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4 definitive record.

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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

08 November 2019

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14 Before:

15
16 **HODGE MALEK QC**

17 (Chairman)

18 **PAUL DOLLMAN**

19 **DEREK RIDYARD**

20 (Sitting as a Tribunal in England and Wales)

21
22
23 **BETWEEN:**

24
25 **TOBII AB (PUBL)**

Applicant

26
27 -v-

28
29 **COMPETITION AND MARKETS AUTHORITY**

Respondent

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APPEARANCES

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.

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1 **Friday, 8 November 2019**

2 **(10.00 am)**

3

4 **Housekeeping**

5 THE CHAIRMAN: Mr Robertson, I have looked at your memo on the Indi. How do
6 you propose dealing with that? Are you going to say anything, or do you just
7 leave it in reply? You can take me through in reply, which may be easier.

8 MR ROBERTSON: I was going to wait to hear what Ms Smith says about it. If there
9 are any points that then arise I need to address in reply, I will do so.
10 Otherwise those are our submissions in response to those questions.

11 THE CHAIRMAN: Ms Smith, do you intend put something in, in reply, in writing?

12 MS SMITH: What I was proposing to do, Sir, with your permission is to outline in
13 summary what our position is, but reserve our ability, if necessary, to put in
14 a similar note.

15 THE CHAIRMAN: Yes, that is fine.

16 MS SMITH: I was going to ask for a week to do that, given counsel and solicitor's
17 availability next week.

18 THE CHAIRMAN: Yes. If I could have it by 4 o'clock on Thursday, that fits in with
19 what I am doing.

20 MS SMITH: We will do our best. I am out of the country for a significant chunk of
21 next week.

22 THE CHAIRMAN: Yes, so am I.

23 MS SMITH: Sir. That is fine. 4 o'clock, Thursday.

24 THE CHAIRMAN: Yes. The updated list of issues.

25 What is the timescale for that? What would be helpful, Mr O'Regan -- you have
26 carriage of that -- is you add in the transcript references in the last column.

1 MR O'REGAN: Yes, Sir.

2 THE CHAIRMAN: Also, it would be nice if you could add in the references to the
3 relevant paragraphs to the report under each issue. Obviously, you will liaise
4 with your opposite number, and whoever wants a paragraph number in, it will
5 go in. So, if that could just be in the last column as well.

6 MR O'REGAN: In the same column, just underneath what is there already, Sir,
7 transcript references and actual references to --

8 THE CHAIRMAN: Just put the paragraph number of the report.

9 MR O'REGAN: Yes, Sir. Technically, I am on leave next week, but I will endeavour
10 to do it by the early part of next week, to get to Mr Bailey and Ms Smith and
11 those instructing me. So, we will get it you -- I think probably do it by the end
12 of next week, 4.00 pm, Thursday, as well.

13 That's looking at Mr Bailey.

14 MR BAILEY: Sir, I am in court on Tuesday and Wednesday next week. I will
15 obviously do my best to liaise with my opposite number and make sure -- we
16 can try and provide it to you by 4 o'clock next Thursday. It may be slightly
17 difficult given that my leader is out of the country at the same time.

18 THE CHAIRMAN: Let's be practical. When are you back, Ms Smith?

19 MS SMITH: I am back at lunchtime on Friday.

20 THE CHAIRMAN: Let's move it back to 4 o'clock, a week on Monday. I don't want
21 to push it. That is okay for you as well?

22 MR O'REGAN: That's fine for me, Sir.

23 THE CHAIRMAN: Yes, okay. What will happen now is a ten or 15 minute
24 demonstration on two of the devices. If you could do it from there, please.

25

26 **Demonstration of devices**

1 (Mr Eskilsson enters the witness box)

2 THE CHAIRMAN: If we could start off with the Indi.

3 MR ESKILSSON: So, this is again the Indi. As you can see just from this screen
4 here, what you see is the standard Windows background screen. This runs
5 any kind of Windows application. You can run Spotify, you have the web
6 browsers because, obviously, a person with communication disability also has
7 a need to do things we do with our computers every day to control everything
8 between heaven and earth, and communicate with society.

9 In addition to that, what is specifically referred to as AAC software is either software
10 used to control the computer in different ways, or to be able to speak.
11 Because almost all of our users are unable to speak by themselves.

12 Many of our users need symbols, and communicate through symbols. Some are
13 able to use text, so a normal screen keyboard, but most of our users are
14 actually relying on symbols. So, AAC software typically has sophisticated
15 means to express and communicate everything between heaven and earth
16 using symbols.

17 MS SMITH: Could we just see what screen is being shown?

18 Great. Thank you.

19 MR ESKILSSON: This piece of software here is -- that you see on screen right
20 now -- is Snap. This is the premium software that Tobii Dynavox is selling.
21 We sell this with all of our devices, and allows for this effective symbol
22 communication. It also allows for text communication and other things.

23 Typically a user simply communicates by pressing buttons.

24 One of the key characteristics of a good AAC solution is that it has very powerful
25 speakers. Whether it's a kid at school, or you are sitting in a restaurant, or in
26 a courtroom for that matter, you may want to be able to make your voice

1 heard. That is the whole point of the communication device.

2 So, this is the Indi. That is essentially what it does. I don't know if you want to touch

3 and feel it?

4 You can press buttons. It is loud, but that is the point.

5 Again, you can communicate with that device either through touch, so just touching

6 the screen, or you can connect different kinds of switches or other access

7 means to this device as well.

8 THE CHAIRMAN: So you have topics; yes?

9 MR ESKILSSON: It's around 10,000 symbols you can actually find throughout that

10 structure. It contains grammar engines, and you can discuss politics with

11 Donald Trump on that device if you want to. It takes a while to figure out how

12 to find all the symbols and communicate effectively with it.

13 THE CHAIRMAN: You have a keyboard as well.

14 MR ESKILSSON: Yes.

15 THE CHAIRMAN: You type the word and then it speaks?

16 MR ESKILSSON: You can do that as well. There is keyboards built in --

17 THE CHAIRMAN: Okay. It is not light though, is it? It is quite chunky.

18 MR ESKILSSON: It is. Yes.

19 THE CHAIRMAN: Does anyone else want to have a look at it? No? Okay. They

20 have probably already seen it. Yes.

21 MR ESKILSSON: Yes. So, we can look at the I-110, the high-end device, or we can

22 look at the Speech Case, which is the consumer tablet version, or quickly

23 both. It depends on what you would prefer.

24 THE CHAIRMAN: Didn't you want to look at the I-15+ or I-12+?

25 MR RIDYARD: You don't have an I-12 or I-15?

26 MR ESKILSSON: I do have an I-12 as well that I could show you, to show you what

1 happens with eye-tracking. I have that over there, so I can go and get it.

2 In the mean time, this is the I-110, so this is the medical graded equivalent of the

3 Indi. Again with exactly the same functionality, so it does the same thing.

4 While I go and get the I-12, you can play with that.

5 For both of those devices, as well as the Speech Case that we discussed yesterday,

6 are non-eye-tracking devices. So, they are used again either with touch or

7 with other kind of access means, switches, et cetera.

8 We have a range from medical grade non-eye-tracking devices down to the

9 Speech Case. Or you can just run the software, same thing on a naked iPad.

10 When it comes to eye-tracking we have a similar range. So, on a high-end, medical

11 graded device that is primarily designed for reimbursement system in the US.

12 So, this is the I-12. Medical grade. It essentially does the same thing as

13 an I-110, but it has a built in eye-tracking sensor, so you can control with this

14 your eyes.

15 MR RIDYARD: Is that the only difference?

16 MR ESKILSSON: It also has even more powerful speakers and batteries, but no

17 one -- barely no one who wants a touch-enabled device would use a I-12. It is

18 really if you want eye-tracking that you would use a I-12.

19 But also for eye-tracking we offer a range of different products. So, we have things

20 like the EyeMobile, which is basically -- this is a Microsoft surface tablet with

21 an attached eye-tracker and some speakers on to it, which sells as

22 a significantly lower price. This is consumer grade. This is largely the type of

23 product we sell in the UK, also to the NHS. Because they don't need the

24 medical grading.

25 You can also buy a peripheral like this and connect it to a normal computer. Or you

26 can even have a normal consumer tablet, or a consumer laptop with a built in

1 eye-tracker. This is my computer I use every day. It has a built in
2 eye-tracker. This is a Dell laptop you can go and buy in a computer store,
3 and it has exactly the same eye-tracking capability as this medical grade --

4 THE CHAIRMAN: So, you could go to one of the computer shops and they will sell
5 you that with the eye-tracker already in there?

6 MR ESKILSSON: Yes. I can use this computer, turn on the eye-tracker here ...

7 (Pause)

8 Just loading up the software.

9 This allows me to, just with my eyes, navigate the system here. Just by looking at it.

10 I can also do that with this medical grade device, and I can say ... exactly the same
11 software on all of these devices, exactly the same on a pure iPad.

12 MR DOLLMAN: Would people buy that one if it didn't need to be used in a hospital
13 environment?

14 MR ESKILSSON: You have to -- most of -- not all, but most insurance companies
15 and entities, like MediCare and Medicaid, require a device to be designed
16 according to medical grading criteria in order to reimburse it in the US.

17 That is just -- it comes from -- these devices in the US, and under the insurance
18 codes that they are paid for, they are classified as durable medical equipment,
19 similar to other kinds of durable, like breathing machines and things like that.
20 So, it is classified according to the same principles, so it needs to be medical
21 grade in the US.

22 But, obviously, again, to the NHS, we sell much more of this type of solution or this
23 type of solution for eye-tracking than we do of this. This comes in two screen
24 sizes. In total for both of those we sell 90 something devices in total in the UK
25 in 2018, compared to about 300 of these eye-tracking devices. Most of all
26 those things go to -- a good chunk of those sales go to the NHS.

1 THE CHAIRMAN: Can we just feel how heavy that is?

2 MR ESKILSSON: Yes, this is a pretty heavy one, which is actually one of the core
3 reasons why people are buying this instead because with a Microsoft surface
4 tablet you get the same eye-tracking, but it is much lighter and there is
5 a much more powerful computer on that one.

6 THE CHAIRMAN: That is it then. Thank you very much for that.

7 MR ESKILSSON: Thank you.

8 (Mr Eskilsson exits witness box)

9

10 **Submissions by MS SMITH (continued)**

11 THE CHAIRMAN: Yes. Thank you.

12 MS SMITH: Sir, members of the Tribunal, if I can pick up from where we left off
13 yesterday afternoon with ground 5(a).

14 THE CHAIRMAN: Yes.

15 MS SMITH: We were discussing the ability of the merged entity. This is the vertical
16 effects argument. The ability of the merged entity to foreclose its rivals in the
17 dedicated AAC solutions market by engaging either in a price increase in
18 price of Grid to those competitors or a reduction in the extent to which the
19 Grid supports the rival's hardware. You may recall Mr Ridyard suggested to
20 me that there might be a tension between what the CMA says about diversion
21 and close competition between Tobii and Smartbox in the downstream
22 dedicated AAC solutions market and what it says about the ability -- what we
23 say about the ability of Liberator and Techcess to avoid the foreclosure by
24 switching from one software Grid to another. That was yesterday's transcript,
25 page 129.

26 Mr Ridyard specifically suggested that the difficulty for those companies, Liberator

1 and Techcess, of switching to another software away from the Grid might, and
2 I quote, in some ways be "proxied" by what he characterised as the lack of
3 "difficulty that Tobii might have found in competing against Smartbox in the
4 UK in the last two or three years."

5 That was yesterday's transcript page 131.

6 I should start by saying this point is of course not something that appears in Tobii's
7 challenge. It is not a ground that's raised in their notice of application or even
8 in their skeleton, but it is, perhaps, useful for me just to briefly address it.

9 We don't accept that competition between Tobii and Smartbox in the dedicated AAC
10 market is a proxy for Liberator and Techcess's ability to switch away from
11 Grid. We don't accept that there was any inconsistency or irrationality, and
12 that of course is the test that this Tribunal has to apply -- that there was any
13 irrationality in the way in which we dealt with the two issues.

14 I am going to refer to paragraphs in the final report, but given the limited amount of
15 time that we have today I am not going to take you to them, except in one or
16 two instances. The starting point is that currently between --

17 THE CHAIRMAN: Do we really need to go to detail on this? It is not a pleaded
18 allegation.

19 MR RIDYARD: Yes, I don't want to waste your time on the point. I am sorry that,
20 you know, if you have done some preparation on it, but I think I understand
21 what you are saying and we should probably get on with the other issues,
22 unless you particularly want to?

23 MS SMITH: In that case --

24 THE CHAIRMAN: If you want to get it off your chest, please do, but I think it --

25 MS SMITH: It is addressed in our skeleton. Well, our skeleton addresses the basis
26 upon which we the CMA concluded that there was no real ability for Liberator

1 or Techcess to switch away from the Grid software. That is set out in a great
2 deal of detail in the report and in the skeleton.

3 So, if the Tribunal is saying that they are satisfy that had we have address that had
4 issue, then I can move on.

5 THE CHAIRMAN: You can.

6 MS SMITH: One other point -- and again I will be guided by you as to whether you
7 want me to address you on this or not -- is a point of clarification as to what
8 the CMA says about the geographical reach of the AAC software market.

9 Now, Mr Ridyard asked a number of questions yesterday about whether the CMA
10 was talking about a UK market for AAC software or a global market for AAC
11 software.

12 THE CHAIRMAN: You said UK.

13 MS SMITH: I did, and I would like, perhaps, to clarify what I said on yesterday's
14 transcript, page 128, lines 21 to 23.

15 I need to clarify my mistake. We do not say that our vertical theory of harm is
16 contingent upon the merged entity being able to differ its terms in the UK.

17 If I can just clarify what we do say, which comes through, I hope, from the report.

18 We accept that the -- obviously, and we found that the upstream market for AAC
19 software is global; that is the final report, paragraph 5.97.

20 We found that the Smartbox had a strong position on that upstream market, and
21 I explained that towards the end of my submissions yesterday. That is final
22 report paragraph 7.39.

23 What is important from the point of view of vertical effects is that the CMA's
24 competition concern was that the merger could foreclose the merged entity's
25 competitors in the relevant downstream market for dedicated AAC solutions in
26 the UK. That is the -- competitors being Liberator and Techcess in the UK.

1 That is final report, paragraph 7.8. It is for that reason we focussed on effects
2 on customers in the UK.

3 Now, it is the position that both Liberator and their software arm, PRC, and
4 Techcess, operate not only in the UK, but around the world.

5 This is the important point that I did not stress yesterday and that needs to be
6 stressed: both Liberator and Techcess only install the Grid on devices that
7 they sell in the UK. They do not install it on devices outside the UK.

8 That is recorded at final report, paragraph 7.104, as regards Techcess.

9 We looked for the references regards Liberator in the final report, and there is not
10 an explicit reference as regards Liberator in the final report, probably because
11 this point was not brought up in the course of the Inquiry. But I can tell on
12 you, on instruction, that in Liberator's response to the CMA's questionnaire it
13 stated:

14 "Since PRC Saltillo only sells our dedicated AAC devices in the UK, this would only
15 affect our customers in the UK."

16 So, as the foreclosure would only affect, in our submission, Liberator and Techcess
17 in the UK, we say it was rational for the CMA to gather evidence on the
18 preferences of UK customers in this respect.

19 MR RIDYARD: Just to clarify, the purpose of my questions was to try and
20 understand if they implemented the strategy in the UK it would have some
21 carry over effect elsewhere, but what you have just said deals with that point.

22 MS SMITH: I hope that clarification the issue. Thank you, Sir.

23 So, those points go, in effect -- although the questions are interrelated, but those
24 points go to the merged entity's ability to foreclose rivals. The second issue
25 that the CMA considered was the merged entity's incentive to foreclose rivals,
26 although the two issues are very closely related.

1 The CMA, as regards the merged entity's incentive to foreclose rivals, the CMA
2 addressed in the final report the issue of whether it would be profitable for the
3 merged entity to foreclose the downstream competitors, and so whether it
4 would have an incentive to engage in that strategy.

5 As I have stressed before, there were two foreclosure mechanisms considered by
6 the CMA, not only an increase in price of Grid to the competitors, but also
7 a quality foreclosure issue, a reduction in the extent to which Grid supports
8 rival's hardware.

9 Now, as regards the first foreclosure strategy, that is an increase in price. Tobii
10 asserts that we had no evidence that Liberator or Techcess would have the
11 incentive to pass on any increase in the wholesale price of Grid. That is their
12 skeleton, paragraph 202.

13 As I understand Tobii's argument, they claim that, on its face, the wholesale price
14 increase was so small that Liberator and Techcess could absorb it.

15 Now, we recognise, and we do explicitly in the final report recognise, that Techcess
16 and Liberator could absorb the increase, or at least part of it. The question,
17 however, was whether they would absorb the increase, or at least part of it.

18 We came to the conclusion that they would not absorb the whole of the wholesale
19 price increase, but would pass on at least a part of that wholesale price
20 increase, or have the ability and the incentive to pass through the cost
21 increase that they would face. That is addressed at paragraphs 7.73 and 7.74
22 of the final report.

23 In a nutshell, our point was that in differentiated product markets, where firms have
24 a degree of market power as regards each product, and customers have
25 relatively low price sensitivity, the suppliers of those differentiated products
26 have both the ability and the incentive to pass through a share of the cost

1 increase. We say that was a wholly rational conclusion to have reached.

2 In any event, that was only the first potential foreclosure mechanism.

3 MR RIDYARD: May I ask you a quick follow up on that?

4 I think it is sometimes interesting to look at what clues you can gather from current
5 conduct when looking towards one of these foreclosure theories about what
6 might happen in the future if a change occurs. I noticed, in 7.73, you refer to,
7 or the CMA refers to, what Liberator does now. So, at the moment, Liberator
8 sells a proportion of its AACs in the UK with the Grid software installed.

9 In 7.73, I think the CMA makes the point that currently Liberator sells the Grid
10 enabled AAC at the same price as the version of its product which
11 incorporates its own software.

12 MS SMITH: Mmm-hmm.

13 MR RIDYARD: Doesn't that -- also the point about what happened when there was
14 a recent price increase of the Grid software as well.

15 The fact that it currently sells the Grid enabled version of its product at the same
16 price as the one where it is using its own in-house software, doesn't that imply
17 it is already choosing to absorb the whole of the cost of the Grid in how it is
18 pricing at the moment?

19 (Pause)

20 MS SMITH: No, I think the point is that, again, we are judging this against the
21 standard of irrationality and whether the CMA took into account relevant
22 considerations. The CMA clearly, in my submission, took into account the
23 current situation and the current conduct and the current reaction to price
24 increases by Liberator.

25 However, we then went on to set out, in paragraph 7.74, our view that, nevertheless,
26 having taken that evidence into account, we consider it is likely that the

1 suppliers of dedicated AAC solutions would pass on the cost increases,
2 particularly if they are more significant than the recent cost increases of the
3 Grid faced by Liberator. This is due to the evidence that customers in this
4 market are not particularly sensitive to price, as their priority is meeting
5 end-user needs. Then we set out the evidence.

6 So, in my submission, this is precisely the type of judgment that the CMA needs to
7 make in these types of cases, and precisely the type of expert judgment that,
8 with the greatest respect, can only be undermined or overturned by the
9 Tribunal if you come to the conclusion that either there was no evidence upon
10 which the CMA could base that judgment, or that judgment was so
11 unreasonable no reasonable regulator could have reached it.

12 So, I think the point is we took on board and considered the point you raise, Sir --

13 MR RIDYARD: You see, I take what you say. We understand the standard is high
14 for one of these appeals, and obviously we will take that into account in our
15 deliberations, but here I am pointing to something which, on the face of it,
16 doesn't seem to have been taken into account by the CMA.

17 The report talks about how Liberator responded to the price increase, and said they
18 absorbed that, but maybe they wouldn't absorb a bigger thing.

19 What I am saying is the implication of what Liberator does at the moment is it
20 absorbs the whole of the cost of the Grid in the price of its product. It is not
21 evident the CMA did take that into account. Possibly that could be a sense
22 check that the CMA should have done.

23 MS SMITH: I disagree strongly with that suggestion because the words in 7.74
24 make it, in my submission, absolutely clear the CMA did take that into account
25 because they say:

26 "... particularly if they [the recent cost increases] are more significant than the recent

1 cost increases of the Grid faced by Liberator."

2 So, we are explicitly taking into account the fact that recently, when Liberator faced
3 cost increases of the Grid, they did not increase their prices. So, in 7.74, we
4 are explicitly taking that into account, but then -- and that is what I am
5 saying -- exercising our judgment on the evidence that that does not exclude
6 the risk, the real risk, that cost increases in the future will be passed on.

7 MR RIDYARD: I understand what you are saying, but I don't think, with respect, it
8 does address the point that I am making, which is: before the recent cost
9 increase of the Grid, which it chose to absorb, why in the first place it didn't
10 charge a premium for the Grid enabled product over the non-Grid enabled
11 product, given that the Grid enabled product must have cost it £450 more or
12 whatever it was?

13 MS SMITH: I think you have had my submission, Sir. The point is: did the CMA take
14 into account the relevant evidence?

15 We say they did.

16 Did they reach a reasoned judgment on the basis of available evidence?

17 We say, yes, they did.

18 THE CHAIRMAN: I think -- look, the fact is that you have 7.73 followed by 7.74,
19 which starts off with the word "however", so they are fully aware of the
20 situation with Liberator.

21 I think that the difficulty Mr Ridyard is having, in reality, is that he thinks that -- do you
22 really have any real basis for concluding that if there is a more significant
23 increase, that Liberator would pass it on?

24 MS SMITH: Sorry, Sir. I don't want to interrupt you, but maybe I could draw your
25 attention to another paragraph in the final report, which we say makes it even
26 clearer that the CMA was aware of and addressing these matters.

1 If you look at paragraph 7.15, on page 133 --

2 THE CHAIRMAN: Yes.

3 MS SMITH: And 7.15(a):

4 "The merged entity could readily raise the wholesale price it charges downstream
5 competitors for the Grid up to its retail price level. Based on the existing retail
6 price ..."

7 So, it's looking at the facts as they currently are:

8 "... we estimated that, in the event, Liberator and Techcess could face an increase in
9 the wholesale price they pay of approximately [the redacted amount]. If this is
10 passed on to customers, it would equate to an increase ..."

11 So, the CMA is clearly addressing there the current situation and the current existing
12 retail price, in our submission. That may be another useful cross-reference,
13 but I stand by the point I have already made. I don't think it gets any better by
14 way of repetition.

15 MR RIDYARD: Actually, on this and on the quality deterioration, did you ask
16 Liberator and Techcess for their views on the price increase and the quality
17 deterioration?

18 MS SMITH: I will get instructions on that, if I may?

19 The point is that -- and I have already made this point, but this one does bear
20 repetition -- that we say we have a reasonable basis for the conclusion that
21 Liberator and Techcess have both the ability and the incentive to pass
22 through the share of any cost increase they face. But, also, we should not
23 lose sight of the fact that the other way in which they could foreclose rivals is
24 a reduction in the extent to which the Grid supports rival's hardware. And
25 foreclosure with respect to quality we say is a credible strategy and
26 particularly important in this case because customers are more sensitive to

1 variations -- ultimate customers are more sensitive to variations in non-price
2 aspects of the product, such as quality. That is the final report,
3 paragraph 7.68.

4 If I can ask you to look at paragraph 7.11.

5 MR RIDYARD: Sorry, which paragraph?

6 MS SMITH: Sorry, I have the wrong reference, 7.71.

7 This addresses the foreclosure, the effect of the quality foreclosure. We say there
8 that -- towards the end of that paragraph:

9 "... We place significant weight of this given the vulnerability of the user group,
10 specifically the difficulty end-users face in communicating and the importance
11 of having a wide range of effective dedicated AAC solutions ..."

12 The point there is the second foreclosure mechanism was particularly important, the
13 quality foreclosure mechanism. I simply note that Tobii has not challenged
14 the CMA's conclusions on that quality foreclosure mechanism.

15 The final and third part of the assessment under input foreclosure is the possible
16 negative effects of the input foreclosure of Smartbox's Grid software. Again,
17 that is very closely tied up with the two previous questions of ability and
18 incentive. But Tobii does assert that the CMA had no evidence of possible
19 negative effects of input foreclosure.

20 Now, I have already explained -- and I am not going to repeat -- the basis upon
21 which the CMA concluded that Liberator and Techcess would be likely to have
22 passed on some increase in the wholesale price of the Grid.

23 In its skeleton argument, paragraphs 209 to 212, and in the revised figure contained
24 in its second speaking note Mr O'Regan handed up yesterday, Tobii sets out
25 various figures and calculations on the basis of which it asserts that any loss
26 of sales in the event of the strategy of partial foreclosure would be negligible.

1 I need to put it on the record we don't accept those figures. We instead put forward
2 figures in paragraphs 159 to 164 of our skeleton argument.

3 I am not going to go through those. The figures for both parties are confidential, but
4 they are there for the Tribunal to refer to.

5 The important point is that we are not, as I say, assessing here the question of
6 whether Liberator and Techcess could absorb a wholesale price increase. It
7 is, as I stressed earlier, whether they would.

8 That, I think, are my submissions on ground 5(a).

9 Sorry, just give me a moment.

10 (Pause)

11 Forgive me a moment. I might be able to answer Mr Ridyard's question immediately.

12 (Pause)

13 If I may, I will give them to you now while we are thinking about it. Two references in
14 response to the question by Mr Ridyard as to whether we raised the issues
15 with Liberator and Techcess. For your note, that is addressed in
16 paragraph 7.27 of the final report, and paragraphs 153 to 155 of the defence.

17 MR RIDYARD: 7.2?

18 MS SMITH: 7.27.

19 MR RIDYARD: Did you ask Techcess and Liberator about the quality deterioration
20 point, and whether they were worried about it or how they would deal with it?

21 (Pause)

22 MS SMITH: I think we need to clarify that point, so I am going to come back, if
23 I may, on that.

24 MR RIDYARD: Thank you. That would be very useful. Yes.

25 MS SMITH: That brings us to the end of ground 5(a). As I indicated yesterday, we
26 refer you to our skeleton and defence as regards ground 5(b) on customer

1 foreclosure.

2 MR RIDYARD: I beg your pardon, may I ask a couple of more questions? I am
3 sorry to labour these points a little bit.

4 But, again, I just wanted to ask about what changes as a result of the merger?
5 Because I think that is quite an important part of this whole story obviously,
6 but particularly this input foreclosure story.

7 Again, this question comes out of the fact that I think it is often quite useful to look at
8 what clues you can gather from existing conduct before you make predictions
9 about what will happen in the future.

10 At the moment, I think as the CMA says in paragraph 7.59 -- it says in a way
11 pre-merger Smartbox already has some of the incentives to do the things you
12 are talking about because, as we know, Smartbox has a pretty high share of
13 the dedicated AAC solutions market. So, at the moment, it would have quite
14 a lot of incentive to take steps not to give Liberator and Techcess a helping
15 hand in the market. A lot of the foreclosure sort of thinking that goes into your
16 theory of harm from the merger is already present in the market at the
17 moment.

18 When you look to see what Smartbox does at the moment in respect of that, it does
19 two things. First of all, it offers these two downstream competitors quite a big
20 discount on the Grid. The numbers are in your report.

21 Secondly, it takes these steps, apparently, to help to integrate their products and
22 help them compete better downstream. So, that is not to say that the merger
23 wouldn't change behaviour and tip it over towards a different form of conduct.

24 I understand the merger changes things, but what the merger changes, what
25 it adds is just an increased probability of picking something up by foreclosing
26 those downstream competitors, doesn't it?

1 I guess that is the essential driving theory of the case.

2 At the moment, Tobii already has -- let's call it a, you know, a 50 per cent market
3 share, to pluck a number out of the air. Post-merger it will have a 70 per cent
4 merger share, whatever the number is. You are saying it is that increment of
5 the market share that will tip the behaviour over from, at the moment, offering
6 these big discounts to these people, to, afterwards, taking the discounts away.
7 It is the incremental per cent of market share that is going to change the
8 behaviour; is that the correct characterisation of your theory of harm?

9 MS SMITH: What we say is what is set out in the final report.

10 The first submission I want to make is that we clearly addressed, in paragraph 7.59
11 of the final report, the existing ability and, we say, some incentive to foreclose
12 downstream rivals that Smartbox has.

13 Then we went on to say, paragraph 7.60:

14 "... the foreclosure incentives of the merged entity would be significantly higher than
15 those of Smartbox absent the Merger."

16 We explain, in paragraphs 7.61 through to 7.64, the three reasons why we come to
17 that conclusion.

18 So, again, trying to draw this back to what the challenge actually is in this case, and
19 what forum we are now in; that of judicial review. We were clearly aware of
20 the issue, we clearly considered it and, in my submission, we addressed it
21 and came to the conclusion that the foreclosure incentives of the merged
22 entity would be significantly higher than those of Smartbox for the reasons set
23 out in the report, which we submit are rational, and which Tobii has not given
24 any reason to suggest are not rational.

25 I am sorry if that doesn't satisfy you, Sir, but that is --

26 MR RIDYARD: I am simply giving an opportunity to comment on these things

1 because I think they may be in some way relevant to our considerations. I am
2 not putting it any stronger than that.

3 MS SMITH: Sir, for your note, that point is also addressed in paragraphs 165 to 167
4 of our defence.

5 MR RIDYARD: I have one final question. You will be pleased to know it is the last
6 one on this topic. That is the diversion ratios. What the CMA does is say -- it
7 assesses what the critical diversion ratio would be and it says, you know, you
8 are confident that the actual diversion ratio would be easily big enough to
9 meet that test.

10 Is that diversion ratio you are talking about there the same as the diversion ratio we
11 were talking about yesterday? The diversion ratio between Tobii and
12 Smartbox.

13 MS SMITH: No, it is not. I will attempt to address any questions you have on that
14 point as well as I can on my feet, but I should place a marker down that this
15 point is not one that is raised in the application, so not one that necessarily
16 I have already considered in any great detail --

17 MR RIDYARD: Okay.

18 MS SMITH: -- in order to make submissions to the Tribunal, but I will of course
19 assist you as far as I can.

20 MR RIDYARD: I mean --

21 MS SMITH: No, the diversion ratios that we relied upon when looking at the
22 incentive to foreclose are different diversion ratios, and they are set out in the
23 report at 7.48 onwards.

24 Those are the critical diversion thresholds in a foreclosure scenario.

25 MR RIDYARD: Do they say diversion between what and what?

26 Are you talking about diversion between Smartbox and Tobii, or diversion between

1 Liberator and Tobii, or Techcess and Tobii?

2 MS SMITH: It is the diversion from the two rivals, Techcess and Liberator, to the
3 merged entity, which by definition is different from the horizontal diversion
4 exercise.

5 MR RIDYARD: Yes, that is what I thought would be the answer.
6 Those diversion ratios haven't been measured anywhere?

7 MS SMITH: Yes, I think so. They are -- well, they are assessed qualitatively in
8 paragraph 7.49 onwards, and the conclusion is reached that the critical
9 diversion ratios are likely to be --

10 MR RIDYARD: Okay.

11 MS SMITH: Sorry, yes, the critical diversions are likely to be higher than the
12 threshold that is set out in 7.48.

13 THE CHAIRMAN: On the issue of foreclosure, you always look at two things, the
14 ability to foreclose and the incentive to foreclose. Does one have to take any
15 view at all as to the likelihood or not of foreclosure in practice?
16 You have the ability, you have the incentive, but do you have to take any view as to
17 the likelihood of the foreclosure, ie that they will actually go ahead with that
18 incentive?

19 MS SMITH: I think, Sir, you infer the likelihood from the ability and incentive.

20 THE CHAIRMAN: Yes, that is the only way of doing it.

21 MR RIDYARD: All these models assume profit maximizing behaviour and a change
22 from one equilibrium to another. And you're saying --

23 THE CHAIRMAN: Well, it's an inference, isn't it?

24 MS SMITH: Yes, that if a profit maximizing firm has the incentive and ability to
25 foreclose --

26 THE CHAIRMAN: My question is slightly different. I understand ability and

1 incentive, you deal with that. But what is a threshold, ie how likely is it that --
2 the view one has to take?

3 Is it a small risk that you will have actual foreclosure? Where do you grade it?

4 MS SMITH: I think the test that is being applied by the CMA is on a balance of
5 probabilities.

6 On the critical diversion ratio, Sir, the figures for the diversion by from Liberator and
7 Techcess are the figures are set out at 7.26 of the report, and then they are
8 used in the analysis from 7.49 onwards.

9 MR RIDYARD: I see, yes. Okay. Thank you. Thanks very much, that is useful.

10 THE CHAIRMAN: We have that.

11 MS SMITH: As regards likelihood, Sir, I think we would draw your attention to the
12 third stage of analysis, which is what the -- sorry.

13 As regards likelihood, Sir, can we draw your attention to paragraphs 7.60 through to
14 7.64, which, although worded in the language of incentive, essentially says
15 these are the reasons why we think that it is likely that the merged entity -- or
16 more likely than not that the merged entity would act in this way.

17 THE CHAIRMAN: Yes. I have that.

18 MS SMITH: This is the point I was going to make on the third stage of the analysis,
19 again as respect to the Chair, Sir, your question about likelihood. The third
20 stage of the analysis is what the effects would be.

21 In that effects stage -- which is addressed in paragraphs 7.70 through to 7.74 -- you
22 will also see assertions and judgments as to the likelihood of what the merged
23 entity and the rivals would do in the foreclosure scenarios.

24 Sir, if those are all the questions, with great regret I will move away from vertical
25 effects and move back to ground 1.

26 As regards ground 1 -- sorry, no, before moving on to ground 1 ...

1 I am misreading my notes.

2 Before moving on to ground 1, I would like to make brief submissions on the situation
3 as regards the Indi. As I have said, we will take a little time to look more
4 closely at the note that has been handed in by Tobii, and if we need to
5 address any of that detail in a note produced by ourselves.

6 THE CHAIRMAN: I think you should put a note in, to be honest.

7 MS SMITH: Yes. Nevertheless, I think in about five minutes I could just outline what
8 we say, which might be useful.

9 THE CHAIRMAN: Yes.

10 MS SMITH: Particularly to give Mr Robertson an opportunity to reply, if he wishes to.
11 First of all, Mr Robertson submitted yesterday that Indi should not be included within
12 the relevant product market because the product did not fulfil two of the four
13 elements within the definition of dedicated AAC solutions. He said that those
14 two of the four elements were service and access means.

15 As regards --

16 MR ROBERTSON: Sorry, if I could just interrupt and assist my learned friend on that
17 point. I did say access means yesterday, I identified that as one of the
18 characteristics that it didn't meet. But having reconsidered that with
19 Mr Eskilsson --

20 THE CHAIRMAN: You have made it clear here it is on service.

21 MR ROBERTSON: It is on service, yes.

22 THE CHAIRMAN: I noticed you had taken it out.

23 MR ROBERTSON: We have taken out access means because although it doesn't
24 have switches fitted to it, it has the means for switches to be fitted to it, if
25 necessary.

26 MS SMITH: Thank you. That is very helpful.

1 In fact, I think that came through clearly from what Mr Eskilsson explained this
2 morning; that access can be by touch or other access means, if necessary.

3 So, just then looking at the service element, if I could ask to you look at -- this point
4 was addressed in our defence. If I could ask you to turn to that in hearing
5 bundle 1, tab 2, page 110, paragraph 110.

6 We make the point there that, in fact, Tobii's marketing material emphasises the
7 availability of technical support for these devices. You will see, in footnote 39,
8 a reference to a brochure for the Indi and a hyperlink.

9 Now, in their first 101-page skeleton argument Tobii said: actually, you can't rely on
10 the document that is in footnote 9 because it is a US document not a UK
11 document.

12 That point appears to have dropped out of their 75-page document skeleton
13 argument.

14 The point we would say remains good, and I can hand up the equivalent UK or hand
15 in the equivalent UK document that is just a download from Tobii's website.

16 THE CHAIRMAN: Has Mr Robertson seen that?

17 MS SMITH: No, not yet. It's his --

18 THE CHAIRMAN: Show it to him before I look at it.

19 MS SMITH: Yes. It is his client's website. The UK website. It is the pages related
20 to Indi.

21 THE CHAIRMAN: Let's see if Mr Robertson has any objections first.

22 MR ROBERTSON: I don't object to this going in. TD care is an optional extra, just
23 like purchasing an extended warranty. You can either choose to do it or not.

24 THE CHAIRMAN: Exactly. Okay, thank you.

25 Is there going to be a home for this?

26 MS SMITH: Yes, perhaps it could go behind our skeleton argument.

1 THE CHAIRMAN: Yes, okay.

2 MS SMITH: Thank you, Sir.

3 If I can ask you to turn to the seventh page of the printout. It's the fourth physical
4 page, as it were. Apologies that it is not numbered. It is the page that says:

5 "Technical support and warranty."

6 THE CHAIRMAN: Yes.

7 MS SMITH: You will see there, next to the language on the right:

8 "Service and support is easily available from one place, Tobii Dynavox, for all your
9 Indi needs. Indi comes with a two-year manufacturer's warranty and 90 days
10 of telephone support to get you up and running."

11 Then, as Mr Robertson says, if you want additional support you can get the optional
12 warranty in addition.

13 THE CHAIRMAN: It says:

14 "Tobii Dynavox also offers the most comprehensive support in the industry."

15 MS SMITH: Yes. So, we make the point, as set out in our defence at
16 paragraph 110, Tobii's marketing material emphasises the availability of
17 technical support for these devices. As we say:

18 "Customers also have the option of purchasing additional warranties and support for
19 these devices. Thus, while the default level of support associated with these
20 devices is lower than that associated with other dedicated AAC solutions, it is
21 higher than that associated with non-dedicated AAC solutions."

22 So, that is our point on service.

23 THE CHAIRMAN: The bit that I have just read out, is that on offer in any event?

24 MS SMITH: What it appears is the bit that is on offer in any event is the 2-year
25 manufacturer's warranty and 90 days of telephone support. Then -- yes, then
26 there also appears to be additional website support materials available.

1 THE CHAIRMAN: Yes.

2 MS SMITH: The point is, of course, none of that comes with a consumer tablet.

3 Tobii will have an opportunity, obviously, to reply on that. I hear the
4 chuntering from the other side of the courtroom.

5 As regards market definition --

6 THE CHAIRMAN: Yes, so let me just make a note --

7 MS SMITH: Yes, Sir.

8 (Pause)

9 THE CHAIRMAN: Yes, okay.

10 MS SMITH: Sir, then, we move on to the treatment of the Indi by the CMA in its
11 decision. The Indi was included, as I think we have made absolutely clear,
12 within the CMA's definition of the relevant product market.

13 In that regard, I want to stress, first, the point that I already made on my submissions
14 under ground 3, which is that in our submission market definition in this
15 context is a framework for assessing competitive constraints. Its edges,
16 particularly in a market such as the current market, can be blurred. That is
17 paragraphs 5.2 and 5.3 of the final report.

18 We say it was not irrational for the CMA to include the Indi in the relevant product
19 market for three initial reasons, and we may develop these points in our note.

20 The first reason is that the Indi fell within the definition of dedicated AAC solutions,
21 as I have explained.

22 Further, there was evidence from respondents to the CMA's questionnaire that they
23 understood it to be within that definition. For your note, our references, just by
24 way of example, hearing bundle 6, tab 1, page 26 and page 99.

25 The second point is that competition on the non-price elements of competition --
26 service, range, innovation, R&D -- took place across Tobii's entire range, and

1 Smartbox's entire range, including the Indi. If there is going to be
2 a development in software or service levels, that will apply to the Indi just as it
3 applies to the other products.

4 The third point is that the CMA found on the basis of the evidence, and particularly
5 the parties' internal documents, that there was some competitive interaction
6 between Tobii's Indi on the one hand, and Smartbox's Grid Pad 8 and 10 on
7 the other. That is final report paragraph 6.34(f), even though there was also
8 a competitive interaction on price only between Tobii's Indi and the iPad. That
9 is paragraph 6.61(k) of the final report.

10 The CMA included Indi in the product market definition of defined AAC solutions,
11 even though it might have been at the blurred edges of that market. That was
12 a rational decision, we say.

13 The important thing is that when the CMA was assessing the intertwined issue of
14 SLC -- which is the purpose of defining the market definition in the merger
15 context -- when the CMA was assessing whether there would be a significant
16 likelihood of competition, we accepted that the Indi was constrained -- or we
17 held that the Indi was constrained to a certain extent, and on price only, by the
18 iPad. That is 6.61(k).

19 That approach -- which we say is consistent with our merger assessment guidelines,
20 paragraph 5.22 -- by taking that approach we looked at constraints from
21 outside the relevant market on products within the relevant market that the
22 iPad exercised on the Indi as to price only, but also on constraints that Indi
23 exercised on other products within the market; the Grid Pad 8 and Grid Pad
24 10. We say that this was a wholly rational approach.

25 This is the second question, Sir, that you asked yesterday: what was the impact of
26 including Indi in the relevant product market?

1 The CMA also considered that issue. The inclusion of the Indi in the relevant market
2 had two particular impacts on market share and diversion ratios. In each of
3 those situations the CMA considered what the position would be if Indi had
4 been taken out of the relevant market. There was no difference. It would
5 have led to no difference in our conclusions of the SLC, so we specifically
6 tested that point.

7 As regards market share, you may recall I took you to final report paragraph 6.11,
8 footnote 211.

9 THE CHAIRMAN: I remember that. You don't need to take me to it again.

10 MS SMITH: As regards diversion ratios, the relevant paragraph of the final report is
11 paragraph 6.56(c), at the top of page 119.

12 But, if I may, I will take you to paragraph 6.70 of the report because that sums up
13 these issues.

14 If I could ask you -- and I don't think we have been there before -- to 6.70.

15 THE CHAIRMAN: We haven't been there before, no.

16 MS SMITH: I think it is also useful because it contains a confidential figure that
17 I want to take you to.

18 THE CHAIRMAN: Yes.

19 MS SMITH: Paragraph 6.70, on page 125:

20 "Our assessment has considered the competitive constraints on dedicated AAC
21 solutions and has not focused on any particular segment. As part of this
22 assessment, the evidence has shown that competitive constraints, particularly
23 on price, are different for one particular product, the Indi. The Indi only
24 represents [X per cent] of Tobii's sales of dedicated AAC solutions in the UK
25 in value and, therefore, excluding that product from the market is unlikely to
26 materially change the results of our analysis."

1 The explanation for that statement is found in footnote 259.

2 There the references are to the points I have already alerted you to.

3 "In relation to market share estimates, see footnote to paragraph 6.11. In relation to
4 diversion ratio estimates, if anything, the inclusion of the Indi might imply that
5 our estimates of diversion ratios overstate diversion to non-dedicated AAC
6 solutions and understate diversion between the Parties. As respondents to
7 our questionnaire took account of their purchases of Indi when responding to
8 the diversion question, then measured diversion to non-dedicated solutions is
9 in fact higher than it would have been if we had asked respondents to only
10 take account of their purchases of dedicated AAC solutions excluding the
11 Indi."

12 Sir, I hope that addresses --

13 MR RIDYARD: One quick question. You have mentioned a couple of times you
14 thought the Indi competed on price for tablets, but not a quality. I am not
15 sure -- how can something compete on price, but not on quality? What does
16 that mean in practical terms?

17 MS SMITH: I think what that means is illustrated, to some extent, by the document
18 I just passed up, which is that the levels of support, customer support and
19 service for example, on the Indi are quite different, the CMA found, from the
20 levels of customer support and service that you would find on iPads. It is
21 more that, for example ...

22 MR RIDYARD: Maybe that is a source of differentiation, but it is not the same as
23 saying they don't -- because on price, I mean you come to quite a stark
24 conclusion in a way, which is that there wouldn't be an SLC on price
25 post-merger because --

26 MS SMITH: If I could take you up on that, because that is not what we say.

1 MR RIDYARD: Okay, can you take me to what you do say.

2 MS SMITH: Sorry, Sir, we say at 6.61(a).

3 MR RIDYARD: (k) isn't it?

4 MS SMITH: (k). It is:

5 "... the Indi is subject to stronger competitive constraints, particularly on price, from
6 non-dedicated AAC solutions than the rest of the dedicated AAC solutions
7 market and, as such, we consider it unlikely Tobii could profitably raise the
8 price for the Indi post-Merger."

9 MR RIDYARD: Right, so wouldn't raise the price of the Indi. I thought that is what
10 I said. So, you are saying it wouldn't raise the price of the Indi post-merger --

11 MS SMITH: Then your second point is addressed in 6.62.

12 MR RIDYARD: Do you think it could reduce the quality and get away with it?

13 MS SMITH: What we say in paragraph 6.62, towards the end of that paragraph:

14 "... For these reasons, we are concerned that the removal of one party as
15 a competitor is likely to allow the merged entity to increase prices or
16 deteriorate other aspects of its offering that are valued by customers, for
17 example the quality and range of products, or the level of service associated
18 with these products. The Merger is likely also to reduce incentives for the
19 merged entity to engage in R&D and innovate."

20 What I think needs to be said is that those conclusions were reached as regards the
21 range as a whole because that was the focus of our concerns, and the focus
22 of customer's concerns. That range offered by Tobii included the Indi.

23 Our concern was that Tobii as a whole, in the range that it offers, including the Indi,
24 would, post-merger, deteriorate other aspects of its offering that are valued by
25 customers. For example, the quality and range, the level of service, and the
26 incentives to engage in R&D to develop better products, to develop better

1 software. That was a concern that applied across the range.

2 What we didn't say is: well, let's look at each product and decide that, yes, quality,
3 service ... for each product.

4 We did that across the range, but we did do that on price just for the Indi because of
5 the evidence that was before us.

6 THE CHAIRMAN: Yes, we looked at that yesterday.

7 MR RIDYARD: Sorry, could it be rational -- if I can use that term -- to say
8 post-merger there would be no incentive to raise the price of the Indi above
9 £999 because consumers are comparing that with the price of the iPad, with
10 the relevant add-ons, but they would get away with suddenly making the
11 product less lower quality and still manage to sell it for £999, even though the
12 quality had gone down.

13 MS SMITH: When we say "quality" included in that is the levels of service,
14 obviously. We could reduce the service offered with the Indi, we could reduce
15 our investment in R&D to develop a better software package, or a better
16 access means package, which is applicable -- or access means product that
17 is applicable to the Indi just as much as to every other product.

18 MR RIDYARD: Yes, of course. All sorts of things could be deteriorated in the quality
19 of the product.

20 MS SMITH: That, in 6.62, is what the concerns were across the range.

21 I think where we may be meeting -- meeting or clashing -- is that you are looking at
22 it, with respect, from the point of view of the products and looking up.

23 What we were concerned about is looking at it from the ranges and looking down.

24 We did that for a number of reasons. Partly because that is what customers
25 told us they were concerned about. What would -- you know, would these
26 suppliers reduce their quality of service, reduce their innovation, reduce their

1 ranges?

2 But also because we were faced with a market where the conditions of competition
3 were the same, in effect, and this is paragraph 6.56(c), the same across the
4 piece.

5 The conditions of competition were the same for two reasons. The parties don't
6 monitor, from their internal documents, different products. They monitor what
7 their competitors are doing as regards their range. They monitor their
8 competitor's offering, and that is what we found from the internal documents.

9 Also, what are the customers facing?

10 They are forcing four suppliers who offer the full range of products, from the cheaper
11 options through to the more expensive options. So, customers are facing four
12 suppliers that are offering the full range.

13 That is the thinking that we engaged in, as is set out in paragraph 6.62.

14 MR RIDYARD: I am still trying to understand. You make specific predictions, if you
15 like, about the effect of the merger, and say prices will go up in the market
16 because of the reduction of competition with respect to the --

17 MS SMITH: Large percentage of the market that is accounted for not by Indi.

18 MR RIDYARD: But you make a specifically different conclusion with respect to the
19 Indi. You say that price wouldn't increase because it is constrained by those
20 consumers' ability to switch to tablets, which is fine.

21 But then, I am saying: can it then be rational to say but nevertheless they could get
22 away with reducing quality and not lose sales to tablets?

23 If something is competitive with tablets on price, is it possible it could be competitive
24 on price, but consumers don't care about the quality?

25 I just don't understand what prediction you are making, with respect to the Indi, on
26 quality.

1 MS SMITH: We do not say anywhere in the report, and we do not say that there
2 would -- Tobii would get away with extremely lower quality on the Indi
3 specifically.

4 What we do say is a concern is that quality, insofar as, for example, its development
5 of software -- which Mr Eskilsson made absolutely clear this morning is
6 common to all devices it offers -- that quality could be reduced as regards, for
7 example, that offering: their software that is offered across all devices,
8 including the Indi.

9 MR RIDYARD: Also, I guess, their other parts of the business too, including
10 licensing of software.

11 MS SMITH: I'm sorry, Sir?

12 MR RIDYARD: It would also affect licencing of software, too, in that case, wouldn't
13 it?

14 MS SMITH: I am not sure I can comment on that.

15 MR RIDYARD: It would have to, wouldn't it, because it is the same product?

16 MS SMITH: So, there are a number of parameters which, broadly defined, are
17 quality parameters rather than price parameters. But they go to service,
18 innovation, investment in R&D, customer support as well, which apply across
19 the range, including to Indi. We say the conclusion we reached was
20 consistent and rational on that basis.

21 If I may, I will move on back finally to ground 1.

22 THE CHAIRMAN: Shall we take a break until 11.25?

23 MS SMITH: Yes, of course.

24 **(11.15 am)**

25 **(A short break)**

26

1 (11.27 am)

2 THE CHAIRMAN: Okay ground 1.

3 MS SMITH: Thank you, Sir. As is always the way when you rise for 5 minutes.

4 Before I turn to ground 1 can I give you one cross-reference?

5 THE CHAIRMAN: I predicted you would do this, don't worry.

6 MS SMITH: I know.

7 One example of parties putting time, effort and money into efforts to compete across
8 their range without distinguishing Indi as a product, that is a development
9 specifically of software across the range. It is an example of competition on
10 quality and range, R&D that does not differentiate by product. The reference
11 is paragraphs 6.43 and 6.44 of the final report.

12 I don't ask you to turn that up, but just to take that reference for your note.

13 Particularly because the material is confidential, so I can't read it out anyway.

14 It gives an example of exactly what I was describing before the short break.

15 THE CHAIRMAN: On Indi, you are going to put in a further written submission, and
16 you will bear in mind the point Mr Ridyard was making. So, there is going to
17 be no harm in you setting out the references on all those in that document.

18 MS SMITH: Thank you for the indication.

19 THE CHAIRMAN: Thank you very much.

20 MS SMITH: So, ground 1.

21 Yesterday Mr Robertson accepted, as I understood it, in response to questions from
22 the Chairman that the principles to be applied under ground 1 were the legal
23 principles set out in Ryanair number 3. Transcript, Day 2, pages 18 to 19.

24 In light of that, my submissions on ground 1, I hope, can be relatively brief.

25 Just by way of introduction, I would ask the Tribunal to recall that -- I won't take them
26 to the cases, but in BMI Healthcare, paragraph 39(6), and Eurotunnel,

1 paragraph 168: the Tribunal held that the approach to be taken to what is fair
2 in any given case is nuanced, and that the CMA's approach should be given
3 great weight. The Tribunal should be slow to second guess the CMA's
4 decisions as to what should and shouldn't be disclosed during an inquiry.

5 We would urge this Tribunal to take the same approach in the present case.

6 As you will have seen during the Inquiry, Tobii made a large number of disclosure
7 requests --

8 THE CHAIRMAN: Can we just go back? Just one thing.

9 MS SMITH: Yes.

10 THE CHAIRMAN: One of the things they say now, having seen the responses to the
11 questionnaires, is: well, you didn't fairly summarise the evidence you are
12 getting back in the questionnaires.

13 In some bits, they may put it a bit slightly stronger than that.

14 MS SMITH: Yes.

15 THE CHAIRMAN: The law is clear that you provide them with the gist of the
16 evidence coming in, and that gives them enough, or should give them
17 enough -- with an opportunity to respond. You say they did have the
18 opportunity to respond.

19 But, in providing the gist, what level -- what are the points? You accept, in providing
20 the gist, it is going to be summarised fairly and not misleading?

21 MS SMITH: Yes.

22 THE CHAIRMAN: Those are the two basic things. Have you fairly summarised
23 material in a way that the other side could respond to? And not misleading, in
24 the sense that you mustn't misrepresent, for example, the questionnaires. So,
25 if you have ten questionnaires saying X, and you say actually they say Y,
26 obviously that is not fair.

1 Does it go as far as to say that you have to disclose all material facts coming out of
2 what is, let's say, in the questionnaires?

3 MS SMITH: We say, if I could -- specifically on the questionnaires, if I could take you
4 to the CMA's, or the CC's as it then was, guidance on disclosure during
5 merger enquiries. This is CC7.

6 You will recall the case law puts great weight on the CMA's guidance. It has
7 important things to say specifically about that type of disclosure. It is in
8 authorities bundle 1, tab 6.

9 THE CHAIRMAN: Yes, we just need to look at that because you have heard what
10 the allegations are being made.

11 MS SMITH: Yes.

12 THE CHAIRMAN: Let's see how far they really go.

13 MS SMITH: It is authorities bundle 1, tab 6. If I could take you, first, to paragraph --
14 well, you are familiar, I am sure, with this document. It sets out guidance on
15 the treatment of information as provided for under part 9 of the Act.

16 THE CHAIRMAN: Yes.

17 MS SMITH: Specifically, in section 6, it addresses how the CC should deal with the
18 main types of information. This is on page 8, received by the CC during the
19 course of an inquiry.

20 In paragraphs 6.2 and 6.3, it specifically addresses how the CC should deal with
21 responses to information requests, for example in response to questionnaires.

22 What it says in paragraph 6.2:

23 "The information received through such responses from main and third parties is
24 predominantly of a factual nature ... although there may be some content that
25 expresses the parties' views."

26 Then what I would ask you to highlight, Sir, is what is in 6.3:

1 "In most inquiries and reviews it will not be appropriate to disclose these responses.
2 However, as the inquiry or review develops the Group may need to consider
3 which of the factual information provided is relevant to its analysis and as
4 such should be disclosed. The usual form of disclosure of such information
5 will be through the incorporation of relevant material into the CC's documents,
6 eg the annotated issues statement, any disclosed working papers, provisional
7 findings [et cetera, and the] Data will often be aggregated."

8 Then, in 6.4, it specifically addresses how to deal with views.

9 But that is the starting point, we say, Sir.

10 THE CHAIRMAN: Yes.

11 MS SMITH: Then you turn from that to what was actually done in this case. I would
12 like to ask to you look at what Mr Meek says in his witness statement in that
13 regard.

14 Mr Meek's statement is in bundle 2, tab 4. Can I ask you to turn to paragraph 92 of
15 his statement, where, on page 93 of the bundle, page 23 of the internal page
16 numbering, he addresses specifically what the CMA did as regards
17 questionnaires and responses in this case.

18 I am not going to read that out. But, in our submission, the questionnaires were --
19 the questionnaires and the responses to the questionnaires were summarised
20 in quite extensive detail in the provisional findings.

21 You will have seen in my skeleton argument, paragraph 46, extensive
22 cross-references to the provisional findings that set out the gist, we say, of
23 each of the issues that arose from the questionnaires and the responses to
24 them.

25 If we had the time and the inclination, we could go through all of those paragraphs.

26 What is notable in this case is we haven't been shown anything by Tobii, any

1 specific problems, to put it at its lowest, or highest I am sure, but any
2 problems with that disclosure in the provisional findings.

3 The level of detail that the CMA provided in this case as regards the questionnaires
4 was extensive, and unusually so, from my experience of CMA inquiries and
5 merger inquiries. To the extent that -- possibly in reaction to the pressure that
6 was being placed on it by Tobii during the Inquiry -- the CMA even identified,
7 in footnotes to the provisional findings, the exact terms of the questions.

8 THE CHAIRMAN: I have noticed that, yes.

9 MS SMITH: It is footnotes -- well, the footnotes are -- you have noticed that.

10 THE CHAIRMAN: I have, yes.

11 MS SMITH: So, Tobii complained: we think your questions were unfair.

12 In the provisional findings, the CMA even disclosed the exact wording of the
13 questions in the questionnaires to enable Tobii to make submissions on that,
14 and they did, in their responses to the provisional findings.

15 THE CHAIRMAN: If someone could just email the registry with those footnote
16 references. Don't give it to me now.

17 MS SMITH: In paragraph 49 of our skeleton, we give you the references to make
18 good the fact that Tobii was given extensive detail of the questionnaires
19 themselves and the responses to the questionnaires, and the opportunity to
20 comment on them, and it took that opportunity. Those references in
21 paragraph 49 to the extensive submissions that Tobii made on those issues.

22 THE CHAIRMAN: It is one thread though, throughout the Inquiry, that they were
23 asking for more information. They repeatedly made the same requests, and
24 some of them you gave more material and others you didn't.

25 MS SMITH: Some of them we did not give them the documents.

26 I think it is an important distinction. We didn't give them the documents, but we

1 certainly gave them a detailed explanation of what we had done, of what we
2 took from the questionnaires, to enable them to understand the case against
3 them and to respond to that case.

4 THE CHAIRMAN: Yes. The point I was making, the mere fact that you make
5 repeated requests doesn't mean the requests are justified. So, I am just
6 saying I am not influenced by the number of requests that have been made.

7 The more fundamental issue is whether or not there are things that you should have
8 disclosed that you didn't, or whether the summaries that you provided in
9 relation to the material you are getting from the questionnaires was a fair
10 summary, and are there things in there that you should have pointed out that
11 you didn't point out? I think that is the focus of the Inquiry.

12 Now we have the actual responses, we will look at them in detail, and look and see
13 what Mr Robertson has said, and what you say about that, and come to
14 a view.

15 MS SMITH: Sir, I am grateful for that indication. Give me a moment.

16 THE CHAIRMAN: I am not a great fan of giving extensive disclosure of underlying
17 documents in the context of a merger inquiry, for the reasons I have explained
18 in other cases.

19 MS SMITH: With respect, Sir, that is the consistent approach that has been taken as
20 a matter of law in these cases.

21 We absolutely adopt that approach that has been taken by the Tribunal for those
22 reasons. We have explained that in our skeleton.

23 (Pause)

24 Sir, in light of your indication I think I can make my submissions even briefer, if there
25 are any more that I need to make.

26 We set out in our skeleton argument five general propositions that we take from the

1 law. I would ask you to return to those general propositions.

2 THE CHAIRMAN: What paragraph is it we are looking at?

3 MS SMITH: This is from paragraphs 26 through to paragraph 39. I think -- I hope --

4 most of those propositions are uncontroversial --

5 THE CHAIRMAN: You don't need to go through that. We have those points well on

6 board.

7 MS SMITH: Yes, that was the impression I was getting, Sir.

8 THE CHAIRMAN: Yes.

9 (Pause)

10 MS SMITH: Sir, in light of that helpful indication, I don't think I need to say anything

11 further on ground 1.

12 THE CHAIRMAN: Yes.

13 MS SMITH: Our position on --

14 THE CHAIRMAN: On ground 1, we will be going through all the questionnaires one

15 by one in looking at your submissions and the reply submissions, to take

16 a view as to whether or not the duty of disclosure was complied with. But it is

17 a detailed exercise and it is a mechanical one. If there is just one minor thing

18 that is a problem, then it is not going to be an issue.

19 But if the impression I get, or we get, having read them all, is that there are things in

20 there that clearly should have been disclosed, or there is something that is

21 misrepresented, then obviously we will say that in our judgment.

22 We know the arguments that are being made, but it is the sort of thing that you can't

23 really deal with in court. We just have to sit down and go through it all.

24 MS SMITH: I am grateful for that indication. I would simply say, by going back to

25 our touchstone, the list of issues, ground 1(a) is about questionnaires and

26 I have made submissions on that.

1 THE CHAIRMAN: Yes, sure.

2 MS SMITH: It's in paragraph 46 and 49 of our skeleton argument.

3 Ground 1(b) is the Smartbox information, which is addressed at paragraphs 47 and
4 49 of our skeleton. Ground 1(c) is the competitor information, which is equally
5 addressed in the same level of detail at paragraph 48 and 49 of our skeleton.

6 I don't think I need to repeat what is said there in court in the light of the indications
7 that you have given, Sir.

8 If I could have just one moment to check with those behind me, but I think that is --

9 THE CHAIRMAN: Yes.

10 (Pause)

11 MS SMITH: Thank you, Sir. Those are the submissions for the CMA.

12

13 **Submissions in reply by MR ROBERTSON**

14 THE CHAIRMAN: Mr Robertson, how long do you think you are going to be?

15 MR ROBERTSON: I am going to be 15 to 20 minutes. Mr O'Regan is going to be
16 maybe a little longer, maybe half an hour.

17 With a fair wind --

18 THE CHAIRMAN: We will probably take a five minute break after you finish, or
19 would you like to take the break now?

20 MR ROBERTSON: Let's crack on.

21 THE CHAIRMAN: Okay.

22 MR ROBERTSON: So, three topics I want to address in reply. The first one is Indi,
23 the second is ground 2 evidence, third is ground 3, SSNIP and product
24 information.

25 THE CHAIRMAN: Yes. Thank you.

26 MR ROBERTSON: So, dealing with 1, Indi, the document that was handed up this

1 morning. If you have the page that Ms Smith QC took you to --

2 THE CHAIRMAN: Yes. Page 7, yes.

3 MR ROBERTSON: She places reliance on the first paragraph, service and support
4 easily available from one place, Tobii Dynavox, 2-year manufacturer's
5 warranty, 90 days of telephone support.

6 The manufacturer's warranty there is required -- I am instructed -- by EU legislation,
7 so that is likely -- we can check this -- to be a feature of consumer tablets as
8 well. So, it is just a standard manufacturer's warranty.

9 THE CHAIRMAN: Yes.

10 MR ROBERTSON: The 90 days of telephone support, that is free. The additional
11 warranty --

12 THE CHAIRMAN: On that point, if you could just give us the reference to the EU --
13 we don't doubt it.

14 MS SMITH: Actually, our understanding is slightly different. So, if that point is going
15 to be made, then I think we do need a reference.

16 THE CHAIRMAN: I just need chapter and verse.

17 MR ROBERTSON: We will get chapter and verse on that.

18 THE CHAIRMAN: Before you send it to us, send it to the CMA. Then if there is
19 an agreed position, that is fine; if there isn't, then I will look at both sides. But
20 do that first, before you send it to us.

21 MR ROBERTSON: Yes. The key point is to -- or the first key point is to draw the
22 distinction between that and the optional what we call "TD care warranty".
23 With telephone support, covering any device repairs, no questions asked.
24 That is not supplied with the Indi. It has to be purchased separately.

25 THE CHAIRMAN: What is the price for that?

26 MR ROBERTSON: I think Mr O'Regan says -- I think it is £250.

1 That comes free with the I-Series, has to be purchased separately for Indi. The
2 I-Series includes the I-110 that you were looking at when we started this
3 morning.

4 THE CHAIRMAN: Yes.

5 MR ROBERTSON: So, that is an extensive additional care warranty, to be
6 distinguished from the basic manufacturer's warranty in the first paragraph.

7 When you come to look at the CMA's definition of "support", the fourth element of
8 their definition, and then you relate that back to what customers told them in
9 response to their questionnaire, you will see that the support that customers
10 expected was not just the basic manufacturer's warranty. They expected to
11 see things like repairs, loans of devices while other devices were being
12 repaired, people to come out to the user to carry out repairs, to investigate
13 problems at no cost, at no extra cost.

14 THE CHAIRMAN: All those things they would have had under the optional care
15 warranty, would they?

16 MR ROBERTSON: Yes.

17 THE CHAIRMAN: So, with the, let's say the high-end devices, that comes free. That
18 is all part of the package. Without it, you have to pay, maybe, £250?

19 MR ROBERTSON: Yes. What is being referred to in the first paragraph, the basic
20 manufacturer's warranty, is not what customers were referring to in
21 responding to questionnaires.

22 We have already covered the distinctions that were being made between --
23 customers were making between the level of service offered by Smartbox,
24 being UK based, and the -- as customers saw it, less good service from Tobii,
25 being remote from Sweden and the US.

26 The second point to make about this is that the Speech Case that you were shown

1 this morning -- if you remember the Speech Case is the device that we sell
2 into which you clip your own iPad to use as an AAC device. If you buy
3 a Speech Case, then you also have the option of buying TD care warranty for
4 it.

5 We say, if you have an iPad in a Speech Case and the user has purchased the
6 optional TD care warranty, how is that any different from an Indi, for which
7 optional warranty has been purchased? They are effectively competing
8 products.

9 One has the computer, the hardware manufactured for Tobii, in the Far East,
10 integrated into the Indi device. The other is a Speech Case into which
11 an iPad has been clipped.

12 They come with the same basic warranty, the same option of having additional TD
13 care warranty, yet, according to the CMA, one is in the market and one is not.
14 You can ignore, according to the CMA, the competitive threat from Apple,
15 which supplies iPads and indeed the other tablet computer offerings, such as
16 the Microsoft Surface.

17 This makes the point that the Indi is blatantly a competitive response to the iPad and
18 to other tablet computers.

19 Mr O'Regan has just given me the specific figures for TD care. If you purchase it for
20 one year, it is £249. If you purchase it for two years, it is £460.

21 We say the bizarre approach to market definition adopted in this case leads to two,
22 obviously, almost identical products to look at, identical to operate when it
23 comes to the software. One has been introduced by Tobii to respond to the
24 threat posed by the other. It has also introduced the Speech Case as its
25 response to the fact that people are using tablets, like the iPad, to provide
26 AAC solutions. One is in the market, one is not, and you have to ignore the

1 one that is not in the market.

2 My learned friend this morning said: well, we look at the range as a whole.

3 That has been the CMA's approach to this case. So, ignoring individual products, it
4 looks at the range as a whole.

5 She said when they look at what Tobii does internally, it looks at competitors' ranges.

6 Well, obviously, we respond to individual products. The Indi is a demonstration of
7 that. But, also, it is not true -- when we come to look at who we monitor, we
8 also monitor Apple and Microsoft.

9 My learned friend, Mr O'Regan, took to you the little chart showing that competitive
10 threat from Apple and Microsoft is not something that is over the horizon, it is
11 not something that is on the horizon. It is right here, in our market, now. It led
12 to Dynavox going into chapter 11 in the early 2010s.

13 The second point I wish to make, which is on evidence. It is ground 2.

14 Ms Smith said that the phase 1 and phase 2 questionnaires weren't pre-judging the
15 outcome, in fact, because they are asking open ended questions about
16 alternatives to the party's products, including consumer tablets.

17 This is incorrect. When you look at the questionnaires, they only asked about
18 alternatives in relation to dedicated AAC solutions. The term that the CMA
19 arrived at. So, no questions were asked as to customers' ability and
20 willingness to substitute away from individual products, or even from groups of
21 products. All that is ever tested is substitution away from the CMA's proposed
22 definition. That is because they have their blinkers on, with this competition
23 range against range.

24 If you are a user, you are interested in a product, not a range. You might be
25 interested in choosing one product as against another, but people, at the end
26 of the day, don't buy a range of products. They are buying individual products

1 for individual users, having regard to the needs of the individual user. That is
2 something that comes through very strongly from the questionnaires.

3 The procurement by NHS hubs and by the other customers is focussed on: what do
4 we need for this individual user? What is going to meet their needs?

5 Ms Smith has also suggested that the CMA didn't have to take a formal SSNIP test
6 as customers are mainly price insensitive.

7 Now, we don't see where the CMA has collected any evidence relevant to supporting
8 that assertion. No questions were asked in either the phase 1 or phase 2
9 questionnaires about customers' willingness or unwillingness to pay for
10 anything.

11 To reiterate the point that I made earlier, there isn't open ended funding in the NHS
12 for AAC services or indeed for anything else. The NHS guidance which I took
13 the Tribunal to refer, at paragraph 22, to AAC services being supplied
14 subject to the financial resources allocated by NHS England each year.

15 So, in our submission, value for money plainly has to be a consideration because
16 everyone is operating under a budget. That, of course, is an NHS England
17 hub budget. Other purchases are obviously going to be subject to budgets for
18 an individual end-user or a school, or a charity, or anyone that has been
19 involved in fundraising -- as I know Ms Smith has for various charities --
20 knows that money isn't open ended. It is hard to raise and you have to justify
21 spending it.

22 Our understanding is that price is an important dimension of competition in this
23 market, along with other factors.

24 What we know from our end-user survey, which objectively asked customers about
25 what factors matter to them, without any prompting, price was raised. That
26 suggests the customers do think price is important.

1 THE CHAIRMAN: Can you give me the reference to that?

2 MR ROBERTSON: Yes, it is pages 55 to 56 of the survey. That is to be found at

3 hearing bundle 4, tab 4, pages 97 to 98.

4 THE CHAIRMAN: That is too quick. Say it again.

5 MR ROBERTSON: Bundle 4, tab 4, pages 97 to 98, internal pages 55 to 56.

6 THE CHAIRMAN: Let me just look at it because we have time.

7 MR ROBERTSON: Yes.

8 So, question 13, at the top of the page:

9 "On a scale of 0 to 10 ... how important were the following features in your most

10 recent purchase decision relating to AAC devices?"

11 Portability comes top, quality of service compatibility with preferred software, price.

12 Then it's battery life, multiple access methods, screen size and so on, down to

13 ability to be mounted on the wheelchair.

14 There are further survey responses set out on the remainder of that page and the

15 following page. Price is either slightly above the middle or slightly below the

16 middle on the various tables.

17 THE CHAIRMAN: Yes. Thank you.

18 MR ROBERTSON: As I say, as far as we know that is the only evidence before the

19 CMA on price sensitivity, and it is evidence we supplied, but was disregarded.

20 This is also pertinent to the CMA's claim they didn't need to test diversion, or

21 substitution by product or segment.

22 Move on to the third of my topics. SSNIP test.

23 This is our answer to Mr Ridyard's question yesterday, which is on page 17 of the

24 transcript. The passage that begins:

25 "When you do the SSNIP test you reach a certain hypothesised market ... When you

26 do that, aren't you inevitably having to do across a bunch of products that are

1 different from one another? Doesn't that inevitably run into the problem you
2 criticised the CMA for?"

3 Our response to that is really under two headings. Firstly, principle. Secondly, let's
4 see what has happened to pricing on this market by reference to
5 Mr Eskilsson's evidence.

6 As a matter of principle, the Tribunal is correct, that having started from a narrow,
7 hypothesised product market, one inevitably will arrive at the proposed market
8 definition, or definitions, which themselves include a set of products which are
9 nonetheless differentiated and encompass various price points.

10 As such, when applying the SSNIP and working outwards from products, the
11 Tribunal is correct to suggest one ends up hypothesising 5 to 10 per cent
12 price increases relating to groups of products in a differentiated market such
13 as this.

14 Our primary criticism of the CMA's approach is its starting point however. By starting
15 at its asserted candidate market, which included all of the parties' products,
16 notwithstanding the obvious differences between them in price, we say its
17 approach to market definition was misconceived.

18 It also fails to recognise the very obvious features of this market, to which I have
19 already made reference: each individual user is unique and their solution
20 tailored to their needs.

21 So, starting from an assessment that included, at one end, the Indi, costing around
22 £999, and extending to devices such as the I-15, which costs just under
23 £9,000, we say that made it inevitable that the CMA would be unable to
24 determine the relevant boundaries of the market, or markets, and assess
25 competition within it.

26 Turning to the evidence on pricing. What if -- the theory that Tobii would raise its

1 prices for its more expensive products.

2 It is absolutely plain it can't raise the price for the Indi because it will be
3 out-competed by the iPad. That goes for price. It goes for quality,
4 suggestions that you could put on less good software for it and exploit
5 customers that way is just -- it really is fanciful.

6 THE CHAIRMAN: Because what will happen is, if your quality deteriorates, the next
7 thing it will be in all the chat rooms, won't it?

8 MR ROBERTSON: Yes. As we said in the main party hearing, you lose your
9 reputation in this market. That is suicide, commercial suicide.

10 THE CHAIRMAN: Yes. When you look at it logically, if one wants to define the
11 ultimate end-users as vulnerable or disadvantaged, whichever way you look
12 at it, it is pretty bad if you start playing games with people like that because it
13 wouldn't help your reputation generally.

14 MR ROBERTSON: Yes.

15 THE CHAIRMAN: I can see the logic of what you are saying.

16 MR ROBERTSON: Can I take you back to Mr Eskilsson's witness evidence, which is
17 in volume 2 of the hearing bundle, tab 2. Just look what is happening in this
18 market.

19 THE CHAIRMAN: Yes, what paragraph?

20 MR ROBERTSON: It starts at paragraph 26. There is a lot of blue here. So, if
21 I could ask the Tribunal to read paragraphs 25 to 28 just to remind ...

22 (Pause)

23 Then we turn the page to paragraph 29, which describes the dramatic rise in total
24 AAC solutions volume in the three years from 2016 to 2018. I'm emphasising
25 these are volumes. Individual products, users being served.

26 So, from 2016 to 2018, a dramatic rise. That is driven by sales of the Indi, the

1 Speech Case and by software sales.

2 Now, sales to the NHS, and sales by volume to the NHS, are a small and declining
3 proportion of Tobii's sales. It is already the case that most sales to the NHS
4 are Indi devices and the Speech Case.

5 The Speech Case is our fastest growing product. That reflects the popularity of the
6 iPad. We pick that up at paragraph 37.2, sub-paragraph (b):

7 "Speech Case ... This is Tobii Dynavox's fastest growing product in the UK market."

8 I would ask the Tribunal -- I am not going to go through it. You have read the
9 witness statements -- to bear in mind and to remind yourselves of paragraphs
10 30 through to 36, particularly of paragraph 35, the small proportion of Tobii
11 Dynavox's unit volumes meeting the -- what we understand -- by the
12 dedicated AAC solutions.

13 You can see the actual figures for the numbers of units sold in 2018 in the last line,
14 penultimate line, at paragraph 35.

15 THE CHAIRMAN: You are taking Tobii out then, are you?

16 MR ROBERTSON: Indi. Yes, that is why I said: what we understand.

17 Indi is fast growing by volume because it is 10 per cent of the price of a I-15. So,
18 you start looking at sales by value, but the difference is not accounted for
19 purely by margin. Just to make that very obvious point, Mr Eskilsson
20 explained why it is much more expensive to build the high-end devices
21 because we don't have anything like the economies of scale that Apple does
22 when it makes an iPad.

23 I should also remind the Tribunal that the detailed product by product sales figures
24 are set out in the tables at paragraph 38 of Mr Eskilsson's witness statement,
25 on pages 49 to 50 of this bundle.

26 That is the trend. Decline in the high-end, switching to consumer devices, hence the

1 Indi. Emphasis on the Speech Case, and emphasis on increasing software
2 sales.

3 The problem in this report with lack of information -- and the evidence gathering
4 exercise, lack of information about the market. It results from the wrong
5 assumed market definition, and this is not a marginal problem, as it is
6 described by my learned friend. It is a core problem. It is the core problem
7 underlying the CMA's final report.

8 Their fundamental error has been to assume a product market definition and conduct
9 all their evidence gathering by reference to that. They have never stepped
10 back and properly tested that market definition, whether by a proper survey or
11 by applying the SSNIP test. Once that product market definition unravels,
12 then all of the reasoning in the report similarly falls apart. It is fundamental. It
13 is a core problem.

14 That is all I wanted to say in relation to grounds 2 and 3. I am not going to address
15 you orally on ground 1. You have our written submissions.

16 THE CHAIRMAN: We will take a five minute break before we hear Mr O'Regan.

17 (12.10 pm)

18 (A short break)

19 (12.24 pm)

20 THE CHAIRMAN: Yes, Mr O'Regan.

21

22 **Submissions in reply by MR O'REGAN**

23 MR O'REGAN: I will address you on grounds 4 and 5.

24 Starting with ground 4, the points I will address you on are evidence, diversion ratios
25 and GUPPIs, and there will be some more -- we've had discussion already in
26 submissions from my learned friend, Mr Robertson QC, on the Indi, but there

1 are some ground 4 specific points I will need to take you to.

2 That follows into the product by product competitive assessments.

3 Then we will be into ground 5, which I think is focussed primarily on the absence of
4 assessment of market power and whether or not there is any realistic
5 prospect of input foreclosure.

6 Going back to ground 4, turn to the wealth of the evidence. It was my learned friend,
7 Ms Smith QC, put it to the Tribunal, yesterday, that the CMA's finding of
8 an SLC on horizontal unilateral effects was based upon, as she put it,
9 "a wealth of evidence". She referred you to paragraph 6.61 of the final report.
10 I won't take you to it.

11 The reference is day 2, transcript at pages 54 and 55.

12 She identified 11 items of evidence the CMA said it relied upon, but it is clear they
13 had three sources. First customers and interest groups, secondly competitors
14 and resellers and, thirdly, the parties' internal documents.

15 Looking, first, at the customer evidence, our submission is that there are multiple
16 issues with the reliability of the customer evidence. That has been I think
17 done to death, both in opening submissions and by my learned friend
18 Mr Robertson QC just now.

19 In terms of competitors, the CMA makes much of having spoken to 23 competitors
20 and 7 resellers. But, if one looks at section 6 of the final report, which is the
21 section on horizontal effects, there is little reference to what competitors and
22 resellers actually said.

23 Thirdly, in relation to the internal documents, our submission in relation to those is
24 the CMA's use of those is partial, selective and lacking in objectivity.

25 So, in relation to that evidence as a whole, we say the CMA did not have a solid and
26 reliable evidential basis for the SLC finding, and that is Wednesbury

1 unreasonable. That is a matter of public law, but it's not, as has been put to
2 you on several occasions, a challenge to the merits. Obviously it relies upon
3 looking at the facts, but this is one of those review cases where the facts are
4 critically important.

5 More facts is diversion ratios and GUPPIs.

6 One further point emerges to those. My learned friend, Ms Smith QC, yesterday, at
7 transcript for Day 2, at page 124, lines 13 to 23, suggested that, in our
8 skeleton argument, we had confused diversion ratios and market shares.

9 Now, with respect, we are well aware of the differences between the two concepts
10 and what they measure.

11 If I could take you to paragraph 168, sub-paragraph 3 of our skeleton, it is probably
12 easier for the Tribunal read it, rather than me read it out to you. That would
13 be in bundle 1, tab 3, page 186. It is at the top of the page, on page --

14 THE CHAIRMAN: Just give the internal page numbers.

15 MR O'REGAN: The internal page number is 59, Sir. It is actually at the top of
16 page 59.

17 It starts:

18 "The evidence provided by customers was not consistent with available contextual
19 evidence ..."

20 If you could read through to the end of that paragraph.

21 THE CHAIRMAN: What are we looking at?

22 MR RIDYARD: Which paragraph?

23 MR O'REGAN: The internal page inside tab 3 of volume 1, is page 59. At the top of
24 page 59, there is a number (3). In my bundle it is --

25 THE CHAIRMAN: Just give me the paragraph number.

26 MR O'REGAN: It is 168(3). 168 actually starts on page 185, internal page 57.

1 MR RIDYARD: So, it is 168(3).

2 THE CHAIRMAN: 61, on the copy in my bundle.

3 MR O'REGAN: 59 in mine, Sir.

4 THE CHAIRMAN: Let's just go with the paragraph numbers.

5 MR O'REGAN: I have the unannotated one in my bundle. So, it is
6 paragraph 168(3), which is immediately above 169.

7 (Pause)

8 THE CHAIRMAN: Yes we have that.

9 MR O'REGAN: The point we are making there, Sir, and members of the Tribunal, is
10 where competitors are of equal closeness in their offering to customers, their
11 respective shares of diverted sales in the event of a forced diversion of the
12 remaining suppliers will be roughly proportionate to their market shares.

13 But if two competitors are closer rivals than others, diversion between them will be
14 higher than that.

15 What we see in looking at the diversion ratios calculated by the CMA, from Tobii to
16 Smartbox, is that they are confidential, but they are in the order of around
17 about 50 per cent.

18 Now, we say that those are equivalent, broadly the same level as would be expected
19 if we were just to calculate diversion on the basis of market shares alone. So,
20 without looking at closeness of competition.

21 On that basis, we submit that Smartbox and Tobii are not particularly close
22 competitors. The CMA's finding that the parties were close competitors is
23 therefore inconsistent with the broader evidence in the case.

24 In relation to GUPPIs, I have already addressed you, yesterday, on concerns relating
25 to the unreliability of the diversion ratios, the version of data that was used to
26 calculate both ratios and GUPPIs. Respectfully agree with an observation of

1 Mr Ridyard yesterday, at Day 2, transcript, page 101, lines 20 to 23, that
2 a GUPPI is a very mechanistic, simplistic kind of calculation.

3 In our submission, they are manifestly not a fully calibrated and specified merger
4 simulation. It is not kind of econometric analysis, and they are really only
5 an indication of possible competition concerns. Or an indication that more
6 investigation is required by the authority. So, they are particularly useful in
7 phase 1 investigations, but, in our submission, they are neither definitive, nor
8 even persuasive evidence of an SLC and a price increase in phase 2.
9 Nevertheless the CMA has relied upon them to support its inference of
10 a significant price rise as a result of the merger.

11 Overall, looking at the -- it is clearly for the CMA to assess the evidence in the round,
12 and it is for it to give reasonable weight to the evidence as a whole.

13 In our submission, however, a case that is made up of numerous pieces of evidence
14 that individually are weak doesn't thereby create a solid and reliable evidential
15 foundation for the finding of an SLC.

16 Turning to the Indi, there has been a lot of discussion about the Indi. The Tribunal
17 members have obviously had an opportunity to take a look at and, to some
18 extent, play with the Indi and the other devices.

19 We agree with the CMA, that the Indi faces strong competition from AAC solutions
20 based on mainstream tablets, such as the iPad, but that is precisely why the
21 iPad was developed in the first place. It was a response to a significant loss
22 of sales from what, in the US, are described as "dedicated devices". So, that
23 is devices that meet requirements of US funding. So, it was developed at
24 a time when Tobii was selling the predecessors to what are now the I-110 and
25 the I-Series. They were losing very significant sales to iPads particularly,
26 including for customers who would be eligible for reimbursement from

1 MediCare and Medicaid, so that is precisely why the Indi was introduced.

2 You also have seen the I-110 this morning, which is a medical grade device. It is
3 essentially functionally the same. It is functionally interchangeable. The only
4 real difference is one is built to medical grade specification for regulatory
5 reasons and the other one isn't.

6 The Indi must be substitutable, in our submission, for the I-110. Therefore it is clear
7 there is a chain of substitution. My learned friend, Mr Robertson QC, has
8 addressed you on this already. You have the iPad with the Speech Case, and
9 iPads with similar cases are supplied by competitors all the way through
10 a continuous chain to the high-end devices, such as the I-110 and then into
11 the I-Series.

12 The CMA has found, based upon evidence from Smartbox, that the Indi also
13 competes with Smartbox's Grid Pad 8 and 10. So, logically, if there is
14 competition between the Indi and the Grid Pad 8 and 10, there must also be
15 competition between those devices and mainstream devices. But also
16 between similar devices made by competitors, such as Liberator and
17 Techcess, but the CMA has just never assessed that.

18 The CMA makes much -- and it says its finding in relation to the Indi is it only
19 competes on price with mainstream devices. That was something that
20 Mr Ridyard discussed with my learned friend this morning.

21 It found that there would be no increase in price for the Indi. But, in our submission,
22 the finding that the competitive constraint on the Indi was only in relation to
23 price is wrong. It must also be competing on quality, both in relation to the
24 computer itself, both in terms of processing speed, screen definition, how fast
25 pages load, et cetera, how much memory it has, what its RAM is, and those
26 kind of things.

1 It also needs to compete on durability, battery life, sound quality, in terms of the
2 speakers, service, and those other factors. So, the suggestion that there is
3 only competition in relation to price, and that the effects of the merger are
4 limited only to price, in our submission is wrong.

5 Which brings me on to innovation. There is competition between the Indi and the
6 iPad. That competition is across the whole range and that must include
7 innovation. It is that competition from the iPad and similar devices that drives
8 innovation in products such as the Indi. That goes beyond hardware. It also
9 extends into software.

10 The Indi is running the Snap and Core First software, which you saw this morning.
11 It's the symbol one. You touch on it, it comes out with words.

12 That is our flagship software, but we also sell it on a standalone download basis for
13 £49, so it is therefore competing, also, with hundreds of other AAC software
14 titles that you can download.

15 As Mr Ridyard observed this morning, it is also licenced out to third parties. So,
16 competition the Indi faces is driving innovation, both in hardware and
17 software. That is an incentive that, on the CMA's case, comes from outside
18 the market, but the CMA has completely ignored that.

19 If one looks at the impetus for R&D in high-end devices, the I-110 or I-Series, that
20 competition isn't driven by competition in the UK at all. It is driven by
21 competition between devices that are eligible in the US for healthcare funding.
22 That is a segment in which Smartbox, with its most advanced product, the
23 Grid Pad 12 -- which was introduced about a year ago -- has little or no
24 presence. So, Smartbox is a small player, if a player at all, in the segment
25 that gives rise to the impetus for innovation in high-end devices.

26 The CMA hasn't reflected that either in its decision. We say that is irrational.

1 Therefore the merger would not reduce innovation because innovation isn't driven
2 primarily by Smartbox. There are some competitive constraints. There would
3 be, but we can't say it would be significant, which brings me on to the CMA's
4 failure to assess competition on a product by product basis in what is
5 a market for highly differentiated products.

6 It is quite conceivable, in our submission, that the characteristics and positioning of
7 individual products along that continuum of different suppliers is different. So,
8 they may or may not, in fact, compete more closely with other competitors'
9 specific individual products. One needs to make the assessment. That
10 assessment was simply never done by the CMA.

11 Now, it is said that it didn't need to, that was a reasonable exercise of its judgment.
12 We would respectfully disagree with that.

13 It was reasonable that it was something that was entirely necessary, to understand
14 how differentiated products compete with each other. You can't just place
15 them all into some kind of amorphous group and assess them on that basis.
16 Individual products may compete, they may not. It may be a strong
17 competition, it may be a weak one. We just simply don't know because the
18 work was never done. That, in our submission, was unreasonable.

19 In relation to the diversion ratios, they obviously were assessed on a basis of product
20 ranges as a whole. There was no assessment of competition and diversion
21 on the basis of individual products, and the CMA accepts that its diversion
22 ratios are averages.

23 It further asserts that if one were to remove the Indi from that analysis, diversion
24 between other products, which it says are closer competitors -- so that is
25 Smartbox and that is the Grid Pad 12. For Tobii Dynavox it is the I-110, I-12
26 and I-15 -- diversion there must be higher. You can only work that out and

1 confirm that by analysing the competition on an individual basis and
2 calculating the ratios for those products.

3 Again, that is something that a reasonable authority would have done in this case,
4 presented with the market circumstances as they were, but, again, that simply
5 wasn't done. So, again, it is, we say, an unreasonable failure by the CMA to
6 investigate matters that it should have done. As a result, it simply doesn't
7 have the evidence to support the conclusions that it makes. That is
8 Wednesbury unreasonable.

9 They are our submissions in relation to ground 4.

10 In ground 5, vertical affects, again, as we have done throughout this hearing on both
11 sides, we will focus on ground 5, 5(a), input foreclosure, not submissions in
12 relation to ground 5(b) on customer foreclosure. I could refer the Tribunal to
13 our various written submissions on that.

14 Basically, covering two points in relation to this. First of all, there was no
15 assessment of market power in the upstream markets and, secondly, whether
16 or not there was actually a likelihood of input foreclosure, both in terms of
17 incentive, but also whether there was likely to be significant negative effects
18 on competition as a result that would have led to the foreclosure of Liberator
19 or Techcess.

20 We have explored at some length -- the Tribunal has explored with both parties
21 whether or not the CMA had in fact assessed that the merged entity would
22 have had significant market power on the upstream market for licensing of
23 AAC software, which is a global market.

24 In our submission, it is plain that the CMA did not do so. I don't think the CMA has
25 been able to point to any specific provision in the final report that actually says
26 that it did so. It merely infers that on the basis that Grid is the most used AAC

1 software in the UK on dedicated AAC solutions.

2 Now, in our submission, given the market share of Smartbox on that downstream
3 market, and the very limited number of devices that Liberator and Techcess
4 sell that have Grid on them, that market position, and it being the most
5 popular software on dedicated solutions, is almost entirely due to the number
6 of AAC solutions that Smartbox is selling in the UK on the downstream
7 market.

8 Now, that market simply is not the right upstream market. Fact: it is not an upstream
9 market at all. It is a downstream market on which any effects from
10 foreclosure, if they were to be proven to the requisite standard, would be
11 observed. That is the last step of the three-step analysis of ability, incentive
12 and effect.

13 So, the CMA simply hasn't done the analysis at all.

14 Now, my learned friend, Ms Smith QC, referred to a concern about users of Grid in
15 the UK. That is an admirable concern, indeed it is one that Tobii shares. That
16 is the whole reason for Tobii being in business, to assist those who are less
17 fortunate and have disabilities to live more full and productive lives, and to
18 communicate with each other, which is widely assessed as being a human
19 right.

20 This isn't a sector where success can be achieved by exploiting vulnerable people,
21 far from it. It is a long-term business, and one that, across all the suppliers,
22 has a specific culture of working to make people's lives better. That is
23 something you will see not only in Tobii Dynavox, but also in other suppliers.

24 Mr Eskilsson, in his witness statement -- I don't propose to take you to it, but the
25 reference is hearing bundle 2, tab 2, paragraphs 8 to 10 and 28 -- explains
26 that culture and why Tobii Dynavox is in business.

1 To show it is a long-term business, Mr Eskilsson co-founded Tobii in 2001. He has
2 been with the business now for the best part of 18 years and is one of the
3 driving forces behind the company as it is now.

4 It is the same with Smartbox. That was started by Mr Paul Hawes from his bedroom,
5 and built into a very successful company, which has a very good reputation
6 with its customers.

7 So, reputation -- and the Chairman observed this earlier, that reputation in this
8 business really is important. That really is, in our submission, an issue that is
9 relevant to whether or not you are likely to have the incentive to foreclose.

10 The closeness of the relationship with AAC users is shown by some of the emails
11 that the CMA received from either interest groups or parents of children who
12 have very severe disabilities and are using AAC solutions. Those emails can
13 be found in bundle 5, at tab 1, pages 5, 10 and 11. They show that both
14 interest groups and parents interact directly with the companies. They are
15 relatively small businesses, so the relationship and reputation is extremely
16 important.

17 What those emails also show is that at no stage did the CMA actually go out and
18 proactively obtain evidence from end-users, parents, people who work in
19 charities and the like. They don't emphasise or show engagement with
20 end-users, really quite the reverse. They weren't solicited, they were sent in.

21 That brings me on to whether or not there was realistically a prospect of input
22 foreclosure in this case.

23 THE CHAIRMAN: Just on this point, the impression I get -- and I can be corrected --
24 I don't see this as an ordinary business. This is one where those who are in
25 this business, the two people you have named just now, are people who strive
26 to help vulnerable people fulfil their lives to the greatest potential, and that

1 doesn't sort of ring true that, you know, you are going to cut back on R&D if,
2 for example, the whole thing is just striving to do better for these people. If
3 you go backwards, it is not going to really be a very good thing to do for
4 anyone.

5 MR O'REGAN: It's neither a good business decision -- I respectfully agree -- nor is it
6 good for the broader reputation.

7 THE CHAIRMAN: I am making a slightly different point. I am saying you can make
8 business decisions and you have all these incentives, I fully understand all of
9 those, but there is another stream in this business. You have people who are
10 out there to help people. I am not saying it is entirely philanthropic.

11 MR O'REGAN: We are there to make a profit, Sir.

12 THE CHAIRMAN: But there is a big element there where it is about helping people
13 to fulfil their potential.

14 MR O'REGAN: I respectfully agree. As Mr Robertson has told me: it is about ethos.
15 That comes back to whether or not there is an incentive to foreclose. I will come
16 back to that extremely briefly in a moment.

17 THE CHAIRMAN: You may have incentives on a financial level, what I am perhaps
18 saying differently is that you may have the ability, you may have the
19 incentives, but if you are an organisation that is actually out there to help
20 people fulfil their potential, how likely is it that you will push those incentives to
21 make more money if, at the end of the day, you are not achieving the
22 objective you have been working decades on?

23 MR O'REGAN: Yes, I respectfully agree, Sir. I think we are saying the same thing in
24 slightly different ways.

25 In our note we handed up yesterday, we showed how much we thought, based upon
26 reasonable assumptions, Tobii Dynavox, the merged entity, might gain if it

1 were to engage in input foreclosure. It was a very small number.

2 As we heard from my learned friend, Ms Smith QC, this morning, that is only
3 generated in the UK because that is the only market in which Techcess and
4 Liberator sell products with Grid installed.

5 THE CHAIRMAN: Just to follow on what I am saying, I am not I am very conscious
6 I am not the decision maker here, and so it is a question of, you know,
7 rationality, Wednesbury unreasonableness, and all that.

8 MR O'REGAN: Exactly, Sir, that is my point. Based upon such a very small
9 increment in additional revenue, which the CMA never actually calculated --
10 there is nothing in the decision at all that shows us they turned their mind to
11 how much the benefit might actually be in terms of pounds, shillings and
12 pence, which is ultimately the driving business factor.

13 My learned friend refers me to -- I think it is paragraph 23 in Mr Eskilsson's witness
14 statement, which says exactly -- that is at tab 2. Bundle 2, tab 2, page 40,
15 paragraph 23, which again says that the ethos and the mission statement is to
16 empower people with disabilities to do what they once did or never thought
17 possible. To bring their challenge is to bring a voice to 100,000 new users in
18 need over the next few years. So very much so.

19 The point I am making, Sir, is that the CMA didn't actually calculate what the financial
20 benefit might be, and then never actually turned its mind to whether or not, for
21 such a small benefit, a company with the ethos you have observed would
22 actually risk trashing its global reputation for such a small financial gain. In
23 our submission, that just isn't reasonable or rational. That is a matter they
24 really should have considered.

25 In terms of whether or not input foreclosure is likely, the debate has largely been on
26 price. I will also focus predominantly on price, but merely in relation to the

1 suggestion whether or not there is an issue of quality foreclosure by
2 downloading Grid.

3 Now, Ms Smith QC submitted this morning that we didn't challenge that. We most
4 definitely do challenge that.

5 THE CHAIRMAN: I have seen that, yes.

6 MR O'REGAN: I just want to make that point clear.

7 There have been submissions already that Grid is neither critical, nor even
8 important. Tobii Dynavox didn't itself install Grid and, even now, only some of
9 the devices it sells have Grid installed. You will have seen the Indi doesn't
10 have Grid on it generally. It is sold predominantly with Snap and Core First.
11 Grid isn't an important driver for those sales. That is how the Indi is our
12 largest selling device in the UK, in terms of actual physical device, as
13 opposed to something like the smart case.

14 One point, Sir, you canvassed with Ms Smith QC this morning is whether or not one
15 has to assess the likelihood of foreclosure.

16 In our submission, you do have to assess the likelihood. You have to come to a view
17 upon whether the merger is likely to reduce competition. So, you do have to
18 assess the likelihood. You can't just assess this in the abstract. The less
19 likely that something is to happen, the more certain within the boundaries of
20 the balance of probabilities test you need to be that is actually likely to
21 happen.

22 I have already made submissions, both in writing and orally yesterday, that any
23 increase in Grid licensing fees would be small, and that they are most likely
24 to -- both small, both in absolute terms given the level of discount, and also
25 relative to the selling price of a high-end dedicated solution, which you have
26 heard ranges up to between £4-, £7-, £8- and £9,000. Liberator today is not

1 charging extra today for Grid. It is clearly able to absorb that cost. Both
2 Liberator and Techcess would be able to do so.

3 It really has no evidence to the contrary. It never asked the question. You were
4 taken to paragraph 7.27 of the final report, but there is no reference in there to
5 any evidence on partial foreclosure. It just says that they can rely upon the
6 evidence they received on total foreclosure, which is, in our submission,
7 a different question.

8 Discussion this morning as to whether or not what would -- customers were not price
9 sensitive, and therefore wouldn't be a -- whether or not there would be a loss
10 of sales if there was a pass on.

11 We don't accept that customers aren't price sensitive. They are. We assume for the
12 minute that they are not, and it is passed on, as I understood submissions on
13 behalf of the CMA this morning, the submission was that because customers
14 aren't price sensitive there would be no loss of sales. If Liberator and
15 Techcess were to increase their pre-sale price by the small increase in Grid
16 licensing fees.

17 Now, if that is right, logically that means there is no loss of ability or incentive to
18 compete because you haven't lost any sales. Customers have been affected.
19 I wouldn't disagree with that.

20 But the key to foreclosure is whether you have a loss, competitors have a loss or a
21 reduction in their ability or incentive to compete. If you are not going to lose
22 sales, that isn't the case. That is clear from the Commission's non-horizontal
23 merger guidelines, at paragraph 29. It is a very small reference, so I don't
24 propose to take to you it. But it is at bundle 1 of the authorities, tab 13.

25 That really would, conceptually, be an issue in relation to whether there is upstream
26 market power and software licensing. But, again, that is not something that

1 was ever assessed.

2 There was very brief discussion about critical diversion thresholds in relation to input
3 foreclosure at paragraph 7.45 to 7.47 of the final report.

4 They were only calculated for total foreclosure, but even on that basis, it is clear from
5 the report that there is no evidential basis for how they were calculated, in our
6 submission. So, they are completely unreliable in relation to whether or not
7 there would be -- any foreclosure would pass over a critical diversion
8 threshold. We address that in paragraph 201 of our skeleton.

9 Almost finished, Sir.

10 Fears of Liberator and Techcess that they would be foreclosed are unfounded, in
11 any event. It is quite clear from the evidence of customers in response to the
12 CMA's questionnaires -- this underlines one reason why it was important they
13 were actually disclosed and should have been disclosed in the Inquiry. It is
14 accepted that an existing user of Grid probably won't want to change to
15 another language when they need a new device. If we change from one
16 software to another, one of the parents describes that as changing from
17 Castilian Spanish to Spanish that you might speak in Latin America. It is
18 an entirely new language. That is understood, but that is only a proportion of
19 demand for AAC solutions. People who already have a solution and need
20 an upgrade, or new device, or whatever it is.

21 Unfortunately, there are a great many new users each year for AAC solutions. We
22 have children who are born with autism, cerebral palsy, and things like that.
23 Then adults who develop motor neurone disease, Parkinsons, or have had a
24 stroke. The customer evidence is, in relation to those customers there is no
25 issue with changing from one AAC language to another because they have
26 never used AAC before. So that, again, reduces the risk, in our submission,

1 of foreclosure.

2 Customers also told the CMA they would still use Liberator and Techcess devices
3 even if they couldn't use Grid. That was in a situation of total foreclosure. So,
4 in our submission, the findings of the CMA in relation to input foreclosure
5 clearly aren't based on a solid, reliable evidential basis. The CMA can't get
6 home in its defence by saying this is all reasonable, it is not irrational, it is all
7 judgments that we were entitled to take. To make those judgments you need
8 to have solid and reliable evidence and, in our submission, that simply isn't
9 the case.

10 In terms of case law reference to that, Stagecoach at paragraph 45 and
11 Intercontinental Exchange at 124 which I took you to yesterday.

12 Therefore, in our submission, the finding of an SLC on input foreclosure was clearly
13 Wednesbury unreasonable and that is the basis of our challenge to that.

14 That is my submissions on ground 5, Sir, members of the Tribunal.

15 In our submission overall, the grounds of challenge are made out. All that Tobii is
16 really seeking with this application for review is that the CMA is held to have
17 undertaken fairly and reasonably its statutory duties to investigate the merger,
18 in order that it would have determined, on the basis of all relevant information,
19 both the scope of the relevant markets and also whether or not the merger
20 would, on the balance of probabilities, have led to a substantial lessening of
21 competition, taking account of all the competitive constraints that Tobii
22 Dynavox and Smartbox face in the various markets affected. Including from
23 AAC solutions that are based on mainstream devices.

24 In our submission, that clearly wasn't the case in this inquiry and therefore the CMA's
25 decision on SLC should be quashed and remitted to the CMA for further
26 consideration under section 120, subsection 5(b) of the Act.

1 Unless Mr Chairman, members of the Tribunal, we can assist you further, those are
2 our submissions. We are grateful.

3 THE CHAIRMAN: Yes. Thank you.

4 Miss Smith and Mr Robertson, I have looked at all the submissions and all the
5 evidence in this case. One of the disadvantages of having advocates of the
6 quality I have had in the last few days is that everyone sounds right. So we
7 will take some time to give a decision on this. This is not one of the ones
8 where I can say I know the answer today. It is not. It is one where I have
9 really got to go back and strip everything down, look at all the questionnaires,
10 go through the final report again, go through it issue by issue once I have got
11 your table with the references to the report and the transcript. So it is going to
12 take a bit longer.

13 I normally try and get these decisions out in two weeks. I am not going to do it on
14 this, it is going to take longer than that. Looking at my diary -- I will try and get
15 you a decision in the week of 9 December. I apologise, it is a lot longer than
16 I would normally take but there is a lot to go through.

17 MR ROBERTSON: We are very grateful for the indication of when judgment will be
18 handed down and we are immensely grateful for the speed with which the
19 Tribunal has heard this case.

20 THE CHAIRMAN: The irony is that, having rushed it to be heard now, I am going to
21 take a month to get the decision, which is longer than I should do normally.
22 But that is where we are.

23 MS SMITH: Thank you very much for the indication.

24 **(1.00 pm)**

25 **(The hearing concluded)**