IN THE COMPETITION APPEAL TRIBUNAL

Case No. : 1334/4/12/19

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

18-19 February 2020

Before:
The Honourable Mr Justice Roth (President)
Sir Iain McMillan CBE DL
Professor Michael Waterson
(Sitting as a Tribunal in England and Wales)

BETWEEN:

Ecolab Inc.

Applicant

v

Competition and Markets Authority

Respondent

A P P E A R AN C E S

Mr Brian Kennelly QC and Mr Paul Luckhurst (On behalf of Ecolab)
Mr Rob Williams and Mr Ben Lask (On behalf of the CMA)

Digital Transcription by Epiq Europe Ltd
Lower Ground 20 Furnival Street London EC4A 1JS
Tel No: 020 7404 1400 Fax No: 020 7404 1424
Email: ukclient@epigglobal.co.uk

Wednesday, 19 February 2020

(10.00 am)

(In open session)

THE PRESIDENT: Just to be clear, we are in open court here.

Housekeeping

MR WILLIAMS: Good morning, sir and members of the tribunal. Just to deal briefly with a couple of matters of housekeeping. Sir, you asked me to look into the grey redactions in the report. The explanation for those redactions is as I explained yesterday, which is that it is third party confidential material, and it is in a different colour because it was unredacted as part of the provision of the defence.

THE PRESIDENT: Yes.

MR WILLIAMS: So the colour distinguishes it in that way.

You also asked us about some highlighting in the corrections to the final report at tab 3. I think -- I'm sorry if there was any confusion about that. That highlighting is meant to show the changes from the final report. Those are not confidentiality markings. They are there to assist the tribunal in understanding what has changed in the right-hand column relative to what has changed in the left-hand column. I'm sorry that the yellow highlighting is serving two purposes there, but that's the explanation for that.

THE PRESIDENT: Yes, and none of that is actually --

MR WILLIAMS: You can see that when you look at the equivalent paragraphs in the final report.

THE PRESIDENT: Yes. Well, some of it is, perhaps, but we can work it out, I would have thought. Yes, thank you.

MR WILLIAMS: So, sir, I will start with ground 1.

THE PRESIDENT: Before that, you were going to look into also what was done with the

non-confidential summary.

MR WILLIAMS: I'm sorry, we did, and we have communicated with Mr Kennelly about that overnight. I will deal with that in the course of the submissions.

THE PRESIDENT: Yes, you will come to it in due course.

MR WILLIAMS: My plan is to stay in open court for as long as possible. If we reach a point where the tribunal wants to hear from me about matters which are confidential, then obviously we can deal with that at the time.

THE PRESIDENT: Yes.

Opening submissions by MR WILLIAMS

MR WILLIAMS: So ground 1. The tribunal has seen that ground 1 is much pared back relative to the case that was advanced in the notice of application. The case I am now meeting is directed to the inclusion of small customers in the SLC finding.

The submission I am going to develop has two parts. The first is that the findings which the CMA actually made about small customers were rational, evidence-based findings which are not open to challenge on judicial review principles and, really, the challenge which Ecolab is advancing is re-arguing the evidence about small customers on the merits.

The second point is that there is a basic flaw in the case Ecolab has advanced under ground 1, which is that it treats competition for small customers as if it were a discrete issue on which the CMA was obliged to reach a discrete and binary conclusion, and that is wrong, given the way the CMA defined the market and the way in which competition for small customers was analysed. We say that the CMA was entitled to make findings about the impact of the merger on small customers within the framework which it adopted and to treat those points as contributing to, and supporting, its SLC finding, and there is no legal flaw in that approach.

Before I develop those submissions, I just want to be clear about the target of the challenge: which of the CMA findings are at issue? The challenge is directed to paragraphs of two types. Some are paragraphs which describe the finding of the SLC in general terms, and, sir, you identified paragraph 9.2 as an example of that yesterday.

Then there is paragraph 7.203. I'm not going to ask the tribunal to turn it up now, but if one looks at how the challenge is put in the notice of application, which is paragraphs -- perhaps it would help for the tribunal to see it.

THE PRESIDENT: The notice of application is in the core bundle, tab 5.

MR WILLIAMS: Yes. It starts at paragraph 58.

THE PRESIDENT: Paragraph 58 on page 22.

MR WILLIAMS: Paragraph 58 is the overarching paragraph dealing with scope of SLC which then covered international customers as well. You can see 58 is a challenge to paragraph 7.203:

"The final report states that this finding encompasses the market 'as a whole' ..."

That's 7.203. Then 59, no rational basis for including them.

If you turn over to 65, skipping out the section on international customers, the first few paragraphs under that heading set out some of the evidence relating to small suppliers and small customers, and then 69 starts the critique. You can see from, really, the footnotes on page 26 that the predominant focus of this challenge is on 7.203.

THE PRESIDENT: Yes.

MR WILLIAMS: That's what the critique is directed to.

THE PRESIDENT: Yes.

MR WILLIAMS: Sir, I will show you that paragraph in its context in the course of my submissions, but I think you probably picked up yesterday that that is the conclusion of a section of the decision which is about a particular topic, that is to say, the extent of the constraint which small suppliers impose on the merging parties and the constraint

which small suppliers could be expected to impose post merger.

We, for our part, agree with Ecolab that 7.203 is where the CMA gave its reasons for rejecting Ecolab's argument that there is no SLC for small customers, but it is important to see the point in its proper context. It is not a discrete conclusion about competition for small customers as an issue in itself; it is not an SLC finding for small customers. It is one strand of this topic. That is to say, the constraint imposed by smaller suppliers, which is, in itself, one strand of the overall SLC assessment.

It related back to evidence set out earlier on in the report, which I will show the tribunal.

With that introduction, I would like to show the tribunal the shape of the CMA's analysis on these points because Mr Kennelly did show you various paragraphs of the report, but he showed you them not in the sequence in which they are presented in the report and, in my submission, it is helpful to see them in sequence.

The place to start is "Market definition". That section starts at paragraph 6.1. The analysis starts at 6.2. Paragraphs 6.2 to 6.6 identify the issues which are considered in the analysis of market definition. I don't need to take you through those issues, but you can see at 6.6 the CMA frames the question, should the market be segmented by 6.6(b), customer size? The consideration of that issue starts at 6.26 on page 24. If I could ask the tribunal to look at paragraphs 6.26 and 6.27 and the footnote at the bottom of that page, please.

Sir, that goes to a point which the tribunal saw yesterday and which you will see in just a minute again, which is the continuum point. There are various different thresholds in practice. Both of the companies used different thresholds. The classification of customers is not binary, and we will see that picked up again in 6.31 in a minute.

6.28 makes the point that different customers of different sizes have different requirements. But in 6.29, the CMA reaches the conclusion that there is no separate market for smaller customers, essentially because of various supply side substitutability. But

notwithstanding that, one can see that the same suppliers supply large and small customers.

You saw the next two paragraphs --

THE PRESIDENT: That's true, but the same suppliers, large suppliers --

MR WILLIAMS: I beg your pardon, large suppliers supply large and small customers.

THE PRESIDENT: Yes.

MR WILLIAMS: You saw 6.30 and 6.31 yesterday. I won't ask you to re-read them now. But the important points are that the CMA has used the threshold of £50,000 for practical reasons. It is very clear that that does not represent a bright line between large customers and small customers, and so the binary idea of a small customer versus a large customer is not really meaningful in the real world, it is not really meaningful economically, it is just a way of presenting the results.

THE PRESIDENT: Well, it reflects a bit the way businesses in the market seem to see it.

MR WILLIAMS: That's right. But it is not reflective of a bright line between two different categories of customers. So one wouldn't say that competition for a customer that is 1 or 2 per cent below that threshold operates materially differently from a customer that is 1 or 2 per cent above that threshold.

Sir, you have picked up the point that there is an asymmetry in the way the market works, which is that small suppliers don't compete for larger customers, but larger suppliers do compete for smaller customers.

Then the CMA deals with international customers as a matter of market definition. I don't need to show you that. The point is, again, one of supply side substitutability.

We then move into competitive effects in section 7. At 7.4, the CMA introduces a section dealing with market shares. I just wanted to pick this up at 7.16 to 7.18. The tribunal may or may not have seen these paragraphs before, but they deal with an important point which sets the scene for the CMA's analysis of competitive effects. The basic

point made is that, because there is differentiation, the CMA doesn't think it is appropriate to proceed on the basis of top-down market shares; it thinks it's important to get into the question of how competition actually works in the detail, and that's what one sees in the competitive effects assessment.

PROF WATERSON: This is differentiation in service, not in product?

MR WILLIAMS: Yes. We would agree with the way that issue was explained in the exchange yesterday, Professor Waterson.

That point, really, permeates the way the CMA carries out its analysis of competitive effects and the focus on closeness of competition, and obviously it sounds a significant health warning when one is looking at total aggregate market shares of small suppliers, for example. That simply isn't the way that the CMA analysed competition.

After the discussion of market shares, there's a section about customer behaviour, starting at 7.24 and 7.25.

THE PRESIDENT: There's differentiation in service -- sorry to go back -- but also a certain specialisation, to some extent, by these three categories of customer, I think, or three areas, as shown in table 2, that some are more focused on the beverage sector, and so on. So there is also that, so that an overall market share is not all that meaningful.

MR WILLIAMS: Exactly, sir, yes.

THE PRESIDENT: Yes.

MR WILLIAMS: 7.24 and 7.25. One can see from those paragraphs, sir, that there's a recognition that there is variation across customers, and, importantly, at the end of 7.25 the CMA makes the point:

"We found each party's pool of customers is broadly similar in terms of these characteristics, with the exception of international customers."

If one is thinking particularly about smaller, UK-only customers, the parties both compete for those customers.

The variation in customer needs is picked up in paragraphs 7.28 particularly to 7.30. There is particular focus there on customer size.

Moving on to paragraphs 7.72 and 7.73, this is the detail making good the point at the end of 7.25, which is the comparison of the customer bases. This is the introduction to the section dealing with international customers. Mr Kennelly showed you the findings about international customers yesterday and why they are in a different category, why they were analysed differently. I won't take you back through that. The short point is that Holchem doesn't compete for international customers, and so there is a conclusion at 7.82 that it seems likely that Holchem isn't, and will not be in the foreseeable future, a strong constraint for international customers.

In essence, the CMA did feel that it could draw a sufficiently clear bright line around international customers and identify that the merger wouldn't result in a loss of competition for those customers because of the particular focus of Holchem, and that is in contrast to the position in relation to small customers, as you've seen, where there is no bright line. The CMA is clear that there is no bright line.

Mr Kennelly said yesterday that the line between international customers and UK-only customers is blurry because one moved back and forth between the two. But that isn't the point, sir. The point is that, for as long as a customer is an international customer, Holchem can't supply them. That is not the same as the position in relation to small customers where one is dealing with a continuum of customers and it not being clear where a customer sits at a particular point in time. So the blurriness is of a different type.

So at this point, international customers drop out of the SLC assessment and, when I talk about large and small customers, or larger and smaller customers, I'm talking about UK-only customers, even if I don't say that every time, sir.

There is more about the size of the parties' customers at 7.84 to 7.87. I think you were taken

to this yesterday. As I say, this is now the detail underlying 7.25. So, in summary, before engaging in its competitive effects assessment, the CMA has carried out a careful analysis of the different categories of customers, their status in the merging parties' businesses and the nature of their needs and how that affects competition, and that all informs the competitive effects assessment.

Moving into the detail of the competitive assessment, we can then see differentiation in the consideration of large customers and small customers. There are, as the tribunal has seen, various different heads of analysis. I'm not obviously going to go through the assessment as a whole, but I do want to highlight the evidence which we say is pertinent to the challenge.

Mr Kennelly picked up paragraph 7.109 on page 57. The tribunal has no doubt seen this, but this is part of an analysis of what is called gain and loss data. So these are records kept by the parties in relation to their accounts and where they gain accounts from and where they lose accounts to and where they regard the threat as coming from.

We are here dealing with Holchem's gain and loss data. There is a previous section dealing with Ecolab's gain and loss data, starting at 7.101. Mr Kennelly drew your attention to the sentence:

"Thus to the extent that there is any competitive constraint", in 7.109. We fully accept that this is one strand of evidence which shows more competition for small customers than for large customers. It is part of the jigsaw and it was treated as such.

The next topic is tender analysis and, for the reasons that were ventilated yesterday, that doesn't illuminate the issue that we are focusing on; that is to say, small customers.

Following that, one comes to customer evidence, at 7.139, page 65, and this is more important. 7.139 is an introductory conclusion, if that is not a contradiction in terms. You can see from 7.141 what the CMA dealt with -- large and small customers. Sorry, I should say questionnaire, rather than survey.

In this section, there are minor errors, which I will show you separately, if I may. I am coming to that, but I think it is helpful to stay in the report for now.

7.143 relates to the Survation questionnaire. Mr Kennelly took you to bits of that yesterday. You can see that 7.143 -- that's a separate source of evidence from the CMA's questionnaires. 7.143 contains a sort of health warning about some aspects of that questionnaire. In 101, the CMA comments on whether that should be regarded as a survey or not. But the CMA does, itself, refer to and rely on the Survation questionnaire at various points. It is not a blanket rejection.

So 7.144 explains what this section is about. It considers responses to the questionnaires which provide evidence on the closeness of competition, and, in particular, the best alternative suppliers listed by customers and customer views on the merger:

> "We also considered responses on the previous suppliers ... although we note that in some cases respondents ... have not been in post for long enough ... and were, therefore, not in a good position to comment on this."

Generally speaking, the evidence of previous suppliers is more thin than the responses to the questionnaires on best alternatives.

In 7.145:

"We highlight responses separately for large and small customers for ease of reference ...", and for the additional reasons, and I think Mr Kennelly showed you that yesterday.

So 7.146 explains the question, the issue being analysed in this section, if I could ask the tribunal to read that. That's an important point. It explains what the issue is. The issue is about who is constraining the existing supplier. They may not be the existing supplier, but who is constraining the existing supplier, because they are the supplier's best alternative.

THE PRESIDENT: The customer's best alternative.

MR WILLIAMS: I'm so sorry, the customer's best alternative.

I'm going to go through this reasonably carefully, because this is the key evidence, really, bearing on 7.203. 7.147, this is the evidence for small Ecolab customers most likely to name Holchem as their best alternative, so two merging parties very much in focus there.

This is consistent, really, with the general picture with the CMA's overall finding that Holchem is Ecolab's closest competitor. That's where the strongest constraint on Ecolab comes from.

If you turn over the page, you see figure 14, which reflects that in graphical form, and this is the graph which Mr Kennelly said yesterday, "We're putting Holchem on one side". With great respect to him, one can't put Holchem on one side. As explained in 7.147, Holchem is consistently identified as the best alternative to Ecolab, so that is the key piece of evidence to emerge from this if one is looking at who is constraining existing suppliers and what will be lost as a result of the merger.

THE PRESIDENT: I'm just trying to follow -- give me a moment -- the table. If it is dark blue, is that their first alternative? Is that what it means?

MR WILLIAMS: It's their best alternative, yes.

THE PRESIDENT: If it is light blue, it is their second best? Is that what it means? The 1, 2, 3.

MR WILLIAMS: I had thought so, because if you look at the note underneath, it says no Ecolab customers listed more than three alternative suppliers. I will be told if -- that is right, sir, yes.

THE PRESIDENT: The number of times listed, that's just -- when you look at the table, it is just 8, is it?

PROF WATERSON: Yes, I think that's right because there aren't many customers in total that they received a questionnaire, a completed questionnaire, from.

THE PRESIDENT: That's what's puzzling me, because 7.141 says "150 small customers

provided ..." but of course, they may not be -- these are small customers generally, not just Ecolab and Holchem small customers. That's it. I see. Yes. Those 150 will be customers of other suppliers as well.

MR WILLIAMS: Yes.

PROF WATERSON: I notice that there's no figure for large, UK Ecolab customers.

THE PRESIDENT: Is that figure 15?

PROF WATERSON: No, that's -- I think figure 15 is the Survation survey, so there is no corresponding CMA survey.

MR WILLIAMS: I'm just going to turn my back for a moment and make sure we have answered the tribunal's question.

These are only Ecolab customers. The 150, I think, at the moment, are Holchem and Ecolab customers.

THE PRESIDENT: Only Holchem and Ecolab?

MR WILLIAMS: I think so, but I will confirm that.

THE PRESIDENT: Then that's slightly odd, because we have 24 in this table, plus 9 who didn't have an alternative, so that's 33, and then --

MR WILLIAMS: I think, at the moment, the answer may be that not every customer answered every question, but I think I would like to check that.

THE PRESIDENT: We can see that, because if you look at the note under the table, 24 customers total, figure excludes 9 who listed no alternatives. So I think that's 33 Ecolab small customers in total; and Holchem small customers is 109.

MR WILLIAMS: These are small only.

THE PRESIDENT: Customers total excludes 49. So that does sort of work, doesn't it? Although you end up with actually more than 150.

PROF WATERSON: Well, they're allowed to choose more than one alternative.

THE PRESIDENT: Yes, or they might be customers of both. Yes. But the survey -- or

questionnaire, it isn't really a survey, is it? The questionnaire was to customers of the parties, not to other?

MR WILLIAMS: Yes, that's right, sir. It is explained in appendix B, if the tribunal wants to look at that later on.

THE PRESIDENT: Yes. Thank you. So what this shows, then, is not many responses for Ecolab small customers, but of the 24 who did specify an alternative, I think, for eight, the first alternative was Holchem; for three, it was Diversey; and, for four, it was somebody else. Is that right?

MR WILLIAMS: Yes.

THE PRESIDENT: That's what it's saying, yes.

MR WILLIAMS: The corresponding evidence for Holchem customers is considered in paragraph 7.150. The table is figure 17.

THE PRESIDENT: That's a much bigger customer base, yes.

MR WILLIAMS: One can see that Diversey is named most often, but not by very much, and then one sees Ecolab.

THE PRESIDENT: Yes.

MR WILLIAMS: Again, both more often than "other". Now, "other" has to be read in conjunction with the small suppliers who are broken out separately. This is a slightly more complicated picture to interpret.

THE PRESIDENT: Murphy's, on this one, and DBM count as small suppliers, don't they?

MR WILLIAMS: They are, yes.

THE PRESIDENT: So, on that basis --

MR WILLIAMS: If one were aggregating them, then the picture would look a bit different. But, of course, the aggregation is an aggregation of a number of different suppliers. If one is looking at the question of which individual suppliers are important to customers, one can't aggregate all the small customers up and treat them as a block.

What one can see from both 7.147 and 7.150 and the two figures is that large suppliers, including, to a significant extent, the merging parties, are very often named as small customers' best alternatives. That is part of a wider picture in which large suppliers generally are an important constraint for small customers. So this is one strand of the evidence, but it is an important strand.

Moving on to 7.154, one deals with previous suppliers. The evidence here, one can see from 7.155, is quite limited. The same is true of 7.156, for Holchem's small suppliers.

I think it is most helpful if I deal with 7.156 in the context of the corrections because a point is taken that there's been a material error in this paragraph which you can't see from here.

THE PRESIDENT: Can you draw much -- given the small response rate on this question, can one draw any conclusions, really?

MR WILLIAMS: When one gets to 7.203, the emphasis is on the best alternative evidence, which you've been looking at.

THE PRESIDENT: We probably needn't pay much attention.

MR WILLIAMS: It is only in focus because Mr Kennelly has invited the tribunal to look back at all of these other strands.

THE PRESIDENT: Yes. He says there isn't evidence to support the conclusion, and if you accept that the previous supplier section doesn't really amount to significant evidence --

MR WILLIAMS: The challenge is to 7.203, and the reliance in 7.203 is on the best alternatives evidence.

THE PRESIDENT: Yes.

MR WILLIAMS: It is a question of weight, sir, as you say, but, in fact, the evidence in relation to previous suppliers, when one looks at it, is actually consistent with the picture one sees elsewhere. So, for example, in 7.155, the most commonly named supplier was Holchem. So I'm not inviting the tribunal to treat that as a heavily

weighty factor by itself, but it is certainly consistent with the other evidence.

The picture is more or less the same in 7.156, even when corrected.

If you then move on to 7.171, sir.

PROF WATERSON: When are you going to talk about the corrections?

MR WILLIAMS: I was going to deal with it when I deal with Ecolab's arguments, but I can take you to that now if that is most helpful, so you can close that section off.

PROF WATERSON: Yes, it seems a bit odd to talk about 7.156 if there are errors in the numbers there.

MR WILLIAMS: We will do that. It is at tab 3 in the same bundle. You can see that there were minor corrections to the numbers in 141 and 150 as well, and an additional supplier is named in 155.

7.156 is Holchem's small customers' previous suppliers. You can see what's happened in the analysis there from the changes that are made in the column on the right-hand side. But the conclusion stands, even though there are changes to the detail. The conclusion is that, in the main, small customers had previously used Holchem, Ecolab, Diversey and Christeyns and, to some extent, this comes back to the point that one can't treat the small suppliers as a block. So two specific smaller suppliers were named by two each, and then, in aggregate, 18 others were listed. But, actually, if one focuses on the number of customers that named a given supplier, far more named large suppliers and a significant number named Ecolab. So the error isn't at all material to the reasoning or the conclusion.

Then going back to 7.171, these are the conclusions on the closeness of competition across all of the different strands of evidence. You can see, first of all, a general conclusion in 171 that the parties are close competitors. 7.172, Holchem is the strongest constraint on Ecolab and Ecolab is one of the three main competitive constraints faced by Holchem in the market. The point I make is that that evidential picture is consistent for

small customers with the picture for large customers. You have seen that.

Then I will move on to remaining competitive constraints, starting at 7.174. First of all, one deals with the large suppliers. We can skip through that. Smaller suppliers are dealt with from 7.191. This discussion I can take a bit more quickly because it draws on the detail of the evidence you have already just seen.

7.196, you can see at (a) -- (a) is the point you already saw at 7.109 which Mr Kennelly drew to your attention, so that point was considered in this context and taken into consideration. 7.197, in my submission, is a summary of what we saw in the best alternatives section and, in my submission, it's a balanced summary and it is unimpeachable.

When you're ready, sir, I want to move to 7.199 next, which is then Ecolab's -- the parties' submission. The parties submit that these responses support the argument that smaller suppliers in aggregate are a significant competitive force in the market. I emphasise the words "in aggregate" because that is consistent with the way in which Ecolab has put this point.

The CMA disagrees, for reasons which aren't pertinent, I don't think -- not of particular pertinence to the issue we are focusing on. If I move to 7.202 and 7.203. Now, you have seen these paragraphs and seen what they say. I won't ask you to read them again now, unless you would particularly like to, sir.

THE PRESIDENT: No.

MR WILLIAMS: What one can see in 7.203 is the original incarnation of this brand of challenge, which is that the parties showed -- these findings show there is no basis for an SLC finding in respect of small customers. The answer is, we, the CMA, have found an SLC in the market, which we defined. Small, UK-only customers are part of that market. They are not in a separate market. They are not even in a market segment which can be carved out. None of that has ever been challenged. So when we say "as

a whole", we are just expressing our finding with reference to the market we have defined, which is what the statutory question invites us to do.

THE PRESIDENT: That includes international customers?

MR WILLIAMS: This is a formalistic point at this stage, sir, which is a complaint about the finding in relation to the market as a whole. The CMA's answer is, well, we are answering the statutory question.

That is separate from the question of what is the evidence relating to particular categories of customers within that market. That's what the CMA then moves on to discuss in the second part of the paragraph.

THE PRESIDENT: All I'm saying is that the first statement, the first part, as you say, is the statutory question, and that would therefore -- that statement will include the international customers because they are in the market as a whole.

MR WILLIAMS: I think the question that's being addressed here is, is there an objection to saying we have found an SLC in the market?

THE PRESIDENT: Yes.

MR WILLIAMS: The words "as a whole" don't really add anything. Ecolab is inviting the CMA to say, well, you've got no basis for including smaller customers. The first point that is made is, we defined the SLC with reference to the market, not in respect of different categories of customers in that market. Essentially, we framed the SLC with reference to the market.

THE PRESIDENT: Yes.

MR WILLIAMS: We emphasise the point, which I won't labour at this stage, that even on Ecolab's case, in circumstances where there is a continuum of customers, an unchallenged finding that there is a continuum of customers, it's difficult to see how the CMA would have broken its SLC down into different brightline categories in the way that Ecolab is suggesting. It is obviously true that the CMA analysed the data for

convenience under two heads, but it doesn't follow that they could identify a discrete category of smaller customers who are immune from any loss of competition. That's contrary to their findings.

So no obligation on the CMA to reach a discrete conclusion about small customers within the framework of analysis it's adopted, and nor is it practically possible to do that. But, as I say, having addressed that point about characterisation of the SLC, the CMA then goes on to deal with the evidence and the submission that the parties aren't constrained by small suppliers and you have seen the evidence in support of the finding that's made there.

Just to reiterate the point, all of Ecolab's emphasis is on how many more small customers are being supplied by small suppliers, but that's not what this finding is about. It is about who is constraining those suppliers that are supplying small customers, who are the best alternatives. There is a finding that large customers are an important constraint in relation to small customers. You have seen the evidence relating particularly to the constraints imposed or the customers that identified Ecolab and Holchem in particular as their best alternatives and, as a result of the merger, that constraint will be lost. That is clearly relevant, salient evidence in relation to the question of whether there is an SLC in the market which the CMA defined.

It isn't evidence of an SLC in itself. It is not treated as such. But the way we put it in the defence is to say that the evidence didn't support Ecolab's submission that the merger could be given essentially a clean bill of health as far as small customers are concerned. There is a clear difference in that regard between small customers and international customers.

THE PRESIDENT: I suppose it could be said that, whereas, for large customers, one of only three alternatives is being removed, so the effect is significant; whereas, for small customers, yes, there's a lessening of competition, but it may not be so significant

because, even if it may be their first alternative or preferable, they have many other alternatives.

MR WILLIAMS: That's one argument, on the basis of the evidence, but there are a number of responses. First of all, I think that way of looking at the case almost proceeds on the basis that one is looking at small customers as a discrete category in themselves, but, in fact, they aren't -- within the market, they are not a discrete category. This is one strand of a loss of competition that is part of the overall loss of competition within the market which has been defined.

The second point, sir, is that this is not a merits review. We are not re-arguing and reinterpreting the evidence. This is a rationality standard. So the question is, was it irrational to make that finding on the evidence and was it irrational to treat it as part of the SLC assessment in this market? The answer, in my submission, to both of those questions is clearly "no".

It is important, of course, not to lose sight of the wood for the trees. We are focusing here on paragraph 7.203 and, indeed, the last sentence of paragraph 7.203. The CMA, of course, accepts that, in its overall SLC assessment, the loss of competition for large customers carried most weight, and that is clear from reading the report as a whole.

THE PRESIDENT: Yes.

MR WILLIAMS: Large customers represent by far the largest part of the parties' revenues, and there's the point you have made, sir, which is that the market is much more concentrated for those suppliers. But none of that is the issue, sir.

The issue is, is there a public law flaw in taking that point at the end of 7.203 into account as part of the SLC assessment? As I said, the finding in itself is supported by evidence, and it is rational to treat it as part of the SLC assessment in this market.

In our submission, part of the reason why this ground should be rejected is because it hasn't really tackled the CMA's findings in the context of the framework which the CMA

adopted. It has tried to break out some sort of discrete finding of an SLC for small customers or for small UK-only customers, and that is not what this is. It is one point within -- one strand of analysis within the finding of an SLC in the relevant market. So what is the case against us? I think you probably have my case broadly in relation to that.

THE PRESIDENT: Yes.

MR WILLIAMS: What we see in the skeleton are a number of points which were pleaded in the reply. In our submission, they are really quite different from the narrow case that's put in the notice of application, and they draw in a whole range of evidential topics into the assessment which go beyond what was said in the notice of application. We haven't fixated on a pleading point, sir, because we say the answer is clear. All of these points are an attempt to re-argue the evidence on small customers on the merits. At this point, it is helpful, I think, to pick up Ecolab's skeleton argument in the core bundle, tab 1. The argument starts at 14. Yes, it is true -- I have made the point that Ecolab and Holchem are focused on large customers. Yes, it is true that smaller suppliers have a significant share of competition for smaller customers. I'm afraid I don't have a proper answer to the question of what that share is, because the market wasn't analysed in that way. We don't necessarily accept the word "huge", but I don't think the language is material.

THE PRESIDENT: No.

MR WILLIAMS: Then, at 16, the CMA did not draw appropriate conclusions from the questionnaire responses. Now, this is a rationality challenge. In my submission, that allegation does pull its punches a bit, but it is clear what Ecolab needs to do in order to vitiate the finding. It needs to demonstrate the finding is irrational. Effectively, this is a re-argument of the evidence that the tribunal has already seen. I'm not going to go through it item by item, save to say that 16(3) notably also leaves Holchem to one side. In the figure you saw, it leaves out the Holchem presence in that data as

the most significant -- sorry, as the best alternative that was named on the largest number of occasions. So it is rather Hamlet without the prince, that paragraph.

I have dealt with the point in 16(2) that the results were materially misstated. I have explained that the change in the detail doesn't affect the conclusion.

16(4) is a challenge to paragraph 7.243. Now, Mr Kennelly showed you this yesterday. I think the thrust of his point is that it says "limited constraints from all other suppliers" without breaking out small customers separately. The short answer to that is, the CMA has reached conclusions in relation to the market. It hasn't broken small suppliers out in that generally expressed conclusion, because it's dealing with the market, but that is merely a conclusion of an extended analysis which goes into the evidence in great detail, in careful detail, which is clear about the different evidence relating to small suppliers, large customers, small customers. So it is just a general conclusion in relation to the market. There's no error in the analysis that underpins it.

You can see, in footnote 3 to that paragraph, the aggregate point again. This footnote uses the word "collectively". I have already dealt with that, that one can't simply aggregate up the small suppliers and exclude focus on exactly how often the merging parties are the best alternative individually. So this is another manifestation of Ecolab's focus on who is supplying, and not on the question the CMA is looking at, which is who is constraining.

The following paragraphs, 17, 18, 19, are, if I may say, sir, more of the same. It is the argument which -- it is drawing out evidence which shows more competition for smaller customers. That isn't the issue. That's not what the tribunal is being asked to decide. The tribunal is being asked to decide if there is a public law error in paragraph 7.203.

Then we come to paragraphs 20 and 21. Now, these are a little bit different. These again point to specific items of evidence relating to competition for small customers on two

particular topics. The first is the extent to which new entrants could expand to constrain the merging parties; and the second is the constraint imposed by unformulated chemicals.

The CMA, again, didn't make specific findings or reach specific conclusions about the extent to which these constraints applied differently for larger and small customers. It's the same point as before: the CMA carried out its analysis in the market which it defined. But these paragraphs are slightly different, because Ecolab did previously challenge those overall conclusions in its notice of application as part of ground 1, and it's withdrawn that challenge to those overall conclusions. What it's now inviting the tribunal to do is to pick through bits of evidence relating to small customers and to re-argue those points without actually challenging the overall conclusion in relation to the market which has been defined. But there isn't a small customer specific finding to target on either point, and, actually, with respect, it's impossible, really, to see in paragraphs 20 and 21 a public law challenge to the CMA's findings. It is conspicuously re-arguing the evidence, but actually it's doing so in a context where Ecolab has actually withdrawn its challenge to the overall conclusion under those headings.

So we say ground 1 is really, at best, an attempt to re-argue the evidence. It is a matter of weight. But there is no proper basis for a challenge on rationality principles.

There was a final strand to Mr Kennelly's arguments yesterday. As I understood it, he said the CMA needed to be clear about the scope of the SLC finding because of the impact it has on other issues, like entry and expansion and particularly remedy. Now, we agree that the CMA needs to explain which aspects of the competitive assessment its concerns relate to and that those reasons will be subject to a public law standard of review. But, in our submission, the finding we made is clear. This isn't a reasons challenge, it is a rationality challenge. Ecolab obviously disagrees with our finding but it has identified the finding and it has challenged it.

THE PRESIDENT: Yes.

MR WILLIAMS: In our submission, that point doesn't help Ecolab, and if what is being said is that the finding needs to be more discrete or more binary for any of the reasons that Mr Kennelly gave, so that it can inform other issues, then we reject that submission for all the reasons I have already given.

So we say ground 1 should be dismissed on the merits. There is no ground for a public law challenge.

There is a further point on ground 1 which is that, even if the tribunal were against me on those submissions, we say that ground 1, in this pared-back form, is actually immaterial to any of the CMA's answers to the statutory questions. Ecolab, I think, doesn't argue that there wouldn't be a finding of an SLC in the relevant market, and we say that, actually, ground 1 doesn't affect the CMA's decision on remedy or its reasoning on remedy. I think the best way to make that submission -- I'm not going to spend significant time on that, sir, but the best way to make that submission is by looking at the CMA's reasoning on remedy when I deal with the remedy grounds of challenge. But the submission will be that nothing in the remedy decision or the CMA's reasoning on remedy is affected by whether small customers are in the SLC or not.

The relevance of small customers in the remedy assessment was in considering the scale of the business that a competitor would need to take on and whether small customers should be transferred or not, and Mr Kennelly went to 10.158, which I will go back to. But the question of scale isn't about whether customers were part of the SLC finding or not, and one can see that because the CMA -- sorry, I should be more precise. The question of scale wasn't about whether the CMA had identified a particular competition concern in relation to those customers. One can see that because the CMA considered small customers in the same way that it considered international customers. I will show you that in due course.

Mr Kennelly made another point yesterday that taking the small customers out of the SLC might affect the assessment of countervailing constraints. I think he mentioned that towards the end of his submissions. But that wasn't really explained. In our submission, it's not a plausible submission anyway, given that the position in respect of large customers would remain completely unchanged. That isn't a point, I don't think, that's been pleaded before --

THE PRESIDENT: Yes, if there was a point, it went over my head. I thought that the -- it is not said there's no SLC because of countervailing which were in error in section 8 in the report.

MR WILLIAMS: Mr Kennelly can perhaps clarify, but I thought he said that if you took small customers out of the SLC, that could affect the CMA's conclusion as to whether there would be sufficient countervailing constraints to mean no SLC arises because your SLC would shrink. I think that's the point he was making.

MR KENNELLY: Yes.

THE PRESIDENT: Are you saying, if you take them out, there's no SLC at all?

MR KENNELLY: Yes. The question is --

THE PRESIDENT: Even for large customers?

MR KENNELLY: It is a materiality issue. So if you remove the small customers from the SLC, the CMA, in looking at the issue afresh, confining the SLC to large customers only, would have to do a fresh countervailing buyer power analysis. Now, one can plainly see how, in the case of small customers, countervailing buyer power may lead to a different consideration than in respect of large customers. But I'm not saying --

THE PRESIDENT: Yes, I see.

MR KENNELLY: That's the submission, which Mr Williams fairly summarised.

MR WILLIAMS: The short point we make, sir, is a theoretical point. You have seen the findings made in respect of large customers. In our submission, it is absolutely clear

that nothing in the submissions made about countervailing constraints could have affected the conclusion that there weren't sufficient countervailing constraints to mean there was no SLC in relation to large customers. So that would then leave the question, well, is there -- could the exclusion of small customers from the SLC affect the decision on remedy, and that's the point I'm going to come back to. But, actually, our primary submission is that you should dismiss ground 1 on the merits.

THE PRESIDENT: Yes.

MR WILLIAMS: That's ground 1, sir. Looking at the time, I should probably carry on for a bit.

THE PRESIDENT: I think so, yes. You can carry on for a bit.

MR WILLIAMS: I will do some introductory remarks on remedy, and perhaps we can break after that.

On paper, sir, there are three distinct grounds of challenge relating to remedy. There is a direct challenge to the CMA's assessment of the ADP; there is a complaint about failure to carry out enquiries under ground 3; and then there is ground 4, which relates to the fallback option.

I hope it is not unfair for me to say that, in Mr Kennelly's submissions yesterday, all of the grounds somewhat merged into one, at least to this extent, the predominant emphasis was on the CMA's failure to make further enquiries in relation to the ADP, either during its investigation or after the final report, as part of the fallback proposal.

Now, I haven't treated Mr Kennelly as having dropped any other part of his case, even if he chose to emphasise those points in his submissions yesterday, and, in fact, a very important point of our answer to the case as a whole is to explain why the CMA's findings in the report are justified and supported by evidence and why no further enquiries were needed in light of those findings.

So if Mr Kennelly's grounds overlap, I certainly don't make any criticism, because our

answers to the grounds overlap as well.

If I can just start by clarifying what the issue is in relation to remedy, in Ecolab's skeleton, the point is put at paragraph 2 -- it might be helpful for you to look at this, actually -- in terms of proportionality. The forced sale is a manifestly disproportionate outcome in light of the limited overlap and area of competitive concern, and Ecolab's alternative remedy proposals.

Sir, in assessing remedies, proportionality principles come into play at two levels: first, as between equally effective remedies, the CMA will accept the least onerous remedy. And, secondly, the CMA will consider whether a remedy is disproportionate to the SLC and its adverse effects.

Very exceptionally, the CMA could conclude that the cost of remedying an SLC outweigh its benefits. But those are extremely rare cases and there is no such issue in this case.

When Ecolab refers to proportionality, it is referring to proportionality in the former sense, that is, the least onerous of equally effective alternatives. It says its own proposal was less onerous than the divestiture of Holchem Laboratories and hence more proportionate. But that obviously hinges on the effectiveness of the ADP to start with. If the ADP isn't effective, that proportionality doesn't come into play.

THE PRESIDENT: It clearly is less onerous. That's obvious.

MR WILLIAMS: Yes. So the important point is, this isn't actually a proportionality challenge, although that's how it's framed in that paragraph of the skeleton. It's a challenge in relation to the assessment of effectiveness, both a direct challenge to the findings made and a further enquiries challenge, and both of those are rationality challenges, which Mr Kennelly has fairly accepted.

But the authorities which Ecolab has cited in relation to proportionality -- Tesco and BAA and so on -- are market investigation cases, and obviously the proportionality question is very different in a market investigation case because the CMA is often intervening to

decide, for example, whether a party should be -- BAA should have to divest part of its assets because the market is not working well. Obviously, in that context, a pure cost benefit assessment really does come into focus, but that's not this case.

Just to close one more point down on that topic, in your disclosure ruling, sir, you raised a question about the proportionality test, particularly in relation to mergers which hadn't been pre-notified, and, for the reasons I have just explained, in our submission, that question doesn't arise in this case because the focus of the challenge isn't actually on proportionality, and I think it is fair to say that Mr Kennelly hasn't taken up the baton on that either. I don't think anything turns. We don't say, for our part, that article 1 protocol 1 isn't engaged in the case, but beyond that, we don't think the tribunal needs to make a decision on the question that you raised in the disclosure ruling.

So proportionality is secondary to the question of effectiveness in relation to the ADP. The second point made in paragraph 2 of Ecolab's skeleton is that there was a narrow area of overlap between the parties, and the SLC relates to only part of the merging parties' businesses. That is, in our submission, not relevant to any of the issues the tribunal has to determine. It is a bit of a jury point, if I may say so, because it just doesn't bear on the question of effectiveness. The only question the CMA asks is, is the remedy an effective remedy for the SLC we found?

It is true that the ADP was narrower in scope than the divestiture remedy that the CMA identified, and that's how one gets into proportionality questions, as you said sir. But that is because the ADP was an attempt by Ecolab to tailor the remedy to the scope of the SLC. So it identified principally a package of customers in the market which were affected by the SLC and then proposed to carve that out from the wider business, together with employees and other assets. I will just give you a reference. You don't need to turn this up now. That's how Ecolab explained the remedy in its response to the remedies notice. It is notice of application bundle volume 1, tab 15, paragraphs 3.1 to

3.4. So that's what they're trying to do. Ecolab explains that the remedy has been designed to match the scope of the SLC.

In our submission, Ecolab's attempt to match the scope of the remedy of the SLC is actually part of the basic weakness of the proposal. The objective of the remedies which the CMA was considering was to create a new competitor to remedy the loss of one of the merging parties and, ordinarily, the way that is achieved is to divest a complete business unit which will allow the purchaser to compete in the market.

Now, of course there are exceptions to that general approach, but that is the CMA's general approach, and for good reason, and I will show you the guidelines dealing with that in due course.

Ecolab wasn't offering to divest a stand-alone business unit. The crux of its offer was, as I have said, that it would transfer some customers, together with some account managers and some other assets, and it would then support the purchaser for a transitional period. The idea was that, hopefully, this arrangement will bed in over a transitional period and the customers would stick with the purchaser.

But the CMA found -- and it is not challenged -- that there was no mechanism by which customers could be transferred and bound to stay in with the purchaser. So, in that sense, the core of the remedy isn't a divestment of tangible assets which the customer could actually buy. Ecolab's proposal was that it would incentivise the customers to move and stay with the purchaser and that it would promise not to take them back, and that is why the CMA says that the core of the remedy involves Ecolab persuading customers to transfer and to stay with the purchaser rather than transferring them.

One only needs to describe the proposal in that way to see how precarious it was and how uncertain its prospects were. If it wasn't clear that customers would transfer to the purchaser, then the remedy wouldn't be effective. That's common ground.

SIR IAIN McMILLAN: May I ask: that point was factored into the risk assessment which

you described, or the CMA described, in its skeleton argument?

MR WILLIAMS: That's right, and it is absolutely critical to the assessment of the risk.

SIR IAIN McMILLAN: That was done to assess degree of impact and degree of likelihood?

MR WILLIAMS: That's right, Sir Iain, in this sense: it was critical to the effectiveness of the remedy that the customers, or a sufficient number of the customers, first, transferred and, secondly, stayed. There was a high degree of uncertainty. So it was essential that that happened, so if it didn't happen, the remedy was ineffective. And there was a high degree of uncertainty as to whether it would happen. So you're right, the assessment has both of those dimensions.

SIR IAIN McMILLAN: Thank you.

MR WILLIAMS: So Ecolab is driven to submit in its skeleton argument that the only rational conclusion that the CMA could reach was that customers would transfer. That's paragraph 53(4) of its skeleton. The only rational conclusion. We say that really is an untenable submission when you look at the evidence that's set out in the report. Now, the risk that customers would transfer wasn't by any means the only problem with the remedy. The CMA found that the remedy had manifest shortcomings on a number of fronts. There were risks around the transfer of employees. There were serious problems with the reliance on the transitional period. Now, this is obviously integral to the remedy, because that's the means by which Ecolab says customers can be encouraged to transfer. But the CMA found that that mechanism itself gave rise to multiple problems. The remedy also depended on a non-solicitation provision which the CMA found created its own distortion of competition. These are all inherent problems --

THE PRESIDENT: You will go through --

MR WILLIAMS: I'm going to come back. This is an outline. These are all inherent

problems with the proposal. The issues didn't begin and end with the transfer of customers. Solving the issue on the transfer of customers was necessary but far from sufficient.

You have seen the guidance, and this really goes to Sir Iain's question: the CMA looks for remedies that have a high degree of certainty of achieving their intended effect. That's because customers shouldn't bear a significant risk that the remedy won't resolve the SLC or its adverse effects. That's paragraph 3.5 of the guidance which you saw.

Ecolab emphasised the significant risk aspects. We emphasise it all, but we encourage the tribunal not to lose sight of the high degree of certainty point, which is obviously where the paragraph starts and goes to Sir Iain's question.

A merger remedy is a one-off intervention. If it doesn't work, the CMA can't go back and have another go at solving the problem. If it doesn't work, it will be customers and consumers that suffer. So the CMA doesn't take chances on the effectiveness of competition remedies, and it is clear in this case that the ADP didn't meet the necessary standard, for a host of reasons.

I will develop those submissions probably after the break for the shorthand writer, sir, but one final observation for now: I have already noted the emphasis that was given to ground 3 yesterday, and the need -- or the allegation that the CMA ought to have carried out further enquiries. The point we make is that the challenge which Ecolab faces under that ground is, in our submission, equally high because it needs to persuade the tribunal that it was irrational for the CMA to take the view that, even if it carried out further enquiries, it wasn't likely to reach the conclusion that the ADP gave it a high degree of certainty and effectiveness.

We say Ecolab really cannot get close to showing that, and I am going to make, really, four overall points over the course of my submissions. First, the CMA had gathered relevant and sufficient evidence to assess whether the ADP was effective, and it was in

a position to reach rational conclusions on the statutory questions.

Secondly, the CMA identified a number of intrinsic features of the remedy, which were inherently high risk, which wouldn't be cured by further information or further enquiries or the identity of the purchaser.

Thirdly, the specific enquiries which Ecolab submitted yesterday that the CMA should have made were not necessary, not appropriate and, in some respects, contrary to what Ecolab was asking the CMA to do at the time.

Fourthly, the case as it really developed over the course of submissions yesterday now amounts to requiring the CMA to consult on the implementation of the remedy through a specific deal, which is separate from the decision as to remedy in the final report. Ecolab is conflating two distinct stages of the CMA's process: the CMA makes a decision about remedy in its report and, subsequently, the remedy identified has to be implemented, inevitably involving a transaction. The CMA will scrutinise a transaction at that stage, but it isn't part of the decision as to remedy in the report to assess the decision in principle on the basis of a specific transaction. That is not the process. I will develop that submission, sir.

THE PRESIDENT: Yes. You will have to explain that to me.

MR WILLIAMS: That's probably a good moment to break, sir.

THE PRESIDENT: We will break for about five minutes.

(11.31 am)

(A short break)

(11.43 am)

MR WILLIAMS: Sir, I am going to move on and make some brief observations on the legal framework and show you some parts of the remedies guidance that you didn't see yesterday.

THE PRESIDENT: Yes.

MR WILLIAMS: I'm going to make what I think are three observations on the legal framework. The first -- I had hoped not to do this, but I do need to go back to authorities 3. I think it is tab 28, where the legislation is set out. Yesterday, Mr Kennelly took you to, I think, these provisions, but I just need to put them in context.

THE PRESIDENT: Yes.

MR WILLIAMS: 35 is the statutory questions. I'm not going to go back into those. You know what those are.

THE PRESIDENT: Yes, we went through those yesterday.

MR WILLIAMS: Then the time limits, again, in 39, Mr Kennelly emphasised the extension provision. Obviously we emphasise the primary deadline in 39.

THE PRESIDENT: We saw that, yes.

MR WILLIAMS: 41 you saw yesterday as well. This partly goes back to the point I was making before we broke, sir. I just want to explain this. The duty in section 35(4), as we saw, is a duty to have regard to the need to achieve as comprehensive a solution as is reasonable and practicable. The way Lord Justice Patten put that duty in the Ryanair case is that the CMA must ensure that no SLC either continues or occurs. I don't think I need to turn it up. Paragraph 57 of that judgment -- that's authorities 2, tab 23. That's paragraph 57. The submission he's responding to is at 54. The submission was, essentially, if the CMA finds an SLC on the balance of probabilities, it needs to cure it on the balance of probabilities and Lord Justice Patten said, that's not right, that confuses issues of burden of proof with what's the statutory duty. Once an SLC has been found to exist, the CMA needs to ensure that no SLC either occurs or continues. That's a strong duty and it is a strong duty for good reason, as I was saying before the short adjournment. A merger remedy is a one-off intervention.

THE PRESIDENT: Yes.

MR WILLIAMS: I come then to section 41. What you saw in section 35 is the statutory question which the CMA has to answer in its report. This section proceeds on the basis that the CMA has answered the statutory question and imposed a remedy in respect of an SLC. You can see a duty in subsection (2) to take action to actually remedy the SLC. The CMA has answered the question, now it is taking action to give effect to that remedy.

Section 41(3):

"The decision of the CMA under subsection (2) shall be consistent with its decisions as included in its report ... unless there has been a material change of circumstances ..."

THE PRESIDENT: There is no suggestion of that.

MR WILLIAMS: No, quite. Then subsection (4) is the same duty as one sees in section 35 and it is the subject of the Ryanair test.

So there's a distinction between decision as to remedy in a report and implementation of a remedy by taking action.

In the statutory period for reporting, the CMA takes a decision on various key issues relating to its decision on remedy, such as, what's the nature of the remedy, so should it be a divestiture remedy or something else? If it is a divestiture remedy, what should the scope of the divestiture be? This is all obviously subject to an assessment of effectiveness, whether there are likely to be purchasers for a divestment package, and issues about the remedies process, such as the period that will be allowed for a divestiture. So those are all decisions in principle. In fact, you can see that playing out in the decision as to remedy in this case dealing with the primary divestiture remedy which the CMA said would be effective.

THE PRESIDENT: Can you help me: how does the time limit work? The time limit in section 39 is for the report.

MR WILLIAMS: That's right. Then, if you turn over to section 41A:

"The CMA shall discharge its duty ... within the period of 12 weeks ..."

That is 12 weeks during which to make an order or to accept undertakings.

THE PRESIDENT: Well, to ultimately make an order, yes. So it can publish a report within the deadline finding an SLC.

MR WILLIAMS: Yes.

THE PRESIDENT: Explaining why, and so on. And then it could continue consulting on remedy after that, provided that it can make any order necessary to give effect to impose the remedy within 12 weeks from the date of publication of the report; is that right?

MR WILLIAMS: Well, yes, sir, but I think I'd clarify it to this extent: the report will contain its decision as to what the remedy ought to be. So the CMA --

THE PRESIDENT: Does it have to do that?

MR WILLIAMS: Yes. Section 35(3)(c), "What action should be taken".

THE PRESIDENT: It is slightly odd, because you'd think, if that's to deal with the remedy, then you've got the subsection (4) duty, the need to achieve the solution, and so on, which, as you say, is then repeated in the sort of separate actions under section 41.

MR WILLIAMS: Yes. It is odd, in the sense that if the CMA has already decided what remedy is going to be effective, then what's section 41 doing? I think the answer is this, sir: the decision at the first stage will not be a completely 100 per cent fleshed out remedial scheme. One will see some issues of detail held over to the process of finalising undertakings or an order at the section 41 stage.

Under section 41, you've seen 41(3), the decision shall be consistent with the decision. So if the CMA has decided, for example, that remedy A is effective and remedy B is not effective, then it's got, at the second stage, to implement remedy A. But further matters of detail may arise, and in dealing with those matters of detail, the CMA has to continue to operate under the general duty in section -- the same duty as in

section 35(4), so the duty to make sure that the CMA is comprehensively remedying the problem applies to that further fleshing out, but it is not an opportunity to go back and reconsider and revisit those matters absent a material change of circumstance.

Just to foreshadow the point I'm going to make, and which I am making already, if the CMA has decided at the point of its report that the ADP is not effective, then that decision stands, that assessment stands, and it can't be held over in abeyance in some way to the section 41 assessment. The CMA has reached a view on that remedy and, indeed, it is under a duty to reach a view as to whether the remedy is going to be effective.

So 41A is a 12-week period, but that's a period for the CMA to accept undertakings or make an order. That is not to say that the remedy itself will necessarily be fully implemented in that period. What that scheme will do, it will set out various conditions. In fact, a party will conventionally have some time after that in which to put the remedy in place, in particular if it is a divestiture remedy, to divest that.

If I can hand up a diagram which comes from the CMA's outline guidance on merger procedures, we can provide the tribunal with the full document, but we have only brought this extract today. You can see where it comes from in the bottom right corner. Obviously we are focused on phase 2, which is the bottom third of the page.

THE PRESIDENT: Well, this suggests that the 12 weeks is for the implementation of the remedies, and, as you have just told us, I think rightly, it seems to me, looking at the statute, the implementation -- the actual implementation can come after the 12 weeks. The 12 weeks is for the imposition of the remedy.

MR WILLIAMS: There are two senses of implementation, sir. There is implementation in the sense of putting in place a legal instrument to give effect to it, and then there's the practical implementation pursuant to that legal implementation. From the CMA's own point of view, it implements the remedy by putting in place the order or the undertaking.

Sir, the only point I wanted to --

THE PRESIDENT: This 12 weeks is extendable, according to this. That must be in the statute. Yes, it is subsection (2).

MR WILLIAMS: The only point I really wanted to draw from the diagram, you can see at the very bottom there is a stage called "Administration of remedies. Purchaser approval". So that is even after the CMA has put in place undertakings.

THE PRESIDENT: Oh, yes, you have got to divest. That will take some time.

MR WILLIAMS: Here we are talking, actually, about picking out the purchaser and identifying them as the appropriate purchaser, blessing them, effectively. That happens a long way down the road. That is not -- the process of deciding on a remedy two or three stages back is not about picking a purchaser and saying -- the CMA saying, "We have decided that a divestiture to X would be an effective remedy". It is a much more overarching assessment, and that obviously has significant bearing on the suggestion that's now made that the CMA ought to have effectively carried out its reporting stage as though it were an assessment of specific purchasers.

THE PRESIDENT: I think what's being said -- that may be true in other cases, where you've got to divest and there's got to be -- and that's the remedy. Here, what's being said is, well, whether the remedy proposed is effective or not may depend on, actually, who the purchaser is, and not finding an approved purchaser. But that will condition whether the remedy is effective.

MR WILLIAMS: It's certainly right that the CMA considers whether there are likely -- before it decides that a divestiture remedy would be appropriate, it considers whether there are likely to be suitable purchasers. That's certainly right. But, in my submission, that's different from going out to consult on whether a divestiture to X would be an effective remedy. But I will come on --

THE PRESIDENT: You're not precluded from doing that, subject to confidentiality

constraints. If the parties have got that far in telling you that -- I mean, that's unusual, that they would actually have got that far, and, indeed, on your -- the remedy that has been decided on in the report, they haven't got that far.

MR WILLIAMS: They haven't, did you say?

THE PRESIDENT: They have not got that far. But if they have and are proposing a remedy and they are saying, "We are proposing that we would sell -- the CMA is suggesting that the entire company should be sold. We suggest it is only this subsidiary that should be sold, and sold to Y, who is keen to buy it, and we think that would work", if they are able to say that, there is no reason you can't go out and consult customers, saying, "Well, what's your reaction to the sale of this subsidiary so that it's operated by Y?". You're not precluded from doing that.

MR WILLIAMS: No. One can envisage cases where that might be the right thing to do, but, obviously, the situation you have posited there, sir, is a situation where the process as between the vendor and the purchaser has reached a conclusion and it's being suggested that the CMA ought, as part of its remedies assessments, to take account of that putative transaction. Obviously, the CMA will have major reservations about focusing a consultation in that way in the situation where, as you have said, sir, the transaction hasn't progressed to that extent and, in fact, that transaction is not nailed down by any stretch of the imagination, and what's being contemplated is a remedy where the purchaser could be one of a number of people, and it wouldn't be appropriate to consult on the basis of a divestiture to a certain person if that's not the nature of the remedy being considered. It might be informative, but that wouldn't be the right question, sir.

I will come back to the facts of this case shortly. But the important points to take are that there are various stages to the remedies process. The CMA has given different periods of time to do different things. To the extent that it is being suggested in this case that

Ecolab ought to have been afforded time to negotiate a deal to a conclusion with a particular purchaser so that the assessment of the remedy in the report can proceed on the basis of a concrete transaction and the CMA needs to wait for that to happen, that is simply not the procedure that's envisaged here. What is envisaged is a decision as to remedy and then the implementation of that remedy in two stages: first of all, through the putting in place of a legal instrument, and then, after that, the execution of a transaction. It is certainly not incumbent on the CMA, within the limited period it is given, the limited time it is given, to answer the statutory question under section 35 to accommodate that kind of extended commercial negotiation so that it can make its -- base its remedies decision on that.

The other point the CMA asks me to emphasise is that, of course, until the final report, there is actually no SLC decision, no remedies decision, and so, in the real world, no party is going to actually progress to the stage of having concluded a deal. All there will ever be, at most, is some sort of transaction in principle.

THE PRESIDENT: Yes.

MR WILLIAMS: Yes, of course.

THE PRESIDENT: I think that's understood all round.

MR WILLIAMS: The point for now, sir, is, as I said, there are these distinct stages, and the CMA has limited time to answer the statutory question, and there are other stages of the process, which the scheme doesn't envisage, that will have to be accommodated within that original period. In my submission, that applies equally to the 24 weeks and to the 32 weeks with an extension. The extension is to enable the CMA to answer the statutory questions. It is not to accommodate --

THE PRESIDENT: Well, I can see that, but if the identity of the purchaser is highly material to the statutory question, then it would be appropriate to take that into account; in other words, if a proposed remedy can only work with certain purchasers, and

otherwise it can't work at all, then you would explore whether those purchasers are interested, and, indeed, you did, you held hearings with them.

MR WILLIAMS: Yes, sir, but two points. First of all, the CMA found -- I will show you the findings -- that, actually, the effectiveness of the remedy wasn't dependent on the identity of the purchaser. So it's made that finding and Ecolab needs to overturn that finding on rationality principles.

THE PRESIDENT: I understand that point. You're talking in more general terms about the scheme.

MR WILLIAMS: In terms of the scheme, there is a difference between consulting on the remedy and the extent to which the identity of the purchaser may inform the assessment of the effectiveness of the remedy and accommodating the sort of process that Ecolab says would have to be accommodated, which is allowing that negotiation to reach a conclusion so that the transaction is effectively finalised in principle so that the CMA can then consult on the effectiveness of the remedy in principle in the context of a specific execution of the remedy. That is absolutely not what the statutory scheme envisages, sir.

THE PRESIDENT: But it could be done. There is nothing in the statutory scheme that prevents it.

MR WILLIAMS: It is not that it prevents it. The CMA has a defined task at stage 1. Other stages are provided for the implementation of the remedy and, as you have seen, the approval of the purchaser in principle comes quite a long way down the road in that process. So it isn't envisaged, and I don't put it higher than this: it isn't envisaged that the CMA needs to accommodate within its administrative process a stage during which the parties are given time to progress their commercial negotiations to a conclusion to enable them to make representations to the CMA about the effectiveness of the remedy. That isn't how it is envisaged that the CMA will make a decision as to remedy.

The point is partly one about the scheme of the legislation and the different stages I've identified, but it is also about the time. It is about the time, sir. The CMA is under a primary duty to report within 24 weeks. The longest it can take is 24 weeks plus eight weeks. These periods are designed to allow the CMA to answer the questions at the level of principle. They are not designed to accommodate commercial negotiations which may take more time.

So all those submissions, I think, are at the level of principle, as you have identified, sir. It is a different question when one comes to the facts, in terms of where the parties have reached on the facts and what consultation was practicable on the facts anyway.

SIR IAIN McMILLAN: Is it also your point that the weaknesses in the alternative were such that, even if that could have been allowed, it would have made no difference?

MR WILLIAMS: Yes, that is very much our point, Sir Iain, and that's 10.198 of the report, which I will show you. The CMA expresses the clear view that the identity of the purchaser wasn't capable of curing the intrinsic weaknesses in the remedy. So from that point of view, this is all, ultimately, in our submission, a distraction, unless Ecolab can set that finding aside on rationality principles. So that's the statutory framework feeding into the practical position.

The second point is the margin of appreciation. So I won't labour the point. It will be well known to you. We have cited Eurotunnel, Somerfield and BAA at paragraph 198 of our defence. We say that an assessment of what is an effective remedy is very much a matter for the judgment and expertise of the CMA, not only because of its expertise in designing and implementing competition remedies, but also because it is proceeding on the basis of an in-depth investigation into this market, how this market operates, how customers in this market choose a supplier.

Inherently, what one is doing here is looking forward to assess what the effect of a remedy is expected to be and, in that context, we rely on the well-known authorities about the

CMA's margin of appreciation in relation to forward-looking judgments. That's BAA, paragraph 20, subparagraph (6), quoting the Cellcom case, authorities 1, tab 16 at page 14.

THE PRESIDENT: BAA?

MR WILLIAMS: BAA. You will recall, sir, Mr Justice Sales, as he then was, has a useful summary of some of the relevant principles. One of them is the breadth of the margin of appreciation which applies to forward-looking predictive assessments.

THE PRESIDENT: I think that's the section of the legal principles in your defence that I asked Mr Kennelly about.

MR WILLIAMS: Yes. Then the third point I wanted to make is the law relating particularly to further investigations and, in this context, we rely on the Bayani case, which is authorities number 1, tab 2. I think it is useful to take that out, given that further investigations is at the forefront of my learned friend's case. This is a case in which the applicant was refused housing in Kensington and Chelsea on the ground that she was said to have made herself intentionally homeless when she left the Philippines. So it is a long way from this case on the facts.

At first instance, the refusal of housing was quashed because the authority in that case had failed to make enquiries into, particularly, her financial circumstances, and that first instance decision was overturned on appeal. If you can turn to internal page 11, sir -- in fact, probably easier to start at the bottom of page 10:

"I see great force in the submission ..."

Then, if you could just read down to the end of that judgment, on the next page.

If you have read that, I'm grateful.

THE PRESIDENT: I'm just looking for Lord Brightman's words. "One must bear Lord Brightman's words in mind", which must be a reference back to something.

MR WILLIAMS: I think it is internal page 4, Hillingdon.

THE PRESIDENT: Oh, yes, it's the Puhlhofer, yes, that's what it is. Yes, it clearly is, thank you.

MR WILLIAMS: What one takes from this case is that the court had real reservations about the enquiries that were made by the authority in that case, but reservations, serious reservations, doesn't amount to irrationality, and you can see the language that's used is critical language, "much more satisfactory" in line 1, "it is a pity" in line 2, "clearly less full than they could have been", and so on, "not enough that enquiries would have been sensible or desirable". In our submission, the case we are dealing with is not a borderline case, for all the reasons I'll develop, but one sees from this the standard of review, and the threshold before the court will intervene on the grounds that inadequate enquiries have been carried out, is a high one. That passage captures the principles very clearly.

THE PRESIDENT: Is there anything in the next judgment that's relevant?

MR WILLIAMS: No. I wasn't going to take you to that. Do you mean South Yorkshire?

THE PRESIDENT: No.

MR WILLIAMS: I'm so sorry, no, that is what I wanted to take from Bayani. In fact, Lady Justice Butler-Sloss dissented.

I then wanted to go to the merger remedies guidance, which is authorities bundle 3, tab 34. You saw 3.5 yesterday, and in particular 3.5(d). I have made the point that's critical partly in relation to the question Sir Iain raised: acceptable risk profile. I won't go back to that. I am going to show you paragraphs that you didn't see yesterday. Internal page 13, "Choice of remedies". This is the well-known statement of principle, second sentence:

"Structural remedies, such as prohibition and divestiture, are generally one-off measures that seek to restore or maintain the competitive structure of the market by addressing the market participants and/or their shares of the market."

Then 3.37 and 3.38 apply that principle to divestiture:

"The aim is to create a new course of competition ... or to strengthen an existing source of competition (if sold to an existing participant independent of the merger parties).

"3.38. A successful divestiture will effectively address at source the loss of rivalry ... by changing or restoring the structure of the market. Divestitures will generally not require detailed monitoring ...", and so on:

"The design and implementation of divestiture remedies is considered in chapter 5."

Before we get to chapter 5, I wanted to go to 4.56 and 4.57, which are on page 33. The CMA's notice of possible remedies is a starting point for discussion. 4.57:

"The CMA will consider remedy options proposed by the merger parties and others, in addition to its own proposals. Parties will be expected to demonstrate that their proposed remedy options will address effectively the provisional SLC and the resulting adverse effects. The merger parties will also be expected to provide evidence to support any claims concerning RCBs ..."

So it is just the practical point that, where the proposal is being made by the party, the onus is on the party to satisfy the CMA that the remedy is effective. Of course the CMA then uses its powers of investigation to take the matter forward, but the onus is on the party to persuade the CMA in relation to matters which lie within its own gift and its own proposal.

Then we can move on to section 5 and pick that up at paragraphs 5.1 and 5.2. Those set out some of the general principles which are consistent with the principles we saw earlier on around structural remedies.

5.3 is important because it identifies the categories of risk that the CMA looks at in relation to remedies. In this case, it is particularly (a) and (b), composition and purchaser. 5.6 and 5.7 are very important in this case, and I just ask you to read those.

5.7 is an important paragraph. Normally, the CMA looks for divestiture of a stand-alone

business. The parties may modify the scope, provided the parties can demonstrate to the CMA's satisfaction that the modified package -- so, again, one sees the onus on the party to satisfy the CMA's concerns.

This point is picked up again in 5.12.

THE PRESIDENT: Yes, in 5.9, the first sentence, that rather supports the notion that it's in the report that the detail of the divestiture is going to be specified.

MR WILLIAMS: The scope will be outlined, and it will be specified in greater detail. I think that's the submission I was making.

THE PRESIDENT: Yes, that's what I'm saying, that ties in with that.

MR WILLIAMS: There are a couple more paragraphs that illuminate that point too.

THE PRESIDENT: Yes. And 5.11 says:

"In appropriate cases, the CMA will consider ... quasi structural remedies."

MR WILLIAMS: Yes. The CMA, of course, takes each case on its merits and assesses the evidence and, where its guidance says that it will normally take a certain approach, it will consider whether reasons have been given for taking a different approach, of course. One sees that over 30 pages of section 10 of the reports. No-one is saying that the CMA has fast forwarded from this guidance to a rejection of the remedy, but it is setting out the principles. 5.12 is in a similar vein and it links the notion or the preference for divestiture of a stand-alone business precisely because of purchaser and composition risk.

Now, there is a link in 5.13 to the capabilities and resources of prospective purchasers may be more critical, but I think goes to your point, sir, that there may be some overlap. But, again, that is, in my submission, at this stage -- one is assessing the scope and nature of the remedy in principle, rather than approving a transaction.

5.14:

"A package of assets may also be far more difficult to define or carve out from an underlying

business and the CMA may have less assurance that the purchaser will be supplied with all it requires to operate competitively ..."

Then, if the CMA does accept a remedy of that nature, it may require additional protective measures. As I say, all proposals are assessed on their merits but, in the context of this guidance, Ecolab's proposal faced a number of issues which had to be addressed and resolved to the CMA's satisfaction and we say it didn't do that.

Mr Kennelly showed you 5.20 and 5.21. If I could just show you two or three more paragraphs which go to the procedural issues we canvassed this morning already. 5.33 on page 47. We are now beyond the decision and into the process. It will enable a suitable purchaser to be secured in an acceptable timescale. This goes to my point that usually one is seeking to secure the purchaser at that later stage. That's not normally a matter for the decision as to remedy. That comes through again in 5.40 to 5.42 and 5.45.

THE PRESIDENT: But, I mean, this is all about how, normally, divestiture remedies are implemented, isn't it?

MR WILLIAMS: Yes.

THE PRESIDENT: As you say, every case is different, and one sees that in 5.14 it says there can be cases where identifying an upfront buyer is important in deciding whether the remedy can be effective at all and suitable.

MR WILLIAMS: That's right. That is right. So every case is different. But what the CMA is not under an obligation to do, in my submission -- I don't mean to labour the point -- is to, at that stage of the process, reach a conclusion so that it can make its decision as to remedy, which is how the case has ultimately been put.

I think these points may become clearer when we deal with this case, which is what I am about to do, sir.

You saw, really, the process yesterday. I'm not planning to take you back into the documents

on that. I want to make some submissions. If there are points that don't accord with the tribunal's understanding or recollection, then of course I will pause and go to it.

MR KENNELLY: As there is a break in my learned friend's submissions, we don't accept his characterisation of having put our case just there. He said our case was they had to allow the negotiations to run and the CMA had to wait to make its decision until they reached their conclusion. He said, I think, that's the case that's being put. We don't accept that characterisation but I will deal with that in reply.

MR WILLIAMS: I think that's one of the ways the case has been put, sir.

THE PRESIDENT: I think we have got Mr Kennelly's point, and I think you have put it, but I think, in a sense, one is talking in generalities here, which is part of the problem. One can certainly envisage a case where merging parties say, "This is our alternative remedy" and the CMA says, "We don't think much of that unless you can identify a buyer who would meet those characteristics, because we think it is unlikely", and they come back and say, "Well, we have got a buyer and here it is". The onus is on the merging parties because they are putting forward the remedy. But the suitability of the remedy might depend on whether there is a buyer who meets those criteria, and a realistic prospect of --

MR WILLIAMS: I will be clear which of Mr Kennelly's submissions I am addressing. I think, because of the confidentiality concerns around the identities of the buyers, one of the points he said was that eventually we would reach the point at which there would be a buyer and, at that point, the CMA would be in a position to go to customers and say yea or nay on that basis, and, in my submission, I'm saying that that's the extreme version of Mr Kennelly's case which I'm addressing here, and I'm saying that that is clearly not the process.

THE PRESIDENT: No, I understand.

MR WILLIAMS: I understand that Mr Kennelly also says there are other enquiries that

could have been made at other stages, and I'm going to deal with that, but that is one of the scenarios that he posits.

THE PRESIDENT: Yes, it was.

MR WILLIAMS: I will take this reasonably quickly, unless asked to slow down.

THE PRESIDENT: Can we put away the merger guidelines?

MR WILLIAMS: You can, thank you.

These are our submissions on the process side of things. Ecolab raised the ADP for the first time in its response to the remedies notice which the tribunal saw. That was 16 August 2019.

A day later, Ecolab wrote to the CMA urging it to delay consultation with customers until after the remedies hearing, strenuously resisting disclosure of the ADP to customers or other third parties in the meantime. We saw that, sir.

The CMA didn't consider that it was necessary or appropriate to put its process on ice. The CMA operates under a statutory timetable. It aims to complete its enquiry in 24 weeks. It doesn't treat the extension as a means of easing time pressure on itself or on the merging parties. It extends for special reasons and, therefore, it needs an exceptional case.

So the CMA carried on to deal with its remedies process under the usual time pressure. Ecolab had advanced the proposal and it needed to be considered, including consultation with customers, so the CMA pressed on with that work. It is a theme of Ecolab's case, in my submission, that it wants the CMA to work to its own timetable and not to the statutory timetable.

Now, the CMA held calls with four customers between 20 August and 2 September. I will give you the exhibit references for those because I'm not going to name the customers. It is exhibit tabs 1, 2, 3 and 4, the exhibits to Ms Baker's statement. The tabs which are exhibited to that, which the tribunal saw yesterday.

THE PRESIDENT: That's in the defence bundle? Defence tabs 1, 2, 3 and 4.

MR WILLIAMS: I said yesterday that, at tab 3, the customer in question had received the summary notice. That wasn't correct. The cut-off date for customers receiving the summary notice were the consultations that took place after 4 September, because some of these consultations had been prearranged. So there were two phases. There was one initial phase, which was those four, and then there was a second wave where the customers had been provided with the summary of Ecolab's proposal.

THE PRESIDENT: The summary that we were given, the non-confidential summary that you were sent on 27 August, was then provided to the customers in the second phase.

MR WILLIAMS: It was provided to the customers where the consultation was set up after it was received, yes.

THE PRESIDENT: Yes. That was obviously the purpose -- the reason it was sent to you. Indeed, you asked for it.

MR WILLIAMS: Yes.

THE PRESIDENT: Patricia Einfeldt is someone who works for the CMA; is that right? That was my understanding. So she emailed the parties advice, saying, "We need a non-confidential version that we can put as part of our consultation".

MR WILLIAMS: Yes.

THE PRESIDENT: She emailed on 20 August. We haven't got her email, but it is referred to. The response was the letter of 27 August.

MR WILLIAMS: The practical point is that there were a number of conversations before 4 September, but --

THE PRESIDENT: Sorry, what's the significance of 4 September?

MR WILLIAMS: The CMA set up a second wave of discussions on 4 September and, when it set up that second wave, it provided the customers with the information it had received from Ecolab in the meantime.

THE PRESIDENT: Yes, I see.

MR WILLIAMS: What that means is that there were a number of conversations before 27 August where the CMA didn't have the non-confidential summary. The one at exhibit 3 took place after the 27th, but because it was a first wave conversation, the customer hadn't seen the summary. That was the --

THE PRESIDENT: I see, yes. That's helpful. So the ones that we have at -- if we look at our defence bundle, the DEF bundle, it's the point Professor Waterson was raising with Mr Kennelly. So, of those confidential notes, 1, 2 and 3 and 4 and obviously 5, they didn't have the version of the ADP.

MR WILLIAMS: That's right.

THE PRESIDENT: But 6 --

MR WILLIAMS: Is the same as 5.

THE PRESIDENT: 6 is 6 September.

MR WILLIAMS: That customer, second time around, had seen it.

THE PRESIDENT: What about 7, which is 4 September itself, is that second wave?

MR WILLIAMS: Yes.

THE PRESIDENT: So all the others from here, number 6 through to number 11, have all seen it?

MR WILLIAMS: In fact, you can see this description of the two waves or the two rounds in Ms Baker's witness statement, which is paragraphs --

THE PRESIDENT: That's in our core bundle, I think.

MR WILLIAMS: In the core bundle, tab 8 at 11 and 12. You can see from paragraph 11, although the CMA hadn't received the summary notice when it set these appointments up, it did consult on the principle of the ADP -- that's the very end of paragraph 11 -- which it had been told about.

THE PRESIDENT: Yes.

MR WILLIAMS: Then just following the chronology forward, the remedies hearing took place on 27 August. The potential purchasers were identified, and the tribunal saw that the CMA was asked not to identify them at least for the next few weeks. That is significant, sir, because the next few weeks, starting on 27 August, one gets really close to 7/8 October very quickly. The CMA can't simply put its process on ice. It's got to get on with it and consult and gather evidence on the basis it's got to report by that deadline.

I do want to go back to the material that was handed up yesterday, because it is, in my submission, important, starting with the cover letter from DLA Piper dated 27 August. You've read it, so I'll just emphasise one or two points. At the bottom of the second page, the final paragraph:

"Finally, as regards the CMA's need to consult, the response summary sets out Ecolab's proposed remedy in sufficient detail for the CMA to be able to consult with third parties."

So that was the position they took at the time. It didn't include specific purchasers. That's what they said. In essence, what we are now being criticised for is largely doing what we were asked to do, with a view to protecting their confidentiality. You can see a bit further down that Ecolab rightly says in this letter:

"Any issues which the CMA may wish to explore with third parties in relation to the feasibility of such a remedy do not, to us, appear to relate to the precise scope or identity ... but rather on the feasibility of a carve-out per se."

That's, again, consistent with the points I have been making about the scope of the enquiry at this stage. The next sentence is a bit ambiguous:

"While we understand that the CMA may eventually envision the need to consult on the identity of the divesting party, it will have further opportunities later in the process ..."

Query what's meant by "later in the process", but if one identifies delaying for a few weeks,

at least a few weeks, from 27 August, and a statutory deadline of 7 October, then it isn't actually feasible to consult on the identity of the purchasers later in the process before the final report. It would be practically possible to deal with that during the different stages post final report, as I have already identified. But, of course, the CMA would have needed to take a decision on effectiveness before that.

Then there's a bit more of the same in the next paragraph, about the ability of the CMA to fully explore the issues on a hypothetical basis. It is fair to say that the hypothesis here is not -- it is about the -- not disclosing certain other aspects of the remedy, but the point stands. That's the nature of the inquiry.

Then you've got -- Mr Kennelly showed you various bits that he relies on. The last paragraph again places emphasis on the point that the CMA has been given enough material on which to carry out the consultation which it needs to carry out and for customers to give an informed view.

Now, the document, then, in the detail -- sorry, the summary itself sets out various components of the ADP, but I do want to pick up 3.7, sir of the summary:

"Suitable purchaser.

"Ecolab considers that any third party other than Diversey or Christeyns currently making F&B cleaning chemicals sales in the EEA could potentially be suitable as a purchaser of the divestment business. The alternative remedy proposal would therefore create a new competitor ..."

Mr Kennelly emphasised the second sentence, but the first sentence is absolutely clear: the proposition is a divestiture to anybody. That is completely at odds with the case that was advanced yesterday, that the CMA ought to have described the potential purchasers in generic terms.

THE PRESIDENT: What was said was, I think, a global player.

MR WILLIAMS: I'm sorry?

THE PRESIDENT: I think it was said that you could consult on the basis of saying it would be a global player. We can turn to the transcript, but that's my recollection, a global player would have presence in the -- significant presence in the EEA. But all that's said here is, it would be an existing supplier.

MR WILLIAMS: Yes.

THE PRESIDENT: Either a new one or one of the smaller ones being beefed up. That's what's put here.

MR WILLIAMS: What's being suggested is that we consult on the basis that this is the definition of the potential purchaser, which is obviously much more general. This is what we are being asked to do. That's why I say -- yesterday, we said that what we had to do was to come up with some non-confidential description of specific purchasers, but that is specifically not what Ecolab effectively instructed us to do. Obviously it has its own reasons for not wanting to tie itself --

THE PRESIDENT: Yes. It's brought out by the question, the draft questions, as well.

MR WILLIAMS: Yes.

THE PRESIDENT: "The proposed purchaser would be a supplier with an existing F&B presence and cleaning products range and expertise". That's how it is put.

MR WILLIAMS: Yes. One can understand that, because discussions with the purchasers were at the stage they were at. Nothing was nailed down and options were open. The consultation needed to be on that basis anyway, but, actually, this is what Ecolab at the time said we should be doing.

THE PRESIDENT: Could we see the email from -- which obviously the parties have seen, from the CMA of 20 August?

MR WILLIAMS: I'm sure that can be arranged. We can produce that.

So it is clear what was being proposed at the time, and Ecolab is now taking a very different position as to what the CMA ought to have done at that time.

Then there was the second round of customer consultation, and the CMA received written responses from -- sorry, this is, in the defence bundle, tabs 6, 7 and 11. There were calls -- tabs 8, 9 and 10. This is a submission -- I will be clear about that. But when one reads the responses from the customers in the two rounds, they are, in our submission, materially the same. The thrust of the responses is the same. The concerns that are identified are the same. It is not the case that if one is in round 1, one has a different response from round 2, or vice versa.

Then there was the process relating to the Remedies Working Paper. Ecolab modified the ADP, including the financial incentives provision you saw yesterday and the fallback provision and the non-solicitation commitment was amended.

The emphasis in the Remedies Working Paper response was on the potential for further consultation with purchasers. Now, no doubt Ecolab will say, "That's because we didn't know what consultation you'd done with customers", but in fact, as the tribunal has now seen, the consultation we had done in round 2 was the consultation that they had proposed.

Just to pause there, this is the remedies working paper. It is the middle of September. Statutory deadline, end of October. We are still not in a position to consult on the identity of the potential purchasers if we wanted to. That's not changed. The only material change from the customers' perspective to the terms of the ADP was the additional financial incentives. That was the customer-facing change and the CMA decided that wasn't a material change for the reasons I will show you after lunch. It didn't resolve the concerns it had identified.

In Mr Kennelly's submissions, you also saw the non-binding written proposals from the potential purchasers. You saw those in a closed session yesterday. It's been identified that they differed in some respects from the ADP. This shows that, really, at this stage, there was no concrete proposition for the CMA to consult on, even if it had wanted to.

This was happening right up against the statutory deadline. The second of those documents was dated 1 October. I have already made the point that the CMA obviously wasn't obliged to let those negotiations progress to the next stage before it carried out its statutory duties.

So the CMA had formed a view on the statutory questions at that point. It reported on 7 October. Ecolab's submission is the CMA wasn't entitled to report with that view at that stage. It was irrational for it to do so. We ask why. At this stage, the only possibilities seem to be that -- well, I have made the point: to allow the parties to negotiate a deal when that had reached an outcome that the CMA could consult on a specific purchaser, and you have my submissions about that.

There is also a chicken and egg problem with this, as emerged in Mr Kennelly's submissions, because the nature of the deal will depend on the report and the decision and the parties couldn't reach a conclusion until they knew what the decision as to remedy was.

So the idea that the CMA was required to put off making a decision so that the parties could reach a deal which would reflect the decision, it breaks down.

The alternative is that the CMA could have accepted a remedy with a fallback option and report on that basis -- I think on the basis that the CMA might have obtained further information after its report to change its mind about the effectiveness of the ADP -- and we say there's a fundamental problem with that, which is that the CMA has to answer the statutory question when it reports. In this case, on the basis of the evidence it had, it found that the ADP was ineffective. So there was no room to accept the ADP as part of a fallback remedy consistently with the statutory questions on the basis that it might change its mind after reporting. That doesn't work.

So there are a number of reasons why Ecolab's case as to how the CMA ought to have proceeded doesn't work, and, in my submission, it is certainly not the basis on which the CMA was legally obliged to proceed to a rationality standard, which is how the

case is put.

I see it is 12.55 pm.

THE PRESIDENT: Would you like us to break now? How are you doing on timing?

MR WILLIAMS: I'm about to move on to the next ground. I think I'm fine for time. Mr Kennelly will certainly have his 45 minutes.

THE PRESIDENT: That's what I'm anxious to ensure. If we come back at 1.55 pm, that will be satisfactory?

MR WILLIAMS: I think that will be fine.

THE PRESIDENT: Shall we do that? So 1.55 pm, please.

(12.55 pm)

(The short adjournment)

(1.55 pm)

MR WILLIAMS: Sir, the CMA has handed up the email of 20 August 2019.

Sir, moving to the grounds, although I foreshadowed my submissions in relation to quite a lot of issues, Mr Kennelly didn't deal with ground 2(a) orally yesterday, so I won't do so either. You have got our defence in relation to that, 234 to 236.

THE PRESIDENT: I don't have in my head what --

MR WILLIAMS: Ground 2(a) is the CMA applied the wrong legal test. It is the submission that because we said certain things in the working paper --

THE PRESIDENT: Oh --

MR WILLIAMS: We said certain things in the working paper and it is said that is indicative of an error in the final report. That's been dealt with in writing and I don't think I need to take up time on that.

I am now going to cover a number of topics which are relevant to grounds 2 and 3 and, to some extent, 4, starting with the complaint that the CMA erred in the report when it made reference to customers going back to [the transferring party], and you may

remember that point. Ecolab says that that wouldn't happen under its proposal and so the references in the report are in error. There are three answers to that point.

THE PRESIDENT: I thought it wasn't customers going back to [the transferring party], it's customers refusing to move from [the transferring party]. That was the point. There is a difference.

MR WILLIAMS: There is different language in different places.

THE PRESIDENT: I think that's what was relied on, as I understood it.

MR WILLIAMS: Yes.

THE PRESIDENT: Because at some point in rejecting -- explaining why the remedy was not -- the alternative remedy, or ADP, was not acceptable, that is said. For example, 10.169, the costs and risks of changing suppliers can be high for customers, which may deter them from transferring away from existing products. The point was made --

MR WILLIAMS: You're right, there are three answers to the point in both of its forms.

THE PRESIDENT: Yes.

MR WILLIAMS: I say, "go back to [the transferring party] ", I'm talking about [the transferring party]. Obviously there is confidentiality around exactly how the remedy would work.

The first point is that if you look, sir, at 10.109 of the report, subparagraph (c), you can see that the non-solicitation obligation is not actually absolute. There are exceptions to it.

THE PRESIDENT: There is an exception, isn't there?

MR WILLIAMS: There is an exception to it.

THE PRESIDENT: I don't know if that exception is significant.

MR WILLIAMS: It simply means that it is not a blanket restriction on whether customers aren't able to deal with the party in question. That's an exception which the parties carved out from their own proposal. So it's not wrong to contemplate that there might be a situation where some parties don't -- some customers don't switch.

The second point is that the CMA dealt directly with the proposed undertaking in the report on the merits, in particular at 10.221, which I would ask the tribunal to look at. The CMA hasn't misunderstood what's being proposed. It's dealt with it directly. That is an answer to the point.

The way it's put by Ecolab in its notice of application is to say, well, non-compete obligations are often applied in a commercial context. So what's wrong with this? But this isn't a standard non-compete situation. Here we are contemplating a situation where customers are rejecting the putative purchaser as a supplier. So they don't regard the remedy as giving them a satisfactory choice. And the solution that's proposed to that is to give the customer even less choice and the CMA was entitled to regard that as a restriction of competition and an unsatisfactory aspect of the proposals, but it is certainly not irrational. It deals with the undertaking on the merits and it is not a point on which further enquiries could ever have made any difference. It is an inherent objection to the remedy.

THE PRESIDENT: Well, that's a different objection, that it reduces -- the fact that they have to leave the divesting company, whether they want to or not, reduces -- creates a loss of competition.

MR WILLIAMS: Yes. I'm making two points. First of all, it's said that the CMA has misunderstood what's being proposed, and we say, well, we haven't misunderstood it because we are dealing with the proposal directly here in this paragraph; and, secondly -- you're right, there are two separate points. Secondly, the CMA says that, in fact, this is actually, in itself, problematic, it is a problematic feature of the remedy, and it is a defect in the remedy to which further investigations wouldn't have made any difference, is the submission I make going to the broader case on ground 3.

So the CMA wasn't proceeding on the basis of a misunderstanding of what Ecolab had in mind.

THE PRESIDENT: Well, in the first sentence there, that's right, but then you do get the statement such as the one I directed you to a moment ago, and indeed in 10.223 below, after competing customers switch away from the purchaser and back to the divesting party. That last part is not a risk, because they can't.

MR WILLIAMS: The first point is, there are exceptions.

THE PRESIDENT: It is not based on exceptions. It is not saying that for a limited -- if it is based on exceptions, you would have to think how significant the exception is, which is not addressed anywhere.

MR WILLIAMS: I think the worst one could say about this, sir, is that there are stray words which didn't necessarily keep up with the final iteration of Ecolab's remedy proposal. Now, we say that isn't right because the CMA has dealt overall with the latest iteration of the proposal, including at 10.221.

There is one more finding I need to show you, sir, which is 10.163 -- I will show you that now generally and then I will deal with that in a bit more detail in a moment -- which says:

"Even if [confidential] decided not to service them, these customers are likely to choose one of the other large suppliers."

Taking the report in the round, the CMA has made clear findings both about the acceptability of the non-solicitation clause and, secondly, about what it thinks is the likely outcome of the non-solicitation clause. It is not that it will secure a transfer of customers to the purchaser, it is that it will just drive customers to consider other options.

THE PRESIDENT: Why do you say likely to move to one or the other?

MR WILLIAMS: Rather than the purchaser.

THE PRESIDENT: Obviously, it means rather than to the purchaser.

MR WILLIAMS: Exactly.

THE PRESIDENT: On what basis it says it is likely?

MR WILLIAMS: I'm going to show you the evidence on this this afternoon. So it's dealt with the undertaking on the merits. It's dealt with what it thinks will be the consequence of the undertaking. There is an exception to the non-solicitation provision and, in the round, this isn't an error, it's certainly not a material error in the CMA's reasoning. This point doesn't go to the central issue, which is, is there a high degree of certainty that customers will transfer to the purchaser? The point is that has been dealt with adequately in the round, but the worst one could say is there is a bit of stray drafting.

That takes me to transfer of customers more generally, sir. If I could just show you the CMA's conclusion on that, which no doubt you have seen, but it is very important. 10.232, page 160:

"A fundamental source of risk is the transfer of customers from X to a purchaser as opposed to transferring a viable, stand-alone business. The evidence from customers is clear and conclusive: they would not welcome a remedy of this type as it would impose costs on them, take time and create a risk to their ongoing operations. Most customers in this market cannot be forced to move without their consent. As they have no contract, they would need to agree to the novation and they are likely to weigh up their options, which include [and this is the point you have just made] ... or finding another supplier."

Clearly the options are open:

"Some may agree to move to a purchaser and be supplied with its products, but we have no certainty of customers doing so, no guarantee they will remain and no powers of redress if they reasonably choose not to."

That is the intrinsic weakness of the remedy. There is a strong body of evidence to show customer concerns about the remedy, which you saw yesterday. But the last sentence is critical: unless Ecolab can show that the finding in the last sentence is irrational, then the remedy is bound to fail. It is not irrational. It is supported by evidence and no

further enquiries were needed.

Now, Ecolab makes three main points by way of counterargument. It criticises our assessment of the customer evidence. It says our conclusions are wrong, given the design of the remedy and the identity of the purchasers. And it says we should have carried out further enquiries on both those points. The answers to those points are all found in the CMA's analysis.

If we could now go back to 10.125. There isn't time and it wouldn't be productive for me to ask you to read all of this while we sit in the hearing. If I may, sir, I will make my submissions pointing to the paragraphs to which the submissions relate.

THE PRESIDENT: Yes, and we have all read it once before.

MR WILLIAMS: I will draw out the points without necessarily asking you to read everything again. 10.125 and 126 are a summary of the competitor and customer responses specifically in relation to the ADP. Competitor responses are summarised in 10.125 and customers in 10.126. There were submissions yesterday about the significance of the competitor evidence and it was said it should have been treated with scepticism. Really, I make two points about that. First, there is nothing in the analysis later on to suggest that the competitive analysis was given undue weight. Secondly, what one can see from these two paragraphs is that, broadly speaking, customers and competitors were saying the same thing. So this isn't a situation where the CMA needs to be sceptical about what competitors are saying, because actually they are saying what customers are saying, broadly speaking.

The customer evidence is summarised in 10.131 and following, up to 139. You have seen that. You were shown the exhibits, or many of them, yesterday. The submission I make is that this is a balanced account of what customers said and it supports the summary conclusions at 10.126 and 10.166, which I will come to in a moment.

Eight out of ten customer responses are summarised here, or eight out of ten customer's

responses, I should say. The ones that are not summarised are exhibits 5 and 6 and 10. The instructions I have are that 5 and 6 were regarded as relatively uninformative responses, and exhibit 10 should have been included, really, with hindsight. It wasn't captured, for some reason, but, in fact, it's materially the same as the ones that are captured.

Without reading the responses out, I'm going to make five points that we say we take from these responses in the round. The first is that the overwhelming emphasis is on quality of performance, not price; that is to say, service, performance, safety, cleanliness.

Secondly, that the preponderance of the responses emphasise the risks of transfer. There is some variation, but that's certainly the preponderance of the responses. Even those who said that they were relatively less concerned said that they would need to ensure that standards were maintained if they switched.

Thirdly, there were several overtly negative responses -- language such as "we would refuse", "would not be happy", "would not work", "we would not support it", "we would be upset".

Fourthly, customers emphasised the cost of switching and the need for trials and testing.

Fifthly, customers would, as a minimum, assess their options and would not simply transfer.

In its reply, Ecolab attacks the CMA's assessment of the responses to the remedy. That's reply paragraph 50. I don't have time to go through the points. My overarching submission is that that is really just re-arguing the evidence and that the tribunal will find that the responses which are -- the summaries of the responses in the report are fair and balanced and adequate.

There is nothing approaching an error of irrationality in the assessment of that evidence.

I have made the important point, which, I'm afraid, given the time, I would ask the tribunal to look at on another occasion, which is that one doesn't see differentiation in the tenor of the responses in terms of round 1 and round 2. They're of a piece.

If I can move, then, to 10.160, which is where the assessment of the remedy starts. The

objective is set out in the first few lines of 10.160, to create a competitor with the ability to compete sufficiently effectively in the market. 10.161, the last bit of the paragraph sets out the critical issue. It says:

"Leaving aside [other things] we must be confident that customers will transfer to the new provider and remain with that provider."

We emphasise both points because the customer needs to stay as well as to transfer and it is a source of concern that this remedy, in some senses, kicks the can down the road, because customers are invited to transfer on the basis of an arrangement of continuity, but at some point, they need to make a decision as to whether they are going to stay with the transferee, with the purchaser. That's why we emphasise both points. The risk is that the remedy is just storing up trouble rather than resolving the problem.

10.162 makes the point that in a large number of cases there isn't even a contract to transfer.

At 10.163, it makes the very important point that there is no mechanism to ensure that customers transfer and to ensure that they stay. As I have said, that is critical to the effectiveness of the remedy.

10.163 then sets out the conclusion -- it is another introductory conclusion, and I will show you the evidence for that -- as to why the CMA finds customers are likely to move to one of the other suppliers.

So there's a bit of repetition in 10.164 and 10.165. 10.164 says, even where there is a contract, the customer is not bound in; they are free to move. 10.165 then pulls the strands together. In some cases, it is not clear what is being divested and, even where there is a contract, the customer is not bound to move.

10.166 is the paragraph that sets out the CMA's conclusions based on the customer evidence which I was dealing with a few moments ago, and it says:

"... is clear and conclusive ... All of the large customers ... would not welcome a transfer of the kind proposed ... and would, at the point of being forced to move,

assess their options."

That's a key point, that the CMA cannot safely assume that customers will transfer just because Ecolab tries to persuade them to do so. Customers will make their own decision, they will consider their options.

Now, when he looked at the customer evidence in closed session yesterday, Mr Kennelly's criticism was that none of the responses showed customers ruling out switching in principle. We say, well, in fact, the responses are predominantly negative. But leaving that to one side, the CMA doesn't rely on that evidence to say customers said, "No, never. No, never"; it says that they would consider their options. That is obviously critical in the context of the question as to whether the CMA can be confident that the remedy will work.

So it's relying on this evidence to show that customers aren't bound in and they would take a view on what to do. That obviously goes to the question of high degree of certainty that customers will transfer. In my submission, the findings made here are balanced and they are commonsensical findings which reflect the evidence. All they say is that customers would object to a forced transfer and that they would decide what to do at the time, taking account of their other options.

We say it is not irrational for us to think that customers didn't need to be asked twice whether they would consider their options and make a decision, taking into account all the circumstances. The point is, there is a risk that the customers will do their own thing, transfer won't happen, the remedy won't work.

THE PRESIDENT: I understand that completely. The only thing that did puzzle me is, 10.163 seems to go even further, and say --

MR WILLIAMS: Yes, I am going to come to that, sir.

THE PRESIDENT: Yes. One could take the view it's unnecessary to go that far. That, I understand, and you say, if there isn't -- in fact, the likelihood has to be the other way.

But I just was puzzled by that.

MR WILLIAMS: Sir, that's one of the submissions I was going to make, which is that, actually, it is the risk and uncertainty that matters, not necessarily the prediction that the customers are going to jump the other way. But you have that point.

But the reason why the CMA reached the conclusion in 10.163 comes through now in these following paragraphs coupled with some paragraphs a bit later on. 10.167:

"We found ... that customers are risk averse when ... changing suppliers. ... reliability backed up by high quality technical support ... is important ... this is because of the potentially very high cost to customers of ... something going wrong ... or because of the risk to public health and to the reputation because of a food hygiene incident."

This is an absolutely critical issue, sir. It goes to the importance of dealing with someone established and reputable rather than a new entrant on the basis of a remedy like the ADP.

I just want to now show you where the more detailed evidence dealing with that is found, because it is very important. It is back at 7.34 in a section called "Choice factors". I'm going to take this reasonably quickly, if the tribunal doesn't mind. I will just point to the key -- so paragraph 7.34, third line, that customers looking for chemicals that meet their needs and are delivered in a timely and reliable manner. 7.35 is the value add point that's been the subject of exchanges, including with Professor Waterson, over the last day or two. The supply of high-quality services and support. We can see what the parties say they provide in the final sentences and the subparagraphs. 7.36 talks about bundles. 7.37 is very important, and I would ask you to read that.

THE PRESIDENT: Yes.

MR WILLIAMS: There is evidence you have seen, then, on the next page, relating to technical assistance relative to other factors. I don't need to take you through that. So that gives the context for the discussion in section 10, some of the detail.

If I can then go back to 10.168, that's what one source of evidence said and we say that speaks for itself.

Then 10.169, there is more on the risks and costs of transfer, and the basic point that we take from this is the whole thrust of this remedy is forcing customers to do something they don't want to do. It's forcing them to do something which they see as risky and costly.

These findings are not based only on a consultation with customers about a specific remedy option. They are the culmination of an in-depth enquiry into the market, including a body of evidence which was obtained at the SLC stage. It is not just looking at it through the prism of the remedy. So these conclusions reflect the totality of the evidence, not just the responses of the ten customers, and that's a point we develop in our skeleton at paragraphs 48 and 65. We say that's very relevant when one is asking the question, was it irrational for the CMA not to carry out further enquiries? This is not just a matter of processing responses from customers to a remedy option. Obviously that's an important strand. But the CMA is taking a view about what sort of remedy is going to work in the market on the basis of its entire investigation and the whole body of material.

When one is talking about, you know, food hygiene incidents and catastrophic reputational damage, the CMA's assessment of the evidence is compelling.

So 10.170 is Cannon and Rentokil. I'm not going to spend time on that now. I just make the point that that is the paragraph, or a paragraph, in which the CMA addresses submissions that the CMA ought to be satisfied with the remedy because it accepted a particular remedy in a different case, and the CMA identifies the different features of the evidence which are at least a reason why a different approach is justified.

PROF WATERSON: It is a little vague on detail, that paragraph, I find. Can you remind me of what was said in Cannon/Rentokil, paragraph 11.134.

MR WILLIAMS: 11.134? You have it, actually, I think, in your bundle.

THE PRESIDENT: We haven't been taken to it yet.

MR WILLIAMS: If you would like to take it out now, of course we can do that. It is disclosure bundle tab 1. There are no internal page numbers, I'm afraid, but you can find 11.134. The point is made that it is just a much more mixed evidence base. The ability to read that is obviously affected by the redactions as well.

I'm going to address you on where this point takes Ecolab towards the end of my submissions.

THE PRESIDENT: What it says in 10.170, that in our case all the customers raised concerns over time, costs or risk, in contrast to the customers in the Cannon case.

MR WILLIAMS: I think the point that's made is that the level of opposition -- I think -- it's actually difficult, given the redactions in the paragraph. But I think the point that's being made is, the tenor of the responses in this case was: object, refuse, upset, would not support, and so on, whereas the responses here are more nuanced.

THE PRESIDENT: They only seem to have referred to three customers. It doesn't seem a very -- 11.134 is not a very extensive consideration of customers at all.

MR WILLIAMS: I think I would accept that, sir. I will come back to deal with this a bit later on. The point doesn't have any legal significance. I just wanted to give you the point for your note.

Then 10.171 is an important paragraph. It deals with the fact that Ecolab offered financial incentives. A number of points are made. First of all, it is not clear what the compensation is and how it would be determined, what commitment customers would need to make to obtain the compensation. In any event, even if those were addressed, the compensation wouldn't address the risks of switching to the customer's businesses nor the customers' time and focus on trialling a new supplier's products.

I am going to come back to deal with the critique on this issue in a little while, but the important point here, a commitment to offer financial compensation doesn't deal with

the risks of switching. It doesn't deal with the risk of a food hygiene incident, reputational damage. It is simply something to smooth the process of transfer. But the customers' concerns go significantly beyond that, and you have seen that. Those considerations are utmost in customers' minds.

So 10.172 is the conclusion and, in my submission, that conclusion speaks for itself. It follows from what comes before.

THE PRESIDENT: 10.172. Why can't the costs of transfer be mitigated by the compensation? I see the risks can't be, but why can't the costs be?

MR WILLIAMS: I think probably, in that context -- I think there's a mixture of points going on. First of all, the CMA is not satisfied with the proposal for financial incentivisation because it says it cannot be mitigated by the compensation proposed by Ecolab, because that's vague.

THE PRESIDENT: If it is vague, that's a question of more detail. That's something else.

MR WILLIAMS: I think part of the point here is that there's time and focus on trialling a new supplier's products, and there's a question of time costs and it is really not clear from the proposal what sort of costs are going to be covered. I mean, for example, management time, supervision, we are not necessarily talking about direct costs here, there is a range of internal costs. But I think the point I would really draw out is -- this is the point I think we have emphasised in the submissions, which is that there are two issues, really. First of all, are the financial arrangements satisfactory to deal with costs and financial issues, and that's not explained, and difficult questions would arise in relation to exactly what's being compensated and what the customer would need to do in order to obtain that compensation.

Secondly, there is the entirely non-financial aspects to this, which simply cannot be dealt with through a commitment to provide financial compensation at all.

THE PRESIDENT: I understand the second. On the first, I mean, if that is the case, isn't

that something you would ask? I mean, when -- it's not that the merged parties present you with a horrendous proposal and you look at it and say, "This raises lots of questions. Therefore, we reject it". If it raises questions, you ask the questions.

MR WILLIAMS: It is partly a function of time, sir. But I think the most important answer to your question is to say, upon these points of clarification, if those had been the only issues, then perhaps the CMA would have gone back and asked the question. But that is manifestly not the case and, broadly speaking, the CMA takes the position that it is incumbent on Ecolab to bring forward convincing proposals. The proposals brought forward in relation to financial compensation, they are entirely generalised. Ecolab relies on them as the absolute beating heart of its proposal. That is the mechanism by which customers are going to be persuaded to transfer. The proposals are extremely top level. They are not really developed and not explained. So the first point is, actually, Ecolab hasn't done what it needs to do, which is to explain to the CMA how its remedy is going to work and how it is going to deal with these issues. But the second point, leaving all that aside, is that, actually, even if those uncertainties were resolved so as to nail down the question of what financial compensation is being provided, that mechanism is not capable of dealing with the concern which is utmost in customers' minds, that is the concern about reliability and so on and so forth.

So I see your point about the drafting in 10.72, but the way we put it is to say some of these things could be resolved, other things simply couldn't be resolved, and for as long as that's the case in relation to fundamental aspects of the proposal, intrinsic risks, then, really, it's not incumbent on the CMA to go back and ask further questions.

THE PRESIDENT: The suggestion that they would have compensation, that came -- it wasn't in the initial proposal, was it?

MR WILLIAMS: No, it wasn't.

THE PRESIDENT: It came in the one on 17 September. That's when it first surfaced,

I think.

MR WILLIAMS: Yes. The point that's made, and perhaps it's a point I should have made, sir, is that, obviously, the risks that are described in relation to, for example, food hygiene incidents, that sort of thing, those could generate costs, and there was no proposal for an indemnity of any sort. But what's being proposed is direct compensation for switching costs, at most.

THE PRESIDENT: I suppose the trialling, the continued supply, the transitional period, is all to mitigate the risks. That's why that's all built in, which is not really reflected here, is it?

MR WILLIAMS: I'm going to come on to trialling in a moment, actually. There is a direct finding dealing with that in a few paragraphs' time.

THE PRESIDENT: Yes.

MR WILLIAMS: So, in fact, one has to read this section together with a number of other sections. I am going to show you some of those key paragraphs. There is a section at 10.188 dealing with brand and reputation. 10.189 reiterates the point about reliability and high-quality technical support services. 10.190 identifies the risk that customers are being asked to downgrade from longstanding, well-established suppliers to a new entrant and the risk they won't be happy with that. Then at 10.191 is the paragraph I wanted to show you:

"Ecolab told us that customers can, and do, test suppliers' reliability rather than rely on reputation."

This goes to the point you were making, that there would be a trialling process. It says:

"We agree with this characterisation of competitive conditions. However, given the costs, time and risk transferring imposes on customers ... customers are more likely to test trusted companies with a longstanding UK presence."

That is a reasonable conclusion, sir. Really, the remedy that's being proposed here, you can

see that from a customer's point of view, it is asking them to take a leap in the dark as part of a remedy which is being put forward in Ecolab's interests. Now, Ecolab is clearly offering incentives and sweeteners to try to encourage the customer but, from the customer's point of view, this is dealing with matters of the utmost concern. They have to make a decision whether to trial with the new party, to give them a go, or to move to an established supplier. This goes back to the point in 10.163, sir, about why the CMA, on balance, thinks customers are more likely to go with an established supplier, taking into account the risks, the nature of the market, customers' concerns.

THE PRESIDENT: It is really that, together with 10.193, isn't it?

MR WILLIAMS: Exactly. That is where I was going to go next, but you're ahead of me, sir. 10.193 is obviously a very important paragraph in the context of the way my learned friend has put his case.

THE PRESIDENT: Yes.

MR WILLIAMS: We have given some other references in our skeleton to the evidence on this topic at paragraph 48(f). There are one or two things I might want to show you in closed session at the very end of my submissions, but we can deal with that at the end.

THE PRESIDENT: Yes, if you are able to, and perhaps that's your intention, to sort of --

MR WILLIAMS: Deal with everything else.

THE PRESIDENT: -- deal with everything else and then everything that has to be in closed session together, even if it is not an entirely logical flow.

MR WILLIAMS: That's the approach I'm taking, sir.

10.193. The CMA had specific evidence about the extent to which customers knew about the purchasers who had been identified. But the point that is made is, well, you haven't specifically asked customers whether they would approve of a sale to these entities or give information about them. The answers to that are as follows. First of all, as you have seen, Ecolab itself suggested a much more general form of consultation. That

may or may not, in our submission, but it probably did, reflect the fact that the remedy was not a sale to these purchasers, it was a remedy in principle. It wasn't bound in to these particular parties.

In practice, the CMA was not in a position to consult on the particular purchasers before its final report, and it wouldn't do that anyway, in circumstances where they are not the purchasers. These are the submissions I make about confusing consultation with remedy or remedy with consultation or implementation. We take your point, sir, that in a different case it might be different, but this was not a case in which the CMA was being asked to bless a specific transaction and there wasn't a specific transaction for it to bless anyway.

The CMA has to be able to do its job in the statutory period. It can't be driven to extend its investigation because a party says you have got to do consultation, but we are not going to let you do it yet.

And the idea that the CMA could have consulted on something specifically clear, but not confidential, without breaching any confidence or running a risk of breaching confidence, it's never been explained. It was advanced yesterday for the first time. We don't know what is being suggested. It is not what they told us to do anyway. They told us to do something else.

We reject the idea that it is incumbent on the CMA to consult iteratively on something gradually more specific on a basis which suits the way the party wants to run the process. That's a recipe for never-ending consultation and it is not compatible with the statutory deadline.

However it is put, the suggestion that we should have done more consultation on the purchasers, in our submission, simply does not work. The CMA certainly wasn't obliged, as a matter of rationality, to do that.

Moving on, 10.196 to 198. We now move on to availability of suitable purchasers. Key

finding at the bottom of 153, over to 154:

"The CMA does not consider that either of the parties, or any potential purchaser, can provide the CMA with assurance that they could sufficiently mitigate the risk because it is inherent to the design of the remedy."

Really, Ecolab is going to have to set that aside as irrational to even get started on some of the arguments it wants to make.

There is then a detailed consideration of the terms being proposed by the purchasers. I just want to draw your attention --

THE PRESIDENT: You again get there in 10.198 --

MR WILLIAMS: I thought that's what I was reading from, sir.

THE PRESIDENT: You were, weren't you? That's why I mention it:

"... we consider that a number of divestment customers may choose to move back to [the divesting company] ... at the point of transfer or shortly afterwards."

Well, they couldn't because of the undertaking.

MR WILLIAMS: I think you have my submissions on that generally, but the CMA has, first of all, made it clear that the issue is the risk of transfer -- sorry, whether there is a risk of no transfer. Secondly, it's made it clear that there is clear evidence to support the proposition that customers are more likely to go to another large supplier rather than the transferee.

THE PRESIDENT: That's because of 10.193, is it? That's the basis?

MR WILLIAMS: 10.191 as well, sir.

THE PRESIDENT: I'm not sure why the longstanding UK presence is important.

MR WILLIAMS: You're not sure why it is important?

THE PRESIDENT: Yes, a longstanding -- I mean, if it is a trusted company and if it's got a longstanding presence in Western Europe, why it has to be in the UK?

MR WILLIAMS: It's based on the range of evidence you've seen, sir, which is that

customers put a very high premium on reliability and knowing who they're dealing with, not taking risks, and the existing UK suppliers are established in this market doing exactly this.

THE PRESIDENT: Yes.

MR WILLIAMS: That's a rational finding, sir. It's not -- none of the preceding paragraphs about the importance of reliability and safety consciousness or risk aversion, none of that is challenged. The CMA is simply saying that points to people dealing with someone they know about, someone who is established, rather than taking a risk.

THE PRESIDENT: But someone they know about and someone established, I understand that, that's why it seems to me you need 10.193.

MR WILLIAMS: I'm so sorry, sir, yes, of course we read them together.

THE PRESIDENT: That's all I'm saying.

MR WILLIAMS: Yes, of course, yes. Mr Lask reminds me that we have given a host of references back to evidence and analysis in paragraph 48 of our skeleton. I'm obviously taking this reasonably quickly.

Then we move on to consideration of the terms being envisaged. I just want to show you some paragraphs. 10.204:

"[X] would expect to transfer the majority, but insufficient information to provide a precise estimate of the likely number which it acknowledged is a risk."

It is very fair, but obviously a point going to the level of certainty, and that comes from the party who is going to be entrusted with this.

If one looks at 10.206, I think this picks up a point that you noted yesterday, sir, when we looked at some of the bid documentation, particularly in the first two lines. So that's another mismatch, as you identified, between the contractual terms which the purchaser had in mind and the terms which have been put forward as part of the remedy. I can elaborate, if I need to, in camera, but a remedy on those terms is self-evidently

unacceptable, given what's being proposed. It seriously undermines the idea that these are suitable purchasers who can be relied upon to pick up the baton.

10.207, I just ask you to ring and read again at a later date.

10.209, if you look at the end of that paragraph, you've got the same issue as we saw in an earlier paragraph. Then a bit further up, we have got the same issue that we looked at in 10.206, third line, "We note". Another very, very serious problem with what's being envisaged.

There are then some paragraphs which deal with suitable suppliers, both in general terms and specifically in relation to the proposed purchasers. If I ask you to look at that again in due course. The things I wanted to flag for now, 10.213 deals specifically with the scale of the proposed purchasers and how that ties in to the CMA's concerns.

THE PRESIDENT: Sorry, 10.213?

MR WILLIAMS: Yes.

THE PRESIDENT: That's not about the two proposed.

MR WILLIAMS: It is further down.

THE PRESIDENT: Is it? 10.213?

MR WILLIAMS: Yes, if you see four lines up from the bottom, sir, there is some grey highlighting. You have to read quite a long way into it to get to see how it ties in to them.

THE PRESIDENT: You have lost me, I'm sorry. I thought 10.213 and 10.214 are looking at the alternative possibility that one of the other competitors in the UK, apart from Diversey and Christeyns, might be a suitable purchaser and explaining why you think they wouldn't be.

MR WILLIAMS: Perhaps it is a bit compressed. You can see there are observations about --

THE PRESIDENT: You can call them purchaser A and purchaser B, apparently.

MR WILLIAMS: Niche Solutions is not confidential.

THE PRESIDENT: No, it is not.

MR WILLIAMS: So the scale of their business is identified, and the point is being made, well, that is small relative to what the competitor is replacing. Then it says: "Niche Solutions has a much larger ... base than [such and such and such and such]." So, by extension, concerns are being expressed about the scale of Niche, and then, by extension, the purchasers are even smaller. We come back to this point in 215.

THE PRESIDENT: All right.

MR WILLIAMS: Mr Lask points out -- I should have shown you. I am trying to take it quickly, but I should have asked you to note that in 10.212, specific points are made about the challenges faced by smaller suppliers trying to secure larger UK customers, which is a theme the tribunal is very familiar with.

THE PRESIDENT: Yes. I don't think it's suggested that a smaller supplier would have been a candidate for the ADP.

MR WILLIAMS: We come to the question as to whether these purchasers are sufficiently in the large purchaser bracket rather than the small --

THE PRESIDENT: What's said is, well, they're small in the UK, but they're big globally, so that compensates.

MR WILLIAMS: Yes, and the CMA has considered all that. It's considered specifically, in 10.193, the point that they're a global player, and it's taken a view and said, "Well, in fact, on balance, we don't think that's good enough. We think customers are going to be concerned about dealing with a supplier that doesn't have a strong UK presence", and that's a rational finding, sir.

THE PRESIDENT: You do that in 10.215.

MR WILLIAMS: I'm trying to show you these paragraphs because the analysis is broken down in the headings, but the points do interrelate. The point we make is the

conclusions in this section take account, of course, of the views of customers, but also the CMA's assessment of the necessary scale of operation for an effective competitor in this market and the challenges they face obtaining large customers. These, again, aren't matters that depended on further investigation with customers; they reflected an assessment of competition in the market generally.

Moving on, sir, to 10.217 to 10.222, I'm not going to labour this now. These are paragraphs which deal with inherent risks in the process of transfer which contribute to the uncertainty, which don't depend on the purchaser and which, really, would never have been addressed by further consultation. They are intrinsic features of the remedy that's being proposed.

So that's a picture of the related findings on those issues. We say they are all evidence based, they are all rational. What does Ecolab say? It emphasises the financial incentives and it says that it makes switching a no-brainer. I have addressed that.

A mechanism based on financial compensation for the cost of switching is not aimed at the right target. It doesn't solve the problem of risk aversion and the priority given by customers to reliability and safety. And it is not, therefore, capable of addressing that central concern around a food hygiene incident, and so on. That is, with respect, a complete answer to this part of the case, and it is a point which is evidently evidence based. It is not a conclusion which is irrational and it's not a point which could have been dealt with through further consultation on the terms of a financial incentive mechanism.

We do also say that what Ecolab put forward wasn't good enough and that it was incumbent on it to put forward, really, much more convincing proposals on this, but given the point I've just made, I think actually nothing turns on that second point.

The lack of detail on financial reimbursement is, however, relevant to whether the CMA could carry out meaningful consultation, and I will come back to that point towards the

end of my submission, sir.

So risks around transfer is a fundamental problem with the remedy. It isn't the only fundamental problem with the remedy. As a result, in its notice of application, Ecolab has had to argue that the CMA's findings on a number of other issues were also irrational.

Now, Mr Kennelly didn't develop all those points yesterday, but I'm going to just show you what they are, because they bear in part on the question of whether further investigations could have led to the conclusion that the remedy was effective.

If I just go back to 10.146, this is scale -- scope of the remedy and scale of the competitor which is created. 10.146 is a conclusion which reflects the body of evidence considered in this section. 10.148:

> "... the parties told us that scale is important ..."

10.149, Ecolab says that the potential purchasers -- again, it comes back to the same point -- they are large -- well, it is confidential, but it's been said in open court now, they are global service providers and they say the scale -- the issue of scale will be addressed through the package. Now, the CMA addresses that and it concludes that, in fact, the ADP wouldn't create a competitor on the scale of the merging parties, and, again, 152, there is a conclusion that, given the lack of scale, unable to exert a constraint on the merged entity and other large suppliers. It is an inherent defect in the remedy put forward. Consultation wouldn't have affected that. It is a defect in the remedy in itself.

Now, what one then sees in the following paragraphs is a discussion of whether particular categories of customers need to be included in the remedy or not. The point I draw from this, as I alluded to earlier on, is that the CMA considered the need to include both international customers and small UK customers, and so one can see that the approach to creating a competitor of scale doesn't depend on whether the particular customers have been identified as giving rise to a competition problem in the SLC assessment.

There is a distinct question of whether -- whether there's a competition problem is not determinative of whether they need to be included in the remedy to create a competitive scale. As I say, one can see that from this discussion because international customers are in the mix. So that is the final part of the submissions I started to make earlier on. We say there is nothing in ground 1 on the merits, but, actually, it doesn't go anywhere in terms of the statutory questions anyway.

Moving on then to employees, this is a short point. It's common ground that a transfer of sales staff was necessary to ensure that the remedy was effective. Ecolab put forward a proposal that employees would be incentivised to transfer across. It didn't say that the employees would be subject to TUPE. It said that it would incentivise them. The CMA considered the proposal and it concluded, in 10.178, that asking employees to move to a new employer is unusual and higher risk compared to the sale of a stand-alone business which involves less change for the employees who would normally transfer.

In that paragraph, it deals with the fact that Ecolab is proposing to financially incentivise the employees, but it says, notwithstanding that, that would mitigate the risk, but there is still a risk that the employees will choose not to move.

THE PRESIDENT: Well, they'd presumably be made redundant. They might choose to go somewhere else, but one can see that they can commercially -- is it right the account managers -- I think one of my colleagues picked this up -- largely worked from home, or are based at home? They are not in an office.

MR WILLIAMS: I don't know the answer to that, sir, I'm sorry.

THE PRESIDENT: It's in the report, yes, 10.175. For some reason, it is confidential. I can't think why.

MR WILLIAMS: Yes, I see.

PROF WATERSON: I think it is the name that is confidential.

THE PRESIDENT: Yes. I doubt that -- well, 10.175, the first sentence is not confidential. I wouldn't have thought -- if the first sentence is not -- well, maybe it helps to identify who they are. But, in any event -- so it is not that they have to geographically move to another part of the country, which clearly people may be very reluctant to do. But it can mean that the option of losing employment with just statutory redundancy or getting an attractive package somewhere else means that the chances of people accepting it are very high.

MR WILLIAMS: The point that's made in 178 is to acknowledge that the proposal to incentivise them may reduce the risk. However, asking them to move in this way, as opposed to staying in the business, is unusual and higher risk compared to the sale of a stand-alone business, which involves less change. So the point is not overstated. It is a material risk in relation to the remedy because it is accepted that this is another vital component of the remedy. This is another point to which further enquiries really -- further enquiries have no bearing on it and it is another aspect in which the remedy is uncertain. In particular, it is uncertain relative to the normal course of divesting a business unit.

So that's a rational finding. I think, in response to it, Ecolab has partly put forward further detail through the evidence of Mr de Boo as to what it was that Ecolab had in mind. That's not admissible, that material. It doesn't actually affect the position anyway, because the conclusion that's drawn in 10.178 is of a general nature.

The point that's said against me is, well, TUPE doesn't tie people in anyway. All TUPE does is protect the employee. If the employee wants to leave, then they are free to leave. And that's true. But what's said in 10.178 is also a rational finding, which is that this is an unusual arrangement and the risk that employees won't be happy with this kind of transfer, finding themselves floating with some contracts, creates additional risk.

THE PRESIDENT: Yes.

MR WILLIAMS: There's a secondary point, which Mr Kennelly didn't refer to yesterday, about the details of the arrangements. Probably if I just give you the reference in our skeleton to that. I beg your pardon, it is in the defence. I'm sorry, sir. It is 279 of our defence.

THE PRESIDENT: Paragraph 279?

MR WILLIAMS: Yes. The issue that's dealt with in that paragraph is secondary to the question of whether the employees would transfer at all, which is the point I was just addressing you on.

THE PRESIDENT: Just a moment while we find it.

MR WILLIAMS: So further risks in relation to employees, further investigations wouldn't do anything about that.

Transitional period. These are important findings at 10.223 to 10.229. I'm not going to ask you to read them but I'm going to draw out some points.

The transitional period here involved the divesting party supplying for a period of up to a year -- supplying the purchaser for up to a year and customers moving across gradually during that transitional period during which the divesting party continued to offer support. What the CMA found is that this delayed the costs and risks of switching but it didn't eliminate them. That's a point I made earlier on. There's a risk that this remedy is simply kicking the can down the road because, for as long as the divesting party is on the scene, the customer doesn't necessarily have to make a decision. As I emphasised earlier on, the importance of this remedy is the customer needs not just to transfer, but they need to stay.

The CMA's concern is that further down the road the customer decides they aren't happy with what's going on and, at that point, the remedy starts to break down.

A second problem is that the arrangement gave the purchaser the problem of juggling the integration of the putatively transferred customers and actually trying to grow the

business and compete. There was a concern that, given the complications around the remedy, they would focus on consolidating on what they had or what they had taken through the remedy and wouldn't actually be competing in the market as a strong competitor would do. That's another rational concern intrinsic in the remedy.

Thirdly, these proposals envisaged an extensive role for the divesting party during the transitional period. It wasn't just maintaining, for example, a legacy IT system, or something like that. It was actually effectively the competitor supplying services and the products. Obviously an arrangement which relies on continued supply by the merging party during that transitional period is not remedying the SLC in that period, and that undermines the effectiveness of the remedy. I have already shown you some other important evidence in relation to this topic a few moments ago.

These are all critical points which go to the heart of the remedy, because the transitional period was the means by which it was suggested that the problem of customers switching or not switching and transferring would be managed, and the CMA concluded this isn't a solution, it is not a satisfactory solution, anyway, and, in fact, the solution itself creates other problems.

Really, Ecolab has no coherent basis for challenging those findings on a rationality principle. It has sought to re-argue the point. It's put forward evidence from Mr de Boo, again giving further information about how this would all have worked. But, in my submission, the findings are unassailable and they're an intrinsic problem with the remedy, again, to which investigations would have made no difference.

So that covers the main heads in the report. Before I conclude on those grounds, just a brief word about Rentokil. The submissions prior to yesterday have placed more emphasis on Rentokil/Cannon and yesterday Mr Kennelly brought the Mitie undertakings into the picture as well. The submissions I am going to make are of a more general nature. The first point is remedies adopted in other cases are not legal precedents, so the decision of

a group in a different enquiry has no legal significance in this case at all. The CMA approaches cases in a consistent way by following its guidance. That's what it did in this case, that's what it did in the other cases.

Secondly, the CMA didn't dismiss this remedy out of hand on the basis of a blanket policy that all remedies need to be a stand-alone business. It dealt with it on its merits. That being the case, the fact that a remedy which Ecolab says is similar in some respects to a remedy advanced in this case, it's really neither here nor there.

Thirdly, the remedy, at least in Rentokil/Cannon, which is the case Ecolab focused upon yesterday, was very different in composition. You were shown that yesterday. The question of the composition of the remedy bundle is also dealt with in the chapter 11, which we took out earlier on, paragraphs 11.29 to 11.31. There is really no comparison in the scope and composition of the packages. All that can be said, really, is that they both involve transfers of contracts together with other assets. But beyond that, they're very different packages.

THE PRESIDENT: What would you say are the key differences? Do you want to summarise them?

MR WILLIAMS: In my submission, none of them are key for the reasons I have already given, sir, there is no legal relevance --

THE PRESIDENT: That's your first point, in which case you can stop there. But you have gone on to make another point, which is --

MR WILLIAMS: To give a few examples, there is a transfer of a brand. All intangible assets --

THE PRESIDENT: Transfer of brand?

MR WILLIAMS: All intangible assets, all Cannon employees and other personnel, all permits and licences, all UK facilities, all leases and all vehicles and so on. That's followed up by observations about the mode of transfer in which the CMA expresses

a preference for the transfer to be through the transfer of shares in a company which obviously is quite a different proposition from what's being envisaged here. There is some flexibility around that, depending on what works best for the transferee, but the mode of transfer that's being contemplated is fundamentally different.

Fourthly, the risk that customers won't transfer will always depend on the product in the market, and the assessment as to whether there was a risk that customers wouldn't transfer in this case was based on evidence relating essentially to the nature of this market, the risks in this market, and the CMA was entitled to reach different conclusions having regard to different evidence.

The CMA concluded that there were serious shortcomings, manifest shortcomings, in the ADP. Those conclusions are wholly justified on the basis of the evidence and the assessment contained in section 10. The conclusions are in the section starting at 10.230, running through to 10.237.

The CMA had adequate evidence to support its conclusions and, if that's right, then it was obviously rational for it to reach its conclusions on the statutory questions on the basis of that evidence without further investigation. It isn't plausible, in my submission, to suggest that further consultation with customers would have moved the CMA's assessment from manifest shortcomings to high degree of certainty in effectiveness.

I'm just going to make a few points on ground 3. You have my point that the rationality standard has to be judged in the context of a time-limited process.

Gathering evidence is not simply a matter of firing out a few emails to customers. It's then a matter of considering the evidence at staff level, then at group level, producing draft texts for a report, circulating and discussing that draft text, discussing it in a group meeting, the group reaching a decision, making amendments, putting it back to the parties. These are all decisions for the CMA about how to run its process, how to plan its process, in the limited time it's got. Here, as you've seen, the CMA was right up

against the deadline in dealing with all of these issues, and it's rational for the CMA to take a view on the basis of the material it's got if it points to a clear conclusion, as it did in this case.

Ecolab points to the opportunity to extend as a way of resolving the difficulties. But when asked rhetorically, what are the special reasons to extend in this case? The CMA had formed a clear view on the evidence that there were inherent problems with the remedy. Some of the consultation which Ecolab says, it now says, should have been done, it actually wasn't allowed to do at the time, consulting on the identity of purchasers, and so on. An extension is not simply a way of accommodating the parties and allowing them to further develop their proposals and to give them another opportunity to convince the CMA that an alternative remedies package is capable of addressing the CMA's concerns, and the CMA was entitled to draw a line where it did.

Then, just returning to the question of -- well, the question that it is said that ought to have been put to the CMA -- sorry, that the CMA ought to have put to the customers, that's at 53(1) of Ecolab's skeleton. I'm going to take your approach, sir, and focus on key features of the question rather than take drafting points. I have already dealt with point 2, that is to say, whether the CMA could, or should, have consulted further on a particular purchaser or a purchaser of a particular description. I hope I have dealt with that point at a number of points in my submissions.

The CMA concluded that the remedy wasn't effective of the specific purchaser, so that point would never have made any difference, but I have already dealt with the suggestion that we could or should have consulted on some other basis.

The next point, uninterrupted supply. Well, that was dealt with in Ecolab's summary, non-confidential summary, of its remedy and so the consultation did take place on the basis of their own description of the remedy. But then you look -- then it says "for initial period". The question arises, well, what is that period? That is going to matter

to customers. Now, I'm not taking a drafting point. The point I'm making is that, for as long as there are questions about the shape and nature of the remedy, the idea that customers ought to be consulted on this as though it is a concrete proposition doesn't hold water. An initial period. The high likelihood of retaining your existing account manager, that is not a satisfactory basis for consulting, sir. What does that mean? What is a customer supposed to do with that? Of course, I'm not taking a drafting point. Again, it wasn't known whether the customer would retain the same account manager. That would all depend.

Next, financial compensation for switching costs. Well, I have already explained why further consultation on the compensation mechanism wasn't necessary, but, again, what's a customer supposed to do with an open-ended proposition that they are going to get unspecified financial compensation? The same point applies to financial incentivisation to remain with the supplier. Again, I stress, I'm not criticising the drafting. I'm saying these proposals were not at a point where customers could meaningfully be asked to react to them. There is an obvious risk that by presenting this proposal to customers as though it is a concrete proposition, that's going to buy us responses or they would ask for more detail when there wasn't any. That's indicative of why it was preferable for the CMA to consult customers either in relation -- on the basis of the summary description prepared by Ecolab or more generally using open questions in relation to a remedy of this nature.

So I have dealt with the point that we have accepted that some aspects of the uncertainty in the proposals might have been capable of resolution through further dialogue. The answer to that is that several aspects could not have been clarified or addressed through further dialogue. The fact that we might have been able, for example, to reach clarity about exactly which customers were included in the package or even obtain further clarity about the scope of the financial incentive mechanism, none of that would have

addressed the more fundamental and intrinsic defects in the remedy.

Sir, that leaves ground 4, and I think what's left of ground 4 is a short point. I will try and deal with it in open court before going into closed session just very briefly.

Ecolab says that the CMA could be confident that there was an effective remedy because the fallback proposal was there in the background. I think you have our primary point on this, which is that that submission misses the point. The CMA had already decided that the ADP was an unsuitable remedy. It followed that it was ineffective whether as a stand-alone remedy or as a primary remedy with a fallback behind it.

The justification for the fallback option, the stated justification was that it provided security in case a suitable purchaser couldn't be found. That's what Ecolab said at the time. I don't know -- I think you saw that yesterday, but would it help to have another look at it, sir?

THE PRESIDENT: Yes.

MR WILLIAMS: It is notice of application volume 2, tab 24. I might have gone further than I ought to have done in there, although I'm not sure that I actually said anything actually confidential.

THE PRESIDENT: Tab 24 at paragraph --

MR WILLIAMS: Perhaps we can look at the transcript afterwards. I'm sorry about that.

THE PRESIDENT: Which paragraph?

MR WILLIAMS: 1.9 and 1.11 on page 891.

THE PRESIDENT: Yes.

MR WILLIAMS: This is dealing with the risk that's identified there. I have already made my submissions that the report is clear that that's not the problem.

Now, as you mentioned yesterday, sir, there are contexts in which the definition of the remedy may depend on the reaction of the market. The prospect of alternative proposals is dealt with in the mergers remedies guidance at paragraph 5.17 and

following. Sir, you made the point yesterday that that's dealing with the marketability of the package and whether the package needs to be modified in order to make it saleable. But that's not the issue here. The CMA knew that there were potential buyers, but there were a host of other reasons why the remedy was rejected.

The answer to the point, and, really, the reason why the remedy is not broken out in a separate analysis in the final report is that it is not a separate remedy. It is another remedy which incorporates this remedy as a primary position.

THE PRESIDENT: If this remedy would not be effective, if it could be implemented, then clearly the fallback doesn't arise. That's your position.

MR WILLIAMS: That's right. That's exactly the problem.

THE PRESIDENT: I think Mr Kennelly accepted that. He said, well, it would be effective or, if you were unsure, you needed to, and should have, indeed, consulted customers further to determine whether or not it would be effective, then the fallback becomes relevant. So that's how they put their case. It is not that if it is not effective, nonetheless they should have had a fallback.

MR WILLIAMS: I think the case is put two ways. I think it's said that -- well, the case on further investigations is put two ways. It's put, first of all, we ought to have carried out further investigations and if we had got a more positive response from customers, that would have at least accommodated this as a primary remedy, and that's the case I have been dealing with, I think, up until now, sir.

THE PRESIDENT: Yes.

MR WILLIAMS: I think the way the argument on fallback developed yesterday was that the CMA could have accepted a composite remedy, including the fallback position, and then, during the post-report period, it could have investigated the ADP further and then, as part of that process, having accepted it as a primary remedy with a fallback, it could have then rejected it at that stage.

There are two answers to that. The first is that the CMA didn't find that the remedy might be more effective with more information if only we had a bit more time. It found that the remedy had manifest shortcomings. We just weren't in the territory of thinking that, if we can just ask a few more questions, this might just get over the line.

Secondly, I think I have made this point, if Ecolab is saying that its proposal might have been more attractive with more information received after the final report, that is not how the process works. The CMA has a statutory duty to answer the statutory questions in its report and to decide what's an effective remedy in its report, on the basis of the available evidence. It considered the ADP in relation to the evidence available to it and rejected it. Having done that, there was no basis on which the CMA could have accepted it with a fallback remedy. The proposal just doesn't work. We say it is wrong in principle to suggest that the CMA should be accepting composite remedies with fallback positions where it is unhappy with the first part, it is not satisfied that the first part is effective, just to give parties another chance to persuade it otherwise in the implementation period.

So it does seem to us now that ground 4 is really essentially, as you put it to me, sir, a sort of variation on ground 3, really. It is another mechanism to allow the CMA to make further enquiries. But we reject the submission that we should have made further enquiries. But we also say it is wrong in principle to carry out those further enquiries post report.

To the extent that Ecolab relies on the fact that there was a fallback remedy in Rentokil, I have made my submissions. That's a different case. In that case, the CMA found that the primary remedy was capable of being effective. So obviously the analysis of the fallback position takes on a different complexion.

Sir, I have some submissions on Mr de Boo's evidence. I don't know whether you feel you need to hear them.

THE PRESIDENT: We weren't really taken to much of his evidence.

MR WILLIAMS: I think the short point is this: there is quite a lot of evidence in Mr de Boo's statement which is repetitious of material that's before the tribunal, in any event. In the Tobii admissibility ruling, paragraphs 70 and 77, the tribunal didn't admit material of that nature because it wasn't necessary and, if anything, there was a risk it would put a gloss on the relevant material, being the material before the decision maker.

There is a lot of material in the statement which -- I'm not critical when say this -- from a legal perspective, it veers into argument and opinion and that material is not admissible in the guise of a factual witness statement. Mr Kennelly has put Ecolab's arguments comprehensively and they don't need to be put through a witness statement as well.

Thirdly, there is genuinely new material in relation to some of the components of the ADP, and I have had to deal with that in my submissions because that material is very clearly inadmissible.

THE PRESIDENT: You have not asked us to rule at the outset that it is inadmissible.

MR WILLIAMS: No.

THE PRESIDENT: Very little reference was made to it. We have looked at -- all the argument has concentrated on the material that was put and we have been taken to it in every stage of the crucial last five weeks or so to the CMA at the time, so I don't think we really need look at Mr de Boo's evidence --

MR WILLIAMS: I will leave it there.

THE PRESIDENT: -- unless Mr Kennelly says, no, there is something terribly important there that he needs to rely on. But I didn't get that impression.

MR WILLIAMS: That's, I think, 99.9 per cent of my submissions.

THE PRESIDENT: You have kept well to time, on that basis.

MR WILLIAMS: I'm grateful, sir.

THE PRESIDENT: The sensible thing is, if we rise for five minutes, would that be appropriate, if you want to go into closed session?

MR WILLIAMS: I wondered whether it would be more convenient, sir, to clear the court, for me to make the very brief points I want to make in closed session, and then for us all to come back in open session, but that's a matter for you, sir.

THE PRESIDENT: And then we will take our break after you have finished?

MR WILLIAMS: Yes.

THE PRESIDENT: And then Mr Kennelly has ten minutes to gather his thoughts. Shall we do it that way? Everyone who is not in the confidentiality ring, if they could please leave the court.

We should make clear, for the purpose of the transcript, that we have now gone into closed session.

(3.33 pm)

(The hearing went into closed session)

(4.00 pm)

(In open session)

THE PRESIDENT: Yes, Mr Kennelly?

Submissions in reply by MR KENNELLY

MR KENNELLY: Thank you. I will begin with SLC and deal with remedy after that. Turning then to SLC, Mr Williams summarised the case against him at the very beginning of his submissions by saying that the basic flaw in our argument -- I paraphrase his submissions -- was to treat competition for small customers as a discrete issue on which the CMA should have made a binary finding. That's what he said, that's the flaw in our submissions.

My response, which I shall develop, is that the CMA itself examined small customers differently. We see that in the questionnaire that it put to small customers different from that which it put to large customers and its own analysis of small customers as compared with large customers in the final report.

The CMA did make a finding at 7.203 in relation to small customers and SLC, and our case is that was an irrational finding.

It is a question, we say, of competitive effects. There is no doubt the parties compete for small customers. The question is, is that competition such that for these small customers the merger would lead to an SLC? So we need to see who else is competing for them and to what extent.

The tribunal saw the evidence in the final report going to this issue. It was figure 14, figure 17 and paragraph 7.156 as corrected, which deals with -- which surveys and establishes the degree to which Ecolab and Holchem customers regard small suppliers as alternative suppliers or describes them as previous suppliers.

Mr Williams said in his submissions, when you look at the columns which separate the popularity of the parties and the large suppliers and the small suppliers, you mustn't aggregate the small suppliers. But why not, we say? That's precisely what the tribunal should do. The question is not whether any particular small supplier is constrained by the big four. The question is whether the body of small suppliers acts as a constraint, and to what extent.

What the evidence demonstrates very clearly to you, the evidence established by the CMA in the final report, is that when you look at figure 14, figure 17, and paragraph 7.156, the small suppliers are a close, or very close, match to the large suppliers when competing for small customers.

That's plain from the simple figures disclosed by that evidence, and that's simply by looking at whether they're alternatives or previous suppliers. It puts to one side the

unchallenged evidence that the small suppliers already supply a huge proportion of small customers across the market. You got that from the submissions I made in opening about the percentage that the small suppliers have of the market as a whole, bearing in mind the unchallenged position, the obvious position, that small suppliers have very little of the large customer segment.

My learned friend relied on the fact that when you look at figure 14, for Ecolab's small customers, Holchem is the best alternative. Well, I would say, first of all, small customers who are already buying from a large supplier, who have gone down the large supplier route, are very likely to prefer a large supplier as an alternative. Secondly, the tribunal has to recognise the limited probative value of that evidence, because Ecolab doesn't have a huge proportion of the small customer market. Small suppliers are more powerful overall in the market than Ecolab, among small customers. You get that from -- the significance of Ecolab around the small customers is clear from the notice of application page 12.

Let me come to the conclusion, 7.203. The key evidence there, 7.203 is the conclusion on this issue in the final report. The key evidence referred to there are the figures for alternative suppliers. The CMA in that paragraph places reliance -- the only thing it cites expressly there is the fact that large suppliers are more often cited as alternatives for small customers.

Because that's a paragraph which dismisses the parties' argument that there should be no SLC finding in respect of small customers, it is a finding that the SLC extends to small customers. But we say, on what basis? When pressed by the tribunal, my learned friend said, well, we couldn't give it a clean bill of health, we couldn't give the small customer situation a clean bill of health. But, members of the tribunal, that's not the test. That test would be satisfied by a finding that there was simply some reduction in competition. What the CMA needs to show is that there is a substantial lessening of

competition. In this case, it was not substantial, because the evidence demonstrated that the removal of one of Ecolab and Holchem, the effect of the merger, does not lead to an SLC for small customers because there's far more competition, far greater constraint, for that segment from small suppliers.

In truth, the paucity of analysis and reasoning in the final report demonstrates why the CMA has got to this position. They didn't apply their minds properly to the question of an SLC for small customers. It was obviously an afterthought in paragraph 7.203.

What my learned friend is reduced to saying in the end is that it isn't necessary to examine them separately because there's no bright line between small customers and large customers. But that, as I said in opening, isn't an answer. The fact that the line between them is blurry doesn't mean you can simply lump one category in with the other entirely. It is obvious that, although the line between them may be blurred, there are very different characteristics in both customer segments, and that's demonstrated by the CMA's own analysis and the way the CMA segregated small and large customers for the purpose of that analysis.

That's my reply on the SLC issue.

I will turn to the larger part of our case, which of course is remedy, and just step back for a moment to crystallise our case on remedy. There are two main problems or holes in the CMA's approach: one in relation to their evidence-gathering exercise of customers, and the other in relation to their analysis of whether the purchasers could be effective competitors to address the SLC.

In relation to the first, the evidence-gathering exercise, what becomes very clear from the material is that the two most important things for the customers who are potentially to be transferred were not consulted on at all, and we know they were important, these features, because that's what emerges from the evidence-gathering exercise that was conducted. The risk of a reduction in quality and service and the risk of increased costs

that would be covered by a transfer of a portfolio of contracts.

Those concerns could have been addressed by consulting the customers on the two things: one, financial incentives; and, two, the identity of the purchaser. These are two things the CMA never consulted on. There was absolutely no obstacle to them consulting on financial incentives, and I will come to that, and the parties put to the CMA an approach whereby they would be able eventually to consult with the benefit of the purchasers' actual identity perfectly within the process allowed under the CMA's legislative rules and guidance.

The second broad point, the second hole in the CMA's case, relates to the viability of the purchasers as businesses sufficient to cure the SLC, because the only evidence on this question of whether the purchasers, fortified by these contracts, could have that effect was the evidence produced by the purchasers themselves, detailed evidence from global, sophisticated businesses, evidence coming from executives at a high level, both in writing and in oral discussions with the CMA, with absolutely nothing to contradict it.

It was irrational, we say, for the CMA simply to put it to one side. Whether they were disbelieved or disregarded matters not; there was no rational basis for simply contradicting it since it was all going one way and was plainly credible, on its face.

So with that broad overview, I turn to the legal framework. Mr Williams set out there, before getting into the facts of this particular case, what he understood to be the operative legal framework both under the legislation and the guidance which constrained the CMA in this case, and it provides, if I may say so, a useful guide to where we say the CMA went wrong because it described to the tribunal a very restrictive approach to what they were prepared to do in this case or, if one takes what Mr Williams said, in any case.

Initially, however, some flexibility was acknowledged. The legislation makes that plain.

Examining sections 41 and 41A, Mr Williams had to accept that it isn't necessary for the remedy decision to be fully fleshed out in the final report. He acknowledged that some issues of detail could be left over to the later stage under section 41, for which there is a further period. One has the period for the final report that may be extended by eight weeks, and then, for the next stage under 41A, a period of 12 weeks, which could be extended by a further six weeks.

What that demonstrates is that it is not necessary to have a fully worked-up plan at the final report stage. Some matters may be left open. Necessarily, that means that some residual uncertainty may well still exist at the end of the final report stage. The legislative scheme contemplates that and permits it.

But Mr Williams adopted then in the CMA's interpretation of that scheme a very restrictive approach. He said that, at the final report stage, it is not appropriate to pick a purchaser. That comes much later. We agree that, in many cases, whether the remedy is effective may involve consideration of purchasers, and answering the questions, Mr Williams said, who is likely to be a suitable purchaser.

Mr Williams said that would arise when a negotiation between a purchaser and a seller had reached its conclusion. The CMA will not consult where the purchaser may be one of a number of people. But that, members of the tribunal, is an overly restrictive approach to the legislative scheme as a whole. That's not what the procedure says. It is much more flexible. It would be a disproportionate approach, in any event. Because, in the real world, as here, it may well be possible, it may well happen, that a transaction in principle has been secured near the close of the final report stage, but with an extension of time which could be done either by extending time or by adopting a fallback, such as we suggest. With that flexibility, a sale and purchase agreement might in a particular case be achieved. Having such a thing may, in a particular case, be extremely important to resolve uncertainties to allow the CMA to answer the statutory question,

where, for example, the identity of the purchaser is highly material to answering the statutory question.

Mr Williams was very clear on this, when pressed by the tribunal, and he had two objections to it: one, as a matter of principle, and the other as a matter of time. He said it is not envisaged in the preconclusion of the final report to allow a deal to be progressed to conclusion for the purposes of allowing the parties -- I paraphrase -- to approve the remedy, the proposed remedy. That may well be the proportionate and appropriate thing to do within the framework of a statutory scheme and within the time limits provided under it. Mr Williams' point about time, the fact that the time periods available may not accommodate it, well, it is a question that we resolve from case to case. It is certainly not this case, as I shall explain. In this case, there was plainly sufficient time to address the uncertainty that troubled the CMA. Even if such uncertainty was properly troubling them.

When Mr Williams was dealing with the staged approach to discussions with customers that the parties expressed in particular in the response, the Remedies Working Paper, at paragraph 2.20 -- I do urge the tribunal, when you deliberate, to review that paragraph again, paragraph 2.20 of the response, the Remedies Working Paper -- Mr Williams said, that's just not the process and isn't normally possible within the time available. That, by the way, is the paragraph where the parties told the CMA that it would be possible, once the deal had been done, to go with the particularity of the deal and the identity of the purchaser to the divestment customers to obtain their consent and to reassure them that the transfer would work for them and for the market.

For such a thing, we say it is plainly appropriate to extend time. That took Mr Williams then to the question of special reasons. He did say in his submissions, by using the word "exceptional" or "exceptionality" that there was some form of exceptionality or exceptional standard applied to the application of the special reasons point, a point

taken up by the tribunal earlier. There is no exceptionality requirement in the legislation for the use of special reasons, and one should not be read in. Parliament chose to use the words "special reasons" and not to use the language of "exceptionality" and that's an important feature. It allows the CMA, and properly allows the CMA, to have a great deal of flexibility in order to extend time, particularly for the purpose of ensuring the CMA can properly and lawfully satisfy its statutory duty in producing a proportionate remedy. I add, of course, there is no authority, and none was cited to you, that the use of the special reasons time extension can only be done where exceptional circumstances are identified. You have seen the Tobii judgment. We have done our own research and there is no authority supporting what Mr Williams said.

What's important, of course, is that, contrary to what he submitted, it was never the parties' case that the CMA should disregard the statutory timetable. On the contrary, the parties urged the CMA to use its powers, not least under section 39 of the Act, to extend time to allow the CMA properly to satisfy its duties.

Then we come to the evidence, the critical question of the evidence upon which the CMA relied. Mr Williams referred to the initial consultation with four customers and what he called the second wave. As the tribunal heard, only the second wave received the summary, the non-confidential summary, of the ADP. He said that that second wave was set up on 4 September and the summary was given then. It appears it was sent by email. Mr Williams said at this stage that the CMA did not have the summary for the purposes of the customer which it met on 2 September. I don't name that customer here. There may have been a slip of the tongue. The CMA obviously did -- the CMA obviously had a summary because it had received it on 27 August.

THE PRESIDENT: I don't think he said they had it. He said they hadn't given it to that customer.

MR WILLIAMS: That's what I intended to say.

MR KENNELLY: That's why I said a slip.

THE PRESIDENT: That's what I understood. It was sent out on the 4th.

MR KENNELLY: The important point is that, even though they had it on the 27th, the particular customer they met on the 2nd, behind tab 3 in the defence bundle, did not receive it when it could have received it.

THE PRESIDENT: I don't know if it went on the website because that's what the email said, to your clients, that's what's going to happen.

MR KENNELLY: That's what it said was going to happen. I don't know if that happened --

THE PRESIDENT: I assume the people behind you know whether it did happen and, ditto, the CMA will know.

MR KENNELLY: The CMA -- my clients ought to know, but the CMA ought to know better.

MR WILLIAMS: I believe it went on the website on 2 September, which was that day. I'm not sure it would have helped with that customer.

MR KENNELLY: Ordinarily, one customer wouldn't make a difference one way or the other. If only six customers get the document, the fact that a further single customer doesn't does make a difference. The evidence base that the CMA has chosen is already extremely small. We know the CMA is well capable of surveying a larger group of large customers because we saw that from the survey they did at the beginning, 41-odd Ecolab customers and a large number of Holchem customers.

What's striking about this whole exercise is the tiny number of customers the CMA chose to consult, not least in view of the fact that a larger number, 21, 24, the figure varied from time to time, that were in the frame for transfer to the purchaser.

THE PRESIDENT: That's not a ground of challenge in the notice of application, that more customers should have been consulted, is it?

MR KENNELLY: On the contrary, sir.

THE PRESIDENT: So the number is too small?

MR KENNELLY: We haven't said in terms that more than six should have been consulted. But we absolutely have said that the consultation exercise was woefully inadequate.

THE PRESIDENT: I thought that's because of what they were asked, not because of specifically the numbers.

MR KENNELLY: The grounds of review are sufficiently broad to allow me to submit to you today that, not least in view of what we learned during the course of the hearing about who was given what when to be able to make the submission I make now and also, sir, in terms of fairness. Just to be clear, we didn't receive the consultations until after we had drafted the notice of application. They came with the defence.

THE PRESIDENT: Yes.

MR KENNELLY: So it would be quite unfair to shut me out from complaining about the number of --

THE PRESIDENT: You didn't apply to amend it. We weren't, therefore, addressed by the CMA as to how the customers were chosen and why there weren't more, and so on, because that wasn't in play. They no doubt could have then answered questions about that. We didn't ask them.

MR KENNELLY: No. My submission goes no further than this, although it is a very important part of my case, that in challenging the evidence-gathering exercise as a whole, which I do, we are not limiting it to the question that was put. We say the evidence-gathering process, as a whole, was inadequate. It is open to me to say that the tribunal can have regard to the fact that the CMA only put -- after 27 August, only put the document containing the non-confidential version of the proposal to six customers. That is something to which the tribunal can absolutely have regard, and we invite you to do that. And it is not limited to that. The question is, having done that -- that's not the end of the process. The CMA's duty properly to inform itself does not end once it

has sent ten emails and got responses from six people or meeting the responses from six people. It had an ongoing duty to inform itself in order to answer the statutory question. That's why we said in our response to the working paper you take a staged approach.

On 27 August -- sorry, sir. If you are looking for reference to the notice of application or reply to where we challenged the sufficiency of the process, Mr Luckhurst will give me references and I can supply them to the tribunal. We haven't lost sight of that point.

The staged approach is important because we said to the CMA at the time that when the identity of the purchasers were revealed to the CMA, on 27 August 2019, we said that's -- the identities cannot be revealed at that time and we asked for the identities to be kept secret, to quote, "at least for a few weeks". That's what we say in the transcript. We were plainly happy for the detail in the non-confidential version and the reference to a strong fourth player to be used in consultation as widely as possible for the purposes of persuading customers of the effectiveness of our proposed remedy.

But, then, importantly, that ADP was revised and strengthened in the response to the Remedies Working Paper. So on 17 September, the CMA received a beefed-up and quite different remedy in two respects. First of all, it's made very clear that the divesting company is going to cease supply. There is some doubt and confusion about before 17 September. But it's made it crystal clear in annex 1 to the response to the Remedies Working Paper that the divesting company will cease supply so that the customer will have to find somewhere else to go.

The second crucial difference was the financial incentives designed to leave the customer whole. The financial incentives designed to ensure that the customer would incur no further cost. The tribunal put to my learned friend -- perhaps this could be just wishful thinking on my part -- was this not worth putting to the customers? Was this not worth putting to the customers? In my submission, it should have been put to the customers

who were in the frame for transfer. If the question is, are these customers going to transfer and stay, you put this revised proposal in an email, at least to those 21 or 24, and if you can't do that, at least put it back to the six with whom you have already engaged. A simple email, a short phone call, would have sufficed.

The question of cost is obviously central to the CMA's concerns, and their customers' concerns, about the transfer. So it is highly material to the question that they are themselves asking.

At this stage, I pause to mention the fact that my learned friend, when dealing with this and dealing with the general concerns of customers, mentioned repeatedly the huge risk of a hygiene incident, and that troubled customers also. But, of course, and the tribunal has this, there is no evidence that either purchaser was ever involved in a hygiene incident ever, anywhere. There was nothing to raise that concern in the mind of the CMA and, had a staged approach to discussions with the customers been allowed, the customers could have had that same reassurance provided to them.

So then we have to ask ourselves, why did the CMA not put the revised ADP to the customers? Why did they not put the financial incentives to the customers who had raised concerns about cost?

Mr Williams suggested that time might have been a problem. But, as I said a moment ago, this detail was given to the CMA on 17 September. Even without an extension of time, the final report was not due until 6/7 October. We have seen the very summary form in which the CMA consults. It would have been a matter of sending 21 or 24 emails, copy/paste, containing the gist of what had been supplied to the CMA.

In seeking to get around the fact that that wasn't done, the CMA argue that, well, there was no point doing that because the customers could not have been reassured. They were looking, among other things, for a supplier with a longstanding UK presence, relying on paragraph 10.191 of the final report. A longstanding UK presence. That is not what

the evidence says. When pressed, my learned friend said that was based on a range of evidence. But there is no evidence that says that.

On the contrary, we saw from the Survation survey that when asked whether they'd be prepared -- whether large customers would be prepared to allow a newcomer with a global European presence to conduct a survey and provide an indicative offer, 83 per cent of customers were happy with that.

Mr Williams' next point was, well, because of the customers' concerns about cost and time and risk, they didn't want to leap into the dark. But, with all due respect, the degree of darkness was due to the CMA. After 17 September 2019, it was possible to explain to customers that they would not incur increased costs because of the financial incentives and, if they had concerns about the transition, to tell them there was a high likelihood that they would retain the account manager with whom they had a relationship from the divesting company. The percentage of account managers who would transfer, the tribunal has, and that percentage, that very high percentage, was based on a fixed number of account managers, but the tribunal will be aware that, ultimately, the parties agreed to transfer further account managers. So that large number of account managers who would transfer is the minimum, that's the baseline. A greater percentage would ultimately have gone.

With that information, it would have been much less of a leap into the dark for these customers, bearing in mind, of course, that they are using homogenised products and, because of the transition period, they would have time to trial and test these homogenised products in order to be reassured and reconciled to the purchasers' products.

I now turn to the relevance of the imminent deal, moving away from the customers and the relevance of the imminent deal. Again, it boils down to timing because it was possible to permit the deal to be concluded either by extending time or by adopting the fallback

option. The question is, is that worth doing? Was it irrational not to do it? We see in this case that the negotiations were already advanced -- you saw that in the term sheets -- and there was a great deal of importance in having a fixed commercial deal for the CMA to review and a concrete deal and identity of purchaser to provide to customers.

So a process that would have allowed the deal to be done was highly relevant to the CMA's duty to answer the statutory questions, facilitating that conclusion that the closing of that deal, by allowing time for it to take place, was highly material to the evidence-gathering exercise that the CMA was bound to undertake in order properly to answer the statutory question in a proportionate way.

Just to make that good, if I could ask you to turn back to paragraph 2.20 of the response to the Remedies Working Paper to demonstrate how this was, in fact, put to the CMA at the time. That's in notice of application bundle 2 behind tab 24, page 902. I look in particular at the -- first of all, the top of 2.20:

"The agreement between [the divesting company] and the purchaser could include [those matters which I have just discussed] including financial incentives to incentivise the customer to stay ..."

So it's been absolutely clear from this document of 17 September what's being offered and the fact we wanted it put to the customers and to ensure that switching costs would be covered. But then:

"Ahead of the final undertakings, [the divesting company] would be working with the potential purchaser to ensure customers are comfortable with the ADP, and [the divesting company] would also offer to provide the CMA ..."

And the tribunal can then read precisely what's set out there:

"... before seeking purchaser approval."

I can say that out loud, I think. That was the proportionate route.

Those are my submissions in reply on the evidence-gathering exercise in relation to customers. Really, it is the heart of our case on the irrationality of the CMA's approach. They have no good answer, no good answer at all, for why they simply didn't do the easy, self-evident and logical thing. It would have cost them nothing, it would have generated no delay, and it was the very thing which we were urging them to do in our own submissions to them.

THE PRESIDENT: When you say "no delay", I mean, 2.20 obviously is delay.

MR KENNELLY: Sorry, sir, 2.20 is there for two purposes: one, to talk about financial incentives and the other to demonstrate what we envisaged in terms of allowing a deal to be done. The point I make about evidence gathering, sir, simply going back to the customers, the 24 customers, 24 emails, with three or four sentences of text --

THE PRESIDENT: That's the previous point you made.

MR KENNELLY: That's the previous point.

THE PRESIDENT: I see that. I thought you meant 2.20 no delay. 2.20 would.

MR KENNELLY: There are two points on 2.20: incentives and a staged approach to disclosure if a deal can be done.

I move on then to the scope of the divestiture package and this question of scale; you know, are these purchasers, fortified by the contracts, able to act as an effective competitor? I say, first of all, because we are now looking at things from the purchasers' perspective, and the question of customers switching. The CMA has completely ignored the fact that no purchaser would have engaged this process, invested and undertaken to do what it had undertaken to do unless they had a very high expectation of getting these customers. These are experienced global businesses, not normally known for wasting their own time and money. They plainly had a high expectation of winning these customers and persuading them to stay. Otherwise, the whole exercise would have been in vain from their perspective, maybe even worse than the status quo.

That fact appears to be given no weight at all, despite the fact that they are experts in the segment and better aware than the CMA of their own ability to win and retain UK business.

Then looking at the scale, first of all, scale is irrelevant in answering the question, does the package cure the SLC? This divestment removed the overlap for UK-only customers. That's how it cures the SLC. The tribunal saw in the final report, paragraph 10.155, the suggestion echoed in my learned friend's submissions that it's not enough simply to fix the SLC by removing the overlap; you have to make sure that the new business is effective as an ongoing competitor. The CMA's preferred remedy means that the whole business is divested -- [redacted], the lot -- which means they get the benefit of the [redacted] customer revenue also.

But the purchasers in this case never said, "We need the [redacted] revenue to be an effective competitor. We need the [redacted] revenue for this to work".

THE PRESIDENT: They did seem to expect £6 million of revenue for it to work.

MR KENNELLY: Which they were ultimately going to get if they got the small customers and the large customers. The CMA did, itself, find ultimately that was the level of revenue they would get.

THE PRESIDENT: There's a bit of confusion in the report on the figures.

MR KENNELLY: There was -- "confusion" is perhaps too harsh a term. There were changes in the course of the investigation. Ultimately, the CMA settled at 10.147, I think it is, on the figure which they said was in issue, which I showed the tribunal.

THE PRESIDENT: Yes.

MR KENNELLY: The point is here, these companies knew exactly what they were doing. This is where I do want to show you what one of them said to the CMA. It is in the defence bundle behind tab 12. I just ask you to read part of it because it is confidential in its entirety.

First of all, we see the summary of the remedies hearing and you will see the attendees.

THE PRESIDENT: This is the hearing with purchaser A.

MR KENNELLY: Purchaser A. The first point to make is, you see the seniority of the person who is attending from purchaser A at the top of the list of attendees, and then, at paragraph 3, please read, and paragraph 4 down to paragraph 12, please.

If the tribunal has that, I will move on. But I will give you the reference. The purchaser B equivalent is at tab 13. I can't take you to that now in the time available to me, because I would like to move on from the question of the scale of the purchasers to the other factors which the CMA found to be reasons to reject the ADP.

On transfer of staff, the tribunal has already taken with Mr Williams the point which we know from paragraph 10.175 of the final report about the working practices of the staff in question which is obviously material to this issue, and you have my submission about the number of account managers was expanded, so the percentage that the tribunal is saying is a base minimum more, that would have been a greater figure than ultimately had it been approved.

The further objection raised by Mr Williams and by the CMA is, well, you are supplying and providing assistance for a lengthy period from the divesting company to the customers of the purchaser, and that's bad for competition. But we say absolutely not, and that's, with all due respect, an irrational finding when it is obviously designed to allow the customer to trial the purchaser's products and to do so in the full confidence that, in that period, it has an uninterrupted supply of products with which it's familiar. Since the products are all homogenised and these purchasers are global businesses with significant EU experience and a UK business, the CMA could have great confidence in the fact that, once trialled, these products would be to the satisfaction of the customers in question.

The CMA has never said we wouldn't expect these products to work or there's some problem

with the purchasers' products or some risk, from the CMA's perspective, that they wouldn't work for some chemical or biological reason. That's never been suggested. It's the customers who need reassurance.

In terms of the length of the transitional period and in terms of the remedy generally, I ask you to look back at the Rentokil/Cannon case, at the back of the notice of application bundle, tab 28. I rely on this -- I'm coming to the end of my submissions -- both in relation to the question of transitional period, but also obviously for the purposes of the fallback. For a transitional period which was described by Mr Williams as wrong in principle that a lengthy transitional period could be permitted, wrong in principle because it was contrary to competition, and so we had that supply being provided.

Please turn to page 953 behind tab 28, bottom right-hand corner. On that page, you can see paragraph 1.2.4. You have seen it before, but in view of the fact that Mr Williams very strongly deprecated a lengthy transition period as being not just wrong in this case, but wrong in principle, I draw your attention again to paragraph 1.2.4 under the heading "Transitional arrangements" in this case which involved the transfer of contracts in not just a recent case but a case in relation to a not dissimilar market.

But of course I rely on this case for --

THE PRESIDENT: We don't know much about the market.

MR KENNELLY: No, we don't.

THE PRESIDENT: How similar or not.

MR KENNELLY: I say "similar" is a very broad term, sir, so I'm not going to overstate it.

THE PRESIDENT: It's very difficult.

MR KENNELLY: But of course I rely on this case for the purpose of my fallback element submissions also because, again, Mr Williams said in terms that the concept of the fallback is somehow anathema, wrong in principle, contrary to the process and completely unworkable because it contemplates, he says, the CMA blessing a primary

remedy without knowing whether it's going to work or not. That is precisely what a fallback remedy is, and it is precisely what the CMA did in this recent case. It is no surprise they did it because it was the proportionate thing to do, it was within their powers and it was secured within the statutory time limit. Except that, in this case, there was even greater uncertainty because there was no purchaser in the frame. What the CMA did, as it could have done in this case, was to set out a list of criteria which were required to be satisfied by a suitable purchaser, and we see that in the annex to the orders. They could have done that here and it would have been possible then for the purchasers to provide the further information to satisfy the CMA or not that they could meet those criteria.

We see from that, also, no fixation on an existing powerful presence in the market. I took the tribunal to the fact that in the purchaser criteria it was possible -- it is confidential, so the tribunal has my submission on that.

So in closing, I say to the tribunal that what the evidence demonstrates and what's plain from what we have heard from Mr Williams is that, at some point in September 2019, the CMA found itself in a bind. They plainly had concerns about the remedy that we had proposed. They knew they had -- they must have known, or ought to have known, they had insufficient information, the evidence base was extremely thin. And the right course, as a matter of law, and their own practice, would have been to have extended the period, as the law permitted -- plainly special reasons were here requiring them or permitting them to conduct further discussions -- or to have approved our proposed remedy with its fallback in the knowledge that if the ADP couldn't be shown to work, all the while the businesses remaining separate, the CMA could then reject it and move to the fallback. Those were the two lawful options.

But, instead, they simply shut down the process. They doubled down, effectively, on the inadequacy of their own process, and in that respect, without any reason or justification

that we have seen, they acted irrationally and unlawfully. Really, that is the nub of the case before you today. Thank you. I'm very grateful to you for sitting late to hear my submissions.

THE PRESIDENT: Thank you very much, and for keeping to time.

Housekeeping

THE PRESIDENT: Can I just ask you, very helpfully, at the very outset, you said that we can refer to the two purchasers with whom there were negotiations as purchaser A and purchaser B.

MR KENNELLY: Yes.

THE PRESIDENT: And the company that was proposing in the ADP to divest as the divesting company.

MR KENNELLY: Yes.

THE PRESIDENT: Once those, as it were, neutral terms are used, it does seem to me that quite a lot of the passages in some of the material that you have put that have been marked as confidential do not need the redactions that are put.

Just by way of example, and you needn't answer this, as it were, on the hoof, but I'd like you to consider it with your clients. If you look at NoA2, the response to the Remedies Working Paper, which is relied on quite a bit, and it is important to your case, in the covering letter at tab 23, where there's the -- on 885, for example, the paragraph beginning, "However, under section 39(3)", I really don't see why the rest of that paragraph is confidential. At most, one could substitute "the divesting company" for the name. But the rest of it. That's one example. There are quite a lot of other examples. You relied just now on paragraph 2.20 in the working response itself. Again, it seems to me it's only the name, and that, as you will appreciate, if one is to reflect your arguments and consider them in a judgment, these are quite important.

Otherwise, one is left with large swathes of redactions, which is unsatisfactory. Perhaps you and those instructing you with your client can give that some consideration. But it does seem to me, and you can see the point straight away there --

MR KENNELLY: I even ignored some of my own confidential information while making submissions to you because I looked at the page and said, "I can't see any" -- I'm afraid I made some decisions on my own. So I completely understand the tribunal's --

THE PRESIDENT: We have got that codeword for purchaser A and purchaser B, which is helpful, we have got the divesting company, and it seems to me obviously there are some details where customers' names are given and they remain confidential, but that's not really so important.

MR KENNELLY: May I make a suggestion, sir: obviously, to require the parties to go through all the papers, even just the documents referred to, and to revise the redactions could be a very, very costly process. If the tribunal produced its judgment in draft, taking its own view on confidentiality --

THE PRESIDENT: That's what we will do.

MR KENNELLY: Very good, because then, in the unlikely event we disagree with your approach, we will be able to deal with it.

THE PRESIDENT: Thank you for the sensible way you have dealt with confidentiality in this case and for your helpful submissions.

MR WILLIAMS: Sir, before you rise, can I just tell you that in the submissions Mr Kennelly just made, he referred to the number of customers with whom the CMA consulted.

THE PRESIDENT: Yes.

MR WILLIAMS: There is a distinction between the number of customers whom we contacted and the number of customers who responded to that contact. You will see that in Ms Baker's statement, the references I gave you earlier on, paragraphs 11 and

12. The short point is, we contacted more than responded.

THE PRESIDENT: Thank you.

(4.58 pm)

(The hearing concluded)