IN THE LEVESON INQUIRY

CULTURE, PRACTICE AND ETHICS OF THE PRESS

MODULE 4

SUBMISSIONS ON BEHALF OF

PRESS STANDARDS BOARD OF FINANCE LIMITED

Introduction

1. On 4 July 2012 the Inquiry provided the Press Standards Board of Finance Ltd ("PressBof") with four questions relating to the regulatory proposal described in the third witness statement of Lord Black.

2. Those questions raise legal issues which, as the Inquiry acknowledged in its email of 4 July 2012, Lord Black will not be in a position to address in evidence. This document therefore sets out the position of PressBof in relation to the legal aspects of the four questions.

3. The author of the privileged legal note which the Inquiry has received is currently unavailable. PressBof will, however, be represented at the Inquiry by counsel who have authored these submissions, who will be available to make further oral submissions on these legal matters should the Inquiry so require.

Question 1

> *"How will the enforcement procedures work? How confident are you that the courts would be able/willing to enforce the provisions in relation to fines and specific performance?"*

4. In the unlikely event that a Regulated Entity were to refuse to comply with a sanction imposed upon it (either following an internal appeal, or alternatively without making use of the appeal procedures), it would be in breach of contract.

5. In such circumstances, there is no reason of principle why the Regulator could not enforce the contractual obligations in Court, by bringing a claim in debt, or for damages for breach of contract or for specific performance. In particular, assuming that the contractual scheme in its final form provides for appropriately tailored sanctions (whether financial or in the form of peremptory orders) to be imposed by an agreed body, following an agreed process, and applying agreed and reasonable guidelines, then neither the scheme itself nor the sanctions imposed under it would be open to successful challenge as unlawful contractual penalties. The sanctions provided for by the scheme would be neither fixed nor arbitrary, but would be flexible and proportionate to the harm arising from the breach.

6. It is of course possible that the Regulated Entity may try to raise defences to an action brought by the Regulator to enforce contractual obligations, based on the particular circumstances of the case. For example, a Regulated Entity might argue that, an individual fine imposed was disproportionate to the breach and amounted to an unlawful penalty, or that a non-financial sanction was too imprecise to be enforced by way of specific performance. However, provided that care is taken in the formulation of guidelines, and in the imposition of sanctions (for example, to ensure that they are proportionate and precise), such defences should not succeed.

Question 2

> *"The contract system gives no rights to third parties. What rights will complainants have under this proposed structure and how will they enforce them?"*

7. It is correct that the scheme envisages that third parties, other than the Industry Funding Body in relation to payment of fees, will not have contractual rights (by providing for the exclusion of any such rights under the Contracts (Rights of Third Parties) Act 1999). The intention is that the scheme will operate contractually only as between the Regulator and the Regulated Entities.

8. However the position of third parties is appropriately protected because the Regulator would be amendable to judicial review by any party with a sufficient interest to give it standing on normal public law principles. Such a conclusion is inevitable given, in particular:

   (a) the very important public functions the Regulator would perform; and

   (b) the fact that self-regulation by the Regulator will be an alternative to statutory regulation. On the hypothesis that this Inquiry recommends a form of self-regulation, it would be impossible for the Regulator to avoid the "but for" test of amenability to judicial review.

9. Complainants or other interested third parties will therefore have the normal protections of public law. The fairness of the Regulator's procedures, and the lawfulness of its decisions, will be subject to the supervisory jurisdiction of the Administrative Court.

Question 3

> *"The five year rolling contract is designed to bind regulated parties into the system for a reasonable amount of time. If ownership of a title transfers is there anything to ensure that the new owner takes on the contract?"*

10. This is addressed at paragraph 3.1.8 of the proposed contractual framework:

> "Transfer of title: if a Regulated Entity transfers control of a newspaper or magazine or website over which it has control it shall use all reasonable endeavours to ensure that the new owner/controller of such newspaper or magazine or website is a member of this regulatory scheme and has entered into a contract with the Regulator."

11. This provision does not go as far as might be lawfully possible (for example, a provision prohibiting the transfer of title unless new owners agree to enter into the scheme). However, it reflects a broad industry consensus against a background in which many small publishers anticipate that there may be market consolidation over the next few years, and are reluctant to impose further limitations on their ability to sell titles.

12. Furthermore, the scheme depends generally on publishers participating voluntarily because of the recognised advantages of doing so. It does not and cannot realistically depend upon compulsion. Accordingly, PressBof's position is that a combination of the obligation to use reasonable endeavours to ensure that new title owners join the scheme, together with the inherent advantages of membership constitutes the most effective way of ensuring that new title owners are joined.

Question 4

> *"This proposal includes propositions for incentives for membership that would not be available to non-members, including access to services, potentially agreements in respect of relationships with advertisers etc. Does this raise questions of compatibility with competition law and if so can you explain how those questions can be resolved?"*

13. Whether or not competition law is engaged will depend on how the incentives operate in practice, the detail of which is subject to further consideration.

14. However, it is certainly possible that the provision of incentives for membership would engage competition law. For example:

    (a) If the Regulator were to enter into an agreement with a third party (such as the Press Association, the providers of press cards, or advertisers) it may be that such an agreement would engage the prohibition on restrictive agreements under section 2 of the Competition Act 1998 (the so-called "Chapter I Prohibition").[1]

    (b) It may be arguable that the Regulator has a dominant position, and that action taken (e.g. to prevent advertisers from advertising with non-members) would be an abuse of its dominant provision in contravention of section 18 of the Competition Act 1998 (the "Chapter II Prohibition").

    (c) The scenarios at (a) and (b) above assume that the Regulator would be an "undertaking" for the purposes of competition law. However, even if the

[1] The Chapter I Prohibition is the domestic equivalent of Article 101 of the Treaty on the Functioning of the European Union. The Chapter II Prohibition is the domestic equivalent of Article 102 TFEU.

Regulator is not itself an undertaking, there are several other ways of engaging competition law: for example, it might be said that there is an agreement or concerted practice between Regulated Entities themselves and third parties; or that the Regulator is "an association of undertakings" within section 2 of the 1998 Act; or that the Regulated Entities enjoy a form of collective dominance.

15. The important point is that even where competition law is engaged, it is a defence to show that the agreement or conduct satisfies competition law standards of objective justification in the public interest and proportionality.

16. In relation to the Chapter I Prohibition, the defence takes the form of an exemption at section 9 of the 1998 Act:

> "**9. Exempt agreements**
>
> (1) An agreement is exempt from the Chapter I prohibition if it—
>
> (a) contributes to—
>
> (i) improving production or distribution, or
>
> (ii) promoting technical or economic progress,
>
> while allowing consumers a fair share of the resulting benefit; and
>
> (b) does not—
>
> (i) impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives; or
>
> (ii) afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.
>
> (2) In any proceedings in which it is alleged that the Chapter I prohibition is being or has been infringed by an agreement, any undertaking or association of undertakings claiming the benefit of subsection (1) shall bear the burden of proving that the conditions of that subsection are satisfied."

17. In relation to the Chapter II Prohibition, there is no statutory defence or exemption as such, but the case-law recognises that undertakings may avoid a

finding of abuse by demonstrating that the conduct has an objective justification.

18. As the incentive proposals develop further, PressBof will therefore subject them to close scrutiny for their compatibility with competition law. That will be done with the assistance of competition law experts.

19. The incentive proposals will only be taken further if they are compatible with competition law. Key considerations will include: (a) whether the potential effects on competition are objectively justified by the public benefits the proposals will bring; and (b) whether any restrictions are the least restrictive method of achieving the benefits.

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