National newspapers

A review of undertakings relating to the supply of national newspapers in England and Wales (the Code of Practice)

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Note: [...] 

This report is published pursuant to section 4(4) of the Enterprise Act 2002. It has been edited for publication in accordance with Part 9 that Act. Among other things, this Part requires that the Office of Fair Trading has regard to the need for excluding from the published report, so far as is practicable, commercial information whose disclosure it thinks might significantly harm the legitimate business interests of the undertaking to which it relates.
EXECUTIVE SUMMARY

Introduction

This report presents the findings of a review of the undertakings\(^1\) which underpin the National Newspapers Code of Practice (the Code) and the advice of the OFT to the Secretary of State for Business, Enterprise and Regulatory Reform (SoS) in relation to those undertakings. The undertakings were given by 78\(^2\) national newspaper wholesalers following the 1993 report of the Monopolies and Mergers Commission (MMC) into the supply of national newspapers in England and Wales.\(^3\)

The OFT has a statutory duty to keep under review the carrying out of undertakings given under section 88 of the Fair Trading Act 1973 (the FTA73), such as those which underpin the Code, and from, time to time, to consider whether, by reason of any change of circumstances, an undertaking is no longer appropriate and either the relevant parties (or any of them) can be released from the undertaking or the undertaking needs to be varied, or superseded by a new undertaking. Where it appears to the OFT that any person can be released or that an undertaking has not been or is not being fulfilled, or needs to be varied or superseded, it is the duty of the OFT to give such advice to the SoS as it may think proper in the circumstances.\(^4\)

Background

Following a reference from the then Director General of Fair Trading (DGFT) in August 1992,\(^5\) the MMC investigated and reported on the supply of national newspapers in England and Wales in December 1993.

\(^{1}\) The full text of the undertakings and the Code are at Annexe A.

\(^{2}\) 76 parties, which were named in the MMC Report, were subject to statutory undertakings. Two other parties, which were not named in the MMC Report, gave voluntary undertakings that they would comply with the Code.

\(^{3}\) MMC 1993, The supply of national newspapers, A report on the supply of national newspapers in England and Wales. Cm 2422. This report can be found at: www.competition-commission.org.uk/rep_pub/reports/1993/345natnewspapers.htm#full. References to this report in footnotes of this summary are denoted by ‘MMC (1993)’.

\(^{4}\) Section 88(4) of the FTA73, which continues to apply in respect of the Code by virtue of schedule 24, paragraph 14 of the Enterprise Act 2002.

\(^{5}\) Under sections 9(1), 10(3), 10(4), 47(1), 49(1) and 50(1) of FTA73.
In its report, it identified practices by newspaper\(^6\) wholesalers which, in accordance with the statutory test,\(^7\) operated, or may be expected to have operated against the public interest:

- the refusal by the wholesalers to supply newspapers to new retail outlets where, in the wholesalers’ view, the area was already adequately served, reinforced by

- the imposition by the wholesalers of a condition that retailers granted supply of newspapers may sell only by retail and from their own retail outlets.\(^8\)

To remedy or prevent these adverse effects, each of the newspaper wholesalers then operating in England and Wales gave a statutory undertaking under the FTA73 to comply with the Code. In summary, the Code, which applies only in respect of newspapers in England and Wales, requires the wholesaler to supply newspapers to a new retail applicant, subject to that applicant accepting, in effect, a minimum value of newspapers (defined in terms of a Minimum Entry Level (MEL)). It also requires the wholesaler not to refuse supply to a retail outlet on the grounds that the retail outlet intends to sub-retail newspapers to another retail outlet, but imposes certain conditions on sub-retailing.\(^9\)

The OFT previously reviewed the Code on two occasions, in 1997 and 2002. On both occasions, it recommended that the Code should remain in place, although in 2002 it advised the SoS that a variation to the Code to remove some of the restrictions on sub-retailing was appropriate.\(^10\)

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\(^6\) Throughout this summary (except where doing so may lead to confusion) references to newspapers relate to national newspapers, which were defined by the MMC as: ‘newspapers...of general interest which one might usually expect to find on sale at most retail outlets in England and Wales’ (MMC (1993), paragraph 11.2).

\(^7\) Sections 49 and 54 of the FTA73.

\(^8\) MMC (1993), paragraphs 11.92 and 11.95.

\(^9\) Sub-retailing, under the Code, covers the situation in which a retailer sells or transfers newspapers to another retail outlet.

\(^10\) This recommendation was accepted by the Secretary of State for Trade and Industry, although it was not implemented due to industry uncertainty regarding the legal status of its distribution agreements (see paragraphs 1.21 to 1.26 for further information on this).
The present review (Code Review) has considered the continued appropriateness of the Code in remedying or preventing the adverse effects specified in the MMC’s report against the background of developments since the MMC reported. In conducting this review, the OFT has engaged extensively with stakeholders at each level of the newspaper supply chain, including individual parties and trade associations. This has involved meetings with a wide range of stakeholders and the consideration of various submissions and detailed responses to OFT questionnaires. The OFT has also visited a newspaper publisher, wholesaler and retailer to further its practical understanding of how the newspaper supply chain operates. The OFT values the constructive engagement it has had in this context with very many stakeholders.

The Code

Although, due to the ambit of the MMC’s findings, the Code formally applies only in respect of England and Wales, the Code is also applied on a voluntary basis in Scotland and Northern Ireland. Compliance with the Code is reinforced by its incorporation into agreements between industry parties.

The OFT has not found any instances of non-compliance with the Code in the present review.

The OFT has found that the practice of wholesaler refusal to supply new retail outlets on the grounds that an area is already adequately served no longer occurs. Many parties have submitted that the Code has been important in remedying or preventing refusal to supply, and was particularly important in doing so immediately following its implementation in 1994. However, parties have expressed mixed views as to its recent effectiveness.

The OFT’s analysis of the effectiveness of the MEL, the primary mechanism in the Code designed to remedy or prevent refusal to supply, indicates that the MEL does not appear to be a key determinant of whether retail outlets are supplied with newspapers, as demonstrated by the lack of evidence that differences in the level of the MEL in different geographical areas have a significant impact on whether retail outlets are supplied. In addition, a significant minority of retail outlets are
supplied with newspapers despite selling newspapers at below the MEL in the area in which they are located.

Further, although the Code appears to have facilitated sub-retailing, the incidence of sub-retailing is very limited. This is likely to reflect the limited financial incentives for retailers to provide sub-retailing services, as well as the practical difficulties for retailers in facilitating the provision of newspapers to sub-retailers.

Changes of circumstances

Refusal to supply

Since the MMC reported, there have been numerous significant changes of circumstances, affecting the publishing, wholesaling and retailing of national newspapers. The OFT considers that three of the changes have impacted on the continued appropriateness of the Code in remedying or preventing the specific adverse effects specified by the MMC. These are the:

• changes in the level of Carriage Service Charges (CSCs)

• changes in the role of publishers in the newspaper supply chain, in particular their increased role in specifying and monitoring the performance of wholesalers regarding the provision of services to retailers and in facilitating supply to new retail outlets directly, and

• changes in the composition and relative prominence of different types of retail outlets, particularly the growth of the significance of multiple retailers in newspaper retailing.

These changes of circumstances are summarised below.

Changes in the level of CSCs

Since 1993, there have been significant changes in the level of CSCs paid by retailers to wholesalers such that they represent a more important source of revenue for wholesalers now. The OFT has identified three specific ways in which these changes have provided wholesalers with greater commercial incentives to supply new retail outlets. These are that:
• The changes to the level of the CSCs, particularly the significant growth in the minimum CSC levels, provides wholesalers with a significantly increased minimum amount of revenue from supplying new retail outlets than was the case in 1993.

• CSCs also now account for a significant proportion of the revenue gained by wholesalers from supplying retailers (as much as 80 per cent on retail outlets at lower MEL levels).

• CSCs now recover a significantly greater proportion of wholesaler distribution costs than was the case in 1993.

These changes provide wholesalers with stronger commercial incentives to supply to new retail outlets than existed at the time the MMC reported and means that refusal to supply new retailers is unlikely to emerge in the future. It is important to note that because the overall structure of CSCs charged by wholesalers is the same between different types of retail outlet, this change is relevant to supply to all retailer outlet types. However, it is particularly relevant to the supply of smaller retail outlets given that CSCs account for a greater proportion of wholesaler revenue obtained from supplying those retail outlets, compared to larger retail outlets.

Changes in the role of publishers in the newspaper supply chain

Since the MMC reported in 1993, the increased role of publishers in imposing and monitoring obligations relating to service to retailers on their wholesalers has provided a mechanism to prevent the re-emergence of wholesalers refusing to supply new retail outlets. In addition, the increased frequency of publishers facilitating supply to new types of retail outlet directly provides an alternative mechanism of supply to new retail outlets which might otherwise have been refused supply by a wholesaler.

The OFT considers that this change of circumstances works to ensure supply to a wide range of different types of retail outlets, as publishers have incentives to ensure supply of their titles to a wide range of different types of retail outlets to increase availability of their titles in order to increase circulation and maximise profits from both copy sales
and advertising. In this context, the particular significance of home news delivery (HND) to many publishers, in terms of maintaining newspaper circulation is relevant. The significant role played by smaller retailers in the provision of HND means that publishers have particular incentives to impose obligations on wholesalers to supply small new retail outlets in the future.

Changes in the composition and relative prominence of different types of retail outlets

The increased importance of multiple retailers in retailing newspapers, such that they now account for over 40 per cent of newspaper sales and the majority of new entrants, mean that these types of retailers are an important source of revenue for newspaper publishers and wholesalers. In addition, the ability of larger multiple retailers (such as supermarkets) to engage with publishers and wholesalers, as they already do on a wide range of issues relating to newspaper supplies, enables the multiple retailers to take action themselves, if required, to ensure continued access to newspaper supplies and to remedy or prevent the re-emergence of issues regarding refusal to supply. Unlike the two changes of circumstances identified above, which apply across a range different types of retailer, this change of circumstances is only likely to be relevant to continued supply to larger multiple retailers.

Conclusions on refusal to supply

The OFT considers that these changes of circumstances both create stronger incentives for wholesalers to supply new retail outlets, and also enable both publishers and certain retailers to engage more effectively with wholesalers to enable new retail outlets to obtain supplies of newspapers. This means that the practice of refusal to supply new outlets on the grounds that an area is already adequately served, that was specified by the MMC, is unlikely to re-emerge in the future in the absence of the Code. The OFT, therefore, considers that the Code is no longer appropriate to remedy or prevent the adverse effects specified by the MMC.

\[11\] Including multiple supermarkets, multiple convenience stores, multiple newsagents and multiple petrol forecourt retailers.
Sub-retailing

The changes of circumstances which are relevant to remedying or preventing refusal to supply, mean that new retail outlets will be able to obtain supplies directly from wholesalers, meaning that sub-retailing arrangements are no longer necessary to ensure the availability of newspapers to consumers. The OFT, therefore, considers that the changes of circumstances which relate to refusal to supply new outlets, also mean that the Code is no longer appropriate to remedy or prevent the adverse effects specified by the MMC in relation to sub-retailing.

Advice and conclusions

The OFT has concluded that the changes of circumstances identified in this review mean that the Code is no longer appropriate to remedy or prevent the specific adverse effects specified by the MMC. The OFT, therefore, advises the SoS that those parties which gave undertakings to comply with the Code can be released from them and the Code in its entirety.

The OFT recognises that these conclusions differ from those identified in the Code Review in 2002 (2002 Code Review). This reflects further significant changes in the newspaper supply chain since 2002, particularly the increased evidence of publishers imposing and monitoring requirements upon wholesalers relating to service to retailers, as well as the continuation of developments in CSCs and the increasing role of multiple retailers, which were identified at the time of 2002 Code Review. In addition, the progression of this Code Review, alongside the Opinion and the consideration of the request for a market investigation reference has allowed the OFT to take a holistic view of the supply chain for newspaper (and magazines) and to gain a more detailed perspective on its operation. It has also enabled access to a wider evidential base than was the case in 2002.

The OFT notes the desire on the part of some industry parties to agree some form of new code of conduct in relation to the supply of newspapers (and magazines) which could include mechanisms to ensure continued access to newspaper supplies for new (as well as existing) retail outlets. Appropriate steps towards self-regulation that would improve the distribution of newspapers and address any issues in the
newspaper (and magazines) supply chain(s) that are of concern and/or may raise competition concerns would be welcome, provided of course any such steps comply with competition law.

Alongside this document, the OFT has also published a paper setting out an introductory overview of the newspaper and magazine supply chains. This paper is supplementary to, and does not form any part of, this Code advice but may be of assistance to those less familiar with the industry. The OFT’s Opinion and proposed decision on an MIR, which are published alongside this Code advice, may also provide useful further background.
1 INTRODUCTION

Background

1.1 This report presents the findings of a review of the undertakings which underpin the National Newspapers Code of Practice (the Code) and the advice of the OFT to the Secretary of State for Business, Enterprise and Regulatory Reform (SoS) in relation to those undertakings. The undertakings were given by 78 newspaper wholesalers following the 1993 report of the Monopolies and Mergers Commission (MMC) into the supply of newspapers in England and Wales.

1.2 The OFT has a statutory duty to keep under review the carrying out of undertakings given under section 88 of the Fair Trading Act 1973 (FTA73), such as those which underpin the Code, and, from time to time, to consider whether, by reason of any change of circumstances, an undertaking is no longer appropriate and either the relevant parties (or any of them) can be released from the undertaking or the undertaking needs to be varied, or superseded by a new undertaking. Where it appears to the OFT that any person can be released or that an undertaking has not been or is not being fulfilled, or needs to be varied

12 The full text of the undertakings and the Code are at Annexe A.
13 In the remainder of this report, unless stated to the contrary, reference to ‘the Code’ includes the undertakings, as the undertakings require newspaper wholesalers to comply with the Code.
14 76 parties, which were named in the MMC Report, were subject to statutory undertakings. Two other parties, which were not named in the MMC Report, gave voluntary undertakings that they would comply with the Code.
15 Throughout this report (except where doing so may lead to confusion) references to newspapers relate to national newspapers, which were defined by the MMC as: ‘newspapers...of general interest which one might usually expect to find on sale at most retail outlets in England and Wales’ (MMC Report, paragraph 11.2).
16 The functions of the MMC were transferred to the Competition Commission from 1 April 1999, pursuant to section 45 of the Competition Act 1998.
17 MMC 1993, The supply of national newspapers, A report on the supply of national newspapers in England and Wales. Cm 2422. This report can be found at: www.competition-commission.org.uk/rep_pub/reports/1993/345natnewspapers.htm#full. References to this report in footnotes in the remainder of this document are denoted by 'MMC (1993)'.

or superseded, it is the duty of the OFT to give such advice to the SoS as it may think proper in the circumstances.18

1.3 On 31 May 2006, the OFT announced a review of the Code (the Code Review), alongside the publication, for consultation, of a draft Opinion that set out a framework for self-assessment by newspaper and magazine publishers and distributors of the compatibility of their newspaper and magazine distribution agreements (the Agreements) with competition law.19

**The MMC Report in 1993**20

1.4 In August 1992, the then Director General of Fair Trading (DGFT)21 referred the supply of newspapers in England and Wales, by both publishers and wholesalers, to the MMC.22 The MMC reported on this reference in December 1993. Although the MMC’s terms of reference were limited to national newspapers in England and Wales, in recognition that these newspapers (including some regional newspapers) and magazines were delivered by the same wholesalers, through the same network, and with common arrangements for returns and carriage charges, the MMC also considered the 'possible impact' of its findings on magazine and regional newspaper distribution arrangements.23

1.5 The MMC Report was published in December 1993 related to the supply of newspapers by both publishers and wholesalers. The MMC did not

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18 Section 88(4) of the FTA73, which continues to apply in respect of the Code by virtue of schedule 24, paragraph 14 of the Enterprise Act 2002.
20 Prior to its report in 1993, the MMC had reported on wholesalers refusing to supply newspapers in 1970 and 1978, and the OFT did so in 1986. A summary the findings of these reports can be found in MMC (1993), chapter 2.
21 Pursuant to section 2 of the Enterprise Act 2002, and with effect from 1 April 2003, the functions of the DGFT were transferred to the OFT and the Office of the DGFT was abolished.
22 The terms of reference for the MMC investigation can be found at Appendix 1.1 of MMC (1993).
23 MMC (1993), paragraph 11.47.
find any facts which operated, or may be expected to have operated, against the public interest in relation to the supply of newspapers by publishers.\textsuperscript{24}

**Newspaper supply by wholesalers**

1.6 The MMC identified two wholesaler practices both of which it found operated, or may be expected to have operated against the public interest:

- the refusal by the wholesalers to supply newspapers to new retail outlets where, in the wholesalers’ view, the area was adequately served, reinforced by

- the imposition by the wholesalers of a condition that retailers granted supply of newspapers may sell only by retail and from their own retail outlets.\textsuperscript{25}

**Refusal to supply**

1.7 The MMC found that some 60 per cent of applications for supplies of newspapers by new retail applicants were refused on the grounds that the area from which the supply application came was, in the wholesalers’ view, already adequately served. In the context of the investigation, both wholesalers and publishers justified this system on the grounds that granting supply to new retail outlets would fragment sales to the detriment of traditional newsagents, which offered early opening hours and home news delivery (HND). They argued that this would lead to a reduction in availability and a decline in sales.\textsuperscript{26}

1.8 The MMC found that refusing to supply new retail outlets on these grounds had the following adverse effects:

\textsuperscript{24} MMC (1993), paragraph 11.74.
\textsuperscript{25} MMC (1993), paragraphs 11.92 and 11.95.
\textsuperscript{26} MMC (1993), paragraphs 11.76 to 11.81.
• the protection of inefficient retailers in the absence of the 'spur of competition'

• a lower level of availability and service than would exist in circumstances where restrictions on supply were removed, and

• a slow response to changes in demand and restricted opportunities to offer consumers improved convenience and innovative sales methods.27

1.9 The MMC concluded that the refusal to supply new outlets on the grounds that an area was already adequately served was an uncompetitive practice which operated, or may be expected to have operated, against the public interest.28 It is important to note that the factual basis of the MMC’s findings related specifically to the supply of newspapers to new outlets. The MMC noted that wholesalers 'almost never' withdrew supplies of newspapers from existing outlets.29

Restrictions on selling (sub-retailing)

1.10 The MMC identified that, when supply was granted to retail outlets, wholesalers imposed a condition that retailers may sell by retail only and only from the designated outlet to which supplies were delivered, unless the wholesaler gave consent to some other arrangement. This prevented a retailer from transferring newspapers between outlets, or providing sub-retailing services, whereby it might supply other retailers with newspapers for resale.30

1.11 The MMC concluded that this condition was primarily designed to reinforce the wholesaler practice of refusal to supply and ensure that it was not circumvented.31 It found that the restriction on sub-retailing

27 MMC (1993), paragraphs 11.79 and 11.92.
28 MMC (1993), paragraph 11.92.
29 MMC (1993), paragraph 6.16.
30 MMC (1993), paragraph 4.67.
31 MMC (1993), paragraph 11.93.
prevented retailers from responding to local variations in demand, for example by moving supplies into neighbouring outlets open at later hours, or transferring them between different outlets to take account of local variations in demand. The MMC concluded that such restrictions operated, or may be expected to have operated, against the public interest.32

The MMC's proposed remedy and the Code

1.12 The MMC’s proposal to remedy or prevent these concerns was to give retailers the right to move newspapers between outlets and the freedom to retail to sub-retailers. It concluded that this would allow retailers more flexibility in responding to changes in local demand and permit those retailers refused supply to make arrangements with a local newsagent to receive or collect supplies.33 The MMC concluded that this proposed remedy was a 'useful, if not complete, answer'34 to the adverse effects it specified.

1.13 Following the MMC Report, the then DGFT recommended to the then Secretary of State for Trade and Industry that wholesalers should be prohibited from refusing to supply new retail outlets on the grounds that the area was already adequately served. The Secretary of State for Trade and Industry accepted this advice and announced his intention to make an order under the FTA73 to give effect to this. However, he also gave industry an opportunity to come forward with remedies of its own as an alternative to an order.35

1.14 The industry took up this opportunity and 76 wholesalers signed a statutory undertaking, effective from 1 October 1994, to comply with

32 MMC (1993), paragraph 11.95.
33 MMC (1993), paragraph 11.117.
34 MMC (1993), paragraph 11.121.
an industry code of practice. The Code includes the following central features:

- It obliges wholesalers to supply newspapers to new retail applicants who apply to be supplied and who agree to a guaranteed minimum net weekly charge from a wholesaler set at the MEL published by the wholesaler.

- It prohibits wholesalers from refusing to supply a retailer on the grounds that the retailer intends to sell or transfer newspapers to another retail outlet (known as a 'sub-retailer'), but imposes a number of conditions which apply to sub-retailing, including:
  - retailers with less than 18 months newspaper trading will not be allowed to sub-retail supplies other than at the wholesaler’s discretion
  - the retailer and the sub-retailer will not be permitted to sell or transfer newspapers to locations outside the wholesaler’s area of operation as defined by the newspaper’s publisher
  - sub-retailing is only understood to be appropriate within specified distances of the supplying retailer’s premises (500 metres for central urban areas and one kilometre for other areas), although the wholesaler has discretion to extend these distances, and

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36 DTI Press Notice P/94/591, 5 October 1994, Neil Hamilton announces implementation of industry code of practice on the supply of national newspapers. Two other parties signed voluntary undertakings to comply with the Code.

37 The undertakings and the Code are reproduced at Annexe A.

38 Section 2 of the Code. The MEL was defined as being half of the average value of the newspapers invoiced weekly to all existing retailers in the wholesaler’s area, calculated as the average weekly newspaper invoice value for the six months ending 31 March 1994. Only those newspapers which the wholesaler was capable of supplying to the applicant was included in the calculation. A MEL was calculated for each wholesale territory. The existing MELs currently vary between the lowest MEL in one territory of £90 and over £418 in another territory.

39 Section 6 of the Code.
- retailers shall have the freedom to supply sub-retailers only up to the MEL value.

- It reinforces territorial exclusivity for the wholesaler by prohibiting the wholesaler from accepting an application for supply from outside its territory and by prohibiting the retailer and sub-retailer from selling or transferring newspapers to locations outside the wholesaler's territory. 40

1.15 In keeping with the MMC's terms of reference, under the statutory framework, the Code only applies to the supply of national newspapers (not regional newspapers or magazines) in England and Wales. However, wholesalers signing the statutory undertaking also agreed to apply the Code's terms, on a voluntary basis, to the supply of newspapers in Scotland and Northern Ireland. 41

Reviews of the Code

1.16 Since the Code was implemented, two Code Reviews have been undertaken by the OFT, in 1997 and 2002.

1.17 Following the first Code Review, 42 the OFT recommended that the Code should be left unchanged. 43 The review noted a rapid rise in the number of retail outlets since 1994 and concluded that the Code appeared to

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40 Paragraphs 1.3 and 6.3 of the Code. In effect, 1.3 prohibits so-called 'passive sales' by one wholesaler into the territory of another wholesaler (each territory having been defined by the newspaper's publisher or distributor) and 6.3 prevents this prohibition from being circumvented via the retailer or sub-retailer. The combined effect of these provisions with the territorial exclusivity granted by the Agreements between publisher and wholesaler is that, for the duration of that contract, the wholesaler enjoys absolute territorial protection in respect of its area of operation.


42 OFT (1997), Review of the Industry Code of Practice for the Supply of Newspapers. References to this report in footnotes in the remainder of this document are denoted by 'OFT (1997)'.

43 The Secretary of State for Trade and Industry accepted the recommendation that the Code should be left unchanged. See DTI press release of 26 September 1997, P/97/600.
have been 'successful in its principal aim of opening up the market'. It also concluded that some sub-retailers experienced difficulties in finding retailers willing to provide them with newspaper titles and noted a lack of awareness of the opportunities for sub-retailing.\(^{44}\) The OFT encouraged wholesalers to make full use of their discretion to allow sub-retailing beyond the specified distance restrictions set out in the Code.

1.18 The OFT's Code Review in 2002 (the 2002 Code Review) concluded that the Code had resulted in an increase in the number of retail outlets selling newspapers, suggesting that overall availability had improved.\(^ {45}\) It also found that there had been several changes and developments in the industry since the Code was implemented.\(^ {46}\) These included:

- a decline in newspaper circulation
- a recent increase in the monitoring of wholesaler service provision to retailers through joint industry service agreements
- increased concentration amongst wholesalers, as the number of independent wholesalers declined
- a marked rise in Carriage Service Charges (CSCs) imposed on retailers and some evidence that wholesaler service quality appeared to have fallen
- changes to the composition of retail outlets – fewer confectioners, tobacconists and newsagents (CTNs) and more grocery chains and petrol stations, and
- a decline in HND.

\(^{44}\) OFT (1997), paragraphs 1.37 to 1.39.

\(^{45}\) OFT (2002), \textit{OFT review of undertakings given by newspaper wholesalers}, December 2002, at paragraph 1.9. References to this report in footnotes in the remainder of this document are denoted by 'OFT (2002)'.

\(^{46}\) OFT (2002), paragraph 5.3.
1.19 The 2002 Code Review concluded that the Code had performed well in remedying or preventing refusal to supply. However, in respect of sub-retailing, it concluded that sub-retailing did not appear to have developed significantly, largely as a result of the restrictions in the Code.  

1.20 Following a period of consultation, the OFT advised the Secretary of State for Trade and Industry in October 2003 that a variation to the Code to remove all distance, temporal and quantitative restrictions on sub-retailing within exclusive territories would better address the adverse effect on sub-retailing specified by the MMC. It considered that this variation would provide more choice for retailers and scope for innovation in distribution. This advice was accepted. In the light of concerns regarding uncertainty around the legal status of their distribution agreements, some wholesalers indicated a reluctance to agree to the variation of the Code until the uncertainty around the legality of the Agreements was resolved.

The Opinion and the request for a Market Investigation Reference (MIR)

The Opinion

1.21 Further information on the background to the opinion process is available in the OFT’s Opinion document. The following section considers the Opinion in so far as it relates to the Code.

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47 OFT (2002), paragraphs 7.10 to 7.12.
49 OFT (2003), paragraphs 14 and 16 to 19.
1.22 Until 1 May 2005, the Agreements benefited from an exclusion from scrutiny under the Chapter I prohibition of the Competition Act 1998 (CA98), which prohibits anti-competitive agreements, by virtue of the Vertical Agreements Exclusion Order (VAEO). On 17 June 2003, the Department of Trade and Industry (DTI) proposed that the VAEO should be repealed in the light of the 'modernisation' of the rules relating to enforcement of competition law. The decision to repeal the VAEO was confirmed on 1 March 2004, to take effect on 1 May 2005.

1.23 Publishers, distributors and wholesalers within the newspaper and magazine industry in the UK expressed concern about the repeal of the VAEO, as it meant that the Agreements would cease to be automatically excluded from the scope of the Chapter I prohibition of the CA98. They also expressed concern that the Agreements in their current form would not be protected by the EC block exemption for vertical agreements because they contain restrictions giving the appointed wholesaler absolute territorial protection (ATP).

1.24 On 7 May 2004, a group of publishers, distributors and wholesalers known as the Block Exemption Initiative made a submission to the OFT putting forward its case as to why the OFT should recommend to the DTI that it grant an industry-specific block exemption under section 6 of the CA98 to remove the Agreements from the scope of the Chapter I

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52 On 1 May 2004, Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (2003) OJ L1/1 (the 'Modernisation Regulation') came into force. The Modernisation Regulation substantially changed the framework for enforcement of European competition law. For further information on the changes introduced by the Modernisation Regulation, see the OFT guideline 442 Modernisation (December 2004).
53 Commission Regulation (EC) No. 2790/1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices (1999) OJ L336/21. Where an agreement satisfies all of the conditions provided for by an EC block exemption regulation, the prohibition in Article 81(1) EC of anti-competitive agreements that may affect inter-state trade – on which the prohibition in section 2 of the CA98 is closely modelled – is automatically disapplied, and by virtue of section 10 of the CA98, the agreement also benefits from a so-called ‘parallel exemption’ from the Chapter I prohibition.
prohibition. The request for a block exemption was subsequently followed by a request that, should the OFT decline to recommend such a block exemption, it should issue an Opinion instead. Given the circumstances of the case, the OFT considered it appropriate to provide guidance to the industry in the form of an Opinion. As indicated above, in the light of concerns regarding uncertainty around the legal status of their distribution agreements, some wholesalers indicated a reluctance to agree to the variation of the Code until the uncertainty around the legality of the Agreements was resolved.

1.25 The OFT published a draft Opinion for consultation in May 2005. Having taken account of the points raised in responses to that consultation, the OFT published a revised draft Opinion for consultation in May 2006. In issuing the second draft Opinion, the OFT announced that, in recognition of the overlap between that draft Opinion and aspects of the Code, it would undertake a review of the Code.

1.26 The Opinion is published alongside this document and reference should be made to that document for the guidance that it provides.

The MIR

1.27 In December 2006, the National Federation of Retail Newsagents (NFRN) submitted a formal request to the OFT for it to consider whether to make a market investigation reference (MIR) to the Competition Commission (CC) in relation to the supply of newspapers and magazines in the UK under section 131 of the Enterprise Act 2002, or to accept undertakings in lieu of a reference under section 154 of the Enterprise Act 2002 (MIR request). The NFRN’s main concern was the degree to which publishers controlled the distribution of newspapers and magazines in the UK. This, it submitted, required the OFT to undertake a wide-ranging examination of the newspaper and magazine supply chains under the MIR reference test, in addition to its work on the Opinion and the Code Review. In its request, the NFRN highlighted a number of features which it considered prevented, restricted or distorted competition, including ATP which is the focus of the Opinion.
The OFT's proposed decision on an MIR (the MIR proposed decision) is published alongside this document and reference should be made to the MIR proposed decision for further detail on the matters on which the OFT is consulting.

The interrelationship between the Code, Opinion and MIR

The OFT's work on the Opinion, Code Review and request for an MIR, have differing central focuses in terms of the product and supply chains and geographical scope. In addition, each work-strand is undertaken under a separate and distinct legal framework. However, in recognition of the close links between the three work-strands, and the overlap between some of the underlying issues raised, the OFT has approached the three work-strands holistically. In so far as it is relevant, information received and analysis conducted in relation to one work-strand has been shared with the others. This has reduced the burdens of information provision for stakeholders and ensured consistency and coherence across the three distinct areas of work.

Approach, methodology and legal framework

In conducting this Code Review, the OFT has engaged extensively with stakeholders at each level of the newspaper supply chain, including individual parties and trade associations. This has involved meetings with a wide range of stakeholders and the consideration of various submissions and detailed responses to the OFT's questionnaires. The OFT has also visited a newspaper publisher, wholesaler and retailer to further its practical understanding of how the newspaper supply chain operates.

54 The Code Review relates to the supply of national newspapers in England and Wales, whereas the Opinion and request for an MIR relate to the supply of newspapers and magazines throughout the United Kingdom. In summary, the Code focuses upon the wholesaler to retailer relationship, the Opinion focuses upon the publisher to wholesaler relationship and the request for an MIR considers the operation of the whole supply chain.

55 The OFT provided questionnaires to a wide range of industry parties at the start of the review, followed by more detailed questionnaires on certain key issues as the review progressed.
operates. The OFT values the constructive engagement it has had in this context with very many stakeholders. As a result, the Code Review has been able to draw on a wide evidential base.

1.31 The progression of the Code Review, alongside the Opinion and the consideration of the request for a market investigation reference has allowed the OFT to take a holistic view of the supply chain for newspaper (and magazines) and to gain a more detailed perspective on their operation. It has also enabled access to a wider evidential base than was the case in 2002.

1.32 When conducting a review of undertakings under FTA73, the OFT is limited to assessing whether the undertakings remain appropriate, in the light of any changes of circumstances, to remedy or prevent the specific adverse effects which the MMC specified, on the basis of the facts found by the MMC.

1.33 This means that the present Code Review has considered only the specific type of refusal to supply practice specified by the MMC, that is refusal to supply new retail outlets on the grounds that, in the wholesaler’s view, an area is already adequately served. Since the Code was given in the form of undertakings to remedy or prevent the adverse effects which the MMC specified in its report, on the basis of the facts found by the MMC, the present Code Review cannot consider, and has not considered, whether the Code is appropriate to remedy or prevent any other type of refusal to supply.

1.34 This report focuses upon the newspaper wholesaling sector because the MMC’s specific adverse effects related to newspaper wholesaler

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56 These visits were at the invitation of the parties.
57 The FTA73 statutory framework is that the MMC, in its report (following a reference under s.49 FTA73), established the facts which it found operated or might be expected to operate against the public interest. The OFT’s advice on the appropriateness of an undertaking and its variation/release must also be given in the light of these facts. In R v Secretary of State for Trade and Industry, ex parte Thomson Holidays [1999] All ER 1397, the Court of Appeal held that under s56(2) the SoS was entitled ‘only to take action...on the basis of the facts established by the MMC pursuant to s49’.
practices. However, in order to understand fully the overall context in which the OFT would report on its assessment, the OFT has also examined other relevant aspects of newspaper publishing and retailing, in recognition of the close links between different levels of the newspaper supply chain. In addition, and consistent with the MMC’s approach in 1993, the OFT has also examined relevant aspects of magazine and regional newspaper distribution, to understand the context in which national newspaper distribution operates.

1.35 Alongside this document, the OFT has also published a paper setting out an introductory overview of the newspaper and magazine supply chains. This paper is supplementary to, and does not form any part of, this Code advice but may be of assistance to those less familiar with the industry. The OFT’s Opinion and proposed decision on an MIR, which are published alongside this Code advice, may also provide useful further background.

Structure of the report

1.36 The remainder of this report is structured as follows:

- **Chapter 2** sets out the OFT’s findings on compliance with the Code and its effectiveness in remedying or preventing the adverse effects specified in the MMC’s report.

- **Chapter 3** outlines developments in the supply of newspapers since the MMC reported in 1993, focusing on developments most relevant to the Code.

- **Chapter 4** considers the changes of circumstances since the MMC reported in 1993 and their impact on the Code’s continued appropriateness.

- **Chapter 5** sets out the conclusions of this Code Review, including the OFT’s advice to the SoS.

- Further details on the Code and the OFT’s analysis can be found in the annexes.
2 COMPLIANCE WITH THE CODE AND THE EFFECTIVENESS OF THE CODE

Introduction

2.1 This chapter sets out the OFT's findings on compliance with the Code and its effectiveness in remedying or preventing the adverse effects specified in the MMC's report.

2.2 In summary, although, due to the ambit of the MMC's findings the Code formally applies only in respect of England and Wales, the Code is also applied on a voluntary basis in Scotland and Northern Ireland. Compliance with the Code is reinforced by its incorporation into the Agreements between industry parties.

2.3 The OFT has not found any instances of non-compliance with the Code in the present Code Review.

2.4 As to the effectiveness of the Code in remedying or preventing the refusal to supply practice specified, the OFT has not found evidence that wholesalers are refusing to supply new outlets on the grounds that an area is already adequately served. Many parties have submitted that the Code was important in remedying or preventing refusal to supply, and was particularly important in doing so following its implementation in 1994. Parties have expressed mixed views as to its recent effectiveness.

2.5 The OFT's analysis of the effectiveness of the MEL, the primary mechanism in the Code designed to remedy or prevent refusal to supply, indicates that the MEL does not appear to be a key determinant of whether retail outlets are supplied with newspapers, as demonstrated by the lack of evidence that differences in the level of the MEL in different geographical areas have a significant impact on whether retail outlets are supplied. In addition, a small, but significant, proportion of retail outlets are supplied with newspapers despite selling newspapers at below the MEL in the area in which they are located.
2.6 As regards sub-retailing, the OFT notes that although the Code has facilitated sub-retailing, the incidence of sub-retailing remains very limited indeed. However, this does not indicate that the Code itself has been ineffective in enabling existing retailers to provide sub-retailing services. Indeed, there would appear to be other factors, such as the limited financial incentive for sub-retailing and the practical difficulties associated with providing sub-retailing services that are likely to have contributed to the limited incidence of sub-retailing.

Compliance with the Code

2.7 In order to assess compliance with the Code, both relating to refusal to supply and any restrictions on sub-retailing, the OFT has considered the following issues:

- the extent to which the Code is included in agreements between parties, and
- the views of parties, including the incidence of retailer complaints of non-compliance.

Incorporation of the Code provisions into the agreements between parties

2.8 The evidence provided to the OFT indicates that all publishers are aware of the existence and content of the Code, and generally enshrine its provisions in their Agreements with wholesalers. The Newspaper Publishers' Association (NPA), for example, has informed the OFT that 'typically, reference to the Code is made in individual publisher contracts.'

2.9 In addition to their incorporation into the Agreements, Code provisions are incorporated into wholesalers’ terms and conditions of supply to

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58 NPA submission to the OFT, 20 October 2006.
retailers. Each of the three multiple wholesalers\textsuperscript{59} has provided a copy of current and historic terms and conditions of supply to retailers to the OFT as part of this Code Review. These all refer to the wholesalers’ obligations under the Code.

2.10 Although inclusion or otherwise of Code provisions in contracts is not of itself evidence of actual compliance, the OFT considers that the wide extent to which Code provisions are enshrined in contracts between industry parties at each level of the newspaper supply chain will have facilitated a general compliance culture.

**Views of parties**

2.11 The OFT has considered the views of parties across the newspaper supply chain on compliance with the Code. Parties typically provided more comments on compliance with the refusal to supply sections of the Code, rather than the sub-retailing sections, reflecting the primary focus of the Code in remedying or preventing refusal to supply.

2.12 The NPA noted that there had been very few retailer complaints about refusal to supply by wholesalers since the Code came into force.\textsuperscript{60} This has been confirmed by other individual publishers which submitted that they were unaware of instances of refusal to supply since the Code was put in place.

2.13 Wholesalers have made similar observations. The Association of Newspaper and Magazine Wholesalers (ANMW) has submitted that applications for supply are assessed entirely on the basis of the Code, noting that 'if the prospective news retailer agrees to the MEL … they will be granted supplies'.\textsuperscript{61} Multiple wholesalers have confirmed this and have provided details of their internal processes to ensure compliance with the MEL, including details of procedures to ensure that a retailer

\textsuperscript{59} The OFT has not received copies of the terms and conditions applied by independent wholesalers.

\textsuperscript{60} NPA submission to the OFT, 20 October 2006.

\textsuperscript{61} ANMW submission to the OFT, 20 October 2006.
which has sustained an order in excess of the MEL for six months is provided with sale or return (SoR) facilities.  

2.14 In addition to compliance with the Code in England and Wales, the OFT has been informed by Menzies Distribution that it also complies with the Code in relation to the treatment of applications for supply in Scotland and Northern Ireland.

2.15 A wide variety of retailers confirmed to the OFT that wholesalers have complied with the Code in how they treat applications for supply. The NFRN has expressed concerns about wholesalers waiving the MEL for certain types of retailers (such as convenience stores), but has acknowledged that it is '...not aware of any retailer which is prepared to accept the terms of the Code being denied supply.'

2.16 The Association of News Retailing (ANR) has submitted that its members do not understand the basis of MEL calculations and that wholesalers apply the MEL in differing ways. However, it has noted that: 'No member that reached the MEL limit has had supplies rejected and that no retailers have been 'directly prevented' from sub-retailing newspapers within the framework set out in the Code.

2.17 The Code also requires wholesalers to have a published appeals procedure regarding applications for supply. The ANMW has submitted that this appeals process is not used, a point which has been confirmed by retailer representatives. The OFT has received no complaints since the 2002 Code Review from retailers to indicate that wholesalers are

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62 In line with paragraph 2.4 of the Code.
63 Pursuant to paragraph 2.4 of the Code, wholesalers have an (unlimited) discretion to supply below the MEL.
64 NFRN submission to the OFT, 20 October 2006.
65 ANR submission to the OFT, 20 October 2006.
66 NERA Economic Consulting, 6 October 2006, Review of the Newspaper Code, A report for the ANR.
67 Code, paragraph 7.1.
68 ANMW submission to the OFT, 20 October 2006.
Conclusions on compliance with the Code

2.18 The OFT considers that the wide extent to which Code provisions are enshrined in contracts between industry parties at each level of the newspaper supply chain will have facilitated a general compliance culture. Moreover, the OFT has not found any instances of non-compliance with the Code.

The effectiveness of the Code

2.19 This section assesses the effectiveness of the Code in remedying or preventing the adverse effects specified in the MMC’s report. The primary focus of this section is the refusal to supply practice specified, given that this was the MMC’s main concern.

Refusal to supply

2.20 Information submitted to the OFT by the ANMW shows that in the period January 2002 to October 2006, there were no recorded specific instances of refusal to supply to new retail outlets by members of the ANMW. There were some instances where a retail outlet, which made an application for newspaper supplies, chose not to pursue that application. However, the OFT did not find any evidence that this was a result of the wholesaler refusing to supply a new retail outlet.

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69 The OFT has received a small number of complaints regarding supply below the MEL or a refusal to supply foreign language newspapers, but these are not covered by the Code.

70 This report reviews the operation of the undertakings since 1993. However, the evidence on incidence of refusal to supply of the type specified by the MMC is from 2002. The 1997 and 2002 reviews indicated that there was no evidence of such refusal to supply at the time of those reviews.

71 ANMW submission to the OFT, 20 October 2006. Out of over 8,500 applications for supply between 2002 and October 2006, there were no instances of refusal to supply.

72 Several wholesalers each noted that they were aware of some instances where a retailer did not pursue a supply application.
Moreover, the OFT has not found any other evidence that a practice of direct refusal to supply new retail outlets currently occurs.

2.21 The OFT has also considered whether the Code itself has been directly responsible for remedying or preventing refusal to supply, by reference to:

- the views of industry parties across the newspaper supply chain, and
- the effectiveness of the MEL provisions of the Code.

Views of industry parties

2.22 The NPA stated that it considers that the effect of the Code has been positive to the extent that it has assisted in ensuring that a larger number of retailers have obtained supplies of newspapers than would have otherwise been the case. However, the NPA has submitted that the level of the MEL is 'too high' and that this has prevented some retail outlets from accessing supplies.\(^7^3\)

2.23 Individual publishers have expressed mixed views on the effectiveness of the Code. One major publisher, for example, has submitted that the Code has been 'instrumental' in providing the means for larger number of retailers to obtain supplies of newspapers. Another noted that it 'seemed' to enable a large number of retailers to become newspaper retailers when it was first introduced, but that the MEL might be 'less relevant today' and even a barrier to entry to smaller retailers. Another publisher argued that wholesalers can discourage retailer applications for supply by charging higher CSCs. It considers, given its view that wholesalers' can set whatever CSCs they consider appropriate, that the expansion in the number of retailers being supplied is due to the fact that the wholesalers have found it profitable to supply these retailers, rather than because the Code has been effective.

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\(^7^3\) NPA submission to the OFT, 20 October 2006.
2.24 The ANMW has argued that the Code has been 'extremely effective' in managing the process for new retail applications and creates 'very clear criteria for the supply of newspapers'.

2.25 Individual wholesalers have made similar arguments to those made by the ANMW regarding the effectiveness of the Code. Wholesalers have emphasised that the system of exclusive territories (with ATP) allows them to commit to the publisher to supply new retail outlets. They have submitted that they would not be willing to accept an obligation to supply in the absence of a system of ATP as, in such circumstances, wholesalers in neighbouring areas could 'cherry pick' outlets that it is most desirable to serve to serve (for example, large outlets) leaving the wholesaler who is under contract to supply the territory with 'residual' retailers that cannot be served economically.

2.26 The NFRN submitted that the Code, and particularly the MEL, plays a 'critical role' in that it provides a legal requirement for wholesalers to supply newspapers to retailers. It also noted that the Code has had the effect of making newspapers more available to consumers, through the increased number of outlets since the Code was introduced.

2.27 The ANR submitted that the Code has made it easier for many retailers who wish to be able to sell newspapers to do so. However, it considers that the MEL discourages retailers from trialing newspapers, by requiring the retailer to take a higher value of newspapers than they could sell. It also submitted that wholesalers can prevent retailers from selling newspapers should they wish to do so, for example by charging high CSCs. The British Retail Consortium (BRC) submitted that the Code has become less relevant as publishers, in order to counteract falling circulation numbers (see the introductory overview paper for information on trends in newspaper circulation), have in any event been even more

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74 ANMW submission to the OFT, 20 October 2006. Information provided at OFT meeting with the ANR, 14 December 2006.
75 NFRN submission to the OFT, 20 October 2006.
76 ANR submission to the OFT, 20 October 2006.
commercially motivated to try to ensure the availability of their titles to retailers, including to multiple retailers.\(^7^7\)

**Conclusion on views of parties**

2.28 Most parties which have contributed to the Code Review considered that the Code was initially effective in remedying or preventing the adverse effects in relation to refusal to supply as specified by the MMC. However, views on its current effectiveness in this regard are mixed. Whereas some parties consider that the Code continues to be effective, others have submitted that it is now less effective in remediying the adverse effects of refusal to supply specified by the MMC. Indeed, some parties have suggested that the Code, and in particular the MEL, have acted as a barrier to entry into newspaper retailing or that the effectiveness of the Code has been limited by the ability of wholesalers to charge higher CSCs. Finally, some parties, particularly wholesalers, have submitted that ATP, rather than the MEL, is the critical factor in enabling them to accept an obligation to supply new outlets.

**The effectiveness of the MEL in remedying or preventing refusal to supply**

2.29 To assess the effectiveness of the MEL in remedying or preventing refusal to supply, the OFT has considered information provided by each of the multiple wholesalers regarding the characteristics of each of the retail outlets to which they deliver in certain areas of England and Wales.\(^7^8\) In particular, the OFT has compared the value of newspapers sold by each retail outlet (retail news bills) to the level of the MEL in the territory in which they are located for 18 areas in England and Wales. Although there are approximately 100 distribution areas for each publisher,\(^7^9\) the OFT selected this sample of 18 areas to provide a wide

\(^7^7\) BRC submission to the OFT, 13 October 2006.

\(^7^8\) The OFT focussed on information from multiple wholesalers as these wholesalers supply to a number of territories, with different MEL levels, where independents typically supply to one territory.

\(^7^9\) The precise number of distribution areas varies according to the publisher.
geographical spread across a variety of multiple wholesalers and a range of different MEL levels.\(^{80}\)

2.30 If the MEL were a key determinant in whether retail outlets were supplied with newspapers, the OFT would expect that there would be clear evidence that the level of the MEL in an area had an impact on the ability of retail outlets in that territory to access supplies of newspapers. The evidence that would support this would include first, indications that the distribution of retailer news bills varies between areas with different MELs, to reflect the impact of different MELs on new retail entrants, and second, that very few retail outlets would be supplied below MEL levels.\(^{81}\)

2.31 The OFT’s findings on the distribution of retail outlet news bills in these territories is shown diagrammatically in Annexe B.\(^{82}\) This analysis demonstrates that:

- There is a somewhat similar distribution of retail news bills in many territories, despite significant differences in MELs in those territories.
- In all territories, there tends to be more retail outlets with smaller news bills than those with larger news bills. The level of the MEL in each territory does appear to have some affect on the number of retail outlets in that territory with smaller news bills (for example,

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\(^{80}\) The areas selected were also confined to those in which a wholesaler delivered a full range of titles (a full sheet area). This is because in a split-sheet area, where several wholesalers deliver newspapers to retail outlets, the value of newspapers delivered to each outlet by each wholesaler would be lower than a full-sheet area. This would distort the analysis by indicating that retailer news bills were lower than they, in fact, are.

\(^{81}\) Although in theory, changes in CSCs between areas may mask conclusions on this matter, given the limited scope for variation in CSCs, compared to the much larger variations between MELs in different areas, the OFT does not consider this to be a significant detriment from the conclusions reached on this issue.

\(^{82}\) The graphs in Annexe B contain information provided to the OFT by wholesalers in September 2007. The information on retailers within particular MEL areas was amended following further information from wholesalers to remove from the list certain retailers that had originally been included, for example 'non-trading' retailer accounts with wholesalers.
territories with lower MELs typically have a greater volume of retail outlets with small news bills).

- The MEL level is consistent with the most common size of retail news bill in some territories (such as in [...]). However, in other areas it is significantly below the most frequent retail news bill (such as [...]).

- In all territories, there are retail outlets served by wholesalers despite being below the relevant MEL for the territory. In some cases, this represents a significant proportion of total retailers. When averaged across each of the multiple wholesalers, 20 per cent of retailers appear to be served at below MEL levels.

- The higher the MEL for a territory, the higher the number of retail outlets that are supplied by wholesalers below the relevant MEL.

2.32 This evidence suggests that there is some relationship between the value of the MEL and the profile of retail news bills, as demonstrated by the relationship between the MEL and the number of retail outlets with smaller news bills in a territory. However, this relationship may be likely to have arisen from the way that the MEL was originally calculated when it was established in 1994, as the MEL reflected a measure of the average value of newspapers invoiced to all existing retail outlets in the wholesaler’s territory at that time. Although the sizes of retail outlets will have changed since the MEL was calculated, it is likely that some correlation between retail news bill sizes and the MEL would continue to be present.

2.33 Beyond that, however, there does not appear to be a more general and consistent relationship between the level of the MEL in a particular territory and the overall distribution of retail news bills, which might be expected if the MEL had a determinative impact on ongoing newspaper supplies in a territory. In addition, in a small, but significant, proportion of cases, retail outlets continue to be supplied with newspapers despite having news bill values below the MEL.
2.34 This evidence, particularly the incidence of supply below MEL levels, indicates that the MEL does not appear to have been a key determinant in facilitating the supply of newspapers, as retail outlets’ ability to access and obtain ongoing newspaper supplies does not appear to be directly and clearly impacted by the MEL.\(^{83}\)

**Conclusions on the effectiveness of the Code in remedying or preventing refusal to supply**

2.35 The OFT has not found evidence that wholesalers are refusing to supply new retail outlets on the grounds that an area is already adequately served. Many parties have submitted that the Code has been important in remedying or preventing refusal to supply, and was particularly important in doing so following its implementation in 1994.

2.36 The OFT’s analysis of the effectiveness of the MEL indicates that the mechanism does not appear to be a key determinant of whether retail outlets are supplied with newspapers. This is demonstrated by various assessments undertaken, including the lack of evidence of differences in the level of the MEL having a significant impact on the size of retail outlet supplied and the significant minority of retail outlets which are supplied by wholesalers, despite the value of their newspapers being below the MEL.

**Sub-retailing**

2.37 The OFT has considered the extent to which the Code has been effective in remedying or preventing the adverse effects specified in the MMC’s report regarding restrictions on sub-retailing. In doing so, it has considered whether the Code has been effective in facilitating existing retailers to provide sub-retailing services. It is important to note at the outset that the MMC recognised that sub-retailing was likely to be

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\(^{83}\) This point is demonstrated further in chapter 4.46, where evidence shows that, for one wholesaler, 44 per cent of new retail entrants over a period selected by the OFT were not subject to MEL terms.
confined to a local level, because of the time-sensitivity of newspaper distribution and the need to split the margin between retailers.\textsuperscript{84}

**Incidence of sub-retailing**

2.38 The OFT identified during the 2002 Code Review that, although sub-retailing did take place, the incidence of it was very limited. It noted that only two to three per cent of existing retail outlets provided sub-retailing services.\textsuperscript{85}

2.39 The OFT has received evidence to suggest that the incidence of sub-retailing since the 2002 Code Review remains limited. The ANMW has submitted that just over one per cent of retail outlets provided sub-retailing services in 2006.\textsuperscript{86} Some wholesalers have indicated that some 'informal' sub-retailing arrangements exist between retail outlets, where a retailer will provide newspapers to another retail outlet without informing their wholesalers, although this does not appear to occur on a widespread scale.

**Views of parties**

2.40 The ANMW has submitted to the OFT that the restrictions in the Code are the primary explanation for the limited incidence of sub-retailing. It considers that the arrangements for sub-retailing in the Code would benefit from the removal of the current restrictions.\textsuperscript{87} This is a view supported by each of the multiple wholesalers individually.

2.41 The NFRN submitted that very few sub-retailing operations exist and it has explained that this is because:

\textsuperscript{84} MMC (1993), paragraph 11.118.
\textsuperscript{85} OFT (2002), paragraph 5.90.
\textsuperscript{86} ANMW submission to the OFT, 20 October 2006. The ANMW information indicates that only 634 retailers out of 53,776 retailers formally provided sub-retailing services.
\textsuperscript{87} ANMW submission to the OFT, 20 October 2006.
• the limited margin available for the retailer means that sub-retailing is not financially attractive, and

• the frequently poor timeliness and quality of the service provided by wholesalers makes sub-retailing unattractive. 88

2.42 The ANR has also noted that 'very few' retailers act as sub-retailers and submitted that, in addition to the restrictions in the Code, it considers that the limited margins available to retailers have restricted the emergence of sub-retailing. 89 The BRC submitted that none of its members undertake sub-retailing because of the additional complexity needed to establish a sub-retailing operation and the limited ability to obtain additional volumes of newspapers, from publishers and wholesalers, in order to carry out sub-retailing. 90

Conclusions on the effectiveness of the Code in remedying or preventing the restrictions on sub-retailing

2.43 Overall the OFT notes that, although the Code has facilitated sub-retailing, the incidence of sub-retailing remains very limited indeed. However, this does not indicate that the Code itself has been ineffective in enabling existing retailers to provide sub-retailing services. Indeed, there would appear to be other factors, such as the financial incentive for sub-retailing and practical difficulties associated with providing sub-retailing services that are likely to have contributed to the limited incidence of sub-retailing.

88 The NFRN has also noted that sub-retailing is restricted because it does not facilitate the sub-retailing of magazines. However, as the NFRN have acknowledged, the Code does not and cannot apply to magazines given that magazines were not included in the MMC’s terms of reference.

89 ANR submission to the OFT, 20 October 2006.

90 BRC submission to the OFT, 13 October 2006.
3 DEVELOPMENTS IN THE SUPPLY OF NEWSPAPERS SINCE 1993

Introduction

3.1 This chapter provides an overview of significant developments in the supply of newspapers since the MMC reported in 1993. This chapter does not consider all of the developments in the newspaper supply chain since 1993, but addresses only those which are most relevant to this Code Review. The analysis of the impact of these changes on the continued appropriateness of the Code is considered in chapter 4.

3.2 Some introductory information on the key aspects of the operation of the newspaper (and magazine) supply chain, for those less familiar with the industry, and wider supply chain developments can be found in the introductory overview paper.

3.3 In summary, there have been numerous significant developments at each level of the newspaper supply chain. These include:

- for newspaper publishing, an increased role for publishers in prescribing and monitoring the performance of wholesalers in the provision of services to retailers and an increased role in facilitating supply to new retail outlets directly

- for newspaper wholesaling, an increase in CSC levels charged by wholesalers to retailers, and significant changes in the technology and processes employed by wholesalers, and

- for newspaper retailing, an increase in the number of retail outlets and the increased prominence of multiple retailers in newspaper retailing.

91 The focus of this chapter is in identifying changes in the market since the MMC reported in 1993. However, in some instances the information used in the MMC’s report was based upon data from before 1993, typically from 1991 or 1992. The OFT has used this earlier data as reflective of market conditions at the time that the MMC reported.
Newspaper publishing

3.4 This section provides an overview of the changes in newspaper publishing since the MMC reported, focusing upon:

- publisher revenues
- the role of publishers in prescribing and monitoring the performance of wholesalers in the provision of services to retailers, and
- publishers facilitating supply to retailers directly.

Publisher revenues

3.5 Newspaper publishing is a two-sided market because publishers have two primary sources of revenue: first, revenue from consumer purchases of newspapers, and secondly, from advertisers who place advertising in their publications. The proportion of newspaper publisher revenue gained from these two sources varies, both by publisher and by title, but, on average in 2007, newspaper publishers obtained 50.4 per cent of revenue from advertising,\textsuperscript{92} with the remainder from consumer purchases.\textsuperscript{93} The revenue that publishers obtain from advertising space depends, amongst other things, on the size of a publication's circulation and the composition of its readership. This gives publishers a strong additional incentive not only to increase circulation but also to target particular demographics among its readership.

3.6 Most newspaper publishers typically sell their titles to wholesalers at a discount from the newspaper cover price (retaining a publisher margin). The wholesaler, in turn, takes a margin (negotiated in advance with publisher, and known as the 'wholesale margin') and then sells the newspapers to the retailer. The margins inherent in the cover price are,

\textsuperscript{92} Information based on OFT analysis on information from the Advertising Statistics Yearbook 2008, World Advertising Research Centre.

\textsuperscript{93} The MMC report in 1993 found that advertising revenue accounted for 46 per cent of total newspaper publisher revenues (MMC (1993), paragraph 3.29).
therefore, split between different levels of the newspaper supply chain, with the precise split varying between titles.

3.7 Since the MMC reported, as noted in the 2002 Code Review,\textsuperscript{94} the proportion of the allocation of the cover price between different levels in the newspaper supply chain has changed significantly. Publishers now receive a greater share of the cover price, with retailers and wholesalers receiving proportionately less. This is demonstrated in Table 3.1 which shows the allocation of the cover price between different levels of the newspaper supply chain in 1992,\textsuperscript{95} compared to equivalent figures in 2005.\textsuperscript{96}

### Table 3.1: The allocation of cover prices to each section of the newspaper supply chain

<table>
<thead>
<tr>
<th>Level of the newspaper supply chain</th>
<th>Average proportion of cover price retained by each level of the supply chain (1992)</th>
<th>Average proportion of cover price retained by each level of the supply chain (2005)\textsuperscript{97}</th>
</tr>
</thead>
<tbody>
<tr>
<td>Publishers</td>
<td>65.9</td>
<td>[...]</td>
</tr>
<tr>
<td>Wholesalers</td>
<td>7.6</td>
<td>[...]</td>
</tr>
<tr>
<td>Retailers</td>
<td>26.5</td>
<td>[...]</td>
</tr>
</tbody>
</table>

Source: MMC (1993), Table 7.11, in respect of the first and second columns, OFT calculations on the basis of information provided by the wholesalers, in respect of the first and third columns.

\textsuperscript{94} OFT (2002), paragraph 5.16.

\textsuperscript{95} The MMC’s analysis was an estimate for 1992, which was based on the information available to the MMC at that time.

\textsuperscript{96} It is important to note that the revenue gained at each level of the supply chain is dependent upon the level of the cover price charged.

\textsuperscript{97} It should be noted that the Dawson News and the Menzies Distribution margins are simple averages of the revenue split between publishers, wholesalers and retailers in each of their territories. The Smiths News margins are simple averages of the margins they take across the titles they supply.
3.8 Most publishers and wholesalers have argued that the reduction in wholesale margins in recent years is a reflection of the publishers’ ability to negotiate lower margins with wholesalers during recent tender rounds.

The role of publishers in prescribing and monitoring the performance of wholesalers in the provision of services to retailers

3.9 The MMC identified in its report in 1993 that although publishers monitored, and intervened in, aspects of the provision of service to publishers, they played a significantly more limited role in monitoring aspects of the provision of services by wholesales to retailers.\(^{98}\) It also noted that publishers had not developed comprehensive measures for monitoring performance across the whole range of wholesaler responsibilities.\(^{99}\)

3.10 The OFT’s 2002 Code Review highlighted that the role of publishers in specifying and monitoring the performance of wholesalers regarding the provision of services to retailers had increased after 1993. It highlighted evidence that publishers were more actively monitoring wholesaler performance through participation in industry groups and through the introduction of Key Performance Indicators (KPIs).\(^{100}\) In particular, publishers referred to the establishment of the Joint Industry Group (JIG), formed of representatives of publishers, wholesalers and retailers, for the purpose of addressing a number of service issues in the industry.\(^{101}\) Initiatives by the JIG include the Focus on Distribution Initiative, which relates to wholesaler delivery times to retailers, and the Industry Standard of Service Agreement (ISSA) which sets out the minimum standards of service retailers can expect from wholesalers.

\(^{98}\) MMC (1993), paragraphs 4.86 and 4.87; in particular the MMC noted that no publisher appeared to measure the timeliness of delivery to the retailer.

\(^{99}\) MMC (1993), paragraph 11.75.

\(^{100}\) OFT (2002), paragraph 5.44.

\(^{101}\) Further information on the JIG is available at: [www.jointindustrygroup.co.uk/](http://www.jointindustrygroup.co.uk/)
3.11 Since 2002, there have been further developments in joint industry initiatives including the updating and revision of the ISSA, the development of an expedited restitution process\textsuperscript{102} and the adoption of a number of best practice agreements through the JIG.\textsuperscript{103} Retailer representatives have highlighted in the responses to the OFT in this Code Review, however, certain perceived deficiencies in these joint industry arrangements from their perspective, in particular the administratively burdensome nature of the restitution process, the inadequacy of some of the service standards and limited awareness of these initiatives across retailers.\textsuperscript{104}

3.12 In addition to publisher participation in joint industry initiatives, there is significant evidence that publishers are taking on an increased role in prescribing and monitoring the service levels provided by their contracted wholesalers to retailers. Since the last Code Review, and particularly since 2004, publishers have increasingly agreed service level agreements (SLAs), including specific KPIs, with their contracted wholesalers during recent tender rounds, including issues such as timeliness and accuracy of delivery to retailers and timely collection of returns.\textsuperscript{105} Publishers have emphasised the ‘strictness’ of the agreed SLAs and KPIs, with one publisher noting that they are the ‘most robust and stringent performance standards ever operated’ by that publisher. The OFT has been informed that persistent or serious failure by wholesalers to meet these performance standards can result in contractual penalties,\textsuperscript{106} or even the loss of an area or the wholesale contract in its entirety.

\textsuperscript{102} This is known as fast track restitution.
\textsuperscript{103} Covering issues such as best practice in voucher processing and communication between parties in the supply chain.
\textsuperscript{104} The ANR, for example, has provided information from a survey of 1,000 convenience store retailers (from 2008) which identified that a limited proportion of the retailers surveyed were aware of ISSA and JIG.
\textsuperscript{105} Although the content of the SLAs between publishers and wholesalers differ in form and content, the OFT has been informed by most of the publishers that contractual KPIs have indeed been introduced as part of their recent wholesaler tenders.
\textsuperscript{106} Including financial penalties.
3.13 One publisher has provided information to the OFT on the contents of the SLA that it agreed with its wholesalers following a recent tender round. This SLA includes 3 KPIs and 22 primary performance indicators (PPIs), which amongst other things, relate to timeliness and accuracy of delivery to retailers and timely collection of returns from retailers. This can be contrasted with historic SLAs provided by wholesalers to the OFT: in the late 1990s, one SLA, for example, contained no KPIs or quantitative performance targets.

3.14 In addition to imposing specific service standards and/or performance measures, a number of publishers (as shown in Table 3.2) have imposed obligations relating to the supply of retail outlets on their wholesalers, requiring them to supply newspapers to a retailer nominated by them or to maintain the number of retailers in a territory. Although such obligations existed in 1993, it would appear that they now exist more widely, with all but one of the newspaper publishers including contractual provisions (albeit with differing formulations) designed to ensure, or in some cases require, supply to retailers.\(^{107}\) It is not clear the extent to which these are invoked in practice. Indeed, the presence of the Code may mean that publishers tend to rely on the Code, rather than on these contractual supply provisions at the current time. In addition to these general supply obligations, publishers have also included obligations on their wholesalers to promote HND, most often by requiring wholesalers to use their best endeavours to facilitate the continuation of HND services in an area where a retail outlet providing HND closes down. This reflects the particular importance of HND to publishers who view HND as important to promoting regular sales of newspapers.\(^{108}\)

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\(^{107}\) In 1993, only 4 out of 9 publishers included contractual requirements for wholesalers to supply particular retailers or otherwise influence choice of retailers by wholesalers (2 others did so by means other than contract): MMC (1993), appendix 4.3.

\(^{108}\) Several newspaper publishers have noted that whereas HND customers represent a ‘guaranteed’ or regular sale, and that it is important in increasing availability of their titles.
Table 3.2: Supply requirements

[...]

Source: Information provided by publishers

3.15 In terms of monitoring these service standards, each of the publishers have submitted that they closely monitor wholesaler performance and have provided the OFT with information on the relevant mechanisms. These mechanisms differ between individual publishers, but often include regular performance meetings with wholesalers, a requirement on wholesalers to provide information to publishers on performance levels or publisher visits to wholesale depots.

3.16 There is also some evidence of some publishers monitoring wholesaler CSC levels in recent years,\textsuperscript{110} with one major publisher requiring the wholesaler to provide it with a copy of its current CSC template and the formula applied to calculate annual increases. The wholesaler is obliged to inform the relevant publisher if it intends to vary from this formula.

\textsuperscript{109} The precise contractual language used differs between publishers.

\textsuperscript{110} The increased monitoring of CSC levels by publishers appears to have occurred in recent years, particularly as part of recent tender rounds.
This is significant as publishers have historically played a limited role in relation to CSCs.\footnote{This point was confirmed at MMC (1993), paragraph 11.75.}

3.17 Wholesalers have also confirmed that publishers actively monitor their performance against the agreed service standards closely and have submitted that the level of monitoring of wholesaler performance has increased in recent years, following the adoption of more specific and stringent KPIs. The ANMW has noted, for example, that 'publishers monitor wholesaler performance levels very closely'.\footnote{ANMW submission to the OFT, 20 October 2006.} This has been echoed by the individual wholesalers, which have each confirmed that the level of monitoring of performance levels by publishers has increased in recent years.

3.18 In support, each of the multiple wholesalers has provided the OFT with evidence on the extent, and frequency with which, they provide monitoring information to publishers. This information often includes wholesaler performance in relation to: \footnote{The precise format and issues covered in each of these reports varies between publishers and wholesalers.}

- the delivery of newspapers in line with required retailer delivery times
- the accuracy of deliveries to retailers
- the collection of returns, and
- the management of retailer claims.\footnote{Claims refer to a retailer claim in relation to a shortage on the delivered order by a wholesaler.}

Wholesalers tend to report on these issues to publishers on a weekly or monthly basis and, in many cases, are required to report against specifically agreed KPIs or measurable, quantitative criteria.

3.19 The increased monitoring of the performance of wholesalers regarding the provision of services to retailers has been facilitated by
developments in wholesaler technology (which are referred to in paragraphs 3.26 to 3.28) and, in particular, the development of information systems which are capable of providing significantly more information which can be provided to publishers. One wholesaler, for example, has submitted that the 'centralisation of marketing services and investment in IT has also allowed for closer monitoring by publishers'.

3.20 Representatives of retailers have stressed, however, that there are numerous deficiencies with the KPI arrangements in place. These are that there is no input by retailers into these KPIs, that retailers have no visibility of these KPIs and that the KPIs reflect publisher requirements rather than retailer requirements (and in some cases can be contrary to retailer requirements).115

3.21 Overall, the OFT considers that the evidence suggests that the increased role of publishers in specifying and monitoring standards relating to the performance of wholesalers regarding the provision of services to retailers represents a significant change since the MMC reported in 1993. The evidence suggests that greater publisher specification of service levels regarding retailers and increased monitoring of the performance of wholesalers regarding the provision of services to retailers, albeit present in 2002, has significantly accelerated and become more sophisticated in recent years.

**Publishers facilitating supply to retailers directly**

3.22 The MMC noted in its 1993 report that publishers rarely supplied retail outlets directly, confining this to Government departments and universities.116 More recently, newspaper publishers have become more

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115 Such as requirements for box outs, which are the supply by publishers to wholesalers, and by wholesalers to retailers, of more copies of newspapers (or magazines) than those ordered by the retailer, in the expectation of extra sales.

116 MMC (1993), paragraph 4.20.
directly involved in supply to a range of new retailers.\textsuperscript{117} This has taken the form of publishers facilitating the supply of newspapers to new retailers, such as coffee shops, book stores and high street stores. The OFT has been informed by some publishers that this attempt to ensure that newspapers are available in a wider range of outlets is to address the general decline in newspaper circulation (referred to above). Examples of these supply arrangements are shown in table 3.3.

**Table 3.3: Publisher-facilitated supply arrangements**

<table>
<thead>
<tr>
<th>Title delivered</th>
<th>Retailer</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mail on Sunday</td>
<td>Boots the Chemist</td>
</tr>
<tr>
<td>The Times</td>
<td>Starbucks</td>
</tr>
<tr>
<td>Express</td>
<td>British Home Stores/Debenhams</td>
</tr>
<tr>
<td>Variety of titles</td>
<td>Blackwells</td>
</tr>
<tr>
<td>Telegraph</td>
<td>Costa Coffee</td>
</tr>
</tbody>
</table>

Source: Information provided by Menzies Distribution on 20 October 2006.

3.23 These arrangements are typically entered into directly between the publisher and the retailer concerned. Although distribution will involve the wholesaler contracted to deliver the publisher’s titles in that geographical area, the terms are agreed between the publisher and the retailer. These terms are often different to those for other retailers, for example MELs may be waived for these retailers.

3.24 The increased role of publishers in engaging with certain retailers and facilitating supply to individual retail outlets directly is also demonstrated by changes which News International has recently announced as part of its 2008 tender round. From July 2009, retailers in London and Birmingham will have a direct relationship with News International,

\textsuperscript{117} In addition to facilitating supply to retailers, the OFT is aware of some instances where publishers distribute their newspapers, or facilitate their delivery, directly to final consumers, such as News International’s establishment of a network of street vendors in London to sell its titles and its introduction of a subscription service within the M25 area where, if no retailer is able to offer home news delivery, it will facilitate delivery of its newspapers itself by 07:00.
which will be directly responsible for the distribution of its titles to retailers.\textsuperscript{118}

**Newspaper wholesaling**

3.25 This section provides an overview of the changes in newspaper wholesaling since 1993, focussing upon wholesaler technology and processes, and CSCs.

**Wholesaler technology and processes**

3.26 One wholesaler informed the OFT that in 1993 a large proportion of the processes associated with newspaper wholesaling were manual. The MMC Report confirmed this, noting that newspaper wholesaling was 'labour intensive' and required only modest computer software, appropriate transport and bulk handling equipment.\textsuperscript{119}

3.27 Since 1993, wholesalers (particularly multiple wholesalers) have introduced a greater degree of automation to the newspaper wholesaling process through investments in new technology and wholesaling processes.\textsuperscript{120} This includes significant investments in:

- **Packing technology:** to increase the accuracy of packing.
- **Returns scanning:** to increase, by use of special scanning equipment, the speed and accuracy of returns handling.
- **Allocation systems:** to assist, by use of special software, with the allocation of newspapers to retailers.

\textsuperscript{118} See Retail Newsagent, 6 June 2008.

\textsuperscript{119} MMC (1993), paragraphs 4.58 and 4.60.

\textsuperscript{120} A number of further changes have also been made to the processes for magazine wholesaling; particularly packing technology sales based replenishment systems (discussed further in the OFT’s proposed decision on the MIR request).
• **Information systems**: to improve the capture of information (on sales, delivery times, unsolds collection), which can then be provided to publishers and retailers.

3.28 Wholesalers have provided detailed information on a number of specific investments which they have undertaken highlighting, in some cases, the significant costs of the investments made. One wholesaler, for example, informed the OFT that [...] has been invested by the company across a range of capital expenditure on changes to its newspaper and magazine distribution business in recent years.

**Carriage service charges**

3.29 In addition to the wholesaler margin from sales (referred to in paragraph 3.6), the wholesaler receives revenue from the retailer by levying a weekly charge on the retailer for delivery of newspapers (and magazines) to its outlet. This charge is known as a CSC.

3.30 In 1993, there was significant variation in the structure and level of CSCs between wholesaler depots, with each wholesaler depot typically setting its own CSC for the area that it served. Some depots set a flat rate CSC, whereas others imposed CSCs which were based on a scale which was related to the value of newspapers delivered, albeit with a minimum and maximum level. The CSCs charged at that time were typically between around £5 and £15 per retail outlet, per week.\(^{121}\)

3.31 Since 1993, there have been numerous significant changes to the structure and level of CSCs. In particular, each of the multiple wholesalers adopted national CSC templates in 2002 which are applied to almost all retail outlets they serve.\(^{122}\) These templates are structured around a fixed charge, based on the number of days delivery per week and the types of product delivered (for example, newspapers and magazines, or newspapers only) and a variable charge which depends on

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\(^{121}\) MMC (1993), paragraphs 4.83 to 4.84.

\(^{122}\) Except for a small number of retailers, where other CSC arrangements are in place.
the value of newspapers delivered. Wholesalers also tend to fix a minimum and maximum charge.

3.32 Although this structure has some similarities to that used by some wholesaler depots in 1992, there have been significant changes in the average minimum levels and average maximum levels charged. These are shown in table 3.4 below.

Table 3.4: Changes to CSC levels charged by multiple wholesalers, 1993 to 2007

<table>
<thead>
<tr>
<th>Year</th>
<th>Average minimum level</th>
<th>Average maximum level</th>
<th>Average maximum level relative to average minimum level</th>
</tr>
</thead>
<tbody>
<tr>
<td>1993 CSCs</td>
<td>£5.35</td>
<td>£19.75</td>
<td>Maximum is 3.7 times larger than minimum</td>
</tr>
<tr>
<td>2007 CSCs</td>
<td>£19.28</td>
<td>£31.00</td>
<td>Maximum is 1.6 times larger than minimum</td>
</tr>
</tbody>
</table>

Sources: MMC Report, appendix 7.8, in relation to the first row; Information provided by wholesalers, in relation to the second row.

3.33 There are two clear changes that have occurred in the level of CSCs since the MMC Report. First, the average minimum charge has risen substantially over time, from just over £5 to just under £20. Second, the average maximum level has risen by a smaller amount, thus reducing the range of CSCs. As an illustration of the reduction in the range of CSCs, the average minimum level is now 3.6 times larger than it was in

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123 The MMC noted that the figures used are ‘simplified in comparison with what happens on the ground’, MMC (1993), appendix 7.8.
124 For seven day newspapers deliveries. The large majority of retailers will pay a higher minimum and maximum charge than this to reflect that they also receive magazines.
1993. Adjusting for inflation, it is now 2.5 times larger than in 1993. 125 Meanwhile, the average maximum level is now 1.5 times larger than in 1993, having experienced a growth of around seven per cent after adjusting for inflation.

3.34 Consequently, the changes to the level of CSCs charged mean that these are now higher for many retailers, particularly retailers with a small news bill which are more likely to be affected by the higher minimum charge. This is consistent with information provided by the NFRN and the ANR, both of which have highlighted a significant growth in CSC levels.

Newspaper retailing

3.35 This section provides an overview of the changes in newspaper retailing since 1993, focussing upon the number of retail outlets and the composition and relative prominence of different types of retail outlets.

The number of retail outlets

3.36 The number of retail outlets selling newspapers throughout the United Kingdom has increased considerably from just over 48,000 outlets in 1993 to almost 54,000 outlets in 2005 (see figure 3.6). Most of this growth in retail outlet numbers occurred between 1993 and 1998, with the number of retail outlets stabilising since 1998 at around 54,000 outlets. The significant growth in the number of retail outlets represents a significant change since the MMC reported.

125 The UK Retail Prices Index (RPI) was used to adjust this figure. The RPI increased by 47 per cent from 1993 to 2007.
Figure 3.5: The change in the number of retail outlets since the 1993 MMC Report

Source: ANMW information, Retail Outlet Report, April 2007.

The composition and relative prominence of different types of retail outlets

3.37 There has also been significant growth in the diversity of types of retail outlets. In 1992, 84 per cent of newspapers were sold in specialist newspaper-retailing outlets (such as CTNs), the majority of which were independent retailers. In contrast, a very limited proportion of newspapers were sold in 'non-traditional' retailers, such as

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126 The classification of retailer types varies significantly between different industry parties. Where possible, the OFT has sought to use the retail classifications provided by the ANMW, PPA and NPA (available at: www.anmw.co.uk/anmw/documents/ANMW RETAIL_OUTLET_CLASSIFICATION.pdf)

127 That is, not part of a multiple retail or symbol group. This is verified by information provided by the wholesalers which indicates that approximately 80 per cent of newspapers were sold to independent retailers in 1992.
supermarkets, convenience stores and petrol forecourts, which were more likely to be multiple retailers.\textsuperscript{128}

3.38 However, as was noted in the 2002 Code Review, and as referred to by all of the parties consulted during this Code Review, there has been a significant and continuing change in the profile of the proportion of newspaper sales through different types of retail outlet since 1993. In particular, the relative prominence of multiple retailers in retailing newspapers has increased such that this category of outlet accounted for about 43 per cent of newspapers sold by volume by 2007. Figure 3.6 demonstrates these changes and the current proportion of newspapers sold through different types of retail outlets for one major wholesaler, Dawson News. This information is consistent with that provided by other multiple wholesalers.

**Figure 3.6: Proportion of total UK newspaper sales made by each type of retail outlet, 1990 and 2006\textsuperscript{129}**

\begin{center}
\includegraphics[width=0.5\textwidth]{figure3.6.png}
\end{center}

Source: Information provided by Dawson News on 10 September 2007.

\textsuperscript{128} The MMC did note that supermarkets and petrol retailers had been more successful in their applications for supply (MMC (1993) 5.10), although supermarkets and petrol retailers did make complaints to the MMC regarding the availability of newspaper supplies.

\textsuperscript{129} This is based upon information provided by Dawson News. Other wholesalers have provided corresponding information, but changes in the categories of retailers used do not make it comparable across time.
3.39 These developments mean that newspaper retailing now takes place across a wider range of types of outlets than was the case at the time when the MMC reported. The growth and prominence of multiple retailers in newspaper retailing, therefore, represents a substantial change in newspaper retailing.

3.40 In addition, multiple retailers now account for a significant proportion of new entrants to newspaper retailing. Evidence provided to the OFT indicates that more traditional newspaper retailers, such as specialist newsagents and roundsmen,\(^\text{130}\) currently account for under 20 per cent of new retail openings. In comparison, over 55 per cent of new retail entrants are supermarkets, petrol stations and convenience retailers, which are more likely to be multiple retailers.\(^\text{131}\)

\(^{130}\) A roundsman is a seller of newspapers who supplies newspapers only by HND.

\(^{131}\) Based on information provided to the OFT by the ANMW Retail Outlet Report, April 2007. The remainder of openings are accounted for by street points, grocers, travel points and other retailer categories.
4 ASSESSMENT OF THE APPROPRIATENESS OF THE CODE

Introduction

4.1 This chapter draws on evidence and information discussed in previous chapters to assess whether, by reason of any change of circumstances, the Code is no longer appropriate to remedy or prevent the adverse effects which the MMC specified in its report in 1993.

4.2 In summary, since 1993, there have been numerous changes of circumstances, relating to the publishing, wholesale and retailing of newspapers, which the OFT considers mean that the Code is no longer appropriate to remedy or prevent the specified adverse effects. Some significant changes of circumstances have occurred since the OFT’s last Code Review in 2002. In addition, the OFT has now identified other relevant changes of circumstances which have evolved over a longer period, which have become apparent due to the OFT’s holistic consideration of issues in the newspaper supply chain involving its concurrent work on the Opinion and the MIR request. \(^{132}\)

4.3 Following this Code Review, the OFT considers that there are three particular changes of circumstances which mean that the Code is no longer appropriate to remedy or prevent the adverse effects specified by the MMC regarding the specified refusal to supply practice. These are:

- changes in the level of CSCs
- changes in the role of publishers in the newspaper supply chain, and
- changes in the composition and relative prominence of different types of retail outlet.

\(^{132}\) Previous reviews of the Code in 1997 and 2002 were focussed on the wholesaler to retailer relationship. In summary, the simultaneous work strands concerning the Opinion, with its focus on the publisher to wholesaler relationship, and the MIR, with its market-wide perspective, have broadened this focus.
4.4 The OFT considers that two of these changes, that is the changes in the level of CSCs and the changes in the role of publishers, are changes of circumstances which are relevant to the supply of newspapers to a wide variety of different types of retail outlet, from smaller retail outlets to larger supermarkets. The changes in the composition and relative prominence of different types of retail outlet relate to the supply of newspapers to multiple retailers, particularly larger multiple retailers, such as supermarkets.

4.5 The OFT considers that the changes of circumstances which are relevant to the specified refusal to supply practice also mean that retail outlets will be able to obtain supplies directly from wholesalers, meaning that sub-retailing arrangements are no longer necessary to ensure the availability of newspapers to consumers. The OFT, therefore, considers that the changes of circumstances which relate to refusal to supply new outlets, also mean that the Code is no longer appropriate to remedy or prevent the adverse effects specified by the MMC in relation to sub-retailing.

**Refusal to supply**

4.6 This section discusses the three changes of circumstances which the OFT considers have in particular impacted on the continued appropriateness of the Code:

- changes in the level of CSCs
- changes in the role of publishers in the supply chain, and
- changes in the composition and relative prominence of different types of retail outlet.

**Changes in the level of CSCs**

4.7 As noted in paragraphs 3.29 to 3.34, since the MMC Report there have been significant changes in the level of CSCs charged by wholesalers to retail outlets. This section assesses how these changes have impacted
upon the continued appropriateness of the Code and, in particular, their impact on wholesaler incentives to supply new retail outlets.

The relationship between CSCs and the MEL

4.8 For wholesalers, the MEL currently provides a guaranteed minimum level of margin income\(^{133}\) from retailers, which is combined with revenues from CSCs to give the total revenue that wholesalers receive. Since 1994, the MEL levels have remained largely unchanged,\(^{134}\) while the minimum levels of CSCs have risen substantially. This means that the relative importance of the two sources of wholesaler income from retailers has changed significantly.

4.9 This section considers the following elements of the interaction between the CSCs, the MEL and wholesaler revenue:

- the significance of changes in CSCs

- CSCs and wholesaler distribution costs, and

- the significance of CSCs for wholesalers at different MEL levels.

The significance of changes in CSCs

4.10 In 1993, wholesalers were dependent upon revenue gained from wholesaler margins as their primary source of revenue. This meant that the primary means by which each wholesaler could increase its revenues was to increase overall newspaper sales. Where, in a wholesaler's view, supply to a new retail outlet would not increase overall sales (the area was already adequately served in industry terminology) wholesaler incentives to supply that retail outlet were limited. Although a wholesaler would obtain revenue from CSCs from each individual outlet, such charges were relatively low in 1993. Indeed, the guaranteed

\(^{133}\) The wholesaler margin is explained in paragraph 3.6.

\(^{134}\) In a small number of instances MELs have changed to reflect changes in territorial boundaries or recalculations made by wholesalers following a territory becoming a split-sheet territory.
4.11 However, since 1993, the significant increases to CSCs have impacted upon the revenue which a wholesaler gains from supplying a new retail outlet. Based upon 2007 CSC templates, for example, wholesalers receive an average minimum CSC level of £19.75 per retail outlet, per week, regardless of whether that supply to new outlets increases newspaper sales. The increased CSC levels, combined with the reductions in wholesaler margins (referred to in table 3.2), mean that CSCs have now become a more significant source of revenue for wholesalers. This is verified by analysis of information provided to the OFT by wholesalers which indicates that CSCs are around 20 per cent higher as a proportion of wholesalers’ revenue in 2005/06 compared to 2001/02.136

4.12 An increased revenue from CSCs will, in general, increase a wholesaler’s commercial incentive to supply a new retail outlet as a wholesaler is more likely to obtain sufficient revenue from CSCs, when added to the wholesaler margin, to meet the incremental costs137 of supply to that retail outlet, regardless of whether it leads to an increase in newspapers sold. In turn, this reduces the likelihood of a wholesaler refusing to supply new outlets on the grounds that an area is already adequately served.

135 Referred to in table 3.4.
136 Based on information provided by wholesalers. Suitable comparable information from 1993 was not available to complete a comparison between CSCs as a proportion of wholesaler revenue between 1993 and 2007.
137 The incremental cost of supplying a retailer is the cost that the wholesaler could avoid if it did not supply that retailer. The OFT does not know what proportion, if any, of retailers are served at below incremental cost. Wholesaler submissions to the OFT indicate that it is not possible to isolate the incremental costs of supplying any one retailer in the distribution network. This is understandable given the high common costs and the fact that the incremental costs of supplying a retailer (such as additional fuel and labour) will depend to a significant extent on how a delivery run is sequenced between retailers.
CSCs and wholesaler distribution costs

4.13 This section examines the extent to which CSCs currently recover wholesaler distribution costs. The MMC calculated that CSCs, on average, recovered 47.3 per cent of wholesaler 'delivery expenses' for multiple wholesalers in 1991.\textsuperscript{138}

4.14 The OFT has considered the extent to which CSCs recover distribution costs again in this Code Review using information provided by wholesalers.\textsuperscript{139} Although this information is not directly comparable to that which the MMC used,\textsuperscript{140} the OFT considers it provides a reasonable basis for comparison. Figure 4.1 shows the average proportion of wholesaler distribution costs which were recovered by the revenue which wholesalers gained from CSCs between 2001 and 2006.

\textsuperscript{138} MMC (1993) Table 7.7 and paragraph 7.19b. Paragraph 7.19b explains the methodology that the MMC used to calculate 'delivery expenses'. The MMC's analysis related to 1991, as this reflected the timing of the information that was provided to the MMC.

\textsuperscript{139} Wholesaler distribution costs include the direct costs of deliveries (including direct costs of third party carriage from wholesaler to retailer and the direct cost of deliveries by in-house transport from wholesaler to retailer) and distribution management (including branch management and central management). Certain publisher recoveries (for example, money recovered by wholesalers from others, such as for second deliveries where the newspaper arrives late at the wholesaler) are then deducted from the direct costs of deliveries and distribution management. This establishes a net delivery cost figure. The ANMW, via Lucidea Consulting Limited, undertakes an annual audit of distribution costs and CSCs. Lucidea Consulting Limited gathers data using industry-wide definitions. The three multiple wholesalers also have their figures independently audited to ensure accuracy of definitions and an appropriate apportionment of common costs.

\textsuperscript{140} In particular, the 1991 figures exclude magazines.
Figure 4.1 Average proportion of wholesaler distribution costs recovered through CSCs

Source: Based on information provided by Lucidea Consulting Limited (which aggregates information from individual wholesalers) on 23 August 2007 and 2 November 2007.

4.15 Figure 4.1 demonstrates that the proportion of wholesalers’ average distribution costs recovered through CSCs has risen gradually between 2001 and 2006, with the recovery level in 2006 being eight per cent higher than in 2001. Although CSCs continue to result in the recovery of less than total wholesaler distribution costs, in 2006\textsuperscript{141} they resulted in the recovery of, on average, around 74 per cent of wholesaler distribution costs, which is a significantly greater proportion than they did in 1991.

4.16 Wholesalers are therefore now more likely to be able to supply a wider range of retailers than in 1993, as it is more likely that the revenue gained through CSCs, when added to the additional wholesaler margin revenue they would receive, would lead to the recovery of the incremental cost of supplying to new retail outlets. Consequently, this would be expected to increase the incentives to supply and reduce the likelihood that wholesalers would refuse supply to new retail outlets.

\textsuperscript{141} The latest period for which the OFT has information.
The significance of CSCs for wholesalers at different MEL levels

4.17 The OFT has considered the impact of the increased importance of CSCs, relative to margin income, in providing wholesalers with incentives to supply retail outlets at different MEL levels. Figure 4.2 shows an estimate of CSCs as a percentage of total revenue which wholesalers gain from selling newspapers to retailers which are receiving newspapers at different MEL levels.

**Figure 4.2 CSCs as a percentage of wholesaler newspaper revenue, 1 July 2006 to 29 June 2007**

4.18 In Figure 4.2, CSC revenues are compared with estimated newspaper revenue, as it is this which determines MEL values. This shows that CSCs can represent up to 80 per cent of newspaper revenue for

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142 Figure 4.2 was calculated by considering the newspaper revenue that wholesalers receive from retailers that have sales at each of the MEL bands. The CSCs that would apply to such retailers were calculated, and the wholesaler margin on newspapers was assumed to be [...] per cent (consistent with information provided to the OFT by industry parties).
wholesalers from retailers at the lower MEL levels, and around 50 to 60 per cent at the higher MEL levels.

**Figure 4.3 CSC as a percentage of total revenue (newspapers and magazines) 1 July 2006 to 29 June 2007**

[...]

Source: OFT calculations based on wholesalers’ response to Code Review questionnaire

4.19 Figure 4.3 includes revenue from magazines, as magazines account typically for around 34 per cent of the total news bill for retail outlets active at the MEL levels. This shows that CSCs still account for a substantial component of wholesaler income, but somewhat lower than in figure 4.3, as the wholesaler margin on magazines is a significant source of income for wholesalers. The figures vary from CSCs representing up to 70 per cent of wholesaler revenue from retail outlets active at the MEL levels.

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143 Figure 4.3 was calculated in a similar way to 4.2 but also includes magazine revenues. Information from the response to the OFT’s Code questionnaire was used to calculate that, for small MEL level retailers, [...] per cent of retailer sales value related to magazines. The MEL newspaper revenue was calculated within each MEL band and the relevant magazine revenue ([... per cent of the total revenue]) was estimated in addition. Wholesalers’ are assumed to earn a margin of [...] per cent from magazines (based upon information provided by one wholesaler) compared to an assumed margin of [...] per cent for newspapers.

144 Data provided to the OFT by wholesalers has been used to estimate the magazines and newspaper bill. The assumed wholesale margins are [...] per cent for newspapers and [...] per cent for magazines.
with small newsbills to around 40 to 60 per cent for territories with higher newsbills.

4.20 This analysis demonstrates that a significant proportion of the revenue which a wholesaler gains from supplying retail outlets which are active at different MEL levels, particularly lower MEL levels, is obtained from CSCs. This will, in general, increase the wholesaler’s commercial incentive to supply new retail outlets as it will obtain a significant source of revenue from that supply, which is more likely to meet its incremental costs of supply to a new retail outlet. In turn, this reduces the likelihood of the wholesaler refusing to supply new outlets on the grounds that an area is already adequately served.

Conclusions on changes in CSCs

4.21 Since 1993, there have been changes in the level of CSCs paid by retailers to wholesalers such that these charges now represent a more significant source of revenue for wholesalers. The OFT has identified three specific ways in which these changes have provided wholesalers with greater commercial incentives to supply new retail outlets. These are that:

- The changes to the level of the CSCs, particularly the significant growth in the minimum CSC levels, provides wholesalers with a significantly increased minimum amount of revenue from supplying new retail outlets now than was the case in 1993 regardless of whether there are increased overall newspaper sales arising from that supply.

- CSCs also now account for a significant proportion of the revenue gained by wholesalers from supplying retailers (as much as 80 per cent on retail outlets at lower MEL levels).

- CSCs now result in the recovery of a significantly greater proportion of wholesaler distribution costs than was the case in 1993.

4.22 These changes provide wholesalers with greater commercial incentives to supply to new retail outlets than existed at the time of the MMC
Report and mean that refusal to supply new retail outlets is unlikely to emerge in the future. It is important to note that, because the overall structure of CSCs is the same between different types of retailers, this change is relevant to supply to all new retailer types. However, it is particularly relevant to the supply of smaller retail outlets given that CSCs account for a greater proportion of wholesaler revenue from supplying those retail outlets, compared to larger retail outlets.

4.23 The OFT, therefore, considers that the changes in the level of CSCs constitute changes of circumstances such that the Code is no longer appropriate to remedy or prevent the adverse effects specified in the MMC’s report.

Role of publishers in the newspaper supply chain

4.24 Due to the two-sided nature of the newspaper publishing market, newspaper publishers have strong incentives to increase availability of their titles in order to increase circulation and maximise profits from both copy sales and advertising (as explained in paragraph 3.5). This general principle has been confirmed by most of the publishers which the OFT has contacted during this Code Review. In addition, one major publisher has highlighted to the OFT that it considers that it is important that its newspapers are widely available on a national basis.

4.25 As noted in chapter 3, since the Code was implemented, the role of publishers in the newspaper supply chain, particularly in specifying and monitoring the performance of wholesalers regarding the provision of services to retailers and in facilitating supply to retailers directly, has increased. The impact of this change upon the continued appropriateness of the Code is considered in this section.

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145 MMC (1993), paragraph 11.61.

146 The NPA, for example, has stated that ‘Publishers have an interest in maximising the number of retailers selling newspapers in order to maximise sales due to the two-sided nature of the market where publishers also have an interest in maximising advertising revenue’. (NPA submission to the OFT, 20 October 2006).
The imposition and monitoring of requirements upon wholesalers in relation to service to retailers

4.26 In paragraphs 3.9 to 3.21, the OFT has demonstrated that the role of publishers in imposing contractual obligations upon wholesalers in relation to the provision of services to retailers has increased significantly since the MMC Report, and particularly so in recent years. Publishers appear to be imposing on wholesalers a wider range of obligations, through specific KPIs and SLAs, in relation to the service provided by the wholesaler to retailers. Wholesaler performance against these obligations appears to be closely monitored by publishers, whose ability to monitor wholesaler performance has been further enhanced by developments in wholesaler information systems.

Publisher incentives to encourage availability

4.27 The OFT has noted in paragraph 3.14, that publishers already tend to impose a number of obligations on their wholesalers to ensure supply to retailers, often going beyond those specifically stated in the Code. However, the presence of the Code has meant that publishers, in practice, may have typically relied upon the Code, rather than specific contractual provisions to ensure newspaper supply to retailers.

4.28 Publishers, in any event, have incentives to ensure wide availability of their newspapers to retailers in order to increase circulation and maximise profits from both copy sales and advertising, and to counteract generally declining newspaper circulation. Publishers therefore have incentives to use their ability to impose contractual obligations on their wholesalers to ensure wide availability of their titles and prevent the re-emergence of refusal to supply.

4.29 In addition, the OFT notes that most of the publishers currently include contractual obligations on each of their wholesalers to promote or support the provision of HND by retailers. In some instances, these publishers specifically require their wholesalers to use reasonable endeavours to attempt to find retailers who are willing to undertake additional HND rounds if another retailer in the wholesaler’s territory
ceases to provide these services. In this context, publishers have informed the OFT that HND for their titles is particularly important to counteracting the declining circulations of newspapers as such sales represent a 'guaranteed' or regular sale. As HND is most often provided by smaller retail outlets, this provides publishers with incentives to take action to ensure that smaller new retail outlets are able to obtain supply of newspapers from wholesalers.

4.30 The evidence provided to the OFT, discussed above, demonstrates that publishers play a significantly greater role in imposing and monitoring obligations regarding supply on their wholesalers than they did in 1994. Given their incentives to increase availability, publishers have incentives to impose and monitor obligations on their wholesalers regarding supply to new retail outlets, including those smaller outlets which provide HND. The imposition of such obligations would be likely to prevent the re-emergence of the practice of refusal to supply new retail outlets which was specified by the MMC.

Increased role of publishers in facilitating supply to retailers directly

4.31 As explained in paragraphs 3.22 to 3.24, the OFT has received evidence that, since 1993, publishers now play a significantly greater role in facilitating supply to some retailers directly. Table 3.3 provides a number of examples, from which it is noteworthy that publishers are facilitating supply to new types of retail outlet, such as coffee shops and department stores.

4.32 This method is likely to be used to currently supply a small proportion of retail outlets with newspapers: one publisher, for example, indicated that [...] per cent of its newspapers are supplied to retailers using these types of methods, although it noted that these retail outlets accounted for [...]. In addition, information provided by one wholesaler indicates

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147 This is confirmed by information provided by publishers, which have noted that small retail outlets, rather than larger retail outlets typically provide HND; this was also confirmed in Code (2002), paragraph 5.67.
that such mechanisms accounted for [...] per cent of supplies to new retailers for a three month period between October 2006 and December 2006.\textsuperscript{148}

4.33 This demonstrates that publishers are taking a stronger role in directly facilitating supply to new retailers in order to increase sales to counteract generally declining newspaper circulation. Even though this method accounts for a limited proportion of supplies to new outlets at the current time, it provides a mechanism whereby publishers can facilitate supply to new retailers directly, who might otherwise be refused supply by a wholesaler.

Conclusions on the role of publishers in the newspaper supply chain

4.34 The OFT notes that publishers have a strong incentive to increase availability of their titles to maximise profits from both copy sales and advertising. The increased role of publishers in imposing and monitoring obligations relating to service to retailers on their wholesalers has provided a mechanism to enable them to prevent the re-emergence of wholesalers refusing to supply new retail outlets in order to increase availability of their titles.

4.35 In addition, the increased role of publishers in facilitating supply to new types of retail outlet provides an alternative mechanism to supply new retailers, who might otherwise have been refused supply by a wholesaler.

4.36 The OFT considers that this change of circumstances ensures supply to a wide range of different types of retailers, as publishers have incentives to ensure supply of their titles to a wide range of different types of retailers to increase availability. In particular, the significance of HND to publishers, provides them with particular incentives to ensure that their

\textsuperscript{148} This was a period selected by the OFT, in conjunction with wholesalers, to enable the OFT to consider in detail the experiences of new retail entrants. The wholesalers confirmed that this period was representative of general retailer experience.
wholesalers supply to smaller retail outlets, which are more likely to offer these services.

4.37 The OFT, therefore, considers that the increased role of publishers in imposing and monitoring obligations on their wholesalers relating to service to retailers and in facilitating supply to new retailers directly represents a change of circumstances such that the Code is no longer appropriate to remedy or prevent the adverse effect of refusal to supply specified in the MMC's report.

Changes in the composition and relative prominence of different types of retail outlet

4.38 The MMC identified that the primary concerns regarding refusal to supply related to the refusal to supply non-traditional retailers, particularly multiple retailers, such as supermarkets, convenience stores and petrol retailers.\(^{149}\) As demonstrated in chapter 3, since the MMC Report, newspaper retailing has changed considerably, such that these multiple retailers now account for over 40 per cent of newspaper sales by volume, and represent the majority of new entrants to newspaper retailing.

4.39 The OFT has considered whether there are factors, in addition to the changes in CSCs and change in the role of publishers in the newspaper supply chain, which have general application to all retailer types, which would be relevant with regard to ensuring continued supply to multiple retailers specifically. In assessing whether multiple retailers are likely to be refused supply in the future, the OFT has considered the importance of multiple retailers the newspaper retailing sector and how the Code is currently applied to them. In addition, the ability of multiple retailers to engage directly with wholesalers and publishers is also considered.

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\(^{149}\) MMC (1993), paragraph 5.10. The MMC did acknowledge that there was evidence of supermarkets and petrol stations being more successful in obtaining supplies.
The importance of multiple retailers

4.40 The increased importance of multiple retailers in terms of proportion of total newspaper sales since 1993 is reflected in the fact that the volume and value of newspapers sold through multiple retail outlets has grown significantly. These retailers now constitute a significantly increased source of newspaper sales, and therefore revenue, for both wholesalers and publishers.

4.41 The importance of multiple retailers is demonstrated by information provided by multiple wholesalers which shows that the average weekly news bill of a supermarket outlet or hypermarket outlet which it serves is over £1,195, compared to an average of £709 for an average newsagent customer. Convenience stores, however, tend to have smaller news bills than supermarkets and newsagents.

4.42 The importance of multiple retailers is particularly pronounced for weekend sales of newspapers, given that consumers may buy their newspapers from multiple retailers when they are shopping for other goods. Information provided by each of the newspaper publishers has demonstrated that the proportion of daily newspaper sales through multiple retailers, by volume, are higher at weekends than weekdays.150

4.43 The information demonstrates that multiple retailers, and particularly supermarket retailers, are now important sources of newspapers sales, particularly at weekends. The high volumes of sales through individual multiple retailer outlets generate revenue for newspaper wholesalers and newspaper publishers and provide ongoing incentives for both to ensure supply to these types of retailers. This is particularly the case regarding supply to large multiple retailers, where newspaper sales volumes will be higher.

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150 Based on information provided to the OFT by Dawson News on 10 September 2007 and by Smiths News on 12 February 2007.
The impact of the Code on supplies to multiple retailers

4.44 The OFT has considered the application of the Code provisions regarding deposits and the MEL to multiple retailers to assess whether these provisions are relevant in facilitating supplies to those types of retailers.

4.45 On deposits, each of the multiple wholesalers indicated that where they have an existing trading relationship with a multiple retailer group, they will not normally require a deposit from new retail outlets in that multiple group. This has been confirmed by representatives of multiple retailers, each of which have noted that requirements for deposits are rarely applied. This indicates that the deposit requirements in the Code do not appear to have any impact on supply to multiple retailers.

4.46 Regarding the MEL, although the details of the MEL application processes differ by wholesaler, wholesalers have generally submitted that, if the volume of newspaper sales by a retailer is likely to exceed the MEL, then they would not apply the Code supply application process and would instead place the retailer on SoR trading terms immediately. One wholesaler has noted that this treatment is most likely to occur in the case of a new 'multiple retailer store'. It provided evidence to show that, over a three month period selected by the OFT, 44 per cent of new retail outlets were supplied with SoR immediately, outside MEL terms, and confirmed that these retailers were 'mainly' multiple retailers. Another wholesaler has noted that retailers benefiting from these arrangements are typically 'large supermarkets'.

4.47 The OFT notes that, at least for large multiple retailers, the MEL requirement appears generally not to be applied and does not appear to

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151 Paragraph 3 of the Code obliges successful new retail applicants to make a cleared deposit equal to three times the wholesaler’s MEL, which will be refunded subject to the retailer’s account being maintained satisfactorily in accordance with the wholesaler’s terms and conditions of supply.
have any significant impact on supply to these types of multiple retailers.

Multiple retailers’ engagement with wholesalers and publishers

4.48 As the prominence of multiple retailers in newspaper retailing has increased, multiple retail groups, particularly larger multiple groups such as supermarkets and major high street groups, have entered into direct arrangements with wholesalers and publishers which relate to the specific requirements of those multiple retail groups. This section considers the impact that these arrangements are likely to have on multiple retailers’ ability to access newspapers. It is important to note that this section relates solely to retailer engagement with publishers and wholesalers on newspaper issues, not magazines.

4.49 Multiple wholesalers informed the OFT that they have entered into arrangements with many multiple retailers (particularly supermarkets), relating to wholesaler service level performance regarding the supply of newspapers. In most instances, these arrangements include KPIs or performance targets which are sought by the multiple retailer. The OFT understands that, unlike SLA arrangements between publishers and wholesalers, these KPIs are not contractually binding upon wholesalers. However, one wholesaler submitted that, if performance fell below such KPIs, multiple retailers would be likely to raise this with trade associations and publishers.

4.50 The multiple wholesalers have provided examples of performance issues which are covered by these arrangements. The details of these arrangements differ by wholesaler and multiple retailer, but typically include [...].

4.51 Multiple wholesalers have provided examples of the reports which they provide to multiple retailers on performance against these KPIs. In all reports which the OFT has seen, there is evidence of wholesalers

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152 The details of these arrangements differ according to multiple retailer group.
153 [...]
reporting on performance against KPIs on a regular (and in most cases weekly) basis.

4.52 The BRC submitted, however, that the level of service provided by wholesalers to multiple retailers falls short of these service levels in the KPIs, particularly regarding availability, and that there is limited recourse for retailers where KPIs are not met.\(^\text{154}\)

4.53 The above generally indicates that multiple retailers are able to engage directly with wholesalers on service issues, in particular on specific bespoke standards of service and to monitor wholesaler performance on a regular basis. These service level arrangements, and the ability to escalate issues to trade associations and publishers directly, provide a further mechanism to remedy or prevent the re-emergence of refusal to supply for these types of retailers.

4.54 In addition to engagement between multiple retailers and wholesalers, the OFT was also informed that multiple retailers increasingly engage directly with publishers on newspaper availability and retailer specific promotional activity (such as the inclusion of a specific gift on newspapers delivered to particular retailers). The BRC highlighted that, consistent with this increased engagement, in the event that one of its multiple retailer members was refused supply by a wholesaler, that member would engage directly with the publisher to ensure that it was supplied with newspapers.

4.55 The significantly increased importance of multiple retailers, particularly larger multiple retailers, in the retailing of newspapers has enabled them to engage directly with the publisher and thereby potentially exert greater influence over wholesaler supply practices and service level performance-related issues. These developments provide a further mechanism to remedy or prevent the re-emergence of refusal to supply for these types of retailers.

\(^\text{154}\) Although it is important to note that most of the BRC’s specific concerns related to magazine supply, rather than newspapers.
Conclusions on changes in the composition and relative prominence of different types of retail outlet

4.56 The increased role of multiple retailers, particularly supermarkets, in newspaper retailing means that publishers and wholesalers have greater incentives to supply newspapers to these types of retailers. The ability of multiple retail groups to engage with newspaper publishers and newspaper wholesalers, as they already do on a wide range of issues relating to their newspaper supplies, provides a further mechanism to enable such multiple retailers to ensure continued access to newspaper supplies and to remedy or prevent the re-emergence of issues regarding refusal to supply for multiple retailers. This is less likely to be the case for smaller multiple retailers (such as convenience stores), with more limited newspaper sales and more limited ability to engage directly with publishers. However, the OFT notes that the other changes of circumstances identified by the OFT (the changes in CSCs and the increased role of publishers in the newspaper supply chain) above are relevant to facilitating supply to these smaller multiple retailers.

4.57 The OFT, therefore, considers that the increased prominence of multiple retailers in newspaper retailing and their increased ability to engage with other newspaper supply chain participants, means that they are unlikely to be refused supply of newspapers by wholesalers. The OFT considers that this represents a change of circumstances such that the Code is no longer appropriate to remedy or prevent the adverse effects of refusal to supply to such retailers specified in the MMC’s report.

Restrictions on sub-retailing

4.58 The second of the MMC’s specified adverse effects related to the wholesaler practice of imposing restrictions upon retailers engaging in sub-retailing. This section considers whether the Code remains appropriate to remedy or prevent this adverse effect in the light of changes of circumstances since the MMC reported.

4.59 The MMC explicitly indicated that the restrictions on sub-retailing which existed at the time it reported were ‘…primarily designed to support the
main restriction on refusal to supply and ensure that it is not circumvented. In particular, it noted that the restrictions on sub-retailing contributed to the restrictions on competition resulting from the direct refusal to supply. In addition to supporting the wholesaler practice of refusal to supply, the MMC also expressed concerns that restrictions on sub-retailing arrangements prevented retailers from responding to local fluctuations in demand (for example, by switching copies into a neighbouring convenience store or petrol station), thereby restricting availability and convenience to consumers.

4.60 The OFT notes that the MMC’s concerns regarding restrictions on sub-retailing were primarily in the context of the extent to which these restrictions supported the specified wholesaler practice of refusal to supply. The OFT considers, due to a number of changes of circumstances, which are analysed in detail earlier in this chapter, that refusal to supply of the type specified by the MMC is unlikely to re-emerge in the future in the absence of the Code. Therefore, to the extent that the MMC’s concerns regarding restrictions on sub-retailing were directly related to concerns about such refusal to supply by wholesalers, the OFT’s analysis and conclusions on refusal to supply mean that the ancillary issue of sub-retailing is unlikely to re-emerge in the future and that the Code is no longer appropriate for this purpose.

4.61 The OFT also considers that the changes of circumstances in relation to refusal to supply are also relevant in relation to the MMC’s concerns regarding ensuring availability and convenience to consumers. This is because the OFT’s conclusion that refusal to supply of the type specified by the MMC is unlikely to re-emerge in the future in the absence of the Code, means that retail outlets, which may otherwise need to engage in sub-retailing, are now more likely to be able to obtain supplies from a wholesaler, either directly from the wholesaler or through a publisher-facilitated supply arrangement (see paragraphs 3.22 to 3.24). This means that the Code’s sub-retailing provisions are no longer necessary to ensure availability of newspapers to consumers. The

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155 MMC (1993), paragraph 11.93.
OFT, therefore, considers that the changes of circumstances which relate to refusal to supply new retail outlets also mean that the Code is no longer appropriate to remedy or prevent the adverse effects specified by the MMC in relation to sub-retailing.

The 2002 Code Review

4.62 The OFT recognises that these conclusions differ from those identified in the 2002 Code Review. This reflects further significant changes since 2002, such as the increased evidence of publishers imposing and monitoring requirements upon wholesalers relating to service to retailers, as well as the continuation of developments in CSCs and the increasing role of multiple retailers, which were identified at the time of 2002 Code Review. In addition, the progression of this Code Review, alongside the Opinion and the consideration of the request for a market investigation reference has allowed the OFT to take a holistic view of the supply chain for newspaper (and magazines) and to gain a more detailed perspective on their operation. It has also enabled access to a wider evidential base than was the case in 2002.
5 CONCLUSIONS AND ADVICE ON THE CODE

5.1 This chapter sets out the OFT’s advice to the SoS in relation to the undertakings which underpin the Code. It draws on the preceding analysis of developments in the newspaper supply chain, particularly the assessment of the appropriateness of the Code. The chapter then advises the SoS on the appropriateness of the undertakings and the Code in the light of these matters.

Compliance with the Code

5.2 Although, due to the ambit of the MMC’s findings, the Code formally applies only in respect of England and Wales, the Code is also applied on a voluntary basis in Scotland and Northern Ireland. Compliance with the Code is reinforced by its incorporation into agreements between industry parties.

5.3 The OFT has not found any instances of non-compliance with the Code in the present Code Review.

Changes of circumstances

5.4 In conducting a review of undertakings, the OFT’s statutory duty is to consider whether, by reason of any change of circumstances, an undertaking is no longer appropriate and either the relevant parties (or any of them) can be released from the undertaking or the undertaking needs to be varied, or superseded by a new undertaking. Where it appears to the OFT that any person can be released or that an undertaking has not been or is not being fulfilled, or needs to be varied or superseded, it is the duty of the OFT to give such advice to the SoS as it may think proper in the circumstances.156

5.5 For these purposes, the issue of whether an undertaking is no longer appropriate is determined by reference to the purpose for which it was given, namely to remedy or prevent the adverse effects specified in the

156 Section 88(4) of the FTA73.
MMC’s report, on the basis of the specific facts found by the MMC.\textsuperscript{157}

In the case of this Code Review, it is important to note that the MMC’s findings, and the factual matrix underlying them, related specifically to the refusal by wholesalers to supply new retail outlets with newspapers on the grounds that an area was already adequately served. This means that continued supply to existing retail outlets or refusal to supply new retail outlets on grounds other than that an area was already adequately served are outside the remit of this Code Review.

**Refusal to supply**

5.6 During this Code Review, the OFT has identified numerous changes of circumstances relating to the publication, wholesale and retail of newspapers since the Code was implemented. The OFT considers that three of these changes constitute changes of circumstances covered by the FTA\textsuperscript{73}, such that the Code is no longer appropriate, as they mean that refusal to supply new retail outlets on the grounds that an area is already adequately served would be unlikely to re-emerge in the future. These changes of circumstances, which are explained further in chapter 4, are:

- changes in the level of CSCs
- changes in the role of publishers in the newspaper supply chain, and
- changes in the composition and relative prominence of different types of retail outlet.

5.7 The OFT considers that two of these changes, that is the changes in the level of CSCs and the changes in the role of publishers, are changes of circumstances which are relevant to the supply of newspapers to a wide variety of different types of retail outlet, from smaller retail outlets to larger supermarkets. In addition to these changes of circumstances, the

\textsuperscript{157} Section 88(1) of the FTA\textsuperscript{73} and *R v Secretary of State for Trade and Industry, ex parte Thomson Holidays* [1999] All ER 1397.
changes in the composition and relative prominence of different types of retail outlet are also relevant to the supply of newspapers to larger multiple retailers, particularly large multiple retailers such as supermarkets.

5.8 The OFT considers that these changes of circumstances both create stronger incentives for wholesalers to supply new retail outlets, and also enable both publishers and certain retailers to engage more effectively with wholesalers to enable new retailers to obtain supplies of newspapers. This means that the practice of refusal to supply new outlets on the grounds that an area is already adequately served, that was specified by the MMC, is unlikely to re-emerge in the future in the absence of the Code. The OFT, therefore, considers that the Code is no longer appropriate to remedy or prevent the adverse effects specified by the MMC.

5.9 The OFT’s focus in this Code Review, consistent with the MMC’s findings and the purpose of the Code, has been the refusal to supply new retail outlets. However, the OFT notes that the changes of circumstances identified above, would mean that the specified practice of refusal to supply is not likely to be significant regarding existing retail outlets, which are likely to continue to receive supplies of newspapers for the same reasons which the OFT has identified for new retail outlets.

Sub-retailing

5.10 The changes of circumstances which are relevant to remedying or preventing refusal to supply, mean that retail outlets will be able to obtain supplies directly from wholesalers, so that sub-retailing arrangements are no longer necessary to ensure the availability of newspapers to consumers. The OFT, therefore, considers that the changes of circumstances which relate to refusal to supply new retail outlets, also mean that the Code is no longer appropriate to remedy or prevent the adverse effects specified by the MMC in relation to sub-retailing.
Potential variations to the Code

5.11 During this Code Review, some industry parties have submitted that the Code should be varied to remedy or prevent the adverse effects specified by the MMC by alternative means. These suggestions for variation were:

- to include more specific provisions regarding CSCs, particularly regarding the transparency of CSCs and ensuring that CSCs are limited to the cost of wholesale distribution

- changes to the MEL, including:
  - reducing the level of the MEL
  - making the MEL more uniform on a national or regional basis, and
  - undertaking more regular reviews of the MEL.

- to remove the restrictions on sub-retailing contained with the Code.

5.12 The OFT can only advise the SoS to vary or supersede an undertaking where, by reason of any change of circumstances, the undertaking is no longer appropriate to remedy or prevent the adverse effects specified in the MMC’s report on the basis of the specific facts found by the MMC. The OFT cannot, therefore, advise the SoS to vary the Code in order to remedy or prevent issues which go beyond the specified adverse effects on the basis of the particular facts found. The OFT has considered the variations which have been suggested by parties against this background, as well as considering the practicability and desirability of these variations.

OFT view on suggested variations to the Code

5.13 First, and most importantly, the OFT has identified relevant changes of circumstances which it considers mean that the adverse effects specified by the MMC would be unlikely to re-emerge and, therefore,
that the Code is no longer appropriate. In these circumstances, it would be inappropriate to recommend a variation.

5.14 Second, the OFT notes that the issue of more detailed regulation of CSCs falls outside of the scope of a solution to remedy or prevent the adverse effects specified in the MMC’s report on the facts found by the MMC. The MMC, at various points in its report, refers to CSCs, but at no point in its report does it link CSCs, directly or indirectly, to the adverse effects specified in its report. A variation to the Code to address CSCs, therefore, falls outside the applicable statutory remit.

5.15 Finally, the OFT considered the practicability and desirability of variations, such as lowering and standardising the level of the MEL and removing restrictions on sub-retailing. These are considered below.

Changes to the MEL

5.16 The OFT notes that, although the characteristics of retail outlets in different territories are in some respects similar, there are also some significant differences in the number and type of retail outlets and the value of newspapers which they sell. The imposition of a uniform MEL, either at a national or regional level, could have significantly different effects on the prospects for retail entry in different areas: in some areas, any uniform MEL, may be too high and, in others, too low to encourage retail entry, as some parties have indicated. In addition, it is unclear that lowering the MEL would result in significant new retail entry, given the OFT analysis of the MEL, including the wide range of retail outlets which are currently supplied below the MEL (as demonstrated in chapter 2).

5.17 The process of reviewing the MEL on a regular basis (some parties have suggested annually), to ensure that its levels were appropriate would constitute a highly significant administrative process, both for industry

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158 CSCs were known as carriage charges at the time of MMC (1993). Reference is made to carriage charges at MMC (1993), paragraphs 4.83 to 4.85, 5.17 and 11.55.
parties and for the OFT.\textsuperscript{159} In particular, this would involve detailed consideration of the effect of different MEL levels in a wide range of different territories, the identification of any appropriate changes of circumstances and the need for the SoS to agree to any changes to the MEL.\textsuperscript{160} This would impose an undesirable, significant and continuing regulatory burden both on the industry parties and the OFT which, based on our analysis, would not have sufficient countervailing consumer benefits.

Removal of restrictions on sub-retailing in the Code

5.18 The OFT considers that the likely ability of new retail outlets to obtain newspaper supplies from wholesalers, or in some cases from publishers, rather than requiring sub-retailing arrangements, means that sub-retailing is no longer necessary.

5.19 Moreover, the OFT considers that there are significant difficulties associated with the provision of sub-retailing services by retailers. These include:

- The limited margin available to retailers providing sub-retailing services, which is now lower than was the case in 1993.

- The time sensitivity of newspaper sales, whereby 70 per cent of newspaper sales are made by 10:00.\textsuperscript{161} This strongly limits the potential time window for retailers to be able to supply newspapers to sub-retailers and means that any sub-retailing is likely to be limited to a local level.

\textsuperscript{159} Although the OFT monitors undertakings on an ongoing basis, it would not undertake a review of them, or aspects of them, on an annual basis. The OFT more usually would review undertakings on a five-yearly basis (OFT 511, April 2006, \textit{Market Investigation References, Guidance about the making of references under Part 4 of the Enterprise Act}, paragraph 2.26).

\textsuperscript{160} In accordance with section 88(4) FTA73.

\textsuperscript{161} Statistic provided by the NPA in its meeting with the OFT on 24 May 2007.
5.20 These factors are likely to significantly restrict the potential for the development of sub-retailing on a larger scale than is currently the case. A variation of the Code would have no or insignificant impact on these issues.

Self-regulatory code

5.21 The OFT notes the desire on the part of some industry parties to agree some form of new code of conduct in relation to the supply of newspapers (and magazines)\textsuperscript{162} which could include mechanisms to ensure continued access to newspaper supplies for new (as well as existing) retail outlets. Appropriate steps towards self-regulation that would improve the distribution of newspapers and address any issues in the newspaper (and magazine) supply chain(s) that are of concern and/or may raise competition concerns would be welcome, provided of course any such steps comply with competition law.

Advice to the SoS on the Code

5.22 For the reasons set out in this report, and in particular chapter 4, the OFT considers that there have been numerous changes of circumstances since the MMC reported such that the Code is no longer appropriate to remedy or prevent the adverse effects specified in the MMC's report. The OFT therefore advises the SoS that those parties which gave undertakings to comply with the Code can be released from those undertakings and therefore the Code in its entirety.

\textsuperscript{162} Referred to by industry parties as the Press Distribution Code.
A THE UNDERTAKINGS AND THE CODE

The Undertakings

Each of the Companies undertook that they would, in respect of suppliers in England and Wales:

- comply with the Code annexed to these undertakings (the Code) in dealing with applications for the supply of national newspapers, and
- permit all retailers to supply national newspapers to other retail outlets in the manner and on the conditions described in paragraph 6 of the code.

For the purposes of this undertaking 'national newspapers' means daily and Sunday newspapers circulating generally in England and Wales.

The Code

1 Uniform procedure and documentation

In order that all applications for supply are considered in an equitable and transparent way, wholesalers will undertake the following:

1.1 Standard documentation

The wholesaler shall provide, to any prospective newspaper retailer, an industry – standard form on which application for the full supply of national newspapers will be made.

1.2 Standard procedure

The wholesaler shall publish an industry-standard procedure which the wholesaler shall follow in processing any application; which application shall be acknowledged on receipt and dealt with within one calendar month.
1.3 **Wholesaler areas**

The wholesaler shall not accept an application for supply of newspapers from an applicant located outside that wholesaler’s area of operation as defined by the newspaper’s publisher or distributor. Such applications shall be forwarded to the appropriate wholesaler and the applicant informed in writing accordingly.

1.4 **Split wholesale areas**

Where more than one wholesaler serves an area, any application for supplies shall be an application to all national newspaper wholesalers in the area. To assist applicants, wholesalers shall advise details of those other national newspaper wholesalers in their area.

1.5 **Limitation of refusal to supply**

Applicants who meet the commercial and economic criteria as laid down within this Code of Practice shall be granted supplies of national newspapers.

1.6 **Register of applications**

Wholesalers will maintain records of all applications. This information will be maintained in accordance with the requirements of the Office of Fair Trading.

2 **Minimum entry level**

In order to ensure that new retail accounts are provided with a wholesale service that meets the minimum commercial and economic requirements of the wholesaler, the following conditions will apply:

2.1 Applicants shall agree to a guaranteed minimum net weekly charge which shall be set at the Minimum entry level.

2.2 The Minimum entry level for each wholesale area shall be published by the wholesaler and shall be half of the average value of the newspapers invoiced weekly to all existing retailers in the wholesaler’s area, calculated
as the average weekly newspaper invoice value for the six months ending 31 March 1994. Only those newspapers which the wholesaler is capable of supplying to the applicant shall be included in the calculation. The initial calculation shall have effect for the first two years following commencement of the Code and thereafter will be subject to annual review.

2.3 Where more than one wholesaler serves an area then such individually determined minimum entry level values shall be afforded to all applicants.

2.4 Wholesalers shall have the discretion to supply below this Minimum Entry Level. Provided that the new retail outlet has sustained an order in excess of the Minimum Entry Level for at least six months, the wholesaler will extend Sale or Return facilities where they are made available and approved by the publisher or distributor, subject to the guaranteed minimum net weekly charge being maintained.

3. **Credit risk control**

Successful applicants will be obliged to make a cleared deposit equal to three times the wholesaler’s minimum entry level, which monies will be held in a separate interest bearing account. Such deposit shall entitle the retailer to receive interest, payable annually in arrears, at the National Westminster Bank Plc base rate, less an administration charge of 1.5 per cent calculated on the sum of the deposit. The retention of the deposit will be reviewed after twelve months trading and refunded, subject to the account being maintained satisfactorily in accordance with the wholesaler’s Terms and Conditions of supply. The holding of deposits beyond the twelve month period will be subject to review every six months. Should any account be closed or transferred, any remaining deposit shall be refunded subject only to the retailer’s account being cleared in full.

4. **Carriage charges**

Carriage charges, which reflect the commercial and economic distribution costs of wholesalers in the handling of national newspapers, shall be
determined by reference to the wholesaler’s published tariff available at the time of application and as determined from time to time.

5. **Marketing and quality standards for the retailing of national newspapers**

Successful applicants will be encouraged to adopt a selection of minimum quality standards for display, merchandising, publisher promotions, signage, hours of trading and for ordering, authorised returns, provision of marketing information support for the delivered copy and shop saves, as specified and published in the industry standard document ‘Application for Supplies’ and the wholesaler’s own Terms and Conditions document. Wholesalers will use their judgement to allow reasonable flexibility to accommodate different types of outlet and/or location.

6. **Sub-retailing**

The wholesalers shall not refuse to supply a retailer on the grounds that the retailer intends to sell or transfer newspapers to another retail outlet (known as a ‘sub-retailer’). In order to maintain the effectiveness of the existing wholesaler’s order reallocation systems, which are recognised as essential in order to maximise sales, minimise waste and optimise availability of newspapers at retailer level, it is essential that sub-retailing is properly monitored.

The following conditions will apply:

6.1 Retailers with less than eighteen months newspaper trading will not be allowed to sub-retail supplies other than at the wholesaler’s discretion.

6.2 The retailer shall notify the wholesaler, by way of an industry-standard form, of all sub-retail locations, including the name, address, postcode and type of outlet of the sub-retailer.

6.3 The retailer and the sub-retailer will not be permitted to sell or transfer newspapers to locations outside the wholesaler’s area of operation as defined by the newspaper’s publisher or distributor.
6.4 Sub-retailing is understood to be appropriate, in order to respond sensibly to local consumer demand by transferring supplies over limited distances of a neighbourhood, within the following distances of the supplying retailer's premises (subject to 6.3 above):

Central urban areas – within a 500 metre radius

Other areas – within a one kilometre radius

6.4.1 Wholesalers will define in their published terms and conditions which parts of their distribution areas are categorised as central urban. Any disputes on the wholesalers' categorisation may be the subject of an appeal to the appeals body referred to below (paragraph 7).

6.4.2 Wholesalers will have the discretion to extend these distances, and will give sympathetic consideration to applications beyond the distances stipulated from supplying retailers which would meet distinct social and community needs throughout the wholesaler's distribution areas, particularly in thinly populated areas.

6.4.3 Where an outlet in such circumstances is unable to meet the Minimum Entry Level, wholesalers will also use their good offices to procure such supplies through a retail outlet in their area which is willing to provide supplies.

6.5 The retailer shall not permit a sub-retailer to sell or transfer newspapers to another retailer or sub-retailer.

6.6 It is recognised that retailers shall have the freedom to supply sub-retailers with firm sale supplies only up to the minimum entry level value. Where a sale or transfer to a sub-retailer involving supplies with a weekly value in excess of the minimum entry level is reached, such sub-retailer shall be required to apply for a direct wholesale supply.

6.7 Payment for all supplies and compliance with the wholesalers' terms and conditions of business and operational requirements shall be the sole responsibility of the wholesaler-supplied retailer.
7. **Appeals**

7.1 The wholesalers shall retain their own published internal appeals procedure regarding applications for supply. Upon lodgement of any appeal such procedures shall be processed within six weeks from the date of receipt thereof.

7.2 In the event that an applicant is unsuccessful, having exhausted the wholesaler’s appeal procedure, the applicant may appeal to an external independent appeal body. All appellants shall lodge an amount of £150 on appeal towards the appeal body’s costs; which sum shall be refunded by the wholesaler if the appeal is successful. Such an appeal will be heard within two months of receipt and acknowledgement of the complaint.

8. **Date of commencement**

This Code of Practice, which will come into effect on 1 October 1994, will be subject to review as necessary.
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Source for all figures: OFT calculations based on information provided to the OFT by wholesalers.

Graphs and titles are indicative and do not all include all retail outlets within a territory. The information on retail outlets within particular areas was amended following discussions with wholesalers to remove from the lists they provided retail outlets that had originally been included in error, for example ‘non-trading’ retailer accounts with wholesalers.