Neutral citation [2020] CAT 6

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1332/4/12/19

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

17 February 2020

Before:

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

Sitting as a Tribunal in England and Wales

BETWEEN:

TOBII AB (PUBL)

Applicant

- v -

COMPETITION AND MARKETS AUTHORITY

Respondent

RULING (DISPOSAL, PERMISSION TO APPEAL AND COSTS)

A. INTRODUCTION

1. The Tribunal handed down its judgment in respect of Tobii's substantive application pursuant to s.120 of the Enterprise Act 2002 on 10 January 2020 ([2020] CAT 1) (the "Judgment"). This is the Tribunal's unanimous ruling on the disposal of Tobii's substantive application, permission to appeal and costs. This ruling adopts the terminology and definitions used in the Judgment.

2. A chronology of these proceedings is set out in the Judgment. Since the handing down of the Judgment, the parties informed the Tribunal on 16 January 2020 that they were not in agreement as regards the form of order to give effect to the Judgment (in particular, which paragraphs of the Final Report should be quashed and whether the Tribunal should refer the paragraphs of the Final Report relating to partial input foreclosure back to the CMA) and the issue of costs.

3. The parties were informed in writing on 17 January 2020 that the Tribunal will deal with costs summarily, and they were directed to file their submissions on costs and costs schedules, which if practicable were to separately list the costs relating to Tobii's specific disclosure application (see [2019] CAT 25 (the "Specific Disclosure Ruling")).

4. On 30 January 2020, Tobii filed an application for permission to appeal the Judgment. The CMA filed written observations on 7 February 2020 in respect of that application.

5. Neither of the parties have requested an oral hearing. Having considered the parties' proposed draft orders, which showed the alternative texts proposed by each party, and written submissions regarding the form of order, permission to appeal and costs in respect of these proceedings, the Tribunal does not consider that a hearing is necessary and is accordingly determining these consequential matters on the papers.

B. DISPOSAL OF TOBII'S SUBSTANTIVE APPLICATION

6. The Judgment at [463] dismissed Grounds 1 to 4 of Tobii's NoA. As regards Ground 5 of Tobii's NoA, the parties were not in full agreement which paragraphs of the Final Report should be quashed, and they were not agreed whether parts of the Final Report should be referred back to the CMA under s.120(5)(b) of the 2002 Act with a direction to reconsider the issue of partial input foreclosure and make a new decision.

(1) Quashing parts of the Final Report

(a) The parties' submissions

7. The parties were agreed that the Tribunal should quash the following paragraphs of the Final Report: 7.15 to 7.17, 7.39(a), 7.40 to 7.65, 7.70 to 7.75, 9.2(b), 10.7(b), 10.32(b), 10.223(a) and 10.369(b) (in so far as they relate to partial input foreclosure).

8. Tobii submitted that the Tribunal should also quash the following paragraphs of the Final Report:

   (1) From Chapter 7 (Competitive Assessment – Vertical Effects): paragraphs 7.37 (other than the last sentence), 7.38 and 7.39 (in so far as they relate to partial input foreclosure through increasing the wholesale and/or retail price of the Grid), 7.66 to 7.69 and 7.177 (in so far as it relates to partial input foreclosure); and

   (2) From Chapter 10 (Remedies): paragraphs 10.138 to 10.188, 10.224(b), 10.225(b) and (c), 10.226, 10.227, 10.241, 10.244(a), 10.276, 10.282, 10.283 and 10.369.

9. Tobii submitted that the CMA's findings and conclusion on remedy relied extensively on its finding of an SLC as a result of partial input foreclosure. As the Tribunal found that the CMA's conclusion on partial input foreclosure was not based on sufficient evidence, the paragraphs of the Final Report relating to

the CMA's assessment of the remedy for its finding of an SLC due to partial input foreclosure of the Grid must also be quashed.

10. The CMA invited the Tribunal to make an order which quashes the relevant paragraphs of the Final Report on partial input foreclosure which the Tribunal concluded did not have a sufficient evidential basis (namely, the paragraphs set out at [7] above). The CMA did not consider it necessary to quash any of the additional paragraphs in the Final Report suggested by Tobii, given the relatively limited findings of the Tribunal as regards Issue 5(a) that are summarised in the Judgment at [435], [442] and [445].

(b) The Tribunal's decision

11. The Tribunal has considered the paragraphs of the Final Report set out at [7] and [8] above. The Tribunal is not bound by the parties' agreement as to which paragraphs of the Final Report should be quashed in order to give effect to the Judgment. Despite the parties' agreement it was not the Tribunal's intention to quash paragraphs 7.54 to 7.65 of the Final Report. The Tribunal quashes only those paragraphs of the Final Report which directly relate to its findings in the Judgment regarding the vertical effects on competition due to partial input foreclosure. In so far as they relate to partial input foreclosure through increasing the price for the Grid and/or the incentive to engage in partial input foreclosure through reducing the extent to which the Grid supports rivals' hardware, the following paragraphs are quashed: 7.15 to 7.17, 7.39(a), 7.40 to 7.53, 7.66 to 7.75, 7.177, 9.2(b), 10.7(b), 10.32(b), 10.223(a) and 10.369(b).

(2) Tobii's request to refer partial input foreclosure back to the CMA

(a) The parties' submissions

12. Tobii contended that the question of partial input foreclosure must be referred back to the CMA for further consideration, pursuant to s.120(5)(b) of the 2002 Act. Tobii submitted that, as the Tribunal found that the CMA's finding of an SLC as a result of partial input foreclosure did not have a sufficient evidential

basis, this was no mere failing in the expression of the CMA's reasoning (see *Barclays Bank plc v Competition Commission* [2009] CAT 27 at [116]).

13. Tobii accepted that the Tribunal has a discretion as to whether to refer the matter back to the CMA for further consideration and will not order such where it would "*be a pointless exercise*", "*serve no useful purpose*" or "*inevitably be otiose*" (see *Virgin Media, Inc. v The Competition Commission* [2008] CAT 32 ("*Virgin Media (Further Relief)*"). However, "*it would not normally be appropriate to decline to remit where there was a realistic prospect that the outcome would be materially different*" (see *Virgin Media (Further Relief)* at [34]). Tobii argued that referring back the question of input foreclosure alone is not devoid of purpose and would not impose an unreasonable delay in the final disposal of the CMA's merger investigation. Tobii contended that a referral back to the CMA is appropriate and necessary since the CMA's Remedy Decision is, to a significant extent, based upon its finding of an SLC as a result of partial input foreclosure. Therefore, only once the CMA has considered and finally reported on the questions to be referred back to it in relation to partial input foreclosure will it be able to determine whether requiring Tobii to divest Smartbox in its entirety remains a reasonable and proportionate remedy, or if some other remedy should be selected. Only at this point will the CMA be able to consider, as it is required to do by s.41(3) of the 2002 Act, whether there has been a material change of circumstances or other special circumstances that would require it to impose a different remedy. According to Tobii, it is not inconceivable that there could be material changes in circumstances since the Final Report was adopted on 15 August 2019. Unless the issue of partial input foreclosure is referred back to the CMA for further consideration, there can be no certainty that the outcome on such a referral in relation to remedies would be the same as that reached in the Final Report.

14. Tobii also submitted that this case is distinguishable from *R v Monopolies and Mergers Commission, ex parte Argyll Group Plc* [1986] 1 WLR 763 and *Virgin Media (Further Relief)*. In this case, it is not inevitable that the CMA would reach the same decision and there is a realistic possibility that, if the CMA were not to find an SLC as a result of partial input foreclosure, it may decide to impose a different remedy.

15. Tobii argued that the existing divestiture remedy requiring Tobii to divest Smartbox in its entirety plainly engages Tobii's Convention rights, in particular under Article 1 of the First Protocol to the ECHR, and any divestiture remedy must be proportionate. This is a matter that can only be properly and fairly considered following a referral back to the CMA. Further, as there is a realistic prospect of a different outcome as to the final remedy on referral back to the CMA, s.6 of the HRA 1998 requires that the question of partial input foreclosure should be referred back to the CMA for fresh consideration.

16. Tobii highlighted that on 19 December 2019, the CMA made an enforcement order pursuant to s.84 of the 2002 Act requiring Tobii to sell the Smartbox business. Tobii referred to the approach adopted in *ICE* by agreement of the parties, which is reflected in the Tribunal's order dated 24 March 2016, and submitted that, similarly in this case, the time period for implementation of the divestiture of Smartbox should be suspended until the CMA has determined the question referred back to it. Tobii also argued that it would be disproportionate and unreasonable for Tobii to be required to progress a process for the sale of Smartbox in circumstances in which a divestiture remedy might not ultimately be required.

17. The CMA submitted that the Tribunal can and should decline to refer back those parts of the Final Report which relate to partial input foreclosure because such relief would serve no useful purpose and there is no realistic prospect that the outcome would be materially different (see *Virgin Media (Further Relief)* at [34]). In the present case, the Tribunal dismissed Tobii's challenges to the CMA's SLC Decision based on both horizontal unilateral effects and on customer foreclosure in relation to eye gaze cameras. Tobii abandoned its challenge to the CMA's Remedy Decision. It is clear from the CMA's unchallenged reasoning in Chapter 10 of the Final Report that the only effective and proportionate remedy to address the horizontal unilateral effects alone would be the full divestiture of Smartbox. There is therefore no realistic prospect that an additional or different remedy would be imposed irrespective of any further findings on the issue of input foreclosure and a referral back to the CMA of the issue of partial input foreclosure would be "*a pointless exercise*".

18. The CMA confirmed that it did not need nor wish to rely on a finding of partial input foreclosure. The CMA argued that in the present case, its Remedy Decision adopted pursuant to s.41(2) of the 2002 Act is entirely consistent with its decisions under ss.35(3)(a) and (c), as set out at paragraphs 10.373 to 10.375 of the Final Report. The Remedy Decision continues to be the appropriate action for the purpose of remedying, mitigating or preventing the SLC and its resulting adverse effects even though the finding of partial input foreclosure has been quashed by the Tribunal.

19. The CMA drew attention to the time that it will take to conclude this matter in the event that the Tribunal is minded to refer the partial input foreclosure issue back to the CMA. The CMA would reconsider that issue and make decisions with an open mind and with full regard to due process. If any such reconsideration were to conclude that the full divestment of Smartbox should still go ahead, the CMA would have to adopt a new order to give effect to the remedy, allowing appropriate time for any such divestiture to take place. It is unlikely that the divestiture process would be completed until the end of 2020 at the very earliest.

20. The CMA highlighted that Tobii's acquisition of SATL and SSIL is a completed merger (completed in October 2018) that was not notified to the CMA and which has existed for well over a year where effects adverse to prices, quality, product range and/or innovation resulting from the SLC due to horizontal unilateral effects and customer foreclosure effects have been found by the CMA and upheld by the Tribunal. In these circumstances, the CMA submitted that it is desirable for all concerned that a final outcome be reached without further unnecessary delay or consumption of resources.

21. The CMA contended that this case is not like *ICE* where a referral back to the CMA was appropriate because it enabled the CMA to reconsider whether or not it would be appropriate to re-impose the termination requirement. The remedy in *ICE* might have turned out to be different. By contrast, there is no realistic prospect in this case that the Remedy Decision would be different.

(b) The Tribunal's decision

22. The Tribunal has a discretion whether to refer a matter back to the CMA and it would not normally refer a matter back where there is no realistic prospect that the outcome would be materially different (see *Virgin Media (Further Relief)* at [34]). For the reasons advanced by the CMA, which are set out at [17] to [18] and [21] above, the Tribunal considers that there is no realistic prospect that the Remedy Decision would be materially different, even if the CMA reached a different conclusion on the issue of partial input foreclosure following a reconsideration. The horizontal unilateral effects and customer foreclosure found by the CMA would in any event justify the CMA's decision to direct divestiture absent of a finding of partial input foreclosure. The Tribunal notes that Tobii withdrew its challenge to the Remedy Decision.

23. The horizontal competition concerns set out in the Final Report are in themselves serious and, on their own, amount to an SLC. The horizontal competition concerns are well founded and not surprising given that the merger involves two major players in the relevant market and would result in them having the overwhelming majority of the market with no competitors having anything more than a relatively small share of the market. Paragraph 10.32 of the Final Report sets out the reasons why a partial divestiture remedy would not address all of these concerns. These concerns are not affected by the Tribunal's finding in respect of partial input foreclosure under Issue 5(a).

24. Accordingly, the Tribunal refuses Tobii's request for the question of partial input foreclosure to be referred back to the CMA for reconsideration pursuant to s.120(5)(b) of the 2002 Act.

C. PERMISSION TO APPEAL

(1) Governing principles

25. Sections 120(6) and (8) of the 2002 Act provide for appeals on a point of law arising from a decision of the Tribunal in respect of merger review cases such

as this to the Court of Appeal. By virtue of ss.120(7) and (8), such an appeal requires the permission of the Tribunal or Court of Appeal.

26. In considering whether an appeal on a point of law arises, the Tribunal is mindful of the Tribunal's analysis in *Napp Pharmaceutical Holdings Limited v Director General of Fair Trading* [2002] CAT 5 ("*Napp*") at [26] to [35] on the distinction between points of law and points of fact, and the Court of Appeal's reference in *Napp Pharmaceutical Holdings Limited v Director General of Fair Trading* [2002] EWCA Civ 796 ("*Napp (CA)*") at [15] and [16] to "*isolat[ing] within the criticised decision what is an issue of law, and what is merely a determination, by a specialist Tribunal, of a matter of fact or judgement*" to identify "*what complaints are truly points of law, and what are attempts to reargue issues of fact or judgement*". In respect of the Tribunal's findings that were challenged in *Napp (CA)*, the Court of Appeal held at [34] that "*[t]hese findings do not and could not involve points of law, at least unless it were to be contended that the conclusions had been arrived at on the basis of no evidence at all*".

27. If a point of law arises, the Tribunal, sitting as a tribunal in England and Wales, decides whether to grant permission to appeal by applying the same test as the High Court applies. This test is set out in Rule 52.6(1) of the Civil Procedure Rules:

> "(1) … permission to appeal may be given only where—
>
> (a) the court considers that the appeal would have a real prospect of success; or
>
> (b) there is some other compelling reason for the appeal to be heard."

28. In considering whether an appeal in respect of merger review cases such as this has a real prospect of success, the Tribunal is mindful of the observations of Lord Sumption in *Société Coopérative de Production SeaFrance SA v The Competition and Markets Authority and another* [2015] UKSC 75 at [44]:

> "This court has recently emphasised the caution which is required before an appellate court can be justified in overturning the economic judgments of an expert tribunal such as the Authority and the CAT: *British Telecommunications Plc v Telefónica and others* [2014] UKSC 42; [2014] Bus LR 765; [2014] 4 All ER 907 at paras 46, 51. This is a particularly important consideration in

> merger cases, where even with expedited hearings successive appeals are a source of additional uncertainty and delay which is liable to unsettle markets and damage the prospects of the businesses involved. …"

(2) Grounds of appeal

29. Of the 22 issues raised by Tobii's substantive application to this Tribunal for a review of the CMA's SLC Decision, Tobii seeks the Tribunal's permission to appeal the Judgment on a single ground relating to Issue 4(d). On this, Tobii submitted that the appeal has a real prospect of success. Tobii has not expressly submitted that there is some other compelling reason for the appeal to be heard, although it submitted that the appeal is not a mere academic matter as the determination of it in Tobii's favour would result in the quashing of the CMA's decisions that the merger had resulted or would result in an SLC as a result of horizontal unilateral effects in the market for dedicated AAC solutions and that Tobii be required to divest Smartbox to a purchaser approved by the CMA.

30. Tobii submitted that the Tribunal made errors of law by concluding in the Judgment at [380] and [381] that the CMA's failure to exclude the Indi from the relevant market did not materially affect the CMA's analysis of the effects of the merger. Tobii contended that the Tribunal made the following three errors:

    (1) The Tribunal was in error by failing to consider whether the CMA should have considered whether devices other than the Indi should also have been excluded from the relevant market and the effect of the CMA's failure to do so on its finding of an SLC in the supply of dedicated AAC solutions.

    (2) The Tribunal was in error in finding that the CMA had properly assessed the impact on market shares of excluding the Indi from the market for the supply of dedicated AAC solutions.

    (3) The Tribunal was in error in finding that the CMA had assessed the effect on its diversion ratio analysis and its GUPPI analysis of excluding the Indi from the market for the supply of dedicated AAC solutions.

31. Tobii relied on *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14 at page 36 and *Pioneer Shipping Ltd v B.T.P. Tioxide Ltd* [1982] AC 724 at pages 752 to 753 to submit that the facts as set out in the Final Report and found by the Tribunal are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination that it was not irrational for the CMA not to conduct a product-by-product evaluation and that its failure to exclude the Indi from the relevant market had no material impact on the overall analysis of the effects of the merger.

32. Further, Tobii argued that it was not attempting to re-argue determinations by a specialist Tribunal of matters of fact or judgment as it relies entirely on findings made by the Tribunal in the Judgment and the CMA in its Final Report. The three alleged errors raise points of law because, according to Tobii, there is no evidence to support a relevant finding of fact and/or the Tribunal's appreciation of the facts and issues before it is one that no reasonable Tribunal could reach (see *Napp* at [35]).

(a) 'Error 1': failure to consider the exclusion of other devices from the relevant market and their corresponding effect on the CMA's analysis

33. Tobii submitted that, after finding in the Judgment at [334] to [337] that the Indi should not have been included within the market for dedicated AAC solutions, the Tribunal did not take account of the possibility that other products, whether supplied by the merging parties or other suppliers, such as PRC/Liberator and Jabbla/Techcess, should also have been excluded and the effect that this would have on the CMA's finding of an SLC.

34. In respect of the Tribunal's alleged failure to consider whether other products should also have been excluded from the relevant market, Tobii submitted that:

(1) The Tribunal unreasonably and irrationally failed to take any account of Tobii's argument (set out in the Judgment at [369], in Tobii's NoA, skeleton argument and oral submissions) regarding paragraph 6.61(k) of the Final Report that it was unreasonable that the CMA did not examine

whether other products also faced different conditions of competition. This included Tobii's submission that the sales of the EyeMobile Plus should also have been excluded and the CMA's failure to do so was unreasonable.

(2) The Tribunal failed to consider whether the CMA erred by not excluding, or considering whether it should have excluded, products such as (but not necessarily limited to) Smartbox's Grid Pad 8 and 10 from the relevant market.

(3) The Tribunal failed to take into account the CMA's apparent acceptance at paragraphs 6.56(c) and 6.74 of the Final Report of the possibility that it should have excluded products other than the Indi from its analysis.

35. In respect of the Tribunal's conclusion that the CMA's failure to exclude the Indi did not have a material effect on the overall analysis of the merger, Tobii submitted that the Tribunal ignored the CMA's findings at paragraphs 6.34(f), 6.61(k) and 6.73 of the Final Report that the Indi competed with and was substitutable for Smartbox's Grid Pad 8 and 10.

(b) 'Error 2': reliance on the CMA's flawed assessment of the impact on market shares

36. Tobii submitted that the Tribunal erred in law in relying on footnotes 211 and 259 of the Final Report to support its conclusion in the Judgment at [380] that: "*the CMA pointed out at footnotes 211 and 259 and paragraph 6.70 of the Final Report that removing the Indi from the relevant market as an ex-post adjustment did not materially change market shares or the substantive analysis*". Tobii contended that:

(1) In footnote 211 of the Final Report, the CMA appears to have simply excluded the Indi from the market in calculating revised market shares. Whilst its calculations may have been accurate as a matter of arithmetic, the CMA's analytical approach was flawed as it failed to consider

whether any other products (whether of the merging parties or of its competitors) should also have been excluded.

(2) In footnote 259 of the Final Report, the CMA merely cross-referred to "*footnote to paragraph 6.11*" (which is footnote 211) and paragraph 6.70 of the Final Report (which footnote 259 is a footnote to) stated that the CMA's assessment "*has considered the competitive constraints on dedicated AAC solutions and has not focused on any particular segment*" [Tobii's emphasis].

(c) 'Error 3': inconsistent finding regarding the CMA's assessment of the effects on diversion ratio and GUPPI analyses

37. Tobii submitted that the Tribunal's finding in the Judgment at [337] that "*[t]he CMA looked at the impact on market shares and diversion ratios if the Indi were instead excluded from the product market and found that the impact on market shares was immaterial and the impact on diversion ratios was to reinforce the closeness of competition between the merging parties*" did not refer to where in the Final Report it considered that the CMA had considered the impact on market shares and diversion ratios if the Indi device were excluded from the market for dedicated AAC solutions.

38. Further, Tobii contended that the Tribunal's finding in the Judgment at [337] was incorrect as a matter of law because this was inconsistent with the following facts, which showed that the CMA did not assess diversion ratios excluding the Indi and had no evidence on which to do so:

(1) Paragraph 5.28 of the Final Report stated that the CMA's views on diversion and closeness of competition were informed by both quantitative and qualitative responses to its diversion questions, which were not asked on a product-by-product basis.

(2) It was plain from paragraphs 5.22, 5.23, 6.45 to 6.48 and 6.56(c) of the Final Report and the evidence before the Tribunal, particularly the responses to the CMA's questions on diversion set out in its customer

questionnaire, that the CMA sought evidence from customers only at the level of suppliers and not at the level of individual products.

(3) The Tribunal itself found in the Judgment at [293] when addressing Issue 3 (e) that "*the CMA did not collect evidence from customers on the substitutability of different individual products*".

(4) The CMA's own admission was that it decided not to collect evidence from customers on substitutability product-by-product or specifically on the positioning of the Indi (see Judgment at [289]).

(5) It was clear from the customer questionnaire, which asked for diversion information on the basis of "*products*", "*dedicated AAC solutions*" and "*suppliers of AAC solutions*" (see Judgment at [77]) that the CMA had not collected any evidence on which it could reach the conclusion that if the Indi were excluded from the product market, the impact on diversion ratios was to reinforce the closeness of competition between the merging parties.

(6) The CMA did not look at the impact on diversion ratios of excluding the Indi from the relevant market and paragraph 6.56(c) and footnote 259 of the Final Report were mere assertions regarding diversion ratios excluding the Indi because the CMA denied at paragraph 6.56 of the Final Report that there was any basis for it measuring diversion of individual products as suppliers could not flex all parameters of competition.

(3) The Tribunal's decision

39. Tobii's application for permission to appeal contended that the Tribunal erred in law because the Tribunal's conclusions were arrived at on the basis of no evidence and/or the Tribunal's appreciation of the facts and issues before it is one that no reasonable Tribunal could reach (see *Napp* at [35]).

40. In our view, these contentions by Tobii are in fact attempts to re-argue issues of fact or judgment (see *Napp (CA)* at [16]). The Tribunal's conclusions were arrived at on the basis of evidence and with due appreciation of the facts and issues before it.

41. The question that fell for determination by the Tribunal under Issue 4(d), as agreed by Tobii and the CMA, was: "*Was the CMA irrational in not evaluating substitutability of the merging parties' products and the closeness of competition between them on a product-by-product basis?*" (see Judgment at [12]). This question arose under Ground 4 of Tobii's NoA, which sought a review of the CMA's finding of an SLC as a result of horizontal unilateral effects on the basis that it was not supported by relevant, reliable and sufficient evidence. Under a separate Ground 3 of Tobii's NoA, Tobii sought a review of the CMA's approach in defining the relevant market on eight bases, which included the questions:

(1) Issue 3(e): "*Did the CMA err by not obtaining evidence on the substitutability of different products but only of different suppliers?*"

(2) Issue 3(g): "*Did the CMA erroneously ignore extensive evidence of the use of consumer tables in AAC solutions?*"

(3) Issue 3(h): "*Did the CMA erroneously include within the relevant market products that were not within its created definition of a dedicated AAC solution?*"

42. It is clear that, in respect of the Tribunal's review of the CMA's finding of an SLC as a result of horizontal unilateral effects, the focus of Issue 4(d) was the merging parties' products. Therefore, in so far as 'Error 1' alleges that the Tribunal erred by not considering the products of other suppliers such as PRC/Liberator and Jabbla/Techcess, that is an attempt either to re-argue the Tribunal's findings in respect of market definition under Issues 3(e), (g) and (h) of Ground 3 or an attempt to re-argue Issue 4(d) in a modified form.

43. In so far as 'Error 1' alleges that the Tribunal erred by not considering the products of the merging parties other than the Indi, it is an attempt either to re-argue the Tribunal's findings in respect of market definition under Issues 3(e), (g) and (h) of Ground 3 or an attempt to re-argue Issue 4(d) with an added gloss. The focus of Issue 4(d) was on the CMA's assessment as to the substitutability and closeness of competition between the merging parties' products. Although there was a link to Issues 3(e) and (h), Issue 4(d) was not concerned with which of the merging parties' products fell within or outside of the relevant product market.

44. The EyeMobile Plus and Mini peripherals were referred to by Tobii at paragraph 162 of its NoA and at the substantive hearing in the context of setting out the types of products produced by Tobii Dynavox. Tobii's skeleton argument referred to the Indi and EyeMobile bracket under Issue 3(h) as products that the CMA included within the relevant market despite neither being sold with customer support. However, as the CMA's written observations on Tobii's application for permission to appeal highlighted, the EyeMobile Plus, unlike the Indi, was not at the forefront of Tobii's submissions on market definition at the hearing and none of Tobii's submissions under Issue 4(d) expressly referred to this product.

45. Tobii's submissions in respect of Issue 4(d) and paragraph 6.61(k) of the Final Report which referred to Smartbox's Grid Pad 8 and 10 did so in the context of Tobii's argument that the CMA erred when considering the merging parties' products by not undertaking a product-by-product analysis to determine whether, like the Indi, an SLC due to horizontal unilateral effects was unlikely (see Judgment at [369] and [370]). The focus in Tobii's NoA and submissions regarding Smartbox's Grid Pad 8 and 10 was to support its argument in respect of market definition (Ground 3) that the CMA failed to take into account competition from non-dedicated AAC solutions (see Judgment at [305]).

46. The CMA highlighted in its written observations that neither paragraphs 6.56(c) nor 6.74 of the Final Report say or imply that the evidence before the CMA indicated that there were various other products that could or should have been

excluded from the relevant product markets. In the Tribunal's view, this is an accurate reading of the two paragraphs in question.

47. Tobii's alleged 'Error 1' lacks any merit, particularly bearing in mind the fundamental factors driving and justifying the CMA's SLC conclusion, which are that:

(1) There are UK customers and end users that have a clear preference for dedicated AAC solutions (Final Report paragraph 5.18. See also the Tribunal's analysis under Issues 3(f) and (g) in the Judgment at [300] to [303] and [310] to [315] respectively);

(2) Tobii and Smartbox are on any assessment major suppliers of dedicated AAC solutions in the UK (Final Report Tables 6-1 and 6-2 and paragraph 6.61. See also the Tribunal's analysis under Issue 4(a) at [349] to [354]); and

(3) Post-merger competition for the sales of dedicated AAC solutions would come primarily from Liberator and Techcess, with the latter being significantly smaller and having a lesser competitor profile (Final Report paragraph 6.61).

The reduction in choice and competition arising from the merger for customers and end users who fall within the category identified at paragraph 5.18 of the Final Report is clear.

48. In respect of the alleged 'Error 2', the CMA noted in its written observations that Tobii's submission in respect of footnote 211 repeated the argument advanced in respect of 'Error 1' that the CMA failed to consider whether any other products should also have been excluded. The Tribunal refers to the question that was to be determined under Issue 4(d), which is set out at [41] above. The Tribunal's observations set out at [42] to [43] above in respect of 'Error 1' apply equally to Tobii's argument regarding footnote 211 under the alleged 'Error 2'.

49. Tobii's argument regarding footnote 259 and paragraph 6.70 of the Final Report under the alleged 'Error 2' is effectively an argument that the CMA failed to undertake a market share analysis on a product-by-product basis. It is an attempt to re-argue Issue 4(d) since the Tribunal held in the Judgment at [381] in respect of Issue 4(d) that it was not irrational for the CMA not to conduct a product-by-product evaluation.

50. As regards the alleged 'Error 3', we do not accept Tobii's submission that the Tribunal erred in law in respect of Issue 4(d) because the Judgment at [337] did not refer to where in the Final Report the Tribunal considered that the CMA had considered the impact on market shares and diversion ratios if the Indi device were excluded from the market for dedicated AAC solutions. The Tribunal's analysis at [337] corresponded to the question that fell to be determined under Issue 3(h) and was preceded in the Judgment by an outline of the parties' submissions on that Issue. In particular, the Judgment at [320] to [328] set out the CMA's submissions, which referred at [326] and [327] to the footnotes and paragraphs of the Final Report which the CMA relied on to support its submission that it considered what the position would be on market share and diversion ratios if the Indi had been taken out of the relevant market.

51. The various paragraphs of the Final Report and Judgment relied on by Tobii in respect of the alleged 'Error 3', which are set out at [38] above, are concerned with Tobii's contention in its substantive application that the CMA acted irrationally by not evaluating substitutability and closeness of competition specifically on a product-by-product basis. We consider it a mischaracterisation of the facts for Tobii to submit that the CMA's decision not to conduct its investigation in a particular way, namely to collect evidence from customers on substitutability product-by-product or specifically on the positioning of the Indi (see Judgment at [289]), shows that the CMA did not assess diversion ratios excluding the Indi and had no evidence on which to do so. Under Issues 2(c) and 4(b), Tobii sought a review of the way in which the CMA generated its diversion ratio estimates and the reliability of the estimates, which the Tribunal found was not irrational or unreasonable (see Judgment at [231] to [240] and [355]). Paragraph 6.56(c) and footnote 259 of the Final Report, which Tobii contended were mere assertions, show that the CMA considered the impact of

excluding the Indi on the estimated diversion ratios it generated from the data collected from NHS Hubs. The CMA concluded at paragraph 6.56(c) that, as the estimated diversion ratios included the Indi, they would underestimate the closeness of competition between the merging parties and at footnote 259 that the CMA's inclusion of the Indi in its diversion ratio estimates might imply that they overstate diversion to non-dedicated AAC solutions and understate diversion between the merging parties. In our view, this is a valid and reasonable assessment of diversion ratios excluding the Indi. This is so even if it does not evaluate substitutability and closeness of competition on a product-by-product basis or arrive at a specific recalculated, estimated diversion ratio figure.

52. In any event, the CMA's SLC conclusion did not rely on the precise accuracy of the diversion ratio estimates (see Judgment at [239], [252], [352], [353] and [355]). On the contrary, the CMA's conclusions were based on a broad range of other evidence from customers, competitors and internal documents that corroborated the results on closeness of competition between the merging parties that were derived from the diversion ratios (Final Report paragraphs 5.32 and 6.61. See also Judgment at [352] and [355]).

53. For the reasons set out above, none of the three errors identified in Tobii's single ground are points of law and, indeed, they lack any merit. The appeal has no real prospect of success nor is there a compelling reason for the appeal to be heard. Accordingly, the Tribunal refuses Tobii's application for permission to appeal.

D. COSTS

54. Tobii has claimed 80% of its costs in relation to its application for specific disclosure and provided a best estimate of £31,512.56 for the total costs of that application. This comprises solicitors' fees of £13,086.56 and Counsel's fees of £18,426.

55. The CMA has claimed £237,380.25 in costs. The CMA's total costs for these proceedings are £250,788.50, comprising £149,357.20 in total fees and

£101,451.30 in total disbursements[1]. The total fees include costs of £13,408.25 in respect of Tobii's application for specific disclosure, which costs the CMA does not claim.

(1) Governing principles

56. The Tribunal's power to award costs is governed by Rule 104 of the Competition Appeal Tribunal Rules 2015 (S.I. 2015 No. 1648) (the "2015 Tribunal Rules"). Rules 104(2), (4) and (5) provide, so far as material:

> "(2) The Tribunal may at its discretion, subject to rules 48 and 49, at any stage of the proceedings make any order it thinks fit in relation to the payment of costs in respect of the whole or part of the proceedings.
>
> …
>
> (4) In making an order under paragraph (2) and determining the amount of costs, the Tribunal may take account of—
>
> (a) the conduct of all parties in relation to the proceedings;
>
> (b) any schedule of incurred or estimated costs filed by the parties;
>
> (c) whether a party has succeeded on part of its case, even if that party has not been wholly successful;
>
> …
>
> (e) whether costs were proportionately and reasonably incurred; and
>
> (f) whether costs are proportionate and reasonable in amount.
>
> (5) The Tribunal may assess the sum to be paid under any order under paragraph (2) or may direct that it be—
>
> (a) assessed by the President, a chairman or the Registrar; or
>
> (b) dealt with by the detailed assessment of a costs officer of the Senior Courts of England and Wales or a taxing officer of the Court of Judicature of Northern Ireland or by the Auditor of the Court of Session, as appropriate."

57. In general terms, the Tribunal's starting point when determining the amount of costs to award in respect of proceedings pursuant to s.120 of the 2002 Act is that the successful party will normally be awarded at least a proportion of its costs: *Unichem Limited v The Office of Fair Trading* [2005] CAT 31 ("*Unichem*

[1] The disbursements comprise Counsel's fees.

(Costs)") at [17]. Where an applicant has succeeded on only limited grounds, in a finely balanced case, it would not be appropriate to make an award to cover all of its costs (*Unichem (Costs)* at [25]). The Tribunal also observed in *Unichem (Costs)* at [27] that:

> "While it is, necessarily, open to a company which chooses to make an application to the Tribunal to assemble a legal team and to present its case in the manner it sees fit, and to incur any costs which it considers appropriate in doing so, it does not necessarily follow that the respondent, (or indeed any other party) against whom an order for costs is made should necessarily be liable for the full extent of those costs. A successful applicant is entitled to no more than reasonable and proportionate costs."

58. The approach referred to in *Unichem (Costs)* at [17] was endorsed by the Tribunal in *Merger Action Group v Secretary of State for Business, Enterprise and Regulatory Reform* [2009] CAT 19 ("*Merger Action Group (Expenses)*"), which concerned an expenses[2] application in respect of proceedings pursuant to s.120 of the 2002 Act, at [21]. The Tribunal highlighted at [17] and [21] that the discretion afforded to it to determine an award of expenses is necessarily wide to retain flexibility in its approach and to enable it to reach a just result on the specific facts of the case. The Tribunal explained at [19] that:

> "It is axiomatic that all such starting points are just that – the point at which the court begins the process of taking account of the specific factors arising in the individual case before it – and there can be no presumption that a starting point will also be the finishing point. All relevant circumstances of each case will need to be considered if the case is to be dealt with justly. The Tribunal's decision in relation to costs/expenses can be affected by any one or more of an almost infinite variety of factors, whose weight may well vary depending upon the particular facts. Beyond recognising that success or failure overall or on particular issues, the parties' conduct in relation to the proceedings, the nature, purpose and subject-matter of the proceedings, and any offers of settlement are always likely to be candidates for consideration, the factors are too many and too varied to render it sensible to attempt to identify them exhaustively."

59. Although there is a wide discretion, in England and Wales costs in judicial review generally follow the event so that the loser will be ordered to pay the costs of the successful party where the matter goes to a full hearing (*Merger Action Group (Expenses)* at [27]).

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[2] "Expenses" rather than "costs" was the relevant term in *Merger Action Group (Expenses)* as the proceedings were treated as proceedings in Scotland.

60. In *British Sky Broadcasting Group Plc v The Competition Commission* [2009] CAT 20 ("*BSkyB (Costs)*"), the Tribunal considered that justice in respect of Virgin Media's application for review pursuant to s.120 of the 2002 Act was best served by making no order for costs (see [33]). Before coming to this conclusion, the Tribunal noted at [28] that Virgin Media's costs application on the plurality issue (a particular aspect of which Virgin Media was successful) was not weakened by virtue of the fact that the Tribunal's conclusion on that particular aspect of the plurality issue made no practical difference to the outcome of the case.

61. The Tribunal's wide and general discretion as regards costs was affirmed by the Court of Appeal in *Quarmby Construction Co Limited v Office of Fair Trading* [2012] EWCA Civ 1552 at [12].

62. The cases referred to above are costs/expenses awards determined in accordance with Rule 55 of the Competition Appeal Tribunal Rules 2003 (the "Old Rule 55"). The Old Rule 55 was replaced by Rule 104. In *Intercontinental Exchange, Inc. v Competition and Markets Authority* [2017] CAT 8 ("*ICE (Costs)*"), the Tribunal determined the parties' costs applications in respect of a s.120 application in accordance with Rule 104. The Tribunal held at [19] that Rule 104 is in materially the same terms as Old Rule 55 and the principles stated in decisions of the Tribunal under Old Rule 55 are of equal relevance to the application of Rule 104.

63. In *ICE*, ICE was successful in its challenge regarding the CMA's treatment of a particular new agreement. The Tribunal held in *ICE (Costs)* at [38] that ICE's challenge concerned two distinct decisions, with ICE being wholly unsuccessful against the main decision but successful in relation to a subsidiary aspect of the CMA's report. The Tribunal distinguished this from the partial success situation in *R (Essex County Council) v Secretary of State for Education* [2012] EWHC 1460 (Admin) where the applicant had been partially successful against the entirety of the Secretary of State's decision such that the decision was quashed and was to be retaken in so far as to give effect to the relevant equalities duties and noted at [39] that:

> "… To a large degree the award of costs is a case specific exercise involving the exercise of judicial discretion. Given that facts may vary, earlier decisions may have little relevance to the case in hand. …"

64. In the circumstances, the Tribunal decided that the starting point was that ICE should pay the CMA's costs, although ICE's success on the new agreement issue should be fairly reflected in a 40% reduction in the amount of costs awarded to the CMA (see *ICE (Costs)* at [40] and [41]).

65. Rules 104(4)(e) and (f) allow the Tribunal to take into account whether costs were proportionately and reasonably incurred and whether they are proportionate and reasonable in amount. The approach of using guideline hourly rates ("GHRs") to calculate the CMA's in-house legal costs and its compliance with the indemnity principle was challenged in *Ping Europe Limited v Competition and Markets Authority* [2019] CAT 6 ("*Ping (Costs)*") and *Flynn Pharma Limited v Competition and Markets Authority* [2019] CAT 9 ("*Flynn/Pfizer (Costs)*"). Both of these cases are Competition Act 1998 appeals for which the Tribunal determined costs awards in accordance with Rule 104.

66. In *Ping (Costs)*, the CMA applied 'London Grade 2' GHRs based on its geographic location. Ping contended that the GHRs claimed by the CMA greatly exceeded the true cost of employing the relevant individuals and that recovery of costs at those rates would be in breach of the indemnity principle which provides that a litigant may only recover the costs that have actually been incurred in the course of the litigation. At [30] and [31], the Tribunal referred to the propositions established by the Court of Appeal in *Re Eastwood (dec'd); Lloyds Bank Limited v Eastwood and others* [1975] Ch 112, and the Tribunal summarised at [42] that:

> "It was common ground between the parties that the Tribunal is bound by the principle established in *Re Eastwood* and applied, that is to say:
>
> (1) The approach to the assessment of costs is the same for independent lawyers as for in-house lawyers in that costs are to be calculated taking into account both the reasonable direct costs of doing the work and the cost of matters which cannot be calculated on an hourly basis.

(2) There is a presumption that costs calculated on this basis do not infringe the indemnity principle unless, in a special case, it is reasonably plain that the indemnity principle is infringed."

67. The Tribunal reasoned that:

"[44] The essential issue for the Tribunal in this case is whether the disparity between, on the one hand (i) the revised hourly rates set out in the CMA's revised schedule representing the salary and overhead costs attributable to each individual working on the case and, on the other hand (ii), the GHRs claimed in the CMA's original cost schedule, which take into account other 'imponderable' costs referred to in Mr Jones' evidence, makes it '*reasonably plain*' that the indemnity principle is being infringed.

…

[46] Consistently with *Re Eastwood*, the CMA has not embarked on a detailed investigation of its internal costs but relies on the presumption, supported by the evidence of Mr Jones, that its internal legal costs are approximately the same as those of an independent legal firm. Mr Jones, understandably, does not say that the CMA has actually incurred the costs claimed but it is far from clear how the cost of the types of activities described by Mr Jones, such as training and administration, fairly allocated, could be greater than the direct costs of the lawyers involved. The 'uplift' of 145% sought by the CMA is to be compared with the significantly lower uplifts applied in the reported cases to the 'A B' method of assessment when assessing internal legal costs (66% in *Re Eastwood*, 50% in *Leopold Lazarus* and 60% in *Cole*).

[47] These considerations give rise to a concern that ordering payment of the CMA's costs based on the GHRs would result in the CMA receiving more than the costs which it incurred in defending its appeal and therefore to an infringement of the indemnity principle.

[48] That concern is not in itself sufficient for the Tribunal to conclude that this is a 'special case' in which recovery of costs calculated in line with independent solicitors' rates would infringe the indemnity principle. In *Cole* the Court of Appeal held that a 'special case' would arise when a sum can be identified which is adequate to cover the actual costs incurred in doing all the work done. No such sum has been identified in this case: the Tribunal is not in a position to postulate an alternative uplift rate to apply to the CMA's revised cost schedule. Any such rate would be completely arbitrary.

[49] The policy justification for the *Re Eastwood* approach is that, whilst there may be uncertainty as to whether the indemnity principle is being infringed by an assessment of in-house legal costs on the conventional basis, attempting to produce a comprehensive analysis of all the costs attributable to the work of inhouse solicitors would entail an immensely complex investigation. The Court of Appeal in *Re Eastwood* took the view that embarking on such an investigation would be a greater evil than assessing costs on the conventional basis albeit with the attendant risk that the indemnity principle was being fortuitously infringed. It is for this reason that the Courts have consistently allowed in-house legal costs to be calculated at the same rate as external solicitors'."

68. In *Flynn/Pfizer (Costs)*, the Tribunal adopted the same approach set out in *Ping (Costs)* and reiterated that:

> "[73] … unless there is a clear indication that the use of a notional hourly rate for internal legal costs breaches the indemnity principle, the Tribunal is not going to probe further and require a detailed assessment of the actual direct and indirect costs involved."

(2) Liability for costs in respect of Tobii's application for specific disclosure

(a) The parties' submissions

69. Tobii submitted that it is entitled to receive 80% of its estimated costs of £31,512.56 for its application for specific disclosure. According to Tobii, its application for specific disclosure was a discrete interim matter and it is appropriate for the Tribunal to make a separate order in relation to those costs, which should be set off against any sum that the Tribunal may order Tobii to pay in respect of the CMA's costs of the substantive proceedings.

70. Tobii argued that it was required to make the application for specific disclosure because the CMA refused to give disclosure on a voluntary basis, save for the requests for information it sent to customers. Had the CMA consented to voluntarily disclosing the customer responses, the costs of Tobii's application and the use of the Tribunal's resources could have been avoided. Tobii considered the CMA's refusal unreasonable and highlighted that, in parallel judicial review proceedings under s.120 of the 2002 Act, the CMA made significant voluntary disclosure of documents (see *Ecolab Inc. v Competition and Markets Authority* [2020] CAT 4 ("*Ecolab (Disclosure)*") at [4]) and should have done the same in this case.

71. Further, Tobii contended that, although it did not succeed in the entirety of its specific disclosure application, the principal focus of that application was the customer requests for information and responses. As the Tribunal granted Tobii's application in respect of the Anonymised Customer Responses, Tobii was in substantial part successful in its application for specific disclosure.

72. Tobii claimed that its estimated costs of £31,512.56 were proportionately and reasonably incurred and were proportionate and reasonable in amount.

73. The CMA submitted that each party should bear its own costs in respect of Tobii's application for specific disclosure, and alternatively, in the event that Tribunal is minded to order any costs in Tobii's favour, the Tribunal should reduce the costs recoverable by Tobii by at least 66% to reflect its degree of success and to ensure proportionality.

74. The CMA disagreed with Tobii's submission that it was forced to make its specific disclosure application and submitted that the CMA's stance in relation to voluntary disclosure was reasonable (see Specific Disclosure Ruling at [41]). The CMA also submitted that Tobii's reference to the CMA's level of voluntary disclosure in *Ecolab (Disclosure)* was irrelevant since it is well established that the need for disclosure depends on the requirements of each case, taking into account the facts and circumstances (see Specific Disclosure Ruling at [13] and case law cited).

75. The CMA highlighted that, since 3 September 2019, Tobii's requests in correspondence to the CMA for disclosure were wide-ranging, unfocused and fluctuating. The CMA disagreed with Tobii's contention that the principal focus of its application for specific disclosure was the customer requests for information and responses. The CMA submitted that Tobii was predominantly unsuccessful in its application for specific disclosure because it sought three entirely distinct classes of documents, of which the Tribunal refused two (see Specific Disclosure Ruling at [54] and [59]) and partially granted one (see Specific Disclosure Ruling at [46] and [51]).

76. In the event that the Tribunal is minded to order any costs in Tobii's favour, the CMA submitted that the costs claimed by Tobii are substantial. While Tobii is free to spend whatever it wishes in making applications, it does not follow that the CMA should be required to bear the full burden of Tobii's legal costs out of public funds. The CMA highlighted that the classes of documents requested by Tobii and its accompanying submissions were very similar to those made in pre-action correspondence on disclosure. As a result, the CMA considered that

Tobii's costs for disclosure were disproportionately incurred and Tobii's proposal to offset its costs against the CMA's costs would result in an unfair and unreasonable reduction in the CMA's overall recoverable costs.

(b) The Tribunal's decision

77. Tobii was only partially successful in its application for specific disclosure. Indeed, to a large extent it failed for the reasons set out in the Specific Disclosure Ruling where the Tribunal refused to order two out of the three categories of documents sought and even in respect of the documents ordered to be disclosed the scope was narrower than requested and on a basis of redacting the names of the customers. The CMA acted reasonably in opposing the specific disclosure application.

78. The Specific Disclosure Ruling noted at [41] that the CMA had quite properly taken the stance that the issue of the outstanding requests for disclosure should be determined by the Tribunal and at [49] that whether the Anonymised Customer Responses will assist Tobii's case is a matter that will be determined by the Tribunal at the substantive hearing. Under Issue 1(a) in the Judgment, the Tribunal considered the CMA's requests for information to customers, the Anonymised Customer Responses and the CMA's Provisional Findings. The Tribunal held at [144] that the summaries of the Anonymised Customer Responses in the CMA's Provisional Findings were fair, neither inaccurate nor misleading, and informed Tobii of the gist of the case it had to meet and for it to make meaningful representations to the CMA. As such, the limited disclosure granted to Tobii did not make a significant contribution to the Tribunal's decision on Issue 1(a), nor did it impact on the case as whole.

79. In the circumstances, the Tribunal makes no order for costs in respect of Tobii's application for specific disclosure.

(3) Liability for costs in respect of Tobii's substantive application

(a) The parties' submissions

80. The CMA submitted that Tobii should pay its reasonable costs because it was largely, if not predominantly, the successful party and there was nothing in the manner of the CMA's conduct of its defence that justifies a reduction in whatever costs order the Tribunal would otherwise make. The CMA highlighted that Tobii was unsuccessful in all aspects but one in its wide-ranging substantive application (*Unichem (Costs)* at [17]) and some of Tobii's arguments were in substance more suited to an appeal on the merits than a judicial review challenge (*BSkyB (Costs)* at [16]).

81. The CMA also submitted that the Tribunal should take into account the nature and history of the proceedings and argued that Tobii's conduct of the proceedings on various occasions had increased costs. In particular:

(1) The CMA was largely successful at the CMC where it opposed Tobii's application to adduce expert evidence and argued that significant parts of Tobii's factual evidence should be excluded.

(2) After the CMA filed its defence, Tobii withdrew Ground 6 of its NoA.

(3) Tobii served a densely-argued skeleton argument of 101 pages, which was reduced following an order of the Tribunal.

(4) Although Tobii was partially successful under Issue 5(a), the extent of its success is limited because the Tribunal's decision regarding Issue 5(a) does not affect the lawfulness of the CMA's SLC and Remedy Decisions.

82. In particular, as regards Issue 5(a), the CMA submitted that Tobii did not obtain the full relief that it sought and the CMA's recoverable costs should not be reduced due to an error that was not capable of affecting the lawfulness of the decisions it was required to adopt under s.35 of the 2002 Act. However, if the

Tribunal were minded to reduce the CMA's costs to reflect the Tribunal's findings on partial input foreclosure, the CMA submitted that 5% would be a reasonable and proportionate reduction, given that Tobii succeeded in only one of the some 22 issues raised in its NoA and Tobii's success did not affect the lawfulness of the CMA's SLC and Remedy Decisions.

83. As regards the Tribunal's observations in the Judgment at [337] and [381] that "*it may well have been better and clearer had the CMA excluded the Indi from the relevant product market*", the CMA submitted that there should be no reduction in its recoverable costs because the Tribunal concluded that the CMA's assessment of horizontal unilateral effects was neither irrational nor unsound:

(1) The Tribunal noted at [337] that the CMA responsibly looked in the Final Report at the impact on market shares and diversion ratios if the Indi were excluded from the relevant product market and rationally concluded that the impact on market shares was immaterial and the impact on diversion ratios was to reinforce the closeness of competition between Tobii and Smartbox.

(2) The Tribunal found that the inclusion or exclusion of the Indi from the relevant product market had no material impact on the overall analysis of the effects of the merger (see Judgment at [381]).

84. In respect of its claimed costs, the CMA contended that it was necessary to instruct new Counsel to attend the substantive hearing because Counsel originally instructed by the CMA could not attend the dates for the substantive hearing which the Tribunal set. The CMA minimised any additional costs by having original Counsel finalise the CMA's defence before new Counsel took over conduct of the case, and the additional costs were limited to the time taken by new Counsel to read into the case.

85. The CMA submitted that the level of hourly rates it used for its Grade A and B solicitors were reasonable and commensurate with those used in private practice for the same level of post-qualification experience. In addition, as the CMA

moved in August 2019 from Holborn to Canary Wharf, the CMA reduced its hourly rates by using 'London Grade 3' rates instead of 'London Grade 2' rates. Furthermore, competition law and litigation are specialist fields and the work required by the CMA on litigation such as this is often complex and requires specialised knowledge. Therefore, the CMA contended that it is reasonable to expect hourly rates to be on the higher end of the scale.

86. According to the CMA, two advisory lawyers who were part of the team of lawyers that worked on the litigation focused on substantive input on legal issues, while the litigation lawyers focused on the conduct of the litigation, liaising with Counsel and co-ordinating the many inputs from different teams within the CMA. The CMA contended that, as the two advisory lawyers worked on the administrative process, they did not have to read in and were an efficient use of the CMA's resources.

87. The CMA contended that its total figure of costs of £149,357.20 for all in-house legal work including paralegal work were neither unusual nor substantially higher than similar types of challenges. For example, the CMA's total costs (including disbursements such as Counsel's time) in *ICE* was £213,000 (see *ICE (Costs)* at [31]). The CMA submitted that its costs were not at all unreasonable in the circumstances of this case, which involved:

    (1) A total of 22 issues;

    (2) A lengthy NoA containing a wide-ranging challenge to the SLC Decision;

    (3) Three witness statements, which still required consideration by the CMA although significant portions were held to be inadmissible; and

    (4) A skeleton argument of 101 pages, which was later reduced to 75 pages at the direction of the Tribunal.

88. The CMA submitted in response to Tobii's written submissions on costs that it is not "*reasonably plain that the indemnity principle is infringed*" in this case

(see *Ping (Costs)* at [42(2)] and *Flynn/Pfizer (Costs)* at [73]), in particular taking into account the nature of the proceedings and length of submissions in this case. Therefore, there is no basis to assume the costs claimed by the CMA breaches the indemnity principle.

89. Tobii accepted that the CMA was the overall winner and submitted that it would be just and proportionate for the CMA to be awarded 60% of its claimed costs (excluding the costs it incurred in responding to Tobii's application for specific disclosure). Tobii considered the CMA's criticisms of Tobii's conduct of the proceedings misplaced. Tobii argued that its "*root and branch challenge*" to the SLC Decision (see Judgment at [13]) was an inevitable consequence of the manner in which the CMA had conducted its administrative investigation, the wide-ranging SLC findings it made and the divestment remedy it imposed, which will have significant strategic, financial and commercial consequences for Tobii, thereby engaging its Convention rights. Tobii's grounds of challenge were properly directed at the applicable standard of review, the CMA did not apply for any part of Tobii's NoA to be struck out, and the Judgment did not find that any part of Tobii's substantive application was improperly brought, vexatious or frivolous.

90. Tobii submitted that it is not an automatic rule that costs follow the event and that the overall winner of proceedings should be entitled to its costs because that is merely a starting point and the Tribunal has a wide discretion in awarding costs under Rule 104 (*Merger Action Group (Expenses)* at [17] to [19]).

91. Tobii argued that where a party has not succeeded on all points, it is appropriate to consider costs on an issue-by-issue basis, in accordance with Rule 104(4)(c) (*ICE (Costs)* at [24] to [29] and [40] to [41]). Tobii submitted that the CMA was not successful in relation to partial input foreclosure under Issue 5(a) (see Judgment at [425] to [445]) and the Tribunal found under Issues 3(h) and 4(d) that the CMA was in error in not excluding the Indi from the relevant product market (see Judgment at [337]). These each justify a reduction of 10% respectively in the proportion of costs that the CMA is entitled to recover.

92. In addition, Tobii submitted that, under Rules 104(4)(e) and (f), the Tribunal may take into account whether the costs of the overall winner were proportionately and reasonably incurred. Tobii considered the CMA's costs not reasonable and proportionate because:

(1) There was unnecessary duplication in Counsel's fees following the CMA's change in Counsel after the CMC on 3 October 2019.

(2) The GHRs used by the CMA for Grade A and B fee earners were excessive. The CMA sought to recover the highest rate for each grade without explanation. Further, the CMA's notional actual costs are significantly lower than costs calculated using GHRs (see *Ping (Costs)* at [45]) and is *prima facie* inconsistent with the indemnity principle.

(3) The CMA sought to recover costs in respect of two in-house lawyers who did not appear to have conduct of the litigation.

(4) There was considerable duplication in the work undertaken by the CMA's internal legal department. The CMA engaged six professionally qualified internal lawyers and provided no explanation for what appeared to be significant over-staffing and duplication by senior lawyers, particularly as it also had the benefit of experienced Counsel.

(5) There was insufficient information for the Tribunal to determine that the costs sought by the CMA did not infringe the indemnity principle (*Ping (Costs)* at [42(1)], [42(2)] and [44]).

(b) The Tribunal's decision

93. In the Tribunal's view, the clear winner in respect of Tobii's substantive application is the CMA. Accordingly, the Tribunal's starting point is that the CMA is entitled to at least a substantial proportion of its costs: *Unichem (Costs)* at [17].

94. The Tribunal notes that Issue 5(a), for which Tobii's challenge succeeded, was only one of the 22 issues dealt with by the Tribunal. Nonetheless, Tobii's challenge as regards the CMA's findings on partial input foreclosure in the Final Report comprised one of three, albeit independent, bases upon which the CMA concluded that the completed acquisition resulted or may be expected to result in an SLC. Although, as the CMA highlighted, Tobii's success has not affected the lawfulness of the SLC and Remedy Decisions, the Tribunal's analysis and conclusions in the Judgment at [425] to [445] have resulted in the Tribunal quashing parts of the Final Report (see [11] above). Submissions were prepared and part of the substantive hearing dealt with Issue 5(a) on which Tobii was successful. In all the circumstances, the Tribunal considers in its discretion that there should be a modest reduction in the costs to be awarded to the CMA and to give some credit to Tobii for its success in respect of Issue 5(a). The Tribunal considers that a reduction of 10% in the Tribunal's award of costs to the CMA would be a fair reflection of the time spent by the parties and by the Tribunal in dealing with that issue.

95. The Tribunal found that the CMA's treatment of the Indi did not have a material impact on the overall analysis of the effects of the merger in this case (see Judgment at [381]), and this has not resulted in the quashing of any parts of the Final Report. It was one of a great number of issues raised by Tobii and the multiplicity of issues was a major factor in the amount spent by both parties on the substantive application. Accordingly, the Tribunal will not reduce its award of costs to the CMA in respect of the Indi issue.

96. The Tribunal, having considered the CMA's costs schedule and the nature and complexity of these proceedings, considers that the CMA's claimed costs are both reasonable and proportionate. It was no fault of the CMA's for instructing new Counsel to attend the hearing dates fixed by the Tribunal. Indeed, the Tribunal stated at the CMC that the substantive hearing should be heard expeditiously and the CMA could instruct other Counsel. The CMA took appropriate steps to limit the additional costs that arose as a result. The overall size and number of the CMA's team were reasonable and there is no good reason to exclude the time of the two advisory lawyers. In such a large and complex case heard within a compressed timetable, it is important for the CMA to draw

upon the knowledge and experience of a number of people, and no doubt individual members of the legal team would have been assigned specific roles. There is no reason to find in this case that there has been an unnecessary duplication of work.

97. For the reasons advanced by the CMA (set out at [85] to [87] above), the Tribunal considers the hourly rates used by the CMA and the team of fee earners on this case reasonable. The Tribunal also considers the overall costs claimed by the CMA for this case are both proportionate and within a reasonable range for the conduct of a case of importance, complexity and with a multiplicity of issues.

98. As regards the parties' submissions on the indemnity principle, the Tribunal adopts the approach in *Ping (Costs)* and *Flynn/Pfizer (Costs)* and, in light of the Tribunal's view at [97] above that the GHRs used by the CMA are reasonable, the Tribunal is not satisfied that this is a "*special case*" in which recovery of costs calculated in line with independent solicitors' rates would infringe the indemnity principle (see *Ping (Costs)* at [48]).

E. CONCLUSION

99. For the reasons set out in this ruling:

IT IS ORDERED THAT:

(1) Grounds 1 to 4 of Tobii's NoA are dismissed.

(2) Ground 5 of Tobii's NoA is dismissed, save that the Final Report is quashed to the extent that it finds that there is likely to be an SLC in the supply of dedicated AAC solutions in the UK as a result of the merged entity having the ability and incentive to foreclose its rivals by increasing the wholesale price of the Grid charged to rivals and/or as a result of the merged entity having the incentive to foreclose its rivals by reducing the extent to which the Grid supports rival dedicated AAC hardware. In so far as they relate to partial input foreclosure through

increasing the price for the Grid and/or the incentive to engage in partial input foreclosure through reducing the extent to which the Grid supports rivals' hardware, paragraphs 7.15 to 7.17, 7.39(a), 7.40 to 7.53, 7.66 to 7.75, 7.177, 9.2(b), 10.7(b), 10.32(b), 10.223(a) and 10.369(b) of the Final Report are quashed, pursuant to s.120(5)(a) of the 2002 Act.

(3) Tobii's request for the question of partial input foreclosure to be referred back to the CMA for reconsideration pursuant to s.120(5)(b) of the 2002 Act is refused.

(4) Tobii's application for permission to appeal is refused.

(5) No costs are awarded in respect of Tobii's application for specific disclosure dated 16 October 2019.

(6) Tobii is to pay the CMA the sum of £213,642.23 in respect of the CMA's costs, such payment to be made within 28 days of this ruling.

Hodge Malek Q.C. Paul Dollman Derek Ridyard
Chairman

Charles Dhanowa O.B.E., Q.C. (*Hon*) Date: 17 February 2020
Registrar