IN THE LEVESON INQUIRY

CULTURE, PRACTICE AND ETHICS OF THE PRESS

MODULE 4

SUBMISSIONS ON BEHALF OF

PRESS STANDARDS BOARD OF FINANCE LIMITED

FOLLOWING EVIDENCE ON 9 JULY 2012

Introduction

1. These further submissions are made following the oral evidence of Lord Black to the Inquiry on 9 July 2012. They address points raised by Counsel to the Inquiry in discussion with Counsel for PressBof, as well as certain legal issues touched on in Lord Black's evidence.

Competition law: Public interest justification

2. Counsel to the Inquiry indicated that it would be of assistance to the Inquiry to set out in greater detail the manner in which public interest considerations may in principle provide a justification for agreements which would otherwise fall foul of the Chapter I Prohibition (or Article 101 TFEU)[1].

3. As set out in PressBof's submissions dated 6 July 2012, the Chapter I analysis essentially entails asking two questions:

   (a) whether the arrangement breaches section 2 of the Competition Act 1998 (Article 101(1) TFEU);

[1] As explained in PressBof's Submission of 6 July 2012, it is the Chapter I Prohibition which is most likely to be potentially engaged by the proposed incentive arrangements. However materially identical considerations would apply if the Chapter II Prohibition were also engaged.

(b) if so, whether the arrangement may be justified under section 9 of the Competition Act 1998 (Article 101(3) TFEU).

4. Public interest considerations have long been treated as relevant to the second of these two questions. However two recent European Court of Justice cases (Wouters and Meca-Medina), both concerning regulatory bodies, also establish that such considerations may be highly relevant to the first question. These cases establish that if (a) the context in which the restrictions in question are imposed is the legitimate objective of regulation of the organisation, qualifications or ethics of a profession or industry in the public interest; and (b) the the restriction of competition is "inherent" in the regulatory scheme then there will be no breach of competition law at all.

5. Case C-309/99 Wouters v Algemene Raad van de Nederlandse Orde van Advocaten [2002] E.C.R. I-1577 concerned a rule imposed by the Bar of the Netherlands prohibiting multi-disciplinary partnerships between barristers and accountants. The Court stated at [97]:

> "However, not every agreement between undertakings or any decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Article [101(1)] of the Treaty. For the purposes of application of that provision to a particular case, account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects. More particularly, account must be taken of its objectives, which are here connected with the need to make rules relating to organisation, qualifications, professional ethics, supervision and liability, in order to ensure that the ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience (see, to that effect, Case C-3/95 Reisebüro Broede [1996] ECR I-6511, paragraph 38). It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives."

6. The Court held that, in light of the legal framework and regulatory objectives, the prohibition did not infringe what is now Article 101(1) TFEU ([98]-[110]).

7. The Court of Justice followed the approach in Wouters in Case C-519/04 P Meca-Medina v Commission of the European Communities [2006] E.C.R. I-

6991, which concerned the anti-doping rules imposed by the International Olympic Committee. The Court held that the anti-doping rules did not infringe what is now Article 101(1) TFEU. It explained the rules' objectives at [43]:

> "the general objective of the rules was, as none of the parties disputes, to combat doping in order for competitive sport to be conducted fairly and that it included the need to safeguard equal chances for athletes, athletes' health, the integrity and objectivity of competitive sport and ethical values in sport."

8. In light of these cases, if any incentives introduced in order to ensure the take up of the proposed regulatory scheme are properly to be regarded as "inherent" in the regulatory scheme, then there is a strong case that the agreements entered in order to establish those incentives would not be in breach of Article 101(1) TFEU (or section 2 Competition Act 1998) at the first stage of the analysis.

9. If and to the extent that the arrangements for incentives in their final form are not to be regarded as "inherent" to the regulatory scheme, the question would then arise as to whether the arrangement may nonetheless be justified under Article 101(3) TFEU (or section 9 Competition Act 1998).

10. Case T-193/02 Piau v Commission of the European Communities [2005] E.C.R. II-209 concerned FIFA regulations governing football agents. The regulations required agents to be licensed and to comply with conditions imposed by FIFA or one of its national associations. The Court described the Commission's stance at [62]:

> "[…] the Commission submits that the amended regulations satisfy the conditions for an exemption laid down by Art.[101(3) TFEU]. The restrictions entailed, which are intended to raise ethical and professional standards, are proportionate. Competition is not eliminated. The very existence of regulations promotes a better operation of the market and therefore contributes to economic progress."

11. The Court upheld the Commission's decision ([100]-[104]).

12. Piau is therefore clear authority for the proposition that apparently anti-competitive restrictions imposed by a regulatory body in order to raise ethical and professional standards may be lawfully justified. In particular, such

measures may promote a better operation of the market and therefore contribute to economic progress within s.9(1)(a)(ii) Competition Act 1998.

13. As set out in PressBof's written submissions dated 6 July 2012, there is therefore no doubt that, as a matter of principle, the incentive proposals may be objectively justified by the public interest inherent in raising the professional and ethical standards of the press. Whether or not the proposals are in fact lawfully justified will entail an assessment of whether they are proportionate, including whether they are the least restrictive method of achieving the desired objectives.

14. Such an assessment will only be possible once the proposals are at a more detailed stage of development. However, the following observations may be made at this preliminary stage.

15. First, there are strong grounds for believing that a properly cast system of incentive agreements would be justified, and therefore lawful as a matter of competition law. There is plainly a very serious public interest in maintaining and raising the professional and ethical standards of journalism. The cases of Wouters, Meca-Medina, and Piau all show that this is to be regarded as a legitimate public interest for the purpose of a competition law analysis. Moreover the European Court has upheld contract based regulatory systems which were significantly more restrictive that the proposed incentive based system. The regulations at issue in Piau made it impossible for a football agent to trade in that sector at all without becoming licensed by FIFA or one of its associations. The regulations were, therefore, significantly more restrictive of competition than any of the incentive proposals, none of which seek to prohibit a publisher from publishing outside the scheme.

16. As regards the particular proposed incentives which have been proposed at this stage, one of the four - the provision of a kitemark - will not engage competition law issues at all. That incentive is self-evidently not restrictive of competition.

17. As regards the three other current incentive proposals, PressBof will only cooperate with other third parties in the adoption of those proposals if it is satisfied on the basis of empirical and/or expert evidence that a less restrictive

solution would not be effective to achieve the same objectives. For example, PressBof would consider whether instead of withholding Press Association copy or Press Cards from non-members, it would be an effective incentive for these to be made available at differential rates to members and non-members. Furthermore PressBof will only cooperate in the adoption of as many of the incentive proposals as it considers to be required to be adopted in order to achieve the objective of ensuring sufficiently widespread participation in the scheme.

18. Provided that careful attention is paid to the above matters, since the incentives adopted will be proportionate and the least restrictive method of achieving the desired objectives (broadly speaking, raising the professional and ethical standards of journalism), they will not infringe competition law.

Variations to the terms of contract

19. Lord Black stated in evidence that it is proposed that the contractual framework may be varied by majority decision. A question was raised as to whether this could work as a matter of contract.

20. The legal position in this regard is clear. The relevant provision in the proposed contract is clause 7:

> "The terms of the contract may be varied from time to time by agreement of the Regulated Entities. A variation to the contract does not require unanimous approval from all Regulated Entities and shall be considered incorporated where a majority agree to the variation."

21. It is well established, since at least Thellusson v Viscount Valentia [1907] 2 Ch 1, that such clauses are legally effective as a matter of English law. Indeed almost all contractually based regulatory schemes (for example Sports Governing Bodies), as well as clubs and other unincorporated associations operate on this basis.

Post-termination obligations

22. Another question which was raised during Lord Black's evidence was the position of Regulated Entities who decide to terminate their contract early. The issue was whether such Regulated Entities would remain subject to the regulatory jurisdiction after they had given notice of early termination of their contracts.

23. Again the legal position in this regard is clear. The proposed contract terms do not permit lawful early termination, save with the consent of the Regulator or the agreement of all Regulated Entities (Clause 10). Thus if a Regulated Entity purported to terminate early without any entitlement to do so, that purported termination would be ineffective unless accepted by the Regulator or all other Regulated Entities. Absent such acceptance, the Regulated Entity would remain a Regulated Entity.

24. Moreover the terms include express provision that Regulated Entities will continue to have certain contractual obligations even once they lawfully cease to be a Regulated Entity. Thus Clause 11.1 provides:

> "Notwithstanding clause 10 above, if an individual publisher ceases for any reason to be a Regulated Entity, the publisher shall continue to be liable for its acts and/or omissions whilst it was a Regulated Entity and the Regulator's powers shall continue to be enforceable against such former Regulated Entity in relation to such acts or omissions following termination."

25. It is well-recognised that separate and severable obligations such as Clause 10 will, if the parties so intend, survive termination of the contract: see Harbinger UK v GE Information Services [2000] 1 All E.R. (Comm) 166.

26. It follows that Regulated Entities will therefore remain subject to the Regulator's powers where they attempt unlawful termination of the Contract (as they will remain Regulated Entities) and even following lawful early termination of the contract.

The possible "Arbitral Arm"

27. The Inquiry was shown the diagram at Appendix 2 to Lord Black's Third Witness Statement. That diagram includes a box entitled "Arbitral Arm" which is surrounded by a dotted line.

28. Lord Black explained in evidence that the "Arbitral Arm" may arise in consequence of the Defamation Bill currently under parliamentary consideration. That prompted a discussion of why statutory provision might be necessary or appropriate for an "Arbitral Arm" but not otherwise.

29. The position in this regard is as follows:

    (a) One proposal under consideration as part of the Defamation Bill is that parties to defamation disputes will be forced to engage in some form of arbitration in order to provide a more effective and less costly way to resolve such disputes (as is now the case for certain construction disputes). Such a step would plainly require legislation as it would impose restrictions on the right of access to the courts for the resolution of legal disputes.

    (b) However this is a quite discrete area. It simply does not follow from the fact that for quite different reasons of public policy, legislation might be appropriate to create a bespoke form of dispute resolution for certain defamation disputes involving the adjudication of legal rights, that legislation might be also appropriate for regulation of the press, in relation to which there is no suggestion that a person's right to access the courts should be curtailed. The policy and legal considerations at issue are quite different.

Responsibilities of Trust Board

30. It was put to Lord Black that the only incentive the Trust Board would have to properly carry out its functions would be the risk of reputational harm.

31. In fact there are also substantial legal incentives.

32. The Trust Board would be subject to judicial review. If it failed to act when it should do under its constitution, it would be open to challenge, and could be compelled to act by Court order.

33. In addition, it would be open to other Regulated Entities to compel the Trust Board to act under the terms of their contracts.

34. Lastly, s.172(2) Companies Act 2006, which provides that a director of a company must act in the way he considers, in good faith, would be most likely to promote the company's purposes. The proposed objects of the company are set out at Article 5 of the proposed Articles of Association: they include, among other things, promoting and upholding the highest professional standards of journalism by promoting compliance with the Editors' Code of Practice. There can be no question but that the Trust Board would be bound to take decisions in good faith in pursuit of those objects.

Conclusion

35. This further submission seeks to assist the Inquiry further on the various legal matters which were identified during discussions between counsel and which arose during Lord Black's evidence. If there are any further legal matters on which the Inquiry would welcome assistance, PressBof is happy to provide it.

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