Neutral citation [2024] CAT 62

Case No: 1638/4/12/24

IN THE COMPETITION

APPEAL TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

25 October 2024

Before:

ANDREW LENON K.C.
(Chair)

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) TEREOS SCA

(2) TEREOS UNITED KINGDOM AND IRELAND LIMITED

Applicants

- v -

COMPETITION AND MARKETS AUTHORITY

Respondent

Heard at Salisbury Square House on 23 May 2024

JUDGMENT (REVIEW UNDER SECTION 120 ENTERPRISE ACT 2002)

APPEARANCES

Aidan Robertson K.C. appeared on behalf of the Applicants

Ben Lask K.C. and Julianne Kerr Morrison appeared on behalf of the Respondent

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A. INTRODUCTION

1. The CMA is investigating the anticipated acquisition by T&L Sugars ("TLS") of the UK packing and distribution site and business-to-consumer ("B2C") activities of Tereos United Kingdom and Ireland Limited ("TUKI") from the Applicants ("Tereos"). The CMA completed the initial stage of its merger review process and provided Tereos with a draft of the decision which it intended to publish referring the anticipated merger for an in-depth investigation. It also provided Tereos with a draft of its issues statement setting out the main issues likely to arise in the investigation. The CMA agreed to make certain redactions to the draft decision at Tereos' request on the grounds of commercial confidentiality but Tereos considers that the CMA should have made further redactions both to the decision and to the issues statement. The CMA has refused to do so on the ground that making the further redactions sought would impair the effectiveness of its investigation into the merger. Tereos has applied for an order quashing the decisions not to make the further redactions on the grounds that they are wrong in law and an irrational exercise of discretion by the CMA.

B. LEGAL BACKGROUND

(1) The CMA's jurisdiction to investigate mergers

2. The CMA's jurisdiction to review mergers is conferred by sections 22 and 33 of the Enterprise Act 2002 ("EA 02"). The merger review process has two stages. At the first stage ("Phase 1"), the CMA conducts an initial review to determine whether it believes that the merger may result in a realistic prospect of a substantial lessening of competition (an "SLC"). If so, the CMA has a statutory duty under section 33 EA 02 to refer the anticipated merger for an in-depth assessment ("Phase 2"). At Phase 2, the CMA assesses whether the merger is expected to result in an SLC. If an SLC is expected, the CMA decides upon the remedies required, which may include prohibiting the merger or requiring the divestiture of parts of the business.

(2) Publication of the Phase 1 Decision

3. Section 107(1) and (4) EA 02 requires the CMA to publish its decision following the Phase 1 review ("the Phase 1 Decision"), the reasons for which need not be published at the same time (section 107(5) EA 02).

> **107 Further publicity requirements**
>
> (1) The CMA shall publish—
>
> > (a) any decision made by it that the duty to make a reference under section 22, 33, 68B or 68C applies and any such reference made by it;
>
> […]
>
> (4) Where any person is under a duty by virtue of subsection (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, subject to subsections (5) and (6), also publish that person's reasons for the action concerned or (as the case may be) the decision concerned.
>
> (5) Such reasons need not, if it is not reasonably 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.

4. The Phase 1 Decision is intended to contribute to the public understanding of the issues in the merger process and to facilitate the gathering of third party evidence in the course of the Phase 2 investigation. The information published by the CMA in the Phase 1 Decision assists third parties in understanding the context of the questions which the CMA raises during the Phase 2 investigation.

(3) Restrictions on disclosure

5. Sections 237 and 238 EA 02 set out restrictions on the disclosure of certain information.

> **237 General Restriction**
>
> (1) This section applies to specified information which relates to—
>
> (a) the affairs of an individual;
> (b) any business of an undertaking;
>
> (2) Such information must not be disclosed-

(a) during the lifetime of the individual, or
(b) while the undertaking continues in existence, unless the disclosure is permitted under this Part.

(3) But subsection (2) does not prevent the disclosure of any information if the information has on an earlier occasion been disclosed to the public in circumstances which do not contravene –

(a) that subsection;
(b) any other enactment or rule of law prohibiting or restricting the disclosure of the information.

[…]

(6) This Part (except section 244) does not affect any power or duty to disclose information which exists apart from this Part.

6. Section 238 defines the "specified information" to which the restrictions on disclosure apply.

238 Specified Information

(1) Information is specified information if it comes to a public authority in connection with the exercise of any function it has under or by virtue of-

(a) Part…3…

7. Thus, information qualifying as "specified information" is information which comes to the authority (i.e. is obtained by the public authority) from an external source.

8. Section 244 EA 02 sets out the considerations relevant to the disclosure of specified information.

244 Specified information: considerations relevant to disclosure

(1) A public authority must have regard to the following considerations before disclosing any specified information (within the meaning of section 238(1)).

(2) The first consideration is the need to exclude from disclosure (so far as practicable) any information whose disclosure the authority thinks is contrary to the public interest.

(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, or

(b) information relating to the private affairs of an individual whose disclosure the authority thinks might significantly harm the individual's interests.

(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.

9. Thus, in deciding what reasons to give in the exercise of its duty under section 107(4) the CMA must have regard to the balancing exercise set out in section 244. The competing considerations to be weighed by the CMA include (i) the need to exclude from disclosure, insofar as is practicable, commercial information which the CMA thinks might significantly harm an undertaking's legitimate business and (ii) the extent to which disclosure of such information is necessary for the CMA to ensure the effectiveness of its merger investigation.

(4) Standard of review

10. Adopting the phraseology of the Tribunal in *Groupe Eurotunnel SA v Competition Commission* [2013] CAT 30 at [168], it is the CMA, not the Tribunal as the reviewing court, that stands in the front line when assessing the competing considerations that arise in relation to disclosure. The Tribunal should accordingly be slow to second-guess decisions of the CMA either as to the extent of any harm that might be caused to an undertaking's legitimate business interests by the disclosure of commercially confidential information or as to the necessity for publication of such information in order to ensure an effective and properly evidenced Phase 2 investigation.

C. THE FACTUAL BACKGROUND

(1) The Phase 1 Decision

11. TLS is a sugar producer which refines and distributes sugar and related products in the UK through two plants in London. TUKI packs and distributes sugar in the UK which it sources from Tereos in France. TLS and TUKI overlap in the supply of various types of white and brown packed sugar to customers. These customers include grocery customers and food service customers such as restaurants, hotels and vending machine operators.

12. Following notification by Tereos to the CMA on 27 July 2023 of the proposed sale of TUKI's packaging and distribution site and B2C business to TLS, the CMA announced the launch of its Phase 1 merger investigation. The CMA issued the Phase 1 Decision on 8 March 2024. It concluded that it has jurisdiction to review the proposed acquisition of TUKI's B2C business ("the Merger") because a relevant merger situation had been created. Having considered the evidence put forward in the Phase 1 process, the CMA concluded that the Merger gives rise to a realistic prospect of an SLC as a result of horizontal unilateral effects in the supply of multiple types of packed sugar to B2C customers in the UK. It therefore referred the Merger to a Phase 2 investigation.

13. The CMA measures the impact of a merger relative to the situation that would prevail absent the merger ("the counterfactual"). Tereos submitted to the CMA during the Phase 1 process that they would close/exit their B2C business in the UK if the Merger did not proceed, and that this was the relevant counterfactual for the CMA to consider in this investigation (the "Exiting Firm Counterfactual"). The Exiting Firm Counterfactual was central to how Tereos put its case to the CMA at Phase 1, and the CMA's assessment of those arguments and evidence was central to the CMA's decision to refer the Merger for a Phase 2 investigation.

14. In the Phase 1 Decision, the CMA decided not to adopt the Exiting Firm Counterfactual as it was not persuaded that compelling evidence had been provided that exit was inevitable. The CMA considered that the resolution passed by the Tereos SCA board in relation to exit on 13 February 2024 may have been passed in response to the CMA's review into the merger and, as such, the CMA placed little evidentiary weight on that resolution. Accordingly, the CMA concluded that the appropriate counterfactual was the prevailing conditions of competition.

15. On 22 March 2024, the CMA decided to refer the Merger for an in-depth Phase 2 investigation.

(2) The Redactions

16. On 7 March 2024, the CMA sent Tereos a summary of its proposed Phase 1 Decision together with an accompanying press notice which it proposed to publish the following day. The summary and press notice were also sent to TLS's advisers in unredacted form. The summary and press release referred to the possibility that the Target would have exited the UK market if the Merger had not gone ahead, that Tereos had considered various options for the UK business and that the appropriate counterfactual was the prevailing conditions of competition, namely that TUKI would continue to compete in the UK B2C markets as an independent competitor.

17. On the same day, 7 March 2024, Tereos challenged publication of the summary and the press notice, objecting to any reference to the possibility of an exit. The CMA rejected this challenge. On the following day, 8 March 2024, Tereos submitted an application by email to the CMA's Procedural Officer, whose role is to determine significant procedural issues arising in the course of CMA investigations including confidentiality issues, reiterating its concern that the proposed summary (although now omitted from the press notice) referred explicitly to the possibility of exit from the market which it contended would detrimentally impact customers' willingness to contract with Tereos in the next bidding round and might lead TLS to walk away from the proposed acquisition, which it has a unilateral right to do on the making of a Phase 2 reference decision by the CMA under the acquisition agreement subject to the payment of a termination fee.

18. Following clarification of the scope of the concern being raised by way of further emails on 8 March 2024, Tereos confirmed that only a single sentence was objected to:

> "The CMA therefore considered whether the Target would exit the UK B2C markets if the Merger did not proceed".

On 8 March 2024, the Procedural Officer issued a decision stating that the decision summary should be published omitting this sentence.

19. Subsequently, also on 8 March 2024, Tereos was provided with a copy of the updated Phase 1 Decision with a request that confidentiality representations be provided by 13 March 2024. Tereos' representations were submitted on 15 March 2024. On 18 March 2024, the CMA rejected the claims to confidentiality which it considered excessive and or unsubstantiated and invited Tereos to submit more targeted confidentiality claims. Tereos submitted its revised confidentiality representations on 20 March 2024. On 2 April 2024, the CMA provided its response to the revised confidentiality representations by Tereos, providing comments on each redaction sought. Tereos submitted further representations by email of 5 April 2024 emphasising the impact on Tereos if information was disclosed about the Exiting Firm Counterfactual argument. On 9 April 2024, the CMA case team informed Tereos that it was willing to accept a further eleven redactions, in particular redactions in relation to the submissions Tereos made on exit. The case team then explained that a number of further redactions sought were not being granted on the ground that the CMA remained committed to allowing readers to be able to understand the framework of the assessment it had carried out in any decision and that the further redaction requests would prevent a reader being able to determine which assessment was applied and how the CMA balanced the evidence presented to it.

20. On 10 April 2024, Tereos submitted a second application by email to the Procedural Officer on the CMA's position on confidentiality. It maintained its application for the redaction of the counterfactual section. The Procedural Officer (Frances Barr) issued her decision in response to Tereos' application on 16 April 2024. She stated that, having discussed the case with the case team, her understanding was that the counterfactual analysis was central to the conclusion as to the SLC and it was therefore proportionate to include the framework for that assessment. She referred to the CMA Merger Assessment Guidelines,[1] in particular the need to see compelling evidence of the Exiting Firm Counterfactual. She said that she had carefully considered, in relation to each request for redaction, the extent to which the proposed disclosure was necessary for explaining the reasons for the CMA's decision in relation to the Exiting Firm Counterfactual and the conclusion that the anticipated Merger may be expected

[1] CMA, Merger Assessment Guidelines 2021 (CMA129).

to result in an SLC. She proceeded to reject Tereos' request that the entire counterfactual section be redacted. She then assessed each specific additional redaction sought and permitted twofurther redaction relating to a footnote.

21. Tereos submitted further representations on 18 April 2024 and asked for the decision to be reconsidered. The Procedural Officer decided that the further matters raised did not alter her decision and that her decision was final.

22. The CMA informed Tereos by email (from Elie Yoo, CMA Mergers Director) on 18 April 2024 that it considered that there was no bar to publication of the Phase 1 Decision and that it would therefore publish it on 23 April 2024, noting that it was important in the CMA's view to ensure that third parties were given a timely opportunity to understand the full basis of its Phase 1 Decision.

23. On 22 April 2024, Tereos filed and served these proceedings, and obtained an interim injunction under Rule 24 of the Competition Appeal Tribunal Rules 2015 requiring the CMA to stay publication of the Phase 1 Decision. The Order was subsequently varied by the Tribunal on 24 April 2024 to make clear that the stay applied to any version of the Phase 1 Decision that disclosed information that was the subject of the Disputed Redactions or any other redactions previously agreed between the parties, until further order.

24. The Phase 1 Decision was published on 24 April 2024. As a result of the interim injunction, as amended, the version of the Phase 1 Decision published on 24 April 2024 has information redacted from it which, but for the interim injunction, the CMA would otherwise have disclosed. The CMA has for the time being published on 26 April 2024 a redacted version of its issues statement ("the Issues Statement") on its website pending the outcome of these proceedings.

D. THE APPLICATION

25. By Application dated 22 April 2024 made pursuant to section 120 EA 02, as amended on 29 April 2024, supported by two witness statements of Tereos' solicitor Diarmuid Ryan, Tereos seeks an order quashing the CMA's decisions

not to grant its request dated 10 April 2024 for (i) confidential treatment of parts of the CMA's proposed text of the Phase 1 Decision dated 8 March 2024 as communicated in the Procedural Officer's decision dated 16 April 2024 and communicated as final in an email from the CMA dated 18 April 2024 and, additionally, for (ii) confidential treatment of parts of the Issues Statement.

26. These decisions are referred to in the Application and in this judgment compositely as "the Ruling".

27. Tereos made clear at the hearing that it has no objection to the CMA discussing the Exiting Firm Counterfactual with third parties, provided that the CMA does not disclose Tereos' business strategy to close down its TUKI B2C business if the transaction does not proceed.

28. Tereos is seeking the continuation of the current injunction to the conclusion of the Phase 2 investigation, which has a statutory deadline of 5 September 2024, on the basis that if the Merger is cleared, it can proceed; if the merger is blocked, Tereos will close the business down.

29. The redactions which Tereos has requested and which the CMA has refused to make and which are the subject of this Application ("the Disputed Redactions") comprise (i) references to the CMA Merger Assessment Guidelines concerning an Exiting Firm Counterfactual and (ii) the CMA's conclusion, in response to Tereos' argument that TUKI B2C business would exit in any event absent the Merger, that there was no evidence of a decision by Tereos for the TUKI B2C business to exit and no compelling evidence that an exit was inevitable.

30. Tereos' Application is responded to in the CMA's Defence which is supported by the witness statement of Sorcha O'Carroll, Senior Director of Mergers at the CMA.

E. THE PARTIES' SUBMISSIONS

(1) Tereos' position

31. Tereos' position is, in summary, as follows:

(i) Tereos has brought this Application because of its fundamental concerns about disclosure of its business strategy, specifically its decision to close the TUKI B2C business if the Merger does not go ahead. If information about this decision leaks out, TUKI's business will be seriously damaged. The tender season for the supply of sugar to UK B2C sugar customers runs from May to September. The Disputed Redactions will inevitably be used by TUKI B2C's competitors to undermine its (already weakened) position vis-à-vis potential customers and instil doubt among UK retailers who will decide which supplier will be their sugar supplier for the next year. The standard duration of UK B2C sugar contracts is one year. TUKI B2C's customers need to be confident that supply will be maintained over at least a one year period. If enough B2C customers do not place orders for the supply of sugar by TUKI B2C in the forthcoming tender season, this will likely spell the immediate end for TUKI B2C as a going concern. In addition, publication of the Disputed Redactions could also lead to TUKI B2C employees deciding to leave the business for alternative employment, given that the vast majority of the 53 TUKI B2C employees (apart from a very small group of "need to know" senior staff) are not aware that Tereos has made the Exiting Firm Counterfactual argument.

(ii) Moreover, publication of the Disputed Redactions, thereby informing TLS of Tereos' specific counterfactual arguments before the CMA, could precipitate the early termination of the transaction by TLS. TLS have the unilateral right to terminate the transaction upon payment of a break fee. TLS may take the

view that if the TUKI B2C business is going to be closed, they may as well walk away from the transaction.

(iii) The CMA's argument that the matters of concern to Tereos are not to be treated as confidential information because "the cat is already out of the bag" is unfounded. The matters on which the CMA relies in support of this submission consist of general statements about the proposed transaction. They do not disclose the closely guarded secret as to Tereos' decision to close the TUKI B2C business absent the Merger being cleared.

(iv) The CMA's further argument that the Phase 1 Decision concluded that exit was not inevitable misses the point that Tereos' position is that it is inevitable that it will exit the market if the Merger does not go ahead.

32. Tereos advances two grounds of review by its Application. The first ground is that the Ruling is wrong in law in three respects:

(i) First, it wrongly applies the concept of "specified information" under sections 238 and 244 EA 02. The Procedural Officer stated incorrectly in her Ruling that the Disputed Redactions comprising references to CMA's Merger Assessment Guidelines were not specified information. These Disputed Redactions were specified information because they necessarily involved disclosure of Tereos' highly sensitive commercial plans.

(ii) Second, the Ruling wrongly interprets and fails correctly to apply the test of necessity of publication in section 244(4) EA 02. The CMA wrongly concluded that the consideration referred to in section 244(4) EA 02, (necessity of disclosure), outweighed the consideration in section 244 (3)(a) (exclusion from disclosure of commercial information whose disclosure the authority thinks might significantly harm Tereos' legitimate business interest). In reaching this conclusion, the CMA wrongly

interpreted "necessary" as meaning in effect "reasonable" or "desirable". It is not necessary for the CMA to disclose the Exiting Firm Counterfactual in its published Phase 1 Decision. Nowhere in the Ruling does the CMA properly explain why it is necessary to disclose it.

(iii) Thirdly, in so far as the Ruling is based on the obligation to publish reasons under section 107(4) EA 02, it is wrong in that the CMA has failed to consider its power to publish the Disputed Redactions at a later date pursuant to section 107(5) EA 02. The relevant passages of the Phase 1 Decision concerning the CMA's reasons on the Exiting Firm Counterfactual need not be published until such time as it is reasonably practicable to do so, i.e. on the final outcome of the Phase 2 investigation.

33. The second ground is that the Ruling is irrational, in the following respects. Publishing the Disputed Redactions in the Phase 1 Decision will, as stated above, lead to a loss of confidence on the part of many, if not all, of TUKI B2C's customers in the ability of the business to fulfil supply obligations for the entire year, causing them not to place further orders. This will spell the end of the business. In addition, as stated above, publishing the Disputed Redactions may cause TLS to terminate the transaction. Either eventuality would render the Phase 2 investigation redundant, thus frustrating the CMA's purpose of deciding to refer the Merger for a Phase 2 investigation. Further, it would risk artificially removing TUKI B2C as a competitor, which is precisely the concern that has led the CMA to decide to refer the transaction to a Phase 2 investigation. Neither consequence could be regarded as rational outcomes. In proposing to publish the Disputed Redactions, the CMA is accordingly proposing to act irrationally in the public law *Wednesbury* sense.

34. As to the standard of review of the Application, Tereos does not dispute that the CMA is the primary decision maker, to whose judgment the Tribunal will naturally afford a margin of appreciation when exercising its supervisory jurisdiction. However, this is an exceptional case which justifies the Tribunal intervening as it did in *BMI Healthcare v Competition Commission* [2013] CAT

24, in relation to the refusal by the CMA's predecessor, the Competition Commission, to grant a party sufficient access to confidential information in a data room.

(2) The CMA's position

35. The CMA's position is, in summary, as follows

(i) The CMA has already agreed to extensive redactions sought by Tereos but considers it critical to disclose the Disputed Redactions so that it can investigate the issue effectively including through the gathering of relevant evidence from third parties. The Disputed Redactions amount to limited and high-level references to the Exiting Firm Counterfactual. In essence, they reveal (a) the fact that the Exiting Firm Counterfactual was assessed at Phase 1 and will be explored further at Phase 2; (b) the CMA's published framework for assessing the issue contained in the CMA's Merger Assessment Guidelines; and (c) the CMA's conclusion on the Exiting Firm Counterfactual at Phase 1.

(ii) The CMA does not accept that disclosure of the Disputed Redactions would cause significant harm to Tereos' business interests – let alone to the extent or with the likelihood asserted in Tereos' Application. The CMA's ultimate judgment that refusing the Disputed Redactions, whilst agreeing to many other redactions, struck the correct balance between the competing considerations should be afforded great weight.

(iii) In assessing the damage that might be occasioned by disclosure of the Disputed Redactions, the CMA had regard to the fact that Tereos had already revealed to customers its financial challenges and had clearly implied that its viability may be at risk, absent the Merger.

36. The CMA responds to the first ground, that the Ruling is wrong in law, in the following manner:

(i) As to the first alleged error, the Procedural Officer was correct in deciding that those parts of the Phase 1 Decision that were based on the CMA's published guidance were not "specified information". Specified information does not include published guidance that is generated by the CMA itself. In any event, as the Procedural Officer's decision makes clear, the CMA considered each of Tereos' redaction requests on its merits and weighed up the overall need for disclosure against the alleged risk of harm as if they were specified information, so the point is academic.

(ii) As to the second alleged error, the CMA did not interpret "necessary" in section 244 EA 02 as meaning "reasonable" or "desirable". The Ruling made clear that the CMA considered what was necessary to disclose, balancing the need for third parties to understand the Phase 1 Decision (and Issues Statement) against the alleged risk of harm.

(iii) As to the third alleged error of law, the CMA did not err in deciding that the Disputed Redactions should be published before the final outcome of the Phase 2 investigation. The Disputed Redactions are part of the CMA's reasons for deciding to refer the merger to a Phase 2 investigation. The CMA is under a statutory duty to publish such reasons: section 107. Since the CMA is under a duty to publish its reasons, the reasons in a Phase 1 decision are not subject to the general restriction on disclosure in section 237(6) EA 02. Whilst reasons need not be published at the same time as the decision concerned "if it is not reasonably practicable to do so", the default statutory position is that they should be.

(iv) Publication of the CMA's reasons at the same time, or at least shortly after, a Phase 1 decision facilitates transparency and, more practically, enables interested third parties to understand why the merger has been referred so that they may provide relevant evidence, targeted at the issues in hand, during Phase 2.

(v) It was Tereos' decision to advance the Exiting Firm Counterfactual in the first place and to pursue it at Phase 2. It is unattractive for Tereos, having raised the argument, to seek to hinder the CMA's ability to investigate it.

37. The CMA responds to the second ground, that the Ruling is irrational, in the following manner:

(i) The CMA was entitled to reject the assertion that publication of the Exiting Firm Counterfactual would cause Tereos significant harm. Further and in any event, it was perfectly rational for the CMA to weigh the alleged risk of harm against the public interest in an effective Phase 2 investigation. It is inherent in section 244 EA 02 that disclosure may be appropriate even where a risk of harm is established.

(ii) It is for the CMA to judge whether the disclosure of specified information might harm Tereos' legitimate business interests. And, where it concludes that it might, Parliament has entrusted the CMA to weigh that risk against the need to disclose the information so as to ensure that adequate reasons are given for its decision. As an expert regulator with extensive experience in merger investigations, the CMA is particularly well placed to conduct that balancing exercise.

F. THE TRIBUNAL'S ANALYSIS

38. The central issue for the Tribunal is as to whether, in reaching its judgment as to which redactions to make to the Phase 1 Decision and the Issues Statement, the CMA has committed a legal error or acted irrationally.

39. The first error of law contended for by Tereos, namely that references in the Phase 1 Decision to the CMA's Merger Assessment Guidelines should have been, but were not, treated by the Procedural Officer as "specified information", turns on the statutory definition of specified information. Since the Guidelines are not information that came to the CMA from an external source they are not within the definition of "specified information" in section 238 EA 02, as the CMA points out. Tereos' position is, however, that, read in context, references to the CMA's published guidance necessarily involve disclosing Tereos' closure plans, since the references presuppose that Tereos has run an exiting firm argument.

40. I do not accept this argument which does not bear on the nature of the guidance documents or the correct interpretation of section 238(1). The connection between references to the Guidelines and Tereos' closure plans is a matter which falls to be taken into account by the CMA in determining whether additional redactions should be made to preserve confidentiality of that which is accepted is specified information. I do not, in any event, accept that references to the guidance involved disclosure of Tereos' plans. As the CMA points out, the mere fact that the CMA is considering an Exiting Firm Counterfactual does not on its own imply that Tereos has argued for it. The CMA may investigate an Exiting Firm Counterfactual of its own motion, whether or not a party has argued for it. In short, there was no error of in treating references to the CMA's guidance as not being specified information.

41. As to the second alleged error of law, Tereos complains that the Procedural Officer wrongly applied a test of reasonableness or desirability rather than necessity as required by section 244(4) EA 02. Her decision does not, however, purport to apply a test of reasonableness or desirability. It explicitly refers to the

extent to which disclosure is necessary for the purposes for which the CMA is permitted to make the disclosure. Her conclusion is as follows:

> "In considering the fourth factor in section 244 (the extent to which the disclosure is necessary for the purpose for which the CMA is permitted to make the disclosure) I have taken the conclusions and assessment set out above into account. I have therefore considered carefully in relation to each request for redaction the extent to which the proposed disclosure is necessary for explaining the reasons for the CMA's decision in relation to the counterfactual and the finding that the anticipated merger may be expected to result in a substantial lessening of competition."

42. Tereos' complaint is in substance, a challenge to the Procedural Officer's assessment that disclosure was necessary. It does not establish that there was any error of law.

43. The third alleged error of law is similarly a challenge to the CMA's assessment that prompt publication of the Phase 1 Decision, including the Disputed Redactions, is necessary. Section 107(5) entitles the CMA to delay publication of its reasons if simultaneous publication is not reasonably practicable but it does not require it to do so. There was no error of law in the CMA's assessment that publication of the Disputed Redaction at the same time as the Phase 1 Decision was necessary.

44. The real crux of Tereos' Application is its argument that the CMA failed, on the one hand, to take proper account of the seriously damaging consequences for its business resulting from publication of the Disputed Redactions and, on the other hand, overstated the need to publish the Disputed Redactions for the purposes of its Phase 2 investigation. This argument underlies its case on the second and third errors of law as well as being the basis of Ground (2) (irrationality).

45. A fundamental obstacle to Tereos' challenge is that the assessment of the extent to which disclosure of the Disputed Redactions might significantly harm Tereos' legitimate business interests and the assessment of whether disclosure is necessary for the purposes of the Phase 2 investigation are quintessentially matters entrusted to the CMA under section 238 EA 02. As Tereos accepted, the CMA has a wide margin of discretion in its assessments and the Tribunal is bound to give great weight to the CMA's assessments.

46. I accept that Tereos' Application is motivated by genuine concerns about the risk of serious damage to legitimate business interests resulting from disclosure, but that risk is ultimately a matter for the CMA to evaluate. In my judgment, there was a sound basis for the CMA to conclude that disclosure of the Disputed Redactions would not cause significant damage to Tereos' legitimate interests. I agree with the CMA's assessment that it is most unlikely that a reader of the Phase 1 Decision, including the Disputed Redactions, would conclude that Tereos had taken a decision to exit the market, absent the Merger, or that such exit was otherwise inevitable. The Disputed Redactions do not refer to any such decision having been taken. Moreover, even if a reader was able to discern from the Phase 1 Decision that Tereos had argued that it would exit the business absent the Merger, it would not follow that this was bound to happen. The CMA concluded on the evidence that no decision to exit had been taken and that exit was not inevitable, as the passages covered by the Disputed Redactions make clear. If Tereos' customers read the Phase 1 decision with sufficient care to infer the nature of Tereos' arguments, then it is to be expected that they would also read and take account of the CMA's conclusions. As the CMA pointed out, it would be surprising if customers were to take major commercial decisions by way of response to the fact that an exiting firm argument had been canvassed before the CMA without any regard to the CMA's actual findings on the evidence.

47. Furthermore, in assessing the risk of damage to TUKI's business resulting from disclosure of the Disputed Redactions, I consider that the CMA was entitled to take account of the fact that Tereos had revealed to customers its financial challenges and had implied that its viability may be at risk absent the Merger. The CMA exhibited a letter from Tereos sent to some thirty of its customers which stated as follows:

> Tereos is selling its B2C business and the Normanton site to TLS because its profitability has been challenged in recent years (in particular, compared to other options open to Tereos for its sugar).
>
> […]
>
> The proposed sale is subject to Competition and Markets Authority (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 TUKI B2C business and will enable the integrated businesses to service the UK market and customer base better and more efficiently across the UK.

48. These paragraphs suggest that, if the transaction is blocked, the continuing viability of the TUKI B2C business will be in question. The CMA also exhibited an email exchange with a major grocery retailer in which the CMA asked for clarification of an answer in a questionnaire completed by a major grocery retailer in which a major grocery retailer had said that there was uncertainty on the future viability of Tereos if the Merger was not approved. In reply a major grocery retailer stated as follows:

> "Dear Robbie,
>
> Please find below some clarification on the question you requested.
>
> […]
>
> [A major grocery retailer] 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."

49. Although it is not clear what the source of the "indication" was, it was suggested by the CMA and not denied by Tereos that it was the letter from Tereos to its customers quoted above.

50. This correspondence undermines Tereos' case that the fact that an Exiting Firm Counterfactual was canvassed before the CMA would surprise its customers and lead them to stop doing business with TUKI. There was no evidence from any of Tereos' customers to support its case as to the potential damage resulting from disclosure of the Disputed Redactions such as evidence as to the importance of the annual tender process and the importance of ensuring supplies throughout the year. Nor was there any evidence to substantiate the assertion that TLS might pull out of the transaction if it discovered that Tereos had argued for an exiting firm counterfactual. There is no evidence to suggest that TLS would not still want the assets which it will acquire under the Merger if it knew that an Exiting Firm Counterfactual had been raised.

51. In my view, the CMA was entitled in these circumstances to conclude that publication of the Disputed Redactions will not cause significant harm to Tereos' legitimate business interests and that the CMA was therefore required to publish the Disputed Redactions as part of the reasons for referring the Merger to Phase 2 pursuant to section 107 EA 02. The balancing exercise under section 244 EA 02 was not engaged.

52. The CMA's case is that, even if, contrary to its assessment disclosure of the Disputed Redactions might significantly harm Tereos' legitimate business interests, the CMA was nevertheless entitled to conclude that disclosure was necessary for the purposes of the Phase 2 Investigation and that, in carrying out the balancing exercise under section 244 EA 02, this consideration outweighed the need to protect the confidentiality of the Disputed Redactions.

53. Ms O'Carroll's witness statement explains why in the CMA's view it is important that third parties can see the core of the CMA's analysis of the Exiting Firm Counterfactual. The Exiting Firm Counterfactual framework is comprised of two limbs:

    (i) the firm is likely to have exited (through failure or otherwise) ("Limb 1"); and, if so

    (ii) there would not have been an alternative, less anti-competitive purchaser for the firm or its assets to the acquirer in question ("Limb 2").

54. The CMA gathers and takes account of third-party evidence in its assessment of both Limb 1 and Limb 2. Ms O'Carroll explains that an Exiting Firm Counterfactual has been expressly made by a party or considered in substance by the CMA in around 17% of Phase 1 cases over the past three financial years. Consultation with third parties in respect of the Existing Firm Counterfactual has yielded evidence that informed the conclusions reached in the investigations. In the Amazon/Deliveroo merger inquiry, submissions from third parties led to the CMA reversing its finding in its Phase 1 Decision that Deliveroo would exit the market.

55. Ms O'Carroll's evidence is that, whilst the CMA can ask these stakeholders about market dynamics, if these stakeholders understand that the CMA is considering an Exiting Firm Counterfactual, they will better understand the context for these questions and what information may be relevant to the CMA's assessment. These stakeholders have far greater knowledge and expertise about this market than the CMA and may be aware of, and provide, relevant information that the CMA would not be aware of and therefore would not request directly. An inability to consult third parties on Tereos' exiting firm argument and to test the supporting evidence would hamper the CMA's ability to assess the argument prior to (or following) the provisional findings stage. The CMA might therefore ultimately accept or reject the Exiting Firm Counterfactual argument based on an incomplete or skewed understanding of the evidence.

56. The CMA's position, as set out in Ms O'Carroll's witness statement, is that it is critical that the Phase 1 Decision and Issues Statement are published with the Disputed Redactions visible. Those documents are the starting point for the Phase 2 investigation and the Disputed Redactions are crucially important to eliciting relevant evidence from third parties with which to test and corroborate the Exiting Firm Counterfactual.

57. Tereos' position is the CMA may refer to the Exiting Firm Counterfactual but that it is not necessary for the CMA to disclose that Tereos has argued for that Counterfactual. In my view, the CMA is entitled to consider that, in order to ensure the effectiveness of the Phase 2 investigation, it needs to make clear to third parties that an Exiting Firm Counterfactual is actually in play, that for this reason it is necessary to disclose the Disputed Redactions and that it is not sufficient or appropriate to ask questions in the abstract, without any indication as to what they are directed to.

58. There is, in these circumstances, no valid basis for impugning the CMA's assessment that disclosure of the Disputed Redactions is necessary for the purpose of its Phase 2 Investigation and that this consideration outweighs the risk of harm to Tereos resulting from disclosure (if, contrary to the CMA's

primary conclusion, disclosure might significantly harm Tereos' legitimate business interests).

G. CONCLUSION

59. For the reasons given, my judgment is as follows:

(i) The Application is dismissed.

(ii) The interim order made on 22 April 2024, as amended on 24 April 2024, is discharged. The CMA may publish the Phase 1 Decision and the Issues Statement with the Disputed Redactions unredacted.

Andrew Lenon, K.C.
Chair

Charles Dhanowa O.B.E., K.C. (*Hon*)
Registrar

Date: 25 October 2024