Neutral citation [2006] CAT 4

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1051/4/8/05

Victoria House
Bloomsbury Place
London WC1A 2EB

13 February 2006

Before:

Sir Christopher Bellamy (President)
Marion Simmons QC
Professor Paul Stoneman

Sitting as a Tribunal in England and Wales

BETWEEN:

SOMERFIELD PLC

Applicant

-and-

COMPETITION COMMISSION

Respondent

Mr James Flynn QC and Mr Aidan Robertson (instructed by TLT Solicitors) appeared for the Applicant

Mr John Swift QC, Mr Daniel Beard and Mr Julian Gregory (instructed by the Treasury Solicitor) appeared for the Respondent

Heard at Victoria House on 13 December 2005

JUDGMENT (Non-confidential version)

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

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I INTRODUCTION AND SUMMARY

1. By a notice of application dated 28 September 2005 the applicant, Somerfield plc ("Somerfield"), applied pursuant to section 120 of the Enterprise Act 2002 ("the Act") for judicial review of the decision of the respondent, the Competition Commission ("the CC"), contained in a document entitled "A Report on the acquisition by Somerfield plc of 115 stores and other assets from Wm Morrison Supermarkets plc" notified to Somerfield on 1 September 2005 and published on 2 September 2005 ("the Report").[1] The Report concluded that the completed acquisition by Somerfield of 115 stores previously owned by Wm Morrison Supermarkets plc ("Morrisons") may be expected to result in a substantial lessening of competition in twelve local grocery markets in Great Britain. By way of remedial action pursuant to section 35(3) of the Act, the CC ordered Somerfield to divest itself of twelve of its stores to suitable grocery retailers approved by the CC.

2. The Tribunal's power of review is set out in section 120 of the Act as follows:

> "(1) Any person aggrieved by a decision of the OFT, the Secretary of State or the Commission under this Part in connection with a reference or possible reference in relation to a relevant merger situation or a special merger situation may apply to the Competition Appeal Tribunal for a review of that decision.
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> …
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> (4) In determining such an application the Competition Appeal Tribunal shall apply the same principles as would be applied by a court on an application for judicial review.
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> (5) The Competition Appeal Tribunal may -
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> (a) dismiss the application or quash the whole or part of the decision to which it relates; and
>
> (b) where it quashes the whole or part of that decision, refer the matter back to the original decision maker with a direction to reconsider and make a new decision in accordance with the ruling of the Competition Appeal Tribunal…"

[1] The Report is dated "September 2005". Because the CC must complete reports within specified periods of time under sections 22 or 33 of the Act (see section 39) it is important that the report should bear the relevant date.

3. Somerfield's grounds of review contained in the notice of application were twofold. First, it submitted that the CC had erred in law and in fact by finding that Somerfield's acquisition of stores from Morrisons may be expected to result in a substantial lessening of competition ("SLC") in the twelve local grocery markets identified. Secondly, it submitted that the CC acted unreasonably and without adequate foundation by (i) ordering Somerfield to divest itself of specified acquired stores in seven of those twelve local markets rather than leave Somerfield itself to decide which of the stores to divest; and (ii) wrongly placing restrictions on the identity of persons to whom Somerfield is being required to divest stores (see paragraphs 11 to 13).

4. At the first case management conference in these proceedings, held on 19 October 2005, Somerfield announced, without prior notice, that it was not pursuing the first ground of review, relating to the CC's finding of SLC. Somerfield's submissions were accordingly limited to the second ground, which related to the remedy. Somerfield later clarified, in its written submissions prior to the second case management conference held on 1 November 2005, that the passages of the expert report of Mr Ridyard relating to the first ground were in large part no longer relevant.

5. The application before us is therefore narrower than that contained in the notice of application. However, it is necessary to refer to certain parts of the Report relating to the finding of SLC in order properly to assess certain of the submissions made by the parties on the remaining ground of review.

6. The CC filed its defence on 11 November 2005 and attached to it witness statements by Christopher Clarke, Deputy Chairman of the CC and Chairman of the group of members responsible for the preparation of the Report, and John Davies, Chief Economist at the CC. Attached to Mr Clarke's statement are a number of exhibits.

7. The oral hearing was on 13 December 2005.

8. There are two issues before us under Somerfield's second ground, namely

   (a) in relation to seven stores, was the CC entitled to require Somerfield to divest the acquired store, rather than its existing store (also referred to as "the proximity store"),

in order to remedy the SLC found in the relevant locality and, more particularly, whether in that regard the CC took into account irrelevant considerations, or acted on the basis of insufficient evidence, or failed to give proper reasons for its decision or otherwise acted outside its powers; and

(b) in relation to the implementation of the divestment ordered, whether the CC's exclusion, for an initial period, from the "competitor set" of permitted divestees, of certain types of purchaser known as Limited Assortment Discounters ("LADs"), was perverse and/or inadequately reasoned.

9. For the reasons given in this judgment, in our view both limbs of Somerfield's remaining ground of review fail.

II LEGISLATIVE FRAMEWORK

10. Under the Act, unlike the position in many other countries, there is no requirement that a proposed acquisition must be pre-notified to the relevant competition authorities, although proposed acquisitions are in fact frequently pre-notified to the Office of Fair Trading ("OFT") on a voluntary basis, either informally or by reference to the formal procedure referred to in section 24 of the Act: see OFT 516, Mergers (Substantive Assessment Guidance), May 2003, as revised by OFT 516a, October 2004, at paragraph 1.9.

11. In respect of both completed mergers (section 22) and prospective mergers (section 33) involving a relevant merger situation, the OFT is required to consider whether a reference should be made to the CC. The present case concerns a report by the CC on a reference of a completed merger made to it by the OFT on 23 March 2005 under section 22 of the Act. Section 22 provides, in so far as material:

> "(1) The OFT shall, subject to subsections (2) and (3), make a reference to the [CC] if the OFT believes that it is or may be the case that-
>
> (a) a relevant merger situation has been created; and
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> (b) the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services."

12. Once such a reference is made, the CC's duties are defined by section 35 of the Act which provides, in so far as material:

> "…the [CC] shall, on a reference under section 22, decide the following questions–
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> (1) (a) whether a relevant merger situation has been created; and
>
> (b) if so, whether the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services.
>
> (2) For the purposes of this Part there is an anti-competitive outcome if-
>
> (a) a relevant merger situation has been created and the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services; or
>
> (b) arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation and the creation of that situation may be expected to result in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services.
>
> (3) The [CC] shall, if it has decided on a reference under section 22 that there is an anti-competitive outcome (within the meaning given by subsection 2(a)), decide the following additional questions–
>
> (a) whether action should be taken by it under section 41(2) for the purpose of remedying, mitigating or preventing the substantial lessening of competition concerned or any adverse effect which has resulted from, or may be expected to result from, the substantial lessening of competition;
>
> (b) whether it should recommend the taking of action by others for the purpose of remedying, mitigating or preventing the substantial lessening of competition concerned or any adverse effect which has resulted from, or may be expected to result from, the substantial lessening of competition; and
>
> (c) in either case, if action should be taken, what action should be taken and what is to be remedied, mitigated or prevented.
>
> (4) In deciding the questions mentioned in subsection (3) the [CC] shall, in particular, have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the substantial lessening of competition and any adverse effects resulting from it.

(5) In deciding the questions mentioned in subsection (3) the [CC] may, in particular, have regard to the effect of any action on any relevant customer benefits in relation to the creation of the relevant merger situation concerned."

13. Section 38 provides, in so far as material:

"(1) The [CC] shall prepare and publish a report on a reference under section 22 or 33 within the period permitted by section 39.

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

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

(b) its reasons for its decisions; and

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

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

14. By virtue of section 39 of the Act, the CC has a period of 24 weeks within which to prepare and publish its report under section 38. There is the possibility of an extension of eight weeks under section 38(3).

15. As to remedial action, section 41 of the Act provides, in so far as material:

"(1) Subsection (2) applies where a report of the [CC] has been prepared and published under section 38 within the period permitted by section 39 and contains the decision that there is an anti-competitive outcome.

(2) The [CC] shall take such action under section 82 or 84 as it considers to be reasonable and practicable-

(a) to remedy, mitigate or prevent the substantial lessening of competition concerned; and

(b) to remedy, mitigate or prevent any adverse effects which have resulted from, or may be expected to result from, the substantial lessening of competition."

16. Section 84 provides, in so far as relevant:

"(1) The [CC] may, in accordance with section 41, make an order under this section.

(2) An order under this section may contain-

(a) anything permitted by Schedule 8; and

(b) such supplementary, consequential or incidental provision as the [CC] considers appropriate."

17. Schedule 8 of the Act provides, in so far as relevant:

"12 (1) An order may prohibit or restrict-

(a) the acquisition by any person of the whole or part of the undertaking or assets of another person's business

…

(2) An order may require that if-

(a) an acquisition of the kind mentioned in sub-paragraph (1)(a) is made;

…

the persons concerned or any of them shall observe any prohibitions or restrictions imposed by or under the order.

13(1) An order may provide for-

(a) the division of any business (whether by the sale of any part of the undertaking or assets or otherwise);

…"

The CC's guidance

18. Under section 106(3) of the Act the CC is under a statutory duty to publish guidance as to its approach to references made to it under sections 22 or 33 of the Act. Pursuant to section 106(3), the CC has published various guidelines on its merger inquiries. The principal source of guidance is contained in a document entitled *Merger references: Competition Commission Guidelines* (CC2, June 2003) ("the CC merger reference guidelines"). That guidance sets out the CC's general approach to the questions to be answered in merger references made to it by the OFT under sections 22 and 33 of the Act. It states, however, that whilst the CC will have regard to the guidance when considering references, it must consider each reference with due regard to the individual circumstances of each case, including the information that is available and applicable time constraints (paragraph 1.4).

19. Part 4 of the CC merger reference guidelines deals with remedial action. Given its importance to this case, we set out here the relevant extracts (emphasis added by the Tribunal):

“Remedies

(a) Consideration of appropriate remedies

…

4.8 The remedial action that the Commission will decide should be taken will always depend on the facts and circumstances of the case. When deciding what is an appropriate remedy, the Commission will consider the effectiveness of different remedies and their associated costs and will have regard to the principle of proportionality. These are discussed in the next sections.

(b) The cost of remedies and proportionality

4.9 The Commission must have regard to the reasonableness of any remedy and this will include consideration of the costs of any action it may decide is appropriate. The Commission will aim to ensure that no remedy is disproportionate in relation to the SLC or other adverse effect. If the Commission is choosing between two remedies which it considers would be equally effective, it will choose the remedy that imposes the least cost or that is least restrictive.

4.10 The Commission will generally include in its consideration of costs the costs of implementing a remedy. However, for completed mergers the Commission will not normally consider the costs of divestment to the parties as it is open to the parties to make merger proposals conditional on competition authorities’ approval. <u>It is for the parties concerned to assess whether there is a risk that a completed merger would be prohibited subsequently</u> and the Commission will normally expect this risk to be reflected already in the acquisition price. Since the cost of divestment was, in essence, avoidable, the Commission will not, in the absence of exceptional circumstances, accept that the cost of divestment should be considered in the setting of remedies.

…

(c) Effectiveness of remedies

…

4.16 A third consideration is the timescale within which the effects of any remedial action will occur. Some remedies will have a more or less immediate effect, either in <u>restoring competition to the status quo ante</u> or in eradicating any detrimental consequences of the merger, while the effects of others will be delayed. There may be particular uncertainty about the timescale within which results can be expected when the remedy calls for action by some other person, for example a recommendation to government to change regulations. Clearly, given the need to protect

customers from an SLC or any other resulting adverse effects of a merger, the Commission will tend to favour a remedy that can be expected to show results in a relatively short time period – so long as it is satisfied that the remedy is both reasonable and practicable and has no adverse long-run consequences.

(d) Types of remedy

4.17 The Commission will consider any of the following types of remedies:

(a) remedies that are intended to restore all or part of the status quo ante market structure, for example:

- prohibition of an anticipated merger;
- divestment of a completed acquisition;
- partial prohibition or divestment.

…

(e) Addressing the competition concern

…

4.23 The Commission's starting point will be to choose the remedial action that will restore the competition that has been, or is expected to be, lessened as a result of the merger. Given that the effect of the merger is to change the structure of the market, remedies that aim to restore all or part of the status quo ante market structure are likely to be a direct way of addressing the adverse effects. However, issues such as the effectiveness of the remedy, or the costs associated with the remedy, may mean that other types of remedy need to be considered. The Commission may decide to impose more than one type of remedy. Examples of when this might be the case follow.

(f) Prohibition and divestment

…

4.25 The Commission will expect remedial action, including divestment, to occur within a specified and reasonable time after the Commission has published its decision in order to minimise the possible reduction in the commercial value of the business to be divested. It is not possible to be prescriptive in this guidance about the period within which a divestment must be made. When deciding the period, the Commission will take account of all the circumstances including market conditions and the adverse effects to be remedied. Until the divestment is complete, measures intended to safeguard the commercial value of the business, including the appointment of a trustee or other person to monitor the process, may be implemented. The

Commission will generally require the subsequent purchase to be approved, usually by the OFT."

20. The CC has also published guidance entitled *Application of divestiture remedies in merger inquiries: Competition Commission Guidelines* (CC 8, December 2004) ("the CC divestiture guidelines"). Again, it is convenient to set out the relevant provisions of the CC divestiture guidelines (emphasis added by the Tribunal):

> "1.9 The CC will start discussing possible remedies with the merger parties and others after publication of its notice of possible remedies with or following publication of provisional findings. The CC will consider remedy options proposed by the merger parties and others in addition to its own options. <u>The onus will be on the parties to demonstrate that their proposed remedy options will address the expected SLC and the resulting adverse effects.</u> The CC will consult customers, competitors and other relevant parties, as necessary, to test remedy options prior to arriving at a final decision on remedies.
>
> …
>
> 2.4 It is helpful to distinguish between three broad categories of risks that may possibly impair the effectiveness of divestiture remedies as follows:
>
> - Composition risks—these are risks that the scope of the divestiture package may be too constrained or not appropriately configured to attract a suitable purchaser or may not allow a purchaser to operate effectively and viably in the market.
> - Purchaser risks—these are risks that a suitable purchaser is not available or that the merger parties will dispose to a weak or otherwise inappropriate purchaser.
> - Asset risks—these are risks that the competitive capability of a divestiture package will deteriorate prior to completion of divestment, for example through loss of customers or key members of staff.
>
> …
>
> **Part 4: Suitable purchasers**
>
> **Criteria**
>
> 4.1 The identity and capability of a purchaser will normally be of major importance in ensuring the success of a divestiture remedy. When assessing the suitability of prospective purchasers, the criteria used by the CC will include:
>
> - Independence—the purchaser should have no significant connection to the merger parties.

- Capability—the purchaser must have the necessary financial resources, incentives, and access to appropriate expertise and assets to enable the divested business to develop as an effective competitor in the market. The CC will also wish to satisfy itself that the purchaser has an appropriate business plan for competing in the relevant markets.
- Absence of competitive concerns—divestment to the purchaser should not create potential SLC concerns.

…

Part 5: Effective divestiture process

…

The divestiture period

5.5 The CC will disclose in its report the period in which the parties should complete disposal of a divestiture package to a suitable purchaser (ie the 'initial divestiture period'). However, this period may be excised from the report if it is considered that disclosure to third parties may undermine the divestiture process. The length of this period will depend on the circumstances of the merger but will normally have a maximum duration of six months. The CC, when determining the initial divestiture period, will seek to balance factors which favour a shorter duration, such as minimizing asset risk and giving rapid effect to the remedy, with factors that favour a longer duration such as canvassing a sufficient selection of potential, suitable purchasers and facilitating adequate due diligence. The initial divestiture period may be extended by the CC where this is necessary to achieve an effective divestiture."

III BACKGROUND

21. The following background is drawn largely from the Report and is common ground.

22. Somerfield is the fifth largest supermarket group in the United Kingdom, with an annual turnover of some £4.7 billion. For the year ended 30 April 2005 it recorded an operating profit of £31 million after exceptional items. In April 2005 Somerfield had 748 stores under the Somerfield fascia, 494 stores under the Kwik Save fascia, 37 petrol forecourts and 29 Aberness stores. Its forecourt convenience stores have increased in number to 177 following purchases from Texaco Limited and Fuelforce Limited (Report, paragraphs 2.1 and 2.2).

23. Morrisons is the fourth largest grocery retailer in the United Kingdom. It operates some 500 stores, with annual sales to 30 January 2005 of approximately £12.1 billion, excluding VAT, after disposal of the stores acquired by Somerfield. The stores acquired by Somerfield were originally acquired by Morrisons as part of its £3.3 billion acquisition of Safeway plc in March 2003. The CC reported on the proposed acquisition of Safeway by Morrisons and three other bidders in September 2003: see *Safeway plc and Asda Group plc (owned by Wal Mart Stores Inc); Wm Morrison Supermarkets plc; J Sainsbury plc; and Tesco plc. A report on the mergers in contemplation* (Cm 5950) ("the Safeway report"). The Safeway report required Morrisons, as a condition of the acquisition of Safeway, to divest 52 Safeway stores. Morrisons subsequently decided to dispose of the 115 stores and other assets examined in the Report in issue in this case, all of which had been acquired from Safeway but only two of which came within the 52 stores Morrisons was required to divest pursuant to the Safeway report (Report, paragraph 2.6).

24. On 25 October 2004 Somerfield, through its subsidiary Somerfield Stores Ltd, agreed unconditionally to acquire the business conducted by Morrisons at 109 leasehold stores, and five freehold stores, plus seven petrol forecourts and the leasehold of a distribution depot at Welwyn Garden City for a cash consideration of £115 million. As part of the transaction, and at the same time, Northwharf Investments Limited ("Northwharf"), a company jointly owned by Barclays Capital and R20 Limited ("R20") (an investment vehicle owned by Mr Robert Tchenguiz), acquired the freeholds or long leaseholds of 51 of the 114 stores and the distribution depot for an aggregate cash consideration of £145 million. Northwharf agreed to lease the properties to Somerfield for 30 years at an initial annual rent of approximately £10 million. Accordingly, total proceeds to be received by Morrisons on completion from either Somerfield or Northwharf were approximately £260 million. This excludes £35 million paid by Somerfield for stock and cash floats (Report, paragraphs 2.7 and 2.8).

25. During the course of the CC's inquiry, but as part of the acquisition referred to the CC, Somerfield acquired a further store at Birtley in County Durham.

26. The acquired stores were located throughout the United Kingdom, but with about two-thirds in Scotland, Yorkshire and the North-East of England. Sales of the 115 stores for

the 12 months to 31 March 2004 were £860 million (including VAT) (having declined since the acquisition of the stores by Morrisons). Store contribution was £82.5 million (after rent) before the allocation of central overhead and distribution costs, which were of a similar sum according to Morrisons (Report, paragraphs 2.10 and 2.11).

27. In February 2005 (following the acquisitions) Somerfield announced a possible cash offer to acquire Somerfield by Baugur Group hf ("Baugur"), an Icelandic retail and property group. In March 2005 Somerfield said that it had subsequently received further proposals regarding possible cash offers which it was considering. In April 2005 Somerfield confirmed that it was in discussion with a consortium comprising Apax Partners Worldwide LLP, Barclays Capital, R20 and Baugur for a recommended cash offer for the Somerfield group. In July 2005 it was reported that Baugur would leave the consortium interested in bidding for Somerfield, and it sold its stake to another member of that consortium. Somerfield assured the CC that none of the potential transactions had any bearing on the CC's inquiry (Report, paragraph 2.5). (We are told that it was at the behest of the consortium that Somerfield abandoned the first ground of review in its notice of application.)

28. The OFT referred the acquisition to the CC on 23 March 2005.

29. On 24 March 2005 the CC published a news release inviting evidence from all interested parties by 15 April 2005. Various third parties, including other supermarket chains, made submissions. Somerfield made its main written submission to the CC on 6 May 2005. On 13 May 2005 the CC published a statement setting out the specific issues the CC inquiry group was examining. During the course of the inquiry, members of the CC's staff prepared various working papers. Similarly, Somerfield submitted various papers on certain aspects of the inquiry. Somerfield attended an oral hearing on 19 May 2005. A second hearing was held on 12 July 2005. Those hearings principally focused on issues related to the question whether the acquisition resulted, or may have been expected to result, in SLC. Oral hearings were also held with certain third parties, including Asda, the Co-op, Sainsbury's, Netto, Tesco, and Morrisons.

30. On 25 July 2005 the CC notified Somerfield of its provisional findings and issued a notice of possible remedies. The CC's provisional findings, which were published on

29 July 2005, included the CC's view that the acquisition would, in respect of certain of the stores, result in SLC. Somerfield responded in writing to the remedies notice on 8 August 2005. A remedies hearing was held on 9 August 2005. Somerfield submitted a supplementary note on 12 August 2005, and further submissions on 19 August 2005. The CC's "current thinking" on remedies was sent to Somerfield on 22 August 2005, to which Somerfield replied on 24 August 2005. The CC published its report on 2 September 2005.

The sector concerned

31. Prior to the Safeway report in 2003, the CC had conducted an inquiry into the supermarket sector under the monopoly provisions of the Fair Trading Act 1973. Its report was published in October 2000 and is entitled *Supermarkets: A report on the supply of groceries from multiple stores in the United Kingdom* (Cm 4842, October 2000) ("the 2000 Supermarkets report").

32. The OFT has also had occasion to consider acquisitions in the grocery sector, principally in relation to so-called "convenience stores": see the decisions listed at footnote 10 of the Report.

IV THE REPORT

33. The main body of the Report is some 68 pages long. There are, in addition, seven appendices containing maps, graphs and the results of various analyses. Of particular importance for present purposes is Appendix B, which, among other things, contains the results of a "competitor impact assessment".

34. In the Report, the CC conducted a two-stage approach. At Stage 1, it sought to identify possible problem markets at a local level. To do so, it sought to define the relevant product and geographic markets. In relation to the product market it considered the approaches adopted in the 2000 Supermarkets report and the Safeway report. It noted the distinction, drawn in the former report, between "one stop" and "secondary" shopping: one-stop shopping was said to be shopping for the bulk of a household's weekly grocery needs, carried out in a single trip and under one roof; secondary

shopping was said typically to involve the use of other types of grocery stores, a different product mix and a lower average basket size. One-stop shopping was said to require a range of products and a minimum store size of some 1,400 sq metres; a dedicated car park would also typically be provided (Report, paragraph 6.5). It also noted the distinction, drawn in the latter report, between convenience stores (stores below 280 sq metres), mid-range stores (stores between 280 sq metres and 1400 sq metres) and one-stop stores (stores over 1400 sq metres) (Report, paragraph 6.7).

35. The CC considered that the two types of shopping – one-stop and secondary – constituted separate sectors of the wider grocery retailing market, and that although all stores can supply both types of shopping, they can do so to varying extents (Report, paragraph 6.23). When considering competition between different types of supermarket, the CC noted an asymmetry of competition between stores of different sizes due to the finding that whilst larger (one-stop) stores are effective substitutes for mid-range stores in the secondary shopping market, mid-range stores are poor substitutes for large stores in the one-stop shopping market (Report, paragraph 6.34). Similarly, the CC did not consider that convenience stores offered effective competition to mid-range stores (Report, paragraphs 6.35 and 6.36).

36. The CC then analysed which fascias significantly constrained Somerfield stores – in other words, which stores were part of the "competitor set". It noted, however, that in order to capture possible problem markets at Stage 1, the competitor set was limited to effective competitors; but other fascias not within the competitor set may also provide a limited degree of competition, or effective competition in a limited number of areas (Report, paragraph 6.41).

37. The CC noted that the Safeway report had defined the list of effective competitors for mid-range stores as the same as the competitors for one-stop shops (namely Asda, Booths, Budgens, Co-op, Morrisons, Sainsbury's, Somerfield, Tesco and Waitrose), together with Iceland. The CC rejected Somerfield's arguments that the LADs – Aldi, Lidl and Netto – together with Marks & Spencer, convenience stores and certain specialist stores should be included in the list (Report, paragraphs 6.41 to 6.48).

38. Accordingly, the CC's conclusion on the product market for the purpose of Stage 1 was that grocery stores above 280 sq metres primarily compete in a market for secondary shopping, which is distinct from one-stop shopping. One-stop shops compete in this market as well as mid-range stores, both directly in that secondary shopping can be carried out in one-stop shops and through possible substitution from secondary to one-stop shopping through increasing the transaction size of the one-stop shopping trip. All stores over 280 sq metres within the competitor set were found to compete in that market (Report, paragraph 6.49).

39. The CC's conclusion in relation to the relevant geographic markets was that they should be delineated by isochrones of five-minute drive times in urban areas and ten-minute drive times in rural areas (Report, paragraph 6.87(c)). Further isochrone recentring was also carried out (Report, paragraph 6.87(e)).

40. The CC also adopted a "4 to 3 fascia rule", contained in the Safeway report, in order to identify local markets in which acquisitions might be expected to lead to SLC: that rule was considered to be the best available indicator of where the acquisition may give rise to competition concerns at Stage 1 of the CC's analysis (Report, paragraph 6.86).

41. The result of the Stage 1 analysis was that the CC identified 33 possible problem stores, which figure was increased to 36 following adjustments to the data. A so-called "census output area recentring analysis" identified, in addition, a further four stores where more than 25 per cent of the population in the isochrone around the acquired store would be affected by the application of the "4 to 3" fascia reduction rule and a further eight stores where between 10 and 25 per cent of the population would be affected (Report, paragraph 6.88). It appears, therefore, that 48 stores were considered worthy of further examination.

42. Part 7 of the Report contains the CC's findings in relation to Stage 2 of its inquiry. Stage 2 contains an assessment of the effect, at local level, of the acquisitions upon each of the 48 stores raising possible problems at local level. In that regard, the CC noted that the formal pricing policy applied by Somerfield in its supermarkets is only one of the dimensions upon which it competes. According to the CC, it was relevant to take into account each element of the so-called PQRS (Price, Quality, Range and

Service) over the full range of which Somerfield and other fascias compete and in respect of any or all of which there could be a deterioration if competitive constraints are weakened (Report, paragraph 7.3).

43. The CC sought a measure of the degree to which Somerfield and Safeway/Morrisons had been rivals locally prior to the transaction. The CC considered that a good measure of that was the so-called "diversion ratio" between them, i.e. the extent to which customers would choose Firm B (as opposed to Firms C, D etc) as their second choice if their first choice were not available (customer diversion ratio) and the proportion of the stores' revenue from those customers which would be diverted to Firm B (revenue diversion ratio). The diversion ratio from the acquired Safeway/Morrisons store to the existing Somerfield/KwikSave store(s) would, according to the CC, measure the degree to which Safeway/Morrisons and Somerfield were competitors locally (Report, paragraph 7.4). The results of the diversion ratio analysis are set out in detail at Appendix D to the Report.

44. The CC did not, however, regard a high diversion ratio, standing alone, as sufficient to measure the degree to which the merger might lessen competitive constraints locally. The CC therefore also looked at an additional element, namely those areas where the stores had, according to the CC, high margins, implying lower residual elasticity of demand for the merging stores. In Appendix D to the Report the CC calculated illustrative "post merger price rises" on the basis of the ratio and the margin, albeit it did not seek to use the formulae directly to predict post-merger price rises.

45. The CC noted its view that neither high diversion ratios nor high margins in isolation need indicate that a merger has potential anti-competitive effects. Rather, the CC considered that it is the combination of the two that can indicate a loss of competition (Report, paragraph 7.6).

46. To carry out its approach in practice the CC commissioned a survey by NOP World ("NOP") to establish diversion ratios at 56 stores, most of which were identified at Stage 1 as being possible problem stores. For the purposes of its analysis, the CC used a threshold diversion ratio of 14.3 per cent (Report, paragraphs 7.7 to 7.12). The CC then calculated illustrative price rises to see whether, post-merger, there would be price

rises in excess of 5 per cent. The results are set out in Appendix E to the Report. They showed that 10 stores had an illustrative price rise in excess of 5 per cent, which the CC regarded as significant (Report, paragraph 7.18). In addition, the CC concluded that a similar result would have been reached in relation to two closed stores – in Kelso and Littlehampton – had they remained open (Report, paragraph 7.36).

47. The CC then considered barriers to entry, concluding that it could not rely on any new entry to resolve any immediate lessening of competition as regards the stores identified (Report, paragraph 7.46).

48. The CC concluded that the loss of competition in the twelve local markets identified was sufficient to constitute SLC in each of the areas (Report, paragraph 7.54). As a result, the acquisition may also be expected to have the adverse effects, in those areas, of higher prices; reduced range of products; loss of choice, in terms of both products and retail outlets; and poorer service (Report, paragraph 8.3).

49. Since Somerfield withdrew its first ground of challenge to the Report, we have not considered the validity of the CC's analysis of the existence of SLC in the 12 areas concerned, nor the assumptions made.

50. Part 11 of the Report considers remedies. The CC ruled out behavioural remedies proposed by Somerfield on the basis that they would be complex, unclear and difficult if not impossible effectively to monitor and enforce. Only structural remedies would address the SLC and accompanying adverse effects (Report, paragraphs 11.6 to 11.7).

51. As to structural remedies, the CC said at paragraphs 11.9 to 11.22, which are central to the first main issue in this case:

> "11.9 Divestment of the acquired store to a suitable purchaser (as discussed in paragraph 11.24 et seq) would normally remedy, mitigate or prevent the SLC. We suggested in the remedies notice that the stores to be divested in the relevant local market would be those stores acquired from Morrisons unless we considered that the divestiture of alternative stores would satisfactorily restore competition in the local markets concerned (remedies notice paragraph 4*(a)*).

11.10 In two of the markets where we expected an SLC to occur (Kelso and Littlehampton), Somerfield has closed but not yet sold a relevant existing store and concentrated its trade on an acquired store. We received considerable concern from residents in Littlehampton about the possibility that Somerfield may be required to sell the acquired store, depriving the town centre of its last remaining grocery retailer. However our concern is whether the SLC resulting from bringing the current Somerfield store and what is now the former Somerfield store under the same ownership can be remedied. Clearly, if we required Somerfield to sell its current store to another grocery retailer without requiring it to reopen its former store, this would fail to remedy the adverse effects of the merger, indeed merely exacerbate them. The alternative of Somerfield selling the closed store to another grocery retailer and retaining the acquired store would cause less disruption to shoppers and to Somerfield, by ensuring that there is no break in trading of the acquired store necessitated by, eg, temporary closure for refurbishment. So requiring divestment of the closed stores in Littlehampton and Kelso to suitable purchasers is, in our view, the most appropriate means of addressing the SLC in those markets.

11.11 We have considered whether the approach adopted following the 2003 Safeway report, to allow a choice of either the existing or acquired store to be divested, would be appropriate in this case. The stores which are the subject of this inquiry are very different from those in the Safeway inquiry. The latter were predominantly one-stop shops of over 1,400 sq metres (15,000 sq feet); the stores in this inquiry are almost all mid-range stores with a diverse range of characteristics: hence the methodology we developed to appraise the effects of the merger in this case to take into account the differing circumstances of the stores and their local markets. We have similarly taken those local characteristics into account in considering the most appropriate remedies, given the diversity of mid-range stores, in particular their size, profitability, condition, availability of car parking, and location, the latter being particularly important given the number of shoppers who walk to the stores.

11.12 To address the SLC, it is important first that the location of the store to be divested be such as to remedy the SLC identified, as would clearly be the case were the acquired store to be divested. If the existing store to be sold was some distance from the acquired store, it may be necessary to reassess the identity of appropriate purchasers for the store, requiring both a re-evaluation of

the extent of competition in the isochrone of the existing store, and of the diversion ratios of customers of the existing, as opposed to the acquired store. In any cases in which there is more than one existing store, divestment of a more distant store, to which diversion ratios are likely to have been lower, may also fail to remedy the SLC identified. But secondly, it is important in order to address the SLC that the store offered for sale should be attractive to purchasers able to satisfy the criteria set out in the remedies notice. They should also be able to offer a comparable degree of competition with Somerfield on PQRS to that which existed prior to the acquisition. Where an existing store is relatively unprofitable, or has a significantly smaller sales area than an acquired store or has a disadvantaged store location, then there may be a significantly greater risk of not attracting a suitable purchaser and addressing the SLC.

11.13 We do not therefore accept Somerfield's argument that, as a matter of principle, it should generally be free to choose whether to divest the acquired or an existing store and that there is necessarily symmetry between divestment of either the acquired or existing stores. We are required to remedy the SLC and the adverse effects that have resulted from the merger, and this requirement determines the choice of store to be divested. We have therefore to consider, in the circumstances of each case, whether there are factors which suggest divestment of the existing store would be as effective in addressing the SLC as divestment of the acquired store. We now examine such factors.

11.14 In the case of five of the 12 stores to be divested, there is no disagreement between Somerfield and ourselves as to whether the divestment should be of the acquired or the existing store—namely, divestment of the two closed stores, both existing stores—Kelso and Littlehampton; and three of the acquired stores—Filey, Poole Bearwood and Whitburn.

11.15 In the case of the other seven stores, Somerfield has proposed divestment of the existing store, not the acquired store. These are at Johnstone, Middlesbrough Linthorpe, Newark, Peebles, Pocklington, South Shields, and Yarm.

11.16 Among the arguments put forward by Somerfield on these cases were that:

(a) For Johnstone, Newark, and South Shields, […][**C**].

(b) For Peebles, Pocklington, and Yarm, […][**C**].

(c) For Middlesbrough Linthorpe, […][**C**].

11.17 We do not accept that the cost of disposing of a store, be it freehold or leasehold, is relevant to our consideration of which store should be disposed. Paragraph 4.10 of our merger guidelines notes:

> … for completed mergers the Commission will not normally consider the costs of divestment to the parties as it is open to the parties to make merger proposals conditional on competition authorities' approval. It is for the parties concerned to assess whether there is a risk that a completed merger would be prohibited subsequently and the Commission will normally expect this risk to be reflected already in the acquisition price. Since the cost of divestment was, in essence, avoidable, the Commission will not, in the absence of exceptional circumstances, accept that the cost of divestment should be considered in the setting of remedies.

11.18 […][**C**].

11.19 On the basis of the information we have seen in the case of the existing stores at Johnstone (High Street), Peebles (Northgate) and Yarm (Healaugh Park), we noted that:

(a) The existing Somerfield store at High Street, Johnstone is located within one minute's drive-time of the acquired OSS. Although not classified as a one-stop shop, it is 13 per cent smaller than the acquired store, […][**C**]; more car parking; and is described to us as in good condition. Although we note that there are three existing stores in the Johnstone isochrone, we note that the other two existing stores are both smaller and further away; hence we believe that the removal of the High Street store will remedy the SLC.

(b) The existing Somerfield store at Peebles Northgate is 1.2 minutes' drive-time from the acquired store; is 10 per cent smaller; […][**C**]; described to us as in average condition (although that of the acquired store was good); and with more car parking, although with no rights or control over most of it.

(c) The existing Somerfield store at Healaugh Park, Yarm is 3.8 minutes' drive-time from the acquired store (but its location relative to other stores is not such as to call into question the isochrone analysis), 10 per cent smaller, […][**C**], with the same amount of parking and described as in good condition.

11.20 Somerfield assured us that there were no other relevant factors to be taken into account in these three cases. The factors outlined in paragraph 11.19 suggest there is little material difference in the characteristics of the acquired

and existing store. On that basis, we conclude that divestment of either the existing store specified in paragraph 11.19, or of the acquired store would be equally effective in remedying the SLC.

11.21 In these three cases, therefore, Somerfield should initially be required to dispose of either the acquired or the existing store as specified above as it may choose.

11.22 In the other four cases, at Middlesbrough Linthorpe, Newark, Pocklington and South Shields, divestment of the existing store would be significantly inferior to divestment of the acquired store in remedying the SLC as these have a significantly greater risk of not attracting a suitable purchaser able to offer comparable PQRS to that which was offered before the acquisition.

(a) Middlesbrough Linthorpe: the existing Kwik Save store, at Eastbourne Road, is located 1.5 minutes' drive-time from the acquired store, but is less than half the size of the acquired store. […][**C**] and was described as in poor condition (as is the acquired store). […][**C**]. There is another Kwik Save store within the isochrone of the acquired store. The divestment of the Eastbourne Road store, […][**C**], would not be as effective in remedying the SLC as selling the acquired store to a suitable purchaser.

(b) Newark: the existing Kwik Save store is 0.5 minute's drive-time from the acquired store, 25 per cent smaller than the acquired store, […][**C**]; has less car parking (although under Somerfield's control, unlike the acquired store's) and is described as in poor condition (the acquired store being in average condition).

(c) Pocklington: the existing, former Kwik Save store now under the Somerfield fascia is less than one minute's drive-time from the acquired store and about the same size, but, we observed, in poorer condition (Somerfield described its condition as average, that of the acquired store as good) with less car parking and a more constrained site and store layout. […][**C**].

(d) South Shields: The existing Kwik Save store is less than one minute's drive-time from the acquired store, and 40 per cent smaller than the acquired store, […][**C**] with slightly less car parking (although that of both stores is limited) and described as in poor condition (that of the acquired store being described as average). […][**C**] We also note that there is an additional Kwik Save store within the isochrone."

52. The CC therefore required Somerfield to divest to a suitable grocery retailer (a) the acquired stores at Filey, Middlesbrough Linthorpe, Newark, Pocklington, Poole Bearwood, South Shields and Whitburn; (b) its existing closed stores at Kelso and Littlehampton; and (c) either the acquired or the specified existing store as it may choose at Johnstone, Peebles and Yarm (Report, paragraph 11.23).

53. As for the identity of the purchaser, and in particular the exclusion of the LADs, which is the second main issue in this case, the CC said this at paragraphs 11.26 to 11.28:

> "11.26 In general, only operators within the competitor set identified in Stage 1 of the CC's analysis are likely to be viewed, in the initial divestiture period, as a viable and active competitor in the relevant market. However, we also believe it would be appropriate to consider purchasers who are not currently within that competitor set, because they do not currently operate within these geographical markets, but who could demonstrate that they can offer PQRS comparable to those previously available in these stores. This would include regional operators that currently do not operate in these particular areas, or new entrants that could demonstrate they would be able to compete effectively with a comparable offer.
>
> 11.27 It was also suggested to us (to which we referred in paragraph 6.90*(e)*) that at least one of the LADs should be included in the competitor set in Stage 1 of our analysis, and as a possible purchaser of any stores to be divested; but given the factors we have set out in paragraphs 6.43 to 6.45, including the very much smaller range of products of the LADs, we do not at present consider that they would be a suitable purchaser for the reasons given above at least in the initial divestiture period.
>
> 11.28 However, while divestment only to an approved potential purchaser, by which we refer to an operator within the competitor set or otherwise able to meet the requirements referred to in paragraph 11.26, is therefore likely to be viewed as fully addressing the SLC, if divestment to such an operator did not prove possible, then sale to other grocery retailers would need to be considered. Should Somerfield demonstrate to the CC after a stipulated period of time ([…][**C**]) that there is no interest in acquiring any store from any of the relevant competitors, it would be allowed to market that store more widely (including, for example, to the LADs), before the involvement of a divestiture trustee to do so."

54. The initial divestment period was set at […][**C**] (Report, paragraph 11.31). A divestment trustee (if needed), however, would be able to offer the stores in question […][**C**] (Report, paragraph 11.33).

V THE STANDARD AND NATURE OF REVIEW

55. The starting point for the Tribunal's review in this case is section 120(4) of the Act, which provides that the Tribunal "shall apply the same principles as would be applied by a court on an application for judicial review". Somerfield submits that in this jurisdiction the Tribunal's review should be relatively intense, and no less than the standard of review applicable to a decision of the OFT not to make a merger reference to the CC under section 22 or 33. The Tribunal should apply the principles which, according to Somerfield, emerge from the judgment of the Court of Appeal in *Office of Fair Trading v. IBA Health* [2004] EWCA Civ 142, [2004] 4 All ER 1103 and the Tribunal's judgment in *UniChem v. Office of Fair Trading* [2005] CAT 8.

56. The CC, on the other hand, submits that in view of its statutory role under sections 35 and 41 of the Act, it should be accorded a wide margin of appreciation, within the parameters of judicial review, particularly as regards the evaluation of evidence (weight being entirely a matter for the CC), and the determination of remedies, the test in that regard being whether the CC's decision was perverse; see, among other cases, *Tesco Stores Ltd v. Secretary of State for the Environment* [1995] 1WLR 759, *City of Edinburgh Council v. Secretary of State for Scotland* [1997] 1 WLR 1447, *R v. Manchester Crown Court ex parte MacDonald* [1999] 1 WLR 841, and *R v. Office of Telecommunications ex p. Cellcom* [1999] COD 105. The CC also submits that judicial review of its decisions is or should be less intense than the equivalent review of comparable decisions of the European Commission by the Court of First Instance, as set out by the Court of Justice in Case C-12/03P *Commission v. Tetra Laval* [2005] ECR I-987.

57. We do not find it necessary, or useful, to embark on an elaborate or abstract exegesis of the appropriate intensity of a review by the Tribunal as regards decisions of the CC under section 120. As Carnwath LJ pointed out in *IBA Health*, cited above, at paragraphs 90 to 92, the intensity of review varies according to the statutory context

and will depend upon the particular circumstances. In the present case, we see no reason not to apply, as a starting point, the Tribunal's observations in *UniChem*, cited above, at paragraphs 158 to 175, and in particular at paragraphs 174 to 175:

> "174. A succinct expression of the legal test, as the OFT reminds us, is set out in *Brind*, cited above, by Lord Lowry at paragraph 756: "*could* a decision maker acting reasonably have reached this decision?". However, it is clear from Carnwath LJ's judgment in *IBA* at [100] that the concept of "reasonableness", and the accompanying intensity of review, varies with the statutory context. In the present context, the Tribunal's review may properly be more intense than it would be if issues of policy or politics were involved. Indeed, it appears to be common ground that the Tribunal has jurisdiction, acting in a supervisory rather than appellate capacity, to determine whether the OFT's conclusions are adequately supported by evidence, that the facts have been properly found, that all material factual considerations have been taken into account, and that material facts have not been omitted. We see nothing in *E v. Secretary of State*, in which Carnwath LJ gave judgment shortly before *IBA*, to contradict the above approach.
>
> 175. Similarly, issues of a fair procedure, which are important in the present case, are undoubtedly matters for the Tribunal. The question of a fair and proper procedure arises independently of *Wednesbury* reasonableness: *IBA* at [92]."

VI WITNESS STATEMENTS IN A JUDICIAL REVIEW UNDER SECTION 120

58. In this case we were provided with witness statements totalling some 60 pages, one by Mr. Clarke, the Chairman of the group conducting the CC's inquiry, and one by Mr. Davies, who is the Chief Economist of the CC. At the first case management conference and at the hearing the Tribunal raised with the CC the precise role of witness statements filed by the latter in proceedings such as these.

59. The CC submitted that, in accordance with *Westminster City Council ex. p Ermakov* [1996] 2 All ER 302, it was entitled to provide evidence in its defence in order to elucidate its reasons, or exceptionally correct or add to a decision, in particular to articulate detailed matters, not all of which it is possible to include in a report under section 38 of the Act. According to the CC, section 38 does not require that the

information or reasons given by the CC must be comprehensive or exhaustive. Moreover, the CC recognised its duty to disclose candidly relevant facts and where necessary the reasoning behind the decision. The CC referred us to the practice in the Administrative Court of accepting such evidence in judicial reviews under the legislation previously contained in the Fair Trading Act 1973, and relied on the remarks of Carnwath LJ in *IBA Health*, cited above, at paragraphs 102 to 106.

60. We make some brief comments on this aspect, with a view to giving guidance generally, and not with a view to criticising the course that was followed in this particular case.

61. First, section 38(2) of the Act provides that the CC's report shall, in particular, contain

> "(b) its reasons for its decisions; and
>
> (c) such information as the [CC] considers appropriate for facilitating a proper understanding of those questions and of its reasons for its decisions."

62. In our view, the duty to give reasons for a decision under section 38(2) has three main purposes: first to allow interested parties to know the justification for the measure so as to enable them to protect their rights, to know the outcome and to enable them to assess whether they have any ground for challenging an adverse decision; secondly, to enhance public confidence in the decision making process through the knowledge that decisions supported by sound reasons must be given; and thirdly, that giving reasons concentrates the mind, so that the resulting decision is much more likely to be soundly based on the evidence than if it is not (see e.g. *Ermakov*, cited above, at 309f-310c).

63. In the present case, the Report is 68 pages long, with a further 70 pages of detailed appendices, following a 5 ½ month inquiry. While we accept that the Report does not necessarily have to contain all the detail of the underlying evidence, or necessarily deal with every point raised by a party in the course of an inquiry, we would expect a report under section 38 to deal at least with the substantial points raised, and to contain all the main reasons, the principal considerations taken into account, and the principal facts found, although not necessarily all the supporting detail, if such detail is not necessary for facilitating the reader's understanding under section 38(2)(c).

64. The application of this approach is a matter of fact and degree in each case. The general principle in *Ermakov* was expressed by Hutchison LJ in these terms at 315h:

> "The court can and, in appropriate cases, should admit evidence to elucidate or, exceptionally, correct or add to the reasons; but should, consistently with Steyn LJ's observations in *Ex p Graham*, be very cautious about doing so."

65. It seems to us that that general principle should be borne in mind in cases such as the present under section 38 of the Act, subject of course to the CC having a full and proper opportunity to defend itself, particularly in answer to new points raised by the applicant.

66. In our respectful view the remarks of Carnwath LJ in *IBA Health*, cited above, arise in the different context of the "short-form" clearance decisions given by the OFT under sections 22 and 33 of the Act, where the duty to give reasons arises not under section 38 but under the more general provisions of section 107 (in particular section 107(1), (4) and (5)). In our view the details and reasoning of the OFT's decision on preliminary investigations under sections 22 or 33 cannot be expected to be set out to the same extent as those of the CC's report following a formal in-depth inquiry.

67. Accordingly, we would anticipate that in most cases such as this supplementary witness evidence from the CC should be kept to a minimum. As with judicial review generally, any witness statements that are necessary should be closely cross-referred to the report under consideration, with any appropriate explanation of the relevance of the additional evidence, bearing in mind that it is the report, not the witness statement, that is the subject of the review. While it may well be helpful for a witness statement to elucidate technical matters contained in the report or respond to evidence submitted by the applicant, witness statements are not submissions and should not need to repeat or place any particular "gloss" on the report in question. Unlike the Administrative Court, which has to deal with an exceptionally wide range of cases and of necessity has no particular familiarity with, or training in, the subject matter of the Act, the Tribunal will not generally need extensive background explanations.

68. It remains of course the case that matters of necessary elucidation are always admissible. For example, in the present case it was necessary for Mr. Clarke to explain

at paragraphs 78 to 97 of his witness statement that, of the three reasons given at paragraph 11.12 of the Report for ordering divestment of the acquired, rather than the existing, store, the third reason was determinative and the other two reasons did not in fact arise on the facts of this case.

69. Against that background, in our view, the question of what witness evidence is appropriate in cases under section 120 will normally need to be considered with care by the Tribunal at the first case management conference with a view, self evidently, to brevity, clarity and expedition.

VII THE CHOICE OF STORE ISSUE

A. THE ISSUE

70. Of the 12 localities where the CC found SLC, in two cases (Kelso and Littlehampton) the existing store had already been closed by Somerfield, and the CC accepted that it would not require divestment of the remaining acquired store (Report, paragraph 11.10). In three other cases (Filey, Poole Bearwood and Whitburn) Somerfield accepted that it would sell the acquired store (paragraph 11.14). Of the seven remaining localities, in three of those cases (Johnstone, Peebles and Yarm) the CC, having considered the evidence, was content to allow Somerfield the choice as to whether to sell the existing or the acquired store, on the basis that "there is little material difference in the characteristics of the acquired and existing store" (paragraph 11.20). At the end of the CC inquiry, the question whether Somerfield should sell the acquired or the existing store remained in dispute at only four stores, namely Middlesbrough Linthorpe, Newark, Pocklington and South Shields. The CC's reasons for requiring divestiture of the acquired, as distinct from the existing, store in those locations are to be found in paragraphs 11.9, 11.11 to 11.13 (as to the principles involved) and 11.22 (as to the circumstances of those particular stores).

The three stores not contested before the CC

71. As to the three stores where Somerfield did not disagree with the CC that the acquired store should be sold (Filey, Poole Bearwood and Whitburn), we do not think the CC

can be criticised for accepting Somerfield's position and not going further into the matter in its Report. As we understand it, Somerfield indicated early on in the remedies process that it accepted the sale of the acquired store in these three cases. Somerfield could have argued before the CC that, in those three cases, the sale of either the acquired or the existing store would suffice to remedy the SLC, but did not do so or provide any evidence about these stores. Somerfield did not tell us whether it had had a change of heart about these three stores or, if so, why. We have no evidence, one way or the other, about the stores in question. In those circumstances in our view it is only in exceptional circumstances that Somerfield should be permitted to challenge before the Tribunal a remedy to which it had not objected during the CC's inquiry. In our view, no such exceptional circumstances arise in the present case and we do not consider these stores any further.

The four contested stores

72. The main focus of this case, therefore, is whether the CC was entitled to order divestiture of the acquired store in the four contested locations of Middlesbrough Linthorpe, Newark, Pocklington and South Shields, having regard to its powers to impose divestiture under sections 35(3), 41(2), and 84, and Schedule 8, paragraphs 12(2) and 13(2) of the Act, set out above.

B. THE PARTIES' SUBMISSIONS

Somerfield's submissions

73. In the notice of application, Somerfield contended that the CC had "unreasonably and without adequate foundation" required divestment of the acquired stores in question, in circumstances where the SLC found by the CC would equally have been remedied by the sale of the existing store owned by Somerfield in each area. According to Somerfield, under section 35 of the Act the CC's powers are limited to removing the SLC found as a result of the merger. Since the SLC in this case arose because the stores came into common ownership, the SLC is removed, and the status quo ante restored, according to Somerfield, through the separation of ownership of the stores. To order otherwise would be disproportionate and perverse. Furthermore, in having

regard to the condition of the existing store which Somerfield proposed to divest, the CC had regard to an irrelevant consideration, according to Somerfield.

74. According to Somerfield, these considerations apply even more in the present case since the CC, in finding SLC, assumed "symmetry" between the acquired and the existing store, i.e. that the competitive constraint exercised by the existing store was equal to that imposed by the acquired store. Contrary to the CC's view at paragraph 11.13 of the Report, a similar assumption should apply at the divestiture stage.

75. Somerfield acknowledges, however, that the CC was entitled to be satisfied that the store to be divested could be disposed of within a reasonable timeframe and to a suitable purchaser, reflecting the CC's concerns set out at paragraph 2.4 of the CC merger reference guidelines. Somerfield's contention is that in the ordinary course and absent special factors – such as the extreme case where there was no prospect at all of a sale – the choice of divestment should be that of the owner who has a legitimate interest in determining which of the assets he wishes to retain. The CC had no basis for depriving Somerfield of that choice.

76. Somerfield points out that the CC's remedies package – which is more stringent than that of the Safeway report case – requires Somerfield to dispose of relevant stores to eligible purchasers, which, in an initial stipulated period, are confined to those fascias identified at Stage 1 of the analysis in the Report and any other purchaser satisfying the CC that it can offer comparable PQRS. If no interest is shown in that period, Somerfield may market the stores more widely, including to LADs. If Somerfield fails to divest itself satisfactorily within the first divestiture period, a trustee may be appointed, who would be able to dispose of the stores […][**C**]. Moreover, there is no reason why the divestiture trustee arrangements could not relate to either an acquired or an existing store. In those circumstances, the CC's decision to specify that the acquired store be divested exceeds what the CC could reasonably have thought necessary to remedy the SLC it had found.

77. According to Somerfield, the SLC is remedied if the ownership of stores is separated. It is irrelevant whether the existing store is smaller or exercises a weaker competitive constraint on the acquired store, or vice versa. That situation existed under the status

quo ante. It is similarly irrelevant that Somerfield rather than Morrisons becomes the owner of the stronger store and divests the weaker store to another grocery retailer. Competitive rivalry has been restored, and the only thing that has changed is the identity of the retailers owning the stores in question. On that basis, there can be no principled objection to Somerfield choosing to divest, say, a Kwik Save store. Somerfield was fully entitled to complete the deal unconditionally and that fact should not be held against it. Furthermore, the basis set out in paragraph 11.11 of the Report for distinguishing the Safeway report has no foundation, since there is as much diversity between "one-stop" stores as there is between "mid-range" stores.

78. According to Somerfield, the CC concedes that the issue of the "saleability" (which is the word Mr Clarke uses to refer to the matters referred to in the last three sentences of paragraph 11.12 of the Report, at paragraphs 57 et seq of his witness statement) of existing and acquired stores was the only consideration that was determinative in paragraphs 11.12 and 11.22 of the Report. However, submits Somerfield, the CC had no evidence before it upon which to reach the conclusion that there would be a real risk that no sale would be made of the four stores – at Middlesbrough Linthorpe, Pocklington, Newark, and South Shields – within a reasonable time. That is particularly striking in relation to Pocklington, but applies equally to the other stores. The CC simply had (and has) no idea about the ease or difficulty of disposing of the stores in question beyond information supplied to it by Somerfield, and no basis for disagreeing with Somerfield's assessment. It did not seek evidence as to "saleability" of the stores in question or, more generally, as to the factors which affect the ability to sell stores. According to Somerfield, size does not affect "saleability", since major retailers are currently investing in smaller stores. The condition of the store goes only to price. Car parking is not necessarily relevant if the store is in a city centre. By contrast, the one factor that does go to "saleability" – whether the store is freehold or leasehold, and the length of the lease – was ignored by the CC in three out of the four cases concerned.

79. According to Somerfield, the CC's conclusions are no more than an inference based upon a comparison of certain characteristics of each of the stores in question, namely financial performance, size and physical location, and car parking facilities. In Somerfield's submission, unless such matters would deter *any* purchase by a grocery

retailer, those matters only go to the price to be achieved, and not to "saleability" itself. Each store's characteristics will be simply reflected in the price that a potential buyer is prepared to pay for the store.

80. According to Somerfield, in relation to the three stores where the CC left the choice of store to be divested to Somerfield, the CC does not refer to "saleability". In Somerfield's submission, the CC's real concern was, therefore, not with "saleability" but with establishing that existing stores should be of broadly comparable competitive weight with the acquired stores. That, however, was an irrelevant consideration, which finds its genesis in remarks made by CC members at the remedies hearing, and various staff papers exhibited as part of Mr. Clarke's evidence. According to Somerfield, the CC did not look at the matter in terms of ease of sale, contrary to Mr. Clarke's evidence. The CC leapt, impermissibly and without evidence, from a comparison between the stores to the conclusion that the store that came off worse in the comparison was unsaleable or difficult to sell. Moreover, the CC's starting point, that the acquired store should be sold, was fundamentally wrong. At the hearing Somerfield also relied on Article 1 of Protocol 1 of the European Convention on Human Rights ("ECHR").

The CC's submissions

81. In the defence the CC states that the key consideration in its decision was "saleability". Having considered the characteristics of the relevant stores in detail, it was clear to the CC that not all stores were equally attractive to potential relevant buyers, and that there would be a real risk that no sale would be made of certain stores within a reasonable time. While accepting Somerfield's arguments on "saleability" as to three stores, in relation to four other stores – Middlesbrough Linthorpe, Newark, Pocklington and South Shields – the CC came to the conclusion set out at paragraph 11.22 of the Report.

82. The CC points out that its approach to structural remedies in the Report is essentially simple and direct, and based on some very clear principles. Referring to paragraphs 11.9 and 11.12 of the Report, and its remedies notice, it explains that the CC's approach was, first, that divestment of the acquired store to a suitable purchaser would normally remedy, mitigate or prevent the SLC, and that the relevant acquired stores would be the

stores to be divested unless the CC considered that the divestiture of alternative stores would satisfactorily restore competition in the local markets concerned.

83. The CC explains that the test it applied was twofold. First, as pointed out in the first sentence of paragraph 11.12, the location of the store had to be such that divestiture would remedy the SLC. Secondly, the store offered for sale in each case had to be attractive to eligible purchasers, who had to be able to offer a comparable degree of competition with Somerfield on PQRS to that which existed prior to the acquisition. In the CC's submission, the characteristics of the stores identified in the relevant local areas have an impact on the risk of not attracting a suitable purchaser within an appropriate timetable and thereby remedying the SLC. The CC evaluated the relative quality of assets, profitability and resources of the existing and acquired stores in each of the markets. Assuming that the CC has not misdirected itself as to the materiality of the matters to be assessed, the question is one for the decision maker itself to determine. The CC submits that contrary to Somerfield's submissions, it did not focus on "comparability" but rather on "saleability".

84. According to the CC, Somerfield accepts the relevance of "saleability". As to Somerfield's specific criticisms, the CC submits that the criteria set out at paragraph 11.12 of the Report were both reasonable and properly applied. Its conclusions as to divestiture of particular stores in paragraph 11.22 were not beyond the bounds of reasonable judgment. In the CC's submission, there is no basis for saying that the only reasonable conclusion would have been to permit Somerfield simply to make its own decision as to which of the stores to divest. Contrary to Somerfield's suggestion that the CC simply made inferences as to "saleability", it in fact received and took into account a considerable amount of store information relating to (i) size (ii) tenure (iii) rent (iv) current condition (v) car parking (vi) refurbishment details (vii) turnover (viii) contribution and (ix) acquisition cost. The CC also knew whether any other bids had been received in respect of the acquired stores when marketed by Morrisons, and was well aware of the conditions of competition in each of the relevant local markets, including the diversion ratios from the acquired stores to their competitors. The CC moreover developed its understanding throughout the course of the inquiry, and one of the members of the CC group involved had prior experience of the sector, as did the

Director of Remedies. The CC submits that the assessment it reached was well within the margin of appreciation which must be afforded to it.

85. As to whether the factors considered by the CC went only to price rather than to the "saleability" of stores as such, the CC submits that it is highly desirable, from the perspective of consumers, that a sale be achieved within the initial divestiture period, and ideally as quickly as possible, as emphasised at paragraph 4.16 of the CC merger reference guidelines. The possibility of a divestment trustee is a worst case scenario, and will not be eliminated by reducing the price. Unattractive characteristics may deter all potential purchasers for a number of reasons. For example, a supermarket may want only certain types of store and may not be interested in a store outside that profile, even if offered at a very low price. Other things being equal, an attractive store is likely to attract more interest from potential purchasers, and to be divested more quickly and efficiently. Moreover, the CC refers to Somerfield's own view, expressed during the CC's inquiry, […][**C**].

C. THE TRIBUNAL'S ANALYSIS

The CC's statutory powers

86. We begin with the CC's statutory powers, set out in section II above. It is not contested in the present case that Somerfield's acquisition of the disputed stores gave rise to an anti-competitive outcome, within the meaning of section 35(2)(a) of the Act, by virtue of the SLC thereby created. It follows, in our view, that the SLC in question was required to be remedied as quickly and effectively as possible.

87. Having found an anti-competitive outcome under section 35(2)(a), under section 35(3) of the Act, the CC had to decide, notably, what action it should take for "the purpose of remedying, mitigating or preventing" the SLC it had found. In that regard, under section 35(4), the CC had to have regard to the need to achieve "as comprehensive a solution as is reasonable and practicable". Under section 41(2) the CC was required to take such action "as it considers to be reasonable and practicable" in order to remedy, mitigate or prevent the SLC in question. Such action includes divestiture, under the combined provisions of section 84 and Schedule 8, paragraph 13(1).

88. It follows in our view that the CC had a clear margin of appreciation to decide what reasonable action was appropriate for remedying, mitigating or preventing the SLC created by Somerfield's acquisition of the disputed stores.

The CC's starting point

89. A major issue between the parties concerns the starting point the CC should adopt when considering a remedy for SLC under sections 35(3)(c), 35(4) and 41(2) of the Act. Somerfield considers that, absent exceptional circumstances, in the normal course of events the acquirer should be left to dispose of either the acquired store or the existing store, unless there is a good reason for requiring the acquired store to be divested, since the separation of ownership of the two stores will restore the status quo ante. The CC maintains, by contrast, that it is entitled to adopt the starting point that the status quo ante is or will be restored by the divestment of the acquired store, although it is open to the acquirer to demonstrate to the CC's satisfaction that the disposal of the existing store would be equally effective in remedying the SLC.

90. There is no doubt that in the present case the CC took, as its starting point, that Somerfield should divest itself of the disputed acquired stores unless the CC was persuaded that the divestiture of alternative stores would be equally satisfactory in remedying the SLC which Somerfield had created.

91. Thus the CC said at paragraph 11.9 of the Report:

> "11.9 Divestment of the acquired store to a suitable purchaser (as discussed in paragraph 11.24 et seq) would normally remedy, mitigate or prevent the SLC. We suggested in the remedies notice that the stores to be divested in the relevant local market would be those stores acquired from Morrisons unless we considered that the divestiture of alternative stores would satisfactorily restore competition in the local markets concerned (remedies notice paragraph 4*(a)*)."

92. As the above paragraph indicates, the CC's starting point was made clear to Somerfield in the remedies notice of 25 July 2005. That notice stated:

> "4. The Group invites views on divestiture of stores in the relevant local markets as an appropriate remedy for the

> expected SLC in each case. It is envisaged that divestiture would involve the following elements:
>
> (a) the stores to be divested in the relevant local markets will be those stores acquired from Morrisons unless the Group considers that the divestiture of alternative stores would satisfactorily restore competition in the local markets concerned."

93. The covering letter which accompanied the remedies notice stated, *inter alia*:

> "In addition to the possible remedies outlined in the attached notice, we would be interested to hear of any practical alternative remedies that you may wish to propose which address the expected SLC. We are particularly interested in your views on the likely reasonableness and practicality of possible remedies and any effects that that may have on any relevant customer benefits you consider would be created by the merger situation."

94. In our view, the CC's starting point was entirely consistent with the CC merger reference guidelines published in June 2003, also set out in section II above. Thus the CC merger reference guidelines emphasise at paragraphs 4.16, 4.17, and 4.23, cited above, the importance of restoring the status quo ante. Paragraph 4.17(a) states that divestment of a "completed acquisition" will restore the status quo ante, but does not mention divestment of the acquirer's existing business. Paragraph 4.23 emphasises that

> "…remedies that aim to restore all or part of the status quo ante market structure are likely to be a direct way of addressing the adverse effects"

while paragraph 4.16 states

> "…the Commission will tend to favour a remedy that can be expected to show results in a relatively short time period…" (see also paragraph 4.25).

95. Paragraph 4.10 of the same guidelines points out that it is open to parties to make merger proposals conditional on competition authorities' approval, and emphasises, admittedly in the slightly different context of the cost of implementing the remedy,

> "It is for the parties concerned to assess whether there is a risk that a completed merger would be prohibited subsequently."

96. Paragraph 1.9 of the CC divestiture guidelines published in December 2004 similarly make it clear that

> "The onus will be on the parties to demonstrate that their proposed remedy options will address the expected SLC and the resulting adverse effects."

97. Somerfield does not challenge the validity of the guidelines, and must have been aware of at least the CC merger reference guidelines of June 2003 before it embarked on the acquisition here in question in October 2004. The above guidelines are statutory guidelines published under section 106 (3) of the Act and, as appears from the CC's website, were widely consulted upon before being adopted by the CC.

98. It seems to us that, in following its own guidelines as the starting point, while leaving open the possibility of alternatives to be proposed by Somerfield, the CC acted entirely reasonably; indeed the CC may have been in difficulty had it departed without good reason from its guidelines which, as we say, Somerfield has not challenged.

99. In particular, in our view, it is not unreasonable for the CC to consider, as a starting point, that "restoring the status quo ante" would normally involve reversing the completed acquisition unless the contrary were shown. After all, it is the acquisition that has given rise to the SLC, so to reverse the acquisition would seem to us to be a simple, direct and easily understandable approach to remedying the SLC in question. While we can see Somerfield's argument that divestment of the existing, rather than the acquired, business may also remedy the SLC, that may not always be the case (e.g. for the reasons given by the CC at paragraph 11.12 of the Report) and may in any event be less certain and less direct.

100. We do not therefore consider that the CC's approach in deciding that its normal starting point is to consider divestment of the acquired business can be criticised as outwith its margin of appreciation. Moreover, Somerfield knew, or should have known, that that was the CC's approach. Had Somerfield wished to protect itself, it could have sought prior clearance of the acquisition from the OFT, either by an informal approach or by using the statutory procedure under section 24 of the Act.

101. We note, moreover, that the CC has only a limited period to consider remedies. Given the overall timetable for a merger inquiry of 24 weeks under section 39(1), with one permitted extension of 8 weeks under section 39(3), the time available to consider

remedies is likely to be relatively short. In the present case, the remedies phase lasted a month, with relatively intense exchanges between the CC and Somerfield, in which the former, in our view fairly, gave Somerfield the chance to convince it of possible alternatives. At that stage of an inquiry it will not be practicable – nor in our view reasonable – to place the onus on the CC to do extra work (e.g. calculate new diversion ratios based on the existing, rather than the acquired store(s)) or itself seek evidence from valuers and the like, as suggested by Somerfield. In our view, for reasons of practicality, in addition to the reasons already discussed, the onus is rightly placed on the merging parties to provide evidence to the CC to satisfy the latter that the CC's starting point should be displaced in the particular circumstances. We emphasise "evidence", if necessary supported by expert opinion. Assertion will not suffice.

102. As to the approach of the CC in the Safeway report, that inquiry, although concluded on 18 August 2003, after the coming into force of the Act, in fact took place under the previous provisions of the Fair Trading Act 1973, where the remedies were supervised by the OFT, and ultimately the Secretary of State, whereas under the Act now in force, it is for the CC to determine the remedies and make the necessary orders. The Safeway report involved the divestment of 52 "one-stop" stores. Although in that inquiry the group concluded that the disposal of either the existing or acquired store would suffice in the particular circumstances of that case (paragraph 2.374), we see no basis upon which it could be said that the group conducting the present inquiry were bound to follow the approach in the Safeway report in the particular circumstances of the present case, as distinct from following the CC's own guidelines as already set out above. Nor are we able to say, on the basis of little more than assertion on Somerfield's part, that it was unreasonable for the CC in the present case to distinguish the Safeway report on the grounds set out in paragraph 11.11 of the Report now under consideration.

103. As to the fact that the CC accepted Somerfield's submissions in relation to Johnstone, Peebles and Yarm, the proper analysis in our view is that, having adopted the starting point that the acquired store should be divested, the CC was persuaded by Somerfield's evidence that disposal of the existing store would, in fact, remedy the SLC in those three cases. We see this as an example of the reasonableness of the CC's overall approach, and not necessarily inconsistent with the CC's decisions in relation to the

four disputed stores at Middlesbrough Linthorpe, Pocklington, Newark and South Shields, which were arrived at on different facts.

104. We therefore reject Somerfield's primary submission that, as a starting point, it should in principle, absent special circumstances, be free to choose which of the acquired and existing stores to divest. We equally dismiss Somerfield's challenge to the CC's conclusion in paragraph 11.13 of the Report rejecting Somerfield's argument that, as a matter of principle, it should generally be free to choose whether to divest the acquired or an existing store. We consider the CC's starting point, divestment of the acquired store, to be a reasonable one. We further uphold the CC's approach in the penultimate sentence to paragraph 11.13 in which the CC said:

> "We have therefore to consider, in the circumstances of each case, whether there are factors which suggest divestment of the existing store would be as effective in addressing the SLC as divestment of the acquired store".

105. We add that it further follows from what we have said that, in considering the relevant factors, the onus was on Somerfield to persuade the CC that divestment of the existing store would be as effective in remedying the SLC as would divestment of the acquired store.

The CC's reasoning

106. In considering the CC's reasons for rejecting Somerfield's suggested alternative in the case of the four disputed localities, it is first necessary to identify what the CC's reasons were. Paragraph 11.12 of the Report states:

> "To address the SLC, it is important first that the location of the store to be divested be such as to remedy the SLC identified, as would clearly be the case were the acquired store to be divested. If the existing store to be sold was some distance from the acquired store, it may be necessary to reassess the identity of appropriate purchasers for the store, requiring both a re-evaluation of the extent of competition in the isochrone of the existing store, and of the diversion ratios of customers of the existing, as opposed to the acquired store. In any cases in which there is more than one existing store, divestment of a more distant store, to which diversion ratios are likely to have been lower, may also fail to remedy the SLC identified. But secondly, it is important in order to address the SLC that the store offered for sale should be attractive to purchasers able to satisfy the

> criteria set out in the remedies notice. They should also be able to offer a comparable degree of competition with Somerfield on PQRS to that which existed prior to the acquisition. Where an existing store is relatively unprofitable, or has a significantly smaller sales area than an acquired store or has a disadvantaged store location, then there may be a significantly greater risk of not attracting a suitable purchaser and addressing the SLC."

107. That paragraph refers, in the second sentence, to the need to re-evaluate the relevant isochrone on the basis of the existing store, if the existing store is to be divested. The third sentence refers to the situation where there is more than one existing store. However, it appears from Mr. Clarke's evidence at paragraphs 78 to 97 that although possibly relevant in other cases, neither of those considerations arose in relation to the disputed stores in this case. In fact, of the three considerations mentioned in this paragraph, only the third, which begins with the word "Secondly", and relates to the need for the divested store to be attractive to purchasers, was a material consideration for the CC in this case.

108. On a similar point, which it is convenient to mention here, while the first sentence of paragraph 11.13 of the Report rejects Somerfield's argument that "there is necessarily symmetry between divestment of either the acquired or existing stores" (i.e. that the competitive constraint exercised by the acquired store on the existing store is the same as the competitive constraint exercised by the existing store on the acquired store) Mr. Clarke's evidence is that in relation to the disputed stores in this case, the group assumed that there was such symmetry (paragraph 95 to 97).

109. While it would have been better if these matters had been spelled out more clearly in the Report, Somerfield has taken no point on this omission. It seems to us that the outcome of this case is therefore unaffected, since it is common ground that the central issue raised by Somerfield relates to the CC's reliance on the factors set out in the last three sentences of paragraph 11.12, relating to the "saleability" of the stores.

110. According to that passage in paragraph 11.12, the CC's approach was (i) that the store divested should be attractive to purchasers (ii) that the purchaser should be able to offer a comparable degree of competition to Somerfield on PQRS to that which existed prior to the acquisition and (iii) that factors such as being relatively unprofitable, having a

smaller sales area, or being in a disadvantaged location could give rise to "a significantly greater risk of not attracting a suitable purchaser".

111. In relation to the four disputed stores this approach is again set out in paragraph 11.22 of the Report, which begins:

> "11.22 In the other four cases, at Middlesbrough Linthorpe, Newark, Pocklington and South Shields, divestment of the existing store would be significantly inferior to divestment of the acquired store in remedying the SLC as these have a significantly greater risk of not attracting a suitable purchaser able to offer comparable PQRS to that which was offered before the acquisition."

112. In its defence, the CC referred to paragraph 11.22 of the Report and further stated, at paragraph 32, that "It was clear to the [CC] that all stores are not equally attractive to potential relevant buyers and that no sale would be made of certain existing stores within a reasonable period of time". Mr. Clarke in his evidence confirmed that "saleability" was the CC's determinative consideration.

113. Somerfield submits that, contrary to appearances and Mr. Clarke's evidence, the CC did not in fact consider "saleability", but looked simply to see whether the stores were comparable in terms of their competitive weight. Putting it bluntly, Somerfield's suggestion is that the CC did not want Somerfield to profit from the transaction by, in effect, acquiring the "better" store in a particular location and then taking the opportunity to dispose of some of its poorer stores. That, says Somerfield, would have been an extraneous and irrelevant consideration. According to Somerfield, if, in a particular isochrone, there was, before the acquisition, one good store A owned by Morrisons and one poor store B owned by Somerfield, the Commission is not entitled to achieve more than the restoration of competition between the good store A and the one poor store B in that isochrone. If, after the acquisition and subsequent divestment, the good store A is owned by Somerfield and the poor store B is owned by (say) the Co-op, the SLC has been effectively remedied. Somerfield relies on various remarks during the remedies hearing and in staff papers, and paragraph 19 of Mr. Clarke's evidence which, it says, suggests a certain hostility to Somerfield's legitimate commercial position.

114. We can see the argument that if the CC's approach had simply been to establish whether the acquired store was "better" than the existing store, and, if so, to require Somerfield to dispose of the acquired store on the ground that Somerfield should not be allowed to keep something in the nature of "an ill-gotten gain" that, standing alone and without more, would have been a questionable approach under the Act. In such circumstances the focus would have been on depriving Somerfield of its "gain" rather than on remedying the SLC. However, the Report states as plainly as possible, in paragraph 11.13 and again in paragraph 11.22, that that was not what the CC did. It is quite true that the CC did compare the acquired and existing stores, but with the plainly stated purpose of determining whether the latter would be relatively less attractive to a potential purchaser in the competitor set, and thus impossible or more difficult to dispose of, with the consequence that the SLC would be remedied less quickly or effectively.

115. It seems to us that a comparison between the relevant stores with a view to determining whether the existing store would be less attractive to a purchaser from the competitor set, thus giving rise to the risk of not attracting a purchaser with a competitive offering capable of remedying the SLC, was a perfectly lawful criterion for the CC to adopt. We have no basis for any finding to the effect that the CC had, in fact, an ulterior motive or a different agenda.

116. We would only add on this part of the case that if in paragraphs 11.13 and 11.22, interpreted in the light of paragraph 32 of the defence, the CC considered that the test was whether there was a risk that no sale at all would take place, that, if we may say so, may have been to go further than the CC needed to go. In our view, it would suffice for the CC's purposes that there was a real risk that the sale of an existing store would be more problematic, or would take longer, from the point of view of finding a purchaser able to offer PQRS comparable to that offered before the acquisition, the onus being on Somerfield to establish that such was not the case.

117. As to Somerfield's point on Article 1 of Protocol 1 of the ECHR, that point was not developed in any detail and was not formulated in advance, which is an unsatisfactory way of dealing with the matter: see e.g. the dicta of Schiemann LJ in *Barclays Bank plc v. Ellis* [2001] CP Rep 50, CA.

118. Article 1 of Protocol 1 of the ECHR provides:

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

119. In our view it is abundantly clear that the control of mergers – which exists in virtually every State party to the ECHR – is within "the public interest" or "the general interest" referred to in the first and second paragraphs respectively of Article 1. It does not seem to us arguable that the way the CC approached the question of remedies in this case went outside the scope of the legitimate protection of those interests, bearing in mind also that the "possessions" in question had only very recently been acquired by Somerfield in full knowledge of the risk that their acquisition would be subject to scrutiny under the Act and of the principles applicable, as set out in the CC merger reference guidelines.

120. We therefore see no basis for challenging the CC's approach as set out in paragraphs 11.9 to 11.13 of the Report.

The criteria in this case

121. Somerfield's next submission is that, in any event, the CC did not have any evidence on which it could have based its conclusion that there was a significant risk of not attracting a suitable purchaser for the four disputed stores in question, had "no idea" about the ease or difficulty of disposing of these particular stores, sought no independent evidence, and overlooked the fact that all that was really in issue was the likely price, rather than whether the store was saleable at all. The CC also overlooked the divestment mechanisms which ensured in practice that a sale would take place.

122. We deal first with the matter at a general level. Paragraph 11.12, last sentence, of the Report expresses the view that there would be a significantly greater risk of not

attracting a suitable purchaser if the existing store is "relatively unprofitable", has "a significantly smaller sales area" or "a disadvantaged store location".

123. The CC is considering here the *relative* ease or difficulty of disposing of one or other of two stores. The CC is a body the members of which have considerable experience, particularly in business and commercial matters, supported by a staff including a Director of Remedies. In our view it is entitled to bring that experience to bear when reaching judgments on particular matters. For example, to take the first consideration mentioned above, profitability, it is apparent from Appendix E to the Report that the CC concluded that […][**C**]. It is apparent from paragraph 11.22 that the disputed stores at Middlesbrough Linthorpe, Newark and South Shields […][**C**]. It does not seem to us that a judgment to the effect that, other things being equal, a more profitable store is likely to be more attractive to potential relevant purchasers than an unprofitable one is the kind of judgment that is outwith the CC's margin of appreciation. Similarly a store in a disadvantaged location may attract fewer potential purchasers from the competitor set than the alternative store in a better location.

124. As to store size, it has to be borne in mind that the relevant purchasers comprise the competitor set offering comparable PQRS – which Somerfield challenges only in respect of the LADs considered below. That competitor set, as is well known, tends to be focused primarily on larger stores. Although as the Tribunal itself knows (see *Association of Convenience Stores v. OFT* [2005] CAT 36) there is evidence that companies such as Tesco and Sainsbury's have been interested in developing smaller stores in cities, that is not necessarily true of the competitor set as a whole. The question whether size would be a factor likely to discourage interest among the competitor set as a whole seems to us to have been one which the CC was entitled to take into account.

125. Somerfield submitted that matters such as the above relate only to the price at which the stores might be sold and not to "saleability" as such. However, in the circumstances under consideration we are not persuaded by the argument that "everything has its price". In the first place, the CC is not judging whether, in absolute terms, a store would eventually be disposed of at some rock bottom price. The CC is judging whether, in relative terms, one store is likely to be more easily and quickly disposed of

than the other, within a reasonable time, so that divestment is likely to be achieved more rapidly and effectively. Secondly, the question in the present case is not whether the existing store would ultimately be disposed of to any purchaser at any price, but whether one or other of the stores would be more readily disposed of to a purchaser within the competitor set within a reasonable period of time. We do not find it hard to imagine that a small, unprofitable store, in a disadvantaged location and poor condition, would not attract any interest at all from the competitor set. It was in our view for the CC to weigh those various matters on the basis of the evidence it had before it.

126. Finally on this aspect we do not regard as relevant Somerfield's argument that […][**C**]. We accept the CC's submission that the intervention of the divestment trustee is a fail-safe mechanism of last resort, and it is in the public interest for divestment to be achieved as quickly as possible to interested purchasers without involving the trustee. Again, in our view the question whether in relative terms one store was more likely than another to be attractive to purchasers without recourse to the trustee was in our view a relevant consideration for the CC. Similarly, while it is no doubt possible, as Somerfield suggests, that other divestment mechanisms could have been devised, it was in our view reasonable for the CC to follow its guidelines in requiring the acquired store to be divested unless persuaded otherwise. The onus was on Somerfield to persuade the CC that the two stores in question were at least equally attractive from the point of view of attracting a purchaser.

127. Again it seems to us that in approaching the matter it had to decide, the essential criteria adopted by the CC and set out in paragraph 11.12 of the Report were reasonable.

Were the CC's findings on the evidence unreasonable?

128. That leaves only the question whether, having regard to the reasons given and findings made by the CC at paragraph 11.22 in relation to the four stores in question, those findings were unsupported by evidence or so unreasonable as to be outwith the CC's margin of appreciation. In *Tesco Stores*, cited above, Lord Keith held that the weight of the evidence is for the decision maker, unless his conclusion is unreasonable in the *Wednesbury* sense: [1995] 1WLR 759 at 764G. We do not need to decide in this case

whether that test is the same, or different from, the test of manifest error of appreciation applied by the Court of First Instance in cases such as *Tetra Laval*, cited above.

129. We note, first, that the CC had a good deal of evidence before it. Specifically on remedies, the CC had Somerfield's response of 8 August 2005 to the CC's remedies notice; the transcript of the remedies hearing of 9 August 2005; the CC's paper on its current thinking dated 22 August 2005; and Somerfield's comments of 24 August 2005. In addition, the CC had all the material submitted earlier in the inquiry, by Somerfield and other parties, which will naturally have made the CC familiar with the case, including a great deal of information about individual stores.

130. More fundamentally, we note that in the notice of application Somerfield advanced no detailed case to the effect that, in the case of individual stores, the CC's Report was against the weight of, or unsupported by, the evidence. The notice of application on this ground of review is limited to five short paragraphs, which rely mainly on the points of principle which we have already dealt with, and not on points of evidence.

131. In this jurisdiction, where matters have to be determined expeditiously, the Tribunal is extremely reluctant to entertain applications under section 120 based on lack of or misinterpretation of evidence, unless the groundwork has been properly laid out in the notice of application. Rule 8 of the Tribunal's Rules (SI 2003/1372), which requires a detailed notice of appeal to be filed, applies equally to applications for review under section 120: Rules 25 and 28. Apart from anything else, the omission of any detailed case in the notice of application would mean that the CC does not have a full opportunity to deal with the matter in its defence.

132. In the present case, the ground of "no evidence" did not emerge until Somerfield's skeleton argument dated 21 November 2005 (see paragraph 27), and then in an entirely unparticularised form. Similarly, the CC's alleged failure to deal with issues relating to the divestment of freeholds as compared to leaseholds only appeared in Somerfield's skeleton argument (see paragraph 34). The points there made were sought to be developed with the aid of various pieces of paper handed up during the hearing, to which the CC had to respond "on the hoof", as it were. In our judgment, that is a wholly inadequate basis on which to found an allegation that the CC had no, or

insufficient, evidence for its conclusions in paragraph 11.22 of the Report in relation to individual stores. That is particularly so where, as we have held, the onus is on Somerfield to show that the CC could not reasonably have come to the conclusion that it did, and not on the CC to show that it had grounds for depriving Somerfield of a choice of store to which it would otherwise be entitled.

133. In those circumstances we can deal with this part of the case very briefly. There is no suggestion that the CC did not give Somerfield an opportunity to deal with its concerns or accurately summarise the arguments put forward. We have ourselves read the remedies material before the CC, and have no reason to think that Somerfield's case has been misrepresented in the Report.

134. We note that at paragraph 11.22 of the Report the CC refers to two elements not expressly referred to in paragraph 11.12, namely the physical condition of the store, and car parking (although probably the latter is included in the concept of disadvantaged location). In the absence of any evidence by way of a witness statement before the Tribunal challenging the factual basis for the CC's decision, it does not seem to us unreasonable for the CC to have taken into account both the physical condition of the store, and the car parking, together with other factors, in deciding whether Somerfield had discharged the onus of showing that the existing store in each disputed locality was at least as attractive to potential purchasers as the acquired store.

135. As regards the various points made by Somerfield as to the difference in "saleability" of freehold as opposed to leasehold interests, that point was not raised by Somerfield prior to the skeleton argument, we have no witness statement about it, and the CC has not dealt with the point in the defence because it was not raised. In those circumstances it would not be right to go into this issue on an application for judicial review. We now turn briefly to the four stores in question.

136. The existing store at Middlesbrough Linthorpe is described in paragraph 11.22 (a) of the Report as less than half the size of the acquired store, […][**C**] and in poor condition. We see no reason to doubt the CC's judgment that the sale of this store would not be as effective in remedying the SLC as would be the sale of the acquired store, the inference

plainly being that in the CC's view the latter would be likely to be more quickly and easily disposed of to one of the competitor set. ([…][**C**].)

137. In relation to Newark, again the existing store was smaller, […][**C**], had less car parking, and was in poorer condition than the acquired store. It is true that […][**C**] (paragraph 11.16 of the Report). Nonetheless Somerfield has advanced no concrete evidence to discharge the onus upon it of showing that the CC could not reasonably have considered that the acquired store in Newark could be more effectively disposed of than the existing store, on the basis of the factors set out in paragraph 11.22(b).

138. In relation to Pocklington, dealt with in paragraph 11.22 (c) of the Report, Somerfield's main initial argument appears to have been that […][**C**], but that argument was rejected by the CC at paragraph 11.18. As to the stores in question, the two stores appear to be of comparable size and at similar locations. In the Report, the CC does not dissent from Somerfield's assertion that […][**C**]. The factors mentioned in the last sentence of paragraph 11.12 (profitability, size, location) do not therefore appear at first sight to be directly applicable in relation to Pocklington. The CC relies, apparently, on its observation of the condition of the stores, the existing store being in poorer condition, according to the CC, and on the fact that the existing store has less car parking and a more constrained layout. Somerfield relied at the hearing on the inadequacy of the CC's conclusion on Pocklington, observing also that the CC had not dealt with its argument that […][**C**].

139. However, it is plain on the face of the Report that the CC had material on which it based its conclusion that the acquired Pocklington store would be more easily disposed of to a purchaser in the competitor set than the existing store. The onus was on Somerfield to convince the CC otherwise. In the absence of any pleaded case in relation to Pocklington in the notice of application, we are unable to say that Somerfield has discharged the burden of showing, in relation to Pocklington, that the CC's decision was unreasonable. We note that paragraph 7.22 of the Report suggests that Somerfield had a particularly strong market position in Pocklington.

140. With respect to South Shields, the existing store was smaller than the acquired store, […][**C**] and in poorer condition. In our judgment there was again material on which

the CC could have come to its conclusion. The onus on Somerfield of showing that it was unreasonable for the CC to rely on that evidence to reach its conclusion has not in our view been discharged. […][**C**] is dealt with in paragraph 11.34 of the Report.

141. For all these reasons in our judgment Somerfield's first ground of review fails.

VIII THE ISSUE OF THE EXCLUSION OF THE LADS AS POTENTIAL DIVESTEES

A. THE ISSUE

142. It appears from paragraphs 11.24 to 11.29 of the Report, and from paragraphs 11.31 to 11.37, that the CC set an initial divestiture period, following which the CC would consider using a divestiture trustee to divest any stores not divested within that period. As appears from paragraph 11.26, in general only operators within the competitor set identified at Stage 1 of its inquiry would be viewed by the CC as potential divestees during that period, although other operators who could demonstrate their ability to offer equivalent PQRS would be considered. As appears from paragraphs 6.41 to 6.48 of the Report, the competitor set, considered by the CC at Stage 1, apparently comprised Asda, Booths, Budgens, the Co-op, Morrisons, Sainsbury's, Somerfield, Tesco and Waitrose, but excluded the LADs, Iceland and Marks & Spencer.

143. At paragraph 11.27 of the Report the CC rejected the suggestion that the LADs – Aldi, Netto and Lidl – should be included in the set of potential divestees, for the reasons given in paragraphs 6.43 to 6.45 of the Report. However, at paragraph 11.28 the CC accepted that if, after a stipulated period of time within the divestiture period, Somerfield could demonstrate that there was no interest in acquiring a particular store shown by any of the approved divestees, then Somerfield would be able to market the store more widely, including to the LADs.

144. The CC's reasoning as regards the LADs is set out at paragraphs 6.43 and 6.45 as follows:

> "6.43 As we note in Appendix C, the LADs offer less than 20 per cent of the range of most other retailers. [✂][2] also sell

[2] This is excised from the version of the Report seen by Somerfield and the Tribunal.

predominately own-brand items. We also note the following evidence which suggests that the LADs cannot be regarded as being in the competitor set.

(a) From our competitor impact assessment in Appendix B for both Somerfield and Kwik Save, the competitor fascias that appeared to have the biggest impact on sales when they opened in the area were Morrisons, Safeway (before it was bought by Morrisons), Tesco and Asda. The impact on sales of the opening of a LAD was significantly smaller (although we only had one instance of the opening of a Netto store) – generally less than […][**C**] effect of the opening of the major retailers. This implies that the LADs are generally less close competitors for Somerfield and Kwik Save.[20]

(b) We note in Appendix C that LADs tend not to see others as competitors or be seen by others as among their main competitors.

(c) From the NOP survey, we note that the three LADs together were only mentioned by 5 per cent of respondents as alternatives had the acquired store not been available. Aldi was mentioned by 1 per cent of respondents at stores in areas where it was present, and by over 5 per cent in only one area. There were two areas where Aldi was mentioned by less than 5 per cent of respondents even where an Aldi store was closer to the Somerfield store than the nearest one-stop shop (Saltcoats and South Shields). Netto on the other hand was seen as an alternative by 4 per cent of respondents in the more limited number of areas where it was present. This included over 20 per cent of respondents seeing it as the alternative store in three areas (Bedlington, Birtley and Doncaster), where it was located very close (within 1-minute's drive time) to the acquired store and at some distance from any other stores (there is no other mid-range or larger store within 3 minutes' drive time of any of these three acquired stores). Lidl was mentioned by less than 1 per cent of respondents at stores in areas where it was present, and by over 5 per cent in three areas.[21] There are therefore a few areas where the LADs do seem effective competitors, particularly Netto, but there are many others where this is not the case: given the conservative approach we have adopted to ensure identification of problem areas, this would not seem sufficient reason to include them in the competitor set in Stage 1 of our analysis.

(d) We also noted from a Mintel report only 14 per cent of adults aged 15+ use a discount format store (here meaning Kwik Save and the three LADs) at least once a week, with another 14 per cent using such stores between once a week

and once a month. In contrast, a majority of adults shop at one of the main chains at least once a week.

Somerfield pointed out that, under our competitive impact assessment, the impact of a new […][**C**] opening was similar to that of […][**C**]. This we accept. But the NOP survey showed that significantly more shoppers (9 per cent) would switch to […][**C**], should an acquired store cease to be available, than to […][**C**]. We do not therefore regard it as illogical to exclude […][**C**] from the analysis, while including […][**C**].

…

6.45 We noted above Somerfield's argument that it would be inconsistent to regard the LADs as not being part of the competitor set, while regarding Kwik Save as competing with the stores acquired. Kwik Save offers a much wider range of goods –about four-times more stock-keeping units (SKUs)-than the LADs. We note in our competitor impact assessment that the impact of the opening of a one-stop shop on Kwik Save is less than on Somerfield. But we have also noted Somerfield's conversion of many Kwik Save stores to the Somerfield fascia: hence there are supply-side reasons to regard Kwik Save stores as at least potentially equivalent to Somerfield stores. The NOP survey also, however, showed 4 per cent of respondents regarded Kwik Save as an alternative in areas where it was present; but one area (South Shields) where a very significant proportion of users of the acquired store – almost half – would have used a Kwik Save store had the acquired store ceased to be available, and another (Middlesbrough Linthorpe) where about one-third would have done so.[24] This suggests to us that Kwik Save stores can generally be regarded as more in competition with the acquired stores than are the LADs."

"[20] The impact on sales of a new store opening was generally greater for Somerfield stores than for Kwik Save stores, by […][**C**] percentage points, on average, and the relative effects of different competitor fascias and other factors also varied depending on whether the store was a Somerfield or a Kwik Save.

[21] Including a maximum of 16 per cent in Kelso where, however, the existing Somerfield store had shut.

[24] In the first of these two cases, there is a Kwik Save store located very close to the acquired store: but there are also some Somerfield stores located close to acquired stores, where, if the acquired store was no longer available. A much smaller proportion of respondents than in these two cases would use the alternative Somerfield store."

145. The issue on this part of the case is whether the CC's approach to the LADs as potential divestees was perverse and/or unsupported by evidence.

B. THE PARTIES' SUBMISSIONS

Somerfield's submissions

146. In the notice of application Somerfield contends that the exclusion of the LADs from the initial divesture period on the grounds set out in paragraph 6.43 of the Report was perverse. In its Stage 1 analysis, the CC concluded, according to Somerfield, that the competitive impact of the LADs was similar to that of […][**C**], as well as […][**C**] and […][**C**], as shown in Appendix B to the Report. If those competitors are permitted divestees, so the LADs should be also.

147. In any event, Somerfield submits that the CC was wrong to rely on the NOP survey mentioned at paragraph 6.43, since that survey was unrepresentative of LADs. The results do show, however, individual locations where a LAD was the most significant beneficiary of switching. As to the different offerings by the LADs, also referred to in paragraph 6.43, Somerfield points out that the 1500 lines upon which the LADs' sales focus account for some 60-70% of the range of products sold in grocery stores.

148. Elaborating its submissions, Somerfield argues that the exclusion of the LADs from the competitor set at Stage 1 on an avowedly conservative basis does not mean that they should be excluded from the range of potential divestees.

149. Furthermore, Somerfield submits that on a proper consideration the CC could not have reached the decision it did on a balanced assessment of the five pieces of evidence referred to at paragraph 6.43 of the Report. Those five pieces of evidence were: the competitor impact assessment, set out at Appendix B of the Report; the range and nature of the products offered by the LADs; the views of supermarket operators as to their perceived competitors; the results of the NOP survey, commissioned by the CC to assist it in evaluating local markets; and the Mintel report. There was, however, only one serious piece of quantitative evidence, namely the competitor impact assessment. The other four pieces of evidence are in Somerfield's submission weak, devoid of real

content and inconclusive. It was perverse of the CC to attach more weight to them collectively than to the competitor impact assessment, if that is what the CC did.

150. Somerfield submits that the competitor impact assessment, contained at Appendix B to the Report, demonstrates the inconsistency of the CC's approach to the LADs compared to its approach to other fascias included within the approved divestee set, namely […][**C**]. The LADs were found to exert a similar level of constraint to those other […][**C**] fascias, yet the CC preferred to disregard that evidence on the basis that the data sample was too small (e.g. in relation to Netto). Somerfield submits that whilst a single observation (in relation to Netto) is insufficient on its own to form the basis for a robust conclusion, it is quite wrong to discard the observation altogether as, Somerfield submits, the CC did. The competitive impact of the LADs should, in fact, have been considered collectively, and the Netto data included in that analysis. Properly understood, the competitor impact assessment, which attempts systematically to measure the impact of different fascias on Somerfield, strongly supports Somerfield's case. The same is true of the last sub-paragraph of paragraph 6.43. Essentially, if […][**C**] were included, then the LADs should also have been included. That is especially so, according to Somerfield, when considering the Kwik Save stores in Figure 1 of Appendix B.

151. Turning to the other four pieces of evidence, Somerfield submits that the narrower product range offered by the LADs is already factored into the competitor impact assessment. The impact of any supposed handicap on the ability to compete which a more limited range of products might represent should itself be picked up in the empirical evidence on impact. It is therefore not, as the CC appears to suggest, an additional piece of evidence deserving of special attention but rather a piece of evidence already subsumed in the empirical evidence used to test the competitive constraints in practice. Furthermore, the CC does not dispute that the LADs offer a range of products which, even if limited, represents a large proportion of total grocery sales. Prima facie, according to Somerfield, this demonstrates the potential for significant competitive impact.

152. Somerfield submits next that the views of other supermarket operators are obviously to be treated with considerable caution as they each have good reason to answer such a

question strategically. They are not a sound basis on which the CC could proceed. The views of the LADs to the effect that they did not consider Somerfield to be a competitor are irrelevant: the question is whether the LADs act as a competitive constraint on Somerfield.

153. Somerfield submits that no weight should be placed on the NOP survey results because the survey was not designed for and is unsuited to the purpose for which it is relied upon at paragraph 6.43 of the Report. The fundamental flaw, in Somerfield's submission, is that the results are not adjusted for matters such as store size and distance. There are fewer LADs than other stores in the areas surveyed and thus on average there are fewer of them close to a surveyed store. It is therefore unsurprising that, on average, the answer to the question where the shopper would have shopped had the store s/he had just left not been available was less likely to be a LAD than another closer fascia. That answer, however, gives no information at all as to whether a store of a given size and proximity owned by a LAD would offer a significantly different competitive constraint to Somerfield from that offered by an equivalent store owned by another retailer. Indeed, says Somerfield, the CC chose to ignore evidence of high diversion ratios in relation to Netto, one of the LADs, on the basis that Netto was very close to the proximity store, despite that being relevant evidence that, where a LAD is close to a Somerfield store in a particular location, the LAD is a significant competitive constraint. That would be, at least potentially, the situation here if one of the disputed stores were to be acquired by a LAD.

154. Furthermore, whilst the CC acknowledged that the NOP survey demonstrated that there were areas where LADs do seem to be effective competitors, and that it must assess those local areas where LADs may provide effective competition in order for it legitimately to establish SLC, it then wrongly excluded the possibility that a LAD could enter a local market and provide effective competition to the remaining Somerfield/Kwik Save store(s).

155. As to the evidence from the Mintel report showing that only 14% of adults used a LAD or Kwik Save store at least once a week, Somerfield submits that such material is obviously irrelevant: there are many more stores operated by the major chains than by the LADs and Kwik Save. In Somerfield's submission it is hardly surprising that many

more people in total shop each week at major chains. Reliance on such irrelevant matters demonstrates the weakness of the CC's case on the limitation of the range of potential divestees.

156. Somerfield finally draws attention to the fact that this aspect of the case does not simply concern the initial stipulated period. […][**C**].

The CC's submissions

157. The CC, in its defence, points out that it has been consistent throughout Stage 1 and Stage 2. In both cases, the LADs, Iceland and Marks & Spencer were excluded from the competitor set. As to Somerfield's specific arguments, the CC contends that it took into account the five pieces of evidence set out at paragraph 6.43 of the Report and that there is no basis for a judicial review of the weight given by the CC to the various elements in the evidence: see e.g. *Tesco Stores*, cited above, at 764G-H.

158. The CC submits that in any event Somerfield's criticism of the CC's approach is misguided. First of all, there was no question of the CC attaching a collective weight to four pieces of evidence and balancing them against one. The CC's approach in the inquiry was similar to that of the Tribunal in *Aberdeen Journals v Director General of Fair Trading* [2003] CAT 11, namely that it considered that the decision would best be taken by making effective use of all available information and looking at the different pieces of evidence 'in the round'.

159. The CC states that it regarded the competitor impact assessment as a valuable piece of evidence, and placed appropriate weight on it, but that single piece of evidence was not regarded as being perfect, particularly given that the sample size was small in respect of some operators. It was entirely reasonable for the CC to have regard to other pieces of evidence. The CC considered that all of the evidence pointed towards the same conclusion. Somerfield's criticisms of the evidence are, in the CC's view, significantly overstated.

160. In relation to the competitor impact assessment, the CC contends that at no point in its application does Somerfield argue that the analysis supports the conclusion that the

LADs exert a significant degree of competitive constraint on Somerfield or Kwik Save. In the CC's submission, the results in fact show that the degree of constraint exerted by the LADs is relatively weak and is significantly less than that exerted by many other operators within the set of approved divestees. Somerfield's criticism is confined to an allegation of inconsistency in treatment. In the CC's submission, the CC had to draw a line somewhere, and the question of where to draw the line is a matter of judgement. Moreover, in this sort of exercise it will often be the case that the results immediately above and below the line will be relatively close. Moreover, says the CC, there were only limited data points available in respect of comparisons with […][**C**].

161. The further evidence in this case suggested that the LADs' business model was significantly different from that of […][**C**] and was regarded as different by customers. Somerfield itself argued that the LADs differed in respect of the nature of the typical shopping mission, the range, product display and service, operating costs and price.

162. In relation to the range of products stocked by the LADs, the CC submits that the degree of competitive constraint between two undertakings with very similar offerings is likely to be higher that that between two undertakings with offerings that are significantly different from one another. Having regard to such differences is entirely uncontroversial. Such qualitative evidence should not be disregarded.

163. In relation to the views of supermarket operators, the CC accepts that such views should be treated with some caution, but rejects the submission that they should be disregarded: see the CC merger reference guidelines and *Aberdeen Journals*, cited above.

164. In relation to the NOP survey results, the CC submits that there is no reason to suppose that the results were heavily biased against the LADs in favour of […][**C**]. For example, any bias produced by […][**C**] being on average slightly closer to the surveyed store might reasonably be expected to be counteracted by the fact that, on average, the nearest LAD store (across all the isochrones in which a LAD was present) was more than double the size of the nearest […][**C**] (across all the isochrones in which […][**C**] was present).

165. Finally, in relation to the Mintel report, the CC submits that whilst Somerfield might be correct in stating that an explanation for the results of that Report is that there are more stores operated by the major chains than by LADs, another explanation likely to play a part is that the nature of a typical LAD shopping trip is different from that of a typical customer of one of the operators within the set of suitable purchasers (a point made by Somerfield during the inquiry). It was not unreasonable, says the CC, for it to have regard to that in the Report.

C. THE TRIBUNAL'S ANALYSIS

166. Somerfield's case seems to be put on two slightly different bases: first, that the CC should have relied entirely on the competitor impact assessment (from which it failed to draw the correct conclusion) and excluded the other four pieces of evidence referred to in paragraph 6.43 as irrelevant; and, secondly, that it was perverse of the CC to give the weight it did to the other four pieces of evidence, rather than drawing from the competitor impact assessment the obvious conclusion that the LADs should be included in the competitor set in the initial phase of the divestiture period.

167. However Somerfield's case is put, Somerfield's essential point is that the competitor impact assessment at Appendix B to the Report shows that the LADs have at least an equivalent competitive impact to that of […][**C**]. According to Somerfield, if those competitors are included in the competitor set in the initial phase of the divestment period, so should be the LADs.

168. We note first that the CC did not exclude the LADs altogether from the competitor set of potential purchasers of the stores to be divested. First, the LADs are excluded only during a stipulated initial phase of the divestiture period. If no expressions of interest are received during that initial phase of the divestiture period, the circle may be widened to include the LADs (paragraph 11.28). Although Somerfield points out correctly that the initial phase of the divestment period may become extended in certain circumstances, we note that the exclusion of the LADs is a limited, rather than an absolute, exclusion. There is also the possibility of a LAD coming forward even during

the initial phase of the divestment period if it can persuade the CC that it can offer equivalent PQRS (paragraph 11.26) although Mr. Clarke considers that this is unlikely.

169. We also note that […][**C**] were included in the competitor set in both the CC's Stage 1 and the remedies stage, while the LADs were excluded at both Stage 1 and the remedies stage. Somerfield has not challenged the CC's reasoning at Stage 1, although the same reasoning is relied on at the remedies stage. While, as Somerfield submits, it does not necessarily follow that competitors excluded from the set at Stage 1 should also be excluded at the remedies stage, in our view in the absence of evidence to the contrary it is not unreasonable for the CC to have adopted a consistent approach across both these stages.

170. The competitor impact assessment is discussed in paragraph 6.43(a) and Appendix B to the Report. As regards Kwik Save stores, Panel B of Figure 1 of Appendix B appears to show that the impact of the opening of […][**C**] in the vicinity of a Kwik Save store was […][**C**], which does not support Somerfield's argument as regards the Kwik Save stores in question.

171. As regards the impact on Somerfield stores, Somerfield does not challenge the CC's conclusion in paragraph 6.43(a) that Tesco, Morrisons, Safeway, Sainsbury's and Asda are much closer competitors to Somerfield than are the LADs, as shown in Panel A of Figure 1 in Appendix B.

172. It is true that in Panel A of Figure 1 of Appendix B, […][**C**]. However, that result is based on a single observation (i.e. the opening of a single Netto store). We do not think it is unreasonable for the CC to be wary of placing much weight on that single observation in Panel A of Figure 1. […][**C**]. Again that does not seem to us to give much support to Somerfield's argument.

173. It is true that Panel A of Figure 1 of Appendix B apparently shows the impact of […][**C**] quite close to that of […][**C**]. Also, at paragraph 6.43, last sub-paragraph, the CC accepted that "the impact of a new […][**C**] opening is similar to that of […][**C**]". (We take it, however, that this remark relates to the Somerfield fascia, rather than the Kwik Save fascia.)

174. It seems to us that the competitor impact assessment, on which Somerfield strongly relies, at first sight provides no support for including the LADs as regards the Kwik Save stores and only some support, at the margin, for the inclusion of the LADs in the competitor set as regards Somerfield stores.

175. To the extent that the competitor impact assessment could be said to support Somerfield's case, the CC's response is twofold: first, in defining the parameters of a competitor set, the line has to be drawn somewhere; and secondly, that the CC had ample other evidence to support its conclusion regarding the LADs. We accept both points.

176. As far as drawing the line is concerned, precisely where the line is to be drawn on an issue such as this is for the CC to evaluate: no doubt there will always be arguments in borderline cases. In our view it would need a strong case to show that the CC had manifestly drawn the line in the wrong place. Even taking the competitor impact assessment standing alone, it seems to us far from manifest that the CC has drawn the line in the wrong place.

177. In so far as Somerfield is arguing that the CC should have rejected as irrelevant the evidence other than the competitive impact assessment set out in paragraph 6.43 of the Report, we see no basis for any such argument. As the CC submits, and as the Tribunal held in *Aberdeen Journals*, cited above, at paragraph 128, in determining questions of market definition, the evidence should be looked at "in the round". Indeed, it is highly desirable in our view that a statistical analysis of the kind set out in Appendix B should be considered together with other available evidence. The weight to be given to that evidence is for the CC to evaluate.

178. We therefore turn to Somerfield's submissions regarding the alleged mis-evaluation by the CC of the other evidence discussed in paragraph 6.43, namely the range offered by the LADs, views of competitors, the NOP survey and the Mintel report.

179. The range of products offered by the LADs is considerably less than that offered by retailers in the competitor set, and by both Somerfield and Kwik Save (paragraph 6.43, first sentence, and paragraph 6.45 of the Report). Although, as Somerfield argues, this

factor may be reflected in the results of the competitor impact assessment, it is in our view a central aspect of the market definition exercise which the CC was undertaking in paragraph 6.43 of the Report. In our view the CC was correct to give weight to that evidence.

180. As to the views of competitors, it is in our opinion difficult to argue that such evidence is irrelevant (see by analogy *Aberdeen Journals*, cited above, at paragraph 128), although both the CC and Somerfield accept that such evidence should be treated with caution.

181. As regards the NOP survey, Somerfield's submission at the hearing appeared to be that one cannot place too much weight on this evidence, a submission from which the CC did not appear to demur. The evidence as summarised in paragraph 6.43(c), and mentioned again in the last sub-paragraph of paragraph 6.43, appears to us overall to support the CC's approach, and we see no reason why the CC should not have relied upon it. It does not seem to us appropriate, on an application for judicial review, to go into the new criticisms of the NOP survey made by RBB Economics and handed up during the hearing, to which the CC responded in the Treasury Solicitor's letter of 16 December 2005.

182. As regards the Mintel report, Somerfield may well be correct in submitting that a weakness of the Mintel report is that LADs do not have as many stores as other operators, so that they are bound to come off worse than their competitors in surveys such as the Mintel report. However, in our view the CC was entitled to have regard to that report, also bearing in mind the fact that Somerfield itself had apparently suggested during the inquiry that the result of the Mintel report as regards the LADs may have been due to their different offerings, and to a difference in the "shopping mission" of their customers, as compared with other operators in the competitor set (CC skeleton, paragraph 63).

183. In the light of the foregoing we can see no basis for suggesting either that the CC should not have had regard to the totality of the evidence referred to in paragraph 6.43 of the Report, or that the weight given by the CC to the different items of evidence was perverse, or amounted to a manifest error of appreciation, or that the CC's conclusion

as regards the exclusion of the LADs from the competitor set during the initial phase of the divestment period was unreasonable on the evidence before it.

184. It follows that the second limb of Somerfield's remaining ground of review also fails.

IX CONCLUSION

185. It follows that we dismiss Somerfield's application for review. We will hear any consequential applications in due course. Our provisional view, of course subject to considering any submissions to the contrary, is that in this case costs should follow the event.

Christopher Bellamy Marion Simmons Paul Stoneman

Charles Dhanowa 13 February 2006
Registrar