

Clarifying the Scope of Judicial Review in Competition Inquiries: The Saga of PPI

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While early reports suggest that 2009 may well prove to be a good vintage for winemakers in Bordeaux, the same cannot unfortunately be said for the U.K. Competition Commission (“CC”). Indeed, 2009 is likely to be remembered as something of an *annus horribilis* for the CC, as the year in which it suffered an unprecedented succession of high-profile defeats before the Competition Appeal Tribunal (“CAT”).

The cases involved in these decisions raise several questions about the institutional balance between competition authorities and reviewing courts, all of which have far-reaching implications for the robustness of the entire system of competition enforcement. How far is it open to a court or tribunal to review a competition authority’s findings of fact, as opposed to the conclusions drawn by the authority from findings and judgments made in the light of those conclusions? Where is the line to be drawn between judicial review of the decision-making process and a full appeal on the merits? Has the CAT struck the right balance between allowing the CC, as a specialist competition authority, to exercise its judgment and intervene in markets where adverse effects on competition have been identified, while at the same time holding the CC to account? Is it realistic to require a competition authority such as the CC to conduct a detailed cost/benefit analysis of each element of its remedy proposals in the context of what is necessarily an imprecise and forward-looking exercise, involving qualitative judgments?

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I. Introduction

The *annus horribilis* year of 2009 all began with Tesco's challenge to the CC's remedy proposals in the groceries inquiry, relating to the introduction of a "competition test" into the planning regime.¹ The CAT agreed with Tesco that the CC had failed to take into account the economic costs associated with its remedy proposal and, specifically, that it had failed to assess the risk that the imposition of a competition test might produce adverse effects for consumers, resulting in unmet demand for grocery retailing. Things took a turn for the worse when the CC's remedy proposals in the payment protection insurance ("PPI") inquiry, relating to the imposition of a point of sale prohibition ("POSP"), were quashed following a successful challenge by Barclays, relying on similar arguments to those upheld in the *Tesco* case.² Essentially the CAT found that the CC had failed to take adequate account of the risk of a radical remedy producing adverse consequences to consumers due to reduced take-up of PPI. The next major challenge to the CC concerned an allegation of apparent bias on the part of one member of the CC panel investigating the supply of airport services by BAA; this led ultimately to substantial portions of the CC's report being quashed.³ The last case in the series was heard shortly before the *BAA* judgment was handed down: here, the CC suffered a more modest defeat at the hands of Sports Direct over the CC's refusal to provide Sports Direct, as a main party in a merger inquiry, with un-redacted versions of the CC's working papers. On the preliminary issue of whether the application by Sports Direct was premature, the CAT ruled that it was not, following which the CC withdrew its decision.⁴

While the *BAA* case will undoubtedly prove to be of major importance for the way in which the CC selects panel members in future inquiries, and while the *Sports Direct* case may have wider implications for other inquiries in which parties seek to challenge provisional decisions by the CC, both of these cases involved discrete and self-contained legal issues. By contrast, the *Tesco* and *Barclays* cases go to the heart of the CC's powers to impose or recommend remedial action, raising fundamental questions about the nature of the CAT's role in reviewing such decisions and, more generally, about the intensity of judicial review of decisions of competition authorities.

These questions about the institutional balance between competition authorities and reviewing courts have far-reaching implications for the robustness of the entire system of competition enforcement. How far is it open to a court or tribunal to review a competition authority's findings of fact, as opposed to the conclusions drawn by the authority from those findings and judgments made in the light of those conclusions? Where is the line to be drawn between judicial review of the decision-making process and a full appeal on the merits? Has the CAT struck the right balance between allowing the CC, as a specialist competition authority, to exercise its judgment and intervene in markets where adverse effects on competition have been identified, while at the same time holding the CC to account? Is it realistic to require a competition authority such as the CC

to conduct a detailed cost/benefit analysis of each element of its remedy proposals in the context of what is necessarily an imprecise and forward-looking exercise, involving qualitative judgments?

Of course the answer may vary from jurisdiction to jurisdiction. In this article we will focus on the judicial review principles applicable to the CAT in the United Kingdom with particular reference to the CAT's judgment in *Barclays*. Some of those principles are interesting as a point of reference for other jurisdictions

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and indeed other areas of judicial review within the United Kingdom. The approach of the CAT (and, more generally, of the English Courts) in relation to competition enforcement is particularly interesting because this is one of the areas that is more naturally influenced by principles developed by the European Courts.

We will start by examining some of the general principles of judicial review and considering whether these principles allow for gradations of judicial scrutiny, depending on the nature of the decision being reviewed. We will

then discuss the background to the PPI inquiry, the basis for Barclays' appeal, and the grounds on which the CAT reached its decision. Finally, we will discuss the wider implications of the *Barclays* judgment, viewed against the background of the case law on the intensity of judicial review.

II. Statutory Background and General Principles of Judicial Review in the United Kingdom

In the United Kingdom, the key provisions of the Enterprise Act 2002 ("EA02") that set out the basis for review of the CC are sections 179 and 120.

Section 179 EA02 states:

“(1) Any person aggrieved by a decision of the OFT, the appropriate Minister, the Secretary of State or the Commission in connection with a reference or possible reference under this Part may apply to the Competition Appeal Tribunal for a review of that decision.”

Then, crucially:

“(4) In determining such an application the Competition Appeal Tribunal shall apply the same principles as would be applied by a court on an application for judicial review.”

In relation to mergers section 120 EA02 follows an identical approach.⁵

It is well recognized that, since the United Kingdom’s accession to the European Communities (now the EU), principles of European law—developed in particular by the European Court of Justice (“ECJ”)—have had an increasing influence over national courts.⁶ This influence is most obvious in areas where U.K. legislation mirrors European provisions (e.g. the Human Rights Act 1998 and European Convention of Human Rights) or where—under U.K. legislation—courts are required to deal with questions of interpretation of national law consistently with EU (formerly Community) law (e.g. section 60 of the Competition Act 1998).

However, even when such a direct statutory link does not arise (as is the case under the EA02), principles developed under EU law (notably the principle of proportionality), increasingly find their way into competition enforcement policy and, as a result, into the jurisprudence of courts and tribunals reviewing such enforcement decisions.

Proportionality in relation to remedial action is a prime example of this. The EA02 requires the CC to “have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to” either (a) the adverse effect on competition and any detrimental effects on customers so far as resulting from it (sections 134(6) and 138(2)(b) in the context of a market investigation), or (b) the substantial lessening of competition and any adverse resulting from it (sections 35(4) and 36(3) in the context of a merger investigation). While the EA02 only refers to “reasonable and practicable” the Guidelines adopted by the CC (pursuant to section 171(3) EA02 for market investigations and section 106(1) EA02 for mergers) refer to a proportionality standard.⁷ How does the proportionality standard in remedial action fit with general principles of judicial review?

In the United Kingdom the traditional grounds of judicial review can be broadly categorized as follows: legality, fairness, and reasonableness. Indeed, Lord Cooke of Thorndon has said that principles of judicial review could be summarized in three adverbs, namely, that a public body has to act lawfully, reasonably, and fairly.⁸ In this article we will focus principally on reasonableness.

These judicial review principles are not static but have evolved over time, influenced in part by principles derived from the case law of the European Courts. The importation of the principle of proportionality is an example.

Proportionality as a test for judicial review in English law was first suggested by Lord Diplock in 1985 in the *GCHQ* case.⁹ It is based on a principle that is widely known in European legal systems and is, in fact, now regarded as a “general principle of law” by the ECJ. The concepts of proportionality and reasonableness are closely linked,¹⁰ because the proportionality test, which seeks to prevent unduly oppressive decision-making, essentially requires the decision maker to

achieve a fair balance of relevant considerations, and thus bears similarities to (and arguably can fit within) the concept of reasonableness in English administrative law.

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Decisions by competition authorities, particularly decisions to impose remedies in the context of mergers and market investigations, often involve complex economic assessments relying on a mixture of economic theory, forensic examination of factual evidence, and qualitative

forward-looking assessments based on judgment and experience. When reviewing such decisions, the courts will assess the adequacy of the evidence relied upon to prove the competitive harm; regulatory intervention by a competition authority without a proper evidential basis will, in principle, be unlawful. Under traditional judicial review principles, inadequacy of evidence has to reach the standard of unreasonableness. However, it is recognized that the “no evidence” standard of judicial review “does not mean a total dearth of evidence. It extends to any case where the evidence, taken as a whole, is not reasonably capable of supporting that finding; or where, in other words, no tribunal could reasonably reach that conclusion on that evidence.”¹¹ The CAT has also recognized that in the “no evidence principle” is the principle that perverse or unreasonable action is unauthorized or *ultra vires*.¹² In this sense, a rationality review approaches the legality standard.¹³

How far do these general principles of judicial review allow for different levels of scrutiny in their application? Following that question, what is the appropriate level of scrutiny for decisions by competition authorities?

III. Different Levels of Scrutiny?

There can be little doubt that general principles of judicial review permit different levels of scrutiny in their application. Indeed, one of the leading U.K. textbooks of judicial review (De Smith)¹⁴ graphically depicts the different categories of review, ranging (in decreasing order) from “full intensity” (correctness review for abuse of power), to “structured proportionality” (where the burden of justification is on the decision-maker), “anxious scrutiny” (where the burden is again on the decision-maker), “standard *Wednesbury* unreasonableness” (where the burden is on the claimant), “light touch unreasonableness,” (again, where the

burden is on the claimant) and “non-justiciability” (where the court will also require an adequate justification).

How far, if at all, does the specialist nature of the CAT enter into the equation? Formally it appears that it does not. As the Court of Appeal put it in *Sky*, a court will apply its own specialized knowledge and experience, which enables it to “perform its task with a better understanding, and more efficiently.”¹⁵ However, the Court of Appeal also made clear that the possession of that knowledge and experience does not, in any way, alter the nature of the task at hand. The task of the CAT is to apply normal principles of judicial review, although as the Court of Appeal also noted, following its earlier decision in *IBA Health*, the CAT will have a better understanding of the issues at stake than a non-specialist court or tribunal.¹⁶

Related to this is the question of how the threshold for judicial intervention is affected by the specialist nature of the decision maker (i.e. the competition authorities whose decisions are under review). As the editors of De Smith put it: “[t]he threshold of intervention is particularly influenced by the respective institutional competence of the decision-maker and the court.”¹⁷ The greater the degree of specialism and “institutional” competence of the decision-maker, the greater the need for self-restraint on the part of the reviewing court or tribunal. The logical corollary of self-restraint where an adjudicative body lacks institutional capacity is that, where that body enjoys enhanced institutional capacity, it should exercise more intensive scrutiny. The CAT itself acknowledged that this may result in its being “a more demanding and/or less deferential tribunal than might otherwise be the case where a court is called upon to review a decision of a specialist regulator.”¹⁸ The ordinary principles of judicial review give the CAT sufficient latitude to do so.

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Leaving aside the CAT’s institutional competence we suggest that there are three other reasons that may call for enhanced scrutiny, all of which are equally applicable to non-specialist courts and, indeed, should influence the standards applied by the primary decision-maker, the competition authority.

The first reason relates to the nature of the competition authority’s intervention and, thus, the nature of the rights affected by the decision under review. In the most intrusive forms of intervention, which occur more frequently in the context of merger control (particularly in merger control regimes such as the United Kingdom which allow mergers to be completed without prior approval from the competition authority), but are also relevant in market investigations (the *BAA* example being a case in point), a divestment remedy engages a fundamental property right and the principles of Article 1 of Protocol 1 of the

European Convention on Human Rights. What is the appropriate standard of review in such cases? The case law in this area suggests a number of different answers to this question, which may to some extent depend on the nature of the interference with fundamental rights.¹⁹ The classic pre-Human Rights Act 1998 formulation of Sir Thomas Bingham MR in *Ex p. Smith*²⁰ (“the more substantial the interference with human rights, the more the court will require by justification before it is satisfied that the decision is reasonable”) can be regarded as an example of “anxious scrutiny.”²¹ More recent cases suggest a higher intensity of review, while continuing to draw a distinction between a proportionality review and a review on the merits: see the speech of Lord Bingham of Cornhill in the *Denbigh High School* case:²²

“... There is no shift to a merits review, but the intensity of review is greater than was previously appropriate, and greater even than the heightened scrutiny test adopted by the Court of Appeal in *R v Ministry of Defence, Ex p Smith* [1996] QB 517, 554.”

However, the distinction is not always clear-cut. As Rose points out, in the *Denbigh* case the court emphasized that it was concerned not with the decision-making process, but with the correctness of the decision (which implies that the reviewing court is substituting its own view for that of the decision-maker); while in cases involving the detention of mentally-ill patients, the case law indicates that the courts will conduct a full merits-based review.²³

The second reason relates to the nature of the theory relied upon by the competition authority. This can be conveniently referred to as the *Tetra Laval* doctrine, derived from ECJ case law.²⁴ In that case, the Commission appealed against a judgment of the CFI annulling its decision to prohibit a merger based on concerns about conglomerate effects. The ECJ referred to the need for a careful prospective analysis of the likely consequences of the merger, given that it would entail: “a prediction of events which are more or less likely to occur in future if a decision prohibiting the planned concentration or laying down the conditions for it is not adopted.” The ECJ noted that, in a conglomerate merger, the period in the future which would need to be examined is lengthy, and that the chains of cause and effect are “dimly discernible, uncertain and difficult to establish.” Therefore, the quality of the evidence relied on by the Commission to establish grounds for a prohibition is “particularly important” since it needs to support the conclusion that, in the absence of a prohibition, the economic development envisaged would be plausible. Although this case was concerned with the examination of mergers under the EC Merger Regulation, its relevance in U.K. pro-

ceedings under the EA02 was accepted by the Court of Appeal in *Sky*²⁵ (albeit found to be inapplicable in the circumstances of that case).

In essence, under the *Tetra Laval* doctrine, without departing from the balance of probability standard the expectation is that the decision-maker must exercise particular care; the standard of evidence required will be particularly high in relation to matters that are inherently less likely to give rise to competitive harm. This can be compared with the well-known Lord Hoffmann caveat about the standard required to prove a sighting of a lioness (rather than an Alsatian) in Regent's Park.²⁶

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The third reason, which is closely related to both the first and second points, relates to the importance or the gravity of the issue reviewed in the context of the general context of the task entrusted to the competition authority, and applies when the remedy chosen by the competition authority is particularly intrusive, uncertain in its effects, or wide-ranging. This approach is not new but is now becoming known as “double proportionality.” It is a principle derived originally from ECJ jurisprudence in the *Fedesa* case,²⁷ where the ECJ described it in the following terms:

“... 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; where 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.”

This principle has recently been applied in two successful challenges to the CC remedy proposals in *Tesco* and in *Barclays*. The principle was described by the CAT in *Tesco* in the following terms:²⁸

“... 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 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. The 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... 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-ranging a proposed remedy is likely to prove, the more detailed or deeper the investigation of the factor in question may need to be.”

Explaining the application of this test in *Barclays*, the CAT commented:²⁹

“double proportionality [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.”

We now turn to consider the *Barclays* judgment in more detail to see how these principles were approached by the CAT.

IV. PPI—The Background

The PPI investigation began life as an OFT market study, conducted using the OFT’s broad powers under section 5 EA02. Having identified competition concerns the OFT made a market investigation reference to the CC on February 7, 2007, pursuant to sections 131 and 133 EA02. PPI is a type of insurance that is intended to protect the borrower against certain defined risks (accident, illness, unemployment, etc.) that might otherwise prevent the borrower from being able to repay his or her loan. The main categories of PPI are personal loan PPI (“PLPPI”), mortgage PPI (“MPPI”), second mortgage PPI (“SMPPI”), credit card PPI (“CCPPI”), retail PPI, and motor finance PPI. However, 90 percent of all PPI sales in 2007 consisted of PLPPI, MPPI, and CCPPI.³⁰

The CC's report was published on January 29, 2009 and concluded that there were features of the PPI market which prevented, restricted, or distorted competition, resulting in an adverse effect on competition ("AEC") for the purposes of section 134(2) EA02. The report concluded:

- 1) Suppliers of PPI were found to face little competition when selling PPI in combination with the underlying credit product.
- 2) Consumers were found to face higher prices and less choice than would be the case in a competitive market.

Accordingly, providers of PPI were earning substantial excess profits, albeit the CC noted that some of these profits were used to cross-subsidize underlying credit prices.³¹

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Deficiencies in the competitive process for selling PPI were also identified. These included:

- 1) a failure by distributors and intermediaries actively to compete for customers on price or quality;
- 2) barriers to searching for consumers who wished to compare PPI policies, whether or not combined with credit; and
- 3) barriers to switching resulting in part from the excessive costs of switching out of single premium policies.

At the heart of the CC's concerns was the point of sale advantage ("POSA"), i.e. that PPI was generally sold by lenders at the point of sale of the underlying credit product, which was said further to restrict the extent to which other providers could compete effectively.³²

The CC's package of remedies included a series of measures designed to improve the level of information provided to consumers in order to facilitate searching, along with a prohibition on selling single premium policies in order to facilitate switching. But, most controversially, the package also included a POSP—in other words, 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. This was designed to address at least some of the incumbency advantages enjoyed by distributors selling PPI at the point of sale of the underlying credit product.

Explaining its decision to introduce the POSP, the CC analyzed a series of potential risks associated with this remedy that had been flagged by various providers during the course of the inquiry. The first was that the POSP would not be fully effective in that it would fail to remove all aspects of this incumbency advantage:³³

“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.”

The second risk considered by the CC was that the POSP would lead to a reduced take-up of PPI, due to the inconvenience of no longer being able to buy PPI at the point of sale when taking out a loan. The CC’s view was that this would be partially or fully off-set by reduced PPI prices which would result from increased competition, and that the ability of consumers to initiate PPI purchases by telephone or internet communication 24 hours after the credit sale would significantly reduce this risk.³⁴

The CC also considered the risk of reduced consumer choice, but concluded that its remedies package would actually stimulate competition, increasing consumer choice.³⁵ On the other hand, the CC

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accepted that the POSP would lead to additional costs for distributors, and factored those costs into its assessment of whether the POSP was a proportionate remedy. It concluded that the POSP was a necessary part of its overall remedies package, which would lead to a “new, more competitive, market structure.”³⁶

It will be recalled that the CC has a discretion, when considering the need for remedial action to address an AEC in a market investigation reference, to take account of “relevant customer benefits” that would be jeopardized by the imposition of the remedy. Relevant customer benefits are defined by section 134(8) EA02 as benefits to existing or future customers in the form of:

- 1) lower prices, higher quality or greater 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
- 2) greater innovation in relation to such goods or services.

During the CC inquiry it was argued by a number of PPI providers that the current market structure resulted in PPI prices cross-subsidizing lower credit prices,

and that this would be jeopardized by the introduction of the POSP. The CC accepted that lower credit prices were a direct result of the features of PPI that led to an AEC in the markets for PPI (in other words, that lower credit prices qualified as a relevant customer benefit),³⁷ but concluded that it would not be appropriate to modify its remedies package on that account. In the CC's view, the benefits of intervention would outweigh the benefit of lower credit prices.³⁸ The CC did not feel able to quantify all aspects of the benefits of intervention, but assessed one element as being in excess of £200 million. Against this, the CC assessed the costs of remedial action as involving one-off set-up costs of £100 million and ongoing annual costs of £50-60 million. Summarizing its assessment of the likely impact of its remedies package, the CC noted:³⁹

“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 document 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.”

V. The Basis for Barclays' Challenge

The summary of Barclays' notice of application, as it appeared on the CAT's web site,⁴⁰ identified four grounds of appeal, which to some extent overlapped. First, it was argued that the CC had failed to take into account considerations that were relevant to the proportionality of the POSP, in particular the benefits that

would arise from the remedies package and the incremental benefits from including the POSP in the package. Second, it was argued that there was no proper evidential basis for the CC's conclusion that the POSP was justified, and that the CC had incorrectly concluded that the POSP was a more reasonable, effective, and proportionate remedy than Barclays' own proposal involving informational remedies and an increased cooling-off period. Third, it was argued that the CC had failed to take into account relevant considerations (or, alternatively, had taken into account irrelevant ones) in its analysis of the consumer detriment arising from the AEC and whether the benefits of its intervention would outweigh the loss of relevant consumer benefits. Fourth, it was argued that the CC had failed to take into account relevant considerations in its analysis of the relevant market(s) and the extent of competition problems. In particular, it was said that the CC's market definition was too narrow, that the CC should have updated its earlier findings in the report in light of new information, and that it had failed to take into account changes in the market since its financial analysis was based on data only through the end of 2006.

VI. The CAT's Approach

Grounds 1-3 of Barclays' application were all essentially aimed at challenging the decision to impose the POSP. Ground 4, however, was a separate challenge to the CC's findings on market definition. As the CAT pointed out, this challenge, if well-founded, would have undermined the whole of the CC's findings on the AEC, and the CAT therefore began its analysis with a consideration of these arguments.⁴¹

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A. GROUND 4

Although presented under the guise of the traditional headings of judicial review, namely a failure to take account of relevant considerations, it seems clear that aspects of Barclays' case were, in substance, a challenge on the merits, as the CAT pointed out at various points in its judgment.⁴² First, however, the CAT rejected Barclays' argument that the CC should have adopted a broader market definition, as it had done in its 2003 report on extended warranties on domestic electrical goods. The mere fact that the CC had on different (albeit, loosely analogous) facts reached a different view in another investigation was not relevant to the lawfulness of its analysis in this particular case.⁴³

Arguments that the CC had failed to take into account more recent developments in the market were also rejected. The CAT found that the CC had, in fact, taken into account reduced profitability, falling penetration rates, and increased claims rates (and that its reasons for not taking into account substantial increas-

es in late 2008 were adequately explained and were well within the CC's margin of appreciation).⁴⁴ As to the overall decline in the PPI market in 2007/2008, the CAT considered that the CC had treated this as a consequence of the AEC; in the CAT's view, Barclays' complaint that the CC had taken no account of the decline was in substance a merits complaint.⁴⁵

“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 the evidence.”

Likewise, arguments that the CC had failed to take into account regulatory changes were also rejected, either on the basis that the CC had, in fact considered them, or on the basis that they were not relevant to the CC's assessment in the first place.⁴⁶

“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.”

Also were rejected were the arguments about the CC's failure to carry out a proper analysis of market definition, including an incorrect application of the SSNIP test, the “cellophane fallacy,” and the CC's alleged failure to take account of evidence suggestive of a wider market definition. In concluding on Ground 4, the CAT noted that even if it had been persuaded that one or more of the arguments were well-founded for judicial review purposes, it would have been reluctant to conclude that they were relevant to the CC's findings as to the AEC.⁴⁷

“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.”

B. GROUND 1

Barclays’ challenge under Ground 1—based essentially on a failure to take account of considerations relevant to a proportionality assessment—relied on a number of separate elements. First, it was claimed that the CC had failed to analyze or identify the extent of the benefits that

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would accrue from its remedies package; second, that the CC had failed to give consideration to the inevitable time lag before its remedies package would take effect; and third, that the CC had failed to assess the incremental benefit of adding the POSP to the remainder of the remedies package. This focus on the need to balance the extent of the consumer detriment resulting from the AEC against the expected

benefits of the remedies package has its roots in the *Tesco* judgment, where the CAT had expressed itself in the following terms:⁴⁸

“... 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.”

Indeed, Barclays went further than this and argued that the CC had repeated exactly the same mistake as in the *Tesco* case, by simply comparing the detriment associated with the AEC against the cost of implementing the remedies package. The CC’s rebuttal was that it had concluded that its remedies package would be fully effective to remedy the AEC, such that the consumer benefit from the remedies package was equivalent to the consumer detriment associated with the AEC. The issue was that, according to Barclays and the interveners (Lloyds and Shop Direct), the CC had nowhere in its report said anything about the degree of effectiveness of the remedies package. The issue therefore boiled down to a question

of how to interpret the CC's report. In answering this question, the CAT followed the approach in *Tesco*, accepted by all parties, that a CC market investigation report should be interpreted on the basis of "a fair and generous reading of the Report as a whole," rather than "word by word as a statute might be."⁴⁹

The debate nonetheless centered on whether the CC's analysis was predicated on the remedies being fully effective, or less than 100 percent effective. While the CC had recognized the risk that its remedies package might not be fully effective, this was not, in the CAT's view, inconsistent with a judgment that it probably would be fully effective.⁵⁰ Just because the remedies package would not completely remove the point of sale advantage this did not mean that the PPI market would not be a properly functioning market (in contrast to an ideal market, with every competitor on a completely level playing field).⁵¹ Thus, although on a dictionary definition, the CC's references to the word "effective" did not equate to "fully effective," viewed in the round, it was clear that the CC believed its remedies package would be "fully, or rather substantially, effective."⁵²

Having rejected these arguments, the CAT was, however, more sympathetic to the argument that the CC had failed to indicate a timescale in which it expected its remedies to take effect. The point was put pithily by Barclays that the CC had identified start-up implementation costs of £100 million and ongoing annual costs of £50-60 million, yet had said nothing about the timescale for the remedies to take effect save that they would do so in a "timely" manner. This was a problem, because this did not describe any measurement of time in an objective sense,⁵³ suggesting that the CC could not logically have carried out a systematic proportionality analysis. Curiously, the CAT then noted that it would not have regarded this failing on its own as sufficient to justify quashing the decision to impose the POSP, because it appeared that the CC had considered the issue, but had simply not spelled it out in the report.⁵⁴

The CAT was distinctly unsympathetic to Barclays' attempts to challenge the CC's proportionality analysis by reason of its failure to address the incremental impact, in terms of both costs and benefits, of adding the POSP to the remaining package of remedies. Indeed, had the CAT decided otherwise, it would probably have made the CC's task in devising a package of remedies practically unworkable.

C. GROUND 2

Ground 2, on the other hand, proved to be more troublesome for the CC. The essence of the argument was that the CC had decided upon the POSP without any proper evidential basis. During the CC's investigation, many of the PPI

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providers had urged the CC to consider the loss of convenience that would arise from imposing the POSP, and the risk that this would lead to a contraction in the market. The CC dismissed these concerns in its report, noting:⁵⁵

“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 problem, according to Barclays and the interveners, was that the CC was proposing a radical and unprecedented remedy, yet had failed to reach a considered judgment on the extent of the reduction in take-up rates, and the extent to which this reduction would be off-set by any increase in PPI demand attributable to lower prices. The CAT agreed, noting that while the CC was entitled to decide how much weight to give to the evidence on loss of convenience, it should have made clear which evidence on reduced take-up it was discounting or rejecting:⁵⁶

“The potential for such a radical remedy to cause disadvantageous side-effects called for rigorous investigation and analysis of its potentially adverse consequences...

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.

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 [of] PPI it discounted or rejected. This is particularly unfortunate because we have found it impossible to discern, from the conclusion at [para 10.50 of the CC report] 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.”

Although the CAT agreed that the CC was right not to treat convenience as a relevant customer benefit for the purposes of section 134(8) EA02, given the very narrow definition in the statute, it did not, in the CAT's view, follow that the loss of convenience could not be a relevant disadvantage to be taken into account in the proportionality analysis. The likelihood of inconvenience leading to reduced take-up rates should, according to the CAT, have been weighed in the balance in the proportionality analysis:⁵⁷

“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.”

It was the CC's failure to give any consideration to reduced take-up rates stemming from the loss of convenience that, in the CAT's view, amounted to a failure to take account of relevant considerations. Unless satisfied that this would not have affected the eventual outcome of the CC's report, this failure would justify quashing the decision to impose the POSP. After what it described as “anxious consideration” the CAT said that it was “not so satisfied.”⁵⁸

D. GROUND 3

Ground 3 was, in essence, a series of challenges to the CC's methodology for quantifying the consumer detriment caused by the AEC. First, it was claimed that the CC had modeled theoretical remedies packages rather than the actual package it was proposing. Further, the model was specifically challenged in several regards: it took no account of costs; was based on unjustified assumptions that the remedies would completely remove all excess PPI profits; took no account of the negative effect on PPI sales due to the loss of convenience of being able to buy PPI at point of sale; and was based on out-of-date information. The last challenge argued that the CC had failed to calculate the proper elasticity of demand.⁵⁹

The debate about modeling theoretical rather than actual remedies packages arose because the CC had identified and modeled both a “system” remedy (which was intended to increase information such that all consumers could search effectively for both credit and PPI before arriving at the point of sale), and a “non-system” remedy (in which prices would be reduced but there would be no increase in the amount of searching for PPI before the point of sale). However, the CAT noted that the primary purpose of the CC's modeling exercise was not to quantify the consumer benefits likely to flow from the proposed remedies package, but to identify any possible modification of the remedies package that

would preserve the relevant customer benefit of lower credit prices (which would be lost if the remedies package had the expected effect of reducing PPI prices).⁶⁰

The CAT accepted that the CC had indeed modeled theoretical remedies packages rather than the actual remedies, but considered that this was well within its margin of appreciation when considering whether its proposed remedies should be amended to preserve relevant customer benefits. Although the CAT expressed doubts about the use of such a methodology purely for quantifying the expected consumer benefits associated with the remedies package, in this particular case, it was only the secondary purpose of the modeling exercise. The use of the modeling exercise for its primary purpose led the CC to anticipate a net consumer benefit; since its actual remedies package lay further along the spectrum towards the more efficient end, the CC could confidently expect the benefits from its actual remedies package to be at least as great.⁶¹

THE CAT HAD MORE SERIOUS CONCERNS ABOUT THE OMISSION OF SET-UP AND ONGOING IMPLEMENTATION COSTS FROM THE MODEL.

The CAT had more serious concerns about the omission of set-up and ongoing implementation costs from the model. Implementation costs would be borne by PPI distributors and therefore should have been taken into account in considering the expected reduction in PPI prices. Although the CC had taken these costs into account when considering the proportionality of its remedies package, the CAT's concern was that the modeling did not fully reflect the impact of reduced PPI prices on higher credit prices. Also of concern was that the CC had failed to consider the increased costs of marketing PPI that would flow from any system remedy, such as the CC's proposed package of remedies. These were material facts that the CC ought to have taken into account. While on its own this omission would not have been sufficient to justify quashing the report, when coupled with the other defects, the CAT considered that this was something that the CC should re-consider as part of the overall conclusion that the CC's decision to impose the POSP should be quashed.⁶²

The next element of Ground 3, namely the claimed assumption by the CC that its remedies would be fully effective and would reduce excess PPI profits to zero, was rejected as in substance the same as Ground 1, which had already been rejected.⁶³

The claimed failure of the CC's modeling to take into account the adverse consequences of the remedies package (i.e. the loss of convenience associated with the imposition of the POSP) had already been considered under Ground 2 as sufficient to justify quashing the decision and, therefore, the CAT did not need to consider the point in detail again.⁶⁴

As to the claim that the model had used out-of-date (2006) information, the CAT noted that it might have been possible to use later figures but this did not

amount to a reviewable error in methodology. Just as the CC had had regard to data subsequent to 2006 when conducting its market definition analysis, and had been entitled to conclude that the more recent data did not undermine that analysis, so it was unnecessary for the CC to repeat the modeling analysis using more recent data than 2006. Although, in an ideal world, it might have been better if the CC had explained why it was content to rely on 2006 figures, the CAT, somewhat surprisingly, expressed itself satisfied that an explanation would have been forthcoming which would not have affected the CC's decision.⁶⁵

The final element of Ground 3 concerned an alleged error in the calculation of the elasticity of demand when estimating the likely effect of the remedies package on sales volumes. The CC conceded that its calculations assumed a price change by a single distributor rather than by all players in the market, but the CAT had little desire to delve into the merits of such a highly technical issue. On the face of it, the CAT considered that the use of an inappropriate elasticity of demand factor was a reviewable error, but on the facts of this case, the CAT was not persuaded that it was material to the decision to impose the POSP. Nonetheless, having identified other failings in the CC's analysis, this was another element that the CC would be required to reconsider as a result of the quashing of its decision.⁶⁶

E. RETAIL PPI

Finally, the CAT dealt briefly with the intervention by Shop Direct, a provider of retail PPI. Shop Direct's role as an intervener in the proceedings was necessarily limited to supporting Barclays' case that the decision to impose the POSP as a remedy for all types of PPI should be quashed. However, the main thrust of Shop Direct's case related to retail PPI, which, as the CAT put it,⁶⁷ "was a case that could only have been advanced under a separate application, rather than by way of intervention." Nonetheless, the CAT gave a very strong hint that, had such a case been brought independently by Shop Direct, it might well have succeeded.

The practical problem for stand-alone providers of retail PPI is that they cannot ascertain the level of credit being extended by the retailer, which makes it difficult to tailor stand-alone PPI policies to fluctuating amounts owed by the consumer. Shop Direct's argument was that the CC'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."⁶⁸ Although the CAT was understandably reluctant to express a view on the merits of this submission in the absence of full argument, it did nonetheless express concern about the point, noting that it had been unable to dismiss it as "obviously wrong," and inviting the CC to bear it in mind in its reconsideration of the POSP remedy, in order to avoid a further challenge being made to the CC's subsequent decision.⁶⁹

VII. Conclusion

Where does the CAT's judgment in *Barclays* leave the CC and, more generally, the scope for judicial review in competition inquiries? As we have shown, there are a number of circumstances where general principles of judicial review allow heightened scrutiny (or even more intense review); some of these apply to competition inquiries. We have identified three main circumstances where this may be relevant: (1) cases where the nature of the rights affected by a competition authority's action engages fundamental rights; (2) cases where the theory relied upon by the competition authority involves "uncertain" outcomes and when the causal links between action and effect are inherently difficult to establish; and

WILL THIS INDUCE THE CC TO BE MORE CAREFUL IN ITS ANALYSIS IN FUTURE CASES, AND/OR IN ITS CHOICE OF REMEDIES? PROBABLY BOTH.

(3) specific issues within the competition authority's overall analysis which—in light of their importance or gravity—require particularly careful consideration.

There is an important link between the level of judicial scrutiny over a competition authority's decisions and the standards to be applied by

the primary decision-maker in its decision-making process: the "double proportionality" test can be seen as relating to the intensity of review, but it is in essence directed towards the nature of the balancing exercise to be conducted by the primary decision-maker. In *Barclays* the CAT was keen to show some deference to the CC's margin of appreciation and avoid a merits-based appeal under the guise of judicial review. It was even prepared to give the CC some latitude as to the erroneous use of evidence (e.g. the use of an inappropriate elasticity of demand factor) when it was not persuaded that the error would have made a material difference to the decision. In addition, the CAT was unsympathetic to arguments (the CC's failure to address the incremental impact, in terms of both costs and benefits, of adding the POSP to the remaining package of remedies) that would have made the CC's overall task practically unworkable. Nevertheless, the CAT was prepared to quash the CC's decision on the basis of defects in the proportionality assessment of such a radical remedy. Will this induce the CC to be more careful in its analysis in future cases, and/or in its choice of remedies? Probably both. ▼

- 1 Tesco plc v. Competition Commission [2009] CAT 6.
- 2 Barclays Bank plc v. Competition Commission [2009] CAT 27.
- 3 BAA Limited v. Competition Commission [2009] CAT 35 (main judgment); and [2010] CAT 9 (judgment on relief and permission to appeal).
- 4 Sports Direct International PLC v. Competition Commission [2009] CAT 32.
- 5 "(1) Any person aggrieved by a decision of the OFT, [OFCOM,] the Secretary of State or the Commission under this Part in connection with a reference or possible reference in relation to a rele-

vant merger situation or a special merger situation may apply to the Competition Appeal Tribunal for a review of that decision." Then, "(4) In determining such an application the Competition Appeal Tribunal shall apply the same principles as would be applied by a court on an application for judicial review."

- 6 See *generally*, DE SMITH'S JUDICIAL REVIEW 3 (H. Woolf, J. Jowell, & A. Le Sueur eds.) (6th ed. 2007).
- 7 See CC3 Market Investigations References: Competition Commission Guidelines (June 2003), ¶¶ 4.10-4.12 and CC8 Merger Remedies: Competition Commission Guidelines (November 2008), ¶¶ 1.9-1.13 (together, the Guidelines).
- 8 R. Cooke, *The Struggle for Simplicity in Administrative Law*, JUDICIAL REVIEW OF ADMINISTRATIVE ACTION IN THE 80s 3 (M. Taggart ed.) (1986).
- 9 Council for Civil Service Unions v. Minister of State for the Civil Service [1985] 1 A.C. 374 at 410.
- 10 See *generally* DE SMITH'S JUDICIAL REVIEW, *supra* note 6 at 590.
- 11 British Sky Broadcasting Group plc v. Competition Commission [2008] CAT 25, at ¶¶ 272-273.
- 12 *Id.*
- 13 Under English law an administrative decision is vitiated by illegality if it: contravenes or exceeds the terms of the power which authorises the making of the decision; pursues objectives other than those for which the power was conferred; is not authorised by any power; or contravenes or fails to implement a public duty. Compare this with the approach taken by the ECJ in competition cases. In Case C-413/06 P. Bertelsmann and Sony Corporation of America v. Impala [2008] ECR I-4951, at ¶ 133, the issue before the ECJ was the way in which the CFI had evaluated the role that market transparency should play in the context of a finding of collective dominance. The ECJ concluded that "in misconstruing the principles which should have guided its analysis of the arguments raised before it concerning market transparency in the context of an allegation of collective dominant position, the Court of First Instance committed an error of law."
- 14 *Supra* note 6 at 592.
- 15 British Sky Broadcasting Group plc v. Competition Commission [2010] EWCA Civ 2, at ¶ 37.
- 16 Office of Fair Trading & Ors v. IBA Health Ltd [2004] EWCA Civ 142.
- 17 *Supra* note 6 at 591.
- 18 *Supra* note 11 at ¶ 61.
- 19 For a review of the recent case law in this area see Vivien Rose, *Margins of Appreciation: Changing Contours in Community and Domestic Case Law*, 5(1) COMPETITION POL'Y INT'L 3 (Spring 2009).
- 20 R v. Ministry of Defence, Ex parte Smith [1996] QB 517, at 554.
- 21 See also R (Ross) v. West Sussex Primary Care Trust [2008] EWHC B15, cited by Rose (*supra* note 19) where this formulation was recently restated.
- 22 R (Begum) v. Denbigh High School [2006] UKHL 15.
- 23 *Supra* note 19, at 15, citing R (Wilkinson) v. Broadmoor [2001] EWCA 1545.

- 24 Case C-12/03 Commission v. Tetra-Laval B.V. [2005] ECR I-987, at ¶¶ 41-44.
- 25 *Supra* note 15.
- 26 “[S]ome things are inherently more likely than others. It would need more cogent evidence to satisfy one that the creature seen walking in Regent’s Park was more likely than not to have been a lioness than to be satisfied to the same standard of probability that it was an Alsatian.” Lord Hoffmann in Secretary of State for the Home Department v. Rehman [2001] UKHL 47, at ¶ 55.
- 27 Case C-331/88 R v. Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte Fedesa and others [1990] ECR I-4023, at ¶ 13.
- 28 *Supra* note 1, at ¶¶ 138-139.
- 29 *Supra* note 2, at ¶ 21.
- 30 *Supra* note 2, at ¶ 1.
- 31 *Id.*, at ¶ 3.
- 32 *Id.*, at ¶ 77.
- 33 *Id.*, at ¶¶ 84-85, citing the CC report at ¶¶ 10.41 and 10.43.
- 34 *Id.*, at ¶ 86.
- 35 *Id.*, at ¶ 87.
- 36 *Id.*, at ¶ 91, citing the CC report at ¶ 10.72.
- 37 *Id.*, at ¶ 93.
- 38 *Id.*, at ¶ 96.
- 39 *Id.*, at ¶ 99, citing ¶¶ 10.509, 10.513 and 10.514 of the CC report.
- 40 A summary of the notice of application is available at http://www.catribunal.org.uk/files/Notice_1109_Barclays_02.04.09.pdf.
- 41 *Supra* note 2, at ¶ 31.
- 42 *Id.*, at ¶¶ 43, 52.
- 43 *Id.*, at ¶ 36.
- 44 *Id.*, at ¶¶ 37-42.
- 45 *Id.*, at ¶ 43.
- 46 *Id.*, at ¶ 47.
- 47 *Id.*, at ¶ 65.

48 *Supra* note 1, at ¶ 143.

49 *Id.*, at ¶ 79; *supra* note 2, at ¶ 76.

50 *Id.*, at ¶ 103.

51 *Id.*, at ¶ 104.

52 *Id.*, at ¶ 105; see also ¶ 106.

53 *Id.*, at ¶ 115.

54 *Id.*, at ¶ 116.

55 CC report, at ¶ 10.50.

56 *Supra* note 2, at ¶¶ 128-130.

57 *Id.*, at ¶ 136.

58 *Id.*, at ¶ 140.

59 *Id.*, at ¶ 142.

60 *Id.*, at ¶ 145.

61 *Id.*, at ¶¶ 153-155.

62 *Id.*, at ¶¶ 158-163.

63 *Id.*, at ¶¶ 164-165.

64 *Id.*, at ¶¶ 166-167.

65 *Id.*, at ¶¶ 168-170.

66 *Id.*, at ¶¶ 171-175.

67 *Id.*, at ¶ 176.

68 *Id.*, at ¶ 178.

69 *Id.*, at ¶ 179.