IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1638/4/12/24

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Thursday 23rd May 2024

Before:

Andrew Lenon KC

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Applicants

(1) Tereos SCA
(2) Tereos UK & Ireland Limited

And

Respondent

Competition and Markets Authority

A P P E A R AN C E S

Aidan Robertson KC (on behalf of Tereos UK & Ireland Limited)

Ben Lask KC & Julianne Kerr Morrison (On behalf of the Competition and Markets Authority)

.

Digital Transcription by Epiq Europe Ltd
Lower Ground, 46 Chancery Lane, London, WC2A 1JE
Tel No: 020 7404 1400
Email:
ukclient@epiqglobal.co.uk

Note: Excisions in this Transcript (marked "[✂]") relate to confidential information

Thursday, 23 May 2024

Proceedings

Housekeeping

MR ROBERTSON: I think before we go any further I will just, first of all, explain that I act for the applicants and Ben Lask, KC, and Julianne Kerr Morrison act for the respondent.

I think we best first check out that as this hearing is about confidential information, can we please check that no one is in this courtroom who is not also in the confidentiality ring.

THE CHAIRMAN: Well, I assume everybody has heard what you say and understood it.

MR ROBERTSON: Yes.

THE CHAIRMAN: So let's take it as there is nobody here who isn't in the confidentiality ring.

MR ROBERTSON: Housekeeping. The Tribunal should have a hearing bundle in two volumes and an authorities bundle in two volumes.

THE CHAIRMAN: I have one electronically.

MR ROBERTSON: Yes. Skeleton arguments, they are in the hearing bundle at the final three tabs: tabs 89 to 91.

THE CHAIRMAN: Thank you very much for those.

MR ROBERTSON: I have two relatively minor corrections to make to the chronology which were drawn to our attention by the CMA.

THE CHAIRMAN: Yes.

MR ROBERTSON: The chronology is at hearing bundle -- we are still old fashioned enough to use hard copy bundles -- it is volume 2, 90. The two corrections are, firstly,

on page 854 the entry halfway down, 3 April 2024, referring to the panel stage 2 inquiry panel being appointed on that date. That is when the appointment of the panel was announced, published. It is not actually the date they were appointed. They seem to have been appointed before then. Then the second point is on the next page, page 855, 25 April 2024. Issues statement adopted by the CMA. That is not quite right. That is when the confidential version of the issues statement was sent to the parties.

THE CHAIRMAN: Okay. Thank you.

MR ROBERTSON: Adopted before then.

As to timetable, Mr Lask and I have had a chat. We are going to divide the time equally between us. I would hope to be finished by 11.30 and Mr Lask will then go, he thinks, until 12.45 giving me a short period of time to reply.

THE CHAIRMAN: Thank you.

Submissions by MR ROBERTSON

MR ROBERTSON: So this is the hearing of Tereos' amended application under section 120 of the Enterprise Act, relating to the phase 1 procedural officer decision which is -- I am not going to ask you to turn it up -- but that is in tab A35 of the hearing bundle. The CMA say that looking at that decision, you have to have regard to the more general process leading up to that decision and they have explained that in their defence which is at tab 46, pages 530 to 545. They also refer to Ms O'Carroll's first witness statement only witness statement in fact, which is at tab 48, pages 548 to 588. We have focused on the procedural officer decision because that was the final and determinative stage of the confidentiality process. I am going to follow the order, uncontroversially, of our application and skeleton so I'm going to address my oral submissions in four parts: factual background, ground 1 error of law, ground 2

irrationality, very briefly [audio interference].

Under background, we have explained in the papers, we [audio interference] concerned about the exiting firm counterfactual issue. I want to deal, first of all, with the CMA's, we say somewhat dismissive submission, that Tereos is worried about nothing because the cat is already out of the bag. As we noted in our skeleton at paragraph 12, that is not a point actually taken in the procedural officer decision but is now taken in the CMA's defence. We don't accept that the cat is out of the bag. It would be rather surprising if that were the case, given the time and expense we have incurred in making this application and appearing before the Tribunal this morning. We would be wasting your time and our time and money. Why on earth would we be doing that?

This merger has involved a careful and delicately handled process right from the outset with the CMA. It started almost ten months ago. In our chronology, we point out that we made our (inaudible) process of notification by submitting a briefing paper to the CMA's Mergers Intelligence Committee on 27 July 2023. Our concerns about the publication of our confidential business strategy were communicated to the CMA once it had been clear what the CMA was proposing by way of publication at the conclusion of the phase 1 process. So that is when the issue suddenly arose and it did arise quite suddenly. That is all explained by Mr Diarmuid Ryan in his witness statement at paragraphs 6 and 7, which is tab 4, pages 31 to 32.

As he explained, what the CMA was proposing to do raised two fundamental concerns about Tereos revealing its business strategy. The key issue is that Tereos has taken the decision to close the business that is being sold to Tate & Lyle, to TLS, that is the Tereos UK and Ireland TUKI business to consumer business.

We are not concerned here with the separate business to business business, that is selling industrial sugar to commercial clients. This is essentially the Whitworths sugar

business. Previously [audio interference] a brand acquired by Tereos in 2015 and it is no longer making commercial sense for Tereos to run it, so they have taken the decision to sell it to Tate & Lyle and if that is blocked, then it is to be closed down and the assets sold off.

That is a decision that we say has been taken. The CMA don't accept at this stage that is irrevocable, but for us that is our business strategy: to close it down if we can't sell it. The concerns we have are that, firstly, the business if that information leaks out, customers for Whitworths sugar are not going to place orders for a supply of sugar for the forthcoming years. Sugar contracts are entered into on an annual basis, there is an annual round of bidding which takes place from May to September, which coincidentally just happens to be basically the period of the phase 2 inquiry that this transaction is now going through.

So the concern is that if customers are aware of that, the business may just be abruptly closed down in September. They are not going to place orders for it now. That stops TUKI proceeding as a going concern. So that is the concern vis-a-vis customers and perhaps even more importantly, this is something that the purchaser, Tate & Lyle, don't know and we have been very careful, right from the outset, to keep that closely held confidential information because Tate & Lyle have the right to terminate this transaction upon payment of a break fee. £[✂] break fee. They may just take the view, well, if it is going to be blocked or there is a risk of it being blocked, well, we pay £[✂] and we take that capacity out of the market. It no longer is competitive capacity.

A loss of capacity is one of the concerns the CMA has about this transaction, but that will happen if Tate & Lyle incur the cost of the break fee and decide, well, we will just walk away from this.

In either of those circumstances, phase 2 comes to an abrupt end because there is no

longer a transaction in play. Phase 2, I should say, is due to be completed the statutory deadline is 5 September this year.

So we have, as the CMA say, well, you wrote to customers seeking to reassure them -- that is paragraph 35 of their skeleton -- and essentially in terms that this transaction will ensure the continuing viability of the business. But it is quite another matter then to tell customers that if the transaction does not proceed, the business is going to be closed down and they will be left without a supplier.

The CMA have referred to a confidential communication from one customer, [✂], expressing concerns about viability. That communication that does not refer to [✂] being aware that we have taken the decision at board level to close this business if the transaction isn't cleared. Now, we are --

THE CHAIRMAN: Why should that be of great concern to Tate & Lyle?

MR ROBERTSON: For Tate & Lyle, our concern is that Tate & Lyle instead of proceeding with the transaction and thus disposing it, the agreed consideration, will just think: well, hang on, we can remove Whitworths as a competitor by paying the break fee of £[✂], which is a lot less than the consideration for the transaction. We remove them, we remove that capacity from the market, we remove that as a source of competition. That is one of the things the CMA are concerned about. So that is why it has gone to phase 2.

But Tate & Lyle can achieve that just simply by paying the break fee, removing the capacity from the market, the £[✂], and that is it. So that is why we are concerned about Tate & Lyle knowing this.

I think it is also worth, just since we are talking about very well-known brand names, just by way of overall background we aren't a sugar refiner in the UK, so this is about what we do is we import sugar from France and sell it under the Whitworths brand.

There are only two refiners on any scale in the UK and that is Tate & Lyle, who are a raw cane sugar refiner, and British Sugar who, like us, use beet sugar. So the market has been duopolistic since the late 1970s.

We are protected for the time being by the interim injunction that the President ordered on 22 April as varied a couple of days later. Simply the relief that we are seeking is to have that protection continue to the conclusion of phase 2. So at the end of phase 2, if a transaction is cleared, it can proceed. If it is blocked, we close the business down. So we only need this protection while phase 2 continues to its conclusion.

What I propose to do is now --

THE CHAIRMAN: Why wouldn't it have the same damaging consequences if the information came out after phase 2?

MR ROBERTSON: If it comes out after phase 2, and we are cleared, the business is sold to Tate & Lyle and it continues to be operated by Tate & Lyle. So our business decision to close it down no longer has any effect: we have sold the business. If it is blocked at the end of phase 2, we are selling the business. That is the decision taken. So we are no longer concerned about continuity of supply to customers to keep it as a going concern --

THE CHAIRMAN: But couldn't Tate & Lyle change its mind after phase 2?

MR ROBERTSON: When they have acquired the business?

THE CHAIRMAN: They will have already acquired it.

MR ROBERTSON: Yes.

THE CHAIRMAN: Yes.

MR ROBERTSON: No, this is on the point that the transaction then closes and Tate & Lyle have acquired the business as a going concern.

THE CHAIRMAN: Okay.

MR ROBERTSON: So I think the thing to do now is to look at what are the contentious

redactions that we are concerned about.

THE CHAIRMAN: Yes.

MR ROBERTSON: I took the President at the interim injunction hearing to a version of the phase 1 decision with those redactions highlighted. Since then, the CMA has very helpfully provided a further version of the phase 1 decision and that is the one I am going to go to. It is not the one I have referred to in my skeleton. This is the one that is now in the bundle. It is to be found at 87, at page 790. Tab 87, page 790. On the first page, you will see that right at the top there are three sets of redactions highlighted with green highlighting. It shows the redactions the CMA have accepted our representations on.

The yellow highlighting is what they refer to as denied redactions, we have referred to them in our pleadings as requested redactions. But these are the ones in dispute. So it is the yellow ones in dispute. You can ignore the red ones on this version because they are third party confidential information and they are redacted from this version as well. So you can see the red edged around the actual redaction but we don't see the redaction itself.

So our case, as I have already said, is that the CMA have not applied the correct legal criteria or to our request for redaction for the yellow highlighting, it is irrational not to redact the yellow highlighting. The key point which we say that the CMA has missed is that the yellow highlighted text will inform the reader what case on the specific business strategy, or TUKI B2C(?) has been advanced by my client to the CMA. Now, I make this point, I really want to stress this point, because the CMA seem in their submissions to be focusing on the fact that they haven't accepted the exiting firm counterfactual at the end of phase 1. They say there needs to be further investigating by the stage 2 inquiry panel at phase 2. You have already seen the composition of the panel on the chronology that I took you to right at the outset, when doing

corrections.

Now, we say that the CMA can investigate the exiting firm counterfactual without disclosing to the world at general our specific business strategy to close the business absent clearance. The CMA argue at paragraph 26 of their skeleton that Tereos fails to explain how this could be done with a blanket redaction in place and that a blanket redaction of any reference to the exiting firm counterfactual issue is wholly unrealistic. I wish to make it clear, that is not what we are seeking. We are not seeking blanket redactions. You will see that when I go through the specific redactions that we are seeking. At an earlier stage of engaging with the CMA, it is correct to say that we were seeking a blanket redaction, alternatively specific redactions.

THE CHAIRMAN: But do you accept that the CMA can raise the counterfactual with third parties?

MR ROBERTSON: Yes. It just must not do so by disclosing our specific business strategy to close, if we can't sell. That is the key point.

So I just want to be absolutely clear. We are not seeking blanket redactions. I made that clear at the interim injunction application. We are just talking about the yellow highlighted redactions on the text that we are about to go through.

There is nothing to stop the CMA seeking views on the possible counterfactual in accordance with -- well, if we turn to it, on pages 793 to 794. So this is the summary of the phase 1 decision. 793, what did the evidence tell the CMA about what would have happened had the merger not taken place? That is the counterfactual. There you see paragraphs 13, 14 and 15 summarising that the business has faced profitability challenges and we have considered various options. That they have come to the conclusion at this stage that they think the counterfactual to the merger taking place is that actually the business would continue.

That is something that at phase 2 the inquiry panel will go into and reach a final

conclusion on that. At this stage, what the CMA is doing is to say we can't conclude that the business would exit the market at the end of phase 1. That is a high bar and that is not something we can conclude and clear the merger at the end of phase 1. That is something that needs to be gone into in depth by the stage 2 inquiry panel.

There you see their concerns. At paragraph 15 on the next page, 794, what the evidence tells about the effects on competition of the merger. You can see what their concerns are in the particular, as I have already indicated, 15(a), that would lead to a duopoly. It would remove an important competitive constraint.

So that is a pretty detailed account of where the CMA have got to at the end of phase 1. There is nothing, we don't object to any of that, there is nothing to stop the CMA going to anyone present in this market, customers, rival suppliers, and saying "this is what we think, please tell us your views".

Now, putting it in court terms, this is almost examination-in-chief. This is where we have got to, do you agree or disagree? What have we missed? So all of that can be consulted on and that will be investigated and is being investigated by the stage 2 panel. We don't object to that.

So I should also just point out that when you turn to page 795, assessment, you will see there the introduction: parties merger, merger rationale, paragraph 4 --

THE CHAIRMAN: Which page is this?

MR ROBERTSON: Sorry. 795.

THE CHAIRMAN: Yes.

MR ROBERTSON: So the structure at the phase 1. It has a summary and then it goes into a more detailed assessment. It is the detailed assessment where the issues arise. But you see that it starts off section 1, parties, merger and merger rationale. That continues and concludes at paragraph 4 on the next page, 796:

"Tereos submitted there is no strategic rationale for the merger. It was to exit the UK

B2C market."

They want to get out of sugar. The CMA has considered these points as part of the counterfactual assessment [audio interference] the issue is well out there, would be well understood by anyone reading this decision. We are talking about supermarket purchasers, food service purchasers, people who buy for the consumer market.

You will also be looking at potential rival suppliers. I think there will be an issue -- I should say, I am not acting in the phase 2 inquiry, I am only acting on this application -- but there will be an issue, I would have thought, as to whether other suppliers in Europe may decide to enter the UK market. For example, the two leading brands in the Republic of Ireland are supplied by, I think, a German based company called Nordzucker. So there may be an issue about them and there are obviously other suppliers on mainland Europe.

So that is, you know, all out there for discussion. That is all out there for a consultation, for information requests from the stage 2 panel.

I will just touch on one point to mention it very briefly at this stage. That is we have also challenged the issues statement. The issues statement, an issues statement, is shortly to become history as a result of a change in CMA's procedure. It used to be issued when you went into stage 2 and some of the issues. Now phase 1 decisions carry a lot more detail and the CMA has decided, well, what is the point of having a separate issues statement. But there is one in this case. It is at tab 88. It begins on page 833 and you will see that it is a very stripped down version.

The only point to which we object is in paragraph 16 on page 836. You can see it highlighted in yellow. There are some other points which are highlighted in green where our objections have been accepted but that is the only one that is in issue. It is just to say that does not raise any different issues from the ones we are now going to look at, looking in the phase 1 decision.

So getting to the heart of what is our concern. The first passage to turn to -- well, the first one we object to is in the list of contents on page 790. The real heart of it begins on page 798 and you can see there that paragraph 15, they accepted that it is appropriate to redact the passage at paragraph 15. At paragraph 16, they have got to -- they propose to reveal that this is a test that they are applying in response to what we have submitted. In particular, they refer at paragraph 17 to a merging firm (inaudible) strategic rather than financial reasons, absent the merger.

Paragraph 18:

"It is inevitable that absent the merger the target would exit the market ...(Reading to the words)... and there would not have been an alternative less anti-competitive approach to the target."

So what they are doing is they are responding to our arguments that we have submitted to them and saying this is our response. In doing that, that's disclosing that we are submitting that the target is going to exit in any event. Which inevitably means it is exiting because if we can't sell it, we are going to close it down.

You then see Tereos' submissions on page 799. They have redacted what we have submitted insofar as it refers to the specific business strategy. But what they are proposing not to redact starts at page 800 and that is their assessment, that we require compelling evidence that exit was inevitable. So that shows the reader that we were submitting exit is inevitable and in the case of strategic exit, we need to be satisfied this exit would have happened for strategic reasons unrelated to the merger. Well, that is what we submit is our business strategy: that irrespective of the merger, we are going to get out of this market.

THE CHAIRMAN: It is a fine line though because you don't have any objection to paragraph 15.

MR ROBERTSON: Paragraph 15. The green we have objected to --

THE CHAIRMAN: You have objected to the green?

MR ROBERTSON: Sorry. To make it clear: the green are redactions that we have requested and the CMA have accepted. Those are business secrets.

THE CHAIRMAN: Yes. I have got you. Yes. Sorry.

MR ROBERTSON: So what I am saying is if you accepted the green, what we have said to you, but you don't go on to disclose your assessment that necessarily is your assessment of what we have submitted to you and you could infer from their assessment what we have submitted to them. You get that, if I go back to page 799, you will see there that under the heading Tereos' submissions, there is quite a lot that they have accepted should be redacted. Concluding at paragraph 27 our submission that the likelihood of Tereos closing its B2C operations in a merger, absent the merger, was evidenced by Tereos' current practice of closing industrial assets if they cannot be sold. So you have a part of your business that just isn't operating profitably enough, you can't sell it off, you close it down. That is a strategy that Tereos, following a change of ownership about four or five years ago, has been following and applies to this business as well.

Then the CMA then set out their assessment at paragraph 28 and they say we need to be satisfied at this stage and we need to be satisfied to the standard of compelling evidence that exit was inevitable and in the case of a strategic exit, need to be satisfied that this exit would have happened for strategic reasons unrelated to a merger.

Exit is one of a number of plausible options, even if it were the most likely option, it would not meet the phase 1 standard for an inevitable exit. That is their conclusion at phase 1. But telling everyone that, they are telling them that is what we have submitted. They are saying we are rejecting their argument at this stage, because it does not meet this high phase 1 standard.

But it is obvious from reading that, that is what Tereos have been saying. Anyone

looking at that with an interest -- our competitors, our customers -- will work out exactly that is what Tereos has been arguing. In the passages that have been redacted, the green redacted passages. So essentially, we are saying it is just illogical to make the green redactions but not to make the yellow redactions as well.

We pick this up again at paragraph 30. As you can see, the passages to which we object, they are very limited indeed but they are ones which lures the reader into thinking that is what Tereos must be arguing: that exit is inevitable. That is in paragraph 30.

The next one is at -- so there are more green redactions on page 802 and then on page 803, paragraph 32, this is where they dispute what we say has been decided by the Tereos board and the CMA take a rather sceptical approach to that, so obviously that does need to be gone into in phase 2. But the problematic words are towards the bottom of paragraph 32, where they are proposing, it says:

"In particular, lack of evidence of any further discussion, decision or the various options or targets discussed at the November 2022 board meeting leave the CMA with no basis to conclude that a decision to exit had been taken."

So what they are saying is we are rejecting your submission the decision to exit has been taken. Turn that around the other way, Tereos submitted to them that a decision to exit had been taken.

The same point applies to paragraph 34, the wording in yellow there. There is also a reference at paragraph -- sorry. At footnote 61, bottom of page 804, where the CMA refers to its own guidance. But when you look at that, what they quote from their own guidance, a natural inference from that is that evidence has been submitted [audio interference] of the merger about exit. So that is why we object to that.

The final yellow highlighted redactions, request for redactions --

THE CHAIRMAN: Sorry to interrupt.

MR ROBERTSON: Yes.

THE CHAIRMAN: This is an example of what is not specified information. Is that --

MR ROBERTSON: That's right. That is what the CMA say: it is not specified information. But we say that is an unduly, sort of, technical or legalistic approach to it. It takes colour from its surroundings. So in this context, it is disclosed what Tereos must have been submitting to the CMA and, therefore, it is within the definition of specified information. So that in a nub is our response to that particular point.

Sir, the final redactions in issue, they are on page 805. Conclusion on limb one, this is limb one of the two limb test that the CMA is applying. Again, they are saying the threshold for accepting an exiting firm argument at phase 1 is high. Must believe there is compelling evidence. One commercially rationale assertion could be to decide to exit the UK B2C market but it is -- we are applying a test at phase 1 there being inevitable and supported by compelling evidence. So what they are saying is we are rejecting Tereos' evidence as meeting that high threshold.

But that discloses that we have put in that evidence. That is the case that we have been running at phase 1. They just simply rejected it.

The same point goes for the other highlighted passages in paragraphs 37 and 39.

So that is what we are concerned about. The CMA essentially takes the line: well, those are our reasons for making our phase 1 decision and that we should disclose those reasons. To which our response is, well, if you are going to accept the green redactions, which you have, if you don't make the other redactions you are effectively rendering the green redactions worthless anyway. That is just simply illogical.

It is not about disclosing the CMA's reasons for making its decision. It is disclosing our case that it is inevitable we are going to close this business if we can't sell it.

Two other points, before I get on to the grounds, to make. Firstly, what is the decision under challenge and, secondly, what is the standard of the review. I deal with both of

those very shortly. We focused on the procedural officer decision because that was presented to us as the final decision on whether to make redactions. You see the procedural officer accepted certain of our requests for redactions and rejected others. So that is the culmination of the decision making process. We said in our application that this does not seem to be addressing minds to the test under sections 238 and 244. It recites them but we don't see any reasoning relating to it.

The CMA's response to that is: well, you need to see that in the context of the run up to the procedural officer's decision, what the case team had said to my client. We still focus on the procedural officer decision, because that is the last word and the CMA accept they would have been bound by that decision, either way. There is no suggestion that they take a different view to the procedural officer decision. So that is why we do focus on that decision. My learned friend will take you to the run up and say, well, that shows colour. But it still doesn't, in our submission, actually show the correct legal test being applied and it does not answer the fundamental underlying illogicality or irrationality of the ultimate decision.

As regards standards of review. This one always comes up with the CMA and people in the past, myself included, have argued for more intensive standards of review. That has been comprehensively rejected by the Court of Appeal in the BSkyB case, a dozen years ago.

Now, this is just an ordinary judicial review. We don't dispute the CMA is the primary decision maker and at the end of the day, the legal tests to be applied are objective concepts to be interpreted and applied by the CMA, so whose judgment the Tribunal will naturally afford a margin of appreciation in exercising its supervisory jurisdiction in the normal way, on the judicial review application.

So I don't think anything turns on this. There is nothing particularly special about this. Our submission is this was just one of those cases that comes along every now and

then which does justify the Tribunal exercising its supervisory jurisdiction. That was the case in BMI Healthcare case, which my learned friends cited in their defence and I refer to in the skeleton, where the Competition Commission, the forerunner of the CMA, did take an approach that was through disclosure and information, there was a refusal to disclose information to one of the parties under investigation in a private healthcare market study and they refused to give them adequate opportunity to respond to data in a data room.

The primary point of the CAT's judgment in that case was, well, that is just an unfair procedure. We (inaudible) but also actually if it was not unfairness, it was irrational. That is an obiter comment but you can do things which are irrational.

So it happened in the BMI case and, in our submission, it has happened here. My learned friend has also cited the BAA and Eurotunnel cases on standard of review. They were both judicial reviews of final Competition Commission reports. This one, of course, is not a final report. It sometimes feels like it is being treated as if it were. It is not. It is a phase 1 decision deciding that this transaction cannot be cleared at this stage and, therefore, must go through for an in depth investigation under stage 2 [audio interference].

So in that sense, it is more akin to the BMI Healthcare case in that it is an interim decision. This isn't the Tribunal being confronted with the final outcome after the full stage 2 inquiry.

So in our submission, the CMA, like any other body in public law -- I was going to say like any court -- is not immune, occasionally, to getting things wrong. I don't think anything turns on standard of review in this case.

Round one: the issue of interpretation of the Act. We say that they have wrongly applied the concept of specified information. We have just touched on that and I don't think I have anything to say to what is in our written pleadings.

The second point is we say they have wrongly interpreted and applied the test of necessity of publication in section 244 of the Act. They justify publishing their conclusions by a reference to their obligation to publish reasons under section 107(4) of the Act, they did not refer in their original decision to subsection 5 where there is a basis for not publishing if it is not reasonably practicable to do so.

Now, dealing with what I have said in my written pleadings is uncontroversial and it was paragraphs 20 to 21 of our application. I think this is still essentially the case. Our specific business strategy is specified information subject to the point about reference to CMA guidance and you have my submission on that. It is, therefore, the CMA is subject to section 244. It is not in dispute. We have got a legitimate interest in the nondisclosure of our information within the meaning of section 244(3)(a) and, therefore, the CMA is required to have regard to that.

What is in issue is whether the disclosure meets the requirement in section 244(4) that it is necessary for the purpose for which the CMA is permitted to make disclosure.

So they submit, in the defence, paragraph 20, the balance of considerations favours disclosure.

They say that it is necessary to comply with their obligation to publish their reasons. It is difficult to see, in our submission, why it is necessary to publish its reasons generally. That is not going to stop the inquiry panel carrying out its job of investigation because the inquiry panel can appropriately redact for confidentiality and in fact does so. So the general reasons for the CMA not clearing at phase 1, I have shown you those in the decision. So it is clear that the world at large can be asked: what do you think is going to happen if this merger isn't cleared? There is no problem with that issue being gone into.

So is it necessary to have the CMA's detailed conclusions rejecting our case on our business strategy published? That is just simply not necessary to enable this inquiry

to go ahead with its phase 2 task.

The CMA make reference to the Amazon Deliveroo case where a view on an exiting firm changed between phase 1 and phase 2 and because third parties made submissions that were inconsistent with the case being run by the parties in that case at phase 1. They say, look, that can happen. The CMA may change its point. Yes, of course it may. But there is nothing that would stop that sort of evidence being submitted by third parties in this case either. It is just that third parties don't need to know an internal business decision has been taken that exit is a final business decision and will happen if this transaction does not go ahead. That is not relevant to third parties' views of what might otherwise happen.

That is a business decision that the CMA have tested at phase 1 with us and at the minute they are not convinced by the evidence and they said the high threshold at phase 1. The phase 2, the threshold is balance of probabilities. It is not quite the same very high threshold at phase 2, it is just a straightforward balance of probabilities. We will be making our case to the phase 2 inquiry panel. That does not require third party comment.

Third parties can be consulted without disclosing the requested redactions. CMA has very extensive powers to carry out information gathering. They have described in the mergers guidance a document which is in the authorities volume 2 at tab 14 in sections 10 to 11 of that document. I don't think we need to turn it up. The specific passage on phase 2 information gathering is at paragraphs 11.9 to 11.45, pages 1231 to 1241 of tab 14 of the authorities bundle. That is, you know, it has all the powers you would expect a competition authority to have.

THE CHAIRMAN: Sorry. Can I just be clear: what do you say the third parties can be told? I mean, I understand you are saying they can't be told that this is a business strategy but can they be told about the possibility of exiting?

MR ROBERTSON: Yes.

THE CHAIRMAN: They can be told about that. It is just about that it is a strategy, that --

MR ROBERTSON: Yes. The Tereos board have taken the decision. That is the problematic confidential information. The possibility of exiting, yes, that is out there. It is in the opening paragraphs 13 to 15 of the phase 1 summary. But that is what you would look at. It is a fairly sort of routine inquiry in this sort of merger where you are looking at, you know, what will happen absent the merger. Will the firms exit without the merger?

So that is out there. You know, we have told our customers that if this measure goes ahead, that will ensure the ongoing viability. So people are being told that. You can ask them: what are your views on the viability of Whitworths as an independent brand. No problem asking anyone that. We are not trying to tie the hands of the phase 2 inquiry panel. We are not engaging in this morning's process for some strategic gaining reason. We are just concerned that if this decision then becomes known about, then our customers will cease placing orders, will cease to be a going concern, Tate & Lyle may well invoke their right to walk away and that's it. The business has to be closed and sold off and there is no phase 2 process. There is just no transaction.

The point about taking an approach to investigating without disclosing business strategy, that is specifically addressed in the CMA's guidance on the disclosure of information in merger and market inquiries. I mean, that probably is just quickly worth turning up. That is in authorities bundle 2 at tab 9, page 616. The document, you look at it and think: hang on, Competition Commission, I thought that was history ten years ago. It was, it merged into the CMA. But this guidance was adopted by the CMA and continues to be in force and we have cited the chapter and verse in our skeleton on that.

So this is guidance from the chairman of the Competition Commission to disclosure of information in merger enquiries. The specific passage to be referred to is at paragraph 6.14 on page 625. This is how the information that is received in the course of their investigation, how it is dealt with. It is just saying you in the group, the stage 2 group, you will be getting in a lot of evidence. You summarise it, you prepare summaries of the key points and groups should have regard to the need to exclude confidential information.

So generally, a summary should be disclosed through publication. However, there may be occasions where it is not appropriate to disclose the summaries due to the sensitivity of the information or the identity of the person providing evidence or both.

Well, that applies here:

"The information may for example refer to a party's future business strategy. In such circumstances, groups will need to consider whether the alternative means of disclosure to key points raised is appropriate."

So it can be dealt with in a much more specifically targeted way. It does not require publication to the world at large.

So I have already made the point that the CMA in its skeleton is raising the straw man that we are seeking blanket reductions [audio interference]. You have seen the redactions that we are seeking and they are carefully, very carefully, crafted.

The second point is the duty of publication under section 107(4) I just note that in our skeleton we pointed out that phase 1 decisions being published, that is a particular feature of the UK system. There is no counterparting [sic] under the European system where only [audio interference] are actually published. So it does not -- this isn't some sort of unusual constraint that we are seeking in this case. But the key point in interpretation of our legislation is section 107(5) which gives in the same way the power to delay publication of reasons if it is not reasonably practicable to do so. So

such reasons, you need not, if it is not reasonable and practicable to do so, be published at the same time as the result of the action concerned or, as the case may be, as the decision concerned.

Here we say this is a classic example of it not being reasonably practicable to do so because there is a problem with disclosure of confidential information. So there is nothing that we are arguing for that stops the phase 1 decision being published at the end of the stage 2 process. At that point, the issue has gone. So this is an example of reasonable practicability. The CMA's response to that is somehow this provision should be (inaudible) as being somehow an emergency power or that there is a presumption of immediate publication. In our submission, there is no reason to read in a limited interpretation into what is meant by "if it is not reasonably practicable to do so". Those are broad words and they are applicable, we say, in this particular case.

Irrationality, my second ground. We will just be taking you through the green then yellow redactions. I hope I have made my point there, that it is irrational to accept the green redactions and then not to make the yellow redactions as well. It is irrational because those are the risk that we have raised is that either through customers refusing to deal with us or Tate & Lyle exercising their exit rights, their break clause, namely to the early termination of the transaction, phase 2 just does not proceed because there is no business being sold.

To run those risks, rendering the phase 2 inquiry redundant, frustrates the CMA's purpose for deciding to refer the transaction for a full inquiry by the phase 2 panel. That is just illogical. It also runs the risk of taking this capacity out of the market. If the business is closed and the assets just sold off, then there has been a reduction of overall capacity in supply in the UK consumer sugar market. That is the concern that the CMA has about the transaction, is its impact on the consumer sugar market in the UK. If we are right on the risks, that would be inevitable. It is totally contrary to the

point of the CMA referring this for a phase 2 inquiry.

The CMA essentially say, well, it is rational to tell third parties. It is rational to tell third parties and the terms are not in dispute. Of course. But there are unusual circumstances specific to this transaction which call for the CMA to take those specific circumstances into account in the facts of this case.

To be fair to Ms O'Carroll in her witness statement, she does accept at paragraph 96 that the CMA's consideration for parties' confidentiality representations are highly fact specific and the proper approach will depend on the specific considerations relevant to the case at hand. Yes. We agree. This case does not raise broad issues of principle going way beyond the parameters of this case. This is very case specific. But unfortunately, in our submission, this is a case where those considerations have not been properly taken into account and we submit, respectfully, that the result is illogical and irrational.

So that is what I wanted to say on the second ground. On relief, I think I have already said that essentially we are only seeking the continuation of the current injunction to the conclusion of the phase 2 inquiry, which has a statutory deadline of 5 September. At that point, we either proceed with the transaction in the event of clearance and TUKI B2C is sold to Tate & Lyle and it has been given clearance by the stage 2 inquiry panel. It does not lead to a substantial lessening of competition in the UK. That's fine and we are making our case on that to the stage 2 inquiry panel. But if it is blocked, at that point we are closing it down and selling it.

In either case, the injunction no longer serves any purpose and that will naturally come to an end. So the relief we are seeking is essentially the continuation of the existing injunction for a further less than three and a half months.

Sir, unless I can assist you further, those are Tereos' submissions.

THE CHAIRMAN: Thank you very much. Yes.

Submissions by MR LASK

MR LASK: Good morning, Sir. In March, Tereos submitted to the CMA what were by its own admission extensive confidentiality claims in respect of the exiting firm counterfactual. It sought the redaction of any explicit reference to that counterfactual and its case before the Tribunal is that that remains the only lawful outcome in the circumstances of this case. Now, the CMA's task was to weigh Tereos' concerns against the need to disclose the contested information, so as to discharge its duty to give reasons and facilitate an effective investigation. That is an assessment that the CMA was and is very well placed to make based on its extensive experience in merger enquiries and it is one that has been specifically entrusted to the CMA by Parliament. It is common ground that the CMA's assessment must be afforded a margin of appreciation and, indeed, the authorities establish that its approach in this context is entitled to great weight.

Now, the CMA agreed to extensive redactions on a precautionary basis in an effort to mitigate Tereos' concerns. But it identified an irreducible minimum that in its view needs to be disclosed. It is that irreducible minimum that is the target of Tereos' challenge. It has been referred to by my learned friend as the requested redactions. You will see in the version of the phase 1 decision that is in the bundle, it is called the denied redactions. We refer to it in our written case as the remaining redactions. These all mean the same thing.

Now, the CMA judged that publication of the remaining redactions was not likely to cause Tereos significant harm and that the risk of any harm was, in any event, outweighed by the need to ensure that third parties could understand the basis for the phase 1 conclusion on the counterfactual ahead of the phase 2 investigation. For reasons I will elaborate on, that assessment was well within the CMA's margin of

appreciation and did not contain any legal error. It was moreover entirely consistent with the CMA's published guidance which makes clear that the CMA will strive to ensure that the gist of its reasoning is published and will not normally accept blanket claims for confidentiality.

Now, the CMA's assessment is reflected not only in the procedural officer decision and the subsequent, what has been termed, the publication decision by Ms Elie Yoo. Those are the direct targets of Tereos' challenge. But it is also reflected in two earlier decisions where the case team engaged with Tereos' confidentiality requests and indicated what it was prepared to redact and explained its reasoning. Whilst Tereos does not direct its challenge at those earlier decisions, our position is that in deciding whether the challenge to the procedural officer decision and the later decision is well founded, it is critical to place those decisions in their proper context. That means having regard to the earlier decisions and the reasons contained in them, which were clearly communicated to Tereos.

As far as the structure of my submissions is concerned, I propose to address firstly the alleged risk of harm to Tereos. Secondly, the need for disclosure and, thirdly -- insofar as I haven't already covered them -- the remaining legal arguments advanced by Tereos.

So dealing firstly with the alleged risk of harm. I propose firstly to outline the CMA's case on harm and then take you to one or two of the key documents to make that case good. The starting point is to be clear about what the remaining redactions show. They essentially show three things. They show that an exiting firm counter factual was assessed at phase 1, they outline the CMA's published framework for assessing an exiting firm counterfactual and they show that the CMA rejected the exiting firm counterfactual at phase 1.

The question for the CMA was whether in its view, publishing these matters might

cause significant harm to Tereos' legitimate business interests. I emphasise that it is only significant harm that engages section 244 and even then the information need only be excluded from disclosure so far as practicable. So the statute recognises that even where significant harm might arise, the CMA may legitimately conclude that this risk is outweighed by the need to disclose.

In any event, the CMA concluded that disclosure was not likely to cause significant harm. Accordingly, it decided that the remaining redactions could and should be published. Far from containing any legal error, which is of course what the applicant must establish in order to succeed, the CMA's conclusion on harm is unimpeachable.

We say there are three key points.

First, the fact that an exiting firm counterfactual was considered by the CMA at phase 1 is most unlikely to come as a surprise to Tereos' customers. This is emphatically not a case where the target company has been careful to avoid any disclosure of its financial challenges for fear of harming the business. On the contrary, Tereos has been quite candid with its customers as regards its profitability and what might happen if the merger does not proceed. In particular -- I will come on to this document in a moment -- but in particular Tereos wrote to their customers to notify them of the acquisition by Tate & Lyle and dropped some strong hints that absent the acquisition, the UK business may close. This was in November 2023, several months before the phase 1 decision was even taken.

The CMA gave weight to this when assessing the risk of harm and it was entitled to do so. The notion that a customer reading the phase 1 decision with the remaining redactions visible, the notion that such a customer would be shell-shocked to see that the exiting firm counterfactual had been canvassed before the CMA has, in my submission, a real air of unreality about it.

Now, we don't know if Tereos' correspondence was copied to Tate & Lyle but it does,

in my submission, seem unlikely that Tereos would conceal from Tate & Lyle things that it had openly told its customers. In any event, Tate & Lyle will of course have conducted its own due diligence prior to the deal so must already be aware of Tereos' financial position. Certainly Tereos does not suggest otherwise. So that is the first key point.

The second key point. It is inconceivable, in my submission, that a reader of the phase 1 decision could reasonably conclude from the remaining redactions that Tereos had taken a decision to exit the market absent the merger or that such exit was otherwise inevitable. The CMA reached precisely the opposite conclusion on the evidence as the passages covered by the remaining redactions make clear.

Just to pick up on a submission my learned friend made and I will show you this in the decision. The CMA did not conclude that a decision to exit had been taken albeit it was not an irrevocable decision. The CMA concluded that there was no evidence on which it could safely conclude that any decision to exit had been taken.

Now, Tereos' only response to this is to assert that the mere knowledge that it had argued for an exiting firm counterfactual would trigger a significant reaction by customers or perhaps Tate & Lyle. That argument does not stand up to scrutiny. Firstly, the fact that Tereos argued for the exiting firm counterfactual is most unlikely to come as any surprise in light of the correspondence I have just referred to. Secondly, in my submission, it is wholly unrealistic to suppose that these businesses would see that an exiting firm argument had been canvassed before the CMA and take major commercial decisions off the back of that without any regard to the CMA's actual findings on the evidence.

Tereos' customers include large and sophisticated businesses. We are talking about household names such as [✂]. Frankly, Tereos' case imbues them with a naivety and

skittishness that seems most uncommercial and is entirely unevidenced. If customers can be expected to read the phase 1 decision with sufficient care to infer the nature of Tereos' arguments, then they can be expected to read and take account of the CMA's conclusions.

It is worth keeping in mind that a successful exiting firm argument would be decisive. It would mean the merger was cleared so it is a potential clincher for Tereos. In my submission, a reasonable reader will understand that merely because Tereos argued for an exiting firm counterfactual, that does not mean that it is bound to happen.

In any event, Tereos' argument is at heart simply a disagreement with the CMA's assessment of risk. The CMA did not miss the point that the remaining redactions would disclose the fact that Tereos had raised this argument. It expressly acknowledged this, but judged that it would not significantly harm Tereos' business interests. The fact that Tereos disagrees with that assessment does not reveal any legal error in the CMA's approach.

The third key point is that there is a quite striking lack of cogent evidence to support Tereos' arguments. In circumstances where those arguments rely on predictions as to how Tereos' business counterparts would react to disclosure, one might have expected to see some evidence from the business itself. For example, on the annual tender process, the importance of regular guaranteed supply, or the availability of contractual mechanisms for ensuring such supply in the event of exit. For example, what happens to existing contracts if a supplier does decide to exit during the course of the contract.

Or perhaps evidence on Tereos' discussions with customers on any concerns or questions raised regarding the merger or the possible consequences of an adverse decision by the CMA. We know that Tereos had calls, meetings and email correspondence with its customers following its letters in November 2023, but no such

evidence was placed before the CMA.

Nor is there any evidence to substantiate the assertion that Tate & Lyle might pull out of the deal if it discovered that Tereos had argued for an exiting firm counterfactual. Tate & Lyle is acquiring Tereos' UK packing and distribution site and its business-to-consumer activities. There is no evidence to suggest it would not still want those assets if it knew that an exiting firm counterfactual had been raised. Indeed, there is no factual evidence at all before the Tribunal on what Tate & Lyle knows about Tereos' financial position.

My learned friend submitted that given the existence of the break clause in the contractual arrangements, Tate & Lyle might decide to take capacity out of the market and front up the three-quarters of a million pounds for that cost. But there is no evidence that taking capacity out of the market was its rationale for the transaction in the first place.

All that was provided to the CMA and all that has been adduced before the Tribunal is unsubstantiated assertions by Tereos' lawyers. Now, they are no doubt made on instruction but such assertions cannot carry the same weight as contemporaneous evidence or direct evidence from the business or even more detailed evidence from the lawyers on the sorts of issues I have mentioned. The CMA is not in the business of accepting unsubstantiated assertions. It has to decide these matters on the evidence.

It is worth bearing in mind here that Tereos is not simply saying that disclosure might cause customers to raise questions or seek reassurance or that Tate & Lyle might raise questions or seek reassurance. That is no doubt because those sorts of reactions would not constitute significant harm as required by section 244.

Instead, Tereos is saying that disclosure would cause so many customers to withdraw their business that it would spell the immediate end of the UK business as a going

concern, or that Tate & Lyle would pull out of the deal all together. But the basis on which Tereos advances those predictions of catastrophe is paper thin. In all the circumstances, it is not a surprise, in my submission, that the CMA rejected Tereos' arguments as regards the alleged risk of harm. It didn't commit any legal error in doing so.

With that, I will turn, if I may, to Tereos' correspondence with customers which I have already referred to. It is at tab 54, or starts at tab 54 of the bundle, volume 2 of the hard copy. Page 691 in the electronic bundle. This is a covering email from Tereos' lawyers to the CMA explaining that after the announcement of the deal --

THE CHAIRMAN: Sorry. I have not got the right page. Which page is it?

MR LASK: It is 691. It is a covering email to the CMA, dated 29 January. I am conscious that at an earlier stage I was provided with an updated version of the electronic hearing bundle and I hope that same version has been provided to the Tribunal.

Sorry, sir, do you have that?

THE CHAIRMAN: No. I am just looking at the index. Is it in the index?

MR LASK: Yes. It is tab 54, I think the tab numbers -- I am hoping the tab numbers remain the same. Let me just check. (Pause).

So in the index it should be in section B and it is SOC1, 06, 29 January 2024.

THE CHAIRMAN: Yes. I have that now. Yes.

MR LASK: Is that not page 691 in --

THE CHAIRMAN: No, it is 689.

MR LASK: I see. So we are about two numbers out: I will try and remember that.

So this is the covering email to the CMA explaining that Tereos has contacted its customers and suppliers both verbally and by email to inform them of the transaction, as well as the rationale. Then it says there were also telephone calls but there are no

minutes of these calls.

Then if one turns two pages on to what should be your page 691.

THE CHAIRMAN: Yes.

MR LASK: One will see a Tereos headed letter. This is an example of the letter that went to Tereos' customers. You will see, the first paragraph announces the agreement to sell. The second paragraph:

"Tereos is selling its B2C business and the Normanton site to TLS [that is Tate & Lyle] because its profitability has been challenged in recent years. In particular, compared to other options open to Tereos for its sugar."

So that is the first hint you get that there is something wrong or at least something that might suggest an exit of the market, absent the deal.

The second paragraph:

"As such, we believe that this deal will, once it completes, deliver important benefits to our customers not just from the continuing operation of the site, but also combining the two like-minded businesses with their complimentary products..."

Et cetera. So it identifies a key benefit of the deal as being the continuing operation of the Normanton site. In my submission, the clear logical implication of that is that absent the deal, the continuing operation of that site may be at risk.

The next paragraph:

"The proposed sale is subject to CMA approval which is a common condition to transactions of this type. Both TUKI and TLS are confident that the CMA will approve this transaction as we believe that the acquisition will ensure the continuing viability of the B2C business and will enable the integrated businesses to serve the UK market and customer base better and more efficiently."

So there you have Tereos expressing confidence that the CMA will approve the deal because it will ensure the continuing viability of the business. Again, in my submission,

the clear logical implication is that if the deal is blocked, the continuing viability of the B2C business may be at risk.

I am going to come on to show you, that is not only how the CMA interpreted the letter but it is how at least one of Tereos' customers appear to have interpreted it.

Indeed, since the continuing viability is offered here as a reason for believing the CMA would approve the deal, it would not come as any surprise to a reader to learn that Tereos had made the same argument to the CMA.

Then, at the end of the page:

"As a valued customer, I want to reassure you."

Over the page, this should be your page 692:

"As part of this transaction, CMA may speak to customers or partners to seek their opinions. We would encourage you to engage with the CMA to provide the CMA with your views."

If we go forward through page 695, 697 in the hard bundle, we see a spreadsheet. Do you have that, sir?

THE CHAIRMAN: Yes.

MR LASK: Yes. That is a list of the customers contacted by Tereos and there are 30 listed there. They contain the sorts of household names that I referred to. But one also sees in the final three columns how these customers were contacted because there were not only letters but there were follow up phone calls and meetings. But no evidence has been provided about what was discussed or whether any questions or concerns were raised.

Next, if we could go forward, please, to page 699. You ought to have a confidential email. I think it is fine for me to read passages out from this, because everyone in the room is in the ring. But if you start actually on page 700, you will see what triggers this email from [✂]. At the top of page 700 is an email from the CMA to [✂]:

"Dear [✂], thank you for your assistance. We have one short follow up question, having read through [✂] questionnaire response. Can you please clarify and expand on what you meant in question 16 where they said there is uncertainty on the future viability of Tereos if the acquisition is not approved."

So [✂] has raised that concern in this questionnaire response to the CMA and the CMA is asking it just to clarify what it means by that. Then if we go forward in the email thread, we see [✂] response. Do you have that? "Dear Robbie"?

THE CHAIRMAN: Hang on. I am just reading the first one.

MR LASK: I am sorry.

THE CHAIRMAN: "[✂]"

Yes. Okay.

MR LASK: And the CMA ask what do you mean by that. Over the page, you have [✂] response:

"Dear Robbie, here is the clarification. [✂] has received an indication from a confidential source which we are not at liberty to disclose that the viability of the Tereos UK site may be at risk if the proposed acquisition by T&L Sugars does not proceed. [✂]"

Et cetera, et cetera. And then the final sentence:

"[✂]"

That, in my submission, is very clear evidence that [✂] at least has interpreted the letter from Tereos in the same way that the CMA has, given the language used. It accords entirely with the CMA's interpretation. Taken together, this correspondence shows, in my submission, that the fact that an exiting firm counterfactual was canvassed before the CMA is most unlikely to come as any surprise.

Now, Tereos makes two points in response, neither of which have any merit, in my submission. Firstly it says - and my learned friend made this point this morning - says that the cat out of the bag point was not advanced previously by the CMA. But that is incorrect. The fact that Tereos had disclosed this position to customers was expressly relied on by the CMA and communicated to Tereos in its decision of 2 April. That is one of the decisions that precedes the procedural officer decision.

If I could just show you that briefly. In my bundle, it is at tab 28, page 271 so I am guessing it is 269 in yours.

What you should have is a document in landscape, headed "Project Tchaikovsky".

THE CHAIRMAN: Yes.

MR LASK: This is actually a composite document that shows firstly the CMA's decision of 2 April responding to Tereos' confidentiality representations. Then Tereos' response to that decision and then the CMA's further response on 9 April, responding again to Tereos.

It is actually worth looking at this with some care, because it provides a response to a number of points made by my learned friend. If I could pick it up on this first page, the CMA's overall comment on confidentiality of the exiting firm counterfactual. At the second paragraph:

"We consider that in order for the gist behind the reasoning of this phase 1 decision to be understood, it is necessary to include not just the conclusion of our counterfactual analysis but also the analysis of how we reached that conclusion, namely the fact that we considered an exiting firm argument raised by a merging party and that we did not consider the threshold to be met."

I emphasise the word necessary, because my learned friend submitted that the CMA had not applied the right statutory test and it had instead applied a lower threshold of reasonableness. But this shows the CMA is fully aware of the statutory test and is

reflecting it in its reasoning.

The next paragraph:

"The original redaction request was so broad the CMA risked breaching its obligation to provide adequate reasons. The redaction request was so extensive that a reader would have been unable to determine the nature of the analysis undertaken by the CMA. The CMA has, however, gone through each of the requests made by Tereos and considered what aspects could be redacted to protect the interests of Tereos."

That was the point I made at the outset. The CMA is taking a precautionary approach, doing what it can to mitigate Tereos' concerns, whilst balancing that against its statutory duty and the need to ensure an effective investigation.

And then towards the bottom of this page, the CMA responds to Tereos' arguments on harm and it says:

"In relation to these arguments, the CMA's overall position is that."

And there are three points:

"First, as noted above, we consider the fact the CMA considered and rejected an exiting firm counterfactual to be an important part of the gist. We reject all requests to redact references to the CMA's framework or analysis. We do not consider these explanations to contain any commercially sensitive information."

Then the second bullet point is important. This is over the page:

"We do not accept that disclosing the fact Tereos made an exiting firm argument will significantly harm its legitimate business interests. We note that the CMA's overall conclusion was that Tereos would continue to compete in the UK B2C markets. We also note that Tereos itself has made public to customers its view that the B2C business profitability has been challenged in recent years and the acquisition will ensure the continuing viability of the B2C business."

So it is quoting there from the Tereos letter. It is making the cat out of the bag point

in terms. So it is quite wrong to say that that point was not made by the CMA previously.

Also, my learned friend submitted that the CMA had missed the point and had not appreciated that by disclosing the remaining redactions, it would allow a reader to infer that Tereos had advanced the exiting firm argument. But that is wrong, as this shows, because the CMA is expressly addressing that point in this second bullet point. “We do not accept that disclosing the fact Tereos made an exiting firm argument will significantly harm its legitimate business interests”. So it appreciates that that is what is going to happen with the contested information being disclosed. But it rejects the argument that that is going to cause significant harm.

Then if we could just carry on, please, to page 272 in your bundle, 274 in the hard copy bundle. This follows a large chunk of text which is Tereos' response to the CMA and this is CMA's further response, with the heading in bold: CMA's assessment of the further representations. This is now provided on 9 April, so it was a composite document.

“The principal argument being submitted by Tereos can be assessed as being that the disclosure of the strategic exit argument and associated evidence put forward by Tereos would be prejudicial to its commercial interests. This argument is based on the perceived consequences of TLS and third parties becoming aware that Tereos had planned to leave the market.”

"This presupposition ignores the fact that the CMA concluded that it did not accept that a strategic exit argument had been substantiated. Rather, the CMA concluded that the evidence indicated that this was one of several options the company considered."

So it fully understands Tereos' concerns and it is explaining why it does not agree with them. In the next paragraph, the CMA notes inconsistencies in Tereos' position, which I am going to come back to when I show you the remaining redactions themselves.

Then after those bullet points, the CMA comes back to its reasons for considering disclosure to be necessary:

"The CMA is duty bound to provide reasons for its decisions. A reader must be able to approach a decision and assess the criteria which has been applied by the CMA, making its decision. In furtherance of this legal obligation, the CMA maintains that it must detail that the test for a strategic exit was applied."

The final paragraph is also important, because this shows the CMA's rationale for distinguishing between those redactions it was prepared to accept and those redactions it was not prepared to accept. It says:

"The CMA has approached its latest assessment of the redaction requests in terms of ensuring a reader is able to determine what form of assessment was undertaken but with specific details as to the stages and exact nature of some of those plans from Tereos' perspective redacted."

That is the CMA doing its best to meet Tereos' concerns, whilst maintaining the irreducible minimum that it says needs to be disclosed. It is quite wrong, in my submission, for Tereos to say: well, the CMA's position is irrational, illogical, because having accepted that the green redactions should be redacted, it can't then maintain that the yellow redactions should be maintained. It is quite wrong because it ignores the rationale for the distinction that the CMA explained there and it also ignores the point that we make in our skeleton argument -- I am just going to read it out to you, if I may -- it is paragraph 32 of our skeleton. Where we say:

"It is no answer to say that having accepted certain redactions, the CMA must be taken to have accepted the risk of harm contended for by Tereos. As already explained, the CMA was prepared to redact explicit references to the fact and details of Tereos' argument because it did not consider the disclosure of such information to be necessary. In essence, the CMA went as far as it reasonably could in an effort to

address Tereos' concerns without obliterating each and every reference to the fact that an exiting firm counterfactual had been assessed. It would be quite wrong if this reasonable and pragmatic approach were then turned against the CMA to mandate a blanket redaction and risk hampering phase 2 investigation."

That is precisely what my learned friend sought to do this morning and it does not get him anywhere, because it does not reveal any irrationality in the CMA's approach.

So with that slight diversion, I was dealing with two points -- sorry, the first point that Tereos make in response to the correspondence that Tereos sent its customers. That was the cat out of the bag point. The second point it makes is that it says that this correspondence with customers does not disclose the closely guarded secret of its decision to close the UK business if the merger isn't cleared. But the remaining redactions don't disclose that either because all they show is the CMA's finding that there was no evidence of such a decision having been taken. So they do the exact opposite of what Tereos fears.

Just picking up on a further point my learned friend made. He said, well, why would we bring this judicial review if the cat was already out of the bag? Why would we be here? We don't doubt that Tereos' concerns are genuinely held. But it is for the CMA to determine whether or not they are well founded and the CMA --

THE CHAIRMAN: What is the evidence of the decision having been taken?

MR LASK: Well, shall we go to the phase 1 decision, so we can see what the CMA has assessed? You will see that the CMA assessed Tereos' internal documents but reached a different conclusion. What I actually would like to show you --

THE CHAIRMAN: Well --

MR LASK: I am sorry?

THE CHAIRMAN: I don't want to take you out of order.

MR LASK: No. Of course. It helpfully anticipates that I was coming to the phase 1

decision anyway.

What I was going to do, actually, I think it is helpful, recognising that Mr Robertson found the CMA's version of the phase 1 decision helpful, we actually find Mr Robertson's version of the phase 1 decision helpful, because it blacks out the green redactions which are the agreed redactions. So reading that version allows the Tribunal to put itself in the position of a third party reader. I think it is helpful to look at that version.

I think in your electronic bundle, it would begin at page 455.

THE CHAIRMAN: Yes.

MR LASK: And this version has red highlighting which corresponds to the yellow highlighting in the other version. These are the remaining redactions. Then the only other thing it has is completely blacked out text and the completely blacked out text reflects the green redactions, so the ones that have already been agreed.

THE CHAIRMAN: Yes.

MR LASK: Now, there was an exchange between the Tribunal and Mr Robertson this morning on what, in his client's case, can and can't be disclosed. Can and can't be disclosed. As far as we understand it, Tereos is maintaining its position that nothing in red can be disclosed. If I have got that wrong, I will stand to be corrected, but that is what we understand their position to be and that is what we are concerned with. So picking up on page 463 you will see paragraphs 15 onwards. Then you will see that there is blacked out text in paragraph 15 and then some red text. What the red text is essentially setting out is the CMA's framework for assessing an exiting firm counterfactual. Actually what you will see in the red text, as we go through -- I am going to take it relatively quickly because you have already seen this -- what you will see is really three categories of information. You will see the outline of the framework for assessment, that is what we see here at paragraphs 16 and 17, you will see the

CMA's conclusion there was no evidence of a decision to exit and the CMA's conclusion that exit was not otherwise inevitable.

Before looking at those passages, it is worth looking at paragraph 19 because you will see that that paragraph is completely unhighlighted. It says:

"To assess limb one, the CMA considered the strategic purpose which Tereos carried on the business of the target, whether or not the target was meeting this purpose and the decision making process of the Tereos board in deciding to sell the target."

So this has already been published in accordance with the Tribunal's interim order, which only precluded the publication of the denied redactions in red and the agreed redactions in black.

If I could just skip forward for a moment, paragraph 40 on page 470, or 472 of the hard copy, you will see again it elaborates on the point. The conditions of the two limbed test at paragraph 3.21 of CMA 129 are cumulative.

THE CHAIRMAN: I haven't got that. Which paragraph is that?

MR LASK: Sorry. Paragraph 40. 40.

THE CHAIRMAN: Yes.

MR LASK: As the CMA does not consider that limb one is met, the CMA has not needed to come to a conclusion on limb two. The reason I highlight this is because in practice, a sufficiently interested reader could already work out that an exiting firm counterfactual is in issue and this has been rejected by the CMA. They can do that by reading paragraph 40, looking up paragraph 3.21 of the CMA 129 which sets out the test for an exiting firm counterfactual and seeing what is in play.

Now, what the remaining redactions do is they put some flesh on the bones because they spell out the CMA's test for an exiting firm counterfactual. But in my submission, it is hard to see any good reason to preclude the CMA from doing that. Tereos' core concern is that a reasonably informed reader could infer from the remaining redactions

that Tereos had argued for an exiting firm counterfactual at phase 1, but that ship has arguably already sailed. It does suggest, in my submission, that Tereos' challenge is somewhat academic.

Now, just to pre-empt a point that Mr Robertson may make in reply. He may say, well, you know, why does the CMA need to publish any more? But in my submission, that looks at things the wrong way round, because if disclosure of the remaining redactions wouldn't cause any significant harm, then the CMA does not need to show that disclosure is necessary. Because absent significant harm, the default position is disclosure as required by section 107.

In any event, if I need to submit that further disclosure of the remaining redactions remains necessary, I do make that submission. The CMA does say it is necessary to spell out the test and what it decided, so as not to leave the prospects of an effective investigation to chance. It is not in the business of dropping crumbs and hoping that third parties will pick up on those crumbs, understand what it is getting at and provide relevant evidence.

With that, and apologies for jumping back and forth, the other passage that is important is paragraph 30 which is on page 466 or 468 of the hard copy bundle. You will see that has unhighlighted text, red highlighted text and blacked out text. Actually, the previous paragraph, paragraph 29, I think answers your question, sir, which was what was the evidence that the CMA was looking at. It refers to Tereos' internal documents. This is all part of the CMA's assessment, this section. It says they support the submission that the target has not been achieving its strategic objective, then there is blacked out text which from memory deals with the detail of what Tereos was saying that those documents show.

Paragraph 30:

"The CMA considers that while this evidence provides illustrative context that TUKI

was not meeting Tereos' strategic objective, these documents all of which were produced prior to the merger and the decision to sell the target do not evidence a decision by Tereos for the target to exit. The CMA considers that deciding to exit could be one commercially rational option on the basis of its being consistently unprofitable. However, the evidence does not indicate that the Tereos board made a conclusive decision to do so, including if the merger did not proceed. It is also not possible to infer that exit was inevitable from Tereos' documents. Several documents indicate that the outlook was becoming more positive for the target by the time it decided to initiate the sales process."

So that is key because, as I have said, Tereos' case boils down to an argument that the remaining redactions will reveal the closely guarded secret of its decision to exit the market. But here, the CMA is expressly rejecting the argument that Tereos had taken any such decision. It concluded that the documents simply did not support the point and actually it found that the outlook was becoming more positive.

Now, if one then continues to paragraph 32, you will see a further reference to the CMA's conclusion:

"In particular, the lack of evidence of any further discussion or decision on the various options at the November 2022 board meeting leave the CMA with no basis to conclude that a decision to exit had been taken and that Tereos would not have pursued the other options for the business in the absence of the merger."

It is important to keep in mind that there has been no challenge to the CMA's conclusions on the evidence. So the Tribunal has to proceed on the basis that that is correct. So it is no good Mr Robertson coming to the Tribunal and saying, "Well, actually, a decision has been taken." Because the CMA's finding is that the evidence does not support that.

Now, I have already addressed the argument that the mere knowledge that Tereos

has argued these points before the CMA would be sufficient to alter the commercial behaviour of customers and Tate & Lyle. We say that is a bad argument for the reasons I have already given.

Now, one thing that isn't really apparent or isn't at all apparent from this version of the decision is that in February 2024, the Tereos board passed a resolution on exit and the CMA deals with that at paragraph 33. Essentially what it finds is that it can't place any material evidentiary weight on this because of the timing of the resolution. You will see:

"The CMA does not consider the board resolution of 13 February to be strong evidence [blacked out text]. Given its timing (between the state of play callbetween the CMA and the parties' advisers and the issues meeting on 15 February, it appears that this resolution may have been passed in response to the CMA's review into the merger. As such, the CMA has placed very little evidentiary weight on it."

Now I am telling the Tribunal and it is clear from the version of the decision that you were shown earlier that Tereos' case is that a resolution on exit was taken on 13 February at that board meeting. But a reader of this version does not know that because the relevant text is blacked out. That is important.

Just to conclude, I don't need to take you through the rest of the decision, because you have already been shown it. To conclude, the remaining redactions consist of limited and high level references to the exiting firm counterfactual. They do indicate that the counterfactual was canvassed before the CMA and the CMA rejected it, but they don't go any further than that. When one considers the CMA's rejection of Tereos' argument, together with the passages that have already been published and together with Tereos' prior correspondence with customers, in my submission it was obviously not irrational for the CMA to conclude that significant harm wouldn't arise.

Just before I leave the issue of harm, and I have made this point in summary terms

but just to flesh it out a bit, before I go on and address the CMA's case on the need for disclosure I make this submission. If, as I submit, the CMA was entitled to conclude that the remaining redactions would not cause significant harm then it was required to publish them in any event. That is the end of the debate. The remaining redactions constitute the CMA's reasons for referring the merger to phase 2. The CMA is, therefore, required to publish them under section 107(4). It is actually worth turning that up for a moment. It is in the first authorities bundle, tab 1, page 5.

Sorry, I said page 5, it is page 13. (Pause)

Do you have that, sir?

THE CHAIRMAN: Yes.

MR LASK: Further publicity and section 107. If one continues to page 15, one sees subsection 4:

"Where any person is under a duty by virtue of subsections 1, 2 or 3 to publish the result of any action taken by that person or any decision made by that person. The person concerned shall also publish that person's reasons for the action concerned or, as the case may be, the decision concerned."

I will come on to the following subsection but just pausing there. So the starting point is that the CMA has a statutory duty to publish the remaining redactions, because those are its reasons for the decision at phase 1. So far as relevant, that duty is subject to only two qualifications and the first one -- I will come back to subsection 5 -- the first one is section 244 which is at page 30 of this bundle.

Section 244:

"A public authority must have regard to the following considerations."

Then subsection 3:

"The second consideration is the need to exclude from disclosure, so far as practicable, (a), commercial information whose disclosure the authority thinks might

significantly harm the legitimate business interests of the undertaking to which it relates."

Then subsection 4:

"The third consideration is the extent to which the disclosure of the information mentioned in subsection 3(a) or (b) is necessary for the purpose for which the authority is permitted to make the disclosure."

So the duty to consider the need for disclosure only attaches to information that might cause significant harm. But if the CMA lawfully concludes that the information in question would not cause significant harm, then it need not weigh up the extent to which disclosure is necessary, because instead the default duty to publish its reasons applies.

Now, the second qualification is section 107(5) which is back on page 15. This essentially provides that publication may be delayed where simultaneous publication is not reasonably practicable. But the only basis on which that qualification is said to be apply here is significant harm. What Tereos says is, well, it is not reasonably practicable because of our concerns on significant harm.

So this collapses into the section 244 point because if the CMA lawfully concludes that the information in question would not cause significant harm, there is no warrant to delay publication under subsection 5.

That is what I wanted to say on harm. I would like to turn now, if I may, to necessity and the CMA's position on the need for disclosure. For the reasons I have just given, we say it does not arise, but if the Tribunal finds that the CMA did make a legal error in its assessment of harm and that there is a risk of significant harm, then we turn to necessity. The CMA's case in a nutshell is that disclosure of the remaining redactions is necessary in order that third parties can understand that an exiting firm counterfactual is in issue and this in turn is critical so that there can be an effective

investigation into that issue at phase 2. The CMA's position is that even if there was a risk of harm to Tereos, it would be outweighed by those considerations.

Mr Robertson said that the CMA's position is simply that, well, these are its reasons and they must be disclosed. But once one gets to the CMA's substantive position on necessity, that really does not do the CMA's position justice. I will explain why.

Ms O'Carroll's witness statement, which is before the Tribunal, explains why it is so important that third parties can see the core of the CMA's analysis of the exiting firm counterfactual. I showed you the CMA's decisions of 2 and 9 April where the CMA made very clear why it was necessary to disclose the remaining redactions, namely so that third parties could understand that the exiting firm counterfactual was in issue. Ms O'Carroll's evidence goes a step further and explains why it is so important that they can understand that.

The reason it does that is, firstly, to assist the Tribunal in understanding what is at stake here but also to respond to submissions made in the notice of application to the effect that, well, it could not conceivably harm the phase 2 investigation to delay publication until the end. That was a point Mr Robertson made in relation to relief.

The CMA's position is that that simply does not work because by then it is too late. Third parties need to know this stuff now so that the phase 2 investigation can proceed properly. So just to outline the CMA's position, it is common ground that the exiting firm counterfactual must be carefully investigated at phase 2. In order to do that, the CMA must be able to gather relevant evidence from third parties. The CMA's experience shows that such evidence can be highly material or even pivotal to its analysis on the exiting firm counterfactual. We have referred to a number of previous decisions that the CMA draws on, including the Amazon Deliveroo case, in which third party evidence that was volunteered to the CMA was decisive.

In order to gather that third party evidence effectively, it needs to be clear to third

parties that an exiting firm counterfactual is in play. The CMA does not consider it sufficient or appropriate to ask questions in the abstract, without any indication as to what they are directed to.

THE CHAIRMAN: I mean, I think the point, as I understood it, the point made by Mr Robertson is that the counterfactual could be put but not on the basis that it was actually argued for by Tereos.

MR LASK: I think CMA finds it hard to understand quite what is being proposed there. Because as we understand it, Tereos' concern is that merely by mentioning the exiting firm counterfactual, you are revealing that it has been argued. If that is the case, then it seems that actually they are objecting to the mere mentioning of the exiting firm counterfactual. That is where we reach an impasse, effectively.

But just taking a step back, these are quintessentially matters of judgment for the CMA in which it has a wide margin of discretion. It is for the CMA to decide how best to investigate the exiting firm counterfactual, what sort of inquiries are necessary, subject only to an irrationality test. That is obviously a formidable hurdle and it is one that, in my submission, Tereos does not come close to surmounting.

It is not enough, I am afraid, for Mr Robertson to come here and assert that it is not necessary for the CMA to publish the remaining redactions because that's a matter for the CMA. It is also worth having in mind the wider implications of Tereos' argument which are troubling from the CMA's perspective, because it would be open to any party advancing this counterfactual to argue that it can't be revealed because it could do harm to their commercial interests. If Tereos' arguments were accepted, particularly given what I have described as the paper thin evidential basis, this could restrict the CMA's ability to investigate these arguments in other cases.

THE CHAIRMAN: Is this exiting counterfactual, is it often put forward in response to --

MR LASK: It is reasonably common. I think Ms O'Carroll's evidence addresses this

point. Perhaps I can be given the reference to where she does. I think she does explain that it is quite common.

Now, Tereos says, well, this case is exceptional because sugar is supplied pursuant to annual tenders. But that is not unusual, in the CMA's experience. Merger cases can very often involve the supply of goods or services that are supplied pursuant to annual or even less frequent tenders. So that does not really get Tereos anywhere.

So just dealing briefly with some of the specific points that have been put. Firstly, Tereos says that the exiting firm counterfactual does not actually require third party input because it turns on a business decision that has already been taken by Tereos. That is all you need to do - just look at that internal evidence.

But again, I mean, at risk of repeating myself, it is not for Tereos to dictate the parameters of the CMA's inquiry at phase 2. Tereos does say it has taken a decision to exit, but the CMA found otherwise on the evidence at phase 1.

Even if the CMA were to reach the same conclusion at phase 2, namely that the evidence does not reveal a decision to exit, the CMA is entitled to decide that it needs to investigate more widely whether there is other evidence to suggest that exit might be inevitable. Because if the CMA were to confine its inquiry and wrongly reject the exiting firm counterfactual, that could have implications not just for Tereos but for the market more generally.

Secondly, Tereos says that if the -- I think this comes back to the point you just put to me, sir -- Tereos says if the CMA wishes to consult with third parties, it can do so without disclosing the remaining redactions, using its broad information gathering powers. Now, the CMA may, of course, well want to use those powers to gather relevant evidence but Ms O'Carroll has explained very carefully why it would not be appropriate to do so in the abstract without any indication that they are directed towards the exiting firm counterfactual.

If I could, just to make that point good, if I could just ask you to turn up her witness statement, please. It is tab 48, page 583 of the hard copy bundle, 581 of your electronic bundle, sir. If I may, could I ask you, sir, to read paragraph 98 to 102, which really do deal with this point in what I say is a compelling way.

THE CHAIRMAN: Sorry, which is the starting page?

MR LASK: I think it should begin on your page 581. There is a heading: anticipated benefits of consultation.

THE CHAIRMAN: Yes.

MR LASK: Yes. So it is paragraphs 98 to 102, please. (Pause)

THE CHAIRMAN: Yes.

MR LASK: Thank you, sir. So you will see that Ms O'Carroll explains why it is important to have third party evidence on these matters and why it actually needs to be clear to third parties that an exiting firm counterfactual is in play. There is nothing in Tereos' submissions to suggest any irrationality in that position.

Just to deal with the point you asked me about, how commonly these arguments are raised. This is dealt with at paragraph 92 of the witness statement. It should be your page 575 where it says that this argument has been expressly made or considered in substance by the CMA in around 17 per cent of phase 1 cases over the last three years. That may reflect economic circumstances but I do reiterate the point I made earlier, which is that an exiting firm argument, if successful, can be a clincher for the party making it.

THE CHAIRMAN: Yes.

MR LASK: Just finally on necessity. My learned friend refers to the European Commission's practice in merger decisions but, in my submission, that is irrelevant in circumstances where Commission investigations are obviously governed by an entirely different legislative framework and entirely different procedures. It certainly

does not disclose any irrationality in the CMA's approach.

THE CHAIRMAN: Yes.

MR LASK: Just finally in the time I have left, I wanted to sweep up any remaining legal arguments advanced by my learned friend. I should say, these are dealt with in full in our skeleton: paragraphs 37 to 42, and in the defence at paragraph 15 to 31. So just dealing with them briefly for present purposes. Firstly, specified information. There is a dispute between the parties as to whether the remaining redactions do or do not constitute specified information in their entirety. We say that insofar as they comprise references to the CMA's published framework for assessing an exiting firm counterfactual, they do not satisfy the definition of specified information.

Having said that, it does appear to be common ground that this point is ultimately academic because the CMA considered each of the redaction requests on its merits and weighed up the overall need for disclosure against the alleged risk of harm. I should say, we are content to defend the decisions on that basis.

Next, the allegation that the procedural officer applied the wrong test, namely a test of reasonableness rather than necessity. We say there is simply no factual basis for that. I don't need to take you to the procedural officer's decision but I can give you the references, the key passages are on page 442 to 443 of your bundle, where the procedural officer expressly deals with section 244 and the test of necessity.

I showed you the earlier decisions by the case team where they also expressly addressed the test of necessity.

Then finally, the power to delay publication under section 107(5), which I have already referred you to, there may not be much between the parties on this. I think we would accept that if the CMA finds that there is a risk of significant harm and that this outweighs the need for disclosure, then it can delay publication of its reasons under section 107(5). But what section 107(5) does not do is require the CMA to delay

publication where, as here, it does not accept there is a risk of significant harm and considers prompt publication is necessary.

On the contrary, as I have submitted, where there is not a risk of significant harm, the default position applies and the reasons must be published.

If I may just have one moment, sir. (Pause).

Those are my submissions, sir.

THE CHAIRMAN: Can I just ask. In terms of my judgment on this application, how is that going to fit into the CMA's timetable for the two phases? Does it have any --

MR LASK: It does, sir. That's a very pertinent question, if I may say so. At the moment, the CMA is restricted in its ability to pursue lines of inquiry under the phase 2 investigation. In particular, lines of inquiry relating to the exiting firm counterfactual. I will be told what the deadline is, the statutory deadline, for a phase 2 decision. I think it is September.

THE CHAIRMAN: September, I think.

MR LASK: But this is an urgent matter, I'm afraid to say. The CMA needs to be able to consult on this issue. At the moment, it feels hampered in its ability to do so.

THE CHAIRMAN: Okay. Thank you.

MR LASK: Unless I can assist you further.

THE CHAIRMAN: No.

MR LASK: Thank you, sir.

THE CHAIRMAN: Thank you.

Yes.

Reply submissions by MR ROBERTSON

MR ROBERTSON: Two short points of reply. Firstly, we are not objecting per se to the CMA investigating at phase 2 whether there is going to be an exiting firm

counterfactual. We are objecting to the disclosure of our confidential business information and that is the decision that has been taken to exit if the transaction does not proceed.

Now, my learned friend took you to the reference in the phase 1 decision to the reason why the CMA does not accept that and it is simply they recognise that the decision was taken but they placed little weight on it. So it is a decision that has been taken and that is our confidential business information.

THE CHAIRMAN: But why would a third party disagree with the CMA's assessment?

MR ROBERTSON: Because it tells the third party that is what Tereos has told the CMA.

THE CHAIRMAN: But they weren't believed.

MR ROBERTSON: It is not that they didn't believe the decision existed. It is not a sham. It is just because it was taken after the merger notification procedure was filed, they chose to place effectively no weight on it.

THE CHAIRMAN: Yes.

MR ROBERTSON: Tells the world the decision was taken, it is just the CMA don't rely upon it.

THE CHAIRMAN: Yes.

MR ROBERTSON: That is the answer to that.

You can see that the CMA are investigating the counterfactual from the correspondence with [✂] that my learned friend took you to. They are asking them: what do you think is going to happen? That, for [✂], telling them: by the way, Tereos have actually taken the decision. That would be a leading question for [✂], so that is something [✂] don't know. We would much rather they didn't know, along with the other of our customers. Because that is our business strategy and we would rather

they didn't know that. But that is confidential business information on any view.

The second point, and it follows on from the point I have just made about the decision, my learned friend said: well, we didn't challenge the CMA's phase 1 decision to place no weight on the decision that was taken to exit. Of course we didn't. You can't get a judicial review off the ground of a phase 1 decision to continue into phase 2, because it is only an interim decision. So only the final outcome that you could challenge by saying, you know, essentially you have no evidence on which to reach that conclusion. You can challenge a phase 1 decision to clear because that then terminates the process. The authority for that is IBA Health against the OFT, as they then were, in about 2004 which was both in this CAT and then on appeal to the Court of Appeal. I recollect being junior counsel for IBA Health in that case led by Lord Justice Green, as he now is. That was a successful application. There, it terminates the process and, therefore, that is the right point at which to bring judicial review proceedings.

You don't have the ability to bring judicial review proceedings to challenge a phase 1 decision to continue into phase 2, because you will be met with the argument: well, Mr Robertson, they are just going into phase 2. You can make your arguments about the decision to the stage 2 inquiry panel. After all, they are the final decision maker. So that point goes nowhere.

So finally to conclude, the cat in the bag here it is our business information, it is our confidential business strategy, and should not be disclosed to third parties. The CMA is well able to investigate the counterfactual and the prospects of exiting without revealing to our competitors, our customers, the world at general that we are exiting if we can't get this transaction cleared.

THE CHAIRMAN: What do you say to the point that Tereos has already dropped some pretty big hints to customers that that will be the consequence of the merger not going ahead?

MR ROBERTSON: What it has said is that the merger will ensure the continuing viability of the business. So that is the positive case. It has not said, well, if we can't go ahead with this transaction, that's it, we are off.

THE CHAIRMAN: Right. They said something about the continuation of the Normanton site or something. I mean --

MR ROBERTSON: I mean, it is giving a reassurance that we are going to carry on trading from Normanton, but essentially it is a going concern. But that is not disclosing that if we can't sell to Tate & Lyle, that is it, it is curtains for the business.

THE CHAIRMAN: Yes. Well, I accept it does not go so far as that.

MR ROBERTSON: Yes. It has not been interpreted that way. You know, even [✂] said: well, somebody has told us there are issues about viability. That is as far as the inference has gone. There is a reason why we are here today and that is to ensure that we can get this transaction, if we can persuade the stage 2 inquiry panel that, in fact, this is not going to lead to a substantial lessening in competition, to get it cleared and to keep the business going under its new ownership by Tate & Lyle.

If this information is disclosed to the market, through trade press, through all the usual channels of communication, then we are really concerned that that is it. It stops being a going concern or Tate & Lyle walk away and that is it: that's the end of the phase 2 inquiry.

So we are not here to gain the system or to prevent CMA carrying out a proper investigation. It has extensive powers to do that and it can do that without disclosing to the world that our business strategy is to close if we can't get the transaction cleared.

THE CHAIRMAN: Thank you.

MR LASK: Sir, may I just canvas two practical points? The first is to follow up on your question about the timetable. The timetable is set out in Ms O'Carroll's witness

statement at paragraph 76, which I think begins on your page 567. One notes from that that the CMA's provisional findings are due in early July. So time is quite pressing, I am afraid.

Linked to that, we understood Mr Robertson to be implying at least that it may be possible for the CMA to publish the issues statement immediately. I just wanted to check whether that is something that Tereos can live with. It is in the bundle at page 831. You were shown it by my learned friend in his opening submissions and you will see there is only one passage that is controversial. It is at paragraph 16 on page 834 where it says:

"In some cases the counterfactual may involve one of the merger firms exiting the market where they currently compete through failure or otherwise."

Which is obviously a very generalised statement. I am not asking you to decide the case here and now, but if what my learned friend is saying is actually we don't have any problem with the CMA publishing that and getting on with things, that would at least be a start from the CMA's perspective.

MR ROBERTSON: My instructions are that we still maintain our amended application to object to that passage as well.

THE CHAIRMAN: Thank you very much. I will reserve judgment.

(The hearing adjourned)