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IN THE COMPETITION

Case No. 1104/6/8/08

APPEAL TRIBUNAL

Victoria House
Bloomsbury Place
London WC1A.2EB

Thursday, 13th November 2008

Before:

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

Sitting as a Tribunal in England and Wales

BETWEEN:

TESCO PLC

Applicant

and

THE COMPETITION COMMISSION

Respondent

and

**WAITROSE LIMITED
MARKS AND SPENCER PLC
ASDA STORES LIMITED
THE ASSOCIATION OF CONVENIENCE STORES**

Interveners

*Transcribed from tape by **Beverley F. Nunnery & Co.**
Official Shorthand Writers and Tape Transcribers
Quality House, Quality Court, Chancery Lane, London WC2A 1HP
Tel: 020 7831 5627 Fax: 020 7831 7737*

HEARING – DAY THREE

APPEARANCES

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

Mr. Peter Roth QC, Mr. Daniel Beard, Ms Valentina Sloane and Mr. Ewan West (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.

Ms Kassie Smith (instructed by Lovells LLP) appeared on behalf of Waitrose Limited.

Mr. Robert O'Donoghue (instructed by SJ Berwin LLP) appeared on behalf of Marks and Spencer Plc.

1 THE PRESIDENT: Good morning, Mr. Roth.

2 MR. ROTH: Good morning. May I start by picking up some points and questions left with me
3 by members of the Tribunal yesterday. The first was Professor Pickering's request to me
4 to address the issue of "unmet demand" (and I use the expression as I have throughout in
5 quotation marks). The question of what that might mean partly depends on from whose
6 perspective it is and who is using it. If one starts with the planning regime and local
7 planning authorities, the LPAs, they use the concept of need with reference to development
8 plans. They have, most of them, a development plan which is a forward looking plan for,
9 typically, ten years, sometimes less, and forecasts the likely future demand for convenience
10 goods floorspace. They use the expression "convenience goods" pretty close to what is
11 here defined as "groceries" that their area needs on the basis that is set out in the planning
12 guidance of PPS6. That is based on projections for population growth or decline, forecast
13 expend for convenience goods over the period of the plan and forecast improvements in
14 productivity in the use of floorspace that is currently in the market. That is the guidelines
15 in PPS6. On that basis the plans identify what they refer to as "need" for additional
16 convenience goods floorspace. That is what is explained in the Report in para.7.41, and
17 there is a bit more in the appendix. I do not ask you to turn it up now.

18 It also plays into their "need" test that they apply at present for specific planning
19 applications. So in making a planning application for a supermarket a large retailer, often
20 with the help of outside consultants, makes an assessment to seek to demonstrate to the
21 LPA that for that local area there is a lack of sufficient grocery floorspace within the
22 planning parameters of the LPA. That is the "need" of the planning regime and that, if you
23 like, is one sense in which one can speak of "unmet demand".

24 The second perspective is that of the large retailers themselves. They each carry out their
25 own internal assessments of where they seek to open a new store or expand an existing
26 store. They certainly do not see the commercial opportunities in the same way as the LPAs
27 view need. Indeed, they see the application of the LPA need test as a barrier that prevents
28 them from opening new stores which otherwise they would wish to do. That is in the
29 Report at para.7.40, and they complained about it.

30 How they actually determine strategically where they seek to open a new store is a matter
31 probably better addressed by the interveners themselves when their counsel comes to speak
32 to you in a short time, but there is little doubt that they have regard also to who is already
33 in the market, the identity of the retailers and to displacement demand. That is, of course,
34 the ability to take customers from their competitors in the local market.

1 Thirdly, there is the perspective of the Commission. The Commission did not use the
2 expression “unmet demand” at all in the report, other than in reference to the need test of
3 the local planning authorities by way of explanation of how the planning process works.
4 What the Commission expressly found is, first, that it was not satisfied that there was any
5 natural monopoly area. That is para.11.13. Secondly, the fact that the persistence analysis
6 showed that so many monopoly or duopoly areas had endured over time was not, in
7 general, a sign of lack of demand for new fascia, but of barriers to entry. That is 7.11. The
8 Commission also accepted that there are areas where there are three or fewer fascia at
9 present and population would not support an additional fascia – in other words, a whole
10 new large store – but not by contrast that the population would not support expansion by
11 one of the existing retailers in those markets. Otherwise the Commission found that this is
12 a dynamic market across the United Kingdom, that competition between large retailers is
13 strong and effective, that the major retailer have been expanding steadily and there was no
14 suggestion for thinking that high concentration markets are in some way different and in
15 commercial terms less attractive in terms of entry than low concentration markets. While
16 of course there has to be sufficient demand to support the profitable operation of a new
17 store, the Commission never suggested that there must be “unmet demand” in the sense
18 used by a planning authority to enable a new store to come in. There clearly can also be
19 displacement demand attracting retailers.

20 So demand in the sense used by the Commission is that of local demand such that it is
21 commercially rational for a retailer to either expand an existing store or a retailer to open a
22 new store. We say that is the situation around the country which is there is a dynamic
23 market and the rate of retailer expansion that one sees, save where that is prevented by
24 barriers to entry. Of course there are local differences, but it is not a difference that reflects
25 high concentration markets and low concentration markets.

26 Tesco has used the expression “unmet demand” repeatedly in its skeleton argument. It is,
27 at the outset, at para.24 of the skeleton. Perhaps you would care to look at that. It is in the
28 core bundle, which, from memory, is your bundle 22, tab 4A. It is p.11 within the
29 document, para.24:

30 “Whatever may be the positive effects which the competition test might bring
31 about it will nonetheless restrict the ability to compete of retailers who are already
32 present in highly-concentrated markets. It will limit the growth of operators who
33 may be the most popular in an area. It will result in reduced capacity and a real
34 risk of unmet demand.”

1 And then that is developed below. But this is not unmet demand as in the sort of Heathrow
2 Airport capacity constraint sense at all.

3 Consumers in high concentration areas are not without a large supermarket, indeed by
4 definition a high concentration area means there is at least one large retailer at the focal
5 point of the market within a 10 minute drive time having 60 per cent or more of the
6 floorspace – that is the definition. If there is demand such that it is commercially rational
7 for one of the retailers in the isochrone to expand or open a new store, or for a new entrant
8 to come in but that does not happen, then what is the result? The result is consumers
9 wanting to shop at the large supermarket will queue for longer in going there, or they will
10 have to drive eight minutes instead of three minutes, where the other supermarket might
11 have been because this is only a 10 minute drive isochrone, or perhaps they buy more of
12 their groceries at the mid-size store and less at the large store.

13 But as regards the quality of the retail offer from the large supermarket in the high
14 concentration market, in fact the finding of the Commission was that this is worse in a high
15 concentration market because the retailer has 60 per cent of market share and there is a
16 limited number of competing fascia; consumers are worse off in terms of PQRS. So, for
17 example, store opening hours are not as long as they might be if a rival comes in and the
18 existing store then responds by opening for a longer period, that improves the PQRS. That
19 is a result of the degree of competition or lack of it.

20 THE PRESIDENT: I am sorry, Mr. Roth, you are not saying that that was a finding ----

21 MR. ROTH: That the PQRS ----

22 THE PRESIDENT: I thought that the proxy for PQRS was the margin concentration ...

23 MR. ROTH: That is the proxy to try and put a finger on it.

24 THE PRESIDENT: I thought that there was no empirical evidence supporting the view that there
25 was any worse PQRS in concentrated areas; there was no difference – the GFK, is that
26 not ----

27 MR. ROTH: No, there were three studies, there was GFK, there was a Tesco analysis and there
28 was the margin concentration analysis, and they were all trying ----

29 THE PRESIDENT: Yes, and the first two were empirical studies.

30 MR. ROTH: And they were all trying to capture the same idea: is there deterioration in the
31 PQRS?

32 THE PRESIDENT: Yes.

33 MR. ROTH: And for reasons that are explained, and this is of course explored now in the
34 witness evidence and we are not troubled with, the Commission decided that it did not find

1 the GFK study or the Tesco analysis reliable, but the margin concentration analysis was
2 much more reliable. The margin concentration analysis is designed to capture PQRS ----

3 THE PRESIDENT: It is a proxy for it.

4 MR. ROTH: It is a proxy for it.

5 THE PRESIDENT: All I was saying was because I thought that what you were just telling us
6 was that there were observed relatively poor PQRS in concentrated local areas such as
7 store opening hours, whereas as I understand it there was not actually a finding directly of
8 that.

9 MR. ROTH: No, there was a finding that the proxy for PQRS ----

10 THE PRESIDENT: Namely the margin.

11 MR. ROTH: The margin, yes, is some mixture of the PQRS which will vary area to area.

12 THE PRESIDENT: Of course, yes.

13 MR. ROTH: So in one area it might be opening hours, in another it might be the number of
14 check outs, in another it might be lack of a fresh fish counter and only packaged fish and so
15 on, we all have our own personal experience of choosing between different supermarkets.
16 It can manifest itself in a range of ways, but it is a finding that the PQRS is worse judge
17 through the proxy of the margin concentration, but not any particular R or Q because that
18 will change.

19 The only point I make is that the retail offer through the proxy of the margin concentration
20 is actually worse off and that is the result not of “unmet demand” it is the result of “lack of
21 competition” in the local market. So I hope that explains ---

22 PROFESSOR PICKERING: Thank you very much, Mr. Roth.

23 MR. ROTH: Thank you, sir. Can I turn to the point raised, Sir, by you as chairman, about the
24 Competition Commission guidance relating to the issue of over time I think they come
25 together. The guidance is in couple of places but perhaps if one takes it in the authorities’
26 bundle, which is where we were yesterday, where it is at tab 21. I think the passages, Sir,
27 that you were directing to my attention on are p.40 in the guidance under the heading
28 “Effectiveness or remedies”.

29 THE PRESIDENT: Yes.

30 MR. ROTH: At 4.13:

31 “Before the several types of remedy are considered in more detail, a few general
32 observations can be made about the effectiveness of remedies.”

33 Then there is a question of the clarity of the remedy.

1 “4.15 A second consideration is the prospect of the remedial action being implemented
2 and complied with”, talking about behavioural remedies and the advantage of one-off
3 remedies that change the structure of the market, in other words structural remedies.

4 “One advantage of one-off remedies that change the structure of the market (so-
5 called structural remedies) when compared with some remedies that impinge
6 upon the behaviour or conduct of firms (so-called behavioural remedies) is that
7 they address the competition concern directly and will require comparatively
8 little, if any, monitoring or enforcement of compliance. However, when deciding
9 upon the action to take, and having considered all other relevant factors, this
10 factor alone may not be decisive.”

11 Then the paragraph I anticipated you may have had particularly in mind 4.16:

12 “A third consideration is the timescale within which the effects of any remedial
13 action will occur. Some remedies will have a more or less immediate effect while
14 the effects of others will be delayed. There may be particular uncertainty about
15 the timescale within which results can be expected when the remedy calls for
16 action by some other person, for example a recommendation to government to
17 change regulations. The Commission will tend to favour a remedy that can be
18 expected to show results in a relatively short time period – so long as it is
19 satisfied that the remedy is both reasonable and practicable and has no adverse
20 long-run consequences.”

21 I do not think 4. 17 is perhaps so important.

22 THE PRESIDENT: Well you get a bit more over the page about timescale, I do not know
23 whether you just want to ----

24 MR. ROTH: There is a bit more about timescale in “Choice of remedies” in 4.23 it is.

25 “In looking for remedies that would be likely to increase competition in the relevant
26 market(s) the Commission will give attention to the time period within which the remedy
27 can be expected to show results. If the remedy is not likely to have speedy results the
28 Commission may choose an alternative remedy or implement additional remedies such as
29 those to remedy the detrimental effect on customers during the interim period. Otherwise
30 not only might there be uncertainty as to whether the effects would ever materialise but in
31 the meantime customers would continue to suffer from the consequences of the adverse
32 effect on competition.”

33 Then there is more about behavioural versus structural remedies.

1 “4.25 Remedial action may also be required to address the adverse effects on
2 competition directly, for example, where remedies aimed at correcting the
3 features which have caused those effects will not bear fruit for some time. Price
4 restraints are the most obvious example, though there may be others. However,
5 they are not likely, by their nature, to provide a solution to the underlying
6 problem, that is, the market features that adversely affect the process of
7 competition, and on that account are less preferable.”

8 General statements of preferring remedies that will operate in a reasonably short time as
9 opposed to remedies that take a longer time that is clearly correct, and indeed one may
10 think is obvious and commonsense. How does that fit in, in the present case? Here there is
11 the finding of AEC and the Commission seeks to produce a remedy that is as
12 comprehensive a solution as is reasonable and practicable.

13 One of the features that cause the AEC is highly concentrated markets. Clearly the
14 Commission cannot mandate new entry or expansion by smaller rivals against the
15 incumbent, that is not a practicable option, I do not think it is even within its powers but it
16 would be nonsensical.

17 The Commission considered recommending a change to the underlying planning regime so
18 as to remove or reduce the barriers to entry, but rejected that. They explain why. They
19 think that is not reasonable to do because of the other social objectives pursued by planning
20 and the unintentional consequences that could have.

21 They considered the remedy of divestiture where there are multiple stores in single
22 ownership in highly concentrated markets. They found that fifty-seven of these highly
23 concentrated markets -- the large retailer had more than one store. So, divestiture was a
24 practicable option and could be done, and they had powers to order that. That would be a
25 direct remedy, though of limited scope because it would only apply, of course, in those
26 fifty-seven highly concentrated markets - not the rest. But, it would bring immediate
27 benefit and it would be quantifiable. You know the actual stores. You can get information
28 on their actual profit margin. You can apply the 3.8 percent of profit margin which is the
29 proxy for the PGRS. So, you can do the calculation and you can say what the benefit is.
30 They rejected that remedy, which was direct and immediate, while favouring a longer term
31 remedy. It is somewhat ironical in the light of the criticism directed at us by Tesco - that
32 they did so -- they rejected the immediate direct remedy on the grounds that that would not
33 be proportionate because it was a very intrusive remedy and it would interfere with
34 property rights. They also noted that it would actually only be a one-off step, and so it

1 would have no longer term preventative effect at all - because although you have
2 divestiture, those areas could again become high concentration areas in two years' time.
3 Of course, it would do nothing about the other areas or preventing new - completely new -
4 high concentration areas emerging.

5 So, in this case the Commission considered that it is more reasonable or proportionate to
6 adopt a remedy which although it has an immediate preventative effect regarding the
7 emergence of new highly concentrated markets or existing highly concentrated markets
8 becoming more highly concentrated markets, it has a much less short-term effect in
9 mitigating those high concentrated markets that exist today than divestiture, and opted for a
10 remedy that would, as it were, work with the dynamism of the market - Professor
11 Pickering's point, if I may respectfully say so, of relying on the invisible hand.

12 If the economic conditions over the next few years lead to more rapid expansion in grocery
13 retailing, then the effect of the competition test in reducing high concentration markets by
14 facilitating new entry will work more quickly. If, on the other hand, expansion in grocery
15 retailing and building new stores slows down, it will work more slowly. But, in
16 conjunction with the landsites remedy, which opens up the potential of more lands for
17 development, then by creating the situation where in any high concentration market it
18 becomes at any particular time commercially attractive for a retailer to open a new store or
19 develop a new store, then the incumbent is denied that opportunity and everyone else
20 knows that the incumbent is denied that opportunity, and so that commercial attractiveness
21 will play to the strategy and entrepreneurial initiatives of the other competing retailers.
22 It alters, in other words, the market dynamic in a way that will encourage rivals of the
23 incumbent. The fact that one cannot say, well, how quickly this will translate into new
24 entry in its number of local areas, yes, means it is a less direct remedy than could be given
25 partially by divestiture or than could be adopted in many other cases. But that, with respect,
26 does not mean that it is a flawed remedy as a result of that, or one that the Commission
27 cannot lawfully adopt under s.134 of the Act.

28 The guidance is quite careful to say, in the passages that one looked at - the effectiveness
29 passages - that the Commission will tend to favour a remedy that can expect -- Indeed, it
30 will. But, it does not mean that that is the proportionate and reasonable remedy in every
31 case. Indeed, the guidance, as you would expect, includes, at the very beginning, in para.
32 1.4, a caveat about how these parameters set out will be applied by the Commission. If I
33 could just ask you to turn back to p.5 of the guidance, at Tab 21, which is how it has been
34 used --"In addressing the questions the Commission must consider in respect of references

1 made under ss. 131 and 132, a group will have regard to this guidance and will apply such
2 of the methodology and analysis summarised in it as it considers appropriate. However,
3 the Commission will consider each reference with due regard to the particular
4 circumstances of each case, including the information that is available and the time
5 constraints applicable to the case. Accordingly, whilst aiming to use a systematic approach
6 to investigations, the Commission will apply the approach described in this guidance
7 flexibly and may, if it considers it appropriate to do so, depart from that approach”.
8 Here, in choosing not to go with divestiture, and choosing to go with a broader, but
9 unquestionably much longer term remedy, that is exactly what the Commission did.

10 THE PRESIDENT: Mr. Roth, you are saying it departed from its guidance in this case?

11 MR. ROTH: Insofar as the guidance says - and the passage says that it will tend to favour
12 immediate short-term remedy as opposed to a longer term remedy - yes, it did -- It clearly
13 said, “No” to divestiture, and “Yes” to competition test. So, when I say ‘departed’ I do not
14 mean that it is inconsistent with the guidance. What I am saying is that the guidance
15 incorporates within it the notion that this is not an inflexible mechanistic operation -- that
16 this is something that will be borne in mind, but if the Commission considers it appropriate
17 to do so it can depart from that approach. So, the guidance says it incorporates within it the
18 potential for departure. So, it becomes slightly semantic. It is within the last sentence of
19 1.4 that it is clearly not a short-term remedy. I think you understand what I am saying. It
20 has not contravened the guidance, certainly. That cannot be said.

21 Certainly, if the Commission had only adopted the control landsites remedy, that would be
22 far less effective or comprehensive because the control landsites remedy does not apply in
23 all high concentration areas because there are not control landsites in all high concentration
24 areas. The details of that are in the report. It is the combination of control landsites
25 remedy and the competition test that the commission found was the most comprehensive
26 remedy that could reasonably be devised to a significant detriment -- as comprehensive as
27 can reasonably be devised to a significant detriment and an effective remedy after
28 examining all the other potential remedies. Tesco has not suggested an alternative remedy
29 other than to say during the enquiry, “Well, there is no AEC, in fact everything was wrong,
30 market definition was wrong, no adverse effect on competition”. Now, faced with a
31 finding of adverse effect on competition that the Competition Commission really should
32 not have had any remedy at all except perhaps the control landsites.

33 THE PRESIDENT: I suppose it is a slightly odd situation, is it not, that one identifies the main
34 barrier to entry, as the Commission have, the planning system, with a fresh one, a

1 subsidiary barrier to entry in terms of controlled landsites and associated practices. One
2 then says, “We cannot touch any of those barriers so we will create a new barrier to some
3 people”, a new barrier to entry, as it were, by which I mean expansion and hope that that
4 encourages others sufficiently so that they will overcome the existing barriers to entry. On
5 one view it is quite a long shot, is it not?

6 MR. ROTH: If one breaks that down, Sir, the first point, yes, it is a situation where you say there
7 is this barrier to entry but it would not be appropriate to do anything about that. That is not
8 so unusual. It is just in this case this barrier to entry arises from legislation where the
9 Commission would have power to recommend a change. There will be other cases where
10 there is a barrier to entry that is some external factor that the Commission could not do
11 anything about, natural barriers to entry. That is taken as a fact of life here. Then one has
12 to say, “What can we do, given that fact of life how can one then come up with as
13 comprehensive a solution as possible?” That does call for some creative thinking and that
14 is why one goes through the various options. What they are doing is, yes, it is saying that
15 where there is scope for expansion/new entry, it should not be by the incumbent. So in that
16 sense there is a barrier on expansion by the incumbent in these limited markets for so long
17 as it is high concentration. That was the point of our answer to those hypothetical
18 examples. It is, of course, very dynamic because once someone else expands it may no
19 longer be a high concentration market which enables the previous incumbent no longer to
20 have 60 per cent, and it can respond. So it is a changing situation. Yes, there is that
21 limited expansion.

22 For the other markets that would become high concentration there is no question of a hope
23 there, it has an immediate effect. It stops things getting worse, or a problem from arising.
24 One can say it is a creative remedy in that sense. It is a remedy that actually came out very
25 early on being suggested by various people, I think, during the enquiry and then got
26 examined and discussed and refined, and so on. We say, with respect, it is not a long shot,
27 it is an immediate effect in the preventative sense for high concentration areas becoming
28 still high concentrated.

29 THE PRESIDENT: Your AEC was in terms of existing concentration. The AEC you had
30 basically identified for your margin concentration analysis is obviously related to existing
31 concentration in markets.

32 MR. ROTH: The AEC we looked at is, is the adverse effect is from high concentration markets?
33 The margin concentration analysis was also then used to have some indication of what the

1 scale of that AEC at present, but it is not an estimation of what will the AEC be in five
2 years time if nothing is done.

3 THE PRESIDENT: No, I appreciate that.

4 MR. ROTH: It was an attempt to get some idea of what sort of scale of problem is one dealing
5 with. Similarly, on the supply side, we can look at that in a moment, it is a very broad
6 estimate there. They do not come up with a figure on the supply side, they say it is very
7 difficult. The national price, in effect, they say, “It is substantial, one can get some sort of
8 handle, as it were, on the scale by saying if it is only 0.1 per cent that would be significant
9 and it could be more”. They were seeking to deal with the problem of high concentration
10 not just as of the date of the report but also looking forward. So they were very much
11 concerned with preventing future developments. Indeed, it is said again and again, that it
12 brings out what they call the “twin benefits”, existing and future.

13 When I make the point and say that no one suggested an alternative that would deal with
14 the significant detriment other than it now being said, “If you cannot measure the benefit
15 more accurately you should have no remedy at all”. That is very relevant to
16 proportionality. It is a point that was, I think, made in the judgment in the *Interbrew* case
17 and repeated in your judgment with your colleagues in the *BSkyB* case. That is where
18 really proportionality comes in, when you are looking at a choice between various
19 remedies and relative costs. It is in *BSkyB*, it is the same bundle that you have open before
20 you for the guidance, the authorities bundle, and *BSkyB* is at tab 11. It is para.308, which is
21 the proportionality section. You quote in para.306 from the judgment of Mr. Justice Moses
22 in *Interbrew*, and I think we quote that in our skeleton argument, and at 308:

23 “Having already concluded that neither of Sky’s proposed remedies would be an
24 effective remedy there was no need for the Commission to examine the
25 proportionality of those remedies vis-à-vis the divestiture remedy or at all. In
26 those circumstances it does not assist Sky to contend that the partial divestiture
27 remedy was disproportionate when compared with its own proposals. As in
28 *Interbrew*, no question arises of weighing the merits of either of the behavioural
29 remedies against the cost to Sky of the partial divestiture of its shareholding in
30 ITV. In any event, the Commission noted that Sky’s proposals would themselves
31 be likely to be far from cost-free ...”

32 So it is when weighing alternatives.

33 I think I mis-spoke a minute ago when I said Tesco did not suggest alternative remedy.

34 Tesco did push for the Commission to recommend a change to fundamental planning

1 regime, and I think particularly what is called the sequential test. The Commission
2 considered that and explained why it did not think that was appropriate.

3 Can I then turn, Sir, to the measure of benefits point, and I approach that now on the basis
4 that the point realistically put against us is not that the competition commission is required
5 to carry out a full regulatory impact assessment, like Ofcom or GEMA, or a full costs
6 benefit analysis, but it should make, as I think was put to me yesterday, some estimate of
7 the benefit that is directly attributable to the competition test. I pick up, if I may,
8 Professor Pickering's point from yesterday that where a remedy is only going to mitigate
9 an AEC and not remove it altogether, or works gradually, then comparing the costs of the
10 remedy against the totality of the AEC does not appear to be a very useful comparison.

11 That is the point he made to me on the guidance, Sir, you will recall, in 4.10.

12 Can I start with costs. Tesco maintains that there are all these costs to consumers of
13 blocked stores, as it puts it, where there is no new entry expansion that otherwise would
14 have taken place. I explained why we reject that hypothesis, why the Commission does not
15 accept that. One then has the costs of the remedy which the Commission unquestionably
16 did calculate in the remedies chapter, Chapter 11. That is an estimated £6 to £8 million a
17 year. That is para.11.382. That actually includes the costs of the controlled landsite
18 remedies, but they are much smaller in comparison. That was costs.

19 What about benefits? The Commission found that the detriment, the customer detriment,
20 from the AEC arose in terms of the estimated existing local market detriment of £105 to
21 £125 million per year. That is the first element. Secondly, existing national detriment
22 which was difficult to estimate but even on a 0.1 per cent change in price would be £80
23 million a year and therefore could be more.

24 Thirdly, there was the detriment that would arise in the future from further high
25 concentration markets or exacerbation of existing high concentration markets, they did not
26 attempt to put a figure on that but that flows from the approach.

27 The numbers that were produced, the 105 to 125 million, and then the 80 million reflects a
28 0.1 per cent change in price were produced to indicate the potential scale of detriment –
29 adverse effect – and therefore to show that this is in the judgment of the Commission really
30 significant. The calculation of 105 to 125 million, as explained in the report, is derived
31 from an estimate of an increasing margin of £300,000 to £350,000 per store, that is how it
32 is calculated.

33 THE PRESIDENT: That is £300,000 to £350,000 of stores in concentrated areas.

1 MR. ROTH: That is per store and then you multiply by the focal store, the “incumbent” – using
2 that word in the way I define it and you multiply by the number of area. It follows from
3 that and the figure for costs, £6 to £8 million, that once 30 high concentration markets
4 cease to be high concentration markets through new entry then the annual benefit in terms
5 of mitigating just the first of the three aspects of detriment, namely, the local detriment put
6 at 105 to 125 million is going to exceed the annual cost, because $30 \times 300,000$, taking the
7 lower one is more than £8 million.

8 The Commission also used as a working assumption from the Office of Fair Trading that
9 there would be about 180 planning applications a year of which 40 would require follow-
10 up work in the competition test, that is in the proportionality assessment at 11.363. We say
11 it is plainly reasonable to consider on that basis but given the dynamism of the market
12 participants and the facilitating effect that the competition has that 30 high concentration
13 markets and the resulting detriment will be undermined in the foreseeable future – one
14 cannot put a number of years on it – but that is not in any way a far fetched assumption to
15 make, 30 out of the 495 in the table; the table in 6.1 is actually on a 1400 sq. metre
16 isochrone and the test applies on a 1000 sq. metre isochrone, so the total number is actually
17 slightly larger, it is more like 600 so 30 out of a total of 600. Once it bites in 30 areas in
18 that way the annual cost is exceeded. The speed at which that process would occur will
19 depend, as I say, upon the rate of activity by the large retailers. If they are expanding
20 rapidly the benefits in reduction of detriment will be felt rapidly, if they are expanding
21 more slowly it will be felt more slowly because the benefit follows the speed of the market.
22 But in deciding not to choose the direct and quick intervention of divestiture because it
23 was disproportionate in the Commission’s view, they developed a remedy that flows with
24 the market and it is for that reason they refer to the effect over time because the
25 Commission obviously is not sufficiently prescient to know exactly at what speed the
26 market will move and as it moves the test will have its effect. We say it would have been
27 quite unreasonable for the Commission having concluded that the market participants are
28 vigorous rivals and that there is expansion and they will take advantage of the competition
29 test to seek to expand or seek to enter high concentration markets in general terms, to
30 conclude that in fact the benefits of the test would not outweigh this measure of costs – the
31 £6 to £8 million. Even if you just look at the benefits in the first aspect of benefit, namely
32 the effect on margin at the local level and existing high concentration, and ignore the other
33 aspect of benefits, namely national effects and, more particularly, the preventative effect of
34 new markets becoming highly concentrated.

1 I can see if the Commission had been persuaded as Tesco sought to persuade it that the
2 annual cost of the remedy was at the sort of level that Tesco was submitting, you may
3 recall yesterday that I took you to that table 11.2 in the report, perhaps if one just looks at
4 that for a moment. This is at 11.385, and that table sets out Tesco's estimates of the cost of
5 the test and you see it is between £183 and £183.5 million. If the Commission had
6 conceded and concluded and it analyses that submission from Tesco, if they had accepted
7 that then I see that on that basis clearly they would have to reconsider whether they could
8 be satisfied that this remedy is proportionate, but that was not the conclusion on costs to
9 which the Commission came, they came to the conclusion that the costs were £6 to £8
10 million. Having given that measure of costs that is why we say their approach is both
11 rational and proportionate having regard to the total scale of detriment and how little inroad
12 has to be made in that total scale to match the annual cost of complying.

13 Can I come, Sir, finally to the question that if we are wrong about all that, could the
14 Commission have calculated the benefits flowing directly from the competition test? We
15 say no they could not in a meaningful sense, because a very significant element of the test
16 is preventative. In numerous submissions by Tesco resisting the proposed competition test
17 during the inquiry at that point Tesco I believe never suggested how this could be done.
18 Now, in these proceedings they seek to urge upon the Tribunal that it could have been
19 done and the Commission could have done it, and yesterday near the end of his
20 submissions Mr. Green handed up a detailed schedule that you will recall setting out the
21 various aspects and the various pieces of evidence and so on. We have not, as you will
22 appreciate, seen that before and I think it is easiest if we prepare a response in writing to
23 the written schedule going through the various points which we could do over the next
24 couple of days. We have started the work upon it, but there are a lot of detailed points in it
25 and how the evidence is assessed, and I hope that is acceptable, but I can make some sort
26 of headline points now.

27 THE PRESIDENT: I suppose we had better hear others on that.

28 MR. ROTH: As I understand it, it is a response to para. 102 of our defence, but it was not with
29 the Tesco skeleton argument. We are not complaining about that, but it does mean that one
30 got it in the middle of Day 2 of the hearing.

31 THE PRESIDENT: If we have your headlines ----

32 MR. ROTH: Can I explain it in this way: a major part of the remedy is preventative. This is a
33 dynamic market where the position in local markets is changing all the time as existing
34 stores expand or new stores are built - and, indeed, stores are closed and replaced with

1 stores in another location. All of that changes the relative percentages of floor space and
2 changes the isochrone because the way in which - as I think you appreciate - the highly
3 concentrated market is calculated is that you take each large store as the focal point - a
4 store over 1,000 sq.m - draw the ten-minute drive-time isochrone around it, and then count
5 up the number of competing facia and the grocery floorspace of the large retailers within
6 the isochrone. So, the moment a new store is built, it is not just for that existing store that
7 the percentages change, but you then have to draw an isochrone around the new store and
8 look at the situation in that new isochrone. So, it is a constantly changing situation. That is
9 why the 24 percent existing is a snapshot of highly concentrated markets as at the time the
10 report was being prepared. It is not the position even today, and certainly not in two years'
11 time. Yes, one can get development plans from the retailers. Tesco said, "Well, we gave
12 you our store development plans" -- But, those are not static either. They are not set in
13 stone. Retailers are revising their development plans to take account of developments in the
14 market, and no doubt, particularly today, to take account of wider economic developments.
15 So, one cannot tell where a particular retailer would choose to site a new store in the future
16 in the absence of the competition test and then, more particularly, how retailers in the
17 counter-factual would choose to develop stores in the changed environment created by the
18 competition test. That is why the historic data is not the basis for a meaningful estimate.
19 Yes, one can estimate the proportion of -- Tesco says, I think, in its schedule, "Take a
20 starting point. The estimate of the annual number of planning applications that will, in the
21 future, be made or would not be made which might otherwise have been made". You then
22 estimate the proportion. You can look at historic planning applications and say, "Well,
23 what might happen in the absence of any competition test?" Then you go on to estimate
24 the proportion of those putative developments that would have been blocked by the
25 competition test based on the number of facia and market shares in each area. But, you
26 cannot do that on the basis of historic data. That just tells you previously what might have
27 failed the competition test. But it is not the benefits of how things will work with the
28 competition test because the dynamics of the market change. It does not provide a basis for
29 estimating how the market will work in the changed environment of the competition test
30 once the remedies are in place - not just, indeed, the competition test remedy, but the
31 landsites remedy as well which will also open up potential for development.
32 You need to measure the benefit of the test on the basis of estimating expansions/new entry
33 which will take place in existing highly concentrated markets where the incumbent is now
34 known to be blocked by the operation of the competition test. That is what you need to do

1 to measure the benefit in that sense. That is nothing to do with the historic development
2 plans of incumbents or, indeed, other retailers because the environment has changed. The
3 test now provides -- Indeed, as I explained at some length, one of the aims of the test is to
4 facilitate entry in a monopoly area or a concentrated area by constraining the possibility of
5 expansion by the incumbent. It is one point also made in the report about the barrier to
6 entry which is created by expansion in existing high concentration markets. At 7.67, an
7 incumbent grocery retailer, by extending its store, will make new larger grocery store entry
8 by a rival grocery retailer more difficult. Well, that was the old world. In the new world
9 that will not happen.

10 So, to what extent will developments take place? That is, as it were, the reason why this is
11 really such a far-fetched exercise.

12 THE PRESIDENT: Why was your client then so interested in what was going to happen to all
13 the 1,300 landsites across the UK and meeting each of the largest retailers to discuss on a
14 case-by-case basis their future plans for the site, and so on? That is the point that is made
15 against you in the schedule, which I appreciate you have not really had very long to
16 consider. Would that not have provided some basis for making an informed estimate of
17 what opportunities might be opened up in some of these areas on which you could
18 extrapolate?

19 MR. ROTH: The landsites are only in some areas.

20 THE PRESIDENT: I appreciate that.

21 MR. ROTH: One could come up with a few figures that there might be a benefit here, or a
22 benefit X. But, to get a sense of the overall benefit of the test ----

23 THE PRESIDENT: It does not seem much more indirect than the margin concentration analysis
24 in a sense -- to decide whether the stores were going to be open longer or shorter hours, or
25 whether the number of people employed at check-outs is fewer or lesser. You get a handle
26 on that indirectly. It is not so different, is it?

27 MR. ROTH: Except that that is at one point in time - a margin concentration analysis. The
28 benefit is one looking ahead three or four years. It is a constantly changing situation. That
29 is why it is such a different situation. Even with the landsites, indeed, when we consider
30 the scale of adverse effect of the landsites -- Certainly there is a supply chain remedy in
31 here as well, for example. One can look at the supply chain remedies which have not
32 featured in this case. But, as you know from reading the introduction to the report, the idea
33 was that there will be a grocery retailers' code of practice towards their suppliers, with an
34 ombudsman and tighter enforcement. There, the AEC that was found was that the

1 practices of the large retailers - again, I make it clear, it is not just Tesco, but large retailers
2 generally - have an effect on investment and innovation by suppliers.

3 But, again, the Commission, looking at trying to get some sense of the measure of that
4 effect, said, "That's something that is pretty impossible to do". All they could do - at
5 11.400, which is summarising what was found back in Chapter 10 -- They set out in para.
6 10.16,

7 "Concerning the supply chain, it is difficult to place a value on the cost of lost
8 investment and innovation that would happen in the future. However, the value
9 of the groceries supply chain is of the order of £70 billion in annual sales to
10 grocery retailers. The scale of the groceries supply industry is such that even a
11 small loss in investment and innovation, and its impact on product quality and
12 choice, is likely to have a significant detrimental impact on consumers".

13 So they say, "We cannot actually measure the detriment, but we just say the total size of
14 the supply chain is very big, so even if it is small that would have a substantial impact".

15 THE PRESIDENT: This is a bit different, because this is saying that good things will start to
16 happen. The forensic point, as it were, is, well, if you cannot even begin to predict, even in
17 specimen areas, what might well happen as a result of the competition test in terms of new
18 entry then why should one assume that it is going to happen over time on a big scale?
19 Even not to have a shot at it is the point that is put against you.

20 MR. ROTH: What this is saying is that it is believed the Commission has concluded that good
21 things will start to happen in terms of investment and innovation, but they cannot put a
22 measure on it. In the competition test it is assumed that good things will start to happen in
23 terms of more entry or expansion by the smaller retailers in high concentration areas. We
24 cannot, in the same, put an exact figure on it. I do not think, with respect, Sir, it is
25 different. They are both saying good things will start to happen and if this is not done bad
26 things or less favourable things will continue to happen. It is exactly the same point and
27 saying, what we are looking at is proportionality so we want a sensible, what is the scale of
28 the problem, how do the costs of the remedy relate to that scale and if the costs are very
29 small compared to the scale and the Commission concludes that this is going to be
30 effective, albeit not immediately, then it is not out proportion to what is being addressed,
31 even though it cannot say in year one, "We estimate X benefit of innovation and
32 investment, in year two, Y, and year three, Z".

33 MR. MATHER: You have advanced, I think, two areas where it is difficult to model these
34 projected benefits, one arising from the fact that lots of things are changing in the package

1 of proposed remedies, the planning system and the other changes as well the competition
2 test, and another heading concerned the difficulty of anticipating the working of the hidden
3 hand of the market quantifying the entrepreneurial actions of the rivals. How would you
4 balance those? Which is more important in leading the Commission not to attempt this
5 modelling, or are they about the same?

6 MR. ROTH: Can I just take instructions on that? (After a pause) Thank you, sir, not an easy
7 question to answer. They are both difficult. The entrepreneurial aspect is the more
8 difficult because the controlled land, at least you have the number of the landsites, you
9 have a figure that you can look at. The change that may come in the planning regime
10 through removal of the need test, that is pretty difficult to feed in, but you know from all
11 the LPAs where they have identified need and where they have not. So there are certain
12 concrete figures. Those are forward looking plans that they developed. It is not easy to
13 deal with the controlled land, but the difficulty is greater because of the shifting position in
14 the market in the changed environment and the need to anticipate new isochrones and what
15 will be in each of the isochrones.

16 The point I made about the GSCOP remedy, I think you will appreciate is, yes, there will
17 be behavioural change by the retailers in terms on which they deal with suppliers. To what
18 extent will that behavioural change lead to more investment and innovation by suppliers
19 when, in fact, the Commission found it extremely difficult and could not in the end
20 measure the effect to which even present investment and innovation by suppliers is reduced
21 through the current environment, let alone how it might change. Sometimes these things
22 are just not sensibly quantifiable.

23 Similarly, with the controlled land remedy, we did not, in fact, estimate the benefit and
24 give a quantity of the benefit that will result from it.

25 Mr. Green gave an illustration towards the end of his submissions – I think it is on the
26 transcript from the day before yesterday at p.11, lines 9-13 – that if an AEC is 100 the
27 Commission needs to know how much the remedy will reduce that AEC. We say that just
28 highlights how unreal this approach would be. Is the Commission really required before it
29 can decide that a remedy is proportionate to say that it considers the implementation of this
30 remedy will, on broad estimates, reduce the AEC to 45 within eight years, and if it cannot
31 do that, if it cannot come up with that, then it cannot adopt a remedy because it has got to
32 put some sort of estimated numbers on it.

33 THE PRESIDENT: It may go to effectiveness. If you cannot actually show that it is going to be
34 effective at all – I am not suggesting that is this case – if you had a situation where you say,

1 “This might work”, but you could not actually show to what degree or at all it would work,
2 that might well have a bearing on proportionality if it had other effects, if it had other
3 definite effects, that were perhaps negative to some people.

4 MR. ROTH: If it is not rational to consider that it will have an effect then I absolutely accept
5 that. Here the Commission very firmly concluded that it will have an effect, and that is the
6 conclusion it sets out and that is how it rejected the divestiture remedy saying not only will
7 this have an effect, although longer, but indeed it will have a more satisfactory effect. That
8 is 11.268. A paragraph, one notes, which conclusion Tesco does not ask the Tribunal to
9 quash. It is not one of the paragraphs that you are being asked to annul. There is the
10 conclusion that:

11 “...high concentration will be sufficient over time to address the AEC we have
12 found ...”

13 and there is no need to require store divestitures.

14 “We therefore believe that the competition test and the controlled land remedies
15 will be more effective remedies over time than would be store divestitures.”

16 They clearly conclude, and we say it cannot seek to be an irrational conclusion when the
17 preventative effect is undeniable and immediate and the effect on existing high
18 concentration markets, not the effect on stopping them becoming higher concentration,
19 because that is undeniable and immediate, in terms of facilitating new entry is entirely
20 rational in terms of the way this market has been operating the effective competition in
21 other respects between retailers which they found, and the dynamic nature of the market in
22 terms of expansion, again which they refer to here. Yes, they have to rationally conclude
23 that the remedy is effective, but they did so. Not only they expressly so concluded, but
24 they rationally so concluded. If the inability of the Commission to put precise numbers or
25 estimated numbers of the term of years in which a remedy will remove X per cent of the
26 AEC, actually precludes the Commission from adopting a remedy under s.134, even
27 though it thinks it is affected because it cannot be sufficiently precise about it then, with
28 great respect, this process of market investigation, one of the great features of United
29 Kingdom Competition law will be emasculated, because what this comes down to is to
30 challenge the validity or lawfulness of the conclusion in 11.268 of the Report that this will
31 be effective over time.

32 PROFESSOR PICKERING: Could I just offer a reflection on this, Mr. Roth. This is clearly
33 important and I think the observation you have just made about the threat to market
34 inquiries in general is perhaps unnecessarily stated because what we are dealing with here

1 and it seems to me that part of the problem that the Competition Commission had to face is
2 that you are dealing with a situation where the Commission has identified that it is certain
3 local markets as defined which give rise to the problem. Now, there are other instances
4 where the market has been locally defined but more often we are dealing with at least a
5 national market where it is probably somewhat easier actually to say what is likely to
6 happen and to address questions of entry and so on.

7 It also seems to me that the tightrope that the Commission put itself on with this Report is
8 that it found, and I would not for a moment dispute the wisdom of its conclusion, that this
9 market has a lot that is competitive and reassuringly competitive. Therefore, what it was
10 saying is it is broadly competitive but there is one particular area, or one or two areas that
11 prevent it being even more competitive and beneficial to the final customer. Where you
12 get that sort of situation then it becomes very difficult to pick your way through the
13 minefield of alternative remedies, and say what is likely to happen. I do not want to offer
14 you an answer and, as I say, I am not sure that this is an answer anyway, but then if we say
15 we will take away some of what we perceive to be the hindrance to an even more
16 competitive situation then what is going to happen and the prediction is based upon, or the
17 difficulty of predicting is based upon what lies behind the operation of the invisible hand
18 which is the business profit motive which in itself is being driven by exogenous factors,
19 such as population movements, income change, and also to some extent I would have
20 thought the availability of capital and the ability of the major operators in this trade to
21 handle more than a certain number of developments at a particular point in time. I do not
22 know what these are, but this seems to me to be part of the problem about how one picks
23 one's way through with a limited set of remedies and the question then whether in relation
24 to individual identified local markets one can then try and say that it will work in this
25 market more rapidly than in that market. I am not sure that anybody could actually say
26 that, certainly not outside the major retailers themselves.

27 MR. ROTH: Sir, if I may respectfully say so, I think that is a very pertinent observation and the
28 remedy that was devised in this situation, as the Chairman pointed out, where one has this
29 barrier to entry that for good reason cannot be removed so one has to work within that
30 parameter, actually seeks to rely on the finding that this is the broadly very competitive
31 nature of the market; it is seeking to build on that, because that is how the remedy takes
32 effect. So it is seen to work with and on the basis of precisely that finding. The only point
33 where, with respect, I would slightly take issue is that when there are structural remedies,
34 there is not the same sort of problem and I think whether it is national or local structure in

1 terms of quantification and measurement. But when there are behavioural remedies
2 looking to the future then the uncertainty comes in and that is why I made the point,
3 although it has not been taken here because there is no challenge to the controlled land
4 remedy or to the
5 GSCOP remedy on the supply side, if these points are valid about failure to quantify the
6 effect and speed, the remedy reduces the detriment, they apply there just as much and the
7 challenge could have been mounted in the same way. The controlled land, I would
8 emphasise, is not just a remedy regarding existing controlled landsites, that is one part of it,
9 but it is also a preventative remedy looking to the future; it is not something one has
10 focused on so far but if I could just ask you to look at the actual remedies that are set out.
11 It is at the very end of chapter 11, at 11.442 – the controlled land remedies.
12 “To address the AEC we found arising from controlled landsites which act as a barrier to
13 entry in a number of highly-concentrated local markets, we decided to implement the
14 following remedies in respect of controlled land.”
15 (a) is the 30 restrictive covenants referred to above. (b) is other restrictive covenants which
16 they do not know about but presently exist, and that is because the retailers could not
17 supply, or said it would be far too burdensome to supply details of any covenants entered
18 into before 2000. So there are a whole lot of other ones the Commission does not know the
19 number of, so they are caught by (b), but they are existing.
20 Then you have (c) “Large grocery retailers will be prohibited from imposing new
21 restrictive covenants that may restrict grocery retailing or which have equivalent effect.”
22 Then there are some exceptions. So that is *in futuro*.
23 Then (d) is the 30 existing exclusivity arrangements in high concentration markets that they
24 are told about. (e) in relation to existing exclusivity arrangements that they do not know
25 about because they are pre-2000 but they exist and they do not know how many there are
26 because no one told them, or is able to tell them, but there is a control to deal with that, so
27 one cannot measure that because one does not know the number. Those are past or present,
28 and then there is *in futuro* at (f)
29 “Large grocery retailers will be prohibited from enforcing or seeking enforcement
30 by others of new exclusivity arrangements once a period of five years from the
31 opening of the grocery store to which the exclusivity arrangement relates has
32 elapsed.”

1 So once you are in the realm of this forward looking preventative remedy, and there I think
2 it may be whether it is national or local, these difficulties particularly arise, and that is why
3 I say it is broader than just ----

4 THE PRESIDENT: Well, it may be; different things might apply to those. I do not think we need
5 to get into things that are not challenged actually because we have enough to contend with
6 here.

7 MR. ROTH: Certainly the Commission did not think it could estimate the post-competition test
8 what might happen on control landsites.

9 (Short break)

10 MR. ROTH: Sir, thank you. Just a couple of matters. I mis-spoke when I said in answer to your
11 question that the only evidence of the deterioration in the local PQRS was the margin
12 concentration analysis as a proxy. That is not right. There was substantial qualitative
13 evidence from the retailers themselves. Could I just ask you to look at para. 6.36 in the
14 report under the heading 'Evidence from Grocery Retailers on their Response to Local
15 Competitive Conditions'?

16 "Grocery retailers provided us with a significant amount of evidence regarding the
17 way in which they vary aspects of their retail offer, including pricing, food counters,
18 store presentation and staffing according to local competitive conditions, and, in
19 particular, in response to changes in local competitive conditions brought about
20 through the opening of new stores by competing retailers.

21 6.37 Both CGL and Somerfield operate multiple price brands where the band to
22 which a store is allocated takes into account local competitive conditions, while
23 Asda, Marks and Spencer, Morrisons, Sainsbury's, Tesco and Waitrose each told us
24 it used local vouchering, which allowed the average prices to be reduced at the
25 store level. For most of these retailers, vouchers are principally used at the time of
26 new store openings or extensions, or in response to a new opening, extension, or
27 store refurbishment by a competitor in the local area.

28 As we set out in para. 5/74, Tesco undertakes substantially more local vouchering
29 than do other retailers, spending [confidential figure] ----

30 6.39 We found that store refurbishments were a common response to entry by a
31 competing retailer. A number of retailers, including Asda, M&S, Morrisons and
32 Waitrose, told us that the opening of a new store by a competitor would often cause
33 them to reprioritise the refurbishment of their own store in the area. CGL told us
34 that entry by a competitor would cause it to review a number of aspects of the offer

1 at a local store, including initiatives such as increased stocking of fresh produce,
2 and noted that this would contribute to additional store costs due to the operation of
3 additional fridges and increased product wastage.

4 We found that food counter initiatives are also being used as a response to local
5 competitive conditions. Sainsbury's told us that competition from a Waitrose store
6 might be the 'tipping point' in the decision to add a fish counter to a store. [I read
7 that with interest, because that is exactly what happened to my local Sainsbury's.]
8 M&S also told us that in response to the recent entry by Whole Foods Market, it
9 had upgraded the bakery counter and redesigned the patisserie counter in its
10 Kensington store.

11 6.41 We found that improved staffing is also a response adopted by retailers when
12 faced with increased local competition".

13 There are then details from Marks and Spencer, Sainsbury's and so on. One can read on,
14 but if perhaps one goes to the end of that section at 6.46,

15 "Other localised competitive initiatives we were told about include the allocation
16 of scarce produces to stores in more competitive areas and increases in the
17 number of home delivery vans in an area. Further details of the way in which
18 grocery retailers vary their retail offer at the store level are provided in Appendix
19 6.2".

20 So, there was quite a lot of additional evidence actually dealing with the particular matters
21 - not just the margin concentration analysis which was attempting to put a figure on how
22 these might translate.

23 The second point I wanted to mention is one point being made, I think, is on the
24 information that we had to use for benefits; it was being updated by retailers through the
25 inquiry. There were lots of discussions with the major retailers. The thrust of the detailed
26 discussions with the large retailers was to establish really which were the areas of high
27 concentration. There was a lot of argument about that - retailers saying, "No, this store is
28 not in an area of high concentration. There are developments by our competitors coming",
29 and so on. In particular, they were so concerned about this because the Commission was
30 considering the divestiture remedy which some of them were very concerned about. It is
31 no secret to say that Morrisons, as a result of the Safeways acquisition, had a lot of stores
32 in high concentration areas, and they were very concerned about the prospect of divestiture.
33 So, the discussions were to eliminate areas that are not presently of high concentration.

1 Coming back to the question of control landsites -- Yes, the Commission got information
2 on control landsites from each large retailer, but it was not in a position to go to the
3 competitors of that retailer and say, "Well, if this landsite now becomes available, would
4 you be interested in developing it?" This was highly confidential information in many
5 cases. They could not go and test out with the rivals. It was again to establish how many
6 landsites there are and whether they are in areas of high concentration, but not to try and
7 make estimates of future development and act as a sort of clearing house between retailers.
8 Finally, Sir, you mentioned, 'well, could we not have looked at sample areas and done
9 some sampling?' Well, one could look at this area or that area, but you could not
10 extrapolate from that across the country because the conditions in each area that make it
11 attractive or unattractive to development, and on what scale, is so different. You could do
12 it. You could come up with numbers. But, they would not be meaningful numbers. That is
13 why the Commission did not undertake that exercise. It did not consider that that was a
14 sensible exercise that would produce results and which could attach any meaningful
15 reliance.

16 THE PRESIDENT: If it is so hard to predict though, is that something which meets Mr. Green's
17 point?

18 MR. ROTH: That the remedy is not effective?

19 THE PRESIDENT: Yes.

20 MR. ROTH: No. It just means that you cannot say what number, or estimated number, of high
21 concentration sites will become less in Year 1 and in Year 2 and in Year 3. You know that
22 it is going to happen over time, and that year by year there will be more, but you cannot put
23 figures on it year by year. What I am saying is that you can rationally conclude, as they
24 did, that they were well within their margin of judgment to reach that conclusion on the
25 basis of the information they had on the market. Therefore, it is as comprehensive a
26 remedy as is reasonable and practicable - the statutory test. One takes an overall view, not
27 having to estimate the probability of each single step in the analysis, not like in your
28 judgment in the *BSkyB* case. It is the totality, and one has to say, is that in the totality as
29 comprehensive a solution as is reasonable and practicable? That is what they concluded,
30 we say entirely rationally, with a remedy that was proportionate given the costs of the
31 remedy that they determined and the scale of the effect and therefore how little
32 improvement is needed to balance the costs.

33 Sir, that concludes my submissions, subject only to the ----

34 THE PRESIDENT: Professor Pickering has a question.

1 PROFESSOR PICKERING: Mr. Roth, I wonder whether you would just reflect on the remedy
2 that we have been addressing in terms of the extent to which it is or is not a particularly
3 novel remedy. I am thinking about possibility analogies with rail franchise acquisitions
4 and the test of the competitive implications there. As I was reflecting on this, I also
5 thought about the concept that we do not actually have really in this country at the moment
6 safe harbours, though I suppose in this case the quotation of a market share might be more
7 about dangerous rocks than a safe harbour. To what extent is this within a framework of
8 policy approaches and to what extent is it really something that does break the mould?

9 MR. ROTH: Thank you. Could I – you asked me to reflect – reflect on it over lunch, rather than
10 taking instructions now from my client and holding matters up, and answer it then, if that is
11 satisfactory.

12 The only other matter is, as I say, we did want to put in something in response to the
13 written schedule. We will consider that later.

14 THE PRESIDENT: We will hear what the other says and then we will deal with that. I have just
15 forgotten what the running order is meant to be. Is it Mr. Ward?

16 MR. WARD: Sir, Tesco offered us a running order that was alphabetical, so Asda of course
17 agreed.

18 THE PRESIDENT: We have gone in reverse order alphabetically!

19 MR. WARD: First me, then Mr. Donoghue and then Miss Smith.

20 THE PRESIDENT: Alphabetical in terms of clients.

21 MR. WARD: We have talked between ourselves. We are not going to cover the same grounds.

22 Both my learned friends assure me that they need at most 30 minutes. I think I need at
23 most slightly more than 30 minutes, maybe 40 minutes. So times three, probably that takes
24 us just into the early afternoon.

25 THE PRESIDENT: Let us see how we get on. It sounds quite a long time to me, but let us see
26 how we get on.

27 MR. WARD: I will do my best. I wanted to start just by reminding the Tribunal of the
28 obligations upon the Competition Commission under s.134 of the Enterprise Act. They
29 have obviously been well ventilated already. Of course, the starting point is that s.134(1)
30 places the Commission under a duty to identify whether there is any feature of the market
31 which is adverse to competition. There is no dispute that it has done so. The feature that it
32 has identified that we are concerned with is that in a significant number of local markets
33 there are high levels of concentration that in many cases have persisted over a number of
34 years. So that much is not in dispute.

1 Then s.134(4) places the Commission under a duty to decide whether to take action or
2 recommend action by others for the purpose of remedying, mitigating or preventing the
3 adverse effect on competition. We agree with the Commission that this, in effect, imposes
4 a duty to impose a remedy if reasonable and practicable to do so.

5 Three questions arise out of this: firstly, whether the competition test does, in fact, remedy,
6 mitigate or prevent the adverse effect on competition or strictly whether the Competition
7 Commission was entitled to so conclude; secondly, whether Tesco is right to suggest that
8 there is a material consideration that the Competition Commission has failed to take into
9 account; and thirdly, whether the remedy fails the proportionality test. I am going to
10 address you very briefly on all three aspects.

11 On the question of whether this is, in fact, a remedy to the adverse effect on competition,
12 we submit it plainly is, and in large part it is not in dispute. It prevents the emergence of
13 new areas of concentration, it prevents the strengthening of existing areas of high
14 concentration; and, as the Competition Commission say in the report, it can be expected to
15 encourage new entry by blocking incumbents from taking up whatever opportunities for
16 new development there may be.

17 The way it works is to allocate opportunities in areas of exceptionally high concentration,
18 and this we say is a characteristic thing for competition policy to do. To pick up
19 Professor Pickering's point made to Mr. Roth just a moment ago, in our statement of
20 intervention we gave a number of examples that were at least in a broad sense analogous -
21 cases where competition authorities had acted to allocate scarce resources of some kind or
22 another. Just for your notes, the reference to that is bundle 6, our intervention is at tab 2,
23 and it is para.7 of the statement of intervention.

24 THE PRESIDENT: Do you want us to turn it up?

25 MR. WARD: Very briefly, sir. I do not want to labour the specific examples, because I accept
26 that there are differences. It is actually p.4324. It is bundle 6. The statements of
27 intervention are all together in one file. Could I just invite you to read para.7. Of course
28 there are differences, but at a very high level of generality the point is the same. The
29 Competition authority has intervened to allocate scarce resources. The resources in
30 question here that are finite are essentially development opportunities.

31 THE PRESIDENT: The difference being that in those other areas they have to be allocated
32 whereas this decision is being made on the basis of how successful people have been in
33 what is admittedly fair competition.

1 MR. WARD: Well fair competition but an adverse effect on competition because, of course, the
2 finding on adverse effect on competition is not challenged, and it is that which is the
3 statutory gateway to imposing a remedy. So the market is effective in some ways but not
4 in others.

5 So the question that one comes to then is whether there is, in any event, a legal flaw in the
6 Competition Commission's approach in assessing the effectiveness of this remedy. Here it
7 is useful, if I may, to take you back to the guidance that Mr. Roth already showed you and
8 that is in the authorities bundle at tab 21. I would like to start, please, on p.39, para.4.9.

9 THE PRESIDENT: This is the Competition Commission's guidance?

10 MR. WARD: Yes, Competition Commission's guidance, p.39 para.4.9:

11 "The remedial action that the Commission will decide should be taken will always depend
12 on the facts and circumstances of the case. When deciding what is an appropriate remedy,
13 the Commission will consider the effectiveness of different remedies and their associated
14 costs and will have regard to the principle of proportionality."

15 I am going to deal very briefly with each of those heads. Mr. Roth already took you to the
16 passage over the page which deals with effectiveness of remedies and the guidance
17 identifies three factors, only one of which I think is seriously in dispute, and those are
18 paras. 4.14 – 4.16. The first factor is whether it is clear to the person to whom it is
19 directed, well obviously it is and there is no suggestion to the contrary. The second is the
20 prospect of the action being implemented and complied with. Here, of course, if the
21 Government adopts the recommendation it will be implemented.

22 Thirdly, and this is of course the contentious point, is about timescale. Mr. Roth dealt with
23 this but we want to emphasise a slightly different point which is that the lack of precision
24 about the timescale is simply inherent to the nature of the remedy and the way that the
25 market works, but that does not make it ineffective.

26 In one sense, of course, it is entirely straightforward to predict how and when the test will
27 apply and that is dealing with concentrated markets that might arise in the future. There is
28 no difficulty at all with that. The difficulty that Tesco complain about is how it will apply
29 to existing areas of concentration.

30 As I have already said, in a sense it is inherent to the way the test works that it is unclear.
31 The test works by privileging new entrants over incumbents as and when development
32 opportunities arise. It blocks the incumbents from taking those opportunities and that way
33 it facilitates expansion by others. Of course, the speed at which that will occur depends
34 upon what happens in the market place. The Competition Commission cannot possibly

1 know or predict, but it is perfectly rational for it to say that it will tend over time to meet
2 the problem, bearing in mind of course that all the statute requires is that the remedy should
3 mitigate; it does not require that it should eliminate the difficulty or, still less, over any
4 particular time. But as and when those development opportunities do arise in highly
5 concentrated markets, what the test says is that it cannot be the incumbent that takes that
6 opportunity, it has to be a new entrant. We submit that that is just inherent to the nature of
7 the remedy that the precise period of time over which that will happen is just not known
8 and, indeed, not really knowable by the Competition Commission.

9 Mr. Mather asked Mr. Roth whether this was a departure from the guidance, because the
10 guidance says that the Commission will tend to favour a remedy which can be expected to
11 show results in a short period. We would respectfully say “No”, because the guidance is
12 drafted in flexible language that allows the Commission to take a flexible approach. It
13 does not say they are bound to adopt a remedy that will take effect quickly. It simply says
14 that that is something that should be taken into account. Here, on the particular facts of the
15 adverse effects on competition that it had found, and the nature of the remedy imposed, it
16 was inevitable that the timescale would be uncertain and that in no way brings us into
17 conflict with the guidance.

18 If I can turn now to the second question which is identified as arising out of the guidance,
19 that of costs. Here the question is whether Tesco is right to suggest that there is a material
20 consideration that the Competition Commission has failed to take into account, namely this
21 loss of consumer welfare, however it is put, and as Mr. Roth said, one could construe it in
22 various different ways, but the idea is that by blocking developments there is a risk that no
23 new entrant will come forward – according to Tesco – and therefore some kind of
24 economic cost will crystallise, which Tesco say the Competition Commission has failed to
25 take into account.

26 Our starting point is from a commercial perspective Asda cannot conceive why this
27 problem should arise other than in truly exceptional circumstances, and I will come in a
28 moment to what those circumstances might be. Asda is actively seeking to enter new
29 markets, including highly concentrated markets, and it is convinced that the competition
30 test will help it; that is what it said to the inquiry and that, of course, is why it is here today.
31 Tesco’s argument is supposedly based on some kind of internal inconsistency in the
32 Competition Commission’s report which is derived, supposedly, from the fact that the
33 planning barriers to entry will persist even after the implementation of the remedies, and
34 those planning barriers will restrict new entry. We submit there is no logical inconsistency

1 here at all. In truth, there is a logical connection between these different elements in the
2 report. Of course, if there were no barriers to entry the competition test would not be
3 needed at all; there would be no difficulty of entry into concentrated markets.

4 One starts with the fact that the competition test is designed to encourage new entry, but it
5 represents a recognition by the Competition Commission that there will be these barriers to
6 entry and the way it deals with the problem is, as I have already said, by privileging the
7 position of the new entrant in these highly concentrated markets, so that where new entry
8 can occur the competition test – to use the language of the Competition Commission –
9 focuses on the identity of the operator. For your note that is said at para.11.24.

10 So instead of altering the planning system, which it could have done, and which actually
11 Asda urged it to do, what the Competition Commission did was come up with a mechanism
12 for allocating that scarce capacity, the scarcity created by the barriers to entry in a way that
13 favoured new entrants as against incumbents.

14 On Tuesday, Mr. Green said that if barriers to entry are low new entry could have been
15 expected to happen and it was indeed a truism that this would be all the more so in highly
16 concentrated markets, but the question then is why the existence of the barriers to entry
17 caused the problem of unmet demand that Mr. Green says is at the heart of this, and it is
18 supposedly going to happen because the incumbent will be blocked by the competition test.
19 But, a very important point that Mr. Roth made yesterday that we respectfully agree with
20 is, of course, that the barriers to entry continue to apply to both incumbents and new
21 entrants alike.

22 So both new entrants and incumbents will need planning permission. As the report itself
23 points out that planning permission system is, on the face of it, blind as to whether the
24 applicant for planning permission is a new entrant or an incumbent. Here, the objective is
25 to help the new entrant enter the market notwithstanding that barrier to entry.

26 So why then is it that Tesco say that the barriers to entry are somehow worse for new
27 entrants than they are for incumbents? Asda sees no reason at all. Take the case of a new
28 store - a completely new store - in a market with high concentration. Both the new entrant
29 and the incumbent will need land. Both will need planning permission. Of course, both will
30 need to have identified some of this unsatisfied demand which is said to give rise to the
31 cost.

32 Now, in a particular market it may be difficult to overcome those barriers or to pass those
33 thresholds, but why, we ask, not rhetorically at all, is it more difficult for a new entrant
34 than it is for an incumbent?

1 THE PRESIDENT: Mr. Ward, just forgive me, did the Competition Commission themselves say
2 it was more difficult?

3 MR. WARD: In one case, which I am going to come to.

4 THE PRESIDENT: I thought they said it in the report.

5 MR. WARD: Yes, in respect of store extensions. I am going to come to that. I am dealing at the
6 moment just with completely new stores.

7 So, in respect of new stores there is no difficulty, in my submission. Therefore, what one is
8 left with is store extensions. The report does indeed say - as you rightly remind me, Sir -
9 that in some circumstances at least store extensions will be easier to get through the
10 planning test. But, of course, the problem cannot arise in respect of all store extensions
11 because, of course, some highly concentrated markets are monopolies and some are
12 duopolies - or, there may even be three stores. Now, if there is more than one store, well,
13 there is more than one store that has the option of building a store extension. So, it is not
14 just the largest store, whichever one that is, which could choose to expand and might be
15 blocked by the competition test, but other rival operators within that market could also
16 choose to expand by extension.

17 So, again, thus far, there is no reason at all to think that the incumbent is privileged, and the
18 new entrant will find it more difficult to soak up demand. Both, in that situation, would
19 have the opportunity, if appropriate, to build a store extension - if they can surmount the
20 barriers to entry. Why, then, is the incumbent any better off?

21 THE PRESIDENT: I have forgotten now, but is it the comparison between the ability of
22 someone who is already in the market to get planning permission for an extension as
23 compared with the difficulty of a new entrant to get a whole new store?

24 MR. WARD: Yes. That is the next step in the argument.

25 THE PRESIDENT: You may not be comparing apples and pears.

26 MR. WARD: Precisely. That is the next step in the argument. Where we are left is with the
27 following cases only: incumbents who are local monopolists; so there is no other store in
28 the market able to get an extension. But, it is not just all local monopolists. It is local
29 monopolists in areas of high concentration seeking to build store extensions - not new
30 stores - and who would get planning permission for that extension, *ex hypothesi*, that are
31 blocked by the competition test. So, this is the difficult task that Mr. Green identified as
32 giving rise to this cost.

33 Well, it is already a narrow class, and it is about to get narrower, in my submission. There
34 is no doubt at all that Asda would like to get into the areas served by the monopoly stores of

1 its rivals. The question is: What, if anything, would prevent them - even in this case where
2 the monopolist is thinking of building a store extension. Mr. Green advanced two reasons:
3 firstly, potentially insufficient population levels to support the new store; and, secondly,
4 planning constraints that might make it difficult to build exactly what the incumbent had in
5 mind.

6 The question of population is really easily answered. Mr. Roth gave the answer yesterday.
7 This point overlooks the dynamic nature of competition and the fact that it is entirely open
8 to rivals to come along and say, "Well, it's not just that we want to take the little bit of
9 extra capacity. We want to supplant you altogether". The report contains a most telling
10 example on p.187, if I could just take you there. Forgive me for repeating something
11 which Mr. Roth said yesterday, but it is extremely pertinent to the point. At para. 11.31
12 one sees that Tesco had claimed that an increase of 34,052 people leads to one extra store.
13 Mr. Green put forward some slightly lower figures yesterday derived from the Competition
14 Commission's analysis - because, of course, that was rejected. But, can I ask you to look
15 again at the footnote at the bottom of the page? "One of the most extreme cases is Huntly -
16 -" Huntly, Google Maps tells me, is in rural Aberdeenshire, about forty miles from
17 Aberdeen.

18 "-- which has a population of about 5,000 in the town itself (and around 16,000
19 within a twenty-minute drive-time), and two large grocery stores - an Asda and a
20 Tesco - in the town".

21 Now, that may, or may not, be sustainable on the facts of Huntly as a market, but, honestly,
22 that is an awful lot of grocery store in a small town. It illustrates the general principle
23 which is that it is entirely open to new entrants to come along and simply challenge the
24 incumbent outright. That, of course, is how competition is supposed to work.

25 THE PRESIDENT: So, if that is right, why will it make such a difference that you restrict one?

26 I mean, is that what is stopping people coming in? Is it, in your client's view, a barrier to
27 entry, or have they so argued, that there is an incumbent with 60 percent of the market? If
28 you want to come and compete for some of that 60 percent, what is stopping you other than
29 the planning barriers?

30 MR. WARD: The thing that makes the difference here, of course, is that under the competition
31 test you know, as a potential new entrant, that there is a slice of unmet demand ex
32 hypothesi - where we are talking about the cases that Tesco is worrying about - that the
33 incumbent will not be allowed to meet. So, supposing the incumbent meets 60 percent of
34 the 100 percent demand. You know there is 40 percent left over for you anyway. The fact

1 that you can secure that 40 percent is obviously an inducement to enter the market and
2 reduces the risk in entering the market, whereas if you know that if you start down that
3 path the danger is that the incumbent will simply expand and swallow up that unmet
4 demand, that changes the calculation.

5 The Competition Commission's judgment is that this remedy will help. We agree. It does
6 not solve the whole problem. It does not mean that overnight all of these areas of high
7 concentration will disappear - because on any view the planning problem will still remain.
8 The barriers to entry in the planning system, which have not been tackled by the report,
9 will still constrain both the incumbent and the potential new entrant. But, the central thrust
10 of my submission so far has been that they affect the incumbent and the new entrant
11 equally.

12 I want to come on now to the point about the planning system that Mr. Green made, which
13 I think is all that is left in this argument. What is left in the argument is that the incumbent
14 is going to be better off. He says, quite rightly, that the report says that it is easier to build
15 an extension than it is to build a new store outright. We have no desire to challenge that
16 proposition at all - of course. It is not even open to us to do so. But, of course, matters are
17 not quite that simple. That comparison may arise on a like-for-like basis. But, the new
18 entrant might want to build something completely different. It might want to build, say, a
19 store that is much closer to the town centre. That radically affects the way in which the
20 planning system poses barriers to entry.

21 Can I take you back to the annexe to the report which just summarises the planning system.
22 It starts at p.419, but I want to take you in fact to p.420. In the middle of the page,
23 'Planning Policy Statement 6 - Objectives'. At para.8,

24 "The key objective of PPS6 is the promotion of 'vital and viable' town centres
25 through: (a) planning for the growth and development of existing centres; and (b)
26 promoting and enhancing existing centres by focusing development in such
27 centres and encouraging a wide range of services in a good environment,
28 accessible to all".

29 It achieves these objectives through a series of tests that you have heard about over the last
30 two days. The starting point is the town centre first or sequential approach, which is at
31 para. 11.

32 "Under PPS6, applicants wishing to develop a retail site outside the primary
33 shopping area, which has not been allocated to retailing in an up-to-date

1 development plan, are required to demonstrate that there are no other centrally-
2 located sites suitable for the development”.

3 So, it is quite possible - quite possible - that a new town centre store may fare better under
4 this test than an extension to an existing store that may be out of town. Over the page is the
5 need test, which we have heard a lot about. At para. 12,

6 “Applicants wishing to develop a retail site outside the primary shopping area [so,
7 it only bites outside], which has not been allocated to retailing in an up-to-date
8 development plan, area also required to demonstrate the ‘need’ for that
9 development”.

10 So, again, it may be that the out-of-town incumbent has to satisfy the need test, but an in-
11 town entrant does not.

12 Then, finally, for present purposes, is the impact assessment. That is at para. 16:

13 “PPS6 also requires that any development of more than 2,500 sq metres of gross
14 floor area that is in an edge-of-centre or out-of-centre location, and not in
15 accordance with an up-to-date development plan, must be accompanied by a retail
16 impact assessment (RIA). An RIA seeks to assess the impact of the proposed
17 development on the vitality and viability of existing centres within the catchment
18 area.”

19 Once again, you can see at a glance that there may be different considerations that arise
20 there if the new development is proposed in the centre of the town rather than outside the
21 town.

22 I am not making an assertion about what will or will not happen in any particular case.

23 What I am saying is that it is not straightforward and it is not obvious that in all cases the
24 incumbent will be able to meet need and there will be no entrant that can.

25 Where we are left then is asking ourselves, what are these cases that Tesco are relying on
26 where there will be some form of unmet demand as a result of the competition test? I
27 submit that there are six conditions that would have to be satisfied before this could
28 possibly arise. Firstly, you have to have an area of high concentration in the first place.
29 Secondly, there must be an incumbent who is monopolist for the reasons we have already
30 been through. Thirdly, that incumbent must be seeking to expand by store extension not by
31 new store. Fourthly, the planning system must be such that it would allow the incumbent
32 to carry out that expansion, because that is the only circumstance which we are worried
33 about. So somehow the incumbent can get through the hoops of the planning system.
34 Fifthly, for some reason the new entrant cannot come in. So even though the incumbent

1 could get planning permission the new entrant could not. Then sixthly, very importantly,
2 there must somehow be this consumer detriment that we are talking about, the somewhat
3 amorphous idea that there will be a cost to consumers because of the loss of this extension.
4 So those are the only cases where this supposedly overlooked cost could possibly arise.
5 We say this is a narrow class and to come back to what I said in opening these submissions,
6 it is in reality truly exceptional. That is exactly where the override comes in by the local
7 planning authority. Can I take you back to that in the Report. It is p.191.

8 MR. MATHER: Just a matter of interest, why do you say it has to be monopolist?

9 MR. WARD: Because if there are two stores in there ----

10 MR. MATHER: There would not be two stores with 50 per cent each.

11 MR. WARD: Let us suppose there are two stores. If there are two stores, whatever the barriers
12 to entry that one store faces in expanding, they are going to be *prima facie* at least the same
13 as the barriers that the other store faces. So if store A would like to expand by extension it
14 faces the same barriers as store B. Of course, there may be different facts on the ground,
15 depending on where they are. The points I have just made about the town centre make it
16 very clear that in individual cases there may be differences. But Tesco has put its case at a
17 very high level of generality and said there is something illogical about the Competition
18 Commission's approach because of the existence of barriers to entry.

19 PROFESSOR PICKERING: What do you say to the argument which, as I recall Tesco
20 advanced, that if A has 60 per cent and B has 40 per cent of the existing market and there is
21 potential for growth, A obviously cannot expand or open a new store but the suggestion is
22 that B will decide strategically that it will not expand or develop new floorspace in order to
23 keep A constrained by the threshold?

24 MR. WARD: Sir, Tesco's skeleton argument at least, although not its oral submissions, was full
25 of all sorts of examples that it said posed various difficulties on various sets of facts,
26 hypothetical examples that were said to be difficult. Of course some difficulties could arise
27 in some cases. In the Competition Commission's skeleton argument it sought to answer all
28 of those examples on a case by case basis. We respectfully agree with what was said there.
29 Even if there are anomalies or hard cases in the margin, or where in some circumstances
30 someone might try and game the system, that, in my submission, does not show there is
31 anything internally illogical or irrational, which is after all the test, about the remedy that
32 the Competition Commission had adopted. It may well just be a feature of any kind of
33 broad remedial rule across a large and complicated market with different players operating

1 with different commercial incentives. I would refer you back to what the Competition
2 Commission said in answering those points in detail.

3 PROFESSOR PICKERING: You are now giving evidence on behalf of one of the other
4 significant players.

5 MR. WARD: I hope not, sir.

6 PROFESSOR PICKERING: Well, submitting, making submissions on behalf of one of the other
7 significant players – I stand corrected. You are not disputing that strategic decision making
8 does occur and indeed that would be so. So under what circumstances could this could be
9 broken? I suppose the argument could be that this is one of the circumstances where one
10 might go to the local planning authority and say, “Actually, this market is being kept too
11 small in terms of floor space, therefore do not take any notice of it” – would that be the
12 solution?

13 MR. WARD: That is one solution, but there is another way of looking it. Supposing my client is
14 at 40 per cent and it has got one of its commercial rivals, let us say Waitrose, who are at 60
15 per cent. It knows Waitrose cannot absorb that extra demand, but my client is in the
16 business of selling groceries and making profits. On the face of it, it will want to absorb
17 that extra demand. The Competition Commission’s case essentially is that the certainty
18 that this cannot be done by an incumbent of course helps the rival make its decision.

19 PROFESSOR PICKERING: So your client expands so that in the enlarged market it now has
20 60 per cent?

21 MR. WARD: It may do, or 59 per cent.

22 PROFESSOR PICKERING: All right, 59.99 per cent.

23 MR. WARD: As high as it dares, I am sure.

24 PROFESSOR PICKERING: Then what is the position of A? Presumably A is likely to say,
25 well, this expansion takes up all the capacity that is needed to serve this local market,
26 therefore there is nowt that we can do anyway in the short run.

27 MR. WARD: If, in my example, Asda expands and then the two stores are roughly the same
28 size, then of course the competition test ceases to apply. Then if there is further demand
29 they are both free to expand again until one or other of them gets over the threshold. It
30 would be, of course, very dangerous for Asda to refrain from expanding in circumstances
31 where that might, in effect, invite in a third entrant.

32 I was going to take you to the override and say, look, this is only going to be an exceptional
33 case where we can get down this taxonomy of circumstances which takes us down to the
34 kernel of what Tesco seem to be complaining about. Of course, the override is supposed to

1 apply only in exceptional circumstances. Could I ask you to look at the terms in which it is
2 couched. It is at pp.191 and 192. It is really the second limb that I want to focus upon,
3 which is at the top of p.192:

4 “The development, or any similar development, would not take place without the
5 involvement of a large grocery retailer that had failed the competition test.”

6 In the narrow case that we are here dealing with, what we are really concerned with is, in
7 effect, a planning law problem. In other words, the incumbent can get planning permission
8 but no other party for some reason can obtain planning permission to enter. Mr. Green
9 suggested yesterday that this was all going to be terribly difficult for the local planning
10 authority, but of course if it is in substance a planning question then the planning authority
11 is actually ideally suited to cope with it. For the reasons that I have given, it is only ever
12 going to happen exceptionally, as the Competition Commission say, and Asda is not in the
13 business of trying to argue that the exception is any broader than that. In those wholly
14 exceptional cases, if, for planning reasons, there can be no expansion by anybody else, the
15 override is there to take up the problem.

16 So taken together and looked at in the round, we do not accept that Tesco has shown any
17 logical inconsistency in the Competition Commission’s reasoning here at all.

18 My final point, which is a very brief one indeed, is about proportionality, the third of the
19 three questions that I identified at the outset. What Mr. Green has said is that the
20 Commission has failed to satisfy this requirement because it has failed to conduct a
21 sufficient analysis of the costs and benefits. As the President said yesterday, there is a
22 double proportionality issue here. There is a question about whether the costs and the time
23 of the assessment are, themselves, justified in terms of what would be required to be done.
24 Then, of course, there is the question ultimately about whether the outcome is, itself,
25 proportionate.

26 The premise of Tesco’s case that is all hopelessly insufficient is that the costs are very
27 large and are unknown. For the reasons that I have just given we submit that that is simply
28 not the case. Looked at properly, all we have here are the very modest administrative costs
29 that the Competition Commission put into the balance. Weighing those costs against the
30 prospective benefit, there was no need at all to conduct the kind of comprehensive Green
31 Book type cost and benefit analysis that Mr. Green argued for. All we had were modest
32 administrative costs and the prospect that over time the adverse effect on competition
33 would be mitigated away. For all of those reasons Asda respectfully submits that the
34 Tribunal should refuse this appeal.

1 Unless I can assist further those are our submissions.

2 THE PRESIDENT: Thank you very much, Mr. Ward. Is it going to be Mr. O'Donoghue?

3 MR. O'DONOGHUE: Sir, thank you very much. I certainly very much hope to finish by lunch
4 time. Sir, I appear on behalf of Marks and Spencer in this matter with Miss Niamh
5 Grogan, and in the interests of consistent corporate branding I shall refer to my client as
6 "M&S" going forward.

7 I have two points to make – one a bit longer, and one very short. The first is really to give
8 our perspective on what Professor Pickering referred to as the economic realism of entry in
9 a post-report environment. I want to do that not by reference to new evidence, submission,
10 conjecture, psychology, U-bends, any of that ----

11 THE PRESIDENT: No plumbing!

12 MR. O'DONOGHUE: -- I am, you will be relieved to hear, limiting myself to the text of the
13 report and to the contemporaneous evidence that was before the Commission at the time.
14 We say that the test is not as a legal matter whether it is self-evident that there would be the
15 same or more new entry post-report; the test is what would a profit maximising, rational
16 retailer reading the report, reading its findings, looking at the remedies, conclude in terms
17 of new entry in a post-report environment. We say very clearly and very fundamentally
18 there are a raft of sea changes that are the direct consequence of the remedies set out in the
19 report, and that the post-report environment will be materially different and better than the
20 situation as to the past.

21 Sir, I want to make a number of points that speak to that broad theme. The first point
22 which has been touched on already and I do not want to make any more or less of it than it
23 is, namely, the Commission found that competition is in general effective (para.10.1 of the
24 report). Of course M&S accepts that this circumstance in and of itself does not guarantee
25 new entry. No one has said that and it would be wrong to say that in the context of
26 concentrated local markets. But the point is a simple one but an important one, and it is as
27 follows: given that finding there is nothing fundamentally wrong with the market
28 equilibrium on a national basis, and there is nothing fundamentally wrong with the
29 dynamic of competition on a national basis, and to that extent it is all things equal,
30 reasonable and rational to conclude that there will be continued entry going forward.
31 Now, to turn that around another way, which I think is useful, suppose you have an
32 equilibrium in which local markets were not, for some reason, particularly concentrated but
33 there were serious questions about the quality of competition on a national level going
34 forward. Suppose, for example, there were one or more failing firms. Now, in that

1 equilibrium with that dynamic the Commission and the Tribunal – we say very properly –
2 ought to be concerned perhaps about the prospects of new entry in local markets going
3 forward, but here we say that the overall dynamic is different, it is positive and that has
4 material effects for looking at the specific local market situations going forward.

5 Sir, it is a matter of record, both before the Commission and this Tribunal that M&S has
6 given confidential evidence of its expansion plans, both as regards as the past, the present
7 and going forward – you will find that at para.12(a) of the statement of intervention
8 (section 2C of the core bundle).

9 Of course, we accept that the fact there has historically been some new entry that the
10 market is generally competitive that that in and of itself does not guarantee new entry going
11 forward, but the key point we wish to make is as follows. Looking at the package of
12 remedies, and looking at the rational economic incentives of profit maximising firms, the
13 report, with its package of remedies introduces a sea change in the environment of
14 competition and in the various barriers to entry as identified. Looked at as a whole that
15 package of remedies and changes fundamentally changes the incentives and, more
16 importantly, the ability of new entrants to compete in a more vigorous fashion than they
17 have in the past to erode these highly concentrated areas.

18 Let me turn first to the issue of incentives. We say that the incentives in a post-report
19 environment with the remedies in place will be materially different than they have been on
20 an historical basis.

21 Tesco has essentially looked at the situation going forward through the prism of what has
22 been the history. I had the great privilege of being next to Mr. Green for the last couple of
23 days and some of his submissions struck me as somewhat surreal. It was as if there was no
24 competition test remedy, it was as if there were no other remedies, and that the historical
25 record is an absolute record going forward of how competition will evolve in the post-
26 report environment. We say this is fundamentally wrong, that the incentives post-report
27 will be radically different.

28 There is a series of logical, coherent findings in the report that support that, and there are
29 logical reasonable conclusions and inferences that can be drawn from those findings to
30 make good that proposition on incentives.

31 The starting point is that for any new entry to occur by an incumbent or anybody else, there
32 must obviously be demand. If there is no additional demand, there will obviously be no
33 entry. That is point 1.

1 Point 2 is that if there is demand in a particular highly concentrated market then entry will
2 in general – I emphasise “in general” – be economically rational for retailers in that
3 locality. The next point is that the competition test does introduce a fundamental change in
4 incentives, because there will be a strong presumption against expansion by an incumbent
5 retailer in a highly concentrated local market, subject to the override.

6 On the flip side of that – that being the case – it will be obvious to other retailers that there
7 is a competitive opportunity, and that competitive opportunity depending on the market
8 shares may be significant, up to 40 per cent or more. That competitive opportunity, clearly
9 under the test in general cannot be met by the incumbent, so there is a fundamental shift in
10 dynamics and incentives. Now, it is very well documented in the report (paras. 7.52 et seq)
11 that each of the major retailers spends substantial resources on planning matters including
12 consultants, in-house teams, etc.

13 Again, in a post-competition test environment those substantial resources will be rationally
14 targeted specifically at those areas where there is additional demand and, more importantly,
15 where that demand cannot be met in general by the incumbent. Plainly, there is great
16 transparency in this regard. The existing sites that are highly concentrated are known. The
17 sites in future that may become so will be known - or at least identifiable. So, we say that as
18 a fundamental matter of incentives -- as a matter of economic rationality, the incentives for
19 non-incumbents to enter highly concentrated markets in a post-report environment will be
20 materially different and better, we say, for new entrants than they have been in the past.

21 That, we say, deals with the issue of incentives.

22 Incentives, of course, do not matter without some sort of changed ability to enter. We say
23 again, very, very clearly that there is a material difference between the historical situation
24 and the post-report environment. This is so for a couple of reasons. First, let me deal with
25 the issue of land-holding remedies, which I think it is fair to say has not received that much
26 air-time in the last couple of days. I will not detain you too long, but I think there are a few
27 important points.

28 Tesco, not surprisingly, sought to very much down-play the effect of these remedies. I
29 took it from Mr. Green that this was the equivalent of a footnote in a land law textbook and
30 it was really nothing else. But, Tesco, whether it likes it or not, not having challenged this
31 aspect of the remedy, is compelled to accept its full force and logic. To be very clear, it is
32 compelled to accept the land-holding remedy will prevent, mitigate, or eliminate barriers to
33 entry associated with land-holding, and that that remedy, or package of remedies, is a
34 comprehensive, reasonable, and practicable solution to the problem as identified.

1 Now, these are not, with respect, cosmetic changes. They are fundamental changes that free
2 up barriers to entry in a very orthodox competition policy fashion. Looking first at the
3 issue of exclusivity - in paras. 11.183 to 11.230 of the report - these are sites which are not,
4 for the most part at least, in the control of retailers, but are owned by developers or
5 landlords. Of course, the immediate effect of removing exclusivity will be that that
6 developer or landlord will be free, going forward, to sell any additional space to a new
7 entrant whereas previously they would have been prohibited. In other words, looking at
8 this in terms of key inputs, a key input - if not the key input - which was previously
9 unavailable to a new entrant will, in the post-report environment, become unrestricted.
10 Now, similar comments can be made about the restrictive covenants. Again for your
11 reference, that is at 11.137 to 11.182 of the report. Again, in broad terms, these restrictive
12 covenants were found to have similar pernicious effects to exclusivity arrangements.
13 Mr. Roth has touched on this, but it is useful to list the series of restrictive covenant
14 remedies because I think they are impressive if looked at together. Of course, as a basic
15 matter, there were thirty specific restrictive covenants in concentrated areas that were
16 identified and need to be removed. There are a further series of restrictive covenants that
17 date back further in time, in addition to new covenants that have been imposed since the
18 Commission concluded its information gathering exercise, which will also need to be
19 removed going forward, and they will need to be notified to the Office of Fair Trading
20 under the procedure identified in the remedy. More importantly, as a preventative
21 measure, there will be a restriction on future restrictive covenants going forward.
22 Now, Mr. Green then says, "Well that's all very well and good, but what actual effect or
23 likely effect will that have on new entry and the availability of land?" Again, we would
24 respectfully submit that it is simply not open to Tesco, not having challenged the remedy,
25 to seek to down-play its force via the back door. Tesco is compelled to accept the full logic
26 as set out in the statute of that remedy. It is effectively *res judicata* for that purpose. There
27 is no scope for a contrary finding. But, again, Marks and Spencer has, in its statement of
28 intervention at para. 12(f), given confidential evidence in relation to eight specific
29 competitive opportunities that the removal of exclusivity has presented to it and will do on
30 a forward-looking basis.
31 Now, quite apart from the situation of Marks and Spencer, it is useful to look at the effect
32 of these land remedies as a matter of economic rationality on the developers in question. It
33 seems to us perfectly reasonable and rational to conclude that a developer owning a
34 specific site in a highly concentrated market that was previously subject to exclusivity or a

1 restrictive covenant -- that developer would sell rationally to the highest bidder in that
2 particular market. Now, it seems to us again obvious that if the incumbent is prevented,
3 because of the competition test, from expanding, then the highest valuation as a bidder will
4 be the next alternative retailer who is in a position to enter the market without failing the
5 test because its valuation for that unrestricted land will be correspondingly higher.

6 Now, one finding which is connected with that, and which is important, is that the report
7 finds that there is no systematic holding of land by retailers with the sole purpose of
8 creating a barrier to entry to competition. That is para. 11.238 of the report. This finding -
9 which again is not contested - suggests implicitly, but clearly, that even an incumbent who
10 held restricted covenant land, or land subject to exclusivity, it would be rational for that
11 incumbent to sell the land to someone who had a higher valuation. So, it seems to us clear
12 and rational from the report that both on the developer's side, and in terms of incumbents
13 themselves, that the economic incentives in a post-report environment will be such that
14 land will, in practice, be free-ed up.

15 Sir, the final point on the issue of incentives which we say of the three is perhaps the most
16 important is the effect of the remedies on the planning system. Again, we see this as a sea
17 change in the current environment. We see it as a change that has enormous benefits for
18 new entry competition. Again, as a basic matter, there is a fundamental change in the
19 planning system, and the change is that there will be a systemic bias, if I can call it that, in
20 favour of new entrant competition, and a corresponding bias against entry or expansion by
21 an incumbent. Whether one calls this a mitigation of a barrier to entry or not, the
22 fundamental fact is that the situation today, before we have a remedy, is that if you identify
23 quantitative need, there is no statutory basis or policy basis for the planning authority to
24 take into account the fact that the expanding party would be an incumbent operator. In a
25 post-competition test environment, that aspect of the planning regime, quite apart from any
26 change to the need test, will be radically different. There will be a specificity and to that
27 extent there is a fundamental change.

28 This is not simply a negative factor. There is also an affirmative benefit. Again, one of the
29 findings in the report which is not challenged (and this is at para. 7.66) is that there is an
30 imbalance of risk in terms of the planning process in favour of larger operators and against
31 new entrants and smaller operators. It seems to us, looking at this as a matter of mis-
32 balance, that, put very bluntly, the risk that a large incumbent retailer might, or would, fail
33 the competition test that that will help redress the imbalance that was found, and redress it
34 in a way that would operate in the new entrant's favour.

1 Now, we accept that this risk imbalance is not something that can be quantified in net
2 present value, or other, terms. But, it does not mean that it is any less real because of that.
3 It is something that is tangible to a new entrant to enter. We say in a post-report
4 environment that the redressing of that imbalance is an important change in terms of the
5 ability of a new entrant to enter.

6 Now, quite separately from that, there is, of course, the issue of the needs test. Mr. Green's
7 main submission on that is that because it is not yet final it is under consultation; it is
8 something that can be ignored for present purposes. We accept, of course, as we must, that
9 it is not something yet final. But, we do not accept that it is something irrelevant for the
10 purposes of these proceedings. Let me outline in what sense I say it is relevant.

11 Clearly, there is a finding in the report - again uncontested - that the needs test has had
12 unintended consequences of restricting competition. You will see that at paras.7.36 and
13 7.41 of the Report. This is so for essentially two reasons. The first is that the basis on
14 which quantitative need is assessed, looking at population growth per capital expenditure,
15 that these factors, again unintentionally, tend to operate in a fashion that makes it less
16 likely that the quantitative need can be identified with these. Secondly, and again this will
17 be obvious, the quantitative need is given priority over any qualitative aspects, and because
18 of that that order of priority that is advised in favour of the quantitative aspects of
19 competition and perhaps not enough emphasis on product differentiation, and so on and so
20 forth.

21 The situation today is as follows: the report clearly identified the needs test as a problem.
22 It foreshadowed, and you will see this at para.7.36, that the government was likely to
23 replace that test. There are further references at 11.135 and 11.131 to the need to take into
24 account broader competition considerations in future planning policy.

25 In the intervening period we, of course, know that the new draft has been published. It is
26 entirely consistent with what has been foreshadowed in the Report. There is no other
27 proposal under consideration. It is as clear as it can be for a proposal that the needs test
28 will be abolished. We say that while the competition test is not dependent on the needs test
29 changing the policy situation today which is reasonably settled, that is something that is
30 relevant to the assessment of the entry prospect in a post-Report world.

31 We say this for a couple of reasons. First of all, it seems to us that where the statute, s.134,
32 contemplates action by a third party as a remedy, it is appropriate, and we would submit
33 necessary, to take some account of that action by a third party going forward. Of course, as
34 I said, the Report itself is predicated on the assumption that this needs test would be

1 replaced, and so the adverse effects they identified in connection with that test, to some
2 extent they can be downgraded or perhaps treated as less relevant than they might have
3 been in the absence of any change going forward.

4 We say that it is relevant. We do not say it is dispositive, we do not say it is decisive, we
5 could not say that, but it clearly is relevant and it clearly is something that weighs in the
6 balance coupled with the package of remedies. I suppose to use a phrase close to some
7 people's hearts in this room, it is a case of "every little helps". There is a broad package of
8 remedies and we say that, as a new entrant, looking at this rationally and as a profit
9 maximising firm, you will look at the cumulative effects of these remedies. You will factor
10 that into rational economic thinking and expansion and, without needing at all to give
11 evidence, we say that it is apparent on the basis of the findings in the Report that any
12 rational economic operator reading this report would conclude that its ability and its
13 incentives in a post-Report environment are materially increased relative to the past, in
14 particular in highly concentrated areas because of the systematic bias of the competition
15 test in favour of new entry and against incumbents.

16 Sir, I will leave the issue of exceptional circumstances. I think it is what it is and I think
17 the Tribunal is clear as to what it says. It can read that.

18 There is one other point I want to pick up which Professor Pickering has identified. It goes
19 to what was it feasible for the Competition Commission to do in terms of looking on a
20 forward looking basis at the benefits of the test. Mr. Roth and the Commission will
21 obviously respond to Mr. Green's table in due course, but let me make a couple of casual
22 observations based on known facts of the last several months. In the last several months
23 while this appeal has been pending, there have been at least three developments that we
24 would say illustrate very, very clearly that the sort of analysis that Tesco has in mind would
25 not be worth the paper it is written on. It would be out of date by the time the ink had
26 dried.

27 In June of this year the Office of Fair Trading had been looking at the merger between
28 Somerfield and the Co-Op Stores. Despite not identifying a single problem on a national
29 basis they have recommended 126 local market store divestitures. That is a very simple
30 example of how 126 local markets could be radically changed in a single stroke. Again at
31 the risk of stating the obvious, and Professor Pickering picked up on this, when we talk
32 about exogenous shocks, there are exogenous shocks and there are exogenous shocks. We
33 have had unprecedented financial turmoil. Not only are there questions about the cost of
34 capital, but there are fundamental questions about even the ability to get capital in the short

1 to medium term. Again it seems to us that anything written in June of this year or in
2 January of this year would be utterly useless in the face of changes of this kind.
3 Finally, there are very public rumours in the press that Iceland, a national retailer with a
4 huge number of stores on prime sites, may be subject to a takeover. Again, this sort of
5 dynamism, even looked at over a very, very short period, to our mind raises serious
6 practical questions as to whether an analysis of forward looking benefits in such a context
7 would be of any value at all.

8 Sir, unless there are further questions I will leave it at that.

9 THE PRESIDENT: Thank you very much, Mr. O'Donoghue. Would you rather, as it were, that
10 we finished a bit earlier and started a bit earlier, Miss Smith?

11 MISS SMITH: Sir, I think a great deal of what I want to say can probably be said in the next ten
12 minutes. I may run over a little bit, but a lot has already been said.

13 THE PRESIDENT: Very well.

14 MISS SMITH: Sir, members of the Tribunal, I am in the unenviable position, or perhaps it is an
15 enviable position, of coming last. Obviously a great deal of what Waitrose wish to say has
16 already been said, and I adopt the submissions of Mr. Roth for the Commission, Mr. Ward
17 for Asda and Mr. O'Donoghue for Marks and Spencer. However, we would like to make
18 very brief submissions on just one point, and that is on the first ground of challenge, the
19 rationality and specifically the question of unmet demand. We do consider that there is
20 some value that we make some points, and it may assist the Tribunal from the point of
21 view of a participant in this market.

22 First of all, Tesco's case, as we understand it, is, in summary, as follows on unmet demand.
23 The Commission cannot assume that the detriment arising from unmet demand resulting
24 from the application of the competition test will be mitigated by rival retailers entering or
25 expanding in a market to meet that demand. As Tesco said, the Commission engaged in a
26 leap of reasoning or a jump in logic from the evidence that there had generally been
27 expansion in the supermarkets' industry to assumption that rival retailers would meet
28 unmet demand in highly concentrated local markets. Mr. Green said this is a non-sequitur,
29 you cannot equate the situation generally with what might happen in highly concentrated
30 local markets. Although generally the picture might be one of growth, he says, growth has
31 not been a feature of highly concentrated local markets, and this is because of barriers to
32 entry in those markets. He says the competition test does not, and has never been said to
33 remove or reduce those barriers to entry.

1 In Waitrose's submission Tesco in this regard is wrong, and not only is it wrong but their
2 submission is divorced both from commercial reality and from our experience in the
3 market. First, we say very briefly the submission is wrong for the following reasons. The
4 detriment that Tesco says the Competition Commission failed properly to consider is a
5 detriment arising from the application of the competition test. That detriment only arises
6 even on Tesco's case in the following scenario. An incumbent retailer identifies unmet
7 consumer demand. That incumbent retailer seeks planning permission to build a new store
8 or to expand an existing store. That incumbent retailer would be granted that planning
9 permission but for the application of the competition test. The competition test is applied
10 so as to block the incumbent's application and there is resulting detriment to consumers
11 because the demand is not met.

12 We say the suggestion that a rival retailer would not enter into or expand upon the market
13 in that situation is unreal. Consumer demand has been identified, planning permission
14 would have been granted were it not for the competition test as Mr. Green himself said on
15 the first day of these proceedings (p.14 transcript day one).

16 "The competition will only have a specific additional effect when the planning
17 regime would otherwise permit a development in its absence".

18 The competition test blocks the incumbent's entry or expansion but a rival retailer is then
19 given the opportunity to meet that demand, that is the effect of the competition test. We
20 say that Tesco's argument is also divorced from commercial reality. It was Waitrose's
21 evidence to this inquiry that it had a clear intention to expand and to open new stores,
22 particularly if it was assisted in doing so by the operation of the competition test.

23 If I could ask you, Sir, in this regard just to turn to Waitrose's statement of intervention,
24 which is in our bundle 6 (your bundle 17) and we are at tab 4. First, we say that this is a
25 highly dynamic market and I do not think there is any dispute on that point, but just to give
26 you a very small example of how things move, and how quickly things move, if you turn to
27 p.4 of our statement of intervention, at para.8 – this is just background information on
28 Waitrose:

29 "As at the date of the Commission's Report Waitrose had 188 stores in the UK." Then
30 from the footnote you are given the update: "As at the date of this Statement of
31 Intervention ..." just a few months after the Commission's Report, Waitrose has 192
32 branches and their total sales' space has increased to 3,996,141 sq. ft.

33 Waitrose gave evidence to the Commission to the following effect. First, that it was
34 actively seeking to expand and open new stores and in fact it had made specific public

1 announcements to that effect. This is shown in para.24 on p.8 of our statement of
2 intervention.

3 The second point is that Waitrose said to the Commission that it had been frustrated in its
4 attempts to grow organically by current market conditions including the application of the
5 planning regime, and you find that in paras. 25 and 26 of our statement of intervention.

6 Thirdly, Waitrose said that it believed the introduction of the competition test would help it
7 to grow organically and open new stores, and again you find that in paras. 25 and 26. It
8 was for those reasons that Waitrose had in fact proposed and supported the introduction of
9 the competition test throughout the Commission's inquiry from the very first submissions it
10 made to the Commission, and that is set out in paras. 12 to 20 of our statement of
11 intervention.

12 It is Waitrose's strong view that the competition test will be effective. We would not, of
13 course, have proposed that test had we not thought that to be the case. One may not be able
14 to quantify exactly how the competition test will operate in this constantly changing and
15 dynamic market, but that does not detract from the point that it will be effective, it will be
16 internalised by participants in the market and it will inform their actions in that market.

17 In his submissions Mr. Green focused on unmet demand on two particular points, and I
18 would just like to address those. He focused first on the fact that the Competition
19 Commission had found a number of areas where monopolies had persisted for a substantial
20 period of time. We heard a lot about the "persistence" study at appendix 7.1 of the Report.
21 He focused first on that fact and secondly on the fact that the Commission had identified
22 evidence of demand that might not be sufficient to justify the entry of a new store into a
23 market, but only expansion or extension of an existing store.

24 He said that if you have that demand in a monopoly area then only the incumbent can
25 expand to meet that demand. Quite apart from the points that were made by Mr. Ward that
26 that is a very rare situation I would also like to address why we say even in that situation
27 what Mr. Green said was misconceived.

28 First, one has to start with a clear finding that the Competition Commission made that it is
29 easier for an incumbent to get planning permission to extend an existing store than for a
30 new entrant to get permission to build a new store, and in that regard if I could just refer
31 you to the Report, file 2, at p.139 of the Report, if I could start with para.7.64, under the
32 heading: "Retailer interaction with the planning system", and there are various pieces of
33 evidence before it. The Commission came to this conclusion set out at para.7.64:

1 However, the relative ease of gaining planning permission for store extensions as
2 evidenced by the number of store extensions that we observed, combined with the need test
3 is likely to provide incumbent retailers with an advantage over new entrants in providing
4 new grocery retailing floor space in a local market.”

5 That point is repeated at the bottom of the page, para.7.67:

6 “The planning regime places more limited constraints on the extension of existing
7 stores by grocery retailers compared with new larger grocery store entry. An
8 incumbent grocery retailer, by extending its store, will make new larger grocery
9 store entry by a rival grocery retailer more difficult.”

10 Now, it may be understandable why that is the case. If you have an existing store you
11 already have land, you already have a brownfield site with appropriate transport links, so it
12 is obvious why it would be easier to get planning permission, while in order to establish a
13 new store the new entrant may have to assemble land, put together a site as well as getting
14 completely new planning permission. The Commission recognised that may take a number
15 of years.

16 In these circumstances the threat that an incumbent retailer may simply extend its existing
17 store in reaction to the possibility of new entry into a monopoly area is very credible and,
18 in our submission, discourages new entry into those monopoly areas.

19 In Waitrose’s view, the application of the competition test to persistent monopoly areas
20 would provide, therefore, an opportunity for it, and other, retailers to enter into, and
21 compete with, the incumbent in that monopoly area. I say that for the following reason: if
22 the quicker and easier route to planning permission by extending an existing store by the
23 incumbent is blocked by the competition test, then a rival retailer or potential new entrant
24 would be more likely to spend the time and money necessary to put together a site and to
25 obtain planning permission for a new store. All of its other competitors would have to do
26 exactly the same thing to enter into that monopoly market by definition. So, everyone
27 would be starting from the same position. It is therefore more likely that once the
28 competition test is in place, rival retailers would make more effort to enter that monopoly
29 market. The effect of the competition test will be that Waitrose, and other rival retailers, I
30 submit, will target markets that they might not previously have targeted for those very
31 reasons.

32 On the other hand, of course, Mr. Roth made the point in his opening submissions
33 yesterday that Waitrose also has a number of monopoly stores. So, it will have to improve
34 its offer in those stores and make defensive strategy against the threat of new entry.

1 The opening of a new store in a market which has previously been a monopoly will meet
2 the consumer demand which the incumbent has been blocked from meeting. But, it will
3 also provide a new entrant such as Waitrose with the opportunity to compete head-on with
4 the incumbent, and to take market share from that incumbent.

5 In our submission, it is quite unreal to focus only on a retailer entering a market to take up
6 unmet consumer demand. Grocery retailing, as we know, is a highly competitive industry.
7 Retailers do not just go in to sop up bits of unmet demand. We also compete to take market
8 share from other retailers by giving customers choice, a different retail offer. If a rival
9 retailer is able to make a better offer than an incumbent - whose retail offer the
10 Competition Commission found was likely to be worse in these highly concentrated local
11 markets - then it has every incentive to enter into those monopoly markets.

12 THE PRESIDENT: So, there is a bit of a tension there, is there not? On that basis there would
13 be nothing to stop you doing it anyway and you would have lots of commercial incentive
14 to ----

15 MISS SMITH: Apart from the real threat that any moves to assemble land to enter into a new
16 market would be met by an extension. It is a real threat.

17 THE PRESIDENT: Yes. I see that point. I am saying that just as important as unmet demand is
18 the need to take market share and compete for the same customers. It would not affect that
19 incentive, would it?

20 MISS SMITH: Sir, I do not think I said it was just as important. I make the point which is a
21 point which is important to my clients - that it is unreal to say that demand is somehow just
22 about filling up a bucket and then you stop. You go in not only to take up unmet demand,
23 but you go in to compete with other retailers and to take market share from them. That is
24 simply a statement, we say, of the obvious. It comes about as well from the questions put
25 by Professor Pickering over the course of the last couple of days about whether the
26 concepts of unmet demand and need had any relationship with how retailers actually
27 considered the questions of capacity, and whether they had any bearing on the business
28 decisions they take for new stores and developments.

29 THE PRESIDENT: I do not want you to feel rushed. If you are going to be a longer than
30 another five minutes ----

31 MISS SMITH: I think I might just be longer than another five minutes.

32 THE PRESIDENT: We will continue after lunch.

33 (Adjourned for a short time)

1 MISS SMITH: Sir, I was moving to the issue of unmet demand and need, and how they might be
2 considered, or not, in the business world. First of all, dealing with the issue of need, as
3 applied by local planning authorities in considering planning applications, that is, of
4 course, relevant to retailers' decisions to open new stores because planning applications
5 will only be granted if the development fulfils a need that has been identified. Of course, it
6 always therefore forms a backdrop to Waitrose's consideration as to whether or not it is
7 going to open a new store.

8 The concept of unmet demand, as it has developed in the course of this case, is not a
9 concept with which we are familiar. As Waitrose explained to the Commission during the
10 course of the investigation, in assessing whether to develop a new store, in general terms,
11 Waitrose will look at the proposed store size, the population in the catchment area for the
12 proposed store, and the competitive characteristics of the catchment area which will
13 include, of course, what other stores might be present in that area. It will then identify
14 Waitrose stores that have similar characteristics - analogous stores - and having established
15 the analogous set of stores will assess the likely market penetration that might be achieved
16 by the proposed store, having regard to the sort of market penetration that has been seen in
17 analogous stores. An estimate of the sales can then be made for the proposed store.

18 It is clear, therefore, that Waitrose obviously considers how much existing demand is being
19 met by other competitors in a catchment area, but also how much it might be able to steal
20 from those competitors by offering choice in a different retail offer.

21 The final point I wish to deal with is Tesco's suggestion that the volume of unmet
22 consumer demand - for example, in a monopoly area - maybe so small as to justify only an
23 extension of a store, and not the opening of a new store. So, by definition, can only be met
24 by an incumbent. With regard to that, I would say one has to recall that although the
25 competition test only applies to developments of larger stores - that is, in excess of 1,000
26 sq.m. - or extensions that take a store to within the definition of a large store, to more than
27 1,000 sq.m. -- Those are the stores that the competition test applies to, but the stores which
28 enter to meet this demand posited by Mr. Green do not, of themselves, have to be larger
29 stores of course. We say there is a real possibility that new, smaller stores may enter a
30 particular market to meet that unmet demand.

31 In that regard, if I can just draw your attention to some of the findings by the Commission
32 which I do not think have been drawn to the Tribunal's attention yet -- Those are contained
33 in Appendix 3.1. These are simply matters of fact. Appendix 3.1 is not in the file with the
34 rest of the report. It appears in a number of other places, but if I can take you to it, attached

1 to our statement of intervention, which is our File 6/your File 17.

2 Appendix 3.1 is a factual overview of the UK grocery retailers. First of all, I will make a
3 number of points in that regard. If you turn to p.4730 there is the summary of facts as
4 regards Waitrose. At p.4732, Figure 25 - Waitrose store distribution. You can see from
5 Figure 25 that Waitrose itself operates a number of stores that are less than 1,000 sq.m. In
6 fact, I think it is publicly known that in actively rolling out a smaller store format as well at
7 the moment to focus on stores of less than 1,000 sq metres. Can you then turn to p.7,
8 internal numbering, p.4700. We have the summary of facts regarding the Co-Op, and there
9 in figure 4 you see the Co-Op store distribution. The majority of Co-Op stores, in fact, are
10 less than 1,000 sq metres. If you see over the page on p.4710, table 7, you see the average
11 size in sq metres of the Co-Op stores. The penultimate column is well below 1,000 sq
12 metres.

13 You see a similar pattern, if one looks now at Somerfield, internal numbering p.22, p.4724
14 of the bundle. At figure 19 we see Somerfield store distribution. Again the majority of its
15 stores are less than 1,000 sq metres. You see on table 18, over the page, p.4725, the
16 average size of Somerfield stores is less than 1,000 sq metres.

17 I am not going to take you to the figures, but I will make the following two points. The
18 average food retailing area for M&S is also less than 1,000 sq metres. That is table 11 in
19 appendix 3.1, internal numbering, p.13. We are all aware that both Sainsbury's and Tesco
20 have local store formats, convenience store formats with stores of less than 1,000 sq
21 metres. That is internal numbering, pp.20 and 26.

22 I would like to compare those figures, if I may, with a finding in para.7 of appendix 7.1 of
23 the Report. Could I just ask you to turn that up, it is in file 2. This is appendix 7.1, the
24 persistence study. It starts on p.409 in bundle 2, and I would ask you to turn to p.411,
25 para.7. This is about extensions by persistent monopolies, and the last sentence of para.7:

26 "These extensions vary in size but on average increase grocery sales area by
27 approximately 630 sq metres."

28 That is the average size of the extensions that have been seen in the past.

29 Perhaps just for completeness I should also refer you to para.10 of that Report on p.412, in
30 which the Commission finds that

31 "... 79 per cent of persisting monopoly and duopoly stores ... are located in
32 isochrones which appear capable being able to support an additional store on the
33 basis of population."

1 In the light of all those findings we say in conclusion that the situations where unmet
2 demand may not be met by a rival retailer will be extremely rare.

3 THE PRESIDENT: The reason they are concentrated up to now is because of some of the
4 barriers that are going to be relaxed?

5 MISS SMITH: Relaxed and mitigated by the competition test.

6 Sir, unless I can help you or your colleagues further those are our submissions.

7 PROFESSOR PICKERING: Miss Smith, what you have just been saying is certainly of interest.

8 Does it bear upon, and I am just trying to check, supplement 1 on 341 of the internal
9 numbering, so that is an annex to the report?

10 MISS SMITH: I cannot say I am 100 per cent familiar with this document, but I will assist you if
11 I can.

12 PROFESSOR PICKERING: Fair enough, but it seems to me, and I am conscious that we,
13 perhaps mercifully and happily have not had econometrics introduced into these hearings,
14 we have the Competition Commission identifying the “big four” as essentially a set of
15 competitors within each other, against each other. Then we have some other also
16 potentially significant players, which includes two of the interveners in Marks and Spencer
17 and your own client, Waitrose, and then some others whose impact may not be as direct on
18 the big four. Then we have other types of fascia operated by Tesco and Sainsbury, and so
19 on, and smaller retailers. So we have a *continuum* perhaps of degrees competitiveness
20 between types of store or competitiveness with a potential incumbent who is one of the big
21 four. What you are saying, and I am trying to draw this out because I think it is certainly of
22 interest, is that while the impact of competition may not be so great between smaller stores
23 and the big stores, nevertheless those smaller stores may well be better able to get into the
24 market. They do not have to accumulate such a large supply of land, they are not
25 dependent upon the high volume of predicted turnover. So they are offering choice even if
26 they are not substantially competitors to the big four. Am I expressing something that you
27 would agree with or not?

28 MISS SMITH: I am not sure I would go that far. The purpose of my submissions was one has to
29 focus in on what is the detriment that Tesco say will occur. The detriment they say will
30 occur is unmet consumer demand. That unmet consumer demand does not necessarily
31 have to be met by a direct competitor of the incumbent. What they are saying is that there
32 is demand out there which will not be met if you do not let the monopolist expand. I am
33 saying the situation where that will occur is extremely rare because we are not just talking
34 about Asda going into a monopoly where there is unmet demand, for example, because

1 there is a monopolist. So we start with a monopoly. Say Waitrose is a monopoly. We are
2 not just talking about Asda coming in to meet the unmet demand. There is a range of
3 situations, there is a range of ways in which that demand could be met. What Tesco is
4 talking about is that there is unmet consumer demand which leads to detriment. There is a
5 broad range of situations where that demand could be met. You do not have to, in fact,
6 someone coming in who is competing directly with the existing incumbent. If there is
7 demand someone going to come in, and it could be one of the other big four, it could be
8 Waitrose or Marks and Spencer, it could be a smaller retailer. They are not talking about
9 competition, they are talking about an unmet demand. So one has to focus in on what the
10 detriment is that Tesco is saying exists.

11 PROFESSOR PICKERING: I get exactly the distinction that you are making, and no doubt if he
12 wants to comment on these two concepts and the extent to which they are inevitably, or not
13 necessarily inevitably inter-related, Mr. Green will no doubt offer us his views on it, but
14 thank you.

15 MISS SMITH: Thank you. Just by way of the final, final submission on that, one has to get
16 back to the point that what this is all about is a judicial review where it is said that the
17 Competition Commission failed to take into account a relevant cost, and that cost is this
18 detriment.

19 THE PRESIDENT: Following up on Professor Pickering's point, if the unmet demand was met
20 by a non-competitor, if I can put it that way, somebody who is not in a larger store
21 category, which I think was between 1000 and 2000 – something of that sort. I think the
22 average you showed us was 600 and something for some of these extensions. But if it was
23 met like that it would do nothing for the problem of concentration, would it, in the
24 Commission's terms?

25 MISS SMITH: But that is not what Tesco's criticism is. Tesco's criticism is that there is this
26 detriment, and the detriment is unmet consumer demand, not that the competition test does
27 not meet ----

28 THE PRESIDENT: I follow that, I was going on another stage to see whether the point you are
29 making actually that had any impact on the other issue as to whether this remedy would be
30 effective – that would not help concentration in the terms in which it has been identified as
31 a problem, would it, if the only entrants were smaller in those circumstances, non-
32 competitors in the larger store sense?

33 MISS SMITH: In that situation one would have to go back to the definition of highly
34 concentrated local store markets, and whether one only included in that definition the

1 larger stores, and I am afraid I do not have that definition at my finger tips but it may be
2 that the Commission can address.

3 THE PRESIDENT: Thank you very much, Miss Smith.

4 MR. ROTH: Just to respond to Professor Pickering's question about the novelty of the remedy, it
5 will only take me two minutes. By that I understand these terms that here is a remedy that
6 relies for its effectiveness on the operation of the market and market forces, but places an
7 obstacle in the way of the commercial options of market participants, and that is the nature
8 of the remedy in generic terms. We say "no", it is not novel and the recent example is the
9 LPG inquiry report of 2006, that was liquefied petroleum gas for domestic use. There was
10 a market where there was competition between different suppliers, there were the big four
11 and there was a significant number of smaller regional suppliers, and of the big four one
12 was much the biggest and that was Calor ** of course. But there were barriers to
13 competition between them that were found in obtaining customers from one another, in
14 other words to switching, and the regional participants were finding it very hard to grow
15 and take customers away from the big four. One of the barriers was safety legislation
16 because the safety legislation led to the practice of exclusive supply so that the big tank
17 that the householder gets and the supply of gas into the tank would come from the same
18 supplier and there was exclusivity with the tank and the supply. The Commission looked
19 at that and found it was not appropriate to direct that there should be no exclusivity of
20 supply because that would impede compliance with safety legislation which had wider
21 public purposes, and so that was not an answer that they could recommend.

22 Another element in the impediment to switching was because the tank belonged to the
23 supplier of the gas and the supplier would not transfer the tank to a new supplier if the
24 consumer switched, and the Commission found that that deterred the consumers from
25 switching because of all the hassle and bother at having the tank taken away – these are big
26 tanks – and a new one installed, etc.

27 So the remedy that the Commission adopted was to provide that if and when a consumer
28 decides to switch supplier then the existing supplier is obliged to offer to sell the tank to the
29 new supplier, and there is a mechanism to determine the price and so on. So that was to
30 facilitate switching of supply. But the effectiveness of the remedy of course depends on
31 new suppliers persuading customers to switch and customers choosing to switch, so it
32 depends on the commercial efforts of the market participants in the new environment, with
33 the new regime, to take market share from each other and in particular for the smaller
34 suppliers to gain.

1 THE PRESIDENT: A bit like number portability, I suppose, it is similar is it not? If you
2 persuade someone to switch you have to impose the obligation that the number can go with
3 them if they want it.

4 MR. ROTH: Yes, indeed, that is a good example. I was thinking particularly of the market
5 investigations. This was a remedy that the smaller regional suppliers strongly supported,
6 because they said “Yes, this will help us gain customers” and the largest company in the
7 market, Calor ** strongly opposed, but that was the remedy that the Commission came up
8 with and incidentally there is no prediction in the report as to what extent switching would
9 increase, or how quickly it would take place, but the Commission was satisfied that this
10 was an effective remedy that would bring about better competitive conditions in the
11 market, and we say that is entirely in tune with the whole purpose of market investigations,
12 because market investigations are concerned with the failure of the market to work as well
13 as it should, so it is entirely appropriate to have a remedy which relies on the working of
14 the market to be effective but with an adjustment so as to make it that bit more effective.

15 THE PRESIDENT: Thank you.

16 MR. GREEN: I will start with the Waitrose point; it is rather a good point. It is a point that
17 Tesco rather sympathises with. It is a point that Tesco made to the Competition
18 Commission, but it was rejected, flatly, by the Competition Commission. For your note
19 p.389 para.18 of appendix 6.1. It was rejected on the basis (a) factually they did not accept
20 it; and (b) a different product market – third bullet point down under para.18.

21 “Third, the presence of mid-size stores (and LADs) in absorbing existing grocery
22 demand. Tesco told us that, whatever conclusions we reach on product definition,
23 mid-sized and LADs stores absorb some demand in local areas. Further, Tesco
24 told us that at the time a retailer decides whether to enter a particular local area, it
25 would take account of the presence of mid-sized and LAD stores. We do not
26 think that mid-sized and LAD stores exercise a sufficient competitive constraint
27 on larger grocery stores to be included in the relevant product market. For that
28 reason, we do not think that on average across local markets in the UK, the
29 presence of these stores explains the existence of highly concentrated local
30 markets.”

31 Appendix 7.1 incorporates the factual conclusion that there is substantial unmet
32 demand sufficient to justify a new store in highly concentrated areas, and that
33 obviously is a factual conclusion which exists notwithstanding the existence and
34 possibilities available to mid-size stores. So as with many aspects of this case

1 Tesco has sympathy for various arguments, does not always agree with the
2 Competition Commission but nonetheless we are concerned with the Competition
3 Commission's actual findings.

4 What I would like to do, and if I was to predict how long I was going to be I would be
5 tempted to say I will be finished over time – (Laughter) – certainly in under 100 years and I
6 will address some, possibly the majority and possibly all of the observations made by the
7 Competition Commission. But in order to facilitate things because this is not a highly
8 speculative exercise we produced a short note and I anticipate I will be approximately half
9 an hour to forty five minutes.

10 If we can circulate this? What I am proposing to do is summarise the points. As I go along
11 I will give you paragraph numbers which track the note. I want to start with some
12 observations on the law and the statutory context. We deal with this in paras. 1 through to
13 7 of the note. The first point is that there is a degree of common ground between Tesco
14 and the Competition Commission. We both agree that there is a “whether or not”
15 requirement in question 1 under s.134 in relation to remedies. The difference between us is
16 that Mr. Roth says that the thrust of the Act is in favour of intervention. He, in effect,
17 suggests a statutory bias. He thinks it is almost inconceivable that if you identify an AEC
18 you would not intervene. We say that if this is the approach that the Competition
19 Commission has adopted to the Act, then it has erred in law because there simply is no
20 bias, one way or the other, in the Act. It poses the question, and it permits a remedy to be
21 imposed where it is comprehensive, practicable and reasonable. But, there is no bias one
22 way or the other.

23 We point out that in this particular report the Competition Commission has itself identified
24 AECs and decided not to adopt a particular remedy. We set out the details in para. 4. Here,
25 the Competition Commission identified ninety individual controlled landsites having an
26 AEC. The Competition Commission imposed remedies in relation to the thirty restrictive
27 covenants and the thirty exclusivity arrangements, but in relation to the eighteen landbank
28 sites and twelve landsites that are leased, or sub-leased, to thirty parties, the Competition
29 Commission decided not to impose any specific remedy.

30 In paras. 5 and 6 we have set out a similar conclusion arrived at by the Competition
31 Commission in the 2000 report, albeit that was under the Fair Trading Act.

32 At para. 7 we simply refer to the Tribunal's judgment in *Somerfield*, which Mr. Roth made
33 submissions on. As you will recollect, that was a divestiture remedy, but we do not demur
34 from the propositions contained within that judgment but we do not think it has much to

1 guide in the present case. We are not suggesting that the Competition Commission does not
2 have an appropriate margin of appreciation. We say they simply have to follow and apply
3 the test of reasonableness, practicability and comprehensiveness. There is nothing in
4 *Somerfield* which detracts, or really adds to, the proper analysis of s.134.

5 If I can now turn to a more substantive issue - costs and benefits. Again, we have dealt with
6 this reasonably fully in the note. So far as costs are concerned - and for your note this is
7 paras. 8 to 28 - we submit that the Competition Commission should take account of costs
8 essentially working in two directions. The costs of the competition test imposes burdens
9 on those who are subject to it. Those are costs which are principally sound when one
10 examines the remedy from the point of view of proportionality. But, it imposes an
11 intrusive cap on growth. It is specifically designed to suppress the profits of those who are
12 subject to it. It covers 24 percent of all the stores. It applies to companies who have
13 obtained their market positions in fair competition, without engaging in any unacceptable
14 practices. In our submission, in our view, very unusual.

15 If grocers got together and agreed the competition test, they would probably go to prison. It
16 is market-sharing. If the grocers simply said, "We will agree who will expand in which
17 area -- which planning applications we will make --" that would be an unlawful agreement
18 contrary to Chapter 1 and Article 81. It would be hard to justify it under Article 81(3) or to
19 grant an exemption. What does that show you? It demonstrates that the concept of a cap
20 on growth is in fact just another word for a fairly serious restriction of competition. It is
21 very unusual to impose something on parties that would be unlawful if they did it
22 collectively - something which is in fact properly analysed as a serious and material
23 restriction of competition. That is important because it plainly does impose a material
24 obstacle and burden on those who are subject to it. It is intended to. It would not be
25 performing its task unless it was intended to be an intrusive dramatic remedy.

26 Secondly, of course, it works in the opposite direction. It imposes costs on consumers and
27 on the competitive process. We deal with this in our note at para. 17. Now, the
28 Competition Commission recognises this in its report at para. 11.103, p.201. This is where
29 they refer to their analysis of whether the threshold should be set at 50, 60, or 70 percent.
30 They say that they chose 60 percent in order to reduce the risk that welfare-enhancing store
31 development would be prohibited by the test. They do not say it would eliminate the risk
32 simply be reducing -- you know, that by mucking around with the figures 50, 60, or 70
33 percent you either increase or reduce the risk. But, it is plainly contemplated that by

1 curtailing the expansion plans of an incumbent, there is a risk that welfare-enhancing store
2 development will be prohibited.

3 Why will this occur? Well, it is because unmet demand will not be met. The concept of
4 unmet demand is an important one. I will return to it shortly because a number of people
5 have suggested that it is not found in the report. Well, it is.

6 THE PRESIDENT: Is that the only element of welfare, or does unmet demand, in a sense,
7 encompass everything? I mean, just a more pleasant environment ----

8 MR. GREEN: The welfare dis-benefit could be the absence of a new store; it could be that if
9 there is no new store people have to travel further, queue longer. They get a lower quality
10 retail service than they would if demand had been met (coming back to a point Professor
11 Pickering made earlier). So, the quality of the offering - which is something the
12 Competition Commission had addressed - as well as the choice -- The competitive
13 dynamic will impact in a variety of different ways on consumers and customers. So,
14 welfare-enhancing store development would encompass a large number of different
15 possibilities. The Competition Commission does not address this. That is one of the
16 problems. In fact, this is the criticism we advance. It has recognised that there will be
17 these developments which will be stymied, but the Competition Commission does not go
18 on in any way to address them. The one thing that the Competition Commission did
19 identify was that 24 percent of existing stores would not be able to extend with the
20 competition test at 60 percent. The Competition Commission knew that because they
21 simply asked each retailer, "How many of your existing areas that we have defined will be
22 affected by the test?" Numbers had to be given. So, they had the numbers because they
23 asked for them.

24 So, the competition test itself risks thwarting welfare-enhancing developments. Unmet
25 demand will not be met. This concept is relevant because it goes to the heart of barriers to
26 entry. The competition test contributes to the consumer detriment which the Competition
27 Commission itself acknowledged exists. It must also add to the AEC. It increases the dis-
28 equilibrium between supply and demand. That dis-equilibrium between supply and
29 demand contributes to the restriction of competition. You are taking out of the equation
30 the single player who, in probability terms, is most likely to meet that demand - in other
31 words, the leading player in each particular market.

32 PROFESSOR PICKERING: Isn't the existence of dis-equilibrium something that is inevitable -
33 not only in this market, but in any market? Doesn't the competitive process inevitably

1 imply that we are continually moving between dis-equilibria situations and never reaching
2 equilibrium?

3 MR. GREEN: Indeed it does. That is one of the problems which arises in the present case
4 because the Competition Commission itself specifically addressed the relevance of the
5 persistence of unmet demand. It explicitly recognised and identified that the normal
6 'invisible hand' would not operate. If you go to para. 7.9 there is the complete answer to
7 the evidence which the three interveners have given this morning about rational conduct,
8 about incentives created by the lure of high profits, and so on.

9 Paragraph 7.9 is, if you like, the antidote to 7.5. Paragraph 7.5 is the Competition
10 Commission's conclusion about the general state of the market. They say there is a trend
11 of general expansion of grocery retailing, but they then go on to say, "Does that trend --
12 does that generality apply in highly concentrated areas". If we start at para. 7.9 they say,

13 "We assessed whether highly concentrated local markets for larger grocery stores
14 and for mid-sized and larger grocery stores had persisted over time [and then one
15 finds this - and this is, if you like, the invisible hand]. Provided that there is
16 sufficient demand to support an additional store, entry into highly concentrated
17 local markets should be attractive to retailers".

18 So, they are considering the psychology, if you like.

19 "This is due to the increased store level profit margins in those markets."

20 Again, this is the invisible hand and the open eyes spotting the profit and saying, "In an
21 ordinary market we would come in" and then they say, "and the ability conferred by these
22 stores to set nationally determined aspects of the retail offer, such as price, that are higher
23 than would otherwise be the case". So that is the green light to entry.

24 Accordingly, the persistence of highly concentrated markets is indicative of the presence of
25 barriers to entry. We examined the experience of new entry near stores that faced few local
26 competitors to assess whether highly concentrated local markets have persisted over time.

27 These are familiar figures to you because they are summarised in appendix 7.1. In 2000
28 there were 186 stores larger than 6,000 sq metres in Great Britain belonging to Asda,
29 Morrison, Safeway, Sainsbury's and Tesco, which faced no, or only one competitor in the
30 local market in which they operated monopoly or duopoly stores.

31 In 2006 106 of these stores, or 86 per cent, continued to face no, or only one competitor,
32 see table 7.1. The persistence of local concentration is indicative of the presence of
33 barriers to entry in the markets in which these stores are located.

1 So they contrast that position with the normal position of general dynamism, which they
2 describe in 7.5. Their conclusion is the norm does not apply in highly concentrated areas.
3 Then in 7.1 I think we have got a slightly verbose but nonetheless pretty accurate
4 description of “unmet demand”.

5 “Insufficient demand to support an additional store may explain the persistence of
6 concentration in some areas. In our view, however, most ...”

7 – and that is obviously an indication of the majority –

8 “... most of the grocery stores that were identified as being monopoly or duopoly
9 stores in 2000 and which continued to be monopoly or duopoly stores in 2006 are
10 in areas where the local population is sufficient to support an additional store.”

11 Just five minutes ago Miss Smith said that Waitrose do not understand the notion of
12 “unmet demand”, but they understood the notion of population. This is, I think the bridge
13 between the two.

14 Then the summary in 7.12, the last bullet point – the first four bullet points are about the
15 market as a whole, and the last bullet point:

16 “highly-concentrated local markets have tended to persist rather than attract new
17 entry.”

18 That position persists into the future because the Competition Commission’s conclusion
19 about entry barriers was one of the principal reasons that it relied upon to justify the
20 remedies going into the future. The competition test, the competition test based upon this
21 evidence of persistent barrier to entry in the past, they say, is justified, and that is on the
22 assumption that those barriers will remain in the future. Indeed, para.13(b) of the
23 Competition Commission’s skeleton argument, p.7, could not be in clearer terms:

24 “The competition test manifestly does not remove or reduce the barriers to entry
25 created by the existing planning system.”

26 Manifest, in the eyes of the Competition Commission, it does not remove or reduce.

27 Let us just put those two conclusions together. There are persistent barriers to entry in
28 highly concentrated areas and the Competition Commission finds these essentially flow out
29 of the planning system. They do, of course, say there may be other reasons why people
30 will not enter. There may be many reasons. It may be to do with population or lack of
31 availability of land, and so on, but the principal barrier to entry is the planning system. It is
32 common ground that the competition test does not even remove or reduce the barrier to
33 entry. So the relevance of this is the barrier to entry goes on into the future.

1 THE PRESIDENT: Mr. Donoghue, Mr. Ward and Miss Smith, and Mr. Roth, they all said this
2 was the past, the historical, and that changes were going to make a difference to this. They
3 may not be changing the planning system directly, but ----

4 MR. GREEN: Absolutely, that is exactly what they said, and of course the fallacy in the
5 argument is to ask yourself, "What was it that blocked expansion in the past, does that
6 persist in the future?" If it persists in the future, you have got to then identify what is
7 different. The things that are different are said to be the suppression of the incumbent – it
8 is perhaps the U-bend point – and then the restrictive covenants. We have been told this
9 will bring about a sea change, a phenomenal change. The thing that the Competition
10 Commission itself identified, the barriers to entry flowing from the planning system, are
11 not affected by the competition test. That is a constant. Those will remain as barriers to
12 entry in the future.

13 So one has got to ask whether the AEC is going to be addressed by virtue of those
14 tweakings which have occurred, namely the competition test itself, which does not affect
15 the barriers to entry from planning, or the restrictive covenants and exclusivity provision
16 changes. If those do not do the job, which plainly they do not, and they are not analysed in
17 the report, then it is really not open to the Competition Commission to say that anything
18 has changed or that they have addressed all the relevant considerations.

19 They say, and we have been over this time and time again, that barriers to entry are now
20 self-evidently gone, the entry will be sucked in instantly. The starting point for my reply
21 must be how, how, given that the Competition Commission itself accepts that the planning
22 barriers to entry persist and they have always been identified as that which prevents entry
23 into highly concentrated areas, that is the starting point, nothing has actually changed
24 before and after the investigation so far as that is concerned. That is the major problem,
25 particularly when they turn round and say, "It is self-evident that entry will now occur".
26 How, when the ----

27 PROFESSOR PICKERING: They do not say that, with respect, they say that there are three
28 actions or consequences that the competition test is intended to achieve. The first two are
29 in relation to the position and further expansion of a store that already has 60 per cent or
30 more of the market in conditions where there are few fascias. The third is to facilitate new
31 entry.

32 Mr. Green, suppose that we were to broaden our understanding and discussion of the
33 concept of the barriers in the reality and talk in terms of first mover advantages, the barrier
34 that dominance itself potentially creates. I can see that sometimes it may be easier to pick

1 off some of the trade from a sleepy giant, but I am sure neither your client nor the retailers
2 are sleepy in this respect. Is it not possible, can you not conceive of a situation where the
3 incumbent and the market share associated is, in fact, itself an entry barrier?

4 MR. GREEN: I suppose that is theoretically possible, but it is certainly not the Competition
5 Commission's case, and it is not in the Competition Commission's report, and it is not
6 something they have addressed. They have not addressed personal advantages, we have
7 not got an analysis of strategic considerations, we do not have an analysis of the impact of
8 dominant incumbents. It is not the case. It might have been if they had addressed their
9 mind, but in a judicial review I am focusing upon their reasoning, what they did and they
10 did not do and the logic of it. If this matter were remitted these are the sorts of things that
11 might be taken account of. The sorts of submissions we have heard today may be the sorts
12 of things the Competition Commission would grapple with. They would have to measure
13 them, but, with great respect, it is not the Tribunal's function to engage in gathering of
14 evidence or evidence analysis. We are concerned with the black and white, the four
15 corners of the report.

16 THE PRESIDENT: Mr. Green, is the Commission not entitled to say, look, if we hobble
17 whoever is the big incumbent in a particular area, that will surely encourage, that will give
18 a bit of heart to the others, and then, for whatever reason, they will look again at those
19 areas and they will know, as it were, that whatever they do there the sleepy giant, or the
20 alert giant, will remain hobbled?

21 MR. GREEN: Who knows, maybe, possibly, not in the report. Indeed, we deal with this point in
22 para.22 of our note.

23 THE PRESIDENT: Do not rush ahead if you are coming to it.

24 MR. GREEN: I will deal with it now. What we say is: knowing that a large incumbent is not
25 able to extend before rival entry or expansion will not significantly affect the willingness of
26 rivals to enter or expand. In its provisional decision on planning remedies the Competition
27 Commission stated that, "As part of our analysis of controlled land and areas of high
28 concentration we have held detailed discussion with retailers about particular areas and
29 from these discussions it was apparent to us that retailers already have – already have –
30 extensive knowledge of their competitors' store opening plans, and it is appendix 7.1, the
31 Competition Commission found that only in 36 of 118 monopoly and duopoly areas had
32 the incumbent applied for and completed an extension since 2000. Accordingly in other
33 areas rivals must have decided not to enter despite knowing the incumbent had no
34 imminent expansion plans and even under the competition test, of course rivals will know

1 that incumbents will often be free to expand after new entry has taken place as the new
2 entry will increase the incumbent's market share. Now, these may or may not be relevant
3 considerations but they are not part of the analysis in the Report they may impact upon the
4 choice of a particular remedy but they are not addressed, they are part of the gaping hole
5 which is at the heart of the Competition Commission's analysis of remedies.

6 There were numerous considerations which they might have taken account of and quite a
7 lot of the Interveners' submissions have put them forward to you but in a Judicial Review
8 you can listen to the evidence, it may be interesting but if they did not address in terms of
9 the reasoning in the report and if it is not blindingly self-evident so that no one could
10 seriously challenge it then it is simply ----

11 THE PRESIDENT: I think that is really what Mr. Roth was saying, that it is just blindingly self-
12 evident.

13 MR. GREEN: Well how, when the planning regime, which is not touched, remains and what is
14 he saying about restrictive covenants when frankly it is a very peripheral issue in terms of
15 this particular obstacle.

16 We have dealt with the so-called "blindingly obvious" point in para.14 of our note. At the
17 hearing Mr. Roth sought to rely on two paragraphs in the report to support the proposition
18 that the competition test will avoid consumer welfare costs by facilitating new entry. So he
19 has given us two paragraphs: 11.25 – here the Competition Commission simply observes
20 that in its view the existing town centre first policy would alone not be sufficient to
21 encourage development that would increase competition in existing highly concentrated
22 local markets. Well as a mere observation it barely scratches even the surface of the issue.
23 11.268, is an explanation of why the Competition Commission did not consider
24 divestments were necessary and they simply set out a view that the preferred remedy will
25 be sufficient over time to address the AEC, but no evidence or reasoning is included.

26 I gave you an exhaustive list of every paragraph they had relied upon. They have added
27 now 11.25 which says absolutely nothing which addresses in any material sense this issue.
28 So you have every paragraph in the decision which is relevant – or is said to be relevant –
29 and as the hearing has gone on we have had a few more plucked out of the Report and they
30 have obviously had as much opportunity as they need to find any stray comment, or any
31 footnote which addresses the point. You will have seen from their skeleton argument they
32 say the barriers to entry are basically surmountable, but they accept that the principal
33 barrier to entry, the planning system remains unchanged. So what does "facilitate" mean in

1 those circumstances? “Facilitate” in circumstances where the main barrier to entry remains
2 and will remain in the future.

3 THE PRESIDENT: What about Mr. Donoghue’s point? He says the fact that they are looking at
4 the “need” point now, and it looks as though it is going to change is something that is going
5 to mean that they were, at least to that extent, different?

6 MR. GREEN: Well that is an irrelevant consideration. First of all we are assessing the case as of
7 the date of the decision and that is ordinary Judicial Review. One is not taking account of
8 new evidence. We do not have any evidence of what the Government is going to do. We
9 do not know whether an Election is going to be called in six months and these sorts of
10 potential changes are going to be thrown out of the window. With respect, I would submit
11 that it is wrong in principle for the Tribunal to take account of a possible political change
12 until such time as it comes about. There are many regulatory changes that might be brought
13 into existence but it would, in our submission, be quite wrong to assume some fluctuating
14 regulatory state of affairs. The decision was taken without – without – changes in planning
15 need being part of the reasoning. It was recorded as being a possibility but the change to
16 the concept of need was not part of the underlying reasoning and the Judicial Review is to
17 the reasoning of the decision as of the date of the decision. Who knows what the
18 Government is going to do? We cannot possibly say whether the consultation paper will
19 turn into new legislation and if it does whether, as it goes through Parliament, it will
20 actually change substantially as a result of lobby? Who knows? It is a complete
21 imponderable. It would be, we would submit, an irrelevant consideration if that were taken
22 account of.

23 But that really is not part of the Competition Commission’s reasoning. The Competition
24 Commission assumes that the planning regime will remain as is.

25 MR. ROTH: Well that is not, with respect, quite correct. We do in the Report actually address
26 the possibility of this change and take into account it may happen, we do not assume it will
27 happen, and whether that impacts on the desirability of the test or not, it is 11.133 to para.
28 11.135. We do not assume it will happen but we do have regard to the fact that there is the
29 possibility.

30 MR. GREEN: I do not think there is any part of the reasoning – I fully accept as I have just said
31 that they refer to it, they refer to the Barker Report is in existence and there is a suggestion
32 for change, they refer to the fact there is a consultation paper, particularly in the annex
33 which deals with the planning regime, which suggests that the need criteria should change.
34 They have made, it seems to me, a recommendation that the LPA should take account of

1 competition in their future development plans, but in terms of the effectiveness of this
2 remedy going forward what happens if the consultation paper just runs into the sand, or the
3 Government changes and planning is not a priority, would one then come back and say
4 “That was an error because they took into account something which did not turn out to be
5 true, it was a false assumption and the market is now operating in a distorted manner
6 because they took account of something which did not happen, so one could look at it either
7 way.

8 MR. MATHER: I am not quite sure how far your proposition goes, because it seemed at one
9 point to be very far reaching and you seem to be suggesting that the Tribunal could not take
10 into account anything which might change as a result of a Government decision, but surely
11 the Tribunal ought to be aware of the full context in which the Commission made its report
12 and we should not deny ourselves the opportunity to consider that in its entirety of which
13 some of the Commission’s proposals were recommendations to Government and others
14 were an analysis of what Government might do.

15 MR. GREEN: Plainly, the Tribunal can take account of the context, and the context is set out in
16 the Report, but if Mr. Roth is going to turn around and say “My competition test is lawful
17 because the planning regime is going to change” – it would have to be an “is”, “and
18 therefore the new laws (whatever those might be) in conjunction with the competition test
19 will facilitate new entry” that with respect is complete nonsense.

20 THE PRESIDENT: It is a bit of a hostage to fortune, is it not?

21 MR. GREEN: Not half!

22 THE PRESIDENT: I do not think Mr. Roth is saying that. (Laughter)

23 MR. GREEN: I did not think he was. If the amendments to the planning regime substantially
24 reduce the barriers to entry then what is the justification for the remedy – it is very chicken
25 and egg. If the planning system is going to resolve the problem then the Competition
26 Commission should have waited and said “We had better adjust the remedy once we see
27 what the new regime is, but they did not, they have adopted a remedy which is stand alone,
28 intended to be effective and proportionate and reasonable.

29 MR. MATHER: Can I test your reference going back to the Competition Commission’s
30 skeleton, if one reformulated that and said that the anticipation would be that the
31 competition test would have an indirect effect on the way the planning system worked,
32 would you accept that as an acceptable description?

33 MR. GREEN: I read to you in opening the other paragraphs of their skeleton where they talk
34 about it facilitating entry. They make the point in this paragraph, 13(b) that it does not

1 reduce or remove the entry barriers which are related to the planning system and plainly we
2 accept, of course, because it is there in black and white, that the competition test exists and
3 the other remedies in relation to restrictive covenants and exclusivity exist. What they
4 have to establish is that those two have addressed their minds to the relevant considerations
5 relating to those two which are going to eradicate any burden on the consumer, long-term
6 persistence of the cost. It is proportionate to those who are subject to the remedy - in
7 particular, Tesco, that they should have this imposed upon them - and that their perceived
8 benefit -- I am sorry. The cost is going to be eradicated because of new entry and the
9 perceived benefit is such that it will eradicate the AEC.

10 Perhaps if I can move on, I want to just address the mechanics of the way in which the
11 costs and the benefit will be impacted. I referred to the cost in terms of the intrusiveness to
12 the companies affected. I have referred to the fact that the cost will exacerbate the AEC
13 because it is recognised and identified as having welfare-enhancing detriments. It will
14 thwart welfare enhancing developments. Then there is the question of the benefits, which is
15 the flip side of the costs of the competition test. I think four questions needed to have been
16 addressed by the Competition Commission. The first question is: Will there be entry at all.
17 The benefit of the competition test will only arise if there is entry. The fact finding of the
18 Competition Commission, as you know, is that in Appendix 7.1, by virtue of the
19 persistence analysis, over a six year period the vast majority of monopolies and duopolies
20 did not change, and they did not change even though the incumbents in the majority of
21 cases were not applying for extensions. We know also that a high percentage - over 70
22 percent - of the areas where there is high concentration have monopolies in them. We
23 know that from 7.1 and Appendix 6.1. So, we know because of their findings that there is
24 a long history of persistence. That is the background to the need for a remedy - a long
25 history of no entry, even though there is very substantial unmet demand. Those are the
26 paragraphs I have just read to you, and they lead them to the conclusion that the barriers to
27 entry will persist.

28 Then one comes to: If entry does not occur, will there be extensions to soak up new
29 demand? We have addressed this in para. 22. But, again, Appendix 7.1 addresses this
30 because it has got some data and statistics which indicate that extensions will not always
31 arise to cure unmet demand. We have the high monopoly percentage, or incidence, point
32 which again means that if the only person who could extend is suppressed, and there is a
33 high percentage of these individuals, and there are many cases where there is unmet
34 demand, then that unmet demand will not be met, and the probability of it being met by

1 new entry is, of course, substantially reduced. Where the level of demand does not
2 succeed, that does justify an entirely new store.

3 Of course, one has simply got to ask the question: If there is a monopoly area, why has
4 there not been entry for so many years? It may be, as the Competition Commission itself
5 says, that there are other reasons. It may just be that there is no land available.

6 The third question: If entry occurs, when will that entry occur? Well, we have addressed
7 this in our note at paras. 37 to 38. The answer is that the Competition Commission simply
8 does not know. They have not got any idea at all. It always seemed to us, on a reading of
9 the report and their skeleton, that what they were really saying was that entry would occur
10 in a reasonably short period of time. That is logical because they have told us on
11 innumerable occasions in their skeleton and defence that entry barriers are pretty low. We
12 have now, it seems to us, have a volte face and they have said, "Well, it could actually be
13 very long". It does not matter that it could occur over any period of time, and it really does
14 not matter because the system is that which is important. Over a sufficiently long period of
15 time there will be entry.

16 Now, we refer to the Competition Commission's guidelines, and for your note, paras. 4.16
17 and 4.25. Both of these paragraphs emphasise the high importance which the Competition
18 Commission has attributed to the need to assess the point in time at which the remedies
19 will bite. In both of them it is clear that the need for a temporal assessment arises because
20 the Competition Commission cannot otherwise assess whether a remedy is practicable or
21 comprehensive, or reasonable. The points set out in 4.16 and 4.25 of the Competition
22 Commission's own guidelines really cover the points that we propose to make about the
23 question of timing. It is obvious that if it is the case - and Mr. Roth used periods of five or
24 ten years, or even seven or twelve years -- If the new entry will not occur for twelve years,
25 then the AEC persists for twelve years and the exacerbation of the AEC because the only
26 person who can meet the unmet demand also persists for twelve years. In fact, it will get
27 worse. So, you will have twelve years of dis-benefit before there is new entry which will
28 cure the system. That is why you have to know how long it will take. If, on average, we
29 are talking about a twelve year period, then surely that should have been addressed because
30 in those circumstances the detriment to the consumer of the incumbent not being able to
31 meet unmet demand is very substantial. They did not address their mind to that issue. I
32 have no idea what the answer would be - nor do they - because we do not know whether on
33 average we are looking at four years, six, eight, ten or whatever.

1 The fourth question that they would have to answer - or at least address themselves to - is:
2 If there is entry, and it occurs within X years, how much of the AEC is actually addressed?
3 Are we talking about 10 percent or 50 percent? Or all of it? We do not know because the
4 Competition Commission did not address itself to this issue. We have referred to this in our
5 note at para.36. But, again, having some indication of how effective the quantum of the
6 benefit will be is relevant because if the remedy is very intrusive to the companies, and it
7 risks creating, or exacerbating, the AEC in a slightly different, but related way, and yet the
8 Competition Commission says, "Well, we'll only nibble at the AEC detriment" (in other
9 words, it will have a fairly small benefit), that must be highly relevant to the balancing
10 exercise and to the proportionality exercise. If you have no idea whether it will attach to 10
11 percent or 50 percent, or all, and if you do not know over what period that will occur, you
12 are not in a position to make that assessment. They simply accept that they do not know.
13 We look at the report for the answer to that. They simply say, "We have decided the
14 remedy is effective". I do not know if we are meant to imply that it will erode all of the
15 AEC or only part of it. We just do not know. The Competition Commission candidly says
16 that, "We have no way of knowing".

17 In the absence of analysis of how great the barriers to entry remaining are; what impact it is
18 going to have on extensions; what time period we are talking about; and the efficacy, then
19 we submit that the questions which have to be answered under s.134 simply cannot be
20 answered. Mr. Roth expounds an oxymoron. He says he can "rationally conclude that
21 there will be benefit". But, inconsistently, he says he does not know how long -- he does
22 not know whether they will enter, or when, or how they will do it, or in what sequence, and
23 he disavows any attempt, or any requirement that he should even attempt that analysis.
24 Those are oxymoronic statements. You cannot say, "Rationally I can conclude there will be
25 a benefit" because if you can do that, then you should be able to set out a chain of cause
26 and effect and you should be able to conclude by some form of quantitative or combined
27 qualitative analysis at each stage that rationally there will be an effect, and it will be a
28 material and significant effect.

29 THE PRESIDENT: He does point to the fact that there will be an immediate effect so far as any
30 exacerbation of concentration is concerned.

31 MR. GREEN: Yes. Absolutely. The AEC, Sir, as you pointed out, is largely defined in the
32 present tense. The AEC is in relation to the existing impact. If one looks, for example, at
33 10.7 onwards, and, indeed, in the other paragraphs that I read to you, the brunt of this case
34 concerns curing the existing AEC. It is undoubtedly true that they are imposing a freeze,

1 as it were. They are preserving the status quo. “We will not make things worse. We put
2 the cap on now.” But, the basic thrust of this report is that in highly concentrated areas
3 there is an existing problem which they say is significant and they have to address that.
4 So, I do not for a moment suggest that it will not have some effect on preserving the status
5 quo, but the basic thrust of this report is to the existing AEC and is not, in all fairness,
6 focused upon the aspect which they take into account to prevent it from becoming worse -
7 the exacerbation. It is on reducing it. Otherwise, this substantial harm that they have
8 identified will simply persist into the future. That, we submit, is the problem. That is what
9 they have to address. That is what the remedy is designed to address in its so-called
10 facilitative capacity.

11 THE PRESIDENT: Do you accept actually that para 102 is dealing with that? I think Mr. Roth
12 took us to the previous paragraph and the post paragraph. It did look as though they were
13 dealing with the standstill point. It is at pp.33 to 34 of the defence.

14 MR. GREEN: I will have to check that. I am simply looking at the Competition Commission in
15 the Report says.

16 THE PRESIDENT: You did place some weight on 102, and I just wondered if you effectively
17 accepted what Mr. Roth said about that?

18 MR. GREEN: I am sorry, yes, I was slightly at cross-purposes. There are two answers to it.
19 First of all, this is a paragraph responding to Tesco’s assertion, it is not intended to be free-
20 standing. It is a response to our assertion. Our assertions have addressed the existing state
21 of affairs and they do not actually say what paragraph it is meant to address. They refer to
22 their provisional decision, but we have not understood their argument to be that this relates
23 only to, as it were, the standstill and indeed orally Mr. Roth has made the same point about
24 the existing state of affairs as he has about the standstill. So the philosophy set out in
25 para.102 and the impossibility point, it applies to the standstill, he says it applies to the
26 existing state of affairs. If it does not then where in the report is the analysis of how the
27 competition test is going to address the existing AEC? It is not. So either this is the reason
28 or it is not in the report. We do not know why they did not conduct the analysis of how the
29 competition test will address the existing state of affairs.

30 We relied upon this because this was meant to be a riposte to assertion. We simply took it
31 at face value. It was a riposte to us, we saying, “Yes, you can do these analyses generally
32 across the board”, and they say, no, we cannot.

1 Mr. Roth has applied the principles set out in 102 to the entire exercise. So we do not
2 accept that it is, in fact, limited to the standstill provision. Their answer is, it is just too
3 complex across the board. There is nothing in the Report which actually addresses this.

4 PROFESSOR PICKERING: You are still depending very much upon the facilitation of new
5 entry as the remedy to the AEC, whereas, whether rightly or wrongly and whether
6 convincingly or not, the Competition Commission has said that the constraints on the
7 further expansion, where there is a 60 per cent market share, etc, is a remedy to the AEC in
8 its own right.

9 Furthermore, Mr. Green, in economics, and I would have thought in strategic thinking
10 generally, one tends not to ask the question only when will entry occur, but also is entry
11 potentially going to occur, and it is the threat of new entry that is often the constraint rather
12 than the actuality. Merger guidelines, and so on, will ask the question, how quickly could
13 new entry occur given the need to invest in the plant and facilities. Actually, you are
14 demanding an answer to a question which is I would have thought a lot of economists
15 would be surprised to be required to answer in terms of, "When does it occur", as opposed
16 to, "How significant and strong is the threat of new entry and will that not be sufficient to
17 control the adverse effects, i.e. the PQRS element that the Commission finds to be to the
18 disadvantage of the consumer in highly concentrated local markets?"

19 MR. GREEN: Let us start with basics. They say there is an existing AEC. We say the
20 competition test will exacerbate matters. They say, no, because there will be new entry.
21 That is the way in which the argument arises. They do not say in their report, and one can
22 search in vain for any analysis of the threat of entry as being sufficient. That may be right.
23 It is not in the report. It is not their reasoning. They say there will be actual entry, nothing
24 to do with threats or potential entry or the prospect of entry, that is not the case that has
25 ever been put to us. Their case is actuality of entry. It would immediately come in, it
26 would be sucked in. So the whole question of strategic impact of a barrier to entry is not
27 one which has emerged in the Report. We have not had to address it. We have only come
28 round to addressing the question of barriers to entry because it has cropped up in their
29 defence and in their skeleton argument. They say, once we have identified the problem,
30 "Ah, but it will not arise, there is no cost because entry will come in". It is a statement of
31 actuality not of potentiality. Again, who knows, if the Competition Commission had
32 actually addressed its mind, what conclusions might have been set out in the Report. That
33 is the case that we have to address. It is not in the Report. It is in the pleadings. We have
34 responded to the pleadings, and we have given our answer to it.

1 The Competition Commission's own guidance says that the remedy, the timing of the
2 biting of the remedy is relevant. I would, with respect, take issue that that is not a relevant
3 matter, particularly when all they are talking about is a facilitative remedy. They are not
4 talking about something which will ease the barrier to entry. The barrier to entry remains
5 and the persistence analysis shows that it is a very strong barrier to entry. They have
6 simply identified in pleadings something which they describe as "facilitative". It is an
7 argument which has arisen in the course of the case, it is not a solution which one finds in
8 this Report. Everyone has been scratching around looking for sentences of half sentences
9 to see whether or not one can draw out of it the notion of facilitative entry.

10 The one paragraph that we get is problematic for the Competition Commission because it
11 says that there are two things which actually constitute a barrier to entry. One is the
12 existence of the incumbent and the other one is need. They say it is the combined effect. If
13 you address A, but not B, then why is it going to have any impact on the situation? If it is
14 we would have expected them to have addressed their minds to it and would expect there to
15 be a proper explanation and report of that. That is the report 7.64. It is a point about the
16 combined effect. If one has got two obstacles, A and B, and you tinker with A but you
17 leave B then where does that leave one? I have to say that this is about the thinnest
18 conceivable justification for an argument that one can find, one and a half lines tucked
19 away in 7.64. This is a facultative argument, as high as it gets. This is the basis upon
20 which the rationale for the competition test now is said to exist, and they have not
21 addressed the question of need which is, I think, where my learned friends are coming from
22 when they talk about need possibly being amended in the light of the legislative changes.
23 This really will not do for a body such as the Competition Commission. If it is going to
24 address this issue it should address it squarely, and I think the fact that we have to argue
25 about a line and a half tucked away in the middle of the Report is indicative of the fact that,
26 in truth, they have not addressed the issue. Vast numbers of points are covered in the
27 Report. If you search long enough you can probably find authority for every proposition
28 under the sun, except for this one. It does not mean to say that the Competition
29 Commission has addressed it in the traditional manner.

30 THE PRESIDENT: We have taken you out of your order.

31 MR. GREEN: No, not at all.

32 Let me turn to the complexity point. They say they have not done it and they say it is all
33 too complex, the quantification of the benefit. There are a number of points I want to make
34 in this regard. The first point is a general point of policy or principle which is that remedy

1 selection is a pivotal part of the investigative process. It is the part which endures and
2 exerts the lasting effect upon the market, and Tesco submits that the choice of remedy is
3 equally as important – or more important – than the determination of the AEC, which is
4 the justification for imposing the remedy, at the very least in principle the level of analysis
5 that goes into the chosen remedy should not be inferior to that which goes into the
6 assessment of the problem to be addressed.

7 At the national level the Competition Commission is without doubt one of the agencies in
8 this country which is best equipped to devise appropriate and proportionate evaluative
9 techniques for determining remedies. One is bound to say that notwithstanding that it
10 approaches its 60th birthday party it does not need to pop Viagra in order to be able to apply
11 its energies to a proper approach. The Tribunal can have complete confidence that if the
12 Competition Commission is required properly to assess costs and benefits it will devise the
13 techniques needed to do so. This brings me to the double proportionality point which we
14 have referred to briefly in para. 30 of our note.

15 Proportionality is a flexible test, it is applied depending upon the context and the
16 circumstances. The suggestion made by Mr. Roth that if you require the Competition
17 Commission properly to address remedies and to address its mind to costs and benefits and
18 burdens, the three things that we say they have not addressed – cost, benefit and burden – if
19 they are required to address those proportionately they will find a way to do so and the
20 level of analysis will vary from case to case depending upon a variety of factors, and it is
21 an alarmist suggestion that to portray a requirement that they should conduct this sort of
22 analysis as having profound implications across the board.

23 In para.29 of our note we referred to the fact that this Tribunal in the *Vodafone* case, in
24 para.51 had said that a proper analysis of proportionality was, as the Tribunal put it on that
25 occasion: “a proposition of attractive simplicity”. I think we have set out the full quotation
26 in our first skeleton and we are really just cross referring back to it, but we do not think
27 there is anything unusual or shocking about the requirement that they should address their
28 minds properly to benefit, burden and cost. The suggestion that there is some difficulty in
29 *in futuro* analysis is, we submit, misconceived.

30 So far as barriers to entry are concerned, the Competition Commission already drew
31 conclusions about the future from its persistence analysis, it performed that extensive
32 review in order to guide itself as to how the market would operate in the future. If it had
33 concluded that the persistence which they found to exist over the minimum of six years
34 was going to suddenly crumble because the market was going to go flaky after six years

1 they would have said so, but they conducted that analysis because they were sufficiently
2 confident that a historical analysis in concentrated areas was sufficient. Everybody who
3 has made submissions to you says that you cannot apply that because the market is
4 dynamic. Well the Competition Commission found otherwise in concentrated areas, that
5 was the very reason they conducted that analysis to decide how dynamic the market was in
6 concentrated areas, they found it was not and that is the point of that analysis from 7.5
7 onwards. The market is not as dynamic in concentrated areas as it is in other areas, it is a
8 much more steady state regime, and it is simply untrue that the Commission is not able to
9 form prospective analysis. They have the past analysis based in the persistence review.
10 They conducted the analysis of the 1300 landsites and they took evidence of the existing
11 rationale for each grocer's plans and what their future plans were. They had evidence of
12 imminence of entry – that is para.11 of appendix 7.1. So they had evidence of past, present
13 and future plans and planning and it is an exercise in despair for the Competition
14 Commission to say that they cannot form a view, get a handle, inform themselves of what
15 the market is going to be like in the concentrated area.

16 The task was not too great, there are 495 concentrated markets, one finds that in para.6.14.
17 Let us assume they take 100 of these, they took 1300 landsites, so let us assume they take
18 100 or 200, let us assume they select from those 495 in order to constitute 100 as a sample,
19 a selection which a monopolistic, a selection which a duopolistic and a selection which are
20 triopolistic, and they instruct an outside expert as they did for the landsites' exercise, and
21 they simply say "We will interview these people, produce a report for us in relation to their
22 plans and their strategies in these concentrated areas and then we will call them in for
23 interview on the basis of your report, largely replicating on a much smaller scale what they
24 did for landsites. Why would that not inform their decision making as to the likelihood of
25 entry, strategic considerations, the quantity of the AEC which was likely to be impacted
26 upon. It is not too complex a task, it is a much smaller task than they conducted for the
27 landsite analysis recently saying they had to conduct a proportionate analysis and use their
28 undoubted skill and experience to predict the future to a reasonable degree of accuracy, and
29 then inform themselves as to cost, benefit and burden.

30 In relation to restrictive covenants, I would like to deal with that by reference to the
31 statistics which we have set out in our note which just pulls together the various points,
32 because it really demonstrates how limited the remedy is in relation to this particular point.
33 Paragraph 21, the controlled landsite remedies are relatively limited, they will apply only in
34 a small number of highly concentrated areas and even there will reduce barriers to entry

1 only to a limited extent (a) in terms of restrictive covenants, table 1 in appendix 7.3
2 indicates that, at most, 30 landsites would have covenants released, and of these only 14
3 are in highly concentrated areas. Even where covenants are released there is no obligation
4 on the landowner to sell the site. (b) in terms of exclusivity agreements table 2 in appendix
5 7.3 similarly shows that at most 30 landsites would be affected of which again only 14 are
6 in highly concentrated areas and as this aspect of the remedy is delayed these sites will
7 become available only in 2013. Collectively therefore these remedies affect only 28 highly
8 concentrated areas where larger stores out of the 495 such areas that the Competition
9 Commission considers exists on the basis of a 10 minute drive time, even in those areas it
10 is not clear the landsite is the only one in the area available for grocery retail such that its
11 non-availability for grocery retail constituted a significant barrier to entry in the past.
12 So just putting the statistics together it is an extremely limited remedy. It may have some
13 effect, I do not deny that, but it is limited.

14 MR. ROTH: I am sorry, I do not really want to interrupt my friend, but just as a matter of fact
15 that is not right if one looks at the remedy in the Report at para.11.442 – I took you through
16 that. There are the landsites identified where restrictive covenants, exclusivity agreements
17 since 2000, and there were the ones before 2000 which we do not have the number of
18 because they could not be disclosed, so there is some other quantity which we do not know
19 plus of course there is the future.

20 MR. GREEN: Well they do not know, but they are not suggesting, and it cannot be suggested
21 that that in and of itself is going to exert any material impact within reasonable period of
22 time. Commonsense tells you it is a long way from being able to exert a serious erosive
23 effect on the AEC. It really means that one is left with the so-called facilitative nature of
24 the suppression of the incumbent as 90 per cent of the answer and, as we have submitted,
25 we say they did not estimate the burden, they did not estimate the benefit and they did not
26 estimate the cost . It may be that that is an adequate remedy; we are not saying that it is not,
27 we are simply saying they have not addressed it. Had they addressed it, it is a possibility
28 they may have come up with another, less intrusive remedy or no remedy, or some
29 different remedy - or, as Mr. Hoskins says, this remedy. One cannot preclude that. But, our
30 criticism is that there were relevant features that they failed to address - the holy trinity of
31 burden, benefit and cost. The excuses given for not addressing them are inadequate, and it
32 is as simple as saying, “Those are relevant considerations”. If we establish that they are
33 relevant and they were not addressed, and they could have been, then we submit that we
34 are entitled to a remedy.

1 One or two very final points. In relation to the schedule that we handed in, which Mr. Roth
2 wishes to respond to, as you will have seen, that was simply a shorthand way of avoiding
3 having to take you through the report at great length. It was simply setting out paragraphs
4 in the report, and it was a substitute for lengthier submissions, although I did make
5 submissions about it. In principle, there is no reason why the Competition Commission
6 should have the opportunity to open up an entirely new front of defence, but if they do
7 have that right, we would want a right of reply. We do believe we have the right of last
8 word, as it were, on this. In principle, they have given their reasons. It seems to us that
9 they had an opportunity to respond. They have responded orally. We did nothing other
10 than simply refer to paragraphs in the report in a convenient way.

11 THE PRESIDENT: Mr. Green, documents always create flutterings. I think we are minded to
12 allow Mr. Roth to put in something which, as it were, makes some comments about that.
13 But, obviously, we are not encouraging a sudden round of written observations. If there is
14 something that calls for reply, then so be it.

15 MR. GREEN: Thank you. Unless I can assist further ----?

16 THE PRESIDENT: No. Thank you.

17 MR. ROTH: Sir, I am grateful. We can have it with the Tribunal for two o'clock tomorrow.

18 MR. GREEN: We will respond to it over time.

19 THE PRESIDENT: Obviously the other parties will have it. Do not keep them in suspense for
20 too long.

21 MR. GREEN: We will turn it around very quickly.

22 THE PRESIDENT: Thank you to everybody for their very helpful written and oral submissions.
23 I am sure you realise that we are not going to be rushing this out this week.

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