**IN THE COMPETITION APPEAL TRIBUNAL**

Case No. 1109/6/8/09

Victoria House,
Bloomsbury Place,
London WC1A 2EB

10th September 2009

Before:

THE HONOURABLE MR. JUSTICE BRIGGS
(Chairman)

PROFESSOR PAUL STONEMAN
DR. VINDELYN SMITH-HILLMAN

Sitting as a Tribunal in England and Wales

BETWEEN:

**BARCLAYS BANK PLC** — Applicant

- v -

**THE COMPETITION COMMISSION** — Respondent

- and -

**FINANCIAL SERVICES AUTHORITY**
**LLOYDS BANKING GROUP**
**SHOP DIRECT GROUP FINANCIAL SERVICES LTD**

Interveners

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# HEARING
# DAY FOUR

# APPEARANCES

Mr. Thomas Sharpe QC and Mr. Matthew Cook (instructed by Clifford Chance LLP) appeared for the Applicant.

Mr. John Swift QC and Miss Kassie Smith and Miss Elisa Holmes (instructed by the Treasury Solicitor) appeared for the Respondent.

Mr. Mark Hoskins QC and Miss Marie Demetriou instructed by and appearing for the Intervener, The Financial Services Authority.

Miss Helen Davies QC and Miss Kelyn Bacon (instructed by Herbert Smith LLP) appeared for the Intervener, Lloyds Banking Group.

Mr. Paul Lasok QC and Mr. Tim Ward (instructed by DLA Piper) appeared for the Intervener, Shop Direct Group Financial Services Ltd.

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THE CHAIRMAN: Yes, Mr. Swift.

MR. SWIFT: Good morning, Sir, Professor Stoneman, Dr. Smith-Hillman. May it please the Tribunal, may I make some preliminary observations before I turn to the central issues in this case and I am intending to follow the order of Barclays' Grounds 1 to 4 and then give a brief summary of the Commission's case the end. There will be a short interlude between my sitting down after Ground 4 and the summary when Miss Smith will put on the body armour and venture into Afghanistan to deal with the shot direct, with the Tribunal's permission.

THE CHAIRMAN: I hope you are not equating us with Al Quaeda! (Laughter)

MR. SWIFT: The observations: after three days of relentless assault upon my position, including my personal position as apparently the lawyer who must have lived through a nightmare seeing the whole substratum of his case disappear as a result of the *Tesco* judgment – an uncomfortable position to be in.

The PPI market, including each of the separate PPI products is one of substantial size, value and importance within our economy. Although it is described as a secondary market in the sense that demand is derived from the demand for credit, it is a market in which there is an expectation of rivalry as between suppliers to compete against each other for the goodwill of customers. Where markets are perceived not to be working effectively the Enterprise Act 2002 provides for market investigations to be carried out by the Competition Commission on a reference from the Office of Fair Trading and indeed, the Office of Fair Trading can itself receive complaints from super complainants such as the Citizen's Advice Bureau; indeed, such is the case here.

As an aside, the Tribunal should be aware that although the CAB had its reservations about the POSP, and that point has been made both by Barclays' and by Lloyds' counsel, they wanted a different remedy, which is substantial and immediate price controls.

The Commission's judgment was that although that was one of the options it consulted on in July 2008, and that is the notice on remedies that was brought to the Tribunal's attention on I think day 2, that would in effect be directed only to what I can call the exploitation issue i.e. the consumer detriment, rather than the causes of the exploitation which are, of course, the features amounting to the adverse effect on competition, otherwise the AEC.

So the Tribunal should not conclude that the CAB did not want a remedy for the serious problems which it had identified and for which it was seeking a solution through the exercise of powers by the Competition Commission.

I appreciate that I have to be careful when addressing such a distinguished Tribunal about not telling you what you already know and, in many cases, know far better than I do, but the distinguishing feature of market investigations is that consumer welfare may be adversely affected not by single firm monopoly abuse, or by collusion – express or tacit – but by one or more features of a market which have an adverse effect on competition. If they do, they operate in a way different from and worse than those that can be expected in what are generally referred to as "effectively functioning markets" – an expression that is normally regarded as a paradigm of what is expected in order that there should be positive consumer welfare – not perfect markets, but effectively functioning markets.

This is a huge part of our competition law since 2002, and the purpose is to ensure that those who shun rivalry and operate in an anti-competitive manner can and should be made subject to new *ex ante* rules governing their future participation in that market. Again, as an aside, it is known that other Member States within the EU are known to look with some envy at the powers which the United Kingdom has had it has to be said for many years under a different statutory form, and the express purpose is to remedy the causes of the market problems that are making consumers worse off, either directly because they are paying higher prices or getting less choice than they would do, or indirectly because they are not getting the benefits of movement and competitive rivalry in that market place, which could dry the market up.

Moving from those general observations to the case in point. Intervention in markets to address the cause of the problem is likely to involve positive and negative obligations within the new *ex ante* set of rules which for this purpose means the entirety of the remedies package.

Over the course of the first two days of this hearing little time was spent in considering the other parts of the remedies package, the attention was focused on the POSP as the issue that divides the Commission from the appellant and the interveners in this case. We know from Lloyds' evidence and we know from Barclays' statements that they would be prepared to live with and work with all the parts of the remedies package other than the POSP. Then, yesterday morning, Miss Davies, on behalf of Lloyds, when she was summarising what was in her skeleton talked about the upside elements of the remedies package from which I inferred that she was talking about the information provisions of which there are several. She covered searching by consumers, she covered stand-alone providers orally, and in her skeleton she referred to the Commission's conclusions on adverse selection and the likelihood of increased advertising. The expression that Miss Davies used in her skeleton

argument on each of those issues was that the Commission was making an assertion with out evidence, so we are entitled to assume no material effect from each of those four in relation to the effectiveness of the remedies package – that is as I read it.

Then Miss Davies drew the Tribunal's attention to a section within the risks section of the report, and the Tribunal will recall that this begins at about 10.41. Could I ask the Tribunal just to go now to core bundle 2, the report at p.195 (203 in the bundle). This group of paragraphs which runs from 10.53 to 10.57 was referred to by Miss Davies yesterday. Mr. Sharpe, despite covering a great deal of the paragraphs in section 10 for some reason avoided mentioning this passage – I am not suggesting anything sinister, but Miss Davies was the first counsel to bring it to the Tribunal's attention.

The Tribunal will know that at para. 10.55 the section is heavily redacted, the Tribunal has the benefit of the unredacted version. What I would like to do is to look at 10.56 very quickly. This is the beginning of what I would say is an evaluation by the Commission of expected consequences in the market, and we are now in the risks section. At line 3 of 10.56 they say that of course the decision to stay in the market would depend on how many consumers would still buy PPI, how many they could access. In other words, it would be a straight business decision based on expected returns. Then they noted the views of distributors who talked about effectively market exit. Then they referred to incentives remaining. They said.

> "PPI is a significant source of income for which consumers have demonstrated a considerable willingness to pay. Margins are currently high. We would expect them to decrease."

Then,

> "PPI sales also benefit distributors, whose repayments become insured as a result. We expect that many distributors and intermediaries would still find it beneficial to continue to sell PPI and then to the extent that there is exit, this would create an opportunity for others".

Then, at 10.57 they conclude that the remedy would not reduce consumer choice. The final sentence is,

> "We concluded that the remedy will increase the choice of PPI provider for most consumers from one to many".

Now, the Tribunal, in my submission, can regard that as a rather significant finding. It is not an assertion made without evidence. It is a properly considered evaluation of expected consequences.

What may be puzzling the Tribunal - and I am still in my preliminary comments stage - is why, when it is admitted that as a result of the introduction of the remedies package as a whole, including that part which consists of information remedies -- When that is admitted that incentives and opportunities exist, can it really be expected that none, or few, of the existing distributors - exactly those companies the lenders, who claim that their policies were superior to those of the stand-alone providers - would simply stand by and do nothing? Or is it not more likely that they would use the incentives and opportunities in what I may call the post-intervention market first of all to cover the costs of compliance (which they say are significant anyway and which they will have to incur if they want to stay in the market) and one or more go for, let us say, first mover advantage in what is going to be an open access market. It is a point to which Professor Stoneman was referring yesterday in respect of the opportunities that arise as a result of the increased choice where there may be a short-term discrimination against what can be called the incumbent credit provider in simultaneously concluding a PPI contract, but for the rest of the market there is no gap. The applicants have tended -- No. Sorry. I think it is more Mr. Sharpe who has tended to dismiss the design of the remedies package as another kind of *Tesco* error or *Tesco* failure on the Commission's part. That is because a rule that is found in a package or a design package is somehow less important than the primary rule. One cannot understand this remedies package without understanding the detail of the obligations set out in the rules, each of which is set as an aid to achieve something in itself and to work with the other remedies in a coherent manner. I will come to that.

In this case, this package has been painstakingly put together ever since the notice of remedies first went out in July 2008 to and beyond the provisional decision on remedies that went out at the end of last year.

So, what is this post-intervention market going to look like? For the first time, information on the price, the quality, the availability of PPI products will be mandatory from early 2010. it will go in marketing materials. It will go in information to be provided to the FSA, and also information provided by the FSA itself. One of the new rules is the provision of a personal quote - so long as the credit provider wishes to remain in the PPI market, again set by the Competition Commission so as to provide information of a kind considered to be relevant to the exercise of choice.

All that is going to be new to this market. The Tribunal - in the old language - may take judicial notice - before anybody says, "This is not in the report" - that once information is made publicly available, then something else happens. You then get secondary suppliers of

services who put together comparison tables. This is what is happening in very many financial markets today. As is well-known, it does not need to have a specific paragraph in the report.

Under these new rules, what are the expectations about what goes into the mandatory personal quotation? In my submission, what goes into the personal quotation in the post-intervention market may be expected to be quite different than that which went in before when there was only one supplier of the customer and not many. That is when competitive rivalry starts to bite in this marketplace -precisely through the availability of information, the size of the market, the relative stability and need for the product, and suppliers not standing back but either going first or waiting for the others to go. That is how markets get going. Whether it is led by the stand-alone providers - rather dismissed by Miss Davies - or whether it is led by, who knows, possibly a maverick bank, if one exists, is not to the point. Someone will see that advantage and move ahead with new products.

Let me link that with the POSP. So, things are going to change. Why is it that the banks and the lenders are prepared to accept the costs of compliance with the other elements of the package, but not the POSP? In my submission, the answer is self-evident. The POSP is the means by which the opportunities and the incentives can be exercised. That is its critical contribution to the whole of the remedies package. It is an assured window in which the incumbent distributor cannot combine the sales of the two products. Indeed, the legislative remedies started off with a period of ninety days, and after consultation that went down to fourteen and then finally to seven, with a possible customer-initiated sale after twenty-four hours. But, that window is critical to the exercise of choice. If Barclays or Lloyds really believed that the intervention might not, after all, much affect their interests because of the design of the package - and that was hinted at by Miss Davies yesterday - and, of course, it was one of the risks that the Commission also addressed, “Are we sure we are going to make this effective?” - why join in the appeal? Because the banks know the POSP will be effective and that it is essential and it is going to drive down their prices as a result of competition. That is why it is essential. That is why it is going to be effective.

So, the Commission expects the means will be used to deliver the ends. The post-intervention market will indeed be radically different. Changes may be expected in a timely manner. I will come on to timescale later. But, once information is in the market, information spreads - whether it is by word of mouth; whether it is by internet. One cannot put, in a sense, a brake on the speed with which consumers will react to new market opportunities that are available to them for the first time in this market.

Those are my brief preliminary points.

You have heard three days of nothing but negatives - what used to be called in United States litigation the "FUD" argument, in which the acronym stood for "fear, uncertainty and doubt", but the outcomes are going to be positive, not determined, with respect, by the forecasts of economists drawing their demand curves moving one way or another, but determined for the first time by market forces for the benefit of consumers. That is by way of introduction.

May I just deal briefly with one paragraph, with the central issue in this case that the Tribunal will have to determine. The central issue is whether the Commission's decision to include the POSP within the remedies package in a market for PPI: (a) is one that it is, or was entitled to make so as to comply with its statutory duties to provide as comprehensive a solution as is reasonable and practicable to the AEC and the resulting issue of detriments; and (b), if there is indeed a separate test – otherwise, it is arguable that the construction of the word "reasonable" involves the automatic application of EU principles of proportionality, but leaving aside that point as a legal point; (b), whether it was entitled to conclude in accordance with the principles of proportionality that that intervention may be expected to bring about a positive net consumer welfare in which benefits exceed adverse effects. In brief, would the remedies package result in consumers of PPI being better or worse off? They would be better off, not, as Mr. Sharpe put it, worse off in order to get better. It is not that kind of surgery, they would be better off. That is what we are asking you to conclude, that where you were entitled to make that decision, we have complied with our statutory duties and we have acted entirely in accordance with the principles of proportionality.

That brings me on to the standard of review and judicial policy in market investigation enquiries. You have now been addressed by three leading counsel, all very learned in law on this and with lots of authorities, and I am proposing to make a humble addition. It is accepted that "*Fedesa*" principles, as they are called, which this Tribunal reformulated and numbered 1 to 4 – we do not find that numbering in the European Court of Justice's judgment – apply in this case as they were held to apply in a case of the assessment of the competition test in groceries, otherwise known as the *Tesco* case. There has to be a legitimate aim and the legitimate aim here is the change from a market which has serious adverse effects on competition, to a market which is functioning effectively, more particularly an aim to provide a solution to the adverse effects on competition and the customer detriments.

The judgment as to whether the remedy provides the solution and whether the benefits outweigh the adverse effects is, and this is generally accepted, one for the Commission to take as the decision maker. That is its role under the legislative and regulatory matrix that we have in this country for the determination of these matters, provided that it is satisfies its accountability to this Tribunal that it has acted lawfully and that the decision cannot be impugned under one or more of the now standard grounds of judicial review.

I would just observe that, as this Tribunal held in *BSkyB*, judicial review is different from an appeal on the merits, even though those appeals do come also to this Tribunal directly from decisions of the regulators under the Competition Act, and the Tribunal must not blur the distinction and, as the Tribunal observed most recently in *Tesco*, the Tribunal must allow to the Commission a margin of appreciation. This is found in para.139 of the judgment – I need not take the Tribunal to it. It is a very important paragraph.

The margin of appreciation, what does it mean? It plainly covers issues of substance. They have the right to determine whether A calls B, and so on and so forth but it is broad enough to cover systems and rules, such as the Commission's guidelines. That is an aspect of methodology left to the Commission. The guidelines themselves are now forming part of this regulatory matrix, because the Commission goes out to consultation, hears the views of government, industry, and formulates them, and that provides part of its own internal discipline, not just an internal discipline, but a helpful guide to people in the market as to how the Commission will exercise that aspect of methodology, techniques of measurement, methods of analysing issues of causation, not just what is happening today but what effects may be expected if structure or conduct is changed, as in this case, through regulatory intervention. This involves evaluation. I keep on referring, and I shall be, to there is a difference between evaluation of likely consequences having regard to the totality of the evidence and assertion, and my submission is that throughout this report you are not seeing assertion, you are seeing evaluation, careful evaluation, based on the evidence.

The critical issue of how to evaluate and whether such evaluation of expected consequences should be qualitative or quantitative, or both, falls, in my submission, squarely within the margin of appreciation as to methodology, which this Tribunal has recognised should be conferred upon the Commission for all kinds of reasons, subject of course to the issue of whether in an extreme case the methodology is such that no reasonable decision maker could or should have used it, which takes us straight to the judicial ground of diversity.

This recognition of evaluation of risk and how it relates to the standard of proof has been considered in several cases. You were kind enough to accept an invitation from me to do

some modest reading of the law last night, and this is the *Mental Health Tribunal* case which is at tab 3 of the index to the supplementary authorities bundle. I believe you have got a number different from mine, I have got 114.

THE CHAIRMAN: Sorry, number of what?

MR. SWIFT: It is the number at the bottom of the page. We see from the headnote that this was a judicial review case that went up to the Tribunal and then to the Court of Appeal. The passage that I was asking the Tribunal to read was at para.92, p.114 of the bundle. Could I say that the standard of proof as such as not been raised as a particular ground by the applicant or by an intervener in this case. Nevertheless, what is said in respect of standard of proof is, in my submission, relevant to how the Tribunal should assess its role in holding this Commission to account. At 92 Lord Justice Richards talks about:

> "… other statutory contexts in which it has been held that the concept of standard of proof is inapplicable or unhelpful."

Then he refers to Mr. Justice Mumby's judgment from which this was an appeal citing the now well known passages of the decisions of the House of Lords in the *Rehman* case and, in particular, the passage from the speech of Lord Hoffmann in which he says the question in the present case, and this is all to do with security risk, is not whether a given event happened but the extent of future risk. He said:

> "This depends upon an evaluation of the evidence of the appellant's conduct against a broad range of facts with which they may interact."

Then he talks about national security and then in the following sentence he said:

> "It is a question of evaluation and judgment, in which it is necessary to take into account not only the degree of probability of prejudice to national security but also the importance of the security interest at stake and the serious consequences of deportation for the deportee."

I read from that one is also looking at the statutory context and the purposes of the particular legislation in mind.

Then at p.116 at para. 99, Lord Justice Richards, giving the judgment of the court accepts that the concept of standard of proof is not particularly helpful. Then at 100 he says:

> "Analysis of this issue is not helped by the fact that 'proof' in the phrase 'standard of proof' and 'probabilities' … are words which go naturally with the concept of evidence relating to fact, but are less than perfect with evaluative assessments. That is why the courts have started to speak of the 'burden of persuasion'…."

- and so on. At para. 104 they differ from the conclusion of the learned Judge.

> "… the tribunal should apply the standard of proof on the balance of probabilities to all the issues it has to determine."

- and so on. In other words the decision maker, who has to carry the burden, he says, that something may be expected to happen, the decision maker would be completely outwith this jurisdiction to say "I am now in the area of evaluation of risk for which I am wholly unaccountable to anybody and I can decide what I like", which appears to be rather the way my learned friend, Mr. Sharpe, was suggesting we did it.

Finally on this point of judicial review, without going into issues of jurisprudence, it is well established that judicial review is a flexible concept. Judicial review has developed massively over the years in not only its extent but in nuancing various aspects of the grounds away from the classic test of Lord Diplock in the *GCHQ* case back in 1984, things have moved a long way in 25 years, but it is still flexible, it can be moved forward.

I am going to talk about the Tribunal' use of the expression "double proportionality". The first time I met it, I cannot say I trundled through **Wade & Forsyth** (last edition) to see whether double proportionality is now accepted as an orthodox ground of judicial review, but the applicant and the intervener rather latched on to this principle as having a particular relevance in circumstances of this kind. So far as I am concerned the Tribunal in *Tesco* applied what it called "orthodox JR", and it referred to the earlier cases, Mr. Justice Moses (as he then was) in the *Interbrew* case and so on – "orthodox JR". We are doing nothing here either in respect of the grounds of review or in respect of the principle of proportionality that is in any way a development so as to provide a more intensive approach to the standards that they expect from the Commission.

As a principle, so long as it is kept within appropriate bounds it makes good sense. My learned friend, Miss Davies, referred yesterday to the *Tetrapak* case, and indeed to *Unichem* and one can understand that in *Tetrapak* where one was dealing with a conglomerate merger where the theories of harm are still somewhat obscure and debated, it is important for an appellate Tribunal to make sure that the European Commission, as decision maker, has really thought through its processes so as to establish that it is more likely than not that the competition rules of the Treaty will be infringed, and there will be a significant impediment to effective competition – using the Treaty test as opposed to our test; there is no difference of substance.

We have to remember that here we are not dealing with a prognosis of what would happen when A merges with B, we are dealing with an existing situation which is working positively and substantially against the public interest; then the question is: what should be

the appropriate remedy? The more problems that exist in a market the more it has got itself wrapped up with these effectively small monopolies, the small PPI markets, then the more invasive the remedy has to be, and that is why this remedy has to have an impact. The double proportionality principle has to be treated with great care that it is not used as a "get out of jail" card put forward by those who wish to escape the consequences of their previous action, and say the Commission is looking for a solution; it is so speculative, so risky and so dangerous that it offends the principle of double proportionality. That deals with the second set of preliminary comments.

We now go from the preliminary comments to what I have been leading up to, which is the adverse effect on competition and the scale of the consumer detriment, and Ground 1A – unless there are any points that the Tribunal wish to put.

THE CHAIRMAN: We will raise points as and when we want to.

MR. SWIFT: Absolutely. Then may we go to the report at core bundle 2 ----

THE CHAIRMAN: Can I just raise one point with you. I think I have understood you to say that never mind double proportionality, you are not coming to challenge what is summarised in *Tesco* as the single proportionality test, i.e. the proportionality test, albeit that as you say the statute does not speak in terms of proportionality, but of "reasonableness" and "practicability".

MR. SWIFT: No, no.

THE CHAIRMAN: You accept that that can be fairly summarised as was summarised in *Tesco* as the proportionality test ----

MR. SWIFT: Yes.

THE CHAIRMAN: And imports the *Fedesa* principles.

MR. SWIFT: Yes, yes, and I am coming on to say I accept that. I am saying to you, Sir, as I would say to the President, "please have a little bit of care just how far one takes this principle of double proportionality."

THE CHAIRMAN: Yes, I am just going back one and looking single proportionality.

MR. SWIFT: Oh yes, we accept single, and double with reservations. May I take you to core bundle 2, which is the report, at para. 10.72, and I am diving in here to just one paragraph – in fact, I can read it out. This under the heading: "Conclusion on the need for a point-of-sale prohibition", the Commission concludes as follows: "We concluded …" and this is 10.72 so we are about 30-odd paragraphs coming up to this one:

> ".. that the point-of-sale advantage contributed significantly to the AEC that we had identified. Given the severity of the competition problems and the scale of the

> resultant consumer detriment, we concluded that it was necessary to introduce a remedies package that would lead to a new, more competitive market structure."

There it is in a nutshell – ".. that would lead to a new, more competitive market structure." I am now on Mr. Sharpe's Ground 1A, which is to do with effectiveness. The Tribunal held in *Tesco* that the effectiveness of the measure: "Is in our view a material consideration in its own right", agreed. The Tribunal also added - in case it is being suggested that I am giving a partial quotation - in that same sentence a reference to 'the likely timescale'. As I say, agreed. That is not in dispute. That was at para. 165, the concluding paragraph, of that part of the judgment.

Indeed, when the Tribunal considers what I call the domestic law and the expression used in the statute there, the reference to the adjectives 'comprehensible', 'reasonable', and 'practicable' are all connected to the solution to the adverse effect on competition and to any detrimental effects on customers. 'Solution' means something which is effective. That is the effectiveness test. That is at Section 134(6) of the Enterprise Act 2002. The expression 'effective' means that it achieves its objective. Here, the objective, or aim, is to take measures which would lead to a new, more competitive market for PPI, entirely in accordance with the principles of the White Paper referred to in the report at para. 10.66 and in Footnote 44. Now, the Tribunal has not been referred to this one before. On Day 4 we are privileged to be able to identify at least a couple of sections that my learned friends have not gone to. This is at p.198 of the report, p.206 of the bundle. It starts at 10.65. My recollection is - but I have not got the notation - that the word in brackets in the first lien of 10.65 has been redacted. If the Tribunal would read that. We are still in the risk section of the report. All the arguments put forward by the banks and the lenders that this POSP would have detrimental effects -- This is one on the restriction of the freedom of establishment. What the Commission says at 10.66 is worth reading.

> "Whilst we do not agree that any part of the remedies package would infringe the right of freedom of establishment, we note that: the aim of our remedies package, in accordance of the aims of the market investigation regime, is to ensure that where market features lead to consumer detriment ----"

Pausing there, that is the cause. That is the consequence. The features leading to consumer detriment.

> "-- these are addressed thereby safeguarding the overriding public interest in markets working well for consumers through the promotion of vigorous competition ----"

Then there is a reference to the footnote to the White Paper which preceded the Enterprise Act 2002. This is the commitment that the government gave:

> "The importance of competition in an increasingly innovative and globalised economy is clear. Vigorous competition between firms is the lifeblood of strong and effective markets. Competition helps consumers get a good deal. It encourages firms to innovate by reducing slack, putting downward pressure on costs and providing incentives for the efficient organisation of production. As such, competition is a central driver for productivity growth in the economy, and hence the UK's international competitiveness".

Nothing could be stated more clearly.

So the statutory test, which is the comprehensive solution, fits within the larger, if you like, parliamentary aim: This is what we are seeking to achieve - not just in one particular market, but across markets generally to the extent that they exhibit features substantially different from those that characterise effectively functional markets.

Moving back from 10.65 and 10.66, let me put the question rhetorically. Was the Commission interfering with a market structure and features that were working well? No. This market is not, and has not been, working well as an effectively functioning market.

May I now take the Tribunal to the report at paras. 5.135? This is p.124 of the report, p.132 of Core Bundle 2. Again, I am not going to refer at all to the earlier sections in Section 5 that I asked the Commission to look at last night. But, they build up to this paragraph at para. 135 under the heading 'The effects on consumers of the level of competition in the market'. They say,

> "Having found features that prevent, restrict or distort competition in the sale of PPI products, we considered what the effects on consumers would be. First, as we found that the distributors have high margins when selling PPI, we thought that consumers were paying prices higher than they would in a well-functioning market".

Paragraph 5.136, which has been referred to both by Mr. Sharpe and Miss Davies - but is worth looking at again,

> "We also thought that the high margins on PPI available to businesses gave them the incentive to maximise the uptake of PPI among their credit customers".

Mr. Sharpe said, "Perfectly normal".

"The effect of this would be higher levels of sales than might otherwise be the case and that the quality of sales would not always be the paramount consideration for businesses".

That is putting it very gently.

"We noted in this respect that the FSA has been active in trying to improve sales of PPI products and has taken action against twenty firms over poor PPI selling".

Then at 5.137(?), which I do not think was referred to by Mr. Sharpe,

"We noted that the high prices for PPI might have countervailing downwards pressure on sales, resulting in lower sales than might otherwise be the case, for two reasons. First, some people who would buy PPI do not do so because the high cost is prohibitive to them. Second, high prices, in combination with regulatory action against mis-selling, have resulted in adverse media coverage, which we would expect to discourage some customers from buying PPI".

That is the connection with the mis-selling point. It is not whether the mis-selling itself is something which this Competition Commission should be addressing rather than the FSA. It is the effect and perception of mis-selling. In the jargon, it is the reputational risk that attaches to this product. That is it.

Then, at 5.138 and 139 the Commission goes into what later comes to be the possible implications of the waterbed effect. At 5.142:.

"We recognise that there is an argument that overall this balances out and that if distributors do not make excessive profits when selling credit and PPI, we should not be concerned whether, within a market for credit and PPI, some customers received a better deal than others. We considered whether there was a relevant customer benefit ----~"

We have been through all that before. I need not go through that.

At 5.143, when the Commission move back from waterbed and credit to the PPI market, what they say here is pretty important.

"We also found that barriers to searching and switching limit consumer choice ----"

Then they refer back to those paragraphs.

"... and concluded that consumers had less choice of PPI policies than would be expected in a well-functioning market. Given that there is no clear evidence of PPI distributors or intermediaries seeking to win sales from each other by competing on non-price factors such as quality innovation or choice, we consider

it is unlikely that there is vigorous competition on non-price factors because these factors are particularly difficult for consumers to observe".

They refer back to 4.2. They say it is possible that there is less innovation than would be expected in a well-functioning market. Then we get to this critically important paragraph about the features which is at para. 5.144, which I will go back to shortly. Then they arrive at 5.145, at their statutory conclusion. They get the paragraph numbering wrong - it should be 5.143. But, nothing hangs on that. Then, "We conclude that the detrimental effects on consumers of these features [in other words, resulting from these features] are higher prices for less choice in PPI policies than would be expected in a well-functioning market".

That takes me back to one of my preliminary points. "We also concluded that the market for PPI was distorted".

I should add there - and I do not believe I am mis-stating Lloyds' position - that I believe it is accepted by Lloyds too that there is a distortion as between credit and PPI as currently sold. Then there is the conclusion of the possibility of less innovation. That is the critical section from that report. That is where we are.

So, we see at 5.144 that there is no rivalry on price or non-price competition as between distributors and intermediaries. Consumers who want to compare policies are hindered in doing so, that is (b), barriers to search, barriers to expansion, barriers to switching. In terms of (b), it is worth just reading through what the problem is, there is complexity in terms and conditions, the way information or PPI is presented to customers, the perception of taking PPI will increase their chances of getting credit, the bundling of PPI with credit, the limited scale of stand-alone provisions act as barriers to search for all types of PPI policies. Then time taken to obtain accurate price information. These are conclusions as to fact. These are straight issues on causation. Is this what is happening in the market today? Yes, it is. They act as barriers to expansion. Then there is switching. One cannot just say, "Oh, yes, we are not objecting to the AEC, we are simply looking at the remedies". This is the scale of the problem. It is not quantified here. When one looks at how that market is working the Commission concluded that that is not a well functioning market, otherwise they would not be taking steps to do what they are doing.

What is the opposite of a well functioning market? This is a rhetorical question. Dysfunctional might, even though Mr. Sharpe says he does not know what it means. I think his clients do.

There we are, there is the AEC. What did the Commission do – I want to use now the language of judicial review – to put itself into a position where it could conclude as follows,

and this goes straight to the conclusions, and they are at 10.509 to 10.514. This is the conclusion. We started at 5.136 and looked at 10.72, and we are now at 10.509 and the conclusions on effectiveness and proportionality. It has been opened by Mr. Sharpe on day one, but we are now on day four, and it is worth just reading the language that is being used here:

> "We decided that that package of remedies ... will provide a comprehensive, reasonable and practicable solution to the AEC ..."

they add "in a timely manner". "Each of the elements makes a significant contribution and the elements interact with each other".

10.510:

> "Because the remedies package will address the AEC in a timely manner, and in doing so will address the resultant consumer detriment, we do not propose to deal separately with the consumer detriment of higher prices arising from the AEC that we have found, and as a resu7lt do not intend to impose price caps."

Just pausing there, I am not sure whether it is even worth making the comment, but I should make it. When Mr. Sharpe on day two, I think it was, was saying that we had failed the *Tesco*, as he calls it, on timescale, he read out sections of our defence. He omitted the one paragraph that deals precisely with the point that the Commission found at 10.510. So there we are, I do not need to have to go back to it twice. It para.87, Miss Smith reminds me, of the defence.

PROFESSOR STONEMAN: Mr. Swift, can I ask you for a point of clarification. Yesterday Mr. Lasok pointed to the fact that in his view the report said that the real impact of the point of sale prohibition would be the increase and number of stand alone providers, and he gave us a definition of stand alone providers. In 10.153 you talk about stand alone market. Earlier in your discussion, your introduction, you talked about the way in which you expected the market to become more competitive through existing providers competing with one another more intensively. I do not think at the moment we are considering the existing providers are stand alone providers.

MR. SWIFT: We are, in 10.513, yes, we are.

PROFESSOR STONEMAN: If we could clarify what is meant here by stand alone provider. Does it just mean the provision of PPI without associated provision of credit?

MR. SWIFT: Yes, it does.

PROFESSOR STONEMAN: That is all it means.

MR. SWIFT: I am grateful, Professor Stoneman, because you see in 10.513, which shows I am not making this up myself, the Commission say:

> "... we concluded that our remedies will remove barriers to searching and switching and lead to a larger stand-alone market whilst still enabling distributors to offer combinations of credit and PPI and to compete on the terms of the combination as well as of its component parts."

PROFESSOR STONEMAN: Yes, it is just that when we go back to 5.144, which is where you have just taken us, each of parts (b), (c) and (d) say that they also, therefore, act as barriers to other PPI providers, in particular providers of stand alone ----

MR. SWIFT: Yes.

PROFESSOR STONEMAN: It is whether stand alone PPI is for those people who do not provide credit at all or whether it means those who will supply PPI to the people who receive credit from other providers. You see what I am getting at? Does Barclays become a stand alone PPI provider if it provides PPI for all its customers?

MR. SWIFT: It depends how it models that business. There is nothing to stop Barclays setting up a stand alone business model.

PROFESSOR STONEMAN: That would be considered as new entry into the market, would it?

MR. SWIFT: I think one would be concerned about whether there is some co-ordination between Barclays as stand alone and Barclays as a distributor in credit and PPI, but yes.

PROFESSOR STONEMAN: That is what it says ----

MR. SWIFT: Yes, there is in the report reference to, and it is probably highly redacted, steps taken by certain distributors to move into the stand alone market and that would be a business market. So for my purpose it does not matter whether it is an existing stand alone provider of the kind that gave evidence to the Commission or whether it is the development of a business model in stand alone mode by a distributor.

We are back to definitions. The definition of a stand alone provider is a company which provides stand alone PPI, but we have moved on from there. You can have a stand alone product even if you are not a stand alone provider.

PROFESSOR STONEMAN: I think that clarifies it.

MR. SWIFT: We were going through the conclusions. The Tribunal has the point. These are the conclusions in six paragraphs which we say, when the Tribunal comes to writing its report, they should look at them and say, yes, the Commission was fully entitled to arrive at those conclusions having regard to both its duties under the statute and its duties to comply with any principles of proportionality, but the question is: do we get that?

In the jurisprudence we have talked about the need to read a report as a whole rather than as a statute. When you look at the size of the PPI report, does it really have to be read as a whole, the entire document including every appendix and every footnote? It was not meant in that sense, but it is a discipline to avoid obviously selective use of passages in the report, and then bundle those passages together, and then come up with a conclusion which is different from that which the Commission intended. So it is just another discipline. We will come on to this specifically in relation to the Barclays' Ground 2, but it is a general discipline, because the report when read as a whole, and certainly when one reads the very important sections on the design of the POSP package, and the other packages, it is quite hard going and I say this personally, because of the care taken by the Commission to consider all the representations made by so many people covering so many different angles to try and get what I call "the right balance".

The AEC in the PPI market that we have just been looking at is quite different from what I would call a highly concentrated local market, which was the AEC in *Tesco*. There are lots of ways in which one can distinguish *Tesco* on the facts, but I am now dealing with Ground 1A, which is the effectiveness of the remedy, and the Tribunal will recall that *Tesco* put its case under two grounds, *Tesco*'s Ground 1 was that when the Commission referred to "costs" they just looked at compliance costs and they did not take into account adverse effects and the negative welfare effect. The adverse effect there was an absolute prohibition on any retailer that had a market share of more than 60 per cent in a defined local market, and the Commission held them to have 24 per cent of the market – an absolute prohibition against further investment in retail space. So no building, no employment. There it was, absolute prohibition, a clear effect on future investment, and they used the expression "unmet demand". A supermarket – it could be Tesco, it could be Waitrose, it could be Asda – even though its marketing told it that there was a business opportunity to put a retail site, or expand a retail site in a particular area, which would be profitable and meet demand, because otherwise it would be unprofitable, there as a block, and the Tribunal said "Well we did not take that into account", that is an adverse effect.

Then the Tribunal will recall the discussion in that Tribunal about "it was really a preventative measure". It was going to prevent greater concentration in particular areas. But of course, the AEC in that case was an existing concentration. It was a status, a structure of a market based on numbers and market share. It was not based on conduct; it was not based on all those matters we are looking at here. So not surprisingly the Tribunal held that the Commission had failed to meet the effectiveness test, and that was under what

was called "*Tesco* Ground 1". It could not establish that by prohibiting future investment that would have any effect on the existing *status quo* in concentrated markets. Obviously, where you do that is through divestment; you change the market shares, you change the concentration ratios by telling people to sell up. I do not want to get too far down the road in *Tesco*, but you can see once you are dealing with divestment you are dealing with serious property rights that are required lawfully, you are then concerned with otherwise what would be a practical solution and so on and so forth – reasonable and proportionate. That is not our case – the groceries case is not the PPI case.

So we are on this question of "effectiveness, and we summarise the Commission's case on the effectiveness of inclusion in the POSP, in the package, which is what we are talking about here, in paras. 10.72 to 10.79 of the report, core bundle 2, at p.201 of the report (209 of the bundle).

The Tribunal will recall about an hour ago – maybe less – I started off with 10.72 and this is how it then goes on at 10.73 – it was opened by Mr. Sharpe on day one but let us go through it again. 10.73:

> "We acknowledge that the POSP prohibition will represent a very significant change to current PPI sales practices and noted the strenuous opposition … We considered carefully the extent to which any of the arguments put to us regarding the alleged risks of the point-of-sale prohibition are well founded."

And that, the Tribunal will recall, was the earlier section, which included among other things the risk of infringement of freedom of establishment, but also the risks in respect of take up and choice.

> "… and accordingly whether we should revisit our provisional decision on this element … However, we concluded that this prohibition, taken together with the other elements of our remedies package was the only effective way to address key aspects of the AEC that we found."

There we have two conclusions. First, that the prohibition was being taken together with other elements of the remedies package; and secondly, it was the only effective way to address key aspects of the AEC that we found.

Then in 10.74 they deal with the risk that it would not eliminate the incumbency advantage. They say "yes, we agree this was the case". "… but considered that it was not necessary to eliminate all aspects of the incumbency advantage of distributors and intermediaries in order effectively to address that element of the AEC." That is para.10.74, again to which Mr. Sharpe referred.

So this is not abdicating a responsibility to find an effective remedy, this is saying: "We do need to eliminate all aspects of a POSP advantage in order effectively to address that element of the AEC, and I would say and thus to move towards compliance with our statutory duties.

Then again, we were told we could not be certain our remedy was sufficiently effective, however we concluded – this is the search remedy effectively –

> "…this would create significant incentives for consumers to search for the best value for money PPI policy, which we expect will stimulate competition."

That is a statement of an expectation, it is not an assertion and it is not an assertion based on no evidence, it is an evaluation on the totality of the evidence the Commission received. Then "open up the possibility to substantially greater sales to be made on a stand-alone basis." I would ask the Tribunal please do not let us pass this report and say does it suggest the possibility of something less than probability? This whole section is written in terms of what may be expected to happen applying an appropriate standard of proof.

They also deal at 10.76 with the reduction in consumer choice and the Tribunal will recall I drew your attention to para. 10.57 before, an extremely important paragraph on expectations as to what not just stand-alone providers will do, but distributors. Then, critically important at para. 10.79,

> "We considered alternatives to point of sale prohibition put to us and whether these would effectively address the AEC and resulting consumer detriment that we had found, and we concluded that these alternatives would not be effective in doing so".
>
> Those are the paragraphs. Then they decided therefore that a prohibition on selling PPI at the credit point of sale was a necessary part of the remedies package in order to achieve -- Then they applied the statutory test.

On Day 2 you may have noticed a certain restiveness on my part when Mr. Sharpe was suggesting it was common ground as between Barclays and the Commission that the point of sale prohibition was just doing something more to what was there already ... No. This is the classic statement of why the POSP is necessary and essential in order for packages ... That is Ground 1A.

(Short break)

MR. SWIFT: May it please the Tribunal, we had just got to the end of para. 10.79 of the report. I had really finished there, save to just identify in 10.77 a further point relevant to what we were considering before - that is the ability of distributors seeking to supply PPI on a stand-

alone basis. This is the point that Professor Stoneman was raising before. Sir, you have it firmly stated in para. 10.77. This is the Commission's recognition in 10.77 that there would be some disadvantage to distributors and intermediaries as they currently operate. This was a disadvantage, or a discriminatory disadvantage that was taken into account, but we could see no reason in principle why distributors could not also seek to supply PPI on a stand-alone basis, etc. The factual reference there to the stand-alone provision is in the report at 2.55. I am not proposing to take the Tribunal to it.

We have looked at the law. We have looked at what is said in the *Tesco* judgment - the effectiveness of the measure is, in the Tribunal's view, a material consideration in its own right. We know that this Tribunal is not a body that substitutes its judgment for that of the Commission, but considers processes and relevant considerations. I would have submitted that in looking at that report, and the sections that I have read, to use the language, the reasoning stacks up. There does not appear to be any obvious omissions. There does not appear to be - to use that expression - a series of assertions without evidence. In my submission it hangs together.

So, where is the failure? What have we done wrong - so wrong that this report is going to be quashed and sent back under Ground 1A? My primary submission - and I think I have made it before - is that those paragraphs, put together, meet the *Fedesa* no. 1 test - that is, that the inclusion of the POSP within the remedies package is an effective measure and will comprehensively, reasonably and practicably address the AEC, and because no other part of the package will do that, we are not in the position of looking at a less intrusive, but equally effective measure. That take me right through to *Fedesa* nos. 1, 2, and 3.

How can our conclusions on the effectiveness be quashed? The case against the Commission, as I understand it, and I have to say, as I understand it because I do have difficulty in understanding Mr. Sharpe's case on what he calls the total detriment of the *Tesco* error or the lack of the sub-stratum or the nightmare that counsel had, and so on, and so forth. The Commission made two errors, either of which is sufficient to cause the Tribunal to quash the report. The first is that the Commission fell into what he calls the Tesco error and did not consider the effectiveness of its remedies. The Tribunal will recall that Mr. Sharpe referred to this at the beginning of his opening on Day 1. I can put up for the Tribunal's assistance later on a note with all the copious references. But, let me just take two. One was on the transcript at Day 1, p.51, lines 15 and 16 -- I am not asking you to turn it up, Professor Stoneman. Mr. Sharpe said, "It is this exclusive reliance on total detriment that damns the Commission".

That was said with some force. Then, again, at p.31, in asking a question, "Where in the report - and this is not a rhetorical challenge - do we find a clearly articulated statement of the evidence underlying the assumptions as to the effectiveness of the remedies?"

My understanding of the way Mr. Sharpe put his case is that on the principle of over-simplify and exaggerate, all the Commission really did was to look at what he called the total detriment which Mr. Sharpe never raised above the figure of £200 million, despite what was said in 10.593, compare it with compliance costs, said that the total detriment figure ... the compliance costs -- that was all right. The Commission could do pretty well what they wanted without considering what the effects would be. That, as I understood it, was what he was saying - a fundamental error. There is a gap. You have just taken a figure of total detriment. You have not addressed the question of how -- You have not even addressed the question of effectiveness.

I reject that. The basic error in Mr. Sharpe's analysis on his first ground, in my submission, is that he is conflating and confusing the AEC, on the one hand, with the customer detriments that flow from it on the other. Now, it is quite clear, in my submission, that when the Commission was considering in s.10 what his remedies should be, and whether they would be effective, they were looking for a new set of rules that would directly and effectively remedy the AEC - not mitigate it (which is a power open to the Commission under the statute), but to provide as comprehensive a solution as is reasonable and practicable. I would say, in my submission, that that is the language of the full remedy to the AEC, or, as we have said in our defence, remove the AEC.

Now, on Day 2, Mr. Chairman, there was a series of questions about the meaning of, "Was it fully effective?" and Professor Stoneman raised the question of, "If it is 50 percent effective, that is all right, but if it is 100 percent ... high risk. Is that okay?" Let us just talk about that. In my submission, 'fully effective' means what it says - the remedy that we are putting here is fully effective in remedying the AEC. To take, for example, para. 10.47, the point raised by Mr. Sharpe when he was considering whether we really were eliminating the point of sale advantage, there in 10.41, and repeated in the paragraph I have just referred to -- So long as what you are arriving at is a package that will produce an effective measure, that is sufficient. Just because the POSA has been identified as a feature of the market that contributes to AEC, it does not mean, somehow, that you have got to eliminate that. That would be a very strange and irrational thing to do. So long as you are dealing with an aspect - the critical aspect - of the POS which contributes to the AEC, then that is what you should be doing. Beyond that, you are getting into areas of disproportionality. For example, if the

Commission had decided that the FSA was pushing this way and that, in effect, this would be giving too much lee-way to the incumbent, relying on them to market too much at the point of sale -- That could be to protect ... advantage. The Commission said, "No, we do not believe that that will happen. That is the exercise of our judgment. We believe that that as part of the balancing exercise will produce the effective result". That is entirely in line with the submissions I have been making. A balanced effectiveness. Getting the balance right. It is an interesting question on the 50 percent. If it is only 50 percent effectively hypothetically I would say that a Commission could conclude lawfully that if it provided a solution that was as comprehensive as was reasonable and practicable, but it could only remedy 50 percent, that would be a lawful thing to do. That would be remedying because you would be bringing in the concept of reasonableness and practicality.

On your second question, when Mr. Sharpe said there was a high risk involved but you could get 100 percent certainty -- If officials were to say to me, and I am a regulator, "We could do it, but there is a high risk you will not succeed", I would say, "Go back and come back with reasonable expectations and likelihood" because I would be concerned about going for 100 percent result if there was an expectation that if part of that result failed, I would be producing something far worse. I think that is the way I would be looking at it. But, it is an interesting series of questions.

THE CHAIRMAN: The trouble I have - and I think your submissions demonstrates it - is that the word 'effective', as used in the report, does not convey any absolute conclusion about how effective. It is essentially a relative term because you can use the phrase 'fully effective'. You can use the words 'as effective as is reasonable and practicable'. Or, you can just use the word 'effective'. The fact that you can preface it with 'fully' or follow it with 'as is reasonable and practicable' demonstrates that if you simply use the word 'effective' you are not saying anything about how effective. It might e 52 percent.

MR. SWIFT: I would submit that, here, the case is that by 'effective' it does mean that we are meeting the statutory -- it is a comprehensive solution as is reasonable and practicable. Then it is going to be a question of judgment in each case. I do not think we are concerned with things here that are partially effective or fully effective.

THE CHAIRMAN: The complaint in Ground 1, as I understand it, is not the devising of a 75 percent effective remedy being a breach of the statutory duty, but that the measurement of the benefit of a remedy by reference to an assumption that it is 100 percent effective cures the AEC and all the detriment that derives from the AEC is only defensible if there is a sufficiently clearly indication of a properly based judgment that the remedy would be fully

effective for that purpose - accepting everything you say about the purpose being the curing of the AEC, which might not involve the removal of the whole of a positional advantage, a POS advantage.

MR. SWIFT: I would say that what is meant by the Commission - if, as you say, it is not fully effective -- The test ----

THE CHAIRMAN: ... (overspeaking) ... one place and in a rather negative way.

MR. SWIFT: The test must be as to whether the aim can be achieved. This is the aim that goes above that of the comprehensive solution. The aim must be, as the Commission identified, to introduce *ex ante* rules that will bring about a new and more effective market structure. That, it appears to me, is the aim that was driving this package the whole time. That is where the judgment comes in. If we move from an AEC and resulting consumer detriment to a new and more effective market structure, then it is complying with the statutory duty, recognising that there are going to be risks along the way. I am not sure I can put it more clearly. I would have submitted that this is not, as Mr. Sharpe put it, the fundamental Tesco-type failure. This is directed at a primary issue of whether the test would be effective in the remedying of the AEC. That is it.. That is what we found. The subsidiary question is, "How effective?"

THE CHAIRMAN: On my understanding of Ground 1 this attacks the Commission's analysis, if you like, of the subsidiary question - not the primary question.

MR. SWIFT: As I understand it, Ground 1A attacks the Commission's decision in two ways ----

THE CHAIRMAN: I am leaving aside Ground 4, of course, for this purpose.

MR. SWIFT: Yes. I am leaving aside Ground 4 too for this purpose. I believe Mr. Sharpe referred you to his two prongs. The first is what he calls his fundamental error where we just did not take into account what the Tribunal was mandating in the *Tesco* case; as we are looking simply at the totality of the detriment, we are considering the effectiveness I say that is just unsustainable on the facts of this case.

We were also concluding, in para. 10.593 that while it was not possible to take into account, to evaluate the full dynamic consequences of the remedies, nevertheless we were satisfied that they far outweighed any detriment. We may come back to that, but it really is a question of how far the Tribunal can ask the Commission to go. We know there is a proportionality exercise and we know it is a primary domestic statutory duty, which is to devise a remedies package which will achieve a comprehensive solution to the AEC. There is a question of value and that is either capable of achievement or not. It seems to me it is partly law, partly fact. It is a question which the members of the Panel must ask themselves

the whole time: are we producing something which is providing a comprehensive solution to the EC? If we are not, we fail.

The second prong, as I understand it, is that if we did attempt to comply with, as it were, the Ground 1/Ground 2 test, which goes to the effectiveness principle, and we failed to do it because we should have been aiming for some kind of perfect solution or a perfect market, and that is where Mr. Sharpe was referring to para. 10.41 and so that by permitting some part of the POSA to remain, you are admitting in a sense you cannot remedy the whole of the AEC. We say "No", that is a misunderstanding. All we need to do is to provide a package that will effectively remedy the AEC, and if we remove such of those features of the AEC as we regard as essential, and we have provided the means by which the new and fully effective market can develop. That seemed to me to be the nub of Mr. Sharpe's argument under paras. 10.41 and 10.43 of the report, and that was the section referring to the risks of a failure of full implementation and that is why the language of 10.41 and 10.43 has to be considered with considerable care because the critical issue is not the elimination of the entire point-of-sale advantage, it is whether the inclusion of POSP enables that package to be effective.

There is a separate ground under Ground 1A, one that has been a consistent theme ----

THE CHAIRMAN: Can I just test your submission this way? Would you be disposed to accept that when looking at the benefits side of the benefit and burden analysis inherent in the proportionality test, and if you start with the elimination of the consumer detriment as the benefit you are trying to achieve, you can only identify the benefit of your remedy package either by an assumption that it will fully remedy the AEC or by applying some discount from the full consumer detriment, referable to your perception as a matter of judgment of course, that the remedy package will less than fully remedy the AEC and, if so, looking at this particular report, is there any other answer to this complaint than a conclusion – reading the report as a whole – that the Commission did in fact think that their remedy package would fully remedy the AEC?

MR. SWIFT: I believe the inference is that the Commission did believe that their package would fully remedy the AEC and, as a result, by fully remedying the AEC it would then remove the cause of the resulting consumer detriments which are found in the form of higher prices and reduced choice and if it failed to do that it would not be a fully effective remedy.

THE CHAIRMAN: Yes, thank you.

MR. SWIFT: Just going back to the point about the construction of the statute, there is a clear distinction drawn between the AEC on the one hand and the detriments to consumers on the

other; the one is the cause of the other. When one is referring to the total detriment that consumers are suffering in markets of this kind, it can sensibly only be evaluated through some form of a counterfactual assessment, and that is what are they being denied that a fully effective market would deliver to them, and this is where the competitive process comes in and this is where what is in grave danger of any Commission trying to quantify what the total result of the changes are going to be because, and I am always treading on dangerous ground when I refer to Professor Hayeck, he came out with one of these memorable expressions about competition being a "discovery mechanism". You introduce competition, you allow people to respond to breaking down barriers to entry, allowing people to innovate and the whole process of competitive rivalry is the consumers get the benefit. You often do not now what they are going to get because that depends on how suppliers respond to their demand. That is what we mean by total detriment. That is in a sense a 'deprival' point – you would have been deprived of what a fully effective market can deliver. This is the fallacy of trying to capture a total detriment and put a figure of £200 million and £440 million on it; or even the total excess profitability of the lenders in 2006, which is £1.4 billion, those are the higher prices, but that is the exploitation. What the package is doing is stripping out those elements of the AEC that enable those customer detriments to be realised. If it does that then at the very least it meets the first of the *Fedesa* tests.

On ground 1A, and this is very much related to the point I have just made, going back to the failure, what is it the Commission should have done in the way that it analysed this market and came to these conclusions? Mr. Sharpe is saying that the Commission could have and should have quantified what the new rules would produce, and unless and until they could quantify what the expected benefits would be it would not be able to carry through the proportionality test, because if one sum is substantially greater than another sum then you have a positive consumer benefit, if not – not, as I understand it.

He said in the transcript on day 1, for your note, p.25, that a good faith attempt to qualify magnitude is what is required here – absolutely clear. In answer to a question that you, Sir, put to Miss Davies yesterday, what is it that they should have done, and Miss Davies again responded in terms of quantification, sensitivity analysis, range of values, and so on and so forth. It is common ground, see para.10.493, much quoted, the Commission said it is not possible to evaluate these dynamic benefits.

Could we just have a look at 10.493, which is core bundle 2, p.297 of the report and p.305 of the bundle. We are now in failure territory, alleged failure territory. The Commission start with a firm sentence:

> "It is not possible to evaluate the full extent of the consumer detriment that we aim to address through our remedies package. First, there is a large category of 'dynamic' benefits to consumers that we would expect to arise from increased competition in the provision of PPI."

which is really what I have been talking about.

> "Such benefits would arise, for example, from arresting any decline in the size of the PPI sector that results from the current lack of competition (for example, negative publicity associated with high prices)."

So here we have an adverse effect of what is happening. One of the features of the market is causing what I call a reputational risk and a decline in the size of the PPI sector.

Mr. Sharpe referred to the decline in the PPI sector, and saying this was a matter should have taken account of. It was pointed out to him, I have to say by Professor Stoneman, that if one looked at the footnotes to para.2.25 one could see that one of the causes for the decline was nothing at all to do with macro economic conditions, it was to do with what I would call reputational risk. How do you begin to quantify how a competitive market produces an end to reputational risk and quantify that element of lost sales that is attributable to reputational risk. That is not the only one.

> "Indeed, we would expect greater competition to bring about increased advertising ..."

Mr. Sharpe was saying, "I do not want precise arithmetic on advertising, but a ball park figure". It depends upon how the suppliers in this new market are going to market and advertise their products. This may turn out to be a high advertising to sales ratio if one is developing a new market, it may be low, it may differ as between different products:

> "... and far more interest in (and awareness of) the sector, such that the demand for PPI should increase, once it is sold at competitive prices."

How do you quantify that?

> "A further example of the benefits ... is from selection pressure."

How is that going to be quantified? Then they conclude:

> "Given the considerable size of the PPI sector even at the current high prices, we would expect these dynamic benefits of competition to be on a very large scale, but we have not been able to put a value upon them."

Absent some glaring error, as I understand it, it is not suggested that that conclusion in 10.493 it outwith the scope of the margin of appreciation allowed to the Commission under the judicial review rules as most recently articulated in the *Tesco* case. Indeed, when the Tribunal wrote that para.139 it followed fairly closely – and I am just making the point for the record – arguments made by Tesco's counsel that in that case the Commission's failure to quantify what it expected to achieve amounted to a council of despair and referred to several publications issued by Her Majesty's Treasury on cost benefit analysis, and the Tribunal clearly enunciated the principle that methodology is a matter for this Commission, the margin of appreciation. I would have submitted, just looking at that simple paragraph on its own, the Commission was fully within its jurisdiction and its rights to decline to engage in a quantification exercise at a time of such significant changes in the post-intervention market. It is precisely the relationship between the impact of the new rules on the market that quantification was, in the judgment of the Commission, not possible.

As I said, my submission is that there is nothing in the case law either of this Tribunal or of other appellate bodies to mandate upon a decision making body of this kind a duty to evaluate not only by qualitative criteria but also quantitative criteria the changes that they impose on a market.

Then when one goes back to the aspects of the AEC that we identified in para.5.144, the barriers to search, the barriers to entry, the barriers to expansion, barriers to switching, all these are intended to effect dynamic changes in the market, affecting the number of suppliers, the products they supply, the relative success and indeed their own results. As I have said, in my submission, the Commission was well within its margin of appreciation in not seeking to engage in any such exercise but to satisfy itself on the ordinary basis of judgment that what it was introducing would be expected to produce those results.

There is a more general point before I leave Ground 1A and that is whether the Commission might have used different language in the PPI report had it had the Tribunal's decision in *Tesco* before it. That is one thing. The issue here is not language or form, it is substance.

On the substance - and this applies as much to Ground 2 as it does to Ground 1 of the Barclays challenge - my submission is that the Commission did everything that was reasonable to 'put themselves into a position' to make the determination that they did, and that they did not need, and should not have gone further, and done the quantification of the kind which my learned friends say is not just a failure, but such a material failure as to quash the report on that ground alone. It is going a long way, and going much further than is, in my view, appropriate.

Sir, I do not want to go into floodgates arguments, but the quantification, if we are talking about modelling the future -- We know it is imprecise. Modelling the future when you are dealing with the effect of new rules on the interaction of behaviour of different suppliers in a post-intervention market would be, in my respectful submission, a source of such huge uncertainty as to cast very considerable doubt on whatever figures arrived as a result of it. It would depend entirely upon assumptions which, in modelling, would probably turn out to be false. However, I do not need to go that far. My position is that what the Commission said in 10.493 was entirely within their margin of appreciation and made sense having regard to the detail in which they carried out their qualitative assessment.

Let me deal briefly with Ground 1B and then I can move to Ground 2.

The Tribunal will recall that Ground 1B is the argument that what the Commission should have done is to have identified each part of the package separately and looked at an incremental benefit and an incremental cost associated with that part of the package, and made that evaluation, and, in the case of POSP, carried out its own separate incremental analysis, incremental benefit, and incremental cost as if one is adding bits and bits together. Of course, when one is considering a package of remedies, as the Commission was in this case, one is looking for synergy; one is looking for the extent to which different parts of the remedies package maybe solve one aspect of the AEC, or combine with each to solve other aspects of the AEC. This is why we say that conceptually what Mr. Sharpe is suggesting really does not make sense because you are looking at the effectiveness of the POSP - not as a sole unit -- it is not addressing a discrete aspect; it is combining with other aspects of the remedies package to remove the AEC. That was the simple point they were making. It is really a very short point. Of course, the inclusion of the POSP has to be justified in terms of its effectiveness. That is why I read out the whole of paras. 10.72 to 10.79. That is quite different from the exercise which Mr. Sharpe suggested should have been carried out. I understand that on this Ground 1B he is suggesting that this is a failure or a Tesco-type failure which is sufficient on its own to quash the report. In my respectful submission there is just no substance in Ground 1B at all. It rests on, in a sense, the false assumption, as you have identified, Sir, in your questions to Mr. Sharpe, that somehow we were adding something more to a package that was, in a sense, already effective and that we were therefore under a duty, on the grounds of proportionality, to determine whether that extra we were adding was justified in terms of benefit and cost. That was not the analysis that was carried out as suggested by Mr. Sharpe.

Finally on Ground 1, timescale. Barclays clearly believes it is on a winner - perhaps a knock-out winner - on timescale. It has devoted no less than thirteen paragraphs of the skeleton to it. It treats with something amounting to scorn the Commission's failure to name a timescale for the emergence of a new, more competitive market structure, and say when would they get the benefits of a 60 percent reduction in PPI prices. Moreover, he does not shrink from accusing counsel represented here today from improving the report in various sections in the recognition that we had - what he calls a *Tesco* failure on our hands, and we had to escape from it.

> Let us look at timescale. First, the reference in the defence to para. 87, which I referred to before. It is precisely because we thought these remedies would be timely is one of the reasons why they referred to price caps. That was a consideration taken into account by the Commission entirely in accordance with its guidelines.

These are timely. It is said against me that all you are doing is introducing rules. Plainly the rules are going to have an immediate effect, but that is all you are doing. The suggestion appears to be that the rules are in place, but, as Miss Davies said yesterday, "What is the evidence the consumer is going to search?" What is the evidence the stand-alone providers are going to come up with? What is the evidence of advertising? What is the evidence that adverse selection is going to go on?

In my submission those rules, when they come in, are intended to have an impact. As I said in my opening comments, once the rules are introduced we are in a post-intervention market. Those rules present opportunities and incentives by reason of the simultaneous imposition of obligations, both positive and negative. There is nothing surprising or unreasonable about that. This is a substantial market in which there will continue to be a demand for new products. The new rules enable existing distributors, existing stand-alone providers, and new entrants, now that the barriers to entry, barriers to search, and barriers to switching have gone, to introduce their new products and compete. That is expected to have a timely effect entirely within the principles adopted by the Commission in its guidelines as endorsed by the Tribunal in the *Tesco* case. One reason why the Tribunal added the reference to timescale in respect of the development of its principles is that plainly when you are dealing with a preventative measure - which was the preventative measure which was the competition test in *Tesco*. You are relying for its effectiveness on retailers other than the incumbent to introduce their investments into the market place, which will involve capital spend, planning permission, and so on and so forth. Then there is

an expectation that so long as the incumbent provider is not allowed to do anything, is not allowed to invest, then surely there must be some expectation that the unmet demand will be met by others within an appropriate timescale, otherwise you have a persistence of an adverse effect. This case is quite different from that case. It really is as simple as that. It is a short point.

PROFESSOR STONEMAN: Mr. Swift, could I take you back to 10.493, which is the issue about the dynamic benefits, and then 10.494 which is the static benefits. I believe your argument was that the dynamic benefits cannot be quantified. The static benefits could be quantified but the dynamic benefits could not. Is that a fair paraphrase?

MR. SWIFT: The static detriments can ordinarily be quantified in stand alone markets simply by reference to the excess profitability earned – for example, in resale PPI it would be much more of a scale. I believe that the same is true of extended warranties, they are simply looked at, the total market. The complication here of course is that we have water bed effect. But, yes, it would be a discipline on the Commission to arrive at a figure for the static. Of course, that is based on, if I can just continue, this: the starting point for the static detriment is of course the figure for excess profitability which has been achieved under the status quo and that is the £1.4 billion.

PROFESSOR STONEMAN: In fact, the Commission has undertaken that exercise and given us some numbers.

In terms of the dynamic benefits would it not be possible to use that framework to say, for example, what the consumer gain from an induced increase in demand for PPI of, say, 10 per cent would be? I am not saying that the actual increase would be 10 per cent, but you would be able to draw out from the static model what would be the consumer benefit from certain changes in demand resulting in the longer term from the dynamic benefit. You would be able to put a number on the dynamic benefits to compare with the number that we have for the static detriment.

MR. SWIFT: Those behind me will correct me no doubt in the short adjournment, but I have every confidence that those behind me, both members of the Commission and their economist staff, could model almost everything if they wished to on the basis of any number of assumptions using the tools that are available to the economic situation today, and we are back again to what are the assumptions that in an exercise of this kind, which is judgmental, and these are decisions that are really affecting the future of a market. Yes, the answer is, I could not say that something could not be modelled. I am just saying, it is the

judgment of the Commission on the facts of this case that it was not possible to do so sensibly.

PROFESSOR STONEMAN: I think your statement was that it was not possible to sensibly model the total impact of all these changes, but it is sensible to be able to model what would be the impact on consumer benefit of a particular change, should it be induced.

MR. SWIFT: I am on pretty shaky ground, Professor Stoneman, I am not a modeller. I would be very hesitant before I could predict what those behind me would be capable of achieving, but I will certainly get instructions to address you on that point.

PROFESSOR STONEMAN: Thank you.

MR. SWIFT: Ground 2: Barclays Ground 2 is the *Tesco* Ground 1, and that is another *Tesco* failure, and that is the failure to take account of the likely adverse effects of the remedies package, in particular and maybe exclusively attributable to the inclusion of the POSP.

May I start with some general observations before we go to consider that much thumbed paragraph, para.10.50. It is a point, Sir, that you raised when Mr. Sharpe was taking you through that section of the report of taking into account relevant customer benefits. We know that the only relevant customer benefit that was taken into account by the Commission was the lower credit prices as a result of a water bed effect particularly in relation to personal loan PPI. Before that there were other matters that had been put forward by the main parties as also having a relevant economic benefit. One, of course, was related to the advantages of the point of sale.

When I said that the Commission did not follow necessarily the form of the *Tesco* approach, which is look at adverse effects, look at benefits, compare one with the other, what the Commission was doing in section 10 before it arrived at the need for the inclusion of the POSP was a balancing exercise. It was not putting certain things into an adverse effects column that would lead to a positive. When it was looking, for example, at reduced take up rates it was considering what the effect of the POSP would be on that aspect. When it was looking at the allegation of a reduced consumer choice it was looking at it that way. It was, in a sense, managing a balancing process throughout the whole of section 10. It was not identifying something and saying, "That is a possible adverse effect, let us put it on one side and look at it later", it is a continuous process. So when we get to, for example, relevant customer benefits and we are looking at the position of the buyers of credit alone, the Commission take that into account in its static study of welfare analysis almost as if it was an adverse effect. It is very hard to think of the benefit of lower credit prices as an adverse

effect of what is happening in the PPI market when there are so many barriers to entry, barriers to expansion and other problems. This is the way the Commission approached it. The principal argument from the applicant and the intervener is that the Commission failed to take any, or any proper, account of the loss of convenience to the POSP, and they have placed a lot of weight on the construction of para.10.50 of the report, which is at bundle 2, p.194 of the report, p.202 of the bundle. This paragraph has been referred to many times, it comes under the little section headed: "Reduced take up of PPI" and the spotlight has been put on the second sentence:

> "By increasing competition and thereby reducing price we expect our remedies package to lead to an increase in PPI sales which will partially or fully offset a decline from a reduction in convenience."

There are two arguments being made here. First, that the evaluation that we carried out and is summarised at 10.50 and 10.51 is contrary to the evidence – all the behavioural research that has been carried out, experiments, some it seems forensic, carried out at different times, and the Commission concluded that the potential reduction has been overestimated by some parties. The first question is whether that is an evaluation that the Commission was entitled to come to on the basis of the evidence. In my submission, it clearly was; that was a judgment that it made, it gave the reasons for it.

When one looks at 10.50 the Tribunal should bear in mind what is also in para. 10.57, which I read out before, and that is the Commission's conclusion, it is a matter of judgment, that there will be no reduction in consumer choice – the paragraph we spent some time in discussing, i.e. the view that in post-intervention markets there would be entry and expansion by stand-alone providers and others. Also, looking ahead to 10.493 of the report it is quite clear the Commission considered in its judgment evaluating the likely consequences that there would be a substantial increase in sales arising from the introduction of the package, so we have to put 10.50 into its context.

What is being partially or fully offset here? Without treating this report as a statute, or even less a will or a trust, it is the decline from a reduction in convenience which would be partially or fully offset. This is what is being addressed here, otherwise what is said in 10.50 is completely inconsistent with the main thrust of the Commission's judgment that the AEC is producing detriments of higher prices and reduced choice, and the removal of the AEC will produce lower prices and higher sales. So when considering what inferences are to be drawn from that sentence that refers to partially or fully offset, on which a huge weight has been placed by my learned friends, let us put it into the context.

So under the post-intervention rules, as I call them, you cannot consider the reduction in convenience, which is essentially the seven day period if you wish to contract with that distributor, subject to a consumer initiated 24 hour aspect, that has to be considered against all the other elements of the package of remedies that go to stimulate consumer search.

I take Professor Stoneman's point yesterday: could they not go into Lloyds one day, get their credit, walk 'round the corner and go to Barclays? "They would have fill in a separate form", the answer is.

THE CHAIRMAN: I think the answer was that you would have to have a separate interview.

MR. SWIFT: A separate interview, well ----

THE CHAIRMAN: The form may be as long as the interview!

MR. SWIFT: I think the discussion then went on to the fact, okay, there are costs involved, there are always costs involved in switching, but that is the point.

MR. SHARPE: I hesitate to rise at this stage even on that point, but I think my friend might be taking you to the draft order, which is in contemplation if our proceedings are unsuccessful, from which it will be clear that it would be impossible, or at the very least very difficult for a customer who had taken out a loan at Lloyds to go 'round the corner to Barclays, especially if that customer had had any dealings with Barclays in the previous six months, including having a credit card or an overdraft or any other lending connection; it is not quite as simple as my friend is pointing out and I am sure he will wish to correct the simplification in due course.

MR. SWIFT: Judging by the vigorous shaking of heads behind me they do not agree with Mr. Sharpe, so we will have to return to it after the adjournment. So thank you for that contribution.

In other words, it is not just the decrease in price, one has to look at things in the round when one is dealing with a reduction in convenience, that makes obvious sense. My point is it is all made – this is para. 10.51 – by the design of the package to reduce risk of a substantial fall in take-up. Miss Davies acknowledged this but said there is nothing else in the report, it is not true, paragraph 10.493.

So 10.50 has to be placed within its appropriate context, and when I heard Miss Davies saying "partial", partial could be anything from 1 to 99, so where on the spectrum does it lie?

I am not putting a gloss on "partial" whether it is said to be partial or total, partial or total in respect of a decline in the reduction in convenience, and I would then add "comma, having regard to all the other factors in the remedies' package would tend to offset this reduction in

convenience and open up opportunities for choice. That is my point on that; it is a simple point. It becomes complicated when the exercise gets into quantification, because then this is when we get the graph makers coming in, and Mr. Colley comes in.

You recall on day 2 or day 3, the diagrams were presented, diagram A and diagram B, and there was this very erudite exchange as between Professor Stoneman and Miss Davies on the shifting of the demand curve. This came from Mr. Colley. When we looked at Mr. Colley's first expert report, para. 4.6, but I can be corrected, Mr. Colley is taking as part of his model, he is assuming under scenario 1, scenario 2, scenario 3 a very significant reduction in sales, and he is moving – he has taken a 30 per cent drop, a 30 per cent contraction in demand. You can draw as many inferences as you like from the values to be attached to the blue and the values to be attached to the pink, but if the movement inward of that demand curve is not plausible, then these graphs have no relevance whatsoever and that is the Commission's main submission, that it is wholly irrelevant to put forward figures and seek a quantification when the assumption you have made is wholly different from that which the Commission made, or which could be reasonably inferred from a proper reading of the report. Obviously there may be points in detail, but that is the critical issue. That graph is not plausible, not based on plausible assumption.

Sir, is it convenient to rise?

THE CHAIRMAN: Yes.

MR. SWIFT: What I would like to do in response to Miss Davies's speaking note in relation to the modelling is to put forward a note which the Commission has prepared in response because, as you will recall, that note finishes with the flourish that the calculations are so rotten that the entire report should be quashed and thrown back on that basis, so it is quite important that we do have a right to reply.

THE CHAIRMAN: Yes, 2 o'clock.

(Adjourned for a short time)

MR. SWIFT: Before the adjournment I was using the adjective 'implausible' about the position on the shift to the left. I thought, "How much more can I say about this?" Not much more. The Commission's position is that it would have been wholly irrelevant to have done any such exercise. It would not have responded to its view about what would happen in the market place. I am not sure I want to get into the technicalities of this. For example, if you are going to do a shift to the left on the grounds of the balance of convenience and assume loss of sales, or should you move the line to the right to take account of the sales that should not have been made because of low quality or mis-selling, or what-have-you -- I am not

quite sure where this pendulum finishes. So, as I have been saying, there is a basic premise and that demand curve should not, by the Commission, have been shifted as far to the left as it has been. But, the scenarios in Mr. Colley's evidence are not only wholly contrary to what the Commission assumed, but there has been no material failure by the Commission in carrying out some form of alternative modelling to take into account what it never thought was plausible. I do not think I can say much more on that particular issue. We have dealt with it in the qualitative terms and the lack of quantitative terms.

I am not sure whether - from Miss Davies' submissions yesterday - there is now a separate point being made that in some way we have failed to allow properly for an adverse effect in respect of the consumers of credit. So far as I know it has never been part of Barclays' case. Indeed, moving on to Ground 3, there was never any challenge made to the Commission's conclusions that having done the modelling exercise for the purpose of determining whether there were relevant consumer benefits for the credit customers, and whether they outweighed the benefits for the PPI customers, the Commission came down very firmly on the side that it did not need to adjust these remedies for that purpose. That is stated very clearly in the report at 10.491. If the members of the Tribunal could turn up Core Bundle 2, at p.297 of the report, p.305 of the bundle -- After reviewing what it did, it concluded at para. 10.491,

> "The results of our analysis led us to conclude, first, that for MPPI and SMPPI, we should not modify our remedies to maintain the relevant customer benefit of lower credit prices or cut-off scores as any effective intervention would have an overall positive effect (and, as noted in para. 10.458, for MPPI at least the scale of the relevant customer benefit is very small). We inferred from our results that we should reach the same conclusion for CCPPI. For PLPPI, we noted that under some circumstances (where a number of fairly extreme assumptions combine) ----

Then there is the footnote which sets out what those assumptions are:

> "-- intervention might not be welfare enhancing. However, in our judgment the circumstances giving rise to a negative net consumer detriment are very unlikely to occur, and we were confident that our remedies would increase both search and the extent to which distributors and intermediaries actively seek to win consumers using price as a competitive variable.
>
> We therefore concluded that, because we expected that the benefits of intervention would outweigh the relevant customer benefit of lower credit prices, we should

not modify our remedies to preserve the relevant customer benefit of lower credit prices or cut-off scores."

That conclusion, so far as I am aware, has never been said to be outwith the reasonable judgment of the Commission to find.

That leads one on to Ground 3. The Commission may be puzzled as to why, if no challenge was made to that conclusion in 10.492, and the same model is being used, and then quantified the result in terms of a net consumer detriment of £200 million on a 100 percent pass-through that rises to £440 million on an 80 percent pass-through, why there is some inherent defect in the methodology in the latter case that does not apply in the former case. At the moment I am puzzled to know what is alleged. I know that what is being alleged is that the static consumer analysis, the detriment analysis based on the premises at 10.9 and 7.11 was faulty because it modelled purely hypothetical cases rather than assessing the actual benefits arising from an actual package of remedies. So, it cannot be seen as an accurate or adequate reflection of the reality. We know that. That, as far as I am concerned, is no different from the allegation that we failed to quantify the benefits of the remedies package. We dealt with that one.

The second argument under Ground 3 is that the model is defective because it should have taken account of the loss of sales. We have dealt with that. That is the implausible shifting of the demand curve to the left.

So, what is left of the criticisms of the modelling in Ground 3 where the alleged failure is so great as to cause the decision to be quashed, or whether the failures are so material that the Commission might reasonably have been expected to arrive at wholly different conclusions on issues of remedies, effectiveness and proportionality.

A number of those raised in Barclays Ground 3 are essentially relying on Professor Yarrow. The model took no account of costs. The model assumed that remedies would be fully effective and would reduce profits to zero. The modelling was based on outdated information. The model used the wrong elasticity of demand. All those have been very fully ventilated in our defence and in our skeleton argument in which we have dealt at length in Core Bundle 3 at pp.138 to 151. Sir, we are now at Day 4. These things have been ventilated. My submission is that looking at the defence, looking at the skeleton arguments, looking at Mr. Yarrow's evidence, there is no error. There are differences in approach to methodology, as there will be in any aspect of modelling. But, there is no convincing argument that in any of those areas we have stepped outside the margin of appreciation in arriving at sums which not only look reasonable, bearing in mind they are derived from an

initial excess profitability for PPI of £1.4 billion, which is the starting point, and using modelling, that we have put forward a £200 figure (one-sixth of the total), and that is why we have said throughout that these are based on very conservative assumptions. It just shows how switching the assumptions to pass-through - and it is by no means clear that the Commission should, on the facts, have assumed a 100 percent pass-through. The Tribunal will recall when we were dealing with the section at 5.136 there is an analysis of considerations that may be relevant to waterbed, although the evidence is mixed, some people say there is subsidisation, some people say there is not. So going for an 80 per cent alternative that brings you to a net consumer detriment of £444 million would not appear to us again to be outwith the margin of appreciation, and simply illustrates the artificiality of Mr. Sharpe's insisting that total detriment is no more than £200 million when he has a figure of £440 million in the same line, when there is no question that that could equally well have been arrived at and then there are all the other aspects that are missing.

So unless the Tribunal have any particular questions to put to me, I would just say please read what we have said in our skeleton in respect of each of those issues and I am happy to put that forward as our case.

There is one additional point I wish to make, and that is the fifth issue raised by Professor Yarrow, and it relates to the elasticity of demand. That is raised in our skeleton at p.150 at para. 86 and it is the issue of the cross-price effects, by reference to the Commission's reasoning. This is the adjustment that Professor Yarrow made, and at the transcript of day 2, p.51, lines 2 to 9 for the record. Mr. Sharpe said:

> "---- My instructions are that the calculation used to produce the elasticity of demand figure which is in the report – I think it is minus 1.54 (minus 1 obviously because it is a slope) – was not provided to the parties during the enquiry or indeed in the report. It was only after Professor Yarrow effectively reverse engineered that calculation which you will find he is working at paras.68 to 72 of his report that the mistaken approach was identified. In our submission, the Commission cannot properly criticise the parties for not taking into account something which they did not understand existed."

My instructions are that is not correct. The elasticity of demand and the Commission's interpretation and use of the GFK results upon which it was based and to which reference is made in para. 69 of the Yarrow report were provided to the parties during the inquiry for consultation, and they were provided – I would just ask the Tribunal to put this into the record – at appendix 3.9 of the Commission's provisional findings on remedies of 5th June

2008 – it is going back quite a long way, and its consultation on further analysis conducted at a decision making on remedies on 14th October 2008. Barclays provided responses to these consultation documents, they are to be found at the exhibit to the witness statement of Nicola Northway, bundle 4 of Barclays' notice of application (which is not in the core bundles) at tab 13, p.421.

MR. SHARPE: Sir, just to speed things up, if I was wrong in making that statement I am absolutely prepared to accept Mr. Swift's statement to you, therefore Barclays did have sight of that figure at the time and places he says they did.

THE CHAIRMAN: If you are wrong, I am not sure whether that is a conditional concession depending on us working out ----

MR. SHARPE: I am accepting Mr. Swift's information and we can move on perhaps.

MR. SWIFT: I am obliged to my learned friend, it was not just the figures, it was the workings.

MR. SHARPE: My statement was that we received the figure, I will need further instructions as to what he calls "the workings."

MR. SWIFT: May we take this, as it were out of ----

THE CHAIRMAN: Yes.

MR. SWIFT: That is all I am proposing to say there, there is nothing further to add to what is in the defence and the skeleton and the specific criticisms raised by Professor Yarrow, and I do not think it is necessary to respond orally to the points made by Mr. Sharpe because I believe I would be simply replicating what is said in the skeleton.

Lloyds offered up a speaking note yesterday, 9th September, on the Competition Commission's welfare modelling, which Miss Davies then took the Tribunal through. We have considered matters overnight and we thought it would be helpful for the Tribunal, indeed for the parties, to see the Commission's response which I am putting forward in the same form, as a note, which has got the cardinal error that it does not have a date.

THE CHAIRMAN: Much more seriously is not hole punched!

MR. SWIFT: Just in case it was thought to come in actually before Lloyds' speaking note it is 10th September.

THE CHAIRMAN: Your response is not hole punched, it runs the risk of getting lost otherwise.

MR. SWIFT: I am not going to go through the Lloyds' speaking note line by line but simply putting forward our comments. So do you have it in front of you, both documents?

THE CHAIRMAN: Yes.

MR. SWIFT: The first comment we make is in relation to para. 1(c) of the Lloyds' speaking note, the assumptions used by the Commission which lead to negative welfare outcomes where

reasonable. We say this is a misrepresentation; that each of the three key assumptions the Commission looked for, a bound reasonable assumption in the sense that values outside the bound can be dismissed. It is very different to say that a scenario which is a combination of all three assumptions is reasonable. The results in table 1 of appendix 10.11 – you will recall that was the table that formed such a significant part of Professor Yarrow's analysis in his report – are based on the bound values – in other words, the values we say of the boundary of reasonable, and the Commission's choice of language is deliberate. It says that it cannot exclude the possibility of a negative outcome. This is very different to saying that a negative outcome is reasonable or likely. These are differences of emphasis which are of some significance, because excluding the possibility in terms of probability analysis is quite different from "reasonable" or "likely".

Can we go to para.2 of the Lloyds speaking note. At para.2 it takes issue with the Competition Commission's approach to the calculation of the net consumer detriment and in particular its conclusion that under any reasonable set of assumptions the remedies will produce a positive net consumer welfare effect. We say this too: it is misleading. The Commission conclude this for NPPI, SNPPI and CCPPI only. For personal loans it says that a negative outcome is unlikely.

Then moving ahead to para.7(a), Lloyds claims that the Commission's assertion that the £200 million is conservative since it was based on a non-system model is flawed; and at para.3(a) Lloyds claims that the Commission admits that a reduction in convenience could reduce demand. We say that is the wrong question. It is not important whether convenience will reduce demand, and this is the point I was making before, what is important is whether the remedies result in a contractual demand. It is clear from a reading of the report as a whole that this is an unsustainable interpretation of the Commission's findings, and we refer to para.10.493, which of course I referred the Tribunal to before. Lloyds, we say, make the mistake of isolating what are many inferences of demand. What is important is the net effect. I was also raising that point when we were looking at para.10.50.

Lloyds' claims at para.3(b) that the remedies will raise marginal cost, so even if fully effective will result in a less than 60 per cent reduction, we do not agree. The contention that the remedies will result in a net increase in marginal cost is unsustainable on reading the whole report, and we refer you to our defence at para.10.495 in respect of claims costs and 10.493 in respect of selection pressure where we would say it is generally uncontentious that competition drives down costs.

At para.3(c) Lloyds claims that the models assume there will be an immediate price reduction. We say Barclays and Lloyds appear to be deliberately reading the reports backwards. The Commission identified an AEC. It proved on the basis of rigorous evidence that the effect of this AEC was a large over-charge and excess profit. It found in chapter 5 on the basis of extensive evidence that the causes of that over-charge would have features of the AEC, and it shows in chapter 10 that the remedies package removes that AEC by addressing the features effectively.

The next point, the little bullet, is a reflection of what I was saying this morning, no requirement for the Commission to prove that prices will fall. It has proved they are too high. It established the cause of that over-charge and it has established that the remedy removes those causes. It is sufficient to show the absence of the cause to show the likely absence of the effect, and there is no gap in the Commission's chain of logic or evidence.

Moving forward again to 7(a), second bullet, Lloyds says that in any event it is refuted by the Commission's admission that the long system model overstates the welfare gains from remedies. This appears at the footnote at para.19 in appendix 10.9. We put in a footnote that we thought it was not significant, something we could not quantify, nor could Lloyds, so Lloyds cannot demonstrate that it is material, and again it is not for us, it is for the applicant to demonstrate that an error or omission, even if it exists, is sufficiently material to have a material impact on the conclusions.

In addition, Lloyds makes no submissions or criticisms on the analysis to appendix 10.10, and this Commission based its view on that appendix.

Then we go to third bullet of para.7(b), Lloyds says that the value attributed to the third assumption is critical, it is nowhere stated in the report, let alone explained. This is the 0.8 figure, figure 8 of appendix 10.11, and we say this. No one asked the Commission for an explanation of the assumptions used. It understood, not unreasonably, that they replicated the results themselves and were asked. We asked the parties for any available information on the market elasticity of credit demand. None was available. There was no way the Commission could produce evidence themselves, no method was suggested to it by the parties, and none was apparent to it given the data it had. Given what we call stylistically a "evidential vacuum" it tried to put some sort of bound on the figure and it did this using the logic which is found in appendix 10.9, paras.16 and 17 which are cited below. It concludes at the bottom of 17, that this assumption is generous to the non-intervention view as there are good economic reasons to believe that the market responsiveness of credit demand and change in credit prices is lower than that of PPI demand in the context of high PPI prices

and artificially low credit prices. We therefore treat this estimate as an upper bound for the elasticity and test the sensitivity of our results with lower values of assumption.

For the basic logic, uncontested, that PPI prices are too high, 1.54 is therefore higher elasticity than would prevail in the competitive PPI market. By similar logic, credit prices, particularly for personal loans, are too low. Whatever the current elasticity of credit demand is, it is lower than it would be in a competitive market. Therefore, the Commission concluded that 1.54 minus would be an appropriate upper ground for the credit. There was no equivalent logical trick that could apply to the other end of the range. The Commission therefore made no determination whatsoever as to the lower bound. This could be zero.

It is purely random that the charts in appendix 10.11 end at minus 0.64. You will remember this was the point where Miss Davies drew the line and said it is very close to the end of the right hand side. For example, SNPPI ends at minus 0.82, NPPI minus 0.32, therefore a presentational decision to cut it off there.

So that was the Commission's judgment. It shows minus 0.8, it could have chosen minus 1 or minus 0.6 or 0.5, it was a matter of judgment. In that area of judgment based on the absence of evidence from the parties the extraordinary difficulty of trying to determine whether there is a right number, the Commission came up with minus 0.8.

Finally, in para.8 of the speaking note, which is the flourish of the conclusion, Lloyds concludes that it follows that the Competition Commission's dismissal of the negative outcomes of its modelling and its approach to the calculation of the static consumer detriment are both flowed on judicial review grounds and that the Competition Commission had no sufficient basis to conclude decisively that the benefits of its remedies package outweighed the costs and it cannot otherwise be salvaged and that is it, so it must be quashed under para.11. We say that is not the case. Essentially this is based on the Commission's judgment. The Commission used evidence wherever it was available but inevitably there are areas where judgment is needed.

Lloyds case is effectively that if the Commission has to make a judgment then this, even of itself, renders the decision flawed since this judgment is not evidence. It also seeks to reverse the burden of proof where it is incumbent upon them.

So that is our response to the Lloyds speaking note, which I will leave with the Tribunal, if I may.

PROFESSOR STONEMAN: Mr. Swift, I just wanted to make one pedantic point, if you do not mind.

MR. SWIFT: I worry about your pedantic points, Professor Stoneman!

PROFESSOR STONEMAN: It is when you talk about your elasticities, what is higher and what is lower, and that minus 2 is lower than minus 1 in number terms, but 2 is greater than 1 in absolute terms. It may be pedantic, but it might be useful to say that when you are talking about higher and lower, you are talking about the absolute value and not the value predicated by the minus ----

MR. SWIFT: That is not a pedantic point. It is an extremely helpful point, Professor Stoneman. Thank you.

Just for the record, there was a submission by Miss Davies towards the end of her submissions on system and non-system remedies. Miss Davies was stating that the POSP, at least initially, was more like a non-system remedy than a system remedy. We say, by definition, POSP-induced search, which is subsequent in time to the credit point of sale, therefore by definition is non-system. What I would ask the Tribunal to note is what is stated at paras. 4 and 5 of Appendix 10.9 in which the Commission spell out in more detail the characteristics of the two distinct categories of remedies. The main point we are putting is that we have said throughout that the majority of the remedies were neither pure system remedies, nor pure non-system remedies. I doubt whether it is of much value to determine whether on Day 1 the POSP might be said to have more of, as it were, a non-system element in it than a system element, just because of that rather technical point. If one is looking at the real world of post-intervention markets, then of course we have the information in the market available at all times for the customer to use, whether at the same time as a credit sale or within the period after. That is information which flows, in a sense, in a single force around the market. It is available from Day 1.

Subject to that, I think that is Ground 3.

Now we have Ground 4. If the Tribunal will just bear with me so that I can sort out my papers. Ground 4 I believe I can take very shortly. Again, Ground 4 has been dealt with extensively in the Barclays notice of application, the Barclays skeleton, our defence, and our skeleton, and, for the record, I would say that largely we repeat what is in there. When my learned friend, Mr. Sharpe, was addressing Ground 4, he was, in a sense, reading out his notice of application and you, sir, were courteous to remind him that the Tribunal had got those papers in your file and that it was not exactly necessary to go through it all unless there were new points.

From the time that we first saw Ground 4 we wondered what on earth it was doing in this application. That is why we sent a request for further and better particulars (if I can use a legalistic expression) to Barclays, saying effectively, "Will you please tell us what is the

relevance of Ground 4; how it relates to AEC, if it does at all; and how it relates to any of the features or findings that the Commission has made in the course of its determination that there must be remedies?" In other words, where is the nexus between these points that you are picking at in Sections 3, 4, and 5 such as to say that the finding of AEC is wobbly or non-existent? I am still in the dark. I still do not know what their case is under Ground 4. That is the first point. I probably am being very slow. I am sure that Ground 4 is in some way there insidiously to plant some poison in one of the findings on relevant market. But, if we look at something like relevant market, the Commission conclude that for all types of PPI policy the relevant product market is the sale of PPI to an individual distributor's or intermediary's, credit customers by that distributor or intermediary. That is para. 3.139 of the report.

The Commission made it plain to the general reader, if there is such a general reader of the PPI report, that when one conducts market analysis one conducts it in accordance with certain disciplines in relation to both demand substitutability, supply substitutability, and the application of the SSNIP test. The SSNIP test is fortunately largely unknown to most people in this country. Nobody really understands what the SSNIP test is all about - apart from those who practice it. But, it is a very well-established discipline, and it is used for determining the degree to which one has power within a particular market. It is perfectly compatible to have a position in which a supplier of credit is, as a result of several factors, the sole monopoly provider of the PPI to that customer. Those are the pockets of monopoly that exist within the wider PPI market that enable these adverse effects to be found in the market place.

The Commission found, at para. 3.149,

> "We do not, therefore, find that the choice of market definition used to frame the analysis of unilateral market power - among those definitions we consider are defensive on the facts - would have led to a different result".

So, the Commission found that even if it had taken a different approach to market definition, it would have made no difference to an analysis of competition for the purposes of this investigation. So far as we can see, Barclays does not seek to challenge that finding. Mr. Sharpe said he was surprised by that one, I think. So, we cannot see where that gets us. In my submission, if I can use a colloquialism, it seems as though we are dealing with a series of dead ends. They start somewhere, they make a point, and then they stop. It does not go through to suggest what is the failure that the Commission has made, which is the relevant matter in judicial review principles. (a) What is it that we should have done? (b)

Why can it be said that that failure is material to any of the findings or any of the conclusions? I am still waiting to hear from Mr. Sharpe what are these arrows that have struck through?

We have market definition inconsistently applied. We have market analysis - took no account of the change in the market; took no account of regulatory changes. All these are dealt with, with reason, in the report and cannot under any circumstance, in my respectful submission, constitute a material error of the kind to cause this Tribunal to quash the report if, on all other grounds they are minded not to quash it. It does not have a separate life of its own. Nor do I see that it weakens any of the main arguments used by the Commission. All our reasoning is set out in the relevant parts of the defence and the skeleton, and as in the case of Ground 3, I would put my oral submissions on the basis also of those written submissions.

THE CHAIRMAN: Can I ask you one question about market analysis. You will need to look at the Enterprise Act for the purpose of my question, which is in authorities bundle 2, at tab 19. Mindful of Mr. Sharpe's submissions about the distinction between market analysis as a tool of analysis and "relevant market" for the purposes of s.134, and I seek to explore that difference. I think Mr. Sharpe submitted that you get the relevant market from your brief, i.e. from the terms of the reference. My reading of s.134(3), which is the definition of relevant market, suggests that the brief specifies the goods and services by way of a description of them, that is s.134(3)(a)(i) and (3)(b)(i), but not the market for them. If one looks at the reference at the beginning of appendix 1 to the report, p.327 of the bundle, one sees the OFT being quite careful only to brief as to the specification or description of the services and to remain studiously agnostic about the definition of the market, not least because in its statement of grounds for suspicion it talks about "market" or "markets". It struck me that that left a statutory task of identifying the relevant market for the Commission rather than it just being a tool of analysis. I am conscious that that approach is not consistent with Mr. Sharpe's submission and that generally speaking you have not been at loggerheads about the law or the statutory construction, I just invite any comment you want to make about it.

MR. SWIFT: My immediate comment is that in terms of economic analysis of a relevant product market – if I can add the word "product" – in the relevant product market, the Commission is plainly required to analyse the goods or services that are referred to it with a view to determining what is the relevant market.

THE CHAIRMAN: That would seem to me.

MR. SWIFT: What has been referred to the Commission by the OFT is the supply of all payment protection insurance services except store card insurance, the reference services. Now, it is absolutely plain that on analysis that consists of, at the very least, separate markets in terms of demand substitutability as between postal loan, credit card, first mortgage, second mortgage, retail. Plainly, the Commission is under a duty to go down one level and to see whether there are individual product markets there, but also it seems it is not necessary to stop there, it can go down further because market definition as we have said is a tool for the purpose of determining market power. But which ever way it goes – I hope I am answering your question – in the present case the Commission could validly and lawfully say "We are looking at the PPI market, at least as defined in terms of the particular aspects of PPI. It could then have said to itself what are the circumstances in which competition takes place? If it asked itself that question it would have said its starting point would always have been: let us look at the position of each individual distributor and then it would go into a SSNIP test. If it found then that the relevant product market was no greater than the market for that distributor that is what it is supposed to find. I am not sure whether I am helping, I am talking about a chain of analysis that goes down, that has to be undertaken by a decision making body. In other words, it has full freedom and indeed, a full duty to investigate, otherwise it will not be in a position to determine what are the features.

THE CHAIRMAN: Thank you.

MR. SWIFT: My plan now, having done Grounds 1, 2, 3 and 4, is to ask Miss Smith if she would address the Commission briefly in relation to the matters raised by Mr. Lasok yesterday so as to give me time to come back with some concluding comments in relation to today's proportionality. Is that acceptable?

THE CHAIRMAN: Yes. Miss Smith?

MISS SMITH: Sir, members of the Tribunal, my submissions will be very brief, so I am afraid I am not going to be giving Mr. Swift that much time.

SDGFS could have joined these proceedings as an applicant, but they chose to intervene, therefore in our submission they are subject to the limitations of that role. By the Tribunal's order of 29th April of this year SDGFS were granted permission to intervene on the following basis: "On condition that their intervention be limited to advancing argument and adducing evidence in support of or, as the case may be, in opposition to, the Grounds of application in Barclays' notice of application.

In our submission SDGFS's intervention goes beyond that and we say this was illustrated by Mr. Lasok's submissions yesterday. Mr. Lasok's submissions focused almost exclusively

on s.6 of the report and it is notable that neither Mr. Sharpe nor Miss Davies had made any reference to any paragraphs from s.6 in their submissions.

We have produced a table – because we were aware we have not done this before – identifying those particular paragraphs of SDGFS's statement of intervention and skeleton which we say go beyond the conditions upon which they were granted leave to intervene. They also obviously also make points in support of Barclays' Grounds, arguments of law, arguments of other submissions, and with your permission I would hand that up, Sir. It is a two-sided document, one page. (Same handed)

In para. 4 of its skeleton argument SDGFS admitted that its intervention advances arguments which are to some extent different from those advanced by Barclays, but they say that they simply demonstrate why Barclays' points have force from the perspective of retail PPI. We say "no", in a number of instances which we have identified in that table. SDGFS seeks to introduce new grounds which relate solely to retail PPI and which bear no relation to Barclays' Grounds as set out in their notice of appeal. We say that was illustrated by Mr. Lasok's submissions yesterday, which focused on the first of the topics identified in that table. In a nutshell, as I understand it, that argument runs as follows: the Commission found that stand alone PPI products had not in the past been a realistic alternative for retail PPI customers, and one of the reasons for this was that stand-alone policies could not track the balance of the credit accounts for retail customers. Mr. Lasok said the Commission's proposed remedies do not address that problem, and so to use the words of their statement of intervention, the POSP is nugatory for retail PPI. I stress the last three words "for retail PPI", in our submission this argument is simply an argument about retail PPI.

Mr. Lasok sought to bring this argument into Barclays' Ground 1 by saying "We put in submissions about reductions in sales that SDGFS would suffer if the POSP was imposed", again I note those were specific to the way in which retail PPI was sold, but these show that the imposition of the POSP will have a substantial effect on sales, and there is nothing counterbalancing that in the report which shows the advantages and benefits to consumers, and we say that link with Ground 1 is tenuous.

SDGFS's arguments yesterday clearly sought to introduce an independent ground of appeal which relates only and specifically to retail PPI. So we say that as that argument and the other arguments set out in that table go beyond the conditions upon which SDGFS was given permission to intervene they should be disregarded by the Tribunal. However, if the Tribunal is not persuaded by our submissions in that regard and is minded to consider

SDGFS's grounds they are addressed in appendix 2 to our defence, and the reference to that is CB1, tab 9, pp.439-443, and I do not propose to develop those any further, they are set out in the defence.

In summary and in conclusion, our position on Shop Direct's intervention is simply as follows: if, contrary to our primary submissions, Barclays succeeds in establishing a case so that it persuades you, the Tribunal, to quash the Commission's decision to impose POSP and to send that issue back to the Commission for reconsideration then, of course, the Commission will reconsider POSP as it applies to all PPI products that were the subject of the investigation, and that would include retail PPI along with the other types of PPI. However, if Barclays does not succeed in establishing such a case we say that Shop Direct must necessarily also be unsuccessful in a challenge, it cannot rely, as an intervener, on any independent grounds to challenge the Commission's decision.

Those, in a nutshell, are our submissions on Shop Direct unless I can assist you further.

THE CHAIRMAN: No, thank you.

MR. SWIFT: I simply wanted to say, I started off this morning with some general propositions about the purpose of this very important piece of legislation and the importance of this market and the importance which this Commission attaches to the timely introduction of the post-intervention market. In my submission, there are no risks to consumer welfare arising from this remedies package. It has been put together by a skilled experienced Commission, charged with the responsibility of doing precisely that and carrying the normal responsibility of a decision maker who knows that the buck stops with him. The Commission cannot say, "I don't know", the Commission has to form a view one way or another as to how a market is going to develop, and it is very much in the interests of this society that the Commission can take strong and effective action if it believes that that is right. That is not in any way suggesting that the review by the Tribunal should not be intensive and should not be in accordance with the rigorous standards that we expect from this Tribunal. The stakes for consumers here are high. They have been very badly handled by the lenders, by the distributors, which has finally brought the matter into a two year enquiry. So this Tribunal will, I know, bring its own expertise to bear, but please believe me that the decision of this Tribunal is going to be absolutely critical to the future of this market.

We have been through so much of the report over the past four and a half days that I am not going to ask you to read yet another paragraph but just to note that when you come to

deliberate on the decision that the sections from 10.465 to 10.479 are, in a nutshell, the justification for this remedies package and a full justification for its immediate acceptance. Unless there are any other matters, those are my submissions.

THE CHAIRMAN: Thank you very much.

PROFESSOR STONEMAN: May I raise one matter? This morning I left you with a question relating to 10.493 and 10.494 as the extent to which you could give some idea of the changes in consumer detriment that might arise from some sensitivity analysis relating to dynamic factors discussed in 10.493. Rather than go through it now, can you put something on paper?

MR. SWIFT: We are in the course of doing that, Professor Stoneman. I have discussed it with the economic advisers to the Commission and we would be very happy to give you a full note on that subject.

PROFESSOR STONEMAN: Right, so you will submit something.

MR. SWIFT: Rather than my interpret it.

PROFESSOR STONEMAN: Yes, that is fine, thank you.

MR. HOSKINS: Are you happy for me to start now and you will tell me when an appropriate moment comes?

THE CHAIRMAN: How long do you anticipate being?

MR. HOSKINS: I will be the shortest of anyone who has made submissions to you. I think I am probably about 40 or 45 minutes now.

THE CHAIRMAN: I think we had better start now to maximise the prospects of finishing today but we are not putting that as a guillotine, Mr. Sharpe.

MR. SHARPE: There is an informal understanding, subject always to your views, that I will reply and then I think there is the modest expectation that Mr. Lasok will reply to Miss Smith and Miss Davies might reply to Mr. Swift.

THE CHAIRMAN: You will probably have to ask for permission but we will deal with that in due course.

MR. SHARPE: I know, subject, as I said, to your wishes. So if there is any optimism that we might finish today under normal time it may be a bit misplaced.

THE CHAIRMAN: Let us get straight on with it.

MR. HOSKINS: Sir, members of the Tribunal, I think there is one thing that certainly is common ground which is that you have been subjected to a deluge of detailed information over the last four days. You are aware of the FSA's position. We fully support the Competition

Commission's conclusion that the POSP is not just a good thing, it is essential for this market that the POSP is introduced.

I anticipate you are probably grateful to hear that I do not intend to the deluge of details, it is not our role, it is not what we are here for. What I would like to try and do is to provide a framework and a frame of reference for deciding the issues in this case. In order to assist, we have prepared a speaking note and there is also one authority I am going to refer to, if I could hand those up, please. (Same handed)

THE CHAIRMAN: Thank you.

MR. HOSKINS: Is an authority that Mr. Lasok referred to yesterday but I do want to take you to it. We can put it at the back of the supplemental authorities bundle.

THE CHAIRMAN: We cannot because of the way it has been bound, but I will put it at the back of what would in an ordinary court be called the exhibit bundles.

MR. HOSKINS: The first three grounds: the first three grounds all concern different aspects of proportionality, and again happily, at least at the outset, there is a large degree of common ground as to the principles. One can get the basic principles as explained by the ECJ in *Fedesa* from the Tribunal's own summary in the *Tesco* judgment. I have set them out at para.3 of the speaking note. There are four main principles. I am particularly concerned with and I am going to stress numbers one and three for my purposes. A measure must be effective ----

THE CHAIRMAN: You do not need to read them out.

MR. HOSKINS: I am sorry. I am purely going to stress (1) which is effective and (3) which, if there is a choice of equally effective measures, must be the least onerous. I am going to come back to those two.

Para. 138 of *Tesco* - again, you have seen it. We know that application of these principles are not an exact science. Many questions of judgment and appraisal. Importantly, in *Tesco* the Tribunal recognised that this is most obviously the case that when it comes to the balancing exercise between the achievable aims of the proposed measure and any adverse effects. That is essentially why we are all here. That is what is being debated here. A wide margin of appreciation. The Tribunal will be very slow to interfere. That gives some sense of what the margin of appreciation means. Then, of course, we know that margin of appreciation extends to methodology as well because that was recognised.

Can I attempt to kill off the myth of the so-called double proportionality principle? There is no such principle. We do need to look at the *Tesco* judgment for that in Authorities Bundle

1, Tab 17, para. 139, p.829. The reference to double proportionality comes about two-thirds of the way down para. 139. It is important to look at the previous sentence as well.

> "The Commission can tailor its investigation of any specific factor to the circumstances of the case and follow such procedures as it considers appropriate. In this regard it may well be sensible for the Commission to apply a 'double proportionality' approach".

This is not a principle that has been recognised as existing in the law. It is not the Tribunal espousing a new principle. It is recognising that the Commission has a wide margin of discretion as to its procedures. It can follow procedures as it considers appropriate and it may well be sensible. It is a suggestion. It is not a legal principle. I think one has to be very careful not to elevate it by virtue of a sort of Chinese Whispers game. What legal precedent comes into existence by Chinese whispers?

THE CHAIRMAN: The fact that it is put between inverted commas suggests that it came from somewhere. Can you help on that, or not?

MR. HOSKINS: I cannot say that I was one of the counsel in Tesco. It is not something that we have put forward. I cannot remember it coming from any particular authority. I think it is a Tribunal creation.

This third point about the margin of appreciation in relation to methodology is particularly important in relation to Lloyds' submissions. Lloyds presented detailed arguments which criticised aspects of the Commission's methodology. The Lloyds' approach was exemplified by one statement - in relation to a particular point which exemplified the whole approach - when Miss Davies suggested that the Competition Commission erred because 'they did not get into this level of analysis' (Transcript 3, p.16, l.1). Of course, the truth is that it is inevitable that when one has a report of this scale one could make finely tuned complaint about all sorts of aspects of it - this sort of granular exercise of coming up with detailed complaints really does not take one very far. Technical granular complaints are not grounds of judicial review unless they show a manifest error of approach. It is important to remember that.

Another important principle which we say has been misunderstood by Barclays is that when one is assessing the efficiency of the desirability of a particular measure, the Commission - indeed, any decision-maker - is not limited to taking account purely of quantitative assessments. The Commission can - indeed, it has to, it must - take account of relevant factors which cannot be quantified. Qualitative assessment. Indeed, one only has to stop and think about it. Failure to take account of a relevant consideration because it cannot be

quantified would itself be a breach of the judicial review principle that you must take account of all relevant considerations. A decision-maker cannot say, "I recognise this as relevant, but I can't quantify it. Therefore I am going to ignore it". It is obvious.

Quite a good indication of how this is to be dealt with arises from the Treasury Guidance on Appraisal and Evaluation in Central Government - the so-called Green Book. I make it quite clear - as, indeed, the Tribunal did in *Tesco* - that this is not a set of rules that the Commission must apply. It is simply an example of a way in which qualitative and quantitative assessment can be used by a decision-maker.

If we can go to the Green Book in Authorities Bundle 2, Tab 23, this is an HM Treasury document. Page 899 at 1.1 - there we see a general explanation of the purpose of the Green Book, which is to ensure that no policy programme or project is adopted without first having the answer to these questions: Are there better ways to achieve this objective? Are there better uses for these resources? You can see that resonates strongly with notions of proportionality.

If we can turn, Sir, to para. 5.8 at p.917 of the bundle,

> "The relevant costs and benefits to government and society of all options should be valued, and the net benefits or costs calculated. The decision-maker can them compare the results between options to help select the best. It is important to avoid being spuriously accurate".

One of the things that a decision-maker must guard against is attempting to quantify and then relying on figures which are not sufficiently accurate. Quantification or attempts at quantification can actually be harmful if used inappropriately

> 5.12 Wider social and environmental costs and benefits for which there is no market price also need to be brought into any assessment. They will often be more difficult to assess but are often important and should not be ignored simply because they cannot easily be costed".

Then detailed methodology is given in Annex 2. We do not have to worry about that for our purposes. Paragraph 5.30:

> "Valuing costs and benefits where there is no market value.
>
> Most appraisals will identify some costs and benefits for which there is no readily available market data. In these cases, a range of techniques can be applied to elicit values, even though they may in some cases be subjective. There will be some impacts, such as environmental, social, or health impacts, which have no market price, but are still important enough to value separately.

5.76 Considering unvalued costs and benefits.

Costs and benefits that have not been valued should also be appraised; they should not be ignored simply because they cannot easily be valued. All costs and benefits must therefore be clearly described in an appraisal, and should be quantified where this is possible and meaningful".

Not a set of rules, but a useful indication of how to approach a proportionality assessment. What this shows us is that in assessing and applying proportionality the Commission must take account of all relevant considerations - basic judicial review principles - whether quantitatively or qualitatively. The qualitative appraisal requires the relevant costs and benefits to be identified, described, and then taken into account. We say that is clearly what happened here. I will take you to some examples.

My final general comments in terms of proportionality concerns the nature of evidence because, again, a repeated mantra in both the Barclays and the Lloyds' submissions was that there was no evidence upon which the Commission could draw particular conclusions and make particular evaluations. With respect, what that submission overlooks is, as Mr. Swift referred to, that there were an enormous amount of submissions to the Commission by people and bodies with knowledge of the PPI market. The FSA made submissions. Barclays and Lloyds made submissions. It had no shortage of submissions from people who knew about this market. Those submissions are evidence. Once one understands that, the submission that there was no evidence upon which the Competition Commission could from a valuation largely falls away. Again, we will come to look at some examples of that. Evidence is not just consumer surveys and economic models. It is far too narrow a view.

Moving on to Section B of the speaking note at para. 8, the *Tesco* judgment -- I have given you the health warning - I was in it. You may think that makes me well-qualified to tell you what it was about, or maybe you will think I have an axe to grind. I was for Tesco, and so probably not the latter.

The *Tesco* judgment clearly assists insofar as it identifies and summarises the legal principles. As with any such judgment, though, one has to be very careful about simply saying, "Well, this is a case which applies legal principles to a set of facts. Therefore we can simply read across to our case". That is a very dangerous one and the courts have said in the past that that is not an appropriate methodology. However, Mr. Sharpe, for Barclays, said on quite a number of occasions: "This is the same as *Tesco*; we are in the same situation." With respect that is simply not correct once one actually understands what the facts of *Tesco* were. We need to go back to the judgment again, I am afraid, authorities

bundle 1, tab 17. You will be aware by now that the remedy being challenged in *Tesco* was the so-called competition test, and the purpose of the competition test as stated in the report was to block the developments of supermarkets by incumbent retailers in local areas of high concentration. One can see that quite clearly from para. 60 of the judgment, that is p.801 of the bundle, and there is a quote there from Mr. Freeman, who was the Chair of that particular inquiry group:

> "… a competition test is necessary to prevent the emergence or strengthening of a strong local market position held by a particular large grocery retailer in respect of larger stores in a local market."

So there was standstill function, it was to stop high areas of concentration coming into existence. Under its first ground of challenge *Tesco* said, and one gets this from para. 86 of the judgment, that the competition test would create a risk of unmet demand, because there would be situations where the competition test would prevent an incumbent retailer either from building a new supermarket, or from expanding an existing one in the highly concentrated local market, and the reason why there was a risk of unmet demand was if the incumbent was prevented from expanding and another retailer did not come in to fill the gap then there would be consumer demand that was unmet and that is where you get the notion of unmet consumer demand.

What Tesco submitted was that that adverse effect was not mentioned, let alone analysed and substantiated in the report, and one gets that submission at para.94 of the judgment, the middle of para. 94:

> "Tesco goes on to argue that this assumption is nowhere mentioned let alone analysed and substantiated in the Report, and that it makes its first real appearance in the Defence and the accompanying witness statement of Mr. Peter Freeman."

As we know, the first ground of challenge was upheld by the Tribunal, and what the Tribunal actually found was it agreed with Tesco that there was no attempt whatsoever to assess the risk of unmet demand in the judgment, and one sees this in the language of paras. 112, 113 and 114, p.819 of the bundle. First, in para. 112 it is actually the penultimate sentence where the Tribunal finds there is no attempt to assess the degree of risk, either generally or in any particular local market or markets. Paragraph 113, the sentence preceding the quote: "yet there is no mention of such assessment in the Report". Paragraph 114: "The commission's explanation for the absence from the Report of any assessment of the risk of economic cost is based …" etc.

So the important point is that in *Tesco* the first ground was successful because there was a relevant consideration, the risk of unmet demand, which had not been subject to any assessment whatsoever in the report, quantitative, or qualitative; it was a complete absence. The second ground of challenge was based on the same premise. One sees Tesco's arguments at para. 129 (p.826) and for the second ground – there were three complaints relating to proportionality it was the first one that carried day. Half way down para. 129, first Tesco complained that the Commission "failed to make any assessment of the possible benefit of the competition test. " Again, as we know, the Tribunal upheld that ground as well, and the reason it upheld it was because it found that the report did not contain any analysis at all of the likely benefits of the competition test. One sees the Tribunal's conclusion at paras. 161 to 163. I cannot remember if you have seen these already, Sir, or not. It also goes to the question of the impossibility of carrying out a quantitative assessment. The Tribunal said:

> "We do not set out the parties' rival submissions on this issue in full because we do not consider that it is either necessary or appropriate in this case for the Tribunal to decide whether or not the Commission is right in saying that no useful estimate could be made of the effectiveness of the test, including the time scale. … The fact is that none of the Commission's arguments against attempting any real estimate of the likely benefits of the test appear in the Report"

- it is the complete absence point. "They have been produced in a forensic context" i.e. in the arguments before the Tribunal not in the report.

> "As we have said, all the Report contains are bald and general statements of the Commission's belief in the test's eventual effectiveness. … There is nothing to indicate that in considering the proportionality and answering the statutory questions the Commission has taken account of the fact that it has felt itself unable to make even a rough estimate of when and by how much the competition test itself and/or the package of remedies will make an inroad into the existing AEC.
>
> 162 If the commission is right in what it now says about the impossibility of making any kind of [quantitative] estimate, this itself is a factor of which account would need to be taken in the balancing exercise which it carried out. Yet there is nothing in the Report to suggest the Commission has taken account of it."

> 163 Whilst the precise methodology adopted for assessing these matters, and the weight to be attributed to the results of such assessments are (subject to rationality or questions of law) likely to fall within the margin of appreciation of the Commission, the assessments and the weighing must take place."

So it is quite clear that Tesco's two challenges were successful because assessment of two relevant considerations were completely absent from the report. It was not a case in which the Tribunal disagreed with assessments which had been undertaken, and that was obviously a very difficult and different judicial review challenge. We say for that reason Tesco contrasts very sharply with Barclays' grounds of challenge in this case, and I will come to them when I deal with the particular grounds of challenge.

There is one other aspect of *Tesco* which requires comment before we leave it and that is the timescale point. Barclays relies on *Tesco* to submit that an evaluation of timescale within which remedies will be effective is an essential part of any proportionality assessment. With respect, *Tesco* does not establish any such general rule, though as Mr. Swift recognised it will often be the case that timescale has some degree of relevance to that sort of assessment but there is not a rule as such. What is important in *Tesco* to realise is that the issue of timescale was of crucial importance in the case, because it was relied on heavily by the Competition Commission to try and fill the gap that was in the report. So again to work through the relevant paragraphs ----

THE CHAIRMAN: It might be sensible if we have a quick look at those during the short break, perhaps.

MR. HOSKINS: Of course.

THE CHAIRMAN: That will bring you to the end of this section of your submission.

MR. HOSKINS: It will.

THE CHAIRMAN: Well, let us do that and resume at half past.

(Short break)

MR. HOSKINS: Sir, I am sorry to have given you a reading list, it was such a short adjournment. You made the offer and ----

THE CHAIRMAN: We fell for it, and we have done it.

MR. HOSKINS: Can I make two points which arise in particular from those paragraphs. The first one is, as you will have seen, what occurred in *Tesco* was that the Commission, having seen Tesco's unmet demand argument, consumer welfare argument, sought to plug the gap after the publication of the report, i.e. in the defence and then witness statements, by saying that there will be no problem of unmet demand because if and when an incumbent retailer is

blocked a new retailer will step into the breach in the same timescale. The question of "in the same timescale" was absolutely fundamental to the Competition Commission's new argument. Of course, as you have seen from the Tribunal's judgment, because the matter had not been considered in the report, they could not make that argument. Again, it was a total absence in the report. The timescale was really at the forefront in *Tesco* in that sense. There is a second point I would like to draw out which relates to para.152 of the judgment because you will see that one of the attempts by the Commission to plug the gap was to rely on a quantitative assessment. It was a bits of the back of a cigarette packet one, but numbers were thrown in saying, "Well, if 30 come in in X years it is all going to be fine", for which again the Tribunal found at para.155 of the judgment there was no discussion or relevant findings in the report to support that. I think what that shows is, of course, and again it is probably a self-evident point, that assessment of time is likely to be far more significant when one attempts a quantitative assessment, because if one is within the confined world of quantitative assessment where you have figures on one side and figures on another and you are seeing where it balances, if one of the vital quantitative inputs is number of years, timescale, etc, you need them; but timescale in a qualitative assessment will be less acute. I am not saying you can ignore it, but you do not necessarily have to put a figure on it for a qualitative assessment. Again, one has to bear that in mind when one is considering the submissions of Barclays and Lloyds because what they would like the Competition Commission to live in, and indeed the Tribunal to impose upon it, is a perfect arithmetical world where everything balances, or at least one can check what the extent of any imbalance is. That is despite the protestations that they do not want exact figures. They still want figures, that is the point.

Can I move on to apply the various comments I have made about proportionality and about Tesco, and then to the different grounds of challenge. The first ground of challenge, failure to take account of benefits. We know it has two parts. The first part: failure to take account of the benefits of the package of remedies. I think this has two sides to it. There is allegedly a failure to take account of the benefits of the package of remedies. Another way it is put is the effectiveness of the package remedies. Mr. Sharpe puts it quite colourfully, first day of the transcript, p.39, lines 26 to 28, which is that unless you know how effective the remedy is going to be how on earth can you assess if it is proportionate relative to the costs of achieving that result? Of course, we know that that sort of argument had two strings to it. Barclays suggests that the Commission only considered the total detriment caused by the AEC, rather than the benefit/effectiveness of the remedies; and/or the

Competition Commission had no evidence as to the effectiveness of the remedies. Those were the two strands.

In our submission, the major flaw in Barclays first ground, and this is a recurring theme, is that it assumes that in order to be valid any assessment of the effectiveness of the remedies must be quantitative. For reasons I have explained, we say that is just simply legal incorrect. It is also illogical.

When one looks at the report again – it is not my job, Mr. Swift's already done it, and I am not going to go through the report and go through all the paragraphs in great detail – it is quite clear that the report is replete with qualitative assessments of the predicted effects of the remedies package, and based on various types of evidence that include submissions made to the Competition Commission and other forms of evidence.

Can I just take two examples in particular to show how this works. Can we pick up the report and look in particular, first of all, at paras.10.42 and 10.43. I am going through these paragraphs for two purposes: one, to show that there was evidence; and two, that there was an assessment of the effectiveness of the remedies, it was a qualitative assessments. I will just take 10.42 and 10.43 as good examples. What one has in 10.42, first of all, is that it sets out submissions that were made to the Commission by various parties. As I have said, submissions are, themselves, evidence. At 10.43, the first sentence, one has an appraisal:

> "We acknowledge that – as with any intervention aimed at enhancing competition – there is a risk that this element of the remedies package will not generate the changes in behaviour necessary fully to address the AEC."

That is an appraisal exercising judgment, assessment, call it what you will.

We then have further evidence relied on in support of the appraisal.

> "However, we found that the sale of PPI at the credit point of sale was a significant barrier to consumer search, and that currently only between 11 per cent and 21 per cent [etc] ..."

So it is a recitation of evidence that is relied on.

Then we have analysis:

> "By creating a clear break between the sale of credit and the sale of PPI, and providing consumers with the tools that they require to compare PPI policies ..."

and we have a conclusion –

> "... we expect this aspect of the remedies package significantly to increase incentives for, and ability of, consumers to search for the best-value PPI policy that meets their needs."

That conclusion is an assessment, a qualitative assessment, of the effectiveness of the remedies.

One sees that elsewhere in this section, 10.40 to 10.45, but I do not need to take you through all the paragraphs.

Similarly, para.10.493, obviously a very important paragraph engraved on our hearts, but let us look at it one more time, p.305, first sentence:

> "It is not possible to evaluate the full extent of the consumer detriment that we aim to address through our remedies package."

So again, echoes of *Tesco* here. If one cannot quantify one should say so, and that is indeed what the Commission has done here.

Professor Stoneman asked Mr. Swift whether it was possible to carry out some form of modelling in relation to this element. Mr. Swift, without instructions, obviously I do not want to steal his thunder if he is coming back, said it might be possible to do a model but who knows whether it would be accurate or not, which takes one into the realms of avoiding spurious accuracy. I am sure Professor Stoneman and the Tribunal is aware of this, but one must be very careful here not to trespass into the margin of appreciation in relation to methodology. That is *Tesco*, para.139.

The Tribunal can only interfere if there has been a manifest error of methodology.

Certainly my understanding, and I think it is shared by Mr. Swift from what he said earlier today, is that neither Barclays nor Lloyds have suggested that this conclusion in the first sentence was irrational. So it is not challenged that it was not possible to evaluate of the consumer detriment that we aim to address through our remedies package. I suggest that "not possible" must mean "not possible sensibly". One might be able to run some figures, but the Competition Commission was entitled to take the view that they were not sufficiently reliable for it to rely upon. That is the first point.

Then we get that, first, there is a large category of dynamic benefits to consumers that we expect to arise from increased competition in the provision of PPI. So, there is a recognition that benefits to consumers would arise from increased competition and provision of PPI. In the final sentence we have a qualitative assessment of the extent of the benefit.

> "Given the considerable size of the PPI sector, even at the current high prices, we would expect these dynamic benefits of competition to be on a very large scale, but we have not been able to put a value upon them".

That is a textbook example of a qualitative assessment. There is identification of the relevant benefit. It is described, and it is taken into account. It is faultless.

PROFESSOR STONEMAN: May I just say, to clarify things, I was not asking for a quantitative assessment of the probability of any particular outcome. What I was asking for was a quantitative assessment using the static welfare model of the pay-off to particular outcomes. That is quite a different issue.

MR. HOSKINS: Mr. Swift, I am sure, will take that into account in the detail. I do not want to trespass. My point is simply a margin of appreciation one, which I am sure you are already aware of.

When one comes to look at how the report deals then with benefits, it is also important to note, as well as saying that dynamic benefits were expected to be on a very large scale, that is put together with the £200 million at para. 10.494, in the final sentence:

> "We would therefore expect that the total consumer detriment for static and dynamic to be addressed would be significantly more than £200 million a year".

So, that is bringing the static and the dynamic into it. With respect, that blows out of the water Mr. Sharpe's suggestion that the £200 million is the only relevant consideration in assessment. It is simply contradicted by that sentence of the report. So, our submission in relation to this first part of the first ground is that this case is very far removed from *Tesco*. *Tesco* was a case in which there was a failure to make any assessment of the possible benefits of the competition test. Here we find a report that is replete with qualitative analysis of the effectiveness of the remedies. So, I am afraid simply to say that this is a *Tesco* case -- That argument fails.

The second aspect of Ground 1, incremental benefits of the POSP -- We say that this argument, with respect, is based both on a mis-characterisation of the report and a misunderstanding of the proportionality principles. I have set out at para. 26 of the speaking note, from the skeleton argument, the way in which Barclays runs this argument. It is dependent heavily on Barclays incorrect gloss of the report (which I have set out at 26C). Barclays suggest that the Commission considered whether the addition of the POSP alongside its information on remedies would be more effective in addressing the AEC. It is for that reason that Mr. Sharpe seeks to characterise it as some sort of additional take-it-or-leave-it measure that can be included in the package of remedies. That mis-characterises the report because the report does not conclude simply that the package of remedies would be more effective with the POSP. What it actually concludes is that the POSP is the only

option that will effectively address - and in particular the part of AEC which is the POSA (the point of sale advantage). So, it is not within the discretion. It is essential to achieving the solution.

We say, therefore, that having clarified what the report actually says, Barclays then misunderstands the proportionality principles. It is no. 3 in Tesco. No. 3 is when there is a choice of equally effective measures it is necessary to conduct a comparative exercise between alternative packages of remedies. It is not necessary to conduct such an exercise when there is only one effective remedy. Indeed, if one thinks of the first principle in *Tesco*, given that there is a finding that the POSP is essential, it would have been contrary to the first principle to leave the POSP out because the package of remedies would then not have been effective in the Commission's eyes. So, with respect, the second part of the first ground simply crumbles under its own weight.

The second ground - failure to take account of detriments. Again, it is said that the Commission failed to evaluate the potential detrimental effect of the POSP and the volume of sales. Therefore, it fails to take it into account. That is the way it is put in the skeleton. It is said again that this is equivalent to *Tesco*. We see where this is going. It is simply not correct. In *Tesco* the potential adverse effects of the competition test - i.e. the risk of unmet demand - had not been subject to any assessment whatsoever, quantitative or qualitative. That is not true in the present case. The report directly addresses this issue at paras. 10.46 and 10.42 in the report. Old friends. I am not going to go to the detail. It is a qualitative assessment. Again, we say textbook qualitative assessment - identify, describe, take account. Therefore, no valid comparison between this case and *Tesco*. It is simply not correct to suggest that the Commission did not address a relevant consideration.

Now, Barclays, in the way it puts its case, may disagree with the qualitative assessment, but that is not a ground of judicial review, absent a manifest error. Lloyds may disagree with the method of assessment. They want some surveys. They want some economic models - not just qualitative analysis. That is only a valid ground of judicial review if it can be shown that the Commission's approach was manifestly flawed. Let us be clear. That means that no reasonable decision-maker could have decided that qualitative assessment was appropriate. Again, we say, doomed to failure.

There is one particular part of Lloyds' submissions that require direct response because they relate to the FSA. In oral submissions Lloyds referred to para. 71 of its skeleton argument. If we can quickly turn that up -- I am going to come back to the report, and so you may

want to keep that out. Core Bundle 3, Tab 2, p.88. Can I ask you just to remind yourselves of what para. 71 says. (After a pause) Sir, I feel somewhat schizophrenic acting for the FSA when I see this because Mr. Sharpe informed me I was irrelevant; Miss Davies seems to think I am the font of all knowledge. The point is this: let me put this in some context. You will be aware from our statement of intervention that the FSA actually urged upon the Competition Commission to adopt a stricter form of POSP because we would have preferred to have seen restrictions on the sorts of conversations that could take place at the point of sale. We said that we felt that without those sorts of restrictions -- Then you have the quote that Lloyds relies upon - that that would significantly reduce customer incentives to search the market for alternative PPI offers post credit sale. The whole picture is that Lloyds actually said the opposite. If we could go to the report at para. 10.92 ----

THE CHAIRMAN: Well Lloyds' comments are at 10.94 are they not?

MR. HOSKINS: Precisely. We get the FSA submission represented at 10.92 and we get Lloyds at 10.94 saying that:

> "… unless information and advice about PPI could be provided at the credit point of sale, advertising of PPI and a general terms discussion is unlikely to be effective to enable consumers to identify the potential benefits of buying PPI and to shop around accordingly."

It is quite a small point. It is not open to Lloyds to say "The FSA said this therefore it must be right," when Lloyds was actually submitting to the Competition Commission that it was not correct. Indeed one knows, one sees it in 10.96 that the Competition Commission did not adopt the FSA's position. That is all I need to say on the second ground. If I can move then on to the third ground. This is based on a critique of the Commission's economic analysis of the static welfare implications I am not about to venture anywhere near the detail of that.

There are two points I would like to make. First, this third ground addresses effectively paras. 10.493 to 10.495, in particular of course it addresses 10.494, which is the quantitative assessment of static welfare. As we know, one has three heads of detriment identified, two are assessed qualitatively and one on a quantitative basis. In its skeleton argument Barclays takes a very stark position and it takes the same position in its oral submissions, but I think it is important to understand what is underpinning this point. Barclays' skeleton, core bundle 3, tab 1, and if I could ask you to turn to p.41 of that, that should be sub-paragraphs (d) and (e) of para. 110.

"(d) in order to quantify the static deadweight losses, the Commission relied upon the Excel model. … This produced a figure in excess of £20 million;"

It is (e) I am particularly interested in:

"since the Commission was not able to put a value on the other two categories of consumer detriment identified, it was the quantification of the static deadweight losses alone which provided the basis for the Commission to conclude that the entire consumer detriment to be addressed would be greater than £200 million and, therefore, greater than its estimate of the costs involved."

The same rather stark proposition is repeated at para. 114. Sir, I hope I have demonstrated that as a matter of law the fact that something cannot be assessed on a quantitative basis means that it should be ignored is clearly wrong, and also as a matter of the wording of the report, the last sentence of para. 10.494 it is simply not correct, as a matter of construction that the report relied solely on the figure of £200 million and ignored the dynamic benefits.

PROFESSOR STONEMAN: If I could ask you, what is wrong with (e)?

MR. HOSKINS: What is wrong with (e)?

PROFESSOR STONEMAN: Yes, the benefit will be greater than £200 million. I cannot see what is wrong with that statement.

MR. HOSKINS: "It was the quantification of the static losses alone which provided the basis for the Commission to conclude that the entire consumer detriment to be addressed would be greater than £200 million."

PROFESSOR STONEMAN: Yes, so you take the static quantification and you say it is going to be £200 million plus everything else.

MR. HOSKINS: That is right.

PROFESSOR STONEMAN: But that is what it says here, is it not?

MR. HOSKINS: Well my understanding of Barclays' position is it is saying the opposite Professor. One sees it starkly in 114:

"Since the Commission did not quantify … either of the other (To the witness): categories of detriment, it was only as a result of concluding that the static deadweight losses were in excess of £200 million that the Commission was able to conclude that the total consumer detriment would be in excess of £200 million."

MR. SHARPE: Could my friend also go to para.115?

MR. HOSKINS: Certainly.

PROFESSOR STONEMAN: I think the key is the words: "in excess of".

MR. HOSKINS: Let me make the simple point, because obviously if I have misunderstood the skeleton – no, I will just simply make the point because the point has value nonetheless. Even if Barclays and Lloyds are successful in putting enough holes in the static welfare model it does not necessarily mean that the report must be quashed because there are still the other aspects of detriment assessed by the remedies package, the two qualitative heads. That is the first point I wanted to make.

The second point is the extent to which the Tribunal would be allowed to do that. This is obviously an argument in the alternative because you have Mr. Swift's submissions as to why the model cannot be challenged, and that is para. 40 of the speaking note. This brings us into the *Ex parte Owen* case, which Mr. Lasok referred to. I have set out what he said was the proposition one got from *Ex Parte Owen* (Day 3, p.58, lines 1 to 7). I would ask you simply to read that to yourselves.

Sir, my concern was that that gloss perhaps does not do full justice to the principle to be applied and that is why I have provided you with a copy of *Ex Parte Owen* it was one of the documents we handed up and it is Lord Justice May's judgment at p.1177 – the relevant principles. He puts it in two ways, first of all, just above B: "Where the reasons given by a statutory body…" to the end of that paragraph.

THE CHAIRMAN: It is really the bit in the paragraph starting between C and D you are relying on presumably?

MR. HOSKINS: It is opposite B and it is opposite D, it is both those aspects, but yes, D may be of some weight if one gets to the conclusion that the model is sufficiently defective to be ----

THE CHAIRMAN: It is just an application of the materiality test, is it not?

MR. HOSKINS: That is effectively ----

THE CHAIRMAN: A mistake is not material unless had it not been made a different decision could have been come to.

MR. HOSKINS: It is certainly a facet of that, Sir, yes. I was simply concerned that one was not given the impression it was simply a question of whether the reasoning was independent of itself or not, it was the whole question of ----

THE CHAIRMAN: Well that probably is a very good example of an immaterial mistake, where the two reasons are quite independent and self-standing.

MR. HOSKINS: That is an example but it is not the only example.

THE CHAIRMAN: No.

MR. HOSKINS: That is simply why I thought it was best to clarify exactly what was said. If I can move on now to the fourth ground, I am only concerned with the final complaint in the fourth ground which is that the Commission took no account of the regulatory changes which had been introduced by my client to the FSA. I can deal with this quite quickly, I think, by reference to my speaking note at p.9. It is important to understand that Barclays' case on this has changed during the written part of the proceedings. In its notice of application the allegation was that the Commission took no account of regulatory changes introduced by the FSA and when the defence came back the Commission gave detailed references to where in fact it had taken account of the FSA's regulatory changes. So not surprisingly faced with that Barclays changed tack. The skeleton now accepts that the Commission did refer to each of these regulatory changes and gave its reasons for concluding that they could be ignored, and what is now said is that the Commission had gathered no evidence to support the conclusion, that is the change of tack. Again, the suggestion that the Commission did not have any evidence in relation to the effects of the SFA's regulatory changes is simply factually incorrect, because it had the FSA's own submissions.

In our submissions we explained our regulatory changes, but we said consistently that in our view our regulatory changes on their own were not sufficient to deal with the problems in this market. I have set out the most pertinent references, and if I can take you to para. 49 I think that will do for these purposes. In our submissions of 5th December 2008 we gave some details of two aspects of the regulatory changes, ICOBS was dealt with in a previous one, the same approach was adopted. We made it clear that the POSP would be crucial to the effectiveness of other elements of the PPI remedies package and that tackling the point of sale advantage of credit providers is essential to encouraging effective competition in PPI markets.

So, it was quite clear that what the FSA was saying was that in its expert view its own regulatory actions were not sufficient. There one has ample evidence to justify the approach taken by the Commission.

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

THE CHAIRMAN: No. Thank you very much.

MR. SHARPE: Sir, I wonder if I could seek your indulgence here? We have enjoyed today the pleasure of submissions from Mr. Swift, Miss Smith (which does not really concern me) and, of course, Mr. Hoskins on behalf of the FSA. There is no question - and I will not disguise from you - the utility of me having a moment of reflection to be able to organise

my thoughts in a more coherent way which will obviously save the Tribunal time tomorrow. I will not finish this evening unless you wish to go on much later than normal. I believe Miss Davies and Mr. Lasok want an opportunity to respond. Given the reality that we are likely to be back here tomorrow, and given the utility of that extra time which I think will save time on my part tomorrow morning, I am wondering whether it might be appropriate to seek an adjournment until tomorrow.

THE CHAIRMAN: Can I have some indication of the interveners' time estimates?

MR. LASOK: Can I just say this? I have written down so far ten points that I would like to reply on. What I was hoping was that I would be able to cross off a number of them in light of what Mr. Sharpe and Miss Davies say. The difficulty is that I cannot be restricted, subject to the court -- From my client's perspective my difficulty is that it is not simply what Miss Smith has said - there is a question from Professor Stoneman to Mr. Swift that arose from something that I said yesterday that I think I ought to come back on. There are also some submissions made by Mr. Hoskins. There are submissions of law. The submissions of law I think my learned friend will ----

THE CHAIRMAN: Give us a qualitative analysis of how long you think you will be?

MR. LASOK: I think that probably twenty minutes - on the basis that a number of the points that I was intending to make will disappear when my learned friends have finished.

THE CHAIRMAN: You are making an informed guess.

MR. LASOK: That is what I would try and limit my submissions to.

MISS DAVIES: Sir, I am obviously in the same boat, but there were a number of points that were directed absolutely clearly to submissions made during the course of the hearing, and, indeed, the speaking note on Ground 3 in responding to our speaking note. I would estimate twenty to thirty minutes.

THE CHAIRMAN: What I am minded to do in relation to all of you is to let you carry your bats and your thoughts overnight, but on terms that as much of your reply material is put into written speaking note time form as possible. It will have the added advantages that those who follow Mr. Sharpe will, in a sense, to a decreasing extent, know what they do not need to repeat. It will also have the advantage of making sure that it speeds the process up.

MR. SHARPE: I felt quite out of place in not providing a speaking note.

THE CHAIRMAN: Not at all. I would not normally expect it, speaking purely for myself, though they are very helpful to have as they reduce the amount of notetaking one has to do.

MR. SHARPE: Sir, I do not anticipate being over-long tomorrow. You have been invited to display a heroic degree of judicial deference to the Competition Commission which I will

address insofar as all they have got to do is mention things and that is enough. I will be dealing with some of those issues. They appear to have misunderstood our argument on total consumer detriment as well. Mr. Swift has not really addressed most of our arguments at all. So, I can be brief.

THE CHAIRMAN: If you could put as much of your reply into writing as possible, that will shorten matters, I am sure, because you will not to read them out. I make it clear that of course we recognise that we are coming tomorrow, but we want to have as much of tomorrow as possible for discussion among ourselves while these submissions are all fresh in our minds. So, we have an incentive to keep this part of tomorrow - the in-court part - as short as possible.

MR. SHARPE: In terms of timetable, to assist us, I will be no more than one hour and could be less. You will have the rest of the day.

THE CHAIRMAN: Speaking notes, please. It may be that they are so eloquent that not much has to be added to them.

(Adjourned until 10.30 a.m. on Friday, 11th September 2009)