Neutral citation [2006] CAT 21

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1070/4/8/06

Victoria House
Bloomsbury Place
London WC1A 2EB

19 September 2006

Before:

Sir Christopher Bellamy (President)
Michael Davey
Richard Prosser OBE

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) STERICYCLE INTERNATIONAL LLC
(2) STERICYCLE INTERNATIONAL LIMITED
(3) STERILE TECHNOLOGIES GROUP LIMITED

Applicants

-and-

COMPETITION COMMISSION

Respondent

Mr Paul Lasok QC, Mr George Peretz and Mr Jorren Knibbe (instructed by DLA Piper) appeared for the Applicants

Mr Ben Rayment (instructed by the Treasury Solicitor) appeared for the Respondent

Heard at Victoria House on 7 September 2006

JUDGMENT
(Non-confidential version)

APPROVED BY THE TRIBUNAL FOR HANDING DOWN
(SUBJECT TO EDITORIAL CORRECTIONS)

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

I INTRODUCTION

1. By a notice of application dated 21 July 2006 the applicants, Stericycle International LLC, Stericycle International Limited and Sterile Technologies Group Limited (collectively "the applicants", the latter two "the merged businesses"), 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 an order dated 18 July 2006 ("the 18 July Order") made under section 81(2) of the Act in connection with an inquiry currently being conducted by the CC into a completed merger ("the merger") of the businesses of Stericycle International Limited and Sterile Technologies Group Limited ("STG").

2. The 18 July Order was supplemented by directions issued on 25 August 2006 ("the 25 August Directions") (as to which see below). The 25 August Directions were the subject of a "Supplementary Notice of Application" filed on 31 August 2006.

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

II LEGISLATIVE FRAMEWORK

4. 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. Powers however exist under sections 71, 72, 80 and 81 of the Act enabling the OFT or the CC to accept undertakings or make orders to ensure that the outcome of their investigations in not prejudiced. Section 81 is the section in issue in this case.

5. 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 reference of a completed merger made to the CC by the OFT on 28 June 2006 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
>
> (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."

6. Section 71 provides for the possibility of the OFT accepting interim undertakings for the purpose of preventing pre-emptive action. Section 72 gives the OFT power to make orders for the purpose of preventing pre-emptive action. Section 71(8) provides:

> "(8) In this section and section 72 "pre-emptive action" means action which might prejudice the reference concerned or impede the taking of any action under this Part which may be justified by the [CC's] decisions on the reference."

7. Undertakings accepted by the OFT under section 71 expire 7 days after a reference is made to the CC unless they are accepted by the latter: sections 71(6) and 80(3).

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

> "(1) …the [CC] shall, on a reference under section 22, decide the following questions–
>
> (a) whether a relevant merger situation has been created; and
>
> (b) if so, whether the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services.
>
> (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; …
>
> (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."

9. 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."

10. 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).

11. 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."

12. 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."

13. Schedule 8 of the Act provides, among other remedies, for divestiture:

"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);

…"

14. Pending completion of its investigation, the CC may take action to prevent the outcome of the reference being frustrated by the actions of the parties. The CC may accept interim undertakings (section 80) or adopt interim orders (section 81). Section 80 provides:

"80 (1) Subsections (2) and (3) apply where a reference under section 22 or 33 has been made but is not finally determined.

(2) The [CC] may, for the purpose of preventing pre-emptive action, accept from such of the parties concerned as it considers appropriate undertakings to take such action as it considers appropriate.

(3) The [CC] may, for the purpose of preventing pre-emptive action, adopt an undertaking accepted by the OFT under section 71 if the undertaking is still in force when the [CC] adopts it."

15. Section 81, pursuant to which the CC acted in this case, provides:

> "81 (1) Subsections (2) and (3) apply where a reference has been made under section 22 or 33 but is not finally determined.
>
> (2) The [CC] may by order, for the purpose of preventing pre-emptive action-
>
> (a) prohibit or restrict the doing of things which the [CC] considers would constitute pre-emptive action;
>
> (b) impose on any person concerned obligations as to the carrying on of any activities or the safeguarding of any assets;
>
> (c) provide for the carrying on of any activities or the safeguarding of any assets either by the appointment of a person to conduct or supervise the conduct of any activities (on such terms and with such powers as may be specified or described in the order) or in any other manner;
>
> (d) do anything which may be done by virtue of paragraph 19 of Schedule 8.
>
> …"

16. Pursuant to section 80(10) of the Act, "pre-emptive action" is defined for the purposes of sections 80 and 81 as

> "action which might prejudice the reference concerned or impede the taking of any action under this Part which may be justified by the [CC's] decisions on the reference".

17. Section 86(6) provides:

> "(6) In this Part "enforcement order" means an order made under section … 81 …."

18. Section 94 provides, so far as is material:

> "(1) This section applies to any … enforcement order.
>
> (2) Any person to whom such an undertaking or order relates shall have a duty to comply with it.
>
> (3) The duty shall be owed to any person who may be affected by a contravention of the undertaking or (as the case may be) order.
>
> (4) Any breach of the duty which causes such a person to sustain loss or damage shall be actionable by him.
>
> …

(7) Compliance with … an order made by the [CC] under … section 81 … shall also be enforceable by civil proceedings brought by the [CC] for an injunction or for interdict or for any other appropriate relief or remedy."

The CC's Guidance

19. On 15 June 2006 the CC published its *Guidance on the use of interim measures pending final determination of merger references* ("the *CC's Guidance*"). Publication followed a consultation period which ended on 14 March 2006. The following extracts are of particular relevance:

> "8. The CC will normally expect to receive interim undertakings from the acquirer in a completed merger, to clarify how that party will treat the acquired business pending final determination of the reference and/or to reinforce or supplement the prohibitions set out in the statutory restriction. The template set of undertakings in the attached Annex contains a number of such provisions, for example a requirement that customer lists are operated separately and that any existing supplier or customer contracts continue to be serviced by the business which is party to them. The CC may also seek to restrict information flows between the parties and require the ring-fencing of information so that it can be destroyed or returned to the acquired business if this were required by any remedy that may be imposed by the CC. However, as noted above, the CC will examine the need for interim measures on a case by case basis, and it will be open to the parties to demonstrate that such undertakings are neither necessary nor appropriate on the particular facts.
>
> …
>
> 15. In some cases, it may be necessary to put in place interim measures that go beyond the safeguards contained in the template [annexed to the *Guidance*]. Any additional safeguards may be included in the interim measures accepted by the CC or they may be put in place by means of a variation to the interim measures or by directions. Additional safeguards may involve the appointment of a hold separate manager with executive powers to operate the acquired business separately from the acquirer and in line with the interim measures for the duration of the investigation. Alternatively or in addition, they may involve the appointment of a monitoring trustee to monitor and report on compliance with the interim measures. The appointment of a hold separate manager and/or a

monitoring trustee will be at the expense of the acquiring party.

16. The CC will normally consider the appointment of a hold separate manager and/or a monitoring trustee at the outset of an inquiry and it will review the issue throughout the inquiry. The appointment of a hold separate manager and/or a monitoring trustee is more likely where particular risk factors have been identified. Such factors include, for example: past breaches of the interim measures; substantial integration of the two businesses prior to the interim measures; subject to the necessary consents from the CC, the need for further or continued integration of the business throughout the inquiry, for example if the acquired business was not a stand-alone business; the absence of the pre-merger senior management of the acquired business; and/or the existence of strong incentives for the current senior management function of the acquired business to operate the acquired business on behalf of the acquirer. This last risk factor in particular will suggest the need for the appointment of a hold separate manager."

(Emphasis added by the Tribunal.)

III FACTUAL BACKGROUND

20. Stericycle International LLC is a company incorporated in Delaware, United States. In the UK it operates through its wholly-owned subsidiary Stericycle International Limited. Stericycle International Limited is in turn a holding company for three further companies: White Rose Environmental Limited ("WRE"), Healthcare Waste Limited ("HW") and Indigo Equity Holdings Limited ("IEH"). These four companies are referred to collectively as "Stericycle (UK)". WRE is the principal operating subsidiary of Stericycle International Limited.

21. STG is a company incorporated in the Republic of Ireland.

22. Both Stericycle (UK) and STG are active in clinical waste management services. It appears, from the OFT's decision of 28 June 2006 to refer the merger to the CC ("the OFT decision to refer"), that Stericycle (UK) is active in England and Wales whilst STG is active in both the United Kingdom and Republic of Ireland. That decision indicates that the merger gives the parties combined shares of 65 and 55 per cent in the UK markets for high temperature treatment of healthcare risk waste and alternative technologies treatment of healthcare risk waste respectively (paragraphs 59 to 60).

23. It appears that the merger, which took the form of an acquisition of the entire issued share capital of STG by Stericycle International LLC on 27 February 2006, came about as a result of an auction of STG. It appears that the whole acquisition took place within seven days of Stericycle obtaining exclusivity, which in turn was just three days after the final date for submission of bids. According to the applicants, this did not allow any time for pre-notification of the merger to the OFT (notice of application, paragraph 22). The Tribunal has not investigated this aspect of the matter.

The OFT stage

24. Despite the fact that the merger had not been pre-notified, the OFT wrote to Stericycle International LLC, the parent company, the day after completion, that is to say on 28 February 2006, requesting certain information so as to help the OFT decide whether the merger fell within the scope of the Act. It appears that further information was requested by the OFT on at least 28 March 2006, 21 April 2006, and on 8, 15 and 18 May 2006.

25. On 24 May 2006 the OFT wrote to Messrs DLA Piper ("DLA"), the applicants' solicitors, enclosing draft initial undertakings pursuant to section 71 of the Act. On 26 May 2006 there took place a telephone conversation between Mr David Blocksidge of the OFT Mergers Branch and Mr Martin Rees and Ms Elizabeth Richardson of DLA, in which, according to a note of the conversation prepared by DLA, DLA expressed the merged businesses' concerns at the draft initial undertakings. The note records Mr Rees as "saying that where integration so complete we are not very happy about having an undertaking that we cannot do because it is impossible." Later that day, DLA sent the OFT a report setting out the integration which had already occurred. The report states, *inter alia*:

> "It is clear from the information below that the Stericycle and STG elements are now being operated as a single business and there cannot be any competition between them. From the [OFT's] point of view this should not be a matter of concern because the separate brands are being maintained."

26. The report further recorded that […][**C**].

27. On 9 June 2006 the OFT responded by email. It was noted that integration which had already been initiated at the date of the signing of initial undertakings was excluded from the draft of the undertakings. In those circumstances, the OFT was unsure why the merged businesses felt unable to sign up to the draft initial undertakings. The same day DLA replied by email, stating that "the principle that we think applies is that the undertakings should not include obligations, which in the circumstances have no content at all. The reason for this is that a court would have great difficulty in construing the undertakings." The email then set out a number of clauses with which issue was taken.

28. On 14 June 2006 the OFT sent revised undertakings. In a covering letter the OFT rejected most of the points made by DLA. On 15 June 2006 DLA wrote to the OFT by email setting out a further matter of clarification and attaching a further suggested draft of the initial undertakings, adding:

> "However, our clients do not wish to be difficult about this and are quite happy to give undertakings provided that there is absolute clarity as to the carve outs. As we pointed out in our email of 9 June, these are in some cases so substantial that the undertakings can have little if any content. Provided this is clearly understood on both sides we would hope that any further problems can be avoided…"

29. In an email of 16 June 2006 the OFT responded, stating *inter alia*:

> "If integration is complete then the undertakings will have no effect and no court would enforce them. If it is not then they preserve the CC's position in the event of a reference."

30. On 19 June 2006 DLA wrote to the OFT enclosing signed copies of the initial undertakings. The letter stated:

> "In providing these undertakings, Stericycle is making no representations that the substance of the undertakings can be complied with in the current circumstances owing to the level of integration that has already occurred."

31. The OFT accepted the initial undertakings the same day, 19 June. Paragraph 1 of the initial undertakings reads as follows:

> "Except with the prior written consent of the OFT Stericycle and STG undertake that they will not during the specified period take any action separately or jointly which might:

(a) lead to the further integration of the Stericycle business with the STG business (save to the extent that such action has been initiated at the date of these undertakings and the OFT has been informed of that fact by that date);

(b) transfer the ownership or control of either of the Stericycle business or the STG business to any third party;

(c) otherwise impair the ability of each of the Stericycle business and the STG business to compete independently in any of the markets affected by the acquisition (save to the extent that measures having this effect have been initiated at the date of these undertakings and the OFT has been informed of that fact by that date); or

(d) prejudice any reference to the CC or impede the taking of any action under the Act which may be justified by the CC's decisions on any such reference."

32. Paragraph 5 of the initial undertakings obliged the merged businesses to comply with such written directions as the OFT or (upon the CC adopting the initial undertakings) the CC from time to time gave to take steps specified or described in such directions for the purpose of carrying out or securing compliance with the initial undertakings.

33. The OFT decision to refer, made on 28 June 2006, 9 days after the initial undertakings were accepted, states that its investigation was prompted by a number of customer complaints. In the reference decision the OFT concluded that the test under section 22 of the Act was satisfied. On the question of "horizontal issues" the OFT noted, among other matters: the parties' high combined market share of supply (based on third party evidence) of both high temperature and alternative technologies treatment of healthcare risk waste; extensive customer concerns; and high barriers to entry in the relevant markets (paragraphs 59 to 62). As to "vertical issues", the OFT (i) noted that the parties were active in all levels of the supply chain (the collection, transportation and treatment of healthcare risk waste) and (ii) considered that it was plausible that the merged entity had the ability and incentive to increase the cost of treatment to certain competitors (paragraph 63). The remedies proposed by the parties did not meet the "clear cut" and "readily implementable" requirements for the OFT to consider undertakings in lieu of a reference (paragraph 70). Accordingly, the merger was referred to the CC. The applicants have not challenged the OFT's view, in paragraph 64 of the decision to refer, that it is or may be the case that the merger has resulted, or

may be expected to result, in a substantial lessening of competition ("SLC") in relevant United Kingdom markets.

The CC stage

34. On the same day, 28 June 2006, the CC wrote to the applicants with regard *inter alia* to the initial undertakings to the OFT of 19 June 2006, pointing out that it was in the process of considering whether to adopt them in accordance with its powers under section 80 of the Act. That letter noted that additional safeguards may be required in order to prevent pre-emptive action pending final determination of the reference, and to that end the CC asked for a response to a number of issues relating, broadly speaking, to the question of integration between the parties. A further request, based on the information provided to the OFT by the merged businesses, was made by the CC on 30 June 2006.

35. On 3 July 2006 the CC adopted the initial undertakings under section 80(3) of the Act, thereby maintaining those undertakings in force after the date on which they would otherwise have expired under section 71(6)(a).

36. A meeting took place between CC staff and the applicants on 4 July 2006 during which the integration of the merged businesses was discussed. It further appears that the applicants made reference to the ongoing programme of integration, which involved making certain key employees redundant, integrating IT and accounting systems and changing the way the combined assets were used. Later that day, the Chairman of the CC, Mr Peter Freeman, wrote to Mr Bill Blyde, CEO of the merged businesses, explaining the CC's concern that if such integration were to continue, the separability and viability of the two businesses as independent competitors, in the event divestment were considered appropriate, might be threatened. For this reason, the Chairman's letter contained a direction from the CC under paragraph 5 of the initial undertakings to the effect that neither of the merged businesses would contravene paragraph 1(d) of the initial undertakings, and in particular that neither would, without the consent of the CC, take any further steps to […][**C**].

37. On 5 July 2006 the Chairman of the CC appointed an inquiry group to consider the merger ("the Group"). The Group was to be chaired by Mrs Diana Guy, a Deputy Chairman of the CC.

38. Various submissions and other documentation relating to the question of the initial undertakings were submitted by the applicants to the CC between 5 and 7 July 2006.

39. On 7 July 2006 Mrs Guy wrote to Mr Blyde, enclosing in draft a revised set of undertakings which the Group considered would meet the aim of ensuring that neither of the merged businesses took pre-emptive action. That letter referred to the *CC's Guidance* and set out the Group's view that certain risk factors were present in this case. Concern was expressed "with the way in which Stericycle has implemented its undertakings to date and [its wish] to ensure that any undertakings are effective in preserving the separability of the Stericycle and STG businesses". For this reason the CC enclosed a draft set of directions under the draft undertakings requiring the merged businesses to appoint a Hold Separate Manager ("HSM").

40. On 11 July 2006 DLA sent the CC a note on the draft revised undertakings together with a marked-up version of the same. A meeting was held the same day between the CC and the applicants to discuss the draft undertakings. Following that meeting, a further note was submitted by the applicants, in which it was emphasised that Stericycle could not accept the provisions for appointing a HSM.

41. On 13 July 2006 the CC sent DLA a reworked set of draft undertakings. The covering letter from Mrs Guy explained that given the complex picture presented by the applicants, the CC had decided to direct the appointment of a monitoring trustee to ascertain precisely the level of integration which had occurred by then.

42. Following further correspondence, the CC issued the 18 July Order, agreement on a set of revised undertakings having proved impossible.

43. The 18 July Order sets out a number of general and more specific obligations on the applicants. Paragraphs 1 and 2 provide:

"1. Except with the prior written consent of the CC, Stericycle LLC, Stericycle and STG shall not during the specified period take any action separately or jointly which might:

   a. lead to the further integration of the Stericycle business with the STG business;

   b. transfer the ownership or control of either of the Stericycle business or the STG business to any third party;

   c. otherwise further impair the ability of each of the Stericycle business and the STG business to compete independently in any of the markets affected by the acquisition in the event that the CC decides that the merger has resulted or may be expected to result in a substantial lessening of competition within any market or markets within the UK for goods or services and decides that the STG business or any part of it should be divested; or

   d. prejudice the reference or impede the taking of any action under the Act which may be justified by the CC's decisions on the reference.

2. Without prejudice to the generality of paragraph 1, Stericycle LLC, Stericycle and STG will at all times during the specified period, procure to the extent within their control that except with the prior written consent of the CC:

   a. the Stericycle business is carried on under different names from the STG business and a separate brand identity is maintained for each of the Stericycle business and the STG business;

   b. the Stericycle business and the STG business are maintained as going concerns;

   c. except in the ordinary course of business, no substantive changes are made to the organisational structure of, or the management responsibilities within, either of the Stericycle business or the STG business except to the extent that such changes are required by this order. The termination of the contracts of employment of the individuals listed in the schedule to this order have already been made at the date of this order and any change in responsibilities flowing directly from these terminations does not fall within this paragraph 2(c);

   d. except in the ordinary course of business, in relation to the assets of each of the Stericycle business and the STG business:

      i. the assets, including facilities and goodwill, are maintained and preserved and for the avoidance of doubt the sites at […][**C**] shall not be closed;

ii. none of the assets are disposed of; and

iii. no interest in the assets is created or disposed of;

e. the nature, description, range and standard of goods and/or services currently supplied in the United Kingdom by each of the Stericycle business and the STG business are in all material respects maintained and preserved;

f. there is no integration of the information technology systems (including but not limited to accounting and financial management systems) of the Stericycle business with the information technology systems of the STG business; data is to be stored on separate servers; and the respective software and hardware platforms of the Stericycle business and of the STG business shall remain essentially unchanged, except for routine changes and maintenance and except as provided for in the schedule to this order; the customer and supplier lists of the Stericycle business and the STG business shall be operated and updated separately and any negotiations with STG's customers or suppliers in relation to the STG business will be carried out by and for the STG business alone; any negotiations with Stericycle's customers or suppliers in relation to the Stericycle business will be carried out by and for the Stericycle business alone;

g. the customer and supplier lists of the Stericycle business and the STG business shall be operated and updated separately and any negotiations with STG's customers or suppliers in relation to the STG business will be carried out by and for the STG business alone; any negotiations with Stericycle's customers or suppliers in relation to the Stericycle business will be carried out by and for the Stericycle business alone;

h. all existing contracts shall continue to be serviced by the business to which they were awarded (except to the extent that the other party to the contract terminates the contract in accordance with its terms);

i. no key staff are transferred between the Stericycle business and the STG business except to the extent that they have already been transferred as described in the schedule to this order and no contracts of employment shall be terminated by Stericycle or STG;

j. for the purpose of preventing pre-emptive action generally and specifically to ensure compliance with paragraph 2(l) below, Stericycle and STG shall make arrangements to ensure that insofar as there are existing separate teams able to carry out the following functions:

commercial and marketing; finance and accounting; and environment, health and safety (for the purposes of this paragraph the "Relevant Functions") on behalf of the STG business, such separate teams shall be preserved; and insofar as the Relevant Functions are not being carried out by existing separate teams, Stericycle and STG shall liaise with the CC in order to establish suitable arrangements for ensuring that the Relevant Functions, or such aspects of the Relevant Functions as the CC shall specify following consultation with Stericycle and STG are carried out by separate teams;

k. all reasonable steps are taken to encourage all key staff of the Stericycle business and the STG business to remain with the business in relation to which they were employed prior to the merger;

l. no additional business secrets, know-how, commercially sensitive information, intellectual property or any other information of a confidential or proprietary nature relating to either of the Stericycle business and the STG business ("Confidential Information") shall pass, directly or indirectly from the Stericycle business (or any of its employees, directors, agents or affiliates) to the STG business (or any of its employees, directors, agents or affiliates) or vice versa, except where strictly necessary in the ordinary course of business and on the basis that, should the merger be prohibited, any records or copies (electronic or otherwise) of such information wherever they may be held will be returned to the relevant business and any copies destroyed other than as may be required for the purposes of regulatory compliance under applicable law;

m. to the extent that Confidential Information has already passed from the Stericycle business to the STG business (or vice versa), Stericycle and STG shall inform the CC of the categories of information that have been passed between the Stericycle business and the STG business and the form in which it has been transferred and thereafter, put in place a mechanism which includes the use of separate servers for each of the Stericycle and STG businesses so that such information can be ringfenced to ensure that it is not further disseminated in accordance with paragraph 2(l) above, nor used by either Stericycle or STG to secure a competitive advantage; and

n. notwithstanding the provisions set out above, Confidential Information flow is permitted between STG and Stericycle LLC arising from and to the extent

> necessary to fulfil any obligation on Stericycle to report to Stericycle LLC or insofar as this is necessary to comply with any regulatory obligations."

44. On the same date the CC issued directions ("the 18 July Directions") under paragraph 7 of the 18 July Order requiring the applicants to appoint a Monitoring Trustee ("MT"). Paragraph 1 of the Annex to the 18 July Directions provides:

> "In order to ascertain precisely the degree of integration which has occurred to date between Stericycle and STG, to supervise the establishment of mechanisms for ensuring compliance with the Order, to monitor compliance by Stericycle LLC, Stericycle and STG, as appropriate, with the Order; and, so far as possible, to ensure their full and effective compliance, Stericycle and STG shall appoint a Monitoring Trustee ("MT"). The functions of the MT shall be as set out below. The MT shall act on behalf of the CC and shall be under an obligation to the CC to carry out his functions to the best of his abilities."

45. According to paragraph 14 of the Annex:

> "Ten working days following the date of his appointment the MT will provide a report to the CC which explains in detail the degree of integration which has already occurred between Stericycle and STG; and provides detailed information on the mechanisms which have been or will be put in place to ensure compliance with the Order."

46. The 18 July Order was the subject of an application for interim relief to the Tribunal, pursuant to rule 61 of the Tribunal's Rules,[1] made on 19 July 2006. The application challenged, notably, paragraph 2(j) of the 18 July Order. At a hearing which took place on the same date, the application for interim relief was adjourned generally, it being agreed that the CC would not seek to enforce the relevant part of the 18 July Order until such time as it had had chance to consider the report of the MT. During that hearing, the President of the Tribunal presumed that the end result of that process would be a more precise order from the CC as to the issues dealt with at paragraph 2(j) of the 18 July Order (see transcript, p. 13). It was on that basis that matters were left.

47. The notice of application was filed on 21 July 2006. The applicants stated that they were content for the matter to be stayed in the light of the position arrived at during the hearing on 19 July 2006, and that the notice of application was made on a precautionary

[1] SI 2003/1372

basis (paragraph 8). The proceedings were stayed by Order of the President on 27 July 2006.

48. On 4 August 2006 the CC agreed with the applicants a "set of principles" governing how the applicants would deal with tenders for new business of interest to Stericycle or STG during the CC's inquiry.

49. On 14 August 2006 Grant Thornton, who had been appointed as monitoring trustee on 24 July 2006, provided its interim report to the CC ("the MT Report"). That document formed the basis of, *inter alia*, (i) a meeting between the CC and Grant Thornton on 16 August 2006 to discuss its contents and (ii) correspondence and meetings between the CC and the applicants as to what, if any, further action should be taken by the CC pursuant to paragraph 2(j) of the 18 July Order. In particular, the Group held a meeting with the applicants on 17 August 2006 on the general principles and approach to be adopted in the light of the MT Report. A meeting between CC staff and the applicants took place the following day to discuss some of the detail. Following further correspondence on the terms of a set of directions, CC staff held another meeting with the applicants on 22 August 2006.

The 25 August Directions

50. On 25 August 2006 the CC issued the 25 August Directions. Those directions are as follows:

> "1. Stericycle LLC, Stericycle and STG shall take such steps as are necessary to put in place the organisational arrangements set out in the First Schedule to these Directions in order to achieve an appropriate separation of Relevant Functions within Stericycle and STG; and.
>
> 2. Stericycle LLC and STG shall appoint a Hold Separate Manager in accordance with the terms provided for in the Second Schedule to these Directions and Stericycle LLC, Stericycle and STG shall comply with the obligations set out in the Second Schedule to these Directions."

51. There are two Schedules to the 25 August Directions, the First Schedule and Second Schedule. The First Schedule sets out the required organisational arrangements relating to the senior management of the Stericycle (UK) and STG businesses in respect of the

following positions: (i) CEO; (ii) sales and marketing; (iii) finance; (iv) operations and logistics; (v) human resources; and (vi) environmental and health and safety issues.

52. Of particular importance are the following directions: (a) Mr Bill Blyde, CEO of merged Stericycle/STG business, is to retain his role as CEO except that he was to have no decision-making power over the STG business; (b) a HSM is to be appointed as CEO of the STG business with delegated decision-making responsibility in respect of that business. The HSM is to report to Mr Blyde as CEO of Stericycle/STG to the extent necessary to enable Mr Blyde to fulfil his regulatory reporting responsibilities in the Republic of Ireland and the USA, and otherwise directly to Stericycle LLC and to the MT on behalf of the CC; (c) Mr Blyde is to have responsibility for the sales and marketing function of the STG business and is to report to the HSM in that respect; (d) those with responsibility for other aspects of the STG business are to report directly to the HSM; and (e) STG management meetings are to be attended by the HSM, Mr Neville Graver and Mr Paul Simpson, the latter two employees respectively responsible (pursuant to the First Schedule) for the finance and operations functions of the STG business. Mr Blyde is permitted to "attend those management meetings or parts of those management meetings of the STG business that are strictly necessary having regard to the functions [he carries] on for the STG business and [he] shall be permitted, if appropriate, to take part in decisions concerning [his] areas of expertise" (First Schedule, paragraph 4). The same restriction on attending management meetings applies to Ms Helen Inch and Mr Stuart Budd, respectively responsible (pursuant to the First Schedule) for human resources issues and for environmental, health and safety issues.

53. It should be noted that Ms Inch and Mr Budd are permitted to provide their respective services to both the Stericycle and the STG businesses, with the services provided to the latter being on an "arm's length" basis. Likewise, Mr Simpson is permitted to provide certain consultancy services to Stericycle (UK) on an arm's length basis.

54. Various provisions of the First Schedule provide in more detail for the functioning of the relevant departments at senior and middle management level. Subject to a few detailed exceptions (which largely arose from amendments to the then draft directions proposed by the applicants and accepted by the CC), the persons to be assigned to the

STG business are not to provide similar services for the Stericycle business and vice versa.

55. Paragraphs 34 and 35 of the First Schedule, respectively under the headings "Contracts with new customers" and "Confidential Information", provide as follows:

> "34. Bill Blyde shall be permitted to continue to perform his functions as regards new business arising from the statement of principles setting out the criteria to be applied when tendering for new business provided by Stericycle in accordance with paragraph 3 of the [18 July] Order. Bill Blyde shall keep the Hold Separate Manager informed of contracts for which STG is preparing tenders.
>
> 35. In accordance with paragraphs 2(l) and (m) of the [18 July Order] and for the avoidance of doubt the Stericycle Interim Team shall not have access to Confidential Information relating to STG and the STG Interim Team shall not have access to confidential information relating to Stericycle, except that Confidential Information may be shared between the Stericycle interim team and the STG interim team if strictly necessary in the ordinary course of business."

56. Paragraph 36 of the First Schedule sets out certain information which falls within the definition of "strictly necessary". Paragraphs 37 and 38 provide:

> "37. For the avoidance of doubt in accordance with paragraph 2(n) of the [18 July Order], Confidential Information flow is permitted between STG and Stericycle LLC arising from and to the extent necessary to fulfil any obligation on Stericycle to report to Stericycle LLC or insofar as this is necessary to comply with any regulatory obligations. Subject to paragraph 38 below, if Confidential Information relating to STG is passed to Stericycle LLC, Stericycle LLC shall not pass such information to Stericycle. If Confidential Information relating to Stericycle is passed to Stericycle LLC, Stericycle LLC shall not pass such information to STG.
>
> 38. Confidential Information flow shall be permitted to the extent necessary for and limited to the coordination of Stericycle and STG's proceedings with the CC, Competition Appeal Tribunal or any other court of law in connection with the reference or related proceedings. The Monitoring Trustee shall monitor such Confidential Information flow and for the avoidance of doubt paragraph 16 of the 18 July Directions shall apply."

57. The Second Schedule to the 25 August Directions sets out in detail various aspects of the appointment and function of the HSM. Paragraph 5 of the Second Schedule provides as follows:

> "The primary function of the Hold Separate Manager will be to exercise day to day management and control of the STG business so as to preserve the possibility of restoring effective competition in the markets affected by the merger through the separation from Stericycle of a viable, saleable, competitive STG business. The Hold Separate Manager will exercise management and control of the STG business in such as way as to ensure that it is held separate from the Stericycle business in line with these Directions."

The applicants' challenge

58. The 25 August Directions were the subject of a "Supplementary Notice of Application" (referred to hereafter as "SNoA") filed by the applicants on 31 August 2006 pursuant to an Order of the Tribunal made on 31 August 2006, which also lifted the stay imposed by the President's Order of 27 July 2006. The SNoA had annexed to it *inter alia* a second witness statement by Mr Blyde ("Blyde 2"), Mr Blyde having produced a first witness statement ("Blyde 1") to accompany the notice of application, and a witness statement by Mr Simpson.

59. The aspects of the 25 August Directions which the applicants seek to challenge (set out in paragraph 4 of the SNoA) are:

> (i) "paragraph 2 of the Directions, which requires the Applicants to appoint a hold separate manager, and in particular a hold separate manager from outside the Applicants' businesses (no suitable candidate from within their businesses apparently being acceptable to the CC), to perform the functions in relation to STG set out in the Second Schedule to the Directions (the primary function being to exercise day to day management and control of the STG business – see paragraph 5 of the Second Schedule)";
>
> (ii) "the absence of an adequate provision to permit Bill Blyde to have proper access to information from STG necessary for him to discharge his obligations as a director under relevant law (including US law as to the duties of directors of subsidiaries of US companies)";
>
> (iii) "paragraph 1 of the Directions, and paragraphs 4 and 36 of the First Schedule to the Directions, insofar as they restrict Bill Blyde, Helen Inch and Stuart Budd from participating

in senior management meetings of STG except where that is '*strictly necessary having regard to the functions they carry on for the STG business*' save that '*they shall be permitted, if appropriate, to take part in decisions concerning their areas of expertise*'";

(iv) "paragraphs 35 and 36 of the First Schedule insofar as they restrict the ability of the individuals listed in paragraph 36 (each of whom retains key responsibilities at senior management level) to obtain information that they need properly to discharge those responsibilities"; and

(v) "paragraph 38 of the First Schedule to the Directions, insofar as it provides for the Monitoring Trustee to monitor, and to report to the CC upon, communications made for the purpose of Stericycle preparing representations and responses to the CC's inquiry and to this Tribunal".

60. In the applicants' submission, if the Tribunal accepts that the imposition of a HSM is unlawful, the consequence is that the 25 August Directions must be quashed and the matter remitted to the CC; the provision requiring the appointment of a HSM is so fundamental to the 25 August Directions that without it the remaining Directions are wholly uncertain and unclear and they cannot sensibly stand without that provision. The remaining grounds of challenge are therefore alternatives to that principal ground (see paragraph 5 of the SNoA).

The CC's defence

61. On 4 September 2006 the CC filed its defence. Annexed to the defence was (*inter alia*) a witness statement from Mrs Guy.

Mrs Guy's witness statement

62. Mrs Guy's witness statement first summarises the CC's general approach in relation to interim and final remedies. Referring to the *Guidance*, she points out that the CC will normally consider the appointment of a HSM or monitoring trustee if certain risk factors are present, which include (i) substantial integration of the two businesses prior to the merger being referred to the CC and (ii) the existence of strong incentives for the current senior management of the acquired business to operate the acquired business on behalf of the acquirer (paragraphs 9 and 20). Mrs Guy also points out that the starting point in determining remedies where it has found that a merger results or is expected to

result in SLC will be to choose the remedial action which will restore the competition which has been, or is expected to be, lessened. Remedies which restore the *status quo ante* are likely to be the most effective way of addressing the adverse effects (paragraph 9).

63. Mrs Guy then sets out the process leading up to the 18 July Order and 25 August Directions. She explains that the CC was concerned at the way in which the merged businesses appeared to be continuing to take steps to integrate their businesses despite the initial undertakings: the applicants appeared to be interpreting very widely those provisions of the interim undertakings which permitted them to continue to make changes to the business if actions had already been initiated or announced by the time the initial undertakings were given (paragraphs 14 to 19).

64. Mrs Guy explains that at a meeting on 7 July 2006 the Group (meeting for the first time since its appointment) resolved to attempt to secure revised undertakings from the applicants, or alternatively the CC would itself impose an interim order. Among other things, she explains that the reasons for that decision were (i) the applicants' view that the interim undertakings were "largely meaningless", which indicated that a set of more precise obligations with appropriate mechanisms to ensure compliance should be put in place; (ii) the applicants' view that the substance of the Stericycle interim undertakings could not be complied with; (iii) the applicants' interpretation of what was permitted by virtue of the initial undertakings; (iv) the general need to re-examine the scope of interim undertakings accepted by the OFT and adopted following a reference; and (v) the presence of risk factors pointing to the likely need to appoint a HSM and/or a monitoring trustee (paragraph 20).

65. Mrs Guy states that she attended a meeting between CC staff and the applicants, which was meant to enable the CC to get a clearer picture of the precise extent of integration and of how separate teams for key functions could be established. However, she states that she and the CC staff were disappointed by the amount of specific information provided by the applicants on the precise state of integration. Appointing a monitoring trustee, therefore, appeared to be the most effective way of finding out what integration had occurred (paragraphs 24 to 28). Provision was accordingly made in this respect in the 18 July Order.

66. Mrs Guy explains that at a meeting with Grant Thornton on 24 July 2006 the CC noted that while Grant Thornton had a general role in respect of monitoring compliance with the 18 July Order, the most pressing task was for them to assess the extent of integration to date concentrating on the Relevant Functions as set out in paragraph 2(j) of the 18 July Order, and to advise the CC on the options available to it in order to prevent pre-emptive action again concentrating on those relevant functions (paragraph 31).

67. Mrs Guy then explains that on 1 August 2006 the CC received the first compliance statements under the 18 July Order from Mr Blyde and Mr Shan Sacranie, (Executive Vice President of Stericycle LLC and highest ranking officer). However, they gave rise to several concerns: first, they excluded any statement of compliance with paragraphs 2(l) and 2(m) of the 18 July Order, on the basis *inter alia* that most conceivably relevant confidential information had already passed between the two companies; secondly, Mr Sacranie's statement was inconsistent with Bill Blyde's statement in a way that suggested it contained factual inaccuracies; and thirdly, certain details given in Mr Blyde's statement suggested concerns as to whether the approach taken by the applicants complied with paragraph 2(g) of the interim order and/or the "statement of principles" governing the allocation of new business.

68. According to Mrs Guy, the second set of compliance statements received from Messrs Blyde and Sacranie on 15 August 2006 were also unsatisfactory, containing numerous caveats which made it impossible to understand whether the applicants were warranting compliance with the provisions of the 18 July Order or not. On 16 August 2006 the CC asked for these statements to be resubmitted, which was done satisfactorily on 23 August (paragraphs 33 to 37).

69. Mrs Guy then moves on to the MT Report. She notes that Grant Thornton recommended that it was not necessary to require a complete segregation of the relevant functions to prevent further integration, and that further controls could ensure compliance with the interim order on the basis of the existing senior management structure; on the other hand, Grant Thornton did highlight a number of areas in respect of the Relevant Functions where 'a certain level of segregation was required'.

70. Mrs Guy then deals with the meeting between the CC and Grant Thornton held on 16 August 2006 to discuss the MT Report, the transcript of which is exhibited to her statement. At paragraphs 41 to 43 she states:

> "41. The Group explained that it was concerned not only about further integration as such but also about the fact that the existing level of integration meant that decisions would be taken during the course of the inquiry by an integrated senior management team, including Bill Blyde. These decisions might be in the best interests of the combined business but might undermine the option of separating out a viable STG business, thereby undermining the option of a divestiture remedy. For this reason, Grant Thornton's recommendations did not appear sufficient to address its concerns. In particular, the Group considered it important to establish a separate decision-making structure for the two businesses during the course of the inquiry, especially in relation to areas where key risks had been identified. These areas of particular risk comprised sales and marketing, operations and finance. The first two were particularly risky because of the importance of maintaining the customer base and the assets and the last was important because of the highly sensitive nature of the information held by the finance function.
>
> 42. Other areas of concern included the situation in relation to […][**C**]. The removal of capacity through closure, even if only temporary, of a facility could damage the ability of WRE and STG to compete as independent businesses, thereby jeopardising the effectiveness of a remedy. Grant Thornton understood the CC's concerns and acknowledged they had not had this particular concern in mind when considering their recommendations. Although they still drew comfort from what they considered to be certain structural impediments towards further integration, they did not rule out the appointment of a hold separate manager.
>
> 43. The option of introducing a hold separate manager was discussed with Grant Thornton. They believed that the nature of the HSM position would depend on the senior management team below him or her. Possible senior management teams for the two businesses were then discussed, with a view to meeting the CC's concerns about the need for separate decision-making minds in those key risk areas of sales and marketing, operations and finance."

71. Mrs Guy then summarises the CC's detailed discussions with Grant Thornton in relation to the possibility of introducing a HSM (paragraphs 43 to 48). She then summarises the contents of (i) a compliance hearing held with the applicants, also on 16

August 2006 and (ii) a staff meeting held with the applicants the following day, 17 August. The purpose of the 17 August meeting was "to discuss in detail how best to achieve a workable solution to effect the separation of the sales and marketing, operations and finance functions in line with our objectives" (paragraph 56).

72. Mrs Guy explains that following those meetings, the Group discussed three options in relation to achieving its aims:

> "67. The first option envisaged Bill Blyde retaining his role as CEO of Stericycle Europe, essentially acting as managing director for both WRE and STG. However, under him, the senior management teams for WRE and STG would be separate in relation to finance (Neville Graver for STG and Richard Taylor for WRE), operations (Paul Simpson for STG and David Hughes in a combined operations and logistics role for WRE) and sales and marketing (with Bill Blyde himself taking responsibility for STG's sales and marketing function and Colm Croskery performing this role for WRE). Under each of these senior managers, a separate team of middle managers and other staff would work for WRE and STG. Human resources, logistics and environmental, health and safety functions would be provided by WRE to STG on an arm's length basis. The WRE senior managers in respect of those functions would not be part of the STG senior management team as such. I was concerned that this option would mean that Bill Blyde would remain in the role of managing director for both STG and WRE, and that, even with separate senior management teams under him, the Group could not be satisfied that Bill Blyde would ensure that decisions taken in respect of the STG business would be solely in the interests of the STG business and that decisions taken in respect of the WRE business would be solely in the interests of the WRE business. The Group considered that option 1 was too similar to the current position, and offered little additional protection.
>
> 68. Option 2 envisaged Bill Blyde becoming chief executive officer of STG and relinquishing his role in relation to WRE. Colm Croskery would take on the chief executive officer role for WRE. The senior management teams would be as described above for option 1. The Group considered that this option would be the most intrusive and would go farthest to restore the pre-merger situation, since Bill Blyde would relinquish his role as Stericycle Europe CEO and would return to his previous role as chief executive officer/managing director of STG. Furthermore, the Group was still concerned about Bill Blyde's position as a director

of Stericycle, and concerned that it would be difficult to have confidence that he would take decisions in relation to STG solely in the interests of STG. This was particularly so assuming Mr Blyde would continue to work for Stericycle after the inquiry had come to an end. In some respects I thought this option went further than necessary while in other respects I did not think it went far enough.

69. Option 3 envisaged a hold separate manager installed as chief executive officer of the STG business. Bill Blyde would remain as chief executive officer of Stericycle Europe with responsibility for WRE. Under Bill Blyde as CEO of Stericycle Europe, the WRE senior management team would be as described above. Under the hold separate manager as chief executive officer of STG, the senior management team would also be as described above, with Bill Blyde acting as the senior manager with responsibility for sales and marketing. This was the Group's strongly preferred option as it seemed to strike the right balance between creating a separate set of decision-makers in respect of the two businesses, and especially in relation to the key risk areas, and the need for the businesses to continue to function effectively through the inquiry. The Group appreciated the fact that no-one other than Bill Blyde was available to perform the senior sales and marketing role for STG, and considered that having him report in respect of this function to a hold separate manager whose role would be to manage the STG business in line with the interim remedies, provided a sufficient safeguard for them to be comfortable with him in that role. The Group also took comfort from Bill Blyde's argument that, even as a director of Stericycle, it would not be in his interest to lose existing business for STG, and in relation to new business, once the statement of principles had allocated that business to STG it would not be in his interest for STG not to win that business. The Group also considered that the additional risk to the separability and viability of STG from the confidential information that Bill Blyde would have access to as part of this was small, as Bill Blyde already knew a great deal about the STG business."

73. It was agreed by the Group to pursue option 3, and the Group instructed the staff team to continue preparing directions to that effect pursuant to the 18 July Order (paragraphs 70 to 71). A further meeting was held between CC staff and the applicants, who by that stage had been informed of the Group's decision to pursue the option of a HSM.

74. Mrs Guy states that on 23 August 2006 the Group held a meeting by telephone, during which the members discussed certain concerns raised by the applicants at the meeting

the previous day. The members also discussed (and rejected) the suitability of Mr Graver as HSM (an option proposed by the applicants). The CC did, however, accept certain amendments to the proposed directions (paragraphs 83 to 88).

The applicants' skeleton argument

75. On 5 September 2006 the applicants filed a reply to the CC's defence in the form of a skeleton argument, together with a witness statement from Mr Rees, the partner with conduct of the matter at DLA.

Mr Rees' witness statement

76. Mr Rees explains (at paragraph 7) that the purpose of his witness statement is to respond to certain points made by Ms Guy as to what she describes (at paragraph 25 of her witness statement) as "a lack of willingness [on the part of the applicants] to discuss in detail how the separability of the businesses could be preserved". He states that this is not the case and that the applicants have at all times sought to be open, honest and cooperative. He explains that the applicants' statements to the OFT as to the meaning of the initial undertakings did not reflect any unwillingness to comply but simply to ensure that there were no misunderstandings about the position and the "carve outs" behind the undertakings (paragraph 18). When the applicants clarified, in DLA's letter of 19 June 2006, that they were "making no representations that the substance of the [initial] undertakings could be complied with in the current circumstances owing to the level of integration that has already occurred", they simply wished to reiterate that there were "carve outs" resulting from the fact that integration had already been initiated.

77. Mr Rees then explains that at the outset of discussions with the CC, the applicants continued to operate on the basis of the initial undertakings, together with the carve outs agreed with the OFT. Mr Rees states that, contrary to the CC's assertions, (i) the applicants did appreciate the significance of the commitments they had given and (ii) they did not adopt a wide interpretation of the initial undertakings. He considers that the applicants were prepared to, and did, give the CC full details of the extent of integration prior to and at the meeting on 11 July 2006. He says that Grant Thornton found the applicants to be "very cooperative" whilst it compiled its report. Mr Rees

cannot understand why the Group felt frustrated by the applicants' engagement with the process. Some of the misunderstandings appear to stem from the fact that the applicants were unclear about the effect of the 18 July Order because of the ongoing uncertainty as to its status. In short, says Mr Rees, the applicants have been as cooperative, open and honest as possible throughout, and have sought constructively to bring about a meaningful resolution to the issue.

IV THE PARTIES' SUBMISSIONS

Applicants' submissions

78. The applicants' main grounds of application were that: (i) the CC had no power to act under section 81 of the Act in the circumstances of this case; and (ii) the imposition of a HSM is unreasonable and not sufficiently explained in the CC's reasons. Objection is also taken to certain particular provisions of the 25 August Directions.

79. At the hearing on 7 September 2006 the first of these grounds fell away; the applicants' challenge is to the reasonableness of the CC's decision. The principal challenge is to the appointment of the HSM.

The appointment of a HSM

80. The applicants state that it appears from Ms Guy's witness statement that the future pre-emptive action which the HSM is designed to prevent consists of business decisions that the merged entity might take between now and the end of the CC's investigation in the areas of (i) sales and marketing and (ii) operations. The applicants submit that apart from the reference, in paragraph 2(j) of the 18 July Order, to paragraph 2(l) of that Order (seeking to prevent the exchange of confidential information) the CC has not set out in the 18 July Order or the 25 August Directions what future "action" the CC contemplates.

81. However, say the applicants, it appears that in fact no weight is now placed upon two considerations that appeared to lie behind the original decision in principle to impose separation of teams, namely (i) a desire to maintain a separation of brands and (ii) a desire to prevent any further circulation of confidential information. In the applicants'

submission, there can be no concern as to these points, as suggested by Grant Thornton at the meeting with the CC on 16 August 2006.

82. The applicants contend that the CC's reasons set out in the defence in justification of its decision to appoint a HSM boil down to just one: that there was a risk, absent the imposition of a HSM, that the integrated manager, Bill Blyde, could take decisions in respect of each of the businesses that were not in the interests of that business regarded separately – particularly in the areas of sales and marketing and operations. In that regard, the applicants also point to (a) the content of their meetings with the CC on 16 and 17 August 2006 and (b) the CC's position at its meeting with Grant Thornton on 16 August 2006. In the applicants' submission, the question for the Tribunal is whether this possibility can reasonably be regarded as sufficient to justify the imposition of a HSM. However, the CC has not addressed the reasonableness – in terms of necessity and proportionality – of the imposition, which involves looking at the particular circumstances of the case.

83. As regards sales and marketing the CC has not, in the applicants' submission, set out any explanation of why it thought that joint decision-making in this area could lead to pre-emptive action, and the applicants are at a loss to see why there should be any concern that Bill Blyde (as the present joint decision-maker) might do anything other than seek to promote the interests of each of the businesses in this respect. The applicants note that the two businesses do not compete with each other, arrangements having been made and agreed with the CC under the "set of principles" agreed on 4 August 2006 to ensure that existing customers remain with the business with which they dealt before the merger and that new customers are allocated fairly between the businesses.

84. In any event, the CC has rightly accepted that Bill Blyde is also the only person who can effectively discharge the management responsibility for sales and marketing functions for STG over the immediate short term. Given Bill Blyde's position, however, it is impossible to see what could in practice be gained by imposing a HSM; the reality of the situation is that any outsider appointed as HSM of STG would, at least over the period of this inquiry, rely on Bill Blyde in relation to sales and marketing matters, and Bill Blyde will be privy to any confidential information in this area that

might arise. Any concern there might be as to the decisions Bill Blyde may take is more effectively and proportionately addressed by supervision by the monitoring trustee.

85. As regards operations (reviewing businesses' sites and site managers' capital expenditure proposals, monitoring site performance) the applicants note, first, that the 18 July Order provides for *inter alia*, the ongoing maintenance and preservation of the assets of the Stericycle (UK) and STG businesses, and the maintenance and preservation of the goods and/or services supplied by Stericycle (UK) and STG (see paragraphs 2(d) and (e)).

86. Furthermore, submit the applicants, (i) the MT Report found (at paragraph 7.29) that the "majority of operational considerations are managed at the plant level" and reported that there was […][**C**]; (ii) a full list has been provided to the CC of decisions as to capital expenditure that have already been taken (decisions in relation to which the CC has accepted it does not need separate decision-making capacity). The applicants have confirmed that there are no other anticipated expenditures of over […][**C**] that will need to be decided over the period of the reference inquiry; (iii) there is no basis for the CC's concern, expressed at its meeting with the applicants on 17 August 2006, about "something go[ing] horribly wrong on some site or other and a certain amount of repair work [being] needed": expenditure up to […][**C**] is dealt with by management at plant level with no involvement of senior management; in relation to decisions concerning expenditure of between […][**C**] and […][**C**], Paul Simpson (as head of operations for STG) assisted by Tom Gaynor would be capable of making those decisions, so that there is no need to appoint a HSM to exercise that function; moreover, such decisions could be reported to, and approved by, the CC and the monitoring trustee; and in relation to decisions as to expenditures of over […][**C**] (which, the applicants say, are unlikely over the period of the inquiry given that the plants are maintained regularly) decisions could be reported to, and approved by, the CC and the monitoring trustee; further, the existence of a HSM is irrelevant to such decisions since they are of such a size that they need to be referred in any event, for consent, to Stericycle LLC as shareholder.

87. The applicants argue that the CC's concerns as to the effects of joint decision-making in sales and marketing and operations therefore fail to provide any (or any adequate) basis for imposing a HSM. As to the CC's "wider concerns" expressed in the covering letter to the 25 August Directions, the CC has provided no particulars or explanation of what such concerns might be. In any event, even if such concerns do exist, neither they nor the evidence on which they are based have been put to the applicants; to that extent, the imposition of a HSM is unfair.

88. The applicants further submit that the absence of any real basis for the imposition of a HSM has to be set against the very real adverse consequences to the businesses of that imposition. Any HSM will need to learn a considerable amount about the business and the industry before he or she can take informed decisions. The learning curve is steep, particularly if there are restrictions on his or her ability to involve senior managers in decision-making, or if senior managers decide to resign, […][**C**] would have very serious consequences for STG and Stericycle more generally, particularly as it would leave an incoming HSM of STG […][**C**] (apart from individuals whose participation in management decisions would be limited).

The applicants' other submissions

89. The applicants make a number of further submissions on the wording of the First Schedule to the 25 August Directions.

90. First, the applicants say that paragraph 3 of the First Schedule to the 25 August Directions, which provides that the HSM shall report to Mr Blyde "to the extent necessary to enable [him] to fulfil his regulatory reporting responsibilities in the Republic of Ireland and the USA, the nature and frequency of such reporting to be discussed with the monitoring trustee immediately after the appointment of the [HSM]", leaves open the very real possibility that Mr Blyde, as CEO of the merged business, will be at risk of possible civil or criminal liability for not having access to and obtaining information which as a director he ought to see in order fully to comply with his duties under company law.

91. This is, the applicants say, against the background where it is in any event impossible to see in reality what point there is in now seeking to restrain the flow of confidential information to Mr Blyde, given that (i) the current senior management team, who would all stay with the retained Stericycle business on divestment, now hold both businesses' existing confidential information (and nothing can now be done about that), and (ii) in relation to any future confidential information, such information will inevitably go to at least one of the team now appointed to run STG – and hence (inevitably) will go to the retained Stericycle business either (a) at once (because it goes to an individual who exercises Stericycle management responsibility as well) or (b) on any divestment, (since all the individuals given responsibilities in paragraph 5(b) to (f) of the First Schedule will stay with the retained business). The CC's covering letter to the 25 August Directions, according to which the relevant regulatory requirements were to be not merely "discussed" but now "agreed" with the MT is a further and even more unreasonable imposition, not in accordance with the Directions.

92. Secondly, the applicants criticise paragraph 4 of the First Schedule, which restricts Messrs Blyde, Inch and Budd from attending management meetings of STG except where it is "strictly necessary having regard to the functions they carry on for the STG business" save that "they shall be permitted, if appropriate, to take part in decisions concerning their areas of expertise". The applicants argue that the effect of this restriction would be to paralyse the ability of the management of STG to operate the STG business effectively and efficiently during the remainder of the CC's inquiry, thereby damaging the market position and saleability of STG. The STG business cannot sensibly be managed by a CEO without allowing the CEO full and free access to collective deliberation, which is an essential part of the management culture of the business.

93. Thirdly, the applicants contest paragraphs 35 and 36 of the First Schedule, which restrict access by Messrs Blyde, Inch and Budd to certain confidential information. The applicants argue that the restriction either prevent senior managers from seeing information they need, or lead to a flow of requests to the CC for clarification or permission which will take up a large amount of STG management time (and the time of the CC); and will hobble STG's ability to operate on a day to day basis.

94. Fourthly, the applicants challenge paragraph 38 of the First Schedule, which provides for the Monitoring Trustee to monitor, and (save to the extent that the communications are legally privileged) to report to the CC upon, communications made for the purpose of preparing representations and responses to the CC's inquiry and to the Tribunal. This provision, in the applicants' submission, infringes their rights of defence and is unreasonable and disproportionate.

Submissions made at the hearing

95. At the hearing the applicants emphasised that they have gone as far as possible in the direction of the CC and that they have always wanted a pragmatic solution. The point has been reached, however, where the applicants feel they cannot go any further.

96. The applicants submitted that the central provision with which they took issue in these proceedings was the interposition of a HSM for the STG business to whom Mr Blyde is to report in his capacity as sales and marketing director for STG. The applicants contended that although a HSM has been imposed, this is not a hold separate operation. There is no clean split between the businesses: indeed, for reasons the applicants accept, the CC has put in place a structure which cannot bring about complete separation. There is already, under the CC's approach, a large degree of permitted interlinking between the two businesses. In the applicants' submission, the imposition of a HSM in practice achieves nothing. This goes to the proportionality and reasonableness of the CC's decision.

97. Turning to paragraph 41 of Mrs Guy's witness statement, the applicants submitted that the last two sentences thereof revealed the CC's concerns, which were, namely, with future decisions in the areas of sales and marketing, operations and finance. Paragraph 42 refers to the situation at "[…][**C**], which the applicants argued was based on a misunderstanding, as explained in paragraphs 40 to 42 of Blyde 2. The applicants also referred to the last two lines of paragraph 43 of Mrs Guy's witness statement, which refer to the CC's concerns as to the need for separate decision-making minds in the "key areas", which are again sales and marketing, operations and finance. The applicants also drew attention to paragraphs 66 to 71 of the witness statement which set out the three options considered by the Group.

98. The applicants suggested that finance, one of the three "key areas", had fallen away as an issue because of the applicants' agreement to maintain the separation of the finance functions of the two businesses. As for the other two areas, the applicants submitted that the transcript of the CC's meeting with Grant Thornton on 16 August 2006, in particular from page 4 to page 12, was important context. In the applicants' view, Grant Thornton did not consider the CC's concerns to be realistic. Grant Thornton did not consider that there was any risk that Mr Blyde would run down the STG business. The applicants submitted that (a) Mrs Guy does not explain in her witness statement why the CC did not accept Grant Thornton's views and (b) the CC did not take into account the matters set out at pages 4 to 12 of the transcript of that meeting.

99. The applicants drew attention to the following points mentioned by Grant Thornton: (i) there were structural impediments to integration in the near term; […][**C**] and (v) there were no issues as regards logistics. There are, the applicants contended, therefore no reasons to suppose that there will not be a viable functional set of assets to dispose of in the event that divestment is ordered.

100. In respect of the operations function, the applicants submitted that satisfactory procedure for dealing with capital expenditure decisions has been suggested by the applicants that obviates the need for a HSM. Decisions as to capital expenditure under […][**C**] would be handled separately by the operations teams of the two businesses (and would be reported to the monitoring trustee), and any decisions as to capital expenditure over […][**C**] will be subject to the approval of Stericycle International LLC and the CC. No explanation has been put forward by the CC as to why this proposal was insufficient to deal with their concerns. The only conceivable function of the HSM, the applicants said, would be to give some kind of overview of Mr Blyde's decisions in relation to sales and marketing, the final "key risk" area identified by the CC. As to the sales and marketing function, the CC has accepted that it is impossible to have complete separation given the need for Mr Blyde to remain responsible for sales and marketing for STG. In the applicants' submission, there is nothing which a HSM would add. Mr Blyde would review whether the different functions of both businesses were being operated efficiently and properly, with the safeguard being the monitoring trustee.

101. As to the restrictions on the passing of STG information to Mr Blyde for the purpose of his fiduciary responsibilities in Ireland and the USA, imposed by virtue of paragraph 3(i) of the First Schedule, the applicants contended that the CC's interpretation of the role of the monitoring trustee (to the effect that the relevant matters had to be "agreed" rather than "discussed") was inconsistent with the wording of the provision itself, which uses the word "discussed". If the CC accepts that the wording of the provision means what it says it means, the applicants will accept the provision. The monitoring trustee could, for example, legitimately require Mr Blyde to produce some authority for the proposition that certain STG information is needed by him. They submitted, however, that the suggestion that the monitoring trustee should have a veto power over the information needed by Mr Blyde for the purposes of his reporting obligations is an unreasonable one.

102. As to the restriction on the attendance of STG management meetings imposed by virtue of paragraph 4 of the First Schedule, the applicants argued that such a restriction is damaging for the reasons set out in Blyde 2. Mr Blyde traditionally conducted STG management meetings on the basis of collective decision-making. The CC's approach prevents this. The restriction will, the applicants contended, lead to the partial fragmentation of the management of the business and to the imposition of a form of management which is alien to the STG management culture. In any event, they said, the borderline between what is and is not permitted participation is unclear. The CC has not explained its reasons for this restriction, nor does it answer the points Mr Blyde has made in Blyde 2.

103. As to the restriction on the sharing of confidential information between the two business except to the extent "strictly necessary in the ordinary course of business", imposed by virtue of paragraph 35 of the First Schedule, the applicants contended that this restriction lacks clarity and is unreasonable and/or disproportionate. There is no evidence any other confidential information which has not already flowed could threaten pre-emptive action. Moreover, there is no explanation in Mrs Guy's witness statement as to these matters raised by the applicants.

104. Finally, as to the provision contained in paragraph 38 of the First Schedule enabling the monitoring trustee to monitor information passing between the two businesses for the

purpose of the 'defence' of the merger in the CC's substantive inquiry, the applicants contended that their objection goes beyond privileged information. If the monitoring trustee is permitted to 'lift' preparatory material and communicate it to the CC, that is unlawful. There is, in the applicants' submission, no reason for the monitoring trustee to see the information passing for the purpose of the applicants' defence before the CC.

CC's submissions

105. The CC's submissions are that (i) it has a wide margin of appreciation in relation to decisions under section 81 and (ii) it exercised its discretion to impose the 25 August Directions reasonably.

CC's preliminary observations

106. The CC notes that whilst there is no requirement to notify mergers in the UK, any costs resulting from regulatory scrutiny which arise from a decision not to notify are entirely at the risk of the merging parties. If the OFT subsequently decides that a merger should be referred to the CC, this highlights the need for interim powers to avoid prejudicing the reference or impeding the effectiveness of any action ultimately considered necessary by the CC.

107. Moreover, if the CC considers the appointment of a HSM necessary, it cannot allow itself to be deterred from taking action which it considers to be justified by the wishes and statements of intention by employees as to their future action were the HSM to be appointed.

108. In seeking undertakings or making interim orders and directions the CC is not able or required to identify in advance every situation that may give rise to such risk. When an order is necessary (this is in practice the first case where the need has arisen) the CC's approach is to lay down general obligations designed to institute robust mechanisms which will address particular issues as they arise. The CC submits, in essence, that it has wide powers to impose remedies in order to comply with its statutory duty , under section 41 of the Act, to remedy the adverse consequences of completed or anticipated mergers, which includes the potential divestment of the acquired business.

109. The CC notes that in respect of *completed* horizontal mergers, especially those in which extensive pre-inquiry integration of the businesses has taken place, there is a real risk that rational decision making will have as its priority the realisation of the benefits seen as flowing from the merger rather than the retention of the two businesses as separate enterprises. The CC submits that in the context of section 81, the key question is whether the pre-emptive action in question *might* prejudice the reference concerned or impede the taking of any action by the CC. It contends that "might" in this context connotes a degree of possibility that is less than "may".

Reasonableness of the decision to order the appointment of a HSM

110. The CC submits that its decision to order the appointment of a HSM for the STG business was reasonable. The Inquiry Group was concerned at the significant level of integration that had taken place between the businesses. The CC also considered that a number of risk factors referred to in the *CC's Guidance* were present in this case that indicated it might be appropriate to appoint a HSM with an appropriate degree of independence from Stericycle to ensure that going forward, the STG business was maintained and managed separately from the Stericycle business.

111. In particular, (i) the level of integration of the merged businesses' senior management threatened the effectiveness of any remedy needed to restore competition in the markets affected by the merger. The CC's concerns were never restricted solely to confidential information and capital expenditure as alleged; (ii) the HSM was part of the separate decision-making structure the CC considered it necessary to achieve; (iii) Mr Graver (the Finance Director of the pre-merger STG business and the applicants' suggested HSM) lacked the requisite independence from Mr Blyde and was in any event only able to be in the UK two days a week; and (iv) the CC's agreement to permit Mr Blyde to continue with the sales and marketing role for STG and to include a reporting line from the HSM to Mr Blyde (albeit only in respect of provision of information to satisfy reporting requirements) made it even more important that a wholly independent HSM be appointed.

112. The CC further submits that its concerns were not limited to sales and marketing and operations as the applicants suggest. Mrs Guy's witness statement, at paragraph 41,

states that the CC considered it important to establish separate decision-making structures generally; this was particularly the case in respect of the key risk areas, namely sales and marketing, operations and finance, but was not confined to those areas. The CC submits that it cannot predict which areas the need for a HSM will arise in, but it has a serious concern in relation to the prospect that there would otherwise be "one directing mind" for the merged businesses pending completion of the CC inquiry (including, potentially, a remedies phase). The CC contends that without the imposition of a HSM, it cannot be confident that Mr Blyde, as CEO of the merged businesses, will take decisions in the best interests of the two businesses viewed as separate concerns instead of taking into account the best interests of the merged entity.

113. The CC submits that these matters were more than sufficient to conclude that without a HSM the continuing management of both businesses on an integrated basis might give rise to pre-emptive action. The statutory threshold for imposing such a measure, as explained above, has been set extremely low to reflect the balance of risk to the CC's decision-making.

114. Contrary to the applicants' submissions, the CC did not treat the potential effects of the proposal to direct the appointment of a HSM on the business as a whole as irrelevant: the CC altered its original proposals in a number of respects to accommodate legitimate business needs that could be met without compromising its objectives. To the extent that the CC did not alter its proposals this was because it considered that these effects were outweighed by its overriding objective of preventing action which *might* be pre-emptive. Nor does the CC accept that there is any unique feature about the STG business such that an external professional manager with access to appropriate advice and assistance could not manage the business on an interim basis in order to achieve the CC's objectives.

115. The CC also draws attention to the length of any interim period. It cannot be assumed that the period will merely be a matter of some 3 months. The statutory deadline for the publication of the CC's report is 12 December 2006. A further extension of up to eight weeks is possible if this is required. Thereafter, if divestment was ordered that process would hopefully not take longer than six months, but it could do and in some cases it

does take longer. In addition there is the potential for legal challenge which would prolong that period further.

116. Finally, as to process and fairness, the CC does not accept that it did not put its concerns or evidence justifying the appointment to the applicants. As set out in the witness statement of Diana Guy, the CC has considered the matter extensively in the meetings and in written exchanges referred to above. It has observed due process and has taken its decision which furthers its statutory duties which the proposals of the applicants would only frustrate.

CC's response to the applicants' other submissions

117. As to Mr Blyde's duties as a director of Irish and US companies, the CC wishes to minimise the exchange of confidential information. The applicants' suggestion that Mr Blyde should be entitled to receive from STG all information he deems necessary (or is advised is necessary) to discharge his fiduciary responsibilities is inconsistent with that aim. The CC does not see why Mr Blyde cannot explain and in discussion with the MT agree in advance what material it is he needs to see. Such agreement would not preclude him asking for other categories of material that he required for these purposes. The CC would ultimately decide if any issue arose as to what needed to be supplied. Such measures constitute, in the CC's view, a legitimate and reasonable requirement to impose in relation to monitoring and where necessary controlling the flow of information across the businesses. The CC notes that similar protocols gave been used in similar situations in the past.

118. As to the provision restricting attendance at STG management meetings, the CC submits that this was a reasonable response to the pre-emptive action threatened by the combined management and associated flow of confidential information across the two businesses. It is, says the CC, a flexible provision that allows discretion to the HSM to obtain access to the expertise he may need in the course of discharging his functions in any particular situation that may arise. The collective deliberation of "shared" senior staff is not precluded in situations where this is necessary. The applicants' stance on this point is, in the CC's view, evidence of their refusal to accept that any system of control whatsoever should be placed on the ability of the integrated senior management

team to meet and exchange information about both businesses. Furthermore it is an example of the applicants' unwillingness to engage to assist the CC in finding solutions to difficulties arising out of the situation that their own actions have created.

119. As to the provision permitting the exchange of information necessary for the merged businesses to coordinate their conduct of the merger inquiry before the CC, the CC submits that its intention is not in any way to compromise the parties' right to legal privilege in respect of information exchanged in connection with the exercise of their rights of defence, as is made clear by the inclusion of paragraph 16 of the 18 July Directions which prevents any monitoring by the MT leading to the disclosure of privileged material to the CC. In any event, there is no reason to assume that in practice any issue would arise under this provision with a constructive approach to setting up an appropriate protocol. Similar provisions have not given rise to any difficulties in practice in other cases. The CC contends that this restriction is a limited one in pursuit of the legitimate objective of monitoring confidential information flows and as such is reasonable.

CC submissions at the hearing

120. At the hearing the CC emphasised that Mr Blyde's dual position (as CEO of the merged businesses) is particularly difficult in terms of managing both businesses in the best interests of each of those businesses. The CC does not suggest that Mr Blyde would deliberately run down one business at the expense of the other, simply that managing on a group basis is not the same as running businesses on an individual basis and that there is a real risk that his decisions will be influenced by the group perspective.

121. The CC pointed out that whilst it is difficult to pin down the many and varied roles of the HSM, in general terms (i) the position will be full-time, (ii) as the title suggests, (s)he will be there to manage, (iii) it is an executive, dynamic role, and (iv) (s)he will be expected prevent problems. On a more detailed level, the HSM would have ultimate responsibility for such matters as key performance indicators for the STG business, the number of contracts involved, contracts won and lost and associated revenues, staff turnover and other personnel issues, logistics and environmental matters, together with the "key" functions emphasised by the applicants. In short, the CC emphasised, the

CC's intention is that HSM will be the principal directing mind. The CC also drew attention to the possibility that the HSM may be in post for anything up to a year.

122. As to the applicants' focus on paragraph 41 of Mrs Guy's witness statement, the CC pointed out that the key risk areas discussed there were not the only risk areas. The CC submitted that it is simply impossible to give a definitive answer as to what risks remain over and above the "key" areas: it is impossible to be very prescriptive. In any event, the applicants' proposals in relation to these key areas were not considered sufficient to overcome the CC's concerns: for example, the applicants' proposed structure would not cover questions of inaction and prioritisation; likewise, whilst decisions on capital expenditure under […][**C**] would be made by the respective operations directors, both would still be reporting to Mr Blyde in connection with those decisions.

123. As regards the transcript of the CC's meeting with Grant Thornton on 16 August 2006, the CC contended that the question of whether to impose a HSM is one for the CC, not the monitoring trustee. That question was not within the instructions given to Grant Thornton. The instructions were focussed on the questions of (i) the degree of integration which had by then occurred and (ii) the merged businesses' compliance with the 18 July Order. In any event, Grant Thornton did not rule out the imposition of a HSM. In respect of Grant Thornton's comment that a HSM would have to be chosen very carefully, the CC fully intends to do so.

124. As to the applicants' other submissions, the CC submitted that the applicants have to discuss with the monitoring trustee the question of what information Mr Blyde needs to see to discharge his reporting responsibilities in Ireland and the USA. "Discuss" means precisely that. Any information requested by Mr Blyde which the monitoring trustee considers has nothing to do with his reporting requirements can be reported by the latter to the CC. Similar issues arise in relation to confidential information that may permissibly flow for the purpose of presenting the applicants' case to the CC in the context of its inquiry. The CC simply wished to establish a protocol to ensure that the transfer of this information can be monitored. There is no intention that privileged information should end up in the CC's hands. Such situations can be managed

appropriately, and indeed the CC successfully adopted a similar arrangement (by consent) for the recent *Heinz* inquiry.

V THE TRIBUNAL'S ANALYSIS

125. As to the standard and nature of review by the Tribunal of decisions of the CC under Part 3 of the Act we see no reason to depart from the position set out by a differently constituted panel of the Tribunal in *Somerfield v Competition Commission* [2006] CAT 4 at paragraphs 55 to 57.

126. We focus our analysis first on the central issue in this case, which is the reasonableness of the CC's decision to order the appointment of a HSM.

127. Section 81 provides:

> "81 (1) Subsections (2) and (3) apply where a reference has been made under section 22 or 33 but is not finally determined.
>
> (2) The [CC] may by order, for the purpose of preventing pre-emptive action-
>
> (a) prohibit or restrict the doing of things which the [CC] considers would constitute pre-emptive action;
>
> (b) impose on any person concerned obligations as to the carrying on of any activities or the safeguarding of any assets;
>
> (c) provide for the carrying on of any activities or the safeguarding of any assets either by the appointment of a person to conduct or supervise the conduct of any activities (on such terms and with such powers as may be specified or described in the order) or in any other manner;
>
> (d) do anything which may be done by virtue of paragraph 19 of Schedule 8.

128. "Pre-emptive action" is defined in section 80(10) as:

> "action which <u>might</u> prejudice the reference concerned or impede the taking of any action under this Part which may be justified by the [CC's] decisions on the reference".
>
> (Emphasis added by the Tribunal.)

129. Section 81 gives the CC wide powers for the purpose of preventing pre-emptive action, including "the appointment of a person to conduct or supervise the conduct of any

activities" – i.e. including a HSM. Moreover, the word "might" used in section 80(10) implies a relatively low threshold of expectation that the outcome of the reference might be impeded. At the time the CC is considering whether to exercise its powers under section 81, it necessarily cannot be sure whether any action being taken (or proposed) by the merging/merged parties *will ultimately* impede any action being taken by the CC as a result of the reference. The power under section 81 enables the CC to intervene where it considers that there is at least some *risk* of that happening.

130. While we accept that the CC must exercise its powers reasonably and proportionately, we also accept that the CC has a considerable margin of appreciation under section 81: see also *Somerfield*, cited above, at paragraph 88. Similarly, since the outcome of a reference may well require a remedy to restore the status quo ante (see e.g. *Somerfield*, at paragraphs 94 to 100), when exercising its powers under section 81 the CC may properly have regard to the need to safeguard the effectiveness of any divestiture that may ultimately be ordered (see also paragraph 4.23 of the CC's guidance *Merger references* CC2, June 2003).

The context

131. In our view, the reasonableness of the CC's decision to order the appointment of a HSM in this case cannot be viewed in isolation from the events leading up to the 25 August Directions.

132. We note that it was only on 18 May 2006, once the process before the OFT had been under way for more than 2½ months, that the OFT suggested initial undertakings pursuant to section 71 of the Act. This was more than two months after completion and came at a stage when the merged businesses had already commenced a programme of integration. Part of the problem in this case stems from the fact that the OFT's intervention as regards pre-emptive action came rather late in the day.

133. It also seems to us unfortunate that the initial undertakings given to the OFT lacked clarity. Although the applicants undertook not to take any action "which might lead to the further integration of the Stericycle business with the STG business" or which might "otherwise impair the ability of each of the Stericycle business and the STG

business to compete in any of the markets affected by the acquisition", there was an exception for "action [which] has been initiated at the date of [the initial] undertakings and the OFT has been informed of that fact by that date".

134. Whilst the undertakings were signed by the applicants and accepted by the OFT, the applicants stated in the covering letter enclosing the signed undertakings that, due to the degree of integration which had occurred up to that point, they made "no representations that the substance of the undertakings can be complied with", and in earlier correspondence asserted that certain of the obligations contained in the initial undertakings had no content at all.

135. In practice, rightly or wrongly, the applicants seem to have interpreted the undertakings given to the OFT as if they were to all intents and purposes ineffective. We can well understand the CC's concerns when it learnt shortly after the reference was made that, notwithstanding the undertakings, the integration of the Stericycle and STG businesses was still in full swing, […][**C**]. In the circumstances the Chairman of the CC found it necessary to give a direction in his letter of 4 July 2006 preventing […][**C**]. It is to us unsurprising that on 7 July 2006 the CC followed up the Chairman's direction by sending the applicants proposed revised undertakings which envisaged, among other things, the appointment of a HSM.

136. In this case, the OFT asked the applicants for information on 28 February 2006, the day after the merger took place. At that point, if no earlier, the applicants were on notice of a likely OFT inquiry, and that the possibility of a reference to the CC could not be discounted. The OFT sought further information on several occasions between 28 March and 18 May 2006. In those circumstances, with combined shares of 65 and 55 per cent in the markets for high temperature treatment of healthcare risk waste and alternative technologies treatment of healthcare risk waste respectively (according to the OFT decision to refer), in our view it should have been apparent to the applicants at all material times that a reference was "on the cards".

137. Notwithstanding that the OFT did not seek undertakings under section 71 until relatively late in its investigation, in our view the applicants took a substantial risk in pressing on with the integration of the Stericycle and STG businesses while the OFT

inquiry was underway. Indeed, it was accepted in argument that there was a foreseeable risk of a reference and that the applicants might come unstuck (transcript, p. 7). In our view, the applicants took a further risk in continuing with their integration plans notwithstanding their undertakings to the OFT. Even if the applicants genuinely believed they were entitled to act as they did, it was in our view always foreseeable that the CC would take a different view when it came to consider the exercise of its powers under sections 80 and 81 of the Act.

138. Mrs Guy's letter of 7 July 2006 to the applicants enclosing suggested revised undertakings also referred to the *CC's Guidance* and set out why the Group considered that the appointment of an HSM might be appropriate. The applicants however resisted giving revised undertakings, and by 13 July 2006 the CC had come to the conclusion that a monitoring trustee ought to be appointed to ascertain the level of integration that had already taken place. On 18 July the CC made its Order of that date, and appointed the monitoring trustee under the 18 July Directions which accompanied that Order. The fact that the CC felt it necessary to make the 18 July Order and to take the serious step of appointing a monitoring trustee indicates to us that the CC had considerable concerns as to the attitude taken by the applicants as regards the continuing integration of the merged business. It appears that the CC's concerns were reinforced by what the CC considered to be the unsatisfactory compliance statements submitted by the applicants on 1 August 2006 and 15 August 2006 pursuant to the 18 July Order.

139. In addition in this case, and while the OFT inquiry was still in progress, the senior management of STG had been given a particularly prominent role in the integrated senior management structure of the merged business. Mr Blyde, who was the Managing Director of STG prior to the merger, was appointed CEO of the merged business. The CC was therefore faced with the situation where the merged business was being overseen by "one directing mind" who was formerly the CEO of the acquired business.

140. Against that background, it was in our view well within the CC's margin of appreciation to propose the appointment of a HSM in this case. Paragraph 16 of the *CC's Guidance* indicates that such an appointment is more likely when certain risk factors are present. The factors identified include past breaches of interim measures,

substantial integration of the merged businesses, the likelihood of further or continued integration, the absence of the pre-merger senior management of the merged businesses, and the risk that the current senior management will run the merged business in the interests of the acquirer. Factors akin to most of these elements are present here. We do not need to find that the applicants were in breach of the initial undertakings given to the OFT. The fact that they had interpreted those undertakings so widely as to be without effect was in our view a legitimate concern on the CC's part. Moreover, substantial integration of the Stericycle and STG businesses had already taken place, and further integration was already in prospect when prevented by the CC. The acquired (STG) business was no longer being managed independently of the acquirer, since Mr Blyde had become CEO of Stericycle (UK). The management of the acquirer, Stericycle (through Mr Blyde as CEO), was also responsible for the management of STG. Those in our view are classic circumstances in which it is likely to be legitimate for the CC to appoint a HSM.

141. However, despite having serious concerns from the outset and the existence of the "risk factors" identified above and referred to in the CC's letter of 7 July 2006, the CC did not initially go down the route of appointing a HSM. The CC first directed the appointment of the monitoring trustee, held a number of meetings with the applicants and engaged in extensive correspondence with them. The CC accepted a number of suggested modifications to its proposals to enable both businesses to benefit, where necessary, from expertise which could only be provided by a particular employee. The CC was persuaded to permit Mr Blyde, the CEO of the merged businesses, to retain responsibility for sales and marketing for STG on the basis that he was the only person with sufficient experience of the tendering process on the part of STG. The CC was also prepared to permit the flow of confidential information between the two businesses (a) to the extent strictly necessary in the ordinary course of business and (b) to the extent necessary for the purpose of preparing representations to the CC in connection with its inquiry into the merger. In our view the CC thus made considerable efforts to accommodate the applicants' concerns.

The HSM issue

142. Nonetheless, the CC was not prepared to resile from the appointment of a HSM, and the applicants have not been prepared to accept such an appointment, essentially on the basis that it is an unnecessary, unreasonable and disruptive step to take.

143. To evaluate these arguments, it is convenient to refer to three diagrams, which are annexed to this judgment as Figure 1, Figure 2 and Figure 3 respectively. Figure 1 shows the management structure of the merged business as it existed at the time of Grant Thornton's report of 14 August 2006. That shows a fully integrated management structure for the merged businesses. For the reasons already given it seems to us entirely reasonable that the CC should have had concerns about that management structure.

144. Figure 2 shows the effect of the 25 August Directions. Essentially, at the lower management tier, there is to be separate management for operations and logistics under David Hughes (Stericycle) and Paul Simpson (STG) respectively. There is also to be separate management for the finance function under Richard Taylor (Stericycle) and Neville Graver (STG) respectively. Sales and marketing for Stericycle is to be managed by Colm Croskery, while Bill Blyde remains responsible for sales and marketing for STG. Human resources (Helen Inch) and environmental, health and safety (Stuart Budd) are shared services, provided to both companies. There are one or two other exceptions where named individuals of one company are allowed to provide specified services to the other company. The cross-supply of services is on an arm's length basis. That structure is not, in essence, in dispute as regards that tier of management.

145. The issue arises at the higher management tier. The 25 August Directions envisage, essentially, that the senior Stericycle management (Messrs Croskery, Taylor, Hughes) will essentially report to Bill Blyde as CEO of Stericycle while the senior STG management (Messrs Blyde, Graver, Simpson) will report to the HSM as regards STG matters. Ms Inch and Mr Budd will report to Mr Blyde on Stericycle matters and to the HSM on STG matters. Mr Blyde will thus have an asymmetric position. He will be CEO of Stericycle only, but as regards STG he will be responsible for sales and marketing only, reporting to the HSM who will be CEO of the STG business. The HSM will in turn provide Mr Blyde with the information he needs to fulfil his

regulatory reporting obligations. What information is required in that context is to be discussed with the monitoring trustee. The flow of confidential information between the businesses is limited to that which is "strictly necessary", subject to certain exceptions to which we refer below.

146. Figure 3 shows the applicants' proposed management structure without a HSM. Essentially, the lower tier senior management structure is the same. At the higher tier, however, both the Stericycle management and the STG management report to Mr Blyde as CEO of both businesses, although for STG Mr Blyde remains responsible for sales and marketing as well as being the CEO. It can be seen that the principal difference between Figures 2 and 3 is in relation to the role of Mr Blyde and the ultimate management responsibility for the STG business. With the applicants' proposal under Figure 3 Mr Blyde remains the CEO and ultimate directing mind of both businesses. Under Figure 2 the CEO for STG is the HSM, to whom Mr Blyde reports on sales and marketing matters.

147. Against that background, the applicants submit essentially that the CC has not given sufficient reasons for the appointment of a HSM, in particular given the extent to which there has been or will be separation at the lower tier of management, notably in relation to finance, operations and logistics, and sales and marketing. In addition, the applicants submit that the appointment of a HSM is unnecessary and unreasonable. It adds nothing, given the extent to which integration has already taken place. It is also disproportionate, and can only disrupt the smooth running of the businesses in question.

148. The applicants submit, in particular in the light of paragraph 41 of Mrs Guy's witness statement, that the Group's concerns about separate decision-making were in relation to (i) sales and marketing, (ii) operations and (iii) to a lesser extent, finance. They contend that the CC's concerns are already dealt with by the applicants' proposals. As for sales and marketing, Mr Blyde would be ultimately responsible, on behalf of both businesses, for making tender bids for new contracts, but he would do so on the basis of the "set of principles", a document which the applicants had agreed with the CC. As for operations (which according to the applicants principally involve capital expenditure decisions), the applicants say they have proposed a structure whereby (a) decisions in relation to capital expenditure under […][**C**] would be taken by Mr

Simpson (reporting for this purpose only to the MT) for STG, and by Mr Hughes together with Mr Blyde for Stericycle (UK) and (b) decisions in relation to capital expenditure over […][**C**] would in any event be submitted to Stericycle International LLC and also to the CC (and the monitoring trustee) for approval before any final decision was taken. As for finance, the finance teams had remained separate, and so there should be no particular concern there.

149. The primary question for the Tribunal is whether the decision taken by the CC to appoint a HSM was within the range of decisions open to it as a reasonable decision maker. The applicants have to show that the decision the CC did take was unreasonable. The fact that the CC could have adopted a different decision does not in itself show that the alternative it did adopt was unreasonable. Similarly, in our view the CC does not have to give detailed reasons for not adopting each of a whole range of possible alternatives that could be envisaged. The primary question for the Tribunal is whether it has given sufficient reasons for adopting the alternative which it did decide to adopt.

150. As to the reasons given by the CC, it is plain to us that the CC's concerns were wider than sales and marketing, and operations, as contended by the applicants. The overarching concern on the CC's part was that under the applicants' proposals the merged business would still have only one "directing mind" – that of Mr Blyde. That point is made in paragraph 67 of Mrs Guy's witness statement:

> "the Group could not be satisfied that Bill Blyde would ensure that decisions taken in respect of the STG business would be solely in the interests of the STG business and that decisions taken in respect of the WRE business would be solely in the interests of the WRE business."

151. Similarly, at paragraph 41 Mrs Guy said:

> "The Group explained that it was concerned not only about further integration as such but also about the fact that the existing level of integration meant that decisions would be taken during the course of the inquiry by an integrated senior management team, including Bill Blyde. These decisions might be in the best interests of the combined business but might undermine the option of separating out a viable STG business, thereby undermining the option of a divestiture remedy. For this reason, Grant Thornton's recommendations did not appear sufficient to address its concerns…"

152. The CC's covering letter enclosing the 25 August Directions is to the same effect:

> "As we have previously explained, the CC believes it is necessary to establish a separate decision-making structure for the Stericycle and STG businesses through the Inquiry. This is in relation both to capital expenditure decisions *and more generally to other decisions which relate to the operation of the business.*" (Emphasis added.)

153. That the CC's concerns were wider than the examples given in paragraphs 41 and 42 of Mrs Guy's witness statement is in our view particularly apparent from the CC's consideration, described in paragraphs 67 to 69 of Mrs Guy's witness statement, of the three options available to it. As to option 1 (where Mr Blyde remained the single directing mind) Mrs Guy says:

> "I was concerned that this option would mean that Bill Blyde would remain in the role of managing director for both STG and WRE, and that, even with separate senior management teams under him, the Group could not be satisfied that Bill Blyde would ensure that decisions taken in respect of the STG business would be solely in the interests of the STG business and that decisions taken in respect of the WRE business would be solely in the interests of the WRE business. The Group considered that option 1 was too similar to the current position, and offered little additional protection."

154. Contrary to the applicants' suggestion, we see no reason to suppose that Mrs Guy is not there reflecting the views of the Group. In our view, Mrs Guy is not there suggesting that Mr Blyde would act other than in good faith, simply that under option 1 there would be a single directing mind, and thus no safeguard that each of the businesses would be managed separately in the interests of each business without regard to the interests of the other. In our view that was a legitimate concern. It is not a question of Mr Blyde seeking to run the STG business down as the applicants suggest. It is the CC's view that the longer the two businesses have a single directing mind, the more difficult it will be to ensure that the businesses will, as far as possible, be run separately, with the possibility that that might render any ultimate divestiture more difficult to achieve. That does not seem to us to be an unreasonable view. As to proportionality, the CC must act in the public interest. Given in particular the facts that in this case the applicants have already taken considerable steps to integrate the two businesses, it does not seem to us disproportionate for the CC to consider that, in the circumstances, an external safeguard in the form of a HSM was necessary. We add that

apart from anything else, in our view Mr Blyde, as an employee of Stericycle and a director of Stericycle companies, would find himself in a very difficult personal position in seeking to take decisions in respect of the STG business without regard to the interests of his employer, Stericycle. We note also that the period of the inquiry could be extended into February next year, and with the possibility of divestiture and perhaps further applications to the Tribunal, it might be a year or so before this matter is resolved.

155. In all these circumstances it seems to us that the CC did have regard to relevant considerations, and did weigh the options available to it, giving reasons for its decision.

156. The applicants further submit that there is in fact no role for a HSM to play. We are unable to accept that submission either. The HSM would have all the normal responsibilities of the CEO of a business, including, for example, supervising the senior management who report to him, deciding budgetary matters, establishing key performance indicators, monitoring performance, deciding how much HR and environmental services to buy in from Stericycle, dealing with employment matters, taking decisions about capital expenditure and so on. As the CC points out, it is difficult to foresee in advance all the matters upon which the HSM will be called to make a decision as CEO of STG. He will, by definition, hold ultimate responsibility for the management of the STG business.

157. In this regard, it was in our view reasonable for the CC to decide that the applicants' proposals as regards sales and marketing, operations and finance did not fully meet the CC's concerns. Without a HSM there would not be, during the period of the inquiry, a demonstrably independent CEO operating at arm's length from Stericycle to whom the executives responsible for these functions would report. It cannot be assumed that there would be no matters arising in these areas requiring a decision by the CEO to be taken in the interests of STG. While no doubt arrangements could be made, as the applicants suggest, for the relevant senior executives to exercise delegated responsibilities in areas such as operations, capital expenditure, finance, and sales and marketing, it seems to us reasonable for the CC to take the view that there must ultimately be a person responsible for the STG business as a whole, and that such a person should be wholly independent of Stericycle.

158. It is true that the ultimate structure envisaged by the 25 August Directions is complex, and will involve an imposition as far as the business of STG is concerned. However, the CC nonetheless decided that such a step should be taken in the public interest. The proposed structure may be less complex in practice than it appears, but such complexity as has arisen seems to us largely the result of the fact that the applicants went ahead with an integration programme when they could have foreseen that a reference to the CC was on the cards. We accept the CC's submission that the degree of integration that has taken place makes it more, not less, important to appoint a HSM in circumstances such as the present.

159. As to the supposed difficulty of a HSM coming "cold" to the business, we see no reason to doubt the CC's view that a competent HSM would have no difficulty in taking over fairly quickly, as occurs in other business situations. In our view the CC was correct not to attach overriding importance to the suggestion that […][**C**] might resign, for otherwise the CC could be held to ransom on matters of public interest. We hope that in the interests of both companies the employees in question will not take such a step, and we draw attention to paragraph 2(k) of the 18 July Order, which requires the applicants to take all reasonable steps to encourage all key staff to remain.

160. As to the applicants' submission that the CC did not pay any, or any sufficient, regard to the MT Report prepared by Grant Thornton, there is no evidence to suggest that the CC disregarded the points made by Grant Thornton in the MT Report and in the meeting with Grant Thornton on 16 August 2006. The weight to be given to the views of Grant Thornton was a matter for the CC. The decision whether or not to appoint a HSM lies with the CC, not with Grant Thornton. In any event, in our view, it appears from the terms of their appointment and the transcript of the meeting of 16 August 2006 that Grant Thornton had not been asked specifically to consider the appointment of a HSM but did not rule out such a possibility when the CC's concerns were pointed out (see e.g. transcript, p. 20).

161. In all these circumstances we dismiss the applicants' challenge to the appointment of a HSM under paragraph 2 of the 25 August Directions. In our view, the CC did not act outside its margin of appreciation in deciding that a HSM was necessary in order to

ensure that the "directing mind" ultimately responsible for the STG business is, and is seen to be, entirely independent of Stericycle during the remainder of the CC's inquiry.

The applicants' alternative submissions

162. The applicants challenge in the alternative four particular restrictions imposed by the CC in the 25 August Directions, namely (i) the restriction on access by Mr Blyde to confidential information relating to STG for the purpose of his reporting obligations in the republic of Ireland and the United States; (ii) the restriction on the passing of confidential information between the two businesses unless "strictly necessary in the ordinary course of business"; (iii) the restriction on attendance at STG management meetings; and (iv) the monitoring of the flow of confidential information between the two businesses to ensure that it is necessary for the preparation of their 'defence' in the CC merger inquiry.

163. These submissions mainly concern the ambit of the restriction, contained in paragraph 35 of the First Schedule to the 25 August Directions, set out above, which limits the flow of confidential information between the two businesses to that which is "strictly necessary in the ordinary course of business". The CC's aim of minimising the future extent of the flow of confidential information about the STG business to Stericycle or vice versa is in our view entirely legitimate, notwithstanding the extent to which certain confidential information has already passed. In our view, the continued flow of such information "might" impede action (such as divestiture) which could be justified by the CC's decision on the reference.

164. The words "strictly necessary" used in paragraph 35 of the First Schedule to the 25 August Directions are ordinary words to be given their natural meaning. Paragraph 36 of the First Schedule gives illustrations of information which falls within the definition of "strictly necessary". In our view, if information of a confidential nature does not fall within the exceptions set out in paragraph 36 of the First Schedule, it is not to be exchanged unless, exceptionally, it is shown to be "strictly necessary". We do not see anything unreasonable or unworkable in such a provision. If the applicants are in doubt as to whether any information they wish to disclose falls within paragraph 35 of the

First Schedule of the 25 August Directions, they should consult the CC before disclosing it.

165. As to Mr Blyde's regulatory responsibilities, the applicants seek in effect to create a large exception to paragraphs 35 and 36 of the First Schedule of the 25 August Directions by contending that it is necessary for Mr Blyde to have a great deal of information about STG in order for him to comply with his regulatory responsibilities under Irish company law and US law. Paragraphs 67 and 68 of Blyde 2 state:

> "67. For instance, I need full access to financial and trading information about STG so that I can sign the necessary directors reports and satisfy myself that the accounts reflect a true and fair view of the company. I see monthly financial statements and senior management reports and senior management team minutes. I also regularly speak with the other Stericycle and STG directors and senior managers about any issues arising in the business. I must continue to have access to any source of information that I need to fulfil my duties.
>
> 68. I also need full access to any information about STG that I feel is necessary for me to see in order to comply with my regulatory reporting requirements to Stericycle LLC under US law, including the US Securities Exchange Commission rules ("SEC Rules") the US Sarbanes-Oxley Act ("Sarbanes-Oxley"); and any other relevant law. To comply with these obligations, I need to see all information which could possibly be relevant, so that I can select which information to report. I am advised that I am personally responsible for the selection of information in this way, and I must therefore be able to examine the relevant information myself."

166. In our view, broad contentions of this kind need to be carefully scrutinised. The CC's approach, as explained to the Tribunal, is that Mr Blyde shall discuss with the monitoring trustee the nature and frequency of his reporting responsibilities with a view to reaching agreement on the same. That seems to us to be eminently sensible. The CC explained at the hearing that if any issues arise, they will be referred to the CC for further consideration. We cannot see that to be an unreasonable approach at all.

167. The applicants further object to the provision, contained in paragraph 38 of the First Schedule, for monitoring by the monitoring trustee of communications between the parties which has the aim of ensuring that confidential information is shared only to the

extent necessary for the 'defence' of the merger before the CC during its inquiry. The applicants' concern is that this provision would effectively enable the monitoring trustee to see and pass on to the CC non-privileged preparatory exchanges.

168. Paragraph 38 of the First Schedule provides:

> "Confidential Information flow shall be permitted to the extent necessary for and limited to the coordination of Stericycle and STG's proceedings with the CC, Competition Appeal Tribunal or any other court of law in connection with the reference or related proceedings. The Monitoring Trustee shall monitor such Confidential Information flow and for the avoidance of doubt paragraph 16 of the 18 July Directions shall apply."

169. Paragraph 16 of the 18 July Directions provides:

> "When providing his reports to the CC, the MT must ensure that he does not disclose any information or documents to the CC which Stericycle and/or STG would be entitled to withhold from the CC on the grounds of legal privilege."

170. Again, misuse of this provision by the applicants could potentially create a large loophole in the 25 August Directions. As we see it, paragraph 38 is already relatively generous since in most contentious merger situations the acquirer and acquiree make separate representations, and for obvious reasons are not permitted to exchange sensitive information with each other.

171. Paragraph 38 of the First Schedule seems to us to be a reasonable provision in principle. The CC has made it clear that it has no desire to see preliminary drafts of submissions that may or may not ultimately be made; it simply wishes to ensure that under the guise of "defence" issues there is not an unauthorised leakage of confidential information. As for non-privileged information, it seems to us that this is unlikely to be a practical problem. It is accepted that the MT must be in a position to monitor the exchange of confidential information (transcript, p. 60). If any preparatory materials seen by the MT do not contain any relevant confidential information, no problem arises. If the MT considers that the applicants are misusing this provision as a means of maintaining a prohibited flow of confidential information, the MT can so inform the CC without disclosing the preparatory drafts and the CC can decide what action to take.

172. Paragraph 4 of the First Schedule restricts certain named persons from attending STG management meetings except in specified circumstances. The applicants' challenge to this provision is that it will be damaging to the STG business. Mr Blyde ran STG on the basis of collective decision-making. The HSM, who will have no knowledge of the STG business, will be faced with the partial fragmentation of the management team. This restriction will, the applicants argue, be unhelpful and will be alien to the management culture at STG.

173. The applicants' submission in our view falls far short of establishing that this restriction is unreasonable. Once again, the rationale for the restriction is to minimise the flow of confidential information between the two businesses and to maintain separate management structures. That is, in principle, an entirely legitimate aim for the CC to pursue. As for the applicants' suggestion that the STG business will be damaged, the HSM will be responsible for the conduct of meetings with the senior management team. He will be able to seek the input of the various members of the team to the extent he sees fit.

174. Accordingly, we dismiss the applicants' alternative challenge to various paragraphs of the First Schedule to the 25 August Directions.

VI CONCLUSION

175. It follows that we unanimously dismiss the applicants' application for review of the 18 July Order and 25 August Directions.