

Decision of the Secretary of State for Business, Enterprise and Regulatory Reform on release of undertakings relating to supply of national newspapers in England and Wales

Introduction

1. In 1993 the Monopolies and Mergers Commission published a report on their enquiry into “The supply of national newspapers, A report on the supply of national newspapers in England and Wales” (Cm2422). The MMC’s report identified two practices by wholesalers that they considered operated against the public interest. These practices were (i) refusal to supply new retail outlets where wholesalers believed an area already to be adequately served and (ii) a restriction imposed on retailers by wholesalers preventing them from selling titles on to other retailers (sub-retailing). The MMC’s 1993 report contained recommendations to the Secretary of State on measures to remedy these practices by wholesalers.
2. The Secretary of State invited the industry to propose its own remedies with the outcome that the relevant industry parties agreed a code of practice governing newspaper supply practices in England and Wales. The 76 national newspaper wholesalers then operating in the market signed statutory undertakings under the Fair Trading Act 1973 which obliged them to comply with that code. The Code prescribed that a wholesaler must supply any retailer located within its exclusive territory that met the specified Minimum Entry Level purchase thresholds and established arrangements for sub-retailing.

OFT advice to the Secretary of State on future of the undertakings and Code

3. Under Section 88 of the Fair Trading Act 1973, the OFT has a statutory duty from time to time to review the undertakings and consider whether, by reason of any change in circumstances, those undertakings are no longer appropriate in order to remedy the adverse effects specified in the MMC’s report based on the facts found in their investigation. The OFT must then advise the Secretary of State whether the relevant parties can be released from those undertakings or whether the undertakings should be varied or superseded by new undertakings under the Fair Trading Act.
4. Having reviewed the Code and associated undertakings, and sought the views of participants in the industry, the OFT published its advice to the Secretary of State on 22 October 2008 in a document entitled “National Newspapers: A review of undertakings relating to the supply of national newspapers in England and Wales” [OFT 1026]. A copy of the Code was attached at Annex A to that document.

The OFT’s advice

5. This is the third time the OFT has reviewed the undertakings with the preceding two reviews having taken place in 1997 and 2002. In preparing their advice to the Secretary of State, the OFT has considered the effectiveness of the Code in remedying the adverse effects identified by the MMC; market developments since 1993; and the impact of changes in circumstances on the continued appropriateness of the Code. The advice sets out the OFT’s reasons for concluding that the adverse effects identified in the MMC’s 1993 report are no

longer a concern and are not likely to re-emerge and, therefore, that the Code is no longer necessary and the undertakings should be released.

6. In reaching this conclusion, the OFT identifies the following three changes in circumstances:
 - a. increase in the relative significance of Carriage Service Charges (CSCs) as a source of income for wholesalers - meaning that wholesalers have a greater commercial incentive to supply as many retailers as possible to increase the income they receive from CSCs;
 - b. changes in the role publishers play in the newspaper supply chain - meaning publishers have greater scope (and the commercial incentive) to require wholesalers to supply retailers and provide a good standard of service; and
 - c. changes in the composition and relative prominence of different types of retail outlet in supplying newspapers - with larger multiple retailers now accounting for over 40% of sales and representing an important source of revenue for publishers and wholesalers.
7. The OFT concluded that the existence or otherwise of the Code is not a key factor in determining whether or not a retailer is supplied with newspapers and does not significantly affect the extent to which sub-retailing occurs. They considered there are significant commercial incentives on both publishers and wholesalers to ensure effective distribution of newspapers such that it is no longer necessary to impose statutory obligations on wholesalers to achieve that end.

Responses to the consultation

8. The same day the OFT published its advice to the Secretary of State on the undertakings, BERR launched a public consultation, inviting views on the OFT's advice to be submitted by 14 January 2009. BERR received 10 responses from The National Federation of Retail Newsagents (NFRN), The Association of News Retailers (ANR), News Direct (Scotland) Limited, The Association of Newspaper and Magazine Wholesalers (ANMW), Dawson News, Smiths News, Menzies Distribution, The Newspaper Publishers Association (NPA), The Periodical Publishers Association (PPA) and The British Retail Consortium (BRC). Together, these bodies reflect the full range of businesses involved in newspaper and magazine supply.
9. Almost all of the respondents supported the OFT's conclusion that, due to a change of circumstances, the adverse effects identified in the MMC's report are no longer a concern and the undertakings can be released. Publishers and wholesalers indicated their belief that supplies to retailers would not be adversely affected in the absence of such regulatory requirements. Retailers tended to take a different view, considering that, while the existing undertakings were no longer appropriate, some form of regulation remained necessary in order to ensure effective supply of newspapers and magazines.

10. The National Federation of Retail Newsagents argued that the undertakings should only be released on the basis that a new regulatory scheme be established to replace the Code. The scheme would govern the supply of both newspapers and magazines throughout all of the UK, regulate the level of CSCs and provide for the review and regulation of Minimum Entry Levels.
11. BERR invited the OFT to comment on the representations we received in response to the consultation. The OFT confirmed that their conclusions remained unchanged in the light of the further representations. .

Industry self-regulation / comments on a voluntary code

12. It is clear from the responses to the consultation that many parties believe a voluntary industry code to govern supply arrangements could play an important role in ensuring consistent good levels of service to retailers and providing for appropriate complaints procedures. There appears to be widespread support for such a code across the industry (from publishers, wholesalers and retailers). This is a matter for the relevant industry parties to take forward.

Transitional period

13. A number of representations were made by wholesalers to the effect that, if deciding to release the undertakings, the Secretary of State should permit a transitional period of around six months before the release of the undertakings comes into effect. The purpose of this transition period was described as being to enable new operating procedures (and related documentation) to be put in place and perhaps also a new voluntary code.

Conclusions and decision

14. Having given careful consideration to the responses received to the BERR consultation and to the OFT's advice, I believe that it is appropriate to accept the OFT's recommendation and to release wholesalers from the undertakings committing them to comply with the Code. .
15. Circumstances have changed since the MMC published their report in 1993. I believe it is no longer necessary or appropriate to impose statutory obligations on wholesalers to address the concerns that were identified by the MMC in their 1993 report. Those concerns – centred on the refusal to supply new types of retail outlet such as supermarkets and petrol stations - are not likely to re-appear if the undertakings and the Code are removed. Such new types of retailers now account for over 40% of newspaper sales and represent an important source of revenue for publishers and wholesalers.
16. It would not be appropriate to vary or supersede the undertakings rather than release them. Varying or superseding the undertakings would only be appropriate if it remained necessary to address the adverse effects specified in the MMC report through such statutory undertakings.
17. I am satisfied that there exist commercial incentives on both publishers and wholesalers to ensure effective distribution of newspapers without the need for undertakings from wholesalers provided under the Fair Trading Act. Wholesalers have an incentive to supply as many retailers as possible to increase the income

they receive from retailers in Carriage Service Charges. And publishers have greater scope (and the commercial incentive) to require wholesalers to supply retailers and provide a good standard of service.

18. The arguments that have been presented for retaining undertakings and some form of code do not appear to contradict this conclusion but rather seek to make a case for some separate measure to be introduced to deal with a different set of concerns. The NFRN proposals for a new regulatory scheme are outside the scope of the code review. As explained in paragraph 5.12 of the OFT report:

“The OFT can only advise the SoS to vary or supersede an undertaking where by reason of any change of circumstances, the undertaking is no longer appropriate to remedy or prevent the adverse effects specified in the MMC’s report on the basis of the specific facts found by the MMC. The OFT cannot, therefore, advise the SoS to vary the Code in order to remedy or prevent issues which go beyond the specified adverse effects on the basis of the particular facts found.”

19. Having carefully considered the responses from the consultees, there appears to be no strong basis for me to reach a different conclusion to that reached by the OFT on this matter. Many of the arguments put forward by the consultees had already been made to and considered by the OFT.

20. In my view, there appears no clear justification for introducing some new regulatory system to govern newspaper and magazine supply in the UK. I recognise that newspapers play an important role in UK society and also that there are unique features to the newspaper and magazine supply market that require specific arrangements to be put in place. It does not, however, follow that the Government should regulate those arrangements.

21. I do believe it is reasonable to accept the proposal from wholesalers that there should be a six month delay between the date of this decision to release the undertakings and the date on which the undertakings are released. This is in order to provide the parties in the industry with some time to review and amend the contractual arrangements they made within the context of the undertakings and the Code. Accordingly, **I have decided that the undertakings will be released with effect from 20th October 2009.**

Ends