Neutral Citation [2009] CAT 27

Case No: 1109/6/8/09

IN THE COMPETITION APPEAL TRIBUNAL

Victoria House
Bloomsbury Place
London WC1A 2EB

16th October 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

-supported by-

LLOYDS BANKING GROUP PLC
SHOP DIRECT GROUP FINANCIAL SERVICES LTD

Interveners

-v -

COMPETITION COMMISSION

Respondent

-supported by-

FINANCIAL SERVICES AUTHORITY

Intervener

JUDGMENT

APPEARANCES

Mr Thomas Sharpe QC and Mr Matthew Cook (instructed by Clifford Chance LLP) appeared on behalf of Barclays Bank Plc

Ms Helen Davies QC and Miss Kelyn Bacon (instructed by Herbert Smith LLP) appeared on behalf of Lloyds Banking Group

Mr Paul Lasok QC and Mr Tim Ward (instructed by DLA Piper UK LLP) appeared on behalf of Shop Direct Group Financial Services Ltd

Mr John Swift QC, Ms Kassie Smith and Ms Elisa Holmes (instructed by the Treasury Solicitor) appeared on behalf of the Competition Commission

Mr Mark Hoskins QC and Ms Marie Demetriou were instructed by and appeared on behalf of the Financial Services Authority

I. INTRODUCTION

1. On 7th February 2007 the Office of Fair Trading ("OFT"), in exercise of its powers under sections 131 and 133 of the Enterprise Act 2002 ("the Act"), made a reference to the Competition Commission ("the Commission") for an investigation into the supply of all payment protection insurance services ("PPI") except store card payment protection insurance services to non-business customers in the United Kingdom. PPI is a form of insurance contract pursuant to which, on the happening of a relevant event (usually accident, sickness, unemployment or death of the consumer) a proportion of the amount due from the credit consumer to the credit provider becomes payable to one or the other of them. The main types of PPI are personal loan PPI ("PLPPI"), mortgage PPI ("MPPI"), second mortgage PPI ("SMPPI"), credit card PPI ("CCPPI"), retail PPI and motor finance PPI. Of these, 90% of all PPI sales in 2007 consisted of PLPPI, MPPI and CCPPI.

2. On 29th January 2009 the Commission published its report entitled "Market Investigation into payment protection insurance" ("the Report"). It will be necessary for us to make repeated and detailed references to paragraphs of the Report, which we do by using the abbreviation "R: number" for references to its findings, and "R: APP number" for references to its numerous and weighty appendices.

3. The Commission found that there were features of the PPI market which prevented, restricted or distorted competition in connection with the supply of PPI in the United Kingdom such that there was, within the meaning of section 134(2) of the Act an adverse effect on competition ("AEC"). In outline, the

Report concluded that sellers faced little competition for the sale of PPI, when sold in combination with the credit which it insures; that consumers faced higher prices and less choice than they would if there was effective competition, and that there were serious deficiencies in the competitive process for selling PPI policies. It concluded that the sale of PPI in combination with the insured credit was therefore highly profitable, although some of the resultant profit was used to subsidise credit prices.

4. In consequence, the Commission proposed in the Report a package of remedies, described in paragraph 2 of the Summary of the Report as:

> "…a prohibition on distributors and intermediaries from selling PPI to their credit customers within seven days of a credit sale, unless the customer had proactively returned to the seller at least 24 hours after the credit sale; a prohibition on selling single-premium PPI policies (where the premium is paid in one upfront payment, generally by adding the premium to the credit borrowed); a requirement on retail PPI distributors to offer retail PPI separately when they also offer retail PPI bundled with merchandise cover; and several requirements to provide specified information in marketing materials, at the points of sale of credit and PPI, and each year after the PPI policy has entered into force."

5. The Commission proposes that this package of remedies should be made the subject of an Order to be made before November 2009, requiring implementation in relation to advertising and the provision of information by 6th April 2010, and as to the other remedies by 1st October 2010.

6. Much the most controversial of the remedies proposed was the first, namely the point of sale prohibition ("POSP") for which, although such a remedy was considered in the Commission's investigation into extended warranties, there is no precedent. It was the proposal to implement the POSP which led to the present application, made by Barclays Bank plc ("Barclays") pursuant to section 179 of the Act on 27th March 2009. Pursuant to permission which we

gave on 28th April 2009, Shop Direct Group Financial Services Limited ("Shop Direct") and Lloyds Banking Group ("Lloyds") have intervened to support Barclays' application, and the Financial Services Authority ("FSA") has intervened in substance in support of the Commission's defence. The relief sought by Barclays' application is that we should, first, quash the Report in so far as it refers to the POSP and the Commission's findings on market definition and the nature and extent of competition in the supply of PPI, and secondly, refer the matter back to the Commission with a direction to reconsider and make a new decision in accordance with our ruling. There is no specific challenge to the Commission's decision to propose any other element of the package of remedies, although the breadth of Barclays' invitation to quash the Commission's findings as to the nature and extent of competition in the supply of PPI by implication challenges its conclusion that there is an AEC. In the absence of a sustainable finding that there is an AEC, the Commission has no power to impose remedies at all: see section 134(4) of the Act.

7. It is common ground that, consistent with section 179(4) of the Act, we must determine this application by applying the same principles as would be applied by a court on an application for judicial review.

II. THE LAW

8. It is convenient, in order to make the detailed grounds of Barclays' application more readily intelligible, to summarise the relevant legal principles, as they affect both those parts of the Commission's task under challenge, and the powers and duties of this Tribunal in determining any such challenge. We can

do so by way of summary because the general terms and effect of those legal principles have not been a matter of dispute before us, albeit that the parties have placed significant differences of emphasis on particular aspects of them.

The Commission's tasks

9. The first task imposed on the Commission by a market investigation reference such as the present is to:

> "…decide whether any feature, or combination of features, of each relevant market prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in the United Kingdom or a part of the United Kingdom." (Section 134(1)).

By subsection (2) an affirmative decision means that, for the purposes of the Act there is an AEC.

10. Both subsections (1) and (2) define this first task by reference to each "relevant market". The phrase "relevant market" is defined in section 134(3), subject to an exception which is irrelevant for present purposes, as a market for goods or services of a description to be specified in the reference: see section 134(3)(a)(i) and (b)(i). Section 134 therefore contemplates that the reference will specify particular goods and services by way of a description of them, and that the Commission will, as part of this first task, identify each relevant market in which the goods or services thus described are sold or supplied, so as to ascertain whether there is an AEC in any of them. In the present case, as we have described, the OFT's reference identified the supply of PPI (subject to the store card exception) to non-business customers in the United Kingdom as the specified services, and avoided any attempt to define

the relevant market, or even to express a view whether those services were to found to be supplied in one or more than one market.

11. It follows in our opinion that the identification of each relevant market was a necessary part of the Commission's first task of deciding whether or not there was an AEC.

12. An affirmative conclusion, that there is an AEC, imposes the Commission's second task, pursuant to section 134(4), as follows:

> "The Commission shall, if it has decided on a market investigation reference that there is an adverse effect on competition, decide the following additional questions—
>
> (a) whether action should be taken by it under section 138 for the purpose of remedying, mitigating or preventing the adverse effect on competition concerned or any detrimental effect on customers so far as it has resulted from, or may be expected to result from, the adverse effect on competition;
>
> (b) whether it should recommend the taking of action by others for the purposes of remedying, mitigating or preventing the adverse effect on competition concerned or any detrimental effect on customers so far as it has resulted from, or may be expected to result from, the adverse effect on competition; and
>
> (c) in either case, if action should be taken, what action should be taken and what is to be remedied, mitigated or prevented."

In the present case, the Commission resolved both to take action itself under section 138 and to recommend the taking of action by others (the FSA).

13. The concept of detrimental effect on customers is not left undefined, although the definition has an element of circularity in it. Section 134(5) provides that:

> "For the purposes of this Part, in relation to a market investigation reference, there is a detrimental effect on customers if there is a detrimental effect on customers or future customers in the form of—
>
> (a) higher prices, lower quality or less choice of goods or services in any market in the United Kingdom (whether or not the market to which the feature or features concerned relate); or
>
> (b) less innovation in relation to such goods or services."

The effect of that definition is to restrict the class of effects qualifying as detrimental to matters of price, quality, choice and innovation. It does not however mean that there is always a detrimental effect on customers merely because, for example, prices are higher.

14. The at first sight broad discretion conferred on the Commission in deciding whether to take or recommend action under section 134(4) is qualified in a number of important respects, central to the present application, both by other provisions in the Act and by the general law. First, the Commission is required to use its statutory powers to remedy, mitigate or prevent any identified AEC or any consequential detrimental effect on customers, to the extent that it is reasonable and practicable to do so. This requirement appears first in section 134(6) which provides that:

> "In deciding the questions mentioned in subsection (4), the Commission shall, in particular, have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the adverse effect on competition and any detrimental effects on customers so far as resulting from the adverse effect on competition."

15. Secondly, the requirement is imposed in terms by subsection 138(2), as follows:

> "The Commission shall, in relation to each adverse effect on competition, take such action under section 159 or 161 as it considers to be reasonable and practicable—
>
> (a) to remedy, mitigate or prevent the adverse effect on competition concerned; and
>
> (b) to remedy, mitigate or prevent any detrimental effects on customers so far as they have resulted from, or may be expected to result from, the adverse effect on competition."

Sections 159 and 161 empower the Commission to impose remedies either by the acceptance of undertakings or the making of Orders. In the present case the Commission decided to impose its remedies by making Orders.

16. It is common ground that the effect of the above provisions is to require the Commission to remedy any identified AEC or consequential detrimental effect on customers as fully and effectively as its powers permit, subject only to the requirements of reasonableness and practicability.

17. That the Act imposes on the Commission a duty to fashion as full and effective a remedy for an identified AEC as possible, subject only to the constraints imposed by reasonableness and practicability, is recognised in the Commission's own Market Investigation References Guidelines ("the Guidelines") published in 2003 pursuant to section 171(3) of the Act. Paragraph 4.7, under the sub-heading "Consideration of appropriate remedies" states:

> "Although the Commission must always consider the appropriateness of any remedial action, it is unlikely that the Commission, having decided that there is an adverse effect on competition, will decide that there is no case for remedial action, at least before it has given attention to any relevant customer benefits that may accrue from the market features. Examples of exceptional circumstances where the Commission may conclude that no action is appropriate might be where the costs of any practicable remedy seem disproportionate in the light of the size of the relevant market…"

Under the sub-heading "The Cost of remedies and proportionality", paragraph 4.10 states:

> "The Commission must have regard to the reasonableness of any remedy and will aim to ensure that no remedy is disproportionate in relation to the adverse effect on competition and any adverse effects on customers. Part of its consideration will include an assessment of the costs of implementing a remedy, for example in disbanding or modifying a distribution system; and the costs of complying with a remedy, for example, providing the OFT with periodic information on prices or margins. However, the Commission must consider the wider picture. Adverse effects on competition are likely to result in a cost or disadvantage to the UK economy in general and customers in particular. Where significant, these costs might usually be expected to outweigh the costs incurred by any person on whom remedies are imposed."

18. The requirement to balance the duty to fashion a full and effective remedy with the constraint that it should be reasonable and practicable lies at the heart

of this application. The use of the phrase "remedy, mitigate or prevent" in sections 134 and 138 of the Act recognises that there may be cases where AECs cannot, because of the constraints of reasonableness or practicability, be fully remedied or prevented, but only mitigated.

19. As is reflected in the language of the Guidelines, the balancing exercise required between effectiveness, reasonableness and practicability has come to be known as the proportionality test, and its operation informed by European Union jurisprudence, summarised in the following extract from the judgment of the European Court of Justice in R v. Ministry of Agriculture, Fisheries and Food and Secretary of State for Health ex parte Fedesa [1990] ECR I-4023, at paragraph 13:

> "The Court has consistently held that the principle of proportionality is one of the general principles of Community law. By virtue of that principle, the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued."

Although this principle is expressed in terms of a restraint on legislation, no-one before us suggested that it was not equally applicable to administrative action.

20. In Tesco plc v. Competition Commission [2009] CAT 6, the same proportionality principle was applied to a market investigation reference by the Tribunal in the following passage, which all the parties to this application commended to us as a correct summary of the law:

> "137. That passage identifies the main aspects of the principles. These are that the measure: (1) must be effective to achieve the legitimate aim in question (appropriate), (2) must be no more onerous than is required to achieve that aim (necessary), (3) must be the least onerous, if there is a

> choice of equally effective measures, and (4) in any event must not produce adverse effects which are disproportionate to the aim pursued.
>
> 138. The first thing to note is that the application of these principles is not an exact science: many questions of judgment and appraisal are likely to arise at each stage of the Commission's consideration of these matters. This is perhaps most obviously the case when it comes to the balancing exercise between the (achievable) aims of the proposed measure on the one side, and any adverse effects it may produce on the other side. In resolving these questions the Commission clearly has a wide margin of appreciation, with the exercise of which a court will be very slow to interfere in an application for judicial review.
>
> 139. That margin of appreciation extends to the methodology which the Commission decides to use in order to investigate and estimate the various factors which fall to be considered in a proportionality analysis (and indeed in its determination of the statutory questions of comprehensiveness, reasonableness and practicability). There is nothing in the governing legislation, or in the general law, which requires the Commission to follow any particular formal procedure or methodology when it comes to consider the effectiveness of a possible remedy, or its relevant costs, adverse effects and benefits. … 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": for example, the more important a particular factor seems likely to be in the overall proportionality assessment, or the more intrusive, uncertain in its effect, or wide-reaching a proposed remedy is likely to prove, the more detailed or deeper the investigation of the factor in question may need to be. Ultimately the Commission must do what is necessary to put itself into a position properly to decide the statutory questions. As the Commission itself accepts, this includes examining and taking account of relevant considerations, such as the effectiveness of the remedy, the time period within which it will achieve its aim, and the extent of any adverse effects that may flow from its implementation.
>
> …
>
> 143. It is worth noting that element (1) of the proportionality principles is closely linked to element (4) (see paragraph [137] above). In other words it is necessary to know what the measure is expected to be able to achieve in terms of an aim, before one can sensibly assess whether that aim is proportionate to any adverse effects of the measure. The proportionality of a measure cannot be assessed by reference to an aim which the measure is not able to achieve."

21. The consensus that the passages which we have extracted from the Fedesa and Tesco cases correctly summarise the relevant law in relation to the proportionality test makes it unnecessary for us to provide any further analysis, save for this observation. The "double proportionality" approach referred to in paragraph 139 of the Tesco judgment does not, it is agreed, introduce any new legal principle. It is simply a convenient label for the

common sense proposition that, within a wide margin of appreciation, the depth and sophistication of analysis called for in relation to any particular relevant aspect of the inquiry needs to be tailored to the importance or gravity of the issue within the general context of the Commission's task.

The task of the Tribunal

22. There was, again, little dispute between the parties as to the judicial review principles which govern the Tribunal's conduct in relation to an application under section 179 of the Act. The Tribunal's concern is not with the correctness or otherwise of the Commission's findings and decision, but with the lawfulness of the decision making process which it adopted. In the present case, the Tribunal is not asked to adjudicate upon allegations of irrationality or perversity. There is no suggestion in the Notice of Application that the Commission's market analysis (Ground 4) or its decision to impose the POSP as part of its remedy package (Grounds 1 to 3) were such as no reasonable decision-maker in the Commission's position could have made.

23. Rather, the allegations are, first, that the Commission omitted to take into account relevant considerations and took into account irrelevant considerations, and secondly that the Commission failed to gather the evidence, or to conduct the analysis called for by the market findings and POSP remedy which are challenged. So far as concerns evidence, the important distinction is between a decision based upon no evidence, with which the Tribunal may interfere, and one based upon the weight given to particular evidence, which is a matter for the Commission, and with which the Tribunal should not interfere, in the absence of irrationality.

24. In that context we were referred to, and have adopted, the following statements of principle. In Secretary of State for Education and Science v. Tameside Metropolitan Borough Council [1977] AC 1014, at 1065B, Lord Diplock said:

> "… the question for the court is, did the [decision-maker] ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?"

In Mahon v. Air New Zealand Limited [1984] AC 808 at 820G, Lord Diplock said that an investigative decision-maker:

> "must base his decision upon evidence that has some probative value …"

In Office of Fair Trading v. IBA Healthcare Limited [2004] EWCA Civ 142 Carnwath LJ said, speaking of this Tribunal when reviewing a factual judgment of the OFT, at paragraph 93:

> "there is no doubt that the court is entitled to enquire whether there was adequate material to support [the relevant] conclusion."

25. In reviewing the extent of its own judicial review powers in British Sky Broadcasting Group plc v. Competition Commission [2008] CAT 25, this Tribunal, at paragraph 54, approved the following summary of the "no evidence" principle in Wade and Forsyth on Administrative Law (9th edition) at page 272 and 273 (footnote references omitted):

> "The limit of this indulgence is reached where findings are based on no satisfactory evidence. It is one thing to weigh conflicting evidence which might justify a conclusion either way, or to evaluate evidence wrongly. It is another thing altogether to make insupportable findings. This is an abuse of power and may cause grave injustice. At this point, therefore, the court is disposed to intervene.
>
> 'No evidence' does not mean only a total dearth of evidence. It extends to any case where the evidence, taken as a whole, is not reasonably capable of supporting the finding; or where, in other words, no tribunal could reasonably reach that conclusion on the evidence. This 'no evidence' principle clearly has something in common with the principle that perverse or unreasonable action is unauthorised and ultra vires. "

26. A market investigation by the Commission is by no means simply a fact-finding exercise. The identification of the "relevant market" for the purpose of section 134 is itself a mixed question of fact and analysis, as is the identification of an AEC. The fashioning of an effective, reasonable and practicable remedy requires not merely fact-finding about the market as it is, but analysis as to the probable effect of alternative remedies upon that market in the future. Analysis of that kind calls for (*inter alia*) quantification, evaluation and the analysis of causation, sensitivity and risk.

27. As emphasised in the decision of the European Court of Justice in Commission v. Tetra Laval Case C-12/03 P [2005] ECR I-987, these tasks call for the application of particular care, beyond that necessitated by mere fact-finding. In the Tesco case this Tribunal summarised its task as to ascertain whether the Commission had done what was necessary to put itself in a position properly to decide the statutory questions. In the BSkyB case, the Tribunal emphasised, at paragraph 56, that the specialist composition of the Tribunal, with members well qualified to form their own views as to the correct methods of economic analysis, did not permit any departure from settled principles of judicial review, so as for example to permit it to substitute its own views as to the correct evaluation methodology, or as to the depth of analysis required, for those of the Commission.

28. Finally, it is not every perceived failure in fact-finding or analysis by a decision-making body which requires or permits its finding or decision to be quashed. The relevant failing must satisfy a materiality test. Generally speaking, a relevant failing will require the finding or decision to be quashed

unless the Tribunal is satisfied that a reasonable decision-maker in the position of the Commission would still have reached the same finding or decision. If a decision-making process which had not included that failing could have led a reasonable decision-maker to a different conclusion, then the relevant finding or decision will usually have to be quashed.

29. This materiality test is of particular importance where a finding or decision is based upon a number of distinct grounds, only one of which is found to have been vitiated. In that context we have found the following passage in the judgment of May LJ in R v. Broadcasting Complaints Commission ex parte Owen [1985] 1 QB 1153 at 1177A-D to be of particular assistance:

> "Where the reasons given by a statutory body for taking or not taking a particular course of action are not mixed and can clearly be disentangled, but where the court is quite satisfied that even though one reason may be bad in law, nevertheless the statutory body would have reached precisely the same decision on the other valid reasons, this court will not interfere by way of judicial review. In such a case, looked at realistically and with justice, such a decision of such a body ought not to be disturbed.
>
> …
>
> Another approach to the same problem in such circumstances, which really reflects the same thinking is this: the grant of what may be the appropriate remedies in an application for judicial review is a matter for the discretion of this court. Where one is satisfied that although a reason relied on by a statutory body may not properly be described as insubstantial, nevertheless even without it the statutory body would have been bound to come to precisely the same conclusion on valid grounds, then it would be wrong for this court to exercise its discretion to strike down, in one way or another, that body's conclusion."

III. THE GROUNDS OF BARCLAYS' APPLICATION

30. Barclays divides its criticisms of the Report into four sections ("Grounds"). The first three, all of which overlap, are aimed at the imposition of the POSP as part of the package of remedies. They allege that the Commission's conduct of the proportionality test was vitiated by absence of evidence, flaws in analysis, the leaving out of account of relevant matters and the taking into

account of irrelevant matters. Ground 4 attacks the Commission's relevant market analysis, and the Commission's findings as to the competition problems which it found to exist in the markets thus identified.

31. Ground 4 is therefore the only part of Barclays' application which addresses the first of the Commission's two tasks and, if well-founded, would at least be capable of undermining the whole of the Commission's findings as to the AEC. Even if it fell short of undermining the Commission's conclusion that there was an AEC, Ground 4 would, in the form in which it is advanced, still at least potentially require a re-examination of the particular nature of the AEC which the Commission found to exist. Logically therefore, Ground 4 calls to be addressed before Grounds 1 to 3, which only criticised the second of the Commission's tasks. We shall therefore address it first.

IV. GROUND 4 - RELEVANT MARKET ANALYSIS

32. The Commission devoted the whole of Chapter 3 of, and Appendix 3 to, the Report to an explanation of its examination and conclusions as to the relevant market. Having reached a provisional conclusion, it sought to verify its findings on market definition by an examination of indicators of the level of competition between providers of PPI, set out in Chapter 4 and Appendix 4. Its conclusion, expressed at the beginning of R3.139 was as follows:

> "We conclude that, for all types of PPI policies, the relevant product market is the sale of PPI to an individual distributor's, or intermediary's, credit customers by that distributor or intermediary."

At R3.2 the Commission described that conclusion as having taken account of all the evidence available, and as being consistent with the evidence in the round.

33. In order to understand the Commission's reasons for this conclusion, it is necessary to explain certain definitions used in the passages to which we are about to refer. We set them out below:

Distributor	A company which sells PPI alongside its own credit product.
Intermediary	An intermediary is a third party through whom consumers identify a suitable type of PPI policy, whether with or without an associated credit product. Examples of intermediaries are brokers and independent financial advisors.
IP	Income protection insurance. Provides protection in the event that one has to provide care for a spouse, partner, parent or child full time; hospitalisation; accident; sickness (disability); and involuntary unemployment.
SSNIP test	Small but significant non-transitory increase in price test (also known as the hypothetical monopolist test).
Stand-alone PPI	PPI that is not sold alongside an underlying credit product.

Stand-alone provider	A company that provides stand-alone PPI.

34. Although this is no substitute for reading Chapters 3 and 4 of the Report as a whole, together with their appendices, (as we have done), it is worth setting out verbatim the Commission's reasons for its narrow market definition, immediately following the conclusion which we have described (R3.139-140):

> "The reason for this is that we found that the competitive constraints being imposed on distributors and intermediaries by other providers of PPI, by providers of short-term IP, by providers of other types of insurance products and by consumers choosing not to purchase PPI were not sufficiently strong to warrant a wider product market. Further, we found that the constraint on PPI prices as a result of the complementary demand relationship with credit was not sufficiently strong to warrant a wider systems market including credit and PPI.
>
> For stand-alone PPI and stand-alone short-term IP providers, we concluded that they competed to win customers from across the range of PPI providers, both those who offer PPI in combination with credit and those who offer it on a stand-alone basis. As such, the relevant markets are asymmetric. We concluded that stand-alone providers are constrained by competition with distributors, but the scale of substitution from distributors to stand-alone providers is insufficient to competitively constrain the distributors. Stand-alone providers therefore operate in a wider economic market including all providers of PPI."

35. The Commission summarised its reasons for concluding that PPI distributors and intermediaries are not competitively constrained by other PPI providers or by alternative types of insurance in R3.3 as follows:

> "• The internal documents and oral evidence that we received from the distributors indicated that the responsiveness of the demand for distributors' PPI policies to changes in the price of those policies was low.
>
> • Our assessment of the evidence on consumers' search and switching patterns indicated that relatively few consumers shop around for PPI policies or combinations of PPI and credit.
>
> • The result of the CC GfK NOP 2008 survey of purchasers of PPI policies indicated that limited numbers of purchasers of PPI policies compared two or more PPI policies before their purchase. Our analysis of the results of this survey indicated that changes in the price of a PPI policy would result in a relatively small change in the sales of that policy.
>
> • Our analysis of the distributors' sales data showed that a demand for a distributor's PPI policies was not as responsive to changes in its PPI price as we would expect in a competitive market.

- There was little evidence of competition on non-price factors.

- The high margins earned on PPI policies indicated that the responsiveness of demand for PPI to changes in PPI prices was low."

The summary which we have recited is underpinned in the Report by detailed and painstaking analysis of each element of that reasoning, cross-referenced to the evidence gathered by the Commission upon which it was based.

36. Ground 4 is expressed in Barclays' Notice of Application as follows:

> "The Commission's analysis of the relevant market(s) and the extent of the competition problems which existed in the markets which the Commission found to exist were flawed by its failure to take account of relevant considerations."

Ground 4 is then subdivided under five sub-headings, each of which we address below. They are however preceded by the assertion that the Commission should, as it had done in its 2003 inquiry into the supply of extended warranties on domestic electrical goods, have adopted a broader market definition, for the reasons given in that report. There is, in our view, nothing in this point. The appropriate market definition in any particular investigation is, as paragraph 91 of the Notice of Application acknowledges, highly fact specific. The fact that, on different (albeit loosely analogous) facts, the Commission reached a different view in another investigation says nothing about the lawfulness of the process whereby the Commission arrived at its narrow market definition in the present case.

37. Two of the sub-sections of Ground 4 allege that the Commission failed to take account of relevant considerations by failing to keep abreast of market changes occurring during the currency of their investigation. The gist of the allegation (repeated for different purposes under Grounds 1 to 3) was that the Commission based its detailed analysis upon market statistics and other

evidence for the period ending in 2006, and paid no more than lip-service to statistics and other evidence about market developments in the following two years, both of which preceded the publication of the Report in January 2009. The result was, according to Barclays, that the Commission ignored the following trends occurring in those two years, namely:

i) a reduction in profitability;

ii) falling penetration rates;

iii) increased claim rates on PPI insurance;

iv) an overall contraction in the PPI market.

38. We have considered each of these categories in turn, and have not been persuaded that the Commission failed properly to take any of them into account. Taking profitability first, the Commission carried forward its analysis of the profitability, both of PPI viewed separately and of PPI aggregated with the supply of the credit which it insured, beyond 2006, as is apparent from R:APP 4.4, in which at paragraph 113 it concluded that results for 2007 were not materially different to those for prior years, and in R:APP 4.5, in which its analysis of the combined profitability of PPI and related credit was assessed through to 2007, and projected onwards thereafter. Appendix 4 contains the detailed statistical underlay for the Commission's analysis of the extent of competition between PPI providers in the supply of PPI which, as we have explained, the Commission used to verify its provisional conclusions as to market definition in Chapter 3.

39. As to penetration rates, the Commission had in R2.24-25 set out in tabular form its detailed findings as to penetration rates from 2002 to the first half of 2008 in relation to each relevant type of PPI, and summarised the evidence which it had received as to the reasons for those changes. Chapter 2 of the Report contained the basic information about PPI upon which the Commission built its market analysis in Chapter 3. More generally, the Commission's view, from reading the Report as a whole, was that falling penetration rates were a consequence of the AEC which it identified, rather than a reason for adopting a different market definition from that justified by the evidence as a whole.

40. Turning to claims rates, Barclays' allegation was that the Commission had received evidence of increasing claims rates during 2007 and in particular in late 2008, and that, while mentioning them in Chapter 10 of the Report (concerned with remedies) it had failed to factor these into its market definition analysis.

41. In fact, the Commission analysed claims rates for 2007 and the first half of 2008 as part of its investigation of PPI underwriting in Chapter 7 and Appendix 7. At R:APP 7.1 paragraph 83 the Commission concluded that the overall claims ratio for 2007 had decreased slightly from 2006, and increased to a little more than in 2006 during the first half of 2008. At R:4.76 and 4.81 the Commission analysed the effect of changing claims rates on distributor profitability, concluding that, since adverse claims experience was largely for the risk of the underwriter rather than the distributor, increased claims rates had a limited effect on profitability. Again, since the whole of the Chapter 4

analysis was used by the Commission to verify its conclusions as to the relevant market, we consider that there is no substance in the allegation that changes in claims rates at least until mid-2008 were not taken into account.

42. It is fair comment that substantial increases in claims rates in late 2008 were not taken into account for this purpose, but the Commission considered and gave reasons for not doing so in R:10.17, as part of its analysis of the possible impact of the current economic downturn upon its proposals as to remedies. It was in our view well within the Commission's margin of appreciation to conclude that the economic downturn which only began at the very end of the investigation period, and the outcome of which could not be known with any certainty until well after the required publication date for the Report, did not call for a reappraisal of its market definition analysis.

43. As for the overall decline in the PPI market during 2007 and the first half of 2008, Barclays' Notice of Application acknowledges (at paragraph 109) that the Commission made the relevant calculations in Chapter 2 of the Report, and it is clear from a more general reading of the Report that, again, the Commission regarded the decline in the PPI market as a consequence of the AEC which it identified, rather than a reason for reappraising its market definition analysis. In our view, Barclays' complaint that the Commission took no account of the decline in the PPI market in 2007 and 2008 is in substance a complaint on the merits. In other words, Barclays simply disagree with the Commission's conclusions as to the reasons for that decline. But that, in the absence of irrationality (and none is alleged in this respect), was a

matter for the Commission to decide having, as we find, properly considered that evidence.

44. A separate but related head of criticism under Ground 4 was that the Commission failed in its market analysis, and in its identification of the existing competition problems, to take into account recent regulatory change, and the effect which this would be likely to have upon market participants. The regulatory changes in question consisted first of the FSA's introduction in January 2008 of an updated Insurance Conduct of Business sourcebook ("ICOBS") requiring, in particular, an extended cooling off period and improved disclosure obligations in relation to the sale of PPI policies, and secondly, the launch by the FSA in June 2008 of free impartial comparison tables for PPI on its own website, along with a series of questions designed to help consumers make informed decisions. Reference was also made to a decision by a number of PPI distributors to cease offering single premium policies, although this was not linked in the Notice of Application to any particular regulatory change.

45. It is fair comment that the Commission did not refer to these events in that part of the Report specifically concerned with market definition, or with the identification of the AEC. By contrast, it clearly did consider each of them as part of its consideration of an appropriate remedy package, in Chapter 10. At R:10.12-13 the Commission specifically considered the ICOBS changes, and the submission that the Commission should allow them to "bed down" so as to gauge their effect in remedying any AEC without the need for intervention by the Commission itself. Its conclusion was, first, that the changes were coming

into force so soon before the deadline for the Report as to make it impracticable to seek evidence from the market place as to the beneficial effect, if any, of the new ICOBS regime; secondly, that the FSA itself had given evidence to the effect that it did not expect those changes significantly to affect the structural problems identified in the Commission's provisional conclusions; and thirdly, that in its own view the Commission did not think that increased cooling-off periods or the greater provision of non-price information, at the behest of a regulatory body not specifically concerned with competition, would be nearly sufficient to remedy the AEC.

46. It is in our view implicit in that reasoning that the ICOBS changes were insufficient in themselves to warrant any reappraisal of the Commission's findings, either as to market definition or as to competition problems in the market, and in our view that was both a judgment reached on the basis of evidence (namely the FSA's own opinion communicated to the Commission), and one which was well within the Commission's margin of appreciation.

47. As for the FSA's introduction of price comparison tables, and the decision of some distributors to cease selling single premium policies, both these events were noted by the Commission in the Report. Again, while it is fair comment that there is no express analysis to be found in the Report of the possible implications of these events upon the Commission's market analysis and identification of competition problems, we consider that it by no means follows that, in an otherwise thorough and careful investigation (as illustrated by the Report) the Commission somehow omitted to consider them, before rejecting them as irrelevant to that analysis. It is we think a non-sequitur to

suppose that the omission of a decision-making body to mention something which it clearly knew about as being irrelevant to its analysis means that the possible relevance of it went unconsidered. It was in our view well within the Commission's margin of appreciation to conclude that the FSA's price comparison tables and the decision by some distributors to discontinue single premium policies, while welcome, did not materially affect its market analysis, without having to spell that out in terms. A requirement that every fact which is noted but deemed irrelevant has to be identified as such (i.e. as irrelevant) would impose a large and in our view usually pointless additional burden on the Commission. The absence of a relevance analysis in relation to a noted fact usually (but not invariably) justifies an inference that it was considered but deemed irrelevant.

48. The central complaint under Ground 4 was that the Commission's narrow market definition was a result of a failure to carry out "proper analysis". This head was broken down into the following three sub-sections:

i) an incorrect application of the SSNIP test;

ii) an incorrect application of the "cellophane fallacy"; and

iii) a failure to take into account evidence supportive of a wider market definition.

Woven into the second and third of those sub-sections was a circularity argument, to the effect that the Commission wrongly used its competition analysis to support its market definition analysis, when the former was to a significant extent the product of the latter.

49. Taking these in turn, the SSNIP test is, as its alternative name implies, an analytical tool used by economists to assist in the identification of market monopolies. The test is used to ascertain whether a small but significant price increase would lead a sufficient number of customers switching supplier to make that increase in price unprofitable. The Commission's approach was, first, to identify by appropriate evidence (by a process which is not challenged) the proportion of customers for each type of PPI policy who actively compared two or more policies before making their choice, and secondly, having chosen a 5% price increase for the test (which is also not challenged) to identify what proportion of those customers who did make that comparison would need to change their supplier on a 5% price increase so as to make the price increase unprofitable. The Commission identified the relevant percentages (of those "active comparers") as 90% for PLPPI, 95% for MPPI and 80% for SMPPI.

50. At paragraphs 45-46 of R:APP 3.9 the Commission concluded that it could not be satisfied that such high percentages of customers would respond by changing their supplier if faced with a 5% price increase, but concluded nonetheless that the outcome of this analysis "did not provide a definitive conclusion on the scope of the relevant market". In consequence the SSNIP test did not play a dominant part in the Commission's conclusions as to the relevant market.

51. Barclays made two criticisms of that approach. First, it described as unsupported by analysis the view that anything less than those high percentages of "active comparers" would switch suppliers in response to a 5%

price increase. Secondly it was suggested that the Commission took no account of those customers who, rather than switch suppliers, would simply decide not to purchase PPI in face of such a price increase.

52. In our view, the first of those criticisms is no more than a merits point. The Commission was fully entitled to conclude, from its appreciation of the evidence as a whole, that no safe assumption could be made as to the number of customers who would switch suppliers in those circumstances. It is only necessary to look, for example, at the Commission's conclusions as to the assumption of many customers that a credit decision would be influenced by the decision whether to take a PPI policy from the credit supplier (see R:5.49) to see why the Commission could properly have such reservations as to levels of customer switching of suppliers.

53. As to the second point, the Commission did take into account the prospect that price increases would lead customers simply not to buy PPI at all: see R:3.18-20, where the Commission specifically includes, as a form of price-driven substitution, consumers choosing not to take out insurance at all. See also footnote 14 to R: 3.19. Accordingly, Barclays' criticisms of the Commission's use of the SSNIP test are, in our view, unfounded, at least for judicial review purposes.

54. The cellophane fallacy arises where a monopolist sets prices above the theoretically competitive level. The fallacy is that, at high market prices two products appear to be close substitutes, whereas at competitive prices they would not be. The result is that the SSNIP test may lead to an excessively broad market definition, by including products which are not true substitutes

in a competitive market. A fundamental plank in the Commission's findings was that PPI prices which they observed were very substantially higher than those which they considered would prevail in a properly competitive market. At paragraph 48 of R:APP 3.9, the Commission therefore concluded that, if the SSNIP test had been applied to the lower prices which they believed would prevail in a properly competitive market, rather than to the then current prices, it would be likely to produce a result more favourable to a narrow market definition than the rather inconclusive result which they had obtained.

55. Barclays attacked this analysis on two grounds. The first was that the Commission's profitability analysis was based on outdated figures. We have already considered and dismissed this, above. Secondly, it was submitted that, if the Commission had adopted a broad or "system" market analysis, pursuant to which PPI and credit were treated as a combined product in a single market, this would have undermined the Commission's approach to profitability, since part of the excess profitability of PPI was used to subsidise the lower credit prices. In other words, reliance should not have been based on a profitability analysis which was itself based on the Commission's view about market definition, and then used to support that view. As to this, there is in our view inevitably an element of circularity in any sophisticated analysis of competitiveness in a market. As the Commission rightly acknowledged, it was necessary for it to test its Chapter 3 market analysis by reference to its analysis of competition in Chapter 4. In our view, the same applies to profitability. The Commission's conclusion that the PPI market made excessive profits for the distributors was in no sense dependant or even predominately based upon its market definition: see in particular R:3.149. The

Commission was entitled in our view to conclude that its findings about profitability and its conclusion as to market definition were complementary.

56. Barclays took four points under the sub-heading that the Commission failed to take account of evidence suggesting a wider market definition. They may be summarised as:

i) a sufficient number of consumers searched for credit and PPI together, to justify a system market definition;

ii) the Commission wrongly assumed that evidence of high termination rates did not imply a high level of switching between PPI policies;

iii) the Commission assumed a lack of innovation (and therefore of non-price competition) without identifying any benchmark as the basis for that value judgment;

iv) the Commission's finding that high margins were earned on PPI sales was vitiated by failure to consider recent market information and by a circular failure to consider the extent to which profits were applied in reducing credit prices.

57. Taking each of these in turn, the Commission's finding that an insufficient number of customers shopped around for PPI and credit as a bundle was based upon its conclusion that only between 11.3 and 21.3% of customers shopped around at all (whether for PPI on its own or in conjunction with credit), and that only a majority of those shopped around for the bundle. In our view, this judgment was well within the Commission's margin of appreciation and justified by the analysis in R:APP 3.9 at paragraphs 14-44, in relation to what

was only one limb of a market definition conclusion supported by a raft of separate reasons.

58. As to the implications to be derived from the evidence as to terminations, the Commission was entitled in our view to have regard to its evidence and analysis about the lack of competitiveness in the PPI market, taken in the round, in declining to conclude that high terminations implied a high level of switching between competing suppliers.

59. As to the third point, relating to innovation, the benchmark chosen by the Commission is encapsulated in its use of the word "significant" in the passage identified in paragraph 104(c) of the Notice of Application. We can see no reason why that benchmark was inadequate, let alone outside the Commission's margin of appreciation.

60. We have already dealt with the first part of the fourth point (relating to recent market evidence). As to the second point, it is simply another variant of the circularity argument, which we have already considered and rejected.

61. Looking more generally at the alleged failure by the Commission to take into account its own evidence, this criticism is in our view more a reflection of Barclays' different view of the merits of the analysis, than of any unlawfulness in the Commission's approach to its task.

62. The final element of Ground 4 with which we must deal is the allegation, at paragraph 106 of the Notice of Application, that the Commission's market definition was thereafter inconsistently applied throughout the Report. Two points were advanced. The first was that, if the appropriate market definition

was that each distributor had a separate market from each other distributor for the sale of PPI to its credit customers, then the Commission should have looked separately at individual distributors' markets. The Commission addressed this in terms at R:3.147, and the thorough evidence gathering process which it conducted meant that it did in fact obtain evidence from a substantial number of different distributors. In the circumstances, we find it impossible, for judicial review purposes, to fault the Commission's conclusion that there were, in all that evidence, no observable differences between individual distributors' markets which called for a separate market-by-market analysis of each.

63. The second point was that, at least in theory, the Commission's narrow market definition excluded stand-alone providers or short-term IP providers, such that they were wrongly excluded from the investigation, but nonetheless made subject to the package of remedies. As to this, the Commission clearly did not exclude stand-alone providers in their investigation: see for example R:2.55-58. We have already noticed the Commission's conclusion at R:3.17 and 3.14 that, notwithstanding its narrow market definition, there was an asymmetrical effect by which sales by stand-alone PPI providers were constrained by PPI policies sold by distributors and intermediaries. There is, therefore, nothing in this point either.

Conclusions on Ground 4

64. Our item-by-item consideration of each element of the multifaceted challenge to the Commission's conduct of its first task constituted by Ground 4 leads to the conclusion that this ground has not been made good. It has therefore been

unnecessary for us to address a primary plank in the Commission's defence to it, to the effect that nowhere in Ground 4 is there any sufficient explanation or identification of the necessary causative link between the matters challenged and the Commission's finding as to an AEC, let alone as to the appropriate remedies package.

65. We wish to make it clear that, even if we had been persuaded that one or more of the matters of criticism in Ground 4 were well founded for judicial review purposes, we would not easily have concluded that they were material to the Commission's findings as to the AEC, for two reasons. First, we were impressed by the breadth of analysis and verification underlying the Commission's market definition, and by the number of separate conclusions which all pointed to the same outcome. Secondly, we were equally impressed by the evident determination of the Commission not to be enslaved by any particular market definition, but rather to assess the competition problems arising in the sale of PPI on an empirical rather than overly theoretical basis which, while no doubt influenced by market definition, was by no means controlled or dominated by it.

V. GROUND 1

66. The allegation under Ground 1 is that:

> "The Commission failed to take account of considerations which are relevant to the proportionality of the POSP."

On analysis, this ground breaks down into two distinct sub-headings, the first of which has two related elements to it. Under the first sub-heading, the allegation is that the Commission entirely failed to analyse or identify the

extent of benefits that would arise from its proposed package of remedies. Rather, it is said that the Commission simply analysed the extent of the detriment to consumers constituted by the AEC which it hoped would be put right by the remedy package. The Commission thereby, it is said, failed to ask itself to what extent its package of remedies could be expected to remedy the AEC.

67. Additionally, Barclays allege that the Commission failed to conduct any analysis of the time which could be expected to pass before its proposed remedies package took effect, and that this was of itself a failure to carry out an essential part of the proportionality analysis.

68. Under the second heading, Barclays submits that the Commission failed to conduct any analysis of the benefit to be expected from adding the POSP as an increment to the remainder of the remedies package, or to analyse its cost, viewed separately from the other items in the remedies package. The result, it is said, was a failure to conduct an essential part of the proportionality analysis arising from its wish to include the POSP as part of the package of remedies.

Failure to identify the extent of the benefits to be derived from the remedies package

69. The starting point of Barclays' case under the first limb of Ground 1 was paragraph 143 of the Tribunal's judgment in the Tesco case, to which we have already referred, and in particular the following passage:

> "… it is necessary to know what the measure is expected to achieve in terms of an aim, before one can sensibly assess whether that aim is proportionate to any adverse effects of the measure. The proportionality of a measure cannot be assessed by reference to an aim which the measure is not able to achieve."

70. The Tesco case concerned an investigation into the UK groceries market, and the AEC identified by the Commission included high levels of concentration in a number of local markets which had persisted over several years, coupled with barriers to entry or expansion in certain local markets caused by the then planning regime, together with barriers caused by the control of land in some highly concentrated markets by incumbent retailers. The Commission proposed remedies which included the introduction into the planning regime for supermarket development of a "competition test", designed to prevent planning authorities from granting planning permission for the construction or expansion of a large grocery store if there was already a high level of concentration in the local market for such stores, and the retailer applying for permission had or would have had a substantial part of that market.

71. The Tribunal concluded that the Commission had failed to address or analyse the question how far, and over what timescale, the competition test would address the AEC which it had identified, and that it had therefore failed properly to apply the proportionality analysis, merely by comparing the extent of the consumer detriment caused by the AEC with the cost, and potential detriment to consumers, of the remedies package including the competition test.

72. The substance of Barclays' case under the first limb of Ground 1 was that the Commission had repeated exactly the same error in the present case, understandably since the Report was published prior to the handing down of the Tribunal's judgment in the Tesco case. The implication was that the conduct of the proportionality analysis by measuring the detriment caused by

the AEC against the cost of the remedies package was standard, but erroneous, Commission practice until corrected by the Tribunal's judgment in Tesco, albeit too late to save this Report from being quashed on the same grounds.

73. The Commission's defence to this part of Ground 1 was very simple. The Commission had, after a proper analysis, concluded that its proposed remedy package would be fully effective to remedy the AEC, with the consequence that the consumer benefit to be expected from its imposition was equivalent to the consumer detriment caused by the AEC. In response, Barclays (supported by Lloyds and Shop Direct) submitted that the Report could not fairly be read as containing any such conclusion as to the degree of effectiveness of the remedies package in remedying the AEC, firstly because no such conclusion is expressed anywhere in the Report and secondly because:

> "The Commission also put forward no analysis which suggested that it expected its remedy to eradicate the entire consumer detriment resulting from the AEC …" (Notice of Application paragraph 32.)

74. It is to be noted that Barclays did not by its Notice of Application advance, under Ground 1, an alternative case that, if the Report is fairly to be read as expressing a conclusion, supported by analysis, that its remedies package could be expected fully to remedy the AEC, then such a conclusion was either irrational, or vitiated by an absence of evidence, or error in the process of analysis. As we have described, absence of analysis was put forward simply as a reason for concluding that the Report contained no judgment that the remedies package would be fully effective. Aspects of Grounds 2 and 3 may be regarded as containing attacks upon aspects of the evidence gathering and analysis underlying the Commission's conduct of the proportionality test, but there is no overriding case to the effect that no reasonable decision-maker in

the position of the Commission could have concluded that its remedies package would be fully effective.

75. Barclays makes a similar case in relation to the alleged absence of any consideration of the effectiveness of the remedies package over time, which we will address separately.

76. It was therefore, or at least became, common ground during the hearing of Barclays' application that the central issue raised by this part of Ground 1 was a question of interpretation of the Report. It was also common ground that for judicial review purposes, a market investigation report by the Commission is to be read and interpreted not word by word as a statute might be (or in reality might once have been), but upon the basis of a fair and generous reading of the Report as a whole, for the purpose of ascertaining the Commission's true meaning and intent: see paragraph 79 of the judgment in the Tesco case. For that purpose we were taken to substantial parts of Chapter 5 (which concluded with the Commission's identification of the AEC) and Chapter 10 (which sets out at great length the Commission's analysis, findings and proposals as to remedies). Mr Lasok QC for Shop Direct also took us to parts of Chapter 6, in which the Commission addressed the issues arising in connection with retail PPI. We have not limited ourselves to the passages in the Report relied upon by the parties and the interveners. We have each read the whole of Chapters 5 and 10, and such other parts of the Report as we considered material to this central question of interpretation. We have also borne in mind Lord Hoffmann's advice in Investors Compensation Scheme v. West Bromwich Building Society [1997] UKHL 28, [1998] 1WLR 896, at 912-3, that

interpretation is not a matter of the dictionary meaning of words but rather the meaning which the document read in its context would convey to a reasonable person. That sensible dictum has been applied both to statutes and contracts. In our view, it applies a fortiori to market investigation reports by the Commission.

77. It is nonetheless impossible to explain either the parties' submissions or our conclusions on this question without reference to what we regard are the most significant parts of the Report bearing on this issue, which we now do. It is necessary to begin by describing in a little more detail than in our introduction, the Commission's findings as to the AEC which it had identified. These are set out by way of conclusion at the end of Chapter 5 at R:5.144-146. They may be summarised as:

i) a failure by distributors and intermediaries actively to seek to win customers by using the price or quality of their PPI policies as a competitive variable;

ii) barriers to search for consumers who wish to compare PPI policies, whether or not combined with credit;

iii) barriers to consumers who wish to switch from one PPI policy to a policy supplied by an alternative provider, or to alternative types of insurance including, in particular, the excessive cost of switching out of a single premium policy; and

iv) "the sale of PPI at the point of sale by credit providers further restricts the extent to which other providers can compete effectively" (paragraph 5.144(d)).

That last element, known as the point of sale advantage or "POSA", is given detailed analysis at R:5.88 to R:5.119, which deserve reading in full.

78. At R:5.146 the consumer detriments arising from the AEC thus identified are described as high prices, less choice, a distortion in demand and less innovation than would be expected in a well-functioning market.

79. We consider it a fair interpretation of the Report to conclude that the Commission regarded the POSA as, on its own, giving rise to a distinct AEC in terms of its adverse effects on effective competition by other providers. Bearing in mind that the Act contemplates that the Commission may identify one or more AECs, we consider that the POSA may in this case fairly be regarded as having, on its own, given rise to a distinct AEC. This is borne out by a reading of Chapter 10, to which we now turn.

80. This compendious chapter, headed Remedies, runs to more than 130 pages, and is supported by 90 pages of appendices. Its general structure, summarised at R:10.3, includes:

i) the Commission's framework for its task of assessing remedies;

ii) a summary of submissions by contributors to the inquiry relevant to the remedy assessment;

iii) a detailed analysis of each element to be included in the proposed package, including the Commission's views on responses to them when published as provisional proposals;

iv) a description of remedies which the Commission decided not to implement, together with reasons;

v) an identification of relevant customer benefits arising from the AEC (as defined in section 134(8));

vi) an assessment of the overall effectiveness and proportionality of the remedies package, including an analysis of the question whether to modify the package for the purpose of preserving relevant customer benefits;

vii) a consideration of issues relating to implementation;

viii) a summary.

81. In section (i), on the framework for assessment, the Commission said this at R:10.7-8:

> "In considering whether a remedy is reasonable and practicable, we should consider its implementation costs … We should endeavour to minimise any ongoing compliance costs to the parties, provided that the effectiveness of the remedy is not reduced … However, we should balance those costs against the benefit to the UK economy and to consumers in particular.
>
> We should also take account of the proportionality of any remedies or package of remedies in relation to the AEC and any resulting detrimental effect on consumers. If we are choosing between two remedies or packages of remedies which we consider would be equally effective, we will choose that which imposes the least cost or that is the least restrictive …."

82. It is apparent that the Commission had in mind the need to conduct the proportionality test in accordance with the European Court of Justice's

guidelines set out in the Fedesa case, although the references (which we have omitted from the passages quoted above) are to the Commission's Guidelines, rather than to that judgment in terms.

83. Section (iii) contains, at R:10.31, the following convenient summary of the proposed remedies package:

> "(a) a prohibition on selling PPI at the credit point of sale and within a fixed time period of the credit sale ('the point-of-sale prohibition');
>
> (b) an obligation to provide a personal PPI quote ('the personal PPI quote');
>
> (c) an obligation to provide information about the cost of PPI and 'key messages' in PPI marketing material ('information provision in marketing material');
>
> (d) an obligation to provide information to the OFT and the FSA for monitoring and publication; and an obligation to provide information about claims ratios to any party on request ('provision of information to third parties');
>
> (e) a recommendation to the FSA that it uses the information provided to it under this obligation to populate its PPI price comparison tables;
>
> (f) an obligation to offer retail PPI separately from merchandise cover where both are offered together as a bundled product ('unbundling retail PPI from merchandise cover');
>
> (g) a prohibition on the selling of single-premium PPI policies ('single premium prohibition'); and
>
> (h) an obligation to provide an annual statement of PPI cost and a reminder of the consumer's right to cancel ('annual statement')."

84. There then follows the most detailed analysis of the POSP, from R:10.34 to 10.156. The POSP was of course the most contentious of the proposed remedies during the conduct of the investigation, and a large part of the Commission's analysis in this part of Chapter 10 was taken up with a consideration of risks which it was suggested were associated with the

imposition of a POSP, which the Commission analysed under seven headings. The first risk, directly relevant for present purposes was that:

> "Aspects of the point-of-sale advantage would not be addressed;" (R:10.39(a)).

85. The Commission's views on this risk are encapsulated in the following extracts from R:10.41 and 10.43:

> "We agree that this remedy will not entirely remove all aspects of the incumbency advantage enjoyed by distributors. However, we do not think that we need to remove all incumbency advantages of distributors in order effectively to remedy this aspect of the AEC.
>
> 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."

There follows, at R:10.43-45 a series of detailed reasons why, in the Commission's view, the POSP would nonetheless substantially contribute to the remedying of the AEC.

86. Another risk identified was that the loss of convenience to consumers arising from the POSP would lead to a reduced take-up of PPI. We shall have to return to this issue at greater length under Ground 2. For present purposes, it is sufficient to note that the Commission's view was that reduced prices would "partially or fully off-set" (paragraph 10.50) a decline in demand attributed to a reduction in convenience, and that its design of the remedies package, and in particular the exception to the general effect of the POSP whereby consumers could initiate the purchase of PPI from their credit provider by a telephone or internet communication 24 hours after the credit sale, would significantly reduce that risk.

87. As to the risk of reduced consumer choice arising from the POSP, the Commission's conclusion, at R:10.57, was that the remedies package would, by stimulating competition, increase rather than reduce choice.

88. The Commission acknowledged that the POSP would lead to additional costs for distributors, and factored that into its proportionality analysis: see R10.62.

89. In relation to Barclays' complaint that the POSP would amount to a restriction on its right of freedom of establishment under EU law, the Commission observed that:

> "The aim of our remedies package, in accordance with the aims of the market investigation regime, is to ensure that where market features lead to consumer detriment, these are addressed thereby safeguarding the overriding public interest in markets working well for consumers through the promotion of vigorous competition;" (R:10.66).

90. At R:10.67-71 the Commission considered whether any alternative remedies (including those proposed by participants in the investigation) would be an effective substitute for a POSP. At R:10.71 the Commission concluded:

> "that a prohibition on selling PPI at the credit point of sale was a necessary part of the remedies package that we have identified as a comprehensive, reasonable and practicable solution to the AEC that we found."

The Commission added that the POSP would complement the other elements in the remedies package.

91. Under the heading "Conclusion on the need for a point-of-sale prohibition" the Commission made the following relevant observations:

> "We concluded 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." (R:10.72).

> "We acknowledge that the point-of-sale prohibition will represent a very significant change to current PPI sales practices and noted strenuous opposition by the parties to this element of our remedies package. We considered carefully the extent to which any of the arguments put to us regarding the alleged risk of the point-of-sale prohibition were well-founded and accordingly whether we should revisit our provisional decision on this element of the remedies package. However, we concluded that this prohibition, taken together with other elements of our remedies package, was the only effective way to address key aspects of the AEC that we found." (R:10.73).
>
> "In view of the scale of the competition issues and resultant consumer detriment that we have identified we consider that imposition of some cost on distributors and intermediaries was justified in order to achieve an effective remedy to the AEC. Moreover, we were confident that our remedies package would be an effective and proportionate solution to the very significant competition problems and resulting consumer detriment that we had identified." **(R:10.78).**
>
> We 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 as comprehensive a solution to the AEC and resultant consumer detriment as was reasonable and practicable." (R:10.79).

92. There follows a lengthy section in which the Commission explained the detailed design and implementation of the POSP, including an analysis of the risk of evasion, and a decision, at R:10.147, that it should be applied also to retail PPI. We need not at this stage describe the lengthy sections on each of the other proposed remedies, and turn therefore to the centrally important section headed "Relevant customer benefits" at R:10.374-464.

93. The Commission considered a number of relevant customer benefits alleged to arise from the AEC, but decided that only one of them was justified by the evidence. This was that because some of the excess profits derived from PPI sales were used by distributors to subsidise credit sales, there was a consequential reduction in credit prices. The Commission concluded, at R:10.459:

> "We concluded that these lower prices were a direct result of the distributors' anticipation of high profit margins on PPI. Lower credit prices are therefore a direct result of the features of PPI that lead to an AEC in the markets for PPI."

This cross-subsidisation has come to be known as the "waterbed effect".

94. There follows the central section headed "The effectiveness and proportionality of the package of remedies" (R:10.465-514). It begins with an explanation of the rationale for the implementation of all elements of the remedies package, and includes, at R:10.469, the following summary, by way of comparison, of the effectiveness of the remedies package contained in the Extended Warranty Order which followed the Commission's investigation into extended warranties:

> "We also noted that the recent evaluation of the Extended Warranty Order found that while the remedies package put in place following the CC's investigation – comprising information provision at the point of sale, a cooling-off period for 45 days and pro-rata rebates beyond that date – has had a net beneficial effect on consumers, the Order has only resulted in a relatively small reduction in consumer detriment (at £18.6 million a year) compared with an estimated annual detriment at £366 million."

It is evident from this passage that the Commission had well in mind that there was a risk that the benefit of a remedies package to consumers would be substantially less than the detriment to consumers constituted by the AEC which that package was intended to address.

95. Under the sub-heading "Benefits and synergies of the remedies package" the Commission said this, at R:10.477:

> "We considered that this combination of measures, opening up the market to competition and directly addressing search and switching costs, will comprehensively address the AEC that we have found and which results in consumer detriment."

96. There follows a sub-section entitled "Modification of the remedies package for relevant customer benefits" in which the Commission addressed the question whether it should modify its provisional remedies package so as to preserve the identified relevant customer benefit of reduced credit prices. The analysis

was based upon a model which is the central subject matter of Ground 3, to which we shall have to return in some detail later. For present purposes it is sufficient for us to note that the Commission's conclusion at the end of this sub-section was that the benefits of intervention by means of the proposed remedies package would outweigh that relevant customer detriment, so that the package should not be modified for the purpose of preserving it: see R10.492.

97. Next the Commission sought to identify the extent of consumer detriment caused by the AEC, at R:10.493-496. The detail of that analysis is the subject of criticism in Grounds 2 and 3. It is sufficient for present purposes to note that the Commission's focus was, as we have described, on the extent of detriment caused by the AEC, rather than upon a distinct analysis of the benefits likely to be conferred by the remedies package. In fact, the language used shifts between benefit and detriment, but the intent is clear: the Commission was seeking to identify the extent of consumer benefits that would flow from a full remedy of the AEC, albeit that the Commission stated that it could only place a monetary value on one out of three large aspects of benefit which they identified. They described that one element as being in excess of £200 million per annum.

98. The Commission then embarked, at R:10.497-508, upon a quantification of the probable cost of the implementation of the remedies package, which it identified as being a one-off cost of £100 million for set up, together with recurring annual costs of between £50-60 million. It is common ground that

these estimates of cost were both reasonable and, in fact, accurate. In passing, at R:10.508, the Commission noted that:

> "…the point-of-sale prohibition, which is the most costly to implement, is at the heart of the remedies package. However, based on the information we have seen, we conclude that the ongoing costs on the remedies package we are proposing would be significantly less than the annual consumer detriment we found (see paragraphs 10.494 and 10.496) so that we expect that, over time, the benefits to customers of putting this package in place will substantially outweigh the costs. The evidence we received indicated to us that the proposed package would not increase parties' costs by an amount that was disproportionate to the AEC and related customer detriment we have found."

99. The final relevant section, headed "Conclusion on effectiveness and proportionality", may best be summarised by two extracts, from R:10.509, 10.513 and 10.514:

> "We decided that the package of remedies we have set out will provide a comprehensive, reasonable and practicable solution to the AEC that we have identified in a timely manner."
>
> "As with any set of competition-enhancing remedies, we cannot predict exactly how the market will develop. However, we concluded that our remedies will remove barriers for 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. We considered that the package of remedies will lead to more active competition for PPI consumers: through more active marketing before the credit sale; in response to increased consumer search just after the credit point of sale; and by encouraging the switching during the life of the credit product. This competition will manifest itself through more PPI advertising and lower prices."
>
> "We decided that the remedies set out in this decision represent as comprehensive a solution to the AEC and resultant consumer detriment that we have identified as is reasonable and practicable, and that this package should not be modified to take account of credit prices being lower than they otherwise might be."

100. Barclays submitted that, by reference to the passages in the Report to which we have drawn attention above, the Commission reached no conclusion that the remedies package would be fully effective to cure the AEC, and conducted no analysis of the inevitably reduced consumer benefit that would flow from remedies which were only partially effective. Reliance was placed in

particular upon the express recognition by the Commission at R:10.43 of a risk that the package would not be fully effective, and the acknowledgment at R10.41 that the remedies package would not fully address the incumbency advantage.

101. It was submitted that the Commission's use of the word "effective" could not be taken without more to mean fully effective, since both the Commission and the Act recognised that a remedy which was "as effective as is reasonable and practicable" might nonetheless for reasons of practicability be less than 100% effective, while still properly being described as effective in general terms. It was submitted that when it is borne in mind that the Commission was well aware of the radical nature of the POSP (which prohibited the mode of sale of PPI which was dominant in the market at the time) and its substantial implementation cost, any awareness that the proportionality test required an assessment of the degree of effectiveness of the remedy (so as to measure expected consumer benefit) would have led either to a clear statement in the Report that the remedy was expected to be fully (i.e. 100%) effective, or to some form of analysis of an expected less than 100% effectiveness with a concomitant reduction in the scale of the anticipated consumer benefit.

102. Attractively as those submissions were put, both for Barclays and the other interveners in Barclays' support, we have not been persuaded by them. In our view, although the conclusion might have been put with greater force and clarity, the Commission did decide that its remedies package, implemented as a whole, would be fully or, as we would prefer to put it, substantially effective to remedy the whole of the AEC which it had identified. It was therefore in

our view appropriate for the Commission to use, as it did, a measure of the extent of consumer detriment which a substantially effective remedy would cure as a measure of the benefit to be expected for consumers from the remedies package. Our reasons follow.

103. It is obvious that the Commission recognised a risk that its remedy package might not be fully effective: see R:10.43. Such a risk is inherent in any judgment about the future effects of a market intervention. The recognition of a risk that a remedies package might be less than fully effective is by no means inconsistent with a judgment that, probably, it will be fully effective. The Report displays an attitude on the part of the Commission of confidence rather than certainty in the substantial effectiveness of its remedy package: see for example R:10.78.

104. Secondly, we regard Barclays' reliance upon the Commission's acknowledgement that the remedies package would not wholly remove the incumbency advantage (a synonym for the POSA) as misplaced. On a fair reading, the Commission concluded that a well-functioning market for PPI (i.e. a market without an AEC) was consistent with the continuation of some incumbency or POSA being enjoyed by distributors and intermediaries. There is, in our view, a clear difference between a properly functioning market unaffected by an AEC and an ideal market, in which every potential supplier of the relevant product competes on a precisely level playing field.

105. Thirdly, whilst we recognise that, as a matter of dictionary definition and use of language, the repeated use by the Commission of the word "effective" does not on a strict construction amount to an assertion of full or 100%

effectiveness, nonetheless we consider that, taking all the Commission's references to the effectiveness or ineffectiveness of different remedy packages and remedy designs together, the Commission is to be understood as having concluded that its proposed remedy package would be fully, or rather substantially, effective.

106. We have in mind in particular the following indicators to that effect, although our conclusion is nonetheless drawn from a fair and generous reading of the Report as a whole. First, the Commission described the possibility that the remedies package would not fully address the AEC as being a risk rather than a probability: see R:10.43. Secondly, the Commission was clearly aware of the fact that an earlier remedies package imposed to meet similar problems in the extended warranty market had been very much less than fully effective. It seems inconceivable to us that the Commission was not asking, and answering affirmatively in the present case, the question whether it expected that its remedy package would be substantially effective. Thirdly, the very fact that the Commission, aware of the Fedesa analysis of the proportionality principle, chose to conduct the proportionality test by comparing the benefits of a full remedy of the AEC with the costs of the remedy package, itself suggests to us that, far from making a fundamental error of analysis, the Commission was of the view that its package would, probably, be substantially effective for that purpose.

107. We are not persuaded by the beguiling submission that, because this Report was published in advance of the Tribunal's decision in the Tesco case, the Commission should be assumed to have fallen into an institutional error,

namely comparing detriment occasioned by an AEC in every case with the cost of the remedy package, until put right by that judgment. In our view, the reason why the Commission fell into that error in the Tesco case was a product of the particular facts underlying that investigation. In that case, the AEC included both a high level of concentration in local markets which had persisted over several years (i.e. an adverse existing state of affairs) and barriers to entry by competing retailers, which were thought likely to make the existing concentration even worse in the future. It is apparent, in particular from paragraphs 144-148 of the Tribunal's judgment in Tesco, that the aim of the competition test was primarily to bring about a "standstill" so that a worsening of the existing concentration would not occur, and only secondarily to address the existing concentration, by encouraging other supermarket operators to intervene. The Commission's failure was to address the effectiveness of the secondary rather than primary aim of that remedy. Nonetheless the point of principle identified by the Tribunal in that case is that:

> "A measure will be considered not to be proportionate if it is ineffective with respect to its aim, or if its "costs" are disproportionately large in comparison with the mischief at which it is aimed." (Paragraph 131)

108. In the present case, the question relates to the effectiveness of the Commission's remedies package as a whole, which was in the Report fairly and squarely aimed (as its primary objective) at the effective remedying of the whole of the AEC.

109. Nor have we been persuaded by the submission that an absence of analysis of the effectiveness of the remedies package should lead to the conclusion that the Commission did not expect its remedies to eradicate the entire consumer

detriment resulting from the AEC (Notice of Application paragraph 32). While it is true that there is not to be found in the Report some express analysis of the percentage of effectiveness of the remedies package, or even a sensitivity analysis: i.e. on the effect on the overall proportionality test of the remedies being, say, 80%, 60% or 40% effective, the Report is nonetheless laden down with detailed analysis of the questions first, whether the proposed remedies package would be effective as a comprehensive remedy for the AEC and secondly, whether any other package of alternative remedies would be effective for that purpose. The analysis is not, it is true, carried out in terms of percentages or statistics, but it is an analysis nonetheless, and one supported at every stage by evidence. It is for that reason that we have set out at some length a description of those parts of the Report in which that thorough and detailed analysis was carried out.

110. It follows that in our judgment this first limb of Ground 1 fails. We turn therefore to the question of timescale.

Timescale

111. This part of Ground 1 is squarely based upon the Tribunal's conclusion in the Tesco case that some estimation of the timescale during which a proposed remedy package may be expected to take effect is an essential part of the task imposed by sections 134(4) and 138 of the Act. In short, neither the effectiveness of a remedy package, nor (if it will impose more than minimal cost) its proportionality, can properly be addressed without some consideration of timescale.

112. Barclays criticised the Report as inadequate in this respect because it contained nothing more than an opinion that the remedies package would take effect in a "timely" manner: see for example R:10.509, which we have set out above. Barclays submits that an opinion that some event will be "timely" says nothing of substance about what is meant in terms of months or years. Since the Commission acknowledged that start up costs of £100 million would follow immediately upon the imposition of the remedies package, to be followed by annual compliance costs of £50-60 million, the proportionality and analysis at least required an estimate of the time during which these costs would be incurred, before the expected benefits would accrue.

113. In its defence, the Commission does not dispute the requirement to have some regard to timescale, nor could it, because an acknowledgement to that effect appears in R10.6. Mr Swift QC for the Commission submitted however that it could be seen from a study of the programme laid down in the Report for the implementation of the proposed remedy package that its effects in bringing about a re-structured market for PPI would, for the most part, be immediate. Furthermore, Mr Swift drew attention to the Commission's reasons for rejecting a suggested price cap on PPI policies as an additional remedy, in R:10.373, as follows:

> "We believe that price caps could address the customer detriment of higher prices and we have not been persuaded by the evidence that price caps would have negative impacts on competition. However, we consider that the packages of remedies we have decided to implement will address the AEC that we have identified in a timely manner and we do not have to address the customer detriment shown in higher prices resulting from the AEC. We consider that by addressing the AEC with the package of remedies which we have decided on, this aspect of the customer detriment will also be addressed."

114. Mr Swift submitted that this analysis put flesh on the bones of the Commission's opinion that the effect of the remedies would be timely. The Commission would have imposed price caps if it had thought that it would take several years for the remedies package to achieve its full effect, in particular by stimulating sufficient competition to cause PPI prices to reduce to levels consistent with marginal cost (including an element for normal rather than excessive profit).

115. In our view the Commission should have addressed the issue of timescale in the Report in more detail than is encapsulated in its use of the word "timely". While it sufficiently conveys an opinion that the timetable would be short enough to mean that the accumulation of costs in advance of the accruing of the benefits would not lead to the cost being disproportionate, it describes no measurement of time in any objective sense. While there may be cases in which a remedy package is of sufficiently low cost to make any quantification of time before full effectiveness unnecessary, the costs element in the present case is not of that low order and, as will appear, other disadvantages of the remedies package needed to be weighed in the balance in addition to pure cost.

116. We would not have regarded this failing, on its own, as justifying the quashing of the decision to impose the POSP. This is because we regard it as having occurred more in the expression of the Commission's reasoning in the Report, than in any deeper failure to take the question of timescale into account. We consider that the Commission's reason for not imposing a price cap, in R:10.373, shows that it did conduct a sufficient review of the timing issue, but then failed to spell it out in the Report. In other words, we are satisfied that if

this failing had been the only reviewable error in the Report, the correction of it could not have led the Commission to a decision not to impose the POSP. Since however we have for reasons arising under Grounds 2 and 3 decided that the decision to impose the POSP must be quashed and remitted for further consideration, the Commission should address the timescale question in any reconsideration of the issue whether to impose a POSP, or similar remedy.

Incremental analysis

117. The second main limb of Ground 1 was that the Commission's proportionality analysis was inherently defective by reason of a failure to address the incremental effect, both in terms of benefit and cost, attributable to the addition of the POSP to the rest of the package of remedies. There is no doubt that the Commission did not do so. The question is whether by not doing so it failed to take into account material considerations to an extent which vitiated its conclusion on proportionality.

118. We have not found this argument at all persuasive. An incremental analysis may, of course, be a valuable tool in the fashioning of an effective and proportionate remedy package where, for example, the question is whether the addition of a further remedy to a package which would be reasonably (but not totally) effective without it would be cost effective. Such an added remedy may, upon an incremental analysis, increase the overall benefits of the package by an amount that is less than the added cost.

119. In the present case, by contrast, the Commission evidently regarded the POSP as lying at the heart of its remedies package rather on the periphery, albeit that it was the most costly to implement, see R:10.508. It is equally apparent that

the Commission considered, after due analysis, that the remedies package would be ineffective as a cure for the AEC without the POSP: see for example R:10.72-73.

120. It was submitted on behalf of the Commission and the FSA that the proportionality principle, as is explained in the Fedesa case, called for a comparative analysis between different remedy packages only where the decision-making body concluded that there was a choice between several appropriate packages. We consider that this submission goes a little too far. There may be cases where the Commission identifies only one substantially effective package, but where its cost or adverse consequences for consumers are so high that the subtraction of one of its elements will leave a package which, although not fully effective, will nonetheless mitigate the AEC without being unreasonable, impracticable or disproportionate. But the question whether the analysis comes down to that kind of balance in any particular case is in our view within the margin of appreciation of the Commission. Leaving aside for the moment the criticisms of the Commission's analysis of the proportionality test in Grounds 2 and 3, we consider that it was well within the Commission's margin of appreciation to conclude that no incremental analysis of the effect of the POSP in terms of cost and benefit was called for in the present case.

121. Our conclusion on Ground 1 is therefore that nothing in it requires the decision to impose the POSP to be quashed. Nonetheless, a failure sufficiently to address the issue of timescale in the Report, while not material in itself,

should be addressed in any reconsideration of that decision which occurs as a result of our decision on Grounds 2 and 3.

VI. GROUND 2

122. This ground is entitled:

> "The Commission concluded that the POSP was justified without any proper evidential basis for this conclusion."

Its focus upon an alleged lack of evidence is to be contrasted with Ground 3, in which the allegation is that the Commission's conduct of the proportionality analysis was flawed by reason of its failure to take account of relevant considerations and/or its taking account of irrelevant considerations. An apparent separation out into distinct grounds of complaints about evidence and, in effect, methodology was not rigorously pursued, either by Barclays or in the arguments of the supporting interveners. In reality, each of Grounds 1, 2 and 3 contained a mixture of allegations of breach of the no evidence rule, the taking into account of irrelevant considerations and the omission of relevant considerations. Furthermore, the grouping of the matters of complaint into each of those three Grounds in the Notice of Application was not strictly adhered to throughout the oral submissions. In this judgment we address, Ground by Ground, the points developed in the order adopted at the hearing, to the extent that there are material differences from the grouping of matters of complaint in the Notice of Application.

123. The main point taken by Barclays under Ground 2, and the centrepiece of Lloyds' submissions, concerned the Commission's treatment of the loss of convenience to consumers which it was alleged would be likely to flow from

the implementation of the POSP, i.e. from prohibiting the sale of PPI policies at the same time as the sale of the credit which those policies insured. Opponents of the POSP argued during the investigation that, since the convenience of being able to purchase PPI insurance at the same time as the credit being insured was a major attraction to consumers which contributed to the level of PPI sales, the inconvenience to consumers arising from being unable to do so after the imposition of the POSP would lead to a reduced take-up of PPI, to the serious detriment of the PPI market.

124. The Commission's treatment of this issue, at R:10.46-52, may be summarised as follows:

i) It recorded evidence from contributors to the investigation suggesting that between 58% and 91% of respondents to consumer surveys valued the convenience of being able to purchase PPI at the credit point of sale (R10.48(a)), together with evidence of experimental research by distributors in the form of pilot schemes, which also suggested substantial reductions in PPI take-up rates when PPI sales were de-coupled in any way from sales of the insured credit (R:10.48(b)-49).

ii) At R:10.50 the Commission expressed its conclusion:

> "While we acknowledge that this element of the remedies package reduces the convenience of purchasing PPI at the credit point of sale, we consider that the potential reduction in PPI sales has been overestimated by some parties. By increasing competition and thereby reducing price, we expect our remedies package to lead to an increase in PPI sales that would partially or fully offset a decline from a reduction in convenience."

The Commission then gave reasons for discounting the weight of some of the evidence of reduced take-up rates, and continued:

> "To the extent that this measure reduces the convenience for some customers of purchasing PPI compared with buying it at the credit point of sale, we are satisfied that this is both necessary to stimulate competition so as to contribute to remedying the AEC identified and justified in light of the scale of the detriment identified."

iii) At R:10.51 the Commission described aspects of its design of the remedies package which it considered would reduce the risks of any substantial fall in take-up rates, in particular by the requirement for a personal PPI quote so as to reduce the risk that consumers would fail to consider PPI at all due to lack of awareness of it, and in permitting consumers to initiate a PPI purchase by internet or telephone 24 hours after the credit sale, so as to reduce inconvenience.

iv) At R:10.52 the Commission considered an argument that the POSP would reduce the level of credit sales, but decided that, even if it did, it should not amend its proposed remedies package on that ground.

125. Thereafter, the risk that loss of convenience occasioned by the POSP would lead to reduced take-up rates is not further addressed, anywhere in the Report. In particular, it is not addressed at any stage in the Commission's consideration of the proportionality of the remedies package, at R10.465-514. The only disadvantages which are there weighed against the benefits expected to flow from an effective remedy for the AEC are first, the loss of the relevant customer benefit constituted by lower credit prices and secondly, the cost of implementing the remedies package.

126. Barclays and in particular Lloyds attacked this approach along the following lines:

i) Having received evidence uniformly to the effect that by prohibiting the sale of PPI at the point of sale of the associated credit the loss of convenience would cause some reduction in take-up rates, the Commission was, in relation to such a radical and unprecedented remedy as the POSP, obliged to form a properly considered judgment about the extent of that reduction, and about the extent to which it could be expected to be off-set by any increase in demand attributable to lower PPI prices.

ii) Instead of forming any such judgment, or carrying out any, let alone any sufficiently rigorous, analysis of the question, the Commission merely discounted some (but without identifying which) of the evidence of reduced take-up rates, and concluded merely that increased demand would "partially or fully" off-set a decline in take-up rates caused by a reduction in convenience.

iii) The Commission thereby left unresolved the question how big that reduction could be expected to be and how much, on a scale of one to one hundred percent, the off-set from increased demand could be expected to be.

iv) Critically, the Commission then failed to include in the proportionality analysis a significant disadvantage attributable to the POSP as part of the remedies package which it had been unable to exclude as a matter of judgment, thereby vitiating its proportionality analysis.

v) Furthermore, in constructing its models for the purpose (among others) of quantifying the static benefits to be expected from the remedies

package and the elimination of the AEC, the Commission assumed a substantial increase in PPI sales, contrary to its judgment at R10.50 that a reduced take-up due to lack of convenience would only be partially or fully off-set by increased demand. It thereby quantified the benefits of the remedies package on the basis of a model which was, in that respect, incompatible with the view which it had already formed as to the potential disadvantage attributable to loss of convenience.

vi) Both Barclays and Lloyds likened this alleged failure to the Commission's failure in the Tesco case to take into account, as a disadvantage attributable to the proposed competition test, the likelihood that refusal of planning permission for enlargements of existing supermarkets would lead to significant unmet demand for groceries by consumers. It was submitted that a loss of convenience would have a similar effect, since many consumers who would have been minded to buy PPI at the credit point of sale (and for whom PPI would represent a real benefit) would be put off by their inability to do so, leaving their need for PPI unmet in the post-remedies market place.

127. In its defence, the Commission characterised Ground 2 as a misguided attempt to shoehorn the facts of the present case into the Tesco analysis to which we have just referred. It was submitted that the Commission was entitled to discount evidence of the extent of any fall in take-up rates put forward by parties opposed to the POSP, and that the level of analysis given to that issue by the Commission was within its margin of appreciation as to methodology, such that it could not be said that the Commission's decision not to amend or

remove the POSP on account of the potential loss of sales due to reduced convenience could not be challenged, either as one based upon no evidence, or as one based upon a failure to take into account material considerations.

128. Our conclusions on Ground 2 now follow. In our view, the starting point is that the POSP is (as is common ground) a remedy without precedent, designed to bring about a radical re-structuring of the PPI market, by prohibiting the method by which, to date, most PPI sales have been made. The potential for such a radical remedy to cause disadvantageous side-effects called for rigorous investigation and analysis of its potentially adverse consequences. In the present case, the potential for the POSP to bring about a reduced take-up of PPI due to the removal of the convenience attributable to being able to buy PPI at the credit point of sale was supported by copious evidence, as the Commission acknowledged.

129. It was, of course, for the Commission to give such weight to that evidence as it reasonably thought fit, having regard in particular to the fact that most of it was tendered by parties with commercial reasons to be opposed to the imposition of the POSP. In that respect, we can identify no basis upon which the Commission's decision to discount part of that evidence can be challenged.

130. In our view however, it is unfortunate that the Commission did not identify which of the evidence that the loss of convenience would lead to a reduced take-up PPI it discounted or rejected. This is particularly unfortunate because we have found it impossible to discern, from the conclusion at R:10.50 that increased sales due to lower prices would "partially or fully off-set" any reduced take-up, a sufficiently clear judgment either as to the extent to which

the Commission considered that the convenience argument was established by the evidence, or as to the extent to which a decline in convenience would be offset by increased demand due to lower prices. A valiant attempt was made in the Commission's defence to characterise the phrase "partially or fully offset" as meaning in reality that reduced prices "will largely or completely counteract any loss of sales from loss of convenience" (Defence, paragraph 119). In our view the Report must stand or fall on a fair and generous reading, but without adjusting its meaning by reference to that which the Commission would now wish it to mean.

131. In relation to a question about the likely effect of future events (here, the future imposition of the POSP) it is of course unrealistic to expect precision in any judgment about a material consideration, and it is legitimate to seek to discern from the whole of the Report whether the Commission did in fact reach any more focused conclusion as to the extent of any fall-off in sales, and the off-set which might be attributable to reduced prices, than is contained in the unfocussed phrase "partially or fully offset" in R:10.50. A more precise identification of the evidence accepted and the evidence discounted might have assisted, but there is none.

132. Nor have we been able to discern from any other part of the Report any more focussed judgment about the important question whether, as a result of the imposition of the remedies package, PPI sales would reduce, remain broadly the same, or increase. The most that can be gathered from R:10.50 is that the Commission thought that PPI sales would either reduce or remain the same. By contrast, the model used (among other purposes) to quantify the static

detriment constituted by the AEC appears to contemplate a substantial net increase in PPI sales, but, as will appear from our analysis of Ground 3, those models were constructed upon assumptions which did not include any adverse consequences in terms of PPI sales arising from the lack of convenience associated with the imposition of the POSP. Those models are not therefore, in our view, capable of constituting a judgment by the Commission that, contrary to what appears from R:10.50, sales would probably increase.

133. An attempt was made in the Commission's defence to submit that a potential reduction in PPI sales attributable to the imposition of the POSP by reason of loss of convenience was not itself necessarily a disadvantage falling to be weighed in balance on a proportionality analysis. Reliance was placed on R:5.136-138, in which the Commission expressed the tentative view that distortions in the PPI market caused by the AEC (and in particular by the high margins available to distributors from PPI sales) might lead to excessive sales attributable to a desire by distributors to maximise profits at the expense of quality. From that basis, it was submitted that the Commission was entitled to take the view that a reduction in PPI sales attributable to the remedies package was not in itself a disadvantage to be weighed in the proportionality balance against the benefits sought to be achieved.

134. A reading of Chapter 10 of the Report as a whole suggests that the Commission did not identify the convenience factor arising from PPI sales being made at the point of sale of the credit as a relevant customer benefit within the meaning of section 134(8), and that this may have been the reason

why the convenience factor was not included as a potential disadvantage of the remedies package in the proportionality analysis described at R:10.465ff.

135. In our view, it was both permissible and indeed correct for the Commission not to identify convenience as a relevant customer benefit, since section 134(8) identifies benefits as consisting only of lower prices, higher quality, greater choice or greater innovation. Indeed, although the first three of those factors were all the subject of submissions during the investigation to the effect that the POSA conferred relevant customer benefits, there was no submission that convenience itself qualified as such.

136. It by no means follows in our view that the loss of convenience arising from the imposition of the POSP (viewed on its own) as potentially causative of an adverse net effect on PPI sales, cannot be a relevant disadvantage to be taken into account in a proportionality analysis. While we consider that the Commission was entitled to place little weight on inconvenience as a disadvantage in itself (not least because the proposed POSP allows customers to initiate a PPI purchase 24 hours after the credit point of sale) the likelihood that inconvenience would lead to a reduced take-up of PPI seems to us at least potentially to constitute a disadvantage of the remedies package requiring to be weighed in the balance on any reasonable proportionality analysis unless, on the evidence, the Commission could with confidence regard it as being wholly negated by increased demand resulting from lower PPI prices. It could hardly be doubted that a remedies package which produced a theoretically perfectly competitive market for PPI, but at the expense of driving a majority

of potential purchasers from the market place, would not be reasonable, proportionate, or for that matter, effective.

137. It is therefore the Commission's failure, when conducting its proportionality analysis, to give any consideration to reduced take-up attributable to the loss of convenience which would follow upon the imposition of the POSP, that constitutes in our view a failure to take into account a relevant consideration. Reduced take-up was relevant because the Commission had been unable to conclude that reduced prices would lead to a fully off-setting increase in sales. Reduced take-up was therefore a material consideration at the proportionality stage.

138. We have been unable to discern, even by implication, any consideration given by the Commission to the disadvantage which would be constituted by a net reduction in the PPI sales attributable to the loss of convenience, in its conduct of the proportionality analysis. The question remains whether, had the Commission done so, its decision that the remedies package including the POSP was proportionate could have been different.

139. There is much in the Report, in particular in the Commission's identification of large dynamic benefits which it could not quantify at R:10.493, to suggest that, had it reached a focussed judgment about the net effect on PPI sales of the loss of convenience flowing from the imposition of the POSP, and factored that into its proportionality analysis, the Commission would still have concluded, on reasonable grounds, that the POSP should form part of its remedies package. But it is not for us to speculate about that question, still less to substitute our own view for that of the Commission, if we are not

satisfied that a proper taking into account of this material consideration could not have led to a different result.

140. After anxious consideration, we are not so satisfied. This is primarily because the Commission's opinion that increased demand flowing from a reduction in PPI prices would "partially or fully off-set" the adverse consequences of reduced convenience is so unfocussed as to leave us with no sufficient yardstick as to the extent of any net reduction in take-up rates which the Commission may have had in mind.

141. For those reasons, we consider that Ground 2 of Barclays' Notice of Application is established, and that we must therefore quash that part of the Report which imposes the POSP as part of the remedies package, and remit the question whether a POSP should be so included for the further consideration of the Commission applying the principles which we have set out above.

VII. GROUND 3

142. Despite its title (for which see above) this Ground consists in substance of a number of distinct challenges to the methodology used by the Commission in connection with its Excel model which it created and used (among other purposes) for quantifying part of the consumer detriment caused by the AEC that it expected effectively to remedy by the proposed remedies package. The criticisms are, in summary as follows:

i) That the Commission modelled theoretical remedies packages rather than the actual package it was proposing.

ii) That the model took no account of costs.

iii) That the model was based upon unjustified assumptions that the remedies would be fully effective and reduce excess PPI profits to zero.

iv) That the model took no account of the negative effect on PPI sales attributable to the loss of the point of sale for convenience.

v) That the model was based upon out of date information.

vi) That the Commission failed to calculate the proper elasticity of demand.

143. Before addressing those criticisms in detail, it is necessary briefly to describe the modelling process undertaken by the Commission, and the purposes to which it was put. The detailed explanation of these matters is to be found at R:APP 10.9-10.11.

144. Having decided (at R:10.442-464) that, because distributors used part of the excess profit generated by high PPI prices to subsidise lower credit prices, the AEC generated a relevant customer benefit in the form of lower credit prices, the Commission considered it necessary to address in some detail the question whether the destruction of that benefit by the proposed remedies package, and in particular the POSP, would be outweighed by the benefit flowing to consumers from the lower PPI prices which it expected that the remedies package would bring about. The starting point was a perception that, because reduced PPI prices would inhibit or prevent cross-subsidisation by distributors, a probable effect of any remedies package which eliminated excess pricing of PPI would be to increase the price of credit sold by the same distributors.

145. It is apparent, in particular from R:10.480-492, that the Commission resorted to a modelling exercise for the primary purpose of addressing the question whether any modification of its proposed remedies package could be identified such as would preserve the relevant customer benefit of lower credit prices. The primary purpose of the modelling exercise was, therefore, not to attempt a quantification of the consumer benefits likely to flow from the proposed remedies package, but to analyse the effect upon credit prices of different theoretical remedies packages, which comprehended the proposed remedy package, but contemplated alternatives, in effect, either side of it on a chosen spectrum.

146. For that purpose, the Commission identified two theoretical types of remedies package, which it labelled respectively "system remedies" and "non-system remedies". It is worth quoting the Commission's explanation of these opposite ends of their chosen spectrum at R:10.484:

> "We therefore considered whether our remedies might be expected to have a positive or negative impact on total consumer welfare. To do this, we considered two different examples: a remedy which increased information such that all consumers were able to search effectively for both credit and PPI before arriving at the point of sale of credit, and a remedy where PPI prices were reduced but there was no increase at all in the amount of searching for PPI before the credit point of sale. These two examples represented the two ends of the spectrum in terms of the potential impact of remedies on consumer search."

The modelling process was applied to MPPI, SMPPI and PLPPI.

147. After sensitivity testing (by varying the assumptions input into the models) the Commission concluded, at R:10.485-486, that for all forms of PPI other than PLPPI, the imposition of any remedies package within the system/non-system spectrum which reduced PPI prices would have a "positive net consumer welfare effect" (taking both PPI and credit market effects into account). For

PLPPI the Commission concluded that any remedies package with an element of system in it (i.e. which enabled consumers to search for both credit and PPI before arriving at the credit point of sale) would have a positive net consumer welfare effect under any reasonable set of assumptions, but that a pure non-system remedy (such as a simple price cap) might have a net negative impact on consumer welfare under certain sets of assumptions, but a positive effect under more realistic assumptions.

148. Since the Commission concluded that its proposed remedies package would have at least an element of system in it, they decided at R:10.491-492 that it was therefore unnecessary to modify that package, since it was confident that a net positive consumer welfare effect would thereby be created.

149. A reading of R:APP 10.9, in particular at paragraph 8, shows that all this modelling was based upon three unvarying assumptions, namely that:

i) both system and non-system remedies would be fully effective;

ii) that they would be costless; and

iii) that they would drive the level of excess PPI profits to zero in each case.

It is the use of those assumptions which has led to all but the last two of the criticisms grouped under Ground 3.

150. The Commission then proceeded to use the same models for the additional purpose of attempting some quantification of the extent of the consumer detriment caused by the AEC, and therefore of the extent of the consumer

benefit which it expected to achieve by the imposition of a substantially effective remedies package. This exercise is summarised at R:10.493-4, by reference to a model set out in summary form at R:APP 10.10, in relation to what the Commission described as "static deadweight losses that stem from people not buying PPI at high prices who would buy it at competitive prices, and, similarly, people being offered credit at lower prices than would be the case if PPI profits were not being used to fund the sale of credit".

151. Rather than attempt a quantification by reference to the effect of its proposed remedies package, the Commission adopted what it evidently regarded as the more cautious approach of modelling a pure non-system remedy, assuming (contrary to its expectation) that all PPI profits were used to fund lower credit prices and basing its analysis on 2006 figures. Its conclusion was that the net static deadweight loss attributable to the AEC on those conservative assumptions was at least £200 million, and that it would rise to £440 million if only 80% of the excess profits from PPI were passed through to subsidise lower credit prices. The Commission concluded further that the true net consumer detriment which would be removed by an effective remedy for the AEC was substantially higher than either of those figures, because of other static benefits and large dynamic benefits which the Commission was unable to quantify in monetary terms.

152. We now turn to the specific criticisms of this approach set out under Ground 3.

(a) The modelling of theoretical remedies packages rather than the proposed remedies package

153. It will be apparent from our summary of the Commission's modelling process that it did indeed model theoretical remedies packages on a spectrum, rather than the specific package proposed. We consider that this was well within the Commission's methodological margin of appreciation in connection with the use of models to determine whether the remedies package should be amended so as to minimise the loss of the relevant customer benefit constituted by reduced credit prices. Indeed, we find it difficult to envisage a modelling process which would serve that purpose which did not model a theoretical range of different types of remedy.

154. It is less obvious to us that the use of theoretical remedies packages was necessarily an ideal methodology in the use of modelling for the purpose of deriving some quantification of the consumer benefits to be expected from the proposed remedies package. Nonetheless, we are not persuaded that by taking this course the Commission adopted a form of methodology which is susceptible to judicial review. Our reasons follow.

155. If the modelling had been constructed purely for the second purpose of quantifying the anticipated consumer benefit to be obtained by the imposition of an effective remedy package, we have some doubt whether a theoretical spectrum of remedies would have been appropriate. But this was only the secondary purpose for the modelling which the Commission undertook. Secondly, the use of the modelling for its primary purpose had (subject to other criticisms of its methodology to which we shall return) led the

Commission to conclude that a package at the least efficient end of the spectrum modelled would, on reasonable assumptions, still produce a net consumer benefit, such that its own proposed package, which lay some way along the spectrum towards its more efficient end, could therefore confidently be expected to produce benefits at least as great as those derived from an analysis at the least efficient end of the spectrum. It was therefore reasonable in our view for the Commission to describe its attempted quantification of its expected static gain as its "lower-bound reasonable estimate" at R10.494, all other things being equal. It was therefore a situation where a model designed for a different primary purpose could properly be used for the quantification of a lower-bound expected gain, even though based only on a spectrum of theoretical remedies. We therefore reject this first challenge.

(b) The Commission's modelling took no account of costs

156. Again, it is evident from paragraph 8 of R:APP 10.9 that the Commission did not build into its model the set-up and ongoing implementation costs of its proposed remedies package, or even the theoretically different costs attributable to different types of remedy packages within its modelled spectrum.

157. We can understand why the Commission omitted costs from a model primarily designed to compare a spectrum of different remedy packages, so as to ascertain whether it should modify its proposed package for the purpose of preserving the identified customer benefit. We have in mind in particular that the more complicated and speculative the inputs into an economic model, the

more its outputs are subject to unpredictable error, thereby at least potentially reducing its value as an analytical tool.

158. Nonetheless, we are not satisfied that the omission of cost from the model was an acceptable aspect of its methodology, once used for the purpose of estimating minimum ("lower-bound") consumer gains. The submissions of Barclays and Lloyds, together with the evidence of their experts, persuaded us that it was both practicable to include set-up and ongoing costs of implementing the proposed remedies package which are substantial and not in themselves contentious, and that the omission of those costs undermined the integrity of a model designed to compare the benefit of reduced PPI prices with the detriment of increased credit prices. This is because, if for no other reason, the cost of implementing the proposed remedies package was part of the cost to distributors of the PPI products being sold, (whether or not a marginal cost), so that the amount of the price reduction to be expected from any remedies package ought to have had those costs taken into account.

159. In mitigation, it is fair to say that the Commission did deduct the agreed costs of set-up and implementation from the minimum £200 million net expected gain, in concluding that the remedies package was not disproportionate. But to input costs only at that stage meant that the modelling did not in our view fully reflect the effects of reduced PPI prices on increased credit prices, and the consequences in terms of rises and falls of sales in those two markets.

160. Furthermore, the Commission did not input the likely increased costs of marketing PPI products which any system remedy would be likely to engender for distributors wishing to compete effectively. This is understandable when

modelling a pure non-system remedy, which is not designed to stimulate search, but not when quantifying the benefits likely to flow from a system remedy like the package proposed.

161. In our view, these omissions did constitute defects in the Commission's modelling methodology susceptible to judicial review, in the sense that those costs were material factors to take into account, but which were at a relevant stage in the process, omitted.

162. We have not however been persuaded that, if this criticism stood alone, it would have amounted to a material failure, such that in the absence of any other valid criticisms we would have been right to exercise our discretion to quash any part of the Report. This is because, having regard to the disparity between the costs and the combined (albeit only partially quantified) benefits which the Commission expected to be derived from its proposed remedies package, we have not been persuaded that the inclusion of those costs in the modelling could, on its own, have led the Commission to a different conclusion about the inclusion of the POSP in the remedies package.

163. Nonetheless, when coupled with the other matters in respect of which we have concluded that Barclays' application is well-founded, this is an aspect of the Commission's modelling which ought to be re-considered in the light of this judgment, as a result of our overall conclusion that the Commission's decision to impose the POSP should be quashed.

(c) The assumption that the remedies would be fully effective and reduce excess PPI profits to zero

164. This is, in substance, a re-introduction in Ground 3 of the main challenge in Ground 1, which we have already rejected for the reasons set out earlier in this judgment. In summary, we have concluded that the Commission did decide, on sufficient evidence, that its proposed remedies package would be substantially effective to remedy the AEC, with the consequence that a new and competitive market would not generate excess PPI profits for the distributors.

165. This criticism gains no new life by being re-introduced as an aspect of Barclays' challenge to the legitimacy of the Commission's modelling methodology, and we need therefore say no more about it.

(d) The modelling took no account of adverse consequences of its remedies package

166. The adverse consequence here referred to is the loss of convenience associated with the imposition of the POSP. We have already concluded that this was a failing on the Commission's part that, on its own, necessitates the quashing and remission for re-consideration of the decision to impose the POSP. It is implicit in our analysis of Ground 2 that the Commission did not indeed factor into its modelling the loss of convenience which it had identified, on the evidence, as flowing from the imposition of a POSP. It is, in a sense, understandable that it did not do so in the context of a model which used a spectrum of theoretical remedies which did not necessarily include a POSP. Nonetheless, in our view the convenience factor was such a material

consideration in any evaluation of the proportionality of the POSP that it ought to have been included in any modelling designed to identify even a minimum net consumer benefit.

167. For these reasons we find it unnecessary to describe the detailed submissions and expert evidence directed to demonstrating how large an adverse effect upon the outputs from the Commission's model might have been created by an input to reflect the loss of convenience associated with the POSP. We express no conclusion as to the extent to which the Commission's conclusions from its modelling would in fact have been undermined. It is sufficient for us to conclude, as we do, that the input of a convenience detriment into the modelling could have produced a sufficiently adverse outcome to lead to a conclusion that a remedies package which included a POSP did not pass the proportionality test.

(e) Modelling based on out of date information

168. It is clear that for the purposes of deriving a minimum net static gain quantification from the Commission's modelling process, 2006 figures were used: see R10.494. It is possible that the evidence available to the Commission might have enabled it to build a model based upon later figures. Nonetheless we are not satisfied that in this respect the Commission made any reviewable error in methodology, or that, in not using more recent figures for its modelling, it omitted to take material matters into account.

169. We have already described earlier in this judgment how, in connection with its analysis of market definition, the Commission did have regard to relevant statistics for the period after 2006, and we consider, for the reasons already

given, that the Commission was entitled to conclude that those more recent figures did not undermine that part of its analysis.

170. In our view, the same is true in relation to the modelling process. It was not necessary for the Commission to repeat the analysis (earlier in the Report) of statistics derived from the period after 2006, as a reason for using 2006 figures in the modelling process. Even if it might have been better, in an ideal world, for the Commission to have explained why it was content to rely on 2006 figures, we are satisfied that an explanation would have been forthcoming which could not, viewed separately, have affected its decision to impose the POSP.

(f) Elasticity of demand

171. This is an issue which occupied a substantial part of the parties' evidence, statements of case and submissions, but with which we need to deal only relatively briefly.

172. An essential feature of the modelling process was the application of an appropriate elasticity of demand to the price changes (reductions for PPI and increases for credit), so as to estimate the effect upon the volume of sales likely to be generated by any remedies package. It became common ground during the hearing that, for this purpose, the Commission used elasticity of demand of a type appropriate when considering a price change implemented by a single distributor within a competitive market which included other distributors, rather than a type derived from an assumed price change by all players in the relevant market.

173. The Commission's defence to this criticism was one of confession and avoidance. It conceded that this had been done, but denied that the result was an elasticity of demand which would not have been derived from a market-wide, rather than an individual distributor, analysis.

174. It is in our view no part of our function to engage with the merits of this highly technical question. Once it is demonstrated that the elasticity of demand factor actually used was derived from a *prima facie* inappropriate single distributor rather than a market-wide basis it is sufficient for us to conclude, as we do, that some significantly different elasticity of demand factor could have been derived from the use of the appropriate basis. For that reason alone, the Commission's error in this respect is one which, subject to materiality, calls for review.

175. We are not however persuaded by the evidence and submissions that we have heard that this error was material to the decision to impose the POSP, in the sense that the derivation of an elasticity of demand on a correct basis could have so affected the outcome of the modelling as to lead the Commission to conclude that the POSP was disproportionate, in that the likely detriments outweighed the expected benefits. Nonetheless, since we have concluded that other aspects of the Commission's approach justify quashing its decision to impose the POSP, we consider that this error of methodology ought to be reconsidered as part of the Commission's general reconsideration whether to impose the POSP, as a result of this judgment taken as a whole.

VIII. RETAIL PPI

176. In coming to our conclusions about Barclays' application, we have found it unnecessary to address the submissions made about retail PPI on behalf of Shop Direct. This is because Shop Direct's permission to intervene was limited to supporting Barclays' case that the Commission's decision to impose the POSP as a remedy in relation to all forms of PPI should be quashed. In the event, the main burden of Shop Direct's submissions was directed to matters particular to retail PPI, rather than to PPI as a whole. This was a case that could only have been advanced under a separate application, rather than by way of intervention.

177. Since we have decided that the decision to impose the POSP should be quashed, we feel bound to mention our concern that, on one point, a separate application by Shop Direct in relation to retail PPI alone might have had significant force.

178. The point which caused us concern was this. The Commission's decision that the proposed remedies package would be substantially effective to remedy the AEC in relation to all types of PPI, including retail PPI, involved a judgment that stand alone providers would be able to offer real competition to distributors. Yet its findings included recognition that, in relation to retail PPI, competition by stand alone providers was adversely affected by their inability to know the level of credit being extended by the retailer, on a constantly fluctuating credit account, so that they could not tailor a stand alone PPI policy to the amount owed from time to time by the consumer. Shop Direct's submission was that the Commission's remedies package contained no

solution to this conundrum, so that it could not therefore rationally be expected effectively to remedy the AEC in relation to retail PPI.

179. We mention this point not by way of decision, for the reason given above, and because no full argument by way of defence to it was called for, but because a further decision by the Commission to impose the POSP in relation to retail PPI might lead to its being raised by a further application. We have not been able to dismiss Shop Direct's submissions on this point as obviously wrong, and therefore the Commission may wish to bear it in mind in their re-consideration to the POSP as a remedy, in relation to retail PPI.

IX. SUMMARY AND CONCLUSION

180. The effect of this necessarily lengthy judgment may therefore be summarised as follows:

i) We have rejected Ground 4 of Barclays' Notice of Application, with the consequence that the Commission's decision as to the appropriate market definition, and as to the nature and extent of competition in the supply of PPI, is not susceptible to review. There has therefore been no effective challenge to any part of the Commission's findings about the nature or seriousness of the AEC which it has identified.

ii) As to Ground 1, we have concluded that the Commission did, as it was entitled to do, conclude that its proposed remedies package would be substantially effective as a remedy for the AEC which it had identified. We have rejected the challenge based upon a supposed failure to adopt an incremental approach. We have concluded that the Commission

failed in its Report to address the question of timescale in sufficient depth, but that this was mainly a failing in expression rather than an underlying deficiency in analysis, which was not on its own material to the decision to impose the POSP.

iii) As to Ground 2, we have concluded that the Commission's failure to take into account the loss of convenience which would flow from the imposition of a POSP in assessing whether it was proportionate to include it in its proposed remedies package was, on its own, a sufficient failure to take into account a material consideration to require the quashing and remission for reconsideration of its decision to impose the POSP.

iv) As to Ground 3, we have concluded that certain aspects of the methodology used by the Commission in the modelling which it employed as a tool for quantification of an aspect of the benefits to be expected from its remedies package were defective so as to be judicially reviewable, but that none of those aspects, viewed individually, would have been material, in the sense that the use of appropriate methodology could have led to a decision not to impose the POSP. Nonetheless the combined effect of those failings, coupled with the self-sufficient failure to take convenience into account in its conduct of the proportionality analysis contribute to our decision that the imposition of the POSP must be quashed and remitted for reconsideration. It follows that any such reconsideration should be

carried out in the light of our adverse decisions as to those specific aspects of the modelling methodology.

181. We therefore quash the Commission's decision to impose the POSP as part of its remedies package, and remit that question to the Commission for reconsideration in accordance with the principles set out in this judgment. We have not, of course, concluded that the Commission could not by that process lawfully decide to include the POSP as the result of that reconsideration.

182. We will hear submissions as to the form which our order should take as the result of this judgment.

Mr Justice Briggs Paul Stoneman Vindelyn Smith-Hillman

Charles Dhanowa
Registrar

16 October 2009