

Whether, in the Complaint by Brannigan Publishing against Newsquest and also Johnston Press Case (CE/3651-03), there were reasonable grounds to suspect an infringement of competition law under section 25 of the Competition Act 1998 (The ‘Act’)

1 Introduction

This assessment sets out the OFT’s views on whether the Complaint provided reasonable grounds to suspect an infringement under section 25 of the Act. It is provided without prejudice to the OFT’s assessment of the Complaint as against its administrative priorities.

2 Assessment

2 There would appear to be no-interstate trade issues. The assessment will therefore concentrate on whether there are reasonable grounds to suspect an infringement of the Act.

5.1 Market Definition

5.1.1 Product Market

3 It is likely that, as in *Aberdeen Journals Decision (2)* [¶ 45] and a number of merger cases investigated by the Competition Commission, the starting point for defining the relevant product market would be advertising space in regional and local titles, and not national newspapers, on the basis that national newspapers are not competing for regional and local advertisers.

4 It is possible that, unlike *Aberdeen Journals*, in this case free titles are in a different market to paid-for titles. Brannigan has implied an exceptionally narrow market definition relating to free newspapers as a result of allegations concerning cross subsidies between Newsquest’s free newspapers in Haywards Heath and Burgess Hill and its Uckfield Leader [B ¶ 31, E ¶ 21 and 22]. However, Johnston as well as Newsquest is accused of anticompetitive behaviour and neither company had any free titles in Uckfield or Lewes before Brannigan’s entry. Indeed, there appears to have been fierce competition between Brannigan and Johnston over both regional and local advertisers [B ¶ 39 and 40]. Thus the alleged conduct of both companies would (at minimum) appear to be aimed at protecting the market share of their existing paid for titles in these towns.

5 Brannigan had also indicated that the main aim of Newsquest was to foreclose the East Sussex market and prevent expansion of a new entrant and that its publications would have the most impact on Newsquest’s paid-for Argus title as well as Johnston’s paid for titles [E ¶ 16]. This would suggest that the product market is wider than free newspapers and includes paid-for newspapers and that it includes both regional and local publications.

6 It would also not make sense for Brannigan to describe Newsquest’s free Uckfield Leader as a market spoiling fighting title if the product market was just free newspapers. A fighting title is launched to protect existing revenue and wound down after an entrant has exited. Newsquest had no existing free newspaper advertising revenue to protect in Uckfield at the time because its free newspaper was launched after Brannigan’s. Moreover, in Lewes, Brannigan would have faced no competition

whatsoever and its exit would therefore have been due to factors other than any anti-competitive behaviour.

7 Finally, as noted by Brannigan's Counsel [D ¶ 18], the CAT concluded in *Aberdeen Journals Judgement*¹ that there is no reason why a title that is free to a reader is necessarily in a different market from a paid-for title and that there is no reason why a free weekly newspaper should not be in competition with a daily, paid-for newspaper for the business of a significant number of advertisers.

8 Therefore the most probable product market, particularly in view of Brannigan's assessment of rival publications, is advertising space in free and paid-for regional and local newspapers.

5.1.2 Geographic Market

9 The narrowest geographic markets would be one centred on Uckfield and the other on Lewes but wider ones such as East Sussex may be appropriate.

10 In Uckfield, the main competition for Brannigan's Uckfield Life appeared to have been from the paid-for titles of Johnston's Sussex Express, Northcliffe's Kent and Sussex Courier, Newsquest's Argus as well as Newsquest's free Uckfield Leader.

11 In Lewes the competition for Brannigan's Lewes Life appeared to have been from the paid-for titles of Johnston's Sussex Express and Newsquest's Argus.

12 It is unclear how much of the advertising content of the newspaper titles in these towns, other than the Uckfield Leader and Uckfield Life and Lewes Life, were specifically geared towards the residents. But, as already mentioned, there must have been sufficient competition for the content for Johnston, which appeared to have had the most readership in both towns prior to the appearance of the free newspapers, to be as concerned as Newsquest about the Uckfield Life and Lewes Life. The ability of advertisers to switch between the regional and the local publications in both towns would suggest that the regional newspapers might have been acting as competitive constraints on local prices for advertising. More generally, regional newspapers also had overlapping readership areas enabling advertisers to switch between them and, because of this, they also acted as price constraints on each other. The net result is that there is likely to have been a chain of substitution covering all regional and local newspapers throughout East Sussex (if not further afield making the geographic market at least as wide as East Sussex (if not wider). Brannigan appeared to have supported this definition in his allegation that the main aim of Newsquest (Sussex) was to foreclose the East Sussex market [E ¶ 16].

13 The possibility of price discrimination against truly local advertisers, which might support the narrower market definitions, is not ruled out. However, it would be difficult to partition publications in this way in any economic analysis. Also, whether or not the geographic market may have been narrow or wide is unlikely to have changed any findings on dominance.

5.1.3 Conclusions on Relevant Market

¹ *Aberdeen Journals Limited v Office of Fair Trading* [2003] [¶ 153].

14 The relevant market was advertising space in free and paid-for regional and local newspapers in East Sussex.

5.2 Chapter II

15 Since the allegations concern predation, abuse of dominance under Chapter II will be considered first. To establish whether Chapter II has been infringed dominance as well as abuse has to be established.²

16 The OFT is of the view that there are no market share thresholds for defining dominance under the Chapter II prohibition (or indeed under Article 82).³ The OFT uses the economics based definition of dominance as set out by the European Court in *United Brands* – ‘a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately consumers’.⁴ The OFT considers that an undertaking will not be dominant unless it has substantial market power.⁵ To establish market power it is necessary to examine competitive constraints such as actual and potential competition and other factors such as buyer power.⁶

5.2.1 Dominance of either Newsquest or Johnston

5.2.1.1 Competition Prior to Entry

17 Market power is more likely to exist if an undertaking (or group of undertakings) has persistently high market shares.⁷

18 There were no reliable figures available for advertising revenue which would have provided a more accurate estimate than readership of any market share relating to a product involving advertising space, particularly where free publications are involved. With free publications actual readership may be quite low, despite claims of total coverage in an area, because a significant number of recipients would treat the publication as unwanted junk mail. Nevertheless, readership figures can act as rough proxy for share of advertising revenue, on the basis that publications which have the best distribution attract proportionately higher revenue (as suggested by Brannigan’s Counsel [D ¶ 25]).

5.2.1.1.1 *Uckfield and Lewes*

19 What immediately distinguishes the markets of Uckfield and Lewes from the market in *Aberdeen Journals Decision (2)* is that whereas Aberdeen Journals had virtually a local monopoly prior to the entry of the Independent, with other players having a combined market share of around 6%⁸, neither Newsquest or Johnston was in such a position. Also, specifically in Uckfield, where predation was alleged to have taken place, a predator aiming to dominate the market would have to eliminate its two main rivals as well as the entrant. Finally, Johnston not Newsquest, the alleged

² OFT 402, [¶ 4.1].

³ OFT Guideline *Assessment of Market Power* OFT 415 [¶ 2.11]

⁴ Case 27/76 *United Brands v Commission* [1978] ECR 207.

⁵ OFT 415 [¶ 2.9]

⁶ OFT 415 [¶ 3.3]

⁷ OFT 415 [¶ 4.2]

⁸ *Predation by Aberdeen Journals Limited (Remitted Case)*, Competition Act 1998, Decision of the Director General of Fair Trading, No CA98/14/2002, 16 September 2002, [¶ 46].

predator, appeared to have the biggest readership by far in both towns prior to entry of the free newspapers and would therefore be expected to have the greatest market power (even allowing for the rough estimate that readership would provide of advertising revenue) and the most to lose from such entry. Based on readership, Newsquest was in fact the smallest of the main players in both towns, particularly Uckfield, and therefore it is unlikely to have had any local dominance. Local dominance of Newsquest in either Uckfield or Lewes is therefore not plausible.

20 It is also unclear whether Johnston was able to act independently of its competitors or customers. In Lewes, Johnston had a readership of 70% with only one other competitor, Newsquest, having a readership of 35%.⁹ The fact that both newspapers were regional would suggest that, as advertising vehicles, they could only ever have a limited impact in the town and that they might represent poor value for advertisers wishing to target their advertisements solely at the residents of the town. Due to overlapping readership areas of different publications, it is likely that advertisers interested in regional advertising would have prices in the overlapping publications constrained as a result of chains of substitution.¹⁰ However, as mentioned above (Paragraph 13) prices for truly local advertisers would not be constrained and Johnston would be able to price discriminate against such advertisers because its newspaper would be the main vehicle for advertising unless Newsquest was able to act as a competitive constraint.

21 Readership data suggested that, in Lewes, Newsquest was in a relatively weak position. Nevertheless, Brannigan had not alleged anywhere in his complaint that either Newsquest or Johnston were earning supra-normal profits and that Brannigan entered the market in Lewes to provide advertisers with a more competitive alternative. Indeed, Mr Brannigan the owner indicated that when he worked for Johnston, between 1996 and 2002, he worked hard to become sales person of the year and build up a profitable area for the company [B ¶ 2]. This suggests that Johnston's advertising operations in Lewes and surrounding East Sussex (Mr Brannigan's sales area) were not that profitable when Mr Brannigan joined, that it had to compete with rival publications to win customers and, as a result, was not making supra-normal profits because of its market position.

22 Such a picture does not indicate markets occupied by dominant companies. In contrast it is characteristic of normal competitive markets. As a result, it is doubtful that Johnston was dominant in either town despite its leading market shares for readership.

5.2.1.1.2 *East Sussex*

23 If a wider geographic market definition is adopted, such as East Sussex, the picture does not become any clearer. Brannigan's estimates of readership figures for Newsquest's publications were 36% and for Johnston's 37% which suggests a more evenly balanced situation than that in the local towns and that neither is likely to have been dominant. The increase in Newsquest's readership as the market is widened, and the corresponding reduction of any local market power that Johnston might have, is to be expected because nationally Newsquest has a slightly larger readership than Johnston. Also, as the geographic market is widened bigger players in the national

⁹ As explained in footnote 4 of the Administrative Priorities Assessment, simple readership totals can exceed 100%. If all the residents of Lewes had read both publications the simple total would be 200%. However, from a market power viewpoint it is the relative totals that are important. In Lewes, Johnston had twice the readership of Newsquest.

¹⁰ See Paragraph 12.

market, such as Northcliffe (DGMT), come into the frame and would have reduced any market power that either Newsquest or Johnston might have had in more local markets. Brannigan had not provided any readership figures for the DGMT in East Sussex. The only conclusion that can be drawn on the basis of the readership figures provided is that as before Johnston, rather than Newsquest, is probably the market leader in the wider geographic market of East Sussex. This suggests that it would be difficult to reach a conclusion that Newsquest was dominant in East Sussex.

5.2.1.1.3 *West Sussex or a part thereof*

24 Even if Newsquest was not dominant in East Sussex or a part thereof, Brannigan also appeared to have alleged that Newsquest was using its dominance in West Sussex and, in particular, its free newspaper market position in Haywards Heath and Burgess Hill to cross subsidise its operations in Uckfield [B ¶ 31]. However, no evidence whatsoever was provided about the operations of Newsquest in West Sussex which would suggest that Newsquest was in fact dominant.

5.2.1.2 Potential Competition (Market Entry/Expansion)

25 The possibility that undertakings would enter the relevant markets and gain share at the expense of an alleged dominant company that sustained prices above competitive levels needs to be considered. The Competition Commission has noted that, although the initial cost of launching a free newspaper was relatively low as a result of desktop publishing, a new entrant might, nevertheless, expect to incur losses during its first years as a result of trying to establish credibility and acceptability with advertisers (see *Aberdeen Journals Decision (2)* [¶ 145]).

26 Newsquest has demonstrated that such entry (or expansion – depending on the market definition used) is possible on a number of occasions in the region. Since 1981, Newsquest has gradually expanded its free newspaper portfolio under the umbrella of its Argus operations in Brighton (www.theargus.co.uk). The Uckfield Leader (now Uckfield and Heathfield Leader) was the most recent of the series which includes the Mid Sussex Leader, Lewes and South Coast Leader (now just South Coast Leader)¹¹ and Brighton and Hove Leader.

27 Without these free titles Newsquest would be in a much weaker position than Johnston in the region, with readership of just 15% (rather than 36%) compared with Johnston's 38%. It therefore seems possible that entry/expansion can act as a constraint on a leading player who might have market power. Also, there would appear to be nothing to prevent Northcliffe (DMGT), the second largest player in the UK and probably of comparable efficiency to the main incumbents, widening its presence in the market(s) if supra-normal profits existed.

5.2.1.3 Other Factors (such as Buyer Power)

28 It is unclear whether the much fought over Halifax Estate Agency and other prize advertisers had any buyer power in advertising. The ability of major advertisers to play rival publications off against each other by switching or adjusting the amount of advertising content in publications would suggest that prices would be constrained and no publisher could have market power.

¹¹ See <http://www.newsquestmedia.co.uk/Regionsmaps.asp?ID=10> and http://www.newsquest.co.uk/portfolio_newspapers.html.

5.2.1.4 Conclusions

29 Counsel for Brannigan [D ¶ 27] stated that ‘... it seems likely that either Newsquest or Johnston Press will occupy a dominant position in the market for the sale of advertising space, but it is not possible to determine which of the two has the greater market power’. It is unclear on what basis this conclusion was reached. Brannigan’s Counsel [D ¶ 23], had stated that ‘Companies may be dominant if their share of the advertising is in excess of 40%, and there is a legal presumption that a market share in excess of 50% of the market constitutes a dominant position’. This appeared to be based on the case law of *AKZO Chemie*¹². However, the OFT interprets the case law as meaning that dominance can only be presumed in the absence of [economic] evidence to the contrary.¹³ Furthermore, the OFT is of the view that an undertaking is more likely to be dominant if its competitors enjoy relatively weak positions or if it has enjoyed a high and stable market share.¹⁴

30 The economic evidence indicates that within East Sussex neither Newsquest nor Johnston could be said to have relatively weak competitors and, market shares based on readership have not been stable as a result of the growth of free newspapers. Brannigan’s own evidence that Johnston had to compete to make its advertising profitable in the Lewes and surrounding East Sussex reinforces this and suggests that even Johnston in Lewes, where it had a very high readership, may not have been dominant.

31 The evidence therefore suggests that irrespective of whether markets are defined narrowly or more widely Newsquest was very unlikely to have been dominant. Johnston is also unlikely to have been dominant in East Sussex. Whether or not Johnston was in fact dominant in Lewes, or indeed Uckfield, is likely to be immaterial in view of the limited nature of its conduct.

5.2.2 Collective Dominance

32 Brannigan appeared to suggest that there might be collective or rather joint dominance more generally because of Newsquest’s and Johnston’s market positions (and possibly as a result of some non compete agreement between them).

33 A dominant position may be held collectively when two or more undertakings are linked in such a way that they adopt a common policy on a market (as a result of parallel behaviour falling short of concerted action).¹⁵ However, such tacit collusion presents a more complicated issue than single dominance and although EC case law has confirmed that the concept of collective dominance may be applicable in certain circumstances, the Court’s judgment in *Airtours*¹⁶ appears to limit the applicability of the concept. The Court stated that there were three conditions necessary for a finding of collective dominance: each member of the dominant oligopoly must have the ability to know how the others are behaving in order to monitor whether or not they are adopting a common policy; tacit collusion must be sustainable over time, which requires that retaliation against firms deviating from the common policy is feasible; and, the foreseeable reaction of current and future competitors, and of consumers, must not jeopardise the results expected from the common policy.

¹² Case C62/86 *AKZO Chemie BV v Commission* [1991] ECR I-3359 [¶ 60].

¹³ OFT 402 [¶ 4.18].

¹⁴ OFT 402 [¶ 4.17].

¹⁵ OFT 402 [¶ 4.24].

¹⁶ Case T-342/99 *Airtours v Commission* [2002] 5 CMLR 317 [¶ 62].

34 Although the newspaper advertising market is transparent in that both Newsquest and Johnston would have known the advertisers in their respective publications there is no evidence to suggest that, in general, they would have known the prices¹⁷ and, as a result, it would be difficult to monitor pricing behaviour. Second, it is likely a co-ordinated market outcome would only be sustainable in Lewes. In Uckfield, Northcliffe would have to be involved, particularly as Newsquest is a minor player, and there is no evidence of this. Third, the ability of bigger newspapers publishers, such as Northcliffe or even Trinity Mirror, or the more prestigious advertisers who seem to have some buyer power, to upset the arrangements appears to be a constraint on tacit collusion.

35 The existence of Newsquest's Lewes and South Coast Leader, although no longer targeted at Lewes but just the South Coast, also appears to shed doubt on tacit collusion in Lewes between Newsquest and Johnston. Moreover, the continued expansion of Newsquest's free newspaper portfolio, and in particular the Uckfield Leader into the Uckfield and Heathfield Leader (after Brannigan's exit) would suggest that there is no co-ordinated market outcome more generally. Finally, no evidence was provided to support tacit collusion.

36 The dynamic nature of the market(s) would suggest that Newsquest and Johnston were in fact competing against each other not only in Uckfield but also in Lewes and more generally in East Sussex and that a co-ordinated market outcome was not possible. In the absence of evidence to the contrary the conclusion is that collective dominance was unlikely.

5.2.3 Abusive Conduct

37 Since dominance by Newsquest in any market is highly unlikely, and even Johnston is unlikely to have been dominant even in Lewes, there is no need to consider whether or not any conduct could have been classed as abuse of a dominant position. The alleged conduct by Newsquest and Johnston has, nevertheless, been examined to determine if it constituted abuse or whether there might have been an objective justification for it.¹⁸ The analysis of conduct follows the order used by Brannigan's Counsel to describe the allegations [D ¶ 29].

a) Cancellation of Brannigan's print slot by Newsquest (Sussex)

38 Although Newsquest (Sussex) appeared to be the only player with printing capability in the area, in the light of *Oscar Bronner*¹⁹, the printing capability cannot be regarded as an essential facility - particularly as the other main publishers of regional and local newspapers use their own facilities elsewhere. Refusal to supply under other circumstances is unlikely to be an abuse. As Brannigan's Counsel notes [D ¶ 34, E ¶10] there are many possible objective reasons for refusing to deal. The fact that Newsquest (Essex) provided printing [B ¶ 20] would also suggest that Newsquest as a single entity was not attempting to eliminate competition from

¹⁷ In *Aberdeen Journals* (2), [¶ 95] it was noted that extensive use of discounting in newspaper advertising markets results in different customers paying widely differing amounts to place the same type of advertising in the same newspapers resulting in a lack of price transparency.

Of course if an advertiser, with buyer power, plays off publications against each other via a 'Dutch' type of auction then prices will be known.

¹⁸ OFT 402, [¶ 5.3].

¹⁹ Case C-7/79 *Oscar Bronner v Mediaprint and others* [1998]. Also opinion of AG Jacobs, [¶ 47 and 65].

Brannigan. The OFT agrees with Brannigan's Counsel [D ¶ 37] that at most this could constitute a breach of contract.

b) Protection of Newsquest's IPR in use of 'Life' in publication titles

39 It is unclear whether or not Newsquest has a legitimate claim to the use of 'Life' in its publication titles for the region. It does appear to use distinct title themes as with its 'Leader' series and it might be able to argue that readers are genuinely confused. The OFT agrees with Brannigan's Counsel [D ¶ 40] that such litigation will only be abusive if there was no objective justification for it other than to harass Brannigan. In absence of any evidence to that effect, this allegation is unfounded.

c) The launch of the Uckfield Leader by Newsquest

40 Brannigan asserts that 'To launch the Uckfield Leader, targeting a small, rural town with a mere 10,386 households would appear to go against company [Newsquest] ethos and would indicate a change in usual practice, unless launched as a market spoiler' [C ¶ 39, E ¶ 56]]. In *Aberdeen Journals Decision (2)* [¶ 108] it is clear that the intention was to use the Herald and Post as a fighting title which was resurrected when the Independent entered the market but would be wound down after it exited. However, at the time of the complaint, Newsquest might well have been able to argue that the launch of the Uckfield Leader was a natural expansion of Newsquest's 'Leader' series of free newspapers and that its launch, although precipitated by the entry of the Uckfield Life, was simply a competitive response.

41 A response to competition even by a dominant company is not in itself anticompetitive. The opinion of the Advocate General in *Compagnie Maritime Belge*, where 'fighting ships' and price cuts were employed, was that '... competition law should not thus offer less efficient undertakings a safe haven against vigorous competition even from dominant undertakings'.²⁰ He went on to say that 'Different considerations may, however, apply where an undertaking which enjoys a market position of dominance approaching a monopoly, particularly where price cuts can be implemented with relative autonomy from costs, implements a policy of selective price cutting with demonstrable aim of eliminating all competition'. In *Compagnie Maritime Belge* the liner conference had a market share of over 90%. *Aberdeen Journals* had a virtual monopoly (Paragraph 19). In Brannigan's case such a situation did not exist. In Uckfield, Newsquest had a readership of just 7%. Also, the other main players in the market(s) with potentially more advertising revenue to lose did not behave in a similar way to Newsquest by introducing new titles or predating. Moreover, Newsquest would be unlikely to eliminate them from the market since they would probably have been of comparable efficiency and size. In view of this situation it is unlikely that, at the time, the Uckfield Leader could be considered simply as a fighting title to eliminate only Brannigan and protect Newsquest's limited market share in Uckfield, even if Newsquest was dominant in some market covering paid-for and free newspapers (which the OFT does not believe it is), since its entry would affect the other players in the market.

42 If the product market was simply free newspapers it would seem a pointless exercise for Newsquest to launch a market spoiler in Uckfield where it had no interests to protect. It is not a credible strategy for a publisher to prevent an entrant from entering a market which it has no long term intention of contesting. Thus the only plausible strategy would have been that entry by Newsquest was a genuine response to competition.

²⁰ AG Opinion *Compagnie Maritime Belge* [¶ 132].

43 With hindsight, this does appear to have been the case. The Uckfield Leader is still around in 2006, almost three years after the events, and has expanded to become the Uckfield and Heathfield Leader. This would suggest that it was not launched purely as a market spoiler to thwart a new entrant.

d) Sale of advertising below cost by Newsquest

44 The OFT is of the view that short run promotions, which often involve selling below average variable costs for a limited period are widely used in many markets, especially where a new product is introduced to a market. A dominant undertaking which adopts a one-off short term promotion of this type is unlikely to be found to have engaged in predation.²¹ The OFT is also of the view that the introduction of a new product is a legitimate commercial reason for pricing below AVC in order to build up a large enough customer base to allow it to achieve and benefit from economies of scale until profitability is reached.²²

45 Thus, there would be some objective justification for Newsquest to sell advertising below AVC in the Uckfield Leader if it was a genuine new product (rather than a fighting title). However, there might have been concern if Newsquest was also selling its advertising in its established title, the Argus, below AVC.²³

46 Where specific evidence was provided, as in the case of the Halifax Estate Agency [B ¶ 29, E ¶ 18], the advertising offer appeared to last for a very short period of only one month. Although a series of short term promotions could, taken together, amount to a predatory campaign when an *existing* product is discounted - for a *new* product, the discounts could be objectively justified as being part of the process of customer acquisition.

47 More generally, it is possible that, as in *Aberdeen Journals Decision (2)*, [¶ 95] extensive use of discounting in newspaper advertising markets results in different customers paying widely differing amounts to place the same type of advertising in the same newspaper resulting in a lack of price transparency and that the observations of Brannigan may simply have reflected this in that some advertisers may have had very good deals but, overall, advertising might not have been sold at a loss.

48 However, if a dominant company continued to sell below AVC beyond what might be considered to be a reasonable period to make a free title profitable then there could be competition concerns. As noted above (Paragraph 25), the CC expected a new free newspaper to incur losses during its first years as a result of trying to establish credibility and acceptability with advertisers. It is therefore unlikely that Newsquest's new newspaper operations would have reached normal profitability in the relatively short period during which predation is alleged to have taken place (the 6 months Brannigan remained in the market). As a result, it is highly probable that any assessment, of whether or not Newsquest operated its new newspaper at below AVC beyond the point where normal profitability was reached, would be

²¹ OFT Draft *Guideline Assessment of Conduct*, OFT 414a, [¶4.12].

²² OFT Draft *Guideline Assessment of Conduct*, OFT 414a, [¶4.12].

²³ Although the Argus had the largest readership in East Sussex of 15%, it only had 20% of the (simple) combined total readership of Newsquest and Johnston (Main Document Paragraphs 20-21) and probably considerably less if the readership of newspapers from other publishers had been included.

fruitless. In view of this, it would be difficult to assess whether Newsquest was deliberately acting abusively on the basis of its conduct relating to the Uckfield Leader.

49 It is also extremely unlikely that Newsquest was operating advertising in the Argus below AVC. The Argus was aimed at the whole of East and West Sussex and any advertising revenue relating to Uckfield and Lewes would form a very small part of its total revenue for Sussex. Furthermore, it would be difficult to partition costs within the Argus in any economic analysis as the target audience of many adverts would not have been confined to Uckfield and Lewes.

50 More importantly, because the Argus had at maximum 20% of the readership in the relevant market in East Sussex predation is not a plausible strategy.²⁴ Newsquest would have had difficulty recouping any losses made by earning supra-normal profits after Brannigan's exit because it would still have had to contend with Johnston's and/or Northcliffe's significant presence in the market(s).

51 Alleged cross-subsidy effects which would have enabled a dominant Newsquest to maintain any predatory conduct (because its pockets would have been deeper than a company earning normal profits) are discussed in (f) below.

e) Newsquest's exclusive purchasing requirement

52 Where a discount also involves exclusive purchasing an explicit non-compete obligation arises. In the European Commission's *Regulation on Vertical agreements and concerted practices* a non-compete obligation is defined in Article 1(b) as an obligation on a buyer 'to purchase from the supplier ... more than 80% of the buyer's total purchases of the contract goods or services and their substitutes on the relevant market, calculated on the basis of the value of its purchases in the preceding calendar year'.²⁵ In its *Guidelines on Vertical Restraints* [¶141] the Commission states that it is not only the market position of the supplier that is of importance but also the extent to and the duration for which the non-compete obligation applies.²⁶ However, it goes on to say that dominant companies may not impose non-compete obligations on their buyers unless they can objectively justify such commercial practice within the context of Article 82.

53 It is unclear whether exclusive deals were struck with advertisers other than the Halifax Estate Agency, whether just Brannigan's publications were the target of the exclusivity arrangements or whether advertisers were also prevented from advertising in Johnston's and Northcliffe's publications as well. An exclusivity strategy, regardless of its duration, which was aimed just at Brannigan's publications would not have been successful since buyers of advertising would be able to purchase their advertising from Newsquest's main rivals (Johnston and Northcliffe). There was no evidence to suggest that advertisers had been prevented from doing so.

54 Given the short period of the exclusivity arrangements with the Halifax Estate Agency, the lack of evidence about any other arrangements and possible objective justification for such arrangements when Newsquest had been establishing its new free newspaper (see Paragraph 44-45 above) it would be difficult to establish that

²⁴ See footnote 23.

²⁵ Commission Regulation *on the application of Article 81(3) of the treaty to categories of vertical agreements and concerted practices* (2790/99/EC).

²⁶ Commission Notice *Guidelines on Vertical Restraints* (2000/C291/01).

Newsquest's had acted abusively with the sole intention of eliminating competition from Brannigan.

f) Newsquest's alleged cross-subsidy

55 Brannigan alleged that Newsquest (Sussex) launched a free newspaper into Uckfield by employing a cross subsidy with one of its free newspapers in West Sussex and that 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. It is alleged that Newsquest financed losses in its Uckfield market from profits made in these other markets where Newsquest had market power [B ¶ 31, E ¶ 21].

56 As Brannigan's Counsel has noted [D ¶ 50] there is no case law on cross-subsidy and guidance that does exist relates primarily to regulated markets. However, the issue is not whether there is a cross-subsidy as such but whether Newsquest was using market power elsewhere in its operations (such as supra-normal profits or leverage in advertising) to reinforce its activities in Uckfield. The principle was established in *Tetra Pak II*.²⁷

57 In this particular allegation Brannigan has, nevertheless, implied an exceptionally narrow market definition relating to free newspapers in specific towns in which Newsquest could have been dominant or have a monopoly if no other free newspaper competitors existed in the towns in question. However, the analysis in Paragraphs 3-12 suggests that such a narrow market definition is not sustainable, particularly in the light of Brannigan's own assessment of the relevant market.

58 It is also unclear whether Newsquest had, in advertising, the same type of leverage between related markets as that in *Tetra Pak II*. Brannigan has not provided evidence that there had been strong associative links between the markets due to a large number of advertisers in free newspapers being the same in the related towns.²⁸ As a result, it would be difficult to establish whether Newsquest would have been able to retaliate against disloyal advertisers in Uckfield by raising advertising rates against them in the towns where it was allegedly dominant.

59 As for supra-normal profits, these would have given Newsquest deeper pockets than ordinary competitors and provided it with an unfair advantage once normal profitability of its new free newspaper had been reached. However, it is doubtful whether such profits, if indeed they existed, could have had any influence given the short period of the alleged predation (see Paragraph 48).

60 Moreover, Brannigan had provided no market data for the towns where dominance was alleged nor evidence of Newsquest's market power to suggest dominance. In particular, Brannigan has not provided evidence - that no other publications, particularly paid-for newspapers would not have been present in these towns and would not have provided a well established competitive constraint on

²⁷ Case T-83/91 *Tetra Pak II v European Commission* [1994] ECR II-755, ¶ 112-122 and ¶ 186.

²⁸ 56% of customers in the non-aseptic market also operated in the aseptic market where Tetra Pak had a 90% market share, *Tetra Pak II*, ¶ 108.

advertising costs in free newspapers - which counters the general evidence that there is competition between the two types of newspaper (Paragraphs 5-7). More generally, although Brannigan would have been unable to demonstrate that Newsquest was earning supra-normal profits in the towns in question, some evidence of Newsquest's market power would be expected, such as its advertising rates in those towns had been above levels elsewhere in the region. Finally, it is also not plausible that Newsquest would be gifted such uncontested markets by its main rivals (Johnston and Northcliffe) in the region if supra-normal profits could be earned.

61 In view of the unlikelihood of the existence of narrow markets in free newspapers in Haywards Heath and Burgess Hill (or indeed other places where Newsquest had free newspapers) and the lack of evidence which would suggest that Newsquest had market power in advertising space in free newspapers there is no basis for having reasonable grounds to suspect an abuse of dominance in related markets.

g) Defamatory remarks about Brannigan's publications

62 Both the staff of Newsquest and Johnston are alleged to have made defamatory remarks about Brannigan's products. This could be viewed as nothing more than sales staff talking up their own products and talking down those of their rivals in order to win sales. Also, with a transparent product such as a newspaper advertisement, advertisers are readily able to determine for themselves whether the remarks made are true or not. Brannigan indicated [B ¶ 39] that a number of Johnston's customers were unhappy with the remarks and cancelled their advertising with Johnston's Sussex Express which suggests that the remarks were not very effective.

h) Newsquest's threats against distributors

63 It is alleged that Newsquest (Sussex)'s staff 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. Also, other distributors of Brannigan's publications were asked to either stop receiving the publications and replace them with the Uckfield Leader or stock both.

64 As Brannigan's Counsel has noted, requesting distributors to stock both publications is not problematic. However, as noted in (e) above, dominant companies may not impose non-compete obligations on their buyers unless they can objectively justify such commercial practice within the context of Article 82. Newsquest might argue that it was trying to prevent Brannigan free riding off its investment in its distributors within Uckfield. However, the protection from free riding would only be possible if Newsquest was not dominant. By demanding that newsagents only stock its publications a dominant publisher might be able to foreclose the market.

65 However, with free newspapers it is difficult to imagine that a market could be foreclosed. Unlike paid-for newspapers, free newspapers do not require a point-of-sale or retail outlet. The main mechanism of distribution is direct to households. Whilst pick-up points may be a useful addition to the main mechanism of distribution they are not essential. As there is no suggestion that Newsquest prevented, or disrupted, Brannigan's distribution to households it is questionable whether such conduct could be classed as an abuse against a free publication even if Newsquest was dominant.

i) Plagiarism by Johnston

66 Brannigan alleged plagiarism of editorial content by Johnston. As Counsel for Brannigan has pointed out [D ¶ 55] it is for Brannigan to enforce his intellectual property rights. It is not a matter for consideration under the Act.

j) Conduct by Johnston in general

67 Mr Brannigan has stated that 'During my six years working with Johnston Press ... the Competition Act was held up as vital information and guidelines to follow, with major repercussions if any member of staff failed to uphold the business of fair trade'[A]. The importance of the Act at Johnston's Sussex Express was also referred to in D ¶ 37. This evidence would suggest that Johnston had a rigorous compliance program in place.

5.2.4 Conclusions on possible infringements of Chapter II

68 The market information provided by Brannigan, although only providing a rough guide, suggested that irrespective of whether markets are defined narrowly or more widely neither Newsquest or Johnston had sufficient market power to have been dominant. If readership figures can be taken as a proxy for advertising revenue Johnston appeared to be the market leader and it would be expected that, if anyone, it would have more to lose than Newsquest from the entry of Brannigan. However, most of the allegations were against Newsquest. In Uckfield, where predation was alleged, Newsquest appears to have had little or no market power, even allowing for the inaccuracy of readership data, since its readership was less than half of that of Northcliffe's and less than a quarter of Johnston's.

69 Joint dominance of Newsquest and Johnston was also ruled out due to structural nature of the markets. The relatively dynamic nature of the market(s) - arising from the launch of free newspapers by Newsquest in a number of towns in East Sussex, including Lewes where a pact was alleged to exist between Newsquest and Johnston - would suggest that there was not a co-ordinated market outcome.

70 Even if Newsquest was dominant in a market, much of the alleged conduct could either be objectively justified or dismissed as vigorous competition. The possibility that the Uckfield Leader was a fighting title to eliminate Brannigan is unlikely because there was not a monopoly, or near monopoly situation to protect, and two other main players in the market would also have had to be eliminated besides Brannigan. Newsquest had introduced a new product and selling below average variable costs would have been a legitimate commercial reason in order to build up an economically viable customer base. Even if predation was feasible, evidence in relation to a major advertiser appeared to be of limited duration and could be viewed as a short term promotion. Finally, Newsquest's threats against retailers of its newspapers would have not resulted in the foreclosure of any market to a free newspaper because the main mechanism of distribution of a free newspaper is directly to households and this was not prevented (indeed, it would be extremely difficult to do so).

71 In respect of Johnston, the OFT agrees with Brannigan's Counsel [D ¶ 55] that there is considerably less of a case on abuse against Johnston than Newsquest.

5.3 Chapter I

72 Even if a company is not dominant, agreements it enters into could give rise to appreciable anti-competitive effects which prevent, restrict or distort competition under Chapter I of the Act.

5.3.1 Vertical agreements

73 The vertical agreements (such as that between Newsquest (Sussex) and the Halifax Estate Agency) allegedly involve exclusive purchasing – a non-compete obligation. By virtue of Section 10 of the Act the European Commission's *Regulation on vertical agreements and concerted practices* provides a parallel 'safe harbour' exempting certain agreements from the Chapter I prohibition. The Commission's *Guidelines on Vertical Restraints* [¶ 58] state that 'Non-compete obligations ... are not covered by the Block Exemption Regulation when their duration is indefinite or exceeds 5 years'. The fact that the alleged infringement, in the case of Halifax Estate Agency lasted only one month would suggest that the exclusive purchasing agreement was not a serious non-compete obligation. Nevertheless, if the market share of the supplier exceeds 30% there is a possible competition risk of foreclosure of the market to competing suppliers and potential suppliers (see *Guidelines for Vertical Restraints* ¶ 138 onwards) and an agreement would not benefit from the block exemption under such circumstances.

74 In the area of Uckfield where Newsquest appears to have demanded exclusivity it had a very low readership base and its advertising revenue (even if its free publication was included) would be such that it would not only have been below 30% but possibly fall within the scope of the Commission's *Notice on Agreements of Minor Importance* (if the advertising revenue had not exceeded the 15% threshold for exclusive purchasing agreements to have an appreciable effect upon competition).²⁹

75 The *Guidelines for Vertical Restraints* (¶ 141) also indicates that non-compete obligations shorter than one year entered into by non-dominant companies are in general not considered to give rise to appreciable anti-competitive effects. This appears to permit even non-dominant companies with a market share of over 30% to enter into relatively short term non-compete agreements. It is unclear whether any of the alleged anti-compete agreements lasted longer than one year. It is also unclear what percentage of advertising purchasers from Newsquest were offered exclusive deals. Thus on a regional basis where Newsquest possibly had a market share in excess of 30% it would still be able to enter into relatively short term exclusive dealing arrangements provided there was not a cumulative effect upon the market from other publishers adopting the same strategy.³⁰

76 There is no evidence that Johnston or Northcliffe/DMGT entered into such agreements in Uckfield or indeed elsewhere. Thus cumulative foreclosure effects can be ruled out.

5.3.2 Horizontal agreements

77 No compelling evidence was provided in relation to the alleged cartel agreement between Newsquest and Johnston. A single, second hand allegation of collusion, even from a named source, would not provide the OFT with reasonable grounds to suspect an infringement of the Act.

²⁹ Commission *Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (de minimis)* (20001/C368/07).

³⁰ *Guidelines for Vertical Restraints* [¶ 142].

78 Agreements between the different entities of Newsquest – even if they could be classed as independent - such as Newsquest (Essex) and Newsquest(Sussex) also seem unlikely particularly as Newsquest (Essex) appears to have printed Brannigan’s newspaper throughout its existence.

5.3.3 Conclusions on possible infringements of Chapter 1

79 The duration of any non-compete vertical agreements between Newsquest and its advertisers, even though Newsquest might have market shares in excess of 30% in some markets would not suggest a foreclosure effect. Evidence on horizontal agreements was insufficient for the OFT to have reasonable grounds to suspect an infringement.

6 Overall Conclusions on Possible Infringements of the Act.

80 From the information supplied by Brannigan 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.

81 Much of the alleged behaviour can be justified as a vigorous competitive response and of too short a duration to pose a threat to serious competition.

82 Overall, it was unlikely that anti-competitive practices by Newsquest and Johnston were responsible for the demise of Brannigan. As a result, the grounds for the OFT to have a reasonable suspicion that the Act had been infringed are weak.

OFT
9 June 2006