



Neutral citation [2012] CAT 27

IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1191/6/1/12

Victoria House
Bloomsbury Place
London WC1A 2EB

24 October 2012

Before:

VIVIEN ROSE
(Chairman)
CLARE POTTER
JOANNE STUART OBE

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) ASSOCIATION OF CONVENIENCE STORES
(2) NATIONAL FEDERATION OF RETAIL NEWSAGENTS

Applicants

- v -

OFFICE OF FAIR TRADING

Respondent

- and -

PRESS DISTRIBUTION FORUM

Intervener

Heard at Victoria House on 28 September 2012

JUDGMENT

APPEARANCES

Mr George Peretz (instructed by Edwin Coe LLP and Nabarro LLP) appeared on behalf of the Applicants.

Mr Josh Holmes (instructed by General Counsel of the Office of Fair Trading) appeared on behalf of the Respondent.

Miss Maya Lester (instructed by Freshfields Bruckhaus Deringer LLP) appeared on behalf of the Intervener.

(1) The background

1. The Applicants challenge under section 179(4) of the Enterprise Act 2002 a decision taken by the Respondent ('the OFT') on 1 March 2012 called 'Newspaper and Magazine Distribution in the UK: Prioritisation decision on whether to conduct a short update review' ('the 2012 Decision'). In that Decision, the OFT considered whether, having regard to its prioritisation principles, it should conduct a short update review to see whether to make a market investigation reference to the Competition Commission under the Enterprise Act 2002. The OFT decided that such a review was not justified.
2. The 'short update review' being debated in the 2012 Decision follows on from a decision of the OFT taken in September 2009 called 'Newspaper and Magazine Distribution in the United Kingdom: Decision not to make a market investigation reference to the Competition Commission' ('the 2009 Decision'). As its name suggests, the 2009 Decision set out the OFT's conclusion that it should not refer the market to the Competition Commission pursuant to section 131 of the Enterprise Act 2002 ('EA2002'). That section provides, broadly, that the OFT may make a market investigation reference to the Competition Commission if the OFT has reasonable grounds for suspecting that any feature, or combination of features, of a market for goods or services prevents, restricts, or distorts competition. We shall refer to the threshold set in section 131 EA2002 as the OFT having a 'reasonable suspicion'.
3. In the 2009 Decision the OFT found that there were certain features of the market for the distribution of newspapers and magazines which gave rise to a reasonable suspicion so that the conditions set in section 131 for making a reference were satisfied. However, the OFT decided in the exercise of its discretion not to make a reference. At the end of the 2009 Decision the OFT said:

'Possible further update review of the supply chains

- 6.8 As part of the OFT's function under section 5 of the [EA2002] to keep under review information about matters relating to the carrying out of its functions, the OFT will consider, after a period of two years from the publication of this decision, whether to undertake a short update review of the newspaper and magazine distribution sector in relation to the features examined in this

decision. Such a review will only take place where it would be justified following an assessment under the OFT's prioritisation principles undertaken at that point in time. The impact of any such review on consumer welfare, which is one aspect of the OFT's prioritisation principles, is likely to be a particularly important consideration in this connection at that point in time.

6.9 The OFT fully recognises that this sector has been subject to significant review in recent years. Were the OFT to undertake a short update review in the future, it would focus on new developments in this sector that are relevant to the features examined in this decision. In addition, any such review would also take into account what action industry parties have taken following the OFT's guidance in relation to industry best practice.'

4. The 2012 Decision was the outcome of the OFT's consideration of whether it should conduct the review envisaged in those paragraphs. The process started in September 2011 when the OFT engaged in a public consultation which, it said, was intended to ensure that it would be informed of any developments in the sector that would be relevant to the prioritisation assessment. The OFT received submissions and information from interested parties. It noted that it had not considered that material at the level of detail that it would have done if it were actually conducting the proposed short update review. However, it had given careful consideration to the submissions and information provided to it by interested parties and had sought clarifications where this was appropriate for the purpose of reaching its decision.
5. The 2012 Decision is thus not a decision on the question of whether to make a reference but rather a decision not to devote resources to addressing that question any further. It is not a decision taken under section 131 EA2002 but under paragraph 13 of Schedule 1 to the EA2002 which confers on the OFT the power 'to do anything which is calculated to facilitate, or is conducive or incidental to, the performance of its functions'.

(2) The test to be applied by the Tribunal

6. Section 179(4) of the EA2002 provides that in determining an application under that section, the Tribunal shall apply the same principles as would be applied by a court on an application for judicial review. The OFT accepts that as a matter of principle, the exercise of its discretion whether to accord priority to a particular investigation is susceptible to review. But Mr Holmes, for the OFT, rightly drew to our attention the

statement of the High Court in *R (Cityhook) v OFT* [2009] EWHC 57 (Admin) at paragraphs 163 and 165:

‘...it is plain that the OFT must have the power to close the file on cases otherwise it would not be able to function satisfactorily. Since it is the body to which Parliament has given the decision-making powers, it is only in very limited circumstances that this court can interfere as indeed was recognised on behalf of Cityhook in its arguments before the CAT. ...

The power of this court to intervene [in relation to such a decision] exists. However, it exists within the well-established, but relatively limited, traditional public law parameters. When it comes to the most appropriate allocation of limited resources, whether financial or manpower or both, the court may only require the body charged with the statutory responsibility for the deployment of those resources to think again if the decision under challenge was irrational in the *Wednesbury* sense. ...’

7. Although that was a case where the High Court was conducting a judicial review of the OFT’s decision to close a file, the same principles apply to this application before the Tribunal. The OFT also stressed the importance of distinguishing between the question whether the decision-maker has taken into account an irrelevant consideration or left out of account a relevant consideration on the one hand, and the question of the weight to be given to each consideration on the other. As Lord Keith said in *Tesco Stores v Secretary of State for the Environment* [1995] 1 WLR 759:

‘...It is for the courts, if the matter is brought before them, to decide what is a relevant consideration. If the decision maker wrongly takes the view that some consideration is not relevant, and therefore has no regard to it, his decision cannot stand and he must be required to think again. But it is entirely for the decision maker to attribute to the relevant considerations such weight as he thinks fit and the courts will not interfere unless he has acted unreasonably in the *Wednesbury* sense...’

8. There was some debate between the parties as to the relationship between the 2009 Decision and the 2012 Decision, prompted by Mr Peretz, for the Applicants, submitting that the Tribunal’s task was to decide whether the 2012 Decision ‘stacks up’ when analysed in conjunction with the 2009 Decision. Mr Holmes accepted that the findings of the 2009 Decision were highly relevant to the exercise being conducted by the OFT in March 2012. The earlier analysis of the market carried out in 2008 and 2009 naturally informed the 2012 exercise and the 2012 Decision does address, as one would expect, the features of the market that were discussed in the 2009 Decision. But in our judgment, the OFT’s task in March 2012 was not to focus exclusively on examining to

what extent the features which had been identified in the 2009 Decision as giving rise to a reasonable suspicion had been resolved in the intervening two years. Rather its task was to assess how the market was now working, from the point of view of consumers of newspapers and magazines, in order to decide whether in the light of that assessment taken together with the earlier work, a further consideration of whether to make a reference was justified, having regard to the OFT's prioritisation principles.

(3) The 2009 Decision in more detail

9. In the 2009 Decision, the OFT described some distinguishing characteristics of the newspaper and magazine distribution market. In particular it noted that:

(a) newspapers are highly perishable products and magazines, although they have a longer useful shelf life, are also time limited;

(b) the wholesaler level of distribution is highly concentrated with two main wholesalers operating in the United Kingdom; Smiths and Menzies;

(c) newspaper and magazine publishers enter into exclusive contracts with a particular wholesaler to supply all the retailers in a given area for a period of up to five years; these contracts are awarded following a tender process and all publishers of newspapers and magazines tend to appoint the same wholesaler for their products in a given area.

10. The OFT then identified a number of features of the market as possibly creating a reasonable suspicion. They were as follows.

(a) The grant of absolute territorial protection by the publishers in their exclusive contracts with the wholesalers. In these contracts, the publisher undertook not only to refrain from supplying another wholesaler in the contract territory but also to prevent its wholesalers in other territories from supplying any retailers in the contract territory. The system therefore precluded 'passive sales' by a wholesaler in response to a request for supply from a retailer outside that wholesaler's own exclusive territory. The effect

of this was that retailers had no choice of wholesaler and could not seek supply, for example, from the wholesaler in a neighbouring territory or from a wholesaler which provided it with other grocery products.

- (b) The fact that competitive constraint on the behaviour of the wholesalers was exerted not by their downstream customers, the retailers, but by their upstream customers, the publishers. This was referred to as ‘competition *for* the market’ (whereby wholesalers compete with each other through the publishers’ tender process for the chance to supply all the retailers in the contract territory) as opposed to ‘competition *in* the market’ (whereby the wholesalers compete with each other to supply each individual retailer).
- (c) The fact that the market operated on the basis of ‘sale or return’ of product whereby the publishers rather than the retailers took the risk of unsold copies at the end of the sale period.
- (d) The degree of control, referred to as ‘copy allocation’, that the publishers exercised over the range and quantity of newspapers and magazines that a retailer receives – in other words, the retailers had very limited influence over the titles that were supplied to them and had to accept and attempt to sell the products chosen for them by the publishers.
- (e) The fact that the price of the newspaper or magazine is printed on the cover of the product, limiting the freedom of the retailers’ pricing decisions.

11. Of these five features, the OFT concluded that three gave rise to a reasonable suspicion. These were first, the practice of granting absolute territorial protection for newspapers and magazines; secondly, the practice of copy allocation for magazines by publishers for retailers; and thirdly the printing of cover prices for newspapers and magazines. In addition, the OFT concluded that the five features combined gave the publishers a high degree of control over the distribution process and this itself restricted competition in relation to magazines but not newspapers.

12. Having found that there was a reasonable suspicion, the OFT went on to consider whether it should exercise its discretion in favour of referring the market to the Competition Commission or not. So far as the printing of prices on the cover was concerned, the OFT concluded that this practice had significant customer benefits and was not a cause for concern in competition terms.
13. As regards absolute territorial protection, copy allocation and more general publisher control over the distribution process, the OFT considered that the time was not right for a market investigation. The participants in the market were in the process of carrying out what the OFT referred to as a ‘self-assessment’ of their contracts, that is to say, they were looking at their contracts to see whether they fell within the prohibition in Chapter 1 of the Competition Act 1998. That Act prohibits anti-competitive agreements and requires the parties to such agreements to assess for themselves (rather than notifying the agreement to the OFT to assess) whether any restrictions on competition contained in the agreements – such as the grant of absolute territorial protection – have pro-competitive effects that outweigh the anti-competitive effects that might arise from such restrictions.
14. The OFT had issued an Opinion to the industry in October 2008 on how to assess these kinds of agreements for compliance with the Competition Act 1998.¹ At paragraph 5.14 of the 2009 Decision the OFT noted that its understanding from the consultation responses was that the process of self-assessment by the parties of the terms of their distribution agreements had led to a position whereby absolute territorial protection was likely to be retained by newspaper publishers but that magazine publishers had removed or intended to remove the ban on passive sales by magazine wholesalers. More generally, the OFT said this:

‘5.26 The OFT considers that the process of self-assessment of individual distribution agreements between publishers and wholesalers that has followed the issue of the Opinion creates a reasonable prospect of a period of flux in the sector. In this connection, the reference to flux is to the changes that may take place as a result of this process of self assessment, which could include changes to distribution arrangements following the recent tender process. Such flux will be particularly relevant to the features of copy allocation and publisher-led distribution in relation to magazines.’

¹ See the OFT’s publication of October 2008 *Newspaper and Magazine Distribution: Opinion of the Office of Fair Trading – guidance to facilitate self-assessment under the Competition Act 1998* OFT 1025.

15. The OFT noted in the 2009 Decision that the publishers had just awarded new contracts following a round of tenders. The pattern of supply across the country generated by those tenders indicated that major population areas were at the ‘border’ between the territories awarded to one wholesaler and the territories awarded to the other. Once the contractual ban on passive sales was lifted, such sales would be possible for many retailers. The OFT recognised that the parties were also in the process of digesting the exit from the market of a third wholesaler whose retail customers had to be supplied by one or other of the remaining two. The OFT concluded (at paragraph 5.31 of the 2009 Decision):

‘... there remains a reasonable prospect of a period of flux in the sector meaning that it would not be feasible for the [Competition Commission] to obtain the requisite evidence at this point in time to properly assess how the supply chains are likely to evolve in the short term, and hence the impact and effectiveness of any remedies. For these reasons it is not appropriate to make a reference to the [Competition Commission].’

16. The OFT then set out some guidance on ‘potential next steps for the industry’ concerning the conduct of future tender rounds of publisher contracts; better ways for addressing concerns expressed by retailers regarding copy allocation and the way in which changes to carriage and service charges are introduced; and a possible new code of conduct in relation to the supply of newspapers and magazines, including mechanisms for redress. These instances of ‘best practice’ outlined by the OFT could, it said, enable the supply chains to work more effectively into the future.

(4) The 2012 Decision in more detail

17. The OFT explained the purpose of the 2012 Decision as an assessment of whether a short update review of the sector was justified, having regard both to the submissions made by the interested parties who had responded to the consultation and to the OFT’s published prioritisation principles. The OFT emphasised that the key element of those principles was ‘consumer impact’ that is to say, whether consumers on the whole would be likely to benefit significantly, either directly or indirectly, as a result of such a review and any subsequent further investigation. The OFT recorded that it had received conflicting information on the question whether the operation of the market had improved since 2009 or had got worse. In seeking to reconcile that information the OFT ‘considered the robustness of that information in the round, taking into account in

particular whether the information related to isolated examples, or drew on reliable industry-wide sources of data' (see paragraph 5.26 of the 2012 Decision).

18. The OFT said that it had received 'convincing market-wide information' indicating that:

(a) there has been an overall improvement in the availability of newspapers and magazines;

(b) overall, retail outlet numbers have remained stable;

(c) there is significant price competition between publishers of newspapers and magazines;

(d) the supply chains appear to be operating effectively in distributing newspapers and magazines to consumers on the whole;

(e) the fact that the number of wholesalers had effectively shrunk to two, and the fact that opportunities for passive sales were limited (despite the demise of absolute territorial protection) does not seem to have dampened competition between wholesalers when responding to the tenders for new contracts with publishers for exclusive territories;

(f) significant investments appear to be being made by both publishers and wholesalers in software and IT systems for retail outlets, for example in providing 'sales based replenishment' systems which automatically notify the wholesaler when the retailer needs more copies of a particular magazine.

19. The OFT therefore concluded that it was unlikely that consumers would benefit from any further investigation of the sector in terms of better prices, in-store availability or convenience. A review was also not justified in strategic terms for the OFT, having regard to its current priorities and the developments in self-regulation in the sector. Further, the OFT had identified a number of potentially resource intensive areas of further information gathering and analysis that would need to be done if it were to

undertake the review and it did not think that this would be a proportionate use of its limited resources.

(5) The Applicants' challenge

20. The First Applicant ('ACS') is a trade association established in 1995 whose membership comprises about 33,500 convenience retail stores, including both multiple chains and independent retailers. About 90 per cent of the stores of their members sell newspapers and magazines. The ACS provided the Tribunal with a witness statement from Mr Shane Brennan, the Public Affairs Director of the ACS.
21. The Second Applicant ('NFRN') is an association of independent retail newsagents with about 16,500 members throughout the United Kingdom and the Republic of Ireland. It provides advice and services to help its members run their businesses more successfully and lobbies across a wide parliamentary spectrum in relation to matters affecting micro-retail businesses. It also runs a helpline responding to operational and legal questions raised by members. It was the NFRN who made a formal request in December 2006 to the OFT to make a market investigation reference of this sector to the Competition Commission. The NFRN provided the Tribunal with two witness statements from Mr Paul Baxter, the Chief Executive of the NFRN.
22. Both the Applicants contend that the position in the market has worsened rather than improved since the publication of the 2009 Decision. They argue that the OFT's decision not to undertake the short update review was not one which, having regard to the evidence before it, it could reasonably have taken. They argue in particular that the evidence on which the OFT relied in finding that there would be little consumer benefit to be gained by investigating this market further was so flawed that that conclusion cannot be supported. They also challenge the OFT's conclusion as to the strategic importance of such a review.
23. In considering the submissions made on behalf of the Applicants, we must bear in mind that the Tribunal's task here is not to assess how well or badly the market for the distribution of newspapers and magazines is currently working. Further, the Tribunal is not required to decide whether the 'period of flux' referred to by the OFT in the 2009

Decision resulted in the mitigation of the features which were identified as generating a reasonable suspicion for the purposes of section 131 EA2002. Our task is to consider whether, looking at the 2012 Decision against the background of the 2009 Decision, the OFT could reasonably have concluded on the basis of the evidence before it that it was not appropriate to carry out a short update review to see if the market should be referred to the Competition Commission.

24. The OFT referred us to *R (Khatun) v LB Newham* [2004] EWCA Civ 56 where Laws LJ (with whom the other members of the Court of Appeal agreed) stated (paragraph 35):

‘... it is for the decision-maker, and not the court, subject again to *Wednesbury* review, to decide upon the manner and intensity of inquiry to be undertaken into any relevant factor accepted or demonstrated as such.’

25. Laws LJ cited the judgment of Neill LJ in *R v Kensington and Chelsea Royal London Borough Council ex p Bayani* [1990] 22 HLR 406 to the effect that the court should not intervene merely because it considers that further inquiries would have been sensible or desirable but only if no reasonable decision-maker could have been satisfied on the basis of the inquiries made. Given the limited nature of the OFT exercise under challenge here, these statements are particularly relevant.

(a) *In-store availability of magazines and investment in IT systems*

26. The Applicants attack the OFT’s conclusion that there had been an overall improvement in in-store availability of newspapers and magazines and that significant investment was being made by the publishers and wholesalers in systems aimed at ensuring that retailers could replenish their stocks easily and efficiently. These points contributed to the OFT’s conclusion that there was little consumer benefit to be gained by any further improvement in this regard, even if such improvement were to result from further investigation of the sector.
27. The OFT’s conclusion on this point was based on the following information:

- (a) ‘crude availability data’ which showed that availability of newspapers and magazines at retail outlets had risen in the period since the 2009 Decision;

- (b) survey data which showed that only one per cent of consumers surveyed reported that they now read fewer 'paid for' magazines because the retail outlet from which they usually made their purchase did not provide the full range of titles;
- (c) that although copy allocation by the publisher (as discussed in the 2009 Decision) still operated, the effects of it were mitigated by improvements in the ability of the retailers to influence the supplies they received;
- (d) the significant investment in IT systems now meant that over half of all magazines sold are sold in retail outlets which have SBR (sales based replenishment); and
- (e) publishers and wholesalers were funding initiatives such as interest-free loans to enable retailers to improve their ability to manage the range of products sold.

28. The Applicants submit that each of these supposed findings was flawed and cannot support the conclusion reached by the OFT.

(i) Crude availability data

29. 'Crude availability data' is produced daily by the wholesalers to show the percentage of retail outlets which return excess stock of magazines at the end of that magazine's shelf life. Since the return of excess stock must mean that the retailer did not run out of copies, the higher the percentage the better, so far as the consumer wanting to buy a magazine is concerned. The OFT had before it information that availability by this measure had improved from 77.4 per cent to 84.7 per cent for magazines and from 80.3 per cent to 85.1 per cent for daily newspapers between the calendar year 2009 and the first eight months of 2011. Although the two 2009 figures were based on whole year data and the more recent on only eight months, there was no evidence before the OFT or before us suggesting that the final four months of 2011 would have significantly altered the picture.

30. The Applicants do not challenge the accuracy of these figures but dispute the inference that can be drawn from them. They argue first that the figures are consistent with a lessening of the efficiency of the supply chain because more excess copies returned means more wastage and indicates that retailers are being supplied more often with copies that they do not want and cannot sell. On this point we agree with Mr Holmes that the crude availability data do not measure how many copies of each magazine are being returned and so do not say anything about levels of wastage. Further, the OFT is not relying on the data as an indicator of allocative efficiency in the supply chain but as an indicator of the consumer's experience of that supply chain. So far as the levels of consumer detriment (and hence the potential for significant consumer betterment arising from further investigation into the sector) are concerned, the volume of returns is irrelevant as long as the consumer finds the magazine or newspaper he or she wants at the outlet he or she visits.
31. Similarly as regards the Applicants' second point that the data do not distinguish between supermarkets and smaller independent retailers, the OFT was entitled to consider the overall availability of products rather than focus on availability through any particular kind of retail outlet.
32. Thirdly, the Applicants complain that the crude availability data do not show whether retailers are running out of the top-selling titles or more specialist titles. Mr Baxter says that NFRN members 'experience serious, widespread and persistent problems in obtaining allocations of magazines' and this is particularly the case with top-selling titles (see paragraph 5 of his second witness statement). The OFT meets this objection with evidence from the Intervener ('PDF') provided in October 2011 indicating that virtually 100 per cent of outlets have copies of all newspapers and best selling magazines available from the beginning of the product's sales period. The OFT also refers to evidence submitted by the Applicants comparing the availability of products in the stores of one retailer during one week in 2011 compared with the same week in 2010. This shows percentage figures for availability and unsold magazines that are roughly the same in both years and that there was no significant difference between the position of the top 100 titles compared with total magazines.

33. Although we were told that the crude availability data are produced by the industry for their own purposes, not just for the purpose of this investigation, there was some confusion at the hearing about how the data were compiled and what they actually purport to show. Nevertheless, in our judgment, the OFT was entitled to rely on the crude availability data to draw an inference that availability for newspapers and magazines was generally at a level which meant that it was unlikely that further investigation by the OFT or the Competition Commission would lead to a significant improvement for the benefit of consumers. There was some debate between the parties whether the increase between January 2009 and August 2011 could be described as significant or modest. We consider that the figures showed generally that availability was good and improving. The data may be imperfect and there may have been evidence before the OFT pointing in the other direction. But the data are not so flawed as to render the OFT's reliance on them unreasonable.

(ii) Consumer survey data

34. The second piece of evidence relied on by the OFT is the fact that of consumers who were asked 'Which, if any, of the following reasons explain why you are reading fewer 'paid for' magazines now compared to a year ago?' only one per cent answered that they bought fewer magazines because the store they visited did not stock their magazine and one per cent answered that it was because the place they usually buy from has stopped selling their preferred magazine. It is true, as the Applicants submit, that this does not record how many consumers could not buy the magazine they wanted at the retail outlet of their choice and so bought a different magazine or found the magazine elsewhere – such a consumer would not report having read fewer paid for magazines as he or she would eventually have bought something. They also say, rightly, that the survey does not record how many people would have bought an additional magazine if the supply chain had been working more as the Applicants wish, by giving their members more control over the range and quantity of product supplied. However, one percent is a strikingly low figure. 56 per cent answered that they were not reading fewer magazines this year than last year and 21 per cent said that they were reading fewer magazines because they were saving money. The survey fully justifies the OFT's inference that consumers are not suffering a significant detriment in the sense of being unable to read the magazine they want because they cannot find it in the

shops. If the OFT or Competition Commission had carried out a more detailed and sophisticated examination of consumer habits, other interesting data may have come to light. Given the nature of the task being undertaken by the OFT in the 2012 Decision, there is nothing untoward in its reliance on this data point in arriving at its conclusion on consumer detriment.

(iii) Improved retailer management of supply and investment in retailer IT systems

35. The last three items of evidence described in paragraph 27 above can be considered together as they all concern indications on which the OFT relied in concluding that retailers were achieving a greater degree of control over the deliveries they received than had previously been the case. This ameliorated one of the features that the OFT had found gave rise to a reasonable suspicion of anti-competitive effect in the 2009 Decision, namely the control that copy allocation and the other features of the market conferred on publishers and wholesalers as opposed to retailers. The OFT referred to evidence to the effect that 99 per cent of retailer alterations to copy allocations were honoured, coupled with the fact that the use of such systems among retailers was increasing did not support the OFT's conclusions. On further investigation following the Tribunal hearing, it transpired that the 99 per cent figure related to data from only one of the two principal wholesalers. The Applicants argue that the data do not show how promptly the requests were met - the OFT had no basis for assuming (if it did assume) that requests were dealt with promptly given the number of complaints from the Applicants' members of difficulty with acquiring titles in a timely manner. The Applicants note that the Second Applicant's helpline dealt with 2,978 complaints between July 2009 and July 2011 regarding problems with copy allocation. The Applicants also complain that the data provided covered too short a period; that even if significant investment had been made in new IT systems it was not reasonably open to the OFT 'simply to assume that the investment was efficiently made or retailer or customer focused' (see paragraph 56 of the Notice of Application).

36. We have considered all the criticisms that the Applicants have made about the OFT's reference to the ways in which it saw the sector moving towards a greater degree of responsiveness to the wishes of retailers. Given the scale of the supply chain with 40,000 unique magazine issues each year, over 50,000 retail outlets being supplied

across the country and the operation of the sale or return system from each retailer for each magazine, it is perhaps not surprising that the Applicants continue to receive a significant stream of complaints from their membership about incomplete deliveries, slow reaction times from wholesalers to requests for change and delayed reimbursement for unwanted product. The OFT had to balance this evidence of dissatisfaction with other evidence which it considered indicated that use of IT systems by retailers was broadening, that this was providing retailers with a better way of registering their needs with wholesalers and that wholesalers were, by and large responding positively. This was a relevant factor for the OFT to weigh in the balance when deciding whether investigating this market was a priority and its decision in this regard cannot be faulted.

(b) *The number of retail outlets supplying newspapers and magazines*

37. The second element that the OFT referred to in the 2012 Decision as indicating that there was little likely consumer benefit to be gained by a further investigation was the finding that retail outlet numbers had remained stable over the period, despite an overall decline in circulation. The numbers quoted by the OFT were that there are about 54,000 news retailers and a further 3,000 specialist outlets. This figure was provided to the OFT by the Association of Newspaper and Magazine Wholesalers. The Applicants argue that these figures are inconclusive and counter with their own evidence which, they say, shows that the total number of retail outlets supplied by wholesalers in the United Kingdom as at 11 September 2011 is 50,178, comprising 30,569 independent retailers and 19,609 multiple retailers. This, they say, is a serious reduction in the overall number of retailers from the figure of 54,000 referred to in the 2009 Decision. The NFRN accepts that it only has figures relating to its members but states that if those figures are extrapolated across the independent sector, it suggests a decline of 11.5 per cent over the last five years.

38. Further, the Applicants asserted that an increasing number of retailers are offering only a more limited range of magazines rather than the full range traditionally offered by the Applicants' members. The Association which provided the 54,000 outlet figure included in that figure categories of retail outlets which offer only a very limited range

of titles such as coffee shops, music stores or DIY shops. The Applicants argue that the data relied on by the OFT did not deal with aspect of potential consumer detriment.

39. In our judgment, these issues are precisely the kinds of issues that the case law makes clear are not matters in which it is appropriate for a reviewing court, applying judicial review principles, to interfere. It is up to the OFT to consider the conflicting evidence submitted to it about retailer numbers and decide which evidence to accept. This Tribunal cannot and should not hold that the OFT was wrong to accept the evidence it did accept and to rely on it. Similarly, it was up to the OFT to decide whether reduction in range was something it considered important enough to investigate in the course of its prioritisation assessment. We are far from being able to say that no reasonable decision-maker could have arrived at the 2012 Decision without having carried out such an investigation.

(c) *The effective operation of the supply chain*

40. The next limb of the OFT's conclusion on consumer impact that is challenged by the Applicants is the statement that supply chains generally appear to operate effectively in distributing newspapers and magazines to consumers. The OFT acknowledged that concerns had been expressed about inefficiencies in the supply chain and noted that although some retailers experienced difficulties with supply, 'overall they do generally appear to distribute effectively newspapers and magazines to consumers' (see page 38 of the 2012 Decision). The OFT also noted the large number of new magazine titles launched in 2010 and the very diverse range of subjects covered. The Applicants' challenge to this is that the OFT was wrong to dismiss evidence of individual complaints because in fact, they say, many deliveries of newspapers and magazines are made late or are incomplete. They also query reliance on figures showing compliance by the wholesalers with scheduled delivery times since, they say, these times are set unilaterally by the wholesaler so that compliance with them does not necessarily mean that the retailer is satisfied with the service provided. The high level of compliance recorded by the OFT does not accord, the NFRN says, with the number of complaints that it receives from its members.

41. In our judgment, there is no substance to this point. The 2012 Decision makes clear that the OFT considered a range of evidence and was aware of the nature of the information it was evaluating. The OFT took a broad brush approach to the issues as it was entitled to do, given the nature of the assessment it was engaged in. It noted that the system had been able to respond effectively to sudden changes such as the closure of the News of the World. The OFT was entitled to conclude on the basis of the information before it that, even though there was a certain level of dissatisfaction among some retailers, the operation of the supply chain did not inhibit the plurality of the media or raise other consumer issues.

(d) Competition for the market

42. The 2009 Decision described how competition within the supply chain mainly took place at the level of the relationship between the publishers and the wholesalers rather than the relationship between the wholesalers and the retailers. This, as we have said earlier, is described as ‘competition for the market’ as contrasted with ‘competition in the market’. In the 2012 Decision the OFT re-examined this feature of the market. The OFT noted that there were fewer wholesalers operating in 2012 as compared with 2009 so that the market had become more concentrated at that level over the intervening period. It also acknowledged that the opportunities for passive sales by wholesalers supplying to retailers outside their contract territory remained limited. The OFT concluded that these additional factors did not give cause for concern. The OFT recorded that it had not received complaints from publishers that their ability to negotiate with the wholesalers at the point when contracts were being put out to tender had diminished because of increased market concentration. There were also signs that some retailers were able to exercise some leverage in their negotiations with the wholesalers – in other words that there was some competition in the market as well as continuing competition for the market.

43. The Applicants argue that this finding does not properly address the fact that the same features that the OFT had identified in the 2009 Decision as operating in an anti-competitive way were still present in the market in 2012. The Applicants point in particular to the fact that although in the 2009 Decision the OFT predicted that passive selling by wholesalers would start once absolute territorial protection was lifted from

magazines, this had not in fact happened, even though the restrictive clauses in the magazine distribution contracts had been terminated.

44. As to the first of these points, in our judgment this misunderstands the exercise that the OFT was carrying out. It was not examining whether the features identified in the 2009 Decision had been removed but was looking at the market as a whole to see whether, having regard to the way the market now operates and the developments in the market since 2009, it was an appropriate use of its resources to examine whether a reference to the Competition Commission should be made. We do not accept the Applicants' argument that the OFT failed to consider how competition *in* the market had developed since 2009. On the contrary, the 2012 Decision records that multiple retailers were able to impose financial penalties on wholesalers for poor service quality and that they have been able to push back on proposals from the wholesalers to increase the carriage service charge. Both of these are, the OFT considers, a reflection of the increased bargaining power that some retailers have as a result of the disappearance of absolute territorial protection for magazines. Further, the OFT had found in 2009 that there were advantages as well as disadvantages to publisher-led distribution and it referred only to the balance of control over the supply chain moving towards the retailers 'to some degree' (see paragraph 4.128 of the 2009 Decision).
45. We also do not accept the Applicants' criticism that the absence of significant passive sales taking place since 2009 shows that competition in the market has failed to improve.² A passive sale will only take place where the retailer is sufficiently dissatisfied with the wholesaler serving its contract territory to seek supply from a different wholesaler. Once the possibility of obtaining such alternative supply exists, the fact that retailers do not use it may well be explained by the wholesalers taking steps to reduce the number of unhappy retailers. The OFT found evidence of such steps, albeit they were of a limited nature. This, together with the recognition in the 2009 Decision that various characteristics of the market make the feasibility of economic passive supply limited, was sufficient, in our judgment, to support the conclusions that the OFT reached on this point.

² The NFRN's evidence was that only 300 retailers out of about 50,000 had been able to take up passive sales: see Mr Baxter's first witness statement, paragraph 47 and similarly Mr Brennan's witness statement paragraph 23.

46. In the light of the above, the Tribunal is unanimous in rejecting the Applicants' challenge to the OFT's finding that the likely consumer benefit did not justify it undertaking the short update review of this sector envisaged at the end of the 2009 Decision.

(e) *The strategic significance of the investigation*

47. One of the other factors, in addition to potential consumer benefit, that the OFT takes into account when assessing the priority to be given to a proposed investigation, is how that work fits with the OFT's wider objectives and current portfolio of work: see paragraph 4.9 of the 2012 Decision. The OFT also considers whether it is best placed to act or whether there are alternatives to OFT action such as self-regulation, private enforcement or action by other bodies.

48. The 2012 Decision records that:

(a) further work on the newspaper and magazine distribution sector 'would not be effectively aligned with the OFT's strategic priorities and key themes in the OFT's Annual Plan for 2011-2012 as a whole' (paragraph 5.30); and

(b) there was evidence to suggest that the industry has taken steps to self-regulate and set minimum service levels standards, indicating that the OFT was not best placed to act in relation to issues raised by respondents to the consultation.

49. The Applicants challenge this second point, submitting that the proposed self-regulation was ineffectual and unlikely to address the concerns that their members expressed. The body to which the OFT referred as providing a forum for self-regulation was the PDF (the Interveners in this application). The PDF was set up in September 2010 with the objective of bringing together the main participants in the newspaper supply chain in a forum which discusses issues such as service performance, complaints resolution, environmental issues, and ensuring the widespread availability of newspapers and magazines. In November 2010, the PDF adopted a 'Charter' which applies to the arrangements between all wholesalers and all retailers. The Charter covers issues such

as order and supply management, invoicing, returns management and customer service. It also establishes a complaints resolution process.

50. As we have described earlier, the Applicants' evidence in this application stresses the high volume of complaints that their respective members lodge with them about the service provided by wholesalers, in particular about the supply of magazines of a kind or in numbers that the retailers do not want, about late deliveries and about delays in receiving refunds on returned goods.³ But both Applicants roundly reject the suggestion that the PDF and its Charter offer any chance of improving the position. They say that they regard them as offering no real benefits and that the key clauses of the Charter are rendered meaningless by caveats which place service standards in publishers' and wholesalers' hands. Despite the fact that the PDF is intended to include representatives of the retailers as well as the wholesalers and publishers, the Applicants say that their lack of confidence in self-regulation has caused them to refuse to take part; they have had no role in selecting the few retailers who have been prepared to join the PDF's Review Panel. Mr Baxter's evidence was that the NFRN has not referred any of its members to the PDF and that the NFRN helpline and field team do not recommend that members approach the PDF to resolve their grievances. This is because, he says, they have no confidence in the PDF's ability to act as an effective or independent arbiter of distribution issues.
51. We regard the Applicants' attitude towards the PDF and the Charter as unfortunate and consider that it is regrettable that they have refused to engage with this new industry body. The terms and conditions of business set out in the Charter appear to us to go beyond bland promises of good service by setting measurable standards. Further, we were told that the PDF has recently appointed an independent chairman to review the operation of the Charter. We do not share the cynicism expressed by Mr Peretz about this review. In our judgment the OFT was right to regard this initiative as having the potential to resolve some of the problems identified in the responses to the consultation. We do not see that the OFT's assessment of its priorities as regards the strategic significance of any update review as flawed in any way.

³ See for example Mr Brennan's witness statement at paragraphs 20 onwards.

(6) Conclusion

52. In the light of the matters set out above, the Tribunal is unanimous in dismissing the Applicants' application for review.

Vivien Rose

Clare Potter

Joanne Stuart OBE

Charles Dhanowa
Registrar

Date: 24 October 2012