

## **Assessment of the Complaint by Brannigan Publishing against Newsquest and also Johnston Press (Case CE/3651-03)**

### **1 Introduction**

Following a private hearing before the Competition Appeal Tribunal<sup>1</sup>, the OFT offered to assess the complaint submitted by Brannigan Publishing (Brannigan), together with any additional materials that he wished to submit (the Complaint).

### **2 The Complaint**

2 The Complaint comprises the following materials. In a letter of 24 October 2003 to the OFT (the original complaint - attachment A) Brannigan Publishing (Brannigan) made a complaint against Newsquest (Sussex) (Newsquest), a rival local newspaper publisher. Allegations were also made against Johnston Press (Johnston). The details of the original complaint were elaborated upon and set out more thoroughly by Brannigan in a letter of 27 February 2004 to Wynne Baxter (attachment B), solicitors acting on behalf of Brannigan. Market information was also subsequently provided to Wynne Baxter in a letter of 13 March 2004 (attachment C). On instructions from Wynne Baxter, an opinion from Counsel of Brick Court Chambers was obtained on 22 March 2004 (attachment D). Following the hearing before the Competition Appeal Tribunal, a redraft of the Complaint was provided to the OFT on 31 May 2006 (the redraft - attachment E).

3 This assessment draws together the various allegations from all of the materials comprising the Complaint. In the original complaint, Brannigan made allegations against both Newsquest and Johnston. The redraft only cites Newsquest as the complaine. However, the Complaint still appears to be aimed at Johnston as well as Newsquest (for example, E ¶ 5 'the conduct by a leading player (or players) plainly flouts the OFT's decision in Aberdeen Journals' and E ¶ 68 'there has been collusion between Newsquest and Johnston Press contrary to the Chapter I prohibition'). Also, important market information about Johnston is missing from E without which it would not be possible to determine the market power of Newsquest.

4 Brannigan alleged that Newsquest (Sussex) had originally agreed to print Brannigan's newspapers, Lewes Life and Uckfield Life aimed at the respective towns in East Sussex, but that one week before launch Newsquest (Sussex) reneged on the agreement [B ¶16-18, E ¶ 8-9]. However, Newsquest (Essex) - which was not in competition with Brannigan - did agree to print the newspapers in question enabling it to be launched more-or-less on time [B ¶ 20, E ¶ 20].

5 Brannigan alleged that Newsquest (Sussex) then tried to claim rights to the use of 'Life' in local newspaper titles in view of its titles Gatwick Life in West Sussex and Horley Life in Surrey (Sussex?) [B ¶ 22, E ¶ 15]. However, Brannigan resisted these attempts and the matter remained unresolved.

6 Brannigan stated that Newsquest (Sussex) then changed tactics and launched a 'market spoiler' in Uckfield (the Uckfield Leader) [B ¶ 24, E ¶ 16]. Brannigan alleged that 'The the main aim was to foreclose the East Sussex market and prevent expansion of a new entrant. The biggest newspaper across the whole of

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<sup>1</sup> Mr T Brannigan v Office of Fair Trading, Private Hearing, Competition Appeal Tribunal, 28 April 2006, page 28, lines 6-23 and page 37, line 32 to page 38, line 16.

Sussex is their [Newsquest's] Evening Argus title, which would have been severely hit hard after we had become established. Johnston's three main titles under threat were the Sussex Life, Eastbourne Advertiser and Eastbourne Herald. At a later date, Johnston's Hastings and Bexhill Observers may have been affected also' [E ¶ 16].

7 Brannigan also alleged that Newsquest (Sussex) began 'breaching the law on price fixing' by charging 'an excessively low – or FREE – price, which had no relation to the economic value of the product supplied, abusing their position of market power' [B ¶ 26-27, E ¶ 17]. In particular, the Halifax Estate Agency - which apparently had been happy with Brannigan's publication - had allegedly agreed a four week free run of a newly designed, weekly full-page colour advertising spread with Newsquest on the proviso that it withdrew its advertising from Brannigan [B ¶ 29, E ¶ 18]. Other advertisers, NSA and Lawson Commercial also withdrew their adverts despite telling Brannigan that the adverts were successful [E ¶ 18]. Brannigan believed that 'predation can be assumed due to the fact that the price is below average variable costs' [B ¶ 30, E ¶ 20]. It alleged that 'The way Newsquest (Sussex) launched in to Uckfield was by employing cross subsidy with one of their free newspapers in West Sussex. The majority of the advertising costs were covered from companies based in Haywards Heath and Burgess Hill, allowing for the introduction of free or excessively low cost advertising to companies in Uckfield' [B ¶ 31, E ¶ 21]. Brannigan also alleged that 'Newsquest (Sussex) state [no source provided] that their Uckfield Leader was highly profitable from day one, mostly due to the profits raised from the Haywards Heath area, which would confirm the conclusion that this fact is based on cross-subsidy of a market spoiler. .... An undertaking was in place where they financed losses from their Uckfield market from profits made in another market where it has market power. This resulted in significant effects on competition' [B ¶ 31, E ¶ 22].

8 Brannigan also alleged that the staff of Newsquest (Sussex) employed other tactics by, for example, making defamatory remarks about Brannigan's products 'in an anti-competitive abusive manner' as well as offering free advertising to Brannigan's regular advertisers as long as they removed their advertising from Brannigan's newspaper [B ¶ 32, E ¶ 26]. Furthermore, Newsquest (Sussex)'s staff are alleged to have informed various newsagents in the area that, if they continued to stock Brannigan's newspapers, they would remove all of their products and any subsidies received [B ¶ 32, E ¶ 27]]. It was also alleged that other distributors of Brannigan's publications were asked to either stop receiving the publications and replace them with the Uckfield Leader or stock both [B ¶ 33, E ¶ 28]. (This allegation was not made in Brannigan's original complaint to the OFT).

9 Johnston Press's staff, like Newsquest (Sussex)'s staff, were alleged to have made derogatory remarks to advertisers about advertisements in Brannigan's newspapers [B ¶ 39]. Brannigan also alleged that Johnston Press 'may have also breached the Act' because on several occasions its editorial staff produced very similar copy to that within Brannigan's newspapers, for example Johnston Press's Sussex Express [B ¶ 41-42].

10 Brannigan, alleged that 'Newsquest (Sussex) and Johnston Press have been strongly rumoured within the industry to have a private cartel agreement concerning areas along the south coast, which is why no spoiler was launched in Lewes also' [B ¶ 24, E ¶ 25]]. (This allegation was not made in Brannigan's original complaint to the OFT). In particular, 'While working at Sussex Express for Johnston Press, I asked [ ] why we have papers to the east, west and north of Brighton, but no paper in that small excluded area. He told me that Johnston Press and Newsquest (Sussex) have

an agreement that no Johnston title would launch in Brighton against Newsquest, and they would reciprocate elsewhere' [E ¶ 25].

11 Finally, in closing his original complaint to the OFT, Brannigan stated that it had 'little chance of getting back into the market of expertise locally due to the dominant position of Newsquest and Johnston Press' [A].

### **3 Parties**

12 According to the Competition Commission the four largest publishers nationally of regional/local paid-for and free titles by volume of circulation are Trinity Mirror with 24%, DMGT with 22%, Newsquest with 15% and Johnston with 12%.<sup>2</sup>

13 Brannigan estimated that the annual advertising revenue of Newsquest and Johnston in East Sussex (probably the widest geographic market of relevance) was about £7 million [C ¶ 10, E ¶ 44 ] and £8 million respectively [C ¶22 but not mentioned in E].

14 Brannigan Publishing was owned by Mr T Brannigan, a sole trader who had sold his home and also arranged a loan and credit card assistance to fund his newspapers [B ¶ 7, E ¶ 4]. He had 6 years experience in the newspaper industry as a sales person but appears to have had no experience of running a newspaper [B ¶ 2, E ¶ 6]. He entered the market(s) in March 2003 and exited (bankrupt) in September 2003 [B ¶ 6 and 14, E ¶ 4].

### **4 Focal Products**

15 The following information for 2003 was provided by Brannigan based on Newspaper Society and other reports [C and E]. (This information was not available in Brannigan's original complaint to the OFT).

16 Within Uckfield, the information suggested that Newsquest's daily paid-for (Brighton) Argus had a readership of 7% [C ¶ 15, E ¶ 48], Johnston's weekly paid-for Sussex Express had a 31% readership [C ¶ 16, E ¶ 48]. Other newspapers included the Kent and Sussex Courier, 14% readership, and the East Grinstead Courier, 1%, both published by the Northcliffe arm of DGMT (Daily Mail and General Trust) [C ¶ 16].<sup>3</sup>

17 Newsquest's publication, the weekly free Uckfield Leader appeared after the entry of Brannigan's Uckfield Life [B ¶ 24, E ¶ 16]. No readership figures were available for either title [C ¶ 8, E ¶ 42].

18 Within Lewes, the information provided by Brannigan suggested that Newsquest, through its paid-for daily title the Argus, had an average readership of 25% [C ¶ 12, E ¶ 46] and that Johnston, through its paid-for weekly title the Sussex Express, had a readership of 70% [C ¶ 27] (this important readership figure is missing from E). No other titles appear to be published.

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<sup>2</sup> Competition Commission *Newsquest (London) and Independent News & Media PLC: A report on the proposed transfers*, 2003 [¶ 3.10], [http://www.competition-commission.gov.uk/rep\\_pub/reports/2003/fulltext/484c3.pdf](http://www.competition-commission.gov.uk/rep_pub/reports/2003/fulltext/484c3.pdf).

<sup>3</sup> See <http://dmgt.co.uk/corporatestructure/northcliffenewspapersgroup/nngwebsites/> and [www.thisiskent.co.uk](http://www.thisiskent.co.uk)

19 No details were given about Newsquest's and Johnston's newspapers in other towns.

20 Across East Sussex, Newsquest's Argus had an average readership of 15% per week, its free Brighton & Hove Leader 15%, its free Mid Sussex Leader 1% and its free South Coast Leader 5% [C ¶ 8, E ¶ 42] giving a readership simple total<sup>4</sup> of 36% [C ¶ 11, E ¶ 45] for Newsquest.

21 The readership figures for Johnston's publications in East Sussex were Sussex Express 7%, Bexhill Observer (weekly paid-for) 4%, Eastbourne Gazette (weekly paid-for) 5%, Eastbourne Herald (weekly paid-for) 10%, Hastings Observer (weekly paid-for) 9%, Rye & Battle Observer (weekly paid-for) 3%, West Sussex Gazette (weekly paid-for) insignificant readership and the free Eastbourne Advertiser (no readership figures but theoretically delivered to every household in Eastbourne) [C ¶ 25]. This gives a readership simple total of 38% (rounded up) [C ¶ 26] for Johnston. (This market information on Johnston is missing from E).

22 No details were given about newspapers in East Sussex from other publishers.

## **5 Section 25 of the 1998 Competition Act (the 'Act')**

23 An assessment has been made of whether, in the Complaint, there were reasonable grounds to suspect an infringement of competition law under section 25 of the Competition Act 1998 (attachment F).

24 The assessment shows that there was no clear evidence that either Newsquest or Johnston was dominant. Or that there were agreements which could have an appreciable effect upon competition. Also, even if dominance had been established much of the alleged behaviour could have been justified as a vigorous competitive response and of too short a duration to pose a threat to serious competition.

25 It was therefore unlikely that anti-competitive practices by Newsquest and Johnston were responsible for the demise of Brannigan and, as a result, the grounds for the OFT to have a reasonable suspicion that the Act had been infringed were weak.

## **6 OFT Administrative Priorities**

26 Even if the OFT had concluded that there were reasonable grounds to suspect an infringement, it would need to assess the case in terms of its administrative priorities. The OFT prioritises its competition casework systematically against six criteria:<sup>5</sup>

- likely consumer harm from anti-competitive behaviour,

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<sup>4</sup> The 'simple totals', that had been used by Brannigan to demonstrate market shares, are a summation of the individual readership percentages and as such overestimate the number of readers in an area if a reader reads more than one publication from a newspaper group (and in some cases the totals exceed 100% if all residents in an area read more than one newspaper). Thus in absolute terms they are erroneous. Nevertheless, in relative terms, the simple totals provide a useful guide to relative market power in the assessment of dominance.

<sup>5</sup> *Office of Fair Trading Annual Plan 2006-07*, TSO,

- strength of the evidence provided,
- type of case,
- special features of the case,
- precedent or policy value, and
- whether the OFT is best placed to take action.

### 6.1 Consumer Harm

27 Any consumer detriment is likely to be small because the markets concerned are local and small, involving two towns rather than a city or a region. Also, the main consumers are the advertisers and the OFT had not received complaints from them. This suggests that they might not have suffered any great loss by the demise of the Uckfield Life if charges for advertising were already competitive and, if anything, they have gained by the continued presence of the Uckfield and Heathfield Leader in the market. Readers have also not lost out. The nature of any detriment resulting from the loss of one of the two free newspapers (which a number of recipients might view in the same light as junk mail and not even read) is relatively unimportant. Even if the widest probable geographic market is chosen, and a rule of thumb upper limit of 10% detriment is applied (usually reserved for horizontal cartels), the annual detriment based on the market information provided by Brannigan, is likely to be only around £1.5 million (using the figures in Paragraph 13) which is very small indeed. In the town where predation is alleged to have taken place, Uckfield, it would be considerably less. As a result, it is unlikely that the complaint would have been a strong candidate for action by OFT in respect of consumer harm.

### 6.2 Strength of Evidence

28 The market structure did not appear conducive to dominance, in particular the dominance of Newsquest, and the fact that there could have been objective justification for some of Newsquest's conduct suggests that the evidence is very weak in respect of an abuse of dominance. The case against Johnston was even less sound. Evidence was also weak in respect of anti-competitive agreements. As a result, there is probably no reasonable prospect of the OFT producing 'strong and compelling' evidence (as required in *Napp*<sup>6</sup>) that an infringement of the Act had indeed occurred.

### 6.3 Type of Case

29 Predation is a serious type of infringement of competition law and would be given a high priority.

### 6.4 Special Features

30 The large difference in the size of the entrant compared to the incumbents would be considered to be an aggravating factor.

31 On the other hand, there is very strong evidence that Newsquest (Sussex) was acting independently of its parent organisation and different arms of that organisation, such as Newsquest (Essex) and it is possible that, in isolation, its annual turnover might not have exceeded £50 million. It might therefore be possible

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<sup>6</sup> Competition Commission Appeal Tribunal, Case No 1001/1/1/01 *Napp Pharmaceutical Holdings Limited and Subsidiaries v The Director General of Fair Trading*, 15 January 2002, [2002] CAT 1 [¶109].

to argue that as independent undertaking its conduct should have been considered to be of minor significance making it immune to fines.<sup>7</sup>

## 7 Precedent or Policy Value

32 The OFT's current annual plan identifies consumer credit, healthcare, construction and housing, mass-market scams and the interaction between government and markets as its priority areas.<sup>8</sup> Newspapers do not fall within one of the sectors identified by the OFT as high priority. In addition, in the light of *Aberdeen Journals Decision (2)* the case has limited precedent value.

### 7.1 OFT Best Placed to Investigate

33 The enforcement of competition law under the Act by OFT would be most appropriate if action was to be taken.

## 8 **Conclusions**

34 Although the Complaint raises allegations in relation to a serious type of infringement, there is very low consumer detriment and the strength of the evidence is weak.

35 Moreover, the OFT's experience in *Aberdeen Journals Decision (2)* suggests that market definition in the newspaper market and the analysis of costs to demonstrate predation would be highly resource intensive. It is also probable that, even if dominance could be demonstrated and predation was feasible, the evidence on predation would in be inconclusive in view of the short period under which predation was alleged to have taken place. A lot of the costs that would normally be included in AVC calculations would not be that variable.

36 Finally, the OFT needs to focus its finite resources on the most important cases. The likelihood that any investigation would be highly resource intensive and that the costs might outweigh any benefits, under normal circumstances, would lead to the case being dismissed immediately on administrative grounds. (It would not be worth spending tax payer's money completing even a preliminary assessment of whether or not there are indeed reasonable grounds for suspecting an infringement of competition law).

37 For the above reasons, the OFT rejects the Complaint on the basis of its administrative priorities.

OFT  
9 June 2006

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<sup>7</sup> OFT Guideline *Abuse of a dominant position*, OFT 402, 2004 [¶ 2.14].

<sup>8</sup> It should be noted that at the time of the complaint the OFT had no priority areas.