Neutral citation [2019] CAT 25

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1332/4/12/19

Victoria House
Bloomsbury Place
London WC1A 2EB

25 October 2019

Before:

HODGE MALEK Q.C.
Chairman

Sitting as a Tribunal in England and Wales

BETWEEN:

TOBII AB (PUBL)

Applicant

- v -

COMPETITION AND MARKETS AUTHORITY

Respondent

RULING (SPECIFIC DISCLOSURE)

A. INTRODUCTION

1. The Applicant ("Tobii") filed an application on 16 October 2019 for an order under Rule 19(1) and 19(2)(p) of the Competition Appeal Tribunal Rules 2015 (S.I. 2015 No. 1648) (the "2015 Tribunal Rules") for specific disclosure from the Respondent (the "CMA") (the "Disclosure Application"), pursuant to paragraph 3 of the Order of the Chairman dated 3 October 2019 made at the case management conference.

2. The Disclosure Application is made in the context of Tobii's application of 13 September 2019 for judicial review pursuant to s.120 of the Enterprise Act 2002 (the "2002 Act") of decisions in the CMA's final report dated 15 August 2019 regarding the completed acquisition by Tobii of Smartbox Assistive Technologies Limited and Sensory Software International Limited (together, "Smartbox") (the "Final Report"). The CMA's decisions in the Final Report are summarised at paragraph 5 of the Tribunal's ruling of 10 October 2019 regarding the admissibility of evidence [2019] CAT 23. The judicial review application (the "s.120 Application") is due to be heard on 6 November 2019 with an estimate of two days.

3. This is my ruling on Tobii's Disclosure Application, having received written submissions from both parties and deciding the Disclosure Application on the papers. Nothing in this ruling prejudges the issues that Tobii has raised in its s.120 Application.

B. BACKGROUND

4. Tobii's Notice of Application ("NoA") contains six grounds of review. In summary, they are:

   (1) Ground 1: the CMA breached its duty of procedural fairness by refusing to disclose to Tobii and/or its external advisers relevant evidence, which includes questionnaires used by the CMA to gather evidence and the responses to the questionnaires.

(2) Ground 2: the CMA's finding that the merger resulted, or may be expected to result, in a substantial lessening of competition ("SLC") is not supported by relevant, reliable and sufficient evidence due to material errors in the collection of evidence. In particular, the CMA failed to obtain evidence from end users of assistive and augmentative communications ("AAC") solutions, focusing instead on intermediate customers and interest groups. Furthermore, the CMA used poorly structured and biased questionnaires, which suffered from design errors, in obtaining information from these third parties and refused to give any weight to the results of Tobii's own survey of end users. The impact of the material errors is that the evidence received by the CMA is inherently unreliable and no reasonable authority could have relied on it.

(3) Ground 3: the CMA failed to properly define the relevant market for AAC solutions. The definition of "dedicated AAC solution" is a term the CMA created, not used in the AAC industry, excludes any AAC solution based on a mainstream consumer device and in fact represents only a very small proportion of AAC solutions that are available in the UK. This occurred because, irrationally and unreasonably, the CMA failed to apply a SSNIP test, did not obtain evidence from end users, and its market questionnaire assumed a market definition of a "dedicated AAC solution", used leading questions and referred to suppliers by name (rather than products) that customers would consider as substitutes. The CMA also ignored the NHS's guidance, which clearly states that mainstream devices may be used for the delivery of AAC solutions, and contemporaneous internal documents concerning customer switching.

(4) Ground 4: the CMA's finding of an SLC as a result of horizontal unilateral effects is not supported by relevant, reliable and sufficient evidence due to material errors in the assessment of evidence. In particular, the CMA's finding relied primarily on evidence received from customers as a result of customer questionnaires, which suffered from significant framing errors, were sent to only a subset of all

purchasers of AAC solutions and had substantial inconsistencies with data provided by Tobii to the CMA, and relied only to a limited extent on evidence from competitors and resellers. This was unreasonable and irrational, given the CMA's finding that dedicated AAC solutions are highly differentiated products. In addition, the CMA irrationally and unreasonably did not undertake any assessment of how individual devices of different suppliers compete with one another, nor did the CMA seek to identify the extent of any likely detriment as a result of any anti-competitive outcome of the merger.

(5) Ground 5: the CMA's finding of an SLC as a result of vertical foreclosure effects is not supported by relevant, reliable and sufficient evidence due to material errors in the assessment of evidence. In particular, the CMA applied the wrong legal test for input foreclosure and the CMA unreasonably relied on evidence from competitors that relates to full foreclosure, did not obtain any evidence of actual diversion in the event of partial foreclosure, did not demonstrate with credible evidence how input foreclosure would be implemented, and failed to determine the likely negative effects of a successful implementation of a partial foreclosure strategy. The CMA also failed to assess the evidence fairly and impartially because evidence from competing suppliers, which undermined the CMA's customer foreclosure theory of harm and was referred to in the CMA's Vertical Effects Working Paper ("VEWP"), was not recorded in the Final Report.

(6) Ground 6: the CMA's full divestiture remedy is disproportionate and unreasonable.

5. On 30 September 2019, the CMA disclosed to Tobii the customer questionnaires referred to in Ground 1 of Tobii's NoA.

6. On 11 October 2019, the CMA served its Defence and a witness statement dated 10 October 2019 by Mr Kingsley Meek, the Chair of the Inquiry Group that conducted the investigation into the completed acquisition by Tobii of

Smartbox. Mr Meek's witness statement exhibited the CMA's customer questionnaires that were disclosed to Tobii on 30 September 2019.

7. Tobii's Disclosure Application requests specific disclosure of the following documents or classes of documents:

   (1) Responses to requests for information (whether under s.109 of the 2002 Act or on a voluntary basis) sent to customers and interest groups in Phase 1 and/or Phase 2 of the CMA's inquiry, in particular those referred to in paragraphs 5.15, 5.17, 6.14 and 6.46 of the Final Report ("All Customer Responses").

   (2) Requests for information ("RFIs") (whether under s.109 of the 2002 Act or on a voluntary basis) sent to competitors in Phase 1 and/or Phase 2 and their responses, in particular those referred to in paragraphs 5.33, 7.80, 7.94 and 7.148 of the Final Report in so far as they contain evidence relating to the CMA's assessment of vertical foreclosure set out in section 7 of the Final Report ("All Competitor RFIs and Responses").

   (3) Unredacted versions of Tables 6-1 and 6-2 of the Final Report and the underlying data used by the CMA to calculate those market shares, broken down by product (the "Unredacted Tables and Market Share Data").

8. The CMA submitted on 22 October 2019 its written observations regarding Tobii's Disclosure Application and Tobii informed the Tribunal in written correspondence on 23 October 2019 how, in the event its Disclosure Application is granted, it intended to deploy each of the three classes of material.

9. Subsequently, by a second letter to the Tribunal dated 23 October 2019, Tobii indicated that it will no longer pursue Ground 6 of its NoA.

C. LEGAL FRAMEWORK

10. The Tribunal's power to give directions for disclosure, is set out in Rule 19 of the 2015 Tribunal Rules:

> "**Directions**
>
> **19.**—(1) The Tribunal may at any time, on the request of a party or of its own initiative, at a case management conference, pre-hearing review or otherwise, give such directions as are provided for in paragraph (2) or such other directions as it thinks fit to secure that the proceedings are dealt with justly and at proportionate cost.
>
> (2) The Tribunal may give directions—
>
> …
>
> (p) for the disclosure and the production by a party or third party of documents or classes of documents;
>
> …"

11. The nature and extent of disclosure before the Tribunal very much depends on the form of the proceedings. A damages claim against alleged cartelists is likely to lead to extensive disclosure under Rule 60 of the 2015 Tribunal Rules. On the other hand where the proceedings consist of a challenge to a decision applying judicial review principles, disclosure is generally not necessary or is only limited to specific documents or categories of documents. The present proceedings are in the latter category.

12. As to disclosure in the context of judicial review proceedings, Lord Bingham opined in *Tweed v Parades Commission for Northern Ireland* [2006] UKHL 53 ("*Tweed*") that:

> "2. The disclosure of documents in civil litigation has been recognised throughout the common law world as a valuable means of eliciting the truth and thus of enabling courts to base their decisions on a sure foundation of fact. But the process of disclosure can be costly, time-consuming, oppressive and unnecessary, and neither in Northern Ireland nor in England and Wales have the general rules governing disclosure been applied to applications for judicial review. Such applications, characteristically, raise an issue of law, the facts being common ground or relevant only to show how the issue arises. So disclosure of documents has usually been regarded as unnecessary, and that remains the position.
>
> 3. In the minority of judicial review applications in which the precise facts are significant, procedures exist in both jurisdictions … for disclosure of

> specific documents to be sought and ordered. … But even in these cases, orders for disclosure should not be automatic. The test will always be whether, in the given case, disclosure appears to be necessary in order to resolve the matter fairly and justly.
>
> 4. Where a public authority relies on a document as significant to its decision, it is ordinarily good practice to exhibit it as the primary evidence. Any summary, however conscientiously and skilfully made, may distort. But where the authority's deponent chooses to summarise the effect of a document it should not be necessary for the applicant, seeking sight of the document, to suggest some inaccuracy or incompleteness in the summary, usually an impossible task without sight of the document. It is enough that the document itself is the best evidence of what it says. There may, however, be reasons (arising, for example, from confidentiality, or the volume of the material in question) why the document should or need not be exhibited. The judge to whom application for disclosure is made must then rule on whether, and to what extent, disclosure should be made."

13. Further, in *Tweed*, Lord Carswell referred to the principle that "*the intensity of review in a public law case will depend on the subject matter in hand*" (see [26]). In particular, the need for disclosure depends on the requirements of each case, taking into account the facts and circumstances. Therefore, disclosure should not be ordered in the same routine manner in applications for judicial review as in merits-based applications but should be "*carefully limited to the issues which require it in the interests of justice*" (see [32]).

14. Lord Brown added at [56] in *Tweed* that:

> "… disclosure orders are likely to remain exceptional in judicial review proceedings … and the courts should continue to guard against what appear to be merely 'fishing expeditions' for adventitious further grounds of challenge. It is not helpful, and is often both expensive and time-consuming, to flood the court with needless paper."

15. The principles in *Tweed* have been applied by the Tribunal in respect of specific disclosure applications in *British Sky Broadcasting Group plc v The Competition Commission and the Secretary of State for Business, Enterprise and Regulatory Reform* [2008] CAT 7 ("*BSkyB*") and in *HCA International Limited v Competition and Markets Authority* [2014] CAT 11 ("*HCA*").

16. The disclosure applications in *BSkyB* and *HCA* were determined by the Tribunal in accordance with Rule 19 of the Competition Appeal Tribunal Rules 2003, the predecessor to the 2015 Tribunal Rules (the "Old Rule 19"). The 2015 Tribunal Rules apply to the present Application. The language of

"just, expeditious and economical conduct of the proceedings" in Old Rule 19 is now reflected in the governing principles of Rule 4 of the 2015 Rules.

17. The Tribunal in *BSkyB* was wary not to give general guidance as to what disclosure would be appropriate as no two cases are likely to be the same (see [37]). Although the Tribunal must remain flexible when exercising its power to order disclosure, the Tribunal in *BSkyB* reiterated at [24], [25] and [37] that the Tribunal's general approach to disclosure in applications for review under s.120 of the 2002 Act is that disclosure is not automatic nor would the Tribunal allow mere fishing expeditions. Before it will make an order for disclosure, the Tribunal must be satisfied that the disclosure sought is necessary, relevant, proportionate and in the interests of securing the just, expeditious and economical conduct of the proceedings. Consequently, the Tribunal will examine the requested disclosure in light of the particular circumstances of each individual case, such as the nature of the decision challenged, the nature of the grounds on which the challenge is being made, and the nature and extent of the disclosure sought.

18. As pointed out in *BSkyB* at [13], the competition authority is expected to comply with its duty of candour. This follows the principles set out in *R (Quark Fishing Limited) v The Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1409 (see also Matthews and Malek (eds) *Disclosure* (5th edn, 2017) paragraph 4.07).

19. In *BSkyB*, the particular circumstances that persuaded the Tribunal to make an order for specific disclosure were that the disclosure sought was focused and expressly tailored to the findings under challenge, it was for specific material upon which reliance had expressly been placed by the decision maker, and the confidential nature of the material could be maintained by supplying it to the parties' external legal advisers within a confidentiality ring. Further, the Tribunal considered that it should have sight of the material in order to deal fairly with the applicant's contention that the Competition Commission could not properly make the findings in question on the basis of the material that it had relied on. (See [30] to [33].)

20. The Tribunal also took into consideration the particular circumstances in *HCA* when it granted an application for specific disclosure, which was brought in the context of an application for judicial review pursuant to s.179 of the 2002 Act. The Tribunal noted at [17] that it did not find the determination of HCA's application for disclosure easy and, on balance, it concluded that disclosure of the commercial data sought was necessary and proportionate and was required to enable HCA's judicial review application to be determined fairly and justly. The Tribunal took into account several factors in that case, which included that the commercial data was relatively aged by then, would be disclosed within a data room established and supervised by the CMA and access to the data room would be bound by strict confidentiality obligations; that HCA was willing to provide a server for use in the data room in order to meet one of the CMA's objections about the diversion of its resources; and that HCA's proposed duration for the review of the data would not disrupt the existing timetable for the determination of HCA's substantive application (see [19] to [23]). In applying *Tweed*, the Tribunal was also satisfied in the particular circumstances of the *HCA* case that HCA's disclosure application was not a mere speculative "fishing expedition" but to assist it to make good an arguable case which it had already set out and advanced in its notice of application (see [30]). As the material was absolutely critical as the basis for the CMA's findings, HCA would be disabled from making the best case it could by being deprived of the information sought and the Tribunal might be hampered in examining whether the CMA acted lawfully and proportionately (see [31] and [36]).

21. What makes disclosure in judicial review proceedings more circumscribed is the fact that the issue is usually the lawfulness or otherwise of a body's decision-making process, rather than the correctness of any substantive decision so produced, and that the decision maker (in this case the CMA) normally complies with its duty of candour.

D. TOBII'S DISCLOSURE APPLICATION

22. Tobii submitted that it is necessary, relevant and proportionate for the Tribunal to order disclosure of the documents and classes of documents sought. The

disclosure is neither extensive nor burdensome as it relates to a limited number of documents that are directly related to the grounds of challenge pleaded in Tobii's NoA and these documents can be readily identified and produced.

23. Further, the matters that the Tribunal must determine at the hearing of the s.120 Application are highly fact-specific and require a careful assessment of the underlying facts and documents, which contents are merely summarised in the Final Report.

24. The full divestiture remedy required by the CMA involves a serious interference with Tobii's rights under the European Convention on Human Rights ("ECHR"), in particular Article 1 of Protocol 1 (right to property). Consequently, a greater level of scrutiny is justified and appropriate, and the precise facts will be significant so that the Tribunal can assess the proportionality of the CMA's interference with Tobii's right to own the Smartbox business. Applying *Tweed*, disclosure of the underlying evidence on which the CMA relied is needed for the Tribunal to determine the substantive issues fairly and justly.

25. According to Tobii, the CMA breached its duty of procedural fairness by refusing to disclose to Tobii evidence during the CMA's inquiry, and the CMA has not complied with its duty of candour by failing to disclose all relevant documents, including those that may potentially be adverse to it. Relying on *R (National Association of Health Stores) v Department of Health* [2005] EWCA Civ 154 and *BSkyB*, Tobii submitted that the original documents containing the underlying evidence are the best evidence available and should be disclosed so that the Tribunal can make findings on the material, rather than rely on a second-hand account contained in the Final Report. Even if (which Tobii does not accept) the Final Report contained accurate summaries and synopses of the underlying documentary and factual evidence relied on by the CMA, this could only be determined with disclosure of the actual documents that contain the evidence that is said to be summarised in the Final Report.

26. In addition, by refusing disclosure, the CMA has failed to comply with its duty to disclose the 'gist' of the case against Tobii. The 'gist' of a case is highly context- and case-specific and this is particularly so in the present case where there is a substantial dispute of fact that must be resolved in order to determine the outcome of Tobii's s.120 Application involving its ECHR rights (*BMI Healthcare Limited v Competition Commission* [2013] CAT 24, *Ryanair Holdings PLC v Competition Commission* [2013] CAT 25 and *R (Al-Sweady) v The Secretary of State for the Defence* [2009] EWHC 2387 (Admin)). Tobii also contended that the version of the Final Report made available to it by the CMA is heavily redacted and insufficient for Tobii to understand the 'gist' of the CMA's findings. It is necessary and proportionate for the Tribunal to have sight of the actual evidence to determine fairly and justly what is the 'gist' of the CMA's case.

27. Tobii submitted in relation to the documents or classes of documents sought that:

(1) All Customer Responses are relevant to Grounds 2 to 6 in Tobii's NoA. They are necessary for the Tribunal to determine whether the CMA's questionnaires suffered design flaws, whether the evidence received by the CMA was inherently unreliable and, thus, to determine the reliability and lawfulness of the CMA's substantive findings on the relevant market and SLCs as a result of horizonal unilateral effects and vertical foreclosure effects. If disclosure is granted, Tobii would use All Customer Responses to demonstrate the impact that the CMA's failure to gather evidence correctly had on the credibility and reliability of the evidence obtained and, as a result, that the CMA's findings on market definition and SLC did not have a reasonable evidential basis.

(2) All Competitor RFIs and Responses are relevant to Ground 5 in Tobii's NoA. They are required for the Tribunal to fairly and justly determine whether the CMA's finding of an SLC due to vertical foreclosure is supported by evidence received by the CMA from competitors. If disclosure is granted, Tobii would use All Competitor

RFIs and Responses to show the insufficiency of the CMA's finding of an SLC as a result of both input foreclosure and customer foreclosure.

(3) The Unredacted Tables and Market Share Data are relevant to Grounds 2 to 5 in Tobii's NoA. It is reasonable to assume that these are readily available to the CMA and they are required in order for the Tribunal to determine fairly and justly whether the CMA properly investigated and defined the relevant product market and their disclosure is necessary and proportionate for the Tribunal to determine whether the CMA's finding of an SLC was made on the basis of incorrect and unreasonable calculations of market shares, closeness of competition and diversion ratios. If disclosure is granted, Tobii would use the actual market share numbers in the Unredacted Tables and the underlying data from which they were calculated to show the scale of the misunderstanding in the CMA's decision making on market definition and the degree and intensity of competition faced by the merging parties, as well as to demonstrate whether, in its approach to market definition and its substantive analysis, the CMA took into account irrelevant considerations and whether relevant factors were properly taken into account.

28. Tobii accepted that some of the documents for which disclosure is sought may contain confidential information and contends that these can be disclosed into the confidentiality ring established pursuant to the Order of the Chairman dated 4 October 2019 (the "Confidentiality Ring").

29. The CMA opposed Tobii's Disclosure Application. The CMA submitted that the principles found in *Tweed* and as cited in *BSkyB* are those to be applied in dealing with disclosure in applications for judicial review, and the requested classes of documents are not necessary for the fair disposal of Tobii's s.120 Application.

30. The CMA contended that the classes of documents requested by Tobii are still wide-ranging and Tobii has failed to identify any specific information or documents which it needs to see. All Consumer Responses and All

Competitor RFIs and Responses comprise most of the evidence received from customers and competitors during the course of the CMA's investigation. The Unredacted Tables could be identified and produced but the CMA does not have a product-by-product breakdown of the Market Share Data sought by Tobii. Further, the ease of production of the requested material goes to the proportionality of the Disclosure Application and proportionality is only one of the considerations for the Tribunal when deciding whether to grant the Disclosure Application.

31. According to the CMA, the requested classes of documents are not necessary for the fair disposal of Tobii's s.120 Application. In particular, the House of Lords made it clear in *Tweed* that disclosure is generally unnecessary in the context of judicial review and that remains the position even where ECHR rights are engaged. The context of *Tweed* was that the appellant's application for judicial review turned on a proportionality argument under the Human Rights Act 1998 and the ECHR and the five specific documents sought were of particular significance to the application. By contrast, Tobii's Disclosure Application has not argued in any reasoned manner that the three classes of documents sought are necessary in order to resolve its proportionality arguments under Ground 6 of Tobii's NoA.

32. The CMA submitted that Tobii wrongly seeks to draw from *Tweed* and *BSkyB* a general principle that, in judicial review proceedings, the CMA should disclose essentially all of the primary evidence going to particular issues, rather than relying on summaries of that evidence in the Final Report. If Tobii were correct, a decision maker would be required to disclose every document in its underlying decision, which is clearly not required by the case law. On the contrary, the Tribunal recognised in *BSkyB* that it is likely to be "wholly impracticable" to disclose all of the evidence received or relied upon in its decision (see [38]). The Tribunal also made clear that each application for disclosure must be considered on its own facts.

33. According to the CMA, the documents requested by Tobii may be relevant in a general sense to its s.120 Application but they are just one piece of evidence among a number of sources of evidence relied upon by the CMA in reaching

its decision. Tobii has failed to specify the "particular document" (other than at a high level of generality) that it requires and why it is "significant" to the specific findings by the CMA that are being challenged (see *BSkyB* [24]).

34. The CMA accepted that it owes a duty of candour but refuted that that duty requires it to disclose the material sought by Tobii, particularly in circumstances where the evidence is already explained in detail in the Final Report, in the CMA's Defence and accompanying witness statement. The extensive material already before the Tribunal is sufficient to enable the Tribunal to deal fairly and justly with the issues raised in Tobii's NoA.

35. The CMA submitted that Tobii has not identified what the "substantial dispute of fact" might be and its argument that it needs to be able to check whether the summaries in the Final Report are accurate is tantamount to saying that Tobii, and in turn the Tribunal, should check and, in effect, redo significant aspects of the CMA's work. This fundamentally misunderstands the nature of judicial review proceedings.

36. In relation to each of the documents or classes of documents sought by Tobii, the CMA responded that their disclosure is not relevant, necessary or proportionate because:

    (1) In respect of All Customer Responses sought, the Final Report contains extensive disclosure of customers' responses. Tobii's Disclosure Application has made a blanket request for disclosure without identifying any particular documents which are significant to specific findings by the CMA and which are necessary for the Tribunal to deal with Tobii's substantive application fairly and justly. Furthermore, Tobii's pleaded Ground 3 that the CMA's assessment was based only on a subset of customers does not require disclosure of All Customer Responses, while Tobii's pleaded Grounds 2 and 4 do not require the disclosure of All Customer Responses in addition to the customer questionnaires, which have been disclosed to Tobii. Moreover, the evidence from customers was only one source of evidence relied upon by the CMA in relation to its SLC findings.

(2) In respect of All Competitor RFIs and Responses sought, there is extensive disclosure of information received from competitors in the Final Report. Tobii's Disclosure Application has made a vague request for blanket disclosure, which fails to identify any particular documents which are significant to specific findings by the CMA. Furthermore, Tobii's pleaded Ground 5 challenges the CMA's treatment of the evidence on vertical foreclosure and disclosure of All Competitor RFIs and Responses is not required for the Tribunal fairly and justly to address the issues.

(3) In respect of the Unredacted Tables and Market Share Data sought, Tobii's Disclosure Application has not identified any particular documents which are significant to specific findings by the CMA, nor has Tobii explained how the disclosure sought would assist in relation to the grounds in Tobii's NoA which challenge the CMA's market definition. The relevant product market is clearly defined as the supply of dedicated AAC solutions in the Final Report, and the Final Report and the CMA's Defence make clear that the CMA did not carry out a product-by-product assessment and explain the reasons why the CMA did not do so.

37. The CMA informed the Tribunal that it wrote to all the third parties who were invited to comment on the merger, notifying them of Tobii's Disclosure Application and asked them to provide any submissions they may have. The CMA asked them in particular whether there is any confidential, commercial or private information which if disclosed would be contrary to the public interest, significantly harm legitimate business interests or significantly harm the private interests of the individual to which the information relates. The CMA told the third parties that disclosure, if ordered by the Tribunal, would be made into a confidentiality ring.

38. As at 22 October 2019, the CMA received nine third party responses, of which five did not object to their information being disclosed into a confidentiality ring, one requested that all personal and identifying information is redacted before disclosure, and three responded that the information they provided to

the CMA in the course of the investigation is confidential and should not be disclosed even into a confidentiality ring because they are concerned that disclosure of their commercially sensitive, financial and strategic information could significantly harm their business interests.

E. DECISION

39. By way of preliminary observations, relevant legal principles that apply when determining applications for disclosure in the context of judicial review proceedings are set out at section C above. In determining Tobii's Disclosure Application, I have considered carefully the particular circumstances of this case, specifically the way in which Tobii's case has been pleaded in its NoA and Tobii's correspondence to the Tribunal on 23 October 2019 regarding the way in which the requested classes of documents will be deployed to support Tobii's pleaded case. I also note the confidentiality concerns of some of the third parties regarding their personal or commercial information. At this stage of the proceedings, I am determining what material is necessary for the Tribunal to deal with Tobii's s.120 Application justly and at proportionate cost, in accordance with Rules 4 and 19 of the 2015 Tribunal Rules.

(1) All Customer Responses

40. It is disputed between Tobii and the CMA how significant All Customer Responses are to the CMA's decision being challenged by Tobii. Tobii contends that All Customer Responses are highly material whereas the CMA contends that it relied on a number of sources of evidence. This is an issue that can be determined, if necessary, at the hearing of Tobii's s.120 Application.

41. Bearing in mind the submissions on this Disclosure Application, Tobii's NoA and its supporting documents, the CMA's Defence and Mr Meek's witness statement, I am satisfied on the basis of the material that I have seen at this stage that the CMA has complied with its duty of candour. The CMA have quite properly taken the stance that the issue of the outstanding requests for disclosure should be determined by the Tribunal. This stance does not amount

to breaching its duty of candour. Whether to order disclosure and the extent of disclosure is not straightforward in this case.

42. Paragraph 5.15 of the Final Report states that the CMA sent questionnaires to 69 customers and received responses from 30 customers. Table 5-1 of the Final Report shows a breakdown of the 30 responses received from various customers.

43. The CMA's Defence states that the customer responses received have been disclosed in aggregate or summary form. These are at:

(1) Paragraphs 5.19 to 5.21 of both the CMA's Provisional findings report dated 30 May 2019 (the "Provisional Findings") and Final Report (regarding substitutability);

(2) Paragraphs 5.23, 6.37 to 6.39 of the Provisional Findings and paragraphs 5.23, 6.46 and 6.48 of the Final Report (diversion ratio data); and

(3) Paragraphs 6.14 to 6.19 of the Provisional Findings and paragraphs 6.15 to 6.20 of the Final Report (relative positioning of different suppliers and general views on the merger).

44. These paragraphs in the Provisional Findings and Final Report show that the evidence the CMA received from customers was relied on to a certain extent by the CMA in its assessments and conclusions regarding market definition, market share, diversion ratios and its finding of an SLC as a result of horizontal unilateral effects (Grounds 3 and 4 of Tobii's NoA).

45. If the only contentions in Tobii's pleaded Grounds 2 and 3 of its NoA were that the CMA's customer questionnaires were poorly structured, contained biased questions and suffered from design errors and that the CMA did not obtain customer evidence from end users, I would not consider the disclosure of All Customer Responses necessary or relevant for the Tribunal to justly determine those issues at the hearing of Tobii's s.120 Application.

46. However, Tobii's pleaded Grounds 3 and 4 of its NoA include arguments that the CMA unreasonably and irrationally based its decisions on customer evidence that is unreliable due to flawed questionnaires. It is my view in the particular circumstances of this case that the 30 customer responses, which were disclosed in aggregated summaries contained in the limited paragraphs of the Provisional Findings and Final Report, may well assist the Tribunal to justly determine whether the customer evidence received by the CMA in response to their customer questionnaires this particular investigation is reliable. The question regarding whether the customer evidence is reliable is distinct from the other issue which Tobii has raised, namely whether the summaries in the Final Report accurately reflect the gist of the customer evidence. I draw a distinction also between the 30 customer responses referred to at paragraph 5.15 and Table 5-1 of the Final Report and the additional evidence obtained from calls and written information requests from third parties referred to at paragraph 7 of the Final Report. The latter additional evidence was not obtained by the CMA using the customer questionnaires which Tobii complains of. Therefore, that additional evidence is neither necessary or relevant for the Tribunal to justly determine whether the 30 customer responses are reliable.

47. In my view, the 30 customer responses referred to at paragraph 5.15 and Table 5-1 of the Final Report do not comprise an unmanageable volume of material. On the basis that Tobii has told the Tribunal it intends to deploy the disclosed material in submissions and argument, I do not expect the disclosure of the 30 customer responses to result in further applications by Tobii to adduce factual or expert evidence or to affect the 6 November 2019 date for the hearing of Tobii's s.120 Application or the two-day estimate for that hearing. Consequently, I consider that the disclosure of the 30 customer responses is unlikely to adversely impact on the timetable for the determination of Tobii's s.120 Application.

48. I emphasise that my decision regarding the 30 customer responses in this case is not to be taken as a precedent by other applicants in future judicial review applications to suggest that decision makers such as the CMA are under a general obligation to disclose underlying evidence and material collected in

their investigation so that a party can test for itself whether the evidence is reliable, or that decision makers are required to disclose more than the gist of their case.

49. In the particular circumstances of Tobii's pleaded case, the 30 customer responses may be relevant, but whether, ultimately, they will assist Tobii's case is a matter that will be determined by the Tribunal at the hearing of Tobii's s.120 Application.

50. I note that not all third parties contacted by the CMA have responded to the CMA's invitation to provide their submissions regarding whether they consider their information confidential and the five customers who responded did not object to their information being disclosed into a confidentiality ring. I am mindful that the CMA relies on third parties' co-operation with investigations and their willingness to do so depends, in turn, on having confidence that their confidential information will be protected. Therefore, balancing the interests of third parties against the interests of securing the just conduct of the proceedings, I do not consider it necessary for Tobii's external legal representatives and external economists who are members of the Confidentiality Ring to be informed of the 30 customers' identities.

51. Accordingly, I rule that the CMA discloses anonymised versions of the 30 customer responses referred to at paragraph 5.15 and Table 5-1 of the Final Report within the Confidentiality Ring to Tobii's external legal and economic advisers.

(2) All Competitor RFIs and Responses

52. The central contention in Tobii's pleaded NoA Ground 5 is that the CMA's SLC finding as a result of vertical foreclosure effects is unsupported by the competitor evidence collected during the CMA's investigation. In particular, that the CMA did not collect competitor evidence relating to partial input foreclosure and the CMA concluded that there is likely to be customer foreclosure of eye gaze camera competitors even though only one competing supplier of eye-gaze cameras expressed a concern of customer foreclosure to

the CMA. Tobii's NoA Ground 5, therefore, concerns the absence of evidence to support the CMA's findings.

53. Tobii's NoA and Disclosure Application rely on the competitor evidence outlined in the CMA's VEWP to demonstrate this lack of evidence. I have read the VEWP and consider that the VEWP and Final Report contain a gist of the competitor evidence. All Competitor RFIs and Responses are neither necessary nor relevant, in addition to the material already available in the VEWP and Final Report, to demonstrate the alleged absence of competitor evidence, and I do not consider All Competitor RFIs and Responses necessary for the Tribunal to justly and fairly determine Ground 5 at the hearing of Tobii's s.120 Application.

54. Accordingly, I refuse Tobii's request for specific disclosure of All Competitor RFIs and Responses.

(3) Unredacted Tables and Market Share Data

55. Tables 6-1 and 6-2 in the Final Report set out the CMA's estimated market shares of various suppliers of dedicated AAC solutions in the UK between 2016 and 2018, by revenue and volume. The data is redacted in the sense that percentage ranges are used, rather than exact percentage figures. Table 6-1 has been calculated by the CMA based on its analysis of Customer Responses, while Table 6-2 has been calculated by the CMA based on its analysis of Competitor Responses.

56. Tobii seeks the unredacted percentage figures in Tables 6-1 and 6-2 and the Market Share Data because it believes that it will be able to deploy the figures and data in submission and argument at the hearing of Tobii's s.120 Application to show the factors that were taken into account by the CMA in its approach to market definition and its substantive analysis, and whether the CMA took into account irrelevant considerations.

57. The CMA has the Unredacted Tables but does not have the Market Share Data (ie data broken down by product) that Tobii seeks. The Final Report and the

CMA's Defence also make clear that the CMA did not carry out a product-by-product assessment.

58. In my view, the unredacted percentage figures in Tables 6-1 and 6-2 of the Final Report are not relevant for the purposes that Tobii seeks to deploy the material and, therefore, the Unredacted Tables are not necessary or relevant for the just and fair determination by the Tribunal of Tobii's s.120 Application. The Market Share Data does not exist in the form that Tobii requires.

59. Accordingly, I refuse Tobii's request for specific disclosure of the Unredacted Tables and Market Share Data.

F. CONSEQUENTIAL MATTERS

60. The parties are invited to agree when the disclosure will be provided and on the filing of any additional submissions arising out of the disclosure for the purposes of the hearing commencing on 6 November 2019. In the absence of agreement, the Tribunal will issue a further direction.

61. In the absence of agreement between the parties as to costs of the Disclosure Application, such costs will be considered at the conclusion of the proceedings.

Hodge Malek Q.C.
Chairman

Charles Dhanowa O.B.E., Q.C. (*Hon*) Date: 25 October 2019
Registrar