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IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1191/6/1/12

Victoria House,
Bloomsbury Place,
London WC1A 2EB

28 September 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

- and -

OFFICE OF FAIR TRADING Respondent

- and -

PRESS DISTRIBUTION FORUM Intervener

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H E A R I N G

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 the Freshfields Bruckhaus Deringer LLP) appeared on behalf of the Intervener.

1 THE CHAIRMAN: Good morning, ladies and gentlemen, thank you everybody for your skeleton
2 arguments. We have read through all of those and the pleadings of course.

3 There are just a couple of housekeeping matters to start with. I know there are some
4 documents which have redactions for confidentiality, so can we leave it to the parties to
5 make sure that if any confidential material is going to be discussed you take responsibility
6 for knowing who is sitting behind you and who should be in court and who should be
7 outside.

8 Thank you for providing the timetable, which we will attempt to stick to fairly rigorously.
9 It does not allow for a mid-morning break but, Mr. Peretz, depending on how you are
10 getting along, if you want a break mid-morning then let us know and we can break for ten
11 minutes or so.

12 MR. PERETZ: Thank you, madam, members of the Tribunal, I appear for the applicants who are
13 the Association of Convenience Stores and the National Federation of Retail Newsagents.
14 My learned friends Mr. Josh Holmes and Miss Maya Lester appear respectively for the
15 Office of Fair Trading and for the intervener, the Press Distribution Forum.

16 As you indicated, madam, there is an agreed timetable, and I am pretty confident that - of
17 course subject to interventions by the Tribunal - I shall finish comfortably within the
18 allocated time, 12.15.

19 Just as a preliminary point, there is, of course, the question of jurisdiction, which is flagged
20 up in our application. It is not a matter of dispute, as all parties agree that the Tribunal has
21 jurisdiction, but I just remind the Tribunal that it will need formally to accept jurisdiction
22 under s.179, the legal test being whether the decision is in connection with a reference, or
23 possible reference, under Part IV of the Enterprise Act. I think all parties are agreed that the
24 decision falls within that test.

25 THE CHAIRMAN: Do you agree that the decision was taken under the incidental powers in the
26 Schedule, as the OFT has said. I think we had an exchange of correspondence about that at
27 an early stage.

28 MR. PERETZ: I am afraid that correspondence is not right at the forefront of my mind, but it is
29 not really in dispute.

30 THE CHAIRMAN: I will assume there is no issue about that.

31 MR. PERETZ: I do not think there is an issue. There is certainly no issue between the parties,
32 but of course the question of jurisdiction is for the Tribunal.

33 THE CHAIRMAN: Yes.

1 MR. PERETZ: The structure of what I am going to say really follows very much that in our
2 skeleton argument. I am going to give the Tribunal some essential background material,
3 and then I will have to have a reasonably thorough analysis of the OFT's 2009 decision not
4 to make a market investigation reference to the CC under part IV. As the Tribunal will
5 recollect, the OFT came very close to making a market investigation reference, and its
6 findings and understanding of the industry are set out in that decision. A critical, if not the
7 critical, part of our case, is that the present prioritisation decision does not stack up with the
8 earlier analysis in that decision.

9 I am then going to deal, as I do in the skeleton argument, with the remaining issues where
10 we say the OFT's analysis in its 2012 decision does not stack up.

11 I ought to say something at the outset about my clients. The National Federation of Retail
12 Newsagents is a body that has around 16,500 members who are, as the name would
13 indicate, retail newsagents. It is a democratic body responsive to the concerns of its wide
14 membership, and it has for years been accepted by the Government as representing the
15 concerns of its members on a range of regulatory issues. Of course, newsagents are an
16 important part of the fabric of daily life in this story. They stock a range of titles. For many
17 consumers they are the nearest shop round the corner and very convenient to even those
18 consumers who are too poor or too immobile to get to town centres or to larger shops. They
19 offer an ordering service for titles, they offer home news delivery and magazine delivery. It
20 is very easy for consumers to get their magazines as they pop in to buy their newspaper,
21 their travel card, their Lottery ticket or their pint of milk.

22 The Association of Convenience Stores is like the NFRN, a democratic body, accepted by a
23 range of Government bodies as representing the concerns of its members. The members,
24 the reference for the Tribunal's note, is at tab 3 of bundle 1, para.6, where we set out who
25 the ACS members are. Its members include multiple chains, such as the Co-operative and
26 BP stores, affinity groups, which will be known to the Tribunal, such as Londis, Spar and
27 Costcutter, and 2,700 odd independent stores. 90 per cent of ACS members sell papers and
28 magazines and, like members of the NFRN, ACS members offer convenient points to
29 consumers passing every day for people to buy their favourite magazines when they pop in
30 to get their pint of milk or loaf of bread or buy stamps, because many of the ACS members
31 are post offices.

32 Magazines are, of course, an important sector of the economy. They are an important
33 source of entertainment and information for a very large section of the British public, often
34 about matters which are of great general interest, or perhaps particularly great interest to

1 particular sectors of the population. There are specialist sports magazines, other specialist
2 interest magazines covering issues that are hardly covered at all in the newspapers or
3 broadcast media.

4 The distribution of magazines is really characterised by two features, Hobson's Choice and
5 the Berlin Wall. The Berlin Wall lies between the rigid territories allocated to each of the
6 two wholesalers. When I looked through the bundles to find a map, I discovered that all the
7 maps covering the territories are in uniform black, so I asked those instructing me to prepare
8 a coloured version. This is a coloured version of the NFRN submissions. (Same handed)
9 The Berlin Wall lies between Menzies land and Smiths land.. On this map Menzies' land is
10 covered in blue and Smiths land in red. The Berlin Wall has been in its current form really
11 since the disappearance of Dawson's, which was a third wholesale distributor until 2009. In
12 the period leading up to 2009 a number of fairly small wholesalers disappeared, leaving just
13 the two that we have now got.

14 If you are in Menzies land every magazine publisher has appointed Menzies to be its
15 distributor, and if you are in Smiths' land every publisher has appointed Smiths. The only
16 slight wrinkle to that picture is that there are 53 post codes, about 2 per cent of Great
17 Britain, in which there is a condominium, with some publishers appointing Menzies and
18 some publishers appointing Smiths, but everywhere else Smiths or Menzies is your only
19 source, if you are retailer of magazines. You have got to go to the one that has been
20 allocated to your area.

21 It is uncontested that passive selling – i.e. a retailer in Menzies' land trying to get orders
22 from Smiths – does not occur, save to a very marginal extent, and the reference for the
23 Tribunal's note is tab 2, bundle 1, p.38, para.6.3.3, where it is said that only 164 retailers
24 have taken advantage. And as far as my clients know no multiple retailer has succeeded in
25 getting cross-Britain supply from the same wholesaler: that was a possibility flagged up by
26 the OFT in 2009. Nor has there been any other sign since 2009 that other wholesalers,
27 e.g. grocery products or other logistic operators, are or will be allowed to, or have been able
28 to move into this market. You have just got the two old hands.

29 That is the Berlin Wall aspect. As to the Hobson's Choice aspect, that is the point, that you
30 are struck with who you are allocated to. So you have got a rigid demarcation of territory
31 and you are stuck with the retailer you are allocated to.

32 Where a retailer is unhappy with the standard of service that they get, and the Tribunal will
33 have read some of the details, and I do not need to go into it – these other details are
34 confidential in any event – the Tribunal has got a significant amount of evidence of

1 unhappiness by particular retailers about the standard of service they get. The option that
2 they do not have is, to use economist terminology, exit. All they can do is exercise voice.
3 They can complain and hope that someone, somewhere, will listen to them.

4 The reference to someone, somewhere paying attention to them, brings me on to the OFT's
5 decisions. As I said, I am going to spend a bit of time on the OFT's 2009 decision, because
6 there is some disagreement between us and the OFT as to how to read it, and I will need to
7 deal, as I go through it, with some of the arguments run by the OFT in its skeleton, and that
8 is going to involve a bit of jumping about, for which I hope the Tribunal will forgive me. I
9 am fortified by the knowledge that the Tribunal will, itself, have already read that decision
10 and be at least broadly familiar with how it runs.

11 The 2009 decision is in tab 5 of the first bundle, and it starts helpfully with an executive
12 summary that fairly accurately summarises what the decision is all about. If the Tribunal
13 would find it helpful I can quickly go through that, but if I can assume that you are familiar
14 with how it works I think I can plunge straight in. I think the first part within the body of
15 the report that I want to take the Tribunal to is p.75, para.4.43. This is the OFT's
16 conclusion on competition for the market. What one picks up at that part of the decision is
17 that the OFT has identified a number of ways in which publishers can make sure that
18 wholesalers work effectively for them. As 4.4 puts it, publishers have been effective in
19 using their buyer power and their control over the bidding process to leverage competitive
20 bids from wholesalers.

21 I can jump over the rest of the analysis until one gets to 4.47 where the OFT concludes that
22 publishers, not retailers, are the wholesalers' focal point of competition for the market.

23 Then significantly it goes on to say:

24 "That is unlikely to create tensions in so far as the incentives of publishers and
25 retailers are aligned. However, there may be scope for retailers to exert greater
26 influence in relation to those aspects of the supply chains in respect of which their
27 incentives may not be as clearly aligned with those of publishers. It can be a
28 source of frustration for retailers on issues such as copy allocation where, as a
29 result of the two-sided nature of the markets, retailer incentives are not necessarily
30 aligned with those of publishers or distributors. The issue of copy allocation is
31 examined further below."

32 So at this point the OFT notes and recognises that as far as retailers are concerned
33 competition for the market may not be particularly helpful because their incentives are not
34 necessarily aligned, for reasons which I will go on to explain, with those of the publishers.

1 So the market works well for publishers but not necessarily for retailers. I hope the
2 Tribunal understands the reference to the two-sided nature of the market, and I do not need
3 to explain that.

4 If one then goes on to p.82 and this is the point that the OFT has flagged up just now, it
5 begins to discuss copy allocation. As the OFT says at 4.69 the issue is whether the degree
6 of publisher control over copy allocation prevents, restricts or distorts competition.

7 Then if one goes on to 4.72 the OFT looks at the ways in which retailers are able to amend
8 their copy allocation. The OFT knows – first bullet point – that there are at that stage, there
9 are now and the Tribunal will remember there is some discussion in the OFT current
10 decision as to online functions and centralised call centres, particularly online functions. So
11 the OFT at that stage noted that those were available for retailers to use. For magazines
12 only the OFT notes that there was a system of SBR, again the Tribunal will remember that
13 that is a focus of discussion in relation to the current decision as well, but the issue was
14 around in 2009, what impact did SBR have on the analysis, and the OFT duly notes it. The
15 OFT noted at the end that to qualify for SBR retailers have to use EPOS systems which are
16 generally only options for large retailers.

17 It is important, because the Tribunal may not have got this – and I need to pin this down,
18 just to get this right – EPOS systems (Electronic Point of Sales’ systems) are, of course very
19 widely used, and I dare say the Tribunal’s experience in going into quite small newsagents
20 and buying newspapers where there is an electronic system which records the transaction.

21 In order to use SBR the point is not whether you have an EPOS system, because quite a lot
22 of newsagents and small retailers, do, the question is whether you have a system of the type
23 that is capable of linking into the wholesalers’ systems. So I just want to add that wrinkle,
24 because it is not entirely clear from this sentence that that is what the position is. But when
25 the OFT here is referring to EPOS systems, EPOS systems of a type that can lead up to
26 SBR.

27 The next passage in this analysis I want to pick up on is 4.74 going on to 4.76, and here the
28 OFT picked up and notes and takes into account a number of retailer submissions about
29 magazine allocation and ordering. I just invite the Tribunal to focus on the details of that
30 going on to 4.76 just to note that here the OFT is taking quite seriously evidence from the
31 NFRN, from the British Retail Consortium, and from the ANR (which is now, as the
32 Tribunal will remember, the ACS). Evidence of a kind which in its current position the
33 OFT now rather dismisses as anecdotal, but here it appears to be given some weight as to
34 the retailer experience of dealing with magazine ordering.

1 Then at 4.78 the OFT finds that it is likely that the concerns that it has noted stem at least in
2 part from the fact that the magazine publishers and distributors and retailers have different
3 incentives in terms of copy allocation as a result of the publishers' desire to maximise
4 profits from advertising as well as copy sales, that is the two-sided market.

5 Here, this is where the OFT gets to grips with the extent to which publishers' and retailers'
6 incentives are likely to be different and gives some reasons why that may be so.

7 The first is, picking up from the fourth line of 4.78:

8 "In a situation of limited shelf space, a publisher will want to allocate its titles in
9 order to maximise expected profit from both copy sales and advertising revenue."

10 So "even if the chance of a title selling at a particular retailer is low", says the OFT:

11 "... the publisher may allocate this title over a more popular one if the revenue that
12 an additional sale may generate in advertising is sufficiently high. Magazine
13 publishers may also choose particular titles for a retailer in order to target a
14 particular advertising demographic."

15 i.e. the concern here – I have no idea whether this is a real world example or not, but the
16 Tribunal will probably note that there are certain publications where one assumes the
17 amount paid for advertising is very high – certain high end fashion magazines and so on.
18 An example may be, I do not know what particular examples there are, that the publishers
19 are more inclined to push that sort of magazine and perhaps a high end motoring magazine
20 with very expensive, remunerative advertising out over magazines which do not carry that
21 amount of advertising. So that is the point there being made by the OFT.

22 The second point begins at 4.79. Magazine publishers are interested in performance of their
23 own titles while retailers are interested in the performance of the category as a whole.

24 Publishers use shelf space as a way of advertising their titles, and have incentives,
25 particularly for magazines, to place their publication on the shelf in preference to rival
26 publications. Publishers use promotions and guidance to wholesalers to achieve this,
27 particularly for new titles. In contrast retailers may not wish to stock individual magazines
28 because it will take space away from other, more popular publications on which they could
29 earn higher revenue.

30 THE CHAIRMAN: Is this a product where you have the kind of planograms that we discussed in
31 tobacco, where there is an agreement as to where on the shelves the particular products go?

32 MR. PERETZ: I am told not generally; I suppose one could not rule out that it happens, but not
33 generally.

1 The OFT explains and gives, we say, very cogent reasons why publishers and retail
2 incentives are different, and why the publishers are perhaps less concerned by some issues
3 than any individual retailer. The individual retailer will want to maximise the offering that
4 he can offer in order to attract customers to his store, so they will want to make sure
5 generally that the customers are given the magazines when they want and where they want,
6 i.e. at his store. Publishers are less concerned with that because they are focusing on their
7 individual titles, and they are focusing also on advertising revenue and are not particularly
8 concerned with whether the retailers' offering at an individual store by store level is a
9 sensible match to the demographic of that particular store. Also, one can take it that the
10 person who really knows what the particular demographic at a particular store is, is the
11 person who is there day in, day out selling magazines at that store and not a publisher sitting
12 in the head office somewhere in London.

13 Picking back up on what the OFT says, the wholesalers are likely to face competing
14 demands from publishers and retailers, and as discussed in para. 4.47, which I took the
15 Tribunal to a few minutes ago, competition for the market means that publishers are the
16 primary customers of wholesalers. It is the publishers' tune to which the wholesalers are
17 likely to dance. As such, most conflicts between the allocation instruction to publish and
18 order to retailers are likely to be resolved in favour of publishers. It is therefore not clear
19 that an ordering system managed by wholesalers could result in more effective retailer
20 influence over magazine copy allocation. So, there the OFT is expressing just a general
21 scepticism about whether any system devised by wholesalers, given that they dance to
22 publishers' tunes, could ever really deal with this problem.

23 THE CHAIRMAN: So, is copy allocation decided by the wholesaler or by the publisher, or in
24 agreement?

25 MR. PERETZ: Primarily, well, the individual, each individual order is primarily set by the
26 publisher, and there is quite a lot of discussion in the papers about the extent to which
27 retailers are able to try and tweak the allocation that they are given.

28 THE CHAIRMAN: Yes. No, the retailer is a different matter.

29 MR. PERETZ: It is a complicated process.

30 THE CHAIRMAN: As between the publisher and the wholesaler, who has the influence over
31 what magazines and how many of each magazine a particular retailer will get.

32 MR. PERETZ: Yes. I mean, the process is not necessarily, I suppose, transparent to my
33 members. I mean, what they know is that they get an allocation. To what extent that is
34 determined by a wholesaler, it may be that others can help you on that. But, from my

1 clients' point of view, the problem that they get, they get an allocation which they then try
2 and influence in various ways with, what the Tribunal will have picked up in many cases is
3 rather limited success. So, that is the process as we see it.

4 Now, going over the page, the OFT then discusses why this matters. And, at 4.81 the OFT
5 makes the point that I have just made a minute ago, that the problem with publisher copy
6 allocation means that retailers cannot differentiate that offer from other retailers, and cannot
7 match local preferences which the retailer is most familiar with. And the OFT says that
8 results in both allocative and dynamic inefficiencies. Now, I think there is a comment
9 somewhere in the PDF's skeleton argument to the effect that allocative and dynamic
10 inefficiencies are not the same thing as consumer detriment. Well, here -- whatever that
11 merits of that point as a general statement -- here what we are talking about is a clear
12 consumer detriment because what it actually means, down on the ground, is that retailers are
13 not being able to offer the customers the magazines that they want, when they want and
14 where they want. That is what the dynamic and allocative inefficiency is here, and that is a
15 consumer detriment.

16 The OFT then goes on to say, at 4.82, that all this is going to be much more significant in
17 the case of magazines than newspapers. The rest of 4.82 discusses newspapers. Then, 4.83,
18 the OFT notes the range of magazines means that retailers really have a wide choice of what
19 they might stock. The Tribunal probably knows that any special interest one can think of
20 seems to have several magazines, and there will be choices as to what magazines to
21 purchase or whether to go for particular special interests at all. And the OFT makes the
22 point that it is the retailer that is going to know about the local demographics. So, for
23 example, to pick up on an example somewhere in our submissions, and I am pretty sure that
24 at the level I am going to mention it there is no confidentiality about this, a retailer that is
25 located in the middle of the country well away from a naval base will know very well there
26 is limited local interest in a magazine about ships, or about naval ships, and there is a
27 complaint from somebody that that is what they seem to get given. So, it is that sort of
28 example one is talking about, perhaps.

29 And the OFT points out though retailers need guidance from wholesalers, and that happens,
30 in managing the complex magazine category that is what one would expect, and of course
31 some retailers are quite small, it need not prevent extensive retailers' influence over the
32 range and number of titles that they stock. So, there is a great scope here for retailers to
33 differentiate themselves and to compete in terms of the quality, range and service that they
34 offer to their customers.

1 Now, while we are on that, I think this is the right moment to pick up on a point made at
2 para.20(b) of the OFT's skeleton. And that makes a point about publishers' incentives to
3 deliver accurately and punctually; the specific reference is made (and this is where people
4 start jumping slightly) at para.3.11 and 3.13 of this decision. If I can just suggest that the
5 Tribunal before it turns — because I am going to come back to this page, you might just
6 want to put a marker in so that we can find it, as I am going to do, so we can find it again
7 quickly, and then go to p.30 to look at paras.3.11-3.13. And this is, you will see at 3.11, it
8 starts off by saying:

9 “It follows that newspaper publishers have strong incentives to control the distribution
10 process”.

11 It is here, of course, 3.11 is talking about newspapers, because at 3.12 that goes on to
12 magazines. So, the first point in relation to magazines being made here is that the
13 magazines are at a longer timescale, so that getting distribution out so quickly is not so
14 critical. It obviously varies to some extent for magazines. Some are much more, sort of,
15 covering contemporary matters, contemporary interest, and some are ones that are
16 obviously much less time critical.

17 Then the OFT goes on to say, and this is 3.13:

18 “This is not to say that the punctuality of delivery is unimportant for magazine
19 publishers”,

20 so, it is not saying it is absolutely critical, it is simply saying it is not unimportant,
21 particularly for more time-sensitive titles. So, the OFT, they have a point that publishers
22 wish to get magazines out quickly, but it is important just to note that the paragraphs
23 referred to by the OFT are somewhat more nuanced than one might gather reading the
24 OFT's skeleton.

25 Now, the next point I need to look at is, again something logically picked up here, is
26 para.20(c) of the OFT's skeleton, which emphasises the expertise of publishers. The points
27 I just want to make about that are, as we have just read in chapter 4 of this report, that that
28 point ignores the OFT's decision that retailers have a very important local expertise that
29 also needs to be taken into account. And the second point I want to make about para.20(c)
30 of the OFT's skeleton is, it is a bit over egged when one looks at the paragraphs relied on, in
31 particular 3.15, which is on p.32. And if one reads that, one sees there it is said that, true, it
32 is said that publisher or distributor experience is important; but it goes on to say that there
33 is a potential at least for retailers to replenish stocks if over the course of sales periods

1 unexpected demand can be met. So, even in this paragraph it is again acknowledged that a
2 retailer input is important.

3 Both these points I have just raised are points of nuance, but, I just picked them up because
4 if one reads those paragraphs in the OFT skeleton, one gets a picture that the OFT is very
5 much emphasising the publisher's interest in getting magazines out punctually and the
6 publisher's interest in, the publisher's expertise, actually when one looks at the paragraphs, it
7 is a bit more nuanced than that and there is much more recognition of the role of retailers.
8 Right, if we can go back to p.89, I do not need to — the next topic being dealt with by the
9 OFT is wastage, which I do just want to say something about, but I think I can pick that up
10 at 4.87 over the page, where the OFT does comment on the amount of wastage. At 4.89 it
11 makes a point that:

12 “A consistent level of wastage of about 40 per cent or more seems high. It cannot be
13 explained by [easily explained by] fluctuation of demand and therefore [it says] it may
14 be connected with a lack of retailer influence over the copy allocation of magazines”,
15 ie part of the OFT's analysis of the problem is that retailers are being given quantities of
16 magazines over what they need and what they want — or indeed titles that they just do not
17 want at all, and that leads to wastage.

18 The next paragraph I want to pick up on is the OFT's conclusions on copy allocation which
19 one can see on the opposite page, p.91. I can pick that up at 4.94 where the OFT says that:

20 “In relation to magazine copy allocation, significant scope for retailers to respond to
21 local preference and more scope for allocative inefficiency to result from centralised
22 control of copy allocation by publishers”.

23 It reminds one of the analysis of different incentives and goes on to conclude that there are
24 reasonable grounds for suspecting that magazine copy allocation is a feature that prevents,
25 restricts or distorts competition. So the OFT has got itself over the threshold needed for a
26 reference to the Competition Commission in relation to that issue.

27 We can skip over cover pricing and go on to “Publisher-led distribution” which starts at
28 p.97, para.4.113. At 4.113 the OFT explains what it means by “Publisher-led distribution”,
29 which is a consideration of the various features the market considered in combination.
30 Then at 4.115 it expands on that. The OFT there in the various bullet points lists the various
31 aspects which give publishers high degrees of control over the distribution process, and then
32 the various aspects in which that publisher control manifests itself.

33 “4.116 As a consequence, retailers have very little scope to differentiate their
34 overall offering.”

1 The next sentence deals with newspapers, where it makes the point that because there are
2 not that many titles there is limited scope for differentiation anyway. It goes on to
3 magazines:

4 “In relation to magazines, the OFT considers there is [far] more scope for
5 retailers to differentiate their offers ...”

6 As a result the OFT considers that publisher control likely results in a prevention, restriction
7 or distortion of competition.

8 That is a sort of executive summary of what it is going to do, and in relation to magazines it
9 picks up at 4.119 on p.99, and the OFT reminds us of the preceding analysis of aspects in
10 which retailer and publisher incentives may differ, and picks up then in the bullet points a
11 couple more for good measure: discounts and promotions, retailers might want to discount
12 particular titles, offer linked purchases, a free loaf of bread with a magazine, or something
13 like that.

14 Then over the page, availability,

15 THE CHAIRMAN: What is it that stops them from doing that?

16 MR. PERETZ: It is not that they are stopped from doing it, it is just that they cannot control their
17 allocation. They just have less freedom in how they might structure those discounts. I
18 assume that that is what is meant. It is not my document, but I assume that is what the OFT
19 is getting at.

20 Then availability is over the page, scope for retailers to distinguish their offers.

21 Then the OFT notes change in composition of the retail network which might increase a call
22 for scope for retailer differentiation and competition, with supermarkets becoming more
23 important for sales of magazines, and there is an increase in the variety of outlets seeking to
24 sell magazines, and there is a greater scope for retailers to offer different types of range,
25 aimed at different types of consumers.

26 Then 4.121, availability levels, and though the phrase “crude availability data” is not
27 mentioned here, this is, as I think is common ground, what the OFT is talking about:

28 “The OFT understands that, on this measure, availability levels for magazines
29 are around 70 to 80 per cent.”

30 So that is the range the OFT is looking at. I note evidence from the British Retail
31 Consortium that availability levels of magazines for its members range from 65 to 85 per
32 cent. The OFT then notes the BRC’s strong concerns to the OFT that this level was too low
33 in comparison to other products. The OFT does not sign up to that, but it does not dissent
34 from it either. The BRC also highlighted a number of examples of a lack of transparency,

1 and I will come back to that when we are looking at the crude availability data later on,
2 because there are some important points there.

3 The OFT goes on to say that it is aware of initiatives to address availability concerns, there
4 is a Joint Industry Group. It then importantly notes at 4.123:

5 “As noted in the context of copy allocation, magazine publishers have a strong
6 incentive to control the availability and timing of promotions of popular titles in
7 retailers in order to leave shelf space in retailers to promote their other titles,
8 meaning that it is unclear that cross-industry initiatives can provide a solution to
9 these concerns. “

10 So the OFT is there expressing a scepticism in principle about whether initiatives such as
11 the JIG recorded in the previous paragraphs can work because the difference in incentives is
12 just there and cannot be dealt with on that basis.

13 Then 4.124:

14 “... the BRC and wholesalers acknowledged that wholesalers are adapting their
15 systems ... and as such there may be improvements in the area in the future.
16 However, the level and tenor of complaints ...”

17 so there the OFT is taking proper account of the evidence of the sort that it is rather
18 dismissive of in the context of the current Decision –

19 “... indicates that the problem may not simply be related to the systems that
20 wholesalers employ, but also reflects the incentives that magazines publishers
21 and distributors have to control allocation and availability ... As discussed in
22 paragraph 4.80, it appears that greater retail influence over availability and
23 promotions regarding magazine sales would require closer interaction between
24 publishers and retailers in this connection.”

25 Then over the page is the conclusion, 4.126, it summarises the various features and says:

26 “As a consequence, retailers have very little scope to differentiate their offer
27 overall.”

28 Then 4.127 deals with magazines, but for 4.128:

29 “In relation to magazines, however, it seems there is greater scope for retailers
30 to differentiate their offers if the balance of control over the supply chain were
31 to move, in some degree, away from publishers towards retailers.”

32 Mr. Holmes is keen I read the next words. In his skeleton he accuses us of saying that we
33 are after absolute control. That is not our case. The point I simply want to make is that the
34 OFT there acknowledges that a shift in the balance of power, and presumably a significant

1 shift, is important, in fact a condition of there being greater scope for retailers to
2 differentiate their offer. The OFT notes:

3 “Competition between retailers could, therefore, be improved across a number
4 of dimensions including discounts, promotions and availability. “

5 Again, the OFT notes the views that retailers expressed to it.

6 At 4.129 the OFT gets itself over the threshold of reference to the Competition
7 Commission:

8 “... reasonable grounds for suspecting that publisher-led distribution is a feature
9 that prevents, restricts or distorts competition ...”

10 Of course, a reference was not made and Chapter 5 is the chapter that explains why not. I
11 do not need, I think, to detain the Tribunal with the discussion of the test which is at 5.2,
12 and the OFT repeats where it has got to. Then 5.6, the second bullet point, coming to
13 magazines, it again summarises where it has got to. I do not think I need to read that out.
14 The conclusion there can be summarised as what it has found, the adverse effects on
15 competition and adverse effects on quality, range and service being offered to consumers,
16 consumers are not getting the magazines they want, where they want and when they want.
17 So the OFT has concluded there are reasonable grounds for a reference, 5.7.

18 Then we come to discretion, and at 5.10 the OFT refers to its guidance, and it notes that,
19 according to its guidance, it will make a reference only when the adverse effects on
20 competition are significant. It then looks at various factors to decide whether or not they
21 are significant, the size of the market, the proportion of the market and persistence of the
22 feature. I do not need to detain the Tribunal with that, but it successfully jumps all those
23 hurdles before then looking at offsetting customer benefits, which do not arise in relation to
24 copy allocation and publisher led distribution. These are points about territorial protection
25 in cover prices.

26 One then goes to 5.26 availability of remedies and other practical issues. This is an
27 important paragraph in explaining why the OFT does not make a reference. That is
28 because:

29 “... the process of self-assessment of individual distribution agreements
30 between publishers and wholesalers that has followed the issue of the [2008]
31 Opinion creates a reasonable prospect of a period of flux in the sector.”

32 Then it explains what it means by “flux”:

33 “In this connection, the reference to flux is to the changes that may take place as
34 a result of this process of self-assessment, which could include changes to

1 distribution arrangements following the recent tender process. Such flux will be
2 particularly relevant to the features of copy allocation and publisher-led
3 distribution in relation to magazines.”

4 I think there is a slightly sterile debate as to whether the OFT saw the prospect of flux, to
5 use the shorthand, as likely or possible. I do not think the Tribunal needs to grapple with
6 that. We are perfectly able simply to say that the OFT clearly regarded the possibility of
7 flux, a significant change in distribution arrangements, as a realistic prospect, it is
8 something that could happen. In fact, if it had regarded it as a remote possibility, this
9 paragraph would have been bizarre. It must have regarded it as a realistic possibility
10 sufficient to stop it doing what it otherwise would have done, which is refer the matter to
11 the Competition Commission.

12 THE CHAIRMAN: Before this 2009 decision was taken, there had been – it refers there to the
13 “recent tender process”, and contracts then had been awarded to Menzies and Smith to last
14 for, is it, five years?

15 MR. PERETZ: Off the top of my head, I do not know. What had happened just before the issue
16 of the Decision, Dawson had become insolvent, so there was the question of what was
17 going to happen to its business. I think it became insolvent fairly swiftly, so there was the
18 need to deal with that situation. That, I think, is part of what it is getting at here. The
19 OFT’s opinion in 2008, there would also have been the removal of the old code of practice
20 that had followed the MMC report in the 1990s. So I think various things had been
21 happening in the period just leading up to this decision, and that is what this is referring to.
22 It is clearly anticipating further developments. The OFT’s opinion was issued in 2008 and
23 that invited the sector to review its agreements in the light of Chapter 1 of the Competition
24 Act, and that process was still ongoing at this time. It had not concluded.

25 THE CHAIRMAN: The point I am trying to get at is that there had been a recent tender process,
26 so but for those other aspects of what was happening in the market about self-assessment
27 and the removal of the code, the position contractually would be expected to stay relatively
28 stable for a number of years following this report.

29 MR. PERETZ: I think that is right.

30 THE CHAIRMAN: And it was therefore really these additional factors that created the
31 possibility of change occurring in the immediate future, from the standpoint of this report.

32 MR. PERETZ: Yes. At 5.28 the OFT turns to look at the possibility of passive sales, and it
33 speculates that passive sales may actually emerge in practice and points to a number of
34 factors. First, the remaining two wholesalers have a greater ability to act in different areas

1 of the country. If one looks at the map even though Smiths is predominantly in the South it
2 has areas of operations up in the North of England, and vice-versa with Menzies. So you
3 have a situation where you have the two distributors who, in principle, one thinks one might
4 be able to access virtually all parts of the country rather than wholesalers very much
5 concentrated in one corner. I assume that is what is meant here.

6 Secondly, although there has been a reduction in the number of contiguous territories
7 arising from the recent tender awards, essentially the frontier has got shorter as the areas
8 have become more rationalised. The OFT notes that many of the remaining contiguous
9 areas are in or around major population centres. I think if one looks at the map one can see
10 that London, Manchester and the conurbation around Leeds and Newcastle are all fairly
11 close to the frontier, so the OFT thinks perhaps there is a possibility of asset sales emerging
12 because, for example, in Newcastle although that is in Smiths land it is not that far from
13 Menzies' land, and perhaps Menzies might be interested in distributing to Newcastle from
14 operations in North Yorkshire or Durham.

15 THE CHAIRMAN: Are the black splodges then conurbations?

16 MR. PERETZ: The black splodges are conurbations rather than anything else.

17 Finally, the OFT notes the prospects for passive sales of magazines are not wholly
18 dependent on the instance of contiguous territories given that it is possible for magazines to
19 be supplied by wholesalers at a significant distance. That is the point because magazines
20 are not quite so time critical as newspapers, it is more acceptable to have a 200 mile journey
21 and the magazine arriving a day later than it might otherwise do because they are not so
22 time critical as newspapers.

23 THE CHAIRMAN: Are there Smiths shops then that are supplied by Menzies and vice-versa?

24 MR. PERETZ: That is my understanding.

25 THE CHAIRMAN: They do not self-supply?

26 MR. PERETZ: They do not, no. While we are on what the OFT thought might happen, it is also
27 perhaps worth looking at the 2008 opinion and that is in the second hearing bundle at tab 2
28 behind tab 11, and I want to go to p.49. Here the OFT is discussing what may happen
29 absent absolute territorial protection and the OFT speculates that major retailers and WH
30 Smith – this rather settles the point that WH Smith in 2008 was at the time not being
31 supplied on a national basis but being supplied area by area.

32 “Major retailers such as supermarkets and WH Smith would invite wholesalers to
33 bid to supply with magazines on a regional or national basis.”

34 - that is another possibility canvassed by the OFT.

1 “Submissions from the BEI suggest that this option is plausible and likely to
2 arise...”

3 And the OFT notes an attempt by Tesco and WH Smith Retail to switch to receiving
4 magazine supplies from a single wholesaler but were prevented from doing so by
5 enforcement of ATP provisions.

6 Then at 3.54 the OFT speculates about the possibility of new entrants to magazine
7 wholesaling from general logistics firms, or wholesalers of other products.

8 At 3.55 it points out that supermarkets, perhaps certain other multiple retailers might be able
9 to use methods of distribution that they use for their other products, their grocery products,
10 although the OFT expressed certain scepticism about that possibility at 3.55 (final
11 sentence). So these are other possibilities that the OFT had in mind for the way in which
12 distribution might develop.

13 If we go back to the 2009 Decision at 5.30 on p.116:

14 “The OFT considers these emerging possible developments of alternative supply
15 by a passive sales and/or national models of distribution will be particularly
16 relevant in the context of any assessment of copy allocation and publisher-led
17 distribution in relation to magazines over the short term. That is because such
18 changes have the potential to give retailers, in particular multiple retailers, more
19 influence over the allocation of copies, the availability of publications and the
20 nature and degree of discounting. Such changes, and the responses anticipated
21 from, retailers, could consequently provide benefits to magazine consumers in the
22 form of increased choice, enhanced availability and greater discounting of
23 magazines. As such, these changes could be very significant in the context of any
24 assessment of these features, and if relevant, any assessment of the desirability or
25 suitability of any remedies.”

26 So the OFT is saying that this is the really important thing that might happen, and it is
27 capable of changing the picture in a way that really affects the consumer detriment at issue
28 here, because it could greatly improve choice enhanced availability or greater discounting
29 magazines. The fact the OFT is looking at is possible developments of alternatives via
30 passive sales, national models of distribution; that is what it is looking at at this stage. That
31 is why at 5.31 the OFT notes that all these developments are in flux. The dust will not have
32 settled within the next year, and therefore it is not the appropriate time to make a reference
33 to the Competition Commission. So its decision is based entirely and solely upon its
34 forecast of what could well happen in relation to emerging possible developments of

1 alternative supply – to use the words at 5.30. That is the only basis on which the OFT
2 decided at that stage not to make a reference. It had already noted various initiatives. As we
3 have seen it had noted the Joint Industry Group. It had noted the existence of Sales Based
4 Replenishment, and none of those were the reasons why it chose not to make the reference.
5 The decision not to make the reference was based only on this point – the forecast change in
6 emerging possible developments and alternative supply.

7 Those are the parts of the 2009 Decision that I want to emphasise to this Tribunal. My note
8 reminds me we ought probably just to look at 5.37 and I just want to pick up a couple of
9 points that the OFT makes. Paragraph 19 of the OFT’s skeleton argues that the 2009
10 Decision found that competition for the market constrained wholesaler behaviour in favour
11 of publishers. It is quite right, it did, but the key point is that, despite that finding the OFT
12 thought that the reference threshold was crossed because of copy allocation and publisher
13 led distribution, i.e. the absence of adequate competition in the market was what led to the
14 reference, and I just wanted to pick up what was in para. 19 of the skeleton.

15 The OFT make the point, in their skeleton, that the 2009 and the 2012 Decisions are of a
16 different kind; that is, of course, right, but the 2012 Decision has to be seen against the
17 background of the findings of the OFT and the conclusions the OFT reached in the 2009
18 Decision from which it has never resiled. Nowhere has the OFT ever said that it departs
19 from any of the analysis in its 2009 Decision, and that that Decision was correct, at the
20 same time as maintaining that the 2012 decision was correct, so therefore the two need to be
21 measured up against each other to see if they stack up. In fact, the analysis in the 2012
22 decision simply ignores or fails to take account of the OFT’s own previous findings and
23 conclusions and thereby, in public law terms, ignoring a relevant consideration or not
24 stacking up, and the decisions do not stack up.

25 It is true that the OFT did not promise an update review and that it said that it would apply
26 its prioritisation criteria in deciding whether or not to make any update review, but that does
27 not deal with the point that the OFT had to look at the question of prioritisation against the
28 background of its earlier findings, so the two must stack up.

29 The 2012 Decision applies, or purports to apply to prioritisation criteria. I do not think I
30 need to take the Tribunal to them, they will be familiar; they are at tab 8, p.8 of bundle 1.
31 The primary focus of the 2012 Decision is on consumer impact, and the words “primary
32 focus” are the OFT’s own in the Decision at para. 5.29. Consumer welfare, of course,
33 includes price, quality, range and service (PQRS). The OFT has to look at all of those

1 points and, indeed, it says that it looks at the benefits of OFT action in terms of price,
2 availability and convenience, and that is again 5.29 of the Decision.

3 As we have seen the 2009 Decision finds serious problems in relation to quality, range and
4 service, but those problems do not seem to be taken fully into account in the Decision; that
5 is because the OFT appears to have relied on competition for the market, i.e. the ability of
6 publishers to get wholesalers to comply with their wishes, and that is the sixth bullet point
7 in para. 5.28, p.39 of the Decision. The problem is, and we have had no really adequate
8 answer to this, is that this simply does not address the problems identified in 2009 in
9 relation to the lack of influence by retailers over the distribution process. The problems in
10 the OFT's view that justified a reference in 2009. It is accepted that nothing real has
11 changed in relation to passive selling or any other aspect of the structure of distribution
12 (para.37 of the skeleton). The Berlin Wall and the Hobson's Choice features remain as
13 they were.

14 At para.37 of the OFT's skeleton it points out that some retailers, probably supermarkets,
15 although it is not stated, can impose financial penalties on wholesalers, but that, we say, is
16 symptomatic of the absence of retailer choice – even supermarkets cannot switch, they
17 cannot use their exit option, they have to fall back on punishment in order to try and get
18 what they want out of wholesalers. The OFT now has to rely, in order to support its no-
19 impact conclusions, on factors that it did look at in 2009 but did not consider to be anything
20 like as important in relation to competition issues faced by retailers, and consequent
21 consumer detriment in terms of range, quality and service.

22 I think, having said that, I can now move on to other aspects of the OFT's non-prioritisation
23 Decision. And the first point I want to look at is availability. And there I need to look at,
24 first of all, the crude availability data and then, secondly, the consumer survey point.

25 On crude availability data, there are seven points I want to make about that.

26 The first is that there is only a modest increase in availability data. The increase has gone
27 from 77.4 to 84.7 per cent. Now, whether our description of that as modest or not is one
28 arguable in principle, but what we do know, we do notice that 84.7 per cent figure is
29 certainly comparable to the 70-80 per cent range found in 2009. The Tribunal will
30 remember I took you to the paragraph that dealt with that. And you will remember also the
31 British Retail Consortium referred to a 65-85 per cent range. So, 84.7 is not outside the
32 BRC range, and it is not that much outside the 70-80 per cent range which the OFT looked
33 at in 2009. And, of course, that figure did not disturb, as you have seen, the OFT's finding
34 at that stage that there were adverse effects on competition.

1 The second point I want to make about crude availability data is that it is common ground
2 that crude availability data does not measure key aspects of availability, because all that is
3 measured, all that is captured in the figure, is the extent to which copies — whether or not
4 copies of a particular title are returned by the shop at the end of the sale period. The data
5 does not capture whether more popular titles are affected. It does not cover situations where
6 the magazine has arrived late at the retailer. It does not cover whether retailers are getting
7 the magazines they actually want or whether they are getting more copies than they want. It
8 does not distinguish supermarkets from other retailers, so they fail to pick up whether poor
9 availability is a continuing or worsening issue in retailers not benefiting from SBR; and at
10 the end of the day the OFT's placing all its eggs in that particular basket of crude
11 availability really contrasts, we say, with its willingness to take account of a much wider
12 range of evidence of 2009 including retailer complaints.

13 Third point — and this picks up on the OFT skeleton at para.46 because, at para.46, the
14 OFT returns to the point that publishers have an incentive, do they not, to put their
15 magazines out and distribute them efficiently. But, of course, that ignores the point from
16 the 2009 decision that publishers' incentives are not well aligned with efficient distribution.
17 And, really, that is all that needs to be said about that.

18 THE CHAIRMAN: Well, except they must be aligned with actually having the magazines in
19 their shops.

20 MR. PERETZ: Yes. I mean obviously —

21 THE CHAIRMAN: They may be not aligned in other aspects, but in the aspect of having a
22 magazine in the shop if there is a customer who comes in and wants to buy it, then they
23 must be aligned.

24 MR. PERETZ: Yes. But what the publisher does not have is the incentive to ensure that each
25 particular retailer has the right range to deal with each particular demographic. And that is
26 what the OFT found in 2009. So, generally the publishers of course have an incentive to,
27 sort of, push out magazines, but they do not have the incentive to get it right at each
28 individual — at the local level that the individual retailers have. And, not getting it right at
29 the local level is a matter of customer detriment, because it means that consumers have to
30 delay their purchases; they have to buy a second choice title because the one they really
31 want is not there, or they have to wait a few days until they do their weekly shop to pick it
32 up at the supermarket or whatever — and those are all matters of consumer detriment, as the
33 OFT rightly recognised in 2009.

1 The fourth point I wanted to make is that the OFT relies on a claim by the PDF that base
2 availability for “best-selling magazines”, was achieved for virtually 100 per cent of outlets.
3 Now, that assertion by the PDF I read out virtually verbatim from (I think verbatim) from
4 para.27 of tab.4 in bundle 2, it is a letter from the PDF to the OFT. So, it is a sort of bare
5 figure:

6 “a ‘base’ availability of ... best-selling magazines is achieved for virtually 100 per
7 cent of outlets”.

8 The figure only applies, plainly, on its face, to best selling magazines. That term is left
9 undefined by the PDF. Nor does it show whether the retailer got anything like the quantity
10 requested or required, and there is no evidence that the OFT ever interrogated that claim by
11 the PDF in any way.

12 THE CHAIRMAN: What does “base availability” mean?

13 MR. PERETZ: It means availability at the — on day one, yes. I mean, the OFT relies on that to
14 deal with our point that crude availability does not capture late arrival. The OFT also rely
15 on the 93 per cent availability figure provided by the PDF. Now, that is a figure that relates
16 only to larger retailers with EPOS systems that connect to wholesaler systems. Those
17 retailers often take a limited range of best sellers. And, as the PDF itself says, at para.3.6 of
18 its intervention:

19 “the limited coverage of that figure makes it less reliable”.

20 The sixth point is that the OFT tries to deal with our point at 49(c) of its skeleton that crude
21 availability is consistent with over-supply by pointing to reduced wastage since 2009. And
22 it is worth just having a quick look at that figure. The figure for reduced wastage is to be
23 found at footnote 23 in the 2009 Decision which I think is, according to my note, it is at
24 p.21. Sorry, actually it is not the, I have mis-read my note it is the 2012 Decision. So, that
25 is at tab.4 of bundle 1, and I think it is footnote 23. Yes, p.28, tab.4. It says:

26 “One interested party submitted information indicating approximately a 20 per cent
27 reduction in the total annual number of unsold copies of magazines between 2006-
28 2010 [from 747 million copies to 598, effectively, million copies] in 2010”.

29 The Tribunal will see those are volume figures. And, of course, we are talking in a context
30 where the total sales of magazines have been declining. There was a 9 per cent decline in
31 magazine sales between 2009 and 2011, for example. I do not, unfortunately, have the
32 2006-2010 figures to make a direct comparison, but of course a decline in overall volumes
33 of wastage does not mean that the percentage of wastage has changed at all. So, the OFT’s

1 point about reduced wastage, we are afraid, just does not fly. So, that is what I want to say
2 about crude availability data.

3 The next point is the consumer survey datum (we use the singular because it is a single
4 figure) and this is the OFT's reliance on an answer to a question in a survey conducted by
5 my clients the NFRN. Consumers were asked, "What factors have led you to reduce your
6 magazine purchases [I think] over the past year?" And when consumers were asked that
7 question only 1 per cent appointed a lack of availability; and we say the OFT attached an
8 unreasonable amount of weight to this figure. As always when you are looking at surveys,
9 you need to look at the question that was actually asked. And the question does not ask
10 consumers, "Is lack of availability a problem?", what it asks is, "Is this one of the factors for
11 reducing your purchases?" And two points arise out of that:

12 * First, where consumers have to delay their purchase, where they have to hunt more than
13 they want; when they buy a second choice title instead — that is not a reduction of their
14 purchases of magazines, and it would not figure in answer to that question.

15 * The second point is that it is a question about reduction. It may be that consumers would
16 buy more with a better service of their chosen retailer, but that point, again, is not got at by
17 the question.

18 So, it is quite significant in that context that para.53 of the OFT's skeleton it refers to
19 factors that limit consumer purchases, "limit". But the question is not about factors that
20 limit, it is about factors that reduce, and the two are different. Now, the OFT complains in
21 its skeleton that we, the NFRN, could have provided different consumer survey evidence,
22 but that just does not deal with the point that the OFT placed wholly unreasonable weight
23 on this particular figure in relation to this survey.

24 The next point I want to go on to is the question of improvement in wholesalers' systems,
25 and the OFT relies on a number of aspects of alleged improvement in wholesalers' systems.
26 The first is the growth in sales based replenishment, SBR. Now, no-one is saying that that
27 growth is irrelevant, but the growth is not enough to displace the concerns and the analysis
28 set out by the OFT in 2009. As I have pointed out, the OFT had already noted that SBR
29 was there and growing in 2009, and on any view SBR does not help a large part of the retail
30 market compete properly in terms of quality, range and service in the magazine sector
31 because they do not have access to it. Mr. Baxter's evidence, indeed, in his second witness
32 statement (the reference is paras.16-19 in the witness statement is at tab.10 of bundle 2, I do
33 not need to go to it) but his evidence is that SBR is actually unhelpful to retailers outside the
34 system because one of the consequences of SBR is that stock held by publishers is ring-

1 fenced for retailers within SBR, and is therefore not accessible to non-SBR retailers when
2 they want extra stock.

3 All the OFT did in its Decision is that it simply accepted a bare statement by the PPA to the
4 effect that SBR benefited non-SBR retailers, which is why we brought evidence on this
5 point in Mr. Baxter's second witness statement. And it simply appears the OFT did not
6 interrogate that assertion in any way, let alone raise it with my clients, but, as I say, there is
7 evidence actually that SBR does not, positively harms — not benefit but positively harms
8 — non-SBR retailers; and the OFT just does not deal with that.

9 On on-line facilities, the fact is that many retailers do not or cannot use them, and the
10 reasons for that are explained again in Mr. Baxter's second witness statement at paras.8-15.

11 Now —

12 THE CHAIRMAN: This is on-line facilities to —

13 MR. PERETZ: To alter one's orders. You can go online and alter the allocation you are given.

14 Now, Mr. Baxter has produced evidence (because he asked the two wholesalers what their
15 number of regular users were and came up with figures of 1,200 and 5,000 retailers being
16 regular users out of a total of 50,000). So that is his evidence. The PDF says, "Well, that is
17 a bit unfair because it does not include occasional users, it is just that you multiply it by 3".
18 But, even granting them that, you are still dealing with a pretty small proportion of retailers
19 overall who are using online retailers.

20 Now, Mr. Baxter gives reasons why they do not use them. But, in any event, one can take it
21 that — assuming retailers are not stupid and would use anything that was reasonably
22 available and offered real improvements to them — their reluctance to use the online
23 facilities says something about the extent to which those facilities actually assist a large part
24 of the retail sector and either they do not assist or they are, for various reasons, simply not
25 practically usable by particular retailers.

26 The next issue is the system of 48 hour pre-notifications, and the source of this point is set
27 out in the PPA submission to the OFT at tab.5 behind tab.11 of volume 2 pp.2-3 and it is
28 picked up in the OFT's defence at para.45(e). Now, in relation to that we maintain our
29 points that the 48 hour pre-notification system still restricts the extent to which retailers can
30 alter their allocation. They have to do so within a narrow set range. Changes in allocations
31 are often made too late to be altered, and repeated changes have to be made before an order
32 actually sticks. And the OFT's only response to that, at para.50 of its skeleton, is simply to
33 say that publishers have a better understanding of likely demand levels. And that, of course,
34 brings us back to the fundamental flaw in the OFT's Decision, which is that it just does not

1 grapple adequately with the OFT's own findings in 2009 that publishers' incentives are
2 different, and that when you are looking at what a particular retailer is likely to want, and of
3 course, we are dealing with individual retailer allocation here, the retailer input is quite
4 important and the publishers do not have the same incentive as the retailer to get it right.

5 THE CHAIRMAN: But if you order, if you put in an order for some extra copies of a magazine,
6 then the wholesaler has to make an unscheduled delivery to you. Is that then, are the
7 charges for that, how are they distributed as between the retailer and the wholesaler, I mean,
8 might the wholesaler say, "Well, you have ordered another 10 copies of 'Hello!' magazine,
9 but it is not really worth my while getting a car and a driver to bring 10 copies of 'Hello!'
10 magazine out to your village". How does that work?

11 MR. PERETZ: My impression, and someone will correct me if I am wrong, is that any retailer
12 will get a regular delivery from the wholesaler, so it is really a question of it turning up, and
13 it will turn up in the next weekly, or whatever it is, delivery. It is not a question of
14 somebody getting on their courier bike and whizzing ten copies of The Economist to you.

15 MR. HOLMES: Madam, if I can assist, there is obviously a daily delivery on account of the
16 newspaper deliveries, and magazines come with that, I think.

17 MR. PERETZ: That must be right, thank you.

18 THE CHAIRMAN: This red and blue map, it is always the same wholesaler who supplies the
19 magazines and the newspapers?

20 MR. PERETZ: Yes, that is right, subject to the 53 post codes where you have got different
21 wholesalers supplying different magazines. I do not know whether they supply different
22 newspapers. There are also, I think in Cornwall, two distributors that still supply just
23 newspapers, so they do not figure on the magazine map. There are odd wrinkles lying
24 around.

25 THE CHAIRMAN: But generally speaking, the same wholesaler supplies the magazines and the
26 newspapers, so they would be every day.

27 MR. PERETZ: Generally speaking, yes.

28 The next issue I want to cover, and I am making good progress, I should finish well before
29 time.

30 THE CHAIRMAN: Do you want to take a break, you have been on your feet for some time?

31 MR. PERETZ: I am perfectly happy to take a break. I have got a few more points I want to
32 make.

33 THE CHAIRMAN: Perhaps this would be a convenient moment, and we will come back at
34 11.30.

1 (Short break)

2 MR. PERETZ: Just on a minor point of fact I raised towards the end of the first part of the
3 morning, I said that there were two independent newspaper distributors. I am told that that
4 is about no longer to be true because one of them, Dash, is just about to disappear, to be
5 replaced, I am told, by Menzies. Dash operated supplying News International titles in the
6 West Country. I just say that so that no one can accuse me of saying something inaccurate
7 to the Tribunal.

8 The next issue I want to look at is retailer numbers, range of consumer purchasing options.
9 The point here is that what one is looking at is the range of choice available to the
10 consumer. Our point has been that there has been a reduction in full range retailers, and that
11 is a point that we made at para.65 of our application. There is evidence from the NFRN to
12 support that at p.21 of tab 2, bundle 1, para.2.2.1(a). Rather than go to that, I can simply
13 remind the Tribunal, and we looked at this morning in the 2009 Decision, that the OFT,
14 itself, refers to a number of other retailers coming in, supermarkets, and the reference to
15 coffee shops, and various other ones. Of course, overall retailer numbers are constant, but if
16 you have got more retailers of that kind coming in who are not full range, it more or less
17 follows that the number of full range retailers is likely to be declining. Of course,
18 supermarkets have all sorts of constraints on their shelf space and all sorts of other things
19 they want to sell so that their range is necessarily limited.

20 The OFT criticises us for not providing information about reductions in full range retailers.
21 What we say is that the problem is that the OFT failed to ask fairly straightforward
22 questions of the PDF about this. The OFT says at para.67 that is very easy to see what
23 evidence would have helped the OFT. If it was so easy, why did the OFT not ask for
24 precisely that information from the PDF, from the wholesalers, who have reams of
25 information about what magazines they supply to which retailers, and could doubtless have
26 easily printed various data sets off to assist the OFT? But the OFT never asked as far as we
27 know.

28 The PDF makes a point about the use of online subscriptions and postal subscriptions as a
29 means of magazine distribution. That is a point that I, myself, have wondered about
30 because I, and I am sure members of the Tribunal, may get magazines on subscription and
31 of course we are aware of increasing attempts to distribute magazines online.

32 There are not any figures for online subscription and postal subscription in evidence as far
33 as I am aware. I hesitate to say something quite so sweeping just in case somebody points
34 me somewhere which I have not spotted, but as far as I am aware there are no figures on

1 this in evidence. The PDF, when it makes the point in its skeleton, does not give any
2 figures. My instructions are, and doubtless somebody will be pop up if I am completely
3 wrong about this, that online subscriptions and postal subscriptions are still a pretty small
4 proportion compared to magazines sold through retail channels.

5 Actually, I think the 2008 OFT paper gives a figure, but that dates back to 2006, of 13 per
6 cent of magazine sales being done by subscription. I suspect in 2006 that online would
7 have been negligible. How much those figures have changed, I am afraid I cannot tell, but
8 my instructions are not much.

9 The next point I wanted to make is about the operation of the supply chains, another point
10 relied on by the OFT. The OFT relied on a figure of 95 per cent compliance with agreed
11 delivery times. One has again to see all of this issue against the basic problem that
12 publishers' and retailers' incentives are not aligned. That creates the conflict and the
13 problem, so it is not an answer, with all respect to para.74 of the OFT's skeleton, to say that
14 publishers have the incentives to get magazines out.

15 A point we have made, and to which we do not really think there is an answer, is that these
16 are targets that are agreed with retailers, but in a situation where the retailer has no choice
17 about which wholesaler to deal with and has to get all their supplies of magazines from that
18 wholesaler, one needs to look fairly askance at what does "agreed" mean. If you have got
19 no choice, it is a "take it or leave it" deal. It is like somebody who wanted to use a
20 Hobson's horse. You either take the horse or you leave it. So we do not think much weight
21 can be attached to the fact that these are agreed. Effectively, they are set targets by the
22 wholesalers. Given that they are set targets for the wholesalers, a 95 per cent compliance
23 with those targets is a figure upon which not much weight can be placed.

24 I think that brings me to the end of our criticisms on the finding of impact with critical
25 primary focus on the OFT, and we say it cannot stand because it is unreasonable and fails to
26 take any, or any adequate account of the OFT's reasonings and findings in its 2009
27 Decision.

28 I have probably only got about four or five minutes left and I will deal with strategic
29 significance. This is, of course, the secondary pillar of the OFT's reasoning and a
30 secondary part of our argument. The issue here is whether the OFT acted reasonably in
31 taking the view that the PDF was "well placed" to deal with competition problems that
32 might arise. "Well placed" is the term used in the prioritisation criteria. Our point, and it is
33 really a very short point, is that it is hard to see that an industry body is well placed when it
34 is rejected on one side of the industry. As the opening of the PDF skeleton makes clear, the

1 PDF is founded by and formed of publishers and wholesalers, it comes from that side. The
2 pleadings swap blows about the number of retailers that have engaged the PDF processes,
3 but whether the number of retailers that applied to go on to the PDF board is eight or 24 out
4 of 50,000 after an extensive advertising campaign, or whether 44 retailers have or have not
5 tried to use the PDF mechanisms, the truth is that very few retailers have done so. My
6 clients, the democratic bodies representing the bulk of retailers, have demonstrably no
7 confidence in the PDF.

8 If the OFT had taken a view ----

9 THE CHAIRMAN: What was the timing of this, remind me? When did this joining or non-
10 joining of the PDF or involvement or non-involvement arise?

11 MR. PERETZ: It has been going on since, I think, 2010, 2011 or 2012. We are looking at that
12 sort of time period. I am afraid I do not have at the forefront of my mind a blow by blow
13 account of that. I am told it is 2009.

14 At the time of the OFT's 2009 Decision it refers to the predecessor of the PDF, the joint
15 industry group, so it is a post-2009 initiative.

16 MISS LESTER: If I can assist, the PDF was formed on 9th September 2010.

17 MR. PERETZ: Thank you. Of course, the OFT could have taken a view that my clients and
18 retailers generally, their objections to the PDF were unreasonable, that they should have
19 engaged with it. Clearly, if the OFT had looked at the PDF and thought, "This is a really
20 excellent body, it is going to provide a great forum for resolving disputes, we simply cannot
21 understand why these bodies are not engaging with it and their objections seem to us to be
22 wholly unreasonable", that would have been quite an acceptable position for it to take, but
23 the OFT notes our concerns but it does not deal with them. There is no reasoning to explain
24 why it thought they were unreasonable. All it says is, "Here is this body, it looks to us well
25 placed". In a situation where there are patent problems with the body because it is more or
26 less essentially rejected by one side of the industry, that is just not a reasonable response.
27 That is our short point on strategic significance because the OFT did place weight on that
28 criteria, and the OFT ought not to have taken the view that there was some other body that
29 could do a competition regulatory job for it.

30 At the end of the day, this case turns on the OFT's analysis of consumer impact. All my
31 clients' members want is to be able to compete on quality and range and service and offer
32 their customers the chance to buy the magazines that they want, when they want and where
33 they want. The fact is that they cannot do so at the moment effectively, because they have
34 got to go to wholesalers, they have got to bang the wholesaler's door down to get any

1 change in allocation, they are tied to what wholesalers are or are not prepared to give them,
2 they can only tweak the allocation they are given, and sometimes after an extraordinary
3 amount of effort, is a matter that causes real consumer detriment and ought to be of concern
4 to the OFT, given the importance of the magazine sector.

5 Of course this is a prioritisation decision. We appreciate that the OFT has many calls on its
6 increasingly scarce resources and has to prioritise, but for the OFT to decline to take this
7 issue up on the basis of lack of consumer impact is, in our submission, unreasonable, and
8 does not stack up when seen against the background of its own conclusions in 2009. In our
9 submission, the Tribunal should ask the OFT to think again about its approach and quash
10 the 2012 Decision.

11 Those are my submissions.

12 THE CHAIRMAN: Thank you very much, Mr. Peretz. Yes, Mr. Holmes.

13 MR. HOLMES: Madam, as you have heard, the applicants criticise the OFT's Decision as
14 unreasonable in a number of respects. My submission today will be that those criticisms are
15 all unwarranted, you will be unsurprised to hear. The decision is a prioritisation
16 assessment. The OFT was considering whether or not to use its scarce resources to embark
17 on an update review of newspaper and magazine distribution, but it decided that that was
18 not an appropriate use of resources.

19 It is not in dispute that prioritisation is a necessary feature of life for an organisation like the
20 OFT which has some tasks which it must undertake, like merger control for example, and
21 others where it needs to decide where to devote its resources to best effects when
22 investigating matters under the Competition Act, or when deciding whether to look at a
23 market with a view to a market investigation reference, and it has to focus its resources so
24 as to achieve the best results for consumers, and one sees that very clearly from the
25 prioritisation guidelines – I do not think it is necessary to take you to them. They make
26 clear that the OFT will generally look at the impact of further work in a given field. It will
27 also consider the strategic significance of further work to see whether it fits in with the
28 OFT's work plan and objectives, and if the OFT is best placed to act, and the OFT will then
29 balance these factors against the risks and resources involved. That was the framework
30 which the OFT applied in the present case. The OFT's primary focus, as Mr. Peretz has
31 said, was fairly and squarely on consumer impact, and it found that consumers on the whole
32 would not be likely to benefit significantly from a review. It came to that conclusion
33 based on a broad range of indicators. It looked at retail prices, in store availability, number
34 of retail outlets, supply chains, investment levels, the tendering process and how

1 competition worked as a result of that process. All, we would submit, obvious factors to
2 consider, relevant factors to consider when assessing the likely impact of further work in
3 this field.

4 It found that on the evidence available to it the markets in question are generally working
5 well from a consumer perspective, so that retail prices, for example – a conclusion which
6 has not been challenged in these proceedings - seemed to be falling for both magazines and
7 newspapers. The OFT considered that in-store availability had improved, there was better
8 access than there had been, for example, at the time of the 2009 Decision. The number of
9 retail outlets had remained stable, although circulation levels for both newspapers and
10 magazines are in long term decline.

11 It found that significant investments were being made in the supply chain and that
12 wholesalers remained subject to effective competitive constraints arising from the tendering
13 process which publishers use to appoint wholesalers. This is the so-called competition for
14 the market which, in our submission, is the primary way in which competitive pressure is
15 exerted at the wholesale level.

16 The OFT also looked at strategic significance but did not find there any other justification
17 for conducting an update review. It found that such work would not be aligned with any of
18 the OFT's current strategic priorities, and it found that there was also evidence that the
19 industry was taking steps to self-regulate and set minimum service level standards, and on
20 that basis it did not appear that the OFT was best placed to act in relation to the issues raised
21 by the competitors. So the conclusion on risk really follows from the conclusion on
22 consumer impact. If there is unlikely to be any significant consumer impact then it is very
23 unlikely that the work undertaken will produce any benefits, and therefore risk really falls
24 out of the equation. Clearly, if there were a modest chance of a substantial consumer
25 benefit that might be something worth taking forward, but where there is no real prospect of
26 consumer benefit in play then really the likelihood or otherwise of achieving that falls by
27 the wayside.

28 On resources, the OFT identified a number of potentially resource intensive areas of further
29 work, information gathering and analysis that would need to be undertaken as part of the
30 review of the sector and that again is not, as we understand it, challenged.

31 So how should the Tribunal approach a decision of this nature? It appears to be common
32 ground that the OFT enjoys a broad margin of discretion in deciding how to deploy its
33 resources, and this can be seen from the *Cityhook* case in the High Court which we should
34 perhaps briefly open. It is in the authorities bundle at tab 15. The case concerned a

1 challenge to a decision of the OFT closing an investigation into a suspected infringement of
2 the Competition Act, and the challenge was by way of judicial review in the High Court, but
3 it is common ground that the same principles apply in the context of the present judicial
4 review before this Tribunal.

5 The case closure decision was challenged on various grounds, and the details of those are
6 not really relevant for today. But what is relevant are some remarks that the court made
7 when delivering its general conclusion from the decision to close the case at p.29 of the
8 transcript that you have in the bundle.

9 At para. 161 the Judge records his conclusion that there are no sustainable grounds for
10 challenging the decision, and then at 163 there is a passage I would like to draw your
11 attention to, where the Judge says:

12 “However, it is plain that the OFT must have the power to close the file on cases
13 otherwise it would no be able to function satisfactorily. Since it is the body to
14 which Parliament has given the decision-making powers, it is only in very limited
15 circumstances that this court can interfere as indeed was recognised on behalf of
16 Cityhook in its arguments before the CAT.”

17 There is then a discussion of the *Floe* case, and at para.165 the court notes:

18 “The power of this court to intervene, not merely at the stage with which that case
19 [*Floe*] was concerned, but in the stages of the process with which this case is
20 concerned, exists. However, it exists within the well-established, but relatively
21 limited, traditional public law parameters. When it comes to the most appropriate
22 allocation of limited resources, whether financial or manpower or both, the court
23 may only require the body charged with the statutory responsibility for the
24 deployment of those resources to think again if the decision under challenge was
25 irrational in the *Wednesbury* sense.”

26 And the Judge notes that he cannot conclude that that is the case in that case. The Tribunal
27 will no doubt be well familiar with the notion of *Wednesbury* unreasonableness, but a
28 convenient summary can very briefly be seen in the Judgment of the Lord Chancellor in the
29 *IBA Health* case which is at tab 5 of the authorities bundle at p.15 of the . At the top of the
30 page, para. 58 there is a discussion here of the failure to apply the *Wednesbury* test. So this
31 was a judicial challenge on appeal from a Judgment of the Tribunal on a judicial review of
32 the OFT’s decision not to refer a merger to the Competition Commission.

33 One of the grounds of challenge was that the Tribunal had failed correctly to apply the
34 *Wednesbury* test in its reasoning. The Vice-Chancellor explains at para. 58:

1 “As is well known ‘Wednesbury unreasonableness’ is shorthand for an act or
2 decision which is so unreasonable as to be an act or decision which no person or
3 Tribunal properly instructed and taking account of all but only relevant
4 considerations could do or make.”

5 So that, in our submission, is the test to be applied in considering whether the OFT’s
6 assessment of its priorities was unreasonable in this case.

7 Just to reinforce the point, you see at para.61 the Vice-Chancellor was turning to consider
8 an argument that the Tribunal had erred in giving the word “reasonably” its ordinary and
9 natural meaning. The Vice-Chancellor there states:

10 “Plainly unreasonableness in the ordinary and natural meaning of the word is
11 different from Wednesbury unreasonableness.”

12 This is not a question about whether the Tribunal agrees with the OFT’s reasoning. The
13 phrase that has been used by my learned friend: “do the reasons stack up?” we say is
14 perhaps slightly loose language and may tend to distract attention from the proper focus of
15 the Tribunal’s assessment.

16 THE CHAIRMAN: As I understand it the “stacking up” point is a slightly different point, which
17 is what was the relationship between the reasoning in the 2009 Decision and the reasoning
18 in the 2012 Decision, looking at the two Decisions? And was that the correct relationship in
19 the sense of what the OFT had said at the end of the 2009 Decision that it was going to do
20 in a couple of years’ time, and that seems to me to be one of the fundamental issues
21 between you and Mr. Peretz.

22 MR. HOLMES: Yes.

23 THE CHAIRMAN: He says that the reason you did not make an MIR then was because there
24 was this state of flux. “What we thought you were going to do was to look at whether the
25 changes that you thought might be about to happen had, in fact, happened. In fact, we see
26 those changes did not happen, so why have you not now made the reference?” That is a
27 rather crude summary. The stacking up point, according to them, is the 2012 Decision does
28 not stack up with what they thought you were going to do having regard to your findings in
29 the 2009 Decision. I did not understand it to be a sort of paraphrase of the Wednesbury test.

30 MR. HOLMES: I am not sure much turns on it. He uses in his written submissions today the
31 phrase “stack up” not only to criticise inconsistencies, or alleged inconsistencies between
32 the 2009 and 2012 Decisions but also the details of the 2012 Decision, but I do not think
33 much turns on it. The key point is that when considering the issue of consistency, which of
34 course is the key issue in this case, that is right.

1 The question for the Tribunal is whether the 2012 Decision is sustainable on the basis of
2 this test; whether it is unreasonable in the sense that no reasonable decision maker could
3 have taken it, taking account of all relevant considerations.

4 The question for the Tribunal is whether or not there are relevant considerations disclosed
5 by the analysis in 2009 which the OFT failed to have regard to in the 2012 Decision. That
6 is how we understand this submission about consistency to fit within the framework of
7 Wednesbury unreasonableness, and our submission is that when you look at the detail of the
8 2009 Decision and the OFT's very broad and detailed work in 2008 and 2009, you do not
9 find the inconsistencies which are alleged, and you do not find relevant considerations
10 which the OFT should have had regard to. So that is our response to the central criticism.
11 As regards the detailed points of disagreement which are also raised with the OFT's
12 evaluation of evidence in 2012, which do not relate to an alleged inconsistency between the
13 2009 and 2012 Decisions, we say that these do not come close to allegations of Wednesbury
14 unreasonableness properly understood. There are clearly a number of differences of
15 opinion about this sector between the OFT and the applicants, but the Tribunal's task is not
16 to adjudicate on those it is to ask whether the OFT has been shown to have acted in a way
17 which is so unreasonable that no reasonable body could have acted in that way.

18 What I propose to do is to deal with the central point, the inconsistency as it arises under the
19 specific heads of the applicants' case. So rather than doing as Mr. Peretz did, and run
20 through those passages of the 2009 Decision on which I rely I will take the points as they
21 come up, where the inconsistencies are alleged to actually operate in connection with the
22 OFT's reasoning, because that connects them with the Wednesbury test; that ensures that
23 we address ourselves to the question of whether there is an irrelevant consideration that has
24 been missed in any specific aspect of the OFT's reasoning.

25 MISS POTTER: Can I just ask whether, in addition to relevant considerations, if there is a
26 difference in conclusion, or an apparent difference in conclusion on an issue between 2009
27 and 2012, given that they are different types of decisions, do you accept that the Tribunal's
28 role includes being satisfied that there is an adequate explanation of a difference between
29 those conclusions?

30 MR. HOLMES: There is no challenge before the Tribunal today which relates to the adequacy of
31 reasoning contained in the 2012 Decision. The challenge is fairly and squarely framed in
32 terms of the reasonableness of the conclusions that the OFT reached.

1 MISS POTTER: I suppose it is coming back to this stacking up point, that my understanding is
2 that the stacking up extends to a failure to explain the difference between conclusions
3 reached in 2009 and 2012.

4 MR. HOLMES: Well, madam, that was not our reading of the challenge.

5 MISS POTTER: Of the — right.

6 MR. HOLMES: We really did not see this as a procedural challenge to the OFT's reasoning; we
7 saw it as a challenge based on unreasonableness.

8 MISS POTTER: But I think, I would say within my view of *Wednesbury* surely extends to the
9 need for the reasoning — if there is a difference in conclusion, the reasonableness
10 assessment extends to whether there has been an adequate explanation of differences.

11 MR. HOLMES: Well, the task of the Tribunal, we would submit, is to look at this Decision on its
12 own terms. So, what is under review here, although a lot of time was spent going through
13 the 2009 Decision, what is actually before the Tribunal for review today is the 2012
14 Decision and the reasonableness of that Decision.

15 MISS POTTER: But, the 2009 Decision is part of the context in which that reasonableness needs
16 to be assessed.

17 MR. HOLMES: Absolutely, and we would submit that the way in which the two Decisions must
18 relate is that there is nothing in the 2009 Decision which contains a relevant consideration
19 which the OFT should have addressed, but which it did not address. That is how we say the
20 two Decisions, the relationship between the two Decisions is to be approached in the
21 context of *Wednesbury* reasonableness/unreasonableness. There is no ground of judicial
22 review based on the consistency between two Decisions taken under completely different
23 criteria, you know, approaching two different questions and obviously therefore covering
24 different ground.

25 Perhaps, when we get into the —

26 MISS POTTER: Yes, let us take it as we go through.

27 MR. HOLMES: — we can address your concern.

28 MISS POTTER: Yes.

29 MR. HOLMES: But certainly the OFT would submit that it has succeeded in explaining its
30 reasons adequately as to why consumer welfare would not be well served, why there would
31 not be a substantial issue impact from a further investigation of this field, that the reasons
32 are adequate to sustain the conclusions arrived at.

33 MISS POTTER: Yes.

34 THE CHAIRMAN: And I think it is, sorry, before you get into it.

1 MR. HOLMES: Yes.

2 THE CHAIRMAN: It is important for us to understand what was the nature of the exercise in
3 2012, and what was the nature of the conclusion. Because one can see it could have been,
4 “Yes, we were expecting all these things”, or “In 2009 we foresaw the possibility of certain
5 things might happen”. And then in 2012 you might decide, “Well, those things did happen,
6 greatly, the market is improved”, or you may say, “Well, we do not know whether they have
7 happened, and it is not our priority to find out whether they have happened or not and
8 whether the market has improved”. Or you might say, “Well, granted that it does not seem
9 that the flux has actually changed the position in the market. Do we think that the market is
10 functioning so badly that this justifies our resources in looking into this, even though we
11 might be a bit disappointed that things had not moved on as we thought they might and
12 rather hoped they would, in 2009?”

13 So, at the moment I am not clear which, if any, of those is a correct summary either of the
14 task you thought you were doing, or the task that you in fact did and the conclusion that you
15 in fact reached.

16 MR. HOLMES: Well, perhaps we should look at the two Decisions with that in mind, just to
17 make clear what the OFT considered was the task that it was undertaking. If we could open
18 hearing bundle 1, the first point to make emerges from the applicant’s application for
19 review, which is at tab.1. The application sets out the grounds on which this judicial review
20 is being sought. And you will see at para.2 of the application that it is stated that:

21 “In summary, [the applicants] contend that the present Decision is vitiated by
22 unreasonableness, and should be quashed and referred back to the OFT for
23 reconsideration”.

24 Then, again, para.11 on p.5 you see the claim that “The Decision was unreasonable”, and
25 the paragraph continues:

26 “The conclusions reached in the Decision are either not supported by evidence or are
27 not adequately supported by evidence, and material considerations that should have
28 been taken into account were not considered”.

29 So, that is the focus of the application. The application is alleging unreasonableness and, to
30 be fair to the applicants, they are grounding their challenge squarely in “*Wednesbury*
31 unreasonableness” as it has just been described, in this description of the challenge.

32 “The conclusions reached in the Decision are either not supported by evidence or are
33 not adequately supported by evidence, and material considerations [ie relevant
34 considerations] that should have been taken into account were not considered”.

1 And this is underlined when one looks at the relevant case law referred to in paras.28-32.

2 You will see at para.28 that the applicants cite the *Cityhook* judgment as confirming that:

3 “The application of the prioritisation principles must be reasonable, and that a
4 Decision applying those principles is reviewable on public law grounds”.

5 And then, over the page, the only category of ground, the only ground identified and
6 expounded by reference to the case law reasonableness and sufficiency of evidence. And
7 you see, at para.29, a quotation from the *BSkyB* case, the underlined passage is probably all
8 that one needs to look at:

9 “A Tribunal conducting a judicial review can, as we have already seen from IBA,
10 review the available factual material to see whether the decision-maker was entitled to
11 make the finding in question. If the material is such that no reasonable decision-
12 maker could [make] that conclusion then the latter is unsustainable in law”.

13 So, the first submission we would make is that this is a challenge relating to reasonableness
14 and not the sufficiency of the OFT’s reasons which is generally regarded as a separate
15 public law challenge based on —

16 THE CHAIRMAN: Clearly a cross-over between the two.

17 MR. HOLMES: Of course. Of course. But, the challenge certainly is not framed here in terms of
18 a claim that we did not give adequate reasons for our conclusion.

19 If one then turns to the Decisions which are the focus OFT application, beginning at tab.5
20 with the 2009 Decision, at paras.6.8 and 6.9 you see the possible further update review of
21 the supply chains that the OFT views as the appropriate next step after a period of flux (and
22 I will come back to what the period of flux means, because I should say that there is an
23 issue between the OFT and the applicants as to what exactly was being referred to by this
24 period of flux, and what the OFT hoped or expected might happen during that period of flux
25 that would address the potential concerns, competition concerns, that were identified in the
26 2009 Decision. But, for now, looking at paras.6.8-6.9, one sees that the OFT records that
27 its:

28 “... function under section 5 OFT EAO2 to keep under review information about
29 matters relating to the carrying out of its functions” and that pursuant to that, “the
30 OFT will consider, after a period of two years from the publication of this decision,
31 whether to undertake a short update review OFT newspaper and magazine
32 distribution sector in relation to the features examined in this decision”.

1 So, the OFT was therefore not saying that it would undertake an update review looking at
2 the features and the concerns that were identified in the 2009 Decision, it is saying that it
3 will conduct a prioritisation assessment which is exactly what it did.

4 “Such a review will only take place where it would be justified following an
5 assessment under the OFT’s prioritisation principles undertaken at that point in time”.

6 So, the OFT’s first stage of analysis would be to consider prioritisation and decide whether,
7 applying the prioritisation principles, there was anything in this market, any dysfunction,
8 from the point of view of consumers, which gave rise to a need to go on and do an update
9 review.

10 “The impact of any such review on consumer welfare, which is one aspect of the
11 OFT’s prioritisation principles, is likely to be a particularly important consideration in
12 this connection at that point in time”.

13 And, 6.9 again reinforces that the short update review was by no means the obvious or
14 essential next step.

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

21 That reference to “best practice” is a reference to a passage which we will come to shortly
22 in section 6 of this document, in which the OFT identified various things which it would
23 like to see, various improvements it would like to see made and which it considered might
24 promote consumer welfare and go towards addressing the competition concerns which it
25 had identified.

26 So, what the 2009 Decision therefore foreshadowed was a prioritisation assessment under
27 the OFT’s prioritisation principles.

28 THE CHAIRMAN: But, you do not think that that would be read as saying “... and if, at the end
29 of two years you have done nothing to improve the situation because ATP still exists,
30 retailers still do not have any control over copy allocation”, then you are going to be hit
31 with a market investigation” —

32 MR. HOLMES: Well, madam, it is not an issue in this case. There is no dispute that ATP no
33 longer exists in relation to magazines. It was removed as a result of the period of self-
34 assessment that followed the 2008 opinion. So, the debate between the parties does not

1 concern absolute territorial protection. And the applicants fairly pointed out in their
2 skeleton argument that their concern is about whether passive selling — you know, they
3 raise a point about whether passive selling has arisen, which is distinct from the question of
4 absolute territorial protection. But, yes, madam, in answer to your question, it is implicit in
5 this that the OFT would consider in its prioritisation exactly the types of matter and the
6 operation for consumers of the market in the light of developments in the sector which this
7 section 6 envisages. And when we come to look at the 2009 Decision which actually the
8 Tribunal has hardly been shown in Mr. Peretz’s opening remarks, one finds exactly the
9 types of development which are identified in the Best Practice Guidance supplied by the
10 OFT actually coming to pass in the findings that the OFT has made.

11 THE CHAIRMAN: In the 2012.

12 MR. HOLMES: In the 2012 Decision, and I will take you to the detailed reasoning in the 2012
13 Decision, which we say is quite sufficient to show why it is that the OFT concluded that
14 these markets were working effectively for consumers on the whole.

15 MISS POTTER: But, am I right in thinking that 6.9 is actually addressing what you would expect
16 the update review to cover if you had taken a prioritisation decision which said that you
17 thought it was something you should look at.

18 MR. HOLMES: Madam, I am grateful for that. That is absolutely right. That is the correct
19 reading of 6.9. I took the Chairman to be asking whether, setting that on one side, one
20 would expect the prioritisation decision implicitly to go on to consider the operation of the
21 market by reference to the types of matter that were identified as best practice in section 6
22 of the 2009 Decision, and our submission is, yes, one would expect to see that, and that one
23 does see that when one looks at the specific considerations which the OFT had in mind
24 when it approached the question of consumer impact in 2012.
25 Could I turn now then to the specific grounds of challenge, and the first one really raises the
26 question of consistency in its starkest form, and that is the challenge in relation to the OFT’s
27 findings on competition for the market and their alleged lack of consideration of
28 competition in the market. It may be helpful for the Tribunal to actually see what the OFT
29 said in relation to that in the decision itself.

30 The crux of the OFT’s reasoning on impact is contained in a single long paragraph with a
31 number of bullet points, which makes it slightly difficult for giving a reference. It is at 5.28
32 at p.35 of the 2012 Decision, tab 4 of the hearing bundle. You will see that this deals with
33 consumer impact:

1 “... the OFT notes the submissions of interested parties regarding the
2 significance of the industry and the number of consumers purchasing
3 newspapers and magazines. Nonetheless, it has received convincing market
4 wide information indicating that ...”

5 Then there is this series of indicators considered. At the end of the indicators one finds the
6 conclusion at 5.29:

7 “In light of the foregoing, in relation to impact, which has been the OFT’s
8 primary focus when considering whether to undertake a short update review,
9 consumers on the whole would not be likely to benefit significantly, either
10 directly or indirectly, as a result of a review and any subsequent further
11 investigation, were they to be considered. In particular , they would not be
12 likely to benefit significantly in relation to

- 13 * price
- 14 * in-store product availability, or
- 15 * convenience (in terms of having a choice of retail outlets from which to buy
16 their preferred titles).”

17 So that is the conclusion on consumer impact. If there were further investigation, and that
18 investigation led to a market investigation reference – that is the reference to subsequent
19 further investigation – the OFT did not think, looking at the current state of the market, that
20 you would be likely to see significant benefits for consumers in terms of price, in-store
21 availability or convenience or otherwise.

22 THE CHAIRMAN: That was because there was not particularly room for improvement on your
23 findings, or was it because, although there is room for improvement, you do not consider,
24 say, the fact that a consumer may have to wait a couple of days or may have to go to
25 another shop as being of sufficiently significant detriment for you to make an effort to
26 alleviate?

27 MR. HOLMES: If one looks at the terms in which the conclusion is given, it is clear that it is the
28 former of those two, that the market is operating effectively. That, in our submission, is
29 what the OFT found.

30 THE CHAIRMAN: I suppose that is where the need to be consistent with 2009 appears to arise
31 in terms of having reached conclusions about aspects of the market that were not
32 sufficiently effectively for there to be grounds for a reference, the way in which these
33 conclusions are framed seems to be reaching conclusions that all those issues have been
34 addressed. One could read 5.29 as suggesting that that is the case.

1 MR. HOLMES: Certainly in this context one would expect the OFT to address the negative
2 outputs for consumers when considering consumer impact that might be expected to flow
3 on the basis of the OFT's previous analysis from its findings in 2009. Our submission is
4 that when read in its proper context the 2009 Decision identified a number of possible ways
5 in which the competition concerns it identified could be addressed, and therefore the
6 negative consequences for consumers which it considered might otherwise flow could be
7 avoided.

8 THE CHAIRMAN: Thank you, that is helpful.

9 MR HOLMES: Could I take you then to the first bullet which is challenged, which is not the first
10 in order, but it is the one on p.39 of the 2012 Decision. There the OFT records that it has
11 received convincing market wide information indicating that:

12 "The existence of wholesale concentration and limited opportunities for passive
13 selling do not appear to have diminished competition for the market between
14 wholesalers."

15 As we understand it, there is no real issue taken with the conclusion that competition for the
16 market has not diminished – in other words, the tendering process is working effectively.

17 There has been no diminution in the effectiveness of competition for the market, the tender
18 process in constraining wholesalers. The dispute is whether the OFT should have given
19 further attention to competition in the market given its 2009 concerns.

20 THE CHAIRMAN: So what you are saying there is, "Publishers have not been complaining to us
21 that now there are only two wholesalers in the market, actually the tendering process has
22 become rather pointless because they are just offering the same ----

23 MR. HOLMES: That is part of it. That is one of the reasons for the OFT's conclusion. The OFT
24 also looks at key performance indicators in contracts, for example. On a minor point of
25 factual clarification, so that there is no doubt about this, the disappearance of Dawson from
26 the market was not something that post-dated the 2009 Decision. That had already
27 happened before the 2009 Decision. It was taken account of in the 2009 Decision. In case
28 there was any confusion as to that point, I thought it was worth clarifying it.

29 THE CHAIRMAN: I think that the process of re-allocating the business had not entirely settled
30 down by the time of this report.

31 MR. HOLMES: No, that is correct, madam.

32 It is worth pausing on competition for the market to emphasise some points from the OFT's
33 previous analysis in relation to competition for the market. The first point is that the
34 economics of this sector means there is limited scope for competition in the market – that is

1 to say competition between wholesalers to supply individual retailers – and that is important
2 in understanding the extent of passive selling, the extent to which the OFT considers that
3 passive selling might emerge.

4 I think this can usefully be picked up from the OFT’s skeleton argument at para.16. I do not
5 think any of these points are in dispute. It saves us leaping around. It is hearing bundle 3,
6 tab 2. This reasoning is set out in detail in the 2008 opinion which was the OFT’s guidance
7 on self-assessment, in which in effect they said there were concerns in relation to ATP –
8 absolute territorial protection – in the case of magazines, but there are less likely to be
9 concerns in relation to ATP for newspapers. That was generally interpreted as an indication
10 that ATP for newspapers could continue following self-assessment, but depending upon the
11 time sensitivity of the magazines distribution, ATP for magazines had to be removed.

12 At para.16, the OFT elaborated in the 2008 opinion on economic features of newspaper and
13 magazine distribution which go to explain the limited scope for competition between
14 wholesalers in respect of a single territory, even in the absence of ATP. So this is
15 imagining a world without ATP, would you see competition ----

16 THE CHAIRMAN: When you say ATP, you mean a contractual obligation by which the
17 publisher promises to the wholesaler that it will impose on the other wholesaler an
18 obligation not to supply retailers within the exclusive territory granted to the counterparty to
19 that contract – is that correct?

20 MR. HOLMES: That is right, madam. So the first point to note is that in relation to newspapers,
21 they are highly perishable product, they have got a very limited window in which they can
22 go to shops and consumers, and, as a result, wholesalers’ depots need to be geographically
23 close to the retailers that are being served, because if the supply lines are stretched too far
24 you simply will not be able to get the newspapers on the ground quick enough and early
25 enough in the morning.

26 The second point is that newspaper distribution is subject to economies of scale and density,
27 so that bigger operations are cheaper at depot level, and at general level in relation to the
28 call centres, and so on, and economies of density arise because the more shops that you visit
29 when you are distributing the stuff from the depot, the more affordable the run will be,
30 because you are splitting the costs of the petrol and the van across a larger number of stores.
31 The third point to note is that for magazines there may be more scope for competition, given
32 the longer time windows for distribution. They do not need to be there by six or seven
33 o’clock in the morning. They usually have a weekly or monthly or quarterly period during
34 which they remain valid, so they can be distributed on a less frenetic timeline.

1 The OFT acknowledged that this may allow greater scope for commercially viable
2 competition between wholesalers, absent ATP, most likely in respect of deliveries to large
3 outlets, such as supermarkets. Mr. Peretz took you to passages in the opinion where
4 possible alternative arrangements were canvassed.

5 The fourth point also needs to be borne in mind, which links with your question about
6 whether newspapers and magazines are generally distributed together. The answer is, yes,
7 they are, and the reason is because there are obvious and significant economies of scope in
8 combining the delivery of newspapers and magazines.

9 THE CHAIRMAN: The publishers are not the same?

10 MR. HOLMES: No, madam, that is right.

11 THE CHAIRMAN: I presume publishers are not the same undertakings as the newspaper
12 publishers.?

13 MR. HOLMES: No, they are separate entities and they conduct separate tenders for the tender
14 regions, but they have tended to find that there is a significant economic advantage enjoyed
15 by the wholesaler that is already incumbent in a territory because of other contracts held,
16 precisely because of this point about scope, or at least partly because of this point about
17 scope.

18 Just to reinforce the point about scope, if you have a van that is travelling around a set of
19 newsagents and shops delivering newspapers and those shops and newsagents also sell
20 magazines, and you can fit the magazines in your van, you are obviously going to be able to
21 offer a better deal than someone who is running a separate network of vans delivering just
22 magazines.

23 As a result, a retailer's newspaper wholesaler may be expected to offer the best deal for
24 supplying magazines and vice-versa, limiting the scope for competition to emerge in
25 relation to the distribution of either product separately."

26 So there is a strong economic explanation why you would tend to see wholesalers of
27 newspapers carrying on wholesaling magazines even after you removed absolute territorial
28 protection in the case of magazines.

29 But the OFT still regarded it as appropriate to remove, or encourage the removal of absolute
30 territorial protection because the potential availability of alternative distribution options
31 allows an "exit route" – to use Mr. Peretz's language – which they can use in negotiating
32 with the incumbent wholesalers; it allows both the retailers and publishers that exit option.
33 As a result they are able to exert more buyer power. You can see this from the opinion at
34 paras. 3.57 to 3.62, which is in hearing bundle 2 at tab 11, sub-tab 2. Just to locate the

1 passage I am going to show you in the discussion that I have just been pursuing, we should
2 start at p.36 You will see at the top of p.36 the heading “How newspaper and magazine
3 distribution may operate in the absence of ATP”, so this is how the economics of the sector
4 might influence the pattern of competition that you would see in the absence of ATP.

5 At p.38 you see a consideration of newspapers, and at p.45 a consideration of the extent of
6 competition in the market, absent ATP magazines.

7 At p.50 one comes to “The relationship between newspaper and magazine distribution”. At
8 3.58 you see the point that:

9 “There are significant synergies between newspaper and magazine distribution
10 which underpin the current practice of delivering the products together. In
11 particular, there are significant economies of scope from delivering newspapers
12 and magazines together, since most retailers receive both newspapers and
13 magazines.”

14 Those economies of scope, as 3.59 explains, extend to packing, subject to a point about the
15 equipment needed for magazines.

16 At para.3.60 the OFT observes:

17 “Where the economies of scope of wholesaling the two products together are
18 significant, one would expect a retailer’s newspaper wholesaler to be able to offer
19 it at the best deal for supplying magazines and vice-versa. Whether or not ATP is
20 retained in contracts for newspapers may therefore affect the extent to which
21 changes occur to magazine distribution, and vice versa. For example, where ATP
22 remains in place for newspapers, retailers may be less willing or able to switch
23 their magazine supplier.”

24 Then at 3.61 and 3.62:

25 “Even if the other alternative methods of distribution for magazine distribution
26 cannot fully complete on cost when compared with distribution via the traditional
27 model alongside newspapers, the OFT considers that the presence of these options
28 may be sufficient to drive some further investment and innovation by the current
29 newspaper and magazine wholesalers.

30 It is also possible that the availability of these options may enable magazine
31 publishers to negotiate a lower share of the common costs of distributing both
32 products in the future. This may, in turn, reduce magazine prices to consumers.
33 However, it may also increase the cost of newspaper distribution, in turn leading to
34 rises in newspaper prices.” by the current newspaper and magazine wholesalers.

1 3.62 is obviously a bit ambivalent for consumers because it is shifting around the cost
2 between newspapers and magazines, but the point at 3.61 is that the removal of ATP may,
3 even if it does not result in the traditional wholesalers being displaced, nonetheless
4 encourage investment. In other words, it may keep wholesalers up to the mark because
5 there is an exit option and that will give greater bargaining power.

6 One sees the same point in the 2009 Decision, so if we could go back to tab 5 of hearing
7 bundle 1.

8 THE CHAIRMAN: But even with ATP there is always the exit option at the point when the
9 tender is negotiated, unless they are staggered, unless the contracts do not come up at the
10 same time, because you then have the decision: Are you going to re-grant ATP or not?

11 MR. HOLMES: Yes, and this was a point that was canvassed in the 2009 Decision, when
12 considering the extent to which publishers could exercise buyer power, and I believe that
13 the OFT's suggestion was that what publishers could do to deal with this was by tendering
14 in rapid succession or around the same time. So it is true that publishers would have an exit
15 option, but the point about passive selling, which is the focus understandably of the
16 applicants' submissions relates to the position of the retailers, and the extent to which they
17 are able to exit, and they may be able to exert constraints on wholesalers.

18 Multiples, on the analysis contained in the opinion may have the option of exiting, you saw
19 the passage that Mr. Peretz took you to. There may be cost advantages to the incumbent,
20 but the threat of exit may be sufficient to constrain the wholesaler in its dealings with
21 multiple retailers. The Tribunal I am sure is aware of this but just to reinforce the point
22 there are obviously terms of dealing between the wholesalers and the retailers, concerning,
23 for example, the level of charges made by wholesalers for delivery to retailers, carriage
24 service charges, and the example is given of financial penalties for late delivery which are
25 imposed by some multiple retailers in their contracts with wholesalers.

26 So the threat of exit ----

27 THE CHAIRMAN: And by "exit" you mean by, say, a large supermarket chain saying to the
28 wholesaler: "We are now going to try and get direct supply" or "We are now going to try
29 and get the person who provides us with milk and cigarettes also to provide us with
30 magazines, that exists now in the absence of ATP because the publisher is not contractually
31 obliged not to supply that alternative medium?"

32 MR. HOLMES: Yes, or an alternative wholesaler. In the contiguous areas of territories you
33 might see another wholesaler being used to make the supply to certain multiple stores if

1 better terms of dealing could be agreed. One sees this borne out in the discussion in the
2 2009 Decision.

3 So at para. 4.32 on p. 66 of the 2009 Decision, underneath the heading: “Factors
4 constraining wholesaler market power” the OFT records that it:

5 “... has examined a number of ways in which the nature and structure of
6 competition for the relevant newspaper and magazine wholesaling territories,
7 coupled with some features relating to the conduct of publishers in the supply
8 chains, serve to counteract any market power that a wholesaler could potentially
9 gain from the factors described above.”

10 Those factors being the territories, the incumbency advantages and so on, which will be
11 enjoyed in relation to a given territory by the wholesaler having contracts already.

12 There are several points to note here: on p.69 the two bullet points on that page record
13 respects in which publishers by means of competition for the market impose constraints in
14 relation to service level, key performance indicators for example, and also constrain
15 carriage service charges level, at least to such a level as will prevent retailers stopping
16 selling magazines and newspapers. So competition for the market does provide some
17 constraint and is therefore a relevant consideration, we would say, if there were any doubt
18 about that, for the OFT to have considered in the 2012 Decision in relation to consumer
19 impact.

20 Then over the page at 70, the penultimate bullet point in the paragraph, there is a paragraph
21 concerning the retailers’ ability to constrain CSC levels:

22 “The OFT also notes that following the recent increase by Menzies Distribution of
23 its CSCs by two per cent, it announced that it would be freezing its CSCs until
24 September 2010 despite likely increases in costs.”

25 So there is a constraint imposed on Menzies’ distribution levels of CSC. That is
26 competition in the market, if you like, it is a constraint imposed on the retailers by the
27 wholesalers.

28 “This followed negotiations between the NFRN and Menzies Distribution, which
29 demonstrates that retailers, through their industry associations, may be in a
30 position to restrict CSC increases. In addition, as discussed in chapter 5, at least
31 for magazines, there remains a reasonable prospect that retailers, particularly
32 multiple retailers, will be able to switch wholesalers if they are unhappy with
33 CSCs levels in the future when the distribution agreements arising from the last

1 tender round take effect. This also creates a potential constraint on CSCs in the
2 future by encouraging negotiating of CSC levels.

3 The point is a short and a simple one. The removal of ATP, and the developments after the
4 removal of ATP, which was the flux that the OFT had in mind, might manifest itself in
5 various ways. It might manifest itself through passive selling, although as we have seen
6 there are economic considerations that the OFT had well in mind that might limit the scale
7 of such passive selling in practice. It might equally manifest itself, the OFT found in 2009,
8 through negotiations and through constraints, for example, on the level of CSCs.

9 So the emphasis which the applicants place upon the need to have investigated levels of
10 passive selling which, if you look at the way in which they put this ground of review is at
11 the centre of their case. The suggestion is that we did not look to see whether there was
12 competition in the market exhibited through passive selling is misplaced, because passive
13 selling on a significant scale was not something that one would necessarily have expected
14 on any significant scale in the light of the OFT's analysis in 2008 and 2009. You might
15 instead have seen, as a result of the removal of ATP, improved constraints, for example, on
16 the level of carriage service charges, increases in the levels of investment as referred to in
17 the 2008 opinion.

18 THE CHAIRMAN: Yes.

19 MR. HOLMES: Penalising retailers for poor service quality —

20 THE CHAIRMAN: Wholesalers for poor —

21 MR. HOLMES: Sorry, wholesalers. Apologies. Yes, retailers imposing upon wholesalers
22 financial penalties for poor service standards, an ability which shows in the case of
23 multiples some element of power following the removal of ATP in relation to their
24 wholesalers.

25 THE CHAIRMAN: Yes. So, you say the removal of ATP is either going to result in passive
26 selling or in the wholesalers taking steps to prevent passive selling by being more
27 responsive to the retailers' concerns.

28 MR. HOLMES: Yes, and given their cost advantage, as the opinion made clear, one might very
29 well see an improved negotiating position for the retailers and, to be clear, the OFT in the
30 2008 opinion, the 2009 Decision, made clear that this was only ever likely to benefit the
31 multiples directly.

32 THE CHAIRMAN: Because the economics of supplying smaller retailers just does not —

33 MR. HOLMES: Yes, I believe (although I will stand to be corrected if I am wrong) the
34 economies of density would obviously mean that, for multiples there is more scope to put in

1 place alternative arrangements, because you are delivering to big stores large quantities, not
2 that many dropping off points along the way. You would also need sufficient scale as an
3 alternative supplier, wholesaler, if you like, to make the operation economic, and that is
4 more likely to be achieved with a large contract than with a small contract.

5 And, if one now turns back to the 2012 Decision, and the penultimate bullet of 5.28 which
6 is at p.39, one sees that the OFT did take account of considerations under this head which
7 are relevant to the discussion that we have just been having, so that we see, to begin with,
8 the point about KPIs, key performance indicators, imposed by publishers, which

9 “... include service issues which are directly relevant to retailers”.

10 So, that is a point about competition for the market. And then:

11 “Additionally, as noted by one party in favour of prioritisation, multiple retailers are
12 also able to impose financial penalties on wholesalers for poor service quality”.

13 Retailers, multiple retailers, exactly those retailers who one would expect to have available
14 to them the exit option as a result of the removal of ATP, here imposing financial penalties
15 on wholesalers for poor service quality.

16 THE CHAIRMAN:

17 “One party in favour of prioritisation”.

18 MR. HOLMES: Yes. Madam, I do not want to do injustice to anyone else’s submissions.

19 THE CHAIRMAN: No, no, I am not asking you who that party is, but if they are in favour of
20 prioritisation, that means they do not want you to consider it as a priority, or that they do
21 want —

22 MR. HOLMES: No, they do want you to consider it as a priority, I believe. And the reason why
23 they are making this point, I suspect, is because they are saying that multiple retailers are in
24 a different position from small retailers. So, their point is that the multiples may be able to
25 do this, but the small retailers are not able to do this. But, the short answer to that is that the
26 removal of ATP was only ever regarded by the OFT as likely to benefit multiple retailers.

27 THE CHAIRMAN: I am struggling a little bit with the lead-in to this paragraph and how that
28 relates to removal of ATP, so:

29 “* The existence of wholesaler concentration and limited opportunities ... do not
30 appear to have diminished competition for the market” —

31 I do not think we would have expected them to, would we, to have diminished competition
32 for the market. Increase the concentration of wholesale, yes, but —

33 MR. HOLMES: I agree that perhaps this — what point I take, and the applicants also take this
34 bullet point to be discussing, is issues competitive constraints upon wholesalers. That is the

1 reference to “competition for the market”. But the reference to “limited opportunities for
2 passive selling”, shows that they are looking in the round at how competitive constraints are
3 applying. They do take account. I mean, it would be, I am not sure that this is how
4 Mr. Peretz puts his case, and I do not want to be accused of attacking, sort of, “straw men”.
5 It is clear that it was a consideration, that passive selling was a consideration that the OFT
6 took into account, because it concluded, it made a finding, that there were limited
7 opportunities for passive selling. It accepted the applicants’ submissions on that point, but
8 that does not really go to the gravamen of the charge which is being levelled against us by
9 the applicants, which is that the OFT did not grapple with how competition in the market
10 was faring. And, the point I am making, although perhaps the heading could be criticised
11 for not referring to competition in the market as well as competition for the market, is that
12 in the subsequent discussion of competitive constraints, there is clearly reference to
13 constraints arising in the market from actions of retailers. And one sees that in the final
14 sentence of the first paragraph following the bullet.

15 And then one sees, just beginning at the foot of p.39 and continuing over the page, sorry,
16 I should pick up whole text really, the OFT first note that publishers have not expressed
17 concerns about any loss of their ability to constrain market power. The competition for the
18 market side, and then finally:

19 “Additionally, the OFT notes that wholesaler CSCs have, in fact, declined in real
20 terms ... over the last two years”

21 When compared with a benchmark of transport costs. Now, this is a consideration, in our
22 submission, which could go equally to competition in the market or competition for the
23 market. We have seen that there are incentives for publishers to restrain the level of CSCs
24 so that they do not exceed a level at which retailers will just say, “We’ve had enough of
25 this, we’re going to pull the plug on newspapers and magazines altogether”. But that is
26 quite a high ceiling. So, we have also seen a reference to retailers in the 2009 Decision, to
27 retailers using their negotiating power after the removal of ATP to keep CSCs in check.
28 And here is evidence that CSCs are not only being kept in check, but they are declining in
29 real terms. And these are all relevant considerations for the OFT to have taken into account.
30 There is obviously a number of different categories which are somewhat necessarily
31 somewhat arbitrarily divided up; but if one looks at the other bullets, one sees other ones
32 which are relevant to the operation of the market and the types of development, the types of
33 output that the OFT identified as potentially following from this exit option for retailers and

1 the consequential keeping of wholesalers up to the mark. So, one sees in the following
2 bullet at the end of the paragraph, reference to:

3 “Significant investments appear to be being made both by publishers and wholesalers
4 in order to increase the efficiency OFT supply chain”.

5 I will not dwell on this now, because we are going to return to it, but there is earlier
6 reference to improved copy allocation, a point which is also relevant to the relations
7 between retailers and wholesalers.

8 So, the 2012 Decision, therefore, observes exactly the types of development that the OFT
9 expected to result from the increased negotiating power of multiple retailers as a result of
10 the threat of going elsewhere following the removal of ATP, and in its analysis of the levels
11 of CSCs, of investment levels and the copy allocation, the OFT is considering the types of
12 benefit that could be expected to result from introducing the potential for competition in the
13 market.

14 And, if one looks at the passage where the OFT deals with flux, what the OFT does not say
15 is that there is, in terms of reasonable prospect of passive sales, it says that (at 4.32 at the
16 passage I showed you) there is a reasonable prospect of passive sales in the event that
17 people are unhappy with the level of carriage service charges. But that keeps in the picture
18 this alternative way in which competition in the market can be achieved through
19 contestability, through the potential for exit, which needs to be balanced and considered in
20 the context of the cost advantages which have been identified for the incumbents, which
21 means that they may well win, at the end of the day, there is still the negotiating power.
22 And that is factored into the OFT’s analysis.

23 There is another reason, we say, why it was not unreasonable for the OFT to engage in any
24 more detailed, sorry, why it was not unreasonable for the OFT not to engage in any more
25 detailed analysis of the scope for and extent of passive selling. The double negatives were
26 perhaps somewhat confusing; but the point I was making was there is another reason why
27 the OFT really was not reasonably required to look at passive selling. And that is because,
28 contrary to the impression created by the applicants, the 2009 Decision did not rely
29 exclusively on the state of flux resulting from self assessment as the only potential source
30 for improvement in the operation of the sector. And this brings us to section 6 which
31 I referred to before, but which we should now look at in more detail.

32 THE CHAIRMAN: Section 6 of —

33 MR. HOLMES: Of the 2009 Decision. So, at paras.6.1-6.2, the OFT explains that it is offering
34 guidance on potential next steps for the industry, to pick up the heading:

1 “In the course of the OFT’s analysis and in its consultation with industry parties, the OFT
2 has identified a number of instances of best practice which, if adopted more widely, it
3 considers could enable the newspaper and magazine supply chains to work more effectively
4 into the future. In addition, the wider adoption of this best practice could address some of
5 the concerns raised by certain retailers. Given the potential benefits of such best practice,
6 the OFT has, therefore, set out the following high-level guidance for industry parties to
7 consider in relation to the following issues:

- 8 “* the process of competition for the market in the future,
9 * certain areas of apparent retailer concern (particularly from independent retailers),
10 and
11 * self-regulation and other services available to retailers”.

12 6.2 The guidance is offered particularly in the context OFT current process of contract
13 renewal between publishers and wholesalers and the opportunity that it affords parties
14 to make further developments to their contractual arrangements (where contracts have
15 not been finalised). In addition, such guidance may help to inform ongoing industry
16 discussions regarding self-regulation”.

17 There is then a discussion of competition for the market, which picks up on your point
18 about how you deal with the problem that, if you stagger the tenders for different
19 publishers, you are going to find yourself basically locked in if you are the last publisher,
20 and there is a suggestion that regular tendering of contracts and parallel tenders can address
21 that concern, ensuring that competition for the market is effective as possible.

22 There is then a discussion of ways in which areas of apparent retailer concern can be
23 addressed. I will not read this out now, but if I could ask the Tribunal quickly to review
24 paras.6.4 and 6.5.

25 THE CHAIRMAN: Yes.

26 MR. HOLMES: The point to make here is that there are various ways in which the position could
27 be improved which the OFT is identifying. They include, for example, sales-based
28 replenishment, SBR systems, which were, as we will see, a feature of the OFT’s
29 consideration of the performance in the sector in 2012.

30 You will see also in footnote 152 that this is an additional point to the flux:

- 31 “The OFT considers that there is some possibility for industry parties to continue to
32 develop replenishment systems to enable potentially greater retailer influence over
33 copy allocation, notwithstanding the reasonable prospect of flux in the supply chain”.

1 So, practical steps that could be taken to improve matters for retailers, and to address the
2 concerns.

3 To wrap up on this, you also see, in 6.6 reference to self-regulation, encouraging parties to
4 take steps towards self-regulation as a welcome development. At 6.7 you see the OFT
5 observing that it is aware of existing wholesaler services which are already available to
6 retailers which may be of assistance in addressing the concerns which they have raised,
7 including the concerns raised by independent retailers. In particular retailers may wish to
8 consider taking advantage of, where applicable, website services offered by Smiths News
9 and Menzies' distribution to give retailers greater visibility and control over copy
10 allocation. These services are connected you and iMenzies, the internet based control
11 systems, to which we will return.

12 Then at 6.9, just to reinforce the importance of the guidance, the OFT records that in
13 relation to the update review which would follow, if prioritisation grounds justified it, that
14 the review would take into account what action industry parties have taken following the
15 OFT's guidance in relation to industry best practice. So this was clearly an important plank
16 of the OFT's policy for the sector and the way in which it saw that the potential competition
17 concerns which it had identified in relation to copy allocation and publisher led distribution
18 could be addressed.

19 In a nutshell, our case on this is that the emphasis on passive selling is misplaced.

20 Competition in the market can exhibit itself through increased levels of investment, through
21 constrained levels of CSCs, both factors which the OFT considered and took account of in
22 2012. Moreover, the flux and passive selling was not the only way forward. The OFT also
23 identified industry best practice.

24 So, in the light of those two features of the previous analysis, we say that the OFT was
25 entitled to stand back before going into an update review and asking itself, looking at broad
26 indicators of consumer welfare, how consumers were currently being served by the market,
27 looking at things like price, availability, and so on. That is our submission on the
28 competition in the market point.

29 If that is a convenient moment, madam?

30 THE CHAIRMAN: Yes, that is convenient. We will come back at 2.05.

31 (Adjourned for a short time)

32 THE CHAIRMAN: Yes, Mr. Holmes.

33 MR. HOLMES: The submission that I made before the short adjournment was addressed to the
34 allegation that there was an inconsistency between the 2009 and 2012 Decisions by reason

1 of the OFT's failure to consider passive selling in more detail in the course of the 2012
2 Decision. My two submissions on that were that, on the one hand, the OFT's previous
3 work, when read in proper context, does not support the notion that there would be any
4 substantial increase in the levels of passive selling following the removal of ATP in the case
5 of magazines; and on the other hand, that the OFT did not regard an increase in competition
6 in the market as the only means of addressing concerns in relation to magazine distribution.
7 There were also the best practice suggestions that were made in relation, for example, to
8 sales based replenishments.

9 I will address shortly in the context of another of the heads of challenge the other main
10 allegation of inconsistency which relates to the OFT's analysis of the incentives of
11 publishers and retailers in the 2009 Decision.

12 To be clear, the arguments that are advanced in relation to inconsistency are made to
13 respond to arguments made in this litigation alleging some relevant consideration that the
14 OFT failed to have regard to. In our submission, there was no requirement for the OFT to
15 set out the process of reasoning which I am now developing in the context of the 2012
16 Decision. The sufficiency of reasons in support of a decision must depend upon the type of
17 decision which is being made.

18 The Decision which is at issue in these proceedings, and which the Tribunal must take a
19 view upon, is the 2012 Decision; a Decision which, in accordance with what the OFT said it
20 was going to do in 2009, was a prioritisation assessment. The prioritisation assessment
21 properly considered, in our submission, the outputs of the market for consumers rather than
22 working through and analysing what may have resolved the competition problems identified
23 in the 2009 Decision in order to lead to satisfactory outcomes. My submissions have
24 shown, I hope, that there were several ways in which the potential competition concerns
25 identified in the 2009 Decision might be addressed in the market. Our submission is that
26 which of those may have come to pass does not matter in the context of prioritisation. The
27 proper question in the context of the prioritisation for the OFT, to which it addressed itself,
28 was how is the market operating now? Are there reasons to think that there are significant
29 detriments to consumers that would be addressed by an update review and the further
30 investigation that might follow thereafter.

31 That, I hope, addresses your point, madam, in relation to adequacy of reasons.

32 Can I now turn to the applicant's second complaint, and we now go to the first bullet point
33 in para.5.28 of the 2012 Decision, which is at tab 4 of the first bundle, p.35. The OFT's
34 first finding in relation to consumer impact was that there has been an overall improvement

1 in the in-store availability of newspapers and magazines. The first factor which the OFT
2 relied on in support of that conclusion is information submitted to the OFT indicating that
3 crude availability of newspapers and magazines has risen from 77.4 to 84.7 per cent for
4 magazines, and from 80.3 per cent to 85.1 per cent for daily newspapers between January
5 2009 and August 2011.

6 The crude availability figures are a measure which show what percentage of retailers send
7 back some copies at the end of the on-sale period, and that is aggregated across all titles of
8 newspapers and magazines. So the higher the percentage, the more retailers are sending
9 copies back at the end of the on-sale period, and that gives some indication of availability
10 because it shows how many had stock left at the end of the on-sale period and had therefore
11 not sold out by that point. It is a conservative measure in that one does not know from the
12 crude availability figures, in relation to that percentage of retailers, who have sold out when
13 the sell out occurs. It might well have occurred only shortly before the end of the on-sale
14 period, and in that case that percentage would not be too worrisome from the point of view
15 of availability.

16 The crude availability figures have the advantage of being an industry wide quantitative
17 measure. It is across retailers, across publications of newspapers and magazines. So it
18 gives a snapshot, albeit not a complete snapshot, of how much availability there is in the
19 market place.

20 THE CHAIRMAN: So the 77.4 per cent, for example, means that of all the retailers 77.4 per cent
21 back some magazines at the end of a particular week?

22 MR. HOLMES: Some magazines and newspapers – I am not sure whether it is across the entire
23 year. It is a huge number of data points. It is an aggregation across all titles. I understand
24 that it is also across, unless others tell me otherwise, the whole of the year.

25 THE CHAIRMAN: I think the word “snapshot” is being mentioned.

26 MR. HOLMES: I will need to take instructions, so perhaps I could get back to you.

27 THE CHAIRMAN: I think it would be useful to know, if you can agree, exactly what that 77.4
28 per cent is of what?

29 MISS POTTER: And the other thing also is, would a retailer register if they had returned copies
30 of at least one magazine, or does it take into account in any way aggregation of numbers of
31 titles?

32 MR. HOLMES: I am grateful for that. It is distinct from wastage levels, if that is what your
33 question is about. It does not show how many magazines are being returned.

1 MISS POTTER: Either quantities of a particular title, or whether it is more than one title, it is just
2 as a retailer I have returned copies of at least one, or at least one copy of one magazine?

3 MR. HOLMES: No, no, no, that is not my understanding. Again, I will stand corrected. You take
4 each individual title of a magazine and of newspapers, and you look for each individual title
5 of magazines and newspapers, whether retailers for that title return stock or do not return
6 stock, and then you aggregate that across all of the different titles. Clearly, it would be a
7 very crude measure indeed if it showed in relation to a newsagent that they sent back one
8 copy of something at the end of the process. It is a more sophisticated measure than that, it
9 does show you aggregated across titles of newspapers and magazines. So that 77 per cent
10 figure would show you in relation to titles generally whether stock was being returned or
11 was not being returned. It is an aggregation, as I understand it.

12 MISS STUART: But that figure is only for magazines, because there are two percentages, there
13 is one for newspapers, and then that one, the 77.4 is just for the magazines.

14 MR. HOLMES: I am grateful, madam, so there is a split within the figures, contrary to the notice
15 of application, between magazines and newspapers. One of the criticisms that I think is not
16 now pursued was that it aggregated across newspapers and magazines. That is not the case;
17 it looks at magazines, and it looks at newspapers and there are separate figures for each.
18 The time period is across a year, save for the most recent figures which were provided in
19 September 2011 and therefore only run up to August. So the most recent figures are for
20 January to August, but the figures for previous years are for the entirety of the year.
21 There are several complaints made about the OFT's reliance on this crude availability data.
22 First, the applicants say that the improvement was modest by comparison with the figures
23 quoted in the 2009 Decision, which referred to a range of availability between 70 and 80 per
24 cent, or 65 to 85 per cent for large multiples on the basis of the BRC submission, and for
25 your note the reference is para. 4.121 of the 2009 Decision.
26 The OFT maintains that it can reasonably rely on the increase in crude availability levels as
27 showing an improvement in in-store availability. The precise figures for 2009 and 2012 are
28 as set out in the 2012 Decision and they showed an increase from 77.4 per cent in January
29 2009 to January 2010, to 84.7 per cent for magazines, and from 80.3 per cent to 85.1 per
30 cent for daily newspapers. So that is the actual increase, and that increase, we say, is
31 significant and it was reasonable in the Wednesbury sense for the OFT to take account of
32 that increase.

33 MISS STUART: Just so I am clear, the increased figures are for nine months, from January to
34 August, so they do not include September, October, November and December?

1 MR. HOLMES: That is right, madam.

2 MISS STUART: But the 77 per cent was for 12 months?

3 MR. HOLMES: Yes.

4 MISS STUART: I am just wondering if there is any indication in the crude availability data of
5 whether it does increase or decrease in that remaining period?

6 MR. HOLMES: We do not have data from September to December, but the fact that it is only a
7 portion of the year should not affect the reliability of the figure, as I understand it,
8 because ----

9 THE CHAIRMAN: No, but that is the question.

10 MISS STUART: I am just wondering whether it is a trend in figures, that the last part of the
11 year ----

12 THE CHAIRMAN: The last quarter, yes.

13 MR. HOLMES: Perhaps if I take you to the source of this data, which is in the submission of the
14 PDF, that is tab 11(4) at p.10. You will see that for magazines there is a trend ----

15 MISS STUART: Where are you looking?

16 MR. HOLMES: I am so sorry, the table at the top of the page, p.10 of sub-tab 4 of tab 11 of
17 bundle 2. The magazine figures show an upward progression, 8-.1 in 2010 and 84.7 in
18 2011. The figures for newspapers, on the other hand, show a very modest drop but then a
19 substantial improvement in 2011.

20 MISS STUART: It does not really answer the question from my perspective in that I suppose
21 what I am trying to understand is whether those figures are collected on a monthly basis,
22 whether that last four months could make a difference to the figure for the first nine months.
23 I am just thinking maybe more people are buying magazines at Christmas, or around that
24 time, and whether that figure has not increased as much if you take it over a full year. I was
25 just trying to understand for previous years if there was that trend, that that figure could
26 significantly change once you have the full year's figures.

27 MR. HOLMES: Madam, what the figures do show is an improvement year on year for
28 magazines. I do not have information that I can give you about whether the trends in terms
29 of levels of sales vary at different times of the year so that the last three months could make
30 a significant difference. What I can, I think, tell you with confidence is that the fact that the
31 2011 figures are only for January to August, does not create an obvious difficulty of
32 comparison in that you could take figures over a monthly period, you could take them over
33 a nine-monthly period, you could take them over a 12 monthly period, they would still be
34 basically the same measure. So, subject to the point you are making about whether there is

1 something that happens that is dramatically different in the September to December period,
2 and that is not something that I can give you any information about; I simply do not know.
3 The submission that I was addressing was a complaint that this was only a modest
4 improvement and too modest to be taken into account. We say that that is an unfair
5 criticism.

6 The actual figures are shown here for 2009 and 2011, but even working from the ranges that
7 one sees in the 2009 Decision and taking the mid-point of those ranges, which is 75 per
8 cent, there is still an upward trend, an improvement discernible. We say that it clearly was
9 not Wednesbury unreasonable for the OFT to take account of this improvement.

10 The second point that the applicants make against us is to say that the figures show that
11 stock could have been supplied in greater quantities than retailers or their customers want.
12 In a sense this is a statement of the obvious. The whole nature of these figures is that they
13 show that more stock is being delivered than is sold, but we say that that is a positive
14 indication from the point of view of consumers and the availability of magazines and
15 newspapers in store, because it means that at the end of the period for a large number of
16 retailers – a large preponderance of retailers – there is still stock available.

17 If I could take you briefly to the 2009 Decision at tab 5, and para.4.88, p.90, this crisply
18 explains why you would expect some wastage in this market. If I could ask the Tribunal
19 just to read that paragraph.

20 (After a pause) The points that I would like to emphasise in that paragraph are first, the low
21 marginal costs of production. The point is that producing the first copy of a newspaper or
22 magazine is hugely expensive. You have to write the material, assemble the material, print
23 the material. Subsequent copies are very cheap to produce and, as a result, publishers have
24 a strong incentive to get out a great deal of stock in the hope that they will sell more copies
25 to cover their high fixed costs and get more profit given their low marginal costs. This, of
26 course, is reinforced by the two-sided nature of the market, which produces revenue for
27 publishers not only from the cover sales, but also from the advertising revenue which is
28 driven by levels of circulation, so publishers have a strong incentive to get the material out,
29 and I will return to that point shortly.

30 There is also uncertainty about where sales will be made, and about levels of demand
31 overall. You never know quite how popular a particular title will be in advance. Publishers
32 are quite well placed to know as we will see in a moment, but there is still some uncertainty
33 about levels of demand for particular issues. There is also the element of impulse
34 purchasing, which is important for magazines. People buy a magazine because they

1 happen to see it quite a lot of the time, and where they happen to see it could vary from
2 week to week, month to month, and therefore some shops may find themselves selling less
3 than they expected and some shops might find themselves selling more than they expected,
4 but having a surplus of stock ensures that consumers on the whole get the demand satisfied,
5 and it is much better to overshoot in supplies than to undershoot, because you might waste
6 the low marginal costs that are associated with the overshoot, but you at least avoid the
7 greater detriment, both to you as a publisher and to consumer welfare, of the consumer
8 walking away empty handed. So you would expect in this market for supplies to exceed
9 demand.

10 The applicants rely on para. 4.89, which refers to high levels of wastage in 2009. This, we
11 say, is beside the point.

12 THE CHAIRMAN: It is beside *this* point?

13 MR. HOLMES: It is beside this point, yes, and no separate ground of appeal is taken, as we
14 understand it, arguing that we have not correctly assessed consumer impact on the basis that
15 wastage levels are too high in the industry now. As I understand it, the submission is made
16 only responsively in relation to our assessment of wastage levels. For the purposes of crude
17 availability, the crude availability figures are not wastage figures, they shed no light
18 whatsoever on levels of wastage, and the evidence is that wastage has fallen by 20 per cent
19 between 2006 and now, as against 9 per cent fall in circulation.

20 The third point is that the applicants say that stock could have been supplied late, but the
21 OFT had base availability data showing that for best selling newspapers and magazines
22 availability is very high for retailers at the start of the on-sale period, exceeding 99 per cent
23 of all retailers. And, we say this cuts against the theory that a lot of retailers, at least for
24 best-selling titles, are being supplied late. And that was further evidence that the OFT was
25 entitled to take account of.

26 Moreover, the OFT also had evidence before it, showing that in those retailers with EPOS
27 systems which are capable of co-ordinating with the wholesalers' systems, product is on
28 sale through most OFT active on sale period. Life cycle availability is very high at 93 per
29 cent, and this data again underlines the suggestion that crude availability can be explained
30 by late delivery of stock in relation to those retailers to whom this data applies. The
31 applicants object that the EPOS data only reflects the position in multiples with the
32 necessary equipment.

33 Now, it was suggested that the necessary equipment had to interact with wholesalers'
34 systems. I do not think that there is any evidence before the Tribunal as to why small

1 retailers' systems could not interact or as to the number of small retailer systems that do not
2 interact. That is something that the Tribunal simply cannot form a view upon on the basis
3 of the material available. The OFT's focus, however, standing back, was on consumers
4 generally. And 58 per cent of magazines are sold in retailers with the relevant EPOS
5 systems. So, this covers a large section of the market.

6 MISS STUART: That is 58 per cent of all magazines sold are sold through retailers who have got
7 this link.

8 MR. HOLMES: Yes.

9 THE CHAIRMAN: Or, is it that, all magazines sold by retailers are sold through —

10 MR. HOLMES: Fifty-eight per cent of — I believe it was, as you said, madam, that 58 per cent
11 of magazines are sold in retailers with the relevant EPOS systems.

12 THE CHAIRMAN: So, that would be a higher percentage of all magazines sold by retailers, as
13 opposed to home delivery or —

14 MISS STUART: So, what we are saying is that 58 per cent of all magazines sold or 58 per cent
15 of all magazines sold through retailers?

16 MR. HOLMES: Madam, I am happy to take instructions on that, but — through retailers, that
17 was the —

18 MR. PERETZ: Just to add while – certainly my understanding, and I will be corrected if I am
19 wrong, is that it is not 58 per cent of all magazines, because the data in question are only
20 collected in relation to a proportion of magazines, I think, essentially, sort of best sellers.
21 So that it relates, it is true that 58 per cent of all magazines are sold through these retailers,
22 but this particular figure, in my understanding, does not apply to 58 per cent of all
23 magazines.

24 THE CHAIRMAN: Because these retailers only sell a narrower range of —

25 MR. PERETZ: They sell whatever range they sell.

26 THE CHAIRMAN: Well, all right, but —

27 MR. PERETZ: But if it is a less popular magazine it is not caught up within the figure. That is
28 my understanding.

29 THE CHAIRMAN: We will have to be a bit careful about that if we get to —

30 MR. HOLMES: Madam, the 58 per cent figure comes from the submissions of the PDF which
31 are, PDF/PPA which are at tab.5 of tab.11 of the second bundle at p.4. So, the figure does
32 relate to total copy sales of magazines:

33 “Retailers who benefit from an SBR process account for 58.5% of total copy sales”,

1 so, in other words, 58.5 per cent of total copy sales of magazines are sold by retailers
2 benefiting from an SBR process. So, of all magazines sold, 58 per cent are sold by retailers
3 with SBR and EPOS. There was a debate. It may be that the confusion arises because there
4 was a debate between ourselves and the applicants about whether the 58.5 per cent relates to
5 the proportion of all magazines sold by retailers that have access to SBR, or the proportion
6 of magazines sold that are included in SBR. We are not saying that 58 per cent of
7 magazines are sold in SBR, whatever that would mean — we are saying that they are sold
8 by retailers having access to SBR. But, I do not think there is any dispute that it is about
9 total copy sales.

10 THE CHAIRMAN: Okay. But the other thing that is telling us is it is 58 per cent of the volume.
11 That does not tell us anything about the number of retailers; because if you had, I do not
12 know what the sort of volume of sales is going through larger retailers, so that does not give
13 us any information around that.

14 MR. HOLMES: That is right, madam. But, I was advancing the figure precisely in support of the
15 submission that we are not concerned with particular channels of distribution, we are
16 looking at consumer welfare, not at whether particular parts of the distribution channel are
17 doing better or worse. In any event, the base availability figure showing over 99 per cent of
18 availability at the start of the on sale period is not limited to multiples.

19 Fourth, the applicants allege that the crude availability data does not show the full picture
20 because it does not distinguish between best-selling and other titles, and they say that there
21 is a particular problem with best-selling titles arriving in inadequate quantities at the start of
22 the on-sale period. And also that it does not distinguish between small retailers and
23 multiples. But the base availability figures show good availability from the start of the on-
24 sale period for best-selling titles: the very category of titles in relation to which the
25 applicants are expressing particular concern. Moreover, there was data submitted by the
26 applicants which suggested equivalent levels of availability for best-selling as for other
27 types of title.

28 I need to be careful here, madam, because the identity of the retailer in question is
29 confidential, so I will not mention that, but I think we can proceed on that basis to look at
30 the page in open court. So, it is hearing bundle 1, tab.3 which is the witness statement of
31 Shane Patrick Brennan and it is the exhibits to that at p.29. So, this is an annexe to the
32 ANR's submission in relation to the OFT's prioritisation assessment. You will see that it
33 shows for one particular retailer availability levels in 2010 and then again in 2011 with each
34 of the two main wholesalers. So, the top two squares show availability in 2011 in a one-

1 week period; and the bottom two squares show availability in the same week of the
2 previous year, 2010. And you will see that within each square there is a “Total
3 Availability” figure stated and a “Top 100 Titles” availability figure stated. Now, we are
4 not totally sure what the measure of availability is here. We assume it is effectively crude
5 availability, the same measure that the OFT was itself applying, but we mentioned in our
6 defence that it was not clear but we assumed it was crude availability, and I do not think
7 that has been contradicted subsequently by the applicants. The key point is that the top 100
8 titles show slightly better availability in 2011, and in relation to one of the distributors in
9 2010 but not in relation to the other, where there is a very very minor difference. Does the
10 Tribunal follow me?

11 MISS STUART: I follow the figures.

12 MR. HOLMES: Yes. And the submission is simply that this particular snapshot which is
13 provided by the applicants does not support the conclusion that best-selling titles are less
14 available than other titles.

15 THE CHAIRMAN: The rubric at the top is a bit confusing either because there is a word missing,
16 or there is a word added.

17 “Overall availability has decreased in and that the number of unsolds has increased”.

18 MR. PERETZ: I think I can say without fear of violating confidentiality, that the word “in” is a
19 typo. You could probably just cross through the word “in”.

20 THE CHAIRMAN: I see — rather than it being — right.

21 MR. HOLMES: But, it is still somewhat confusing because it does not seem to be borne out by
22 the data below except in relation to one of the two distributors, where there is a very modest
23 decrease.

24 THE CHAIRMAN: Well, we will have to have a look at this and see what it shows. Okay. Yes.

25 MR. HOLMES: So, it is a small point, madam, it probably need not detain us longer.

26 You have already my point on small retailers and multiples. The OFT is looking at the
27 situation of consumers generally and, anyway, the base availability data do not bear out the
28 suggestion that small retailers are struggling to get stock at the beginning of the period.

29 You have got very nearly 100 per cent availability across all retailers.

30 That brings me to the customer survey evidence, and to go back to the Decision, just to see
31 what the OFT said about this, this is at tab.4 of bundle 1.

32 THE CHAIRMAN: And this is still on the point about the evidence that you relied on in relation
33 to in-store availability.

1 MR. HOLMES: Yes, madam. So, after the point about availability, crude availability, we go on
2 to say:

3 “Additional information submitted to the OFT also indicates that it is not clear that
4 improving in-store newspaper and magazine availability beyond current levels would
5 have a significant impact on consumers on the whole. For example, consumer survey
6 data submitted to the OFT from representatives of independent retailers showed that
7 only 1 per cent of the respondents read fewer paid-for magazines or newspapers as a
8 result of the retail outlet from which they usually purchase these papers and/or
9 magazines not having access to a full range of titles”.

10 In relation to this, the OFT was here concerned to address an argument which features later
11 in the present application, that consumers are being disadvantaged by reason of small
12 retailers reducing their ranges of magazines and thereby cutting in-store availability in local
13 stores. The applicants object, in essence, that this data does not shed light on whether some
14 consumers still purchase magazines or newspapers but now have to hold off from doing so
15 in their local newsagent and, instead, must do so somewhere else. Now, we have two short
16 points to make on that:

17 First, the 1 per cent data is a very low level of consumers suffering the most severe
18 detriment that one could imagine, which is not buying as many magazines because they
19 cannot get them locally. We say that it is telling that it is such a small number, and that is
20 relevant data. It may not tell one very much, but it is a relevant consideration to take into
21 account and it is not *Wednesbury* unreasonable for the OFT to have relied upon it.

22 Second, we say that the survey evidence was submitted by the applicants themselves, and
23 they could easily have asked questions designed to show that consumers were
24 inconvenienced by having to buy elsewhere. The submission that they were making in the
25 form of a claim was one which, with respect, was not evidenced in any concrete quantitative
26 terms. We think that the criticisms of the data, when understood for the limited purpose for
27 which they were being used, are overstated and do not demonstrate *Wednesbury*
28 unreasonableness.

29 The third point is improvements in wholesaler systems, which one finds beginning
30 “Finally” about two-thirds of the way down the paragraph on p.36:

31 “One organisation submitted that there had been improvements in wholesaler
32 systems allowing retailers actively to manage aspects of their supplies and to
33 request changes to their system generated copy application. The party
34 submitted data indicating that more than 99 per cent of retailer alterations to

1 copy allocation on magazines generated through these wholesale systems were
2 by publishers, wholesalers in the period October to December 2007.”

3 The first point the applicants make is to say that most retailers do not make use of online
4 capabilities. It was suggested that perhaps some of them cannot make use of online
5 capabilities, but that is not supported by any evidence before the Tribunal today. The
6 witness evidence to which the Tribunal was referred refers only to the fact that they do not
7 use it, not that they cannot use it. It is a matter of common knowledge that computers and
8 broadband, and so on, are not limited to a small or select section of the population.

9 Businesses have them, including small businesses. It is not a valid reason for disregarding
10 evidence about online capabilities that retailers do not choose to make use of it.

11 The improved wholesaler systems provide a means for retailers to manage copy allocation,
12 to ensure good availability of titles, even if they choose not to use the facility.

13 The second complaint the applicants make is to say that the facilities do not allow retailers a
14 free hand to determine what they got, and this reflects a broader complaint by the applicants
15 and the conclusions on consumer impact are inconsistent with the OFT’s concerns about
16 publisher led distribution of magazines and insufficient retailer influence over copy
17 allocation in the 2009 Decision. Again, we say that this allegation of inconsistency does not
18 do justice to the OFT’s findings in 2009.

19 In 2009, in our submission, the OFT was certainly not suggesting that publisher led
20 distribution should be replaced by retailer led distribution, or that publishers should have no
21 say over the copy that gets sent out.

22 Although Mr. Peretz distanced himself from any such submission, we would submit that the
23 skeleton argument comes close to suggesting as much in a number of places. What the OFT
24 did in 2009 was to recognise that the economic features of the sector made a high level of
25 publisher oversight inevitable and desirable.

26 For reasons of time, I propose to take this primarily by reference to the OFT’s skeleton
27 argument, which is at HB3, tab 14. At p.9, para.20, the first point to note is that publisher
28 and retailer incentives do not leave publishers without a strong incentive to get their copy
29 out into the market place and to get it sold, to get it out there in timely fashion and in
30 enough amounts to ensure consumers can buy – as many consumers as possible, in fact.

31 Indeed, they have greater incentives in that regard than do retailers, which explains why
32 producer led distribution is so central.

33 Let me explain that by reference to several features which are borne out, if you look at the
34 paragraphs of the decision referred to in the skeleton argument. The first point is the two

1 sided nature of newspaper and magazines markets, which means that there are two strands
2 of revenue enjoyed by publishers by comparison with retailers.

3 Retailers will try and extract the most revenue they can from the price they charge to
4 consumers. If they can push the price up they will do so to a profit maximising level, even
5 if that means supplying less copies because there are a whole number of consumers who
6 will pay less than the level at which they will maximise profits.

7 THE CHAIRMAN: Except it has got the price printed on the cover.

8 MR. HOLMES: Madam, that is a feature of the current system which the OFT gave a green light
9 to in the 2009 Decision. It makes it difficult, albeit not impossible, for retailers to try and
10 raise the price. That is a feature of publisher control, the fact that they put their price on the
11 front of this product. That was one of the features you will remember that Mr. Peretz
12 showed you in the 2009 Decision, which go to make up publisher led distribution, the fact
13 that they print cover prices.

14 Cover pricing in a way is a bit of a sideline for this case because no one is challenging cover
15 pricing here as something that the OFT should have taken account of.

16 THE CHAIRMAN: What prevents the retailer from putting up the price is competition from
17 other retailers. That is how the market works. No one is suggesting that they have got more
18 power, these retailers.

19 MR. HOLMES: Combined with the fact that there is a price printed which consumers are very
20 used to paying and which they will cavil at not paying.

21 The second point is the perishability of newspapers and, to a lesser extent, magazines,
22 means that the publishers have incentives to ensure that copy is delivered as accurately and
23 as punctually as possible, getting it out early. Although Mr. Peretz took you to those
24 paragraphs, I think they fully bear out the point that is being made there.

25 Third, there is an element of demand unpredictability involved in newspapers in magazines,
26 so that publishers have a good idea very often when a publication will generate particular
27 interest, and they therefore know to produce more supplies. That is often at short notice that
28 they will know that, and retailers will not know. Moreover, the impulse purchasing
29 connects with the differing incentives and the greater incentive of publishers to get stock out
30 than retailers. The point about this is that a retailer, if they had to bear the cost of stock that
31 they did not sell, would be very reluctant to order quantities sufficient to allow for
32 variability in demand as a result of impulse purchasing. This leads to the sale or return
33 device where publishers assume the risk, because they want to get more copy out than
34 retailers would otherwise be willing to accept. This again connects with the high fixed

1 costs, low marginal costs. For publishers, each additional copy they sell earns them the
2 difference between the wholesale cover price and the marginal cost, whereas if retailers
3 bore the cost of the stock that was left at the end of the day they would pay the whole of the
4 wholesale price. For that reason in these markets you see a system of sale and return, and
5 this is developed ----

6 THE CHAIRMAN: It is return to the publisher not just to the wholesaler?

7 MR. HOLMES: Yes, the publisher bears the product specific risk and cost of getting the product
8 out there, and one sees this at para.22. At para.22 you see these features leading to
9 publisher led distribution, the various features of publisher led distribution: first of all, sale
10 or return. Through sale or return publishers reimburse wholesalers and retailers for copies
11 of newspapers and magazines that are not sold at the end of the on-sale period, subject to
12 certain limits. Because they carry the risk, it avoids the risk that retailers would otherwise
13 order too few copies and/or a narrower range of titles, because they would get lumbered
14 with the loss, which is greater than the loss that will be experienced by the publisher.
15 Cover prices similarly promote output by keeping prices down at a level lower than retailers
16 would be likely to set them at.

17 Similarly, copy allocation allows publishers to use their better understanding of likely
18 demand levels to calibrate stock levels from issue to issue. There is also a close link
19 between sale or return and copy allocation. If you, as the publisher, are taking the financial
20 risk it is obvious, blindingly obvious, that you will want to retain some control over what
21 goes out, because there is no longer any break on retailers ordering as much of the product
22 as they like because they do not bear the risk of it not selling.

23 So sale or return overcomes the difficulty that retailers have less incentive than publishers to
24 sell stock and to take the risk of unsold stock.

25 The flip side of that is copy allocation, an element of control over what goes out. This is
26 actually very clearly set out in the opinion. It is all in the Decision, and if you follow
27 through the references to the Decision paragraphs you will find all of this analysis there, but
28 perhaps I can just briefly take you to the 2008 opinion at the third bullet point, which is at
29 the second hearing bundle ----

30 THE CHAIRMAN: Is there any contractual obligation on a retailer to display a particular
31 magazine?

32 MR. HOLMES: No, madam. As we understand it, the point was made earlier that there is not
33 generally the type of contractual arrangement that you might see in relation to other
34 products where a certain amount of shelf space at the retailer is reserved for the product.

1 That does place in context, and may perhaps mitigate some of the concern expressed by the
2 OFT in relation to publishers filling up the shelves with stock that was less likely to sell. It
3 was even suggested, I think, by the OFT in 2009 that it might force out other publishers. It
4 is difficult fully to understand that argument in view of the fact that the retailer retains
5 control over the display of the stock and can decide which of the various publishers it is
6 receiving stocks from that it wants to give shelf space to.

7 We do not resile from the publishers' concern expressed in 2009.

8 THE CHAIRMAN: I was just thinking about the point that Mr. Peretz was making about if you
9 get 300 copies of some ship magazine and you are in the middle of the country, you do not
10 have to put the ship magazine on your shelf, you then have the inconvenience of storing it
11 and returning it and waiting for the money to be reimbursed.

12 MR. HOLMES: Yes, that is where we understand the argument has always lain, with the
13 inconvenience to the retailers of sending the stuff back. It is a gripe about that. It is not an
14 argument that they have to put it on their shelf front and centre stage of Maritime magazine
15 in the middle of Worcestershire.

16 MR. PERETZ: Also, madam, I think we actually make the point, if I heard correctly, my clients
17 have to pay for it, and if they are lucky they get the money back, although, as you will see
18 in some of the complaints, there are some issues about that. That is a problem as well.

19 MR. HOLMES: It is certainly no part of this application that the OFT has failed to take account
20 of a failure of the sale or return system to work. I think it is a fairly well accepted feature of
21 this market that sale or return is how it works.

22 Turning then to the opinion which is at sub-tab 2 of tab 11 in hearing bundle 2, and looking
23 at para.3.10, which is on p.32, the OFT has previously been discussing the various features
24 that I have discussed of high fixed low marginal cost demand, variability, perishability, and
25 so on. At 3.10 it states its conclusions about how the sector works and it points out that the
26 use of cover prices provided a disincentive for retailers to raise prices which should
27 otherwise be likely to reduce circulation levels, the supply of copies on a sale or return
28 basis, and without this retailers may be unwilling to take the additional copies that the
29 publisher would like to supply –

30 “... for example, if publishers wished to use availability as a promotional tool to
31 boost circulation or to stock new titles that publishers may wish to launch, and
32 * the high degree of control over copy allocation – there are various reasons why
33 publishers may seek control over copy allocation. First, as noted above, publishers
34 are likely to have a better understanding than retailers of how overall demand for

1 different titles is driven by the content of a particular issue. Second, with SOR,
2 retailers may wish to take more copies given that they bear no revenue risk, and
3 publishers may need to allocate copies between retailers to ensure that copies are
4 distributed in such a way as to maximise the likelihood that they are sold. Third,
5 publishers may wish to allocate copies between retailers in a certain way in order
6 to target a particular customer demographic because of the impacts that would
7 have from their advertising revenue.”

8 An interesting final point in view of the concerns expressed about demographics.

9 Over the page you see two further points which are the seeds of the competition concerns
10 which are then developed into the 2009 Decision:

11 “... divergence of incentives between publishers and retailers in that publishers
12 are interested in the performance of their own titles whereas retailers are interested
13 in the performance of the category as a whole. Publishers use shelf-space as a way
14 of advertising their titles and (particularly for magazines) have incentives to place
15 their publication on the shelf in preference to rival publications.”

16 Without an obligation to display particular magazines, the extent of that concern may
17 appear somewhat more speculative.

18 “Retailers may not wish to stock an individual magazine because it would take
19 away space from other publications from which they could earn higher revenues.”

20 Again, the same point applies.

21 “Whereas the factors discussed in para.3.10 suggest that publisher control over
22 copy allocation may have efficiency benefits ...”

23 in other words copy allocation, sale or return cover prices:

24 “... this factor suggests that publisher control over copy allocation may also have
25 adverse consequences. This issue does not appear likely to apply to newspapers, at
26 least to the same extent, as virtually all outlets stock all newspaper titles.”

27 The point here is that it is much too simplistic to suggest that publisher led control was
28 uniquely regarded as a problem. It has something that one would want to dispense with.
29 That is clearly not what the OFT’s analysis in 2008 or 2009 was suggesting. There were a
30 number of other advantages that are inherent and it is really an inevitable feature of a
31 system in which publishers take the risk to get more of their stock out and to overcome the
32 lower incentives of retailers to carry the stock in sufficient quantities to deal with problems
33 like variability of demand. So that was a very long excurses but it shows that to say that
34 publisher led distribution is a problem in and of itself, and that therefore limits on these on-

1 line ordering systems to prevent retailers doing exactly what they like, is not a valid
2 criticism.

3 No one has ever suggested on our side that retailers should have a free hand. At most, and
4 the Tribunal will recall when I asked Mr. Peretz to read on in the paragraph where it said
5 that the most that the OFT was talking about was that there should be a rebalancing to some
6 degree. There was nothing in those conclusions to suggest that the OFT erred in taking
7 account of the on-line systems because they do not give a free hand to retailers. It remained
8 reasonable for the OFT to take account of that.

9 The applicants also contend that the systems in question were already up and running in
10 2008 and, although they cannot be said to show any improvement from the situation in 2009
11 when the OFT identified concerns about copy allocation. What was new was evidence
12 about the levels of alterations honoured. That was what the OFT was observing here, the 99
13 per cent figure – a very telling figure – the extent to which the requests were being
14 fulfilled. That was something that the OFT could reasonably take into account.

15 A final point, the OFT had specifically identified the on-line systems in its best practice
16 guidance in 2009 and had sought to encourage retailers to make more use of them. We say
17 that it cannot be said to be unreasonable in those circumstances for the OFT to re-visit the
18 question of on-line systems to take note of the very significant levels to which alterations
19 were respected by those systems.

20 The next point is “Investments and Supply Chain”. I have only brief points on most of the
21 other material and I do not envisage being longer than another 15 or 20 minutes at most.

22 THE CHAIRMAN: Are you saying you would like a short break?

23 MR. HOLMES: No, no, I am happy to continue, I am just aware that I am pushing against my
24 allocation of time, but Mr. Peretz used less time than I think he anticipated.

25 THE CHAIRMAN: Carry on.

26 MR. HOLMES: Thank you, madam.

27 THE CHAIRMAN: You have until 3.30 actually, according to my timetable.

28 MR. HOLMES: In fairness to Mr. Peretz, I think that is because he was so well timed, so I am
29 slightly overrunning my allocation.

30 THE CHAIRMAN: Oh, I see, well all right, go on. We have interrupted you more than we
31 interrupted Mr. Peretz.

32 MR. HOLMES: I will not take until 3.30. Investments and the Supply Chain. This is the next
33 complaint and it takes one actually to the last bullet point, because perfectly reasonably the

1 applicants have lumped it together with the in-store availability point. So turning to p.40,
2 you see the final bullet at para. 5.28:

3 “Significant investments appear to be being made both by publishers and
4 wholesalers in order to increase the efficiency of the supply chain.”

5 That is at tab 4 of hearing bundle 1, p.40. final bullet. The example that the OFT gives of
6 the significant investment:

7 “The OFT has received submissions and information indicating that there has been
8 significant wholesaler investment in software and IT systems facilitating the use
9 of SBR and other sales initiatives. The submissions and information received state
10 that SBR delivers a number of benefits to the Sector, including increased net sales,
11 increased crude availability and reduced numbers of unsold products.

12 Furthermore, interested parties have submitted that the use of SBR is increasing in
13 the sector such that over half of all magazines are sold in retailers that have SBR.”

14 That was the 58 per cent figure that you saw before.

15 “The OFT has also received submissions and information pointing to other
16 publisher and wholesaler funded initiatives, such as offering interest-free loans to
17 independent retailers to improve category and range management (for example,
18 investing in EPOS systems to facilitate SBR).”

19 The publishers and wholesalers actively encouraging independent retailers to get the kit that
20 would enable them to take advantage of SBR.

21 Again, it was reasonable for the OFT to take account of SBR. It was identified amongst the
22 best practice developments which the OFT hoped to encourage in 2009. It has expanded
23 significantly. In 2006 20 per cent of magazines were sold by retailers that have access to
24 SBR and the figure is now 58.5 per cent. There is a slight discrepancy between the skeleton
25 argument and the defence on this point. The skeleton argument states that the 20 per cent
26 figure is from 2009. To be clear, the figure in the defence is the correct figure, that it was
27 20 per cent in 2006, so I apologise for that error.

28 This conclusion is, of course, consistent with and supports the OFT’s findings on improving
29 availability; new investments to encourage more use of SBR and improved availability, the
30 two should be taken together.

31 THE CHAIRMAN: Just tell me in two sentences what SBR does? It is some automatic
32 notification of a sale that has been made so that somebody somewhere ----

33 MR. HOLMES: Yes, in very simplistic terms, and again I will be corrected if I am mistaken, if a
34 shop has SBR it might receive an initial allocation of 10 magazines. If they sold out after

1 the first week in the month long sale period, the sell out on the EPOS system would trigger
2 a replenishment order, sales based replenishment, so that new supplies are linked to the
3 demand as one goes along. This system obviously, if it works effectively, reduces the risk
4 that you will have a period of time in any given shop where you have sold out during the
5 on-sale period.

6 THE CHAIRMAN: So instead of the shopkeeper having to notice and then ring up and say: "I'd
7 like more", or order more on the on-line allocation facility, it happens automatically?

8 MR. HOLMES: That is my understanding, madam.

9 As regards retailer numbers, this is appoint that was raised in the second bullet point at
10 para.5.28 and there the OFT records that:

11 "Overall, retail outlet numbers have remained stable, despite an overall decline in
12 the circulation of newspapers and separately magazines.

13 Market-wide information submitted to the OFT by one interested party indicates
14 that there are approximately 54,000 news' retailers and a further 3,000 specialist
15 outlets. In addition, the information ----

16 MISS POTTER: I am sorry, where are you reading?

17 MR. HOLMES: I am sorry, madam, I am going too fast. It is p.36 of the 2012 Decision at tab 4,
18 and we are now back on the second bullet point. The applicants took the last bullet point
19 together with the first one because they relate to much the same subject matter. The second
20 bullet point is about the number of retail outlets, and what the OFT is saying is that the
21 numbers held steady. There are 54,000, together with a further 3,000 specialist outlets and:

22 "... only a relatively small number of those retailers are retailers such as coffee
23 shops that are supplied directly by publishers and offer only one or two titles. On
24 that basis, it would appear that consumers therefore continue to retain wide access
25 to newspapers and magazines."

26 The applicants appeared in the application to cast doubt on whether the figures overall had
27 remained steady, but from their skeleton argument we do not understand that now to be an
28 issue. The complaint is rather that there has been a move, which is concealed by these
29 figures from specialist retailers that carry a large range to multiples, or other retailers who
30 carry less of a range. Equally, within individual retailers there has been a reduction in the
31 shelf-space that is made over to newspapers and magazines, so that is the complaint that is
32 being made.

33 However, the difficulty that the OFT face was that there was really no specific evidence to
34 back that claim up and such evidence, we say, would not have been difficult to obtain. The

1 applicants could have shown how particular representative retailers had cut the number of
2 titles covered and they could also have provided survey evidence substantiating their claim
3 that consumers are having to hunt around more than they used to in order to get hold of
4 magazines.

5 I should clarify that there is no specific evidence to back up the claim that consumers are
6 suffering as a result of the shift. There was quantitative evidence to suggest a reduction in
7 the number of specialist newsagents that was provided by the applicants.

8 THE CHAIRMAN: One would think that that would be a response to shifts in demand rather
9 than a decision taken in the face of customers coming in to buy a magazine and the shop
10 having decided it is not going to stock it. Is that what you are saying?

11 MR. HOLMES: Madam, that is really a point to put to the applicants, but I see the force of it.
12 Our point is that this is a prioritisation review, and there is a limit to how much evidence
13 gathering you can sensibly undertake when you are deciding whether to devote resources to
14 something. In the end you have to ask interested parties who all have some resources to
15 bring to bear. I am not suggesting that there are not resource constraints for everyone in
16 today's market place, but you have in the end to let people come forward to some extent
17 with the material that they say shows there is a problem. That just seems to be a statement
18 of the obvious in prioritisation terms.

19 There is also case law to back up the point that the adequacy of inquiries that the OFT
20 should undertake is itself subject to the *Wednesbury* unreasonableness test and I refer to the
21 *Khatun* case in the defence in support of that proposition - I do not think I need to take you
22 there given the time. The point is simply that it was reasonable for the OFT to really invite
23 parties to make submissions and to consider the evidence that was brought forward, and
24 there really was not evidence to show that consumers were suffering a detriment because of
25 the shift in the composition of this figure of 54,000.

26 There is also a complaint, which I do not think was developed orally, about retailers'
27 margins being squeezed, and retail space declining accordingly. But the evidence of
28 declining retail space is itself based on two retail groups' experiences, and it can also be
29 explained by the general long term decline in newspaper and magazine circulation which
30 really is the same point that I think you were making, madam, when you raised the question
31 of whether this was demand led.

32 An important point: retail prices, obviously a consideration of key importance when you are
33 assessing consumer impact. The evidence is that prices have declined in real terms for both

1 magazines and newspapers, and that is not challenged, and that is at the following bullet
2 point. The applicants do not take issue with that.

3 The next point that the OFT makes is that the supply chains generally appear to operate
4 effectively in distributing newspapers and magazines to consumers on the whole. Now,
5 there are — and a point that is taken in relation to that. So, in support of the conclusion that
6 supply chains operate effectively, the OFT makes reference to the 95 per cent compliance
7 rate that was achieved with delivery times.

8 THE CHAIRMAN: This is the point about the schedule, the agreed schedule of delivery times
9 and whether they are imposed are agreed, that point.

10 MR. HOLMES: Yes, I am sorry, madam, this is in footnote 33, I momentarily could not see the
11 point. The second point relied on by the OFT is the lack of complaint from publishers in
12 relation to the availability of their titles. And the third point is a reference to the self-
13 regulatory initiatives being taken by industry participants further to improve efficiency.
14 Now, the applicants dismiss the first of these matters as compliance with the title that
15 suppliers themselves set in the context of publisher led distribution. As to this, the OFT
16 found in the 2009 Decision, that publishers have a strong incentive to ensure accurate and
17 punctual deliveries, we have seen that, we have that point. So, the fact that the distribution
18 is publisher led does not suggest that delivery targets are not stringent.

19 The second point is that publishers' concern to ensure punctual and accurate delivery is part
20 of a more general incentive to get their products to the market, and if they were unable to do
21 so, you would expect them to complain. So, there was no unreasonableness in the OFT
22 taking account of the fact that publishers and publishing ever more titles; and yet none of
23 them came and said, "The supply chains are not letting us get any of these new titles to
24 market". And there is no reason in publisher incentives that would suggest that publishers
25 would not shout out if there were a problem with supply chains. And, in any event, para.80
26 of the defence notes that 88 per cent of delivery times are agreed with retailers rather than
27 being set independently by wholesalers. Now, it is said that the agreement is in some way
28 coerced. But, with respect, there simply is not evidence that was either before the OFT to
29 that effect — it was not a point that was even made, I think, to the OFT when arriving at
30 this Decision — or in the material that is before the Tribunal.

31 And, in the circumstances, we submit that it was reasonable for the OFT to take account of
32 the high compliance with delivery times when assessing the effectiveness of the supply
33 chains.

1 On strategic significance, I can be very brief indeed, as was Mr. Peretz. The OFT took
2 account of two elements to conclude that strategic significance did not favour doing a
3 review any more than consumer impact did. The first was that the, the first point that the
4 OFT noted was that, yes, there is just the point about it not being aligned with the OFT's
5 strategic priorities and key themes; and the second point was the point about self-regulatory
6 initiatives.

7 Now, we say that it was reasonable for the OFT to take these into account. It did not have
8 to form a view as to whether they would be successful or not in order to take them into
9 account as a factor when deciding whether the OFT was best placed to act. There is no
10 challenge to the first of the two elements of strategic significance, but the second is
11 disputed.

12 Another important factor which Mr. Peretz omitted to mention in his submissions about the
13 timing of this is that there is currently an independent review under way under the
14 chairmanship of a retired civil servant, or an ex civil servant, Mr. Michel Woodman, in
15 order to try to find a way forward for self-regulation; and that was a factor that the OFT
16 could also reasonably take into account.

17 MISS STUART: Sorry — what is the timescale for that review? That is ongoing at the moment,
18 did you say?

19 MR. HOLMES: Madam, we do not know a specific date, but it is apparently likely to be
20 concluded fairly soon. So, we say the strategic significance was, that the conclusions on
21 strategic significance were reasonable. We also say that this was an additional reason in
22 support of the OFT's Decision. Given its findings on consumer impact, that was sufficient
23 to sustain the OFT's Decision and if the OFT is with us on consumer impact, any concerns
24 it might have on our reasoning in relation to strategic significance should not provide a
25 basis for remission. Nor, vice-versa, if the Tribunal is with us on strategic significance but
26 not on consumer impact, should the OFT consider it necessary to remit, because these are
27 two independent conclusions as to why an update review was not an appropriate
28 prioritisation of resource.

29 So, to conclude very briefly, the applicants clearly disagree with a number of aspects of the
30 OFT's analysis, but that disagreement is not the stuff of judicial review. The applicants
31 may take a different position from the OFT on a number of points of detail, but they have
32 not shown the OFT's position to be *Wednesbury* unreasonable. They also have a more
33 general complaint which the Tribunal rightly drew me to, because this is at the core of this
34 case, which is that the OFT's current approach is said to be inconsistent with its

1 identification of potential competition concerns in 2009. But, we say that this complaint
2 does not do justice to the OFT's conclusions in 2009 which are more nuanced than has been
3 suggested:

4 * Firstly, the OFT did not identify a general lack of incentives on the part of
5 publishers to distribute their titles — quite the reverse;

6 * Secondly, it did not contend that publisher-led distribution should be replaced by
7 retailer-led distribution;

8 * Thirdly, it did not support an expectation of widespread passive selling. It had a
9 reasonable expectation of a period of flux, and the language was carefully chosen, in
10 the period following the self-assessment. The consequences of that period of flux
11 might manifest themselves in a number of ways including an enhanced negotiating
12 position for multiple retailers rather than passive selling. So, it is no criticism. No
13 relevant consideration has been shown which the OFT failed to take account of in the
14 form OFT prevalence of passive selling, because the OFT's conclusions really taken
15 in the round in 2008-2009, and that was a coherent set of projects that were taken
16 forward together, those conclusions do not support the conclusion that you would
17 expect to see wide prevalence passive selling as the cure or the solution to the
18 concerns about competition and consumers that were identified in 2009 Decision.

19 * Fourthly, the OFT did not suggest that passive selling was the only solution to the
20 two specific competition problems which were identified. It identified a range of best
21 practice initiatives. And the clearest illustration that the OFT did not envisage this as
22 a conveyor belt where the only stoppage was flux and that, once flux was removed, in
23 the absence of passive selling this could all be sent off to the Competition
24 Commission — the clearest indication that that was not how the OFT saw things in
25 2009 is the next step which it saw in this process, which was not an update review to
26 decide whether or not to make a reference, but a prioritisation assessment to determine
27 whether it was worth progressing to an update review.

28 And so, in deciding in 2012 whether to embark on a further review of the sector, the OFT
29 was entitled to look at the broad picture for consumers based on the evidence submitted to it
30 by interested parties in order to see whether the way in which consumers were experiencing
31 the market suggested that the concerns, the difficulties, that might result from the potential
32 competition problems that it had in mind in 2009, were actually eventuating. It was not
33 required, we say, to look at whether those competition problems had been resolved or why
34 they had been resolved. It was entitled to look at how the market as a whole was

1 functioning: that is what prioritisation involves. It is standing back and looking at the
2 market from above to see whether there are any indicators of concern.

3 THE CHAIRMAN: Yes. But, you do not say that you were entitled to, or did stand back a step
4 further to say even if this market or maybe this is a strategic point, even if this market is not
5 really working terribly well, it is still not something that we choose to investigate.

6 MR. HOLMES: No, madam, we do not say that. The question is how one approaches the
7 assessment of the market.

8 THE CHAIRMAN: Yes.

9 MR. HOLMES: Whether you begin in the detail, in the midst, in a continuation of the previous
10 review, that will be an update review, looking to see whether the specific features that were
11 pinpointed in 2009 were persisting and, if not, how they had been addressed. You look at
12 the outputs to see whether there are symptoms, if you like — outputs that would be
13 indicative of a competition concern that would justify you then in diving into the detail to
14 work out why the market was not working effectively, and the OFT, we submit, must be
15 entitled to stand back subject to the limits of *Wednesbury* unreasonableness; it must be
16 entitled to stand back and ask whether its priorities would be well served looking at the
17 market overall. And we say that it was perfectly reasonable to do so in this case, to conduct
18 the decision as we did, and we therefore invite the Tribunal to reject the application
19 accordingly. And we say that our approach is fully confirmed by the decision in *Cityhook*
20 which shows the reasonableness of prioritisation and the correct approach to be taken when
21 assessing prioritisation. And it is precisely because the problems, the analysis that we were
22 applying here was an analysis of outputs of broad parameters of how the markets were
23 working that we were not required to do the kind of reasoning you would expect to see an
24 update review. The reasons were sufficient in this case because they were not addressed to
25 the same questions as the 2009 Decision. But they are consistent with the 2009 Decision in
26 that there is no relevant consideration that we have left out of account, taking the nature of
27 this Decision on its own terms which emerges from the 2009 assessment.

28 One final point, madam. That is not to say, of course, that the outputs were not informed by
29 the OFT's understanding of the 2009 Decision. I have, you know, probably, to too great
30 extent taken you into the detail in my submission today in order to meet some of the
31 submissions that are made against us, and I hope I have given a flavour of the care and
32 sophistication of the analysis and the very significant levels of work which went on in 2009
33 which informed the OFT's overall understanding of this sector. And those, we say, the
34 2012 Decision states on its face that part of what the OFT did here was taking account of

1 what was done in 2009. I think the reference is para.5.2 and we should perhaps very briefly
2 (I know that I am in borrowed time now, but) we should just briefly turn that up. So, you
3 see in the second sentence that prioritisation is based on the submissions, so, the first
4 sentence:

5 “Prioritisation assessment is based on the points made in the submissions and
6 information provided by interested parties ... also necessarily been informed by
7 knowledge acquired through the OFT’s previous work between 2004 and 2009 of how
8 the sector operates”.

9 So, the OFT’s understanding was of course carried forward in this assessment and the
10 analysis is full of the sort of — it connects back in a number of complex and cross-cutting
11 ways with the previous analysis. There is no inconsistency when you look at the detail of
12 what was done before. And the OFT did not need to set out all of the convoluted process
13 that I put before you today because it was doing in 2012 a prioritisation assessment. What
14 is necessary now in the context of this review is to show you that there is no inconsistency,
15 no relevant consideration that was left out of account. And I hope, madam, that I have done
16 that, and on that basis we invite the Tribunal to reject the application accordingly.

17 Unless I can be of any further assistance, those are my submissions.

18 THE CHAIRMAN: Thank you.

19 MISS STUART: I just have one question on the — you mentioned about the independent review
20 that is looking at self-regulation in the market. Have you commissioned that report,
21 commissioned that review?

22 MR. HOLMES: It may be that my learned friend, Miss Lester, can help me with this. I believe
23 that the Press Distribution Forum commissioned the report, but it appointed an independent
24 chairman. The applicant’s skeleton argument contains an error of fact on this point, that the
25 independent chairman is in fact an official, not someone associated with one of the
26 publishers.

27 MISS STUART: Now, I am not sure whether this can be answered or not, but you said that that
28 review will be concluded shortly as far as you know. Is this something then that the OFT
29 will look at when it comes out, the report?

30 MR. HOLMES: I will need to take instructions on that. The OFT will generally keep markets
31 under review, and it will, of course, take all relevant considerations into account in the
32 process. The OFT will obviously keep itself informed. This is a sector it has been involved
33 in for some considerable time. Inevitably, these decisions are taken in a state of flux, to
34 coin a phrase, where there are ongoing developments all the time, and the OFT was taking

1 account of those developments which were in process during the course of the prioritisation
2 assessment.

3 MISS POTTER: One other point from me which you may or may not be able to address, but I
4 think it is a point that is picked up the applicants. It is coming back to the famous 5.28 of
5 the 2012 Decision, and you took us to this figure of 99 per cent of retailer alterations being
6 honoured, but in the period October to December 2010, I think the applicants picked it up, it
7 just looks a little odd to take a two month period and draw any conclusions from it if one
8 does not have information about other two month periods and trend information. I just
9 wondered if there was any ----

10 MR. HOLMES: It was a three month period, and our answer, I think, as we set out in the defence,
11 was to say that if you look at those three months at least, they are all consistent. Madam, it
12 may be that my learned friend Miss Lester is better placed to address the point.

13 THE CHAIRMAN: In para.39 of your defence, you there seem to be taking issue, and I am not
14 sure whether you were taking issue today, with the point about what was the reason for not
15 making a market investigation reference in 2009. We have focused today, or you have
16 focused today, on saying, as I understood it, "Yes, it was because of this period of flux, but
17 when you look at the market as it now stands after that period of flux we identified certain
18 features that indicated that it was not working too badly and we decided it is not a priority".

19 MR. HOLMES: Yes.

20 THE CHAIRMAN: Today you seem to be making a slightly different point, which is, "There are
21 all sorts of reasons why we did not make the reference which have not been challenged".

22 MR. HOLMES: I think that is best explained by looking at the way the point was put in the
23 application. I make no criticism of the applicants for this, but the applicants' skeleton
24 argument focused more directly on the two concerns that were actually outstanding,
25 competition concerns outstanding, if you like, at the end of the 2009 Decision, the two on
26 which a reference might have been made.

27 There were other points that the applicants appeared to suggest in the application were
28 outstanding competition concerns as at 2009, and that is simply wrong if one looks at the
29 2009 Decision – for example, ATP cover pricing. They were offsetting customer benefits
30 which dealt with those points. Have I misunderstood your point?

31 THE CHAIRMAN: No, I think I have probably misunderstood what you have been saying. So
32 you are saying the threshold for making the reference was only ever crossed in relation to
33 these points, copy allocation and publisher led distribution, and it was in relation to those
34 that because of this period of flux you then did not make it. There were other features

1 which you investigated as to whether they did provide reasonable grounds, and decided
2 actually they did not because there were advantages and disadvantages.

3 MR. HOLMES: Offsetting customer benefits, exactly. Madam, just by reference, paras.15 and
4 16 of the application identify ATP, for example, as a feature in which there were reasonable
5 grounds to suspect that they were preventing, restricting or distorting competition without
6 there referring to the fact that ATP was dealt with on the basis of offsetting customer
7 benefits. So it was really just a clarification of what the competition concerns really were in
8 2009.

9 THE CHAIRMAN: Yes, thank you very much, Mr. Holmes. Yes, Miss Lester.

10 MISS LESTER: I am grateful to the Tribunal. I am going to try not to revisit old ground too
11 much. Could I just ask the Tribunal to take up my skeleton argument. I would ask the
12 Tribunal, and I am sure you have already, to read our statement of intervention and skeleton
13 argument at some point because they make a number of detailed points which I will not
14 have time to make today, in particular about the quality of evidence from the applicants.
15 Could I just invite you for now to read the first six paragraphs. It is tab 15 of the bundle.
16 The second paragraph sets out the nature of the Press Distribution Forum and its
17 membership. At para.4 it introduces the Press Distribution Charter, at para.5, the Press
18 Distribution Review Panel. That is simply by way of introduction to those concepts which
19 we have been hearing about.

20 Can I, first of all, attempt recklessly an explanation again of crude availability data, because
21 that will be the first point. I have taken instructions on this several times and I hope I have
22 now got it right. For every title, Vogue, for example, what percentage of retailers returns
23 some copies out of all the retailers that stock that particular title? So, for example, if 60 per
24 cent of retailers that stock Vogue return a copy of Vogue, that will be recorded as Vogue
25 having been 60 per cent available. It is then aggregated across all titles and you reach your
26 aggregated figure. That, as I understand it, is that.

27 I am instructed that there are not fluctuations month by month, but the data is recorded
28 every day, so one simply takes a snapshot. My instructions are that there are no significant
29 variations throughout the year.

30 Overall, the thrust of the Press Distribution Forum's evidence to the Office of Fair Trading
31 was that this was indeed a market that was working well for consumers. What I propose to
32 do is simply go through each of the issues very briefly, principally in order to show the
33 Tribunal what the evidence was that was before the OFT and why it was therefore entitled
34 to take the decision it did on each of the perhaps more technical aspects of the Decision.

1 First of all, I have given the definition of “crude availability data”. What the OFT said
2 about crude availability, as you have heard, is that it had received convincing market wide
3 information indicating an overall improvement in availability. The data itself which you
4 have seen was submitted by the PDF.

5 THE CHAIRMAN: Is it the PDF that generally gathers this information and produces these
6 figures?

7 MISS LESTER: The data is compiled by the wholesalers and the PDF is made up of wholesalers
8 and publishers.

9 THE CHAIRMAN: My understanding is that it was not compiled for the purpose of this exercise

10 MISS LESTER: No, it is compiled every day as a matter of general recording.

11 THE CHAIRMAN: And published?

12 MISS LESTER: It is not published. It is not available on a website, it is simply part of the large
13 amount of data that is compiled on a daily basis by wholesalers. It was, therefore,
14 submitted to the OFT in the PDF submission in order to be a helpful measure of availability
15 to consumers.

16 Would it assist to have another look at what the PDF did submit on those percentages, or
17 does the Tribunal ----

18 THE CHAIRMAN: I suspect not.

19 MISS LESTER: The reference is tab 11(4), p.10, if you want it. We do say that the Tribunal has
20 examined those figures it really does not support my learned friend Mr. Peretz’ submission
21 that this was a modest improvement, and it does support the OFT’s view that this was very
22 clearly an overall improvement in consumer availability. That is all the measure is intended
23 to record, and it clearly does record it. It is plainly in line with the 2009 Decision by the
24 OFT that publishers are incentivised to enable wide availability of titles, and that is fully
25 supported by the data, and also as a result of the sale or return system of publication.
26 My learned friend Mr. Holmes rightly said that, in fact, this is a conservative measure of
27 availability, and you can see that if you look at the figures of those who do have EPOS SBR
28 systems in the PPA submission to the OFT at tab 11(5), p.9. This is the submission of the
29 Professional Publishers Association to the OFT. As is common ground, crude availability
30 data is crude in the sense that it does not specifically note at what point in a lifetime of a
31 title it has become unavailable, but if you look at the middle of p.9 of the PPA submission,
32 the paragraph starting “Despite”, the last sentence of that paragraph reads:

1 “Where EPOS data is available to measure accurately the lifecycle availability
2 of the magazine category availability is 93% and reached 99% where and a
3 Sales Based Replenishment approach can be used.”

4 The reason why that figure is higher than the crude availability figure, as I think
5 Mr. Holmes said, is that very often a title becomes unavailable on the last day – for
6 example, because a new issue is coming out and it is still recorded as having been
7 unavailable where it was available for meaningful purposes.

8 The figures which are confidential provided by Shane Brennan that the Tribunal was taken
9 to earlier, we have provided a detailed criticism of those figures, and if I could give you the
10 references to where we set out why those figures are not accurate. It is para.3.10 of our
11 statement of intervention which is at tab 12, and it is also para.17 of our skeleton argument.
12 I do not propose to take you to them, but I would ask the Tribunal to look at those when you
13 are looking at the figures provided by Shane Brennan, and also just note that that is
14 provided without my solicitors and I having been able to speak to our clients about the
15 figures because they are claimed as being confidential. So that is our own deconstruction of
16 those figures.

17 MISS STUART: What paragraph was it of your skeleton argument?

18 MISS LESTER: Paragraph 17. Finally, on crude availability, it is not correct to say, as
19 Mr. Peretz did, that the OFT puts all of its eggs in that basket, because of course it also
20 relies on the survey evidence and on evidence about copy allocation to substantiate its
21 conclusions about availability to consumers of newspapers and magazines.

22 That is all I was proposing to say about availability.

23 Copy allocation and the efficiency of the supply chain, I was proposing to deal with briefly
24 together because in some sense those are all part of the same issue. You have heard that
25 what the OFT said about these matters is that one organisation submitted that there had been
26 improvements in wholesaler systems, allowing retailers actively to manage aspects of their
27 supplies. Retailers plainly do have influence over their allocations of magazines as well as
28 newspapers. First, there is the SBR system, which you have heard about, but secondly,
29 there are call centres, and there are internet systems. So even if it is correct to say that SBR
30 systems can only be used by a certain subset of retailers there are clearly other ways in
31 which retailers can express preferences about magazines being insufficiently available; so it
32 is simply not right to say there is a way in which they can express a preference to
33 wholesalers.

1 The evidence is that this is working. If I can show you, first, PDF's submission to the OFT,
2 that is tab 11 (4), p.6. If I could just ask you to read that paragraph, and particularly the
3 reference to 99.5 per cent of alterations being honoured at the end of that paragraph.

4 MISS STUART: (After a pause) That information, is that coming from the wholesalers saying
5 that they are honouring those, or is that information from retailers who said their changes
6 are being honoured?

7 MISS LESTER: That is wholesalers saying that that is the percentage that are honoured.

8 MISS STUART: That they are honouring.

9 MISS LESTER: That they are honouring them, and I can show you also what the Professional
10 Publishers Association said, which is at the next tab, tab 11, p.2, where, near the bottom of
11 the page, the percentage of 99.48 per cent of standing order changes being honoured
12 appears. I would just note ----

13 THE CHAIRMAN: Sorry, where is that?

14 MISS LESTER: Tab 11(5), p.2, it is the document we were in before, which was the PPA
15 submission. The table at the top of the page sets out the figures and, in response to Miss
16 Potter's comment that that simply covered October to December of one year, the PDF
17 statement of intervention at para. 4.10 and skeleton argument at 23, records that the figure
18 of over 99 per cent of retailer alterations before delivery being honoured is correct between
19 October 2010 and May 2012. So although those figures are only those months it remains
20 true for that period. That is obviously an extremely striking figure.

21 On time delivery Mr. Holmes has covered, and the figures there are equally striking. The
22 NPA submission at tab 12(1) gives a figure of 98.4 per cent for on time deliveries, and the
23 PDF submission (tab 11(4), p.3) gives a figure of 95 per cent. So that is timely deliveries
24 and amendment requests by retailers being honoured with extremely high figures.
25 The OFT also noted that investments were being made in the supply chain. Again, this was
26 plainly justified on the evidence, the PDF's evidence on the investments being made is at
27 tab 11(4), p.5. One of the matters noted is that interest free loans are provided to retailers
28 who wish to invest in SBR systems, and there is evidence that this is being taken up and,
29 again, if I can give you the references, it is PDF submission tab 11(4), p.6 and 11(5), p.2,
30 and the PPA's submission at 11(5), p.7.

31 The other aspect the OFT took into account as regards copy allocation and the efficiency of
32 the supply chain was self-regulation, and this was not simply a matter relating to the
33 strategic aims of the prioritisation decision, but also copy allocation, and again this is
34 plainly justified. What the OFT said about self-regulation is that it aims to address

1 efficiency and service issues and that the OFT was not best placed in relation to service
2 standards for retailers because of the existence of the PDF which was open to engagement
3 with retailers.

4 The system of self-regulation is outlined at the first six paragraphs of my skeleton argument
5 as I have said, and the striking feature of the PDF is that it is all aimed at service standards
6 for retailers and although my learned friend, Mr. Peretz, may say that the OFT should not
7 have looked at it because the retailers do not buy into it the fact is that, even though the
8 retailers have refused to join the PDF, the charter which sets out service standards for
9 retailers has nonetheless been implemented, designed with retailer input, and implemented
10 into terms and conditions that are now applied in all contracts with retailers, and I can show
11 you that from the charter itself, which is useful briefly to have a look at – the Press
12 Distribution Charter at tab 11(4d). The second page of the document states:

13 “The Press Distribution Forum has developed the Press Distribution Charter as our
14 promise of good service. It sets out the standards you can expect from publishers
15 and wholesalers, and helps you find solutions if things go wrong. It is supported
16 by all the leading publishers and wholesalers, and it applies to all retailers no
17 matter what their size or location.”

18 On the right hand side, p.3, the Charter notes that performance under the Press Distribution
19 Charter will be reviewed by the Panel under an independent chairmanship. Over the page at
20 clause 1.3:

21 “The standards of [the Charter] will be incorporated by each wholesaler into its
22 Terms and Conditions of Business.”

23 What follows is a series of undertakings about matters such as delivery times, amending
24 allocations in response to retailer requests for amendments of that kind, and I would invite
25 the Tribunal to read it when considering the main thrust of Mr. Peretz’s submissions, which
26 is wholesalers simply do not do anything: “we can only complain and there is no one there
27 to listen”, because that is precisely what this system has been set up to do.

28 Can I also refer you to p.9 while we are in this document, which is the complaints resolution
29 process. You will see that stages 1 and 2 of the complaints’ process are designed so that
30 complaints from retailers can be consensually agreed and resolved with wholesalers and
31 there is evidence from the PDF in our statement of intervention that that has been happening
32 swiftly.

33 Stage 3 is where disputes, if they cannot be resolved go to independent arbitration. I am
34 instructed, which is startling in light of Mr. Peretz’s submission, that no complaint relating

1 customer allocation has ever reached stage 3. So any complaint that has been made, and you
2 have seen evidence from the PDF that there are 44 – the number does not matter, clearly
3 there is some engagement with the process – all have been resolved between the retailer and
4 the wholesaler. So even if the retailers are not fully buying into the system there is a system
5 in place. If there were real concern from retailers that there are problems with copy
6 allocation of magazines that is precisely what this process is there to do.

7 In those circumstances it was plainly justified for the OFT to have regards to that as being
8 relevant to how the market is working both in terms of copy allocation and whether the OFT
9 is best placed to deal with complaints by retailers about service standards.

10 Finally, a quick word on retailer numbers and retail price, the simple point about retailer
11 numbers is that the OFT noted that they had remained stable, despite an overall decline in
12 circulation of newspapers and magazines, and that is not contested. This is in a market
13 which is changing and this was noted by the OFT in its reports of 2008, which provide
14 relevant background as well as 2009, and this is a market in which there are declining
15 circulation numbers for newspapers and magazines, and a growth in other forms of media
16 transmission and it is striking in those circumstances that the number of retail outlets has
17 remained stable.

18 Finally on retail prices, as Mr. Holmes said, this is not a matter of dispute, but again we
19 draw attention to the fact that in overall terms there has been a reduction in real terms in
20 average newspaper and magazine prices compared with RPI and the background from the
21 OFT in 2008 and in its report in 2009 note that the incentives of cover prices are for prices
22 to be pushed lower and that without cover pricing retail prices would be likely to be higher,
23 and that is confirmed by the evidence of the applicants in this case who are complaining
24 about the fact that because of this they have to cross-subsidise from other products. But
25 plainly consumer harm has to be assessed in the light of this striking figure that prices are
26 declining.

27 Unless I can assist you further?

28 MISS STUART: You have made obviously reference to the 99 per cent figure, this availability.

29 MISS LESTER: Yes.

30 MISS STUART: Just going through I just want to clarify a point on that. This is in tab 5, p.2.

31 MISS LESTER: This is the PPA figures.

32 MISS STUART: And this is the table with the alterations, it is about the tools that have been
33 provided. Can I just confirm, is that of all the changes or alterations that were put through
34 that particular system, 99.54 per cent have been actioned. But what it does not capture is

1 the people who are not using those tools, if they are ringing up with changes that need to be
2 made or emailing or whatever way, because at one point it does say that there are 9,000
3 retailers made use of the on-line facilities, obviously I appreciate there are over 50,000
4 retailers and I am just trying to get a feel for what this figure is.

5 MISS LESTER: May I take instructions?

6 MISS STUART: Yes.

7 MISS LESTER: (After a pause) The figure does relate simply to retailers using that system.

8 MR. PERETZ: Actually there was a point I was going to make in reply about precisely that
9 figure. The critical point about it, and I think it is a point made by Mr. Baxter in his second
10 witness statement at tab 10, is that the figure only relates to alterations that are accepted on
11 to the system, so that if you try an alteration it is ruled out of court because it is more than
12 the wholesaler thinks you should be getting, it is not recorded on the system. So that is why
13 we say the figure actually does not tell you very much of any great interest.

14 I think I am only going to be about 15 minutes or so in reply. There has been a certain
15 amount of muttering going on behind me and I just want to check that I have got every point
16 that those behind me would like me to make in reply.

17 THE CHAIRMAN: Yes, why do we not take a short break then and come back at ten past four.

18 MR. PERETZ: That would be very helpful, thank you.

19 (Short break)

20 MR. PERETZ: I am very conscious of the time, so I am going to make essentially headline
21 points.

22 The first point I make really deals with the point that Mr. Holmes was making before the
23 lunchtime break; and his point as I understood it, in essence, was that when the 2009
24 Decision talked about flux, what it included was what one might call “the indirect effects”
25 of the ending of ATP — that retailers, or at least large retailers, could threaten, even if they
26 did not actually do it, to leave their allocated wholesaler, and that that threat would have
27 effects on the balance of power as between publishers and retailers, and therefore address
28 the concerns identified in the 2009 Decision that the balance of power, if I can put it this
29 way, was too much weighted towards the publisher.

30 And the OFT, says Mr. Holmes, thought in 2012 that the position in relation to carriage
31 service charges, their finding that those, that they had gone up, had not gone up as much as
32 Freight Transport Association rates for delivery generally. And the point about
33 supermarkets being able to impose penalties on wholesalers —as I understood what

1 Mr. Holmes was saying is that the OFT considered those developments were manifestations
2 of a shift in the balance of power that had happened.

3 The difficulty with that analysis as we see it is, well, first of all in so far as there has been
4 any improvement in carriage service charges, and the Tribunal will have picked up that is a
5 matter which is fairly hotly in dispute — and of course we say that the carriage service
6 charges were already extremely high in 2009, so the fact that they have not gone up as much
7 as some other rates may not tell you very much; and the fact that supermarkets have a
8 certain ability to throw their weight around, there is no evidence that any of that results
9 from an increased ability of anybody to threaten exit, to threaten passive sales route, or to
10 threaten to find some third party distributor.

11 We also note that the OFT did not look at any case in which penalties were imposed. And it
12 is perhaps just worth quickly looking, as far as we can tell, at the bits of information that the
13 OFT relied on in finding that supermarkets are in a position to impose penalties. As,
14 madam chairman, you point out, this is evidence that came from a party in favour of
15 prioritisation, so it came from one or other of us. And we think that the reference that the
16 OFT was relying on is at tab.2, p.29 of bundle 1, if I have got that reference right. Yes, it is
17 para.3.7.5. And we think that this is the only reference we can find in our submissions, it is
18 the final sentence here when we the National Federation of Retail Newsagents says:

19 “The large retail multiples have stronger bargaining powers and are able to impose
20 significant financial penalties for poor service quality”.

21 Now, that, as was fairly evident, was on our part a bit of hearsay, and large retail multiples
22 are not members of the NFRN, and it is — which is slightly surprising that the OFT built a
23 conclusion on that sentence in which was inevitably somewhat supposition in our report.

24 There is no evidence that the OFT has actually tried to find out from wholesalers or
25 anybody else whether penalties have actually been imposed; whether they have been
26 imposed, have they been paid, or the extent to which supermarkets have actually been able
27 to use that power. So, we are somewhat sceptical about the reasoning there.

28 But, just returning to a fundamental point, there is no evidence — whatever there is, there is
29 no evidence that any of this was due to a plausible threat by any retailer to switch
30 wholesaler, to go to Smiths when they were based in Menzies or vice versa, or to go to an
31 alternative channel of distribution. In fact, the evidence that we have about attempts by
32 retailers to switch is to the contrary.

33 Now, the evidence I just want to point to is in the confidentiality ring, so I am just going to
34 get the Tribunal to read it rather than read it out aloud. The reference is at tab.3 of

1 volume 1, p.22, and it is para.26 which should be wholly redacted in the non-confidential
2 version, and I would like the Tribunal just to read that.

3 That is evidence about an attempt to pursue passive sales not getting anywhere. There is
4 certainly no evidence that we are aware of that anyone has been plausibly able to threaten to
5 move to a new third party distributor — one of the logistics companies or the other
6 distributors, the OFT talked about and speculated about in their opinion as being a
7 possibility, given the state of flux.

8 So, indeed, when one thinks about it, it is difficult to see how a third party distributor
9 actually at the moment could come into the market. You have — what happened in 2009
10 was a series of tenders and publishers entered into contracts with the two wholesalers in
11 2009. Those contracts, as we understand it, last for four or five years, so, in 2014-2015. At
12 the moment, if any retailer, even Tesco, wanted to try and get supply from anybody other
13 than Menzies or Smiths, that third — with one of the distributors they use has read or
14 whatever, that distributor would find that they cannot get supply from the publisher,
15 because the publishers are in contracts that bind them to Smiths or Menzies. So, the
16 possibility of third party distribution certainly cannot exist as a plausible threat at the
17 moment.

18 So, we find the point made by Mr. Holmes before lunch somewhat difficult to follow. We
19 simply cannot see how reasonably the OFT can attribute any of the developments that have
20 happened in the market since 2009 to increased ability to threaten passive selling, or an
21 increased ability to threaten to move to a third party distributor.

22 And, as far as we can see, there is really nothing to support a contention that there is any
23 evidence at all of a significant shift in the balance of power away from publishers to
24 retailers; and I am using “balance of power” as a shorthand for the sort of shift that the
25 OFT thought would be desirable in its 2009 Decision in order to improve distribution from
26 the point of view of consumers. Indeed, if one wants to be slightly cynical, there is an
27 obvious alternative explanation for such steps that have been taken. Well, one explanation
28 we are perfectly prepared to some degree to accept, is that publishers do have an interest in
29 pushing out magazines. We are not in any way suggesting that the interests of publishers
30 and retailers are wholly divergent on that front. There is clearly quite a lot of interest which
31 they have in common. And so, you know, we accept that publishers have an interest in
32 controlling carriage service charges and so on. What they do not have, and this is what the
33 2009 Decision finds, is the same interest in making sure that each retailer can carefully

1 tailor the sort of range and stock that they have got to the particular needs that that retailer
2 in the particular market that that retailer has.

3 The other explanation for what improvements there have been — in so far as there have
4 been improvements — is of course that up until March 2012 the publishers and wholesalers
5 were living with the threat hanging over them of a possible update review. And the OFT
6 have given some fairly clear steer about what it expected to see, so it is slightly unsurprising
7 that that then to some extent happens. Whether that is indicative of any fundamental shift in
8 the balance of power once the threat of regulatory intervention — and the OFT effectively
9 says of course it has an ongoing duty to review, but that threat of regulatory intervention, if
10 the prioritisation decision stands, is certainly much less present than it has been to date.

11 Whether any of that will continue, one can only speculate.

12 Now, just some sort of slightly bitty points about particular aspects of the data and so on,
13 crude availability, it was interesting, madam, your question about seasonality and when
14 looking at the January to August figure, I mean, we have not made any point about that, just
15 that we do think that it is somewhat indicative that there is the sort of obvious question
16 sitting there for the OFT to ask and it never asked it, which may say something about the
17 extent to which the OFT challenged some of the information it was being given by the PDF.
18 I perfectly accept that this is a prioritisation decision, not, you know, a finding of abusive
19 dominant positions under chapter 2. There is no requirement on the OFT to pin everything
20 down to a position of precise certainty, but a reasonable amount of care has to be taken to
21 ask sort of obvious questions.

22 The Tribunal generally has our criticism of the crude availability figure, and perhaps the
23 point, and it is set out in our skeleton and in our application. I do not think I need to repeat
24 the point. Just one particular point I just want to emphasise is, it does not, of course, cover
25 situations where retailers want a particular title and do not get it at all, which is a fairly
26 drastic form of non availability. That will not show up in the figure.

27 A point Mr. Holmes made about, under the heading, really, of publisher-retailer incentive.
28 This goes back to looking at the 2009 Decision, and you will remember he took you to
29 paragraphs which deal with the — he said demonstrate that the OFT considered in 2009 that
30 publisher-led distribution was a fairly inevitable feature of the industry. When one reads his
31 skeleton, one has got to be slightly careful, there is a reference to a long passage which is in
32 fact when one reads it a passage about what would be the position were Sale or Return not
33 there. Of course, sale or return is there, so it is a feature. But, to be fair, he also refers to a
34 passage which covers the real world where you have sale or return.

1 Actually, just to state for the record, my understanding of sale or return, this is not
2 something that retailers can opt in or out of. Sale or return is the basis on which you are
3 supplied. If a retailer wanted to say, “Actually, we prefer to take the risk ourselves”, and
4 just have the copies outright and would you give us whatever we want on that basis”, that is
5 not something that at the moment exists. The possibility does not exist under the existing
6 system. So, sale or return is a sort of compulsory feature of the system.

7 In the end, this is not a question of, sort of, 100 per cent, 0 per cent question, black and
8 white question, it is a sort of “shades of grey” question. We accept that in a sale or return
9 world, publishers have a legitimate interest; there is clearly a theoretical risk – at least a
10 theoretical risk – that retailers will demand unreasonable quantities of stock because at the
11 end of the day they know they can shove it back to the publisher. Practically that may not
12 be so serious because that has cash flow implications, the retailer has to pay for it and then
13 get it back. But one can see that it is not by any means an unreasonable concern for the
14 OFT to have.

15 At the end of the day the point though is that, notwithstanding that reasonable point that the
16 OFT makes about the need to be some publisher control on distribution, the 2009 Decision
17 clearly says – and again I paraphrase, the Tribunal knows what I am getting at – that the
18 balance of power needs to be shifted, at least to some extent (and presumably to a
19 significant extent) towards retailers, because retailers have an understanding of the local
20 market: they are in a position to give their own customers, the ones who walk past their
21 door every day, the selection of magazines that they think their customers want, and they
22 are better placed to do that than publishers who look at things from a national perspective.
23 Another point I wanted to make – this is now replying to Miss Lester’s points, and actually
24 also to Mr. Holmes’ points about the independent review and what the PDF has done to set
25 up the Press Distribution Charter, and so on. I am not going to invite the Tribunal this
26 afternoon to go through the various reasons that we have for not engaging with the PDF; it
27 is not a sort of rush of blood to the head, or a mad whim. The reasons are set out - I will
28 give the reference for the Tribunal’s note – at bundle 1, tab 3, p.56, paras. 40 to 45 which
29 explain what the problems are from our point of view.

30 There are real problems, as we see it, with the PDF process and behind it all is the point that
31 the PDF, as is evident from what Miss Lester says, and frankly accepted, is an organisation
32 that is set up by, and ultimately controlled by, the publishers and wholesalers.

33 Of course, there is an independent review going on, chaired by an independent chairman,
34 but those of us who have been former civil servants – including a few distinguished

1 members of the current Panel – may remember an episode of “Yes Minister”, where
2 Bernard Woolley discusses the issues about independent chairmen with the Minister, and
3 points out that independent chairmen are a bit like railway trains, they may be all very
4 independent but you lay down the tracks and they go where you want them to go. I make
5 that point, and I only need to make it at a very general level. The point is simply that the
6 fact that a particular chairman who has been brought in, whose independence I am certainly
7 not in a position to challenge in any way and I do not, that is not necessarily a key that gets
8 everybody out of all problems, in the particular context of an organisation where the
9 ultimate paymasters are the publishers and the wholesalers.

10 Following on from the point I made very quickly about the break about the 99.5 per cent
11 figure, and I think about some of the other figures that have been bandied around anyway,
12 we say there is a very useful witness statement by Paul Baxter (his second witness
13 statement) and in relation to the 99.5 figure it is paras. 14 to 15, but the statement repays
14 close reading. It deals with a number of the data issues that have been discussed, and we say
15 has answers to many of the points raised today. However, looking at the time, and I am just
16 about to turn into a pumpkin, I will not go through them now, the Tribunal can read them at
17 leisure.

18 Those, madam, are my submissions.

19 THE CHAIRMAN: Yes, thank you.

20 MISS LESTER: Can I make one request about the 99 per cent. I am getting instructions that
21 there is uncertainty about that figure and whether it is purely on-line responses. The
22 Tribunal has seen the evidence on it. Could I ask that we seek clarification - unfortunately,
23 we cannot in this room today – and if there is clarification it is sent as soon as it can be to
24 everyone?

25 THE CHAIRMAN: Yes, thank you very much.

26 MISS LESTER: Thank you.

27 THE CHAIRMAN: Thank you very much everybody, that has been an extremely useful and
28 interesting day for us, and thank you for the discipline you have all exhibited in sticking to
29 the time allotted, despite us trying to ‘derail’ you – if that has not been an over-used
30 metaphor during the course of the day.

31 We will decide what we are going to do and let you know the result in due course. Thank
32 you very much to everybody.