



Northern & Shell Plc
Britain's Leading Independent Publisher

The Northern & Shell Building, Number 10 Lower Thames Street, London EC3R 6EN
Telephone: +44 (0) 208 612 7000 (Switchboard) / Facsimile: +44 (0) 208 612 7766

6 July 2012

UKPCA
Catherine Flury
7 Cliff Road
Cowes
Isle of White
PO31 8BN

Dear UKPCA

Cc: Lord Black of Brentwood
Lord Hunt of Wirral

We are writing to set out our concerns about reports that the UK Press Card Authority ("UKPCA") has been giving consideration to proposals that would prevent press cards being issued to reporters on newspapers whose employer refuses to sign up to the Press Complaints Commission code of practice.

We consider that were the UKPCA to adopt such a proposal, it would give rise to serious breaches of UK and EU competition law.

As you are no doubt aware, Express Newspapers is not a member of the PCC, having withdrawn in December 2010. It continues to be involved in negotiations to form a new body, which will effectively regulate the Press. It adheres to the Editors' Code of Practice, but operates its own internal system of self-regulation. There are, however, many journalists working on Express Newspapers titles who carry UK Press Cards, issued by the UKPCA. Those Press Cards are indispensable to their work, allowing access to police briefings and a wide range of other press conferences, media launches and other situations were inaccessible to the general public.

Under the current rules of the UKPCA, those cards are provided on a strictly non-discriminatory basis, irrespective of the nature, views, or editorial content of the media organisation for which a particular journalist works. Clause 1.9 of the UK Press Card Scheme Rules ("the Rules") defines "eligible newsgatherer" to mean:

"anyone working in the UK whose employment or self-employment is wholly or significantly concerned with the gathering, transport or processing of information or images for publication in broadcast electronic or written media including TV, radio, internet-based services, newspapers and periodicals; and who needs in the course of those duties to identify themselves in public or to other official services." (emphasis added)

Thus, "eligible newsgatherer" is entirely defined by reference to the function that the newsgatherer in question performs – not the nature of the organisation for which he or she works. Clause 2 of the Rules explain the purpose of the Scheme:

"To provide a standard, verifiable photo card for anyone who is working professionally as a media worker and who needs to identify themselves in public and who meet the criteria (an Eligible Newsgatherer).
To seek and maintain accreditation for the card.
To provide verification of the cardholders' identity." (emphasis added)

This essential neutrality is further reinforced by clause 3.1 of the Rules which provides:

"The scheme recognises that the definition of Eligible Newsgatherer should rest only in the hands of the industry. Eligibility does not depend upon membership or non-membership of any organization; nor does it depend upon the views of any State or private organisation." (emphasis added)

Thus, the neutral and non-discriminatory nature of the scheme serves as an important protection of press freedom. The scheme makes no judgment at all about the underlying newsgathering organisations. The integrity of the scheme itself is, however, protected by clause 10.4.1, which provides that a card may be withdrawn if a Gatekeeper considers that, inter alia, "[t]he holder has used the

card in a way likely to bring the Authority into disrepute through misrepresentation or dishonesty.”

The proposed changes would alter fundamentally the nature of the scheme: it is to be used in an effort to compel membership by news organisations of an entirely separate body, the PCC. The PCC itself lacks any statutory foundation and membership of it remains entirely voluntary. The entire system of press regulation is of course currently under review, and it remains a matter of speculation as to whether, and if so in what form, the PCC will continue. Express Newspapers has made plain its intention to continue with negotiations to form and to join in a revised form of PCC if adopted, but the proposal under consideration by the UKPCA does not appear to be dependant upon revision to the existing PCC.

Membership of the PCC is entirely irrelevant to the question whether a particular journalist is an “eligible newsgatherer”. Such a rule would amount to a judgment upon the form of regulation chosen by a particular news organisation. It is plainly irrelevant to the issue of verification of legitimate journalists, which the Scheme is designed to address.

We shall explain briefly why we consider that such a change would give rise to a serious breach of UK and EU competition law.

It is clear that the UKPCA is either an undertaking, or an association of undertakings for the purpose of UK and EU competition law: it is engaged in the provision of goods, namely Press Cards, for which a fee is charged: Case C-309/99 *Wouters* [2002] ECR I-1577, para 47. It is immaterial in this regard whether or not it makes a profit: Case C-49/07 *MOTOE*: [2008] 5 CMLR 8, para 27. It does not exercise any public law powers.

The terms of the Scheme amount to an agreement between undertakings and/or a decision of an association of undertakings for the purposes of Chapter I of the Competition Act 1998 ("the 1998 Act") and Article 101 of the Treaty on the Functioning of the European Union ("TFEU"). Any decision to change the rules would amount to a further agreement and/or decision.

The Chapter I prohibition and Article 101 TFEU render automatically void any such agreement and/or decision "which have as their object or effect the prevention, restriction or distortion of competition" within the United Kingdom (1998 Act) and/or internal market (TFEU), by means including the fixing trading conditions, imposing a limit on production, sharing markets, applying dissimilar conditions to equivalent transactions and making of the conclusion of contracts subject to acceptance of supplementary obligations which have no connection to the subject matter of the contract.

The Chapter II prohibition and Article 102 TFEU prohibit any abuse by one or more undertakings in a dominant position. Such abuse may consist of (but is not limited to) the imposition of unfair trading conditions, limiting production, applying dissimilar conditions to equivalent transactions and making the conclusion of contracts subject to acceptance of supplementary obligations which have no connection to the subject matter of the contract.

It is clear that the UKPCA is dominant in the market for press accreditation in the UK. To all practical purposes it is a monopolist: it is the only provider of such accreditations. Moreover, the barriers to entry for anyone wishing to establish an alternative scheme are high: the Press Card depends upon its standard form and universal recognition within the industry for its effectiveness. Moreover, it carries the following endorsement on the back of the card:

"The Association of Chief Police Officers of England, Wales and Northern Ireland and the Association of Chief Police Officers in Scotland recognise

the holder of this card as a bona fide newsgatherer. To check, ring our verification hot line 0870 8376477."

The authority, and universal acceptance of the Press Card could not readily be replicated.

The essential reason why the proposed change to the rules would give rise to a breach of these provisions is that its object and/or effect is to give rise to a serious restriction of competition. The loss of accreditation for journalists working on Express Newspapers' titles would severely impede its ability to publish those titles. The inevitable consequence would be an inability on the part of Express Newspapers to retain and hire skilled and experienced journalists. The result would be to damage the strength of the competitive offering that Express Newspapers provide, to the advantage of the other news outlets with which it competes.

Under the proposed change in the rules, Express Newspapers would be required to join the PCC in order to obtain accreditation. As already noted, the question whether it chooses to do so is wholly irrelevant to that of whether its journalists are eligible newsgatherers and should be entitled to accreditation. Such a rule would accordingly amount to a requirement to accept supplementary obligations, which have no connection to the subject matter of the contract. For essentially this reason, the imposition of such a requirement also gives rise to unjustified discrimination against Express Newspapers.

It is moreover clear that the adoption of such a rule would have a sufficient effect on trade within the United Kingdom (for the purpose of the 1998 Act) and the EU (for the purposes of the TFEU) to fall within the scope of the competition rules. The rules would very substantially affect the ability of Express Newspapers to compete for readers, advertisers and the recruitment of journalists both within the UK and the EU.

We strongly urge the UKPCA to decline the proposed change to its rules, but reserve all our rights in the event that it decides to proceed with it.

Yours sincerely

Paul Ashford
Group Editorial Director