Neutral citation [2009] CAT 9

IN THE COMPETITION APPEAL TRIBUNAL

Case Number: 1104/6/8/08

Victoria House
Bloomsbury Place
London WC1A 2EB

3 April 2009

Before:

THE HONOURABLE MR JUSTICE BARLING (President)
PROFESSOR JOHN PICKERING
GRAHAM MATHER

Sitting as a Tribunal in England and Wales

BETWEEN:

TESCO PLC

Applicant

-v-

COMPETITION COMMISSION

Respondent

- supported by -

ASDA STORES LIMITED

MARKS AND SPENCER PLC

WAITROSE LIMITED

THE ASSOCIATION OF CONVENIENCE STORES

Interveners

APPEARANCES:

Mr. Mark Hoskins and Mr. Julian Gregory (instructed by Freshfields Bruckhaus Deringer LLP) appeared on behalf of Tesco Plc.

Mr. Peter Roth QC and Mr. Daniel Beard (instructed by the Treasury Solicitor) appeared on behalf of the Competition Commission.

Mr. Tim Ward (instructed by Slaughter and May) appeared on behalf of Asda Stores Limited.

Heard at Victoria House on 16 March 2009

JUDGMENT ON RELIEF

Introduction

1. The abbreviations and terminology used by the Tribunal in the judgment handed down on 4 March 2009 ([2009] CAT 6) ("the Main Judgment") are adopted in the present unanimous judgment, which should be read with the Main Judgment.

2. In the Main Judgment the Tribunal concluded that the Commission, in the Report, failed properly to consider certain matters which are relevant to its recommendation that a competition test be imposed as part of a package of remedies to address the AEC and resulting detrimental effects on customers that it had identified in certain highly-concentrated local markets. The Tribunal left open the question of relief and invited further submissions from the parties. To that end a short further hearing took place on 16 March 2009 following receipt of written submissions by the main parties and the interveners.

3. Three main issues relating to relief divided the parties:

   (i) the extent to which the Report should be quashed in the light of the Tribunal's conclusions;

   (ii) whether it is possible or appropriate for the Tribunal to refer relevant matters back to the Commission for reconsideration and a new decision pursuant to subsection 179(5)(b) of the Act; and

   (iii) costs.

4. At the outset of the relief hearing the parties indicated that they were making good progress on agreeing the specific passages in the Report which should be quashed in the light of the Tribunal's conclusions in the Main Judgment, but that they had not had sufficient time to conclude the process. Both Mr. Hoskins, who appeared for Tesco, and Mr. Roth QC, who appeared for the Commission, expressed the hope and expectation that with a little more time full agreement would be reached. On that basis they suggested, and the Tribunal agreed, that this aspect of relief be stood over to give the parties the opportunity to reach consensus. Failing agreement they

would make submissions in writing on any outstanding issues and the Tribunal would determine the matter thereafter. In the event the parties were not able to reach agreement on the extent of the quashing, and if anything the divide between them widened to include a related issue as to the form of the order for referral back.

5. We deal first with issue (ii) above, and then turn to a somewhat enlarged issue (i). Issue (iii) will be the subject of a separate ruling.

Can or should the Tribunal refer back under subsection 179(5)(b)?

6. Subsection 179(5) provides as follows:

> "(5) The Competition Appeal Tribunal may—
>
> (a) dismiss the application or quash the whole or part of the decision to which it relates; and
>
> (b) where it quashes the whole or part of that decision, refer the matter back to the original decision maker with a direction to reconsider and make a new decision in accordance with the ruling of the Competition Appeal Tribunal."

7. The Commission submits that the Tribunal can and should refer the relevant matters back to it under subsection 179(5)(b) for reconsideration and the making of a new "decision in accordance with the ruling of the [Tribunal]". The Commission also offers an undertaking to the Tribunal to deal with such referral within a period of six months.

8. Tesco, on the other hand, submits that the Tribunal cannot properly refer the matters in question back to the Commission or that it would be otiose to attempt to do so as the statutory time limit in subsection 137(1) of the Act, which allows no more than two years for the preparation and publication of the Report, has expired and cannot be extended. Alternatively Tesco submits that even if the Tribunal's discretion to refer the matter back to the Commission is unaffected by the expiry of that time limit, the Tribunal should exercise its discretion not to do so.

9. Mr. Ward, who appeared on behalf of one of the interveners, Asda, supported the Commission's approach and urged the Tribunal to refer the matter back for reconsideration and to encourage the Commission to complete the exercise within a

shorter period than the six months offered. M&S and Waitrose sent letters in support of the Commission's submissions.

10. After hearing counsel we indicated that we preferred the submissions of the Commission and the interveners to those of Tesco on these issues, and that we would provide our reasons in due course. We now provide them.

Does the time limit in the statute preclude referral back to the Commission?

11. The first question is whether Mr. Hoskins is correct that there is no jurisdiction in the Tribunal to refer back and/or that it would be otiose so to refer as the Commission could not now make a new decision containing a recommendation.

12. Mr. Hoskins' argument, which can be shortly stated, proceeds as follows. He refers first to section 134 of the Act, which (paraphrasing it) requires the Commission, if on a market investigation reference it has decided that there is an AEC, to decide also whether the Commission should itself take action under section 138, whether it should recommend the taking of action by others and, in either case if action is to be taken, what that action should be and what is to be remedied, mitigated or prevented by it. In preparation for an argument he makes based on section 138, Mr. Hoskins draws attention to the distinction between action to be taken by the Commission itself, and a recommendation by the Commission that action be taken by others.

13. Next Mr. Hoskins refers to sections 136 and 137. Section 136, so far as relevant, provides:

> "**Investigations and reports on market investigation references**
>
> (1) The Commission shall prepare and publish a report on a market investigation reference within the period permitted by section 137.
>
> (2) The report shall, in particular, contain—
>
> (a) the decisions of the Commission on the questions which it is required to answer by virtue of section 134;
>
> …"

14. Section 137, so far as relevant, provides:

> "**Time-limits for market investigations and reports**
>
> (1) The Commission shall prepare and publish its report under section 136 within the period of two years beginning with the date of the market investigation reference concerned.
>
> …
>
> (4) No alteration shall be made by virtue of subsection (3) which results in the period for the time being mentioned in subsection (1) exceeding two years.
>
> …
>
> (7) References in this Part to the date of a market investigation reference shall be construed as references to the date specified in the reference as the date on which it is made."

15. On the basis of these provisions Mr. Hoskins submitted that any recommendation by the Commission as to a remedy must be contained in its report, which must be prepared and published within the statutory period of two years. When it comes to a new decision under subsection 179(5)(b) replacing a Commission recommendation, there is nothing in that subsection or anywhere else which expressly permits the Tribunal or the Commission to override or extend that time limit. It followed that in the present case, the statutory time limit having expired on 8 May 2008, any referral back to the Commission would be otiose because the Commission would have no power to adopt a new recommendation. Mr. Hoskins submitted that for this to be possible the new decision would have to be adopted within the original two year period. He acknowledged that in many cases that would not be achievable, given the time which would be taken up by the original market investigation and preparation of the Commission's report in accordance with the requirements in section 136, the proceedings in the Tribunal, any appeal from a decision of the Tribunal, and the time required for further consideration and preparation of the new decision itself.

16. He put forward two factors as explaining the apparent tension between Tesco's interpretation of the statute and the power to refer back in subsection 179(5)(b).

17. First, he relied upon section 138 of the Act, and in particular subsections (1), (2) and (3) which provide:

> "**Duty to remedy adverse effects**
>
> (1) Subsection (2) applies where a report of the Commission has been prepared and published under section 136 within the period permitted by section 137 and contains the decision that there is one or more than one adverse effect on competition.
>
> (2) 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.
>
> (3) The decisions of the Commission under subsection (2) shall be consistent with its decisions as included in its report by virtue of section 134(4) unless there has been a material change of circumstances since the preparation of the report or the Commission otherwise has a special reason for deciding differently."

18. Mr. Hoskins referred to the express power in subsection (3) to depart from decisions in the report under section 134 and do something different after the report had been published. He argued that this derogation clearly covered the situation where the Tribunal had quashed all or part of a report, albeit that it was limited to the situation where remedial action was to be taken by the Commission itself (for example action under sections 159 or 161, which respectively allow the Commission to accept final undertakings from the parties or make a final order to remedy the competition problems identified in its report on a market investigation reference), and did not cover action by others recommended by the Commission. Mr. Hoskins submitted that the existence of this ability under section 138 to adopt a different approach from that taken in the report prevented the power to remit under subsection 179(5)(b) from being otiose or futile. The difference in treatment as between remedial action to be taken by the Commission itself, and action recommended to be taken by others was, he submitted, explicable on the basis that, in the case of recommendations, a third party would become involved who would have to decide independently whether to accept or reject the recommendation. In such a case there

was no justification for overriding the statutory maximum period for a market investigation.

19. As a second supporting factor Mr. Hoskins argued that Parliament had struck a balance between the need to protect industry from uncertainty and expense of an overly long market investigation, and the need to ensure an effective outcome of such an investigation. To this end he showed us certain passages from Hansard containing statements by the Minister when the Enterprise Bill was in Committee. These emphasised the importance of the statutory timetable as providing certainty to business, and voiced the expectation that many market investigations would be completed in less than two years. Mr. Roth countered by showing us other passages in which the Minister referred to the Tribunal's proposed power to refer a matter for reconsideration as being the appropriate way to deal with challenged decisions in the context of market investigations. We were shown these extracts from Hansard, although neither counsel took us to the criteria in *Pepper (Inspector of Taxes) v Hart* [1993] A.C. 593 permitting the use of such material. In any event we did not find any of them particularly illuminating in relation to the issues before us.

20. We do not agree with Mr. Hoskins' interpretation of the Act. We see no tension between the time limit in subsection 137(1) and the power in subsection 179(5)(b) to refer a matter back to the Commission for reconsideration and a new decision where the original decision has been quashed by the Tribunal under subsection 179(5)(a). Indeed a tension would only arise on Mr. Hoskins' interpretation.

21. We agree with Mr. Roth that the starting point for an analysis should be subsection 179(5) itself (quoted above). That provision states, in terms which are plain and unambiguous, that where the Tribunal has quashed the whole or part of a decision, it may refer the matter in question back to the original decision maker (in this case the Commission) "with a direction to reconsider and make a new decision in accordance with the ruling" of the Tribunal. There is no reference there to the time limit in subsection 137(1) or to any time limit at all. On the basis of the plain meaning of the Act the Tribunal's power to refer back is entirely separate from the time limit in subsection 137(1).

22. Mr. Hoskins's attempt to link the two is misconceived. Subsection 137(1) imposes a time limit on the preparation and publication of the Commission's report. That time limit has admittedly been complied with in the present case. In those circumstances it has served its purpose. The Act does not require any other step to be taken within that period of two years. It certainly does not expressly require a "new decision" under subsection 179(5)(b) to be produced within that period. The fact that the Commission's report (which is subject to the time limit) is required by subsection 136(2)(a) to contain the Commission's decisions on the remedial questions in section 134 does not mean that, where such a decision is later challenged and quashed in a section 179 review, the time limit is somehow reactivated. Whether the time limit was or was not complied with must be capable of being judged at the time the report is published. If, as here, the report was published in time and contained the Commission's decisions on the matters referred to in section 134 that is the end of the matter. A decision made pursuant to a referral back under subsection 179(5)(b) is a *new* decision to which subsection 137(1) has no application.

23. Nor can such a requirement be implied into the statute. By providing for a period of two years for production of a market investigation report by the Commission, Parliament must be taken to have recognised that the Commission might well on occasions take all or most of that period to produce it. It would be absurd if, by taking the full period allowed by Parliament, the Commission would deprive the Tribunal of the power to require the Commission to reconsider a deficient recommendation and to make a new decision in accordance with the Tribunal's ruling. If Parliament had intended to impose such a drastic limitation on the important power to refer a matter back for reconsideration it is inconceivable that the statute would not have expressly provided for it. This is so even if the limitation were only applicable to recommendations, as Mr. Hoskins contends.

24. In practice the suggested limitation would be even more drastic than appears above, as it would not only bite in cases where the Commission had taken the full two years to produce its report. To allow time within that period for a possible challenge in the Tribunal, for further appeals, and for a new decision, the Commission would need to carry out its market investigation and publish the

original report within a few months, and certainly in considerably less time than the full period. But however quickly the Commission acted, it would not be able to be sure of preserving the position, as once a challenge was made the timetable would not be in its hands alone. For example, any party aggrieved by a decision may make an application for review under section 179 up to two months from the date upon which they were notified of the decision or the date of publication of the decision, whichever is the earlier (see Rule 27 of the Tribunal Rules).

25. As to section 138, we agree with Mr. Roth and Mr. Ward that it is a red herring. It has nothing whatsoever to do with the relief which can be granted in a review pursuant to subsection 179(5)(b), or with the reconsideration to be carried out by the Commission pursuant to such relief. Section 138 relates to the implementation of remedial action which the Commission has decided to take itself (as opposed to recommendations for remedial action by third parties). In such situations Parliament has felt it necessary to impose on the Commission a duty of consistency as between the original decision of the Commission in the report, and the action which the Commission ultimately takes to implement that decision. This duty of consistency is subject to certain exceptions where the circumstances have changed materially in the interim, or where there is "a special reason" to decide differently. So far as recommendations for remedial action by third parties are concerned, there is no need for an equivalent to section 138, as no question of consistency on the part of the Commission arises.

26. Mr. Hoskins' submission that one of the reasons why subsection 138(3) authorises the Commission to decide differently on the basis of "a special reason" is to enable the Commission to take account of a Tribunal judgment, is in our view wrong. The exceptions within subsection 138(3) are simply not needed, or apt, for that purpose. Subsection 179(5)(b) clearly authorises the Commission to reach a decision which is different from the original one where the Tribunal's ruling so requires. Further, subsection 179(5)(b) is not limited to deciding in a manner inconsistently with the original decision: there may well be cases of referral back where the "new decision" will be the same as before. Subsection 138(3) would clearly have no bearing on such a case.

27. It seems to us that the fallacy in Tesco's submissions lies in the suggestion that the time limit in subsection 137(1) has any application once the original report has been prepared and published. As we have said, that limit is inapplicable to the power to grant relief under subsection 179(5), and to any decision of the Commission made pursuant to such relief.

28. Further, for the reasons set out above (paragraphs [15], [23] and [24]), if Tesco's interpretation were correct the result would be that a fundamental aspect of the relief apparently available in section 179(5) would, in effect, become a dead letter so far as a Commission recommendation for remedial action is concerned. The Commission would be deprived in very many (probably virtually all) of such cases of an opportunity to reconsider the quashed aspects of its report. For the Tribunal to be able merely to quash, in circumstances where the matter could usefully be reconsidered and a new decision taken by the Commission, could well result in a waste of some or all of the effort and resources expended on the particular market investigation.

29. Moreover, as Mr. Roth submitted, Tesco's interpretation would militate against the purpose of the statute in other respects: the statutory scheme requires the Commission to identify whether there is an AEC and, if they find that there is, the Commission must consider what, if any, is the appropriate remedy to recommend or impose. Where, as here, an AEC exists but the recommended remedy has been successfully challenged by judicial review, it would indeed be extraordinary if the question of the remedy could not be sent back and reconsidered by the Commission. Unlike a merits appeal under the Competition Act 1998 ("the 1998 Act"), judicial review does not enable the Tribunal to substitute its own decision for that of the original decision maker. The possibility of a further market investigation reference by the OFT to the Commission would hardly be a satisfactory substitute for immediate reconsideration by the Commission, which is the relief expressly envisaged by the statute.

Should the Tribunal refer the matter back to the Commission?

30. Tesco's alternative submission is that the Tribunal should not exercise its discretion to refer the matter back to the Commission for reconsideration. A number of points are made in support of this submission in Tesco's skeleton argument and by Mr. Hoskins. In summary, it is submitted first that the discretion whether to refer back is a real one, as shown by the Tribunal's decision not to refer back in *Virgin Media, Inc. v Competition Commission & Anor* [2008] CAT 32, paragraph [32]. Next Mr. Hoskins reminded us that, in laying down a statutory time limit of two years, Parliament intended there to be an end point to the uncertainty and cost imposed on an industry in a market investigation. The Tribunal should bear in mind this legislative intention when exercising its discretion. Third, the Commission had already had ample time to analyse the competition test, which was not a new idea, as made clear in paragraphs [59] and [60] of the Main Judgment. Fourth, if the matter were referred back there would be a great deal of work to be done by the Commission to rectify the omissions in its analysis. In this regard, a number of examples of the work which, in Tesco's view, would be required are set out at paragraphs 43 to 44 of Tesco's skeleton argument. Tesco argues that given this amount of work, considerable further time, with attendant uncertainty and detriment to industry, would be involved including further use of the Commission's investigative powers. In his view, this would not be desirable. Finally, Tesco argues that a refusal to refer the matter back would not preclude the OFT making a further market investigation reference under section 131 nor would it prevent the Government considering a competition test itself in any event.

31. Despite these arguments we have no doubt that the right thing to do in this case is to refer the matter in question back to the Commission for further consideration.

32. We accept that referral back involves the exercise of a discretion, and that in certain circumstances it can be appropriate not to refer back. The most obvious example is where the referral back would be otiose, because the ultimate outcome would be the same whether or not a referral was made. Such a case was *Virgin*, in the context of a merger reference.

33. In the present case there exists, as we have said, an unchallenged finding of AEC arising from highly-concentrated local markets causing estimated consumer detriment to the tune of £105 to £120 million per annum in additional profits made by large grocery retailers operating large grocery stores. One of a proposed package of remedies intended by the Commission to deal with that AEC and resulting detriment, namely the recommendation for a competition test, is quashed on the ground that in considering that remedy the Commission failed properly to take account of certain relevant considerations. The Tribunal also held that those considerations were capable of affecting the recommendation in question (see paragraph [171] of the Main Judgment). Moreover, as we pointed out in the Main Judgment (paragraph [170]), the grounds on which the recommended competition test is quashed do not preclude the possibility that, the matters in question having been assessed and taken into consideration in accordance with the Tribunal's ruling, the test could lawfully be recommended by the Commission. In these circumstances it cannot be said that it would be otiose or futile for this matter to be referred back to the Commission for reconsideration under subsection 179(5)(b).

34. This being so, the appropriate course would be to refer back unless any of the other factors urged by Tesco leads to a different conclusion. In our view they do not.

35. As to the statutory time limit in section 137, this ensures that a market investigation report is prepared and published in a timely way. We do not go so far as to say that the limit is incapable indirectly of informing the exercise of the discretion to refer back: it provides a timescale for one part of the market investigation. Moreover, the passage of time in a particular case may affect the usefulness or desirability of a referral back to the Commission. However, we do not find that it provides us with much assistance in this case. (See in this regard however paragraph [42] below.) The Commission has offered an undertaking to reconsider and reach a new decision within six months which, in our view, is a reasonable period of time in all the circumstances.

36. Nor is it clear why the fact that a competition test or similar remedy has been the subject of discussion and submissions on the part of the Commission and interested

parties in the past should assist the Tribunal in deciding whether to refer the matter in question for reconsideration by the Commission in the light of our ruling.

37. We are also unimpressed by Tesco's suggestion that we should not refer back because of the substantial amount of work this is said to entail for the Commission. It is clear that the work entailed will not be negligible, although at the main hearing Tesco submitted that the Commission was already in possession of, or could relatively easily obtain, all the data needed to carry out the assessments which would, in Tesco's view, be necessary to fulfil its obligations in regard to the issues which were in dispute (see paragraph [159] of the Main Judgment). If, as Tesco argued at that hearing, and as we have found, there were matters which ought to have been, but were not, properly examined in the course of the market investigation, then the work involved in doing so can hardly be regarded as prohibitive now.

38. As for uncertainty and detriment to the industry concerned, it is true that there will be continuing uncertainty as to the outcome. However, some uncertainty would be inevitable whether we refer back or not. If, as Tesco suggests, the proposal for a competition test were to be left in the air by quashing but not referring back for reconsideration, the uncertainty might arguably be more difficult to resolve. Any delay is obviously to be regretted but one should not lose sight of the fact that the remedy in question, if ultimately recommended and implemented in approximately its present form, would be operating indefinitely. If, on the other hand, the Commission's new decision were to be different, then any delay would have served some purpose. Whether the Commission's new decision is different or not, the unchallenged AEC will have been addressed within the four corners of the statutory scheme, which would not necessarily be the case if the matter in question were left in limbo by simply quashing the relevant aspects of the Report.

The Commission's undertaking to the Tribunal

39. As mentioned in paragraph [36] above, the Commission has offered an undertaking to the Tribunal to reach a new decision pursuant to subsection 179(5)(b) within six months. Had this undertaking not been offered it would probably have been necessary to consider whether the Tribunal could and should impose a time limit on

the Commission's reconsideration and production of a new decision. This would in turn have involved our investigating to what extent the ruling of the Court of Appeal in *Office of Communications & Anor v Floe Telecom Limited* [2006] EWCA Civ 768 ("*Floe*") applies by analogy to relief given by the Tribunal under subsection 179(5).

40. In that decision the Court of Appeal held that where, following a successful appeal on the merits under sections 46 or 47 of the 1998 Act, the Tribunal sets aside the whole of a competition authority's decision and remits the whole matter to the authority pursuant to paragraph 3(2) of Schedule 8 to the 1998 Act, then save in very unusual circumstances the Tribunal must be taken to have disposed entirely of the appeal. As the appeal is no longer subsisting the Tribunal is not then able to direct the authority to carry out any further investigation within a specific time period. Nor can the Tribunal fix a future case management conference relating to the authority's new investigation. If the relevant competition authority fails to discharge its duties within a reasonable time period, then the appropriate remedy would be an application for judicial review in the Administrative Court.

41. The present case is not an appeal on the merits under the 1998 Act but a statutory judicial review under different legislation. More importantly the Tribunal is here given an express power to quash a decision and refer the matter back to the decision maker:

> "with a direction to reconsider and make a new decision in accordance with the ruling of the [Tribunal]".

42. The power to direct a reconsideration and a new decision (which is expressed in very similar terms to subsection 31(5) of the Supreme Court Act (Senior Courts Act) 1981 governing judicial review in the High Court) may arguably imply a power to impose a time limit and other directions in relation to the completion of those steps. A further relevant factor may be that (unlike an investigation by a competition authority under the 1998 Act) the original report of the Commission is subject to completion within a statutory time limit. When that report, or part of it, is then quashed it might seem odd if no time limit at all could be imposed on the "new decision" which the Commission is directed to make in replacement of the one

which was quashed. The subsection 179(5)(b) situation may therefore be closer to that which faced the Administrative Court in *R v Bolton Metropolitan Borough Council ex parte B* [1985] FLR 343 discussed by Lloyd LJ in *Floe* (see paragraphs [38]-[39] of his judgment).

43. It is also worth noting that even in relation to paragraph 3(2)(a) of Schedule 8 to the 1998 Act, Sedley LJ considered that the Tribunal could impose appropriate conditions upon an order for remission (see paragraph [55] of his judgment in *Floe*).

44. There are clearly arguments going both ways and it is not necessary to reach a conclusion on this issue now; nor do we; the undertaking offered by the Commission to complete the reconsideration and decision making process within a period of six months is, in the Tribunal's judgment, appropriate and sufficient for present purposes. Tesco has raised no objection to this period, nor did the interveners, with the exception of Asda, which suggested a maximum period of 3 months. At the relief hearing Mr. Ward reiterated that his client would like the Tribunal to encourage the Commission to perform the exercise more quickly than the period of six months in the proposed undertaking. However we are sure that the Commission needs no such encouragement, and will exercise all due expedition. In these circumstances we will recite the undertaking in the Tribunal's order.

Which passages in the Report should be quashed and what should be the form of the Order for referral?

45. The hoped-for consensus on this having failed to materialise, both Tesco and the Commission initially requested a further opportunity to address the Tribunal orally on (a) the passages of the Report which should be quashed and (b) the specific form of the order referring the matter back to the Commission for reconsideration. However, they have now indicated that an oral hearing is no longer required and have asked the Tribunal to resolve these further issues on the papers. The Tribunal has received written submissions on these matters from Tesco, the Commission, Asda and M&S.

46. In essence the parties' respective positions are as follows. The Commission, supported by Asda and M&S, submits that the order for referral back should not

limit the Commission to considering whether or not, having taken into account those factors which were not properly considered in the Report, the competition test as originally formulated should be recommended. Rather the Commission should also, if necessary, be able to consider whether a modified form of that test, or even a different remedy to address the unchallenged AEC and its detrimental effects, should be recommended. On that basis the Commission submits that an order in these terms would be appropriate:

> "The Competition Commission is directed to reconsider, in the light of the Tribunal's judgment, the proposed competition test remedy to the adverse effect on competition identified in the report, and to make a new decision accordingly."
>
> (See letter from the Treasury Solicitor's Office to the Tribunal dated 24 March 2009.)

47. Tesco's solicitors, on the other hand, in correspondence with the Commission's solicitors suggested that the only matter to be reconsidered on a referral back should be the question whether to recommend the original competition test; the order should not permit consideration of the contingent questions whether to recommend a modified competition test or some other remedy. Accordingly they proposed the following form of order:

> "(1) The issue of whether to recommend the adoption of the competition test as defined at paras 11.437 to 11.441 of the Report on the supply of groceries in the UK dated 30 April 2008 ("the Report") is referred back to the Competition Commission.
>
> (2) The Competition Commission is directed to reconsider whether to recommend the adoption of the competition test as defined at paras 11.437 to 11.441 of the Report and make a new decision in accordance with the ruling of the Competition Appeal Tribunal."
>
> (See letter from Freshfields Bruckhaus Deringer to the Treasury Solicitor's Office dated 23 March 2009.)

48. In the Tribunal's view the form of order suggested in this letter would not be appropriate in this case. It is formulated in such a way that if the Commission's conclusion were to the effect that the original competition test could not or should not be re-recommended, then its "new decision" under subsection 179(5)(b) would be limited to recording that conclusion, resulting in the "limbo" referred to earlier in this judgment (see paragraph [38]). We see no warrant for imposing such a limitation on the scope of the "new decision" in the present case. On the contrary,

we consider that in the event of the Commission reaching that conclusion, it should be able to consider alternative remedies. The original competition test was part of a package of remedies put together with a view to providing as comprehensive a solution to the AEC and its detrimental effects on customers as is reasonable and practicable, in accordance with the aims of the legislation (see in particular subsection 134(6) of the Act). If, in a case such as the present, one part of the package were to be removed, the Commission should be able to consider whether a replacement remedy would satisfy those aims. We will return later in this judgment to the precise form of the order we propose to make.

49. In its written submissions Tesco makes a further point, arguing that there is a link between the form of the order for referral and the extent of the quashing which should be ordered by the Tribunal. If the order is in the form advocated by Tesco then it submits that the quashing can be more limited, and need not, for example, include the passages in the Report which merely describe the characteristics of the test such as paragraphs 11.78 to 11.122. If, on the other hand, the form of the order leaves it open to the Commission to consider alternative remedies, then Tesco contends that all the passages in the Report relating to the competition test should be quashed.

50. The Commission for its part does not accept that an order which leaves scope for it to reconsider, if appropriate, the design of the competition test or indeed a different remedy, should affect how much of the Report is quashed. In the Commission's view there is a distinction to be drawn between the passages which are directly connected with the questions the Commission needs to reconsider and those which, although they relate to the competition test, were not challenged and would not need to be reconsidered in the event that the Commission ultimately confirmed its original recommendation. The Commission gives as an example paragraph 11.65 which expresses the Commission's conclusion as to the stage within the planning process at which the test should be applied. That finding was not challenged by Tesco and the Commission submits that if the test were ultimately re-recommended the finding could stand without needing reconsideration. If a modified form of the competition test or a new remedy were to be recommended, the Commission would merely need to explain why the conclusion in paragraph 11.65 was now different or

irrelevant, as the case may be. No quashing of such a passage is required, and would only lead to additional problems by requiring the Commission unnecessarily to re-visit and re-examine the conclusion if it were to confirm its original recommendation.

51. In order to resolve this issue we find it useful to recall what can be challenged and quashed under the legislation in question. The Report contains the decisions with respect to the questions which the Commission is required to answer under section 134, together with the reasons for those decisions and such other information as the Commission considers appropriate for facilitating a proper understanding of those matters (see subsection 136(2) of the Act). Subsection 179(5)(b) provides for the quashing of "the whole or part of the decision" to which the application for review relates. The decision to which the present application relates is the decision by the Commission under subsections 134(4)(b) and (c) to recommend the implementation of the competition test. In the Main Judgment the Tribunal held that decision to be flawed because the Commission had failed properly to take account of certain relevant considerations. That is therefore the decision which falls to be quashed.

52. In our view it is not necessary or appropriate in this case for the Tribunal to conduct a trawl through the Report in order to identify and quash each reference to the competition test. Still less (even if permissible) should the Tribunal engage in a re-drafting exercise in an attempt to make sense of passages in the Report which have been mutilated by a quashing exercise of that kind. The Report is the Commission's document. It is sufficient for the Tribunal simply to indicate that the decision to make the recommendation in question is quashed. The effects of that quashing upon the reasoning, findings and other aspects of the Report are, at least in the first instance, for the Commission to determine in the light of the grounds on which the decision is quashed, as set out in the Main Judgment.

53. In the light of the above we propose, subject to any comments of the parties on its precise terms, to make an order as follows:

(1) that the decision of the Commission contained in the Report to recommend the establishment within the planning system of a competition test, as described in, *inter alia*, paragraphs 43, 11.12 to 11.16, and 11.437 to 11.441 thereof, as one of a package of remedies to address the AEC and its detrimental effects identified in the Report, is quashed;

(2) that the matter be referred back to the Commission and that the Commission is directed to reconsider and make a new decision in accordance with the Tribunal's ruling.

54. As already indicated, the order will recite the Commission's undertaking to reach a new decision within a period of six months.

The President Graham Mather John Pickering

Charles Dhanowa
Registrar Date: 3 April 2009