Neutral citation [2019] CAT 1

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1300/4/12/18

Victoria House
Bloomsbury Place
London WC1A 2EB

18 January 2019

Before:

THE HON MR JUSTICE ROTH
(President)
TIM FRAZER
ANNA WALKER CB

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) J SAINSBURY PLC
(2) ASDA GROUP LIMITED

Applicants

- v -

THE COMPETITION AND MARKETS AUTHORITY

Respondent

Heard at Victoria House on 14 December 2018

JUDGMENT

APPEARANCES

Mr Jon Turner QC, Mr Alistair Lindsay and Mr Nikolaus Grubeck (instructed by Linklaters LLP and Gibson, Dunn & Crutcher UK LLP) appeared on behalf of the Applicants.

Ms Marie Demetriou QC, Mr Rob Williams and Mr David Bailey (instructed by CMA Legal) appeared on behalf of the Respondent.

A. INTRODUCTION AND SUMMARY

1. The proposed merger between J Sainsbury PLC ("Sainsbury's") and Asda Group Ltd ("Asda") clearly gives rise to various significant issues concerning competition which the Competition and Markets Authority ("the CMA") has to address in carrying out its statutory functions of merger control. The present application made jointly by Sainsbury's and Asda (together, "the Applicants") concerns none of those substantive issues but narrow questions regarding the procedural timetable: more particularly, whether the CMA acted unfairly in setting the dates and times by which the Applicants must respond to various CMA working papers disclosed to them for comment ("Working Papers") and also the time of the Applicants' so-called "main party hearing".

2. The application was made in circumstances of great urgency. The Notice of Application and supporting witness statement were lodged on the afternoon of 12 December 2018. The deadline for the Applicants to respond to the Working Papers was 9am on Monday, 17 December, and the main party hearing was to be held in the week ending 14 December. The Tribunal accordingly severely abridged time for the CMA to respond, and it filed two witness statements and the skeleton argument on its behalf by 4pm on 13 December. The application was heard on Friday, 14 December.

3. The Applicants were represented by Mr Jon Turner QC, leading Mr Alistair Lindsay and Mr Nikolaus Grubeck. The CMA was represented by Ms Marie Demetriou QC, leading Mr Rob Williams and Mr David Bailey. We are grateful to Counsel on both sides for the clear and effective way they presented their submissions, prepared, particularly in the case of the CMA, at very short notice.

4. Following the conclusion of the argument, we announced our unanimous decision that, in the exceptional circumstances here, the application would be granted, with full reasons to follow. In accordance with the wishes of the parties, we gave some indications as to how the matters might now be dealt with, while making clear that the Tribunal could not bind the CMA in that regard. This judgment sets out our reasons.

B. THE STATUTORY AND ADMINISTRATIVE FRAMEWORK

5. The statutory provisions for merger control are set out in the Enterprise Act 2002 ("the EA").[1] The EA provides for a two stage review for anticipated mergers, generally referred to as Phase 1 and Phase 2 although those terms are not used in the statute. The CMA's functions in Phase 1 are, in summary, to obtain and review information relating to such an anticipated merger and then, if it believes that it is or may be the case that the arrangements will result in the creation of a relevant merger situation that fulfils the statutory criteria and that this may be expected to result in a substantial lessening of competition in a UK market, to make a reference for an in-depth investigation, i.e. for Phase 2: sect 33.

6. The CMA's Phase 1 investigation period has a statutory deadline of 40 working days: sect 34ZA. There is scope for an extension in limited circumstances.

7. The Phase 2 investigation is conducted by a group of members of the CMA panel ("the Group"), as selected by the Chair of the CMA pursuant to Schedule 4 of the Enterprise and Regulatory Reform Act 2013 ("the ERRA"). The Phase 2 investigation involves more detailed analysis than occurs in Phase 1. In summary, in the case of an anticipated merger, pursuant to sect 36 the CMA considers three questions:

   (1) whether arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation;

   (2) if so, whether the creation of that relevant merger situation may be expected to result in a substantial lessening of competition within any market or markets in the UK for goods or services; and

[1] All statutory references are to the EA save as otherwise stated.

(3) if the first two questions have been answered in the affirmative, whether any, and if so what action should be taken to remedy, mitigate or prevent any substantial lessening of competition so identified.

8. The CMA is required to prepare and publish its report within a period of 24 weeks from the start of Phase 2. That period may be extended by no more than eight weeks if the CMA considers that there are "special reasons" why the report cannot be prepared and published within 24 weeks: sect 39.

9. The making of a decision on a merger reference, like various other decisions provided for in the EA, is subject to a duty to consult under sect 104, which provides insofar as material:

> " (1) Subsection (2) applies where the relevant authority is proposing to make a relevant decision in a way which the relevant authority considers is likely to be adverse to the interests of a relevant party.
>
> (2) The relevant authority shall, so far as practicable, consult that party about what is proposed before making that decision.
>
> (3) In consulting the party concerned, the relevant authority shall, so far as practicable, give the reasons of the relevant authority for the proposed decision.
>
> (4) In considering what is practicable for the purposes of this section the relevant authority shall, in particular, have regard to-
> (a) any restrictions imposed by any timetable for making the decision; and
> (b) any need to keep what is proposed, or the reasons for it, confidential."

10. Pursuant to para 51 of Schedule 4 ERRA, the CMA has published rules of procedure that apply to Phase 2 of merger references ("Rules of Procedure"). Pursuant to rules 7.1 and 7.4, the Group is required to prepare and notify to all parties an administrative timetable for the major stages of the reference.

11. Rule 7.2 provides:

> "The major stages of the reference may include, in particular, the following:
>
> (a) gathering information;
>
> (b) issuing questionnaires;
>
> (c) hearing of witnesses;
>
> (d) verifying information;

(e) providing a statement of issues;

(f) considering responses to a statement of issues;

(g) notifying provisional findings;

(h) notifying and considering possible remedies;

(i) considering exclusions from disclosure; and

(j) publishing reports;

provided that these stages need not necessarily take place within the administrative timetable in the order in which they are mentioned in this rule."

12. The Rules of Procedure contain particular provisions concerning the "provisional findings" referred to at rule 7.2(g). It is appropriate to set out the relevant parts of rule 11 to that effect:

> "11.3 When a group makes provisional findings on any reference it shall notify the main parties to the reference as soon as practicable after it has made them.
>
> …
>
> 11.5 Every notice:
>
> (a) shall invite the main party affected, within such period being not less than 21 days as may be specified in the notice, to provide the group with its reasons in writing as to why such provisional findings should not become final (or, as the case may be, should be varied);
>
> …
>
> 11.6 If any main party fails to provide reasons in writing by the date specified in the notice then the group shall not be obliged to take them into account."

13. By para 52 of Schedule 4 ERRA, in determining how to proceed in accordance with the Rules of Procedure, a group must have regard to any guidance issued by the CMA Board; see also rule 6.10. In fact, the CMA Board has not issued fresh guidance but has adopted the guidance previously issued by the Competition Commission ("the CC") under the now repealed paras 19A(7) and (8) of Schedule 7 to the Competition Act 1998.[2] This is entitled *Chairman's Guidance on Disclosure of Information in Merger Inquiries, Market Investigations and Reviews of Undertakings and Orders accepted or made*

[2] See *Transparency and Disclosure: Statement of the CMA's policy and approach* (CMA 6), paras 1.4-1.5.

under the Enterprise Act 2002 and Fair Trading Act 1973 (CC7 Revised) (the "*Chairman's Guidance*"). The *Chairman's Guidance* stresses the objective of being, insofar as practicable, open and transparent. Para 2.2 provides:

> "Transparency facilitates inquiries for a number of reasons:
>
> (a) First, it is a means of achieving due process and of ensuring that by having a better understanding of the CC's analysis affecting them, the main parties in inquiries are treated fairly.
>
> …
>
> (d) Fourthly, as a result of the above, the effectiveness, efficiency and quality of CC inquiries and decisions are improved."

14. Para 3.3 of the *Chairman's Guidance* includes the following:

> "Although this guidance sets out the general framework within which the CC considers disclosure issues, the circumstances of an individual case (including practical considerations) may call for a flexible approach to the means by which the CC achieves its transparency aims. There can be many reasons for this including, for example:
>
> …
>
> (d) Practical and timing considerations – for example, in a merger inquiry information about the CC's developed thinking on remedies and submissions received may be included in a remedies working paper provided to the main party but not usually published."

15. Section 5 of the *Chairman's Guidance* is headed "Approach to disclosure of information received during inquiries or reviews". It includes the following:

> "5.1 When determining how best to achieve the transparency aims of the CC (see paragraph 2.2), Groups must have regard to the statutory framework (see Part 4) and the CC's Rules and guidance published by the CC or the CC Chairman relating to the CC's process and conduct of investigations.
>
> 5.2 Additionally, Groups should have regard to:
>
> …
>
> (b) the desirability of avoiding unnecessary burdens on business, the need to conduct investigations effectively and efficiently, the need to reach properly reasoned decisions within statutory and administrative timescales;
>
> (c) the need to disclose information supplied to the CC so that interested persons (main parties or other interested persons) are able to comment on matters affecting them and so that they can draw to the CC's attention any inaccuracies, incomplete or misleading information;
>
> …

> These considerations may inform the Group as to whether particular information should be disclosed, to whom and the manner of disclosure.
>
> 5.3 For the most part these factors will not be in conflict with the CC's transparency aims and its statutory functions. However, when decisions are finely balanced, Groups should pay particular attention to the need to achieve due process."

16. Sections 7 and 8 of the *Chairman's Guidance* address in more detail the appropriate disclosure of various documents.

17. Para 7.1 notes that the publication of provisional findings and the notice of possible remedies are the main means by which the duty to consult under sect 104 is fulfilled. However, the *Chairman's Guidance* continues, at para 7.2, as follows:

> "The CC is not subject to a general obligation to disclose all its thinking in advance of consulting on its provisional decisions. However, the CC's practices have developed to provide insight prior to this. Earlier disclosure can improve the efficiency of the inquiry or a particularly complex review as it gives main parties (and interested third parties) the opportunity to comment before the publication or disclosure of the key documents mentioned in the paragraph above. At an early stage of either a merger or a market investigation the CC should publish an issues statement which will set out the theories of harm the CC propose to explore. It should also disclose an annotated issues statement at a later stage (typically before the hearings with main parties).* The annotated issues statement provides an overview of the CC's current thinking with reference to the theories of harm and analysis conducted to date. In the case of mergers, the annotated issues statement is disclosed to the merger parties (but is not usually published) …
>
> * To enable a party to respond to CC questions at a hearing, it may be necessary, for the purpose of due process, to make a disclosure of certain information held by the CC (Sports Direct PLC v CC [2009] CAT 3[2]). The disclosure of an annotated issues statement will generally be the means of providing the necessary information but Groups should consider whether this needs to be supplemented (see paragraph 7.4)."

18. Para 7.3 observes that there is no general obligation to disclose any of the many internal working papers produced in the course of an inquiry by and for the Group. It then continues:

> "However, Groups may disclose some working papers (or extracts from them) during the course of an inquiry or review, where they consider that to do so would assist parties to understand their developing thinking. Whether it is appropriate or practical to do so may depend upon timing considerations; for example, it would not be sensible to do so when the CC is soon to disclose that thinking in an annotated issues statement or provisional findings. However, parties will have the ability to comment following disclosure.

> 7.4 In merger inquiries it is generally more appropriate to disclose working papers (or extracts) to main parties (and occasionally interested third parties) by supplying the party concerned with the document…"

19. Section 8 of the *Chairman's Guidance* includes the following:

> "8.2 When considering the timing of disclosure, Groups should have regard to the requirement to conduct inquiries and reviews fairly. The purpose of the disclosure as well as its practical aspects will be relevant considerations. Timing may also be affected by the CC's developing practice when conducting inquiries and reviews, particularly as it aims to increase efficiency and meet its statutory deadlines.
>
> …
>
> 8.4 The appropriateness of disclosure is not limited to these key stages. As noted (see paragraphs 7.3 and 7.4) in merger and market inquiries it may be helpful for a Group to share its approach and developing thinking prior to the provisional findings by the disclosure of some working papers, in addition to the disclosure of the annotated issues statement.

20. Furthermore, pursuant to sect 106, the CMA has published *Mergers: Guidance on the CMA's jurisdiction and procedure* (CMA2) (the "*Mergers Guidance*"). Para 1.3 of the *Mergers Guidance* states that it is to be read alongside, inter alia, the *Chairman's Guidance*. The *Mergers Guidance* is a lengthy document explaining the CMA's practice in a way designed to help the parties and their advisors. It includes an account, in section 6, of "Pre-notification discussions" and "Fast-track reference cases".

21. "Pre-notification" refers to the voluntary practice whereby the parties to a merger engage in confidential discussions with the CMA concerning the intended notification of a contemplated merger. The *Mergers Guidance* notes that this "is an important part of the whole merger review process". Para 6.39 states that parties planning to notify a merger are strongly encouraged to contact the CMA to engage in pre-notification discussions "at least two weeks before the intended date for notification", although in more complex cases "a more extended pre-notification period may be appropriate."

22. Ms da Silva of the CMA notes in her witness statement that for merger investigations commenced since January 2016, the length of pre-notification has ranged from one week to four months. However, she stresses that there is no

'standard' length, and in contrast to Phase 1 and Phase 2, no statutory time period applies.

23. "Fast track reference cases" involve an accelerated Phase 1, as follows:

> "6.61 The CMA considers that, exceptionally, it may be possible to accelerate significantly the treatment of cases for referral for a Phase 2 investigation where this corresponds with the wishes of the merger parties and where there is sufficient evidence available to meet the CMA's statutory threshold for reference.
>
> 6.62 For a case to be fast tracked to reference, the CMA must have evidence in its possession at an early stage in an investigation that it believes objectively justifies a belief that the test for reference is met and the notifying parties must have requested and given consent for use of the procedure.
>
> …
>
> 6.64 Given that fast track reference cases will by definition be those where the parties accept that the test for reference is met (and agree to waive their normal procedural rights during Phase 1), the CMA will not be required to undergo all of the normal procedural steps followed when a case is referred… The CMA would expect the overall time taken from formal notification to reference decision would be ten to 15 working days …
>
> 6.65 It is open to merger parties to inform the CMA that they consider their case meets the criteria for fast track reference for a Phase 2 investigation during pre-notification, at the time of notification or at any point during the course of the CMA's investigation. In addition to considering whether the case meets those criteria, the CMA will in deciding whether to utilise the fast track process have regard to its administrative resources and the efficient conduct of the case."

24. In his witness statement made in support of the Application, Mr Simon Pritchard, a partner in the solicitors to Sainsbury's and himself a former Senior Director of mergers at the Office of Fair Trading (the predecessor to the CMA), notes that there have been a small number of fast track requests in larger, more complex cases, including *Ladbrokes/Coral, BT/EE* and *Tesco/Booker*, but that use of this procedure does not mean that the pre-notification phase of review should be truncated. For example, in the *Ladbrokes/Coral* case, the pre-notification phase lasted around 20 weeks.

25. Section 12 of the *Mergers Guidance* is entitled, "Developing the Phase 2 Assessment". It includes discussion of Working papers, the Annotated issues statement, the main party hearings, and the Publication of provisional findings, as follows:

"**Working papers**

...

12.2 Working papers contain the CMA's approach and developing thinking on issues at a point in time. They are not definitive, nor do they represent the CMA's final views, either in relation to the scope of the inquiry or the merits of any particular argument. The CMA's approach to disclosure of such papers is set out in its published guidance on disclosure of information [i.e. the *Chairman's Guidance*]

Annotated issues statement

12.3 In advance of the main party hearing, the CMA will provide the parties with an annotated issues statement as well as a hearing agenda, giving an overview of its analysis to date and an indication of the topics that the CMA wishes to explore in the main party hearing. Parties will also generally have an opportunity to comment on any further working papers that are disclosed to them after that hearing (either in writing, or where appropriate at a case team meeting (a record of such meetings would be made and provided to the Inquiry Group)).

…

The main party hearings

12.10 Towards the close of the assessment phase the CMA will hold hearings with the main parties. The hearings will be attended by the Inquiry Group and members of the case team. The CMA is likely to wish to speak to senior management in the businesses affected by the merger. The CMA will inform the parties if it wishes specified individuals to attend the hearing. In the case of a completed merger, the CMA will usually want a separate hearing with the sellers/former management of the acquired company (see paragraph 11.29). For an anticipated merger, the CMA is likely to want to hear from the acquirer and the target company separately.

12.11 Unlike a court hearing, CMA main party hearings are an inquisitorial and not an adversarial process. The primary purpose of this hearing is to enable the CMA to test the evidence and explore key issues with the parties. The hearings therefore take place at a stage in the investigation at which Inquiry Group members have absorbed sufficient evidence to produce an annotated issues statement and to frame challenging questions from it. It also provides an opportunity for the parties to explain their position on these issues orally, directly to the Phase 2 decision makers.

12.12 Prior to the hearings the CMA will provide the parties with an agenda of the topics that it wishes to explore in the hearings. As noted in paragraph 12.3, in advance of the main party hearings the CMA will provide the relevant party with an overview of the CMA's analysis at that stage in the form of an annotated issues statement.

12.13 The main party hearings are a formal occasion. The main party is given the opportunity to make brief opening and/or closing statements. Parties should expect to provide a concise explanation of their case and to respond to the CMA's questions. A transcript of the hearing will be taken, and will be sent to the relevant main party after the hearing for checking (the transcript is not

published). Intentional or reckless provision of false or misleading information is a criminal offence (this includes where the information is provided during a hearing). Whilst a party may be accompanied by its legal or other professional advisers, the CMA will expect to hear primarily from the representatives of the business themselves. The CMA may direct its questioning at specific individuals. If parties are unable to provide specific information requested at the hearing, this may be provided subsequently in writing.

…

Publication of provisional findings

12.16 The CMA reaches provisional conclusions on the first two statutory questions (see paragraph 3.5). These are recorded in the Notice of provisional findings. The provisional findings represent a provisional decision on the two statutory questions, including the CMA's competition assessment. They will set out the core background details necessary for an understanding of the inquiry (for example, details of the main party or parties, the principal features of the industry where relevant and a description of the relevant merger situation) and a full explanation of the CMA's reasoning in reaching its provisional findings. The provisional findings report is therefore the key means by which the CMA discloses its provisional views, reasoning and relevant evidence to the main and third parties at Phase 2.

…

12.19 … If an SLC [i.e. substantial lessening of competition] has been identified a Notice of Possible Remedies is published, usually at the same time as the summary of the provisional findings.

12.20 It may be appropriate, though unusual, to include proposals for possible remedies in the provisional findings report, depending on the CMA's proposed decision on the competition questions and the stage that its thinking has reached. Usually where there is a provisional SLC finding, the CMA publishes a separate Notice of Possible Remedies."

C. THE FACTS

26. An announcement of the proposed combination of Sainsbury's and Asda (the "Proposed Merger") was made by Sainsbury's and Asda's parent company, Walmart Inc, on 30 April 2018.

27. There is no doubt that this is, by UK standards, a large merger giving rise to complex issues in competition terms. Mr. Pritchard in his evidence suggests that it is about five times the size of the average UK Phase 2 case. Mr Stuart McIntosh, the Chair of the Group conducting the investigation into the Proposed Merger, observes in his witness statement that the Applicants are the second and third largest grocery retailers in the United Kingdom and he continues:

> "Their activities overlap in the supply or acquisition of a range of products and services in the UK, including the retail supply of groceries (both in-store and online), the procurement of groceries, the retail supply of fuel, and the retail supply of various types of general merchandise."

28. On the same day as the public announcement, representatives of the solicitors and the economic consultants advising the Applicants had an initial meeting with the CMA. They proposed that the CMA case team should do a lot of evidence-gathering from the Applicants during the pre-notification phase, to avoid undue pressure on the timetable later on. However, on 11 May 2018, Mr Colin Raftery of the CMA, explained that an extended pre-notification process was unrealistic in this case and that the CMA had in mind that the Phase 1 review should begin in the middle of August, which would therefore start the statutory clock. The Applicants' advisors continued to assert that a more prolonged pre-notification period was desirable and would avoid undue pressure on the timetable in Phase 2.

29. The Applicants proceeded with substantive pre-notification discussions between May and July 2018. They submitted the first and largest tranche of their draft merger notice, relating to the retail supply of groceries, on 23 May 2018; the second tranche, relating to buyer power and coordinated effects, on 18 June 2018; the third tranche, relating to general merchandise, on 6 July 2018; the fourth tranche, relating to fuel, on 12 July 2018; and the fifth tranche, relating to online groceries on 20 July 2018. The CMA sent 10 requests for information over this period, produced following discussion with the Applicants' advisors and key individuals within each business.

30. On 26 June 2018, the Applicants formally confirmed their request for the CMA to use the fast track process, while reiterating their concerns that a longer pre-notification process should be permitted before the statutory time period started to run.

31. On 17 August 2018, the Applicants' advisors were informed by the CMA that it intended to start the clock on its Phase 1 review the following week, on 23 August 2018. In response to further expressions of concern from the Applicants'

advisors, Mr Raftery wrote a very full letter dated 22 August 2018, in which he stated;

> "... starting the formal investigation on 23 August does not risk comprising [sic] the CMA's broader investigation. The clock is only able to start because a very significant amount of scoping and evidence-gathering has already taken place. Once evidence-gathering is sufficiently advanced, there are evident benefits (in working towards our shared aim of a fair process) in ensuring that the ultimate decision-makers, the independent Group, are able to engage with the substance of the case, rather than considerable amounts of substantive work being undertaken without the Group's oversight. While there is, of course, much work still to be done, we consider that the remaining steps in the process can be fully accommodated within the framework provided by a fast-track Phase 1 and full Phase 2 investigation".

32. The formal investigation was duly launched on 23 August 2018.

33. There were a number of meetings between the Applicants' advisors and the CMA case team during the short Phase 1 period. At a meeting on 6 September 2018 to discuss project management for the case, Mr Ali Nikpay, a partner in the solicitors to Asda, said that the Proposed Merger was a case where it would be beneficial for everyone if Working Papers were produced earlier so that the Applicants could comment on them and respond ahead of the main hearing. He also noted that it would be difficult for the Applicants if Provisional Findings were to be published over Christmas, given that this is a major retailer trading period. In his response, Mr Joel Bamford of the CMA stated (as recorded in the solicitors' attendance note):

> "Normally start of Phase II is a scramble, but we're not in that position here. Can therefore stagger the Working Papers. Can progress them, and share them with the parties on a staggered basis, so you DON'T end up with 6 Working Papers dumped on you 2 weeks before hearing, and we aren't rushed digesting your responses. There will always be some papers that come out closer to the hearing than others."

34. The CMA referred the Proposed Merger for Phase 2 investigation on 19 September 2018. The statutory deadline of 24 weeks would therefore expire on 5 March 2019.

35. On 27 September 2018, in accordance with rule 7 of the Rules of Procedure, the CMA published an administrative timetable for Phase 2. This included the following:

Phase 2 Date	*Action*
Early December	Main party hearing; verify information; consider provisional findings
Early December	Deadline for all parties' responses/submissions before provisional findings
Early January	Notify provisional findings and consider possible remedies
Early February	Responses hearing(s), if required
Mid-February	Final deadline for all parties' responses/submissions
Early March	Publish final report

36. In accordance with that timetable, on 16 October 2018 the CMA published its Issues Statement. This covered 30 pages and identified up to 18 theories of harm across multiple product areas, including the retail supply of groceries in-store, the retail supply of groceries online, the procurement of groceries, the retail supply of general merchandise products (in particular clothing and electricals) and the retail supply of fuel. The Issues Statement required a response by 30 October 2018 (i.e., within two weeks) but the Applicants were granted a one week extension and provided their response on 6 November 2018.

37. Meanwhile, on 25 October 2018, the Chief Executives of Sainsbury's and Asda wrote to the Chair of the Group expressing concern about the timetable and its effect on fairness and due process, and they urged the CMA to exercise its power to extend the timetable by eight weeks as permitted under the EA. Mr McIntosh responded on 29 October 2018, stating that although the Group had not ruled out an extension to the deadline and that it would continue to keep the position under review, it did not consider it necessary or appropriate to extend the timetable at that point of the investigation. In his letter, Mr McIntosh stated:

> "In this context, I would like to emphasise the iterative nature of the Phase 2 process which provides merging parties with multiple opportunities to engage with the CMA and its emerging thinking on the potential competitive effects of the merger. The first opportunity is responding to the Phase 1 decision, which the Parties duly did on 10 October. The second is responding to the Issues Statement, which the Parties are engaged with at present, and to which I return below. This is followed by responding to the CMA's working papers, both in writing and in person at the main party hearings, and, eventually, responding to the CMA's Provisional Findings.

> Consistent with all Phase 2 investigations, the inquiry group is committed to ensuring that the Parties can engage fully with the CMA at each of these stages, and that the CMA can reflect that engagement ahead of moving to the next stage of its investigation. This has been a key consideration in setting the overall timetable for the investigation, as well as the timeframe for each stage in the process. Indeed, as explained in the case team's email of 19 October, the CMA's decision not to grant the full two-and-a-half week extension requested by the Parties to respond to the Issues Letter took into account that such an extension would not leave sufficient time for the CMA to then digest, assess, and reflect that response in its emerging thinking, ahead of circulating its working papers (which the CMA has agreed to share on a rolling basis during November, to give the Parties additional time to engage with them ahead of the main party hearings)."

38. On 9 November 2018, the Applicants' advisors received from the CMA the first Working Paper: Relevant Merger Situation and the Counterfactual. This was a short paper (9 pages) outlining the transaction and confirming the CMA's jurisdiction to review the transaction.

39. On 14 November 2018, the Applicants received the first substantive Working Papers: National switching analysis (20 pages) and Entry and exit analysis for groceries (32 slides). On 16 November 2018, the CMA provided two further Working Papers: Buyer power (24 pages) and Fuel Price Concentration Analysis (19 pages).

40. Thereafter, the Applicants received the Working Papers as follows:

Date received from CMA	*Working Paper*	*No. of pages*
21 November	Online: likelihood of entry and expansion	12
22 November	General Merchandise – clothing, electricals and toys	44
22 November	Efficiencies	55
23 November	Margins	26
26 November	In-store Groceries (internal documents)	27
27 November	Industry background	10
27 November	Competition in Online Groceries	54
27 November	Fuel	97
27 November	Online: assessment of competitive effects	23
27 November	In-store Groceries: unilateral effects overview	21
27 November	In-store Groceries (internal documents) (re-issued)	26
27 November	GUPPI (Gross Upward Pricing Pressure Index)	11

27 November	Coordinated effects	44
28 November (at 00:55am)	In-store Groceries: local assessment	66

Each of the Working Papers stated on its face that the Applicants must provide any comments by 7 December 2018.

41. Just before 1am on 28 November, the CMA sent the Applicants' advisors the annotated Issues Statement.

42. The Working Papers were accompanied by a large amount of underlying data totalling almost 9GB of data and 163 separate sets of codes. For example, there were 47 sets of codes underlying the Fuel Price Concentration Analysis and Fuel Working Papers and 60 sets of codes underlying the Online: assessment of competitive effects Working Paper.

43. Mr Pritchard points out that of the nine substantive Working Papers received from the CMA on 27-28 November 2018, six were provided late in the evening or in the early hours of 28 November and that those nine Working Papers (excluding underlying data and including the Annotated Issues Statement) together comprise over 400 pages out of the total of some 850 pages (including the Annotated Issues Statement) of all the Working Papers together. While mere length is not in itself necessarily an indication of complexity, the CMA has not disputed the general statement by Mr Pritchard that:

> "The Working Papers comprise, for the most part, dense and detailed analysis of a huge volume of complex material, covering sales data, survey data, postcode data, margin figures, shareholdings, strategic plans, a review of the Applicants' internal documents, and third party submissions."

44. On 30 November 2018, the Applicants submitted their response to the first substantive Working Paper received, the National Switching analysis. They also wrote to the CMA formally requesting it to extend its statutory timetable by eight weeks and stating that the deadline of 7 December stipulated for response for all the Working Papers was unreasonable. They proposed to provide responses to what they described as "the more standalone working papers" i.e. on Buyer Power and General merchandise, to the extent possible before 7 December, but for the rest, and in particular the Working Papers received on 27-

28 November, they proposed to provide responses by 11 January 2019, on a staggered basis "[a]gain, to the extent possible".

45. The main party hearing had been fixed for Tuesday, 4 December 2018. As described in the *Mergers Guidance*, that is a formal hearing where the executives of the merging parties are questioned on behalf of the Group and are provided with an opportunity to explain their position on the issues raised in the Annotated Issues Statement orally. On the afternoon of Monday, 3 December, the CMA published summaries of the hearings with Tesco and Morrisons, as well as three unnamed suppliers, whom the Applicants regard as key complainants and on which some of the Working Papers heavily rely. The Applicants considered that they would not have sufficient time to review and prepare their position in the light of those documents and sent by email a letter on the afternoon of 3 December stating that they were not in a position to attend the hearing which should be postponed to a later date

> "when the Parties have had the opportunity to properly review and respond to the evidence and the CMA has had the opportunity to reflect on that response before there is questioning at the hearing".

Unsurprisingly, the CMA responded that evening expressing the view that the late withdrawal from the hearing was regrettable.

46. Mr McIntosh responded substantively to the letter from the Applicants' advisors on 4 December 2018. He stated that at this point of the investigation the Group did not deem it appropriate to extend the statutory timetable. As regards the Working Papers and the request for an extension until 11 January, he noted that that would amount to a response time of between six and eight weeks depending on the date on which the relevant Working Paper had been received, and stated:

> "We recognise the importance of giving the Parties sufficient time to respond to the CMA's working papers. However, an overall response time of over six weeks is clearly incompatible with the timely fulfilment of the CMA's statutory duties. It is also wholly disproportionate when compared to the time allocated to other stages of the investigation. We are willing to agree to a limited extension to 14 December for those working papers that were received by the parties most recently. We do however still expect to receive responses to at least those working papers set out in your letter of 30 November (ie buyer power and general merchandise) by 7 December.
>
> …

> Necessarily, a number of working papers could only be delivered simultaneously towards the end of November, given that the CMA's emerging thinking and approach needed to be consistent across different workstreams. Nevertheless, these final working papers were all delivered sufficiently in advance of the scheduled main party hearings, as agreed.
>
> The length of the working papers is reflective of the fact that the CMA is sharing a significant amount of emerging thinking at this stage of the process, giving the Parties a strong foundation to make their case in writing ahead of the CMA's provisional findings. The delivery of the last of the working papers sufficiently in advance of the scheduled main party hearings should also have ensured that the Parties were all well placed to address the key points raised in those papers directly with the Group today, had they not withdrawn from the hearings yesterday evening."

Mr McIntosh also stated that the Group will not be obliged to consider any of the responses received after the extended deadlines.

47. In fact, by this stage the CMA recognised that an eight week extension to the statutory timetable was almost inevitable and its internal planning proceeded on that basis. Indeed, Mr McIntosh states that in setting deadlines for responding to the Working Papers, the CMA and the Group were assuming that the inquiry would ultimately last 32 weeks.

48. Over the week following Mr McIntosh's letter of 4 December there were a number of exchanges of correspondence between the Applicants' advisors and Mr McIntosh. These covered also other issues but, in essence, in response to the Applicants' request to reschedule the main hearing Mr McIntosh wrote on 6 December 2018 to say that the main hearing can be held beneficially prior to receipt of the Parties' response to the Working Papers and that the Group could hold this on 12 December, a delay commensurate with the one week extension for delivery of responses to the Working Papers. He also said that the Group was not "currently minded" to take any decision about an extension to the statutory timetable, while keeping an open mind on that question.

49. Later that day, the Applicants' advisors responded, proposing to deliver their responses to the Working Papers (except for the three which they had agreed to provide by 7 December) on 21 December for seven of the Working Papers and by 4 January for the rest. The solicitors' letter stated that those proposals "are at the limit of what it is possible for the Parties to deliver, given the volume and

complexity of the detailed material which was provided to us to respond to only a little over a week ago."

50. The next day, 7 December 2018, Mr McIntosh replied stating that the CMA had considered the proposals very carefully, taking "very seriously" the Parties' claims with regard to the fairness of the process. He said that the CMA was firmly of the view that the proposed extended timeline for delivery would jeopardise subsequent stages of the process, even when allowing for eight week extension which he acknowledged was "a real possibility". He said that the deadline for responses to the Working Papers could be extended to 9am on 17 December but that a "further one- to three-week extension is simply not something which the overall timetable can absorb." Mr McIntosh repeated the offer to hold the main hearing on 12 December, but proposed as an alternative that it could be held another day that week to the extent that the Group's availability allowed (i.e. by Friday, 14 December).

51. Mr McIntosh explains that before he sent that reply, the CMA staff had produced indicative timelines showing the impact of receipt of some of the responses to the Working Papers only on 4 January 2019: that would leave insufficient time later on for proper consultation should it be necessary to produce a supplementary Remedies Working Paper or for drafting the final decision before an extended deadline of 30 April 2019 (bearing in mind the occurrence of the Christmas, New Year and Easter statutory holidays). By contrast, receipt of all the responses by 14 December (or the morning of Monday, 17 December) would enable the CMA to publish the Provisional Findings and Remedies Notice in the week commencing 11 February 2019, leaving 11 further weeks of an extended statutory timetable for the remaining stages of the investigation. Mr McIntosh explains that he considers that this was already "a very stretching timetable."

52. In their letter in reply of 9 December 2018, the Applicants' advisors said that the deadline of 9am on 17 December was simply not practical and that having the main party hearing in the week ending 14 December was "plainly unreasonable" since that coincided with the intensive work needed to prepare comments on the Working Papers by the stipulated deadline.

53. It was in those circumstances that the Notice of Application was issued on 12 December 2018.

D. THE LAW

54. By sect 120, an application to the Tribunal for review of a decision of the CMA in connection with a merger reference shall be determined according to the same principles as would be applied by court on an application for judicial review.

55. There was much common ground between the two sides on the law and the difference between them was essentially a matter of emphasis. The Applicants relied, in particular, on the decision of the Supreme Court *R (Osborn) v Parole Board, In re Reilly* [2013] UKSC 61. That judgment concerned three judicial review cases against the refusal of the Parole Board to allow an oral hearing as part of the procedure whereby it declined to direct the release of prisoners held in custody. Giving the judgment of the Court, Lord Reed considered the role of a court when considering whether a fair procedure had been followed by a decision-making body. At [65], he held that it was not correct that the question of what procedural fairness required was a matter of judgment for the decision-maker, reviewable by a court only on *Wednesbury* grounds. Lord Reed stated:

> "The court must determine for itself whether a fair procedure was followed… its function is not merely to review the reasonableness of the decision-maker's judgment of what fairness requires."

Lord Reed further referred to the observation by Lord Hoffmann in *Secretary of State for the Home Department v AF (No3)* [2010] 2 AC 269, para 72, that the purpose of a fair hearing is not merely to improve the chances of the tribunal reaching the right decision. Lord Hoffmann referred to other important values that are engaged, including "the avoidance of the sense of injustice which the person who is the subject of the decision will otherwise feel." Lord Reed continued, at [68]:

> "I would prefer to consider first the reason for that sense of injustice, namely that justice is intuitively understood to require a procedure which pays due respect to persons whose rights are significantly affected by decisions taken in the exercise of administrative or judicial functions. Respect entails that such persons ought to be able to participate in the procedure by which the decision

> is made, provided they have something to say which is relevant to the decision to be taken."

56. The Applicants further relied on a judgment of the Tribunal concerning the disclosure of Working Papers in a merger reference, *Sports Direct International plc v Competition Commission* [2009] CAT 32 at para 27:

> "Given the interests at stake, the fair conduct of a merger reference generally requires a party to know what evidence has been given and what statements have been made affecting it, and then it must be given a fair opportunity to respond or correct them. However, what is fair in relation to a particular process, and to a particular situation which is subject to that process, self-evidently depends on the facts of the case..."

This is the passage referred to in the *Chairman's Guidance*: see para 17 above.

57. For the CMA, Ms Demetriou emphasised that the only statutory obligation to consult is in sect 104, which the CMA satisfies by putting out its Provisional Findings for consultation in accordance with rule 11 of the Rules of Procedure. Moreover, sect 104 itself recognises that the duty applies only "so far as practicable" and sect 104(4)(a) makes clear that considerations of practicability must have regard to the restrictions imposed by the statutory timetable under which the CMA has to conduct its enquiry.

58. Ms. Demetriou pointed out that the question of release of a prisoner from custody considered, in *re Reilly* is far removed from the circumstances of the present case. But she fully accepted that it is for the Tribunal here to determine whether the CMA had followed a fair procedure.

59. However, Ms. Demetriou stressed that what is procedurally fair is very context sensitive. In that regard, she referred to *Groupe Eurotunnel SA v Competition Commission* [2013] CAT 30, where the Tribunal observed at para 167(d) that the right to make representations is coloured by the applicable statutory framework, and continued, at para 168:

> "…whilst it is for the Tribunal to decide what is and what is not fair, the Commission's approach should be given great weight. We consider this is reflected in the case-law which repeatedly emphasises that when considering what is procedurally fair, one size does not fit all."

See, to similar effect, *BMI Healthcare Limited v Competition Commission* [2013] CAT 24, at para 39(6).

60. Ms. Demetriou submitted that the Tribunal should therefore be slow to "second guess" the procedural decision of the CMA as to what fairness required. Moreover, in considering what fairness required it was important to appreciate that this was not the Applicants' "only crack of the whip". They would have a full opportunity to make submissions in response to the CMA's Provisional Findings and any Notice on Remedies.

E. DISCUSSION

61. Although the Notice of Application sought an order that the Applicants may respond to the Working Papers within the timetable they put forward, and similarly that the main hearing be rescheduled to a date in the New Year, once the Applicants' attention was drawn to the judgment of the Court of Appeal in *Ofcom v Floe Telecom* Ltd [2006] EWCA Civ 768, and in particular the observations of Lloyd LJ at [35]-[38], the Applicants revised their Application to seek an order merely quashing the CMA's decisions as to the deadline for responses and as to the date for the main hearing. We consider that the Applicants were clearly correct to do so. It is not for the Tribunal to direct the CMA as to the timetable which it should follow. The only concern of the Tribunal is whether the procedure adopted by the CMA meets the standard of fairness required as a matter of law.

62. In that regard, we shall consider separately the Working Papers and the date for the main hearing although, as will appear, the two here are interlinked.

(1) Working Papers

63. For its part, the CMA very properly accepted that, although there was no statutory requirement to disclose its Working Papers to the Applicants or indeed to give them an opportunity to make representations in response, once it chose to disclose those Working Papers and invited comments, then the Applicants' procedural rights were engaged. This process accordingly had to be a fair

process. In our view, that must mean that the Applicants must be given a proper opportunity to digest the Working Papers and prepare their comments. As noted in the *Chairman's Guidance*, at para 8.2 (see para 19 above), the purpose of the disclosure and its practical aspects are relevant when assessing what constitutes such a proper opportunity.

64. While the Applicants, along with third parties, have a later opportunity to comment on the CMA's Provisional Findings, it seems to us that this does not diminish the significance of comments on the Working Papers. As Mr McIntosh explains, the purpose of sharing the Working Papers is essentially two-fold. First, it enables the Applicants to submit representations on the Group's emerging thinking, "that the Group could take into account ahead of producing its Provisional Findings"; and he refers to the Working Papers as comprising analysis that may "form some of the building blocks" of those Provisional Findings. Although the Applicants will in due course be able to make submissions in response to the Provisional Findings, we think it is unrealistic to suggest that once the Group has reached provisional conclusions based upon those underlying analyses, the Group would readily require the CMA staff to adopt a different methodology, or even significantly to revise the underlying analysis. That stage of the inquiry will effectively be passed. Indeed, it seems to us that this is one of the reasons why it is important for the CMA to receive the parties' response to the Working Papers sufficiently in advance of the Group producing its Provisional Findings.

65. The second reason given by Mr McIntosh for disclosure of the Working Papers is "[t]o enable the Applicants to understand the overarching points in the Group's emerging thinking, so as to respond to the Group's questioning at the main party hearings." Accordingly, we think that fairness requires that the Applicants should have time to digest the detail of the Working Papers in advance of that hearing. We note that Mr McIntosh goes on to say that the Annotated Issues Statement provides a clearer indication of those overarching points than the Working Papers. However, we were provided with a copy of the Annotated Issues Statement, which itself was provided to the Applicants' advisors only in the early hours of 28 November 2018. The annotations in that document cross-refer extensively to the Working Papers, and in many instances

can only be understood through consideration of the relevant Working Paper. Therefore, in the present case we do not see that a real distinction can be drawn for these purposes between the Annotated Issues Statement and the various Working Papers. This was accordingly a case where, as recognised in the footnote to para 7.2 of the *Chairman's Guidance* (para 17 above), the Annotated Issues Statement was appropriately supplemented by the Working Papers.

66. Early in the formal investigation, on 6 September 2018, Mr Bamford, who is the project director at the CMA for this inquiry, had told the Applicants' advisors, who had been concerned about the pressure of the timetable, that the CMA's Working Papers would be provided "on a staggered basis, so you DON'T end up with 6 Working Papers dumped on you 2 weeks before the hearing": para 33 above. Mr McIntosh in effect reiterated this commitment in his letter of 29 October 2018: para 37 above. However, that aspiration was clearly not achieved. The CMA provided nine of the 18 substantive Working Papers in a period of some 24 hours on 27-28 November 2018, just a week before the date fixed for the main hearing. As noted above, many of those Working Papers are very complex and involved detailed analysis of a large volume of data. And each of those Working Papers stated that the Applicants were required to provide their response by 7 December 2018.

67. We have no doubt that imposing that timetable was unreasonable and unfair. And we are somewhat surprised that in his letter of 4 December 2018, while granting an extension to 14 December for the responses, Mr McIntosh should nonetheless have stated that "these final working papers were all delivered sufficiently in advance of the scheduled main party hearings, as agreed": para 46 above.

68. In her oral submissions, Ms Demetriou said that she did not have to defend the original deadline of 7 December: the question for the Tribunal was whether the deadline as finally extended to 9am on Monday, 17 December 2018, gave rise to unfairness. We do not regard it as irrelevant that it was only on 4 December 2018, when over half the time at first provided for response to those nine Working Papers had elapsed, that any extension was granted (then to Friday, 14 December). But we agree that the question is as to whether the unfairness

remained once an additional week, and then a further weekend, was granted for the Applicants to respond.

69. In many circumstances, we consider that allowing parties some 19 days to respond to a Working Paper in a merger inquiry could not be criticised; indeed, in some cases a significantly shorter period may not be unfair. But we think that there are particular features here which meant that the deadline of 9am on 17 December deadline was unfair.

    a. The Applicants had from the outset, before the formal inquiry began, expressed concern that sufficient time should be built in to the process to enable proper discussion of the various issues, urging for a longer pre-notification period. But the CMA had dismissed those concerns on the basis that there would be an adequate opportunity to address all the issues with the parties during the formal inquiry.

    b. The volume of substantive and complex Working Papers provided on 27-28 November is striking and, we apprehend, exceptional: see paras 39-43 above. The CMA in its skeleton argument describes the Working Papers as "technical and detailed." It is presumably because of the magnitude and complexity of what was involved that the CMA could not provide those Working Papers earlier or on the 'staggered basis' as it had originally intended. We do not say that as a criticism, but we note that this complexity of course equally affected the Applicants in their task of evaluating and preparing their responses to the Working Papers.

    c. Mr Pritchard explains in his evidence that several of the Working Papers received on 27 November 2018 introduced new analytical approaches to the CMA's assessment of a merger, including the Fuel and GUPPI Working Papers. He says that scrutiny of those analyses, both methodologically and in terms of the data used, therefore gives rise to particularly intensive work by the Applicants' economic consultants. At least one of the Working Papers reasonably required the Applicants to assemble and process additional empirical data. The CMA has not taken issue with those statements.

d. Although the time for responses was extended to 9am on Monday 17 December 2018, the CMA continued to require that the main hearing with the Applicants should be in the week ending Friday, 14 December 2018. We of course recognise that both Applicants are well resourced and have large teams of advisors working on this case. Nonetheless, such cases require effective coordination, and given the importance of the main hearing, we think that preparing for that hearing inevitably imposes an additional burden and diverts senior personnel from the task of overseeing the responses to the Working Papers.

70. In reaching this conclusion, we fully accept that the CMA has to take an overall view of the end-to-end process of the inquiry. Fairness does not require parties to a merger to be given as much time as they believe, from their own perspective, may be necessary for them to respond to any documents. The effect of the overall statutory timetable means that their responses may have to be less complete or thorough than they would wish. Nonetheless, for the reasons we have set out, the time here allowed and the burden it imposed, crossed the line to unfairness. We accord significant weight to the assessment by the CMA of the constraints caused by the statutory timetable, but we note that para 5.3 of the *Chairman's Guidance* (adopted by the CMA) recognises the fundamental importance of due process: para 15 above. We should emphasise in this judgment, as we stated when announcing our decision at the conclusion of the hearing, that we are not holding that fairness required the Applicants to be given until 4 January 2019 for some of the responses, as they proposed. As Mr McIntosh explained, that would render the statutory timetable all but unachievable for the CMA, and place undue pressure on the important, and statutorily required, consultation on the Provisional Findings, and on any potential Remedies Notice. However, and having considered the comparative timelines prepared by the CMA, we do not accept that no extension beyond 9am on 17 December 2018 could be accommodated within an inquiry for which the final report has to be published (with the extension now recognised to be necessary) by 30 April 2019.

(2) The main party hearing

71. The question of the date of the main party hearing requires separate consideration. The Applicants' position was that the hearing should be held after their responses to the Working Papers had been submitted. That would enable the Applicants to explain their position on key points in the Working Papers, and also help the CMA to frame questions for the hearing accordingly.

72. We reject the argument that fairness requires that the main party hearing should take place only after the parties had submitted their response to the Working Papers. As Mr McIntosh explains, the main party hearing is not the occasion for detailed critique of the methodology in the Working Papers, and he points out that it is typical for additional correspondence and submissions to follow such hearings, to provide additional clarification. Indeed, Ms Demetriou said, and we of course accept, that such hearings in merger inquiries are often held before receipt of the responses to CMA working papers.

73. Having regard to the important role of the main hearings, as set out in paras 12.11 – 12.13 of the *Mergers Guidance* (para 25 above), we consider that the relevant question is whether the parties have been given sufficient time to digest the emerging thinking on the key issues set out in the Annotated Issues Statement, here in conjunction with the Working Papers, to explain their position at the hearing.

74. Since the Annotated Issues Statement and Working Papers had all been disclosed by 28 November, in ordinary circumstances we would see nothing unfair in the amended proposal to hold the hearing either on 14 December 2018, or on another day that week. In the context of an intensive merger inquiry, that should give the parties ample time to prepare appropriately. We therefore came close to dismissing this ground of the Application. However, the exceptional aspect of the present case is that this proposed date fell within the tight deadline imposed for submission of the responses to the Working Papers, which deadline we have held to be unfair. Accordingly, at the same time as they were subject to the unreasonable burden of trying to produce responses to a substantial number of detailed Working Papers, the Applicants were required to prepare for

and attend the main party hearing, which is well recognised to be a significant and important occasion in the inquiry process. We have referred to the effect of this in para 69(d) above. For that reason only, we find that the requirement that the hearing be held by 14 December 2018 was here unfair.

75. Although the application was put forward on the basis that the main party hearing should not take place until early in the New Year, at the conclusion of his submissions in reply Mr Turner said that the Applicants would not object to a hearing being held in the week commencing 17 December 2018 if that was convenient for the Group. We would only observe that if the CMA had in correspondence proposed to reschedule the hearing for that week, we would have dismissed any contention that this was unfair.

F. POSTSCRIPT

76. This case highlights the difficulties, as much for the CMA as for the parties, created by the statutory deadlines in the case of a particularly large and complex merger. The public interest does not benefit if the period in which the inquiry has to be completed is unreasonably compressed. At present, such cases are relatively rare, but if the departure of the United Kingdom from the European Union will lead to all large-scale, international mergers affecting the United Kingdom which currently fall within the exclusive jurisdiction of the EU Commission, being in future also subject to the UK merger regime, this problem is likely to be multiplied. In that event, we hope that urgent consideration will be given to a revision of the statutory deadlines, to provide for the greater flexibility that is available under the EU merger regime, and perhaps also expressing the deadline for Phase 2 in terms of working days (as it already is for Phase 1): the problems in the present case were exacerbated by the fact that the time periods spanned the public holidays over Christmas, New Year and Easter.

The Hon Mr Justice Roth
President

Tim Frazer

Anna Walker CB

Charles Dhanowa OBE, QC (*Hon*)
Registrar

Date: 18 January 2019