS SMITH: Yes. I hope I can answer that by taking you to the document. Or a
22 survey as defined in that document, or to which that document is to apply.

23 THE CHAIRMAN: Yes, okay.

24 MS SMITH: If I can ask you to turn to tab 10. It is the survey guidance. You were
25 taken, page 3, to paragraphs 1.1, 1.2, 1.3 and 1.4 by Mr Robertson. What
26 you weren't taken to is paragraph 1.5. That, we say, makes absolutely clear

1 what "survey", or what type of survey, this guidance is to apply to. You will
2 see there:

3 "Generally speaking, the aim of a statistical sample survey ..."

4 That, we say, is what this is about. It is about statistical sample surveys. It says
5 there:

6 "... the aim of a statistical sample survey is to interview a small proportion of people
7 from a large population of interest (eg a few hundred customers from the
8 many thousands who use a cinema chain) in such a way that robust
9 inferences can be made from their responses about the population as
10 a whole."

11 So, it is about how you ensure that surveying a sample is -- that sample is
12 statistically significant, but the way in which you have carried out that sample
13 survey means that you can draw conclusions or inferences from the
14 responses of the sample about the population as a whole. It says there:

15 "Research to inform our investigations may be, alternatively or in addition,
16 'qualitative' in nature, for example, in the form of focus groups or in-depth
17 interviews. Good practice for qualitative research methods is outside the
18 scope of this guidance."

19 We say what the CMA was engaged in, in the present case, with its questionnaires --
20 which you will see and I will take you to the questionnaires -- is a qualitative --
21 it is essentially a qualitative and a limited quantitative exercise. It was not
22 engaged in a statistical sample survey.

23 THE CHAIRMAN: Surely there are certain things, though, that may be logical
24 irrespective of whether you call it a technical survey --

25 MS SMITH: Absolutely. We do not, for example, say we can ask biased or
26 misleading questions. Of course we don't. There is a public law obligation on

1 us, as a public authority, to ensure that we engage in a fair inquiry. Public law
2 principles oblige us to ensure that we carry out a neutral, fair, non-biased
3 assessment of the evidence. We certainly don't resile from that.

4 That is why this argument is almost a straw man as to whether or not this survey
5 applies. Of course we don't suggest that we can ask biased or misleading
6 questions.

7 THE CHAIRMAN: What about leading questions? That is one of the points they are
8 making.

9 MS SMITH: I think, Sir, I am with on you that, which is that it may be that when you
10 are engaged in a qualitative exercise of gathering, assessing, applying your
11 judgment to evidence -- which is what the CMA has to do here -- and most
12 importantly, also, assessing what people might do in the future, what
13 customers might do in a hypothetical situation and a future situation. In order
14 to draw out what they might do, then to say you can't ask any question that
15 might be leading probably goes too far. But I think the most important point,
16 my Lord, is that you heard various assertions that leading questions were
17 asked. You weren't shown any questions that were said to be leading.

18 THE CHAIRMAN: Well, I am sure that will be remedied in the reply.

19 MS SMITH: It may be, my Lord. We will see what they come up with.

20 I think it was also extremely striking you weren't even taken to the questionnaire.
21 Criticisms were made of the questions asked -- and I will take to you the
22 questionnaire.

23 THE CHAIRMAN: I think it's fair --

24 MS SMITH: As a matter of principle, no, I wouldn't go as far as that. I would say
25 definitely we have a public law obligation not to ask misleading questions.

26 THE CHAIRMAN: Yes.

1 MS SMITH: But the point is that there are very specific requirements in this survey
2 guidance, and I want to take you as well, if I may, to paragraph 1.28 on
3 page -- sorry, there are very specific requirements in this survey guidance that
4 are necessary, we say, that provide guidance for carrying out a statistical
5 sample survey. For example, ensuring that you put the questions back to the
6 parties. We don't say that obligation applies in this case.

7 We say it is clear what type of survey is being talked about in this case when you
8 look at, for example, page 8, paragraph 1.28 of the guidance:

9 "The CMA commissions market research agencies to conduct most of its survey
10 work."

11 That is the sort of survey we are talking about here. Then it goes on to explain how
12 those surveys are to be conducted by the market research agency, and
13 specifically that, in paragraph 1.32, those agencies have to observe the MRS
14 code of conduct. This is about a specific type of statistical survey, and you
15 can see that if you turn over the page, on to page 10, where we see
16 requirements as to the design of the survey. Paragraph 2.1:

17 "Sound statistical research requires that the survey design adheres to certain
18 principles."

19 The principles are there set out, which make it clear what sort of survey we are
20 talking about.

21 THE CHAIRMAN: Yes, there is a lot of law on surveys, how they should be carried
22 out and all that. You are saying that your exercise wasn't a survey in that
23 sense.

24 MS SMITH: It wasn't a statistical sample survey, yes.

25 THE CHAIRMAN: Also, most of the surveys I have come across aren't statistical
26 surveys. Most of the ones that you see in practice are --

1 MS SMITH: Actually, I could take to you it, but I think this is made clear in the
2 transcript of the main hearing, when Mr Meek was asked a question about this
3 by Tobii. He said, "No, we didn't carry out a survey", as he understood it, as
4 the CMA define it. "We carried out ..." I can't remember exactly what he said,
5 but I could give you the reference. He exactly engaged with this point. When
6 the CMA talks about surveys, it talks about a specific beast, which is this,
7 the statistical sample survey.

8 THE CHAIRMAN: Exactly, yes.

9 MS SMITH: That is not what we were engaged in here.

10 THE CHAIRMAN: That is a fundamental gulf between both parties. Because if
11 yours is a survey within the meaning of this guidance, you haven't followed it.
12 But you say it is not within the guidance for the reasons you have given. You
13 say, if you look at the beginning of the guidance, it is not really talking about
14 the sort of exercise we are dealing with.

15 MS SMITH: Yes. The first point, in my submission you have to understand what the
16 guidance relates to. We say it relates to a statistical sample survey.

17 Then the next stage is it was put to Tobii by the during the Inquiry to the CMA. It
18 was put by Tobii that the CMA should have followed that guidance, and the
19 CMA said: no, this is not the exercise we are engaged in here.

20 If you look at the final report, this was addressed. Page 66 of the internal page
21 numbering, it starts at paragraph 5.26 of the final report. So, it is internal
22 page numbering 66. It starts at paragraph 5.26. It is again a response to
23 Tobii's submissions. It says, at paragraph 5.26:

24 "It is important to understand that there are material differences between a 'customer
25 survey', to which our good practice recommendations apply, and the type of
26 detailed customer engagement exercise that we have used in this case."

1 Then they go on to explain the three ways in which they say there are differences.
2 I am not going to read them all out, but this was clearly engaged with by the
3 CMA during the Inquiry.
4 They go on then at the end, in 5.30, to make the point:
5 "Nonetheless we designed our questionnaire carefully to limit the risk of any framing
6 bias ..."
7 This is the point I make: of course we will seek to obtain evidence and views in the
8 most neutral, fair and non-misleading way and that we had that well in mind
9 when we designed the questionnaire.
10 That will lead me to the more general argument that, actually, the questionnaire was
11 not worded improperly. I will come to that once I have dealt with this first
12 overarching point.
13 THE CHAIRMAN: The point I asked Mr Robertson yesterday: to what extent were
14 you following up with the purchasers after the questionnaire? So, you had the
15 questionnaires in, to what extent were you following up with them to drill down
16 as and when necessary, or to clarify things which weren't clear?
17 MS SMITH: I have asked about this. During the phase -- I will answer in this way, if
18 I can: I will give you the facts the and then I will carry on.
19 THE CHAIRMAN: Yes.
20 MS SMITH: Mr Meek addresses this issue in his witness statement. If I could ask
21 you to turn to that. It's in hearing bundle 2, tab 4.
22 He addresses it in paragraph -- this is the direct evidence. We can obviously -- I am
23 going to say some other points on instruction, and if I need to put them in the
24 form of evidence, I can do so.
25 To start with the evidence, Mr Meek's statement is at tab 4, internal page numbering
26 4, paragraph 18. He just gives an overview of the process, as we weren't

1 facing exactly this question at that stage:

2 "... and resellers ... The CMA issued questionnaires to 69 customers ... and to 17
3 interest groups to which we received 38 responses. 30 responses were from
4 customers and 8 were from interest groups. The CMA also obtained evidence
5 through telephone conversations and written requests with 23
6 competitors/suppliers and 7 resellers."

7 This is not exactly on the point you asked, Sir, and I will come to that, but it does give
8 you the evidence that there were telephone conversations as well, with
9 competitors and resellers.

10 THE CHAIRMAN: Yes.

11 MS SMITH: As regards the questionnaires from the customers and the follow-up to
12 that, those questionnaires were issued, you have been told -- the 30 -- to 69
13 customers and 17 interest groups, from which we had 38 responses. The
14 CMA -- now I am moving to instructions -- did make calls to three customers
15 as a follow-up; two NHS hubs and one school.

16 The calls or the information obtained from those calls is referred to in the final report,
17 5.70, which refers to two schools, and final report 6.41, and footnote 312.

18 THE CHAIRMAN: Yes, so it is in the report, anyway; yes?

19 MS SMITH: Yes. I don't think in the report it actually says, "We made follow up calls
20 to these schools". It says, "X school told us", but I can tell you that was on
21 a telephone call.

22 THE CHAIRMAN: That is all right. All I wanted to know was was there any follow up
23 and did they speak to the customers directly. I think that is the answer to the
24 question I wanted.

25 MS SMITH: The point I am going to come back to is that, when it comes to reliability
26 of the responses to the questionnaires, the customer responses, it was not

1 just a question of the CMA making follow up calls, the CMA carried out
2 various cross-checks on all the data that it obtained, a number of different
3 cross-checks and sensitivity analyses. I am going to take you to those when
4 I deal with the specific criticisms. For example, just to pre-figure what I am
5 going to say, the CMA cross-checked the data that it obtained from the
6 customers as to their purchases. It checked that data against the sales data,
7 the equivalent sales data, that it had obtained from the parties and the
8 suppliers.

9 So, it had the purchase data from the customers, it had the sales data from the
10 suppliers. It did a cross-check of that data, and came to the conclusion that
11 there were no systemic differences of concern.

12 Carried out a sensitivity analysis on the diversion ratios that it obtained from the
13 customer responses that showed that, even if the weighted diversion ratios,
14 even if -- let me get this right.

15 Even if the diversion ratios were half of what we had calculated, the GUPPIs -- and
16 I will come on to diversion ratios and GUPPIs, but the GUPPIs were still of
17 a magnitude that would cause concern. They were still within 5 to 10
18 per cent.

19 I will come to that.

20 So, there were a number of ways in which -- you know, we didn't just take this
21 material and go, "Oh yes, there we go".

22 Always you have all these various sources of evidence, and we are cross-checking it
23 and testing it.

24 THE CHAIRMAN: That is how you would expect a decision to be made.

25 MS SMITH: Of course. That is our job.

26 THE CHAIRMAN: You have ten separate pieces of evidence, and you look at them

1 and come back to them in the light of the other evidence coming in.

2 MS SMITH: Absolutely. That is our job. That is what we do. And we did.

3 THE CHAIRMAN: Some evidence, as I said earlier, is clearly black and white and
4 100 per cent clear, but most of it isn't, and it is a question of weighing it up.

5 MR RIDYARD: Sorry, can I just ask a specific on that?

6 MS SMITH: Yes.

7 MR RIDYARD: Tobii's submissions, in their supplemental skeleton, they referred to
8 some of the questionnaire responses, where they say that the respondents
9 found it hard to answer the diversion question; did you follow up those
10 responses to see whether the respondent needed more help in figuring out
11 what was meant by the questions and how they answered them?

12 MS SMITH: No, we didn't, but I don't think they found it difficult because of the way
13 in which the questions were expressed. They found it difficult because what
14 we were asking them to do is to forecast, or to imagine, what they might do in
15 a certain situation.

16 We said to them: if Tobii's products are no longer available what would you do?
17 What would you buy? And what proportion of your spend would you spend
18 where?

19 You will see when I take to you the questionnaires and some of the responses, the
20 answers we had were: I would spend 80 per cent of what I currently spend
21 with Tobii on Smartbox products. I would spend 10 per cent on Techcess
22 products.

23 So, yes, that is a difficult exercise to engage in, to ask people to imagine this
24 situation; what would you do?

25 Those are the comments we had back. When you look at the responses, what they
26 say is: that is a difficult thing to do.

1 They don't say: we don't understand your wording.

2 We recognise that, and you will see, when I come to the diversion ratios, that we
3 afford them weight, but we are careful to say we have only afforded them
4 some weight, alongside all the other evidence that we have. That is said
5 a number of times in the report.

6 We are here in the realms, the classic realms in all the cases, of having to exercise
7 judgment as to what is going to happen in the future. That is the expert
8 judgment that the CMA has to exercise in a case such as the present.

9 Can I just give you one reference, while we are on the good practice guide point?

10 If I could ask -- I took you to where the point was addressed about whether we
11 should have used the good practice customer survey guidance. I took you to
12 where that issue was addressed in the final report, at paragraph 5.26 through
13 to paragraph 5.30. We also put in evidence on that issue from Mr Meek. For
14 your note, it is at paragraph 118 to 123 of his witness statement, where he
15 explains the process and the reasoning of the CMA as regards its decision
16 that the good practice guide was not appropriate to be applied in this case.

17 Before I leave that point about the good practice survey guide, I think I do need to
18 just address the judgment in the AkzoNobel case. I hope I can do that briefly.

19 THE CHAIRMAN: You should do, yes.

20 MS SMITH: I would ask you to note that, in paragraph 49 of its skeleton argument,
21 Tobii asserted -- and I quote:

22 "This judgment makes it clear that the CMA is obliged to follow its own survey good
23 practice guidance when asking questions of third parties, whether in a main
24 questionnaire, in a follow up email, or any other form of communication."

25 That is what they said in their skeleton. I understood Mr Robertson to have stepped
26 back a little from that yesterday. The transcript of Day 1, page 24, line 26, he

1 said:

2 "It is not, in our submission, an absolute obligation to follow the guidance."

3 We agree with that.

4 If I can take you to AkzoNobel, which is in authorities bundle 2, tab 37. As you have
5 been here before I am not going to take you through the detail, but if I can just
6 take to you paragraph 150, which is on internal page number 27.

7 If I can just put this in context. AkzoNobel was not arguing in this case that the
8 Commission should have -- sorry, I will start again.

9 AkzoNobel, in this case, was making generalised arguments that the Commission
10 used leading questions in its customer survey. You can see that from
11 paragraph 146 onwards.

12 What is said in paragraph 150:

13 "Whilst it is clearly of the utmost importance that questions posed by the Commission
14 in merger investigations are neutral and do not presuppose any particular
15 answer, as per the OFT and Commission's guidance, we do consider that the
16 context in which this question was asked is highly relevant. We do not doubt
17 that the question could have been phrased better. In our view, however, it
18 was quite proper for the Commission to follow-up on this issue that arose in
19 the oral hearings before it."

20 So, all that the Tribunal is doing in that case is that you have to look at what was
21 done or what was asked, or what process was engaged in by the Commission
22 in -- or the CMA in context. Obviously, the CMA should ask questions that are
23 fair and neutral, as recognised by the guidance, but that is as far as
24 paragraph 150 goes. It doesn't go any further than that. It doesn't say there
25 is an obligation to follow the guidance in all types of question, regardless of
26 the type of questions asked or the type of questionnaire, which is what was

1 suggested in the skeleton argument.

2 I am not sure I can really take it much further than that.

3 THE CHAIRMAN: That is fine for now, thank you.

4 MS SMITH: That takes me to the second part of Tobii's criticism under ground 2(b),
5 which is the six design errors allegedly in the questionnaires.

6 Tobii identify six specific errors, which I will address, but it has done a lot more than
7 that since then. It makes generalised criticisms of the definition and language
8 used in the questionnaires. Some of which is rather difficult to tie down to
9 what was actually done in the questionnaires.

10 Now, as you have been told, I think yesterday, and as was in the Tobii's skeleton,
11 paragraph 73, during the Inquiry Tobii did acquire a copy of one of the
12 customer questionnaires from one of its own customers, an NHS hub. So, it
13 saw and looked at the questions in the course of the Inquiry, and it did raise
14 a number of its concerns about those questions with the CMA during the
15 Inquiry. Particularly the nature of the language used, the nature of the
16 questions asked.

17 If I can first of all take you to the CMA's consideration of this in the final report, which
18 is paragraph 6.56(a), page 117.

19 What this shows you, 6.56(a), the first response is on a point, a slightly differently
20 nuanced point about lack of consistent and definition. The CMA addresses
21 that, but they then go on to make the point that I made earlier. Towards the
22 bottom of sub-paragraph (a), they make the point:

23 "As a practical point, no customer raised this issue with us."

24 Which is about the difference between the definition of a supplier of a dedicated AAC
25 device and a definition in the Inquiry. But then they make the point that
26 I made earlier that:

1 "Finally, supposing that customers had misunderstood our definition of the product,
2 for example by excluding 'wrapped tablets' from the scope of dedicated AAC
3 solutions, we would expect to see a systematic bias between their reported
4 purchase volumes of 'dedicated AAC solutions' from Tobii and Smartbox, and
5 the Parties' sales volumes of products that fall under that definition (as
6 recorded in their sales data). We have checked this was not the case. That
7 is, customers did not systemically under-report purchases of dedicated AAC
8 solutions compared to the Parties' sales data. This gives us additional
9 confidence that customers understood our definition of the relevant products
10 and that their responses to our questions reflect that understanding."

11 All I want to say on the back of that is: when, in this instance, Tobii raised the point
12 that the definition in the questionnaires that you have used, of dedicated AAC
13 solutions, is unclear. The CMA looked at that and said: no, actually, we
14 disagree, but we have also checked against the data to see whether there is
15 any indication that customers misunderstood that definition. We have
16 checked the data and we are satisfied that there is no systematic
17 misunderstanding of the definition.

18 Then can I ask you to go to appendix C, paragraph 18, which addresses a slightly
19 different point, but another criticism that was made during the course of the
20 Inquiry of the questionnaires, by Tobii. This is the question of framing bias.
21 You will see, at the bottom of internal page numbering C5, paragraph 18 of
22 appendix C, it starts:

23 "As discussed in paragraph 5.30, we have designed our questionnaire with care to
24 limit the extent of any framing bias."

25 They are responding specifically here to the criticisms that were made of the
26 questionnaire in a report by Dr Jonathan Cave commissioned by Tobii. The

1 CMA explicitly addressed those criticisms made by Dr Cave:

2 "The design of the questionnaire reviewed by Dr Cave built upon our earlier
3 engagement with the NHS in phase 1 ..."

4 Sorry, here we go:

5 "... which included both written questionnaires and six calls to the NHS
6 organisations".

7 That was during phase 1. The three calls I referred to were during phase 2:

8 "The wording and terminology used in our phase 2 questionnaire reflected that
9 experience, and when we spoke again to NHS hubs in the course of this
10 inquiry there was no indication that respondents did not understand any of the
11 terms or the purpose of any of the questions. Respondents understood that
12 we were interested in exploring substitutability between dedicated AAC
13 solutions and solutions based on consumer tablets, and they commented on
14 this issue qualitatively before answering the diversion question."

15 So, there was a diversion question, but we preceded that deliberately by a number of
16 qualitative questions, to set the scene and to get the respondents thinking
17 about these issues:

18 "We used the word 'tablets' accompanied with examples (eg an 'iPad' or a 'Surface
19 Pro') to refer to non-dedicated AAC solutions as this was the terminology most
20 commonly used by respondents. It was clear from their written responses and
21 our verbal engagement with them that they understood that this referred to
22 non-dedicated AAC solutions incorporating such tablets with other peripherals
23 and specialised software. Our diversion question was framed by reference to
24 percentages of expenditure, so that it could accommodate all diversion
25 strategies (eg 'unbundling' a dedicated AAC solution to purchase various
26 components from different suppliers, including a consumer tablet)."

1 Then they go on to address -- but I will come back to this -- the specific point on why
2 we asked a forced diversion question rather than a pricey elasticity SSNIP
3 test-type question, but I will come back to the SSNIP test point.

4 (Pause)

5 So, what comes through from this, in my submission, is that the CMA very carefully
6 developed the questionnaires on the basis of contact with the customers that
7 had been engaged in phase 1, spoke to customers, used examples, designed
8 the questionnaire so as to avoid bias.

9 What I think I might do is to address the six specific points, the six design errors that
10 are asserted by Tobii, and then perhaps come back and address briefly the
11 further criticisms made in the supplemental skeleton, and in the speaking note
12 that were handed up yesterday.

13 I am not going to go through every paragraph in the speaking note, every paragraph
14 in the supplemental skeleton, unless there is anything in particular given the
15 time --

16 THE CHAIRMAN: Insofar as there has been any written stuff put in, you will have
17 the liberty to put something in writing in reply, if you feel you need to.

18 MS SMITH: Fine.

19 If I can then go to the six specific errors of certified Tobii. I can hopefully deal with
20 them relatively quickly.

21 First, Tobii argues:

22 "The CMA assumed a product market definition for dedicated AAC solutions and, in
23 particular, didn't ask customers about the broad range of alternative solutions
24 that they purchased for end-users that are based on consumer electronic
25 devices."

26 I am quoting there from the skeleton in paragraph 90.

1 In responding to this, I think it is important to start with setting the scene as to what
2 the CMA's approach to market definition was in this case, and what the
3 purpose of market definition was in this case. I am going to come back to it
4 a bit in ground 3, but just to set the scene a little here.

5 If I could ask you to look at paragraph 4 of appendix C of the final report.

6 Paragraph 4 makes the point -- which I think is pretty obvious:

7 "We are defining a product market for the purpose of assessing a horizontal
8 unilateral effects theory of harm (as well as some vertical theories of harm)
9 ..."

10 That is the purpose of defining the product market in this case.

11 "... so our assessment framework for market definition should be understood in this
12 light. The purpose of the assessment is essentially to identify the set of
13 products that are likely to be considered by a significant number of the Parties'
14 customers as their 'next best option'. It is the availability of these products
15 that reduces the proportion of the Parties' customers who regard the other
16 Party's products as their closest alternative, which is considered as a key
17 determinant of horizontal effects."

18 Basically, if the parties' customers regard the other parties' products as their closest
19 alternative, that is going to tell you what the competitive constraints are going
20 to be after the merger. Similarly, in paragraph 6:

21 "... the purpose of the exercise is to elicit information on customer's relative
22 preferences between dedicated and non-dedicated AAC solutions. The
23 question is not whether the Parties' customers could or could not use a
24 non-dedicated AAC solution [whether they physically are a viable alternative],
25 but whether a significant share of these customers consider non-dedicated
26 AAC solutions as their closest alternative to the dedicated AAC solution they

1 are using pre-Merger. The focus of the analysis should be on customers'
2 relative preferences between products, rather than their general ability to use
3 different solutions."

4 So, in other words, because we are assessing the horizontal effects of the merger,
5 we need to identify what products the parties currently -- or solutions the
6 parties currently supply, and to see what their customers consider to be the
7 next best option. There was no pre-judging carried out by the CMA as to what
8 the answer to that might be.

9 If you go and look at the questionnaires, that is absolutely clear.

10 If I can take you to the questionnaires -- I asked, or my instructing solicitor asked,
11 that you bring a copy of the defence bundle, or that a copy of your defence
12 bundles is available simply because I want to take you to the questionnaires
13 as exhibited to Mr Meek's statement. Mainly because they are most
14 conveniently set out there behind different tabs, and you can see the different
15 questionnaires carefully set out.

16 MR ROBERTSON: Sir, I am just making the point: we didn't receive the message
17 about bringing defence bundles.

18 THE CHAIRMAN: Yes, I had the message.

19 MS SMITH: The problem with the trial bundles is they don't include the phase 1
20 questionnaires either. They are incomplete, as well as slightly unclear.

21 THE CHAIRMAN: Never mind. Mr Robertson, has one now.

22 MS SMITH: That is great. Thank you very much.

23 So, these are the customer questionnaires exhibited to Mr Meek's statement. He
24 describes them at paragraph 74 of his witness statement.

25 If you turn to tab 6, that is the questionnaire that was sent out to customers in phase
26 1, described by Mr Meek at paragraph 74(a) of his witness statement.

1 The defined terms are set out under the heading "Definitions".

2 Then, there are a number of questions set out on page 3, questions 8, 9, 10 and 11,

3 all of which ask about the alternatives to the products. First the hardware

4 products, then the software applications provided by the parties.

5 You will see these are qualitative questions, they don't pre judge any answer. They

6 ask the customer (a):

7 "To what extent is a standard consumer tablet (eg iPad or Surface Pro) a viable

8 alternative to a hardware product? If this varies by the needs of the final user,

9 please explain."

10 So, they are asking whether these are viable alternatives. There is no pre-judging as

11 to what the boundaries of the relevant market are:

12 "To what extent [question 9] is a software application for a consumer tablet a viable

13 alternative to the software products provided by Smartbox or Tobii?"

14 Then more qualitative questions at 10:

15 "How often do individual users switch software products?

16 "Would your answer change for hardware products?

17 "What factors usually trigger the decision to switch software and/or hardware

18 products?"

19 Open questions to try to get a feel from the customers.

20 Then, 11:

21 "Among all suppliers you are aware of, please list the best alternative suppliers (one

22 or more, best first) to each of Tobii and Smartbox for each product category."

23 There is no suggestion as to what those alternative suppliers -- who those alternative

24 suppliers might be.

25 That is the phase 1 questionnaire. For your information, the tab 7 questionnaire is

26 also a phase 1 questionnaire, exactly the same as tab 6. Except because it

1 was sent to NHS hubs who we had previously spoken to by phone, there is no
2 question asking them to provide their contact details because we already had
3 them.

4 Apart from that, it is exactly the same.

5 Tab 8, we now start looking at the phase 2 questionnaires.

6 THE CHAIRMAN: As regards phase 1 and phase 2 questionnaires --

7 MS SMITH: Yes.

8 THE CHAIRMAN: -- to what extent were the same people answering the
9 questionnaires?

10 MS SMITH: They were the same people, and you will see -- answering -- some of
11 the same people. I will go through the phase 2 questionnaires.

12 There is a different questionnaire for those NHS hubs that had previously been
13 contacted during phase 1, as to those who had not previously been contacted.

14 The CMA did use -- as it is entitled to do under the relevant legislation and
15 guidance -- the evidence obtained in phase 1 to inform its phase 2
16 assessment.

17 So, the questionnaire at tab 8 is a questionnaire sent to NHS hubs that were existing
18 customers of Tobii or Smartbox.

19 It is referred to in Meek, paragraph 74(b)(i). If I can ask you to look at questions 7
20 and 8, building on the questions that have been previously asked that were
21 more open questions about diversion to non-AAC solutions, in 7 and 8 we are
22 getting a little more specific. We are asking them here -- these are what Tobii
23 described as the diversion questions:

24 "Suppose that Tobii dedicated AAC products were no longer available in the market,
25 which products would you use instead? Please use the table below.

26 "Estimated proportion of AAC products previously bought from Tobii that you would

1 buy from that alternative supplier."

2 As I said, we are asking them to engage in quite a complicated exercise. Imagine
3 that Tobii had basically been eliminate from the market and their products
4 weren't available, where would you go to buy your products?

5 We do set out some names there, and we also leave it open for them to add other
6 suppliers of dedicated AAC solutions, but also suppliers of other alternatives.
7 So, within the definition of dedicated AAC solutions or would you go and look
8 at non-dedicated AAC solutions?

9 So, all open questions seeking to understand how the customers would act.

10 Tab 9 is the phase 2 questionnaire for NHS hubs not previously contacted from the
11 CMA. They ask them a version of the questions that were asked in phase 2.
12 If you look at question 3, this question already hasn't been asked to these
13 people:

14 "To what extent is a standard consumer tablet a viable alternative to a dedicated
15 AAC solution?"

16 We are asking them those questions. They are also asked the diversion questions,
17 which appear in 12 and 13.

18 MR RIDYARD: Ms Smith, could I take you back to tab 8?

19 MS SMITH: Yes.

20 MR RIDYARD: Just a question on that. These questions, 7 and 8, we have looked
21 at these already. One question I had which relates to your comment earlier
22 about unbundling, if someone would react to the non-availability of Tobii by
23 unbundling and buying a tablet and then bits of software, and some other bits
24 and pieces to plug into the device, can you tell me how you would expect
25 them to fill in this response?

26 MS SMITH: We would expect them, in that situation, to use the further explanations

1 or qualifications box under the table.

2 If it was: well, if we no longer could buy the Smartbox Grid Pad 8, we would go out
3 and buy all the separate components and put them together ourselves.

4 I think in one or two instances we would expect them to explain that in the box
5 underneath.

6 MR RIDYARD: It is the term "product" that is a bit confusing. What you would be
7 doing there is you would be substituting one product, the indicated product,
8 for maybe three separate products you would then plug together.

9 MS SMITH: Yes, I think you will see, if you look at the responses, that box below
10 was used quite extensively by the customers to respond -- to provide those
11 explanations of what they might do in these situations.

12 MR RIDYARD: Right, okay. Thank you.

13 MS SMITH: I think behind tab 10 is the questionnaire for non-hub NHS customers,
14 and they are asked the questions at 5 and 6, the qualitative questions about
15 standard consumer tablets being a viable alternative. They are not asked --
16 because they are not the non-NHS hubs -- they are not asked the forced
17 diversion questions.

18 It is the case that the NHS hubs only were asked the forced diversion questions.

19 Nor is that question asked in the questionnaire for non-NHS customers, at tab 11.

20 Although they are asked the same questions, 5 and 6, about dedicated AAC
21 solutions versus other solutions.

22 Then, at tab 12, you have the email that was mentioned to interest groups. This is
23 the standard form email at tab 12, where they were asked six questions. Six
24 open questions, in our submission. Including question 3:

25 "Please list the main suppliers of AAC solutions in the UK market that you are aware
26 of, and comment on their strengths and weaknesses."

1 Question 4:

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

5 So, I make a number of submissions on that. These questionnaires, in my
6 submission, clearly show that Tobii's assertion in its skeleton argument, that
7 the CMA failed to ask questions to customers about the broad range of
8 alternative solutions based on consumer electronics devices, is clearly wrong.
9 We did.

10 The second point I would make is that we did ask a number of questions on the
11 differentiation between dedicated and non-dedicated solutions, both in
12 an open, qualitative way. Then, after that, seeking to structure a more
13 structured quantitative set of diversion questions.

14 We did not assume a product market and then simply tell the customers what that
15 product market was. We asked a number of open questions about
16 alternatives to the products supplied by the parties.

17 The second specific criticism made by Tobii is that we didn't apply the SSNIP test in
18 our questionnaires. I will, if I may, deal with the SSNIP test under ground 3,
19 so I will come back to that. Also, I will come back to the assertion that we
20 should have applied the SSNIP test on a product by product basis.

21 The third criticism made by Tobii is that the questionnaire failed to determine that
22 those completing it had the requisite knowledge. We address that in
23 paragraph 90 of our defence. I am not sure I need to repeat that.

24 We say the argument lacks reality. The questionnaire asked respondents to state
25 their position within the organisation and warned them it was an offence to
26 provide false or misleading information, whether knowingly or recklessly.

1 There was nothing in the responses to suggest they didn't have the requisite
2 knowledge to fill in the response.

3 The fourth criticism is that the questionnaire didn't establish the purchasing process
4 of customers. Again, we address that at defence paragraph 91.

5 The CMA investigated the purchasing processes at phase 1 and phase 2, both
6 through questionnaires and in bilateral calls with customers. There is
7 a cross-reference there to Meek 1, Mr Meek's witness statement,
8 paragraph 98.

9 MR RIDYARD: May I ask a related question on that, similar to my previous
10 question?

11 For customers who bought, you know, a number of different AAC devices, say over
12 the last year or whatever period is relevant, when they came to the diversion
13 question, do you understand that they would have sort of portioned out their
14 answer across that year's purchases?

15 So, if they bought ten different AAC solutions, they would think about those ten
16 solutions and which alternative they would have gone to for each one of them
17 and summarised the total, or how do you think they would have dealt with
18 that?

19 MS SMITH: How the responses came back is estimated percentages. That was
20 combined with a previous question on their units, the numbers they had
21 bought over the previous three years and the value.

22 So, if, for example -- I have just opened this page completely at random -- you look
23 in bundle 6, tab 1, page 116, we have here, on page 116, the units bought.
24 You can see the very low number of units and the value for each of the three
25 years.

26 Then, over the page, on 118, they have done what you suggest they might do. The

1 estimated proportion of AAC products previously bought from Tobii, you would
2 buy from an alternative supplier, and you see they have estimated 65 per cent
3 Smartbox; 15 per cent Liberator; 10 per cent Techcess and, in fact, 10
4 per cent Microsoft.

5 MR RIDYARD: So, you think they have estimated the totals from page 116,
6 aggregated them into the answer on 118?

7 MS SMITH: I do not want to suggest what they did.

8 MR RIDYARD: Isn't it quite important to understand what they did?

9 MS SMITH: I am sorry, I do not want to suggest what was going through their mind
10 because I don't know what was going through their mind.

11 What they did, I mean we had asked them to focus on their previous purchases, and
12 so they were aware of those purchases when they then went to answer the
13 diversion question.

14 So, I don't want to make assumptions, but one would assume that they had that in
15 mind when answering the diversion question, yes.

16 MR RIDYARD: So, not the last one that they bought, but the -- I mean, I understand
17 you can't know exactly what was going through their minds, but the best
18 guess would be they would answer for the generality of the products that they
19 had bought?

20 MS SMITH: Yes. So, we have asked them to focus on previous purchases and
21 then, in a slightly obviously more -- then to focus on what the future might hold
22 if one of those suppliers had disappeared.

23 Going back to where we were in the criticisms made by Tobii, the six criticisms under
24 ground 2(b), the fifth criticism is that the framing of the questions was unclear.
25 I have already addressed that by reference to the final report and to
26 Mr Meek's statement.

1 At this stage, it might be appropriate to address Tobii's criticisms in the supplemental
2 skeleton. We did put in a very detailed supplemental skeleton in response,
3 and I would ask you to look at that.

4 We do not accept Tobii's case, that the responses now disclosed in this case confirm
5 ground 2 to the effect:

6 "The customer questionnaires were poorly drafted, misleading, leading and/or
7 biased, so couldn't provide information for the SLC analysis."

8 I would make the following general points: the questionnaires, as you have seen, ask
9 a number of open questions, and so the respondent's answers to those
10 questions are not susceptible, we say, to the quantitative analysis that Tobii
11 has attempted in annex 1 to its supplemental skeleton.

12 You will recall that in annex 1 it sought to say, well, 21 per cent of the answers
13 displayed confusion and 73 per cent displayed something else. It is entirely
14 unclear how those percentages in annex 1 were calculated. Presumably
15 based on Tobii's subjective interpretation of what is in the responses. We
16 submit the Tribunal shouldn't and can't rely on any interpretation of those
17 questionnaires as set out in annex 1.

18 As regards specific assertions made by Tobii about particular responses, for
19 example they say up front, in their supplemental skeleton: well, certain
20 answers displayed confusion on the part of the respondents.

21 We say that is not borne out when you actually look at the responses in context and
22 in full. Each point to that regard is addressed in our supplemental skeleton,
23 but that is the general argument. Tobii had cherry picked not just from certain
24 responses, but had cherry picked certain phrases from certain responses.

25 If you look at the responses as a whole, and you look at them in context, they don't
26 show confusion, to the extent that you cannot put any weight on the

1 responses.

2 Those criticisms don't establish the customer evidence received by the CMA was
3 inherently unreliable so that no reasonable authority could have relied on it,
4 and that is what they have to establish.

5 As to the speaking note handed up by Mr Robertson, we will consider whether we
6 want to address it in written submissions, but we say simply that doesn't take
7 his case any further either. Tobii simply seeks to draw different conclusions
8 from the evidence provided in the customer response, or the points it makes
9 are uncontroversial and were considered by the CMA in any event.

10 So, for example, in their paragraph 6, they say the views of end-users were
11 "important in deciding what products to buy."

12 Absolutely. We don't demur from that.

13 So, the final of the six points made by Tobii is that the ordering of the diversion
14 questions in particular was leading. That was already addressed by the CMA
15 during the Inquiry.

16 If I can ask you to go to the final report, paragraphs 5.30 and 5.31. We have already
17 been to 5.30, but now you have seen the questionnaires, hopefully this will
18 also make a little more sense:

19 "We designed our questionnaire carefully to limit the risk of any framing bias. Our
20 diversion question [you have seen] was preceded by a number of more
21 general questions on how NHS experts make purchasing decisions and the
22 type of solutions they use, which were framed neutrally.

23 "The questionnaire also included some questions on mainstream devices, except for
24 NHS hubs who had already answered similar questions in our phase 1
25 questionnaire. We verified that there was no material difference between the
26 diversion responses of these two groups of hubs, and this corroborates our

1 view that the respondents were not particularly sensitive to the questionnaire
2 structure. We also structured the diversion question in terms of expenditure
3 to accommodate all possible diversion strategies (including the 'unbundling' of
4 purchasing)."

5 That is the point we just discussed:

6 "Moreover, the table included in the questionnaire to collect responses explicitly
7 included an entry for 'suppliers of other alternatives (tablets)' to encourage
8 respondents to keep such alternatives in mind at the point of answering this
9 question."

10 At 5.31:

11 "We acknowledge that the table that was used to collect responses ordered the
12 options in a non-random way."

13 We don't accept, as is suggested in Tobii's skeleton, that the question was leading or
14 misleading, or suffered from some sort of ordering bias.

15 We do accept that the table did set out options in a non-random way. When you
16 asked about alternatives to Tobii, it started with Smartbox and then it listed
17 Liberator and then Techcess, and gave them the opportunity to add other
18 suppliers. But, we say, and as we say, dedicated AAC solutions appeared
19 first and within that category the parties appeared first. We accept that:

20 "We recognise that in general the ordering of options in a diversion question may
21 have some impact on responses. However, the customers who responded to
22 our questionnaires are sophisticated purchasers with good knowledge of their
23 options and, as such, we would expect any bias to be small and not to impact
24 our conclusions materially.

25 "For these reasons, we consider that it is appropriate to put some [and I underline
26 some] weight on these diversion results, albeit this evidence has also been

1 assessed alongside several other evidence sources."

2 That is the point I make. We put some weight on the diversion evidence, the
3 diversion ratio evidence. But the most important thing that we took from those
4 diversion ratios is that it was consistent with a whole load of other evidence
5 that pointed in the same direction.

6 MR RIDYARD: Somewhere in those paragraphs is there a little bit of an admission
7 that you could have done it more neutrally, and it might have had a bit of
8 effect or are you saying --

9 MS SMITH: No, I don't think so, no. What we were dealing with here was a ...

10 No, I don't think so. We say, yes, the table did set out specific names of specific
11 alternative suppliers.

12 MR RIDYARD: I know what you say, but you also say that sometimes the ordering
13 can matter, and here the ordering was non-random.

14 MS SMITH: Sometimes.

15 MR RIDYARD: You might infer from that maybe there was a little --

16 MS SMITH: Sometimes the ordering can matter, and it matters specifically when
17 you are dealing with respondents who are not these expert buyers or
18 experienced buyers.

19 MR RIDYARD: You don't think the ordering matters at all when they are professional
20 buyers?

21 MS SMITH: No, we say any bias would be small and not impact on our conclusions
22 materially.

23 And, yes, we accept that, and that is why we then say in the following paragraph it is
24 appropriate to put some weight on these diversion results.

25 We don't say, and then go on to say the evidence has been assessed alongside
26 several other evidence sources.

1 What is important is the diversion ratios were consistent with the other sources,
2 which were clear. So, we concluded that, standing back from this evidence,
3 taking into account the criticisms that have been made, exercising our
4 judgment on what that meant, we stepped back and we came to the
5 conclusion to give those diversion ratios some weight.

6 That is why I started right at the beginning with all the evidence that was available.
7 Evidence was available not just from customers, but from suppliers,
8 competitors, the parties themselves, their internal documents.

9 As regards the evidence from customers, we had questionnaires from 30 customers,
10 qualitative evidence.

11 Then we went down to the diversion ratios, and we calculated diversion ratios
12 weighted on the basis of 12 NHS hubs' data and -- sorry, unweighted on the
13 basis of 12 NHS hubs, weighted on the basis of ten.

14 So, we had that smaller piece of evidence, the diversion ratios. All of that, like
15 Russian dolls inside each other, pointed in the same direction. We stood
16 back and we looked at it all, and we say we came to a rational conclusion that
17 the evidence, as a whole, supported our conclusions on market definition and
18 the SLC.

19 Our conclusion to put some weight on the diversion ratios -- and I will come to that
20 specific criticism now -- we also say was rational, and that is ground 2(c),
21 which I will deal with for ten minutes.

22 You have to look at ground 2(c) in that context. Here we are dealing with one very
23 small part of the evidence base, the diversion ratios. Very small part. The
24 very smallest little Russian doll in the middle. But we say our approach to that
25 evidence was also rational.

26 Tobii says that we acted unreasonably in collecting evidence on diversion ratios from

1 a narrow subset of customers. As I have said, the diversion ratios were
2 calculated on the basis of these responses to questionnaires. Unweighted
3 diversion ratios on responses from 12 NHS hubs, weighted diversion ratios on
4 responses we only felt that the data was good enough from ten NHS hubs.
5 That estimates diversion, those are the alternatives to which the customers
6 would switch, and those diversion ratios went to both the market definition
7 issue and the SLC.

8 The diversion ratios were consistent with the rest of the evidence, as they showed
9 there was a low level of diversion from dedicated AAC solutions to
10 non-dedicated, so that was relevant for the market definition, and that they
11 showed there was a high level of diversion between Tobii's and Smartbox's
12 products; that goes to the SLC arising from horizontal effects.

13 I want to make, if I may, four points in support of our positive case that the CMA took
14 a rational approach to the evidence from diversion ratios.

15 First, the weighted diversion ratios, as I have said, were calculated on the basis of
16 data from ten NHS hubs. We say this accounted for a material percentage.
17 No more than a material percentage, but it was a material percentage of the
18 parties' sales.

19 Now, that percentage is set out in paragraph 69(a) of our skeleton, and it is
20 confidential, so I am not going to read it out. But it is in paragraph 69(a). You
21 will see the marking, confidentiality marking.

22 If you have seen the percentage there, it is material. I say no more than that, but it is
23 material because we are here in the realms of rationality.

24 The second point we make is that, as well as the NHS hubs, the CMA obtained
25 evidence from other institutional customers, like schools, charities, interest
26 groups. Schools and charities. Sorry, the institutional customers.

1 That evidence didn't reveal any systemic differences in their choices of dedicated
2 AAC solutions. That point is explained in the final report, at
3 paragraph 6.56(b).

4 Do you see 6.56(b)? It is on internal page numbering 118:

5 "With respect to Tobii's second point ('sample size' of 12 customers) [on the
6 diversion ratios; that's 12 for the unweighted, ten for the weighted], our
7 approach to data gathering is explained in paragraph 5.14. In 2018,
8 Smartbox had X customers of dedicated AAC solutions in the UK, and Tobii
9 had X customers of dedicated AAC solutions in the UK. However, 6 large
10 customers (the NHS hubs) account for [50 to 60%] of the Parties' sales of
11 dedicated AAC solutions. On that basis, it was possible to estimate the
12 diversion ratios based on direct engagement with these large customers
13 instead of resorting to a process of statistical sampling and inference. The
14 NHS hubs who responded to our questionnaire account for a large proportion
15 ..."

16 It is there redacted, but it's the percentage I took you to in the skeleton:

17 "... of the Parties' sales ... and therefore their preferences are likely to shape the
18 Parties' incentives to raise price post-Merger."

19 This is the second point I have just made:

20 "In addition, the more qualitative submissions from NHS hubs and smaller customers
21 (schools, charities, local authorities, et cetera) suggest that there are no
22 systematic differences in the way these different groups of customers choose
23 AAC products. For this reason, we consider that the diversion ratios we have
24 estimated for NHS hubs [who gave quantitative information] are likely to
25 broadly reflect the preferences for the Parties' broader customer base."

26 That is the second point. We say it was rational to afford the diversion ratios some

1 weight.

2 Third -- and I have mentioned this as well -- the CMA carried out a sensitivity
3 analysis of the diversion ratios, and the GUPPIs calculated on the basis of
4 those ratios.

5 GUPPIs, for the uninitiated, are gross upward pricing index figures. They seek to
6 reflect the incentive on parties to increase their prices by showing by how
7 much it would be profitable for the parties to increase their prices after the
8 merger.

9 So, if we have a 5 to 10 per cent GUPPI, gross upward pricing pressure index, that
10 would be the level at which it would be profitable for parties to increase their
11 prices, so they are likely to push them up to an increase of that level.

12 We carried out a sensitivity analysis on the diversion ratios and GUPPIs, which is
13 explained at paragraph 6.55(c), while we are there, the next paragraph.
14 Sorry, no, previous paragraph, 6.55(c), on page 116.

15 On the GUPPIs -- I am going to get the try and get the figures right here -- the CMA's
16 finding was that on the basis of the diversion ratios it calculated, there was
17 a gross upward pricing pressure index of around 10 to 20 per cent for both
18 parties. That you will find in paragraph 6.61(i).

19 We carried out a sensitivity analysis on that, which is explained at 6.55(c), and
20 explains:

21 "Even if the diversion ratios were half the level we have estimated, the GUPPIs
22 would still be approximately [5 to 10%], a level at which the CMA typically
23 finds competition concerns."

24 So, even if we halved the diversion ratios, there would still be an incentive to raise
25 prices 5 to 10 per cent.

26 MR RIDYARD: May I just ask -- I don't want to get into detail on GUPPIs, believe

1 me.

2 MS SMITH: Nor do I.

3 MR RIDYARD: Mischievous thought.

4 But what weight -- I mean, a GUPPI is a very mechanistic, simplistic kind of
5 calculation, isn't it? So, I mean, are you presenting these as predicted effects
6 of the merger, these GUPPIs? Or can you say something about what status
7 you give to them?

8 MS SMITH: They are part of the overall evidential base that we considered, that led
9 to our conclusion of their being horizontal effects, there being a substantial
10 lessening of competition. They are part of that evidential base.

11 It is made quite clear that we simply gave them some weight, along with all the other
12 evidence, which is set out at paragraph 6.61, that I took you to almost the very
13 beginning of my submissions.

14 6.61, starting on page 120, this is the findings on horizontal unilateral effects we set
15 out under sub-paragraphs (a) through to (k). The evidence we rely upon in
16 order to come to the conclusion of horizontal effects. Part of that, at (i), are
17 GUPPIs. We simply draw from the GUPPIs the conclusion that the parties
18 face a significant incentive to raise prices post-merger.

19 MR RIDYARD: Which paragraph was that?

20 MS SMITH: Paragraph 6.61(i):

21 "Even if diversion ratios were half the level we have estimated, the Parties would
22 face high GUPPIs and, therefore, would have strong incentives to raise prices
23 post-Merger."

24 MR RIDYARD: It was that "therefore" I have underlined in my copy. Maybe it is just
25 a bit of wording, but that seemed to imply a more slavish adherence to
26 GUPPIs than maybe they might --

1 MS SMITH: I think you need, as you are told to do, with respect, in all the cases, in
2 all the court Tribunal judgments, you need to look at the document and the
3 decision document as a whole.

4 We have that sentence appearing in a paragraph which sets out a whole range of
5 evidence, which we say leads to the same conclusion: the parties are close
6 competitors, the removal of one of those two parties means there will be
7 an incentives on the merged entity, strong incentive on the merged entities to
8 otherwise reduce competition post-merger.

9 This is one of the sources of that. The evidence that is consistent with that finding.

10 That, in fact, brings me to, quite neatly, the end of ground 2.

11 THE CHAIRMAN: Okay. We will hear ground 3 at 3.25.

12 MS SMITH: Yes. Sorry, there is one point that Mr Ridyard asked about that it might
13 be best just to do very briefly.

14 THE CHAIRMAN: We will do it now.

15 MS SMITH: Yes, this was about the ordering bias question, the non-random nature
16 of the diversion question. If I could just ask you, Sirs, to turn to -- it's a point
17 I should have made at the time. If you turn to our defence, paragraph 93, this
18 is the first point which I made, that the questionnaire was addressed to expert
19 buyers, who is have a good knowledge of the options available to them.

20 But then there is a slightly more technical point, but also I think an important one.

21 Paragraph 93 of our skeleton argument:

22 "Moreover, it specifically asked respondents to provide diversion estimates for all
23 options presented in a list, which is likely to have mitigated any ordering effect
24 (ordering effects typically arise in circumstances where respondents are
25 asked to select only one out of several options out of a list). In those
26 circumstances, having taken care to design the questionnaire in a way that

1 limited the risk of bias, the CMA was reasonably entitled to conclude that the
2 risk was a small one."

3 Absolutely, Sir, I should have made this point: ordering bias is particularly an issue
4 where you say, "Choose one of the following options", and then you set out
5 a number of named options, and respondents, there may be a risk they will
6 just go for the first option.

7 That is not what we were asking here. We were asking them to say: look at all of
8 these possible options, including options that we haven't identified, where
9 would your purchases go if Tobii was no longer selling these products? Or in
10 existence. Or Smartbox.

11 Just for your note, the same point is made in paragraph 29 of our supplemental
12 skeleton argument.

13 THE CHAIRMAN: Okay, thank you. We will rise.

14 **(3.20 pm)**

15 **(A short break)**

16 THE CHAIRMAN: It was getting a bit warm earlier.

17 MS SMITH: Before we go on to ground 3, could I raise a point of timetabling.

18 I personally would have problems staying far beyond 4.30 this afternoon.

19 I discussed with Mr Robertson whether it might be possible -- obviously we
20 are in the hands of the Tribunal -- to have our little demonstration of the
21 products, say, at 10 o'clock tomorrow morning.

22 THE CHAIRMAN: Yes, that is fine. Yes, no problem.

23 MS SMITH: Thank you. I think that is okay with the other side as well.

24 THE CHAIRMAN: Yes. I just want just to see how those two particular products
25 work.

26 MS SMITH: No problem with that at all. It is just when we do it. So, we will kick on

1 off -- what I didn't ask was if that is okay with the shorthand writers and the
2 other staff in the court.

3 So, ground 3, under ground 3 Tobii argues the CMA erred in defining the relevant
4 market for dedicated AAC solutions, and they identify 8 errors.

5 Some of these have appeared before, so I am not going to revisit them.

6 It is important, I think, to start a little bit by stepping back and saying: well, we are
7 here in a merger inquiry, what is the role of market definition in a merger
8 inquiry?

9 We are not in a case, for example, of Article 102, or an abuse of dominance case,
10 where you need to define -- you are required to define a relevant market and
11 then to find dominance in that particular market.

12 We are in a merger inquiry and, in our submission, in that context, the merger control
13 context, the guidance is clear that market definition is not an end in itself, but
14 it is a tool, a useful tool, which frames the competitive assessment. That is
15 what is likely -- is there likely to be a substantial lessening of competition in
16 a market, or markets, after the merger?

17 This is addressed in the final report, paragraphs 5.2 and 5.3.

18 What is the role of a market definition in the merger control context?

19 But also, importantly, in paragraph 5.2 and 5.3 of the final report, page 58. The point
20 there, made in 5.2, is that in practice -- sorry, the very first point is 5.1.

21 These submissions, these points, are made by reference. You will see, in footnotes
22 151 and 152, what is said in the merger assessment guidelines in
23 paragraph 5.2.1 and 5.2.2. It reflects what is said in those guidelines:

24 "Market definition provides a framework for assessing the competitive effects of a
25 merger. It is a useful analytical tool, but not an end in itself, and identifying
26 the relevant market involves an element of judgment.

1 "In practice, the analysis of market definition and competitive effects will overlap, with
2 many of the factors affecting market definition being relevant [in effect to both
3 questions]. Therefore, market definition and the assessment of competitive
4 effect should not be viewed as two distinct analyses. The question for market
5 definition is not whether a particular alternative does or does not exert a
6 competitive constraint on the parties' products, but about the strength of this
7 constraint relative to that exercised by other products. The CMA's aim when
8 identifying the relevant market is to include the most significant constraints on
9 the behaviour of the merger firms ... as these will be the immediate
10 determinants of the effect of the merger.

11 "However [this is important], the CMA recognises that the boundaries of the market
12 may be blurred, particularly when products are differentiated ..."

13 This is what we have in this case. In merger control, market definition is just a tool
14 for assessing competitive constraints.

15 But we have an added element in this present case, which is that we are dealing with
16 differentiated products; that is we are not dealing with sales of widgets, where
17 there are a number of different producers, suppliers, all supplying exactly the
18 same thing. We are dealing with a number of suppliers supplying
19 differentiated products.

20 In such a case particularly, the boundaries of the market may be blurred because the
21 products are not exactly the same.

22 As such:

23 "The CMA recognises the boundaries of the market may be blurred, particularly
24 when products are differentiated, and, as such, it [the CMA] takes into
25 account in its assessment the strength of the constraints between products in
26 the relevant market and from products outside the relevant market."

1 So, the boundaries are blurred of this market -- start from the beginning. The role of
2 market definition is simply to provide a framework. In a differentiated market,
3 the boundaries may be blurred.

4 What we are concerned with in this merger is assessing the strength of competitive
5 constraints on the products that are the subject of the merger, supplied by the
6 parties, the subject of the merger. Competitive constraints may be exercised
7 on those products from within the relevant market, but also -- less strong --
8 but also constraints from outside the market. So, the questions of relevant
9 market definition and substantial lessening of competition and competitive
10 constraints after the merger are necessarily intertwined. So, it is in that
11 context that, in my submission, we need to consider how the CMA
12 approached market definition in this case.

13 As I said, that reflects what is set out in paragraphs 5.2 and 5.3 of the decision.

14 What is in the merger assessment guidelines at paragraphs 5.21 and 5.22.

15 I would very quickly ask to you go to that because Mr Robertson read out, I think,
16 paragraph 5.21, but not 5.22. It is in authorities bundle 1, tab 9, page 29.
17 Authorities bundle 1, tab 9, page 29.

18 Mr Robertson read out paragraph 5.2.1, so I won't read that out again, but what he
19 didn't read out was 5.2.2:

20 "Market definition is a useful tool, but not an end in itself, and identifying the relevant
21 market involves an element of judgment. The boundaries of the market do
22 not determine the outcome of the Authorities' analysis of the competitive
23 effects of the merger in any mechanistic way. In assessing whether a merger
24 may give rise to an SLC the Authorities may take into account constraints
25 outside the relevant market, segmentation within the relevant market, or other
26 ways in which some constraints are more important than others."

1 That is what we say the CMA did in this case. Both generally and particularly as
2 regards to the Indi, but I will come back to the Indi specifically.

3 When I make my specific submissions on the Indi I would ask to you have in mind
4 what is said in paragraph 5.22 of the merger assessment guidelines and
5 paragraph 5.2 and 5.3 of the final report.

6 So, going to the points identified by Tobii under ground 3.

7 The first error identified by Tobii is that the CMA failed to apply the SSNIP test.

8 Now, I think I can be confident that at least some members of the Tribunal are
9 familiar with the SSNIP test, but I would make this submission: it is simply
10 a way to assess demand-side substitutability.

11 That is for customers. What products are substitutes for the parties' products?

12 You ask the question: if a hypothetical monopolist puts up the price of its products by
13 a small but significant non-transitory amount, increase in price, or SSNIP,
14 typically 5 per cent, what other products would its customers buy?

15 The SSNIP test works well where competition is on price. It also works well where
16 we are dealing with commodity type products, such as steel or cement, or
17 widgets.

18 It doesn't work quite so well for differentiated products, such as those in the present
19 case, and in circumstances where -- and I say as well: in this case,
20 competition is not solely or even mainly on price, but also on other factors,
21 such as service, innovation, R&D, and quality.

22 In the present case, when defining the market, the CMA engaged in the same
23 process. It assessed demand-side substitutability, but the application of
24 a formal SSNIP test was considered but rejected by it as being appropriate or
25 helpful -- as not being appropriate or helpful in this case, on the facts.

26 If I can take you -- and because of those two elements, that here we have price

1 insensitive customers and competition substantially on quality, service, range
2 and innovation. We also have differentiated products.

3 In that regard, can I take you to the final report, appendix C, internal page numbering
4 C6.

5 Paragraph 19 of appendix C explains why, in effect, the CMA did not ask a SSNIP
6 type question in the questionnaire, also why it didn't apply a SSNIP test in this
7 case:

8 "We chose to ask a 'forced diversion' question ('what would you have done if product
9 x was not available'), rather than ask alternative questions designed to
10 explore the elasticity of demand to price changes and hence focus on the
11 preferences of marginal customers (eg 'what would you have done if the price
12 of product x rose by 5%'). [Effectively the SSNIP test.]"

13 We chose not to ask that question, we chose to ask the forced diversion question:

14 "The main reason for this is that our theory of harm involves not just a possible
15 increase in price, but also various other deteriorations in the offering of the
16 Parties that could harm customers, for example a deterioration in the quality
17 of the products or the level of service associated with them, or a reduction in
18 the range of products offered. As the possible changes in the Parties'
19 offerings are varied and difficult to forecast, it is neither feasible nor
20 meaningful to try to estimate demand elasticity through diversion questions.
21 In this context, a forced diversion question is more appropriate to get
22 an overall view of the closeness of competition between the merging parties."

23 We also have in this case a finding based on the evidence that customers are
24 generally price insensitive. That is final report, paragraph 7.74, on page 150,
25 internal page numbering of the final report.

26 Paragraph 7.74 refers to:

1 "The evidence that customers in this market are not particularly sensitive to price as
2 their priority is meeting end-user needs."

3 Then we refer to the evidence we base that conclusion on.

4 So, that is the first element that we have here, competition on factors other than
5 price and price insensitive consumers. The second element is differentiated
6 products.

7 MR RIDYARD: May I just ask a couple of questions?

8 When you say you haven't applied the SSNIP test in the classic sense, you mean
9 you haven't asked the 5 per cent price rise question?

10 MS SMITH: Absolutely.

11 MR RIDYARD: Because in other respects, I mean would you characterise the
12 framework that you have used as being a SSNIP test framework, even --

13 MS SMITH: That is going to be the point I come on to, that this really is a complaint
14 of form over substance. What we did was carry out an assessment of
15 demand-side substitutability by --

16 MR RIDYARD: That helps to solve one confusion that I had.

17 The other thing is on this price insensitivity, let's come back to that later on, but
18 I think there were some more questions to be asked about that question,
19 when the time comes.

20 MS SMITH: I will answer those in due course.

21 The differentiated product markets, if I could ask to you go to paragraphs 5.1 and 5.2
22 of the report.

23 I am sorry, we have already looked at that. So, we don't need to. The point there is
24 made about the differentiated products, and also, for your note, 6.7 makes the
25 note about differentiated products.

26 Originally, in their skeleton argument, Tobii said that we were obliged by law to apply

1 a SSNIP test. It now appears, if my note is correct, that Mr Robertson's
2 position is that the SSNIP test is a:

3 "Useful starting point, unless there are reasons for departing from it."

4 That is exactly what the situation was in this case. There were reasons for departing
5 from the technical SSNIP test, of asking about 5 per cent rise in prices.

6 We say that is absolutely borne out by the authorities.

7 I am not going to spend too much time on this, but if I can go back to the Paroxetine
8 judgment, GlaxoSmithKline, authority bundle 3, tab 48.

9 Tab 48, page 149 of the internal page numbering, page 159. If I can ask you to look
10 at paragraph 397, at the top:

11 "In deciding this issue, we think it is important to bear in mind that market definition is
12 not an end in itself: it is a tool for determining the question of dominance."

13 Even in a dominance case it is not obligatory. We are here in the context of
14 a merger control.

15 Then, 401, over the page, on page 160:

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

20 Then there is a reference to a European court judgment in Topps. Then, at the end
21 of that paragraph:

22 "The critical question, as stated in Aberdeen Journals, is to identify what other
23 products provided a competitive constraint to the conduct of the potentially
24 dominant firm."

25 So, here, a particular feature of the market is that demand for the product is not price
26 sensitive. Here, we did carry out an assessment of what other products

1 provided a competitive constraint to the conduct of the merging parties.

2 MR RIDYARD: What you have just taken us to here says:

3 "If demand wasn't sensitive to price, then you wouldn't even apply the SSNIP test as
4 a framework."

5 Are you saying that is the situation here?

6 MS SMITH: This is where we start dancing on the head of a pin as to what you
7 mean by "SSNIP test".

8 If you mean should you carry out an assessment of demand-side substitutability as
9 a framework, then that is what we did and we don't say we shouldn't have
10 done that. We should have looked at demand-side substitutability.

11 In our view it is artificial to rely on a SSNIP test even as a framework. I think what
12 they might be referring to there is to rely on a 5 per cent of a question, even
13 as a framework, what would happen if there were a 5 per cent increase in
14 price? It doesn't appear to make much sense when they go on to say they
15 are not price sensitive in this market.

16 MR RIDYARD: When you say parties "aren't price sensitive", does that mean they
17 are all getting their pricing wrong and they should be charging more for their
18 products?

19 MS SMITH: I am not starting to say anything like that.

20 MR RIDYARD: That would be the oversimplification of that, wouldn't it?

21 MS SMITH: No, what we say is: we were not, by law, obliged to apply a SSNIP test
22 in that. What they are saying -- when you went out to get your customer
23 evidence, instead of asking the forced diversion question, you should have
24 said: what would happen if there were 5 per cent increase in price of the
25 products?

26 MR RIDYARD: I think I understand.

1 MS SMITH: So, let's go right back to what they say the problem is. We say, no, in
2 this investigation that was not appropriate for a number of reasons. I have
3 given you the reasons.

4 We also say we were not obliged by law to do that exercise, and we rely on
5 Paroxetine in this case for that submission.

6 I don't seek to make any further submissions on what prices they are currently
7 charging, or whatever. I am simply meeting the criticism that is made of the
8 investigation we carried out in this case and the market definition carried out
9 in this case.

10 Just for completeness ...

11 I think that is as far as I need to take it, I hope. We say we clearly carried out
12 an assessment of demand --

13 THE CHAIRMAN: Can we just go back to the issue of price insensitivity on the part
14 of the purchasers?

15 MR RIDYARD: Yes. I understand where you are coming from on the SSNIP test
16 and the way in which you have used the SSNIP test framework, using the
17 diversion question rather than a 5 per cent pricing question. But I am a bit
18 puzzled by this -- to me -- sudden revelation that this is a market where
19 demand is not sensitive to price because that affects a lot of things about how
20 one analyses the market, which until now I hadn't come up to me.

21 I mean, do you think that demand would be lower if the companies charged more for
22 their products or not?

23 MS SMITH: I am not sure -- with the greatest respect, I am not sure how that is
24 relevant to the point we are addressing now.

25 MR RIDYARD: It is not relevant to the question about the SSNIP test. It is relevant
26 to a lot of other things.

1 MS SMITH: I think I have to be honest, and say that I am not prepared, in that I
2 have not prepared myself to answer that question, so I don't think I can. It is
3 not a question that arises, as I understand it, from the challenge.

4 MR RIDYARD: Okay, well, let me just give you a heads up then on that, maybe for
5 tomorrow, but it does come up specifically when we come to look at the input
6 for closure arguments; that is the bit I think you just took us to in the report,
7 actually, input foreclosure.

8 So, I think we will want a bit more explanation on how you have reached your
9 conclusions about sensitivity of demand to price changes in that context,
10 because it does matter quite a lot for those input foreclosure arguments, and
11 I certainly would like the answer to some questions, maybe tomorrow
12 morning.

13 MS SMITH: Absolutely.

14 I take that on board, yes. 7.74 is in the context of vertical effects.

15 I think I need to stress as well that price sensitivity is one point, but, actually, what is
16 more important with regards to the SSNIP test is what I drew to your attention
17 at paragraph 19 of appendix C. We asked forced diversion questions
18 because what we are concerned about after the merger is not just a reduction
19 in competition on price, but a reduction in competition across the whole
20 competitive offering, particularly the levels of service offered, the R&D, and
21 the innovation, particularly in the development of new software and ranges of
22 software.

23 So, it was those other elements of competition we are particularly interested in, in
24 this case.

25 The second, third and fourth of the errors that are identified by Tobii under ground 3
26 are arguments that the CMA failed to obtain evidence from end-users, that the

1 CMA's questionnaires wrongly assumed the existence of a market for
2 dedicated AAC solutions, and that the CMA's market definition was based
3 primarily on evidence obtained from customers using a questionnaire that was
4 flawed. Those have all been addressed under ground 2.

5 The fifth argument under ground 3 is that there is a complaint that in the CMA's
6 questionnaires to customers, the questions on substitution and diversion did
7 not ask the customers to identify product by product substitution, but instead
8 asked about suppliers and brands.

9 Now, this was an argument that was made by Tobii during the Inquiry and addressed
10 in the final report. If I can ask you to go back to what we say is the perfectly
11 rational reasons why the CMA took that approach, they are explained in
12 paragraph 5.65(c) in the final report, which is in internal page numbering 118
13 to 119.

14 So, paragraph 6.56(c) explains that there are three reasons why the CMA did not
15 accept Tobii's criticism that diversion should be measured for individual
16 products.

17 The first is that it is only appropriate to measure diversion ratios at individual product
18 levels where suppliers can flex all the parameters of competition for individual
19 products.

20 So, in the market for dedicated AAC solutions, this isn't the case. Some of the
21 decisions made by suppliers, for example the development of new software,
22 or the quality of customer service, have implications for their whole product
23 range. So, the software that is developed applies to all of the hardware
24 products that are produced by, or is used on, all the hardware products
25 produced by the parties. Or the decisions to develop new software. So, they
26 have implications for the whole product range.

1 The incentives to flex those parameters will be shaped by diversion at the level of the
2 range, rather than individual product. That is the first point.

3 The second point is that, as a practical matter, the CMA hasn't seen any evidence
4 conditions of competition vary materially across different products within the
5 relevant market with the possible exception of the Indi.

6 MR RIDYARD: Can we stop there? Because it does seem quite clear that, okay,
7 you are right that if all the products have the same software, then that element
8 is common across all of the Tobii products.

9 But it is, in principle, possible for a company such as Tobii to price the Indi quite
10 separately from the pricing of the I-15+. So, it is possible to flex -- if Tobii felt
11 it was facing strong competition for the Indi, but weaker competition for the
12 other, it could certainly cut the price for the Indi and keep the price high -- that
13 is in fact one of the things you say.

14 MS SMITH: If I may, I will come to the Indi tomorrow, which I said I would do.

15 The Indi was considered individually by the CMA and was considered to be a slightly
16 different -- in a slightly different position as regards -- vis à vis other products.
17 I will come to that.

18 If you want to look at it overnight, it is addressed particularly in 6.61(k). But I will
19 come to that, and we do say, as I think I said earlier today, as regards the
20 Indi, it may be that the constraints with regards price on the Indi -- there are
21 stronger constraints on the Indi, as regards price, that are exercised on it from
22 outside the relevant product market, as we have defined it. But we do not
23 accept that is the case as regards the other elements of competition on which
24 Indi is competing.

25 MR RIDYARD: Okay, I am looking forward to that discussion.

26 MS SMITH: This is the general point about whether, as a whole, the CMA erred in

1 law by not defining the market or asking substitution questions product by
2 product.

3 MR RIDYARD: Yes, and I --

4 MS SMITH: That's the point I --

5 MR RIDYARD: -- was raising it in the general sense here because you say it is only
6 appropriate to measure it if the suppliers can flex each and every one of the
7 parameters separately. But you only have to flex one of the parameters
8 separately, don't you, to be able to price one element differently from all the
9 others? I wonder whether this test here has been -- you set too high a bar.

10 MS SMITH: This is responding to the point that we should have measured diversion
11 for individual products across the board.

12 Our response is that we should only have measured it, diversion ratios at individual
13 product level, where you can flex all the parameters of competition for
14 individual products.

15 MR RIDYARD: Yes. I am asking you whether that is right, because surely you just
16 need to be able to flex one element in order to be able to price them
17 separately from one another?

18 As is rather well illustrated by the case of the Indi, which we will come to later.

19 MS SMITH: I think I have already made that point, that we are not concerned solely
20 with price, but we are concerned with all the non-price elements of
21 competition as well.

22 So, what we are concerned about is the diversion at the level of the product range
23 because the concern primarily, after the merger, is that the merging parties
24 will not only reduce -- there will be an incentive to reduce competition not only
25 on price, on a number of products -- and we will leave the Indi to one side and
26 I will deal with that tomorrow because we have reached a different conclusion

1 on price -- but also non-price issues across the product range.

2 That is one of the three reasons why we rejected the invitation by Tobii to measure
3 diversion for all individual products, rather than across the range. Or we
4 reject that criticism.

5 The second is that we make the point, and we explicitly allow -- with the possible
6 exception of the Indi -- that the evidence is that conditions of competition don't
7 vary materially across different products.

8 The parties as well -- and this is an additional point -- don't tend to monitor different
9 competitors for different -- this is from the internal documentation:

10 "The four main competitors all offer a range of dedicated AAC solutions with different
11 levels of portability, access options and price points."

12 Thirdly, we make this point -- and I think this is also important:

13 "Our diversion ratios are effectively average diversion ratios across the Parties'
14 product ranges."

15 So, if those ranges include products over which the parties compete less closely, for
16 example the Indi, then actually our diversion ratios would underestimate the
17 closeness of competition between the parties. So, the SLC would be greater.

18 I think this third point maybe is an important point for the concern that you have, Sir,
19 that we are being told: no, you should not have measured diversion ratios
20 across the range, you should have focussed on products.

21 We are saying even if those ranges include products which have lower competitive
22 constraints, such as the Indi, actually our diversion ratios underestimate the
23 closeness of competition.

24 I think that, I hope, meets the concern.

25 Just on the point about ...

26 If you will give me a moment.

1 (Pause)

2 That's it on the arguments about products versus range.

3 The sixth point that Tobii makes under ground 3 is that the CMA ignored the NHS
4 guidance.

5 We did not mention it in the final report, but we can't mention every document that
6 was relevant. The proposition that Tobii seeks to draw from that guidance,
7 that the NHS bodies provide solutions based on dedicated and non-dedicated
8 devices is clearly undisputed and recognised in the final report at 5.18. So,
9 we may not have referred to the document in name, but we clearly referred to
10 the proposition which Tobii relies upon the document to make good.

11 Tobii's seventh argument is that the CMA ignored evidence on the use of consumer
12 tablets in AAC solutions.

13 Well, you have seen that is clearly wrong. The questionnaires asked specific
14 questions about whether the customers considered the use of consumer
15 tablets to be a substitute or alternative to the parties' products.

16 The use of consumer tablets is explicitly addressed in paragraphs 5.18 and 5.19 of
17 the report. If I could ask you to look at that. It is internal page numbering 63.
18 It makes the point, paragraph 5.18:

19 "We asked the Parties' AAC solutions customers to the extent to which a standard
20 consumer tablet is a viable alternative to a dedicated AAC solution."

21 Then we go through the responses. We recognise that:

22 "Many respondents specified that a consumer tablet (used along with AAC software
23 and any required accessories) can be a viable alternative [so it is physically
24 and technically possible] for those users who can access the device through
25 touch, although other user requirements are also taken into account during
26 the assessment ... However, [we said] many customers also identified

1 a range of circumstances where a mainstream device could not be substituted
2 for a dedicated device."

3 Then we go through and describe those circumstances.

4 So, the suggestion that we ignored evidence on the use of consumer tablets and
5 AAC solutions is clearly wrong.

6 The eighth argument is that the CMA included within the relevant product market
7 products that weren't within the definition of AAC solutions; that is addressed
8 just for your note in defence paragraph 110.

9 So, in conclusion on ground 3, in Genzyme -- and I won't take you to this case, but it
10 is at authorities bundle 1, tab 20, paragraph 150. The Tribunal recognised
11 that defining a relevant product market:

12 "may require a more or less complex assessment of numerous interlocking factors,
13 including economic evidence. Such an exercise intrinsically involves
14 an element of appreciation and the exercise of judgment."

15 We say, in this case, the CMA submits that the definition of a relevant product
16 market was well within its margin of appreciation, and Tobii's arguments do
17 not establish that the CMA was irrational in reaching that conclusion.

18 Moving on to ground 4. Under ground 4, Tobii argues that the CMA's finding of
19 horizontal affects isn't adequately supported by the evidence.

20 As I have said before, the test for that is one of rationality, as regards which the CMA
21 has a wide margin of appreciation. It is sufficient, for purposes of judicial
22 review, that there was evidence available to the CMA of some probative value
23 upon which it could rationally reach the conclusion that it did. We say there
24 clearly was under ground 4, as regards substantial competition and horizontal
25 effects.

26 So, ground 4(a) of the list of issues, the question is:

1 "Was the evidence relied upon from customers, competitors and the parties' internal
2 documents insufficient and unreliable?"

3 I have already described to you the wealth of evidence that was available to the
4 CMA, and shown you the summary of that evidence in the report. I have
5 made the point that all this evidence came from a number of different sources,
6 which pointed in the same direction; that Tobii and Smartbox were close
7 competitors, they benchmarked each other, they identified each other
8 internally as their closest competitors, customers identified them as the
9 closest competitors, their competitors identified them as close competitors,
10 and they are the two largest suppliers in a market with only three main
11 suppliers and one fourth supplier, smaller competitor, Techcess.

12 The removal of one of those three main suppliers, the move from three to two in
13 effect, is likely to allow the merged entity to increase prices or decrease other
14 aspects of its offering on quality, range, service and innovation.

15 Now, many, I say, of Tobii's criticisms -- and I do say this -- go to the merits of the
16 case under ground 4. They go beyond what is appropriate on a judicial
17 review challenge. That, I would say, was made clear by Mr O'Regan's
18 submissions this morning, which were effectively, in my submission, with the
19 greatest respect, an attempt to re-argue arguments that have already been
20 made before the CMA.

21 Further, many of the points made by Tobii under ground 4 have already been made
22 under grounds 2 and 3, so I will only address the new points.

23 The first of those new points, as I understand it, is that Tobii, in paragraph 168(2) of
24 its skeleton argument, refers to discrepancies between the data obtained from
25 NHS hubs, the NHS hubs expenditure data, and Tobii's sales data.

26 I think we may have already mentioned this, but just to tick it off the list, if I could ask

1 to you go to the final report, paragraph 6.56(a) and (d). So, I have taken you
2 I think at least once or twice before to 6.56(a), which is on page 117 of the
3 internal page numbering.

4 THE CHAIRMAN: You did, yes.

5 MS SMITH: So, I have taken you to that. It has been checked. Then, in (d), we
6 respond the third point under (d):

7 "There were some discrepancies between the purchases reported by customers and
8 the sales reported by Tobii. They are not necessarily indicative of reporting
9 mistakes, but could reflect differences in how transactions are recorded in
10 accounting systems."

11 We recognise that there were some discrepancies, but we satisfied ourselves that
12 they weren't systematic, there was no systematic bias between the purchase
13 volumes and the sales volumes by cross-checking them.

14 Now, just to make it clear, the important point is: how did the CMA use that NHS
15 hubs data?

16 It was used for two purposes. First, to calculate market shares and, secondly, to
17 weight the diversion ratios. So, the NHS hubs gave us data on their
18 purchases. You remember it is that first of the questions, with the table with
19 three years, and what were the value and volumes of your purchases.

20 How did we use that data?

21 We used it to calculate market shares, only two ways, and to weight the diversion
22 ratios. In both of those cases we tested whether it was appropriate and
23 reasonable to use that data in that way, given there were slight discrepancies,
24 although we didn't think they were systematic between the purchasing data
25 and the sales data.

26 As regards market shares, if I could take you to page 93 of the report.

1 On page 93, internal page number at the top of that page, there is a table, 6.1, which
2 sets out the estimated market shares. You will see from the table, based on
3 customer responses. So, these are the estimated market shares based on
4 the purchase data obtained from the NHS hubs questionnaires.

5 Then, over the page, on page 94, you have Table 6-2, which sets out the estimated
6 market shares based on supplier responses.

7 We also obtained evidence from Tobii, Smartbox, but also the other suppliers --
8 Liberator, Techcess -- as to what their sales data was. We cross-checked it
9 against the purchase data and we produced market shares based on each of
10 the sets of data.

11 We say in paragraph -- we have given you the ranges set out there. In
12 paragraph 6.10, on the bottom of page 93:

13 "Table 6-2 below provides estimates of market shares in the supply of dedicated
14 AAC solutions in the UK based on the aggregation of competitor responses.
15 These are broadly consistent with the estimates based on customer
16 responses."

17 So, the market shares are consistent.

18 If I could ask you as well, just while we are here -- I will come back to this point, but if
19 I can also ask you while we are here to look at footnote 211 which is on
20 page 94.

21 We also did a cross-check on the market shares if we took Indi out of the relevant
22 product market. You will see there in footnote 211:

23 "Given the evidence suggests that the Indi is subject to stronger price constraints
24 from non-dedicated AAC solutions (paragraph 5.79), we have also estimated
25 market shares excluding Indi from the relevant product market. However, we
26 note that such exclusion would not have a material impact on market share

1 estimates: Tobii's market share would decrease from [10-20%] to [10-20%] by
2 value, and from [20-30%] to [10-20%] by volume; and Smartbox's market
3 share would increase from [40-50%], to [40-50%] by value and from [40-50%]
4 to [40-50%] by volumes".

5 So we carried out a third, as it were, cross-check by taking out Indi and then looking
6 at the market shares.

7 While we are there, I thought it was just useful to highlight that.

8 So that was the first way we used the NHS hubs data, to calculate market shares.

9 The second way was to weight the diversion ratios. Now, as I have said, the CMA
10 used both weighted and unweighted diversion ratios to inform its findings on
11 closeness of competition and we checked that the estimates of weighted
12 diversion ratios weren't sensitive to changes in weight. That is at
13 paragraph 6.56(d), internal page numbering 119.

14 So 6.56(d), the third point we have made is about the discrepancies, what they could
15 reflect.

16 Fourth:

17 "Our estimates of diversion ratios are not very sensitive to our choice of weights:
18 When we weight diversion ratios using the Parties' sales data for 2018 instead
19 of the hub's reported purchases for three years, diversion from Tobii to
20 Smartbox increases ... and diversion from Smartbox to Tobii is unchanged."

21 So that addresses the first point made by Tobii about discrepancies between the
22 hub's expenditure data and the sales data.

23 The second point made under ground 4, this is paragraph 168(3) of the skeleton:

24 "The parties estimated diversion ratios are inconsistent with the parties' estimated
25 market shares."

26 But market shares and diversion ratios measure different things. They are both

1 informative as to competition post-merger but they are different. Market
2 shares measure market concentration, obviously based on sales revenue, but
3 diversion ratios measure the closeness of competition. So nothing can be
4 drawn from the point made by Tobii.

5 If you need a reference for what diversion ratios do versus what market shares do,
6 for your note it is merger assessment guidelines paragraph 5.3.2,
7 paragraph 5.3.3 and paragraph 5.4.9(a).

8 MR RIDYARD: I think you say there would be no point in doing diversion ratios if
9 they always turned out the same as market shares?

10 MS SMITH: Absolutely.

11 Moving on to 4(b) in the list of issues. There the question is:

12 "Were the CMA's assessment of diversion ratios and its GUPPI analysis based on
13 credible and reliable evidence?"

14 I have already addressed that under ground 2(c) so I am not going to address that
15 again.

16 Ground 4(c):

17 "Was the CMA irrational in not evaluating the substitutability of any of the parties'
18 products and closeness of competition on a product by product basis?"

19 Again, I have addressed that under the response to Tobii's fifth argument under
20 ground 3.

21 Ground 4(e) is that Tobii argues the CMA did not determine the extent of any
22 lessening of competition and so could not establish that it was substantial.

23 THE CHAIRMAN: We call that 4(d) now.

24 MS SMITH: We do, don't we. 4(d). I slavishly copied what was there.

25 THE CHAIRMAN: Yes.

26 MS SMITH: Under this point, whether there was a substantial lessening of

1 competition, Tobii makes one argument on the facts which turns on the
2 position of Indi -- so, with permission, I will come and deal with that in all the
3 submissions on Indi tomorrow -- and one argument on the law.

4 Just, while we are here at 4.15, I will address the issue on the law.

5 THE CHAIRMAN: So you will finish 4(d) today and start --

6 MS SMITH: Absolutely, yes.

7 THE CHAIRMAN: Then we will start off with 5 tomorrow and go back to 1?

8 MS SMITH: Yes.

9 Tobii's legal point is that the CMA didn't make an attempt to quantify the effects of
10 a reduction in competition post-merger and so can't say that there would be
11 a substantial lessening of competition. Now, we say that that argument rests
12 on a misreading of paragraph section 35 of the Enterprise Act, which doesn't
13 require the CMA to quantify the customer detriment arising from a merger as
14 long as it is substantial.

15 I think that this point is best addressed by reference to our defence, where it is very
16 clearly set out. It is paragraph 138 of our defence, hearing bundle 1, tab 2,
17 page 111, internal page numbering 47 of the defence. I am not sure whether
18 much will be added to me reading it out, I think you can read what is in
19 paragraph 138 of the defence.

20 (Pause)

21 THE CHAIRMAN: Yes. You just have to say determine it substantial rather than
22 precisely quantifying it. Quite often it is going to be an impossible job to
23 determine it --

24 MS SMITH: Precisely. That is it in a nutshell. It is there set out in some more detail
25 by reference to both law and to the statutory requirement.

26 THE CHAIRMAN: Yes.

1 MS SMITH: Sir, that brings me to the end of ground 4.

2 Given that we do have 15 minutes, or 12 minutes or whatever it is, shall I start on
3 ground 5?

4 THE CHAIRMAN: You could do, yes. That is fine.

5 MS SMITH: So I think, like Mr O'Regan, I will simply make oral submissions on
6 ground 5(a). Ground 5(b) is dealt with extensively in our defence and
7 skeleton argument so I would refer you to those documents in that regard.

8 As regards ground 5, just by way of introduction, ground 5 is about the CMA's finding
9 on vertical effects. They say that our finding is not supported by reliable
10 evidence and it was unreasonable. Our response, as before, is that our
11 assessment was evidence based and reasonably open to it on that evidence.

12 We made two findings of vertical effects, first a finding of input foreclosure of
13 Smartbox's Grid software -- that is issue 5(a) -- and second a finding of
14 customer foreclosure of eye-gaze camera competitors, which is 5(b).

15 Ground 5(a) as to input foreclosure, the CMA concluded there is likely to be
16 a substantial lessening in competition in the supply of dedicated AAC
17 solutions in the UK as a result of the merged entities having an ability and
18 incentive to foreclose its rivals in that market downstream to supply of
19 dedicated AAC solutions in two ways. First, by reducing the extent to which
20 the Grid supports the rival dedicated AAC hardware, so deteriorating the
21 quality of the rival's access to the Grid; and/or, 2, increasing the wholesale
22 price of the Grid charged to rivals.

23 Tobii attacks our conclusion on three bases: (1) the CMA has not shown the merged
24 entity would have the ability to foreclose rivals; we haven't shown the merged
25 entity would have the incentive to foreclose rivals; and we have no evidence, I
26 quote, of possible negative effects of the input foreclosure of Smartbox's Grid

1 software.

2 As regards the ability to foreclose rivals, Tobii makes two points. First of all, they say
3 that, contrary to the requirements of the CMA's guidelines and the
4 Commission's guidelines, we have not found that Smartbox had market power
5 on the upstream market. That is for the supply of AAC software. We say the
6 CMA clearly found that the merged entity would have a strong position in the
7 upstream market due to its control of the Grid and because competitive
8 constraints from alternative software are weak.

9 If I can take you in that regard to the final report at 7.39, internal numbering
10 page 140 and 141.

11 This is the conclusion, at 7.39, on ability. Based on the assessment of the evidence
12 set out in some detail in the preceding paragraphs, the CMA states:

13 "We find that the merged entity has a strong position in the upstream supply of AAC
14 software due to its control of the Grid and that constraints from alternative
15 software are weak. In particular:

16 "(a) we consider that the merged entity could significantly increase the price ... thus
17 deteriorating the quality of rival dedicated AAC solutions ... and

18 "(b) we find that downstream rivals would not be able to avoid such foreclosure
19 mechanisms by switching away from the Grid without significantly weakening
20 their competitive position in the supply of dedicated AAC solutions."

21 Tobii's challenge is, effectively, the principle basis. They say we have not shown
22 that Smartbox had power on the upstream market. We say, well, we may not
23 have said "market power" but we have made it absolutely clear that our
24 finding as regards the merged entities' ability to engage in this foreclosure
25 activity is due to the fact that it has a strong position in the upstream supply of
26 AAC software, due to its control of the Grid and because the constraints from

1 alternative software are weak.

2 The basis for that is summarised -- and I am not going to go through that because it
3 is set out in a lot of detail in the final report -- but it is summarised in
4 paragraph 148 of our skeleton argument.

5 MR RIDYARD: Are we talking about the UK market here or a global market?

6 MS SMITH: What we are concerned about is the substitutability between the Grid
7 and the alternative software in the UK market. So we say the merged entity
8 has a strong position in the upstream supply of AAC software due to its
9 control of Grid and that constraints from the alternative software available to
10 parties in the UK market --

11 MR RIDYARD: So it is premised on the idea that you could, that everyone licensing
12 software could have a separate price for software in the UK compared to
13 other places?

14 MS SMITH: Yes.

15 MR RIDYARD: Right.

16 MS SMITH: We say that, on the basis of what is set out in paragraph 148, there was
17 a reasonable evidential basis for coming to that conclusion. We have got the
18 matters set out in paragraph 148 and I am not sure me reading them out
19 again makes them any better. We have got the references there to the final
20 report.

21 MR RIDYARD: Do you think there is a bit of tension between this argument and
22 what we have just been talking about, your higher diversion ratios between
23 Tobii and Smartbox at the AAC level? Because those higher diversion ratios
24 imply closeness of competition between a bunch of products which are using
25 Tobii software and a bunch of products that are using Smartbox's software,
26 and there you are saying they are competing very much head to head with

1 one another. Here, I know it is not exactly the same but it is almost the same
2 thing transposed one point upstream, you seem to be saying, oh, there is very
3 little credibility in switching from one software to another.

4 MS SMITH: I am not so sure it is as simple as saying --

5 MR RIDYARD: It is not simple, no.

6 MS SMITH: Because we are looking here at the Grid software which is supplied by
7 Smartbox and that software is used on a number of dedicated AAC
8 hardwares, including hardware produced by Tobii now. So we were not
9 simply looking at a Tobii product with Tobii software versus a Smartbox
10 product with Smartbox software and saying there is close competition
11 between the two. We were looking at the suppliers and their ranges generally
12 and saying, yes, they conceive of themselves as their closest competitors and
13 all other evidence we have seen shows that they are competitors in our
14 horizontal assessment.

15 MR RIDYARD: Sorry to interrupt, there you are talking about Tobii products which
16 already incorporate Grid software?

17 MS SMITH: A proportion do and a proportion don't. The Grid software is --

18 THE CHAIRMAN: I think they use it more now than before. I think that is the
19 evidence.

20 MR RIDYARD: When the customers were answering those questions over that
21 period of time, were they using the Grid software then a lot? In regards to
22 Tobii products, I mean.

23 MS SMITH: Let me see if I can get you a specific reference. I am not sure I can off
24 the top of my head.

25 MR RIDYARD: Maybe it is something you can note down and come back tomorrow
26 on. I don't want to waste time.

1 MS SMITH: The point that I can draw your attention to is what is in paragraph 148(c)
2 of our skeleton argument, which is by reference to paragraph 7.28(a) of the
3 final report. The Grid software was on or accounted for 50 to 60 per cent of
4 dedicated AAC solutions sold in the UK.

5 "It is the most popular software [this is 7.28(a) says] included as part of dedicated
6 AAC solutions included in the UK. In 2018, [50-60%] of dedicated AAC
7 solutions sold in the UK included the Grid software. In contrast, the
8 equivalent figures for PRC's software and Jabbla's software were only [10-
9 20%] and [0-5%] respectively."

10 And the equivalent figures are set out in the footnote 293 for Tobii's software.

11 "Tobii sometimes installs more than one type of software on one of its devices
12 therefore there is some overlap between these figures, which is why the sum
13 of the figures for each piece of AAC software ... is over 100 per cent."

14 MR RIDYARD: The reason -- Smartbox has a high share of the AAC market, doesn't
15 it, in the UK? So it is not surprising that a high share of the market is using
16 Grid software -- I know it is elsewhere too but a lot of it is in those Smartbox
17 products and --

18 MS SMITH: Yes. It is also on other --

19 MR RIDYARD: I understand it is on other things too. I know I am looking at it one
20 level removed, so I am not suggesting that there is a complete contradiction
21 here. I am just saying there is a bit of tension between the idea that, if I am
22 right, that the Tobii AACs which are using primarily Tobii software and
23 managing to compete, you think very directly with the Smartbox products
24 which are incorporated in the Smartbox software, and then here in section 7
25 suddenly we find that there doesn't seem to be very good competition
26 between those two softwares when you look at it one point upstream at the

1 software level.

2 MS SMITH: The question here is what -- well -- the question, thanks to my junior,
3 the question here is for those customers who are currently using Grid, what
4 would the effect of the merger be for them?

5 MR RIDYARD: I understand that.

6 MS SMITH: So when we look at is there an ability for -- or would there be an ability
7 for the merged entity to engage in foreclosure activity as regards Grid? We
8 say, well, yes, because they have a strong position in that market because
9 they offer Grid, which is used by a substantial proportion of these competitors
10 at the moment and after the merger are those competitors going to be able
11 to -- if the merged entity engages in this foreclosure activity as regards Grid --
12 are those competitors going to be able to move to alternative software? We
13 say that for those current users, the alternatives are weak.

14 MR RIDYARD: Yes. I understand that when it comes to the foreclosure theory we
15 are talking about what Liberator and Techcess can do to wean themselves off
16 the Grid, if it became difficult. I totally understand that.

17 I am also saying that, you know, the difficulty of them switching to another software --
18 presumably they would switch mainly to their own software if that happened --
19 is in some ways proxied by the difficulty that Tobii might have found in
20 competing against Smartbox in the UK in the last two or three years when, as
21 I understand it rightly, Tobii was usually mainly inferior Tobii software
22 competing against superior Grid software. There, when we are talking about
23 the SLC at; unilateral effects level, you are saying that competition was very
24 effective. That is why you are concerned about the unilateral SLC.

25 I am just highlighting --

26 MS SMITH: Well, no. Again, I don't think it is as simple as that. As I have said, they

1 were competing on a number of bases and overall we held they were
2 competitors. Both of them, as you see in paragraph 148(e), note that the Grid
3 has strength and advantages over the other competing AAC software and --
4 I just don't want to go into the realms of confidentiality but --

5 (Pause)

6 I will give you a reference. I can't say what I wanted to say because it is confidential
7 but I hope I can try and give you a reference where you can read the point
8 I want to make about the rationale for the merger.

9 It is difficult to make the submission without saying anything confidential but if I can --
10 I think I can do it by -- yes, 6.42 and 6.43 of the report gives you some
11 indication of what was said in Tobii's document, internal documents, about its
12 competitive offering with Smartbox -- and I can say this because it is not
13 highlighted -- in 6.42 as to their software.

14 MR RIDYARD: Yes. I think that was one of the points behind my question actually,
15 that I am not sure that really --

16 MS SMITH: Once the merger has happened, the ability and incentive for the merged
17 entity to use that strength in the Grid software is what we are concerned with
18 here.

19 MR RIDYARD: Yes, I get that.

20 MS SMITH: Also, I am reminded that 6.61(f), the last sentence, is confidential but, if
21 read in context, it tells you why in the 18-months preceding the merger Tobii
22 was increasingly concerned by the competitive threat posed by Smartbox,
23 because of its software offering. Smartbox's software offering which is the
24 Grid.

25 THE CHAIRMAN: Is that a convenient moment?

26 MS SMITH: Sir, it is. Thank you.

- 1 THE CHAIRMAN: We will come back tomorrow at 10 o'clock just to look at those
2 two devices. Thank you very much.
- 3 MS SMITH: Thank you.
- 4 **(4.35 pm)**
- 5 **(The hearing adjourned until 10.00 am the following day)**