



Neutral citation [2019] CAT 23

**IN THE COMPETITION**  
**APPEAL TRIBUNAL**

Case No: 1332/4/12/19

Victoria House  
Bloomsbury Place  
London WC1A 2EB

10 October 2019

Before:

HODGE MALEK Q.C.  
(Chairman)  
PAUL DOLLMAN  
DEREK RIDYARD

Sitting as a Tribunal in England and Wales

BETWEEN:

**TOBII AB (PUBL)**

Applicant

- v -

**COMPETITION AND MARKETS AUTHORITY**

Respondent

Heard at Victoria House on 3 October 2019

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**RULING**

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## APPEARANCES

Aidan Robertson QC and Matthew O'Regan (instructed by Preiskel & Co LLP) appeared on behalf of the Applicant.

Marie Demetriou QC (instructed by the Competition and Markets Authority) appeared on behalf of the Respondent.

## **A. INTRODUCTION**

1. On 13 September 2019 the Applicant (“Tobii”) filed an application for review pursuant to s.120 of the Enterprise Act 2002 (the “2002 Act”) of decisions contained in the Respondent’s (the “CMA”) final report dated 15 August 2019 regarding the completed acquisition by Tobii of Smartbox Assistive Technologies Limited (“SATL”) and Sensory Software International Limited (“SSIL”) (the “Final Report”).
2. At a case management conference on 3 October 2019 (the “CMC”), the Tribunal ruled on the admissibility of two witness statements and an expert report that Tobii sought to adduce, stating that it would give reasons in writing in due course. This is the Tribunal’s written ruling. Nothing in this ruling regarding the admissibility of evidence prejudices the issues that Tobii has raised in its application for review (the “s.120 Application”).

## **B. BACKGROUND**

3. Tobii acquired the entire issued share capital of SATL and SSIL (together, “Smartbox”) on 1 October 2018 without notifying the CMA of the merger. The CMA’s mergers intelligence function identified the acquisition and the CMA commenced a Phase 1 investigation on 27 November 2018, which resulted in a reference for an in-depth Phase 2 merger inquiry on 8 February 2019 (the “Phase 1 Decision”).
4. During the CMA’s Phase 2 inquiry, Tobii made various submissions to the CMA orally at hearings, as well as in writing in the form of documents, economic papers, comments and responses on the CMA’s working papers, Phase 1 Decision, Issues Statement, Provisional Findings and Notice of Possible Remedies. Tobii was represented by a firm of solicitors, Counsel, as well as economists.
5. The CMA adopted its Final Report on 15 August 2019. In summary, the CMA decided that Tobii’s acquisition of Smartbox created a relevant merger situation that has resulted or may be expected to result in a substantial lessening of

competition (“SLC”) as a result of both horizontal unilateral effects and vertical effects, and the only effective remedy to the SLC and its effects is a full divestiture of SATL and SSIL.

6. In its Notice of Application (“NoA”) made under s.120 of the 2002 Act, Tobii alleged with detailed reasons why certain conclusions and findings made by the CMA in the Final Report are unlawful. The NoA has 20 annexures. Three of the documents annexed to the NoA are:
  - (1) A witness statement dated 12 September 2019 by Mr Timothy Cowen (“Cowen 1”), a Partner at the firm of Preiskel & Co LLP. Cowen 1 contains 16 exhibits (collectively, the “Cowen Exhibits”).
  - (2) A witness statement dated 12 September 2019 by Mr Henrik Eskilsson (“Eskilsson 1”), the Chief Executive Officer and co-founder of Tobii. Eskilsson 1 contains 10 exhibits (collectively, the “Eskilsson Exhibits”).
  - (3) An expert report dated 10 September 2019 by Mr Sam Williams of Economic Insight (“Williams 1”). Williams 1 contains seven annexes (collectively, the “Williams Annexes”).
7. Tobii’s NoA stated that *“neither of [Cowen 1 nor Eskilsson 1] were before the CMA at the date of the Final Report, although much of the content of them and their exhibits was”*. Further, *“in accordance with rule 27, Tobii will make an application for permission to adduce Williams 1”*.
8. At the Tribunal’s request, Tobii submitted a statement pursuant to Rule 9(4)(h) of the Tribunal Rules (S.I. 2015 No. 1648) (the “2015 Tribunal Rules”) on 27 September 2019 stating that *“the substance of the evidence contained in [Cowen 1 and the Cowen Exhibits, Eskilsson 1 and the Eskilsson Exhibits and Williams 1 and the Williams Annexes] was before the maker of the disputed decision”* (the “Rule 9(4)(h) Statement”).

9. On 30 September 2019, Tobii submitted an application under Rule 27 of the 2015 Tribunal Rules for permission to adduce expert evidence, namely Williams 1 (the “Rule 27 Application”).
10. The CMA opposed the admission of Cowen 1 (save for paragraphs 1 to 42 of Cowen 1), Eskilsson 1 and Williams 1.
11. The main issue that fell to be determined at the CMC by the Tribunal, pursuant to its case management powers under the 2015 Tribunal Rules and in the context where Tobii’s substantive application for a review has been brought under s.120 of the 2002 Act, was whether to permit Tobii to adduce Cowen 1, Eskilsson 1 and Williams 1 as evidence in support of its s.120 Application.
12. In considering the admissibility of these materials, the Tribunal notes that judicial review principles apply in the determination of Tobii’s s.120 Application. Further, the Tribunal is mindful of the governing principles set out at Rule 4 of the 2015 Tribunal Rules, which requires the Tribunal to exercise active case management and to ensure that the substantive application is heard justly, at proportionate cost and expeditiously.

### **C. LEGAL FRAMEWORK**

13. Section 120 of the 2002 Act provides that:

**“120. Review of decisions under Part 3**

(1) Any person aggrieved by a decision of the CMA ... 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.

...”

14. The Tribunal Rules that relate to evidence in applications for a review of a decision under s.120 of the 2002 Act are Rules 9(4)(h), 21, 26 and 27.

15. Rule 9(4)(h) (read in conjunction with Rule 26) of the 2015 Tribunal Rules requires applicants to identify any new evidence provided in support of their application. It provides that:

**“Time and manner of commencing [applications]**

**9.—...**

(4) The notice of [application] shall contain—

...

(h) a statement identifying the evidence (whether witness statements or other documents annexed to the notice of [application]) the substance of which, so far as the [applicant] is aware, was not before the maker of the disputed decision.

...”

16. Paragraph 7.73 of the Competition Appeal Tribunal Guide to Proceedings 2015 (the “Guide”) states that:

“The [2015 Tribunal Rules] refer to ‘the substance’ to reflect the fact that matters are often put forward at the administrative stage less formally, for example in correspondence or at meetings. The requirement to identify evidence as ‘new’ therefore does not apply where the substantive material was placed before the Regulator although it was not in the form of a witness statement or expert report that is produced for the purpose of the proceedings in the Tribunal.”

17. Paragraph 7.77 of the Guide provides that “*the failure to identify evidence as being ‘new’ does not of itself render the evidence inadmissible*”.

18. Rule 21 of the 2015 Tribunal Rules gives the Tribunal the power to admit or exclude evidence. It provides that:

**“Evidence**

**21.—(1)** The Tribunal may give directions as to—

- (a) the provision by the parties of statements of agreed matters;
- (b) the issues on which it requires evidence, and the admission or exclusion from the proceedings of particular evidence;
- (c) the nature of the evidence which it requires to decide those issues;
- (d) whether the parties are permitted to provide expert evidence;

(e) any limit on the number of witnesses whose evidence a party may put forward, whether in relation to a particular issue or generally; and

(f) the way in which evidence is to be placed before the Tribunal.

(2) In deciding whether to admit or exclude evidence, the Tribunal shall have regard to whether it would be just and proportionate to admit or exclude the evidence, including by reference to the following factors—

(a) the statutory provision under which the appeal is brought and the applicable standard of review being applied by the Tribunal;

(b) whether or not the substance of the evidence was available to the respondent before the disputed decision was taken;

(c) where the substance of the evidence was not available to the respondent before the disputed decision was taken, the reason why the party seeking to adduce the evidence had not made it available to the respondent at that time;

(d) the prejudice that may be suffered by one or more parties if the evidence is admitted or excluded;

(e) whether the evidence is necessary for the Tribunal to determine the case.

(3) Unless the Tribunal otherwise directs, no witness of fact or expert witness may be heard unless the relevant witness statement or expert report has been submitted in advance of the hearing and in accordance with any directions of the Tribunal.

...”

19. Rule 27 of the 2015 Tribunal Rules makes it a requirement that permission from the Tribunal is needed in order to adduce new expert evidence in proceedings for a review under s.120 of the 2002 Act. Rule 27 provides that:

**“Expert evidence**

27. If the applicant in proceedings for a review under section 120 or section 179 of the 2002 Act wishes to rely upon expert evidence that was not before the decision maker whose decision is the subject of the application, it shall serve with its application for review an application to adduce that evidence, attaching either the statement of expert evidence on which it wishes to rely or a detailed explanation of the nature of the expert evidence that it wishes to adduce.”

20. The limited circumstances in which fresh evidence may be admitted in judicial review proceedings were set out by the Court of Appeal in *R v Secretary of State for the Environment, ex parte Powis* [1981] 1 WLR 584 (“*Powis*”) at page 595:

“(1) that the court can receive evidence to show what material was before the minister or inferior tribunal ... (2) where the jurisdiction of the minister or inferior tribunal depends on a question of fact or where the question is whether

essential procedural requirements were observed, the court may receive and consider additional evidence to determine the jurisdictional fact or procedural error ... and (3) where the proceedings are tainted by misconduct on the part of the minister or member of the inferior tribunal or the parties before it. ...”

21. This restrictive approach applies also to the admission of fresh expert evidence, although there is a “very rare” extension beyond *Powis* in respect of expert evidence which assists the court by explaining technical terms. This was set out by Collins J in *R (Lynch) v General Dental Council* [2003] EWHC 2987 (Admin) (“*Lynch*”):

“19. ... In judicial review proceedings, the circumstances in which fresh evidence can be received are very limited. ...

...

22. I have no doubt that fresh evidence involving expert evidence should in general not be admitted unless it falls within the *Powis* guidelines. ... If the decision in question is made by an expert tribunal or indeed by anyone dealing in a field involving consideration of matters which would not obviously be fully understood by a layman without some assistance from an expert in that field, it may be necessary at the very least to have some explanation of any technical terms. ...

...

24. It is clear that the Court’s function must not be usurped. But it seems to me that the Court must be enabled to carry out its function. To do this it must understand the material which is put before it. There is in my view a real distinction between a report from an expert which seeks to explain what is involved in a particular process ... and how complicated that process is and one which goes on to opine that it was irrational for the body to have reached the conclusion it did. ... However, it seems to me that in a truly technical field, where the significance of a particular process is in issue expert evidence can be admitted to explain the process and its significance. Cases where this can be permitted will be very rare and what I have said should not be regarded as opening the door to the admissibility of experts’ reports in all cases such as this which involve judicial review of an expert tribunal or body. ...

25. This is, I appreciate, some extension beyond that recognised by *Powis* of the possibility of admitting fresh evidence. But its purpose is in reality to explain to the court matters which it needs to understand in order to reach a just conclusion. ... But a word of caution is appropriate. Where the tribunal or body is itself composed of experts or has been advised by an expert assessor ... it will be virtually impossible to justify the submission of expert evidence which goes beyond explanation of technical terms since it will almost inevitably involve an attempt to challenge the factual conclusions and judgment of an expert. That is something which is inappropriate for a reviewing court.”

22. Case law of the Tribunal demonstrates how it has applied the principles from *Powis* and *Lynch* when considering the admissibility of factual evidence and expert evidence in applications brought under s.120 or s.179 of the 2002 Act, since the 2002 Act stipulates that applications brought under these sections are to be determined by applying judicial review principles.

**(1) Factual Evidence**

23. The Tribunal's general approach in judicial review cases has been that permission to adduce factual evidence is not granted unless the *Powis* test is met. Where the party seeking to adduce the factual evidence claims that it is not new in substance, the Tribunal has looked at the content and nature of the evidence to determine whether it is necessary, taking into account that it is a specialist Tribunal.

24. The Tribunal considered in *Somerfield PLC v Competition Commission* [2006] CAT 4 ("*Somerfield*") what witness evidence is appropriate in cases brought under s.120 of the 2002 Act and explained that supplementary witness evidence should be kept to a minimum as the Tribunal will not generally need extensive background explanations. In *Somerfield*, the Competition Commission's SLC finding and remedial decision were challenged by the applicant and the Competition Commission provided two witness statements. The Tribunal took the view at [67] that:

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

25. In *Celesio AG v Office of Fair Trading* [2006] CAT 9 ("*Celesio*"), the Office of Fair Trading ("OFT") filed a witness statement as part of its defence to an application brought by an applicant pursuant to s.120 of the 2002 Act for review

of the OFT's decision not to refer a proposed acquisition of Alliance UniChem PLC by Boots Group PLC to the Competition Commission. Although the witness statement in question contained some cross-referencing to the disputed decision, the Tribunal looked at the content and nature of the statement to assess whether it simply elucidated or went further, and the Tribunal took into account only that in the statement which provided elucidation (see [143] and [171]).

26. Although the admissibility of factual evidence considered in both *Somerfield* and *Celesio* pertained to witness statements from the decision-making authority, the Tribunal has applied the *Powis* principles also in respect of factual evidence from an applicant. *Ryanair Holdings PLC v Competition Commission* [2014] CAT 3 ("*Ryanair*") concerned an application brought under s.120 of the 2002 Act. The Tribunal considered witness statements submitted by the applicant and an intervener and admitted the evidence to the extent that it was relevant to a jurisdictional issue in the case (see [30], [238] and [239]).

## (2) Expert Evidence

27. The Tribunal's general approach in judicial review cases has been that permission to adduce new expert evidence is not granted unless the *Powis* test is met and, given that it is a specialist Tribunal, it is not likely to be common that the *Lynch* principle would apply. Permission to adduce expert evidence is granted only in "exceptional circumstances".
28. In *BAA Limited v Competition Commission* [2012] CAT 3 ("*BAA*"), the Tribunal applied the *Powis* principles and considered the *Lynch* extension explaining at [79] that the reason why it dismissed BAA's application to adduce new expert evidence was:

"... we simply applied the conventional approach in judicial review proceedings as laid down by *R v Secretary of State for the Environment, ex p. Powis* [1981] 1 WLR 584, 595-597. The new evidence did not fall into any of the categories identified there of material which will be admitted as evidence on a judicial review: it was not evidence to show what material was before the CC, nor was it relevant to any jurisdictional question affecting the CC, nor was it relevant to any allegation that the actions of the CC were tainted by misconduct. ... Unlike in *Lynch*, we were not at all persuaded that we needed to see the expert reports in order to understand the submissions made by [BAA's Counsel] ..."

29. The Tribunal cautioned at [80] that:
- “... attempts to introduce detailed technical expert evidence in reviews under section 179 of the [2002] Act should be strongly discouraged and disallowed other than in very clear cases. Otherwise, there is an obvious danger that costs will be wastefully multiplied with no significant benefit for the speedy and efficient dispute resolution procedure which is supposed to be provided for by a section 179 review, as with judicial review generally.”
30. The Tribunal also refused the applicant permission to adduce expert evidence in *Lafarge Tarmac Holdings Limited v Competition and Markets Authority* [2014] CAT 5 (“*Lafarge*”), which concerned an application brought under s.179 of the 2002 Act, by applying *Powis* and *Lynch*. The Tribunal reiterated that expert evidence may be admissible and useful in exceptional cases and *Lafarge* was not such a case. The Tribunal did not need further expert evidence in order to understand the parties’ arguments as the matters covered by the expert report in question were well within the expertise and experience of the Tribunal as a specialist tribunal with cross-disciplinary expertise in law, economics, business and accountancy. Further, the Tribunal already had the benefit of earlier expert reports which covered much of the same ground, and the Tribunal did not wish to risk added time, effort and costs being expended on inconclusive arguments arising out of disputed expert reports. (See [10], [11] and [12].)
31. In *HCA International Limited v Competition and Markets Authority* [2014] CAT 10 (“*HCA*”), the Tribunal considered an application to adduce an expert report on an application for review under s.179 of the 2002 Act. It refused the application, applying *Powis* and *Lynch* and endorsing *BAA* and *Lafarge*. The Tribunal reminded the parties that the admission of expert evidence in judicial review proceedings is “exceptional” and, as the Tribunal is a body which itself has technical expertise and an ability to understand technical economic points without external assistance, “*the sort of situation in which technical assistance is required under the Lynch principle is not likely to be a common one in this Tribunal*” (see [2] and [4(c)]). The Tribunal noted that factors which pointed strongly against the helpfulness of the expert report in question and, therefore, its inadmissibility included: the expert was not coming as a fresh and transparently independent expert but had acted for HCA throughout the Competition Commission’s inquiry and his expert report re-argued points

already made on HCA's behalf during the inquiry. Some of the points made were opinion more appropriate for an appeal on the merits, rather than the questions that need to be addressed under judicial review principles, and other points were more appropriately made by Counsel based on the facts of the case. (See [6(i)] to [6(iii)].)

32. The *BAA*, *Lafarge* and *HCA* cases were determined in accordance with Rule 22 of the Competition Appeal Tribunal Rules 2003, the predecessor to the 2015 Tribunal Rules (the "Old Rule 22"). The 2015 Tribunal Rules apply to the present Application. Although the Old Rule 22 has been amended, the Old Rule 22 and Rule 21 of the 2015 Tribunal Rules are consistent in that they confer on the Tribunal an unfettered discretion to admit or exclude evidence (see *Ping Europe Limited v Competition and Markets Authority* [2018] CAT 8 at [24]).

#### **D. THE PARTIES' SUBMISSIONS**

##### **(1) Tobii**

###### **(a) *Witness Statements***

33. Counsel for Tobii relied on *Ryanair* and submitted that the proportionate and pragmatic way of dealing with the witness statements is to admit Cowen 1 and Eskilsson 1 and to assess at the hearing of the s.120 Application what weight, if any, should be attached to it. Although the point was not pursued with any great force in oral argument, Counsel for Tobii submitted that there is little to be gained at this stage to fillet out parts of the witness statements and potentially having to re-exhibit documents that are exhibited to parts of the witness statement that have been excluded.
34. Counsel for Tobii referred to Tobii's Rule 9(4)(h) Statement and submitted that the substance of Cowen 1 and Eskilsson 1 was before the CMA and accordingly is not new evidence, is not an "ambush" on the CMA, nor is Tobii "gaming the system". Tobii was not seeking to make a new case before the Tribunal that it did not make before the CMA.

35. Tobii referred also to paragraph 7.73 of the Guide to support its position that it is not necessary for the witness statement itself to have been submitted to the CMA during its inquiry so long as its substance had been placed before the CMA. Evidence is new if its substance was not before the CMA.
36. Tobii considered that Cowen 1 and Eskilsson 1 will be of assistance to the Tribunal in understanding the issues raised by the s.120 Application because they summarise the key evidence before the CMA during its inquiry, which are to be found in a combination of separate documents and oral submissions made at main party hearings, and are focused on the grounds of challenge in Tobii's NoA. Cowen 1 and Eskilsson 1 are a procedurally efficient, convenient and practical way to present evidence to the Tribunal and for it to dispose of the case more efficiently and at lower cost. It would be cumbersome and inconsistent with the governing principles set out in Rule 4 of the 2015 Tribunal Rules to inundate the Tribunal with a considerable volume of documentary material.
37. Tobii contended that there is no "floodgates" risk or prejudice to the CMA if the Tribunal admits Cowen 1 and Eskilsson 1, whereas Tobii will suffer significant prejudice if the witness statements are not admitted.

**(b) Expert Report**

38. Counsel for Tobii submitted that the Tribunal's case management powers need not invariably be exercised to exclude expert opinion evidence in merger review cases and relied on *Somerfield* and *Celesio* where economic expert evidence was heard and a dispute as to admissibility in *Celesio* was resolved by the parties accepting that "*the Tribunal could look at the material de bene esse and rule on it at the same time as giving its judgment on the substance*" (see [58]). Therefore, the Tribunal should admit Williams 1 provisionally now and assess its admissibility or weight at the hearing of the s.120 Application.
39. Tobii submitted that the substance of the matters addressed in Williams 1 was before the CMA during its inquiry and it was not attempting to "ambush" the CMA, nor is it "gaming the system". Counsel for Tobii relied, in skeleton argument, on paragraph 7.73 of the Guide and on [75] and [80] of *BAA* and

submitted that Williams 1 does not “introduce” detailed technical expert evidence as Tobii has not run an entirely new case with new evidence that it had not made during the CMA’s inquiry.

40. Tobii advanced similar arguments regarding procedural efficiency in accordance with Rule 4 of the 2015 Tribunal Rules to support the admissibility of Williams 1 as it did in relation to the witness statements, Cowen 1 and Eskilsson 1. According to Tobii, what Williams 1 does is draw various documents and oral submissions together in one report by compiling in a single document points that were made during the CMA’s inquiry and this is more convenient for the Tribunal. Counsel for Tobii also submitted that it is procedurally efficient for the alleged deficiencies in the CMA’s economic analysis to be identified and Tobii’s economic arguments that were put before the CMA to be drawn together in the form of a single expert economist’s report.
41. Counsel for Tobii submitted that a reason why Tobii has presented its economic arguments in Williams 1 is to get its arguments in up front, together with Tobii’s NoA, so that the CMA can see the detailed arguments that Tobii will advance at the hearing of the s.120 Application and the CMA has the opportunity to respond to Tobii’s arguments in their Defence. Tobii contends that absent Williams 1 Tobii would be advancing arguments, which were advanced in large measure during the inquiry, in that level of detail for the first time in Counsel’s skeleton argument for the hearing of the s.120 Application.
42. Tobii considered that Williams 1 focuses on demonstrating Tobii’s grounds of review and specifically addresses matters which must be determined by the Tribunal.
43. In addition, Tobii noted that Mr Williams is an experienced economist and expert witness on matters of competition economics and is well aware of the difference between an “appeal on the merits” and an application for review under judicial review principles. He does not seek to re-argue his substantive submissions to the CMA during its inquiry and his expert opinion would be of assistance to the Tribunal.

44. In response to the CMA’s argument that Williams 1 contains new evidence comprising points not made to the CMA during its inquiry, Tobii contended that those new points relate to a small number of matters that were raised for the first time in the CMA’s Final Report or where the significance of a finding made in the Final Report only became apparent at that time and, therefore, Tobii had no earlier opportunity to raise them.
45. Again, Tobii contended that there is no “floodgates” risk or prejudice to the CMA if the Tribunal admits Williams 1 whereas Tobii will suffer significant prejudice if it cannot rely on Williams 1 to assist it in developing complex technical economic arguments at the hearing of the s.120 Application.

**(2) The CMA**

***(a) Witness Statements***

46. The CMA submitted that, in so far as the substance of Cowen 1 and Eskilsson 1 was before the CMA at the time of the decision, there is no need for it to be re-admitted or reincarnated in the form of a witness statement and Tobii can rely on the original material in support of its case without the need for detailed accompanying witness statements.
47. In so far as Cowen 1 and Eskilsson 1 contain new evidence, Counsel for the CMA submitted that a restrictive approach is required in relation to the admission of new evidence in applications under s.120 of the 2002 Act. With the exception of paragraphs 1 to 42 of Cowen 1, Cowen 1 and Eskilsson 1 do not satisfy the *Powis* test.
48. The CMA submitted that Tobii has not provided any good reason for its failure to place its new evidence before the CMA during the inquiry and pointed out that the efficacy of the merger inquiry system would be undermined if parties were to withhold material evidence during the inquiry, only to deploy it on appeal.

49. The CMA considered that Tobii will not suffer any material prejudice if Cowen 1 and Eskilsson 1 are disallowed to the extent contended for by the CMA. By contrast, admitting Cowen 1 and Eskilsson 1 risks real prejudice to the CMA and wider public interest as it would undermine the system of merger inquiries and drive a coach and horses through Parliament's decision that merger decisions should be challengeable on judicial review grounds only. Admitting Cowen 1 and Eskilsson 1 would risk encouraging applicants to blur the boundaries between judicial review and merits appeals.
50. The CMA stated that, if Cowen 1 and Eskilsson 1 are admitted, it will feel compelled to adduce evidence in response and this will inevitably create additional costs and delay, and risk distracting the parties and the Tribunal from the applicable legal principles governing Tobii's challenge, contrary to the streamlined review process envisaged by Parliament.
51. The CMA also contended that, with the limited exception of paragraphs 1 to 42 of Cowen 1, it is neither necessary nor appropriate to admit Cowen 1 and Eskilsson 1. All that is needed is a short statement from Tobii's solicitor to exhibit those documents that were provided to the CMA during the inquiry. Furthermore, much of Cowen 1 and Eskilsson 1 is not factual but contains a significant amount of submission and impermissible opinion targeted at the merits of the CMA's decision rather than its legality. The CMA stated that it did not accept that all the contents of paragraphs 8 to 42 of Cowen 1 constitute factual evidence but proposed to deal with that by way of submission at the hearing of the s.120 Application.

***(b) Expert Report***

52. The CMA argued that various parts of Williams 1 are new in substance and pointed out that Tobii's Rule 27 Application recognised that Williams 1 "*(i) expanded on, or had provided further substantiation of, a number of matters in light of the contents of the CMA's Final Report and (ii) addressed a small number of points that were first dealt with by the CMA in its Final Report*".

53. The CMA submitted that a particularly strict approach is required in relation to the admission of expert evidence in applications under s.120 of the 2002 Act as laid down in *Powis* and the modest adjustment by *Lynch*. According to the CMA, the new economic arguments in *Williams 1* go outside the scope of this judicial review application. Given the experience and expertise available to the Tribunal and the subject matter of the CMA's decision, the Tribunal does not require expert evidence to enable it to understand any technical matters arising from the Final Report.
54. The CMA referred to the *BAA*, *Lafarge* and *HCA* cases where the Tribunal made clear that expert evidence should be strongly discouraged and disallowed other than in very clear cases.
55. The CMA contended that there was an absence of any good reason for Tobii's failure to place its new evidence before the CMA during the inquiry and advanced the same observations regarding *Williams 1* as it did in relation to *Cowen 1* and *Eskilsson 1* about the efficacy of the merger system being undermined if parties were to withhold material evidence during an inquiry.
56. In response to Tobii's contention that any new points in *Williams 1* related to a small number of matters that were raised for the first time in the CMA's Final Report and Tobii had no earlier opportunity to raise them, the CMA submitted that its provisional conclusions were set out fully in its Provisional Findings, to which Tobii provided a detailed response on 13 June 2019 and 20 June 2019, and the Final Report did not contain a fundamental shift of the CMA's position. Had there been a fundamental shift in the CMA's position in the Final Report, it would have had to re-consult. In the many grounds advanced in its NoA, Tobii has not alleged that to be the case.
57. In so far as the substance of *Williams 1* was before the CMA at the time of the decision, the CMA took the same position regarding *Williams 1* as it did in relation to *Cowen 1* and *Eskilsson 1*. All the representations and evidence submitted by Tobii during the inquiry can be placed before the Tribunal without the need for *Williams 1*.

58. Further, in the CMA's submission, Williams 1 is entirely unnecessary because the matters covered by Williams 1 are well within the expertise and experience of the Tribunal as a specialist tribunal. Tobii's economic arguments are raised in the NoA and can be made by way of Counsel's submissions.
59. In so far as Williams 1 contains economic arguments that are not new although glossed, the CMA referred to material that was excluded in *Somerfield* and *Celesio* because it had been glossed and argued that economic arguments that had been put before the CMA which are glossed in Williams 1 should not be admitted.
60. The CMA considered that it is difficult to extract from Williams 1 which economic arguments are new, glossed and old. If Williams 1 is admitted, there is necessarily going to follow an exercise to parse Williams 1 to work out the parts that are unnecessary because they simply refer to material that was before the CMA and those points can be made by way of submission, the parts that are gloss and therefore impermissible, and the parts which are new.
61. For the same reasons advanced regarding Cowen 1 and Eskilsson 1, the CMA argued that Tobii will not suffer any material prejudice if Williams 1 is disallowed but admitting Williams 1 risks real prejudice to the CMA and the wider public interest. Particularly in relation to Williams 1, the CMA will feel compelled to adduce its own expert evidence in response.
62. The CMA submitted that it would not be appropriate to admit Williams 1 as the stated purpose of Williams 1 is to argue "*that no reasonable authority could have reached the decision that the CMA did in its Final Report*". The question of rationality is a matter for the Tribunal, not expert opinion, and these aspects of Mr Williams' report is akin to a merits challenge, not an application for judicial review.
63. The CMA further submitted that parts of Williams 1 relate to factual matters that do not require expert evidence and can be made by way of submission.

64. Finally, the CMA argued that Mr Williams does not come to these proceedings as a “*fresh and transparently independent*” expert. Since he acted for Tobii during the inquiry, he is “*more involved in the dispute and less dispassionate than one would expect or wish an independent expert to be*” (HCA [6(i)]).

## **E. THE TRIBUNAL’S ANALYSIS**

65. The context of Tobii’s substantive application is important. It is a merger appeal brought under s.120 of the 2002 Act. The principles of judicial review confine the nature and scope of scrutiny by the Tribunal to the process undertaken in – not the merits of – the CMA’s decision-making, and the Tribunal is under an obligation to determine merger appeals as expeditiously as possible. These are key factors that impact on the Tribunal’s assessment at the case management stage of the proceedings as to what evidence is required to deal with Tobii’s s.120 Application justly and at proportionate cost.

### **(1) Witness Statements**

#### **(a) Cowen 1**

66. The purpose of Cowen 1 is said to be “*in order to direct the Tribunal’s attention to particular documents and correspondence in support of the Grounds for Review set out in the NoA*”. It is structured according to the various grounds in the NoA and contains some cross referencing to the Final Report, Eskilsson 1 and Williams 1. Paragraphs 1 to 42 of Cowen 1 contain an account of correspondence between Tobii and the CMA during the CMA’s Phase 2 inquiry, while paragraphs 43 to 110 of Cowen 1 sets out Mr Cowen’s interpretation of case law, the European Commission’s *Notice on market definition for the purposes of Community competition law* and the CMA’s *Merger Assessment Guidelines* (OFT1254, September 2010) and *Good practice in the design and presentation of customer survey evidence in merger cases* (CMA78, May 2018), criticisms regarding the CMA’s assessment and reasons why Tobii needs disclosure from the CMA of particular documents. There is no clear demarcation in Cowen 1 as to which points are not new in substance and which are.

67. Ordinarily in appeals before the Tribunal, which include applications pursuant to s.120 or s.179 of the 2002 Act, witness statements provided by the applicant's solicitor are relatively uncontentious as they set out the history and background of the application. In so far as paragraphs 1 to 42 of Cowen 1 demonstrate the correspondence that was exchanged between Tobii and CMA during the inquiry and what material was before the CMA during the inquiry, it is not new material and the Tribunal permits Tobii to adduce it.
68. In so far as the rest of Cowen 1 contains material that is new in substance, it does not show what evidence was before the CMA during the inquiry. The arguments do not relate to a jurisdictional issue of fact and, although Cowen 1 alleges that the CMA has acted unreasonably, it does not allege that the CMA's decision was tainted by misconduct. Consequently, in so far as paragraphs 43 to 110 of Cowen 1 contain new material, they do not meet the *Powis* test and, therefore, are not admissible in the context of an application for judicial review pursuant to s.120 of the 2002 Act.
69. With regard to the material in the rest of Cowen 1 that is not new in substance, the Tribunal accepts the general observations made by the CMA regarding its content. Paragraph 7.61 of the Guide explains in relation to witness statements that:
- “As regards witnesses of fact, a witness statement should simply cover those issues, but only those issues, on which the party serving the statement wishes that witness to give evidence in chief. Thus it is not, for example, the function of a witness statement to provide a commentary on the documents in the case files, to set out quotations from such documents or to engage in matters of argument.”
70. In the Tribunal's view, paragraphs 43 to 110 of Cowen 1 in particular go into argument and opinion, which repeat arguments that are already set out in Tobii's NoA. They do not elucidate but go beyond the function of a factual witness statement and the factual evidence necessary to ensure the relevant evidence is put before the Tribunal. It is not appropriate or necessary for such arguments to be made in Cowen 1 and the Tribunal can decide the s.120 Application fairly without those paragraphs.

71. Tobii will not suffer prejudice by the exclusion of the rest of Cowen 1 as almost all of the arguments in paragraphs 43 to 110 of Cowen 1 are set out extensively in Tobii's NoA and, in so far as this results in the exclusion of the Cowen Exhibits, the Tribunal permits Tobii to provide a short witness statement that exhibits those documents.
72. The Tribunal does not accept Tobii's suggestion to leave it to the hearing of the s.120 Application to assess whether any parts of Cowen 1 should be excluded as this would prejudice the CMA, since the CMA will feel obliged to put in some witness statement in reply. This will also elongate proceedings and does not assist in the expeditious determination of the s.120 Application, contrary to the governing principles in Rule 4 of the 2015 Tribunal Rules.
73. Accordingly, paragraphs 43 to 110 of Cowen 1, which contain a mixture of old and new material, commentary, opinion and legal argument, are excluded.

**(b) *Eskilsson 1***

74. The purpose of Eskilsson 1 is said to be "*in order to inform the Tribunal of (i) the business and products of Tobii ... and (ii) the remedy proposals that Tobii made to the [CMA] and why these were a proportionate and effective remedy to the [SLC] concerns identified by the CMA, both in its Provisional Findings ... and its Final Report*". Paragraphs 1 to 39 and 43 of Eskilsson 1 contain an account of the Tobii group of companies, products and sales data, while paragraphs 40 to 42 and 44 to 81 set out Mr Eskilsson's views of the Smartbox business and Tobii's remedy proposal. Again, there is no clear demarcation between what material in Eskilsson 1 is not new in substance and what is.
75. Although the Final Report sets out the various Tobii products, the Tribunal considers paragraphs 1 to 39 and 43 of Eskilsson 1 where Mr Eskilsson provides a background and describes Tobii's products helpful and should not be excluded. These paragraphs provide the Tribunal with a better understanding of what the products are than from reading the Final Report.

76. Without going into a paragraph-by-paragraph and line-by-line exercise to identify those parts within paragraphs 40 to 42 and 44 to 81 of Eskilsson 1 that are new in substance, the Tribunal is satisfied from reading Eskilsson 1 that, to the extent that there is new material in paragraphs 40 to 42 and 44 to 81 of Eskilsson 1, it does not satisfy the *Powis* test and, therefore, is inadmissible.
77. In our view, the substance of the rest of paragraphs 40 to 42 and 44 to 81 of Eskilsson 1 comprises repetition of information and arguments that are already present in other documents such as the NoA, adds a gloss and commentary in a way that resembles a contentious submission, or expresses Mr Eskilsson's opinion or emotion regarding the CMA's decision. The Tribunal does not find this helpful. The said paragraphs are not necessary for the Tribunal to fairly determine Tobii's s.120 Application.
78. The Tribunal is not convinced by Tobii's suggestion that the Tribunal should admit the whole of Eskilsson 1 now and leave it to the hearing of the s.120 Application to assess its weight. Doing so would prejudice the CMA because the CMA will feel obliged to put in some witness statement and reply to answer to the points of contention in Eskilsson 1. This would elongate proceedings and does not assist in the expeditious determination of the s.120 Application, contrary to the governing principles in Rule 4 of the 2015 Tribunal Rules. On the other hand, Tobii would suffer no prejudice if paragraphs 40 to 42 and 44 to 81 of Eskilsson 1 are excluded because by and large the points made in those paragraphs are made comprehensively in the NoA. Further, to the extent that any of the Eskilsson Exhibits are excluded as a result, the Tribunal permits Tobii to put in a short witness statement exhibiting those documents.
79. Accordingly, paragraphs 40 to 42 and 44 to 81 of Eskilsson 1, which contain a mixture of old and new material, commentary and opinion, are excluded.

**(2) Expert Report**

80. By way of preliminary observation, the Tribunal usually does not admit new expert evidence in a judicial review of a CMA merger decision, but such

evidence can be admitted where appropriate and necessary for the fair resolution of the application for review.

81. The purpose of Williams 1 is said to be “*to specifically consider, from the perspective of an economist, the CMA’s evidence; its approach to evidence gathering; and the implications of this to the questions pertinent to the merger clearance decision in Tobii/Smartbox*”. Having read Williams 1, the Tribunal’s view is that it comprises a mixture of a) points made before the CMA during the inquiry, b) a gloss with further arguments on points already dealt with in the past before the CMA, and c) to a limited extent new points. Overall, Williams 1 largely contains arguments that were put before the CMA and does not contain a lot of new material. However, there is no clear demarcation in the structure or presentation of points within Williams 1 as to which are old, glossed or new.
82. Again, the Tribunal rejects Tobii’s suggestion that it should leave it to the hearing of the s.120 Application to assess the admissibility, weight and value of Williams 1. Although that approach can be used in some cases, it is not a pragmatic approach for merger appeals because of the uncertainty of what is going to be considered and not considered by the Tribunal and that is prejudicial to the CMA. In both the *Somerfield* and *Celesio* cases, which Tobii relied on, much of the expert evidence was eventually either not relevant or not relied on at the final hearing, or not considered by the Tribunal (see *Somerfield* [4] and [181] and *Celesio* [58] and [78]). No doubt as part of the preparation for the trial, time and costs would have been expended in dealing with such expert evidence. Accordingly, the Tribunal considers that it is in accordance with the governing principles under Rule 4 of the 2015 Tribunal Rules not to defer its decision regarding the admissibility of Williams 1 to the hearing of the s.120 Application.

**(a) Old material**

83. In determining whether to grant Tobii permission to adduce the material in Williams 1 that is not new in substance, the Tribunal takes into consideration the factors set out at Rule 21(2) of the 2015 Tribunal Rules and the case law referred to above. In striking a balance, the Tribunal is aware also of the factors

summarised in Malek (ed) *Phipson on Evidence* (19<sup>th</sup> edn, 2018) paragraph 33-36, page 1210, in particular, the extent to which the expert evidence is likely to assist in the resolution of the issue and the effect that the introduction of the expert evidence would have on the management of the case in terms of delay.

84. In respect of the old material in Williams 1, the Tribunal does not consider it necessary for economic arguments that had been put before the CMA to be replicated or summarised in a single expert report for Tobii's s.120 Application. In particular, some parts of Williams 1 summarise economic arguments made to the CMA whereas the contemporaneous economic reports and documents that were put before the CMA contain a lot more detail. The Tribunal's preference is to work from the contemporaneous economic material. Accordingly, Williams 1 is not necessary for the Tribunal to understand the issues or arguments in the economic material that was before the CMA.
85. The Tribunal rejects Tobii's explanation that Williams 1 is a constructive way to present up front with detail the economic arguments that it will rely on at the hearing of the s.120 Application. The CMA had Tobii's economic arguments before it during the inquiry and a significant portion of the Final Report seeks to respond to them. Williams 1 does not assist with understanding Tobii's economic arguments.
86. Tobii's NoA is well-drafted and extensive. Williams 1 is not necessary for the Tribunal nor the CMA to understand Tobii's NoA, including the factual issues which are set out comprehensively in the NoA.
87. The Tribunal rejects the CMA's contention that Mr Williams lacks independence because he acted for Tobii during the inquiry. The Tribunal considers that Mr Williams is an experienced professional who is mindful of his professional duties and obligations.
88. If the Tribunal grants Tobii permission to adduce Williams 1, it would, as a matter of fairness, allow the CMA to instruct its own expert and adduce it. This would be unsatisfactory as it will result in increased costs and delay to when the

s.120 Application can be heard and the length of the hearing, which is contrary to the governing principles in Rule 4 of the 2015 Tribunal Rules, and it would add little value to the resolution of the s.120 Application since Tobii's economic arguments are already reflected in the material that was before the CMA during the inquiry. Williams 1 is not necessary to fairly resolve Tobii's s.120 Application.

89. The Tribunal does not consider that Tobii will suffer any prejudice if Williams 1 were excluded as it is largely not new and Tobii can make its case without Williams 1. Further, the Tribunal permits Tobii to provide a short witness statement to exhibit the Williams Annexes.
90. Accordingly, in so far as Williams 1 replicates or summarises economic arguments that were put before the CMA during the inquiry, it is excluded.

***(b) Glossed material***

91. In its skeleton argument, the CMA submitted that paragraphs 62 to 82 of Williams 1, which advance a number of detailed criticisms of the CMA's customer questionnaire, contain criticisms which are new even though Tobii had criticised the questionnaire during the CMA's inquiry; and paragraphs 120 to 126 of Williams 1, which advance detailed arguments on the consistency between the CMA's diversion ratios and other evidence on the closeness of competition, contain arguments that expand upon those which were put to the CMA during the inquiry. With regard to points like these in Williams 1, the Tribunal's view is they are not wholly new arguments but a gloss as they present Tobii's economic arguments in a different way to how they were put before the CMA during its inquiry. Such glossed arguments go beyond elucidation and, therefore, are of little value or assistance to the Tribunal in understanding the arguments that were put before the CMA and in determining the issues in the s.120 Application.
92. Accordingly, in so far as Williams 1 glosses economic arguments that were put before the CMA during the inquiry, it is excluded.

(c) *New material*

93. In respect of the points in Williams 1 that are new, Tobii accepted in its skeleton argument that the points made in part C, paragraphs 144 to 160, of Williams 1 regarding the CMA's reliance on customer questionnaires are new and explained that it was not until the CMA adopted its Final Report that Mr Williams could understand or evaluate the extent to which the CMA had relied on its market questionnaire and the implications of this for its finding on market definition and SLC. The Tribunal does not take the view that Tobii is attempting to "game" the system. On the basis of the submissions made at the CMC, the Tribunal is not satisfied either such evidence is necessary for fairly resolving Tobii's s.120 Application or that the s.120 Application was the first opportunity Tobii had to put these economic arguments before the CMA as they were foreshadowed in the CMA's Provisional Findings. If there was any unfairness in which this aspect of the CMA's reliance on consumer questionnaires was dealt with in the Final Report, then Tobii can raise this as part of their s.120 Application.
94. The new points in Williams 1 do not satisfy the *Powis* test nor the *Lynch* extension. They do not show what material was before the CMA, do not concern a jurisdictional issue of fact, nor do they allege that the CMA's decision was tainted by misconduct. Neither do they comprise explanations of technical terms, which in any event a specialist Tribunal as this does not require.
95. Accordingly, in so far as Williams 1 contains new economic arguments that were not put before the CMA during the inquiry, this material is excluded.

**F. CONCLUSION**

96. For the reasons set out in this ruling, the Tribunal unanimously excludes from evidence paragraphs 43 to 110 of Cowen 1, paragraphs 40 to 42 and 44 to 81 of Eskilsson 1 and refuses permission to adduce Williams 1.
97. The Tribunal grants Tobii permission to exhibit in a short statement the documents in the Cowen Exhibits, Eskilsson Exhibits and/or Williams Annexes.

Hodge Malek QC  
Chairman

Paul Dollman

Derek Ridyard

Charles Dhanowa O.B.E., Q.C. (*Hon*)  
Registrar

Date: 10 October 2019